No. 24-5525

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GABRIEL J. BASSFORD
Plaintiff-Appellee,

v.

KYLER NEWBY,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Arizona
No. 2:22-cv-00572-JAT
Hon. James A. Teilborg

APPELLANT'S CORRECTED OPENING BRIEF

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JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, and 1983. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1291 and *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Isayeva v. Sacramento Sheriff's Dep't*, 872 F.3d 938, 945 (9th Cir. 2017) (the Ninth Circuit "may review a denial of qualified immunity where a defendant argues…that the facts, even when considered in the light most favorable to the plaintiff, show no violation of a constitutional right, or no violation of a right that is clearly established in law.")

The district court order being appealed was entered on August 15, 2024 (ER-6-25), and a notice of appeal was timely filed on September 9, 2024 (ER-4-5), which is within the 30-day period provided in 28 U.S.C. § 2107(a) and F.R.A.P. Rule 4(a)(1)(A). The summary-judgment order denied the entitlement of qualified immunity to Mesa P.D. Officer Newby as to Plaintiff's §1983, First Amendment Retaliatory Arrest claim.

ISSUES FOR REVIEW

1. Whether Qualified Immunity applied to Plaintiff's First Amendment claim where he failed to meet his burden of proving the clearly established existence of a Constitutionally protected, First Amendment right to film police activity from a private convenience store's parking lot, without seeking or obtaining the business' consent or approval, and consistent with the store's No Trespassing signage, the

convenience store's security guard concluding those filming from the Circle K property to be non-customers, trespassers and loiterers.

2. Whether the district court's reference to *Nieves v. Bartlett*, 587 U.S. 391, 398 (2019), and *Hartman v. Moore*, 547 U.S. 250, 256 (2006), or any other legal authorities complied with the legal standard as to Officer Newby's entitlement to qualified immunity on Plaintiff's First Amendment claim, and whether the "clearly established" standard that cases squarely govern the facts alleged was met.

3. Whether the district court's ruling that Officer Newby possessed reasonable suspicion, arguable probable cause, and entitlement to qualified immunity on false arrest/wrongful imprisonment claims defeated Plaintiff's First Amendment Retaliatory Arrest Claim due to Plaintiff's failure to prove a lack of probable cause.

4. Whether Officer Newby is entitled to qualified immunity on Plaintiff's First Amendment claim based on mistake of fact or mistake of law.

STATEMENT OF THE CASE

A. Factual Background

On the night of Saturday October 9, 2021, Mesa Police Officers responded to a Circle K Security Guard's call regarding another matter. (ER-48, ¶ 1.) While Appellant Officer Newby (the "Defendant-Officer") and other Officers met with the Circle K Security Officer in the Circle K convenience store parking lot, Plaintiff –

driving by -- saw Mesa Police Officers in the Circle K parking lot and decided to film the police activity. [ER-48, ¶ 2.] Appellee Gabriel Bassford ("Plaintiff") parked his vehicle on a nearby street and walked to the Circle K, walking west on the southern, public sidewalk of Main Street; Plaintiff then walked south on the eastern side of the public sidewalk of Alma School Road. While walking on the public sidewalks, Plaintiff was filming the police activity that he saw occurring within the Circle K park lot. (ER-48, ¶¶ 3,4.)

No one stopped him from doing that. But Plaintiff then walked onto the Circle K driveway, past Circle K's roadway signage and into the Circle K parking lot, all while filming the Mesa Police Officers, and other individuals filming who recently entered the property and were located in front of the store's exterior, west-facing wall. (ER-49, ¶ 5.) On the night of incident, prior to Officer Newby first approaching him in the Circle K parking lot, Plaintiff had not made a purchase at the Circle K.

While Officer Newby spoke to Circle K Security Officer John Drechsler in the Circle K parking lot in front of the Circle K store building, Security Officer Drechsler noticed multiple individuals standing within the Circle K parking lot and holding cameras or cell phones. [ER-49, ¶ 6.] Circle K Security Officer Drechsler asked Officer Newby who the individuals were, learned from the Officer that they were First Amendment auditors, and agreed that individuals filming on the property were not acting as customers, informing Officer Newby and the other Officers

standing with them, "You can trespass them too, if you want to." (ER-49, ¶ 7; ER-78 (Axon body camera clip) at 1:05 - 1:09; *see* ER-39 ¶ 7) In the presence of the Security Officer, Officer Newby replied to the Security Officer, "If you'd like them trespassed, we'll grab them,"; "he wants them trespassed."; and "…go grab those two and grab these two." (ER-49, ¶ 7; ER-78 (Axon body camera clip) at 1:09 - 1:17; *see* ER-39 ¶ 7) As Officer Newby and the Police Officers began walking toward filmers on the Circle K property, the Security Officer replied, "If you want, you can get them for loitering too. (ER-49, ¶ 7; ER-78 (Axon body camera clip) at 1:18 - 1:21; *see* ER-39 ¶7)

Officer Newby saw and approached Plaintiff in the Circle K parking lot filming two other individuals who were also filming on the property and talking to a different Officer. At that time, Plaintiff was facing the store's exterior wall where a "No Trespassing" sign was posted, standing approximately 46 feet from the sign on the exterior wall and filming the Officers as they spoke to the two individuals filming. (ER-49, ¶ 8; ER-78 (Axon body camera clip) at 2:13; *see* ER-78 at 1:20 – 2:13; *see* ER-39-40) Plaintiff was standing in the parking lot in front of the Circle K curb's parking spots, holding a tripod/monopod and camera pointed at the exterior wall, the Officers, and the two other individuals filming. (ER-78 at 2:13; *id*., 2:10 – 2:13)

It is undisputed that, when seeing Plaintiff's location in the Circle K parking lot and proximity to the "NO TRESPASSING" sign, Officer Newby determined that the "NO TRESPASSING" sign provided Plaintiff with reasonable notice prohibiting his entry onto Circle K's private property to film from the convenience store's commercial parking lot and property. (ER-50, ¶ 10; ER-40, ¶ 10)

It is undisputed that, based on the determination of Circle K Security Officer Drechsler that individuals filming from the Circle K property were trespassing, the proximity of Plaintiff to the "NO TRESPASSING" sign as perceived by Officer Newby, pursuant to Officer Newby's understanding that Plaintiff was trespassing on Circle K's private property and not acting as a Circle K customer, and pursuant to Officer Newby's law enforcement training and experience regarding investigations involving Criminal Trespass, Officer Newby believed he possessed reasonable suspicion and probable cause as to Plaintiff's violation of A.R.S. § 13-1502 (A)(1), Criminal Trespass in the Third Degree. (ER-50, ¶ 11; ER-40, ¶ 11) There is no dispute that at this time, Officer Newby was aware that a total of just 3 Mesa Officers were on the Circle K property, that the Police Officers were outnumbered by the individuals filming on the property, and that when Officer Newby approached Plaintiff, the Officer knew based on training and experience that the Circle K was located in a high crime area. (ER-50, ¶12; ER-40, ¶ 12).

Officer Newby's statement of facts paragraphs 13-18 also were not disputed:

· From the location where Plaintiff stood when approached by Officer Newby, approximately 46 feet from the "NO TRESPASSING" sign, Officer Newby believed the "NO TRESPASSING" sign was easy to recognize and read, and pursuant to his law enforcement training and experience, that it provided "reasonable notice" prohibiting non-customers from entry onto the Circle K property without prior permission from Circle K. (ER-51, ¶13; ER-40, ¶ 13).

· Officer Newby understood that Plaintiff did not have prior permission from Circle K to enter the Circle K property as a non-customer for the purpose of filming or recording from the private property. (ER-51, ¶14; ER-40 ¶ 14).

· Officer Newby placed Plaintiff in handcuffs, walked Plaintiff over to the nearby curb next the Circle K store's exterior wall where the "NO TRESPASSING" sign was displayed, and asked Plaintiff to sit on the curb. (ER-51, ¶15; ER-40, ¶ 15).

· Officer Newby did not turn Plaintiff's recording device off and informed Plaintiff that he could continue to record; and Plaintiff continued to record. (ER-51, ¶16; ER-40, ¶ 16).

· Officer Destefino arrived on scene, and Officer Newby asked him to determine the identities of Plaintiff, informed Officer Destefino and Plaintiff that they are lawfully detained for trespassing, and left the immediate vicinity to continue the investigation. (ER-51, ¶¶ 17-18; ER-40, ¶¶ 17-18).

While in the Circle K parking lot and detained, Plaintiff failed to tell the Officers his truthful name when asked, though he now alleges he was willing to say

his full name when asked, but only if the Officer released him from the detention he alleged to be unlawful. (ER-52, ¶ 20) It is undisputed that Plaintiff's recording device continued to record continuously from the time when Officer Newby first approached Plaintiff until Plaintiff entered Officer Destefino's Patrol S.U.V. for transportation to Mesa P.D.'s Holding facility. (ER-53, ¶ 25; ER-41 ¶ 25).

B. Procedural History

Plaintiff filed a First Amended Complaint (ER-204-247) against the City of Mesa, Mesa P.D. Officer Newby and other Mesa P.D., alleging that the Officers unlawfully seized, searched, and arrested him for filming Police Officers after he entered a private convenience store parking lot solely to film, without permission.

After the close of discovery, all Defendants filed a motion for summary judgment as to each count of the pleading (ER-188-203), a separate statement of facts (ER-47-53), supporting exhibits (ER-54-187), and a reply in support of the motion. (ER-26-37) The district court order (ER-6-25) granted judgment in favor of Defendants on all counts except as to Officer Newby on Count 3.

The Officer timely appealed the denial of qualified immunity as to the alleged retaliatory arrest for trespassing where Plaintiff entered Circle K's parking lot to film police activity from the business' parking lot, without the business' permission. (ER-22-24; ER-4-5)

SUMMARY OF THE ARGUMENT

Qualified immunity applies to Plaintiff's retaliatory arrest claim because Plaintiff did not meet his burden of proving he possessed a protected right to film police activity from Circle K's private property. He did not obtain Circle's K's permission to film from Circle K's parking lot. The business location of the arrest differed from the inapposite locations found in case law: government forums.

The district court erred by denying qualified immunity without clearly established caselaw showing closely analogous, specific fact patterns where the right to film police activity was held to be a protected, actionable right where the filmer entered the private business' convenience-store parking lot without that business' permission to film, despite the presence of the business' No Trespassing signage and private security guard, The district court's citation to two dissimilar cases, *Nieves v. Bartlett* and *Hartman v. Moore* (ER-24, ll. 2-13), did not clearly establish notice of conduct relating to the violation of a protected right to film police from the property of a business under the circumstances alleged. The Circle K parking lot was privately owned, had No Trespassing signs posted on the exterior walls of the Circle K Store that faced the parking lot, and the private Circle K Security Officer indicated to Officer Newby that individuals filming from the parking lot were trespassing and loitering. The Circle K Security Officer gave Officer Newby and the Officers authority to trespass the individuals filming on Circle K property. Neither case cited

by the district court squarely governed the facts alleged here, and they cannot defeat the Officer's entitlement to qualified immunity.

Just as with probable cause analysis on a Fourth Amendment § 1983 claim of false arrest, Plaintiff had the burden of proving a lack of probable cause to maintain his retaliatory arrest claim. He failed to meet his burden as to false arrest, as correctly found by the district court as to the probable cause analysis in Plaintiff's false arrest claim. (ER-20, ll. 11-28 (finding it was objectively reasonable for the Officer to believe he had probable cause to make the arrest; finding that Plaintiff failed to offer a factually analogous case clearly establishing that the Officer's actions were unlawful where the Officer mistakenly believed Plaintiff knew he was trespassing)).

But the court erred when it failed to extend this finding of arguable probable cause to its analysis whether Plaintiff met his retaliatory-arrest burden of establishing a lack of probable cause. As instructed by the Supreme Court in *Nieves v. Bartlett*, a court's analysis of whether a plaintiff met his burden of showing a lack of probable cause, is the same analysis for both a false arrest claim and a retaliatory arrest claim. Where a court finds arguable probable cause, Plaintiff's retaliatory arrest claim is defeated because Plaintiff failed to meet his burden of proving a lack of probable cause. *See Jennings v. Smith*, No. 23-14171, 2024 U.S. App. LEXIS 24513, at *1, 7 (11th Cir. Sep. 27, 2024); *accord*, Rucker v. Marshall, 2024 U.S. App. LEXIS 25808 at *12 (5th Cir. Oct. 14, 2024); *Keenan v. Tejeda*, 290 F.3d 252,

262 (5th Cir. 2002); *Just v. City of St. Louis*, 7 F.4th 761, 768-79 (8th Cir. 2021) (citing to *Nieves v. Bartlett*, 139 S.Ct. 1715, 1724 (2019); *Stuart v. City of Scottsdale*, 2024 U.S. Dist. LEXIS 54742 at * 68 (Mar. 27, 2024).

The Officer is entitled to qualified immunity where a reasonable mistake of fact or law exists. Here, where no controlling case law found a violation based on closely analogous facts, a mistake of fact or law as to the implication of this specific right applied to private property justified entitlement to qualified immunity. This is especially true where Plaintiff failed to meet his burden to defeat the immunity.

STANDARD OF REVIEW

This Court "review[s] *de novo* the district court's denial of summary judgment on the ground of qualified immunity." *Liberal v. Estrada*, 632 F.3d 1064, 1073 (9th Cir. 2011). "The determination of immunity is a question of law, which we review de novo." *Id*.; *J.K.J. v. City of San Diego*, 17 F.4th 1247, 1254 (9th Cir. 2021). The Court has "jurisdiction over issues that do not require resolution of factual disputes including in cases where officers argue that they have qualified immunity, assuming the facts most favorable to plaintiff." *Id*. Although facts and inferences are drawn in favor of the non-moving party "to the extent supportable by the record," the reasonableness of an officer's action "is a pure question of law." *Scott v. Harris*, 550 U.S. 372, 381, n.8 (2007) (emphasis in original).

Once an officer asserts qualified immunity, "[t]he plaintiff bears the burden of demonstrating that the right at issue was clearly established." *Kramer v. Cullinan*, 878 F.3d 1156, 1164 (9th Cir. 2018). Until the plaintiff meets his burden, an officer is "presumed to be immune from any damages." *Gasho v. United States*, 39 F.3d 1420, 1438 (9th Cir. 1994). When a plaintiff alleges a specific right is clearly established, that plaintiff's burden is to identify sufficiently specific Constitutional precedents to alert an officer that his conduct was unlawful. must identify "controlling authority" or at least "a robust consensus of cases of persuasive authority" that placed the constitutional issues "beyond debate." *City and Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 611, 617 (2015). A court must not define clearly established law at a high level of generality. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1152-53 (2018). Instead, the "clearly established" standard required legal authority that squarely governed the facts at issue, such that all reasonable officers would know the specific conduct at issue was held to have violated the right. *Id*.

LEGAL ARGUMENT

A. QUALIFIED IMMUNITY APPLIED TO PLAINTIFF'S FIRST AMENDMENT CLAIM BECAUSE HE FAILED TO PROVE THAT HE WAS ENGAGED IN A CONSTITUTIONALLY PROTECTED ACTIVITY WHEN HE FILMED FROM A BUSINESS' PROPERTY AND WITHOUT THE BUSINESS' AUTHORIZATION.

To succeed on a retaliatory arrest claim, a plaintiff must show: 1) that he was engaged in a Constitutionally protected activity; 2) that the Officer's actions would

chill a person of ordinary firmness from continuing to engage in the protected activity; and 3) that the protected activity was a substantial or motivating factor in the Officer's conduct. *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 827 (9th Cir. 2020). The First Amendment prohibits government officials from retaliating against individuals engaging in protected speech. *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998) (emphasis added).

Plaintiff filmed from a private business' property where he failed to obtain permission from the business to film. Qualified immunity applied because the generalized Constitutional right to film police officers performing duties in public forums did not automatically entitle Plaintiff to expand the right to dissimilar lands owned by private businesses. To the extent Plaintiff possessed a protected right to film from privately owned business properties, it was *not* a clearly established right.

It was reasonable for the arresting Officer to believe that Plaintiff was not engaged in protected speech when filming once Plaintiff entered the Circle K parking lot, stood in the privately owned parking lot and filmed. It was also reasonable for the Officer to believe that Plaintiff was not engaged in protected speech when the private, Circle K Security Officer indicated to the Officer that individuals filming from the Circle K lot were trespassing and loitering.

This is because Plaintiff was not engaging in a Constitutionally protected First Amendment activity once he entered land owned by Circle K in order to film and while filming without the business' permission to film from its property:

> [t]he right extends only to filming police performing their public duties in public places. And even then, the right is subject to reasonable time, place, and manner restrictions.

Nat'l Press Photographers Ass'n v. McCraw, 90 F.4th 770, 793 (5th Cir. 2024) ("there is an important and obvious distinction between recording in public spaces and unauthorized recording on private property"; no First Amendment right to record on private property without consent). "The right to exclude others is a fundamental element of private property ownership, and the First Amendment does not create an absolute right to trespass." *Armes v. City of Philadelphia*, 706 F. Supp. 1156, 1164 (E.D. Pa. 1989), *aff'd sub nom. Armes v. Doe*, 897 F.2d 520 (3rd Cir. 1990) citing *Kaiser Aetna v. United States,* 444 U.S. 164, 179–180, 100 S.Ct. 383, 392–393, 62 L.Ed.2d 332 (1979); *Hudgens v. National Labor Relations Board,* 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976).

Cases addressing the rights and interests of a private property owners highlight the distinction between alleged retaliatory arrests on public land versus Plaintiff's incident, which occurred on the land of a private business. For the purpose of highlighting that Circle K, a private business, had infrastructure in place at all relevant times to this lawsuit to discourage non-customers from trespassing and loitering: it is undisputed that Circle K is a private business, that its parking lot

housed business infrastructure such as gas pumps, Circle K related signage, parking spots immediately adjacent to the store building's exterior walls; that the north-facing and west-facing exterior walls of the store building were immediately adjacent to its parking lot and faced the parking lot, that Circle K displayed "No Trespassing" signage on the exterior walls facing the parking lot; that Circle K employed a private security guard on duty on the night of the incident, and that the security guard was on duty and working in the Circle K parking lot during the general timeframe when Plaintiff entered and stood in the Circle K parking lot while filming. interacted with Plaintiff in the business' parking lot.

In sum, the location of the incident was unequivocally that of a private business, as opposed to public space. *See Lloyd Corp. v. Tanner*, 407 U.S. 551, 567–70 (1972) (holding individuals did not have First Amendment right to distribute literature at a privately owned shopping center, even though the shopping center was open to the public); *see Manhattan Cmty Access Corp. v. Halleck*, 587 U.S. 802, 813 (2019) ("The Constitution does not disable private property owners…from exercising editorial discretion over speakers on their property."); *see Dougherty v. Cnty. of Vermillion*, 2024 U.S. Dist. LEXIS 129496 (S.D. Ind. July 23, 2024) (denying retaliatory arrest claim: plaintiff "cannot show that he engaged in activity protected by the First Amendment because trespassing and speaking on private property is not protected activity"); *Williams v. Boseley*, 2023 U.S. Dist. LEXIS 93484 (D. N.J. May 30, 2023) (holding plaintiff cannot establish he was engaged in protected activity under First Amendment when recording police from private

property without permission to enter; refusing to expand right to record police in public to circumstance where filmer was located on private property); *see DeCastro v. Las Vegas Metro. Police Dep't*, 2024 U.S. Dist. LEXIS 164883 (D.Nev. Sept. 12, 2024) (noting Ninth Circuit has not held that a plaintiff has unfettered right to record regardless of state's criminal laws); *Hulbert v. Pope*, 70 F.4th 726, 736 (4th Cir. 2023) ("[n]either this court, nor the Supreme Court, nor any other circuit has recognized an unlimited First Amendment right to film police free of otherwise reasonable limitations."). "[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Cohen v. Cowles Media Co*., 501 U.S. 663, 669 (1991) (holding beyond dispute that those acting as media/press have no special privilege to invade the rights and liberties of others; information sought must be lawfully acquired).

As provided in Ninth Circuit case law by the date of this incident, the Court addressed the right to film from public forums and from public properties or public lands. But this Court's case law did not extend that protected right to film police from private lands owned by a private business, and certainly not to a business' land such as a convenience store parking lot where the filmer failed to request and receive the business' approval to enter the property to film. *See Askins v. U.S. Dep't of Homeland Sec*., 899 F.3d 1035, 1038-40, 1044 (9th Cir. 2018).

In *Askins*, plaintiffs took photos while standing on *public* lands, including a public, pedestrian bridge spanning Interstate 5 and connecting to a U.S. government

transit plaza and a government road. *Id*., at 1040. As with *Askins*, controlling case law identified the protected right in relation to a traditional public forum, such as a city street, city sidewalk, or park, not a privately owned parking lot. *Askins*, 899 F.3d at 1044-46 (defining "public" place as a street, sidewalk, or park regarding public walkway; defining situs of *Askins* incident as public forums; failing to reference existence of protected right as to privately owned business' lands/privately owned business' parking lots); *see Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018) (categorizing forums for First Amendment purposes as traditional public forums, designated public forums, and nonpublic forums; failing to reference a privately owned company's or business' land or properties or business infrastructure, all of which would likely constitute assets and properties of the non-governmental company/business); *accord*, *Seattle Mideast Awareness Campaign v. King Cnty*., 781 F.3d 489, 496, 499 (9th Cir. 2015) (noting Supreme Court's classification of government forums; applying Supreme Court classification to County government's property).

As noted in these examples, a private business' property is not defined in case law or other controlling legal authority as a forum where a protected First Amendment right existed to film police. This is because a private business is not Constitutionally required to allow individuals to just drop by unannounced and set up a camera and a tripod in the retail business' parking lot, in order to film, without

first seeking and obtaining that business' permission to do so. *Id*. (acknowledging First Amendment activity conducted at a private business engaged in commerce holds potential to harm business' sales and reputation.) This is likely why filming police activity from a public sidewalk is clearly established in case law but filming from a convenience store parking lot is not. To be clear, Plaintiff's case does not regard Officer Newby approaching a filmer on a public sidewalk or public road.

In *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995), this Court did not clearly establish a violation of the right as applied to Plaintiff's allegations. The *Fordyce* plaintiff filmed a public protest march where police officers were present. *Id*., at 438. An officer arrested Fordyce when he filmed "sidewalk bystanders" at the public protest march and "on the streets of Seattle." *Id*., at 438-39. The facts of *Fordyce* are inapposite because the plaintiff recorded from and on public streets and sidewalks. *Id*., at 439. Likewise, in a Third Circuit opinion, *Fields v. City of Philadelphia*, 862 F.3d 353, 357 (3rd Cir. 2017), the protected right at issue was exercised during an anti-fracking protest at the Philadelphia Convention Center. Again, the facts related to a traditional public forum.

Based on the foregoing, there is no controlling case law or robust consensus of persuasive case law upholding a § 1983 First Amendment right to film police officer activity from the confines of a business' privately owned property; nor is there controlling case law or a robust consensus of persuasive cases finding an

officer liable for a First Amendment retaliatory arrest claim arising from a person filming an officer from the private convenience store's parking lot without obtaining permission from the convenience store to film there.

In the district court's order, the court cited *Nieves*, 139 S.Ct. at 1727, and *Hartman*, 547 U.S. at 256, as controlling case law on point and in support of the court's finding that: "[i]t was clearly established in 2021 that in the absence of probable cause, a police officer cannot arrest an individual who is engaging in First Amendment activity in retaliation for engaging in that activity." (ER-24, ll. 9-11) But denying qualified immunity based on that high level of generality is contrary to law. The two cases cited by the district court did not involve filmers on a private company's land without that filmer receiving the company's permission to film from its property. Neither those cases, nor any other cases cited met the Supreme Court's standard as to "clearly established" law. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1152-53 (2018) ("[P]olice officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue.") (internal quotes removed). Instead, the district court's reference to those cases hinged on "a high level of generality," which cannot constitute clearly established law. *Id*., 1152 (quoting *Sheehan*, 575 U.S. at 613.); *see White v. Pauly*, 137 S. Ct. 548, 552 (2017) (requiring "a case where an officer acting under similar circumstances" was held to have violated the right at issue.). *Irizarry v. Yehia*, 38 F.4th 1282, 1295 n.14 (10th Cir. 2022) ("general First Amendment principles protecting the creation of speech and the gathering of news do not clearly establish a First Amendment

right to film the police") (internal quotation marks and citation omitted). Accordingly, to the extent this Court receives an argument that the district court's above-referenced explanation implied the existence of a protected right was obvious and clearly established, as applied to a business property with a security guard, No Trespassing signs, and a lack of permission from the business to enter the property solely to film…that argument fails. The order focused on Plaintiff's burden to establish probable cause, but the order failed to acknowledge the argument raised here, raised in the motion for summary judgment (and in a motion to dismiss).

Simply put, the order did not regard the many distinctions between relevant First Amendment case law and this incident. As noted above, significant distinctions as to the business-related forum exist. In a case involving retaliatory arrest where the alleged retaliation is as to a protected right allegedly frustrated by a detention for trespassing on Circle K property, it was Plaintiff's burden to prove he had a protected First Amendment right to film from the Circle K parking lot without the business' permission or consent from him to enter on his own accord and film.

The facts of *Nieves*, 139 S.Ct. at 1727, did not squarely govern Plaintiff's allegations because the *Neives* arrest occurred on public land in the Alaskan wilderness at a campground in "the remote Hoodoo Mountains near Paxson, Alaska." 139 S.Ct. at 1717, 1720. The *Nieves* case did not regard a person filming police, or an arrest for trespass, or an arrest occurring on a private business'

convenience store parking lot where a person entered the property to film without obtaining permission from the business. *Nieves*, 139 S.Ct. at 171.

The facts of *Hartman*, 547 U.S. 250, 252, 256 (2006), are also dissimilar and incapable of squarely governing Plaintiff's allegations. In *Hartman*, the Supreme Court held that a plaintiff has the burden to plead and show a lack of probable cause for the underlying criminal charge, among other things, in order to state an actionable violation of the First Amendment. But the facts in *Hartman* do not squarely govern Plaintiff's allegation that he had a protected First Amendment right on Circle K property. Hartman was a *Bivens* action involving postal inspectors and a federal prosecutor allegedly conducting a retaliatory *prosecution* of a business person. *Id*., at 252-54. The *Hartman* plaintiff verbally criticized the Postal Service via testimony in a government forum -- congressional committees. *Id*. It did not regard a person filming a police officer from a convenience store parking lot, did not involve filming at all, and did not involve an arrest sounding in trespass.

As to the legal standards applied to qualified immunity, courts routinely hold that it "shields government officials from civil liability unless a plaintiff establishes that: (1) the official violated a constitutional right; and (2) that right was 'clearly established' at the time of the challenged conduct[.]" *Morales v. Fry*, 873 F.3d 817, 821 (9th Cir. 2017) (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)). The Court "may address these two prongs in either order." *Thompson v. Rahr*, 885 F.3d 582,

586 (9th Cir. 2018). A plaintiff must prove both prongs to deny qualified immunity to a law enforcement officer. *See Nelson v. City of Davis*, 685 F.3d 867, 875 (9th Cir. 2012).

To be "clearly established" "means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (cleaned up); *Bennett-Martin v. Plasencia*, 804 F. App'x 560, 562 (9th Cir. 2020); *Hunter v. Bryant*, 502 U.S. 224, 228 229 (1991) (qualified immunity provides "ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law"; the inquiry is not "whether another reasonable or more reasonable interpretation of events can be constructed . . . after the fact".) (citation and internal quotations omitted).

Importantly, the Supreme Court repeatedly has reaffirmed that the clearly established right must be defined with specificity. "This Court has 'repeatedly told courts . . . not to define clearly established law at a high level of generality.'" *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (quoting *Sheehan*, 575 U.S. at 613). To say that the law was clearly established, "[t]he precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *D.C. v. Wesby*, 138 S. Ct. 577, 590 (2018) (emphasis added). The burden is on the plaintiff "to identify sufficiently specific constitutional precedents to alert

[the defendant] that his particular conduct was unlawful." *Shafer v. Cnty. of Santa Barbara*, 868 F.3d 1110, 1118 (9th Cir. 2017); *see White v. Pauly*, 137 S. Ct. at 552 (clearly established requires "a case where an officer acting under similar circumstances" was held to have violated the right at issue). The Supreme Court has relied on its own precedent to determine if law "squarely governed" the case facts. It has reviewed circuit precedents when lower courts do so, without deciding that circuit precedents constitute clearly established law. *See Mullenix*, 577 U.S. at 16-18; *Sheehan*, 575 U.S. at 614.

The qualified immunity inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau*, 543 U.S. at 198 (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). Qualified immunity shields an officer unless the contours of the constitutional right were "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mattos v. Agarano*, 661 F.3d 433, 442 (9th Cir. 2011) (quoting *al-Kidd*, 563 U.S. at 741). It is to be awarded unless there was clearly established precedent that "squarely govern[ed]" the circumstances faced by the police officer. *See Mullenix v. Luna*, 577 U.S. 7, 13 (2015) (internal quotation and citation omitted). A right is rarely clearly established "absent any published opinions on point or overwhelming obviousness of illegality." *Sorrels v. McKee*, 290 F.3d 965, 971 (9th Cir. 2002).

This lack of squarely governing facts explains why citation to *Nieves* or *Hartman*, *supra*, are inapplicable the qualified-immunity analysis whether Plaintiff's asserted right was clearly established to extend to Circle K's parking lot under the specific facts alleged. Analysis on that issue is critical because, as opposed to skipping past it and analyzing alleged retaliation, a protected right must exist. "First Amendment" "audit"/"auditors" is a colloquial term found in case law as a descriptor; the term does not connote animus.

The "burden to demonstrate that the law is clearly established" belongs to the plaintiff. *Morgan v. Robinson*, 920 F.3d 521, 524 (8th Cir. 2019). Here, no case law clearly established a non-customer's First Amendment right to film from private land displaying No Trespassing signage and containing the private company's security guard who determined that Plaintiff and the others filming from the property were trespassing and loitering. Though Officer Newby did not turn Plaintiff's videorecorder off, and though Officer Newby allowed Plaintiff's videorecorder to film during the detention on Circle K property, it is important to note that there is no clearly established right to film one's own detention or arrest. *See Sharpe v. Winterville Police Department*, 59 F. 4th 674, 683-84 (4th Cir. 2023). In fact, the district court ruled that Officer Newby's detention was based on reasonable suspicion, and that the arrest was entitled to qualified immunity based on arguable probable cause. Therefore, the district court determined that was not capable of

maintaining a Fourth Amendment claim for damages arising from the detention or arrest. Here, where the is no clearly established right for a person to film his own detention or arrest, Plaintiff cannot maintain his claim that he was injured or damaged by the arrest for which qualified immunity already applies under the Fourth Amendment.

In the context of the First Amendment where case law regards government forums as a center-point of courts' analyses of an alleged, protected right as applied to a particular forum and degree to which the right is protected and restricted, no clearly established law existed to support Plaintiff's contention that he was exercising a protected Frist Amendment right on Circle K property without the company's permission to film there.

B. THE DISTRICT COURT'S RULING THAT OFFICER NEWBY POSSESSED REASONABLE SUSPICION, ARGUABLE PROBABLE CAUSE AND AN ENTITLEMENT TO QUALIFIED IMMUNITY ON FALSE ARREST/WRONGFUL IMPRISONMENT DEFEATED PLAINTIFF'S FIRST AMENDMENT CLAIM OF RETALIATORY ARREST.

In *Nieves*, 139 S.Ct. at 393, the Supreme Court noted that, just as with a Fourth Amendment claims sounding in false imprisonment/false arrest claims, courts analyze a case for the presence of probable cause when analyzing a First Amendment claim sounding in retaliatory arrest claim. *See Nieves*, 139 S.Ct. at 393. Based on *Nieves*, *supra*, an officer is entitled to qualified immunity if "a reasonable officer

could have believed" that probable cause was present. *Anderson*, 483 U.S. at 641 (emphasis added); *see Pearson v. Callahan*, 555 U.S. 223 at 244-45 (2009).

Courts analyze whether probable cause or arguable probable cause existed as to a plaintiff's First Amendment claim, just as with a Fourth Amendment claim: as a matter of law, under the totality of the circumstances, from the perspective of a reasonable officer on scene, and not with 20/20 vision of hindsight. *See Nieves*, *supra*; *see Cnty. of Los Angeles v. Mendez*, 137 S.Ct. 1539 (2017); *see Graham v. Connor*, 490 U.S. 386, 396 (1989). "The Constitution is not blind to the fact that police officers are often forced to make split second judgments.") *City and Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 611, 617 (2015). Here, Officer Newby made those decisions on a weekend night in a high crime area where he had already responded to investigate an unrelated criminal incident, and obvious was unable to continue advancing that separate investigation while addressing the Circle K Security Officer's request for those filming on the property to be trespassed. Based on the foregoing, the specificity of precedent is especially important in the context of the Court's determination of probable cause and arguable probable cause. *See Mullenix*, 577 U.S. at 12 (noting it is difficult for officers to apply broad principles of reasonableness to the complicated factual situations they often confront).

As a matter of law, probable cause exists "when 'under the totality of circumstances known to the arresting officers, a prudent person would have

concluded that there was a fair probability that [the suspect] had committed a crime.'" *United States v. Smith*, 790 F.2d 789, 792 (9th Cir. 1986) (emphasis added); *see also Maryland v. Pringle*, 540 U.S. 366, 371, (2003). Courts find arguable probable cause where "it is reasonably arguable that there was probable cause." *Henry v. Bank of Am. Corp.*, 522 F. App'x 406, 408 (9th Cir. 2013) (emphasis added); *Guerrero v. Scarazzini*, 274 F. App'x 11, 13 (2nd Cir. 2008) ("Arguable probable cause exists if 'either (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met.'"). Officer Newby met this definition, as a matter of law based on the undisputed facts within the statement of the case, *infra*. Qualified immunity applied to the First Amendment claim as to the element of probable cause based on those undisputed facts. For example, it is undisputed that Plaintiff walked onto the Circle K property from the public sidewalk in order to film; his objectively observable actions shown on body camera video – standing with a tripod and camera with the camera and Plaintiff facing the individuals and Offices near the building's exterior west wall – are a far cry from that of a Circle K customer. (ER-131; ER-92:17-20; 108-111; 114-115; 94; 95:17-21; 96:1-8; 97:24-98:16). It is undisputed that he failed to obtain prior approval from the business to enter the private business' land for the purpose of filming. (ER-94; 95:17-20; 96; ER-117:16-24). *See State ex rel. Purcell v. Superior Court in and for*

Maricopa County, 11 Ariz. 582, 584, 535 P.2d 1299, 1301 (Ariz. 1975) (at common law, any unauthorized physical presence on another's property was a "trespass".). It is undisputed that Plaintiff had not made a purchase at the Circle K that night prior to Officer Newby approaching him where he stood in the Circle K parking lot. (ER-126; ER-131; 110:4-111; 117:16-22)

Based on the totality of the circumstances, the district court erred when finding that a material fact dispute precluded him from ruling on Plaintiff's inability to prove a lack of probable cause as to Plaintiff's retaliatory-arrest and qualified-immunity burden of proof on Count 3. As a matter of law, the Officer was not required to believe that Plaintiff did not see the "No Trespassing" sign on the wall he was facing when undisputably standing approximately 15 yards from the sign. "The Court has made clear that the Fourth Amendment does not simply 'incorporate' state statutes." *U.S. v. Carloss*, 818 F.3d 988, 1001 (10th Cir. 2016) (quoting *Virginia v. Moore*, 533 U.S. 164, 179). The district court also erred when failing to incorporate its finding of arguable probable cause into its analysis of qualified immunity for retaliatory arrest. Arguable probable cause did not require proof of every element of a crime. *Gates v. Khokhar*, 884 F.3d 1290, 1298 (11th Cir. 2018).

Qualified immunity as to the probable cause element of Plaintiff's retaliatory arrest claim also applies because it is law of the case that Officer Newby possessed reasonable suspicion and arguable cause, as provided in the district court's order.

Multiple Circuits have held that the presence of arguable probable cause defeated a First Amendment claim of retaliatory arrest. For example, as held in the Eleventh Circuit:

> The existence of probable cause both allows for a qualified immunity defense and defeats 42 U.S.C.S. § 1983 claims for false and retaliatory arrests. ***Even without probable cause, a court may still grant qualified immunity to an officer who had arguable probable cause for the arrest.*** Arguable probable cause exists where a reasonable officer, looking at the entire legal landscape at the time of the arrests, could have interpreted the law as permitting the arrests. *The arguable probable cause inquiry in a false arrest case is no different from the clearly established law inquiry in any other qualified immunity case.* ***If the court concludes that the officers had arguable probable cause then we conclude that their violation of the law was not clearly established*** and vice-versa.

Jennings v. Smith, No. 23-14171, 2024 U.S. App. LEXIS 24513, at *1, 7 (11th Cir. Sep. 27, 2024) (defining arguable probable cause as when reasonable officer, looking at the entire legal landscape at the time of arrest, could have interpreted the law as permitting the arrest).

Case law holding that arguable probable cause defeated a retaliatory arrest claim is not limited to the Eleventh Circuit. For example, the Fifth Circuit held that arguable probable cause defeated a retaliatory arrest claim. *Roy v. City of Monroe*, 950 F.3d 245, 255 (5th Cir. 2020) (holding the Supreme Court in *Nieves v. Bartlett*, 139 S.Ct. at 1724, required plaintiff to rebut qualified immunity defense by: 1)

producing evidence that probable cause was unsupported; and 2) establishing that the absence of probable cause would have been apparent to any reasonable officer); *Keenan v. Tejeda*, 290 F.3d 252, 262 (5th Cir. 2002) ("[i]f probable cause existed…or if reasonable police officers could believe probable cause existed" then the defendants in retaliatory arrest claim are "exonerated" from liability.); *see Rucker v. Marshall*, 2024 U.S. App. LEXIS 25808 at *12 (5th Cir. Oct. 14, 2024) ("[o]ur court has repeatedly explained that a police officer is protected by qualified immunity against a First Amendment retaliatory arrest claim if probable cause existed…or if reasonable police officers could believe probable cause existed.") (internal quotation omitted).

The Eighth Circuit also held that arguable probable cause defeated a retaliatory arrest claim. *Just v. City of St. Louis*, 7 F.4th 761, 768-79 (8th Cir. 2021) (citing to *Nieves v. Bartlett*, 139 S.Ct. at 1724, as the basis for holding that arguable probable cause defeats a First Amendment retaliatory arrest claim); *Peterson v. Kopp*, 754 F.3d 594, 602 (8th Cir. 2014); *see Welch v. Dempsey* (citing *Nieves*, *supra*, as holding that a First Amendment retaliatory arrest claim should not turn solely on the personal motive of the arresting officer; noting that arguable probable cause defeated a First Amendment retaliatory arrest claim).

As to a trespass arrest and a plaintiff's claim of a First Amendment retaliatory arrest, in *Stuart v. City of Scottsdale*, the District of Arizona utilized the Supreme Court's holding in *Nieves*, *supra*, to grant qualified immunity to the arresting officer:

> [t]he Court already settled that a reasonable officer could have believed probable cause existed to arrest Mr. Stuart at the podium for trespass. Therefore, Mr. Stuart's retaliatory arrest claim must fail.

Stuart v. City of Scottsdale, 2024 U.S. Dist. LEXIS 54742 at * 68 (Mar. 27, 2024).

Here, similar to the rationale cited in the above Circuits and in *Stuart v. City of Scottsdale*, *supra*, the application of arguable probable cause to Plaintiff's claim of retaliatory arrests is essential because the district court already held that Officer Newby established reasonable suspicion and arguable probable cause, and, therefore, was immune to Plaintiff's § 1983 Fourth Amendment claims under the identical First-Amendment legal standard for determining whether a plaintiff met his burden of proving a *lack* of probable cause and arguable probable cause.

Qualified immunity allows for errors in judgment and protects "all but the plainly incompetent or those who knowingly violate the law...[I]f officers of reasonable competence could disagree on the issue [whether or not a specific action was constitutional], immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). Where a court finds that greater care may have been warranted, that court's task "is not to serve as a police oversight board or to second-guess officers' real-time decisions from the standpoint of perfect

hindsight, but to ask whether the officers violated clearly established law." *O'Doan v. Sanford*, 991 F.3d 1027, 1036 (9th Cir. 2021) (citing *Wesby*).

Once probable cause exists, there is no duty to further investigate. *Id*., at 145-46. Even if a plaintiff is arrested in the absence of probable cause, an officer is still immune from an unlawful-arrest claim if it was "*reasonably arguable* that there was probable cause for arrest." *Rosenbaum v. Washoe Cty.*, 663 F.3d 1071, 1076 (9th Cir. 2011) (emphasis in original). An officer is entitled to qualified immunity if "a reasonable officer *could have believed*" that probable cause was present. *Anderson*, 483 U.S. at 641 (emphasis added); *see Pearson v. Callahan*, 555 U.S. 223, 244-45 (2009) (entitlement to qualified immunity where clearly established law does not show, based on objective legal reasonableness, that the conduct alleged violated the right alleged); *id*., citing *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) ("qualified immunity operates to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful") (internal quotation marks omitted)).

Here, no published opinion from the Supreme Court or the Ninth Circuit hold that conduct similar to that of Officer Newby was violative of Plaintiff's First Amendment right based on facts closely analogous to this case. *See Wesby*, 138 S. Ct. at 589. For example, Plaintiff asserted a right to film police activities that were occurring within a private convenience store parking lot, from the vantage of a non-customer standing in the private convenience store's parking lot without first seeking

and obtaining the company's permission to film there. [ER-205, ¶¶ 1, 22-27, 29, 31-33, 59] There is no clearly established First Amendment right to do so, and Plaintiff failed to cite to controlling precedent showing that the right to film is clearly established from the confines of a convenience store parking lot displaying No Trespassing signs and employing a security guard. Accordingly, Plaintiff failed to meet his burden, and Officer Newby is entitled to qualified immunity as to Plaintiff's First Amendment claim. For example, Plaintiff failed to both plead and allege that any exception allowing his retaliatory arrest claim to survive despite failing to meet his burden of proving a lack of probable cause and arguable probable cause.

To the extent that Officer Newby made an objectively reasonable mistake of fact or mistake of law regarding, for example, the significance of the "No Trespassing" signage in relation to the criminal trespassing offense or to the application of a right where a plaintiff was on the Circle K property and deemed to be trespassing and loitering by the Circle K security guard in the parking lot with the Officer, qualified immunity still applies. *Heien*, 574 U.S. at 60-61; *see Anderson*, 483 U.S. at 641; *see Dave v. Laird*, 2021 WL 7367084 at *12 (S.D. Tex. Nov. 30, 2021) (no clearly established right for a person to film his *own* detention or arrest with his own camera while his detention or arrest is happening.).

A "plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest." *Nieves*, 139 S.Ct at 1727. "[P]robable

cause speaks to the objective reasonableness of an arrest" and "its absence will…generally provide weighty evidence that the officer's animus caused the arrest, whereas the presence of probable cause will suggest the opposite." *Id*., at 1274 (noting a plaintiff must plead and prove the absence of probable cause for the arrest). An officer's state of mind is irrelevant and cannot invalidate an arrest. *Id*.

As noted by the district court when granting qualified immunity on Plaintiff's false arrest claim, "qualified immunity applies when it was objectively reasonable for an officer to believe he or she had probable cause to make the arrest." (ER-20) citing *Hill v. City of Fountain Valley*, 70 F.4th 507, 516 (9th Cir. 2023); *Rosenbaum v. Washoe County*, 663 F.3d 1071, 1076 (9th Cir. 2011). Arguable probable cause is met where, for example, an officer shows that he had arguable probable cause to believe that a plaintiff was committing the crime of trespass. *See Blankenhorn v. City of Orange*, 485 F.3d 463, 475 (9th Cir. 2007); *id*., at 472 (officer "need not have probable cause for every element of the offense."). Based on the multi-Circuit grouping of cases citing and interpreting *Nieves*, *supra*, Officer Newby is entitled to qualified immunity on Plaintiff's First Amendment claim. *See Jennings v. Smith*, No. 23-14171, 2024 U.S. App. LEXIS 24513, at *1, 7 (11th Cir. Sep. 27, 2024); *accord*, Rucker v. Marshall, 2024 U.S. App. LEXIS 25808 at *12 (5th Cir. Oct. 14, 2024); *Keenan v. Tejeda*, 290 F.3d 252, 262 (5th Cir. 2002); *Just v. City of St. Louis*, 7 F.4th 761, 768-79 (8th Cir. 2021) (citing to *Nieves v. Bartlett*, 139 S.Ct. 1715, 1724

(2019); *Stuart v. City of Scottsdale*, 2024 U.S. Dist. LEXIS 54742 at * 68 (Mar. 27, 2024).

Immaterial facts cannot preclude summary judgment. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). The district court generally referenced Plaintiff's conclusory allegation that Officer Newby "understood" that Plaintiff did not see the "No Trespassing" signage (ER-17, ll. 24-27) and "understood" that he no longer possessed probable cause (ER-18, ll. 3-6). First, speculation cannot create a material fact dispute. *Nelson v. Pima Cmty Coll*., 88 F.3d 1075, 1081-82 (9th Cir. 1996). Second, Officer Newby was not required to believe that Plaintiff –standing in the same location as Officer Newby while wearing spectacles -- was unaware of the NO TRESPASSING signage approximately 15 yards away from Plaintiff's and Officer Newby's standing location in the parking lot. (ER-100:21-104:17); *Watkins v. Broward Sheriff Off*., 824 F. App'x 865, 869 (11th Cir. 2020) (officer under no obligation to believe suspect's story and forgo arrest when initial information provided probable cause). Plaintiff's self-serving statement to the Officer that he was not looking for signage did not prevent a reasonable officer from deeming the No Trespassing signage as reasonable notice under A.R.S. § 13-1502(a). As a matter of law and based on an objective, reasonableness standard, a mistake of fact or law exists which entitled the Officer to qualified immunity. Here, the qualified immunity afforded in *Heien v. North Carolina*, 574 U.S. 54, 66 (2014) applied as to whether

Plaintiff's failure to obtain permission to film on the business property, his location on the property while filming, and the Officer's knowledge of the Circle K No Trespassing sign established that it was objectively reasonable for the Officer to believe Plaintiff knowingly trespassed on the property despite the reasonable notice afforded by the sign approximately 15 yards from Plaintiff.

CONCLUSION

Because the Defendant Officer, Kyler Newby, did not violate a clearly established right of Plaintiff when arresting him on private property for criminal trespass, the Officer respectfully asks this Court to direct the district court to enter judgment in his favor as to qualified immunity for the alleged retaliatory arrest.

DATED this 20th day of December, 2024.

CITY OF MESA ATTORNEY'S OFFICE

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set in Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 8,648 words, excluding the parts of the brief exempted by the Federal Rules of Appellate Procedure, and it contains fewer than 759 lines of text.

This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) because it is proportionally spaced and uses 14-point Times New Roman font.

Signature: /s/ Duncan J. Stoutner

Attorney for: Defendant-Appellant Kyler Newby

Date: December 20, 2024

STATEMENT OF RELATED CASES

There are no related cases pending before the Ninth Circuit Court of Appeals.

/s/ Duncan J. Stoutner
Duncan J. Stoutner