

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

---

**BRIEF IN OPPOSITION**

---

STEPHEN S. HAMILTON  
*Counsel of Record*  
KALEB W. BROOKS  
MONTGOMERY & ANDREWS, P.A.  
P.O. Box 2307  
Santa Fe, New Mexico 87504-2307  
(505) 982-3873  
shamilton@montand.com

*Counsel for Respondent  
Daniel Hicks*

August 13, 2021

---

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

## **QUESTIONS PRESENTED**

With respect to Respondent Hicks, the first and dispositive issue on appeal is whether the Court of Appeals for the Tenth Circuit correctly concluded that the property located at 301 S. Foch St., Truth or Consequences, New Mexico, was not the type of public forum in which the government must allow picketing and other forms of protest. If so, then Petitioner Fenn was not engaged in any constitutionally protected activity at the time of his arrest, and Respondent Hicks's signing a trespass order did not impinge any constitutional right.

If the Court resolves the first issue in Petitioner Fenn's favor, the second issue on appeal is whether the district court properly granted qualified immunity to Respondent Hicks where Petitioner Fenn failed to identify any case law standing for the proposition that Respondent Hicks's conduct violated First Amendment law that was clearly established at the time of the incident giving rise to this litigation.

**TABLE OF CONTENTS**

QUESTIONS PRESENTED .....	i
TABLE OF AUTHORITIES.....	iv
INTRODUCTION.....	1
STATEMENT OF THE CASE.....	2
I.    Factual Background .....	2
II.    Procedural History .....	4
III.    Misstatements within the Petition.....	6
REASONS TO DENY THE PETITION .....	11
I.    The Tenth Circuit Correctly Applied the Standards Articulated by this Court to Conclude that the Center Was Not the Type of Public Forum in which the Government Must Allow Picketing and Other Forms of Protest .....	11
II.    The District Court Correctly Applied the Standards Articulated by this Court to Conclude that No Clearly Established First Amendment Precedent Put Respondent Hicks on Notice that Signing a Trespass Notice May Violate Fenn's Constitutional Rights.....	16
CONCLUSION.....	20

APPENDIX

Complaint Due to Deprivation of Civil Rights  
and Malicious Abuse of Process in the United  
States District Court for the District of New  
Mexico (July 5, 2018) . . . . . App. 1

**TABLE OF AUTHORITIES****CASES**

<i>Adderley v. Florida</i> , 385 U.S. 39 (1966).....	12, 13
<i>Arkansas Educ. Television Comm'n v. Forbes</i> , 523 U.S. 666 (1998).....	12
<i>Ashcroft v. al-Kidd</i> , 563 U.S. 731 (2011).....	18, 19
<i>Brosseau v. Haugen</i> , 543 U.S. 194 (2004).....	18
<i>Cornelius v. NAACP Legal Def. &amp; Educ. Fund, Inc.</i> , 473 U.S. 788 (1985).....	12, 14, 16
<i>Cutter v. Wilkinson</i> , 544 U.S. 709 (2005).....	14
<i>Doe v. City of Albuquerque</i> , 667 F.3d 1111 (10th Cir. 2012).....	15
<i>Green v. Post</i> , 574 F.3d 1294 (10th Cir. 2009).....	17
<i>Greer v. Spock</i> , 424 U.S. 828 (1976).....	13
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982).....	17
<i>Hawkins v. City &amp; Cnty. of Denver</i> , 170 F.3d 1281 (10th Cir. 1999).....	6, 13, 14
<i>Klen v. City of Loveland</i> , 661 F.3d 498 (10th Cir. 2011).....	20

<i>Kreimer v. Bureau of Police for Town of Morristown</i> , 958 F.2d 1242 (3d Cir. 1992) . . . . .	13, 15
<i>Malley v. Briggs</i> , 475 U.S. 335 (1986) . . . . .	17
<i>McCullen v. Coakley</i> , 572 U.S. 464 (2014) . . . . .	12
<i>McGlone v. Bell</i> , 681 F.3d 718 (6th Cir. 2012) . . . . .	15
<i>Mullenix v. Luna</i> , 577 U.S. 7 (2015) . . . . .	17
<i>New England Reg. Council of Carpenters v. Kinton</i> , 284 F.3d 9 (1st Cir. 2002) . . . . .	14
<i>Nieves v. Bartlett</i> , — U.S. —, 139 S. Ct. 1715 (2019) . . . . .	7, 8, 19
<i>Pearson v. Callahan</i> , 555 U.S. 223 (2009) . . . . .	17, 18
<i>Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n</i> , 460 U.S. 37 (1983) . . . . .	1, 12, 13
<i>Saucier v. Katz</i> , 533 U.S. 194 (2001) . . . . .	18
<i>Swanson v. Town of Mountain View</i> , 577 F.3d 1196 (10th Cir. 2009) . . . . .	17
<i>T.D. v. Patton</i> , 868 F.3d 1209 (10th Cir. 2017) . . . . .	18
<i>United States v. Grace</i> , 461 U.S. 171 (1983) . . . . .	13, 15

<i>United States v. Kokinda</i> , 497 U.S. 720 (1990) . . . . .	12, 13, 14
<i>U.S. Postal Serv. v. Greenburgh Civic Ass'n</i> , 453 U.S. 114 (1981) . . . . .	13
<i>Verlo v. Martinez</i> , 820 F.3d 1113 (10th Cir. 2016) . . . . .	13
<i>White v. Pauly</i> , — U.S. —, 137 S. Ct. 548 (2017) . . . . .	17
<b>STATUTES</b>	
42 U.S.C. § 1983 . . . . .	4, 5, 8, 10, 19
NMSA 1978, § 30-14-1(C)(1995) . . . . .	13
<b>RULES</b>	
Fed. R. Civ. P. 12(b)(6) . . . . .	1, 7
Sup. Ct. R. 12 . . . . .	2, 12
Sup. Ct. R. 15(2) . . . . .	6

## INTRODUCTION

This case arose from Petitioner Fenn's arrest and removal from the property at 301 S. Foch St., Truth or Consequences, New Mexico, known as the Lee Belle Johnson Center ("Center"), for criminal trespass. Respondent Hicks played a bit part in the events leading to the arrest. Hicks signed a trespass notice withdrawing consent on behalf of the New Mexico Spaceport Authority, doing business as Spaceport America, to access the area of the Center that the City of Truth or Consequences leased for use as the Spaceport America Visitor Center. The Visitor Center was not in operation at the time. Fenn claimed that Hicks's signing the notice was retaliation for Fenn's speech protesting the City's conversion of the property to a visitor center from its prior use as a senior center. The district court dismissed the claims against Hicks pursuant to Federal Rule of Civil Procedure 12(b)(6), and the Tenth Circuit affirmed.

Contrary to Fenn's insistence otherwise, this is not a case to test the nascent limits of qualified immunity. The Tenth Circuit's opinion in this matter relies on well-established law distinguishing the protections afforded to citizens under the First Amendment in traditional public forums from those applicable to nonpublic forums. *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37 (1983). Applying that standard, the Tenth Circuit concluded that the Center is not a traditional public forum, and Fenn offered no argument that the limitations on speech in this case would be unreasonable in a nonpublic forum or that the Center was a designated public forum. Fenn has

identified no—and there are no—novel questions of law or legal questions on which the Tenth Circuit’s opinion is inconsistent with the precedent of this Court or the holdings of any coordinate court of appeal. Accordingly, there is no good reason for the Court to grant certiorari in this case. Sup. Ct. R. 12.

Moreover, even if Petitioner Fenn established that his ultimate arrest was a constitutional violation in this case, he has not, in successive rounds of briefing before the district court, Tenth Circuit, and this Court, ever cited any precedent that clearly established that a state government official’s signing a trespass notice may violate First Amendment rights. In the absence of clearly established law that is particularized to the facts of the case, Hicks is entitled to qualified immunity because no reasonable official in his position would have notice of a potential constitutional violation. On this basis, the district court correctly determined that, in the ultimate analysis, the constitutional questions are unnecessary to dispose of Fenn’s claims against Hicks.

## STATEMENT OF THE CASE

### I. Factual Background

Spaceport America is a New Mexico state governmental entity. [Pet’r’s App. 2a]. Hicks was, at all relevant times, Spaceport America’s executive director. [*Id.*]. Spaceport America leases space for its visitor center in the Center. [*Id.*] Prior to being used by Spaceport America (and other tenants), the Center was a senior center that Fenn frequented. [*Id.*] Fenn

publicly protested the closing of the senior center and the use of the Center for other purposes. [*Id.*]

Fenn regularly frequented the Center for various purposes after the senior center closed. Beginning in 2015, Truth or Consequences police officers regularly responded to the Center in response to calls about Fenn's presence and/or conduct. [*Id.* at 3a-4a]. As stated in his Complaint, which Hicks attaches as an Appendix to this response for the Court's convenience, on June 26, 2015, another building occupant, Ms. Larena Miller, reported to police that Fenn made her feel unsafe. [Resp't Hicks App. 3-4 at ¶¶ 11-15]. Police observed Fenn handing out business cards and attempting to sell videos to visitors. [*Id.* App. 4, 5 at ¶¶ 16, 21]. Truth or Consequences Police officers investigated and determined that Fenn did not have a license to engage in this solicitation, and Fenn was charged with, and convicted of, conducting business without a license. [*Id.* App. 5 at ¶¶ 22-24]. After these incidents, another individual associated with Spaceport America, Rosemary Bleth, issued a trespass authorization restricting Fenn from entering the Center. [*Id.* App. 5 at ¶¶ 19-20].

The trespass order notwithstanding, Fenn periodically returned to the Center for various purposes during 2016. [*Id.* App. 6 at ¶¶ 25-26]. Then, on May 5, 2017, a building occupant called the Truth or Consequences Police to report that Fenn was in the Center in violation of the trespass order and that he (the occupant) had concerns about expensive items being damaged or stolen. [*Id.* App. 6-7 at ¶¶ 28-32].

At this time, Truth or Consequence police officers concluded that the trespass order needed to be updated and met with Hicks. [*Id.* App. 6-7 at ¶ 32]. Hicks signed the updated trespass authorization based on the prior incidents and to prevent future disruptions on May 11, 2017. [*Id.* App. 7 at ¶ 33].

Fenn received a copy of the order on May 12, 2017. [Pet'r's App. at 21a]. Fenn returned to the Center on June 4, 2017, and June 18, 2017. [*Id.*] Fenn was arrested on June 18, 2017. [*Id.* at 22a]. Petitioner has not alleged that Hicks was involved in this arrest or the subsequent prosecution. [*Id.* at 36a].

## **II. Procedural History**

Fenn filed this case in the United States District Court for the District of New Mexico against all Respondents. [Resp't Hicks App. 1]. Fenn brought three claims, only one of which applied to Hicks. [*Id.* App. 11-12 at ¶¶ 59-67]. With respect to Hicks, Appellant alleged violations of his First Amendment rights and sought damages under 42 U.S.C. § 1983. [*Id.*]

Hicks filed his Motion to Dismiss based on a qualified immunity theory, arguing specifically that the law was not clearly established. [Pet'r's App. at 35a]. The parties fully briefed the motion. The district court ruled that Hicks was entitled to qualified immunity and dismissed the claim. [*Id.* at 35a-37a].

Specifically, the district court concluded that “Plaintiff [Fenn] failed to carry his heavy burden that the law was clearly established.” [*Id.* at 35a]. The district court did not address the question “whether

there was a constitutional violation,” because Fenn failed to cite to any 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.” *[Id.* at 35a-36a].

Following the order on the motions to dismiss, no claims against Hicks remained. Sometime later, the district court entered an order disposing of all other claims on summary judgment. *[Id.* at 38a-51a, 52a].

Fenn appealed from the final judgment of the district court to the Tenth Circuit, and the Tenth Circuit affirmed. *[Id.* at 3a]. Specifically, the Tenth Circuit concluded that “[t]he individual defendants are entitled to qualified immunity because no constitutional violation occurred.” *[Id.]* With respect to the retaliation claim under § 1983, the Tenth Circuit expressed two rationales for its conclusion: (1) Fenn “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”; and (2) “where the adverse action takes the form of an arrest and subsequent prosecution, the Plaintiff must show an absence of probable cause,” and “Fenn has not shown a lack of probable cause here.” *[Id.* at 7a, 9a]. Of these rationales, only the first applies in any meaningful way to the claim against Hicks. There are not allegations that Hicks was involved in the arrest or prosecution, and the only allegations against Hicks in the

Complaint concern his signing the trespass notice at the request of the City Police Chief. *See [id. at 36a]; [Resp't Hicks App. 7 at ¶¶ 33-36].*

On the public forum issue, the Tenth Circuit specifically concluded that “[t]he Center is a city-owned building, leased to various entities [that] is a nonpublic forum.” [Pet'r's App. at 8a]. The Tenth Circuit compared the Center to the publically accessible walkway of the Denver Performing Arts Center that it considered in *Hawkins v. City & Cnty. of Denver*, 170 F.3d 1281, 1287-88 (10th Cir. 1999). The court reasoned that the mere fact that the public is permitted to come and go at will does not transform a space into a traditional public forum. [Pet'r's App. at 8a]. The Tenth Circuit was careful in cabining its analysis to Fenn's claim that the Center should be considered a traditional public forum. Accordingly, the Tenth Circuit did not reach the question of whether the Center may be a designated public forum or whether the restrictions at issue in this case would be unreasonable in a nonpublic forum. [Id. at 8a-9a]. Fenn simply did not make these arguments, and there was not any development of the record to reach them. *See [id.].*

### **III. Misstatements within the Petition**

Pursuant to Supreme Court Rule 15(2), Hicks alerts the Court to the following perceived misstatements of fact or law in the Petition that bear upon the claims against Hicks:

1. On page one of the Petition, Fenn states that he was “arrested for trespass because his protest is

perceived on the basis of its content as obnoxious.” Fenn makes similar statements concerning Respondents’ purported motivations to retaliate against Fenn for the content of his speech on pages seven, nine, ten, eleven, and elsewhere. With respect to the claim against Hicks, these statements are disputed. The district court dismissed the retaliation claim under Federal Rule of Civil Procedure 12(b)(6). [Pet’r’s App. at 37a]. Accordingly, the district court did not hear evidence concerning Hicks’s motivations. Neither the district court’s nor the Tenth Circuit’s orders consider whether Hicks was motivated by retaliatory animus. *See* [id. at 19a-37a, 1a-14a]. Further, Fenn’s own complaint contains numerous allegations indicating motivations other than the content of his speech for Hicks’s signing the trespass notice: (1) Fenn’s conduct made people concerned for their safety and the safety of property, and (2) Fenn was improperly soliciting patrons in violation of a municipal ordinance requiring a business license. [Resp’t Hicks App. 3, 4, 5, 6-7 at ¶¶ 12, 16, 23-24, 32-26]. The Complaint explicitly alleges that Hicks requested the trespass order based on these “prior incidents as a preventive measure.” [Id. App. 7 at ¶ 33].

2. On page eight of the Petition, Fenn states that the district court’s granting qualified immunity to Hicks conflicts with this Court’s decision in *Nieves v. Bartlett*, \_\_ U.S. \_\_, 139 S. Ct. 1715 (2019). It does not for the reasons stated in the Tenth Circuit opinion [Pet’r’s App. at 10a-11a]

and discussed below. Moreover, this Court issued its opinion in *Nieves* after the district court opinion dismissing the § 1983 retaliation claim against Hicks. [Id. at 19a].

3. On page ten of the Petition, Fenn states that the district court accepted Hicks's argument that signing a trespass order would not chill First Amendment activity. Fenn characterizes the argument as follows: "Petitioner was not injured because he could 'voice his concerns at other venues.'" [Pet. at 8]. This statement mischaracterizes Hicks's argument before the district court, and more importantly, it is incorrect with respect to the reasoning of the district court. The district court did not reach the elements of the First Amendment analysis, including whether a person of ordinary firmness would be chilled from speech, because it resolved the case on other qualified immunity grounds. [Pet'r's App. at 35a] ("The Court need not address whether there was a constitutional violation.").
4. Also on page ten of the Petition, Fenn states that "[t]here is no question that Mr. Hicks'[s] action (to obtain a trespass order for other reason than the content of Mr. Fenn's speech) did chill Mr. Fenn, a person of above ordinary firmness." This passage contains a number of misstatements. First, the parenthetical statement concerning Hicks's motivation is disputed for the reasons discussed in paragraph one above. Second, there is no indication in the

record that the issuance of the trespass order, standing alone, did anything to chill Fenn's conduct. To the contrary, the record indicates that Fenn returned to the Center on no less than two occasions after Hicks signed the order and Fenn received it. [Resp't Hicks App. 7, 8 at ¶¶ 37, 43].

5. Also on page ten of the Petition, Fenn writes that he "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 . . ." This passage contains a number of misstatements. First, as discussed in paragraph one above, the pleadings contain numerous examples of "disruptive" behavior other than Fenn's speech. [Resp't Hicks App. 3, 4, 5, 6-7 at ¶¶ 12, 16, 23-24, 32-26]. Second, the statement that Fenn was arrested "solely" on the basis of Hicks's trespass order is incorrect. The Complaint details significant developments after Hicks signed the order that culminated in the arrest. [*Id.* App. 7-9 at ¶¶ 37-47]. Third, the statement that Fenn was "falsely arrested" is unclear and potentially a misstatement. There is nothing in the record to suggest that there was any materially "false" misrepresentation or fabrication leading to the arrest.
6. On page eleven of the Petition, Fenn states that the district court "erred in determining" that Hicks was not "motivated as a response to Mr.

Fenn’s exercise of constitutionally protected conduct.” As discussed above in paragraphs one and three, the district court did not reach this question. [Pet’r’s App. at 35a].

7. On page thirteen of the Petition, Fenn states that the district court “erred in answering . . . whether Mr. Fenn, a citizen, had the right to petition and enjoyed freedom of speech at the public visitor locations that he selected and which all other citizens were invited to attend.” Fenn makes similar claims on page fourteen concerning the district court’s purported error to “accept[]” Hicks’s argument that a person may be “excluded” from a location.” Again, with respect to the § 1983 claim against Hicks, the district court did not reach this question. [Pet’r’s App. at 35a].
8. Also on page thirteen of the Petition, Fenn argues concerning Hicks’s intent:

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

Because the district court dismissed the claims against Hicks on a motion to dismiss, Hicks

never filed an answer. As such, Hicks never had the procedural opportunity to deny these averments. Fenn's characterization of Hicks's motives is, nonetheless, disputed.

9. On page 24 of the Petition, Fenn states that "whether or not this was a public forum [was] never at issue before the District Court, because the parties never disputed that it was." Fenn is correct that the district court did not reach the question, but the parties, including specifically Hicks, did argue to the district court that the Center was not a public forum. *See* Defendant Daniel Hicks' Motion to Dismiss, *Fenn v. City of Truth or Consequences*, No. 2:18-cv-00634 (dkt. no. 18), at 8-9.

#### **REASONS TO DENY THE PETITION**

- I. The Tenth Circuit Correctly Applied the Standards Articulated by this Court to Conclude that the Center Was Not the Type of Public Forum in which the Government Must Allow Picketing and Other Forms of Protest.**

As noted, the sole dispositive issue, with respect to the Tenth Circuit's opinion affirming dismissal of the retaliation claim against Hicks, is whether the Center is a traditional public forum. The Tenth Circuit's conclusion that the Center is not a traditional public forum accords with the guidance of this Court, and Fenn has not identified any contrary case law from any coordinate court of appeals or state court of last resort.

Accordingly, there is no good reason for the Court to grant certiorari in this case. Sup. Ct. R. 12.

This Court has long established that persons who want to propagandize protests or views do not have a constitutional right to do so whenever and however and wherever they please. *Adderley v. Florida*, 385 U.S. 39, 47 (1966). “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, Inc.*, 473 U.S. 788, 799-800 (1985). See *Perry Educ. Ass’n*, 460 U.S. at 46 (holding that the “First Amendment does not guarantee access to property simply because it is owned or controlled by the government” (internal quotation marks and citation omitted)). “The Government’s ownership of property does not automatically open that property to the public.” *United States v. Kokinda*, 497 U.S. 720, 725 (1990).

Traditional public fora are places that have traditionally been open to public assembly and debate. *McCullen v. Coakley*, 572 U.S. 464, 467 (2014); *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677 (1998). For instance, streets and parks are traditionally public forums. See *Perry Educ. Ass’n*, 460 U.S. at 45 (“streets and parks . . . have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” (internal quotation marks and citation omitted)). Under this analysis, “[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.” *United States v. Grace*, 461 U.S. 171, 175 (1983). *See, e.g., Kokinda*, 497 U.S. at 727 (sidewalk leading from public thoroughfare to Post Office was not traditional public forum); *Hawkins*, 170 F.3d at 1287-88 (publicly accessible walkway of the Denver Performing Arts Center was not a traditional public forum); *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1256 (3d Cir. 1992) (public library was not traditional public forum).

If the location at issue “is not a traditional public forum and has not been designated as a public forum, it is a nonpublic forum[,]” access to which can be restricted. *Verlo v. Martinez*, 820 F.3d 1113, 1129 (10th Cir. 2016); *accord Perry Educ. Ass’n*, 460 U.S. at 46. With respect to nonpublic fora, the state is permitted to control the property under its control for its proper use. *Perry Educ. Ass’n*, 460 U.S. at 46 (quoting *U.S. Postal Serv. v. Greenburgh Civic Ass’n*, 453 U.S. 114, 129 (1981)). *See Greer v. Spock*, 424 U.S. 828, 836 (1976); *Adderley*, 385 U.S. at 48; *see also* NMSA 1978, § 30-14-1(C) (1995) (prohibiting entry on government property while knowing that consent to enter has been withdrawn).

Here, Fenn’s only argument was that the Center was a traditional public forum. He did not argue before either the district court [Pet. at 24] or the Tenth Circuit [Pet’r’s App. at 8a-9a] either that the Center was a designated public forum or that the restrictions on speech alleged in this case would be unreasonable in a nonpublic forum. Accordingly, the only relevant

question with respect to the Petition on this issue is whether the Center was a traditional public forum. *See Cutter v. Wilkinson*, 544 U.S. 709, 718, n.7 (2005) (“[W]e are a court of review, not of first view.”).

On this narrow question, there is no doubt that the Tenth Circuit correctly applied the Court’s well-developed precedent defining the bounds to traditional public fora. The Center is a City-owned building that the City leased to various entities, including Spaceport America, Geronimo Trail Scenic Byway, and Follow the Sun Tours, for use as a visitor center. *See* [Pet’r’s App. at 2a]; [Resp’t Hicks App. 3, 4, 5 at ¶¶ 10-11, 13, 19]. Accepting these facts as pled to be true, there is no reason to understand the Center (under its current configuration) to be a traditional public forum for assembly, communication with others, and the discussion of public questions. There is nothing in the record to suggest that the Center, operating as a visitor center, is analogous to a public thoroughfare, park, or other space that this Court has recognized as a traditional public forum. Instead, the case is most analogous to that in the Tenth Circuit’s prior opinion in *Hawkins*; the Center was open to the public “to permit ingress to and egress from” the various commercial tenants therein. *Cf.* 170 F.3d 1287. Notably, *Hawkins* accords with this Court’s precedent in *Kokinda*, 497 U.S. at 725, and numerous other circuits have cited *Hawkins* with approval. *See, e.g.*, *New England Reg. Council of Carpenters v. Kinton*, 284 F.3d 9, 22 (1st Cir. 2002).

Fenn has not cited, whether in the Petition or any other briefing in this case, any authority that considers a visitor center to be a traditional public forum, and the arguments that he makes with respect the character of the Center misconceive the applicable standard. Fenn repeatedly emphasizes that the Center was open to “all other citizens” or was a “public location.” *E.g.*, [Pet. at 13]. This Court has long recognized that this fact, standing alone, is not dispositive. *See Grace*, 461 U.S. at 175. Next, Fenn argues that the Center was “inclusive of a public library.” [Pet. at 11]. The presence of a public library annex near the area of the Center where Fenn was arrested does not transform the space into an area traditionally open to public assembly and debate. *See Kreimer* 958 F.2d at 1256; *accord Doe v. City of Albuquerque*, 667 F.3d 1111, 1130 (10th Cir. 2012). Finally, Fenn argues that the Tenth Circuit improperly engaged in fact finding related to the Center. [Pet. at 24-27]. The Tenth Circuit opinion contains no findings of fact; and the facts concerning the current use of the Center are all contained within the pleadings. *See* [Pet.’s App. at 2a]; [Resp’t Hicks App. 3, 4, 5 at ¶¶ 10-11, 13, 19]. Fenn confuses conclusions of law—e.g., whether the Center “was not a type of space where a person would traditionally engage in protected speech or conduct” (Pet. at 26)—with findings of fact. *See McGlone v. Bell*, 681 F.3d 718, 732 (6th Cir. 2012) (where facts are not in dispute, whether a space qualifies as a traditional public forum is “purely a question of law”).

That the Center is not a traditional public forum means that Fenn (and any other member of the public) can be excluded for conduct that is inconsistent with

“the nature of the property[.]” *Cornelius*, 473 U.S. at 800. This right to exclude persons for conduct that is inconsistent with the nature of the property in no way limits Fenn’s right to protest, pamphlet, and engage in one-on-one conversations with interested persons in a number of traditional public fora—including specifically at public board meetings for Spaceport America, nearby parks, or even on the street directly outside the Center.

**II. The District Court Correctly Applied the Standards Articulated by this Court to Conclude that No Clearly Established First Amendment Precedent Put Respondent Hicks on Notice that Signing a Trespass Notice May Violate Fenn’s Constitutional Rights.**

The next issue concerns the separate and wholly independent reason that the district court dismissed the claims against Hicks. As noted above, the district court did not reach the question of whether Hicks’s signing the trespass order was a violation of Fenn’s First Amendment rights; instead, the district court ruled that Hicks was entitled to qualified immunity because Fenn failed to carry his burden to demonstrate clearly established law. *See* [Pet’r’s App. at 68a-7a]. Fenn does not directly address this issue in the Petition. It remains important, however, because even if the Court is inclined to grant a writ of certiorari to review the First Amendment issues, the question is moot with respect to Hicks unless Fenn demonstrates a basis for removing qualified immunity.

“The doctrine of qualified immunity protects 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) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). While there need not be case law “directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate.” *White v. Pauly*, \_\_ U.S. \_\_, 137 S. Ct. 548, 551 (2017) (emphasis added) (internal quotation marks and citation omitted); *see Swanson v. Town of Mountain View*, 577 F.3d 1196, 1200 (10th Cir. 2009) (holding that “for a right to be clearly established [the Tenth Circuit Court of Appeals] looks for Supreme Court or Tenth Circuit precedent on point, or clearly established weight of authority from other courts that found the law to be as the plaintiff maintains” (internal quotation marks and citations omitted)).

“[Q]ualified immunity protects ‘all but the plainly incompetent or those who knowingly violate the law.’” *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). A motion to dismiss based on qualified immunity imposes the burden on the plaintiff to show “both that [1] a constitutional violation occurred and [2] that the constitutional right was clearly established at the time of the alleged violation.” *Green v. Post*, 574 F.3d 1294, 1300 (10th Cir. 2009) (quotations omitted). A court evaluating qualified immunity is free to “exercise [its] sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed

first in light of the circumstances in the particular case at hand.” *Pearson*, 555 U.S. at 236.

“A Government official’s conduct violates clearly established law when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (alterations, internal quotation marks, and citation omitted)). A clearly established right should not be defined “at a high level of generality,” but instead “must be particularized to the facts of the case.” *T.D. v. Patton*, 868 F.3d 1209, 1220 (10th Cir. 2017) (internal quotation marks and citations omitted). The inquiry “must be undertaken in light of the specific context of the case, not as a broad general proposition.” *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

Nearly all of the Petition (with respect to Hicks) advances an argument that Hicks violated Fenn’s First Amendment rights by preventing Fenn from protesting on public property. *See* [Pet. at 9-15]. Fenn does not identify the existence of any case law clearly establishing (or even suggesting) that a state official violates a person’s First Amendment rights by signing a trespass order based on the person’s prior non-protected conduct. The failure to cite to any case law indicating that Hicks’s specific conduct violated a clearly established constitutional right is fatal to his claim, and the district court properly ruled that Hicks was entitled to qualified immunity.

Rather than cite to any case considering facts analogous to these, Fenn, in the words of the district court, “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.” [Pet’r’s App. at 70a]. For instance, Fenn relies on *Nieves v. Bartlett*, \_\_\_ U.S. \_\_\_, 139 S. Ct. 1715 (2019). *See* [Pet. at 15]. In *Nieves*, the Supreme Court analyzed the plaintiff’s § 1983 retaliatory arrest claim. *Nieves*, 139 S. Ct. at 1721. The claim arose from the plaintiff’s arrest for disorderly conduct and resisting arrest by a police officer who was patrolling an outdoor winter sports festival. *Id.* at 1720-21. The incident giving rise to the action began while a police officer was speaking to some minors who were suspected of drinking alcohol while at the festival. *Id.* The plaintiff stepped between the police officer and the minors and was verbally abusive toward the police officer. *Id.* The case does not involve any alleged protest of government action. The case does not involve the conduct of a non-police state official. The case does not involve the signing of a trespass order related to public property. *Nieves* is, therefore, not analogous to the instant case and would not place Hicks on notice that he could be violating Fenn’s First Amendment rights by signing a trespass order under the circumstances present here. *See Ashcroft*, 563 U.S. at 741, 743 (holding that qualified immunity is appropriate unless “the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right.” (emphasis added) (alterations, internal quotation marks, and citation omitted)).

The specific burden on a plaintiff to overcome an assertion of qualified immunity by a government official is clear. The plaintiff must show, by citation to a “Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts[,]” that the law is “as the plaintiff maintains.” *Klen v. City of Loveland*, 661 F.3d 498, 511 (10th Cir. 2011). As such, Fenn bears the burden to cite case law holding that a government official violates a person’s First Amendment rights by signing a trespass order based on the non-protected conduct Fenn engaged in. Fenn has not cited any such cases. As such, the district court properly ruled that Hicks was entitled to qualified immunity, and this Court should affirm that ruling.

## **CONCLUSION**

The Tenth Circuit properly affirmed the dismissal of Petitioner Fenn’s claims against Hicks, concluding that the Center was not a traditional public forum. Hicks’s signing a trespass order did not infringe on Fenn’s constitutional rights, and even if it did, the district court appropriately ruled that Fenn failed to carry his burden to overcome the Hicks’s defense of qualified immunity. This Court should deny Fenn’s Petition and affirm the ruling of the Tenth Circuit.

Respectfully submitted,

STEPHEN S. HAMILTON  
*Counsel of Record*  
KALEB W. BROOKS  
MONTGOMERY & ANDREWS, P.A.  
P.O. Box 2307  
Santa Fe, New Mexico 87504-2307  
(505) 982-3873  
shamilton@montand.com

*Counsel for Respondent*  
*Daniel Hicks*

Dated: August 13, 2021

## **APPENDIX**

**APPENDIX**  
**TABLE OF CONTENTS**

Complaint Due to Deprivation of Civil Rights and Malicious Abuse of Process in the United States District Court for the District of New Mexico (July 5, 2018) .....	App. 1
--	--------

---

**APPENDIX**

---

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

**Civ No.**

**[Filed July 5, 2018]**

---

RON FENN,	)
	)
Plaintiff,	)
	)
v.	)
	)
CITY OF TRUTH OR CONSEQUENCES,	)
MICHAEL APODACA, Truth or Consequences	)
Police Captain Individually Acting Under the	)
Color of Law, POLICE CHIEF LEE	)
ALIREZ, Individually Acting Under the Color	)
of Law, and DANIEL HICKS, Director of	)
Spaceport American, Individually Acting Under	)
the Color of Law,	)
	)
Defendants.	)
	)

---

**COMPLAINT DUE TO DEPRIVATION OF  
CIVIL RIGHTS AND MALICIOUS ABUSE  
OF PROCESS**

Plaintiff brings this action to recover damages for violations of his civil rights pursuant to 42 U.S.C. 1983

## App. 2

and for retaliation and harassment under the color of law, including malicious prosecution and defamation by Defendants, with the intent to bring harm.

### **INTRODUCTION**

This case arises from the intentional malicious abuse of process by Defendants against Plaintiff Ron Fenn.

### **PARTIES**

1. Plaintiff Ron Fenn is a resident of Sierra County, New Mexico.

2. Defendant City of Truth or Consequences is located in Sierra County, New Mexico.

3. Defendant Michael Apodaca is a Police Captain for the City of Truth or Consequences and is sued in his individual capacity acting under the color of law.

4. Defendant Lee Alirez is the Chief of Police for the City of Truth or Consequences and is sued in his individual capacity acting under the color of law.

5. Defendant Daniel Hicks is the Director of Spaceport America and is sued in his individual capacity acting under the color of law.

### **JURISDICTION AND VENUE**

6. This action arises under 42 U.S.C. § 1983.

7. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the Parties pursuant to 28 U.S.C. §§ 1331 and 1343.

### App. 3

8. The Court has authority to grant the requested relief pursuant to 28 U.S.C. § 1343(a)(1) and (2) and to redress the deprivation under 28 U.S.C. § 1343(a)(3). This Court also has authority to grant relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

9. Venue lies in this district pursuant to 28 U.S.C. § 1391.

### FACTUAL BACKGROUND

10. Plaintiff has been very outspoken regarding his disagreement with the city of Truth or Consequences regarding the lease of a city building to public entities. He has frequently attended meetings and publicly protested in traditional forums against the use of Truth or Consequences funds for the benefit of Spaceport America.

11. On June 26, 2015, Larena M. Miller, an employee of the Geronimo Trails Scenic By-Way, housed at 301 S. Foch St. in Truth or Consequences, requested that Plaintiff Ron Fenn “be trespassed” from the location at 301 S. Foch St. (*See* Exhibit 1 – Truth or Consequences Police Department Crime Report for Case Number: 2017-0602, dated June 18, 2017).

12. Ms. Miller also stated that Mr. Fenn had been offensive to her, and that she felt unsafe around Mr. Fenn because of his opposition of the current use of the building. Ex 1 and 2.

13. On that same date, Rosemary Bleth, the Chief Executive Officer for Follow the Sun Tours, Spaceport America Visitor Center, located 301 S. Foch

#### App. 4

St., Truth or Consequences, New Mexico, contacted the Truth or Consequences Police Department to report improper soliciting. (See Exhibit 2 – Truth or Consequences Police Department Crime Report for Case Number 2015-0588, dated June 26, 2015).

14. Ms. Bleth identified Plaintiff to the police officer, stating that he had been demonstrating against the opening of the Spaceport Visitors Center, indicating that she was not actually there, but that her manager, Steven Bleth, had reported this to her. Ex. 2.

15. Mr. Bleth told the officers that he had observed Mr. Fenn walking around the inside of the center engaged in conversation with an unidentified woman. They approached the counter, requesting a pen and paper, which he used to jot down her email address. Ex 2.

16. Mr. Bleth alleged that Mr. Fenn then handed a business card to the female which said, “Spaceport Tour Video Memory Services”, and that Mr. Fenn informed her that for a \$10.00 donation he would send her a collection of videos. Ex 2.

17. Mr. Bleth informed the officers that Mr. Fenn had been a very vocal opponent to the opening of the Spaceport Visitor Center, and that Mr. Belth had been instructed by the Chief Executive Officer to notify her immediately of any visit by Mr. Fenn. Ex 2.

18. Rosemary Bleth arrived at the location at approximately 10:00 and notified the officer the she was interested in a criminal trespass order against Mr. Fenn to prevent him from entering the location. Ex 2.

App. 5

19. A trespass authorization was issued at the request of the Space Port America Visitors Center Representative Rosemary Bleth restricting Ron Fenn from the property located at 301 S. Foch. Ex 1.

20. At approximately 11:00 am of the same day, Captain Apodaca and Chief Alirez of the Truth or Consequences Police Department attempted to serve the trespass authorization forms on Ron Fenn at his residence. Although Mr. Fenn took receipt of the forms, he refused to sign them. Ex 1. Ex 2.

21. Chief Alirez asked Mr. Fenn for a copy of the business cards he had been handing out. Mr. Fenn provided a copy of his cards, which on the front held the statement "Help save our Lee Belle Johnson Senior Recreation Center..." and contained Mr. Fenn's telephone number. Ex 2.

22. Chief Alirez question Mr. Fenn at that time as to his business status, and if he currently possessed a City of Truth or Consequences business license.

23. Chief Alirez then met with the Clerk for the City of Truth or Consequences, had a records check conducted, and verified that Mr. Fenn did not posses a business license within the City of Truth or Consequences.

24. Mr. Fenn was prosecuted in the City of Truth or Consequences Municipal court for Conducting business without a license and was subsequently convicted on September 9, 2015. Ex 1.

## App. 6

25. On October 10, 2016, Linda DeMarino contacted the Police Department and reported the Plaintiff Fenn had again entered the location at 301 S. Foch and was making “obnoxious comments”. Captain Apodaca was dispatched to the location. Ex 1, Ex 6.

26. Ms. DeMarino informed the officer that Mr. Fenn had been “carrying on” about dismay of the building no long being in use as a senior center. Ms. DeMarino filmed Mr. Fenn’s behavior with her phone, at which time Mr. Fenn began filming her as well. Ex 6.

27. Ms. DeMarino was asked to preserve the video footage in the even of criminal trespass charges.

28. On May 5, 2017, Captain Apodaca was again detailed to 301 S. Foch in reference to Plaintiff Fenn being on the property in violation of trespass orders. Ex 1.

29. The reporting party was John Muenster, a volunteer of Geronimo Trail Scenic Byway Center. Ex 1.

30. Mr. Fenn was at the location setting up posters on a counter inside the center.

31. Captain Apodaca informed Mr. Fenn that he “could put up his propaganda and stay... but not to harass any visitors”. (Exhibit 5 – Incident Narrative of Captain Apodaca)

32. Captain Apodaca took Mr. Muenster’s statement, including his concern about expensive items kept in the center being damages or stolen. At that

App. 7

time, Captain Apodaca told Mr. Muenster that he and the Chief of Police would attempt to update the trespass order against Mr. Fenn with either the current tenant or the person in charge of the Spaceport America Visitor's Center. Spaceport America is a governmental subdivision of the State of New Mexico. Ex 5.

33. According to Chief Alariz', on May 11, 2017, Daniel Hicks, CEO of Space Port America requested a trespass order on Plaintiff Fenn from Chief Alirez based on prior incidents as a preventive measure. Ex 1.

34. There has been no staff in the Spaceport America Visitor Center since their MOU was signed in March of 2017.

35. Chief Alirez drove 75 miles to the offices of Spaceport America in Las Cruces for Mr. Hicks' signature the day after the May 10, 2017 police report of Captain Apodaca

36. Chief Alirez met with Plaintiff Fenn on May 12, 2017 to serve the new trespass order from Space Port America. Plaintiff again refused to sign but took receipt of the form. Ex 1.

37. June 4, 2017, Larena M. Miller again contacted the Truth or Consequences police department to report Plaintiff Fenn inside the premises at 301 S. Foch. Ex 1.

38. Sergeant E. Baker responded and located Mr. Fenn inside the *common use are of the building*. There is a satellite city library also housed at the location.

App. 8

Plaintiff was in the area of the building housing the library. Ex 1.

39. Sergeant Baker told Plaintiff to leave, and he refused as he was in the public section of the building, and not visiting Space Port America, nor Geronimo Trail Scenic Byway Center. Ex 1.

40. Chief Alirez also came to the scene to speak with Plaintiff Fenn and told him to leave. Plaintiff again refused and Chief Alirez left the area. Ex 1.

41. Chief Alirez then met with Plaintiff Fenn June 13, 2017 in the police chief's office. He offered to hold the newest citation for trespass violation in abeyance as long as Plaintiff Fenn had no further violations of the same nature at the location in question. Ex 1.

42. Plaintiff refused again, as he has a right to access the public locations in Truth or Consequences.

43. On June 18, 2017, Officer Ontiveros was dispatched to the 301 S. Foch location in reference to a call the Plaintiff Fenn was again visiting the premises.

44. Upon arrival, Officer Ontiveros located Plaintiff "within the common area of the areas he had previously been trespassed from" Ex 1, Ex 7.

45. Mr. Fenn informed Officer Ontiveros that he was not trespassing but was protesting the building having been taken away from the citizens of Truth or Consequences and that he was waiting for people to come in and sign his petition. Ex 7.

App. 9

46. A direct verbal command to leave the building was issued by Officer Ontiveros and Plaintiff refused to leave.

47. Chief Alirez was called, and when he arrived on scene again directed Plaintiff to leave, again Plaintiff refused. Ex 1, Ex 7.

48. Chief Alirez then arrested Plaintiff Fenn and he was transported to the Sierra County Detention facility.

49. On June 19, 2017 a Criminal Complaint was filed against Mr. Fenn in the Sierra Magistrate Court, case no. M-51-MR-2017-00256, charging him with; i) Resisting, Evading or Obstructing an Officer pursuant to NMSA 30-22-1(D), and ii) Criminal Trespass pursuant to NMSA 30-14-1(C). (Exhibit 3, Docket for magistrate case 256).

50. On June 26, 2018, a criminal complaint was filed against Mr. Fenn in the Sierra Magistrate Court, case no. M-51-MR-2017-00293, charging him with; i) 2 counts of Resisting, Evading or Obstructing an Officer pursuant to NMSA 30-22-1(D), and ii) Criminal Trespass pursuant to NMSA 30-14-1(C). (Exhibit 4, Docket for magistrate case 293).

51. Mr. Fenn pled not guilty to all charges.

52. An arraignment was held in both cases on June 26, 2017 and Mr. Fenn was released on personal recognizance, placed on probation and was ordered not to be in or near the Lee Bell Johnson Center located at 301 S. Foch.

App. 10

53. Mr. Fenn filed a Motion to Dismiss for Failure to Establish Essential Elements of Offense in M-51-MR-2017-00293 on August 8, 2017, a Response to the Motion was filed August 22, 2017 and a Hearing held on the Motion on August 25, 2017.

54. The Motion to Dismiss was denied.

55. September 12, 2017, current counsel for Mr. Fenn entered its appearance.

56. Mr. Fenn sent a Demand Notice on September 14, 2017 to former city manager Jaime Aguilera, on behalf of the taxpayers of Truth or Consequences, requesting repayment of funds made on Aguilera's behalf into the Rotary Club from the public coffers. The "Demand Letter" requested that the repayment be made into the General Fund for Truth or Consequences. Mr. Fenn signed the letter as "Co-CEO, City of Truth or Consequences".

57. On September 14, 2017, Coppler Law Firm sent a cease and desist letter to Mr. Fenn insisting that he stop misrepresenting himself as a purported officer of the City, and that if Mr. Fenn did not do so he would be subject to legal action from the City. Exhibit 8 – Letter from Coppler Law Firm

58. Both of the magistrate cases filed against Mr. Fenn were Dismissed Without Prejudice *Nolle Prosequi* on October 11, 2017.

**FIRST CAUSE OF ACTION:  
42 U.S.C. 1983 - VIOLATION OF FIRST  
AMENDMENT**

59. Plaintiff re-alleges each and every one of the above paragraphs as if fully set forth herein.

60. The First Amendment of the United States Constitution protects an individual's freedom of expression, freedom of speech and an individual's right to petition his government for redress.

61. Plaintiff has a right to be free from retaliation for exercising his First Amendment rights.

62. Defendants each and every one of them to actions took actions to explicitly prohibit Plaintiff from engaging in protected speech on the basis of the content of his speech.

63. Defendants, all of them, by the action of trespassing, requesting removal, removal, arrest or prohibiting Plaintiff's lawful and peaceful protest deprived Plaintiff of his First Amendment rights on the basis of the content of his speech in violation of the United States Constitution.

64. Plaintiff Fenn has been subjected, as a result of the recited acts, to deprivations of his rights under color of law and per the customs, policies and usages of the County, of rights, privileges and immunities secured to him by the Constitution and laws of the United States and in particular his right to freedom of speech and to petition his government as protected by the First Amendment to the United States Constitution.

App. 12

65. The Defendants have engaged in, created or condoned a policy of violating Plaintiff's First Amendment rights and retaliating against Plaintiff for engaging in his right to petition his government. Defendants have engaged in such conduct in clear violation of law.

66. As a direct and proximate result of the retaliatory and vindictive acts by Defendants, Plaintiff has suffered injuries consisting of deprivation of a constitutional right for which Defendants are liable.

67. Defendants are also subject to punitive damages for their conduct.

**SECOND CAUSE OF ACTION:  
MALICIOUS PROSECUTION, ABUSE OF  
PROCESS BY DEFENDANTS APODACA AND  
ALARIZ**

68. Plaintiff re-alleges each and every one of the above paragraphs as if fully set forth herein.

69. Defendants Alariz and Apodaca with the assistance of officers under their control, arrested, charged and prosecuted Plaintiff for unjustified charges that were not supported in law or fact for the express purpose of harming and harassing Plaintiff.

70. Defendants violated Plaintiff's constitutionally protected rights in an effort to chill his activities and retaliate against him for disclosing their malfeasance. Their actions of arrest and prosecution were specifically designed to prevent and deter Plaintiff from the lawful and peaceful exercise of his rights, as such actions would deter any person of ordinary

firmness from lawful exercise of speech and protest under the threat of criminal prosecution.

71. As a direct and proximate result of the retaliatory and malicious prosecution and abuse of process, Plaintiff suffered injuries for which Defendants are responsible.

72. The Defendants are also subject to punitive damages for their conduct.

**THIRD CAUSE OF ACTION:  
42 U.S.C § 1983 – MUNICIPAL & SUPERVISORY  
LIABILITY FOR VIOLATIONS OF FEDERAL  
CONSTITUTIONAL RIGHTS (By Plaintiff  
Against Defendants City of Truth or  
Consequences and Chief Lee Alirez for Each of  
the Aforementioned Federal Violations)**

73. Plaintiff incorporates all of the preceding paragraphs as if fully stated herein.

74. Defendants City of Truth or Consequences and Chief of Police Lee Alirez are authorized policymakers and responsible for creating, and adhering to, policies, procedures, and customs for the City of Truth or Consequences. Defendants City of Truth or Consequences and Chief of Police Lee Alirez are responsible for the hiring, supervision, and training of the City's employees, contractors and agents.

75. Defendants City of Truth or Consequences and Chief of Police Lee Alirez created a climate that led other Defendants consisting of officers of the city, to believe that they could act with impunity, violate civil

rights, and otherwise conduct himself in the manner described herein.

76. Defendants City of Truth or Consequences and Chief of Police Lee Alirez failed to properly train, supervise, and admonish Defendants.

77. There is a causal connection between Truth or Consequences' failure to train, supervise, and admonish their employees including Chief Lee Alirez leading to the violation of Plaintiff's constitutional rights.

78. Defendant Truth or Consequences failure to properly train, supervise, and admonish their employees amounts to deliberate indifference.

79. The policies, customs, decisions and practices of Truth or Consequence that promoted retaliation against an outspoken citizen who was critical of the City's actions along with their failure to train, supervise, and admonish, were willful, wanton, obdurate and in gross and reckless disregard of Plaintiff's rights.

80. Defendants acts and omissions caused Plaintiff to suffer severe emotional distress and attorneys' fees and costs.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays for:

- A. A trial on the merits before a jury;
- B. A declaration that the actions of identified Defendants described in this Complaint

violated Plaintiffs' Constitutional rights under the First Amendment of the United States Constitution and Article II, Section 17 of the New Mexico Constitution;

- C. General and specific compensatory damages according to proof;
- D. Punitive damages in such amount as will sufficiently punish defendants for their willful and malicious conduct and as will serve as an example to prevent a repetition of such conduct in the future;
- E. Interest on such damages awarded at the legal rate from the date of judgment until paid;
- F. An order granting Plaintiffs' costs and attorney fees; and
- G. Any and all other relief that may be appropriate as deemed by this Court.

**JURY DEMAND**

Plaintiff also requests a jury trial.

App. 16

WESTERN AGRICULTURE, RESOURCE  
AND BUSINESS ADVOCATES, LLP

/s/ A. Blair Dunn

A. Blair Dunn, Esq.  
Dori E. Richards, Esq.  
400 Gold Ave SW, Suite 1000  
Albuquerque, NM 87102  
(505) 750-3060  
[abdunn@ablairdunn-esq.com](mailto:abdunn@ablairdunn-esq.com)  
[dorierichards@gmail.com](mailto:dorierichards@gmail.com)

[\*\*\*Civil Cover Sheet Omitted for this Appendix\*\*\*]

App. 17

**EXHIBIT 1**

**Case Number:** 2017-0602

**Truth or Consequences Police Department  
NM02701**

**Crime Report  
30-14-1 NMSA1978 Criminal trespass  
30-22-1 NMSA1978 Resisting, evading or  
obstructing an Officer**

**Location:** 301 S. Foch St. Truth or Consequences, New Mexico 87901

**Date:** 06/18/2011 **Time:** 0933

**Suspect:**

Fenn, Ronald W. (575) 894-1543  
M/W/Bro/Bro/6'0"/168/D.O.B. 02/23/1944  
OLN# NM 120413821  
316 N. Foch St. Truth or Consequences, New Mexico  
87901

**Witness(s):**

W/1  
Miller, Larena M. (575) 267-3455  
F/W/Bro/Bro/5'5"/220/ D.O.B. 07/30/1996  
OLN# 000170471  
301 S. Foch St. Truth or Consequences, New Mexico  
87901

App. 18

**W2** Hickes, Daniel (575) 267-8599  
CEO Spaceport America  
901 E. University Ave. Suite #9651  
Las Cruces, New Mexico 88001

**W3** Sergeant E. Baker (575) 594-1204  
Clerk, City of Truth and Consequences  
505 Sims St. Truth or Consequences, New Mexico  
87901

**W4**  
Captain Apaodaca M. Apodaca #9027 (575) 894-1204  
507 McAdoo St. Truth or Consequences, New Mexico  
87901

**Evidence:**

- Item #1 Video Recording of contact with Ronal Fenn
- Item #2 Trespass Authorization (copy) signed by Daniel Hicks
- Item #3 Trespass Authorization (copy) signed by W/4 Larena Miller

**Details:**

On June 26, 2015 W/1 Lorena miller requested that Ronal Fehn be trespassed from 301 S. Foch. W/1 Miller signed the trespass authorization as an authorized representative of Geronimo Trails Scenic By-way housed at 301 S. Foch St. Onn this same date a trespass authorization was also issued at the request of the Space port America Visitors Center Representative Rosemary Bleth restricting and or prohibiting Ronald Fenn from going onto the property

## App. 19

located at 301 S. Foch Spaceport America Visitors center Both Trespass authorizations were based on conduct and City ordinance violations committed by Ronald Fenn. On This same date Captain Apodaca and I served the two trespass authorization forms on Ronald Fenn at his residence, and he refused to sign them but took receipt of the forms. This was documented under Case #205-0588 Mr. Fenn was prosecuted in The City of Truth or Consequences Municipal court for 7-32 Conducting business without a license 7-32 Soliciting Article I, section 7-1 and was subsequently convicted on September 09<sup>th</sup>, 2015

On October 10, 2016 at approximately 1055s Captain Apodaca was detailed to 301. S. Foch in reference to Ronald Fenn entering the location in violation of an existing trespass order and making "obnoxious" Comments. The reporting party was Linda DeMarino and Captain Apodaca documented the incident under case # 61-0961 see attached copy.

On May 5<sup>th</sup>, 2016 Captain Apodaca was detailed to 301 S. Foch in reference to Ronald Fenn being on property in violation of a current trespass order and being unruly. The reporting Party was John Muenster a Volunteer of Geronimo Trail Scenic Byway center. Mr. Fenn was located on property and was advised regarding the trespass order and he argued the prior occupant of the Space Port Visitors Center, Rosemary Bleth of Follow the Sun Tours was no longer an occupant making the trespass order null and void Captain Apodaca advised Ronald Fenn the trespass order issued on behalf of the Geronimo Trails Scenic Byways was still valid and ordered him to leave

App. 20

immediately and he complied and left the location. This incident was documented under case # 17-0444 (see attached copy)

On May 11<sup>th</sup>, 2017 Captain Apodaca and I met with Daniel Hicks, C.E.O. of Space port America who had leased the building located at 301 S. Foch (see attached lease agreement) and he requested Mr. Fenn be trespass from the location based on prior incidents which proved to be disruptive, and as a preventative measure to avoid further disruption by Mr. Fenn. Mr. Hicks on behalf of Spaceport America signed the trespass authorization form.

On May, 12<sup>th</sup>, 2017 I met with Mr. Fenn in my office in the police Department and I served him with this trespass order which he again refused to sign but took receipt of the form. I advised Mr. Fenn of the consequences if he continued to disobey this, and he stated "I am the Co-CEO of the City" and gave me a business card (see attached). I advised Mr. Fenn regardless of his own internal justifications he would be held accountable.

On Sunday June 4<sup>th</sup> 1017 at approximately 1333 hours W/1 Miller contacted the Truth or Consequences police department to report Ronald Fenn was inside the building (Spaceport Visitors Center where had been previously trespass from. Sergeant E. Baker responded and located Mr. Fenn inside the common use area of the building located directly adjacent to the Geronimo Tails Scenic Byway and the Space Port Visitors Center, and Directed him 3 three times to leave the premises, however he refused to comply and verbally stated "NO" and related he was in the library

App. 21

section. It should be noted there is a satellite city library also housed at this address, but it was closed and not open as it was a Sunday and was posted on the door (See attached Photo). Sergeant Baker issued Mr. Fenn a citation for the trespass violation Citation #13180 (See Attached copy) and he refused to sign the Citation. I arrived on scene at approximately 1415 hours, and I contacted Mr. Fenn who was seated in the common area as described, and I asked him if he refused to sign the citation and he related he was refusing to leave or sign the citation. I advised him I had strep throat and was now here dealing with this especially after having a long conversation on May 12th advising him not to violate the trespass order, and He asked me "Are you contagious, I don't want to get sick" and I ultimately left the location..

On Thursday June 13<sup>th</sup> 2017, I met with Ronald Fenn at my request in my office at the Police Station. I discussed his conduct on Sunday June 4<sup>th</sup> and I offered the hold those charges in abeyance as long as he had no further violations of this nature at this location. Mr. Fenn stated I am going to remain "Civilly Disobedient and you will just have to do your job and arrest me."

This case and incident was documented under Case# 2017-0754 (see attached Copy

On June 18<sup>th</sup>, 2017 at approximately 0933 Officer Ontiveros was detailed to 301 S. Foch in reference to Mr. Fenn being at this location in violation of a trespass order. Upon arrival Officer Ontiveros located Mr. Fenn inside the building within the common area of the areas he had previously been trespassed from. Officer Ontiveros gave Mr. Fenn a direct verbal

App. 22

command to leave the building and he refused to comply. I arrived on scene and also directed Mr. Fenn to leave and he also refused to comply. Based on the fact Mr. Fenn refused to comply with the direct orders given by Officer Ontiveros and I coupled with his awareness of the trespass issues I laced Mr. Fenn under arrested for the above listed charges, Officer Ontiveros transported and booked into the Sierra County Detention facility without incident.

I obtained the Lease agreements for Space Port America and the Geronimo Trails Scenic Byway and they are attached to this report.

App. 23

**EXHIBIT 2**

**Case Number:** 2015-0588

**Truth or Consequences Police Department  
NM02701**

**Crime Report  
City of Truth or Consequences Municipal Code  
Violation(s) Conducting a Business Without a  
License, Article I, Section 7-32  
Soliciting Article I, Section 7-1**

**Location:** 301 S. Foch St. Truth or Consequences, New Mexico 87901

**Date:** 06/26/2015 **Time:** 0915

**W/5**

Bruch, Christina (575) 894-6673  
Clerk, City of Truth or Consequences,  
New Mexico 87901

**W/6**

Sergeant M. Apodaca #9027 (575) 894-1204  
507 McAdoo St. Truth or Consequences,  
New Mexico 87901

**W/7**

Captain J. Morgan #9077 (575) 894-1204  
507 McAdoo St. Truth or Consequences,  
New Mexico 87901

**Evidence:**

Item #1 One Business card provided by S/Ronald Fenn during investigation

App. 24

- Item #2 Trespass Authorization (copy) signed by W/2  
Rosemary Bleth
- Item #3 Trespass Authorization (copy) signed by W/4  
Larena Miller
- Item #4 Seven color digital photograph of a copyright  
infringement sign and S/Fenn' Business Card

Details:

On Friday June 26, 2015 at approximately 0915 hours I was contacted by W/2 Rosemary Bleth who identified herself as the Chief Executive Officer for Follow the Sun Tours, Spaceport America Visitor Center located at 301 S. Foch St. Truth or Consequences, New Mexico 87901. W/2 related she wanted to report a subject soliciting donations in return for "Spaceport Tour Video's" in her business.

W/2 related the subject was identified to her as S/Fenn who she is familiar with as a local citizen who has been demonstrating against the opening of the Spaceport Visitors Center. W/2 related she was not at the location when this occurred but her manager W/1 Steven Bleth called and reported this to her, just prior to calling me.

On this same date at approximately 0930 hours, Captain Morgan, Sergeant Apodaca and I arrived at the Spaceport Visitors Center where I contacted W/1 Steven Bleth the manager of the Spaceport Visitor Center, who related the following. W/1 related on today's date at approximately 0900 hours he was working behind the retail counter located on the west side of the visitor center. W/1 related he observed an

elderly male subject who he recognized and identified as S/Fenn inside of the business. W/1 related an unknown elderly female subject was walking around the inside of the center in the retail area when he observed S/Fenn approach her and engage in conversation. W/1 related approximately 5 minutes passed when the female subject accompanied by S/Fenn approached the counter and she asked him for a pen and paper. W/1 related he gave the woman a pen and paper, and in his presence S/Fenn asked for the female subjects email address then presented her with a business card. W/1 related he observed the business card and it stated "Spaceport Tour Video Memory Services." W/1 related he observed S/Fenn inform the female subject that for a \$10.00 donation he would send her his complete collection of "Spaceport America Tour Videos." W/1 related he did not intervene as he was instructed by his direct report C.E.O. W/2 Rosemary Bleth. W/1 related S/Fenn has been a very vocal opponent to the opening of the Spaceport Visitor Center, and he had been instructed by the Chief Executive Officer (W/2) in the event there was any issue regarding Mr. Fenn to notify her immediately. W/1 related at no time did he give S/Fenn permission to solicit donations inside the business.

I observed affixed to the south wall adjacent to the retail counter where W/1 related the incident took place, was a large black sign with 1.5" white letters which stated ***"Copying or reproducing Spaceport America developed media content is a copyright infringement and prohibited under law."*** I took measurement of the sign and found it to be 17' from the retail counter area and measured 16" in height and 18"

App. 26

in width and approximately 6'5". from the floor. I observed the sign was clearly visible from within the center. I took a total (5) digital color photographs depicting the location of the sign in proximity to the information/ sales counter, including a close up picture of the actual sign. W/1 was unsure when the sign had been affixed to the wall, but related he believed it was there prior to the centers grand opening on June 24, 2015.

On this same date at approximately 1000 hours W/2 Rosemary Bleth arrived on-scene and I contacted her. W/2 again identified herself as the Chief Executive Officer for the business and related her concern was not only the solicitation inside her business and copyright infringements, but a contact her husband & business partner W/3 Mark Bleth had with S/Fenn earlier on this same date. W/2 related W/3 Mark Bleth was not currently at the location and she provided with his contact information. W/2 related she was desirous of a criminal trespass order against S/Fenn, to prevent him from entering the location and soliciting donations and violating copyright infringements. I presented W/2 with a Trespass Authorization form which she read and signed. W/2 related at no time was S/Fenn given permission to solicit donations inside her place of business.

While at the location I was contacted by W/4 Larena Miller who advised me she currently manages the "Geronimo Trail National Scenic Byway Visitor Center" which is housed at the same location but in a different part of the building. W/4 related within the past two months she has been contacted by S/Fenn and he had

publicly insulted her by stating "***There is no point in talking to someone with no intelligence.***" 16 W/4 related S/Fenn has been offensive and aggressive in her prior contacts with him. W/4. related the "Spaceport Visitor Center" and the "Geronimo Trail National Scenic Byway Visitor Center" occupy the same building and she no longer feels safe and secure because S/Fenn has become too unpredictable in his opposition of the current use of the building they are located in. W/4 related her staff has shared the same concern with her as well, and she would like a criminal trespass order preventing S/Fenn from entering the location and harassing and or intimidating her and her staff. I presented W/4 Larena Miller with a Trespass Authorization form which she read and signed.

On this same date at approximately 1100 hours Captain Morgan, Sergeant Apodaca and I responded to 316 N. Foch St. Truth or Consequences, New Mexico 87901, the residence of S/Fenn. I contacted S/Fenn who was standing the threshold of his front door, and explained the nature of the contact to him. I asked S/Fenn if he was inside the Spaceport Visitor Center earlier, and he replied he was. I asked him if during his visit if he solicited donations inside of the visitors center, which he replied he did. I asked him if he presented a woman with a business card and if so if I could have one of the cards, which he replied he did solicit a donation and provided me with a business card. I examined the business card and on the front it stated "***Help save our Lee Belle Johnson Senior Recreation Center call Ron Fenn 575-894-1543***" and the reverse side stated "***Spaceport Tour Video Memory Services Free Video***" and in small letters

stated "***only \$10.00 to cover postage and handling with a donation to: save.o.rec@gmail.com***".

I noticed the business card contained no permanent address, and no indication the organization was a non-profit per 501(c)(3) of the Internal Revenue Code. I asked S/Fenn if he currently possess a City of Truth or Consequences business license, and he related he did not, but was thinking of getting one if he can make enough money. I presented S/Fenn with the two separate signed Trespass Authorization notices, and he refused to sign them. In the presence of S/Fenn, I wrote the words "Refused" on the signature line utilized for the "Trespasser" and served him with both forms. We left the location without incident.

On this same date at approximately 1125 hours, I contacted W/5 Christina Bruch, who related she is employed as a Clerk for the City of Truth or Consequences. W/5 conducted a records check and verified S/Fenn does not currently possess nor has he applied for a license to conduct business in the City of Truth or Consequences or possess a permit to solicit donations per Article I Section 7-1.

On 06/29/2015 at approximately 1000 hours, I contacted via telephone W/3 Mark Bleth who related he and his wife W/2 Rosemary Bleth own Follow the Sun Tours and operate the Spaceport America Visitor Center. W/3 related on 06/26/2015 at 0830 hours he was at his place of business located at 301 S. Foch St. Truth or Consequences, New Mexico 87901, the Spaceport America Visitor Center. W/3 related when he opened the doors for business he observed S/Fenn standing outside. W/3 related S/Fenn inquired what

time the center opened, and he informed him it was open. W/3 related S/Fenn entered the location and stated "I have not been inside here since all this work has been done." W/3 stated S/Fenn told him "I got no issues with you, your family or your business, my issue is they took away my building." W/3 related S/Fenn during the conversation stated "This building belongs back to the people." W/3 stated to S/Fenn "this building is for the entire community free to enter and interact with the displays." W/3 related S/Fenn stated "This stuff is for kids and kids aren't people. W/3 related at that point the contact was turning negative and he invited two other employees over, and excused himself from the conversation. W/3 related at no time did he give S/Fenn permission to solicit donations inside his place of business, and confirmed the signage regarding copyright infringement was installed at its current location on 06/24/2015 the morning of the grand opening.

**Additional Information:**

I attempted to contact two employees mentioned by W/3 Mark Bleth who were identified as Tyson Rush and his spouse Stacy Rush, without success.

S/Fenn was also involved in a separate incident on the day of the grand opening which was documented under case # 2015-1587 for disorderly conduct during the grand opening event of the Spaceport America Visitor Center.

All items of evidence will remain with the original report maintained by the Truth or Consequences Police

App. 30

Department. I have attached copies of all digital photographs with this report.

**EXHIBIT 3**

**REGISTER OF ACTIONS  
CASE NO. M-51-MR-2017-00256**

State of New Mexico v. Ronald W. Fenn

Case Type: Misdemeanor (Mag)  
Date Filed: 06/19/2017  
Location: Sierra Magistrate  
Judicial Officer: Page, Matthew S.

**RELATED CASE INFORMATION**

**Related Cases**

M-51-MR-2017-00293 (Same Party)

**PARTY INFORMATION**

Defendant	Fenn, Ronald	Male	Attorneys
			A. Blair Dunn
		DOB:	<i>Retained</i>
		02/23/1944	505-750-
	316 Foch	6'0", 168 lbs	3060(W)
		Truth or Consequences, NM	87901
		DL:	NM120418321

Pro Se

Plaintiff	State of New Mexico	Seventh Judicial District
		Attorney - Sierra County
		575-894-9033(W)

**CHARGE INFORMATION**

Charges:	Statute	Level	Date
Fenn, Ronald			
1. Resisting, Evading or Obstructing an Officer (Resisting)	30-22-1(D)	Misdemeanor	06/18/2017
2. Resisting, Evading or Obstructing an Officer (Resisting)	30-22-1(D)	Misdemeanor	06/18/2017
3. Criminal Trespass (Public)	30-14-1(C)	Misdemeanor	06/18/2017

**EVENTS & ORDERS OF THE COURT**

	<b>DISPOSITIONS</b>
06/26/2017	<p>Plea (Judicial Officer: Brown, Alan J.)</p> <p>1. Resisting, Evading or Obstructing an Officer (Resisting) Not Guilty</p> <p>2. Resisting, Evading or Obstructing an Officer (Resisting) Not Guilty</p> <p>3. Criminal Trespass (Public) Not Guilty</p>

App. 33

10/11/2017	<p>Disposition (Judicial Officer: Page, Matthew S.)</p> <p>1. Resisting, Evading or Obstructing an Officer (Resisting) Dismissed by Prosecutor / Nolle Prosequi</p> <p>2. Resisting, Evading or Obstructing an Officer (Resisting) Dismissed by Prosecutor / Nolle Prosequi</p> <p>3. Criminal Trespass (Public) Dismissed by Prosecutor / Nolle Prosequi</p> <p><b>OTHER EVENTS AND HEARINGS</b></p>
08/08/2010	MTN: FOR DISMISSAL
06/19/2017	OPN: CRIMINAL COMPLAINT FILED
06/19/2017	RELEASE SHEET
06/19/2017	ORD: RELEASE ORDER & BOND FILED

App. 34

06/19/2017	Interim Condition for Fenn, Ronald - No Weapons - Random Urinalysis/Breath Test Weekly - Notify the court of any change of address - Not to Leave County and/or State Sierra County - Maintain Contact with Attorney - Do not violate any federal, state, tribal, or local laws - Release on Personal Recognizance - Other <i>Not to report to Space Port Vistitor Center</i> - Will not take or use drugs without a prescription - Not enter any liquor establishments - Not drive without a license, registration or insurance - \$50.00 monthly to be paid to Sierra County Compliance
06/26/2017	Arraignment (8:30 AM) (Judicial Officer Brown, Alan J.) Result: Held
06/26/2017	ADVISEMENT OF RIGHTS READ
06/26/2017	WAIVER OF COUNSEL FILED
06/26/2017	DEMAND FOR JURY TRIAL (Judicial Officer: Brown, Alan J. )

App. 35

06/26/2017	Interim Condition for Fenn, Ronald - No Weapons - Random Urinalysis/Breath Test Weekly - Notify the court of any change of address - Not to Leave County and/or State Sierra County - Maintain Contact with Attorney - Do not violate any federal, state, tribal, or local laws - Release on Personal Recognizance - Other <i>Do not return to vicinity of the Lee Bell Johnson Center</i> - Will not take or use drugs without a prescription - Not enter any liquor establishments - Not drive without a license, registration or insurance - \$50.00 monthly to be paid to Sierra County Compliance
06/26/2017	NTC: OF EXCUSAL FILED (Judicial Officer: Brown, Alan J. )
07/05/2017	CERTIFICATE OF EXCUSAL/RECUSAL FILED (Judicial Officer: Brown, Alan J. )
07/05/2017	NTC: OF REASSIGNMENT ISSUED (Judicial Officer: Page, Matthew S. )
07/17/2017	MTN: FOR DISCOVERY/ PRODUCTION FILED

App. 36

07/19/2017	PROSECUTION PACKET FILED <i>The following documents have been filed: 5718- Entry of Appearance 5750- Witness List</i>
08/25/2017	Pre-Trial Hearing (10:00 AM) (Judicial Officer Page, Matthew S.) Result: Held
08/25/2017	Motion Hearing (10:00 AM) (Judicial Officer Page, Matthew S.) Result: Commenced and Continued
09/12/2017	ENTRY OF APPEARANCE FILED
10/10/2017	NTC: Notice of Dismissal <i>Nolle Prosequi</i>
10/11/2017	CLS: DISMISSED WITHOUT PREJUDICE
10/13/2017	CANCELED Motion Hearing (10:30 AM) (Judicial Officer Page, Matthew S.) <i>Case Dismissed</i>

**EXHIBIT 4**

**REGISTER OF ACTIONS  
CASE NO. M-51-MR-2017-00293**

State of New Mexico v. Ronald W. Fenn

Case Type: Misdemeanor (Mag)  
Date Filed: 06/23/2017  
Location: Sierra Magistrate  
Judicial Officer: Page, Matthew S.

**RELATED CASE INFORMATION**

**Related Cases**

M-51-MR-2017-00256 (Same Party)

**PARTY INFORMATION**

Defendant	Fenn, Ronald W	Male	Attorneys	A. Blair Dunn
			DOB:	<i>Retained</i>
			02/23/1944	505-750-
	316 Foch		6'0", 168 lbs	3060(W)
			Truth or Consequences, NM	87901
			DL:	NM120418321

Plaintiff	State of New Mexico	Seventh Judicial District
		Attorney - Sierra County
		575-894-9033(W)

**CHARGE INFORMATION**

Charges: Fenn, Ronald W	Statute	Level	Date
1. Resisting, Evading or Obstructing an Officer (Resisting)	30-22-1(D)	Misdemeanor	06/04/2017
2. Criminal Trespass (Public)	30-14-1(C)	Misdemeanor	06/04/2017

**EVENTS & ORDERS OF THE COURT**

	<b>DISPOSITIONS</b>
06/26/2017	Plea (Judicial Officer: Brown, Alan J.) 1. Resisting, Evading or Obstructing an Officer (Resisting) Not Guilty 2. Criminal Trespass (Public) Not Guilty
10/11/2017	Disposition (Judicial Officer: Page, Matthew S.) 1. Resisting, Evading or Obstructing an Officer (Resisting) Dismissed by Prosecutor / Nolle Prosequi

	2. Criminal Trespass (Public) Dismissed by Prosecutor / Nolle Prosequi
<b>OTHER EVENTS AND HEARINGS</b>	
06/23/2017	OPN: CRIMINAL COMPLAINT FILED
06/23/2017	STATEMENT OF PROBABLE CAUSE
06/23/2017	Summons Issued - Arraignment/First Appearance arraignment 6-26-17@8:30am
06/26/2017	Arraignment (8:30 AM) (Judicial Officer Brown, Alan J.) Result: Held
06/26/2017	ADVISEMENT OF RIGHTS READ
06/26/2017	WAIVER OF COUNSEL FILED
06/26/2017	DEMAND FOR JURY TRIAL (Judicial Officer: Brown, Alan J. ) <i>in open court.</i>
06/26/2017	Interim Condition for Fenn, Ronald W - Notify the court of any change of address - Obey federal, state or local laws - Release on Personal Recognizance - Other <i>Not to be in or near Lee Bell JohnsonCetner</i>
06/26/2017	NTC: OF EXCUSAL FILED (Judicial Officer: Brown, Alan J. )

07/05/2017	CERTIFICATE OF EXCUSAL/RECUSAL FILED (Judicial Officer: Brown, Alan J. )
07/05/2017	NTC: OF REASSIGNMENT ISSUED (Judicial Officer: Page, Matthew S. )
07/12/2017	WITHDRAW/DECLINE PROSECUTION <i>Notice of Non Appearance</i>
07/17/2017	MTN: FOR DISCOVERY/PRODUCTION FILED
07/17/2017	ENTRY OF APPEARANCE FILED
08/08/2017	MTN: FOR DISMISSAL <i>Motion to Dismiss for Failure to Establish Essential Elements of Offense</i>
08/22/2017	RESPONSE TO MOTION OR BRIEF <i>Response to Motion to Dismiss</i>
08/24/2017	MTN: FOR CONTINUANCE
08/25/2017	Pre-Trial Hearing (10:00 AM) (Judicial Officer Page, Matthew S.) Result: Held
08/25/2017	Motion Hearing (10:00 AM) (Judicial Officer Page, Matthew S.) Result: Commenced and Continued
08/25/2017	ORD: DENYING
09/12/2017	ENTRY OF APPEARANCE FILED

App. 41

10/10/2017	NTC: Notice of Dismissal <i>Nolle Prosequi</i>
10/11/2017	CLS: DISMISSED WITHOUT PREJUDICE
10/13/2017	<i>CANCELED</i> Motion Hearing (10:30 AM) (Judicial Officer Page, Matthew S.) <i>Case Dismissed</i>

**EXHIBIT 5**

**Incident Narrative  
Suspicious Activity  
17-0444**

At about 0930 hours on (Saturday) 05-06-17, I was dispatched to the Spaceport America Visitor's Center (301 S. Pershing) in reference to an unruly subject there. Upon arrival I made contact with the reporting person, John Muenster and the suspect, Ronald Fenn in front of the building.

Mr. Muenster was holding some posters and set them down when I arrived. Mr. Fenn picked the posters up and walked inside the building. I asked Mr. Muenster (volunteer assistant for Geronimo Trails Visitor's Center) what was going on. He told me that Mr. Fenn had been trespassed from the Spaceport Visitor's Center and was setting his posters up on a counter inside the center. Mr. Muenster further informed me that Mr. Fenn wasn't supposed to be in the Spaceport Visitor's Center due to a trespass order which I was familiar with. I went into the Spaceport Visitor's Center and asked Mr. Fenn if he knew he was trespassed from there. He told me that the trespass order was signed by a representative of Sun Tours which is no longer running the center. I informed Mr. Fenn that he could put up his propaganda and stay there, but not to harass any of the visitors that enter the center. He started telling me about how Spaceport America was no financial benefit to the City of T. Or C. and that housing the center in a City building was illegal, and attempted to quiz me on these issues. I told

App. 43

him that those were not police issues and did not entertain his questions.

Mr. Muenster was concerned about some expensive items kept in the center being damaged or stolen. I had him show the items and took photographs of the items kept in drawers behind a display counter. I also informed Mr. Muenster that I would get with Chief Alirez and attempt to update the trespass order with the current tenant or the person in charge of the Spaceport America Visitor's Center.

No further action was taken on this matter which is for informational purposes at this time.

Michael S. Apodaca \_\_\_\_\_ Date \_\_\_\_

**EXHIBIT 6**

**Incident Narrative**  
**Trespass**  
**160961**

At about 1055 hours on (Wednesday) 10-05-16, I was dispatched to the Spaceport America Visitor's Center in reference to a delayed trespassing incident. Upon arrival I made contact with the reporting person, Linda DeMarino who is employed there as a volunteer.

Ms. DeMarino told me that earlier at about 0950 hours as subject known to her as Ronald Fenn entered the center and started being obnoxious. She said Mr. Fenn was carrying on about his dismay over the building being used for a visitor's center rather than the senior center it used to be. Ms. DeMarino knew of a prior incident where Mr. Fenn had been trespassed from that property and asked him "are you not supposed to be here?" At that time she used her cellular telephone to video tape Mr. Fenn's behavior at which time he started filming her with his cellular telephone.

Ms. DeMarino showed me the footage she had on her cellular telephone of Mr. Fenn walking around the room making sarcastic comments about the displays. I have prior knowledge of Mr. Fenn being served with a trespass order served on him for the Spaceport America Visitor's Center. However, I also spoke with Chief Alirez who informed me that he was in contact with the City of T. or C.'s attorney and he would offer guidance on how to proceed with this incident. I did ask Ms. DeMarino to save the video footage in the event criminal trespass charges are filed.

App. 45

No further action was taken on this incident which is  
considered closed at this time.

Michael S. Apodaca \_\_\_\_\_ Date \_\_\_\_

**EXHIBIT 7**

**T or C Police Department  
Case: #170602  
Resisting, Evading, Obstructing/Trespassing  
Spaceport Visiting Center  
301 S. Foch**

On the 18th day of June 2017 (Sunday) at approximately 0923 hours Central Dispatch requested that I respond to the Spaceport Visitors Center located at 301 S. Foch in reference to Ron Fenn violating a trespass order.

Upon arrival I made contact with a male subject whom I known from past incidents as Ronald Fenn inside of the Spaceport Visitors Center. I advised Mr. Fenn that he was trespassing and that he needed to leave the build. Mr. Fenn stated to me that he was not trespassing and I then advised him that I had prior notice that he was trespassed and that he was also escorted out of the buildings.

Mr. Fenn stated to me that he was protesting of how the building was taken away from the citizens of T or C and that he was waiting for people to come in and sign his petition and that he would not leave until they closed the building at 2:00 p.m.

I asked Mr. Fenn numerous times to leave premises and he refused, upon arrival of Chief Alirez he also asked Mr. Fenn to leave the building because he has been trespassed and he refused which at that time Mr. Fenn was taken into custody for Resisting Evading or Obstructing an Officer and for violation of a trespass order.

App. 47

*/s/* \_\_\_\_\_  
Ted Ontiveros  
Patrol Officer/SRO/C18  
18 June 2017

App. 48

**EXHIBIT 8**

**COPPLER LAW FIRM, P.C.**  
A PROFESSIONAL CORPORATION

ATTORNEYS AND COUNSELORS AT LAW  
645 DON GASPAR AVENUE  
SANTA FE, NEW MEXICO 87505

TELEPHONE  
(505) 988-5656

TELECOPIER  
(505) 988-5704

FRANK R. COPPLER  
GERALD A. COPPLER\*  
JOHN L. APPEL  
KATI KOPPLER  
JOSHUA D. HOWARD  
ZACH COOK (of Counsel)

\* also licensed in Texas

September 14, 2017

Certified Mail  
No. 7008 0500 0001 4684 3369

Mr. Ron Fenn  
316 N. Foch Street  
Truth or Consequences, NM 87901

Re: **Misrepresentation as a Purported Officer  
of the City  
Our No.: 4130.01**

Dear Mr. Fenn:

**You are hereby instructed to cease and desist from misrepresenting yourself as an officer of the City of Truth or Consequences.**

This letter is being sent to you at the request of the City Manager and the Mayor of Truth or Consequences (the “City”) As we believe you are aware, Coppler Law Firm. P.C., serves as counsel for the City on various matters, as requested by the City Manager or the City Commission.

The City for some time has been aware that you distribute “business cards” bearing a likeness of the City’s official seal and misrepresenting yourself as a City official with the title of “Co-CEO.” The City has more recently learned that you have distributed documents bearing a similar likeness of the municipal seal and purporting to command third parties to take certain actions and make payments on your instructions as “Co-CEO” of the City. A copy of one such document, a “Demand Notice” dated August 9. 2017, and directed to former City Manager Jaime Aguilera, is enclosed. The City has also been informed that you have sent materials to the New Mexico Department of Transportation falsely representing yourself as an officer or employee of the City. The City does not know how many similar documents you may have sent to third parties who may not be aware that your representations and demands as a purported City official are entirely fraudulent.

As you should be aware, the City as a municipal corporation acts only through its Commission and its

App. 50

elected and appointed officers. You are neither a member of the Commission nor an elected or appointed officer of the City. Your fraudulent misrepresentation of yourself as an officer of the City, coupled with your issuance of illegal monetary demands and other commands to third parties in that purported capacity, can no longer be tolerated. As a matter of protecting both the City and the general public, the City demands that it cease immediately. If it does not, the City will be forced to take appropriate legal action against you.

Very truly yours,

COPPLER LAW FIRM, P.C.

/s/

John L. Appel

Encl.

cc: Mayor and Commissioners  
Juan Fuentes, City Manager  
Jay Rubin, City General Counsel  
Renee Cantin, City Clerk

[SEAL]

RON FENN  
Co-CEO, City of Truth or  
Consequences, NM

DEMAND NOTICE

Jaime Aguilera  
5421 Alden Dr  
Santa Theresa, NM 88008

9 August 2017

On behalf of the rate and taxpayers of Truth or Consequences. For consideration of Dues Payments made on your behalf to the Rotary Club of T or C from the Public coffers. Due to the Private, social and business nature of this organization and in respect to the Anti-Donation Clause of New Mexico Constitution (Art. IX, Sec 14), these payments are likely to be prohibited in a court of competent jurisdiction, should such need be pursued.

Your repayment of **\$1,539.00** (*Fifteen Hundred thirty Nine Dollars*) principle and reasonable interest to be calculated and assessed would be greatly appreciated within a reasonable period, (60 days) to avoid further repercussions.

This notice covers payments on your behalf from September 26, 2007 through September 19, 2009

Please remit payment by check to: Finance Director, 505 Sims Street, T or C, NM 8790, for credit to the General Fund.

Your cooperation will be greatly appreciated.

App. 52

Sincerely,

Ron Fenn  
Co-CEO, City of Truth or Consequences  
575-894-1543

cc Randy van Vleck  
NMML General Counsel  
Rvanvleck@NMML.org

316 N. FOCH STREET • TRUTH OR  
CONSEQUENCES, NM • 87901-2219  
PHONE: 575-894-1543 • CELL: 575-740-8571