No. 20-1768

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 a Writ of Certiorari to the U.S. Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Did the unanimous Tenth Circuit panel below properly affirm dismissal and summary judgment in favor of these Respondents where the allegations made in, and the documents attached to, Petitioner's own complaint show that his arrest was supported by probable cause, and where Petitioner failed to show that his clearly established constitutional rights were violated?

II. Did the unanimous Tenth Circuit panel below properly affirm summary judgment in favor of these Respondents on Petitioner's *Monell*/supervisory liability claim where Petitioner failed to show an underlying violation of his clearly established constitutional rights?

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BRIEF IN OPPOSITION

Respondents City of Truth or Consequences, New Mexico, Captain Michael Apodaca, and former Police Chief Lee Alirez respond in opposition to Petitioner Ron Fenn's petition for a writ of certiorari to review the Tenth Circuit's unanimous judgment in this case.

STATEMENT OF THE CASE

1. New Mexico's Spaceport America Visitor Center is located in the Lee Belle Johnson Center at 301 S. Foch St. in Truth or Consequences, New Mexico. App. 19a. Petitioner Ron Fenn was "very outspoken regarding his disagreement with the city of Truth or Consequences regarding the lease of a city building to" Spaceport America. App. 38a. Fenn alleged that he "frequently attended meetings and publicly protested in traditional forums against the use of Truth or Consequences funds for the benefit of Spaceport America." App. 39a.

Petitioner has a lengthy history of being asked to leave the facilities at 301 S. Foch Street. On June 26, 2015, Larena Miller—an employee of the Geronimo Trails Scenic Byway Center, also housed at 301 S. Foch Street—requested that Fenn "be trespassed" from that location because Fenn was being "offensive to her," causing her to "fe[el] unsafe around" him. *See* App. 2a, 20a. That same day, another witness at 301 S. Foch St. called the Truth or Consequences Police Department to report Fenn's "improper soliciting." App. 20a. This second witness, Rosemary Bleth, identified Fenn to police. *Id.* Ms. Bleth's manager (Steven Bleth) had also observed Fenn soliciting business for a "Spaceport Tour Video Memory Services," and told officers that Fenn "had been a very vocal opponent of the opening of the Spaceport visitor center." *Id.* Ms. Bleth notified police that she wanted a criminal trespass order against Fenn to prevent him from entering the location; thereafter, a trespass authorization was issued restricting Fenn from the property. *See* App. 20a, 21a.

Captain Michael Apodaca and Chief Lee Alirez of the Truth or Consequences Police Department attempted to serve the trespass authorization on Fenn, who took receipt of the forms. App. 20a. Chief Alirez asked Fenn for a copy of the business cards that Fenn had been handing out at 301 S. Foch St., and also asked Fenn if he possessed a City of Truth or Consequences business license. *Id.* Fenn was later prosecuted for conducting business without a license, and was convicted on September 9, 2015. *Id.*

Over a year later, on October 10, 2016, another third-party witness, Linda DeMarino, contacted the Truth or Consequences Police Department and reported that Fenn had again entered the location at 301 S. Foch and was making "obnoxious comments." App. 20a. Captain Apodaca responded to this call. *Id.* Ms. DeMarino reported that Fenn had been "carrying on" about the building no longer being in use as a senior center. App. 20a-21a.

On May 5, 2017, Captain Apodaca was again dispatched to 301 S. Foch St. to respond to a report that Fenn had been on the property in violation of trespass orders. App. 21a. The reporting party was John Muenster, a volunteer at the Geronimo Trail Scenic Byway Visitor's Center. *Id.* Fenn was putting up posters on a counter inside the center. *Id.* Captain Apodaca told Fenn that he could "put up his propaganda and stay…but not to harass any visitors." *Id.* Mr. Muenster was concerned that expensive items kept in the center could be damaged or stolen. *Id.* Meanwhile, Ms. Bleth notified the officer that she was interested in a criminal trespass order against Fenn to prevent him from entering the location. *Id.*

On May 11, 2017, Daniel Hicks, then-CEO of Spaceport America, requested a trespass order against Fenn, based on prior incidents as a preventative measure. App. 21a. Mr. Hicks signed the trespass authorization form. App. 21a, 26a. Chief Alirez then met with Fenn on May 12, 2017 to serve the trespass order; Fenn received it but refused to sign it. App. 21a.

On June 4, 2017, Larena Miller again contacted the Truth or Consequences Police Department to report Fenn being inside the premises at 301 S. Foch. App. 21a. Sergeant Erica Baker (not named as a party-Defendant below) responded and located Fenn inside the building. *Id.* Sergeant Baker told Fenn to leave, however, Fenn refused. *Id.* Both Sergeant Baker and Chief Alirez told Fenn to leave, however, Fenn refused. *Id.*

2. On June 18, 2017, Truth or Consequences Police Officer Ontiveros (also not a named party-Defendant below) was dispatched to the 301 S. Foch St. location in response to a call that Fenn was again on the premises. App. 21a-22a. Officer Ontiveros located Fenn "within the common area of the areas [Fenn] had previously been trespassed from." *Id.* Both Officer Ontiveros and Chief Alirez ordered Fenn to leave, and he refused. App. 22a. Chief Alirez then arrested Fenn, and a criminal complaint was filed against Fenn for Criminal Trespass in violation of NMSA 1978, Section 30-14-1(C) (1995). App. 22a.

In response to the criminal charges filed against him, Fenn filed a motion to dismiss for failure to establish certain elements of the offense. App. 22a. Following a hearing in state court, Fenn's motion to

dismiss was denied. *See id.* The criminal case against Fenn was later dismissed without prejudice (via a *nolle prosequi*) on October 11, 2017. *Id.*

3. Fenn filed his complaint initiating the present case on July 5, 2018, alleging (1) First Amendment Retaliation; (2) Malicious Prosecution and Abuse of Process; and (3) supervisory and *Monell* liability. App. 22a. In lieu of answering the complaint, the Truth or Consequences Respondents filed a Motion to Dismiss Fenn's first and third causes of action on the basis of qualified immunity. *Id.* The District Court granted in part these Respondents' First Motion to Dismiss, agreeing "that a reasonable [law enforcement] officer could have reasonably believed that probable cause existed for criminal trespass in light of well-established law." App. 26(a). The District Court correctly found that Spaceport America Director/CEO Daniel Hicks "revoked consent for Plaintiff to be on the premises [of the Spaceport visitor center at 301 S. Foch St.] and signed a trespass notice." *Id.* The District Court correctly ruled—based on Fenn's own allegations—that "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." *Id.* The District Court also noted that plaintiff "did not cite any law on when probable cause for trespass is valid in the First Amendment context," and did "not cite to case law showing when a trespass statute can be enforced or argue that the trespass statute is overbroad." App. 27a. The District Court found that Chief "Alirez had

probable cause to arrest or prosecute" Fenn. App. 26a. The District Court also found that "Defendants Apodaca and Alirez [we]re entitled to qualified immunity for the arrest and subsequent prosecution in June 2017." App. 31a.

Subsequently, these Respondents moved for summary judgment on Fenn's second and third causes of action. *See* App. 38a. Notably, Fenn completely failed to respond to Respondents' assertions of fact under Fed. R. Civ. P. 56. *See* App. 41a. The District Court found that "Fenn's own admissions in the complaint and references to documents attached to the complaint constitute[d] evidence that Defendants arguably had probable cause" to prosecute Fenn. App. 43a. Under the undisputed facts—which included, *inter alia*, Fenn's "trespassing and disruptive activities at the Johnson senior center over a period of nearly two years" and his admitted "ignor[ance] or refus[al to obey] orders by law enforcement to leave the center"—"arguable (if not actual) probable cause existed to prosecute" Fenn. *Id.* As such, the District Court granted Respondents' motion for summary judgment on Fenn's federal Malicious Prosecution and state Malicious Abuse of Process claims. *See* App. 44a-45a. Moreover, while Fenn had not "expressly assert[ed] a claim for retaliatory malicious prosecution," the District Court properly found that such a claim would fail given the existence of probable cause. App. 46a. Finally, because there was no underlying constitutional violation by the police officers, the District Court found that Fenn could not maintain his *Monell* claim against the City. App. 48a-49a.

4. Following full briefing and oral argument, the United States Court of Appeals for the Tenth Circuit affirmed the District Court's rulings in all respects. *See generally* App. 1a-16a. In pertinent part, the Tenth Circuit noted that "Fenn did not establish the elements of [his] constitutional claims. And because those claims fail[ed], his claims for supervisory liability against Alirez and for *Monell* liability against the City also fail[ed]." App. 6a. In the first instance, Fenn failed to show that "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." App. 7a. Moreover, Fenn failed to show a lack of probable cause for his arrest and prosecution. App. 9a-11a.

5. The Tenth Circuit entered its Judgment in favor of all Respondents on December 29, 2020. App. 17a. On January 26, 2021, the Tenth Circuit entered its Order denying Fenn's petition for rehearing. App. 18a.

REASONS FOR DENYING THE PETITION

I. This Case is a Poor Candidate for Certiorari Because Petitioner Has Failed to Identify Any Compelling Reasons for Reviewing the Tenth Circuit's Unanimous Decision.

As to his claims against these Respondents, the substance of Fenn's Petition reveals that his chief complaint is, primarily, a misguided argument that the unanimous panel below misapplied or misinterpreted this Court's and the Tenth Circuit's First Amendment precedents. *See generally* Pet. at 15-24. Even if that argument were correct, however, this case is not one warranting review. "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. "[T]his Court is not equipped to correct every perceived error coming from the lower federal courts." *Boag v. MacDougall*, 454 U.S. 364, 366 (1982) (O'Connor, J., concurring); *see also Tolan v. Cotton*, 572 U.S. 650, 661 (2014) (Alito, J., concurring) (citing S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 5.12(c)(3), p. 352 (10th ed. 2013) ("error correction...is outside the mainstream of the Court's functions and...not among the 'compelling reasons'...that govern the grant of certiorari")); *Cavazos v. Smith*, 565 U.S. 1, 11 (2011) (Ginsburg, J., dissenting).

"Because certiorari jurisdiction exists to clarify the law, its exercise 'is not a matter of right, but of judicial discretion.'" *City and Cnty. of San Francisco*

v. Sheehan, 135 S.Ct. 1765, 1774 (2015) (quoting Sup. Ct. R. 10). The "compelling reasons" for granting certiorari include the existence of conflicting decisions on issues of law among federal courts of appeals, among state courts of last resort, or between federal courts of appeals and state courts of last resort. *Sheehan*, 135 S.Ct. at 1779. This Court's Rule 10 concludes: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The questions presented by petitioner in the present case implicate, at most, the latter. *See Sheehan*, 135 S.Ct. at 1779. As discussed herein, the unanimous Tenth Circuit panel correctly applied this Court's First Amendment precedents regarding retaliatory arrests and malicious prosecution.

A. The Tenth Circuit Correctly Found That These Respondents had Probable Cause to Arrest and Prosecute Fenn.

In *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001), this Court held that if an officer has probable cause to believe that an individual has committed even a very minor criminal offense in their presence, the officer may, without violating the Constitution, arrest the offender. In evaluating whether the events leading up to an arrest amount to probable cause, the Court asks whether an objectively reasonable officer could conclude that the historical facts at the time of the arrest amount to probable cause. *Cortez v. McCauley*, 478 F.3d 1108, 1116 (10th Cir. 2007) (citing *Maryland v. Pringle*, 540 U.S. 366, 371 (2003); *Gardenhire v. Schubert*, 205 F.3d 303, 318 (6th Cir. 2000)); *see also D.C. v. Wesby*, 138 S.Ct. 577, 586

(2018). Probable cause exists where the facts and circumstances within the officer's knowledge are sufficient to warrant a prudent person to believe that the suspect has committed or was committing an offense. *Beck v. Ohio*, 379 U.S. 89, 91 (1964) "[I]n determining whether probable cause exists, the courts must apply the 'totality of circumstances' test." *Brierley v. Schoenfeld*, 781 F.2d 838, 841 n.1 (10th Cir. 1986) (citing *Illinois v. Gates*, 462 U.S. 213 (1983)).

Probable cause "is not a high bar." *Kaley v. U.S.*, 571 U.S. 320, 338 (2014); *Wesby*, 138 S.Ct. at 586. Substantively, the question of whether probable cause exists in light of the factual record does not require proof beyond reasonable doubt, or even a preponderance of the evidence. *See Kerns v. Bader*, 663 F.3d 1173, 1188 (10th Cir. 2011), *cert. denied*, 568 U.S. 1026 (2012). It does not even require the suspect's guilt to be "more likely true than false." *Texas v. Brown*, 460 U.S. 730, 742 (1983); *see also U.S. v. Ludwig*, 641 F.3d 1243, 1252 (10th Cir. 2011). Because probable cause for a warrantless arrest is determined in terms of the circumstances confronting the arresting officer at the time of the seizure, "the validity of such an arrest is not undermined by subsequent events in the suspect's criminal prosecution, such as dismissal of charges or acquittal." *Summers v. Utah*, 927 F.2d 1165, 1166-67 (10th Cir. 1991) (citations omitted); *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979); *see also Hubbert v. City of Moore*, 923 F.2d 769, 773 (10th Cir. 1991) ("[w]hether the jury eventually convicts the defendant of the crime has no bearing on the question whether the officer had probable cause to make the arrest").

Under this rubric, Fenn's arrest was lawful if the facts available to Chief Alirez furnished probable cause to believe that Fenn had committed any crime for which he could be arrested. *See*, *e.g.*, *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (explaining that an officer's "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause"). As Fenn himself admitted in his own Complaint, he had repeatedly been "trespassed" from the 301 S. Foch St. location in Truth or Consequences, which houses, *inter alia*, a governmental agency (Spaceport America). Under NMSA 1978, Section 30-14-1(C) (1995) (one of the statutes Fenn was charged with violating), 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*" (emphasis supplied).

On June 26, 2015, an employee of the Geronimo Trail Scenic Byway Center—housed at 301 S. Foch St.—requested that Fenn "be trespassed" from the building for being "offensive to her." App. 20a. On that same date, a separate person (Rosemary Bleth) in the same building reported that Fenn was engaging in improper soliciting and sought a trespass order against Fenn. *Id.* Fenn took receipt of the trespass forms, i.e. he was on notice that he had been "trespassed" from the Johnson Center. Nonetheless, Fenn returned to the Johnson building, where he was reportedly making "obnoxious comments" and was otherwise "carrying on" about the alleged misuse of the building. *Id.* Yet another time, on May 5, 2017, Fenn was again on the

Johnson building premises in violation of trespass orders. App. 21a. Six days later, on May 11, 2017, Daniel Hicks, then-CEO of Spaceport America (which leases part of the Johnson building) requested a trespass order against Fenn; Fenn received these trespass forms. App. 21a. Nonetheless, Fenn again entered the building on June 4 and 18, 2017. When Fenn refused to leave the building on June 18, 2017, he was arrested for trespassing. App. 22a. As set forth in Fenn's own complaint, multiple people who worked or volunteered at the Johnson Center reported Fenn for improper conduct and for violating previously-issued trespassing orders.

On June 18, 2017, Chief Alirez had, at the very least, arguable probable cause to believe that Fenn had committed one or more of the offenses listed in the criminal complaint that was filed against him. Fenn ignores the fact—pleaded in his own complaint and supported by one of the documents attached to his complaint—that Daniel Hicks (the CEO of Spaceport America) requested a trespass order against Fenn "based on prior incidents as a preventative measure." App. 21a. Hicks requested the trespass notice on behalf of Spaceport America. App. 4a. Respondents did not "manufacture" any factual basis for arresting or charging Fenn as he repeatedly and derisively suggests—the probable cause supporting the charges filed against Fenn was apparent from the historical facts that Fenn failed to contest below. Given these facts, Fenn was a known trespasser at 301 S. Foch St. on June 18, 2017. The Truth or Consequences Police Officers—including Chief Alirez—properly investigated the call about Fenn, properly instructed him to leave, and then properly arrested him when he refused that order.

These facts amply supplied probable cause for Fenn's arrest, and consequently, the Tenth Circuit properly affirmed the dismissal of Fenn's retaliatory arrest claim.

B. Petitioner Fails to Identify Any "Clearly Established" Law Governing his First Amendment Claim.

The Truth or Consequences Respondents did not violate Fenn's clearly established rights by issuing him a trespass notice in the two years leading up to his June 2017 arrest, nor did they violate his rights by arresting him. Indeed, Fenn has not cited a single source of legal authority for the specific proposition that issuing him a trespass notice violated his constitutional rights. *See generally Vincent v. City of Sulphur*, 805 F.3d 543 (5th Cir. 2015), *cert. denied*, 136 S.Ct. 1517 (2016) (prior Supreme Court and Circuit case law did not establish unlawfulness of no-trespass warning covering city buildings issued as a prophylactic security measure for the duration of a live investigation of alleged threats against city officials).

In his Petition, Fenn claims that he was in an "open-to-the-public space" while he was protesting at the Johnson Center. Pet. 19. Of course, Fenn did not actually show that he was engaged in constitutionally protected activity in the first place, because the Johnson Center (which, as Fenn admits, was a government-owned building *formerly* used for public meetings, *see* Pet. 26) 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. As this Court has held, "[n]othing 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); *cf. Minn. Voters All. v. Mansky*, 138 S.Ct. 1876, 1885 (2018) (recognizing "parks, streets, sidewalks, and the like" as traditional public forums); *see also* App. 7a-8a. Additionally, Petitioner fails to establish that his ability to access a publicly-owned building represents a clearly-established constitutional right. *See Williams v. Town of Greenburgh*, 535 F.3d 71, 74-76 (2nd Cir. 2008) (finding that access to public facilities does not amount to a constitutionally-protected liberty interest). "The First Amendment does not entitle a citizen to trespass, block traffic, or create hazards for others." *Frye v. Police Dep't of Kansas City*, 260 F.Supp.2d 796, 799 (W.D. Mo. 2003).

"Where probable cause exists, the subjective intent of the officer in effectuating an arrest is irrelevant." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). For purposes of qualified immunity, this Court need not determine whether Fenn was actually guilty of trespass, or even if probable cause to arrest him for that crime actually existed—rather, the Court must only ask whether an officer in Defendants' position could have reasonably, even if mistakenly, believed that he or she had probable cause to make the arrest. *Fink v. Gonzalez*, 911 F.Supp. 332, 335 (N.D. Ill. 1996). Even where Fenn may have lawfully entered one part of the Johnson building, and even acknowledging that the trespass charges against him were dismissed, the Officers had probable cause to arrest Fenn, and are therefore entitled to qualified immunity from Fenn's claims.

Granito v. Tiska, 120 F. App'x 847, 849 (2d Cir. Jan. 7, 2005) (unpublished); *see also Blankenhorn v. City of Orange*, 485 F.3d 463, 471-75 (9th Cir. 2007) (plaintiff—who had previously been issued trespass notice at mall property—was arrested for returning to mall; even where a shopping center is generally "open to the public" under state law, the trespass notice arguably rendered mall "not open to the public" with respect to plaintiff); *Jones v. Michael*, 656 F. App'x 923, 927 (11th Cir. July 7, 2016) (unpublished) ("whether Schaefer was in fact guilty of trespass is not pertinent to our qualified immunity analysis…objective officers in Defendant Officers' place could have believed reasonably—when they told Schaefer that he was under arrest—that Schaefer was remaining willfully in an area where he had been told to leave"); *Lawson v. City of Miami Beach*, 908 F.Supp.2d 1285, 1291-92 (S.D. Fla. 2012) (arguable probable cause existed for plaintiff's trespassing charge, even where plaintiff alleged he was arrested on a public sidewalk).

In April of 2006, this Court held that, to proceed with a claim for retaliatory prosecution a plaintiff must plead and prove an absence of probable cause to support the charge. *Hartman v. Moore*, 547 U.S. 250, 252, 265-66 (2006). Because *Hartman* did not involve a claim for retaliatory arrest, it was not clear whether its rationale applied in that context. Six years later, in *Reichle v. Howards*, 566 U.S. 658 (2012), this Court declined to decide "whether a First Amendment retaliatory arrest claim may lie despite the presence of probable cause to support the arrest." *Reichle*, 566 U.S. at 663. Instead, this Court held that the law was not clearly established as of June 2006. *See id.* at 666-67, 670. Specifying that "the

right in question is not the general right to be free from retaliation for one's speech, but the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause," this Court noted that it "has never held that there is such a right." *Id.* at 665. "Although the facts of *Hartman* involved only a retaliatory prosecution, reasonable officers could have questioned whether the rule of *Hartman* also applied to arrests." *Id.* at 666. "[F]or qualified immunity purposes, at the time...it was at least arguable that *Hartman*'s rule extended to retaliatory arrests." *Id.* at 669. Accordingly, this Court held that the Defendant officers were entitled to qualified immunity. *Id.* at 670.

Per this Court's decision in *Reichle*, "*Hartman* [had] injected uncertainty into the law governing retaliatory arrests." *Reichle*, 566 U.S. at 670. Thus, the law as to First Amendment retaliatory arrest in the presence of probable cause was not clearly established in 2012 (when *Reichle* was decided). The Circuit Courts have cited *Reichle* as the basis for upholding the dismissal of First Amendment retaliatory arrest claims when arrests were supported by probable cause. *See*, *e.g.*, *Galarnyk v. Fraser*, 687 F.3d 1070, 1076 (8th Cir. 2012); *Marshall v. City of Farmington Hills*, 693 F. App'x 417, 425-26 (6th Cir. June 1, 2017) (unpublished); *accord Thayer v. Chiczewski*, 705 F.3d 237, 253 (7th Cir. 2012).

1. <u>*Lozman v. Riviera Beach* Did Not Clearly Establish the Law in Petitioner's Favor</u>

This Court's 2018 decision in *Lozman v. City of Riviera Beach*, 138 S.Ct. 1945 (2018), did not clearly establish the law, least of all in Fenn's favor. This Court avoided ruling generally on the question

whether a 42 U.S.C. § 1983 plaintiff who alleges a retaliatory arrest in violation of the First Amendment must allege and prove the absence of probable cause in addition to an impermissible First Amendment motive (i.e. whether probable cause to arrest is a defense to a First Amendment retaliatory arrest damages claim). Instead, this Court ruled narrowly for the plaintiff based on the particular facts of the case. In *Lozman*, the plaintiff alleged "that high-level city policymakers adopted a plan to retaliate against him for protected speech and then ordered his arrest when he attempted to make remarks during the public-comment portion of a city council meeting." *Lozman*, 138 S.Ct. at 1949. Plaintiff claimed that he was arrested at a city council meeting when he got up to speak because he previously had criticized the city's eminent domain redevelopment efforts and had also sued the city for violating state law. *See generally id.* at 1949-50.

In *Lozman*, the plaintiff was never prosecuted—however, probable cause supported plaintiff's arrest for violating a Florida statute prohibiting interruptions or disturbances at certain public assemblies, because he had refused to leave the podium after receiving a lawful order to do so. *Lozman*, 138 S.Ct. at 1950. This Court ruled that, in the particular case before it, the plaintiff did not have to allege and prove the absence of probable cause, and probable cause was not a defense to his First Amendment retaliatory arrest claim. *Id.* at 1955. The only question was whether the existence of probable cause barred Lozman's First Amendment retaliation claim. *Id.* at 1951. This Court observed that the issue in First Amendment retaliatory arrest cases was whether *Mt. Healthy City Sch. Dist. Bd. of*

Educ. v. Doyle, 429 U.S. 274 (1977), or *Hartman v. Moore*, *supra*, applied. *See Lozman*, 138 S.Ct. at 1952; *see also id.* at 1953.

As noted above, in *Hartman*, this Court held that a plaintiff must plead and prove an absence of probable cause to support a retaliatory prosecution claim. In *Mt. Healthy*, a city board of education decided not to rehire an untenured school teacher after a series of incidents indicating unprofessional demeanor. *Mt. Healthy*, 429 U.S. at 281-83. One of the incidents was a telephone call the teacher made to a local radio station to report on a new school policy. *Id.* at 282. Because the board of education did not suggest that the teacher violated any established policy in making the call, this Court accepted the District Court's finding that the call was protected speech. *Id.* at 284. This Court went on to hold, however, that since the other incidents, standing alone, would have justified the dismissal, relief could not be granted if the board could show that the discharge would have been ordered even without reference to the protected speech. *Id.* at 285-87. This Court held that even if retaliation might have been a substantial motive for the board's action, there could be no liability unless the alleged constitutional violation was a but-for cause of the employment termination. *Id.*

In *Lozman*, this Court determined that resolution of the matter would have to wait for another case: "For Lozman's claim is far afield from the typical retaliatory arrest claims, and the difficulties that might arise if *Mt. Healthy* is applied to the same mine run of arrests made by police officers are not present here." *Lozman*, 138 S.Ct. at 1954. Notably,

the plaintiff did not sue the officer who actually made the arrest. *Id.* Since he sued the city, *Lozman* had to allege and prove an official policy or custom, which "separate[d] Lozman's claim from the typical retaliatory arrest claim." *Id.* Moreover, the causation issues in *Lozman* were relatively straightforward because the plaintiff's allegations of an official policy or custom of retaliation were unrelated to the criminal offense for which the arrest was made but rather to prior, protected speech. *See id.*

Lozman holds only that a plaintiff may prevail on a civil claim for damages for First Amendment retaliation for an arrest made pursuant to a retaliatory official municipal policy, even if there was probable cause for the arrest, if "the alleged constitutional violation was a but-for cause" of the arrest. *Lozman*, 138 S.Ct. at 1952 (citing *Mt. Healthy*, 429 U.S. at 285-87). This Court left open the question of whether *Mt. Healthy* applied as against individual Defendant police officers, as opposed to the municipality for which they work. *See Lozman*, 138 S.Ct. at 1953-54; *see also Higginbotham v. Sylvester*, 741 F. App'x 28, 31 (2d Cir. July 25, 2018) (unpublished).

2. This Court's Opinion in *Nieves v. Bartlett* Undercuts Petitioner's Claims

The issue left open in *Lozman* was largely resolved by this Court the following year. In *Nieves v. Bartlett*, this Court found that because the Defendant troopers had probable cause to arrest plaintiff, his First Amendment retaliatory arrest claim failed as a matter of law. *See generally Nieves v. Bartlett*, 139 S.Ct. 1715 (2019). Although this Court recognized some differences between

retaliatory prosecution and retaliatory arrest cases, ultimately, this Court found that the "related causal challenge" in the two types of cases required plaintiffs "pressing a retaliatory arrest claim to plead and prove the absence of probable cause for the arrest." *Id.* at 1724; *see also Roy v. City of Monroe*, 950 F.3d 245, 255 (5th Cir. 2020); *Borawick v. City of Los Angeles*, 793 F. App'x 644, 646 (9th Cir. Feb. 13, 2020) (unpublished). This Court found that "[t]he presence of probable cause should generally defeat a First Amendment retaliatory arrest claim." *Nieves*, 139 S.Ct. at 1726; *see also Lund v. City of Rockford*, 956 F.3d 938, 943-44 (7th Cir. 2020); *Cass v. Town of Wayland*, 383 F.Supp.3d 66, 85-86 (D. Mass. 2019). Moreover, to prevail on a retaliatory arrest claim, the plaintiff must establish a 'causal connection' between the government defendant's 'retaliatory animus' and the plaintiff's 'subsequent injury.'" *Nieves*, 139 S.Ct. at 1722 (quoting *Hartman*, supra, 547 U.S. at 259). In particular, a plaintiff must show that the defendant's retaliatory animus was "a 'but-for' cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive." *Id.* (quoting *Hartman*, 547 U.S. at 260).

In the present case, Fenn's retaliatory arrest claim fails on all counts: probable cause supported Fenn's arrest as discussed in detail above. *See Johnson v. McCarver*, 942 F.3d 405, 409-10 (8th Cir. 2019) (plaintiff did not leave club after officer instructed him to do so based on doorman's request for plaintiff to leave); *see also Hinkle v. Beckham Cty. Bd. of Cty. Comm'rs*, 962 F.3d 1204, 1227 (10th Cir. 2020); *Just v. City of St. Louis*, __ F.4th __, 2021 WL 3411783, *4 (8th Cir. Aug. 5, 2021) (slip op.). Moreover, Fenn made absolutely no showing that the

Officers' actions were motivated by Fenn's protesting activities. Indeed, the record reflects that Fenn was "trespassed" from the Johnson Center after multiple complaints from third-party witnesses, and that he was arrested after returning to the Center and refusing lawful orders to leave. *See Watkins v. Cent. Broward Reg'l Park*, 799 F. App'x 659, 664 (11th Cir. Jan. 3, 2020) (unpublished) (police officer order plaintiff to leave park because park manager "no longer wanted him there"; officer's actions were therefore motivated by park manager's trespassing complaint, not plaintiff's speech) (citing *Nieves*, 139 S.Ct. at 1722).

Contrary to what Fenn now suggests, *see* Pet. 15-16, the Tenth Circuit's unanimous decision below is fully consistent with this Court's decision in *Nieves*. Nonetheless, Fenn points to language in *Nieves* suggesting 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." Pet. 15. However, this is a narrow exception not applicable here. *See*, *e.g.*, *DelPriore v. McClure*, 424 F.Supp.3d 580, 592 (D. Alaska 2020); *Thomas v. Cassia Cnty.*, 491 F.Supp.3d 805, 813 (D. Idaho 2020); *cf. DeMartini v. Town of Gulf Stream*, 942 F.3d 1277, 1296-97 (11th Cir. 2019).

3. The Cases on Which Petitioner Relies Do Not Clearly Establish the Law in his Favor

Even assuming a First Amendment violation occurred—a proposition that is not at all evident here—these Officers remain entitled to qualified immunity. *See Kisela v. Hughes*, 138 S.Ct. 1148, 1152

(2018). As Respondents raised qualified immunity by way of their dismissal and summary judgment motions, it was Fenn's burden to marshal both the proof and the arguments necessary to overcome this defense. *See*, *e.g.*, *Pierce v. Smith*, 117 F.3d 866, 871-72 (5th Cir. 1997) (noting that the plaintiff bears the burden of demonstrating that an individual defendant is not entitled to qualified immunity); *Strickland v. City of Crenshaw*, 114 F.Supp.3d 400, 412 (N.D. Miss. 2015); Mark D. Standridge, *Requiem for the Sliding Scale: The Quiet Ascent—and Slow Death—of the Tenth Circuit's Peculiar Approach to Qualified Immunity*, 20 Wyo. L. Rev. 43, 44 (2020).

Per the uncontested facts of this case, Fenn had been served with trespass notices pertaining to his activities at the Center well before June 18, 2017, and Fenn refused a direct verbal command by Officer Ontiveros to leave the Center. Under the circumstances, Fenn's arrest was not clearly unlawful, and as such, the District Court properly dismissed Fenn's retaliatory arrest claim.

Nonetheless, in his Petition, Fenn asserts that Respondents violated his "clearly established right protected by the First Amendment to peaceably pamphlet in a public place and engage in protected speech." Pet. 9. Fenn's formulation of the constitutional right at issue in this case is far too broad, and violates the precepts set forth in, *inter alia*, *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) and *White v. Pauly*, 137 S.Ct. 548, 552 (2017), in which this Court stated that clearly established law must not be defined at a high level of generality. This Court's qualified immunity jurisprudence requires far more precision in the definition of clearly

established rights. *See also* Standridge, *supra*, 20 Wyo. L. Rev. at 53 (citing *Estate of Armstrong v. Village of Pinehurst*, 810 F.3d 892, 907-08 (4th Cir. 2016) ("[t]he constitutional right in question in the present case, defined with regard for Appellees' particular violative conduct, is Armstrong's right not to be subjected to tasing while offering stationary and non-violent resistance to a lawful seizure"); *Hagans v. Franklin Sheriff's Office*, 695 F.3d 505, 509 (6th Cir. 2012) ("[d]efined at the appropriate level of generality—a reasonably particularized one—the question at hand is whether it was clearly established in May 2007 that using a taser repeatedly on a suspect actively resisting arrest and refusing to be handcuffed amounted to excessive force")).

As he did in the Tenth Circuit, Fenn cites *Lusby v. T.G. & Y. Stores*, 749 F.2d 1423, 1431 (10th Cir. 1984), and *Anthony v. Baker*, 767 F.2d 657, 662-63 (10th Cir. 1985) in support of his First Amendment retaliatory arrest claim. Pet. 21. However, these cases do not provide the "clearly established law" necessary to defeat qualified immunity. *Lusby* involved a police officer who brought and pursued knowingly false shoplifting charges against the plaintiff. Both the officer and the store where the alleged offense occurred failed to tell the prosecutor that the charges were groundless and the charges thus pended for several months. *Lusby*, 749 F.2d at 1431. The officer and the store "actively bargained" with the plaintiffs, seeking a release of civil liability before the officer and store would drop the charges. *Id.* The Tenth Circuit found that this was the type of egregious misuse of the legal process which is actionable under Section 1983. *Id.*

The egregious conduct which justified Section 1983 liability against the Defendants in *Lusby* is completely absent from this case. As discussed in detail above, the uncontroverted facts of this case show that Fenn was properly "trespassed" from the Lee Belle Johnson Center and then arrested after he returned to that building. Of course, *Lusby* also does not speak to First Amendment rights, *see Smith v. Plati*, 56 F.Supp.2d 1195, 1206 (D. Colo. 1999), *aff'd*, 258 F.3d 1167 (10th Cir. 2001), *cert. denied*, 537 U.S. 823 (2002), and as such, is wholly inapposite to Fenn's claims in this case. Similarly, *Anthony v. Baker* was also not a First Amendment case—instead, in that case, the Tenth Circuit concluded that a due process violation could have occurred when detectives conspired to bring plaintiff to trial based on fabricated evidence and false testimony because "the misuse of legal procedure [was] so egregious." *Anthony*, 767 F.2d at 662–63, 665.

Additionally, Fenn cites *Wolford v. Lasater*, 78 F.3d 484, 488 (10th Cir. 1996). Pet. 21-22. However, this case severely undercuts Fenn's claims: in *Wolford*, the Tenth Circuit affirmed the dismissal of the plaintiff's vindictive/retaliatory prosecution claim, noting *inter alia* that probable cause supported the charges filed against plaintiff. See *Wolford*, 78 F.3d at 489-90. Even setting that aside, *Wolford* did not involve any claims that the police wrongfully issued plaintiff a trespass notice or arrested plaintiff for trespassing. As such, *Wolford* cannot serve as clearly established law in this case. In sum, Fenn has failed to meet his heavy burden of showing that the Respondents violated clearly established law with respect to his "retaliatory arrest" claim, thus Respondents remain entitled to

qualified immunity, and this Court should not disturb the Tenth Circuit's opinion holding as much.

II. The Tenth Circuit Properly Affirmed the Dismissal of Petitioner's Malicious Prosecution and Malicious Abuse of Process Claims.

A. The Charges Against Petitioner Were Supported by Probable Cause.

Malicious prosecution requires showing, in part, that a defendant instigated a criminal proceeding without probable cause. *See McDonough v. Smith*, 139 S.Ct. 2149, 2156 (2019). As discussed in detail above, probable cause existed to support the arrest of, and the charges against, Fenn. Indeed, "Fenn's own complaint allege[d] 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. 10a. These judicial admissions by Fenn further establish the probable cause that supported the criminal charges. Under the undisputed historical facts of this case, probable cause existed to prosecute Fenn. *See*, *e.g.*, *Williams v. Town of Greenburgh*, *supra*, 535 F.3d at 78-79 (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"). For the same reason, Fenn's state law claim for malicious abuse of process also fails. *See Durham v. Guest*, 2009-NMSC-007, ¶ 29, 145 N.M. 694; *Fleetwood Retail Corp. of N.M. v. LeDoux*, 2007-

NMSC-047, ¶ 12, 142 N.M. 150; *Chavez v. Jones*, 2018 WL 1582415, *9 (D.N.M. March 27, 2018) (unpublished).

B. Petitioner's Arguments Regarding "Favorable Termination" Do Not Support his Petition.

In his Petition, Fenn argues that his criminal prosecution terminated in his favor, and that "the District Court erred in determining" otherwise. *See* Pet. 16-18. However, Fenn appears to misread the District Court's basis for granting summary judgment on his malicious prosecution claims: the District Court noted that it was "not entirely clear whether the original action terminated in [Fenn's] favor," but nonetheless dismissed Fenn's claims based upon the existence of probable cause to arrest and charge him. *See* App. 44a, 78a. The Tenth Circuit affirmed, solely on the basis that Fenn had failed to show a lack of probable cause. App. 12a-13a. Again, Fenn's "own complaint establishe[d] 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." App. 13a. Thus, unlike *Thompson v. Clark*, 794 F. App'x 140 (2d Cir. Feb. 24, 2020) (unpublished), *cert. granted*, 141 S.Ct. 1682 (2021), both the District Court and the Tenth Circuit based the dismissal of Fenn's claims on the existence of probable cause, not simply the lack of a favorable termination of his criminal case. Fenn has failed to show any error warranting review by this Court.

C. Petitioner has Failed to Show a Retaliatory Prosecution.

In the District Court, Fenn "also frame[d] this case as a retaliatory prosecution case in violation of the First Amendment." App. 24a. Fenn now suggests that his claim 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. Pet. 16 (quoting *Nieves*, *supra*, 139 S.Ct. at 1727). However, Fenn's purported retaliatory prosecution claim fails for the same reason that his malicious prosecution claim fails: at all times, probable cause supported the criminal charges filed against Fenn. *See Hartman v. Moore*, *supra*, 547 U.S. at 265-66) (plaintiff in First Amendment retaliatory prosecution case must show lack of probable cause); *Mocek v. City of Albuquerque*, 813 F.3d 912, 931-32 (10th Cir. 2015). Throughout the course of this case, Fenn has repeatedly failed to undercut these Respondents' showing that probable cause supported both Fenn's arrest and the charges filed against him.

As this Court has noted:

> a retaliatory motive on the part of an official urging prosecution *combined with an absence of probable cause supporting the prosecutor's decision to go forward* are reasonable grounds to suspend the presumption of regularity behind the charging decision, and enough for a prima facie inference that the unconstitutionally motivated inducement infected the prosecutor's decision to bring the charge.

Hartman, 547 U.S. at 265 (emphasis added) (internal citation omitted). Thus, the plaintiff must show both retaliatory motive on the part of the official urging prosecution and lack of probable cause. Indeed, as this Court later emphasized in *Reichle v. Howards*, *supra*, 566 U.S. at 666, "a plaintiff cannot state a claim of retaliatory prosecution in violation of the First Amendment if the charges were supported by probable cause." In the present case, probable cause supported the criminal charges filed against Fenn as demonstrated above—as such, Fenn could not maintain a retaliatory prosecution claim any more than he could maintain a malicious prosecution claim.

Fenn claims that "[o]btaining 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." Pet. 20. However, Fenn cites absolutely no authority—from this Court or beyond—in support of that argument. Again, "[t]he First Amendment does not entitle a citizen to trespass…or create hazards for others." *Frye v. Police Dep't of Kansas City*, *supra*, 260 F.Supp.2d at 799. For purposes of qualified immunity, this Court need not determine whether Fenn was actually guilty of trespass, or even if probable cause to charge him with that crime actually existed—rather, this Court must only ask whether an officer in Defendants' position could have reasonably, even if mistakenly, believed that he or she had probable cause to charge Fenn with trespassing. *Cf. Fink v. Gonzalez*, *supra*, 911 F.Supp. at 335. That said, the Tenth Circuit

correctly found that, based upon the allegations in Fenn's own Complaint, there was probable cause to prosecute Fenn for criminal trespass. App. 10a. Fenn has made absolutely no showing that this finding was in error or that it should be reversed.

D. Petitioner has Failed to Show That Respondents Violated Clearly Established Law Regarding Malicious or Retaliatory Prosecutions.

At no time has Fenn met his burden of showing that Respondents violated his clearly established constitutional rights, particularly with respect to his malicious or retaliatory prosecution claims. In addition to *Lusby v. T.G. & Y. Stores*, *Anthony v. Baker*, and *Wolford v. Lasater*, discussed above, Fenn also purports to rely on the Tenth Circuit's decision in *Gehl Group v. Koby*, 63 F.3d 1528 (10th Cir. 1995). Pet. 22. As with his other cases, the general language that Fenn cites from *Gehl Group* does not suffice to overcome Respondents' entitlement to qualified immunity. Indeed, *Gehl Group* does not involve a prosecution for trespassing or resisting/obstructing an officer, and moreover, the Tenth Circuit affirmed the grant of summary judgment to the Defendants in that case. *See Gehl Group*, 63 F.3d at 1537-38.

Finally, *Poole v. Cnty. of Otero*, 271 F.3d 955 (10th Cir. 2001)—also cited by Fenn, *see* Pet. 21—was abrogated by this Court in *Hartman v. Moore*, *supra*, 547 U.S. at 255-56. As noted above, this Court ruled in *Hartman* that a plaintiff in a First Amendment retaliatory prosecution case must plead and prove the lack of probable cause. *Poole* is no longer valid law in the retaliatory prosecution context in light of *Hartman*. *See Reichle v. Howards*,

supra, 566 U.S. at 666-67. In sum, there is no clearly established law that supports Fenn in this case, and Respondents Apodaca and Alirez remain entitled to qualified immunity on Fenn's Section 1983 malicious or retaliatory prosecution claims.

III. Without an Underlying Constitutional Violation, Petitioner Cannot Maintain his *Monell* or Supervisory Liability Claims.

Fenn himself gives short shrift to his purported claims under *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 691 (1978). *See* Pet. 23-24. While admitting that the lower courts' finding that Alirez and Apodaca are entitled to qualified immunity is determinative of his *Monell* claims, Fenn nonetheless posits that "if the Respondents lacked probable cause to initiate the prosecution that they undertook at the onset," Fenn's *Monell* claims should be reinstated. Pet. 23. Of course, Fenn has completely failed to demonstrate, in the first instance, that Respondents lacked probable cause to arrest or prosecute him.

To impose liability on the City of Truth or Consequences under Section 1983, Fenn was required to identify a municipal "policy" or a "custom" that caused plaintiff's alleged constitutional injury. *Bd. of Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 403 (1997); *Pembaur v. Cincinnati*, 475 U.S. 469, 479-81 (1986); *Monell*, 436 U.S. at 694. Moreover, the disputed "policy" or "custom" must also be the cause and moving force behind the alleged deprivation of plaintiff's constitutional rights. *Brown*, 520 U.S. at 404. However, absent a showing of constitutional injury, a municipality cannot be liable for damages, regardless of the existence of a

policy or custom. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). A municipality can only be liable under *Monell* if the violated right is clearly established "because a municipality cannot *deliberately* shirk a constitutional duty unless that duty is clear." *Arrington-Bey v. City of Bedford Heights, Ohio*, 858 F.3d 988, 995 (6th Cir. 2017), *cert. denied*, 138 S.Ct. 738 (2021) (emphasis in original) (citing *Szabla v. City of Brooklyn Park*, 486 F.3d 385, 393 (8th Cir. 2007) (en banc)); *see also Contreras v. Doña Ana Bd. of Cnty. Comm'rs*, 965 F.3d 1114, 1123-24 (10th Cir. 2020), *cert. denied*, 141 S.Ct. 1382 (2021); *Hollingsworth v. City of St. Ann*, 800 F.3d 985, 992 (8th Cir. 2015) ("[a]s it was not clearly established in July 2009 that force resulting in only de minimis injury could violate the Fourth Amendment, the City did not act with deliberate indifference by failing to train its officers that use of a Taser in these circumstances was impermissible"); *Jenkins v. Bartlett*, 487 F.3d 482, 492 (7th Cir. 2007) ("there can be no liability under *Monell* for failure to train when there has been no violation of the plaintiff's constitutional rights")).

Quite simply, "a municipal policymaker cannot exhibit fault rising to the level of deliberate indifference to a constitutional right when that right has not yet been clearly established." *Hagans v. Franklin Cnty. Sheriff's Office*, *supra*, 695 F.3d at 511 (quotation omitted); *see also Young v. Cnty. of Fulton*, 160 F.3d 899, 903-04 (2d Cir. 1998); *Szabla*, 486 F.3d at 393; *Townes v. City of New York*, 176 F.3d 138, 143-44 (2d Cir. 1999); *Bustillos v. El Paso Cnty. Hosp. Dist.*, 891 F.3d 214, 222 (5th Cir. 2018) ("[b]ecause Bustillos did not demonstrate a clearly established right, it follows that her claims for

deliberate indifference against the District also fail"). Because the individual Truth or Consequences Police Officers did not violate Fenn's clearly established First Amendment rights with respect to his arrest or prosecution, Fenn cannot sustain his *Monell* claim against any Defendant in this case. As such, the Tenth Circuit's decision should be affirmed on this ground as well.

IV. The Tenth Circuit Did Not Engage in Improper "Fact Finding."

In the closing pages of his Petition, Fenn blithely suggests that the Tenth Circuit engaged in improper "fact finding" in order to "preserve qualified immunity for the Respondents." Pet. 24. It is impossible for either the Tenth Circuit or the District Court to have engaged in such fact-finding, however, because at *no* time were there any disputed facts from which to pick and choose. The facts underlying every decision below were either pulled directly from Fenn's own Complaint and the documents attached thereto, *see* 10a, 13a, 20a, 34a-35a, 38a-39a, 43a, or were uncontroverted by Fenn under Fed. R. Civ. P. 56. *See* App. 41a (Fenn did not "offer[] any responsive facts to Defendants' thirty-one Statement of Undisputed Facts," all of which were "supported by evidence…the Court deem[ed] as undisputed all facts leading up to [Fenn's] arrest for criminal trespass, as well as the description and disposition of the criminal charges that were filed"). Fenn inexplicably undermined his own claims with the allegations stated in his Complaint and the documents that he attached to his pleading. He cannot run from his own judicial admissions or his failure to illustrate a disputed issue of material fact by accusing the Tenth

Circuit of construing the facts against him. Certainly, Fenn has not shown any compelling reasons by which this Court should exercise its judicial discretion to review the Tenth Circuit's well-reasoned unanimous decision in this matter.

CONCLUSION

The petition should be denied in all respects, and the Tenth Circuit's unanimous decision below should be affirmed.

Respectfully submitted,

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