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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

MIGUEL DOMINGUEZ,  
  
Plaintiff,  
  
v.  
  
CITY OF ESCONDIDO, et al.,  
  
Defendants.

Case No.: 20-CV-442 JLS (AHG)  
  
**ORDER GRANTING DEFENDANTS’  
MOTION FOR SUMMARY  
JUDGMENT**  
  
(ECF No. 27)

Presently before the Court is Defendants Mark Zeller, Cory Spinos, and the City of Escondido’s Motion for Summary Judgment, or in the alternative, Partial Summary Judgment. ECF No. 27. Pursuant to Local Rule 7.1(d)(1), the Court finds the matters presented appropriate for resolution without oral argument. Having considered the Parties’ arguments, the evidence, and the law, the Court rules as follows.

**BACKGROUND**

**I. Factual Background**

This is a civil rights action alleging excessive force by police officers in forcibly extracting a detained individual from his vehicle.

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1           **A.     *The Initial Encounter***

2           On March 7, 2018, Defendant Officer Zeller responded to a dispatch call to check  
3 the welfare of a child allegedly left unrestrained in a vehicle stalled in traffic.  
4 Declaration of Mark Zeller (ECF No. 27-4, “Zeller Decl.”) ¶ 2; ECF No. 27-8 at 2:3–11.<sup>1</sup>  
5 According to Officer Zeller, upon arriving on the scene, he was not able to see the driver  
6 of the vehicle, but was able to identify an unrestrained child within. Zeller Decl. ¶ 2.  
7 Officer Zeller subsequently opened the door and saw Plaintiff sitting in the driver’s seat  
8 holding a blow torch in his right hand. Zeller Decl. ¶ 2; Bodycam Footage taken by  
9 Officer Mark Zeller (ECF No. 27-9, “Zeller BWC”) at 0:17–0:25; ECF No. 27-13 at  
10 158:17–19. According to Officer Zeller, Plaintiff had an unknown object in his left hand.  
11 Zeller Decl. ¶ 2.

12           Officer Zeller asked Plaintiff if he had identification, to which Plaintiff replied in  
13 the affirmative. ECF No. 27-10 at 2:8–9; Zeller BWC at 0:54–57. Officer Zeller then  
14 asked Plaintiff if he was on parole or probation, to which Plaintiff replied in the negative.  
15 ECF No. 27-10 at 2:19–22. According to Officer Zeller, he suspected Plaintiff was  
16 smoking or about to smoke drugs and was concealing a drug pipe in his left hand. Zeller  
17 Decl. ¶¶ 2–3; Zeller BWC at 2:53–2:57.

18           **B.     *Officer Zeller’s Questioning of Plaintiff***

19           While waiting for backup, Officer Zeller learned from dispatch Plaintiff had  
20 previously been arrested for drugs, vandalism, and assault with a deadly weapon. Zeller  
21 Decl. ¶ 3.

22           The following exchange subsequently occurred:

23                   [ZELLER]: So I’m looking for some honesty here . . . do you  
24                   have a pipe on you?

25                   [PLAINTIFF]: No.  
26

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27  
28 <sup>1</sup> According to Plaintiff, he was driving back from a convenience store when his vehicle  
stalled in front of his apartment entrance. ECF No. 27-13 at 53:1–14.

1 [ZELLER]: No? Are there any pipes in the car?

2 [PLAINTIFF]: No.

3 [ZELLER]: No? Okay. So why would you be holding a blow  
4 torch?

5 [PLAINTIFF]: That's my lighter. For my cigarettes.

6 [ZELLER]: For cigarettes?

7 [PLAINTIFF]: Yeah. That's also my tool for soldering. And I  
8 do have electrical issues on the car. And I do use that . . . I've  
9 used that for everything from . . . .

10  
11 Zeller BWC at 11:41–12:37; ECF No. 27-10 at 4:9–17.

12 ***C. The Detainment and Use of Force Against Plaintiff***

13 After some more time elapsed, Plaintiff questioned Officer Zeller as to why he was  
14 “still here with the door open[.]” Zeller BWC at 15:14–15:59; ECF No. 27-10 at 5:3–14.  
15 Plaintiff further expressed he wanted to either get his car inside or take his daughter in.  
16 *Id.* Officer Zeller responded that he was waiting for another officer to proceed to the  
17 “next step.” *Id.*

18 A few moments afterwards, Officer Spinos arrived on the scene. Bodycam  
19 Footage taken by Officer Cory Spinos I (ECF No. 27-11, “Spinos BWC I”) at 0:29–0:34.

20 After Officer Spinos' arrival, the following exchange occurred:

21 [ZELLER]: Alright. I need you to follow instructions okay?  
22 At this point you're being detained. If you –

23 [PLAINTIFF]: Why am I being detained?

24 [ZELLER]: If you do other than you're told force may be used  
25 against you, so you need to follow instructions okay?

26 [PLAINTIFF]: Why am I being detained?

27  
28 Zeller BWC at 16:12–16:24; ECF No. 27-10 at 5:16–21

1 Officer Zeller then reached into the vehicle and grasped Plaintiff's left arm while  
2 simultaneously instructing Plaintiff to: "go ahead and step out of the car for me." Zeller  
3 BWC at 16:26–16:30; ECF No. 27-10 at 5:22. Plaintiff did not step out of the vehicle,  
4 but continued to question why he was being detained. Zeller BWC at 16:31–16:39.  
5 Officer Spinos also reached into Plaintiff's vehicle. Zeller BWC at 16:37–16:45; Spinos  
6 BWC I at 1:00–1:08.

7 According to the Officers, Plaintiff "shot his right hand behind and under the  
8 passenger seat of the car." Zeller Decl. ¶ 6; Declaration of Cory Spinos (ECF No. 27-3  
9 ("Spinos Decl.") ¶ 4. At his deposition, Plaintiff did not deny he was using his right arm  
10 to hold the passenger seat of his vehicle to prevent himself from being pulled out. ECF  
11 No. 27-13 at 186:25–187:9.

12 Officer Zeller subsequently informed Officer Spinos he believed Plaintiff had a  
13 "pipe" down by Plaintiff's side. Zeller BWC at 16:38–16:40; ECF No. 27-10 at 6:5.  
14 According to Officer Spinos, he used a "pressure point application" on the left side of  
15 Plaintiff's face to try to get Plaintiff to "release his grip" and exit the vehicle. Spinos  
16 Decl. ¶ 4. Officer Zeller then pulled Plaintiff's left arm, and both Officers Zeller and  
17 Spinos forcibly held Plaintiff's left arm outside the vehicle. Zeller BWC at 16:48–16:52;  
18 Zeller Decl. ¶ 6; Spinos Decl. ¶ 4. The bodycam footage shows that Officer Zeller then  
19 attempted to extract Plaintiff from the vehicle. Spinos BWC I at 1:14–2:18. At his  
20 deposition, Plaintiff stated he refused to exit the vehicle because the Officers had not told  
21 him why he was being detained and because he feared for his safety and that of his  
22 daughter. ECF No. 27-13 at 195:23–196:7.

23 According to Officer Zeller, he put his left knee on Plaintiff's thigh and entered the  
24 vehicle. Zeller Decl. ¶ 7. He then used his left forearm to apply pressure along the left  
25 side of Plaintiff's neck to prevent himself from being bitten. *Id.* The bodycam footage  
26 indicates Officer Zeller kept pressure on Plaintiff's neck for approximately forty-five  
27 seconds or less. Zeller BWC at 17:00–17:45. In the attempt to extract Plaintiff, Officer  
28 ///

1 Spinos warned Plaintiff he would deploy a taser—but ultimately did not do so. Zeller  
2 Decl. ¶ 6; Spinos Decl. ¶ 4; Zeller BWC at 17:07–17:09; Spinos BWC I at 1:28–1:35.

3 On the bodycam footage, Plaintiff is heard telling the Officers he cannot breathe.  
4 Zeller BWC at 17:31–17:32; Spinos BWC I at 1:52–1:54; ECF No. 27-10 at 7:10.  
5 According to Plaintiff, during the Officers’ application of force, he began to black out  
6 and let go of the passenger seat. ECF No. 27-13 at 196:14–20. However, according to  
7 both Officers, Plaintiff verbally indicated he would comply with their directions and  
8 released his hold on the vehicle. Zeller Decl. ¶ 9; Spinos Decl. ¶ 7.

9 The Officers subsequently pulled Plaintiff out of the vehicle, forced Plaintiff to his  
10 knees, and then to his stomach, before placing him in handcuffs. Zeller Decl. ¶ 9; Spinos  
11 Decl. ¶ 7; Zeller BWC at 17:57–18:20; Spinos BWC I at 2:18–2:40. During this process,  
12 the Officers can be seen on video placing their knees against Plaintiff’s back. Zeller  
13 BWC at 18:01–18:21; Spinos BWC I at 2:23–2:40.

14 Officer Spinos later searched Plaintiff’s vehicle and found a cracked pipe. Spinos  
15 Decl. ¶ 9. According to Officer Spinos, the pipe appeared to be encrusted with  
16 methamphetamine. *Id.* According to Plaintiff, the pipe belonged to a friend and he was  
17 completely unaware it was in the vehicle. ECF No. 27-13 at 100:17–101:5.

#### 18 ***D. Subsequent State Court Proceedings***

19 In a later state court proceeding, Plaintiff was found guilty of “Possession of  
20 Paraphernalia Used for Narcotics” in violation of Health and Safety Code Section 11364.  
21 ECF No. 27-25 at 2.<sup>2</sup>

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22  
23 <sup>2</sup> Defendants request that the Court take judicial notice of the verdict form in the San  
24 Diego Superior Court case—*The People of the State of California v. Miguel Antonio*  
25 *Dominguez*, Case No. CN384937—entered on October 25, 2018. ECF Nos. 27-5 at 1–2;  
26 27-25.

27 Under Fed. R. Evid. 201, “[t]he court may judicially notice a fact that is not subject to  
28 reasonable dispute because it: (1) is generally known within the trial court’s territorial  
jurisdiction; or (2) can be accurately and readily determined from sources whose

1 **II. Procedural Background**

2 On March 6, 2020, Plaintiff initiated this action asserting a claim against  
3 Defendants Zeller and Spinos for excessive force under 42 U.S.C. § 1983. ECF No. 1  
4 ¶¶ 11–13. Plaintiff also asserted a claim for municipal liability against the City of  
5 Escondido, alleging the City had created a *de facto* policy “encouraging excessive force  
6 by its officers, by failing to supervise, review, and discipline its officers’ use of force  
7 against citizens.” *Id.* ¶ 14. On January 20, 2021, the Court granted the Parties’ Joint  
8 Motion to Dismiss Plaintiff’s municipal liability claim against Defendant City of  
9 Escondido with prejudice. ECF Nos. 17 at 2; 18 at 1.

10 On April 26, 2021, the Court granted Plaintiff’s former counsel’s Motion to  
11 Withdraw as Plaintiff’s attorney of record in this case. ECF No. 23 at 1. The Court  
12 continued all pending deadlines in the case by ninety days to allow Plaintiff time to  
13 secure new counsel. *Id.* at 3. Plaintiff has continued to proceed *pro se* since the  
14 withdrawal of his former counsel. *See* Docket.

15 On July 7, 2021, Defendants filed the instant Motion for Summary Judgment. ECF  
16 No. 27-1. On September 2, 2021, Defendants filed a notice indicating that they had not  
17 received an Opposition to their Motion by the August 30, 2021 deadline. ECF No. 31 at  
18 2. The Court subsequently extended Plaintiff’s deadline to file an Opposition twice.  
19 ECF Nos. 32, 33. Plaintiff did not file an Opposition. *See* Docket. For these reasons, on  
20 November 3, 2021, the Court issued an Order to Show Cause requiring Plaintiff to show  
21 in writing why the instant action should not be dismissed for failure to comply with the  
22 Local Rules and failure to prosecute. ECF No. 38 at 2.

23 In response, Plaintiff filed a letter *nunc pro tunc* to November 18, 2021. ECF No.  
24 40. In light of Plaintiff’s filing, the Court discharged the Order to Show Cause and

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25  
26 accuracy cannot reasonably be questioned.” Because the verdict form is a state court  
27 record, the Court **GRANTS** Defendants’ request. *See Harris v. Cty. of Orange*, 682 F.3d  
28 1126, 1132 (9th Cir. 2012) (holding courts “may take judicial notice of undisputed  
matters of public record,” including “documents on file in federal or state courts”).

1 provided Plaintiff with yet another opportunity to file an Opposition. ECF No. 41 at 2.  
2 The Court cautioned Plaintiff that if he did not file an Opposition by the Court’s deadline,  
3 the Court would thereafter construe Plaintiff’s November 18, 2021 letter as his  
4 Opposition. *Id.*

5 As Plaintiff did not file an Opposition, the Court construes Plaintiff’s November  
6 18, 2021 letter as his Opposition. *See* Docket. On December 22, 2021, Defendants filed  
7 a Reply. ECF No. 42.

### 8 **LEGAL STANDARD**

9 Rule 56 of the Federal Rules of Civil Procedure provides that “[a] party may move  
10 for summary judgment, identifying each claim or defense—or the part of each claim or  
11 defense—on which summary judgment is sought.” Fed. R. Civ. P. 56(a). “The court  
12 shall grant summary judgment if the movant shows that there is no genuine dispute as to  
13 any material fact and the movant is entitled to judgment as a matter of law.” *Id.*

14 Material facts are those that may affect the outcome of the case. *See Anderson v.*  
15 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is  
16 “genuine” if the evidence is such that “a reasonable jury could return a verdict for the  
17 nonmoving party.” *See id.* “[I]n ruling on a motion for summary judgment, the judge  
18 must view the evidence presented through the prism of the substantive evidentiary  
19 burden.” *Id.* at 254. The question is “whether a jury could reasonably find *either* that the  
20 [moving party] proved his case by the quality and quantity of evidence required by the  
21 governing law *or* that he did not.” *Id.* (emphasis in original). “[A]ll justifiable inferences  
22 are to be drawn in [the nonmovant’s] favor.” *Id.* at 255.

23 The moving party “bears the initial responsibility of informing the district court of  
24 the basis for its motion, and identifying those portions of the pleadings, depositions,  
25 answers to interrogatories, and admissions on file, together with the affidavits, if any,  
26 which it believes demonstrate the absence of a genuine issue of material fact.”  
27 *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal quotations omitted).

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1 A party opposing a properly supported motion for summary judgment “may not  
2 rest upon the mere allegations or denials of his pleading,” *Liberty Lobby*, 477 U.S. at 248,  
3 and affidavits or declarations supporting his opposition “must be made on personal  
4 knowledge,” Fed. R. Civ. P. 56(c)(4). The opposing party need not show the issue will  
5 be resolved conclusively in its favor. *See Liberty Lobby*, 477 U.S. at 248–49. All that is  
6 necessary is submission of sufficient evidence to create a material factual dispute, thereby  
7 requiring a jury or judge to resolve the parties’ differing versions at trial. *See id.*

8 Where there is video evidence of the incident giving rise to an excessive force  
9 claim, a court should “view[] the facts in the light depicted by the videotape.” *Scott v.*  
10 *Harris*, 550 U.S. 372, 381 (2007). However, the “mere existence of video footage of the  
11 incident does not foreclose a genuine factual dispute as to the reasonable inferences that  
12 can be drawn from that footage.” *Vos v. City of Newport Beach*, 892 F.3d 1024, 1028  
13 (9th Cir. 2018).

## 14 ANALYSIS

### 15 I. The Excessive Force Claim (Defendants Zeller and Spinos)

16 Defendants Zeller and Spinos (collectively, “Defendant Officers”) move for  
17 summary judgment on Plaintiff’s claim for excessive force on two grounds. ECF No. 27-  
18 1 at 13. First, Defendants contend there is no triable issue of fact that the force the  
19 Defendant Officers used in this case was objectively reasonable. *Id.* at 13–14. Second,  
20 even assuming there is a material dispute of fact as to whether excessive force was used,  
21 the Defendant Officers claim they are entitled to qualified immunity on Plaintiff’s claim.  
22 *Id.* at 14.

#### 23 A. Whether Defendant Officers’ Use of Force Was Objectively Reasonable

24 A claim that officers used excessive force “in the context of an arrest or  
25 investigatory stop of a free citizen” is analyzed under the Fourth Amendment’s  
26 prohibition against unreasonable seizures. *Graham v. Connor*, 490 U.S. 386, 394 (1989);  
27 *Ames v. King Cnty.*, 846 F.3d 340, 348 (9th Cir. 2017) (holding use of force “is a seizure  
28 that is subject to the Fourth Amendment’s reasonableness requirement”). “Under the



1 Fourth Amendment, officers may use only such force as is ‘objectively reasonable’ under  
2 the circumstances.” *Ames*, 846 F.3d at 348 (citing *Graham*, 490 U.S. at 397).  
3 Accordingly, the Court must determine, in light of the particular facts and circumstances  
4 Officers Zeller and Spinos faced, whether the actions the Officers took in extracting  
5 Plaintiff from his vehicle and arresting him were objectively reasonable.

6 The Court makes this determination “from the perspective of a reasonable officer  
7 on the scene, rather than with the 20/20 vision of hindsight.” *Graham*, 490 U.S. at 396.  
8 “Not every push or shove, even if it may later seem unnecessary in the peace of a judge’s  
9 chambers, violates the Fourth Amendment.” *Id.* (internal citation omitted). Instead,  
10 “[t]he calculus of reasonableness must embody allowance for the fact that police officers  
11 are often forced to make split-second judgments—in circumstances that are tense,  
12 uncertain, and rapidly evolving—about the amount of force that is necessary in a  
13 particular situation.” *Id.* at 397–97.

14 In order to determine “whether the force used to effect a particular seizure is  
15 reasonable under the Fourth Amendment,” courts must carefully balance “the nature and  
16 quality of the intrusion on the individual’s Fourth Amendment interests against the  
17 countervailing governmental interests at stake.” *Id.* at 396 (internal quotation marks  
18 omitted). “Because such balancing nearly always requires a jury to sift through disputed  
19 factual contentions, and to draw inferences therefrom,” the Ninth Circuit has held “on  
20 many occasions that summary judgment or judgment as a matter of law in excessive force  
21 cases should be granted sparingly.” *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002);  
22 *Chew v. Gates*, 27 F.3d 1432, 1440 (9th Cir. 1994) (“Because questions of  
23 reasonableness are not well-suited to precise legal determination, the propriety of a  
24 particular use of force is generally an issue for the jury.”).

### 25 1. *Nature and Quality of the Intrusion*

26 The Court first considers the quantum of force used to arrest Plaintiff. *Davis v.*  
27 *City of Las Vegas*, 478 F.3d 1048, 1054 (9th Cir. 2007); *see Espinosa v. City & Cty. of*  
28 *S.F.*, 598 F.3d 528, 537 (9th Cir. 2010) (stating the court must first “assess the severity of

1 the intrusion on the individual’s Fourth Amendment rights by evaluating the type and  
2 amount of force inflicted”) (internal quotation marks omitted).

3 The use of force challenged in the instant case reduces to the following: while  
4 attempting to extract Plaintiff from his vehicle, Defendants Zeller and Spinos forced  
5 Plaintiff’s left arm out of the vehicle. Zeller BWC at 16:48–16:52; Zeller Decl. ¶ 6;  
6 Spinos Decl. ¶ 4. Defendant Spinos applied force against a “pressure point” on the left  
7 side of Plaintiff’s face. Spinos Decl. ¶ 4. Defendant Spinos drew his taser and cautioned  
8 Plaintiff he would deploy it against him. Zeller Decl. ¶ 6; Spinos Decl. ¶ 4; Spinos BWC  
9 I at 1:28–1:35. Defendant Zeller put his left knee on Plaintiff’s thigh and pressed his  
10 forearm against Plaintiff’s neck. Zeller Decl. ¶ 7; Zeller BWC at 17:00–17:45.  
11 Defendants Zeller and Spinos subsequently forced Plaintiff from his vehicle and to his  
12 knees, and then to his stomach, before placing Plaintiff in handcuffs. Zeller Decl. ¶ 9;  
13 Spinos Decl. ¶ 7; Zeller BWC at 17:57–18:20; Spinos BWC I at 2:18–2:40.

14 Defendants compare the type of force used in this case to “pain compliance”  
15 techniques. ECF No. 27-1 at 26. It is true the Ninth Circuit has found the quantum of  
16 force from such techniques to be “less significant than most claims of force.” *Forrester*  
17 *v. City of San Diego*, 25 F.3d 804, 807 (9th Cir. 1994) (holding reasonableness inquiry  
18 satisfied where use of force consisted of physical pressure administered on limbs “in  
19 increasing degrees, resulting in pain”).

20 The use of “pain compliance” techniques, however, are not the *only* applications of  
21 force at issue in this case. Here, Plaintiff contends the Defendant Officers placed him in  
22 a “choke hold.” ECF No. 40 at 1. The video evidence corroborates that Defendant Zeller  
23 applied some type of physical neck restraint against Plaintiff. Zeller BWC at 17:00–  
24 17:45. There is also unrefuted video evidence both Defendant Officers placed their knees  
25 on Plaintiff’s back while effectuating his arrest. Zeller BWC at 18:01–18:21; Spinos

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1 BWC I at 2:23–2:40. Finally, Plaintiff also contends Defendant Spinos pointed his taser  
2 at Plaintiff and threatened to deploy it against him. ECF No. 40 at 1–2.<sup>3</sup>

3       Accepting Plaintiff’s version of the events, the reasonableness of these uses of  
4 force must be evaluated. *See Cortesluna v. Leon*, 979 F.3d 645, 653 (9th Cir. 2020)  
5 (holding a knee on the back “constitutes a meaningful personal intrusion when it causes  
6 injury”); *Tuuamalemalu v. Greene*, 946 F.3d 471, 477 (9th Cir. 2019) (“There is a robust  
7 consensus among the circuits that the use of a chokehold on a non-resisting person  
8 violates the Fourth Amendment.”); *Robinson v. Solano Cty.*, 278 F.3d 1007, 1015 (9th  
9 Cir. 2002) (stating in cases involving investigatory stops, the Ninth Circuit has  
10 “consistently applied the principle that drawing weapons . . . is unreasonable in many  
11 situations.”).

12       Here, there are triable disputes as to the amount of force applied against Plaintiff.  
13 For example, the Parties appear to dispute the amount of pressure Officer Zeller applied  
14 to Plaintiff’s neck. The evidence on the record indicates Officer Zeller used his left  
15 forearm to apply pressure to the left side of Plaintiff’s neck for approximately forty-five  
16 seconds or less. Zeller Decl. ¶¶ 7; Spinos Decl. ¶ 5; Zeller BWC at 17:00–17:45.  
17 Plaintiff is clearly heard on the bodycam footage telling the Officers he cannot breathe.  
18 Zeller BWC at 17:31–17:32; Spinos BWC I at 1:52–1:54; ECF No. 27-10 at 7:10. The  
19 Court must also credit Plaintiff’s deposition testimony that the technique used was  
20 sufficient to cause him to black out. ECF No. 27-13 at 196:14–20. In contrast,  
21 Defendants contend Plaintiff was still able to provide verbal indication he would comply  
22 with the Officers’ instructions. Zeller Decl. ¶ 9; Spinos Decl. ¶ 7.

23       Upon careful, repeated reviews of the video evidence, the Court is unable to  
24 determine with certainty whether Officer Zeller applied pressure upon Plaintiff’s neck

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25  
26 <sup>3</sup> In his declaration, Officer Spinos states he merely warned Plaintiff that he might deploy  
27 his taser. Spinos Decl. ¶ 4. The video evidence shows Officer Spinos unholstering his  
28 taser although it stops short of conclusively showing Officer Spinos “brandished” it  
against Plaintiff. Spinos BWC I at 1:34–1:50.

1 with sufficient force to render Plaintiff temporarily unconscious. A reasonable juror  
2 however, viewing the footage, could credit Plaintiff’s version of the facts. At the  
3 summary judgment stage, this dispute cannot be resolved in Defendants’ favor. *See, e.g.,*  
4 *Martinez v. City of Pittsburg*, No. 17-cv-04246-RS, 2019 U.S. Dist. LEXIS 37904, at \*16  
5 (N.D. Cal. Mar. 8, 2019).

6 Defendants argue there is no evidence Plaintiff suffered any injury from Officer  
7 Zeller and Spinos’ applications of force. ECF No. 27-1 at 23. The Court agrees that “the  
8 severity of [a plaintiff’s] injuries may support the inference that the force used was  
9 substantial[.]” *Santos*, 287 F.3d at 855. In this case, there is no such evidence to support  
10 such an inference. Plaintiff did not submit evidence he was injured as a result of the  
11 Defendant Officers’ application of force.<sup>4</sup> The infliction of a physical injury, however,  
12 “are facts considered but are not necessary to establish an excessive force claim.”  
13 *Schafer v. El Dorado Cty.*, No. 2:06-cv-1259-MCE-DAD, 2007 U.S. Dist. LEXIS 1336,  
14 at \*9 (E.D. Cal. Jan. 9, 2007); *see Wilkins v. Gaddy*, 559 U.S. 34, 38 (2010) (“Injury and  
15 force, however, are only imperfectly correlated, and it is the latter that ultimately  
16 counts.”). As the Ninth Circuit has cautioned, “[a]lthough such a form of deductive  
17 reasoning may be appropriate in some use-of-force cases, in others the intrusion may be  
18 substantial even though the injuries are minor.” *Santos*, 287 F.3d at 855.

19 Construing the evidence in the light most favorable to Plaintiff, as the Court must  
20 at this stage, the Court finds a jury could reasonably conclude the Officers’ use of force  
21 in this case was more than a minimal intrusion on Plaintiff’s liberty. *See LaLonde v. Cty.*  
22 *of Riverside*, 204 F.3d 947, 959 (9th Cir. 2000) (holding jury could conclude officer who  
23

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24  
25 <sup>4</sup> Defendants’ contention that Plaintiff *admitted* he was uninjured, however, is from the  
26 Courts’ perspective, one step too far. As to this point, Defendants rely on bodycam  
27 footage taken by Officer Spinos. *See* ECF No. 27-1 at 23. Upon the Court’s review,  
28 however, Plaintiff’s responses to Officer Spinos’ question as to whether he was injured  
appear audibly ambiguous. Bodycam Footage taken by Officer Cory Spinos II (ECF No.  
27-23, “Spinos BWC II”) at 0:45–1:20.

1 forcefully placed a knee onto a plaintiff’s back used force “in excess of what was  
2 reasonable”); *Manesh v. City of Beverly Hills*, No. CV 20-7427 DSF (ASx), 2021 U.S.  
3 Dist. LEXIS 252580, at \*13 (C.D. Cal. Aug. 10, 2021) (finding reasonable jury could  
4 find more than a minimal intrusion on plaintiff’s liberty where officers grabbed plaintiff’s  
5 neck and pushed him against the patrol car and put their knees on his back as he lay on  
6 the ground).

## 7 2. Governmental Interests at Stake

8 “Force, even if less than deadly, is not to be deployed lightly. To put it in terms of  
9 the test we apply: the degree of force used by the police is permissible only when a strong  
10 government interest *compels* the employment of such force.” *Drummond v. City of*  
11 *Anaheim*, 343 F.3d 1052, 1057 (9th Cir. 2003). In evaluating the governmental interest  
12 in the use of force, courts look to: “the severity of the crime at issue, whether the suspect  
13 poses an immediate threat to the safety of the officers or others, and whether [the suspect]  
14 is actively resisting arrest or attempting to evade arrest by flight.” *Graham*, 490 U.S. at  
15 396.

16 The Court’s inquiry is not limited to these factors. Instead, “‘the facts and  
17 circumstances’ of every excessive force case will vary widely.” *Forrester*, 25 F.3d at  
18 815. As such, the Court’s ultimate inquiry addresses “the totality of the circumstances”  
19 to consider “whatever specific factors may be appropriate in a particular case[.]” *Bryan*  
20 *v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010) (internal quotation marks omitted).

### 21 a. Severity of the Crime

22 In this case, there is no indication Plaintiff was suspected of having committed any  
23 crime. Instead, Officer Zeller was responding to a dispatch report of a child allegedly left  
24 unattended in a vehicle. Zeller Decl. ¶ 2; ECF No. 27-8 at 2:3–11. Upon opening the  
25 door of the vehicle, Officer Zeller was able to identify an attending adult, Plaintiff, sitting  
26 in the driver’s seat. Zeller Decl. ¶ 2; Zeller BWC at 0:17–0:25

27 Nevertheless, the calculus of the encounter changed after Officer Zeller opened the  
28 door. According to Officer Zeller, Plaintiff had an unknown object in his left hand and

1 kept this hand near his right hip until he was ordered out of the vehicle. Zeller Decl.  
2 ¶¶ 2–3. There is also no dispute a pipe was found in Plaintiff’s vehicle and that Plaintiff  
3 was later found guilty of “Possession of Paraphernalia Used for Narcotics” in violation of  
4 Health and Safety Code Section 11364—a misdemeanor. ECF No. 27-25 at 2; *see In re*  
5 *Alvarez*, 222 Cal. App. 4th 1064, 1072 (2013) (categorizing possession of narcotics  
6 paraphernalia under Health and Safety Code Section 11364 as a misdemeanor offense).

7 Normally, the governmental interest in using force against a person suspected of a  
8 misdemeanor is a minor one. *See Nehad v. Browder*, 929 F.3d 1125, 1136 (9th Cir.  
9 2019) (“[A] particular use of force would be more reasonable, all other things being  
10 equal, when applied against a felony suspect than when applied against a person  
11 suspected of only a misdemeanor.”); *Phillips v. City of Fairfield*, 406 F. Supp. 2d 1101,  
12 1112 (E.D. Cal. 2005) (finding arrest for non-violent misdemeanor “weighs against the  
13 use of force”).

14 Nevertheless, the Court also evaluates the nature of the circumstances at the time  
15 the allegedly excessive force was employed. *Ames*, 846 F.3d at 348 (holding district  
16 court applied severity of the crime factor “too narrowly” when it focused on  
17 misdemeanor obstruction “rather than the nature of the ongoing emergency”). Here,  
18 Officer Zeller declared he suspected Plaintiff was either smoking or about to smoke drugs  
19 in the presence of a minor within an enclosed vehicle. Zeller Decl. ¶¶ 2–4. Defendants  
20 therefore contend the government had a “compelling interest” in protecting a minor from  
21 physical abuse—in this case, in preventing Plaintiff’s minor child from being in an  
22 enclosed vehicle with Plaintiff as he was smoking or about to smoke. ECF No. 27-1 at  
23 16–19.

24 Defendants’ argument reflects the “second way” in which the Ninth Circuit has  
25 “sometimes applied the severity of the crime factor.” *Nehad*, 929 F.3d at 1136.  
26 “Although the danger a suspect posed is a separate *Graham* consideration,” the Ninth  
27 Circuit has “used the severity of the crime at issue as a proxy for the danger a suspect  
28 poses at the time force is applied.” *Id.*

1 Here, the Court acknowledges “[i]t is evident beyond the need for elaboration that  
2 [the governmental] interest in safeguarding the physical and psychological well-being of  
3 a minor is compelling.” *New York v. Ferber*, 458 U.S. 747, 756–57 (1982) (internal  
4 quotation marks omitted). Despite this, there is a triable issue as to whether Plaintiff  
5 actually posed an immediate threat to his minor child. In his deposition, Plaintiff  
6 contends the pipe belonged to a friend and he was unaware it was in the vehicle. ECF  
7 No. 27-13 at 100:17–101:5. The videotape evidence does not conclusively show whether  
8 Plaintiff was concealing anything in his left hand. Plaintiff denied having such a pipe and  
9 stated he had a blow torch to light his cigarettes and to fix electrical issues in his car.  
10 Zeller BWC at 11:41–12:38; ECF No. 27-10 at 4:13–19.

11 Defendants are essentially asking this Court to make a credibility determination.  
12 Whether Plaintiff’s version of the facts is worthy of credence cannot be determined on a  
13 motion for summary judgment. *Agosto v. Immigration & Naturalization Serv.*, 436 U.S.  
14 748, 756 (1978) (“[A] district court generally cannot grant summary judgment based on  
15 its assessment of the credibility of the evidence presented[.]”). In other words, whether  
16 the Defendant Officers credibly and reasonably believed Plaintiff posed an immediate  
17 threat to his minor child presents a genuine question of material fact that must be  
18 resolved by a jury.

19 b. Immediate Threat

20 The Court considers next whether Plaintiff posed an immediate threat to the safety  
21 of the Officers. Defendants argue Plaintiff posed an immediate threat by refusing an  
22 order to step out of this vehicle. ECF No. 27-1 at 19. Defendants further note Plaintiff:  
23 (1) had been holding a blow torch in his right hand; (2) was allegedly concealing an  
24 object in his left hand; and (3) had access to other tools in the vehicle, including a ratchet  
25 and socket in the center console. *Id.* In addition, Defendants note Officer Zeller had  
26 learned from dispatch that Plaintiff had previously been arrested for assault with a deadly  
27 weapon. *Id.*

28 ///

1 Plaintiff's account of the incident and the videotape evidence does not differ  
2 significantly from Defendants' accounting. Plaintiff does not dispute he was holding a  
3 blow torch in his right hand when Officer Zeller opened the door to his vehicle. ECF No.  
4 27-13 at 158:17–19; Zeller BWC at 0:25–0:35. Nevertheless, the video evidence shows  
5 that when the encounter began, Plaintiff was compliant. He answered Officer Zeller's  
6 questions and waited in his car. Zeller BWC at 0:17–16:00. It was only when Officer  
7 Zeller informed Plaintiff he was being detained and then did not answer Plaintiff's  
8 questions as to why he was being detained that Plaintiff became upset and increasingly  
9 uncooperative. *Id.* at 16:01–19:38.

10 After this point, the bodycam footage shows Plaintiff was noncompliant with the  
11 Defendant Officers' instructions to exit the vehicle. The footage also shows that fairly  
12 early into the encounter, Officers Zeller and Spinos were able to secure Plaintiff's left  
13 hand and force it out of the vehicle. Zeller BWC at 16:48–16:52; Zeller Decl. ¶ 6; Spinos  
14 Decl. ¶ 4. Plaintiff was not verbally threatening the officers.

15 Even so, it would be incorrect to say that Plaintiff posed *no* threat to the Officers.  
16 The footage does not indicate what Plaintiff was doing with his right hand. Plaintiff  
17 presumably did still have access to his blow torch. Plaintiff also conceded at his  
18 deposition there were tools in the car—a fact that is corroborated by the video evidence.  
19 ECF No. 27-13 at 203:19–24; Zeller BWC at 12:38–12:45. In theory, Plaintiff could  
20 have attempted to reach for the blow torch or one of the other tools in the car. Plaintiff  
21 could have also, in theory, attempted to bite Officer Zeller, as Officer Zeller feared he  
22 would. Zeller Decl. ¶ 7.

23 As the Ninth Circuit has stated, “a suspect who repeatedly refuses to comply with  
24 instructions or leave [his] car escalates the risk involved for officers unable to predict  
25 what type of noncompliance might come next.” *Brooks v. City of Seattle*, 599 F.3d 1018,  
26 1028–29 (9th Cir. 2010). Although Plaintiff may not have posed a *great* threat, a  
27 reasonable jury could find that Plaintiff did pose at least *some* threat by virtue of his  
28 continued noncompliance.



1 c. Resisting Arrest and Other Factors

2 The third enumerated governmental interest factor is whether a suspect was  
3 “actively resisting arrest or attempting to evade arrest by flight.” *Deorle v. Rutherford*,  
4 272 F.3d 1272, 1280 (9th Cir. 2001). Defendants contend Plaintiff was “actively”  
5 resisting. ECF No. 27-1 at 20–23. The Court disagrees.

6 From the video camera footage, it is undisputable Plaintiff verbally and physically  
7 refused to get out of his vehicle when instructed to do so. Further, in his deposition  
8 testimony, Plaintiff conceded he did not exit the vehicle when instructed to do so. ECF  
9 No. 27-13 at 195:23–196:7. Plaintiff further testified that as the Defendant Officers were  
10 attempting to physically extract him, he used his right arm to hold onto the passenger seat  
11 to prevent himself from being pulled out. *Id.* at 186:19–187:9; 196:4–7.

12 Although it is therefore unquestionable Plaintiff engaged in *some* resistance, the  
13 Ninth Circuit has “long distinguished between passive and active resistance.” *Rice v.*  
14 *Morehouse*, 989 F.3d 1112, 1123 (9th Cir. 2021). From the bodycam footage, Plaintiff’s  
15 resistance does not appear to have involved any violent actions towards the Defendant  
16 Officers. In addition, there is no evidence Plaintiff was attempting to flee.

17 As such, Plaintiff’s level of resistance is more comparable to a “relatively passive”  
18 or “minor” form of resistance than to truly “active” resistance. *See Rice*, 989 at 1123  
19 (finding plaintiff’s refusal to exit his vehicle was “far closer to ‘the purely passive  
20 protestor who simply refuses to stand’”); *Coles v. Eagle*, 704 F.3d 624, 629–30 (9th Cir.  
21 2012) (“We have drawn a distinction between passive and active resistance, and failing to  
22 exit a vehicle is not active resistance.”) (internal quotation marks omitted); *Mattos v.*  
23 *Agarano*, 661 F.3d 433, 445 (9th Cir. 2011) (holding suspect “engaged in some resistance  
24 to arrest” when she “refused to get out of her car when requested to do so and later  
25 stiffened her body and clutched her steering wheel to frustrate the officers’ efforts to  
26 remove her from her car”); *Bryan*, 630 F.3d at 829–30 (“Even if [the suspect] failed to  
27 comply with the command to remain in his vehicle, such noncompliance does not  
28 constitute ‘active resistance’ supporting a substantial use of force.”); *Klamut v. Cal.*

1 *Highway Patrol*, No. 15-cv-02132-MEJ, 2017 U.S. Dist. LEXIS 17337, at \*43 (N.D. Cal.  
2 Feb. 7, 2017) (finding that plaintiff who ignored commands, shut vehicle door repeatedly,  
3 and refused to exit patrol car engaged in resistance that was “something more than purely  
4 passive” but “less than active”).

5 Accordingly, while a reasonable jury could conclude Plaintiff engaged in more  
6 than passive resistance, the evidence before the Court on summary judgment does not  
7 establish Plaintiff “actively” resisted.

8 d. Other Factors

9 In addition to the *Graham* factors described above, the Court also considers the  
10 “totality of the circumstances.” *Bryan*, 630 F.3d at 826. “Whether an officer warned a  
11 suspect that failure to comply with the officer’s commands would result in the use of  
12 force is another relevant factor in an excessive force analysis.” *Nehad*, 929 F.3d at 1137.  
13 Here, the Court notes Plaintiff was warned at the outset that if he did not follow the  
14 Officer Zeller’s instructions that force could be used against him. ECF No. 27-10 at  
15 5:19–20. This factor weighs in favor of the Defendants.

16 “Another relevant factor is ‘the availability of alternative methods of capturing or  
17 subduing a suspect.’” *Nehad*, 929 F.3d at 1138 (quoting *Smith v. City of Hemet*, 394 F.3d  
18 689, 701 (9th Cir. 2005)). The Parties did not address this point, however, and the Court  
19 declines to engage in after-the-fact speculation. Regardless, “the appropriate inquiry is  
20 whether the officers acted reasonably, not whether they had less intrusive alternatives  
21 available to them.” *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994). This factor does  
22 not weigh in favor of either Party.

23 e. Balancing

24 Finally, the Court balances the severity of the intrusion with the government’s  
25 interest. In this case, the Court acknowledges that there are “only so many ways that a  
26 person can be extracted from a vehicle against [his or her] will, and none of them  
27 is pretty.” *Mattos*, 661 F.3d at 459 (Silverman, J, concurring).

28 ///

1           Nevertheless, there are a number of material factual disputes in this case directed  
2 to, among other things, the quantum of force deployed against Plaintiff and whether  
3 Plaintiff posed an immediate threat to his minor child or to the Officers. Viewing the  
4 record in the light most favorable to Plaintiff, the *Graham* factors do not fully support  
5 either side. The Court “cannot say that a verdict in favor of the defendants on the claim  
6 for excessive force is the only conclusion that a reasonable jury could reach.” *Gonzalez*  
7 *v. City of Anaheim*, 747 F.3d 789, 797 (9th Cir. 2014).

8           Consequently, the Court finds the question as to reasonableness of force is more  
9 appropriately resolved by a jury. *See Chew*, 27 F.3d at 1443 (“[W]hether a particular use  
10 of force was reasonable is rarely determinable as a matter of law.”); *see also Manesh*,  
11 2021 U.S. Dist. LEXIS 252580, at \*16–17 (stating question of reasonableness should be  
12 resolved by jury); *Adamson v. City of S.F.*, No. 13-cv-05233-DMR, 2015 U.S. Dist.  
13 LEXIS 124588, at \*20 (N.D. Cal. Sep. 17, 2015) (stating reasonable jury could question  
14 whether officer’s “use of a carotid hold amounted to excessive force”).

15           ***B. Whether Defendants Are Entitled to Qualified Immunity***

16           “The doctrine of qualified immunity protects government officials ‘from liability  
17 for civil damages insofar as their conduct does not violate clearly established statutory or  
18 constitutional rights of which a reasonable person would have known.’” *Pearson v.*  
19 *Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818,  
20 (1982)).

21           The doctrine of qualified immunity “is more than a ‘mere defense to liability,’” but  
22 is “a complete *immunity from suit*” which is “effectively lost if a case is erroneously  
23 permitted to go to trial.” *Mueller v. Auker*, 576 F.3d 979, 987 (9th Cir. 2009) (emphasis  
24 in original). The Supreme Court has emphasized “the importance of resolving immunity  
25 questions at the earliest possible stage in litigation.” *Hunter v. Bryant*, 502 U.S. 224, 227  
26 (1991).

27           To determine whether government officials are entitled to qualified immunity,  
28 courts conduct a two-step inquiry. First, courts consider “whether the facts that a plaintiff

1 has alleged make out a violation of a constitutional right[.]” *Martinez v. City of Clovis*,  
2 943 F.3d 1260, 1270 (9th Cir. 2019). Second, courts consider “whether that right was  
3 clearly established at the time of the incident.” *Id.* Courts have discretion “in deciding  
4 which of the two prongs of the qualified immunity analysis should be addressed first in  
5 light of the circumstances in the particular case at hand.” *Pearson*, 555 U.S. at 236.

6 In this case, the Court has determined there is an open question as to whether the  
7 Defendant Officers violated a constitutional right. The Court therefore proceeds to the  
8 second step of the qualified immunity inquiry—whether “the right at issue was clearly  
9 established at the time of the incident such that a reasonable officer would have  
10 understood [his or] her conduct to be unlawful in that situation.” *Torres v. City of*  
11 *Madera*, 648 F.3d 1119, 1123 (9th Cir. 2011).

12 The “threshold determination of whether the law governing the conduct at issue is  
13 clearly established is a question of law for the court.” *Act Up!/Portland v. Bagley*, 988  
14 F.2d 868, 873 (9th Cir. 1993). “This requires two separate determinations: (1) whether  
15 the law governing the conduct at issue was clearly established and (2) whether the facts  
16 as alleged could support a reasonable belief that the conduct in question conformed to the  
17 established law.” *Green v. City & Cty. of S.F.*, 751 F.3d 1039, 1052 (9th Cir. 2014)  
18 (citing *Act Up!*, 988 F.2d at 873)). “Both are questions of law to be determined by the  
19 court in the absence of genuine issues of material fact.” *Id.*

20 Under Supreme Court precedent, “[w]hile there does not have to be a case directly  
21 on point, existing precedent must place the lawfulness of the particular action beyond  
22 debate.” *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (internal quotation  
23 marks omitted). There can, of course, “be the rare obvious case, where the unlawfulness  
24 of the officer’s conduct is sufficiently clear even though existing precedent does not  
25 address similar circumstances.” *Id.* But “‘a body of relevant case law’ is usually  
26 necessary to “‘clearly establish’ the answer’ with respect to probable cause.” *Id.*  
27 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004)). “Put simply, qualified  
28

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1 immunity protects all but the plainly incompetent or those who knowingly violate the  
2 law.” *Mullenix v. Luna*, 577 U.S. 7, 12 (2015).

3 Defendants contend no clearly established law would have put the Defendant  
4 Officers on notice that using “pain compliance” techniques and “control holds” while  
5 extracting an individual who was: (1) “actively” refusing to exit a vehicle; and (2)  
6 “hiding his right hand behind the passenger seat” would violate the Fourth Amendment.  
7 ECF No. 27-1 at 26–29.

8 The Court does not wholly agree with how Defendants have framed this inquiry.  
9 Instead, drawing all inferences in Plaintiff’s favor, the Court finds the question at hand is  
10 whether police officers violate clearly established law when they progressively increase  
11 their use of force against a misdemeanor from verbal commands to control holds, a  
12 pressure point application, “brandishing” a taser, placing significant pressure on the  
13 misdemeanor’s neck, forcing the misdemeanor out of the car, and then placing their  
14 knees on the misdemeanor’s back while handcuffing him. The Court considers this  
15 question under circumstances where the misdemeanor has refused the officers’  
16 instructions to exit a vehicle and instead engaged in less than active resistance. For  
17 purposes of this analysis, the Court also assumes the misdemeanor does not pose a threat  
18 to any minor children in the same vehicle.

19 In considering this question, the Court is mindful that it is Plaintiff who “bears the  
20 burden of proof that the right allegedly violated was clearly established at the time of the  
21 alleged misconduct.” *Romero v. Kitsap Cty.*, 931 F.2d 624, 627 (9th Cir. 1991); *see also*  
22 *Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th Cir. 1993) (“The plaintiff in a § 1983  
23 action bears the burden of proving that the right allegedly violated was clearly established  
24 at the time of the official’s allegedly impermissible conduct.”).

25 Here, Plaintiff neither identified a sufficiently analogous case nor adequately  
26 explained how the Defendant Officers’ conduct was so plainly egregious any reasonable  
27 officer would know such conduct was a violation of Plaintiff’s constitutional right to be  
28 ///

1 free from excessive force. The Court, therefore, cannot find Plaintiff has met his  
2 summary judgment burden in this case.

3 Ninth Circuit precedent is instructive on this point. In *Felarca v. Birgeneau*, 891  
4 F.3d 809, 822 (9th Cir. 2018), the Ninth Circuit considered whether an officer violated  
5 clearly established law when “after several warnings to disperse have been given, the  
6 officer uses baton strikes on a plaintiff’s torso or extremities for the purpose of moving a  
7 crowd actively obstructing the officer from carrying out lawful orders in a challenging  
8 environment.” The *Felarca* court held to meet the burden of showing the right allegedly  
9 violated was clearly established, “plaintiffs must generally identify a case where an  
10 officer acting under similar circumstances was held to have violated the Fourth  
11 Amendment.” *Id.* The *Felarca* court concluded plaintiffs had not met their burden when  
12 they devoted “scant argument” or “failed to address [the second step of qualified  
13 immunity] at all[.]” *Id.* (emphasis in original).

14 Similarly, in *Reese v. County of Sacramento*, 888 F.3d 1030, 1038 (9th Cir. 2018),  
15 the Ninth Circuit affirmed a district court’s ruling a police officer was entitled to  
16 qualified immunity where plaintiff had “not identified any sufficiently analogous cases”  
17 of a “clearly established Fourth Amendment right[.]” The *Reese* court concluded that  
18 “[a]bsent a showing by [plaintiff] that the right was clearly established at the time,” the  
19 defendant officer was “entitled to qualified immunity on the Fourth Amendment  
20 excessive force claim.” *Id.* at 1040.

21 In *Shafer v. County of Santa Barbara*, 868 F.3d 1110, 1117 (9th Cir. 2017), the  
22 Ninth Circuit considered whether an officer violated clearly established law by  
23 progressively increasing the use of force “from verbal commands, to an arm grab, and  
24 then a leg sweep maneuver” against a misdemeanant who “refuses to comply with the  
25 officer’s orders and resists, obstructs, or delays the officer in his lawful performance of  
26 duties such that the officer has probable cause to arrest him in a challenging  
27 environment.” The *Shafer* court again emphasized that plaintiff “bears the burden of  
28 showing that the rights allegedly violated were clearly established.” *Id.* at 1118 (internal

1 quotation marks omitted). The *Shafer* court then held that because plaintiff failed “to  
2 identify sufficiently specific constitutional precedents to alert [the defendant officer] that  
3 his particular conduct was unlawful, [the defendant officer was] entitled to qualified  
4 immunity.” *Id.*

5 Finally, in *Sharp v. County of Orange*, 871 F.3d 901, 916 (9th Cir. 2017), the  
6 Ninth Circuit considered whether an officer violated clearly established law by yanking  
7 the plaintiff’s left arm behind his back with enough force that it required surgery and then  
8 applying handcuffs tight enough to break plaintiff’s skin. *Id.* at 916. The *Sharp* court  
9 characterized this application of force “significant.” *Id.* Nevertheless, the *Sharp* court  
10 held the defendant officer was still “entitled to qualified immunity because [p]laintiffs  
11 have not offered anything other than general legal propositions which cannot clearly  
12 establish that [the officer’s] particular conduct was unlawful.” *Id.*

13 District Courts within this Circuit have reached similar conclusions. *See, e.g.,*  
14 *Goldsby v. City of Henderson Police Dep’t*, No. 2:18-cv-01912-GMN-VCF, 2020 U.S.  
15 Dist. LEXIS 243749, at \*23–24 (D. Nev. Nov. 13, 2020) (finding officers entitled to  
16 qualified immunity where plaintiff provided no law “indicating that he has a clearly  
17 established right to be free from strikes to the head when resisting arrest and refusing to  
18 show his hands as officers are trying to arrest him when he was believed to potentially be  
19 armed”); *Smith v. Aubuchon*, No. 2:14-CV-0775-KJM-DMC-P, 2020 U.S. Dist. LEXIS  
20 56472, at \*44–45 (E.D. Cal. Mar. 30, 2020) (finding defendant entitled to qualified  
21 immunity where plaintiff failed to specify what Ninth Circuit precedent he was  
22 referencing or explain “how his particular circumstance [was] a *clear* violation of a  
23 constitutional right”) (emphasis in original); *Mackovski v. Bex*, No. SACV 11-01538-  
24 CJC(DFMx), 2018 U.S. Dist. LEXIS 81991, at \*24 (C.D. Cal. May 15, 2018) (finding  
25 defendant officer entitled to qualified immunity where plaintiff failed to cite to any  
26 existing precedent that clearly established the illegality of the alleged conduct or failed to  
27 show the conduct was so egregious any reasonable person would have recognized a  
28 constitutional violation).

1 The burden to show the illegality of the alleged conduct was clearly established  
2 rested on Plaintiff’s shoulders and he has not met it here—despite numerous  
3 opportunities to file a proper Opposition to Defendants’ Motion for Summary Judgment.  
4 The arguments contained in Plaintiff’s November 18, 2021 letter are simply not sufficient  
5 to satisfy Plaintiff’s burden.

6 Even if the Court were to use its “‘full knowledge’ of relevant precedent,” *Gordon*  
7 *v. Cnty. of Orange*, No. 19-56032, 2021 U.S. App. LEXIS 22055, at \*15 (9th Cir. July  
8 26, 2021), the Court is mindful it must still generally identify precedent that put the  
9 Defendant Officers on “clear notice” using force in the particular circumstances of this  
10 case would be excessive, *S. B. v. Cnty. of San Diego*, 864 F.3d 1010, 1015 (9th Cir.  
11 2017); *see Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (“Use of excessive force is an  
12 area of the law in which the result depends very much on the facts of each case, and thus  
13 police officers are entitled to qualified immunity unless existing precedent squarely  
14 governs the specific facts at issue.”) (internal quotation marks omitted). Here, however,  
15 the Court is aware of “no controlling precedent or judicial precedent that is specific  
16 enough” to have alerted the Defendant Officers in this case that “the degree of force”  
17 used in these circumstances was unreasonable. *See Sharp*, 871 F.3d at 917.<sup>5</sup>

18 For these reasons, the Court concludes Defendant Officers Zeller and Spinos are  
19 entitled to qualified immunity in this case.

## 20 **II. Municipal Liability (Defendant City of Escondido)**

21 Defendant City of Escondido moves for summary judgment to be entered in its  
22 favor as to Plaintiff’s claim for municipal liability. ECF No. 27-1 at 29. However, this  
23

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24  
25 <sup>5</sup> The fact that this Court concluded there is a triable issue as to whether the Defendant  
26 Officers’ application of force was objectively reasonable also does not preclude it from  
27 holding the Defendant Officers are entitled to qualified immunity. *See S. B.*, 864 F.3d at  
28 1014–15 (holding defendant officer was entitled to qualified immunity at summary  
judgment stage, even where there was a triable issue as to whether the defendant officer’s  
use of force was objectively reasonable).



1 Court already previously granted the Parties' Joint Motion to dismiss Plaintiff's *Monell*  
2 claim against the Defendant City with prejudice, ECF No. 18 at 1, and a *Monell* claim is  
3 the only means of asserting a § 1983 claim against a municipality. *See, e.g., Peterson v.*  
4 *Allegheny Cty.*, No. 2:21-CV-00078-CCW, 2022 U.S. Dist. LEXIS 17466, at \*115 (W.D.  
5 Pa. Jan. 31, 2022) (“[A] *Monell* claim is the exclusive means of pleading a 42 U.S.C.  
6 § 1983 claim against a municipality[.]”); *Cardenas v. Cty. of Alameda*, No. C 16-05205  
7 WHA, 2017 U.S. Dist. LEXIS 66904, at \*6 (N.D. Cal. May 2, 2017) (“The sole avenue  
8 of municipal liability is under *Monell.*”).

9 For these reasons, the Court **DENIES AS MOOT** Defendant City of Escondido's  
10 motion for summary judgment.

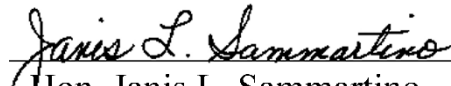
### 11 CONCLUSION

12 For the reasons stated above, the Court **GRANTS** Defendants' Motion for  
13 Summary Judgment with respect to Plaintiff's claims against Defendants Zeller and  
14 Spinos. The Court **DENIES AS MOOT** Defendants' Motion for Summary Judgment  
15 with respect to Plaintiff's claims against Defendant City of Escondido and **DISMISSES**  
16 Defendant City of Escondido from the case, in light of the Court's prior Order granting  
17 the Parties' Joint Motion to Dismiss Plaintiff's *Monell* claims.

18 The Clerk of Court **SHALL ENTER JUDGMENT** in favor of Defendants Zeller  
19 and Spinos and **SHALL CLOSE** the file.

20 **IT IS SO ORDERED.**

21 Dated: March 24, 2022

22   
23 Hon. Janis L. Sammartino  
24 United States District Judge  
25  
26  
27  
28