No. 23-55603

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOY HO SCHERER,
***Plaintiff and Appellant*,**

vs.

CITY OF LOS ANGELES, WESSAM ISMAIL, NELSON MARTINEZ, AND DOES 1 THROUGH 10, INCLUSIVE,
Defendants and Appellees

On Appeal from the United States District Court
for the Central District of California
United States District Court Judge James V. Selna
Case No. 8:22-cv-01931-JVS(ADSx)

APPELLANT'S OPENING BRIEF

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STATEMENT OF JURIDICTION

Appellant Joy Scherer (hereinafter "Appellant" or "Ms. Scherer") appeals from a May 10, 2023 order of the United States District Court for the Central District of California granting Appellees' motion to dismiss her claims pursuant to Fed. R. Civ. P. 12(b)(6). (*See* Appellant's Excerpts of Record [hereinafter "ER"]-27—39.) The District Court had original jurisdiction over Appellant's claims pursuant to 28 U.S.C. § 1331. The Court's judgment became final and appealable on May 10, 2023, when it dismissed all her claims with prejudice. (ER-39.) Appellant filed her timely Notice of Appeal on July 8, 2023. (ER-94—109.) *See* Fed. R. App. P. 4(a)(1). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. section 1291.

STATEMENT OF ISSUES ON APPEAL

Under the First Amendment and California law, where a victim of domestic violence seeks redress from the government by "pressing charges" against her attacker, does an officer chill that victim's exercise of First Amendment rights by erroneously telling her that she will also be arrested, along with her attacker, if she presses charges?

STATEMENT OF THE CASE

I. UNDERLYING INCIDENT

The Following facts are derived from Appellant's First Amended Complaint ("FAC"). (ER-65—93.)

In 2020 Appellant Joy Scherer ("Ms. Scherer" or "Appellant") had an ongoing "dating relationship" with a man named Maxwell Bravo (hereinafter referred to as "Bravo"). On October 31, 2020, Bravo invited Ms. Scherer to go out that evening with him to celebrate Halloween. Bravo also invited Appellant to stay the night with him. Appellant took an overnight bag and her five-pound Yorkie dog, "Stanley," with her to Bravo's apartment. After arriving at Bravo's apartment, Ms. Scherer, Bravo, and Bravo's friend "Ezra" departed and went to a local bar. (ER-70, ¶¶ 19-24.)

At the bar, Bravo got into a heated argument with the bouncer which resulted in the bouncer escorting Mr. Bravo from the bar. The bouncer told Appellant and Ezra that Bravo had been told to leave the bar because he started an argument with another customer. The bouncer also told Appellant and Ezra that Bravo drove out of the parking lot at a high rate of speed and fired his gun up in the air while doing so. (ER-71, ¶¶ 25-31.)

After a couple of minutes Scherer and Ezra received a phone call from Bravo, telling them that he would pick them up on the street adjacent to the bar.

When they got into the car, Bravo was extremely angry and Ezra told him not to fire his gun. Scherer saw a gun in Bravo's waistband and was very frightened of him. Bravo entered the freeway and drove in excess of 100 mph while yelling and growling. Scherer and Ezra were afraid that Mr. Bravo might kill them. (ER-71—72, ¶¶ 32-36.) When Bravo exited the freeway, Ezra opened the car door and rolled out on to the street. Bravo drove Ms. Scherer back to his apartment. After they arrived at the apartment, Bravo again became enraged. He grabbed Ms. Scherer by the wrist and bit her. At that point Scherer decided to gather her dog and her belongings and leave Bravo's company. (ER-72 ¶¶ 36-38.)

Once inside the apartment, Scherer began gathering her belongings. Bravo asked what she was doing. Scherer said she was going to drive home. Bravo yelled that she was not leaving and grabbed her. Ms. Scherer went into the bathroom and locked the door. She was seated on the toilet with her pants and underwear down at her feet, when Bravo tore the door and frame from the wall and entered the bathroom. Bravo grabbed Scherer by her hair and began hitting her on her head. Scherer tried to pull up her pants, but Bravo would not allow her to do so. Bravo dragged Ms. Scherer by her hair out of the bathroom and forced her against the back of the couch. (ER-72 ¶¶ 38-43.)

Bravo screamed at Ms. Scherer that she was not going to leave, and with her pants still around her ankles, he unbuttoned his pants and pressed his penis against

her, attempting to penetrate her. Ms. Scherer screamed for Mr. Bravo to stop, but Bravo told her to "Shut the fuck up." Ms. Scherer elbowed Mr. Bravo, which made him even angrier. Mr. Bravo bit down on Ms. Scherer's left shoulder and repeatedly punched and kicked her. Eventually, Ms. Scherer was able to pull her pants up. Mr. Bravo opened the door to his apartment and pushed Scherer outside. (ER-72—73 ¶¶ 44-48.) At that time, Ms. Scherer did not have her bag, keys, or her dog. Scherer pounded on the door, pleading with Bravo to return her property. Bravo opened the door and threw Scherer's dog and her belongings outside. As Ms. Scherer gathered her belongings, Bravo came outside and attempted to drag Scherer by her hair back inside of his apartment. When Scherer attempted to flee, Bravo began beating her head against a metal railing. (ER-73 ¶¶ 49-54.)

Ms. Scherer was screaming for her life. A male bystander yelled for Bravo to stop beating her and told him that the police were on the way. The man told the LAPD dispatcher that Bravo was beating Ms. Scherer's head against a railing outside of his apartment. The dispatcher made a radio call to Appellee LAPD police officers Ismail and Martinez of a "Domestic Battery." (ER-73—74 ¶¶ 55-56.) When officers Ismail and Martinez arrived at Bravo's apartment building, they heard Ms. Scherer screaming loudly. The officers saw Bravo walking quickly back toward the stairway leading up to his apartment. Ms. Scherer was next to the

stairway, crying, bloody, and obviously beaten. The officers detained Mr. Bravo. (ER-74—75, ¶¶ 57-63.)

Officer Martinez spoke with Ms. Scherer about the incident with Mr. Bravo. (ER-75—76 ¶¶ 64-68.) Officer Martinez asked Ms. Scherer if Bravo was her boyfriend. Scherer replied "No," that Bravo was only her friend. Officer Martinez then observed Scherer's wounds, commented that she was "really beat up," and that she needed an ambulance. At that time, Ms. Scherer was wearing a sleeveless low-cut top. She had a bloody hematoma / laceration on her scalp area, a laceration on her right forehead, bite marks on both of her exposed shoulders, and bruises all over her face and body. Officer Martinez asked Ms. Scherer how she got her injuries, and she told him that she refused to have sex with Bravo, that he attempted to rape her, and that when he was not successful, that he threw her personal items out of his apartment and beat her. Ms. Scherer to Officer Martinez "He beat the fuck out of me." Scherer told Martinez hat Bravo hit her 10 to 15 times in her face, and that because she was a model, her career was ruined. (ER-76—77 ¶¶ 69-73.)

Officer Martinez again asked Scherer if she had any "romantic ties to [Bravo]." Appellant replied that they had dated "over the years," but that they were not presently dating. Martinez then told Scherer that he was going to ask Bravo

about the relationship. Officer Martinez then approached Mr. Bravo, who was being questioned by Officer Ismail. (ER-77, ¶¶ 73-76.)

Upon observing Mr. Bravo, Officer Ismail and Martinez saw that Bravo had no visible injuries, save possibly a tiny scratch under his chin. Bravo told Officer Ismail that he gatherer Scherer's belongings and dragged them outside of his apartment. Bravo the officers that he had been "dating" Ms. Scherer for 4 months, and later said he dating her for about a year. (ER-77—78 ¶¶ 77-80.)

After speaking with Bravo, Officer Martinez asked Ms. Scherer if she wanted to "press charges" against Bravo, and she said "Yeah." Officer Martinez walked back to where Officer Ismail was standing with Mr. Bravo. Bravo told the Officers that Ms. Scherer hit him with her "flailing arms," that she hit one of his eyes, and that she had been trying to get Bravo to assault her. (ER-78 ¶¶ 81-82.) Officer Ismail asked Bravo how he got "this" (referring, apparently, to a mark under Bravo's chin which is not visible on the video recording of this incident). Bravo replied: "How did she get anything on her face? Nothing." Officer Martinez asked Bravo "Who threw the first blow?" Bravo replied: "Her. I didn't throw any blows." Officer Martinez told Bravo: "Dude, she's pretty beat-up." Officer Martinez then told Bravo that since there is no dating relationship, the incident was being treated as a battery between the two of them. Martinez asked Bravo if he wanted to press charges. Bravo answered "No." (ER-78—79, ¶¶ 83-86.)

Officer Martinez again returned to speak with Ms. Scherer. Officer Martinez did not tell Ms. Scherer that he had asked Bravo if he wanted to "press charges" against her, and that Bravo had declined. Instead, Officer Martinez told her: "Just like you, he has injuries too, and he's claiming that you were the aggressor, and that you started the fight, and that just like I told you that you have the right to do a private person's arrest, that he has that right too. So if he wants to press charges, you will be going to jail too." Ms. Scherer responded that she did not want to go to jail right now. Officer Martinez told Ms. Scherer that she would be going to jail right now. Scherer told Officer Martinez that he must be kidding her, and he said that he was not. Ms. Scherer believed, based on what Officer Martinez told her, that if she "pressed charges" against Bravo, that she would be arrested as well. Although Ms. Scherer still wanted to "press charges" against her attacker and execute a private person's arrest, she withdrew her request based on Officer Martinez's statement. (ER-79 ¶¶ 87-91.)

Eventually, Ms. Scherer hired a lawyer to advocate on her behalf for the Los Angeles County City Attorney's Office to prosecute Mr. Bravo. Those efforts were successful, and Bravo was charged and convicted under Cal. Penal Code § 273.5 (domestic violence with corporal injury) in *People of the State of California v. Maxwell Bravo*, Los Angeles County Superior Court Case Number LAV1VW01547-01. (ER-82 ¶ 99.)

Appellant Scherer filed this suit soon after.

II. PROCEDURAL HISTORY

On October 21, 2022, Ms. Scherer filed the underlying civil action in C.D. Case No. 8:22-cv-01931-JVS-ADS. (ER-111, ¶ 1.) Ms. Scherer filed an amended complaint on January 13, 2023 alleging three causes of action under 42 U.S.C. § 1983: (1) violation of First Amendment right to petition government for redress of grievances, asserted against Appellees Ismail and Martinez; (2) violation of Fourteenth Amendment right to substantive due process of law, asserted against Appellees Ismail and Martinez; and (3) violation of First Amendment right to petition government for redress of grievances, asserted against Appellee City of Los Angeles pursuant to *Monell v. Dep't of Social Servs. of N.Y.*, 436 U.S. 658 (1978). (ER-70—86, ¶¶ 18—113.)

On January 30, 2023, Appellees moved to dismiss Ms. Scherer's FAC under Fed. R. Civ. Proc. 12(b)(6). (ER-113, ¶ 20.) On March 6, 2023, Appellant Scherer filed her opposition papers. (ER-114, ¶ 29.) After viewing the District Court's tentative ruling, Appellant Scherer requested and was granted a hearing on Appellees' motion. (ER-40.) To aid the District Court in ruling on the motion, Appellant Scherer lodged a video of her encounter with Appellees, as well as a transcript of that video. (ER-64 [Notice of Manual Filing or Lodging — Video of

Incident 10-31-2020]; ER-41—63 [Notice of Filing of Transcript of Video in Opposition to Motion To Dismiss First Amended Complaint].)

On May 8, 2023, the parties appeared in the District Court for a hearing on Appellees' motion. (ER-3—26.) Appellant's counsel requested for the District Court to "look at the video before making a ruling on this because . . . sometimes the words of a transcript can be deceiving in that it doesn't" convey the full context of the parties' interactions. (ER-6.) Counsel explained to the Court that, based on "the cadence of the discussion" shown on the video, it was clear that Officer Martinez "convinced [Ms. Scherer] that if she insisted on making a private person's arrest she was going to jail right then there and there." (ER-11—12, 18.)

Appellant's counsel explained that Appellee Officers faced "an obvious domestic violence situation as defined by statute."[1] (ER-21.) Counsel pointed out that when Appellee Officers encountered Ms. Scherer, "[h]er face was badly disfigured . . . She had a big gash over her right eye in a kind of criss-cross gash . . . and there was blood everywhere. . . . And it was very obvious [she had been

[1] Under California law, domestic violence situations are handled differently than ordinary battery incidents. For example, California law requires police agencies to "encourage the arrest of domestic violence offenders if there is probable cause that an offense has been committed," and to "discourage, when appropriate, but not prohibit, dual arrests." Cal. Penal Code § 13701(a). The law also provides that "Peace officers shall make reasonable efforts to identify the dominant aggressor in any incident," i.e. "the person determined to be the most significant, rather than the first, aggressor." *Id*.

beaten by Max Bravo]. . . The video shows it, and the photos that I submitted as an exhibit in the Complaint show it." (ER-6—8.) Counsel pointed out that when Appellees "ask [Mr. Bravo] if he has a dating relationship with [Ms. Scherer], . . . Max Bravo . . . says: 'I've dated her for the past like four-and-a-half months,'" and later said they had been dating "on and off" for "about a year."[2] (ER-9.) Counsel explained that "even if there wasn't any type of domestic relationship[,] . . . the beating was so severe that, if nothing else, it would qualify as a [Pen. Code §] 245 for assault." (ER-8, 21.) Nevertheless, Appellee Officers told Ms. Scherer "that the only way [Mr. Bravo] can be arrested . . . is by way of a private person's arrest." (ER-13.)

Counsel explained that when Appellees asked Ms. Scherer if she wanted to "press charges" against Mr. Bravo, in the form of a private person's arrest, "she said yes *twice*." (ER-9—17 [emphasis added].) Counsel explained that Officer Martinez, after hearing Ms. Scherer's request to carry out a private person's arrent on Mr. Bravo, told Ms. Scherer "he has injuries, too, and he's claiming that you're the one that were the aggressor and you started fighting against him. So just like I gave you the right to a private person's arrest . . . if he wants to press charges, I

[2] The California Penal Code defines "dating relationship" as "frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement independent of financial considerations." Cal. Pen. Code § 243(f)(10).

mean, you'd be going to jail, too." (ER-11—12.) Counsel pointed out that when Ms. Scherer told Officer Martinez "I don't wanna go [to jail] right now," he responded "[n]o, you're going to go [to jail right now] . . . That's how private person's arrest works. The law gives you the right and gives him the right." (*Id*.)

The Court asked: "If [Appellees] had discretion [to arrest Mr. Bravo], and they apparently weren't going to exercise their discretion to arrest Bravo, and she's offered the opportunity to make a private person's arrest, where's the problem?" (ER-17.) Appellant's counsel replied that "[t]he problem is that she said yes twice," but was deterred from exercising that right because Officer Martinez told her she would also be arrested if she exercised that right. (*Id*.) The Court asked Appellant's counsel: "Is she being told she's going to jail because she's going to be arrested or because that's a requirement of making a private person's arrest, that you accompany the detainee to the jail and fill out the paperwork?" (ER-18.) Appellant's counsel reiterated that Officer Martinez had "convinced [Ms. Scherer] that if she insisted on making a private person's arrest she was going to jail right then there and there" because "[t]hat's what he told her." (ER-18—19.)

Appellees' Counsel argued that when Officer Martinez told Ms. Scherer that she would be arrested if she went through with a private person's arrest, it was "not a threat," but "a statement of the law as the officer understood it." (ER-22—23.) When the Court asked why Officer Martinez told Ms. Scherer she would be going

to jail, Appellees' counsel replied "I think what [Officer Martinez] was trying to say is if you're going to press charges against Mr. Bravo . . . you're both going to jail. And that's a statement of fact because that's exactly what would have happened[.]" (*Id*.)

The Court granted Appellees' Rule 12(b)(6) motion as to Ms. Scherer's First Amendment retaliation claim because the Court found that "she cannot establish that Officer Martinez's actions had a 'chilling effect.' " (ER-33—37.) Although the Court agreed with Ms. Scherer's argument that "her verbal request [to execute a private person's arrest on Mr. Bravo] constitutes protected petitioning activity," the Court held that "Scherer cannot plausibly establish that Officer Martinez's actions would objectively chill a person of ordinary firmness from asking law enforcement to 'press charges.' " (ER-36.) The Court explained:

> The Court agrees that Officer Martinez probably did not have any objective basis to tell Scherer that there was a possibility that charges would be brought against her; he already knew that Bravo did not want to press charges. But the officer's subjective intent is not the relevant inquiry. [Citation.] Ultimately, Officer Martinez's conditional statement could not have had a chilling effect on her right to petition. He conveyed that if Bravo chose to go forward with pressing charges against her, she would face the same consequences. This was neither an explicit nor implicit threat.

(ER-36.) Thus, the District Court dismissed Ms. Scherer's first and third claims. (ER-37, 39.)

The District Court also found that "Scherer's substantive due process claim is essentially duplicative of her First Amendment claim" and dismissed it without

leave to amend on that basis. (ER-37—38 [citing *Hufford v. McEnaney*, 249 F.3d 1142, 1151 (9th Cir. 2001), *Brandenburg v. Hous. Auth. of Irvine*, 253 F.3d 891, 900 (6th Cir. 2001)].)

Appellant filed her notice of appeal soon thereafter. (ER-94—109.)

SUMMARY OF ARGUMENT

The District Court erred in granting Appellees' motion under Fed. R. Civ. P. 12(b)(6) for dismissal of Appellant's 42 U.S.C. § 1983 claim for violation of First Amendment rights. Appellant Joy Scherer had a Fist Amendment right to petition the government for redress of her grievances. Here, Ms. Scherer was the victim of domestic violence and attempted rape. Appellee police officers declined to arrest her attacker and instead told Appellant Scherer that her attacker would only be arrested if she executed a private person's arrest. Appellant Scherer repeatedly told Appellees that she wanted to execute a private person's arrest for her attacker. However, Appellees erroneously represented to Appellant Scherer that if she executed a private person's arrest for her attacker, that she would also be arrested. As a direct result, Appellant Scherer did not execute a private person's arrest for her attacker.

Under the circumstances, a person of ordinary firmness in Appellant's position would understand Appellees' representation as a threat / promise of reprisal if Appellant continued to exercise her First Amendment right by following through with a private person's arrest on her attacker. Thus, a person of ordinary firmness in Appellant's position would be chilled from exercising their First Amendment rights.

Accordingly, this Honorable Court should REVERSE the District Court's granting of Appellees' Rule 12(b)(6) motion and REMAND this case for further proceedings.

ARGUMENT

I. STANDARD OF REVIEW.

This Honorable Court reviews *de novo* a district court's decision to dismiss a § 1983 action pursuant to Rule 12(b)(6). *See Patel v. City of Montclair*, 798 F.3d 895, 897 (9th Cir. 2015); *Watson v. Weeks*, 436 F.3d 1152, 1157 (9th Cir. 2006). All allegations of material fact are presumed true and construed in the light most favorable to the nonmoving party. *Dougherty v. City of Covina*, 654 F.3d 892, 897 (9th Cir. 2011); *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). Although review is generally limited to the contents of the complaint, the Court may take judicial notice of matters of public record and consider documents on which the complaint "necessarily relies and whose authenticity" is not contested. *See Skilstaf, Inc. v. CVS Caremark Corp*., 669 F.3d 1005, 1016 n.9 (9th Cir. 2012); *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1141 n.5 (9th Cir. 2003).

First Amendment claims under 42 U.S.C. § 1983 are reviewed "de novo since they present mixed questions of law and fact, 'requir[ing] us to apply principles of First Amendment jurisprudence to the specific facts of this case.' " *Gerritsen v. City of Los Angeles*, 994 F.2d 570, 575 (9th Cir. 1993) (quoting *ACORN v. Phoenix,* 798 F.2d 1260, 1263 (9th Cir. 1986); *Bay Area Peace Navy v. United States,* 914 F.2d 1224, 1227, n. 1 (9th Cir. 1990)).

II. THE DISTRICT COURT ERRED IN GRANTING APPELLEES' MOTION TO DISMISS APPELLANT'S CLAIM FOR FIRST AMENDMENT RETALTION.

A. First Amendment Claims Under 42 U.S.C. § 1983—Generally.

All speech is presumptively protected under the First Amendment. *See R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992); *Simon & Shuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). The right to petition the government for redress of grievances is a specifically enumerated and protected form of speech under both the federal and state Constitutions. *See Vargas v. City of Salinas*, 200 Cal.App.4th 1331, 1134 (2011) (citing U.S. Const. amend. I; Cal. Const., art. I, § 3.) "Police officers have been on notice at least since 1990 that it is unlawful to use their authority to retaliate against individuals for their protected speech," and that such retaliation can render them liable for damages under 42 U.S.C. § 1983. *Ford v. City of Yakima*, 706 F.3d 1188, 1193 (9th Cir. 2013); *Duran v. City of Douglas,* 904 F.2d 1372, 1375-1378 (9th Cir. 1990).

"Retaliation"[3] in the First Amendment context is not limited to physical retribution, such as arrests or beatings. This Court has "stated multiple times, 'a retaliation claim may assert an injury no more tangible than a chilling effect on First Amendment rights.' " *Brodheim v. Cry*, 584 F.3d 1262, 1269-70 (9th Cir.

[3] This Court also sometimes uses the term "adverse action" when discussing whether an action was retaliatory in the First Amendment context, most notably in cases involving prison litigation.

2009) (citing *Gomez v. Vernon*, 255 F.3d 1118, 1127 (9th Cir. 2001) and *Hines v. Gomez*, 108 F.3d 265, 269 (9th Cir. 1997)). "Thus, the mere *threat* of harm can be an adverse action, regardless of whether it is carried out because the threat itself can have a chilling effect." *Id*.

In addition, this Court has "never held that a plaintiff must establish an explicit threat to prevail on a retaliation claim." *Id*. (citing *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 655 (9th Cir. 2006) [noting implicit threat of adverse action sufficient to establish Title VII prima facie case]; *N.L.R.B. v. Island Film Processing Co., Inc.*, 784 F.2d 1446, 1451 (9th Cir. 1986) ["Implied threats of retaliation suffice to taint a [labor representation] election."].) A § 1983 plaintiff asserting a First Amendment claim "need not need establish that [the actionable] statement contained an explicit, specific threat." *Id*.

Moreover, there is no requirement that an officer / agent's actions constitute a true "threat" to be actionable; it is sufficient if their actions "deterred or chilled" the citizen from exercising First Amendment rights. *Mendocino Environ. Ctr. v. Mendocino Cty*, 192 F.3d 1283, 1300 (9th Cir. 1999). Thus, as this Court observed, where a citizen engages in protected First Amendment activity, a government agent's " 'threat of invoking legal sanctions and *other means of coercion, persuasion, and intimidation*,' can violate the First Amendment also.' " *Mulligan v. Nichols*, 835 F.3d 983, 990 n.5 (9th Cir. 2016) (quoting *White v. Lee* , 227 F.3d

1214, 1228 (9th Cir. 2000) and *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963)) (emphases added).

The elements of a First Amendment retaliation claim are now well-settled: "To establish a retaliation claim, the evidence must show that (1) the officer's conduct 'would chill or silence a person of ordinary firmness from future First Amendment activities,' and (2) the officer's desire to chill speech was a 'but-for cause' of the adverse action." *Sharp v. Cty. of Orange*, 871 F.3d 901, 919 (9th Cir. 2017) (citing *Skoog v. Cty. of Clackamas*, 469 F.3d 1221, 1231-1232 (9th Cir. 2006)). However, a plaintiff need not prove that "his speech was actually inhibited or suppressed," and it is sufficient if "deterrence [of protected speech] was a substantial or motivating factor" in the defendant's conduct. *Mendocino Env'l Ctr. v. Mendocino County,* 14 F.3d 457, 459-560 (9th Cir. 1994); *Mendocino Env'l Ctr. v. Mendocino County,* 192 F.3d at 1288. Moreover, the causation element is satisfied where the officer's verbal expressions at the scene are "quite literally a statement of but-for causation." *See Sharp*, 871 F.3d at 908.

B. Requesting a Private Person's Arrest is a Grievance Procedure Established By California Law, and Constitutes Protected First Amendment Petitioning Activity.

It has long been established that the reporting of a crime to police is protected "petitioning" activity under both federal and California state law.[4] *See Forro Precision, Inc. v. Int'l Bus. Machines Corp*., 673 F.2d 1045, 1060 (9th Cir. 1982); *Chabak v. Monroy*, 154 Cal.App.4th 1502, 1512 (2007); *Comstock v. Aber*, 212 Cal.App.4th 931, 943–44 (2012); *Wang v. Hartunian*, 111 Cal.App.4th 744, 748–49 (2003). In fact, that legal principle is clearly established *everywhere*,[5] and

[4] *See Forro Precision, Inc. v. Int'l Bus. Machines Corp*., 673 F.2d 1045, 1060 (9th Cir. 1982) ("it would be difficult indeed for law enforcement authorities to discharge their duties if citizens were in any way discouraged from providing information. We therefore hold that the Noerr-Pennington doctrine applies to citizen communications with police*."). See also Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972*); City of Columbia v. Omni Outdoor Adver.*, Inc., 499 U.S. 365 (1991).

[5] *See, e.g., Meyer v. Bd. of Cnty. Comm'rs*, 482 F.3d 1232, 1243 (10th Cir. 2007) (concluding that filing a criminal complaint is an exercise of the First Amendment right to petition); *Gable v. Lewis*, 201 F.3d 769, 771 (6th Cir. 2000) ("[S]ubmission of complaints and criticisms to nonlegislative and nonjudicial public agencies like a police department constitutes petitioning activity protected by the petition clause"); *Seamons v. Snow*, 84 F.3d 1226, 1238 (10th Cir. 1996) (stating that denying the ability to report physical assaults is an infringement of protected speech); *Estate of Morris v. Dapolito*, 297 F. Supp. 2d 680, 692 (S.D.N.Y. 2004) (concluding that swearing out a criminal complaint against a high school teacher for assault and seeking his arrest were protected First Amendment petitioning activities); *Lott v. Andrews Ctr.,* 259 F. Supp. 2d 564, 568 (E.D. Tex. 2003) ("There is no doubt that filing a legitimate criminal complaint with law enforcement officials constitutes an exercise of the First Amendment right");

cannot reasonably be disputed. *See Entler v. Gregoire*, 872 F.3d 1031, 1043 (9th Cir. 2017) ("we join our two sister circuits that have held that the filing of criminal complaints falls within the embrace of the First Amendment").

Likewise, the California Supreme Court has also recognized that "every citizen has a right protected by state law to report criminal violations to the police," particularly "where a remedial scheme depends upon private initiative for enforcement." *Barela v. Superior Court*, 30 Cal.3d 244, 252-253, 254 (Cal. 1981). "California has a long history of protecting those citizens who report violations of the criminal laws." *Id*. " 'It is for the best interests of society that those who offend against the laws shall be promptly punished, and that any citizen who has good reason to believe that the law has been violated shall have the right to cause the arrest of the offender.' " *Barela*, 30 Cal.3d at 252 (citing *Ball* v. *Rawles*, 93 Cal. 222, 228 (1892)). "Laws which define certain acts as criminal would be meaningless if citizens who reported crime were not protected from vindictive

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United States v. Hylton, 558 F. Supp. 872, 874 (S.D. Tex. 1982) ("[T]he filing of a legitimate criminal complaint with local law enforcement officials constitutes an exercise of the [F]irst [A]mendment right."); *Curry v. Florida*, 811 So. 2d 736, 743 (Fla. Dist. Ct. App. 2002) (finding that complaints, even though numerous, made to law enforcement agencies are protected First Amendment activity regardless of the "unsavory motivation" of petitioner); *Arim v. Gen. Motors Corp.*, 520 N.W.2d 695 (Mich. Ct. App. 1994) (per curiam) (granting summary judgment to individuals who were sued for their participation in a criminal sting operation run based on the First Amendment).

retaliation."[6] *Id*. "This fundamental principle is embodied in Penal Code section 136.1, which declares that it is a misdemeanor to dissuade or attempt to dissuade any victim of crime from reporting the crime to the police." *Id*. (citing Cal. Pen. Code, § 136.1(b)(1).)

Here, Ms. Scherer's FAC clearly demonstrates that she—and not Mr. Bravo, her abuser—was the victim of extreme domestic violence, and no reasonable officer could dispute that. (*See* ER-68—82.) In addition to detailed allegations of the underlying incident, the FAC includes detailed photographs of her injuries, all of which were visible to Appellees on the night of the subject incident. (ER-87—93.) Ms. Scherer, as a victim reporting a crime, had a First Amendment right to petition Defendants for redress of her grievances by asking them to "press charges" on her attacker. *See Entler*, 872 F.3d at 1043-1044 ("While Plaintiff did not have a right to force the local prosecutor to *pursue* her charges, she possessed the right to

[6] The need to protect the right to report criminal violations is especially important where the suspected crime is the sort of abuse that invokes mandated reporting requirements. *See Chabak*, 154 Cal.App.4th at 1512 ("reports of child abuse to individuals bound by law to investigate the report are protected by section 425.16, i.e., the statements arose from protected activity . . . Monroy's statement to the police arose from her right to petition the government and thus is protected activity"); *Comstock*, 212 Cal.App.4th at 943–44 ("it would appear that the Legislature intended that reporting of information to a mandatory reporter result in a governmental investigation—an 'official proceeding'—even when the victim does not directly report to the law enforcement agency"). Government-sanctioned retaliation for such protected petitioning activity is forbidden, whether it takes the form of a SLAPP suit or a retaliatory arrest.

access judicial procedures for redress of her claimed wrongs and to set in motion the governmental machinery"); *see also Barela*, 30 Cal.3d at 252-253, 254 (noting that the "strong policy reasons for encouraging the reporting of crime" are stronger "where a remedial scheme depends upon private initiative for enforcement"). The District Court below agreed and found that Ms. Scherer's "verbal request [to execute a private person's arrest on Mr. Bravo] constitutes protected petitioning activity" under the First Amendment. (ER-36.)

The District Court's ruling on this point was correct and should not be disturbed. However, as explained further below, the District Court erred in determining as a matter of law that Appellees did not "chill" Ms. Scherer from exercising her right to engage in that petitioning activity.

C. For Purposes of Pleading a First Amendment Claim Under 42 U.S.C. § 1983, an Allegation That the Officer's Actions Would "Chill" a Person of Ordinary Firmness is Sufficient, and Whether Plaintiff Reasonably Interpreted the Officer's Actions as Threatening / Retaliatory is a Determination Reserved for the Jury.

For purposes of pleading a First Amendment claim Under 42 U.S.C. § 1983, "an allegation that a person of ordinary firmness would have been chilled is sufficient to state a retaliation claim," and " 'since harm that is more than minimal will almost always have a chilling effect, alleging harm *and* alleging the chilling effect would seem under the circumstances to be no more than a nicety.' "

Brodheim, 584 F.3d at 1269-70 (quoting *Rhodes v. Robinson,* 408 F.3d 559, 568, n.11 (9th Cir. 2005) (alteration marks omitted).

Where the "retaliation" at issue is in the nature of a threat, or a statement that someone "could . . . interpret as intimating that some form of punishment or adverse" action, the determination of whether that statement violates the First Amendment is reserved for the factfinder. *See Brodheim*, 584 F.3d at 1270 (quoting *Okwedy v. Molinari*, 333 F.3d 339, 343 (2d Cir. 2003)). This Court in *Brodheim* confronted the issue of whether an officer / agent's words were sufficiently "chilling" as to be actionable under the First Amendment.[7] *See Brodheim v. Cry*, 584 F.3d 1262, 1269-1274 (9th Cir. 2009). There, a corrections officer merely told the plaintiff that he "should be 'careful' what he writes and requests in his administrative grievances." *Id*. at 264. This Court rejected the defendant's argument that "the threat of harm must be explicit and specific to constitute an adverse action." *Id*. at 1270. This Court held:

> Outside the prison context, we have never held that a plaintiff must establish an explicit threat to prevail on a retaliation claim. . . . We see no reason why a different standard should apply in this setting. Thus, Brodheim need not need establish that Cry's statement contained an explicit, specific threat of discipline or transfer if he failed to comply.

[7] Even though *Brodheim* involved a motion for summary judgment, it relied upon cases which consider the First Amendment in a Rule 12(b)(6) context, such as *Rhodes*. The difference was of no consequence for purposes of that case because "the elements of the claim are the same on a motion for summary judgment."

Brodheim, 584 F.3d at 1270. This Court further explained that "[b]y its very nature, a statement that 'warns' a person to stop doing something carries the implication of some consequence of a failure to heed that warning." *Id*. This Court also noted the importance of "circumstantial evidence that a jury could view as supporting" the plaintiff's interpretation of the officer's statement to "be careful." *Id*. In other words, this Court did not limit its analysis of the "threat" at issue strictly to the officer's words, but also considered the surrounding circumstances which contributed to the plaintiff interpreting those words as a threat. *Id*. Thus, based upon this Court's foregoing analysis, this Court held that a "reasonable person may have been chilled by [the officer's] warning," and "reverse[d] the [contrary] finding of the district court[.]" *Id*. at 1271.

District Courts likewise follow *Brodheim* when deciding First Amendment cased based on "threats," or similar such statements "intimating" adverse treatment for exercising First Amendment rights. For example, in *Burghardt,* the District Court for Northern District of California found that the "statements, 'You're lucky you're eating' and 'You're lucky if you eat tomorrow' (or words to that effect) could be reasonably interpreted as a threat that food would be withheld from [the plaintiff] if he obtained and submitted a grievance form." *Burghardt v. Franz*, 17-cv-00339-BLF, 3 (N.D. Cal. Jun. 16, 2022) (citing *Brodheim*, 584 F.3d at 1270 and *Okwedy*, 333 F.3d at 343). Thus, the Court held, "[a] jury must resolve whether

[the defendant officer] made those statements and whether such statements were reasonably interpreted as threats of harm in retaliation for seeking to file a grievance." *Id*.

D. Appellees' Actions in Telling Appellant That She Would be Taken to Jail if She Executed a Private Person's Arrest on Her Attacker Would "Chill" a Person of Ordinary Firmness From Redressing Their Grievances Through the Private Person's Arrest Process.

In this case, the FAC alleges—and the video shows—that when Appellee officers asked Ms. Scherer if she wanted to "press charges" against Mr. Bravo in the form of a private person's arrest, "she said yes *twice*." (ER-9—17 [emphasis added].) The FAC alleges—and the video shows—that when Officer Martinez heard Ms. Scherer's request to carry out a private person's arrest on Mr. Bravo, he told Ms. Scherer "[Mr. Bravo] has injuries, too, and he's claiming that you're the one that were the aggressor and you started fighting against him. So just like I gave you the right to a private person's arrest . . . if he wants to press charges, I mean, you'd be going to jail, too." (ER-11—12.) The FAC alleges—and the video shows—that when Ms. Scherer told Officer Martinez "I don't wanna go [to jail] right now," Martinez responded by saying "[n]o, you're going to go [to jail right now] . . . That's how private person's arrest works. The law gives you the right and gives [Mr. Bravo] the right." (*Id*.) As in *Brodheim*, Reasonable jurors "could . . . interpret [Officer Martinez's words] as intimating . . . some form of punishment or adverse" action if she pressed on with a private person's arrest of Mr. Bravo. *See*

Brodheim, 584 F.3d at 1270 (quoting *Okwedy v. Molinari*, 333 F.3d 339, 343 (2d Cir. 2003)). Likewise, as in *Brodheim*, Ms. Scherer was not required to "establish that [Officer Martinez's] statement contained an explicit, specific threat." *Id*. (citing *Berry*, 447 F.3d at 655). The allegations contained in the FAC—taken as true, as they must—are more than sufficient to state a claim under the First Amendment and § 1983 because they specifically allege "that a person of ordinary firmness would have been chilled" from executing a private person's arrest of Mr. Bravo. *Brodheim*, 584 F.3d at 1269-70; *Rhodes,* 408 F.3d at 568. And in fact, Ms. Scherer was "chilled" from executing a private person's arrest of Mr. Bravo, which resulted in her attacker and attempted rapist roaming free, without consequence.

Nevertheless, the Court granted Appellees' Rule 12(b)(6) motion as to Ms. Scherer's First Amendment retaliation claim because the Court found that "she cannot establish that Officer Martinez's actions had a 'chilling effect' " or "plausibly establish that Officer Martinez's actions would objectively chill a person of ordinary firmness from asking law enforcement to 'press charges.' " (ER-33—37.) However, if the words "be careful" were sufficient to chill First Amendment petitioning activity in *Brodheim*, then surely Officer Martinez's statement that "you'd be going to jail too" meets that standard. (ER-11—12.) And contrary to the District Court's reasoning, the fact that Officer Martinez's threat was phrased as a "conditional statement" (ER-36) is of little importance because

conditional statements can easily be "interpret[ed] as intimating that some form of punishment or adverse" action. *See Brodheim*, 584 F.3d at 1270. Indeed, threats are often phrased as conditional statements. The fact that a "conditional statement" may not meet the standard for *criminal* threats has no bearing on whether it would "chill a person of ordinary firmness" from engaging in protected speech.

Although Appellees' counsel argued that Officer Martinez's statement was "not a threat," she effectively confirmed that Officer Martinez would have arrested Ms. Scherer if she had pressed forward with the private person's arrest: "I think what [Officer Martinez] was trying to say is if you're going to press charges against Mr. Bravo . . . you're both going to jail. And that's a statement of fact because that's exactly what would have happened[.]" (ER-22—23.) Although Appellees' counsel's admission is telling, such an arrest would not have been lawful. Defendants could not have lawfully arrested Plaintiff on some backwards theory of "mutual combat." Because Ms. Sherer had previously been in a dating relationship with Bravo, Officer Martinez had only the right to arrest the *primary aggressor* under California law.[8] The photographs attached to the FAC lay to rest

[8] Cal. Penal Code § 13701 provides in pertinent part:

> 13701. (a) Every law enforcement agency in this state shall develop, adopt, and implement written policies and standards for officers' responses to domestic violence calls by January 1, 1986. These policies shall reflect that domestic violence is alleged criminal

any dispute about who the "primary aggressor" was. (ER-87—93.) When Appellee Officers encountered Ms. Scherer, "[h]er face was badly disfigured . . . She had a big gash over her right eye in a kind of criss-cross gash . . . and there was blood everywhere. . . . And it was very obvious [she had been beaten by Max Bravo]." (ER-6—8.) Appellees cannot hide behind Officer Martinez's unreasonable statement that Bravo "has injuries too, and he's claiming that you were the aggressor, and that you started the fight" as a justification for arresting Plaintiff when the FAC clearly alleges that Bravo did not have such visible injuries.[9] Nor

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> conduct. Further, they shall reflect existing policy that a request for assistance in a situation involving domestic violence is the same as any other request for assistance where violence has occurred. (b) **The written policies shall encourage the arrest of domestic violence offenders if there is probable cause that an offense has been committed.** . . . **These policies shall discourage, when appropriate, but not prohibit, dual arrests. Peace officers shall make reasonable efforts to identify the dominant aggressor in any incident. The dominant aggressor is the person determined to be the most significant, rather than the first, aggressor.** In identifying the dominant aggressor, an officer shall consider the intent of the law to protect victims of domestic violence from continuing abuse, the threats creating fear of physical injury, the history of domestic violence between the persons involved, and whether either person acted in self-defense[.]

Cal. Penal Code § 13701(a) (emphases added).

[9] This conclusion is strengthened by the fact that Officer Martinez knew that Scherer had complained that Bravo attempted to rape her, in violation of Cal. Penal Code § 664/261, a felony. California law permits a peace officer to arrest another for a felony, even if that crime was not committed in the officer's presence. Officer Martinez also had the right under California state law to arrest Bravo, in the absence of any request by plaintiff or any private person's arrest form, for the

can Appellees claim that their policy of "citizen's arrest" required them to arrest both Plaintiff and Bravo, because "any policy that allows the police to substitute a citizen's arrest for probable cause to arrest must be stricken as unconstitutional." *Corcoran v. Fletcher*, 160 F.Supp.2d 1085, 1092 (C.D. Cal. 2001).

Although Appellees had the discretion to refuse to arrest Bravo, they did not have the right to threaten plaintiff with arrest if she insisted on executing a private person's arrest. Defendants lacked probable cause to arrest Ms. Scherer, and to condition her First Amendment petitioning activity upon her unlawful arrest amounts to a violation of her First Amendment rights, actionable under 42 U.S.C. § 1983. Thus, for the reasons above, Officer Martinez's statement to Ms. Scherer that she would be "going to jail too" if she executed a private person's arrest for Mr. Bravo chilled her from engaging in protected First Amendment petitioning activity, and would have chilled a person of ordinary firmness as well. *Brodheim*, 584 F.3d at 1269-71; *Rhodes,* 408 F.3d at 568; *Entler*, 872 F.3d at 1043; *Barela*, 30 Cal.3d at 252.

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felony offenses of violation of Cal. Penal Code § 245(a)(4) (assault by means likely to produce great bodily injury) and Cal. Penal Code § 203 (Mayhem). He simply chose not to.

Accordingly, the District Court erred when it granted Appellees' Rule 12(b)(6) motion to dismiss Appellant Scherer's First Amendment retaliation claim. The District Court's ruling must be reversed.

CONCLUSION

For the foregoing reasons, this Honorable Court should: (1) REVERSE the District Court's dismissal of Appellant's § 1983 claim for First Amendment retaliation; and (4) REMAND this case for further proceedings.

Dated: January 19, 2024

Respectfully submitted,

___S/ Brenton W. Aitken Hands
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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