No. 25-

IN THE

Supreme Court of the United States

KYLER NEWBY,

Petitioner,

v.

GABRIEL J. BASSFORD,

Respondent.

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

A claim for First Amendment retaliatory arrest is typically not actionable unless the plaintiff proves the absence of probable cause. *Nieves v. Bartlett*, 587 U.S. 391, 403 (2019). Additionally, qualified immunity bars a retaliatory arrest claim unless the plaintiff demonstrates that the First Amendment right was so clearly established that any reasonable officer would know there was no probable cause to make an arrest. *Reichle v. Howards*, 566 U.S. 658, 664 (2012).

Here, the petitioner (a police officer) arrested the respondent (an individual filming the officer) for trespassing on private property. The respondent sued the petitioner for Fourth Amendment false arrest and First Amendment retaliatory arrest. The district court ruled that qualified immunity barred the false arrest claim because an objective police officer could have reasonably but mistakenly believed there was probable cause to arrest the respondent. Despite that finding, the court denied qualified immunity on the retaliatory arrest claim.

On appeal to the Ninth Circuit, a divided panel held that even if the petitioner acted reasonably but perhaps mistakenly in arresting the respondent—what many lower courts call arguable probable cause—the petitioner was not entitled to qualified immunity on the retaliatory arrest claim. This holding is contrary to decisions in the Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits.

The question presented is whether a police officer is entitled to qualified immunity from a retaliatory arrest claim when the officer could have reasonably but perhaps mistakenly believed there was probable cause for the arrest, and the *Nieves* exception does not apply.

PARTIES TO THE PROCEEDINGS

Petitioner Tyler Newby, a police officer with the City of Mesa, Arizona, was the appellant in the Ninth Circuit and is a defendant in the district court.

Respondent Gabriel J. Bassford was the appellee in the Ninth Circuit and is the plaintiff in the district court.

The City of Mesa, Sergeant Joseph Adams, Officer Phillip Clark, and Officer Michael Destefino were all defendants in the district court and were not party to the interlocutory appeal.

RELATED PROCEEDINGS

U.S. District Court for the District of Arizona

Bassford v. City of Mesa et al., No. CV-22-00572. Order Denying Summary Judgment in Part entered February 27, 2024.

U.S. Court of Appeals for the Ninth Circuit

Bassford v. Newby, No. 24-5525. Decision filed August 26, 2025. Motion for Rehearing en banc denied November 17, 2025.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kyler Newby is a police officer with the City of Mesa, Arizona. One evening in October 2021, while on-site at a Circle K convenience store, the store's security guard informed Officer Newby that Respondent Gabriel Bassford was trespassing. Believing that a "No Trespassing" sign had warned Bassford not to trespass and relying on his law enforcement training and experience, Officer Newby arrested Bassford for trespassing.

Bassford subsequently brought a § 1983 suit alleging a Fourth Amendment false arrest claim and a First Amendment retaliatory arrest claim. The district court concluded that Bassford's Fourth Amendment claims were barred by qualified immunity because there was arguable probable cause for his arrest—that is, an objective officer could have "reasonably but mistakenly conclude[d] that probable cause" supported the arrest. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987); *see Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir. 2014) ("Arguable probable cause is another way of saying that the officers' conclusions rest on an objectively reasonable, even if mistaken, belief that probable cause exists."). But the district court refused to dismiss the First Amendment retaliatory arrest claim, notwithstanding its own conclusion that an objective officer could have reasonably found probable cause for the arrest.

A divided panel of the Ninth Circuit affirmed the district court's decision, reasoning that this Court has "not yet imported arguable probable cause from the Fourth Amendment unlawful arrest context into the First Amendment retaliatory arrest context." App. at 7a.

The dissenting judge noted there is "no distinction in the case law between what is required for probable cause for purposes of a false arrest claim and what is required for purposes of a First Amendment retaliatory arrest claim." *Id.* at 10a. As a result, the First Amendment claim was not actionable because, under clearly established law, "a reasonable officer could have believed that he had probable cause to arrest Bassford." *Id.* at 9a.

The Ninth Circuit's refusal to consider arguable probable cause when analyzing a retaliatory arrest claim is a significant departure from other circuits. The six circuit courts that have considered whether arguable probable cause bars a retaliatory arrest claim have held that a typical retaliatory arrest claim cannot proceed if a reasonable officer could have believed the arrest was supported by probable cause.

The Ninth Circuit's decision also conflicts with this Court's precedent, which establishes (1) the absence of probable cause as a requirement in a typical retaliatory arrest case, *Nieves*, 587 U.S. at 402, and (2) a retaliatory arrest claim cannot proceed unless "every reasonable official would have understood that what he is doing violates" the First Amendment, *Reichle*, 566 U.S. at 664 (cleaned up). This is also not a case that implicates the limited *Nieves* exception that applies when evidence shows that officers do not typically arrest a person in a given situation.

The Ninth Circuit's holding in this case runs against a core purpose for qualified immunity. Police officers who make arrests every day in the course of their duties must "go about their work without undue apprehension of being sued." *Nieves*, 587 U.S. at 403. Qualified immunity

protects against an "overwhelming litigation risk" by avoiding probing the subjective intent of arresting officers. *Id.* The Ninth Circuit's holding incorrectly deprives an officer of qualified immunity when making an arrest that is supported by arguable probable cause. This is contrary to this Court's precedent and the other circuits that have explored this issue. Accordingly, this Court should grant a writ of certiorari to clarify the law governing qualified immunity for First Amendment claims for retaliatory arrests when arguable probable cause exists.

OPINIONS BELOW

The Ninth Circuit's August 26, 2025 decision was unpublished. App. at 1a–10a; *Bassford v. Newby*, No. 24-5525, 2025 WL 2452367 (9th Cir. Aug. 26, 2025). The district court's August 15, 2024 order denying summary judgment on Officer Newby's retaliatory arrest claim was unreported. App. at 11a–39a; *Bassford v. City of Mesa*, No. CV-22-00572, 2024 WL 811614 (D. Ariz. Feb. 27, 2024).

JURISDICTION

The Ninth Circuit filed its decision on August 26, 2025, App. at 1a, and it denied Officer Newby's timely motion for rehearing en banc on November 17, 2025, App. at 40a. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS

As relevant here, 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

> State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

The First Amendment to the U.S. Constitution provides:

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

The Fourth Amendment to the U.S. Constitution provides:

> 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.

And as relevant here, A.R.S. § 13-1502(A)(1) states:

> A person commits criminal trespass in the third degree by . . . [k]nowingly entering or

> remaining unlawfully on any real property after a reasonable request to leave by a law enforcement officer, the owner or any other person having lawful control over such property, or reasonable notice prohibiting entry.

STATEMENT

I. Factual Background

In the evening of October 9, 2021, a security guard at a Circle K convenience store located in a high crime area of Mesa, Arizona, called for police assistance to address a trespassing issue. App. at 14a–15a; *see* Excerpts of Record ("ER") at 56 ¶¶ 8–9, *Bassford v. Newby*, No. 24-5525 (9th Cir. Dec. 19, 2024), ECF No. 13. Several police officers responded, including Officer Newby. App. at 15a. While the officers were in the convenience store's privately owned parking lot, Bassford drove by and decided to stop and film the officers. *Id.* Bassford was joined by several passengers in his car, who were traveling with him looking for police officers to film. *Id.*; ER-94 (Bassford Deposition). Bassford parked his vehicle on a nearby street, walked to the sidewalk adjoining the convenience store, began filming the officers, and ultimately entered the parking lot. App. at 15a; ER-59 ¶ 25; ER-109, 131.

While Bassford and his friends were in the parking lot, Officer Newby was speaking with the convenience store security guard. At some point during this conversation, Officer Newby remarked to the security guard, "you have six new customers out here." App. at 15a. Taking stock of the "multiple individuals standing within the Circle K parking lot [] holding cameras or cell phones," the security

guard commented that they "were not acting like Circle K customers." *Id.*

After the security guard authorized the police to "trespass" the people who did not appear to be Circle K customers, Officer Newby approached Bassford, who was facing towards a "No Trespassing" sign posted on the convenience store's outside wall. *Id.* at 15a–16a. Officer Newby believed the sign "was easy to recognize and read" from where Bassford was standing. *Id.* at 16a; ER-59 ¶ 26. Officer Newby thus believed Bassford had "reasonable notice that he was prohibited from entering onto Circle K's private property to film from the convenience store's commercial parking lot and property." App. at 16a; ER-60 ¶ 33.

Based on the security guard's determination that Bassford was trespassing, Bassford's proximity to the no trespassing sign, and Officer Newby's law enforcement training and experience with criminal trespass, Officer Newby determined there was probable cause to arrest Bassford for criminal trespass under A.R.S. § 13-1502(A)(1). App. at 16a; ER-60 ¶¶ 31–33. Consequently, Officer Newby arrested Bassford.

II. Procedural history

A. District Court Order

Bassford filed a complaint under 42 U.S.C. § 1983 alleging that Officer Newby, three other officers, and the City of Mesa were liable for false arrest, false imprisonment, and unlawful policies under the Fourth

Amendment.[1] Bassford also brought a First Amendment retaliatory arrest claim against Officer Newby and the other officers. Following discovery, the defendants filed a joint motion for summary judgment. The district court granted the motion as to the other officers and the City, dismissing the claims against them. The district court also dismissed the Fourth Amendment claims against Officer Newby, but it denied him summary judgment on the First Amendment claim. App. at 32a–33a, 37a–38a.

Among the Fourth Amendment claims on which the district court granted summary judgment to Officer Newby was Bassford's false arrest claim. Officer Newby argued he was entitled to qualified immunity on that claim because (1) there was probable cause to arrest Bassford, and (2) even if not, it was not clearly established that he lacked probable cause to arrest Bassford. The district court found a genuine dispute as to whether Officer Newby had probable cause to arrest Bassford for trespassing. But it also found that, "even if" Officer Newby "did not have probable cause to arrest" Bassford, "not all reasonable police officers would believe that they lacked probable cause to make the arrest." *Id.* at 32a. Because Officer Newby "reasonably but mistakenly believed" he had probable cause to arrest Bassford, "then, based on the totality of the circumstances, [Officer Newby] acted reasonably" and was entitled to qualified immunity. *Id.*

Despite holding that qualified immunity barred the false arrest claim, the district court found that Officer Newby was not entitled to qualified immunity as to

1. The district court had jurisdiction over these claims under 28 U.S.C. § 1331.

the First Amendment claim. *Id.* at 37a–38a. The court reiterated that there was a genuine factual dispute about whether Officer Newby had probable cause to arrest, as well as whether Bassford's "First Amendment activity was a substantial or motivating factor behind his arrest." *Id* at 37a. But when the court again considered whether Officer Newby "could have reasonably believed that his particular conduct was lawful," *id.* at 30a, the court ruled that "[i]t was clearly established in 2021 that in the absence of probable cause, a police officer cannot arrest an individual who is engaging in First Amendment activity in retaliation for engaging in that activity." *Id.* at 38a. The court did not reconcile this holding with its earlier holding in its analysis of the Fourth Amendment claim that "not all reasonable police officers would believe that they lacked probable cause to make the arrest." *Id.* at 32a (citation omitted).

B. Ninth Circuit Decision

Officer Newby appealed the district court's denial of qualified immunity against the retaliatory arrest claim. Bassford did not cross appeal. In a divided decision, the Ninth Circuit affirmed. *Id.* at 2a. The majority agreed there was evidence with which "a jury could find Officer Newby arrested Bassford in violation of the First Amendment and without probable cause." *Id.* at 3a.

The majority then held, like the district court, that Officer Newby was not entitled to qualified immunity. The majority concluded it was clearly established that Bassford possessed a "right to be free from arrest for engaging in First Amendment activity in retaliation for engaging in that activity where there is no probable cause for the arrest." *Id.* at 3a. In so holding, the court relied on Ninth

Circuit precedent holding "that it would be unlawful to arrest Plaintiffs in retaliation for their First Amendment activity, *notwithstanding* the existence of probable cause." *Id.* at 3a–4a (emphasis added) (quoting *Ballentine v. Tucker*, 28 F.4th 54, 65 (9th Cir. 2022)). Because "it would be unlawful to arrest Bassford in retaliation for Bassford's First Amendment activity, notwithstanding the existence of probable cause," the court concluded it was also established "that it would be unlawful for Officer Newby to arrest Bassford in retaliation for Bassford's First Amendment activity *without* probable cause." *Id.* at 4a.

The dissent argued that the finding of arguable probable cause demonstrated that "a reasonable officer could have believed that he had probable cause to arrest Bassford." *Id.* at 9a. The existence of arguable probable cause is directly applicable to the second step of qualified immunity, which asks whether clearly established law would give notice to an objectively "'reasonable official . . . that what he is doing violates' the law." *Id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). The dissent reasoned that because arguable probable cause foreclosed Plaintiff's Fourth Amendment false arrest claim at the second step, his retaliatory arrest claim also must fail. *Id.* at 10a (explaining there is "no distinction in the case law between what is required for probable cause for purposes of a false arrest claim and what is required for purposes of a First Amendment retaliatory arrest claim").

Officer Newby timely filed a motion for rehearing en banc, which was denied on November 17, 2025. *Id.* at 40a–41a.

REASONS TO GRANT A WRIT OF CERTIORARI

The Ninth Circuit's holding that Officer Newby is not entitled to qualified immunity conflicts with holdings in the Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits that retaliatory arrest claims are not actionable where there was arguable probable cause for the arrest. This Court should grant a writ of certiorari to resolve the circuit split and clarify the law governing this important issue concerning law enforcement officers' immunity from suit.

Likewise, this Court should grant review to explicitly decide whether arguable probable cause entitles an officer to qualified immunity from First Amendment retaliatory arrest claims. This Court's precedent makes clear that Fourth Amendment and First Amendment arrest claims share a common requirement that a "plaintiff . . . plead and prove the absence of probable cause for the arrest," and in both contexts this Court has "almost uniformly rejected invitations to probe subjective intent" in analyzing an officer's actions. *Nieves*, 587 U.S. at 402–03 (citation omitted). Additionally, in the Fourth Amendment context, this Court has been clear that even if an officer "lacked actual probable cause to" make an arrest, they are nevertheless entitled to immunity if under the totality of the circumstances "they reasonably but mistakenly concluded that probable cause was present." *District of Columbia v. Wesby*, 583 U.S. 48, 65 (2018) (cleaned up). Whether an action is reasonable under the circumstances is the same qualified immunity test used in the First Amendment context. *See Reichle*, 566 U.S. at 658. Consequently, this Court's precedents show that arguable probable cause entitles an officer to qualified

immunity against a First Amendment retaliatory arrest claim. The Ninth Circuit, however, synthesized the wrong rule because this Court has not directly ruled on the issue. This Court should grant the petition and do so now.

I. The Ninth Circuit's opinion conflicts with decisions from other circuits.

The petition should be granted because, contrary to the Ninth Circuit, the Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have all concluded that arguable probable cause in making an arrest entitles an officer to qualified immunity against retaliatory arrest claims. The opinions in other circuits reaching decisions contrary to the Ninth Circuit include:

- **Fifth Circuit**: *Rucker v. Marshall*, 119 F.4th 395, 402–03 & n.3 (5th Cir. 2024) (holding "a police officer is protected by qualified immunity against a First Amendment retaliatory arrest claim if probable cause existed or if reasonable police officers could believe probable cause existed" (citation modified)); *Davidson v. City of Stafford*, 848 F.3d 384, 391–92 (5th Cir. 2017) (analyzing whether arguable probable cause defeated a retaliatory arrest claim).

- **Sixth Circuit**: *Novak v. City of Parma*, 33 F.4th 296, 305 (6th Cir. 2022) (dismissing a retaliatory arrest claim as barred by qualified immunity because the defendant officers "'reasonably,' even if 'mistakenly,' concluded that probable cause existed").

- **Seventh Circuit**: *Thayer v. Chiczewski*, 705 F.3d 237, 253 (7th Cir. 2012), *overruled on other grounds by Lozman v. Riviera Beach*, 585 U.S. 87 (2018) (dismissing a retaliatory arrest claim because the defendant officers "had *arguable* probable cause to arrest" the plaintiff); *see also Brown v. Robinett*, No. 1:19-cv-02336, 2021 WL 663378, at *9 (S.D. Ind. Feb. 19, 2021) (applying *Thayer*'s holding that "qualified immunity shields an officer from liability [for a retaliatory arrest claim] so long as the officer had arguable probable cause for the arrest").

- **Eighth Circuit**: *Watson v. Boyd*, 119 F.4th 539, 551–56 (8th Cir. 2024) (rejecting a retaliatory arrest claim because the defendant officer had arguable probable cause); *Brown v. City of St. Louis*, 40 F.4th 895, 903 (8th Cir. 2022) (dismissing a First Amendment retaliation claim because there was "arguable probable cause to arrest" the plaintiff); *Just v. City of St. Louis*, 7 F.4th 761, 768 (8th Cir. 2021) ("Like a Fourth Amendment claim for a wrongful arrest, a First Amendment retaliatory arrest claim is defeated by a showing of probable cause (or arguable probable cause).").

- **Tenth Circuit**: *Detreville v. Gurevich*, No. 24-1427, 2025 WL 1874587, at *6 (10th Cir. July 8, 2025) ("We agree with the circuits holding that when probable cause is lacking at prong one, arguable probable cause for an arrest entitles a defendant to qualified immunity at prong two.")

- **Eleventh Circuit**: *Redd v. City of Enterprise*, 140 F.3d 1378, 1384 (11th Cir. 1998) ("[W]hen an officer has *arguable* probable cause to believe that a person is committing a particular public offense, he is entitled to qualified immunity from suit, even if the offender may be speaking at the time that he is arrested."); *Prospero v. Sullivan*, 153 F.4th 1171, 1188 (11th Cir. 2025) (holding that "[t]he existence of *arguable* probable cause entitle[d]" two defendants to qualified immunity on a retaliatory arrest claim).

The Second and Fourth Circuits have also indicated that an officer is entitled to qualified immunity "where the existence of probable cause for an arrest was at least reasonable and arguable." *Rupp v. Buffalo*, 91 F.4th 623, 642 (2d Cir. 2024); *Garcia v. Does*, 779 F.3d 84, 96 (2d Cir. 2015) (dismissing Fourth and First Amendment claims because the plaintiffs did not show that a reasonable officer could find the defendant officers' actions unlawful); *Somers v. Devine*, 132 F.4th 689, 697 (4th Cir. 2025) ("[W]hether this right [to be free from retaliatory arrest] is 'clearly established' turns on the question of whether [the defendant] was objectively reasonable in believing that probable cause existed to arrest [the plaintiff]."). Only the First and Third Circuits have not reached the issue in any context.

Of the circuit courts, only the D.C. Circuit arguably aligns with the Ninth Circuit. Prior to the decision in *Nieves*, the D.C. Circuit held that "the doctrine of arguable probable cause does not apply to a First Amendment retaliatory *inducement to prosecution* claim." *Moore v. Hartman*, 644 F.3d 415, 426 (D.C. Cir. 2011), *reaffirmed*

at 704 F.3d 1003 (D.C. Cir. 2013). It did so because it believed that First Amendment retaliatory prosecution claims are distinct from Fourth Amendment claims, and the two are aimed at different harms. *See id.* The court opined that "nothing about the First Amendment's right to free speech or the concomitant right to be free from punishment therefor suggests any connection between the right and criminal 'probable cause.'" *Id.* at 424. Therefore, the evidentiary value of probable cause does not make the concept "an element of the free speech right." *Id.* at 425. The court thus concluded that "the doctrine of arguable probable cause does not apply to a First Amendment retaliatory inducement to prosecution claim." *Id.* at 426.

In contrast to the decisions from other circuits, the Ninth Circuit's decision in this case ignores the objective reasonableness of Officer Newby's actions—the critical question at the second step of the qualified immunity analysis—by failing to examine whether it was reasonable, even if mistaken, for Officer Newby to arrest Bassford for trespassing. But whether an officer has qualified immunity from a First Amendment retaliation claim based on arguable probable cause is an issue that should be resolved consistently throughout the country. Accordingly, this Court should grant the petition for a writ of certiorari to resolve the circuit split on this important issue.

II. The Ninth Circuit's decision conflicts with this Court's precedent.

This Court should also grant the petition to settle an important question of federal law that has not been directly addressed by this Court. As the Ninth Circuit noted, this Court has not "imported arguable probable cause from

the Fourth Amendment unlawful arrest context into the First Amendment retaliatory arrest context." App. at 6a. While true, the Ninth Circuit took the wrong lesson. Rather than support the Ninth Circuit's conclusion, this Court's precedents make clear that arguable probable cause would entitle an officer to qualified immunity in the First Amendment context.

A. This Court's precedent indicates that arguable probable cause entitles an officer to qualified immunity.

Whether an officer is entitled to qualified immunity always comes down to the same two questions: whether the officer violated a constitutional right, and whether the officer "could have reasonably thought" their actions were "consistent with the rights they are alleged to have violated." *Anderson*, 483 U.S. at 638 (explaining qualified immunity in the Fourth Amendment context); *Reichle*, 566 U.S. at 664 (explaining that an officer is entitled to qualified immunity in the First Amendment context where alleged violations would not have been clear to "a reasonable official") *see also Saucier v. Katz*, 533 U.S. 194, 203 (2001) ("We held that qualified immunity applied in the Fourth Amendment context just as it would for any other claim of official misconduct."), *modified on other grounds by Pearson v. Callahan*, 555 U.S. 223, 236 (2009). In the context of arrests, an officer is entitled to qualified immunity where he "reasonably but mistakenly conclude[d] that probable cause" supported the arrest. *Anderson*, 483 U.S. at 641. The Ninth Circuit's decision is thus contrary to this Court's precedents.

As an initial matter, Fourth Amendment false arrest and First Amendment retaliatory arrest claims share a common element: they both require that a plaintiff show an officer acted without probable cause. *Wesby*, 583 U.S. at 56–58 (granting summary judgment where a "reasonable officer could conclude that there was probable cause to believe" the plaintiffs were committing a crime); *Nieves*, 587 U.S. at 402 ("The plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest."). In both claims, "a particular officer's state of mind is simply irrelevant and provides no basis for invalidating an arrest." *Nieves*, 587 U.S. at 403 (cleaned up). This Court's precedents take any substantive difference between the two claims into account by carving out a limited, additional method of proving a First Amendment violation: a plaintiff may prove a constitutional violation by presenting "objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Id.* at 407. Outside of that exception, Fourth and First Amendment violations both require a plaintiff to show that there was no probable cause for an arrest.

Likewise, a successful claim in either context requires that a plaintiff demonstrate an officer is not entitled to qualified immunity; that is, the plaintiff must show that "every reasonable official would have understood" that the alleged conduct violated the law. *Ashcroft*, 563 U.S. at 741 (Fourth Amendment); *Reichle*, 566 U.S. at 664 (First Amendment). As an extension of this standard, this Court has explained in the Fourth Amendment context that "law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present'" are entitled to qualified immunity. *Hunter v. Bryant*, 502 U.S. 224, 227

(1991) (quoting *Anderson*, 483 U.S. at 641). But again, that rule is derived from the broader rule that "[q]ualified immunity shields" an officer if a "reasonable officer" could have believed the alleged conduct was lawful. *Id.* As noted, the First Amendment shares the "reasonable officer" rule. *Reichle*, 566 U.S. at 664. Nothing in this Court's precedents suggests that the narrower rule—that a reasonable, but mistaken, officer is entitled to qualified immunity—would not be shared between the two claims as well.

Consistency in granting qualified immunity where an officer reasonably, but perhaps mistakenly, makes an arrest serves the purposes of qualified immunity in both Fourth and First Amendment contexts. In both, "it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present." *Anderson*, 483 U.S. at 641. In both, due to the "imprecise nature" of probable cause, "officers will often find it difficult to know how the general standard of probable cause applies in the precise situation encountered." *Wesby*, 583 U.S. 48, 64 (2018) (citation omitted); *Nieves*, 587 U.S. at 403 ("Police officers conduct approximately 29,000 arrests every day—a dangerous task that requires making quick decisions in circumstances that are tense, uncertain, and rapidly evolving." (citation omitted)). Consequently, in both, this Court has "uniformly rejected invitations to probe subjective intent" behind an arrest. *Nieves*, 587 U.S. at 403. Granting qualified immunity where an officer has arguable probable cause is the result of these concerns.

In short, this Court's qualified immunity precedent shows an officer is entitled to qualified immunity when there is arguable probable cause for the officer's actions,

regardless of whether the claim is a Fourth Amendment wrongful arrest claim or a First Amendment retaliatory arrest claim. Here, the district court concluded that Officer Newby had at least arguable probable cause to arrest Bassford, and neither Bassford nor the Ninth Circuit questioned that finding. Officer Newby is thus entitled to qualified immunity for both the Fourth Amendment claim and the First Amendment claim under this Court's precedent.

B. The Ninth Circuit ignored this Court's precedent in concluding Officer Newby was not entitled to qualified immunity.

Despite this Court's precedents, the Ninth Circuit affirmed the denial of qualified immunity to Officer Newby. In doing so, the Ninth Circuit created its own rule by holding that arguable probable cause is of no consequence to a First Amendment retaliatory arrest claim. However, as explained above, this Court's precedents show the opposite and suggest arguable probable cause entitles an officer to qualified immunity in both Fourth and First Amendment claims. As explained below, the Ninth Circuit's reasons for concluding otherwise fail.

1. The Ninth Circuit took the wrong lessons from this Court's precedents.

The Ninth Circuit's primary justification for its holding was its understanding of this Court's decisions in *Nieves*, 587 U.S. at 406, and *Gonzalez v. Trevino*, 602 U.S. 653, 655 (2024). *See* App. at 6a–7a. In the Ninth Circuit's view, because those cases only "discuss probable cause, not arguable probable cause," arguable probable cause had no impact on the analysis. *Id.* at 6a. This misconstrues those cases.

Nieves and *Gonzalez* focused only on whether the plaintiffs had adequately alleged a constitutional violation; that is, both cases analyzed only the first prong of qualified immunity. *Nieves*, 587 U.S. at 408 ("Because there was probable cause to arrest [the plaintiff], his retaliatory arrest claim fails as a matter of law."); *Gonzalez*, 602 U.S. at 658 (holding the plaintiff "provided that sort of evidence" that demonstrated a constitutional violation). Neither case addressed the issue here: whether an officer nevertheless acted reasonably under the circumstances and was therefore entitled to qualified immunity. As discussed above, an officer's entitlement to qualified immunity where he acts "reasonably but mistakenly" is a well-established component of this Court's qualified immunity doctrine. *Wesby*, 583 U.S. at 591. Neither *Nieves* nor *Gonzales* suggest otherwise.

The Ninth Circuit further misconstrued *Nieves* by taking the wrong lessons from its "narrow" exception. *Nieves*, 587 U.S. at 406. That exception exists "for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Id.* Under this exception, the "no-probable-cause requirement" does not apply "when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Nieves*, 587 U.S. at 407. From this, the Ninth Circuit concluded that arguable probable cause could not entitle an officer to qualified immunity because it was conceivable that a plaintiff could show a First Amendment violation "even when an officer has *actual* probable cause." App. at 5a.

But whatever the qualified immunity analysis might be when the *Nieves* exception applies does not explain what the analysis is here, where, as the Ninth Circuit

acknowledged, the *Nieves* exception is not implicated. *See id.* at 14a–19a (discussing the facts at summary judgment). The general rule is that probable cause defeats a claim for retaliatory arrest. *Nieves*, 587 U.S. at 402. A consequence of that rule is that arguable probable cause entitles an officer to qualified immunity. *Wesby*, 583 U.S. at 591. Contrary to the Ninth Circuit's analysis, the existence of the *Nieves* exception does not suggest the same would not hold true in the First Amendment context.

2. The Ninth Circuit's concerns are already addressed under existing law.

The Ninth Circuit's contradiction of existing case law was driven by its belief that "there is good reason to treat Fourth Amendment unlawful arrest claims differently than First Amendment retaliatory arrest claims." App. at 7a. It supported that belief by relying on Justice Gorsuch's partial dissent in *Nieves*, where he explained that a retaliatory arrest claim does not "guard against officers who *lack* lawful authority to make an arrest" but rather "guard[s] against officers who *abuse* their authority by making an otherwise lawful arrest for an unconstitutional *reason*." *Nieves*, U.S. at 414 (Gorsuch, J., concurring in part and dissenting in part). What the Ninth Circuit missed, however, is that *Nieves* already accounts for the difference between Fourth Amendment and First Amendment claims. As explained above, both claims require a plaintiff to "plead and prove the absence of probable cause for the arrest." *Nieves*, 587 U.S. at 402. But to account for the circumstances where an officer "may exploit the arrest power as a means of suppressing speech," *Nieves* allows a First Amendment plaintiff to proceed notwithstanding probable cause if "a plaintiff presents objective evidence that he was arrested when

otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Nieves*, 587 U.S. at 406–07. In other words, the *Nieves* exception addresses the Ninth Circuit's concern by identifying the limited circumstances where an officer's reason for an arrest would be most relevant.

The Ninth Circuit's approach, in contrast, goes too far, and risks injecting an analysis of an officer's subjective intent into the qualified immunity analysis—something this Court has "almost uniformly rejected." *Nieves*, 587 U.S. at 403. By focusing its qualified immunity analysis on an officer's subjective intent—their subjective reason for an arrest—the Ninth Circuit makes the analysis turn on an officer's state of mind. But that state of mind "is simply irrelevant and provides no basis for invalidating an arrest." *Id.* (internal quotation marks omitted). So, the Ninth Circuit's "good reason" for ignoring arguable probable cause is, in fact, a reason this Court has rejected. This Court has already identified an objective standard to assess whether an officer's arrest was retaliatory. The Ninth Circuit erred by trying to create a new one.

3. The Ninth Circuit misidentified clearly established law.

Finally, and more broadly, the Ninth Circuit's understanding of clearly established law at the time of Bassford's arrest missed the mark.

An officer is not entitled to qualified immunity only where, under "existing precedent" at the time of the arrest, "every reasonable official would have understood that what he is doing violates" the right at issue. *Reichle*, 566 U.S. at 664. The Ninth Circuit majority concluded it was clearly established in 2021 that there is a First

Amendment "right not to be arrested in retaliation for engaging in First Amendment activity, notwithstanding the existence of probable cause." App. at 4a.

This misstates the state of the law: the case the Ninth Circuit relied on, *Ballentine*, 28 F.4th at 65, was decided after the arrest in question and only in the context of the *Nieves* exception. *Nieves* itself makes clear that, generally, there is *not* a freestanding right to be free from an arrest supported by probable cause—instead, it requires that a plaintiff plead and prove the absence of probable cause. *Nieves*, 587 U.S. at 403. Indeed, outside of the *Nieves* exception, this Court has "never held" that there is a "right to be free from a retaliatory arrest that is otherwise supported by probable cause." *Reichle*, 566 U.S. at 665.

The Ninth Circuit's misstatement of law relied on a case with facts implicating the *Nieves* exception, which is not an issue in the present case. This misstatement further illustrates the majority's failure to follow this Court's precedent.

4. This Court should grant the petition to clarify this point of law.

Altogether, this Court's qualified immunity decisions indicate that the district court's finding of arguable probable cause should be equally applicable to Bassford's retaliatory arrest and unlawful arrest claims. In its analysis of the unlawful arrest claim, the district court held that even if Officer Newby "reasonably but mistakenly believed [Bassford] knew he was trespassing," Officer Newby nevertheless "acted reasonably by arresting" him. App. at 32a. As the Ninth Circuit dissent explained,

this unchallenged holding established that a "reasonable officer could have believed that he had probable cause to arrest Bassford." *Id.* at 9a. Because Officer Newby could have "reasonably but mistakenly believed" there was probable cause to arrest Bassford, *id.* at 32a, qualified immunity should bar the retaliatory arrest claim. The Ninth Circuit's holding to the contrary is unsupported by this Court's precedent.

Accordingly, this Court should grant the petition and clarify the law regarding the application of qualified immunity to a police officer who has arguable probable cause to make an arrest.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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February 13, 2026

APPENDIX

TABLE OF APPENDICES

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED AUGUST 26, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-5525
D.C. No. 2:22-cv-00572-JAT

GABRIEL BASSFORD,

Plaintiff-Appellee,

v.

KYLER NEWBY,

Defendant-Appellant,

and

CITY OF MESA, *et al.*,

Defendants.

Appeal from the United States District Court
for the District of Arizona
James A. Teilborg, District Judge, Presiding

Submitted August 15, 2025*
San Francisco, California

Filed August 26, 2025

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Appendix A

MEMORANDUM**

Before: RAWLINSON and KOH, Circuit Judges, and FITZWATER, District Judge.***

Dissent by Judge Fitzwater.

Defendant-Appellant Officer Kyler Newby appeals the district court's denial of qualified immunity on summary judgment as to Plaintiff-Appellee Gabriel Bassford's First Amendment retaliatory arrest claim. Orders denying summary judgment motions are usually not immediately appealable under 28 U.S.C. § 1291, but denials of qualified immunity at the summary judgment stage are immediately reviewable "under the collateral order exception to finality." *Ballou v. McElvain*, 29 F.4th 413, 421 (9th Cir. 2022). We have jurisdiction, and we affirm.

The district court did not err in denying qualified immunity to Officer Newby for Bassford's retaliatory arrest claim. "We must affirm the district court's denial of qualified immunity if, resolving all factual disputes and drawing all inferences in [Bassford's] favor, [Officer Newby's] conduct (1) violated a constitutional right (2) that was clearly established at the time of [Officer Newby's] alleged misconduct." *Rosenbaum v. City of San Jose*, 107 F.4th 919, 924 (9th Cir. 2024) (cleaned up).

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

*** The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

Under prong one, the district court correctly concluded that a jury could find Officer Newby arrested Bassford in violation of the First Amendment and without probable cause. Officer Newby's only challenge is that Bassford was not "engaged in a constitutionally protected activity" because there is no right to film police on private property. *Capp v. Cty. of San Diego*, 940 F.3d 1046, 1053 (9th Cir. 2019). Officer Newby's argument fails under established Ninth Circuit precedent. The Ninth Circuit has "recognized that there is a First Amendment right to film matters of public interest." *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018) (cleaned up). The Ninth Circuit has never limited the scope of the First Amendment to categorically exclude this type of activity on private property. Rather, the Ninth Circuit has held that the First Amendment applied to secret audiovisual recording on private property done without the consent of the business owner, *see id.* at 1189, 1203-05, and that the First Amendment applied to secret audiovisual recording of conversations in both public and private places, *see Project Veritas v. Schmidt*, 125 F.4th 929, 937, 942 (9th Cir. 2025) (en banc).

Under prong two, the district court correctly found that "[t]he right at issue is the right to be free from arrest for engaging in First Amendment activity in retaliation for engaging in that activity where there is no probable cause for the arrest," and that this right was clearly established in 2021. "[I]n July 2013, binding Ninth Circuit precedent gave fair notice that it would be unlawful to

arrest Plaintiffs in retaliation for their First Amendment activity, notwithstanding the existence of probable cause." *Ballentine v. Tucker*, 28 F.4th 54, 65 (9th Cir. 2022). *See id.* (holding this "right was first established in our November 2006 decision in *Skoog* [*v. Cnty. of Clackamas*, 469 F.3d 1221, 1235 (9th Cir. 2006)]," and reaffirmed in "our February 2013 decision in *Ford* [*v. City of Yakima*, 706 F.3d 1188, 1194 (9th Cir. 2013)]"). Thus, at the time Officer Newby acted, the law in the Ninth Circuit was clearly established that it would be unlawful to arrest Bassford in retaliation for Bassford's First Amendment activity, notwithstanding the existence of probable cause. Given this clearly established law, it was clearly established that it would be unlawful for Officer Newby to arrest Bassford in retaliation for Bassford's First Amendment activity *without* probable cause.

Officer Newby's arguments to the contrary are unpersuasive. The district court correctly characterized the right at issue. *Ballentine v. Tucker*, 28 F.4th 54, 65 (9th Cir. 2022), held that the right at issue in a First Amendment retaliatory arrest claim is the right not to be arrested in retaliation for engaging in First Amendment activity, notwithstanding the existence of probable cause. Officer Newby contends that the district court's articulation of the right was not sufficiently fact-specific and at too high a level of generality. However, both U.S. Supreme Court and Ninth Circuit precedent articulate the right at a similar level of generality as the district court. *See Reichle v. Howards*, 566 U.S. 658, 665, 132 S. Ct. 2088,

182 L. Ed. 2d 985 (2012) ("[T]he right in question is not *the general right* to be free from retaliation for one's speech, but *the more specific right* to be free from a retaliatory arrest that is otherwise supported by probable cause.") (emphasis added); *Ballentine*, 28 F.4th at 65 ("[I]t would be unlawful to arrest Plaintiffs in retaliation for their First Amendment activity, notwithstanding the existence of probable cause.").

Finally, Officer Newby contends that arguable probable cause should defeat a First Amendment retaliatory arrest claim. Similarly, the dissent would grant Officer Newby qualified immunity because a reasonable officer could have believed that he had probable cause to arrest Bassford. Although the dissent does not use the phrase arguable probable cause, it acknowledges that it raises the same arguable probable clause argument as Officer Newby.

The district court's finding of arguable probable cause on Bassford's Fourth Amendment unlawful arrest claim does not necessarily defeat his First Amendment retaliatory arrest claim. "Although probable cause should generally defeat a retaliatory arrest claim," there is an exception for situations where an officer has probable cause, but typically would not make an arrest. *Nieves v. Bartlett*, 587 U.S. 391, 406, 139 S. Ct. 1715, 204 L. Ed. 2d 1 (2019). Thus, a plaintiff can establish a First Amendment retaliatory arrest claim even when an officer has *actual* probable cause, meaning a finding of *arguable* probable cause would not necessarily defeat the claim.

Further, regardless of whether the *Nieves* exception applies to this case, the U.S. Supreme Court and Ninth Circuit have not imported arguable probable cause from the Fourth Amendment unlawful arrest context into the First Amendment retaliatory arrest context. *See Reichle*, 566 U.S. at 664-65; *Ballentine*, 28 F.4th at 65. Arguable probable cause as asserted by Officer Newby and the dissent derives from Fourth Amendment unlawful arrest claims. *See Rosenbaum v. Washoe Cnty.*, 663 F.3d 1071, 1076 (9th Cir. 2011) ("In the context of an unlawful arrest, then, the two prongs of the qualified immunity analysis can be summarized as: (1) whether there was probable cause for the arrest; and (2) whether it is *reasonably arguable* that there was probable cause for arrest—that is, whether reasonable officers could disagree as to the legality of the arrest[.]"); *D.C. v. Wesby*, 583 U.S. 48, 65, 138 S. Ct. 577, 199 L. Ed. 2d 453 (2018) ("Even assuming the officers lacked actual probable cause to arrest the partygoers, the officers are entitled to qualified immunity because they reasonably but mistakenly concluded that probable cause was present.") (cleaned up). The two recent U.S. Supreme Court cases cited by the dissent examining First Amendment retaliatory arrest claims discuss probable cause, not arguable probable cause. *See Nieves*, 587 U.S. at 406 ("Although probable cause should generally defeat a retaliatory arrest claim, a narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so."); *Gonzalez v. Trevino*, 602 U.S. 653, 655, 144 S. Ct. 1663, 219 L. Ed. 2d 332 (2024)

(per curiam) ("[A]s a general rule, a plaintiff bringing a retaliatory-arrest claim must plead and prove the absence of probable cause for the arrest.") (internal quotation marks and citation omitted).

As the U.S. Supreme Court and Ninth Circuit have not yet imported arguable probable cause from the Fourth Amendment unlawful arrest context into the First Amendment retaliatory arrest context, we decline to do so. Moreover, there is good reason to treat Fourth Amendment unlawful arrest claims differently than First Amendment retaliatory arrest claims. "The point of [a First Amendment retaliatory arrest] claim isn't to guard against officers who *lack* lawful authority to make an arrest. Rather, it's to guard against officers who *abuse* their authority by making an otherwise lawful arrest for an unconstitutional *reason*." *Nieves*, 587 U.S. at 414 (Gorsuch, J., concurring).

AFFIRMED.

FITZWATER, District Judge, dissenting:

Because I would hold that defendant-appellant Kyler Newby ("Officer Newby") is entitled to qualified immunity from plaintiff-appellee Gabriel J. Bassford's ("Bassford's") First Amendment retaliatory arrest claim, I respectfully dissent.

To recover on his First Amendment retaliatory arrest claim, Bassford must plead and prove the absence of probable cause for his arrest. *Nieves v. Bartlett*, 587 U.S. 391, 404, 139 S. Ct. 1715, 204 L. Ed. 2d 1 (2019). The "[Supreme] Court has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause." *Reichle v. Howards*, 566 U.S. 658, 664-65, 132 S. Ct. 2088, 182 L. Ed. 2d 985 (2012). As recently as 2024, after the October 9, 2021 incident at issue in this case, the Supreme Court again recognized in the context of a First Amendment retaliation claim "that, as a general rule, a plaintiff bringing a retaliatory-arrest claim 'must plead and prove the absence of probable cause for the arrest.'" *Gonzalez v. Trevino*, 602 U.S. 653, 655, 144 S. Ct. 1663, 219 L. Ed. 2d 332 (2024) (per curiam) (quoting *Nieves*, 587 U.S. at 402).[1] Where there is probable cause

1. The reason this is a "general rule" is because there is a narrow exception "when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Nieves*, 587 U.S. at 407; *see also Gonzalez*, 602 U.S. at 655 ("At the same time, we recognized a narrow exception to that rule.").

to arrest a plaintiff, "his retaliatory arrest claim fails as a matter of law." *Nieves*, 587 U.S. at 408 (addressing First Amendment-based retaliation claim).

Officer Newby is entitled to qualified immunity unless Bassford can show that Officer Newby violated Bassford's constitutional right and that the right was clearly established at the time of the challenged conduct. *See, e.g., Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011). "[P]olice officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue." *Kisela v. Hughes*, 584 U.S. 100, 104, 138 S. Ct. 1148, 200 L. Ed. 2d 449 (2018) (internal quotation marks omitted). Bassford must demonstrate "that every reasonable official would have understood that what he is doing violates" the law. *al-Kidd*, 563 U.S. at 741.

Even if all factual disputes are resolved, and all reasonable inferences are drawn, in Bassford's favor, a reasonable officer could have believed that he had probable cause to arrest Bassford. Probable cause could have been based on the assertions of the Circle K (private property owner's) security officer that Bassford was trespassing and loitering (i.e., without considering whether Bassford could have observed, or did observe, the posted "NO TRESPASSING" sign), and the security officer's suggestions that Bassford could be arrested for these

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Bassford cites this exception in his response brief, Appellee Br. 24-25 n.8, but he does not allege that it applies in this case.

violations. In other words, a reasonable officer could have believed from what the property owner's security officer said that he had probable cause to arrest Bassford for trespassing and loitering and that his arrest of Bassford was lawful.[2] Officer Newby is therefore entitled to qualified immunity as a matter of law.

Moreover, in deciding that Officer Newby is entitled to qualified immunity on Bassford's false arrest claim, the district court *did* correctly hold that it was objectively reasonable for Officer Newby to believe that he had probable cause to arrest Bassford. Although the claims are different, I have found no distinction in the case law between what is required for probable cause for purposes of a false arrest claim and what is required for purposes of a First Amendment retaliatory arrest claim.

Accordingly, I respectfully dissent from the decision to affirm the denial of qualified immunity for Officer Newby as to Bassford's First Amendment retaliatory arrest claim.

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2. Officer Newby raised this argument on appeal. Appellant Br. 24-25 ("Based on *Nieves, supra*, an officer is entitled to qualified immunity if 'a reasonable officer *could have believed*' that probable cause was present.") (some citations omitted). And the individual defendants, including Officer Newby, preserved this argument in the district court. Defs.' Mot. Summ. J. 12, ER at 199 ("In other words, an officer is entitled to qualified immunity on an unlawful-arrest claim if a reasonable officer *could have believed* that probable cause was present.") (citation and internal quotation marks omitted); *id.* ("Defendants are also entitled to immunity based on arguable probable cause.") (citation omitted); *id.* at 11, ER at 198 ("Further, Defendants had a reasonable belief that probable cause existed for criminal trespass.").

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, FILED AUGUST 15, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-22-00572-PHX-JAT (ESW)

GABRIEL BASSFORD,

Plaintiff,

v.

CITY OF MESA, *et al.*,

Defendants.

Filed August 15, 2024

ORDER

Pro se Plaintiff Gabriel Bassford brought this civil rights action pursuant to 42 U.S.C. § 1983. Defendants City of Mesa, Sergeant Joseph Adams, and Officers Kyler Newby, Phillip Clark, and Michael Destefino move for summary judgment on the merits of Plaintiff's First and Fourth Amendment and based on qualified immunity. (Doc. 77.) Plaintiff was informed of his rights and obligations to respond pursuant to *Rand v. Rowland*, 154 F.3d 952, 962 (9th Cir. 1998) (en banc) (Doc. 84), and he opposes the Motion. (Doc. 97.) Defendants filed a Reply, Plaintiff filed a

Sur-Reply, and Defendants filed a Response to Plaintiff's Sur-Reply. (Docs. 102, 110, 112.)

The Court will grant in part and deny in part the Motion for Summary Judgment.

I. Background

As relevant here, in the First Amended Complaint, Plaintiff alleges that Defendants Newby and Clark unreasonably seized and searched him and unlawfully arrested him for filming police officers' activity at a convenience store. (First Amended Complaint (FAC), Doc. 9, ¶¶ 83-85.) Plaintiff asserts Defendants Newby, Clark, Destefino, and Adams retaliated against Plaintiff for exercising his First Amendment right to film police officers in the course of their public duties. (*Id.* ¶¶ 93-94.) Plaintiff claims Defendants Newby, Clark, Destefino, and Adams unlawfully imprisoned him in violation of the Fourth Amendment. (*Id.* ¶¶ 103-105.) Plaintiff contends the City of Mesa has an unconstitutional written policy—DPM 2.4.10—that resulted in his false imprisonment. (*Id.* ¶¶ 146-147.)

On screening the First Amended Complaint under 28 U.S.C. § 1915(e), the Court determined that Plaintiff had stated the following claims against Defendants Newby, Clark, Destefino, and Adams: a Fourth Amendment false arrest claim in Count Two, a First Amendment claim freedom of expression claim in Count Three, and a Fourth

Amendment unlawful imprisonment claim in Count Four.[1] (Doc. 13 at 12.) The Court also determined that Plaintiff stated a claim in Count Eight against the City of Yuma based on the allegedly unlawful policy. (*Id.* at 14.) The Court directed Defendants to answer the claims. (*Id.* at 12, 14.) The Court dismissed the remaining claims and Defendants. (*Id.* at 11-15.)

II. Summary Judgment Standard

A court must grant summary judgment "if 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); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The movant bears the initial responsibility of presenting the basis for its motion and identifying those portions of the record, together with affidavits, if any, that it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323.

If the movant fails to carry its initial burden of production, the nonmovant need not produce anything. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Co., Inc.*, 210 F.3d 1099, 1102-03 (9th Cir. 2000). But if the movant meets its initial responsibility, the burden shifts to the nonmovant to demonstrate the existence of a factual dispute and that the fact in contention is material, i.e., a

1. The Court determined that Plaintiff stated a claim against another officer, Officer Rangel. Plaintiff failed to serve Officer Rangel, and on February 27, 2024, the Court dismissed Rangel. (Doc. 103.)

fact that might affect the outcome of the suit under the governing law, and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *see Triton Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995). The nonmovant need not establish a material issue of fact conclusively in its favor, *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968); however, it must "come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (internal citation omitted); *see* Fed. R. Civ. P. 56(c)(1).

At summary judgment, the judge's function is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. In its analysis, the court must believe the nonmovant's evidence and draw all inferences in the nonmovant's favor. *Id.* at 255. The court need consider only the cited materials, but it may consider any other materials in the record. Fed. R. Civ. P. 56(c)(3).

III. Facts

A. Undisputed Facts

On October 9, 2021, Mesa Police Department officers responded to a call by John Dreschler, a Circle K security guard, to respond to a Circle K location to investigate

another matter. (Defs.' Statement of Facts (DSOF), Doc. 81 at 1 ¶ 1.) While Mesa Police Officers met with Dreschler in the Circle K parking lot, Plaintiff and three other individuals in Plaintiff's vehicle saw the Mesa Police Officers in the parking lot and decided to film the police activity. (*Id.* ¶ 2.)

Plaintiff parked his vehicle on a nearby street, and Plaintiff and the other three occupants walked toward the Circle K. (*Id.*) Plaintiff walked onto the Circle K driveway and into the Circle K parking lot, all while filming the Mesa Police Officers. (*Id.*) Defendant Newby told Dreschler, "you have six new customers out here. These guys are waiting to buy something with all their cameras." (Pl.'s Controverting Statement of Facts (PCSOF), Doc. 98 at 2 ¶ 6.) Dreschler noticed multiple individuals standing within the Circle K parking lot and holding cameras or cell phones. (*Id.*) Drechsler asked who the individuals recording them were. (*Id.* ¶ 7.) Defendant Newby told Dreschler that they were First Amendment "auditors" and not customers. (*Id.*) Dreschler "agreed" with Defendant Newby's "assessment" that the individuals filming them were not acting like Circle K customers and told Defendant Newby, "You can trespass them if you want to." (*Id.*) Defendant Newby responded, "Oh. You want them trespassed," and told Defendant Clark that Dreschler "want[ed] them trespassed." (*Id.*) Defendant Newby instructed Clark to "seize" the individuals who were standing in the Circle K parking lot and filming the officers. (*Id.*)

Plaintiff was facing and filming towards the store's exterior east wall and was roughly 46 feet from the Circle

K "NO TRESPASSING" sign on the store's east wall. (DSOF ¶ 8.) Defendant Newby approached Plaintiff in the Circle K parking lot. (*Id.* ¶ 9.) Based on Plaintiff's location in the Circle K parking lot and proximity to the "NO TRESPASSING" sign, Defendant Newby determined that the "NO TRESPASSING" sign provided Plaintiff with reasonable notice that he was prohibited from entering onto Circle K's private property to film from the convenience store's commercial parking lot and property. (DSOF ¶ 10.) Based on Drechsler's determination that the individuals filming on Circle K property were trespassing, the proximity of Plaintiff to the "NO TRESPASSING" sign as perceived by Defendant Newby, Newby's understanding that Plaintiff was trespassing on Circle K's private property and not acting as a Circle K customer, and Newby's law enforcement training and experience regarding investigations involving criminal trespass, Newby believed he possessed reasonable suspicion and probable cause that Plaintiff had violated Arizona's criminal trespass law. (*Id.* ¶ 11.) From the location where Plaintiff stood when approached by Defendant Newby, approximately 46 feet from the "NO TRESPASSING" sign, Defendant Newby believed the "NO TRESPASSING" sign was easy to recognize and read, and pursuant to his law enforcement training and experience, that it provided "reasonable notice" prohibiting non-customers from entry onto the Circle K property without prior permission from Circle K. (*Id.* ¶ 13.) Defendant Newby understood that Plaintiff did not have prior permission from Circle K to enter the Circle K property as a non-customer for the purpose of filming or recording from the private property. (*Id.* ¶ 14.)

Defendant Newby placed Plaintiff in handcuffs, walked Plaintiff over to the nearby curb, and asked Plaintiff to sit on the curb. (*Id.* ¶ 15.) Defendant Destefino arrived after Defendant Newby placed Plaintiff in handcuffs and just after Defendant Newby walked Plaintiff to the storefront's curb where Plaintiff sat down. (*Id.* ¶ 17.) Defendant Newby asked Defendant Destefino to determine Plaintiff's identity, informed Defendant Destefino and Plaintiff that Plaintiff was detained for trespassing, and left the immediate vicinity to continue the investigation. (*Id.* ¶ 18.) Plaintiff informed Defendant Destefino that he would like to speak with a supervisor before identifying himself because there was no probable cause for his seizure, and Defendant Destefino informed Plaintiff that his request to speak with a supervisor was "okay with him" and that a supervisor was on his way. (PCSOF ¶ 19.)

Defendant Clark, who was investigating other individuals also trespassing on Circle K's property on the opposite side (north facing side) of the Circle K store -- did not have contact with Plaintiff and did not converse with Plaintiff on the night of this incident. (DSOF ¶ 20.) Defendant Adams responded to the Circle K after Plaintiff was detained in handcuffs and while Plaintiff was sitting on the storefront's curb near the west-facing wall. (*Id.* ¶ 21.) Defendant Adams learned from Defendant Newby that the Circle K store's representative, Security Officer Drechsler, had determined that Plaintiff and the other individuals in the Circle K parking lot were determined by the Circle K Security Officer to be trespassing on Circle K property because they were not acting as customers. (*Id.* ¶ 22.) Defendant Newby determined that Plaintiff

would be transported at the Mesa Holding Facility where he would be booked for violating Criminal Trespass. (*Id.* ¶ 23.)

Defendant Destefino drove Plaintiff from the Circle K property to Mesa Police Department's Holding Facility, where staff booked Plaintiff for criminal trespass in the third degree, in violation of Arizona Revised Statutes § 13-1502(A)(1). (*Id.*) The next day, Plaintiff was charged in Mesa Municipal Court with one count of trespass in the third-degree.[2] Plaintiff appeared before a judge and had a lawyer representing him during the hearing. (*Id.* ¶ 24; Decl. of Joseph Adams, Doc. 82-13 at 4 ¶ 14.) On November 9, 2022, the charge was dismissed.[3]

B. Plaintiff's Additional Facts

Circle K's "No Trespassing" sign states, "NO TRESPASSING—A.R.S. 13-1502" and does not specifically prohibit the public from video recording on the store's premises. (PSOF ¶ 35.) The "No Trespassing" sign on Circle K's exterior east wall was to the east of the location Plaintiff was filming, hidden 46 feet away above a blue Amazon Pick Up Box, and was not legible from that distance. (*Id.* ¶ 37.)

When Defendant Newby seized Plaintiff for trespassing, he asked Plaintiff if he had seen Circle K's

2. *See* https://ecourt.mesaaz.gov/DispositionReport?cn=2021063632&ds=Cms (last accessed July 30, 2024).

3. *See id.*

"No Trespassing" sign. (PSOF ¶ 28.) Plaintiff stated that he had not seen Circle K's "No Trespassing" signs, that he had not been asked to leave, and that he would have been willing to leave the store's property if he had been asked. (*Id.*) Plaintiff was not able to continue recording freely and unencumbered because he was detained and handcuffed by Defendant Newby. (*Id.* ¶ 30.) Defendant Newby took possession of Plaintiff's video camera until he sat Plaintiff on the curb and placed Plaintiff's recording device in Plaintiff's lap before turning Plaintiff's video camera off. (*Id.*) Defendant Adams spoke with Plaintiff, and Plaintiff informed Defendants Adams and Destefino that he was being unlawfully detained because he had not violated any laws, and that he was willing to identify himself under the threat of going to jail, if that was what was required. (*Id.* ¶ 31.) Plaintiff also informed Defendant Newby that he was willing to identify himself to avoid being placed in jail. (*Id.*)

In his Sur-Reply, Plaintiff purports to add facts regarding the City of Mesa's Trespass Enforcement Program. (Doc. 110 at 2.) Plaintiff asserts the TEP was created specifically for businesses to help with incidents of trespassing and loitering during non-business hours and mandates that "no trespassing signs," with the ARS code printed on them, be posted in highly visible locations on the property. (*Id.*) According to Plaintiff, under the TEP, if a business is open, a police officer must contact someone at the business to verify that an individual is not a customer or otherwise allowed to be on the property before making an arrest for trespassing. (*Id.*)

IV. Claims Regarding Arrest (Counts Two and Four)

A. Defendant Clark

As an initial matter, the Court addresses Plaintiff's claims against Defendant Clark. It is undisputed that Defendant Clark, who investigating other individuals on Circle K's property on the opposite side (north facing side) of the Circle K store, had no contact with Plaintiff on the night of the incident. There is no evidence that Defendant Clark was personally involved in stopping or arresting Plaintiff, and Plaintiff does not address Defendants' arguments that Plaintiff cannot prevail on a § 1983 claim against Defendant Clark. The Court will therefore grant Defendants' Motion for Summary Judgment as to Defendant Clark.

B. Initial Stop

1. Legal Standards

Under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), police officers may conduct a brief, investigative stop of an individual when they have reasonable suspicion that the "person apprehended is committing or has committed a criminal offense." *Arizona v. Johnson*, 555 U.S. 323, 326, 129 S. Ct. 781, 172 L. Ed. 2d 694 (2009). Reasonable suspicion requires more than "inchoate and unparticularized suspicion or [a] hunch"; the officer must have "some minimal level of objective justification" for making the stop. *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L.

Ed. 2d 1 (1989) (internal citations omitted). This level of suspicion is "considerably less than proof of wrongdoing by a preponderance of the evidence." *Id.*; *United States v. Montoya de Hernandez*, 473 U.S. 531, 541, 105 S. Ct. 3304, 87 L. Ed. 2d 381 (1985) ("The 'reasonable suspicion' standard . . . effects a needed balance between private and public interests when law enforcement officials must make a limited intrusion on less than probable cause.").

The Court must examine the "totality of the circumstances" to determine whether a detaining officer has a "particularized and objective basis" for suspecting criminal wrongdoing. *United States v. Arvizu*, 534 U.S. 266, 273, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002). "All relevant factors must be considered in the reasonable suspicion calculus—even those factors that, in a different context, might be entirely innocuous." *United States v. Fernandez-Castillo*, 324 F.3d 1114, 1117 (9th Cir. 2003); *see United States v. Manzo-Jurado*, 457 F.3d 928, 935 (9th Cir. 2006) ("Seemingly innocuous behavior does not justify an investigatory stop unless it is combined with other circumstances that tend cumulatively to indicate criminal activity.").

During a *Terry* stop motivated by reasonable suspicion, the officer may ask investigatory questions, but the "scope of the detention must be carefully tailored to its underlying justification." *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983). "[I]t is well established that an officer may ask a suspect to identify himself during a *Terry* stop." *Hiibel v. Sixth Jud. Dist. Ct. of Nevada, Humboldt Cnty.*, 542 U.S. 177, 178, 124 S. Ct. 2451, 159 L. Ed. 2d 292 (2004).

2. Analysis

In his Response, Plaintiff does not address whether Defendants had reasonable suspicion to stop him. It is undisputed that Defendant Newby was investigating possible criminal trespass in the third degree, in violation of Arizona Revised Statutes, § 13-1502. Section 13-1502 provides, "A person commits criminal trespass in the third degree by: Knowingly entering or remaining unlawfully on any real property after a reasonable request to leave by a law enforcement officer, the owner or any other person having lawful control over such property, or reasonable notice prohibiting entry." Ariz. Rev. Stat. § 13-1502. "Enter or remain unlawfully" means "an act of a person who enters or remains on premises when the person's intent for so entering or remaining is not licensed, authorized or otherwise privileged . . . ." Ariz. Rev. Stat. § 13-1501(2). "Knowingly" means "with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or believes that the person's conduct is of that nature or that the circumstance exists. It does not require any knowledge of the unlawfulness of the act or omission." Ariz. Rev. Stat. § 13-105(10)(b); *see State v. Malloy*, 131 Ariz. 125, 639 P.2d 315, 320 (Ariz. 1981) (stating that prosecution must prove not only that the defendant knowingly, voluntarily, entered or remained, but it must also prove that the defendant was aware that his entry or remaining was unlawful); *State v. Kozan*, 146 Ariz. 427, 706 P.2d 753, 755 (Ariz. Ct. App. 1985) (noting the defendant's awareness that entry or remaining was unlawful is a distinct element from "knowingly" entering or remaining).

There is no evidence that any law enforcement or other person having control over the Circle K property asked Plaintiff to leave to the property. Therefore, the question is whether Defendants had reasonable suspicion to believe that Plaintiff knowingly entered or remained unlawfully on the property despite having reasonable notice prohibiting entry. Assuming the truth of Plaintiff's facts, he could not and did not see the "No Trespassing" sign on the Circle K wall before he entered the parking lot.

According to Plaintiff's facts, Security Officer Dreschler agreed with Defendant Newby that Plaintiff, along with the other individuals who were filming the officers, was not acting like a Circle K customer and told Defendant Newby that he could "trespass" Plaintiff if Defendant Newby "want[ed] to." (PCSOF ¶ 7.) It is irrelevant for Fourth Amendment purposes that Plaintiff did not or could not see the "No Trespassing" sign; Defendants could not have known when they stopped Plaintiff that he could not see the sign, and the sign gave the public reasonable notice that trespassing on the property was prohibited. In addition, Defendants could lawfully ask Plaintiff to identify himself, which Plaintiff declined to do until he could speak to a supervisor. On these facts, Defendants had reasonable suspicion to believe Plaintiff was trespassing on the Circle K property, and their initial stop of Plaintiff did not violate the Fourth Amendment. There is no genuine dispute of material fact regarding whether Defendants had reasonable suspicion to stop Plaintiff.

Appendix B

C. Probable Cause for Arrest/False Arrest

1. Legal Standards

The Fourth Amendment requires an arrest to be supported by probable cause. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001). "'A police officer may make a warrantless arrest when the 'officer has probable cause to believe that the person to be arrested has committed a felony, whether or not a felony, in fact, has been committed.'" *Blankenhorn v. City of Orange*, 485 F.3d 463, 471 (9th Cir. 2007) (quoting *Peng v. Mei Chin Penghu*, 335 F.3d 970, 976 (9th Cir. 2003)). To determine whether an officer had probable cause for an arrest, the Court "'examine[s] the events leading up to the arrest, and then decide[s] whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause.'" *O'Doan v. Sanford*, 991 F.3d 1027, 1039 (9th Cir. 2021) (quoting *District of Columbia v. Wesby*, 583 U.S. 48, 56, 138 S. Ct. 577, 199 L. Ed. 2d 453 (2018); *see also Blankenhorn*, 485 F.3d at 471 ("The test for whether probable cause exists is whether at the moment of arrest the facts and circumstances within the knowledge of the arresting officers and of which they had reasonably trustworthy information were sufficient to warrant a prudent [person] in believing that the petitioner had committed or was committing an offense.'") (quoting *United States v. Jensen*, 425 F.3d 698, 704 (9th Cir. 2005), *cert. denied*, 547 U.S. 1056, 126 S. Ct. 1664, 164 L. Ed. 2d 398 (2006)).

Appendix B

"Probable cause is 'a fluid concept' that 'deals with probabilities and depends on the totality of the circumstances,' which cannot 'readily, or even usefully, [be] reduced to a neat set of legal rules.'" *O'Doan*, 991 F.3d at 1039 (quoting *Wesby*, 583 U.S. at 57). It "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Wesby*, 583 U.S. at 57 (quoting *Illinois v. Gates*, 462 U.S. 213, 243-44 n.13, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)). This is not a high bar. *Id.* (quoting *Kaley v. United States*, 571 U.S. 320, 338, 134 S. Ct. 1090, 188 L. Ed. 2d 46 (2014)) (quotation marks omitted). "Probable cause exists when, under the totality of the circumstances known to the arresting officers (or within the knowledge of the other officers at the scene), a prudent person would believe the suspect had committed a crime." *Dubner v. City & County of San Francisco*, 266 F.3d 959, 966 (9th Cir. 2001) (citation omitted).

"Because probable cause must be evaluated from the perspective of 'prudent [people], not legal technicians,' an officer need not have probable cause for every element of the offense." *Blankenhorn v. City of Orange*, 485 F.3d 463, 472 (9th Cir. 2007) (quoting *Gasho v. United States*, 39 F.3d 1420, 1428 (9th Cir. 1994)). But "'when specific intent is a required element of the offense, the arresting officer must have probable cause for that element in order to reasonably believe that a crime has occurred." *Id.* (quoting *Gasho v. United States*, 39 F.3d 1420, 1428 (9th Cir. 1994)) (citations omitted); *see State v. Malloy*, 131 Ariz. 125, 639 P.2d 315, 320 (Ariz. 1981) (to convict a defendant of criminal trespass, the state must prove that the defendant understood the illegality of his entry or remaining).

"False arrest, a species of false imprisonment, is the detention of a person without his consent and without lawful authority." *Donahoe v. Arpaio*, 869 F. Supp. 2d 1020, 1064 (D. Ariz. 2012) (quoting *Reams v. City of Tucson*, 145 Ariz. 340, 701 P.2d 598, 601 (Ariz. Ct. App. 1985)), *aff'd sub nom. Stapley v. Pestalozzi*, 733 F.3d 804 (9th Cir. 2013). Under Arizona law, false imprisonment and false arrest consist of non-consensual detention of a person "without lawful authority." *Slade v. City of Phoenix*, 112 Ariz. 298, 541 P.2d 550, 552 (Ariz. 1975). "Reflective of the fact that false imprisonment consists of detention without legal process, a false imprisonment ends once the victim becomes held *pursuant to such process*—when, for example, he is bound over by a magistrate or arraigned on charges." *Wallace v. Kato*, 549 U.S. 384, 389, 127 S. Ct. 1091, 166 L. Ed. 2d 973 (2007) (emphasis in original). To prevail on a § 1983 claim for false arrest, Plaintiff must show that Defendants made the arrest without probable cause or other justification. *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1097 (9th Cir. 2013).

2. Analysis

The Court first addresses Plaintiff's new arguments in his Sur-Reply regarding the TEP. Plaintiff argues that the TEP provides that "No Trespassing" signs are only applicable during a store's non-business hours and if the business is open to the general public, an inquiry must be made as to whether an individual is a customer of the business or not "before trespassing could apply." (Doc. 110 at 2.) This argument is meritless. The Mesa Trespassing Enforcement Program is not a law. Rather,

as Plaintiff notes, it was created to assist businesses with incidents of trespassing and loitering that occur when businesses are closed.[4] The program allows business owners to register their property and permits officers to "trespass an individual from [the] property, who does not have a legitimate reason to be there when the business is closed, without contacting the business owner or property manager first." The program does not limit the applicability of Arizona Revised Statutes § 13-1502 to when businesses are closed.

In their Motion for Summary Judgment, Defendants argue Defendant Newby had probable cause to arrest Plaintiff. Defendants provide a Declaration of Defendant Newby, in which Newby avers that he could easily read the "No Trespassing" sign when he faced the unobstructed wall, as Plaintiff was. (Decl. of Kyler Newby, Doc. 82-1 at 6 ¶ 26.) Defendant Newby declares that he told Plaintiff and another individual, "Hey, go ahead and sit down for us, guys. You're lawfully detained. You're being trespassed. Go ahead and sit down." (*Id.* ¶ 28.) Defendant Newby avers that based on his training and experience, he believed he had probable cause to charge Plaintiff with criminal trespass in the third degree based on his arrival at the Circle K before any individuals gathered on the sidewalks; Security Officer Dreschler's "subsequent determination that the non-customers filming in the parking lot were trespassers"; the "reasonable notice prohibiting trespassers from entry onto the property by

4. *See* https://www.mesaazpolice.gov/crime-safety/trespass-enforcement-program (last visited July 26, 2024).

means of the clearly posted and legible" "No Trespassing" signs; and Plaintiff's proximity to the unobstructed "No Trespassing" sign. (*Id.* ¶¶ 32-33.) Defendant Newby further avers that he believed Plaintiff "knowingly entered the Circle K property as a trespasser despite the above-referenced reasonable notice provided" and that because he walked onto the property at the same approximate time as other individuals, he believed they were all coordinating their efforts together, and that they likely got that close and onto Circle K's private property because they knew that one or more of their associates was currently being investigated for trespassing." (*Id.* ¶ 34.)

In his Response, Plaintiff contends Defendant Newby arrested him without probable cause because Newby "understood" that Plaintiff did not see Circle K's "No Trespassing" signs and that Plaintiff "was not provided a reasonable request to leave" before Newby placed Plaintiff under arrest. (Doc. 97 at 6.) Plaintiff contends he entered the Circle K property during business hours and "was not looking for" a "No Trespassing" sign because he "believed he had [a] First Amendment [right] to film police activity in the general public." (*Id.* at 7.) Plaintiff asserts that when he told Defendant Newby that he had not seen the "No Trespassing" sign, that he had not been asked to leave the property, and that he was willing to leave the property, Defendant Newby "understood . . . that he no longer possessed reasonable suspicion or probable cause to arrest Plaintiff" for criminal trespass. (*Id.*)

Assuming the truth of Plaintiff's facts, Plaintiff did not and could not see the "No Trespassing" sign on the

Circle K wall and did not believe he was trespassing. After Plaintiff was detained, Defendant Newby asked Plaintiff if he had seen Circle K's "No Trespassing" sign. Plaintiff told Defendant Newby that he had not seen the "No Trespassing" sign, that he had not been asked to leave, and that he was willing to leave the store's property if he had been asked. On these facts, a reasonable jury could conclude that Defendant Newby did not have sufficient knowledge or information that would lead a prudent person to believe that Plaintiff had *knowingly* entered or remained on the Circle K property despite having reasonable notice that his entry or remaining there was prohibited.

There are genuine disputes of material fact regarding whether Defendant Newby had probable cause to arrest Plaintiff. The Court will therefore consider whether Defendant Newby is entitled to qualified immunity with respect to Plaintiff's Fourth Amendment and false arrest claims.

D. Qualified Immunity

1. Legal Standards

Government officials enjoy qualified immunity from civil damages unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). In deciding if qualified immunity applies, the Court must determine: (1) whether the facts alleged show

the defendant's conduct violated a constitutional right; and (2) whether that right was clearly established at the time of the violation. *Pearson v. Callahan*, 555 U.S. 223, 230-32, 235-36, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).

Whether a right was clearly established must be determined "in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). The plaintiff has the burden to show that the right was clearly established at the time of the alleged violation. *Sorrels v. McKee*, 290 F.3d 965, 969 (9th Cir. 2002); *Romero v. Kitsap Cnty.*, 931 F.2d 624, 627 (9th Cir. 1991). "[T]he contours of the right must be sufficiently clear that at the time the allegedly unlawful act is [under]taken, a reasonable official would understand that what he is doing violates that right;" and "in the light of pre-existing law the unlawfulness must be apparent." *Mendoza v. Block*, 27 F.3d 1357, 1361 (9th Cir. 1994) (quotations omitted). Regardless of whether the constitutional violation occurred, the officer should prevail if the right asserted by the plaintiff was not "clearly established" or the officer could have reasonably believed that his particular conduct was lawful. *Romero*, 931 F.2d at 627.

2. Parties' Arguments

Defendants argue that Defendant Newby is entitled to qualified immunity because "no published opinion from the Supreme Court or the Ninth Circuit has held that conduct similar to that of Defendants was violative of Plaintiff's stated Fourth Amendment rights under the objectively

reasonable standard and based on circumstances closely analogous to this case." (Doc. 77 at 11.) Defendants contend that "[e]ven if a plaintiff is arrested in the absence of probable cause, an officer is still immune from an unlawful-arrest claim if it was *reasonably arguable* that there was probable cause for arrest." (*Id.* at 12) (quotation marks and citation omitted). In other words, Defendants assert, an "officer is entitled to qualified immunity on an unlawful-arrest claim if a reasonable officer *could have believed* that probable cause was present." (*Id.*) (quotation marks and citation omitted).

In his Response, Plaintiff argues at length that this Court should abandon the qualified immunity doctrine. (Doc. 97 at 9-19.) Plaintiff also asserts that Defendant Newby is not entitled to qualified immunity because the laws that Newby violated are clearly established. (*Id.* at 19.) That is, Plaintiff contends that because Defendant Newby violated Plaintiff's Fourth Amendment rights, and his Fourth Amendment rights were clearly established at the time, Defendant Newby is not entitled to qualified immunity.

3. Analysis

The Court rejects out of hand Plaintiff's argument that the Court should disregard the qualified immunity doctrine. Neither the Supreme Court nor the Ninth Circuit has overturned decades of qualified immunity jurisprudence on the grounds Plaintiff asserts.

Plaintiff fails to substantively respond to Defendants' arguments regarding qualified immunity and misunderstands the qualified immunity test. As discussed above, whether Defendant Newby violated Plaintiff's Fourth Amendment rights is only the first part of the test.

The Ninth Circuit has held that "qualified immunity applies when it was objectively reasonable for an officer to believe he or she had probable cause to make the arrest." *Hill v. City of Fountain Valley*, 70 F.4th 507, 516 (9th Cir. 2023) (citing *Rosenbaum v. Washoe County*, 663 F.3d 1071, 1076 (9th Cir. 2011). "Framing the reasonableness question somewhat differently, the question in determining whether qualified immunity applies is whether all reasonable officers would agree that there was no probable cause in this instance." *Rosenbaum*, 663 F.3d at 1078 (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149, (2011)).

Here, even if Defendant Newby did not have probable cause to arrest Plaintiff, "not all reasonable police officers would believe that they lacked probable cause to make the arrest." *Hill*, 70 F.4th at 516. If Defendant Newby reasonably but mistakenly believed Plaintiff knew he was trespassing, then based on the totality of the circumstances, Newby acted reasonably by arresting Plaintiff. *See Hill v. California*, 401 U.S. 797, 804, 91 S. Ct. 1106, 28 L. Ed. 2d 484 (1971) (finding that officers acted reasonably based on the totality of the circumstances, including a good-faith, but ultimately mistaken, belief that they were arresting the correct suspect). In short, qualified immunity applies because Plaintiff has not

offered any factually analogous case "clearly establishing" that Defendant Newby's actions were unlawful under these circumstances. *Hill*, 70 F.4th at 517. The Court concludes that Defendant Newby is entitled to qualified immunity with respect to Plaintiff's Fourth Amendment claim.

For the foregoing reasons, the Court will grant Defendants' Motion for Summary Judgment as to Plaintiff's Fourth Amendment and false arrest claims.

V. *Monell* Claim

Section 1983 imposes liability on any "person" who violates an individual's federal rights while acting under color of state law. Congress intended municipalities and other local government units to be included among those persons to whom § 1983 applies. *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 689-90, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). However, "a municipality may not be sued under § 1983 solely because an injury was inflicted by its employees or agents." *Long v. County of L.A.*, 442 F.3d 1178, 1185 (9th Cir. 2006). The actions of individuals may support municipal liability only if the employees were acting pursuant to an official policy or custom of the municipality. *Botello v. Gammick*, 413 F.3d 971, 978-79 (9th Cir. 2005).

In the First Amended Complaint, Plaintiff alleges that Mesa Police Department Policy (DPM) 2.4.10(3)(D) is unlawful because the state statutes it "cites for its authorities" "allow exceptions to due process of law

regarding arrest without a warrant." (FAC ¶¶ 47, 49.) Plaintiff asserts Arizona Revised Statutes sections 13-3883 and 13-3903 "are void ab initio because they allow for arrest for misdemeanors and violations, and also release for these violations." (*Id.* ¶ 52.) Plaintiff claims section 13-3903 is also void "because it allows executive officers to arrest and release, and take property (fingerprints and images of [the] arrestee) in violation of due process, in accordance with the '[n]o takings clause' under the Fourteenth Amendment." (*Id.* ¶ 54.) Plaintiff contends the statutes "clearly bypass the procedure for bringing the arrestee before a magistrate when arrested without a warrant," which he asserts permits an "executive officer" to perform a "judicial function," in violation of the "distribution of powers clause" of the Arizona Constitution. (*Id.* ¶ 55.)

In their Motion, Defendants argue Plaintiff's *Monell* claim fails for four reasons: First, Defendants assert Plaintiff's *Monell* claim fails because he cannot prevail on a constitutional claim against any individual Defendant. (Doc. 77 at 14.) Second, Defendants contend Plaintiff was arrested for trespass in the third-degree, a misdemeanor, not for a violation of law less than a misdemeanor. (*Id.*) Third, Defendants argue Plaintiff was transported to Mesa's Holding Facility the night of his arrest and saw legal counsel and a judge the following day. (*Id.* at 14-15.) Fourth, Defendants assert Arizona Revised Statutes §§ 13-3883 and 13-3903 are not void. (*Id.* at 15.)

Plaintiff fails to address Defendants' arguments in his Response. Plaintiff has not presented any evidence that

he suffered any injury *because of* DPM 2.4.10. The Court will therefore grant Defendants' Motion for Summary Judgment as to the *Monell* claim against the City of Mesa.

VI. First Amendment Retaliatory Arrest Claim (Count Three)

A. Legal Standard

"'[A]s a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions" for engaging in protected speech." *Nieves v. Bartlett*, 587 U.S. 391, 398, 139 S. Ct. 1715, 204 L. Ed. 2d 1 (2019) (quoting *Hartman v. Moore*, 547 U.S. 250, 256, 126 S. Ct. 1695, 164 L. Ed. 2d 441 (2006)). "If an official takes adverse action against someone based on that forbidden motive, and 'non-retaliatory grounds are in fact insufficient to provoke the adverse consequences,' the injured person may generally seek relief by bringing a First Amendment claim." *Id.* (quoting *Hartman*, 547 U.S. at 256.)

To prevail on a First Amendment retaliatory arrest claim, a plaintiff must first plead and prove the absence of probable cause. *Id.* at 401. "[I]f the plaintiff establishes the absence of probable cause, 'then . . . [t]he plaintiff must show that the retaliation was a substantial or motivating factor behind the [arrest], and, if that showing is made, the defendant can prevail only by showing that the [arrest] would have been initiated without respect to retaliation.'" *Id.* at 404; *see also id.* at 398 ("It is not enough to show that an official acted with a retaliatory motive and the

plaintiff was injured— the motive must *cause* the injury. Specifically, it must be a 'but-for' cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive.").

B. Analysis

With respect to probable cause for Plaintiff's arrest, the Court has already determined there are genuine disputes of material fact regarding whether Defendant Newby had probable cause to arrest Plaintiff. The second step of the retaliatory arrest inquiry requires Plaintiff to show that filming the police officers while they carried out their duties was a substantial or motivating factor behind his arrest. In other words, Plaintiff must establish a "causal connection" between Defendant's "retaliatory animus" and Plaintiff's "subsequent injury." *Id.* at 398 (quoting *Hartman*, 547 U.S. at 259). The Supreme Court has recognized that retaliatory arrest cases "present a tenuous causal connection between the defendant's alleged animus and the plaintiff's injury" and that the "causal inquiry is complex because protected speech is often a 'wholly legitimate consideration' for officers when deciding whether to make an arrest." *Id.* at 401 (quoting *Reichle v. Howards*, 566 U.S. 658, 668, 132 S. Ct. 2088, 182 L. Ed. 2d 985 (2012)). In *Hartman*, the Supreme Court observed that although it "may be dishonorable to act with an unconstitutional motive," an official's "action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway." 547 U.S. at 260.

There is no evidence in the record that Defendants Clark, Destefino, and Adams expressed or demonstrated any kind of retaliatory animus toward Plaintiff because he was recording police officers. The Court will therefore grant Defendants' Motion for Summary Judgment with respect to Plaintiff's First Amendment retaliatory arrest claim against Defendants Clark, Destefino, and Adams.

With respect to Defendant Newby, a reasonable jury could conclude that Newby exhibited retaliatory animus when he told Security Officer Dreschler that Plaintiff and the other individuals filming the police officers were "First Amendment auditors," not customers, which prompted Dreschler to tell Newby that Newby could "trespass" Plaintiff if Newby "wanted to." On this record, there are genuine disputes of material fact regarding whether Plaintiff's First Amendment activity was a substantial or motivating factor behind his arrest. The Court will therefore consider whether Defendant Newby is entitled to qualified immunity with respect to Plaintiff's retaliatory arrest claim.

Defendants argue they are "entitled to qualified immunity because there was no clearly established right for a person to continue recording while arrested and on private property where the company posted 'No Trespassing' signs, where the person was not a store customer, and where the store's Security Officer determined that the individual was trespassing." (Doc. 77 at 13.) Defendants mischaracterize the right at issue.

The right at issue is the right to be free from arrest for engaging in First Amendment activity in retaliation for engaging in that activity where there is no probable cause for the arrest.

It was clearly established in 2021 that in the absence of probable cause, a police officer cannot arrest an individual who is engaging in First Amendment activity in retaliation for engaging in that activity. *See Nieves*, 587 U.S. at 398; *Hartman*, 547 U.S. at 256. The Court concludes Defendant Newby is not entitled to qualified immunity with respect to Plaintiff's retaliatory arrest claim. The Court will therefore deny Defendants' Motion for Summary Judgment as to Plaintiff's First Amendment claim against Defendant Newby.

IT IS ORDERED:

(1) The reference to the Magistrate Judge is **withdrawn** as to Defendants' Motion for Summary Judgment (Doc. 77).

(2) Defendants' Motion for Summary Judgment (Doc. 77) is **granted** in part and **denied** in part. The Motion is **denied** as to Plaintiff's First Amendment retaliatory arrest claim in Count Three against Defendant Newby. In all other respects, the Motion is **granted**.

(3) Counts Two, Four, and Eight are **dismissed with prejudice**.

(4) Defendants City of Mesa, Clark, Destefino, and Adams are **dismissed with prejudice**.

(5) The remaining claim is the First Amendment retaliatory arrest claim in Count Three against Defendant Newby.

(6) This action is referred by random lot to Magistrate Judge Morrissey for the purpose of conducting a settlement conference.

(7) Defendants' counsel must arrange for all parties to jointly contact the chambers of Magistrate Judge Morrissey at 602-322-7680 within 14 days of the date of this Order to schedule a settlement conference.

Dated this 15th day of August, 2024.

/s/ James A. Teilborg
James A. Teilborg
Senior United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED NOVEMBER 17, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-5525
D.C. No. 2:22-cv-00572-JAT
District of Arizona, Phoenix

GABRIEL BASSFORD,

Plaintiff-Appellee,

v.

KYLER NEWBY,

Defendant-Appellant,

and

CITY OF MESA; *et al.*,

Defendants.

Filed November 17, 2025

ORDER

Before: RAWLINSON and KOH, Circuit Judges, and FITZWATER, District Judge.*

* The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

Appendix C

Judge Rawlinson and Judge Koh have voted to deny the petition for rehearing en banc, and Judge Fitzwater has so recommended. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition. Fed. R. App. P. 40. The petition rehearing en banc (Dkt. 46) is **DENIED**.