

No. 25-2618

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

APRIL FONSECA, a.k.a. APRIL EHRLICH,

Plaintiff-Appellee,

v.

JAMES BARRINGER et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Oregon, Case No. 1:22-cv-01416
Before the Honorable Mark D. Clarke

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INTRODUCTION

In September 2020, Plaintiff April Fonseca, an award-winning radio journalist, was reporting on an encampment that formed in a public park in Medford, Oregon, following a devastating wildfire. The presence of the encampment in the park had become controversial in the community, drawing substantial attention from the press and public. Defendants—Medford city officials and police officers—decided to evict the campers and clear the park. On the day of the clearance, they barred the press from entering the park, instead directing journalists to a “media staging area” outside the park from which they could not adequately see or hear what the police were doing. When Ms. Fonseca instead attempted to report on the clearance from inside the park, Defendants arrested her, seized and searched her recording equipment, and took her to jail—even as many other members of the public were permitted to stay.

Defendants’ actions violated Ms. Fonseca’s clearly established rights under the First and Fourth Amendments. This Court has long recognized that “the First Amendment protects the media’s right to gather news.” *Daily Herald Co. v. Munro*, 838 F.2d 380, 384 (9th Cir. 1988). That “includes the right to record law enforcement officers

engaged in the exercise of their official duties in public places.” *Askins v. U.S. Dep’t of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018). Hawthorne Park is a traditional public forum. The encampment clearance was a matter of public concern. And, at the time of her arrest, Ms. Fonseca was attempting to observe and record that newsworthy event. The First Amendment protects Ms. Fonseca’s newsgathering “on several levels,” *Daily Herald Co.*, 838 F.2d at 384, both by safeguarding the right of the press and public to access government proceedings, *see Press-Enter. Co. v. Superior Ct.*, 478 U.S. 1, 8-9 (1986), and by limiting the ability of the government to restrict expression, which includes newsgathering, in traditional public forums, *Askins*, 899 F.3d at 1044. As this Court has explained, courts must scrupulously protect the press’s ability to gather news in public because “[t]he free press is the guardian of the public interest, and the independent judiciary is the guardian of the free press.” *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012).

Under that precedent, to overcome Ms. Fonseca’s First Amendment right to report on the encampment clearance, Defendants needed to show that their actions in excluding reporters from the park and arresting Ms. Fonseca were narrowly tailored to advance an overriding government

interest. But they failed to support their motion for summary judgment with any evidence substantiating their claim that excluding journalists was necessary to protect public safety. On the contrary, the evidence shows that, although Defendants purported to close the park to the public during the clearance, they in fact let in anyone who wanted to help with the cleanup while selectively excluding the press and other observers. Officers on the scene explicitly stated that they were targeting the press for exclusion. Defendants' actions suggest that their real goal was to avoid public scrutiny, not to protect anyone's safety.

By preventing Ms. Fonseca from engaging in constitutionally protected newsgathering in a public forum, without any legitimate justification for doing so, Defendants violated her clearly established First Amendment rights. It follows that Defendants also violated her clearly established Fourth Amendment rights: Defendants lacked probable cause to arrest her for unlawfully remaining in the park because she had a First Amendment right to be there.

Because Defendants violated Ms. Fonseca's clearly established rights, they are not entitled to qualified immunity. The district court's

decision denying Defendants’ motion for summary judgment based on qualified immunity should be affirmed.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1367. A district court’s denial of qualified immunity at summary judgment is immediately appealable under the collateral order doctrine. But this Court’s jurisdiction in an interlocutory qualified-immunity appeal is “circumscribed.” *Foster v. City of Indio*, 908 F.3d 1204, 1210 (9th Cir. 2018). Although the Court may review pure questions of law related to the qualified-immunity defense, “[a] public official may not immediately appeal ‘a *fact*-related dispute about the pretrial record, namely, whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial.’” *Id.* (quoting *Johnson v. Jones*, 515 U.S. 304, 307 (1995)).

STATEMENT OF ISSUES

1. Whether the district court correctly denied qualified immunity to Defendants on Ms. Fonseca’s claim that Defendants violated her First Amendment rights by excluding her from Hawthorne Park

while police were clearing an encampment there and by arresting her for attempting to report on the clearance.

2. Whether the district court correctly denied qualified immunity to Defendants on Ms. Fonseca's claim that her arrest while reporting on the encampment clearance in Hawthorne Park violated her Fourth Amendment rights.

STATEMENT OF THE CASE

I. Factual Background

A. An Encampment Forms in Hawthorne Park.

On September 8, 2020, the Almeda Fire ravaged Oregon's Rogue Valley region, destroying thousands of homes within a matter of hours.¹ Later that week, a group of individuals began camping in Hawthorne Park in Medford, the Rogue Valley's largest city. ER-122. The encampment quickly became "a pretty hot button political issue" locally, according to Medford's City Manager, Defendant Brian Sjothun.² SER-75 (Sjothun Dep. 35). Plaintiff April Fonseca, an award-winning

¹ JPR News Team, *The Almeda Fire: One Year Later*, Jefferson Public Radio (Sept. 8, 2021), <https://www.ijpr.org/wildfire/2021-09-08/the-almeda-fire-one-year-later>.

² All Defendant officials are referred to herein by the titles they held at the time of relevant events.

journalist working for Jefferson Public Radio, began reporting on the encampment and city officials' response. SER-17 (Fonseca Dep. 33-36).

Within roughly one week of the appearance of tents in Hawthorne Park, city officials began formulating a plan to evict the campers and clear the park. They decided to keep that plan secret. On Friday, September 18, 2020, Defendant Medford Police Chief Scott Clauson wrote to City Manager Sjothun that the “plan ... to clean up Hawthorne Park Monday morning starting at 8 AM” was “not for public or media dissemination,” explaining that the police were “keeping this date/time quiet” because of “concern[s] about an influx of protestors over the weekend.” SER-115-16. Four hours later, Sjothun e-mailed Clauson a purported order closing Hawthorne Park beginning at 8:00 a.m. on Monday, September 21. SER-30-31. The e-mail contained no explanation or justification for the closure. It likewise made no mention of notifying the public or the press of the impending action, but it noted that Sjothun intended to alert the Mayor and City Council on the morning of the planned operation. *Id.*

Later that Friday, the City of Medford prepared an Operation Plan for an event titled “Hawthorne Park Encampment removal.” ER-122.

That plan, which officials also declined to share with the public, asserted that “there has been an increase of littering, drug use, and other unlawful behavior making the area no longer accessible by the public.” *Id.* It also asserted that organizers of the encampment had been “accused of intercepting donations destined for established organizations by claiming to represent those entities.” *Id.* The City provided no factual basis for those unsourced accusations.

As planning for the encampment clearance unfolded over the weekend, Chief Clauson e-mailed other city officials that, “[d]ue to a critical ‘technical’ error on our end[,] the actual eviction of campers will occur on Tuesday 9/22.” SER-115. He explained that the delay “was unintentional, but from a public relations standpoint it will probably be better that we are working with campers a day in advance,” giving people “time to get their stuff out.” *Id.*

Also over the weekend, Ms. Fonseca e-mailed Chief Clauson seeking an update on Hawthorne Park. SER-29. She specifically asked whether a resource fair to connect unhoused individuals with services would be held, and, if so, when and where it would be. *Id.* She further asked: “Does the police department plan on clearing Hawthorne Park, or

taking any other actions regarding Hawthorne Park? If so, when?” *Id.* Ms. Fonseca’s e-mail was sent more than 24 hours after Chief Clauson had internally relayed his plan to “clean up Hawthorne Park,” SER-115-16, and had received notice of Sjothun’s written order to close the park, SER-30-31.

But Chief Clauson declined to share that information. He waited until Monday afternoon to reply and then told Ms. Fonseca only that the city was “bringing resources in this morning and will continue through the end of day Tuesday [September 22, 2020],” and that Lieutenant Trevor Arnold would handle media inquiries. SER-29. In other words, in response to a direct question about whether the police department planned to clear the park, Chief Clauson addressed only the provision of resources to unhoused individuals—thereby creating the misleading impression that law enforcement would not be taking other actions, such as evicting campers or purporting to close the park. No evidence in the summary judgment record indicates that Ms. Fonseca was informed of the purported closure of Hawthorne Park in advance, despite the fact that she explicitly asked the Police Chief whether any such action was planned.

B. Medford Police Remove the Hawthorne Park Encampment.

On Monday, September 21, 2020, officers patrolled Hawthorne Park, posting notices on tents instructing campers to vacate within 24 hours or face arrest, and offering to connect campers with shelters and other service organizations. *See, e.g.*, Kafoury Decl. Ex. 20 at 3:30-6:40 (bodycam video); *see also* ER-112. Throughout the day, reporters conducted interviews with campers and others in the park, and social service agencies held a resource fair for campers. *See generally* Kafoury Decl. Ex. 20 (bodycam video); SER-32; *see also* ER-112-13. According to the City, over 30 people accepted placement in shelters or were connected to other services. SER-112-13. Despite the City's assertion that the purported closure and encampment removal was necessitated by drug use, human waste, and other public-safety threats, ER-121-22, the more than 28 hours of bodycam and other video footage produced in discovery shows *no* evidence whatsoever of needles or feces visible in the park. SER-124 (Yang Decl. ¶¶ 2-3).

As part of their planning for the clearance, Defendants decided to specifically exclude reporters, other members of the media, and legal observers from entering Hawthorne Park during the encampment

clearance. SER-54. They did so despite knowing that the encampment had become a newsworthy “hot button political issue,” SER-75 (Sjothun Dep. 35), that local reporters, including Ms. Fonseca, were covering. Defendant Medford Police Lieutenant Trevor Arnold, who served as the Incident Commander for the operation and was its designated media contact, testified that he selected a “media staging area” *outside* the park where police would direct reporters and other observers. SER-61-62 (Arnold Dep. 12-15). Arnold admitted that he spent “all of about two minutes to pick out that space,” and that he did not consider whether any alternative locations within the park, which covers more than 700,000 square feet, might serve as more suitable locations for media to observe and record. SER-61-62 (Arnold 12-15, 24-25); SER-124 (Yang Decl. ¶ 4).

The “media staging area” was approximately 208 feet from the center of the tent encampment. SER-124 (Yang Decl. ¶ 4); *see* SER-128. Trees and other obstacles obscured the view of the police activity from that location. SER-122. And the staging area was located near an interstate highway overpass and other roads such that traffic noise rendered it impossible to hear, much less record audio of, the police activity taking place in the park. SER-118 (Neumann Decl. ¶¶ 9-10).

Bodycam footage captured the Event Supervisor for the Hawthorne Park operation, Defendant Medford Police Corporal Randall Jewell, gleefully anticipating the exclusion of the media. On September 21, as preparations for the clearance unfolded, Jewell told Defendant Medford Police Officer Geoffrey Kirkpatrick: “The benefit[] of tomorrow is. The park is closed. So they don’t have to follow us around fucking recording us all the time.” SER-12. Officer Kirkpatrick replied: “No. Get the fuck out.” *Id.*

The clearance took place the next morning. As the same pair of officers arrived on the scene, Officer Jewell said: “They got to leave. Legal observers got to leave.” Kafoury Decl. Ex. 6 (bodycam video). Officer Kirkpatrick added: “Media got to leave.” *Id.* Officer Jewell agreed. *Id.* Around this time, Jewell and Arnold gave an operational briefing to the police officers assigned to clear the park. SER-79 (Jewell Dep. 55-56); SER-66-27 (Arnold Dep. 36-39). Jewell and Arnold told the assembled officers that reporters and other members of the media should be directed to the media staging area outside Hawthorne Park. SER-67 (Arnold Dep. 39).

Evidence in the record shows that Defendants’ purported “closure” of Hawthorne Park operated, in practice, as a selective exclusion of specific individuals based on their purpose for being in the park, with officers exercising broad discretion over which people to arrest. Officers were told at the morning briefing that anyone who was helping the campers pack and move could remain in the park. SER-67 (Arnold Dep. 40). Bodycam footage from the police operation shows a number of civilians, as well as city officials, in the park during the encampment clearance. Yang Decl. Ex. 5 (bodycam video); Yang Decl. Ex. 6 (bodycam video); *see generally* Kafoury Decl. Ex. 1 (bodycam video); *see also* SER-98.

Individuals who claimed they were there to help the campers in any way were permitted to stay. For example, an officer told two men who said they wanted to help get campers into shelters, “Perfect, I’m just trying to differentiate the looky-loos.” Yang Decl. Ex. 6 at 0:01-0:15 (bodycam video). Shortly thereafter that same officer recounted to his colleagues that he’d told another civilian to help out if he wanted to stay in the park, prompting that person to “go get trash bags.” *Id.* at 0:30-1:00. Another officer told a group of campers sitting around that they would

receive “leniency” as long as they actively started packing. Kafoury Decl. Ex. 21 at 4:55-5:20 (bodycam video). Indeed, the city admitted in discovery that numerous people *were* permitted to remain in Hawthorne Park during the encampment clearance—including various city employees, any employee or agent of private social service agencies seeking to help the campers, and even members of the general public so long as they “were actively engaged in” assisting the campers with “gathering their belongings and leaving the park.” SER-96-100.

Meanwhile, Defendants aggressively removed journalists and legal observers from the park. Footage from the bodycam of Defendant Medford Police Officer Steven Furst shows him evicting multiple journalists and observers from the park and threatening them with arrest. Kafoury Decl. Ex. 1 at 1:00-2:40 (bodycam video). Officer Furst later wrote in a report that he began evicting journalists, including two who were “hesitant and resistive,” shortly after arriving. ER-133. Local TV news reporters who had been excluded from the park were forced to broadcast from outside. Kafoury Decl. Ex. 2 at 0:05-1:00 (footage from KTVL Channel 10 reporter, noting he “had to be escorted out earlier” and recording from outside Hawthorne Park); Kafoury Decl. Ex. 3 (footage

from local NBC affiliate reporter narrating from outside the park, with police activity barely visible in the distant background).

C. Defendants Arrest Ms. Fonseca.

Ms. Fonseca arrived at the park before dawn on September 22 to begin recording conversations and reporting on police activity within the park. SER-20 (Fonseca Dep. 46-47). She was wearing a hat that identified her employer, “JPR,” a press pass, and carrying professional recording equipment. Kafoury Decl. Ex. 1 at 1:30-2:50 (bodycam video); SER-121. Police arrived a couple of hours after Ms. Fonseca began reporting that morning. SER-20-21 (Fonseca Dep. 46-47, 55-56). As the police operation began, Ms. Fonseca moved through the park, silently recording interactions between officers, campers, and other civilians. *See, e.g.*, Kafoury Decl. Ex. 21 at 2:45-3:15 (bodycam video). Shortly after 8:00 a.m., Officer Furst—who, as detailed above, began evicting media and observers shortly after arriving in the park—encountered Ms. Fonseca silently recording. Kafoury Decl. Ex. 1 at 1:30-2:50 (bodycam video). Within 30 seconds of encountering Ms. Fonseca, Officer Furst pronounced her under arrest and began twisting her arms into handcuffs. *Id.* at 2:42-3:12.

All within that half minute: Officer Furst turned to Ms. Fonseca and asked, “Can I help you?” *Id.* at 2:41-2:46. She replied, “I’m a reporter.” *Id.* Officer Furst told her to “go up there and contact Trevor Arnold,” prompting Ms. Fonseca to shake her head in a “no” gesture while telling him, “I’m in a public park and I’m reporting on this.” *Id.* at 2:46-2:52. Officer Furst told her, “You’re trespassing,” to which Ms. Fonseca replied “I am not trespassing. This is a public park.” *Id.* at 2:52-2:56. Officer Furst told her, “The park is closed,” but Ms. Fonseca insisted, “This is my job.” *Id.* at 2:56-3:00.

Throughout this encounter, the two stood several feet apart, and Ms. Fonseca does not appear to have moved from the spot on which she stood when Officer Furst first engaged her. Officer Furst then turned away from Ms. Fonseca for roughly four seconds, during which, the bodycam footage shows, Ms. Fonseca also turned, began walking away from him, and appears to have been preparing to record someone else. *Id.* at 3:00-3:05. As Officer Furst turned back to Ms. Fonseca and began to address her again, she looked back at him, still holding out her professional recording equipment, and the officer told her, “OK, I’m going to tell you right now, OK, you’re committing the crime of trespass, the

park is closed, you have to leave.” *Id.* 3:04-3:09. Ms. Fonseca once again silently shook her head “no,” at which point Officer Furst said, “OK, you’re under arrest.” *Id.* at 3:09-3:11. As he said that, in one motion, he grabbed her right hand (which was holding her recording equipment) and began to twist it behind her back. *Id.* at 3:09-3:11.

Defendant Probation Officer Anna Stokes jumped in to assist Officer Furst with arresting the shocked Ms. Fonseca. *Id.* at 3:11-3:14. Ms. Fonseca protested, calling out, “Hey! Hey! I am a reporter! What the fuck? I’m just doing my job. I’m here to report on this.” *Id.* at 3:12-3:24. Officer Furst then began addressing several other officers who approached to assist with the arrest, telling them that he had told Ms. Fonseca where reporters had to go, but she had refused to leave. Although Ms. Fonseca’s *verbal* protests became more agitated, and she screamed “let me go!” as several larger men handcuffed her, the video shows that at no point did she *physically* resist arrest. The officers nonetheless told her to “stop resisting” as they pried her recording equipment from her hands and forced them into cuffs. *Id.* at 3:25-4:00. Other officers, including Officer Kirkpatrick, formed a perimeter around Ms. Fonseca and the arresting officers.

Another observer, who was recording on a cellphone but does not appear—based on the bodycam footage—to have been carrying press credentials, stood nearby recording Ms. Fonseca’s arrest and cursing at the officers. Although the officers told the observer to leave, at no point did they try to arrest her, and she was allowed to walk away. *Id.* at 4:00-4:30. Shortly after officers led Ms. Fonseca away in handcuffs, Officer Furst approached several of his colleagues and justified his arrest of a reporter, claiming, “That JPR girl kept getting in my face.” *Id.* at 4:50-5:05. The bodycam footage shows that Ms. Fonseca had done no such thing.

Defendants led Ms. Fonseca away and—although they had the discretion to merely issue her a citation, evict her from the park, and leave it at that—she was arrested and taken to the Jackson County jail. SER-84 (Furst Dep. 77). Ms. Fonseca’s recording equipment was seized and searched. SER-88 (Barringer Dep. 46). Ms. Fonseca was held for hours without the ability to make a phone call because, she was told, she likely would not be fully booked into the county jail; eventually, however, and without warning or explanation, she was fully booked into the jail, which required “stripping down in front of a worker at the jail and a

trainee, and doing a full cavity search.” SER-27 (Fonseca Dep. 123-24); SER-91 (Kennedy Dep. 21). Ms. Fonseca described this experience as “incredibly humiliating” and something she “can’t seem to get over.” SER-28 (Fonseca Dep. 125).

Ms. Fonseca was charged with trespassing, resisting arrest, and interference with an officer. SER-33. After the city dismissed the interference charge, *id.*, Ms. Fonseca moved to dismiss the trespassing charge, arguing that her arrest violated the First Amendment to the U.S. Constitution, as well as the Oregon Constitution, SER-34-48. The court granted Ms. Fonseca’s motion and dismissed her trespassing charge, SER-49, at which point the city dismissed the remaining charge of resisting arrest.

II. Procedural History

Ms. Fonseca filed this lawsuit following the dismissal of all criminal charges against her, and named as Defendants the City of Medford, Jackson County,³ City Manager Sjothun, Probation Officer Stokes, and eight individual Medford Police Officers. ER-144-53. Ms. Fonseca invoked 42 U.S.C. § 1983, alleging that Defendants violated her First

³ The County was later dismissed as a Defendant.

Amendment rights to freedom of the press and freedom of speech and her Fourth Amendment right to be free from unreasonable search and seizure. *Id.* She also asserted state-law claims for false arrest and battery. *Id.* Following discovery, the City of Medford and individual Defendants moved for summary judgment on all claims. ER-84-109. As relevant to this appeal, the individual Defendants claimed qualified immunity.

The district court denied Defendants' motion for summary judgment in full. The district court first found that Defendants were not entitled to summary judgment on Ms. Fonseca's claim that they had violated her First Amendment rights by preventing her from observing and recording police activity in a public park, "a traditional public forum where such protections are at their strongest." ER-10. The court found that, because Ms. Fonseca was indisputably engaged in activity protected by the First Amendment, the government bore the burden of establishing the constitutionality of the restrictions imposed. ER-11. The court found that Defendants had failed to present enough evidence to justify their actions under either the "time/place/manner test" or the "right of access doctrine" because they had failed to show either that exigent

circumstances justified the closure of the park or that they had left open adequate alternative channels for expressive activity. ER-11-18. The court likewise found that Defendants were not entitled to summary judgment on Ms. Fonseca's Fourth Amendment claim because, if "the command [to leave Hawthorne Park] was ... violative of the Constitution," then "the resulting arrest was unlawful, and the incident search was beyond the bounds of the Fourth Amendment." ER-19.

For similar reasons, the court denied Defendants' request for qualified immunity, finding that the rights Ms. Fonseca invoked were clearly established at the time of her arrest. ER-22-24. The court also denied Defendants' motion for summary judgment with respect to Ms. Fonseca's municipal-liability claim against the City of Medford, ER-20-21, as well as her state-law claims for false arrest and battery. ER-24-25.

Defendants timely appealed the district court's denial of qualified immunity to the individual Defendants on Ms. Fonseca's constitutional claims.

STANDARD OF REVIEW

The Court "review[s] *de novo* the denial of a motion for summary judgment predicated on qualified immunity." *Felarca v. Birgeneau*, 891

F.3d 809, 815 (9th Cir. 2018). This Court “must affirm the district court’s denial of qualified immunity if, resolving all factual disputes and drawing all inferences in [the plaintiff’s] favor, [the defendant’s] conduct (1) violated a constitutional right that (2) was clearly established at the time of the violation.” *Ballou v. McElvain*, 29 F.4th 413, 421 (9th Cir. 2022).

SUMMARY OF ARGUMENT

The Court lacks jurisdiction in this interlocutory appeal to review the district court’s factual findings. The Court’s collateral order jurisdiction to review denials of qualified immunity is circumscribed: The Court may consider purely legal questions, but not fact-related questions about the sufficiency of the evidence in the pretrial record. Accordingly, the Court has jurisdiction to consider Defendants’ arguments that the district court applied the wrong legal standards and misapplied the law to the undisputed facts. But the Court may not review the district court’s determination that Defendants presented insufficient evidence either to satisfy heightened scrutiny under the First Amendment or to demonstrate probable cause under the Fourth Amendment.

Defendants are not entitled to qualified immunity on Ms. Fonseca's First Amendment claim. Contrary to Defendants' suggestion, the district court applied the correct legal standard. This Court's precedents clearly establish that when the government denies the press and public access to newsworthy events occurring in a traditional public forum, those restrictions are subject to heightened First Amendment scrutiny. That is true under two complementary, mutually reinforcing lines of cases. This Court's right-of-access precedents establish that in order to deny access to a government proceeding traditionally open to the public, the government must show an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. Likewise, the Court's free speech precedents establish that time, place, and manner restrictions on expression in a public forum, even if they are content-neutral, must be narrowly tailored to serve a significant government interest and leave open ample alternative channels for communication.

Defendants' actions in excluding reporters and the public from Hawthorne Park during an encampment clearance and in arresting Ms. Fonseca for attempting to report on that event trigger heightened

scrutiny under either line of precedent. Ms. Fonseca's newsgathering activity was protected by the First Amendment. Hawthorne Park is a traditional public forum. And the encampment clearance was a newsworthy event that the press and public had an interest in observing. The right to record the police in public exposes their actions to the light of public accountability.

Because heightened scrutiny applies, Defendants' appeal must fail. They make no effort whatsoever in this Court to satisfy heightened scrutiny, nor could they. The evidence they presented to the district court provided no support for their contention that the closure of Hawthorne Park and the arrest of Ms. Fonseca were necessary to protect public safety. During the closure, Defendants let in anyone who wanted to help clean the park, refuting their contention that the situation was too dangerous for a reporter to safely observe. If Ms. Fonseca had simply identified herself as a volunteer instead of a journalist, she would have been allowed to stay. Worse yet, evidence in the record indicates that Defendants singled out Ms. Fonseca for arrest specifically because of her constitutionally protected newsgathering. Their real purpose was to avoid public scrutiny, not protect public safety.

Defendants offer two responses, neither of which is persuasive. First, they argue that the right-of-access test requires only rational-basis review, but that is plainly incorrect under this Court's precedent. Second, they say that because the park was closed, Ms. Fonseca had no right to enter it, but that argument is tautological. The whole point of the right-of-access test is to assess the constitutionality of closing off government proceedings to public view. The test would do no work if every closure was constitutional merely by virtue of being a closure. That is not the law. Instead, the Court must ask whether the closure was necessary to serve a government interest that overrides Ms. Fonseca's right to report on a newsworthy event occurring in a traditional public forum. This Court's precedents provide a clear answer: the closure and subsequent arrest violated the First Amendment.

For similar reasons, Defendants are not entitled to qualified immunity on Ms. Fonseca's Fourth Amendment claim. Their assertion of probable cause to arrest Ms. Fonseca for trespass depends wholly on their contention that Ms. Fonseca refused a lawful order to leave the park. But because Ms. Fonseca had a First Amendment right to remain in the park, the order directing her to leave was not lawful.

The district court’s denial of qualified immunity should be affirmed.

ARGUMENT

I. The Court Lacks Jurisdiction to Review Factual Disputes.

“An order denying a motion for summary judgment is usually not an immediately appealable final decision.” *Est. of Anderson v. Marsh*, 985 F.3d 726, 730 (9th Cir. 2021). The Court “may, however, review orders denying qualified immunity under the collateral order exception to finality.” *Ballou v. McElvain*, 29 F.4th 413, 421 (9th Cir. 2022) (citing *Plumhoff v. Rickard*, 572 U.S. 765, 771-73 (2014)). But that collateral-order review is “circumscribed.” *Foster v. City of Indio*, 908 F.3d 1204, 1210 (9th Cir. 2018).

In this interlocutory posture, the Court may review “the application of ‘clearly established’ law to” an “undisputed[] set of facts.” *Johnson v. Jones*, 515 U.S. 304, 313 (1995). But the Court may not review any “portion of a district court’s summary judgment order that, though entered in a ‘qualified immunity’ case, determines only a question of ‘evidence sufficiency,’ *i.e.*, which facts a party may, or may not, be able to prove at trial.” *Id.* Although that distinction “has perplexed courts for years,” this Court has “stated the rule as follows: A ‘public official may

not immediately appeal a fact-related dispute about the pretrial record, namely, whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial.” *Peck v. Montoya*, 51 F.4th 877, 885 (9th Cir. 2022) (quoting *Est. of Anderson*, 985 F.3d at 731).

Here, the district court denied summary judgment to Defendants based on several “underlying factual disputes that only a jury can resolve.” ER-11. Most significantly, the district court found a material dispute of fact with respect to Defendants’ purported justification for excluding journalists from Hawthorne Park during the removal of the encampment. Defendants contended that the encampment clearance constituted an “emergency operation” requiring closure of the park, but they failed to present evidence proving that their safety and sanitation concerns necessitated excluding observers. ER-16, 12-13.

The district court found that “Defendants have not offered any evidence that allowing reporters and observers in the park during the clearance posed any threat to the safety of anyone in the park.” ER-13. The clearance “was a scheduled, announced event that took place over several hours, with multiple civilians allowed to enter and remain in the park, while city employees and social service agency representatives

came and went.” ER-15-16. Meanwhile, “Plaintiff’s actions did not interfere with the ability of the police to do their job.” ER-17. “[I]n fact, if Plaintiff had simply been acting as a civilian volunteer she would have been allowed to enter the restricted access area.”⁴ *Id.* This Court lacks jurisdiction to review the district court’s conclusion that Defendants presented insufficient evidence to back up their claim that public safety required excluding reporters from the park. *See Peck*, 51 F.4th at 885 (quoting *Est. of Anderson*, 51 F.4th at 731).

The district court also found a factual dispute regarding whether Defendants left open “ample alternative channels” for Ms. Fonseca’s newsgathering activity. ER-14. Although Defendants set up a “media staging area” outside the park during the encampment clearance, the district court found that “Plaintiff could not successfully observe and report on police activity from the sidewalks and media staging area.” ER-14. The media staging area “served its purpose only in name.” *Id.*

⁴ Because Ms. Fonseca did not file a cross-motion for summary judgment, the district court had no occasion to consider whether, viewing all evidence in the light most favorable to Defendants, Ms. Fonseca would have been entitled to judgment as a matter of law. *See Fed. R. Civ. P. 56.* But at several points in its analysis, including the passages quoted above, the district court indicated that the evidence strongly favored Ms. Fonseca. *See ER-10-18.*

“Reporters and observers could not see, hear, or record interactions between and among law enforcement and people in the park from the staging area.” *Id.* Trees and buildings in the park made it difficult for reporters to see the clearance from the staging area, while noise from a nearby interstate made it difficult to hear. *Id.* Based on “evidence that reporters could not hear, see, record and report on police activity” from the staging area, the district court found “a factual dispute a jury must resolve to determine whether these restrictions left open ample means of observation and communication.” ER-15. Here again, this Court lacks jurisdiction to second-guess the district court’s weighing of the evidence. *Peck*, 51 F.4th at 885.

As explained more fully below, the upshot is that, as to several issues on which Defendants bore the burden of proof, including whether their actions satisfy First Amendment scrutiny, the Court lacks jurisdiction to review the district court’s conclusion that Defendants submitted insufficient evidence.

II. Defendants Are Not Entitled to Qualified Immunity on Ms. Fonseca’s First Amendment Claim.

A. Defendants Misstate the First Amendment Standard.

Defendants contend that the district court committed “legal error” by subjecting the exclusion order and Ms. Fonseca’s arrest under that order to heightened First Amendment scrutiny. Opening Br. 22. According to Defendants, the district court should have analyzed the exclusion order and subsequent arrest as restrictions on the right to access government proceedings, rather than as restrictions on the freedom of speech. *Id.* at 22-23. And Defendants claim that Ms. Fonseca’s right of access may be defeated so long as “the exclusion was rationally related to the accomplishment of a legitimate governmental purpose.” *Id.* at 26.

But the district court applied the appropriate standards, and it is instead Defendants who misstate the relevant law. They rely on outdated, out-of-circuit cases while completely ignoring well-established, binding precedent from this Court and the Supreme Court. Regardless of whether Defendants’ actions are analyzed as restrictions on the right of access to government proceedings or as restrictions on expression in a

public forum, those restrictions are subject to heightened scrutiny—not rational-basis review.

1. Restrictions on the Right of Access Are Subject to Heightened Scrutiny.

Contrary to Defendants’ suggestion (at 16), the district court did in fact evaluate whether Defendants violated Ms. Fonseca’s First Amendment rights under the right-of-access test. Indeed, the district court’s opinion included an entire section applying precedent from the Supreme Court and this Court holding that “[r]eporters and members of the public have a First Amendment qualified right of access to government proceedings.” ER-17-18 (citing *Press-Enter. Co. v. Superior Ct. (Press-Enter. II)*, 478 U.S. 1, 8 (1986)). And as the district court correctly explained, the right-of-access standard is far more demanding than Defendants suggest.

As this Court has long held, “the First Amendment protects the media’s right to gather news,” *Daily Herald Co. v. Munro*, 838 F.2d 380, 384 (9th Cir. 1988), including “a qualified right of access for the press and public to observe government activities,” *Leigh v. Salazar*, 677 F.3d 892, 898 (9th Cir. 2012). “Open government has been a hallmark of our democracy since our nation’s founding,” which “has made possible the

vital work of . . . investigative journalists who have strengthened our government by exposing its flaws.” *Id.* at 897. Given this history and tradition, “courts have a duty to conduct a thorough and searching review of any attempt to restrict public access.” *Id.* at 900. “The free press is the guardian of the public interest, and the independent judiciary is the guardian of the free press.” *Id.*

The Supreme Court has “articulated a two-part test to determine whether a member of the public has a First Amendment right to access a particular place and process.” *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 829 (9th Cir. 2020) (citing *Press-Enter. II*, 478 U.S. 1). A court must ask “whether the place and process has historically been open to the press and general public” and “whether public access plays a significant positive role in the functioning of the particular process in question.” *Press-Enter. II*, 478 U.S. at 8. If the answer to those questions is yes, “a presumptive First Amendment right of access arises.” *Courthouse News Serv. v. Planet (Courthouse News II)*, 947 F.3d 581, 590 (9th Cir. 2020). If a qualified right of access exists, the government can overcome that right and exclude reporters and the public only by showing “an overriding interest based on findings that closure is essential to

preserve higher values and is narrowly tailored to serve that interest.” *Press-Enter. II*, 478 U.S. at 9 (quoting *Press-Enter. Co. v. Superior Ct.* (*Press-Enter. I*), 464 U.S. 501, 510 (1984)).

Once the right of access attaches, binding precedent thus requires the government to show that a restriction is both “essential to preserve higher values” and “narrowly tailored.” *Press-Enter. II*, 478 U.S. at 9. This Court has described that standard as subjecting restrictions on the right of access to “rigorous scrutiny.” *Leigh*, 677 F.3d at 900. Defendants’ request that the Court instead apply rational-basis review relies on out-of-circuit cases that are outdated and irreconcilable with this Court’s precedent. For instance, Defendants cite (at 23) a Second Circuit case decided two years before *Press-Enterprise II* that adopted a less demanding standard in part because the Supreme Court had not yet provided clear guidance on whether the “newly minted” right of access would receive “the same degree of protection historically accorded to free expression.” *In re Application of The Herald Co.*, 734 F.2d 93, 100 (2d Cir. 1984). But two years later, in *Press-Enterprise II*, the Supreme Court did in fact grant the right of access that degree of protection, and this Court has subsequently held that “recording of conversations in connection

with . . . newsgathering activit[y] is protected speech within the meaning of the First Amendment.” *Project Veritas v. Schmidt*, 125 F.4th 929, 943 (9th Cir. 2025) (en banc). The Second Circuit’s decision in *Herald Co.* thus conflicts with this Court’s precedent.

Defendants also appear to rely on the Sixth Circuit’s decision in *S.H.A.R.K. v. Metro Parks Serving Summit County*, 499 F.3d 553 (6th Cir. 2007), though they quote the case without providing a full citation. See Opening Br. 25-26. Although *S.H.A.R.K.* is more recent, it fails to cite *Press-Enterprise II* and instead applies a standard drawn from a single district-court decision, *D’Amario v. Providence Civic Center Authority*, 639 F. Supp. 1538 (D.R.I. 1986), which suggested that content-neutral restrictions on the right of access need only be “reasonably related to the government’s interest.” *S.H.A.R.K.*, 499 F.3d at 560-61. That standard is inconsistent with *Press-Enterprise II* and this Court’s cases, which do not require a limitation on access to be content-based for heightened scrutiny to apply. *E.g., Leigh*, 677 F.3d at 898. And even in *S.H.A.R.K.*, despite applying a standard that conflicts with this Court’s cases, the Sixth Circuit emphasized that limitations on access must “outweigh the systemic benefits inherent in unrestricted . . . access.” 499 F.3d at 560

(quoting *D’Amario*, 639 F. Supp. at 1543). This more searching review is necessary, the court said, to ensure that the government cannot “arbitrarily shroud genuinely newsworthy events in secrecy.” *Id.*

Meanwhile, Defendants fail to cite this Court’s binding precedent delineating the contours of the right-of-access test. Those cases make plain that to “overcome plaintiffs’ right of access,” a defendant must “demonstrat[e] ‘an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.’” *Index Newspapers*, 977 F.3d at 831 (quoting *Press-Enter. II*, 478 U.S. at 9). That is the right-of-access test applicable in this case.

2. Time, Place, and Manner Restrictions on Newsgathering in a Public Forum Are Likewise Subject to Heightened Scrutiny.

In addition to its right-of-access analysis, the district court also analyzed Defendants’ issuance and enforcement of the exclusion order under the standards applicable to time, place, and manner restrictions on First Amendment activity in public forums. Contrary to Defendants’ arguments (at 16), the district court’s time, place, and manner analysis was perfectly consistent with this Court’s precedent recognizing that

restrictions on access are especially suspect when they occur in a public forum.

“[T]he Supreme Court has repeatedly observed that excluding the media from public fora can have particularly deleterious effects on the public interest, given journalists’ role as ‘surrogates for the public.’” *Index Newspapers*, 977 F.3d at 830 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572-73 (1980)). “The First Amendment protects the right to photograph and record matters of public interest,” “includ[ing] the right to record law enforcement officers engaged in the exercise of their official duties in public places.” *Askins v. U.S. Dep’t of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018); *see also Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995).

This Court has recognized that when government seeks to limit newsgathering in public places, the freedom of speech is implicated more directly than when government limits access to otherwise nonpublic proceedings. In *Askins*, for instance, the Court analyzed restrictions on photographing government activities at U.S. ports of entry as an infringement on “speech on matters exposed to public view—not the right of access to government-controlled information or to areas not freely open

to the public.” *Askins*, 899 F.3d at 1044 n.2. Since *Askins*, the Court has repeatedly reaffirmed that “an organization’s ‘recording of conversations in connection with its newsgathering activities is protected speech within the meaning of the First Amendment,’” especially when it occurs in “traditional public forums.” *Garcia v. Cnty. of Alameda*, 150 F.4th 1224, 1230, 1232 (9th Cir. 2025) (quoting *Project Veritas*, 125 F.4th at 943); see also *Project Veritas*, 125 F.4th at 944 (holding that the First Amendment protects “record[ing] newsworthy conversations involving public officials, police, and protesters”).

Speech restrictions in traditional public forums are especially suspect. As this Court has long recognized, “[p]ublic fora have achieved a special status in our law,” and “the government must bear an extraordinarily heavy burden to regulate speech in such locales.” *NAACP v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984). “The government’s ability to regulate speech in a traditional public forum, such as a street, sidewalk, or park, is ‘sharply circumscribed.’” *Askins*, 899 F.3d at 1044 (quoting *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45 (1983)).

Given the strong protection afforded to speech occurring in traditional public forums, content-based restrictions on speech occurring there are “subject to strict scrutiny and may only be upheld if they are ‘the least restrictive means available to further a compelling government interest.’” *Askins*, 899 F.3d at 1044 (quoting *Berger v. City of Seattle*, 569 F.3d 1029, 1050 (9th Cir. 2009) (en banc)). “Reasonable, content-neutral, time, place, or manner restrictions, on the other hand, are subject to ‘an intermediate level of scrutiny.’” *Id.* (quoting *Jacobson v. U.S. Dep’t of Homeland Sec.*, 882 F.3d 878, 882 (9th Cir. 2018)). Such time, place, and manner restrictions must be “‘narrowly tailored to serve a significant governmental interest,’ ‘leave open ample alternative channels for communication of the information,’ and . . . ‘not delegate overly broad licensing discretion to a government official.’” *Id.* (quoting *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1023-24 (9th Cir. 2009)).

That public forum analysis dovetails neatly with the right-of-access test. As this Court has noted, the right to access government proceedings “is inextricably intertwined with the First Amendment right of free speech.” *Courthouse News Serv. v. Planet (Courthouse News I)*, 750 F.3d

776, 785 (9th Cir. 2014). And when access to government activity has been restricted in a traditional public forum, this Court has blended the two tests, as the district court did here. For instance, the Court used the “time, place, and manner” test where a plaintiff “was located on a public street, which is a quintessential public forum” and “was engaging in the First Amendment-protected activity of observing a government operation.” *Reed v. Lieurance*, 863 F.3d 1196, 1211 (9th Cir. 2017); *see also Courthouse News II*, 947 F.3d at 595-96 (discussing overlap between the tests when “access policies resemble time, place, and manner restrictions”).

Ultimately, both tests require a plaintiff to show that she is engaged in activity protected by the First Amendment in a place traditionally open for that activity. The burden then shifts to the government to show that restrictions on that activity are narrowly tailored to serve an overriding government interest, including by leaving open adequate alternative avenues of communication. Contrary to Defendants’ position, neither test allows the government to cut off access merely by showing any rational basis for doing so.

B. Defendants Violated Ms. Fonseca’s Clearly Established First Amendment Right to Report on the Encampment Clearance in Hawthorne Park.

Whether analyzed as a restriction on the right to access government proceedings or on the right to gather news in a public forum, Defendants’ issuance and enforcement of the exclusion order violated Ms. Fonseca’s clearly established First Amendment rights.

1. Defendants’ Actions Trigger Heightened Scrutiny.

To ascertain whether the right of access attaches, the Court asks “whether the place and process has historically been open to the press and general public” and “whether public access plays a significant positive role in the functioning of the particular process in question.” *Press-Enter. II*, 478 U.S. at 8. Similarly, for purposes of public forum analysis, the Court begins by asking whether the plaintiff is engaged in speech protected by the First Amendment and whether that speech is occurring in a public forum. *Askins*, 899 F.3d at 1044.

Defendants do not contest that, at the time of her arrest, Ms. Fonseca was attempting to engage in newsgathering protected by the First Amendment. And it is plain under this Court’s precedent that she was. “[T]he First Amendment protects the media’s right to gather news.”

Daily Herald Co., 838 F.2d at 384. That includes “the right to record law enforcement officers engaged in the exercise of their official duties in public places.” *Askins*, 899 F.3d at 1044.

Here, Ms. Fonseca went to Hawthorne Park on the day of the encampment clearance to “[s]ee what happened, record exchanges between people, and report on those events to the public.” SER-20 (Fonseca Dep. 47); *see also* SER-22 (Fonseca Dep. 60) (Ms. Fonseca explaining that she was “there as a reporter covering public activities in the public interest”). Bodycam footage of Ms. Fonseca’s arrest shows that she was carrying a press pass and professional recording equipment, and she repeatedly indicated to officers at the scene that she was there to report on the clearance activity. Kafoury Decl. Ex. 1 at 1:30-2:50 (bodycam video); SER-121. Even the police report documenting Ms. Fonseca’s arrest noted that she had identified herself as a reporter and was in the process of recording police activity when Defendants initially encountered her in the park. ER-133. At the time of her arrest, Ms. Fonseca was thus “engaging in the First Amendment-protected activity of observing a government operation.” *Reed*, 863 F.3d at 1211.

It is equally plain that Hawthorne Park is a traditional public forum, *Askins*, 899 F.3d at 1044, which has historically been open to the press and general public, *Press-Enter. II*, 478 U.S. at 8. Both the Supreme Court and this Court have repeatedly identified parks as “a traditional public forum.” *Askins*, 899 F.3d at 1044. Public parks “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). Because public parks are “quintessential public forums,” “the rights of the state to limit expressive activity are sharply circumscribed.” *Perry Educ. Ass’n*, 460 U.S. at 45.

The mere fact that the encampment clearance involved the police does not undermine the public’s right of access. “[C]ircuit precedent establish[es] the right to film public police activity.” *Index Newspapers*, 977 F.3d at 831; *see also Fordyce*, 55 F.3d at 439 (recognizing a “First Amendment right to film matters of public interest” where the plaintiff recorded police during a public protest). Like this Court, at least five other circuits “have all recognized the public’s First Amendment right to observe and film police activities in public.” *Index Newspapers*, 977 F.3d

at 827 n.4 (collecting cases). Public access to police activity occurring in public “plays a significant positive role in the functioning of” police operations, *Press-Enter. II*, 478 U.S. at 8, by permitting the press to play “a vitally important role in holding the government accountable,” *Index Newspapers*, 977 F.3d at 831. “[W]hen the government announces it is excluding the press for reasons such as administrative convenience, preservation of evidence, or protection of reporters’ safety, its real motive may be to prevent the gathering of information about government abuses or incompetence.” *Leigh*, 677 F.3d at 900 (alteration in original) (quoting Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 Stan. L. Rev. 927, 949 (1992)) (alteration in original).

Indeed, it appears that Defendants targeted Ms. Fonseca for arrest specifically because of her constitutionally protected newsgathering. See Kafoury Decl. Ex. 6 (bodycam video) (Officer Kirkpatrick stating that “[m]edia got to leave”). In that way, the exclusion order was enforced in a manner that discriminated among those who wanted to enter the park based on the content of their speech. And such content-based restrictions are subject to strict scrutiny. *Askins*, 899 F.3d at 1044. But even if the Court were to assume, as the district court did, that the exclusion order

was content neutral, Defendants’ actions would still be subject to heightened scrutiny. *See id.* (describing the heightened scrutiny that applies to content-neutral time, place, and manner restrictions in public forums); *see also Courthouse News II*, 947 F.3d at 595-96 (describing the heightened scrutiny that applies to content-neutral restrictions on the right of access).

Defendants’ only response is to argue—incorrectly—that Ms. Fonseca failed to challenge the order closing Hawthorne Park. Opening Br. 21. Based on that alleged omission, Defendants say that the park must be regarded not as a public forum, but as an area “closed to the general public,” to which no right of access attaches. *Id.* at 22. This argument fails for a multitude of reasons.

To start, Ms. Fonseca made abundantly clear in the district court that she is in fact challenging all aspects of Defendants’ decision to exclude journalists from Hawthorne Park during the clearance of the encampment, including the supposed closure order. In her opposition to Defendants’ motion for summary judgment, Ms. Fonseca argued that Defendants’ “position rests on the assumption that the closure order is legal,” which put “the analysis backwards” because “they can only close

a public park in a manner that complies with the First Amendment’s requirements.” ER-53. Ms. Fonseca “is challenging Defendants’ actions preventing her from observing and recording police activity in a public park and arresting her for exercising her First Amendment rights.” *Id.*; *see also* ER-77 (rejecting Defendants’ framing of the issue as “whether reporters can trespass in areas closed to the public” and again clarifying that Ms. Fonseca “is challenging whether and how the government can restrict reporters’ and observers’ access to a public forum to observe and record police activity”). Ms. Fonseca is challenging the constitutionality of the closure order, the operation plan, the unwritten policy of excluding reporters from the park during the encampment clearance, and her arrest in accordance with those policies.

Defendants suggest that if Ms. Fonseca wanted to contest the closure, she needed to “challenge the constitutionality of the City Charter provision allowing such a closure.” Opening Br. 15; *see also* Medford City Charter § 18(3)(e) (granting the City Manager “general supervision of all city property”). But this again misapprehends the nature of Ms. Fonseca’s claims. Her argument is not that public parks can never be closed for any reason or that it is unconstitutional for city officials to have the power to

close a park in appropriate circumstances. Rather, her claim is that this particular closure, during this particular newsworthy event, with its particular effect on the ability of journalists and the public to observe and record police activity, violated the First Amendment. That was Ms. Fonseca's argument in the district court, and it is her argument in this appeal.

Defendants are also wrong to portray the "fact that Hawthorne Park had been closed to the public" as "undisputed." Opening Br. 22. To the contrary, the district court found a material dispute of fact regarding the extent to which the park was closed, given that "there were numerous campers and volunteers in the park" at the time of Ms. Fonseca's arrest. ER-8. The district court found that during the clearance, "multiple civilians [were] allowed to enter and remain in the park, while city employees and social service agency representatives came and went." ER-15-16. The operation plan for the clearance called for the participation of "[l]ocal outreach and shelter organizations." ER-123. And police bodycam footage from the clearance shows campers, police, city employees, representatives from social service agencies, and assorted volunteers who showed up to help the campers pack and move, all coming and going from

the park during the clearance. *E.g.*, Yang Decl. Ex. 5 (bodycam video); Yang Decl. Ex. 6 (bodycam video); Kafoury Decl. Ex. 1 (bodycam video); *see also* SER-98. For instance, one officer stated that he allowed a private citizen to remain in the park after the person said he would “go get trash bags.” Yang Decl. Ex. 6, 0:30-1:00 (bodycam video). Accordingly, the district court found that if Ms. Fonseca “had simply been acting as a civilian volunteer she would have been allowed to enter the restricted access area.” ER-17. Viewing the evidence in the light most favorable to Ms. Fonseca, Defendants selectively excluded journalists from the park, rather than closing it entirely.

More fundamentally, the entire purpose of the right-of-access test is to determine whether the government may constitutionally close a place or government proceeding to public observation. Likewise, time, place, and manner analysis comes into play only after the government has closed a public forum, at least in part, to First Amendment activity. The murder trial in *Richmond Newspapers*, 448 U.S. at 560, the pretrial hearing in *Press-Enterprise II*, 478 U.S. at 4, the executions in *California First Amendment Coalition v. Woodford*, 299 F.3d 868, 871 (9th Cir. 2002), the law enforcement operation herding buffalo in *Reed*, 863 F.3d

at 1202, and the horse roundup in *Leigh*, 677 F.3d at 894, had all been closed in full or in part to the public. But in each case, the closure was merely the starting point for the analysis. One of Defendants' own preferred cases explains the point well: "The lawful-right-of-access inquiry would be a circular endeavor if we merely determined that there was a rule prohibiting access and then stopped there. Instead, we must determine whether the rule blocking access is, itself, constitutional." *S.H.A.R.K.*, 499 F.3d at 560.

For similar reasons, Defendants are wrong to contend that Ms. Fonseca's First Amendment claim necessarily fails because other members of the public were barred from the park, and journalists have no greater access or speech rights than the public at large. *See* Opening Br. 23-24. Ms. Fonseca's argument is not that she as a reporter had a special right to be in the park. Her claim is that Defendants unconstitutionally excluded all observers, including her, from documenting a newsworthy government action occurring in a traditional public forum. This Court has held that "the press is entitled to a right of access at least coextensive with the right enjoyed by the public at large" and that "excluding the media from public fora can have particularly

deleterious effects on the public interest.” *Index Newspapers*, 977 F.3d at 830. As explained above, Ms. Fonseca was in fact treated worse than other members of the public. But even if she had not been, this Court has held that it makes no difference whether a reporter was “treated differently than other members of the public” because “that is not part of the *Press-Enterprise II* balancing test.” *Leigh*, 677 F.3d at 900.

In short, Ms. Fonseca challenges Defendants’ closure of Hawthorne Park to journalists and other observers during the encampment clearance and her arrest pursuant to that closure. Defendants’ actions trigger heightened constitutional scrutiny because Ms. Fonseca’s newsgathering is protected by the First Amendment, the park is a traditional public forum, and the ability of the public to record the police in public serves the vitally important purpose of exposing government activity to public view and, ultimately, public accountability.

2. *Defendants’ Actions Fail Heightened Scrutiny.*

If the Court agrees that the exclusion order and arrest trigger heightened scrutiny, it should stop its analysis there and affirm. Once a plaintiff shows that heightened scrutiny applies, the burden shifts to the government to “demonstrate[] an overriding interest in the viewing

restrictions” and that “the restrictions are narrowly tailored to serve that interest.” *Leigh*, 677 F.3d at 900; *see also Askins*, 899 F.3d at 1044 (explaining that content-neutral time, place, and manner restrictions must be “narrowly tailored to serve a significant governmental interest” and must “leave open ample alternative channels for communication of the information” (internal quotation marks omitted)). “The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.” *Press-Enter. I*, 464 U.S. at 510.

Here, as explained above, the Court lacks jurisdiction to consider whether Defendants carried their burden. The district court ruled against Defendants on the ground that they presented insufficient evidence to demonstrate either an overriding interest in closing the park or the existence of adequate alternative channels of expression. *See* ER-11-15. The district court found that “Defendants have not offered any evidence that allowing reporters and observers in the park during the clearance posed any threat to the safety of anyone in the park.” ER-13. To the contrary, the district court found that Defendants’ own statements in the record indicated that their primary objective may have been to

suppress newsgathering activity. *Id.* In this interlocutory appeal, the Court lacks jurisdiction to second-guess the district court’s ruling on “whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial.” *Peck*, 51 F.4th at 885 (quoting *Est. of Anderson*, 985 F.3d at 731).

Perhaps recognizing the Court’s lack of jurisdiction over factual disputes, Defendants make no effort whatsoever on appeal to satisfy heightened scrutiny. Instead, they argue only that the exclusion order and subsequent arrest are subject to rational-basis review. *See* Opening Br. 21-30. According to Defendants, the district court should “not have questioned the significance of the City’s interest in the safety of the operation” because “the evidence . . . existing in the record” was, “at a minimum, some evidence of a legitimate interest.” *Id.* at 27. But “some evidence” of a merely “legitimate” government interest is insufficient to justify either a restriction on the right of access or a time, place, and manner limitation on constitutionally protected activity in a public forum. Instead, Defendants needed to argue that they had an overriding interest and that their actions were narrowly tailored to that interest. They failed to do so, and “arguments not raised by a party in its opening

brief are deemed waived.” *United States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325, 336 (9th Cir. 2017) (quoting *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999)).

In any event, viewing the evidence in the light most favorable to Ms. Fonseca, Defendants failed to carry their burden of demonstrating their restriction of Ms. Fonseca’s newsgathering was “essential to preserve higher values” or “narrowly tailored to serve that interest.” *Press-Enter. II*, 478 U.S. at 9 (quoting *Press-Enter. I*, 464 U.S. at 510). In the district court, Defendants “argue[d] they excluded reporters and observers for safety reasons, fearing that the clearance could be volatile and that the damage to the park posed a general threat to health and safety.” ER-12. But contrary to Defendants’ suggestion on appeal, the district court did not find “that the City also presented evidence in support of [that] position.” See Opening Br. 27. To the contrary, the district court found that “Defendants have presented no evidence of any critical health or safety concerns justifying the wholesale exclusion of reporters and observers.” ER-12.

Defendants failed to substantiate their supposed safety concerns. Their evidence primarily pertained to their justifications for clearing the

encampment, rather than for excluding reporters from observing the clearance. Specifically, the closure order invoked a desire to “allow for sanitation, cleaning, and inspection of City property,” SER-31, and the operation plan cited a purported “increase of littering, drug use, and other unlawful behavior” in the encampment, ER-122. Those concerns with the encampment do not show an overriding interest in excluding observers. Defendants also point to an increase in calls for service at the park during the encampment, but their chart does not show an increase in the sorts of violent crime that might pose a safety risk to journalists. *See* ER-119 (indicating one assault call in the period before the encampment and also one assault call during the encampment). In fact, bodycam footage from the day before the clearance shows reporters safely conducting interviews with campers and others in the park, while social service agencies held a resource fair for campers. SER-29, 32. And Ms. Fonseca was safely, quietly observing the clearance at the time of her arrest. Kafoury Decl. Ex. 1 at 1:30-2:50 (bodycam video).

The presence of volunteers in the park throughout the closure further undermines Defendants’ purported safety interest. Officers were told at the morning briefing that anyone who was helping the campers

pack and move could remain in the park, SER-67 (Arnold Dep. 40), and bodycam footage from the police operation shows numerous civilians in the park during the encampment clearance. *See generally* Yang Decl. Ex. 5 (bodycam video); Yang Decl. Ex. 6 (bodycam video); Kafoury Decl. Ex. 1 (bodycam video). One officer told two men who said they wanted to help campers access shelters they could stay and that he was “just trying to differentiate the looky-loos.” Yang Decl. Ex. 6 at 0:01-0:15 (bodycam video). As the district court correctly concluded, “if the park was safe enough for volunteers, there is no reason to believe it was unsafe for journalists.” ER-13.

In addition, evidence in the record indicates that Defendants’ true reason for excluding observers was to avoid public scrutiny, not to protect anyone’s safety. Officers’ bodycams caught them denigrating and specifically targeting journalists and other observers. Officer Jewell said, “The benefit[] of tomorrow is, the park is closed. So they don’t have to follow us around fucking recording us all the time.” SER-12. As this Court has explained, “[w]hen the government announces it is excluding the press for reasons such as administrative convenience, preservation of evidence, or protection of reporters’ safety, its real motive may be to

prevent the gathering of information about government abuses or incompetence.” *Leigh*, 677 F.3d at 900 (internal quotation marks omitted). Here, the Court need not speculate about whether the officers had ulterior motives. They said so themselves.

Nor did Defendants demonstrate that they “le[ft] open ample alternatives for communication.” *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). The district court found that the “media staging area” Defendants set up for the press “served its purpose only in name.” ER-14. Defendant Arnold spent “all of about two minutes” selecting the media area. SER-61-62, 64-65 (Arnold Dep. 12-15, 24-25). The staging area was 208 feet from the center of the encampment and was located near an interstate highway overpass and other roads, such that traffic noise rendered it impossible to hear, much less record audio of, the police activity taking place in the park. SER-118 (Neumann Decl. ¶¶ 9-10). That was not an ample alternative to observing the clearance from within the park.

In short, Defendants’ evidence comes nowhere close to satisfying heightened scrutiny.

3. *Defendants Violated Clearly Established Law.*

Ms. Fonseca’s First Amendment right to observe the encampment clearance was clearly established at the time of the violation. A government official is not entitled to qualified immunity if his conduct violates clearly established constitutional rights. *See Ballou*, 29 F.4th at 421. “For a constitutional right to be clearly established, its contours ‘must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.’” *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). This is because, at bottom, qualified immunity operates “to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.” *Id.* (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001)).

Although the Supreme Court has advised against “defin[ing] clearly established law at a high level of generality,” *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011), it has made equally clear that, because “officials can still be on notice that their conduct violates established law even in novel factual circumstances,” courts need not have previously held that the precise action at issue is unlawful, *Hope*, 536 U.S. at 740; *see al-Kidd*, 563 U.S. at 741 (“We do not require a case directly on point . . .”). Nor

are courts required to identify cases with “fundamentally similar” facts. *Hope*, 536 U.S. at 740-41. Rather, precedent need only make the violation “apparent.” *Id.* at 739, 743.

In some instances, “a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question.” *Taylor v. Riojas*, 592 U.S. 7, 9 (2020) (quoting *Hope*, 536 U.S. at 741); *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 4-6 (2021). That can be true even in circumstances requiring application of the rule “to a new factual permutation.” *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 784 (9th Cir. 2022) (quoting *Eng v. Cooley*, 552 F.3d 1062, 1076 (9th Cir. 2009)).

This Court has also held that courts may “rely on the intersection of multiple cases’ to conclude that the unlawfulness of government officials’ conduct should have been apparent to them.” *DeFrancesco v. Robbins*, 136 F.4th 933, 939-40 (9th Cir. 2025) (quoting *Polanco v. Diaz*, 76 F.4th 918, 930 & n.8 (9th Cir. 2023)); see also *Moonin v. Tice*, 868 F.3d 853, 868 (9th Cir. 2017) (considering holdings from two separate lines of cases and finding that “the marriage of these two precepts in large part” clarified the constitutional right at issue).

Here, Defendants had received double notice that their actions were unconstitutional: Precedents involving both the right to access government proceedings and the right to record the actions of government officials in a public forum clearly establish that Defendants violated Ms. Fonseca's First Amendment right to report on the encampment clearance in Hawthorne Park. Long before Ms. Fonseca's arrest, both the Supreme Court and this Court had put officials on notice that newsgathering is protected by the First Amendment, *Daily Herald Co.*, 838 F.2d at 384; that First Amendment protections are at their zenith in a public park, which is the prototypical public forum, *Askins*, 899 F.3d at 1044; that included in the right to gather news is the right to record the police, *Fordyce*, 55 F.3d at 439; that the right of access to government proceedings likewise includes the right to observe government officials engaged in newsworthy conduct in public, *Reed*, 863 F.3d at 1211; and that the government must satisfy heightened scrutiny in order to restrict access to government proceedings, especially those occurring in public, *Press-Enter. II*, 478 U.S. at 9; *Askins*, 899 F.3d at 1044.

Those cases involved facts similar to the facts of this case in all material respects. In *Fordyce*, for instance, a Seattle police officer interfered with the plaintiff's effort to record police activity during a protest march for broadcast on a local television station. 55 F.3d at 438. This Court reversed the district court's grant of summary judgment to the officer, concluding that "a genuine issue of material fact exists concerning whether he interfered with Fordyce's First Amendment right to gather news." *Id.* at 442.

In *Reed*, officers herding buffalo into Yellowstone National Park closed a road along the herding route to "prevent collisions between cars and buffalo," and then issued a citation to the plaintiff for parking at an observation point. 863 F.3d at 1202-03. In the midst of trial, the district court granted judgment as a matter of law to the officers on the plaintiff's First Amendment claims. *Id.* at 1203. But this Court reversed, holding that the district court had improperly credited the defendants' "evidence regarding the buffalo's dangerousness and unpredictability" and their assertion that "the presence of Reed's vehicle parked on the gravel road presented a safety risk." *Id.* at 1211. This Court identified in the record "evidence sufficient to show that there was no genuine safety or

operational reason to exclude him from parking on the gravel road, and therefore, the restriction was not narrowly tailored to a significant government interest.” *Id.* at 1212.

And in *Askins*, this Court reversed a district court decision dismissing a complaint from two individuals who were stopped and searched by officers while attempting to photograph U.S. ports of entry along the United States-Mexico border. 899 F.3d at 1038. The Court found that the plaintiffs had plausibly alleged that the streets and sidewalks from which they attempted to take photos of ports of entry were public forums. *Id.* at 1045-47. And the Court held that the defendants’ interest in “protecting our territorial integrity,” while potentially significant, had not been substantiated with enough detail to warrant dismissal. *Id.* at 1045. The government could not carry its burden “through general assertions of national security, particularly where plaintiffs have alleged that [the government was] restricting First Amendment activities in traditional public fora such as streets and sidewalks.” *Id.*

Based on that precedent, Defendants were on notice that cutting off access to newsworthy government operations occurring in a public forum

would trigger heightened First Amendment scrutiny, and that merely invoking the need to preserve public safety without specific evidence to support that claim would be insufficient to justify a restriction on newsgathering.

Defendants fail to even acknowledge those controlling precedents, much less argue that they did not clearly establish Ms. Fonseca's constitutional rights. Instead, their only argument at the second step of the qualified-immunity analysis is that they were "entitled to presume that the authority they were acting under or pursuant to was valid at the time of their conduct." Opening Br. 31. Because City Manager Sjothun issued the closure order pursuant to his authority under the City Charter, and because the other Defendants acted to carry out the operation plan put in place to effectuate that closure order, Defendants contend they each acted reasonably by presuming the validity of the "authority" under which they acted. *Id.*

Defendants did not make this argument in their summary judgment briefing in the district court, *see* ER-105-107, so this Court should not consider it. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009). In any event, this Court's precedents gave Defendants clear

notice that they could not depend on the closure order to immunize their unconstitutional actions. It is true that an officer may rely on a “presumptively valid ordinance” to establish probable cause for an arrest, even if that ordinance is later declared unconstitutional. *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979). But, as this Court has explained, that doctrine is based on the notion that, “when a city council has duly enacted an ordinance, police officers on the street are ordinarily entitled to rely on the assumption that the council members have considered the views of legal counsel and concluded that the ordinance is a valid and constitutional exercise of authority.” *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994). In that situation, “the existence of a statute or ordinance . . . is a factor which militates in favor of the conclusion that a reasonable official” would not have notice they were violating the Constitution. *Id.*

Here, Defendants were not relying on a validly enacted ordinance, so *Grossman* does not apply. The City Charter provision that the City Manager invoked to issue the closure order merely granted him “general supervision over all city property.” Medford City Charter § 18(3)(e). Nothing in its text authorizes the selective exclusion of reporters from

public parks. Instead, the closure order, implementation plan, and unwritten policy of permitting volunteers but not journalists to enter the park during the encampment closure constituted only “an unofficial or unacknowledged policy or practice.” *Chew v. Gates*, 27 F.3d 1432, 1450 (9th Cir. 1994). And this Court’s precedent holds that such unofficial policies are “not sufficient to immunize an officer from liability” because “[t]he clandestine nature of such a policy” itself may “put a reasonable officer on notice that it violates established legal norms.” *Id.* Defendants’ reliance on the closure order and operation plan is thus misplaced.

And even if the closure order could constitute a source of law on which Defendants were entitled to rely, it is also clearly established that “an officer who enforces a statute in an arbitrary or discriminatory manner is not entitled to presume that his conduct is constitutional simply because the statute exists.” *Grossman*, 33 F.3d at 1209 n.19. Likewise, “an officer who unlawfully enforces an ordinance in a particularly egregious manner, or in a manner which a reasonable officer would recognize exceeds the bounds of the ordinance, will not be entitled to immunity.” *Id.* at 1210.

It bears repeating that here, Defendants actively evicted reporters and legal observers, while allowing members of the general public to remain so long as they professed an intention to help the campers in any conceivable way, none of which was required by the closure order or operation plan. Had Ms. Fonseca put down her recording equipment, removed her press pass, and picked up a garbage bag, she would have been permitted to stay in Hawthorne Park and observe the very same activity Defendants arrested her for recording. That is a closure in name only. Any reasonable officer should have known that selectively excluding a reporter from a park to prevent her from gathering news plainly violates the First Amendment.

III. Defendants Are Not Entitled to Qualified Immunity on Ms. Fonseca's Fourth Amendment Claim.

The district court properly denied qualified immunity to Defendants on Ms. Fonseca's Fourth Amendment claim. Defendants lacked probable cause to believe that Ms. Fonseca had committed a crime, and they could not arrest her for exercising her First Amendment rights, particularly not in a traditional public forum like a public park.

To start, the Court lacks jurisdiction to consider Defendants' Fourth Amendment argument, *see Foster*, 908 F.3d at 1210, because the district

court identified factual disputes related to whether Defendants had probable cause to arrest Ms. Fonseca, *see* ER-19. The district court reasoned that Defendants’ arrest of Ms. Fonseca was premised on the lawfulness of their order that she leave the park. *Id.* The lawfulness of the order to leave the park, in turn, depended on whether excluding Ms. Fonseca from the park violated the First Amendment. *Id.* And whether Ms. Fonseca had a First Amendment right to access the park depended on questions of fact related to Defendants’ justifications for closing the park to observers during the encampment clearance. *Id.* That factual dispute thus precluded summary judgment on Ms. Fonseca’s Fourth Amendment claim for the same reason it precluded summary judgment on her First Amendment claim, and this Court lacks jurisdiction to review such “fact-related dispute[s] about the pretrial record” in this interlocutory posture. *Peck*, 51 F.4th at 885 (quoting *Est. of Anderson*, 51 F.4th at 731).

In any event, Defendants’ Fourth Amendment argument fails on the merits. As the district court concluded, Defendants’ assertion of probable cause depends wholly on their claim that Ms. Fonseca trespassed by remaining in the park after being ordered to leave, in

violation of Medford Municipal Code § 5.250. Opening Br. 39. That ordinance provides that “[n]o person shall enter or remain unlawfully in or on premises,” including by “fail[ing] to leave premises . . . after being *lawfully* directed to do so” by a person with “lawful control of [the] premises.” ER-143 (emphasis added); *see also* Opening Br. 39. Under the plain terms of the ordinance, refusing an *unlawful* order to leave the park cannot constitute a trespass. And if Ms. Fonseca did not commit a trespass, no probable cause for her arrest existed.

The lawfulness of an individual’s presence is typically the most important fact that distinguishes criminal trespass from innocent conduct. The lawfulness of an order to leave the premises is thus an “essential element” of trespass. *State v. White*, 154 P.3d 124, 127 (Or. Ct. App. 2007).⁵ And Oregon courts have long recognized that a person who has “a constitutional right to remain as an incident to the proper exercise of a constitutionally protected right” cannot commit a trespass. *State v. Marbet*, 573 P.2d 736, 739 (Or. Ct. App. 1978); *accord, e.g., State v. Riddell*, 21 P.3d 128, 132 (Or. Ct. App. 2001). Oregon’s approach follows

⁵ The cited Oregon Court of Appeals decisions discuss a state statutory ban on trespass that is identical in relevant respects to the Medford ordinance. *See* Or. Rev. Stat. §§ 164.205, 164.245.

federal law: “Obviously,” the Supreme Court has recognized, “one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution.” *Wright v. Georgia*, 373 U.S. 284, 291-92 (1963). In *Wright*, the Supreme Court ruled unanimously that no crime was committed when a person refused an unconstitutional order to leave a park. *Id.* That holding controls here.

As that settled precedent makes clear, the mere fact that Officer Furst had ordered Ms. Fonseca to cease newsgathering activities and vacate the park was not enough to provide probable cause that Ms. Fonseca committed the crime of trespass. Instead, under the plain text of the Medford trespass ordinance and long-settled Oregon law, the underlying order to leave the premises must itself be lawful. But as explained above, *supra* Section II.B, excluding Ms. Fonseca from the park during the encampment clearance violated her clearly established First Amendment rights. Accordingly, the order directing her to leave the park was unlawful, and Defendants lacked probable cause. Yet neither Defendants’ arguments in the district court, ER-97, nor the evidence on which Defendants relied, *see* ER-135 (probable cause affidavit), made any effort to establish the “essential element” that the order to leave was

lawful. *See White*, 154 P.3d at 127. Based on that record, the district court properly declined to grant summary judgment to Defendants on the lawfulness of the arrest.

For the first time on appeal, Defendants claim that the order closing the park and the associated implementation plan supplied them with probable cause to arrest Ms. Fonseca, even if those directives were unlawful. Opening Br. 38-39. At a minimum, they say, their reliance on the closure order entitles them to qualified immunity. *Id.* at 40. By not advancing this argument in the district court, *see* ER-105-107, Defendants have forfeited it. *See Padgett*, 587 F.3d at 985 n.2. And even now, Defendants cite no authority in support of their argument, which would effectively eliminate an essential element of the offense of trespass under long-settled Oregon law and the plain language of the Medford ordinance. Any reasonable officer should have known that he could not arrest someone without probable cause that the person committed an offense under the plain language of the ordinance. *See Rosenbaum v. Washoe Cnty.*, 663 F.3d 1071, 1079 (9th Cir. 2011).

In addition, as explained above with respect to Ms. Fonseca's First Amendment claim, the closure order is not the type of formal policy on

which officers can reasonably rely. *See Chew*, 27 F.3d at 1450. Even if it were, the order said nothing about selectively excluding journalists while letting in volunteers. The order said only that “the City Manager has ordered the closure of Hawthorne Park for at least 48 hours to allow for sanitation, cleaning, and inspection of City property,” with no other details. SER-31. Officers enforced that facially neutral order in a discriminatory fashion by singling out Ms. Fonseca for arrest. *See Grossman*, 33 F.3d at 1209 n.19. The closure order thus provides no cover for Defendants’ actions.

Finally, Defendants complain that the district court should have granted summary judgment to Defendants Sjothun, Claussen, Arnold, Jewell, and Kirkpatrick on the Fourth Amendment claim because they did not “play[] a role in the arrest” of Ms. Fonseca. Opening Br. 37. Defendants make no attempt to square that argument with their insistence that Officers Furst, Todd, and Barringer *also* should be excused from liability because they relied on instructions received from their supervisors—*i.e.*, Defendants Sjothun, Claussen, Arnold, Jewell, and Kirkpatrick. *See id.* at 38. In any event, as the district court noted, a supervisor “can be liable in his individual capacity for his own culpable

action or inaction in the training, supervision, or control of his subordinates; for his acquiescence in the constitutional deprivation; or for conduct that showed a reckless or callous indifference to the rights of others.” *Starr v. Baca*, 652 F.3d 1202, 1208 (9th Cir. 2011) (quoting *Watkins v. City of Oakland*, 145 F.3d 1087, 1093 (9th Cir. 1998)). A supervisor can be held liable for such actions “as long as a sufficient causal connection is present” between his actions and the plaintiff’s injury. *Id.* at 1207 (internal quotation marks omitted).

Here, the district court concluded that whether the requisite causal connection exists between these supervisors’ actions and the constitutional violations involves factual disputes, and the district court specifically found, in weighing the evidence, “that a reasonable juror could find the causal connection necessary to establish supervisory liability.” ER-21. This Court lacks jurisdiction, in this interlocutory posture, to second-guess the district court’s weighing of the evidence.

CONCLUSION

For the foregoing reasons, the district court’s denial of qualified immunity should be affirmed.

Respectfully submitted this 3rd day of November 2025.

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STATEMENT OF RELATED CASES

I hereby certify that I am unaware of any related cases currently pending in this court.

/s/ William Powell
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