No. 21-55624

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARCUS BRICENO,

Plaintiff-Appellee,

v.

BLAKE WILLIAMS,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of California, Case No. 3:16-cv-01665-JAH

APPELLEE'S RESPONSE BRIEF

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INTRODUCTION

Plaintiff-Appellee Marcus Briceno was helping his mobility-impaired friend onto a public sidewalk, when he was approached by Defendant-Appellant Officer Blake Williams of the San Diego Police Department, who believed Mr. Briceno may have possessed an open container of alcohol. Mr. Briceno offered Officer Williams his identification. Officer Williams did not take Mr. Briceno's identification, but instead became aggressive toward Mr. Briceno, pushing, grabbing, and even punching him. Concerned for his safety, Mr. Briceno fled. He made it about one block before Officer Williams tackled Mr. Briceno, who fell face-first onto the ground, with his arms underneath him and Officer Williams's knee on top of him. Officer Williams immediately began punching and kneeing Mr. Briceno, causing him to lose consciousness.

Mr. Briceno sued *pro se*, alleging that Officer Williams violated his constitutional rights when he tackled him and then struck him repeatedly. The District Court granted summary judgment to Officer Williams on the tackle, ruling that Officer Williams violated the Fourth Amendment, but could not be held liable for that violation because the law was not clearly established on September 19, 2013. The District Court denied summary judgment to Officer Williams on the subsequent strikes, reasoning that, on the summary judgment record, a jury could reasonably find a Fourth Amendment violation that had been clearly established for years.

Officer Williams filed this interlocutory appeal, challenging the District Court's denial of summary judgment on Officer Williams's strikes. On appeal, Officer Williams presents a factual universe that, though described as undisputed, is impermissibly skewed in his favor, arguing that on *his* set of facts, summary judgment was warranted.

But the standard on summary judgement cuts precisely the opposite way and the record shows that the District Court correctly denied summary judgment to Officer Williams for the strikes dealt to Mr. Briceno after tackling him to the ground. The summary judgment record would allow a reasonable jury to find that Officer Williams drove Mr. Briceno face-first to the ground, pinning his arms underneath his body, and then punched and kneed Mr. Briceno while he was incapacitated and helpless. What's more, at the time Officer Williams started hitting Mr. Briceno, Officer Williams had given him no warning or commands. That conduct was a clear Fourth Amendment violation that would have been obvious to any police officer and had been clearly established for years.

STATEMENT OF JURISDICTION

The District Court exercised jurisdiction over Plaintiff's claim under the Fourth Amendment pursuant to 28 U.S.C. § 1331. In an opinion and order dated October 15, 2020, the District Court denied Officer Williams's motion for summary judgment, finding that Officer Williams would not be entitled to qualified immunity

if a jury credited Mr. Briceno's account of the encounter. Officer Williams sought reconsideration of that order, which was denied on June 2, 2021. Officer Williams filed a timely notice of appeal on June 15, 2021, seeking interlocutory review of the District Court's decision.

Although the denial of summary judgment is not a final order appealable under 28 U.S.C. § 1291, this Court has jurisdiction over Officer Williams's interlocutory appeal pursuant to the collateral order doctrine. *See Estate of Anderson v. Marsh*, 985 F.3d 726, 730 (9th Cir. 2021). However, the scope of its review is "circumscribed," and limited to purely legal questions that do not require resolution of disputed facts. *Id.* (citation omitted). Put another way, this Court's jurisdiction is limited to the purely legal argument that the record, taken in the light most favorable to Mr. Briceno, does not establish a violation of the law for which Officer Williams can be held liable. *Id.*; *see also Orn v. City of Tacoma*, 949 F.3d 1167, 1171 (9th Cir. 2020) ("In an interlocutory appeal challenging the denial of qualified immunity, we must construe the facts in the light most favorable to the plaintiff."). This Court does not have jurisdiction to consider arguments that the District Court's identification of material factual disputes was error. *See Pauluk v. Savage*, 836 F.3d 1117, 1121 (9th Cir. 2016).

STATEMENT OF ISSUES PRESENTED

1. Whether this Court has jurisdiction over Officer Williams's appeal, given his rejection of the material factual disputes the District Court identified.

2. Whether Officer Williams violated the Fourth Amendment by punching Mr. Briceno in the head and neck and kneeing him in the ribs after Officer Williams had tackled Mr. Briceno and had Mr. Briceno pinned face-down on the ground with his hands underneath him.

3. Whether it was clearly established on September 19, 2013, that repeatedly striking a non-resisting suspect in the head, neck, and ribs violates the Fourth Amendment.

STATEMENT OF THE CASE[1]

I. FACTUAL BACKGROUND

On the evening of September 19, 2013, Plaintiff-Appellee Marcus Briceno was helping his mobility-impaired friend Anna return to her home. 3-ER-332-33. At approximately 10:30 p.m., Mr. Briceno was assisting Anna as she climbed onto the curb at the corner of 63rd Street and Imperial Avenue. *Id.* The street corner was

[1] The record evidence includes Mr. Briceno's Verified Complaint, which he filed *pro se* and swore to under penalty of perjury—rendering it admissible for purposes of resolving summary judgment. *See Jones v. Blanas*, 393 F.3d 918, 922–23 (9th Cir. 2004).

brightly lit, as were the streets themselves; in fact, Mr. Briceno and Anna were standing directly under a streetlight. 3-ER-335.

At that moment, Defendant-Appellant Blake Williams, an officer with the San Diego Police Department, pulled up in a squad car, parked, and exited his vehicle. 3-ER-334. Officer Williams approached Mr. Briceno and Anna and began issuing commands for Mr. Briceno to move towards the squad car. 3-ER-336. Confused, Mr. Briceno tried to offer Officer Williams his ID card so that Officer Williams could run his name. *Id.* Instead, according to Mr. Briceno, Officer Williams began to "grab[] and yank[] . . . and even . . . punch[]" Mr. Briceno "for no reason," 3-ER-412, forcibly moving him towards the squad car, 3-ER-337-38.

At that point, Mr. Briceno "ran for his life." 3-ER-412. He headed towards the trolley station at 62nd Street, then up Akins Avenue—approximately one block total. 3-ER-340. Officer Williams gave chase and attempted to grab at Mr. Briceno's sweatshirt, but missed and lost his balance, falling to the ground and scraping his knees and fingers. 3-ER-341-42; 3-ER-269 ¶ 8. Mr. Briceno turned to see if Officer Williams would stop chasing him, but Officer Williams got back up, continued yelling and cursing at Mr. Briceno, and resumed chase. 3-ER-341.

Mr. Briceno briefly attempted to run again from Officer Williams, seeking to find another officer or witness to observe Officer Williams's conduct. 3-ER-343-44. Officer Williams reached Mr. Briceno, however, and grabbed him by the neck and

drove him face-first into the ground. 3-ER-343. To brace his fall, Mr. Briceno put his hands in front of his chest, landing on his stomach with his arms tucked beneath him. 3-ER-345. Officer Williams immediately climbed on top of Mr. Briceno and began to punch him in the head and neck with his closed fist and knee him in the ribs. 3-ER-343; 3-ER-345-46. In total, Officer Williams struck Mr. Briceno with his hands and knees between three and five times before Mr. Briceno lost consciousness. 3-ER-346. Mr. Briceno was then transported to the emergency room at Paradise Valley Hospital, where he was seen at approximately 12:30 a.m. on September 20, 2013. 3-ER-376. While being treated by medical staff, a bottle opener with a one-inch blade attached to it fell out of Mr. Briceno's pants. 3-ER-347-48; 3-ER-306-08; 3-ER-352.

II. PROCEDURAL HISTORY

Proceeding *pro se*, Mr. Briceno commenced the instant action on June 27, 2016, by filing a Verified Complaint, sworn to under penalty of perjury, against Officer Williams, alleging that Officer Williams used excessive force in violation of the Fourth Amendment.[2] 3-ER-410-19. At the close of discovery, Officer Williams moved for summary judgment on Mr. Briceno's claim, arguing that he was entitled to qualified immunity. In an opinion and order dated October 15, 2020, the District

[2] Mr. Briceno initially brought claims against another officer as well, but he did not pursue those claims and they are not before this Court.

Court granted in part and denied in part Officer Williams's motion, determining that a reasonable jury could view the evidence and reach the following conclusions: (1) Officer Williams used significant force on Mr. Briceno by slamming him to the floor and striking him repeatedly; (2) Officer Williams suspected Mr. Briceno of committing only minor offenses—a potential open container violation under San Diego Municipal Code § 56.54(b), and, later, leaving the scene before Officer Williams's investigation was complete; (3) at the time Officer Williams used force, Mr. Briceno did not pose a threat to Officer Williams or anyone else; and (4) after being tackled, Mr. Briceno did not resist or otherwise attempt to evade arrest before Officer Williams began beating him. 1-ER-020-24. Those facts would establish that Officer Williams violated Mr. Briceno's Fourth Amendment rights both when he tackled Mr. Briceno and when he struck him after tackling him.

Nonetheless, the District Court granted Officer Williams qualified immunity on the takedown Fourth Amendment violation, finding that it was not clearly established until 2016 that such action was illegal. But the court denied qualified immunity on the blows that Officer Williams delivered after tackling Mr. Briceno, citing this Court's opinion in *Blankenhorn v. City of Orange*, 485 F.3d 463, 480 (9th Cir. 2007), for the proposition that "the act of punching the plaintiff while he was on the ground being handcuffed was unreasonable force even if the plaintiff had been resisting arrest." 1-ER-26-27.

Officer Williams sought reconsideration of the District Court's order, arguing primarily that the District Court's reliance on *Blankenhorn* was misplaced in light of the version of facts Officer Williams had set forth in his declaration and incident report. The District Court denied that motion on June 2, 2021, again noting that Mr. Briceno's testimony contradicted Officer Williams in several regards, and that such factual disputes could not be resolved before trial. 1-ER-5-6.

STANDARD OF REVIEW

The District Court's denial of summary judgment to Officer Williams on qualified immunity grounds is reviewed de novo. *Blankenhorn*, 485 F.3d at 470. The Court must view the evidence in the light most favorable to Mr. Briceno, as the non-movant, drawing all reasonable inferences in his favor. *Id*.; *see also Wilkins v. City of Oakland*, 350 F.3d 949, 951 (9th Cir. 2003) ("[W]e will determine if the denial of qualified immunity was proper by assuming that the version of events offered by the non-moving party is correct.").

SUMMARY OF ARGUMENT

First, the Court should reject Officer Williams's attempt to rewrite the summary judgment record in his favor. Because Officer Williams rejects the material factual disputes that the District Court identified, the Court should hold that it has no jurisdiction over this appeal. Should the Court exercise jurisdiction, it should

reject Officer Williams's attempt to rewrite the record in his favor and instead must construe the facts in the light most favorable to Mr. Briceno.

On the merits, this Court should affirm the District Court's holding that a reasonable jury could find a Fourth Amendment violation. A review of the record under the proper standard shows that Officer Williams used significant force in striking Mr. Briceno multiple times in the head, neck, and ribs. That amount of force was not justified by an equally weighty governmental interest, given that Mr. Briceno was not suspected of a serious crime, did not pose a threat to Officer Williams or others, and was not fleeing or resisting at the time the force was used.

This Court should also affirm the District Court's conclusion that Officer Williams was provided fair notice that his conduct violated the Fourth Amendment and thus is not entitled to qualified immunity. As the District Court properly held, *Blankenhorn v. City of Orange* found a Fourth Amendment violation on materially similar facts, putting Officer Williams squarely on notice that his conduct was unconstitutional. Even if *Blankenhorn* itself were insufficient, however, it has long been established in both the Ninth Circuit and by the U.S. Supreme Court that striking a non-resisting suspect is not reasonable.

ARGUMENT

III. THIS COURT MUST REJECT OFFICER WILLIAMS'S IMPROPER EFFORTS TO MISCONSTRUE THE FACTS.

In this interlocutory posture, this Court's jurisdiction is limited to determining the purely legal question whether, "construing the facts and drawing all inferences in favor of [the plaintiff,] the evidence demonstrates a violation by [the officer], and whether such violation was in contravention of federal law that was clearly established at the time." *Villanueva v. California*, 986 F.3d 1158, 1165 (9th Cir. 2021). The Court has no jurisdiction "over a district court's determination that there are genuine issues of material fact." *Pauluk*, 836 F.3d at 1121. The Court therefore cannot entertain an appeal that argues that "an examination of the record reveals that there is no dispute as to the facts, or that there is not sufficient evidence in the record to create such a dispute." *Collins v. Jordan*, 110 F.3d 1363, 1370 (9th Cir. 1996).

A. This Court Lacks Jurisdiction Over Officer Williams's Rejection of the Material Factual Disputes the District Court Identified

The District Court identified several factual disputes that were material to the merits of Mr. Briceno's Fourth Amendment claim and to whether Officer Williams is entitled to qualified immunity. Officer Williams does not directly argue that the District Court erred in identifying these material disputes, presumably because doing so would make clear that this Court lacks jurisdiction over the appeal. But, as explained below, his brief rejects each of the District Court's determinations that a material dispute existed and instead construes the record in the light most favorable to Officer Williams.

1. The District Court noted a dispute as to the number of times that Officer Williams struck Mr. Briceno. The District Court noted that Mr. Briceno testified that Officer Williams struck him three to five times and punched him in the head several times. 1-ER-18-20. Officer Williams admitted to one punch to the head. 1-ER-20. On appeal, Officer Williams argues that the record really only supports an inference that Officer Williams struck Mr. Briceno one to two times. Appellant's Opening Br. (Opening Br.) at 8-9, 26 ("There is therefore no dispute that the subject force was one or two distraction strikes.").

2. The District Court found that the record did not definitively establish whether Officer Williams gave Mr. Briceno "any commands at all before punching [him] in the head." 1-ER-23. On appeal, Officer Williams sets forth as "undisputed" that his force was justified by Mr. Briceno "hearing commands of stop resisting," Opening Br. at 30-31, and stating that it is "undisputed that Plaintiff heard commands to stop resisting once on the ground," *id*. at 34. Officer Williams's brief is imprecise about when Plaintiff "heard" these commands—before or after being punched—but of course they would only be relevant if given before the use of force at issue.

3. The District Court held that there were "disputed facts as to whether Plaintiff was actively resisting arrest after Williams took Plaintiff to the ground." 1-ER-23. On appeal, Officer Williams argues that, once on the ground, Mr. Briceno "had his arms beneath him, *still resisting arrest*." Opening Br. at 29 (emphasis added). He

then describes Mr. Briceno as engaging in both "active resistance" and "assaultive behavior" while on the ground. *Id.* at 32-33.

4. The District Court held that it was disputed "whether Williams could reasonably believe that Plaintiff was reaching for a weapon necessitating his use of force in punching Plaintiff in the head," 1-ER-19. But Officer Williams argues that "[t]he threat of Plaintiff reaching for a weapon near his front waistband did not resolve until Plaintiff's hands were handcuffed behind his back." Opening Br. at 33. He also invokes the fact that Mr. Briceno was armed—a fact that Officer Williams did not learn until hours after his arrest—as if it were relevant to the reasonableness of Officer Williams's use of force. *See id.* at 31.

Officer Williams's brief amounts to an argument that the record does not support the factual disputes the district court identified. Officer Williams's implicit rejection of the District Court's identification of disputed material facts leaves this Court without jurisdiction to consider Officer Williams's appeal as it is presented. *See Cunningham v. Gates*, 229 F.3d 1271, 1286 (9th Cir. 2000).

B. Officer Williams's Brief Impermissibly Construes the Record in His Favor

Should this Court decide to exercise jurisdiction over the appeal, its review is limited to "construing the facts and drawing all inferences in favor of [Mr. Briceno], to decide whether the evidence demonstrates a violation by [Officer Williams], and whether such a violation was in contravention of federal law that was clearly

established at the time." *Villanueva*, 986 F.3d at 1165 (quoting *Pauluk*, 836 F.3d at 1121). The Court is "not permitted" to credit Officer Williams's version of facts over Mr. Briceno's contrary evidence. *Orn*, 949 F.3d at 1171. But that is exactly what Officer Williams asks this Court to do.

In addition to implicitly rejecting the District Court's identification of material disputes, discussed above, Officer Williams characterizes the record in his favor throughout his brief and ignores Mr. Briceno's contradictory evidence on two key points: (1) the degree to which Mr. Briceno resisted, attempted to evade capture, or posed a threat before Officer Williams beat him unconscious, and (2) the amount of force Officer Williams used on Mr. Briceno.

First, Officer Williams suggests that Mr. Briceno was far more aggressive in his resistance than his single-block flight. For example, Officer Williams disputes that he tripped and fell while chasing Mr. Briceno, instead asserting that he grabbed Mr. Briceno by his sweater, and only fell when Mr. Briceno twisted and turned sharply away, knocking him off balance. *See* Opening Br. at 6. But Mr. Briceno testified that before the tackle, Officer Williams never was able to make contact with him, and that Officer Williams simply lost his balance and fell down. 3-ER-341-42. This is a classic disputed fact for a jury to resolve.

Similarly, Officer Williams posits that he tackled Mr. Briceno onto his side, and then Mr. Briceno rolled onto his stomach and moved his hands underneath his

body, by his waistband. Opening Br. at 30-31. Again, this assertion directly contradicts Mr. Briceno's testimony that he landed face-down, directly on his arms and stomach after being tackled. 3-ER-345. Officer Williams then suggests that he gave Mr. Briceno commands to stop resisting, but that Mr. Briceno attempted to push himself up off the ground with one hand. *See* Opening Br. at 9, 31, 34. This claim again conflicts with Mr. Briceno's testimony that Officer Williams said nothing before beginning to beat Mr. Briceno immediately after tackling him face-first onto the ground. 3-ER-345. Indeed, Mr. Briceno testified that the only commands Officer William gave him were while Officer Williams was already striking him. 3-ER-346.[3]

In addition to presenting disputed facts as if they were undisputed, Officer Williams attempts to retroactively justify his use of force by repeatedly pointing out that Mr. Briceno had a one-inch combination bottle opener and knife in his pants. *See* Opening Br. at 9–11, 22, 31. But there is no dispute that the bottle opener was only found in Mr. Briceno's waistband at the hospital after the fact; Officer Williams was unaware of it when he decided to beat Mr. Briceno. 3-ER-303-04.

[3] Officer Williams also suggests that Mr. Briceno was resisting by pointing to his own statement that he told Mr. Briceno to stop resisting. *See* Opening Br. at 31. But Officer Williams cannot, through his words alone, obtain summary judgment. *See Zion v. County of Orange*, 874 F.3d 1072, 1076 (9th Cir. 2017) (the court "may not simply accept what may be a self-serving account by the police officer") (quoting *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994)). Mr. Briceno's testimony is unequivocal that he never resisted after being tackled.

It is only based on his own narrative—which is both one-sided and inconsistent with what Officer Williams actually knew at the time—that Officer Williams claims Mr. Briceno "presented an immediate threat." Opening Br. at 30–31 (asserting as "undisputed" that Mr. Briceno landed on his left side and rolled over; that Mr. Briceno had a knife in his pocket; that Officer Williams gave verbal commands before using force; and that Mr. Briceno attempted to push himself up with one hand while keeping his other hand at his waistband before force was used).

Officer Williams also repeatedly attempts to downplay the amount of force he used on Mr. Briceno and the harm that resulted. For instance, he insists that there is "no dispute" that he struck Mr. Briceno no more than two times. *See* Opening Br. at 26. Yet Mr. Briceno testified that Officer Williams struck him many more times—twice with his fist, and a few more times with his knee—before Mr. Briceno lost consciousness. 3-ER-346.[4] Officer Williams also inappropriately asks this Court to infer, from Mr. Briceno's consciousness at the hospital two hours after the assault,

[4] Officer Williams also appears to argue that Mr. Briceno's testimony that he was struck three to five times can be ignored in light of a supposed subsequent contradiction in his deposition. *See* Opening Br. at 8. But that assertion is factually and legally wrong. First, Mr. Briceno testified that he was struck—by Officer Williams's fists and knees—between three and five times. 3-ER-346. That he subsequently spoke of one or two "punches" is wholly consistent with the remaining one to four strikes being knee strikes. 3-ER-346-37. Second, even if there were any inconsistency in Mr. Briceno's testimony (and there is not), that inconsistency would simply go to credibility—an assessment which is beyond this Court's jurisdiction. *Foster v. City of Indio*, 908 F.3d 1204, 1211–12 (9th Cir. 2018).

that "the force used was minor." Opening Br. at 28. Officer Williams cites Mr. Briceno's medical records to claim that doctors found "no evidence that [Mr. Briceno] had lost consciousness." *Id.* at 27. But the hospital only assessed whether Mr. Briceno was conscious when he presented for treatment—two hours after the assault. *See* 3-ER-278 (encounter began at 22:25 hours on September 19, 2013); 3-ER-378 (medical records dated 00:46 hours on September 20, 2013); Mr. Briceno's testimony that he had lost consciousness two hours earlier is entitled to the presumption of truth at this stage.[5]

Officer Williams is entitled to present these factual disputes to a jury for resolution. But on interlocutory appeal, he cannot ignore Mr. Briceno's testimony and other record evidence. Should the Court exercise jurisdiction in this case, it should therefore "ignore [Officer Williams's] attempts to dispute the facts, accept [Mr. Briceno's] version of the facts as true, and draw all reasonable inferences in [Mr. Briceno's] favor" in deciding this appeal. *Thomas v. Baca*, 827 F. App'x 777, 777–78 (9th Cir. 2020).

IV. OFFICER WILLIAMS VIOLATED MR. BRICENO'S FOURTH AMENDMENT RIGHTS

A police officer's use of force violates the Fourth Amendment when it is "objectively unreasonable under the circumstances." *Zion v. County of Orange*, 874

[5] Of course, as explained *infra* Section IV.A, force can be significant even if it doesn't knock a person out.

F.3d 1072, 1075 (9th Cir. 2017). Whether an officer's use of force was reasonable is a highly fact-specific inquiry most appropriately resolved by a jury. *Green v. City and County of San Francisco.*, 751 F.3d 1039, 1049 (9th Cir. 2014). "Only information known to the officer at the time the conduct occurred is relevant." *S.R. Nehad v. Browder*, 929 F.3d 1125, 1132 (9th Cir. 2019); *see also Young v. County. of Los Angeles*, 655 F.3d 1156, 1161 (9th Cir. 2011).

This Court evaluates Fourth Amendment excessive force claims by balancing "the 'nature and quality of the intrusion' against the 'countervailing governmental interests at stake.'" *Green*, 751 F.3d at 1049 (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)). The crux of the excessive force inquiry is whether the governmental interests at stake justified the force used. *See Bryan v. MacPherson*, 630 F.3d 805, 825 (9th Cir. 2010). Courts thus begin by analyzing how severe the officer's use of force was, then consider whether that force was justified by the nature of the offense the victim was suspected of, whether the victim posed a danger to the officer or another person, and whether the victim was fleeing or resisting the officer at the moment force was used. *Green*, 751 F.3d at 1049.

A. Officer Williams Used Significant Force

The Court's Fourth Amendment reasonableness inquiry starts by identifying the "quantum of force used." *Chew v. Gates*, 27 F.3d 1432, 1441 (9th Cir. 1994). The greater the degree of an officer's use of force, the more compelling their

justification for such force must be. *Id.* Force that is "capable of inflicting significant pain and causing serious injury" constitutes a "significant Fourth Amendment intrusion." *Coles v. Eagle*, 704 F.3d 624, 628 (9th Cir. 2012); *see also Young*, 655 F.3d at 1161 (characterizing both pepper spray and baton blows as "capable of inflicting significant pain and causing serious injury" and therefore constituting "a significant intrusion"). The use of significant force will be justified only by a "strong governmental interest" that "compels" its use. *Deorle v. Rutherford*, 272 F.3d 1272, 1280 (9th Cir. 2001).

Officer Williams knocked Mr. Briceno unconscious by punching him in the head and neck and kneeing him in the ribs. That level of force was capable of inflicting—and indeed did inflict—significant pain and serious injury and therefore constituted a significant level of force. This Court has compared hard punches to the use of a bean bag shotgun in that both are "intended to induce compliance by causing sudden, debilitating, localized pain," *Glenn v. Washington County.*, 673 F.3d 864, 871 (9th Cir. 2011), and has characterized "physical blows" as more significant than the use of physical pressure resulting in pain, *Forrester v. City of San Diego*, 25 F.3d 804, 807 (9th Cir. 1994). The Court has also characterized lower levels of force as "significant," including yanking a person's arm behind their back and applying handcuffs too tightly. *See Sharp v. County of Orange*, 871 F.3d 901, 916 (9th Cir. 2017). And in multiple cases in which suspects resisted arrest, the Court has held

that officers used reasonable force when they employed control holds *rather than* punching, kicking, or kneeing the suspect. *See Luchtel v. Hagemann*, 623 F.3d 975, 982 (9th Cir. 2010); *Tatum v. City and County of San Francisco*, 441 F.3d 1090, 1097 (9th Cir. 2006).

Officer Williams argues that he used "minor" force. Opening. Br. 26-28. But he cites no case law in support of the claim that repeatedly punching and striking a prone subject in the head, neck, and ribs and knocking him out constitutes "minor" force. Rather, he relies on his assertion that Mr. Briceno did not suffer from injuries. This assertion fails to construe the record properly for summary judgment purposes. Mr. Briceno testified that he lost consciousness after Officer Williams struck him. 3-ER-346. That loss of consciousness is plainly an injury, and indeed a serious one. *See, e.g., Takapu v. Holder*, 356 Fed. App'x 17, 18 (9th Cir. 2009) (including "loss of consciousness" as an example of "serious injury"). Moreover, even if Mr. Briceno had not suffered the injury that he did, Officer Williams's argument would be unavailing. The standard is not whether actual injuries occurred, but whether the conduct is "capable" of inflicting serious pain and injury. *Young*, 655 F.3d at 1161. Here, the strikes were both capable of causing and actually did cause serious injury.

The summary judgment record shows that Officer Williams used significant force when he punched Mr. Briceno in the head multiple times and kneed him in the ribs.

B. The Governmental Interests at Stake Were Minimal

The second step of the excessive force inquiry is calculating the governmental interest at stake. To do so, this Court assesses three factors articulated by the Supreme Court in *Graham v. Connor*: "(1) the severity of the crime at issue, (2) whether the suspect pose[d] an immediate threat to the safety of the officers or others, and (3) whether he [was] actively resisting arrest or attempting to evade arrest by flight." *Green*, 751 F.3d at 1049 (quoting *Chew*, 27 F.3d at 1440). In addition, courts may consider whether proper warnings were given and whether the officer could have used less intrusive alternatives. *Glenn*, 673 F.3d at 872.

All three of these factors support a finding of excessive force. At the time Officer Williams punched and kneed Mr. Briceno, he knew that Mr. Briceno was not suspected of a serious crime; that Mr. Briceno did not pose a threat to Officer Williams or anyone else; and that Mr. Briceno's flight—which was only undertaken to escape Officer Williams's assaultive behavior—had ended and he was not resisting arrest. Officer Williams was therefore operating without a significant government interest at the time he repeatedly struck Mr. Briceno.

1. Officer Williams Did Not Suspect Mr. Briceno of Committing a Serious Crime

The first *Graham* factor weighs decidedly in Mr. Briceno's favor because there was absolutely no evidence that Mr. Briceno had committed a serious crime.

When Officer Williams first approached Mr. Briceno, he suspected Mr. Briceno of having an open alcoholic beverage in public—a possible violation of San Diego Municipal Code 56.54(b). 3-ER-268. And when Officer Williams punched and kneed Mr. Briceno, according to Officer Williams, Mr. Briceno had arguably violated California Penal Code section 148(a)(1)—obstructing an officer—by running from Officer Williams. 3-ER-269.

First, neither of these alleged offenses constitutes a serious crime. *See Davis v. City of Las Vegas*, 478 F.3d 1048, 1055 (9th Cir. 2007) (trespassing and obstructing a police officer provided "little, if any, basis for the officer's use of physical force"); *Bryan*, 630 F.3d at 828-29 (resisting a police officer, failure to comply, and being under the influence of a controlled substance are not serious crimes). Possession of an open container is a minor municipal infraction.[6] And disobeying a peace officer "constitutes only a non-violent misdemeanor offense that will tend to justify force in far fewer circumstances than more serious offenses, such as violent felonies." *Young*, 655 F.3d at 1164-65. The record contains no facts suggesting the Mr. Briceno was "a particularly dangerous criminal or that his offense

[6] According to the San Diego City Attorney's Office, the violation of Section 56.54 is punishable *either* as a civil infraction or a criminal misdemeanor, "based upon the discretion of the City Attorney." *See* San Diego City Attorney's Office Fact Sheet: What Does the "Alcohol Ban" Mean to Me?, https://www.sandiego.gov/sites/default/files/legacy/cityattorney/pdf/reports/alcoholbanfactsheet.pdf.

was especially egregious." *Smith v. City of Hemet*, 394 F.3d 689, 702 (9th Cir. 2005). Officer Williams does not argue otherwise.

Second, even though a violation of California Penal Code section 148(a)(1) is not a serious crime and thus could not weigh against Mr. Briceno, the record on summary judgment does not even support the claim that Mr. Briceno violated California Penal Code section 148(a)(1). "[T]he lawfulness of the officer's conduct is an essential element of [Section 148(a)(1)]." *Smith*, 394 F.3d at 696. Where an officer uses excessive force in conducting an arrest, a plaintiff's resistance to that arrest cannot be considered obstruction under Section 148. *Id.* at 696-97. Because Officer Williams was not lawfully performing his duties when he pushed, yanked, and punched Mr. Briceno before Mr. Briceno fled, Mr. Briceno could not have been obstructing Officer Williams.

Finally, Officer Williams argues that Mr. Briceno's "unprovoked flight" enhanced Officer Williams's reasonable suspicion that Mr. Briceno was doing something illegal. App. Br. 29. But once again, describing Mr. Briceno's running away from Officer Williams as "unprovoked flight" ignores that Mr. Briceno was running for safety after Officer Williams assaulted him. *See* 3-ER-336-39. On summary judgment, there simply was no "unprovoked flight." And even if there was, mere suspicion of unspecified illegal activity does not alone justify the use of force, let alone significant force. *See, e.g.*, *Green*, 751 F.3d at 1050 (reasonable suspicion

did not alone justify officers' intrusive tactics). And flight certainly does not establish that Mr. Briceno was engaged in a serious crime, which is the relevant inquiry for purposes of *Graham*. *See Id.* at 1049 (quoting *Chew*, 27 F.3d at 1440).

2. Officer Williams Did Not Reasonably Perceive a Threat to Himself or Others

Nor does the record support an inference that Mr. Briceno posed an immediate threat to Officer Williams's safety or to the safety of others.

First, Mr. Briceno did nothing to suggest danger to Officer Williams in the lead-up to the strikes. Officer Williams approached Mr. Briceno on an open-container suspicion, began assaulting him for no reason, and rather than fight back, Mr. Briceno ran away. *See supra* at 5.

Second, Mr. Briceno posed no threat to Officer Williams or anyone else when he was hit and knocked out. Officer Williams had already tackled Mr. Briceno and had him pinned face down on the ground before striking him. 2-ER-148; 3-ER-270-71; 3-ER-279; 3-ER-345. Mr. Briceno landed with his hands under him and had no opportunity to move his hands before Officer Williams started striking him. 3-ER-345. Moreover, Officer Williams had given Mr. Briceno no instruction to present his hands for cuffing. *Id*.

On these facts, Officer Williams could not reasonably have perceived immediate danger to himself or others. *See Young*, 655 F.3d at 1164 (noting that jury could "readily conclude" that delivering baton blow to suspect laying face-first on

the ground constituted force "far in excess" of safety concerns); *Smith*, 394 F.3d at 702 (a reasonable jury could conclude plaintiff, who shielded one arm from officers who attempted to handcuff him while also shouting expletives, posed no danger to anyone).

Officer Williams claims that he "feared that Mr. Briceno was attempting" to pull a weapon from his waistband because Mr. Briceno was trying to push himself up with one hand while the other hand remained underneath him "near his waistband." 3-ER-270; Opening Br. at 31-32. The Court should reject this argument because, once again, it is not consistent with the summary judgment record viewed in the light most favorable to Mr. Briceno.

Williams's testimony that Mr. Briceno was trying to push himself up is contradicted by Mr. Briceno's deposition, in which Mr. Briceno testified that he landed with his hands underneath him and that Officer Williams immediately started punching him in the head. 3-ER-345. By claiming that Mr. Briceno was trying to push himself up while keeping one hand near his waistband, Officer Williams once again fails to construe the facts in the light most favorable to Mr. Briceno. The Court "may not simply accept what may be a self-serving account by the police officer." *Zion*, 874 F.3d at 1076 (quoting *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994)); *see also Young*, 655 F.3d at 1163-64 (whether officer's claim of subjective fear is credible and reasonable is a jury question).

Williams also relies on the fact that Mr. Briceno was subsequently found to have a bottle opener with a one-inch blade on his person, 3-ER-347-48; 3-ER-306-08; 3-ER-352; *See* Opening Br. at 31. But it is undisputed that at the time Officer Williams assaulted Mr. Briceno, Mr. Briceno had done nothing to cause Officer Williams to think he was armed. The bottle opener was discovered only when Mr. Briceno was being medically treated, after Officer Williams handcuffed him and after two other officers transported Mr. Briceno to the hospital. 3-ER-273 ¶ 19; 3-ER-352. Neither Officer Williams nor any other officer even had enough suspicion that Mr. Briceno was armed to search him, and a jury would be well within reason in concluding Officer Williams had no objective reason to believe Mr. Briceno was armed at the moment of Officer Williams's assault.

Moreover, even if Officer Williams was aware of the presence of the blade on Mr. Briceno's person, its mere presence, without any evidence that Mr. Briceno was trying to use it, does not render Officer Williams's strikes reasonable. This Court has weighed this factor in the plaintiff's favor even where the plaintiff *brandished* and refused to drop a three-inch-bladed pocketknife because he did not appear intent on harming others. *See Glenn*, 673 F.3d at 873-74. Here, Mr. Briceno did not threaten anyone with, or even pull out his bottle opener. Its secret presence on his person cannot retroactively create a threat to Officer Williams.

3. At the Time Officer Williams Punched and Kneed Mr. Briceno, Mr. Briceno's Flight Had Ended and He Was Not Actively Resisting

The third *Graham* factor also does not support the need for the level of force Officer Williams used. Mr. Briceno fled from Officer Williams to escape Officer Williams's assaultive behavior. Moreover, at the time Officer Williams punched and kneed Mr. Briceno, Mr. Briceno was not resisting.

Officer Williams argues that Mr. Briceno disobeyed Officer Williams when he engaged in "unprovoked flight." Opening Br. 34. At this stage, this flight cannot be counted against Mr. Briceno, however, because a jury could reasonably find that it was taken only to escape Officer Williams's assaultive behavior.

Moreover, even if Mr. Briceno's flight had been evasive as opposed to self-preservative, a plaintiff's initial resistance to being arrested will not justify the use of force if that resistance has abated when the force at issue is deployed. For instance, in *Blankenhorn v. City of Orange*, this Court held that a defendant officer was not justified in punching the plaintiff several times during arrest. Although the plaintiff had initially resisted being arrested, at the time he was punched, his resistance had ended and therefore the "punches were not reasonably justified by the circumstances." 485 F.3d at 480; *see also Headwaters Forest Def. v. County of Humboldt*, 276 F.3d 1125, 1130 (9th Cir. 2002) (use of pepper spray unreasonable where officers had "control over" protestors).

The same principle applies to a plaintiff's flight that has ended. In *Emmett v. Armstrong*, 973 F.3d 1127 (10th Cir. 2020), the defendant officer tackled a fleeing suspect and then ten seconds after tackling him deployed his taser. *Id*. at 1136. The court reasoned that the resistance-or-flight *Graham* factor weighed against the officer because "any attempt to flee had been effectively subverted by [the officer] tackling [the suspect]." *Id*. Moreover, although the suspect "did not readily comply with [the officer's] order to roll over [after being tackled], he was not actively resisting" at the moment he was tased. *Id*; *see also Branscum v. San Ramon Police Dep't*., 606 Fed. App'x 860, 862-63 (9th Cir. 2015) (jury could conclude striking and tasering suspect whose dangerous and high-speed chase had ended was excessive if suspect was no longer resisting); *Larkin v. Kenison*, 475 F. Supp. 3d 1124, 1140-41 (D. Haw. 2020) (plaintiff's flight ended when officer bear-hugged him, rendering leg sweep without warning or opportunity to comply unreasonable).

Here, Mr. Briceno never physically resisted Officer Williams, and only engaged in a one-block flight after Officer Williams had already began to grab, yank, and punch him. That brief flight was over once Officer Williams caught up to Mr. Briceno and slammed him face-down on the ground, pinning Mr. Briceno down. It was at that moment that Officer Williams started punching Mr. Briceno in the head and neck and kneeing him in the ribs. 3-ER-344-45. Mr. Briceno testified that Officer Williams did not say anything to Mr. Briceno between the time that he

tackled him and started punching him in the head. 3-ER-345. As Officer Williams was punching and kneeing Mr. Briceno, he then started telling Mr. Briceno to "stop resisting." 3-ER-346. Under these facts, Mr. Briceno was not fleeing or resisting arrest when Officer Williams began to punch him.

Moreover, even if Officer Williams had ordered Mr. Briceno to release his hands before punching him in the head, that type of failure to comply with commands does not amount to active resistance. This Court has "recognized that a failure to fully or immediately comply with an officer's orders neither rises to the level of active resistance nor justifies the application of a non-trivial amount of force." *Nelson v. City of Davis*, 685 F.3d 867, 881 (9th Cir. 2012) (collecting cases); *see also Mattos v. Agarano*, 661 F.3d 433, 450 (9th Cir. 2011) (drawing "a distinction between a failure to facilitate an arrest and active resistance to arrest").

4. Alternative Methods to Detain Mr. Briceno Were Readily Available to Officer Williams

Officer Williams's use of force was particularly unreasonable in light of his failure to command Mr. Briceno to release his hands before punching and kneeing him, as well as his failure to use less intrusive force.

An officer's "failure to give sufficient warnings [] weighs against the [officer's] decision to use force." *Nelson*, 685 F.3d at 883. Officer Williams failed to issue any verbal directive to Mr. Briceno after he tackled Mr. Briceno but before he started punching Mr. Briceno in the head. It was feasible to do so, given that Mr.

Briceno's flight had ended, and he was face-down on the ground with Officer Williams on top of him. *See Bryan*, 630 F.3d at 831 (officers should give a warning when feasible before using force).

Even if Officer Williams had warned Mr. Briceno and Mr. Briceno had failed to comply, Officer Williams could have used lesser force to obtain compliance. While officers are not required to use the least amount of force possible, they are "required to consider what other tactics if any were available." *Glenn*, 673 F.3d at 876. Accordingly, this Court may consider "the availability of alternative methods of capturing or subduing a suspect" when determining Fourth Amendment reasonableness. *Smith*, 394 F.3d at 703. "[I]f there were clear, reasonable and less intrusive alternatives to the force employed, that militates against finding the use of force reasonable." *Glenn*, 673 F.3d at 876 (cleaned up) (quoting *Bryan*, 630 F.3d at 831). Put another way, even where an officer is entitled to make an arrest, and to use force in doing so, the use of a given level of force is "only reasonable if such force is needed to make an arrest in the circumstances." *Headwaters Forest Def. v. County of Humboldt*, 240 F.3d 1185, 1204 (9th Cir. 2000), *vacated and remanded on other grounds by* 534 U.S. 801 (2001).

Officer Williams repeatedly characterizes his strikes as "distraction strikes," justified to gain compliance. *See, e.g.*, Opening Br. at 26-27, 31-32, 35. While the record shows that no such technique was required because Mr. Briceno was face-

down on the ground and Officer Williams had not asked for his hands, even if it were, the San Diego Police Department Procedures advise officers to start with "a controlled strike, using a lower level of force aimed at a specific area which is not intended and not likely to cause injury." 3-ER-312; *see also Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1059 (9th Cir. 2003) (although not dispositive, court "may certainly consider a police department's own guidelines when evaluating whether a particular use of force is constitutionally unreasonable"). Punches to the head and neck resulting in loss of consciousness do not fit that description. Thus, even if Officer Williams had warned Mr. Briceno before punching him in the head and kneeing him in the ribs, and even if some level of force was appropriate to effect the arrest after Mr. Briceno was brought to the ground, Officer Williams could have struck Mr. Briceno somewhere other than his head and with something other than a closed fist. For example, assuming Mr. Briceno was resisting arrest, Officer Williams could have utilized an open hand strike on a limb or Mr. Briceno's back to "distract" him into compliance.

C. Officer Eglin's Report Does Not Support Summary Judgment in Officer Williams's Favor

In arguing that he used a reasonable level of force, Officer Williams points to the "undisputed" declaration submitted by Officer Debbie Eglin, 3-ER-355, another law enforcement officer in San Diego, who Officer Williams puts forward as an "expert" on police use of force. Opening Br. at 35. But Officer Eglin's declaration

is not relevant to resolving this appeal. First, any conclusions it reaches simply go to the weight of evidence, not the pure legal questions before this Court. Second, its conclusions are based on the same sets of mischaracterizations of the record that Officer Williams set forth in his briefing.

Officer Williams trumpets Officer Eglin's conclusion that "this use of force was reasonable, in accordance with applicable procedures, and necessary in light of Plaintiff's active resistance and assaultive behavior." *Id.* But those opinions—on the ultimate issues in this case—must be presented to a jury to weigh; that Officer Williams's expert believes them does not make them, as a matter of law, true. *See City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1044 (9th Cir. 2014) (noting that "the fact finder decides how much weight to give [expert] testimony").

Moreover, Officer Eglin's report is unpersuasive, given that it ignores Mr. Briceno's deposition testimony entirely. *See Rice v. Morehouse*, 989 F.3d 1112, 1125 (9th Cir. 2021) (finding use-of-force expert report unpersuasive at summary judgment because it relied on disputed facts). Officer Eglin describes Mr. Briceno as knocking Officer Williams off his feet by twisting out of his grasp, 3-ER-365 ¶ 24(B); facing off against Officer Williams "with his hands up in what [Officer Williams] described as an aggressive fighting stance," 3-ER-365 ¶ 24(C); and struggling with and refusing commands from Officer Williams even after being pinned on the ground, 3-ER-365 ¶ 24(D). Officer Eglin similarly minimizes the

extent of force used by Officer Williams. *See* 3-ER-361 (stating that just one strike took place before Mr. Briceno was handcuffed). As discussed *supra*, Section I, all of these facts are disputed by Mr. Briceno's own testimony—which Officer Eglin *did not review* before reaching her conclusions. 3-ER-356 (listing documents reviewed in forming opinion).

* * *

As the District Court properly held, the summary judgment record would permit a jury to conclude the following: Officer Williams used significant force when he punched Mr. Briceno in the head and kneed him in the ribs multiple times, rendering him unconscious; Mr. Briceno was suspected of a minor open container violation; Mr. Briceno posed no threat to Officer Williams or anyone else; and Mr. Briceno was not fleeing or actively resisting arrest at the moment Officer Williams beat him. And if found, those facts would necessitate the determination that Officer Williams violated Mr. Briceno's Fourth Amendment right.

V. OFFICER WILLIAMS IS NOT ENTITLED TO QUALIFIED IMMUNITY

Officers are not entitled to qualified immunity when they have "violated a federal statutory or constitutional right" that was "clearly established" at the time of the violation. *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018).

To determine the contours of a clearly established right, courts generally look to "cases relevant to the situation" confronted by the officer. *Brosseau v. Haugen*,

543 U.S. 194, 200 (2004). However, a defendant is not entitled to qualified immunity merely because the "very action in question" had not "previously been held unlawful." *C.B. v. City of Sonora*, 769 F.3d 1005, 1026 (9th Cir. 2014) (quoting *Wilson v. Layne*, 526 U.S. 603, 615 (1999)). The "salient question" is whether the state of the law at the time provided an officer "fair warning" that his alleged conduct was unconstitutional. *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (citing *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)); *see also Gordon v. County of Orange*, 6 F.4th 961, 969 (9th Cir. 2021) ("[C]asting an allegedly violated right too particularly, would be to allow [the instant defendants], and future defendants, to define away all potential claims." (cleaned up)). Indeed, in some circumstances, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful." *Bonivert v. City of Clarkston*, 883 F.3d 865, 872 (9th Cir. 2018) (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)).

Here, both factually analogous precedent *and* general constitutional principles should have made the illegality of Officer Williams's conduct apparent. He is thus not entitled to qualified immunity at this stage.

A. *Blankenhorn v. City of Orange* Clearly Established that Officer Williams's Conduct Was Unlawful

As the District Court recognized, this Court, in 2007, addressed a situation strikingly similar to the case at bar in *Blankenhorn v. City of Orange*, providing

specific warning to Officer Williams that punching and kneeing Mr. Briceno while Mr. Briceno was no longer resisting arrest violated the Fourth Amendment. That determination was correct, as the facts of *Blankenhorn* make clear. 485 F.3d 463.

In July 2001, Gary Blankenhorn was approached by an officer while speaking with two acquaintances. *Id*. at 468. The officer suspected Blankenhorn of trespassing, asked Blankenhorn to walk toward him, and asked what Blankenhorn was doing. *Id*. at 468-69. Blankenhorn tried to walk away, but the officer stopped him and grabbed his arm. *Id*. at 469. Blankenhorn yanked his arm away and the officer threatened to spray him with mace. *Id*. After more officers arrived on the scene, Mr. Blankenhorn threw his driver's license on the ground and was angry and loud. *Id*. The officers asked him to kneel on the ground, but he refused. *Id*.

The officers then tackled Blankenhorn, struggled to get him on the ground for "several seconds," and placed him in handcuffs. *Id*. The officers punched Blankenhorn several times prior to placing him in handcuffs and one officer placed a knee behind his neck, pressing his face into the ground. *Id*. at 469-70. The officers contended that Blankenhorn clenched his fists and took a fighting stance before he was tackled; that, while on the ground, Blankenhorn resisted being handcuffed by pinning his arms beneath his body; and that the punches were distraction strikes necessary to release his arms and facilitate the handcuffing. *Id*. at 469-70, 480.

Video of the incident showed Blankenhorn approach an officer and point at him before getting tackled and showed him raise his arms above his head and touch his chest. *Id*. at 469. Though the video confirmed that Blankenhorn was punched repeatedly, the video was unable to corroborate the officers' contentions that Blankenhorn took a fighting stance or that he resisted. *Id*.

This Court concluded that both the tackle and the punches by the officers were unreasonable uses of force. *Id*. at 479-80. It also concluded that the clear principle of *Graham* would have "put a reasonable officer on notice that punching Blankenhorn to free his arms when, in fact, he was not manipulating his arms in an attempt to avoid being handcuffed, was also a Fourth Amendment violation." *Id*. at 481.

The facts in *Blankenhorn* are materially indistinguishable from the facts in this case, meaning Officer Williams was provided sufficient notice that he was violating a clearly established right. The plaintiffs in both cases were not suspected of a violent offense and were congregating with someone in an open, well-lit space when an officer approached and started giving orders. Both plaintiffs offered identification and tried to remove themselves from the police encounter—Mr. Briceno offered it in a non-aggressive manner, whereas Mr. Briceno threw his

identification.[7] Both plaintiffs were subsequently tackled to the ground and struck repeatedly. The defendants in both cases contended that they perceived a combative stance before tackling the individual, and both defendants relied on perceived resistance earlier in the respective encounters to justify the use of force at a point absent any resistance. And, finally, the officers in each case argued that the plaintiff hid his arms under his body to resist arrest and that the punches on the ground were "distraction strikes."

Confronted with precedent that provided ample notice of the unconstitutionality of his behavior, Officer Williams largely focuses on hyper-specific and irrelevant details to contend that *Blankenhorn* is inapposite. None of the purported distinctions meaningfully address the significant overlap between the cases, and some of them are inaccurate.

For example, Officer Williams contends that *Blankenhorn* "did not involve a fleeing suspect in a high-crime area." Opening Br. at 21. However, there is nothing in the *Blankenhorn* opinion to suggest it was a less dangerous area than the area where Mr. Briceno was stopped (if anything, the opinion suggests the opposite with its reference to a report of a gang fight occurring on the scene a few weeks prior)

[7] Although Mr. Briceno did run from Officer Williams, it was only after being punched, grabbed, and pushed by the officer.

and the opinion is explicit that Blankenhorn also tried to leave the encounter after it was initiated by the officer. 485 F.3d at 469.[8]

Officer Williams also makes much of the fact that there was a dispute of material fact as to whether the plaintiff in *Blankenhorn* actually had his arms below his body. Opening Br. at 21-22. However, this misreads the thrust of *Blankenhorn*, and the controlling legal principles set forth by that case. The placement of Blankenhorn's arms was discussed only with regard to whether Blankenhorn resisted being handcuffed, and thus whether a so-called distraction strike was a proportional response to any resistance. *See* 485 F.3d at 481 (describing the constitutional violation as "punching Blankenhorn to free his arms when, in fact, [Blankenhorn] was not *manipulating his arms in an attempt to avoid being handcuffed*" (emphasis added)); *see also id*. at 470 ("[Defendant officers] all reported that Blankenhorn resisted being handcuffed by maneuvering his hands and arms under his body. Blankenhorn denies he ever did this.").

Thus, the crux of the inquiry is not the placement of each plaintiffs' arms, but rather, whether the plaintiff was resisting arrest. Here, according to Mr. Briceno's

[8] To the extent Mr. Briceno's flight is relevant at all, given that it was undertaken in response to Officer Williams's aggression, it is relevant only to Officer Williams's tackling of Briceno, on which the District Court granted Officer Williams qualified immunity—a decision not at issue on this interlocutory appeal. Analytically, the situations converge once we consider the officers' actions on the ground as both plaintiffs were not a threat nor were they resisting at that point.

version of the facts, he landed on his arms and was immediately struck without warning. *Compare Blankenhorn*, 485 F.23d at 478 (noting "[o]nce on the ground . . . Blankenhorn did not attempt to prevent the officers from handcuffing him"). Arm placement cannot be determinative of resistance since Mr. Briceno did not receive a warning or verbal command to move his hands. *See id*. at 480 n.11 (discussing grant of summary judgment for officer where plaintiff stiffened arms *after* receiving specific orders). The central question is whether Mr. Briceno was resisting, and given the record before this Court, that is a question reserved for the jury.

It is difficult to imagine more directly analogous case law that serves as notice to an officer. Indeed, if the similarities between these two cases fails to establish *Blankenhorn* as controlling for the purposes of qualified immunity, then no case is sufficient in the Fourth Amendment context.

B. *Blankenhorn* and Other Cases Put Officers on Notice that They May Not Strike an Individual that Is Not a Threat nor Resisting Arrest

The abundant factual similarities between *Blankenhorn* and this case leave no doubt that Officer Williams was on fair notice that his actions violated the law. Contrary to Officer Williams's argument that the applicability of *Blankenhorn* as clearly established law should be cabined to a very narrow set of circumstances, courts have continuously applied it for the proposition that officers shall be on notice that striking an individual who is not or no longer posing a threat is unconstitutional.

For example, in *Myers v. City of Hermosa Beach*, this Court cited *Blankenhorn* in its analysis and recognized that no reasonable officer could have thought that "punch[ing] or otherwise forcefully hit[ting]" an arrestee on the back of the head for no apparent reason was proper. 299 F. App'x 744, 746 (9th Cir. 2008). In *Young v. County of Los Angeles*, this Court again relied on *Blankenhorn* and explained that the "principle that it is unreasonable to use significant force against a suspect who was suspected of a minor crime, posed no apparent threat to officer safety, and could be found not to have resisted arrest, was thus well-established in 2001." 655 F.3d 1156, 1168 (9th Cir. 2011). And, in *Orr v. California Highway Patrol*, a district court noted the following in a decision affirmed by this Court: "A review of Ninth Circuit case law shows that, even when an arrestee refuses to comply with an officer's instructions, the use of a punch, or a 'distraction blow,' is impermissible when the arrestee's conduct is non-threatening." No. 2:14-585 WBS EFB, 2015 WL 4112363, at *4 (E.D. Cal. July 8, 2015), *aff'd sub nom. Orr v. Brame*, 727 F. App'x 265 (9th Cir. 2018); *see also Aranda v. City of McMinnville*, 942 F. Supp. 2d 1096, 1108 (D. Or. 2013) ("The case of *Blankenhorn v. City of Orange,* 485 F.3d 463 (9th Cir. 2007), is sufficiently similar to the present case to have put [the officer] on notice as to the legality of using "focused blows" to arrest a non-combative individual whose only apparent crime was minimal resistance to arrest.").

Additionally, though *Blankenhorn* provided ample notice to Officer Williams, that decision and its progeny are not the only ones in this Circuit that provided a fair warning about this clearly established right. Construing the summary judgment record in the light most favorable to Mr. Briceno, he was effectively under police control and was completely subdued at the time he was rendered unconscious with blows. *See supra* Sections I, IV(B)(iii). For years, this Court has ruled consistently that an officer may not use significant force against an individual while they are handcuffed or being handcuffed if they do not pose a threat, especially on the ground. *See e.g.*, *Davis v. City of Las Vegas*, 478 F.3d 1048, 1058 (9th Cir. 2007) (denying qualified immunity where the officer slammed the plaintiff into a wall and punched the plaintiff while he lay on the ground); *Smith*, 394 F.3d at 702-03 (denying qualified immunity where officers pepper sprayed and released dog on plaintiff when he was on the ground, face down, and unarmed); *Drummond*, 343 F.3d at 1052-53 (finding violation of Fourth Amendment where officers sat on the back of an unarmed man on the ground, asphyxiating him); *Mendoza v. Block*, 27 F.3d 1357, 1362 (9th Cir. 1994) (denying qualified immunity to officer that released dog on individual that had surrendered and was "under control"); *Palmer v. Sanderson*, 9 F.3d 1433, 1436 (9th Cir. 1993) (denying qualified immunity where handcuffs were placed too tightly on plaintiff's wrists); *cf. Zion*, 874 F.3d at 1076 ("If the suspect is

on the ground and appears wounded, he may no longer pose a threat; a reasonable officer would reassess the situation rather than continue shooting.").

Simply put, this Court has spoken specifically about the illegality of repeatedly striking an arrestee who has already been tackled and pinned to the ground, and is no longer resisting or fleeing. This Court has also spoken repeatedly about the prohibition against using significant force on an arrestee who is not posing a threat. Because these principles were clearly established years before Officer Williams assaulted Mr. Briceno in exactly the way outlawed in *Blankenhorn* and other cases, Officer Williams is not entitled to qualified immunity.

C. Notwithstanding Similar Cases, it Was Obvious that Officers May Not Strike an Individual that Was Not a Threat nor Resisting Arrest

Officer Williams is also foreclosed from receiving qualified immunity for another, independent reason: the general principal established in *Graham v. Connor*—that an officer may use force only when warranted and at levels proportionate to the facts facing an officer—was sufficient to put him on notice of the illegality of his conduct.

This principle has been upheld repeatedly by federal courts of appeals for years. *See e.g., McCoy v. Meyers*, 887 F.3d 1034, 1052 (10th Cir. 2018) (stating cases "clearly establish that the Fourth Amendment prohibits the use of force without legitimate justification, as when a subject poses no threat or has been subdued"); *Hadley v. Gutierrez*, 526 F.3d 1324, 1330 (11th Cir. 2008) ("Our cases hold that

gratuitous use of force when a criminal suspect is not resisting arrest constitutes excessive force."); *Sallenger* v. Oakes, 473 F.3d 731, 742 (7th Cir. 2007) ("[A] reasonable officer would have known that administering closed-fist punches and flashlight blows . . . after the arrestee was handcuffed, continuing to strike him after he had stopped resisting arrest and failing to place him in the proper position after hobbling him violated the individual's Fourth Amendment right[.]"); *Shreve v. Jessamine Cty. Fiscal Ct*., 453 F.3d 681, 688 (6th Cir. 2006) ("Cases in this circuit clearly establish the right of people who pose no safety risk to the police to be free from gratuitous violence during arrest.").

In *Blankenhorn*, this Court recognized the same principle—namely, that gratuitous force during an arrest is an obvious constitutional violation that forecloses qualified immunity without requiring a prior case with facts that are "fundamentally similar." 485 F.3d at 481 ("In assessing the state of the law at the time of Blankenhorn's arrest, we need look no further than *Graham*'s holding that force is only justified when there is a need for force.").

As noted above, when construing the facts in the light most favorable to Mr. Briceno, Mr. Briceno did not pose an immediate threat to Officer Williams's safety, nor the safety of others, and he was not actively resisting arrest at the time Officer Williams struck him repeatedly without warning. *See supra* Section IV(B)(2)-(3). Further, Officer Williams did not suspect that Mr. Briceno was armed and had only

suspected Mr. Briceno of committing a misdemeanor offense when he initiated the encounter. *See supra* Section IV(B)(1). Thus, given the central holding of *Graham*, and its repeated application in the Ninth Circuit, there is no doubt that Officer Williams had fair warning that closed-fist punches and knee strikes could not be deployed on a subdued individual posing no threat and pinned on the ground by an officer.

CONCLUSION

Should this Court exercise jurisdiction over this appeal, the District Court's decision denying summary judgment to Officer Williams on Mr. Briceno's Fourth Amendment claim that punching him in the head and kneeing him in the ribs while he was face-down on the ground and no longer resisting arrest should be affirmed.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that, pursuant to Federal Rule of Appellate Procedure 31, I electronically filed the foregoing Response Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on November 17, 2021.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and this circuit's Local Rules 29.1(c) and 32.1 (a)(4)(A) because it contains 10,422 words.

This brief complies with the typeface requirements of Fed. R. App. P.32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word, and is in Times New Roman, 14-point font.

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Washington, D.C.

Respectfully submitted,

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