No. 26-____

IN THE

Supreme Court of the United States

JOY HO SCHERER,

Petitioner,

v.

WESSAM ISMAIL AND NELSON MARTINEZ,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Joy Ho Scherer was beaten, and nearly raped, by a man she had been dating. Bloody and visibly injured, she told Officer Nelson Martinez that she wanted to press charges. Her attacker said that he did not. Officer Martinez then told Scherer: "if he wants to press charges, you will be going to jail too."

In a prior appeal, the Ninth Circuit held that Scherer plausibly alleged that this statement "was a threat, not a statement of law," and that it "would have chilled a person of ordinary firmness from exercising the First Amendment right to press charges." App. 30a. A divided panel nevertheless granted qualified immunity because Scherer cited no case "clearly establishing a First Amendment violation in a situation like this one, where a police officer is responding to the scene of a domestic assault and advising both parties about their respective rights to press charges"—even when those "advisals" are "plausibly regarded as threats." App. 4a.

The questions presented:

1. Whether, under *Hope v. Pelzer*, 536 U.S. 730 (2002), an officer whose threat of arrest would chill a crime victim from exercising her First Amendment right to press charges is entitled to qualified immunity because no prior decision involved materially similar facts.

2. Whether, in deciding qualified immunity on a motion to dismiss, a court may define the "specific context" of an officer's conduct by drawing inferences in the officer's favor, contrary to *Tolan v. Cotton*, 572 U.S. 650 (2014).

PARTIES TO THE PROCEEDING

Petitioner Joy Ho Scherer was the plaintiff-appellee below.

Respondents Wessam Wayne Ismail and Nelson Antonio Martinez, Jr., Los Angeles Police Department officers, were defendants in the district court and defendants-appellants in the court of appeals.

The City of Los Angeles and Does 1 through 10 were also named as defendants in the district court. They were not parties to the appeal.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is directly related to the following proceedings:

- *Scherer v. City of Los Angeles*, No. 22-cv-01931 (C.D. Cal.) (order dismissing complaint entered May 10, 2023; order denying qualified immunity entered April 14, 2025; judgment entered July 27, 2026).
- *Scherer v. City of Los Angeles*, No. 23-55603 (9th Cir.) (judgment entered November 4, 2024).
- *Scherer v. Ismail*, No. 25-2651 (9th Cir.) (judgment entered May 14, 2026; rehearing en banc denied June 23, 2026).

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PETITION FOR A WRIT OF CERTIORARI

A bystander called the police after he saw Maxwell Bravo beating Joy Scherer's head against a metal railing. The officers who arrived took Bravo into custody and found Scherer "obviously beaten, bloody, injured and crying." App. 8a-9a, 68a-70a. Scherer told Officer Nelson Martinez that she wanted to press charges; Bravo said that he did not. Officer Martinez then returned to Scherer and, without informing her of Bravo's answer, told her that if Bravo pressed charges, she would be "going to jail too." When she said she did not want to go to jail, he told her she would go "right now," and that he was not kidding. Scherer did not press charges, and Bravo was not arrested that night. App. 6a n.4, 9a-10a, 17a-18a, 73a-75a.

In Scherer's first appeal, a unanimous Ninth Circuit panel held that she had plausibly alleged a threat, not a statement of law. App. 30a. In her second, a divided panel granted the officers qualified immunity because the cases she relied on "do not involve police officers, domestic violence, threatened arrest, or the right to press charges." App. 5a. As Judge Nguyen put it in dissent, "[t]he majority today immunizes a police officer who threatened to arrest a domestic violence victim for attempting to press charges against her attacker." App. 8a.

The panel majority's reasoning turns the fair-warning inquiry on its head. Every reasonable official in Officer Martinez's position would have known that the First Amendment prohibited him from threatening Scherer to stop her from petitioning the government. That prohibition does not depend on

whether the official is a police officer, whether he is investigating domestic violence, or whether the threatened sanction is arrest. Yet the panel majority treated each of these as a missing element and demanded a precedent that matched them all.

This Court has rejected that kind of fact-matching. Precedents with "fundamentally similar" or "materially similar" facts "can provide especially strong support for a conclusion that the law is clearly established," but "they are not necessary to such a finding." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *see United States v. Lanier*, 520 U.S. 259, 269-71 (1997). Close factual analogues matter most where the constitutional standard itself turns on the facts of each case, as the reasonableness of force does. But the First Amendment standard at issue in this case does not. Nor was Officer Martinez making a split-second judgment. With Bravo already in custody, he went back and forth between the two, learned that only Scherer wanted to press charges, and then chose to threaten her. The panel majority reached its result only by describing those facts from Officer Martinez's point of view, contrary to *Tolan v. Cotton*, 572 U.S. 650 (2014) (per curiam).

The consequences of the panel majority's ruling reach well beyond this case. The California legislature, anticipating this very situation, directed its officers to protect domestic-violence victims by identifying the dominant aggressor and discouraging dual arrests. Yet the panel majority disregarded the warning that directive gave Officer Martinez. That approach will also have a chilling effect on victims of domestic violence, such as Scherer, for whom a

request to press charges against an attacker is often the only realistic avenue for redress. If officers may threaten such victims with jail and still claim immunity because no court has condemned that exact threat, victims will learn that asking for help is dangerous. The Court should grant review or, at a minimum, summarily reverse.

OPINIONS BELOW

The court of appeals' unpublished memorandum disposition, with Judge Nguyen's dissent, is available at 2026 WL 1347409 and reproduced at App. 1a-13a. Its unpublished order denying rehearing en banc is reproduced at App. 51a-52a. The district court's order denying qualified immunity is available at 2025 WL 1206877 and reproduced at App. 14a-28a, and its unpublished judgment is reproduced at App. 53a-54a.

The court of appeals' earlier unpublished memorandum disposition is available at 2024 WL 4658773 and reproduced at App. 29a-30a. The district court order it reversed is available at 2023 WL 4291464 and reproduced at App. 31a-50a.

JURISDICTION

The court of appeals entered judgment on May 14, 2026, App. 1a, and denied a timely petition for rehearing en banc on June 23, 2026, App. 51a. On September 18, 2026, Justice Kagan extended the time to file this petition to and including November 20, 2026. No. 26A372. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment 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.

U.S. Const. amend. I.

Section 1983 of Title 42 provides in relevant part:

> 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, suit in equity, or other proper proceeding for redress[.]

42 U.S.C. § 1983.

The relevant provisions of California Penal Code §§ 13700 and 13701, as in effect in October 2020, are reproduced at App. 55a-57a.

STATEMENT OF THE CASE

A. Factual Background

On October 31, 2020, petitioner Joy Ho Scherer went out to celebrate Halloween with Maxwell Bravo, a man she had been dating. Scherer planned to spend the night at Bravo's apartment. App. 8a, 64a. But Bravo's behavior grew increasingly erratic, and Scherer, frightened, decided to go home instead. App. 65a-66a.

When they returned to Bravo's apartment, Scherer began packing her belongings. Bravo, after learning that Scherer was going home, began to yell. He grabbed Scherer and told her she was not leaving. App. 66a. Scherer locked herself in the bathroom, but Bravo tore the door down, grabbed her by the hair, and struck her on the head. App. 8a, 66a-67a. Bravo then dragged Scherer by her hair and forced her against his couch. There, he attempted to rape her. App. 8a, 15a, 67a. As Scherer fought back, Bravo bit her shoulder and struck her repeatedly. *Id.* When his rape attempt failed, he shoved her, partially naked, onto the second-floor landing. App. 8a, 15a, 67a, 71a. Scherer tried to flee down the stairs, but Bravo dragged her back up by her hair and "began beating her head against the metal railing." App. 8a, 15a, 68a. A bystander yelled at Bravo to stop and called the police. App. 8a, 68a. Respondents, Los Angeles Police Department Officers Nelson Martinez and Wessam Ismail, responded to a "Domestic Battery" call. App. 8a-9a, 68a.

As the officers entered the apartment complex, they could hear Scherer screaming. App. 9a, 15a,

69a. Once inside, they detained Bravo and radioed to dispatch, "suspect in custody." App. 9a, 69a-71a. The officers found Scherer at the top of the stairs, "obviously beaten, bloody, injured and crying."[1] App. 9a, 70a, 84a-89a. Scherer had a hematoma and laceration on her scalp, a laceration on her forehead, bite marks on both shoulders, and bruising on her face and body. App. 9a, 16a, 71a, 84a-89a. Officer Martinez observed that Scherer was "really beat up" and needed an ambulance. App. 9a, 16a, 71a. Scherer told the officers that she had refused to have sex with Bravo, and that he responded by beating and attempting to rape her. *Id.* She said Bravo struck her "10 to 15 times" in the face. App. 9a, 16a, 72a.

Bravo, by contrast, had no visible injuries except possibly a tiny scratch under his chin. App. 9a, 16a-17a, 72a. He told the officers he had been dating Scherer for four months to a year. App. 9a, 17a, 73a. He denied hitting Scherer and claimed that she had thrown "the first blow" with her "flailing arms." App. 9a, 17a, 73a-74a. Officer Martinez appeared to doubt that account, responding, "Dude, she's pretty beat-up." App. 17a, 74a.

California law required Officers Martinez and Ismail to "make reasonable efforts to identify the dominant aggressor," which is defined as "the person determined to be the most significant, rather than the first, aggressor." App. 56a-57a, 76a-77a (quoting Cal. Penal Code § 13701(b)); *see also* App. 10a-11a, 30a. The "intent of the law," which the officers were also

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[1] Officer Martinez's body-worn camera recorded much of the encounter that followed. App. 7a, 8a n.1.

required to consider, is "to protect victims of domestic violence from continuing abuse[.]" App. 57a, 77a. Officer Martinez also knew that he could arrest Bravo for felonies[2] committed outside the officers' presence, without a private person's arrest. App. 75a, 77a.

Against this backdrop, Officer Martinez asked Scherer whether she wanted to "press charges" against Bravo, and she answered, "Yeah." App. 9a, 17a, 73a. Officer Martinez then told Bravo that, absent a current dating relationship, it was "just a battery," and asked whether he wanted to press charges. Bravo answered, "No." App. 9a, 17a, 74a. Officer Martinez nonetheless returned to Scherer and said that she could make a private person's arrest on Bravo, but "he has that right too," and "if he wants to press charges, you will be going to jail too." *Id.* Scherer, still crying, said that she did not want to go to jail. *Id.* Officer Martinez replied that she was "going to go [to jail]" right now, and that "[t]hat's how private persons arrest works." App. 30a; *see id.* Scherer, incredulous, asked if Officer Martinez was "kidding," and he confirmed that he was not. App. 74a.

Officer Martinez never told Scherer that Bravo declined to press charges—a deliberate omission designed to dissuade her from pressing charges. App. 9a-10a, 18a, 75a. Officer Ismail was present and aware of Officer Martinez's statements, yet failed to

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[2] Based on Scherer's statements and visible injuries, those felonies included attempted rape, domestic violence with corporal injury, assault by means likely to produce great bodily injury, and mayhem. App. 9a, 75a, 77a, 84a-89a; *see* Cal. Penal Code §§ 203, 245(a)(4), 261, 273.5, 664.

intervene. App. 24a n.5, 78a. Relying on Officer Martinez's statements, and believing that pressing charges would lead to her own arrest, Scherer chose not to press charges against Bravo. App. 10a, 74a. Bravo was not arrested that night. App. 6a n.4. Bravo was eventually convicted of domestic violence with corporal injury, but only after Scherer hired a lawyer to press prosecutors to pursue the case. App. 6a n.4, 10a, 78a.

B. Procedural History

1. The Initial Dismissal and the First Appeal

Scherer sued Officers Martinez and Ismail in the United States District Court for the Central District of California, alleging under 42 U.S.C. § 1983 that the officers had violated her First Amendment right to petition. App. 36a, 64a, 77a-78a. Jurisdiction rested on 28 U.S.C. §§ 1331 and 1343(a)(3). The district court dismissed the claim, reasoning that Officer Martinez's "conditional statement" could not have chilled a person of ordinary firmness. App. 44a-46a. Finding no constitutional violation, it did not reach qualified immunity. App. 48a-49a.

A unanimous Ninth Circuit panel reversed. App. 29a-30a. It held that Scherer "plausibly alleged that Martinez's statement that Scherer would go to jail too was a threat, not a statement of law, given that Bravo had already told Officer Martinez that he did not want to press charges, and that California law requires officers to discourage the dominant aggressor (in this case, Bravo) from pressing charges." App. 30a. That statement "would have chilled a person of ordinary firmness from exercising the First

Amendment right to press charges." *Id.* The panel remanded so that the district court could address qualified immunity "in the first instance." *Id.*

2. The District Court's Denial of Qualified Immunity

On remand, the district court denied qualified immunity. App. 14a-15a, 28a. Because the Ninth Circuit had resolved the constitutional question, the court addressed only whether the right was clearly established. App. 21a-22a. It rejected the officers' framing, in which Scherer was a "secondary" aggressor who was merely warned, because that framing "directly contradicts the Ninth Circuit's finding" that the statement was a threat, and because the complaint alleged that Scherer was the victim. App. 22a-24a. It applied the same analysis to Officer Ismail, whose liability was premised on his failure to intervene. App. 24a n.5.

The court then held that the right was clearly established. App. 24a-28a. Precedent established that reporting a crime to police is protected petitioning; that a threat of retaliation can chill protected activity even if it is never carried out; and that arrest, and the threat of arrest, can chill the exercise of First Amendment rights. App. 24a-27a. Although "there is no case with precisely the same facts," the court explained, that "is not the correct standard," and "any reasonable officer would have understood that telling Scherer she would be arrested should Bravo press charges would chill Scherer from exercising her clearly established First Amendment right to press charges." App. 28a.

3. The Second Appeal

The officers took an interlocutory appeal. A divided panel reversed. App. 1a-7a. Addressing only the clearly established prong, the majority defined the context as one "where a police officer is responding to the scene of a domestic assault and advising both parties about their respective rights to press charges, even when advisals about going to jail are plausibly regarded as threats that would chill a person of ordinary firmness from pressing charges." App. 4a. It deemed the district court's principles articulated "at too high a level of generality," and it found the cases on which it relied "too far afield" because they did not involve "police officers, domestic violence, threatened arrest, or the right to press charges." App. 4a-5a.

The panel majority further held that this was not "the rare 'obvious case,'" because Officer Martinez "could not know if Bravo would change his mind" and so "framed his communications with Scherer in conditional terms." App. 5a-6a. It also held the obviousness argument waived because Scherer first raised it at oral argument. App. 5a n.2. In the alternative, it held that it was not clearly established that Scherer's protected activity was a "substantial or motivating factor" in the officer's conduct, and that a violation of California's dominant-aggressor law did not, on its own, give rise to liability under § 1983. App. 6a. The panel majority acknowledged "valid concerns with Officer Martinez's approach, including his failure to arrest Bravo that night." App. 6a n.4. But citing the body-worn camera video, it held that the officers were entitled to qualified immunity and that dismissal was proper at the pleading stage. App. 7a.

Judge Nguyen dissented. "[T]he majority today immunizes a police officer who threatened to arrest a domestic violence victim for attempting to press charges against her attacker." App. 8a. The majority, she explained, was bound by the prior panel's holding that the statement was a threat, and it had drawn inferences in the officer's favor by recasting that threat as neutral advice. App. 8a, 10a-11a. She agreed with the district court that the right at issue was "the right to be free from threats of arrest in retaliation for protected petitioning activity." App. 11a. Because courts may not define rights "so narrowly as to require a case on identical facts," and because a right may be clearly established where the unlawfulness of the conduct is obvious or where the "intersection of multiple cases" places it beyond debate, she concluded that the officers had "ample notice." App. 11a-12a. That notice came from settled precedent prohibiting officials from threatening retaliation for petitioning, together with precedent recognizing that "arrest and jailing are paradigmatic forms of unconstitutional retaliation." App. 12a-13a. In her words, "[a]ny reasonable officer would understand that threatening a domestic violence victim with arrest for seeking to press charges would chill her right to petition—particularly when our cases have condemned far less coercive forms of retaliatory intimidation." App. 13a.

The Ninth Circuit denied rehearing en banc after no judge requested a vote. App. 51a-52a. On remand, the district court entered judgment in favor of the defendants. App. 53a-54a.

REASONS FOR GRANTING THE PETITION

The decision below conflicts with this Court's decisions in *Hope* and *Lanier*, which reject the fact-matching the panel majority required. A precedent can give fair warning to officers without sharing identical facts, and this Court has demanded heightened factual specificity only when some reason requires it. No such reason exists here. *See infra* Part I.A-B. This Court's decisions, together with a consistent body of circuit precedent, informed every reasonable officer in October 2020 that the First Amendment forbids threatening a crime victim with arrest to deter her from pressing charges. That proscription would have been obvious even without a case on all fours. *See infra* Part I.C-D. The panel majority avoided that conclusion only by defining the case's "context" through inferences drawn in the officers' favor, which *Tolan* forbids. *See infra* Part II.

The courts of appeals, including the Ninth Circuit's own panels, disagree about what *Hope* requires outside the Eighth Amendment, the question already presented in *Hershey v. City of Bossier City*, No. 25-1389. The panel majority's fact-matching also undermines § 1983 and state policies that protect crime victims, and it deters victims from seeking help. *See infra* Part III. This case, decided on the pleadings with the constitutional violation resolved below, is an ideal vehicle. *See infra* Part IV. The Court should grant certiorari or, at a minimum, summarily reverse or hold this petition for *Hershey*. *See infra* Part V.

I. The decision below conflicts with this Court's rulings in *Hope* and *Lanier*.

A. *Hope* and *Lanier* hold that general rules can give fair warning in novel factual circumstances and, in other instances, may apply with obvious clarity.

Qualified immunity is a rule of fair notice. Its test "is simply the adaptation of the fair warning standard" that due process requires before a criminal conviction, and "[t]o require something clearer than 'clearly established' would, then, call for something beyond 'fair warning.'" *United States v. Lanier*, 520 U.S. 259, 270-71 (1997).

Lanier also answered how much factual similarity fair warning requires. It rejected a rule demanding "fundamentally similar" precedent, which would have entailed an "extreme level of factual specificity" in every case. *Id.* at 268. The Court noted that it had upheld convictions "despite notable factual distinctions . . . so long as the prior decisions gave reasonable warning." *Id.* at 268-69. A requirement for "fundamentally similar" precedent, the Court explained, would "demand a degree of certainty at once unnecessarily high and likely to beget much wrangling." *Id.* at 270. "[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *Id.* at 271.

Hope v. Pelzer, 536 U.S. 730 (2002), applied *Lanier* to § 1983. It called a requirement of "materially similar" facts a "rigid gloss on the qualified immunity

standard" that "is not consistent with our cases." *Id.* at 739. "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* at 741. The "salient question" is whether "the state of the law" gave the officials "fair warning." *Id.* This Court has since reaffirmed that principle. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); *White v. Pauly*, 580 U.S. 73, 79 (2017) (per curiam).

Obviousness is one way to show fair warning for any right when no precedent addresses similar facts, because "in an obvious case," general standards "can 'clearly establish' the answer, even without a body of relevant case law." *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam). But obviousness is not a condition that every plaintiff without an on-point case must meet, and *Hope* does not suggest otherwise.[3] In reversing a grant of qualified immunity to corrections officers who handcuffed a prisoner to a hitching post for seven hours, this Court said the violation was "[a]rguably" so obvious that its own Eighth Amendment cases gave fair warning, then set that point aside: "Regardless, in light of binding Eleventh Circuit precedent, an Alabama Department of Corrections (ADOC) regulation, and a DOJ report," the law was clearly established. *Hope*, 536 U.S. at 741-42.

Precedent can give warning even when its facts differ, regardless of whether the violation is obvious. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

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[3] Much of *Hope*'s discussion of obviousness drew on the Eighth Amendment's deliberate-indifference standard, under which a subjective state of mind may be inferred "from the fact that the risk of harm is obvious." 536 U.S. at 738 (citing *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)).

This Court's admonitions against defining clearly established law "at a high level of generality" are consistent with these holdings. *al-Kidd*, 563 U.S. at 742. Fair warning does not demand "a single level of specificity sufficient in every instance." *Lanier*, 520 U.S. at 271. A heightened demand for specificity is tied to a reason, as "when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue." *Id.*; *see Reichle v. Howards*, 566 U.S. 658, 665-67 (2012) (this Court's retaliatory-prosecution precedent left open whether probable cause defeats a retaliatory-arrest claim); *Lane v. Franks*, 573 U.S. 228, 243-46 (2014) (circuit precedent conflicted). Heightened specificity is also appropriate where the constitutional standard is itself highly fact-bound. In Fourth Amendment excessive-force cases, specificity is "especially important" because the constitutional standard is reasonableness, which "depends very much on the facts of each case." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam); *Kisela v. Hughes*, 584 U.S. 100, 104 (2018) (per curiam) (quoting *Mullenix*, 577 U.S. at 13); *see Graham v. Connor*, 490 U.S. 386, 396 (1989). Accordingly, a decision condemning force against a handcuffed suspect offers little guidance to an officer confronted with a fleeing suspect.

Unlike Fourth Amendment reasonableness, the standards governing First Amendment petitioning are relatively concrete. This Court generally does not decide what the First Amendment protects by weighing the facts of each case; it asks whether the expression falls within a narrow category that has historically been unprotected. *United States v. Stevens*, 559 U.S. 460, 468-72 (2010). Petitioning follows the

same pattern: a genuine petition is protected, and protection is withdrawn only from a "sham" that is "objectively baseless." *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993). If the First Amendment forbids an official to threaten a citizen with sanctions for petitioning, a precedent applying that rule to a prison official and an inmate's grievance warns a police officer and a crime victim just as clearly. *See infra* Part I.C. The rule asks *whether* the official used a threat to deter petitioning, not *who* the official was or *what* the petition concerned.

B. By defining the "specific context of the case" with an "extreme level of factual specificity," the panel majority required the equivalent of a "fundamentally similar" precedent.

The panel majority asked whether any case clearly established a violation "in a situation like this one, where a police officer is responding to the scene of a domestic assault and advising both parties about their respective rights to press charges." App. 4a. It dismissed the district court's authorities because they "do not involve police officers, domestic violence, threatened arrest, or the right to press charges." App. 5a.[4] Under that approach, a precedent gives fair

[4] The panel majority's description was also inaccurate. Police officers were the defendants in *Ford v. City of Yakima*, 706 F.3d 1188 (9th Cir. 2013), *abrogated in part on other grounds by Nieves v. Bartlett*, 587 U.S. 391 (2019), and *Duran v. City of Douglas*, 904 F.2d 1372 (9th Cir. 1990), both of which Scherer cited below. Pet. C.A. Br. 16. "[P]olice officers have been on notice at least since 1990 that it is unlawful to use their authority to retaliate against individuals for their protected speech." *Ford*, 706 F.3d at 1195. The panel majority addressed neither case.

warning only if it combines every one of those features. That is the "fundamentally similar" standard *Lanier* rejected and the "materially similar" standard *Hope* rejected.

The panel majority left Scherer only two routes: a precedent sharing every listed feature, or "the rare 'obvious case,'" which it confined to "exceedingly rare circumstances with extreme facts." App. 5a-6a. This Court's cases do not divide the field that way. The "rare 'obvious case'" is one in which "existing precedent does not address similar circumstances." *District of Columbia v. Wesby*, 583 U.S. 48, 64 (2018). Precedent can address similar circumstances despite "notable factual distinctions." *Lanier*, 520 U.S. at 268-69. "[E]ven as to action less than an outrage, 'officials can still be on notice that their conduct violates established law . . . in novel factual circumstances.'" *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377-78 (2009) (quoting *Hope*, 536 U.S. at 741).

None of the features the panel majority identified bears on why Officer Martinez's conduct was unlawful. The governing rule is that an official may not threaten a person to stop her from petitioning the government. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67-68 (1963); *Hartman v. Moore*, 547 U.S. 250, 256 (2006); *infra* Part I.C. That rule does not hinge on the identity of the official. The First Amendment generally bars "government officials" from retaliating against protected activity, and shortly before the events here, the Ninth Circuit refused to confine retaliation liability to particular kinds of officials. *Nieves v. Bartlett*, 587 U.S. 391, 398

(2019); *Sampson v. County of Los Angeles*, 974 F.3d 1012, 1019-20 (9th Cir. 2020). Nor does the rule depend on whether the official was investigating any particular crime. If anything, the domestic-violence call made Officer Martinez's threat less defensible, because California law required him to identify the dominant aggressor (here, Bravo) and discourage him from pressing charges. App. 10a-11a, 30a, 57a. And it was not "just a battery": the domestic-violence statute covers former dating partners. Cal. Penal Code § 273.5(b)(3). Nor does the rule depend on the threatened sanction. Arrest is the sanction that most directly threatens "[t]he freedom of individuals verbally to oppose or challenge police action." *City of Houston v. Hill*, 482 U.S. 451, 462-63 (1987); *see Lozman v. City of Riviera Beach*, 585 U.S. 87, 99 (2018). Because the governing rule did not turn on the presence or absence of these facts, Officer Martinez had no reason to doubt that the rule applied to him.

The panel majority's approach also defeats the purpose of the clearly established requirement, which is fair notice. A rule defined by every fact of this case would offer no guidance to an officer who threatens to arrest the victim of a burglary, or any other crime, for asking to press charges. Each setting would require its own precedent, and officers would escape liability in any setting that no prior case happened to address, no matter how ordinary. That approach gives officers less guidance, not more. The absence of a case about threatening crime victims with arrest shows that officers have understood the rule, not that the rule was unclear, because "[t]he easiest cases don't even arise." *Safford*, 557 U.S. at 377 (internal quotation marks omitted). As then-

Judge Gorsuch put it, "it would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt." *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082-83 (10th Cir. 2015).

The panel majority drew its demand for factual identity from this Court's excessive-force decisions, requiring precedent that would "'squarely govern[]' the specific facts at issue." App. 5a (quoting *Kisela*, 584 U.S. at 104). But the reasons for specificity there—the fact-bound reasonableness standard applied to "split-second judgments"—are absent here. *Graham*, 490 U.S. at 396-97. Officer Martinez had time to deliberate. App. 9a, 16a-17a, 69a-74a. An officer with "time to make calculated choices" has no claim to the latitude given an officer making "a split-second decision to use force in a dangerous setting." *Cf. Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., statement respecting denial of certiorari).

C. At the time of the underlying incident, settled law gave Officer Martinez fair warning that threatening a crime victim with arrest to stop her from pressing charges violates the First Amendment.

Measured against the correct standard, the law in October 2020 gave Officer Martinez fair warning. The rule he violated is specific, not a broad general proposition: an officer may not threaten a crime victim with arrest to deter her from asking the police to arrest and charge her attacker. Each element of that rule was settled, and the cases read together placed its application here "beyond debate." *al-Kidd*,

563 U.S. at 741.

First, reporting a crime to the police and asking them to act on it is petitioning protected by the First Amendment. The right to petition is "one of the most precious of the liberties safeguarded by the Bill of Rights," and more than a century ago this Court recognized every citizen's constitutional "right . . . to communicate to the executive officers any information which he has of the commission of an offense." *Lozman*, 585 U.S. at 101 (citation omitted); *In re Quarles*, 158 U.S. 532, 535-36 (1895). Five circuits had held that the First Amendment protects complaints to law enforcement, including reports of crime. *Jackler v. Byrne*, 658 F.3d 225, 241 (2d Cir. 2011); *United States v. Hylton*, 710 F.2d 1106, 1111 (5th Cir. 1983); *Gable v. Lewis*, 201 F.3d 769, 771 (6th Cir. 2000); *Entler v. Gregoire*, 872 F.3d 1031, 1043-44 (9th Cir. 2017); *Meyer v. Bd. of Cnty. Comm'rs*, 482 F.3d 1232, 1243 & n.5 (10th Cir. 2007). The Ninth Circuit recognized that "[i]t matters not who files the criminal complaint or who the complaint is against." *Entler*, 872 F.3d at 1044. *Entler* granted immunity only because the question was one of "first impression in our circuit"; its holding settled the law three years before the events here. *Id.* at 1043-44. And the Tenth Circuit applied the rule to a woman's report that a former partner had assaulted her, holding that "denying the ability to report physical assaults is an infringement of protected speech." *Meyer*, 482 F.3d at 1243. The right is not a right to compel a prosecution; it is the right "to set in motion the governmental machinery." *Id.* at 1243 n.5; *see Entler*, 872 F.3d at 1043-44. California law is in accord—a citizen with good reason to

believe the law has been violated "shall have the right to cause the arrest of the offender," and California courts treat a report to the police as petitioning. *Ball v. Rawles*, 93 Cal. 222, 228 (1892); *Barela v. Superior Court*, 30 Cal. 3d 244, 252 (1981); App. 25a.

Second, officials may not threaten sanctions to deter First Amendment activity. A government official's "threat of invoking legal sanctions and other means of coercion" to suppress protected expression violates the First Amendment. *Bantam Books*, 372 U.S. at 67; *see NRA v. Vullo*, 602 U.S. 175, 180 (2024). The Ninth Circuit had long applied that rule. It held that "the mere threat of harm can be an adverse action, regardless of whether it is carried out," even when the threat was only a prison official's warning to an inmate to "be careful what you write." *Brodheim v. Cry*, 584 F.3d 1262, 1270-71 (9th Cir. 2009); *see White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000). It also held that a reasonable official would have known that threatening a parent's custody of his children out of retaliatory intent violates the First Amendment. *Capp v. County of San Diego*, 940 F.3d 1046, 1059 (9th Cir. 2019). And seven weeks before the events in this case, it reversed a pleading-stage grant of immunity, explaining that *Capp* had "simply articulated, in the context of social workers, what is a longstanding, clearly established right under the First Amendment to be free from retaliation in the form of threatened legal sanctions." *Sampson*, 974 F.3d at 1020. The Tenth Circuit agreed that "threatened prosecution" for protected speech "constitutes an infringement of that freedom." *Worrell v. Henry*, 219 F.3d 1197, 1212

(10th Cir. 2000). Writing for the same court, then-Judge Gorsuch held that a reasonable official "should have clearly understood" that intimidating a taxpayer to deter his tax appeals, allegedly including a deputy sheriff's threat to shoot him, violated the right to petition, which "does not pick and choose its causes." *Van Deelen v. Johnson*, 497 F.3d 1151, 1156-59 (10th Cir. 2007).

Third, arrest is the paradigmatic sanction an officer can threaten. *Bantam Books* condemned "thinly veiled threats to institute criminal proceedings." *Vullo*, 602 U.S. at 189 (quoting *Bantam Books*, 372 U.S. at 68). The freedom "to oppose or challenge police action without thereby risking arrest" distinguishes "a free nation from a police state," and "some police officers may exploit the arrest power as a means of suppressing speech." *Hill*, 482 U.S. at 462-63; *Lozman*, 585 U.S. at 99; *Nieves*, 587 U.S. at 406. The Ninth Circuit had denied immunity to an officer who told a motorist, "If you run your mouth, I will book you in jail for it," and then did so, explaining that "closely analogous preexisting case law is not required." *Ford*, 706 F.3d at 1190-91, 1196 (citation omitted); *see Lacey v. Maricopa County*, 693 F.3d 896, 916-17 (9th Cir. 2012) (en banc).

Read together, these decisions informed every reasonable official in Officer Martinez's position that he could not threaten to arrest Scherer for asking him to press charges against Bravo. This Court's decisions confirm that "the state of the law" includes more than a single on-point case. In *Hope*, circuit precedent, a state regulation, and a Department of Justice report together gave the officers fair warning.

536 U.S. at 741-46. Here, California law reinforced that warning. As the Ninth Circuit read it, California Penal Code § 13701(b) required Officer Martinez to identify the dominant aggressor and to discourage him from pressing charges. App. 10a-11a, 30a, 57a. California also required that officers be trained in those duties and in "[t]he use of an arrest by a private person in a domestic violence situation," and that patrol officers be retrained every two years. Cal. Penal Code § 13519(c)(1), (9), (g). And California made it a crime to "dissuade or attempt to dissuade any victim of crime from reporting the crime to the police," because "[l]aws which define certain acts as criminal would be meaningless if citizens who reported crime were not protected from vindictive retaliation." *Barela*, 30 Cal. 3d at 252 (citing Cal. Penal Code § 136.1(b)(1)). Officer Martinez did the opposite of what California law required: he used the dominant aggressor's supposed right to press charges as leverage against the victim. The panel majority answered by observing that "state law violations do not, on their own, give rise to liability under § 1983." App. 6a. But Scherer does not rely on state law as a source of liability. Rather, as in *Hope*, an officer's disregard of state requirements "provide[s] *equally strong support* for the conclusion that [he was] fully aware of the wrongful character of [his] conduct."[5]

[5] *Davis v. Scherer* is not to the contrary; it "concerned not the authorities a court may consider in determining qualified immunity, but this entirely discrete question: Is qualified immunity defeated where a defendant violates any clearly established duty, including one under state law, or must the clearly established right be the federal right on which the claim for relief is based?" *Elder v. Holloway*, 510 U.S. 510, 515 (1994) (discussing *Davis v. Scherer*, 468 U.S. 183, 193-96 (1984)).

536 U.S. at 744 (emphasis added).

Nor does this case depend on whether circuit precedent alone can clearly establish the law—a question this Court has reserved. *Zorn v. Linton*, 607 U.S. 568, 573 n.3 (2026) (per curiam). The governing principles derive from this Court's own decisions on fair warning, threats of legal sanction, the arrest power, and the right to petition; the circuit decisions merely apply them. If nothing else, these circuit decisions form "a robust 'consensus of cases of persuasive authority.'" *Wesby*, 583 U.S. at 63 (citation omitted).

D. This is also an obvious case under *Hope* and *Taylor v. Riojas*.

Even without a precedent addressing a threat of this kind, the officers would still not be entitled to qualified immunity because the governing rule "appl[ied] with obvious clarity to the specific conduct in question." *Hope*, 536 U.S. at 741 (quoting *Lanier*, 520 U.S. at 271). In *Taylor*, this Court acted summarily because, "[c]onfronted with the particularly egregious facts of this case, any reasonable officer should have realized" that the conduct was unconstitutional, and no facts demonstrated "necessity or exigency." *Taylor v. Riojas*, 592 U.S. 7, 9 (2020) (per curiam). Officer Martinez found Scherer bloodied and beaten after an attempted rape. Bravo was already detained, and Officer Martinez knew Bravo did not want to press charges. Yet when Scherer said she did, Officer Martinez told her she would go to jail too, and he hid Bravo's answer from her. App. 8a-10a, 69a-75a. Nothing suggests Officer Martinez faced necessity or

exigency, and his omission of Bravo's answer shows he acted deliberately. No reasonable official in Officer Martinez's position would believe the Constitution permitted him to threaten the arrest of a bloodied victim of assault and attempted rape for requesting to press charges against her attacker.

The panel majority reached a different conclusion only by departing from *Hope* and *Taylor* in two ways. It confined the obvious-case rule to "exceedingly rare circumstances with extreme facts"—a phrase that appears in no decision of this Court. App. 6a (quoting *Waid v. County of Lyon*, 87 F.4th 383, 389 (9th Cir. 2023)). It also drew inferences in the officers' favor by crediting Bravo's claim that Scherer "had thrown the first blow," and by surmising that Officer Martinez "could not know if Bravo would change his mind." App. 5a. This Court's decisions forbid drawing such inferences at the pleading stage. *See infra* Part II.

The panel majority's waiver footnote is no obstacle to review. It decided the question in the alternative, so the issue was "passed upon" below. App. 5a n.2; *United States v. Williams*, 504 U.S. 36, 41 (1992). The officers themselves briefed the point. Resp. C.A. Opening Br. 34. Whether law was clearly established is a question of law, decided "in light of all relevant precedents." *Elder*, 510 U.S. at 512, 516. And obviousness is not a separate claim but one way of showing fair warning; "parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

II. The decision below conflicts with *Tolan v. Cotton* because it defined the "specific context of the case" by drawing inferences in the officers' favor at the pleading stage.

The panel majority's error under *Hope* and *Lanier* rests on a second error. In defining the "specific context of the case" narrowly enough to avoid governing precedent, it described facts and drew inferences from the officer's point of view. That is precisely the error *Tolan* corrected, this time on a motion to dismiss.

Tolan holds that courts "must take care not to define a case's 'context' in a manner that imports genuinely disputed factual propositions." 572 U.S. at 657. That rule applies with greater force on the pleadings: "When there are well-pleaded factual allegations, a court should assume their veracity." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). And in *Vullo*, this Court reversed a court of appeals that read a First Amendment complaint "in isolation" and "fail[ed] to draw reasonable inferences in the [plaintiff's] favor." 602 U.S. at 194-95. The panel majority violated *Tolan* and *Vullo* in four ways.

First, it recast the threat as advice, framing the issue around an officer "advising both parties about their respective rights to press charges." App. 4a. But the complaint alleges a threat, not advice: Officer Martinez told Scherer that she "will be going to jail too" and "would be going to jail right now." App. 74a, 77a. Whether a statement is a threat is a question of fact, and "a statement that 'warns' a person to stop doing something carries the implication of some consequence of a failure to heed

that warning." *Brodheim*, 584 F.3d at 1270. The Ninth Circuit had already held that Scherer plausibly alleged the statement "was a threat, not a statement of law," and the panel majority did not disturb that holding. App. 2a-3a, 30a. It instead redefined the case's "context" in the officers' terms. App. 10a (Nguyen, J., dissenting).

Second, the panel majority credited Bravo's claim that Scherer "had been the initial aggressor and had thrown the first blow." App. 5a. The complaint alleges the opposite, and the district court found that Bravo "was clearly the primary aggressor." App. 25a, 66a-68a. Who struck first was beside the point, because California law defines the dominant aggressor as "the most significant, rather than the first, aggressor." App. 57a. Building Bravo's account into the case's context imported "genuinely disputed factual propositions." *Tolan*, 572 U.S. at 657.

Third, the panel majority supplied a justification the complaint does not allege, reasoning that Officer Martinez "could not know if Bravo would change his mind, and so he framed his communications with Scherer in conditional terms." App. 5a. The complaint alleges instead that Officer Martinez concealed Bravo's refusal deliberately, "for the purpose of convincing plaintiff not to exercise her right." App. 75a. It also alleges that the threat was *not* conditional: she "would be going to jail right now." App. 74a. In any event, "conditional phrasing does not render a statement non-threatening"; if Bravo had changed his mind, Officer Martinez "could have informed Scherer then." App. 11a (Nguyen, J., dissenting).

Fourth, the panel majority resolved motive against Scherer, holding in the alternative that it was not clearly established that her protected activity was "a substantial or motivating factor" in the officer's conduct. App. 6a (quoting *O'Brien v. Welty*, 818 F.3d 920, 932 (9th Cir. 2016)). But motive is a question of fact, not a legal rule that must be clearly established. *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999). "[E]ven when the general rule has long been clearly established (for instance, the First Amendment bars retaliation for protected speech)," motive remains part of the plaintiff's case on the merits, and this Court has refused to impose special burdens on claims that "require proof of improper intent." *Crawford-El v. Britton*, 523 U.S. 574, 592-94 (1998). At the pleading stage, intent "may be alleged generally." Fed. R. Civ. P. 9(b). Scherer alleged it specifically: Officer Martinez learned that she wanted to press charges and Bravo did not, and then threatened her while withholding Bravo's answer "for the purpose of convincing plaintiff not to exercise her right." App. 9a-10a, 73a-75a. *O'Brien* itself held similar allegations sufficient and denied immunity on the pleadings. 818 F.3d at 933-34, 936. The panel majority's alternative holding rests on the same error as its primary holding.

Neither the preference for early resolution nor the video cures the error. Courts may decide immunity early, but not on the officer's version of events. *See Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam). A court may disregard a party's account only when it is "blatantly contradicted by the record." *Scott v. Harris*, 550 U.S. 372, 380 (2007). The panel

majority identified no allegation that the video contradicts, and a recording cannot show what Officer Martinez "could not know." App. 7a. The earlier panel that held the statement to be a threat had the same video. App. 7a, 30a. If a court may adopt the officer's description of his own conduct, every threat becomes "advice," and no precedent will ever be close enough.

III. The questions presented are important and recurring.

A. The circuits apply *Hope* inconsistently and are unlikely to resolve their confusion without this Court's intervention.

The decision below reflects a broader confusion about how *Hope* applies outside the Eighth Amendment. That question is already pending in *Hershey*, which asks "[w]hether the principles of *Hope v. Pelzer* are limited to Eighth Amendment claims or extend to Free Speech and Free Exercise claims." *Hershey* Pet. i. Fifth Circuit judges dispute whether that court so confines *Hope*. Other circuits have denied immunity for First Amendment violations without factually identical precedent. *See, e.g.*, *Nagle v. Marron*, 663 F.3d 100, 115-16 (2d Cir. 2011); *Tobey v. Jones*, 706 F.3d 379, 391-93 (4th Cir. 2013); *Bailey v. Wheeler*, 843 F.3d 473, 484-85 (11th Cir. 2016).

The Ninth Circuit applies *Hope* to First Amendment claims, but its panels divide over what *Hope* requires. *See Galvin v. Hay*, 374 F.3d 739, 746-47 (9th Cir. 2004). Some ask whether the law gave "fair warning," not "whether an earlier case mirrors the specific facts here," and rely on "the intersection

of multiple cases." *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1064 (9th Cir. 2013); *Polanco v. Diaz*, 76 F.4th 918, 930 n.8 (9th Cir. 2023); *see Ford*, 706 F.3d at 1195-96. Others treat *Hope* as a narrow "exception to the specific-case requirement," reserved for "exceedingly rare circumstances with extreme facts." *Sharp v. County of Orange*, 871 F.3d 901, 912 (9th Cir. 2017); *Waid*, 87 F.4th at 389. The panel majority took the second path. Under *Ellins* and *Ford*, the same allegations would have gone to a jury.

Scherer asked the en banc court to resolve that conflict, and no judge requested a vote. App. 51a-52a. She does not ask this Court to resolve an intra-circuit conflict. *Cf. Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam). But the circuit that decides the most qualified-immunity appeals has left the result to the draw of the panel, and courts elsewhere would have denied immunity here. *See Worrell*, 219 F.3d at 1212, 1215-16; *Meyer*, 482 F.3d at 1243; *Jackler*, 658 F.3d at 241. Only this Court is positioned to resolve lingering confusion about what *Hope* and *Lanier* require.

Judges across the circuits have asked for guidance. Judge Willett has observed that the "courts of appeals are divided—intractably—over precisely what degree of factual similarity must exist." *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part). Judge Oldham has described the "level-of-granularity problem" and suggested a less demanding approach when officials do not face "split-second decision-making." *Villarreal v. City of Laredo*, 134 F.4th 273, 284 (5th Cir. 2025) (en banc)

(Oldham, J., concurring). And Judge Hurwitz has written that, "much like Lucy of 'Charlie Brown' fame, the Court repeatedly yanks away the football when lower courts attempt to apply" *Hope*. *Sampson*, 974 F.3d at 1026 (Hurwitz, J., concurring in part and dissenting in part). Three Justices have warned against "discarding every case that presents any factual variation." *Smith v. Kind*, 146 S. Ct. 2346, 2350 (2026) (Sotomayor, J., dissenting from denial of certiorari).

B. Fact-matching undermines both the remedy Congress created and the policies States have adopted to protect crime victims.

Fact-matching protects officials most where protection is least justified. From 2010 through 2020, the courts of appeals decided at least 5,526 qualified-immunity appeals, more in the Ninth Circuit than in any other, and First Amendment claims were the third most common category. Inst. for Just., *Unaccountable* 4, 16, 18 (Feb. 2024). In a representative sample, most of those claims alleged premeditated retaliation, not split-second judgments. Yet defendants fully prevailed in 34% of First Amendment appeals but only 23% of excessive-force appeals, because First Amendment claims are "more factually diverse" and harder to match to precedent. *Id.* at 4, 24-25. Officials with "time to make calculated choices" thus receive more protection than officers who must act in an instant. *Hoggard*, 141 S. Ct. at 2422 (Thomas, J., statement respecting denial of certiorari).

Fact-matching also disregards the notice States give their own officers. By 2012, at least 34 States had enacted laws addressing the primary aggressor or dual arrests. David J. Hirschel & Eve S. Buzawa, *The Role and Impact of Primary Aggressor Laws and Policies*, 12 J. Police Crisis Negotiations 165, 170 (2012). Jurisdictions with such laws or policies had a dual-arrest rate of 2%, compared with 9% in jurisdictions with neither. *Id.* at 179. California changed "primary aggressor" to "dominant aggressor" in 2000 because of "concerns about law enforcement arresting both abuser and victim," and because officers had read "primary" "to mean the first person who hit." Cal. Senate Off. of Rsch., *California's Response to Domestic Violence* 23 (2003); Sen. Rules Comm., Off. of Sen. Floor Analyses, Unfinished Business Analysis of S.B. 1944 (1999-2000 Reg. Sess.), at 4 (Aug. 25, 2000). The Los Angeles City Attorney, whose city employs respondents, sponsored the change, and it passed the Senate 38-0 and the Assembly 74-0. S.B. 1944 Analysis, at 1. Yet under the panel majority's approach, that direction counted for nothing because no federal court had condemned the same conduct. A doctrine meant to ensure fair warning should not disregard the warning a State gives its own officers.

C. The decision below deters crime victims from seeking the law's protection, and it ensures that the law will never become clear.

Police answer domestic-violence calls every day. From 2006 to 2015, police learned of only 56% of nonfatal domestic-violence victimizations, and

female victims were four times as likely as male victims to stay silent for fear of reprisal. Bureau of Justice Statistics, Brian A. Reaves, *Police Response to Domestic Violence, 2006-2015*, at 1, 5 (May 2017) (NCJ 250231). When a seriously injured victim signed a complaint, the offender was arrested or charged 89% of the time, compared with 35% when she did not. *Id.* at 12. As this Court has recognized, domestic violence "is notoriously susceptible to intimidation or coercion of the victim." *Davis v. Washington*, 547 U.S. 813, 832-33 (2006).

A victim who asks the responding officer to arrest and charge her attacker is petitioning the one official with the power to act, at the moment it matters most. *See Borough of Duryea v. Guarnieri*, 564 U.S. 379, 388 (2011). "The effective enforcement of [the] criminal laws depends upon the willingness of victims and witnesses to report crime." *Barela*, 30 Cal. 3d at 253. When the officer answers with a threat of jail, the State finishes what the abuser started. If an officer who makes that threat is immune whenever no earlier case involved the same kind of criminal investigation, the victim's right has no remedy where it is most often exercised. The burden weighs most heavily on victims like Scherer, whose attackers accuse them of being the aggressor.

The panel majority's approach also ensures that the law will stay unsettled. Deciding the constitutional question "is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). The Ninth Circuit held that Scherer plausibly

alleged an unconstitutional threat, but in an unpublished memorandum that binds no one, and a second unpublished memorandum then granted immunity. App. 1a-7a, 29a-30a; 9th Cir. R. 36-3(a). In that "vacuum," as Judge Berzon has warned, officials "can continue to violate the First Amendment . . . as they will face no adverse consequences." *DeFrancesco v. Robbins*, 136 F.4th 933, 946 (9th Cir. 2025) (Berzon, J., concurring).

IV. This case is an ideal vehicle.

This case presents the questions cleanly. It arises on a motion to dismiss, the panel majority observed that "the parties do not dispute the material facts," and the constitutional violation was decided below. App. 2a-3a, 7a, 30a. The sole issue is whether the law was clearly established, and the Court can decide it without reaching probable cause: Scherer was threatened, not arrested, and the officers agreed below that "the question is not whether the officers had probable cause." D. Ct. Dkt. 61, at 8. There are no pending proceedings below; the judgment is final. App. 53a-54a.

The questions presented also decide the case. The panel majority's alternative holding on motive is not an independent ground. The officers never argued motive on appeal; the panel majority raised it in one sentence and resolved it by drawing the inferences the second question challenges. App. 6a; *see supra* Part II. And because motive is a fact to be proved, not a rule that must be clearly established, that holding cannot survive a ruling for Scherer on either question. Nor does the first question depend on obviousness. *See supra* Part I.A-C. The claim against

Officer Ismail rises or falls with the claim against Officer Martinez. App. 24a n.5. And both questions were pressed or passed upon below. App. 4a-6a, 28a; Pet. C.A. Br. 19-20, 27, 28-31; *see Williams*, 504 U.S. at 41. The inference-drawing error first appeared in the panel majority's opinion, and Judge Nguyen's dissent identified it. App. 10a-11a.

Neither the video nor the decision's unpublished status is an obstacle. *See supra* Part II. This Court has summarily reversed a divided, unpublished Ninth Circuit qualified-immunity decision before. *Los Angeles County v. Rettele*, 550 U.S. 609, 612 (2007) (per curiam). And it has granted plenary review of unpublished decisions on First Amendment retaliation. *E.g.*, *Nieves*, 587 U.S. 391 (reviewing 712 F. App'x 613 (9th Cir. 2017)); *Lozman*, 585 U.S. 87 (reviewing 681 F. App'x 746 (11th Cir. 2017)); *Lane*, 573 U.S. 228 (reviewing 523 F. App'x 709 (11th Cir. 2013)).

V. Alternatively, the Court should summarily reverse or hold this petition for *Hershey*.

If the Court does not grant plenary review, it should summarily reverse. This Court uses that procedure "to correct a clear misapprehension of the qualified immunity standard." *Brosseau*, 543 U.S. at 198 n.3. It has acted summarily where the violation was obvious, where a court of appeals viewed the facts in the officer's favor, and where a court granted immunity on the pleadings on a First Amendment claim. *Taylor*, 592 U.S. at 9; *Tolan*, 572 U.S. at 657; *Sause v. Bauer*, 585 U.S. 957, 960 (2018) (per curiam). This case combines those errors.

Otherwise, the Court should hold this petition pending its disposition of *Hershey*. If the Court holds there that *Hope* governs First Amendment claims, it should then grant this petition, vacate the judgment, and remand.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the Court should summarily reverse the judgment of the court of appeals, or hold this petition pending its disposition of *Hershey*, and then dispose of it accordingly.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 25-2651

JOY HO SCHERER,
Plaintiff-Appellee,

v.

WESSSAM WAYNE ISMAIL; NELSON ANTONIO MARTINEZ, JR.,
Defendants-Appellants,

and

CITY OF LOS ANGELES, DOES, 1 through 10, inclusive,
Defendants.

Filed: May 14, 2026

Before: HIGGINSON, NGUYEN, and BRESS, *Circuit Judges*.** Dissent by Judge NGUYEN.

MEMORANDUM*

Los Angeles Police Department Officers Nelson Martinez and Wessam Ismail (Defendants) appeal the district court's order

** The Honorable Stephen A. Higginson, United States Circuit Judge for the Court of Appeals, 5th Circuit, sitting by designation.

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

denying their motion to dismiss based on qualified immunity in plaintiff Joy Scherer's suit alleging First Amendment retaliation under 42 U.S.C. § 1983. In a prior appeal in this case, we reversed the district court's dismissal of Scherer's complaint for failure to state a claim, noting that, "[o]n remand, the district court may address, in the first instance, whether the officers are entitled to qualified immunity because Scherer failed to allege a violation of a 'clearly established' constitutional right." *Scherer v. City of L.A.*, 2024 WL 4658773, at *1 (9th Cir. Nov. 4, 2024) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)). On remand, the district court concluded that the alleged constitutional violation was clearly established. We have jurisdiction to review denials of qualified immunity on an interlocutory basis under the collateral order doctrine. *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). We review the denial of qualified immunity de novo. *Hopson v. Alexander*, 71 F.4th 692, 697 (9th Cir. 2023). We reverse.

Defendants are entitled to qualified immunity under § 1983 "unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *District of Columbia v. Wesby*, 583 U.S. 48, 62–63 (2018) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)). In the first appeal, we held that, at the Rule 12(b)(6) stage, Scherer had sufficiently pleaded a constitutional violation. *Scherer*, 2024 WL 4658773, at *1. This second appeal thus concerns only the "clearly established" prong of the qualified immunity

analysis. In conducting that inquiry, we are guided by the Supreme Court's instruction that "'[c]learly established' means that, at the time of the officer's conduct, the law was 'sufficiently clear that every reasonable official would understand that what he is doing' is unlawful." *Wesby*, 583 U.S. at 63 (quoting *al-Kidd*, 563 U.S. at 741). "This demanding standard protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

In conducting the "clearly established" analysis, the Supreme Court has "repeatedly stressed that courts must not 'define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced.'" *Id.* at 63–64 (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014)). "It is not enough that a rule be suggested by then-existing precedent; the 'rule's contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *City of Tahlequah v. Bond*, 595 U.S. 9, 12 (2021) (per curiam) (quoting *Wesby*, 583 U.S. at 63). As we stated in a recent First Amendment retaliation case, the question is "whether the violative nature of the defendants' particular conduct is clearly established in light of the *specific context* of the case." *Bird v. Dzurenda*, 131 F.4th 787, 790 (9th Cir. 2025) (citation modified) (quoting *Rico v. Ducart*, 980 F.3d 1292, 1298 (9th Cir. 2020)).[1]

[1] The district court interpreted our prior decision in this case to bear on the question of the proper level of generality at which

Scherer cites no case or body of case law clearly establishing a First Amendment violation in a situation like this one, where a police officer is responding to the scene of a domestic assault and advising both parties about their respective rights to press charges, even when advisals about going to jail are plausibly regarded as threats that would chill a person of ordinary firmness from pressing charges. The district court denied qualified immunity based on three principles which the court found were clearly established: (1) reporting a crime to police is protected "petitioning" activity under the First Amendment, (2) threats of retaliation can chill speech, and (3) arrest can chill speech. These principles, however, are articulated at too high a level of generality and thus do not answer "the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Wesby*, 583 U.S. at 63–64 (quoting *Plumhoff*, 572 U.S. at 779).

For example, Scherer relies on *Brodheim v. Cry*, 584 F.3d 1262, 1265–66 (9th Cir. 2009), which involved a prison official who threatened an inmate with retaliation for submitting grievances, and *White*

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to define the claimed constitutional right. The dissent does the same. Both the district court and the dissent overread our prior decision. In the first appeal, we reversed the dismissal of Scherer's claim because it was based on the incorrect conclusion that Officer Martinez's statement would not have chilled a person of ordinary firmness from pressing charges. We did not analyze qualified immunity and explicitly left that issue open on remand. We did not hold it was clearly established that Officer Martinez's conduct violated Scherer's First Amendment rights.

v. Lee, 227 F.3d 1214, 1220–25 (9th Cir. 2000), which involved an agency investigation into protestors. These precedents, which do not involve police officers, domestic violence, threatened arrest, or the right to press charges, are too far afield to "'squarely govern[]' the specific facts at issue" in this case. *Kisela v. Hughes*, 584 U.S. 100, 104 (2018) (quoting *Mullenix v. Luna*, 577 U.S. 7, 13 (2015) (per curiam)).

Nor is this "the rare 'obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances."[2] *Wesby*, 583 U.S. at 64 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam)). Bravo told the officers that Scherer had been the initial aggressor and had thrown the first blow. Officer Martinez then told Scherer that if Bravo pressed charges, he would have to arrest her. Officer Martinez did not tell Scherer that if *she* pressed charges, he would have to arrest her. And, although Bravo had earlier told Officer Martinez he did not wish to press charges, Officer Martinez could not know if Bravo would change his mind, and so he framed his communications with Scherer in conditional terms. That Scherer plausibly

[2] At oral argument, Scherer's counsel argued obviousness for the first time (and conceded that Scherer had not made that argument below or in her briefs). Because this argument was "not advanced in the district court or in the briefs on appeal," it is "deemed waived." *Murphy v. Sloan*, 764 F.3d 1144, 1152 n.9 (9th Cir. 2014); *see also United States v. Dreyer*, 804 F.3d 1266, 1277 (9th Cir. 2015) ("Generally, an appellee waives any argument it fails to raise in its answering brief."). Even if it were not waived, it would fail for the reasons we describe.

alleged Officer Martinez's communications could be interpreted as threats does not make the asserted constitutional violation here clearly established.[3]

Under these circumstances, we cannot say that this case involves "exceedingly rare circumstances with extreme facts," such that the obviousness exception would apply. *Waid v. Cnty. of Lyon*, 87 F.4th 383, 389 (9th Cir. 2023). Even if Officer Martinez's actions would have chilled a person of ordinary firmness from pressing charges, it is not clearly established that "the protected activity was a substantial or motivating factor in the defendant's conduct." *O'Brien v. Welty*, 818 F.3d 920, 932 (9th Cir. 2016) (quoting *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 770 (9th Cir. 2006)). And, to the extent Officer Martinez violated California law requiring officers to discourage dominant aggressors in his handling of the situation, "state law violations do not, on their own, give rise to liability under § 1983." *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 371 (9th Cir. 1998).[4]

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[3] The dissent asserts that *Brodheim* and *White* provide an officer with "ample notice" of the alleged constitutional violation. Dissent at 5. But it is not clear whether the dissent is suggesting that the alleged violation is clearly established because it is "squarely govern[ed]" by those cases, *Kisela*, 584 U.S. at 104, or because it is "obvious," *Hardwick v. County of Orange*, 844 8 F.3d 1112, 1117 (9th Cir. 2017). Regardless, the dissent does not explain how such factually dissimilar cases could clearly establish the violation here, or, in the alternative, how Officer Martinez's statements would rise to the level of an obvious constitutional violation.

[4] We recognize that there are valid concerns with Officer Martinez's approach, including his failure to arrest Bravo that

Although this case is at the motion-to-dismiss stage, qualified immunity should be decided "at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam). And in this case, there is a videotape of the entire encounter (made available to us in the prior appeal), and the parties do not dispute the material facts. *Cf. Scott v. Harris*, 550 U.S. 372, 381 (2007) (holding that courts should "view[] the facts in the light depicted by the videotape"). Therefore, we conclude that dismissal based on qualified immunity is proper at this stage. We reverse and remand for entry of judgment in favor of Defendants.

REVERSED.

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night. (Bravo was ultimately arrested and criminally convicted for a violation of Cal. Penal Code § 273.5, domestic violence with corporal injury.) Whether Officer Martinez failed to arrest Bravo promptly, however, is different from whether his statements to Scherer constituted obvious First Amendment retaliation.

NGUYEN, Circuit Judge, dissenting:

The majority today immunizes a police officer who threatened to arrest a domestic violence victim for attempting to press charges against her attacker. We are bound by a prior panel's conclusion that the officer's statement to Plaintiff Joy Ho Scherer constituted a threat that violated her First Amendment right to engage in protected petitioning activity—namely, pressing charges against her attacker. The majority now finds that the right to be free from such a threat was not "clearly established." Because the majority's decision is untethered to the facts and the law, I respectfully dissent.

I.[1]

On October 31, 2020, Maxwell Bravo brutally beat and attempted to rape Scherer, whom he had been dating. At one point, Bravo broke down the bathroom door behind which Scherer had been hiding, dragged her out by her hair, and beat and attempted to rape her. Scherer tried to fend him off as Bravo ripped her clothes and bit, punched, kicked, and struck her. Bravo eventually threw Scherer and her belongings outside, but then followed her and attempted to drag her back into his apartment by her hair. He then "began beating her head against [a] metal railing." A bystander yelled at Bravo to stop and said that the police were on their way.

A witness had called the police and reported that a man was beating a woman at Bravo's apartment. Los Angeles Police Department officers responded

[1] These facts are drawn from the First Amended Complaint and the video from Officer Martinez's body camera.

and, before they entered the apartment complex gate, heard Scherer screaming.

After detaining Bravo, Officer Martinez began questioning Scherer, who "was obviously beaten, bloody, injured and crying." She had visible wounds, including bloody lacerations on her scalp and forehead, bite marks on her shoulders, and bruising on her face and body. Officer Martinez told her that she was "really beat up" and needed an ambulance. Scherer told Officer Martinez that she had refused to have sex with Bravo, that he tried to rape her, and that he "beat her up badly." Bravo had hit her in the face 10 to 15 times.

Officers interviewed Bravo, who had no injuries except for a possible small scratch under his chin. Bravo gave inconsistent statements about his dating relationship with Scherer, denied hitting her, and claimed that she "threw the first blow" and hit him with her "flailing arms." He expressly declined to make a private person's arrest against Scherer and stated that he just wanted to return to his apartment.

Scherer, however, told Officer Martinez that she wanted to press charges against Bravo. Despite knowing that Bravo had already declined to press charges, Officer Martinez told Scherer that Bravo also had the right to make a private person's arrest, and that, if "he wants to press charges, you will be going to jail too." Scherer, still crying, said that she did not want to go to jail, and Officer Martinez replied that "she would be going to jail right now." At no point did Officer Martinez inform Scherer that Bravo had already declined to press charges. Scherer

alleges that this omission was deliberate and designed to dissuade her from exercising her rights. Believing that pressing charges would lead to her own arrest, Scherer chose not to do so. Bravo was eventually charged and criminally convicted of domestic violence with corporal injury.

II.

The district court properly denied qualified immunity. When reviewing the denial of qualified immunity on a motion to dismiss, we "accept as true all well-pleaded allegations" and "construe them in the light most favorable to the non-moving party." *Padilla v. Yoo*, 678 F.3d 748, 757 (9th Cir. 2012) (simplified).

Here, the nature of Officer Martinez's statement is dispositive. The majority draws inferences in Officer Martinez's favor by characterizing his conduct as merely "advising both parties about their respective rights to press charges." Maj. Dispo. at 4. That characterization cannot be squared with our prior decision, which held that Officer Martinez's statement would have chilled a person of ordinary firmness from exercising the First Amendment right to press charges. *Scherer v. City of Los Angeles*, 2024 WL 4658773, at *1 (9th Cir. Nov. 4, 2024). As we explained, the officer's statement was "a threat, not a statement of law, given that Bravo had already told Officer Martinez that he did not want to press charges, and that California law requires officers to discourage the dominant aggressor (in this case, Bravo) from pressing charges, even if he had expressed a wish to do so." *Id.* (citing Cal. Penal Code § 13701(b)).

Although the "constitutional violation" and "clearly established" inquiries are distinct, the majority effectively recasts the interaction—and therefore the violation—as a neutral legal explanation to define the right narrowly and then concludes that no precedent clearly establishes it.

Taking the facts as alleged, Officer Martinez threatened Scherer with arrest for engaging in protected First Amendment activity. Unlike our prior panel, the majority here resists this conclusion by emphasizing that Officer Martinez spoke in conditional terms and could not know whether Bravo might later change his mind. See Maj. Dispo. at 6. But conditional phrasing does not render a statement non-threatening. If Bravo later chose to press charges, Officer Martinez could have informed Scherer then. Scherer plausibly alleged that the officer deliberately omitted the fact that she alone wanted to press charges to deter her from exercising that right. The district court therefore correctly defined the right at issue as the right to be free from threats of arrest in retaliation for protected petitioning activity.

The question, then, is whether that right was clearly established at the time of the officers' conduct. It was.

Although courts must not define rights at too high a level of generality, neither may they define them so narrowly as to require a case on identical facts. *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *Ioane v. Hodges*, 939 F.3d 945, 956 (9th Cir. 2019). A right may be clearly established even in novel circumstances, *see Ballentine v. Tucker*, 28 F.4th 54,

64 (9th Cir. 2022), including where the unlawfulness of the conduct is "obvious," *see Hardwick v. County of Orange*, 844 F.3d 1112, 1117 (9th Cir. 2017), or where the "intersection of multiple cases" places the unconstitutionality of the officers' conduct "beyond debate," *see Polanco v. Diaz*, 76 F.4th 918, 930, 930 n.8 (9th Cir. 2023) (simplified). The ultimate question is "whether the state of the law at the time [gave] officials fair warning that their conduct [wa]s unconstitutional." *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1064 (9th Cir. 2013) (simplified).

Here, existing precedent provided ample notice. We have long held that public officials may not threaten retaliation for engaging in First Amendment activity, including petitioning. *See Capp v. County of San Diego*, 940 F.3d 1046, 1059 (9th Cir. 2019) (denying qualified immunity to a government official who threatened a parent with loss of custody to deter him from criticizing a government agency); *Brodheim v. Cry*, 584 F.3d 1262, 1270–71 (9th Cir. 2009) (holding that a prison official's warning to "be careful what you write" could chill grievances in violation of the right to petition, even absent an explicit threat); *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) (holding that "[i]nformal measures," including "invoking legal sanctions and other means of coercion, persuasion, and intimidation," can violate the First Amendment even if not carried out) (simplified). We have likewise repeatedly recognized that arrest and jailing are paradigmatic forms of unconstitutional retaliation. *See, e.g., Ballentine*, 28 F.4th at 65; *Lacey v. Maricopa County*, 693 F.3d 896, 916–17 (9th Cir. 2012); *Beck v. City of Upland*, 527 F.3d 853, 871 (9th Cir. 2008).

Taken together, these authorities "clearly establish" the unconstitutionality of the officers' conduct. Knowing that Scherer wished to press charges, Officer Martinez "intimated that some form of punishment"—arrest and jailing—would follow if she proceeded. *Brodheim*, 584 F.3d at 1271. Any reasonable officer would understand that threatening a domestic violence victim with arrest for seeking to press charges would chill her right to petition—particularly when our cases have condemned far less coercive forms of retaliatory intimidation.

Because this case involves the straightforward "application of settled law to a new factual permutation[,]" *Eng v. Cooley*, 552 F.3d 1062, 1076 (9th Cir. 2009) (simplified), the district court correctly denied qualified immunity.

Appendix B

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 22-cv-01931

JOY HO SCHERER,
Plaintiff,
v.
CITY OF LOS ANGELES, et al.,
Defendants.

Filed: April 14, 2025

ORDER REGARDING QUALIFIED IMMUNITY

Before the Court is the issue of whether Defendant Officers Wessam Wayne Ismail ("Officer Ismail") and Antonio Martinez, Jr. ("Officer Martinez") (collectively "Defendants") are entitled to qualified immunity regarding Plaintiff Joy Ho Scherer's ("Scherer") 42 U.S.C. § 1983 claim for her First Amendment right to petition. In February 2025, this Court adopted a briefing schedule on the issue of qualified immunity. (Briefing Schedule, Dkt. No. 60.) In accordance with that schedule, Officers Ismail and Martinez filed a supplement brief on qualified immunity, (Defendants' Br., Dkt. No. 61), and Scherer filed a response, (Scherer's Br., Dkt. No. 62).

For the following reasons, the Court finds that Officers Martinez and Ismail are not entitled to qualified immunity for Scherer's 42 U.S.C. § 1983 claim for violation of her First Amendment right to petition. Accordingly, the case will proceed.

I. BACKGROUND

1. *Factual Allegations*

The following allegations are taken from Scherer's FAC. (FAC, Dkt. No. 17.)

On October 31, 2020, Maxwell Bravo ("Bravo") brutally beat and attempted to rape Scherer inside his second-floor apartment. (*Id.* ¶¶ 19, 44–47, 71.) Scherer and Bravo had an ongoing "dating relationship" at the time. (*Id.* ¶ 19.) Scherer fought back as Bravo ripped off her clothes and bit, punched, kicked, and struck her. (*Id.* ¶¶ 46-49.) Eventually, Bravo pushed Scherer outside of his apartment and left her partially naked and without any of her belongings. (*Id.* ¶¶ 47–48.) Bravo then opened the door, threw Scherer's belongings at her, and dragged her back inside by her hair. (*Id.* ¶¶ 51–55.) Scherer tried to flee down the stairs, but he again grabbed her by her hair, dragged her up the stairs, and "began beating her head against the metal railing." (*Id.* ¶¶ 53-54.) A witness then yelled at Bravo to stop beating her and said that the police were on their way. (*Id.* ¶ 55.)

When Officers Martinez and Ismail arrived at the scene, it took them approximately forty seconds to get inside the gate of the apartment building. (FAC ¶ 58.) During this time, the Officers could hear Scherer's screams. (*Id.*) Once the Officers entered,

they saw Bravo quickly walking towards the exterior stairway leading up towards his apartment. (*Id.* ¶ 59.) The Officers detained Bravo near the bottom of the stairs and found Scherer standing at the landing on the top of the stairway leading down to the first floor. (*Id.* ¶¶ 60-62.)

At the time, Scherer was "crying and obviously beaten and bloody." (*Id.* ¶ 62, 64.) She had observable wounds, including "a bloody hematoma / laceration on her scalp area," a bloody laceration on the right side of her forehead, "bite marks on both of her exposed shoulders," facial bruising, and body bruising. (*Id.* ¶ 71; *see* Ex. A, *id.*) Officer Martinez told Scherer that she needed an ambulance because she was "really beat up." (*Id.* ¶ 70.) On the other hand, Bravo possibly had a "tiny scratch under his chin." (*Id.* ¶ 77.)

The officers then proceeded to investigate the incident. (FAC ¶¶ 70-85.) Officer Martinez and another unidentified officer ascended the stairs and questioned Scherer, while Officer Ismail questioned Bravo below. (*See id.* ¶¶ 62, 67, 69.) Scherer told Officer Martinez and the other officer that Bravo was not her boyfriend, and was only a friend. (*Id.* ¶ 69.) She stated that they had "romantic ties" in the past, but that they were not presently "dating." (*Id.* ¶ 73.) She further told the officers that Bravo had "tried to rape her, and when he was not successful, that he threw her personal items out of his apartment onto the walkway outside of the same, and beat her up badly." (*Id.* ¶ 72.) Specifically, she told the officers that Bravo hit her ten to fifteen times in the face. (*Id.* ¶ 73.)

Officer Martinez then descended the stairs to question Bravo about the parties' relationship status. (*Id.* ¶¶ 75-76.) Officers Ismail, Martinez, and others observed that Bravo had no visible injuries except for the possible scratch on his chin. (*Id.* ¶ 77.)

Bravo told Officers Martinez and Ismail that he had been "dating" Scherer for four months but then changed his answer and said they were "dating" for about a year. (*Id.* ¶ 79.) When Officer Ismail asked Bravo about "dating" Scherer, he clarified that they "were not now dating." (*Id.* ¶ 80.)

Officer Martinez walked back to Scherer and asked her if she wanted to "press charges" against Bravo, and she answered "yeah." (*Id.* ¶ 81.) Officer Martinez then went back to question Bravo. (*Id.* ¶ 82.) Bravo denied hitting Scherer and stated that she "threw the first blow," and hit him with "flailing arms." (*Id.* ¶ 85.) Officer Martinez seemed to doubt this statement, stating: "Dude, she's pretty beat up." (*Id.*) Officer Martinez told Bravo that because there was no "dating relationship," the incident was a battery. (*Id.* ¶ 86.) Bravo expressed that he did not want to press charges. (*Id.*)

Then, Officer Martinez returned to Scherer and told her: "Just like you, he has injuries too, and he's claiming that you were the aggressor, and that you started the fight, and that just like I told you that you have the right to do a private person's arrest, that he has that right too. So if he wants to press charges, you will be going to jail too." (*Id.* ¶ 87.) Scherer responded that she did not want to go to jail, but Officer Martinez "told [her] that she would be going to jail right now." (*Id.* ¶ 88.)

Officer Martinez deliberately did not tell Scherer that Bravo already confirmed that he would not press charges. (*Id.* ¶ 91.) He omitted this fact in an effort to convince her "not to exercise her right to complain to the police to have Bravo arrested and jailed for beating her up." (*Id.*) She alleges that Officer Martinez "essentially convinced" her that if she chose to press charges against Bravo, they would both go to jail. (*Id.* ¶ 90.) It is not clear whether Scherer ultimately decided to "press charges," but eventually Bravo was criminally convicted for domestic violence under Cal. Penal Code § 273.5.[1] (*Id.* ¶ 99.)

2. *Procedural Background*

On January 13, 2023, Scherer filed her First Amended Complaint. (FAC.) It asserted 3 causes of action: (1) violation of First Amendment right to petition government for redress of grievances, under 43 U.S.C. § 1983, against Officers Ismail, Martinez, and DOES 1 through 6; (2) violation of right to substantive due process of law, under 42 U.S.C. § 1983, against Officers Ismail, Martinez, and DOES 1 through 6; and (3) municipal liability for violation of First Amendment right to petition government for redress of grievances, under 42 U.S.C. § 1983 and *Monell*, against the City. (*Id.*)

On May 10, 2023, this Court granted Defendants' motion to dismiss the FAC in its entirety, without leave to amend. (Order, Dkt. No. 39.) Scherer then appealed this decision to the Ninth Circuit. (Notice of Appeal, Dkt. No. 41.) In November 2024, the Ninth

[1] *People v. Maxwell Bravo*, No. LAV1VW01547-01.

Circuit reversed and remanded the decision, and held that this Court erred in dismissing Scherer's First Cause of Action for First Amendment right to press charges under 42 U.S.C. § 1983.[2] (Memorandum, Dkt. No. 51; *see also* Mandate, Dkt. No. 52.) Specifically, the Ninth Circuit stated:

> Taking the facts in the light most favorable to Scherer, Officer Martinez's statement to Scherer that her attacker, Max Bravo, had the right to press charges; that if Bravo pressed charges "you're going to go [to jail]" right now; and "[t]hat's how private persons arrest works" would have chilled a person of ordinary firmness from exercising the First Amendment right to press charges. Contrary to the district court's conclusion, Scherer has plausibly alleged that Martinez's statement that Scherer would go to jail too was a threat, not a statement of law, given that Bravo had already told Officer Martinez that he did not want to press charges, and that California law requires officers to discourage the dominant aggressor (in this case, Bravo) from pressing charges, even if he had expressed a wish to do so. Cal. Penal Code § 13701(b).

(*Id.* at 2.) The Circuit court further stated: "On remand, the district court may address, in the first instance, whether the officers are entitled to qualified immunity because Scherer failed to allege a violation of a 'clearly established' constitutional

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[2] The Ninth Circuit noted that Scherer did not challenge the dismissal of her substantive due process or *Monell* claims. (Memorandum, at 2 n.1.)

right." (*Id.* at 2-3 (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011).)

The Court now addresses whether Officers Ismail and Martinez are entitled to qualified immunity.

II. LEGAL STANDARD

The doctrine of qualified immunity protects "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity shields an official even if the conduct resulted from "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting)). The doctrine protects "all but the plainly incompetent or those who knowingly violate the law. . . . [If] officers of reasonable competence could disagree on th[e] issue [of whether a chosen course of action is constitutional], immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

The Ninth Circuit applies a two-pronged inquiry to resolve claims of qualified immunity. First, the Court determines whether the officer's conduct violated a constitutional right. *Robinson v. York*, 566 F.3d 817, 821 (9th Cir. 2009) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). Second, the Court must determine whether the constitutional right at issue was "clearly established in light of the specific context of the case" at the time of the events in

question. *Mattos v. Agarano*, 661 F.3d 433, 440 (9th Cir. 2011) (en banc) (citing *Robinson*, 566 F.3d at 821). While the *Saucier* sequence is often appropriate, courts are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson*, 555 U.S. at 236.

A right is clearly established if "a reasonable officer would recognize that his or her conduct violates that right under the circumstances faced, and in light of the law that existed at that time." *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1065–66 (9th Cir. 2006); *see also Saucier*, 533 U.S. at 202. The inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 201. "[T]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). A case need not be directly on point, but existing binding or persuasive precedent "must have placed the statutory or constitutional question beyond debate." *Mattos*, 661 F.3d at 442 (quoting *al-Kidd*, 131 S. Ct. at 2083); *see Osolinski v. Kane*, 92 F.3d 934, 936 (9th Cir. 1996) (permitting use of persuasive authority). The plaintiff has the burden of establishing that constitutional right was "clearly established" at the time of the alleged violation. *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1109 (9th Cir. 2011).

III. DISCUSSION

Because the Ninth Circuit clearly established that Officer Martinez's statements to Scherer violated her constitutional right, the first prong

of the qualified immunity analysis is met. *See Robinson*, 566 F.3d at 821 (citing *Saucier*, 533 U.S. at 201).[3] Thus, the Court addresses only the second prong of the analysis: whether the constitutional right at issue was "clearly established in light of the specific context of the case" at the time of the events in question. *Mattos*, 661 F.3d at 440 (citing *id.*).

The parties provide different interpretations of the constitutional violation in this case. Consequently, the Court begins its analysis by defining the constitutional violation at issue.

Defendants claim that the alleged constitutional violation "hinges on Officer Martinez's statement that both Scherer and Bravo had the right to conduct a private person's arrest, and that if Bravo asserted this right, the officers would bring Scherer into physical custody for booking, which is generally how the California private persons arrests statutes work. (Penal Code Sections 242 and 837.)" (Defendants' Br., at 7.) Thus, Defendants frame the relevant question as: "whether it is well-settled that an officer's assertion that he will arrest the 'secondary' aggressor if the primary aggressor chooses to conduct a private person's arrest, violates the secondary aggressor's First Amendment rights." (*Id.* at 8.) In contrast, Scherer asks: whether "at

[3] This is consistent with the Court's previous finding that Scherer "exercised [her] right [to petition for grievance] when she informed Officer Martinez she wanted to 'press charges,'" and that "her verbal request constitutes protected petitioning activity." (Order, at 8; *See* Scherer's Br., at 16.)

the time of the incident, on October 31, 2020, the law was clearly established such that every reasonable officer would know that implied threats of arrest would chill a person of ordinary firmness from pressing charges against an attacker." (Scherer's Br., at 14.) *Kennedy*, 439 F.3d at 1065-66.

The Court agrees with Scherer's framing of the constitutional violation. Specifically, the Ninth Circuit found that "Officer Martinez's statement to Scherer that her attacker, Max Bravo, had the right to press charges; that if Bravo pressed charges 'you're going to go [to jail]' right now; and '[t]hat's how private persons arrest works'" violated Scherer's First Amendment right to press charges. (Memorandum, at 2.) Further, the Ninth Circuit found that "Martinez's statement that Scherer would go to jail too was a threat, not a statement of law . . ." (*Id.*) Thus, Defendants' claim that the constitutional violation involves Officer Martinez's explanation of the California private persons arrests statutes directly contradicts the Ninth Circuit's finding. (Defendants' Br., at 7.)[4] Further, the Court disagrees with Defendants' focus on primary and secondary

[4] Defendants also argue that "Bravo never waived his right to make a private person's arrest, in writing, and could have changed his mind and elected to place Plaintiff under arrest, as well." (Defendants' Br., at 1.) According to Defendants, had Bravo chose to do so, Officer Martinez would have been required by California law to inform Scherer that she was being arrested too. (*Id.* at 2.) However, regardless of whether Bravo could have made a private person's arrest, the Ninth Circuit found that Officer Martinez's statement was a threat. Thus, the Court declines to re-litigate this issue at this time.

aggressors. (*Id.* at 8.) Specifically, the FAC alleges that Scherer was a victim, and not a "secondary aggressor." (*See* FAC ¶¶ 93, 95.) The Court declines to resolve this factual dispute at the pleadings stage. (*See* Scherer's Br., at 20-21.) Consequently, construing these allegations as true, the relevant constitutional violation is Officer Martinez's[5] threats to arrest Scherer when faced with her pressing charges. *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010) (citation omitted).

The Court now asks whether a reasonable officer would have known that a threat of arrest in the particular circumstance violated Scherer's First Amendment right to petition. The Court finds that the answer is "yes."

First, Scherer argues that, at the time of the incident, "it was clearly established in this Circuit that the reporting of a crime to police is protected

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[5] Defendants claim that the Court need only determine whether Officer Martinez is entitled to qualified immunity because "the Ninth Circuit's memorandum opinion fails to indicate Plaintiff has stated a claim against Officer Ismail." (Defendants' Br., at 1.) Specifically, Defendants claim that the FAC does not "identify any conduct or words on the part of Officer Ismail which plausibly violated the First Amendment." (*Id.*) The Court finds that its qualified immunity analysis, as discussed below, applies equally to Officer Martinez and Officer Ismail. Paragraph 98 of the FAC alleges that Officer Ismail was "present and aware of" Officer Martinez's statements and he "had a duty, an opportunity and the ability to have intervened and to have stopped Officer Martinez' violation of [Scherer]'s First Amendment right to petition." (FAC ¶ 98; Defendants' Br., at 3; Scherer's Br., at 13 n.4.) Thus, the Court declines to exclude Officer Ismail from the qualified immunity analysis at this time.

'petitioning' activity under both federal and California state law." (Scherer's Br., at 14.) The Court agrees. For example, in *Entler v. Gregoire*, the Ninth Circuit held that "the filing of criminal complaints falls within the embrace of the First Amendment." 872 F.3d 1031, 1043 (9th Cir. 2017) (citing *Meyer v. Bd. of Cnty. Comm'rs of Harper Cnty., Okla.*, 482 F.3d 1232, 1235, 1243 (10th Cir. 2007) (finding that the plaintiff had a First Amendment right to file a report against her prior romantic partner for physical assault, and stating: "denying the ability to report physical assaults is an infringement of protected speech")). Similarly, in *Chabak v. Monroy*, the California court of appeals held that a female student's reports to authorities that she was being sexually abused constituted protected petitioning activity. 154 Cal.App.4th 1502, 1512 (2007). Finally, in *Comstock v. Aber*, a plaintiff's "complain[t] to the police" that defendant had sexually assaulted her was protected activity under her right to petition. 212 Cal.App.4th 931, 942 (2012).

Additionally, Scherer states that "no reasonable officer could dispute" that Scherer, and not Bravo, was the victim of domestic violence. (Scherer's Br., at 15.) The Court agrees that, taking the FAC's allegations as true, Bravo was clearly the primary aggressor of the incident. Consequently, as the victim of a crime, Scherer had a clearly established First Amendment right to petition the officers by asking to "press charges" against Bravo. (*See id.*) Thus, in light of the existing law, "a reasonable officer would recognize" that Scherer was exercising her First Amendment right when she stated that she

wanted to press charges. (*See id.*) *Kennedy*, 439 F.3d at 1065–66.

Because the Court finds that the right to petition is clearly established in the circumstances of this case, the only remaining question is whether a reasonable officer in the same circumstance would know that telling Scherer that she would go to jail if Bravo pressed charges would violate that First Amendment right. The Court finds that a reasonable officer would have known that such a threat of arrest would chill Scherer from exercising her right to press charges.

First, the Ninth Circuit has clearly established that a threat of retaliation can chill speech. For example, in *Brodheim v. Cry*, the circuit court found that a prison appeals coordinator's warning to "be careful what you write" on an interview request form may have chilled a reasonable person from filing grievances. 584 F.3d 1262, 1266, 1272 (9th Cir. 2009). The court further held that "the threat itself can have a chilling effect," regardless of if that threat is carried out. *Id.* at 1270. Additionally, it is clearly established that threats of lawful action fall under this standard if the threat is undertaken in an attempt to chill protected speech. For example, in *White v. Lee*, the Ninth Circuit found that a HUD investigation, which ultimately resulted in no criminal or civil sanctions, would have chilled a reasonable person from engaging in protected activity. 227 F.3d 1214, 1228-29 (9th Cir. 2000). The court explicitly stated: "Informal measures, such as the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation, can

violate the First Amendment also." *Id.* at 1228 (internal quotations and citation omitted); *see also Mulligan v. Nichols*, 835 F.3d 983, 989 (9th Cir. 2016).

Second, binding precedent has clearly established that arrest can chill speech. *See Lacey v. Maricopa Cnty.*, 693 F.3d 896, 916-17 (9th Cir. 2012) (holding that the defendant was not entitled to qualified immunity for investigating and arresting the plaintiff in retaliation for his First Amendment speech). Further, Courts in this circuit have interpreted this to mean that *threats* of arrest can also "chill a person of ordinary firmness from continuing to exercise his First Amendment rights." *Tabi v. Baker*, No. 8:20-CV-00323-VBF-JC, 2022 WL 3162203, *5 (C.D. Cal. Feb. 2, 2022), *report and recommendation adopted*, No. 8:20-CV-00323-VBF-JC, 2022 WL 3155049 (C.D. Cal. Aug. 8, 2022)[6] (pooling prior cases which stand for the proposition that threat of arrest chills First Amendment rights); *Doe v. City of San Diego*, 198 F.Supp.3d 1153 (S.D. Cal. 2016) ("threat of arrest[] chills the exercise of First Amendment rights") (citing *The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518 (9th Cir. 1989)). Thus, it is clearly established that threats of arrest can chill a reasonable person from exercising her First Amendment rights.

Defendants argue that these authorities are too general to prove that the Officer's specific conduct is clearly established in this particular case.

[6] Although this case was decided after the incident in question, the cases that it summarizes were decided before the incident.

(Defendants' Br., at 9-10.) While the Court acknowledges that there is no case with precisely the same facts as the one at issue here, this is not the correct standard. (*See* Scherer's Br., at 17.) Scherer need only demonstrate that the existing case law placed Defendants' actions "beyond debate." *Mattos*, 661 F.3d at 442 (quoting *al-Kidd*, 131 S. Ct. at 2083). (*See id.*) Thus, in the circumstances of this case, and in light of existing case law, any reasonable officer would have understood that telling Scherer she would be arrested should Bravo press charges would chill Scherer from exercising her clearly established First Amendment right to press charges. Consequently, the Officers are not entitled to qualified immunity. *Kennedy*, 439 F.3d at 1065-66.

IV. CONCLUSION

For the foregoing reasons, the Court finds that Officers Martinez and Ismail are not entitled to qualified immunity regarding Scherer's 42 U.S.C. § 1983 claim for her First Amendment right to press charges. Scherer may proceed with this claim as alleged in her FAC.

IT IS SO ORDERED.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-55603

JOY HO SCHERER,
Plaintiff-Appellant,
v.
CITY OF LOS ANGELES; et al.,
Defendants-Appellees.

Filed: November 4, 2024

Before: IKUTA and BRESS, *Circuit Judges*, and BASTIAN,** *District Judge*.

MEMORANDUM*

Plaintiff Joy Ho Scherer appeals from the district court's order granting a motion to dismiss under Rule 12(b)(6) in favor of the City of Los Angeles and Los Angeles Police Department officers (Wessam Ismail, Nelson Martinez, Jr., and unknown Doe

** The Honorable Stanley A. Bastian, Chief United States District Judge for the Eastern District of Washington, sitting by designation.

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

officers). We have jurisdiction under 28 U.S.C. § 1291, and we reverse.

The district court erred in dismissing Scherer's 42 U.S.C. § 1983 claim for First Amendment retaliation.[1] Taking the facts in the light most favorable to Scherer, Officer Martinez's statement to Scherer that her attacker, Max Bravo, had the right to press charges; that if Bravo pressed charges "you're going to go [to jail]" right now; and "[t]hat's how private persons arrest works" would have chilled a person of ordinary firmness from exercising the First Amendment right to press charges. Contrary to the district court's conclusion, Scherer has plausibly alleged that Martinez's statement that Scherer would go to jail too was a threat, not a statement of law, given that Bravo had already told Officer Martinez that he did not want to press charges, and that California law requires officers to discourage the dominant aggressor (in this case, Bravo) from pressing charges, even if he had expressed a wish to do so. Cal. Penal Code § 13701(b).

Because the district court dismissed the claim based on the lack of any constitutional violation, it did not address qualified immunity. On remand, the district court may address, in the first instance, whether the officers are entitled to qualified immunity because Scherer failed to allege a violation of a "clearly established" constitutional right. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011).

REVERSED and **REMANDED**.

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[1] Scherer does not challenge the district court's dismissal of her substantive due process and *Monell* claims.

Appendix D

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 22-cv-01931

JOY HO SCHERER,
Plaintiff,
v.
CITY OF L.A., et al.,
Defendants.

Filed: May 10, 2023

ORDER REGARDING MOTION TO STRIKE AND MOTION TO DISMISS

Defendants City of Los Angeles ("City"), Wessam Ismail ("Officer Ismail"), and Nelson Martinez ("Officer Martinez") (collectively "Defendants") move to dismiss the First Amended Complaint ("FAC"), (FAC, Dkt. No. 17), in its entirety. (Mot., Dkt. No. 20.) Furthermore, Defendants move to strike portions of the FAC. (Mot. to Strike, Dkt. No. 21.) Plaintiff Joy Ho Scherer ("Scherer") opposed both motions. (Opp'n, Dkt. No. 29.) Defendants replied. (Reply, Dkt. No. 30.)

The Court issued its Tentative Order on April 7, 2023, and vacated the April 10, 2023 hearing but allowed either party to request a hearing. (*See* Dkt.

No. 36.) Scherer requested a hearing, (Dkt. No. 33), which the Court granted. (Dkt. No. 36.) Scherer also physically lodged the video recording of the October 31, 2020 incident, (Dkt. No. 34), and prepared a transcript of the same, (Ex. A, Dkt. No. 35.) The parties appeared for oral argument on May 8, 2023. This Order reflects Court's final order on the instant motion.

The Court first DENIES the Defendants' Motion to Dismiss Plaintiff's Complaint, (Dkt. No. 11), as moot. Plaintiff previously filed a First Amended Complaint. (Dkt. No. 17.) The Court DENIES the motion to strike, (Dkt. No. 21), and GRANTS the motion to dismiss the First Amended Complaint (Dkt. No. 20.)

I. BACKGROUND

Scherer, a victim of an attempted rape and brutal beatings, alleges that LAPD officers manipulated her into not pressing charges against her perpetrator. The following allegations are taken from Scherer's FAC and are assumed to be true.

A. Factual Allegations

On October 31, 2020, Scherer was brutally beaten during an attempted rape by a man, Maxwell Bravo ("Bravo"), with whom she was in an ongoing "dating relationship." (FAC ¶¶ 19, 44–47, 71.) Scherer fought back during the attempted rape and beatings, which took place inside Bravo's apartment that was on the second floor. (*Id.* ¶ 47.) Eventually, Bravo pushed Scherer outside his apartment, where she was left partially naked from Bravo having ripped off her clothing. (*Id.* ¶¶ 47–48.) She was left without any of

her belongings. (*See id.*) Bravo then opened the door, threw her belongings at her, and then dragged Scherer back inside by her hair while she was screaming for her life. (*Id.* ¶¶ 51–55.) She tried to flee down the stairs, but he again grabbed her by her hair, dragged her up the stairs, and "began beating her head against the metal railing." (*Id.* ¶ 53.) A witness then yelled at Bravo to stop beating her and said that the police were on their way. (*Id.* ¶ 55.)

When Officers Martinez and Ismail arrived, they initially could not get inside the gate that surrounded the apartment building. (*Id.* ¶ 58.) But Scherer's screams could still be heard at this time. (*Id.*) Once the officers were able to enter the gate, which took approximately 40 seconds, they saw Bravo quickly walking towards the exterior stairway leading up towards his apartment.[1] (*Id.* ¶ 59.) Scherer was located at the landing next to the stairway leading down to the first floor. (*Id.* ¶ 60.) Bravo was detained near the bottom of the stairs. (*Id.* ¶ 60.) The officers proceed towards the top, where Scherer was standing. (*Id.* ¶ 61.)

Scherer was obviously beaten, bloody, injured, and crying. (*Id.* ¶ 64.) She had observable wounds, including a bloody hematoma / laceration on her scalp area, a bloody laceration on the right side of her forehead, bite marks on both of her exposed shoulders, facial bruising, and body bruising. (*Id.* ¶ 71; *see* Ex. A, *id.*) On the other hand, Bravo possibly had a "tiny scratch under his chin." (*Id.* ¶ 77.)

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[1] Based on her allegations, it can be inferred that at some point during the 40 seconds, Bravo descended down the stairs and walked towards the gate.

The officers then proceeded to investigate the incident. Officer Martinez and another unidentified officer ascended the stairs and questioned Scherer, while Officer Ismail questioned Bravo below. (*See id.* ¶¶ 67, 69.) Officer Martinez and the other officer asked Scherer if Bravo was her boyfriend. (*Id.* ¶ 69.) She responded, "No," and told them that Bravo was only her friend. (*Id.*) The officers observed Scherer's wounds, told her that she was "cut up and bruised up," she was "really beat up," and she "really needed an ambulance." (*Id.* ¶ 70.) The officers asked her how she received her injuries. (*Id.* ¶ 72.) She explained that Bravo "tried to rape her" and when he was unsuccessful, he threw her items outside his apartment, hit her ten to fifteen times in the face, and "beat the fuck out of [her]." (*Id.* ¶¶ 72–73.) The officers asked her a second time whether she had any "romantic ties" to Bravo, to which she responded "Yeah, over the years" but that they were not presently "dating." (*Id.* ¶ 73.)

They descended the stairs to question Bravo about the parties' relationship status. (*Id.* ¶ 76.) Officers Ismail, Martinez, and others observed that Bravo had no visible injuries except for the scratch. (*Id.* ¶ 77.) Bravo told officers Martinez and Ismail that he had been "dating" for four months but then changed his answer and said they were "dating" for about a year. (*Id.* ¶ 79.) When Officer Ismail asked Bravo about "dating" Scherer, he clarified that they "were not now dating." (*Id.* ¶ 80.)

Officer Martinez walked back up towards Scherer and asked her if she wanted to "press charges" against Bravo, and she answered "yes." (*Id.* ¶ 81.) Officer Martinez then went back to question Bravo.

(*Id.* ¶ 82.) Bravo denied hitting Scherer—even though she was obviously bleeding and bruised—and stated that he did not want to press charges. (*Id.* ¶¶ 82–86.) Officer Martinez seemed to doubt his statement, stating "Dude, she's pretty beat up." (*See id.* ¶ 85.) Bravo told the officers that Scherer hit him with "flailing arms" and accused her of antagonizing him. (*See id.* ¶ 82.)

Officer Martinez told Bravo that because there was no "dating relationship," the incident merely involved a battery. (*Id.* ¶ 86.) Then, Officer Martinez returned to Scherer and told her:

> Just like you, he has injuries too, and he's claiming that you were the aggressor, and that you started the fight, and that just like I told you that you have the right to do a private person's arrest, that he has that right too. So if he wants to press charges, *you will be going to jail too*.

(*Id.* ¶ 87 (emphasis added).) But Officer Martinez deliberately did not tell Scherer that Bravo already confirmed that he would not press charges. (*Id.* ¶ 91.) He omitted this fact in an effort to convince her to "not to exercise her right to complain to the police to have Bravo arrested and jailed for beating her up." (*Id.*)

Scherer responded that she did not want to go "right now," but Officer Martinez "told [her] that she would be going to jail right now." (*Id.* ¶ 88.) She alleges that Officer Martinez "essentially convinced" her that if she chose to press charges against Bravo, they would both go to jail. (*Id.* ¶ 90.) It is not clear whether Scherer ultimately decided to "press

charges," but eventually Bravo was criminally convicted for domestic violence under Cal. Penal Code § 273.5.[2] (*Id.* ¶ 99.)

B. Procedural Background

Scherer filed her complaint on October 21, 2022. (Dkt. No. 1.) On November 21, 2022, Defendants filed a motion to dismiss. (Dkt. No. 11.) The parties stipulated to continuing the hearing and permitting Scherer to file an amended complaint. (*See* Dkt. Nos. 15, 16.) Accordingly, on January 13, 2023, Scherer filed the First Amended Complaint. (FAC, Dkt. No. 17.) It asserts three causes of action: (1) violation of First Amendment right to petition government for redress of grievances, under 43 U.S.C. § 1983, against Ismail, Martinez, and DOES 1 through 6; (2) violation of right to substantive due process of law, under 42 U.S.C. § 1983, against Ismail, Martinez, and DOES 1 through 6; and (3) municipal liability for violation of First Amendment right to petition government for redress of grievances, under 42 U.S.C. § 1983 and *Monell*, against the City. (*Id.*)

Defendants filed the instant motions on January 30, 2023. (Dkt. Nos. 20–21.)

II. LEGAL STANDARD

A. Motion to Strike

Under Rule 12(f), a party may move to strike any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. Fed. R. Civ. P. 12(f). A motion to strike is appropriate when a defense is insufficient as a matter of law. *Kaiser*

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[2] *People v. Maxwell Bravo*, No. LAV1VW01547-01.

Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1057 (5th Cir. 1982). The grounds for a motion to strike must appear on the face of the pleading under attack, or from matters of which the Court may take judicial notice. *SEC v. Sands*, 902 F. Supp. 1149, 1165 (C.D. Cal. 1995).

The essential function of a Rule 12(f) motion is to "avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev'd on other grounds by Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). "As a general proposition, motions to strike are regarded with disfavor because [they] are often used as delaying tactics, and because of the limited importance of pleadings in federal practice." *Sands*, 902 F. Supp. at 1165–66 (alteration in original) (internal quotation marks omitted).

Therefore, courts frequently require the moving party to demonstrate prejudice "before granting the requested relief, and 'ultimately whether to grant a motion to strike falls on the sound discretion of the district court.'" *Greenwich Ins. Co. v. Rodgers*, 729 F. Supp. 2d 1158, 1162 (C.D. Cal. 2010) (quoting *Cal. Dep't of Toxic Substances Control v. Alco Pac., Inc.*, 217 F. Supp. 2d 1028, 1033 (C.D. Cal. 2002)).

B. Motion to Dismiss

Under Rule 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. A plaintiff must state "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

A claim has "facial plausibility" if the plaintiff pleads facts that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In resolving a 12(b)(6) motion under *Twombly*, the Court must follow a two-pronged approach. First, the Court must accept all well-pleaded factual allegations as true, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Nor must the Court "'accept as true a legal conclusion couched as a factual allegation.'" *Id.* at 678-80 (quoting *Twombly*, 550 U.S. at 555). Second, assuming the veracity of well-pleaded factual allegations, the Court must "determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679. This determination is context-specific, requiring the Court to draw on its experience and common sense, but there is no plausibility "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." *Id.*

III. DISCUSSION

A. Motion to Strike

Defendants' motion to strike is without merit. Defendants seek to strike nearly all paragraphs in Scherer's complaint that reference the physical injuries she suffered or the relationship she had with Bravo. (Mot. 3.) These allegations provide context for the officers' responses and actions, which Scherer contends were unlawful. Defendants are not entitled to cleanse and editorialize Scherer's allegations in a

light most favorable to them. And they identify no prejudice they would suffer as a result of retaining these allegations. The motion is **DENIED**.

B. Motion to Dismiss

1. (Claim 1) First Amendment Right to Petition the Government

The First Amendment of the United States Constitution guarantees a "right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend. I. It is applicable to the states by virtue of the Due Process Clause of the Fourteenth Amendment. *L.F. v. Lake Wash. Sch. Dist. #414*, 947 F.3d 621, 626 (9th Cir. 2020). Plaintiffs may seek civil damages under 42 U.S.C. § 1983 against local governments for violations of their First Amendment rights. *Nieves v. Bartlett*, 139 S. Ct. 1715, 1721 (2019); *see also Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972).

Individuals have a right to be free from retaliation for engaging in protected First Amendment activity. *Nieves*, 139 S. Ct. at 1721. To state a First Amendment retaliation claim, a plaintiff must plausibly allege that (1) she was engaged in a "constitutionally protected activity," (2) the defendant's actions would "chill a person of ordinary firmness from continuing to engage in the protected activity," and (3) the protected activity was a "substantial or motivating factor"[3] in the

[3] Courts have described this element in various ways, but in essence, a plaintiff is required to establish a causal connection between "a defendant's animus and a plaintiff's injury." Nieves, 139 S. Ct. at 1722. A plaintiff must "show that an official acted

defendant's conduct." *Capp v. Cnty. of San Diego*, 940 F.3d 1046, 1053 (9th Cir. 2019) (quoting *O'Brien v. Welty*, 818 F.3d 920, 932 (9th Cir. 2016)).

At the outset, the Court rejects Defendants' complaint that Scherer is raising a "new" cause of action "not alleged in the FAC." (Reply 2.) This form-over-substance argument has little merit. Scherer was not required to use the word "retaliate" in her pleadings. She has alleged that "[a]lthough Officer MARTINEZ had the right to have not arrested BRAVO, he did not have the right to have threatened plaintiff with being arrested if she insisted that he do so; a violation of her right to petition the government for grievances under the First Amendment to the United States Constitution." (FAC ¶ 97.) This adequately provides Defendants with sufficient notice of her First Amendment claim.

i. **Whether Scherer's Request to "Press Charges" Constitutes a "Petition"**

The First Amendment is triggered by a "petition" to the government for the "resolution of legal disputes," whether those petitions relate to a matter of public or private concern. *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 387, 394 (2011).

Scherer has not specified what the petitioning conduct is. She alleges that Officer Martinez

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with a retaliatory motive" and that "the motive . . . cause[d] the injury." Id. (emphasis removed). At a minimum, the retaliatory intent must be a "but-for" cause, meaning that the defendant would not have taken the adverse action against the plaintiff "absent the retaliatory motive." Id.

convinced her that if she "pressed charges," she would go to jail along with Bravo. (FAC ¶ 90.) But she also argues that the protected petitioning activity is the "continuation" of "pressing charges" against Bravo. (*See* Opp'n 14.) Based on the foregoing, it is unclear whether Scherer is alleging that she has exercised her right to petition when she answered "Yes" to Officer Martinez's question asking her if she wanted to "press charges" or whether she argues that her right to petition extends further.

Regardless, Scherer's right to petition does not include the right to have law enforcement arrest Bravo or take some action on her behalf. The right to petition does not impose any affirmative obligation on the government to a particular course of action in response to a grievance. *See Smith v. Arkansas State Highway Emp., Loc. 1315*, 441 U.S. 463, 465 (1979); *Brown v. Villaraigosa*, No. CV 06-4169, 2010 WL 11483802, at *12 (N.D. Cal. 2010). In *Brown*, the government's total lack of response to a plaintiff's numerous, unsuccessful attempts to lodge a formal complaint against officers for their excessive use of force did not violate his right to petition. *Id.* at *4–5, 12–13. Nothing "impeded his ability to seek redress," even though his petition was met with utter silence. *See id.* at *12. Likewise, nothing impeded Scherer from requesting the officers to take some legal recourse, such as executing an arrest, initiating an investigation, or "pressing charges."

Scherer was entitled to petition for grievance, not to the redress of her grievance. Thus, it would seem that she exercised that right when she informed Officer Martinez she wanted to "press charges." If

that is Scherer's claim,[4] then the next relevant inquiry is whether Officer Martinez's made a "threat" to her in a way that "would chill" such protected activity.

Assuming that Scherer argues that she petitioned the government by answering "Yes" to Officer Martinez's question, the Court sees no reason why it should not find that her verbal request constitutes protected petitioning activity. A petition "conveys the special concerns of its author to the government and, in its usual form, requests action by the government to address those concerns." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 388–89 (2011) (emphasis added). And a "petition" can take many forms. *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 393 (2011) ("[T]he right to petition is not limited to petitions lodged under formal procedures."); *White v. Lee*, 227 F.3d 1214, 1227 (9th Cir. 2000) (recognizing that the right is exercised when a plaintiff attends and speaks at a zoning hearing); *Mack v. Loretto*, 839 F.3d 286, 297 (3d Cir. 2016) (recognizing that the right to petition "embraces a broad range of communications"); *Pearson v. Welborn*, 471 F.3d 732, 741 (7th Cir. 2006) ("Nothing in the First Amendment itself suggests that the right to petition for redress of grievances only attaches when the petitioning takes a specific form."); *Holzemer v. City of Memphis*, 621 F.3d 512, 519 (6th Cir. 2010) ("[There is] no constitutional distinction between an oral and written petition for redress . . . .").

Furthermore, reporting a crime to police is

[4] Neither party disputed this or otherwise addressed this at oral argument.

protected under the First Amendment, at least as recognized by California courts.[5] In *Chabak v. Monroy*, 154 Cal. App. 4th 1502, 1512 (2007),[6] a female student's reports to authorities that she was being sexually abused constituted protected petitioning activity. Similarly, in *Comstock v. Aber*, 212 Cal. App. 4th 931, 942 (2012), a plaintiff's "complain[t] to the police" that defendant had sexually assaulted her was protected activity under her right to petition or free speech.

Defendants' briefings assume that Scherer's "petition" encompasses the right to "compel the police to 'press charges'" or "to have him prosecuted." (Reply 3.) They do not address whether her verbal response to Officer Martinez's question constitutes a petition.[7] However, even assuming that Scherer invoked her right to petition, her claim fails for other reasons.

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[5] (See Opp'n 14.) She also cites one Ninth Circuit decision, but this case is inapposite. Forro Precision, Inc. v. IBM, 673 F.2d 1045, 1060 (9th Cir. 1982) addressed a narrow issue of whether the Noerr-Pennington doctrine, which immunizes private parties from anti-competitive conduct taken to petition for government action, applied to communications made to police.

[6] In California, a cause of action arising from the right of petition under the U.S. Constitution or the California Constitution is subject to a special motion to strike commonly referred to as an anti-SLAPP motion. See Cal. Civ. Proc. Code § 425.16. A court first determines whether there is a protected activity arising under the U.S. Constitution or the state constitution. Id. § 425.16(e).

[7] Nor did they address this at oral argument.

ii. **Whether Officer Martinez's Actions Would "Chill" a Person's First Amendment Right to Request Law Enforcement to "Press Charges"**

Assuming that Scherer has established that she engaged in constitutionally protected activity, she must establish that Officer Martinez's actions would have a chilling effect.

Under this requirement, a plaintiff must show that a person of "ordinary firmness" would be deterred—or "chilled"—from further engaging in the protected activity. *Capp*, 940 F.3d at 1053. This is an objective inquiry. *Id.* An "unconstitutional chill" may "only exist if the government action has injured the individual or places the individual in immediate danger of sustaining a direct injury." *O'Keefe v. Van Boening*, 82 F.3d 322, 325 (9th Cir. 1996). Threats of arrest have such chilling effect. *See, e.g.*, *Houston v. Hill*, 482 U.S. 451, 459 n.7 (1987).

Scherer cannot plausibly establish that Officer Martinez's actions would objectively chill a person of ordinary firmness from asking law enforcement to "press charges." Officer Martinez told Scherer that if Bravo chose to press charges, she would also be arrested. (FAC ¶ 87 ("So if he wants to press charges, you will be going to jail too.") He did not tell her that if she chose to press charges, she would be arrested. While Scherer might have believed these statements to be interchangeable, they are not. Indeed, it does not matter whether his statements "actually chilled" Scherer. *Capp*, 940 F.3d at 1054. At oral argument,

Scherer urged the Court to consider the cadence of Officer Martinez's statements as depicted in the videotape to argue that his statements objectively chilled her right to petition. Additionally, she argued that his follow-up statement, "No, you're going to go," (*see* Dkt. No. 35, at 16), meant that if she chose to continue with a private person's arrest, she would also be imprisoned. But that statement was made in reference to his explanation of "how private persons arrest works." (*Id.* at 16.) And he subsequently represented multiple times that both parties had the "right to press charges." (*See id.* at 16–17.)

Unfortunately, Scherer's arguments are unavailing. The Court agrees that Officer Martinez probably did not have any objective basis to tell Scherer that there was a possibility that charges would be brought against her; he already knew that Bravo did not want to press charges. But the officer's subjective intent is not the relevant inquiry. *See Capp*, 940 F.3d at 1053. Ultimately, Officer Martinez's conditional statement could not have had a chilling effect on her right to petition. He conveyed that if Bravo chose to go forward with pressing charges against her, she would face the same consequences. This was neither an explicit nor implicit threat. Whether Officer Martinez utterly failed to discourage a dual arrest as provided under California law[8] or whether he was being

[8] California Penal Code § 13701(b) mandates that law enforcement agencies "shall" implement "written policies and standards" that "discourage, when appropriate, but not prohibit, dual arrests" in domestic violence incidents. Cal. Penal Code § 13701(b) (emphasis added). California law imposes an affirmative duty on peace officers to "make

intentionally disingenuous, it is not plausible under the objective standard that the "average person" would be deterred from seeking assistance from police by his statement. *Id.* at 1055.

Whether or not Scherer's right to petition was triggered in this instance, her claim fails because she cannot establish that Officer Martinez's actions had a "chilling effect." The Court **GRANTS** the motion. While, generally, parties are allowed to amend their pleadings, Fed. R. Civ. P. 15(a)(2); *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990), leave to amend may be denied where amendment "would be an exercise in futility, or where the amended complaint would also be subject to dismissal." *Steckman v. Hart Brewing*, 143 F.3d 1293, 1298 (9th Cir. 1998) (internal citations omitted). This is such a case. Because Scherer's claim fails as a matter of law, the Court finds that leave to amend would be futile.

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reasonable efforts to identify the dominant aggressor in any incident. . . [who] is the person to be the *most significant, rather than the first*, aggressor." *Id.*

Scherer contends that Officer Martinez failed to abide by such policy because he incorrectly determined that the matter was not a domestic dispute and therefore failed entirely to determine who was the most significant aggressor. Whether his legal conclusion that the parties were not in a "dating relationship" was erroneous does not alter the analysis under the second prong of her First Amendment claim here. The Court bases its "unconstitutional chilling" analysis on the statements that were made to Scherer, irrespective of why the officer made those statements.

2. (Claim 2) Substantive Due Process Under the Fourteenth Amendment

Scherer alleges that her substantive due process rights under the Fourteenth Amendment of the Constitution were violated when Officer Martinez threatened to arrest her if she insisted on pressing charges against Bravo and when the other officers, including Officer Ismail and Officers Does 1–3 failed to intervene and stop said threats. (FAC ¶ 105.)

To state a substantive due process claim under 42 U.S.C. § 1983, there must be a deprivation of a constitutionally protected life, liberty, or property interest recognized by the Fourteenth Amendment's Due Process Clause. *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 523 (9th Cir. 1994). Substantive due process "forbids the government from depriving a person of life, liberty, or property" in such a way that "shocks the conscience" or "interferes with rights implicit in the concept of ordered liberty." *Nunez v. City of L.A.*, 147 F.3d 867, 871 (9th Cir. 1998).

While neither party has addressed the issue, the Court finds that Scherer has failed to meet the threshold requirement of asserting a cognizable liberty or property interest. Section 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred." *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003); *Sampson v. Cnty. of L.A.*, 974 F.3d 1012, 1018 (9th Cir. 2020). If a plaintiff's claim brought under section 1983 "can be analyzed under an explicit textual source of rights in the Constitution, a court should not resort to the more subjective standard of substantive due process." *Hufford v. McEnaney*, 249

F.3d 1142, 1151 (9th Cir. 2001) (internal quotation omitted); *see also Corales v. Bennett*, 567 F.3d 554, 568–69 n.11 (9th Cir. 2009).

Here, Scherer's substantive due process claim is essentially duplicative of her First Amendment claim. *See Brandenburg v. Hous. Auth. of Irvine*, 253 F.3d 891, 900 (6th Cir. 2001) (upholding a court's dismissal of the substantive due process claim based on the First Amendment retaliation claim because the plaintiff failed to identify "any other fundamental rights"). She has not asserted whether the officers' conduct violated other fundamental rights or liberty interests. For example, she has not alleged that the officers detained her, arrested her, or otherwise impeded her liberty interests (or any other protected interest) as a result of the exercise of her First Amendment rights. In fact, Scherer has pled that she was not arrested; she was only threatened with the prospect of an arrest. (FAC ¶ 105.) Her factual allegations are identical to those underlying her First Amendment claim, which subsumes this claim.

The Court **GRANTS** the motion without leave to amend. *Steckman*, 143 F.3d at 1298. If Scherer wishes to pursue this claim, she may do so only upon a motion for leave to amend within fourteen days, explaining what liberty or property interest is at stake.

3. Qualified Immunity

Because the Court finds that Scherer has failed to establish a violation of a constitutional right, the Court need not address qualified immunity as an alternative

basis for dismissing her claim. Furthermore, Scherer has failed to address qualified immunity in its entirety.

4. (Claim 3) Monell Liability Under § 1983

Scherer claims that the City's unconstitutional policies caused the violation of her right to petition the government for redress of grievances under the First Amendment. (FAC ¶ 112.)

A local government may be liable under 42 U.S.C. § 1983 for constitutional torts committed by its officials "according to municipal policy, practice, or custom." *Monell v. Dep't of Social Servs. of N.Y.*, 436 U.S. 658, 690–91 (1978); *Weiner v. San Diego Cnty.*, 210 F.3d 1025, 1028 (9th Cir. 2000). To impose municipal liability under § 1983, a plaintiff must show: "(1) that the plaintiff possessed a constitutional right of which she was deprived; (2) that the municipality had a policy; (3) that this policy amounts to deliberate indifference to the plaintiff's constitutional right; and, (4) that the policy is the moving force behind the constitutional violation." *Plumeau v. Sch. Dist. No. 40 Cnty. of Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997) (alterations and internal quotation marks omitted); *see also City of Canton v. Harris*, 489 U.S. 378, 388–89 (1989).

Fatal to Scherer's claim is her inability to establish a violation of her constitutional rights. Because the Court has found that she cannot plausibly state a claim under the Petition Clause of the First Amendment, Scherer's *Monell* claim likewise fails. *See City of L.A. v. Heller*, 475 U.S. 796, 799 (1986).

The Court **GRANTS** the motion and dismisses this claim.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** the motion to dismiss.

IT IS SO ORDERED.

Appendix E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 25-2651

JOY HO SCHERER,
Plaintiff-Appellee,
v.
WESSSAM WAYNE ISMAIL and NELSON ANTONIO MARTINEZ, JR.,
Defendants-Appellants,
and
CITY OF LOS ANGELES and DOES, 1 through 10, inclusive,
Defendants.

Filed: June 23, 2026

Before: HIGGINSON, NGUYEN, and BRESS, *Circuit Judges*.*

ORDER

Judge Nguyen and Judge Bress voted to deny the petition for rehearing en banc, and Judge

* The Honorable Stephen A. Higginson, United States Circuit Judge for the Court of Appeals, 5th Circuit, sitting by designation.

Higginson so recommended. The petition was circulated to the judges of the Court, and no judge requested a vote for en banc consideration. Fed. R. App. P. 40. The petition for rehearing en banc, Dkt. 30, is denied.

Appendix F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 22-cv-01931

JOY HO SCHERER,
Plaintiff,

v.

CITY OF LOS ANGELES, WESSAM WAYVE ISMAIL, NELSON ANTONION MARTINEZ, JR., and DOES 1 through 10, inclusive,
Defendants.

Filed: July 27, 2026

JUDGMENT IN FAVOR OF DEFENDANTS ON REMAND AFTER APPEAL

Pursuant to the Order of the Ninth Circuit dated May 14, 2026 (Dkt #72) reversing the District Court's denial of qualified immunity, finding that dismissal based on qualified immunity is proper at this stage, and order that judgment be entered in favor of Defendants, **IT IS HEREBY ORDERED, ADJUGED AND DECREED**, that Plaintiff **JOY HO SCHERER** have and recover nothing by each and all the claims as set forth in the operative complaint against Defendants **CITY OF LOS ANGELES, WESSAM WAYVE ISMAIL, NELSON ANTONION MARTINEZ, JR.**, and that

Defendants shall recover their costs in accordance with Local Rule 54.

JUDGMENT IS HEREBY ENTERED IN FAVOR OF DEFENDANT CITY OF LOS ANGELES, WESSAM WAYVE ISMAIL, NELSON ANTONION MARTINEZ, JR., ON ALL CLAIMS ALLEGED AGAINST THEM.

IT IS SO ORDERED.

Dated: July 27, 2026

[handwritten signature]
HONORABLE JAMES V. SELNA
United States District Court Judge

Appendix G

STATUTORY PROVISIONS INVOLVED

California Penal Code § 13700 (2020) provides:

As used in this title:

(a) "Abuse" means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another.

(b) "Domestic violence" means abuse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship. For purposes of this subdivision, "cohabitant" means two unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship. Factors that may determine whether persons are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same living quarters, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) whether the parties hold themselves out as spouses, (5) the continuity of the relationship, and (6) the length of the relationship.

(c) "Officer" means any officer or employee of a local police department or sheriff's office, and any peace officer of the Department of the California Highway Patrol, the Department of Parks and Recreation, the University of California Police Department, or the California State University and

College Police Departments, as defined in Section 830.2, a peace officer of the Department of General Services of the City of Los Angeles, as defined in subdivision (c) of Section 830.31, a housing authority patrol officer, as defined in subdivision (d) of Section 830.31, a peace officer as defined in subdivisions (a) and (b) of Section 830.32, or a peace officer as defined in subdivision (a) of Section 830.33.

(d) "Victim" means a person who is a victim of domestic violence.

California Penal Code § 13701 (2020) provides, in relevant part:

(a) Every law enforcement agency in this state shall develop, adopt, and implement written policies and standards for officers' responses to domestic violence calls by January 1, 1986. These policies shall reflect that domestic violence is alleged criminal conduct. Further, they shall reflect existing policy that a request for assistance in a situation involving domestic violence is the same as any other request for assistance where violence has occurred.

(b) The written policies shall encourage the arrest of domestic violence offenders if there is probable cause that an offense has been committed. These policies also shall require the arrest of an offender, absent exigent circumstances, if there is probable cause that a protective order issued under Chapter 4 (commencing with Section 2040) of Part 1 of Division 6, Division 10 (commencing with Section 6200), or Chapter 6 (commencing with Section 7700) of Part 3 of Division 12, of the Family Code, or Section 136.2 of this code, or by a court of any other state, a

commonwealth, territory, or insular possession subject to the jurisdiction of the United States, a military tribunal, or a tribe has been violated. These policies shall discourage, when appropriate, but not prohibit, dual arrests. Peace officers shall make reasonable efforts to identify the dominant aggressor in any incident. The dominant aggressor is the person determined to be the most significant, rather than the first, aggressor. In identifying the dominant aggressor, an officer shall consider the intent of the law to protect victims of domestic violence from continuing abuse, the threats creating fear of physical injury, the history of domestic violence between the persons involved, and whether either person acted in self-defense. These arrest policies shall be developed, adopted, and implemented by July 1, 1996. Notwithstanding subdivision (d), law enforcement agencies shall develop these policies with the input of local domestic violence agencies.

Appendix H

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 22-cv-01931

JOY HO SCHERER,
Plaintiff,

v.

CITY OF LOS ANGELES, WESSSAM WAYNE ISMAIL, NELSON ANTONIO MARTINEZ, JR. and DOES 1 through 10, inclusive,
Defendants.

Filed: January 13, 2023

FIRST AMENDED COMPLAINT FOR DAMAGES
For Violation for Federal Constitutional Rights Under Color of State Law (42 U.S.C. § 1983) Claim For Violation of Right to Petition Government For Redress of Grievances (U.S. Const. Amend 1), Violation of Due Process Of Law (U.S. Const. Amend 14) and Claim For Municipal (Monell[1]) Liability

COMES NOW plaintiff Joy Ho Scherer and shows this honorable court the following:

[1] *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978).

JURISDICTIONAL ALLEGATIONS

1. As this action is brought under 42 U.S.C. § 1983, this court has jurisdiction over this case under its federal question jurisdiction pursuant to 28 U.S.C. § 1331.

2. As the incidents complained of in this action occurred in the CITY of Los Angeles, State of California, within the territorial jurisdiction of this court, venue properly lies in this court pursuant to 28 U.S.C. § 1391(b)(2).

GENERAL ALLEGATIONS

3. Plaintiff Joy Ho Scherer, hereinafter referred to as "plaintiff" or "plaintiff Scherer or "SCHERER" and/or "plaintiff" and/or "Joy Ho Scherer" is a natural person, who, at all times complained of in this action, resided in the State of California. Plaintiff is a professional model and actress.

4. Defendant City of Los Angeles, hereinafter also referred to as "City of Los Angeles" or "CITY", is a political subdivision of the State of California and is a municipal entity, located within the territorial jurisdiction of this Honorable Court.

5. Defendant Wessam Wayne Ismail, hereinafter referred to as "ISMAIL" and/or "defendant Ismail" and/or "defendant Wessam Ismail" and/or "defendant Wessam Wayne Ismail" is a Certified California Peace Officer and a sworn Los Angeles Police Department police officer, who, at all times complained of herein, was acting in the course of and within the scope of his employment with defendant City of Los Angeles.

6. At all times complained of herein, defendant Wessam Wayne Ismail was acting an individual person under the color of state law.

7. Defendant Nelson Antonio Martinez, Jr., hereinafter referred to as "MARTINEZ" and/or "defendant Nelson Martinez, Jr." and/or "defendant Nelson Antonio Martinez, Jr.", is a Certified California Peace Officer and a sworn Los Angeles Police Department police officer, who, at all times complained of herein, was acting in the course of and within the scope of his employment with defendant City of Los Angeles.

8. At all times complained of herein, defendant Nelson Antonio Martinez, Jr. was acting an individual person under the color of state law.

9. Defendant City of Los Angeles, hereinafter also referred to as "City of Los Angeles" or "CITY", is a political subdivision of the State of California and is a municipal entity, located within the territorial jurisdiction of this Honorable Court.

10. Defendants DOES 1 through 6, inclusive, are sworn peace officers and/or police officers and/or Detectives and/or supervisors and/or investigators and/ Special Officers and/or a dispatchers and/or some other public officer, public official or employee of defendant City of Los Angeles[2], who in some way committed some or all of the tortious actions (and constitutional violations) complained of in this action, and/or are otherwise responsible for and liable to plaintiff for the acts complained of in this

[2] And/or with some other public entity.

action, whose identities are, and remain unknown to plaintiff, who will amend her complaint to add and to show the actual names of said DOE defendants when ascertained by plaintiff.

11. At all times complained of herein, DOES 1 through 6, inclusive, were acting as individual persons acting under the color of state law, pursuant to their authority as sworn peace officers and/or police officers and/or Special Officers and/or Supervisors (i.e. Sergeants, Lieutenants, Captains, Commanders, etc.) and/or dispatchers and/or public officers, employed by defendant City of Los Angeles and/or with some other public entity, and were acting in the course of and within the scope of their employment with defendant City of Los Angeles[3].

12. Defendants DOES 7 through 10, inclusive, are sworn peace officers and/or Supervisors and/or the City Manager or some other high ranking persons in City Management, the Chief of Police and/or Assistant Chiefs and/or Deputy Chiefs and/or Commanders and/or Captains and/or Lieutenants and/or Sergeants and/or Detectives and/or other Supervisory personnel (such as) and/or policy making and/or final policy making officials, employed by the City of Los Angeles[4], who are in some substantial way liable and responsible for, or otherwise proximately caused and/or contributed to the occurrences complained of by plaintiff in this action, such as by creating and/or causing the creation of and/or contributing to the creation of the

[3] And/or with some other public entity.

[4] And/or with some other public entity.

policies and/or practices and/or customs and/or usages of the Los Angeles Police Department / City of Los Angeles[5] for: 1) arresting both parties demanding the arrest of the other party to a domestic dispute, if both parties to the domestic dispute insist on the other party being arrested, rather than determining which party was the "primary aggressor"; 2) arresting both parties demanding the arrest of the other party to a domestic dispute, without determining whether the LAPD officer(s) had probable cause to arrest each party arrested; and 3) for failing to discipline its LAPD officers for failing to intervene during constitutional violations by fellow LAPD officers.

13. Plaintiffs are presently unaware of the identities of DOES 1 through 10, inclusive, and will amend his complaint to add and to show the actual names of said DOE defendants, when ascertained by plaintiff.

14. At all times complained of herein, DOES 7 through 10, inclusive, were acting were acting as individual persons acting under the color of state law, pursuant to their authority as Police Officers and/or Supervisory Officers, Commanders and/or Captains and/or Lieutenants and/or Sergeants and/or other Supervisory personnel and/or policy making and/or final policy making officials, employed by the City of Los Angeles and/or with some other public entity, and/or some other public official(s) with the City of Los Angeles and/or with some other public entity, and were acting in the course of and

[5] And/or with some other public entity.

within the scope of their employment with defendant the City of Los Angeles.

15. At all times complained of herein, defendants DOES 7 through 10, inclusive, were acting as individual persons under the color of state law; under and pursuant to their status and authority as peace officers and/or Supervisory peace officers (as described herein, above and below), and/or policy making peace officers, with defendant City of Los Angeles.

16. In addition to the above and foregoing, defendants DOES 1 through 6, inclusive, acted pursuant to a conspiracy, agreement and understanding and common plan and scheme to deprive the plaintiff Joy Scherer of her federal Constitutional and statutory rights, as complained of in this action, and acted in joint and concerted action to so deprive plaintiffs of those rights as complained of herein; all in violation of 42 U.S.C. § 1983, and otherwise in violation of United States (Constitutional and statutory) law.

17. Said conspiracy / agreement / understanding / plan / scheme / joint action / concerted action, above referenced, was a proximate cause of the violation of the plaintiff Joy Scherer's federal and state constitutional and statutory rights, as complained of herein.

FIRST CAUSE OF ACTION
VIOLATION OF FIRST AMENDMENT RIGHTS – RIGHT TO PETITION GOVERNMENT FOR REDRESS OF GRIEVANCES
[42 U.S.C. § 1983]
(By Plaintiff JOY SCHERER Against Defendants WESSSAM WAYNE ISMAIL, NELSON ANTONIO MARTINEZ, JR. and DOES 1 through 6, inclusive)

18. Plaintiff hereby realleges and incorporates by reference the allegations set forth in paragraphs 1 through 17, inclusive, above, as if set forth in full herein.

19. In 2020 plaintiff Joy Scherer had a former and/or an ongoing "dating relationship[6]" with a man named Maxwell Bravo (hereinafter referred to as "BRAVO").

20. On October 31, 2020 plaintiff was invited by BRAVO to go out that evening with him to celebrate Halloween. He also invited plaintiff to stay the night with him since she lived so far away.

21. Plaintiff took an overnight bag and her five-pound Yorkie dog, "Stanley", with her to BRAVO's house.

22. When plaintiff arrived at BRAVO's apartment there was another friend of BRAVO's there, who he introduced as man named "Ezra".

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[6] As defined by Cal. Penal Code § 243(f)(10), that provides: "(10) "Dating relationship" means frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement independent of financial considerations."

23. Plaintiff and BRAVO, along with his friend Ezra, thereafter left for the evening for their Halloween celebration.

24. They all went to a local bar. BRAVO asked plaintiff what she wanted to drink and she excused herself to the restroom.

25. When plaintiff came back to the bar area from the restroom, she saw that BRAVO was having a heated discussion with the bouncer there.

26. The bouncer told plaintiff and Ezra that due to COVID-19 restrictions they would have to go outside to the front patio of the bar.

27. The bouncer told BRAVO that he would have to leave by the rear door and escorted him out.

28. A short time later plaintiff heard a car tires squealing / screeching, followed by a gunshot.

29. Plaintiff and Ezra went to the back of the bar where BRAVO had parked the car that they arrived in.

30. The bouncer told plaintiff and Ezra that BRAVO had been told to leave the bar because he started an argument with another customer.

31. The bouncer also told plaintiff and Ezra that BRAVO drove out of the parking lot at a high rate of speed and fired his gun up in the air while doing so.

32. After a couple of minutes plaintiff and Ezra received a phone call from BRAVO, telling them that he would pick them up on the street adjacent to the bar. When they got into the car, BRAVO was extremely angry and Ezra told him to calm down and that he could not fire his gun off.

33. Plaintiff saw a gun in BRAVO's waistband and was very scared of him due to his angry demeanor.

34. BRAVO entered the freeway and drove in excess of 100 mph, further scarring plaintiff and Ezra.

35. Ezra yelled at BRAVO to slow down, or BRAVO was going to kill them[7].

36. BRAVO drove faster and began making growling noises. When BRAVO slowed down to take the off-ramp for Ventura Blvd., Ezra was able to exit BRAVO's car, by opening the door and rolling out of the car.

37. Thereafter, after arriving at BRAVO's apartment, BRAVO again became enraged, and grabbed plaintiff by the wrist and bit down on the same, violently.

38. At this point plaintiff knew she had to get her dog and her belongings and leave BRAVO's apartment. Plaintiff was afraid for her life and did not want to further aggravate or anger BRAVO.

39. Once BRAVO and plaintiff were both inside the BRAVO's apartment, she began gathering her things, and BRAVO asked what she was doing. Plaintiff said she was going to drive home.

40. BRAVO yelled that no she wasn't leaving and grabbed her.

41. Plaintiff made it into the bathroom and locked the door. She was seated on the toilet with her

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[7] Accidentally that is.

pants and underwear down at her feet, when BRAVO tore the door and frame from the wall and entered the bathroom.

42. BRAVO grabbed plaintiff by her hair and began hitting her on her head.

43. Plaintiff tried to pull up her pants but BRAVO would not let her do so, and drug her by her hair out of the bathroom, and forced her against the back of the couch.

44. At this point BRAVO was screaming at plaintiff that she was not going to leave, and with her pants still around her ankles he unbuttoned his pants and pressed his penis against her, attempting to have sex with her.

45. Plaintiff screamed at him to stop and he told her to "Shut the fuck up".

46. When BRAVO continued to try to have sex with plaintiff she elbowed him. This made BRAVO even angrier, and he violently bit down on plaintiff's left shoulder and repeatedly punched, kicked and otherwise struck plaintiff.

47. Plaintiff continued to fight against BRAVO's attempted rape of her, and pulled-up her pants, while BRAVO continued to beat her.

48. BRAVO thereafter opened the front door of his apartment and pushed plaintiff outside of the apartment on the second-floor landing.

49. Plaintiff did not have her bag, keys, or dog when BRAVO shoved her out of his apartment, and she was partially naked from BRAVO ripping-off her clothing.

50. Plaintiff pounded on the door, pleading with BRAVO to give to her, her dog and keys so she could leave.

51. BRAVO opened the door and threw plaintiff's dog and her belongings outside of BRAVO's apartment.

52. Plaintiff began to pick up her clothes and belongings when BRAVO again came outside of his apartment door.

53. BRAVO grabbed plaintiff by her hair, dragging her back inside of his apartment.

54. Plaintiff tried to flee down the stairs, but BRAVO grabbed her by her hair, dragging her back up the stairs and began beating her head against the metal railing.

55. Plaintiff was screaming for her life, when a man yelled at BRAVO to stop beating her, and that the police were on the way. The man / witness told the LAPD dispatcher that a man was beating a woman at BRAVO's apartment. BRAVO was beating plaintiff's head against the railing outside of his apartment building on that time[8].

56. The LAPD dispatcher made a radio call to defendants LAPD police officers ISMAIL, MARTINEZ and DOES 1 to 3, inclusive, of a "Domestic Battery" at 15033 Dickens Street in Los Angeles.

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[8] BRAVO's apartment was on the second floor of the apartment building.

57. When defendant LAPD police officers ISMAIL, MARTINEZ and DOES 1 to 3, inclusive, arrived at BRAVO's apartment building, they heard plaintiff screaming loudly from the beating and pain that BRAVO was inflicting upon her.

58. It took LAPD police officers ISMAIL, MARTINEZ and DOES 1 to 3, inclusive, approximately 40 seconds to get inside of the gate that surrounded BRAVO's apartment building, and during that time, those defendant officer heard plaintiff's very loud screams of pain and terror from her beating by BRAVO, as well as BRAVO screaming at the plaintiff.

59. When defendant LAPD police officers ISMAIL, MARTINEZ and DOES 1 to 3, inclusive, finally were able to enter the gate that surrounded BRAVO's apartment, they saw BRAVO walking quickly back toward the stairway leading up to his apartment, as his apartment was on the second floor of the apartment building; the first and second floor of said building being connected by exterior stairways.

60. Plaintiff was at that time at the landing right next to the stairway leading down to the first floor where said defendant police were with BRAVO, inside of the outside gate, and on the first floor of the apartment building.

61. Also, when said defendant LAPD officers saw BRAVO walking toward the stairway, said defendant officers ordered BRAVO to "Stay right there. Stay right there", and BRAVO did so; stopping and then placing his hands up and behind his head in a surrender position.

62. While defendant LAPD Officer ISMAIL and DOES 1 and 2 spoke with the now detained BRAVO, defendant LAPD officer MARTINEZ and DOE 3 proceeded to the bottom of the stairway that went from the first floor of the apartment building where he/they saw plaintiff standing at the landing on the top of that stairway, crying and obviously beaten and bloody.

63. Defendant LAPD Officer MARTINEZ and DOE 3 called out to plaintiff to come down the stairs to him, and plaintiff started to comply to descend the stairs toward Officer MARTINEZ and DOE 3; all why crying.

64. Plaintiff was obviously beaten, bloody, injured and crying, and was scooting down the stairs toward Officer MARTINEZ and DOE 3 with her rear end on the steps of the stairway.

65. Defendant LAPD Officer MARTINEZ and DOE 3 then ascended the stairway toward plaintiff, who was still crying and obviously very upset.

66. LAPD Officer MARTINEZ and DOE 3 was now standing on the stairway and questioning plaintiff while she was sitting on the stairway, answering his questions.

67. Shortly after Officer MARTINEZ and DOE 3 began questioning plaintiff, Officer MARTINEZ and DOE 3 called out to his partner(s), defendant LAPD Officer Ismail and DOES 1 and 2, that he/they was/were going to call into to LAPD dispatch and tell the dispatcher to cancel the additional unit.

68. Officer MARTINEZ and DOE 3 then proceeded to radio LAPD dispatch to cancel the

additional unit, and to show "Code 4, Suspect in Custody"; the "suspect in custody" being BRAVO.

69. Officer MARTINEZ and DOE 3 asked plaintiff if BRAVO was her boyfriend, and she told him "No", that BRAVO was only her friend.

70. Officer MARTINEZ and DOE 3 then observed plaintiff's wounds, and tells her that she was all cut up and bruised up, and that she was "really beat up", and that she really needed an ambulance.

71. Plaintiff was wearing a sleeveless low-cut top. She had a bloody hematoma / laceration[9] on her scalp area, and a bloody laceration on her right forehead, bite marks on both of her exposed shoulders, facial bruising and other bruising about her body. It was very obvious that BRAVO had beaten her badly (See photos, Exhibit "A", attached to this instant First Amended Complaint for Damages).

72. Officer MARTINEZ and DOE 3 continued to ask plaintiff how she got all of the contusions, lacerations, cuts, hematoma and blood about her, and she told him that she refused to have sex with BRAVO, that he tried to rape her, and when he was not successful, that he threw her personal items out of his apartment onto the walkway outside of the same, and beat her up badly, stating to Officer MARTINEZ and DOE 3: "He beat the fuck out of me".

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[9] A large bloody gash on the right side of her forehead, caused by the tearing of her skin by trauma.

73. Plaintiff also told Officer MARTINEZ and DOE 3 that BRAVO hit her 10 to 15 times in her face, and that she was a model, and that she was now fucked for life.

73. When Office MARTINEZ and DOE 3 again asked plaintiff if she had any "romantic ties to him" [to BRAVO], plaintiff told Officer MARTINEZ and DOE 3, "Yeah, over the years" that they did, but that they were not presently "dating".

74. Officer MARTINEZ and DOE 3 then told plaintiff that he was going to ask BRAVO about her relationship with him, and asked for plaintiff's name and identification.

75. Officer DOE 3 then ascended the stairway and approached Officer MARTINEZ and told Officer MARTINEZ that he would stay with / look after plaintiff while Officer MARTINEZ went back down the stairs to ask BRAVO about the nature of his relationship with plaintiff.

76. Officer MARTINEZ then descended the stairs back down to the first floor, where BRAVO stood handcuffed and detained, while BRAVO was being questioned by defendant LAPD Officer ISMAIL and DOES 1 and 2.

77. Defendant Officers ISMAIL, MARTINEZ and DOES 1 through 3, saw that BRAVO had no visible injuries, save possibly a tiny scratch under his chin.

78. When Officer MARTINEZ arrived down to the first floor and stood and watched Officer ISMAIL question BRAVO, he and DOES 1 and 2 all heard BRAVO tell Officer ISMAIL that BRAVO grabbed plaintiff's belongings (i.e. her purse, her dog and

other items of plaintiff's) and dragged them outside of his apartment.

79. Officer ISMAIL then approached Officer MARTINEZ and BRAVO, and asked him if he and plaintiff had were dating, and BRAVO to Officer MARTINEZ and Officer ISMAIL that he had been "dating" plaintiff for 4 months, and then BRAVO told said Officers that he had been "dating" plaintiff for about a year.

80. Then, Officer ISMAIL asked BRAVO about him "dating" plaintiff over that period of time, and BRAVO told Officer MARTINEZ[10] that he and plaintiff were "fucking" on and off during that period of time, and they were not now dating.

81. Thereafter, Officer MARTINEZ walked back upstairs to where plaintiff was sitting (on the upper steps of the staircase, with Officer DOE 3), and he asked plaintiff is she wanted to "press charges" against BRAVO, and she said "Yeah".

82. Thereafter, Officer MARTINEZ walked back downstairs to where Officer ISMAIL and DOES 1 and 2 were standing with / around BRAVO, and BRAVO told Officers ISMAIL, MARTINEZ and DOES 1 and 2 that plaintiff hit him with her "flailing arms", that she hit one of his eyes, and that the rest of it was her trying to get BRAVO to assault plaintiff. she was going to have then go to court and plaintiff said that was fine with her.

83. Officer ISMAIL asked BRAVO how he got "this", apparently alluding to some mark under his

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[10] In the presence of Officer ISMAIL and DOES 1 and 2.

left chin area, that cannot be seen on the video recording of this incident.

84. In response to Officer ISMAIL's question (how he got "this"), BRAVO stated: "How did she get anything on her face. Nothing".

85. Officer MARTINEZ asked BRAVO "Who threw the first blow", BRAVO stated "Her, I didn't throw any blows", to which Officer MARTINEZ stated "Dude, she's pretty beat-up".

86. Officer MARTINEZ then told BRAVO that right now, since there is no dating relationship, that it's just a battery between the two of them (BRAVO and the plaintiff), and MARTINEZ asked BRAVO if he wanted to press charges, to which BRAVO answered "No".

87. Officer MARTINEZ returned upstairs to plaintiff's location, and told plaintiff: "Just like you, he has injuries too, and he's claiming that you were the aggressor, and that you started the fight, and that just like I told you that you have the right to do a private person's arrest, that he has that right too. So if he wants to press charges, you will be going to jail too."

88. Plaintiff responded that she did not want to go to jail right now, and Officer MARTINEZ told plaintiff that she would be going to jail right now.

89. Plaintiff told Officer MARTINEZ that he had to be kidding her, and he said that he wasn't.

90. Officer MARTINEZ essentially convinced plaintiff that if she "pressed charges" against BRAVO, that both BRAVO and plaintiff would both be going to jail right then and there.

91. Officer MARTINEZ deliberately failed to tell plaintiff that he had already asked BRAVO if he wanted to "press charges" against plaintiff and that BRAVO said that he did not want to do so, for the purpose of convincing plaintiff not to exercise her right to complain to the police to have BRAVO arrested and jailed for beating her up.

92. Officer MARTINEZ also knew that plaintiff had complained that BRAVO attempted to rape her, a violation of Cal. Penal Code § 664/261 (attempted rape), a felony, and that California law permitted a peace officer to arrest another for a felony, even if that crime was not committed in the officer's presence.

93. In addition, Officer MARTINEZ falsely and maliciously represented to plaintiff that she needed to have presently been in a dating relationship with BRAVO for BRAVO to have violated Cal. Penal Code § 273.5 domestic violence with corporal injury, and, therefore, the protections of California law for Domestic Violence victims such as plaintiff were not applicable to her situation, as Section 273.5, a felony, also applies to persons who were formally in a dating relationship.

94. In fact, it was confirmed to Officer MARTINEZ by plaintiff and by BRAVO that plaintiff had previously been in a dating relationship with BRAVO, as a dating relationship is defined under California law as *"frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement independent of financial considerations"*.[11]

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[11] *See*, Cal. Penal Code § 243(f)(10).

95. Moreover, as plaintiff had previously been in a dating relationship with BRAVO, Officer MARTINEZ had under California law the right to arrest the primary aggressor, even if the person was not the one who threw the first blow, as Cal. Penal Code § 13701 provides in pertinent part:

> 13701.
>
> (a) Every law enforcement agency in this state shall develop, adopt, and implement written policies and standards for officers' responses to domestic violence calls by January 1, 1986. These policies shall reflect that domestic violence is alleged criminal conduct. Further, they shall reflect existing policy that a request for assistance in a situation involving domestic violence is the same as any other request for assistance where violence has occurred.
>
> (b) The written policies shall encourage the arrest of domestic violence offenders if there is probable cause that an offense has been committed. These policies also shall require the arrest of an offender, absent exigent circumstances, if there is probable cause that a protective order issued under Chapter 4 (commencing with Section 2040) of Part 1 of Division 6, Division 10 (commencing with Section 6200), or Chapter 6 (commencing with Section 7700) of Part 3 of Division 12, of the Family Code, or Section 136.2 of this code, or by a court of any other state, a commonwealth, territory, or insular possession subject to the jurisdiction of the United States, a military tribunal, or a tribe has been violated. These

> policies shall discourage, when appropriate, but not prohibit, dual arrests. Peace officers shall make reasonable efforts to identify the dominant aggressor in any incident. **The dominant aggressor is the person determined to be the most significant, rather than the first, aggressor.** In identifying the dominant aggressor, an officer shall consider the intent of the law to protect victims of domestic violence from continuing abuse, the threats creating fear of physical injury, the history of domestic violence between the persons involved, and whether either person acted in self-defense. Notwithstanding subdivision (d), law enforcement agencies shall develop these policies with the input of local domestic violence agencies. (emphasis added).

96. Moreover, Officer MARTINEZ had the right under California state law to have also arrested BRAVO, in the absence of any request by plaintiff or in the absence of any private person's arrest by her of BRAVO, for the felony offenses of violation of Cal. Penal Code § 245(a)(4), assault by means likely to produce great bodily injury, and Cal. Penal Code § 203, Mayhem.

97. Although Officer MARTINEZ had the right to have not arrested BRAVO, he did not have the right to have threatened plaintiff with being arrested if she insisted that he do so; a violation of her right to petition the government for grievances under the First Amendment to the United States Constitution.

98. Moreover, defendant Officer ISMAIL and defendant Officers DOES 1 through 3, inclusive, were present and aware of defendant Officer MARTINEZ' actions in threatening plaintiff with being immediately arrested if she insisted on the defendant LAPD officers arresting BRAVO, and they had a duty, an opportunity and the ability to have intervened and to have stopped Officer MARTINEZ's violation of plaintiff's First Amendment right to petition.

99. Eventually, after having to hire a lawyer to pressure the Los Angeles County City Attorney's Office, BRAVO was criminally convicted for the beating of plaintiff, for violation of Cal. Penal Code § 273.5, domestic violence with corporal injury, in the case of People of the State of California v. Maxwell Bravo, Los Angeles County Superior Court Case Number LAV1VW01547-01.

100. As a proximate result of the actions of defendants ISMAIL, MARTINEZ and DOES 1 through 3, inclusive, plaintiff suffered mental and emotional pain and suffering and the physical manifestation of the same[12], attorney's fees, medical and psychological bills, lost wages / profits, and other general and special damages in an amount in excess of $10,000,000.00.

101. In addition, the actions of defendants ISMAIL, MARTINEZ and DOES 1 through 6, inclusive, were done maliciously and oppressively, entitling plaintiff to an award of punitive damages against said defendants, save defendant City of Los Angeles in an amount in excess of $10,000,000.00.

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[12] Psychosomatically induced actual physical injuries.

SECOND CAUSE OF ACTION
VIOLATION OF RIGHT TO SUBSTANTIVE DUE PROCESS OF LAW
[42 U.S.C. § 1983]
(By Plaintiff JOY SCHERER Against Defendants WESSSAM WAYNE ISMAIL, NELSON ANTONIO MARTINEZ, JR. and DOES 1 through 6, inclusive)

102. Plaintiff hereby realleges and incorporates by reference the allegations set forth in paragraphs 1 through 101, inclusive, as though set forth in full herein.

103. The actions of defendants ISMAIL, MARTINEZ and DOES 1 through 6, inclusive, were done maliciously and oppressively, and constituted outrageous government conduct; conduct shocking to the conscience.

104. Accordingly, defendants ISMAIL's, MARTINEZ' and DOES 1 through 3, inclusive's action constituted a violation of substantive due process of law, in violation of plaintiff's rights under the Fourteenth Amendment to the United States Constitution.

105. In addition to the above and foregoing, because plaintiff has no adequate remedy under California state law to sue defendants ISMAIL, MARTINEZ and DOES 1 through 3, inclusive, for their threats to plaintiff to arrest her if she insisted on BRAVO being arrested by said defendants for his beating, attempted rape and false imprisonment of her, and for their failure to intervene and stop said threats to plaintiff by said officers; said actions of said defendants also constitute a violation of

substantive due process of law under the Fourteenth Amendment to the United States Constitution.

106. As a proximate result of the actions of defendants ISMAIL, MARTINEZ and DOES 1 through 3, inclusive, plaintiff suffered mental and emotional pain and suffering and the physical manifestation of the same[13], attorney's fees, medical and psychological bills, lost wages / profits, and other general and special damages in an amount in excess of $10,000,000.00.

107. In addition, the actions of defendants ISMAIL, MARTINEZ and DOES 1 through 6, inclusive, were done maliciously and oppressively, entitling plaintiff to an award of punitive damages against said defendants, save defendant City of Los Angeles in an amount in excess of $10,000,000.00.

THIRD CAUSE OF ACTION
MUNICIPAL / MONELL[14] LIABILITY FOR VIOLATION OF FIRST AMENDMENT RIGHTS – RIGHT TO PETITION GOVERNMENT FOR REDRESS OF GRIEVANCES
[42 U.S.C. § 1983]
(By Plaintiff JOY SCHERER Against Defendants City of Los Angeles and DOES 7 through 10, inclusive)

108. Plaintiff hereby realleges and incorporates by reference the allegations set forth in paragraphs 1 through 107, inclusive, as though set forth in full herein.

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[13] Psychosomatically induced actual physical injuries.

[14] *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978).

110. As set forth above, defendants DOES 7 through 10, inclusive, are sworn peace officers and/or Supervisors and/or the City Manager or some other high ranking persons in City Management, the Chief of Police and/or Assistant Chiefs and/or Deputy Chiefs and/or Commanders and/or Captains and/or Lieutenants and/or Sergeants and/or Detectives and/or other Supervisory personnel (such as) and/or policy making and/or final policy making officials, employed by the City of Los Angeles[15], who are in some substantial way liable and responsible for, or otherwise proximately caused and/or contributed to the occurrences complained of by plaintiff in this action, such as by creating and/or causing the creation of and/or contributing to the creation of the policies and/or practices and/or customs and/or usages of the Los Angeles Police Department / City of Los Angeles[16] for: 1) arresting both parties demanding the arrest of the other party to a domestic dispute, if both parties to the domestic dispute insist on the other party being arrested, rather than determining which party was the "primary aggressor"; 2) arresting both parties demanding the arrest of the other party to a domestic dispute, without determining whether the LAPD officer(s) had probable cause to arrest each party arrested; and 3) for failing to discipline its LAPD officers for failing to intervene during constitutional violations by fellow LAPD officers.

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[15] And/or with some other public entity.

[16] And/or with some other public entity.

111. Pursuant to said policies and/or practices and/or customs and/or usages of the Los Angeles Police Department, described above, defendants ISMAIL, MARTINEZ and DOES 1 through 6, inclusive, threatened plaintiff with arrest for battering BRAVO if she insisted on said defendants arresting BRAVO, and for their failure to intervene in other officers so threatening the plaintiff.

112. Accordingly, the policies and/or practices and/or customs and/or usages of the Los Angeles Police Department, described above, were a proximate cause of the violation of the plaintiff's right to petition the government for redress of grievances guaranteed to her under the First Amendment to the United States Constitution; to wit; the right to make a complaint to the police of criminal conduct by another person in which they were the victim of that criminal conduct by that other person.

113. As a result of the actions of defendants ISMAIL, MARTINEZ and DOES 1 through 6, inclusive, that were caused by defendant City of Los Angeles as described above, plaintiff 95. As a proximate result of the actions of defendants ISMAIL, MARTINEZ and DOES 1 through 6, inclusive, plaintiff suffered mental and emotional pain and suffering and the physical manifestation of the same[17], attorney's fees, medical and psychological bills, lost wages / profits, and other general and special damages in an amount in excess of $10,000,000.00.

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[17] Psychosomatically induced actual physical injuries.

WHEREFORE, plaintiff Joy Ho Scherer prays for judgment as follows:

a) For judgment against all defendants for compensatory damages in an amount in excess of $10,000,000.00;

b) For judgment against all defendants, save defendant City of Los Angeles, for punitive / exemplary damages in an amount in excess of $10,000,000.00;

c) For reasonable attorney's fees and other costs of suit;

d) For a Trial by Jury, and

e) For other and further relief as this Honorable Court deems just and equitable.

/s/ Jerry L. Steering
JERRY L. STEERING,
ATTORNEY FOR PLAINTIFF
JOY HO SCHERER

EXHIBIT "A"



Exhibit A - 1



Exhibit A - 2



Exhibit A - 3



Exhibit A - 4



Exhibit A - 5



Exhibit A - 6