No. 21-16437

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID GETZEN,

Plaintiff-Appellee,

v.

J. LONG, et al.

Defendants-Appellants.

On Appeal from the United States District Court for the District of Arizona, Case No. 3:18-cv-08093-SRB-DMF

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INTRODUCTION

Plaintiff-Appellee David Getzen was sitting alone on the bathroom floor in his apartment when Defendant-Appellant Deputy Jeff Long electrocuted him with a Taser in dart mode, pepper sprayed him in the face, directly applied the Taser to his leg, and then pepper sprayed him in the face again. At some point during this string of attacks, Mr. Getzen defecated himself. Deputy Long then dragged Mr. Getzen out of the bathroom by his legs, causing his head to strike the door and sustain a laceration that required medical attention.

Why did Deputy Long use such force? His own statements provide the answer: he was not satisfied with Mr. Getzen's response to contradictory verbal instructions that Detective Long and his partner issued without warning that failure to comply would result in electrocution and pepper spray. It is undisputed that at the time Deputy Long found him, Mr. Getzen was unarmed, was not suspected of any serious crime, and remained seated with his hands behind his neck until Deputy Long began to electrocute him. Indeed, Deputy Long concedes that Mr. Getzen remained stationary and that the only words Mr. Getzen spoke throughout the entire encounter were a "calm[]" request that Deputy Long stop tasing him after getting tased twice but before getting pepper sprayed a second time. ER-035 ¶ 48.

Mr. Getzen filed a *pro se* suit, alleging that Deputy Long violated his right to be free from excessive force throughout their encounter. Deputy Long filed a motion for summary judgment, which the District Court denied. Relevant to this appeal, the District Court conducted a detailed analysis of the facts under this Court's Fourth Amendment precedent and found that every factor used to determine whether force was excessive weighed in Mr. Getzen's favor. The District Court then denied Deputy Long qualified immunity, pointing to an extensive line of authority that clearly established the unlawfulness of using non-trivial force on an individual who was, at most, engaged in passive resistance.

Deputy Long seeks interlocutory relief of that order. But he identifies no error in the District Court's analysis of the *Graham* factors; rather, he simply raises the same arguments—some verbatim—he made to the District Court. And in asserting his entitlement to qualified immunity, Deputy Long ignores unambiguous language from this Court's precedent clearly establishing that officers violate the Fourth Amendment when they use significant force on a passively noncompliant subject who poses no immediate threat. The District Court's well-reasoned opinion should be affirmed in all respects; any officer should have known on August 2, 2016, that the repeated use of a Taser and pepper spray on a nonviolent individual who was, at most, passively uncooperative violated the Fourth Amendment.

COUNTERTSTATEMENT OF JURISDICTION

The District Court exercised jurisdiction over Mr. Getzen's Fourth Amendment excessive force claim pursuant to 28 U.S.C. § 1331. In an order dated August 9, 2021, the District Court denied Deputy Long's motion for summary judgment, which included a denial of qualified immunity. Deputy Long timely filed a notice of appeal on September 1, 2021, seeking interlocutory review of the District Court's order.

This Court has jurisdiction under the collateral order doctrine, though the scope of its review is "limited to resolving a defendant's 'purely legal . . . contention that [their] conduct did not violate the Constitution and, in any event, did not violate clearly established law.'" *Est. of Anderson v. Marsh*, 985 F.3d 726, 731 (9th Cir. 2021) (citation omitted). This Court lacks jurisdiction to entertain an interlocutory appeal "where the district court denies summary judgment based on qualified immunity because material facts remain in dispute," *Thomas v. Gomez*, 143 F.3d 1246, 1248 (9th Cir. 1998), and must assume all factual disputes are resolved, and all reasonable inferences made, in Mr. Getzen's favor, *Marsh*, 985 F.3d at 731.

STATEMENT OF ISSUES PRESENTED

1. Whether Deputy Long violated the Fourth Amendment when he twice shot Mr. Getzen with a Taser and twice pepper sprayed him in the face because

Mr. Getzen remained seated after being commanded to stand up and show his hands or lie on his stomach.

2. Whether it was clearly established as of August 2, 2016, that repeatedly using a Taser and pepper spray on an unarmed, seated individual who is neither actively resisting nor evading arrest violates the Fourth Amendment.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND[1]

David Getzen and Terry Kampfe[2] shared an apartment in Cornville, Arizona, and Mr. Getzen contributed to the rent. ER-079; ER-028. On the evening of August 2, 2016, the two had an argument. ER-079. At around 7 p.m., Ms. Kampfe exited their apartment and went to the local fire department across the street. *Id.* She was intoxicated. ER-027. Soon after, Deputy Jeff Long of the Yavapai County Sheriff's Office was sent to the fire department for an agency assist call relating to Ms. Kampfe. ER-032 ¶¶ 3. He spoke with a firefighter and learned that Ms.

[1] Because this Court must "construe the facts in the light most favorable to the plaintiff," *Orn v. City of Tacoma*, 949 F.3d 1167, 1171 (9th Cir. 2020), all disputed facts are resolved in Mr. Getzen's favor. In particular, where Deputy Long's own submissions are inconsistent with each other, this Court must consider the version of events that is most favorable to Mr. Getzen. *See George v. Morris*, 736 F.3d 829, 835 (9th Cir. 2013); *see also Galbraith v. Cnty. of Santa Clara*, 231 F. App'x 576, 577 (9th Cir. 2007).

[2] Ms. Kampfe is referred to as both "Terry Barrett" and "Terry Barrett Kampfe" in filings before the District Court. For the sake of clarity and consistency, Mr. Getzen refers to her as "Ms. Kampfe" throughout this brief.

Kampfe had contacted the fire department to report a man who would not leave her apartment. *Id*. ¶ 4. The firefighter relayed an allegation from Ms. Kampfe that the man in the apartment had taken her cell phone and removed its battery. *Id*. The firefighter provided no further information, and Ms. Kampfe had wandered away from the area. ER-042.

Some time thereafter, Ms. Kampfe returned to the fire department, where she spoke with Deputy Long. Deputy Long noticed a strong odor of alcohol coming from her breath, and Ms. Kampfe told Deputy Long that she had been drinking ER-033 ¶¶ 13–14, ER-042. Because of Ms. Kampfe's condition, Deputy Long had difficulty communicating with her and could not get much information. ER-033 ¶ 15. Ms. Kampfe did, however, report that she had known Mr. Getzen for several months, and that Mr. Getzen was "currently drunk and would not leave her apartment after she had requested him to do so." *Id.* ¶¶ 11–12, ER-042. Ms. Kampfe also reported that Mr. Getzen had "verbally abused" her "by calling her names, yelling, and cursing," and that he took her keys and cell phone. ER-033 ¶ 16, ER-046. She also reported that Mr. Getzen removed the battery from her cell phone. ER-033 ¶ 16. She later confirmed, however, that the situation never "became physical," and that Mr. Getzen did not attempt to prevent her from leaving. ER-046. When asked, Ms. Kampfe stated that Mr. Getzen was not armed

with any weapons. ER-033 ¶¶ 17–18. She said that she did not know if he would be violent towards law enforcement. *Id*. ¶ 18.

Deputy Long then crossed the street to Mr. Getzen's and Ms. Kampfe's apartment and knocked on the door several times. ER-034 ¶ 20. Mr. Getzen was inside the apartment, which is divided into two separate floors, and did not answer the door. ER-079; ER-034 ¶¶ 20, 30. Deputy Long then called Ms. Kampfe over and asked her to unlock the front door of the apartment. ER-034 ¶ 21. Deputy Long "called into" the apartment and announced that he was with the Sheriff's Office and "advised [Mr.] Getzen to exit if he was inside." *Id*. ¶ 23. Deputy Long "received no answer." *Id*. ¶ 24. Deputy Long then "stated" that he would be searching the apartment soon and that Mr. Getzen could be pepper sprayed or tased if Mr. Getzen were hiding. ER-43. Although Deputy Long's affidavit indicates that this statement included a reference a concern about officer safety, the police report he initially prepared makes no mention of any reference to officer safety. *Compare* ER-034 ¶ 25, *with* ER-043. Deputy Long was then joined by Deputy Hearl, also from the Yavapai County Sherriff's Office. ER-034 ¶ 26. Deputies Long and Hearl entered the apartment and proceeded to clear the downstairs portion of the apartment, as Deputy Long "continuously repeated 'Sheriff's Office, if you are inside you need to come out now.'" *Id*. ¶ 29. The record does not indicate how loudly Deputy Long made these statements, or whether such statements would

have been audible in the upstairs portion of the apartment, which contained a "studio type room with a separate bathroom." ER-034 ¶ 30; ER-079. And unlike his statements made from outside the apartment, Deputy Long does not report warning that a Taser or pepper spray could be used. ER-034 ¶¶ 29, 31; ER-043.

Eventually, Deputies Long and Hearl made their way upstairs, "stat[ing]," as they ascended the stairs, that they were police and asking anyone there to show their hands. ER-034 ¶ 31. They then cleared the room outside the bathroom and "advised [Mr.] Getzen to exit if he was inside." *Id*. ¶¶ 32–33. Again, the record lacks any indication that these statements included a warning about the possibility that Tasers or pepper spray would be used. *Id.*; ER-043; ER-047. Deputy Hearl opened the bathroom door without knocking and entered the room with his weapon drawn. ER-035 ¶¶ 34, 37. Mr. Getzen was sitting on the bathroom floor off to the right of the doorway, facing Deputy Hearl with his back to the wall and both his hands behind his neck. ER-047, ER-035 ¶ 40. Neither Deputy Hearl nor Deputy Long reported observing any weapons or other dangerous objects in the bathroom. *See generally* ER-043, ER-047.

Deputy Hearl gave Mr. Getzen "verbal commands to show his hands and to stand up." ER-035 ¶ 37. Deputy Hearl also gave Mr. Getzen commands to "get on his belly." ER-047; *accord* ER-043. Mr. Getzen was nonresponsive. ER-047. Deputy Long reported that he "noticed the suspect was not following [these]

commands," ER-035 ¶ 39, though he also stated that he "was unable to see anyone" from where he stood, *id.* ¶ 35. Deputy Long then drew his Taser and entered the bathroom, where he finally saw Mr. Getzen sitting on the floor, facing the officers, with his back against the wall. *Id*. ¶ 40. Mr. Getzen provided sworn testimony that there was "no conflict" between him and Deputy Long before the use of force and no "violent act on [his] part—no resisting." ER-079. For his part, Deputy Long says only that Mr. Getzen was noncompliant with commands to stand up and show his hands. ER-035 ¶¶ 37, 39, 41.

Although Deputy Long's incident report, his affidavit, and Deputy Hearl's incident report differ in describing what happened next, they all agree on some key points. There is no dispute that Deputy Long fired his Taser in probe mode, and that both prongs initially made contact with Mr. Getzen. *Id*. ¶¶ 41–42. One probe appears to have come off; Deputy Long states that "it looked as though [Mr. Getzen] had removed one of the probes," *id.* ¶ 43, though neither deputy observed Mr. Getzen remove the probe or otherwise move his hands. ER-043; ER-047. Deputy Long did not notice any immediate effect of the Taser on Mr. Getzen. ER-035 ¶ 43, ER-043. It is also undisputed that Deputy Long used his Taser once more, this time in drive-stun mode, and applied pepper spray to Mr. Getzen's face at least once. ER-043; ER-035 ¶¶ 44–47; ER-047. All three accounts are silent on how much time elapsed between Deputy Hearl's issuance of commands in the

bathroom and Deputy Long's decision to fire his Taser. Neither deputy reported seeing anything in Mr. Getzen's hands or reported seeing Mr. Getzen's hands move at any point in the encounter. And neither deputy reported any aggression by Mr. Getzen. Indeed, the record indicates only one statement from Mr. Getzen throughout the entire encounter—a "calm[]" request that Deputy Long stop tasing him. ER-035 ¶ 48.

The accounts differ in other meaningful respects. Deputy Long's incident report, for example, states that Deputy Long issued commands for Mr. Getzen to lie face-down on the ground before first firing his Taser. ER-043. This command is not referenced in Deputy Hearl's report, which does make reference to the statements made by Deputy Long on the ground floor of the apartment. ER-047. Deputy Long's affidavit also makes no reference to a command he issued before using the Taser. ER-035 ¶¶ 40–42. Neither Deputy Long's nor Deputy Hearl's reports indicate that any additional commands or warnings were given after Deputy Long first used his Taser. ER-043 (Deputy Long stating that after tasing Mr. Getzen, Deputy Long "pepper sprayed [Mr. Getzen] in the face and then removed [the Taser's] cartridge and drive stunned [Mr. Getzen] in the back of the thigh and calf giving him commands to get his hands behind his back"); ER-047 (Deputy Hearl noting that after first Tasing "appeared to be ineffective," Deputy Long "attempted to drive stun [Mr. Getzen]" and then "pepper sprayed [Mr. Getzen]").

Deputy Long's affidavit, however, states that Deputy Long continued to issue commands and warnings between each application of force. ER-035 ¶¶ 44–47. Finally, the incident reports prepared by Deputy Long and Deputy Hearl indicate only three total applications of force—two uses of the Taser and one discharge of pepper spray. ER-043; ER-047. But Deputy Long's affidavit admits a fourth application of force—a second use of pepper spray after Mr. Getzen "calmly asked" for Deputy Long to stop tasing him. ER-035 ¶¶ 48–49.

After Deputy Long tased and pepper-sprayed Mr. Getzen repeatedly, both deputies noticed that Mr. Getzen had defecated his pants. ER-036 ¶ 53. Deputy Long used his radio to report the use of force and requested medical assistance for Mr. Getzen. *Id.* ¶ 51. Mr. Getzen lay on his chest motionless and told Deputy Long that he was unable to stand up. *Id*. ¶ 52. Despite noticing that Mr. Getzen had soiled himself, and despite the fact that EMS was heading to the scene, Deputy Long dragged Mr. Getzen out of the bathroom by his feet, and in doing so caused Mr. Getzen's face to strike the door on exit; Mr. Getzen began bleeding from his face. *Id*. ¶¶ 54–55.

Emergency medical personnel brought Mr. Getzen to the Verde Valley Medical Center, where Mr. Getzen received medical care. ER-080. At the hospital, Mr. Getzen reported to Deputy Long multiple times that he did not understand what was going on and did not understand what he was doing at the hospital. ER-

036 ¶¶ 60-65. Mr. Getzen was in the ER for about three hours. ER-080. He suffered breathing problems and 16 hours of blindness from the pepper spray. ER-078, ER-080. He also suffered a heart injury from the use of the Taser. *Id*. Mr. Getzen was not charged with resisting arrest, assault, or any other violent crime; rather, he was charged with disorderly conduct and preventing the use of a telephone during an emergency, both stemming from his argument with Ms. Kampfe.[3] ER-027; ER-042.

II. PROCEDURAL BACKGROUND

Mr. Getzen, proceeding *pro se*, filed a verified complaint on May 2, 2018, which he thrice amended. In his Third Amended Complaint, sworn to under penalty of perjury, Mr. Getzen sought damages from Deputy Long for the "wanton inflictions [of force]" during the arrest on August 2, 2016.[4] ER-078. Under 28 U.S.C. § 1915(A), the United States District Court for the District of Arizona screened the case and determined that Mr. Getzen stated a Fourth Amendment excessive force claim seeking damages. ER-106.

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[3] Although Deputy Long's submissions make reference to a handful of other misdemeanors, *see* ER-040, Deputy Long does not explain whether those offenses were also charged and, if so, what their dispositions were. And in the investigation summary prepared by Deputy Long, those other charges are not listed or otherwise referenced. The District Court thus treated the only two allegations as disorderly conduct and preventing the use of a telephone during an emergency. ER-010.

[4] Mr. Getzen initially brought additional claims against officers and personnel he encountered that night at the Sheriff's Office and holding facility. Those claims were dismissed by the District Court and are not before this Court.

On April 26, 2021, Deputy Long sought summary judgment, arguing that his successive uses of a Taser and pepper spray were the "least levels of force" necessary to bring Mr. Getzen into compliance in the bathroom. ER-053; ER-060. He argued that he should be entitled to qualified immunity since the use of force was objectively reasonable and since there was no case law that would serve to clearly establish his behavior as a constitutional violation. *See* ER-061. In support of his motion, Deputy Long relied on two documents: (1) his own affidavit, ER-031–ER-038; and (2) the Yavapai County Sheriff's Office Incident Report, prepared a few hours after the encounter and containing statements from Deputy Long, Deputy Hearl, and a third deputy sheriff who arrived later, ER-039–ER-048. On May 7, 2021, Mr. Getzen filed an opposition to the motion, and cross-moved for summary judgment. ER-024–ER-030.

On August 9, 2021, the District Court denied both motions.[5] ER-003. In relevant part, the District Court concluded that Deputy Long was not entitled to summary judgment or qualified immunity. ER-018. The District Court determined that, crediting Mr. Getzen's evidence and drawing all inferences in his favor, a reasonable jury could find that each factor under *Graham v. Connor*, 490 U.S. 386, 395 (1989), weighed in Mr. Getzen's favor, rendering Deputy Long's use of force

[5] Mr. Getzen's motion was summarily dismissed as procedurally deficient because it was unaccompanied by a separate statement of facts or legal standards. ER-04–ER-05. That ruling is not before this Court.

excessive. ER-009–ER-013. In particular, the District Court determined that there was "no evidence that [Mr. Getzen] had a weapon or verbally or physically interacted with the deputies," "no evidence of what [Mr. Getzen] was doing once [the deputies] encountered him that constituted an immediate threat to their safety," and no record support "that [Mr. Getzen] was either actively resisting or fleeing to avoid arrest." ER-011–ER-013. The District Court went on to hold that Ninth Circuit case law clearly prohibited the use of non-trivial force, such as a Taser and pepper spray, on an individual who was at most passively resisting an officer's commands. ER 016–ER-018. The District Court pointed to several cases, dating back to 2001, establishing a constitutional violation where intermediate force was used to subdue an individual that was not engaging in active resistance. *Id*.

On September 1, 2021, Deputy Long filed a notice of interlocutory appeal. ER-098.

SUMMARY OF ARGUMENT

Viewed in the light most favorable to Mr. Getzen, the evidence would permit a jury to find that Deputy Long twice electrocuted Mr. Getzen with a Taser and twice deployed pepper spray directly into Mr. Getzen's face—all because Mr. Getzen remained seated on the floor, his hands behind his neck, after being given conflicting commands to stand up or get on his stomach. And Deputy Long did so

without attempting the readily available alternative of lifting and handcuffing Mr. Getzen *without* tasing or pepper-spraying him, and without any indication that Mr. Getzen had heard the sole warning—issued from outside of the apartment's first floor, while Mr. Getzen was found in the bathroom on the apartment's second floor—that such force could be used.

Deputy Long does not challenge the District Court's determinations that this use of force was significant, and that Deputy Long ignored reasonable alternatives, such as lifting and handcuffing Mr. Getzen. In fact, in arguing that his use of significant force complied with the Fourth Amendment, Deputy Long simply parrots the exact same arguments he made to the District Court—and which that court carefully considered and properly rejected. This Court should affirm the District Court's determination that a reasonable jury could find Deputy Long's conduct violated the Fourth Amendment.

Deputy Long next suggests that, even if his repeated use of a Taser and pepper spray on a seated, passively noncompliant individual violated the Fourth Amendment, reasonable officers could have believed such conduct lawful. But that argument ignores decades of authority from this Court clearly establishing the right of individuals who are not actively resisting arrest to be free from significant force of any kind. Moreover, it ignores controlling authority specifically discussing Tasers and pepper spray, the precise type of force applied here. Taken together,

both lines of authority made it clear as of August 2, 2016, that twice Tasing and twice pepper spraying an individual who presented no danger to anyone and simply refused to comply with an officer's directive violates the Fourth Amendment.

The judgment of the District Court should be affirmed.

ARGUMENT

This Court employs a two-part test to determine whether an officer is entitled to qualified immunity, first deciding whether the officer violated a plaintiff's constitutional rights and, if so, determining whether the constitutional right was clearly established at the time of the events in question. *See Mattos v. Agarano*, 661 F.3d 433, 440 (9th Cir. 2011) (en banc). In conducting this analysis on an interlocutory appeal from the denial of summary judgment, this Court "view[s] the evidence in the light most favorable to the plaintiff." *Martinez v. Stanford*, 323 F.3d 1178, 1184 (9th Cir. 2003).

Here, that evidence establishes that Deputy Long twice shot Mr. Getzen with a Taser and twice pepper-sprayed him in the face; that Mr. Getzen was suspected of, at most, two misdemeanors that were "not extremely serious," ER-010; that Mr. Getzen was unarmed, was not violent or aggressive, and posed no immediate threat to anyone; and that Mr. Getzen remained seated with his back against a wall and his hands behind his neck throughout the encounter. Unambiguous authority from

this Circuit makes clear that Deputy Long's use of force was significant, and not justified by any countervailing interests, rendering Deputy Long's use of significant force excessive.

Deputy Long is not entitled to qualified immunity for his misconduct. Since at least 2001, this Court has repeatedly denied qualified immunity to police officers who use significant force against individuals who are not actively resisting arrest—including, on numerous occasions, to officers who tase or pepper spray passively resisting arrestees.

I. DEPUTY LONG'S USE OF A TASER AND PEPPER SPRAY VIOLATED MR. GETZEN'S FOURTH AMENDMENT RIGHTS.

In analyzing Fourth Amendment excessive force claims, this Court balances "the 'nature and quality of the intrusion' against the 'countervailing governmental interests at stake.'" *Green v. City and Cnty. of S.F.*, 751 F.3d 1039, 1049 (9th Cir. 2014) (quoting *Graham*, 490 U.S. at 396). This Court "first assess[es] the quantum of forced used" against Mr. Getzen, then balances that against "the governmental interests at stake . . . ." *Davis v. City of Las Vegas*, 478 F.3d 1048, 1054 (9th Cir. 2007) (citation omitted). To determine the government's interest in the use of force, this Court considers a variety of factors, including the nature of the offense Mr. Getzen was suspected of, whether Mr. Getzen posed an immediate threat to anyone's safety, whether Mr. Getzen was actively resisting arrest, and whether Deputy Long had less intrusive alternatives available to him. *Id.* In balancing these

considerations, the Court should be mindful that "summary judgment . . . in excessive force cases should be granted sparingly." *Torres v. City of Madera*, 648 F.3d 1119, 1125 (9th Cir. 2011) (citation omitted).

As the District Court found—and as Deputy Long does not dispute—the repeated application of a Taser and pepper spray constitutes significant force that must be justified by the need to "bring[] a dangerous situation to a swift end." *Deorle v. Rutherford*, 272 F.3d 1272, 1283 (9th Cir. 2001). Deputy Long faced no such situation here. At the moment he twice tased and pepper-sprayed Mr. Getzen, he only suspected Mr. Getzen of misdemeanors the District Court described as "not extremely serious," ER-010; Mr. Getzen was seated on the bathroom floor with his hands behind his neck; and Mr. Getzen was, at most, passively resisting. In addition, the District Court found—and Deputy Long does not dispute—that Deputy Long could have attempted to lift and handcuff Mr. Getzen without using weapons, but instead chose to tase him twice and pepper spray him. Further, Deputy Long's submissions do not indicate how much time passed between the commands issued to Mr. Getzen and Deputy Long's decision to begin assaulting him, leaving an open factual question as to whether Mr. Getzen had adequate time to comply. Deputy Long's use of force thus violated the Fourth Amendment.

A. Deputy Long Does Not Dispute That He Applied Significant, Intermediate Force by Using His Taser and Pepper Spray.

As the District Court recognized, the use of a Taser—whether in probe mode or drive-stun mode—sends an immediate electrical charge coursing through a victim's body, which can cause muscle paralysis. ER-009. The charge is "extremely painful," *Mattos*, 661 F.3d at 443; a Taser in probe mode "instantly overrides the victim's central nervous system, paralyzing the muscles throughout the body and leaving the target limp and helpless," *id.*, while a Taser in drive-stun mode can burn the victim's skin, *Marquez v. City of Phx.*, 693 F.3d 1167, 1174 n.7 (9th Cir. 2012). Both modes constitute an "intermediate, significant level of force." *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010); *accord Marquez*, 693 F.3d at 1174 (describing both modes of Taser use as "considerable force"). The same is true of pepper spray, which "inflicts a burning sensation that causes mucus to come out of the nose, an involuntary closing of the eyes, a gagging reflex, and temporary paralysis of the larynx, as well as disorientation, anxiety, and panic." *Young v. Cnty. of L.A.*, 655 F.3d 1156, 1162 (9th Cir. 2011) (citation and internal quotes omitted). In light of these authorities, the District Court found that Deputy Long's use of force was significant, ER-010—a determination that Deputy Long does not dispute.

B. Deputy Long's Use of Significant Force Was Not Justified.

Deputy Long's use of significant force violated the Fourth Amendment because it was not justified by any countervailing governmental interests. To weigh the governmental interests at stake, this Court evaluates three factors: "(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." *Green*, 751 F.3d at 1049 (quoting *Graham*, 490 U.S. at 396). In making the ultimate determination whether the force used was reasonable, the Court may consider additional factors, including the availability of less intrusive alternatives and whether the officer gave proper warning. *Glenn v. Wash. Cnty.*, 673 F.3d 864, 872 (9th Cir. 2011).

The District Court's detailed analysis concluded that, viewing the record in the light most favorable to Mr. Getzen, all three *Graham* factors weighed in favor of Mr. Getzen, and Deputy Long could have used less intrusive means to apprehend Mr. Getzen. ER-009–ER-014. Based on this analysis, the District Court determined that a reasonable jury could find that Deputy Long used excessive force when he tased Mr. Getzen—first in probe mode then in drive-stun mode—and pepper sprayed Mr. Getzen twice. ER-014–ER-015. Those determinations were correct and should be affirmed by this Court.

1. Mr. Getzen's alleged criminal activity was not severe.

When Deputy Long tased, drive-stunned, and twice pepper sprayed Mr. Getzen, Ms. Kampfe had made the following allegations: (1) Mr. Getzen had been arguing with Ms. Kampfe; (2) Mr. Getzen had refused to leave the apartment after being asked; (3) Mr. Getzen had taken her keys; and (4) Mr. Getzen had taken her cell phone and removed its battery. ER-011, ER-033. Ms. Kampfe had also confirmed that Mr. Getzen had not been physically violent toward her and was unarmed. *Id*. And when Deputy Long encountered Mr. Getzen, he was simply sitting on the bathroom floor, with his hands behind his neck. ER-047. The District Court correctly characterized Ms. Kampfe's allegations as worth investigating, but "not extremely serious." ER-010.

Deputy Long argues that the situation was "particularly dangerous" because it involved "domestic violence," and that a reasonable officer would therefore "conclude that this domestic altercation was serious." Appellants' Opening Br. ("AOB") at 17 (citing *Mattos*, 661 F.3d at 450). In fact, there was no indication that Mr. Getzen engaged in any violence. ER-033 ¶¶ 16–18. Ms. Kampfe herself confirmed as much. ER-046. Further, as the District Court noted, Ms. Kampfe had left the apartment and was well away from any possible danger by the time Deputy Long found Mr. Getzen. ER-011.

Even if Mr. Getzen had been accused of "domestic violence," this Court has specifically declined to presume that all domestic violence suspects are physically dangerous. In *Thomas v. Dillard*, this Court recognized that the term "domestic violence" encompasses a broad range of conduct. 818 F.3d 864, 879 (9th Cir. 2016). Given the breadth of the term, "the specific circumstances of a call must be factored into" the relevant Fourth Amendment inquiry—in that case, the reasonable suspicion analysis. *Id*. In *Thomas*, this Court rejected the invitation to adopt a presumption that a domestic violence suspect is armed and dangerous, citing research undermining the claim that domestic violence calls are uniquely dangerous to responding officers. *Id*. at 878, 880. Deputy Long asks this Court to do what it has expressly declined to do in the past—presume, merely from the nature of a dispute, that someone is dangerous.

Deputy Long ignores all this, and instead cites to a few sentences of this Court's opinion in *Mattos v. Agarano* to assert that all domestic violence situations are inherently dangerous, and, therefore, any crime related to domestic violence is inherently severe. In *Mattos*, this Court acknowledged that "the volatility of situations involving domestic violence makes them particularly dangerous." *Mattos*, 661 F.3d at 450 (quoting *United States v. Martinez*, 406 F.3d 1160, 1164 (9th Cir. 2005)). But that statement does not support the proposition that any domestic violence allegation weighs in favor of an officer's use of significant

force. Indeed, this Court specifically rejected that proposition in *Smith v. City of Hemet*. In *Smith*, officers responded to a 911 call placed by Smith's wife, reporting that Smith "was hitting her and/or was physical with her, that he had grabbed her breast very hard." 394 F.3d 689, 702 (9th Cir. 2005). In assessing the first *Graham* factor, the Court acknowledged the "seriousness and reprehensibility of domestic abuse," but nonetheless held that the "nature of the crime at issue provide[d] little, if any, basis for the officers' use of physical force" because the circumstances of the case did not "warrant the conclusion that Smith was a particularly dangerous criminal or that his offense was especially egregious." *Id*. at 702–03. The Court noted that—much like Mr. Getzen here—Smith was separated from his wife by the time officers arrived, his wife told officers that Smith had no weapons on him and there were none in the house, and that he was wearing pajamas. *Id*. at 703. The nature of Smith's alleged conduct was far more severe than Mr. Getzen's alleged conduct, and even it did not give rise to a presumption of severity.

In light of this Court's holdings in *Thomas* and *Smith*, Deputy Long's cherry-picked sentences from *Mattos* simply cannot do the work that Deputy Long asks of them; the "domestic" nature of Mr. Getzen's conduct does not automatically render it severe.

2. Mr. Getzen did not pose an immediate threat to Deputy Long's safety.

The second, and "most important," factor asks whether Mr. Getzen "posed an immediate threat to the safety of" Deputy Long or others. *Mattos*, 661 F.3d at 441 (citation omitted). Like the other *Graham* factors, this is an objective inquiry, "based on [the officer's] contemporaneous knowledge of the facts," and requires more than "a simple statement that [the officer] fears for his safety or the safety of others." *Deorle*, 272 F.3d at 1281.

Relying on these principles, the District Court held that Mr. Getzen posed no immediate threat to Deputy Long or others when Deputy Long tased, drive-stunned, and twice pepper sprayed Mr. Getzen. ER-012. That evaluation was correct. The record shows that Deputy Long knew Mr. Getzen was not armed, ER-033 ¶ 18, and was seated on the floor of the bathroom with his hands behind his neck until after Deputy Long first tased him, ER-035 ¶ 40, ER-047. There is no indication that Mr. Getzen made any sudden moves; indeed, Mr. Getzen stated under penalty of perjury that there was "no conflict" and "no violent act" on his part. ER-079.

Deputy Long argues that Mr. Getzen "posed an immediate threat to the safety of Deputies Long and Hearl." AOB at 18. But his argument ignores both the actual evidence in this case and clear authority from this Court. For example, Deputy Long argues that he "did not know if [Mr.] Getzen had access to weapons"

and thus was justified to treat Mr. Getzen as a threat. *Id.* But that is simply not true; Ms. Kampfe had explicitly told Deputy Long that Mr. Getzen was *not* armed. ER-033 ¶ 18. And at the time Deputy Long first encountered Mr. Getzen, Mr. Getzen was sitting with his hands behind his neck, ER-047—leaving little reason to think he was concealing a weapon. All Deputy Long had left was the mere "reality that any civilian could be armed," which this Court has squarely found insufficient to create a reasonable threat to officer safety. *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1091 (9th Cir. 2013) (quoting *Deorle*, 272 F.3d at 1281).

Deputy Long next claims that he was justified in treating Mr. Getzen as a threat because he knew Mr. Getzen had "taken actions to prevent his friend from involving law enforcement" by taking Ms. Kampfe's cell phone. AOB at 18. But his own testimony makes clear that he did not learn of Ms. Kampfe's allegation that Mr. Getzen was trying to stop her from calling police until *after* he repeatedly tased and pepper-sprayed Mr. Getzen. ER-037 ¶ 70. And even if Deputy Long had known this information at the time he used force, he does not explain how trying to prevent someone from calling law enforcement during a non-violent dispute is inherently dangerous, or why any such dangerousness should be inferred into his later interaction with Mr. Getzen.

The remainder of Deputy Long's arguments are wholly speculative—and foreclosed by this Court's precedent. Deputy Long claims that Mr. Getzen was a

threat because he "was unsure if [Mr. Getzen] would be violent with law enforcement" and was hiding in the bathroom. AOB at 18. As the District Court observed, Mr. Getzen had done nothing that suggested he would engage in violence at the time Deputy Long used force. ER-012. By Deputy Long's account, Mr. Getzen sat unmoving on the bathroom floor until Deputy Long tased him. ER-035 ¶¶ 40–42. The "failure to affirmatively exhibit a 'benign motive' is . . . insufficient to demonstrate that he reasonably could have been perceived as posing an immediate threat." *Gravelet-Blondin*, 728 F.3d at 1091. And as this Court has found, hiding from officers in the bathroom does not constitute threatening behavior. *See Chew v. Gates*, 27 F.3d 1432, 1442 (9th Cir. 1994) (finding that a rational jury could "easily find" that a suspect who "hid[] quietly" posed no immediate safety threat).

The record provides no basis for a reasonable officer to conclude that Mr. Getzen posed an immediate threat to Deputy Long or others. This most important factor therefore favors Mr. Getzen.

3. Mr. Getzen was not fleeing and at most passively resisted arrest at the time Deputy Long assaulted him.

As the District Court appropriately held, at the time Deputy Long tased, drive-stunned, and twice pepper sprayed Mr. Getzen, any flight that Mr. Getzen had undertaken was over and he was, at most, passively resisting arrest. ER-012–ER-013.

The Ninth Circuit measures resistance on a spectrum, distinguishing between active and passive resistance, but also evaluating whether resistance, even if active, was "particularly bellicose." *Smith*, 394 F.3d at 703. "Resistance … runs the gamut from the purely passive protestor who simply refuses to stand, to the individual who is physically assaulting the officer." *Bryan*, 630 F.3d at 830.

On appeal, Deputy Long describes Mr. Getzen's conduct as "ch[oosing] to hide and, when confronted, refus[ing] repeated commands to show himself and . . . to show his hands to the Deputies." AOB at 18. He then argues Mr. Getzen "would not stand and needed to be dragged from the confines of the bathroom." *Id*. at 19. None of this constitutes resistance that would justify the amount of force Deputy Long used. First, Deputy Long had no basis to believe that the intoxicated and nonresponsive Mr. Getzen had fled at all; he encountered Mr. Getzen for the first time seated on the bathroom floor upstairs, and had no idea when, why, or how Mr. Getzen had ended up there. And even if Deputy Long could point to evidence that Mr. Getzen had fled upstairs after Deputy Long entered the apartment, the District Court properly reasoned that any such flight had terminated by the time Deputy Long found Mr. Getzen in the bathroom. ER-035 ¶¶ 34–40; *see Chew*, 27 F.3d at 1442 (describing suspect's flight as terminated when he hid in a scrapyard).

As to Mr. Getzen's refusal to show his hands or obey commands to stand up or lie on his stomach, precedent establishes that such passive noncompliance with

commands does not justify the use of significant force. In *Bryan v. MacPherson*, the Court characterized as largely passive the plaintiff's failure to comply with an order to remain in his car, shouting gibberish, and hitting his legs. 630 F.3d at 830. The Court explained such behavior was a "far cry from actively struggling with an officer" and did not support even a single deployment of a Taser. *Id*.; *accord Forrester v. City of San Diego*, 25 F.3d 804, 805 (9th Cir. 1994) (suspect engaged in passive resistance by "remaining seated, refusing to move, and refusing to bear weight"). In *Smith v. City of Hemet*, this Court found that a suspect's refusal to remove his hands from his pajamas and his reentry into his home for a brief period, both in contravention of police commands, did not justify pepper spraying the suspect and then ordering a canine to attack. 394 F.3d at 694.

Nor can the fact that Deputy Long had to drag Mr. Getzen out of the bathroom justify the force that Deputy Long had already used on Mr. Getzen. First, the argument is illogical: a suspect's conduct after force has been used cannot retroactively justify that force. Second, it misstates the record. Deputy Long's declaration reports that Mr. Getzen "stated he was unable to stand up and just laid on his chest," after being tased, drive-stunned, and pepper-sprayed. ER-036 ¶ 52. Being *unable* to stand is not any kind of resistance. This factor also weighs in Mr. Getzen's favor.

4. Deputy Long ignored readily available alternatives that were less intrusive.

All three *Graham* factors favor Mr. Getzen, which alone would render Deputy Long's conduct unreasonable. But the unconstitutionality of Deputy Long's misconduct is underscored by the District Court's finding that neither Deputy Long nor Deputy Hearl "attempted to make any physical contact with [Mr. Getzen] such as lifting him up from his seated position and cuffing him" before resorting to significant force. ER-014. This available less intrusive option cuts heavily against the reasonableness of Deputy Long's conduct. *Smith,* 394 F.3d at 703 (noting relevance of "the availability of alternative methods of capturing or subduing a suspect"). Deputy Long does not dispute this finding on appeal.

Similarly, a reasonable jury could conclude that Deputy Long did not provide adequate warnings that he would use a Taser or pepper spray on Mr. Getzen before doing so. Defendant Long's submissions are unclear—and often contradictory—about whether, when, and how many warnings were given. While it is undisputed that Deputy Long announced that he may use his Taser and pepper spray before entering the apartment at all, ER-043, the record is unclear whether any of either Deputy's subsequent statements warned about the possibility that force would be used. *See, e.g.*, ER-047 (statement from Deputy Hearl, reporting that he and Deputy Long simply asked Mr. Getzen to come out); ER-043 (statement from Deputy Long, noting that, after entering the apartment,

announcements simply asked Mr. Getzen to "exit now"). Further, as noted above, the record contains no information about how audible any of the warnings given from outside the apartment or the downstairs level would have been to Mr. Getzen, sitting in the bathroom upstairs. Taken together, these open questions about the nature and quality of the described warnings further counsel against the reasonableness of Deputy Long's conduct. *See Nelson v. City of Davis*, 685 F.3d 867, 883 (9th Cir. 2012) (analyzing whether "sufficient warnings" were given before use of force); *Gravelet-Blondin*, 728 F.3d at 1092 (when a meaningful warning of imminent force is "plausible," but not given, that omission "weighs in favor of finding a constitutional violation").

* * *

Not a single factor relevant to the excessive force inquiry would justify the use of considerable or significant force under these circumstances. The District Court properly determined that Deputy Long's conduct violated the Fourth Amendment, and this Court should do the same.

II. MR. GETZEN'S RIGHT TO BE FREE FROM SIGNIFICANT FORCE, INCLUDING TASERS AND PEPPER SPRAY, WHILE PASSIVELY RESISTING ARREST HAS BEEN CLEARLY ESTABLISHED FOR DECADES.

This Court's precedent put Deputy Long on notice that his conduct violated the Fourth Amendment, meaning he is not entitled to qualified immunity.

For a right to be clearly established, "the contours of the allegedly violated right" must be "sufficiently clear that a reasonable official would understand that what he was doing violated that right." *P.B. v. Koch*, 96 F.3d 1298, 1301 (9th Cir. 1996) (citation and internal brackets omitted). "Reasonableness is not a demanding standard" for purposes of analyzing qualified immunity. *A.D. v. Cal. Highway Patrol*, 712 F.3d 446, 454 (9th Cir. 2013). A defendant is not entitled to qualified immunity merely because the "very action in question" had not "previously been held unlawful." *C.B. v. City of Sonora*, 769 F.3d 1005, 1026 (9th Cir. 2014) (quoting *Wilson v. Layne*, 526 U.S. 603, 615 (1999)). The "salient question" is whether the state of the law at the time provided a reasonable officer "fair warning" that his alleged conduct was unconstitutional. *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (citation omitted). Here, that notice came from decades of controlling precedent with materially indistinguishable facts.

Any reasonable officer would have known that Deputy Long's undisputed conduct—tasing Mr. Getzen in probe mode and in drive-stun mode, and twice spraying Mr. Getzen's eyes with pepper spray—violated the Fourth Amendment. For decades, this Court has denied qualified immunity to officers who use significant force against individuals who are only passively resisting arrest without demanding prior case law involving the specific type of significant force an officer chooses to employ. Further, this Court has previously confronted situations

involving the same types of force at issue here, denying qualified immunity to officers who use Tasers and pepper spray on passively resisting arrestees. In short, any reasonable officer should have known that Deputy Long's conduct here violated the Fourth Amendment.

A. It Has Been Clearly Established Since at Least 2001 That Officers May Not Use Significant Force on Someone Who is Not Actively Resisting.

This Court has unequivocally held that "[t]he right to be free from the application of non-trivial force for engaging in mere passive resistance was clearly established prior to 2008." *Gravelet-Blondin*, 728 F.3d at 1093. This principle applies regardless of whether the particular type of force at issue has been previously found unlawful. *See, e.g.*, *Deorle* , 272 F.3d at 1286 ("It does not matter that no case of this court directly addresses the use of such weapons; we have held that an officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury." (cleaned up)). For two decades, this Court has consistently reaffirmed this rule as sufficiently specific to defeat qualified immunity. *See, e.g.*, *Rice v. Morehouse*, 989 F.3d 1112, 1125–26 (9th Cir. 2021) (denying qualified immunity to officer for a 2011 arrest by citing cases dating back to 2001 that clearly established "the right to be free from any kind of non-trivial force where the plaintiff either did not resist or only passively resisted the officer"); *Nelson*, 685 F.3d at 884–85 (denying qualified

immunity to officer who used pepper balls on passively resisting subject, even in the absence of prior case law involving pepper balls).

Deorle and its progeny thus clearly establish the proposition that "a failure to fully or immediately comply with an officer's orders neither rises to the level of active resistance nor justifies the application of a non-trivial amount of force." *Nelson*, 685 F.3d at 881. As the District Court properly recognized, by August 2, 2016, when Deputy Long shot Mr. Getzen with a Taser and pepper sprayed him solely because Mr. Getzen did not follow his commands, it was "clearly established that the use of intermediate force against someone engaged only in passive resistance was unlawful." ER-017–ER-018.

Deputy Long ignores these clear directives by insisting that the cases relied upon by the District Court "deal with differing types of force" than that which he used here, and thus cannot satisfy Mr. Getzen's burden. AOB at 27. As discussed *infra*, Section II(B), this assertion is simply incorrect; several of the District Court's cited cases involve the precise types of force at issue here: Tasers and pepper spray. *See* ER-017–ER-018. Moreover, Deputy Long ignores this Court's unambiguous pronouncements: Even if "there [were] no prior case prohibiting the use of this specific type of force in precisely the circumstances here involved," Deputy Long's use of significant force on the passively resisting Mr. Getzen

precludes qualified immunity. *Deorle*, 272 F.3d at 1285; *accord Gravelet-Blondin*, 728 F.3d at 1093 ("Though these cases do not concern tasers, they need not.").

B. This Circuit Has Specifically Held That the Use of Tasers and Pepper Spray on Passively Resisting Arrestees—and Even Some Actively Resisting Ones—Violates the Fourth Amendment.

As detailed above, Deputy Long is not entitled to qualified immunity based on this Circuit's unequivocal rule proscribing the use of significant force on a passively resisting subject. But Deputy Long's conduct is doubly indefensible in light of *even more specific* case law from this Court addressing the precise types of force Deputy Long employed here: Tasers deployed in dart and drive-stun mode, and pepper spray applied directly to the face.

In *Bryan v. MacPherson*, this Court held that the use of a Taser in dart mode constituted significant force that was constitutionally excessive when deployed against an unarmed arrestee who posed no threat to the arresting officers and only passively resisted commands to show his hands. 630 F.3d at 830. And this Court reached the same conclusion with respect to a Taser deployed in drive-stun mode to the plaintiff in *Mattos*, 661 F.3d at 444–45, 451. In both cases, however, this Court granted qualified immunity to the defendant officers in light of the "dearth of prior authority" considering Tasers at all as of 2005. *Bryan*, 630 F.3d at 833; *accord Mattos*, 661 F.3d at 448, 452. But it is no longer 2005; in the years since *Mattos* and *Bryan*, this Court has reaffirmed their core holdings and *denied*

qualified immunity to officers who employ Tasers in dart or drive-stun mode against passively resisting arrestees. *See, e.g.*, *Gravelet-Blondin*, 728 F.3d at 1094–95; *Silva v. Chung*, 740 F. App'x 883, 886 (9th Cir. 2018).

Similarly, this Court found that as of 1997 the use of pepper spray on passively resisting arrestees, who refused police commands to unhook their arms from each other violated the Fourth Amendment—so obviously as to warrant the denial of qualified immunity—in *Headwaters Forest Defense v. County of Humboldt*. 276 F.3d 1125, 1131 (9th Cir. 2002). Indeed, this Court confronted a case nearly identical to the one at bar in 2005 in *Smith v. City of Hemet*, finding that officers violated a man's Fourth Amendment rights by pepper spraying him when they responded to a domestic violence call. 394 F.3d at 703. The man's refusal to show his hands—and his attempts to walk away from the officers—was not "particularly bellicose" and did not justify the use of pepper spray. *Id.*[6] This Court has repeatedly reaffirmed this principle, denying qualified immunity time and again on the grounds that "the use of intermediate force in general, and of pepper spray in particular, . . . constitute[s] an excessive response to a suspect's commission of a misdemeanor and disobedience of a police order." *Young*, 655 F.3d at 1168 (denying qualified immunity to officers who employed pepper spray

[6] Tellingly, Deputy Long ignores the District Court's extensive discussion of the *Smith* decision in his brief.

on passively resisting subject in 2005); *accord Nelson*, 685 F.3d at 882 (finding that the use of pepper spray on an arrestee who committed a "single act of non-compliance, without any attempt to threaten the officers or place them at risk" was, even in 2004, a clear violation of the Fourth Amendment); *Silva*, 740 F. App'x at 887 (same in 2015).

Simply put, any reasonable officer in Deputy Long's position would have known that the use of any type of significant force—and specifically, the use of his Taser and pepper spray—against the passively-resisting Mr. Getzen violated the Fourth Amendment. Qualified immunity affords him no defense here.

C. Deputy Long's Arguments to the Contrary Rely on His Misreading of the Law and the Facts of This Case.

In his briefing, Deputy Long tellingly does not argue that he would be entitled to qualified immunity for tasing and pepper spraying a passively resisting suspect. Rather, Deputy Long mischaracterizes the District Court's opinion and this Court's precedent in protesting that reasonable officers could have believed his conduct lawful.

Deputy Long first faults the District Court for citing this Court's opinion in *Rice v. Morehouse*, asserting that because that case "was decided 5 years *after* Deputy Long's interaction with [Mr.] Getzen," it "could not . . . have informed Deputy Long of anything in 2016." AOB at 25. But the District Court did not cite *Rice* to clearly establish anything; rather, the District Court cited *Rice*'s discussion

of the state of law in 2001—well before Deputy Long tased and pepper sprayed Mr. Getzen—and noted that this Court denied qualified immunity to officers for their conduct in 2011. *See* ER-017. And it is well-settled that "post-incident cases that make a determination regarding the state of the law at the time of the incident are persuasive authority" in analyzing an officer's entitlement to qualified immunity. *Osolinski v. Kane*, 92 F.3d 934, 936 (9th Cir. 1996).

Deputy Long also cites a handful of cases—most of them outside this Circuit—in which courts have approved the use of Tasers or pepper spray on arrestees who actively resisted arrest. *See* AOB at 21–22. Indeed, Deputy Long premises his entitlement to qualified immunity on his assertion that "[Mr.] Getzen was not engaged in mere passive resistance . . . ." AOB at 25. But as discussed *supra*, Section I(B)(3), the District Court properly determined that a reasonable jury could view Mr. Getzen's conduct as constituting at most passive resistance. And this Court "ha[s] long distinguished between passive and active resistance . . ." *Rice*, 989 F.3d at 1123 (citing *Forrester*, 25 F.3d at 805). That the use of Tasers and pepper spray has been found justified against actively resisting subjects thus has no bearing on Deputy Long's immunity here; indeed, Deputy Long identifies no case—nor has undersigned counsel found one—where this Court approved of the use of a Taser and pepper spray on a passively resisting subject.

Even if Mr. Getzen had engaged in any sort of active resistance, that alone would still not entitle Deputy Long to qualified immunity. This Court has found that, as early as 2011, it was clearly established that "use of a taser in drive-stun mode on a person who 'actively resisted arrest,' but posed no 'immediate threat to the safety of the officers or others,' constitute[s] excessive force." *Bonivert v. City of Clarkston*, 883 F.3d 865, 880 (9th Cir. 2018) (quoting *Mattos*, 661 F.3d at 445–46). Just so here; given the complete lack of a threat posed by Mr. Getzen, Deputy Long's use of force would have violated clearly established law *even if* Mr. Getzen had engaged in active resistance.

At other points, Deputy Long attempts to distinguish the numerous controlling authorities cited by the District Court by making arguments contradicting the District Court's determinations about the universe of facts a reasonable jury could find. All such arguments are outside this Court's jurisdiction or irrelevant. *Marsh*, 985 F.3d 726, 734 (reiterating rule that this Court lacks jurisdiction over appeals challenging a district court's determinations as to what a reasonable jury could find). Deputy Long asserts, for example, that "[Mr.] Getzen was evading police" at the moment Deputy Long first used his Taser. AOB at 26. But the District Court plainly determined that a reasonable factfinder could determine that any flight had terminated by the time Deputy Long encountered Mr.

Getzen sitting motionless in the bathroom. ER-012. This Court lacks jurisdiction to review that finding.

Finally, Deputy Long points to immaterial factual distinctions from the cases cited by the District Court in an attempt to muddy clear waters. He points, for instance, to the fact that the plaintiffs in those cases were suspected of other types of crimes. AOB at 24–26. But this Court has never required precedent involving the exact same type of charged offense under *Graham*; rather, the core question is whether the crime was especially severe—which the misdemeanors and violations here were simply not. *See, e.g.*, *Young*, 655 F.3d at 1165 (citing to various types of misdemeanors, not just the specific misdemeanor charged, in denying officer qualified immunity). He also suggests that the extent of the injuries suffered by plaintiffs in other cases renders them insufficient to clearly establish Mr. Getzen's rights here. AOB at 25–26. But that type of inquiry is for a jury in assessing damages, not for this Court exercising interlocutory jurisdiction. These sorts of minor factual distinctions are simply not the sort that entitle an officer to qualified immunity. *Torres*, 648 F.3d at 1128 ("We have never required a prior case on all fours prohibiting that particular manifestation of unconstitutional conduct.") (cleaned up).

* * *

In sum, none of Deputy Long's arguments can change the fact that this Court repeatedly put officers on notice, well before August 2, 2016, that the use of significant force on a passive suspect is unlawful.

CONCLUSION

For the foregoing reasons, the District Court's order denying Deputy Long qualified immunity should be affirmed in all respects.

February 22, 2022

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and this circuit's Local Rules 29.1(c) and 32.1 (a)(4)(A) because it contains 9,280 words.

This brief complies with the typeface requirements of Fed. R. App. P.32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word, and is in Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

I certify that, pursuant to Federal Rule of Appellate Procedure 31, I electronically filed the foregoing Response Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on February 22, 2022.

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