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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF ARIZONA**

Caitlin Bartness Wilenchik,	)	
	)	CV-10-541-TUC-DCB (GEE)
Plaintiff,	)	
v.	)	
	)	
Michael Ryan, et al.,	)	<b>ORDER</b>
	)	
Defendant.	)	
	)	
_____	)	

This matter was referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1)(B) and the local rules of practice of this Court for hearing and a Report and Recommendation on the Defendants' Motion to Dismiss for Failure to State a Claim. Before the Court is the Magistrate Judge's Report and Recommendation on the Defendants' Motion to Dismiss. The Magistrate Judge recommends, after hearing oral argument, that the Motion to Dismiss should be denied. The Defendants filed Objections to this Recommendation and Plaintiff filed a Response to the Objections. Fed.R.Civ.P. 72(b).

**STANDARD OF REVIEW**

When objection is made to the findings and recommendation of a magistrate judge, the district court must conduct a de novo review. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003).

**DEFENDANTS' OBJECTIONS**

Defendants generally object to all of the legal and evidentiary conclusions contained in the Report and Recommendation. Defendants

1 objected that the Magistrate "effectively ruled that each and every  
2 allegation asserted as a federal claim states a claim for a  
3 constitutional violation... The Complaint states nothing more than some  
4 form of 'unconstitutional unpleasantness', not a claim for any 4th  
5 Amendment violation not subject to qualified immunity protection on its  
6 face." Defendant further objects that the force was not excessive on the  
7 face of the complaint and the stop and detention raised no question of  
8 facts. In addition, "Plaintiff, plainly, has not stated enough facts  
9 with allegations that the officer acted on a long standing practice or  
10 custom of the City of Tucson."

#### 11 DISCUSSION

12 This Court agrees with Plaintiff that the facts should be viewed  
13 as a "totality of the circumstances." *Smith v. City of Hemet*, 394 F.3d  
14 689 (9th Cir.2005). The Report and Recommendation advised that  
15 "[a]llthough the plaintiff's injuries were not extensive, her allegations  
16 are sufficient to make out a claim for excessive force. Assuming the  
17 plaintiff's allegations are true, the defendant officer is not entitled  
18 to qualified immunity." This Court must treat all factual allegations  
19 raised in the complaint as true for purposes of resolving a motion to  
20 dismiss for failure to state a claim of excessive use of force.  
21 *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 984 (9th Cir.  
22 2000). Plaintiff's Complaint states an excessive use of force claim  
23 against the Defendant police officer, as well as the Defendant City of  
24 Tucson for maintaining an official municipal policy of some nature such  
25 that a constitutional tort may result. *Gillette v. Delmore*, 979 F.2d  
26 1342, 1346 (9th Cir. 1992), *cert. denied*, 510 U.S. 932 (1993).

