APPENDIX TO THE
PETITION FOR A WRIT OF CERTIORARI

APPENDIX A

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 25a0252p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ULYSSES LEE FEAGIN,

Plaintiff-Appellee,

v. No. 24-3710

MANSFIELD POLICE DEPARTMENT; JORDAN MOORE; MARK BOGGS; CLAY BLAIR,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Ohio at Cleveland.
No. 1:22-cv-01201—J. Philip Calabrese, District Judge.

Argued: May 8, 2025

Decided and Filed: September 11, 2025

Before: CLAY, THAPAR, and READLER, Circuit Judges.

COUNSEL

ARGUED: Melvin L. Lute, BAKER | DUBLIKAR, North Canton, Ohio, for Appellants. Rachael Jensen, ORRICK, HERRINGTON & SUTCLIFFE LLP, Austin, Texas, for Appellee.

ON BRIEF: Melvin L. Lute, BAKER | DUBLIKAR, North Canton, Ohio, for Appellants. Rachael Jensen, ORRICK, HERRINGTON & SUTCLIFFE LLP, Austin, Texas, Alyssa Barnard-Yanni, Daniel A. Rubens, ORRICK, HERRINGTON & SUTCLIFFE LLP, New York, New York, Samuel Weiss, RIGHTS BEHIND BARS, Washington, D.C., for Appellee.

READLER, J., delivered the opinion of the court in which THAPAR, J., concurred. CLAY, J. (pp. 22–31), delivered a separate dissenting opinion.

OPINION

READLER, Circuit Judge. Advancing technology reaches every corner of society. The law is no exception. Consider, on this front, the advent of portable recording devices, from those attached to the body (body cams) to those placed on a vehicle's dashboard (dash cams). These innovations have dramatically changed our collective understanding of law enforcement encounters. Today, most officer interactions are captured on video. *See* Logan Seacrest & Jillian Snider, R St. Inst., *The Past, Present, and Future of Police Body Cameras* 3 (2025), https://perma.cc/2KKH-8LY3 (recognizing that over the past decade and a half police cameras have become "standard operating procedure" in the

United States); *see also* Sean E. Goodison & Connor Brooks, Bureau Just. Stats., *Local Police Departments, Procedures, Policies, and Technology, 2020–Statistical Tables* 6 (2023), https://perma.cc/B8EC-TLQ4 (noting that as of 2020, 79% of local police officers worked in departments using body cams, with use ubiquitous in major urban areas). With those recordings typically available for broader viewing through public records laws and the like, body and dash cam video makes the work of law enforcement more open to public evaluation (and, invariably, debate). *See, e.g.*, Ohio Rev. Code § 149.43(A)(1)(jj) (generally subjecting body cam and dash cam videos to public release).

The court system has especially benefitted from these advancements. Whereas encounters with law enforcement historically had to be understood through witness recollections alone, video now captures key aspects of the engagement, if not the entire event itself. According to one recent study, video evidence has resulted in cases being "decided more quickly, with fewer disputed facts." *See* Seacrest & Snider, *supra* at 3 (discussing how "body camera footage began to make its way from police stations to courtrooms"). For judges in particular, video evidence makes us far better equipped to evaluate claims tied to an officer's conduct. Especially so in the interlocutory posture in which we review qualified immunity appeals, where we must measure that conduct against constitutional norms. In the past, it could be tempting to leave untouched a district court's assessment of the evidence, as our review was limited to a paper

record. *See Johnson v. Jones*, 515 U.S. 304, 307–09 (1995) (refusing to resolve factual dispute centered on dueling affidavits at summary judgment). But today, where video allows us in effect to witness the critical events at issue, we are equipped to assess for ourselves both the factual and legal questions underlying an officer encounter without reflexively deferring to the district court. After all, while we well appreciate the vital role district courts play in assessing live testimony or a complex record, we are on more equal footing in reviewing video evidence. *See Johnson v. Rogers*, 944 F.3d 966, 969 (7th Cir. 2019) (observing that a "conclusive video allows [an appellate] court to know what happened and decide the legal consequences").

Our jurisprudence over interlocutory qualified immunity appeals bears out these developments. In the increasingly rare excessive force case where the underlying record contains no video or audio record, and instead consists entirely of conflicting witness testimony, we have understood our role to be limited. Namely, it is for the jury, not us, to settle any underlying material factual disputes. *Gambrel v. Knox County*, 25 F.4th 391, 404–05 (6th Cir. 2022). But when presented with video footage that "accurately depicts most of the relevant events," we may utilize that footage to "ensure [that] the district court properly constructed the factual record" and assessed the legal questions in line with that record. *Heeter v. Bowers*, 99 F.4th 900, 910 (6th Cir. 2024); *Rudlaff v. Gillispie*, 791 F.3d 638, 639 (6th Cir. 2015) (using video evidence when it captures the material facts); *Hayden v. Green*, 640 F.3d 150, 152 (6th Cir.

2011) (similar). Put another way, rather than "clos[ing] our eyes to the evidence presented" through dash or body cam, we instead "assess [that evidence] in the light depicted by the videotapes." *Moore v. Oakland County*, 126 F.4th 1163, 1167 (6th Cir. 2025) (citation modified). This approach is now the rule more than the exception, with fewer and fewer police interactions occurring outside the scope of a camera's lens.

Today's case is emblematic, with dash cam video vividly telling the tale of Ulysses Feagin's most recent encounter with law enforcement officers. Now a prisoner, Feagin sued the officers under 42 U.S.C. § 1983, raising both excessive force and deliberate indifference claims tied to the officers' deployment of a taser and pepper spray to effectuate Feagin's arrest. The district court granted summary judgment to defendants on all but two claims: an excessive force claim related to the use of a taser, and a deliberate indifference claim stemming from the officers not tending to Feagin's medical needs after he was pepper sprayed. Those remaining issues are now before us as part of the officers' interlocutory appeal. As explained next, we reverse the district court's denial of qualified immunity as to the excessive force claim, dismiss the appeal of the deliberate indifference claim for lack of jurisdiction, and remand to the district court for further proceedings.

I.

A settled evidentiary hierarchy governs the factual landscape in this interlocutory appeal. We start with the available dash cam footage, which largely captures the incident in question and leaves few facts in dispute. *See Scott v. Harris*, 550 U.S. 372, 380 (2007). For those moments where the footage does not aid our understanding, we fill in the blanks by considering disputed evidence in a light most favorable to Feagin, completing the story with any uncontested factual assertions the officers proffer. *See Berryman v. Rieger*, 150 F.3d 561, 563 (6th Cir. 1998); *Heeter*, 99 F.4th at 910.

Consider what occurred on July 6, 2020, informed, again, largely by police cruiser dash cam video. Two marked police cars—one driven by Officer Mark Boggs and one driven by Officer Jordan Moore—were proceeding down a residential street. In the opposite direction, Ulysses Feagin and a passenger were "cruising around in a black Lincoln SUV" with all its windows rolled down, "drinking liquor and smoking marijuana." *State v. Feagin*, No. 2021-CA-0084, 2022 WL 6949422, at *1 (Ohio Ct. App. Oct. 12, 2022). Barreling down the middle of the road and veering to the left, Feagin encountered Boggs's vehicle, forcing Boggs to swerve into a ditch, narrowly avoiding a head-on collision. Moore and Boggs both performed U-turns to follow Feagin. With Moore in the lead, the officers pursued Feagin for roughly half a minute. About 20 seconds into the pursuit, and with officers activating their vehicles' flashers and sirens, Feagin turned into a crowded parking lot in an apartment complex. Officers could

now see the apparently shot out back window of Feagin's SUV.

After Feagin parked his SUV, Moore approached the vehicle. With Moore directly outside the driver's side door, Feagin began rolling up the car's windows. Feagin then reached toward the center console of the vehicle. Moore knocked on the window and thrice commanded Feagin to "get out of the car." When Feagin refused, Moore attempted to open the driver's door. Suddenly, the car began rolling backwards. Moore frantically smashed his fist against the driver's side window, prompting Feagin to put the car into park.

With the car at rest, Feagin opened the door. As the door opened, Moore grabbed Feagin's arm, causing Feagin's body to move limply away from the front seat. While Feagin's left leg was now out of the car, he kept his right leg inside the vehicle. Feagin stiffened his body and moved slightly back to his car seat. At this point, Boggs joined Moore at the side of the SUV. As the officers tussled to remove Feagin from the vehicle, they witnessed bullets fall from Feagin's pocket.

"[W]ithin seconds" of Feagin's removal from the SUV, Feagin later explained, Moore tased him. Feagin Affidavit, R. 61-2, PageID#452. At that exact moment, Boggs attempted to grab Feagin's left arm, while Moore had a partial hold on Feagin's torso, with Feagin's right arm free and flailing against the SUV. Following the tasing, the officers managed to

grab Feagin's right arm, handcuff him, and place him in the backseat of the police cruiser.

While in the cruiser, Feagin remained uncooperative, refusing to keep his legs in the police car and later repeatedly kicking the car's window. Moore warned Feagin that continuing with this behavior risked the deployment of pepper spray. When Feagin ignored that command, Moore rolled down the window of his cruiser, sprayed Feagin, and then rolled the window back up. Several minutes later, officers transferred Feagin to a different police cruiser, eventually driving him to a police station. An inventory search of the SUV unearthed a large bag of marijuana; additional bags of cocaine, crack, THC, and heroin; a bevy of pills, including Xanax, Desyrel, Klonopin, Percocet, Valium, and Ultracet; and two handguns on the passenger side floorboard (including a stolen police gun).

These events culminated in Feagin being convicted for a host of firearm and drug trafficking offenses. He received a multiyear sentence that will keep him in the state penitentiary until at least the end of the decade. While incarcerated, Feagin sued several entities and individuals, including Moore. Emphasizing that he was tased and maced during his arrest, Feagin alleged claims of "excessive force" and the denial of "adequate medical care" in violation of the Fourth and Eighth Amendments. Following discovery, defendants jointly moved for summary judgment on qualified immunity grounds, which Feagin opposed.

The district court granted the motion in part and denied it in part. Turning first to the excessive force claim tied to Moore's use of a taser, the district court concluded that a genuine dispute over a material fact existed between the parties, and thus denied defendants' motion. In so doing, the district court found dispositive the fact that Feagin's conduct, based on the video evidence, "f[ell] in the gray area between active and passive resistance." Order Den. and Granting Defs.' Mots. Summ. J., R. 70, PageID#608. But as to the excessive force claim related to Moore's use of pepper spray once Feagin was detained, the district court granted summary judgment to defendants. To the district court's mind, the undisputed evidence showed that Feagin repeatedly disregarded instructions to stop kicking the window and, in so doing, "interfere[d] with the officers' efforts to arrest…Feagin and safely transport him." *Id.* at PageID#610. With respect to the deliberate indifference claims, the district court recognized that defendants' summary judgment motion did not address those claims, and thus set them for trial.

Defendants filed a timely notice of appeal. Before us, they challenge the district court's treatment of both the excessive force and deliberate indifference claims. We review the district court's decision de novo, resolving all genuine factual disputes in a light most favorable to Feagin. *Lawler ex rel. Lawler v. Hardeman County*, 93 F.4th 919, 925 (6th Cir. 2024).

II.

A.1. We begin with the excessive force claim based on Moore's tasing of Feagin. The ground rules here are familiar. To overcome Moore's qualified immunity defense, Feagin needs to show both that Moore committed a constitutional violation and that any reasonable officer in Moore's position would have known that his conduct exceeded constitutional bounds. *See Plumhoff v. Rickard*, 572 U.S. 765, 778–79 (2014). As to the first prong, whether a use of force qualifies as excessive and therefore an unreasonable seizure under the Fourth Amendment depends on the "facts and circumstances of each particular case" measured "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). Embedded in this reasonableness calculus is the understanding that "police officers are often forced to make split-second judgments" that we, as jurists, have no right to second guess from the "peace of [our] chambers." *Id.* at 396–97 (citation modified). Relevant to our inquiry are the "severity of the crime" at issue, the nature of Moore's conduct, and the nature of Feagin's conduct, including the threat Feagin posed and whether he was actively resisting an officer. *Barnes v. Felix*, 145 S. Ct. 1353, 1358 (2025) (citation modified).

With respect to the second prong, Feagin must show that Moore's use of a taser violated "clearly established" law, meaning that Moore had "fair notice" that his conduct was unlawful. *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7 (2021) (per curiam). Because qualified immunity covers mistakes in

judgment, both of fact and law, the summary judgment record must show that Moore "knew or reasonably should have known" that his conduct was unlawful in light of the information he possessed. *Hicks v. Scott*, 958 F.3d 421, 434 (6th Cir. 2020) (citation modified). Accordingly, it is Feagin's burden to identify a closely analogous precedent with "facts like the ones at issue here" that placed the constitutional question beyond debate, *Rivas-Villegas*, 142 S. Ct. at 8; *Cunningham v. Shelby County*, 994 F.3d 761, 764 (6th Cir. 2021), in other words, "on-point caselaw that would bind a panel of this court," *Moore*, 126 F.4th at 1167 (citation modified). The combination of these two inquiries—the Fourth Amendment's reasonable officer test and qualified immunity's fair notice test—impose two significant hurdles for plaintiffs alleging excessive force claims. *See Browning v. Edmonson County*, 18 F.4th 516, 537 (6th Cir. 2021) (Murphy, J., concurring in part and dissenting in part). After all, to prevail, a plaintiff must show the officer was doubly unreasonable—unreasonable in using force and unreasonable in his assessment of the facts and law—leaving "all but the plainly incompetent or those who knowingly violate the law" shielded from liability. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

This framework is evident in our decisions addressing taser usage. We impose liability on individual officers only in the rare instance where an officer tases a suspect who posed no danger and was fully compliant with officer commands or had completely ceased resisting at the time of the tasing.

See Hagans v. Franklin Cnty. Sheriff's Off., 695 F.3d 505, 509 (6th Cir. 2012); *Wright v. City of Euclid*, 962 F.3d 852, 867 (6th Cir. 2020). Otherwise, we allow the deployment of tasers, typically non-lethal force, even if a more lethal weapon (for instance, a gun) could not be utilized in the same instance. *Brown v. Giles*, 95 F.4th 436, 440 (6th Cir. 2024); *Hagans*, 695 F.3d at 510 (recognizing the low risk of injury posed by tasers). Tasing is a reasonable response, for instance, to subdue a suspect who poses a threat to officers. *See Shanaberg v. Licking County*, 936 F.3d 453, 456 (6th Cir. 2019); *Kent v. Oakland County*, 810 F.3d 384, 391 (6th Cir. 2016) (acknowledging tasing is appropriate where an individual is armed, makes an evasive movement to suggest that he had a weapon, or is otherwise violent toward officers). Tasing is likewise appropriate for subduing a suspect who "actively resists" arrest. *Hagans*, 695 F.3d at 509. What is "active" resistance? Physical struggles with the police qualify. *Id*. But so can conduct that is perhaps intuitively not all that active. For example, active resistance can take the form of "verbal hostility or a deliberate act of defiance." *Wright*, 962 F.3d at 867 (citation modified). Or it can include an arrestee refusing to move his hands for police to handcuff him, at least when "coupled with other acts of defiance." *Rudlaff*, 791 F.3d at 641 (citation modified).

Of course, some cases fall in between these two extremes: tasing where the suspect is neither wholly submissive yet neither threatening another nor engaging in active resistance. In this zone of

twilight, when the evidence—viewed in a light most favorable to the plaintiff, but through the lens of a reasonable officer at the scene—presents a "complex situation[]," leaving the exact nature of the threat or degree of resistance unclear, we give officers the benefit of the doubt and excuse any reasonable mistake of judgment in deploying a taser. *Brown*, 95 F.4th at 440; *Hagans*, 695 F.3d at 511 ("The essence of qualified immunity…is to give government officials cover when they resolve close calls in reasonable (even if ultimately incorrect) ways."). Said more directly, when operating "in the hazy border between excessive and acceptable force," the "proper course is to grant summary judgment to the officers" on qualified immunity grounds. *Rudlaff*, 791 F.3d at 644; *King v. City of Rockford*, 97 F.4th 379, 397 (6th Cir. 2024); *Thomas v. City of Eastpointe*, 715 F. App'x 458, 461 (6th Cir. 2017) (granting qualified immunity when plaintiff's actions "fall somewhere in the middle" between active and no resistance).

2. Where does Feagin's claim of excessive force lie within the realm of our tasing jurisprudence? Given the undisputed evidence, the totality of the circumstances counsel that Moore acted reasonably in tasing Feagin, meaning no constitutional violation resulted. Even if that were not the case, this dispute falls within the "hazy border between excessive and acceptable force" that warrants a grant of qualified immunity. *Rudlaff*, 791 F.3d at 644 (citation modified).

a. In concluding that Moore did not use excessive force, we measure his conduct against the reasonableness guideposts from the Supreme Court's excessive force jurisprudence. *Barnes*, 145 S. Ct. at 1358; *Graham*, 490 U.S. at 396. Start with the first guidepost, the severity of the crimes at issue. *Barnes*, 145 S. Ct. at 1358. Two officers witnessed Feagin nearly collide head on with Boggs's marked police cruiser. Feagin then disregarded officers' repeated efforts to bring his SUV to a complete stop—first by refusing to stop for roughly half a minute as two cruisers tailed him and then by refusing to comply with commands to park the SUV and, in turn, get out of the car. From these events, officers could conclude that it was fairly probable that Feagin had just committed multiple felonies under Ohio law, and that his conduct could escalate from there. *See, e.g.*, Ohio Rev. Code § 2903.11(A)(2) (felonious assault); *State v. Sepeda*, 157 N.E.3d 889, 898 (Ohio Ct. App. 2020); *see also* Ohio Rev. Code. § 2921.331(C)(3)–(4) (failing to bring a motor vehicle to a stop upon signal from police officer). Given the serious crimes at issue, Moore was reasonably justified in thinking he could use a considerable degree of force to restrain and arrest Feagin. *See Roell v. Hamilton County*, 870 F.3d 471, 481 (6th Cir. 2017). Indeed, given the alternatives facing the officers when they encountered Feagin, it strikes us as laudable that a particularly dangerous situation was contained without harm to a third party. *See Barnes*, 145 S. Ct. at 1362–63 (Kavanaugh, J., concurring) (acknowledging that there are "no easy or risk-free answers" to officers when confronted with a fleeing driver, with many alternatives

presenting serious risks to the officers and the community-at-large).

Second, the "actions [Moore] took during the stop" were restrained given the crimes he had just witnessed. *Barnes*, 145 S.Ct. at 1358 (majority op.). Only after repeated commands that Feagin submit to law enforcement went unheeded did Moore opt to use non-lethal force—tasing—to procure Feagin's handcuffing. *Brown*, 95 F.4th at 440.

Finally, consider the suspect's conduct, the issue on which "[m]any of our tasing cases rise and fall." *Shanaberg*, 936 F.3d at 456. Two questions fall under this rubric: What threat would a reasonable officer have perceived from Feagin's conduct, and was Feagin actively resisting? *See Barnes*, 145 S. Ct. at 1358.

As to the first question, there were safety concerns from the very moment Feagin encountered law enforcement. Driving an SUV that appeared to have had its rear window shot out, Feagin narrowly avoided ramming a police cruiser. Feagin's SUV continued to be a threat to Moore even after the vehicle entered the parking lot. Feagin ignored Moore's repeated commands to exit the vehicle. Making matters worse, the SUV began to move in reverse out of its parking spot, suggesting to the officers that Feagin may have been trying to escape. As these events reveal, the stop that Moore initiated, an "inherently risky" activity itself, was becoming exponentially more dangerous by the second. *Barnes*, 145 S.Ct. at 1361 (Kavanaugh, J., concurring); *id*. at

1363 (discussing the "extraordinary dangers and risks facing police officers and the community at large" when an officer conducts a traffic stop and the driver does not comply).

Now add in what Moore witnessed with respect to Feagin's conduct during the stop. While the parties dispute Feagin's exact motives, all agree that as Moore approached the SUV, Feagin reached toward the center console of the vehicle, a move that fairly suggests he was trying to access a weapon. *See United States v. Ledbetter*, 929 F.3d 338, 347 (6th Cir. 2019). Couple that fact with the undisputed evidence that bullets fell from Feagin's pockets as officers labored to get him out of the SUV. "Where there are bullets, it's fair to infer that a gun is nearby." *United States v. Walker*, 750 F. App'x 324, 329 (5th Cir. 2018). On this record, significant evidence suggested that Feagin posed an immediate threat to the officers' lives that made it quite reasonable to think Feagin needed to be restrained as soon as possible. Later discovered evidence—including the firearms found in or around the SUV—further confirms the veracity of the officers' initial impressions of the safety concerns they faced. *See Kapuscinski v. City of Gibraltar*, 821 F. App'x 604, 609 (6th Cir. 2020) (recognizing that "subsequent" observations can confirm the prior perspective of the reasonable officer at the scene).

What about evidence of Feagin's active resistance? There was plenty. Recall that Feagin's first actions in the parking lot were to defy Moore's repeated commands to get out of the vehicle. *See*

Wright, 962 F.3d at 867 (recognizing deliberate defiance by a suspect can constitute active resistance). Instead of promptly exiting the car, Feagin opted to roll up the vehicle's (unbroken) windows and seemingly put the car in reverse. Feagin then struggled for several seconds with officers after his car door opened. *See Hagans*, 695 F.3d at 509. He kept at least one leg in the vehicle as officers tried to extract him, moving his body back inside the SUV during the struggle. At the moment he was tased, Feagin was still not handcuffed, with his right arm flailing. Collectively, the undisputed evidence shows that Moore acted reasonably in tasing Feagin. Accordingly, no constitutional violation occurred.

b. Even if one were to read the record differently, defendants would still prevail in their assertion of qualified immunity. Recall that, at this juncture, Feagin needs to show not only that Moore was unreasonable in tasing him, but also that he was unreasonable in his understanding of what the law permitted him to do. *See Malley*, 475 U.S. at 341. On this issue, it is Feagin's burden to identify a closely analogous precedent that would have put Moore on notice that his actions were unlawful given the information he possessed. *See Rivas-Villegas*, 142 S. Ct. at 8; *Hicks*, 958 F.3d at 433–34; *Cunningham*, 994 F.3d at 764. At no stage of this litigation has Feagin done so.

Begin with Feagin's motion opposing summary judgment. Most of his cited use-of-force cases were unpublished, which plainly fail to satisfy his burden.

Bell v. City of Southfield, 37 F.4th 362, 368 (6th Cir. 2022) ("[H]ow can an unpublished case place a question beyond debate when it doesn't even bind a future panel of this court?"). In passing, he also mentioned an out of circuit case, *Coles v. Eagle*, 704 F.3d 624 (9th Cir. 2012). But our sister circuits' case law is "usually irrelevant" to the clearly established inquiry, save for the extraordinary case that announces a right "clearly foreshadowed" by the direct holding of our own case law so that the officers is left with "no doubt" as to whether his conduct was lawful. *Ashford v. Raby*, 951 F.3d 798, 804 (6th Cir. 2020) (citation modified). We need not dwell on whether *Coles* meets that high bar. For one thing, it did not involve the use of a taser. For another, its facts—the use of considerable force (dragging a suspect out of a car through a shattered car window) without any serious crime, threat to the officer's lives, or resistance from the suspect at issue—are miles from this case. *See Coles*, 704 F.3d at 630.

That leaves the sole published case Feagin discussed in any detail, *Solomon v. Auburn Hills Police Department*, 389 F.3d 167 (6th Cir. 2004). But consider its facts: an officer who, upon confronting a woman suspected of sneaking into a movie, used a leg-sweep maneuver even though the woman posed no threat to the officer and was fully compliant with his requests. *Id*. at 175. Comparing Feagin's high risk behavior to that of the matinee goer in Solomon gives analogy a bad name.

Feagin's appellate briefing fares no better. *Gradisher v. City of Akron*, 794 F.3d 574 (6th Cir.

2015), his lone citation on the merits of qualified immunity, was never raised with the district court. Assuming we could excuse that forfeiture, *Gradisher* is still distinguishable. There, the facts suggested that officers tased a fully compliant suspect and continued gratuitously tasing him once incapacitated. *Id.* at 586. At day's end, Feagin has failed to even hint at a case with "facts like the ones at issue here," i.e., where an officer tases a non-complaint individual suspected of committing a serious crime in part to prevent access to a potential firearm. *See Rivas-Villegas*, 142 S. Ct. at 8. With nothing to suggest Moore should have been on notice about the putative unlawfulness of his conduct, Feagin would fail to overcome Moore's assertion of qualified immunity as to the tasing claim, had he made out a constitutional violation (which, again, he did not).

3.a. Much of Feagin's appellate briefing emphasizes a procedural point: that, according to Feagin, we lack jurisdiction over the appeal under *Johnson v. Jones*, 515 U.S. 304 (1995). *Johnson* generally limits our jurisdiction in interlocutory qualified immunity appeals to questions of law. *Id.* at 313. Questions of evidence sufficiency, that is, "which facts a party may, or may not, be able to prove at trial," typically are not resolved in an interlocutory posture. *Id.* To Feagin's mind, because Moore continues to contend that a jury could not accept Feagin's telling that he was not resisting arrest, this appeal is a fact-based one that falls outside of our jurisdiction.

We disagree. Consider the classic "he said, she said" dispute in which the defendant's argument in its entirety is an attack on the plaintiff's evidence-supported version of the material facts. *See Plumhoff*, 572 U.S. at 773 (recognizing that *Johnson* limits the scope of our jurisdiction over qualified immunity denials only to the extent they involve "purely factual issues"). In that setting, *Johnson* concerns are most acute. *See Pollard v. City of Columbus*, 780 F.3d 395, 401 (6th Cir. 2015); *Leary v. Livingston County*, 528 F.3d 438, 441 (6th Cir. 2008). But *Johnson* does not impose a magical rule of docket clearing whenever an appealing party simply mentions an issue of fact in their appellate briefing on qualified immunity or fails to wholly abandon their trial defense while on appeal. *Romo v. Largen*, 723 F.3d 670, 678 (6th Cir. 2013) (Sutton, J., concurring in part and dissenting in part); *see also Sevy v. Barach*, 815 F. App'x 58, 68 (6th Cir. 2020) (Readler, J., concurring in part and concurring in the judgment); *Est. of Matthews ex rel. Matthews v. City of Dearborn*, 826 F. App'x 543, 548 (6th Cir. 2020) (Readler, J., concurring in the judgment). Nor does "*Johnson* mean that *every*…denial of summary judgment is nonappealable" simply because the district court determined that there were "controverted issues of material fact." *Behrens v. Pelletier*, 516 U.S. 299, 312–13 (1996). Quite the opposite. When defense counsel includes fact-based arguments in a qualified immunity appeal, our obligation is to "separate" the legal wheat from the factual chaff and proceed. *Johnson*, 515 U.S. at 319–20; *DiLuzio v. Village of Yorkville*, 796 F.3d 604, 610

(6th Cir. 2015); *Bunkley v. City of Detroit*, 902 F.3d 552, 560 (6th Cir. 2018).

In fairness to Feagin, Moore certainly overindulges in record-based arguments. Yet we cannot say that his entire appeal is devoid of any legal argument. Instead, his briefing raises a number of issues we have long recognized as legal questions or mixed questions of law and fact that we can (and do) resolve here. Moore's lead argument is that the district court erred in denying him qualified immunity. Embedded within that argument are a bevy of cascading legal questions that Moore raises in his briefing on appeal. Does the undisputed evidence warrant a grant of summary judgment on the merits of the constitutional question? Or did Feagin satisfy his legal burden at summary judgment? If so, did Moore violate clearly established law? Or were his actions instead within the "hazy border between excessive and acceptable force" that would justify a grant of qualified immunity? *See* Appellant's Br. at 11 (concluding the qualified immunity section of his brief by maintaining that the district court "erred when it found that there was a genuine dispute of material fact in this case" and that Moore, at best, was not on notice that his actions were clearly out of bounds (quoting *Rudlaff*, 791 F.3d at 644)). All of these inquiries have long been standard fare in qualified immunity appeals. *See, e.g.*, *Chappell v. City of Cleveland*, 585 F.3d 901, 906 (6th Cir. 2009) (recognizing jurisdiction to determine whether the plaintiff's evidence raises a genuine issue of material fact warranting trial); *Doe ex rel. Doe v. City of Roseville*, 296 F.3d 431, 438 (6th

Cir. 2002) (same); *Williams v. Mehra*, 186 F.3d 685, 690 (6th Cir. 1999) (en banc) (same); *Farm Lab. Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 531 n.3 (6th Cir. 2002) (holding we have jurisdiction to determine whether, in accepting the plaintiff's evidence, the defendants violated a clearly established legal right). With plenty of non-purely factual questions for us to examine, *Johnson's* limits on fact-based appeals are beside the point.

Like Feagin, the dissenting opinion also presses for an aggressive, review-limiting understanding of *Jones*. Rather than allowing appealing parties to have their day in court, the dissent seemingly would extinguish that right in cases where, having looked to the "core of Defendants' argument," one can detect "Defendants [to have] use[d] their appellate briefing to argue" that the district court erred as to its assessment of a factual matter in the record. Dissenting Op. at 24–25. But the mere existence of "competing allegations on both sides" does not stand in the way of us assessing whether legal arguments likewise exist. *Id.* at 22. Indeed, we have long recognized that the "district court's assertion that there were genuine issues of material fact does not, standing alone, destroy the appealability of a qualified immunity ruling." *See Turner v. Scott*, 119 F.3d 425, 428 (6th Cir. 1997). We instead consider the facts in a light most favorable to the plaintiff. *Id.* Any other approach risks eliminating our review altogether in this setting. After all, facts permeate every qualified immunity dispute. *See Sevy*, 815 F. App'x at 66–67. And qualified immunity exists to protect against a government official's

mistake of both fact and law. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Those protections would be "effectively lost if" an appeal were dismissed and a case "permitted to go to trial" simply because a party highlighted factual disputes in the court of appeals. *Id*. (citation modified). So rather than throwing up our hands whenever the parties disagree over the facts or whenever the district court has assessed the record, we instead roll up our sleeves and train our attention on any remaining legal questions. *See Johnson*, 515 U.S. at 319–20; *DiLuzio*, 796 F.3d at 610; *Bunkley*, 902 F.3d at 560.

The dissenting opinion's contrary approach runs counter to Supreme Court authority. Especially with video evidence available here and elsewhere, we can assess many of the facts for ourselves, regardless how the parties portray them, filling in any holes with the plaintiff's evidence and the defendant's uncontested evidence. And in doing so, as the Supreme Court recently reminded us, we look comprehensively at "any relevant events" that influenced the use of force, *Barnes*, 145 S. Ct. at 1360 (majority op.), rather than narrowly considering, as does the dissenting opinion, only whether Feagin was resisting when he was "pulled upright from his vehicle." Dissenting Op. at 27. We may not make that our sole concern, as we might have done in days gone by. *Barnes*, 145 S. Ct. at 1358.

Rather than following this straightforward path, the dissenting opinion takes odd detours. Case in point, instead of "put[ting] aside factual disputes

that are minor or…immaterial," *Clark v. Abdallah*, 131 F.4th 432, 445 (6th Cir. 2025), as we must, the dissenting opinion embraces them. We need not, for example, dwell on Feagin's motive in reaching toward the center console of his SUV, let alone, as the dissenting opinion mischaracterizes our opinion as saying, on whether "Feagin reached toward the center console of his vehicle *for a weapon*," Dissenting Op. at 29 (emphasis added). Nor is it material whether Feagin in fact put his car in reverse or the reason his arm was flailing as officers tried to subdue him. *See id.* at 27–29. On these points, again, the relevant touchstone is how a "reasonable officer on the scene" would perceive those actions, not Feagin's mindset. *Graham*, 490 U.S. at 396. And contrary to the dissenting opinion's understanding, *see* Dissenting Op. at 30, the absence of evidence, such as any limitations on what the video shows or Feagin's naked assertions that he was not resisting, cannot create genuine disputes of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). In the end, the dissenting opinion would allow a plaintiff to survive summary judgment and escape our interlocutory review by simply pointing to the absence of evidence or irrelevant evidentiary disputes. Much more is necessary before we would turn away on jurisdictional grounds a party seeking review of a qualified immunity denial.

b. That leaves Feagin's arguments on the merits. Primarily, he contends there are disputed facts in the record as to whether he was actively resisting at the exact moment he was removed from his vehicle.

But his focus on whether there was active or passive resistance at that moment largely misses the point. We do not evaluate a particular use of force by considering just one tile in the reasonableness mosaic. Rather, the totality of the circumstances, not just one circumstance in isolation, informs our views. *See Barnes*, 145 S. Ct. at 1358. As the Supreme Court recently confirmed, Feagin's resistance, while necessary to our calculus, should be evaluated together with the nature of the crime he was suspected of committing, Moore's response, and the threat Feagin posed to officers. *Id*. And, as just explained, Moore was justified in using non-lethal force to disable the immediate threat posed by Feagin.

In believing otherwise, Feagin asks us to instead focus narrowly on whether he resisted just before being tased. Ample case law, in particular, the Supreme Court's recent decision in *Barnes*, rejects Feagin's artificial dicing of the record. We pause here to reflect on the last few decades of relevant precedent. The seminal Supreme Court cases on use of force simultaneously emphasize the "split-second judgments" that an officer must make in a use of force situation while instructing lower courts nonetheless to employ a "totality of circumstances" approach. *See, e.g.*, *Graham*, 490 U.S. at 396; *Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985). Appellate courts reconciled these commands in different ways in use of force cases. Some took a broad view and considered "all context and causes prior to the moment" of the use of force, *see Abraham v. Raso*, 183 F.3d 279, 291 (3d Cir. 1999), even

examining whether an independent Fourth Amendment violation created the need for an otherwise reasonable use of force and rendered the force impermissible, see *Billington v. Smith*, 292 F.3d 1177, 1190–91 (9th Cir. 2002). Others took a narrow approach, one that considered only the seconds immediately surrounding the use of force when the moment of threat arose. *See, e.g.*, *Fraire v. City of Arlington*, 957 F.2d 1268, 1276 (5th Cir. 1992). We took a third path: "carv[ing] up [an] incident" into "conceptually distinct" segments, "judg[ing] each on its own terms to see if the officer was reasonable at each stage." *Dickerson v. McClellan*, 101 F.3d 1151, 1161–62 (6th Cir. 1996) (citation modified); *Pleasant v. Zamieski*, 895 F.2d 272, 276 (6th Cir. 1990). This segmented approach allows for evaluation of the "events preceding" the use of force occurring in "close temporal proximity," *Bletz v. Gribble*, 641 F.3d 743, 752 (6th Cir. 2011), while excluding distinct events that played no direct or foreseeable role in a particular use of force, *see, e.g.*, *Puskas v. Delaware County*, 56 F.4th 1088, 1097 (6th Cir. 2023); *Claybrook v. Birchwell*, 274 F.3d 1098, 1103 (6th Cir. 2001); *Pleasant*, 895 F.2d at 276–77.

Admittedly, we sometimes strayed from this approach, albeit in different ways. Here and there, we nodded towards the over-inclusive provocation approach utilized elsewhere, considering whether an officer should be denied immunity because he unreasonably "placed himself in potential danger" at some point prior to the incident necessitating the use of force. *See, e.g.*, *Latits v. Phillips*, 878 F.3d 541, 552

(6th Cir. 2017) (faulting officer for violating police procedures by ramming suspect's car, leading to a later use of deadly force); *Kirby v. Duva*, 530 F.3d 475, 482 (6th Cir. 2008). Yet on other occasions, we veered in the opposite direction, narrowing the timeframe question functionally to adopt the moment of threat doctrine. *See, e.g.*, *Reich v. City of Elizabethtown*, 945 F.3d 968, 978 (6th Cir. 2019). In extreme outlier cases, we even "hyper-segment[ed]" within the moment of the use of force. *See Osborn v. City of Columbus*, No. 22-3570, 2023 WL 2523307, at *7 (6th Cir. Mar. 15, 2023) (Readler, J., concurring in part and dissenting in part). At the height of such absurdity, we went so far as to divvy up shots fired just seconds apart in the heat of a continuous confrontation to analyze each as a discrete use of force. *See Palma v. Johns*, 27 F.4th 419, 441 (6th Cir. 2022), *see also Hart v. Michigan*, 138 F.4th 409, 420 (6th Cir. 2025) (distinguishing between an officer's use of pepper spray and use of tear gas moments after the pepper spray proved ineffective); *Hood v. City of Columbus*, 827 F. App'x 464, 469–70 (6th Cir. 2020). But *see Palma*, 27 F.4th at 453 (Readler, J., dissenting); *Hart*, 138 F.4th at 427 (Larsen, J., concurring in part and dissenting in part); *Hood*, 827 F. App'x at 472 (Guy, J., concurring in part and dissenting in part) (criticizing the majority for segmenting an exchange of gunfire "within a period of approximately five seconds").

Aware of this confusion, the Supreme Court in recent years clarified the temporal question in use of force cases. In so doing, the Supreme Court mercifully scrubbed any precedential value from

many of these outlier cases adopting either extreme view. As to the broad temporal view, the Supreme Court dispelled the notion that the totality of the circumstances test requires consideration of irrelevant circumstances, such as whether an officer at some earlier point in time acted in a way that later led to the use of force. *See Plumhoff*, 572 U.S. at 776 n.3 (rejecting that deadly force cannot be justified simply due to an officer's "deci[ding] to continue" chasing a suspect); *County of Los Angeles v. Mendez*, 581 U.S. 420, 429 (2017) (holding that an unreasonable use of force cannot be premised on a separate incident that "in some sense set the table for the use of force"). At the other end of the spectrum, the Supreme Court earlier this year barred courts from restricting the relevant timeframe to seconds or less, expressly rejecting the moment of threat doctrine. *Barnes*, 145 S. Ct. at 1356; *see also Est. of Hernandez ex rel. Hernandez v. City of Los Angeles*, 139 F.4th 790, 829 (9th Cir. 2025) (en banc) (Bumatay, J, dissenting) (observing that *Barnes* abrogated the moment of the threat doctrine and other "extreme version[s]" of that rule in which a court "puts on…blinders to ignore everything" except the last seconds of a particular interaction). "[N]arrowing [of] the requisite Fourth Amendment analysis" to focus on just the "climatic moment" where force was used, the Supreme Court explained, is, as all agree, improper. *Barnes*, 145 S. Ct. at 1356; *Hodges v. City of Grand Rapids*, 139 F.4th 495, 517 (6th Cir. 2025) (recognizing that *Barnes* rejected "such a segmented approached" that limits the scope of the inquiry to the seconds immediately prior to a shooting); *Heid v. Rutkoski*,

143 F.4th 1255, 1264 (11th Cir. 2025) (similar); Dissenting Op. at 31 (recognizing *Barnes* controls the determination as to Moore's reasonableness). Instead, the Supreme Court embraced a middle path, one akin to our segmented approach when it was properly applied. In utilizing the objective reasonableness analysis, a court must "separately" consider "each search or seizure that is alleged to be unconstitutional." *Mendez*, 581 U.S. at 428*; see also Plumhoff*, 572 U.S. at 777 (considering 15 gunshots as a single use of force); *Mullins v. Cyranek*, 805 F.3d 760, 768 (6th Cir. 2015) (considering multiple gunshots as a single use of force for purposes of qualified immunity analysis because the "second shot did not come at a time after which a reasonable officer would think the threat had passed"). And for each purported violation, in turn, we must consider all the "relevant circumstances" "leading up to the climactic moment." *Barnes*, 145 S. Ct. at 1356. While no artificial "time limit" cabins our consideration of a given use of force, id. at 1358, our focus is on what "proximately caused" any Fourth Amendment violation, *Mendez*, 581 U.S. at 430–32; *Puskas*, 56 F.4th at 1097 (holding *Mendez* requires some direct and foreseeable relation between the circumstances being considered and the use of force).

Heeding these commands, the timeframe to consider here is not just the seconds before Feagin's tasing, but instead all of the events that foreseeably led to the use of force. Viewed in this light, the undisputed evidence reveals active, unceasing resistance, as well as threatening behavior by

Feagin up to the point he was tased. In the preceding minute, recall, Feagin made a furtive movement to the inside of the vehicle, ignored Moore's repeated commands to exit the SUV, seemingly put his car in reverse while Moore was standing next to it, dropped bullets from his pockets, and then refused to submit to handcuffing, instead tussling with the officers. *See Wright*, 962 F.3d at 867; *Hagans*, 695 F.3d at 509. And in the seconds around the time of the tasing—a relevant (but not the lone) consideration in assessing the permissibility of the force used— Feagin's right arm was flailing against the SUV as Moore tried to handcuff him. *See Barnes*, 145 S. Ct. at 1358 ("Of course, the situation at the precise time of the shooting will often be what matters most."). *But see Cunningham*, 994 F.3d at 766–67 (rejecting that qualified immunity can be denied based on "stop-action viewing of the real time situation" an officer encountered). In the absence of evidence that Feagin posed no danger and was either fully compliant with officer commands or had ceased resisting, Moore's conduct was not unreasonable. *Rudlaff*, 791 F.3d at 642; *Hagans*, 695 F.3d at 509.

Were that not the case, Feagin still fails to show that Moore was on sufficient notice that his use of force was unreasonable. As already explained, he cites no case denying qualified immunity in circumstances similar to this one. *See Rivas-Villegas*, 142 S. Ct. at 8. The district court, recall, described the events here as falling in the "gray area between active and passive resistance." Order Den. and Granting Defs.' Mots. Summ. J., R. 70, PageID#608.

In that instance, our precedents require a grant of qualified immunity. *See Rudlaff*, 791 F.3d at 644 ("Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." (quoting *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992))); *see also Brown*, 95 F.4th at 440; *Hagans*, 695 F.3d at 511; *King*, 97 F.4th at 397.

Nor do Feagin's assertions in his affidavit move the ball in his direction. To rebut Moore's showing that summary judgment is warranted, Feagin "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). Blanket denials of a defendant's evidence are "not enough" to create a genuine issue of material fact. *Irvin v. Airco Carbide*, 837 F.2d 724, 726 (6th Cir. 1987). As such, Feagin does not receive an "automatic trial" simply by "assert[ing], without any evidence, that 'the police are lying'" as to whether he was resisting. *See Elliott v. Leavitt*, 105 F.3d 174, 175 (4th Cir. 1997) (Wilkinson, J., concurring in the denial of rehearing en banc). That point is compelling here, where Feagin's affidavit consists merely of unadorned assertions that he was "not resisting arrest" when he was tased. Feagin's statements at most reflect his subjective belief that he was not intending to actively resist arrest at the time of the tasing. Yet Feagin's view of his own actions is "not the whole ballgame"; we instead ask "whether, at the time [Moore] fired his taser, every reasonable officer would have perceived [Feagin] as no longer actively resisting arrest." *Perez v. Simpson*, 83 F.4th 1029,

1031 (6th Cir. 2023); *see Lanman v. Hinson*, 529 F.3d 673, 680 (6th Cir. 2008). Based on the objective unrebutted evidence, there is no dispute of fact worthy of a trial as to whether a reasonable officer would have perceived Feagin as having surrendered himself when he was tased.

Lastly, Feagin protests that Moore did not warn him before deploying his taser. Perhaps so. But officers need not do as much. *See, e.g.*, *Thomas v. City of Columbus*, 854 F.3d 361, 366 (6th Cir. 2017). Our precedent on that score is especially understandable when one remembers that the Supreme Court's use of force rulings allow officers to make split-second decisions in employing force. *Graham*, 490 U.S. at 396.

All told, a grant of summary judgment is warranted as to the tasing claim against Moore.

B. That leaves the deliberate indifference claims stemming from the allegedly inadequate medical care Feagin received in the wake of Moore deploying pepper spray while Feagin was detained in the police cruiser. The district court refused to grant summary judgment on that claim solely on the basis that defendants never moved on the ground, a position defendants concede. That fact dooms the officers' assertion that we may opine on the deliberate indifference claim. While our interlocutory jurisdiction can include qualified immunity appeals, *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); *DiLuzio*, 796 F.3d at 609–10, it is difficult to see how it would extend to claims to which officers never

sought such immunity, *see Glennborough Homeowners Ass'n v. U.S. Postal Serv.*, 21 F.4th 410, 414 (6th Cir. 2021) (recognizing appellant can forfeit an affirmative argument for jurisdiction by not raising the issue below).

Defendants explain this oversight by noting that they did not read Feagin's deliberate indifference claim to concern the arresting officers, as opposed to the county jail officials. Either way, without subject matter jurisdiction, we are powerless to render a judgment on the proper scope of that claim. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868). That said, if Feagin is in fact pursuing a claim beyond the reach of his pleadings, the district court is well positioned to address that concern through proper trial management.

III.

We reverse the district court's denial of qualified immunity as to Feagin's excessive force claim, dismiss the appeal of Feagin's deliberate indifference claim for lack of jurisdiction, and remand to the district court for further proceedings.

DISSENT

CLAY, Circuit Judge, dissenting. This case unfortunately follows the paradigm of so many qualified immunity appeals involving the use of excessive force by police. Despite the existence of disputed facts, Defendants attempt to obscure, minimize, or misrepresent the events leading to the allegations of police misconduct. Qualified immunity

supposedly exists for a reason, and no one wishes to see a law enforcement officer subjected to the vagaries of litigation where the facts fail to arguably support a cause of action. But this case is not one in which the incident at issue, when properly construed, should permit judgment to be rendered in the officer's favor based on the reversal of the district court's denial of qualified immunity. In fact, the competing allegations on both sides of this case render the conferring of qualified immunity out-of-bounds under our controlling caselaw. Instead of following legal precedent, Defendants vigorously dispute Plaintiff's version of the facts. Because we can resolve only legal issues on an interlocutory appeal of the denial of qualified immunity, and Defendants present us with none, the appeal should be dismissed for lack of jurisdiction.

The relevant facts may be described, in part, as follows: Ulysses Feagin was driving down the center of a narrow street in Mansfield, Ohio, and approached a Mansfield Police Department ("MPD") police cruiser driving in the opposite direction. Feagin did not stop as he approached the cruiser, though the officer driving, Defendant Mark Boggs, honked his horn in warning. Fearing an accident, Boggs swerved on the road. Immediately thereafter, Boggs and another MPD officer, Defendant Jordan Moore, who was driving a second cruiser, turned to pursue Feagin. Moore and Boggs followed Feagin for about forty seconds before Feagin drove his vehicle to the parking lot of an apartment building, turned into a parking space, and stopped. Believing that Feagin was unresponsive to Moore's initial orders to

exit his vehicle, Moore pulled him out of the vehicle. Moore and Boggs then held him against the driver's side door, and Moore tased him twice. The district court denied qualified immunity to Moore, finding that genuine disputes of fact existed as to the crucial question of whether Feagin actively resisted Moore prior to the tasing. The majority would reverse the district court's denial of qualified immunity to Moore for this use of force, arguing in this appeal that we have jurisdiction over Feagin's allegations of the officers' use of excessive force. But Moore raises only a factual challenge to the denial of qualified immunity. We do not have jurisdiction over such an appeal, and therefore should dismiss this appeal.

In determining whether government officials are entitled to qualified immunity, this Court conducts a two-step inquiry, determining: "(1) whether, considering the allegations in a light most favorable to the party injured, a constitutional right has been violated, and (2) whether that right was clearly established." *Everson v. Leis*, 556 F.3d 484, 494 (6th Cir. 2009) (internal quotation marks omitted). To prevail on his excessive force claim, Feagin must show that Moore's use of the taser violated his clearly established constitutional rights. *See Meadows v. City of Walker*, 46 F.4th 416, 422 (6th Cir. 2022). On this point, the question of whether Feagin actively resisted the officers' efforts to apprehend and handcuff him is a crucial one. "A suspect has a clearly established constitutional right to be free from the use of physical force by police officers when he is not resisting efforts to apprehend him." *Coffey v. Carroll*, 933 F.3d 577, 589 (6th Cir.

2019). But the majority correctly states that tasing is a reasonable response when a suspect actively resists arrest. "We have often found that the reasonableness of an officer's use of a taser turns on active resistance." *Kent v. Oakland Cnty.*, 810 F.3d 384, 392 (6th Cir. 2016). "Active resistance includes physically struggling with, threatening, or disobeying officers,…refusing to move your hands for the police to handcuff you,…or fleeing from police." *Id.* (internal quotation marks and citations omitted). Contrary to the majority's assertions, however, tasing is not justified in instances of "passive resistance," such as when a suspect fails to fully comply with an officer's commands but does not pose a physical threat. *See id.* at 392–94 (where a suspect did not comply with officers' commands and "demonstrated 'verbal hostility,'" dismissing officers from his home, but was physically submissive, tasing was unreasonable). The district court denied qualified immunity to Moore because it found that whether Feagin actively or passively resisted, despite some noncompliance, depended on how a factfinder addressed disputed evidence. In other words, whether Feagin actively resisted was a genuine dispute of material fact precluding the grant of qualified immunity to Moore, and Feagin's resistance was also determined by disputed facts.

Defendants' appeal of the district court's denial of qualified immunity presents a jurisdictional issue, as "[w]e are authorized to hear appeals only from 'final decisions' of the district court," *Adams v. Blount Cnty.*, 946 F.3d 940, 948 (6th Cir. 2020) (quoting 28 U.S.C. § 1291), and a district court's denial of a

claim of qualified immunity is an appealable final decision only "to the extent that it turns on an issue of law." *Ouza v. City of Dearborn Heights*, 969 F.3d 265, 276 (6th Cir. 2020) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)). "That is, on an interlocutory appeal from the denial of qualified immunity, we have jurisdiction to review only the 'purely legal' question of 'whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions.'" *Id*. (quoting *Mitchell*, 472 U.S. at 528 & n.9). And "[w]e have jurisdiction only to the extent that the defendant limits his argument to questions of law premised on facts taken in the light most favorable to the plaintiff." *Adams*, 946 F.3d at 948 (alteration adopted) (internal quotation marks omitted).

The issue in dispute in this appeal is not one of law. Defendants argue against the conclusion that this appeal involves a disputed issue of material fact as to whether Feagin actively resisted arrest, raising only a factual challenge. The core of Defendants' argument is that "Feagin was actively resisting arrest at the time Officer Moore deployed the taser," and therefore that Moore's use of force is reasonable and qualified immunity is due. Appellant's Br., 10. Feagin vigorously denies Defendants' factual allegations in this regard, and denies the allegation that he was actively resisting when the taser was used.

In this case, the district court found that disputes of fact governed whether Feagin's actions amounted to active resistance. The Supreme Court made clear

in *Johnson v. Jones*, 515 U.S. 304 (1995), that a defendant "may not appeal a denial of a motion for summary judgment based on qualified immunity 'insofar as that order determines whether or not the pretrial record sets forth a "genuine" issue of fact for trial.'" *Adams*, 946 F.3d at 948 (quoting *Johnson*, 515 U.S. at 320). In this case, the district court determined that the video evidence presented a "gray area" in which it was disputed whether Feagin was passively resisting arrest. Op., R. 70, Page ID #608. The question of Feagin's active or passive resistance rests on the characterization of Feagin's actions and movements under the circumstances, as seen in the video and described in the record. This is a quintessentially fact-bound inquiry. The district court found that factual disputes raised the possibility that a jury could reasonably conclude that Feagin did not actively resist, and only passively resisted—so as to warrant liability for excessive force. *Cf. Meadows*, 46 F.4th at 423–24 (distinguishing between a "gray area" in which "facts are disputed, but a reasonable jury could find a set of facts that, if proven at trial, would show that an officer's actions violated a clearly established right," and a situation in which the undisputed "facts confronting an officer leave ambiguity about whether the officer's actions violate a constitutional right").

In arriving at its ultimate conclusion that Feagin's active resistance was disputed, the district court identified areas of factual dispute from which a jury could conclude that Feagin was not actively resisting. First, the district court read the facts in the record to dispel "a concern for potential escape or

immediate harm," concluding that Feagin "parked at the apartment complex" to await the officers' arrival and "made no effort to flee," evincing no threat to the officers. Op., R. 70, Page ID #607. Second, the district court viewed the video to support "run-of-the-mill noncompliance" and that Feagin was "under control" and not resisting when Moore used his taser. *Id*. at Page ID #608.

Defendants dispute both findings using their characterization of the evidence that Feagin was persistently resisting arrest. *See* Appellant's Br., 4, 10. Defendants argue that "arrest reports, the affidavits of the officers, the response to resistance forms, and the video all establish that Mr. Feagin was actively and persistently resisting arrest," and claim that evidence to the contrary—Feagin's sworn affidavit—is inadmissible. *Id*. at 10–11. This itself is jurisdiction-defeating. We have "consistently enforced *Johnson's* jurisdictional bar in cases in which the defendant's qualified immunity appeal is based solely on his or her disagreement with the plaintiff's facts." *Ouza*, 969 F.3d at 277. Defendants' appeal is based on such disagreement, as they quibble with the district court's contrary findings and Feagin's contrary attestations. Feagin attested that "he never physically resisted" the officers, never reached for a weapon, and never reversed his car. Feagin Aff., R. 61-2, Page ID #451–52. As described, the district court concluded that Feagin never fled, never presented a threat, and that a reasonable jury could conclude that Feagin, though noncompliant, did not resist arrest. Defendants use their appellate briefing to argue otherwise. They state instead that

Feagin resisted arrest, reached in the back of his vehicle, and reversed out of his parking spot in an attempt to flee officers. These facts, Defendants argue, establish that the district court erred in finding a genuine dispute of material fact and denying qualified immunity.[1]

Defendants' arguments defeat our jurisdiction because they reflect a challenge to the district court's determinations about genuine disputes of fact. *See Gregory v. City of Louisville*, 444 F.3d 725, 744 (6th Cir. 2006). Defendants' protestations further defeat our jurisdiction by constituting a failure to accept Feagin's version of the facts as true, thwarting our well-established rule that "to bring an interlocutory appeal of a qualified immunity ruling, the defendant must be willing to concede the plaintiff's version of the facts for purposes of the appeal." *Ouza*, 969 F.3d at 277 (quoting *Jefferson v. Lewis*, 594 F.3d 454, 459 (6th Cir. 2010)); *cf. Heeter v. Bowers*, 99 F.4th 900, 909 (6th Cir. 2024) ("A defendant may invoke our jurisdiction by conceding the district court's version of the facts, as construed in the light most favorable to the plaintiff." (internal quotation marks omitted)). Because Feagin's actions are disputed, we simply

[1] Defendants seem to make the bizarre argument that when there are unresolved factual disputes, "rather than throwing up our hands whenever the district court has assessed the record," Maj. Op., 18, we should address remaining legal questions. Defendants miss the point that when there are material factual disputes, this Court is without jurisdiction and should not reach the legal questions. It is not our place to "[fill] in any holes with the plaintiff's evidence," as Defendants would have us do. *Id.*

cannot reach the legal question of whether his actions amounted to active resistance. *Cf. Adams*, 946 F.3d at 949 (declining to exercise jurisdiction because the defendant contested factual determinations at "the heart of the legal issue" determining whether his conduct amounted to excessive force). This precludes our jurisdiction in this case.

To be sure, "[t]here are two narrow circumstances in which an interlocutory appeal record may contain some dispute of fact," such as the one Defendants raise. *Id.* at 948. One exception is worth discussing here: "[I]n exceptional circumstances, we may decide an appeal challenging the district court's factual determination if that determination is 'blatantly contradicted by the record, so that no reasonable jury could believe it.'" *Id.* (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)). Often, these circumstances come about where there is video footage, as in the prototypical example of *Scott v. Harris*, where video footage "clearly contradict[ed]" the facts as told by the plaintiff and adopted by the lower court. 550 U.S. at 378. Where video footage "resolves many of the factual disputes" in a case, "[w]e may view the facts in the light depicted by the videotape and use it to ensure the district court properly constructed the factual record." *Heeter*, 99 F. 4th at 910 (internal quotation marks omitted).

But in this case, video footage fails to resolve the disputed question of Feagin's resistance and fails to contradict the district court's determination that Feagin's resistance was a genuinely disputed fact.

The district court was correct that the video fails to illuminate whether Feagin actively resisted. Thus, the video does not resolve the issue of our jurisdiction over this appeal. The majority makes two errors in exercising jurisdiction anyway and deciding that Moore is entitled to qualified immunity. First, the majority misrepresents by overstating the events depicted in the video to decide the factual and legal issues at hand, implicitly using this decisiveness to exercise jurisdiction. Second, the majority reaches outside of the video and distorts facts in Defendants' favor in order to grant qualified immunity.

The video shows exactly the gray area the district court described, evincing a genuine dispute of material fact that precludes qualified immunity for Moore on Feagin's excessive force claim. From the video, it is apparent that Moore and Boggs are physically controlling Feagin's body before Moore tases Feagin at close range. Feagin opened his car door for the officers, and Moore and Boggs immediately pulled him upright, wrestled his hands behind his back, and pulled him into a standing position. The officers held Feagin against the vehicle and attempted to handcuff him. Moore deployed his taser while the officers were handling Feagin's body in an effort to secure the handcuffs. On the available video footage, much of Feagin's body is obscured. But once he is pulled upright from his vehicle, Feagin does not appear to fight the officers. He was not resisting.

The district court's description of Feagin's movements as he was pulled out of his vehicle, tased, and handcuffed is persuasive. According to the district court, Feagin "appear[ed] to go limp as the officers wrestle[d] him from the driver's seat of the car to a standing position beside it." Op., R. 70, Page ID #594. As the officers put handcuffs on Feagin, "Feagin appear[ed] to cooperate and not resist." *Id.* at Page ID #595. Indeed, Feagin appears to have been unable to resist, because the officers were in control of his body. Though the majority characterizes Feagin's arm as "flailing" in resistance at the point Moore deployed his taser at close range, Maj. Op. 13, Feagin's arm is largely obscured by the officers at the critical point. The officers have a hold on Feagin's shoulders and upper arm, and a reasonable jury could conclude that the "flailing" might be characterized as an involuntary response to the hold, rather than a form of resistance. As Moore tases Feagin, he and Boggs remain in control of Feagin's body.

The district court was also correct to qualify its statements as Feagin's "apparent" movements. The angle of the footage does not give much insight as to the rigidity of Feagin's body as he was forced against the car, nor to the subtlety of his movements, because the officers are obscuring much of his body as they force him into handcuffs. This leaves us with a factual dispute, as the district court recognized, and thus no jurisdiction. *Cf. Heeter*, 99 F. 4th at 910 (exercising jurisdiction where the video gave a "clear view" of the events relevant to plaintiff's claim). I therefore differ from the majority in my view of the

video and its ability to resolve the issues in this appeal.

The majority is also of the mind that utilizing the video and the record exception is unnecessary to exercise our jurisdiction. The majority says that Defendants have raised legal disputes because, despite "overindulg[ing] in record-based arguments," Defendants' "lead argument is that the district court erred in denying [Moore] qualified immunity." Maj. Op., 17. But in other appeals in which we have denied jurisdiction because the interlocutory appeal concerned a factual dispute, defendants necessarily raised the same argument, because they all challenged the denial of qualified immunity. *See, e.g.*, *Gregory*, 444 F.3d at 743–44; *McGrew v. Duncan*, 937 F.3d 664, 667, 669 (6th Cir. 2019). The majority raises for itself questions that it claims are "embedded" within the appeal, such as whether "the undisputed evidence warrant[s] a grant of summary judgment," or whether "Moore violated clearly established law." Maj. Op., 17. Defendants did not raise these issues, as their appeal relies on disputing Feagin's version of events, and they never mention the legal issue of whether the tasing violated clearly established law. It is not our duty to discern "embedded" legal questions for an appellant who does not raise them.

Rather, the majority distorts our precedent in order to assume jurisdiction and reverse the district court. In addition to its outsized misconstrual of the video, it does so by failing to construe other facts in Feagin's favor while purporting to do so. *See id.* at 8

("We review the district court's decision de novo, resolving all genuine factual disputes in a light most favorable to Feagin."). This allows the majority to consider disputed facts in the record as "tile[s] in the reasonableness mosaic" supposedly supporting Moore's use of force. *Id*. at 18. By resting its decision on both the unclear video and disputed circumstances surrounding it, the majority reaches far outside our jurisdiction. *Cf. Heeter*, 99 F. 4th at 910 (concluding an appeal of the denial of qualified immunity was within our jurisdiction because we could conduct a legal analysis based on a clear video and undisputed facts).

To reiterate, we must "take the facts in the light most favorable to [Feagin] unless they are clearly contradicted by video." *Ayala v. Hogsten*, 786 F. App'x 590, 591 (2019). What follows are a few ways in the which the majority fails to do so.

First, the majority states that Feagin reached toward the center console of his vehicle for a weapon. Maj. Op., 5. Defendants' "response to resistance" report states that Feagin reached toward the floorboards of his vehicle. Feagin disputes that he reached for the floorboards and acknowledges only that the gear shift is in the center console; he disclaims that he reached for a weapon while he was in his vehicle or as he was pulled from it. The video does not provide a view as to whether Feagin reached for the console—it only shows Feagin being pulled from the car.

Second, the majority asserts that Feagin "[s]uddenly" reversed his car after parking it, in an effort to evade arrest. *Id*. Feagin denies in his sworn affidavit that he attempted to reverse his vehicle. The district court only characterized the vehicle as "roll[ing] slightly backward," without attributing the rollback to Feagin's efforts, acknowledging instead that the rollback occurred when the vehicle "shifted into park and the engine settled into gear." Op., R. 70, Page ID #594. Again, the video does not show Feagin inside the car. Consequently, the mechanism by which the car rolled back is unclear. Taking the facts in Feagin's favor, we would construe the evidence as supporting the narrative that the car rolled back as it settled into park, not because of an intentional reversal. From what the video does show, the car's rollback can be characterized as unintentional. Further, the district court astutely noted that "[n]o evidence in the record suggest[ed] a concern for potential escape or immediate harm," because Feagin voluntarily parked at the apartment complex and "officers blocked his car." *Id*. at Page ID #607. The circumstances fail to support Defendants' allegation that Feagin intended to flee—he willingly parked his car in the first place, after a limited pursuit.

Third, the majority asserts that bullets fell from Feagin's pocket as the officers were pulling Feagin from his vehicle. Maj. Op., 5. This is based on assertions from Defendants' "response to resistance" report and Boggs' affidavit. As the district court concluded, however, "the video footage does not show ammunition falling from Mr. Feagin's pocket, though

it might be too small to see." Op., R. 70, Page ID #595.

The majority's mischaracterization of Feagin's conduct before he was tased allows it to conclude that Feagin was a continuing threat to Moore and Boggs, supporting the conclusion that Moore's use of the taser was reasonable. *See* Maj. Op., 12–13. But these are not facts that the district court found, and for good reason. The majority is wrong to conclude that these purported facts were "undisputed," and to discount Feagin's averments to the contrary. *See id.* "An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim." *Mitchell*, 472 U.S. at 528 (1985). We are obliged instead to accept the plaintiff's factual allegations as true, and to utilize them only in resolving the relevant legal claims. *Id.* Ignoring this, the majority takes the officers' version of events at face value, contradicting our summary judgment standards. That the majority must bend the record to Defendants' favor evinces the existence of factual disputes precluding a resolution at this juncture. But to any objective observer, it is clear that Feagin has raised disputes as to the Defendants' characterization of events. To be sure, where the moving party comes forward with evidence to support summary judgment, a non-moving party must advance more than a "blanket denial" to defeat the motion. *Irvin v. Airco Carbide*, 837 F.2d 724, 726 (6th Cir. 1987). But in this case, the evidence that Defendants provided

itself presented "a sufficient disagreement to require submission to a jury," and was not "so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251–52 (1986). The record evidence in this case cannot be characterized as one-sided given the ambiguity of the interactions in the video and, indeed, what it does not show. There is more than "metaphysical doubt" as to the officers' versions of material facts and whether the use of force was justified. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In addition to Feagin's sworn attestations, the video fails to show that Feagin was actively resisting when the taser was deployed and fails to corroborate the officers' testimony as to the events leading to the tasing.

In any event, the minutiae of the disputes as to the events preceding the tasing should be irrelevant for the purposes of this appeal. What is relevant is that such disputes exist, and that Defendants rely upon them to argue against the denial of qualified immunity. The majority contends that the reasonableness of Moore's use of force depends on the "totality of the circumstances." *See Barnes v. Felix*, 605 U.S. ---, 145 S. Ct. 1353, 1358–59 (2025) (internal quotation marks omitted). Were we making a determination as to Moore's purported reasonableness, Feagin's conduct outside the moment of the tasing might affect our judgment. But Defendants' appeal, which raises only factual disputes, prevents us from reaching the merits of this issue. Furthermore, our duty to construe factual disputes in Feagin's favor prevents us from viewing

the totality of circumstances in the misleading way that the majority does in attempting to sift through unresolved factual disputes.

For these reasons, though I concur in the dismissal of the appeal as to Feagin's deliberate indifference claim, I respectfully dissent from the reversal of the district court's denial of qualified immunity as to Feagin's excessive force claim.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ULYSSES LEE FEAGIN, Case No. 1:22-cv-1201

Plaintiff, Judge J. Philip Calabrese

v. Magistrate Judge Jennifer Dowdell Armstrong

MANSFIELD POLICE DEPARTEMENT, *et al.*,

Defendants.

OPINION AND ORDER

Plaintiff Ulysses Feagin was driving in Mansfield, Ohio, when his vehicle nearly ran a marked police cruiser off the road. After a brief pursuit, he pulled into a parking lot, where police arrested him. During the encounter, Officer Jordan Moore of the Mansfield Police Department used a TASER, first in distance mode and then in drive-stun mode. The same officer later pepper sprayed Mr. Feagin. The police maintain that Mr. Feagin resisted arrest, justifying this use of force. Mr. Feagin claims that he did not. He also argues that the Officers' responses to his alleged resistance amounted to excessive force.

Mr. Feagin brought suit without a lawyer to vindicate his federal constitutional rights, specifically claiming that the Mansfield Police Department, Officers Moore, Boggs, and Blair, as well as John and Jane Doe each violated his Fourth, Eighth, or Fourteenth Amendment rights. The City of Mansfield and the Officers seek summary judgment in their favor, which Plaintiff opposes.

For the reasons that follow, the Court **GRANTS IN PART AND DENIES IN PART** Defendants' motion for summary judgment.

STATEMENT OF FACTS

On Defendants' motion for summary judgment, the Court construes the facts in Mr. Feagin's favor as the non-moving party. Video footage captures nearly all key events at issue in this case, leaving little room to dispute what they show. *See Scott v. Harris*, 550 U.S. 372 (2007). At this stage of the proceedings, the record establishes the following facts.

A. Stop and Arrest

On July 6, 2020, Plaintiff Ulysses Lee Feagin was driving down a residential street in Mansfield, Ohio. (*See* Moore's Dashcam at 0:23–0:30.) The road does not have marked lanes, and cars were parked on both sides of the two-lane road. (*Id.*) Officer Mark Boggs was traveling in the opposite direction in a marked police cruiser. (*Id.*) Officer Jordan Moore, operating another marked police cruiser, followed immediately behind Officer Boggs. (*Id.*) As

Mr. Feagin's and Officer Boggs' vehicles approached each other from opposite directions, Mr. Feagin drove in the center of the road, nearly hitting the police cruiser head-on. (*Id*. at 0:17–0:30; Boggs' Dashcam at 2:17–2:30.) Officer Boggs pulled his cruiser over to the side of the road, nearly into a ditch, and honked his horn multiple times to avoid a collision, after which both he and Officer Moore immediately turned their cruisers around to follow Mr. Feagin's vehicle. (Moore's Dashcam at 0:23–0:39; Boggs' Dashcam at 2:17–2:30.)

After a brief pursuit, and less than one minute after the two cars almost collided, Mr. Feagin turned his vehicle into the parking lot of an apartment complex. (*Id*. at 0:25–1:00.) As he did so, Officer Moore activated his lights and sirens. (*Id*.; Boggs' Dashcam at 2:58–3:04.) Officer Moore parked his cruiser behind Mr. Feagin's vehicle and immediately proceeded to Mr. Feagin's driver's side window, instructing him multiple times to exit his vehicle. (Boggs' dashcam at 3:17–3:37; Moore's Dashcam at 1:12–1:30.) Officer Moore saw the vehicle roll slightly backward after Mr. Feagin pulled into a parking space as he shifted into park and the engine settled into gear. (Moore's Dashcam at 1:25–1:30; Boggs' Dashcam at 3:26–3:30.)

At this point, Officer Moore attempted to break Mr. Feagin's window with a window breaker, during which time Officer Boggs also approached. (Moore's dashcam at 1:30–1:35; Boggs' Dashcam at 3:31–3:36.) After hitting the window twice with the breaker, Mr. Feagin opened the door. (Moore's

Dashcam at 1:30–1:45; Boggs' Dashcam at 3:31–3:46.)

B. TASER Incidents

At this point, the video shows Mr. Feagin hunched over facing forward as his door opens and he is removed from the vehicle, suggesting he was leaning down or reaching over. (Moore's Dashcam at 1:30–1:45; Boggs' Dashcam at 3:31–3:46.) As Officer Moore pulls Mr. Feagin from the vehicle, the videos show Mr. Feagin reaching in the direction of the open driver's door, but not lunging or in control of his movements at this point. (*See also* ECF No. 46-1, ¶ 14, PageID #296.) At first, he strains against the two officers as they take control of him. Then, he appears to go limp as the officers wrestle him from the driver's seat of the car to a standing position beside it. (*See* Moore's Dashcam at 1:35–2:06; Boggs' Dashcam at 3:36–3:45.) As Mr. Feagin stands facing the car between the two officers, each officer has control of one of his arms. (*Id.*)

On the videos, the officers have Mr. Feagin's arms under control pinned behind him within a second or two as he stands facing the car. (*See* Moore's Dashcam at 1:35–2:06; Boggs' Dashcam at 3:36–3:45.) They clearly struggle to place Mr. Feagin in handcuffs, but Mr. Feagin appears to cooperate and not resist. (Moore's Dashcam at 1:45–2:07.) During this brief second or two, Officer Moore deploys his taser at close range twice. (Moore's Dashcam at 1:40–1:58; Boggs' Dashcam at 3:43–

3:46.) After that, the officers cuffed Mr. Feagin and led him away from his car. (*Id.*)

Officer Boggs characterizes these events as Mr. Feagin's "continued and determined resistance." (ECF No. 46-1, ¶ 10, PageID #295.) Officer Boggs swears that ammunition fell out of Mr. Feagin's pocket as the officers extracted him from his vehicle. (*Id.*, ¶ 11.) However, the video footage does not show ammunition falling from Mr. Feagin's pocket, though it might be too small to see. (Moore's Dashcam at 1:30–1:50; Boggs' Dashcam at 3:31–3:51.) Later, officers found two handguns, one loaded, in the passenger area of his car. (ECF No. 46-1, ¶12, PageID #295.)

C. Pepper Spray Incident

After handcuffing Mr. Feagin, Officer Moore secured him in the rear of his cruiser. (Moore's Rearcam at 2:37-3:18.) Although Mr. Feagin walked to the cruiser, he did not cooperate in getting into the backseat. (*See* Moore's Rearcam at 2:37-3:18; Boggs' Dashcam at 3:55–5:16.) Once seated, he refused multiple times to pull his legs into the cruiser, causing Officer Moore to try to push them in on several occasions before being able to close the door. During this process, Officer Moore attempted to pepper spray Mr. Feagin, but the pepper spray did not deploy. (Boggs' Dashcam at 5:05–5:16.)

Once Officer Moore was able to confine Mr. Feagin in the back of his cruiser, the video footage shows Mr. Feagin kicking the window. (Moore Rearcam at 3:27–7:11.) Looking in the

direction of Officers Blair and Boggs, Officer Moore said, "hey, give me your pepper spray." (Moore's Dashcam at 5:09–5:10; Boggs' Dashcam at 7:10–7:15.) Officer Moore warned Mr. Feagin that, if he kicked at the windows and damaged the police car, then he would be exposed to pepper spray. (Moore's Rearcam at 6:55–7:02; Boggs Dashcam at 8:54–9:01.) Mr. Feagin continued to kick the window. Then, Officer Moore rolled down the cruiser's window, reached into the cruiser, and pepper sprayed Mr. Feagin, before rolling the window back up and walking away. (Moore's Rearcam at 7:11–7:25; Boggs' Dashcam at 9:07–9:18.) In his affidavit, Officer Boggs recites that Officer Moore used pepper spray to prevent "damage to the cruiser or himself [Mr. Feagin]." (ECF No. 46-1, ¶ 15, PageID #296.)

After being pepper sprayed, Mr. Feagin continued to kick the window but was not sprayed again. (Moore's Rearcam 9:40–11:11; Moore's Dashcam at 9:40–11:11.) Instead, officers transferred him to another cruiser. (Moore's Rearcam at 11:11–12:09; Boggs' Dashcam at 13:15–13:44; Oblak's Rearcam at 3:32–4:08; Oblak's Dashcam at 3:34–4:10.) In the second cruiser, Officer Oblak's, Officer Moore assisted Officer Boggs in placing Mr. Feagin into the cruiser by reaching in from the opposite side door to pull Mr. Feagin by the neck of his shirt, dragging him backward fully into the cruiser. (Oblak's Rearcam at 3:56–4:08.)

Officers also arrested a female passenger in the front passenger seat of Mr. Feagin's vehicle. (ECF No. 46-1, ¶ 16, PageID #296.) Like Mr. Feagin, she

was kicking the windows of a police cruiser, warned to stop, and pepper sprayed. (*Id.*)

D. Medical Treatment

Once secured in the second cruiser, Officer Oblak drove Mr. Feagin to the police station (*see* Oblak's Rearcam at 3:50–18:08; Oblak's Dashcam at 14:34–17:57), where Defendants claim he was "decontaminated and processed." (ECF No. 46-1, ¶ 27, PageID #290.) Mr. Feagin disputes this account, instead claiming that he was "denied medical treatment in regards to the OC spray by intentionally refusing to clean the face and skin where the mace was burning [his] face, eyes, and skin." (ECF No. 1, ¶ 2, PageID #2; *see also* ECF No. 61-2, ¶¶ 27–29, PageID #451.) In his affidavit, Mr. Feagin states that he was left in this condition without treatment for two days. (ECF No. 61-2, ¶¶ 54–55.) Also, he swears that that the officers "removed Taser probes without assistance of medical professionals" in an aggressive way, but does identify any particular officer who did so. (ECF No. 1, ¶ 2, PageID #2; *see also* ECF No. 61-2, ¶ 28, PageID #451.)

STATEMENT OF THE CASE

On July 6, 2022, Mr. Feagin filed suit *pro se* against Defendants seeking compensatory and punitive damages. (ECF No. 1.) Based on the events during his traffic stop and arrest on July 6, 2020, Mr. Feagin alleges violations of his constitutional rights under the Fourth, Eighth, and Fourteenth Amendments, in addition to various State-law tort

claims. Because he seeks monetary damages, the Court reads the complaint to state these claims against the officers in their individual capacities.

Under Section 1983, Mr. Feagin claims (1) use of excessive force in violation of the Fourth and Fourteenth Amendments; (2) denial of adequate medical care in violation of the Eighth Amendment; and (3) failure to intervene during the use of excessive force in violation of the Fourth and Eighth Amendments. (*Id.*, PageID #1–5.) He also brings a claim for intentional infliction of emotional distress. (*Id.*)

Defendants seek summary judgment on three grounds: (1) the officers' actions were reasonable and did not constitute excessive force; (2) qualified immunity; and (3) statutory sovereign immunity. (ECF No. 46, PageID #265–83.)

EVIDENTIARY ISSUES

Before turning to the merits of Defendants' arguments for summary judgment, the Court addresses Mr. Feagin's "Motion to Strike Defendant's Exhibit 4," his filing of a document called "Judicial Notice of Improper Affidavit," and his motion for return of evidence at the end of the case. (ECF No. 63; ECF No. 64; ECF No. 65.)

A. Defendants' Exhibit 4

On March 4, 2024, Plaintiff moved to strike Defendants' Exhibit 4—the "unedited recording of the mic activated at the time of the encounter." (ECF

No. 63, PageID #520.) Mr. Feagin argues that Defendants failed to disclose this exhibit during discovery. Defendants failed to respond to this motion. The Court takes that failure as an admission that they did not produce the contents of Exhibit 4 in discovery and that they had an obligation to do so either under Rule 26(a) or (e). Indeed, the fact that Defendants proffer this recording to support their motion for summary judgment demonstrates that this recording should have been produced pursuant to Rule 26(a)(1). But nothing in the record suggests that it was produced in discovery.

Where a party fails to provide information as required under Rule 26(a) or (e), "the party is not allowed to use that information…to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or harmless." Fed. R. Civ. P. 37(c)(1). Defendants make no argument that the exception to this self-executing exclusionary rule applies. Therefore, the Court **GRANTS** Mr. Feagin's motion. In connection with ruling on Defendants' motion for summary judgment, the Court has not listened to Exhibit 4 and gives it no consideration.

B. Officer Moore's "Affidavit"

In support of summary judgment, Defendants submitted and rely heavily on a document titled "Affidavit of Jordan Moore." (ECF N. 46-1, PageID #287.) On April 1, 2024, Mr. Feagin requested that the Court take judicial notice of the impropriety of Officer Moore's affidavit. (ECF No. 65.) Mr. Feagin

contends that Officer Moore's affidavit is not valid because it is "not properly notarized." (ECF No. 65, PageID #528.) Specifically, he contends that the affidavit lacks "the proper notary Jurat, and was not dated." (*Id.*) Indeed, unlike the affidavit of Officer Boggs (ECF No. 46-1m PageID #298), Officer Moore's statement lacks these formalities (ECF No. 46-1, PageID #291)—a sign of sloppy lawyering.

Under Ohio law, errors in notarizing a document are not necessarily fatal. *See, e.g.*, *Anderson v. Mitchell*, No. 99876, 2014-Ohio-1058, ¶ 8 (Ohio Ct. App.). For example, a notary's failure to sign his name on the document does not invalidate the affidavit. S*tern v. Board of Elections of Cuyahoga Cnty.*, 14 Ohio St. 2d 175, 178–83, 237 N.E. 313 (1968). Nor does failing strictly to comply with the statutory requirements. *Anderson*, 2014-Ohio-1058, ¶ 8 (citing *City Comm'n of Gallipolis v. State*, 36 Ohio App. 258, 261, 173 N.E. 36 (Ohio Ct. App. 1930)). But Ohio law does require substantial compliance for an affidavit to be valid. *Id.* at ¶ 8. However, where a notary's name is not printed or stamped and the signature is illegible, an affidavit is invalid. *Id.* at ¶ 10. Such is the case here. Officer Moore's affidavit does not contain the notary's stamp, and the notary's signature is illegible. The Court finds that it fails substantially to comply with the requirements of Ohio law.

In place of an affidavit, federal law permits a person to provide an unsworn declaration so long as he does so under penalty of perjury in substantially the language the statute requires. 28 U.S.C. § 1746.

On this score too, Officer Moore's statement fails. It is not signed under penalty of perjury. It is not dated. In some cases, technical non-compliance with the statute might not make a declaration improper. *See, e.g.*, *Peters v. Lincoln Elec. Co.*, 285 F.3d 456, 475–76 (6th Cir. 2002).

In such cases, however, the statements at issue suffer from only a single technical defect—for example, it is not dated, not notarized but sworn under penalty of perjury, or was an otherwise good-faith attempt to swear out an affidavit that somehow failed to meet all the technical requirements but nonetheless substantially complied with the requirements of the statute. Through no fault of his own, Officer Moore's statement does not fall into that category. His statement includes no pretense of binding Officer Moore to testimony under penalty of perjury. It merely "aver[s]" to the truth and accuracy of the contents of his statements. (ECF No. 46-1, PageID #287.) But averring, meaning alleging, presents a matter for the pleading stage and does not constitute proper evidence on summary judgment. Averments fall far short of being a statement under penalty of perjury. And the statement at issue does not even purport to be one. *See Sfakianos v. Shelby Cnty. Gov't*, 481 F. App'x 244, 245 (6th Cir. 2012) (holding that the district court properly disregarded an affidavit in ruling on summary judgment because it failed to comply with Section 1746); *Little v. BP Exploration & Oil Co.*, 265 F.3d 357, 363 n.3 (6th Cir. 2001) (concluding that the trial court properly disregarded the

unsworn statement because it was not given under the penalty of perjury).

Again, Defendants offer no response to Plaintiff's motion directed at Officer Moore's "affidavit." Because it is not a valid affidavit, the Court cannot consider Officer Moore's statement as evidence in support of Defendants' motion for summary judgment.

C. Return of Discovery

On March 18, 2024, Mr. Feagin requested that the discovery he submitted be returned to him, specifically the video evidence (Exhibit G). (ECF No. 64.) The Court **DENIES** this motion as premature. At the conclusion of the case, after the entry of a final non-appealable order, Mr. Feagin may renew this motion. Until then, Exhibit G remains a part of the record and will be maintained as such.

ANALYSIS

Summary judgment is appropriate "if 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). On a motion for summary judgment, "the judge's function is not…to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "The party seeking summary judgment has the initial burden of informing the court of the basis for its motion" and

identifying the portions of the record "which it believes demonstrate the absence of a genuine issue of material fact." *Tokmenko v. MetroHealth Sys.*, 488 F. Supp. 3d 571, 576 (N.D. Ohio 2020) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The non-moving party must then "set forth specific facts showing that there is a genuine issue for trial." *Id.* (citing *Anderson*, 477 U.S. at 250). To determine whether a genuine dispute about material facts exists, it is not the Court's duty to search the record. *See Betkerur v. Aultman Hosp. Ass'n*, 78 F.3d 1079, 1087 (6th Cir. 1996). Instead, the parties must bring those facts to the Court's attention. *Id.*

"When the moving party has carried its burden under Rule 56(c), its opponent must do more than show there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The Court, instead, determines "whether the evidence presents a sufficient disagreement to require submission to a jury" or whether the evidence "is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251–52. In doing so, the Court must view the evidence in the light most favorable to the non-moving party, in this case Mr. Feagin. *Kirilenko-Ison v. Board of Educ. of Danville Indep. Schs.*, 974 F.3d 652, 660 (6th Cir. 2020) (citing *Matsushita*, 475 U.S. at 587).

If a genuine dispute exists, meaning "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," summary judgment is not appropriate. *Tokmenko*, 488 F. Supp

3d at 576 (citing *Anderson*, 477 U.S. at 250). If the evidence, however, "is merely colorable or is not significantly probative," summary judgment for the movant is proper. *Id.* The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Scott v. Harris*, 550 U.S. at 380 (quoting Anderson, 477 U.S. at 247–48).

"Just as a plaintiff may not rely on conclusory allegations to proceed past the pleading stage, so too a plaintiff may not rely on conclusory evidence to proceed past the summary-judgment stage." *Viet v. Le*, 951 F.3d 818, 823 (6th Cir. 2020) (cleaned up). "Conclusory statements unadorned with supporting facts are insufficient to establish a factual dispute that will defeat summary judgment." *Id.* (quoting *Alexander v. CareSource*, 576 F.3d 551, 560 (6th Cir. 2009)).

To the extent that videos in the record show facts so clearly that a reasonable jury could view those facts in only one way, those facts should be viewed "in the light depicted by the videotape." *Scott*, 550 U.S. at 380–81. "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id.* at 380.

I. Section 1983

Section 1983 provides a federal cause of action to a person whose rights "secured by the Constitution"

are violated by an official acting "under color of [State law]." 42 U.S.C. § 1983. In this way, Section "1983 creates a species of tort liability" where State actors violate federal constitutional rights. *Heck v. Humphrey*, 512 U.S. 477, 483 (1994) (citation omitted). "The first inquiry in any § 1983 suit is to isolate the precise constitutional violation" alleged. *Graham v. Connor*, 490 U.S. 386, 394 (1989) (internal quotation marks and citation omitted). "After pinpointing" the constitutional right at issue, "courts still must determine the elements of, and rules associated with, an action seeking damages for its violation." *Manuel v. City of Joliet*, 580 U.S. 357, 370 (2017) (citation omitted). Under Section 1983, "the general 'common law of torts'" bridges the gap between a constitutional right and the elements of a cause of action. *Dibrell v. City of Knoxville*, 984 F.3d 1156, 1160 (6th Cir. 2021) (citation omitted).

Mr. Feagin alleges that his arrest violated the Fourth, Eighth, and Fourteenth Amendments. (ECF No. 1, ¶¶ 1–17, PageID #1–5.) Under the Fourth and Fourteenth Amendments, he contends that the force used during his arrest was unreasonable and excessive. (*Id.*, ¶ 2, PageID #2.) Under the Eighth Amendment, Mr. Feagin claims he was denied adequate medical care. (*Id.*, ¶ 1, PageID #1.)

Officers Moore, Boggs, and Blair and the City of Mansfield move for summary judgment on Mr. Feagin's claims of excessive force and failure to intervene. (ECF No. 46, PageID #259.) They assert that the use of force was "objectively reasonable" (ECF No. 46, PageID #266), that they are entitled to

qualified immunity on these claims (ECF No. 46, PageID #265), and that Defendants enjoy statutory sovereign immunity (ECF No. 46, PageID #278–83). Although Defendants seek summary judgment "as to all of Plaintiff's claims" (ECF No. 46, PageID #259), Defendants' motion did not address the merits of Mr. Feagin's claim of inadequate medical care. Though Mr. Feagin brings that claim under the Eighth Amendment, because he was a pretrial detainee and not an inmate, the law treats it as a Fourteenth Amendment claim. *See, e.g.*, *Trozzi v. Lake Cnty.*, 29 F.4th 745, 752–55 (2022). Because Defendants fail to develop any argument entitling them to judgment as a matter of law on this claim, the Court will not consider it further in this ruling and will schedule it for trial.

I.A. Excessive Force

"The police must act reasonably when seizing a person." *Rudlaff v. Gillispie*, 791 F.3d 638, 641 (6th Cir. 2015) (citing U.S. Const. amends. IV & XIV). Using excessive force is unreasonable. *Id.* "Courts reviewing § 1983 claims alleging excessive force must first consider whether the officer violated the constitution by using excessive force, then decide whether the officer deserves qualified immunity because he did not violate 'clearly established' federal law." *Wysong v. City of Heath*, 260 F. App'x 848, 854 (6th Cir. 2008). "Whether an officer's use of force in effecting an arrest violates the Fourth Amendment turns on 'whether the officer['s] actions are objectively reasonable in light of the facts and circumstances confronting [him], without regard to

[his] underlying intent or motivation.'" *Kent v. Oakland Cnty.*, 810 F.3d 384, 390 (6th Cir. 2016) (quoting *Graham*, 490 U.S. at 397 (1989)).

Careful attention must be paid to "the facts and circumstances of…[the] case…." *Graham*, 490 U.S. at 396 (citation omitted). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* (citation omitted). Police officers "are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396–97.

Ultimately, "[o]fficers may use non-lethal force—such as tasers or pepper spray—if they have an 'objective justification' for doing so." *Palma v. Johns*, 27 F.4th 419, 430 (6th Cir. 2022) (quoting *Gaddis v. Redford Twp.*, 364 F.3d 763, 774 (6th Cir. 2004).) When "assessing objective reasonableness in the typical situation of a law-enforcement officer accused in a civil suit of using excessive force," courts use the three-factor *Graham* test. *Estate of Hill by Hill v. Miracle*, 853 F.3d 306, 312 (6th Cir. 2017). This test examines: (1) "the severity of the crime at issue," (2) "whether the suspect poses an immediate threat to the safety of the officers or others," and (3) "whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396 (1989) (citation omitted).

I.A.1. Taser Use

Taser devices "can be used to either shoot 2 probes out at the target…or in 'stun gun' mode where the taser is directly placed on the body of the target." *Landis v. Baker*, 297 F. App'x 453, 456 n.4 (6th Cir. 2008). The videos of Mr. Feagin's arrest show that Officer Moore used his taser twice at a short distance, but fail to provide other technical information or details about its use.

Under the Fourth Amendment, the "reasonableness of an officer's use of a taser turns on active resistance." *Kent*, 810 F.3d at 392. "When a suspect actively resists arrest, the police can use a taser…to subdue him; but when a suspect does not resist, or has stopped resisting, they cannot." *Rudlaff*, 791 F.3d at 642. "It is clearly established in this Circuit that 'the use of a Taser on a non-resistant suspect' constitutes excessive force." *Kent*, 810 F.3d at 396 (quoting *Kijowski v. City of Niles*, 372 F. App'x 595, 601 (6th Cir. 2010)). "Absent some compelling justification—such as the potential escape of a dangerous criminal or the threat of immediate harm—the use of such a weapon on a non-resistant person is unreasonable." *Kijowski*, 372 F. App'x at 600 (citation omitted).

No evidence in the record suggests a concern for potential escape or immediate harm. After Mr. Feagin parked at the apartment complex, officers blocked his car, he made no effort to flee, and the videos show no threat of immediate harm to the officers, Mr. Feagin, or any other person during his

arrest. Nor does the affidavit of Officer Boggs point to these rationales to justify the use of tasers. Therefore, under the law of this Circuit, the analysis focuses on resistance to arrest. "If a suspect actively resists arrest and refuses to be handcuffed, officers do not violate the Fourth Amendment by using a taser to subdue him." *Hagans v. Franklin Cnty. Sheriff's Off.*, 695 F.3d 505, 509 (6th Cir. 2012). Where Sixth Circuit has "found excessive force, the suspects were compliant or had stopped resisting." *Id*.

One undisputed fact that does not bear on the analysis, in the Court's view, is the failure of the officers to give Mr. Feagin a warning that he would be tased. "In determining whether officers used excessive force, courts have placed great weight on officers' failure to warn a suspect before deploying a taser." *Gradisher v. City of Akron*, 794 F.3d 574, 585 (6th Cir. 2015). On the facts of this case, removing Mr. Feagin from his car and cuffing him happened in a matter of seconds, not enough time to provide a warning, and in circumstances that make a warning impractical.

Based on the video evidence of Mr. Feagin's removal from his vehicle and arrest, the events fall in the gray area between active and passive resistance. Certainly, Mr. Feagin did not comply with the officers. Construing the video and record in favor of Mr. Feagin on summary judgment, as the Court must, Officer Moore, with the help of Officer Boggs, hauled Mr. Feagin out of his car as he reached back toward the inside of his vehicle. After

extricating him from his vehicle, they secured both of Mr. Feagin's arms behind his back almost immediately. (Moore's Dashcam at 1:34–1:44; Boggs' Dashcam at 3:37–4:00.) Officer Boggs helped hold Mr. Feagin's left arm in place while Officer Moore held his right arm.

Whether these facts show active resistance—justifying the use of force as the officers claim—or run-of-the mill noncompliance—making the use of force unnecessary and constitutionally excessive—turns on how a finder of fact assesses these events following a significant traffic violation. Based on the video evidence and the record, a jury would be justified in finding that Mr. Feagin was largely under control "or had stopped resisting" by the time Officer Moore used his taser. *See Hagans*, 695 F.3d at 509. By the same token, a jury could review the facts and the testimony of the officers and find that Mr. Feagin offered sufficient resistance to the police to necessitate the use of force. Summary judgment does not permit the Court to wade into this factual dispute, which is the province of the jury. Put another way, the Court cannot say as a matter of law that Officer Moore acted objectively reasonable in using his taser on Mr. Feagin.

I.A.2. Pepper Spray

"[T]here is a very limited class of circumstances when the use of pepper spray is proper, including where a detainee is unsecured, acting violently, and posing a threat to himself or others." *Cabaniss v. City of Riverside*, 231 F. App'x 407, 413 (6th Cir.

2007). Where a suspect "surrenders, is secured, and is not acting violently, and there is no threat to the officers or anyone else," the use of pepper spray constitutes excessive force. *Champion v. Outlok Nashville, Inc.*, 380 F.3d 893, 903 (6th Cir. 2004) (quoting *Vinyard v. Wilson*, 311 F.3d 1340, 1348 (11th Cir. 2002)).

Prior decisions of the Sixth Circuit illustrate application of the principles on specific facts. For example, the use of pepper spray was reasonable where officers feared than an arrestee, armed with a knife, was going to flee. *Gaddis v. Redford Twp.*, 364 F.3d 763, 774 (6th Cir. 2004). Using pepper spray on a handcuffed detainee in the backseat of a police car whose ankles were also bound with a hobble device violated the suspect's constitutional rights. *Champion*, 380 F.3d at 901, 903–04. But the use of pepper spray did not amount to excessive force where the plaintiff was unsecured in the backseat of a cruiser, suicidal, and "beating his head against" the plexiglass. *Cabiness*, 231 F. App'x at 413.

Here, the record shows Mr. Feagin repeatedly and forcefully kicking the window of the back of the police cruiser while handcuffed. (*See* Moore's Dashcam at 4:45–7:20.) As Mr. Feagin kicked the windows, Officer Moore asked Officer Blair and Officer Boggs for pepper spray. (Moore's Dashcam at 5:09–5:10.) Officer Moore grabbed it out of Officer Blair's holster himself. (Moore's Dashcam at 5:10–5:17; Boggs' Dashcam at 7:10–7:17.) Then, Officer Moore directed Mr. Feagin to stop kicking the window, saying, "You got to stop hitting your head or

you're getting pepper sprayed. Kick my window, you're getting pepper sprayed." (Moore's Rearcam at 6:55-7:02: Moore's Dashcam at 6:55–7:02; Boggs' Dashcam at 8:54–9:01.) Within seconds, and with Mr. Feagin again kicking the window, Officer Moore rolled down the window, deployed pepper spray on Mr. Feagin, then closed the window. (Boggs' Dashcam at 9:07–9:18; Moore's Rearcam at 6:55–7:20.)

Officer Moore's direction to Mr. Feagin to stop hitting his head on the cruiser's window would appear to bring this case squarely within the narrow circumstances in which the use of pepper spray does not constitute excessive force—preventing harm to the suspect himself. However, the record contains no evidence that Mr. Feagin was actually hitting his head against the window. Nonetheless, as a matter of law, Officer Moore's use of pepper spray was reasonable and not excessive on the facts and circumstances presented. Mr. Feagin disregarded multiple instructions to stop kicking the window—a violent act that threatened to interfere with the officers' efforts to arrest Mr. Feagin and safely transport him. Therefore, the Court **GRANTS** Defendants' motion for summary judgment on the excessive use of force claim to the extent it involves the use of pepper spray.

I.B. Failure to Intervene

Mr. Feagin also brings failure to intervene claims against Officers Boggs and Blair. To find that an officer liable for excessive force, Mr. Feagin must

prove that the officer "(1) actively participated in the use of excessive force, (2) supervised the officer who used excessive force, or (3) owed the victim a duty of protection against the use of excessive force." *Turner v. Scott*, 119 F.3d 425, 429 (6th Cir. 1997) (citing *Durham v. Nu'Man*, 97 F.3d 862, 866 (6th Cir. 1996)). "[A] police officer who fails to act to prevent the use of excessive force may be held liable when (1) the officer observed or had reason to know that excessive force would be or was being used, and (2) the officer had both the opportunity and the means to prevent the harm from occurring." *Id.* (citing *Anderson v. Branon*, 17 F.3d 552, 557 (2d Cir. 1994)).

When Officer Moore tased Mr. Feagin, Officer Boggs was holding Mr. Feagin's left arm in an effort to restrain him. Even if a jury finds Officer Moore's use of the taser excessive, the undisputed record depicted on the video confirms that Officer Boggs did not have the opportunity or means to prevent Officer Moore from using his taser. Nothing in the record suggests that Officer Boggs had reason to know that Officer Moore would use his taser. Even if he did, Officer Boggs lacked the means to prevent him from doing so without releasing Mr. Feagin's arm and making his arrest more dangerous for all involved. As for Officer Blair, the videos confirm that he was not close enough to intervene to stop the use of the taser, even if its use was excessive. Therefore, he too did not have the opportunity to prevent the excessive use of force. For these reasons, the Court **GRANTS** Defendants' motion for summary judgment on Plaintiff's failure-to-intervene claim.

I.C. Qualified Immunity

Officer Moore asserts that he enjoys qualified immunity against Mr. Feagin's excessive force claim. Qualified immunity protects public officials against lawsuits for civil damages where their conduct does not violate clearly established constitutional rights. *Martin v. City of Broadview Heights*, 712 F.3d 951, 957 (6th Cir. 2013) (quotation omitted). In evaluating a claim of qualified immunity, the Sixth Circuit directs a district court to undertake two inquiries, in either order. The Court must determine whether "the facts alleged make out a violation of a constitutional right." *Id*. Also, the Court asks if the right at issue was clearly established at the time "such that a reasonable officer would have known that his conduct violated it." *Id*. (citation omitted). The burden to show that qualified immunity does not exist rests on the plaintiff. *Chappell*, 585 F.3d at 907 (citation omitted). To meet this burden, he must satisfy both steps of the test. *Martin*, 712 F.3d at 957 (citing *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)).

I.C.1. Clearly Established Right

The Court proceeds in reverse order and addresses first whether Mr. Feagin's right to be free from excessive force through Officer Moore's use of a taser was clearly established as of July 2022. It is clearly established that "police must act reasonably when seizing a person." *See Rudlaff*, 791 F.3d at 641 (citing U.S. Const. amends. IV & XIV). More specifically, when it comes to the use of a taser, for

at least a decade the Sixth Circuit has held that a person has "a clearly established constitutional right not to be tasered when he was at most offering passive resistance to an officer." *Goodwin v. City of Painesville*, 781 F.3d 314, 328 (6th Cir. 2015).

Qualified immunity turns on "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Griffith v. Coburn*, 473 F.3d 650, 660 (6th Cir. 2007). On that score, the law of this Circuit leaves no doubt. If a jury finds that Mr. Feagin offered, at most, passive resistance to the officers, then he had a clearly established constitutional right that Officer Moore violated. Further, as reflected in the language of Officer Boggs' affidavit (*see* ECF No. 46-1, ¶ 10, PageID #295), the record demonstrates that the officers on the scene knew as much.

Defendants focus, in part, on "Mr. Feagin [having] no clearly established constitutional right to threaten the police, to assault the police, to expose the police to danger," or "to attempt to destroy a police cruiser by kicking out the back window or otherwise attempting to harm himself in order to disrupt the lawful search of his vehicle during the course of a lawful traffic stop." (ECF No. 46, PageID #277.) But this strawman seeks to divert attention from the proper legal question. Instead, the constitutional inquiry focuses on whether Mr. Feagin had a clearly established right to be free from the use of excessive force. That right was clearly established long before the events at issue.

I.C.2. Constitutional Violation

As discussed above, when "assessing objective reasonableness in the typical situation of a law-enforcement officer accused in a civil suit of using excessive force," courts use the three-factor *Graham* test. *Estate of Hill*, 853 F.3d at 312. These factors are: (1) "the severity of the crime at issue," (2) "whether the suspect poses an immediate threat to the safety of the officers or others," and (3) "whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. In support of its motion, Defendants argue that the *Graham* factors "all weigh in favor of summary judgment for Defendants." (ECF No. 46, PageID #272.) Further, they maintain that their actions were a direct result of and in proportion to Mr. Feagin's criminal conduct and that the "reasonableness of [their] conduct…cannot be placed beyond debate from the standpoint of the application of qualified immunity." (ECF No. 46, PageID #276.)

On summary judgment, deciding qualified immunity is not proper where, as here, a genuine disputes of material fact exist. *See Gillispie v. Miami Twp.*, 18 F.4th 909, 915–19 (6th Cir. 2021). That is, because finding a violation of Mr. Feagin's clearly established Fourth Amendment right to be free from excessive force turns on disputed material facts, qualified immunity is not proper at this stage. *See id*. The disputed facts call into question the availability of qualified immunity under the Graham factors. Application of those factors involves disputed facts that a jury must first decide. Therefore,

Defendants' qualified arguments are premature. *See id*.

* * *

Defendants' motion argues that "[w]hen the question is unclear as to whether an officer's use of force was reasonable or excessive, the proper course is to grant summary judgment to the officers, even if the court would hold the officers' conduct unconstitutional in hindsight." (ECF No. 46, PageID #266 (citations omitted).) However, Defendants misrepresent the case they quote, *Rudlaff v. Gillispie*, 791 F.3d 638 (6th Cir. 2015). What the Sixth Circuit held was that district courts should grant summary judgment where facts are not in dispute and where government action was within "the hazy border between excessive and acceptable force.'" *Id*. at 644 (quotation omitted). This is not a case like *Rudlaff*, in which undisputed facts created a situation where it was unclear whether the force "fit cleanly within" case law. *Id*; *see also id*. at 642 (finding "no genuine dispute of fact" regarding active resistance of arrest). In this case, the dispute is not whether the facts fit cleanly within case law, but instead whether the disputed facts show excessive or acceptable uses of force.

Accordingly, the Court **DENIES** Defendants' motion for summary judgment regarding Officer Moore's use of force regarding the taser incidents and **GRANTS** the balance of Defendants' motion.

II. State-Law Claim

Mr. Feagin's complaint appears to assert all but one claim under Section 1983. (*See* ECF No. 1, ¶¶ 14–17, PageID #4–5.) He asserts one claim against Officer Moore under State law for intentional infliction of emotional distress relating to his use of pepper spray when Mr. Feagin was in the back of the cruiser. (*Id.*) Also, he names the Mansfield Police Department as a Defendant in this case. The Court easily dispenses with these loose ends.

First, to prove a claim for intentional infliction of emotional distress, Ohio requires a plaintiff to show "(1) that the defendant intended to cause the plaintiff serious emotional distress, (2) that the defendant's conduct was extreme and outrageous, and (3) that the defendant's conduct was the proximate cause of plaintiff's serious emotional distress." *See Phung v. Waste Mgt. Inc.*, 71 Ohio St. 3d 408, 410, 1994-Ohio-389, 644 N.E.2d 286, 289 (citation omitted). Ohio employs a reasonable person standard. That is, the emotional distress suffered by the plaintiff must be of such a nature that "no reasonable [person] could be expected to endure it." *Pyle v. Pyle*, 11 Ohio App. 3d 31, 34, 463 N.E.2d 98, 103 (8th Dist. 1983) (quoting Restatement (Second) of Torts § 46 cmt. j (1965)). The undisputed video evidence precludes a finding by a reasonable finder of fact that Officer Moore intended to cause serious emotional distress or that the officer's conduct was extreme and outrageous. To the contrary, the video footage shows that Officer Moore sought to ensure

reasonable compliance from Mr. Feagin to transport him safely. In any event, Mr. Feagin presents no evidence to support a finding of serious emotional distress. For these reasons, Defendants are entitled to a summary judgment on this claim.

Second, to the extent Mr. Feagin asserts any claim against the Mansfield Police Department, any such claim suffers from a fatal defect. It is well established that there is no *respondeat superior* liability under Section 1983. That is, an employer cannot be held responsible for the acts of a police officer only where an official policy or custom causes the alleged constitutional violation. *Johnson v. Hardin Cnty.*, 908 F.2d 1280, 1285 (6th Cir. 1990) (citing *Monell v. Department of Social Services*, 436 U.S. 658, 690–91 (1978)). In other words, the entity can only be liable "through its deliberate conduct," that made it "the 'moving force' behind the injury alleged." *Board of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 404–05 (1997). Put simply, each Defendant must have "intentionally" deprived the plaintiff of a federally protected right. *Id.* But Plaintiff points to no evidence in the record that the Mansfield Police Department itself caused the violations of his rights of which he complains.

CONCLUSION

For the foregoing reasons, the Court **GRANTS IN PART AND DENIES IN PART** Defendants' motion for summary judgment. After the Court's ruling, what remains for trial are two claims: (1) Plaintiff's claim of excessive force under the

Fourth Amendment against Officer Moore based on his use of a taser on Mr. Feagin; and (2) Plaintiff's claim under the Fourteenth Amendment that the three officers failed to attend to his legitimate medical needs after he was tased and pepper sprayed. By separate order, the Court will set this case for trial.

SO ORDERED.

Dated: July 15, 2024

/s/ J. Philip Calabrese
J. Philip Calabrese
United States District Judge
Northern District of Ohio

APPENDIX C

No. 24-3710

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ULYSSES LEE FEAGIN,

Plaintiff-Appellee,

v. O R D E R

MANSFIELD POLICE DEPARTMENT; JORDAN MOORE; MARK BOGGS; CLAY BLAIR,

Defendants-Appellants.

BEFORE: CLAY, THAPAR, and READLER, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Kelly L. Stephens, Clerk