No. 26-3282

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMEER ALKAYALI, WEILLIN FENG, and KEVIN KENNELLY,

Plaintiffs-Appellants,

v.

ERIC KALER, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Ohio, No. 1:25-cv-983

BRIEF FOR PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants Ameer Alkayali, Weillin Feng, and Kevin Kennelly are neither subsidiaries nor affiliates of any publicly owned corporation. There is no publicly owned corporation, not a party to this appeal, that has a financial interest in the outcome.

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STATEMENT CONCERNING ORAL ARGUMENT

Plaintiffs-Appellants respectfully request oral argument. The district court's dismissal order implicates important questions about the First and Fourth Amendment rights of protesters to not be covered in spray paint at the direction of the police. Oral argument would aid the Court's consideration of those questions.

STATEMENT OF JURISDICTION

Plaintiffs filed this civil-rights action under 42 U.S.C. § 1983, alleging that Defendants violated the First and Fourth Amendments by directing painters to spray-paint Plaintiffs in retaliation for their expressive protest activity. Compl., R.1, PageID # 17-19. The district court had jurisdiction under 28 U.S.C. § 1331. *Id.* at PageID # 4. On March 5, 2026, the district court granted Defendants' motion to dismiss in full. Op., R.16, PageID # 145-46. The district court issued its final judgment the same day. J., R.17, PageID # 147. Plaintiffs filed a timely notice of appeal on April 1, 2026. Notice of Appeal, R.18, PageID # 148-49. This Court has jurisdiction over Plaintiffs' appeal under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether Plaintiffs plausibly alleged that Defendants engaged in state action that caused Plaintiffs' injuries.

2. Whether Plaintiffs plausibly alleged that Defendants retaliated against them for their protected expression in violation of the First Amendment.

3. Whether Plaintiffs plausibly alleged that Defendants subjected them to excessive force in violation of the Fourth Amendment.

4. Whether the district court abused its discretion in denying Plaintiffs leave to amend the complaint.

INTRODUCTION

In May 2024, students at Case Western Reserve University (CWRU) painted the campus Spirit Wall—a designated space for free expression—with statements of support for the people of Palestine, including "I dream of breaking the siege" and "come together in peace." CWRU President Eric Kaler viewed these statements as antisemitic and ordered them removed. But when the contractors he hired tried to cover the mural in spray paint, Plaintiffs Ameer Alkayali, Weillin Feng, and Kevin Kennelly stood in front of the wall, blocking their path. Plaintiffs' message was clear: They supported the mural's pro-Palestine statements and opposed Kaler's efforts to censor them.

The painters asked campus police officers Kurtis Bialowsky, Milo Drumm, and Michael Jastatt to move Plaintiffs out of the way. But the officers refused to order Plaintiffs to disperse or otherwise to move them. Instead, acting at the behest of Kaler and CWRU Police Chief Paul Owens, the officers on the scene directed the painters to spray-paint Plaintiffs along with the wall. Although the painters initially balked, they eventually used their industrial sprayer machines to coat Plaintiffs' bodies in toxic paint.

Plaintiffs brought this lawsuit against Kaler and the campus police officers, seeking redress for that unconstitutional attack. But the district court dismissed Plaintiffs' claims based on state-action doctrine. It concluded that Plaintiffs' injuries were not attributable to the state because CWRU is a private university and because the painters were private actors. That reasoning is fundamentally flawed. The spray-painting

constituted state action because it was directed by the campus police, who are unquestionably state actors under this Court's precedent. Kaler too engaged in state action by acting in concert with the campus police officers. On the merits, Plaintiffs plausibly alleged that Defendants' decision to spray-paint them constituted retaliation for protected expression in violation of the First Amendment and excessive force in violation of the Fourth Amendment. The district court's decision dismissing Plaintiffs' claims should be reversed. At a minimum, Plaintiffs should be permitted to amend their complaint.

STATEMENT OF THE CASE

A. Factual Background

On May 6, 2024, students at Case Western Reserve University (CWRU), a private university in Ohio, painted a pro-Palestine mural on CWRU's "Spirit Wall," which was "expressly designated by the University" as a "forum for free expression." Compl., R.1, PageID # 2-3, 6 (¶ 2, 8, 22).[1] The mural included phrases such as "I dream of breaking the siege" and "come together in peace," as well as statistics reporting the number of children who had died in Gaza as a result of the war with Israel. *Id.* at PageID # 6 (¶ 22). Students also painted pro-Palestine statements on an adjacent "Advocacy Wall." *Id.*

[1] Because this case is at the pleading stage, the Court must "construe the complaint in the light most favorable to" Plaintiffs and "accept[] all well-pleaded factual allegations as true." *Parrino v. Price*, 869 F.3d 392, 397 (6th Cir. 2017).

The next day, Defendant Eric Kaler, CWRU's president, emailed the student body denouncing the murals. *Id.* at PageID # 6-7 (¶ 23). Kaler had previously opposed pro-Palestine protests and viewpoints on campus. *Id.* at PageID # 11-16 (¶ 38-47). He described the mural on the Advocacy Wall as "threatening, intimidating, and antisemitic." *Id.* at PageID # 6-7 (¶ 23). He acknowledged that the separate mural on the Spirit Wall "was less threatening." *Id.* But he said that even the Spirit Wall mural, with its message of peace, was "still intimidating to some in our community." *Id.*

Kaler then hired a company to paint over the murals. *Id.* When students learned of this plan, they gathered at the Spirit Wall and informed the painters that they intended to prevent the wall from being painted. *Id.* at PageID # 7 (¶ 25). The painters departed "after discussing plans to return with officers." *Id.*

Plaintiffs Weillin Feng and Ameer Alkayali learned that the painters intended to return around 5:00 a.m. on May 7, when the painters hoped to encounter less resistance. *Id.* (¶ 26). At the time, Feng was a student at CWRU and had participated in pro-Palestine protests on campus during the 2023-2024 school year. *Id.* at PageID # 3 (¶ 6). Alkayali lived across the street from the CWRU campus, and, since 2001, his family had owned and operated The Algebra Tea House, a restaurant and café popular with CWRU students. *Id.* (¶ 7). Based on what they had heard about the painters' plans, Feng and Alkayali went to the Spirit Wall before 5:00 a.m. *Id.* at PageID # 7 (¶ 26). When they arrived, they encountered the painters and Defendant CWRU Officers Kurtis Bialowsky, Milo Drumm, and Michael Jastatt. *Id.* Around the same time, Plaintiff Kevin

Kennelly, a CRWU student who had also participated in pro-Palestine protests on campus and who was preparing for the last exams of his college career, walked past the Spirit Wall after a long night of studying. *Id.* at PageID # 3, 7 (¶ 6, 27). Seeing the students, painters, and officers gathering around the Spirit Wall, he stopped to watch. *Id.* at PageID # 7 (¶ 27).

As the painters prepared to cover the Spirit Wall mural with industrial paint-spraying machines, Kennelly, Feng, and Alkayali each separately decided to protest. *Id.* at PageID # 7-8 (¶ 28, 30). They stood in a line in front of the Spirit Wall, with their backs inches from the wall, and faced the painters. *Id.* at PageID # 8 (¶ 30). Plaintiffs intended to block the painters and "stand against censorship" of the pro-Palestine mural. *Id.*

Defendant Officers Bialowsky, Drumm, and Jastatt then contacted Defendant Kaler and Defendant CWRU Police Chief Paul Owens (or their agents) to ask how to proceed. *Id.* at PageID # 3-4, 8 (¶ 9, 31). At the instruction of Kaler and Owens, the officers on the scene "decided to send a message to the protesters that their expressions of support for Palestinians would not be tolerated on the CWRU campus." *Id.* at PageID # 2-3 (¶ 4). The officers "expressly instructed the painters that they could discharge spray paint on the Plaintiffs." *Id.* at PageID # 10-11 (¶ 37).

At first, the painters balked at the prospect of painting over Plaintiffs and asked the officers to instead move Plaintiffs. *Id.* at PageID # 8 (¶ 32). But the officers declined to do so. *Id.* When the painters asked what they should do, Drumm replied with words

to the effect of "if they don't move, it's on them." *Id.* (¶ 33). He continued: "[W]e're just advising them that they're gonna get paint on 'em … we're just here." *Id.* Drumm also advised Plaintiffs not to touch the paint sprayers because they were "dangerous." *Id.* The officers "order[ed] the painters to paint over" Plaintiffs standing against the wall. *Id.* ¶ 34.

The painters followed the officers' instructions. "[U]nder the direct supervision and authorization" of the officers, the painters applied paint to the wall, and to Plaintiffs' bodies, one after the other. *Id.* at PageID # 9 (¶ 35). Plaintiffs remained in front of the wall after being covered in paint, until the painters determined they could not finish painting over the rest of the mural with Plaintiffs there and decided to return later. *Id.* at PageID # 10 (¶ 36). All three Plaintiffs were coated in toxic spray paint, and they left the scene to try to wash it off. *Id.* (¶ 37); *see also id.* at PageID # 8 n.4 (linking to video of the spray-painting incident).

After the video of the spray-painting incident went viral and prompted substantial news coverage, Kaler sent a follow-up email at 7:15 p.m. that night. *Id.* at PageID # 16 (¶ 48). The email stated that Kaler was "deeply sorry" about the incident. *Id.* Kaler wrote that "[n]o students—or any individuals—should ever be treated this way, especially on a campus where our core values center on providing a safe, welcoming environment." *Id.* He promised that "[t]he university will continue to fully investigate these actions and hold individuals responsible for this behavior," and he specifically called out, in bold letters, "**the failure of our own officers to intervene**."

Id. To date, Plaintiffs have never been contacted about any investigation, nor has CWRU announced the results of one. *Id.* (¶ 49).

B. Procedural Background

Plaintiffs filed a civil-rights complaint under 42 U.S.C. § 1983 against Defendants Kaler, Owens, Bialowsky, Drumm, and Jastatt. Plaintiffs alleged that Defendants violated their First Amendment rights by directing the painters to blast them with toxic paint in retaliation for their protected expressive conduct. *Id.* at PageID # 18-19 (¶ 61-67). And they alleged that Defendants' actions also constituted excessive force in violation of the Fourth Amendment. *Id.* at PageID # 17-18 (¶ 55-60).

Defendants filed a motion to dismiss, which the district court granted. The court first concluded that Kaler was not a state actor, so Plaintiffs' constitutional claims could not proceed against him. Op., R.16, PageID # 140. The court stated that CRWU is a private university and that providing a forum for speech does not transform a private entity into a state actor. *Id.* The court also noted that the painters were private actors. *Id.* But the court did not consider whether Kaler's concerted action with the campus police, who are unquestionably state actors, rendered his conduct state action. *See id.*

The district court recognized that Chief Owens was a state actor. *Id.* at PageID # 141. And the court acknowledged that "[a] liberal reading of the Complaint shows that Owens allegedly ordered the painters to paint over the Plaintiffs with toxic paint, or provided instructions to the officers over phone or radio to direct the painters to spray-paint over the Plaintiff protesters standing in front of the wall." *Id.* But the court

nevertheless concluded that these instructions to the on-site officers were "too tenuously connected to the injuries claimed by Plaintiffs" to "meet the standard for official or individual supervisor liability." *Id.* at PageID # 142.

Turning to those officers, the court concluded first that the complaint's references to Bialowsky and Jastatt collectively as "Officer Defendants" amounted to no "specific factual allegations" as to either of them. *Id.* at PageID # 142-43. Based on this assessment of the complaint, the district court dismissed Plaintiffs' claims against those two officers without further discussion. *Id.* at PageID # 143.

That left Officer Drumm. The district court recognized that Plaintiffs had alleged specific statements by Officer Drumm directing the painters to cover Plaintiffs with toxic paint. *Id.* The court described the complaint as alleging that Drumm "seized or applied force against Plaintiffs 'by ordering the painters to paint over the Plaintiffs.'" *Id.* at PageID # 143 (quoting Compl., R.1, PageID # 8 (¶ 34)). But the court nevertheless concluded that "the allegations involving Defendant Drumm fare no better … than the claims against the other Defendants. *Id.* at PageID # 143-44. As to Plaintiffs' Fourth Amendment claim, the Court concluded that Plaintiffs had failed to plausibly allege that Officer Drumm "exercised physical force against Plaintiffs" or "used the authority of his badge or uniform to control Plaintiffs by compelling them to leave or to remain." *Id.* at PageID # 144. The court did not discuss whether Officer Drumm had caused the painters to seize Plaintiffs. *See id.* With respect to the First Amendment claim, the district court recognized that Plaintiffs were engaged in

protected activity and that they suffered an adverse action—two of the three elements of First Amendment retaliation. *Id.* But the Court concluded that Officer Drumm did not cause that adverse action because he "did not wield the paint sprayer" himself. *Id.*

Because the court concluded that Plaintiffs failed to plausibly state a claim against any Defendant, it granted Defendants' motion to dismiss without considering their qualified-immunity defense. *Id.* at PageID # 145. The Court also denied Plaintiffs' request to amend their complaint. *Id.* at PageID # 134-35. Plaintiffs timely appealed. *See* Notice of Appeal, R.18, PageID # 148-49.

SUMMARY OF ARGUMENT

I. Plaintiffs sufficiently alleged that Defendants acted under color of state law and caused Plaintiffs' injuries. It is undisputed that members of the CWRU campus police force are state actors. And Plaintiffs plausibly alleged that the officer Defendants caused Plaintiffs' injuries by directing the painters to cover them with toxic spray paint. Holding otherwise would allow state actors to evade liability for constitutional violations if they simply direct a private party to violate the Constitution on their behalf.

CWRU President Kaler, as a private actor with authority over the CWRU police officers, also engaged in state action by instructing the officers to have the painters cover Plaintiffs with spray paint. It is well established that a private actor who jointly engages with state officials in a deprivation of civil rights is acting under color of law.

II. Plaintiffs sufficiently alleged that Defendants retaliated against them in violation of the First Amendment. First, Plaintiffs engaged in expressive conduct

protected by the First Amendment when they stood in front of the Spirit Wall to protest censorship of the pro-Palestine mural. Second, as Defendants did not contest below, the spray-painting was an adverse action. Blasting a person of ordinary firmness with toxic spray paint would deter them from continuing to exercise their constitutional rights. Finally, Plaintiffs plausibly alleged that their protest was a motivating factor in Defendants' decision to spray-paint them, which is sufficient to show causation at the motion-to-dismiss stage. The fact that the spray-painting occurred during and in direct response to Plaintiffs' protest is strong evidence of causation. Plaintiffs' allegations concerning CWRU's bias against pro-Palestine viewpoints also raise an inference of causation.

III. Plaintiffs sufficiently alleged that Defendants violated their Fourth Amendment rights. To start, Defendants seized Plaintiffs within the meaning of the Fourth Amendment. The facts alleged in the complaint suggest that Defendants manifested an objective intent to restrain Plaintiffs by ordering the painters to cover Plaintiffs' bodies in toxic paint. Alternatively, Defendants effectuated a seizure by showing their authority in a manner that ultimately led Plaintiffs to leave the scene. Defendants' use of force was objectively unreasonable because Plaintiffs were peaceful protesters who had committed no crime, posed no threat to anyone, and were not resisting or evading arrest.

IV. At a minimum, the district court should have allowed Plaintiffs to amend their complaint. In opposing the motion to dismiss, Plaintiffs sought leave to add a

substantive-due-process claim, and they spelled out exactly what that claim would entail. In those circumstances, the district court abused its discretion by not granting leave to amend. In addition, if this Court were to conclude that the complaint's extensive allegations of causation are insufficient, Plaintiffs should be given a chance to cure that defect.

STANDARD OF REVIEW

This Court reviews de novo a district court's decision to grant a motion to dismiss for failure to state a claim. *Cooperrider v. Woods*, 127 F.4th 1019, 1027 (6th Cir. 2025). In so doing, this Court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Royal Truck & Trailer Sales & Serv., Inc. v. Kraft*, 974 F.3d 756, 758 (6th Cir. 2020) (quoting *Jones v. City of Cincinnati*, 521 F.3d 555, 559 (6th Cir. 2008)). If "the complaint 'contains sufficient factual matter to state a claim to relief that is plausible on its face,'" dismissal is improper. *Id.* (alterations and additional internal quotation marks omitted) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

ARGUMENT

I. Defendants Acted Under Color of State Law and Caused Plaintiffs' Injuries.

"Section 1983 provides a cause of action against '[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State' deprives someone of a federal constitutional or statutory right." *Lindke v. Freed*, 601 U.S. 187, 194 (2024)

(emphasis omitted) (quoting 42 U.S.C. § 1983). "As its text makes clear, this provision protects against acts attributable to a State, not those of a private person." *Id.* In granting Defendants' motion to dismiss, the district court relied primarily on its conclusion that Plaintiffs' injuries were not caused by state action. That was mistaken. As members of a state-sanctioned campus police force, the officer Defendants are state actors. And the complaint plausibly alleges that they caused Plaintiffs' injuries by directing the painters to blast Plaintiffs with toxic spray paint. As for Kaler, although the president of a private university would not ordinarily be a state actor, his alleged conduct in concert with the officers here constituted state action because he "jointly engaged with state officials in a deprivation of civil rights." *Memphis, Tenn. Area Local, Am. Postal Workers Union v. City of Memphis* ("*Memphis*"), 361 F.3d 898, 905 (6th Cir. 2004). The complaint therefore sufficiently alleges that all Defendants caused Plaintiffs' injuries while acting under color of state law.

A. The CWRU Police Chief and Police Officers Were State Actors Who Directed the Painters and Caused the Spray-Painting.

To start, there can be no debate that CWRU Police Chief Owens and Officers Bialowsky, Jastatt, and Drumm are state actors, as the district court correctly recognized. Op., R.16, PageID # 141-44. In Ohio, campus police officers have "the same powers and authority that are vested in a police officer of a municipal corporation or a county sheriff." Ohio Rev. Code Ann. § 1713.50(C). This Court recently held that campus police officers operating under this Ohio law are state actors. *Warman v. Mount*

St. Joseph Univ., 144 F.4th 880, 894 (6th Cir. 2025). Although such officers "are subject to certain statutory limitations and the oversight of the university," "they exercise police powers that typically reside only in the state." *Id.* That is equally true for campus police officers at CWRU. *See* Cleveland Div. of Police, *General Police Order* 1 (2021), https://tinyurl.com/yykn3tt6 (CWRU police have "the same authority" as Cleveland Division of Police officers). "Where a private university's officers violate a plaintiff's civil rights, a 'plaintiff's ability to claim relief under § 1983 should be unaffected.'" *Warman*, 144 F.4th at 894 (quoting *Payton v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 184 F.3d 623, 629 (7th Cir. 1999)).

The painters, by contrast, are admittedly private actors, and as the district court pointed out, they were the ones who physically wielded the paint sprayers. *See* Op., R.16, PageID # 142, 144. But the district court erred by ending the analysis there. The participation of private actors is not dispositive. Instead, liability can be imposed so long as a plaintiff's constitutional injuries are "fairly attributable to the State," even when private actors are involved. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

Applying that standard, courts have held that state actors are liable under Section 1983 for "active participation" in the violation of a plaintiff's rights, even when the state officers act in concert with private actors. *Hensley v. Gassman*, 693 F.3d 681, 691 (6th Cir. 2012). For instance, this Court explained that police officers could be held liable under Section 1983 if they "organized or participated" in an illegal drag race "by waving a flag to signal the start of the race, by doing the play-by-play for the race or by driving

one of the cars." *Jones v. Reynolds*, 438 F.3d 685, 695 (6th Cir. 2006). In that circumstance, the issue would not be whether the officers were indirectly "responsible for harm caused by a private actor," but rather whether the officers "had caused the harm themselves." *Id.*; *see also Dwares v. City of New York*, 985 F.2d 94, 98-99 (2d Cir. 1993) (holding that officers could be liable for directing private parties to harm plaintiffs), *abrogated on other grounds by Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 168-69 (1993).

This Court's decision in *Hensley* illustrates the point. There, a private "repo-man" arrived at the plaintiffs' residence to repossess their car, accompanied by police officers. *Hensley*, 693 F.3d at 684-85. Although the plaintiffs repeatedly—and correctly—insisted that the car was being wrongfully repossessed, the officers prevented the plaintiffs from driving off with the car and then instructed the repo-man to tow the car to the road. *Id.* at 691. This Court concluded that the officers were liable for their "active participation" and "instrumental" role in the wrongful private repossession. *Id.* at 691-93.

The same reasoning applies here. Like the officers in *Hensley*, who did not themselves physically move the plaintiffs' car but took action to ensure the repo-man could, the officer Defendants here played an "instrumental" role in spray-painting Plaintiffs. As alleged in the complaint, the three Defendants on the scene went beyond mere participation and directed the painters to coat Plaintiffs' bodies, after the painters "balked" at the prospect of painting over Plaintiffs and the officer Defendants refused

the painters' request to move Plaintiffs out of the way. Compl., R.1, PageID # 8, 10-11 (¶ 32-33, 37).

The Fourth Circuit's decision in *Meeker v. Edmundson*, 415 F.3d 317, 318 (4th Cir. 2005), is also instructive. There, the court held that a student at a public high school had stated a claim that his former wrestling coach, who was a state actor, was liable for directing and encouraging students, who were private actors, to beat the plaintiff. *Id.* at 322-23. The court explained that the coach could not "escape liability simply because he did not administer the beatings with his own hands," but instead used private actors as his "instruments" to cause the plaintiff physical harm. *Id.* at 322.

Officers Bialowsky, Jastatt, and Drumm are liable here for the same reasons. As in *Meeker*, the officer Defendants directly caused Plaintiffs' harm using the painters as their "instruments." When the painters saw Plaintiffs blocking the mural and asked the officers "what they should do," the officers "expressly instructed" the painters to cover Plaintiffs with spray paint. Compl., R.1, PageID # 8, 10-11 (¶ 33, 37). Like in *Meeker*, the officers "instituted" the violence against Plaintiffs, and they are thus liable for it. *See* 415 F.3d at 322-23. It is well established in this circuit that an official "need not 'have physically put his hands on the injured party'" to be liable for that injury. *Venema v. West*, 133 F.4th 625, 633 (6th Cir. 2025) (quoting *Peatross v. City of Memphis*, 818 F.3d 233, 242 (6th Cir. 2016)).

Police Chief Owens, as the officers' supervisor, also caused Plaintiffs' injuries when he instructed the officers to tell the painters to begin painting. Compl., R.1,

PageID # 2-3 (¶ 4). A supervisor may be held liable under Section 1983 when he encourages or directs his subordinates to engage in misconduct, *see Peatross*, 818 F.3d at 241-42, even if he was not physically present when the violation happened, *Venema*, 133 F.4th at 633. To establish liability for a supervisory official, a plaintiff must satisfy two elements: "active involvement by the supervisor and causation." *Crawford v. Tilley*, 15 F.4th 752, 761 (6th Cir. 2021). With respect to active involvement, "the plaintiff must show that the defendant at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending" actors. *Venema*, 133 F.4th at 633 (quoting *Peatross*, 818 F.3d at 242); *see also Campbell v. City of Springboro*, 700 F.3d 779, 790 (6th Cir. 2012) (a supervisor may be liable under Section 1983 if he "either encouraged the specific incident of misconduct or in some other way directly participated in it" (quoting *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999))). Accepting Plaintiffs' allegations as true, Owens expressly "instructed" his subordinate officers at the scene to paint the mural with Plaintiffs standing in the line of fire. Compl., R.1, PageID # 2-3 (¶ 4). The officers followed his instructions, directing the painters to proceed. *Id.* at PageID # 8 (¶ 32-33).

As to causation, the plaintiff must show "a causal connection between the defendant's wrongful conduct and the violation alleged." *Venema*, 133 F.4th at 633 (quoting *Peatross*, 818 F.3d at 242). "A causal connection is established when the supervisor's conduct, or lack thereof, 'could be reasonably expected to give rise to just the sort of injuries that a plaintiff alleges have occurred.'" *Id.* (quoting *Campbell*, 700

F.3d at 790). By telling the officers to have the painters go ahead, Owens caused the harm that resulted from Plaintiffs being covered in toxic paint.

Contrary to the district court's conclusions, Plaintiffs sufficiently alleged that each officer "violated the Constitution through [his] own actions." *Id.* The complaint alleges that each of the three officers on the scene participated in directing the painters to coat Plaintiffs in toxic spray paint as a response to Plaintiffs' protest, and that they did so at the behest of Kaler and Owens, with whom they were communicating. At this early stage of the case, that is sufficient to "allow[] the court to draw the reasonable inference that [each] defendant is liable for the misconduct alleged." *Chambers v. HSBC Bank USA, N.A.*, 796 F.3d 560, 567 (6th Cir. 2015) (internal quotation marks omitted).

B. Kaler Willfully Participated in Joint Action with State Agents.

The analysis proceeds differently for the remaining Defendant, President Kaler, because as a private university president, he is not a state actor. But a private actor may be liable under Section 1983 if he "willfully participate[d] in joint action with state agents." *Memphis*, 361 F.3d at 905. As this Court has explained, "[p]rivate persons jointly engaged with state officials in a deprivation of civil rights are acting under color of law." *Id.* (quoting *Hooks v. Hooks*, 771 F.2d 935, 943 (6th Cir. 1985)). Here, Kaler's joint action with the officer Defendants renders him liable under Section 1983.

"When a defendant is a private entity," *id.*, the Sixth Circuit has employed a few different tests to determine whether the actor's conduct is "fairly attributable to the

state": "(1) the public function test; (2) the state compulsion test; (3) the symbiotic relationship or nexus test; and (4) the entwinement test," *Marie v. Am. Red Cross*, 771 F.3d 344, 362 (6th Cir. 2014). These tests ultimately "boil down to a core question: whether 'there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself.'" *Brent v. Wayne Cnty. Dep't of Hum. Servs.*, 901 F.3d 656, 676 (6th Cir. 2018) (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001)); *see Siefert v. Hamilton County*, 951 F.3d 753, 759-60 (6th Cir. 2020). At the same time, the Court has indicated that these tests become "relevant only in cases in which there are no allegations of cooperation or concerted action between state and private actors." *Memphis*, 361 F.3d at 905. Where "a private party has conspired with state officials to violate constitutional rights," that alone is sufficient to transform their conduct into state action. *Id.* (quoting *Cooper v. Parrish*, 203 F.3d 937, 952 n.2 (6th Cir. 2000)).

Here, Plaintiffs alleged that there was a joint, concerted effort between Kaler and the officers to ensure that Plaintiffs were spray-painted. As alleged, the officers contacted Kaler "to receive instructions on how to proceed" when Plaintiffs lined up in front of the mural. Compl., R.1, PageID # 8 (¶ 31). Kaler expressly instructed the officers to tell the painters to paint over Plaintiffs, and the officers followed Kaler's instruction. *Id.* at PageID # 2-3 (¶ 4). This willful joint participation between Kaler and the officers caused Plaintiffs' injuries. *See Memphis*, 361 F.3d at 905.

The facts alleged here are similar to those in cases where the Sixth Circuit found that coordination between state and private actors was sufficient to transform private conduct into state action. In *Siefert*, the Sixth Circuit found state action existed when a private hospital "worked in tandem" with county officials to prevent parents from taking their child home from the hospital. 951 F.3d at 757-60. The Court emphasized that the hospital and the county "remained in constant contact," were "[o]ften collaborating and communicating" about the child's situation, and the county "gave 'significant encouragement'" to the hospital's actions. *Id.* at 760 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)). The hospital and county ultimately "depended on each other to block" the child's release from the hospital, leaving the child's parents unsure which entity was ultimately in charge. *Id.* at 760-61. And in *Memphis*, the plaintiffs alleged that a private employer "continuously conferred" with on-duty and off-duty police officers to confront, harass, and arrest striking workers on the picket line. 361 F.3d at 900-01. The Court held that based on the coordination between the companies and the police, the employers' actions could be attributed to the state. *Id.* at 905-06.

The complaint here alleges that Kaler coordinated with—and indeed, oversaw—the campus police in connection with the spray-painting incident in much the same way. The officers and painters arrived at the mural in the early morning, Compl., R.1, PageID # 7-8 (¶ 28), and Plaintiffs then stood in a line in front of the wall, *id.* at PageID # 8 (¶ 30). The officers reached out to Kaler and Owens to figure out next steps, and Kaler and Owens instructed the officers to tell the painters to go ahead. *Id.* at PageID # 2-3

(¶ 4). In the lead-up to the incident, Kaler had expressed his displeasure with the Spirit Wall mural specifically—and with pro-Palestine speech more generally. *Id.* at PageID # 6-7, 11-12, 14 (¶ 23, 40, 44). And he hired the painters to cover the mural. *Id.* at PageID # 6-7 (¶ 23). It is thus no surprise that, when contacted on the morning of the incident, Kaler and Owens told the officers to proceed. In so doing, Kaler "worked in tandem," *Siefert*, 951 F.3d at 760, and "conferred," *Memphis*, 361 F.3d at 901, with the officers to ensure that the mural was censored, even if it meant painting over Plaintiffs. The spray-painting happened because, like the state and private actors in *Siefert* and *Memphis*, the officers and Kaler jointly "depended on" each other. *Siefert*, 951 F.3d at 760-61. The officers needed and relied on Kaler's guidance and instruction; Kaler, in turn, relied on the on-site officers' authority to direct the painters to spray-paint Plaintiffs' bodies. Because Kaler directed state actors to engage in unconstitutional activity, he is liable under Section 1983 for the harm that Plaintiffs suffered as a result.

Kaler's role in this case differs from that of the university officials in *Warman*. In that case, a student who objected to a private university's COVID-19 vaccine mandate alleged that two officers from the campus police department detained him for an hour at the police station, where they aggressively tried to convince him to take the vaccine and denigrated his religious beliefs. *Warman*, 144 F.4th at 886-87. Later, school officials denied the student's request for a religious exemption from the vaccine requirement. *Id.* at 887. Although this Court permitted the student's Fourth Amendment claims against the campus police officers to proceed, the Court held that the administrators

who denied the exemption did not engage in state action. *Id.* at 898. That denial was "wholly separate from" the harassment by the officers and was thus "a private administrative decision made by the private employees of a private university." *Id.* Here, by contrast, Kaler's actions and those of the campus police were inextricably intertwined. The morning of the incident, the officers, acting at Kaler's behest, accompanied the painters that Kaler had hired to paint over the Spirit Wall mural. When they had questions about next steps, the officers spoke to Kaler and Owens, who instructed the officers to give the painters the go-ahead, even though Plaintiffs stood in harm's way. Nothing about the officers' actions was "wholly separate" from Kaler's oversight. *Id.*

II. Defendants Violated Plaintiffs' First Amendment Rights.

"To prove a First Amendment retaliation claim, a plaintiff must show: (1) he engaged in protected speech; (2) the defendant took an adverse action against him; and (3) there is a causal connection between the protected speech and the adverse action." *Josephson v. Ganzel*, 115 F.4th 771, 783 (6th Cir. 2024). Plaintiffs have plausibly alleged each of those elements here.

The district court considered Plaintiffs' First Amendment retaliation claim on the merits only as to Defendant Drumm. Despite holding that Plaintiffs satisfied the first two elements of a First Amendment retaliation claim, the court held that the "analysis cease[d] to apply at this juncture" because "Drumm did not wield the paint sprayer and did not himself take adverse action against Plaintiffs." Op., R.16, PageID

144. It further concluded, without elaboration, that "none of Plaintiffs' allegations allow[ed] the Court to make a plausible inference that Drumm was motivated to punish Plaintiffs for the exercise of their free speech and free expression rights." *Id.* But as explained below, the bar is low for plausibly alleging causation for purposes of a First Amendment retaliation claim at the motion-to-dismiss stage, and Plaintiffs here clear that bar.

A. Plaintiffs Engaged in Constitutionally Protected Expressive Conduct.

As the district court correctly recognized, Plaintiffs sufficiently alleged that they engaged in expressive conduct protected by the First Amendment. Op., R.16, PageID # 144 (finding that Plaintiffs "engaged in protected conduct" because they "were protesting the obliteration of the mural on the 'Spirit Wall'"). Conduct "implicates the First Amendment" when it "is 'sufficiently imbued with elements of communication.'" *Yoder v. Bowen*, 146 F.4th 516, 529 (6th Cir. 2025) (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989)). Conduct is expressive when the person engaging in the conduct intends to convey a "particularized message" and there is a high "likelihood" that those who observe the conduct will understand that message. *Spence v. Washington*, 418 U.S. 405, 410-11 (1974). Expressive conduct includes picketing, *Phelps-Roper v. Strickland*, 539 F.3d 356, 360 (6th Cir. 2008); wearing a symbolic shirt intended to convey a message, *Castorina ex rel. Rewt v. Madison Cnty. Sch. Bd.*, 246 F.3d 536, 539-40 (6th Cir. 2001); and

sharing a meal in a public park, *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1240-45 (11th Cir. 2018).

Plaintiffs here engaged in expressive conduct when they stood in front of the Spirit Wall to protest the removal of the pro-Palestine mural. First, Plaintiffs intended to convey a message. This prong of the test "does not pose a high bar." *Lichtenstein v. Hargett*, 83 F.4th 575, 594 (6th Cir. 2023). All three Plaintiffs had "separately and individually participated in peaceful [pro-Palestine] protests" on campus "in the days leading up to May 7, 2024." Compl., R.1., PageID # 6 (¶ 21). Early that morning, Plaintiffs Feng and Alkayali went to the Spirit Wall after hearing that CWRU planned to paint over the mural. *Id.* at PageID # 7 (¶ 26). Plaintiff Kennelly joined them when he walked by the Spirit Wall and saw Feng, Alkayali, police, painters, and others gathered there. *Id.* (¶ 27). In that moment, each Plaintiff decided to stand in front of the pro-Palestine mural on the Spirit Wall and use their bodies as shields to block the painters from destroying it. *Id.* at PageID # 8 (¶ 30). In doing so, Plaintiffs plainly intended to convey a particularized message: their support for the Palestinian people and opposition to the censorship of the Spirit Wall. *Id.* at PageID # 18 (¶ 63).

There was also a high likelihood that the audience who saw Plaintiffs' protest would understand the message. The "symbolism" of Plaintiffs' protest—blocking painters from covering over political speech on a wall—would have been obvious to anyone watching. *See Spence*, 418 U.S. at 410; *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969) (holding that wearing a black armband to school in protest of

the Vietnam War was "the type of symbolic act" protected by the First Amendment). Plaintiffs' expression would have been even clearer in context. *Johnson*, 491 U.S. at 405 ("[I]n characterizing such action for First Amendment purposes, we have considered the context in which it occurred."). By 2024, protests about Israel's bombardment of Gaza were ubiquitous on college campuses across the United States. *See* Compl., R.1, PageID # 5 (¶ 16-19). CWRU's campus was no exception. *Id.* at PageID # 5-6 (¶ 20-21). Plaintiffs and other students previously engaged in pro-Palestine campus protests that "attracted extensive press coverage." *Id.* (¶ 19, 21). And on May 6, 2024, students painted the Spirit Wall with pro-Palestine messages. *Id.* at PageID # 6 (¶ 22). In that context, Plaintiffs' decision to stand in front of the pro-Palestine mural to block painters from destroying it "conveyed an unmistakable message about a contemporaneous issue of intense public concern." *Spence*, 418 U.S. at 410. Indeed, President Kaler recognized that Plaintiffs were "protesters" sharing a message. Compl., R.1, PageID # 16 (¶ 48). A reasonable observer thus would have interpreted Plaintiffs' decision to block the painters as expressing support for the pro-Palestine messages painted on the Spirit Wall behind them and opposition to the censorship of those messages.

The fact that this protest occurred on private property does not take Plaintiffs' expression outside the First Amendment's protections. What matters is whether the power of the state is used to retaliate against someone for their speech, regardless of where that speech occurs. *See Lindke*, 601 U.S. at 198 (holding that government officials' activities on privately owned social-media platforms implicate the First Amendment

when they constitute state action); *Reed v. Town of Gilbert*, 576 U.S. 155, 159 (2015) (holding that ordinance regulating signs posted on private property implicates the First Amendment); *Martin v. City of Struthers*, 319 U.S. 141, 147-49 (1943) (recognizing a First Amendment interest in door-to-door solicitation on private property). The rights secured by the Constitution would mean little if they could be exercised only on designated government property. That is not the law. *See Wolford v. Lopez*, 146 S. Ct. 2032, 2050 n.13 (2026) ("States may not adopt property-law rules that violate constitutional rights," including "property-law rules that violate the freedom of speech.").

"[T]he nature of" Plaintiffs' "activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that" Plaintiffs "engaged in a form of protected expression." *Spence*, 418 U.S. at 409-10.

B. Defendants Took Adverse Action Against Plaintiffs.

Plaintiffs suffered an adverse action. Defendants did not contest this point below, Defs.' MTD Br., R. 11-1, PageID # 72-75, nor did the district court, Op., R.16, PageID # 144 ("Plaintiffs suffered an adverse action by being painted over with toxic paint."). An adverse action is one that "would deter a person of ordinary firmness from continuing to engage in" First Amendment protected activities. *Maben v. Thelen*, 887 F.3d 252, 262 (6th Cir. 2018) (quoting *Thaddeus–X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc)). This is a question of fact, *Cooperrider*, 127 F.4th at 1037, and as such, "retaliation claims based on all but genuinely 'inconsequential' official actions 'should

go to the jury,'" *Josephson*, 115 F.4th at 787 (quoting *Bell v. Johnson*, 308 F.3d 594, 603 (6th Cir. 2002)). An action is "inconsequential" if it results in a "de minimis injury" that would "trivialize[] the First Amendment." *See Wurzelbacher v. Jones-Kelley*, 675 F.3d 580, 584 (6th Cir. 2012) (quoting *Bell*, 308 F.3d at 603, 606).

There is no question that Defendants' actions here "would deter a person of ordinary firmness." *Maben*, 887 F.3d at 262 (quoting *Thaddeus–X*, 175 F.3d at 394). Being blasted "with toxic spray-paint from industrial spray-painting machines" would be more than enough to make a person of ordinary firmness stop speaking. *See* Compl., R.1, PageID # 3 (¶ 4). This Court has held that mere threats of such physical violence constitute adverse actions for purposes of First Amendment retaliation. *See MacIntosh v. Clous*, 69 F.4th 309, 316 (6th Cir. 2023) ("On multiple occasions, [the Sixth Circuit has] held that when an official responds to speech with threats of physical harm, that response constitutes an adverse action."); *Thaddeus–X*, 175 F.3d at 398 (explaining that even threats of violence, without infliction of bodily harm, can constitute adverse action). And courts have recognized that use of chemical irritants—like pepper spray or tear gas—against protesters constitutes an adverse action. *E.g.*, *De Mian v. City of St. Louis*, 86 F.4th 1179, 1182 (8th Cir. 2023) ("[A] person of ordinary firmness would be chilled from continuing to report or protest after being pepper sprayed."); *Green v. City of St. Louis*, 52 F.4th 734, 739 (8th Cir. 2022) ("Deploying tear gas towards individuals is an adverse action."); *Alsaada v. City of Columbus*, 536 F. Supp. 3d 216, 269 (S.D. Ohio 2021) (exposure to tear gas and pepper spray is adverse action because it can be

"extremely painful" and cause "lasting and serious physical injuries"). The same goes for coating someone with toxic spray paint from an industrial spraying machine.

C. There Is a Causal Connection Between the Protest and the Spray-Painting.

Plaintiffs sufficiently alleged a causal connection between their protest and the ensuing spray-painting. To succeed on their First Amendment retaliation claim, a "plaintiff must show a causal connection between a defendant's retaliatory animus and [the plaintiff's] subsequent injury." *Hartman v. Moore*, 547 U.S. 250, 259 (2006). Courts evaluate the causal connection using a burden-shifting framework. First, the plaintiff must show that his constitutionally protected conduct was a "substantial factor" contributing to the adverse action, and the burden then shifts to the defendant to show "by a preponderance of the evidence that it would have reached the same decision … even in the absence of the protected conduct." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

Under this burden-shifting framework, a plaintiff at the motion-to-dismiss stage is "required only to *plausibly allege* that his speech was a motivating factor of the enforcement action." *Cooperrider*, 127 F.4th at 1038 n.13. A plaintiff can satisfy this motivating-factor test with "'specific, nonconclusory allegations reasonably linking her speech' to the adverse action." *Id.* at 1038 (quoting *Bailey v. Floyd Cnty. Bd. of Educ. ex rel. Towler*, 106 F.3d 135, 144 (6th Cir. 1997)). Although "[s]ome statements in [this Court's] cases have (wrongly) equated this motivating-factor test with but-for causation," "this

test does not require a but-for relationship." *Lemaster v. Lawrence County*, 65 F.4th 302, 309 (6th Cir. 2023). "Whether or not the action would have been taken in the absence of [the plaintiff's] speech is a quintessential fact question to be inquired into during the discovery process." *Cooperrider*, 127 F.4th at 1038 n.13.

Contrary to the district court's reasoning, Op., R.16, PageID # 144, the complaint adequately alleges that Plaintiffs' expressive conduct was a motivating factor for Defendants' decision to direct the painters to spray them. "To answer this causation question in the free-speech context," the Court's "cases typically start by looking at the time gap between the protected speech and the harmful action." *Lemaster*, 65 F.4th at 310. In some cases, "temporal proximity alone may be significant enough to constitute indirect evidence of a causal connection so as to create an inference of retaliatory motive." *Muhammad v. Close*, 379 F.3d 413, 417-18 (6th Cir. 2004) (internal quotation marks omitted); *see Brown v. Mich. Dep't of Corr.*, No. 25-1576, 2026 WL 1333575, at *5 (6th Cir. May 8, 2026) (collecting cases holding "that a First Amendment retaliation claim should survive the dismissal stage, even when the only indication of a causal connection is temporal proximity, provided that temporal proximity is particularly close in time"). Here there was no "time gap" at all. *Lemaster*, 65 F.4th at 310. Defendants directed the painters to spray Plaintiffs with toxic paint during Plaintiffs' expressive protest. Compl., R.1, PageID # 2-3, 8-11 (¶ 4, 32-37). This immediacy between Plaintiffs' protected expression and Defendants' response alone raises an inference of a causal connection.

Even if more were required, Plaintiffs' complaint presents several "other indicia of retaliatory conduct." *Sensabaugh v. Halliburton*, 937 F.3d 621, 630 (6th Cir. 2019). The officers' conduct on the scene indicates an intent to retaliate against Plaintiffs for the viewpoint they were expressing, beyond what was necessary to permit the painters to complete their work covering the mural. The painters asked the officers to move Plaintiffs out of the way. Compl., R.1, PageID # 8 (¶ 32). Perhaps the officers could have ordered Plaintiffs to disperse or even cited them for trespass. But the officers refused to do so. *Id.* Instead, after consulting with President Kaler and Chief Owens, the officer Defendants instructed the painters to go ahead and paint the wall with Plaintiffs in the way, thereby causing them to be blasted with toxic paint. *Id.* at PageID # 2-3, 8-9 (¶ 4, 31-34). And they did so despite Officer Drumm's explicit recognition that the industrial paint sprayers were "dangerous." *Id.* at PageID # 8 (¶ 33). The peculiar decision to cover Plaintiffs in paint, rather than using a more typical law-enforcement technique, indicates that the officers intended to retaliate.

This inference of causation is further supported by Kaler's broader "policy of using physical force to remove student protestors" and "of falsely equating support for Palestin[e] or criticism of the Israeli government's policies toward Palestinians with antisemitism in order to justify said force." *Id.* at PageID # 11 (¶ 38). The complaint details numerous incidents on campus in the lead-up to the spray-painting here indicating that Kaler sought to silence pro-Palestine voices on campus, including warnings and suspensions issued to students involved in protests in the spring of 2024.

Id. at PageID # 12-16 (¶ 41-49). This Court has previously found the "motivating factor" test met at the motion-to-dismiss stage where the plaintiff plausibly alleged that the defendants were "angered by" the plaintiff's speech and that lower-level officials took adverse action based on "directives they received from" higher-up state officials. *Cooperrider*, 127 F.4th at 1025, 1038-39. Plaintiffs here plausibly allege that Kaler repeatedly expressed animus toward pro-Palestine protests on campus and that the officers on the scene directed the painters to spray Plaintiffs in furtherance of Kaler's policies intended to silence pro-Palestine speech. The complaint thus plausibly alleges that a desire to retaliate against speech supporting Palestine was a motivating factor in Defendants' decision to spray Plaintiffs with paint.

The fact that Defendants did not physically "wield the paint sprayer[s]," *see* Op., R.16, PageID # 144, does not defeat causation. Defendants may be held liable for retaliatory conduct that gives rise to foreseeable harm, "even if the harm is executed by someone else." *King v. Zamiara*, 680 F.3d 686, 695-96 (6th Cir. 2012). The plaintiff in *King* argued that his transfer to a higher-security facility was retaliation for his protected conduct. The district court concluded that certain defendants could not be held liable because they did not make "the ultimate decision to increase" the plaintiff's security level. *Id.* at 695. This Court rejected that reasoning: "The district court failed to acknowledge that a person who sets in motion an adverse action can be liable for retaliation for the reasonably foreseeable consequences of his actions." *Id.* If that were not so, "those with the necessary intent to retaliate" would "escape liability for setting

in motion a punitive act ultimately executed by someone else." *Id.* at 696. Here, Defendants set in motion the punitive act by directing the painters to cover Plaintiffs' "bodies with toxic spray-paint from industrial spray-painting machines." Compl., R.1, PageID # 2-3 (¶ 4). Defendants cannot escape liability merely because they used the painters as their instruments to carry out the retaliation.

III. Defendants Violated Plaintiffs' Fourth Amendment Rights.

The district court addressed the merits of Plaintiffs' Fourth Amendment claim in one sentence: "There is no plausible allegation that Drumm exercised physical force against Plaintiffs nor that he used the authority of his badge or uniform to control Plaintiffs by compelling them to leave or remain." Op., R.16, PageID # 144. No analysis accompanied this bare assertion, and the district court did not address the merits of Plaintiffs' Fourth Amendment claims against any of the other Defendants.

Plaintiffs' allegations are sufficient to establish a Fourth Amendment claim as to each Defendant. To plead a Fourth Amendment excessive-force claim, Plaintiffs must plausibly allege that (1) they were seized within the meaning of the Fourth Amendment and (2) the seizure involved an objectively unreasonable use of force in light of the totality of the circumstances. *See Campbell v. Cheatham Cnty. Sheriff's Dep't*, 47 F.4th 468, 476 (6th Cir. 2022). Plaintiffs' complaint satisfies both elements.

A. Plaintiffs Were Seized for Purposes of the Fourth Amendment.

"[A]n excessive-force claim" may be "analyzed under the Fourth Amendment" only if the "incident out of which [the claim] arises is … a search [or] a seizure." *Ciminillo v. Streicher*, 434 F.3d 461, 464-65 (6th Cir. 2006). But "[i]t is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime—'arrests' in traditional terminology." *Terry v. Ohio*, 392 U.S. 1, 16 (1968). Instead, "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Id.* An officer can seize a person for these purposes "in one of two ways: (1) use of force with the intent to restrain; or (2) show of authority with acquisition of control." *Campbell*, 47 F.4th at 476. At this early stage in the case, Plaintiffs have sufficiently pleaded that Defendants seized them under either theory by instructing the painters to begin spray-painting.

1. Defendants Used Force with Intent to Restrain.

Defendants seized Plaintiffs by intentionally directing the use of physical force against them in an attempt to "restrain [their] movement." *See California v. Hodari D.*, 499 U.S. 621, 625 (1991). A seizure via physical force requires that "the circumstances objectively manifested" the defendant's "intent to restrain," *Kilnapp v. City of Cleveland*, 167 F.4th 909, 921 (6th Cir. 2026), and that the force was not "[a]ccidental" or "applied for some other purpose," *Torres v. Madrid*, 592 U.S. 306, 317 (2021). An "application of physical force to the body of a person with intent to restrain is a seizure even if the

person does not submit and is not subdued." *Id.* at 325; *see also Hodari D.*, 499 U.S. at 624 (explaining that "the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing" the individual, constituted a seizure). Accordingly, even brief or temporary uses of physical force can constitute a seizure, and the force used need not immobilize or incapacitate the plaintiff. *See, e.g.*, *Torres*, 592 U.S. at 318 ("[B]rief seizures are seizures all the same.").

The circumstances here objectively manifested Defendants' intent to restrain Plaintiffs. *See Kilnapp*, 167 F.4th at 921 ("[I]ntent must be determined by dint of the *objective* circumstances, not the officer's *subjective* intent."). Any form of physical contact, direct or indirect, can constitute the requisite "physical force." *See, e.g.*, *Torres*, 592 U.S. at 317-18 ("While a mere touch can be enough for a seizure, the amount of force remains pertinent in assessing the objective intent to restrain."). Here, Defendants used far more than a "mere touch." At Defendants' direction, the painters used spray-painting machines to cover Plaintiffs from head to toe with toxic spray paint. Compl., R.1, PageID # 8 (¶ 34). Drumm even acknowledged the danger involved, warning Plaintiffs "not to touch the paint sprayers, as they were dangerous." *Id.* (¶ 33). Working with this sort of industrial spray paint involves "exposure to toxic materials and flammable or explosive mists, particulates, and vapors," with "[p]otential physical and health hazards" that must be "effectively controlled by appropriate work procedures, controls …, protective clothing, and equipment." Occupational Safety & Health Admin., Spray Operations: Controlling Hazards, https://www.osha.gov/spray-

operations/controlling-hazards (last visited July 27, 2026). As with other chemical irritants, being sprayed at close range by industrial-strength spray paint "usually is blinding and incapacitating." *Adams v. Metiva*, 31 F.3d 375, 386 (6th Cir. 1994). This use of a harsh chemical substance, known to be dangerous, and with the capability of blinding or incapacitating Plaintiffs, objectively indicates that Defendants intended for Plaintiffs' movement to be limited as a result of the spray-painting.

This use of physical force terminated Plaintiffs' "freedom of movement through means intentionally applied," *Brower v. County of Inyo*, 489 U.S. 593, 597 (1989) (emphasis omitted), rather than by "[a]ccident[]," *Torres*, 592 U.S. at 317. Upon witnessing Plaintiffs standing resolutely in front of the Spirit Wall, the officer Defendants contacted Kaler and Owens to ask how to proceed. Compl., R.1, PageID # 8 (¶ 31). After Kaler and Owens gave them "instruction," the officers "expressly instructed the painters that they could discharge spray paint on the Plaintiffs." *Id.* at PageID # 2-3, 11 (¶ 4, 37). Even after the painters "balked" at doing so and asked the officers to move Plaintiffs out of the way, the officers refused, instead directing the painters to paint over Plaintiffs' bodies. *Id.* at PageID # 8 (¶ 32-33). The complaint plainly alleges that the spray-painting was done intentionally, at the behest of Kaler and the police officers, rather than accidentally. It is not as though Defendants were unaware of Plaintiffs' presence in front of the wall. That the officers chose to apply force through the instrumentality of painters rather than directly does not alter the Fourth Amendment analysis. *See supra*, at 14-19.

Defendants' intent to restrain Plaintiffs via physical force is all the more evident from the fact that the spray-painting targeted Plaintiffs in particular rather than, for instance, being generally dispersed into a crowd. In *Ciminillo*, this Court reversed the grant of summary judgment to a police officer on the issue of whether an individual had been "seized" when he was shot with a beanbag projectile, "allegedly without provocation and at point blank range," by the officer, who was attempting to disperse participants in a street party that had become "rowdy." 434 F.3d at 463, 465-66. Although the district court had concluded that the "use of force was not accompanied by an effort to restrain or apprehend" the plaintiff, this Court determined that a reasonable jury could conclude the plaintiff was shot "in an effort to restrain his movement," given that he was the "'deliberate object of [the officer's] exertion of force.'" *Id.* at 465-66 (quoting *Fisher v. City of Memphis*, 234 F.3d 312, 318 (6th Cir. 2000)).

The Ninth Circuit reasoned similarly in *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. 2012), in which police officers hit a student in the eye with a projectile filled with pepper spray while shooting into a crowd in an attempt to disperse a party at a university's apartment complex. *Id.* at 872-74. The Ninth Circuit rejected the officers' argument that no seizure had occurred, because "the officers intentionally directed their use of force at the students." *Id.* at 877. As in *Ciminillo* and *Nelson*, Defendants here subjected Plaintiffs to force that was "intentional" and specifically "aimed towards" Plaintiffs, further indicating an objective intent to restrain. *See id.* at 877.

That Defendants' ultimate objective may have been to clear the path to the wall rather than to arrest Plaintiffs or otherwise keep them in place does not alter the seizure analysis. The complaint does not support the inference that Defendants' purpose in directing the spray-painting was solely to disperse Plaintiffs: Defendants never issued a dispersal order and expressly declined the painters' request to move Plaintiffs, instead instructing the painters to begin spraying. Declining to move Plaintiffs and instead directing that they be sprayed with toxic chemicals cannot readily be characterized as manifesting a mere intent to disperse them. Nor are restraint and dispersal necessarily mutually exclusive. An officer who grabs a protester and throws her down a flight of stairs to remove her from a protest scene, deploys pepper spray to force an individual to leave a rowdy environment, or fires a beanbag round at a retreating partygoer manifests an objective intent to exercise control over that person's movement. *See, e.g.*, *Ciminillo*, 434 F.3d at 466; *Nelson*, 685 F.3d at 877.

The Ninth Circuit's decision in *Sanderlin v. Dwyer*, 116 F.4th 905 (9th Cir. 2024), is illustrative. In that case, a previously peaceful protest became violent "as some members of the crowd began … smashing vehicles with rocks and throwing objects at officers from an overpass." *Id.* at 908. Police officers issued dispersal orders to the crowd. *Id.* One protester occupied a sidewalk, holding a sign over his head, and a police officer briefly warned him to move before firing a foam baton round at him and hitting him in the groin. *Id.* at 909. The Ninth Circuit recognized that "courts have not hesitated to hold that a seizure occurred when an officer uses physical force in any way that

restricts or otherwise limits the ability of an individual to move about freely, even if the restriction is limited in nature or time, and even where the force is not applied for the purpose of effectuating an arrest." *Id.* at 912 (collecting cases from the Second, Seventh, Eleventh, and D.C. Circuits). It then held that "a reasonable factfinder could find that [the officer] *objectively* manifested an intent to restrain [the plaintiff] and prevent [him] from freely walking away," because "[t]he method of force [the officer] used [wa]s, by its nature, intended to incapacitate its target, thereby making it difficult to freely walk away." *Id.* at 913.

So too here: Defendants intentionally used a potentially "incapacitating" chemical irritant, *see Adams*, 31 F.3d at 386, to coat the bodies of Plaintiffs, who were specifically targeted for this use of force, allowing the inference that Defendants' manifest intent was to restrain. At this early stage in the proceedings, that is all that is required.

2. Defendants Showed Authority with Acquisition of Control.

Alternatively, Plaintiffs have sufficiently alleged that Defendants seized them by "acquisition of control," which must "involve[] either voluntary submission to a show of authority or the termination of freedom of movement." *Torres*, 592 U.S. at 322. A person has been seized for purposes of the Fourth Amendment if they voluntarily submit to a show of authority that, under the totality of the circumstances, would "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988).

Police who effectuate a show-of-authority seizure, unlike a seizure by physical force, need not "show an unambiguous intent to restrain," but a show-of-authority seizure does require "actual submission," which may "take[] the form of passive acquiescence." *Brendlin v. California*, 551 U.S. 249, 254-55 (2007).

This inquiry looks to whether a reasonable person would not have felt "free to decline the officers' requests or otherwise terminate the encounter." *Florida v. Bostick*, 501 U.S. 429, 439 (1991). In applying that standard, this Court has explained that "a person is seized not only when a reasonable person would not feel free to leave an encounter with police, but also when a reasonable person would not feel free to *remain* somewhere, by virtue of some official action." *Bennett v. City of Eastpointe*, 410 F.3d 810, 834 (6th Cir. 2005) (holding that a seizure occurred where an officer either "escorted" the plaintiff across a road or "watched" the plaintiff "to ensure that he complied"); *see, e.g.*, *Couzens v. City of Forest Park*, 114 F.4th 571, 578 (6th Cir. 2024) (finding that, though the officers had not physically touched the plaintiff, he had been seized "when those officers, bearing their weapons, directed" him to leave his location "or else be arrested"). Factors that can give rise to such a reasonable perception include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). "'[O]fficers need not totally restrict a citizen's

freedom of movement'" to effectuate a seizure. *United States v. Delaney*, 955 F.3d 1077, 1083 (D.C. Cir. 2020) (quoting *United States v. Smith*, 794 F.3d 681, 686 (7th Cir. 2015)).

Here, the totality of the circumstances supports the inference that Plaintiffs submitted to Defendants' show of authority because a reasonable person would not have felt free to remain standing in front of the Spirit Wall, and Plaintiffs did not. As they engaged in their protest, which was disfavored by the top officials at the university, Plaintiffs were encircled by "the threatening presence of several" armed officers, *Mendenhall*, 446 U.S. at 554, and pinned between the police and a large wall with no obvious avenue of retreat. This kind of "[c]oercive or intimidating behavior supports a reasonable belief that compliance is compelled." *Cassady v. Tackett*, 938 F.2d 693, 696 (6th Cir. 1991); *see also, e.g.*, *Lawson v. Creely*, 137 F.4th 404, 417 (6th Cir. 2025) (finding a seizure where the plaintiff, a school guidance counselor, was enclosed in a confined office with the superintendent standing at the door and "two law-enforcement officers equipped with firearms" present); *Baude v. Leyshock*, 23 F.4th 1065, 1071-72 (8th Cir. 2022) (finding a seizure simply because a person was "surrounded by officers on all sides").

From this position Plaintiffs were sprayed with toxic paint from close range—a "physical touching of [their] person," *see Mendenhall*, 446 U.S. at 554—as a means of penalizing them for their protest activities. A reasonable person under the circumstances would not have felt "at liberty to ignore the police presence and go about [their] business," *Chesternut*, 486 U.S. at 569, particularly when that business involved an

unpopular protest. Instead, a reasonable person would have perceived that they were not "free to *remain*" in front of the Spirit Wall but were being compelled by Defendants to move elsewhere. *See Bennett*, 410 F.3d at 834. Despite standing firm in front of the wall for some time, Plaintiffs ultimately "left the scene" after they had been completely coated by the toxic spray paint, Compl., R.1, PageID # 10 (¶ 36-37), constituting submission to Defendants' coercive actions.

B. Defendants' Use of Force Was Unreasonable.

Once it is established that Defendants seized Plaintiffs, it is plain that this seizure was objectively unreasonable and therefore constituted excessive force in violation of the Fourth Amendment. "[*A*]*ll* claims that law enforcement officers have used excessive force … in the course of …. [a] 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard …." *Graham v. Connor*, 490 U.S. 386, 395 (1989). Application of this standard "requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Id.* at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)). This inquiry "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*; *see also, e.g.*, *Grawey v. Drury*, 567 F.3d 302, 310 (6th Cir. 2009). "These factors are not an exhaustive list, and the ultimate inquiry is whether the seizure was reasonable under the

'totality of the circumstances.'" *Slusher v. Carson*, 540 F.3d 449, 455 (6th Cir. 2008) (quoting *Ciminillo*, 434 F.3d at 467). This "'objective reasonableness' standard … does not include the underlying intent or motivation of the officer." *Id.*

Each *Graham* factor strongly favors Plaintiffs, rendering Defendants' conduct objectively unreasonable. At the time of the spray-painting, Plaintiffs were not engaged in or suspected of any criminal behavior. Because the officers had neither ordered them to disperse nor otherwise attempted to remove them from the front of the Spirit Wall, Plaintiffs were not trespassing, nor did they do anything else giving rise to a suspicion of criminal activity. *See* Compl., R.1, PageID # 8-9 (¶ 30-35). Rather, they were engaging in peaceful, First Amendment-protected protest. *See supra*, at 24-27. The fact that Plaintiffs "had committed no crime clearly weighed against a finding of reasonableness." *Ciminillo*, 434 F.3d at 467. For the same reason, Plaintiffs posed no risk to the officers or anyone else. They were standing passively in front of a wall and made no gestures nor gave any other indications that they might prove threatening. *See* Compl., R.1, PageID # 8-9 (¶ 30-35). Nor did the officers' behavior suggest that they perceived—reasonably or otherwise—Plaintiffs to be a threat to the officers or anyone else on the scene. The officers stood behind the painters, observing what was happening and directing the painters to begin spraying, but they did not attempt to protect the painters from Plaintiffs, engage with Plaintiffs except to warn them not to touch the paint sprayers, or take any action suggesting Plaintiffs were a risk to the officers or others. *Id.* Indeed, the complaint includes a photo of the officers standing directly

behind the painters, in which Drumm has his arms outstretched and his palms up in an apparent shrug, while the other two officers display similarly relaxed postures demonstrating no concern about any threat. *See id.* at PageID # 9. And Plaintiffs neither resisted nor evaded arrest: The officers did not indicate that Plaintiffs were under arrest in the first place, but in any event Plaintiffs did nothing to resist or evade them. *See id.* at PageID # 8-9 (¶ 30-35). Under the totality of the circumstances, the use of force against Plaintiffs was patently unreasonable.

This is consistent with precedent uniformly holding that use of any force against a nonresisting individual who is suspected of a minor infraction or no crime at all and who is not actively resisting is objectively unreasonable. In *Adams*, for instance, this Court held that a reasonable jury could conclude that it was excessive force for a police officer to pepper spray an individual who was suspected of at most a seatbelt infraction, posed no threat to the officers, and was not resisting or evading arrest because "he was never told he was under arrest." 31 F.3d at 385. This Court similarly concluded in *Grawey* that it was objectively unreasonable to pepper spray an individual who was suspected of disturbing the peace, who did not pose a threat to the officers or others, and who had previously attempted to flee but had "stopped running and placed his hands against the wall" by the time he was sprayed. 567 F.3d at 311; *see also, e.g.*, *Wright v. City of Euclid*, 962 F.3d 852, 871 (6th Cir. 2020) (use of pepper spray was objectively unreasonable where a reasonable jury could find that plaintiff had not committed a crime, did not pose a threat to the officers, and was not actively resisting arrest).

Finding the use of force here unreasonable would also align with decisions from sister circuits holding that the use of force against peaceful protesters is objectively unreasonable. *See, e.g.*, *Buck v. City of Albuquerque*, 549 F.3d 1269, 1289-90 (10th Cir. 2008) (officers unreasonably shot repeated rounds of pepper balls at compliant protesters); *Fogarty v. Gallegos*, 523 F.3d 1147, 1160-61 (10th Cir. 2008) (officers unreasonably shot compliant protester with pepper balls, then "grabbed him, thrust him to the ground, and forcibly escorted him through a cloud of tear gas"); *Headwaters Forest Def. v. County of Humboldt*, 276 F.3d 1125, 1129-30 (9th Cir. 2002) (officers unreasonably used pepper spray on peaceful protesters where they could have dispersed them through other means "without causing pain or injury").

The use of force here was even more unreasonable than in *Ciminillo*, where this Court concluded that officers used excessive force in violation of clearly established law. *See* 434 F.3d at 469. There, police arrived at a street party that had turned into a "riot," with some participants "set[ting] fires in the street" and "throwing bottles at police officers and civilians." *Id.* at 463, 467. The police began engaging in crowd-control measures in an attempt to restore order and disperse the unruly crowd. *Id.* at 463. By the plaintiff's account, he was advancing toward a group of officers with his hands above his head when the defendant officer shot him with a beanbag projectile. *Id.* at 463, 466. In that context, although the beanbag shooting took place in a fast-moving riot scene and the plaintiff was admittedly moving toward the officers when he was hit, this Court concluded that the use of force was constitutionally excessive

because the plaintiff had committed no crime, posed no threat to the officers, and was not resisting or attempting to evade arrest at the time he was shot. *Id.* at 467. Here, there were none of the same mitigating factors potentially justifying the officers' use of force: The scene was a peaceful, passive protest, not a riot, and Plaintiffs were stationary at the time Defendants instructed the painters to spray them with toxic paint.

IV. The District Court Erred by Denying Plaintiffs Leave to Amend.

At a minimum, the district court should have granted Plaintiffs leave to amend their complaint. Federal Rule of Civil Procedure 15(a)(2) provides that district courts "should freely give leave" to amend "when justice so requires." In opposing the motion to dismiss, Plaintiffs requested that the district court allow them to amend their complaint to add a substantive due process claim. Opp'n, R.14, PageID # 104-06. Plaintiffs did not seek to change the facts alleged in the complaint, but merely sought to assert a different legal theory on which those facts state a claim for relief. *Id.* And they spelled out the nature of this new claim and the case law supporting it. *Id.*

The district court denied leave to amend on the technical ground that Plaintiffs did not file a formal motion. Op., R.16, PageID # 134-35. But in the circumstances of this case, that was an abuse of discretion. *See Robbins v. New Cingular Wireless PCS, LLC*, 854 F.3d 315, 322 (6th Cir. 2017) (explaining that when a plaintiff seeks leave to amend without filing a formal motion, review is for abuse of discretion). As this Court has observed, "[a]lthough a motion is the form most commonly used by parties seeking an amendment, no specific procedure is set forth in Rule 15 for amendments, and a variety

of methods have been recognized as sufficient." *Tefft v. Seward*, 689 F.2d 637, 639 (6th Cir. 1982). Other circuits have likewise concluded that "the requirement of a formal motion need not always be met so long as the requesting party has set forth with particularity the grounds for the amendment and the relief sought." *CH Offshore, Ltd. v. Mexiship Ocean CCC S.A. de C.V.*, 163 F.4th 171, 183 (5th Cir. 2025) (internal quotation marks omitted); *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec.*, 797 F.3d 160, 190 (2d Cir. 2015) (The "lack of a formal motion is," on its own, "not a sufficient ground for a district court to dismiss without leave to amend." (internal quotation marks omitted)). Plaintiffs here provided "the substance of the proposed amendment." *Roskam Baking Co. v. Lanham Mach. Co.*, 288 F.3d 895, 906 (6th Cir. 2002). The district court thus should have construed Plaintiffs' brief as a motion to amend and permitted Plaintiffs to raise their substantive due process claim.

To be sure, this Court has held that when a plaintiff fails to file a motion to amend or present a copy of the proposed amended complaint, the district court is "not required to engage in a guessing game" about what the amended complaint might say. *Tucker v. Middleburg-Legacy Place, LLC*, 539 F.3d 545, 552 (6th Cir. 2008) (internal quotation marks omitted). Accordingly, this Court has affirmed the denial of leave to amend where the "request to amend came by a mere passing suggestion" in a plaintiff's opposition to a motion to dismiss. *Swanigan v. FCA US LLC*, 938 F.3d 779, 789 (6th Cir. 2019); *see also Begala v. PNC Bank, Ohio, Nat'l Ass'n*, 214 F.3d 776, 784 (6th Cir. 2000) (request to amend was made "almost as an aside"); *Kuyat v. BioMimetic Therapeutics,*

Inc., 747 F.3d 435, 444 (6th Cir. 2014) ("one-sentence request"). But that is not the situation here. Plaintiffs devoted an entire section of their brief to the proposed amendment, identifying the specific claim they wished to plead and describing the law underpinning the new claim, which does not depend on any facts beyond those already in the complaint. No guessing on the part of the district court was required, and leave to amend should have been granted.

More broadly, this Court has held that, in situations where a plaintiff lacks "sufficient notice" of the supposed defects in his pleading and "where a more carefully drafted complaint might state a claim," the district court should give the plaintiff "at least one chance to amend the complaint before the district court dismisses the action with prejudice." *U.S. ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 342 F.3d 634, 644 (6th Cir. 2003) (quoting *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 546 (6th Cir. 1993)). Here, Plaintiffs alleged that the officer Defendants "order[ed] the painters to paint over the Plaintiffs with toxic spray-paint." Compl., R.1, PageID # 8 (¶ 34). Before the district court issued its opinion, Plaintiffs had no reason to suspect that this factual allegation would not adequately plead that the officers caused the painters to injure Plaintiffs. This Court should reverse the district court's erroneous conclusion that Plaintiffs' allegations fail to state a claim. But if the Court were to agree with the district court's judgment, it should at the very least permit Plaintiffs to cure any defect in their complaint with a more definite statement of how Defendants caused their injuries.

CONCLUSION

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

Dated: July 27, 2026

Respectfully submitted,

/s/ William Powell

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(g), I hereby certify that the foregoing brief complies with the type-volume requirements of Federal Rule 32(a)(7) because it contains 12,539 words, excluding those portions of the brief exempted by Federal Rule 32(f) and Sixth Circuit Rule 32(b). I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in 14-point Garamond font, a proportionally spaced typeface, using Microsoft Word.

/s/ William Powell
William Powell

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July 2026, this brief was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ William Powell
William Powell

ADDENDUM

Plaintiffs/Appellants' Designations of Court Documents

Pursuant to Sixth Circuit Rules 28(b) and 30(g), Plaintiffs-Appellants hereby designate the following relevant district court documents in the electronic record.

Record Entry No.	Description of Document	Page ID #
Northern District of Ohio, No. 1:25-cv-983		
1	Complaint	1-20
11	Defendants' Motion to Dismiss	57
11-1	Memorandum in Support of Defendants' Motion to Dismiss	58-81
14	Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss	86-112
16	Opinion and Order	132-146
17	Judgment	147
18	Notice of Appeal	148-49