USCA No. 18-55149

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAMELA FOX KUHLKEN,

Plaintiff-Appellant

v.

COUNTY OF SAN DIEGO, SHERIFF'S DEPUTY DARIN SMITH, and DOES 1-5,

Defendants-Appellants.

United States District Court
Southern District of California
USDC No. 16-CV-2504-CAB (RNB)
Honorable Cathy Ann Bencivengo, U.S. District Judge

APPELLANT'S OPENING BRIEF

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APPELLANT'S OPENING BRIEF

Statement of the Case

I. Nature of the Case

A. Basis for Subject Matter Jurisdiction in the District Court

This appeal is from the judgment entered in the U.S. District Court for the Southern District of California, the Honorable Cathy Ann Bencivengo, District Judge Presiding. The District Court had original jurisdiction pursuant to 28 U.S.C. § 1331, § 1343(4), § 167 and 42 U.S.C. § 1983.

The Judgment followed a grant of Summary Judgment on Appellees' motion, entered on January 16, 2018. Fed. R. Civ. P., rule 56 (CR 32-33; ER 1, 298).[1]

B. Basis for Jurisdiction in the Court of Appeals

This Court has jurisdiction under 28 U.S.C. § 1294(1).

C. The Judgment is Appealable

A judgment in a civil action is subject to appeal. 28 U.S.C. § 1291.

[1] "CR" is the Clerk's Record; "ER" is the Excerpt of Record. There is no Reporter's Transcript as the District Court did not conduct a hearing on the Summary Judgment Motion.

D. The Notice of Appeal Was Timely Filed

Judgment was entered January 16, 2018. The Notice of Appeal was filed February 5, 2018. Fed. R. Civ. P., rule 58; Fed. R. App. P. 4(a)(1)(A). (CR 33; ER 298).

II. Introduction and Summary of Issues

PAMELA FOX KUHLKEN (”FOX”) sued San Diego Sheriff's Deputy DARIN SMITH (Deputy SMITH”) and his employer, the COUNTY OF SAN DIEGO (”COUNTY”) (collectively ”Appellees”) for violating her civil rights.

This case started over a parking spot. A tenured professor of religious studies at SDSU who practices holistic medicine and had no arrest record was aggressively accosted in a volleyball center parking lot by 2 unknown people when she tried to lawfully pull her vehicle into an empty space. Scared, she did what she was supposed to: call 911 and follow their instructions, which were to leave the scene and await a Deputy. Within 15 minutes of her call, Deputy SMITH displayed an aggressive attitude, threatened her with a TASER, threw her to the ground (causing her to hit her head) and overly tightened her handcuffs. Why? Because she allegedly refused to produce her driver’s license fast enough, despite the fact that dispatch knew who she was. She was booked and released with a misdemeanor citation, which never

resulted in a prosecution. The next day she passed out, hit her head and spent several days in the hospital. One of the 2 falls likely caused a concussion.

Appellees successfully asserted in the District Court she was not entitled to judgment because Deputy SMITH acted constitutionally, reasonably and without warning his actions could be deemed unconstitutional. .

This appeal presents 3 (related) issues:

First, whether Appellees' conduct was actionable under a Fourth Amendment theory of either false arrest or excessive force[2] (the "first prong" of the qualified immunity analysis).

Second, whether the law was "clearly established" (the "second prong" of the qualified immunity analysis).

Third, whether disputed issues of material fact remained to be decided by a jury which would render summary judgment inappropriate on either prong.

In this case, Qualified Immunity was/is not warranted because (1) viewing the facts in the light most favorable to Appellant, the conduct is actionable and (2) the law was either clearly established or the illegality of the conduct was obvious.

[2] Dr. FOX abandoned a claim based upon an unlawful detention in her Opposition to the Summary Judgment motion.

III. Proceedings and Disposition in the District Court

On or about August 8, 2016, FOX filed a claim with the County of San Diego. Cal. Gov't Code § 905, § 905.2, 945.4. The claim was denied. § 912.4.

The Complaint was filed on October 6, 2016. (CR 13). A First Amended Complaint correcting a scrivener's error was filed on October 8, 2016. (CR 3 ER 23). Appellees answered on October 31, 2016. (CR 6 ER 37). A Scheduling Order was issued on January 30, 2017. (CR 11).

On November 20, 2017, after discovery had closed, Appellees filed their Motion for Summary Judgment. (CR 16; ER 47). An Opposition and Reply were thereafter filed on December 12 and December 19, 2017, respectively. (CR 25, 29; ER 49-297).

On January 16, 2018, the Court granted summary judgment in favor of Appellees without oral argument. (CR 32; ER 1). That same day, Judgment was entered. (CR 33; ER 298).

A notice of appeal was filed on February 5, 2018. (CR 36; ER 299)

IV. Statement of Facts

Dr. PAMELA FOX KUHLKEN is a writer and professor of Religious Studies, Classics and Humanities at San Diego State University. She has a PhD in Comparative Literature, a B.A. in English and

Philosophy, and Masters degrees in Theology and Poetics. FOX Depo[3] @ 27–30. She has no criminal record and has never previously been arrested nor handcuffed. FOX Depo @ 140–141. She is divorced and has a teenage daughter, Zoe. She considers herself athletic, health conscious and generally healthy, but takes an anti-depressant. She rarely drinks and does not smoke marijuana. FOX Depo @ 10–11, 18, 22–23. She lives with her mother; Zoe lives about a mile away with her ex-husband. FOX Depo @ 26–27. She is dating an attorney named Eli Himmelstein. FOX Depo @ 36.

On Sunday, February 21, 2016 she took Zoe to the Epic Volleyball Club in Poway for a tournament. She picked her up about 8:30 and about 9:00, dropped her off at the front door and went to look for a parking spot. FOX Depo @ 40, 228–229; Exhibit 12[4], item 2. She pulled into a spot some distance from the entrance, intending to look for a closer one, preferably in the shade. FOX Depo @ 52–55, 228–229; Exhibit 12, item 1. In between games, she intended to grade some exams in the car. FOX Depo @ 53.

After a few minutes she saw 2 spaces open up. She drove over and began slowly pulling into the one of them. FOX Depo @ 57–58, 65, 228–229; Exhibit 12, item 3. She did not see any cars circling the lot

[3] ER 86 et. seq.

[4] ER 226

looking for spaces. She saw a man later identified as Cleon Platts sitting on a traffic island talking to an Asian woman. She paid them no mind. FOX Depo @ 59.

As she pulled partway into the spot, Platts walked up from her right side and stepped in front of the center of her car. She stopped, but he kept walking toward her. FOX Depo @ 64, 67–68, 71–72. She motioned for him to move. FOX Depo @ 69. He did not. Instead, he kept approaching until his thighs, hips and waist were touching her car. FOX Depo @ 71.

She rolled down her driver's window to ask him to move. He shook his head and sat down in front of her car, out of sight. She heard kicking underneath her car and got scared. FOX Depo @ 73–76. She thought he might be staging an accident for some sort of insurance scam. He had yet to say anything. FOX Depo @ 76

His wife arrived and started screaming "What are you doing? Are you trying to kill my husband? You're trying to run him over," and began taking pictures or video with her phone. Mrs. Platts was focused on Dr. FOX; she did not seem concerned about her husband, never even asking if he was alright. As far as Dr. FOX knew, Mrs. Platts had not seen anything. Mrs. Platts began kicking her car. FOX Depo @ 77–80.

Scared, she called 911. FOX Depo @ 83–95, Exhibit 3a[5]. The call was logged as having been made at 9:15:22. She provided a detailed description of the events, gave her name and telephone number, the other party's license plate, and complied with the instructions given her, namely to "stay separated".

The Computer Assisted Dispatch ("CAD") (Exhibit 2[6]) shows the following timeline with respect to Event Number E3169938 (reported by Dr. FOX). It fairly related the information she provided.

> 1. 02/21/16 @ 09:15:22 ph02[7] 106823[8] EVENT CREATED: [AREA] POW :EPIC VOLLEYBALL [XST] STOWE DR / SCRIPPS POWAY PKWY [RP NAME] PAM CAULKEN [RP ADDRESS] SA [SOURCE] ADMIN [RP PHONE] (619) 335–0401
>
> 2. 02/21/16 09:15:23 ph02 106823 NOW...AT LOC....(RP DID NOT HAVE ADDRESS).....415 IN PARKING LOT OVER PARKING SPACES.....MTF
>
> 3. 02/21/16 09:15:57 ph02 106823 COMMENT ADDED: RP VS UNK MALE
>
> 4. 02/21/16 09:16:13 encd 105575 [UNIT] 41P5A[9] DP . . .

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[5] ER 63. All audio and video files/exhibits will be conventionally lodged at a later time.

[6] ER 57

[7] The audio file name.

[8] The operator identification number.

[9] Deputy SMITH's designation that day.

> 5. 02/21/16 09:18:18 ph02 106823 COMMENT ADDED: RP STATING MALE WAS ROLLED HIS BODY INTO A PARKING SPOT AND PARTIALLY UNDER CAR
>
> 6. 02/21/16 09:18:44 ph02 106823 COMMENT ADDED: MALES WIFE PULLED UP AND THEY STARTED HITTING AND KICKING RPS VEH
>
> 7. 02/21/16 09:19:06 ph02 106823 COMMENT ADDED: SUBJS HAVE A VEH 6VZN184.
>
> 8. 02/21/16 09:19:22 ph02 106823 RP IS PULLED OUT OF PARKING SPOT AND IS PULLING INTO ANOTHER SPOT TO WAIT FOR DEPS
>
> 9. [Officer(s) were dispatched at] 02/21/16 09:19:51 . . . Event: 415A - DISTURBANCE, ARGUMENT[10]
>
> 10. 02/21/16 09:20:23 ph02 106823 COMMENT ADDED: 1ST RP PAM IS SAYING THE OTHER HALF FEMALE IS TAKING PICTURES OF HER
>
> 11. 02/21/16 09:20:40 ph02 106823 COMMENT ADDED: PAM WILL STAY SEPARATED...NFD

The radio traffic with respect to Dr. FOX' call (Exhibit 4a[11]) was much less specific than the CAD[12]:

> DISPATCH: 41P5 for a 415 argument on Stowe. OFFICER: 41P5. DISPATCH: 41P5 unit to cover, 415 argument Stowe

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[10] See SMITH Depo @ 20–21, 82 (ER 242 et. seq.).

[11] ER 67

[12] Deputy SMITH had access to the information on the CAD via his patrol car computer; he did not look at it before engaging with anyone. SMITH Depo @ 84–85.

> and Scripps Poway Parkway the Epic Volleyball. Now 415 in the parking lot over parking spaces, RP is unsure of the exact address. Unknown male. No further description at this time, P5. OFFICER: P5, 10–4. (Unintelligible).

Meanwhile, a different operator took Mrs. Platts call 2 minutes later at 9:17:39 (Exhibit 6a[13]). It was clear from the call that Mrs. Platts did not see what happened. She described his injuries as "his foot is caught up underneath her car."

The second CAD (Exhibit 5[14]) reveals the following timeline with respect to Event Number: E169941 (Mrs. Platt's call):

> 1. 02/21/16 09:17:39 ph19 106163 . . . RP STATES THAT HER HUSBAND WAS STANDING IN A PARKING SPOT WAITING FOR HIS WIFE TO PULL IN AND ANOTHER VEH PULLED IN AND HIT HIM... RAN OVER HIS FOOT...
>
> 2. 02/21/16 09:18:24 ph19 106163 COMMENT ADDED: "S" VEH IS A RED CHEVY VOLT LIC 7KCX685..
>
> 3. 02/21/16 09:18:33 if01 106163 COMMENT ADDED: ** VEH search completed at 02/21/16 09:18:33
>
> 4. 02/21/16 09:19:00 ph19 106163 COMMENT ADDED: .... THE "S" DRIVER IS IS A WFA... SHE IS ATTEMPTING TO LEAVE..
>
> 5. 02/21/16 09:19:22 encd 105575 . . . CROSS REFERENCED TO EVENT= E3169938[15]

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[13] ER 73

[14] ER 71

> 6. 02/21/16 09:19:54 ph19 106163 COMMENT ADDED: SHE REFUSED TO GIVE ANY INFO ON HER OR HER VEH INS..

At 09:21:31, Operator 105575 reported, as reflected on Exhibit 2, "COMMENT ADDED: 41P5A -- BOTH PARTIES 97, V' DECLINING MEDICAL"

The radio traffic (Exhibit 4a) with respect to Mrs. Platts call was less brief and accurate than the CAD:

> DISPATCH: 41T3[16] (unintelligible) for an 11–83
>
> OFFICER: T3.
>
> DISPATCH: 41T3 unit to cover 11–83, 13955 Stowe Drive. 13955 Stowe Drive, San Diego Volleyball Club. RP is advising her husband was standing in the parking lot waiting for his wife to pull in. And another vehicle ran over his foot[17]. Suspect vehicle is a red Chevy Volt, license 7KCX685. T3.
>
> OFFICER: 10–4 I'll be in route. So this will be related to the 415.
>
> DISPATCH: Affirm[18].

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[15] See SMITH Depo @ 21–22.

[16] Deputy Peterson's designation that day.

[17] That is not what she said.

[18] Deputy SMITH overheard this broadcast as well. Although the CAD was available to him in his vehicle's computer, he did not consult it. The CAD information wa not broadcast. SMITH Depo @ 22–24, 84–85.

As instructed, Dr. FOX parked elsewhere and waited for a Deputy. FOX Depo @ 96, 228–229; Exhibit 12, item 4. When she saw a patrol SUV and firetruck, she walked back to Epic in the company of another volleyball mom. FOX Depo @ 96, 101. She walked toward the SUV, her exams in one arm, Zoe's lunch and her purse in the other. Deputy SMITH, on the job since 1989, was sitting inside. (He had arrived on scene at 9:20.) His window was down, and as she approached, SMITH asked Mr. Platts "Is this the woman?" She testified "And Cleon looked at me and just shook his head again. That's all I ever saw Cleon do. So he shook his head no when I approached. And so I explained to Smith, "Yes. Good. I called 9–1–1. I'm glad you're here." FOX Depo @ 107, 110, 119; SMITH Depo @ 10, 82; Exhibit 2.

Deputy SMITH said "its all the same" opened his door, "tucked in his shirt, puffed up his chest and said 'Give me your ID'" in an "aggressive, frightening, demanding" tone. FOX Depo @111–114; SMITH Depo at 31. Dr. FOX thought this was strange and, taken aback, said "Excuse me?" She didn't understand what was unfolding. There was no medical attention being provided to Mr. Platts, who seemed "100% fine." . FOX Depo @115–116.

The next thing Deputy SMITH said was "Do you want to be tased?" She asked for clarification, and said she was sure he couldn't tase her because she didn't do anything wrong. FOX Depo @118, 121. (Deputy SMITH admitted he threatened her with the use of a TASER to get her

to provide her identification before any alleged physical resistance took place. Dr. FOX denied that he told her to sit in his patrol car as he claims. He demanded she give him her purse. FOX Depo @ 124; SMITH Depo @ 31, 37–38. He grabbed her arm and went for the purse but she did not let go, frantically asking him to stop. FOX Depo @ 125. Her exams went flying out of her other arm, and then Deputy SMITH began to handcuff her. FOX Depo @ 127.

It was at this point he detained her for a violation of Penal Code § 148:

> A First I explained to her if she's not going to give me her driver's license, then she's going to need to sit in the back of my patrol car until the traffic investigator arrives.
>
> Q Okay. Did she respond to that?
>
> A I don't remember exact words, but she resisted.
>
> Q Verbally or physically or both?
>
> A Initially it was verbal. . . .
>
> Q Okay. And initially verbally she declined to do that. What happened next?
>
> A I grabbed her by the arm to walk her over to my car.
>
> Q Was she being detained at that point in time?
>
> A Yes.

> Q And what was the crime that you were detaining her pending further investigation?
>
> A The 148, resisting.
>
> SMITH Depo @ 38.

According to Dr. FOX, he grabbed her by the wrist, pulled her arms behind her and handcuffed her. One of the cuffs simply dropped off because it was too loose, so she showed him, and his response was to grab and throw her to the asphalt by pulling her arms behind her and wrapping his leg around hers, a maneuver he described as a "modified arm bar takedown." She simply did not know what was going on and didn't understand why any of this was necessary. FOX Depo @ 132–134, 139–140, 144; Himmelstein Depo[19] @ 94; SMITH Depo @ 47–48.

Her shoulders and head[20] hit with the asphalt. Her 2 hair clips broke. FOX Depo @ 146–147. He overly tightened the handcuffs and with the assistance of a man in the crowd, got her to her feet and took her to the back of the SUV. This is approximately when a bystander's video recording begins[21]. FOX Depo @ 145–148. She admitted that she did not

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[19] ER 242

[20] Deputy SMITH admitted in deposition that she had hit her head on the ground. SMITH Depo @ 47–48.

[21] ER 53; see fn. 5.

want to get into the car. FOX Depo @ 152; SMITH Depo @ 50–51, 53. This was about the time (9:28 am) Deputy Peterson arrived. SMITH Depo @ 56, 82

Deputy Peterson, a traffic officer, did not witness any use of force. Peterson Depo[22] @ 17, 27, 88. He conducted his investigation, and quickly concluded Mr. Platt (whom he described as a little dramatic and confrontational) had not been injured. His immediate thought was that something did not make sense about Platt's claim:

> I remember he said his toes were run over, and that didn't make any sense to me at all because it was a front impact. It wasn't like the tire went over his feet. And I remember going back and forth with him, trying to make sense of that. And he eventually described how his toes got injured because his feet had been underneath the vehicle, kind of like up into the engine compartment, and then Ms. Fox had backed out over him. So this is already after Ms. Fox allegedly ran into him and then backed over him.
>
> Q Okay. So his toes somehow got caught on the undercarriage of the car and bent in some fashion that caused injury to them?
>
> A Yeah. Supposedly they had been bent backwards.

He thinks this was the first time he had heard anything like that in his career. Peterson Depo @ 45–46. He spoke to Mrs. Platts, who he described as "dramatic" and said she had not seen the alleged assault.

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[22] ER 227

Peterson Depo @ 48. He inspected Dr. FOX' vehicle, which had no signs of impact. Peterson Depo @55. He also spoke with someone who described aggressive behavior by Mr. Platts inside the volleyball center. Peterson Depo @ 60–61.[23]

Meanwhile, Dr. FOX was in the SUV. The handcuffs were excruciatingly tight, and she said so a few times. SMITH admitted she complained and that he did nothing to alleviate her pain. FOX Depo @ 150, 159–162; SMITH Depo @ 64–65. She sat in the car for what she estimated to be about a half hour, and was then transported to the substation. She declined to provide her daughter's name. She had no idea where her purse or exams were, and was not told. FOX Depo @ 157–158, 160, 252–253.

When they got to the station Deputy SMITH went inside leaving her still painfully handcuffed in the back of his SUV. After 10–15 minutes Deputy SMITH, another male Deputy and Deputy Boegler, a female, came and ordered her out of the vehicle. Again she asked that someone loosen the handcuffs, but was ignored. The three officers escorted her inside the station, where she was questioned. SMITH Depo @ 69, 71.

Deputy Boegler took custody of Dr. FOX at the station. She searched her, assisted Deputy Smith take photographs, asked questions about

[23] Deputy Peterson testified that when he mentioned he was being deposed, he thinks Deputy SMITH's response was "something to the effect of that his feeling of the matter is very silly." Peterson Depo @ 26.

possible contraband and health related questions, took off her handcuffs, and put her in a holding cell. It is unclear if the handcuffs were on or off during the majority of the questioning. Boegler Depo[24] @ 27–28.

What is clear from the audio is that at 4:17, Dr. FOX says "ouch, could you loosen these." She was told that the cuffs would be removed when they were finished (which was about another 15 minutes). The Court can see for itself how tight the cuffs were affixed to her and the visible marks they left immediately upon their removal. See Exhibit 16[25], pageID 139–141.

At some point, Deputy Peterson returned to the station and advised that "he was convinced there was not a collision." SMITH Depo @ 69, 71

At the station, she did not need any medical treatment "on the spot. " FOX Depo @ 164. Nevertheless, her wrists, knees, hips, shoulder and head hurt. FOX Depo @ 165. Bruising, including on her wrists, did not appear until later. FOX Depo @167, 171.

She was cleared of assault charges and given a citation to appear on charges of resisting arrest, and Deputy SMITH drove her back to the volleyball center around noon. FOX Depo @ 176; SMITH Depo @ 75; Declaration ¶10. She met Zoe, but didn't tell her what had actually happened for fear of upsetting her. FOX Depo @ 179. She felt foggy the

[24] ER 80

[25] ER 290

rest of the day and was sore. FOX Depo @ 180, 196–197. She spent the evening at her boyfriend's home. He observed her to be distraught, banged up, bruising, and had a headache. He did not recall seeing any physical injuries on her wrists at that time. Himmelstein Depo @ 32–36.

The next evening, at Eli's home, without warning she suddenly lost consciousness, fell and cut her head on the concrete floor, bleeding profusely. She was out cold for about 10 minutes. FOX Depo @ 197; Himmelstein Depo @ 74. She awoke in an ambulance on the way to the hospital. She received stitches for a four inch laceration and was held for observation for 2 nights and 3 days to monitor for a concussion. FOX Depo @ 198–203, 253; Himmelstein Depo @ 64, 66–69, 72, 76. She treated her injuries holistically. She also has been treated for PTSD. FOX Depo @ 258–267. With respect to her wrists, she now has carpal tunnel, and sleeps with a wrist brace. She experiences intermittent pain, as well as pain when she attempts to do the yoga postures she could once do, when she writes on dry erase boards and when she types. FOX Depo @ 165.

She reaffirmed that knowing what she does now, she still did not know why Deputy Smith was asking for her driver's license. She explained " Because I had already identified myself to the 911 operator, and I walked up to him and introduced myself. So I -- I don't. And I was not in my car." She also said that if she could go back in time, she still would not be able to provide her driver's license." She explained "I

couldn't have. I wasn't able to because I didn't feel safe. And he was threatening. . . . I could not have acted any differently when the police is threatening me saying, "Hand me your ID. Do you want to be tased?" It was terrifying. I had no explanation of what was going on." FOX Depo @ 269–270, 272

Argument

I. Summary Judgment Is Not Warranted in this Case

A. Standard of Review

The grant of a motion for summary judgment, and specifically the decision that an officer is entitled to qualified immunity, is/are subject to de novo review. *Glenn v. Washington Cnty.*, 673 F.3d 864, 870 (9th Cir. 2011).[26]

"Summary judgment is appropriate only 'if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.'" Fed. R. Civ. P., rule 56; *Stoot v. City of Everett*, 582 F.3d 910, 918 (9th Cir. 2009).

This Court must draw all reasonable inferences in favor of the non-moving party and is obligated to construe the record in the light most

[26] The District Court granted summary judgment on the state claims as well. ER 21. Because review is de novo, the District Court's decision (CR 32; ER 1) will not be specifically analyzed.

favorable to that party. Felarca v. Birgeneau 2018 U.S. App. LEXIS 14335 *10 (9th Cir. 2018); *Liston v. Cnty. of Riverside*, 120 F.3d 965, 977 (9th Cir. 1997)(same standard applies in analyzing qualified immunity).

Police officers are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was "clearly established at the time." Courts have discretion to decide which prong of the analysis to address first. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

A decision in the defendant's favor on either prong establishes qualified immunity, even without consideration of the other prong. *C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 986 (9th Cir. 2011).

While qualified immunity is to be determined at the earliest possible point in the litigation, summary judgment in favor of officers is "inappropriate where a genuine issue of material fact prevents a determination of qualified immunity until after trial on the merits." *Estate of Lopez v. Gelhaus*, 871 F.3d 998, 1021 (9th Cir. 2017); *Green v. City & Cnty. of San Francisco*, 751 F.3d 1039, 1049 (9th Cir. 2014)(Because the inquiry is "inherently fact specific, the determination . . . should only be taken from the jury in rare cases."); *Wall v. Cnty. of Orange*, 364 F.3d 1107, 1111 (9th Cir. 2004)(Factual matters concerning

the reasonableness of a Fourth Amendment claim generally are jury questions. Thus, there was no probable cause if plaintiff's version were accepted).

B. The Elements of a § 1983 Claim

A plaintiff must establish by a preponderance of the evidence that a defendant: (1) performed an act or acts which operated to deprive her of one or more of her Federal Constitutional rights; (2) acted under color of law; and (3) was the legal cause of damages. *Wood v. Strickland*, 420 U.S. 308 (1985). Proof of specific intent to deprive one of constitutional rights is not required. *Monroe v. Pape*, 365 U.S. 167, 187 (1961); *Caballero v. City of Concord*, 956 F.2d 204, 206 (9th Cir. 1992).

It is a question of fact as to what force a reasonable officer would have used which controls, not his state of mind. Evil intentions will not establish a constitutional violation if the force used was objectively reasonable, nor will good faith protect an officer who used unreasonable force. *Graham v. Connor*, 490 U.S. 386 (1989).

1. Serious or Permanent Injuries are not an Element

The Fourth Amendment prohibits more than the unnecessary strike of a nightstick, sting of a bullet, and thud of a boot. cf. *Schmerber v. California*, 384 U.S. 757 (1966). Instead,"the question is whether the

officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." *Griego v. Cnty. of Maui*, 2017 U.S.Dist.LEXIS 4620, at *53–54 (D. Haw. 2017)(citing cases)

Thus, courts have held that physical injury is not an element of a § 1983 claim. *Felarca v. Birgeneau*, at *12–13; *Robinson v. Solano Cnty.*, 278 F.3d 1007, 1013–14 (9th Cir. 2002)(pointing a gun and causing the suspect to "fear for [his] life" even it does not cause physical injury); *Meredith v. Erath*, 342 F.3d 1057, 1063 (9th Cir. 2003) (lawful detention may be unreasonable if "unnecessarily painful, degrading, or prolonged"); *Tekle v. United States*, 511 F.3d 839, 846 (9th Cir. 2007)(excessive force where officers kept an eleven year old child handcuffed and pointed their weapons at him "even after it was apparent that he was a child and was not resisting them or attempting to flee"); *McDowell v. Rogers*, 863 F.2d 1302, 1307 (6th Cir. 1988)(we do not believe that a serious or permanent injury is a prerequisite to a claim under § 1983).

"The intrusion [on a person's liberty] may be substantial even though the injuries are minor." *Santos v. Gates*, 287 F.3d 846, 855 (9th Cir. 2002). The injuries FOX has described are sufficient.

II. Taken in the Light Most Favorable to Appellant, There Was No Probable Cause to Arrest Her. Further, Disputed Issues of Material Fact Remain

A. Introduction

The Fourth Amendment guarantees the right of the people to be secure against unreasonable searches and seizures. *Bell v. Wolfish*, 441 U.S. 520, 545 (1979).

The interests protected by the Fourth Amendment are not confined to the right to be secure against physical harm; they include "liberty, property and privacy interests - a person's "sense of security" and individual dignity." *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1195 (10th Cir. 2001); *Schmerber v. California*, 384 U.S. 757, 767 (1966).

Claims that police officers have unconstitutionally detained or arrested a person are analyzed under an objective reasonableness standard. *Graham v. Connor*, 490 U.S. 386.

A warrantless arrest is presumed unlawful and in violation of the 4th Amendment. Once a plaintiff meets this burden, the burden of proof shifts to the defendant(s) to establish that arrest was based upon probable cause. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

To determine whether officers have probable cause at the time of the arrest, the Court must consider:

> "whether at that moment the facts and circumstances within [the Officers'] knowledge . . . were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." (Citation) Although conclusive evidence of guilt is not necessary to establish probable cause, "mere suspicion, common rumor, or even strong reason to suspect are not enough." (Citation.) Generally, officers need not have probable cause for every element of the offense, but they must have probable cause for specific intent when it is a required element. . . .
>
> *Edgerly v. City & Cnty. of San Francisco*, 599 F.3d 946, 953–954. (9th Cir. 2010)

In *Rodis v. City & Cnty. of San Francisco*, 499 F.3d 1094 (9th Cir. 2007), the Court held that there was no probable cause to make an arrest on charges of passing a counterfeit bill, as the police had no evidence whatsoever supporting probable cause to believe the knowledge and intent elements were present. The officers argued, in part, that the charge was not a specific intent crime, and, therefore, evidence regarding intent or knowledge was not required to establish probable cause. The Court rejected the claim:

> By focusing on the distinction between specific and general intent, Defendants lose sight of the principal inquiry: whether they had probable cause to effectuate an arrest. . . . [the cited] facts have no bearing on the crime's two mens rea components (i.e., knowledge and intent to defraud), which are indispensable in the probable cause calculus. (Citations) . . . The record shows, and Defendants concede, they had no evidence whatsoever demonstrating that Rodis intended to use the bill to defraud the store, nor was there any reason to believe Rodis believed the bill was fake.

Rodis v. City & Cnty. of San Francisco, 499 F.3d at 1097–1099.

Those facts which justify probable cause are those known at the time of the arrest. Facts uncovered afterwards are irrelevant. *Hart v. Parks*, 450 F.3d 1059 (9th Cir. 2006).

"Officers may not solely rely on the claim of a citizen witness that he was a victim of a crime, but must independently investigate the basis of the witness' knowledge or interview other witnesses." *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1444 (9th Cir. 1991)(declining to adopt contrary argument that "merely because citizen witnesses are presumptively reliable" nothing more is required); *Stoot v. City of Everett*, 582 F.3d at 919

Despite any argument that an officer is "free to disbelieve" a suspect, the law is clear that all the evidence must be considered in a probable cause analysis. *Broam v. Bogan*, 320 F.3d 1023, 1032 (9th Cir. 2003)("An officer is not entitled to a qualified immunity defense, however, where exculpatory evidence is ignored that would negate a finding of probable cause").

A mistake of fact or law can justify an arrest, even when the actual conduct at issue is lawful, so long as the officer's beliefs are reasonable. *Heien v. North Carolina*, 135 S.Ct. 530 (2014)

The totality of the circumstances includes the 'collective knowledge of the officers involved, and the inferences reached by experienced, trained officers.' " *United States v. Sharpe*, 470 U.S. 675, 682 (1985). The Court

should look to the collective knowledge of all the officers involved even though all of that information may not have been communicated to the officers who actually makes the stop. *United States v. Ramirez*, 473 F.3d 1026, 1032–33 (9th Cir. 2007).

B. The Arrest was Unjustified

Here, there can be no dispute that Dr. FOX was in fact arrested when she was thrown to the ground, handcuffed, placed into a police vehicle, and transported to the substation. See *Park v. Shiflett*, 250 F.3d 843, 851–852 (4th Cir. 2001)(custodial arrest occurred when detainee, despite being told he was not under arrest, was thrown against wall by officers, kicked, handcuffed, and locked in patrol car after he attempted to leave).

1. Cal. Penal Code § 148(a)(1)

Penal Code § 148(a)(1) provides, "Every person who willfully resists, delays, or obstructs any . . . peace officer . . . in the discharge or attempt to discharge any duty of his or her office or employment, . . . shall be [guilty of a misdemeanor]."

The lawfulness of the officer's conduct is an essential element. See *People v. Curtis*, 70 Cal.2d 347, 354–56, 357 (1969). Thus, "excessive

force used by a police officer at the time of arrest is not within the performance of the officer's duty." *Smith v. City of Hemet*, 394 F.3d 689, 695 (9th Cir. 2005)(en banc);

A citizen cannot be arrested for questioning or protesting the actions of a police officer. "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston v. Hill*, 482 U.S. 451, 463 (1987).

"It is no crime in this state to nonviolently resist the unlawful action of police officers." *In re Michael V.*, 10 Cal.3d 676, 681 (1974). §148 does not make it a crime to "resist unlawful orders." *Maxwell v. Cnty. of San Diego*, 708 F.3d 1075, 1086 (9th Cir. 2013) Nor does § 148 criminalize a failure to "respond with alacrity to police orders." *People v. Quiroga*, 16 Cal.App.4th 961, 966 (1993) review denied (1993). An outright refusal to cooperate with police officers, without more, is not adequate grounds to arrest for a violation of § 148. *People v. Bower*, 24 Cal.3d 638, 649 (1979); *Mackinney v. Nielsen*, 69 F.3d 1002, 1006 (9th Cir. 1995).

Simply asserting a constitutional right, without more, cannot form the basis of a lawful arrest for violating § 148(a)(1), either, even if it causes the officer's job to become prolonged. *United States v. Prescott*, 581 F.2d 1343, 1346 (9th Cir. 1978)(no crime to refuse entry to officers who had no search or arrest warrant but requested consent).

When a person is arrested under § 148, any such resistance (and corresponding probable cause) arises out of the initial basis for the encounter. If there was no probable cause to arrest in the first place, it makes no difference for present purposes if he resisted arrest. See *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 920 (9th Cir. 2001)("If the officers could not lawfully arrest [a person] for battery, the officers could also not lawfully arrest [the person] for resisting arrest.")

2. Vehicular Offenses

A suspect in a crime may be compelled to identify himself, consistent with the Fourth Amendment, only if a State has enacted a statute creating such an obligation. *Hibel v. Sixth Judicial Dist. Court of Nevada, Humboldt Cnty.*, 542 U.S. 177, 187–88 (2004). However, "the use of § 148 to arrest a person for refusing to identify herself during a lawful Terry stop violates the Fourth Amendment's proscription against unreasonable searches and seizures." *Martinelli v. City of Beaumont*, 820 F.2d 1491, 1494 (9th Cir. 1987)

As such, Appellees rely upon Veh. Code § 20001, which states:

> (a) The driver of a vehicle involved in an accident resulting in injury to a person, other than himself or herself, or in the death of a person shall immediately stop the vehicle at the scene of the accident and shall fulfill the requirements of Sections 20003 and 20004.

Veh. Code § 20003 states:

> (b) Any driver or injured occupant of a driver's vehicle subject to the provisions of subdivision (a) shall also,upon being requested, exhibit his or her driver's license, if available, or, in the case of an injured occupant,any other available identification, to the person struck or to the driver or occupants of any vehicle collided with, *and to any traffic or police officer at the scene of the accident*. (emphasis added)

One essential element of these statutes is that the conduct (either the failure to stop or the failure to produce a driver's license) be willful, which CALCRIM 2140 defines as "an act done willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage."

"§ 20001 has long been deemed to impose a knowledge requirement that the accused knew or was aware that (1) he or she was involved in an accident and (2) the accident resulted in injury to another." Knowledge of injury to another or involvement in an accident may be constructive. *People v. Holford*, 63 Cal.2d 74, 80 (1965); *People v. Mace*, 198 Cal.App.4th 875, 881 (2011); *People v. Carter*, 243 Cal.App.2d 239, 241 (1966)(Where personal injuries are minor and the collision not of sufficient magnitude to compel the conclusion that injuries had probably occurred, there is no basis for imputing constructive knowledge of injury.)

Penal Code § 245 (assault) includes an identical willfulness requirement. CALCRIM 875

C. Argument

Here, considering all the facts personally known to Deputy SMITH as well as those which were knowable from the CAD and the telephone calls, there are disputed issues of material fact as to whether probable cause existed to arrest Dr. FOX. Specifically, (1) Dr. FOX asserts she did not physically resist or wilfully refuse to provide her identification; rather she simply tried to question Deputy SMITH about his purpose, as is her right under the cases cited above, before complying with his demand; (2) Deputy SMITH's response to this questioning was to threaten her with a TASER and immediately use excessive force by grabbing her, handcuffing her, and then throwing her to the floor after her cuff slipped loose; and (3) there was no evidence from which a reasonable person would have believed that Dr. FOX knew of either an accident or injury.

If Dr. FOX is telling the truth and she was simply trying to verbally engage the officer she herself called, but simply did not respond as quickly as Deputy SMITH desired, she was not subject to arrest under any theory.

III. Disputed Issues of Material Fact Prevent a Legal Determination Whether the Force Used Was Excessive

This is a classic example of a case in which the jury must determine which version of the facts it believes in order to determine whether the force used by Defendant SMITH was reasonable. Under Dr. FOX' version of the facts, SMITH conducted an immediate physical takedown of a scared woman who had done nothing more that ask for an explanation of his commands, after he threatened to tase her. This culminated in her striking her head on the pavement and led to her being placed in overly tight handcuffs.

In *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001), the Court held that an arrest made in an "extraordinary manner, unusually harmful to privacy or ... physical interests" is actionable. The Court stated:

> . . . As our citations in *Whren v. United States*, 517 U.S. 806, 818 (1996) make clear, the question whether a or seizure is "extraordinary" turns, above all else, on the manner in which the search or seizure is executed. . . . Atwater's arrest was surely "humiliating," as she says in her brief, but it was no more "harmful to . . . privacy or . . . physical interests" than the normal custodial arrest. . . . The arrest and booking were inconvenient and embarrassing to Atwater, but not so extraordinary as to violate the Fourth Amendment.
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> Id. at 354–355.

However, a seizure reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. *Meredith v. Erath*, 342 F.3d at 1062.

This is because "once a seizure occurred, it continues throughout the time the arrestee is in the custody of the arresting officers . . . Therefore, excessive use of force by a law enforcement officer in the course of transporting an arrestee give rise to a § 1983 claim." *Robins v. Harum*, 773 F.2d 1004, 1010 (9th Cir. 1985)

Because the excessive force and false arrest inquiries are distinct, establishing one does not automatically establish, or preclude, the otehr. *Blankenhorn v. City of Orange*, 485 F.3d 463; *Beier v. City of Lewiston*, 354 F.3d 1058, 1064 (9th Cir. 2004)

The "right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham v. Connor*, 490 U.S. at 396. However, "where there is no need for force, any force used is constitutionally unreasonable." *Headwaters Forest Def. v. Cnty. of Humboldt*, 240 F.3d 1185 (9th Cir. 2000); *Lolli v. Cnty. of Orange*, 351 F.3d 410, 417 & n. 5 (9th Cir. 2003) (*Headwaters* remains good law); *Espinoza v. City & Cnty. of San Francisco*, 598 F.3d 528 (9th Cir. 2010).

"Even where some force is justified, the amount actually used may be excessive." *Santos v. Gates*, 287 F.3d at 853. "Resistance, or the reasonable perception of resistance, does not entitle police officers to use

any amount of force to restrain a suspect. Rather, police officers who confront actual (or perceived) resistance are only permitted to use an amount of force that is reasonable to overcome that resistance." *Barnard v. Theobald*, 721 F.3d 1069, 1076 (9th Cir. 2013).

The Fourth Amendment permits law enforcement to use "objectively reasonable" force in light of the facts and circumstances confronting the officer. *Graham v. Connor*, 490 U.S. at 396–97. In making this assessment, the Court considers: (1) "the severity of the intrusion . . . by evaluating the type and amount of force inflicted," (2) "the government's interest in the use of force," and (3) the balance between "the gravity of the intrusion on the individual" and "the government's need for that intrusion." *Lowry v. City of San Diego*, 858 F.3d 1248, *13 (9th Cir. 2017)(en banc)("These factors . . . are not exclusive, however, and we examine the totality of the circumstances, considering other factors when appropriate.")

The evaluation of the second factor, the government's interest in the use of force, is assessed by considering three primary factors: "(1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight." Id.

"Whether the suspect pose[d] an immediate threat to the safety of the officers or others," is "the most important single element . . . ."

”Other relevant factors include "whether proper warnings were given" and "the availability of less intrusive alternatives to the force employed." *Lowry v. City of San Diego*, 858 F.3d at *13–20

The threat, or use, of excessive force during an unlawful arrest or detention triggers the right of self-defense. *Evans v. City of Bakersfield*, 22 Cal.App.4th 321, 331 (1994)

"Once a seizure occur[s], it continues throughout the time the arrestee is in the custody of the arresting officers . . . Therefore, excessive use of force by a law enforcement officer in the course of transporting an arrestee give rise to a § 1983 claim." *Robins v. Harum*, 773 F.2d at 1010

In this case, material questions of fact, such as whether Dr. FOX was engaged in protected speech or conduct or was actively resisting prior to her arrest, the severity of the threat she posed, the adequacy of police warnings, and the potential for less intrusive means are plainly in dispute. See, e.g., *Smith v. City of Hemet*, 394 F.3d at 703 ("it is evident that the question whether the force used here was reasonable is a matter that cannot be resolved in favor of the defendants on summary judgment.")

A. The Severity of the Intrusion on the Individual's Fourth Amendment Rights by Evaluating the Type and Amount of Force Inflicted and Risk of Harm

Dr. FOX, a middle aged college professor, called the police, and was pulled to the ground by a more physically imposing Deputy Sheriff, and forcibly handcuffed much too tightly over her alleged failure to produce a driver's license fast enough and in response to a citizen's demand for an explanation. This factor is in dispute or favors Dr. FOX.

B. The Government's Interest in the Use of Force

1. The Severity of the Crime at Issue

Although "an officer can effect an arrest for even a minor infraction, [a] minor offense-at most-support[s] the use of minimal force." *Perea v. Baca*, 817 F.3d 1198, 1203 (10th Cir. 2016); *Morris v. Noe*, 672 F.3d 1185, 1195 (10th Cir. 2012) (force should be reduced for a misdemeanor); *Fisher v. City of Las Cruces*, 584 F.3d 888, 895 (10th Cir. 2009) (petty misdemeanor weighs in favor of using minimal force).

There was no probable cause to believe Dr. FOX had committed a vehicular assault, and any questioning of the Deputy which "delayed" him in the performance of his duties was constitutionally privileged. Her only "crime" was the failure to speedily hand over her driver's

license while asking why. The Deputy was there to help her. The need for force was at its nadir under these circumstances. This factor is in dispute or favors Dr. FOX.

2. Whether Dr. FOX Posed an Immediate Threat to the Safety of the Officers or Others is in Dispute

deWhen a suspect's only resistance is failure to comply with a police order, and that resistance is "not particularly bellicose," it is considered passive and does not weigh heavily in the government's favor. *Bryan v. MacPherson*, 630 F.3d 805, 830 (9th Cir. 2010); *Mackinney v. Nielsen*, 69 F.3d at 1006 (outright refusal to comply with police commands to stop writing on a sidewalk with chalk does not constitute obstruction under § 148); *Smith v. City of Hemet*, 394 F.3d at 703 (refusal to obey officers' commands to remove hands from pockets, entry into his home despite officers' orders and brief physical resistance were "not . . . particularly bellicose." and did not constitute active resistance. . .)

Deputy SMITH also testified the crowd was not causing him any concern. SMITH Depo @ 37.

3. Whether Proper Warnings Were Given

"Appropriate warnings comport with actual police practice" and "such warnings should be given, when feasible, if the use of force may result in serious injury." *Deorle v. Rutherford*, 272 F.3d 1272, 1272 (9th

Cir. 2001). Dr. FOX stated she was only given a demand to produce her ID, and a threat to tase her, before force was applied. This factor is in dispute or favors Dr. FOX.

4. The Availability of Less Intrusive Alternatives to the Force Employed

This factor is neutral. *Glenn v. Washington Cnty.*, 673 F.3d at 872 (dispute over availability of less intrusive options precluded summary judgment.)

C. The Balance Between the Gravity of the Intrusion on the Individual and the Government's Need for That Intrusion

Deputy SMITH was there to help Dr. FOX resolve a dispute over a parking spot after she removed herself from the scene at the direction of the police. At worst, Mr. Platts, who did not appear visibly injured, alleged his toes had been run over, an explanation which made little sense on its face. Even though dispatch had her name, phone number, make and model and license plate (making her easily identifiable) she was nevertheless pulled to the ground and handcuffed in a painful manner for failing to produce her drivers' license fast enough.

In light of the stated reason for being there, to help her, Deputy SMITH had no interest in in acting the way that he did. A reasonable jury might agree. This factor is in dispute or favors Dr. FOX.

IV. The Law was either "Clearly Established" or "Obvious" and Genuine Disputes of Material Fact Existed

Appellees must prove they are entitled to qualified immunity. *Moreno v. Baca*, 431 F.3d 633, 638 (9th Cir. 2005). However, Dr. FOX bears the burden of showing that the rights allegedly violated were "clearly established." *Shafer v. Cnty. of Santa Barbara*, 868 F.3d 1110, 1118 (9th Cir. 2017).

This Court has recently acknowledged that qualified immunity may be denied in novel circumstances."Otherwise, officers would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct." *Longoria v. Pinal Cnty.*, 873 F.3d 699, 709 (9th Cir. 2017)

In *Dist. of Columbia v. Wesby*, 138 S.Ct. 577 (2018), it's most recent decision on qualified immunity, the Supreme Court explained:

> . . . "Clearly established" means that, at the time of the officer's conduct, the was "'sufficiently clear' that every 'reasonable official would understand that what he is doing'" is unlawful. *Ashcroft v. al–Kidd*, 563 U.S. 731, 741 (2011) In other words, existing law must have placed the constitutionality of the officer's conduct "beyond debate." Id. This demanding standard protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).
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> To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. The

rule must be "settled law," *Hunter v. Bryant*, 502 U.S. 224, 228 (1991)(per curiam), which means it is dictated by "controlling authority" or "a robust 'consensus of cases of persuasive authority,'" *Ashcroft v. al–Kidd*, 563 U.S. 731. It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. (Citation omitted) Otherwise, the rule is not one that "every reasonable official" would know. (Citation omitted)

The "clearly established" standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. The rule's contours must be so well [*23] defined that it is "clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). This requires a high "degree of specificity." *Mullenix v. Luna*, 136 S.Ct. 305, 309 (2015)(per curiam). We have repeatedly stressed that courts must not "define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." (Citation omitted) A rule is too general if the unlawfulness of the officer's conduct "does not follow immediately from the conclusion that [the rule] was firmly established." (Citation omitted) . . .

We have stressed that the "specificity" of the rule is "especially important in the Fourth Amendment context." (Citation omitted) . . . Thus, we have stressed the need to "identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment." *White v. Pauly*, 137 S.Ct. 548 (per curiam); While there does not have to be "a case directly on point,[27]"

[27] The Supreme Court has rejected any requirement that the facts of prior cases be "fundamentally" or "materially" similar. Thus, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." The key question is not whether there is a

> existing precedent must place the lawfulness of the particular arrest "beyond debate." al-Kidd, supra, at 741. Of course, there can be the rare "obvious case,[28]" where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances. *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004)(per curiam). But "a body of relevant case law" is usually necessary to "'clearly establish' the answer" with respect to probable cause. *Ibid*.
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> *Dist. of Columbia v. Wesby*, 138 S.Ct. at *21-24.

In a footnote, the court added:

> We have not yet decided what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity. See, e.g., *Reichle v. Howards*, 566 U.S. 658, 665–666 (2012) (reserving the question whether court of appeals decisions can be "a dispositive source of clearly established law"). We express no view on that question here. Relatedly, our citation to and discussion of various lower court precedents should not be construed as agreeing or disagreeing with them, or endorsing a particular reading of them. See *City & Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, fn. 4 (2015). Instead, we address only how a reasonable official "could have interpreted" them. (Citation omitted).
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> *Dist. of Columbia v. Wesby*, 138 S.Ct. at * 24, fn. 8.

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case directly on point, but whether a reasonable officer would understand that his or her conduct was unlawful. *Kinney v. Weaver*, 367 F.3d 337, 349–50 (5th Cir. 2004) (en banc)(citing *Hope v. Pelzer*, 536 U.S. at 741).

[28] See e.g. *Pierce v. Smith*, 117 F.3d 866, 882 (5th Cir. 1997)("There has never been a § 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages liability . . . ."

This Court has recently elaborated. "[I]n the absence of a precedential case with precisely the same facts as the case before us, [this Court] must compare the specific factors before the responding officers with those in other cases to determine whether those cases would have put a reasonable officer on notice that his actions were unlawful." *Hughes v. Kisela*, 2017 U.S. App. LEXIS 11465, at *5–6 (9th Cir. 2017)(Berzon, J. concurring in denial of rehearing and rehearing en banc)[29]. Therein, Judge Berzon stated:

> . . . The inverse of a "high level of generality" is not, as the dissent suggests, a previous case with facts identical those in the instant case — because, of course, no two cases are exactly alike. . . . "If qualified immunity provided a shield in all novel factual circumstances, officials would rarely, if ever, be held accountable for their unreasonable violations of the Fourth Amendment." *Mattos v. Agarano*, 661 F.3d 433, 442 (9th Cir. 2011) (en banc). . . .
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> . . . in the absence of a precedential case with precisely the same facts as the case before us, we must compare the specific factors before the responding officers with those in other cases to determine whether those cases would have put a reasonable officer on notice that his actions were unlawful. That framework is precisely the one the panel applied to Kisela's claim of qualified immunity. After conducting that inquiry, the panel concluded that this case is, given the pertinent precedents, squarely within — indeed, at the more

[29] Although the Supreme Court recently reversed the Ninth Circuit's decision (see *Kisela v. Hughes*, 138 S.Ct. 1148 (2018)) nothing in its opinion cast doubt upon Judge Berzon's concurrence.Rather, the Supreme Court disapproved of this Court's conclusion in that particular case.

> egregious border of — the group of precedents in which excessive force was found. (*Mullenix v. Luna*, 136 S.Ct. 305, 309–10 (2015). . . .)
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> Id. at *5-6

Reasonableness is not a demanding standard. The "state of the law" is sufficiently clear if it gave "fair warning" to an officer that his conduct was unconstitutional. *A. D. v. State of Cal. Highway Patrol*, 712 F.3d 446, 454 (9th Cir. 2013)

"To achieve that kind of notice, the prior precedent must be controlling—from the Ninth Circuit or Supreme Court—or otherwise be embraced by a 'consensus' of courts outside the relevant jurisdiction." *Sharp v. Cty. of Orange*, 871 F.3d 901, 911 (9th Cir. 2017); cf. *Tarabochia v. Adkins*, 766 F.3d 1115, 1125 (9th Cir. 2014) ("In the absence of binding precedent clearly establishing the constitutional right, we look to whatever decisional law is available . . . including decisions of state courts, other circuits, and district courts.")

"District court decisions — unlike those from the courts of appeals — do not necessarily settle constitutional standards or prevent repeated claims of qualified immunity." *S.B., a minor v. Cnty. of San Diego*, 864 F.3d at 1016.

The qualified immunity analysis involves more than "a scavenger hunt for prior cases with precisely the same facts." *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007). "The more obviously

egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation." *Perea v. Baca*, 817 F.3d at 1204.

Because the inquiry concerns the objective reasonableness of the officers' actions, the analysis is limited to "the facts that were *knowable*"[30] to the officers at the time. *White v. Pauly*, 137 S. Ct. at 551.

For purposes of qualified immunity a "reasonable officer" is a well-trained officer. *Malley v. Briggs*, 475 U.S. 335, 345–46 (1986); *Groh v. Ramirez*, 540 U.S. 551 (2004), *Hope v. Pelzer*, 536 U.S. 730 (2002), and *Wilson v. Layne*, 526 U.S. 603 (relying in part on officers' actual or constructive awareness of policies or training.)

A. It is Clearly Established That A Warrantless Arrest Requires Probable Cause

"A claim for unlawful arrest is cognizable under § 1983 as a violation of the Fourth Amendment, provided the arrest was without probable cause or other justification." *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 918

[30] "or could have been known." *Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2474 (2015) This includes information in the possession of other officers under the "collective knowledge" doctrine. *United States v. Sutton*, 794 F.2d 1415, 1426 (9th Cir. 1986); *United States v. Ramirez*, 473 F.3d 1026, 1032-1033 (9th Cir. 2007)(doctrine applies "regardless of whether [any] information was actually communicated to" the officer conducting the stop, search, or arrest at least "[w]hen there has been communication among agents"), as is the case here.

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(9th Cir. 2012) (quoting *Dubner v. City & Cnty. of San Francisco*, 266 F.3d 959, 964 (9th Cir. 2001)). "Probable cause exists when there is a fair probability or substantial chance of criminal activity." *Id.*

"It is well-settled that 'the determination of probable cause is based upon the totality of the circumstances known to the officers at the time of the search.' " *Id.*

This court must examine "whether the violative nature of particular conduct is clearly established" by controlling precedent, not whether the conduct violates a general principle of law. This inquiry applies not just to excessive force cases, but arrest based claims as well. *Sharp v. Cty. of Orange*, 871 F.3d at 910–911.

Except in the rare case of an "obvious" instance of constitutional misconduct (which is not presented here), Plaintiffs must "identify a case where an officer acting under similar circumstances as [defendants] was held to have violated the Fourth Amendment." *Sharp v. Cty. of Orange*, 871 F.3d at 910–911. (citation omitted)

It is well established that under Veh. Code § 20001, knowledge that one had been involved in an accident must be proven. *People v. Mayo*, 194 Cal.App.2d 527 (1961), *People v. Ryan*, 116 Cal.App.3d 168 (1981).

It is also well established that while "officers need not have probable cause for every element of the offense, . . . they must have probable cause for specific intent when it is a required element. . . ." *Edgerly v. City & Cnty. of San Francisco*, 599 F.3d at 953–954.

Lastly, it is well established that it is not a crime to fail to "respond with alacrity to police orders." *People v. Quiroga*, 16 Cal. App. 4th at 966.

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B. It is Clearly Established That Where There Is No Need for Force, Any Force Used Is Unreasonable.

The "right to be free from application of non-trivial force for engaging in mere passive resistance" was clearly established prior to this event. *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1093 (9th Cir. 2013); *Nelson v. City of Davis*, 685 F.3d 867, 881 (9th. Cir. 2012).

C. It is Clearly Established that the Way Handcuffs are Applied can Constitute Excessive Force

"By their very nature, handcuffs are "uncomfortable and unpleasant." *LaLonde v. Cnty. of Riverside*, 204 F.3d 947, 964 (9th Cir. 2000) (Trott, J., concurring in part, dissenting in part). However, handcuffing "substantially aggravates the intrusiveness of an otherwise routine investigatory detention and is not part of a typical Terry stop." *United States v. Bautista*, 684 F.2d 1286, 1289 (9th Cir. 1982).

Handcuffs may be justified during a detention if an officer reasonably believes a suspect is armed and dangerous or if "restraints are necessary for some other legitimate purpose," like officer safety .

Bennett v. City of Easpointe, 410 F.3d 810, 837 (6th Cir. 2005). However, their use must always be "justified by the totality of the circumstances." *Meredith v. Erath*, 342 F.3d at 1061.

The Ninth Circuit has recognized since the mid-1990s that "tight handcuffing can constitute excessive force" and requires that the matter go to a jury when the arrestee was either in visible pain, complained of pain, alerted the officer to pre-existing injuries, sustained severe injuries, was in handcuffs for a longer period of time, asked to have the handcuffs loosened or released, and/or alleged other forms of abusive conduct. *Hansen v. Black*, 885 F.2d 642, 645 (9th Cir. 1989)(witness saw officer being "rough and abusive" to plaintiff while handcuffing her); *Alexander v. Cnty. of Los Angeles*, 64 F.3d 1315, 1322–23 (9th Cir. 1995)(dialysis patient was carried and pushed into the back of a police car with his hands behind his back, and remained in tight handcuffs for forty-five minutes to an hour despite repeated requests to have the handcuffs loosened or removed); *Baldwin v. Placer Cnty.*, 418 F.3d 966, 970 (9th Cir. 2005); *Wall v. Cnty. of Orange*, 364 F.3d at 1109–10(officer tackled plaintiff from behind, twisted his right arm behind his back, forced him face down into a patrol car, handcuffed him tightly, and then left him in an 80 to 90 degree police car for twenty minutes.)

In *Meredith v. Erath*, 342 F.3d 1057, IRS agent Erath had a warrant to search a building for evidence of income tax violations. Ms. Bybee was not the target, and she repeatedly demanded that Erath produce a

search warrant. She alleged that, in response, Erath grabbed her, threw her to the floor, twisting her arms, placed her in handcuffs, refused to loosen them for 30 minutes despite complaints that they were too tight, and then left her in the handcuffs for several more hours. She did not "pose a safety risk and made no attempt to leave." The tax related crimes, "although felonies, are nonviolent offenses." Bybee "passively resisted" the handcuffing.

The Court denied qualified immunity because the law was clearly established that ""The need for force, if any, was minimal at best. In these circumstances, it was objectively unreasonable . . . for Erath to grab Bybee by the arms, throw her to the ground, and twist her arms while handcuffing her. *Meredith v. Erath*, 342 F.3d at 1061–1063.

D. It is Clearly Established that Pulling Dr. FOX to the Ground is Actionable

In *Blankenhorn v. City of Orange*, 485 F.3d at 478–479, the Plaintiff was arrested on suspicion of misdemeanor trespass. In doing so, officers gang tackled him, used hobble restraints, and punched him. After the charges were dismissed, he sued. The Court denied qualified immunity, holding that his rights were clearly established and a rational jury could find that the gang tackle was unreasonable for several reasons: (1) the severity of the alleged crime was minimal, (2) he did not pose a serious threat to the officers' or others' safety; (3) the pace of events

could reasonably lead to the conclusion that the latitude Graham requires for split-second police judgments in "tense, uncertain, or rapidly evolving" situations was not warranted; and (4) he did not actively resist being handcuffed before he was gang-tackled. see also *Morris v. Noe*, 672 F.3d at 1192 (two officers threw Morris to the ground despite the fact Morris "presented no threat to officer safety and had not engaged in any suspicious activity." "Morris's right to be free from a forceful takedown was clearly established under Graham.")

In *Shafer v. Cnty. of Santa Barbara*, 868 F.3d 1110 this Court held that an officer does not violate clearly established law when he "progressively increases his use of force from verbal commands, to an arm grab, and then a leg sweep maneuver to take an individual to the ground, when a misdemeanant refused to comply with the officer's orders."

The operative facts, taken in the light most favorable to Dr. FOX, that distinguish this case from Shafer are (1) she was never given any lawful verbal commands, (2) there was no probable cause or reasonable suspicion that she had committed a crime, and (3) Defendant SMITH did not "progressively increase his use of force,"

Shafer, which took place in what the panel stressed was a "challenging environment." Hundreds to thousands of intoxicated UCSB students congregated on a public street. There was loud music playing, and students were yelling, screaming, and running around. Shortly

after midnight, four students complained to deputies that they had just been hit with water balloons. This complaint caused Deputy Padilla concern, because water balloons had been a serious problem on that street and could cause injuries or start fights. The deputy then used a leg sweep maneuver to take down the plaintiff after he refused to comply with the officer's orders to drop the water balloons he was carrying.

By contrast, this case involves a simple dispute over a parking spot, where Dr. FOX, who was being accosted, called the police for help. It is the polar opposite of a "challenging environment." Unlike *Shafer*, which went to verdict, this case is still in the summary judgment stage and there are many disputed issues of material fact. Also, the nature of the force used here was very different. Notably, the panel affirmed the jury's finding that under the totality of the circumstances, the Deputies' conduct constituted excessive force, as this Court should do as well.

The panel noted in "a sufficiently "obvious" case of constitutional misconduct, we do not require a precise factual analogue in our judicial precedents. ... The bar for finding such obviousness is quite high." *Shafer v. Cnty. of Santa Barbara*, 868 F.3d at *13, fn 3 Unlike *Shafer*, Dr. FOX has asserted and met his burden of proving that this is such an obvious case.

Sharp v. Cty. of Orange, 871 F.3d 901 does not disrupt the longstanding principle that where there is no need for force, any force

used is unconstitutionally unreasonable. In Sharp, deputies had reason to believe they were authorized to apply the appropriate amount of force to arrest, handcuff and protect themselves from a wanted, actively-fleeing suspect prone to violence towards law enforcement. The Ninth Circuit explained that the "obviousness principle," an exception to the specific-case requirement, was inapplicable because it could not be held that "it is almost always wrong for an officer in those circumstances to act as he did." *Sharp v. Cty. of Orange*, at 911–912.

Although in the Fourth Amendment context "that kind of categorical statement is particularly hard to make when officers encounter suspects every day in never-before-seen ways," *Sharp v. Cty. of Orange*, 871 F.3d at 912, the Ninth Circuit has had no difficulty making categorical statements of law about the unconstitutionality of applying any force where there is no need for force. *Headwaters Forest Def. v. Cnty. of Humboldt (Headwaters I)*, 240 F.3d at 1199.

Here, Deputy SMITH did not encounter a suspect; he encountered a middle aged college professor armed with exams, a purse and her daughter's lunch who merely questioned why he needed her ID. As the *Shar*p court explained, when the court can "say that it is almost always wrong for an officer in those circumstances to act as he did," then "a violation is obvious enough to override the necessity of a specific factual analogue." *Sharp* at *22. The Court is confronted with such a set of facts here.

Accordingly, the Court should hold that material factual disputes preclude a finding of qualified immunity at this stage.

V. The State Civil Arrest and Battery Claims Should be Decided on the Same Grounds as the Federal Claims, But Are Not Subject to a Qualified Immunity Defense

As the District court recognized, Dr. FOX' state law claims are based upon the same facts as the § 1983 claims so they should be resolved identically. (CR 32; ER 21).

A state law battery claim is a counterpart to a federal § 1983claim of excessive use of force. *Harding v. City & Cnty. of San Francisco*, 602 F.App'x 380, 384 (9th Cir. 2015). A false arrest is cognizable under the same principles as § 1983; Cal. Gov't Code § 820.4; *Asgari v. City of Los Angeles*, 15 Cal.4th 744 (1997); Edson v. City of Anaheim, 63 Cal.App.4th 1269, 1272–73 (1998)

A finding of qualified immunity on the federal claism does not impact the remaining state claim "at all." *S.B., a minor v. Cnty. of San Diego*, 864 F.3d 1010 (citing *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1171 (9th Cir. 2013)("[T]he doctrine of qualified immunity does not shield defendants from state law claims.")

Dr. FOX agreed below that the County, as to the State Claims only, can be held liable if Deputy SMITH is found liable on those claims. *Sullivan v. Cnty. of Los Angeles*, 12 Cal.3d 710 (1974).

A. The State Claim Under Civ. Code § 52.1 Is Viable

The Ninth Circuit has recognized that, under California law, where an arrest is unlawful and excessive force is applied in making the arrest, there has been coercion "independent from the coercion inherent in the wrongful detention itself." *Lyall v. City of Los Angeles*, 807 F.3d 1178, 1196 (9th Cir. 2015)(citing *Bender v. Cnty. of Los Angeles*, 217 Cal.App.4th 968, 977 (2013)); *Thomas v. Dillard*, 212 F. Supp. 3d 938, 947. (S.D.Cal. 2016)("Dillard violated Plaintiff's Fourth Amendment rights by unlawfully detaining him for the purpose of performing a *Terry* frisk. Dillard then used excessive force to coerce Plaintiff to submit to the unlawful *Terry* frisk. . . . this is a violation of Civ. Code § 52.1.") There is no qualified immunity defense available to a defendant for a § 52.1 cause of action. *Thomas v. Dillard*, 212 F. Supp. 3d at 948.

Here, Dr. FOX has established that the "arrest is unlawful and excessive force is applied in making the arrest" so summary judgment was unwarranted.

Conclusion

For the foregoing reasons, Dr. FOX requests that the Judgment of the District Court be reversed and the matter remanded for jury trial as soon as possible.

Respectfully submitted,

Dated: June 6, 2018

By: /s Keith H. Rutman
KEITH H. RUTMAN
Attorney for Plaintiff-Appellant
PAMELA FOX KUHLKEN

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P., rule 32(a)(7)(C) and Ninth Circuit Rule, rule 32–1, this Opening Brief is proportionately spaced, has a typeface of 14 points or more and, according to the word processing program used to prepare it, contains **10,964** words.

Executed under penalty of perjury on June 6, 2018 at San Diego, California.

Respectfully submitted,

Dated: June 6, 2018

By: /s Keith H. Rutman
KEITH H. RUTMAN
Attorney for Plaintiff-Appellant
PAMELA FOX KUHLKEN

CERTIFICATION OF RELATED CASES

In accordance with Ninth Circuit Rule 28–2.6, counsel for Appellant is unaware of any matters pending in this Court which might be deemed related to the issues presented in the instant appeal.

Respectfully submitted,

Dated: June 6, 2018

By: /s Keith H. Rutman
KEITH H. RUTMAN
Attorney for Plaintiff-Appellant
PAMELA FOX KUHLKEN

CERTIFICATE OF SERVICE

I declare that I am over the age of eighteen years and not a party to this action. My business address is 501 West Broadway Ste. 1650 San Diego, California 92101–3741. On June 6, 2018, I electronically filed the instant **APPELLANT'S OPENING BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed under penalty of perjury under the laws of the United States on June 6, 2018 at San Diego, California.

Respectfully submitted,

Dated: June 6, 2018

By: /s Keith H. Rutman
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