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

8 Miles Parish,
9
10 Plaintiff,

11 v.

12 Troy Lansdale, et al.,
13 Defendants.

No. CV-17-00186-TUC-JGZ

ORDER

14
15 Plaintiff Miles Parish brings this civil rights action against Tucson Police
16 Department (TPD) Officers Troy Lansdale and Bradley Kush, the City of Tucson, and TPD
17 Chief of Police.¹ Parish alleges that while Officers Lansdale and Kush were investigating
18 a complaint about a loud party, they illegally entered his home and pulled him outside,
19 taking him to the ground, where Officer Lansdale struck him.

20 Currently pending before the Court are three motions for summary judgment. Parish
21 seeks summary judgment on Officers Lansdale and Kush's affirmative defenses of
22 qualified immunity and state law defenses, and seeks partial summary judgment on his
23 state law claims. (Doc. 63.) Officers Lansdale and Kush seek summary judgment on
24 Plaintiff's civil rights and state law claims. (Doc. 64.) The City of Tucson and Chief of
25 Police request summary judgment asserting that the City did not maintain policies
26 condoning unconstitutional police conduct. (Doc. 66.) The motions were heard on August

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28 ¹ Parish's Complaint originally named TPD Chief Roberto Villasenor, the TPD Chief on
the incident date. Chief Chris Magnus has since replaced Chief Villasenor. (Doc. 66 at 1.) Under
Fed. R. Civ. P. 25(d), Chief Magnus is automatically substituted for Defendant Villasenor for
official capacity claims.

1 20, 2019.

2 For the following reasons, the Court will grant parts of and deny parts of the
3 motions.

4 **I. Factual Background²**

5 On December 13, 2015, at around 12:40 a.m., Officer Lansdale and other officers
6 responded to a report of a loud party with yelling and screaming in Parish's neighborhood
7 near the University of Arizona. (Doc. 42, ¶ 14; Doc. 52, p. 4, ¶ 14; Doc. 53, p. 4, ¶ 14;
8 Doc. 65 at ¶ 1; Doc. 66, p. 2 n.2.) Upon arriving in the area, Officer Lansdale was able to
9 identify Parish's residence as the source. Lansdale described the music as overwhelming.
10 (Doc. 65, ¶ 2.)

11 Officer Lansdale rang the doorbell and knocked on Parish's front door. (*Id.*) He
12 could hear people inside yelling "Oh shit, the cops are here. Turn the music off. Just be
13 quiet." (Doc. 65-1, Ex. 1, p. 4.) He used his flashlight to look through a window where he
14 saw "people begin to scatter and run into different rooms of the house" (*Id.* at pp. 3–
15 4.) The music was turned off after Officer Lansdale had been knocking for 30 seconds to a
16 minute. (Doc. 42, ¶ 20; Doc. 52, p. 4, ¶ 20; Doc. 53, p. 5, ¶ 20.) Some minutes later, the
17 house became dark inside other than the flashing DJ-style lighting. (Doc. 42, ¶ 17; Doc.
18 52, p. 4, ¶ 17; Doc. 53, p. 5, ¶ 17.)

19 Officer Lansdale continued knocking and asking for a resident to open the door.³

20 ² Numerous statements of facts and controverting statements of fact were filed by the
21 parties in support of and in opposition to the motions. The Court culled through these filings and
22 some of the underlying documents to identify those facts that were disputed and those that were
not.

23 ³ According to Officer Lansdale, one of the officers called out that they were there for a
24 loud party and announced that if someone did not come to the door, "they were gonna get a red
25 tag" as the officers had determined from looking through the blinds that there were more than five
26 people inside. (Doc. 42-3, p. 5.) "Red tag" refers to a civil citation for violating Tucson's "unruly
27 gathering" ordinance, which carries a \$500 fine. Tucson City Code § 16-32. Section 16-32,
28 defines an "[u]nruly gathering" as "a gathering of five (5) or more persons on any private
property . . . in a manner which causes a disturbance of the quiet enjoyment of private or public
property by any person or persons. Such disturbances include, but are not limited to, excessive
noise . . . the service of alcohol to minors or consumption of alcohol by minors, fighting,
disturbing the peace . . ." Tucson City Code § 16-32(a). "A peace officer may abate an unruly
gathering by reasonable means including, but not limited to, citation or arrest of violators under
applicable ordinances or state statutes, and dispersal of the persons attending the gathering." *Id.*

1 (Doc. 42 at ¶ 24; Doc. 52, p. 5, ¶ 24; Doc. 53, p. 5, ¶ 24.) After about four minutes, Parish
2 opened the door just wide enough to lean out his head and part of one shoulder. (Doc. 42,
3 ¶¶ 24, 28; Doc. 52, p. 5, ¶¶ 24, 28; Doc. 53, p. 5, ¶¶ 24, 28; Doc. 65, ¶ 2.) At some point,
4 Officer Kush arrived and joined Officer Lansdale on the front porch. (Doc. 42, ¶¶ 21, 23;
5 Doc. 52, p. 4, ¶¶ 21, 23; Doc. 53, p. 5, ¶¶ 21, 23.) Officer Lansdale told Parish that the
6 officers were there for a loud party complaint and advised him that if he could get
7 everybody out of the party, he would not be given a red tag. (Doc. 42, ¶ 31; Doc. 52, p. 5,
8 ¶ 31; Doc. 53 p. 7, ¶ 31.) According to Officer Lansdale, Parish was initially apprehensive
9 and uncooperative, saying that he would only cooperate if he didn't get a red tag. (Doc.
10 65, ¶ 7.)

11 Parish agreed to disperse the party but insisted on closing his front door. (Doc. 42
12 at ¶¶ 32, 33; Doc. 52, p.5, ¶¶ 32, 33; Doc. 53 at 6–7, ¶¶ 32, 33.) While speaking to Parish,
13 Officer Lansdale placed his foot on the threshold of the doorway to prevent Parish from
14 closing the door.⁴ (Doc. 42, ¶ 30; Doc. 52, p. 5, ¶ 30; Doc. 53, p. 6, ¶ 30; Doc. 65, ¶ 10.)
15 Parish yelled at Officer Lansdale that he “was entering his f[]ing house without a warrant
16 and that [Lansdale] needed to get the f[] out and the only reason [Lansdale] was coming in
17 was because [Parish] was black.”⁵ (Doc. 65, ¶ 10.) The parties dispute at what point
18 Officer Lansdale placed his foot in the door. Officer Lansdale states he placed his foot
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at § 16-32(b).

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21 ⁴ The parties dispute where precisely Officer Lansdale placed his foot. In his response to
22 Plaintiff's statement of facts, Officer Lansdale admits only that he placed his boot “onto the
23 threshold.” (Doc. 53, p. 7, ¶ 34.) In Officer Lansdale's statement of facts, he claims that he
24 “positioned his foot so that it was on the threshold only and not inside the house.” (Doc. 65, ¶ 11.)
25 However, Officer Lansdale also admits that Parish was unable to shut the door because of Officer
26 Lansdale's foot, and that Officer Lansdale placed his boot on the threshold in that manner for the
27 express purpose of preventing Parish from closing the door. (Doc. 42, ¶ 30; Doc. 52, p. 5, ¶ 30;
28 Doc. 53, p. 6, ¶ 30; Doc. 65, ¶ 10.) It is implausible that Officer Lansdale could prevent Parish from
closing the door unless his foot extended into Parish's home. Moreover, at oral argument, defense
counsel conceded that when Lansdale placed his boot on Parish's threshold, he made entry into
Parish's home. Importantly, although it is not now disputed whether Officer Lansdale entered
Parish's house, the extent of the entry is still at issue. Parish testified that Officer Lansdale placed
his entire foot inside the house, parallel to the threshold and blocking the door. (Doc. 42, Ex. 5,
pp. 111–13.)

⁵ The parties dispute whether Parish was intoxicated, but do not dispute that Parish did not
want the police to remain at his house.

1 when Parish became belligerent. (Doc. 53, p. 6, ¶ 30.) According to Parish, Officer
2 Lansdale placed his foot on the threshold's doorstep immediately after Parish opened his
3 front door, so Parish could not close his door. (Doc. 42, ¶ 30.)

4 It is undisputed that Parish made numerous requests, characterized by Officer
5 Lansdale as screaming and yelling, that the officers get out, and when Officer Lansdale
6 acknowledged that he did not have a warrant, Parish attempted to shut the door.⁶ (Doc. 42,
7 ¶¶ 34, 36; Doc. 52, p. 4, ¶¶ 34, 36; Doc. 53, pp. 7–8, ¶¶ 34, 36; Doc. 65, ¶ 10.) Officer
8 Lansdale refused to remove his boot from the threshold, advising Parish that “we were
9 going to keep it open” for officer safety reasons. (Doc. 42, ¶¶ 34, 38; Doc. 52, p. 5, ¶¶ 34,
10 38; Doc. 53, pp. 7–8, ¶¶ 34, 38; Doc. 65, ¶ 12.) Officer Lansdale characterized Plaintiff as
11 belligerent and Officer Lansdale was not going to allow the door to be closed because “the
12 totality of the circumstances reflected that people were yelling and screaming, people were
13 scattering within the home, Plaintiff was expressing belligerent behavior and attitude, and
14 it was unknown what was actually occurring in the home.” (Doc. 53, p. 6, ¶ 30.) Officer
15 Lansdale was concerned about an officer safety issue and a public safety issue.⁷ (*Id.*; Doc.
16 65, ¶ 7.) Officer Kush said that although Parish was adamant that he was going to close
17 the door, Officer Kush similarly advised Parish that for officer safety reasons the door
18 needed to stay open—to enable the Officers to “see if anyone was walking in or out, as
19 well as to see if there was anybody else in there for a check welfare.” (Doc. 52, p. 5, ¶ 33;
20 Doc. 53, p. 7, ¶ 33.) Kush explained that he didn't know the intoxication level or ages of
21 anyone in the house. (Doc. 52, p. 5, ¶ 33; Doc. 53, p. 7, ¶ 33.)

22 A male occupant of the house tried to pull Parish back into the house and told him
23 he would deal with the police, but Parish continued to scream at Officer Lansdale to get
24 out, and to push the door shut, which he was unable to do because of Officer Lansdale's

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26 ⁶ Officer Kush testified that Parish “repeatedly requested to close the door, before he
would even go and talk—and start having people leave.” (Doc. 42, ¶ 34)

27 ⁷ In describing Officer Lansdale's safety concerns, Defendants explain: “The officers
28 didn't know if people were fighting, or if someone is passed out. Officer Lansdale has responded
to party calls and had shootings, stabbings, homicides, females sexually assaulted and forcibly
raped.” (Doc. 65, ¶ 8.)

1 foot. (Doc. 65, ¶ 12.) At some point Officer Lansdale yelled, “Ouch, you’re hurting my
2 foot. You’re smashing my foot, you need to stop,” but Parish began to scream and yell
3 again that the Officers were entering his house and he pushed the door harder. (Doc. 65, ¶
4 13.) Officer Lansdale kept his foot on the threshold, and contends it was ultimately trapped
5 in the door. (Doc. 42, ¶ 43; Doc. 52, p. 6, ¶ 43; Doc. 53, p. 9, ¶ 43.)

6 As Parish was trying to close the door, Officer Kush heard Officer Lansdale say,
7 “[O]w, you’re now hurting my foot[.]” and saw “that the door was covering . . . a quarter
8 of the right part of Officer Lansdale’s boot, and his foot appeared to be stuck.”⁸ (Doc. 42,
9 ¶ 44; Doc. 52, p. 6, ¶ 44; Doc. 53, p. 9, ¶ 44.) Officer Kush testified that he was concerned
10 for officer safety and “impact pushed^[9] the door with two hands,” putting a lot momentum
11 into it to release Officer Lansdale’s foot. (Doc. 42, ¶ 45; Doc. 52, p. 6, ¶ 45; Doc. 52, p. 2,
12 ¶ 3; Doc. 53, p. 10, ¶ 45.) The momentum of pushing the door carried Officer Kush about
13 a step and a half or so inside the door, and put him between the door and the door frame.
14 (Doc. 52, p. 2, ¶ 5.) Parish continued to try to shut the door, which, according to Officer
15 Kush, pinned Kush between the door and the door frame. (Doc. 65, ¶ 15.) Officer Kush
16 “impact pushed” the door open a second time. (Doc. 52, p. 2, ¶ 7.) The second push
17 knocked Parish back into the home and allowed Officer Lansdale and Officer Kush to grab
18 onto Parish’s jacket and right arm. (Doc. 52 p. 2, ¶¶ 7, 8.)

19 Officers Lansdale and Kush pulled Parish from his house despite efforts from people
20 inside the house to pull Parish back into the house, and Parish and the Officers all ended
21 up on the ground.¹⁰ (Doc. 65, ¶ 17.) Parish asserts that the Officers “reached into . . . [his]

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23 ⁸ Officer Lansdale denied the door went over his foot when interviewed by Internal Affairs
24 three days later. He testified that the door crushed the right side of his toe. (Doc. 42, ¶¶ 46, 48;
25 Doc. 52, p. 6, ¶¶ 46, 48; Doc. 53, p. 10, ¶¶ 46, 48.)

26 ⁹ The parties do not describe what an “impact push” is. The Court notes Parish’s testimony
27 that he believed Officer Kush kicked the door open. (Doc. 42-5, p. 121) Parish also testified that
28 Officer Kush forced the door open with such force that Parish “flew back.” (*Id.*) Officer Kush
confirmed that his second impact push “pushed Parish back into the home.” (Doc. 52, p. 2, ¶ 8.)

¹⁰ The Officers contend that “someone in the house was trying to pull Plaintiff back into
the house and out of the grip of the officers, in a ‘tug of war’ fashion. Further, in the course of
resolving the ‘tug of war’ and Plaintiff’s resistance, the officers and Plaintiff stumbled and fell to
the ground.” (Doc. 53, pp. 10–11, ¶ 49; *see also* Doc. 52, 6, ¶ 49.) Officer Lansdale at his

1 home, pulled . . . [him] from inside, and threw him onto his home’s concrete front porch.”
2 (Doc. 42, ¶ 49.) According to the Officers, Parish’s assaultive conduct against Lansdale
3 and Kush justified their attempt to pull him from the house. (Doc. 52, p. 6, ¶ 49; Doc. 53,
4 pp. 10–11, ¶ 49.) The Officers reasoned that Plaintiff had repeatedly struck Officer Kush
5 with the door, several times, with force, and had resisted his extraction from the house.
6 (*Id.*)

7 After being pulled from his house, Parish lay on the ground, on his stomach, with
8 his head against the concrete porch. (Doc. 42, ¶ 50; Doc. 52, p. 6, ¶ 50; Doc. 53, p. 6, ¶
9 50.) The Officers assert that Parish continued to resist and, as they attempted to handcuff
10 him, Plaintiff lay on his stomach and resisted the Officers’ efforts to bring his hands from
11 underneath his chest so he could be handcuffed. (Doc. 65, ¶ 18; Doc. 52, p. 6, ¶ 51; Doc.
12 53, p. 11, ¶ 51.) Officer Lansdale warned Parish that if he did not comply, the officer
13 would strike him, (Doc. 65, ¶ 18; Doc. 42-3, p. 21), and upon concluding that Parish was
14 not complying, Officer Lansdale struck Parish in the head four times with a closed fist
15 while Parish lay on his stomach on the concrete. (Doc. 42, ¶¶ 53, 54; Doc. 52 p. 6 ¶¶ 53,
16 54; Doc. 53 p. 11, ¶¶ 53, 54; Doc. 65, ¶ 18.) Parish testified that he did not resist the
17 officers: “I landed on my hand on my chest, and I couldn’t get my arm out. And I was
18 wearing a jacket, and my arm was stuck, and I couldn’t get it out, and then they were hitting
19 me to, like, pull it out.” (Doc. 42-5, p. 124.) After striking Parish, the Officers were then
20 able to handcuff Parish and they pulled him up to his feet. (Doc. 65, ¶ 18.)

21 Parish claims that he suffered a concussion (and other injuries) as a result of the
22 Officers’ actions (Doc. 42, ¶¶ 56, 60), and he testified that when officers brought him to a
23 standing position, he felt dizzy and disoriented. (Doc. 42-5, pp. 129–31.) The Officers
24 state that Parish resisted their efforts to escort him to the patrol car by stomping his feet
25 and attempting to pull back toward his house.¹¹ (Doc. 65, ¶ 19.) Consequently, the Officers

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27 deposition, described what happened as an “arm-style drag out of the home that wound up in a
take down.” (Doc. 42-2, p. 52.).

28 ¹¹ Officer Lansdale characterized Parish’s conduct at this point as “defensive resistance.”
(Doc. 42, ¶ 66.) “At one point in time he was leaning backwards toward the house after he had

1 put Parish back on the ground and used a TARP restraint to secure his legs together and
2 then carry him to the patrol car. (Doc. 42, ¶¶ 67, 68; Doc. 52, p. 7, ¶¶ 67, 68; Doc. 53, p.
3 ¶¶ 67, 68; Doc. 65, ¶ 19.) Although the use of force involved in putting Parish back onto
4 the ground and employing a TARP restraint is not included in specific statements of fact,
5 the record exhibits include Parish’s testimony that as five or six officers were walking him
6 toward the patrol car, the Officers pulled on him, screamed at him to stop resisting, and
7 “they started punching me all over and they took me back to the ground.” (Doc. 42-5, pp.
8 129–132.) Parish was handcuffed behind his back when the take down occurred. (*Id.* at
9 131.) Officer Lansdale stated that he and another officer used a “leg sweep” maneuver to
10 bring Parish to the ground. (Doc. 42-3, p. 16.) He denied that Parish was struck when
11 brought to the ground. (Doc. 42-2, p. 108.) Parish was taken to the jail.

12 Officer Lansdale cited Parish for violating Tucson’s unruly gathering (red tag)
13 ordinance, a civil infraction. (Doc. 42, ¶ 69; Doc. 52, p. 7, ¶ 69; Doc. 53, p. 13, ¶ 69.)
14 Parish was subsequently found responsible and that finding was upheld on appeal. (Doc.
15 52 at 7, ¶¶ 69, 69B.)

16 Parish was charged criminally with obstruction of government operations and
17 resisting arrest, class 1 misdemeanors. (Doc. 42, ¶ 71; Doc. 52, p. 7, ¶ 71; Doc. 53, p. 13,
18 ¶ 71.) Officer Reese issued the criminal citation. (Doc. 52, pp. 7–8, ¶ 70.) Parish asserts
19 that Officer Lansdale consulted with supervisors in deciding what charges to bring. (Doc.
20 42, ¶¶ 70–71.) Officer Lansdale could not recall specifically which supervisor made the
21 determination. (*Id.*; Doc. 53, p. 13, ¶¶ 70–71.) The criminal charges were subsequently
22 dismissed. (Doc. 42, ¶ 72; Doc. 52, p. 8, ¶ 72; Doc. 53 p. 13, ¶ 72.)

23 During the subsequent internal affairs investigation of the incident, Officer Lansdale
24 stated that he was “taught that if you can articulate a safety reason at a party, as long as
25 you’re not entering the home, your foot can be in the threshold of the door.” (Doc. 42-3,
26 p. 26.) He stated that based on his training, he could put his foot on the threshold even if
27 it prevented the door from closing because “the threshold is not considered part of the

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been detained in the handcuffs. Defensive resistance is an attempt to actively get away and/or flee
without the use of means of actually harming someone.” (*Id.*)

1 premises And that’s a common consensus between the officers I work with and the
2 officers in this division that I’ve worked with.” (*Id.* at p. 27.) Officer Lansdale also stated
3 that “I’m a field trainer myself, this is something that is routinely taught to individuals and
4 it goes as far as when officers don’t put their foot in the door at loud parties, they’ve
5 actually been docked for officer safety issues. So, this is a reoccurring . . . trend in the
6 department that has been established that this is a reasonable and expected thing to be
7 done.” (*Id.* at p. 42.)

8 Sergeant Faulk, one of Officer Lansdale’s supervisors, confirmed during the internal
9 affairs investigation that officers “had been trained . . .” to put a foot in the doorway “for a
10 very long time . . .” and that such action “has been . . . a common place, uh, practice due,
11 uh, due to the officer safety concerns and keeping the contact” (Doc. 67, ¶ 1; Doc.
12 75, ¶¶ 1, 2.) Sergeant Faulk defined “threshold” as “the area . . . in between . . . the outside
13 of the house, and the interior of the house. Meaning the threshold . . . is normally defined
14 as—or I would say as the, uh, kind of that doorframe area to . . . where you are. So you’re
15 not breaking inside of the . . . scope of the residence.” (Doc. 67-2, p. 2.) According to
16 Sergeant Faulk, “you have the area to where the door is going to close and, uh, so the
17 placement of the foot is not necessarily inside of the house . . . to just make sure that the
18 officers keep a visual on what’s going on inside . . . and just keep that contact.” (*Id.* at p.3)
19 He opined that an officer’s foot could be caught in the door without having crossed the
20 threshold “because where the door closes, and you look at the actual door jamb, uh, if your
21 foot is there and it can still get stuck between the door because you have an angle of [foot
22 or boot size between doorframe and door closing.” (*Id.*) Sergeant Faulk “would have
23 issues and concerns . . .” if an officer stuck “the lower half of [his] leg inside of the
24 residence . . .” or “put his foot inside of that door.” (*Id.* at pp. 3, 4.)

25 In March 2016, TPD Investigator Lieutenant Doggert prepared an Internal Affairs
26 Report. Lieutenant Doggert “did not find fault or a violation with Officer Lansdale initially
27 putting his foot in the door when it was opened[.]” (Doc. 75, Ex. 1, p. 3.) Lieutenant
28 Doggert did find there was “no legal justification for Officer Lansdale using his boot to

1 keep the incident location's door open after being asked to remove it. Although this tactic
2 can be used in certain circumstances, there were no reported exceptions to the warrant
3 requirement" in this case. (Doc. 75, ¶ 5.) Lieutenant Doggert concluded:

4 Officer Lansdale was acting in good faith when he placed his boot into the
5 door threshold and although I disagree with his action, I believe he was trying
6 to work in a safe and effective manner. He did not knowingly misuse his
7 authority. Additionally, Sgt. Faulk confirmed that this practice was common
amongst some officers and that in his opinion the actions were appropriate.

8 (Doc. 67, ¶ 2 (emphasis omitted).)

9 Lieutenant Doggert also found that that Officer Lansdale violated several TPD
10 General Orders.¹² (Doc 75, ¶ 4.) He recommended that Officer Lansdale receive a written
11 reprimand. (Doc. 75, Ex. 1, p.7.) In concurring in Lieutenant Doggert's recommendation,
12 one Chain of Command officer further recommended training on "'threshold' related"
13 matters, and another Chain of Command officer recommended training on Fourth
14 Amendment issues. (Doc. 67, ¶ 4; Doc. 75, ¶ 6.)

15 On December 11, 2016, Parish filed suit. Parish alleges his Fourth Amendment rights were
16 violated when (1) Officers Lansdale and Kush illegally entered his home, seized him, and
17 maliciously prosecuted him (Count VIII); (2) Officer Lansdale used excessive force (Count VIII);
18 and (3) Officer Kush failed to intervene to prevent Officer Lansdale's unlawful entry and use of
19 excessive force (Count VIII). (Doc. 1-3.) Parish asserts state law claims against Officer Lansdale
20 for assault and battery, negligence, aggravated negligence, abuse of process, and false
21 imprisonment (Counts I, III, IV, V, VI); and state law claims against Officer Kush for aiding and
22 abetting an assault and battery, negligence, and false imprisonment. (Counts II, III, VI). Finally,
23 Parish brings a § 1983 claim against the City of Tucson and TPD Chief of Police alleging that they
24 maintained a policy condoning Officer Lansdale's unlawful entry into his residence and used

25 ¹² The TPD General Orders Officer Lansdale was found to have violated provide that:
26 officers shall observe and obey all laws and Department general orders; searches may not be
27 performed without a warrant unless the search can be justified by an exception to the warrant
28 requirement; a person has a reasonable expectation of privacy from unreasonable search and/or
seizure; consent searches are limited to the consent given and can be revoked at any time; and the
warrantless search of a person's home is presumed to be unreasonable and officers must be
prepared to justify a warrantless entry into a residence based on an exception to the warrant
requirement. (Doc. 67-3, pp. 2-3.)

1 Internal Affairs to minimize or “cover up” unconstitutional police activity (Count VII).

2 **II. Summary Judgment Standard**

3 Currently pending before the Court are three motions for summary judgment or
4 partial summary judgment. Parish seeks summary judgment as to the applicability of
5 certain affirmative defenses, including qualified immunity, and liability on the state law
6 claims. (Doc. 63.) As to the civil rights claims, Officers Lansdale and Kush argue they
7 are immune from suit and their conduct was objectively reasonable. As to the state law
8 claims, the Officers argue that Parish cannot establish facts to support the necessary
9 elements of those claims. (Doc. 64.) The City and the Chief move for summary judgment,
10 arguing that there is no evidence that Officer Lansdale violated Parish’s constitutional
11 rights and no evidence that the City or Chief had a policy or practice permitting officers to
12 place a foot inside a residence or refusing to remove their foot when asked to do so, or
13 using Internal Affairs to cover up unconstitutional police activity.

14 In deciding a motion for summary judgment, the Court views the evidence and all
15 reasonable inferences in the light most favorable to the party opposing the motion. *See*
16 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Eisenberg v. Insurance Co. of*
17 *North America*, 815 F.2d 1285, 1289 (9th Cir. 1987). Summary judgment is appropriate if
18 the pleadings and supporting documents “show that there is no genuine issue as to any
19 material fact and that the moving party is entitled to a judgment as a matter of law.” *Celotex*
20 *Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also* Fed. R. Civ. P. 56(a). Material facts
21 are those “that might affect the outcome of the suit under the governing law.” *Anderson*,
22 477 U.S. at 248. A genuine issue exists if “the evidence is such that a reasonable jury could
23 return a verdict for the non-moving party.” *Id.* A party moving for summary judgment
24 initially must demonstrate the absence of a genuine issue of material fact. *Celotex*, 477
25 U.S. at 325. Where the nonmoving party bears the burden of proof, the burden of the
26 moving party may be discharged by showing that there is an absence of evidence
27 supporting its opponent’s claim. *Id.*; *see also* Fed. R. Civ. P. 56(c). If a moving party has
28 made this showing, the non-moving party may not rest upon the mere allegations or denials

1 of the adverse party's pleading, but must set forth specific facts showing that there is a
2 genuine issue for trial. *Anderson*, 477 U.S. at 256; *see also Brinson v. Linda Rose Joint*
3 *Venture*, 53 F.3d 1044, 1049 (9th Cir. 1995).

4 **III. Qualified Immunity**

5 **A. Applicable Law**

6 “In § 1983 actions, the doctrine of qualified immunity protects city officials from
7 personal liability in their individual capacities for their official conduct so long as that
8 conduct is objectively reasonable and does not violate clearly-established federal rights.”
9 *Cnty. House, Inc. v. City of Boise, Idaho*, 623 F.3d 945, 964 (9th Cir. 2010) (citing *Harlow*
10 *v. Fitzgerald*, 457 U.S. 800, 818 (1982)). A state official is entitled to qualified immunity
11 unless the plaintiff can show “(1) the facts ‘[t]aken in the light most favorable to
12 [plaintiff] . . . show [that] the [defendants’] conduct violated a constitutional right’ and (2)
13 the right was clearly established at the time of the alleged violation.” *Sandoval v. Las*
14 *Vegas Metro. Police Dep’t*, 756 F.3d 1154, 1160 (9th Cir. 2014) (quoting *Saucier v. Katz*,
15 533 U.S. 194, 201 (2001), *rev’d on other grounds by Pearson v. Callahan*, 555 U.S. 223
16 (2009)). “Both prongs entail questions of law that [the court] . . . may answer in either
17 order.” *Bonivert v. City of Clarkston*, 883 F.3d 865, 872 (9th Cir. 2018).

18 As to the second prong, “[a] Government official’s conduct violates clearly
19 established law when, at the time of the challenged conduct, ‘[t]he contours of [a] right
20 [are] sufficiently clear’ that every ‘reasonable official would [have understood] that what
21 he is doing violates that right.’” *Ashcroft v. Al-Kidd*, 563 U.S. 731, 741 (2011) (quoting
22 *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (changes in original).
23 “Importantly, . . . it is not necessary that the alleged acts have been previously held
24 unconstitutional’ in order to determine that a right was clearly established, ‘as long as the
25 unlawfulness [of defendant’s actions] was apparent in light of pre-existing law.” *Bonivert*,
26 883 F.3d at 872 (internal quotation marks and citation omitted). Therefore, “in some
27 circumstances, ‘a general constitutional rule already identified in the decisional law may
28 apply with obvious clarity to the specific conduct in question, even though ‘the very action

1 in question has [not] previously been held unlawful.” *Id.* (quoting *United States v. Lanier*,
2 520 U.S. 259, 271 (1997)). “To evaluate whether a particular question is beyond debate, a
3 court looks for ‘cases of controlling authority in [the plaintiff]’s jurisdiction at the time’ or
4 ‘a consensus of cases of persuasive authority such that a reasonable officer could not have
5 believed that his actions were lawful.” *Kramer v. Cullinan*, 878 F.3d 1156, 1163–64 (9th
6 Cir. 2018) (citing *1164 Wilson v. Layne*, 526 U.S. 603, 617 (1999)). At bottom, “[t]he
7 relevant dispositive inquiry in determining whether a right is clearly established is whether
8 it would be clear to a reasonable officer that his conduct was unlawful in the situation
9 confronted.” *Saucier*, 533 U.S. at 202. The plaintiff bears the burden of showing that the
10 right at issue was clearly established. *Kramer*, 878 F.3d at 1164.

11 When resolving a motion for summary judgment on the issue of qualified immunity,
12 the court must “adhere to the fundamental principle that at the summary judgment stage,
13 reasonable inferences should be drawn in favor of the nonmoving party.” *Tolan v. Cotton*,
14 572 U.S. 650, 657 (2014). If “genuine issue[s] of material fact exist that prevent a
15 determination of qualified immunity at summary judgment, the case must proceed to trial.”
16 *Sandoval*, 756 F.3d at 1160 (internal quotation and citation omitted); *cf. Pierce v.*
17 *Multnomah Cty.*, 76 F.3d 1032, 1038–39 (9th Cir. 1996) (holding, in context of a directed
18 verdict, that when foundational facts regarding a qualified immunity defense are disputed
19 they must be decided by the jury before the issue of qualified immunity can be resolved).

20 **B. Officer Lansdale’s Warrantless Entry Into Parish’s House**¹³

21 The Officers assert they are entitled to qualified immunity because Parish fails to
22 present clearly established law “that would have apprised an Arizona police officer that a
23 foot on the threshold under these specific facts and circumstances was unconstitutional.”
24 (Doc. 78 at 6.) The Officers initially argued in their motion for summary judgment that
25 Lansdale’s placement of his foot on Parish’s threshold was not an entry into the house.¹⁴

26 _____
27 ¹³ Both parties’ motions address qualified immunity as to all the § 1983 claims, but neither
28 motion specifically addresses the malicious prosecution claim. This order therefore does not make
any rulings pertinent to that claim.

¹⁴ The City maintains this position.

1 They also argued that therefore no constitutional violation occurred. At oral argument,
2 however, counsel conceded that a foot on the threshold is an entry into the structure. And,
3 given the undisputed facts that the door would not close due to Officer Lansdale's
4 placement of his foot, and that Officer Lansdale intended to prevent the door from closing,
5 the Court concludes, as a matter of law, that Officer Lansdale entered Parish's home.

6 **1. Clearly Established Right**

7 In December 2015, Parish's right to be free from Officer Lansdale's warrantless
8 entry into his house was clearly established. "At the [Fourth] Amendment's 'very core'
9 stands 'the right of a man to retreat into his home and there be free from unreasonable
10 governmental intrusion.'" *Florida v. Jardines*, 569 U.S. 1, 7 (2013) (quoting *Silverman v.*
11 *United States*, 365 U.S. 505, 511 (1961)). "As a matter of clearly established law, 'the
12 Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent
13 circumstances, that threshold may not reasonably be crossed without a warrant.'" *Bonivert*,
14 883 F.3d at 874 (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)); *see also Welsh*
15 *v. Wisconsin*, 466 U.S. 740 (1984) (discussing necessity of exigent circumstances "[b]efore
16 agents may invade the sanctity of the home . . ."). The Supreme Court has "made clear
17 that any physical invasion of the structure of the home by even a fraction of an inch [is]
18 too much [for Fourth Amendment standards], and there is certainly no exception to the
19 warrant requirement for the officer who barely cracks open the front door and sees nothing
20 but the nonintimate rug on the vestibule floor." *Kyllo v. United States*, 533 U.S. 27, 40
21 (2001); Further, the Supreme Court has recognized that the Fourth Amendment's
22 protections "would be of little practical value if the State's agents could stand in a home's
23 porch or side garden and trawl for evidence with impunity; the right to retreat [into one's
24 home] would be significantly diminished if the police could enter a man's property to
25 observe his repose from just outside the front window." *Jardines*, 569 U.S. at 7. Even
26 when an occupant "chooses to open the door and speak with the officers [who do not have
27 a warrant], the occupant need not allow the officers to enter the premises . . ." without
28 probable cause and exigent circumstances or other exception to the warrant requirement.

1 *Kentucky v. King*, 563 U.S. 452, 470 (2011).

2 Courts have consistently relied on the *Payton*, *Kyllo*, and *Welsh* line of cases in factual
3 scenarios similar to this case to conclude that an officer’s warrantless entry into a residence
4 violates the Fourth Amendment absent consent, probable cause and exigent circumstances,
5 or an exception to the warrant requirement. *See e.g., Mitchell v. Shearrer*, 729 F.3d 1070
6 (8th Cir. 2013) (denying qualified immunity where officer investigating violation of
7 ordinance regarding leaf debris, put her foot in the doorway to prevent resident from
8 shutting it; “a reasonable officer would have known that at the time Mitchell tried to close
9 the door, he stood within his home and thus could not be pulled therefrom and placed under
10 arrest in the absence of exigent circumstances”); *Dalcour v. City of Lakewood*, 492 F.3d
11 Appx. 924, 928, 932–34 (10th Cir. 2012) (denying qualified immunity where agent “put
12 her foot in the doorway to keep [plaintiff] from shutting the door” because “the facts
13 presented did not establish an objectively reasonable basis for believing anyone in the home
14 needed immediate aid or that there was any other exigent circumstance which would justify
15 a warrantless entry”: “Physical entry of a home, even if only with one foot on the threshold,
16 is an entry of the home for constitutional purposes.”); *Cummings v. City of Akron*, 418 F.3d
17 676, 685 (6th Cir. 2005) (warrantless entry unsupported by consent or exigent
18 circumstances was unlawful when the resident attempted to close the door on officers, but
19 one of the officers wedged his foot in the doorway, forced the door open, and went inside);
20 *Siedentop v. State*, 337 P.3d 1, 3 n.5 (Alaska Ct. App. 2014) (officer acted unlawfully when
21 he stuck his foot across the threshold to prevent the person inside from closing the door);
22 *Hanie v. City of Woodstock*, No. 1:06-CV-889-RWS, 2008 WL 476123 at *7 (N.D. Ga.
23 Feb. 19, 2008) (officer investigating noise complaint “was on fair notice that she could not
24 place her foot even a fraction of an inch into the structure of the [plaintiffs’] home.”); *State*
25 *v. Maland*, 103 P.3d 430, 434 (Idaho 2004) (finding constitutional violation where, in
26 absence of warrant or probable cause for a felony and exigent circumstances, an officer
27 “insert[ed] her foot into the threshold far enough to prevent [defendant] from closing the
28 door.”); *State v. Larson*, 668 N.W.2d 338, 342, 345–46 (Wis. Ct. App. 2003) (absent a

1 warrant, consent or probable cause and exigent circumstances, officer’s intrusion into
2 apartment was illegal; “even if the officer’s incursion only extends from the tips of his toes
3 to the balls of his feet, this incursion is the fixed ‘first footing’ against which the United
4 States Supreme Court . . . [has] previously warned.”).

5 The “emergency aid exception” to the warrant requirement “authorizes a warrantless
6 home entry where officers ha[ve] an objectively reasonable basis for concluding that there
7 [i]s an immediate need to protect others or themselves from serious harm; and [that] the
8 search’s scope and manner [a]re reasonable to meet the need.” *Rodriguez v. City of San*
9 *Jose*, 930 F.3d at 1123, 1137 (9th Cir. 2019) (internal quotation marks and citation
10 omitted); *see also Sandoval*, 756 F.3d at 1163–64 (discussing *Ryburn v. Huff*, 565 U.S. 469
11 (2014) (per curiam), and *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006)). In
12 *Sandoval*, the Ninth Circuit explained that the aid exception permits law enforcement
13 officers to enter a home without a warrant to give emergency assistance to an injured
14 occupant or to protect an occupant from imminent injury. 756 F.3d at 1163. Moreover, an
15 officer may enter without a warrant if he has a reasonable basis for concluding there is an
16 imminent threat of violence or threat to the officers’ safety and the safety of others. *Id.* at
17 1164.

18 As with all exceptions to the warrant requirement, the emergency aid exception is
19 “narrow and [its] boundaries are rigorously guarded.” *Id.* at 1161 (citations and internal
20 quotation marks omitted). Officers bear the burden of demonstrating “specific and
21 articulable facts” to justify the finding of either exigent circumstances or emergency. *Id.*
22 (internal quotation marks and citation omitted). The officers must also show that they
23 could not have obtained a warrant in time. *Id.* Because the officers’ actions must be
24 assessed objectively, their subjective motivation is irrelevant. *Brigham City*, 547 U.S. at
25 404. However, when determining whether an officer is entitled to qualified immunity, the
26 Court considers the facts that were knowable to the defendant officers. *White v. Pauly*, 137
27 S. Ct. 548, 551 (2017) (per curiam).

28

2. Violation of a constitutional right

1
2 In their motion, Defendants argue that a reasonable officer in the field would have
3 believed that the “foot in the door” technique was reasonable and proper “under the
4 circumstances” for the safety of the occupants and the safety of the officers. (Doc. 64 at
5 9.) Defendants state that the danger the officers feared, based on their experience, was that
6 it was a college party, and that there could be underage drinking and other crimes occurring.
7 Further, a neighbor had called because of loud music and screaming and the neighbor had
8 to go to work the next day. Defendants assert that two grounds permitted the Officers to
9 maintain their warrantless entry: the need (1) to ensure everyone in the house was safe and
10 leaves the premises, and (2) to protect themselves and the neighborhood.

11 Viewing the evidence in the light most favorable to the Defendants,¹⁵ under clearly
12 established law, no reasonable officer could have concluded that any exigency, including
13 the emergency aid exception, justified a warrantless entry. There was no indication of any
14 crime that was occurring within the home. Rather, Officers were responding to a complaint
15 of a loud party in a university neighborhood—a potential civil infraction. Officer Lansdale
16 contends that based on the yelling and screaming he heard inside the house, the Officers
17 did not “know if people were fighting, we don’t know if someone is passed out. . . .” (Doc.
18 65-1, Ex. 4, p. 68.) He asserts that “party calls are very dynamic. We’ve responded to
19 party calls and had shootings, stabbings, homicides, females sexually assaulted and
20 forcibly raped. The dynamic is we don’t know what’s going on.” (*Id.*)

21 “Simply invoking the unknown . . .” is insufficient to justify warrantless entry.
22 *Sandoval*, 756 F.3d at 1164; *see also Bonivert*, 883 F.3d at 877–78 (rejecting emergency
23 exception where officer’s “only mention of an actual threat was in terms so general that
24 they could apply to any interaction involving a criminal suspect in a home.”); *LaLonde v.*
25 *Cty. of Riverside*, 204 F.3d 947, 957 (9th Cir. 2000) (burden of establishing exigent
26 circumstances based on officer safety “is not satisfied by leading a court to speculate about

27
28 ¹⁵ A decision to deny qualified immunity is reviewed “by assuming that the version of the
material facts asserted by the non-moving party is correct.” *Nicholson v. City of Los Angeles*, 935
F.3d 685,693 (9th Cir. 2019) (citation omitted).

1 what may or might have been the circumstances.”) And here, there is no evidence from
2 which a reasonable juror could conclude that the occupants or the officers were in any
3 danger, or that any crime was occurring. Officer Lansdale admitted as much when he
4 testified that he did not have probable cause to believe that any crime was occurring
5 inside.¹⁶ His statement that “reasonable suspicion is there to the extent of the unknown” is
6 insufficient.¹⁷ (Doc. 42, ¶ 42.) Similarly, Officer Kush conceded that there was no
7 probable cause to believe any emergency was occurring or that anyone’s safety was issue.
8 When asked whether he believed that criminal activity was occurring inside of the house,
9 he responded no, “but there’s a potential for one.” (Id.) On the undisputed facts, the
10 Officers lacked an “objectively reasonable basis for concluding that there [wa]s an
11 immediate need [for officers] to protect others or themselves from serious harm.” *United*
12 *States v. Snipe*, 515 F.3d 947, 952 (9th Cir. 2008). Therefore, Court will deny Officer
13 Lansdale’s request for summary judgment on qualified immunity concerning Parish’s
14 illegal entry claim.¹⁸

15 C. Officer Kush’s entry and Parish’s seizure by both Officers

16 Officer Kush entered Parish’s home during his attempt to extract Officer Lansdale’s
17 foot from the doorway. Parish claims his constitutional rights were violated when Officer

18 ¹⁶ There is a suggestion that Parish was committing the crime of underage consumption.
19 However, whether he was intoxicated is disputed. And there is no evidence that the officers were
20 aware of Parish’s age at the time he answered the door, or that they were able to fully observe him
21 from behind the door.

22 ¹⁷ The fact that Officers initially stated that they did not intend to cite anyone or to
23 determine if underage drinking was occurring further supports the conclusion that there was no
24 exigency or probable cause.

25 ¹⁸ The Court also rejects Defendants’ contention that because they were at Parish’s to break
26 up a loud party and not to conduct a search or seizure, Office Lansdale placing his “foot in the
27 door . . .” was “‘de minimis’ at best and does not rise to the level of a Fourth Amendment
28 violation.” (Doc. 64, p. 8.) Defendants cite *Artes-Roy v. City of Aspen*, 31 F.3d 958 (10th Cir.
1994) in support of their argument. Unlike the building inspector in *Artes-Roy*, who left when
asked, Officer Lansdale refused Parish’s requests to remove his foot so Parish could shut the door.
Officer Lansdale’s persistent failure to honor the fundamental and clearly established right to be
free from unreasonable intrusion into one’s home amounted to more than a de minimis violation
of Parish’s constitutional rights. Moreover, as a reasonable juror could conclude that Officer
Lansdale’s conduct resulted in Parish being pulled from his home and subjected to an unwarranted
use of force, the Court rejects Defendants’ arguments that all of the alleged constitutional
violations should be dismissed as “trifling matters.”

1 Kush forced his door open, entered his home, and the Officers pulled him from his home.
2 Officer Kush argues that whether illegal entry into a home occurs “when an officer is trying
3 to prevent an assault on another officer, and the momentum of pushing a door open carries
4 his foot into a doorway . . . ” was not clearly established at the time of the incident. (Doc.
5 50, p. 6) He also argues no constitutional violation occurred because his conduct was
6 reasonable. (*Id.*) The Officers contend that when they pulled Parish out of his home, they
7 had probable cause to believe he had committed felony assault on both of them by shutting
8 the door on them. (*Id.*). The Court concludes that the Officers are not entitled to qualified
9 immunity as to these claims because there are disputed issues of fact.

10 **1. Clearly Established Right**

11 As set forth in Section III.B., the law clearly established that Officer Lansdale’s
12 warrantless entry into Parish’s home was not justified. On that date, the right to be free
13 from warrantless seizures in one’s home was also clearly established. “The Fourth
14 Amendment protects against warrantless arrest inside a person’s home in the same fashion
15 that it protects against warrantless searches of the home, which is to say that police officers
16 may not execute a warrantless arrest in a home unless they have both probable cause and
17 exigent circumstances.” *Hopkins v. Bonvicino*, 573 F.3d 752, 773 (9th Cir. 2009) (citing
18 *Payton*, 445 U.S. at 586; *Welsh*, 466 U.S. at 749).

19 **2. Violation of Constitutional Rights**

20 Officer Kush asserts that the risk of injury to Officer Lansdale created an exigency
21 that justified his entry into Parish’s house. He claims that after Parish pinned Kush between
22 the door and the door frame, during Parish’s attempt to close the door, Kush and Lansdale
23 were justified in seizing Parish and pulling him from his home. According to Defendants,
24 once Parish “started trying to slam Lansdale’s foot in the door, and then Plaintiff was
25 slamming the door into Kush’s chest, pinning Kush in the doorway, the die was cast;
26 Plaintiff was going to jail.” (Doc. 64 at 12.)

27 Generally, in the context of warrantless entries, police-created exigencies cannot
28 form “the basis for excusing compliance with the warrant requirement. . . .where

1 exigencies arose because of unreasonable and deliberate [conduct] by officers, in which
2 the officers consciously established the condition which the government now points to as
3 an exigent circumstance.” *United States v. Von Willie*, 59 F.3d 922, 926 (9th Cir. 1995)
4 (internal quotation marks and citations omitted). Here, Officer Lansdale violated Parish’s
5 Fourth Amendment rights by placing his foot in Parish’s house to prevent Parish from
6 closing the door. Lansdale’s refusal to remove his foot and both Lansdale and Kush’s
7 insistence that the door remain open resulted in Lansdale’s foot being closed in the door.
8 Kush’s “impact push” into the house escalated the violation, as did the Officers seizure of
9 Parish. Notably, Parish did not strike the Officers or threaten them. He just tried to close
10 the door. A reasonable juror could reject the Officers’ suggestion that Parish’s efforts to
11 close the door constituted a felonious assault necessitating the use of force and Parish’s
12 arrest. A reasonable juror could conclude that the Officers unreasonably created any
13 exigency. *Mabe v. San Bernardino Cty.*, 237 F.3d 1101, 1107 (2001) (“Whether reasonable
14 cause to believe exigent circumstances existed in a given situation, and the related
15 questions, are all questions of fact to be determined by the jury.” (internal quotation marks
16 and citation omitted).) Therefore, the Court will deny the Officers’ motion for summary
17 judgment on qualified immunity concerning Kush’s entry and Parish’s seizure.

18 **D. Excessive Force**

19 Defendants argue they are entitled to qualified immunity on Parish’s excessive force
20 claims because there is no case law “directly on point that says that it is excessive force to
21 face punch an arrestee that refuses to give up his hands from under his body so that he can
22 be handcuffed[.]” or “to take the handcuffed arrestee to the ground and to use a TARP [leg]
23 restraint device to immobilize an arrestee’s legs when he is resisting with his feet and legs
24 the officers’ efforts to escort the arrestee to the patrol car.” (Doc. 64, p. 9.)

25 For the same reasons as stated in Section III. C., the Court concludes material issues
26 of fact preclude summary judgment on the excessive force claims.

27 **1. Clearly Established Law**

28 Excessive force claims arising in the context of search or seizure are analyzed under

1 the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 388 (1989). The Fourth
2 Amendment requires police officers to use “only an amount of force that is objectively
3 reasonable in light of the circumstances facing them.” *Blankenhorn v. City of Orange*, 485
4 F.3d 463, 477 (9th Cir. 2007) (quoting *Tennessee v. Garner*, 471 U.S. 1, 7–8 (1985)). The
5 Supreme Court has repeatedly emphasized that the general standard for excessive force
6 claims set forth in *Graham*, does not, except in obvious cases, clearly establish that a right
7 exists. *See White*, 137 S. Ct. at 552 (appeals court “misunderstood the ‘clearly established’
8 analysis” where it “failed to identify a case where an officer acting under similar
9 circumstances . . . was held to have violated the Fourth Amendment.”) The clearly
10 established law must be particularized to the facts of the case. *Tolan*, 134 S. Ct. at 1866.
11 Such specificity is especially important in the Fourth Amendment context, where the Court
12 has recognized that “[i]t is sometimes difficult for an officer to determine how the relevant
13 legal doctrine, here excessive force, will apply to the factual situation the officer
14 confronts.” *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *Saucier*, 533 U.S. at
15 205).

16 Here, the contours of Parish’s right to be free from the excessive force at issue was
17 clearly established. In *Sandoval v. Las Vegas Metro. Police Dep’t*, 756 F.3d 1154, 1160
18 (9th Cir. 2014), the Ninth Circuit found that officers were on notice that handcuffing,
19 removing from their residence, and detaining compliant persons not suspected of any
20 crime, or alternatively that causing excessive pain while handcuffing, constituted excessive
21 force. *Id.* at 1165–66. And in *Blankenhorn*, the Ninth Circuit explained that “[n]either
22 tackling nor punching a suspect to make an arrest necessarily constitutes excessive
23 force. . . . But even where some force is justified, the amount actually used may be
24 excessive.” 485 F.3d at 477 (citing *Graham*, 490 U.S. at 396 and *Santos v. Gates*, 287 F.3d
25 846, 853 (9th Cir. 2002)).

26 *Blakenhorn* is particularly relevant. In that 2007 case, the Court found that officers
27 “punching [a suspect] to free his arms when, in fact, he was not manipulating his arms in
28 an attempt to avoid being handcuffed, was . . . a Fourth Amendment violation.” *Id.* at 481.

1 The court similarly found that the law clearly established that the application of hobble
2 restraints can constitute excessive force if unnecessary to maintain control of the suspect
3 and prevent possible danger to passersby. *Id.* (denying qualified immunity because a
4 reasonable jury could find that officers’ gang-tackling and punching without warning an
5 uncooperative but non-threatening misdemeanor suspect, and later applying a hobble-
6 restraint, was an unreasonable and excessive use of force); *see also Johnson v. Cty. of*
7 *Riverside*, 2015 WL 13649444, at 9–10 (C.D. Cal. Feb. 17, 2015) (concluding that the law
8 governing the use of hobble restraints was clearly established in light of *Blakenhorn*).
9 The *Blakenhorn* court also recognized that the law permits a “limited right to offer
10 reasonable resistance to an arrest that is the product of an officer’s . . . bad faith or
11 provocative conduct.” 485 F.3d at 479 (internal quotation marks and citation omitted).

12 **2. Violation of a Constitutional Right**

13 Excessive force claims are analyzed under an “‘objective reasonableness’ standard,
14 which requires balancing ‘the nature and quality of the intrusion on the individual’s Fourth
15 Amendment interest against the countervailing governmental interests.” *Sandoval*, 756
16 F.3d at 1166 (quoting *Graham*, 490 U.S. at 396). In evaluating governmental interests in
17 the use of force, courts must judge reasonableness “‘from the perspective of a reasonable
18 officer on the scene,” and consider several factors when evaluating the strength of the
19 government’s interest in the force used, such as: (1) the severity of the crime at issue, (2)
20 whether the suspect poses an immediate threat to the safety of the officers or others, and
21 (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight.
22 *Graham*, 490 U.S. at 396. Of the three factors, the most important is whether the suspect
23 posed an immediate threat to officer and public safety. *Young v. Cty. of Los Angeles*, 655
24 F.3d 1156, 1163 (9th Cir. 2011). Because the balancing analysis “‘nearly always requires
25 a jury to sift through disputed factual contentions, and to draw inferences therefrom, [the
26 Ninth Circuit] . . . ha[s] held on many occasions that summary judgment or judgment as a
27 matter of law in excessive force cases should be granted sparingly.” *Santos*, 287 F.3d at
28

1 853.¹⁹

2 Here, questions of fact preclude granting summary judgment, including whether
3 Parish posed an immediate threat to the safety of the officers and whether he actively
4 resisted. The evidence, viewed most favorably to Plaintiff, shows the Officers were present
5 at the house to investigate a civil infraction. After the Officers arrived, the loud music was
6 turned off and Parish agreed to shut the party down. The Officers claim that Parish
7 assaulted them by closing the door on them. Parish attempted to shut the door only after
8 the Officers refused Parish's repeated requests to leave. Parish did not threaten the
9 Officers. He claims that he did not resist arrest. Against this backdrop, a jury could
10 conclude that (1) Parish posed little, if any, threat to the officers; (2) shutting the door did
11 not constitute threatening behavior; (3) even if Officer Kush was justified in pushing the
12 door open to free Officer Lansdale's foot, the force he used in light of the degree of threat
13 posed by Parish was unreasonable; (4) the amount of force that Kush and Lansdale used to
14 extract Parish from the house was unreasonable; (5) Officer Lansdale's striking of Parish
15 was excessive under the circumstances; (6) the use of TARP was excessive given Parish's
16 conduct and the number of officers present; and (7) the officers acted in bad faith in
17 entering Parish's house and arresting Parish. *See Young*, 655 F.3d at 1164 ("an officer's
18 'provocative conduct' can trigger an individual's limited right to offer reasonable
19 resistance," thus reducing the reasonableness of force used in response to such resistance.)
20 (internal quotation marks and citation omitted); *Blankenhorn*, 485 F.3d at 479–80 ("The
21 lack of forewarning, the swiftness, and the violence with which the defendant officers
22 threw themselves upon [plaintiff] could reasonably be considered 'provocative,' triggering
23 Blankenhorn's limited right to reasonable resistance and thus making their later use of the
24 hobble restraints unreasonable."). Applying the *Graham* analysis here, the Court finds that
25 there are genuine disputes of material fact which prevent the Court from granting qualified

26
27 ¹⁹ The Supreme Court has "instructed courts not to conflate the analysis for excessive-force
28 claims with related Fourth Amendment claims." *Sharp v. Cty. of Orange*, 871 F.3d 901, 916–17
(9th Cir. 2017) (citing *Cty. of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1547 (2017)). Thus, an
unconstitutional entry or arrest like that which may have occurred in this case, "does not
predetermine the question of whether the quantum of force used was excessive." *Id.*

1 immunity on summary judgment on the excessive force claims.²⁰

2 **E. Officer Kush’s failure to intervene to prevent Officer Lansdale’s entry and**
3 **use of excessive force**

4 Parish claims that Officer Kush violated his Fourth Amendment rights by failing to
5 intervene when Officer Lansdale placed his foot in the doorway, thereby entering his home,
6 and by failing to intervene in Officer Lansdale’s use of excessive force. “[P]olice officers
7 have a duty to intercede when their fellow officers violate the constitutional rights of a
8 suspect or other citizen.” *United States v. Koon*, 34 F.3d 1416, 1447 n. 25 (9th Cir. 1994),
9 *rev’d on other grounds*, 518 U.S. 81 (1996). To be held liable for failing to intercede, the
10 officer must have “had an opportunity to intercede.” *Cunningham v. Gates*, 229 F.3d 1271,
11 1289 (9th Cir. 2000). A passive defendant violates a constitutional right that “is
12 analytically the same as the right violated by the person who . . .” actively engaged in the
13 unconstitutional conduct when he fails to intervene. *Koon*, 34 F.3d at 1417 n. 25.

14 Defendants acknowledge that an officer has a duty to intervene, but Officer Kush
15 contends that because Officer Lansdale is entitled to qualified immunity for the alleged
16 conduct, Officer Kush is likewise entitled to qualified immunity for failing to prevent that
17 conduct. (Doc. 87 at 1-2.) In light of the Court’s conclusion that Officer Lansdale is not
18 entitled to qualified immunity for this conduct, Officer Kush’s argument fails.
19 Consequently, the Court will deny Officer Kush’s request for summary judgment on
20 qualified immunity grounds.

21
22
23
24 _____
25 ²⁰ The Court notes that, in addition to arguing that they are entitled to qualified immunity,
26 Defendants also assert that “[t]his Court should rule as a matter of law that all actions taken by
27 Officer Lansdale and Kush were objectively reasonable” under *Graham*. (Doc. 64, p. 11.) The
28 Officer Defendants claim that a reasonable officer would have put his foot on the threshold under
the circumstances present here. *Graham* is a use of force case. It has no applicability to the
reasonableness of Officer Lansdale’s warrantless entry into Parish’s house. As for the Officers’
remaining conduct, as noted above, in applying the *Graham* factors, questions of fact preclude a
determination at this point as to whether the Officers’ use of force was objectively reasonable.

1 **IV. Monell and Supervisor Claims**

2 **A. Defendant City of Tucson**

3 In Count VII, Parish asserts § 1983 claims against the City of Tucson and the Chief
4 of Police, alleging these Defendants maintained a policy condoning constitutional
5 violations related to TPD officers' illegal entry into homes.²¹ The City and the Chief move
6 for summary judgment, arguing that there is no evidence that Officer Lansdale violated
7 Parish's constitutional rights and no evidence that the City or Chief had a policy or practice
8 permitting officers to place a foot inside a residence or refusing to remove their foot when
9 asked to do so.

10 The City of Tucson may not be sued under § 1983 solely because an injury was
11 inflicted by one of its employees. *Long v. Cty. of Los Angeles*, 442 F.3d 1178, 1186 (9th
12 Cir. 2006). Instead, a municipal entity may be held liable only when execution of its policy
13 or custom inflicts the injury. *Id.* (citing *Monell v. Dep't of Soc. Servs. of City of New York*,
14 436 U.S. 658, 690–94 (1978)). To succeed on a *Monell* claim, Parish must prove Officer
15 Lansdale deprived Parish of a constitutional right and the City of Tucson had a policy or
16 custom that led to this deprivation. *Monell*, 436 U.S. at 694; *Gillette v. Delmore*, 979 F.2d
17 1342, 1346 (9th Cir. 1992) (*Monell* liability may be established by “prov[ing] that a city
18 employee committed the alleged constitutional violation pursuant to a formal governmental
19 policy or a longstanding practice or custom which constitutes the standard operating
20 procedure of the local governmental entity.”) (internal quotation marks and citation
21 omitted).²² A widespread practice that, although not authorized by written law or express

22 _____
23 ²¹ Defendants also moved for summary judgment on Parish's claims that the City and the
24 Chief maintained a policy to use Internal Affairs to minimize or cover up unconstitutional police
25 activity. Defendants argue that Parish lacks evidence to support these allegations. As Parish failed
26 to respond to this argument and failed to cite any evidence supporting the claim, the Court will
grant summary judgment in favor of Defendants on the internal affairs policy claims. *See Celotex*,
477 U.S. at 322 (where the nonmoving party bears the burden of proof, the burden of the moving
party may be discharged by showing that there is an absence of evidence supporting its opponent's
claim).

27 ²² Parish is not required to show that the City's alleged practice “was unconstitutional in
28 that it was deliberately indifferent to [] the constitutional rights of its inhabitants,” as alleged by
Defendants. (Doc. 66 at 4 (citing *Castro v. Cty. of Los Angeles*, 833 F.3d 1060 (9th Cir. 1997))).
Parish alleges a “direct” *Monell* claim—that the City affirmatively authorized the alleged

1 municipal policy, is so permanent and well settled as to constitute a “custom or usage” with
2 the force of law satisfies the second *Monell* prong. *City of St. Louis v. Praprotnik*, 485 U.S.
3 112, 127 (1988); *see also Price v. Sery*, 513 F.3d 962, 966 (9th Cir. 2008) (plaintiffs may
4 “establish municipal liability by demonstrating that . . . the constitutional tort was the result
5 of a longstanding practice or custom which constitutes the standard operating procedure of
6 the local government entity.”) (internal quotation marks and citation omitted). An act
7 performed pursuant to widespread custom need not have “been formally approved by an
8 appropriate decision maker . . . ,” *Brown*, 520 U.S. at 404, although proof of random acts
9 or isolated incidents are insufficient to establish a custom. *Navarro v. Block*, 72 F.3d 712,
10 714 (9th Cir. 1996).

11 As discussed in Section III.B., on the undisputed evidence, the Court concludes that
12 Officer Lansdale violated Parish’s constitutional rights. Officer Lansdale admits that he
13 placed his foot in Parish’s doorway in a manner which prevented Parish from closing the
14 door, and Officer Lansdale refused to remove his foot when asked to do so. In viewing the
15 evidence in the light most favorable to Parish, the Court also concludes that there is a
16 material issue of fact as to whether the Tucson Police Department had a policy authorizing
17 officers to enter residences, without exigent circumstances and probable cause or consent,
18 by placing a foot on the threshold of the door to the residence to prevent a resident from
19 closing the door. Facts from which a jury might find that such a policy exists include
20 Officer Lansdale’s statement that he acted in accordance with his training when he placed
21 his foot on the threshold; Officer Lansdale’s statement that that “the threshold is not
22 considered part of the premises And that’s a common consensus between the officers

23 _____
24 violations. With direct *Monell* claims, proof that a municipality’s decisionmaker has intentionally
25 deprived a plaintiff of a federally protected right necessarily establishes that the municipality acted
26 culpably. *Bd. of Cty. Comm’rs of Bryan Cty. v. Brown*, 520 U.S. 397, 405 (1994); *Mann v. Cty. of*
27 *San Diego*, 907 F.3d 1154, 1164 (9th Cir. 2018) (county’s “deliberate adoption of its policy or
28 practice establishes that the municipality acted culpably.”), *petition for cert. filed* (U.S. May 24,
2019) (No. 18-1465); *see also City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989) (deliberate
indifference required where a plaintiff alleges that a facially neutral policy led a municipal
employee to violate the plaintiff’s rights); *Gibson v. Cty. of Washoe, Nev.*, 290 F.3d 1175, 1185
(9th Cir. 2002) (distinguishing “direct” *Monell* claims from “indirect” claims which allege that a
municipality violated the constitution by its omissions and require a showing of deliberate
indifference), *overruled on other grounds by Castro*, 833 F.3d at 1076.

1 I work with and the officers in this division that I've worked with." (Doc. 42-3, p. 27); and
2 Sergeant Faulk's statement that officers "had been trained . . . for a very long time . . ." to
3 put a foot in the doorway and that this practice was "a common place [] practice." (Doc.
4 67, ¶ 1; Doc. 75, ¶ 1.) Moreover, although Lieutenant Doggert recommended that Officer
5 Lansdale be disciplined for his improper entry, Lieutenant Doggert also concluded that
6 Officer Lansdale was acting in good faith in placing his boot into the door threshold and
7 noted that Sergeant Faulk confirmed that this practice was common amongst some officers
8 and that in Sergeant Faulk's opinion the actions were appropriate. Presumably, due to this
9 common practice, officers in the Chain of Command recommended training on
10 "threshold-related" matters and Fourth Amendment issues. (Doc. 67-3, p. 1.)

11 In arguing that the internal affairs investigation did not reveal that threshold
12 breaches into a person's home were a common or accepted practice, Defendants suggest
13 that the evidence shows that TPD policy permitted officers only to place a boot on a
14 threshold, not to enter into the residence. But in placing a boot on a threshold, an officer
15 may enter a residence, as Officer Lansdale undisputedly did at the Parish residence. Officer
16 Lansdale's and Sergeant Faulk's statements and Lieutenant Doggert's findings suggest that
17 officers had been trained to put their foot on the threshold in the manner that Officer
18 Lansdale did. *See Hamilton v. City of Olympia*, 687 F.Supp.2d 1231, 1245 (W.D. Wash.
19 2009) (plaintiff's reliance on testimony from lead officer and training officer was sufficient
20 to establish an issue of fact as to whether use of pepper spray was an "official custom,
21 pattern or policy" under *Monell*.)

22 Sergeant Faulk defined "threshold" as "the area . . . in between . . . the outside of
23 the house, and the interior of the house." (Doc. 67-2, p. 2.) But thresholds are not uniform.
24 And whether a boot would fit on a threshold, without breaking the plane and entering into
25 a residence, depends, of course, on the size of the threshold, the size of the boot, and the
26 placement of the threshold in relation to the interior of the house, i.e., whether the threshold
27 extends into the house. Sergeant Faulk acknowledged that when an officer puts a boot on
28 a threshold, the officer's foot could be caught in the door. He opined this was "because

1 where the door closes, and you look at the actual door jamb, uh, if your foot is there and it
2 can still get stuck between the door because you have an angle of []foot or boot size
3 between doorframe and door closing. (*Id.* at p. 3.) But another reasonable explanation for
4 a boot getting caught in a closing door is that the officer's foot, even if on a threshold, is
5 inside of the house. Because a reasonable juror viewing the evidence in a light favorable
6 to Parish could conclude that Officer Lansdale's conduct was in conformity with a
7 longstanding TPD practice and policy, the Court will deny the City's motion for summary
8 judgment as to Parish's § 1983 claim that the City of Tucson maintained a policy condoning
9 unconstitutional entries into residences.

10 **B. Defendant Chief of Police**

11 "[I]f individuals are being sued in their official capacity as municipal officials and
12 the municipal entity itself is also being sued, then the claims against the individuals are
13 duplicative and should be dismissed." *Vance v. Cty. of Santa Clara*, 928 F.Supp. 993, 996
14 (N.D. Cal. 1996) (citation omitted); *cf. Kentucky v. Graham*, 473 U.S. 159, 166 (1985)
15 ("[A]n official capacity suit is, in all respects other than name, to be treated as a suit against
16 the entity . . . for the real party in interest is the entity."). Parish's official capacity claims
17 against the Chief of Police are duplicative of Parish's claims against the City of Tucson.
18 The Court will therefore dismiss the official capacity claims against Chief Magnus.

19 "A defendant may be held liable as a supervisor under § 1983 'if there exists either
20 (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient
21 causal connection between the supervisor's wrongful conduct and the constitutional
22 violation.'" *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) (quoting *Hansen v. Black*,
23 885 F.2d 642, 646 (9th Cir. 1989)). Supervisory wrongful conduct may include action or
24 inaction in the training, supervision, or control of subordinates; acquiescence in the
25 constitutional deprivation; or for conduct that shows a reckless or callous indifference to
26 the rights of others. *Id.* at 1208. As Defendants correctly state, Parish fails to produce any
27 evidence that would support a claim of individual capacity liability against either Chief of
28 Police. Thus, Parish's individual capacity claims against the Chief of Police will also be

1 dismissed.

2 **V. State law claims**

3 Parish sues Officer Lansdale for assault and battery, abuse of process, and false
4 arrest/imprisonment, and Officer Kush for aiding and abetting an assault and battery, and
5 false arrest/imprisonment. Plaintiff and Defendants seek summary judgment as to liability
6 on the state law claims.

7 **A. Dismissal of negligence claims and request for punitive damages on the**
8 **state law claims**

9 Parish has withdrawn his negligence and aggravated negligence claims and
10 concedes that he is not entitled to punitive damages on any state law claims. (Doc. 71, p.
11 13.) Accordingly, the Court will dismiss these claims and the request for punitive damages
12 on these claims.

13 **B. Tort Claims**

14 **1. Assault and Battery**

15 Parish argues he is entitled to summary judgment because Officer Lansdale admitted
16 all elements of assault. To prove battery Parish must show that Officer Lansdale
17 “intentionally engaged ‘in an act that results in harmful or offensive contact with the person
18 of another.’” *A.G. v. Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195, 1210 (9th
19 Cir. 2016) (quoting *Duncan v. Scottsdale Med. Imaging, Ltd.*, 70 P.3d 435, 438 (Ariz.
20 2003)). To succeed on his assault claim, Parish must prove that Officer Lansdale “acted
21 ‘with intent to cause [Parish] . . . harmful or offensive contact or apprehension thereof, and
22 [Parish] . . . person apprehend[ed] imminent contact.’” *Id.* (quoting *Garcia v. United*
23 *States*, 826 F.2d 806, 809 n.9 (9th Cir. 1987)). “The two claims are the same except that
24 assault does not require the offensive touching or contact. Both require the defendant have
25 the requisite intent.” *Id.* (citations omitted).

26 For Parish to succeed on his claim against Officer Kush for aiding and abetting an
27 assault and/or battery, Parish must prove the following three elements: (1) Officer
28 Lansdale committed a tort that caused injury to Parish; (2) Officer Kush knew that Officer

1 Lansdale's conduct constituted a tort; and (3) Officer Kush substantially assisted or
2 encouraged Officer Lansdale in accomplishing the tort. *Dawson v. Withycombe*, 163 P.3d
3 1034, 1052 (Ariz. App. 2007). "Because aiding and abetting is a theory of secondary
4 liability, the party charged with the tort must have knowledge of the primary violation, and
5 such knowledge may be inferred from the circumstances." *Wells Fargo Bank v. Ariz.*
6 *Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund*, 38 P.3d 12,
7 23 (2002). (citation omitted).

8 Although the undisputed facts establish that Officer Lansdale struck Parish multiple
9 times with a closed fist, and that Officer Kush was present and involved in Parish's arrest,
10 questions of fact exist regarding the applicability of state affirmative defenses. Under
11 A.R.S. § 13-409, an officer cannot be held civilly liable for use of force when effecting an
12 arrest. *Ryan v. Napier*, 245 Ariz. 54, 63 (2018) (quoting A.R.S. § 13-413). That statute
13 provides:

14 A person is justified in threatening or using physical force against another if
15 in making or assisting in making an arrest or detention or in preventing or
16 assisting in preventing the escape after arrest or detention of that other
17 person, such person uses or threatens to use physical force and all of the
18 following exist:

- 17 1. A reasonable person would believe such force is immediately
18 necessary to effect the arrest or detention or prevent the escape.
- 19 2. Such person makes known the purpose of the arrest or detention or
20 believes that it is otherwise known or cannot reasonably be made
21 known to the person to be arrested or detained.
- 22 3. A reasonable person would believe the arrest or detention to be lawful.

21 A.R.S. § 13-409.

22 Viewing the evidence in the light most favorable to the Officers, questions of fact
23 exist as to whether Lansdale's use of force was reasonable under the circumstances and
24 whether the Officers had probable cause to arrest Parish. Consequently, the Court will
25 deny Parish's motion as to the assault and battery charges.

26 The Officers advance two arguments in support of their motion for summary
27 judgment on the assault and battery claims. First, their use of force was supported by
28 probable cause to arrest after Parish assaulted them. Second, pursuant to *United States v.*

1 *Span*, 970 F.2d 573 (9th Cir. 1991), Parish did not have a right to resist the arrest, even if
2 it was not supported by probable cause. (*Id.*)

3 Viewing the evidence in the light most favorable to Parish, the Court will deny the
4 Officers' motion for summary judgment on the assault and battery claims. As noted above,
5 questions of fact exist regarding the existence of probable cause and application of A.R.S.
6 § 13-409's justification defense. Moreover, although *Span* recognizes that "an individual
7 has a limited right to offer reasonable resistance to an arrest that is . . . triggered by the
8 officer's bad faith or provocative conduct," *Id.*, 970 F.2d at 580 (citation omitted), a
9 reasonable jury might conclude that any resistance on Parish's part was reasonable in light
10 of Officer Lansdale's conduct.

11 **2. False arrest/Imprisonment**

12 Under Arizona law, "false arrest and false imprisonment differ only in terminology
13 and are defined as the detention of a person without his consent and without lawful
14 authority." *Spears v. Ariz. Bd. of Regents*, 372 F.Supp. 3d 893, 922 (D. Ariz. 2019)
15 (internal quotation marks and citation omitted). "The essential element necessary to
16 constitute either false arrest or false imprisonment is unlawful detention." *Id.* (internal
17 quotation marks and citation omitted). To make a warrantless arrest, the Officers needed
18 probable cause to believe Parish had committed a criminal offense.

19 Officers Lansdale and Kush seek summary judgment arguing they had probable
20 cause to arrest Parish because he committed felony assault when he shut the door on them.
21 Parish argues that probable cause was lacking because Officer Lansdale was trespassing
22 when he refused to remove his foot from the doorway. Parish argues that Arizona law
23 permits use of reasonable force to prevent the Officers' criminal trespass²³ into his home.
24 A.R.S. § 13-407(A). Whether Parish's reliance on A.R.S. § 13-407 is viable depends on
25 the jury's determination of factual questions regarding the circumstances of Officer

26
27 ²³ Criminal trespass in the third degree occurs when a person "[k]nowingly enter[s] or
28 remain[s] unlawfully on any real property after a reasonable request to leave by . . . the owner or
any other person having lawful control over such property, or reasonable notice prohibiting entry."
A.R.S. § 13-1502(A)(1).

1 Lansdale's entry. Moreover, there are factual disputes as to the existence of probable cause
2 and the question of whether Parish ordered the Officers off of his property, or only out of
3 his house. Accordingly, the Court will deny both parties' motions for summary judgment
4 on the false arrest/imprisonment claim.

5 **3. Abuse of Process against Officer Lansdale.**

6 To prove abuse of process, Parish must establish "a wilful act in the use of judicial
7 process for an ulterior purpose not proper in the regular conduct of proceedings."²⁴ *Morn*
8 *v. City of Phoenix*, 152 Ariz. 164, 166, 730, P.2d 863, 875 (1986). "[T]here is no action
9 for abuse of process when the defendant uses the process for its authorized or intended
10 purpose, even though with bad intentions, or . . . an incidental motive of spite." *Id.*
11 (internal quotation marks and citation omitted). Moreover, "an ulterior purpose alone
12 cannot constitute abuse of process." *Bird v. Rothman*, 627 P.2d 1097, 1100 (Ariz. Ct. App.
13 1981).

14 Parish seeks summary judgment on his abuse of process claim against Officer
15 Lansdale. Parish asserts that Officer Lansdale testified that he did not intend to take action
16 against Parish for the red tag violation, nor did he intend to arrest Parish "until after Parish
17 asked to see a warrant, and asked the officers to leave the property." (Doc. 63, p. 13.)
18 Parish contends that Officer Lansdale cited Parish in order to punish Parish for invoking
19 his Fourth Amendment rights and to conceal Lansdale's own wrongdoing. (*Id.*)

20 Viewing the evidence in the light most favorable to Defendants, the Court concludes
21 that factual questions prevent summary judgment in Parish's favor. The undisputed facts
22 are that Officer Lansdale gave Parish the option of ending the party or getting a red tag
23 citation. Instead of stopping the party, Parish became upset that the Officers would not let
24 him shut his door and events escalated, leading to issuance of the citations. As discussed
25 throughout this Order, questions of fact exist as to whether the Officers had probable cause
26

27 ²⁴ "[P]rocess' includes a summons, subpoena, garnishment, writ of replevin, arrest
28 warrant, or 'other orders directly affecting obligations of persons or rights in property'" *Fappani*
v. Bratton, 407 P.3d 78, 81-82 (Ariz. Ct. App. 2017) (quoting 3 Dan B. Dobbs, et. al., *The Law of*
Torts § 594 (2d ed 2011)).

1 to arrest Parish. Resolution of that question can affect the outcome of the abuse of process
2 claim. *See Rondelli v. Pima Cty.*, 586 P.2d 1295, 1301 (Ariz. Ct. App. 1978) (no abuse of
3 process where, *inter alia*, plaintiff failed to produce evidence that defendants “acted
4 willfully to procure [the plaintiff’s] . . . arrest for a corporate debt they knew he was not
5 liable for.”) As to the red tag notice, a reasonable jury may find that Officer Lansdale
6 lawfully issued the citation, even if he did so out of spite. The Court will deny Parish’s
7 motion on this issue.

8 In their motion for summary judgment on Parish’s abuse of process claim, Officers
9 Lansdale and Kush argue that instead of shutting down the party as they requested, Parish
10 “became belligerent, assaulted Lansdale and Kush, resisted arrest, was arrested, charged,
11 and incarcerated. There is no version of the facts that would support an abuse of process
12 claim.” (Doc. 64, p. 17.) Viewing the evidence in the light most favorable to Parish, the
13 Court finds there are material issues of fact concerning whether Officer Lansdale cited
14 Parish to conceal a Fourth Amendment violation, or for some other improper purpose.

15 **4. Common law qualified immunity.**

16 In the Officer’s Reply to Parish’s Opposition to their Motion for Summary
17 Judgment, Officers Lansdale and Kush argue that under recent case law, Parish’s state law
18 claims are barred by qualified immunity. In *Spooner v. City of Phoenix*, 435 P.3d 462
19 (Ariz. Ct. App. 2018), the court recognized that “[c]ommon law qualified immunity
20 generally provides public officials, including police officers, limited protection from
21 liability when performing an act that inherently requires judgment or discretion.” *Id.* at
22 466 (internal quotation marks and citation omitted). “If qualified immunity applies, a
23 public official performing a discretionary act within the scope of her public duties may be
24 liable only if [h]e knew or should have known that she was acting in violation of established
25 law or acted in reckless disregard of whether h[is] activities would deprive another person
26 of their rights.” *Id.* at 467 (internal quotation marks and citation omitted).

27 Generally, courts will not consider new arguments raised in a reply brief. However,
28 because the same rationale applies to the common law qualified immunity defense of state

1 claims that applied to the federal constitutional claims, the Court addresses, but denies
 2 Defendants' request for summary judgment on the issue of common law qualified
 3 immunity.

4 **VI. Other Affirmative Defenses**

5 **A. Statutory justification and necessity defenses.**

6 Parish seeks summary judgment precluding the Defendant Officers' reliance on
 7 A.R.S §§ 13-402²⁵, 13-403(3)²⁶, 13-404²⁷, 13-406²⁸, 13-410²⁹, 13-411,³⁰ and 13-413³¹, and
 8 13-417.³² As with A.R.S. § 13-409, civil liability cannot be imposed on Defendants if they
 9 engaged in conduct justified under the cited statutes, regardless of the theory of recovery.
 10 *Ryan*, 425 P.3d at 239 (quoting A.R.S. § 13-413). These defenses require that Defendants'

11 ²⁵ In pertinent part, A.R.S. § 13-402 concerns justification in the use of physical force by
 12 "[a] reasonable person [who] believe[s] such conduct is required or authorized to assist a peace
 13 officer in the performance of such officer's duties notwithstanding that the officer exceeded the
 officer's legal authority."

14 ²⁶ Under A.R.S. § 13-403(3), "[a] person responsible for the maintenance of order in a
 15 place where others are assembled . . . may use physical force if and to the extent that a reasonable
 person would believe it necessary to maintain order[.]"

16 ²⁷ Under A.R.S. § 13-404(A), with certain exceptions, "a person is justified in threatening
 17 or using physical force against another when and to the extent a reasonable person would believe
 18 that physical force is immediately necessary to protect himself against the other's use or attempted
 19 use of unlawful physical force." Additionally, "[t]he threat or use of physical force against another
 20 is not justified: . . . To resist an arrest that the person knows or should know is being made by a
 peace officer or by a person acting in a peace officer's presence and at his direction, whether the
 arrest is lawful or unlawful, unless the physical force used by the peace officer exceeds that
 allowed by law[.]" A.R.S. § 13-404(B)(2).

21 ²⁸ A.R.S. § 13-406 permits use of force to defend a third person in certain situations.

22 ²⁹ A.R.S. § 13-410 permits use of deadly physical force in certain situations.

23 ³⁰ A.R.S. § 13-411 permits use of force necessary to prevent specified crimes.

24 ³¹ A.R.S. § 13-413 protects officers from civil liability for justified conduct under A.R.S.
 25 § 13-401 *et. seq.* See *Ryan*, 245 Ariz. at 63, 425 P.3d at 239.

26 ³² Under A.R.S. § 13-417, "conduct that would otherwise constitute an offense is justified
 27 if a reasonable person was compelled to engage in the proscribed conduct and the person had no
 28 reasonable alternative to avoid imminent public or private injury greater than the injury that might
 reasonably result from the person's own conduct." However, this defense is not available to a
 person who "intentionally, knowingly or recklessly placed himself in the situation in which it was
 probable that the person would have to engage in the proscribed conduct." A.R.S. § 13-417(B).

1 actions must be reasonable in light of the circumstances. *See Gavigan v. Pima Cty.*, No.
2 CV 02-212-TUC-RCC, 2007 WL 9724346, at *3 (D. Ariz. Nov. 15, 2007).

3 In opposing Parish's motion, Defendants do not discuss A.R.S. §§ 13-406, 13-410
4 and 13-411. (*See* Doc. 51, pp. 10–11.) Thus, the Court will grant Parish's motion as to
5 these statutes. As to the remaining Title 13 defenses, the Court will deny Parish's motion.
6 As discussed in relation to the applicability of A.R.S. § 13-409, viewing the evidence in
7 the light most favorable to Defendants, questions of material fact exist as to the
8 applicability of these defenses.

9 **B. Defense of collateral estoppel/res judicata.**

10 Collateral estoppel binds a party to a decision issued in a previous law suit where:
11 (1) the issue was actually litigated in the previous proceeding, (2) the parties had a full and
12 fair opportunity and motive to litigate the issue, (3) a valid and final decision on the merits
13 was reached, and (4) resolution of the issue was essential to the decision. *Kilian v. Equity*
14 *Residential Trust*, No. 02–CV–1272–PHX–FJM, 2004 WL 3606893, *1 (D. Ariz. May 27,
15 2004) (citation omitted.) Additionally, in some cases, there must be a common identity
16 of the parties. *Id.* (mutuality not required with defensive use of collateral estoppel).

17 Parish argues that collateral estoppel is unavailable because Officers Lansdale and
18 Kush “have never been parties in litigation against . . .” him. (Doc. 59, p. 10.) However,
19 mutuality is not required here because the Officers are using collateral estoppel
20 defensively. *See Kilian*, 2004 WL 3606893, at *1. Thus, the Court will deny Parish's
21 motion on this issue.

22 **C. Other defenses**

23 There are issues of fact as to the applicability of defenses under A.R.S. § 12-711
24 (intoxication) and failure to mitigate of damages. Moreover, these issues are not proper
25 subjects of a motion for summary judgment. The Court will deny Parish's motion for
26 summary judgment on these defenses.

27
28

1 **VII. Conclusion**

2 Based on the foregoing, the Court will grant in part and deny in part Plaintiff's
3 Amended Motion for Summary Judgment (Doc. 63). The Court denies qualified immunity
4 to Defendants Lansdale and Kush on Plaintiff's Fourth Amendment unlawful entry claims.
5 The Court finds that issues of fact preclude resolution of qualified immunity as to
6 Plaintiff's remaining constitutional claims. The Court denies Plaintiff's request for partial
7 summary judgment on his state law claims and preclusion of certain defenses with the
8 exception of A.R.S. §§ 13-406, 13-410, 13-411, and 12-712.

9 The Court will grant in part and deny in part Defendant Lansdale and Kush's motion
10 for summary judgment. The Court denies Defendants qualified immunity on Plaintiff's
11 Fourth Amendment unlawful entry claims. The Court denies Defendants qualified
12 immunity as to the remaining constitutional claims based on the existence of material issues
13 of fact. The Court denies Defendants' request for summary judgment on Plaintiff's state
14 law claims, with the exception of Plaintiff's claims for negligence and punitive damages
15 on state law causes of action, which will be dismissed.

16 The Court will grant in part and deny in part the motion for summary judgment of
17 Defendants City of Tucson and Chief of Police. The Court will grant the motion to dismiss
18 Defendant Chief of Police. The Court will grant the City's motion to enter judgment on
19 Plaintiff's claim that the City covered up unconstitutional officer conduct, but deny the
20 City's motion for judgment on Plaintiff's remaining *Monell* claim.

21 Accordingly,

22 IT IS ORDERED that

23 1. Plaintiff's Amended Motion for Summary Judgment (Doc. 63) is
24 GRANTED IN PART and DENIED IN PART.

25 2. Defendants Troy Lansdale's and Bradley Kush's Motion for Summary
26 Judgment (Doc. 64) is GRANTED IN PART and DENIED IN PART.

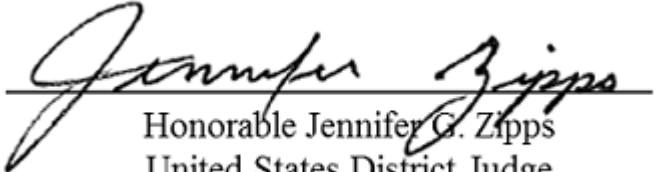
27 3. Plaintiff's negligence claims and claim for punitive damages as to his state
28 causes of action are dismissed.

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4. Defendants City of Tucson and Chief of Police’s Motion for Summary Judgment (Doc. 66) is GRANTED IN PART and DENIED IN PART. The TPD Police Chief is DISMISSED with prejudice.

5. The parties shall file the Joint Proposed Pretrial Order on or before **October 30, 2019**.

Dated this 30th day of September, 2019.


Honorable Jennifer G. Zipp
United States District Judge