**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| BASILEA MENA,<br>Plaintiff-Appellee,<br>v.<br>ROBERT MASSIE,<br>Defendant-Appellant. | No. 19-15214<br>D.C. No.<br>4:17-cv-00368-DCB<br>MEMORANDUM*<br>(Filed Feb. 26, 2020) |

Appeal from the United States District Court
for the District of Arizona
David C. Bury, District Judge, Presiding

Argued and Submitted January 22, 2020
San Francisco, California

Before: W. FLETCHER and R. NELSON, Circuit Judges, and MOLLOY,** District Judge.

Defendant-Appellant police officer Massie (Massie) appeals from the district court's denial of summary judgment (and motion for reconsideration) on Plaintiff-Appellee Mena's (Mena) claim of excessive force. This court has jurisdiction to hear interlocutory appeals from summary judgment denying qualified immunity. *Plumhoff v. Rickard*, 572 U.S. 765, 771-72 (2014). We

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Donald W. Molloy, United States District Judge for the District of Montana sitting by designation.

review the denial of summary judgment de novo. *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1090 (9th Cir. 2013). We affirm.

1. Evaluating the force used by Massie under the standards articulated in *Graham v. Connor*, 490 U.S. 386, 394–98 (1989), and *Miller v. Clark County*, 340 F.3d 959, 964 (9th Cir. 2003), we conclude that, viewing evidence in the light most favorable to Mena, a reasonable factfinder could conclude that Massie's use of force was objectively unreasonable and therefore constitutionally impermissible.

2. Massie argued that qualified immunity protects him for his actions here. Qualified immunity does not apply where clearly established rights are violated. *Saucier v. Katz*, 533 U.S. 194, 202 (2001). Determining whether the right was clearly established at the time of the violation "must be undertaken in light of the specific context of the case[.]" *Id*. at 201. "A constitutional right is clearly established if every reasonable official would have understood that what he is doing violates that right." *Rodriguez v. Swartz*, 899 F.3d 719, 728 (9th Cir. 2018) (internal quotation marks and citation omitted). The clearly defined right should not be defined "at a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). "The right must be settled law, meaning that it must be clearly established by controlling authority or a robust consensus of cases of persuasive authority." *Tuuamalemalo v. Greene*, 946 F.3d 471, 477 (9th Cir. 2019) (per curiam).

On June 22, 2016, there was a body of clearly established law that put Massie on notice that it would be excessive force to use violence that is foreseeably likely to cause more than de minimis amounts of pain and injury against an arrestee where the crime is a non-violent misdemeanor and the arrestee (1) was not a threat to the officers or anyone else, (2) was not a flight risk, (3) did not resist (or at most passively resisted) being handcuffed, and (4) was not warned that the officer was going to use violent force before it was applied. *Gravelet-Blondin*, 728 F.3d at 1089–93; *Barnard v. Theobold*, 721 F.3d 1069, 1073 (9th Cir. 2013); *Young v. Cty. of Los Angeles*, 655 F.3d 1156, 1166–67 (9th Cir. 2011); *Meredith v. Erath*, 342 F.3d 1057, 1061 (9th Cir. 2003).

**AFFIRMED.**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

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| Basilea Mena,<br>Plaintiff,<br>v.<br>Robert Massie,<br>Defendant. | No. CV-17-00368-TUC-DCB<br>**ORDER**<br>(Filed Feb. 6, 2019) |

On January 8, 2019, this Court granted in part and denied in part the Defendant's Motion for Summary Judgment and set the excessive use of force claim against Defendant Massie for trial. On January 18, 2019, the Defendant filed a Motion for Reconsideration based on new legal authority, *City of Escondido, Calif. v. Emmons*, 2019 WL 113027 (January 7, 2019). In *Escondido*, the Court framed its holding as follows:

> As we have explained many times: "Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Kisela v. Hughes*, . . . 138 S.Ct. 1148, 1152 . . . (2018) (per curiam) (internal quotation marks omitted); *see District of Columbia v. Wesby*, . . . 138 S.Ct. 577, 593 . . . (2018); *White v. Pauly*, . . . 137 S.Ct. 548, 551 . . . (2017) (per curiam); *Mullenix v. Luna*, . . . 136 S.Ct. 305, 308 . . . (2015) (per curiam).

*Id.* at *2. This Court considered *Kisela* when ruling on Defendant's summary judgment motion. Order (Doc. 37) at 3.)

Defendant asks this Court to reconsider its application of "cases which are black and white, regardless of differing factual predicates, where any force used is constitutionally unreasonable, if there is no need for any use of force." *Id.* at 6. The Defendant argues that as a matter of law under *Escondido* factual dissimilarities mean there can be no clearly established constitutional right, and the Court should have granted summary judgment for Massie based on the doctrine of qualified immunity.

This Court found the facts as alleged by the Plaintiff reflected a circumstance where absolutely no force was justified against her. In other words, Defendant Massie had no reasonable basis for grabbing Plaintiff's wrist and jerking her about, which she alleged resulted in her hand being pinched, and no need to push her face-first into the palm tree and handcuff her. As noted by the Defendant, the Court *sua sponte* cited several cases reflecting that the law is clearly established: that any degree of force is constitutionally unreasonable, if there is no need for any use of force at all. On reconsideration, the Defendant challenges the cases relied on by the Court because one, *P.B. v. Koch*, 96 F.3d 1298, 1303–04 & n. 4 (9th Cir.1996), involves the use of force by a school principal and the other two cases, *Felix v. McCarthy*, 939 F.2d 699, (9th Cir. 1991) and *Meredith v. Arizona*, 523 F.2d 481, 482-84 (9th Cir.1975), involve use of force by prison guards.

The Court agrees that generally diversity of facts would preclude a finding that there is clearly established law and would warrant summary judgment under the doctrine of qualified immunity. Specificity is especially important in the Fourth Amendment context because it is sometimes difficult for an officer to determine how the legal doctrine of excessive force will apply to the factual situation the officer confronts. Use of excessive force, especially, depends very much on the facts of each case. And, hence police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue in the case. *Escondido*, 2019 WL 113027 * 2 (citing *Kisela*, 138 S. Ct. at 1153.)

While *Escondido* is not new law, it does offer a good example of the type of analysis required to avoid the risk of describing clearly established law "at a high level of generality by saying only that 'the right to be free of excessive force' was clearly established. *Id.* at *3. The Court explained that the appellate court "should have asked whether clearly established law prohibited the officers from stopping and taking down a man in these circumstances," referring to the specific facts of the case. *Id.*

In *Escondido*, police had received a 911 call about a domestic violence incident where children were present and reportedly crying for help. When officers attempted to conduct a welfare check, they knocked, and no one answered, but a side window opened and officers spoke to a woman and attempted to get her to open the door. A man inside told her to move away from the

window, and she did. A few minutes later, a man exited the apartment. Officers told him not to close the door, but he did and tried to brush past police. Officer Craig stopped the man, took him quickly to the ground, and handcuffed him. The Supreme Court found error by the appellate court's reliance on *Gavelet-Blondin v. Shelton*, 728 F.3d 1086, 1093 (9th Cir. 2013), a case involving the use of force by police against individuals engaged in passive resistance.

In *Gavelet-Blondin*, police arrived to conduct a welfare check of an elderly man, Jack, suspected of being in the process of committing suicide. It was reported that he owned a gun and might have it with him. When officers arrived, Jack was in his car with the exhaust hose running from the exhaust pipe into the car window. After some hesitation, Jack complied with directives to get out of the car but then refused to show his hands. For officer safety reasons, police tasered him twice before successfully restraining him. His neighbors, the Blondins, hearing the commotion, went outside and into Jack's back yard and saw officers holding him on the ground. Approximately 37 feet away and separated by the car from where police were holding Jack on the ground, Mr. Blondin called out, "what are you doing to Jack?" Police yelled at Mr. Blondin, "get back" and "stop," both of which he did—taking about two steps back and stopping. While screaming "get back," Sgt. Shelton ran towards Mr. Blondin with his taser extended and began to warn Blondin that he would be tased if he did not leave, but fired his taser before he finished the warning. Sgt.

Shelton tased Blondin in dart mode, knocking him down and causing excruciating pain, paralysis, and loss of muscle control. Mr. Blondin was disoriented and weak, and began to hyperventilate. Sgt. Shelton asked Blondin if he "wanted it again" and then turned to Ms. Blondin and warned, "You're next." Mr. Blondin was arrested and charged with obstructing a police officer, a charge that was ultimately dropped. *Id.* at 1089-90.

In *Gavelet-Blondin*, the court found police had used excessive force and turned to the question of qualified immunity. Citing numerous cases, the court found it was clearly established prior to 2008 that the application of non-trivial force for engaging in mere passive resistance was excessive. *Id.* at 1093 (citations omitted). Defendant argued, however, that the law was not clearly established until 2010 when tasers in dart mode were found to be an intermediate level of force. The court discussed the facts of the taser cases and found they were based on behavior which could have been perceived as threatening or resisting. *Id.* at 1094. The court evaluated the situation with Sgt. Shelton and Blondin—who, unlike Bryan[1], Brooks and Mattos[2] had no connection to the underlying crime—committed no act of resistance. He took no affirmative step to violate an officer's order (Bryan), did not physically resist officers (Brooks), and neither made physical contact with an officer nor tried to interfere with efforts to

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[1] *Bryan v. MacPherson*, 630 F.3d 805 (9th Cir. 2010).

[2] *Brooks v. City of Seattle* and *Mattos v. Agarano*, reviewed jointly 661 F.3d 433 (9th Cir. 2011).

arrest a suspect (Mattos). The court found that Blondin's momentary failure to move farther than thirty-seven feet away from officers who were arresting his neighbor, after merely inquiring into what those officers were doing, could hardly be considered resistance. *Id.* at 1094. As such, the law was clearly established that when there is no resistance, non-trivial force in response to passive bystander behavior would be unconstitutionally excessive. The court found that it was well known in 2008, without it being clearly established in law until 2010 that a taser in dart mode was more than trivial force. The court concluded that Sgt. Shelton was not entitled to qualified immunity. *Id.* at 1096.

Coincidentally, *Gavelet-Blondin* is relevant for Mena's case. The court in *Gavelet-Blondin* found that the right to be free from non-trivial force for engaging in passive resistance was clearly established prior to 2008. Arguably, the facts in this case, as alleged by Mena, reflect that at most she engaged in passive resistance by not immediately tendering her identification and asking what she and her boyfriend did wrong? It is equally well established that "handcuffing substantially aggravates the intrusiveness" of a detention. *Washington v. Lambert*, 98 F.3d 1181, 1188 (9th Cir.1996); *United States v. Bautista*, 684 F.2d 1266, 1289 (9th Cir. 1982). "Circumstances which would justify a detention will not necessarily justify a detention by handcuffing. More is required." *Meredith v. Erath*, 342 F.3d 1057, 1062 (9th Cir. 2003). Handcuffing is more than nontrivial force.

In *Meredith v. Erath*, 342 F.3d 1057, (9th Cir. 2003), the court considered circumstances where there was no officer safety risk, no attempt to flee, the investigation was into nonviolent offenses (income tax related crimes,) and she objected vociferously to the search and "passively resisted." The court concluded that the need for force, if any, was minimal at best—and police violated the Fourth Amendment by grabbing her by the arms, throwing her to the ground, and twisting her arms while handcuffing her.

To the extent that the Court's previous analysis was deficient under *Escondido*, the Court supplements it here. The relevant facts alleged by the Plaintiff reflect circumstances amounting to passive resistance at best and a need, if any, for no more than minimal force. It does not matter that Officer Massie is a police officer and the defendants in the cases relied on by the Court in denying qualified immunity were a principal and prison guards. Plaintiff alleges that she and her boyfriend were fighting but both were calm and cooperative after police arrived and began questioning them. Both readily answered questions. She did not touch either officer. When officer Massie asked her to produce her identification she started to comply, then paused, and asked: "What did we do wrong?" The relevant circumstances as alleged by the Plaintiff are that there were no officer safety issues, no risk of flight concerns, the offense was minor and non-violent (disturbing the peace), and if she resisted at all, it was passive resistance by way of asking a question. Under these circumstances, the law is clearly established that any

degree of force is unconstitutional, if there is no need for any use of force at all. Likewise, the law is equally well established that it is an excessive use of force to use non-trivial force (handcuffing) when there is only passive resistance.

**Accordingly,**

**IT IS ORDERED** that the Motion for Reconsideration (Doc. 38) is DENIED.

Dated this 5th day of February, 2019.

/s/ David C. Bury
Honorable David C. Bury
United States District Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

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| Basilea Mena,<br>Plaintiff,<br>v.<br>Robert Massie,<br>Defendant. | No. CV-17-00368-TUC-DCB<br>**ORDER**<br>(Filed Jan. 8, 2019) |

For the reasons explained below, the Court grants in part and denies in part the Defendants' Motion for Summary Judgment.

The Court grants summary judgment to the extent the Plaintiff alleges an illegal seizure or false arrest. The Court denies summary judgment on Plaintiff's claim of excessive use of force.

Neither party seeks oral argument on the motion. The parties submitted memoranda thoroughly discussing the law and evidence in support of their positions, and oral argument will not aid the court's decision-making process which is entirely based on questions of law. *See Mahon v. Credit Bur. of Placer County, Inc*., 171 F. 3d 1197, 1200 (9th Cir. 1999) (explaining that if the parties provided the district court with complete memoranda of the law and evidence in support of their positions, ordinarily oral argument would not be required). The Court rules without hearing arguments.

Plaintiff alleges that Defendants violated the Fourth Amendment which prohibits unreasonable searches and seizures when she refused to produce her identification. Defendants arrested her for violating A.R.S. § 13-2412(A) which provides:

> It is unlawful for a person, after being advised that the person's refusal to answer is unlawful, to fail or refuse to state the person's true full name on request of a peace officer who has lawfully detained the person based on reasonable suspicion that the person has committed, is committing or is about to commit a crime. A person detained under this section shall state the person's true full name but shall not be compelled to answer any other inquiry of a peace officer.

Failure to comply with this statute is a class two misdemeanor and probable cause for arrest. A.R.S. § 13-2412(B). *See also State v. Fittz*, 2018 WL 3730953, at *2 (Ariz. Ct. App. July 26, 2018).

The Court turns to the Defendants' assertion of qualified immunity, which protects police officers from individual liability under 42 U.S.C. § 1983 for an abuse of discretion violating civil rights unless the legal right was "clearly established" at the time, and a reasonable person in the same position would have known that what he did violated that right. *Behrens v. Pelletier*, 516 U.S. 299, 304 (1996); *Collins v. Jordan*, 110 F.3d 1363, 1369 (9th Cir. 1996); *Trevino v. Gates*, 99 F.3d 911, 916 (9th Cir. 1996); *Act Up / Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993). Qualified immunity is designed to protect an officer who, reasonably, but

mistakenly, acts in violation of some constitutional right. *Saucier v. Katz*, 533 U.S. 194, 205 (2001). The doctrine bars the suit; it is not a defense to liability. *Act Up/Portland*, 988 F.2d at 872-73. Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Qualified immunity is a legal question, and it is addressed by the Court at the earliest possible point in the litigation. *Act Up/Portland*, 988 F.2d at 872-73.

When determining whether an officer is entitled to qualified immunity, the Court considers (1) whether there has been a violation of a constitutional right, and (2) whether that right was clearly established at the time of the officer's alleged misconduct. *Lal v. California*, 746 F.3d 1112, 1116 (9th Cir. 2014). At summary judgment, an officer may be denied qualified immunity in a Section 1983 action "only if (1) the facts alleged, taken in the light most favorable to the party asserting injury, show that the officer's conduct violated a constitutional right, and (2) the right at issue was clearly established at the time of the incident such that a reasonable officer would have understood [his] conduct to be unlawful in that situation." *Torres v. City of Madera*, 648 F.3d 1119, 1123 (9th Cir. 2011).

If the question of whether there has been a constitutional violation involves disputed facts which, when viewed most favorably to the Plaintiff, could support a rational jury finding in her favor, this Court must move to the second question: whether the right at issue was clearly established such that a reasonable officer

would have understood his actions were unlawful. Then, the law does not "require a case directly on point, but existing precedent must have placed the . . . constitutional question beyond debate." *Ashcroft v. al–Kidd*, 563 U.S. 731, 740 (2011). There must be precedent involving similar facts to provide an officer notice that a specific use of force is unlawful. *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (*per curium*).

The Court turns to the facts of the case as alleged by the Plaintiff. She submits that she and her boyfriend had left a bar where they had played pool and drank two small pitchers of beer. It was around midnight and they were walking along Speedway. They were "speaking in raised voices," i.e., arguing about whether she was cheating on him. They crossed the street at the Swan intersection and at the median, her boyfriend stopped on the center median. It is undisputed that police officers, Defendants Pettey and Massie, heard them from where the officers were parked in a Chase Bank parking lot on Swan and Speedway. Defendants Pettey and Massie drove, with their emergency lights on, to the intersection to investigate what was going on. According to the Plaintiff, her boyfriend was crying, and he told police that she was cheating on him. According to the Plaintiff, the Defendants asked her for her identification and DID NOT ask her for her name. (Ps' SOF (Doc. 31) ¶¶ 2,4-11, 14-23)

According to the Plaintiff when the Defendants asked her to produce her identification, she started to open her wallet and asked, "what we did wrong," and

they wouldn't answer her, which caused her to stop getting her identification from her wallet. (Ds' SOF, Ex. Mena Depo. at 25 (Doc. 29-2 at 11)). According to her, very quickly, 3 minutes or less, without any warning that they were going to arrest her, the male officer, Defendant Massie grabbed her and jerked her around to handcuff her. *Id*. at 26-27. According to the Plaintiff, as she was jerked around the handcuffs must have pinched the officer's hand[1] and he shoved her against a palm tree. *Id*. at 27. Her face and shoulders were severely scratched. *Id*. at 44-45.

It is undisputed that she was arrested, pursuant to a citation for violating A.R. S. § 13-2412(A), which makes it a crime to refuse to give a person's true full name upon a request from a peace officer while being lawfully detained based on reasonable suspicion that a crime has been, is being, or about to be committed. She submits she was not advised that her refusal to give her full true name was unlawful. Failure to comply with this statute is probable cause for arrest.

Based on the facts as alleged by the Plaintiff, the Court finds that Plaintiff's constitutional rights were not violated when Officer Robert Massie and Police Sergeant Pettey drove from the Chase Bank parking lot and approached her and her boyfriend because they

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[1] According to Defendant Massie, she was defensively resisting arrest by twisting her arms, meaning she was trying to keep from getting arrested but was not assaulting him. As she twisted her arm, the handcuff bound up and pinched his hand and as she tried to pull away, she came into contact with the palm tree. (Ds' SOF, Ex. Massie Depo. at 21 (Doc. 29-3 at 12)).

were arguing with raised voices in the median of the street. Police may approach and ask questions without violating the Fourth Amendment, "[a]s long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). Defendants correctly assert that police officers may briefly detain an individual if there is reasonable suspicion that criminal activity may be afoot. *Terry v. Ohio*, 392 U.S. 1 (1968), *see also United States v. Cortez*, 449 U.S., at 417 (1981) ("An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity"). Reasonable suspicion determinations must consider the "totality of the circumstances" of each case to see whether a police officer has a "particularized and objective basis" for suspecting wrongdoing. The Court finds that there was reasonable suspicion to detain the Plaintiff under *Terry* to investigate the cause of the disturbance occurring in the middle of the street, including whether it involved illegal underage consumption of alcohol, domestic violence, or some public safety issue.

Plaintiff by her own testimony reflects she believed she was free to walk away until she was not. She was surprised when without any warning Defendant Massie grabbed her wrist and jerked her around to handcuff her. The issue here is whether Defendant

Massie had reasonable suspicion when he handcuffed and subsequently arrested the Plaintiff for violating A.R.S. § 13-2412(A). According to the facts as stated by the Plaintiff, he did not. He did not ask her to state her true name. He did not warn her that failure to give her full true name would result in her arrest. He had neither a reasonable suspicion nor probable cause to believe she was violating A.R.S. § 13-2412(A).

The Court finds that this is the exact type of mistake that qualified immunity guards against. There is no allegation by the Plaintiff that Defendant Massie intentionally disregarded the statute. Either he did ask her for her full true name or as she alleges he didn't because he reasonably, but mistakenly believed the statute reached her conduct of refusing to produce identification. The Court grants summary judgment for Defendants on any claims of illegal seizure or false arrest.

The harder question is whether Defendant Massie, six feet two inches and weighing 225 pounds, used excessive force when arresting the five feet five inches tall and 120 pound Plaintiff, by shoving or pushing her face first into the palm tree. According to her, she was jerked around and not resisting arrest. According to him, she was trying to keep from getting arrested by twisting her arms and pulling away, which caused her to come into contact with the palm tree. The Court finds there are material questions of fact in dispute that preclude summary judgment on the basis of qualified immunity.

The Supreme Court recently considered this Circuit's application of qualified immunity in the context of excessive use of force cases. It explained the following:

> Use of excessive force is an area of the law 'in which the result depends very much on the facts of each case,' and thus police officers are entitled to qualified immunity unless existing precedent "squarely governs" the specific facts at issue. *Id.* at 309[ ][2] Precedent involving similar facts can help move a case beyond the otherwise "hazy border between excessive and acceptable force" and thereby provide an officer notice that a specific use of force is unlawful. *Id*.

*Kisela*, 138 S. Ct. at 1153.

Here, the underlying facts are disputed. Did the Plaintiff resist arrest? Did she jerk away or did Defendant Massie jerk her about? Was she inebriated and a danger to herself and/or others if not quickly subdued. Could Defendants have simply asked her to turn around and put her hands behind her back? These disputed facts must be determined to assess whether Defendant Massie violated the Plaintiff's constitutional right to be free from the excessive use of force. Also, these facts must necessarily be established before the Court can consider the second prong of the qualified immunity assessment: whether precedent exists "squarely governing" the specific facts of the case,

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[2] "*Mullenix v. Luna*, 136 S.Ct. 305 (2015) (*per curiam*).

which will move the case beyond the "hazy border" between excessive and acceptable force.

If pressed to determine qualified immunity, now, based on the facts as alleged by Plaintiff and construed in her favor, the Court would look to cases which are black and white, regardless of differing factual predicts, where any force used is constitutionally unreasonable, if there is no need for any use of force. *See e.g.*, *P.B. v. Koch*, 96 F.3d 1298, 1303–04 & n. 4 (9th Cir.1996) (where there was no need for force, slapping, punching, and choking a student bears no reasonable relation to need and can only be found to have been done for the purpose of causing harm); *Felix v. McCarthy*, 939 F.2d 699, (9th Cir. 1991) (denying qualified immunity were guard's unprovoked attack against prisoner causes bruising, soreness, and emotional damage); *Meredith v. Arizona*, 523 F.2d 481, 482-84 (9th Cir.1975) (inmate states a claim when he alleges that guards used official force for unjustified purposes).

Ordinarily this Court would resolve qualified immunity before trial, *see Hunter v. Bryant*, 112 S.Ct. 534, 536-37 (1991), but here the underlying facts are in dispute, and therefore, the Court will not resolve the issue of qualified immunity on summary judgment. *See Act Up!/Portland*, 988 F.2d at 873 ("[i]f a genuine issue of fact exists preventing a determination [of qualified immunity] at summary judgment, the court may permit the case to proceed to trial and make the qualified immunity determination after the facts have been fully aired in the courtroom").

**Accordingly,**

**IT IS ORDERED** that the Defendants' Motion for Summary Judgment (Doc. 28) is GRANTED IN PART AND DENIED IN PART.

**IT IS FURTHER ORDERED** that the Plaintiff's excessive use of force claim shall proceed to trial.

**IT IS FURTHER ORDERED** that within 30 days of the filing date of this Order the parties shall prepare and file the Proposed Pretrial Order. A Pretrial Conference shall be held thereafter, with the trial date to be set at the Pretrial Conference.

Dated this 7th day of January, 2019.

/s/ David C. Bury
Honorable David C. Bury
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| BASILEA MENA,<br>Plaintiff-Appellee,<br>v.<br>ROBERT MASSIE,<br>Defendant-Appellant. | No. 19-15214<br>D.C. No. 4:17-cv-00368-DCB<br>District of Arizona, Tucson<br>ORDER<br>(Filed Apr. 22, 2020) |

Before: W. FLETCHER and R. NELSON, Circuit Judges, and MOLLOY,* District Judge.

The petition for panel rehearing is DENIED. Judges Fletcher and Nelson vote to DENY he petition for rehearing en banc, and Judge Molloy so recommends. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED.

* The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.