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 REPLY BRIEF

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INTRODUCTION

Defendants' 13,134 word brief amounts to no more than a matador's cape designed to distract this Court from two essential factors in this appeal, which are as follows: (1) Plaintiff Anni Ma exposed only her breasts, not her genitals; and (2) California courts have made it clear that the state's indecent exposure law–Penal Code section 314, subdivision (1)–is violated only if genitals are exposed.[1] Therefore, it should have been clear to any reasonable officer that plaintiff was not violating the indecent exposure statute.

However, the defendant police officers, and the City of Los Angeles, which unlawfully trained the officers that a woman could be arrested for indecent exposure if she exposed her breasts, simply ignored these court decisions in order to enforce their own morality. This is unacceptable and unconstitutional behavior, which this Court should end now. At a time when contempt for law emanates from the top of this country's executive branch, courts should be especially vigilant to guard against governmental disregard of judicial decisions.

Defendants offer a variety of excuses for plaintiff's unlawful arrest. For reasons discussed below, none have merit.

[1/] All further California statutory references are to the Penal Code unless otherwise indicated.

ARGUMENT

I.

PLAINTIFF'S ARREST FOR INDECENT EXPOSURE LACKED PROBABLE CAUSE SINCE HER GENITALS WERE NOT EXPOSED.

A. This Court Should Decide Whether Plaintiff's Arrest For Indecent Exposure Lacked Probable Cause Because Her Genitals Were Not Exposed.

Defendants suggest that this Court "skip the constitutional analysis. . . ." (Answering Brief ("AB") 15.) There are two independent reasons why this Court should not follow defendants' suggestion in regard to plaintiff's contention that her arrest for indecent exposure lacked probable cause because her genitals were not exposed.

First, constitutional analysis of this contention is necessary to resolve plaintiff's *Monell* issue, which challenges the City of Los Angeles's ("City") unlawful policy of training police officers to arrest women for indecent exposure pursuant to section 314, subdivision (1) when they have exposed only their breasts and not their genitals. *Scott v. Henrich*, 39 F.3d 912, 916 (9th Cir. 1994) ("the liability of municipalities doesn't turn on the liability of individual officers, it is

contingent on a violation of constitutional rights.")

Second, even if plaintiff had not brought a *Monell* claim, the constitutional analysis should be performed in order to preclude recurring illegal arrests of women pursuant to section 314, subdivision (1). Defendants themselves cite a case involving the same police department and the same statute, decided three months after plaintiff was arrested, where the court avoided the constitutional question by applying qualified immunity. (AB 17-18, citing *Williams v. City of L.A.* [*sic*].) The Supreme Court has cautioned that "our regular policy of avoidance sometimes does not fit the qualified immunity situation because it threatens to leave standards of official conduct permanently in limbo." *Camreta v. Greene*, 563 U.S. 692, 706 (2011). "Qualified immunity thus may frustrate 'the development of constitutional precedent' and the promotion of law-abiding behavior." *Id*. at p. 706. Both the City, which trains its employees to violate section 314, subdivision (1), and the employees themselves will continue to illegally apply that statute unless they are stopped.

Defendants contend that the constitutional analysis should be ducked so that this Court can avoid interpreting California law. (AB 16.) However, that course of action is potentially appropriate only when the interpretation is "uncertain." *Pearson v. Callahan*, 555 U.S. 223, 238 (2009.) As was shown in plaintiff's

opening brief, there is no question that California courts have interpreted section 314, subdivision (1) as requiring genital exposure. Moreover, as noted above, plaintiff's *Monell* claim would require the constitutional question to be resolved even if the law was not clearly established.

B. Plaintiff's Arrest Lacked Probable Cause Because Her Genitals Were Not Exposed.

Plaintiff demonstrated in her opening brief that the officers lacked probable cause to arrest her for violating section 314, subdivision (1) because that statute does not apply to breast exposure. (Appellant's Opening Brief ("AOB") 12-22.) Plaintiff also showed that qualified immunity should be denied because the law was clear. (AOB 25-35.) Plaintiff discussed these questions separately because they are analytically distinct. Moreover, not all of plaintiff's arguments relevant to the statute's interpretation would necessarily have pertained to qualified immunity. (AOB 20-21 [citing an unpublished decision, noting a potential constitutional challenge, and contending the legislature lacked intent to brand as lifetime sex offenders women who lewdly exposed breasts].)

Defendants effectively concede the lack of probable cause for arresting plaintiff under section 314, subdivision (1) by choosing to focus on whether there

was sufficient uncertainty regarding the statute's meaning to justify granting the individual officers qualified immunity. (AB 16-33.) Defendants' sole contention in regard to probable cause for plaintiff's indecent exposure arrest is that "probable cause to arrest exists even if an officer makes a reasonable mistake of fact or law." (AB 14, citing *Heien v. North Carolina*, 135 S. Ct. 530 (2014) ("*Heien*").)

This assertion is wrong because *Heien* held only that "reasonable suspicion can rest on a mistaken understanding of the scope of a legal prohibition." *Heien*, 135 S. Ct. at p. 536. "The Court made no indication that its holding was meant to encompass determinations of probable cause to arrest, or, for that matter, any reasonable mistake of law outside of those made to justify reasonable suspicion." *Flint v. City of Milwaukee*, 91 F.Supp.3d 1032, 1057 (E.D. Wis. 2015). Defendants cite three non-precedential decisions of this Court, one of which involves reasonable suspicion–*United States v. White*, 654 F. App'x 319, 320 (9th Cir. 2016)–and two of which apply *Heien* in the probable cause context without any analysis. (AB 49). Given the important differences between the two standards in terms of the quality of evidence needed and the consequences stemming from an arrest as opposed to a detention, *Heien* should not be extended to probable cause determinations.

Moreover, even if *Heien* potentially applied to such determinations, it would not apply in this case. "[T]he inquiry is not as forgiving as the one employed in the distinct context of deciding whether an officer is entitled to qualified immunity for a constitutional or statutory violation." *Heien*, 135 S. Ct. at p. 539. The statute must be "genuinely ambiguous," and must pose a "'really difficult' or 'very hard question of statutory interpretation.'" (*Id*. at p. 541, concurring opinion of Kagan, J.) "*Heien* does not support the proposition that a police officer acts in an objectively reasonable manner by misinterpreting an *unambiguous* statute." *United States v. Stanbridge*, 813 F.3d 1032, 1037 (7th Cir. 2016). Because section 314, subdivision (1), as interpreted by the courts, is unambiguous, *Heien* does not apply.

II.

THE CITY OF LOS ANGELES IS POTENTIALLY LIABLE UNDER *MONELL*.

Plaintiff demonstrated in her opening brief that the City' policy of training police officers to arrest topless women for indecent exposure was unlawful, so plaintiff's *Monell* claim should be remanded for trial to determine if the policy caused her arrest. (AOB 22-25.) Defendants' responsive arguments are meritless.

A. Plaintiff Has Not Forfeited Her *Monell* Argument.

Defendants advance two reasons why plaintiff has purportedly forfeited her *Monell* argument. Neither is correct.

Defendants contend first that plaintiff "previously conceded, in her summary judgment papers, that the City does not have any policy regarding indecent exposure arrests. SER 82 ¶57; cf. SER 98 (cited in Ma's response to ¶57 and referencing only a generic department statement against biased policing)." (AB 42.) Plaintiff conceded nothing of the sort, but disputed the statement in part, albeit on a ground other than the one she now advances. (Supplemental Excerpts of Record ("SER") 82,¶57.)

Although plaintiff did not specifically assert that the policy consisted of training officers that topless women could be arrested for indecent exposure, such particularity was not necessary to preserve the issue for review because no one questions that the training occurred (SER 80-81,¶¶ 54-56), and whether it amounted to a "policy" is a question of law, not fact. (See AB 46-48 [contending that the training could not be deemed a City policy].) Because the factual predicate for plaintiff's *Monell* argument was set forth in plaintiff's (and defendants') papers, the argument was not waived.

Defendants also argue that because plaintiff did not raise the improper

training theory in the trial court, she is precluded from raising it here. (AB 42-43.) However, as plaintiff explained in her opening brief, an appellate court has the discretion to consider theories raised for the first time on appeal. (AOB 23.) The cases defendants cite (AB 42-43) do not change the fact that "the waiver rule is not one of jurisdiction, but discretion. [Citations]. We can exercise that discretion to consider a purely legal question when the record relevant to the matter is fully developed." *United States v. Northrop Corp*., 59 F3d 953, 957, n.2 (9th Cir. 1995).

As plaintiff noted in her opening brief, and as defendants did not challenge, "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 plaintiff's claim against the public entity defendants." (AOB 22.) As plaintiff also asserted, and as defendants did not contest, *Monell* liability is a complicated area of law. (AOB 23.) Plaintiff advanced a *Monell* claim in her operative complaint and argued that claim in her summary judgment papers. That she did not argue the precise theory on which she now relies should not bar her from obtaining relief. *Smith v. Arthur Andersen LLP*, 421 F3d 989, 999 (9th Cir. 2005) ("Although the Non–Settling Defendants did not make one of the particular arguments they advance here, i.e.,

that the judgment reduction credits do not fully extinguish any harm caused by the bar orders, we will not preclude them from bolstering their defense to the Settling Parties' challenge to their standing.")

There is no prejudice to defendants if plaintiff's *Monell* theory is considered; in fact defendants have addressed the theory's merits. (AB 43-49.) Under these circumstances, and in order to prevent manifest injustice, this Court should exercise its discretion to consider plaintiff's theory. *United States v. Echavarria-Escobar*, 270 F.3d 1265, 1267-1268 (9th Cir. 2001) (issue presented for the first time on appeal would be considered because it was "purely one of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court."); *Retail Flooring Dealers of America, Inc. v. Beaulieu of America, LLC*, 339 F.3d 1146, 1150, n.5 (9th Cir. 2003) ("Although Retail Flooring did not raise this argument before the district court, an appellate court can review an issue not raised nor objected to prior to appeal if necessary to prevent manifest injustice.")

B. Deliberate Indifference Is Irrelevant to Plaintiff's *Monell* Claim, Which Is Based On City Policy.

Defendants argue that "there can be no inadequate training claim, or incorrect training claim, unless there is evidence the City acted with deliberate indifference towards the plaintiff's rights." (AB 43.) Defendants' assertion is only correct regarding inadequate training claims. When City policy is to train its officers to violate the law, as occurred here, there is no deliberate indifference requirement. *Chew v. Gates,* 27 F.3d 1432, 1445 (9th Cir. 1994) ("*Chew*") (if training dogs to bite and hold was not "officially sanctioned," then deliberate indifference would have to be shown.)

The reason for this distinction is simple: "deliberate indifference" manifests intent equivalent to a policy choice. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 389 (1989) ("'[M]unicipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives' by city policymakers. [Citation.] Only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality—a 'policy' as defined by our prior cases—can a city be liable for such a failure under § 1983.")[2]

[2/] 42 U.S.C. §1983 and other statutes and regulations cited in this brief and not previously set forth in the parties' addenda can be found in this brief's addendum.

Thus, where official policy is alleged to have caused a constitutional injury, a conscious choice to follow a course of action has been made, and the deliberate indifference requirement does not apply. *Chew*, 27 F.3d at p. 1445; *Gibson v. County of Washoe, Nev.*, 290 F.3d 1175, 1186 (9th Cir. 2002) (deliberate indifference applies to *Monell* claims based on omissions), overruled on other grounds by *Castro v. County of Los Angeles*, 833 F.3d 1060, 1076 (9th Cir. 2016) (en banc); *Bravo v. City of Santa Maria*, 639 F. App'x 412, 415-416 (9th Cir. 2016) (refusal to instruct on deliberate indifference was proper when City policy directed officers to "call the wrong agency and rely on the wrong agency to check state custody status"); *Koistra v. County of San Diego*, --- F.Supp.3d ----2018 WL 1876116, *14, n.8 (S.D. Cal. 2018) ("When a *Monell* claim is based on an official policy, a showing of deliberate indifference to plaintiff's constitutional right is not required"); *Mann v. County of San Diego*, 2016 WL 3365746, *7-8 (S.D.Cal. (2016) (same).

Because deliberate indifference is irrelevant to plaintiff's *Monell* claim, defendants' contentions that the claim fails because "[t]here can be no deliberate indifference towards a right or a need unless it is clearly established" (AB 44) and "a City cannot be deliberately indifferent if a problem is rare" (AB 45) are irrelevant as well.

C. Defendants Cannot Fob The City's Policy Off On The State.

Defendants resort to an "I was just following orders" defense in attempting to blame the state for the illegal policy that caused plaintiff's arrest. (AB 46-48.) This assertion fails for several reasons.

First, defendants repeat their mistaken assertion that plaintiff conceded the City had no policy. (AB 46.) This contention was dealt with in Section IIA (pp. 7-9) above.

Second, although defendants claim that officer Fernandez referred to the state's POST "Learning Domain" (SER 80, ¶54), they make no similar claims for either officer Weston, who received instruction at the Los Angeles Police Academy on sex crimes including indecent exposure (SER 80, ¶55), or Sergeant Young, who also received training on indecent exposure both at the Academy and at a seminar between 2006-2008. (SER 81, ¶56.) Thus, there is no reason to conclude that this Learning Domain was the only basis for the City's training policy regarding arrests for indecent exposure.

Third, assuming the city's training was based on the Learning Domain, the City does not have to provide POST training in its academy. *In re Acknowledgment Cases,* 239 Cal.App.4th 1498, 1508, n.7 (2015) ("Oakland did *not* require its officers to attend its police academy for basic POST training.") By

choosing to provide such training, the City espoused the POST standards, and cannot avoid responsibility for the use of these standards in its training policies simply because they were promulgated by the state. See also *Heflin v. County of Los Angeles*, 438 F. App'x 596, 597 (9th Cir. 2011) (Although the County must endure that peace officer candidates meet minimum selection requirements, "the County has discretion to decide how to satisfy those standards.")

Fourth, even if the City had been required to provide POST training in its academy, it can also provide other training. Pen. Code, §13510, subd. (d) ("Nothing in this section shall prohibit a local agency from establishing selection and training standards that exceed the minimum standards established by the commission."); *County of Los Angeles v. Commission on State Mandates*, 110 Cal.App.4th 1176, 1180 (2003) ("[c]ompliance with POST's requirements is voluntary. (Pen. Code, § 13510 et seq.).") Nothing stopped the City from providing a correct interpretation of section 314, subdivision (1). Instead, the City relied on the POST interpretation of the statute, a deliberate choice. It would be absurd to contend that when a city adopts a legal interpretation espoused by a state, the city is not liable for its own acts.

Finally, even if the City was required to train its officers that section 314, subdivision (1) permitted arresting women who bared their breasts, *Monell*

liability would be proper. *Evers v. Custer County*, 745 F.2d 1196, 1203 (9th Cir. 1984) ("The County argues that it should be immune because it was merely acting according to state law, rather than carrying out County policy. This argument, however, goes only to the question of the Commissioners' good faith in applying the statute. The fact that the Commissioners are immune from suit under section 1983 because of their good faith does not relieve the County from liability.")

For all of these reasons, the City's attempt to deflect responsibility onto the state fails.

D. Plaintiff's Arrest Cannot Be Justified On Other Grounds.

Defendants argue that plaintiff's arrest can be justified on other grounds. (AB p. 39, citing *Devenpeck v. Alford*, 543 U.S. 146 (2004) ("*Devenpeck*.") *Devenpeck* held that the rationale provided by an arresting officer is irrelevant, so if the officer had probable cause to arrest the suspect on another charge at the time of the arrest, the arrest is valid even if there was no probable cause to arrest on the stated charge. *Id.* at pp. 152-153. However, neither of the grounds defendants advance would have provided probable cause for plaintiff's arrest at the time the arrest occurred.

Defendants contend that plaintiff could have been arrested for resisting a

peace officer in violation of section 148, subdivision (a)(1). (AB 40-41.) This argument fails for two independent reasons.

First, *Devenpeck* only applies to situations where officers know of probable cause to arrest for the uncharged offense at the time the arrest occurred. *Farmer v. City of Spokane*, 2015 WL 4604251, *4 (E.D. Wash July 30, 2015) (outstanding warrant could not serve as an alternate ground for justifying an arrest under *Devenpeck* when the arresting officer did not know of the warrant.) Plaintiff in the present case did nothing that could be construed as resistance until after she was seized by an officer and told to "put on your shirt." (SER 3-4.) Even assuming arguendo that the seizure can be characterized as only a detention, not an arrest, there were no grounds to detain plaintiff for violating section 314, subdivision (1), as she had not exposed her genitals. Therefore, conduct after the unlawful detention could not serve to legitimize her arrest for indecent exposure. Holding *Devenpeck* applicable to such circumstances would incentivize officers to unlawfully seize people in hope that they will resist, thus retroactively justifying the seizure.

The second reason why plaintiff could not have been arrested for resisting a police officer was that her seizure and arrest was unlawful, as plaintiff had not violated section 314, subdivision (1). "Section 148 has long been construed by the

courts as applying only to lawful arrests, because '[a]n officer is under no duty to make an unlawful arrest.'" *People v. Curtis*, 70 Cal.2d 347, 354 (1969), disapproved on other grounds in *People v. Gonzalez*, 51 Cal.3d 1179, 1222 (1991). Because plaintiff's detention and arrest for indecent exposure were unlawful, she could not properly have been charged with resisting a police officer.

Defendants also argue that plaintiff could have been arrested for committing a public nuisance. (AB 39-40.) "'A public or common nuisance ... is a species of catch-all criminal offense, consisting of an interference with the rights of the community at large....'" *People ex rel. Clancy v. Superior Court*, 39 Cal.3d 740, 749 (1985).

Almost 50 years ago, the California Supreme Court, noting (among other things) "the recently stylish exposure of the upper torso in fashions designed for the supposedly Soigne [*sic*] members of our society," found "an obvious lack of societal consensus as to the morally permissible degree of diaphanous raiment and public dishabille." *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control*, 2 Cal.3d 85, 102 (1970) ("*Boreta Enterprises, Inc.*") Today, clingy and even see-through women's tops are so commonly worn that the judiciary has found it necessary to issue rules prohibiting the wearing of such garments in court. Tenn. R. 20 Dist. Rule 1.04; Or. R. Union Wallowa Rule 3.011(2)(a); Or. R. Coos

Curry Rule 3.011(2)(a) (Juvenile Court). Given the widespread use of such clothing, any contention that fully exposing a breast while chanting political slogans amounts to "an interference with the rights of the community at large" is risible.

Defendant cites an utterly gratuitous dictum regarding the possible application of the public nuisance statute to "mooning," (AB 40, citing "*In re Dallas W.*, 85 Cal. App. 4th at 938, 940"), but this suggestion is unworthy of any deference. *United States v. Johnson*, 1256 F.3d 895, 915 (9th Cir. 2001) (Kozinski, J. concurring) (statement "made casually and without analysis" is not binding.) The far-fetched nature of defendants' speculation that the public nuisance statute could apply is illustrated by the fact that the record is devoid of evidence that anyone even thought about arresting plaintiff for committing a public nuisance.

E. Plaintiff's Monell Claim is Based on an Underlying Constitutional Violation.

Defendants contend that "there could be no false arrest, and no underlying violation, if probable cause justified Ma's arrest for *any* crime, be it indecent exposure, public nuisance, or resisting an officer." (AB 48.) For reasons set forth

in plaintiff's opening brief, and not seriously challenged by defendant, there was no probable cause for arresting plaintiff for indecent exposure. And, as explained in section IID (pp. 14-17) above, plaintiff's arrest cannot be retroactively justified on the basis of resisting an officer or public nuisance.

Citing *Heien*, defendants also assert that "there could be no unreasonable seizure under the Fourth Amendment if the officers were reasonably mistaken about the scope of any of these laws." (AB 48.) Plaintiff has already explained in Section IB (pp. 4-6) above why *Heien* does not apply to plaintiff's arrest for indecent exposure. Defendants' contention that *Heien* applies to their resisting an officer or public nuisance rationales makes no sense because plaintiff was not arrested for either offense, so there was no "mistake" for the officer to make.

For all of the reasons cited in Sections IIA-IIE, defendants' *Monell*-related arguments are meritless.

III.

THE OFFICERS ARE NOT ENTITLED TO QUALIFIED IMMUNITY ON PLAINTIFF'S CLAIMS INSOFAR AS THEY ARE BASED ON THE INAPPLICABILITY OF SECTION 314, SUBDIVISION (1) WHEN GENITALS ARE NOT EXPOSED.

A. California Courts Have Clearly Established That "Private Parts," As Used in Section 314, Subdivision (1), Means "Genitals."

1. Defendants' characterization of plaintiff's case law as "dicta" is inaccurate in part; moreover California courts deem California Supreme Court dicta highly persuasive.

Plaintiff's opening brief demonstrated that California Courts have clearly established that the term "private parts" is equivalent to genitals. (AOB 12-19, 25-34.) Defendants respond that this argument "largely hangs on stray dicta from indecent exposure cases involving male defendants." (AB 27.) However, language from at least some of the decisions plaintiff cites cannot be deemed dicta. *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1186 (9th Cir. 2003) ("'where a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical

sense.'") At least two cases cited in plaintiff's opening brief feature discussions "confront[ing] an issue germane to the eventual resolution of the case" by giving "reasoned consideration" regarding why Penal Code section 314, subdivision (1) requires genital exposure. (AOB 16-18, citing *People v. Massicot*, 97 Cal.App.4th 920, 922, 925, n.3., 926, 928, 931 (2002) ("*Massicot*") and *People v. Carbajal*, 114 Cal.App.4th 978, 982-983, 986 (2003) ("*Carbajal*").)

Moreover, defendants overlook the fact that the California Supreme Court was the first California court to equate "private parts" with "genitals." *In re Smith*, 7 Cal.3d 362, 363-364, 366 (1972) ("*Smith*.") Even if the Court's equating the two terms was dicta, "[d]icta from the California Supreme Court is highly persuasive and should generally be followed." *Wechsler v. Superior Court*, 224 Cal.App.4th 384, 393, n.2 (2014). Not surprisingly, that is exactly what happened in the years following *Smith*, as intermediate appellate courts and authors of the CALJIC and CALCRIM jury instructions cited *Smith* as requiring that genital exposure is required to violate section 314, subdivision (1).[3] (AOB 15-18.)

[3/] Defendants note that the California Judicial Council withdrew its endorsement of the CALJIC instructions on January 1, 2006. (AB, 32, n.3) However, "'CALJIC instructions that were legally correct and adequate on December 31, 2005, did not become invalid statements of the law on January 1, 2006. . . . The Judicial Council's adoption of the CALCRIM instructions simply meant they are now endorsed and viewed as superior.'" *People v. Cornejo*, 3 Cal.App.5th 36, 61 (2016).

Nearly forty years after *Smith*, this Court recognized 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 v. Holder*, 594 F.3d 1124, 1130 (9th Cir. 2010).

Defendants then contend "that dicta are not law, and cannot create clearly established law for purposes of defeating qualified immunity." (AB 28.) "'[C]learly established law' includes 'controlling authority in [the defendants'] jurisdiction....'" *Carrillo v. County of Los Angeles*, 798 F.3d 1210, 1221 (9th Cir. 2015). As defendants themselves note, the Supreme Court defined "controlling authority" to be "a robust 'consensus of cases of persuasive authority.'" (AB 28, citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 741-42 (2011) ("*Ashcroft*").) Nothing in *Ashcroft* or any other case defendants cite prelude dicta, especially dicta deemed highly persuasive, from being part of this consensus. And as defendants acknowledge, the Supreme Court has relied in part on dicta in determining that law was clearly established. (AB 28, citing *Hope v. Pelzer*, 536 U.S. 730 (2002).) Significantly, it was a dissent that condemned any reliance on dicta. *Id.* at p. 762. (Thomas, J., dissenting.)

Defendants close their discussion of dicta by incorrectly implying that

plaintiff's cases "conflict with other authority." (AB 28.) Defendants do not specify the "other authority," but to the extent defendants are referring to cases and other material cited on pages 18-27 of their brief, section IIIB (pp. 26-35) below shows that this "authority" either fails to conflict with, or is irrelevant to, the clearly established law that indecent exposure in California requires genitals to be shown.

2. The fact that California cases interpreting section 314, subdivision (1) to require genital exposure involve male defendants does not prevent these cases from clearly establishing that the statute requires genital exposure.

Defendants' primary basis for attempting to distinguish plaintiff's cases is that they do not involve women. (AB 29-32.) In fact, defendants assert "there is no California case involving a female defendant that excludes the breast from the meaning of private part [*sic*]. . . ." (AB 27.) Although no case features a female defendant, an unpublished decision upholds the conviction of a man for falsely reporting to the police that a woman with whom he was feuding violated section 314, subdivision (1), when she exposed her bosom in a "mammary moon" without showing her genitals. *People v. Nitzke*, 2006 WL 62285, *4 (Cal.Ct.App., January

12, 2006). (Internal quotation marks omitted.)

More importantly, plaintiff's argument fails to take into account the fact that section 314, subdivision (1), enacted in 1872 as section 311, codified "the common law offense of indecent exposure which . . . 'require[d] display of the genitals.'" *Carbajal*, supra, 114 Cal.App.4th at p. 982. "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.]" *Id.* at p. 983. (Internal quotation marks omitted.) After reviewing the common law and cases from other jurisdictions, the Court 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 . . . ." *Id*. at p. 986. (Emphasis added.) See also *Massicot*, *supra*, 97 Cal.App.4th at p. 928 ("the common law offense of indecent exposure requires display of the genitals.")

Plaintiff made this point in her opening brief. (AOB 17-18.) Defendants' failure to respond to it is telling, as is defendants' contention that had the legislature intended to confine section 314, subdivision (1) to genital exposure, it could simply have used that term. (AB 26-27.) Defendants fail to realize that limiting section 314, subdivision (1) to genital exposure was exactly what the

legislature was doing when it adopted the common law formulation "private parts." Given *Massicot* and *Carbajal*, no reasonable police officer could believe that section 314, subdivision (1) applied to the exposure of anything but genitals.

Ironically, defendants cite *People v. Catelli*, 227 Cal. App. 3d 1434 (1991) ("*Catelli*") for the proposition that "'private parts'" is a "broader, pluralized, and 'all encompassing' term." AB 27, citing *Catelli*, *supra*, pp. 1454-55. (Carr, Acting PJ, concurring and dissenting.) *Catelli* held that "sexual organ," as used in section 288, subdivision (a), included the scrotum as well as the penis. *Id.* at p. 1448. In dissenting from this holding, Justice Carr stated that "[t]he Legislature was free to use 'genitalia' or such similar term in lieu of 'sexual organ' but chose not to do so." *Id.* at p. 1454. It was in this context that Justice Carr referred to "'private parts'" as "an all-encompassing term." *Id.* at p. 1455. If anything, Justice Carr's discussion of "private parts" strengthens plaintiff's argument that this term refers to genitalia.

Defendants seize on a footnote in *Massicot* to suggest that since "private parts" was deemed to include the anus in a North Carolina decision, "the court did not foreclose the possibility in future cases that exposure of the 'anus,' as opposed to the buttocks, could be indecent exposure . . . ." (AB 31.) This suggestion is unwarranted because the court was simply observing that other jurisdictions may

define "private parts" differently than California. Not surprisingly, Westlaw considers the North Carolina case to have been distinguished in *Massicot*.[4]

Defendants note as well that *Massicot* "explicitly focuses on male offenders," "reviewing writings that discuss indecent expose [*sic*] as linked to male exhibitionism and particularly 'display of the male genital organs for sexual gratification.'") (AB 30.) *Massicot* referred to these writings in discussing the common law crime of indecent exposure. (*Massicot*, *supra*, 97 Cal.App.4th at pp. 928-931.) The fact that the common law viewed exhibitionism as men exposing their genitals actually makes it less likely that the California legislature, in adopting the common law definition of indecent exposure, meant to include breasts within the statute's ambit.

Defendants also cite *Williams v. City of Los Angeles*, 2016 WL 3951398 (June 17, 2016) ("*Williams*"), adopted 2016 WL 3951401 (July 20, 2016), terming it "solid evidence of the law at the time." (AB 17.) However, *Williams'* cursory analysis does not discuss *Massicot*, *Carbajal*, or most of the other cases plaintiff pertaining to section 314, subdivision (1) cited in her opening brief. *Williams*,

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4/ https://1.next.westlaw.com/RelatedInformation/Ic751f856033c11da9439b076ef9ec4de/kcNegativeTreatment.html?originationContext=citingReferences&transitionType=NegativeTreatment&contextData=(sc.DocLink)&docSource=6278b3ef9b424ff19ef312fdf05532a6&rulebookMode=false

2016 WL 3951398 at *3. The only thing that *Williams* is "solid evidence" of is the need for courts to actually decide constitutional issues so that decisions like *Williams* cannot be cited as evidence that the law is not clearly established.

Finally, defendants contend that the City Attorney's failure to prosecute was "irrelevant" to whether the law was clear. (AB 33.) Defendants are correct that a mere failure to prosecute does not indicate that the law was clear, but this was not plaintiff's argument. Instead, plaintiff contended that the City attorney declined to prosecute because he found Ms. Ma did not violate section 314, subdivision (1). (AOB 32, citing 3 ER 174-177.) The cited materials show that the City Attorney, after reviewing the case and deciding not to prosecute, wrote "corpus as to 314-1PC." (2 ER 177.) If the City Attorney knew this, the officers should have known it too.

For all of the above reasons, California case law clearly establishes that section 314, subdivision (1) does not apply when breasts are exposed.

B. Defendants' Attempts To Introduce Ambiguity Into The Meaning Of "Private Parts" As Used In Section 314, Subdivision (1) Fail.

Defendants contend that "private parts" at least arguably includes the female breast. (AB 18-27.) Whether or not this is correct in some of the contexts

defendants discuss, it is wrong in connection with section 314, subdivision (1), whose meaning the courts have clearly established. Ultimately, defendants' contentions regarding the meanings of "private parts" in different contexts are no more than chaff scattered in an attempt to spoof the Court's radar. Plaintiff will nonetheless discuss defendants' contentions *seriatim*.

1. The California Supreme Court has never held, or even stated, that section 314, subdivision (1) applies to female breasts.

Defendants contend that the California Supreme Court "has noted section 314(1)'s application to a topless dancer." (AB 18, citing *In re Giannini*, 69 Cal.2d 563, 565 (1968) (*In re Giannini.*) (Internal quotation marks omitted.) The Court did nothing of the sort, at least in regard to whether breasts could be deemed private parts within that statute's meaning. The petitioners never raised this issue, and the Court never decided or even commented on it. "'Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.'" *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 170 (2004).

Defendants attempt to evade the application of this principle by asserting

without any basis that "neither the parties nor the California Supreme Court were troubled about section 314(1)'s application to female breasts . . . ." (AB 18-19.) This rank speculation should be given no credence whatsoever. Moreover, what the parties thought is irrelevant to the state of California law, and courts will not address non-jurisdictional questions the parties fail to raise, so there is no evidence the Court thought about the question at all. Additionally, *In re Giannini* was decided before *In re Smith*, 7 Cal.3d 362 (1972). ("*Smith*.") If the Court had truly deemed breasts to be "private parts" in the former case, then four years later the Court would not have used the terms "genitals" and "private parts" interchangeably in *Smith*. *Id.* at pp. 364, 366.

2. The legislative history defendants cite is irrelevant and ambiguous.

Defendants cite the legislative history of California's statute allowing public breastfeeding to support their argument that section 314, subdivision (1)'s construction was not clearly established when plaintiff was arrested. (AB 19-20.)

As a threshold matter, the legislative history of other laws is irrelevant to whether section 314, subdivision (1)'s construction was clearly established, as this depends solely on how courts interpret that statute. "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, [citation] including decisions of state courts, other circuits, and district courts." *Malik v. Brown*, 71 F.3d 724, 727 (9th Cir. 1995). (Internal brackets and quotation marks omitted.)

Moreover, the legislative history is ambiguous. Assembly Bill 977, a breastfeeding bill introduced in 1995, mentioned section 314, subdivision (1). ftp://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_0951-1000/ab_977_bill_950223_introduced.pdf. Two years later, the legislature passed Assembly Bill 157, a breastfeeding bill codified as Civil Code section 43.3, that did not specifically refer to section 314, subdivision (1), but permitted breastfeeding under public and most private circumstances "[n]otwithstanding any other provision of law ...."

The failure to refer to section 314, subdivision (1) could well have occurred because the second bill's drafters realized that section 314, subdivision (1) did not apply to the exposure of breasts. This inference is strengthened by a committee analysis stating that "EXISTING LAW does not prohibit a mother from breastfeeding her child in public places." Assem. Com. On the Judiciary, Analysis of Assem. Bill No.157 (1997-1998 Reg. Sess.), as amended March 19, 1997, http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_0151-0200/ab_157_cfa_199703

18_133407_asm_comm.html. The potential "unwarranted 'charges of indecent exposure'" feared by the governor (AB 20) could just as easily have referred to a misperception that section 314, subdivision (1) applies to breasts as it did to a misconception that breastfeeding was "lewd".

For the above-stated reasons, the legislative history of the breastfeeding statute does not cloud the clearly established law pertaining to indecent exposure.

3. The POST training is irrelevant to construing "private parts."

Defendants contend that the POST learning domain's construction of the term "private parts" to include female breasts should be taken into account in determining whether the law is clearly established. (AB 20-21.) This Court has already rejected such contentions. *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039, 1049 (9th Cir. 1999) ("The fact that Los Angeles and Santa Monica may have trained their police to violate the rights of individuals does not provide any defense for these officers.") If the courts' construction of the law is clear, police training is irrelevant to qualified immunity. *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (law enforcement policies "could not make reasonable a belief that was contrary to a decided body of case law.")

4. Section 318.5's language does not support defendants' construction of section 314, subdivision (1).

Plaintiff's opening brief cited section 318.5 for the non-controversial proposition that breasts are not genitals and that the California legislature recognized this fact by mentioning both in that statute. (AOB 18-19.) Defendants puzzlingly argue that because the statute allows localities to regulate the exposure of female breasts as well as genitals, it suggests that "private parts," as used in section 314, subdivision (1), includes female breasts. (AB 21.) Actually, the reverse is true. If the legislature thought that female breasts were "private parts," it could simply have used that term instead of the more cumbersome language of section 318.5. More importantly, it is not the legislature's choice of language in another law, but the courts' construction of section 314, subdivision (1), that governs whether it is clearly established that "private parts" as used in that statute does not include breasts.

5. The other California statutes and regulations defendants cite are irrelevant and do not support their construction of section 314, subdivision (1).

Defendants assert that "[e]ven though California's statutes and regulations

do not define the term 'private parts,' they offer definitions of similar terms that a reasonable officer would look to for guidance." (AB 21.) As noted above, however, it is not the text of other statutes (or regulations), but court decisions interpreting section 314, subdivision (1), that provide the necessary guidance to determine whether the law regarding that statute's definition of "private parts" is clearly established. Thus, the other California statutes and regulations cited by defendants are irrelevant.

Moreover, as with section 318.5, the use of the term "intimate" parts in other California statutes (AB 22) indicates the legislature's awareness of the fact that the term "private parts" as used in section 314, subdivision (1), does not include breasts. Similarly, a court's interpretation of the California regulation prohibiting prison inmates from possessing "'sexually explicit images that depict frontal nudity'" as applying to "'the exposed female breast(s) and/or the genitalia of either gender'" (AB 22), emphasizes the distinction between genitals and breasts that underlies plaintiff's argument.

6. Defendants' non-California case law is irrelevant.

Defendants contend that "[l]ooking beyond California, an officer would find support for including the breast as a private part." (AB 23.) Leaving aside the

improbability of an officer burrowing into the law books to determine how other states have interpreted their laws, these out of state cases are irrelevant because the California courts have already interpreted section 314, subdivision (1) as requiring genital exposure. See generally *Schneider v. Schneider*, 82 Cal.App.2d 860, 862 (1947) ("if a rule of law is clearly established by the decisions of the courts of California we are not at liberty to overrule it in favor of one followed in decisions of other states.")

7. That female breasts are sexualized and sometimes referred to as private parts is irrelevant to whether it is clearly established that section 314, subdivision (1) prohibits only genital exposure.

Defendants cite the "widespread view that the female breast, as [Tiernan] Hebron noted at her deposition, remains, at least for now, sexualized." (AB 24.) Plaintiff does not dispute that female breasts are sexualized. Nor does plaintiff contest defendants' assertions that "[c]ourts routinely view the breast as sexualized in numerous other contexts, including sexual harassment lawsuits" (AB 24) and that breasts have been referred to as "private parts" in other contexts. (AB 25-26.)

Plaintiff does, however dispute that these assertions gain defendants any ground. Whether the officers are entitled to qualified immunity depends solely on whether courts have clearly established that section 314, subdivision (1) applies only to the exposure of genitals, and female breast sexualization is irrelevant, as are references in other contexts to breasts as "private parts."

Moreover, buttocks–both male and female–are also sexualized in this culture. *State v. Discola*, 184 A.3d 1177, 1187 (Vt. 1918) ("the buttocks are frequently sexualized in our society"); *Carchio v. City of Fort Lauderdale*, 755 So.2d 668, 669 (Fla.App. 1999) (ordinance prohibited "showing of the human male or female buttocks or any portion thereof with less than a full opaque covering" on premises serving alcohol). Women's legs are, and have long been, also sexualized in this society, as those who know of World War II pinup Betty Grable can attest. *In re Sills*, 250 B.R. 675, 676-677 (Bankr. N.D. Ill. 2000) (Lloyds of London insured "Betty Grable's 'million dollar legs...'"); Jessica Wolfendale, *Provocative Dress and Sexual Responsibility*, 17 Geo. J. Gender & L. 599, 623 (2016) ("revealing women's clothing is construed as signifying sex by drawing men's attention to women's sexualized body parts; a woman's breasts, buttocks and legs can mean 'sex' regardless of the personal desires of the woman in question.")

Despite the common sexualization of these body parts, no one could plausibly argue that buttocks (or legs) are within the definition of "private parts" as used in section 314, subdivision (1). *Massicot*, *supra*, 97 Cal.App.4th at pp. 925, 932 (Defendant who exposed his buttocks, but not his genitals, could not be convicted of indecent exposure.) Ultimately, the fact that a body part is sexualized does not even colorably render it a private part as that term is defined in section 314, subdivision (1).

For the reasons stated above, defendants' attempts to sow confusion as to the state of the law produce only a barren field.

IV.

QUALIFIED IMMUNITY SHOULD BE DENIED BECAUSE PLAINTIFF'S ARREST LACKED PROBABLE CAUSE, AS THERE WAS NO EVIDENCE THAT HER CONDUCT WAS SEXUALLY MOTIVATED, AND A REASONABLE POLICE OFFICER WOULD HAVE BEEN AWARE OF THIS.

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

Plaintiff's opening brief demonstrated that her conduct was not lewd

because there was no evidence that her conduct was intended to sexually gratify or affront anyone. (AOB 36-40.)

Defendants respond by accusing plaintiff of "arguably taunting and gratifying conduct . . . ." (AB 34.) However, there is no evidence whatsoever that plaintiff taunted anyone. She was not angry. Compare *People v. Archer*, 98 Cal.App.4th 402, 407 (2002) ([d]efendant "expose[d] his penis in anger during an incident of 'road rage,'" and said "'suck my dick.'") She was not trying to prank anyone. Compare *In re Dallas W.*, 85 Cal.App.4th 937, 938 (2000) (mooning by a juvenile.)

Nor is there any evidence that plaintiff was attempting to sexually gratify herself or anyone else. Plaintiff did not touch her breasts or her genitals. (2 ER 108:3-8.) The only testimony that plaintiff received "gratification" came from Officer Fernandez, who asserted that plaintiff "had gratification that people were paying attention" to her breasts. (2 ER 108:17-21.) There is no evidence that this "gratification" was sexual, nor would such an assumption be justified, given the obvious fact that plaintiff was engaged in political activity.

Defendants then contend that "there was arguable probable cause for believing Ma had acted lewdly by reason of sexual affront." (AB 36.) Defendants are really accusing plaintiff of "épater le bourgeois" or shocking the middle class.

https://www.merriam-webster.com/dictionary/%C3%A9pater%20le%20bourgeois. Defendants' contention fails because a review of what the officers knew when they seized plaintiff shows they had no evidence that plaintiff *intended* to affront the people attending the Sanders rally. *Smith*, *supra*, 7 Cal.3d at p. 365 ("The separate requirement that the intent of the actor be 'lewd' is an essential element of the offense declared by section 314.")

It was undisputed that officers were present beginning around 4:35 p.m. on the day of the rally at the Wiltern Theatre. (SER 57, ¶ 1.) During that time, plaintiff and Tiernan Hebron traversed the Wiltern area with breasts bare except for tape on their nipples, walking around the block several times and shouting slogans including "'Free the Nipple' and 'Gender Equality,' 'ERA.'" (2 ER 84:16-25, 85:5-6, 86:23-25, 89:8-10, 90:1-91:15.) The two women engaged in 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 44:16-21; 93:5-10.) In short, plaintiff engaged, not outraged, the crowd. Not surprisingly, only one person complained to the officers about plaintiff and Hebron during that time. (SER 45.)

The only reasonable inference to be drawn from these facts is that plaintiff

did not intend to affront the crowd, but to educate it. This inference should not have been affected by plaintiff's removing the tape from her nipples, as the videos defendants transmitted to this Court show that the crowd's attitude did not materially change. If the crowd had become hostile then, the officers could perhaps have inferred that plaintiff was aware this might happen and therefore intended to offend the crowd. However, that did not occur.

The first video begins before plaintiff was seized and shows Hebron entirely topless and addressing people immediately outside the theatre. There is applause and sounds of approval. No one looks upset. As the officers grab the two entirely topless women, shouts of disapproval can be heard about 20-25 seconds into the tape. The second video begins with plaintiff's seizure. As she and Hebron are taken away by officers, the crowd's booing can be heard around the 1:20 and 2:00 marks. The people on the videos appear to be variously approving of the women, curious, indifferent and amused (as evidenced by the "Jerry, Jerry" chants when plaintiff and Hebron were being arrested), but no one seems hostile to them, although officers testified that there were people in the crowd who were offended. (SER 43-45.) .

Whether there was probable cause to believe that plaintiff acted lewdly does not depend on whether some in the crowd (or, for that matter, the officers

themselves) were offended. It depends on whether, given the totality of the circumstances, there was probable cause to believe that plaintiff intended to sexually affront her fellow rally goers. Defendants' references to others outside of the rally area who might potentially have been offended (AB 6) are irrelevant because they were not plaintiff's target audience, so she would not have had any intentions toward them. Given the evidence available to the officers, there was no probable cause to arrest plaintiff for indecent exposure.

B. A Reasonable Police Officer Would Have Been Aware There Was No Probable Cause To Arrest Plaintiff.

Context matters. "[A] bar is not a church." *Boreta Enterprises, Inc.*, 2 Cal.3d at p. 101. Neither is a 2016 Bernie Sanders rally in Los Angeles, as should be evident from the long haired man holding up the "Fuck Trump" t-shirt at about 5 seconds into the first of the videos defendants transmitted to this Court. Plaintiff encourages the Court to view these videos in assessing whether a reasonable officer would have concluded that plaintiff intended to sexually affront the people waiting to attend that rally.

Defendants acknowledge that although the officers "could not read Ma's mind, . . . they could assess her conduct and the response of the crowd." (AB 38.)

In evaluating these facts, the officers were required to make only those inferences regarding intent as would be reasonable. That did not occur. Instead of taking into account the evidence that plaintiff's actions were directed at informing, not offending the crowd, the officers simply reacted to the display of nipples. That was not reasonable, and the officers should not have been granted qualified immunity.

V.

THE JUDGMENT SHOULD BE REVERSED ON PLAINTIFF'S STATE LAW CLAIMS FOR FALSE ARREST/FALSE IMPRISONMENT AND NEGLIGENCE.

Defendants assert that plaintiff's state law claims were properly dismissed because summary judgment was granted on her federal claims. (AB 50.) However, summary judgment should not have been granted on plaintiff's federal claims based on unlawful seizure of the person and unconstitutional municipal customs and policies, so the state claims should not have been dismissed.

Defendants also contend that summary judgment on plaintiff's state law claims was correct because the officers were entitled to state law immunity, which is equivalent to federal qualified immunity. (AB 50-51.) However, the officers

were not entitled to the latter immunity, so they were not entitled to the former.

VI.

PLAINTIFF SHOULD BE GRANTED SUMMARY JUDGMENT ON HER FALSE ARREST CLAIMS.

Defendants contend that if the judgment on plaintiff's false arrest claims is reversed, she should not be granted partial summary judgment against the individual officers on liability issues pertaining to these claims. (AB 51-53.)

Defendants argue first that qualified immunity is an immunity to suit, not merely liability, and that if "an officer is not protected by qualified immunity, that only means the litigation continues and the officer proceeds to trial on the claim, not that the officer automatically loses on the claim." (AB 52.) If this contention were correct, summary judgment could never be granted against government employees sued for constitutional rights violations. Not surprisingly, the cases cited by defendant do not espouse this proposition. (See AB 52.) And, in fact, plaintiffs have obtained partial summary judgment against individual government employees who have violated plaintiffs' constitutional rights. See, e.g., *Shafer v. City of Boulder*, 896 F.Supp.2d 915, 927-928 (D. Nev. 2012).

Defendants also assert that plaintiff should not be granted summary

judgment against the officers because disputed facts were resolved in her favor. (AB 53.) However, defendants cite no disputed facts relevant to plaintiff's claims against the officers, which is not surprising, because only the law is in dispute in regard to those claims. Defendants also say that they "presented discrete theories" and, if they proceeded to trial, "would raise all arguments available to them even if not made in the summary judgment motion . . . ." (AB 53.) Defendants again give no specifics, perhaps because it is difficult to imgaine an argument that was not made in the Answering Brief.

CONCLUSION

For the reasons stated above and in her opening brief, 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.

July 25, 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

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The brief is ☐ words or ☐ pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the longer length limit authorized by court order dated ☐
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is ☐ words or ☐ pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☒ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is 8,601 words or ☐ pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is ☐ words or ☐ pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.
The brief is ☐ words or ☐ pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant: s/Barry M. Wolf

Date: July 25, 2018

("s/" plus typed name is acceptable for electronically-filed documents)

(Rev.12/1/16)

ADDENDUM

TO APPELLANT'S

REPLY BRIEF

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United States Statutes

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

California Statutes

Civ. Code § 43.3

Notwithstanding any other provision of law, a mother may breastfeed her child in any location, public or private, except the private home or residence of another, where the mother and the child are otherwise authorized to be present.

Pen. Code § 13510, subd. (d)

Nothing in this section shall prohibit a local agency from establishing selection and training standards that exceed the minimum standards established by the commission.

Oregon Rules of Court (Local Rules)

Coos/Curry Counties (Oregon) Local Rules, Rule Rule 3.011 (2)(a) (Juvenile Court)

(1) Proper attire is required by everyone entering the Curry County Circuit Court for Juvenile Hearings, and will be strictly enforced. Anyone not properly dressed upon arriving in the courtroom may be sent away until properly dressed.

(2) The following items are unacceptable attire:

(a) Tube tops, tank tops, halter tops, bare midriff tops, see-through tops

Union Wallowa Counties (Oregon) Local Rules, Rule 3.011(2)(a)

(1) Proper attire and appropriate behavior is required by everyone entering the Union or Wallowa County Circuit Court and will be strictly enforced. Anyone not properly dressed upon arriving in the courtroom may be sent away until properly dressed.

(2) The following apparel items are unacceptable:

(a) Tube tops, tank tops, halter tops, bare midriff tops, see-through tops;

Tennessee Rules of Court (Local Rules)

Twentieth Judicial District Local Rules of Practice (Davidson County), rule 1.04

All parties, including Counsel and witnesses, shall dress appropriately for Court. Please do not enter the Courtroom wearing a halter, t-strap tops, or see through tops and blouses, shorts, no exposed midriff, no underwear exposed, hats, sagging or low riding pants, torn clothing, shirts with inappropriate language, untucked shirts and blouses, mini-skirts, or any other inappropriate clothing or shoes.

9th Circuit Case Number(s) Case No. 17-56544

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) July 25, 2018 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) /s Barry M. Wolf

****

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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