No. _____

In the

Supreme Court of the United States

RON FENN, PETITIONER

v.

CITY OF TRUTH OR CONSEQUENCES, MICHAEL APODACA, POLICE CHIEF LEE ALIREZ, and DANIEL HICKS, RESPONDENTS

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

As the jurisprudence becomes broader on when a government actor enjoys qualified immunity and the instances where a citizen can hold that government actor accountable becomes more limited, beginning with this Court's guidance in *Harlow v. Fitzerald* 457 U.S. 800 (1982) requiring that a person's violated rights must be "clearly established," *id.,* there is a question of at what point, perhaps like the one this case presents, that should define when a grant of qualified immunity to the government Respondents that have interfered with free speech on the basis of content has gone too far.

Thus, the question presented is: Did the lower courts err in dismissing Petitioners' case on the basis of Qualified Immunity in the face of US Supreme Court precedent and New Mexico jurisprudence clearly establishing the right that was violated?

PARTIES TO THE PROCEEDING

Petitioner is Ron Fenn. He was the Plaintiff in The United States District Court for the State of New Mexico, Case No. 2:18-cv-00634 WJ-GW, *Fenn v. City of Truth or Consequences et al.,* wherein judgment for the Defendants was entered November 6, 2019; and plaintiff-appellant in the United States Court of Appeals for the 10th Circuit Case No. 19-2201, *Fenn v. City f Truth or Consequences et al*. wherein judgment for the defendants-Appellees was entered December 29, 2020.

Respondents are the City of Truth or Consequences, Michael Apodaca, Police Chief Lee Alirez, and Daniel Hicks. They were Respondents in the District Court and Respondents-appellees in the Tenth Circuit Court of Appeals.

RULE 29.6

Corporate disclosure statement is not required in this matter.

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It must be that the First Amendment really means nothing at all anymore when a senior citizen that is unhappy with the taking away of a senior center to give it to a taxpayer boondoggle can no longer peacefully protest to pamphlet and criticize his government in a common area public space without being arrested for trespass because his protest is perceived on the basis of its content as obnoxious. At some point the line that appears to drift farther away from protecting the civil rights of American citizens and towards granting greater qualified immunity to government actors must become capable of being crossed, the public must be allowed to hold their government to account for trampling constitutionally protected liberty interests. Otherwise at some point those constitutionally protected rights and the will of Congress in passing 42 U.S.C. § 1983 means nothing. Thus, the longstanding, well-documented, and known interpretation that one may engage in their First Amendment protected right to peaceably protest without fear of government reprisal based on the content of his speech is at the core of maintaining the functionality of Republic. Petitioner Ron Fenn frequented a senior center at 301 S. Foch St., Truth or Consequences, New Mexico. The senior center was converted to other uses, and was eventually leased out to Spaceport America, a New Mexico public agency, for use as a visitor center. Petitioner publicly protested the conversion of the senior center.

On May 5, 2017, Captain Apodaca responded to a call by John Muenster, a volunteer of Geronimo Trail Scenic Byway center (another government agency tenant from a separate part of the building from Spaceport America), about Mr. Fenn being

on the property in violation of trespass orders (there was no trespass order in place preventing Mr. Fenn from occupying the public space of Spaceport America) as Mr. Fenn was putting posters and pamphlets on a counter inside the center. Captain Apodaca told Mr. Fenn that he could "put up his propaganda and stay… but not to harass any visitors." Mr. Muenster was concerned that expensive items kept in the center could be damaged or stolen. Ms. Rosemary Bleth (of Geronimo Trail Scenic Byway center) notified the officer that she was interested in a criminal trespass order against Mr. Fenn to prevent him from entering the location because she found his protest obnoxious.

On May 11, 2017, Mr. Hicks, CEO of Spaceport America (a state agency) was contacted by Chief Alirez who encouraged him to request a trespass order from Chief Alirez based on prior incidents of peaceful protest as a preventative measure to halt Mr. Fenn's criticism of the City and the Spaceport which Mr. Hicks agreed to request. Chief Alirez drove 75 miles to the offices of Spaceport America for Respondent Hicks' signature that day. Chief Alirez then met with Mr. Fenn on May 12, 2017, to serve the trespass order. Mr. Fenn received it but refused to sign it.

On June 4, 2017, Larena Miller contacted the police department to report Mr. Fenn inside 301 S. Foch St. Sgt. Baker responded and found Mr. Fenn inside the "common use area of the building," in the area housing a satellite library. Sgt. Baker and Chief Alirez told Petitioner to leave, and Mr. Fenn refused. Then Chief Alirez met with Petitioner on June 13, 2017, in his office, and offered to hold the trespass

citation in abeyance as long as Petitioner Fenn had no further violations at 301 S. Foch St.

On June 18, 2017, Officer Ontiveros was dispatched to another trespass call at 301 S. Foch St. Mr. Fenn was "within the common area of the areas he had previously been trespassed from." Mr. Fenn said he was not trespassing but was protesting. Both Officer Ontiveros and Chief Alirez ordered Petitioner to leave, and he refused. Chief Alirez then arrested Petitioner and a criminal complaint was filed against him for Criminal Trespass pursuant to NMSA § 30-14-1(C). The criminal complaint was eventually dismissed *nolle prosequi* and never refiled within the statute of limitations for the event.

The District Court erred in Dismissing Petitioners' Case based on qualified immunity. The District Court erred in dismissing Petitioners claims as his actions are fully protected by the Constitution. Petitioners pled, and applicable law supports, Petitioner's right to engage in his First Amendment protected right to peaceably protest without fear of reprisal based solely on the content of his speech. Petitioners respectfully request that lower Court's decisions be overturned. The Circuit Court lacked any meaningful basis for its decision to affirm the District Court and could only reach its decision to affirm by deciding facts that were not established regarding whether or not the public area that Mr. Fenn chose to protest was a traditional public location which was in clear error.

OPINIONS BELOW

The unpublished judgment of the United States Court of Appeals for the Tenth

Circuit in *Fenn v. City of Truth or Consequences et al., ca 19-2201,* 983 F.3d 1143 dated December 29, 2020, affirming the district court's judgment of dismissal is set forth in the appendix hereto.

The unpublished judgment of the United States Court of Appeals for the Tenth Circuit in *Fenn v. City of Truth or Consequences et al., ca 19-2201,* dated December 29, 2020, affirming the district court's judgment of dismissal is set forth in the appendix hereto.

The unpublished Order denying Petitioner's Petition for Rehearing *Fenn v. City of Truth or Consequences et al.*, dated January 26, 2021, is set forth in the appendix hereto.

The unpublished Memorandum Opinion and Order Granting in Part Truth or Consequences Respondents' Motion to Dismiss and Granting Respondent Daniel Hicks' Motion to Dismiss in *Fenn v. City of Truth or Consequences et al.*, 2019 WL 943518, dated February 26, 2019, is set forth in the appendix hereto.

The unpublished Memorandum Opinion and Order Granting Respondent's Motion for Summary Judgement on Petitioner's Second and Third Causes of Action *Fenn v. City of Truth or Consequences et al.*, 2019 WL 5789279, dated November 6, 2019, is set forth in the appendix hereto.

The unpublished Rule 58 Judgment granting Respondents' Motion for Summary Judgment on Petitioner's Second and Third Causes of Action in *Fenn v. City of Truth or Consequences et al.*, dated November 6, 2019, is set forth in the appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit affirming the District Court judgment of dismissal was entered on December 29, 2020. The judgment of the United States Court of Appeals for the Tenth Circuit denying Appellants' Petition for Rehearing was entered January 26, 2021. This petition for writ of certiorari by Ron Fenn is filed within one hundred fifty (150) days from the date of the Order denying the petition for rehearing. 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, Section 1:

> The Judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish…

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

28 U.S.C. Section 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States … except where a direct review may be had in the Supreme Court.

28 U.S.C. Section 1343

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: 1) to recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, 2) to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; and 3) to recover damages or to secure equitable or other relief under an Act of Congress providing for the protection of civil rights…

42 U.S.C. Section 1983

Every person who, under color of any statute ordinance, regulation, custom, or usage, of any State…, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a

> judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section…

STATEMENT OF THE CASE

A. Right to Peacefully Protest

Petitioner brought 42 USC §1983 litigation against the CEO of Spaceport America, a New Mexico government agency, for the intentional and malicious deprivation of the Petitioner's First Amendment right to free speech based solely on the content of his speech and against City of Truth or Consequences ("T or C"), its Chief of Police and a police officer for retaliatory prosecution for the exercise of Petitioner's right to free speech.

In sum, Petitioner filed a Complaint alleging (1) First Amendment Retaliation; (2) Malicious Prosecution and Abuse of Process; and (3) supervisory and *Monell* liability in the U.S. District Court for the District of New Mexico on July 5, 2018. T or C Respondents moved for partial dismissal on qualified immunity on August 2, 2018, and Respondent Hicks moved for dismissal on qualified immunity on August 28, 2018. After completion of briefing, the District Court granted in part the T or C Respondents' Motion and granted Respondent Hick's Motion. T or C Respondents then moved to dismiss the remaining claims on qualified immunity grounds which after the completion of briefing the District Court granted.

B. District Court Proceedings.

The Complaint was filed in the United States District Court for The District of New Mexico on July 5, 2018. Final judgment was entered on the district court docket on November 6, 2019. The notice of appeal was filed on December 2, 2019.

C. Tenth Circuit Decision.

The Tenth Circuit Affirmed the District Court decision on December 29, 2020. The Appeals Court affirmed on the basis that no constitutional violation had occurred based upon their determination of a fact never adjudicated by the District Court that "because the Center is not the type of public forum in which the government must allow picketing and other forms of protest Fenn claims to have engaged in." *Fenn v. City of Truth or Consequences*, 983 F.3d 1143, 1148 (10th Cir. 2020). The Petitioners petitioned for rehearing on January 11, 2021, and the Tenth Circuit denied rehearing on January 26, 2021.

REASONS FOR GRANTING THE PETITION

I. THE DISTRICT COURT ERRED IN DISMISSING PETITIONERS' CASES ON THE BASIS OF QUALIFIED IMMUNITY AND THE CIRCUIT COURT ERRED IN AFFIRMING THE DISMISSAL.

At the core of the case before the District Court was the basic premise that one may exercise his free speech peacefully in a public forum as protected under the Constitution without fear of reprisal from the government based solely on content of speech that is critical of the government. The District Court erred in granting qualified immunity to all Respondents and those decisions along with Tenth Circuit's affirmance conflicts with this Court's decision in *Nieves v. Bartlett*, 139 S. Ct. 1715, 204 L. Ed. 2d 1 (2019) as well as the precedent of the Tenth Circuit.

A. The District Court Erred in Affording Dan Hicks Qualified Immunity

Regarding Mr. Hicks, Petitioner alleged, and the District Court refused to recognize, discrimination against the free exercise of protected speech by Mr. Hicks of Mr. Fenn based solely on the content of his speech as reported by Chief Alirez and Captain Apodaca. The act of trespassing Mr. Fenn from a public area clearly violated Mr. Fenn's clearly established right protected by the First Amendment to peaceably pamphlet in a public place and engage in protected speech. The District Court concluded that Mr. Hicks was entitled to qualified immunity from suit in his individual capacity. However, the actions alleged in in the Complaint supported his personal and specific involvement in discriminatory and retaliatory conduct directed at Petitioner. Mr. Hicks took the specific action to request a trespass order against Mr. Fenn when he was invited to do so, in collusion with Chief Alirez, who drove 75 miles to obtain Mr. Hicks signature on the trespass order request.

1. Hicks Violated Petitioner's First Amendment Rights.

Mr. Fenn correctly pointed out to the District Court that to prove a claim of retaliation for the exercise of his First Amendment rights, he must prove the following: (1) he was engaged in constitutionally protected activity; (2) that Hicks' actions caused Petitioner to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) Hicks' adverse action was substantially motivated as a response to Petitioner's exercise of constitutionally protected conduct. *Nielander v. Bd. of Cnty Comm'rs*, 582 F.3d 1155, 1165 (10th Cir. 2009); *Smith v. Plati*, 258 F.3d 1167, 1176-77 (10th Cir. 2001).

There is no doubt that Mr. Fenn was engaged in a constitutionally protected activity while present at the public visitor's center in the open public area to discuss his concerns and protest the elimination of the senior center and lease of the center to Mr. Hicks' entity. This same protected right has been well established and revisited as recently as 2014. *Meyer v. Grant,* 486 U.S. 414, 424, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988)(in the context of petition campaigns, "one-on-one communication" is "the most effective, fundamental, and perhaps economical avenue of political discourse."); *McCullen v. Coakley*, 134 S. Ct. 2518, 2536, 189 L. Ed. 2d 502 (2014).

As to the second prong, "that Hicks' actions caused Mr. Fenn to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity," Mr. Hicks' sole argument that was accepted by the District Court, *i.e.* that Petitioner was not injured because he could "voice his concerns at other venues." The assertion was fundamentally flawed, as seen from the discussion *supra.*, that a person's right to protest at *public locations* is protected and curtailment is limited. There is no question that Mr. Hicks' action (to obtain a trespass order for no other reason than the content of Mr. Fenn's speech) did chill Mr. Fenn, a person of *above ordinary firmness,* because Mr. Hicks' action in conjunction with other Respondents did exactly what each intended, to stop Mr. Fenn from seeking redress at the very location that had been impacted by the City's actions.

Importantly, Mr. Fenn was falsely arrested for trespass, based solely on a trespass order derived from representations to Mr. Hicks' that Mr. Fenn was "disruptive." Yet, the only suggested disruptiveness was the content of Mr. Fenn's

speech and seeking redress at the former senior center/*vis a vis* Spaceport visitor center. There was no report of vulgar speech, nor report of abusive or hostile speech. Simply put, but for Mr. Fenn speaking out against the visitor center/senior center closure he would not have been removed or "trespassed" from the open public location, accessible by all citizens and invitees and visitors, inclusive of a public library.

This action by Mr. Hicks was motivated as a response to Mr. Fenn's exercise of constitutionally protected conduct, his protest in a public forum regarding the use of portions of 301 S. Foch St. for Spaceport purposes. These averments were evident from the complaint and included exhibits and the District Court plainly erred in determining otherwise. Moreover, the Tenth Circuit's adjudication that the public area where Mr. Fenn was protesting was not in a public forum is detached from and unsupported by any allegations in the pleadings in this matter.

2. Petitioner had a Right to Protest at the Visitor Center.

"'The right to peaceably assemble and petition for redress of grievance . . . are rights of the citizen guaranteed by the Federal Constitution.' " *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 513, 59 S. Ct. 954, 963, 83 L. Ed. 1423 (1939), *citing to* the Slaughter-House Cases, 16 Wall. page 79, 21 L.Ed. 394. In assessing a restriction on the right to assemble, the Supreme Court has queried whether the place of assembly is or is not a traditional public forum. *Adderley v. Florida; Greer v. Spock,* 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976); *U.S. Postal Service v. Greenburgh Civic Assns.,* 453 U.S. 114, 101 S.Ct. 2676, 69 L.Ed.2d 517 (1981). To answer that question, the Courts have asked whether the character of the place is appropriate for the

expression of views and ideas generally. *State v. McCormack*, 1984-NMCA-042, ¶¶ 17-18, 101 N.M. 349, 352, 682 P.2d 742, 745. Not a relevant inquiry is whether the location is appropriate to the demonstration.

Invariably, the First Amendment provides and protects the rights of United States citizens to peacefully assemble and seek redress from their government representatives – regardless of whether those representatives like or desire to hear such complaints. Long have the Courts been required to preserve the "presumptively protected status of peaceful picketing activities..." in the face of overreaching to curtail this well-established right. *See Agric. Labor Relations Bd. v. California Coastal Farms, Inc.*, 31 Cal. 3d 469, 481–82, 645 P.2d 739, 745–46 (1982); *Kaplan's Fruit and Produce Co. v. Superior Court* (1979) 26 Cal.3d 60, 81, 162 Cal.Rptr. 745, 603 P.2d 1341; *United Farm Workers of America v. Superior Court* (1976) 16 Cal.3d 499, 505, 128 Cal.Rptr. 209, 546 P.2d 713.) Thus, courts must be "cautious in entertaining actions to enjoin or restrain [peaceful picketing activities]' (*United Farm Workers of America v. Superior Court, supra*, 16 Cal.3d 499, 505, 128 Cal.Rptr. 209, 546 P.2d 713) and any action by a government official preventing or impacting the right to peaceably assemble must "'be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order' (*id.*, at p. 504, 128 Cal.Rptr. 209, 546 P.2d 713)." Any judicially imposed restraints must be tailored with caution, reserved for cases in which the threat of harm is clear. *See United Farm Workers of America v. Superior Court, supra*, 16 Cal.3d 499, 506, 128 Cal.Rptr. 209, 546 P.2d 713; *Kaplan's Fruit and*

Produce Co. v. Superior Court, supra, 26 Cal.3d at p. 81, 162 Cal.Rptr. 745, 603 P.2d 1341.)

The question the District Court erred in answering is whether Mr. Fenn, a citizen, had the right to petition and enjoyed freedom of speech at the public visitor location that he selected and which all other citizens were invited to attend. The Spaceport America visitor center was an open public location at which every citizen as well as international visitors, were invited to enter during its open hours. Mr. Fenn enjoyed the same rights to enter the visitor center as did other citizens and visitors, as long as his actions were peaceful. Mr. Hicks took specific action to impair Mr. Fenn's right to peacefully assembly, to air his grievances and to seek redress when Mr. Hicks obtained a "trespass order"/restraining order to prevent Mr. Fenn's access to the pubic location with the express intent and purpose of quashing Mr. Fenn's speech. Mr. Hicks never denied his intent was to stop Mr. Fenn from speaking out against Spaceport America's use of the former senior center. Nor did Mr. Hicks deny that he worked with Respondents Alirez and Apodaca to restrain Mr. Fenn from access to the public visitor center and cease Mr. Fenn's speech by issuance of a trespass order. While "exclusion" from a public location may – in certain instances – be "lawful" as the District Court accepted, such curtailment of rights to speech and to seek redress are not lawful simply because a public official personally desires to exclude access based upon finding the content spoken by the person to be critical of the government's actions. Such exclusion is not lawful when the intent and purpose of the actor is to prevent speech, and then perfected outside of the careful judicial

considerations required before curtailing First Amendment rights.

This Court has reaffirmed that pamphleteering and one-on-one communications are First–Amendment–protected activities. *See McCullen,* 134 S.Ct. at 2536. In *McCullen*, the Court "observed that one-on-one communication is the most effective, fundamental, and perhaps economical avenue of political discourse" and that "no form of speech is entitled to greater constitutional protection" than leafletting. *Id.* (internal quotation marks and alteration omitted). This Court went on to state that when a governmental actor "makes it more difficult to engage in these modes of communication, it imposes an especially significant First Amendment burden." *Id.* Petitioner's communications here are thus clearly established to be protected by the First Amendment.

Nor did Mr. Hicks argue to the District Court or provide any facts to support or legitimately assert that the location from which he sought to restrict Mr. Fenn was not a public location. Instead, the District Court accepted the suggestion that a person can be "excluded" from a location. While that may be the case, such exclusion must be considered in the constitutional context, when it is sought at a public location:

> Turning now to the constitutional restrictions on speech, our analysis is guided by Plaintiffs' wish to engage in First Amendment-protected activity on government property. "Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius,* 473 U.S. at 799–800, 105 S.Ct. 3439. But in some instances, the public may have acquired by tradition or prior permission the right to use government property for expressive purposes. *See id.* at 802, 105 S.Ct. 3439. To determine when and to what extent the Government may properly limit expressive activity on its property, the Supreme Court has adopted a range of

> constitutional protections that varies depending on the nature of the government property, or forum. *Id.* at 800, 105 S.Ct. 3439.

Verlo v. Martinez, 820 F.3d 1113, 1128–29 (10th Cir. 2016). Thus, applying *Nieves*, this Court should find Mr. Hicks' animus was clear and necessarily shows that the actions of Mr. Hicks induced by the actions of Chief Alirez and Captain Apodaca who but for the signing of the trespass order could not have pressed charges for trespass against Mr. Fenn.

B. The District Court Erred in Affording T or C Respondents Qualified Immunity

1. The Actions of Chief Alirez and Captain Apodaca to "Press Charges" by Seeking Out and Inducing Mr. Hicks to Obtain a Trespass Order Against Mr. Fenn when there was No Probable Cause that a Crime was Being Committed was Objectively Unreasonable and Therefore Conflicts with the Supreme Court's Decision in *Nieves* regarding Retaliatory Arrest.

Regardless of whether the District Court reviewed the actions of T or C Respondents as a false arrest or a malicious prosecution under *Nieves;* the decision should not have been to afford qualified immunity with regard to retaliatory arrest based upon probable cause. In reviewing the lack of probable cause requirement for retaliatory arrest this Court examined both malicious prosecutions and false arrest context to conclude that the "no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been. Cf. *United States v. Armstrong*, 517 U.S. 456, 465, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996)." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1727, 204 L. Ed. 2d 1 (2019). Thus, when the record clearly indicates that there was no other evidence that a crime was being

committed and that the officers were responding purely to the content and location of Mr. Fenn's speech to press charges, arrest Mr. Fenn and prosecute Mr. Fenn that objectively but for the officer's animus towards the protected activities of Mr. Fenn he would not have been persecuted. And having sufficiently demonstrated the same to the District Court as he did, Mr. Fenn's claims for retaliatory prosecution should have been allowed to "proceed in the same manner as claims where the plaintiff has met the threshold showing of the absence of probable cause. See *Lozman*, 585 U.S., at ——, 138 S.Ct., at 1952–1953." *Nieves* at 1727. Thus, it is beyond argument that the retaliatory arrest of Mr. Fenn falls well outside of the realm for which Chief Alirez and Captain Apodaca enjoyed qualified immunity. This Court's application of *Hartman* in *Nieves* serves to highlight that violation of Mr. Fenn's constitutional rights through retaliatory arrest based solely upon the location and content of his peaceful protest was clearly established at the time of injury.

2. The District Court's Decision Regarding the Prosecution of Mr. Fenn is Inconsistent with the Jurisprudence from the U.S. Supreme Court and the 10th Circuit.

Likewise, rightfully putting aside the analysis of whether or not the ensuing prosecution of Mr. Fenn was initiated with malice, the District Court erred in determining that the prosecution did not terminate favorably. Of course, Fourth Amendment malicious prosecution requires "(1) the defendant caused the plaintiff's continued confinement or prosecution; (2) the original action terminated in favor of the plaintiff; (3) no probable cause supported the original arrest, continued confinement, or prosecution; (4) the defendant acted with malice; and (5) the plaintiff

sustained damages." *Wilkins v. DeReyes*, 528 F.3d 790, 799 (10th Cir. 2008). The District Court, in evaluating favorable termination, should have considered and accepted that entry of Mr. Fenn's legal counsel into the criminal case and the subsequent discussions of counsel resulting in the dismissal *nolle prosequi,* coupled with the fact that the case was never refiled within the statute of limitations proved favorable termination for Mr. Fenn. The Tenth Circuit's guidance should have confirmed for the District Court this where it stated:

> [I]n *Wilkins* ... the prosecutor had dismissed the underlying charges by filing a so-called *nolle prosequi*—a voluntary dismissal of charges.... We found the mere fact that a prosecutor had chosen to abandon a case was insufficient to show favorable termination. Instead, the termination must in some way "indicate the innocence of the accused." ... (quoting Restatement (Second) of Torts § 660 cmt. a (1977)). When it is unclear whether the termination indicates innocence, we "look to the stated reasons for the dismissal *as well as to the circumstances surrounding it" and determine "whether the failure to proceed implies a lack of reasonable grounds for the prosecution*." ... Or, as a leading treatise put it, the abandonment of prosecution that "does not touch the merits ... leaves the accused without a favorable termination." Dan B. Dobbs et al., Dobb's Law of Torts § 590 (2d ed. 2015).

Cordova v. City of Albuquerque, 816 F.3d 645, 651 (10th Cir. 2016) (*emphasis added*).

Importantly, as noted above, the actions of Respondents to manufacture probable cause, out of retaliation for the content of Mr. Fenn's protected speech, is fatal to the conclusion the District Court reached in analyzing malicious prosecution. Perhaps more importantly, with regard to malicious prosecution's second element,[1] the fact that litigation terminated by the admission that there was "insufficient evidence to proceed" by the District Attorney's Office after Mr. Fenn pointed out *pro*

[1] *See Wilkins v. De Rey* 528 F.3d 790,799(10th Cir. 2008)

se in his Motions to Dismiss (which though denied resulted in the District Attorney dismissing the case *nolle prosequi* for the same reasons) that the element of intent could not be met to convict a person of trespass that entered into a public place upon the reasonable belief that their First Amendment right to engage in protected speech to peaceably protest gave them the right to be in an open public forum. Thus, a recognition that there was insufficient evidence to prosecute is exactly the type of favorable termination that Mr. Fenn sought *pro se* in the criminal proceeding.

Two other critical facts largely ignored by the District Court support the notion that Mr. Fenn's criminal prosecution terminated favorably. The first is the fact that following Mr. Fenn's retention of counsel, along with that counsel's entry into the case to discuss and pointing out to the District Attorney's Office the lack of merit to the criminal prosecution, caused the District Attorney's Office to abandon their prosecution. Further, while the abandonment of prosecution was without prejudice, it was never refiled before the statute of limitations ran. All of these add support to the notion that Mr. Fenn has met his "burden to show that the termination was favorable." *Cordova v. City of Albuquerque*, 816 F.3d 645, 630 (10th Cir. 2016). The admission of the District Attorney to recognize that with a complete factual record before them they lack sufficient evidence to prosecute such that a jury could easily determine that proceeding terminated "for reasons indicative of innocence" is a termination favorable to Petitioner. *See M. G. v. Young,* 826 F.3d 1259, 1263 (10th Cir. 2016).

Thus, the remaining inquiry not reached by the District Court of whether or not the third element of determining "probable cause…during the institution of legal process" was fact specific and critical for the District Court to have evaluated in examining the claim of malicious prosecution. *McGarry v. Bd. Of Cty. Comm'rs for Cty. Of Lincoln,* 294 F. Supp.3d 1170, 1194 (D.N.M. 2018). At the time prosecution was initiated the Respondents clearly knew they lacked an essential element of probable cause to support prosecution, namely, that Mr. Fenn had "enter[ed] or remain[ed] on the lands of another knowing that such consent to enter or remain is denied." NMSA 1978 § 30-14-1. What the District Court ignored was that that the Respondents were lacking in the elements necessary to establish probable cause at the time that they sought a trespass order as evidenced by the fact that Respondents had to contact the current tenant and travel to Las Cruces to obtain a new trespass order for Spaceport America's Visitor Center as the current tenant had never complained of Mr. Fenn's presence in their leased, open-to-the-public space, much less requested that Mr. Fenn be trespassed from Spaceport America Visitor's Center. A previous tenant, ostensibly still in violation of Mr. Fenn's First Amendment rights, Follow the Sun Tours (a government actor), had requested that Mr. Fenn no longer be allowed to peacefully protest against their government action, but they we no longer the tenants at the time Mr. Fenn resumed his exercise of protected speech to peacefully protest the use of a government public space for the government agency Spaceport America Visitor's Center. Respondents admitted to the District Court that the critical element of knowingly entering and remaining at a place where consent

was revoked to remain was notably not present at the time that they commenced their malicious prosecution and retaliatory prosecution such that they had to proactively seek out and persuade the current tenant to revoke consent so that they could claim probable cause. This was the equivalent of filing a deficient affidavit to obtain a warrant for arrest or seizure. Under the great weight of federal jurisprudence and New Mexico substantive law that warrant must be tossed out as lacking probable cause just as this arrest must be held to have lacked probable cause. *See Franks v. Delaware*, 438 U.S. 154, 156, 98 S. Ct. 2674, 2676, 57 L. Ed. 2d 667 (1978); *see also State v. Haidle,* 2012-NMSC-033, ¶ 12, 285 P.3d 668, 672. Obtaining a trespass order from a current tenant that had not complained of Mr. Fenn's conduct of protected speech during the act of peaceful protest is the functional equivalent to obtaining an arrest warrant based upon the fabrication of facts that support that a crime had been committed.

As to retaliatory prosecution, Mr. Fenn presented to the District Court what the elements of a retaliatory prosecution or vindictive prosecution are, but the District Court misapplied the facts to the law: first, the undisputed material facts establish Mr. Fenn was clearly engaged in protected speech to criticize his government during peaceful protest which is unquestionably a constitutionally protected activity especially in light of the fact that at the time of the initiation of the prosecution there was no trespass order (valid or not) in place; second, it is beyond question that Mr. Fenn's arrest and prosecution for engaging in peaceful protest would chill a person of ordinary firmness from continuing to engage in that activity;

and third, that Respondents' actions were undeniably motivated solely as a response to the First Amendment speech rights of Mr. Fenn that are only discernably different from any other person based upon the content of his speech as being critical of the government that employed those officers. *See Becker v. Kroll*, 494 F.3d 904, 925 (10th Cir. 2007).

Thus, retaliatory prosecutions such as this one that also display a lack of probable cause, *see Hartman v. Moore,* 547 U.S. 250, 262 (2006); *see also Cowley v. West Valley City*, supra, 2018 WL 1305709 at *8 & n.12, are appropriately viewed through the lens of the 10th Circuit's decisions on vindictive prosecutions that "if the misuse of the legal procedure is egregious there may be a deprivation of constitutional dimensions for which a plaintiff can invoke § 1983." *Lusby v. T.G. & Y. Stores,* 749 F.2d 1423, 1431 (10th Cir.1984), *cert. denied,* 474 U.S. 818, 106 S.Ct. 65, 88 L.Ed.2d 53 (1985). Such view was reiterated in *Anthony v. Baker,* 767 F.2d 657, 662–63 (10th Cir.1985). The 10th Circuit has also provided helpful guidance of *Poole v. County of Otero,* 271 F.3d 955 (10th Cir. 2001), in evaluating a claim for violation of a First Amendment right thru vindictive prosecution stating:

> [a] claim for vindictive prosecution ordinarily arises when, during the course of criminal proceedings, a Plaintiff exercises constitutional or statutory rights and the government seeks to punish him therefor by instituting additional or more severe charges, see, e.g., *United States v. Wall,* 37 F.3d 1443, 1448 (10th Cir. 1994). In this context, such a claim is governed by a two-part test, see *United States v. Lampley*, 127 F.3d 1231, 1245 (10th Cir. 1997). Nonetheless, we recognize that this court has not limited the term to the criminal prosecution setting, but has characterized First Amendment claims similar to Mr. Poole's as "vindictive prosecution." *See Wolford v. Lasater*, 78 F.3d 484, 488 (10th Cir. 1996) (comparing a First Amendment claim to a "vindictive prosecution action"); *Gehl Group*, 63 F.3d at 1534 (stating that a First

> Amendment claim alleging retaliatory prosecution "is essentially one of vindictive prosecution"); *United States v. P.H.E., Inc*., 965 F.2d 848, 853 (10th Cir. 1992) (discussing vindictive prosecution claim in terms of prosecution motivated by "the improper purpose of interfering with the Appellee's constitutionally protected speech"); cf. *Phelps v. Hamilton*, 59 F.3d 1058, 1065 n.12 (10th Cir. 1995) (stating that prosecution brought for the purpose of hindering an exercise of constitutional rights may constitute "harassing and/or bad faith prosecution")."

Poole v. County of Otero, 271 F.3d 955, fn. 5 (10th Cir. 2001) (emphasis added).

In *Wolford*, the Tenth Circuit examined whether a plaintiff's constitutional rights were violated by the government's prosecution of her, where she alleged the government's action was motivated in part to retaliate against her for exercising her First Amendment rights. In that case the 10th Circuit commented that "[i]n the context of a government prosecution, the decision to prosecute which is motivated by a desire to discourage protected speech or expression violates the First Amendment and is actionable under § 1983." *Wolford v. Lasater,* 78 F.3d 484, 488 (10th Cir. 1996). The Tenth Circuit reasoned that a central question to be addressed in such an action was "whether retaliation for the exercise of First Amendment rights was the 'cause' of the prosecution and the accompanying injuries to plaintiff." *Id*.; *citing Rakovich v. Wade*, 850 F.2d 1180, 1189 (7th Cir. 1988)). Likewise, in *Gehl Group v. Koby*, 63 F.3d 1528 (10th Cir. 1995), a controversy the 10th Circuit characterized as a vindictive prosecution case brought in retaliation against the plaintiffs' exercise of their First Amendment rights, 63 F.3d at 1534, the Tenth Circuit noted that "the ultimate inquiry is whether as a practical matter there is a realistic or reasonable <u>likelihood of prosecutorial conduct that would not have occurred but for the hostility or punitive animus towards the Appellee</u> because he exercised his specific legal rights." *Id*. at n.6

(*emphasis added*) The Tenth Circuit framed the § 1983 claim for First Amendment rights violations under the tort of "vindictive prosecution." *Id.* "These cases make clear that a governmental lawsuit brought with the intent to retaliate against a citizen for the exercise of his First Amendment rights is of itself a separate violation that provides grounds for a § 1983 suit." *Beedle v. Wilson*, 422 F.3d 1059 United States Court of Appeals (10th Cir. 2005)*Ibid*. at 1066.

Thus, when the District Court should have appropriately found that when Respondents *initiated* their prosecution, by seeking out a trespass order to manufacture probable cause for the arrest and continued prosecution of Mr. Fenn, that they lacked probable cause, then the District Court should have found that Mr. Fenn could sustain a Section 1983 claim for both a malicious prosecution and a vindictive prosecution claim.

3. Without a Determination that Respondents are Entitle to Qualified Immunity the District Court's Decision Regarding the *Monell* claims was in Error.

The District Court's determination of that qualified immunity is determinative of Mr. Fenn's *Monell* claims, at least initially. Thus, without belaboring the analysis contained in the District Court's decision, Mr. Fenn offers that if the Respondents lacked probable cause to initiate the prosecution that they undertook at the onset; then the District Court's decision must fail with regard to both *Monell* claims and the state law claim for Malicious Abuse of Process. *See Monell v. New York City Dep't of Social Servs*, 436 U.S. 658, 694 (1978); *see also Durham v. Guest,* 2009-NMSC-007, ¶

29, 145 N.M. 694; *see also Fleetwood Retail Corp. of N.M. v. LeDoux*, 2007-NMSC-047, ¶ 12, 142 N.M. 150.

C. The Tenth Circuit was Wrong to Engage in Fact Finding.

Finally, facing a clearly erroneous District Court decision the Tenth Circuit created an escape hatch in the factual record regarding whether or not the large open meeting space open to the public in the Spaceport Visitor Center was a public forum in order to preserve qualified immunity for the Respondents. Quite simply, the facts regarding whether or not this was a public forum were never at issue before the District Court, because the parties never disputed that it was. Yet, the Tenth Circuit, without the benefit of substantive factual record regarding the space, adjudicated for the first time on appeal that the open public space was not a public forum.

Few things are as basic and fundamental to our system of justice as the notion that we are innocent until proven guilty. Such an important precept comes into play in a civil case such as this when the District Court, and then the Tenth Circuit, construed or fabricated facts to convict Mr. Fenn of being "obnoxious" or determine without any factual development that Mr. Fenn was not peacefully protesting in a traditional public forum. This Court has been abundantly clear for a significant amount of time that "factfinding is the basic responsibility of district courts, rather than appellate courts, and ... the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court." *DeMarco v. United States*, 415 U.S. 449, 450, n., 94 S.Ct. 1185, 1186, n., 39 L.Ed.2d 501 (1974). Moreover, where there is more than one way to construe ultimate

facts, as is the case here regarding Mr. Fenn's conduct, or whether or not the public space was traditional public fora, this Court has directed that a remand is the proper course unless the record permits only one resolution of the factual issue. *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 331–332, 95 S.Ct. 472, 479–480, 42 L.Ed.2d 498 (1974). Instead, contrary to the holdings of this Court, the Tenth Circuit engaged not only in affirming the mistakes of the district court but took its own independent step to further construe allegations or create factual support to construe conclusions that support a finding of qualified immunity. As the Supreme Court has stated:

> Proceeding in this manner seems to us incredible unless the Court of Appeals construed its own well-established Circuit rule with respect to its authority to arrive at independent findings on ultimate facts free of the strictures of Rule 52(a) also to permit it to examine the record and make its own independent findings with respect to those issues on which the district court's findings are set aside for an error of law.

Pullman-Standard v. Swint, 456 U.S. 273, 293, 102 S. Ct. 1781, 1792, 72 L. Ed. 2d 66 (1982). Thus, Tenth Circuit erred in construing the facts as follows:

1) **Dan Hicks, the Spaceport Director, never complaint about Mr. Fenn, instead police initiated a conversation with Mr. Hicks and encouraged him to request a trespass based upon their opinion of Mr. Fenn's speech and conduct.**
2) **There is absolutely no factual support in the record that would allow the lower court, much less this Panel on Appeal, to construe that there was probable cause to trespass Mr. Fenn from the open auditorium spaces. Moreover, unsubstantiated, unfounded allegations from other building tenants not in control of the portion of the building where**

Mr. Fenn was peacefully protesting, of feeling unsafe that a senior citizen would suddenly turn violent or begin damaging property when he did not exhibit nor is even alleged to have engaged in words or actions that could reasonably be indicative of imminent threat, cannot provide the support Tenth Circuit used to shield the government with qualified immunity.

3) **There is no factual development that supports the Tenth Circuit's determination that the auditorium, no longer used (for over 75 years) for meetings and political assembly, currently housing a promotional exhibit for a government agency, was not "traditional public fora." In fact, there are actually facts not in the record that disprove this conclusion by the Tenth Circuit.**

Thus, the Tenth Circuit created facts not contained in the record that never happened, such as that Respondent Dan Hicks complained about Mr. Fenn and that the space (previously an auditorium used for public meetings) was not a type of space where a person would traditionally engage in protected speech or conduct such as petitioning for redress. Such action by the Tenth Circuit is incorrect and is a clear contradiction of this Court's direction. The Tenth Circuit in so interpreting facts compounded its error by affirming the district court's decision construing facts concerning Mr. Fenn's behavior against Mr. Fenn. Both the trial and reviewing courts must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party. *E.g., Jenkins v. McKeithen*, 395 U.S.

411, 421—422, 89 S.Ct. 1843, 1848—1849, 23 L.Ed.2d 404 (1969).

CONCLUSION

It is the sincere hope that cases that present such an extreme departure from the clearly established direction of this Court are as rare as it seems to present to Petitioner, but it should be just as clear that to allow such an obviously flawed decision to stand would be manifestly unjust. And despite the troubling trend of the erosion of the ability to hold one's government accountable for depriving a person of their liberty interests, this case presents a startling step too far, a step over a line already far removed from where it started, that ignores the precedent of this Court and the clearly established weight of the jurisprudence from New Mexico. This Court's review is necessary if the boundaries of qualified immunity are to mean anything, and the matter is likely capable of being corrected summarily which Petitioners respectfully pray the Court consider.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that Petitioner's petition complies with the type-volume limitation of Supreme Court Rule 33.1 and 33.2 regarding page limitation as it consists of 7316 words using Microsoft Office Word 2010 in 12-point font in the Century family.

CERTIFICATE OF SUBMISSION

I hereby certify that the copy of the foregoing submitted in digital form via the Court's ECF system is an exact copy of the written document filed with the clerk. I further certify that all required privacy redactions have been made and that this brief has been scanned for viruses with the Avast Premier version 11.1.2245 and is free of viruses.

CERTIFICATE OF SERVICE

I certify that on June 15, 2021, I filed the foregoing through the United States Supreme Court ECF System and served one hardcopy of the Petition with the Clerk of the Court. Additionally, I certify that on June 15, 2021, I caused a copy of the foregoing to be served upon counsel for Respondents via their counsel of record as follows:

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APPENDIX

FILED
United States Court of Appeals
Tenth Circuit

December 29, 2020

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

RON FENN,

Plaintiff - Appellant,

v.

CITY OF TRUTH OR CONSEQUENCES; MICHAEL APODACA, Truth or Consequences Police Captain, individually acting under the color of law; LEE ALIREZ, Truth or Consequences Police Chief, individually acting under color of state law; DANIEL HICKS, Director of Spaceport America,

Defendants - Appellees.

No. 19-2201

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO (D.C. NO. 2:18-CV-00634-WJ-GBW)

A. Blair Dunn, Western Agriculture, Resource an Business Advocates, LLP, Albuquerque, New Mexico, for Appellant.

Matthew Zidovsky (Michael R. Heitz with him on the brief), Montgomery & Andrews, P.A., Santa Fe, New Mexico, for Appellee Daniel Hicks.

Mark Standridge (Cody R. Rogers with him on the brief), Jarmie & Rogers, P.C., Las Cruces, New Mexico, for Appellees City of Truth or Consequences, Chief Lee Alirez, and Captain Michael Apodaca.

Before **TYMKOVICH**, Chief Judge, **LUCERO**, and **BACHARACH**, Circuit Judges.

TYMKOVICH, Chief Judge.

The City of Truth or Consequences converted a community center for senior citizens into a visitor center operated by Spaceport America. Seeking leadership in the emerging space industry, New Mexico created Spaceport as a public agency to attract investment in a planned space launch facility near Truth or Consequences. The facility, the Lee Belle Johnson Center, contained not only Spaceport, but other tenants, including Geronimo Trail Scenic Byway and Follow the Sun Tours.

A local resident, Ron Fenn, was unhappy with this change, and beginning in 2015 he publicly protested his opposition over a period of several years. Some of his protests were inside the building and included offensive behavior and unauthorized uses of the facility. Several tenants in the building, including Spaceport Director Daniel Hicks, complained to local law enforcement about Fenn's behavior and presence at the Center. He was issued three no trespass notices pursuant to New Mexico law over that time. Finally, in June 2017, Fenn was arrested and charged with trespass. The charges were later dismissed.

Fenn sued, asserting (1) a 42 U.S.C. § 1983 civil rights claim for First Amendment retaliation against Hicks, arresting officer Michael Apodaca, and Police Chief Lee Alirez; (2) a § 1983 claim for malicious prosecution against Apodaca and Alirez; (3) claims against Truth or Consequences for supervisory liability and under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978); (4) a § 1983 claim for supervisory liability against Alirez; and (5) a state law claim for malicious abuse of process against Apodaca and Alirez.

The district court rejected Fenn's claims on qualified immunity grounds, and we affirm. The individual defendants are entitled to qualified immunity because no constitutional violation occurred. And, in the absence of a constitutional violation by Apodaca or Alirez, there is no basis for the *Monell* and supervisory claims. Finally, the district court correctly dismissed Fenn's state law claim for malicious abuse of process.

I. Background

As the district court noted, Fenn has "a lengthy history of being asked to leave the Lee Belle Johnson Center." App. at 112. In June 2015, a tenant at the Center asked police to ban Fenn from the premises because he was offensive and made her feel unsafe. Another tenant reported to the police that Fenn was improperly soliciting business at the Center and requested he be banned from the Center. Police were told by witnesses that while at the Center, Fenn handed out a

business card that read, "Spaceport Tour Video Memory Services," and asked for donations in connection with his video services.

Apodaca and Alirez subsequently served no-trespass notices on Fenn as a result of the tenants' requests. Fenn was later prosecuted for conducting business without a license and convicted on September 9, 2015.

Approximately a year later, someone contacted the police department and reported Fenn had entered the Center and was making "obnoxious comments." Apodaca reported to the Center and was informed Fenn had been "carrying on" about how the building was no longer being used as a senior center. Apodaca took no action against Fenn.

Apodaca responded to another call from the Center in May 2017. Witnesses reported Fenn had been on the premises yet again and was putting up posters. One tenant expressed concern that expensive items kept in the Center could be damaged or stolen, and another notified the officer she was interested in pursuing a no-trespass notice against Fenn to prevent him from returning. Around the same time, Hicks also requested such a notice on behalf of Spaceport—the first such request made by Spaceport. After collecting Hicks' complaint, Alirez served the new no-trespass notice on Fenn.

On June 4, 2017, someone at the Center again contacted the police to report Fenn's presence inside the building. An officer responded and found Fenn inside

the "common use area of the building," in an area housing a satellite library (although the library was closed at the time). The responding officer told Fenn to leave, but he refused. The officer then issued Fenn a citation for trespass, which Alirez later offered to hold in abeyance as long as Fenn committed no further violations.

Two weeks later, an officer was dispatched to respond to yet another report of Fenn's trespassing. Fenn told the responding officer he was not trespassing but protesting. Both the officer and Alirez ordered Fenn to leave, and he again refused. Alirez then arrested Fenn and a complaint was filed against him for Criminal Trespass pursuant to N.M. Stat. § 30-14-1(C).

In the criminal case, Fenn filed a motion to dismiss for failure to establish essential elements of the offense. The motion was denied after a hearing. The criminal case, however, was later dismissed without prejudice and never refiled. In the dismissal papers, the district attorney stated the charges were being dismissed because there was "insufficient evidence to proceed with charges at this time." App. at 117.

II. Analysis

Fenn argues that all of his claims should be allowed to proceed to trial. We disagree, concluding the district court properly granted qualified immunity on Fenn's § 1983 claims of First Amendment retaliation and malicious prosecution.

Fenn did not establish the elements of these constitutional claims. And because those claims fail, his claims for supervisory liability against Alirez and for *Monell* liability against the City also fail. Finally, Fenn's state claim for malicious abuse of process fails because he cannot show the criminal complaint was unsupported by probable cause.

We review de novo a district court's dismissal of an action under Rule 12(b)(6), as well as a district court's grant of summary judgment under Rule 56. *Khalik v. United Air Lines*, 671 F.3d 1188, 1190 (10th Cir. 2012) (Rule 12(b)(6) dismissals); *Simms v. Okla. ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir. 1999) (grants of summary judgment).

Defendants here raised a defense of qualified immunity, "which shields public officials from damages actions unless their conduct was unreasonable in light of clearly established law." *T.D. v. Patton*, 868 F.3d 1209, 1220 (10th Cir. 2017). "Once an individual defendant asserts qualified immunity, the plaintiff carries a two-part burden to show: (1) that the defendant's actions violated a federal constitutional or statutory right, and, if so, (2) that the right was clearly established at the time of the defendant's unlawful conduct." *Gutierrez v. Cobos*, 841 F.3d 895, 900 (10th Cir. 2016) (internal quotation marks omitted).

We consider each of Fenn's claims in turn.

A. First Amendment Retaliation

Fenn argues that he has sufficiently alleged the violation of his First Amendment right to peaceful assembly and protest, and that the district court erred in concluding otherwise. We disagree.

To prove a claim of retaliation for the exercise of First Amendment rights, Fenn must establish: (1) he was engaged in constitutionally protected activity; (2) that Defendants' actions caused Fenn to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) the Defendants' adverse action was substantially motivated as a response to Fenn's exercise of constitutionally protected conduct. *Nielander v. Bd. of Cty. Comm'rs*, 582 F.3d 1155, 1165 (10th Cir. 2009).

Fenn has failed to establish a violation of his First Amendment rights for two reasons. First, he has not shown he was engaged in constitutionally protected activity because the Center is not the type of public forum in which the government must allow picketing and other forms of protest Fenn claims to have engaged in. "Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of government property without regard to the nature of the property." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 799–800 (1985). The Center is a city-owned building, leased to various entities, and we conclude it is a nonpublic

forum. In contrast, traditional public fora are places that "by long tradition or by government fiat have been devoted to assembly and debate," such as streets, sidewalks, and parks. *Perry Ed. Ass'n v. Perry Local Ed. Ass'n*, 460 U.S. 37, 45 (1983).

Our case law illustrates this distinction.[1] In *Hawkins v. City & County of Denver*, 170 F.3d 1281, 1287–88 (10th Cir. 1999), we held that the main walkway of the Denver Performing Arts Complex, which the city leased to several commercial and public agency tenants, was not a traditional public forum despite its high volume of public traffic. We explained that although the walkway was generally open to the public, "[p]ublicly owned or operated property does not become a public forum simply because members of the public are permitted to come and go at will." *Id.* at 1287 (internal quotations omitted). That is because "when government property is not dedicated to open communication, the government may—without further justification—restrict use to those who participate in the forum's official business." *Perry*, 460 U.S. at 53; *see also International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 686 (1992) (O'Connor, J., concurring). We also noted in *Hawkins* that the walkway was not

[1] In addition, a designated public forum is a place the government creates "by intentionally opening a non-traditional forum for public discourse." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 802 (1985). Fenn has not argued the Center is a designated public forum.

analogous to a public right of way or thoroughfare because it "does not form part of Denver's . . . transportation grid, for it is closed to vehicles, and pedestrians do not generally use it as a throughway to another destination." 170 F.3d at 1287.

The same holds true with respect to the Center, which has been leased to various tenants for specific uses, and is not used as a throughway or other pedestrian walkway. Even if the Center may have at one time been "open-to-the-public space," as Fenn puts it, that does not by itself confer the status of a traditional public forum. "The government may, by changing the physical nature of its property, alter it to such an extent that it no longer retains its public forum status." *Hawkins*, 170 F.3d at 1287. And while First Amendment restrictions in a nonpublic forum may still be challenged as unreasonable in light of the purposes they are intended to serve, *see id.* at 1288–89, Fenn has made no such argument here. Rather, he continues to insist that the Center is a traditional public forum for purposes of the First Amendment. It is not.

Second, where the adverse action takes the form of an arrest and subsequent prosecution, the plaintiff must show an absence of probable cause. *Hartman v. Moore*, 547 U.S. 250, 252, 265–66 (2006) (retaliatory prosecution); *Nieves v. Bartlett*, 139 S. Ct. 1715, 1726 (2019) (retaliatory arrest). The presence of probable cause, therefore, is a bar to a First Amendment retaliation claim, and Fenn has not shown a lack of probable cause here.

"Probable cause is based on the totality of the circumstances, and requires reasonably trustworthy information that would lead a reasonable officer to believe that the person about to be arrested has committed or is about to commit a crime." *Cortez v. McCauley*, 478 F.3d 1108, 1116 (10th Cir. 2007). Here, the Defendants had ample trustworthy information that would have led a reasonable officer to believe Fenn had committed criminal trespass under New Mexico law. The relevant portion of the trespass statute states: "Criminal trespass . . . consists of knowingly entering or remaining upon lands owned, operated or controlled by the state or any of its political subdivisions knowing that consent to enter or remain is denied or withdrawn by the custodian thereof." N.M. Stat. § 30-14-1(C). The Center is owned by the City of Truth or Consequences. And Fenn's own complaint alleges that building tenants reported to the police that Fenn's behavior made some tenants feel unsafe and gave rise to concerns about damage or theft, thus resulting in at least three no-trespass notices being issued against him. App. at 10–12. On this set of facts, there was probable cause for the officers to arrest Fenn after multiple violations of that notice, and for the subsequent prosecution of Fenn for criminal trespass.

Fenn argues, however, that a lack of probable cause is not a required element of First Amendment retaliation under the circumstances presented here. He claims to fit within a narrow exception to the no-probable-cause requirement,

as described by the Supreme Court in *Nieves*. In that case, the Court held a plaintiff need not show a lack of probable cause "when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." 139 S. Ct. at 1727. But Fenn has not pointed to any evidence in the record that he was arrested when other similarly situated individuals were not. Indeed, it seems unlikely that any such similarly situated individuals exist. The record demonstrates, after all, that Fenn was arrested only after having violated no-trespass orders at the Center at least three times, and only after multiple complaints from building tenants about his behavior. Fenn does not fit within the narrow exception carved out in *Nieves*.

Accordingly, because Fenn has not shown he was engaged in constitutionally protected activity and because Defendants had probable cause for Fenn's arrest and prosecution, he has not established a constitutional claim for First Amendment retaliation.

B. Malicious Prosecution under § 1983

To state a § 1983 claim for malicious prosecution, a plaintiff must show, among other things, that the original action terminated in favor of the plaintiff, and that no probable cause supported the original arrest, continued confinement, or prosecution. *Wilkins v. DeReyes*, 528 F.3d 790, 799 (10th Cir. 2008). While

Fenn has established—for summary judgment purposes—that the prosecution ended in his favor, he again fails to establish that probable cause was lacking.

To show that the termination was favorable, a plaintiff must allege facts that, if true, would allow a reasonable jury to find the proceedings terminated "for reasons indicative of innocence." *See M.G. v. Young*, 826 F.3d 1259, 1263 (10th Cir. 2016). Here, the charges were dismissed without prejudice, and the state court denied Fenn's motion to dismiss for failure to establish all the elements of the offense. Defendants point to case law stating that a § 1983 malicious prosecution claim may proceed "only if the criminal prosecution against the plaintiff is disposed of in a way which indicates his innocence." *Mendoza v. K-Mart, Inc.*, 587 F.2d 1052, 1057 (10th Cir. 1978).

Dismissal without prejudice does not necessarily indicate innocence, but here the district attorney stated in the dismissal papers that there was insufficient evidence to proceed. When the issue of termination indicating innocence is unclear, the court "look[s] to the stated reasons for the dismissal as well as to the circumstances surrounding it and determine[s] whether the failure to proceed implies a lack of reasonable grounds for the prosecution." *Cordova v. City of Albuquerque*, 816 F.3d 645, 651 (10th Cir. 2016) (internal quotations omitted). The surrounding circumstances point in both directions, but Fenn has cleared this

hurdle for summary judgment purposes based on the district attorney's stated reason for the dismissal.

Probable cause is an element of malicious prosecution "because not every arrest, prosecution, confinement, or conviction that turns out to have involved an innocent person should be actionable." *See Pierce v. Gilchrist*, 359 F.3d 1279, 1294 (10th Cir. 2004). Fenn cannot show that his prosecution was without probable cause, for the same reasons discussed above. His own complaint establishes a basis for probable cause to support his arrest and prosecution. A reasonable officer would have believed that probable cause existed given New Mexico's definition of criminal trespass and the multiple complaints from various tenants about Fenn's behavior.

The district court did not err in dismissing this claim.

C. **Monell *and Supervisory Liability***

In the single paragraph Fenn devotes to these claims in his brief, he argues only that if the panel overturns the district court's qualified immunity determination with respect to the individual defendants, then the *Monell* and supervisory claims must be revived. This argument implicitly recognizes that "[a] municipality may not be held liable where there was no underlying constitutional violation by any of its officers." *Hinton v. City of Elwood, Kan.*, 997 F.2d 774,

782 (10th Cir. 1993). Because Fenn cannot establish a violation of a clearly established constitutional right, his *Monell* and supervisory liability claims fail.

Accordingly, the claims against the City and Alirez were properly dismissed.

D. Malicious Abuse of Process Under New Mexico Law

The district court also correctly granted summary judgment on Fenn's state law claim. The elements of malicious abuse of process are: (1) the use of process in a judicial proceeding that would be improper in the regular prosecution or defense of a claim or charge; (2) a primary motive in the use of process to accomplish an illegitimate end; and (3) damages. *Fleetwood Retail Corp. v. LeDoux*, 164 P.3d 31, 35 (N.M. 2007). A mere allegation that one has maliciously filed a complaint is insufficient to state a claim unless it was done without probable cause or was accompanied by some subsequent abuse of process. *Durham v. Guest*, 204 P.3d 19, 25 (N.M. 2009). Fenn has made no allegation of an abuse of process after the complaint was filed, so he must show the criminal complaint was unsupported by probable cause. For the same reasons discussed above, Fenn cannot make such a showing.

III. Conclusion

For the foregoing reasons, we affirm the district court's dismissal of Fenn's First Amendment retaliation claims and its granting of summary judgment in favor of the Defendants on Fenn's remaining claims.

cc: Michael R. Heitz
Cody R. Rogers
Mark D. Standridge
Matthew A. Zidovsky

CMW/jjh

FILED
United States Court of Appeals
Tenth Circuit

December 29, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RON FENN,

Plaintiff - Appellant,

v.

CITY OF TRUTH OR CONSEQUENCES; MICHAEL APODACA, Truth or Consequences Police Captain, individually acting under the color of law; LEE ALIREZ, Truth or Consequences Police Chief, individually acting under color of state law; DANIEL HICKS, Director of Spaceport America,

Defendants - Appellees.

No. 19-2201
(D.C. No. 2:18-CV-00634-WJ-GBW)
(D. N.M.)

JUDGMENT

Before **TYMKOVICH**, Chief Judge, **LUCERO**, and **BACHARACH**, Circuit Judges.

This case originated in the District of New Mexico and was argued by counsel.

The judgment of that court is affirmed.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

FILED
United States Court of Appeals
Tenth Circuit

January 26, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RON FENN,

Plaintiff - Appellant,

v.

CITY OF TRUTH OR CONSEQUENCES; MICHAEL APODACA, Truth or Consequences Police Captain, individually acting under the color of law; LEE ALIREZ, Truth or Consequences Police Chief, individually acting under color of state law; DANIEL HICKS, Director of Spaceport America,

Defendants - Appellees.

No. 19-2201
(D.C. No. 2:18-CV-00634-WJ-GBW)
(D. N.M.)

ORDER

Before **TYMKOVICH**, Chief Judge, **LUCERO**, and **BACHARACH**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

RON FENN,

Plaintiff,

vs. No. 2:18-cv-00634 WJ-GW

CITY OF TRUTH OR CONSEQUENCES,
MICHAEL APODACA, Truth or Consequences
Police Captain individually acting under the color of Law,
LEE ALIREZ, Truth or Consequences Police Chief individually
Acting under color of state law, and DANIEL HICKS,
Director of Spaceport America,

Defendants.

MEMORANDUM OPINION AND ORDER GRANTING IN PART TRUTH OR CONSEQUENCES DEFENDANTS' MOTION TO DISMISS and GRANTING DEFENDANT DANIEL HICKS' MOTION TO DISMISS

THIS MATTER comes before the Court upon the Truth or Consequences Defendants' (Lee Alirez's, Michael Apodaca's, and City of Truth or Consequences') Motion for Partial Dismissal of Plaintiff's Complaint, filed August 2, 2018 **(Doc. 13)**, and Defendant Daniel Hicks' Motion to Dismiss, filed August 28, 2018 **(Doc. 18).** Having reviewed the parties' pleadings and the relevant law, the Court finds that Defendants' motions are well-taken and, therefore, are **GRANTED IN PART**.

BACKGROUND

Plaintiff Ron Fenn frequented a senior center at 301 S. Foch St., Truth or Consequences, New Mexico. The senior center was converted to other uses, and was leased out to Spaceport America, a New Mexico public agency, for use as a visitor center. Plaintiff publicly protested the conversion of the senior center.

On June 26, 2015, an employee of Geronimo Trail Scenic Byway, also located at 301 S. Foch St, asked police that Plaintiff "be trespassed" from 301 S. Foch. St. because Plaintiff "had been offensive to her, and that she felt unsafe around Plaintiff." **Comp**. ¶ 11-12.

On that same day, Rosemary Bleth, CEO for Follow the Sun Tours, located at 301 S. Foch. St., contacted police to report that Plaintiff was improperly soliciting. Ms. Bleth requested a trespass authorization against Plaintiff. When police arrived, the manager, Mr. Bleth, told officers he had observed Plaintiff walking around the inside of center engaged in conversation with an unidentified woman. Plaintiff requested a pen and paper to jot down her email address. Mr. Bleth alleged that Plaintiff handed a business card to the woman that said "Spaceport Tour video Memory services, and that Plaintiff asked for a $10 donation for the videos. Mr. Bleth told officers that Plaintiff had been a very vocal opponent of the opening of the Spaceport visitor center.

Plaintiff alleges that a "trespass authorization" was issued at the request of the Rosemary Bleth, a "representative" of Spaceport America, restricting Plaintiff from 301 S. Foch St. That same day, Captain Apodaca and Chief Alirez attempted to serve the trespass authorization on Mr. Fenn. Mr. Fenn took receipt of the trespass form. Chief Alirez received a copy of the business card Plaintiff had been handing out, which stated "help save our Lee Belle Johnson Senior Recreation center."

Chief Alirez questioned Plaintiff whether he had a business license. Plaintiff was prosecuted for conducting business without a license and convicted on September 9, 2015.

On October 10, 2016, Linda DeMarino contacted the police department and reported Plaintiff had entered 301 S. Foch St. and was making "obnoxious comments." Captain Apodaca responded. Ms. DeMarino informed Captain Apodaca that Plaintiff had been "carrying on" about

the building no longer being used as a senior center. Ms. DeMarino filmed Plaintiff's behavior. There is no allegation that Cpt. Apodaca took any action.

On May 5, 2017, Captain Apodaca responded to a call by John Muenster, a volunteer of Geronimo Trail Scenic Byway center, about Plaintiff being on the property in violation of trespass orders. Plaintiff was putting up posters on a counter inside the center. Captain Apodaca told Plaintiff that he could "put up his propaganda and stay… but not to harass any visitors." Mr. Muenster was concerned that expensive items kept in the center could be damaged or stolen. Ms. Bleth notified the officer that she was interested in a criminal trespass order against Mr. Fenn to prevent him from entering the location.

On May 11, 2017, Defendant Hicks, CEO of Spaceport America requested a trespass order from Chief Alirez based on prior incidents as preventative measure. Chief Alirez drove 75 miles to the officers of Spaceport America for Defendant Hicks' signature that day. Chief Alirez then met with Plaintiff on May 12, 2017 to serve the trespass order. Plaintiff received it but refused to sign it.

On June 4, 2017, Larena Miller contacted the police department to report Plaintiff Fenn inside 301 S. Foch St. Sgt. Baker responded and found Mr. Fenn inside the "common use area of the building," in the area housing a satellite library. Sgt. Baker and Chief Alirez told Plaintiff to leave, and Plaintiff refused. There is no allegation whether Plaintiff was made to leave or whether any further action as taken.

Chief Alirez met with Plaintiff on June 13, 2017 in his office, and offered to hold the newest citation in abeyance as long as Plaintiff Fenn had no further violations at 301 S. Foch St.

On June 18, 2017, Officer Ontiveros was dispatched to another trespassing call at 301 S. Foch St. Plaintiff was "within the common area of the areas he had previously been trespassed

from." Plaintiff said he was not trespassing but was protesting. Both Officer Ontiveros and Chief Alirez ordered Plaintiff to leave, and he refused. Chief Alirez then arrested Plaintiff and a criminal complaint was filed against him for Criminal Trespass pursuant to NMSA § 30-14-1(C).

In the criminal case, Plaintiff filed a motion to dismiss for failure to establish essential elements of the offense. A hearing was held, and the motion to dismiss was denied. The criminal case was dismissed without prejudice (*Nolle Proseque*) on October 11, 2017.

Plaintiff filed this complaint alleging (1) First Amendment Retaliation; (2) Malicious Prosecution and Abuse of Process; and (3) supervisory and *Monell* liability. The Truth or Consequences Defendants seek dismissal of Plaintiff's First and Third causes of action on the basis of qualified immunity. Moreover, Defendant Hicks seeks dismissal of the First Amendment claim on similar grounds.

Because some arguments were either not addressed by Plaintiff in his response or were raised for the first time by the T or C Defendants in their reply brief, the Court ordered supplemental briefing from Plaintiff.

LEGAL STANDARD

Rule 12(b)(6) permits the Court to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a plaintiff's complaint must have sufficient factual matter that if true, states a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) ("*Iqbal*"). As such, a plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) ("*Twombly*"). All well-pleaded factual allegations are "viewed in the light most favorable to the nonmoving party." *Brokers' Choice of Am., Inc. v. NBC Universal, Inc*., 757 F.3d 1125, 1136 (10th Cir. 2014). In ruling on a motion to dismiss, "a court

should disregard all conclusory statements of law and consider whether the remaining specific factual allegations, if assumed to be true, plausibly suggest the defendant is liable." *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011). Mere "labels and conclusions" or "formulaic recitation[s] of the elements of a cause of action" will not suffice. *Twombly*, 550 U.S. at 555.

DISCUSSION

Plaintiff alleges that Defendants violated his free speech rights under the First Amendment. The free speech rights protected by the First Amendment include the right to petition the government for redress of grievances. *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998). Governmental retaliation for exercising one's freedom of speech constitutes infringement of that freedom. *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000). To state a First Amendment retaliation claim, a plaintiff must allege "(1) he was engaged in constitutionally protected activity, (2) the government's actions caused him injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the government's actions were substantially motivated as a response to his constitutionally protected conduct." *Mocek v. City of Albuquerque*, 813 F.3d 912, 930 (10th Cir. 2015), *quoting Nielander v. Bd. of Cty. Comm'rs*, 582 F.3d 1155, 1165 (10th Cir. 2009).

I. First Amendment Retaliation Claim against Defendants Apodaca and Alirez (Count I).

Plaintiff alleges that Defendants Apodaca and Alirez violated his First Amendment right to free speech by issuing trespass notices to him and ordering him to vacate 301 S. Foch St. Plaintiff also alleges that Defendant Alirez arrested him, in retaliation for his protest about the

alleged misuse of 301 S. Foch St. Plaintiff also frames this case as a retaliatory prosecution case in violation of the First Amendment. *See* **Doc. 17, p. 4-6**.

The Truth or Consequences Defendants seek dismissal of the First Amendment Retaliation claim on qualified immunity grounds. Defendants argue that these claims should be dismissed under qualified immunity because (1) the officers had at least arguable probable cause to arrest Plaintiff, and (2) the law was not clearly established that arresting and prosecuting Plaintiff where there was probable cause to do so would constitute First Amendment retaliation. In its discretion, the Court addresses only the second prong of qualified immunity, which is dispositive. *Pearson v. Callahan*, 129 S.Ct. 808, 818 (2009).

A. General Law on Clearly Established Prong and Arguable Probable Cause.

When a Plaintiff alleges an unlawful retaliatory arrest in violation of the First Amendment, the First and Fourth Amendment analyses overlap to some extent. *See Sause v. Bauer*, 138 S. Ct. 2561, 2563, 201 L. Ed. 2d 982 (2018) ("When an officer's order to stop praying is alleged to have occurred during the course of investigative conduct that implicates Fourth Amendment rights, the First and Fourth Amendment issues may be inextricable."). The Court agrees with Defendants that for a First Amendment retaliatory arrest or prosecution case, it must analyze whether there was arguable probable cause. *See Mocek v. City of Albuquerque*, 813 F.3d 912, 931–32 (10th Cir. 2015) (In First Amendment Retaliation claim, Plaintiff must show lack of probable cause for retaliatory *prosecution* cases, and law not clearly established that officers violate First Amendment where there is probable cause for *arrests*), *citing Hartman v. Moore*, 547 U.S. 250, 265–66, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006) (plaintiff in first amendment retaliatory prosecution case must show lack of probable cause); *Peterson v. Kopp*, 754 F.3d 594, 602 (8th Cir. 2014) (in retaliatory

arrest claim for violation of First Amendment, analyzing whether there was a lack of probable cause or arguable probable cause).

"A right is clearly established in this circuit when a Supreme Court or Tenth Circuit decision is on point, or if the clearly established weight of authority from other courts shows that the right must be as the plaintiff maintains." *Thomas v. Kaven*, 765 F.3d 1183, 1194 (10th Cir. 2014) (internal quotation marks omitted); *Gadd v. Campbell*, 2017 WL 4857429, at *4 (10th Cir. 2017) (unpublished). "A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, —– U.S. ——–, 136 S.Ct. 305, 308, 193 L.Ed.2d 255 (2015) (per curiam) (internal quotation marks omitted). "Clearly established law should not be defined at a high level of generality." *White v. Pauly*, —– U.S. ——–, 137 S.Ct. 548, 552, 196 L.Ed.2d 463 (2017) (internal quotation marks omitted). Instead, "the clearly established law must be 'particularized' to the facts of the case." *Id.*

To determine whether an officer violated clearly established law, the Court looks to whether there was "arguable probable cause" for an arrest. *Garcia v. Escalante*, 678 F. App'x 649, 655 (10th Cir. 2017). Arguable probable cause exists where "a reasonable police officer in the same circumstances . . . and possessing the same knowledge as the officer in question *could* have reasonably believed that probable cause existed in light of well-established law." *Felders ex rel. Smedley v. Malcom*, 755 F.3d 870, 879 (10th Cir. 2014). "Arguable probable cause is another way of saying that the officers' conclusions rest on an objectively reasonable, even if mistaken, belief that probable cause exists." *Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir. 2014).

Therefore, to the extent this is a retaliatory arrest or prosecution case, Plaintiff must show the absence of arguable probable cause.

B. Defendant Alirez had arguable probable cause to arrest or prosecute Plaintiff.

The Court agrees with Defendants that a reasonable officer could have reasonably believed that probable cause existed for criminal trespass in light of well-established law. The New Mexico Criminal Trespass Statute (NMSA § 30-14-1) provides:

> C. Criminal trespass also consists of knowingly entering or remaining upon lands owned, operated or controlled by the state or any of its political subdivisions knowing that consent to enter or remain is denied or withdrawn by the custodian thereof.

NMSA § 30-14-1 (C). Here, Defendant Hicks revoked consent for Plaintiff to be on the premises and signed a trespass notice.[1] Defendant Hicks was the CEO of Spaceport America, which leased a portion of 301 S. Foch St. as a visitor center. A reasonable officer would believe that Defendant Hicks was a custodian of 301 S. Foch St. who could revoke Plaintiff's permission to be on the property. Moreover, Plaintiff was hand-delivered the trespass notice by Defendants. Finally, an officer observed Plaintiff at the Spaceport America Visitors Center and was repeatedly warned to leave and he refused. Therefore, based on Plaintiff's allegations, a reasonable officer would believe that Plaintiff trespassed, because (1) the custodian revoked Plaintiff's authorization to be on the premises, (2) officers gave notice to Plaintiff that he must vacate, and (3) Plaintiff was observed by an officer at 301 S. Foch St. and he refused to leave.

Plaintiff argues that Defendant Hicks was not the custodian of 301 S. Foch St., which Spaceport America leased, and therefore could not revoke Plaintiff's permission to be there. The Court finds no support for this position in the New Mexico statutes or case law. Defendant Hicks was the CEO of Spaceport America, which leased the property for its visitor center, and therefore is likely the "custodian" permitted to revoke. Nevertheless, even if mistaken, the Court finds that

[1] To the extent Plaintiff argues that Ms. Bleth previously signed a trespass notice on behalf of Spaceport America, Plaintiff does not allege that the officers arrested or prosecuted Plaintiff based on that prior trespass notice. Therefore, Ms. Bleth's trespass notice is not relevant to the arguable probable cause analysis.

a reasonable officer would believe that Defendant Hicks had authority to revoke Plaintiff's permission to be on the property.

Plaintiff also argues that there was no probable cause, because he did not do anything to warrant being excluded from the visitor center by the custodian. Initially, the Court notes that Plaintiff did not cite any law on when probable cause for trespass is valid in the First Amendment context. Plaintiff does not cite to case law showing when a trespass statute can be enforced or argue that the trespass statute is overbroad. This falls short of Plaintiff's burden under the clearly established prong.

Nevertheless, as explained below, the issue here is whether it is clearly established that an officer, *assuming retaliatory animus*, would violate Plaintiff's First Amendment rights by arresting him where there is probable cause. *See Mocek v. City of Albuquerque*, 813 F.3d 912, 931-32 (10th Cir. 2015) (regardless of officer's retaliatory motives, it was not clearly established that officer could not arrest plaintiff when he reasonably believed he had probable cause); *Moral v. Hagen*, 553 F. App'x 839, 840 (10th Cir. 2014) (unpublished) (evidence of retaliatory motive not enough to overcome qualified immunity in first amendment retaliatory arrest case, where there was probable cause), *citing Reichle v. Howards*, —— U.S. ——, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012). Here, Plaintiff fails to cite to any case that indicates that a reasonable officer would believe that he did not have probable cause to arrest Plaintiff based on the First Amendment.

C. Law was not Clearly Established as to Arrest and Prosecution.

Defendants argue that it was not clearly established at the time of Plaintiff's arrest in June 2017 that an arrest supported by probable cause could constitute First Amendment Retaliation. The Court agrees.

1. Plaintiff did not carry heavy burden of citing to clearly established law.

Initially, the Court notes that Plaintiff failed to carry his burden of citing to any clearly established law that states that he has a right to be free from retaliatory arrest or prosecution where there is arguable probable cause. On that basis alone, Plaintiff failed to carry his heavy burden. *See Cox v. Glanz*, 800 F.3d 1231, 1247 (10th Cir. 2015) (plaintiff failed burden under qualified immunity by failing to cite to any Supreme Court or Tenth Circuit opinion that would indicate right was clearly established); *Gutierrez v. Cobos*, 841 F.3d 895, 907 (10th Cir. 2016) (plaintiff failed to meet burden where they did not cite to legal authority for clearly established law or use term "clearly established"); *citing Thomas v. Durastanti*, 607 F.3d 655, 669 (10th Cir. 2010) ("The plaintiff bears the burden of citing to us what he thinks constitutes clearly established law."); *see also Rojas v. Anderson*, 727 F.3d 1000, 1004 (10th Cir. 2013) (same); *Smith v. McCord*, 707 F.3d 1161, 1162 (10th Cir. 2013); *Hedger v. Kramer*, 2018 WL 1082983, at *5 (10th Cir. 2018) ("The failure to identify [] a case is fatal to the claim.").

Plaintiff argues that *Reichle v. Howards*, 132 S.Ct. 2088, 2083 (2012), clearly established that an arrest supported by probable cause could give rise to a First Amendment Violation. **Doc. 17**, **p. 10-11**. But in that case, the United States Supreme Court expressly declined to hold whether a First Amendment retaliatory arrest claim could sound where the arrest was supported by probable cause and held instead that it was not clearly established that an arrest supported by probable cause could violate the First Amendment.

2. Law otherwise indicates that right is not clearly established. Alternatively, the Court agrees with Defendants that the law is not clearly established that an officer would violate Plaintiff's First Amendment right against retaliatory arrest or prosecution when there was arguable probable cause.

In *Hartman v. Moore*, the United States Supreme Court held a plaintiff in a retaliatory *prosecution* claim must show there was no probable cause to support the indictment. 547 U.S. 250, 265–66, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006). Later, in *Reichle v. Howards*, the Supreme Court held that it was not clearly established in the Tenth Circuit that there is "First Amendment right to be free from a retaliatory arrest that is supported by probable cause." 132 S.Ct. 2088, 2083 (2012) ("This Court has never recognized a First Amendment right to be free from retaliatory arrest that is supported by probable cause... [arresting officers] are thus entitled to qualified immunity."). The *Reichle* Court did not address whether a First Amendment retaliation claim may sound where there is probable cause. Since then, neither the Tenth Circuit nor the United States Supreme Court has established any such right. *See, e.g., Wilson v. Vill. of Los Lunas*, 572 F. App'x 635, 643 (10th Cir. 2014) (unpublished) (noting that *Howard* was reversed by *Reichle* without clearly establishing any right).

Plaintiff argues that whether there was arguable probable cause is not relevant to a First Amendment Retaliatory arrest claim. While Plaintiff may or may not be right that probable cause is not an element of a First Amendment retaliation claim, it is not clearly established that a First Amendment retaliatory arrest claim may sound where there is probable cause. *See, e.g., Reichle v. Howards*, 566 U.S. 658, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012) (it was not clearly established at the time of the defendant's arrest in June 2006 (six months before Marshall's arrest in the instant case) that an arrest supported by probable cause could violate the First Amendment); *Moran v. Cameron*, 362 F. App'x 88, 96–97 (11th Cir. 2010) (applying arguable probable cause standard in case of first amendment retaliation); *Mocek v. City of Albuquerque*, 813 F.3d 912, 931 (10th Cir. 2015)(in first amendment claim retaliation claim, stating "When Mocek was arrested, it was not clearly established that a plaintiff could show the requisite motive where his arrest was arguably

supported by probable cause. Mocek has not addressed Tenth Circuit or Supreme Court precedent compelling that conclusion."); *Marshall v. City of Farmington Hills*, 693 F. App'x 417, 426 (6th Cir. 2017) (holding that *Reichle* is dispositive of First Amendment retaliatory arrest claim); *see also Green v. Nocciero*, 676 F.3d 748, 751–52 (8th Cir. 2012) (arresting officers were entitled to qualified immunity on Fourth Amendment claim where activist was disruptive and refused to leave a public meeting and there was probable cause to arrest the activist for trespass under Missouri state law).

Moreover, *Howards v. McLaughlin*, 634 F.3d 1131, 1148 (10th Cir. 2011), *rev'd and remanded sub nom. Reichle v. Howards*, 566 U.S. 658, 132 S. Ct. 2088, 182 L. Ed. 2d 985 (2012), once reversed, did not clearly establishes the law in the Tenth Circuit. The Supreme Court in *Reichle* explicitly declined to address whether an arrest supported by probable cause violated the First Amendment, and instead reversed on the ground that it was not clearly established in the Tenth Circuit before then. The Court finds that this reversal creates enough uncertainty that a reasonable officer could not pick up *Howard* and then *Reichle* and conclude that *Howard* clearly establishes law beyond debate. To do so, officers would have to analyze both cases and determine which portions of *Howards* are still good law. *See, e.g.*, *Ross v. Balderas*, 2017 WL 2963885, at *4 (D.N.M. Mar. 16, 2017) (Kelly, J.) (for post-*Howards* arrest in 2016, Plaintiff must plead and prove absence of probable cause for underlying criminal charge); *Brewer v. Ross*, No. 1:15-CV-87-TC, 2018 WL 3128998, at *8 (D. Utah June 26, 2018) (in post-*Howards* arrest in September 2011, finding that law was not clearly established); *see also Karns v. Shanahan*, 879 F.3d 504, 522 (3d Cir. 2018) (in post-*Reichle* arrest, it was reasonable for officers to believe that arrest otherwise supported by probable cause would not violate plaintiff's First Amendment rights); *Moral v. Hagen*, 553 F. App'x 839, 840 (10th Cir. 2014) (unpublished) ("Only recently the Supreme Court

[in *Reichle*]explained that it remains unsettled under current law whether an officer violates the Fourth Amendment by initiating an arrest for retaliatory reasons when the arrest itself happens to be supported, as an objective matter, by probable cause.")

Under these circumstances, the Court declines to find that a constitutional right was "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix*, 136 S.Ct. at 308 (quoting *Reichle v. Howards*, 566 U.S. 658, 664, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012)). Generally, "existing precedent must have placed the statutory or constitutional question beyond debate" for a right to be clearly established. *Id.* A reasonable officer would not read *Howard* and *Reichle* determine that the relevant law is clearly established. To find it clearly established, an officer would have to discern a distinction that even the counseled parties in this case did not do in their briefs.

The relevant law in the Tenth Circuit is unclear and unsettled, and certainly not "beyond debate" for arrests post-2011. Therefore, the Court finds that Defendants Apodaca and Alirez are entitled to qualified immunity for the arrest and subsequent prosecution in June 2017.

3. Plaintiff failed to carry burden that issuing trespass notices under these circumstances violated clearly established First Amendment law.[2]

Plaintiff also alleges that Defendants violated his First Amendment rights by issuing trespass notices and ordering him to vacate 301 S. Foch St. **Comp., ¶ 63.** In a reply brief, Defendants argued that Plaintiff did not clearly establish that issuing trespass notices violated his First Amendment rights. The Court directed Plaintiff to respond to those arguments in a sur-reply.

None of Plaintiff's references in his sur-reply satisfy his burden of citing to clearly established law. Plaintiff cited to *Edwards v. South Carolina*, 372 U.S. 229, 83 S.Ct. 680 (1963).

[2] Plaintiff also appears to agree that the statute of limitations otherwise bars claims based on earlier trespass notices – but not the trespass notices issued in 2017. **Doc. 37, p. 3**.

In that case, the criminal defendants were convicted of breach of the peace following public protests on the streets. That case does not inform officers of when they can or cannot issue trespass warnings for the visitor center of a state agency. Plaintiff also cited to *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218, 2226 (2015), but that case addressed a town's content-based regulation of signs. These cases cite to the broad general proposition that prohibits government from "abridging the freedom of speech." U.S. Const., Amdt 1. However, none of these cases address whether an officer violates the First Amendment by serving trespass notices at the request of the apparent custodian of the building. Plaintiff did not attempt to address the legal contours of this issue. Plaintiff's quote of *The Big Lebowski* mentions prior restraint, but Plaintiff otherwise did not attempt to brief the issue of prior restraint.

Plaintiff also cited to, and quoted from, a movie – *The Big Lebowski* – arguing that the First Amendment right is so clearly established that it is prevalent in pop culture. *See* **Doc. 37, p. 3.** The Court disagrees and does not find that any of the cases cited by Plaintiff "have placed the statutory or constitutional question beyond debate." *Mullenix*, 136 S.Ct. at 308. Therefore, the Court concludes that these references do not satisfy Plaintiff's burden of citing to clearly established law under the specific facts of this case.

II. Supervisory and *Monell* claims against Defendant Alirez and T or C (Count III).

Plaintiff asserts that Chief Alirez and the City of Truth or Consequences are liable under *Monell* for failing to properly train, supervise, and admonish officers in his department. Plaintiff alleges that Chief Alirez is a "policymaker" and created a climate that led officers under his supervision to believe they could act with impunity and violate civil rights. Defendants Alirez and the City of Truth or Consequences argue that because the law is not clearly established, they cannot be held liable under a supervisory theory or under *Monell*.

A. Supervisor Liability for Chief Alirez as to First Amendment Violation.

To assert a § 1983 supervisory claim and overcome Defendant Alirez's assertions of qualified immunity, Plaintiff must establish that Chief Alirez, by virtue of a policy over which he possessed supervisory responsibility, caused a violation of Plaintiff's clearly established constitutional rights. *Pahls v. Thomas*, 718 F.3d 1210, 1228 (10th Cir. 2013) (Plaintiff "must identify specific actions taken by particular defendants, or specific policies over which particular defendants possessed supervisory responsibility, that violated [his] clearly established constitutional rights."); *see also Cox v. Glanz*, 800 F.3d 1231, 1250 (10th Cir. 2015) (analyzing clearly established law as to supervisory liability claim). Here, since, the underlying First Amendment claim was dismissed on the clearly established prong, the Court dismisses the supervisory liability claim against Defendant Alirez.

B. Municipal liability.

To the extent Plaintiff sues Chief Alirez in his official capacity, that is in reality a *Monell* claim against the City of Truth or Consequences. *Porro v. Barnes*, 624 F.3d 1322, 1328 (10th Cir. 2010). Defendant Truth or Consequences only argues that the *Monell* claim against it should be dismissed, because the First Amendment right at issue was not clearly established.

Generally, in the Tenth Circuit, granting qualified immunity to individual officers based on the clearly established prong does not do away with a *Monell* claim. *Hinton v. City of Elwood*, 997 F.2d 774, 782-83 (10th Cir. 1993); *see also Medina v. City and County of Denver*, 960 F.2d 1493, 1499–1500 (10th Cir. 1992) (granting qualified immunity on clearly established prong does not relieve local government of *Monell* claim), *citing Watson v. City of Kansas City, Kansas*, 857 F.2d 690, 697 (10th Cir.1988). Here, the Defendants argued that the violations were not *clearly established*, and therefore the Court did not address whether there was a constitutional violation.

Because Defendant Truth or Consequences does not argue any other basis to dismiss the *Monell* claim, Defendant Truth or Consequences' request to dismiss the *Monell* claim is denied.

However, if Plaintiff nevertheless seeks to abandon his *Monell* claim, he should notify the Court and opposing parties. *See* **Doc. 37, p. 3.**

III. Defendant Daniel Hicks is entitled to Qualified Immunity as to the First Amendment Claim (Count I).

A. Plaintiff's Allegations.

Plaintiff alleged that Defendant Hicks violated his First Amendment rights in two ways. First, Defendant Hicks requested a trespass order "based on prior incidents as a preventive measure". Second, Plaintiff alleges that Defendant Hicks signed a trespass order on May 11, 2016. Plaintiff did not allege the content of the notice or specify the scope of the trespass notice in his complaint. Plaintiff also does not allege that Defendant Hicks was involved in the arrest or prosecution.

Plaintiff alleged that he was protesting the use of a former T or C senior center as a visitor center for Spaceport America, a New Mexico state agency. The complaint details a long saga of Tor C officers responding to Plaintiff's presence at the visitor center, and either allowing him to stay, or asking him to leave, without taking any further action. But he also alleges that he (1) made other building occupants, including Larena Miller, feel unsafe, *Compl.* ¶ 12, (2) was soliciting and conducting business without a license, *id.* ¶¶ 12-13, 18-19, 21-24; (3) commenting that he was unhappy that the building was no longer being used as a senior center, *id.* ¶ 25-26, and (4) a volunteer at Geronimo Trial Scenic Byway was concerned about expensive items in the center being damaged or stolen and the police warned Plaintiff not to harass any visitors. For example, Plaintiff pled that he had previously approached visitors at the visitor center, handed out business

cards that said "Spaceport Tour Video Memory Services", and offered videos for a $10.00 donation.

B. Defendant Hicks' Defense of Qualified Immunity.

Defendant Hicks raised qualified immunity and specifically argued that the law was not clearly established.[3] The Court need not address whether there was a constitutional violation. For the reasons stated by Defendant Hicks, even assuming there was a constitutional violation, the Court concludes that Plaintiff failed to carry his heavy burden that the law was clearly established.

Qualified immunity "is an entitlement not to stand trial or face the other burdens of litigation. The privilege is an immunity from suit rather than a mere defense to liability. When a defendant asserts the defense of qualified immunity, the burden shifts to the plaintiff to overcome the asserted immunity." *Ahmad v. Furlong*, 435 F.3d 1196, 1198 (10th Cir. 2006) (internal citations and quotation marks omitted). "Cleary established law should not be defined at a high level of generality…the clearly established law must be "particularized" to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 552, 196 L. Ed. 2d 463 (2017) (quotation marks and internal citations omitted). Under the *White v. Pauly* analysis, the Supreme Court requires courts to identify a case where a government official acting under similar circumstances as Defendant Hicks was held to have violated the First Amendment. *Id.*

Plaintiff bears the burden of citing to case law and articulating the clearly established right he claims had been violated. *See Thomas v. Durastanti*, 607 F.3d 655, 669 (10th Cir. 2010); *Martinez v. Carr*, 479 F.3d 1292, 1295 (10th Cir. 2007) ("[T]he record must clearly demonstrate the plaintiff has satisfied his heavy two-part burden; otherwise, the defendants are entitled to

[3] Defendant Hicks is the CEO of Spaceport America, a New Mexico state governmental entity. Plaintiff does not dispute that Defendant Hicks is an individual entitled to assert the defense of qualified immunity.

qualified immunity." (internal quotation marks omitted)). In analyzing clearly established law, the Court looks at the cases cited by Plaintiff to determine whether those cases can serve as clearly established law. *See, e.g., A.M. v. Holmes*, 830 F.3d 1123, 1154 (10th Cir. 2016) (granting qualified immunity where "neither of Plaintiff's cited sources can serve as the clearly established law governing this First Amendment retaliation claim.")

Here, Plaintiff cites to cases which are not factually on point or are cited for general statements of law which would not make a reasonable official aware that he or she was violating Plaintiff's First Amendment rights. Plaintiff cites to no cases that apply the complex First Amendment analysis to the facts of this case, i.e., that it was clearly established that issuing a trespass notice barring Plaintiff for his alleged conduct from a state agency visitor center would violate Plaintiff's First Amendment rights. Therefore, those cases cited by Plaintiff do not clearly establish that Defendant Hicks would violate Plaintiff's First Amendment rights by having a trespass notice served on him.

For example, in an attempt to satisfy his burden, Plaintiff cited to *Wolford v. Lasater*, 78 F.3d 484, 488 (10th Cir. 1996). In that case the Tenth Circuit affirmed dismissal of a First Amendment retaliatory prosecution claim because probable cause supported the charges filed against Plaintiff. Here, Defendant Hicks was not alleged to have been involved in the arrest or prosecution of Plaintiff, and that case would not have placed Defendant Hicks on notice that he could violate Plaintiff's First Amendment rights by signing the trespass notice. Plaintiff also cites to a number of California state cases that the "presumptively protected status of peaceful picketing activities" is a well-established right. **Doc. 26, p. 10-11.**

Plaintiff also cites to the First Amendment retaliation elements. *Nielander v. Bd. Of Cnty Comm'rs,* 582 F.3d 1155, 1165 (10th Cir. 2009) *and Smith v. Plati*, 258 F.3d 1167, 1176-77 (10th

Cir. 2001). Again, that law is too general to identify to a reasonable official under these circumstances that his or her conduct was unlawful.

Most of Plaintiff's response ably argues why a constitutional violation occurred. While a constitutional violation may or may not have occurred, Plaintiff did not satisfy his burden of citing to cases that make it apparent to a reasonable government official that his conduct was unlawful.

CONCLUSION

The Court finds and concludes that Defendants Apodaca and Alirez are entitled to qualified immunity on the First Amendment claim (Count I). Defendant Alirez is also entitled to qualified immunity as to the supervisory liability claim (Count III). However, the *Monell* claim (Count III) against the City of Truth or Consequence remains. Moreover, Defendant Hicks is entitled to qualified immunity on Count I. Finally, Count II, which was not addressed in any of the motions to dismiss, remains.

IT IS THEREFORE ORDERED that the Truth or Consequences Defendants' Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim and Lack of Jurisdiction **(Doc. 13)** is hereby **GRANTED IN PART** for reasons described in this Memorandum Opinion and Order; and

IT IS FURTHER ORDERED that the Defendant Hicks' Motion to Dismiss **(Doc. 18)** is hereby **GRANTED** for reasons described in this Memorandum Opinion and Order.

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

RON FENN,

Plaintiff,

vs. No. 2:18-cv-00634 WJ-GW

CITY OF TRUTH OR CONSEQUENCES,
MICHAEL APODACA, Truth or Consequences
Police Captain individually acting under the color of Law,
LEE ALIREZ, Truth or Consequences Police Chief individually
Acting under color of state law, and DANIEL HICKS,
Director of Spaceport America,

Defendants.

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S SECOND AND THIRD CAUSES OF ACTION

THIS MATTER comes before the Court upon a Motion for Summary Judgment on Plaintiff's Second and Third Causes of Action, filed by Defendants City of Truth or Consequences, Chief Lee Alirez, and Captain Michael Apodaca ("Defendants" herein) on August 12, 2019 **(Doc. 42)**. Having reviewed the parties' pleadings and the applicable law, the Court finds that Defendant's motion is well-taken and, therefore, is granted.

BACKGROUND

Plaintiff, a resident of Sierra County, New Mexico, was an outspoken critic of the Spaceport America facility located in Sierra County. According to the complaint, Plaintiff claims that he "has been very outspoken regarding his disagreement with the city of Truth or Consequences regarding the lease of a city building to" Spaceport America. Compl., ¶¶1, 10. He

alleges that "[h]e has frequently attended meetings and publicly protested in traditional forums against the use of Truth or Consequences funds for the benefit of Spaceport America." *Id*. at ¶ 10.[1] Aug. 2, 2018).

Plaintiff has a lengthy history of being asked to leave the Lee Belle Johnson Center, 301 S. Foch St., which was a senior center in Truth or Consequences (where the Spaceport America Visitor's Center is housed, alongside other facilities). He was ultimately arrested for trespassing at the Johnson Center in June of 2017, and criminal trespass charges were filed against him. In the criminal case, Plaintiff filed a motion to dismiss for failure to establish essential elements of the offense. A hearing was held, and the motion to dismiss was denied. The criminal case was dismissed without prejudice (*Nolle Proseque*) on October 11, 2017.

Plaintiff filed this complaint alleging (1) First Amendment Retaliation; (2) Malicious Prosecution and Abuse of Process; and (3) supervisory and *Monell* liability.

In its prior Memorandum Opinion and Order, this Court granted in part Defendants' First Motion to Dismiss, concluding that:

(1) Defendants Apodaca and Alirez were entitled to qualified immunity on the First Amendment claim (Count I) because a "reasonable [law enforcement] officer could have reasonably believed that probable cause existed for criminal trespass in light of well-established law," Doc. 38 at 8;

(2) Defendant Alirez was also entitled to qualified immunity as to the supervisory liability claim (Count III); and that

(3) Defendant Hicks is entitled to qualified immunity on the First Amendment claim (Count I);

(4) However, the Court found that the *Monell* claim (Count III) against the City of Truth or Consequence remains.

[1] A more detailed factual account is contained in the Court's previous Memorandum Opinion and Order, Doc. 38.

DISCUSSION

In this motion, Defendants seek summary judgment on the second and third counts in the complaint which assert claims of (1) Malicious Prosecution and Abuse of Process; and (2) supervisory and *Monell* liability.

I. Legal Standard

Defendants have raised the defense of qualified immunity, which shields government officials from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *Romero v. Story*, 672 F.3d 880 (10th Cir. 2012). "In resolving questions of qualified immunity at summary judgment, courts engage in a two-pronged inquiry." *Tolan v. Cotton*, 134 S.Ct. 1861, 1865(2014). The first prong asks whether the facts, taken in the light most favorable to the party asserting the injury—here the Defendant officers—show that the officer's conduct violated a federal right. The second asks whether the right in question was "clearly established" at the time of the violation. *Id*. at 1865–66 (citations and quotation marks omitted). The Court may consider these two inquiries in any order. See *Pearson*, 555 U.S. 223, 236 (2009).

Once a defendant asserts a defense of qualified immunity, the burden shifts to the plaintiff to show that the defendant violated a constitutional or statutory right, and that the right was clearly established at the time of the conduct. *See McBeth v. Himes*, 598 F.3d 708, 716 (10th Cir. 2010). The contours of the right must be sufficiently clear that a reasonable official would understand what he is doing violates that right." *Thomas v. Kaven*, 765 F.3d 1183, 1194 (10th Cir. 2014). Courts may decide "which of the two prongs of the qualified immunity analysis should be

addressed first in light of the circumstances in the particular case." *Pearson*, 555 U.S. at 236 (2009); *Quinn v. Young*, 780 F.3d 998, 1004 (10th Cir. 2015).

As Defendants point out, Plaintiff has not complied with Fed.R.Civ.P.56 by offering any responsive facts to Defendants' thirty-one Statement of Undisputed Facts. Under Rule 56, a party opposing a motion for summary judgment must set out in its response specific facts showing a genuine issue for trial." Failure to do so allows the Court to consider the movant's facts as undisputed and enter summary judgment against the non-movant. *See* Fed.R.Civ.P. 56(e)(2); *Elephant Butte Irr. Dist. of New Mexico v. U.S. Dep't of Interior*, 538 F.3d 1299, 1305 (10th Cir. 2008); *see also* D.N.M.LR-Civ.56.1(b) ("All material facts set forth in the Memorandum will be deemed undisputed unless specifically controverted").

All of Defendants' statement of facts are supported by evidence presented in exhibits. Based on Plaintiff's failure to controvert any of these facts, the Court deems as undisputed all facts leading up to Plaintiff's arrest for criminal trespass, as well as the description and disposition of the criminal charges that were filed.

II. Second Cause of Action: Malicious Prosecution/Abuse of Process

Plaintiff asserts claims of malicious prosecution/abuse of process against Defendants Apodaca and Alirez.[2] Defendants contend that Plaintiff cannot maintain a claim for malicious prosecution under the first qualified immunity prong, and that Defendants Alirez and Apodaca are entitled to qualified immunity under the second "clearly established" prong.

A. Malicious Prosecution: Probable Cause and Favorable Termination

To state a Section 1983 claim for malicious prosecution, a plaintiff must show:

[2] Defendants point out that Captain Apodaca did not actually arrest Plaintiff on June 18, 2017 or file charges against him. Doc. 42 at 11, n.5. Chief Alirez arrested Plaintiff and filed the second complaint regarding the June 4, 2017 encounter with plaintiff. *See* Doc. 38 at 3 (details of encounters and arrests). However, the identity of the arresting officer is not critical for purposes of deciding whether Plaintiff can maintain the second cause of action.

(1) the defendant caused the plaintiff's continued confinement or prosecution;

(2) the original action terminated in favor of the plaintiff;

(3) no probable cause supported the original arrest, continued confinement, or prosecution;

(4) the defendant acted with malice; and

(5) the plaintiff sustained damages.

Wilkins v. DeReyes, 528 F.3d 790, 799 (10th Cir. 2008); *see also Margheim v. Buljko*, 855 F.3d 1077, 1085 (10th Cir. 2017); *Griffin v. Kinnison*, 2018 WL 1415185, *8 (D.N.M. Mar. 21, 2018) (unpublished). To meet the second element, the plaintiff has the "burden to show that the termination was favorable." *Cordova v. City of Albuquerque*, 816 F.3d 645, 650 (10th Cir. 2016). To carry that burden, a plaintiff must allege facts which, if true, would allow a reasonable jury to find the proceedings terminated "for reasons indicative of innocence." *See M.G. v. Young*, 826 F.3d 1259, 1263 (10th Cir. 2016). A plaintiff must prove lack of probable cause to prosecute as an essential element of his malicious prosecution or false arrest claim. *See, e.g., McCarty v. Gilchrist*, 646 F.3d 1281, 1285-86 (10th Cir. 2011); *U.S. v. White*, 584 F.3d 935, 945 (10th Cir. 2009); *Novitsky v. City of Aurora*, 491 F.3d 1244, 1258 (10th Cir. 2007); *Hoffman v. Martinez*, 92 F. App'x 628, 631 (10th Cir. 2004) (unpublished). This is so "because not every arrest, prosecution, confinement, or conviction that turns out to have involved an innocent person should be actionable." *See Pierce v. Gilchrist*, 359 F.3d 1279, 1294 (10th Cir. 2004). In a Fourth Amendment malicious prosecution case such as this one, "the third element deals only with the probable cause determination during the institution of legal process." *McGarry v. Bd. of Cnty. Comm'rs for Cnty. of Lincoln*, 294 F.Supp.3d 1170, 1194 (D.N.M. 2018).

1. Probable Cause

The question here is whether the officers "arguably had probable cause." *Kaufman v. Higgs*, 697 F.3d 1297, 1300 (10th Cir. 2012). The validity of an arrest "does not depend on whether the suspect actually committed the crime; the mere fact that the suspect is later acquitted of the offense for which he is arrested is irrelevant to the validity of the arrest." *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979); *see also Summers v. Utah*, 927 F.2d 1165, 1166-67 (10th Cir. 1991) (citations omitted).

Plaintiff's own admissions in the complaint and references to documents attached to the complaint constitute evidence that Defendants arguably had probable cause. *See Guidry v. Sheet Metal Workers Int'l. Ass'n.*, 10 F.3d 700, 716 (10th Cir. 1993) (allegations contained in a complaint can constitute judicial admissions). Plaintiff's trespassing and disruptive activities at the Johnson senior center over a period of nearly two years. He was issued trespass warnings directing him to stay away from center on multiple occasions and by his own admission, Plaintiff ignored or refused orders by law enforcement to leave the center. Moreover, while the criminal charges against plaintiff were pending, the Sierra County Magistrate Court ordered plaintiff to stay away from the Johnson Center/Spaceport America Visitor's Center. *See* Docs. 1-2, 1-3; 1-6 to 1-8; Doc. 23 at 1-2). Thus, under these undisputable facts, arguable (if not actual) probable cause existed to prosecute plaintiff. *See, e.g., Williams v. Town of Greenburgh*, 535 F.3d 71, 78-79 (2d Cir. 2008) (plaintiff's false arrest and malicious prosecution claims failed because "there was probable cause to arrest [plaintiff], who was therefore not deprived of any constitutional right").[3]

[3] Defendants argue that Plaintiff is collaterally estopped from challenging the existence of probable cause for his criminal charges under the full faith and credit doctrine, *see* 28 U.S.C. §1738. Doc. 42 at 13. However, given that the Court finds that probable cause existed, this issue is irrelevant to the issues raised in this motion.

2. Favorable Termination

It is not entirely clear whether the original action terminated in Plaintiff's favor. Defendants contend that the *nolle prosequis* does not constitute a favorable termination for Plaintiff because a "bare *nolle prosse* without more is not indicative of innocence." *Wilkins v. DeReyes*, 528 F.3d 790, 803 (10th Cir. 2008). Rather, the "dispositive inquiry is whether the failure to proceed implies a lack of reasonable grounds for the prosecution." *Id.*

Defendants argue that because the *nolle prosequis* was filed without prejudice, it could have been refiled at a later time and does not imply a lack of reasonable grounds for the prosecution. Therefore, they argue, it is insufficient to satisfy the favorable termination requirement. However, *Wilkins* does not entirely resolve the question of whether Plaintiff's case ended favorably. In that case, the Tenth Circuit concluded that the *nolle proseques* "should be considered terminations **in favor of Plaintiffs** [because the] dismissals were not entered due to any compromise or plea for mercy. . . [but rather] they were the result of a judgment by the prosecutor that the case could not be proven beyond a reasonable doubt" and that it was "the State's opinion that currently there is insufficient evidence upon which to retry the defendant[s] for these crimes." *Id.* (emphasis added).

In this case, the State of New Mexico found that there was "insufficient evidence to proceed with charges at this time." Doc. 42-8. One might conclude that this basis for dismissal is not unlike the reason given in *Wilkins*, which would mean that Plaintiff's proceeding ended favorably for him. However, Plaintiff cannot sustain a malicious prosecution claim even if the original criminal action had a favorable termination because the elements of the claim are conjunctive and probable cause existed for the criminal charges. Because at least arguable probable cause existed, Plaintiff cannot proceed on this claim.

B. Malicious Abuse of Process[4]

The tort of malicious abuse of process recognizes that the legal process may be invoked or used in a wrongful manner, causing harm to the party forced to bear the consequences of the wrongful lawsuit. The malicious abuse of process tort is disfavored in the law because of the potential chilling effect on the right of access to the courts. *Fleetwood Retail Corp. v. LeDoux*, 142 N.M. at 150, 156 (N.M. 2007). Maliciously filing a complaint is insufficient to state a malicious abuse of process claim unless it was done without probable cause or was accompanied by some subsequent abuse of process. *Durham v. Guest*, 204 P.3d 19, 25 (N.M. 2009). The elements of this tort are: (1) the use of process in a judicial proceeding that would be improper in the regular prosecution or defense of a claim or charge; (2) a primary motive in the use of process to accomplish an illegitimate end; and (3) damages.

An improper use of process may be shown several different ways, either by showing that a complaint was filed without probable cause or by demonstrating a misuse of procedural devices such as discovery, subpoenas, or attachments, or an irregularity or impropriety in the proceedings suggesting extortion, delay, or harassment. *Fleetwood,* 142 N.M. at 155. Here. Plaintiff can show neither the lack of probable cause or the use of impropriety since his own judicial admissions demonstrate that the criminal charges were based on probable cause. Therefore, Plaintiff cannot maintain a claim of malicious abuse of process.

[4] When addressing malicious prosecution claims brought pursuant to §1983, a court uses common law elements of malicious prosecution as starting point for its analysis; however, the ultimate question is whether plaintiff has proven the deprivation of a constitutional right. *Novitsky v. City Of Aurora*, 491 F.3d 1244 (10th Cir. 2007).

In New Mexico, the Supreme Court has merged the torts of malicious prosecution and abuse of process into a single cause of action known as malicious abuse of process. *DeVaney v. Thriftway Mktg. Corp*., 124 N.M. 512, 953 P.2d 277, 285-86 (1997), cert. denied 118 S.Ct. 2296 (1998) (listing elements). Neither party suggests addressing count II as a merged tort. Plaintiff styles Count II as "Malicious prosecution, Abuse of Process" and Defendants analyze these as separate claims as well.

C. Retaliatory Malicious Prosecution

Plaintiff does not expressly assert a claim for retaliatory malicious prosecution, but Defendants contend that to the extent he intends to assert such a claim, it would fail.[5] For this claim, a plaintiff must show *both* retaliatory motive on the part of the official urging prosecution *and* lack of probable cause. *Hartman v. Moore*, 547 U.S. 250, 265 (2006). *Becker v. Kroll*, 494 F.3d 904, 925 (10th Cir. 2007) (stating elements of retaliatory prosecution claim); *Reichle v. Howards*, 566 U.S. 658, 666 (2012) ("a plaintiff cannot state a claim of retaliatory prosecution in violation of the First Amendment if the charges were supported by probable cause").

The Court agrees with Defendants that based on the undisputed facts, Plaintiff has failed to show lack of probable cause as well as retaliatory motive on the part of Defendants and so Plaintiff cannot sustain this claim, either.

D. Defendants Alirez and Apodaca are Entitled to Qualified Immunity

(1) First Prong of Qualified Immunity Inquiry:

In the foregoing discussion, the Court has determined that Plaintiff has not shown that Defendants violated his constitutional rights based on claims of Malicious Prosecution, Malicious Abuse of Process and Retaliatory Malicious Prosecution. These findings are sufficient to entitle Defendants to qualified immunity under the first prong of the inquiry.

(2) Second Prong of Qualified Immunity Inquiry: The Court need not consider the second part of the inquiry, since if a plaintiff "fails to satisfy either part of the two-part inquiry, the court must grant . . . qualified immunity." *Gross v. Pirtle*, 245 F.3d 1151, 1156 (10th Cir. 2001).

[5] Defendants' desire to be thorough in its analysis is understandable, given the lack of clarity in the complaint. While the Second Cause of Action is titled as "Malicious Prosecution, Abuse of Process," the text of that count alleges that Defendants attempted to "chill his activities and retaliate against him for disclosing their malfeasance"—which looks similar to Plaintiff's First Amendment retaliatory prosecution claim asserted in the First Cause of Action. Compl., ¶70.

However, the Court will consider it to illustrate that there is no basis for Plaintiff to continue litigating his claims. Defendants claim they would be entitled to qualified immunity on the second part of the inquiry because there is an absence of controlling authority that specifically prohibited Defendants from their actions toward Plaintiff regarding the criminal trespass charges. The Court agrees with Defendants that Plaintiff has failed to satisfy his burden to show that the law was clearly established such that Defendants Alirez and Apodoca would have known that their conduct violated Plaintiff's Fourth Amendment rights.

Plaintiff's first legal error is to urge the Court to espouse a more general concept of "clearly established" law, when this notion has been soundly rejected by the United States Supreme Court. Cases offered to show "clearly established law" must include facts that are sufficiently analogous and specific so that a reasonable official would know "that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U. S. 194, 202 (2001); *D.C. v. Wesby*, 138 S. Ct. 577, 590 (2018) ("We have repeatedly stressed that courts must not "define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced"):

> A rule is too general if the unlawfulness of the officer's conduct "does not follow immediately from the conclusion that [the rule] was firmly established." The rule's contours must be so well defined that it is "clear to a reasonable officer that his conduct was unlawful in the situation he confronted." **This requires a high degree of specificity.**

Wesby, 138 S. Ct. at 590 (emphasis added) (citing *Saucier*, 533 U.S. at 202. Plaintiff commits a second error as well: even after having advanced the position that "clearly established" law should be premised on a more general statement of the law, he offers no case law at all as examples. Instead, Plaintiff engages in legal argument (Doc. 45 at 1-2) and lamely argues that the operative

inquiry is whether officer's actions were objectively reasonable (*id.* at 3)—which does not in any way satisfy his burden of showing the law was clearly established.

Plaintiff's failure to carry his burden of showing the law was clearly established entitles Defendants to qualified immunity. *See Cox v. Glanz*, 800 F.3d 1231, 1247 (10th Cir. 2015) (plaintiff failed burden under qualified immunity by failing to cite to any Supreme Court or Tenth Circuit opinion that would indicate right was clearly established); citing *Thomas v. Durastanti*, 607 F.3d 655, 669 (10th Cir. 2010) ("The plaintiff bears the burden of citing to us what he thinks constitutes clearly established law."); *Hedger v. Kramer*, 2018 WL 1082983, at *5 (10th Cir. 2018) ("The failure to identify [] a case is fatal to the claim."). Accordingly, Defendants are entitled to qualified immunity on Plaintiff's second cause of action, under either prong of the qualified immunity inquiry.

III. Third Cause of Action: §1983 Municipal and Supervisory Liability for Violations of Federal Constitutional Rights.

In the Third Cause of Action, Plaintiff claims that Chief Alirez, by virtue of a policy over which he possessed supervisory responsibility, and the City of Truth or Consequences ("City") through this policy, caused a violation of Plaintiff's clearly established constitutional rights.

Plaintiff's municipal liability and supervisory liability claims hinge on a finding that the complaint alleges the violation of a constitutional right. To establish municipal liability under § 1983, a plaintiff must demonstrate a direct causal link between an underlying constitutional violation and a municipal policy or custom exists. *See Graves v. Thomas*, 450 F.3d at 1218. A plaintiff may impose liability upon a defendant-supervisor who creates, promulgates, implements, or in some other way possesses responsibility for

the continued operation of a policy which results in a deprivation of constitutional rights. *Dodds v. Richardson*, 614 F.3d 1185 (10th Cir. 2010).

The Court has already determined that Plaintiff cannot maintain his second cause of action, whether presented as a claim for Malicious Prosecution, Malicious Abuse of Process or Retaliatory Malicious Prosecution; and that as a result, Defendants are entitled to qualified immunity on Plaintiff's second cause of action under the first prong of a qualified immunity inquiry. This finding bars Plaintiff's third cause of action against the City because there is no underlying constitutional violation on which to base a *Monell* claim. *See, Apodaca v. Rio Arriba County Sheriff's Dept*., 905 F.2d 1445, 1447 (10th Cir. 1990) (a municipality may not be held liable where there is no underlying constitutional violation by any of its officers (citing *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986)); *Hinton v. City of Elwood, Kan*., 997 F.2d 774, 782 (10th Cir. 1993) (where an individual law enforcement officer is entitled to qualified immunity on the ground that his or her conduct did not violate the law, it is proper to dismiss claims against the municipality.

Plaintiff's supervisory liability claim against Defendant Alirez also fails for the same reason. *See Butler v. City of Norman*, 992 F.2d 1053, 1055 (10th Cir.1993) (liability of supervisor based on showing that the defendant-supervisor personally directed the violation or had actual knowledge of the violation and acquiesced in its continuance); *Cox v. Glanz*, 800 F.3d 1231, 1250 (10th Cir. 2015) (analyzing clearly established law as to supervisory liability claim). In addition, the Court's finding that Plaintiff has failed to show the law was clearly established also entitles Defendant Alirez to qualified immunity. *See Owen v. City of Independence*, 445 U.S. 622, 638 (1980); *Seamons v. Snow*, 206 F.3d 1021, 1029 (10th Cir. 2000) (Qualified immunity is not available as a defense to municipal liability.).

CONCLUSION

In sum, this Court finds and concludes that:

(1) Plaintiff cannot sustain his second cause of action against Defendants Apodaca and Alirez asserting Malicious Prosecution and Abuse of Process and as a result, Defendants are entitled to qualified immunity on both parts of the qualified immunity analysis;

(2) Plaintiff cannot sustain his second cause of action against Defendant Alirez based on supervisory liability and as a result Defendant is entitled to qualified immunity on the second cause of action; and that

(3) Plaintiff cannot sustain his second cause of action against Defendant City of Truth or Consequences ("City") based on municipal liability because there is no underlying constitutional violation and as a result, the City is entitled to summary judgment on Count III in the *Monell* claim.

In its previous decision, the Court did not address the *Monell* claim with regard to the First Amendment claim in Count I because Defendants did not offer any argument on this issue. *See* Doc. 38 at 16. In their summary judgment motion, however, Defendants argue that the *Monell* claim should be dismissed because Plaintiff cannot show that his constitutional rights were violated. While the Court focused on the "clearly established" prong in the Order granting in part Defendants' motion to dismiss (Doc. 38 at 15-16), it is also clear that Plaintiff cannot show that Defendants retaliated against him in violation of his First Amendment rights either, because probable cause existed for the criminal trespass charge. *See Mocek v. City of Albuquerque*, 813 F.3d 912, 931–32 (10th Cir. 2015) (In First Amendment Retaliation claim, Plaintiff must show lack of probable cause for retaliatory prosecution cases). As a result, the *Monell* claims in Count III must be dismissed entirely, with regard to both of Plaintiff's underlying substantive claims in Count I and Count II.

THEREFORE,

IT IS ORDERED that Defendants' Motion for Summary Judgment on Plaintiff's Second and Third Causes of Action **(Doc. 42)** is hereby GRANTED for reasons described in this Memorandum Opinion and Order.

As a result of the Court's cumulative findings in this Opinion and in its previous Opinion, there are no claims remaining in Plaintiff's complaint, and the rulings herein dispose of Plaintiff's case in its entirety.

By separate pleading, the Court shall issue a Rule 58 Judgment.

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

RON FENN,

Plaintiff,

vs. No. 2:18-cv-00634 WJ-GW

CITY OF TRUTH OR CONSEQUENCES,
MICHAEL APODACA, Truth or Consequences
Police Captain individually acting under the color of Law,
LEE ALIREZ, Truth or Consequences Police Chief individually
Acting under color of state law, and DANIEL HICKS,
Director of Spaceport America,

Defendants.

RULE 58 JUDGMENT

THIS MATTER came before the Court upon Defendants' Motion for Summary Judgment on Plaintiff's Second and Third Causes of Action **(Doc. 42)**. Pursuant to the findings and conclusions set forth in the Memorandum Opinion and Order which accompanies this Rule 58 Judgment **(Doc. 52)**.

IT IS THEREFORE ORDERED and **ADJUDGED** that Defendants' Motion for Summary Judgment on Plaintiff's Second and Third Causes of Action **(Doc. 42)** is hereby GRANTED, thus disposing of this case on its merits and in its entirety.

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

RON FENN,

Plaintiff,

vs. No. 2:18-cv-00634 WJ-GW

CITY OF TRUTH OR CONSEQUENCES,
MICHAEL APODACA, Truth or Consequences
Police Captain individually acting under the color of Law,
LEE ALIREZ, Truth or Consequences Police Chief individually
Acting under color of state law, and DANIEL HICKS,
Director of Spaceport America,

Defendants.

MEMORANDUM OPINION AND ORDER GRANTING IN PART TRUTH OR CONSEQUENCES DEFENDANTS' MOTION TO DISMISS and GRANTING DEFENDANT DANIEL HICKS' MOTION TO DISMISS

THIS MATTER comes before the Court upon the Truth or Consequences Defendants' (Lee Alirez's, Michael Apodaca's, and City of Truth or Consequences') Motion for Partial Dismissal of Plaintiff's Complaint, filed August 2, 2018 **(Doc. 13)**, and Defendant Daniel Hicks' Motion to Dismiss, filed August 28, 2018 **(Doc. 18).** Having reviewed the parties' pleadings and the relevant law, the Court finds that Defendants' motions are well-taken and, therefore, are **GRANTED IN PART**.

BACKGROUND

Plaintiff Ron Fenn frequented a senior center at 301 S. Foch St., Truth or Consequences, New Mexico. The senior center was converted to other uses, and was leased out to Spaceport America, a New Mexico public agency, for use as a visitor center. Plaintiff publicly protested the conversion of the senior center.

On June 26, 2015, an employee of Geronimo Trail Scenic Byway, also located at 301 S. Foch St, asked police that Plaintiff "be trespassed" from 301 S. Foch. St. because Plaintiff "had been offensive to her, and that she felt unsafe around Plaintiff." **Comp.** ¶ 11-12.

On that same day, Rosemary Bleth, CEO for Follow the Sun Tours, located at 301 S. Foch. St., contacted police to report that Plaintiff was improperly soliciting. Ms. Bleth requested a trespass authorization against Plaintiff. When police arrived, the manager, Mr. Bleth, told officers he had observed Plaintiff walking around the inside of center engaged in conversation with an unidentified woman. Plaintiff requested a pen and paper to jot down her email address. Mr. Bleth alleged that Plaintiff handed a business card to the woman that said "Spaceport Tour video Memory services, and that Plaintiff asked for a $10 donation for the videos. Mr. Bleth told officers that Plaintiff had been a very vocal opponent of the opening of the Spaceport visitor center.

Plaintiff alleges that a "trespass authorization" was issued at the request of the Rosemary Bleth, a "representative" of Spaceport America, restricting Plaintiff from 301 S. Foch St. That same day, Captain Apodaca and Chief Alirez attempted to serve the trespass authorization on Mr. Fenn. Mr. Fenn took receipt of the trespass form. Chief Alirez received a copy of the business card Plaintiff had been handing out, which stated "help save our Lee Belle Johnson Senior Recreation center."

Chief Alirez questioned Plaintiff whether he had a business license. Plaintiff was prosecuted for conducting business without a license and convicted on September 9, 2015.

On October 10, 2016, Linda DeMarino contacted the police department and reported Plaintiff had entered 301 S. Foch St. and was making "obnoxious comments." Captain Apodaca responded. Ms. DeMarino informed Captain Apodaca that Plaintiff had been "carrying on" about

the building no longer being used as a senior center. Ms. DeMarino filmed Plaintiff's behavior. There is no allegation that Cpt. Apodaca took any action.

On May 5, 2017, Captain Apodaca responded to a call by John Muenster, a volunteer of Geronimo Trail Scenic Byway center, about Plaintiff being on the property in violation of trespass orders. Plaintiff was putting up posters on a counter inside the center. Captain Apodaca told Plaintiff that he could "put up his propaganda and stay… but not to harass any visitors." Mr. Muenster was concerned that expensive items kept in the center could be damaged or stolen. Ms. Bleth notified the officer that she was interested in a criminal trespass order against Mr. Fenn to prevent him from entering the location.

On May 11, 2017, Defendant Hicks, CEO of Spaceport America requested a trespass order from Chief Alirez based on prior incidents as preventative measure. Chief Alirez drove 75 miles to the officers of Spaceport America for Defendant Hicks' signature that day. Chief Alirez then met with Plaintiff on May 12, 2017 to serve the trespass order. Plaintiff received it but refused to sign it.

On June 4, 2017, Larena Miller contacted the police department to report Plaintiff Fenn inside 301 S. Foch St. Sgt. Baker responded and found Mr. Fenn inside the "common use area of the building," in the area housing a satellite library. Sgt. Baker and Chief Alirez told Plaintiff to leave, and Plaintiff refused. There is no allegation whether Plaintiff was made to leave or whether any further action as taken.

Chief Alirez met with Plaintiff on June 13, 2017 in his office, and offered to hold the newest citation in abeyance as long as Plaintiff Fenn had no further violations at 301 S. Foch St.

On June 18, 2017, Officer Ontiveros was dispatched to another trespassing call at 301 S. Foch St. Plaintiff was "within the common area of the areas he had previously been trespassed

from." Plaintiff said he was not trespassing but was protesting. Both Officer Ontiveros and Chief Alirez ordered Plaintiff to leave, and he refused. Chief Alirez then arrested Plaintiff and a criminal complaint was filed against him for Criminal Trespass pursuant to NMSA § 30-14-1(C).

In the criminal case, Plaintiff filed a motion to dismiss for failure to establish essential elements of the offense. A hearing was held, and the motion to dismiss was denied. The criminal case was dismissed without prejudice (*Nolle Proseque*) on October 11, 2017.

Plaintiff filed this complaint alleging (1) First Amendment Retaliation; (2) Malicious Prosecution and Abuse of Process; and (3) supervisory and *Monell* liability. The Truth or Consequences Defendants seek dismissal of Plaintiff's First and Third causes of action on the basis of qualified immunity. Moreover, Defendant Hicks seeks dismissal of the First Amendment claim on similar grounds.

Because some arguments were either not addressed by Plaintiff in his response or were raised for the first time by the T or C Defendants in their reply brief, the Court ordered supplemental briefing from Plaintiff.

LEGAL STANDARD

Rule 12(b)(6) permits the Court to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a plaintiff's complaint must have sufficient factual matter that if true, states a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) ("*Iqbal*"). As such, a plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) ("*Twombly*"). All well-pleaded factual allegations are "viewed in the light most favorable to the nonmoving party." *Brokers' Choice of Am., Inc. v. NBC Universal, Inc*., 757 F.3d 1125, 1136 (10th Cir. 2014). In ruling on a motion to dismiss, "a court

should disregard all conclusory statements of law and consider whether the remaining specific factual allegations, if assumed to be true, plausibly suggest the defendant is liable." *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011). Mere "labels and conclusions" or "formulaic recitation[s] of the elements of a cause of action" will not suffice. *Twombly*, 550 U.S. at 555.

DISCUSSION

Plaintiff alleges that Defendants violated his free speech rights under the First Amendment. The free speech rights protected by the First Amendment include the right to petition the government for redress of grievances. *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998). Governmental retaliation for exercising one's freedom of speech constitutes infringement of that freedom. *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000). To state a First Amendment retaliation claim, a plaintiff must allege "(1) he was engaged in constitutionally protected activity, (2) the government's actions caused him injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the government's actions were substantially motivated as a response to his constitutionally protected conduct." *Mocek v. City of Albuquerque*, 813 F.3d 912, 930 (10th Cir. 2015), *quoting Nielander v. Bd. of Cty. Comm'rs*, 582 F.3d 1155, 1165 (10th Cir. 2009).

I. First Amendment Retaliation Claim against Defendants Apodaca and Alirez (Count I).

Plaintiff alleges that Defendants Apodaca and Alirez violated his First Amendment right to free speech by issuing trespass notices to him and ordering him to vacate 301 S. Foch St. Plaintiff also alleges that Defendant Alirez arrested him, in retaliation for his protest about the

alleged misuse of 301 S. Foch St. Plaintiff also frames this case as a retaliatory prosecution case in violation of the First Amendment. *See* **Doc. 17, p. 4-6**.

The Truth or Consequences Defendants seek dismissal of the First Amendment Retaliation claim on qualified immunity grounds. Defendants argue that these claims should be dismissed under qualified immunity because (1) the officers had at least arguable probable cause to arrest Plaintiff, and (2) the law was not clearly established that arresting and prosecuting Plaintiff where there was probable cause to do so would constitute First Amendment retaliation. In its discretion, the Court addresses only the second prong of qualified immunity, which is dispositive. *Pearson v. Callahan*, 129 S.Ct. 808, 818 (2009).

A. <u>General Law on Clearly Established Prong and Arguable Probable Cause.</u>

When a Plaintiff alleges an unlawful retaliatory arrest in violation of the First Amendment, the First and Fourth Amendment analyses overlap to some extent. *See Sause v. Bauer*, 138 S. Ct. 2561, 2563, 201 L. Ed. 2d 982 (2018) ("When an officer's order to stop praying is alleged to have occurred during the course of investigative conduct that implicates Fourth Amendment rights, the First and Fourth Amendment issues may be inextricable."). The Court agrees with Defendants that for a First Amendment retaliatory arrest or prosecution case, it must analyze whether there was arguable probable cause. *See Mocek v. City of Albuquerque*, 813 F.3d 912, 931–32 (10th Cir. 2015) (In First Amendment Retaliation claim, Plaintiff must show lack of probable cause for retaliatory *prosecution* cases, and law not clearly established that officers violate First Amendment where there is probable cause for *arrests*), *citing Hartman v. Moore*, 547 U.S. 250, 265–66, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006) (plaintiff in first amendment retaliatory prosecution case must show lack of probable cause); *Peterson v. Kopp*, 754 F.3d 594, 602 (8th Cir. 2014) (in retaliatory

arrest claim for violation of First Amendment, analyzing whether there was a lack of probable cause or arguable probable cause).

"A right is clearly established in this circuit when a Supreme Court or Tenth Circuit decision is on point, or if the clearly established weight of authority from other courts shows that the right must be as the plaintiff maintains." *Thomas v. Kaven*, 765 F.3d 1183, 1194 (10th Cir. 2014) (internal quotation marks omitted); *Gadd v. Campbell*, 2017 WL 4857429, at *4 (10th Cir. 2017) (unpublished). "A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, —— U.S. ——, 136 S.Ct. 305, 308, 193 L.Ed.2d 255 (2015) (per curiam) (internal quotation marks omitted). "Clearly established law should not be defined at a high level of generality." *White v. Pauly*, —— U.S. ——, 137 S.Ct. 548, 552, 196 L.Ed.2d 463 (2017) (internal quotation marks omitted). Instead, "the clearly established law must be 'particularized' to the facts of the case." *Id.*

To determine whether an officer violated clearly established law, the Court looks to whether there was "arguable probable cause" for an arrest. *Garcia v. Escalante*, 678 F. App'x 649, 655 (10th Cir. 2017). Arguable probable cause exists where "a reasonable police officer in the same circumstances . . . and possessing the same knowledge as the officer in question *could* have reasonably believed that probable cause existed in light of well-established law." *Felders ex rel. Smedley v. Malcom*, 755 F.3d 870, 879 (10th Cir. 2014). "Arguable probable cause is another way of saying that the officers' conclusions rest on an objectively reasonable, even if mistaken, belief that probable cause exists." *Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir. 2014).

Therefore, to the extent this is a retaliatory arrest or prosecution case, Plaintiff must show the absence of arguable probable cause.

B. Defendant Alirez had arguable probable cause to arrest or prosecute Plaintiff.

The Court agrees with Defendants that a reasonable officer could have reasonably believed that probable cause existed for criminal trespass in light of well-established law. The New Mexico Criminal Trespass Statute (NMSA § 30-14-1) provides:

> C. Criminal trespass also consists of knowingly entering or remaining upon lands owned, operated or controlled by the state or any of its political subdivisions knowing that consent to enter or remain is denied or withdrawn by the custodian thereof.

NMSA § 30-14-1 (C). Here, Defendant Hicks revoked consent for Plaintiff to be on the premises and signed a trespass notice.[1] Defendant Hicks was the CEO of Spaceport America, which leased a portion of 301 S. Foch St. as a visitor center. A reasonable officer would believe that Defendant Hicks was a custodian of 301 S. Foch St. who could revoke Plaintiff's permission to be on the property. Moreover, Plaintiff was hand-delivered the trespass notice by Defendants. Finally, an officer observed Plaintiff at the Spaceport America Visitors Center and was repeatedly warned to leave and he refused. Therefore, based on Plaintiff's allegations, a reasonable officer would believe that Plaintiff trespassed, because (1) the custodian revoked Plaintiff's authorization to be on the premises, (2) officers gave notice to Plaintiff that he must vacate, and (3) Plaintiff was observed by an officer at 301 S. Foch St. and he refused to leave.

Plaintiff argues that Defendant Hicks was not the custodian of 301 S. Foch St., which Spaceport America leased, and therefore could not revoke Plaintiff's permission to be there. The Court finds no support for this position in the New Mexico statutes or case law. Defendant Hicks was the CEO of Spaceport America, which leased the property for its visitor center, and therefore is likely the "custodian" permitted to revoke. Nevertheless, even if mistaken, the Court finds that

[1] To the extent Plaintiff argues that Ms. Bleth previously signed a trespass notice on behalf of Spaceport America, Plaintiff does not allege that the officers arrested or prosecuted Plaintiff based on that prior trespass notice. Therefore, Ms. Bleth's trespass notice is not relevant to the arguable probable cause analysis.

a reasonable officer would believe that Defendant Hicks had authority to revoke Plaintiff's permission to be on the property.

Plaintiff also argues that there was no probable cause, because he did not do anything to warrant being excluded from the visitor center by the custodian. Initially, the Court notes that Plaintiff did not cite any law on when probable cause for trespass is valid in the First Amendment context. Plaintiff does not cite to case law showing when a trespass statute can be enforced or argue that the trespass statute is overbroad. This falls short of Plaintiff's burden under the clearly established prong.

Nevertheless, as explained below, the issue here is whether it is clearly established that an officer, *assuming retaliatory animus*, would violate Plaintiff's First Amendment rights by arresting him where there is probable cause. *See Mocek v. City of Albuquerque*, 813 F.3d 912, 931-32 (10th Cir. 2015) (regardless of officer's retaliatory motives, it was not clearly established that officer could not arrest plaintiff when he reasonably believed he had probable cause); *Moral v. Hagen*, 553 F. App'x 839, 840 (10th Cir. 2014) (unpublished) (evidence of retaliatory motive not enough to overcome qualified immunity in first amendment retaliatory arrest case, where there was probable cause), *citing Reichle v. Howards*, —— U.S. ——, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012). Here, Plaintiff fails to cite to any case that indicates that a reasonable officer would believe that he did not have probable cause to arrest Plaintiff based on the First Amendment.

C. <u>Law was not Clearly Established as to Arrest and Prosecution</u>.

Defendants argue that it was not clearly established at the time of Plaintiff's arrest in June 2017 that an arrest supported by probable cause could constitute First Amendment Retaliation. The Court agrees.

1. Plaintiff did not carry heavy burden of citing to clearly established law.

Initially, the Court notes that Plaintiff failed to carry his burden of citing to any clearly established law that states that he has a right to be free from retaliatory arrest or prosecution where there is arguable probable cause. On that basis alone, Plaintiff failed to carry his heavy burden. *See Cox v. Glanz*, 800 F.3d 1231, 1247 (10th Cir. 2015) (plaintiff failed burden under qualified immunity by failing to cite to any Supreme Court or Tenth Circuit opinion that would indicate right was clearly established); *Gutierrez v. Cobos*, 841 F.3d 895, 907 (10th Cir. 2016) (plaintiff failed to meet burden where they did not cite to legal authority for clearly established law or use term "clearly established"); *citing Thomas v. Durastanti*, 607 F.3d 655, 669 (10th Cir. 2010) ("The plaintiff bears the burden of citing to us what he thinks constitutes clearly established law."); *see also Rojas v. Anderson*, 727 F.3d 1000, 1004 (10th Cir. 2013) (same); *Smith v. McCord*, 707 F.3d 1161, 1162 (10th Cir. 2013); *Hedger v. Kramer*, 2018 WL 1082983, at *5 (10th Cir. 2018) ("The failure to identify [] a case is fatal to the claim.").

Plaintiff argues that *Reichle v. Howards*, 132 S.Ct. 2088, 2083 (2012), clearly established that an arrest supported by probable cause could give rise to a First Amendment Violation. **Doc. 17**, **p. 10-11**. But in that case, the United States Supreme Court expressly declined to hold whether a First Amendment retaliatory arrest claim could sound where the arrest was supported by probable cause and held instead that it was not clearly established that an arrest supported by probable cause could violate the First Amendment.

2. Law otherwise indicates that right is not clearly established. Alternatively, the Court agrees with Defendants that the law is not clearly established that an officer would violate Plaintiff's First Amendment right against retaliatory arrest or prosecution when there was arguable probable cause.

In *Hartman v. Moore*, the United States Supreme Court held a plaintiff in a retaliatory *prosecution* claim must show there was no probable cause to support the indictment. 547 U.S. 250, 265–66, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006). Later, in *Reichle v. Howards*, the Supreme Court held that it was not clearly established in the Tenth Circuit that there is "First Amendment right to be free from a retaliatory arrest that is supported by probable cause." 132 S.Ct. 2088, 2083 (2012) ("This Court has never recognized a First Amendment right to be free from retaliatory arrest that is supported by probable cause... [arresting officers] are thus entitled to qualified immunity."). The *Reichle* Court did not address whether a First Amendment retaliation claim may sound where there is probable cause. Since then, neither the Tenth Circuit nor the United States Supreme Court has established any such right. *See, e.g., Wilson v. Vill. of Los Lunas*, 572 F. App'x 635, 643 (10th Cir. 2014) (unpublished) (noting that *Howard* was reversed by *Reichle* without clearly establishing any right).

Plaintiff argues that whether there was arguable probable cause is not relevant to a First Amendment Retaliatory arrest claim. While Plaintiff may or may not be right that probable cause is not an element of a First Amendment retaliation claim, it is not clearly established that a First Amendment retaliatory arrest claim may sound where there is probable cause. *See, e.g., Reichle v. Howards*, 566 U.S. 658, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012) (it was not clearly established at the time of the defendant's arrest in June 2006 (six months before Marshall's arrest in the instant case) that an arrest supported by probable cause could violate the First Amendment); *Moran v. Cameron*, 362 F. App'x 88, 96–97 (11th Cir. 2010) (applying arguable probable cause standard in case of first amendment retaliation); *Mocek v. City of Albuquerque*, 813 F.3d 912, 931 (10th Cir. 2015)(in first amendment claim retaliation claim, stating "When Mocek was arrested, it was not clearly established that a plaintiff could show the requisite motive where his arrest was arguably

supported by probable cause. Mocek has not addressed Tenth Circuit or Supreme Court precedent compelling that conclusion."); *Marshall v. City of Farmington Hills*, 693 F. App'x 417, 426 (6th Cir. 2017) (holding that *Reichle* is dispositive of First Amendment retaliatory arrest claim); *see also Green v. Nocciero*, 676 F.3d 748, 751–52 (8th Cir. 2012) (arresting officers were entitled to qualified immunity on Fourth Amendment claim where activist was disruptive and refused to leave a public meeting and there was probable cause to arrest the activist for trespass under Missouri state law).

Moreover, *Howards v. McLaughlin*, 634 F.3d 1131, 1148 (10th Cir. 2011), *rev'd and remanded sub nom. Reichle v. Howards*, 566 U.S. 658, 132 S. Ct. 2088, 182 L. Ed. 2d 985 (2012), once reversed, did not clearly establishes the law in the Tenth Circuit. The Supreme Court in *Reichle* explicitly declined to address whether an arrest supported by probable cause violated the First Amendment, and instead reversed on the ground that it was not clearly established in the Tenth Circuit before then. The Court finds that this reversal creates enough uncertainty that a reasonable officer could not pick up *Howard* and then *Reichle* and conclude that *Howard* clearly establishes law beyond debate. To do so, officers would have to analyze both cases and determine which portions of *Howards* are still good law. *See, e.g.*, *Ross v. Balderas*, 2017 WL 2963885, at *4 (D.N.M. Mar. 16, 2017) (Kelly, J.) (for post-*Howards* arrest in 2016, Plaintiff must plead and prove absence of probable cause for underlying criminal charge); *Brewer v. Ross*, No. 1:15-CV-87-TC, 2018 WL 3128998, at *8 (D. Utah June 26, 2018) (in post-*Howards* arrest in September 2011, finding that law was not clearly established); *see also Karns v. Shanahan*, 879 F.3d 504, 522 (3d Cir. 2018) (in post-*Reichle* arrest, it was reasonable for officers to believe that arrest otherwise supported by probable cause would not violate plaintiff's First Amendment rights); *Moral v. Hagen*, 553 F. App'x 839, 840 (10th Cir. 2014) (unpublished) ("Only recently the Supreme Court

[in *Reichle*]explained that it remains unsettled under current law whether an officer violates the Fourth Amendment by initiating an arrest for retaliatory reasons when the arrest itself happens to be supported, as an objective matter, by probable cause.")

Under these circumstances, the Court declines to find that a constitutional right was "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix*, 136 S.Ct. at 308 (quoting *Reichle v. Howards*, 566 U.S. 658, 664, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012)). Generally, "existing precedent must have placed the statutory or constitutional question beyond debate" for a right to be clearly established. *Id.* A reasonable officer would not read *Howard* and *Reichle* determine that the relevant law is clearly established. To find it clearly established, an officer would have to discern a distinction that even the counseled parties in this case did not do in their briefs.

The relevant law in the Tenth Circuit is unclear and unsettled, and certainly not "beyond debate" for arrests post-2011. Therefore, the Court finds that Defendants Apodaca and Alirez are entitled to qualified immunity for the arrest and subsequent prosecution in June 2017.

3. Plaintiff failed to carry burden that issuing trespass notices under these circumstances violated clearly established First Amendment law.[2]

Plaintiff also alleges that Defendants violated his First Amendment rights by issuing trespass notices and ordering him to vacate 301 S. Foch St. **Comp., ¶ 63.** In a reply brief, Defendants argued that Plaintiff did not clearly establish that issuing trespass notices violated his First Amendment rights. The Court directed Plaintiff to respond to those arguments in a sur-reply.

None of Plaintiff's references in his sur-reply satisfy his burden of citing to clearly established law. Plaintiff cited to *Edwards v. South Carolina*, 372 U.S. 229, 83 S.Ct. 680 (1963).

[2] Plaintiff also appears to agree that the statute of limitations otherwise bars claims based on earlier trespass notices – but not the trespass notices issued in 2017. **Doc. 37, p. 3**.

In that case, the criminal defendants were convicted of breach of the peace following public protests on the streets. That case does not inform officers of when they can or cannot issue trespass warnings for the visitor center of a state agency. Plaintiff also cited to *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218, 2226 (2015), but that case addressed a town's content-based regulation of signs. These cases cite to the broad general proposition that prohibits government from "abridging the freedom of speech." U.S. Const., Amdt 1. However, none of these cases address whether an officer violates the First Amendment by serving trespass notices at the request of the apparent custodian of the building. Plaintiff did not attempt to address the legal contours of this issue. Plaintiff's quote of *The Big Lebowski* mentions prior restraint, but Plaintiff otherwise did not attempt to brief the issue of prior restraint.

Plaintiff also cited to, and quoted from, a movie – *The Big Lebowski* – arguing that the First Amendment right is so clearly established that it is prevalent in pop culture. *See* **Doc. 37, p. 3.** The Court disagrees and does not find that any of the cases cited by Plaintiff "have placed the statutory or constitutional question beyond debate." *Mullenix*, 136 S.Ct. at 308. Therefore, the Court concludes that these references do not satisfy Plaintiff's burden of citing to clearly established law under the specific facts of this case.

II. Supervisory and *Monell* claims against Defendant Alirez and T or C (Count III).

Plaintiff asserts that Chief Alirez and the City of Truth or Consequences are liable under *Monell* for failing to properly train, supervise, and admonish officers in his department. Plaintiff alleges that Chief Alirez is a "policymaker" and created a climate that led officers under his supervision to believe they could act with impunity and violate civil rights. Defendants Alirez and the City of Truth or Consequences argue that because the law is not clearly established, they cannot be held liable under a supervisory theory or under *Monell*.

A. Supervisor Liability for Chief Alirez as to First Amendment Violation.

To assert a § 1983 supervisory claim and overcome Defendant Alirez's assertions of qualified immunity, Plaintiff must establish that Chief Alirez, by virtue of a policy over which he possessed supervisory responsibility, caused a violation of Plaintiff's clearly established constitutional rights. *Pahls v. Thomas*, 718 F.3d 1210, 1228 (10th Cir. 2013) (Plaintiff "must identify specific actions taken by particular defendants, or specific policies over which particular defendants possessed supervisory responsibility, that violated [his] clearly established constitutional rights."); *see also Cox v. Glanz*, 800 F.3d 1231, 1250 (10th Cir. 2015) (analyzing clearly established law as to supervisory liability claim). Here, since, the underlying First Amendment claim was dismissed on the clearly established prong, the Court dismisses the supervisory liability claim against Defendant Alirez.

B. Municipal liability.

To the extent Plaintiff sues Chief Alirez in his official capacity, that is in reality a *Monell* claim against the City of Truth or Consequences. *Porro v. Barnes*, 624 F.3d 1322, 1328 (10th Cir. 2010). Defendant Truth or Consequences only argues that the *Monell* claim against it should be dismissed, because the First Amendment right at issue was not clearly established.

Generally, in the Tenth Circuit, granting qualified immunity to individual officers based on the clearly established prong does not do away with a *Monell* claim. *Hinton v. City of Elwood*, 997 F.2d 774, 782-83 (10th Cir. 1993); *see also Medina v. City and County of Denver*, 960 F.2d 1493, 1499–1500 (10th Cir. 1992) (granting qualified immunity on clearly established prong does not relieve local government of *Monell* claim), *citing Watson v. City of Kansas City, Kansas*, 857 F.2d 690, 697 (10th Cir.1988). Here, the Defendants argued that the violations were not *clearly established*, and therefore the Court did not address whether there was a constitutional violation.

Because Defendant Truth or Consequences does not argue any other basis to dismiss the *Monell* claim, Defendant Truth or Consequences' request to dismiss the *Monell* claim is denied.

However, if Plaintiff nevertheless seeks to abandon his *Monell* claim, he should notify the Court and opposing parties. *See* **Doc. 37, p. 3.**

III. Defendant Daniel Hicks is entitled to Qualified Immunity as to the First Amendment Claim (Count I).

A. Plaintiff's Allegations.

Plaintiff alleged that Defendant Hicks violated his First Amendment rights in two ways. First, Defendant Hicks requested a trespass order "based on prior incidents as a preventive measure". Second, Plaintiff alleges that Defendant Hicks signed a trespass order on May 11, 2016. Plaintiff did not allege the content of the notice or specify the scope of the trespass notice in his complaint. Plaintiff also does not allege that Defendant Hicks was involved in the arrest or prosecution.

Plaintiff alleged that he was protesting the use of a former T or C senior center as a visitor center for Spaceport America, a New Mexico state agency. The complaint details a long saga of Tor C officers responding to Plaintiff's presence at the visitor center, and either allowing him to stay, or asking him to leave, without taking any further action. But he also alleges that he (1) made other building occupants, including Larena Miller, feel unsafe, *Compl.* ¶ 12, (2) was soliciting and conducting business without a license, *id.* ¶¶ 12-13, 18-19, 21-24; (3) commenting that he was unhappy that the building was no longer being used as a senior center, *id.* ¶ 25-26, and (4) a volunteer at Geronimo Trial Scenic Byway was concerned about expensive items in the center being damaged or stolen and the police warned Plaintiff not to harass any visitors. For example, Plaintiff pled that he had previously approached visitors at the visitor center, handed out business

cards that said "Spaceport Tour Video Memory Services", and offered videos for a $10.00 donation.

B. Defendant Hicks' Defense of Qualified Immunity.

Defendant Hicks raised qualified immunity and specifically argued that the law was not clearly established.[3] The Court need not address whether there was a constitutional violation. For the reasons stated by Defendant Hicks, even assuming there was a constitutional violation, the Court concludes that Plaintiff failed to carry his heavy burden that the law was clearly established.

Qualified immunity "is an entitlement not to stand trial or face the other burdens of litigation. The privilege is an immunity from suit rather than a mere defense to liability. When a defendant asserts the defense of qualified immunity, the burden shifts to the plaintiff to overcome the asserted immunity." *Ahmad v. Furlong*, 435 F.3d 1196, 1198 (10th Cir. 2006) (internal citations and quotation marks omitted). "Cleary established law should not be defined at a high level of generality…the clearly established law must be "particularized" to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 552, 196 L. Ed. 2d 463 (2017) (quotation marks and internal citations omitted). Under the *White v. Pauly* analysis, the Supreme Court requires courts to identify a case where a government official acting under similar circumstances as Defendant Hicks was held to have violated the First Amendment. *Id.*

Plaintiff bears the burden of citing to case law and articulating the clearly established right he claims had been violated. *See Thomas v. Durastanti*, 607 F.3d 655, 669 (10th Cir. 2010); *Martinez v. Carr*, 479 F.3d 1292, 1295 (10th Cir. 2007) ("[T]he record must clearly demonstrate the plaintiff has satisfied his heavy two-part burden; otherwise, the defendants are entitled to

[3] Defendant Hicks is the CEO of Spaceport America, a New Mexico state governmental entity. Plaintiff does not dispute that Defendant Hicks is an individual entitled to assert the defense of qualified immunity.

qualified immunity." (internal quotation marks omitted)). In analyzing clearly established law, the Court looks at the cases cited by Plaintiff to determine whether those cases can serve as clearly established law. *See, e.g., A.M. v. Holmes*, 830 F.3d 1123, 1154 (10th Cir. 2016) (granting qualified immunity where "neither of Plaintiff's cited sources can serve as the clearly established law governing this First Amendment retaliation claim.")

Here, Plaintiff cites to cases which are not factually on point or are cited for general statements of law which would not make a reasonable official aware that he or she was violating Plaintiff's First Amendment rights. Plaintiff cites to no cases that apply the complex First Amendment analysis to the facts of this case, i.e., that it was clearly established that issuing a trespass notice barring Plaintiff for his alleged conduct from a state agency visitor center would violate Plaintiff's First Amendment rights. Therefore, those cases cited by Plaintiff do not clearly establish that Defendant Hicks would violate Plaintiff's First Amendment rights by having a trespass notice served on him.

For example, in an attempt to satisfy his burden, Plaintiff cited to *Wolford v. Lasater*, 78 F.3d 484, 488 (10th Cir. 1996). In that case the Tenth Circuit affirmed dismissal of a First Amendment retaliatory prosecution claim because probable cause supported the charges filed against Plaintiff. Here, Defendant Hicks was not alleged to have been involved in the arrest or prosecution of Plaintiff, and that case would not have placed Defendant Hicks on notice that he could violate Plaintiff's First Amendment rights by signing the trespass notice. Plaintiff also cites to a number of California state cases that the "presumptively protected status of peaceful picketing activities" is a well-established right. **Doc. 26, p. 10-11.**

Plaintiff also cites to the First Amendment retaliation elements. *Nielander v. Bd. Of Cnty Comm'rs,* 582 F.3d 1155, 1165 (10th Cir. 2009) *and Smith v. Plati*, 258 F.3d 1167, 1176-77 (10th

Cir. 2001). Again, that law is too general to identify to a reasonable official under these circumstances that his or her conduct was unlawful.

Most of Plaintiff's response ably argues why a constitutional violation occurred. While a constitutional violation may or may not have occurred, Plaintiff did not satisfy his burden of citing to cases that make it apparent to a reasonable government official that his conduct was unlawful.

CONCLUSION

The Court finds and concludes that Defendants Apodaca and Alirez are entitled to qualified immunity on the First Amendment claim (Count I). Defendant Alirez is also entitled to qualified immunity as to the supervisory liability claim (Count III). However, the *Monell* claim (Count III) against the City of Truth or Consequence remains. Moreover, Defendant Hicks is entitled to qualified immunity on Count I. Finally, Count II, which was not addressed in any of the motions to dismiss, remains.

IT IS THEREFORE ORDERED that the Truth or Consequences Defendants' Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim and Lack of Jurisdiction **(Doc. 13)** is hereby **GRANTED IN PART** for reasons described in this Memorandum Opinion and Order; and

IT IS FURTHER ORDERED that the Defendant Hicks' Motion to Dismiss **(Doc. 18)** is hereby **GRANTED** for reasons described in this Memorandum Opinion and Order.

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

RON FENN,

Plaintiff,

vs. No. 2:18-cv-00634 WJ-GW

CITY OF TRUTH OR CONSEQUENCES, MICHAEL APODACA, Truth or Consequences Police Captain individually acting under the color of Law, LEE ALIREZ, Truth or Consequences Police Chief individually Acting under color of state law, and DANIEL HICKS, Director of Spaceport America,

Defendants.

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S SECOND AND THIRD CAUSES OF ACTION

THIS MATTER comes before the Court upon a Motion for Summary Judgment on Plaintiff's Second and Third Causes of Action, filed by Defendants City of Truth or Consequences, Chief Lee Alirez, and Captain Michael Apodaca ("Defendants" herein) on August 12, 2019 **(Doc. 42)**. Having reviewed the parties' pleadings and the applicable law, the Court finds that Defendant's motion is well-taken and, therefore, is granted.

BACKGROUND

Plaintiff, a resident of Sierra County, New Mexico, was an outspoken critic of the Spaceport America facility located in Sierra County. According to the complaint, Plaintiff claims that he "has been very outspoken regarding his disagreement with the city of Truth or Consequences regarding the lease of a city building to" Spaceport America. Compl., ¶¶1, 10. He

alleges that "[h]e has frequently attended meetings and publicly protested in traditional forums against the use of Truth or Consequences funds for the benefit of Spaceport America." *Id*. at ¶ 10.[1] Aug. 2, 2018).

Plaintiff has a lengthy history of being asked to leave the Lee Belle Johnson Center, 301 S. Foch St., which was a senior center in Truth or Consequences (where the Spaceport America Visitor's Center is housed, alongside other facilities). He was ultimately arrested for trespassing at the Johnson Center in June of 2017, and criminal trespass charges were filed against him. In the criminal case, Plaintiff filed a motion to dismiss for failure to establish essential elements of the offense. A hearing was held, and the motion to dismiss was denied. The criminal case was dismissed without prejudice (*Nolle Proseque*) on October 11, 2017.

Plaintiff filed this complaint alleging (1) First Amendment Retaliation; (2) Malicious Prosecution and Abuse of Process; and (3) supervisory and *Monell* liability.

In its prior Memorandum Opinion and Order, this Court granted in part Defendants' First Motion to Dismiss, concluding that:

(1) Defendants Apodaca and Alirez were entitled to qualified immunity on the First Amendment claim (Count I) because a "reasonable [law enforcement] officer could have reasonably believed that probable cause existed for criminal trespass in light of well-established law," Doc. 38 at 8;

(2) Defendant Alirez was also entitled to qualified immunity as to the supervisory liability claim (Count III); and that

(3) Defendant Hicks is entitled to qualified immunity on the First Amendment claim (Count I);

(4) However, the Court found that the *Monell* claim (Count III) against the City of Truth or Consequence remains.

[1] A more detailed factual account is contained in the Court's previous Memorandum Opinion and Order, Doc. 38.

DISCUSSION

In this motion, Defendants seek summary judgment on the second and third counts in the complaint which assert claims of (1) Malicious Prosecution and Abuse of Process; and (2) supervisory and *Monell* liability.

I. Legal Standard

Defendants have raised the defense of qualified immunity, which shields government officials from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *Romero v. Story*, 672 F.3d 880 (10th Cir. 2012). "In resolving questions of qualified immunity at summary judgment, courts engage in a two-pronged inquiry." *Tolan v. Cotton*, 134 S.Ct. 1861, 1865(2014). The first prong asks whether the facts, taken in the light most favorable to the party asserting the injury—here the Defendant officers—show that the officer's conduct violated a federal right. The second asks whether the right in question was "clearly established" at the time of the violation. *Id*. at 1865–66 (citations and quotation marks omitted). The Court may consider these two inquiries in any order. See *Pearson*, 555 U.S. 223, 236 (2009).

Once a defendant asserts a defense of qualified immunity, the burden shifts to the plaintiff to show that the defendant violated a constitutional or statutory right, and that the right was clearly established at the time of the conduct. *See McBeth v. Himes*, 598 F.3d 708, 716 (10th Cir. 2010). The contours of the right must be sufficiently clear that a reasonable official would understand what he is doing violates that right." *Thomas v. Kaven*, 765 F.3d 1183, 1194 (10th Cir. 2014). Courts may decide "which of the two prongs of the qualified immunity analysis should be

addressed first in light of the circumstances in the particular case." *Pearson*, 555 U.S. at 236 (2009); *Quinn v. Young*, 780 F.3d 998, 1004 (10th Cir. 2015).

As Defendants point out, Plaintiff has not complied with Fed.R.Civ.P.56 by offering any responsive facts to Defendants' thirty-one Statement of Undisputed Facts. Under Rule 56, a party opposing a motion for summary judgment must set out in its response specific facts showing a genuine issue for trial." Failure to do so allows the Court to consider the movant's facts as undisputed and enter summary judgment against the non-movant. *See* Fed.R.Civ.P. 56(e)(2); *Elephant Butte Irr. Dist. of New Mexico v. U.S. Dep't of Interior*, 538 F.3d 1299, 1305 (10th Cir. 2008); *see also* D.N.M.LR-Civ.56.1(b) ("All material facts set forth in the Memorandum will be deemed undisputed unless specifically controverted").

All of Defendants' statement of facts are supported by evidence presented in exhibits. Based on Plaintiff's failure to controvert any of these facts, the Court deems as undisputed all facts leading up to Plaintiff's arrest for criminal trespass, as well as the description and disposition of the criminal charges that were filed.

II. Second Cause of Action: Malicious Prosecution/Abuse of Process

Plaintiff asserts claims of malicious prosecution/abuse of process against Defendants Apodaca and Alirez.[2] Defendants contend that Plaintiff cannot maintain a claim for malicious prosecution under the first qualified immunity prong, and that Defendants Alirez and Apodaca are entitled to qualified immunity under the second "clearly established" prong.

A. Malicious Prosecution: Probable Cause and Favorable Termination

To state a Section 1983 claim for malicious prosecution, a plaintiff must show:

[2] Defendants point out that Captain Apodaca did not actually arrest Plaintiff on June 18, 2017 or file charges against him. Doc. 42 at 11, n.5. Chief Alirez arrested Plaintiff and filed the second complaint regarding the June 4, 2017 encounter with plaintiff. *See* Doc. 38 at 3 (details of encounters and arrests). However, the identity of the arresting officer is not critical for purposes of deciding whether Plaintiff can maintain the second cause of action.

(1) the defendant caused the plaintiff's continued confinement or prosecution;

(2) the original action terminated in favor of the plaintiff;

(3) no probable cause supported the original arrest, continued confinement, or prosecution;

(4) the defendant acted with malice; and

(5) the plaintiff sustained damages.

Wilkins v. DeReyes, 528 F.3d 790, 799 (10th Cir. 2008); *see also Margheim v. Buljko*, 855 F.3d 1077, 1085 (10th Cir. 2017); *Griffin v. Kinnison*, 2018 WL 1415185, *8 (D.N.M. Mar. 21, 2018) (unpublished). To meet the second element, the plaintiff has the "burden to show that the termination was favorable." *Cordova v. City of Albuquerque*, 816 F.3d 645, 650 (10th Cir. 2016). To carry that burden, a plaintiff must allege facts which, if true, would allow a reasonable jury to find the proceedings terminated "for reasons indicative of innocence." *See M.G. v. Young*, 826 F.3d 1259, 1263 (10th Cir. 2016). A plaintiff must prove lack of probable cause to prosecute as an essential element of his malicious prosecution or false arrest claim. *See, e.g., McCarty v. Gilchrist*, 646 F.3d 1281, 1285-86 (10th Cir. 2011); *U.S. v. White*, 584 F.3d 935, 945 (10th Cir. 2009); *Novitsky v. City of Aurora*, 491 F.3d 1244, 1258 (10th Cir. 2007); *Hoffman v. Martinez*, 92 F. App'x 628, 631 (10th Cir. 2004) (unpublished). This is so "because not every arrest, prosecution, confinement, or conviction that turns out to have involved an innocent person should be actionable." *See Pierce v. Gilchrist*, 359 F.3d 1279, 1294 (10th Cir. 2004). In a Fourth Amendment malicious prosecution case such as this one, "the third element deals only with the probable cause determination during the institution of legal process." *McGarry v. Bd. of Cnty. Comm'rs for Cnty. of Lincoln*, 294 F.Supp.3d 1170, 1194 (D.N.M. 2018).

1. Probable Cause

The question here is whether the officers "arguably had probable cause." *Kaufman v. Higgs*, 697 F.3d 1297, 1300 (10th Cir. 2012). The validity of an arrest "does not depend on whether the suspect actually committed the crime; the mere fact that the suspect is later acquitted of the offense for which he is arrested is irrelevant to the validity of the arrest." *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979); *see also Summers v. Utah*, 927 F.2d 1165, 1166-67 (10th Cir. 1991) (citations omitted).

Plaintiff's own admissions in the complaint and references to documents attached to the complaint constitute evidence that Defendants arguably had probable cause. *See Guidry v. Sheet Metal Workers Int'l. Ass'n*., 10 F.3d 700, 716 (10th Cir. 1993) (allegations contained in a complaint can constitute judicial admissions). Plaintiff's trespassing and disruptive activities at the Johnson senior center over a period of nearly two years. He was issued trespass warnings directing him to stay away from center on multiple occasions and by his own admission, Plaintiff ignored or refused orders by law enforcement to leave the center. Moreover, while the criminal charges against plaintiff were pending, the Sierra County Magistrate Court ordered plaintiff to stay away from the Johnson Center/Spaceport America Visitor's Center. *See* Docs. 1-2, 1-3; 1-6 to 1-8; Doc. 23 at 1-2). Thus, under these undisputable facts, arguable (if not actual) probable cause existed to prosecute plaintiff. *See, e.g., Williams v. Town of Greenburgh*, 535 F.3d 71, 78-79 (2d Cir. 2008) (plaintiff's false arrest and malicious prosecution claims failed because "there was probable cause to arrest [plaintiff], who was therefore not deprived of any constitutional right").[3]

[3] Defendants argue that Plaintiff is collaterally estopped from challenging the existence of probable cause for his criminal charges under the full faith and credit doctrine, *see* 28 U.S.C. §1738. Doc. 42 at 13. However, given that the Court finds that probable cause existed, this issue is irrelevant to the issues raised in this motion.

2. Favorable Termination

It is not entirely clear whether the original action terminated in Plaintiff's favor. Defendants contend that the *nolle prosequis* does not constitute a favorable termination for Plaintiff because a "bare *nolle prosse* without more is not indicative of innocence." *Wilkins v. DeReyes*, 528 F.3d 790, 803 (10th Cir. 2008). Rather, the "dispositive inquiry is whether the failure to proceed implies a lack of reasonable grounds for the prosecution." *Id.*

Defendants argue that because the *nolle prosequis* was filed without prejudice, it could have been refiled at a later time and does not imply a lack of reasonable grounds for the prosecution. Therefore, they argue, it is insufficient to satisfy the favorable termination requirement. However, *Wilkins* does not entirely resolve the question of whether Plaintiff's case ended favorably. In that case, the Tenth Circuit concluded that the *nolle proseques* "should be considered terminations **in favor of Plaintiffs** [because the] dismissals were not entered due to any compromise or plea for mercy. . . [but rather] they were the result of a judgment by the prosecutor that the case could not be proven beyond a reasonable doubt" and that it was "the State's opinion that currently there is insufficient evidence upon which to retry the defendant[s] for these crimes." *Id.* (emphasis added).

In this case, the State of New Mexico found that there was "insufficient evidence to proceed with charges at this time." Doc. 42-8. One might conclude that this basis for dismissal is not unlike the reason given in *Wilkins*, which would mean that Plaintiff's proceeding ended favorably for him. However, Plaintiff cannot sustain a malicious prosecution claim even if the original criminal action had a favorable termination because the elements of the claim are conjunctive and probable cause existed for the criminal charges. Because at least arguable probable cause existed, Plaintiff cannot proceed on this claim.

B. Malicious Abuse of Process[4]

The tort of malicious abuse of process recognizes that the legal process may be invoked or used in a wrongful manner, causing harm to the party forced to bear the consequences of the wrongful lawsuit. The malicious abuse of process tort is disfavored in the law because of the potential chilling effect on the right of access to the courts. *Fleetwood Retail Corp. v. LeDoux*, 142 N.M. at 150, 156 (N.M. 2007). Maliciously filing a complaint is insufficient to state a malicious abuse of process claim unless it was done without probable cause or was accompanied by some subsequent abuse of process. *Durham v. Guest*, 204 P.3d 19, 25 (N.M. 2009). The elements of this tort are: (1) the use of process in a judicial proceeding that would be improper in the regular prosecution or defense of a claim or charge; (2) a primary motive in the use of process to accomplish an illegitimate end; and (3) damages.

An improper use of process may be shown several different ways, either by showing that a complaint was filed without probable cause or by demonstrating a misuse of procedural devices such as discovery, subpoenas, or attachments, or an irregularity or impropriety in the proceedings suggesting extortion, delay, or harassment. *Fleetwood,* 142 N.M. at 155. Here. Plaintiff can show neither the lack of probable cause or the use of impropriety since his own judicial admissions demonstrate that the criminal charges were based on probable cause. Therefore, Plaintiff cannot maintain a claim of malicious abuse of process.

[4] When addressing malicious prosecution claims brought pursuant to §1983, a court uses common law elements of malicious prosecution as starting point for its analysis; however, the ultimate question is whether plaintiff has proven the deprivation of a constitutional right. *Novitsky v. City Of Aurora*, 491 F.3d 1244 (10th Cir. 2007).

In New Mexico, the Supreme Court has merged the torts of malicious prosecution and abuse of process into a single cause of action known as malicious abuse of process. *DeVaney v. Thriftway Mktg. Corp*., 124 N.M. 512, 953 P.2d 277, 285-86 (1997), cert. denied 118 S.Ct. 2296 (1998) (listing elements). Neither party suggests addressing count II as a merged tort. Plaintiff styles Count II as "Malicious prosecution, Abuse of Process" and Defendants analyze these as separate claims as well.

C. Retaliatory Malicious Prosecution

Plaintiff does not expressly assert a claim for retaliatory malicious prosecution, but Defendants contend that to the extent he intends to assert such a claim, it would fail.[5] For this claim, a plaintiff must show *both* retaliatory motive on the part of the official urging prosecution *and* lack of probable cause. *Hartman v. Moore*, 547 U.S. 250, 265 (2006). *Becker v. Kroll*, 494 F.3d 904, 925 (10th Cir. 2007) (stating elements of retaliatory prosecution claim); *Reichle v. Howards*, 566 U.S. 658, 666 (2012) ("a plaintiff cannot state a claim of retaliatory prosecution in violation of the First Amendment if the charges were supported by probable cause").

The Court agrees with Defendants that based on the undisputed facts, Plaintiff has failed to show lack of probable cause as well as retaliatory motive on the part of Defendants and so Plaintiff cannot sustain this claim, either.

D. Defendants Alirez and Apodaca are Entitled to Qualified Immunity

(1) First Prong of Qualified Immunity Inquiry:

In the foregoing discussion, the Court has determined that Plaintiff has not shown that Defendants violated his constitutional rights based on claims of Malicious Prosecution, Malicious Abuse of Process and Retaliatory Malicious Prosecution. These findings are sufficient to entitle Defendants to qualified immunity under the first prong of the inquiry.

(2) Second Prong of Qualified Immunity Inquiry: The Court need not consider the second part of the inquiry, since if a plaintiff "fails to satisfy either part of the two-part inquiry, the court must grant . . . qualified immunity." *Gross v. Pirtle*, 245 F.3d 1151, 1156 (10th Cir. 2001).

[5] Defendants' desire to be thorough in its analysis is understandable, given the lack of clarity in the complaint. While the Second Cause of Action is titled as "Malicious Prosecution, Abuse of Process," the text of that count alleges that Defendants attempted to "chill his activities and retaliate against him for disclosing their malfeasance"—which looks similar to Plaintiff's First Amendment retaliatory prosecution claim asserted in the First Cause of Action. Compl., ¶70.

However, the Court will consider it to illustrate that there is no basis for Plaintiff to continue litigating his claims. Defendants claim they would be entitled to qualified immunity on the second part of the inquiry because there is an absence of controlling authority that specifically prohibited Defendants from their actions toward Plaintiff regarding the criminal trespass charges. The Court agrees with Defendants that Plaintiff has failed to satisfy his burden to show that the law was clearly established such that Defendants Alirez and Apodoca would have known that their conduct violated Plaintiff's Fourth Amendment rights.

Plaintiff's first legal error is to urge the Court to espouse a more general concept of "clearly established" law, when this notion has been soundly rejected by the United States Supreme Court. Cases offered to show "clearly established law" must include facts that are sufficiently analogous and specific so that a reasonable official would know "that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U. S. 194, 202 (2001); *D.C. v. Wesby*, 138 S. Ct. 577, 590 (2018) ("We have repeatedly stressed that courts must not "define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced"):

> A rule is too general if the unlawfulness of the officer's conduct "does not follow immediately from the conclusion that [the rule] was firmly established." The rule's contours must be so well defined that it is "clear to a reasonable officer that his conduct was unlawful in the situation he confronted." **This requires a high degree of specificity.**

Wesby, 138 S. Ct. at 590 (emphasis added) (citing *Saucier*, 533 U.S. at 202. Plaintiff commits a second error as well: even after having advanced the position that "clearly established" law should be premised on a more general statement of the law, he offers no case law at all as examples. Instead, Plaintiff engages in legal argument (Doc. 45 at 1-2) and lamely argues that the operative

inquiry is whether officer's actions were objectively reasonable (*id.* at 3)—which does not in any way satisfy his burden of showing the law was clearly established.

Plaintiff's failure to carry his burden of showing the law was clearly established entitles Defendants to qualified immunity. *See Cox v. Glanz*, 800 F.3d 1231, 1247 (10th Cir. 2015) (plaintiff failed burden under qualified immunity by failing to cite to any Supreme Court or Tenth Circuit opinion that would indicate right was clearly established); citing *Thomas v. Durastanti*, 607 F.3d 655, 669 (10th Cir. 2010) ("The plaintiff bears the burden of citing to us what he thinks constitutes clearly established law."); *Hedger v. Kramer*, 2018 WL 1082983, at *5 (10th Cir. 2018) ("The failure to identify [] a case is fatal to the claim."). Accordingly, Defendants are entitled to qualified immunity on Plaintiff's second cause of action, under either prong of the qualified immunity inquiry.

III. Third Cause of Action: §1983 Municipal and Supervisory Liability for Violations of Federal Constitutional Rights.

In the Third Cause of Action, Plaintiff claims that Chief Alirez, by virtue of a policy over which he possessed supervisory responsibility, and the City of Truth or Consequences ("City") through this policy, caused a violation of Plaintiff's clearly established constitutional rights.

Plaintiff's municipal liability and supervisory liability claims hinge on a finding that the complaint alleges the violation of a constitutional right. To establish municipal liability under § 1983, a plaintiff must demonstrate a direct causal link between an underlying constitutional violation and a municipal policy or custom exists. *See Graves v. Thomas*, 450 F.3d at 1218. A plaintiff may impose liability upon a defendant-supervisor who creates, promulgates, implements, or in some other way possesses responsibility for

FILED
United States Court of Appeals
Tenth Circuit

January 26, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RON FENN,

Plaintiff - Appellant,

v.

CITY OF TRUTH OR CONSEQUENCES; MICHAEL APODACA, Truth or Consequences Police Captain, individually acting under the color of law; LEE ALIREZ, Truth or Consequences Police Chief, individually acting under color of state law; DANIEL HICKS, Director of Spaceport America,

Defendants - Appellees.

No. 19-2201
(D.C. No. 2:18-CV-00634-WJ-GBW)
(D. N.M.)

ORDER

Before **TYMKOVICH**, Chief Judge, **LUCERO**, and **BACHARACH**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

the continued operation of a policy which results in a deprivation of constitutional rights. *Dodds v. Richardson*, 614 F.3d 1185 (10th Cir. 2010).

The Court has already determined that Plaintiff cannot maintain his second cause of action, whether presented as a claim for Malicious Prosecution, Malicious Abuse of Process or Retaliatory Malicious Prosecution; and that as a result, Defendants are entitled to qualified immunity on Plaintiff's second cause of action under the first prong of a qualified immunity inquiry. This finding bars Plaintiff's third cause of action against the City because there is no underlying constitutional violation on which to base a *Monell* claim. *See*, *Apodaca v. Rio Arriba County Sheriff's Dept*., 905 F.2d 1445, 1447 (10th Cir. 1990) (a municipality may not be held liable where there is no underlying constitutional violation by any of its officers (citing *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986)); *Hinton v. City of Elwood, Kan*., 997 F.2d 774, 782 (10th Cir. 1993) (where an individual law enforcement officer is entitled to qualified immunity on the ground that his or her conduct did not violate the law, it is proper to dismiss claims against the municipality.

Plaintiff's supervisory liability claim against Defendant Alirez also fails for the same reason. *See Butler v. City of Norman*, 992 F.2d 1053, 1055 (10th Cir.1993) (liability of supervisor based on showing that the defendant-supervisor personally directed the violation or had actual knowledge of the violation and acquiesced in its continuance); *Cox v. Glanz*, 800 F.3d 1231, 1250 (10th Cir. 2015) (analyzing clearly established law as to supervisory liability claim). In addition, the Court's finding that Plaintiff has failed to show the law was clearly established also entitles Defendant Alirez to qualified immunity. *See Owen v. City of Independence*, 445 U.S. 622, 638 (1980); *Seamons v. Snow*, 206 F.3d 1021, 1029 (10th Cir. 2000) (Qualified immunity is not available as a defense to municipal liability.).

CONCLUSION

In sum, this Court finds and concludes that:

(1) Plaintiff cannot sustain his second cause of action against Defendants Apodaca and Alirez asserting Malicious Prosecution and Abuse of Process and as a result, Defendants are entitled to qualified immunity on both parts of the qualified immunity analysis;

(2) Plaintiff cannot sustain his second cause of action against Defendant Alirez based on supervisory liability and as a result Defendant is entitled to qualified immunity on the second cause of action; and that

(3) Plaintiff cannot sustain his second cause of action against Defendant City of Truth or Consequences ("City") based on municipal liability because there is no underlying constitutional violation and as a result, the City is entitled to summary judgment on Count III in the *Monell* claim.

In its previous decision, the Court did not address the *Monell* claim with regard to the First Amendment claim in Count I because Defendants did not offer any argument on this issue. *See* Doc. 38 at 16. In their summary judgment motion, however, Defendants argue that the *Monell* claim should be dismissed because Plaintiff cannot show that his constitutional rights were violated. While the Court focused on the "clearly established" prong in the Order granting in part Defendants' motion to dismiss (Doc. 38 at 15-16), it is also clear that Plaintiff cannot show that Defendants retaliated against him in violation of his First Amendment rights either, because probable cause existed for the criminal trespass charge. *See Mocek v. City of Albuquerque*, 813 F.3d 912, 931–32 (10th Cir. 2015) (In First Amendment Retaliation claim, Plaintiff must show lack of probable cause for retaliatory prosecution cases). As a result, the *Monell* claims in Count III must be dismissed entirely, with regard to both of Plaintiff's underlying substantive claims in Count I and Count II.

THEREFORE,

IT IS ORDERED that Defendants' Motion for Summary Judgment on Plaintiff's Second and Third Causes of Action **(Doc. 42)** is hereby GRANTED for reasons described in this Memorandum Opinion and Order.

As a result of the Court's cumulative findings in this Opinion and in its previous Opinion, there are no claims remaining in Plaintiff's complaint, and the rulings herein dispose of Plaintiff's case in its entirety.

By separate pleading, the Court shall issue a Rule 58 Judgment.

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

RON FENN,

Plaintiff,

vs. No. 2:18-cv-00634 WJ-GW

CITY OF TRUTH OR CONSEQUENCES,
MICHAEL APODACA, Truth or Consequences
Police Captain individually acting under the color of Law,
LEE ALIREZ, Truth or Consequences Police Chief individually
Acting under color of state law, and DANIEL HICKS,
Director of Spaceport America,

Defendants.

RULE 58 JUDGMENT

THIS MATTER came before the Court upon Defendants' Motion for Summary Judgment on Plaintiff's Second and Third Causes of Action **(Doc. 42)**. Pursuant to the findings and conclusions set forth in the Memorandum Opinion and Order which accompanies this Rule 58 Judgment **(Doc. 52)**.

IT IS THEREFORE ORDERED and **ADJUDGED** that Defendants' Motion for Summary Judgment on Plaintiff's Second and Third Causes of Action **(Doc. 42)** is hereby GRANTED, thus disposing of this case on its merits and in its entirety.

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 19-2201

RON FENN

Plaintiff-Appellant

v.

CITY OF TRUTH OR CONSEQUENCES, MICHAEL APODACA, POLICE CHIEF LEE ALIREZ, and DANIEL HICKS

Defendants-Appellees

On Appeal from the United States District Court
For the District of New Mexico (Hon. William P. Johnson)
District Case No. 2:18-cv-00634

APPELLANT'S OPENING BRIEF

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Oral Argument Requested

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I. STATEMENT OF PRIOR RELATED APPEALS

There are no prior related appeals.

II. JURISDICTIONAL STATEMENT

The United States District Court for the District of New Mexico had subject matter jurisdiction and personal jurisdiction of the underlying case pursuant to 28 U.S.C. §§ 1331 and 1343.

This Court has jurisdiction over the appeal per 28 U.S.C. § 1291. The District Court entered its *Memorandum Opinion and Order Granting in Part Truth or Consequences Defendants' Motion to Dismiss and Granting Defendant Daniel Hick's Motion to Dismiss* on February 26, 2019 (Aplt App 078-096) and its *Memorandum Opinion and Order Granting Defendant's Motion for Summary Judgment on Plaintiff's Second and Third Cause of Action* on November 6, 2019, with final judgment issued November 6, 2019. (Aplt App 111-125). Appellant timely noticed his appeal on December 2, 2019.

III. STATEMENT OF THE ISSUES

The District Court erred in granting qualified immunity to all Appellees and those decisions conflict with the U.S. Supreme Court's decision in *Nieves v. Bartlett*, 139 S. Ct. 1715, 204 L. Ed. 2d 1 (2019).

IV. STANDARD OF REVIEW

The Federal Court of Appeals for the 10th Circuit review de novo the grant of a motion to dismiss under Rule 12(b)(6) due to qualified immunity. *See Doe v. Woodard*, 912 F.3d 1278, 1288 (10th Cir. 2019), *cert. denied sub nom. I.B. v. Woodard*, 139 S. Ct. 2616, 204 L. Ed. 2d 265 (2019) *citing Estate of Lockett v. Fallin*, 841 F.3d 1098, 1106 (10th Cir. 2016).

V. STATEMENT OF THE CASE

This is 42 USC §1983 litigation against the CEO of Spaceport America, a New Mexico government agency, for the intentional and malicious deprivation of the Plaintiff/Appellant's 1st Amendment right to free speech and against City of Truth or Consequences ("T or C"), its Chief of Police and a police officer for retaliatory prosecution for the exercise of Plaintiff's right to free speech.

In sum, Appellant filed a Complaint alleging (1) First Amendment Retaliation; (2) Malicious Prosecution and Abuse of Process; and (3) supervisory and *Monell* liability in the U.S. District Court for the District of New Mexico on July 5, 2018. T or C Defendant/Appellees moved for partial dismissal on qualified immunity on August 2, 2018 and Defendant/Appellee Hicks moved for dismissal on qualified immunity on August 28, 2018. After completion of briefing, the District Court granted in part the T or C Appellees' Motion and granted Appellee Hick's

Motion. T or C Appellees then moved to dismiss the remaining claims on qualified immunity grounds which after the completion of briefing the District Court granted.

VI. STATEMENT OF THE RELEVANT FACTS

Appellant Ron Fenn frequented a senior center at 301 S. Foch St., Truth or Consequences, New Mexico. The senior center was converted to other uses, and was eventually leased out to Spaceport America, a New Mexico public agency, for use as a visitor center. Appellant publicly protested the conversion of the senior center.

On May 5, 2017, Captain Apodaca responded to a call by John Muenster, a volunteer of Geronimo Trail Scenic Byway center (another tenant from a separate part of the building from Spaceport America), about Mr. Fenn being on the property in violation of trespass orders (there was no trespass order in place preventing Mr. Fenn from occupying the public space of Spaceport America) as Mr. Fenn was putting up posters on a counter inside the center. Captain Apodaca told Mr. Fenn that he could "put up his propaganda and stay… but not to harass any visitors." Mr. Muenster was concerned that expensive items kept in the center could be damaged or stolen. Ms. Rosemary Bleth (of Geronimo Trail Scenic Byway center) notified the officer that she was interested in a criminal trespass order against Mr. Fenn to prevent him from entering the location.

On May 11, 2017, Mr. Hicks, CEO of Spaceport America was contacted by then Chief Alirez who encouraged him to request a trespass order from Chief Alirez

based on prior incidents as a preventative measure, which Mr. Hicks agreed to request. Chief Alirez drove 75 miles to the offices of Spaceport America for Defendant Hicks' signature that day. Chief Alirez then met with Mr. Fenn on May 12, 2017 to serve the trespass order. Mr. Fenn received it but refused to sign it.

On June 4, 2017, Larena Miller contacted the police department to report Mr. Fenn inside 301 S. Foch St. Sgt. Baker responded and found Mr. Fenn inside the "common use area of the building," (Aplt App. 013, 024) in the area housing a satellite library. Sgt. Baker and Chief Alirez told Plaintiff to leave, and Mr. Fenn refused. Then Chief Alirez met with Plaintiff on June 13, 2017 in his office and offered to hold the trespass citation in abeyance as long as Appellant Fenn had no further violations at 301 S. Foch St. (Aplt App 024).

On June 18, 2017, Officer Ontiveros was dispatched to another trespassing call at 301 S. Foch St. Mr. Fenn was "within the common area of the areas he had previously been trespassed from." (Aplt App 024-025). Mr. Fenn said he was not trespassing but was protesting. Both Officer Ontiveros and Chief Alirez ordered Appellant to leave, and he refused. Chief Alirez then arrested Appellant and a criminal complaint was filed against him for Criminal Trespass pursuant to NMSA § 30-14-1(C). The criminal complaint was eventually dismissed *nolle prosequi* and never refiled within the statute of limitations for the event. *See* Aplt App 009-015.

VII. SUMMARY OF THE ARGUMENT

There was never probable cause (at no time did Mr. Fenn do anything other than quietly and peacefully engage in lawful protest) for the T or C Appellees to seek and obtain a trespass order, nor was there probable cause for Mr. Hicks to obtain a trespass order. The actions of all Appellees amount to nothing more than the manufacture of the probable cause that enabled them to deprive Mr. Fenn of his First Amendment protected right to peaceably protest on the basis of the content of his speech. Quite simply, the Appellees engaged in retaliation against Mr. Fenn because they did not like what he had to say, and the Appellees are not entitled to qualified immunity for that retaliation.

VIII. ARGUMENT

At the heart of the error by the District Court in this case is the important aspect that no conduct by Appellant initiated or ever justified the actions that all Appellees took against him. Which is to say that Mr. Fenn engaged in peaceful protest and there was no reason for the Police Chief and his Captain to seek out and obtain from Mr. Hicks a trespass order, nor was there any reason for Mr. Hicks to obtain a trespass order barring the free exercise of protected speech in a peaceful manner in the public space under Mr. Hicks control. Instead, the only evidence before the District Court was that of retaliatory animus regarding the content of Mr. Fenn's protected speech, which is the only reason that the retaliatory actions,

including the manufacturing of probable case for the malicious arrest and prosecution, occurred. Thus, the District Court's insistence that the Appellees were all entitled to qualified immunity ignores the reality of the retaliatory actions based upon an animus towards the content of Mr. Fenn's speech which is a clearly established violation of Mr. Fenn's constitutional rights. This premise was clarified after the District Court's first decision and before the second decision in *Nieves v. Bartlett*, 139 S. Ct. 1715, 204 L. Ed. 2d 1 (2019) with which the District Court decisions strongly conflict. Importantly, the U.S. Supreme Court's decision in that case in evaluating actions similar to those at issue in this case state that for retaliatory prosecution claims holds,

> "proving the link between the defendant's retaliatory animus and the plaintiff's injury ... 'is usually more complex than it is in other retaliation cases.'" ...Unlike most retaliation cases, in retaliatory prosecution cases the official with the malicious motive does not carry out the retaliatory action himself—the decision to bring charges is instead made by a prosecutor, who is generally immune from suit and whose decisions receive a presumption of regularity.... Thus, even when an officer's animus is clear, it does not necessarily show that the officer "induced the action of a prosecutor who would not have pressed charges otherwise." ...
>
> To account for this "problem of causation" in retaliatory prosecution claims, *Hartman* adopted the requirement that plaintiffs plead and prove the absence of probable cause for the underlying criminal charge.

*Id.*at 1723 (quoting *Hartman*, 547 U.S. at 261-63, 126 S.Ct. 1695).

A. The District Court Erred in Affording Dan Hicks Qualified Immunity

Regarding Mr. Hicks, Mr. Fenn alleged and the District Court refused to

recognize that discrimination against the free exercise of protected speech by Mr. Hicks, based solely on the content of Mr. Fenn's speech as reported by Chief Alirez and Captain Apodaca, clearly violated Mr. Fenn's clearly established right protected by the First Amendment to peaceably assemble in a public place and engage in protected speech. The District Court concluded that Mr. Hicks was entitled to qualified immunity from suit in his individual capacity. However, the actions alleged in ¶ 33 and 35 of Appellant's Complaint (Aplt App 012-013) support his personal and specific involvement in discriminatory and retaliatory conduct directed at Mr. Fenn. Mr. Hicks took the specific action to request a trespass order against Mr. Fenn when he was invited to do so, in collusion with Chief Alirez, who drove 75 miles to obtain Mr. Hicks signature on the trespass order request.

1. Hicks Violated Plaintiff's First Amendment Rights.

Mr. Fenn correctly pointed out to the District Court that to prove a claim of retaliation for the exercise of his First Amendment rights, he must prove the following: (1) he was engaged in constitutionally protected activity; (2) that Hicks' actions caused Mr. Fenn to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) Hicks' adverse action was substantially motivated as a response to Mr. Fenn's exercise of constitutionally protected conduct. *Nielander v. Bd. of Cnty Comm'rs*, 582 F.3d 1155, 1165 (10th Cir. 2009); *Smith v. Plati*, 258 F.3d 1167, 1176-77 (10th Cir. 2001).

There is no doubt that Mr. Fenn was engaged in a constitutionally protected activity while present at the public visitor's center to discuss his concerns and protest the elimination of the senior center and lease of the center to Mr. Hicks' entity. This same protected right has been well established and revisited as recently as 2014. *Meyer v. Grant,* 486 U.S. 414, 424, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988)(in the context of petition campaigns, "one-on-one communication" is "the most effective, fundamental, and perhaps economical avenue of political discourse."); *McCullen v. Coakley,* 134 S. Ct. 2518, 2536, 189 L. Ed. 2d 502 (2014).

As to the second prong, "that Hicks' actions caused Mr. Fenn to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity," Mr. Hicks' sole argument was accepted by the District Court, *i.e.* that Mr. Fenn was not injured because he could "voice his concerns at other venues." The assertion was fundamentally flawed, as seen from the discussion *supra.*, that a person's right to protest at *public locations* is protected and curtailment is limited. There is no question that Mr. Hicks' action (to obtain a trespass order for no other reason than the content of Mr. Fenn's speech) did chill Mr. Fenn, a person of *above ordinary firmness,* because Mr. Hicks' action in conjunction with other Appellees did exactly what each intended, to stop Mr. Fenn from seeking redress at the very location that had been impacted by the City's actions.

Importantly, Mr. Fenn was falsely arrested for trespass, based solely on a

trespass order derived from representations to Mr. Hicks' that Mr. Fenn was "disruptive." Yet, the only suggested disruptiveness was the content of Mr. Fenn's speech and seeking redress at the former senior center/*vis a vis* Spaceport visitor center. There was no report of vulgar speech, nor report of abusive or hostile speech. Simply put, but for Mr. Fenn speaking out against the visitor center/senior center closure he would not have been removed or "trespassed" from the open public location, accessible by all citizens and invitees and visitors, inclusive of a public library.

This action by Mr. Hicks was motivated as a response to Mr. Fenn's exercise of constitutionally protected conduct, his protest in a public place regarding the use of portions of 301 S. Foch St. for commercial purposes. These averments were evident from the complaint and included exhibits and the District Court plainly erred in determining otherwise.

2. Appellant had a Right to Protest at the Visitor Center.

"'The right to peaceably assemble and petition for redress of grievance . . . are rights of the citizen guaranteed by the Federal Constitution.'" *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 513, 59 S. Ct. 954, 963, 83 L. Ed. 1423 (1939), *citing to* the Slaughter-House Cases, 16 Wall. page 79, 21 L.Ed. 394. In assessing a restriction on the right to assemble, the Supreme Court has queried whether the place of assembly is or is not a traditional public forum. *Adderley v. Florida; Greer v.*

Spock, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976); *U.S. Postal Service v. Greenburgh Civic Assns.*, 453 U.S. 114, 101 S.Ct. 2676, 69 L.Ed.2d 517 (1981). To answer that question, the Courts have asked whether the character of the place is appropriate for the expression of views and ideas generally. *State v. McCormack*, 1984-NMCA-042, ¶¶ 17-18, 101 N.M. 349, 352, 682 P.2d 742, 745. Not a relevant inquiry is whether the location is appropriate to the demonstration.

Invariably, the First Amendment provides and protects the rights of United States citizens to peacefully assemble and seek redress from their government representatives – regardless of whether those representatives like or desire to hear such complaints. Long have the Courts been required to preserve the "presumptively protected status of peaceful picketing activities..." in the face of overreaching to curtail this well-established right. *See Agric. Labor Relations Bd. v. California Coastal Farms, Inc.*, 31 Cal. 3d 469, 481–82, 645 P.2d 739, 745–46 (1982); *Kaplan's Fruit and Produce Co. v. Superior Court* (1979) 26 Cal.3d 60, 81, 162 Cal.Rptr. 745, 603 P.2d 1341; *United Farm Workers of America v. Superior Court* (1976) 16 Cal.3d 499, 505, 128 Cal.Rptr. 209, 546 P.2d 713.) Thus, courts must be "cautious in entertaining actions to enjoin or restrain [peaceful picketing activities]' (*United Farm Workers of America v. Superior Court*, *supra*, 16 Cal.3d 499, 505, 128 Cal.Rptr. 209, 546 P.2d 713) and any action by a government official preventing or impacting the right to peaceably assemble must "'be couched in the narrowest terms

that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order' (*id.*, at p. 504, 128 Cal.Rptr. 209, 546 P.2d 713)." Any judicially imposed restraints must be tailored with caution, reserved for cases in which the threat of harm is clear. *See United Farm Workers of America v. Superior Court, supra*, 16 Cal.3d 499, 506, 128 Cal.Rptr. 209, 546 P.2d 713; *Kaplan's Fruit and Produce Co. v. Superior Court, supra,* 26 Cal.3d at p. 81, 162 Cal.Rptr. 745, 603 P.2d 1341.)

The question the District Court erred in answering is whether Mr. Fenn, a citizen, had the right to petition and enjoyed freedom of speech at the public visitor location that he selected and which all other citizens were invited to attend. The Spaceport America visitor center was a public location at which every citizen as well as international visitors, were invited to enter during its open hours. Mr. Fenn enjoyed the same rights to enter the visitor center as did other citizens and visitors, as long as his actions were peaceful. Mr. Hicks took specific action to impair Mr. Fenn's right to peacefully assembly, to air his grievances and to seek redress when Mr. Hicks obtained a "trespass order"/restraining order to prevent Mr. Fenn's access to the public location with the express intent and purpose of quashing Mr. Fenn's speech. Mr. Hicks never denied his intent was to stop Mr. Fenn from speaking out against Spaceport America's use of the former senior center. Nor did Mr. Hicks deny that he worked with Appellees Alirez and Apodaca to restrain Mr. Fenn from access

to the public visitor center and cease Mr. Fenn's speech by issuance of a trespass order. While "exclusion" from a public location may – in certain instances – be "lawful" as the District Court accepted, such curtailment of rights to speech and to seek redress are not lawful simply because a public official personally desires to exclude access. Such exclusion is not lawful when the intent and purpose of the actor is to prevent speech, and then perfected outside of the careful judicial considerations required before curtailing First Amendment rights. (Aplt App 075).

The Supreme Court has reaffirmed that pamphleteering and one-on-one communications are First–Amendment–protected activities. *See McCullen*, 134 S.Ct. at 2536. In *McCullen*, the Court "observed that one-on-one communication is the most effective, fundamental, and perhaps economical avenue of political discourse" and that "no form of speech is entitled to greater constitutional protection" than leafletting. *Id.* (internal quotation marks and alteration omitted). The Court went on to state that when a governmental actor "makes it more difficult to engage in these modes of communication, it imposes an especially significant First Amendment burden." *Id.* Plaintiff's communications here are thus protected by the First Amendment.

Nor did Mr. Hicks argue to the District Court or provide any facts to support or legitimately assert that the location from which he sought to restrict Mr. Fenn, was not a public location. Instead, the District Court accepted the suggestion that a

person can be "excluded" from a location. While that may be the case, such exclusion must be considered in the constitutional context, when it is sought at a public location:

> Turning now to the constitutional restrictions on speech, our analysis is guided by Plaintiffs' wish to engage in First Amendment-protected activity on government property. "Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius,* 473 U.S. at 799–800, 105 S.Ct. 3439. But in some instances, the public may have acquired by tradition or prior permission the right to use government property for expressive purposes. *See id.* at 802, 105 S.Ct. 3439. To determine when and to what extent the Government may properly limit expressive activity on its property, the Supreme Court has adopted a range of constitutional protections that varies depending on the nature of the government property, or forum. *Id.* at 800, 105 S.Ct. 3439.

Verlo v. Martinez, 820 F.3d 1113, 1128–29 (10th Cir. 2016). Thus, applying *Nieves*, this Court should find Mr. Hicks' animus was clear and necessarily shows that the actions of Mr. Hicks induced the actions of Chief Alirez and Captain Apodaca who but for the signing of the trespass order could not have pressed charges for trespass against Mr. Fenn.

B. T or C Appellees are Not Entitled to Qualified Immunity For Either Retaliatory Arrest or Malicious Prosecution.

1. The Actions of Chief Alirez and Captain Apodaca to "Press Charges" by Seeking Out and Inducing Mr. Hicks to Obtain a Trespass Order Against Mr. Fenn when there was No Probable Cause that a Crime was Being Committed was Objectively Unreasonable and Therefore Conflicts with the Supreme Court's Decision in *Nieves* Regarding Retaliatory Arrest.

Regardless of whether the District Court reviewed the actions of T or C Appellees as a false arrest or a malicious prosecution under *Nieves* the decision they should not have been to afford qualified immunity with regard to retaliatory arrest based upon probable cause. In reviewing the lack of probable cause requirement for retaliatory arrest the *Nieves* Court examined both malicious prosecutions and false arrest context to conclude that the "no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been. *United States v. Armstrong*, 517 U.S. 456, 465, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996)." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1727, 204 L. Ed. 2d 1 (2019). Thus, when the record clearly indicates that there was no other evidence that a crime was being committed and that the officers were responding purely to the content and location of Mr. Fenn's speech to press charges, arrest Mr. Fenn and prosecute Mr. Fenn, that objectively but for the officer's animus towards the protected activities of Mr. Fenn he would not have been persecuted. And having sufficiently demonstrated the same to the District Court as he did, Mr. Fenn's claims for retaliatory prosecution should have been allowed to "proceed in the same manner as claims where the plaintiff has met the threshold showing of the absence of probable cause. See *Lozman*, 585 U.S., at ——, 138 S.Ct., at 1952–1953." *Nieves* at 1727. Thus, it is beyond argument that the retaliatory arrest of Mr. Fenn falls well

outside of the realm for which Chief Alirez and Captain Apodaca enjoyed qualified immunity. The *Nieves* Court's application of *Hartman* serves to highlight that violation of Mr. Fenn's constitutional rights through retaliatory arrest based solely upon the location and content of his peaceful protest was clearly established at the time of injury as a retaliatory arrest.

2. The District Court's Decision Regarding the Prosecution of Mr. Fenn is Inconsistent with the Jurisprudence from the U.S. Supreme Court and the 10th Circuit.

Likewise, rightfully putting aside the analysis of whether or not the ensuing prosecution of Mr. Fenn was initiated with malice; the District Court erred in determining that the prosecution did not terminate favorably. Of course, Fourth Amendment malicious prosecution requires "(1) the defendant caused the plaintiff's continued confinement or prosecution; (2) the original action terminated in favor of the plaintiff; (3) no probable cause supported the original arrest, continued confinement, or prosecution; (4) the defendant acted with malice; and (5) the plaintiff sustained damages." *Wilkins v. DeReyes*, 528 F.3d 790, 799 (10th Cir. 2008). The District Court, in evaluating favorable termination, should have considered and accepted that entry of Appellant's counsel into the criminal case and the subsequent discussions of counsel resulting in the dismissal *nolle prosequi*, coupled with the fact that the case was never refiled within the statute of limitations,

proved a favorable termination for Mr. Fenn. The Tenth Circuit's guidance should have confirmed such for the District Court where this Court stated:

> [I]n *Wilkins* ... the prosecutor had dismissed the underlying charges by filing a so-called *nolle prosequi*—a voluntary dismissal of charges.... We found the mere fact that a prosecutor had chosen to abandon a case was insufficient to show favorable termination. Instead, the termination must in some way "indicate the innocence of the accused." ... (quoting Restatement (Second) of Torts § 660 cmt. a (1977)). When it is unclear whether the termination indicates innocence, we "look to the stated reasons for the dismissal *as well as to the circumstances surrounding it" and determine "whether the failure to proceed implies a lack of reasonable grounds for the prosecution*." ... Or, as a leading treatise put it, the abandonment of prosecution that "does not touch the merits ... leaves the accused without a favorable termination." Dan B. Dobbs et al., Dobb's Law of Torts § 590 (2d ed. 2015).

Cordova v. City of Albuquerque, 816 F.3d 645, 651 (10th Cir. 2016) (*emphasis added*).

Importantly, as noted above, the actions of Appellees to manufacture probable cause, out of retaliation for the content of Mr. Fenn's protected speech, is fatal to the conclusion the District Court reached in analyzing malicious prosecution. Perhaps more importantly, with regard to malicious prosecution's second element,[1] the fact that litigation terminated by the admission that there was "insufficient evidence to proceed" by the District Attorney's Office, after Mr. Fenn pointed out the same in his *pro se* Motions to Dismiss (which though denied resulted in the District Attorney dismissing the case *nolle prosequi* for the same reasons) that the

[1] *See Wilkins v. De Rey* 528 F.3d 790,799(10th Cir. 2008)

element of intent could not be met to convict a person of trespass that entered into a public place upon the reasonable belief that their First Amendment right to engage in protected speech to peaceably protest gave them the right to be in an open public forum. Thus, a recognition that there was insufficient evidence to prosecute is exactly the type of favorable termination that Mr. Fenn sought *pro se* in the criminal proceeding.

Two other critical facts largely ignored by the District Court support the notion that Mr. Fenn's criminal prosecution terminated favorably. The first is the fact that following Plaintiff's retention of counsel, along with that counsel's entry into the case to discuss and point out to the District Attorney's Office the lack of merit to the criminal prosecution, the District Attorney's Office abandoned their prosecution. Further, while the abandonment of prosecution was without prejudice, it was never refiled before the statute of limitations ran. All of these add support to the notion that Mr. Fenn has met his "burden to show that the termination was favorable." *Cordova v. City of Albuquerque*, 816 F.3d 645, 630 (10th Cir. 2016). The admission of the District Attorney to recognize that with a complete factual record before them they lack sufficient evidence to prosecute such that a jury could easily determine that proceeding terminated "for reasons indicative of innocence" is a termination favorable to Plaintiff. *See M. G. v. Young*, 826 F.3d 1259, 1263 (10th Cir. 2016).

Thus, the remaining inquiry not reached by the District Court is whether or not the third element of determining "probable cause…during the institution of legal process" was fact specific and critical for the District Court to have evaluated in examining the claim of malicious prosecution. *McGarry v. Bd. Of Cty. Comm'rs for Cty. Of Lincoln*, 294 F. Supp.3d 1170, 1194 (D.N.M. 2018). At the time prosecution was initiated the Appellees clearly knew they lacked an essential element of probable cause to support prosecution, namely, that Mr. Fenn had "enter[ed] or remain[ed] on the lands of another knowing that such consent to enter or remain is denied." NMSA 1978 § 30-14-1. What the District Court ignored was that that the Appellees were lacking in the elements necessary to establish probable cause at the time that they sought a trespass order as evidenced by the fact that Appellees had to contact the current tenant and travel to Las Cruces to obtain a new trespass order for Spaceport America's Visitor Center, as the current tenant had never complained of Mr. Fenn's presence in their leased, open-to-the-public space, much less requested that Mr. Fenn be trespassed from Spaceport America Visitor's Center. A previous tenant, ostensibly still in violation of Mr. Fenn's First Amendment rights, Follow the Sun Tours, had requested that Mr. Fenn no longer be allowed to peacefully protest against their government action, but they were no longer the tenants at the time Mr. Fenn resumed his exercise of protected speech to peacefully protest the use of a government public space for the government agency Spaceport America Visitor's

Center. Appellee admitted to the District Court that the critical element of knowingly entering and remaining at a place where consent was revoked was notably not present at the time that they commenced their malicious prosecution and retaliatory prosecution such that they had to proactively seek out and persuade the current tenant to revoke consent so that they could claim probable cause. This was the equivalent of filing a deficient affidavit to obtain a warrant for arrest or seizure. Under the great weight of federal jurisprudence and New Mexico substantive law that warrant must be tossed out as lacking probable cause just as this arrest must be held to have lacked probable cause. *See Franks v. Delaware*, 438 U.S. 154, 156, 98 S. Ct. 2674, 2676, 57 L. Ed. 2d 667 (1978); *see also State v. Haidle*, 2012-NMSC-033, ¶ 12, 285 P.3d 668, 672. Obtaining a trespass order from a current tenant that had not complained of Mr. Fenn's conduct of protected speech during the act of peaceful protest is the functional equivalent to obtaining an arrest warrant based upon the fabrication of facts that support that a crime had been committed.

As to retaliatory prosecution, Mr. Fenn presented to the District Court what the elements of a retaliatory prosecution or vindictive prosecution are, but the District Court misapplied the facts to the law: first, the undisputed material facts establish Mr. Fenn was clearly engaged in protected speech to criticize his government during peaceful protest which is unquestionably a constitutionally protected activity especially in light of the fact that at the time of the initiation of the

prosecution there was no trespass order (valid or not) in place; second, it is beyond question that Mr. Fenn's arrest and prosecution for engaging in peaceful protest would chill a person of ordinary firmness from continuing to engage in that activity; and third, that Appellee's actions were undeniably motivated solely as a response to the First Amendment speech rights of Mr. Fenn that are only discernably different from any other person based upon the content of his speech as being critical of the government that employed those officers. *See Becker v. Kroll*, 494 F.3d 904, 925 (10th Cir. 2007).

Thus, retaliatory prosecutions such as this one that also display a lack of probable cause, *see Hartman v. Moore*, 547 U.S. 250, 262 (2006); *see also Cowley v. West Valley City*, supra, 2018 WL 1305709 at *8 & n.12, are appropriately viewed through the lens of the 10th Circuit's decisions on vindictive prosecutions that "if the misuse of the legal procedure is egregious there may be a deprivation of constitutional dimensions for which a plaintiff can invoke § 1983." *Lusby v. T.G. & Y. Stores*, 749 F.2d 1423, 1431 (10th Cir.1984), *cert. denied*, 474 U.S. 818, 106 S.Ct. 65, 88 L.Ed.2d 53 (1985). Such view was reiterated in *Anthony v. Baker*, 767 F.2d 657, 662–63 (10th Cir.1985). The 10th Circuit has also provided helpful guidance of *Poole v. County of Otero*, 271 F.3d 955 (10th Cir. 2001), in evaluating a claim for violation of a First Amendment right thru vindictive prosecution, stating:

> [a] claim for vindictive prosecution ordinarily arises when, during the course of criminal proceedings, a Plaintiff exercises

> constitutional or statutory rights and the government seeks to punish him therefor by instituting additional or more severe charges, see, e.g., *United States v. Wall*, 37 F.3d 1443, 1448 (10th Cir. 1994). In this context, such a claim is governed by a two-part test, see *United States v. Lampley*, 127 F.3d 1231, 1245 (10th Cir. 1997). Nonetheless, we recognize that this court has not limited the term to the criminal prosecution setting, but has characterized First Amendment claims similar to Mr. Poole's as "vindictive prosecution." *See Wolford v. Lasater*, 78 F.3d 484, 488 (10th Cir. 1996) (comparing a First Amendment claim to a "vindictive prosecution action"); *Gehl Group*, 63 F.3d at 1534 (stating that a First Amendment claim alleging retaliatory prosecution "is essentially one of vindictive prosecution"); *United States v. P.H.E., Inc*., 965 F.2d 848, 853 (10th Cir. 1992) (discussing vindictive prosecution claim in terms of prosecution motivated by "the improper purpose of interfering with the Appellee's constitutionally protected speech"); cf. *Phelps v. Hamilton*, 59 F.3d 1058, 1065 n.12 (10th Cir. 1995) (stating that prosecution brought for the purpose of hindering an exercise of constitutional rights may constitute "harassing and/or bad faith prosecution")."

Poole v. County of Otero, 271 F.3d 955, fn. 5 (10th Cir. 2001) (emphasis added).

In *Wolford*, the Tenth Circuit examined whether a plaintiff's constitutional rights were violated by the government's prosecution of her, where she alleged the government's action was motivated in part to retaliate against her for exercising her First Amendment rights. In that case the 10th Circuit commented that "[i]n the context of a government prosecution, the decision to prosecute which is motivated by a desire to discourage protected speech or expression violates the First Amendment and is actionable under § 1983." *Wolford v. Lasater*, 78 F.3d 484, 488 (10th Cir. 1996). The Court reasoned that a central question to be addressed in such an action was "whether retaliation for the exercise of First Amendment rights was

the 'cause' of the prosecution and the accompanying injuries to plaintiff." *Id*.; *citing Rakovich v. Wade*, 850 F.2d 1180, 1189 (7th Cir. 1988)). Likewise, in *Gehl Group v. Koby*, 63 F.3d 1528 (10th Cir. 1995), a controversy the 10th Circuit characterized as a vindictive prosecution case brought in retaliation against the plaintiffs' exercise of their First Amendment rights, 63 F.3d at 1534, the Tenth Circuit noted that "the ultimate inquiry is whether as a practical matter there is a realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for the hostility or punitive animus towards the Appellee because he exercised his specific legal rights." *Id*. at n.6 (*emphasis added*) The Court framed the § 1983 claim for First Amendment rights violations under the tort of "vindictive prosecution." *Id.* "These cases make clear that a governmental lawsuit brought with the intent to retaliate against a citizen for the exercise of his First Amendment rights is of itself a separate violation that provides grounds for a § 1983 suit." *Beedle v. Wilson, Ibid*. at 1066.

Thus, when the District Court should have appropriately found that when Appellees *initiated* their prosecution, by seeking out a trespass order to manufacture probable cause for the arrest and continued prosecution of Mr. Fenn, that they lacked probable cause, then the District Court should have found that Mr. Fenn could sustain a Section 1983 claim for both a malicious prosecution and a vindictive prosecution claim.

C. Without a Determination that Appellees are Entitled to Qualified Immunity the District Court's Decision Regarding the *Monell* claims is in Error.

The District Court's determined that qualified immunity is determinative of Mr. Fenn's *Monell* claims, at least initially. Thus, without belaboring the analysis contained in the District Court's decision, Mr. Fenn offers that if the Appellee lacked probable cause to initiate the prosecution that they undertook at the onset; then the District Court's decision must fail with regard to both *Monell* claims and the state law claim for Malicious Abuse of Process. *See Monell v. New York City Dep't of Social Servs*, 436 U.S. 658, 694 (1978); *see also Durham v. Guest*, 2009-NMSC-007, ¶ 29, 145 N.M. 694; *see also Fleetwood Retail Corp. of N.M. v. LeDoux*, 2007-NMSC-047, ¶ 12, 142 N.M. 150.

IX. CONCLUSION

The Court should reverse the decisions of the District Court.

X. ORAL ARGUMENT STATEMENT

Pursuant to 10th Cir. L. R. 28.2(C)(f), Appellants request oral argument in this matter. Such argument is necessary because the issues involve important questions of law. Appellants respectfully suggest that the Court may benefit from the interactive conversation that oral argument would provide on these issues.

Respectfully submitted this 25th day of February 2020.

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CERTIFICATE OF COMPLAINCE

Undersigned counsel certifies that Appellants' Opening Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,900 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii). This opening 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 the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing via the appellate CM/ECF system on February 25th, 2020 causing all parties of record to be served electronically.

/s/ A. Blair Dunn
A. Blair Dunn, Esq.

CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to the Tenth Circuit ECF User's Manual, Section II.J, I hereby certify, with respect to the foregoing document, that:

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/s/ A. Blair Dunn
A. Blair Dunn, Esq.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 19-2201

RON FENN

Plaintiff-Appellant

v.

CITY OF TRUTH OR CONSEQUENCES, MICHAEL APODACA, POLICE CHIEF LEE ALIREZ, and DANIEL HICKS

Defendants-Appellees

On Appeal from the United States District Court
For the District of New Mexico (Hon. William P. Johnson)
District Case No. 2:18-cv-00634

PETITION FOR PANEL REHEARING

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Oral Argument Requested

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I. STATEMENT OF THE ISSUES

The Panel erred in affirming the district court's decision which relied on construing facts against the Appellant and in construing additional facts to incorrectly determine that Appellees were entitled to qualified immunity.

II. SUMMARY OF THE ARGUMENT

Few things are as basic and fundamental to our system of justice as the notion that we are innocent until proven guilty. Such an important precept comes into play in a civil case such as this when the district court, and then this Court, construe or fabricate facts to convict Appellant of being "obnoxious" or determine without any factual development that Appellant was not peacefully protesting in a traditional forum. This panel has erred greatly in construing facts in an effort to protect the government from liability for trampling Mr. Fenn's rights, in order to use qualified immunity as a force to close the courthouse door to cases pursuing civil rights justice. It is hard to fathom that in America that a senior citizen, that is quietly and non-aggressively pamphlet-ing and protesting in an open public space that in no way impeded access to the building, could be trespassed with zero due process merely because the government found through a third-party that the content of his speech "obnoxious." Then to further tear open a wound in the heart of liberty enshrined in the First Amendment, this Court and the lower court would protect such trampling of liberty by upholding that it is then probable cause to arrest and jail a senior citizen

exercising his rights. Such actions by any branch of the government must be recognized as contributing to the decay of civility and the loss of faith in our government that leads to events such as the insurrection of January 6, 2021 in our sacred halls of freedom.

III. ARGUMENT

A. The Panel Incorrectly Construed Facts to Engage in Independently Determining Ultimate Facts Contrary to the Clear Precedent of the United States Supreme Court.

The Supreme Court has been abundantly clear for a long time that "factfinding is the basic responsibility of district courts, rather than appellate courts, and ... the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court." *DeMarco v. United States*, 415 U.S. 449, 450, n., 94 S.Ct. 1185, 1186, n., 39 L.Ed.2d 501 (1974). Moreover, where there is more than one way to construe ultimate facts, as is the case here regarding Mr. Fenn's conduct, or whether or not the public space was traditional public fora, the Supreme Court has directed that a remand is the proper course unless the record permits only one resolution of the factual issue. *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 331–332, 95 S.Ct. 472, 479–480, 42 L.Ed.2d 498 (1974). Instead here, contrary to the holdings of the Supreme Court, the Panel engaged not only in affirming the mistake of the district court but took its own independent step to further construe allegations or create factual support to construe conclusions that support a

finding of qualified immunity. As the Supreme Court has stated:

> Proceeding in this manner seems to us incredible unless the Court of Appeals construed its own well-established Circuit rule with respect to its authority to arrive at independent findings on ultimate facts free of the strictures of Rule 52(a) also to permit it to examine the record and make its own independent findings with respect to those issues on which the district court's findings are set aside for an error of law.

Pullman-Standard v. Swint, 456 U.S. 273, 293, 102 S. Ct. 1781, 1792, 72 L. Ed. 2d 66 (1982). The Panel erred in construing the following facts:

1) **Dan Hicks, the Spaceport Director, never complaint about Mr. Fenn, instead police initiated a conversation with Mr. Hicks and encouraged him to request a trespass based upon their opinion of Mr. Fenn's speech and conduct.**
2) **There is absolutely no factual support in the record that would allow the lower court, much less this Panel on Appeal, to construe that there was probable cause to trespass Mr. Fenn from the open auditorium spaces. Moreover, unsubstantiated, unfounded allegations from building tenants not in control of the portion of the building where Mr. Fenn was peacefully protesting, of feeling unsafe that a senior citizen would suddenly turn violent or begin damaging property when he did not exhibit nor is even alleged to have engaged in words or actions that could reasonably be indicative of imminent threat, cannot provide the support this Court has used to shield the government with qualified immunity.**

3) There is no factual development that the support's the Panel's determination that the auditorium, no longer used (for over 75 years) for meetings and political assembly, currently housing a promotional exhibit for a government agency, was not "traditional public fora."

Thus, this Panel has created facts not contained in the record that never happened, such as that Appellee Dan Hicks complained about Mr. Fenn and that the space (previously an auditorium used for public meetings) was not a type of space where a person would traditionally engage in protected speech or conduct such a petitioning for redress. Such action by the Panel is incorrect and is a clear contradiction of the Supreme Court's direction. This Panel in so construing facts compounded its error by affirming the district court's decision construing facts concerning Mr. Fenn's behavior against Mr. Fenn. Both the trial and reviewing courts must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party. *E.g., Jenkins v. McKeithen*, 395 U.S. 411, 421—422, 89 S.Ct. 1843, 1848—1849, 23 L.Ed.2d 404 (1969).

B. Review of the Case is Vital to Maintaining the Consistency of Dismissal Decisions Among District Courts in the Circuit.

The trial court simply failed in its duty to correctly construe the allegations of facts of the complaint in favor of the Appellant as proper in a 12(b)(6) analysis. The Panel's contrary conclusion to affirm the error of the district court and then to compound the error by independently finding and construing additional facts without

factual development before the lower court is a serious legal error of extraordinary importance because it conflicts in several ways with the Court's precedents in these important areas, and leaves the door open for the district courts to experience confusion about the standard that governs district court determinations of disputed facts under Rule 12(b)(6) motions to dismiss for qualified immunity where the facts are not clearly established or developed. Justice requires especially in the context of civil rights that a person not be convicted of conduct that would condone stripping them of a fundamental liberty with some examination of the proof upon which such a conviction rest.

IV. CONCLUSION

For the foregoing reasons, Appellant respectfully asks the Court to grant its petition for panel rehearing.

Respectfully submitted this 25th day of February 2020.

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CERTIFICATE OF COMPLAINCE

Undersigned counsel certifies that Appellants' Petition for Panel Rehearing complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 1154 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B) (iii). This Petition for Panel Rehearing 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 the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing via the appellate CM/ECF system on January 11, 2020 causing all parties of record to be served electronically.

/s/ A. Blair Dunn
A. Blair Dunn, Esq.

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