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Via CM/ECF Filing

Ms. Molly C. Dwyer, Clerk of the Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

RE: *American News and Info. Services, Inc., et al. v. William D Gore, et al.*
Ninth Circuit Court of Appeals No.:16-55770
Panel Members: Wardlaw, Hurwitz, Korman
Date of Oral Arguments: February 05, 2018

To Honorable Chief Judge and Circuit Judges:

Pursuant to this Court's Order of June 3, 2019 (Docket No. 51) requesting additional briefing regarding the impact of *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), defendant-appellees—the County of San Diego, William D. Gore, Jan Caldwell, Jesse Allensworth, James Breneman, Brendan Cook, Michael Proctor, and Thomas Seiver—respectfully submit this supplemental letter brief.

INTRODUCTION

At oral argument, this Court asked counsel for the appellant, "What if the Supreme Court says there is no right . . . whatsoever to be free from retaliatory arrest if there is probable cause. Doesn't that mean you lose?" *See* https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000012922 (at 4:56-5:20). The answer is yes, appellant loses.

The Supreme Court's recent decision in *Nieves* is a dispositive bar to plaintiff-appellant James Playford's First Amendment claims. *Nieves* is clear – a First

Amendment claimant alleging retaliatory arrest must allege (and eventually prove) that the arresting officers lacked probable cause for the arrest. Here, Playford *concedes* that three of his four arrests were based on probable cause. As to his fourth and final arrest—for attempting to enter the scene of a fatal accident—the undisputed facts show the existence of probable cause. As such, Playford's claims for First Amendment retaliation fail at the threshold.

Nieves provides a single, narrow exception, but it does not apply here. With respect to laws that are frequently violated but rarely enforced (such as jaywalking), a First Amendment plaintiff is excused from pleading and proving the absence of probable cause. Instead, such a plaintiff bears a replacement burden. He must present evidence of a valid comparator – an individual who did not engage in protected First Amendment activity that was *not* arrested, despite being otherwise similarly situated in all material respects. Here, Playford was not arrested for jaywalking, or for a similar offense that is rarely enforced. Rather, he was arrested for obstructing police activity. Moreover, Playford's own allegations and the undisputed record demonstrate that he was uniquely disruptive to police efforts, including during a bomb threat and a multiple-fatality car accident. His First Amendment claims fall under *Nieves*, as there was no constitutional violation here.

At a minimum, the arresting officers are entitled to qualified immunity. At the time of the arrests (2010-2012), it was not "clearly established" that a retaliatory arrest could violate the First Amendment even if it was supported by probable cause. *See Reichle v. Howards*, 566 U.S. 658, 660 (2012) (as of 2006, "it was not clearly established that an arrest supported by probable cause could violate the First Amendment").

And *Nieves*, of course, went further still, holding that a finding of probable cause acts as a dispositive bar to a First Amendment retaliation claim. The officers here had probable cause, and the constitutional question was hardly "beyond debate." They are entitled, at a minimum, to qualified immunity.

PROCEDURAL BACKGROUND

The parties submitted their briefs in this action in 2017, and this Court held oral argument in early 2018. Shortly thereafter, the United States Supreme Court granted *certiorari* in *Nieves v. Bartlett*, and this Court stayed proceedings pending the *Nieves* decision.[1] The Supreme Court entered the *Nieves* decision (139 S. Ct. 1715) on May 28,

[1] This Court previously stayed this appeal pending a decision in *Lozman v. Riviera Beach*, 138 S. Ct. 1945 (2018), but that case was decided on comparatively narrow

2019, and this Court ordered supplemental briefing as to the effect of *Nieves* (Docket No. 51).

THE *NIEVES* DECISION FORECLOSES PLAYFORD'S CLAIMS

I. The First Amendment Claims Are Barred.

A. Under *Nieves*, a First Amendment retaliation plaintiff must plead (and prove) lack of probable cause.

Bartlett v. Nieves arose from the "Arctic Man" festival in backcountry Alaska, an event known for "extreme sports and extreme alcohol consumption." *Nieves*, 139 S. Ct. at 1720. Bartlett was arrested following two confrontations with officers. At 1:30 a.m., Sergeant Nieves asked certain partygoers to move their keg inside of their RV (because minors had been making off with alcohol). Bartlett intervened. He began belligerently yelling to the RV owners not to talk to the police. Nieves tried to speak with Bartlett, but Bartlett refused, and yelled at him to leave. Rather than escalating, Nieves left. *Id.*

A few minutes later, Bartlett saw another officer (Weight) questioning a teenager about whether he had been drinking. According to Weight, Bartlett approached aggressively, positioned himself between the officer and the teenager, and stepped very close to Weight in a combative way. Weight pushed him back, and Nieves came to the scene, immediately initiating an arrest. Bartlett claimed that after he was handcuffed, Nieves said: "[B]et you wish you would have talked to me now." *Id.* at 1720-21.

Bartlett brought suit, alleging retaliatory arrest in violation of his First Amendment right to refuse to speak with Nieves. The district court determined that there was probable cause for the arrest, and that the existence of probable cause precluded any First Amendment retaliatory arrest claim. *Id.* at 1721. This Court disagreed, finding that a retaliatory arrest claim may proceed even if the arrest was supported probable cause. 712 Fed. App'x 613, 616 (9th Cir. 2017), following *Ford v. City of Yakima*, 706 F.3d 1188, 1198-96 (9th Cir. 2013).

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grounds that do not apply here. *See Nieves*, 139 S. Ct. at 1722 ("*Lozman* involved unusual circumstances in which the plaintiff was arrested pursuant to an alleged official municipal policy of retaliation. Because those facts were far afield from the typical retaliatory arrest claim, we reserved judgment on the broader question presented and limited our holding to arrests that result from official policies of retaliation.") (internal citations omitted).

The Supreme Court reversed. "**Because there was probable cause to arrest Bartlett, his retaliatory arrest claim fails as a matter of law**." 139 S. Ct. at 1728 (emphasis supplied). The burden of pleading and proving probable cause falls on the plaintiff. *Id.* at 1723. *See also id.* at 1722-23, citing *Hartman v. Moore*, 547 U.S. 250, 256 (plaintiff bears burden of pleading and proving lack of probable cause in retaliatory prosecution cases). The test is an objective one, and "a particular officer's state of mind is simply 'irrelevant' and it provides 'no basis for invalidating an arrest.'" *Id.* at 1725, citing *Devenpeck v. Alford*, 543 U.S. 146, 153 (2005). Thus, statements and motivations of the arresting officer are "irrelevant" during the threshold inquiry. *Nieves*, 139 S. Ct. at 1727, citing *Devenpeck*, 543 U.S. at 153.

This approach—treating the absence of probable cause as a threshold element of a plaintiff's First Amendment retaliation claim—serves two purposes. First, it assesses officer conduct by objective standards of reasonableness, which enables officers to "go about their work without undue apprehension of being sued." *Id.* at 1725. Second, it avoids the inconsistency that would result from a subjective test, which would make "the constitutionality of an 'arrest vary from place to place and from time to time depending on the personal motives of individual officers.'" *Id.*, quoting *Devenpeck*, 543 U.S. at 154.

B. Playford did not meet his threshold burden.

1. Playford did not (and cannot) plead lack of probable cause as to the first three arrests.

As Playford conceded in his Opening Brief, his complaint did not allege the absence of probable cause as to any of his first three arrests (on February 28, 2010; March 9, 2010; and December 1, 2011). *See* Appellant's Opening Brief ("AOB") 31 ("The May 25, 2012 arrest was the only arrest of the four arrests where Playford pleaded lack of probable cause.").

Nor could Playford colorably contend otherwise. His no contest plea on the first two arrests conclusively established probable cause. *See Dobson Medical Group, Inc. v. Midland Risk Ins. Co.*, 18 Fed. App'x 578, 580 (9th Cir. 2001). Likewise, he was *convicted* following his third arrest, which likewise conclusively establishes probable cause. *See Gowin v. Altmiller*, 663 F.2d 820, 823 (9th Cir. 1981); *Plumley v. Mockett*, 164 Cal. App. 4th 1031, 1052 (2008).

Moreover, the undisputed facts further confirm that "there is strong evidence of probable cause for each arrest." Excerpt of Record ("ER") 13. As to the first arrest,

Playford interfered with Deputy Seiver's efforts to interview an individual about a crime; the conduct was so distracting that the interviewee stopped responding to Seiver's questions; and Seiver had to stop the interview numerous times to direct Playford away. ER 13, 187-88, 204-05. As to the second arrest, Playford ignored Seiver's directive to get out of the way as he tried to move a suicidal individual, who was threatening to kill others, into the back of his patrol car; and Playford aggravated the situation, provoking the suicidal individual into charging toward him. ER 13, 205. As to the third arrest, on which Playford was convicted by a jury, Playford defied the directions of a deputy who was evacuating people and attempting to secure a perimeter in light of a bomb threat. ER 7-9, 14, 194, 227-245, 263.

There was probable cause as to the first three arrests, and Playford failed even to allege otherwise. Under *Nieves*, Playford's First Amendment claim must fail because he has not met his burden.

2. The fourth arrest—for refusing to leave the scene of a fatal accident—was supported by probable cause.

On March 25, 2012, Playford entered the scene of a multiple-fatality car accident, which was closed to the public, and refused officer instructions to leave. Deputy Proctor arrested Playford for resisting, delaying, or obstructing a peace officer in violation of California Penal Code section 148(a)(1). The elements of a section 148(a)(1) claim are: "(1) the defendant willfully resisted, delayed, or obstructed a peace officer, (2) when the officer was engaged in the performance of his or her duties, and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties." *Yount v. City of Sacramento*, 43 Cal. 4th 885, 894-95 (2008).

Based on Playford's own allegations, each element was readily satisfied. Specifically, in his Third Amended Complaint (ER 363-406), Playford alleged that he approached the accident scene (ER 387 ¶ 131); that the scene was closed to the public (ER 387 ¶¶ 134-135), and that Deputy Proctor was directing traffic (ER 388 ¶ 141). The second and third elements were thus established. Playford further alleged that he refused orders to move away from the accident scene (ER 391 ¶¶ 161-162), thus satisfying the first element. Based on Playford's own allegations, his arrest was supported by probable cause.

Playford claims that he had a First Amendment right to be present, but the Supreme Court foreclosed that argument over forty years ago. *See Houchins v. KQED*, 438 U.S. 1, 10-11 (1978) ("The press has no First Amendment right to access accident or

crime scenes if the general public is excluded."); *Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972) ("Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded.").[2] That another journalist was permitted entry does not change the analysis. Playford concedes that the public was excluded (ER 387 ¶¶ 134-135), and this negates any right of entry under *Houchins* and *Branzburg*. As the district court explained: "[T]he May 25, 2012 arrest occurred within an accident scene closed to the general public that Playford had no First Amendment right to be within. . . . [The] claim cannot succeed based on the May 25, 2012 arrest." ER 33.

C. The narrow exception for rarely enforced laws does not apply.

The *Nieves* Court recognized only one "narrow qualification" to the requirement that a plaintiff plead and prove the absence of probable cause. Specifically, the Court recognized that with respect to laws that are often violated but rarely enforced, the presence of probable cause does little to dispel an inference of retaliatory animus. *See Nieves*, 139 S. Ct. at 1727 ("a narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so.").

For example, an officer who arrests a vocal protestor for jaywalking, while ignoring jaywalking by others, undoubtedly has probable cause, but offends First Amendment principles nonetheless. To that end, the Court held that such a plaintiff is relieved of his burden of pleading and proving the absence of probable cause. Instead, the plaintiff may proceed with his claim only if he "presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Nieves*, 139 S. Ct. at 1727. *See also Nieves*, TRANSCRIPT OF ORAL ARGUMENT p. 28 (Alito, J. – "Well, if there's no comparator, then the plaintiff is out of luck.").[3]

Who qualifies as a valid comparator? The Supreme Court did not specifically say. But the logic of *Nieves* is clear – the comparator analysis is designed to provide an

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[2] Playford further argued that he had a right to be on the scene pursuant to California Penal Code section 409.5(d), and that the orders to leave the scene were unlawful. *See* AOB 47-49. The argument lacks merit – section 409.5 authorizes media access in the event of *bona fide* "calamities" that are "a menace to the public health or safety" (such as floods, earthquakes, or other disasters), not in the event of car accidents. *See* Appellee's Brief 15-17.

[3] Available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-1174_n7ip.pdf

objective mechanism for identifying retaliatory arrests. *Id.* at 1727. A comparison between the plaintiff and another individual who engaged in different conduct or who had different characteristics would not serve this end. Rather, as this and other circuits have held, a comparator must be similarly situated in all material respects. *Cf. Weil v. Citizens Telecom Servs. Co., LLC*, 922 F.3d 993, 1004 (9th Cir. 2019) (to create inference of discriminatory animus in employment context – "plaintiff and the comparator employee must be similarly situated in all material respects") (citation omitted); *Moran v. Selig*, 447 F.3d 748, 756 (9th Cir. 2006) (same, with citation to cross-Circuit consensus); *Zia Shadows, L.L.C v. City of Las Cruces*, 829 F.3d 1232, 1239-40 (10th Cir. 2016) (in equal protection context, burden of showing "similarly situated" comparator is substantial, and requires "a specific and detailed account"); *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1220 (10th Cir. 2011) (dismissal, even at pleading stage, is proper if plaintiff fails to plead "specific facts plausibly suggesting . . . similar[ity] in all material respects").

The narrow qualification under *Nieves* does not apply here. Playford was not arrested for jaywalking, nor for any similar offense. He was arresting for willfully resisting, delaying or obstructing an officer, in violation of California Penal Code section 148(a)(1). This is not the type of criminal conduct where officers "typically exercise their discretion" not to make arrests. *Cf. Nieves*, 139 S. Ct. 1727. Nor does Playford allege that there was any other individual who was obstructing police activity, who the police declined to arrest. There are no valid comparators, so the *Nieves* exception does not apply.

Indeed, as to the February 28, 2010 and March 9, 2010 arrests, Playford did not attempt to identify any comparators *at all*. *See* ER 378-380 (describing February 28, 2010 arrest, but identifying no comparator); ER 380-382 (same as to March 9, 2010 arrest).

As to the December 1, 2011 arrest, Playford claims that he was arrested for talking on his cell phone while he filmed in an area subject to a bomb threat. The comparators, as he would have it, were the many individuals nearby who were also using their phones. But the test is not whether the plaintiff shares a characteristic or some characteristics with other individuals on the scene. The question is whether they are similarly situated in *all material respects*. Playford does not allege that these other individuals were engaging in the same conduct as him, or that they obstructed or resisted police activity in any way. He alleges only that they used their phones, a superficial comparison that falls far short of his burden.

Moreover, his characterization ignores the *many* material differences between Playford's behavior and the others nearby that led Sergeant Cook to be concerned about Playford. Playford was reportedly in the building right before the threat; he was observed walking at a hurried pace, wearing jeans covered with grease and oil; he pointed his phone and camera at the suspected bomb location; he refused to answer whether he was carrying any weapons; he ignored four or five orders to hang up the phone; and instead of hanging up he yelled and screamed at Cook. *See* ER 7-9, 194, 227-245, 263. *See also* ER 14 (summary judgment order – "Plaintiff's only basis to dispute probable cause for this arrest is that other people were using cell phones too. However, other people had not been pointed out as being of concern by an evacuating individual and other people were not aiming their cell phone and camera directly at the location where the bomb was suspected to be."). Officer Cook's decision to arrest Playford (and not to arrest other cell phone users) does not suggest retaliatory animus. Rather, it was the consequence of Playford's own conduct. Tellingly, a jury agreed, and convicted Playford of violating section 148(a)(1). ER 275, 480.

As to the March 15, 2012 arrest, Playford complains that a different journalist (from the Ramona Sentinel) was given access to the scene of the fatal car accident. But that is not sufficient under *Nieves*. To be similarly situated, the other journalist would need to have engaged in the same conduct and shared the same relevant characteristics as Playford – *i.e.*, his attempt to enter a scene that was closed to the public without providing valid press credentials (ER 373 ¶ 42), and then resisting officer orders to leave the scene (ER 391 ¶¶ 161-162). Plaintiff has not (and cannot) make any such allegations about the Ramona Sentinel journalist, and accordingly, she is not a valid comparator.

The narrow exception under *Nieves* does not apply.

II. At A Minimum, The Individual Defendants Are Entitled To Qualified Immunity.

A. An officer does not violate the First Amendment if an arrest is supported by probable cause. Any prior cases to the contrary are now overruled.

The qualified immunity analysis consists of two prongs. First, the court must determine whether the facts "show [that] the [defendant's] conduct violated a constitutional right[.]" *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Wood v. Moss*, 572 U.S. 744, 757 (2014). "If there is no constitutional violation, the inquiry ends and the [official] is entitled to qualified immunity." *Ioane v. Hodges*, 903 F.3d 929, 933 (9th Cir.

2018). For the reasons stated above, there is no constitutional violation here, and the Court may end its analysis with such a finding.

Alternatively, the Court may proceed under the second-prong.[4] For that inquiry, the court must determine whether the right was "clearly established" at the time of the incident. *Saucier*, 533 U.S. at 201. The burden of identifying clearly established law falls on the plaintiff. *See Shafer v. Cnty. of Santa Barbara*, 868 F.3d 1110, 1118 (9th Cir. 2017) ("It is the plaintiff who bears the burden of showing that the rights allegedly violated were clearly established."). The burden is a heavy one. A plaintiff can show that a right is clearly established only if "existing precedent . . . placed the statutory or constitutional question beyond debate." *Jessop v. City of Fresno*, 918 F.3d 1031, 1035 (9th Cir. 2019), quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011).

Here, Playford attempted to defeat qualified immunity based on a single case, *Skoog*, which held that a plaintiff need not "ple[a]d the absence of probable cause in order to state a claim for retaliation." *Skoog v. Cnty. of Clackamas*, 469 F.3d 1221, 1235 (9th Cir. 2006). But even if that principle was ever clearly established—and in light of the 2012 *Reichle* decision and the 2013 *Acosta* decision, it wasn't[5])—*Nieves* leaves no question that *Skoog* misstated the law. It would be incongruous to rely on *Skoog* to find a law clearly established (*i.e.*, "beyond debate") at the time of the arrests, when the Supreme Court has now made it clear that *Skoog* was wrongly decided.[6]

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[4] "The courts of appeal should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first . . . ." *Pearson v. Callahan*, 555 U.S. 223, 226 (2009). *See also Jessop v. City of Fresno*, 918 F.3d 1031, 1035 (9th Cir. 2019) ("Addressing the second prong before the first is especially appropriate . . . where a court will rather quickly and easily decide that there was no violation of clearly established law.") (internal quotations omitted).

[5] *See Reichle v. Howards*, 566 U.S. 658, 660 (2012) (as of 2006, "it was not clearly established that an arrest supported by probable cause could violate the First Amendment"); *Acosta v. City of Costa Mesa*, 718 F.3d 800, 825 (9th Cir. 2013) ("In *Reichle*, the Supreme Court held that it had never recognized, nor was there a clearly established First Amendment right to be free from a retaliatory arrest that is otherwise supported by probable cause.").

[6] Assuming, *arguendo*, that a plaintiff could rely on an overruled case to meet his burden of identifying clearly established law, *Skoog* would still be insufficient, as it is factually far afield from the case at hand. *See* Appellees' Brief, pp. 10-12. As this Court recently noted, a case specifically on point is necessary. *Emmons v. City of Escondido*, 921 F.3d 1172, 1174-75 (9th Cir. 2019) ("[W]e are unable to find a case so precisely on point with

B. The *Nieves* exception (for rarely enforced laws) dates back only a month. It was not clearly established at the time of the arrests.

Should Playford attempt to argue that any of the arrests fall under the *Nieves* exception, the case for qualified immunity would be equally strong. The *Nieves* Court cited no prior case establishing its exception. Indeed, the majority drew criticism from both concurring and dissenting Justices for creating the exception from whole cloth. *See Nieves*, 139 S. Ct. at 1728-29 (Thomas, J., concurring) ("[T]he majority cites not a single common-law case that supports imposing liability based on an officer's treatment of similarly treated individuals. . . . The majority's exception is also untethered from our First Amendment precedents."); *id.* at 1735 (Sotomayor, J., dissenting) ("The Court barely attempts to explain where in the First Amendment or § 1983 it finds any grounding for that rule. . . .").

The *Nieves* exception is a new rule, and was not "clearly established" at least until the *Nieves* decision (entered May 28, 2019). The officers were not on notice at the time of the arrests in this case (2010 - 2012), and are entitled to qualified immunity.

CONCLUSION

Nieves bars Playford's First Amendment claims, because there was no unconstitutional retaliation. And even assuming *arguendo* that the officers violated any rights, such rights were not clearly established. This Court should affirm.

s/JEFFREY P. MICHALOWSKI
Senior Deputy

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this one as to satisfy the [Supreme] Court's demand for specificity. [Defendant] is therefore entitled to qualified immunity.")