



Mark Reynolds

**IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

**CITY OF FARMINGTON,**  
Plaintiff-Appellee,

vs.

**A-1-CA-42673**  
**D-1116-LR-2024-00036**

**ADAM HOWELL,**  
Defendant-Appellant.

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**DEFENDANT-APPELLANT'S BRIEF IN CHIEF**

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Appeal from the Eleventh Judicial District Court  
San Juan County, New Mexico  
The Honorable Stephen Wayne, Presiding

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**Statement Regarding Record Citations**

This Brief follows the citation conventions of Rule 23-112 NMRA. Citations to the record proper are in the format **[RP (page number)]**. District court proceedings were audio recorded using For The Record software and reviewed using The Record Player. Citations to the audio transcripts are cited by date and time stamp as **[(month-date-year) CD (hour:minute:second)]**.

**Statement Regarding Pilot Project for Criminal Appeals**

Pursuant to the Appellate Criminal Case Pilot Project Procedure, contained in Joint Miscellaneous Order No. 2019-002, undersigned counsel states that this appeal is timely if filed on or before August 1, 2025 and that this appeal is from the Judgment and Sentence filed on March 5, 2025 in D-1116-LR-2024-00036.

### **Certificate of Compliance**

The body of this brief does not exceed the page limit (35 pages) set forth in accord with Rule 12-318(F)(2) NMRA. Counsel used Times New Roman font, a proportionally-spaced typeface. As required by Rule 12-318(F)(3) NMRA, I certify that this brief is proportionally spaced, and the body of the brief contains 7,969 words, which does not exceed 11,000. This brief was prepared using Google Docs.

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## **I. Introduction**

On February 11, 2025, independent journalist Adam Howell was convicted of one count of *Resisting or Obstructing an Officer* (hereafter, “Resisting”) contrary to Farmington City Code Section 18-7-2. On February 6, 2023, Howell and Justin Chee heard on a police scanner that there was a call in the area of Arrington Street and Auburn Avenue in Farmington, New Mexico. Howell decided to go to film what he could, and to report on the police activity.

Howell and Chee stood on a public sidewalk, and they filmed Farmington Police Department (FPD) officers engaged in a traffic stop. During the first two minutes of the encounter, Howell and Chee were given conflicting instructions: being asked to film from across the street, being told the driver of the vehicle did not want to be filmed, being told that they were not doing anything wrong, and then being told to step back. Howell did step back when he was asked to, and he was not told that there was anything wrong with his new position until two sergeants arrived on scene and asked him to step back further, which he did.

At trial, the City of Farmington argued that Howell interfered with FPD Officer Boyd’s investigation, and the City incorrectly argued that Howell never complied with directions to step back. The City gave lip service to Howell’s First Amendment right to film police conduct, but it argued that he was nevertheless obligated to comply with Officer Boyd’s commands to move from the public

sidewalk where he was filming. *See* U.S. Const. Amend. I. The City made no effort to establish that that command was lawful beyond eliciting testimony from Officer Boyd that she believed her own command was lawful. The district court held that “this is not a First Amendment case, not even particularly close.” [2/11/2025 CD 3:36:40]. The Court, without further explanation, noted that it believed Howell’s understanding of the First Amendment was incorrect, and that police would have asked any bystander to “back up” under these circumstances. [2/11/2025 CD 3:37:35].

This Court should reverse Howell’s convictions because Officer Boyd’s orders to cross the street and not film the vehicle driver were unlawful, and because Howell did comply with every officer’s lawful orders to step back.

## **II. Summary of Proceedings**

Adam Howell is an independent journalist who runs a website called Press for Transparency. [2/11/2025 CD 2:41:40]. As a part of this, he frequently records police officers performing their duties. [2/11/2025 CD 2:43:10].

On February 6, 2023, Howell heard on his police scanner that there was a call in the area of Arrington Street and Auburn Avenue in Farmington, New Mexico. [2/11/2025 CD 2:43:50]. He did not know what the call was about, only that there was police activity. [2/11/2025 CD 2:43:50]. When he got on scene with his colleague, Justin Chee, they approached a police vehicle and attempted to film

an open laptop through the window so that they could learn what the call was about, but there was too much glare to read the screen before FPD Officer Callie Boyd shut the laptop. [2/11/2025 CD 1:56:30; 2:44:30].

Officer Boyd and FPD Officer Zachary Young were at Arrington and Auburn at the Law Office of Brandt Thrower responding to a call about a trespassing and a possible armed subject. [2/11/2025 CD 1:26:50; 1:53:10]. They were dispatched to the call around 4:00 in the afternoon. [2/11/2025 CD 1:27:25]. After speaking with Mr. Thrower, they crossed the street to speak with the suspect, Jay Deluzio. [2/11/2025 CD 1:29:00; 1:56:25]. Officers knew that Deluzio had a history of mental illness, and they were concerned that he might have a weapon. [2/11/2025 CD 1:57:00].

Deluzio was sitting in a pickup truck, parked in a parking lot across the street from Thrower's office. [Pltf. Ex. 1<sup>1</sup>]. Officer Boyd approached the driver's window of the truck and began to question Deluzio about his dispute with Thrower. [Pltf. Ex. 1, 9:20]. Shortly thereafter, Howell and Chee approached on the sidewalk, and they began to film. [Pltf. Ex. 1, 9:50]. Officer Boyd testified that Howell was approximately five feet from her. [2/11/2025 CD 2:00:25]. Howell estimated that he was ten feet from Officer Boyd. [2/11/2025 CD 2:55:10].

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<sup>1</sup> The flash drive marked "Plaintiff's Exhibit 1 & 2" contains four video files. Howell presumes that the file labeled "ZacharyYoung..." is Plaintiff's Exhibit 1.

Officer Boyd immediately told Howell and Chee, “if you’ll do me a favor, I don’t mind if you guys film, but can you guys film across the street for me, please?” [Pltf. Ex. 1, 9:50]. Boyd repeated her request, and Howell put his finger to his lips and made a “shhh” noise. [Pltf. Ex. 1, 9:55]. Several seconds later, Boyd again requested “sir, I need you at least across the street while we investigate. [Pltf. Ex. 1, 10:10]. Boyd repeated the request as Howell continued to make the “shhh” noise and Deluzio made an obscene gesture and made clear that he did not wish to be filmed. [Pltf. Ex. 1, 10:12].

Officer Boyd then changed her command, and she ordered “for your, my safety, I need you to go across the street while I talk to this gentleman. He does not want to be filmed.” [Pltf Ex. 1, 10:25]. Officer Young was standing several feet behind Boyd during this encounter. Chee told Young there is no privacy in public. [Pltf. Ex. 1, 10:40]. Chee then said “we’re not doing nothing wrong,” and Young responded “yeah, you guys aren’t doing nothing wrong.” [Pltf. Ex. 1, 10:44]. Young engaged Chee and Howell in conversation. [Pltf. Ex. 1, 10:55]. He asked Chee “you guys live right now,” and Chee responded that they were. [Pltf. Ex. 1, 11:08]. At no point during this exchange did Officer Young indicate that there was anything wrong with where Howell and Chee were positioned.

While Howell and Chee were simply standing on the sidewalk, filming, and engaging Officer Young in polite conversation, Deluzio again shouted at Howell;

Officer Boyd turned and said “sir, I’m going to need you to go across the street.” [Pltf. Ex. 1, 11:14]. She repeated the command, and Officer Young asked Howell and Chee “do you mind stepping away from us.” [Pltf. Ex. 1, 11:30]. Officer Boyd turned back to Deluzio, and Howell moved back several feet down the sidewalk. [Pltf. Ex. 1, 11:40].

Officer Young engaged Chee and Howell in conversation about the First Amendment for several minutes. [Pltf. Ex. 1, 12:00]. Neither Officer Boyd nor Young indicated to Howell and Chee that there was anything wrong with their new position after they moved. Howell told Young that under *Branzburg v. Hayes*, [408 U.S. 665 (1972)], members of the press have a right to be anywhere the public can be, and because they were standing on a public sidewalk “which is a traditional public forum,” they were exercising their rights. [Pltf. Ex. 1, 12:05]. At no point did Officer Young disagree with Howell’s interpretation of his First Amendment right to stand right where he was on the sidewalk to film.

While Howell was speaking with—and pointing his camera at—Officer Young, Deluzio ignored him. However, seconds after Howell pointed his camera back at the traffic stop, Deluzio began shouting at him again. [Pltf. Ex. 1, 14:19]. Neither Officer Boyd nor Young said anything to Howell at this point. Instead, Officer Young positioned his body between Howell and Deluzio, blocking Howell’s

camera. [Pltf. Ex. 1, 14:52, Def. Ex. A, 16:42<sup>2</sup>]. Officer Young acknowledged that neither Howell nor Chee caused any issues with him blocking their view: they did not push him, argue with him, or say anything at all. [2/11/25 CD 1:48:50]. Officer Boyd acknowledged that Howell and Chee did not physically resist and were not threatening in any way throughout the encounter. [2/11/25 CD 2:18:45; 2:21:20].

Nobody spoke to Howell or Chee again until two sergeants arrived and asked “can we give them a little bit of space. [Def. Ex. A, 19:36]. Howell responded, “I gave them a little, just a minute ago,” and FPD Sergeant Chris Blea asked “can we give them a little bit more?” [Def. Ex. A., 19:41]. Howell asked if FPD intended to keep him from seeing or hearing anything, and Blea responded “no... if we could just take a few steps back.” [Def Ex. A, 19:53]. Howell immediately complied, and took several steps back. [Def. Ex. A, 20:00]. Chee told the sergeant they were just filming, and Blea responded, “I know what you’re doing, and that’s fine... So now that we’re here, you’re fine.” [Def Ex A, 20:05].

The traffic stop ended shortly thereafter, and Deluzio and all officers left without any indication that they believed Howell or Chee had done anything wrong. [Def. Ex A., 22:22]. Officer Young testified that he did not think there was an arrestable offense for obstructing at that point. [2/11/2025 CD 1:50:30].

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<sup>2</sup> The flash drive marked “Defendant’s Exhibit A” contains four files. The file labeled “...Camcorder video” is Defendant’s Exhibit A.

Howell testified that he disregarded Boyd's order to cross the street because he did not believe that it was a lawful order. [2/11/2025 CD 2:49:10]. As a member of the press, he has a right to record the police in the course of their duties. [2/11/2025 CD 2:49:10]. The sidewalk was not closed to the public, and Boyd only told him to leave the public sidewalk because he was recording. [2/11/2025 CD 3:10:45]. Across the street was not good enough because he wanted to be able to record audio of the traffic stop. [2/11/2025 CD 3:16:20]. Officer Young agreed that Howell was positioned where he was close enough to hear Deluzio's conversation with Officer Boyd. [2/11/2025 CD 1:46:35].

Both Officers Boyd and Young agreed that Deluzio's primary concern was being filmed at all, not Howell's proximity while filming. [2/11/2025 CD 1:51:05; 2/11/2025 CD 2:17:00]. The next day, February 7, Officer Boyd had an arrest warrant issued for Howell for *Resisting or Obstructing an Officer* contrary to Section 18-7-2.

### III. Argument

“Resisting or obstructing an officer consists of: ... (2) Resisting or abusing any... peace officer in the lawful discharge of his duties.” §18-7-2.<sup>3</sup> Other than the addition of “justice of the peace” in the categories of jobs protected by the statute,

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<sup>3</sup> While the arrest warrant affidavit is nonspecific as to which subsection Howell was charged under, the City clarified at trial that it was only arguing that Howell violated Section 18-7-2(a)(2). [2/11/2025 CD 1:20:45; 3:25:50]

this language is identical to its state law counterpart. *See* NMSA 1978 §30-22-1(D).

“[T]he phrase ‘resisting or abusing’ in section 30-22-1(D) [prohibits] three types of conduct: (1) physical acts of resistance, (2) the use of fighting words to attack an officer, and (3) the refusal to obey lawful police commands.” *United States v. Romero*, 935 F.3d 1124, 1128 (10th Cir 2019) (internal citations omitted).

In this case, there is no dispute that Howell neither physically resisted FPD officers, nor used “fighting words.” [2/11/25 CD 1:48:50; 2:18:45; 2:21:20]. Howell is accused of the crime of Resisting merely for failing to immediately comply with Officer Boyd’s orders.

New Mexico and Tenth Circuit cases provide only a few examples of what it means to refuse to obey lawful police commands in violation of section 30-22-1(D). However, in each relevant case where a defendant is found to have unlawfully resisted an officer, the commands given by the officer are clear and repeated, the defendant is given a reasonable opportunity to comply with the commands under the circumstances, and the defendant nonetheless overtly refuses to comply.

*Romero*, 935 F.3d at 1129. In addition to clear and repeated commands and an opportunity to comply, the command must be lawful. §30-22-1(D) (“Resisting... in the lawful discharge of his duties.” (emphasis added)); *see also Storey v. Taylor*, 696 F.3d 987, 993-994 (10th Cir. 2012) (holding that even where the defendant

“clearly... disobeyed [an officer’s] order,” where “the order was not lawful... [the defendant’s] refusal to obey could not justify his arrest.”).

Howell’s alleged Resisting did not begin until Officer Boyd ordered him to cross the street to interfere with his right to film. Immediately upon Howell and Chee’s approach, Officer Boyd told them that they could film, but she asked them to “do me a favor” and “film across the street.” [Pltf. Ex. 1, 9:50]. At trial, Officer Boyd agreed that this was a request, which later “escalated to a demand.” [2/11/2025 CD 2:01:30]. Officer Boyd’s initial request for a favor that Howell film across the street was exactly that: a request that could be ignored, not a command that had to be obeyed. Officer Boyd did not order Howell across the street until she was also telling him that Deluzio did not want to be filmed.

Resisting requires overt disobedience of a lawful order that is given clearly and repeatedly in a manner that gives the defendant a reasonable opportunity to comply. The City presented insufficient evidence to support a conviction for Resisting in this case for three reasons. First, despite the City’s protestations to the contrary at trial, the only reasonable inference supported by the evidence is that Officer Boyd’s order was an unconstitutional and unlawful order in violation of Howell’s First Amendment right to film the police in public. Second, even if this Court determines that Officer Boyd’s order was lawful in general, it was still an overbroad and unreasonable restriction on the time, place, and manner of Howell’s

exercise of his First Amendment right to film. Finally, regardless if this Court determines that Officer Boyd's order to cross the street was lawful, it was insufficiently clear and repeated to support a conviction for Resisting.

### **A. Preservation and Standard of Review**

Whether the First Amendment to the United States Constitution protected Howell's conduct was first discussed with Officer Young during this incident, and it was then the central issue at trial, preserving this issue for appellate review. While the district court was dismissive of the First Amendment issues at play in this case, it was clearly aware of them when it ruled that "this is not a First Amendment case, not even particularly close." [2/11/2025 CD 3:36:40]; see *State v. Bell*, 2015-NMCA-028, ¶2 (the purposes of the preservation rule are to alert the trial court to the issue, allow the opposing party to fairly respond, and to create a record sufficient for appellate review). Howell also moved for a directed verdict at the close of the State's case, further preserving this issue for review. [2/11/2025 CD 2:38:05]. Even without a motion for directed verdict, the sufficiency of the evidence is appropriate for appellate review. *State v. Lard*, 1974-NMCA-004, ¶6, 86 N.M. 71.

When assessing the sufficiency of the evidence presented at a bench trial, appellate courts are to resolve "all conflicts and indulg[e] all permissible inferences with deference to the findings of the trial court," then determine if the evidence

“could justify a finding by any rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt.” *State v. Rael*, 2024-NMSC-010, ¶57, quoting *State v. Myers*, 2009-NMSC-016, ¶13, 146 N.M. 128. However, the rights to free speech and a free press are guaranteed by the First Amendment to the United States Constitution. Questions of constitutional law are reviewed de novo by this court. *State v. Arguello*, 2024-NMCA-074, ¶25.

**B. Howell had a Constitutional right to film this traffic stop**

Where a person’s “journalistic activities ‘[are] peaceful, not performed in derogation of any law, and *done in the exercise of his First Amendment rights*, [a police officer] lack[s] authority to stop them.” *Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011), quoting *Iacobucci v. Boulter*, 193 F.3d 14, 25 (1st Cir. 1999) (emphasis in original).

“If the order [given by police] did not comport with the federal and state constitutions... it was not ‘lawful’ within the meaning of the statute, and [the Resisting statute] would thus impose no requirement of compliance.” *State v. Russo*, 407 P.3d 137, 146 (Haw. 2017); *see also Storey*, 696 F.3d at 994 (failure to comply with an unlawful order cannot constitute Resisting.). “Federal constitutional rights are not typically defined—expanded or contracted—by reference to non-constitutional bodies of law.” *Smith v. Arizona*, 602 U.S. 779, 794 (2024).

Similarly here, Howell's First Amendment rights cannot be diminished by the Resisting code unless Officer Boyd's command to him was lawful.

This Court has previously recognized that members of the press have “a right to gather news.” *State v. McCormack*, 1984-NMCA-042, ¶22, 101 N.M. 349. “Freedom of the press necessarily involves two things, acquisition of information and dissemination of information.” *Id.* ¶23 (emphasis added). In this case, Howell was engaged in both. He was acquiring information by filming, and he was immediately disseminating that information by live broadcasting, which Officer Young knew. **[Pltf. Ex. 1, 11:08]**

The Tenth Circuit and at least six other circuits have held that the First Amendment protects the right to film the police in public. *Irizarry v. Yehia*, 38 F.4th 1282 (10th Cir. 2022); *see also Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *see also Fields v. City of Philla.* 862 F.3d 353 (3d Cir. 2017); *see also Turner v. Driver*, 848 F.3d 678 (5th Cir. 2017); *see also ACLU of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *see also Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995); *see also Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000). According to the Tenth Circuit, this “places the constitutional question ‘beyond debate’” for qualified immunity purposes. *Irizarry*, 38 F.4th at 1294.

Filming the police performing their duties in public is protected because 1) “a major purpose of the First Amendment was to protect the free discussion of

government affairs;” 2) “without some protection for seeking out the news, freedom of the press could be eviscerated;” and 3) “videorecording is unambiguously speech-creation, not mere conduct.” *Irizarry*, 38 F.4th at 1289 (internal citations and quotations omitted). The right to a free press includes “an undoubted right to gather news from any source by means within the law.” *Id.*, quoting *Glik*, 655 F.3d at 82.

Access to information regarding public police activity is particularly important because it leads to citizen discourse on public issues, “the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”

*Fields*, 862 F.3d at 359, quoting *Snyder v. Phelps*, 562 U.S. 443, 452 (2011).

Further, the right to record the police in public extends not only to video, but also to audio. *Alvarez*, 679 F.3d at 592. “Any bystander within earshot can hear what police officers say in public places.” *Id.* “Audio and audiovisual recording are media of expression... and are thus ‘included within the free speech and free press guaranty of the First and Fourteenth Amendments.’” *Id.* 595, quoting *Burstyn v. Wilson*, 343 U.S. 495, 502 (1952).

In this case, it was undisputed at trial that Howell is an independent journalist. However, even if he were simply a private individual, he would be protected by the First Amendment’s guarantee of a free press. “The First Amendment right to gather news is... not one that inures solely to the benefit of the news media.” *Glik*, 655 F.3d at 83. “Many of our images of current events

come from bystanders with a ready cell phone... news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper.” *Id.* 84; *see also Branzburg*, 408 U.S. at 704 (“[L]iberty of the press is the right of the lonely pamphleteer.”).

In this case, as established in *McCormack*, *Irizarry*, and the multitude of cases cited by *Irizarry*, Howell had a clearly established First Amendment right to stand on a public sidewalk and record Officer Boyd in the performance of her duties in a public parking lot.

Deluzio’s objection to being filmed in a public parking lot, a place where he had no reasonable expectation of privacy, is irrelevant. Howell’s First Amendment right to record the police is not limited by a member of the public’s desire not to be recorded in public while speaking with a public official. Nor was Deluzio getting escalated relevant to whether Howell had the right to do what he was doing. “In our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969). Howell’s Constitutional rights are not bounded by Deluzio’s unreasonable reaction or by a government agent’s desire to appease Deluzio’s unreasonable reaction.

Officer Boyd initially told Howell and Chee they could film, and that fact was emphasized often at trial. However, mere seconds later, she began directing

Howell to cross the street because “this gentleman... does not want to be filmed.” [Pltf. Ex. 1, 10:12]. From Howell and Chee’s perspective, the only reasonable interpretation of Officer Boyd’s order was that she intended to move them for the purpose of reducing their ability to film. As established above, Howell had a right to film. As established in *Alvarez*, Howell had the right to stand close enough to record any audio that could be overheard by any other bystander walking down the public sidewalk.

The evidence indicates that Officer Boyd also interpreted her order as an order to stop filming. In her arrest warrant affidavit, Boyd wrote that Howell “created a dangerous situation by ignoring my lawful order to go across the street and escalating Jay’s behavior due to him not wanting to be filmed.” [RP 56 (emphasis added)]. This would make little sense if Officer Boyd did not interpret her own command as an order to limit Howell’s ability to film Deluzio. Further, both Officers Boyd and Young testified at trial that Deluzio’s primary concern was being filmed at all, not Howell’s proximity. [2/11/2025 CD 1:51:05; 2/11/2025 CD 2:17:00].

There is no evidence that any other bystander would have been diverted off the public sidewalk that Howell was standing on. Howell did not cross any crime scene tape, as the journalist in *McCormack* did. No other pedestrians were diverted

by FPD. Neither Officer Boyd nor Young testified that they would have ordered any other pedestrian off that sidewalk.

Whether Howell filming from a distance would have appeased Deluzio is speculative. What is not speculative is that Officer Boyd ordered Howell off of the public sidewalk because of his camera, not solely his proximity. She ordered Howell to a location where he would be less able to film, so she could appease someone who unreasonably expected to avoid being filmed while parked in a public parking lot interacting with the police. And she then charged Howell in part due to him filming Deluzio after she told him Deluzio did not want to be filmed.

Under the First Amendment, Howell had a right to film FPD in a public parking lot while they were in the performance of their duties. Officer Boyd gave lip service to Howell's right to film when she asked him to cross the street, but her commands to him were based on his camera. Those commands were unconstitutional, and they cannot be the basis for a Resisting charge. Howell was not obligated to interpret which portions of Officer Boyd's order were lawful and which portions were not. Her entire order based on Deluzio's desire not to be filmed was unconstitutional and unlawful, and Howell was under no obligation to follow it.

There is no evidence that Howell disobeyed any lawful orders given by FPD, and his conviction for Resisting should be reversed due to insufficient evidence.

### **C. Officer Boyd's order to cross the street was not reasonable**

As established above, Officer Boyd's entire order was intended to impair Howell's First Amendment right to film, it was unconstitutional in its entirety, and Howell was not obligated to follow it. However, to the extent that this Court considers the reasonableness of her order, it was also not a reasonable time, place, and manner restriction on Howell's right to film.

"The First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." *Branzburg*, 408 U.S. at 684; *see also McCormack*, 1984-NMCA-042, ¶24, citing *Pell v. Procunier*, 417 U.S. 817 (1974).

The right to film the police in public is "subject to reasonable time, place, and manner restrictions." *Irizarry*, 38 F.4th at 1292, fn. 10; *see also Glik*, 655 F.3d at 84. "When police departments or officers adopt time, place, and manner restrictions, those restrictions must be 'narrowly tailored to serve a significant governmental interest.'" *Turner*, 848 F.3d at 690 (5th Cir. 2017), quoting *McCullen v. Coakley*, 573 U.S. 464, 477 (2014).

For a content-neutral time, place, or manner regulation to be narrowly tailored, it must not "burden substantially more speech than is necessary to further the government's legitimate interests." ... Such a regulation, unlike a content-based restriction of speech, 'need not be the least restrictive or least intrusive means of' serving the government's interests... But the government still "may not regulate

expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.”

*McCullen*, 573 U.S. at 486, quoting *Ward v. Rock against Racism*, 491 U.S. 781, 798-799 (1989).

The rights guaranteed by the First Amendment may not be protected if they are not exercised in a public forum. *McCormack*, 1984-NMCA-042. In *McCormack*, this Court upheld a trespassing charge where a “freelance journalist” “crossed a police barricade” during a protest. *Id.* ¶2. This Court held that the test for whether First Amendment rights may be reasonably exercised in an area is “whether the character of the place is appropriate for the expression of views and ideas generally.” *Id.* ¶18. Areas such as the construction site at issue in *McCormack* or a jail yard are not public forums. *Id.* ¶¶18-19, citing *Adderley v. Florida*, 385 U.S. 39 (1966). On the other hand, “[s]treets and parks are traditional public forums.” *McCormack*, 1984-NMCA-042, ¶19, citing *Hague v. C.I.O.*, 307 U.S. 496 (1939) (finding that streets and parks have “immemorially... been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” And their use as public forums has “from ancient times” been a part of the “liberties of citizens.”).

Courts have upheld the First Amendment right of journalists to film an arrest from as close as ten feet away. *Glik*, 655 F.3d at 80. In *Glik*, a police officer asked

the bystander journalist if his video recorded audio, and when the journalist confirmed that it did, he was arrested for violating a wiretapping law. *Id.* at 78. The First Circuit found that “Glik’s exercise of his First Amendment rights fell well within the bounds of the Constitution’s protections” because the arrest and filming occurred “in Boston Common, the oldest city park in the United States and the apotheosis of a public forum.” *Id.* at 84. “In such traditional public spaces, the rights of the state to limit the exercise of First Amendment activity are ‘sharply circumscribed.’” *Id.*, quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983); *see also Fields*, 862 F.3d at 356 (finding that the First Amendment protected the right of a person to take a picture of police from 15 feet away despite police orders to stop.); *see also Alvarez*, 679 F.3d at 586 (holding that criminalizing recording the audio from police traffic stops “restricts far more speech than necessary to protect legitimate privacy interests.”).

Other states have found, as this Court should, that a traffic stop on a public road is public activity located in a traditional public forum that is entitled to First Amendment protections, regardless of if police baselessly claim that the journalist is interfering with them. *Russo*, 407 P.3d at 137. In *Russo*, a journalist filming with a cell phone approached a traffic stop “into proximity with the closest vehicle, which appears to be an unmarked police car.” *Id.* 141. He began questioning the police, but the officer directed him to stand back away from the traffic stop. *Id.*

142. After a series of commands to step back, the journalist was arrested for obstructing. *Id.* Hawaii’s obstruction statute, similar to the Farmington Resisting code at issue in this case, criminalizes refusing to comply with “any lawful order or direction of a police officer...” *Id.* 145 (emphasis in original).

The state argued that the journalist “did not simply want to record the traffic stop, but wanted to interfere.” *Id.* 140. The state argued that a traffic stop “was not a reasonable place to film police because it was not safe, and [the journalist’s] actions in entering and remaining in the traffic stop area were therefore not constitutionally protected.” *Id.* The trial court in *Russo* “determined that the case did not involve police officers objecting to Russo videotaping, but, rather, Russo’s failure to heed their instructions based on their view that he was hindering their operations.” *Id.* 143-144. The Hawaii Supreme Court cautioned that “law enforcement personnel... ‘are granted substantial discretion that may be misused to deprive individuals of their liberties.’” *Id.* 149, quoting *Glik*, 655 F.3d at 82. The *Russo* Court held that the standard is not whether the officer giving the order restricting filming felt it was necessary, but whether the restrictions were necessary if “a reasonable officer would conclude that the individual’s action is interfering or about to interfere with the officer’s performance of his or her duties.” 407 P.3d at 149. “Police orders pertaining to the time, place, or manner of filming must be

narrowly tailored to mitigate the actual danger or risk posed by the recording and leave open ample alternative channels to engage in the protected activity.” *Id.*

“In our society, police officers are expected to endure significant burdens caused by citizens’ exercise of their First Amendment rights.” *Glik*, 655 F.3d at 84, citing *City of Houston v. Hill*, 482 U.S. 451 (1987). Police officers are expected to show restraint “when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces.” *Glik*, 655 F.3d at 84, quoting *Hill*, 482 U.S. at 461; *see also State v. Wade*, 1983-NMCA-084, ¶17, 100 N.M. 152 (holding that “screaming obscenities and yelling ‘get the hell out of the house’ do not amount to ‘fight’ words, particularly when addressed to police officers, who are supposed to exercise restraint.” (emphasis added)).

This Court should find as the *McCormack*, *Glik*, and *Hague* Courts did, that streets have been traditional public forums since ancient times, and they are where First Amendment rights are at their zenith. This Court should hold as the *Glik* and *Perry Educ. Ass’n* Courts did, that the right of the State—or City—to limit First Amendment protected activities is “sharply circumscribed” in public places such as parks or streets. This Court should hold as the *Turner* and *McCullen* Courts did, that restrictions on speech adopted by police departments must be narrowly tailored, meaning, they must not burden more speech than is necessary to further the government’s legitimate interests.

As cautioned by the *Glik* and *Russo* Courts, simply deferring to the subjective judgement of the involved law enforcement personnel can all too easily lead to the deprivation of liberties. This Court should hold as the *Russo* Courts did: the standard should be whether an objective officer would conclude the restrictions were necessary to prevent the individual from interfering with an officer's performance of their duties. And, as established in *Glik*, this objective officer should be aware that "police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights." 655 F.3d at 84.

Turning this standard to this case, it is clear that no objective, reasonable officer would have felt it was necessary to move Howell all the way to the other side of the street to keep him from impairing Officer Boyd's ability to do her job while being cognizant of Howell's right to see and hear the traffic stop as close as any other bystander without a camera would be able to.

*Glik* and *Fields* found that the First Amendment protected the right of bystanders to film within ten and fifteen feet of an arrest in a public space. *Irizarry* found that the First Amendment clearly protected a journalist's right to film a traffic stop. *Russo* found that the First Amendment was implicated when the journalist was in close proximity to a vehicle involved in a traffic stop, exactly where Howell was in this case.

In this case, Howell was five to ten feet away from Officer Boyd. [2/11/2025 CD 2:00:25; 2:55:10]. As close as the journalist in *Russo* and slightly closer than the bystanders in *Glik* and *Fields*. However, whether Officer Boyd's restriction was reasonable is judged not by where Howell was standing but by where Officer Boyd ordered him to go. There was no need to send Howell all the way to the other side of the street if the objective was to impose the least restrictive condition necessary on his First Amendment rights rather than to unconstitutionally impair his right to film.

The fact that other officers subsequently reached a compromise and ordered Howell to step back does not change the lawfulness of Officer Boyd's order. A person does not forfeit their First Amendment rights because they do not partially comply with an unreasonable, unlawful order. An order restricting the time, place, and manner of recording is either lawful, or it is not. In this case, Officer Boyd's order to cross the street was objectively unreasonable and unlawful.

As discussed in *Russo*, Officer Boyd's subjective belief that Howell was interfering with her investigation is irrelevant; the question is whether an objective officer would have felt that moving Howell across the street was reasonably necessary.

This Court need not rely on the arguments of Defendant-Appellant or the other courts that have considered this issue to conclude that Officer Boyd's order

was objectively unreasonable. Three out of four of the officers on scene that day also apparently agreed that moving Howell all the way to the other side of the street was an unreasonable restriction on his First Amendment rights. Regardless of what Officer Young testified to at trial to support his fellow officer, on February 6, 2023, he told Howell and Chee “you guys aren’t doing nothing wrong.” [Pltf. Ex. 1, 10:44]. When Officer Young intervened, he did so with a reasonable compromise: “do you mind stepping away from us?” [Pltf. Ex. 1, 11:30]. Howell quickly complied with Officer Young’s reasonable and lawful request to step back. [Pltf. Ex. 1, 11:40]. At no point did Officer Young instruct Howell or Chee that they needed to go all the way across the road to film.

When the two sergeants arrived, they again did not order Howell or Chee to the other side of the road. Rather they instructed Howell to “just take a few steps back,” which he quickly did. [Def Ex. A, 19:53]. When Sergeant Blea told Howell “now that we’re here, you’re fine,” they were still standing firmly on the same side of the road as Deluzio and Officer Boyd.

Not one of the three other officers there that day supported Officer Boyd’s order that Howell needed to cross to the other side of the street. Officer Boyd’s order was an objectively unreasonable imposition on Howell’s First Amendment rights to freedom of speech and freedom of the press. It was a substantial burden on his rights beyond what was necessary for Officer Boyd to complete her

investigation, it was unlawful, and Howell cannot be convicted of Resisting for failure to comply with that unlawful order. Howell's conviction for Resisting should be reversed due to insufficient evidence.

**D. Howell's conduct was insufficient as a matter of law to constitute Resisting**

FPD's instructions to Howell on February 6, 2023 were confused, contradictory, and, as established above, at times clearly unlawful. Even setting aside the unlawfulness issue for purposes of this section only, FPD's instructions were insufficiently clear or repeated to constitute Resisting. And, Howell did sufficiently comply. The district court's findings to the contrary were not supported by substantial evidence.

“Resisting, evading or obstructing an officer’ primarily consists of physical acts of resistance.” *Wade*, 1983-NMCA-084, ¶6. New Mexico's appellate courts have only upheld convictions for Resisting by refusing to obey lawful commands in limited circumstances involving clear, repeated lawful commands, overt noncompliance, and clear safety risks. *State v. Diaz*, 1995-NMCA-137, ¶¶4-7, 121 N.M. 28. In *Diaz*, this Court held that a defendant could be convicted of Resisting when he refused to drop a knife despite many commands by officers to do so. *Id.* Similarly, refusing to leave the scene of a disturbance that the defendant himself was involved in, despite clear repeated commands to leave, can constitute Resisting. *City of Roswell v. Smith*, 2006-NMCA-040, ¶8, 139 N.M. 381. In *Smith*,

this Court held that where the defendant was involved in an earlier and ongoing disturbance, he “was lawfully instructed to leave the parking lot to prevent a breach of the peace.” *Id.* Merely being evasive cannot constitute Resisting. *Keylon v. City of Albuquerque*, 535 F.3d 1210, 1217 (10th Cir. 2008).

Simply exhibiting frustration does not constitute Resisting. *Romero*, 935 F.3d at 1131. In *Romero*, the defendant talked back to an officer and “exhibited some frustration,” but ultimately “in one minute’s time he complied with every unrevoked order that [the officer] gave.” *Id.* Compliance, though frustrated and delayed, does not constitute Resisting as a matter of law. *Id.*

Complying with repeated commands to “step back” does not constitute resisting. *Russo*, 407 P.3d at 142. In *Russo*, the officer repeatedly ordered the journalist to step back, and the journalist repeatedly stepped back. 407 P.3d at 142. The trial court found this to be sufficient to constitute Resisting because the journalist “did not comply with the order to step back and continued to engage the officers.” 407 P.3d at 143. While the *Russo* Court reached the First Amendment issues discussed above, it ultimately overturned the journalist’s conviction due to insufficient evidence. 407 P.3d at 151-152. While the journalist may not have stepped back as far as the officer wanted him to, each time the officer instructed him to step back, he did in fact take several steps back. 407 P.3d at 151. The journalist “may have continued to engage [the officers] in conversation and

questions during the encounter, the video itself plainly demonstrates that [he] obeyed their command.” 407 P.3d at 151.

In this case, Officers Boyd and Young gave Howell rapid and conflicting orders, and they did not give him a reasonable opportunity to comply. Despite this, he did comply with their clear, lawful orders. Within the first thirty-five seconds of Howell approaching Officer Boyd, she told him first that she did not mind if he filmed [**Pltf. Ex. 1, 9:50**], and then that she needed him to cross the street because Deluzio “does not want to be filmed” [**Pltf. Ex. 1, 10:25**]. Twenty seconds later, Howell and Chee had not moved an inch when Officer Young told them “you guys aren’t doing nothing wrong.” [**Pltf. Ex. 1, 10:44**].

The next time Officer Boyd ordered Howell across the street [**Pltf. Ex. 1, 11:14**], Officer Young again quickly countermanded her and instead asked Howell and Chee “do you mind stepping away from us?” [**Pltf. Ex. 1, 11:30**]. As can be clearly seen in the video, Howell did in fact step back in response to this lawful request. [**Pltf. Ex. 1, 11:40**]. When later instructed to move again by Sergeant Blea, Howell responded “I gave them a little, just a minute ago,” indicating that he had in fact moved in direct response to and intending to comply with Officer Young’s order to step back. [**Def. Ex. A., 19:41**].

Young testified that he did not believe Howell and Chee stepped back sufficiently, [**2/11/2025 CD 1:46:10**], but neither he nor Officer Boyd ever

communicated in any way to Howell or Chee that there was anything improper about their new position. When Howell told Officer Young that he believed he and Chee had the constitutional right to stand where they were, Officer Young did not disagree with him. [Pltf. Ex. 1, 12:10]. When Deluzio began getting escalated again, Officer Young responded by placing his body between Deluzio and Howell, affirming to any reasonable observer that neither Officer Young or Boyd believed they needed to order Howell to move again. [Pltf. Ex. 1, 14:52]. In fact, nobody spoke further with Howell or Chee until the two sergeants asked them to step back again, which they did, at which point Sergeant Blea specifically instructed “now that we’re here, you’re fine.” [Def Ex A, 20:05].

The *Russo* Court found that a journalist complied with directions to step back when he was repeatedly told to step back, and he did so each time, if only a few steps at a time. Similarly here, Howell may have only stepped back a few steps, but he did in fact step back. He did not engage the officers as the *Russo* journalist did. He did not “voice[] [his] disapproval” as the journalist in *Irizarry* did. Howell simply stepped back and silently filmed. He may have taken a moment to comply, and he may have exhibited some very mild frustration before he complied, but as the *Romero* Court held, that is insufficient to constitute Resisting.

Unlike the defendant in *Smith*, Howell was not a participant in any breach of the peace or other criminal conduct. He stood on a sidewalk and filmed. As

established above, Howell's rights should not be limited by Deluzio's unreasonable reaction or the unreasonable reaction of a police officer attempting to appease Deluzio at the cost of Howell's First Amendment rights. Assuming *arguendo* that Officer Boyd's order to cross the street was lawful, it was at best an order intended to make her life simpler rather than "endure" the "significant burdens caused by citizens' exercise of their First Amendment rights" that she is expected to endure as a police officer. *Glik*, 655 F.3d at 84. Her order to Howell to cross the street was in no way the equivalent of an order to leave the scene of a disturbance at issue in *Smith* or the order to "drop the knife" at issue in *Diaz*.

In its ruling, the district court found that Howell was a bystander "agitating" Deluzio. [2/11/2025 CD 3:37:27]. But this finding was unsupported by the evidence. Howell merely stood there, more or less silently exercising his Constitutional rights. Deluzio became agitated because Deluzio unreasonably expected to not be filmed in public. However, that does not mean that Howell was responsible for "agitating" him or that Howell's First Amendment rights could or should be limited because of Deluzio's unreasonable expectations.

The district court then found "no doubt that the officers would have asked anybody, press or otherwise, to back up that were agitating." [2/11/2025 CD 3:37:34]. Again, this is not supported by the evidence. Officer Boyd did not order Howell "to back up." She ordered Howell to cross the street. The district court did

not even address the lawfulness of Officer Boyd's order to cross the street, nor did it find that Howell disobeyed a lawful order to cross the street.

The district court held that the City proved "that the defendant resisted Officer Boyd in the lawful discharge[] of her duties." [2/11/2025 CD 3:38:31]. This is unsupported by the evidence. The City simply did not prove that Howell failed to comply with any lawful order by FPD on February 6, 2023. Officer Boyd's initial request to Howell to cross the street was just that: a request for a favor that did not need to be complied with. As established above, Officer Boyd's subsequent commands to Howell to cross the street because Deluzio did not want to be filmed were unlawful, unconstitutional, and cannot be the basis for a Resisting charge. Finally, Officer Young essentially did ask Howell to step back. Despite the officers' in-court testimony to the contrary, Officer Young's video clearly shows that Howell did take several steps back in response to Young's order to do so. [Pltf. Ex. 1, 11:40].

Even if Officer Boyd's very first command to cross the street were lawful, which it was not, Howell stepped back within two minutes of that command, and he was then repeatedly told by other officers on scene that he was fine right where he was, still on the same side of the street as Deluzio and Officer Boyd. [Pltf. Ex. 1, 10:44, Def. Ex. A, 20:05]. *Romero* found one minute to be a reasonable amount of time to express frustration and then comply with an officer's commands, this

Court should find that less than two minutes is reasonable under these circumstances.

In light of the video evidence, no rational trier of fact could find beyond a reasonable doubt that Howell resisted Officer Boyd. Her commands were unclear, contradictory, and contradicted by Officer Young. Then, unlike the officer in *Russo*, when Howell and Chee did step back, no officer ordered them to move again until they complied with the sergeants' request to step back again. [**Def. Ex. A, 20:05**]. Officers Young and Boyd may have testified in court that they do not believe Howell stepped back sufficiently, but that information was never communicated to Howell. He had no way of knowing that FPD believed his new position was not in compliance with Officer Young's prior lawful order to step back, which was the most recent order that he was given by FPD. This Court should find that Howell cannot be convicted of Resisting for failing to comply with Officer Young's lawful order to step back when Howell did step back and he received no further directions to step back farther that he did not comply with.

The City failed to prove that Howell disobeyed the type of clear, repeated, lawful commands that this Court has previously found to be sufficient to support a Resisting conviction. This Court should find that Howell's conviction is not supported by sufficient evidence.

#### **IV. Conclusion**

For the foregoing reasons, Defendant-Appellant Adam Howell respectfully requests that this Court reverse his conviction for *Resisting or Obstructing an Officer* due to insufficient evidence.

Respectfully submitted,

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#### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of this pleading was served by electronic filing on the Odyssey portal and served on Jennifer Breakell, Farmington City Attorney, on this 1<sup>st</sup> day of August, 2025.

/s/ Mathew R. Wadsworth

Mathew R. Wadsworth



Mark Reynolds

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

CITY OF FARMINGTON  
Plaintiff-Appellee,

vs.

A-1-CA-42673  
D-1116-LR-2024-00036

ADAM HOWELL,  
Defendant-Appellant.

PLAINTIFF-APPELLEE'S RESPONSE BRIEF

Appeal from the Eleventh Judicial District Court  
San Juan County, New Mexico  
The Honorable Stephen Wayne, Presiding

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## Citations to the Record

Citations to the record proper are in this form: **[(vol.) RP (pg.)]**. References to the digitally recorded audio compact disc of the proceedings are cited, at first occurrence, in a full-form citation indicating the date of recording followed by “CD” and the time of the passage. For example, January 2, 2023, counter 0:34:56 to 0:34:57 is cited as **[2/11/2025 CD 12:34:56–57]**. Where appropriate, a short-form citation is used—e.g., **[*Id.* 12:34:56–57]**. References to the video records of the incident, recorded on the officer’s body camera and entered into the record as City’s Exhibit 1 and 2 will be cited in a full-form citation indicating the party that admitted the exhibit, followed by the exhibit number, followed by the minute and second(s) of the passage. For example, a citation to a portion of Officer Boyd’s video would be cited as **(Plaintiff’s Exhibit 2, 0:15:43)**. Where appropriate, a short-form would indicate the abbreviation of the party, exhibit number and then the time mark on the video. For example a citation to a statement made by Officer Boyd’s body camera would be **(Plntf’s Exh 2 @ 15:43)**. Where appropriate, a short form of the specific officer’s body camera video would be officer’s name, video ampere sign and the time mark of the video. For example, a citation to Officer Boyd’s body camera would be cited as **(Boyd’s video @ 15:43)**.

**Statement Regarding Pilot Project for Criminal Appeals**

Pursuant to the Appellate Criminal Case Pilot Project Procedure, contained in Joint Miscellaneous Order No. 2019-002, undersigned counsel states that this response is timely filed on or before October 24, 2025. The Court of Appeals sent notice on September 19, 2025 that Plaintiff-Appellee was required to file a response brief in 45 days.

**Certificate of Compliance**

The body of this brief does not exceed the page limit (35 pages) set forth in accord with Rule 12-318(F)(2) NMRA. Counsel used Times New Roman font, a proportionally-spaced typeface. As required by Rule 12-318(F)(3) NMRA, I certify that this brief is proportionally spaced, and the body of the brief contains 5,589 words, which does not exceed 11,000. This brief was prepared using Microsoft Word.

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## **Introduction**

Adam Howell was charged in Municipal Court with one count of Resisting or obstructing officer, a violation of City of Farmington Municipal Code 18-7-2. At a bench trial in Municipal Court on September 18, 2024 Howell was found guilty of violating Sec. 18-7-2; he was represented by Travis Marston. Howell filed a timely appeal for a trial de novo in District Court. Howell was represented by Arlon Stoker at a bench trial in District Court on February 11, 2025. The District Court Judge, Steven Wayne, found Howell guilty of violating Code 18-7-2. Howell filed a timely appeal to Court of appeals.

## **II. Summary of Facts**

On February 6, 2023, certified police officers Callie Boyd and Sean Cambridge, of the Farmington Police Department, responded to a call for service at 412 W. Arrington St, Farmington, New Mexico. Officer Boyd and officer Cambridge were advised by dispatch there was a dispute between an attorney and his client, and officers were advised that one suspect was possibly armed with a firearm or dangerous weapon. [2/11/2025 CD 0:35:10-35].

Officers arrived at 412 W. Arrington St, Farmington, New Mexico and met with Brandth Thrower in his law office. Officers learned that Thrower wanted Jay Deluzio trespassed from his office. [*Id.* 0:35:46-56]. Officer Boyd

explained prior to her arrival, dispatch warned that Deluzio had a history of mental illness and was in the CIT database. [*Id.* 0:37:34-45]. Boyd testified was aware that Deluzio had a history of negative contact with law enforcement. [*Id.* 0:38:00-04]. Officers believed Deluzio might be armed with a deadly weapon and noted that Thrower was wearing a bullet proof vest for his safety. [*Id.* 0:35-00-13]. Deluzio reported to dispatch he did not have a firearm but he did have a knife. [*Id.* 0:35-28-33].

After obtaining necessary information from Thrower, officer Young and officer Boyd make the decision to exit the building and make contact with Deluzio. Deluzio was sitting in his truck across the street from Thrower's office. (**Plaintiff's Exhibit 2, 15:43**). Boyd walks up to Deluzio who is sitting in a maroon Ford truck. Boyd makes direct contact with Deluzio through his truck window because the driver's side window is down. Howell walks up behind Boyd and sets up his camera on the sidewalk as a position that would be level or parallel with the front of Deluzio's truck. Howell is approximately five (5) to eight (8) feet away from Boyd and the driver's side window of Deluzio's truck. [**2-11-25 CD 0:27:00-12**]. Boyd tells Howell, "I don't mind if you film, but right now, can you go across the street?" (**Plaintiff's Exhibit 2, 0:16:07-15**). Howell responds to Boyd's request by shushing her. (**Plntf's Exh. 2 @16:25**) Boyd says, "I need you at least to go across the street while we

investigate, ok”. (Plntf’s Exh. 2 @16:30) The video shows Howell continuing to shush Boyd after her second request. (Plntf’s Exh. 2 @16:32). Boyd then says, “I am not going to be quiet; can you please go across the street for me?”. (Plntf’s Exh. 2 @16:37). Howell refuses to move and Boyd explains, “You are interfering with my investigation right now and I need you to go across the street for me”. (Plntf’s Exh. 2 @16:42). Boyd then reiterates her command by telling Howell “for your... for my safety, I need you to go across the street while I talk to this gentleman. He does not want to be filmed”. (Plntf’s Exh. 2 @16:48). The whole time Boyd is giving commands to Howell, Howell is giving her a non-verbal gesture to be quiet and shushing her. Howell makes no move to step back or go across the street. Boyd then requests a sergeant to come to her location to help with safety and control the scene. (Plntf’s Exh. 2 @16:55).

Boyd goes back to talking and establishing a rapport with Deluzio. (Plntf’s Exh. 2 @17:32). However, as Deluzio is talking to Boyd about his history, he breaks his own conversation and starts telling Howell he needs to leave. (Plntf’s Exh. 2 @16:36). Deluzio offers to get out of his vehicle and deal with Howell himself, but Boyd tells Deluzio, “no just stay in your car”. (Plntf’s Exh. 2 @17:38). At this time Boyd makes gives a direct order to Howell saying, “Sir, I am going to need you to go across the street. You are

interfering with my investigation”. (Plntf’s Exh. 2 @17:45). Howell does not comply with officer Boyd’s command and responds by asking Boyd a question. (Plntf’s Exh. 2 @17:47). Howell engages Boyd, during her interaction with Deluzio by asking, “What is your name and badge number”. (Plntf’s Exh. 2 @17:49).

From the video, it can be seen Deluzio’s changes his topic of conversation from talking about Thrower and the distribution of his trust money, to how the police “hassle him”. (Plntf’s Exh. 2 @18:04). Deluzio is frustrated with police in general as he says, “you guys hassle me at the Courtyard [Marriot] across from Denny’s”. (Plntf’s Exh. 2 @18:13). Boyd regained control of the conversation by discussions options to go to court and address Thrower’s distribution of trust money. (Plntf’s Exh. 2 @19:43).

Unfortunately, because Howell has not moved from his position at the front of the truck, Deluzio can be seen focuses his attention on Howell again and the video shows Deluzio becomes angry. (Plntf’s Exh. 2 @20:49-21:11). Deluzio yells at Howell saying, “Turn the mother fucking thing around...”. (*Id.*).

Deluzio tries to force his truck door open. (*Id.*) He physically opens his truck door into Boyd as she is standing outside his truck window. (*Id.*). The video shows Boyd fighting to push the door closed as Deluzio fights to open the door to escalate the conflict between himself and Howell. (*Id.*). Deluzio is obviously

angry and expresses an intent to use violence as he yells out @ 21:00, "I am going to beat his mother fucking ass...". (*Id.*) Boyd is able to push Deluzio back into the truck and close the door. However, Deluzio uses verbal fighting words and non-verbal gestures to express his intention to escalate the conflict with Howell. (*Id.*) It is at this point that Officer Young can be heard on Boyd's camera saying, "I will stand right here for you Jay" (**Plntf's Exh. 2 @21:10**). Deluzio responds to Officer Young comment saying, "you are not big enough to...".(**Plntf's Exh. 2 @21:10-13**). The words exchanged between Deluzio and Young reflect the conflict between Deluzio and Howell.

Boyd again establishes a rapport with Deluzio through calm speech and eye contact. (**Plntf's Exh. 2 @22:15-25:10**). However, because Howell has not left the sidewalk, Deluzio again is distracted by Howell. (**Plntf's Exh. 2 @25:13**). Deluzio says, "That son-of-a-bitch" and looks in the direction of Howell. (*Id.*) Boyd then asks Deluzio to just go home and not do anymore. (**Plntf's Exh. 2 @22:15**). Boyd eventually makes a break through with Deluzio and says something that allows Deluzio to cooperate with law enforcement and leave the premises. (**Plntf's Exh. 2 @26:35-43**).

On Young's body camera you can see Howell repositioning his camera (**Plaintiff's Exhibit 1, 10:09**). Howell is definitely not taking a step back. (**Plntf's Exh 1 @ 10:50**). Howell takes one step away from Boyd as he focuses

on Officer Young, however, he is definitely not taking multiple steps away from the conflict. (Plntf's Exh 1 @ 11:04). Howell repositions his camera again, pointed back at Boyd and Deluzio. He has not taken a step to create distance between himself and the officer. Howell's step is one of picking up his camera tripod for a better position. Howell moves a few steps away from the front of the truck, and toward Young. (Plntf's Exh 1 @ 11:41). However, then both Howell and his partner completely engage Young away from his duties of watching Deluzio and making sure Boyd is not injured. (Plntf's Exh 1 @ 12:40). At his current location, Howell is still close enough to Deluzio to send Deluzio into a rage concerning his opposition to being filmed. This is when Deluzio starts to get out of his truck to initiate a physical confrontation with Howell. (Plntf's Exh 1 @ 14:42). After the situation has escalated, Howell does not step away from the area of the sidewalk where he repositioned his camera to film and interview Young.

### III. Argument

This Court should uphold the judgment of the District Court judge based on three reasons. The first reason is the First Amendment of the Constitution is not a defense to resisting or obstructing officer. Second, Boyd's order was lawful and enforceable. Last, after giving indulgence of all reasonable inferences and resolving all conflicts of evidence in favor of the verdict, this Court should find

that any rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt. For these reasons, the Court should uphold the lower court's judgment.

**A. First Amendment Freedom of Press is not a criminal defense**

The First Amendment to the Constitution establishes a right to a free press. However, the Amendment does not designate what actions can be taken in order to exercise this right. There is ample case law which explains the right to free press allows journalist to record officers in the performance of their duties. *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000). And there is ample case law that explains that officers who unreasonably restrict the right to free press violation First Amendment to the United States Constitution. *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011). However, the Supreme Court has established that, “[T]he First Amendment of the Constitution generally grants the press no right to information superior to that of the general public”. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609, 98 S. Ct. 1306 (1978). This means the right to information does not excuse criminal conduct. Even more applicable, “[the] mere lack of compliance with a police officer's verbal "order or direction" renders conduct "unlawful" that otherwise may be lawful and constitutionally protected”. *State v. Russo*, 141 Haw. 181, at 194 (2017). Therefore, the exercise of the First Amendment of the Constitution does not establish a defense to any criminal action.

The press does not enjoy immunity based purely upon their status as a journalist. The Supreme Court made it clear that, “[p]rivate restraints on the flow of information are not so favored by the First Amendment that they override all other public interests”. *Branzburg v. Hayes*, 408 U.S 665, 684, 697 (1972). Likewise, there is no caselaw that holds a journalist is not required to follow an unlawful order. To the contrary, journalist, like other citizens, are held criminally responsible when they refuse to follow an order. For example, the Supreme Court held, “Similar considerations to those outlined in this opinion have led several courts to conclude that there is no longer a right to resist an unlawful arrest”. *United States v. Ferrone*, 438 F.2d 381, 390 (3rd. Cir., 1971) citing *United States v. Simon*, 409 F.2d 474 (7th Cir. 1969). Journalist, like citizens, are not given discretion to refuse to follow an order. The courts have established no case law that allows journalist an exception to following orders on the basis of their status. To hold that a journalist, exercising the right to free press, is allowed to maintain a particular distance, or a journalist must be allowed to remain close enough to be able to record video and audio information would be contrary to many cases concerning the government’s right to restrict the ability to exercise free press. Therefore, to overturn this conviction on the basis that Mr. Howell had a right to record, and therefore resist an order, essentially grants him immunity based upon his status as a journalist.

### **B. Officer Boyd's Command was lawful**

This Court must uphold this conviction because Boyd's order was lawful. The lawfulness of Officer Boyd's order must be evaluated by this court because the elements of the crime include "in the lawful discharge of her duties". (Municipal Code 18-7-2(a)(2)). On February 6, 2023, Officer Boyd gave Howell an order to cross the street. This command was lawful. In order to negotiate this analysis, it is necessary to consider multiple superior court holdings. In consideration if the order was lawful, this court must evaluate where this incident took place. The court must consider the action Howell was performing, the location of Howell in relations to the officer, and how Howell engaged the officer during the incident. After considering these four elements, it is necessary for the court to analyze the order given by Boyd, and if this order reasonably restricted Howell's right to exercise his First Amendment right in a way that was narrowly tailored by time, place, and manner.

In order to ultimately determine if Boyd's order was lawful, this court must first evaluate where the incident took place and establish what Howell was doing. According to the facts in the Section II, Summary of the Facts, on February 6, 2023, Howell was recording the actions of a peace officer in the discharge of her duties. The City concedes this is a protected activity and is included in Howell's first amendment right to exercise freedom of press. *Branzburg v. Hayes*, 408 U.S.

665, 684 (1972). The location is important because journalist do not have the ability to record police in all spaces. (*Fields v. City of Philadelphia*, 862 F.3d 535, 360, (3rd Cir. 2017). However, the courts have held that journalist do have a right to exercise the right to free press in public spaces. *Glik v. Cunniffe*, 655 F.3d 78, 83.

According to facts in Section II, Summary of the Facts, the incident occurred on a public sidewalk. When a government actor imposes restrictions on First Amendment activities in a public place, those restrictions must be narrowly tailored. *Id.* at 84. The City concedes this interaction was in a public space.

The next part of the analysis requires a determination of Howell's location in relation to the officer. This is important because the lawful order analysis includes a determination of Howell's distance from Boyd and if Howell was interfering with Boyd as she was conducting a lawful duty. *Id.* First, Howell concedes in his statement of facts he was between five (5) to ten (10) feet away from Boyd when he started filming. [see **Defendant Brief, page 3 of 32, last paragraph**] and Boyd's testimony [2/11/25 CD 0:41:15]. This is important because no court has established a presumptive distance which is not interfering. *State v. Russo*, 141 Haw. 181, at 192 (2017). The courts in *Glik* and *Fields* do not establish the right to film within 10 to 15 feet from the officer. To the contrary, the facts of the both cases included distances. For example, in *Glik* the court mentions the distance as

part of the facts of the case saying, “Glik stopped roughly ten feet away and began recording video footage of the arrest on his cell phone.” *Glik*, 655 F.3d at 80. In *Fields* the court includes the distance as it relates to officers saying, “The nearest officer was 15 feet away”. *Field v. City of Philadelphia*, 862 F.3d 353, at 356. However, the holding of both cases fail to establish rules or distances from which a journalist can stand without restriction. The holding in *Glik* states, “Such peaceful recording of an arrest in a public space that does not interfere with the police officers' performance of their duties is not reasonably subject to limitation”. *Glik*, 655 F.3d at 84. Likewise, the holding in *Fields* states, “If a person's recording interferes with police activity, that activity might not be protected”. *Fields v. City of Philadelphia*, 862 F.3d 535, 360 (3rd Cir. 2017). These holdings show that distance is established as a rule, but it is a factor in evaluating what the journalist was doing while they were filming.

As part of the same analysis required to consider the distance between the journalist and the officers, this court must also determine if the journalist interfered with the officer’s execution of duties. In this case, Howell did engage the officers. There is no need to delve into an analysis if this was objective or subjective interference to the officer because the videos show Howell asking Boyd for her name and badge number and shows Howell talking to Officer Young during the incident. Further, at two different points in the video, Deluzio starts shouting and

engaging Howell directly. An actual conflict arises between Howell and Deluzio! Regardless of the reason for the conflict, and regardless of the argument that Deluzio has no right stop Howell from filming, the conflict is evident that Howell injected himself into the trespass situation by getting into a conflict with Deluzio. This is not the kind of passive journalism which is protected in *Glik*.

The *Russo* court emphasizes the importance of interference by citing language from *Jacobucci*, a 1999 case out of the 1st Circuit. *Russo*, 141 Haw. at 192. citing *Jacobucci v. Boulter*, 193 F.3d 14, 25 (1st Cir. 1999). The *Jacobucci* case explains that when journalist's activities interfere with government enforcement, their actions may no longer be considered activities that are protected by the First Amendment. The *Jacobucci* court held, "he was in a public area of a public building; he had a right to be there; he filmed the group from a comfortable remove; and he neither spoke to nor molested them in any way". *Id.* The *Russo* court quoted *Jacobucci* but clarified the actions that are protected by the First Amendment. The *Russo* court held, "[that when a journalist] recorded the police officers [in a public park], from a comfortable remove... and neither spoke to nor molested them in any way, ...then the individual's [actions] fell well within the bounds of the Constitution's protections". *State v. Russo*, 141 Haw. 181, at 192 (2017) citing *Jacobucci*, 193 F.3d at 25. These two cases represent a requirement by the court to analyze and determine if Howell interfered.

As a way to reemphasize the importance of interference, and its place in the analysis of lawful orders, it is helpful to consider the holding in *Fields*. The court in *Fields* held, “If a person’s recording interferes with police activity, that activity might not be protected”. *Fields*, 862 F.3d at 360. This holding is important because it establishes interference as a parameter when determining activity that is protected by the First Amendment. Therefore, when the court finds interference and holds the activity is not protected, then there is no need to determine if the order is narrowly tailored. It is upon this principle that the City makes its first argument that Boyd’s order was lawful.

In summary, the City’s first argument that Boyd’s order is lawful is based upon Howell’s interference. Howell’s conduct qualifies as interference in the context of *Glik*, *Fields*, *Russo* and the *Iacobucci* case because he actively interferes with Boyd as she trespasses Deluzio. This is an important finding because interference can be a reason to find Howell’s actions were not protected. The City argues the court should find Howell’s actions were not protected because he was not at a comfortable remove away from Boyd, he did speak with Boyd, and he did harass, annoy, and bother Deluzio to the point of confrontation. If Howell’s actions are not protected under the First Amendment, then the Court is not required to analyze if the order is narrowly tailored but instead can analyze the order under *State v. Jimenez* which explains, “our courts interpret a refusal to do something

required as constituting "resisting" not "evading" an officer, which violates Subsection [NMSA §30-22-1] (D)." *Jimenez*, 2017-NMCA-039, ¶ 39, 392 P.3d 668. Under this analysis, Boyd's order is lawful.

In considering if Howells's conduct qualifies as interference, this court should not be distracted by arguments that Boyd is required to, "endure significant burdens caused by citizen's exercise of their First Amendment Rights". *Glik*, 655 F.3d at 84. And, this court should disregard arguments that Howell was not interfering because, "a properly trained officer may reasonably be expected to exercise a higher degree of restraint' than the average citizen". *City of Houston v. Hill*, 482 U.S. 451, 463 (1987). These cases and principles cannot be used to nullify actual interference or a failure to obey a lawful order. Boyd did not order Howell across the street because she was being filmed or because Howell was taunting her with fighting words or obscene language. Boyd ordered Howell across the street because of his proximity to the trespass scene, his questioning of the officer, and his interaction with the suspect during the trespass incident.

After evaluating these four elements, it is necessary to evaluate the order that Boyd gave to Howell. Because the exercise of free press is a protected activity, the court has held that the order must be narrowly tailored. This is where this court must determine if the actions taken by government, through Boyd, were narrowly restricted by time, place, and manner restrictions to serve a legitimate purpose.

*Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000). This is a fact intensive analysis and there is no bright line rule to establish what is narrowly tailored. Despite this difficult analysis, Boyd's order was narrowly tailored.

Boyd ordered Howell to proceed immediately across the street. The City concedes that initially Boyd asks Howell to go across the street. However, as the incident begins to escalate and Deluzio become angry, Boyd gives a clear order to Howell saying, "I am going to need you to go across the street". Boyd is clear the order is to be complied with immediately. However, as to a restriction on the time that Howell can film or record, there is none. Boyd does not tell Howell he can film later, nor does she tell him that he is not allowed to film while he is across the street. Essentially, the order is to be complied with immediately, but there is no restriction on the time that Howell can exercise his right to film and gather information.

The place Boyd ordered Howell to go was across the street. It is important to note that Boyd was asking Deluzio to leave and was enforcing a criminal law of trespass. Brandt Thrower had asked police to remove Deluzio from his office, as a business owner and private property owner. Asking Deluzio to leave the area had inherent risks because the action is confrontational. The evidence supports that Boyd was considering this inherent risk when she explains that Howell must cross the street, "for his safety and hers". She assessed the scene as one of possible

danger because Deluzio was sitting in a vehicle and because Deluzio was angry with Thrower. Boyd was aware that Deluzio was a suspect with a mental issue which increases the risk of danger to the officer and the public. [2/11/25 CD 0:41:30–50]. Deluzio was sitting in his vehicle, which could be started and driven into the officer or Howell. Therefore, across the street was a convenient distance to provide safe separation between Howell and Deluzio. To the contrary, ordering Howell to step back 10, 15, or even 20 yards, on the same side of the road, would have taken time to explain and describe, and would have taken Boyd's attention away from Deluzio. As the officer explained on the stand, she did not want to turn her back on Deluzio to deal with Howell because Deluzio was a safety risk. [2/11/25 CD 0:43:08–15]. Therefore, Boyd's restriction on place was reasonable given the trespass situation with Deluzio.

Boyd did not restrict the manner in which Howell was exercising his journalism. Boyd's order did not include any stipulations or conditions on how he could record the incident. Boyd's order did not include any conditions on what he could record. In fact, on the video she told Howell he could record from across the street. The order did not prevent Howell from video recording the incident from across the street. However, Howell argues that the order restricted his ability to record the audible statements made by Deluzio and Boyd. But Boyd did not order Howell could not record audible statements. Howell argues, Boyd's order

restricted his ability to record audio statements because his equipment could not record audio statements from across the street. It is important to note that Howell has cited no case that requires journalist to be allowed access to audio statements in a public forum. In fact, the court in *Fields* held, “We do not say that all recording is protected or desirable”. *Fields*, 862 F.3d at 360. In conclusion, Howell was restricted in the manner in which he was allowed to exercise his right to free press. Howell was restricted to a location that allowed video recording but not audio recording. The City argues that this restriction is narrowly tailored given the inherent risk of dealing with a mentally ill person, sitting in a vehicle, who would be put in a confrontational situation when he was asked to leave under a trespass order. To hold that Boyd’s order was not narrowly tailored because Howell could not record the audible statements would open a pandora’s box of questions and issues from which officers and government actors could not manage.

In short, Boyd’s order was narrowly tailored. Boyd’s order had reasonable time, place, and manner restrictions. Essentially, there was no restriction as to the time Howell could exercise his right. The place, across the street, was reasonable distance given the volatile situation of enforcing a trespass from private property upon a subject with mental health issues. The distance ordered by the officer was narrowly tailored given the hostile nature of the enforcement and the fact that the subject was in a vehicle. And, given Howell’s interference into the volatile

situation, the distance was reasonable to defuse Deluzio's anger. The order contained no restriction in the way Howell could record the incident. Although the distance was not the best location to record audible statements, the order allowed video recording and did not restrict the manner in which Howell could record the incident from a safe distance. Therefore, the order was narrowly tailored in relation to time, place, and manner to serve a legitimate government purpose.

### **C. The Defendant Challenges the Sufficiency of the Evidence**

The Defendant brings forth a challenge of the sufficiency of the evidence. The defendant states the Plaintiff/Appellee did not present sufficient evidence to prove the elements of the crime of resisting evading arrest, as defined by Municipal Code 18-7-2 (a)(2). The Court is required to perform a two-part analysis concerning this challenge of the verdict. First, the Court must consider the evidence in the light most favorable to the guilty verdict, "indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711. After consider the evidence in a light most favorable to the prosecution, indulging all reasonable inference and resolving all conflicts in favor of the verdict, the court must determine if any "rational trier of fact" could have found the essential elements of the crime charged were proven beyond a reasonable doubt. *State v. Garcia*, 1992-NMSC-048, ¶ 24, 114 N.M. 269, 274. The evidence supports a rational trier of

fact would find Officer Boyd was a certified peace officer. That she was in the lawful discharge of her duties. The evidence supports that she was in discharge of removing an unwanted subject from private property. A rational trier of fact could find that Howell was so close to Boyd that he interfered with Boyd's duties, and thereby compromised his ability to exercise his right to free press. A rational trier of fact could find that Boyd was reasonable in her assessment of the situation when she believed a mentally disabled person, sitting in a vehicle, and being asked to leave private property could be dangerous. A rational trier of fact could find that Boyd gave a narrowly tailored order to film across the street for reasons of officer and public safety. Or, a rational trier of fact could find that Boyd gave a narrowly tailored order to film across the street when Howell interjected himself into the trespass situation with Deluzio. In addition to these rational findings, a rational trier of fact could find that Howell did not step back after being given two clear, unambiguous orders from Boyd, and he did not step back after Young gave supporting orders. Given being given every reasonable indulgence a rational trier of fact could have resolved any question or conflict created by Young's supporting order in favor of a finding that supports the verdict. All these inferences are rational after given reasonable indulgence and resolving conflicts in the evidence in favor of the prosecution.

#### IV. Conclusion

For the foregoing reasons, Plaintiff-Appellee, City of Farmington, respectfully requests that this Court uphold the conviction of Adam Howell for the crime of Resisting or Obstructing an Officer,

Respectfully submitted,

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#### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of this pleading was served by electronic filing on the Odyssey portal and served on Mathew Wadsworth, on this 24th day of October, 2025.

/s/ Russel Frost

Russel Frost



Mark Reynolds

**IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

**CITY OF FARMINGTON,**  
Plaintiff-Appellee,

vs.

**A-1-CA-42673**  
**D-1116-LR-2024-00036**

**ADAM HOWELL,**  
Defendant-Appellant.

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**DEFENDANT-APPELLANT'S REPLY BRIEF**

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Appeal from the Eleventh Judicial District Court  
San Juan County, New Mexico  
The Honorable Stephen Wayne, Presiding

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**Statement Regarding Record Citations**

This Brief follows the citation conventions of Rule 23-112 NMRA. Citations to the record proper are in the format **[RP (page number)]**. District court proceedings were audio recorded using For The Record software and reviewed using The Record Player. Citations to the audio transcripts are cited by date and time stamp as **[(month-date-year) CD (hour:minute:second)]**.

**Certificate of Compliance**

The body of this Reply Brief does not exceed the page limit set forth in Rule 12-318(F)(2) NMRA. Counsel used Times New Roman font, a proportionally-spaced typeface, and the body of this Reply Brief contains 2,781 words, which does not exceed 4,400. This brief was prepared using Google Docs.

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## I. Reply Argument

### A. Howell had a Constitutional right to film the police

In his Brief-in-Chief, Howell established that members of the press have a right to gather news. [BIC 11-14, U.S. Const. Amend. I]. Howell acknowledged that the State has a right to place reasonable time, place, and manner restrictions on the right to film, but that those restrictions must be narrowly tailored. [BIC 17-18].

The City's Answer Brief reframes Howell's argument as if he were claiming that "the press [] enjoy[s] immunity based purely upon their status as a journalist." [AB 13]. The City then attacks this strawman as if its defeat means that the First Amendment has no relevance to this case. [AB 11-13]. However, Howell did not and does not argue that the First Amendment grants journalists immunity from the requirement to obey lawful police commands.

Rather, in his Brief-in-Chief, Howell established that failure to comply with an unlawful police command cannot constitute Resisting by anyone, journalist or otherwise. [BIC 11-12]. Howell further established that the First Amendment informs whether a police command restricting filming is lawful. The police cannot give a lawful command to prevent a journalist from filming public conduct in a public place, and any command to limit filming must be a narrowly tailored time, place, and manner restriction. *Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011),

quoting *Iacobucci v. Boulter*, 193 F.3d 14, 25 (1st Cir. 1999); see also *Irizarry v. Yehia*, 38 F.4th 1282 (10th Cir. 2022); see also *Fields v. City of Philla.* 862 F.3d 353 (3d Cir. 2017); see also *Turner v. Driver*, 848 F.3d 678 (5th Cir. 2017); see also *ACLU of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); see also *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995); see also *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000). Howell also established that journalists have a right to record audio of police encounters. *Alvarez*, 679 F.3d at 592, **[BIC 13]**.

The City responds by claiming that “to hold that a journalist, exercising the right to free press, is allowed to maintain a particular distance, or a journalist must be allowed to remain close enough to be able to record video and audio information would be contrary to many cases...” **[AB 13]**. Despite this conclusory assertion, the City declines to cite a single one of the “many cases” that allegedly support it. See *In re Doe*, 1984-NMSC-024, ¶2, 100 N.M. 764, 765 (“We assume where arguments in briefs are unsupported by cited authority, counsel after diligent search, was unable to find any supporting authority.”).

In his Brief-in-Chief, Howell established that Officer Boyd’s commands to him were not intended to reasonably restrict his location of filming, but rather to unconstitutionally bar his right to film at all on the public sidewalk. **[BIC 14-16]**. Howell established that Officer Boyd chose to charge him, in part, for “escalating Jay’s behavior due to him not wanting to be filmed,” **[RP 56]**, which violated her

unlawful command to him to cross the street because “this gentleman... does not want to be filmed” [Pltf. Ex. 1, 10:12].

To the extent that the City addresses the issue, it is by emphasizing numerous irrelevant facts regarding Deluzio and Deluzio’s history and behavior that Howell both had no way of knowing, [AB 6-7], and is not responsible for [AB 8-11]. Howell does not dispute that people who have chosen to work as police officers have chosen a difficult field of employment, but that does not mean Howell’s Constitutional rights are limited by an officer’s difficulty with other people. [BIC 14, 21]. The City attempts to reframe the “conflict” as “between Deluzio and Howell.” [AB 10]. However, Howell had no interaction with Deluzio other than to exercise his First Amendment right to stand on the public sidewalk and film a public interaction with the police. [Pltf. Ex. 1, 9:50]. The City’s own argument is that Deluzio was irrational and unstable. [AB 6-7]. Howell’s right to film in public cannot be limited because some other irrational person responds unreasonably to his exercise of that right. [BIC 14].

The City gives a cursory acknowledgement of Howell’s First Amendment right to film. [AB 12, 14-15]. However, it then makes the citation-free arguments that the First Amendment “does not establish a defense to any criminal action,” and “there is no case law that holds a journalist is not required to follow an unlawful

order.” [AB 12-13, but see *State v. Russo*, 407 P.3d 137, 146 (Haw. 2017); see also *Storey v. Taylor*, 696 F.3d 987, 994 (10th Cir. 2012)].

The City cannot be correct. It would be irreconcilably contradictory to hold that journalists have the Constitutional right to film police but that journalists can still be convicted of a crime for violating an unlawful order by the police to stop filming them. Such a holding would render the First Amendment’s guarantee of a free press illusory. As established in Howell’s Brief-in-Chief, Constitutional rights are not limited by the subjective judgement of police officers on scene who simply want to make their own lives easier. [BIC 22].

Howell’s position is not that the First Amendment “essentially grants him immunity based upon his status as a journalist.” [AB 13]. Rather, his position is that anybody exercising their First Amendment rights has the right to disregard orders that unreasonably and unlawfully seek to prevent the exercise of those rights. As established above and in his Brief-in-Chief, Officer Boyd intended to prohibit Howell from filming at all. That order was unlawful, it cannot be the basis for a Resisting charge, and the Court need not continue the analysis any further.

### **B. Officer Boyd’s order to cross the street was not lawful**

In his Brief-in-Chief, Howell established that he had a First Amendment right to film subject only to narrowly tailored, objectively reasonable time, place,

and manner restrictions. [BIC 17-18]. To the extent that this Court construes Officer Boyd's order to cross the street as a restriction on the time, place, and manner of Howell's filming, rather than a prohibition of his filming, that order was still not lawful as it was still not a reasonable restriction.

The City declares that there is a four part test for determining if Officer Boyd's order was lawful. [AB 14]. The City claims that there are "multiple superior court holdings" supporting its four part test, but it declines to cite any of these "superior court holdings" so that Howell might have an opportunity to evaluate and argue the applicability of this alleged test. [AB 14], *see In re Doe*, 1984-NMSC-024, ¶2.

The City engages in a misleading analysis of an alleged conflict between Howell and Deluzio that is simply unsupported by the evidence in this case. [AB 16-17]. Deluzio—a person who the City claims was unstable—unreasonably threatened Howell, and Howell did not directly engage Deluzio even once. [AB 6-7, Pltf. Ex. 1, 9:50]. This one-sided engagement by Deluzio is not "a conflict." [AB 17]. A conflict requires mutual participation. Nor is Deluzio's conduct evidence that Howell "actively interfere[d] with Boyd." [AB 18]. Rather, the video evidence shows that Howell—the only person whose conduct Howell is responsible for—attempted to neither speak to nor molest Officer Boyd in any way, exactly as discussed in *Russo* and *Glik*. Howell only spoke when the officers engaged him,

and he only spoke with Officer Young after Officer Young specifically advised him “you guys aren’t doing nothing wrong.” [Pltf. Ex. 1, 10:44].

The City announces that there is “a requirement by the court to analyze and determine if Howell interfered.” [AB 17]. This “requirement” is allegedly based on language in *Iacobucci*, 193 F.3d 14, and *Russo*, 141 Haw. 181, both of which hold that journalists have a right to film police officers in public places. [AB 17]. According to the City, “interference can be a reason to find Howell’s actions were not protected.” [AB 18]. However, even by the City’s reading of *Iacobucci* and *Russo*, they only allegedly hold that “when journalist’s activities interfere with government enforcement, their actions may no longer be... protected.” [AB 17 (**emphasis added**)]. Going from an action may not be protected to an action is not protected is quite a leap based on two cases that do not hold that.

The City’s entire argument regarding Howell’s alleged interference is factually unsupported. But more importantly, the City’s argument is legally unsupported. This Court should decline to engage in the City’s citation-free four-part “test” to determine if Officer Boyd’s order was lawful. Instead of focusing on Howell’s conduct, this Court should analyze the reasonableness of Officer Boyd’s order. [BIC 17, *Turner*, 848 F.3d at 690, quoting *McCullen v. Coakley*, 573 U.S. 464, 477 (2014) (“When police departments or officers adopt time, place, and manner restrictions, those restrictions must be ‘narrowly tailored

to serve a significant governmental interest.” (emphasis added).)]. As established in Howell’s Brief-in-Chief, and unrebutted in the City’s Answer, no objective, reasonable officer would have felt it was necessary to move Howell all the way to the other side of the street to exercise his First Amendment rights. [**BIC 22**].

The City appears to argue that moving Howell to the other side of the street was not an unreasonable order because the move would not have inherently interfered with his ability and right to record the traffic stop from a reasonable distance. [**AB 21-22**]. “It is important to note that Howell has cited no case that requires journalist[s] to be allowed access to audio statements in a public forum.” [**AB 22**, *but see BIC 13, Alvarez*, 679 F.3d at 595. (“Audio and audiovisual recording are media of expression... and are thus included within the free speech and free press guaranty of the First and Fourteenth Amendments.”)]. First, the City argues that Officer Boyd’s order to cross the street was not unreasonable because “Boyd did not order Howell could not record audible statements.” [**AB 21**]. However, it then concedes that “Howell was restricted to a location that allowed video recording but not audio recording.” [**AB 22**]. Howell concurs with the City’s assessment that Officer Boyd’s order would have unreasonably prohibited his right to record statements audible to any bystander, and Howell further asserts that moving him across the street also inherently limited his ability to record video from a reasonable distance. This was a significant infringement on Howell’s First

Amendment right that no objective officer would have felt was reasonable. Officer Boyd's subjective reasons are insufficient. [AB 20-21].

The City argues that “to hold Boyd’s order was not narrowly tailored... would open a pandora’s box... from which officers and government actors could not manage.” [AB 22]. However, the City fails to acknowledge that not one but two of the other three officers on scene in this case also apparently felt it was unnecessary to move Howell across the street to safely manage this scene. As established in Howell’s Brief-in-Chief, Officer Young initially told Howell “you guys aren’t doing nothing wrong,” and ten minutes later Sergeant Blea told Howell from a few steps further down the sidewalk “now that we’re here, you’re fine.” [BIC 24]. This Court should accept the City’s silence on the other officers’ actions as a concession that at least half of the other officers on scene that day plainly felt that it was unnecessary for Howell to record from across the street. Far from opening a pandora’s box, such a holding would simply reflect that an objectively reasonable officer may have asked Howell to take a few steps back—which he did as discussed below—but two of the three officers who subjectively weighed in in this case felt that moving Howell all the way across the street was unnecessary. No objectively reasonable officer would have felt that such an order was necessary.

Officer Boyd's order to cross the street was objectively unreasonable, it was not a narrowly tailored restriction on Howell's right to film, and Howell's disregard for that unlawful order cannot constitute Resisting.

### **C. Howell did comply with all lawful orders within a reasonable time**

New Mexico and Tenth Circuit cases provide only a few examples of what it means to refuse to obey lawful police commands in violation of section 30-22-1(D). However, in each relevant case where a defendant is found to have unlawfully resisted an officer, the commands given by the officer are clear and repeated, the defendant is given a reasonable opportunity to comply with the commands under the circumstances, and the defendant nonetheless overtly refuses to comply.

*United States v. Romero*, 935 F.3d, 1124, 1129 (10th Cir. 2019). Compliance need not be instantaneous. *Romero*, 935 F.3d at 1131. Frustrated and delayed compliance does not constitute Resisting as a matter of law.

The City argues that a rational trier of fact could find that Howell did not cross the street when Officer Boyd ordered him to do so. [AB 24]. Howell does not dispute this. Rather, as established in his Brief-in-Chief and above, Officer Boyd's order to cross the street was not lawful and therefore non-compliance with that unlawful order cannot be the basis of a Resisting charge.

The City further argues that a rational trier of fact could find that Howell did not step back after being ordered to do so. **[AB 24]**. As established in Howell's Brief-in-Chief, this is not supported by substantial evidence. **[BIC 27]**.

The City's argument relies nearly exclusively on statements by Officer Boyd. **[AB 24]**. It ignores that Officer Young was also speaking with Howell, and he was giving contradictory instructions. **[BIC 27]**. How was Howell supposed to know that he was committing a crime by ignoring Officer Boyd's order to cross the street when only 20 seconds later Officer Young was telling him he was not doing anything wrong? **[Pltf. Ex. 1, 10:44]**.

Howell did comply with Officer Young's clear order to step back. **[BIC 27, Pltf. Ex. 1, 11:40]**. The City argues that Howell's step back was insufficient or somehow made for the wrong reason. **[AB 10-11]**. The City characterizes Howell's step back as made to re-position his camera rather than to comply with the officers' order to step back. **[AB 11]**. However, the City cites no authority to support the extreme position that an objective physical step back in response to a request to step back does not "count" if it is made for the wrong alleged subjective reason. As can be seen on video, Howell objectively stepped back after being asked to do so. **[Pltf. Ex. 1, 11:30]**. Further, Howell stated on camera that he subjectively believed he stepped back in compliance with the officers' orders. **[Def. Ex. A, 19:36]**.

Most importantly, the burden was not on Howell to interpret the officers' orders. As discussed in *Romero*, the burden was on Officers Boyd and Young to give "clear and repeated" commands that gave Howell a reasonable opportunity to comply. Officer Young ordered Howell to take a step back, and Howell quickly did so. In this case, as in *Russo*, if Officer Young thought that Howell's step back was insufficiently compliant, the burden was on Young to clearly and repeatedly communicate that Howell needed to step back again. *Russo*, 141 Haw. at 195. Yet, no officer told Howell to move again until Howell moved in response to Sergeant Blea's command and was again told that he was in an acceptable location. [**Def Ex A, 20:05**]. Officers Boyd and Young may have testified at trial that they believed Howell's step back was insufficient, and the City may be asserting that now on appeal, but no officer on scene gave Howell any notice while he was filming that day that his step back was insufficient.

The burden was not on Howell to know what concerns the City speculates Officer Boyd may have subjectively held, and the burden was not on Howell to know that the Officers Young and Boyd thought his step back was insufficiently compliant. Rather, as discussed in *Romero*, the burden was on Officers Boyd and Young to communicate clearly and repeatedly to Howell on scene that day that his step back was insufficient. They failed to do so. Their uncommunicated opinion that Howell's step back was inadequate is not enough evidence for any rational

trier of fact to find that Howell committed *Resisting or Obstructing an Officer*. His conviction should be reversed.

## **II. Conclusion**

For the reasons stated herein and in his Brief-in-Chief, Defendant-Appellant Howell respectfully requests that this Court reverse his conviction as not supported by sufficient evidence, and that the Court grant such further relief as it deems just and proper.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of this pleading was served by electronic filing on the Odyssey portal and served on Russel Frost, Counsel for Plaintiff, at rfrost@farmingtonnm.gov on this 19<sup>th</sup> day of December, 2025.

/s/ Mathew R. Wadsworth

Mathew R. Wadsworth