No. 24-

IN THE

Supreme Court of the United States

NICHOLAS YAROFALCHUW,

Petitioner,

v.

JOHN CABRERA AND DANNY FITIAL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is it clearly established that a warrantless arrest, in the absence of exigent circumstances, by physical force, for a misdemeanor, in the entrance to the curtilage of the suspect's home is an unreasonable seizure, or could a reasonable officer still believe that the "doorway exception" of *United States v. Santana*, 427 U.S. 38 (1976), allows for such an arrest?

RELATED CASES

Nicholas Yarofalchuw v. John Cabrera and Danny Fitial, No. 1:22-cv-00001, District Court for the Northern Mariana Islands. Judgment entered February 2, 2023.

Nicholas Yarofalchuw v. John Cabrera and Danny Fitial, No. 23-15279, United States Court of Appeals for the Ninth Circuit. Judgment entered March 8, 2024.

Nicholas Yarofalchuw v. Commonwealth of the Northern Mariana Islands, No. 22-0230-CV, Superior Court of the Commonwealth of the Northern Mariana Islands. Dismissed without prejudice by stipulation December 29, 2022.

Nicholas Yarofalchuw v. Commonwealth of the Northern Mariana Islands, No. 23-0067-CV, Superior Court of the Commonwealth of the Northern Mariana Islands. Pending.

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UNITED STATES STATUTES

NORTHERN MARIANA ISLANDS STATUTES

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is unpublished, but is available on Lexis at 2024 U.S. App. LEXIS 5635, and on Westlaw at 2024 WL 1007685. It appears as Appendix A to this Petition. The decision of the District Court for the Northern Mariana Islands is unpublished, but is available on Lexis at 2023 U.S. Dist. LEXIS 141086, and on Westlaw at 2023 WL 5204490. It appears as Appendix B to this Petition. Pertinent parts of the ruling of the District Court for the Northern Mariana Islands delivered orally from the bench appear as Appendix C to this Petition.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit decided this case March 8, 2024. A timely petition for rehearing and rehearing en banc was denied by the Court of Appeals on April 23, 2024. The order denying the petition appears at Appendix D to this Petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment 4:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not

> be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment is applicable to the states via the Fourteenth Amendment, *see*, *e.g.*, *New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985), and to the CNMI via § 501(a) of the US-NMI Covenant, *reprinted in* U.S. Pub. L. 94-241, 90 Stat. 263 (extending both Fourth Amendment and Section 1 of Fourteenth Amendment to CNMI "as if the Northern Mariana Islands were one of the several States").

STATEMENT OF THE CASE

Statement of Material Facts

On May 10, 2020, Petitioner Nicholas Yarofalchuw was sitting talking with three relatives at a picnic table in front of his house, located on the island of Saipan in the Commonwealth of the Northern Mariana Islands (CNMI). The table was located in the front yard of the house, and the yard itself was surrounded by bushes which the parties agreed marked the boundary of the curtilage. A police officer, Sergeant John Cabrera, drove into the yard, and began an initially consensual encounter with Mr. Yarofalchuw. He was investigating whether Mr. Yarofalchuw had been involved in a disturbing the peace incident that had occurred earlier in the day at a nearby beach site. Disturbing the peace is a misdemeanor under CNMI law.[1]

1. *See* 6 CMC § 3101(b) ("A person convicted of disturbing the peace may be punished by imprisonment for not more than six months.") (available online at https://cnmilaw.org/cmc.php).

After speaking with Sergeant Cabrera for a short time, Mr. Yarofalchuw attempted to terminate the encounter by instructing him to depart. Sergeant Cabrera responded by moving his car to the roadside just outside the curtilage area, calling for backup to help him arrest Mr. Yarofalchuw, and standing by the roadside at the head of Mr. Yarofalchuw's driveway to await its arrival. Mr. Yarofalchuw responded by going into his house, retrieving his cell phone, and walking toward the road, recording and live-streaming Sergeant Cabrera on the cell phone, and demanding his name and badge number. He reached, but did not go beyond, the entrance to the curtilage area – a gap in the bushes where the driveway entered the yard.[2]

A second policeman, Officer Danny Fitial, then arrived and parked his car on the roadside behind Sergeant Cabrera's. He walked around behind Mr. Yarofalchuw, who was still in the entrance to the curtilage facing outward, and physically restrained and handcuffed him, with the assistance of Sergeant Cabrera. Neither of the officers had a warrant for Mr. Yarofalchuw's arrest, and no exigent circumstances existed.

The district court granted summary judgment to the officers, finding that, since "the physical arrest [occurred in an area that was] more akin to . . . the front porch, as opposed to within," there was no "warrantless arrest inside the home," and therefore "there [was] no Fourth Amendment violation." Appendix at 44a. The court of appeals affirmed, holding that, "[e]ven if Yarofalchuw's

2. *See*, *e.g.*, Appendix at 3a (he was arrested "between the hedges at the end of his driveway"); *id.* at 24a ("he was at the entrance of his driveway and curtilage"); *id.* at 25a ("he effectively stood at the 'doorway'").

physical arrest was unlawful, no clearly established law put the officers on notice that arresting him between the hedges at the end of his driveway would constitute an arrest within the curtilage of his home." *Id.* at 3a.

Basis for Federal Jurisdiction in the Court of First Instance

The District Court for the Northern Mariana Islands had jurisdiction pursuant to 28 U.S.C. § 1343 (granting district courts jurisdiction over civil actions alleging deprivation of constitutional rights), by way of 48 U.S.C. §§ 1821-22 (establishing the District Court for the Northern Mariana Islands, and providing that it "shall have the jurisdiction of a district court of the United States").

REASONS FOR GRANTING THE PETITION

The decision in this case perpetuates the erroneous view that, under *United States v. Santana*, 427 U.S. 38 (1976), the warrantless arrest of a person at his own home is constitutionally permissible, even without exigent circumstances, if the person arrested is standing exposed to public view in the doorway of the home at the time of the seizure. Although dicta in *Santana* does support this view, such a "doorway exception" to the general rule against warrantless home arrests is fundamentally inconsistent with later decisions of this Court, including *Payton v. New York*, 445 U.S. 573, 588-89 (1980), *Kyllo v. United States*, 533 U.S. 27 (2001), *United States v. Jones*, 565 U.S. 400 (2012), and *Florida v. Jardines*, 569 U.S. 1 (2013), which uniformly draw a "firm line at the entrance to the house" that may not constitutionally be crossed

without warrant or exigency. Numerous lower courts have pointed out the inconsistency, but the *Santana* "doorway dictum" nevertheless continues to be applied, and was applied in this case, because – and often only because – *Santana* itself has not been expressly overruled, clarified or limited by the Court. The Court should take this case as its opportunity to do so.

This is explained in further detail below.

A. Warrantless Home Arrests Are Unreasonable Seizures Absent Exigent Circumstances.

In its Fourth Amendment jurisprudence, this Court has long acknowledged the special status of the home. *See*, *e.g.*, *Jardines*, *supra*, 569 U.S. at 6 ("But when it comes to the Fourth Amendment, the home is first among equals. At the Amendment's very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.") (*quoting Silverman v. United States*, 365 U.S. 505, 511 (1961)); *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984) ("It is axiomatic that the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.") (*quoting United States v. U.S. District Court*, 407 U.S. 297, 313 (1972)) (internal quotation marks omitted).

The Court has therefore long adhered to the rule that the arrest of a person in his own home, in the absence of either a warrant or sufficient exigent circumstances – such as "hot pursuit of a fleeing felon," "destruction of evidence," or an "ongoing fire," *Welsh*, *supra*, 466 U.S. at 479-50 – is an unreasonable, thus an unconstitutional,

seizure. *See*, *e.g.*, *Payton v. New York*, 445 U.S. 573, 588-89 (1980) ("To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances[.]") (*quoting United States v. Reed*, 572 F.2d 412, 423 (2nd Cir. 1978)); *Coolidge v. New Hampshire*, 403 U.S. 443, 474-75 (1971) ("It is accepted . . . that a search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of exigent circumstances.") (internal quotation marks omitted). Most recently, in *Lange v. California*, ___ U.S. ___, 141 S. Ct. 2011 (2021), the Court has held that even hot pursuit is not, of itself, a sufficient exigent circumstance to justify a warrantless arrest in the home, when the arrest is for a misdemeanor. *Id.* at 2021-22.

B. Santana Appeared to Create a "Doorway Exception" to the Warrant Requirement.

In 1976, in *Santana*, the Court approved, in hypothetical terms, the warrantless arrest of a suspect as she stood in the doorway of her home. Santana was standing in the doorway when the police arrived at her house, and then she retreated into the house, where police pursued and arrested her. The Court approved the arrest inside the house under the doctrine of "hot pursuit," *Santana*, *supra*, 427 US. at 42-43, but it also found that it would have been proper for the police to have arrested Santana as she stood in the doorway, as they had originally sought to do. The Court wrote:

> While it may be true that under the common law of property the threshold of one's dwelling is 'private,' as is the yard surrounding the house, it is nonetheless clear that under the cases interpreting the Fourth Amendment Santana was in a 'public' place. She was not in an area where she had any expectation of privacy.

Id., 427 U.S. at 42. In support of this view, the Court cited *Katz v. United States*, 389 U.S. 347, 351 (1967), for the principle that "[w]hat a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection." *Id.*

This part of *Santana* is purely hypothetical on its face, since Santana had not in fact been arrested as she stood in the doorway, but rather later, inside the house, following a "hot pursuit." As such, this discussion was not essential to the Court's disposition of the case, and can accurately be described as dicta.[3] Nevertheless, *Santana* was afterward generally read to support the proposition that:

> The Fourth Amendment's prohibition on warrantless entry into an individual's home does not apply to arrests made at the doorway, because the doorway is considered a public place.

LaLonde v. County of Riverside, 204 F.3d 947, 955 (9th Cir. 2000) (*citing Santana*). *See also*, *e.g.*, *Soza v. Demsich*, 13 F.4th 1094, 1106 (10th Cir. 2021) ("*Santana* . . . upholds

3. *See*, *e.g.*, *Central Green Co. v. United States*, 531 U.S. 425, 431 (2001).

a warrantless entry into the threshold of one's home – like the front porch – for the purpose of a seizure[.]"); *Coffey v. Carroll*, 933 F.3d 577, 585 (6th Cir. 2019) ("*Santana* stands for the proposition that a person in the doorway of a home is 'exposed to public view,' meaning the person does not have a reasonable expectation of privacy for Fourth Amendment purposes."); *United States v. Vaneaton*, 49 F.3d 1423,1426 (9th Cir. 1995) ("[W]e held that . . . a doorway . . . is a public place. As authority for this proposition, we relied on *United States v. Santana*") (citations internal punctuation omitted) (*citing United States v. Whitten*, 706 F.2d 1000, 1015 (9th Cir. 1983)); *United States v. Gori*, 230 F.3d 44, 53-54 (2nd Cir. 2000) ("[T]he principle of *Santana* . . . is that the warrant requirement depends on the suspect's actual expectation of privacy."); *United States v. Sewell*, 942 F.2d 1209, 1212 (7th Cir. 1991) ("As the Supreme Court made clear in *Santana* . . . a person has no expectation of privacy when he knowingly exposes himself to the public, even in his own house or office and, therefore, is not a subject of Fourth Amendment protection.") (internal punctuation omitted). *Santana* was read, in other words, as creating a "doorway exception to the warrant requirement." *United States v. Oaxaca*, 233 F.3d 1154, 1158 (9th Cir. 2000). *See also*, *e.g.*, *LaLonde*, *supra*, 204 F.3d at 955 ("doorway exception"); *Coffey*, *supra*, 933 F.3d at 585 ("public-view exception"); *United States v. Elizalde-Adame*, N.D. Ill. 2002 Case No. 01 C 6534 (June 12, 2002), U.S. Dist. LEXIS 10675 at *11, 2002 WL 1308639 ("the *Santana* 'open doorway' exception").

This "doorway exception" view of *Santana* was also adopted and applied by the district court in this case, when it wrote that Mr. Yarofalchuw

> had no expectation of privacy when he effectively stood at the "doorway" because he "was exposed to public view, speech, hearing, and touch as if [he] had been standing completely outside [his] house." *United States v. Santana*, 427 U.S. 38, 42 (1976). In other words "one step forward would have put [him] outside, one step backward would have put [him] in the vestibule of [his] residence." *Id.* at 40 n. 1.

Appendix at 25a (brackets by district court).[4]

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4. The district court noted that the "actual physical seizure" of Mr. Yarofalchuw occurred in "an area that's more akin to what has been known as the doorway of a person's home," Appendix at 43a, and reasoned:

> Accepting as true that we have the two hedges and your client in between the hedges, because that's the driveway, with the hedge to the left; hedge to the right, and he's basically along that line, that's the doorway I'm talking about . . . So case law talks about the doorway concept . . . I'm talking about *United States versus Santana* which is United States Supreme Court, 1976, which the Court held that, while standing in a doorway of her house, a defendant was in the public place for purposes of the Fourth Amendment.

Id. at 43a-44a. The court concluded that, at the time of "the physical arrest," Mr. Yarofalchuw was "basically at the doorway from the hedge area," which was "akin to . . . being on the front porch," and so, "given that this is an area that has been found to remove the conclusion that this was a warrantless inside the home, the finding is that there is no Fourth Amendment violation." *Id.* at 44a.

C. It Is No Longer Reasonable to Read Santana as Creating a "Doorway Exception"

In the years since *Santana*, however, the Court has made several decisions in this area that fatally undermine the authority of *Santana* as a "doorway exception" case. The first of these was *Payton*, *supra*, decided only four years after *Santana*, wherein the Court wrote:

> In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Payton, *supra*, 445 U.S. at 590. Then, in *Kyllo v. United States*, 533 U.S. 27 (2001), the Court reiterated *Payton*'s "firm line at the entrance" language, *id.* at 40, and emphasized, with the stated intent of establishing a "bright line" rule, *id.*, that, without a warrant, "any physical invasion of the structure of the home, 'by even a fraction of an inch,' [i]s too much[.]" *Id.* at 37 (*quoting Silverman*, *supra*, 365 U.S. at 512). After *Payton* and *Kyllo*, *Santana* could perhaps still support a "doorway exception" for situations where a suspect standing in the doorway was placed under arrest verbally by officers who stood outside, but not for cases where the officer stepped, or even reached, into the doorway, "by even a fraction of an inch," to physically seize the suspect.

Then in *United States v. Jones*, 565 U.S. 400 (2012), the Court knocked out the entire doctrinal support upon which the *Santana* "doorway exception" had stood, by

holding that "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." *Id*. at 409 (*citing Katz*, *supra*) (emphasis in original). *Katz* had famously held that Fourth Amendment protections extend to places where one has a "reasonable expectation of privacy," *Katz*, *supra*, 389 U.S. at 360 (Harlan, J., concurring), but had also stated, as a corollary, that they did not extend to "[w]hat a person knowingly exposes to the public, even in his own house[.]" *Id.* at 351. *Katz* had therefore been used in *Santana* to justify the arrest of one who, by standing in the doorway, had knowingly exposed her person to the public. To apply *Katz* in this way, *Santana* had expressly rejected the application, in the Fourth Amendment context, of "the common law of property," under which "the threshold of one's dwelling is 'private,' as is the yard surrounding the house." *Santana*, *supra*, 427 U.S. at 42. *Jones*, by holding that *Katz* does *not* displace the common law in this way, was thus diametrically opposed to *Santana*, to the extent *Santana* had established a "doorway exception" to the constitutional prohibition of warrantless home arrest absent exigent circumstances.

Finally, in *Florida v. Jardines*, 569 U.S. 1 (2013), the Court invalidated a warrantless front-porch search, reiterating *Jones*' holding that "the *Katz* reasonable-expectations test 'has been *added to*, not *substituted for*' the traditional property-based understanding of the Fourth Amendment." *Id*. at 10-11 (*quoting Jones*, *supra*, 565 U.S. at 409) (emphasis from *Jones*). It thus reaffirmed that public visibility in the doorway, on the porch, or elsewhere in the home, does not itself justify warrantless arrest, a person standing on the front porch being at least as visible to the public as a person standing in the front

doorway. It also confirmed the Court's embrace, contrary to *Santana*, of the rule that "the threshold of one's dwelling [and] the yard surrounding the house" – *i.e.*, the curtilage – is constitutionally protected. *Cf. Santana*, *supra*, 427 U.S. at 42. Indeed, *Jardines* held that the curtilage is not only "private," *see id.*, it is "*part of the home itself* for Fourth Amendment purposes." *Jardines*, *supra*, 569 U.S. at 6 (emphasis added).[5] And if the curtilage is "part of the home," then what is true of the home is necessarily also true of the curtilage,[6] meaning that a warrantless physical intrusion of "even a fraction of an inch" into the entrance to the curtilage to effect a seizure is no more lawful, in the absence of exigent circumstances, than is a similar intrusion into the doorway to the house.[7]

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5. It described the front porch as the "classic exemplar" of the curtilage to which Fourth Amendment protection attaches. *See id.* at 7. *But see* Appendix at 44a (district court denying Fourth Amendment protection in this case *because* the site of the arrest was "akin to . . . being on the front porch").

6. *Jardines* indicates, for example, that the principles of *Kyllo* apply with equal force to the curtilage. *See Jardines*, *supra*, 569 U.S. at 11 (reading reference in *Kyllo* to "explor[ing] details of the home" to mean "explor[ing] details of the home (*including its curtilage*)") (emphasis added).

7. This was further emphasized a few years later in *Collins v. Virginia*, 584 U.S. 586 (2018), when the Court refused to create "a carveout to the general rule that curtilage receives Fourth Amendment protection, such that certain types of curtilage would receive Fourth Amendment protection only for some purposes but not for others," and adhering instead to "uniform application of the Court's doctrine." *Id.* at 600 (citations and internal quotation marks omitted). This holding admits of no theory whereby the entrance to the curtilage would be treated any differently, for Fourth Amendment purposes, from the entrance to the house.

D. Santana Needs to Be Overruled or Limited to Prevent Its Further Misuse.

Many courts have noted the fundamental incompatibility of *Santana*'s "doorway exception" with the Court's more recent cases. *See*, *e.g.*, *Soza*, *supra*, 13 F.4th at 1107 ("*Santana*'s foundation has been eroded by subsequent curtilage cases like *Jardines*"); *United States v. Lundin*, 817 F.3d 1151, 1160 (9th Cir. 2016) (recognizing that *Vaneaton*, *supra*, a doorway arrest case following *Santana*, "may be on infirm ground after *Jardines*"); *McClish v. Nugent*, 483 F.3d 1231, 1246 (11th Cir. 2007) ("[T]o the extent that *Santana* is read as allowing physical entry past *Payton*'s firm line . . . without a warrant or an exigency, this interpretation is inconsistent with *Payton* [and] the Court's subsequent cases[.]"); *United States v. Soza*, 162 F. Supp. 3d 1137, 1157 (D.N.M. 2016), *rev'd on other grounds* 686 Fed. App. 564, 566 (10th Cir. 2017) (*Santana's* underpinnings have been eroded by *Jones* and *Jardines*.") (footnote omitted); *Hess v. Village of Bethel*, S.D. Ohio Case No. 1:22-cv-56 (July 8, 2024), 2024 U.S. Dist. LEXIS 119133 at *21 fn. 2, 2024 WL 3327761 ("*Santana*'s doorway-is-public holding seems difficult to reconcile with more recent Supreme Court precedent[, such as] *Florida v. Jardines*[.]").

Nevertheless, the "doorway exception" doctrine has continued to be applied, primarily because *Santana* itself "has not been overruled." *Soza*, *supra*, 13 F.4th at 1106. *See also*, *e.g.*, *id.* at 1107 ("[A]lthough *Santana*'s foundation has been eroded by subsequent curtilage cases like *Jardines*, its decision upholding the constitutionality of a warrantless seizure at the threshold of a suspect's home remains binding Supreme Court precedent."); *Maros v.*

Cure, D.S.C. No. 6:21-cv-03346-JD-JDA (Jan. 24, 2024), 2024 U.S. Dist. LEXIS 48404 at *21-22, 2024 WL 1528518 ("*Santana* upholds a warrantless entry into the threshold of a home for the purpose of a seizure, and *Santana* has not been overruled."). The problem was summed up in one recent decision as follows:

> On the whole, *Jardines* seems to undercut *Santana*'s logic as to why an open residential doorway constitutes a 'public place.' And with good reason. One would have a difficult time arguing with a straight face that the word 'house,' the plural form of which appears in the text of the Fourth Amendment itself, does not include the literal doorway of one's house. But until the Supreme Court overrules its own precedent, it is not the prerogative of this Court to ignore a perhaps questionable but yet on-point case.

Hess, *supra*, 2024 U.S. Dist. LEXIS 119133 at *21 fn. 2.

Some courts have gotten around this by reading *Santana* solely as an "exigent circumstances" case, justifying the arrest on the ground of "hot pursuit." *See*, *e.g.*, *Bailey v. Swindell*, 940 F.3d 1295, 1302 (11th Cir. 2019) ("In order to prevail based on *Santana*, then, Swindell would have to point to some exigent circumstance[.]"); *Morse v. Cloutier*, 869 F.3d 16, 27 (1st Cir. 2017) ("Crucial to the analysis [in *Santana*] was the officers' claim that they were operating under exigent circumstances: the suspect was not merely stepping into her home but was fleeing arrest, requiring the officers to follow her in hot

pursuit."). As the court noted in *United States v. Soza*, the "hot pursuit" portion of *Santana* "has not been drawn into question by subsequent case law," but rather only "the portion of *Santana* regarding the constitutionality of front porch arrests." *Soza*, *supra*, 162 F. Supp. 3d at 1157 fn. 19.

Nevertheless, and even though the discredited portion of *Santana* was hypothetical dicta, it lurks in the shadows of the law creating endless mischief. It has been held at least to prevent the law in the area from being clearly established. *See*, *e.g.*, *Soza*, *supra*, 13 F.4th at 1107 ("At the very least, considering *Santana*, we hold that reasonable minds could differ as to the constitutionality of a warrantless front porch seizure and we cannot say the law was clearly established in Mr. Soza's favor."); *McClish*, *supra*, 483 F.3d at 1248-49 ("Were it not for *Santana*, this might have been a different case. . . . In light of *Santana*, however, and since McClish was standing within arm's reach of an officer at the front door, we cannot say that the illegality of McClish's arrest was clearly established at the time of the arrest.") (full cite omitted); *Matos*, *supra*, 2024 U.S. Dist. LEXIS 48404 at *23 ("At the very least, *Santana* muddies the water sufficiently that it cannot be said that [the law] was clearly established."). That is what occurred in this case, as well as another recent entrance-to-the-curtilage case in New Mexico. In *Marta v. City of Las Cruces*, D.N.M. Civ. No. 23-192 GBW/KRS (May 23, 2024), 2024 U.S. Dist. LEXIS 92877, 2024 WL 2396602, "Plaintiff's seizure occurred while he was standing within the fenced-in curtilage of the home while at the open fence door." *Id.*, 2024 U.S. Dist. LEXIS 92877 at 46. The court found that, as in *Soza*, the officers "could have reasonably relied on *Santana*" in making the arrest. *Id.* (internal

punctuation marks omitted). Such confusion, if justified at all, is justified only by the ghost of *Santana* remaining at large, still on the books and unreconciled in any formal way – *i.e.*, overruled, clarified or limited – with the Court's later holdings.

CONCLUSION

Justice Marshall, dissenting in *Santana*, wrote that the "doorway exception" endorsed by the majority was "useful only in arresting persons who are 'as exposed to public view, speech, hearing, and touch,' as though in the unprotected outdoors." *Santana*, 427 U.S. at 47 (Marshall, J., dissenting) (cross-reference omitted). Since the mere fact of the suspect being so exposed in the doorway does not of itself create any kind of exigency, however, he found it insufficient to justify a warrantless arrest. *See id.* ("Narrow though it may be, however, the Court's approach does not depend on whether exigency justifies an arrest on private property, and thus I cannot join it."). This view is entirely in accord with the views of the full Court as later expressed in *Payton*, *Kyllo*, *Jones* and *Jardines*. It should now be expressly adopted by the full Court, and *Santana* overruled, clarified or limited, so as to eliminate a lingering constitutional anomaly that continues to perplex the lower courts and to prevent those later cases from having their full salutary effect.

Petitioner therefore submits that the writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED MARCH 11, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-15279
D.C. No. 1:22-cv-00001

NICHOLAS YAROFALCHUW,

Plaintiff-Appellant,

v.

JOHN CABRERA; DANNY FITIAL,

Defendants-Appellees.

Appeal from the United States District Court for the
District of the Northern Mariana Islands
Ramona V. Manglona, Chief District Judge, Presiding

Argued and Submitted February 13, 2024
Honolulu, Hawaii

Before: PAEZ, M. SMITH, and KOH, Circuit Judges.

MEMORANDUM*

NOT FOR PUBLICATION

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appendix A

Plaintiff Nicholas Yarofalchuw (Plaintiff) appeals the district court's grant of summary judgment in favor of Defendant-Appellees Sergeant John Cabrera and Danny Fitial in his action brought pursuant to 42 U.S.C. § 1983. Because the parties are familiar with the facts, we do not recount them here, except as necessary to provide context to our ruling. We have jurisdiction pursuant to 28 U.S.C. §1291, and we affirm.

1. The district court did not err in granting Defendants' motion for summary judgment. We assume without deciding that Yarofalchuw was seized by a show of authority when Cabrera failed to leave the property and the officers blocked the driveway with their cars. However, Yarofalchuw has not met his burden to show that the alleged violation of his rights was clearly established by law. *See Gordon v. Cnty. of Orange*, 6 F.4th 961, 969 (9th Cir. 2021).

"For a constitutional right to be clearly established, a court must define the right at issue with specificity and not at a high level of generality." *Id.* at 968 (internal quotations omitted and cleaned up). Moreover, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what [the official] is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Yarofalchuw argues that the officers violated his right to be free from an unlawful seizure and defines

the right as one to be "free to disregard the police, terminate the encounter with them, and go about his business." But that right is defined at too high a level of generality to put officers on notice of a potential violation, and the cases Yarofalchuw cites in support of his position are materially distinguishable from the facts at issue here. *See*, *e.g.*, *United States v. Al-Azzawy*, 784 F.2d 890, 891, 893 (9th Cir. 1985) (holding that seizure occurred where officers surrounded the defendant's trailer with their guns drawn and ordered him to step outside and get on his knees); *Fisher v. City of San Jose*, 558 F.3d 1069, 1072, 1074 (9th Cir. 2009) (holding that seizure occurred when the arrestee's house was surrounded by over sixty police officers in an armed standoff).

2. Even if Yarofalchuw's physical arrest was unlawful, no clearly established law put the officers on notice that arresting him between the hedges at the end of his driveway would constitute an arrest within the curtilage of his home. Yarofalchuw argues otherwise, citing *Brizuela v. City of Sparks*, No. 22- 16357, 2023 WL 5348815, at *1 (9th Cir. Aug. 21, 2023), in which we affirmed a district court's denial of qualified immunity on a plaintiff's search and seizure claims. But the officers in *Brizuela* were put on notice of the constitutional violation because Supreme Court precedent made clear that Brizuela's front porch—where the violation occurred—constituted curtilage, *see Fla. v. Jardines*, 569 U.S. 1, 6–7 (2013). Moreover, *Brizuela* cannot have clearly established that Yarofalchuw's arrest in 2021 was unlawful: it is an

unpublished memorandum disposition and was decided after the events of this case. Yarofalchuw raises a number of other cases in support of his argument, but none "place[] the statutory or constitutional question beyond debate." *Foster v. City of Indio*, 908 F.3d 1204, 1210 (9th Cir. 2018) (per curiam).

3. The district court did not abuse its discretion in denying Plaintiff's motion to amend. The first time Plaintiff sought leave to add an excessive force claim was at the same hearing where the district court denied his motion for summary judgment, on December 1, 2022.

In denying Plaintiff's motion, the district court explained that Plaintiff had to show "good cause" existed for modifying the scheduling order under Rule 16. Fed. R. Civ. P. 16(b)(4) ("A schedule may be modified only for good cause and with the judge's consent."); *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607–08 (9th Cir. 1992) ("Once the district court had filed a pretrial scheduling order pursuant to Federal Rule of Civil Procedure 16 which established a timetable for amending pleadings that rule's standards controlled."). The court noted that Plaintiff was fully aware of his excessive force claim earlier in the litigation and had in fact filed a separate action for excessive force in state court on October 6, 2022—ten months after the district court complaint was filed and six months after the deadline for any amendment of pleadings in the federal case.

The district court properly exercised its discretion by enforcing the deadlines in the scheduling order and

ensuring that Plaintiff did not manipulate deadlines once "he s[aw] the value of an alternative claim or theory of liability after an adverse ruling by the Court."

AFFIRMED.

APPENDIX B — MEMORANDUM DECISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN MARIANA ISLANDS, FILED AUGUST 14, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

Civil Case No. 1:22-cv-00001

NICHOLAS YAROFALCHUW,

Plaintiff,

v.

JOHN CABRERA and DANNY FITIAL,

Defendants.

MEMORANDUM DECISION DENYING PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT AND RECONSIDERATION, AND GRANTING DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT AND RECONSIDERATION

Plaintiff Nicholas Yarofalchuw ("Yarofalchuw") moved for summary judgment ("MSJ," ECF No. 15) asserting a 42 U.S.C. § 1983 civil rights cause of action for an unlawful seizure based on his warrantless arrest within his home and curtilage in violation of the Fourth Amendment.[1] Defendants are two Commonwealth of the

1. In his Complaint, Yarofalchuw asserts a single cause of action: deprivation of civil rights under 42 U.S.C. § 1983. (Compl. 3, ECF No. 1.) Under that cause of action, he claims that he was subject

Northern Mariana Islands ("CNMI") police officers, Sergeant John Cabrera ("Sgt. Cabrera") and Officer Danny Fitial ("Fitial") (collectively "Defendants"); they oppose Yarofalchuw's motion and assert their own cross motion for summary judgment ("Cross MSJ," ECF No. 20) claiming probable cause for the warrantless arrest outside Yarofalchuw's home and curtilage, and a defense of qualified immunity. At a hearing on the motions for summary judgment, the Court originally found no genuine dispute of material fact that there was an unlawful seizure but GRANTED Defendant Fitial's cross-motion on qualified immunity grounds. (Mins., ECF No. 28.) The parties were nevertheless ordered to file supplemental briefing on qualified immunity as applied to Defendant Sgt. Cabrera. (*Id.*) Defendant Sgt. Cabrera urges the Court to reconsider the Court's finding of an unconstitutional seizure (ECF No. 36) while Yarofalchuw seeks reconsideration of the Court's finding of qualified immunity as to Defendant Fitial (ECF No. 37). After initially taking the matters under advisement (Mins., ECF No. 43), the Court rendered its disposition at a status conference on December 1, 2022 (Mins., ECF No. 48).

At the status conference, the Court GRANTED Defendant Cabrera's motion for reconsideration (ECF No. 36) and found there was no unlawful seizure. Accordingly,

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to an unreasonable seizure in violation of the Fourth Amendment *and* that he was subjected "to a deprivation of his liberty without due process of law, in violation of the Fourteenth Amendment[.]" (*Id.* at ¶¶ 17, 18.) Notwithstanding this latter claim, Plaintiff's MSJ focuses solely on the unreasonable seizure cause of action, and at the September 1, 2022 hearing, Yarofalchuw clarified that he is not pursuing a Fourteenth Amendment due process claim.

Defendants' Cross-MSJ (ECF No. 20) was GRANTED, Yarofalchuw's MSJ (ECF No. 15) as to both Defendants was DENIED, and Yarofalchuw's motion for reconsideration as to granting judgment in favor of Defendant Fitial (ECF No. 37) based on qualified immunity was also DENIED. (Mins., ECF No. 48.) This memorandum decision now sets forth the Court's reasoning.

I. FACTUAL BACKGROUND

The facts below are derived from the parties' undisputed facts and their responses (ECF Nos. 44-47), which is in turn derived from numerous declarations. The Court relies on those facts that are undisputed by all parties. To the extent that a fact was not explicitly identified as disputed or undisputed, the Court will treat the fact as undisputed for purposes of the motion pursuant to Rule 56(e) of the Federal Rules of Civil Procedure. Where a part of a fact is disputed, the Court annotates as such.

On the evening of May 10, 2021, the Department of Public Safety ("DPS") received a 911 emergency phone call from Mr. James Roberto who was located at Tank Beach in Kagman, Saipan. (Decl. Jesse Sablan 2 ¶¶ 8-9, ECF No. 31-2; *compare* Cabrera's Undisputed Facts 6 ¶¶ 1, 2, ECF No. 45, *with* Yarofalchuw's Resp. 1 ¶¶ 1, 2, ECF No. 47 (undisputed).) Sgt. Cabrera quickly responded to the call and found Mr. Roberto, a Turtle Field Survey Technician with the CNMI Department of Fish and Wildlife ("DFW"). (*Compare* Yarofalchuw's Undisputed Facts 7 ¶ 21, ECF No. 44 *with* Cabrera's Resp. 5 ¶ 21 (undisputed that

Roberto reported a threat); Second Decl. Cabrera 2 ¶¶ 8-9, ECF No. 31-1; Decl. Jesse Sablan 2 ¶¶ 9-11.) Mr. Roberto informed Sgt. Cabrera that Yarofalchuw, accompanied by three other male individuals, threatened to shoot an alleged drone flying over Yarofalchuw's home and any DFW employee associated with said drone. (Second Decl. Cabrera ¶¶ 13, 14; Decl. Carlos Topulei 1 ¶¶ 4-5, ECF No. 31-5; Decl. Roberto 2 ¶¶ 26, 36-42, ECF No. 20-4.) This was apparently the second time in which Yarofalchuw threatened Mr. Roberto. (Decl. Roberto 2 ¶¶ 12-22.) Sgt. Cabrera left the scene to look for Yarofalchuw and his three companions. (Decl. Cabrera 2 ¶ 21, ECF No. 20-2.)

Shortly after his conversation with Mr. Roberto, Sgt. Cabrera reported to DPS Central "his arrival at a residence located along Niyoron Street, just east of Tank Beach" at 5:49 p.m.[2] (Decl. Sablan 2 ¶ 12; *compare* Def. Fitial's Undisputed Facts 4 ¶ 4, ECF No. 46, *with* Yarofalchuw's Resp. 4 ¶ 4 (undisputed).) Officer Fitial reported his arrival to the same residence just four minutes later (Decl. Sablan 2 ¶ 13), but left immediately after because, as admitted by Sgt. Cabrera, "no backup was necessary at this point." (Second Decl. Cabrera 2 ¶ 19; *compare* Fitial's Undisputed Facts 4 ¶ 6, *with* Yarofalchuw's Resp. 4 ¶ 6 (undisputed).)

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2. The Court takes judicial notice of the conversion from military time as reflected in Sablan's declaration to regular time. *See* Fed. R. Evid. 201(b)(2) ("The court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.").

Appendix B

According to Sgt. Cabrera, "[t]here were four men fitting the description of the individuals that were previously at Tank Beach sitting outside the residence drinking alcoholic beverages." (Second Decl. Cabrera 2 ¶ 18.) Initially, Sgt. Cabrera parked his vehicle by the table where the four individuals were seated and opened his driver's side window to speak with them. (*Id.* ¶ 21; *compare* Cabrera's Undisputed Facts 6-7 ¶¶ 3, 4, *with* Yarofalchuw's Resp. 1 ¶¶ 3, 4 (undisputed).) Several of the individuals answered in the affirmative that they were just at Tank Beach. (Second Decl. Cabrera 3 ¶ 23; *compare* Cabrera's Undisputed Facts 7 ¶ 5, *with* Yarofalchuw's Resp. 1 ¶ 5 (undisputed as to location but not as to probable cause).) Sgt. Cabrera then "asked if one of them was 'Nick,'" to which Yarofalchuw identified himself. (Decl. Cabrera 3 ¶ 29.)

The conversation between Sgt. Cabrera and Yarofalchuw was initially cordial. (*See* Decl. Topulei 2 ¶ 8 ("When [Cabrera] arrived at [Yarofalchuw's] house, he was very nice and attempted to advise Nick how to address his issues with Fish and Wildlife.").) Yarofalchuw then "admitted to confronting a DFW employee at Tank Beach less than a half hour before [Cabrera] arrived at the residence." (Second Decl. Cabrera 3 ¶ 26.) However, after being questioned, Yarofalchuw insisted that Sgt. Cabrera leave his property. (*Compare* Yarofalchuw's Undisputed Facts 2 ¶ 7 *with* Cabrera's Resp. 2 ¶ 7 (undisputed as to instructions to depart).) It was at this point that Sgt. Cabrera exited the driveway and parked outside the hedge by the front of the driveway. (*Compare* Cabrera's Undisputed Facts 7 ¶ 8, *with* Yarofalchuw's Resp. 2 ¶ 8 (undisputed).)

According to Sgt. Cabrera, he backed out of the driveway and along Niyoron Street but "did not block the driveway." (Decl. Topulei 2 ¶ 11; Second Decl. Cabrera 4 ¶ 37 ("I did not block the driveway and I had no intention to block or partially block the driveway.").) Yarofalchuw provided a photographic rendition of the location of Sgt. Cabrera's vehicle which depicts Sgt. Cabrera's vehicle as parked outside the hedge of Yarofalchuw's driveway without obstructing it. (ECF No. 38-1; *see* Third Decl. Yarofalchuw 1 ¶ 2, ECF No. 38 (describing that the position of the black pickup as Cabrera's patrol vehicle).) Nevertheless, Yarofalchuw maintains that Sgt. Cabrera did in fact block the driveway by parking the patrol car "in the grassy area along the roadside, outside the hedge but immediately adjacent to it, partly blocking egress from [Yarofalchuw's] driveway into the road." (Yarofalchuw's Undisputed Facts 3 ¶ 8, ECF No. 44 (referencing two photographs at ECF Nos. 38-1 and 38-2).)

After he parked his police vehicle in the grassy area, Sgt. Cabrera got out of his vehicle and approached Yarofalchuw's three guests; he asked them to stay back so that he could get their identification information, to which they agreed. (Decl. Topulei 2 ¶¶ 13-14; *compare* Cabrera's Undisputed Facts 7, ¶ 12, *with* Yarofalchuw Resp. 3 ¶ 12 (undisputed).) Yarofalchuw came out of his house and saw that Sgt. Cabrera was standing in the driveway speaking with the three individuals. (Third Decl. Yarofalchuw 1 ¶ 3; *cf.* Second Decl. Cabrera 4 ¶ 43 ("I then rushed back to my vehicle, and about the same time Mr. Yarofalchuw came out of his house.").) Yarofalchuw avers that as his three guests were leaving, Sgt. Cabrera told them he intended to arrest Yarofalchuw. (Yarofalchuw's Undisputed Facts

3-4 ¶ 8 (first citing Decl. Salapwa ¶ 4, ECF No. 23 ("The policeman spoke to us, saying, 'I am (or maybe we are) going to arrest your cousin.'"); and then citing Decl. Ratauyal ¶ 4, ECF No. 24 (same)).)

Yarofalchuw approached Sgt. Cabrera while holding up something in his hand. (Second Decl. Cabrera 4 ¶¶ 45, 46; Cabrera's Undisputed Facts 8 ¶ 15, *with* Yarofalchuw's Resp. 3 ¶ 15 (undisputed except as to Yarofalchuw approaching aggressively).) Six minutes after his initial arrival at 5:49 p.m., Sgt. Cabrera radioed in to DPS Central about Yarofalchuw's "belligerent behavior which allowed other officers to hear the yelling in the background." (Decl. Sablan 2 ¶¶ 12, 14.) Officer Fitial heard Yarofalchuw over the radio, prompting Officer Fitial to return to Yarofalchuw's residence for a second time. (*Compare* Fitial's Undisputed Facts 4 ¶ 7, *with* Yarofalchuw's Resp. 4 ¶ 7 (undisputed except as to Yarofalchuw yelling profanities).) Officer Fitial arrived on scene where he allegedly at least partially blocked the driveway. (Decl. Topulei 2 ¶ 16; *see* Third Decl. Yarofalchuw 1 ¶ 2 (describing the position of Fitial's vehicle as where the white sedan in Ex. 1 (ECF No. 38-1) is located); *see also* Second Decl. Cabrera 4 ¶ 44 ("Officer Fitial returned to the residence, and he parked behind my vehicle facing the same direction on the left side of driveway and may have blocked the driveway[.]").)[3] Allegedly, the position of Officer Fitial's vehicle made it so that the three guests could not leave. (*See* Decl. Ratauyal ¶ 4 ("Just then the

3. Fitial does not admit or deny whether he partial blocked the driveway in response to Yarofalchuw's undisputed facts. (*Compare* Yarofalchuw's Undisputed Facts 5 ¶ 12 *with* Fitial's Resp. 2 ¶ 12.)

second police car came back and parked behind [Cabrera's car], blocking the driveway, so then we could not leave.").

Upon arrival, Officer Fitial observed Yarofalchuw approach Sgt. Cabrera holding a phone possibly to record Sgt. Cabrera. (*Compare* Cabrera's Undisputed Facts 8 ¶ 16 with Yarofalchuw's response 3 ¶ 16 (undisputed).) Yarofalchuw cites to two photos depicting his position when he was arrested (ECF Nos 38-4 and 38-5), which both show that he was at the entrance of his driveway. (*See* Yarofalchuw's Undisputed Facts ¶ 16.) Although both Defendants dispute Yarofalchuw's claim "subject to clarification (*see* Cabrera's Resp. ¶ 16; Fitial's Resp. ¶ 16), both assert in their declarations that Yarofalchuw was outside his property when confronting Sgt. Cabrera (*see* Decl. Cabrera ¶ 48, ECF No. 20-2; Fitial Decl. ¶ 21, ECF No. 20-3). Sgt. Cabrera then instructed Fitial to arrest Yarofalchuw for disturbing the peace. (*Compare* Fitial's Undisputed Facts 5 ¶ 14, *with* Yarofalchuw's Resp. 5 ¶ 14 (undisputed).) Yarofalchuw was arrested at 6:02 p.m., less than 30 minutes after DPS Central received the 911 call from Mr. Roberto and less than 15 minutes after Sgt. Cabrera first arrived at Yarofalchuw's residence. (*See* Decl. Sablan 2 ¶¶ 9, 12, 16.)

II. PROCEDURAL BACKGROUND

Yarofalchuw initiated this § 1983 action alleging a seizure in contravention of the Fourth Amendment to the United States Constitution on January 3, 2022. (Compl.) Defendants Sgt. Cabrera and Officer Fitial each filed an answer (Answer, ECF Nos. 8 (Cabrera); 9 (Fitial))

supported by a number of attachments (ECF Nos. 8-1, 9-1 (police report); 8-2, 9-2 (investigative report); 8-3, 9-3 (police call log sheet)). Yarofalchuw subsequently moved for summary judgment (ECF No. 15) and filed numerous supporting documents including his own declaration (ECF No. 16) and photos in support of his factual allegations (ECF Nos. 16-1-16-3). Yarofalchuw replied (ECF No. 21) with additional declarations (ECF Nos. 22-25).

Defendants cross-moved for summary judgment themselves (ECF Nos. 20, 20-1) attaching numerous declarations (ECF Nos. 20-2 (Cabrera); 20-3 (Fitial); 20-4 (Roberto); 20-5 (Alepuyo)) and a map depicting their factual representations (ECF No. 20-5).

On September 1, 2022, the Court held a hearing on the parties' motions (Mins., ECF No. 28), and found that an unlawful seizure had occurred prior to the physical arrest. Specifically, when Defendant Sgt. Cabrera failed to leave the scene by parking outside the premises and obstructing the driveway, he unlawfully seized Yarofalchuw by demonstrating his show of authority. The Court relied on the map depictions by Defendants and reasoned that while Yarofalchuw was free to enter his home, he was not free to leave, and both Sgt. Cabrera and later Fitial impeded his movements. Therefore, by wholly obstructing Yarofalchuw's driveway the Court found that Defendant Sgt. Cabrera's conduct constituted an unconstitutional seizure as clearly established by law.

The Court initially applied its ruling to Defendant Fitial, too; however, after hearing arguments from Fitial's

counsel regarding qualified immunity, the Court denied Yarofalchuw's MSJ as to Fitial and granted Fitial's Cross MSJ based on qualified immunity. (*Id.*) In particular, the Court found that because the seizure occurred prior to Defendant Fitial's second arrival on the scene, Fitial could not have been aware of the initial seizure. This mistake of fact therefore warranted a finding of qualified immunity as to Fitial only.

Nevertheless, the Court permitted Sgt. Cabrera to file supplemental briefing on the issue of qualified immunity as applied to him, and another subsequent hearing was scheduled.[4] (*Id.*) During this time, Yarofalchuw also moved for reconsideration as to the Court's finding of qualified immunity as applied to Fitial.[5]

At the subsequent hearing on October 17, 2022 (Mins., ECF No. 43), the Court pressed Yarofalchuw as to whether Sgt. Cabrera's conduct that allegedly constituted an unlawful seizure was clearly established at the time of its occurrence. Yarofalchuw responded that Sgt. Cabrera's conduct constituted a show of authority such that

4. These filings include the supplemental briefs and related attachments which include declarations (see ECF Nos. 31 (Cabrera's supplemental brief); 31-1 through 31-5 (declarations); 35 (Yarofalchuw's supplemental brief); 36 (Cabrera's reply); 36-1 (declaration)).

5. The briefing includes Yarofalchuw's motion for reconsideration, relevant declarations and supporting documents, and Fitial's opposition. (ECF Nos. 37 (Yarofalchuw's motion for reconsideration); 38 (declaration) 38-1 through 38-6 (photos and other supporting documents); 40 (declaration); 42 (Fitial's opposition)).

Yarofalchuw was not free to leave, as is clearly established by case law. Sgt. Cabrera, by contrast, continued to argue there was no seizure and that Yarofalchuw had exposed himself to the public's eye having approached Sgt. Cabrera at the driveway entrance. Therefore, he argued, there was no seizure within the home or curtilage, there was probable cause for Yarofalchuw's arrest, and there was no constitutional violation. The Court took the matter under advisement. (*Id.*)

At the December 1, 2022 status conference, the Court rendered its findings in favor of Defendants, as detailed below. (Mins., ECF No. 48.)

III. LEGAL STANDARD

A. Summary Judgment

The Court shall grant summary judgment when the movant "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[W]hen parties submit cross-motions for summary judgment, '[e]ach motion must be considered on its own merits.'" *Fair Hous. Council of Riverside Cnty., Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001) (citation omitted). The court must consider the evidence proffered by both sets of motions before ruling on either one. *Id.* "[C]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from facts are jury functions, not those of a judge." *Bravo v. City of Santa Maria*, 665 F.3d 1076, 1083 (9th Cir. 2001) (citation omitted).

"As a general matter, where the party moving for summary judgment would bear the burden of proof at trial, that moving party bears the initial burden of proof at summary judgment as to each material fact to be established in the complaint and must show that no reasonable jury could find other than for the moving party." *Twitter, Inc. v. Barr*, 445 F. Supp. 3d 295, 302 (N.D. Cal. 2020) (citing *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003)). "Where the moving party would not bear the burden at trial, the motion need only specify the basis for summary judgment and identify those portions of the record, if any, which it believes demonstrate the absence of a genuine issue of material fact on some essential elements of the claims." *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). "The burden then shifts to the opposing party to establish the existence of material disputes of fact that may affect the outcome of the case under the governing substantive law." *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)).

B. Reconsideration

Pursuant to Rule 59(e), a party may move to alter or amend a judgment within twenty-eight days after entry of the challenged judgment. *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011) (citing Fed. R. Civ. P. 59(e)). District courts have "considerable discretion" when ruling on a motion under Rule 59(e). *See Teamsters Local 617 Pension and Welfare Funds v. Apollo Grp., Inc.*, 282 F.R.D. 216, 220 (D. Ariz. 2012) (citation omitted).

Nonetheless, relief pursuant to Rule 59(e) is granted only in highly unusual circumstances, such as (1) a court's manifest error of law or fact; (2) "newly discovered or previously unavailable evidence"; (3) a manifestly unjust decision; or (4) "an intervening change in the controlling law." *Turner v. Burlington N. Santa Fe. R.R. Co.*, 338 F.3d 1058, 1063 (9th Cir. 2003) (citations omitted).

IV. DISCUSSION

The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" Searches and seizures inside a home or in the curtilage of a home without a warrant are presumptively unreasonable. *United States v. Perea-Rey*, 680 F.3d 1179, 1184 (9th Cir. 2012) (first quoting *Payton v. New York*, 445 U.S. 573, 586, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980) (inside a home); and then citing *Oliver v. United States*, 466 U.S. 170, 180, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984) (curtilage)). However, "[q]ualified immunity is a defense to lawsuits against government official arising out of the performance of their duties." *Kraus v. Pierce County*, 793 F.2d 1105, 1108 (9th Cir. 1986). "Its purpose is to permit such officials conscientiously to undertake their responsibilities without fear that they will be held liable in damages for actions that appear reasonable at the time, but are later held to violate statutory or constitutional rights." *Id.* (first citing *Harlow v. Fitzgerald*, 457 U.S. 800, 819, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982); and then citing *Pierson v. Ray*, 386 U.S. 547, 554, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967)).

Officers may not avail of the qualified immunity defense if there has been a violation of a constitutional right and if the right at issue was "clearly established" at the time of the defendant's alleged misconduct. *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id.* at 231.

The parties' arguments boil down to two questions: (1) whether there is no genuine dispute of material fact that an unlawful seizure occurred in violation of the Fourth Amendment, and (2) whether either or both Defendant Sgt. Cabrera and Officer Fitial are entitled to qualified immunity. The Court reconsiders its original rulings and instead finds that there was not an unlawful seizure because neither Sgt. Cabrera nor Fitial displayed a show of authority such that Yarofalchuw's movements were restrained within the home or curtilage. Furthermore, even if the Court were to adopt Yarofalchuw's factual representations, there is no robust consensus of caselaw to put Sgt. Cabrera and Fitial on notice that their conduct was clearly established to constitute an unconstitutional seizure.

A. Violation of Constitutional Right—Seizure

Yarofalchuw asserts that qualified immunity does not apply because it is clearly established that (1) a warrantless arrest in the home is per se unreasonable

absent exigent circumstances, (2) the location of the arrested person, not the arresting officers, determines whether an arrest occurs within the home or curtilage, and (3) "an arrest is effected by a show of authority indicating to a reasonable person that he is not free to terminate his encounter with police and go about his business, and that such a show of authority can include blocking the suspect's egress, such as his driveway." (Pl. Suppl. Br. 2-3, ECF No. 35.) On the third point, Yarofalchuw argues that Sgt. Cabrera showed his authority when he parked outside the driveway, at least partially obstructing it, stood next to his vehicle, and instructed the three other individuals, who were still within the curtilage of the home, to remain on the premises. (*Id.* at 5.) "His call for backup, which resulted in the speedy return of Officer Fitial, was also part and parcel of this show of authority." (*Id.*) Thus, Yarofalchuw concludes, Sgt. Cabrera's conduct and continued investigation led to an unlawful seizure within Yarofalchuw's home and curtilage.

A person is seized if "taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Florida v. Bostick*, 501 U.S. 429, 437, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991) (citation omitted). In other words, "[a] seizure occurs only when a reasonable person would believe that he was not free to go based on police conduct." *United States v. Brown*, 828 F. App'x 366, 369 (9th Cir. 2020) (unpublished) (citing *United States v. Washington*, 490 F.3d 765, 769 (9th Cir. 2007)). This usually happens when law enforcement uses "physical

force or show of authority[.]" *Brendlin v. California*, 551 U.S. 249, 254, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007) (citations omitted). There must be "actual submission" such that there is an "unambiguous intent to restrain[.]" *Id.* at 254-55 (citations omitted). Circumstances to consider include: the threatening presence of multiple officers, an officer's display of a weapon, physical touching, or "the use of language or tone of voice to indicate that compliance with the officer's request might be compelled." *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980) (citations omitted).

At the initial motions hearing on September 1, 2022, the Court originally agreed with Yarofalchuw that there was an unconstitutional seizure by Sgt. Cabrera. The facts begin with Sgt. Cabrera responding to a disturbance at Tank Beach, and upon finding Yarofalchuw at his home, engaging in a consensual and cordial conversation. (*See* Decl. Topulei 2 ¶ 8.) Once Yarofalchuw terminated that consensual interaction, Sgt. Cabrera proceeded to leave Yarofalchuw's curtilage and park outside the entrance of his home. (*See* Second Decl. Cabrera 3 ¶¶ 27-29; *compare* Cabrera's Undisputed Facts 7 ¶ 8, *with* Yarofalchuw's Resp. 2 ¶ 8 (undisputed).) Up until this point, no seizure had occurred.[6] However, relying on Defendants' own

6. At the hearings, Yarofalchuw suggested that Sgt. Cabrera *intended* to show his authority as he was backing out of Yarofalchuw's home and then parking outside the curtilage. However, because Cabrera's state of mind at the time cannot readily be ascertained by the evidence submitted, the Court rejects any argument as to whether backing out of the driveway might reflect Sgt. Cabrera's intent or plan.

photo rendition of the location of their patrol vehicles (*see* ECF No. 20-5 at 4 (Ex. 7.B)), the Court found that there was no genuine dispute of material fact that Sgt. Cabrera's police vehicle, with Fitial's vehicle parked to the rear of Sgt. Cabrera's, completely obstructed the entrance of Yarofalchuw's driveway. *Cf. Brown*, 828 F. App'x at 369 ("[T]he officers pulled up behind Wilson's SUV, did not block it, and simply walked up to the SUV to speak with the occupants. There was no seizure for Fourth Amendment purposes."). On this basis, the Court determined that the conduct by Sgt. Cabrera depicted a show of authority such that Yarofalchuw's movements were constrained, and an unlawful seizure had occurred within his home and curtilage and prior to Yarofalchuw's physical arrest. *See Brendlin*, 551 U.S. at 254 (describing an unlawful seizure as restraining one's freedom of movement (citations omitted)).

However, upon further briefing and argument, the Court now reconsiders its initial determinations and finds that Sgt. Cabrera did not demonstrate a show of authority leading to an unlawful seizure.

First, Yarofalchuw cannot conclude that there was a threatening police presence. At the outset, the conversation was cordial without any allegation of a threatening tone or command. Sgt. Cabrera acquiesced in leaving Yarofalchuw's curtilage, parked outside Yarofalchuw's driveway, got down on foot, and walked towards the three male guests to gather their identification information. (Decl. Topulei 2 ¶¶ 13-14; *compare* Cabrera's Undisputed Facts 7, ¶ 12, *with* Yarofalchuw Resp. 3 ¶ 12 (undisputed).) Sgt. Cabrera was the lone officer

on the scene, outnumbered four-to-one and was still outnumbered when Fitial arrived. Despite this and the report that Yarofalchuw threatened to shoot the DFW employee responsible for the drone allegedly flying over his house, Sgt. Cabrera never patted down any of the individuals. Sgt. Cabrera did not brandish his weapon or conduct himself in a threatening manner towards Yarofalchuw or the three male individuals. Taking in the totality of the circumstances, Sgt. Cabrera's presence was not a "threat," such that would support a show of authority.

That said, two of Yarofalchuw's three guests indicated that Sgt. Cabrera stated his intent to arrest Yarofalchuw. (Yarofalchuw's Undisputed Facts 3-4 ¶ 8 (first citing Decl. Salapwa 1-2 ¶ 4 ("The policeman spoking to us, saying, 'I am (or maybe we are) going to arrest your cousin.'"); and then citing Decl. Ratauyal 1 ¶ 4 (same).) But this comment was communicated to the three individuals, *not* to Yarofalchuw. As far as Yarofalchuw was concerned, he had no idea that Sgt. Cabrera had any intent to arrest him. Furthermore, these alleged statements made by Sgt. Cabrera are at odds with the third guests' rendition of the facts which omit any suggestion that Sgt. Cabrera made any kind of threat. (*See* Decl. Topulei ¶¶ 13-14 (describing that Sgt. Cabrera requested contact information).) At a minimum, there is a dispute of fact as to whether Sgt. Cabrera informed all three guests that he intended to arrest Yarofalchuw, but this dispute is not as to a material fact. It would be material had Yarofalchuw known about Sgt. Cabrera's alleged statement to arrest him. Therefore, the facts in this case lead the Court to conclude there was no show of authority.

As for the alleged obstruction of Yarofalchuw's entryway, Yarofalchuw's *own depiction* of the position of Sgt. Cabrera's vehicle shows that Sgt. Cabrera did *not* obstruct the driveway entrance. (*See* Ex. 1, ECF No. 38-1 (representing Sgt. Cabrera's patrol vehicle as the black truck off to the side of the driveway entrance).)[7] This depiction alone warrants reconsideration of the Court's original findings. But even without the benefit of Yarofalchuw's own depiction, Yarofalchuw was free to move about and even felt free to approach Sgt. Cabrera himself. This strongly indicates that Yarofalchuw did not feel threatened or subservient.

Officer Fitial's arrival and conduct does not alter the Court's disposition. Critically, by the time Fitial returned, Yarofalchuw was approaching Sgt. Cabrera at the driveway entrance of his curtilage. (*Compare* Yarofalchuw's Undisputed Facts 6 ¶ 15 *with* Fitial's Resp. 3 ¶ 15 (undisputed as to approach).) Within minutes, Sgt. Cabrera instructed Fitial to physically arrest Yarofalchuw. However, as represented by Yarofalchuw himself—he was at the entrance of his driveway and curtilage. Specifically, Yarofalchuw cites to two photos depicting his position when he was arrested (ECF Nos 38-4 and 38-5), which both show that he was at the front of his driveway. (*See* Yarofalchuw's Undisputed Facts ¶ 16.) Although Defendants' dispute Yarofalchuw's claim "subject to clarification" (*see* Cabrera's Resp. ¶ 16; Fitial's Resp. ¶ 16), both assert in their declarations that

7. The Court did not originally benefit from having this depiction as Yarofalchuw submitted this exhibit after the first set of briefing and the first hearing on the MSJ.

Yarofalchuw was outside his property when confronting Sgt. Cabrera (*see* Decl. Cabrera ¶ 48, ECF No. 20-2; Fitial Decl. ¶ 21, ECF No. 20-3). Based on the photo renditions provided by Yarofalchuw, he had no expectation of privacy when he effectively stood at the "doorway" because he "was exposed to public view, speech, hearing, and touch as if [he] had been standing completely outside [his] house." *United States v. Santana*, 427 U.S. 38, 42, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976). In other words "one step forward would have put [him] outside, one step backward would have put [him] in the vestibule of [his] residence." *Id.* at 40 n.1. Given these facts based on Defendants' declarations and Yarofalchuw's depictions, the Court finds there was no "show of authority" that occurred within the curtilage of his home. Any "show of authority" by Fitial essentially occurred outside the home—in fact right by the road—and requiring no exigent circumstances but probable cause, which Yarofalchuw does not challenge.

Taken in its totality, in the approximate fifteen minutes between Sgt. Cabrera's initial arrival at Yarofalchuw's residence and Yarofalchuw's arrest (*see* Decl. Sablan ¶¶ 12, 16), there was no such show of authority that led to an unlawful seizure. Sgt. Cabrera's actual conduct was not authoritative, and Officer Fitial's behavior did not depict a show of authority while Yarofalchuw was within the curtilage of his home. Based on the facts as analyzed above, the Court reconsiders its September 1, 2022 ruling pursuant to Rule 59(e) and finds that there was no unlawful seizure within the home or curtilage before being physically arrested. Defendant Sgt. Cabrera's motion for reconsideration is therefore granted. (ECF No. 36).

B. Qualified Immunity—Clearly Established Law

Even if the Court were to find that there was an unconstitutional seizure, Yarofalchuw has failed to identify a robust consensus of caselaw to suggest that Sgt. Cabrera and Fitial's allegedly unconstitutional conduct was clearly established. Officers are entitled to qualified immunity unless (1) they "violate[] a federal statutory or constitutional right[,]" and (2) the unlawfulness of their conduct was "clearly established at the time[.]" *Reichle v. Howards*, 566 U.S. 658, 664, 132 S. Ct. 2088, 182 L. Ed. 2d 985 (2012) (citation omitted). "'Clearly established' means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *District of Columbia v. Wesby*, 583 U.S. 48, 138 S. Ct. 577, 589, 199 L. Ed. 2d 453 (2018) (internal quotation marks and citations omitted). "In other words, existing law must have placed the constitutionality of the officer's conduct 'beyond debate.'" *Id.* (citation omitted). The standard is demanding as it protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986). "The plaintiff bears the burden of demonstrating that the right at issue was clearly established." *Kramer v. Cullinan*, 878 F.3d 1156, 1164 (9th Cir. 2018) (citation omitted).

"To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be 'settled law,' which means it is dictated by 'controlling authority' or a 'robust "consensus of cases of persuasive authority."'" *Wesby*, 138 S. Ct. at 589-90

(citations omitted). The contours of the clearly established rule "must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Id.* at 590 (quoting *Saucier v. Katz*, 533 U.S. 194, 202, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)). It must be examined "in light of the specific context of the case, not as a broad general proposition." *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004) (citation omitted). In other words, it "requires a high 'degree of specificity[,]'" *Wesby*, 138 S. Ct. at 590 (quoting *Mullenix v. Luna*, 577 U.S. 7, 136 S. Ct. 305, 309, 193 L. Ed. 2d 255 (2015) (per curiam)), examined in a more "particularized" and "relevant" sense, *Brosseau*, 543 U.S. at 199-200 ("The parties point us to only a handful of cases relevant to the 'situation [Brosseau] confronted': whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight."). "Of course, in an obvious case . . . even without a body of relevant case law" the conduct at issue may be clearly established. *Id.* at 199 (citations omitted). While a specific case directly on point is not required, "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011) (citations omitted).

In this case, the pertinent inquiry is whether it is clearly established that an officer leaving the curtilage of the home but continuing the investigation with other individuals within or near the curtilage and partially obstructing a driveway constitutes a show of authority such that there is an unconstitutional seizure. Yarofalchuw

has failed to cite to any authority to establish as much. In fact, during the October 17, 2022 hearing, the Court continuously pressed Yarofalchuw to describe with particularity the caselaw that supports Yarofalchuw's position that the law is clearly established in his favor. Yarofalchuw responded referencing footnote six of his supplemental brief which cites to seven cases. (*See* Pl. Suppl. Br. 4 n.6, ECF No. 35.) The Court distinguishes them below.

The facts in *Washington* are most analogous to the facts in this case but are nevertheless distinct. 490 F.3d at 767. There, two officers—Shaw and Pahlke—investigated Washington who "was seated in his lawfully parked car[.]" *Id.* Initially, no seizure occurred when Officer Shaw:

> parked his squad car a full length behind Washington's car so he did not block it. Shaw did not activate his sirens or lights. Shaw approached Washington's car on foot, and did not brandish his flashlight as a weapon, but rather used it to illuminate the interior of Washington's car. Although Shaw was uniformed, with his baton and firearm visible, Shaw did not touch either weapon during his encounter with Washington. Shaw's initial questioning of Washington was brief and consensual, and the district court found that Shaw was cordial and courteous. Under these circumstances, the district court correctly concluded that a reasonable person would have felt free to terminate the encounter and leave.

Id. at 770. However, as the circumstances evolved, so did the scope of the search. *See id.* at 772. Although Washington consented to being searched outside his vehicle, the way the officer searched him "was authoritative and implied that Washington 'was not free to decline his requests.'" *Id.* at 771-72 (first quoting *Orhorhaghe v. INS*, 38 F.3d 488, 495 (9th Cir. 1994); and then citing *United States v. Patino*, 649 F.2d 724, 727 (9th Cir.1981), *abrogation on other grounds recognized by United States v. $25,000 U.S. Currency*, 853 F.2d 1501, 1505 n.2 (9th Cir.1988)). To conduct the search, the officers directed Washington, who had his hands raised, away from his personal vehicle and towards the squad car. *Id.* The search of Washington's person itself exceeded the usual pat-down for weapons. *See id.* And, Officer Pahlke

> positioned himself between Washington [who was being searched at the squad car] and [Washington's] personal car. If Washington wanted to end his encounter with [the officers] and leave, he would have had to either: (a) leave on foot, abandoning his unlocked car, with the driver's door partially open; or (b) navigate through or around [Officer Pahlke] to get back into his car.

Id. at 773. The court determined that "[n]either option was realistic, especially considering [the officers] outnumbered and outsized Washington." *Id.* (citation omitted). In concluding that an unconstitutional seizure occurred, the *Washington* court described:

> In sum, under the totality of the circumstances—Shaw's authoritative manner and direction of Washington away from Washington's car to another location . . . that [the officers] outnumbered Washington two to one, the time of night and lighting in the area, that [the officer] was blocking Washington's entrance back into his car, and that neither [officer] informed Washington he could terminate the encounter and leave—we conclude that a reasonable person would not have felt free to disregard [the officer's] directions, end the encounter with [the officers], and leave the scene.

Id. at 773-74.

Although *Washington* contains facts most analogous to this case, it is nonetheless distinguishable. In this case, the question is whether there was a show of authority such that Yarofalchuw was unconstitutionally seized before any actual arrest. Unlike in *Washington*, Sgt. Cabrera did not direct Yarofalchuw to a specific location let alone away from the safety of his home—in fact, Sgt. Cabrera did not instruct Yarofalchuw to do anything. Furthermore, despite having been approached by Yarofalchuw, and despite knowing about the allegations of earlier threats by Yarofalchuw to Mr. Roberto, Sgt. Cabrera did not pat him down. While Yarofalchuw maintains Sgt. Cabrera and Officer Fitial blocked the entryway to his house, Yarofalchuw freely moved about and did not seem threatened by the presence of the two officers. Additionally, it was Sgt. Cabrera who was

outnumbered four-to-one when Sgt. Cabrera first arrived at the residence (and then four-to-two when Fitial arrived). Yarofalchuw further argues he was seized immediately after Sgt. Cabrera parked his police vehicle outside his curtilage rather than completely leaving the premises. But when Sgt. Cabrera stepped out of his vehicle and walked back into Yarofalchuw's driveway, it was not to approach Yarofalchuw, but to briefly speak to his guests. Sgt. Cabrera never addressed Yarofalchuw again inside the curtilage of his home. It was not until after Yarofalchuw left the pavilion, went into his house, came out of his house, and walked straight to Sgt. Cabrera did the two come into contact again. While seemingly analogous, the totality of the facts reveals that there are many more distinctions than there are similarities and *Washington* cannot be used to demonstrate that Sgt. Cabrera or Fitial's conduct was clearly established as being unconstitutional.

Yarofalchuw's reliance on *United States v. Alvarado*, 763 F. App'x 609 (9th Cir. 2019) (unpublished), is also misplaced. In that case, Alvarado moved to suppress the firearm found in his vehicle because he alleged "the police initiated an investigatory stop without reasonable suspicion[.]" *Id.* at 610. The Ninth Circuit agreed with the district court in finding that the two officers conducting the investigatory stop seized Alvarado when the officers "simultaneously parked their marked patrol cars perpendicular to [Alvarado's vehicle which he was occupying] and shone their spotlights into the car." *Id.* (citing *Washington*, 490 F.3d at 769-70). The position of the patrol cars combined with the use of spotlights affected Alvarado's vision and "likely restricted [his]

ability to leave." *Id.* (citing *Washington*, 490 F.3d at 773). Additionally, "[t]he encounter took place late at night in an isolated residential setting, and neither officer informed Alvarado of his right to terminate the encounter." *Id.* at 611. Nevertheless, the court found reasonable suspicion for Alvarado's arrest.

Like *Alvarado*, Yarofalchuw contends that the obstruction of his path and failure to terminate the encounter constituted a seizure. However, the totality of the circumstances is critical to the seizure analysis, and here, the totality of the circumstances reveals a very different set of facts than that in *Alvarado*. In that case, Alvarado was occupying a vehicle which was aggressively blocked by the patrol cars with spotlights directly pointed at Alvarado's vehicle. The situation occurred late at night in an isolated residential setting. Here, as the Court previously described, Yarofalchuw's own depiction shows that Sgt. Cabrera did not obstruct Yarofalchuw's pathway. But even if the Court were to assume that Fitial obstructed the entryway, this did not occur until after Yarofalchuw had approached Sgt. Cabrera and escalated the situation. Unlike in *Alvarado*, where Alvarado was constrained from movement away from his vehicle, Yarofalchuw felt free to move and confront Sgt. Cabrera. Apart from the alleged obstruction by the vehicle, no other set of facts tend to show that Sgt. Cabrera asserted such a show of authority that this Court should find *Alvarado* analogous.

Jacobo-Esquivel v. Hooker, No. CV-14-01781, 2016 U.S. Dist. LEXIS 16212, 2016 WL 524655 (D. Ariz. Feb. 10, 2016), is also inapt. In *Hooker*, two police officers—Hooker

and Jones—sought to investigate a vehicle parked at a house believed to be a drug stash house. 2016 U.S. Dist. LEXIS 16212, [WL] at *1. Mid-morning, Jacobo-Esquivel exited the alleged drug stash house and headed toward a Jeep parked in the driveway. *Id.* "Officer Hooker drove the patrol car to the residence. The parties dispute whether Officer Hooker parked directly behind the Jeep so as to block the driveway. Officer Jones exited the patrol car and approached the driver's side of the Jeep." *Id.* (citation omitted). According to the plaintiffs, upon trying to step outside the Jeep, Officer Jones ordered Jacobo-Esquivel to remain in the vehicle and demanded identification from him and his companion in the passenger seat. 2016 U.S. Dist. LEXIS 16212, [WL] at *2. After taking their identification cards, Jacobo-Esquivel consented to getting out of the jeep at which point, "Officer Jones immediately frisked him and handcuffed him." *Id.* In its *Terry* analysis,[8] the district court determined that "[w]hether the driveway was blocked is *only one factor* in the totality of the circumstances analysis for determining whether the officers' initial approach constituted a stop." 2016 U.S. Dist. LEXIS 16212, [WL] at *6 (emphasis added). The court ultimately concluded that whether the officers blocked the driveway was a genuine dispute of material fact that could not be determined on a summary judgment motion. *Id.* In its qualified immunity analysis,

8. "A *Terry* stop generally consists of, at most, a brief stop, interrogation and under proper circumstances, a brief check for weapons. If the *Terry* stop exceeds this limited intrusion, it has become a de facto arrest, requiring probable cause." *United States v. Kinsey*, 952 F. Supp. 2d 970, 973 (E.D. Wash. 2013) (internal quotation marks and citations omitted).

the court noted that if the disputed fact "that the officers blocked the driveway with their patrol car—were resolved in Jacobo-Esquivel's favor, that fact *in combination with the other circumstances in this case* would conclusively determine that Defendant[] [officers] do not enjoy qualified immunity." *Id.* (citing *Washington*, 490 F.3d at 773).[9]

Here, even if the Court assumes Sgt. Cabrera and/or Fitial blocked Yarofalchuw's driveway, that fact in combination with the other circumstances in this case would *not* conclusively determine that Sgt. Cabrera and Fitial are barred from qualified immunity. As iterated previously, neither Sgt. Cabrera nor Fitial demonstrated such a show of authority that Yarofalchuw can claim he was unconstitutionally seized within his home and/or curtilage. Rather, as previously established, the Court finds that Fitial was responding swiftly and reasonably to a situation that Yarofalchuw himself escalated and Sgt. Cabrera's conduct did not rise to the level of authoritative. Instead, Yarofalchuw's behavior (moving freely within his home and curtilage, confronting Sgt. Cabrera, recording the situation) suggests that he did not feel threatened by or submissive to the officers.

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9. The District Court of Arizona cites to *Washington* for the proposition that blocking an individual's path in any way is a consideration of probably decisive significance in finding a seizure. *Hooker*, 2016 U.S. Dist. LEXIS 16212, 2016 WL 524655, at *6. In reviewing *Washington*, that statement was derived from a parenthetical out of a 1982 Fifth Circuit decision. *Washington*, 490 F.3d at 773 (citing *United States v. Berry*, 670 F.2d 583, 597 (5th Cir.1982)). This Court notes this attribution but nevertheless agrees that obstructing a pathway is a critical component in the seizure analysis.

Appendix B

The circumstances in *Orhorhaghe v. INS*, 38 F.3d 488 (9th Cir. 1994) are also not present here. In that case, a team of four agents including two investigators from the United States Immigration and Naturalization Service ("INS"), one police officer, and an investigative banker, sought to investigate a Nigerian national, Orhorhaghe, for an alleged credit card scheme. *Id.* at 491. In finding an unconstitutional seizure, the Ninth Circuit determined that Orhorhaghe was faced with "the threatening presence of several officers . . . [even though] he reasonably expected to meet a *single* bank investigator" to discuss the alleged scheme in his apartment building. *Id.* at 494 (emphasis added) (citation omitted). "For all Orhorhaghe knew, all four people in the hallway were armed and in league with the INS agents. (In fact, three of them were armed law enforcement personnel.)" *Id.* At least one agent "made it clear to Orhorhaghe by his actions that he was carrying a weapon," with the record reflecting that the agent "*did* reveal his weapon to Orhorhaghe" by "put[ting] his hands on his hip 'in such a way as to reveal that he was carrying a gun on his right hip.'" *Id.* at 495. Additionally, "the nonpublic setting substantially increased the coercive nature of the encounter[.]" *Id.* "[T]he fact that a confrontation between law enforcement officers and an individual takes place in a private place does not in itself transform that encounter into a 'seizure.'" *Id.* But, in the case of Orhorhaghe, the confrontation "took place in the hallway of his apartment building—private property shielded from the view of the vast majority of the public." *Id.* And, finally, the INS agent "acted in an officious and authoritative manner that indicated that Orhorhaghe was not free to decline [the agent's] requests." *Id.*

Here, Yarofalchuw was not confronted with four agents, but one (Sgt. Cabrera), with Fitial only returning after Yarofalchuw escalated the situation. While Yarofalchuw may have assumed Sgt. Cabrera had a weapon on him as an on-duty officer, there are no facts to suggest that Sgt. Cabrera brandished his weapon or flaunted it in a threatening manner. Significantly, Sgt. Cabrera had already retreated from Yarofalchuw when he reversed his police vehicle, and when he approached Yarofalchuw's guests to get their contact information. In contrast to the four agents' presence inside the building, it was Yarofalchuw who approached Sgt. Cabrera at the driveway entrance, far away from the doorsteps to his actual home, and on the edge of the curtilage exposed to public view. Finally, Sgt. Cabrera did not act authoritatively towards Yarofalchuw. In fact, it was Yarofalchuw who approached Sgt. Cabrera. Therefore, based on the facts of this case, *Orhorhaghe* does not support a finding of clearly established law.

As discussed below, the remaining cases that Yarofalchuw rely on also do not clearly establish that Sgt. Cabrera or Officer Fitial's conduct was in contravention of the Fourth Amendment. Those cases are inapplicable to the facts here, and therefore do not constitute the robust consensus of caselaw that would support Yarofalchuw's position.

In *United States v. Brown*, Brown sought to suppress evidence of heroine because "his encounter with two police officers in a motel parking lot did not comply with" *Terry* requirements. 996 F.3d 998, 1001 (9th Cir. 2021). Two

law enforcement officers approached Brown and another individual after receiving a radio call about two transients loitering in a motel parking lot, with one of them having urinated in the bushes. *Id.* at 1002. After seven minutes of conversation (including routine and generic questions such as inquiring on date of birth, height, and weight), the officer's suspicions of drug dealing prompted him to order Brown to stand up and turn around. *Id.* at 1003. Brown complied, and the officer reaching into Brown's pocket, pulled out a plastic bag containing heroine and finding several thousand dollars, "unused syringes, and suboxone strips used to treat opioid withdrawal." *Id.* Brown was charged with possession of heroine with intent to distribute. *Id.* at 1004.

He subsequently moved to suppress the items based on an allegedly unconstitutional seizure. *Id.* The Ninth Circuit described that the initial approach was consensual and nonthreatening, with generic questions from the officer to Brown. *Id.* at 1005. The officer "never suggested that Brown was not free to decline to answer or to ignore the officer." *Id.* "Indeed, during the encounter Brown felt free to take a personal phone call, during which he was chatting and laughing, for nearly a full minute." *Id.* at 1006. However, "the nature of the encounter changed once [the officer] ordered Brown to stand up and turn around. By giving this order, [the officer] 'affirmatively assert[ed] authority over [Brown's] movements[.]'" *Id.* (citation omitted). Nevertheless, "the seizure was justified because, by that time, [the officer] had developed reasonable suspicion that Brown was engaged in a drug transaction with [the second transient]." *Id.* at 1005.

Brown is patently different from this case and actually cuts against Yarofalchuw. Here, Sgt. Cabrera never told Yarofalchuw to do anything nor did Sgt. Cabrera at any point touch Yarofalchuw. There was no demand by Sgt. Cabrera to Yarofalchuw to "stand up and turn around." In fact, after Yarofalchuw demanded Sgt. Cabrera leave the property, Sgt. Cabrera complied. Sgt. Cabrera never affirmatively asserted any authority over Yarofalchuw's movements. At most, Sgt. Cabrera sought to control Yarofalchuw's movements by allegedly obstructing the pathway. In fact, like Brown feeling free to take a phone call, Yarofalchuw felt free to go back into his home and then come out to confront Sgt. Cabrera. Taken as a whole including Sgt. Cabrera's conduct after he parked his police vehicle, the facts do not suggest a show of authority. Yarofalchuw initially asserted there was an obstruction by Sgt. Cabrera's vehicle within the home or curtilage; however, after additional evidence was presented, including his own, there was at most a partial obstruction, and it was outside the curtilage. Because the facts are so different, Yarofalchuw cannot rely on *Brown* as clearly establishing law relevant to the facts here.

Yarofalchuw's reliance on *United States v. Orman*, 486 F.3d 1170 (9th Cir. 2007), is likewise not on point. In *Orman*, two police officers approached Orman who had been seen placing a handgun in his boot before entering a shopping mall. *Id.* at 1171. Orman was subsequently arrested and charged with being a felon in possession of a firearm. *Id.* at 1172. During the pendency of his case, Orman moved to suppress the seizure of the gun because, in part, "the encounter was not consensual and

immediately custodial." *Id.* at 1173. The district court rejected this argument, found that the conversation was consensual, and ultimately denied the motion to suppress. *Id.* On appeal, the Ninth Circuit agreed. *Id.* at 1177. The Ninth Circuit determined that the officers never drew their guns, and the second officer was non-threatening, located at least 20 feet behind the first officer. *Id.* at 1175. "Additionally, the encounter was brief—lasting three to four minutes and occur[ing] in a public setting. Finally, the consensual nature of the encounter is not undermined by [the officer's] failure to expressly tell Orman that he was free to leave." *Id.* at 1175-76 (citation omitted). Thus, the Ninth Circuit concluded that the encounter was consensual and "[a] reasonable innocent person would not feel that he was being detained by a police officer who politely asked him if he could have a word with him and quickly inquired about a handgun." *Id.*

It is unclear how *Orman* helps Yarofalchuw given that the Ninth Circuit found no seizure. Insofar as Yarofalchuw uses *Orman* as a contrasting case, the Court is not convinced that *Orman* clearly establishes Sgt. Cabrera and Fitial's duties. A case need not be directly on point, but for a right to be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate." *Wesby*, 138 S. Ct. at 589. Simply because there is a case that indicates what is *not* a seizure, does not mean that the case establishes what *is* a seizure.

Finally, Yarofalchuw cites the U.S. Supreme Court decision *Bostick*, 501 U.S. 429. However, the Supreme Court did not decide whether a seizure had occurred based

on the facts in *Bostick*. *See id.* at 437 (refraining from deciding whether a seizure occurred and remanding to the state court to evaluate the seizure question under the correct legal standard of totality of the circumstances). Rather, *Bostick* outlined principles of Fourth Amendment law applicable to future cases. *See id.* at 439 (determining that random bus searches conducted pursuant to a passenger's consent is not per se unconstitutional). While these legal principles are helpful, the facts in *Bostick* are inapplicable to this case and therefore cannot be relied on as clearly establishing either Sgt. Cabrera or Officer Fitial's duties.

In summary, the facts in the case at bar are distinguishable from the cases cited to represent a show of authority and in fact tend to represent the contrary. There is no "robust consensus of caselaw" to indicate that either Defendant's conduct is clearly established to be a constitutional violation. Qualified immunity therefore applies, and Yarofalchuw's motion for reconsideration as to Fitial is denied.

V. CONCLUSION

Plaintiff Yarofalchuw has failed to meet his burden to demonstrate that Sgt. Cabrera and/or Officer Fitial's allegedly unconstitutional conduct was clearly established. Indeed, at a hearing on the matter, the Court continuously pressed Yarofalchuw to identify the robust consensus of case law to back his position. Yarofalchuw generally referred to the "show of authority" caselaw to support his arguments—such is insufficient to overcome the defense

of qualified immunity. Additionally, the caselaw he did cite are inapplicable. Thus, the Court DENIES Yarofalchuw's motion for reconsideration as to Fitial's grant of qualified immunity (ECF No. 37), and GRANTS both Sgt. Cabrera's motion for reconsideration (ECF No. 36) and Cross-MSJ (ECF No. 20) on qualified immunity grounds in the alternative. Accordingly, the Court DENIES Yarofalchuw's Motion for Summary Judgment (ECF No. 15). Judgment shall enter in favor of both defendants Sgt. Cabrera and Officer Fitial.

IT IS SO ORDERED this 14th day of August, 2023.

/s/ Ramona V. Manglona
RAMONA V. MANGLONA
Chief Judge

APPENDIX C — EXCERPT OF TRANSCRIPT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN MARIANA ISLANDS, FILED APRIL 28, 2023

[1]IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

Case No: 1:22-cv-00001

NICHOLAS YAROFALCHUW,

Plaintiff,

v.

JOHN CABRERA AND DANNY FITIAL,

Defendants.

CERTIFIED

United States District Court
1671 Gualo Rai Road
Saipan, MP 96950

December 1, 2022
1:46 p.m.

TRANSCRIPT OF PROCEEDINGS

MOTION FOR SUMMARY JUDGMENT/CROSS-MOTION FOR SUMMARY JUDGMENT HEARING

Appendix C

BEFORE THE HONORABLE RAMONA V. MANGLONA, CHIEF JUDGE

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[7]THE COURT: And then, finally, as to when this actual physical seizure occurred, it is discussed it is outside of the curtilage because it is out in the area by the hedge, and if anything, it would be an area that's more akin to what has been known as the doorway of a person's home, where Plaintiff presented himself, not through any direction by the sergeant.

***

[30]THE COURT: Well, what I was saying is: Accepting as true that we have the two hedges and your client in between the hedges, because that's the driveway, with the hedge to the left; hedge to the right, and he's basically along that line, that's the doorway I'm talking about, not somewhere within the curtilage, or the physical door of the house.

So case law talks about the doorway concept.

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[31]THE COURT: Well, first, in regards whether that's still good law, I'm talking about *United States versus Santana*, which is United States Supreme Court, 1976, which the Court held that, while standing in a doorway of her house, a defendant was in the public place

for purposes of the Fourth Amendment. So when you're talking about -- are you saying *Santana* has been reversed by the U.S. Supreme Court?

***

[35]THE COURT: The concern I have is the physical arrest that did occur, and even accepting as true that the test is where the Plaintiff was standing, not where the officers were, and we have some disputed argument of, I guess, the conclusion of the fact. I've just turned to the photo that we all agree to, and in this instance, it appears that Mr. Yarofalchuw was basically at the doorway from the hedge area, not the doorway from his physical house. So I agree with Ms. Healer, it's more akin to the -- being on the front porch, as opposed to within. And so given that this is an area that has been found to remove the conclusion that this was a warrantless arrest inside the home, the finding is that there is no Fourth Amendment violation.

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APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED APRIL 24, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-15279

D.C. No. 1:22-cv-00001
District of the Northern Mariana Islands,
Saipan

NICHOLAS YAROFALCHUW,

Plaintiff-Appellant,

v.

JOHN CABRERA; DANNY FITIAL,

Defendants-Appellees.

ORDER

Before: PAEZ, M. SMITH, and KOH, Circuit Judges.

The panel unanimously votes to deny the petition for panel rehearing. Judge M. Smith and Judge Koh vote to deny the petition for rehearing en banc, and Judge Paez so recommends. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are DENIED.