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Molly C. Dwyer
Clerk of the Court
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94119-3939

Re: *American News and Information, et al. v. William Gore, et al.*
Ninth Circuit Case No. 16-55770
Oral Argument: February 5, 2018
(Judges Wardlaw, Hurwitz, and Korman)

Dear Ms. Dwyer:

Pursuant to the court's order of June 3, 2019, appellants American News and Information Services, Inc., James C. Playford, and Edward A. Peruta submit this supplemental letter brief of less than ten pages as to the effect, if any, of the Supreme Court's decision in *Nieves v. Bartlett*, No. 17-1174, 2019 WL 2257157 (U.S. May 28, 2019) on this appeal.

I. The Applicability of *Lozman* to the First Amendment Retaliatory Arrest Claims in *American News* is not Affected by *Nieves*

In *Nieves v. Bartlett*, 139 S.Ct. 1715 (2019), Russell Bartlett's First Amendment retaliation claim arose from two encounters with two officers during a brief period in a single evening. Sergeant Luis Nieves and Trooper Bryce Weight had never met Bartlett and did not know of Bartlett prior to that evening. The facts in *Nieves* limit the analysis of the relation between probable cause and First Amendment retaliation claims to the immediacy of an isolated, ad hoc incident that only implicates Bartlett's speech (speech that was unrelated to freedom of the press or petitioning the government for redress) and the two officers directly involved in the arrest.

In *Lozman v. City of Riviera Beach, FL*, 138 S.Ct. 1945 (2018), Lozman’s First Amendment retaliation claim arose from a previous history of litigation and confrontation between Lozman and the City. When the City Council directed Lozman to stop making remarks about officials during the public comment session of a Council meeting, Lozman refused. A Councilman requested the assistance of a police officer who asked Lozman to leave the podium. When Lozman refused to leave, the Councilman asked the officer to remove him and Lozman was arrested.

Lozman alleged that the City Council anticipated his reaction and planned the interruption to his public comments to intimidate him and retaliate against him for the exercise of his First Amendment right to petition the government for redress of grievances. See *Lozman*, 138 S.Ct. at 1954-55 (“As a final matter, it must be underscored that this Court has recognized the ‘right to petition as one of the most precious of the liberties safeguarded by the Bill of Rights.’ *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524, 122 S.Ct. 2390, 153 L.Ed.2d 499 (2002). ... Thus, Lozman’s speech is high in the hierarchy of First Amendment values. See *Connick v. Myers*, 461 U.S. 138, 145, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).”). The facts in *Lozman* limit the analysis of the relation between probable cause and First Amendment retaliation claims to the premeditated acts of official policymakers intent on shutting down a litigious, constant presence in municipal politics whose opinions and statements they do not welcome.

The difference between *Nieves* and *Lozman* is anticipated in *Lozman*:

An official retaliatory policy is a particularly troubling and potent form of retaliation, for a policy can be long term and pervasive, unlike an ad hoc, on-the-spot decision by an individual officer. ... An official policy can also be difficult to dislodge. A citizen who suffers retaliation by an individual officer can seek to have the individual officer disciplined or removed from service, but there may be little practical recourse when the government itself orchestrates the retaliation. For these reasons, when retaliation against protected speech is elevated to the level of official policy, there is a compelling need for adequate avenues of redress.

Lozman, 138 S.Ct. at 1954.¹ In the hierarchy of need for adequate avenues of redress even when probable cause exists, official policy, rather than the ad hoc actions of individual actors, and First Amendment guarantees of freedom of speech specific to redress of government grievances or, pertinent to *American News v. Gore*, freedom of the press, argue against the holding that “probable cause should generally defeat a retaliatory arrest claim.” *Nieves*, 139 S. Ct. at 1727. See *Lovell v. City of Griffin, Ga.*, 303 U.S. 444, 450 (1938) (“Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action. ... It is also well settled that municipal ordinances adopted under state authority constitute state action and are within the prohibition of the amendment.”).

In *American News v. Gore*, Playford’s First Amendment retaliation claims are broader in scope and more complex in causation than *Nieves* and *Lozman* combined, encompassing five deputies, four arrests over a 27-month period, an official San Diego County (SDC) policy of training deputies to deny First Amendment freedom of the press to anyone not sanctioned as the press with government-issued media credentials - all preceded by a breakdown in the

¹ The jaywalking example from *Nieves* is inapposite to Playford’s arrests. Unlike jaywalking, Playford’s conduct in covering the news prior to his arrests was protected by the First Amendment. He was arrested because he was exercising a right not because he was engaged in unlawful conduct that was used as a pretext to arrest him for the previous exercise of a First Amendment right. In *Nieves*, the Supreme Court held that Bartlett could not show that he was treated objectively different because of his speech. In *Lozman*, the Supreme Court held that the City Council had choreographed the probable cause for his arrest by planning to cut-short Lozman’s public comments knowing that he would refuse which would lead to his forceful removal and arrest. In Playford’s case, SDCSD had an official policy that denied Playford his First Amendment right to freedom of the press because he did not have a government-issued media credential. Then the SDCSD deputies, in their enforcement of that official policy, approached Playford and arrested him for attempting to exercise that right without a government-issued credential after he had been told to leave by the deputies.

relationship between Playford and the SDC Sheriff's Department (SDCSD) after Playford recorded and disseminated video footage of SDCSD deputies beating Alan Baker outside a bar in Ramona. (ER056)

The facts in *American News v. Gore* are amenable to the probable cause and First Amendment analyses in *Nieves* and *Lozman*. The SDCSD policymakers, Sheriff William Gore and Public Information Officer (PIO) Jan Caldwell, train deputies to deny First Amendment freedom of the press to anyone who is not sanctioned by government-issued media credentials. The deputies, incorporating this training into their on-scene presence, arrest individuals engaged in covering the news who do not have government-issued press credentials and refuse to leave when ordered to do so by the deputies.

Nieves states a “no-probable-cause” requirement for a First Amendment retaliatory arrest claim with a “narrow exception” that applies when “a plaintiff provides objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.” *Nieves*, 139 S.Ct. at 1727. This exception limits the “narrow qualification” to the “no-probable-cause” requirement to arrests where “non-retaliatory grounds [we]re in fact insufficient to provoke the adverse consequences.” *Nieves*, 139 S.Ct. at 1727, quoting *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (brackets in *Nieves*).

Lozman's standard of proof for a First Amendment retaliatory arrest is the “existence and enforcement of an official policy motivated by retaliation” *Lozman*, 138 S.Ct. at 1954.

The SDCSD has an official policy of arresting members of the press who do not possess a government-issued media credential when those press members attempt to cover the news in the same manner as members of the press who do have a government-issued media credential. This is an official policy, the kind of policy described in *Lozman*, that is “separate from the typical retaliatory arrest claim.” *Lozman*, 138 S.Ct. at 1954. SDCSD deputies approach Playford on-scene when he is covering the news. They have been trained to interrupt Playford because Playford does not possess government-issued media credentials. When Playford opposes the violation of his First Amendment rights through speech and a refusal to leave, SDCSD deputies arrest him for resisting, obstructing, and delaying an officer. Except for arrests by officers who engage in the retaliatory conduct, *American News* is distinguishable from *Nieves*. The retaliatory animus against Playford and other

members of the press who do not have government-issued media credentials arises from an official policy implemented through training officers who adopt the animus toward members of the press not approved or sanctioned by the government. In *Nieves*, Bartlett never claimed that the officers arrested him pursuant to an official policy or their training.

The official policy underlying the retaliatory animus against members of the press not approved or sanctioned by the government leaves Playford “little practical recourse” because it is the government orchestrating the retaliation. In these instances which include Playford’s four arrests, proof of the existence and enforcement of the retaliatory policy, not “no-probable-cause,” is the standard. The fourth arrest on May 25, 2012, lacks probable cause so it meets the First Amendment retaliatory arrest no-probable-cause standard under *Nieves* as well.

II. The Applicability of *Lozman* to *American News* is Evidenced in the Record

According to SDCSD PIO Caldwell, when questioned about Playford and media credentials at a March 16, 2016, deposition:

- “I don’t recall a specific incident. The last one would have been I believe last June when we had a news conference in the building, and we were trying to ascertain if Mr. Playford had media – valid media credentials issued by the San Diego Police Department.” (ER092)
- For a media credential to be recognized as valid it has to be issued by a government agency. (ER102)
- If a media credential is not issued by the government, then it is not valid. (ER103)

Members of the press with government-issued press credentials are recognized by the SDCSD and not subjected to the threats of arrest that Playford and other members of the press who do not have government-issued media credentials encounter. The existence and enforcement of this official policy motivated by retaliation as described and addressed in *Lozman*, not *Nieves*, was expressed by SDCSD PIO Caldwell when she made the following statements on February 19, 2013, at a San Diego Society of Professional Journalists’ Annual Report Card on the Media Panel Discussion as confirmed at her March 16, 2016, deposition. ER142-

(ER143, ER145-ER146)²

- “Um first of all and my first point I want to make is be nice to me, I mean seriously be nice to me because I’m a mirror and I will reflect how you treat me. If you are rude, if you are obnoxious, if you are demanding, if you call me a liar, I will probably not talk to you anymore.”
- “And there’s only one Sheriff’s Department in town and you can go talk to all the deputies all you want, but there’s one Public Affairs Director, just be nice to me. If you’re nice to me and when I say I’m sorry I don’t know the answer to that but I’m sorry I can’t talk about that, I’m not lying, I’m not lying to you. Thirty Two years with the FBI, six years with the Sheriff’s Department I believe I have Integrity, because if you don’t have integrity you don’t have a good soul, then you have nothing. That’s my soapbox on that.”
- “Now we’re getting into a whole nother area with regard to the, and this may be a panel for next year, journalism credentials and who should have them and should we have them and I would al...I’m gonna throw that back on you all in a minute to find out what you think.”
- “[B]ecause you can sit with your Apple laptop in your fuzzy slippers, you can be eight hundred pounds, a disabled man who can’t get out of bed and be a journalist, because you can blog something.”
- “Does that give you the right because you blog in your fuzzy slippers out of your bedroom, and you don’t go out, and you haven’t gotten that degree? Should you be called a journalist or should you be like Pauline ??? who graduated from Journalism school and has been doing a long time or J.W or Dennis I mean are you on the same par?”
- “In my estimation, and I’d like to hear from Darren and Michael on that no, because Pauline and J.W. and Matt and the others that have been doing this a long time know the questions to ask, as will you. But if you’re sitting at home on your laptop and you’re blogging and you just want to get under my skin for your city beat, I love that then yea, so I drop that out on you all what do you think about that?” (ER396)

² SDCSD PIO Caldwell’s individual animus toward Playford for his exercise of his First Amendment rights without a government-issued media credential is demonstrated by her conduct in distributing a poster of Playford at the SDCSD headquarters. This conduct is outside the scope of the ruling in *Nieves*. (ER129-ER136, ER199)

III. The Four Arrests Emanated From an Official Policy that Condoned the Exclusion of Press Members who did not Possess Government-Issued Media Credentials

American News issued Playford media credentials as its duly authorized representative on February 10, 2010. (ER345) The SDCSD arrested Playford for resisting, obstructing, or delaying an officer on February 28, 2010, (ER378) March 9, 2010, (ER380) December 1, 2011, (ER383) and May 25, 2012. (ER387) Playford entered “no contest” pleas to making loud and disturbing noise to resolve his first two arrests after a trial on the two arrests resulted in a deadlocked jury. (ER 353, ER346, ER394) He was convicted of resisting, obstructing, or delaying an officer for the December 1, 2011, arrest (ER275) and found “not guilty” for the same charge arising from the May 25, 2012, arrest. (ER403)

A. May 25, 2012, Ramona Arrest

Playford arrived at an accident scene in Ramona and observed *Ramona Sentinel* reporter Karen Brainard and her vehicle further southbound closer to the accident scene. (ER389, ER446) SDCSD Deputy Breneman approached Playford as Playford walked south toward *Ramona Sentinel* reporter Karen Brainard and then directed Playford to the northbound side of State Road 67. (ER389, ER446) Playford immediately complied with Deputy Breneman’s direction and positioned himself in an area further from the accident scene than *Ramona Sentinel* reporter Karen Brainard. (ER389, ER446) Breneman then approached and informed Playford: "My sergeant advised me you do not have press credentials," and told Playford "you cannot be over here." (ER389, ER446) SDCSD deputies Allensworth, Breneman, and Proctor arrested Playford on May 25, 2012, for resisting, obstructing, or delaying an officer when Playford refused to acquiesce to the abridgement of his First Amendment freedom as a member of the press to report the news. The district court determined that the arrest was lawful and founded in probable cause because the deputies had been told that Playford was not a member of the press:

Defendants had been previously advised Playford was not a member of the media and he lacked government-issued media credentials. When Playford was repeatedly advised that he was not permitted there, he objected and refused to leave. Under these circumstances, it was not clearly established that the order to leave was unlawful.

(ER023) The fact that the deputies had been told that Playford was not a member of the press, based on a policy of exclusivity for government-sanctioned members of the press, violated the First Amendment. Playford was a member of the press on May 25, 2012, to the same extent that another reporter, Karen Brainard of the *Ramona Sentinel*, was a member of the press. Brainard was granted access to the accident scene while Playford was not. When Playford challenged the abridgement of his First Amendment freedom to report the news he was arrested. The arrest was in direct retaliation for his assertion of the right and but for the deputies “having been previously advised Playford was not a member of the media” and his lack of “government-issued media credentials” Playford would not have been arrested. Brainard was not arrested. No such advisory had been issued about a reporter for the *Ramona Sentinel*.

B. February 28, 2010 and March 9, 2010 Arrests

SDCSD James Ward states in a report related to the February 28, 2010, incident that resulted in Playford’s arrest:

A subject in a white Ford F-150 parked his vehicle on the east shoulder of Magnolia, approximately 75 yards south of our location. As the subject exited his vehicle, I immediately recognized the subject from prior law enforcement contacts as J.C. Playford.” (ER187)

Playford alleged in his SAC, TAC, and declaration in opposition to summary judgment the following regarding the March 9, 2010, arrest:

(1) “Deputy Seiver recorded in his report that ‘several months ago Playford’s media credentials were not renewed by the San Diego police department,’ that ‘[o]n several incidents Playford claimed to be a member of the media, but never could produce any credentials,’ and that Playford, ‘who is no longer a member of the media, went far beyond the reasonable rights of the press or public to film in public.’” (ER381, ER061)

(2) “Deputy Seiver stated in his report that Playford is ‘usually confrontational and argumentative with any deputy who contacts him.’”

This is the same testimony that Playford’s attorney sought successfully to exclude at the trial on the February 28, 2010, and March 9, 2010, arrests where Deputy Seiver was the main witness for each arrest and attended the trial as the prosecution’s investigator. (ER334, ER061)

C. December 1, 2011 Arrest

The allegation of First Amendment retaliatory arrest on December 1, 2011, is supported by statements that individuals in Playford’s vicinity using their cell phones without cameras and media credentials were not approached by SDCSD Deputy Cook because they were not gathering news with a camera. (ER440) Playford observed in his vicinity civilians freely walking and using their cell phones to make and receive phone calls. (ER441) While using his cell phone to contact the news desk at a San Diego television channel and positioning his camera to record the scene to the south of his location, Playford was identified, approached, confronted, detained, questioned, and prevented from gathering news by Deputy Cook. (ER441) Playford remained north of the yellow policetape cordoned boundaries and north of all public safety vehicles and personnel engaged in traffic control. (ER440) Other individuals walking in the vicinity and individuals in motor vehicles operating eastbound and westbound on State Road 78 in closer proximity to the perimeter were captured by Playford on video using cell phones but those individuals were not ordered to stop using their cell phones or accused of having a bomb detonator disguised as a cell phone because they did not have cameras recording at the scene. (ER441)

At the state court trial SDCSD Deputy Cook testified on May 16, 2012, on direct-examination by the prosecution that reporters dress in a certain way or have credentials that help distinguish them as press compared to regular civilians. (ER240) According to Deputy Cook, “[t]hey [reporters] have little identification cards, press credentials that are usually validated by the San Diego Police Department or the San Diego Sheriff’s Department, at least in this area.” (ER240) Deputy Cook testified that he never saw a media badge on Playford. (ER240) Playford’s counsel argued at closing, without objection from the prosecution, that Deputy Cook testified initially that he had never seen Playford’s media credential

and at no time had he ever seen one or been able to verify that Playford was a member of the media. Deputy Cook changed his testimony to state that he had seen “something around his [Playford’s] neck.” (ER270) Deputy Cook admitted during questioning by Playford’s counsel, Deputy Public Defender Rick Crawford:

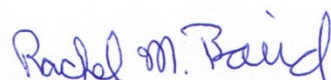
Question: As part of your training and part of your briefings, were you ever briefed on who might be members of the media and who might not be members of the media?

Answer: Yes.

IV. Conclusion

For the foregoing reasons, the standard set forth in *Lozman* for consideration of First Amendment retaliatory arrest claims applies to the claims in *American News* more than the “no-probable-cause” standard with its “narrow qualification” in *Nieves*. If *Nieves* applies to *American News*, its “narrow qualification” applies to the arrests on February 28, 2010, March 9, 2010, and December 1, 2011 for which there was probable cause.

Respectfully submitted.



Rachel M. Baird

Re: American News and Information, et al. v. William Gore, et al.

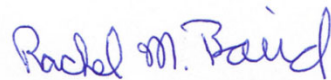
June 24, 2019

Ninth Circuit Case No. 16-55770

Supplemental Briefing Addressing *Nieves v. Bartlett*, 139 S.Ct. 1715 (2019)

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.



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