HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SHIRLEY SCHEIER,

Plaintiff,

vs.

CITY OF SNOHOMISH, a municipal corporation, and DARLENE GIBSON, CHUCK MACKLIN, and ALEXANDER ROSS, all individuals,

Defendants.

Case No.: CV 07-01925 JCC

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BASED ON QUALIFIED IMMUNITY

NOTING DATE: **August 22, 2008**

I. INTRODUCTION

The law governing when and how detentions and arrests may occur is clearly established. Invoking the tragedy of September 11 and the specter of terrorism should not automatically immunize police officers and permit them to disregard well-established constitutional rights under the First and Fourth Amendments of the United States Constitution. Here, testimony and documents establish that the Defendants had no reasonable suspicion to detain, and no probable cause to arrest, Plaintiff Shirley Scheier, an art professor who was taking photographs while on public property. In an effort to manufacture suspicion, Defendants' Motion exaggerates and in several material respects misstates facts in the record. When Defendants' contentions that Ms. Scheier trespassed, ducked, and ran are stripped away, it is clear that the officers detained and

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arrested Ms. Scheier solely because she was taking photographs of a publicly visible facility while on public property. This is an insufficient basis to detain and arrest someone. The officers' detention and arrest of Ms. Scheier was contrary to well established Fourth Amendment principles. At a minimum, there is a material factual dispute regarding Ms. Scheier's conduct which the officers are now claiming supported their suspicions. Accordingly, Plaintiff respectfully requests that the Court deny Defendants' Motion for Summary Judgment based on qualified immunity.

Summary judgment in favor of the officers would immunize them for their violations of Ms. Scheier's clearly established Fourth Amendment rights. In addition, it would pave the way for detention and arrest based on lawful non-suspicious activity which millions of Americans (and tourists) engage in on a daily basis. Such a decision would have the effect of chilling the rights of photographers, which would ultimately affect their photography, art, and expression, as well as the public's right to receive this expression.

II. FACTUAL BACKGROUND

A. An Art Professor Takes Pictures on Public Property and is Unlawfully Detained and Arrested for Doing So

Ms. Scheier is an Associate Professor of Art at the University of Washington and she specializes in depicting waterways and industrial systems and their environmental relationships in her artwork. (Deposition transcript of Shirley Scheier, attached as **Exhibit A** to the Declaration of Venkat Balasubramani (hereinafter "***Scheier Dep.***"), p 80:1-24.) (Examples of Ms. Scheier's work, and some of the actual photographs taken by Ms. Scheier are attached as **Exhibit A** and **Exhibit B** to the Declaration of Shirley Scheier ("***Scheier Decl.***").) Ms. Scheier wished to take photographs of the power lines around the BPA substation (the "***BPA Facility***") for use in her artwork.

On the morning in question, Ms. Scheier drove to Snohomish, Washington to take pictures of power lines and towers around the BPA Facility. (Scheier Dep., p. 48:24-p. 49:3.) On a previous trip between Everett and her home in North Seattle, Ms. Scheier – who avoids travel on large highways because of the size and age of her car – had noticed the BPA Facility. (Id., p. 46:11-17.) She returned to take photographs on the date in question because of her schedule and favorable

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weather conditions. (Id., p. 46:22; p. 47:16; p. 53:11-15.)

Ms. Scheier arrived at the BPA Facility around 9:30 in the morning. (Scheier Dep., p. 45:15-23.) She drove up from the north end of the BPA Facility, and parked in a parking lot near some power structures. (Id., p. 48:17-22.) Because she was too close to get shots to suit her artwork, she drove around to try to get an unobstructed view of the power lines and towers. (Id., p. 48:23.) Driving south, she saw an "entryway" and drove up to it, but felt that the intercom and gate meant that the area beyond the gate was "for employees only." Realizing this, she turned around to find another vantage point. (Id., p. 49:12-17.) Ms. Scheier, wishing to avoid intruding on a nearby neighborhood, parked across the street from an entrance to the facility in a business's parking lot. (Id., p. 50:1-5.) She walked up the roadway toward the plant, and through a grassy park and noticed some mulberry bushes near a fence. (Id., p. 52:9-14.) The location was not conducive for photography, so she walked back to her car, "strolling along" and listening to the birds. (Id., p. 52:14-25; p. 54:2-5.)

Ms. Scheier was unaware that her actions had gotten the attention of anyone at BPA, or that anyone at the BPA had attempted to contact her in anyway. (Scheier Dep., p. 55:3-5 ("I had no awareness of people wanting to talk to me until I saw the flashing lights in my rearview mirror.").) She returned to her car, drove to several other locations in the area to take photographs, stopped at a coffee shop to purchase tea, and drove back to Highway 9. (Id., p. 56:1-4.) Ms. Scheier noticed another location to take photos, and pulled over to do so. (Id., p. 56:11-8.) She accelerated to merge onto the highway in front of a large cement truck or tractor-trailer and headed home. (Id.) Soon thereafter, she saw flashing lights behind her car, and stopped on the side of the highway. (Id., p. 57:7-20.) Believing that there was some minor problem with her car, such as a broken taillight, she pulled over and got her driver's license and registration out of her glove compartment. (Id., p. 57:7-15.) When the officer [Deputy Chief Macklin] came to her window, she was ordered to keep her hands on the wheel, and told that she "was seen taking photographs." (Id., p. 57:16-21.) She truthfully responded that she was taking photographs in the area. (Id., p. 57:21-25.) The officer asked her if she thought it was "suspicious" and Ms. Scheier told him that she did not think it was.

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(Id., p. 58:1-3.) He asked to see a map that was on the front seat of her car, and demanded that she point to where she lived in Seattle. (Id., p. 58:9-23.) Deputy Chief Macklin asked Ms. Scheier why she was in the area taking photographs, and she told him that she liked the landscape. The officer then reported back to the other officers and talked about calling the FBI. (Id., p. 59:1-2.)

Another officer [Officer Gibson] came to speak to Ms. Scheier. Officer Gibson refused to identify herself to Ms. Scheier, and responded with incredulity and disbelief when Ms. Scheier told the officer her name and that she was a professor at the University of Washington. (Scheier Dep., p. 59:20-24.) Ms. Scheier was then asked to step out of her car, was not allowed to turn it off or to lock it, and was forcibly pulled up and out of the car by the female officer. (Id., p. 61:19-p. 62:5.) As soon as Ms. Scheier was out of the car, she was placed in handcuffs, pushed against the side of the car, and frisked while on unsteady ground. (Id., p. 62:6-20.) Ms. Scheier was frightened, her legs were shaking and she felt at several times as if she was about to fall. (Id., p. 62-63.) Ms. Scheier was brought to Officer Gibson's patrol car, and Ms. Scheier made the officer aware of her blood clotting disorder. (Id., p. 63:8-25.) She was placed in the back of the police car, where she could not sit properly, (Id., p. 65:23-25) and was kept there for almost a half hour. (Id., p. 66:1-10.) While in the back of the police car, Ms. Scheier was asked if the officers could search her car (Id., p. 68:9-18) and was questioned by the female officer while in the back of the car. (Id., p. 67:1-p. 68:8.) Eventually, Ms. Scheier was told that she was going to be let out of the police car and her handcuffs were removed. (Id., p. 71:1-7.) She was then told that the FBI would be contacting her at her home. (Id., p. 71:11-24.) Ms. Scheier called friends and attempted to calm down, then returned to her home. (Id., p. 72:10-22.) The incident left Ms. Scheier shaken, and unable to sleep for several weeks. (Id., p. 31:8-10.) The incident also resulted in Ms. Scheier experiencing anxiety when taking photographs now. (Id., p. 33:18-22.)

B. The Officers Do Not Have Reasonable Suspicion to Detain Nor Probable Cause to Arrest Ms. Scheier

1. The BPA reports Ms. Scheier taking photographs of the BPA Facility which triggers the unlawful events.

After observing Ms. Scheier taking photographs around the BPA Facility, a BPA employee

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initiated a non-urgent "priority 2" 911 call. (Deposition transcripts of Deputy Chief Macklin attached as **Exhibit B** to the Declaration of Venkat Balasubramani (hereinafter "***Macklin Dep. I***"), pp. 46-47 (distinguishing between a priority 1 call which would warrant a response within five minutes, and a lesser level priority 2 call) and ***Macklin Dep. II***.) Officer Darlene Gibson was dispatched to the BPA Facility, and spoke to Neil Echols, a BPA employee, who reported that another employee had told him that she had seen someone approach the security gate and leave. (*See* Gibson Incident Report (Jolley Decl., **Ex D**).) Officer Gibson reported the description of the car and of Ms. Scheier over her radio. Deputy Chief Macklin set off separately and sought to locate Ms. Scheier's vehicle. (Macklin Dep. I, p. 60:9-11.) At the time, Ms. Scheier had pulled off Highway 9 and was parked on the shoulder. Deputy Chief Macklin saw Ms. Scheier's vehicle, and after passing her vehicle, made a u-turn, and initiated a stop of her vehicle. (Id., p. 69:4-9.)

2. The officers detained Ms. Scheier based on generalized concerns.

Deputy Chief Macklin, the officer who pulled Ms. Scheier over, testified that he stopped Ms. Scheier because of the BPA's report of "suspicious circumstances." (Macklin Dep. I, p. 77:2.) Deputy Chief Macklin's incident report describes Ms. Scheier's allegedly suspicious behavior as "photographing the facility." (Macklin Incident Report, p. 1:1-2 (Jolley Decl., **Ex. F**).) None of the incident reports written following the incident describe any suspicious activity on the part of Ms. Scheier of which the officers were aware of prior to initiating the stop of Ms. Scheier, other than her photography around the BPA Facility and her alleged reaction to the BPA employees. (*See* Jolley Decl., **Ex. D** (Gibson Incident Report) & **Ex. F** (Macklin Incident Report).) The officers testified that while they were not aware of any specific crime which Ms. Scheier was thought to have committed; they thought that she was involved in "terrorist activity." (*See, e.g.*, Deposition transcript of Officer Gibson attached as **Exhibit C** to the Declaration of Venkat Balasubramani (hereinafter "***Gibson Dep.***"), p. 13:3-10 ("Possibly conspiracy to commit, you know, terrorism or release pertinent information that would be a threat to . . . Washington . . . .").) Deputy Chief Macklin's Memorandum also reported that his suspicions were further raised by a map of Seattle with circled locations including the airport, Seattle Center, and the Westin Hotel. (Macklin

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Memorandum (Jolley Decl., **Ex. G**).)

3. The officers handcuff and arrest Ms. Scheier.

After the other officers arrived, they "took Ms. Scheier into custody" (Macklin Dep. I, p. 117:14-15) by asking her to step out of her car, handcuffing her, frisking her and moving her to the police car. (Id., p. 117:21-23; Gibson Incident Report (Jolley Decl., **Ex. D**), p. 2.) The officers also searched Ms. Scheier's vehicle. (Id.) Ms. Scheier remained handcuffed in the back of the police car until the officers cleared the incident. (Macklin Memorandum (Jolley Decl., **Ex. G**), p. 3.)

a. the officers' justifications for frisking Ms. Scheier

Officer Gibson's incident report states that the officers "frisked [Ms. Scheier] for [their] safety." (Gibson Incident Report (Jolley Decl., **Ex. D**), p. 2). Apart from this, none of the incident reports shed any light on why the officers frisked Ms. Scheier. In depositions (and as confirmed by the City in response to written discovery (*see* Balasubramani Decl., **Ex. E**)), the officers indicated that the City had in place a policy which required officers to search all suspects who were ordered out of their vehicles. (Macklin Dep. I, p. 118:18-22; p. 16:19-21; Gibson Dep., p. 23:16-18.)

b. the officers' justifications for searching Ms. Scheier's vehicle

None of the incident reports indicate any reasons for why the officers ordered Ms. Scheier out of her vehicle and searched her vehicle. Deputy Chief Macklin testified that he decided to search Ms. Scheier's car "when [he] pulled her over." (Macklin Dep. II, p. 34:3-5.) Deputy Chief Macklin stated that it was "policy" not to have people in the car when they searched a car. (Id., Macklin Dep. I, p. 118:16-21.) Prior to searching the vehicle, the officers did not observe anything in plain view that gave rise to suspicion that the vehicle contained weapons or illegal contraband. (Macklin Dep. II, p. 41;14-21.) The officers believed that they had obtained Ms. Scheier's consent to search her vehicle when she responded affirmatively in response to their request – made while she was handcuffed and in the back of the police vehicle. (Scheier Dep., p. 68:15-18.)

c. the officers' justifications for handcuffing Ms. Scheier and placing her in the back of the vehicle

The incident reports also do not offer any specific reasons for why the officers handcuffed

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Ms. Scheier. Officer Gibson in her deposition testified that Ms. Scheier was handcuffed – in Officer Gibson's words – "for our safety and hers." (Gibson Dep., p. 21:2.) Deputy Chief Macklin elaborated that Snohomish Police Department had a policy in place that all suspects were to be handcuffed at the time they are searched, and that all suspects were to be handcuffed when placed in the back of a police vehicle. (Macklin Dep. II, p. 37:9-11; p. 30:8-16.)

Neither the incident reports nor Deputy Chief Macklin's supplemental memorandum offer any reasons for why Ms. Scheier was detained in the back of the police vehicle. Officer Gibson testified in her deposition that Ms. Scheier was kept in the back of the vehicle for safety and for investigatory reasons. (Gibson Dep., p. 22:10-15.) Deputy Chief Macklin testified that Ms. Scheier was kept in the back of Officer Gibson's vehicle so the officers could complete their investigation. (Macklin Dep. II, p. 47:20-24.) However, he testified that the officers could have completed their investigation while Ms. Scheier was outside of Officer Gibson's vehicle. (Id., p. 49:1-9.)

C. Inconsistencies in the Officers' Accounts and Factual Disputes

That the officers had no reasonable suspicion to detain and no probable cause to arrest Ms. Scheier is reflected in the contradictions between the incident reports drafted at the time of the event and their deposition testimony after the lawsuit was filed. This is also reflected in the fact that Defendants misstate Ms. Scheier's actions at the BPA Facility, now claiming that she trespassed and ignored signage.

1. The officers' conflicting testimony on whether Ms. Scheier was cooperative.

Deputy Chief Macklin reported in his deposition that Ms. Scheier was "uncooperative," because among other things she did not comply with some of the commands of the other officers. (Macklin Dep. II, p. 18:2-6.) Deputy Chief Macklin also stated that Officer Gibson reported that Ms. Scheier was angry. (Macklin Dep. I, p. 111:15-16.) However, Officer Gibson's report in two separate instances describes Ms. Scheier as "cooperative". (Gibson Incident Report (Jolley Decl. **Ex. H**), p. 2 ("Shirley was cooperative but did keep claiming that there were no signs stating she was not allowed to photograph…").) Similarly, Deputy Chief Macklin also acknowledged that Ms. Scheier was cooperative. (Macklin Dep. II, p. 98:4-5 ("Q: Did she seem cooperative at this point?";

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"A: Yeah".).)

2. The officers' conflicting testimony on whether Ms. Scheier constituted a threat.

Officer Gibson's report and the City's follow up letter averred that the officers escalated the stop in part due to safety concerns. In depositions, the officers only offered generalized concerns regarding what threat (if any) Ms. Scheier posed. For example, Officer Gibson stated that she felt Ms. Scheier constituted a physical threat to the officers in part because "as a police officer, anyone is capable of a physical threat against me." (Gibson Dep., p. 34:20-22). Similarly, when asked if he had any reason to believe that Ms. Scheier had weapons, Deputy Chief Macklin responded that "the suspicious circumstances we were investigating gave me cause for concern." (Macklin Dep. I, p. 119:18-20.) He also listed a number of potentially dangerous activities that a suspect in Ms. Scheier's position could have undertaken but, aside from general description of her "cyclical emotions," Deputy Chief Macklin did not articulate specific reason to believe that Ms. Scheier was armed or violent. (Id., p. 111:8; p. 112:3; p. 119:16-20.) Deputy Chief Macklin testified squarely, however, that he did not view Ms. Scheier as posing a "direct threat". (Id., p. 109:1-2; p. 24:12 ("She didn't provide a direct physical threat to me, no . . . ."); (Macklin Dep., p. 53:12 ("I never believed that she posed an immediate threat . . .").) Officer Ross similarly testified that he did not feel threatened by Ms. Scheier. (Deposition transcript of Officer Ross, attached as **Exhibit F** to the Declaration of Venkat Balasubramani (hereinafter "***Ross Dep.***"), p. 60:7-8.)

3. The officers' conflicting testimony on whether Ms. Scheier was forthcoming.

After she was pulled over, Ms. Scheier explained that she had been taking pictures of the power lines and towers. She also explained that she was a professor of art at the University of Washington and that she had seen the facility previously when driving from her North Seattle home to Everett. (Macklin Dep. I, p. 102:2-5.) She provided Deputy Chief Macklin with her license, registration, and University of Washington identification. (Id., p. 97:12-23.) She complied with all of Deputy Chief Macklin's requests and answered all of his questions. (Id., p. 113:20-22.) When asked to explain, it became clear he felt that her answers were "conflicting" because they did not make sense to him, not because they were internally inconsistent or logically unsound. (Id., p.

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107:15-108:17.) Deputy Chief Macklin said that her statements were "inaccurate" because "power lines aren't poetic . . . [t]hey didn't to [his] mind rise to anything artistic." (Macklin Dep. II, p. 19-20.) The officers similarly offered that their suspicions were aroused due to seeing a map with locations circled on it, but they did not recall asking Ms. Scheier why those locations were circled. (Macklin Dep. I, p. 116:5-7.)

4. Factual disputes regarding Ms. Scheier's actions at the BPA Facility.

Defendants argue repeatedly that Ms. Scheier "ran" upon encountering the BPA employees. *See, e.g.*, Motion, p. 1 ("ducking and then running away"); p. 2 (Scheier "had run away when approached"); p. 3 (officers "possessed information that she had fled earlier when BPA personnel attempted to contact her"). Ms. Scheier's testimony directly contradicts this. (Scheier Dep., p. 28:1-3; Scheier Decl., ¶¶ 2-5.) Officer Gibson's testimony also contradicts this. (Gibson Dep., p. 10:14-16.) Deputy Chief Macklin had no recollection of what the BPA employees relayed about Ms. Scheier allegedly running, and similarly did not remember whether the BPA employees called out to Ms. Scheier. (Macklin Dep. II, p. 7:15 – p. 8:6.) Most telling, contemporaneous email correspondence among BPA personnel do not mention that anyone at BPA actually spoke to Ms. Scheier or that they observed Ms. Scheier "ducking" or "running." (Balasubramani Decl., **Ex G** (emails produced by BPA.)

Defendants' Motion also relies heavily on the fact that Ms. Scheier had "driven on to BPA property," ignored signage, and made a u-turn. (Motion, pp. 5-7.) These contentions flatly misstate the facts in the record. These contentions are contrary to the fact that the BPA reported someone taking pictures "*outside* [the] secured gate." (CAD Report (Jolley Decl., **Ex. C**) (emphasis added).) Deputy Chief Macklin testified that he was not aware of a trespass (Macklin Dep. I, p. 77:10-14), and contemporaneous BPA emails confirm this. (Balasubramani Decl., **Ex. G**.) None of the BPA emails mention the u-turn, the fact that Ms. Scheier allegedly ignored the signage, or that Ms. Scheier trespassed. Finally, Ms. Scheier's testimony is that she did not pass any gated area or ignore any signage. (Scheier Decl., ¶¶ 2-5.) She approached an intercom, beyond which it seemed to her was BPA-restricted property, and accordingly turned around. (Id.)

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D. Facts Which Are Undisputed

The officers' testimony and the incident reports establish the following undisputed facts:

Undisputed Fact	Citation to Record
Ms. Scheier did not trespass on the BPA Facility and Ms. Scheier took photographs from publicly accessible locations	(CAD Report (Jolley Decl., **Ex. C**); Macklin Dep. I , p. 77:10-14)
Ms. Scheier volunteered that she took photographs and provided the officers her University of Washington identification	(Id., p. 97:12-23)
The officers were not aware of any specific crime that Ms. Scheier committed or (was) thought to have committed	(Id., p. 109:2-9; 109:10-12; Macklin Dep. II, p. 58:15-21)
The officers did not view Ms. Scheier as posing a specific physical threat	(Macklin Dep. II, p. 24:12)
The search by the officers did not reveal any weapons or contraband	(Macklin Dep. I, p. 122:20-23)
Ms. Scheier was "cooperative"	(Gibson Incident Report (Jolley Decl., **Ex. D**))

III. ARGUMENT

A. Summary Judgment/Qualified Immunity Standards

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED R. CIV. P. 56(c). In determining whether a police officer is entitled to qualified immunity, the Court must first decide whether, "[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right." Saucier v. Katz, 533 U.S. 194, 201 (2001). If so, the Court must determine whether the right violated was clearly established such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Id. at 202.

The "dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his or her conduct was unlawful in the situation he confronted." Id. It is not necessary to point to authority precisely on point to resolve the qualified immunity inquiry. Hope v. Pelzer, 536 U.S. 730, 739 (2002) (requirement that existing authority be

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"materially similar" to case at bar is an unduly "rigid gloss" on qualified immunity). A grant of summary judgment on qualified immunity is inappropriate when there are genuine issues of material fact relevant to that analysis. *See, e.g.*, Sloman v. Tadlock, 21 F.3d 1462, 1467-69 (9th Cir. 1994). While the question of clearly established law is for the Court, it is the jury that is "best suited to determine the reasonableness of an officer's conduct in light of the factual context in which it takes place." Id. at 1468. Finally, in evaluating the justifications offered by the officers in the context of qualified immunity, courts compare the justifications offered during depositions or at trial with the contemporaneous justifications contained in "reports drafted near the time of the incident." *See, e.g.*, Martiszus v. Washington County, 325 F. Supp. 2d 1160, 1169 (D. Or. 2004).

B. Clearly Established Fourth Amendment Standards Govern Searches and Seizures

The Fourth Amendment allows government officials to conduct an investigatory (Terry) stop upon a showing of "reasonable suspicion, that is: 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'" United States v. Thomas, 211 F.3d 1186, 1189 (9th Cir. 2000) (internal citations and quotations omitted). Although reasonable suspicion is determined under the "totality of the circumstances," officers must have an objectively reasonable basis for suspecting legal wrongdoing; "a mere 'hunch' is insufficient to justify a stop." United States v. Arvizu, 534 U.S. 266, 273-74 (2002). Absent "specific, objective facts establishing reasonable suspicion to believe the suspect was involved in criminal activity," upholding a detention based on generalized suspicion "furthers tolerance of an unacceptable risk of arbitrary and abusive police practices." Martiszus, 325 F. Supp. 2d at 1169 (quoting Hiibel v. Sixth Judicial Dist. Court of Nev., 542 U.S. 177, 184 (2004)). Further, during a Terry stop, "officers may act to 'verify or dispel their suspicions,' . . . but once suspicions no longer reasonably exist, an officer may not continue to detain the person." Martiszus, 325 F. Supp. 2d at 1169.

Defendants argue that "the specific factual context of the incident here demonstrates that the law was not clearly established." (Motion, p. 19: 9-12.) However, this argument can be used to argue that *any* stop is sufficiently factually novel that the plaintiff's rights are not clearly established and the Ninth Circuit has rejected it for this reason. *See, e.g.*, Way v. County of Ventura, 445 F.3d

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1157, 1164 (9th Cir. 2006) ("officials can . . . be on notice that their conduct violates established law even in novel factual circumstances . . . [o]therwise, officers would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct") (Wardlaw, J., concurring). What is important is that the legal principles at issue were clearly established at the time of the conduct in question. Id. In this case, these principles were clearly established. *See, e.g.*, United States v. Michael R., 90 F.3d 340, 346 (9th Cir. 1996) (applying Fourth Amendment principles to conclude that officers had effected an arrest without probable cause); United States v. Sokolow, 490 U.S. 1, 7 (1989) ("The Fourth Amendment requires some minimal level of objective justification for making the stop."); *see also* Bradford v. City of Seattle, 2008 U.S. Dist. LEXIS 27347, 36-37, Case No. C07-365-JPD (W.D. Wash., Apr. 4, 2008) (applying Fourth Amendment standards to deny summary judgment in the context of a search, detention, and arrest).

Indeed, in this case, Deputy Chief Macklin's testimony demonstrated familiarity with the well established principles applicable to any Fourth Amendment analysis. First, a Terry stop requires reasonable suspicion. (*See* Macklin Dep. I, p. 75:8-21 ("articulable, objective facts that would lead a reasonable officer or person to the belief that a crime had been, was being, or was about to be committed"); Id., p. 109:22-25 (same).) Second, escalating an initial detention requires heightened suspicion, and an arrest requires probable cause. (Id., p. 109:2-9; Macklin Dep. II, p. 58:15-21 ("All of the circumstances that led to the BPA calling us and . . . all of the information we had gathered up to point was still suspicious in nature. It didn't rise to the level of giving us probable cause to make an arrest for any specific crime . . . .").)

C. The BPA Report Did Not Generate Reasonable Suspicion

A threshold issue here is whether the initial stop of Ms. Scheier by the officers was supported by reasonable suspicion. The officers rely on the report from the BPA employee(s), who advised the officers that Ms. Scheier was seen possibly taking photographs from outside the BPA Facility. This did not generate reasonable suspicion sufficient for an investigatory stop.

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1. The report from the BPA employee did not provide reasonable suspicion that Ms. Scheier had been or was about to be involved in a crime.

The Fourth Amendment "forbids stopping a vehicle even for the limited purpose of questioning its occupants unless police officers have a founded suspicion of criminal conduct." United States v. Ramirez-Sandoval, 872 F.2d 1392, 1395 (9th Cir. 1989). Such suspicion "must exist at the time the officer initiates the stop." United States v. Thomas, 863 F.2d 622, 625 (9th Cir. 1988). Where officers rely on a third person's information, the investigatory stop is justified "only when the information possesses sufficient indicia of reliability that are independently corroborated by the police." Thomas, 211 F.3d at 1190. Moreover, the independent observations of the officers must corroborate the report of criminal activity, and not an innocuous fact relayed in the tip. Thomas, 211 F.3d at 1189. In Thomas, local officers got a tip from the Federal Bureau of Investigation that there might be drugs in a certain house. Id. at 1188. The officers began surveillance of the house and observed people entering and leaving the house and thumps in a garage. The Ninth Circuit held that there was insufficient independent corroboration of possible criminal activity – the officers own observations "were . . . too attenuated from the tip that drugs might be present at the residence to stop the car . . . and too innocuous to factor into the calculus for reasonable suspicion of criminal wrongdoing." Id.

Here the officers have described their hunches – this might have been terrorist surveillance. Officer Gibson testified that the officers "were investigating what other potential, possible crime she had committed." (Gibson Dep., p. 12:23-24.) Officer Macklin similarly testified that "it [the crime Ms. Scheier supposedly committed] could be criminal conspiracy, or criminal attempt to commit any number of different crimes." (Macklin Dep. I, p 109:17-21.) However, the officers did not in their initial reports or in depositions point to any "specific and articulable facts," which would support a reasonable belief that Scheier committed a crime or engaged in criminal activity. Terry, 392 U.S. at 21. The BPA employee did not report that Ms. Scheier committed any crime. Deputy Chief Macklin offered no testimony that upon initially encountering Ms. Scheier he observed her engaging in criminal activity, or observed any evidence that she had engaged in criminal activity.

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Prior to stopping Ms. Scheier the officers did not corroborate any BPA report of criminal activity or suspicions that a crime was committed or was about to be committed. (Id., p. 77.) The only facts they corroborated was the fact the Ms. Scheier was taking pictures around the facility. These are the types of facts held to be insufficient in Thomas as "too innocuous to factor into the calculus of reasonable suspicion for criminal wrongdoing." [1]

2. Defendants' arguments that Ms. Scheier ignored signage and trespassed is contradicted by the evidence.

Defendants repeatedly argue that Ms. Scheier committed trespass and ignored signage requiring identification. *See, e.g.*, Motion, p. 5 (alleging Ms. Scheier "had driven on to BPA property); p. 6 ("After ignoring the No Unauthorized Vehicles and No Trespass signs, Plaintiff then disregarded clearly marked signage"); p. 13 (Plaintiff "ignored multiple signs at BPA indicating that no unauthorized vehicles were allowed and that trespassing was prohibited"); p. 14 fn. 6 ("Plaintiff's failure to comply with the no trespassing and no unauthorized vehicle signs demonstrate that reasonable suspicion existed . . . ."); p. 16 fn. 7 ("Plaintiff's conduct, which disregarded the voluminous signage prohibiting trespass at the substation, also provided probable cause . . . ."). Setting aside the complete lack of evidentiary basis for this contention (the fact that the photographs of the signage were not taken by the officers or BPA employees and the lack of testimony placing Ms. Scheier physically in context vis a vis the signage), this contention is squarely at odds with the evidence.

First, neither the CAD report (*see* Jolley Decl., **Ex. C**), nor any of the reports of the officers (Gibson Incident Report (Jolley Decl., **Ex. D**)**,** Macklin Incident Report (Jolley Decl., **Ex. F**), and Macklin Memorandum (Jolley Decl., **Ex. G**)), nor any of the contemporaneous accounts from BPA

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[1] Deputy Chief Macklin during his deposition offered also that Ms. Scheier reaction, including eye contact and a look of "surprise" upon his initial approach contributed to his suspicion. (Macklin Dep. I, 84:21-86:16.) Setting aside whether Deputy Chief Macklin could have observed such behavior while in his car passing along in opposing traffic to Ms. Scheier's car, it is well established that such conduct is not inherently suspicious and does not factor into the reasonable suspicion analysis. Kreca v. Edwards, 2008 U.S. Dist. LEXIS 20502, Case No. CV 06-1789-L(AJB) (S.D. Cal., Mar. 17, 2008) ("It is not uncommon to look at an approaching police patrol car, and this fact has been ruled as not supporting reasonable suspicion."); United States v. Montero-Camargo, 208 F.3d 1122, 1136 (9th Cir. Cal. 2000) (eye contact is "of questionable value . . . generally").

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personnel (Balasubramani Decl., **Ex. G**) mention *anything* about signage or trespass. In fact, the CAD report describes the BPA call as reporting Ms. Scheier as "outside [the] secured gate." (CAD Report (Jolley Decl., **Ex. C**).) Second, contrary to the contentions in the Motion, Deputy Chief Macklin testified that the officers had no information that Ms. Scheier committed any trespass:

> Q. nobody's told you at this point, hey somebody's committed trespass?
> A. No. I don't have probable cause for trespass, criminal trespass arrest, no.

(Macklin Dep. I, p. 77:10-14.).) Deputy Chief Macklin also testified that "anything [on the BPA substation] that's unfenced is accessible." (Macklin Dep. II, p. 66:12-14.)

3. Defendants' arguments that Ms. Scheier ran is also contradicted by the evidence.

Defendants also argue that Ms. Scheier "duck[ed] and then [ran] when BPA personnel approached her." (Motion, p. 1.) However, this is contradicted by the near-contemporaneous report generated by BPA employees. An email written by Neil Echols (a BPA maintenance assistant) does not indicate that Ms. Scheier ran. (Balasubramani Decl., **Ex G**.) Nor does this email mention anything about Ms. Scheier ducking. (Id.)[2] Additionally, Ms. Scheier testified that she did not run and also testified that she did not even notice any of the BPA employees attempt to get her attention or talk to her. (Scheier Dep., p. 28:1-3; Scheier Decl., ¶ 2-5.) Defendants' Motion thus overstates the evidence regarding Ms. Scheier's interactions with BPA employees. Additionally, the officers testified that once they initiated contact with Ms. Scheier, she did not evince any intention to escape. (Macklin Dep. II, p. 26:15-24.) Even to the extent Defendants' contentions are given some credence, Ms. Scheier's actions after being stopped should dispel any suspicion created by the BPA reports. The record thus simply does not support consideration of Ms. Scheier's alleged attempt to evade the BPA employees as a factor in deciding to detain Ms. Scheier.

In sum, the officers were not told by anyone at BPA that Ms. Scheier committed any crime. Nor did they observe Ms. Scheier engage in any activity that could be deemed suspicious from an objective point of view. The officers thus lacked adequate justification to pull over Ms. Scheier. If

[2] These emails are admissible under the excited utterance or business records exceptions to the hearsay rule. To the extent admissibility is an issue, Ms. Scheier requests Rule 56(f) relief to have the emails further authenticated by BPA.

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anything, the Court should be skeptical of Defendants' proffered justifications in light of the fact that they vary from the near-contemporaneous incident reports, and misstate the facts in the record.

D The Roadside Stop Did not Yield any Objectively Suspicious Facts

Even assuming the officers had reasonable suspicion sufficient to initially effect a Terry stop, the initial stop did not generate any suspicious facts or corroboration sufficient to continue Ms. Scheier's detention. Reasonable suspicion is formed by "specific, articulable facts which, together with objective and reasonable inferences, form the basis for suspecting that the particular person detained is engaged in criminal activity." United States v. Michael R., 90 F.3d 340, 346 (9th Cir. 1996). An officer is entitled to rely on his training and experience in drawing inferences from the facts he observes, but those inferences must also "be grounded in objective facts and be capable of rational explanation." Id.; *see also* United States v. Sokolow, 490 U.S. 1, 7 (1989) ("The Fourth Amendment requires some minimal level of objective justification for making the stop."). "Observations leading to an 'inchoate hunch' that some kind of criminal activity is afoot are insufficient to justify detention . . . and the Fourth Amendment is not satisfied if the factors articulated would cast too wide a net over persons likely to be engaged only in lawful activity." United States v. Turner, 815 F. Supp. 1332, 1337 (N.D. Cal. 1993).

Defendants argue that the roadside stop generated additional suspicion in two ways: (1) based on a map observed by Deputy Chief Macklin in the front seat of Ms. Scheier's vehicle which "had small circles on it including SeaTac Airport, the Westin Hotel and an area North of Seattle Center," and (2) based on Ms. Scheier's explanation regarding how she came to the facility to take photographs. (Motion, p. 8.)

1. There is nothing suspicious about a map containing circles around tourist locations.

The officers placed importance on the map in Ms. Scheier's car and the fact that it bore circles around several locations. Deputy Chief Macklin testified that the locations circled were "places that a tourist might visit if they were coming to Seattle." (Macklin Dep. I, p 116:1-10.) Defendants' reliance on the map with circled locations is similar to the government's contentions in United States v. Salinas, 940 F.2d 392 (9th Cir. Ariz. 1991), that the driver was stopped based on

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the observation that he was of Hispanic ancestry and driving a late model, heavily loaded General Motors sedan. The Ninth Circuit rejected these facts are adding up to adequate suspicion:

> It is a well known fact . . . that Mexican males, driving old model General Motors sedans, blend into the morning commuter traffic to transport tons of Mexican marijuana from ports of entry in small towns along the Arizona-Sonora border. It is also well known that many thousands more Mexican males drive old model General Motors cars to work every morning. Thousands of United States citizens of Mexican ancestry drive old cars on perfectly legitimate errands, with 100 pounds of potatoes or carpenter tools or other commodities weighing down the rear springs. A driver who glances at a border patrol car does not thereby become a suspicious character.

United States v. Salinas, 940 F.2d 392, 395 (9th Cir. Ariz. 1991). As in Salinas, countless drivers, including tourists, carry maps with them in their cars, many of them with touristic locations circled. These drivers, including Ms. Scheier, do not become "suspicious characters" as a result.

2. There is nothing suspicious about Ms. Scheier's route to the facility.

Deputy Chief Macklin also placed importance on the fact that Ms. Scheier's explanation for why she came to the facility did not ring true. However, he did not testify that he bothered to ask her why she may have taken I-99 versus I-5 and what locations she travelled from and to. (Macklin Dep. I, p. 106:13-22.) Had he asked Ms. Scheier, Deputy Chief Macklin would have received a perfectly reasonable explanation for this. Ms. Scheier's choice of route is not in any way indicative that she was engaged in illegal activity, and there is no objective, rational, explanation for why it would point to this. United States v. Sigmond-Ballesteros, 285 F.3d 1117, 1124-26 (9th Cir. 2002) (defendant's location on a highway commonly used for alien smuggling was of only "minimal significance" because the court presumed the great majority of people who used the highway were lawfully present in this country).

The officers lacked reasonable suspicion to detain Ms. Scheier in the first place. Even if they did, the officers did not unearth any facts which justified escalation of the detention.

E. After Stopping Scheier the Officers Did not Unearth Any Facts Which Gave Rise to Probable Cause Sufficient to Escalate The Initial Investigatory Detention

While a Terry stop only requires reasonable suspicion, a warrantless arrest requires a showing of probable cause. Dubner v. City and County of San Francisco, 266 F.3d 959, 965 (9th

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Cir. 2001). Probable cause exists when, under the totality of circumstances known to the arresting officer, "a prudent person would have concluded that there was a fair probability that [the suspect] *had committed a crime*." Hart v. Parks, 450 F.3d 1059, 1066 (9th Cir. 2006) (emphasis added). "There is no bright-line rule to determine when an investigatory stop becomes an arrest." Washington v. Lambert, 98 F.3d 1181, 1185 (9th Cir. 1996). In making this determination, courts consider a "totality of circumstances," including "intrusiveness of the stop, i.e., the aggressiveness of the police methods and how much the plaintiff's liberty was restricted, and the justification for the use of such tactics, i.e., whether the officer had sufficient basis to fear for his safety to warrant the intrusiveness of the action taken." Id. The court must evaluate both the intrusiveness of the stop and whether "the methods used were reasonable given the specific circumstances." Id.

1. Ninth Circuit cases hold that use of intrusive means absent extenuating circumstances transforms a detention into an arrest.

In determining the severity of the intrusion and the aggressiveness of the police action, the Ninth Circuit has ruled that "handcuffing substantially aggravates the intrusiveness of otherwise routine investigatory stop." Id. In addition the "physical restriction" by the police "is an important factor in analyzing the degree of intrusion effected by the stop." Id. These "especially intrusive means" of effecting a stop are only held to be appropriate in special circumstances, such as, (1) where the suspect is uncooperative or raises the threat of flight; (2) where the police have information that the suspect is armed; (3) where the stop follows a violent crime; and (4) where the police have information that a violent crime is imminent. Id. at 1189. Use by police officers of particularly intrusive means absent special circumstances amounts to an arrest. *See, e.g.*, United States v. Ricardo D., 912 F.2d 337, 340 (9th Cir. 1990) ("taking hold of and isolating an unarmed, compliant juvenile in the back of a police car was unnecessarily coercive, and thus transformed the investigatory stop into an arrest"); Mitchell v. Anchorage Police Dep't, 2007 U.S. Dist. LEXIS 81372, 10-11, 05-cv-00273 JWS (D. Ak., Oct. 30, 2007) (denying summary judgment on qualified immunity based on grounds where use of unduly intrusive and coercive techniques could have been disproportionate to the situation).

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Mitchell is instructive. There the police officers mistook the plaintiff for a robbery suspect and searched and handcuffed her, and held her in the back of the police car for approximately thirty minutes. Defendants moved for summary judgment on grounds of qualified immunity. In denying the motion, the court focused on the intrusive means used by the officers without any justification: "it [was] undisputed that the police handcuffed plaintiff . . . and held plaintiff for about thirty minutes [although] . . . she was fully compliant with the police, [the officers determined] she was unarmed, [and] did not fear for their own safety . . . ." Mitchell, 2007 U.S. Dist. LEXIS 81372, * 11.

2. The officers employed intrusive means notwithstanding Ms. Scheier's obvious cooperation and the fact that she did not pose a physical threat.

Here, the officers ordered Ms. Scheier out of the car and actually physically removed her. The officers searched her and her vehicle, handcuffed her, and then placed her in the back of the police car. None of the extenuating facts required for the use of such invasive techniques were present here. It is undisputed that Ms. Scheier was cooperative. (Gibson Incident Report (Jolley Decl., **Ex D**).) She did not try to escape. (Macklin Dep. II, p. 26:20-24 ("**Q**: At any time after you pulled her over . . . what did she do that indicated to you that she was trying to escape? **A**: Nothing.").) The police had no information that she was armed. In fact, the pat down search unearthed no weapons or contraband. (Macklin Dep. I, p. 122: 20-23.) There was no report of any violent crime. (Id., p. 77.) Similarly, the police had no information that any violent crime was imminent. In these circumstances, the officers employed unduly intrusive techniques absent special circumstances to justify them. As in Ricardo D and Mitchell, the unduly intrusive techniques employed by the officers absent special circumstances were disproportionate to the situation. These techniques (Ms. Scheier's search, handcuffing, and placement in the back of the vehicle) transformed Ms. Scheier's detention into an arrest for which the officers lacked probable cause. At a minimum, as in Mitchell, this case present a jury question as to whether the techniques employed by the officers and the length of Ms. Scheier's detention were commensurate with the circumstances.

According to the Defendants, Ms. Scheier was supposedly angry (Macklin Dep. I, p. 111:24-

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5; p. 112:1-3), displayed cyclical emotions (Id., p. 111:8-9), and needed to be repeatedly told to keep her hands visible. (Snohomish Letter, p. 2.) This testimony is contradictory at best, varies from what is found in the contemporaneous incident reports, and also contradicted by testimony from the officers that (1) Ms. Scheier evinced no intent to escape (Macklin Dep. II, p. 26:20-24; Macklin Dep. I, p. 79:15-18); (2) Ms. Scheier was cooperative (Macklin Dep. I, p. 98:4-5); and (3) the officers asked Ms. Scheier to retrieve various objects from her car (the map, her camera, her license and registration, and her University of Washington identification) all of which would require her to move her hands (Id., p. 114:10-115:4). The evidence of Ms. Scheier's emotional state and hand movements is simply insufficient to dispel a factual dispute as to whether the intrusive means employed by the officers were justified in light of the circumstances. More likely, these are after-the-fact rationalizations which demonstrate the absence of a constitutionally acceptable justification for their use of such means.

F. Plaintiff Had a Clearly Established First Amendment Right to Photograph a Public Facility From a Publicly Accessible Locations

This case also raises the troubling issue that the behavior on the part of Ms. Scheier which triggered her detention by the officers was her photography. The CAD report initially describes the 911 call as reporting Ms. Scheier as "taking pics [of the BPA Facility]." (CAD Report (Jolley Decl., **Ex. C**).) The incident reports reference Ms. Scheier's photography as being the cause for her detention. (Macklin Incident Report (Jolley Decl., **Ex. F**), p. 1; Gibson Incident Report (Jolley Decl., **Ex. D**), p. 1).) The City's Letter similarly references Ms. Scheier's photography as being the cause for her detention. (Snohomish Letter (Balasubramani Decl., **Ex. D**).) Granting Defendants' motion would immunize their conduct which had the effect of chilling Ms. Scheier's First Amendment rights.

The First Amendment recognizes the right to gather information. Courts recognize that the First Amendment encompasses the right to take photographs, particularly where the photography has a communicative or expressive purpose. Gilles v. Davis, 427 F.3d 197, 211, n. 14 (3d Cir. 2005) ("photography or videography that has a communicative or expressive purpose enjoys some

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First Amendment protection"); Tunick v. Safir, 209 F.3d 67, 91 (2d Cir. N.Y. 2000) ("[public] photography is undoubtedly entitled to constitutional protection."); Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir.1995) (recognizing a "First Amendment right to film matters of public interest") *see also* Porat v. Lincoln Towers Cmty. Ass'n, 2005 U.S. Dist. LEXIS 4333, 04 Civ. 3199 (LAP), at *4 (S.D.N.Y., Mar. 21, 2005) (noting that photography for more than mere aesthetic or recreational purposes enjoys First Amendment protection). One court noted that "[i]t is undisputed that . . . street photography is First Amendment expression[.]" Baker v. City of New York, 2002 U.S. Dist LEXIS 18100, 01 Civ. 4888 (NRB), at *19 (S.D.N.Y., Sept. 25, 2002). Public photography may be subject to regulation or restriction where the photography creates some traffic or other safety concern. *See, e.g.*, Cuviello v. City of Oakland, 2007 U.S. Dist. LEXIS 59833, No. C-06-5517 MHP (EMC) (N.D. Cal., Aug. 14, 2007) (rejecting government's contentions seeking to justify a restriction on videotaping on a public entrance to stadium based on alleged traffic disruption concerns). For example, photographers have no right to disrupt traffic in taking their photographs. Photographers similarly have no right to trespass in taking their photographs. However, the government is on much shakier First Amendment ground where it restricts photography based on what is being photographed, without reference to any disruption caused by the photography.

These First Amendment concerns are not limited to direct regulation or legislation which restricts photography of certain subject matter. The relevant First Amendment concerns would equally apply when the police intimidate photographers based on what is being photographed, or detain them based on what they photograph. *See, e.g.*, Robinson v. Fetterman, 378 F. Supp. 2d 534, 542 (E.D. Pa. 2005) (bench trial finding defendant-officers liable for violating plaintiff's First Amendment rights when plaintiff was arrested for videotaping officers while performing their duties); Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995). Fordyce involved a section 1983 claim against officers who allegedly harassed a photographer who was filming a public protest. The trial court granted summary judgment in favor of the officers on qualified immunity grounds. The Ninth Circuit reversed the grant of summary judgment in favor of the officers on the

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basis of a factual dispute as to whether plaintiff "was assaulted and battered by a Seattle police officer in an attempt to prevent or dissuade him from exercising his First Amendment right to film matters of public interest." Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995). Fordyce and Fetterman raised the specter of government censorship due to the chilling effect of the arrest, detention, or harassment of the photographer.

Here, there was nothing disruptive about Ms. Scheier's photography. The officers viewed Ms. Scheier's photography as suspicious based on the subject of her photography. But the BPA Facility is a publicly visible facility, and there was no law that prohibits photographing it. Indeed, detailed satellite photographs of the BPA Facility are available on the internet (via for example, Google Maps and MSN Maps). (*See* Balasubramani Decl., **Ex. H**.) Accordingly, it is difficult to conceive of a justification for prohibiting Ms. Scheier's photography. Yet the conduct of the officers in this case will have precisely this effect. The conduct of the officers will have the effect of forming a buffer zone around the BPA Facility which is off limits for photography. The conduct of the officers is not isolated – numerous photographers have voiced concerns of being harassed while photographing buildings, bridges, and other public infrastructure. (*See* Balasubramani Decl., **Ex. I**.) Throughout the country, including in Seattle, photographers are being harassed while engaging in lawful behavior which is protected under the First Amendment. (Id.) The officers here lacked sufficient justification to detain and arrest Ms. Scheier and did so at least in part due to Ms. Scheier's photography. The conduct of the officers is particularly problematic since Ms. Scheier was engaged in First Amendment activity that could not be expressly prohibited under relevant First Amendment standards. Granting Defendants' Motion would immunize their conduct which chilled Ms. Scheier's exercise of her First Amendment rights.

G. Request to Strike Portions of the Declarations of Jolley

Pursuant to Local Rule 7(g) Ms. Scheier requests that the Court strike or disregard Defendants' contentions regarding Ms. Scheier's alleged trespass and disregard of BPA signage, and the accompanying photographs contained in the Declaration of Richard Jolley (Dkt. # 22).

Defendants' contentions that Ms. Scheier trespassed and ignored BPA signage suffers from

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several evidentiary flaws. First, these contentions lack any supporting testimony from any fact witnesses. *See* FED. R. EVID. 602. Second, these contentions are contradicted by actual evidence in the record. Finally, the photographs[3] which purport to show that Ms. Scheier trespassed and ignored signage are unauthenticated and lack context provided by any competent testimony. Defendants' Motion fails to provide even the most basic spatial or temporal context for these photographs and how they relate to Ms. Scheier's experience at BPA on the date in question. *See* United States v. Stearns, 550 F.2d 1167, 1171 (9th Cir. 1977) ("Proper authentication . . . require[d] that the Government identify the scene itself and its coordinates in time and place."). Accordingly, the photographs should be stricken, along with the accompanying contentions that Ms. Scheier disregarded signs or trespassed.

IV. CONCLUSION

Ms. Scheier was engaged in law abiding activity. When approached by the police she provided them accurate information regarding why she was taking photographs of the BPA Facility. Despite her accurate, forthcoming, and reasonable explanation, the officers chose to handcuff and detain Ms. Scheier, resulting in an incident which left Ms. Scheier fearful. The legal standards at issue and the rights of someone in Ms. Scheier's position are both clearly established. In these circumstances, the officers cannot be said to have acted reasonably. At a minimum, there exists a factual dispute as to whether the actions of the officers are reasonable. Accordingly, Ms. Scheier respectfully requests that the Court deny summary judgment.

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[3] Defendants attached two sets of photographs to their Motion: (1) black and white photographs of Ms. Scheier's vehicle which were provided to Officer Gibson from BPA (Photos 7-11); and (2) color photographs (which were not provided by BPA or taken by any of the officers) which purport to show that Ms. Scheier disregarded signage and trespassed (Photos 1-6). Photos 1 through 6 are clearly inadmissible since they were not provided by BPA or taken by any of the officers or supported by any foundation testimony, including as to when and where they were taken.

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DATED this 18th day of August, 2008.

For Plaintiff

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 18th day of August, 2008, I caused the foregoing **(1) PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BASED ON QUALIFIED IMMUNITY; (2) THE DECLARATION OF VENKAT BALASUBRAMANI; AND (3) THE DECLARATION OF SHIRLEY SCHEIER**, to be filed via the Court's cm/ecf system which will provide notice to counsel for Defendants:

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(A courtesy copy was contemporaneously transmitted to chambers.) I declare under penalty of perjury under the laws of the United States and the State of Washington that the foregoing is true and correct and that this declaration was executed on August 18, 2008, at Seattle, Washington.

/s/ Venkat Balasubramani
_____
Venkat Balasubramani

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