Case No. 17-56544

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Anni Ma,

Plaintiff and Appellant

vs.

City of Los Angeles et al.,

Defendants and Respondents

On Appeal From The United States District Court
for the Central District of California
United States District Court Case No. 2:16-cv-05819-DMG-RAO
Honorable Dolly M. Gee, Judge

APPELLANT'S OPENING BRIEF

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INTRODUCTION

Plaintiff and appellant Anni Ma was arrested for indecent exposure when she bared her chest while shouting political slogans outside of a Bernie Sanders campaign rally. The arrest lacked probable cause since the statute Ms. Ma purportedly violated did not apply to her conduct, principally because (as courts have repeatedly made clear) the California indecent exposure statute applies only when genitals are exposed. Despite these rulings, the Los Angeles police department improperly trains its officers that the statute is not restricted to genital exposure, but also applies when the female chest is exposed.

Ms. Ma was not arrested simply because she bared her chest, but because she was purportedly also drawing attention to herself by shouting political slogans such as "Free the Nipple" and "Feel the Bern." However, indecent exposure requires "sexually motivated" conduct, and there was no evidence of such conduct, so probable cause was lacking for this reason as well.

Ms. Ma sued individual officers, the City of Los Angeles, and its police department for violating her rights under federal and state law. The district court granted summary judgment on her federal claims, dismissed her state claims and entered judgment, which Ms. Ma appeals. Ms. Ma respectfully requests that this Court reverse the judgment in part, for reasons set forth below.

JURISDICTIONAL STATEMENT

District Court

Ms. Ma brought federal and state claims in the United States District Court for the Central District of California. (Volume 2 ("2") Excerpts of Record ["ER"] 123-160.) That court had jurisdiction over the federal claims, which were based on United States Constitutional provisions and federal civil rights statutes, under 28 U.S.C. section 1331 (federal question jurisdiction). The court had jurisdiction over the state claims pursuant to 28 U.S.C. section 1367 (supplemental jurisdiction.)

Court of Appeals

This Court has jurisdiction pursuant to 28 U.S.C. section 1291 (final decisions of district courts.) On September 11, 2017, the district court entered a final judgment disposing of all of Ms. Ma's claims by granting defendants' motion for summary judgment on Ms. Ma's federal claims and dismissing without prejudice her state law claims. (1 ER 2.) Ms. Ma filed her notice of appeal from that judgment on October 10, 2017. (2 ER 29.) That notice was timely under Federal Rule of Appellate Procedure 4(a)(1)(A), which requires a notice of appeal to be filed within 30 days after entry of the judgment appealed from.

ISSUES PRESENTED

1. Does California Penal Code section 314, subdivision (1) ("section 314, subdivision (1)") apply only when genitals are exposed? (Argument IA.)
2. Is the City of Los Angeles liable for training police officers that section 314, subdivision (1) can apply when genitals are not exposed? (Argument IB.)
3. Is the law clearly established that section 314, subdivision (1) applies only when genitals are exposed, thus precluding qualified immunity when officers arrest a person who has not exposed her genitals? (Argument IC.)
4. Was the statutory requirement that Ms. Ma's conduct be sexually motivated met when there was no evidence that Ms. Ma's purpose was to sexually arouse, gratify or affront anyone? (Argument IIA.)
5. Is the law clearly established that section 314, subdivision (1) applies only when conduct is sexually motivated, thus precluding qualified immunity when officers arrest a person whose conduct was not sexually motivated? (Argument IIB.)

PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES, RULES, AND JURY INSTRUCTIONS

Please see addendum.

STATEMENT OF THE CASE

A. Substantive Fact Summary.

On March 23, 2106, Ms. Ma went to a rally for presidential candidate Bernie Sanders, whose candidacy she supported because of his views on women's rights and equal protection from discrimination. (2 ER 81:17-25.) Ms. Ma attended the rally "to discuss gender equality and gender discrimination, in support of Bernie Sanders, and to exercise [her] First Amendment rights to free speech and freedom of expression." (2 ER 82:12-15.)

The rally was to be held at the Wiltern Theatre at 5:00. (2 ER 84: 115:4-18.) After arriving at the Wiltern, Ms. Ma, who was wearing a top, went across the street to purchase tape and a board. (2 ER 82:21-83:23.) She wrote "'Free the Nipple'" on the tape and "Free the Nipple, hashtag EqualRightsAmendment and hashtag FeeltheBern" on the board. (2 ER 85:10 and 20-25, 86:1-5.) Ms. Ma walked back to the Wiltern and put tape on her areola while still wearing her top. (2 ER 84:16-25.) She then took her top off. (2 ER 85:5-6.)

Several minutes after 5:00, Ms. Ma met up with Tiernan Hebron, whom she had previously met for a "project that [they] were doing together for Free the Nipple. (2 ER 82:1:1-8, 86:12-14.) The object of "Free the Nipple" is "to actually desexualize the female body" and "normalize it." (2 ER 43:22-23.) Ms. Hebron

was "top-free with tapes on her." (2 ER 86:23-25.) Ms. Hebron had the "words 'Feel the Bern' written on her body and her chest." (2 ER 87:1-4.) Ms. Ma wrote the word "equality" on her own chest, and "Free the Nipple" on Ms. Hebron's tapes. (2 ER 87:8-22, 88:12-14.)

Ms. Ma and Ms. Hebron then "started at Wilshire and south Western Avenue and walked clockwise shouting 'Free the Nipple' and 'Gender Equality,' 'ERA.'" (2 ER 89:8-10.) They also shouted "Feel the Bern." (2 ER 91:23-92:5.) They walked around the block several times, at which point approximately 500 people were on line. (2 ER 90:1- 91:15.) The crowd was "mainly adults," but Ms. Ma and Ms. Hebron talked to a person or people accompanied by a ten year old. (2 ER 48:14-20, 24-25.) No "parents or people that had children with them" told them "to cover up." (2 ER 48:21-23.)

People would approach Ms. Ma and Ms. Hebron for photos and ask about what they were doing. (2 ER 93:7-8.) They had over 20 conversations and between 50-100 interactions (including "high fives" and posing for pictures) in an hour and a half. (2 ER 45:13-46:2, 94:3-7.) They explained what "Free the Nipple is" and gave tape to 5-10 people who wanted to take their tops off. (2 ER 93:5-10; 44:16-21.) No one told them they were offended or annoyed, and only police officers told them to "put on a shirt or cover up." (2 ER 47:15-25.)

After about an hour, Ms. Ma removed the tape from her nipples. (2 ER 95:25-96:4.) She felt "physically safe and not in any danger." (2 ER 97:11-21.) No one reported that anyone from the crowd touched her. (2 ER 37:3-5.) At no time while she and Ms. Hebron were walking did the crowd appear to be agitated. (2 ER 54:7-11, 102:20-24.) No officer "called in" to say the crowd was unruly. (2 ER 53:18-23.) Defendant Officer Elmer Fernandez testified that he never considered arresting Ms. Ma for disturbing the peace. (2 ER 110:2-3.)

Defendant Sergeant David Martinez subsequently approached Ms. Ma, and told her to "cover up" or she would be arrested for violating section 314, subdivision (1). (2 ER 99:17-20.) Sergeant Martinez never saw Ms. Ma touch her breasts or her genitalia, or expose her genitals. (2 ER 101:2-9.) He relied on the following "specific facts" in telling Ms. Ma to cover up:

> The fact she had her breasts and nipples exposed in public, her -- so her actions, her statements drawing attention, 'Free the Nipple, Free the Nipple.' As she would do so, she would get a reaction out of the - - the people in line.
>
> And so it was my interpretation that she was doing it for for [*sic*] a front [*sic*] to -- to -- to challenge the social norm and -- and offend people that were out for the afternoon.
>
> There was a -- there was a public library next to -- at 7th and Oxford where there were kids and families coming in and out that I felt would take offense to it based on her actions and, again, her statements.
>
> And just north of the library, there is a -- a lawn area that serves as a park in front of the Korean radio station where also there were --

there were children present.

(2 ER 99:25-100:21.)

Officer Fernandez arrested Ms. Ma for allegedly violating section 314, subdivision (1). (2 ER 104:22-105:18.) He did so after his partner, defendant Officer David Weston, spoke with Sergeant Martinez, who advised Officer Weston that Ms. Ma "could be subject to arrest." (2 ER 105:19-106:6; 2 ER 115:4-14.) Officer Fernandez did not see Ms. Ma touch her breasts or genitals, or expose her genitals, but he "saw [her] drawing attention to [her] breasts – breast area," and thought "that people were offended" and that Ms. Ma "had gratification" that people were paying attention to her breasts. (2 ER 108:1-24.) Officer Fernandez testified that "We have a learning domain in the academy that classifies the breast as a private part . . . ." (2 ER 111:10-12.)

Officer Weston also participated in Ms. Ma's arrest, including the decision to arrest her. (2 ER 107:18-23, 113:10-12, 114:2-7.) Officer Weston testified that Ms. Ma (and Ms. Hebron) were not arrested simply because their breasts were exposed, but also because "they yelled out to the crowd to get their attention." (2 ER 116:6-25.) Officer Weston heard them yelling "'Free the Nipple' and 'Feel the Bern.'" (2 ER 117:22-25.) Officer Weston did not see Ms. Ma (or Ms. Hebron) direct attention to their genitals, no one reported they had exposed their genitals,

and nothing in his or any other report he read to prepare for his deposition indicates that either Ms. Ma or Ms. Hebron exposed their genitals. (2 ER 50:4-51:2.) Officer Weston received training that genitals do not have to be exposed in order for section 314, subdivision (1) to be violated. (2 ER 118:20-23.) Ms. Hebron testified that neither she nor Ms. Ma directed public attention to their genital areas, nor did either of them touch their genitals, breasts or buttocks in a way that would be sexually arousing. (2ER 47:1-14.)

After speaking with officers Fernandez and Weston, Defendant Sergeant Young approved Ms. Ma to be booked under "314.1 of the Penal Code, indecent exposure . . . ." (2 ER 58:12-15, 121:6-12.) The approval "was based on the totality of circumstances what [*sic*] they told [her]." (2 ER 56:16-25.) Sergeant Young was trained that "private parts" included breasts under section 314. (2 ER 120:13-19.) However, Sergeant Young also testified that the mere exposure of breasts would not amount to probable cause that section 314, subdivision (1) had been violated. (2 ER 57:16-25.) There would have to be "reasonable suspicion or probable cause to make the arrest . . . ." (2 ER 57:12-15.)

Defendant Sergeant Vidal was the approving supervisor who reviewed the probable cause determination. (2 ER 109:16-23.)

The City Attorney's office declined to prosecute Ms. Ma or Ms. Hebron for

violating section 314, subdivision (1). (3 ER 163.) The "Los Angeles City Attorney Complaint Screening" form states why Ms. Ma was not prosecuted for violating this statute. (3 ER 161:4-8.) This document stated in relevant part "corpus as to 314-1PC." (3 ER 163.)[1]

B. Procedural Fact Summary.

Ms. Ma's operative complaint is her First Amended Complaint ("FAC.") (2 ER 123.) The FAC alleged that Ms. Ma had been unlawfully arrested and subjected to excessive force in violation of federal and California law. (2 ER 124:12-125:13.) The FAC named individual defendants as well as the City of Los Angeles and the City of Los Angeles Police Department (collectively "City.") (2 ER 123.)

The trial court dismissed two of Ms. Ma's state-law causes of action and defendant officer Luz Bermudez pursuant to the parties' stipulation. (II ER 74-77.) Defendants moved for summary judgment, or, in the alternative, summary

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[1/] The Attorney Complaint Screening form was filed under seal in the district court. (2 ER 31.) A request for judicial notice was also filed. (2 ER 59-60.) The district court declined to consider the form and denied the request for judicial notice as moot. (1 ER 5.) This material is evidentiary in nature and has been authenticated by declaration. (3 ER 174-177.) Therefore, a request for judicial notice is unnecessary. The form is relevant to whether the defendant officers are entitled to qualified immunity.

adjudication on the remaining causes of action. (2 ER 122.) Ms. Ma opposed the motion. (2 ER 61.) The trial court granted summary judgment on Ms. Ma's federal claims, declined to exercise supplemental jurisdiction over the remaining state law claims, and dismissed the latter without prejudice. (I ER 4:1-3.) A judgment consonant with the order was entered and Ms. Ma timely appealed. (1 ER 2:1-3; 2 ER 29-30.)

SUMMARY OF ARGUMENT

Ms. Ma raises two arguments on appeal, both of which pertain to the district court's grant of summary judgment on her causes of action alleging false arrest. Ms. Ma is not contesting the court's grant of summary judgment on the causes of action pertaining to her excessive force claim.

The first argument has three sections, and is based on Ms. Ma's contention that the statute she was arrested for violating–section 314, subdivision (1)–was inapplicable to her conduct because she did not expose her genitals. The first section will demonstrate that this contention is correct, so Ms. Ma's arrest lacked probable cause. The second section will establish that the City can be held liable because there is at the very least a triable issue of fact as to whether Ms. Ma's illegal arrest was caused by the City's training its officers that section 314,

subdivision (1) can apply when genitals are not exposed. The third section will show that it is clearly established law that this statute applies only when genitals are exposed, so the individual defendants are not entitled to qualified immunity. If this qualified immunity issue is decided in Ms. Ma's favor, then the second argument need not be considered.

The second argument has two sections. The first section will show that Ms. Ma's conduct was not sexually motivated–as is required to violate section 314, subdivision (1)–because there is no evidence that her purpose was to sexually arouse, gratify or affront anyone. The second section will demonstrate that the law on this subject is clearly established, thus precluding qualified immunity for officers who violate it.

REVIEWABILITY AND STANDARDS OF REVIEW

Reviewability will be discussed in the context of each argument section. The de novo standard of review applies to all of plaintiff's arguments, which pertain to causes of action on which summary judgment was granted. *Hughes v. Kisela*, 862 F.3d 775, 779 (9th Cir. 2016) ("A district court's grant of a motion for summary judgment is reviewed de novo.") "Summary judgment is appropriate only if the pleadings, the discovery and disclosure materials on file, and any

affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Id*. at 779. (Internal quotation marks omitted.) The record is construed most favorably to the opposing party, and all reasonable inferences are drawn in that party's favor. *Ibid*.

ARGUMENT

I.

MS. MA'S ARREST LACKED PROBABLE CAUSE SINCE HER GENITALS WERE NOT EXPOSED, THERE IS EVIDENCE THAT THE CITY'S OFFICER TRAINING PROXIMATELY CAUSED MS. MA'S ARREST, AND A REASONABLE POLICE OFFICER WOULD HAVE BEEN AWARE THAT THE ARREST LACKED PROBABLE CAUSE.

A. Ms. Ma's Arrest Lacked Probable Cause Since Her Genitals Were Not Exposed.

The record establishes that Ms. Ma's genitals were at no time exposed when she was at the Bernie Sanders' rally site. (2 ER 50:4-51:2, 101:2-9, 108:22-23.) Because a violation of section 314, subdivision (1) requires such exposure, the officers lacked probable cause to arrest Ms. Ma. This issue was raised in

plaintiff's opposition to summary judgment. (2 ER 64:25-65:2.)

Section 314, subdivision (1) applies to "[E]very person who willfully and lewdly" "[e]xposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby . . . ." "California courts require 'proof beyond a reasonable doubt that the actor not only meant to expose himself, but intended by his conduct to direct public attention to his genitals for purposes of sexual arousal, gratification, or affront.'" *Nunez v. Holder*, 594 F.3d 1124, 1130 (9th Cir. 2010).

As *Nunez* recognizes, California state courts have made it clear that the term "private parts," as used in this statute, means "genitals." The California Supreme Court used the words interchangeably in *In re Smith*, 7 Cal.3d 362 (1972), where a habeas corpus petitioner had been convicted for purportedly violating section 314, subdivision (1) by sunbathing nude on a beach. *Id*. at 363-364. In describing the petitioner's activities, the Court stated that he "at no time had an erection or engaged in any activity directing attention to his genitals." *Id*. at 364. The Court concluded that:

> From the foregoing definitions and cases the rule clearly emerges that a person does not expose his private parts 'lewdly' within the meaning of section 314 unless his conduct is sexually motivated. Accordingly, a conviction of that offense requires proof beyond a reasonable doubt that the actor not only meant to expose

> himself, but intended by his conduct to direct public attention to his genitals for purposes of sexual arousal, gratification, or affront.

In re Smith, 7 Cal.3d at 366.

As a result, the Court held that "[ab]sent additional conduct intentionally directing attention to his genitals for sexual purposes, a person, as here, who simply sunbathes in the nude on an isolated beach does not 'lewdly' expose his private parts within the meaning of section 314." *In re Smith*, 7 Cal.3d at 366 see also *People v. Honan*, 186 Cal.App.4th 175, 181 (2010) ("The Supreme Court has construed *willful* and *lewd* exposure of private parts to mean 'that the actor not only meant to expose himself, but intended by his conduct to direct public attention to his genitals for purposes of sexual arousal, gratification, or affront.'")

The California Supreme Court's use of "genitals" in describing the alleged offense, construing the applicable statute, and issuing a holding, shows that the Court considered "private parts" a euphemism for genitals, as does the Oxford English dictionary. https://en.oxforddictionaries.com/definition/private_parts. That dictionary is "one of the most authoritative on the English language . . . ." *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 569 (2012). If the *Smith* Court did not consider "private parts" equivalent to genitals, there would have been no reason for the Court to have used the latter word in discussing whether the

petitioner's actions violated section 314, subdivision (1).

The holding in *Smith* was incorporated into a jury instruction. *People v. Swearington*, 71 Cal.App.3d 935, 944-945 (1977) ["In accord with the holding in *In re Smith*, *supra*, the court in the case at bench gave CALJIC Instruction No. 16.220 (misdemeanor) (1973 revision) as an integral part of the definition of the felony of 'indecent exposure.'"] That instruction read in relevant part:

> "Every person who intentionally exposes his private parts, in any public place, or in any place where there are present other persons who may be offended or annoyed thereby, if such exposure is made with the specific intent to direct public attention to his genitals for the purpose of his sexual arousal or gratification or to affront others, is guilty of a crime."

Swearington, 71 Cal.App.3d at 945.

The present version of this instruction also requires genital exposure, as does its counterpart promulgated by the California Judicial counsel. See CALJIC Instruction 16.220 (September 2017); CALCRIM Instruction No. 1160 (2017).[2]

Post-*Smith* cases have continued to deem "private parts" to be genitals. In

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[2] CALJIC Instruction 16.220 (September 2017) is available at https://1.next.westlaw.com/Document/Idc8db69bf9a011dba7b2c6090451df8c/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.Default)&userEnteredCitation=CALJIC+Instruction+16.220#co_pp_sp_108826_16.220. CALCRIM Instruction No. 1160 (2017) is found at http://www.courts.ca.gov/partners/documents/calcrim_2017_edition.pdf. These instructions are included in the addendum to this brief.

People v. Massicot, 97 Cal.App.4th 920 (2002), the Court of Appeal overturned the conviction of a partially nude defendant whose genitals were covered, stating:

> Under what we hold is the proper interpretation of the phrase "[e]xposes his person" in section 314, subdivision 1, we agree Massicot's conviction is not supported by substantial evidence because Massicot did not display his naked genitals. We also, necessarily, conclude the specific intent to expose one's genitals in this manner is an essential element of the indecent exposure offense.

Massicot, 97 Cal.App.4th at 922.

Given this holding, "private parts" has to mean genitals. Otherwise, the statute would internally conflict, as the phrase "exposes his person" would require genital exposure, whereas exposure of "private parts" could include body parts other than genitals. *Dannenberg v. Valadez*, 338 F.3d 1070, 1074 (9th Cir. 2003) ("courts should interpret statutory provisions in a manner that renders them internally consistent.")

In holding that genital exposure is a prerequisite to indecent exposure, *Massicot* cited *Smith*'s "statement that section 314 requires an intent to direct public attention to one's genitals . . . ." *Massicot*, 97 Cal.App.4th at 926. Additionally, after noting that "[t]he trial court instructed the jury that the term private part[s] refers to one's genitals" and "[i]n supplemental briefing, the People concede the term refers to the genitals[,]" the Court of Appeal made its agreement

with these positions clear, stating that:

> [t]he Oregon high court has expressly held the term "private parts" to be synonymous with one's genitals. (E.g., *State v. Moore* (1952) 194 Or. 232, 241 P.2d 455, 459, overruled on other grounds in *State v. Walters* (1991) 311 Or. 80, 804 P.2d 1164, 1167, fn. 8 ["It is hornbook law that, whenever and wherever the terms 'privates' or 'private parts' are used as descriptive of a part of the human body, they refer to the genital organs. Every dictionary so defines them[.]"]

Massicot, 97 Cal.App.4th at 925, n.3.

Massicot also stated that "[o]ur conclusion is bolstered by the fact the common law offense of indecent exposure requires display of the genitals. One tenet of statutory construction is that statutes are presumed to codify common law rules absent clear language disclosing an intent to depart from those rules." *Massicot*, 97 Cal.App.4th at 928. *Massicot* cited with approval a District of Columbia case that held a woman who allegedly exposed "her buttocks and the sides of her breasts" was improperly convicted of lewdness, as "English and American common law cases compel the conclusion that indecent exposure was limited to exposure of the genitals because they consistently referred to the defendants' exposure of their private parts." *Id*. at 931. (Internal quotation marks omitted.)

In *People v. Carbajal*, 114 Cal.App.4th 978 (2003) the court referred to *Massicot* court's reliance on "the common law offense of indecent exposure

which, it determined, 'require[d] display of the genitals.'" *Carbajal*, 114 Cal.App.4th at 982. The *Carbajal* court then noted that:

> Penal Code section 314 was enacted in 1872 as section 311; no substantive changes have been made to subdivision 1 since that time. "We presume that when the statute was enacted the Legislature was familiar with the common law rule, and 'when it couches its enactment in common law language, that its intent was to continue those rules in statutory form....' [Citation.]"

Carbajal, 114 Cal.App.4th at 983.

The *Carbajal* court concluded that "[o]ur review of the common law and cases from other jurisdictions leads us to conclude that a conviction for indecent exposure under Penal Code section 314, subdivision 1 requires evidence that a defendant actually exposed his or her genitals in the presence of another person . . . ." *Carbajal*, 114 Cal.App.4th at 986. Although the issue in *Carbajal*–whether a conviction under section 314, subdivision (1) requires that the exposed genitals actually be seen–is not the same as the issue in the present case, the *Carbajal* court's language provides yet more confirmation of the appropriate legal standard.

The above-cited cases make it clear that California courts deem "private parts," as used in section 314, subdivision (1), to be genitals. The California legislature has recognized that breasts are not genitals. Cal. Pen. Code §318.5, subd. (a) ("[n]othing in this code shall invalidate an ordinance of, or be construed

to prohibit the adoption of an ordinance by, a county or city, if that ordinance directly regulates the exposure of the *genitals or buttocks of any person, or the breasts of any female person* who acts as a waiter, waitress, or entertainer . . . .") (Emphasis added.)

Courts have also acknowledged this physiological fact. S*tate v. Castaneda*, 126 Nev. 478, 488, n.3 (2010) ("[T]he common law teaches that breasts are not genitals."); *Weyer v. State*, 333 Ga.App. 706, 711 (2015) (citing dictionary definitions in concluding that "'genitals' and 'pubic area' do not include buttocks or breasts."); *United States v. Alvarez*, 127 F.3d 372, 375 (5th Cir. 1997) ("we simply cannot accept the premise that an officer with Rivera's qualifications could in good faith believe that breasts are genitals"); see generally *Sparks v. Ribicoff*, 197 F.Supp. 174,176 (W.D. Va., 1961) ("'judicial notice may be taken of well-known facts relating to the anatomy and physiology of man . . . ." Because breasts are not genitals, the above-cited case law pertaining to section 314, subdivision (1) rendered Ms. Ma's arrest unlawful.

There are three additional reasons why this Court should hold that section 314, subdivision (1) does not pertain to breasts. Ms. Ma does not know if this Court would conclude that a reasonable officer should be expected to consider these reasons, so out of an abundance of caution they will not be discussed in

Argument IIIC, which deals with qualified immunity. However, these reasons provide additional confirmation that section 314, subdivision (1) applies only to genitals.

First, an unpublished California state court decision held that a defendant was improperly convicted under section 314, subdivision (1) for exposing his buttocks because "'private parts' only refers to 'genitals' within the meaning of section 314 . . . ." *People v. Johnson*, 2002 WL 31854952, *2, *5 (Cal. App. 2002.) Although this decision cannot be cited in California state courts (Cal. R. Ct. Rule 8.1115(a)), this Court can consider it. *Employers Ins. of Wausau v. Granite State Ins. Co.*, 330 F.3d 1214, 1220, n.8 (9th Cir. 2003) ("Granite correctly notes that we may consider unpublished state decisions, even though such opinions have no precedential value.") Ms. Ma respectfully suggests that the *Johnson* court's analysis, which relies heavily on *Massicot*, is persuasive. Moreover, the decision's non-publication is strong evidence that it is clearly established that "private parts," as used in section 314, subdivision (1), means "genitals." Cal. R. Ct. 8.1105(c)(1) (an opinion should be certified for publication if it "[e]stablishes a new rule of law.")

Second, if this Court holds that breasts are included in the term "private parts," the Court will be construing the statute in a manner that could render it

unconstitutional. *Free the Nipple–Fort Collins v. City of Fort Collins*, *Colorado*, 237 F.Supp.3d 1126, 1132-1134 (D. Col. 2017) (granting on equal protection grounds a preliminary injunction against enforcement of a law prohibiting female toplessness); see generally *United States v. Harris*, 185 F.3d 999, 1003-1004 (9th Cir. 1999) ("Statutes are construed to avoid defects which would render them unconstitutional.")

Third, a conviction under section 314, subdivision (1) requires lifetime registration as a "sex offender" pursuant to California Penal Code section 290, subdivision (c). That law was first enacted in 2007. Stats.2007, c. 579 (S.B.172), § 8, eff. Oct. 13, 2007. "[W]e must assume that when passing a statute the Legislature is aware of existing related laws and intends to maintain a consistent body of rules." *Fuentes v. Workers' Comp. Appeals Bd.*, 16 Cal.3d 1, 7 (1976); *Hall v. United States*, 566 U.S. 506, 516 (2012) ("'We assume that Congress is aware of existing law when it passes legislation . . . .'") Can anyone seriously contend that the California legislature, acting in 2007, intended that a woman be required to register as a lifetime sex offender simply because she "willfully and lewdly" exposed her chest in public? As in *Smith*, section 314, subdivision (1)'s interpretation should be influenced "by a consideration of its consequences." *In re Smith*, 7 Cal.3d at 366.

For all of the above-stated reasons, section 314, subdivision (1) does not apply to exposing the female chest, and Ms. Ma's arrest lacked probable cause, thus violating her rights under the Fourth Amendment to the United States Constitution.

B. There Is Evidence That The City's Training its Officers That Section 314, Subdivision (1) Applies to Exposure of the Female Chest Proximately Caused Ms. Ma's Arrest.

Although Ms. Ma's opposition to summary judgment contended the City failed to adequately train its officers (2 ER 72:19-73:27), Ms. Ma did not specifically assert that the City trained its officers that section 314, subdivision (1) is not restricted to the exposure of genitals, but also applies to exposure of the female chest. However, the facts regarding the officers' training are undisputed, the issue to be decided is one of law and the trial court discussed the officers' training pertaining to section 314, subdivision (1) in granting summary judgment on Ms. Ma's claim against the public entity defendants. (1 ER 26:27-27:3.) Additionally, Ms. Ma asserted in her operative complaint that the defendants "set[] in motion policies, plans or actions that led to the unlawful conduct . . . ." (2 ER 130:3-7.)

Moreover, "[t]here is no question but that the rule in *Monell v. Department of Social Services of the City of New York* is messy."[3] Robert E. Manley, *Effective But Messy, Monell Should Endure*, 31 Urb. Law 481, 481 (Summer 1999). As Justice Breyer stated: "*Monell*'s basic effort to distinguish between vicarious liability and liability derived from 'policy or custom' has produced a body of law that is neither readily understandable nor easy to apply." *Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 433 (1997) (Breyer, J., dissenting).

Given these circumstances, Ms. Ma respectfully requests that the Court exercise its discretion to consider the *Monell* theory she raises on appeal. *Douglas County v. Babbitt*, 48 F.3d 1495, 1502, n.8 (9th Cir. 1995) ("Though in the district court, the defendants did not argue that the process of designating a critical habitat replaced NEPA, there is no bar to their raising new *arguments* on appeal if those arguments are purely legal. A court of appeals has the discretion to consider those new theories.")

Moving to the merits, the relevant facts regarding the officers' training are undisputed, as noted above. Arresting officer Fernandez testified that "[w]e have a learning domain in the academy that classifies the breast as a private part . . . ."

[3/] *Monell v. Dep't of Soc. Servs. of the City of New York*, 436 U.S. 658 (1978).

(2 ER 111:10-12.) Officer David Weston also participated in Ms. Ma's arrest, and he received training that genitals do not have to be exposed in order for section 314, subdivision (1) to be violated. (2 ER 118:20-23.) Sergeant Young, who approved Ms. Ma's booking, was trained that "private parts" included breasts under section 314. (2 ER 120:13-19, 121:6-12.)

This evidence, coupled with Ms. Ma's arrest without probable cause, demonstrates the potential for *Monell* liability. This Court has stated:

> Under the *Monell* doctrine, [plaintiff] may recover from the city if his injury was inflicted pursuant to city policy, regulation, custom, or usage. (Citation omitted.) City policy "need only cause the constitutional violation; it need not be unconstitutional per se." (Citations omitted.) (Footnote omitted.) City policy "causes" an injury where it is "the moving force" behind the constitutional violation (citation omitted) or where "the city itself is the wrongdoer." (Citation omitted.) (Brackets in the original omitted.)

Chew v. Gates, 27 F.3d 1432, 1444 (9th Cir. 1994).

City policy includes training. *Ruvalcaba v. City of Los Angeles*, 167 F.3d 514, 523 (9th Cir. 1999) (training canine officers to strike suspects who resist dog attacks was among the policies that could potentially result in municipal liability); *Chew*, 27 F.3d at 1445 ("Los Angeles could not, for example, distance itself from policy regarding the use of firearms by *de facto* delegating the formulation of firearms policy to the commander of the police academy.")

It is at the very least a triable issue of fact as to whether Ms. Ma's unlawful arrest resulted from the officers' training that genitals do not have to be exposed and that "private parts" includes breasts. *Chew*, 27 F.3d at 1444-1445 (when City conceded for the purpose of summary judgment that departmental policy authorized seizure of all concealed suspects by dogs trained to bite hard and hold, such policy could be found to be the "'moving force'" behind plaintiff's dog bite injuries.) Therefore, the judgment granted to the City of Los Angeles and the Los Angeles Police Department on Ms. Ma's *Monell* claim (Fourth Cause of Action) should be reversed and the claim remanded to the district court for trial.

C. Because Published Case Law Clearly Establishes That Section 314, Subdivision (1) Is Violated Only If Genitals Are Exposed, Any Reasonable Police Officer Would Have Been Aware That Ms. Ma's Arrest Lacked Probable Cause, So The Individual Defendants Are Not Entitled To Qualified Immunity.

This issue was raised in plaintiff's opposition to the motion for summary judgment. (2 ER 66:20-72:18.)

"The doctrine of qualified immunity protects government officials '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.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). "[Q]ualified immunity operates 'to ensure that before they are subjected to suit, office26rs are on notice their conduct is unlawful.'" *Hope v. Pelzer*, 536 U.S. 730, 739 (2002).

The notice requirement is the same as that accorded to "defendants charged with the criminal offense defined in 18 U.S.C. § 242." *Hope*, 536 U.S. at 739. Convictions under that statute have been upheld "'despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.'" *Id*. at 740.

In evaluating whether officers have qualified immunity for an unlawful arrest, "the relevant question is 'whether a reasonable officer could have believed [the] arrest to be lawful, in light of clearly established law and the information the arresting officers possessed.'" *Knox v. Southwest Airlines*, 124 F.3d 1103, 1108 (9th Cir. 1997); see generally *White v. Pauly*, __U.S.__, 137 S.Ct. 548, 552 (2017) ("the clearly established law must be 'particularized' to the facts of the case.")

The only fact relevant to this qualified immunity argument is that Ms. Ma did not expose her genitals. In order to determine whether clearly established law rendered Ms. Ma's arrest unlawful, this Court looks first to "binding precedent."

Boyd v. Benton County, 374 F.3d 773, 781 (2004) ("If the right is clearly established by decisional authority of the Supreme Court or this Circuit, our inquiry should come to an end.") "In the absence of binding precedent, a court should look to whatever decisional law is available to ascertain whether the law is clearly established for qualified immunity purposes, including decisions of state courts, other circuits, and district courts." *Malik v. Brown*, 71 F.3d 724, 727 (9th Cir. 1995). (Internal citations and quotation marks omitted.)

Even if *Nunez* –where this Court recognized that California courts deem "private parts" as used in section 314, subdivision (1) to mean genitals–is not binding precedent, that case and the published California case law discussed in Argument IA was more than sufficient to put the officers on notice that this statute only potentially applies to people who expose their genitals.

The California Supreme Court used the statutory term "private parts" interchangeably with genitals. *In re Smith*, 7 Cal.3d at 364, 366; *Honan*, 186 Cal.App.4th at 181 (*Smith* "construed willful and lewd exposure of private parts" to require that one 'direct public attention to his genitals . . . .'") The California Court of Appeal in *Massicot*, citing *Smith*, common law, and definitions of private parts, *held* that the phrase "exposes his person" in section 314, subdivision 1 required display of the naked genitals. *Massicot*, 97 Cal.App.4th at 922. As noted

in Argument IA, the statute would internally conflict if "private parts" could include body parts other than genitals. Another Court of Appeal, after reviewing common law and cases from other jurisdictions, also concluded that genitals must be exposed in order to obtain a conviction under section 314, subdivision (1). *Carbajal*, 114 Cal.App.4th at 986.

Because these cases clearly established that genital exposure is a pre-requisite for violating section 314, subdivision (1), the individual officers are not entitled to qualified immunity. The district court's ruling to the contrary rested on a cramped and superficial reading of some of the published decisions cited above, a failure to consider those decisions collectively, a legally meaningless factual distinction between those decisions and the present case, and an unjustifiable reliance on another California statute.

The district court did acknowledge that "there is law to suggest that 'private parts' means genitals specifically." (1 ER 18:28-19:1.) In reality, the decisions cited above do far more than "suggest" that private parts, as used in section 314, subdivision (1), means "genitals." For one thing, if California case law did no more than "suggest" that the statute requires genital exposure, it is inconceivable that this Court would have flatly stated that "California courts require 'proof beyond a reasonable doubt that the actor not only meant to expose himself, but

intended by his conduct to direct public attention to his genitals for purposes of sexual arousal, gratification, or affront.'" *Nunez*, 594 F.3d at 1130.

Moreover, both *Massicot* and *Carbajal* relied in part on the fact that the common law offense of indecent exposure required displaying the genitals, and that there was no indication the legislature intended to depart from this rule. *Massicot*, 97 Cal.App.4th at 928; *Carbajal*, 114 Cal.App.4th at 983. Thus, even if the statute does not define "private parts," as the district court observed (1 ER 18:15), *Massicot* and *Carbajal* made it clear that no such definition was needed, because the statute simply continued the common law rule in effect, which required genitals be exposed in order to commit the offense of indecent exposure.

The district court relied as well on the proposition that "it also appears that California courts also have yet to expressly interpret the term 'private parts' in the context of the statute." (1 ER 17:11-12.) However, as discussed in Argument IA, the *Massicot* court did interpret the phrase "private parts" to mean genitals. *Massicot*, 97 Cal.App.4th at 925, n.3. The district court dismisses this finding as "*dicta*" (1 ER 18:28-19:2), but it is still an express interpretation of the term private parts, and dicta can be used to show that law is clearly established. *Hope*, 536 U.S. at 743 (Court of Appeal decision holding that refusing water to a prisoner was constitutional because the refusal was not punishment, but noting

that such a denial would be unconstitutional if it were used as punishment, helped clearly establish the latter principle); see *id*. at 762, characterizing the Court of Appeal's language regarding unconstitutional punishment as "dicta." (Thomas, J., dissenting).

The district court also stressed a factual distinction between this case and previous decisions construing section 314, subdivision (1), stating that "California courts have yet to interpret this statute in the context of the female body. . . ." (1 ER 17:9-10.) However, although all the above-cited cases involved males, *Massicot* cited approvingly a District of Columbia case holding that a woman who exposed her breasts and buttocks was improperly convicted of lewdness. *Massicot*, 97 Cal.App.4th at 931- 932. Additionally, *Carbajal* concluded that "a conviction for indecent exposure under Penal Code section 314, subdivision 1 requires evidence that a defendant actually exposed his or *her* genitals in the presence of another person . . . ." *Carbajal*, 114 Cal.App.4th at 986. (Emphasis added.)

More fundamentally, "precedent directly on point is not necessary to demonstrate a clearly established right." *Blueford v. Prunty*, 108 F.3d 251, 255 (9th Cir. 1997); *Ostlund v. Bobb*, 825 F.2d 1371, 1374 (9th Cir. 1987) ("[defendants] cannot use the absence of case law directly on point to shield them

from liability. The unlawfulness of their conduct should have been apparent to them in light of preexisting case law.") "[A] general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has not previously been held unlawful . . . .'" *United States v. Lanier*, 520 U.S. 259, 271 (1997) (Brackets in the original omitted.) "'[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.' [Citation] We are 'particularly mindful of this principle in the context of Fourth Amendment cases, where the constitutional standard—reasonableness—is always a very fact-specific inquiry.'" *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1093 (9th Cir. 2013).

The district court's stress on the lack of factually similar cases creates a Catch-22. As one court colorfully put it, "[a] police officer could not beat a cooperative suspect with a chair and then plausibly argue that he did not know that such conduct was unconstitutional because no court had ever specifically decided that beating with a chair amounts to excessive force." *United States v. Praisner*, 2010 WL 2574103, *3 (D.Conn 2010). Analogously, it is quite likely that the reason why there is no case law involving women prosecuted under section 314, subdivision (1) for going topless is because court decisions have established that

"private parts" means genitals, and *breasts* are not *genitals*. There are also no cases involving prosecutions under section 314, subdivision (1) of people who exposed feet, hands or other body parts that are not genitalia. However, the lack of such cases does not mean that the case law fails to make clear that only genital exposure is potentially prosecutable.

The law was obvious to the City Attorney, who declined to prosecute because he found Ms. Ma did not violate section 314, subdivision (1). (3 ER 174-177.) The law should have been just as obvious to the defendant officers. Any reasonable police officer would realize, as did the writers of the CALJIC and CALCRIM instructions cited in Argument IA, that published decisions establish that "private parts," as used in section 314, subdivision (1), is simply a euphemism for genitals. See generally *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (law can be clearly established by "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.") When such a consensus exists, even conforming to policy will not render the officers' actions reasonable. *Id.* at 617. The district court improperly disregarded this consensus in concluding that "the statutory interpretation of 'private parts' within section 314" is "unresolved." (1 ER 18:24-25.)

Finally, the district court relies on language in California Penal Code

section 647. (1 ER 18:17-23.) However, as the court recognized, the language in that statute does not apply to public exposure of a person, but to distribution of people's images. Pen. Code § 647, subd. (j)(4). This statute was aimed at "'revenge porn,'" which "refers to the *posting* of illicit pictures of another person without his/her consent, often as retaliation following a bitter breakup between partners." *People v. Iniguez*, 247 Cal.App.4th Supp. 1, 11 (App. Div. Sup. Ct. 2016). "As in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes [the legislature] sought to serve." *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979).

Because the purpose of section § 647, subd. (j)(4) was to prevent people from embarrassing their former partners, it is not surprising that it applies to exposure of the female breast. (*Iniguez*, 247 Cal.App.4th Supp. at 7 ("The images subject to the statute are those of intimate body parts, including genitals and female breasts.") Significantly, the statute uses the language "intimate body part" (Pen. Code § 647, subd. (j)(4)(C)), not "private parts," which–as *Massicot* and *Carbajal* show–had a very specific meaning at common law and retained the same meaning in section 314, subdivision (1).

The district court ultimately concluded that "[i]n light of the unresolved statutory interpretation of 'private parts' within section 314 and the Penal Code's

analogous statutory terms. . . . ," whether section 314, subdivision (1) applied to exposure of the female chest was not "sufficiently clear to preclude the qualified immunity defense." (1 ER 18:24-28.) By disregarding the published decisions construing genitals to mean private parts, and stressing a different definition in a different statute aimed at a different problem than section 314, subdivision (1), the district court ignored the beam and focused on the mote.[4]

For the reasons set forth above, Ms. Ma respectfully requests this Court to find that the district court incorrectly deemed the officers entitled to qualified immunity. Because no material disputed facts are pertinent to this issue, the Court should reverse the judgment granted to the individual defendants on Ms. Ma's federal claim based on arrest without probable cause (First Cause of Action), and remand with directions to enter a partial summary judgment for Ms. Ma on that claim and set the case for trial to determine damages. *Kassbaum v.Steppenwolf Productions, Inc.*, 236 F.3d 487, 494 (9th Cir. 2000) ("It is generally recognized that a court has the power sua sponte to grant summary judgment to a non-movant when there has been a motion but no cross-motion.")

For the same reasons, the Court should reverse the judgment insofar as it

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[4/] "And why beholdest thou the mote that is in thy brother's eye, but considerest not the beam that is in thine own eye?" *Matthew* 7:3 (King James).

dismissed Ms. Ma's state claim pertaining to arrest without probable cause (fifth cause of action), and remand with directions to enter a partial summary judgment for Ms. Ma on that claim and set the case for trial to determine damages. Civil liability under California state law is precluded where the "peace officer, at the time of the arrest, had reasonable cause to believe the arrest was lawful." Cal. Pen. Code §847, subd. (b) This immunity "contains principles that parallel the [federal qualified] immunity analysis." *Scott v. County of San Bernardino*, 2016 WL 6609216, *14 (C.D. Ca. 2016). Because the analyses are essentially the same, the denial of qualified immunity to the officers means that they are liable under state, as well as federal, law.

II.

MS. MA'S ARREST LACKED PROBABLE CAUSE BECAUSE THERE WAS NO EVIDENCE THAT HER CONDUCT WAS SEXUALLY MOTIVATED, AND A REASONABLE POLICE OFFICER WOULD HAVE BEEN AWARE THAT THE ARREST LACKED PROBABLE CAUSE.

A. Ms. Ma's Arrest Lacked Probable Cause Because There Was No Evidence That Her Conduct Was Sexually Motivated.

Assuming arguendo that section 314, subdivision (1) potentially prohibits female toplessness, the statute applies only if Ms. Ma acted "willfully and lewdly." Cal. Pen. Code §314, subd. (1). This issue was raised in plaintiff's opposition to summary judgment. (2 ER 63:19-28, 64:8-24, 65:3-12.)

Ms. Ma's toplessness was unquestionably "willful." However, by no stretch of the imagination could it have been deemed lewd, as that term is used in section 314, subdivision (1), because there is no evidence whatsoever that Ms. Ma's conduct was sexually motivated. "[A] person does not expose his private parts 'lewdly' within the meaning of section 314 unless his conduct is sexually motivated." *In re Smith*, 7 Cal.3d at 366. In order for conduct to be "sexually motivated," the actor must "have intended by his conduct to direct public

attention to his genitals for purposes of sexual arousal, gratification, or affront." (*Ibid*.) "Sexual" modifies "gratification" and "affront," as well as "arousal." *People v. Archer,* 98 Cal.App.4th 402, 406 (2002); see *Nunez*, 594 F.3d at 1142 ("The California Supreme Court has applied § 314's requirement of 'lewd' intent narrowly.") (Bybee, J., dissenting.)

The evidence utterly fails to show that Ms. Ma's toplessness was intended to sexually arouse, gratify, or affront anyone. Neither Ms. Ma nor Ms. Hebron touched their breasts in such a way as to sexually arouse anyone. (2 ER 47:11-14.) Nor was there evidence that Ms. Ma or Ms. Hebron said anything licentious or gestured in a licentious way. Instead, they had political slogans written on their bodies, and (before they removed it) on tape covering their nipples. (2 ER 87:1-4 and 8-22, 88:12-14.) Ms. Ma had a board on which she wrote "Free the Nipple, hashtag EqualRightsAmendment and hashtag FeeltheBern." (2 ER 85:20-86:5.) Ms. Ma and Ms. Hebron walked around the rally area shouting "'Free the Nipple' and 'Gender Equality,' 'ERA,'" and "'Feel the Bern.'" (2 ER 89:8-10, 91:23-92:5.) The crowd was "mainly adults," but the two women talked to someone accompanied by a ten year old. (2 ER 48:14-20, 24-25.) No "parents or people that had children with them" told them "to cover up." (2 ER 48:21-23.)

Ms. Ma and Ms. Hebron had over 20 conversations and between 50-100

interactions (including "high fives" and posing for pictures) in an hour and a half. (2 ER 45:13-46:2, 93:5-94:7.) They explained what "free the Nipple is" and gave tape to 5 to 10 people who wanted to take off their tops. (2 ER 22:16-21, 93:5-10.) No one told the two women that they were offended or annoyed, and only police officers told them to "put on a shirt or cover up." (2 ER 47:15-25.)

These facts show that Ms. Ma and Ms. Hebron were trying to gain support for their cause at a Bernie Sanders rally, which was a logical place to do so given Sanders' socially liberal politics and youth appeal. They went topless, chanted political slogans, talked to people about their cause, posed for pictures, and supplied tape to others who wanted to go topless. Given Ms. Ma's and Ms. Hebron's conduct and the setting, no reasonable person would believe their purpose was to sexually arouse, gratify or affront anyone. See generally *Ginzburg v. United States*, 383 U.S. 463, 465-466 (1966) "We agree that the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity . . . .")

The officers' rationales for Ms. Ma's arrest further reveal the lack of evidence that she was attempting to sexually arouse, gratify or affront anyone. Officer Weston testified that Ms. Ma (and Ms. Hebron) were not arrested simply because their breasts were exposed, but also because "they yelled out to the crowd

to get their attention." (2 ER 116:6-25.) However, simply getting attention by shouting political slogans does not amount to evidence that Ms. Ma and Ms. Hebron were attempting to sexually arouse, gratify or affront anyone.

Officer Fernandez testified that he "saw [Ms. Ma] drawing attention to [her] breasts – breast area," and thought "that people were offended" and that Ms. Ma "had gratification" that people were paying attention to her breasts. (2 ER 108:1-21.) However, Officer Fernandez did not see Ms. Ma touch her breasts (2 ER 108:3-5), he did not testify that she was making any gestures (much less lewd ones) and he did not explain what he meant by "drawing attention." Whether "people were offended" is not the issue; the question is whether a reasonable officer would have thought that Ms. Ma intended to offend them. As far as "gratification" is concerned, Officer Fernandez neither contended, nor cited any facts indicating, that this "gratification" was sexual in nature.

Sergeant Martinez testified that Ms. Ma's exposed breasts and her statements drew "a reaction" from people on line, and it was his "interpretation that she was doing it for for [*sic*] a front [*sic*] to -- to -- to challenge the social norm and -- and offend people that were out for the afternoon." (2 ER 99:25-100:12.) If Ms. Ma had gone to a church picnic to perform these actions, then Sergeant Martinez's conclusion might make sense. However, Ms. Ma was at a

Bernie Sanders rally where she could reasonably expect people would welcome a challenge to this particular "social norm" and not be offended.

Not surprisingly, Ms. Ma and Ms. Hebron were generally very well received by the crowd, with some people even wanting to emulate them. (2 ER 44:16-46:2, 93:5-94:7.) When Ms. Ma removed the tape from her nipples, she felt "physically safe and not in any danger." (2 ER 97:11-21.) No one reported that anyone from the crowd touched her. (2 ER 37:3-5.) Sergeant Martinez acknowledged that the crowd did not appear to be agitated. (2 ER 54:7-11, 102:20-24.) No officer "called in" to say the crowd was unruly. (2 ER 53:18-23.) Officer Fernandez never considered arresting Ms. Ma for disturbing the peace. (2 ER 110:2-4.)

Sergeant Martinez also expressed his concern for children in nearby locations who might witness Ms. Ma's actions. (2 ER 100:13-21.) While concern for children's welfare is laudable, the manner in which children in nearby locations might react does not bear at all on whether Ms. Ma intended to sexually arouse, gratify or affront anyone by her actions at the Sanders' rally.

Because there was no evidence that Ms. Ma intended to sexually arouse, gratify or affront anyone, her arrest was unlawful.

B. Because Section 314, Subdivision (1) Is Violated Only If Conduct Is Sexually Motivated, Any Reasonable Police Officer Would Have Been Aware That Ms. Ma's Arrest Lacked Probable Cause, So The Individual Defendants Are Not Entitled To Qualified Immunity.

This issue was raised in plaintiff's opposition to the motion for summary judgment. (2 ER 66:20-72:18.)

The case law cited in section IIA demonstrates that Ms. Ma had a clearly established right not to be arrested for violating section 314, subdivision (1) unless she was attempting to sexually arouse, gratify or affront anyone. "[G]eneral statements of the law are not inherently incapable of giving fair and clear warning . . . ." *Lanier*, 520 U.S. at 271. "[E]ven if there is no closely analogous case law, a right can be clearly established on the basis of 'common sense.'" *Giebel v. Sylvester*, 244 F.3d 1182, 1189 (9th Cir. 2001).

Any officer using common sense would have known that Ms. Ma was not attempting to sexually arouse, gratify or affront anyone. The facts in this case stand in stark contrast to those in *Archer*, where the Court upheld a conviction under section 314, subdivision (1) because the "[d]efendant's act of exposing his penis in anger during an incident of 'road rage,' accompanied by the comment,

'suck my dick,' can reasonably be characterized as an act undertaken for the purpose of *sexual* affront." *Archer*, 98 Cal.App.4th at 407. (Brackets in the original omitted.) The facts are not even potentially suggestive of lewdness, unlike those in *In re Dallas W.*, 85 Cal.App.4th 937 (2000), where a juvenile court ruled that the defendant's "twice stopp[ing] to moon oncoming traffic" violated the statute. *Id.* at 938.[5]

Ms. Ma was not raging at people, childishly pranking them or attempting to affront them in any other way. Her actions reveal that she was attempting to gain the attention of a group of people she had reason to believe would be sympathetic in order to make them aware of her cause and gain supporters. The officers ignored these facts because they were preoccupied with the display of the female nipple. Ms. Ma trusts that this Court will not be similarly distracted, and will instead reverse the judgment insofar as it pertains to her federal and state claims for arrest without probable cause.

[5/] Ms. Ma does not rely on *Dallas W.*'s holding reversing the conviction, as the decision could be read to state that a "sexual affront" requires intent to sexually arouse. *Dallas W.*, at 939. This statutory interpretation might be correct, but it is not clearly established, as *Archer* rejected it. *Archer*, 98 Cal.App.4th at 406. Ms. Ma notes in passing that *Massicot* "reject[ed] any attempt to read the Court of Appeal's decision in *Dallas* to implicitly hold that exposure of the buttocks with lewd intent is sufficient conduct to violate section 314; *Dallas* cannot be relied upon as authority for a proposition it did not address." *Massicot*, 97 Cal.App.4th at 927-28.

CONCLUSION

For the reasons stated above, Ms. Ma respectfully requests that this Court:

(1) Reverse the judgment as to Ms. Ma's first cause of action based on unlawful seizure of the person (2 ER 140:14-141:27) and fifth cause of action based on false arrest/false imprisonment under California state law (2 ER 151:1-152:17), and remand with directions to enter a partial summary judgment for Ms. Ma on these claims and set the case for trial on damages.

(2) Reverse the judgment as to Ms. Ma's fourth cause of action based on unconstitutional municipal customs and policies (2 ER 146:19-150:23) and ninth cause of action based on negligence (2 ER 156:18-157:23), and remand these claims for trial on liability and damages.

March 5, 2018

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STATEMENT OF RELATED CASES

I know of no related cases.

March 5, 2018

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Attorney for Plaintiff and Appellant Anni Ma

STATEMENT PERTAINING TO ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a)(1), Ms. Ma respectfully requests oral argument.

March 5, 2018

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By: /s/ Barry M. Wolf
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Ninth Circuit Rule 32-1(a) because this brief contains 9,364 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Fed. R. App. P. 32 (f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using WordPerfect Times New Roman 14-point font.

March 5, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2018, I electronically filed the foregoing Appellant's Opening Brief 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.

March 5, 2018

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ADDENDUM

TO APPELLANT'S

OPENING BRIEF

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United States Constitution

Amendment 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Statutes

28 U.S.C. §1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. §1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1367

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be

inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term “State” includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

California Statutes

Pen. Code § 290, subd. (c)

(c) The following persons shall register:

Any person who, since July 1, 1944, has been or is hereafter convicted in any court in this state or in any federal or military court of a violation of Section 187 committed in the perpetration, or an attempt to perpetrate, rape or any act punishable under Section 286, 288, 288a, or 289, Section 207 or 209 committed with intent to violate Section 261, 286, 288, 288a, or 289, Section 220, except assault to commit mayhem, subdivision (b) and (c) of Section 236.1, Section 243.4, Section 261, paragraph (1) of subdivision (a) of Section 262 involving the use of force or violence for which the person is sentenced to the state prison, Section 264.1, 266, or 266c, subdivision (b) of Section 266h, subdivision (b) of Section 266i, Section 266j, 267, 269, 285, 286, 288, 288a, 288.3, 288.4, 288.5, 288.7, 289, or 311.1, subdivision (b), (c), or (d) of Section 311.2, Section 311.3, 311.4, 311.10, 311.11, or 647.6, former Section 647a, subdivision (c) of Section 653f, subdivision 1 or 2 of Section 314, any offense involving lewd or lascivious conduct under Section 272, or any felony violation of Section 288.2; any statutory predecessor that includes all elements of one of the above-mentioned offenses; or any person who since that date has been or is hereafter convicted of the attempt or

conspiracy to commit any of the above-mentioned offenses.

Pen. Code § 314, subd. (1)

Every person who willfully and lewdly, either:

1. Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby;

Pen. Code § 318.5, subd. (a)

(a) Nothing in this code shall invalidate an ordinance of, or be construed to prohibit the adoption of an ordinance by, a county or city, if that ordinance directly regulates the exposure of the genitals or buttocks of any person, or the breasts of any female person, who acts as a waiter, waitress, or entertainer, whether or not the owner of the establishment in which the activity is performed employs or pays any compensation to that person to perform the activity, in an adult or sexually oriented business. For purposes of this section, an "adult or sexually oriented business" includes any establishment that regularly features live performances which are distinguished or characterized by an emphasis on the exposure of the genitals or buttocks of any person, or the breasts of any female person, or specified sexual activities that involve the exposure of the genitals or buttocks of any

person, or the breasts of any female person.

Pen. Code §647 (j)(4)

(4)(A) A person who intentionally distributes the image of the intimate body part or parts of another identifiable person, or an image of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation by the person depicted or in which the person depicted participates, under circumstances in which the persons agree or understand that the image shall remain private, the person distributing the image knows or should know that distribution of the image will cause serious emotional distress, and the person depicted suffers that distress.

(B) A person intentionally distributes an image described in subparagraph (A) when he or she personally distributes the image, or arranges, specifically requests, or intentionally causes another person to distribute that image.

(C) As used in this paragraph, "intimate body part" means any portion of the genitals, the anus and in the case of a female, also includes any portion of the breasts below the top of the areola, that is either uncovered or clearly visible through clothing.

(D) It shall not be a violation of this paragraph to distribute an image described in

subparagraph (A) if any of the following applies:

(i) The distribution is made in the course of reporting an unlawful activity.

(ii) The distribution is made in compliance with a subpoena or other court order for use in a legal proceeding.

(iii) The distribution is made in the course of a lawful public proceeding.

(5) This subdivision does not preclude punishment under any section of law providing for greater punishment.

Pen. Code §647 (j)(4)(C)

(C) As used in this paragraph, "intimate body part" means any portion of the genitals, the anus and in the case of a female, also includes any portion of the breasts below the top of the areola, that is either uncovered or clearly visible through clothing.

Pen. Code §847, subd. (b)

(b) There shall be no civil liability on the part of, and no cause of action shall arise against, any peace officer or federal criminal investigator or law enforcement officer described in subdivision (a) or (d) of Section 830.8, acting within the scope of his or her authority, for false arrest or false imprisonment arising out of any

arrest under any of the following circumstances:

(1) The arrest was lawful, or the peace officer, at the time of the arrest, had reasonable cause to believe the arrest was lawful.

(2) The arrest was made pursuant to a charge made, upon reasonable cause, of the commission of a felony by the person to be arrested.

(3) The arrest was made pursuant to the requirements of Section 142, 837, 838, or 839.

Stats.2007, c. 579 (S.B.172), § 8, eff. Oct. 13, 2007

SEC. 8. Section 290 is added to the Penal Code, to read:

<< CA PENAL § 290 >>

290. (a) Sections 290 to 290.023, inclusive, shall be known and may be cited as the Sex Offender Registration Act. All references to "the Act" in those sections are to the Sex Offender Registration Act.

(b) Every person described in subdivision (c), for the rest of his or her life while residing in California, or while attending school or working in California, as described in Sections 290.002 and 290.01, shall be required to register with the chief of police of the city in which he or she is residing, or the sheriff of the county if he or she is residing in an unincorporated area or city that has no police

department, and, additionally, with the chief of police of a campus of the University of California, the California State University, or community college if he or she is residing upon the campus or in any of its facilities, within five working days of coming into, or changing his or her residence within, any city, county, or city and county, or campus in which he or she temporarily resides, and shall be required to register thereafter in accordance with the Act.

(c) The following persons shall be required to register:

Any person who, since July 1, 1944, has been or is hereafter convicted in any court in this state or in any federal or military court of a violation of Section 187 committed in the perpetration, or an attempt to perpetrate, rape or any act punishable under Section 286, 288, 288a, or 289, Section 207 or 209 committed with intent to violate Section 261, 286, 288, 288a, or 289, Section 220, except assault to commit mayhem, Section 243.4, paragraph (1), (2), (3), (4), or (6) of subdivision (a) of Section 261, paragraph (1) of subdivision (a) of Section 262 involving the use of force or violence for which the person is sentenced to the state prison, Section 264.1, 266, or 266c, subdivision (b) of Section 266h, subdivision (b) of Section 266i, Section 266j, 267, 269, 285, 286, 288, 288a, 288.3, 288.4, 288.5, 288.7, 289, or 311.1, subdivision (b), (c), or (d) of Section 311.2, Section 311.3, 311.4, 311.10, 311.11, or 647.6, former Section 647a,

subdivision (c) of Section 653f, subdivision 1 or 2 of Section 314, any offense involving lewd or lascivious conduct under Section 272, or any felony violation of Section 288.2; any statutory predecessor that includes all elements of one of the above-mentioned offenses; or any person who since that date has been or is hereafter convicted of the attempt or conspiracy to commit any of the above-mentioned offenses.

Federal Rules

Fed. R. App. P. 4(a)(1)(A)

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

Fed. R. App. P. 32(a)(5)

(a) Form of a Brief.

,,,

(5)Typeface. Either a proportionally spaced or a monospaced face may be used.

(A) A proportionally spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 14-point or larger.

(B) A monospaced face may not contain more than 101/2 characters per inch.

Fed. R. App. P. 32(a)(6)

(a) Form of a Brief.

.....

(6) Type Styles. A brief must be set in a plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined.

Fed. R. App. P. 32(a)(7)(B)

(a) Form of a Brief.

.....

(7) Length.

.....

(B) Type-volume limitation.

(i) A principal brief is acceptable if it:

- contains no more than 13,000 words; or

- uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type volume specified in Rule 32(a)(7)(B)(i).

(iii) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation.

Fed. R. App. P. 32(a)(7)(C)

(a) Form of a Brief.

.....

(7) Length.

.....

(C)

Certificate of compliance.

(i) A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may

rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:

- the number of words in the brief; or
- the number of lines of monospaced type in the brief.

(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rules 28.1(e)(3) and 32(a)(7)(C)(I).

Fed. R. App. P. 34(a)(1)

(a) In General.

(1) Party's Statement. Any party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted.

Ninth Circuit Rules

Ninth Cir. R. 32-1(a)

(a) Principal Briefs: The opening and answering briefs filed by appellant and appellee, respectively, may not exceed 14,000 words. (New 12/1/16)

California Rules

Cal. R. Ct. 8.1105(c)(1)

(c) Standards for certification

An opinion of a Court of Appeal or a superior court appellate division-whether it affirms or reverses a trial court order or judgment-should be certified for publication in the Official Reports if the opinion:

(1) Establishes a new rule of law;

Cal. R. Ct. Rule 8.1115(a)

(a) Unpublished opinion

Except as provided in (b), an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action.

Jury Instructions

CALJIC Instruction 16.220

Authority:

(Penal Code § 314, subdivision (1))

[Defendant is accused [in Count[s]] of having violated section 314, subdivision (1) of the Penal Code, a misdemeanor.]

Every person who willfully and lewdly exposes [his] [her] person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed, is guilty of a violation of Penal Code section 314, subdivision (1), a misdemeanor.

The term "private parts" refers to and means a person's genitals.

[The word "person" means the entire body of a person. "Exposing the person" means exposing the entire body including of necessity the genitals.]

"Willfully" means an intentional exposure of one's [person] [or] [private] parts.

"Lewdly" means with specific intent to direct public attention to one's genitals for the purpose of one's own sexual arousal or gratification, or that of another, or of sexually insulting or offending others.

In order to prove this crime, each of the following elements must be proved:

1. A person intentionally exposed [his] [her] [person] [private parts] [in a public place] [, or] [in any place where there were present other persons to be offended or annoyed]; and

2. That person did so with the specific intent to direct public attention to [his] [her] genitals for the purpose of [his] [her] own sexual arousal or gratification, or that of

another, or of sexually insulting or offending others.

CALCRIM Instruction No. 1160

The defendant is charged [in Count] with indecent exposure [in violation of Penal Code section 314].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant willfully exposed (his/her) genitals in the presence of another person or persons who might be offended or annoyed by the defendant's actions;

[AND]

2. When the defendant exposed (himself/herself), (he/she) acted lewdly by intending to direct public attention to (his/her) genitals for the purpose of sexually arousing or gratifying (himself/herself) or another person, or sexually offending another person(;/.)

<Give element 3 if defendant charged with entering inhabited dwelling.>

[AND]

[3. The willful and lewd exposure occurred after the defendant had

entered an inhabited (dwelling house/part of a building/trailer coach) without consent.]

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

[It is not required that another person actually see the exposed genitals.]

[A (house/part of a building/trailer coach) is inhabited if someone uses it as a dwelling, whether or not someone is inside at the time of the alleged indecent exposure.]

[A (house/part of a building/trailer coach) is inhabited if someone used it as a dwelling and left only because a natural or other disaster caused him or her to leave.]

[A (house/part of a building/trailer coach) is not inhabited if the former residents have moved out and do not intend to return, even if some personal property remains inside.]

[A house includes any (structure/garage/office/ <*insert other description*>) that is attached to the house and functionally connected with it.]

[A *trailer coach* is a vehicle without its own mode of power, designed to

be pulled by a motor vehicle. It is made for human habitation or human occupancy and for carrying property.]

[A *trailer coach* is [also] a park trailer that is intended for human habitation for recreational or seasonal use only and

1. has a floor area of no more than 400 square feet;

2. is not more than 14 feet wide;

3. is built on a single chassis;

AND

4. may only be transported on public highways with a permit.]

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2018, I electronically filed the foregoing Addendum to Appellant's Opening Brief 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.

March 5, 2018

LAW OFFICE OF BARRY M. WOLF
Barry M. Wolf

By: /s/ Barry M. Wolf
Barry M. Wolf

Attorney for Plaintiff and Appellant Anni Ma