

**Heffernan v. City of Patterson, New Jersey**

136 S.Ct. 1412 (2016)

- 1<sup>st</sup> Amendment Retaliation: Viable §1983 claim where public employer's mistaken perception of plaintiff's alleged political activity motivated plaintiff's termination.

The First Amendment Generally Prohibits government officials from dismissing or demoting an employee because of the employee's engagement in constitutionally protected political activity (ex: joining, working for, or contributing to the political party and candidates of their own choice). The exceptions to this rule take into account the practical realities such as the need for efficiency and effectiveness in government service. Examples of the exceptions include policies and restrictions/requirements regulating political activity when such policies are limited and neutral or where a restriction/requirement is appropriate for the effective performance of the public office involved.

Normally, this plaintiff's claim would most likely survive a motion for summary judgment, as his conduct falls directly under the protection of the first amendment (see above). However, the issue here was whether the plaintiff's §1983 claim was barred because the defendants were *mistaken* in believing he was engaged in a constitutionally protected political activity; plaintiff was merely picking up campaign signs as a favor to his bedridden mother and NOT for himself. The court applied its previous ruling in Waters v. Churchill, which held that the plaintiff's §1983 claim was barred where the public employer *reasonably, but mistakenly believed* that he was engaging in non-protected activity, and had dismissed him because of that mistaken belief.

Here, as in Waters, the public employer's reason for demoting plaintiff is what counted. When an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment and 42 U.S.C. §1983 – even if, as here, the employer makes a factual mistake about the employee's behavior.

**Sialoi v. City of San Diego**

2016 WL 2996138

9<sup>th</sup> Cir. (May 24, 2016)

- Probable Cause/Qualified Immunity: Surrounding circumstances of an unlawful arrest, such as conducting it in a high-crime area, alone are not necessarily sufficient to establish probable cause or qualified immunity
- Unlawful Arrest: A plaintiff's temporary refusal to comply with an officer's commands is not, in itself, a valid basis for an arrest

Officers respond to a report that two armed black males had been seen in the parking lot of an apartment complex. When they arrived, the officers, armed with assault rifles and eventually numbering over twenty, encountered not two black males but a large Samoan family celebrating the birthday of a seven-year-old girl. The officers detained the members of the family (handcuffing the vast majority of them, including numerous adolescents) and then searched each of them for weapons. Finding nothing incriminating, the officers then searched the family's

apartment without a warrant or consent. Again finding nothing incriminating, the officers left without removing a single family member from the scene or filing any charges.

During the incident, one of the plaintiffs was handcuffed and placed in the back of the police car after pleading with the officers to stop pointing their weapons at the children. Plaintiff did raise his voice and initially refused to raise his hands when directed to do so by the police, but he calmed down within a matter of minutes and complied with the officers' requests when they approached him for the purpose of handcuffing him.

In this action, defendant officers sought to raise qualified immunity from plaintiff's unlawful seizure/arrest claim. The court first determined that defendants placed plaintiff under arrest, as opposed to merely conducting an investigatory stop, and that in doing so defendants violated plaintiff's 4<sup>th</sup> Amendment rights. The court held that plaintiff's temporary refusal to comply with an officer's commands is not in itself a valid basis for an arrest. Thus, plaintiff's arrest was unlawful as it was unsupported by probable cause.

Next, the court concluded that plaintiff's constitutional right was clearly established. Here, because the standard for probable cause "is well settled", the court used the "reasonable officer" test: whether reasonable officers could disagree as to the legality of the arrest such that the arresting officer is entitled to qualified immunity. Here, the court held that the background circumstances on which the defendants rely to establish qualified immunity (the officers presence in a high-crime area) do not make it even "reasonably arguable" that probable cause existed to arrest plaintiff nor does plaintiff's initial response to the officers' instructions. Thus, the defendants' request for qualified immunity was denied because the violated constitutional right was clearly established to a reasonable officer.

### **O'Brien v. Welty**

818 F.3d 920

9<sup>th</sup> Cir. (April 7, 2016)

- **First Amendment Restrictions:** Government restrictions on expressive conduct at state universities are constitutional if not overbroad, vague, and do not punish constitutionally protected speech when applied to an individual case.
- **First Amendment Retaliation:** University student can properly state a §1983 retaliation claim if he sufficiently alleges that sanctions imposed by university faculty and administrators, under government regulation constitutionally restricting expressive conduct, were substantially motivated by student's protected activity.

Neil O'Brien was a student at California State University Fresno ("Fresno State"), where he was an outspoken political conservative and critic of the university. In May 2011, O'Brien confronted and videotaped two professors in their offices, questioning them about a poem that had been published in a supplement to the student newspaper. After disciplinary proceedings, the university found that O'Brien had violated the Student Conduct Code's prohibition on harassment and intimidation that poses a threat to others. The university imposed sanctions. O'Brien brought suit in district court against several faculty members and administrators, alleging violations of his constitutional rights including those protected by the First Amendment. The district court dismissed the complaint under FRCP 12(b)(6) for failure to state a claim.

O'Brien's first contention was that the Student Conduct Code's prohibition on harassment and intimidation, as codified in the California Code of Regulations, was overbroad

and vague, because the terms “intimidation” and “harassment” involve subjective determinations that turn on whether a particular individual finds the conduct to be intimidating or harassing. Thus, he argued that conduct that is “offensive” but protected under the First Amendment is covered by the regulation. Generally, a regulation is unconstitutionally overbroad if it reaches too much protected expression and is unconstitutionally vague if a person of ordinary intelligence would not have a reasonable opportunity to know what is prohibited.

The court held that **the fact that the terms may in some cases entail interpretation is not enough to sustain an overbreadth or vagueness challenge.** Further, the contended terms did not stand on their own, and were narrowed by “threatens or endangers the health or safety” of another in the university community, well narrower and more precise than university harassment policies that have been held overbroad. The regulation thus permissibly authorized the university to discipline students who engage in harassment or intimidation that threatens or endangers the health or safety of another person in the university community.

O’Brien’s second contention was that the university’s application of the regulation punished him for engaging in speech and speech-related conduct protected by the First Amendment. Generally, a regulation that is not facially overbroad or vague may nonetheless be constitutionally applied, in an individual case, to constitutionally protected speech. Here, the court held that it was permissible for the university to impose discipline for O’Brien’s conduct. O’Brien had not alleged facts sufficient to show that the location of the incident was a public forum. Therefore, the university could regulate expressive conduct as long as the regulation was reasonable and viewpoint neutral.

Further, the university’s application of the regulation was reasonable because it was done in the name of safety. The court reasoned that “professors at work in their personal offices do not generally expect to be confronted without warning by a student asking hostile questions and videotaping. If the uninvited student refuses to cease hostile questioning and refuses to leave a professor’s personal office after being requested to do so, as O’Brien admits occurred here, the professor may reasonably become concerned for his or her safety.” Thus, O’Brien’s behavior could be considered “harassment” or “intimidation” and threatening under an objective reasonableness standard.

Finally, O’Brien alleged that he was unconstitutionally retaliated against for his conduct leading up to the videotape incident. Otherwise lawful government action may nonetheless be unlawful if motivated by retaliation for having engaged in activity protected under the First Amendment. The court held that although O’Brien was appropriately subject to discipline for his confrontation giving rise to the sanctions, his allegations of retaliation for conduct leading up to the videotape incident could plausibly show that the defendants’ action in disciplining him were substantially motivated by his protected speech and expressive conduct.

O’Brien’s protected speech and conduct included posting his position of opposition to the student government president and school administration on a website as well as making several public records requests to the university. Also, defendants’ actions in disciplining O’Brien would “chill a person of ordinary firmness” from engaging in these protected activities. Finally, O’Brien’s allegations, that prior to the videotape incident the Dean requested that students and other faculty members gather information and complaints to use against him, support reasonable inference that defendants’ actions were substantially motivated by O’Brien’s protected speech prior to the videotape incident. Thus, O’Brien’s First Amendment retaliation claim survives a 12(b)(6) motion to dismiss.

## Seattle Mideast Awareness Campaign v. King County

781 F.3d 489

9<sup>th</sup> Cir. 2015

- First Amendment – Limited Public Forums: Exclusion from county’s program allowing paid advertisements on exterior of county buses, for speech that was so objectionable under contemporary community standards as to make it reasonably foreseeable that it would result in harm to, disruption of, or interference with the transportation system, was reasonable, as required under First Amendment for subject-matter or speaker-based exclusion from a limited public forum

The Seattle Mideast Awareness Campaign (SeaMAC) submitted an advertisement to run on King County Metro buses in the Seattle metropolitan area. After initially accepting the ad, the County revoked its approval, concluding that displaying the ad would likely result in vandalism and violence disruptive to the bus system. The court was asked to decide whether the County's action violated SeaMAC's First Amendment rights.

Three categories of forums exist, for First Amendment purposes: traditional public forums, designated public forums, and limited public forums. Under the First Amendment, in traditional public forums and designated public forums, content-based restrictions on speech are prohibited, unless they satisfy strict scrutiny. Under the First Amendment, in limited public forums, content-based restrictions are permissible, as long as they are reasonable and viewpoint neutral. Traditional public forums, for First Amendment purposes, are places like streets and parks which 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.

The government creates a designated public forum, for First Amendment purposes, when it intends to make property that has not traditionally been open to assembly and debate generally available for expressive use by the general public or by a particular class of speakers. The defining characteristic of a designated public forum, for First Amendment purposes, is that it is open to the same indiscriminate use and almost unfettered access that exist in a traditional public forum. When the government creates a designated public forum by imbuing its property with the essential attributes of a traditional public forum, it is bound by the same standards as apply in a traditional public forum, for First Amendment purposes, except that the government may close a designated public forum whenever it chooses, but it may not close a traditional public forum to expressive activity altogether. The government does not create a designated public forum, for First Amendment purposes, through inaction or by permitting only limited discourse; instead, the government must intend to grant general access to its property for expressive use, either by the general public or by a particular class of speakers.

County's bus advertising program, which helped finance bus operations by allowing advertisers to purchase ad space on exterior of county buses, was intended to create a limited public forum rather than a designated public forum, for First Amendment purposes; county's formal policy provided selective access to program, through pre-screening process with fixed guidelines that imposed categorical subject-matter limitations, county consistently rejected proposed ads that failed to comply with program's subject-matter limitations, and expressive activities permitted under the program were incidental to providing public transportation and were part of a commercial venture.

Exclusion from county's program allowing paid advertisements on exterior of county buses, for speech that was so objectionable under contemporary community standards as to make it reasonably foreseeable that it would result in harm to, disruption of, or interference with the transportation system, was reasonable, as required under First Amendment for subject-matter or speaker-based exclusion from a limited public forum; exclusion was consistent with purposes served by public buses, i.e., providing safe and reliable public transportation, and the exclusion was a sufficiently definite and objective standard that prevented arbitrary or discriminatory enforcement by county officials.

**Hamby v. Hammond**

2016 WL 1730532

9<sup>th</sup> Cir.

- Deliberate Indifference to Prisoner/Detainee Medical Care: Qualified immunity afforded to officials who decided conservative treatment over surgery for plaintiff's hernia because chosen method of treatment was arguably medically acceptable for management of his hernia.

State prisoner brought § 1983 action against medical director for prison facility, chief medical officer for the state department of corrections, and the Secretary of the department, alleging that they were deliberately indifferent to his serious medical needs in violation of the Eighth Amendment by delaying surgery to repair his umbilical hernia and failing to diagnose and treat his inguinal hernia, and seeking damages for the pain prisoner allegedly suffered prior to getting the surgery. The United States District Court for the Western District of Washington, [Ronald B. Leighton, J., 2015 WL 1263253](#), granted summary judgment in favor of prison officials. Prisoner appealed.

To defeat a defense of qualified immunity asserted by government officials, a plaintiff must show first, that he suffered a deprivation of a constitutional or statutory right; and second that such right was clearly established at the time of the alleged misconduct. To be "clearly established," for purpose of the qualified immunity defense, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right.

Although a plaintiff need not find a case directly on point, in order to demonstrate that a defendant's conduct violates a clearly established right, as required to defeat qualified immunity, existing precedent must have placed the constitutional question beyond debate. State officials are entitled to qualified immunity so long as none of the court's precedents squarely governs the facts of the case, meaning that the court cannot say that only someone plainly incompetent or who knowingly violates the law would have acted as the officials did.

State prison officials here were entitled to qualified immunity for their delay in authorizing surgery to repair state prisoner's umbilical hernia, in prisoner's § 1983 Eighth Amendment claim, alleging that officials were deliberately indifferent to his serious medical needs; even assuming that officials were actually aware that prisoner experienced intermittent pain and discomfort, it was not clearly established that officials should have authorized surgery sooner than they did, as medical monitoring and conservative treatment provided to prisoner was arguably medically acceptable for management of his hernia.

**Ragasa v. County of Kaua'i**

2016 WL 543118  
D. Hawai'i

- First Amendment Retaliation: Public employment context where employee has non-supervisory/managerial duties.

Plaintiff Ragasa alleges that the County of Kauai Fire Department (“KFD”) and KFD supervisors retaliated against him after he reported improper conduct by fellow KFD employees that included gas theft, on-duty drug use, and the falsification of time sheets. Because issues of fact persist with respect to Ragasa's 42 U.S.C. § 1983 First Amendment retaliation claim against the individually named Defendants the motions for summary judgment are DENIED as to those claims. The motions are GRANTED with respect to the Section 1983 municipal liability claim against the County.

The Court follows a sequential five-step inquiry to determine whether an employer impermissibly retaliated against an employee for engaging in protected speech. First, the plaintiff bears the burden of showing: (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; and (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action. Next, if the plaintiff has satisfied the first three steps, the burden shifts to the government to show: (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech.

(1) Ragasa spoke on a matter of public concern. Speech concerning information that would enable members of society to make informed decisions about the operation of government is generally considered of public concern. Courts also look to the content, form, and context of the speech and may consider the motivation and the chosen audience. Here, the form and context of Ragasa's speech bring his motivations into dispute; whether it was self-serving and opportunistic. However, content is at the core of the Court's inquiry, and the content of Ragasa's speech clearly invokes matters of public concern: gas theft, drug use, falsification of time records, and an alleged cover up, all by County employees, present questions of public significance that relate to matters of political, social, or other concern to the community.

(2) There is a genuine dispute of material fact as to whether Ragasa's complaints were made as a private citizen and not as a public employee. A public employee speaks as a private citizen if the speaker had no official duty to make the questioned statements, or if the speech was not the product of performing the tasks the employee was paid to perform. Ragasa's job duties included beach patrols, keeping the public safe from dangers they may encounter in the water, and rescue swimmers in danger; all non-supervisory job duties. There was also no indication that Ragasa's speech was the product of performing the tasks that he was paid to perform.

To the extent Defendants argue that Ragasa spoke as a public employee because he reported the alleged illegal conduct to his supervisors rather than the general public or media, the factor is relevant, but not dispositive. Generally when a public employee raises complaints or concerns up the chain of command about his job duties, that speech is undertaken in the course of performing his job. However here, the court noted that it would be ironic, at best, if the only way Ragasa could maintain his First Amendment retaliation claim was by airing the OSB's dirty laundry before the media.

Further, Ragasa's allegations regarding a cover up by administration and/or individual administrators appear to be well beyond the scope of his duties as a Water Safety Officer, and his allegations of gas theft and employee drug use can be characterized as broad concerns about corruption or systemic abuse. Thus, there is a dispute as to whether Ragasa's complaints were made as a private citizen and not as a public employee.

(3) Issues of fact preclude summary judgment on causation. Ragasa must establish that his speech and an adverse employment action were sufficiently related such that the speech was a substantial or motivating factor in Defendants' retaliatory discipline. Ragasa introduced sufficient evidence of adverse employment actions with respect to each defendant to defeat summary judgment, as the disciplinary actions Ragasa faced affected the compensation, terms, and conditions of Ragasa's employment, and are of the type reasonably likely to deter an employee from engaging in protected activity under the First Amendment. Ragasa also introduced evidence that a significant portion of the protected speech and adverse actions taken by each of the Defendants were proximate in time, as the close temporal proximity between Ragasa's protected speech and the resulting discipline are within the time range that can support an inference of retaliation, especially when viewed along the accumulating spectrum of enforcement here.

(4) Defendants failed to meet their summary judgment burden on adequate justification for their treatment of Ragasa. The courts must weigh the state's administrative interests against the employee's First Amendment rights. For a court to find that the government's interest as an employer in a smoothly-running office outweighs an employee's first amendment right, defendants must demonstrate actual, material, and substantial disruption, or reasonable predictions of disruption in the workplace. Here, Defendants mere asserted that their administrative interests "greatly outweigh Plaintiffs' interests" without offering any explanation or evidence to support that conclusion.

(5) Defendants have not met their burden of establishing that they would have made the same employment decisions, even absent the questioned speech. The employer may avoid liability by showing that the employee's protected speech was not a but-for cause of the adverse employment action. defendants' contention that they would have disciplined Ragasa in the same fashion , even if the absence of his protected speech, are disputed by Ragasa, whose version of the facts must be accepted by the Court as true.

Defendants are not entitled to qualified immunity on summary judgment, as the constitutional protections afforded to employee speech and First Amendment claims for retaliation against protected speech were clearly established at the time.

**The County's motion for summary judgment as to Ragasa's Monell claims is granted**, as he failed to raise any genuine issue of material fact. Ragasa failed to establish a custom or practice of retaliation, as Ragasa does not appear to identify and County policy nor is there any evidence of any longstanding custom or practice which constitutes the standard operating procedure of the County to retaliate against employees based upon their protected speech. None of the defendants are also officials with final policy-making authority, as the County had the power to overturn individual Defendants' disciplinary actions. Finally, Ragasa failed to show that the final policy maker ratified the unconstitutional actions as he attempts to establish municipal liability through the same individual Defendants as above.

- Unlawful Entry and Arrest: In absence of exigent circumstances or emergency, entry and arrest requires a warrant under the Fourth Amendment.
- Equal Protection Class of One Claim: Plaintiff's §1983 Class of One claim survives motion to dismiss where his claim sufficiently alleges that he was treated differently from his fiancé who was engaged in exactly the same conduct plaintiff was arrested for.

Plaintiff and fiancé were arguing at home about daughter's behavior when the Sheriff's Office was notified that a dispatcher received a 911 call from a person they thought was a young boy who stated that his parents were about to fight. The Sheriff's Office attempted to return the phone call from the young boy, but there was no response. Deputies were dispatched to the origin of the call. About 30 minutes after the 911 call, Plaintiff and fiancé heard pounding on the front door. As they approached the door a deputy smashed the door and forced it open. The officers then entered the residence with handguns and rifles aimed at both Plaintiff and fiancé (who was holding her baby). After interrogating the family it was determined that there had only been an argument, not a fight. As a result of the incident Plaintiff suffered injury to his shoulder and charged with resisting arrest and child endangerment. Charges were later dropped "in the interests of justice."

Plaintiff filed, inter alia, 4<sup>th</sup> Amendment unlawful entry and arrest claims as well as a 14<sup>th</sup> Amendment equal protection class of one claim. Defendants seek a 12(b)(6) motion to dismiss.

Unlawful Entry: Plaintiff alleges that Defendants violated his 4<sup>th</sup> Amendment rights by entering his residence without a warrant, probable cause, exigent circumstances or consent. There are two general exceptions to the 4<sup>th</sup> Amendment warrant requirement for home searches: exigency and emergency. The exigency exception permits a warrantless search of a home if there is probable cause to believe that contraband or evidence of a crime will be found at the premises and that exigent circumstances exist. Exigent circumstances are defined as those circumstances that would cause a reasonable person to believe that entry was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts. To prove exigent circumstances existed, the defendants must point to specific and articulable facts which, taken together with rational inferences, support the warrantless intrusion.

Here, Plaintiff has alleged facts establishing that the search of his residence was presumptively unreasonable under the 4<sup>th</sup> Amendment, as the facts alleged in the complaint do not demonstrate that the officer Defendants had probable cause to search Plaintiff's residence, and that exigent circumstances justified the warrantless intrusion.

Officer Defendants argue that they are entitled to qualified immunity. It is well established that, absent exigent circumstances or the applicability of the emergency doctrine, the 4<sup>th</sup> Amendment requires that a search warrant be obtained prior to entering a private residence. An officer will receive qualified immunity if a reasonable officer could have believed, even mistakenly, the action to be lawful, in light of clearly established law and the information the officer possessed. Here, Defendants have not cited any allegations in the complaint demonstrating that a reasonable police officer could have believed that the 4<sup>th</sup> Amendment permitted them to enter Plaintiff's residence without a warrant. At the time of the incident, a reasonable officer, possessing knowledge of the facts alleged in the complaint, would have known that he or she lacked reasonable grounds to believe that exigent circumstances existed to justify warrantless

entry. The law existing at the time of the warrantless entry provided the Officer defendants with fair warning that their conduct was unlawful.

Equal Protection Class of One: Plaintiff alleges that despite specific knowledge that his fiancé had engaged in the same conduct as he did, the officer Defendants arrested him but not her in violation of his equal protection rights. Class of one claims requires a plaintiff to allege that he has been (1) intentionally treated differently from others similarly situated and (2) there is no rational basis for the difference in treatment. Such circumstances state an Equal Protection claim because, if a state actor classifies irrationally, the size of the group affected is constitutionally irrelevant. The rationale is that when those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to assure that all persons subject to legislation or regulation are indeed being 'treated alike, under like circumstances and conditions.

Here, Plaintiff has identified his fiancé as an individual whom he can be compared to. Plaintiff's claim is predicated on his assertion that he was treated differently than his fiancé (i.e., arguing he was arrested) even though he and his fiancé were engaged in the same behavior that gave rise to his arrest (i.e., arguing about their child's behavior). Defendants have not cited any controlling authority holding that Plaintiff's allegations are insufficient to survive a motion to dismiss. Accordingly, Defendants' motion to dismiss is denied.

Unlawful Arrest: Plaintiff alleges Officer Defendants arrested him without probable cause in violation of his 4<sup>th</sup> Amendment rights. Warrantless arrests require probable cause. An arrest is supported by probable cause if, under the totality of the circumstances known to the arresting officer, a prudent person would have concluded that there was a fair probability that the defendant had committed a crime. The inquiry is whether a reasonable officer, based on the information known to him at the time, had probable cause to think that the suspect could have committed the offense. A plaintiff can make a prima facie case of unlawful arrest simply by showing that the arrest was conducted without a valid warrant.

Here, Plaintiff has alleged sufficient facts to state a prima facie case for false arrest in violation of his 4<sup>th</sup> Amendment rights. The complaint alleges that Plaintiff was arrested inside his residence without a warrant and without probable cause approximately 30 minutes after a young boy called from his residence stating that his parents were "about to fight." There are no allegations in the complaint demonstrating that the officer Defendants could have believed, based on the information known to them, that Plaintiff had committed a crime or was committing a crime at the time they entered his residence without a warrant and arrested him. Accordingly, Defendants' motion to dismiss Plaintiff's unlawful arrest claim for failure to state a claim is denied.

Officer Defendants assert qualified immunity. Having determined that Plaintiff has pled sufficient facts to state a cognizable claim for false arrest in violation of the Fourth Amendment, the issue is whether, at the time of the violation, the constitutional right was clearly established. The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. Other than the 911 call alerting the police that Plaintiff and his fiancé were "about to fight," and the failure of the 911 caller to answer a return phone call from the Sheriff's office, there are no facts in the complaint that would lead a reasonable officer to believe that probable cause existed to arrest Plaintiff for any crime, including child endangerment. Based on the facts alleged in the complaint, a reasonable officer would have known that a warrantless arrest of Plaintiff was unlawful. Accordingly, the officer Defendants are not entitled to qualified

immunity for the warrantless arrest of Plaintiff. Therefore, Defendants' motion to dismiss Plaintiff's unlawful arrest claim on qualified immunity grounds is denied.

**Malicious Prosecution:** Plaintiffs allege that Officer Defendants are liable for malicious prosecution for supplying the prosecutor with false information and leading the prosecutor to maintain charges against him without a reasonable basis. To maintain a §1983 action for malicious prosecution, a plaintiff must show that the defendants prosecuted him with malice and without probable cause, and that they did so for the purpose of denying her a specific constitutional right. Further, plaintiff must generally establish that the prior proceedings terminated in such a manner as to indicate his innocence. To constitute a favorable termination, a dismissal in the interests of justice must reflect the opinion of the prosecuting party or the court that the action lacked merit or would result in a decision in favor of the defendant.

The decision to file a criminal complaint is presumed to result from an independent determination on the part of the prosecutor, and thus, precludes liability for those who participated in the investigation or filed a report that resulted in the initiation of proceedings. However, the presumption of prosecutorial independence does not preclude a §1983 claim against state or local officials who improperly exerted pressure on the prosecutor, knowingly provided misinformation to him, concealed exculpatory evidence, or otherwise engaged in wrongful or bad faith conduct that was actively instrumental in causing the initiation of legal proceedings.

Here, Plaintiff has pled facts that, if established, rebut the presumption of prosecutorial independence. The complaint alleges that Officer Defendants violated Plaintiff's 4<sup>th</sup> Amendment rights by arresting him without probable cause, providing the prosecutor with false information as to the vents in question, and by causing the prosecutor to maintain a prosecution against him for cruelty to child by endangering health, and for resisting, obstructing, and delaying a peace officer knowing there was not even a reasonable basis for bringing said charges. Defendants' motion to dismiss Plaintiff's malicious prosecution claim is denied.

**Monell Claim:** Plaintiff alleges that the County failed, with deliberate indifference, to properly and adequately hire, train, retain, supervise, and discipline its law enforcement officers to prevent the violation of Plaintiff's constitutional rights. Here, while Plaintiff has not alleged a pattern of similar violations demonstrating the County's deliberate indifference to his constitutional rights, Plaintiff has alleged sufficient facts that, if proven, may establish that the consequences of the County's failure to train were so "patently obvious" that the County can be held liable under §1983 without proof of a preexisting pattern of violations. Defendants' motion to dismiss Plaintiff's Monell claim is denied.

### **Application of Utah v. Strieff, 2016 WL 3369416 (June 20, 2016)**

Under Utah v. Strieff, if an officer discovers a warrant after illegally stopping someone, courts will now excuse the officer's illegal stop and will admit into evidence anything the officer happens to find by searching an individual after arresting him on the warrant. For example, say that in Williams v. County of Alameda, after illegally entering Plaintiff's home and illegally arresting him, the officers searched his person or home and found illegal drugs. The officers then charged Plaintiff with possession of an illegal drug. Under Utah, the court would admit the drugs as evidence, regardless of the fact that the search and seizure that led to the discovery of the drugs was illegal and in violation of Plaintiff's Fourth Amendment rights.

### Selected Class of One Cases Cited

Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000)

Gerhart v. Lake County, 637 F.3d 1013, 1022 (9<sup>th</sup> Cir. 2011)  
Lazy Y Ranch Ltd. v. Behrens, 546 F.3d 580, 592 (9<sup>th</sup> Cir. 2008)  
Engquist v. Oregon Dep't of Agric., 553 U.S. 591, 602 (2008)  
Flowers v. City of Minneapolis, 558 F.3d 794, 799-800 (8<sup>th</sup> Cir. 2009)  
United States v. Moore, 543 F.3d 891, 901 (7<sup>th</sup> Cir. 2008)  
Hanes v. Zurick, 578 F.3d 491, 492 (7<sup>th</sup> Cir. 2009)

**Felarca v. Birgeneau**  
2016 WL 324351  
N.D. California

- Fourth Amendment Excessive Force: Failure to fully or immediately comply with an officer's orders neither rises to the level of active resistance nor justifies the application of a non-trivial amount of force

This §1983 lawsuit arises from incidents that took place on November 9, 2011, near Sproul Hall on the campus of the University of California at Berkeley ("UCB" or "the University"). On that day, a planned demonstration occurred on the UCB campus, described by organizers as an "Occupy" event in solidarity with the Occupy Wall Street movement and similar actions in Oakland and elsewhere across the country. During the demonstration, a confrontation between Officers and demonstrators led to the arrest of 30 protestors for obstructing officers, resisting arrest, and unlawful assembly in regards to camping. One student ended up in the hospital, two ended up at an urgent care, and there were multiple reports of injuries to both other demonstrators and officers (who sustained "bumps and bruises"). Plaintiffs, a group of demonstrators, sued both the administrators and officers involved. One of the claims included a direct claim for excessive force in violation of the 4<sup>th</sup> Amendment.

An interesting issue in this case involves the third governmental interest factor of the Graham test in the use of force: (iii) whether plaintiff was actively resisting arrest. The court here denied Defendants' motion for summary judgment on issue because there was a triable issue of fact as to whether Plaintiffs' actions rose to the level of "active resistance." The Court recited the notion that failure to fully or immediately comply with an officer's orders neither rises to the level of active resistance nor justifies the application of a non-trivial amount of force. Even if not perfectly passive, if the resistance is not "particularly bellicose", the third Graham factor offers little support for the use of significant force.

Here, there is a dispute of fact as to whether Plaintiffs' actions included anything more than refusing to move, linking arms, and yelling at officers, as Defendants claim Plaintiffs grabbed officers' batons, pushed officers, or kicked at officers. It seems that should Defendants' assertions be correct, the "active resistance" factor may possibly be met.

The idea that failing to immediately comply with an officer's orders neither rises to the level of active resistance nor justifies the application of a non-trivial amount of force seems to be cited more and more when courts address the third Graham factor. In the 9<sup>th</sup> Circuit, one of the first courts to state this rule was that in Nelson v. City of Davis, 685 F.3d 867 (9<sup>th</sup> Cir. 2012), where plaintiff university student was shot with a pepper-ball gun after failing to immediately comply with officers' orders to disperse. To support this proposition, the Nelson court cited past cases within the 9<sup>th</sup> Circuit in which the extent of resistance was substantially greater than that of the plaintiff's in Nelson. Yet, in those cases, the even greater instances of resistance were held to

not have risen to the level of “active resistance.” See Nelson, 685 F.3d at 882. Thus, as a practical note, we can expect courts to take this proposition into heavy consideration in the future.

### **Wynn v. San Diego County**

2015 WL 472552

S.D. California

- **Unlawful Arrest and Excessive Force:** When a routine traffic stop goes wrong.

Plaintiff sued the County and the Sheriff’s Department, and individual Deputies in their official and individual capacities for personal injuries and violations of her civil rights under the 4<sup>th</sup> and 14<sup>th</sup> Amendments arising from a traffic stop and subsequent arrest. Deputies seek partial summary judgment as to Plaintiff’s false arrest and excessive force claims, for which they assert qualified immunity.

Plaintiff was driving on a rainy night when she realized she was being pulled over by a Deputy. Because she didn’t feel safe pulling over in the area they were in, she signaled the officer that she would keep driving to pull over somewhere safe. When Plaintiff finally pulled over, into a gas station, the original Deputy, now accompanied by two more Sheriff’s Department cars, blocked Plaintiff in so she could not drive away.

The original Deputy told Plaintiff she was being given a ticket for failing to yield and speeding. Plaintiff contested that she was speeding, and refused to sign the ticket. Plaintiff was told she would be arrested if she didn’t sign the ticket, yet she continued to deny any wrong doing and further refused to sign. The original Deputy then opened Plaintiff’s car door, intending to have her exit the car so that he could reason with her, as in the past doing so usually resulted in the person signing the ticket. The Deputy then reached into Plaintiff’s car, grabbing her arm, as she took her keys out of the ignition and threw them on the ground.

The Deputies then forcibly pulled Plaintiff out of the car by her arms after yelling at her to get out of the car. The Deputies then pushed Plaintiff into the ground to have her handcuffed. Plaintiff suffered cuts, bruises, and a fractured elbow from the incident, and sued the County, Sheriff’s Department, and the involved Deputies. Deputies seek partial summary judgment as to Plaintiff’s §1983 Excessive force and false arrest claims, for which they assert qualified immunity.

**Unlawful Arrest:** Plaintiff alleges unlawful arrest because the Deputies both knew or had reason to know that they lacked probable cause to arrest and detain plaintiff. A traffic stop constitutes a seizure under the Fourth Amendment, and thus must be reasonable. A traffic stop is reasonable if based on probable cause to believe illegal activity has occurred or is about to occur. It is also reasonable if based on a reasonable suspicion of illegal activity. Here, under Plaintiff’s version of the facts, which the court must accept as true, she was not speeding in violation of California law. Thus, the Original Deputy had no reasonable suspicion on which to stop and detain Plaintiff. When the Deputy did so, he violated Plaintiff’s clearly established right to be free from unreasonable seizures.

Defendants also claim they arrested Plaintiff because she refused to sign the ticket. For the arrest to have been lawful, the Deputies would have had to have probable cause. Probable cause for a warrantless arrest exists when, under the totality of circumstances, a prudent law enforcement officer would conclude there is a fair probability that the suspect has committed a

crime. Here, because both parties disagree to whether the Deputies ever handed the ticket to Plaintiff or otherwise gave her a full opportunity to view, sign, or decline to sign it prior to her arrest. The Deputies' attempts to try to reason with Plaintiff to sign the ticket were interrupted once they made a grasp for Plaintiff's keys and then dragged her out of her car. Thus, there is an issue of fact as to whether Plaintiff simply refused to sign the ticket, giving Deputies probable cause to arrest her, or didn't have the opportunity to sign the ticket.

**Excessive Force:** The court here used the Graham factors to weigh the nature of the intrusion on Plaintiff's liberty with the countervailing governmental interests at stake to determine the reasonableness of the force used. The court found that the injuries Plaintiff sustained were "moderately serious." Here, the Deputies jointly used the full force of their bodily strength to physically apprehend Plaintiff as they pulled her out of her car, each grabbing one of her arms. The court found that since Plaintiff had thrown her keys to the floor, she was unable to start the car and therefore posed no threat of using the car to harm them. Thus, a reasonable jury could find that the force used amounted to unreasonable and therefore excessive force.

**Qualified Immunity:** The Deputies are not afforded qualified immunity because there is an issue of fact as to whether they violated Plaintiff's rights (as discussed above), and "the contours of the right against excessive force in this context were clearly established at the time, so that a reasonable officer would have known that his conduct was unlawful."

### **Birchfield v. North Dakota**

2016 WL 3434398

SCOTUS June 23, 2016

- **Fourth Amendment Searches:** The Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving but not warrantless blood tests. Thus, implied consent laws imposing criminal penalties for refusing to submit to warrantless blood tests are unconstitutional.
- **Impact on §1983 Claims:** Plaintiffs can no longer claim violations of their Fourth Amendment rights when punished for refusing a warrantless breath test conducted as an incident to arrest.

Three separate petitioners were arrested on drunk-driving charges. After arrest, petitioner Birchfield was advised of his obligation under North Dakota law to undergo BAC testing and told, as state law requires, that refusing to submit to a blood test could lead to criminal punishment. Birchfield refused to let his blood be drawn and was charged with a violation of the refusal statute. Petitioner Bernard, after arrest, was read Minnesota's implied consent advisory, which informs motorists that it is a crime to refuse to submit to a BAC test. Bernard refused to take a breath test and was charged with test refusal. Petitioner Beylund, after arrest, was read North Dakota's implied consent advisory, which informed him that test refusal in these circumstances is itself a crime. Beylund agreed to have his blood drawn which revealed a BAC level more than three times the legal limit.

While each petitioner's case differs in several respects, success for all three depends on the proposition that the criminal law ordinarily may not compel a motorist to submit to the taking of a blood sample or to a breath test unless a warrant authorizing such testing is issued. Because a BAC test (blood or breath) has been established as a "search" under the Fourth Amendment, the tests must be reasonable and must be accompanied by a warrant. However, there are

exceptions to the warrant requirement such as consent, exigent circumstances, or incident to arrest. The court in this case considered how the search-incident-to-arrest doctrine applied to breath and blood tests incident to such arrests.

The court weighed the degree to which the warrantless tests intrude upon an individual's privacy against the degree to which the tests are needed for the promotion of legitimate government interests. The breath tests were determined to be a very slight intrusion, as blowing into a small tube is analogous to using a straw. However, the blood tests were determined to be a significant intrusion when compared to the breath tests.

For both types of BAC tests, the court determined that the government's need was significant, as it avoids loss of evidence due to time used in waiting for a warrant, the criminal punishment for refusal provides incentive to cooperate, and discourages drunk driving. However, the court held that the significant intrusion factor and the availability of alternatives (i.e., breath test) required the blood test to have a warrant, while the breath test does not need one.