IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHASE HOWSE *Plaintiff-Petitioner*, v. THOMAS HODOUS, et al., *Defendants-Respondents*.	)	No. 19-3418

Appeal from the United States District Court
Northern District of Ohio
Eastern Division

Lower Court Case No.1:17-CV-1714

PLAINTIFF-PETITIONER SHASE HOWSE'S PETITION FOR REHEARING EN BANC

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Rule 35 Statement

Pursuant to Federal Rule of Appellate Procedure 35(b) and Sixth Circuit Rule 35(b), Plaintiff-Petitioner Shase Howse respectfully petitions this Court to rehear this case en banc.

Defendant-Respondent Brian Middaugh, a detective in the Cleveland Police Department, accosted and assaulted Shase Howse as he attempted to unlock the front door to his home. Mr. Howse had not committed any crime. His only offense was responding to Detective Middaugh's repeated inquiries with an "attitude" while standing on his own front porch. In response, Detective Middaugh tackled Mr. Howse, repeatedly punched Mr. Howse in the neck, and arrested him. Mr. Howse was charged with three crimes—all of which were later dismissed. Notwithstanding these facts, a divided panel of this Court concluded that Detective Middaugh did not "d[o] anything wrong." Maj. Op. at p. 2.[1] This was error that warrants en banc reconsideration for three reasons.

First, the majority opinion conflicts with this circuit's precedent. The majority held that no Sixth Circuit case clearly establishes that "law enforcement cannot tackle someone who disobeyed an order and then use additional force if they resist

[1] The court unanimously dismissed Mr. Howse's claims against the City of Cleveland's Police Department. The court also unanimously dismissed Mr. Howse's claims against Officer Thomas Hodous except the malicious prosecution claim, which Chief Judge Cole would have permitted to proceed.

being handcuffed." Maj. Op. at pp. 5–6. But a panel of this Court recently held in *Jones v. City of Elyria*, 947 F.3d 905, 917 (6th Cir. 2020), that it is clearly established—and had been clearly established in 2016—that an officer cannot use more force than is necessary to arrest a suspect who is not resisting arrest. Similarly, the law in this circuit is clear that an officer cannot use a leg sweep or other takedown maneuver to subdue a nonviolent person. *See Solomon v. Auburn Hills Police Dep't.*, 389 F.3d 167, 175 (6th Cir. 2004); *McCaig v. Raber*, 515 F. App'x 551 (6th Cir. 2013); *Pershell v. Cook*, 430 F. App'x 410 (6th Cir. 2011); *Lawler v. City of Taylor*, 268 F. App'x 384, 387–88 (6th Cir. 2008). And it is clearly established that an officer cannot use gratuitous force against a person who poses no safety risk. *See Shreve v. Jessamine Cty Fiscal Court*, 453 F.3d 681 (6th Cir. 2006); *McCaig*, 515 F. App'x at 555; *Lawler*, 268 F. App'x at 387–88.

Second, the majority opinion conflicts with Supreme Court precedent, which frames "the salient question" in the clearly established analysis for qualified immunity as whether the state of the law provided "fair warning" to the defendants that their alleged conduct was unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). The Supreme Court has rejected the requirement that "the facts of previous cases be materially similar" to the circumstances at issue to overcome qualified immunity. *Hope*, 536 U.S. at 741. Here, Supreme Court and Sixth Circuit precedent make it clear "beyond debate" that officers cannot arrest a person without probable

cause or tackle an arrestee who is not resisting. *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018). That means Officer Middaugh was not entitled to qualified immunity, and the panel majority erred by granting such immunity because, in its view, Mr. Howse had not pointed to "a case directly on point." *Id*.

Third, the majority opinion's malicious prosecution analysis raises an issue of exceptional importance: *i.e.*, whether the presence of probable cause to support one of multiple criminal charges precludes a plaintiff from pursuing malicious prosecution claims for the remaining charges. The majority concluded that it does, treating malicious prosecution claims as indistinct from false arrest claims. However, the Supreme Court has consistently classified and treated malicious prosecution and false imprisonment claims as "entirely distinct." *Wallace v. Kato*, 549 U.S. 384, 390 (2007). Additionally, the panel's conclusion is inconsistent with authoritative case law in the Second, Third, and Seventh Circuits, all of which have held that a finding of probable cause to support one charge does not bar a party from pursuing malicious prosecution claims for other charges. *See Posr v. Doherty*, 944 F.2d 91, 100 (2d Cir. 1991); *Johnson v. Knorr*, 477 F.3d 75, 83 (3d Cir. 2007); *Holmes v. Village of Hoffman Estate*, 511 F.3d 673, 682 (7th Cir. 2007).

Factual Background[2]

On July 28, 2016, at approximately 9:00pm, Shase Howse, then 20 years old, walked from his home in Cleveland, Ohio, to a nearby convenience store. R29-3, Exh., p. 731. Mr. Howse returned home and was standing on his front porch, talking on the phone with his mother. *Id*. He was about to open the front door with his key when a man in plainclothes, riding in an unmarked car—later identified as Detective Brian Middaugh—asked Mr. Howse, "Is this your house?" *Id*. All parties agree that Mr. Howse had not committed any crime.

Mr. Howse responded, "Yes, this is my house, I live here." *Id*. The car started to pull off, but the questioning officer told the driver to back up. R25-3, Exh., p. 411; R29-3, Exh., p. 732. The man then asked Mr. Howse a second time whether that was his house; Mr. Howse responded by saying, "Yes, . . . what the f---?" R25-3, Exh., p. 411; *see also* R29-3, Exh., p. 732. According to Mr. Howse, the man in the car responded by saying, "You have a smart mouth and a bad attitude." R29-3, Exh., p. 732.[3]

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[2] The district court dismissed Mr. Howse's claims on the defendants' motions for summary judgment. R898–920. The procedural posture of this case requires that the Court view the facts in the light most favorable to the non-movant, Mr. Howse. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Therefore, where there is a divergence between the detectives' story and that of Mr. Howse, the petition includes the facts as recounted by Mr. Howse.

[3] The record is devoid of any indication that Mr. Howse knew that Detective Middaugh was a police officer when he asked Mr. Howse whether he lived in the house.

Detective Middaugh exited the car and asked again if Mr. Howse lived there. Mr. Howse responded, "yes, I live here. I live here." R25-3, Exh., p. 411. At that point, without any provocation, Detective Middaugh told Mr. Howse to put his hands behind his back because he was going to jail. *Id*. Mr. Howse responded, "[N]o, I live here. I am going home. I am not doing anything." *Id*.

Detective Middaugh walked onto the porch and grabbed Mr. Howse, at which point Mr. Howse screamed at the top of his lungs, "I live here. I live here." *Id*. Detective Middaugh responded by throwing Mr. Howse to the porch floor and attempting to handcuff him, but Mr. Howse stiffened his body to avoid being handcuffed. R25-3, Exh., p. 415. At this point, Mr. Howse's mother arrived, asked the officers what they were doing, and identified Mr. Howse as her son. R25-3, Exh., p. 412. Mr. Howse heard his mother's voice and looked up to her, and Detective Middaugh punched him twice in the neck. *Id*. Mr. Howse never attempted to hit, knock over, or push Detective Middaugh and remained nonviolent. R25-3, Exh., p. 415–16.

The detectives handcuffed Mr. Howse, lifted him from the porch floor, and put him in the back of the patrol car. Mr. Howse suffered a bruised neck and scratches from the officer tackling and punching him. R25-3, Exh., p. 421. Although Mr. Howse had personal identification confirming his address in his pocket, the officers never asked to see his identification. R25-3, Exh., p. 413.

Next, the detectives transported Mr. Howse to central booking in downtown Cleveland, where Detective Middaugh completed a complaint charging Mr. Howse with assault and battery of a police officer. R29-5, Exh., 736. Detectives Middaugh and Hodous also completed "Use of Force" reports asserting that Mr. Howse resisted arrest and struck the officers. R37-2, Exh., p. 866; R37-4, Exh., p. 881. Mr. Howse spent three days and two nights in jail before his mother secured his release by posting a $1,000 bond. R25-3, Exh., p. 428; R29-3, Exh., pp. 732–33.

Based on Detective Middaugh's complaint and both officers' "Use of Force" reports, a Grand Jury indicted Mr. Howse for Obstructing Official Business in violation of Ohio Revised Code § 2921.31(A), and two felony counts of Assault on a Police Officer in violation of Ohio Revised Code § 2903.13(A). R25-4, Exh., pp. 448–49. After Mr. Howse filed a Citizen Complaint Form describing his encounter with Officer Middaugh, the county prosecutor dismissed all charges.

Mr. Howse sued Detective Hodous, Detective Middaugh, and the City of Cleveland under 42 U.S. § 1983 for Fourth Amendment violations (excessive force), malicious prosecution, assault, and battery. R2, Complaint, pp. 38–51. As relevant here, Detectives Hodous and Middaugh sought summary judgment on qualified immunity grounds for all of Mr. Howse's claims. The district court granted their summary judgment motions and dismissed Mr. Howse's claims. R40, Opinion, pp. 898–920.

Mr. Howse appealed the district court's order to this Court. A divided panel affirmed, holding that neither the officers nor the City of Cleveland did anything wrong. Slip. Op. Chief Judge Cole dissented in part, disagreeing with the panel majority's disposition of Mr. Howse's excessive force, malicious prosecution, and state law claims. *Id*. Mr. Howse timely filed this petition for rehearing.

Argument

1. The Majority Opinion Conflicts with Circuit Case Law, Which Clearly Establishes That an Officer's Use of Force—Specifically an Officer's Use of a Takedown Maneuver and Gratuitous Violence—Against A Nonviolent, Passively Resistant or Non-Resistant Arrestee Constitutes Excessive Force.

The majority held that Detective Middaugh was entitled to qualified immunity because his conduct was not proscribed by clearly established law. The panel majority framed the "clearly established" question as "whether every reasonable officer would know that law enforcement cannot tackle someone who disobeyed an order and then use additional force if they resist being handcuffed." Maj. Op. at pp. 5–6. The majority then concluded that "the alleged unlawfulness of the officers' conduct wasn't clearly established." Maj. Op. at p. 6. However, this Court has previously held that tackling a suspect who was not resisting arrest constituted excessive force and violated clearly established law.[4]

[4] Disobeying an order is not the same as resisting arrest, which connotes active resistance, such as physically struggling with or threatening officers. *See, e.g.*, *Osberry v. Slusher*, 750 F. App'x 385, 395–96 (6th Cir. 2018) (holding that the

In *Jones*, a panel of this Court considered the qualified immunity defense of two police officers who approached a man on the street and, even though he did not resist, "tackled [the man] to the ground, placed their weight on top of him, employed closed fist strikes on his arms and sides, punched him in the face, and then tased him." 947 F.3d at 917 (internal quotation marks omitted). The court concluded that the officers were not entitled to qualified immunity, holding that "[i]t is well established that an officer may not use more force than is necessary to effectuate the arrest of a suspect who offers no resistance." *Id*. (citing *Bennett v. Krakowski*, 671 F.3d 553, 562–63 (6th Cir. 2011)). Applying *Jones* and its citation to *Bennett*, it was clearly established well before 2016 that an officer may not do what Detective Middaugh did here—that is, tackle a suspect who is not resisting arrest.

This circuit has also previously proscribed the specific types of force Detective Middaugh employed as objectively unreasonable under similar circumstances. Specifically, a panel of this Court in *McCaig v. Raber*, 515 F. App'x 551, 555 (6th Cir. 2013), denied qualified immunity to a police officer who used a leg sweep to take down an arrestee who "jerked away" and did not place his hands behind his back to be handcuffed when ordered by the officer. In so ruling, the Court noted that this circuit "has held that the right to be free from excessive force is a

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plaintiff's refusal to leave a crime scene despite officers' command was not resisting arrest and denying officers qualified immunity).

clearly established Fourth Amendment right." *Id*. at 554–55 (citing *Neague v. Cunkar*, 258 F.3d 504, 507 (6th Cir. 2011)). And in *Pershell v. Cook*, 430 F. App'x 410 (6th Cir. 2011), the Court denied qualified immunity to police officers who used a leg sweep to take down a man who was not resisting arrest. The court held that "[u]sing a leg sweep to knock [the plaintiff] face-first onto the floor was objectively unreasonable," even though the plaintiff told the officers to "get the f--- out of my house" and possibly balled up his fist. *Id*. at 415. The court reasoned that the plaintiff did not pose an immediate danger to officers at the time he was knocked to the floor, as he was unarmed and did not swing or strike at the officers. *Id*. Other Sixth Circuit cases have reached similar conclusions. *See Barton v. Martin*, 949 F.3d 938, 954 (6th Cir. 2020) (denying qualified immunity to an officer who picked a suspect up, slammed him against his kitchen cupboard, and wrenched the suspect's arms behind his back when the suspect was unarmed and non-threatening because "[a] compliant, non-threatening individual's right to be free from excessive force during arrest was . . . clearly established" in 2014); *Solomon*, 389 F.3d 167, 175 (6th Cir. 2004) (an officer's attempt to leg sweep a woman, and subsequent use of force, was extreme and objectively unreasonable in violation of the Fourth Amendment); *Lawler*, 268 F. App'x 384, 387–88 (6th Cir. 2008) (the use of a leg sweep to take down an arrestee was objectively unreasonable).

Additionally, Mr. Howse's right to be free from Detective Middaugh's post-tackle, gratuitous violence is clearly established. Mr. Howse was unarmed and nonviolent when Detective Middaugh punched him twice in the neck. This circuit has consistently recognized a categorical bar on an officer's use of gratuitous violence against a person who poses no safety risk. *See Shreve*, 453 F.3d at 688 ("Sixth Circuit case law supports Shreve's right not to be struck and jumped on gratuitously"); *McCaig*, 515 F. App'x at 555 (observing that "cases in this circuit clearly establish the right of [persons] who pose no safety risk to the police to be free from gratuitous violence") (quoting *Baker v. City of Hamilton, Ohio*, 471 F.3d 601, 608 (6th Cir. 2006)); *Lawler*, 268 F. App'x at 387–88 (an officer's use of gratuitous force against the arrestee violated the individual's clearly established rights). These cases confirm that, contrary to the majority's conclusion, the law prohibiting Detective Middaugh's use of force against Mr. Howse was clearly established.

2. The Majority's Framing of the "Clearly Established" Question Is Inconsistent with Supreme Court Precedent.

In defining the "clearly established" right governing Officer Middaugh's use of force, the panel majority posed the question as "whether every reasonable officer would know that law enforcement cannot tackle someone who disobeyed an order and then use additional force if they resist being handcuffed." Maj. Op. at 5–6. The majority concluded that Mr. Howse had not identified a case involving this specific conduct, and therefore held the officers were entitled to qualified immunity. Maj.

Op. at 6. It refused to address whether the officers violated Mr. Howse's clearly established right to be free from "unreasonable government intrusions," concluding that this framing of the question was too general. Maj. Op. at 5–6. The panel majority's analysis is inconsistent with the Supreme Court's decisions in *Hope* and its progeny. 536 U.S. 730 (2002). *Hope* makes clear that officers are not entitled to qualified immunity when (as here) the legal rules set forth in prior cases make clear that their conduct was unlawful.

When determining whether a public official is entitled to qualified immunity, "the salient question . . . is whether the state of the law" gives the official "fair warning" that their conduct is unconstitutional. *Hope*, 536 U.S. at 741; *accord Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (per curiam). The Supreme Court has rejected a requirement that "the facts of previous cases be materially similar" to the situation in question, instead opting for a more lenient standard that proscribes conduct that is unlawful "in light of pre-existing law." *Hope*, 536 U.S. at 739 (internal quotes and citation omitted). In other words, the touchstone is whether the officers' conduct was clearly unlawful, not whether Mr. Howse can point to a case directly on point. *See Wesby*, 138 S. Ct. at 590.

"[U]nder *Hope*, a requirement that a prior case be 'fundamentally' or 'materially' similar to the present case would be too rigid an application of the clearly established inquiry." *Baynes v. Cleland*, 799 F.3d 600, 613 (6th Cir. 2015)

(citing *Hope*, 536 U.S. at 741). Had the panel majority focused instead on whether the officers' conduct was "clearly unlawful" in light of established law concerning "unreasonable government intrusions," it would have recognized that the officers were not entitled to qualified immunity. Rather than look for a case involving an officer who "tackle[d] someone who disobeyed an order," the Court should have analyzed whether it was lawful for the officer to: (a) accost Mr. Howse on his front porch and tell him he was going to jail, i.e., to arrest him, without probable cause, and (b) to tackle him even though he did not resist, and then punch him twice in the neck. In both respects, Officer Middaugh's conduct was clearly unlawful.

3. This Case Involves A Question of Exceptional Importance: Whether the Existence of Probable Cause to Support One of Multiple Charges Precludes A Plaintiff from Pursuing Malicious Prosecution Claims for The Remaining Charges.

The panel majority disposed of Mr. Howse's malicious prosecution claim after concluding that (1) the detectives had probable cause to charge Mr. Howse with Obstructing Official Business, and (2) the presence of probable cause to support the obstruction charge foreclosed Mr. Howse from pursuing malicious prosecution claims for the two remaining assault charges.[5] To support the second point, the panel analogized the malicious prosecution claim to the constitutional tort of false

[5] Mr. Howse maintains that the detectives lacked probable cause to charge him with obstructing official business and does not waive any rights or arguments should the court revive his lawsuit.

imprisonment, which, according to the majority, fails so long as there is at least one valid reason for the arrest. Maj. Op. at pp. 7–9. The majority's decision is inconsistent with Supreme Court precedent, creates a circuit split with at least three other circuits, and is inconsistent with prior Sixth Circuit cases.

As Chief Judge Cole's dissent explains, "[t]he Supreme Court tells us that the tort of malicious prosecution is entirely distinct from the tort of false imprisonment, which includes false arrest, as the former remedies the wrongful institution of legal process and the latter remedies detention in the absence of legal process." Diss. Op. at pp. 17–18 (internal quotation marks omitted) (quoting *Wallace v. Kato*, 549 U.S. 384, 390 (2007)). The majority opinion's decision to treat the two claims identically—and consequently to hold that a malicious prosecution claim fails so long as there is probable cause to prosecute on one of several charges—fails to recognize this key distinction.

The decision also directly conflicts with decisions from multiple other circuits. In *Posr*, the Second Circuit concluded that a malicious prosecution claim could proceed even when a separate charge was supported by probable cause. 944 F.2d 91, 100 (2d Cir. 1991). In *Posr*, the district court instructed the jury that if it "found probable cause supporting any of the three charges of disorderly conduct, resisting arrest and assault lodged against Posr, no liability for malicious prosecution could be found as to any of the charges filed." *Id*. The Second Circuit concluded that

the district court's instructions were improper, explaining that "[i]f the rule were the one followed by the district court, an officer with probable cause as to a lesser offense could tack on more serious, unfounded charges . . . knowing that the probable cause on the lesser offense would insulate him from liability for malicious prosecution on the other offenses." *Id*.

Similarly, the Third Circuit held in *Johnson* that a probation officer's possession of probable cause to arrest a probationer on one charge did not defeat the probationer's malicious prosecution claim on the remaining charges for which there was no probable cause. 477 F.3d at 85. The court distinguished malicious prosecution claims from false arrest claims, *id*. at 82 ("[m]alicious prosecution differs from false arrest"), and agreed "courts 'need to separately analyze the charges claimed to have been maliciously prosecuted.'" *Id*. (quoting *Posr*, 944 F.2d at 100).

Similarly, in *Holmes*, the Seventh Circuit distinguished malicious prosecution claims from false arrest claims and held that probable cause to believe an individual committed one crime, and even his conviction of that crime, does not foreclose a malicious prosecution claim for additionally prosecuting the individual on a separate charge. 511 F.3d at 682–83. The court's reasoning is persuasive:

> "[W]hen it comes to prosecution, the number and nature of the charges matters: the accused must investigate and prepare a defense to each charge, and as the list of charges lengthens (along with the sentence to which the accused is exposed), the cost and psychic toll of the prosecution on the accused increase. At the same time, when an officer prepares and signs a criminal complaint, he typically will have more of

> an opportunity to reflect on the nature and ramifications of the accused's conduct than he did in making the arrest. It is reasonable to demand that each charge that a police officer elects to lodge against the accused be supported by probable cause. Otherwise, police officers would be free to tack a variety of baseless charges on to one valid charge with no risk of being held accountable for their excess."

Id. (internal citations and quotation marks omitted).

Finally, the panel majority's opinion is not even consistent with Sixth Circuit case law. As explained by Chief Judge Cole in dissent, prior panels of this Court have analyzed malicious prosecution claims even when some of the charges against the plaintiff were valid. *See, e.g.*, *Barnes v. Wright*, 449 F.3d 709, 713 (6th Cir. 2006). The majority's decision to not consider Mr. Howse's malicious prosecution claims for the assault charges lodged against him cannot be reconciled with this prior Sixth Circuit case law. This Court should rehear this case en banc to harmonize this circuit's case law and reinstate the rights of plaintiffs to pursue malicious prosecution claims despite a finding of probable cause as to one of multiple claims.

Conclusion

Plaintiff-Petitioner Shase Howse respectfully asks the Court to grant his petition for en banc review.

Dated: April 1, 2020

Respectfully submitted,

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Certificate of Compliance

This petition complies with the type-volume and page-length limitations of Federal Rule of Appellate Procedure 35(b)(2). This petition contains 15 pages and 3,807 words, excluding those portions of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This petition also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This petition has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, 14-point font.

/s/ Christopher Kemmitt
Christopher Kemmitt

Counsel for Petitioner

Certificate of Service

I hereby certify that on April 1, 2020 a copy of Plaintiff-Petitioner Shase Howse's Petition for Rehearing En Banc was filed electronically, and all counsel of record will receive service through the Court's electronic filing system.

/s/ Christopher Kemmitt
Christopher Kemmitt

Counsel for Petitioner

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

File Name: 20a0083p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SHASE HOWSE,

Plaintiff-Appellant,

v.

THOMAS HODOUS and BRIAN MIDDAUGH, individually and in their official capacities as employees of the City of Cleveland, Ohio; CITY OF CLEVELAND, OHIO,

Defendants-Appellees.

No. 19-3418

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 1:17-cv-01714—Donald C. Nugent, District Judge.

Argued: January 29, 2020

Decided and Filed: March 18, 2020

Before: COLE, Chief Judge; COOK and THAPAR, Circuit Judges.

COUNSEL

ARGUED: James L. Hardiman, Cleveland, Ohio, for Appellant. Elena N. Boop, CITY OF CLEVELAND, Cleveland, Ohio, for Appellees Hodous and Middaugh. Timothy J. Puin, CITY OF CLEVELAND, Cleveland, Ohio, for Appellee City of Cleveland. **ON BRIEF:** James L. Hardiman, Cleveland, Ohio, for Appellant. Elena N. Boop, Elizabeth M. Crook, CITY OF CLEVELAND, Cleveland, Ohio, for Appellees Hodous and Middaugh. Timothy J. Puin, CITY OF CLEVELAND, Cleveland, Ohio, for Appellee City of Cleveland.

THAPAR, J., delivered the opinion of the court in which COOK, J., joined, and COLE, C.J., joined in part. COLE, C.J. (pp. 13–21), delivered a separate opinion dissenting in part.

OPINION

THAPAR, Circuit Judge. Shase Howse sued several police officers and the City of Cleveland for alleged violations of the Fourth Amendment. The district court dismissed the suit, concluding that neither the officers nor the City did anything wrong. We affirm.

I.

One summer night in 2016, Howse was walking home from a convenience store. Along the way, Howse says an unidentified Cleveland Police officer approached and asked whether he had any weapons. Howse said no. The John Doe officer then patted him down and searched his pockets. After finding no contraband, the officer told Howse that he could leave.

When Howse got home, he began climbing the steps on his front porch. The parties dispute what happened next.

As Howse tells it, several men (two of whom he later identified as Officers Thomas Hodous and Brian Middaugh) pulled up in an unmarked vehicle. Middaugh asked Howse if he lived at the house. Howse replied that he did. Middaugh asked Howse if he was *sure* that he lived there. Howse said something like "yes, what the f---" in response. R. 33-1, Pg. ID 810. That prompted Middaugh to comment that Howse had a smart mouth and a bad attitude. Middaugh then got out of the car, walked toward the porch, and asked Howse (yet again) if he was sure that he lived there. Again, Howse responded yes.

Things escalated from there. Middaugh told Howse to put his hands behind his back and that he was going to jail. Howse disobeyed Middaugh's command to put his hands behind his back. Instead, Howse yelled that he hadn't done anything wrong and that he lived at the house. Middaugh ran onto the porch, grabbed Howse (who at that point was screaming at the top of his lungs), and threw him down. When Middaugh was on top of him, Howse realized that Middaugh was a police officer. Middaugh, with help from Hodous, then tried to handcuff Howse. But Howse, in his own words, was resisting arrest by screaming and "stiffening up" his

body. R. 25-3, Pg. ID 414, 415. Howse says he never tried to hit, push, or fight with the officers. And he claims that he "didn't do anything that would be considered offensive" to the officers. *Id.* at 416.

At this point, Howse's mother (who owned the house) showed up. She had heard some commotion and rushed to the front porch. When she arrived, she saw a "chaotic" scene: a man in dark clothing straddled Howse and another man struck Howse with a closed fist, which caused Howse's head to strike the porch. R. 29-4, Pg. ID 735. She asked the men (who she later realized were police officers) to stop beating her son—she kept explaining that he lived at the house. After things settled down, the officers put Howse in a police car and took him to jail.

The officers tell a different story. That night, Hodous and Middaugh (along with another officer) were patrolling the area where Howse lived—an area known for violence, drugs, and gang activity. While driving in an unmarked vehicle, they saw Howse lingering suspiciously on the front porch of a house. Howse looked nervous when he saw the unmarked vehicle. Middaugh thought the house was vacant because it appeared to be boarded up and there were bars on the doors.

Based on his training and experience, Middaugh suspected that Howse might be engaged in criminal activity. So Middaugh asked Howse whether he lived there. Howse said he did. Middaugh wanted to investigate more, so he got out of the car, walked toward Howse, and asked him if he was trying to break in. Middaugh doesn't remember exactly what Howse said in response, but he does remember that Howse said "f---" along with some other words. R. 25-1, Pg. ID 176. (Hodous, for what it's worth, recalls Howse saying "f--- you" and "leave me the f--- alone." R. 25-2, Pg. ID 303.)

When Middaugh reached the front porch, Howse clenched his fists and "squared up" into a fighting stance. R. 25-1, Pg. ID 177. Middaugh, afraid that Howse wanted to fight, told Howse to put his hands in the air. Howse ignored that instruction and instead motioned towards his pockets, which prompted Middaugh to grab Howse's arm. Hodous joined Middaugh and tried to restrain Howse, who was grabbing at the officers and flailing around. Howse struck Hodous in the chest. Howse also tried to rip off Middaugh's flashlight and handcuff case. So

Middaugh used a leg sweep to take Howse to the ground. Even while on the ground, Howse resisted the officers by burying his hands underneath his chest. The officers eventually handcuffed him and put him in a police vehicle. It wasn't until Howse's mother showed up, the officers claim, that they found out that Howse did in fact live at the house.

(While the parties have offered two vastly different accounts of what happened, we must view the facts in the light most favorable to Howse. *Bletz v. Gribble*, 641 F.3d 743, 757 (6th Cir. 2011). That means we ignore what the officers allege happened to the extent that it conflicts with what Howse alleges happened that night. So while we tell both sides for the sense of completeness, we accept the plaintiff's version when deciding whether the officers are entitled to qualified immunity.)

Keeping that principle in mind, we can continue with some undisputed facts. After Howse was booked into jail, Middaugh signed a complaint charging Howse with assaulting a police officer. Hodous and Middaugh then wrote up "Use of Force" reports detailing what happened on the front porch. These reports said that Howse resisted arrest and struck the officers. After a few days, Howse posted bond and was released. Later, a grand jury indicted him on two counts of assault along with one count of obstruction of official business. But the State eventually dismissed the charges.

Howse then sued Hodous and Middaugh under 42 U.S.C. § 1983 for violating his Fourth Amendment rights and for committing assault and battery under Ohio law. He also sued the City of Cleveland, claiming that the City was responsible for the Fourth Amendment violations. The district court granted summary judgment for the defendants. This appeal followed.

II.

Howse brought three claims against Hodous and Middaugh: (1) a claim for excessive force under the Fourth Amendment, (2) a claim for malicious prosecution under the Fourth Amendment, and (3) a claim for assault and battery under Ohio law. We address each claim in turn.

Fourth Amendment—Excessive Force. Howse first argues that Hodous and Middaugh violated the Fourth Amendment when they stopped him without reasonable suspicion and used excessive force during his arrest. In response, the officers ask for qualified immunity.

Qualified immunity shields law enforcement officers from civil liability unless the officers (1) violated a statutory or constitutional right and (2) the unlawfulness of their conduct was clearly established at the time. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). Howse must show that both prongs are met here. *Maben v. Thelen*, 887 F.3d 252, 269 (6th Cir. 2018).

We begin our analysis with the second prong—by asking whether the unlawfulness of the officers' conduct was clearly established at the time they approached and arrested Howse. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009). "Clearly established" means that the law is so clear at the time of the incident that every reasonable officer would understand the unlawfulness of his conduct. *Wesby*, 138 S. Ct. at 589. That's a deferential rule. And for good reason: officers often find themselves in positions where they must make split-second decisions in dangerous situations. In those crucial seconds, officers don't have the time to pull out law books and analyze the fine points of judicial precedent. To avoid "paralysis by analysis," qualified immunity protects all but plainly incompetent officers or those who knowingly violate the law. *Rudolph v. Babinec*, 939 F.3d 742, 756 (6th Cir. 2019) (Thapar, J., concurring in part and dissenting in part).

With all this in mind, we consider Howse's claim. Howse argues that the officers violated his clearly established right to be free from "unreasonable government intrusions." Appellant Br. at 18. But that frames the "clearly established" test at too high a level of generality. The law must be specific enough to put a reasonable officer on clear notice that his conduct is unlawful. *See Wesby*, 138 S. Ct. at 590. The right to be free from "unreasonable government intrusions" is much too vague to do that.

Instead, we must examine the *particular* situation that Hodous and Middaugh confronted and ask whether the law clearly established that their conduct was unlawful. To answer this question, we must ask whether every reasonable officer would know that law enforcement

cannot tackle someone who disobeyed an order and then use additional force if they resist being handcuffed. Importantly, this question asks about the lawfulness of conduct under the Fourth Amendment. And in that context, the Supreme Court has stressed "the need to identify a case where an officer acting under similar circumstances" was found "to have violated the Fourth Amendment." *Id.* (cleaned up). Without such a case, the plaintiff will almost always lose. *See id.*

Howse hasn't identified any case that addresses the conduct at issue here (and we aren't aware of any either). Instead, Howse cites a single case in support: *Terry v. Ohio*, 392 U.S. 1 (1968). But that case does him no good. *Terry* held that a search did *not* violate the Fourth Amendment because the law enforcement officer reasonably believed that the suspects were engaged in criminal activity and might be armed and dangerous. *Id.* at 30–31. The case has nothing to do with excessive force. So *Terry* doesn't clearly establish that law enforcement cannot tackle a non-compliant suspect and use additional force against him if he resists arrest. *Cf. Rudlaff v. Gillispie*, 791 F.3d 638, 641–42 (6th Cir. 2015) (explaining that using a taser or a knee strike against someone who is actively resisting arrest does not qualify as excessive force).

Because the alleged unlawfulness of the officers' conduct wasn't clearly established, the officers are entitled to qualified immunity.[1]

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[1]The dissent concludes otherwise after it frames the question as follows: "whether it violates a clearly established constitutional right for an officer to throw a person to the ground in order to arrest that person without probable cause." Dissenting Op. at 16 (footnote omitted). Of course, it's true that an officer cannot *arrest* someone without probable cause. But it's also true that an officer doesn't need probable cause to *stop* someone—reasonable suspicion is enough. *Terry*, 392 U.S. at 30–31. Thus, the level of justification depends on whether the officer is carrying out a stop or an arrest. *See United States v. Martinez*, 808 F.3d 1050, 1053 (5th Cir. 1987).

The mere act of handcuffing someone doesn't transform a stop into an arrest. That's because an officer *may* temporarily handcuff someone during a *Terry* stop "so long as the circumstances warrant that precaution." *United States v. Foster*, 376 F.3d 577, 587 (6th Cir. 2004). So it isn't obvious that the officers were effectuating an arrest (rather than an investigatory stop) when they tackled and handcuffed Howse.

Acknowledging this point, the dissent cites *Centanni v. Eight Unknown Officers*, 15 F.3d 587, 591 (6th Cir. 1994) to show that the officers arrested Howse when they initially threw him to the ground. But *Centanni* cuts *against* the dissent's conclusion. That's because *Centanni* says that an arrest generally doesn't occur until the officers physically remove the suspect from the scene. *See id.* Of course, the officers hadn't removed Howse from the scene when they initially threw him down. So that would mean the officers *didn't* need probable cause until they removed him from his home and took him to the station.

Fourth Amendment—Malicious Prosecution. Howse next argues that Hodous and Middaugh committed malicious prosecution when they helped prosecutors charge him with two counts of assault and one count of obstructing official business. To win on that claim, Howse must show (among other things) that the officers helped start a prosecution against him without probable cause. *King v. Harwood*, 852 F.3d 568, 580 (6th Cir. 2017). Probable cause exists when there are enough "facts and circumstances" to make a reasonable person believe that "the accused was guilty of the crime charged." *Webb v. United States*, 789 F.3d 647, 660 (6th Cir. 2015) (cleaned up).

To begin with, there's enough evidence for a reasonable person to believe that Howse obstructed official business. Someone obstructs official business when he acts with the purpose of obstructing or delaying an officer from performing a lawful duty and he actually hampers or impedes the officer. Ohio Rev. Code § 2921.31; *State v. Henry*, 110 N.E.3d 103, 116 (Ohio Ct. App. 2018). Ohio courts have interpreted this crime broadly. For example, someone may be convicted if they make it "more difficult" for law enforcement to gain control of a situation, *State v. Florence*, No. CA2013-08-148, 2014 WL 2526069, at *3 (Ohio Ct. App. June 2, 2014), or interfere with an officer's attempt to arrest someone, *State v. Overholt*, No. 2905-M, 1999 WL 635717, at *4 (Ohio Ct. App. Aug. 18, 1999). Here, Howse himself admitted that he tried to make it more difficult for the officers to arrest him by stiffening up his body and screaming at the top of his lungs. That's enough to provide probable cause for the obstructing-official-business charge.

And because there was probable cause for *that* charge, Howse cannot move forward with *any* of his malicious-prosecution claims. According to our circuit, malicious-prosecution claims are based on the Fourth Amendment. *Spurlock v. Satterfield*, 167 F.3d 995, 1006, 1006 n.19 (6th Cir. 1999).[2] Although we call it a claim for malicious prosecution, that's a bit of a

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Even if we assume the officers carried out an arrest unsupported by probable cause, that doesn't change the outcome here. Howse still needs a case putting the officers on clear notice that their use of force was excessive. And we still aren't aware of one.

[2]A majority of the Supreme Court has not yet decided whether there is a cognizable claim for malicious prosecution under the Fourth Amendment. Justice Alito, writing in dissent in *Manuel v. City of Joliet*, reasoned that malicious-prosecution claims do not arise under the Fourth Amendment. 137 S. Ct. 911, 923 (2017) (Alito, J., dissenting). If they are constitutionally cognizable at all, he said, they must arise under another constitutional

misnomer. After all, our circuit doesn't even require a showing of malice to succeed on such a claim. *Sykes v. Anderson*, 625 F.3d 294, 310 (6th Cir. 2010). It's really a claim for an "unreasonable prosecutorial seizure" governed by Fourth Amendment principles. *Id.* (cleaned up); *see also Gregory v. City of Louisville*, 444 F.3d 725, 748–49 (6th Cir. 2006).

Under the Fourth Amendment, an officer can seize someone so long as he has probable cause that the person has violated the law. For example, suppose a police officer clocks someone driving twenty miles per hour over the speed limit. The officer pulls over the driver and offers two reasons for the stop. The first is that he saw the driver speeding. The second is that he suspected that the driver might have illegal drugs. Even if there's nothing to support the officer's hunch about drugs, the officer still has probable cause to stop the car for speeding. *See Whren v. United States*, 517 U.S. 806, 811–13 (1996). So the seizure doesn't violate the Fourth Amendment even though one of the justifications for the stop was meritless.

That's why the constitutional tort claim of false arrest fails so long as there's just one valid reason for the arrest. A false arrest, as its name suggests, is simply an arrest which isn't supported by probable cause. *Webb*, 789 F.3d at 666. The Supreme Court has held that the reason the officer gives for an arrest need not be the reason which *actually* provides probable cause for the arrest. *Devenpeck v. Alford*, 543 U.S. 146, 153–55 (2004). If the facts known to the officers support probable cause in any form, then an individual may lawfully be arrested. *Id.* at 155. So it follows that when an officer arrests someone based on multiple charges, "it is not relevant whether probable cause existed with respect to each individual charge." *Jaegly v. Couch*, 439 F.3d 149, 154 (2d Cir. 2006) (Sotomayor, J.). What matters is the validity of the *arrest* (the seizure) and not the validity of every *charge* (the potential justifications for the seizure). *Id.* As long as the arrest is supported by probable cause on one charge, then a false arrest claim cannot move forward. *See Alman v. Reed*, 703 F.3d 887, 900 n.3 (6th Cir. 2013);

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provision—presumably the Due Process Clause. *Id.* But because our circuit has held that a federal malicious-prosecution claim does arise under the Fourth Amendment (and not the Due Process Clause), we are bound by that decision and must consider Fourth Amendment principles when defining the scope of the claim. *See, e.g.*, *Sykes v. Anderson*, 625 F.3d 294, 310 (6th Cir. 2010) (refusing to import the common-law malice requirement into a federal malicious-prosecution claim because that would conflict with Fourth Amendment principles).

see also Gill v. City of Milwaukee, 850 F.3d 335, 342 (7th Cir. 2017); *Tatum v. City & Cty. of San Francisco*, 441 F.3d 1090, 1095 (9th Cir. 2006).

The same rules apply here. After all, claims for false arrest and malicious prosecution both arise under the Fourth Amendment. They both hinge on an alleged unreasonable seizure. And they both rise and fall on whether there was probable cause supporting the detention. Indeed, just like in the context of false arrests, a person is no more seized when he's detained to await prosecution for several charges than if he were seized for just one valid charge. In the end, there's no principled reason for treating a Fourth Amendment malicious-prosecution claim differently than a Fourth Amendment false-arrest claim.[3]

Because there was probable cause to prosecute Howse for obstructing official business, he cannot proceed on his other malicious-prosecution claims.

Ohio law—Assault & Battery. Howse also sued Hodous and Middaugh for assault and battery under Ohio law. For this claim, Howse must show (1) that the officers acted with an intent to cause harmful or offensive contact and (2) that such contact occurred (that's battery) or that he *thought* that such contact would occur (that's assault). *See Love v. City of Port Clinton*, 524 N.E.2d 166, 167 (Ohio 1988); *Smith v. John Deere Co.*, 614 N.E.2d 1148, 1154 (Ohio Ct. App. 1993).

The officers once again claim that they're immune from suit. This time, they point to an Ohio statutory provision which provides a general grant of immunity to government employees. Ohio Rev. Code § 2744.03(A)(6). That provision creates "a presumption of immunity" that can be overcome only in a handful of circumstances. *Hoffman v. Gallia Cty. Sheriff's Office*, 103 N.E.3d 1, 13 (Ohio Ct. App. 2017).

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[3]The contrary conclusions of other circuits don't persuade us otherwise. The Second Circuit has held that each criminal charge must be supported by probable cause. *Posr v. Doherty*, 944 F.2d 91, 100 (2d Cir. 1991). Otherwise, the court reasoned, an officer might tack on many additional (meritless) charges. *Id.*; *cf. Holmes v. Village of Hoffman Estate*, 511 F.3d 673, 681–83 (7th Cir. 2007). Tacking on meritless charges, however, does not change the nature of the seizure. If hypothetically it were to change the length of detention, that would be a different issue. But the plaintiff has not presented any evidence that the additional assault charges caused Howse to suffer longer detention.

Howse can't proceed to trial on his assault-and-battery claim because he hasn't challenged the officers' statutory immunity. Indeed, "the burden necessary to deny immunity to [law enforcement] officers is onerous." *Argabrite v. Neer*, 75 N.E.3d 161, 169 (Ohio 2016). And Howse offers nothing to meet that burden. He hasn't argued that any exception to immunity applies here. Nor has he cited a single Ohio case to support such an argument. Because Howse makes no argument on the matter, we conclude that the officers are entitled to statutory immunity. *See Puckett v. Lexington-Fayette Urban Cty. Gov't*, 833 F.3d 590, 611 (6th Cir. 2016).

III.

Howse also brought a § 1983 claim against the City of Cleveland. He says that Cleveland is responsible for the alleged constitutional violations by Hodous, Middaugh, and the John Doe officer.

Municipalities may be held liable under § 1983 for their own unlawful acts. *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978). To be liable, though, it's not enough that a municipality's employees violated someone's constitutional rights. Instead, the plaintiff must show that the municipality *itself* caused the constitutional violation through one of its own customs or policies. *Id.* at 694. One way to prove liability is to show a municipal policy of inadequate training that led to the constitutional harm. *Thomas v. City of Chattanooga*, 398 F.3d 426, 429 (6th Cir. 2005). Another way is to show a municipal custom of tolerating rights violations that led to that constitutional harm. *Id.*

Howse argues both theories on appeal. He claims that Cleveland inadequately trained its officers about how to use proper force. And he also claims that the City adopted a custom of tolerating constitutional violations.

To start, Howse faces an uphill battle in trying to prove that Cleveland's (alleged) inadequate training caused his (alleged) constitutional injuries. That's because he must show (1) the training program did not adequately prepare the officers for the tasks they must perform, (2) the inadequacy resulted from the municipality's deliberate indifference, and (3) the

inadequacy either closely related to or caused Howse's injury. *Winkler v. Madison Cty.*, 893 F.3d 877, 902 (6th Cir. 2018).

Howse cannot show that these three elements are met here. Cleveland's training academy's standards exceed state requirements, and Cleveland's police force has explicit written policies instructing officers not to use excessive force. Howse offers no evidence to the contrary—at least relevant to the claims here. On top of that, Howse hasn't shown how any inadequacy in the training program led to his constitutional injuries. This causation requirement is "rigorous." *Bd. of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 415 (1997). And it's not met here because Howse hasn't offered any argument that links the legal harm he allegedly suffered back to Cleveland. *See Puckett*, 833 F.3d at 611.

Nor can Howse succeed under a custom-of-inaction theory. To win on this claim, Howse would need to show that Cleveland had notice (or constructive notice) of a "clear and persistent pattern" of unlawful activity. *Thomas*, 398 F.3d at 429 (cleaned up). Then he would need to show that Cleveland tacitly approved of that unlawful activity by doing nothing. *Id.* And *then* he would need to show that Cleveland's tacit approval was the moving force behind his constitutional violation. *Id.* Howse points to a Department of Justice memo as evidence of a pattern of unlawful activity. But even assuming that's enough (and we're not sure it is), Howse hasn't shown that Cleveland approved of that unlawful activity *or* that any such approval caused Howse to suffer a constitutional injury. Mere blanket assertions that Cleveland "tolerated" or "condoned" officer misconduct aren't enough. *Bickerstaff v. Lucarelli*, 830 F.3d 388, 402 (6th Cir. 2016) (cleaned up). On the contrary, Cleveland has taken affirmative steps to combat the unlawful use of excessive force. Those steps include a thorough use-of-force policy and active enforcement of that policy. Take this case. After Hodous and Middaugh filed their Use of Force reports, several other officers reviewed those reports to make sure that the force used was reasonable.

In sum, Howse hasn't shown that Cleveland can be held responsible for any constitutional wrongs that Hodous, Middaugh, or the John Doe might have committed.

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We affirm.

DISSENTING IN PART

COLE, Chief Judge, dissenting in part. At this stage, we are required to view the facts in the light most favorable to Howse. *See, e.g.*, *Brown v. Lewis*, 779 F.3d 401, 411 (6th Cir. 2015). This proposition of law is not in dispute. The majority, like the district court before it, acknowledges that when the officers' version of events conflicts with Howse's, we must resolve that factual conflict in Howse's favor. (Maj. Op. at 4). Many of the majority's conclusions, however, are predicated on resolving key factual disputes in the officers' favor. Properly considering those factual disputes under the standard our precedent mandates compels a different conclusion than the majority's. Specifically, I find that the facts viewed in the light most favorable to Howse demonstrate that Middaugh executed an arrest unsupported by probable cause using excessive force, and then, along with Hodous, spurred a prosecution of Howse by making false statements about the incident. As such, although I agree with the majority's approach to Howse's municipal liability claims, I respectfully disagree with its disposition of Howse's excessive force, malicious prosecution, and state law claims.

I. The Facts Viewed in the Light Most Favorable to Howse

On July 28, 2016, Howse was on the porch of the home he shared with his mother, had his key in the gate, and was in the process of opening the gate when Middaugh and Hodous, who were not in uniform, pulled up in an unmarked car. The officers asked Howse if he lived at the residence, and Howse responded that he did. The officers started to pull away but then pulled back and asked Howse if he was sure that he lived at the home. Howse, agitated, responded to this second inquiry, "Yes, this is my home. What the f—." (R. 25-3, PageID 411.)

Once Howse used the expletive, Middaugh commented that Howse had a "smart mouth." (R. 25-3, PageID 411.) At this point, Howse repeatedly stated, "I live here. I live here." (R. 25-3, PageID 411.) Middaugh then approached Howse on the porch and ordered Howse to put his hands behind his back, stating that Howse was "going to jail." As Howse continued to protest that he lived at the residence and was not doing anything wrong, Middaugh threw Howse to the

ground and attempted to arrest him. As the commotion continued, Howse's mother emerged from the residence and protested that Middaugh was attempting to arrest her son. When Howse looked up to see his mother, Middaugh struck him twice in the back of the neck. During Middaugh's attempt to arrest him, Howse was screaming at the top of his lungs and stiffened his arms to make it difficult for Middaugh to place the handcuffs on Howse. Howse never attempted to hit or push Middaugh, remaining nonviolent throughout the entire incident. With regard to Hodous, Howse testified that Hodous "was just there." (R. 25-3, PageID 418.) Howse explained that Middaugh made the arrest while Hodous and another officer were "standing there." (R. 25-3, PageID 419.)

Once Howse was placed in handcuffs, he was taken to jail, where he stayed for two nights and three days. As the majority notes, Hodous and Middaugh prepared reports detailing the use of force, which included statements that Howse actively resisted arrest and struck the officers as they attempted to investigate the situation. Although a grand jury indicted Howse on two counts of assault and one count of obstructing official business, the state ultimately dismissed all charges against Howse.

II. Excessive Force Claim

First, it is important to identify the point in the timeline at which the allegedly unlawful conduct took place, as the Fourth Amendment analysis is different for an arrest than it is for an investigatory stop. Much of the majority's analysis treats the interaction between Howse and the officers as a *Terry* stop. *See Terry v. Ohio*, 392 U.S. 1 (1968). It is true that there may have been a brief moment where Howse's interaction with the police may have qualified as an investigatory stop and required only reasonable suspicion under *Terry*, but Howse does not claim that Middaugh violated his rights during a *Terry* stop. Rather, he claims that the police used excessive force, and all parties agree that Middaugh deployed the force in question while executing an arrest. When an investigatory stop "ripens into an arrest," the arresting officer "must show probable cause." *Brown*, 779 F.3d at 412 (internal citation omitted).

Here, the officers lacked probable cause to arrest Howse. In justifying the encounter, the officers note that Howse was in a high-crime area and that their experience led them to believe

that the vacant-looking house could have been a drug house. Middaugh testified that Howse's behavior reminded him of another arrest where he "believed [the suspect] was tucking something in his waistband, a gun . . . made eye contact with the officer in an undercover car, touched his waistband, looked away, and went up on a porch that was not his." (R. 25-1, PageID 160–61.) In the prior case, the individual, once confronted, had attempted to flee and disposed of a gun in the process.

Even if we assume that these factors could support an investigatory stop, as the majority does, they certainly do not support probable cause to make an arrest. "Probable cause to make an arrest exists if the facts and circumstances within the arresting officer's knowledge were sufficient to warrant a prudent man in believing that the [arrestee] had committed or was committing an offense." *Arnold v. Wilder*, 657 F.3d 353, 363 (6th Cir. 2011) (internal citation and quotation marks omitted). It requires "less than *prima facie* proof but more than mere suspicion." *Hoover v. Walsh*, 682 F.3d 481, 499 (6th Cir. 2012) (internal citation and quotation marks omitted).

Crucially, unlike the individual in Middaugh's prior case, Howse never attempted to flee or revealed himself to be armed. Prior to Middaugh telling Howse he was going to jail and attempting to arrest him, Howse had done nothing illegal at all, and the officers do not allege otherwise. Instead, Howse had only repeatedly asserted the (true) fact that he lived at the residence and sworn at the plainclothes officers when they kept asking him the same question. In fact, as Middaugh attempted to arrest Howse, his *only* professed basis for doing so was Howse's profanity.

There are many actions a person could take that would support a determination that an officer has probable cause to make an arrest, but responding to plainclothes officers who are asking the same question over and over with a "smart mouth" is not one of them. *See Wilson v. Martin*, 549 F. App'x 309, 311 (6th Cir. 2013) (finding that where a gesture was "crude, not criminal . . . officers were patently without probable cause to arrest [the person who made the gesture] for it"); *see also Cohen v. California*, 403 U.S. 15, 25 (1971) ("For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely

because government officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.")

For additional evidence that the officers lacked probable cause to arrest Howse, look no further than the crimes he was ultimately charged with: two counts of assault on a police officer and one count of obstructing official business. The record is completely devoid of any suggestion that Howse assaulted the officers or obstructed official business *before* he was arrested. Any factual allegation that would have supported those charges had to have arisen *after* the officers began the arrest. Thus, there was no probable cause at the point at which Middaugh endeavored to arrest Howse.

I turn next to the question of qualified immunity. I concur with the majority's conclusion that Hodous is entitled to qualified immunity. Howse admits that Hodous did not physically participate in Howse's arrest and it was only Middaugh who threw Howse to the ground to effectuate the arrest. As for Middaugh, the majority correctly states that, in order to overcome an assertion of qualified immunity, Howse must show that the officers violated a clearly established constitutional right. *E.g.*, *District of Columbia v. Wesby*, 138 S.Ct. 577, 589 (2018). I also agree that a right is clearly established only when every reasonable officer would understand that what they are doing is unlawful. *Id.* My disagreement with the majority stems from its application of that standard to this record. The majority asks, "whether every reasonable officer would know that law enforcement cannot tackle someone who disobeyed an order and then use additional force if they resist being handcuffed." (Maj. Op. at 6.) We should instead be asking whether it violates a clearly established constitutional right for an officer to throw a person to the ground in order to arrest[1] that person without probable cause**.** I conclude that the answer to that question is yes on the basis that follows below. Accordingly, I would deny Middaugh qualified immunity.

[1]The majority says "it isn't obvious that the officers were effectuating an arrest (rather than an investigatory stop) when they tackled and handcuffed Howse" because, in some cases, officers may be permitted to handcuff a person as part of an investigatory stop. (Maj. Op. at 8, fn. 1.) Contrary to the majority's suggestion, however, I do not reach the conclusion that Middaugh was arresting Howse because he handcuffed him, as I agree that our precedent allows for the use of handcuffs during some investigatory stops. Rather, I conclude that Middaugh was arresting Howse because of Middaugh's statement that Howse was "going to jail." (R. 25-3, PageID 411.) We have previously held that "[T]he removal of a suspect from the scene of the stop generally marks the point at which the Fourth Amendment demands probable cause." *Centanni v. Eight Unknown Officers*, 15 F.3d 587, 591

"The right to be free of excessive force, as a general matter, is clearly established." *Brown*, 779 F.3d at 419 (citing *Bletz v. Gribble*, 641 F.3d 743, 756 (6th Cir. 2011)). To determine whether force is excessive, we consider the "objective reasonableness" of the force "in light of the totality of the circumstances confronting the defendants[.]" *Brown*, 779 F.3d at 418 (citing *Burgess v. Fischer*, 735 F.3d 462, 472 (6th Cir. 2013)). When we make this objective inquiry, we look at three issues: (1) the severity of the crime that prompted the officers to conduct the arrest; (2) the extent to which the suspect poses an immediate threat to the arresting officers; and (3) whether the suspect is either actively resisting arrest or attempting to evade arrest by fleeing. *Martin v. City of Broadview Heights*, 712 F.3d 951, 958 (6th Cir. 2013) (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)).

And clearly established law on those factors compels the conclusion that the force used in throwing Howse to the ground was excessive. First, Howse did not commit (and Middaugh had no reason to believe he had committed) any crime. *See, e.g.*, *Patrizi v. Huff*, 690 F.3d 459, 464 (6th Cir. 2012) (noting Fourth Amendment right to be free from arrest without probable cause is clearly established). Second, Middaugh cannot point to evidence that Howse posed an immediate threat to the safety of any officer. *Griffith v. Coburn*, 473 F.3d 650, 659 (6th Cir. 2007) (observing that "the right of people who pose no safety risk to the police to be free from gratuitous violence during arrest" is clearly established). Third, Howse did not resist or attempt to evade arrest, as he was immediately thrown to the ground by Middaugh. Howse stiffening his arms to resist being handcuffed does not change the conclusion on this factor, as he did not do so until Middaugh had already used force to throw Howse to the ground. Based on this analysis, I would find that Middaugh violated Howse's clearly established Fourth Amendment right to be free from excessive force and deny qualified immunity to Middaugh on Howse's excessive force claim.

III. Malicious Prosecution Claim

The Supreme Court tells us that the tort of malicious prosecution is "entirely distinct" from the tort of false imprisonment, which includes false arrest, as the former remedies the

(6th Cir. 1994). Here, Middaugh's intent to remove Howse from the scene, and specifically to take him to jail, demonstrates that Middaugh was attempting to effectuate an arrest.

wrongful institution of legal process and the latter remedies detention in the absence of legal process. *Wallace v. Kato*, 549 U.S. 384, 390 (2007) (internal citation and quotation marks omitted). Here, the majority determines that these "entirely distinct" claims must necessarily be analyzed in the exact same way, despite myriad reasons to follow the Supreme Court's direction and treat them differently. And it does so sua sponte, absent the urging of any party, and without the support of a single decision of this court or any other. I decline to join the majority in making this leap to new legal ground.

We have never indicated that a malicious prosecution claim fails so long as there is probable cause to prosecute on one of several charges. In every prior case where there were some valid charges on the indictment and we were tasked to consider a malicious prosecution claim on acquitted charges, we separately analyzed whether probable cause supported the charge that was the subject of the claim. In *Barnes v. Wright*, we addressed a case where the plaintiff was convicted on the other charges for which he was indicted but nonetheless brought a malicious prosecution claim concerning the charge on which he was acquitted. 449 F.3d 709, 713 (6th Cir. 2006). Rather than dismiss the matter immediately due to the existence of valid charges on the indictment, we undertook an analysis of whether probable cause supported the charge that was the subject of the malicious prosecution claim. *Id.* at 716–17. In *Cook v. McPherson*, we were similarly confronted with a case where the plaintiff had been convicted of all but one of the charges he faced in state court. 273 F. App'x 421, 422 (6th Cir. 2008). There, we affirmed the dismissal of the malicious prosecution claim because the plaintiff could not point to evidence that the indictment returned against him on the challenged charge had been obtained by fraud or other police misconduct, not because the plaintiff had been separately convicted on a different charge. *Id.* at 424.

Additionally, other circuit courts have explicitly rejected the majority's approach, and with good reason. The Second Circuit has concluded that a malicious prosecution claim can proceed even when a separate charge is supported by probable cause. *Posr v. Doherty*, 944 F.2d 91, 100 (2d Cir. 1991). That court observed that the majority's approach would allow prosecutors to tack on additional meritless charges in any case where they had probable cause to prosecute for a single offense. *Id.* The Seventh Circuit held that "a malicious prosecution claim

is treated differently from one for false arrest[.]" *Holmes v. Village of Hoffman Estate*, 511 F.3d 673, 682 (7th Cir. 2007). It aptly noted:

> An arrested individual is no more seized when he is arrested on three grounds rather than one; and so long as there is a reasonable basis for the arrest, the seizure is justified on that basis even if any other ground cited for the arrest was flawed. But when it comes to prosecution, the number and nature of the charges matters: the accused must investigate and prepare a defense to each charge, and as the list of charges lengthens (along with the sentence to which the accused is exposed), the cost and psychic toll of the prosecution on the accused increase.

Id. Other circuits have joined this conclusion. *See Johnson v. Knorr*, 477 F.3d 75, 83 (3d Cir. 2007) (declining to "establish legal precedent of such broad application that it would 'insulate' law enforcement officers from liability for malicious prosecution in all cases in which they had probable cause for the arrest of the plaintiff on any one charge"); *Uboh v. Reno*, 141 F.3d 1000, 1005 (11th Cir. 1998) (concluding that a malicious prosecution claim could proceed even when the plaintiff had already been convicted of other charges included in the same indictment).

I join these circuits and dispute the majority's contention that "there's no principled reason for treating a Fourth Amendment malicious-prosecution claim differently than a Fourth Amendment false arrest claim." (Maj. Op. at 9–10.) As a practical matter, the precise nature of a prosecution matters a great deal to the defendant who must grapple with its consequences. And it is a reality that no two prosecutions share the exact same character. Some prosecutions are for one charge, others for several. Some prosecutions can result in incarceration, others only a fine. Some prosecutions are based on a straightforward set of facts, others are far more complicated. The addition of more charges than probable cause can support to a prosecution changes the nature of the case, doing so in a way that negatively impacts the defendant.

We can imagine, for example, that putting on a defense against multiple charges requires more resources than defending against a single one. We might also note that the severity of the crimes charged could have psychological impacts for the defendant, as well financial ones: it may impact the amount the defendant must post in bail in order to maintain his liberty. We ought further consider that a defendant facing a list of charges where only a single one is supported by probable cause would be in a much worse negotiating posture for plea bargaining than one who is only bargaining over the disposition of a single charge. It follows that the

damages suffered by a defendant in an unlawful prosecution would depend largely, if not entirely, on which specific charges are at issue in that prosecution. In stark contrast, a false arrest, as the Seventh Circuit observed, does not change in character simply because the officer making the arrest believed that she had probable cause to arrest for more charges then she did in reality. *See Holmes*, 511 F.3d at 682. I therefore believe that we must address the merits of Howse's claim that he was maliciously prosecuted for assaulting Hodous and Middaugh.

I further believe that when we reach this claim, summary judgment is inappropriate given this record. Perhaps the most ardently disputed fact in this case is whether Howse struck or attempted to strike the officers as they confronted him on his own porch; the officers say he did, while Howse says he did not. Given that we view disputed facts in the light most favorable to Howse, we proceed on the assumption that Howse did not strike either officer. A malicious prosecution claim survives where an officer knowingly or recklessly makes a false statement or falsifies or fabricates evidence. *King v. Harwood*, 852 F.3d 568, 587–88 (6th Cir. 2017). A natural corollary of our assumption that Howse's version of the events is the true one is that Hodous and Middaugh's statements that spurred the prosecution of Howse for assault are false. I would therefore hold that the malicious prosecution claim should proceed.

IV. State Law Assault and Battery Claim

The majority disposes of Howse's state law assault and battery claim on the basis that Howse has not challenged the officers' statutory immunity under Ohio law. Ohio Rev. Code 2744.03(A)(6). As with the excessive force claim, I find that Howse has a plausible assault and battery claim against Middaugh, and I would allow that claim to proceed.

Ohio Rev. Code § 2744.03(A)(6)(b) provides that there is an exception to the general immunity the officers enjoy under state law when officers act "with a malicious purpose, in bad faith, or in a wanton or reckless manner." Again viewing the facts in the light most favorable to Howse, I believe that Howse has met his burden of overcoming the claim of immunity. By alleging that Middaugh threw him to the ground in order to effect an arrest made without probable cause that Howse was not resisting, Howse has created a genuine issue as to whether Middaugh acted "with malicious purpose, in bad faith, or in a wanton or reckless manner" and,

thus, overcome his burden to show that Middaugh should be denied statutory immunity. We have previously observed that when there is a question as to whether an officer acted unreasonably under the Fourth Amendment, there is also a question as to whether he acted recklessly under Ohio Rev. Code § 2744.03(A)(6)(b). *See Burgess*, 735 F.3d at 480. As I find that Howse's excessive force claim should proceed, I find that this claim should as well.

I respectfully dissent.