

In the  
Supreme Court of the United States

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KYLER NEWBY,

*Petitioner,*

v.

GABRIEL J. BASSFORD,

*Respondent.*

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

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BRIEF OF AMICUS CURIAE  
NATIONAL SHERIFFS' ASSOCIATION  
IN SUPPORT OF PETITIONER

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## **IDENTITY AND INTEREST OF THE AMICUS CURIAE<sup>1</sup>**

The **NATIONAL SHERIFFS' ASSOCIATION** (the “NSA”) is a non-profit association formed under 26 U.S.C. 501(c)(4). Formed in 1940 the NSA seeks to promote the fair and efficient administration of criminal justice throughout the United States and in particular to advance and protect the Office of Sheriff throughout the United States. The NSA has over 13,000 members and is the advocate for 3,083 sheriffs throughout the United States.

The NSA also works to promote the public interest goals and policies of law enforcement throughout the nation. It participates in the judicial process where the vital interests of law enforcement and its members are affected.

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<sup>1</sup> This brief was not authored in whole or in part by counsel for any party. No person or entity other than amicus made a monetary contribution to this brief's preparation or submission. Counsel of record for all of the parties received notice of amicus curiae's intention to file an amicus brief at least 10 days prior to the deadline to file the brief.



## SUMMARY OF ARGUMENT

Qualified immunity is critical for public safety. It allows peace officers to protect the public by making split second decisions without fear of legal ramifications where the law is not clearly established as to what may violate a person's Constitutional rights. Qualified immunity protects taxpayer funds earmarked for public safety by dismissing questionable cases where the law is unclear without the need for protracted discovery and litigation, depriving taxpayers of their funds needed for public safety.

The instant case presents an ideal opportunity to grant qualified immunity to an officer who arrested a trespasser, at the request of the property owner, who happened to be filming the officer. The trespasser's assertions of violating his First Amendment rights can certainly be debated, but such an assertion is anything but clearly established law. As can be seen by the dissenting opinion in the instant case, as well as other similar cases, the law is not clearly established that a trespasser can video law enforcement anywhere and anytime he desires and be immune to arrest.

Further, this Court has repeatedly instructed the court below to not define "clearly established" at too high a level of generality. Here, the Ninth Circuit did just that. It declared that the law is clearly established that a peace officer cannot violate a person's First Amendment rights without considering the facts and circumstances of the instant case. This articulation of what law must be clearly established in this

case is clearly overbroad and assumes a retaliatory intent before plaintiff has met his burden of proving such. The law in this case that must be “clearly established” is whether an officer can arrest someone who is trespassing at the request of a private property owner where the trespasser is filming the police or otherwise engaging in free speech.

In addition, the court below failed to consider that the plaintiff did not meet the threshold burden of proof of lack of probable cause for the arrest and objective evidence of a retaliatory motive behind the arrest. Accordingly, Officer Newby is entitled to qualified immunity in this case.



## ARGUMENT

### **I. Qualified Immunity is Critical to Law Enforcement**

Qualified immunity is an immunity to a civil lawsuit that protects peace officers from suit so long as their conduct does not violate clearly established law or constitutional rights of which a reasonable officer would have known. Qualified immunity allows officers to respond to incidents in the field and rely on the current state of the law in making decisions. Qualified immunity does not prevent individuals from recovering damages from law enforcement officers who knowingly violate an individual’s constitutional rights. It only prevents questionable lawsuits where the constitutional validity of a particular action was not known at the time.

Qualified immunity protection is important because peace officers are often called upon to make split second decisions in the field. Then, long after the incident is over, a court, attorneys, legal scholars, and experts will be called upon to decide whether what the officer did, at that very instance, violated someone's Constitutional rights. To make things more difficult, Federal Courts of Appeal across the country often come to different conclusions on whether something is actually a constitutional violation. Even members of the U.S. Supreme Court have frequently disagreed in 5 to 4 decisions as to whether something violates the Constitution.

To retroactively punish a peace officer for conduct that he or she had no way of knowing at the time that such conduct would later be found to violate the Constitution would be wrong. Fundamental fairness requires that peace officers not be subject to civil monetary judgments for conduct that they would not have known violates the Constitution or in situations where it was not clearly established that their conduct would violate the Constitution.

Denying qualified immunity protection for peace officers in questionable cases is likely to have negative consequences for law enforcement in America. First, persons will be less likely to begin a career with, or remain in, the law enforcement profession, if they know that at any given moment an action that they have taken could subsequently be declared unconstitutional, without warning. And this could result in them being subject to a money judgment for all of their worldly possessions.

Additionally, the denial of qualified immunity in close cases may lead to peace officers refusing to take any action unless it has been declared constitutional

prior to the action being taken. Given the speed at which incidents occur and the numerous variations on whether an action could subsequently be deemed unconstitutional, necessary law enforcement activity would most likely be significantly chilled if qualified immunity is denied even where the law is unclear.

Ultimately the denial of qualified immunity where the law is unclear will not only impact law enforcement directly, but also law enforcement's ability to provide public safety to society as a whole. If law enforcement officers are afraid to do their job for fear of a lawsuit at every decision, public safety will suffer. Officers will hesitate to act quickly when time is of the essence. Tax dollars earmarked for public safety will be used to defend questionable lawsuits that could otherwise be used for public safety. Therefore, where the law pertaining to a specific factual scenario is not clear, qualified immunity should apply to protect law enforcement from prolonged discovery and litigation. And as explained below, the present case is a prime example of a situation where the law was anything but "clearly established."

## **II. The Law of This Case Is Not Clearly Established So as to Deny Qualified Immunity**

In the instant case, the District Court and the Ninth Circuit held that the law was clearly established that it would be unlawful to arrest plaintiff in retaliation for their First Amendment activity, notwithstanding the existence of probable cause. *Bassford v. Newby*, 2025 U.S. App. LEXIS 21869 at 3 (9th Cir. August 26, 2025). First, this articulation of what law must be clearly established in this case is clearly overbroad and assumes a retaliatory intent before plaintiff

has met his burden of proving such. The law in this case that must be “clearly established” is whether an officer can arrest someone who is trespassing at the request of a private property owner where the trespasser is filming the police or otherwise engaging in free speech. That is the law which must be “clearly established” for Officer Newby to have violated plaintiff’s First Amendment right to free speech and to be denied qualified immunity. And it is not clearly established that an officer cannot arrest a trespasser who refuses to leave while engaging in free speech at the request of the private property owner.

In *Solomon v. Las Vegas Metro Police Dept.*, 2023 U.S. Dist. LEXIS 229345, United States District Judge Cristina Silva found that Ninth Circuit and Supreme Court precedent allows a police officer to arrest a trespasser engaging in free speech on presumably private property when asked to do so by the security guard of the property owner. And presumably a Federal District Court Judge in the Ninth Circuit would know more than a police officer what law is clearly established in the Ninth Circuit.

In *Solomon*, Solomon, a professional photojournalist, was assigned by his employer KLAS-TV to film a protest on the sidewalk of Fashion Show Drive outside of the Trump International Hotel. 2023 U.S. Dist. LEXIS 229345 at 2-4. As Solomon set up his video equipment on the sidewalk, Fashion Show Mall security guards insisted that the sidewalk was private property, told Solomon that he could not film from his location, and demanded that he leave (just like in the instant case). Solomon refused to leave at the direction of Sergeant Fryman, just like in the instant case. Solomon refused

to give his name to the officer, just like in the instant case.

After the protest ended, Solomon was transported to Clark County Detention Center where he was booked for trespassing and obstruction of a police officer. The Clark County District Attorney's office declined to pursue charges against Solomon.

In April 2019, Solomon filed a complaint suing the Las Vegas Metropolitan Police Department "LVMPD", the individual officers involved in his arrest, the Fashion Show Mall, and Universal Protection for allegedly violating his civil rights when he was arrested while filming a protest from the Fashion Show Mall sidewalk. The LVMPD and officer defendants moved for summary judgment, contending that (1) Solomon failed to demonstrate a constitutional violation; (2) the officers are entitled to qualified immunity; and (3) Solomon failed to establish a legitimate *Monell* claim against the LVMPD.

In *Solomon*, the court held that the officer defendants did not violate Solomon's First Amendment right to free speech and press. 2023 U.S. Dist. LEXIS 229345 at 8. The court explained that the First Amendment prohibits government actors from "abridging the freedom of speech," citing U.S. Const. amend. I. Further, "[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." *Solomon*, 2023 U.S. Dist. LEXIS 229345 at 9, citing *City of Houston, Tex. v. Hill*, 482 U.S. 451, 461, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987). In fact, the court said, the freedom of individuals to oppose or challenge police action verbally without thereby risking arrest is one important characteristic by which we distinguish ourselves from a police state.

But the First Amendment “does not guarantee the right to communicate one’s views at all times and places or in any manner that may be desired.” *Solomon*, 2023 U.S. Dist. LEXIS 229345 at 8, citing *Heffron v. Int’l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647, 101. Rather, government actors violate one’s free speech rights when it restricts constitutionally protected speech absent sufficient justification. *Solomon*, 2023 U.S. Dist. LEXIS 229345 at 10, citing *Frisby v. Schultz*, 487 U.S. 474, 479-81, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988).

The court in *Solomon* explained that to determine whether government actors infringed an individual’s First Amendment rights, the court must consider whether the speech is protected, the nature of the relevant forum, and whether the justification for the exclusion satisfies the requisite standard for the forum. *Solomon*, 2023 U.S. Dist. LEXIS 229345 at 10, citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985). *Solomon* asserted that the nature of the speech at issue there was his “right to film an event of public significance,” his “right to disagree with the police,” his right to “express his disbelief that he could not film from a sidewalk open to public traversal,” and “efforts to make inquiries to police officers about their tactics and treatment of him.” *Solomon*, 2023 U.S. Dist. LEXIS 229345 at 10. The court did not disagree with *Solomon*’s summary of his rights. But, upon review of the record, and viewing the facts in the light most favorable to *Solomon*, the court found that there was no genuine issue of material fact that the officer defendants did not restrict *Solomon*’s right to film an event of public significance, as he was free to film from

other locations, just not from a specific segment of the Fashion Show Mall sidewalk. *Solomon*, 2023 U.S. Dist. LEXIS 229345 at 10-11.

The *Solomon* court found that the evidence did not show that Solomon was detained for disagreeing with the officers about the character of the sidewalk or his alleged right to film therefrom. Rather, the evidence indicated that the speech in question was Solomon's insistence to remain on Fashion Show Mall's sidewalk against Sergeant Fryman's directive to move to another location where he could then film the ongoing protest. *Solomon*, 2023 U.S. Dist. LEXIS 229345 at 11.

The *Solomon* court eventually determined that the nature of the Fashion Show Mall sidewalk, based on its location directly across the street from the Trump Hotel in Las Vegas, was a public forum subject to protections of the First Amendment. *Solomon*, 2023 U.S. Dist. LEXIS 229345 at 11. But law enforcement could not have known that the court would make that determination 6 years later. Assuming they could or should have predicted the court's ruling, the *Solomon* court held that even in a public forum, the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information. *Solomon*, 2023 U.S. Dist. LEXIS 229345 at 12, citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L. Ed.

2d 221 (1984)); *see also Jacobson v. United States Dep't of Homeland Sec.*, 882 F.3d 878, 882 (9th Cir. 2018). The *Solomon* court concluded that the evidence before the court showed that defendants imposed reasonable time, place, and manner restrictions. *Solomon*, 2023 U.S. Dist. LEXIS 229345 at 12.

The court in *Solomon* found the restriction was content-neutral. 2023 U.S. Dist. LEXIS 229345 at 12. Restrictions on speech are content-neutral when they can be justified without reference to the content of the regulated speech. *Solomon*, 2023 U.S. Dist. LEXIS 229345 at 12, citing *One World One Fam. Now v. City & Cnty. of Honolulu*, 76 F.3d 1009, 1012 (9th Cir. 1996) (quoting *Clark*, 468 U.S. at 293). The court found officer defendants' restriction on Solomon's speech was content-neutral as there was no evidence in the record suggesting that officer defendants targeted the content of Solomon's speech. The facts showed that officer defendants were informed that the sidewalk was private property owned by Fashion Show Mall, and that Fashion Show Mall did not want any protestors, regardless of the subject or content of their protest, on their property. *Solomon*, 2023 U.S. Dist. LEXIS 229345 at 12-13. The *Solomon* court found that because the undisputed evidence demonstrated that the officer defendants cleared the Fashion Show Mall sidewalk of all protestors—regardless of their speech—as requested by the Fashion Show Mall, an action evincing content-neutrality, the restriction on Solomon's speech was content-neutral. *Solomon*, 2023 U.S. Dist. LEXIS 229345 at 13. Further, the court found the restriction was narrowly tailored. *Solomon*, 2023 U.S. Dist. LEXIS 229345 at 14.

A restriction on free speech is narrowly tailored if it does not burden substantially more speech than is

necessary to further the government's legitimate interests. *Solomon*, 2023 U.S. Dist. LEXIS 229345 at 13, citing *Ward*, 491 U.S. at 799. Although sidewalks are open to the public, including for expressive activities, the government has a legitimate interest in ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, and protecting property rights. *Solomon*, 2023 U.S. Dist. LEXIS 229345 at 13-14, citing *McCullen v. Coakley*, 573 U.S. 464, 486, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014); *United States v. Grace*, 461 U.S. 171, 179, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983). The fact that protestors were able to continue to demonstrate across the street showed that officer defendants did not substantially burden speech more than necessary. *Solomon*, 2023 U.S. Dist. LEXIS 229345 at 14. The restriction left ample means of communication open. *Id.*

In sum, the *Solomon* court held that because the officer defendants' restriction on Solomon's right to protest on the Fashion Show Mall sidewalk was content-neutral, narrowly tailored, and left open adequate alternative channels for communication, it was a permissible time, place, and manner restriction on speech and did not violate the First Amendment. Accordingly, the court granted defendants summary judgment on Solomon's First Amendment claim against officer defendants.

The *Solomon* court also found that the officer defendants did not violate Solomon's Fourth Amendment right to be free of unlawful searches and seizures. *Solomon*, 2023 U.S. Dist. LEXIS 229345 at 18. Defendants correctly contended that their initial detention of Solomon is justified because they developed reasonable suspicion that Solomon was committing the crime of

trespass when he refused to move. *Id.* Officer defendants gave him multiple opportunities to grab his camera equipment and move to an alternative location to film but Solomon refused and entrenched himself, committing the act of willfully remaining upon the land on which he had been warned to leave. Thus, it was reasonable for officers to believe that Solomon was trespassing on private property, according to the court. *Solomon*, 2023 U.S. Dist. LEXIS 229345 at 19. He also refused to identify himself, prompting the officers to detain him for failure to identify. Solomon's refusal to identify himself also gave rise to a probable cause arrest according to the court. *Solomon*, 2023 U.S. Dist. LEXIS 229345 at 20. Therefore, the officer defendants did not violate Solomon's Fourth Amendment right to be free from unlawful searches and seizures. *Id.* at p. 21.

As in *Solomon*, in the present case, Officer Newby arrested a trespasser on private property, at the request of the security guard, who refused to leave despite repeated instructions to do so and refused to identify himself. Plaintiff could have continued filming Officer Newby outside of the private property, just as in *Solomon*. And as in *Solomon*, Officer Newby did not violate plaintiff's First Amendment rights of free speech in doing so.

Furthermore, if the law in this case is so "clearly established," why has District Court Judge Fitzwater, in the instant case, dissented believing that Officer Newby was entitled to qualified immunity? Should Officer Newby be held to a higher legal standard of knowledge than Judge Fitzwater?

### **III. This Court has Repeatedly Instructed the Ninth Circuit Not to Define “Clearly Established” at Too High a Level of Generality**

In *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 135 S. Ct. 1765, 191 L. Ed. 2d 856 (May 18, 2015), this Court found that the Ninth Circuit’s holding on clearly established law was far too general a proposition to control that case. 575 U.S. at 613. There, this Court stated, “We have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality,” *citing al-Kidd, supra*, at 742, 131 S. Ct. 2074, 179 L. Ed. 2d 1149, 1160. This Court in *Sheehan* emphatically stated that Qualified immunity is no immunity at all if “clearly established” law can simply be defined as a general proposition of law. 575 U.S. at 613. And in the instant case, the Ninth Circuit did just that stating that the law was clearly established that it would be unlawful to arrest plaintiff in retaliation for his First Amendment activity. Such a pronouncement of what needs to be “clearly established” for qualified immunity purposes is devoid of any particular facts or circumstances of the instant case.

Here, Officer Newby was told by the security guard (agent of the private property owner) that plaintiff was trespassing and had to be removed from the property. Officer Newby did so after plaintiff refused to leave and was, therefore, in violation of the trespassing law. Further, plaintiff refused to identify himself which was also a violation of the law. He was therefore arrested. These are the facts that must be considered in determining if Officer Newby violated “clearly established” law.

In *City of Escondido v. Emmons*, 586 U.S. 38, 139 S. Ct. 500, 202 L. Ed. 2d 455 (January 7, 2019), this Court again admonished the Ninth Circuit on defining “clearly established” at too high a level of generality. In that case, this Court explained that facts of the particular case at hand must be considered, stating, “Under our cases, the clearly established right must be defined with specificity. This Court has repeatedly told courts . . . not to define clearly established law at a high level of generality,” citing *Kisela*, 584 U. S., at \_\_\_, 138 S. Ct. 1148, 200 L. Ed. 2d 449, at 454. 586 U.S. at 42. There, this Court explained as follows:

“[I]t does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer cannot be said to have violated a clearly established right unless the right’s contours were sufficiently definite that any reasonable official in the defendant’s shoes would have understood that he was violating it.” *Id.*, at \_\_\_, 138 S. Ct. 1148, 200 L. Ed. 2d 449, at 454 (quotation altered [by the Court]).

In this case, the Court of Appeals contravened those settled principles. The Court of Appeals should have asked whether clearly established law prohibited the officers from stopping and taking down a man in these circumstances. Instead, the Court of Appeals defined the clearly established right at a high level of generality by saying only that the “right to be free of excessive force” was clearly established. With the right defined at that

high level of generality, the Court of Appeals then denied qualified immunity to the officers and remanded the case for trial. 716 Fed. Appx., at 726.

586 U.S. at 42-42.

This Court in *City of Escambia* emphasized the importance of not defining clearly established too generally without accounting for the particular circumstances of the case. This Court explained:

Under our precedents, the Court of Appeals' formulation of the clearly established right was far too general. To be sure, the Court of Appeals cited the *Gravelet-Blondin* case from that Circuit, which described a right to be "free from the application of non-trivial force for engaging in mere passive resistance. . . .", the Ninth Circuit's *Gravelet-Blondin* case law involved police force against individuals engaged in passive resistance. The Court of Appeals made no effort to explain how that case law prohibited Officer Craig's actions in this case. That is a problem under our precedents:

"[W]e have stressed the need to identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment. . . . While there does not have to be a case directly on point, existing precedent must place the lawfulness of the particular [action] beyond debate. . . . Of course, there can be the rare obvious case, where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent

does not address similar circumstances. . . . But a body of relevant case law is usually necessary to clearly establish the answer. . . .” *Wesby*, 583 U. S., at \_\_\_, 138 S. Ct. 577, 199 L. Ed. 2d 453, at 468 (internal quotation marks omitted).

The Court of Appeals failed to properly analyze whether clearly established law barred Officer Craig from stopping and taking down Marty Emmons in this manner as Emmons exited the apartment. Therefore, we remand the case for the Court of Appeals to conduct the analysis required by our precedents with respect to whether Officer Craig is entitled to qualified immunity.

*City of Escondido v. Emmons*, 586 U.S. at 43.

Again in *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 142 S. Ct. 4, 211 L. Ed. 2d 164 (October 18, 2021), this Court found that the Ninth Circuit failed to consider the specific facts of the case in denying qualified immunity to officers. There, in an action alleging excessive force under 42 U.S.C.S. § 1983, this Court held that the court of appeals erred when it determined that the police officer was not entitled to qualified immunity because neither the arrestee nor the court of appeals identified any U.S. Supreme Court case that addressed facts like the ones at issue. 595 U.S. at 5. Further, even assuming that Circuit precedent could clearly establish law for purposes of § 1983, the precedent the court of appeals relied on was materially distinguishable and thus did not govern the facts of this case. *Id.* This Court held that because the facts of cases relied upon by the court of appeals did not give the officer fair notice that his actions constituted a

violation of clearly established law, the officer was entitled to qualified immunity. *Id.*

Unfortunately, the Ninth Circuit in the instant case has failed to follow this Court's repeated instructions on not defining "clearly established" law for qualified immunity purposes at too high a level of generality. The Ninth Circuit failed to consider the facts and circumstances of this particular case in holding that the law was "clearly established" that Officer Newby violated plaintiff's First Amendment rights.

#### **IV. Here, Plaintiff Failed to Meet His Burden of Proof of a Retaliatory Motive**

This Court has clearly set out the burden of proof required to show a violation of a First Amendment Right to free speech in *Nieves v. Bartlett*, 587 U.S. 391, 139 S. Ct. 1715, 204 L. Ed. 2d 1 (May 28, 2019). There, a rowdy partygoer, Bartlett, refused to speak with an officer and became belligerent with another officer. Bartlett was arrested for disorderly conduct and resisting arrest. The District Court granted summary judgment for the officer but the Ninth Circuit reversed. This Court reversed and remanded the case with clear guidelines to establish a retaliatory arrest claim.

In *Nieves*, this Court explained that where probable cause exists for an arrest, a plaintiff claiming retaliatory arrest in violation of his First Amendment right to free speech must put forth 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. This Court further explained as follows:

And like a probable cause analysis, it provides an objective inquiry that avoids the significant problems that would arise from reviewing police conduct under a purely subjective standard. Because this inquiry is objective, the statements and motivations of the particular arresting officer are “irrelevant” at this stage. After making the required showing, the plaintiff’s claim may proceed in the same manner as claims where the plaintiff has met the threshold showing of the absence of probable cause.

*Id.*

According to *Nieves*, plaintiff has to show objective evidence of a retaliatory motive whether or not probable cause exists for the arrest. *Nieves*, 587 U.S. at 404. Here, plaintiff has not made the required showing of retaliatory motive. Even if a plaintiff shows an absence of probable cause, he must then 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.*

In the present case, plaintiff has not produced any objective evidence that Officer Newby has not arrested other people for trespassing when confronted with people on private property without permission who are asked to leave. Further, the evidence shows that it was the agent of the private property owner, here the security guard, who informed Officer Newby that plaintiff was trespassing. Therefore, Officer Newby’s reason for arresting plaintiff was the security guard’s desire, not Officer Newby’s desire. This is objective evidence that Officer Newby did not have a

retaliatory motive in arresting plaintiff. So even if probable cause was not present for the arrest, no objective evidence exists of Officer Newby's alleged retaliatory intent.

**V. Further, Plaintiff Failed to Meet His Threshold Burden to Prove No Probable Cause for Arrest**

Plaintiff has failed to put forth evidence that the arrest was unreasonable and lacked probable cause. Plaintiff was on private property which had a "NO TRESPASSING" sign and was asked to leave the premises. Officer Newby's subjective intent has no bearing on whether the arrest was reasonable.

In *Nieves*, this Court explained that legal tests based on reasonableness are generally objective. *Nieves*, 587 U.S. at 403. This Court has long taken the view that evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer. *Id.* 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. *Id.* To ensure that officers may go about their work without undue apprehension of being sued, courts generally review their conduct under objective standards of reasonableness. *Id.* Thus, when reviewing an arrest, courts ask whether the circumstances, viewed objectively, justify the challenged action, and if so, conclude that action was reasonable whatever the subjective intent motivating the relevant officials. *Id.* This Court has stated, "A particular officer's state of mind is simply

irrelevant, and it provides no basis for invalidating an arrest.” *Id.*

Here, plaintiff has failed to meet his threshold burden of proof that no probable cause existed for the arrest. Simply alleging a retaliatory motive on the part of Officer Newby is insufficient to meet that burden.

In Judge Fitzwater’s dissent in the instant case, he explains that 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, citing *Gonzales v. Trevino*, 602 U.S. 653, 655 (2024) (per curiam). *Bassford v. Newby*, 2025 U.S. App. LEXIS 21869 at 8 (9th Cir. August 26, 2025). There the Court acknowledge this is a general rule subject to a narrow exception where 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. In the instant case, plaintiff 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. 2025 U.S. App. LEXIS 21869 at 8, Footnote 1.)



## CONCLUSION

Based on the above, amicus prays that this Court find that Officer Newby did not violate plaintiff's First Amendment right to film the police by arresting him for trespassing. Alternatively, amicus prays that this Court find that Officer Newby did not violate any "clearly established" law and is, therefore, entitled to qualified immunity. In the further alternative, amicus prays that this Court grant the Petition for Certiorari.

Respectfully submitted,

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