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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOHN PATRICK HENNEBERRY,
Plaintiff,
v.
CITY OF NEWARK, et al.,
Defendants.

Case No. [13-cv-05238-TSH](#)

**ORDER DENYING DEFENDANTS’
RENEWED MOTION FOR SUMMARY
JUDGMENT**

Re: Dkt. No. 224

I. INTRODUCTION

Plaintiff John Patrick Henneberry brings this civil rights action for claims arising from his 2013 arrest and incarceration. After the Court granted summary judgment in part, two claims remain pending: (1) a First Amendment retaliation claim against Defendant Karl Fredstrom, the City of Newark police officer that arrested him; and (2) a claim under the Bane Act, Cal. Civ. Code § 52.1, against Fredstrom and Defendant City of Newark (together, “Defendants”). Order re: Mot. for Summ. J. (“MSJ Order”), ECF No. 98. The case was scheduled for a jury trial in September 2019; however, on May 28, 2019, the Supreme Court issued its decision in *Nieves v. Bartlett*, in which it held: “The plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest.” 139 S. Ct. 1715, 1724 (2019). Based on *Nieves*, the Court vacated the trial and ordered Defendants to file a renewed motion for summary judgment. Now pending before the Court is Defendants’ renewed motion. ECF No. 224. Henneberry filed an Opposition (ECF No. 227) and Defendants filed a Reply (ECF No. 230). The Court finds this motion suitable for disposition without oral argument and **VACATES** the September 12, 2019 hearing. *See* Civ. L.R. 7-1(b). Having considered the parties’ positions, relevant legal authority, and the record in this case, the Court **DENIES** Defendants’ motion for the following reasons.

1 **II. BACKGROUND**

2 **A. Factual Background**

3 For several years leading up to the events at issue in this lawsuit, Henneberry attended
4 every City Council meeting held by the City of Newark. Henneberry Decl. ¶ 2, ECF No. 90-1.
5 During these meetings and at other times, he actively participated in Newark City politics,
6 criticizing the salaries of City officials and their decisions to curtail public services. *Id.* ¶¶ 2-8, 18.
7 As a result of his frequent and vocal participation at City Council meetings, Henneberry was well
8 known to Defendants Jon Becker (Newark’s City Manager), Officer Fredstrom, and Linda Ashley
9 (Newark Chamber of Commerce President). Becker Decl. ¶ 6, ECF No. 89-3; Huang Decl. Ex. D
10 (Ashley Dep.) at 39:16-43:25, ECF No. 90-2; *id.*, Ex. C (Fredstrom Dep.) at 22:6-18, 24:24-25:13,
11 ECF No. 90-2. They and other Newark City officials felt Henneberry was disruptive and
12 complained too much. Ashley Dep. at 39:16-41:24 (describing prior interactions with
13 Henneberry), 42:8-43:25 (Ashley had discussed Henneberry with “a large portion of” the members
14 of the City of Newark, including Becker: the gist of those conversations was that “it was hurtful
15 what Henneberry did to people at the council meetings”); Thornton Decl. Ex. B (Defs.’ Ashley
16 Dep.) at 90:15-25, ECF No. 89-1 (Henneberry “has a history of calling the Mayor Hitler, of
17 cussing at him, at cussing at the other council members, at City staff, me. And when you create a
18 pattern, you expect that pattern to continue. And we had every reason to believe he would do it
19 again and no reason to belief he wouldn’t.”); Fredstrom Dep. at 22:5-25:16 (recognized
20 Henneberry’s name from prior council and planning meetings where he was disruptive and “very
21 loud”).

22 Henneberry saw advertisements about an upcoming State of the City address to be held on
23 April 18, 2013 at a Hilton Hotel in Newark (the “Event”). Henneberry Decl. ¶ 13; *see also* Becker
24 Decl. ¶ 3; Fredstrom Decl. ¶ 4, ECF No. 89-3. He looked up further information about the Event
25 online and was directed to a “Community Events” page on the City of Newark Chamber of
26 Commerce website. Henneberry Decl. ¶¶ 13-14 & Ex. A. The webpage made no mention of
27 reservations being required, did not state the Event was private or indicate the Chamber of
28 Commerce was hosting the Event, and stated there “will be gallery seating for those who do not

1 attend the luncheon.” *Id.* ¶ 14 & Ex. A. He also clicked a link on the Community Events page
2 that directed him to a flyer for the Event, which bore the Newark Chamber of Commerce’s and the
3 City of Newark’s logos and the title “2013 State of the City Address & Showcase Mayor Al
4 Nagy.” *Id.* ¶¶ 14-15 & Ex. B. The flyer stated, “Registration & Networking Showcase Open
5 (lunch ticket not req.)” and “Gallery Seating Open (no charge).” *Id.*, Ex. B. It described “New
6 Sponsor Opportunities!” and listed fees associated with different levels of sponsorship; the lower
7 half of the flyer allowed attendees to reserve showcase space and order lunch. *Id.* The flyer also
8 stated “[r]eservations are required by April 16” and directed attendees to pay the Chamber of
9 Commerce online or by mail. *Id.*

10 At 12:05 p.m. on April 18, 2013, Henneberry arrived at the Event. Henneberry Decl. ¶ 16.
11 He waited in the lobby, filled out a nametag he found at an unstaffed table, helped latecomers fill
12 out nametags, asked them if they were registered to vote, and directed them to the event room. *Id.*
13 ¶ 17. Just before 12:30 p.m., he entered the ballroom, where the Event was taking place; he was
14 not asked whether he had a reservation. *Id.* ¶¶ 18-19. He sat in the back row of the gallery section
15 of the ballroom. *Id.*; *see also* Defs.’ Ashley Dep. at 60:2-14. Henneberry wrote on a pad of paper
16 and did not say a word. Henneberry Decl. ¶ 20.

17 After spotting Henneberry, Becker found Ashley and told her he did not want Henneberry
18 “embarrassing the Mayor” and asking whether there was “some reason why he shouldn’t be here.”
19 Defs.’ Ashley Dep. at 55:6-9, 58:18-59:23; *see also* Becker Decl. ¶¶ 6-7. Ashley told Becker that
20 Henneberry did not have a reservation, stated “we don’t let anybody in who doesn’t have a
21 reservation,” and assured Becker she would “take care of it.” Defs.’ Ashley Dep. at 55:6-9, 94:5-
22 13; *see also* Becker Decl. ¶¶ 7-8 (“Ms. Ashley confirmed that Henneberry did not have a
23 reservation for the Event, and that any person who did not have a reservation was not permitted at
24 the Event. Ms. Ashley then told me that she would take care of the situation, and she walked over
25 to Henneberry.”). Within a few minutes of Henneberry sitting down in the gallery, Ashley
26 informed him he needed to leave because he had not made a reservation. Defs.’ Ashley Dep. at
27 59:22-25; Henneberry Decl. ¶ 20. Ashley did not check whether persons in the gallery had
28 reservations until Becker noticed Henneberry in attendance. Defs.’ Ashley Dep. at 51:10-55:5.

1 Henneberry declined to leave because “[h]e had every right to be there.” *Id.* at 61:8-9.
2 Ashley replied the Event was not a public event as it was run by the Chamber of Commerce and
3 he did not have a right to be there because he did not make a reservation. *Id.* at 61:10-15; 80:10-
4 13; Henneberry Decl. ¶ 20; *see also* Becker Decl. ¶ 5 (The Event “was not a City of Newark event.
5 I did not have control over who was permitted to attend the event.”). Henneberry explained that
6 he was entitled to attend the meeting under the Brown Act.¹ Defs.’ Ashley Dep. at 61:17-20;
7 Henneberry Decl. ¶ 20. At some point, Fredstrom and Newark Police Officer Renny Lawson
8 joined Ashley. Defs.’ Ashley Dep. at 61:25-15. Fredstrom was dispatched to the Event “because
9 there was some type of disturbance involving Mr. Henneberry.” Thornton Decl., Ex. A (Defs.’
10 Fredstrom Dep.) at 20:5-21:6, ECF No. 89-1. Ashley informed the officers that Henneberry did
11 not have a reservation and she had asked him to leave, but that he refused to do so. *Id.* at 67:3-12;
12 Lawson Decl. ¶ 4, ECF No. 89-4.

13 There is no dispute that Henneberry refused to leave after being asked to do so, but there is
14 no evidence he was loud, used inappropriate language, was confrontational, or abusive. Defs.’
15 Fredstrom Dep. at 103:1-105:22; Henneberry Decl. ¶ 20. There is also no dispute that, while
16 Henneberry was seated, Fredstrom and Lawson grabbed him by the hands and arms and escorted
17 him out of the building using a rear wrist lock. Defs.’ Fredstrom Dep. at 38:16-40:21 & Ex. A
18 (Incident Report) at 6. When Fredstrom asked Lawson whether he wanted Henneberry detained,
19 Lawson responded affirmatively. Defs.’ Fredstrom Dep. at 40:22-41:7 & Incident Report at 6. At
20 this point, Fredstrom handcuffed Henneberry and placed him in a patrol car. Incident Report at 6.
21 Fredstrom then returned to the conference to investigate the incident. *Id.* Henneberry was kept in
22 the patrol car for 30-45 minutes while Fredstrom conducted his investigation. Henneberry Decl. ¶
23 22.

24 Fredstrom took statements from Ashley and several other witnesses who reiterated that

26 ¹ The Brown Act provides that a “majority of the members of a legislative body shall not, outside
27 a meeting authorized by this chapter, use a series of communications of any kind, directly or
28 through intermediaries, to discuss, deliberate, or take action on any item of business that is within
the subject matter jurisdiction of the legislative body.” Cal. Gov’t Code § 54952.2(b)(1). There
are a number of exceptions to this requirement. *Id.* §§ 54952.2(c)(1)-(6).

1 they had told Henneberry or had overheard him being told that the Event was private and not open
2 to the public, and that Ashley had asked him to leave but he refused. *See* Incident Report at 6-9.

3 One of the witnesses Fredstrom interviewed was Defendant David Benoun, Newark’s City
4 Attorney, who

5 told me that Linda Ashley had come up to him and said that Mr.
6 Henneberry was at the event and that Henneberry was claiming a
7 violation of the Brown Act. Benoun said that Ashley told him that if
8 Henneberry was to be removed, that Henneberry wanted to speak to
9 the city attorney. Benoun agreed and spoke with Henneberry.
Benoun . . . advised Henneberry that this was a private affair, has
nothing to do with the city, it’s a [Chamber of Commerce] event and
that if they ask you to leave, it is within their rights.

10 *Id.* at 8. Fredstrom determined he had probable cause to arrest Henneberry for trespassing based
11 on his investigation. Defs.’ Fredstrom Dep. at 61:22-62:1. Fredstrom also believed the arrest was
12 supported by Ashley’s willingness to sign a Citizen’s Arrest form. *Id.* at 62:2-63:9, 73:20-75:12.

13 By the time Fredstrom drove Henneberry to the Newark Police Department, the Event was
14 over, as evidenced by the fact that people were leaving. Henneberry Decl. ¶ 22. Fredstrom
15 continued to interview him at the police station. Defs.’ Fredstrom Dep. at 75:13-19; Henneberry
16 Decl. ¶ 23. Fredstrom arrested Henneberry for violating California Penal Code section 602.1(a).²
17 *See* Huang Decl. Ex. A (Consolidated Arrest Report). Fredstrom made the decision not to “field
18 cite” him at the Newark Police Station. Defs.’ Fredstrom Dep. at 94:25-95:5, 95:10-15 (Newark
19 Police Department policy allows officers either to issue a citation and release somebody from the
20 scene under certain circumstances, or to transport the person to Fremont Jail and have them issue a
21 citation and release the subject after booking). At 2:54 p.m., Fredstrom left the police station to
22 transport Henneberry to the Fremont City Jail. *Id.* at 88:1-13. Persons booked at the Fremont jail
23 are eligible for “cite and release,” and Fredstrom intended to tell the officers booking Henneberry

24 _____
25 ² California Penal Code section 602.1(a) provides that: “Any person who intentionally interferes
26 with any lawful business or occupation carried on by the owner or agent of a business
27 establishment open to the public, by obstructing or intimidating those attempting to carry on
28 business, or their customers, and who refuses to leave the premises of the business establishment
after being requested to leave by the owner or the owner’s agent, or by a peace officer acting at the
request of the owner or owner’s agent, is guilty of a misdemeanor, punishable by imprisonment in
a county jail for up to 90 days, or by a fine of up to four hundred dollars (\$400), or by both that
imprisonment and fine.”

1 at Fremont City Jail that he was eligible for immediate release and citation. *Id.* at 91:20-93:2. The
2 cite and release process can take anywhere from 10 minute to hours, depending on how many
3 people are waiting to be booked. *Id.* at 93:21-94:2. But when they arrived at Fremont Jail,
4 Fredstrom was ordered to take Henneberry and another arrestee to Santa Rita Jail. *Id.* at 91:12-19,
5 94:14-16.

6 Henneberry was booked into Santa Rita Jail where, instead of being cited and released, he
7 was held for more than 30 hours. Henneberry Decl. ¶ 24. As a result of this experience, he has
8 drastically reduced his participation in local government and has stopped attending City Council
9 meetings. *Id.* ¶ 26.

10 **B. Procedural Background**

11 Henneberry filed his initial complaint on November 12, 2013.³ ECF No. 1. The case has
12 since had a lengthy procedural background but relevant here is that on April 26, 2017, Judge
13 James granted summary judgment on Henneberry’s remaining claims except his First Amendment
14 retaliation and Bane Act claims. As to Henneberry’s retaliation claim, Judge James found
15 Fredstrom had probable cause to arrest him but allowed the claim to proceed because “[a]
16 reasonable trier of fact could also find this type of arrest would chill a person of ordinary firmness
17 from future First Amendment activities.” MSJ Order at 11, 21 (citing *Ford v. City of Yakima*, 706
18 F.3d 1188, 1199 (9th Cir. 2013)). As to his Bane Act claim, Judge James held that “[a] reasonable
19 jury could . . . find that Fredstrom’s refusal to cite and release [Henneberry] for this misdemeanor
20 from the Newark Police Department and instead to book him at the Fremont City Jail constitutes
21 threats, intimidation, or coercion. The City would be vicariously liable for any damages resulting
22 from Fredstrom’s actions.” *Id.* at 29.

23 Defendants filed the present renewed motion on July 18, 2019, seeking summary judgment
24 as to both claims.

25 **III. LEGAL STANDARD**

26 Summary judgment is proper where there is “no genuine dispute as to any material fact and
27

28 ³ The case was initially assigned to Magistrate Judge Maria-Elena James, who retired in August
2018, after which the case was reassigned to the undersigned. ECF No. 187.

1 the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The party moving
2 for summary judgment bears the initial burden of identifying those portions of the pleadings,
3 discovery and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex*
4 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Material facts are those that may affect the outcome
5 of the case, and a dispute as to a material fact is genuine if there is sufficient evidence for a
6 reasonable jury to return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477
7 U.S. 242, 248 (1986).

8 If the moving party meets its initial burden, the opposing party must then set forth specific
9 facts showing that there is some genuine issue for trial. Fed. R. Civ. P. 56(c)(1); *Anderson*, 477
10 U.S. at 250. All reasonable inferences must be drawn in the light most favorable to the
11 nonmoving party. *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004). However,
12 it is not the task of the Court “to scour the record in search of a genuine issue of triable fact.”
13 *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996). The nonmoving party has the burden “to
14 identify with reasonable particularity the evidence that precludes summary judgment.” *Id.* Thus,
15 “[t]he district court need not examine the entire file for evidence establishing a genuine issue of
16 fact, where the evidence is not set forth in the opposing papers with adequate references so that it
17 could conveniently be found.” *Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir.
18 2001).

19 “While the evidence presented at the summary judgment stage does not yet need to be in a
20 form that would be admissible at trial, the proponent must set out facts that it will be able to prove
21 through admissible evidence.” *Norse v. City of Santa Cruz*, 629 F.3d 966, 973 (9th Cir. 2010)
22 (citing Fed. R. Civ. P. 56(c) (“An affidavit or declaration used to support or oppose a motion must
23 be made on personal knowledge, set out facts that would be admissible in evidence, and show that
24 the affiant or declarant is competent to testify on the matters stated.”)). Still, to survive summary
25 judgment, the nonmoving party “must set forth non-speculative evidence of specific facts, not
26 sweeping conclusory allegations.” *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d
27 1047, 1061 (9th Cir. 2011) (citations omitted).

28

1 IV. DISCUSSION

2 In their motion, Defendants argue that Henneberry’s First Amendment retaliation claim is
3 barred because the Court has already determined Fredstrom had probable cause to arrest him, and
4 the Supreme Court’s holding in *Nieves* establishes that a retaliation claim must fail in such
5 circumstances. Mot. at 8. Defendants acknowledge that *Nieves* “provides a ‘narrow qualification’
6 to its ruling, setting forth that the ‘no-probable-cause requirement should not apply when a
7 plaintiff provides objective evidence that he was arrested when otherwise similarly situated
8 individuals not engaged in the same sort of protected speech had not been.’” *Id.* at 10 (quoting
9 *Nieves*, 139 S. Ct. at 1727). However, they argue this exception is inapplicable here because the
10 Supreme Court explained that “this narrow exception is warranted ‘for circumstances where
11 officers have probable cause to make arrests, but typically exercise their discretion not to do so.’”
12 *Id.* (quoting *Nieves*, 139 S. Ct. at 1727). Defendants note that the offense in question here is
13 trespassing, which they argue cannot be characterized as a crime for which officers rarely affect an
14 arrest. *Id.* Defendants further argue there is no evidence that probable cause existed to arrest any
15 other attendee at the Event. *Id.* at 11. Defendants note that, in denying their motion for summary
16 judgment on qualified immunity grounds, Judge James relied upon *Ford*, but they argue *Ford* is
17 no longer viable after *Nieves*. *Id.* at 12-13. They now request the Court reexamine the decision
18 because Henneberry cannot establish that Fredstrom “was ‘plainly incompetent’ or ‘knowingly
19 violated the law,’ such that no reasonable officer could conclude his actions were lawful.” *Id.* at
20 14. Finally, as to Henneberry’s Bane Act claim, Defendants argue it must also fail because it
21 requires interference with a constitutional or legal right and, as Henneberry suffered no First
22 Amendment retaliation injury and no other claims remain, there can be no liability under the Act.
23 *Id.*

24 In response, Henneberry argues *Nieves* “simply does not cover” his claims because,
25 although the Court concluded that “[t]he plaintiff pressing a retaliatory arrest claim must plead
26 and prove the absence of probable cause for the arrest,’ and ‘[t]he presence of probable cause
27 should generally defeat a First Amendment retaliatory arrest claim,’ . . . it cannot be that probable
28 cause for an arrest immunizes every action by the arresting officer that occurs after the arrest.”

1 Opp'n at 1 (quoting *Nieves*, 139 S. Ct. at 1724, 1726). Henneberry notes there are two sets of
2 events at issue here: (1) his arrest and (2) whether Fredstrom's decision and actions to book,
3 transport, and jail him were in retaliation for his speech. *Id.* at 1-2. Henneberry maintains his
4 First Amendment claim is grounded on the latter, "on the conduct and punishment flowing from
5 his arrest," including his transportation to Santa Rita Jail and detention there for approximately 30
6 hours. *Id.* at 2. "As a result, *Nieves*'s general rule that a plaintiff must plead and prove an absence
7 of probable cause, and that a finding of probable cause precludes a retaliatory arrest claim, does
8 not apply." *Id.* Henneberry argues that, even if *Nieves*'s general rule were to apply to his claims,
9 they fall within the exception to that rule because he was arrested and jailed for misdemeanor
10 trespass under California Penal Code section 602, "[b]ut hardly anyone is arrested or cited for this
11 offense." *Id.* To the extent the Court determines there is insufficient evidence to make this
12 determination, Henneberry requests it deny or defer Defendants' motion under Rule 56(d) while
13 discovery is reopened. *Id.* Finally, Henneberry argues Fredstrom is not entitled to qualified
14 immunity "because at the time of his conduct here, it was clearly established that an officer 'could
15 not exercise his discretion to book an individual in retaliation for that individual's First
16 Amendment activity.'" *Id.* at 3 (quoting *Ford*, 706 F.3d at 1196).

17 **A. First Amendment**

18 **1. Retaliation**

19 "[T]he First Amendment prohibits government officials from subjecting an individual to
20 retaliatory actions' for engaging in protected speech." *Nieves*, 139 S. Ct. at 1722 (quoting
21 *Hartman v. Moore*, 547 U.S. 250, 256 (2006)). "If an official takes adverse action against someone
22 based on that forbidden motive, and 'non-retaliatory grounds are in fact insufficient to provoke the
23 adverse consequences,' the injured person may generally seek relief by bringing a First
24 Amendment claim." *Id.* (quoting *Hartman*, 547 U.S. at 256). "To prevail on such a claim, a
25 plaintiff must establish a 'causal connection' between the government defendant's 'retaliatory
26 animus' and the plaintiff's 'subsequent injury.' *Id.* (quoting *Hartman*, 547 U.S. at 259). "It is not
27 enough to show that an official acted with a retaliatory motive and that the plaintiff was injured—
28 the motive must cause the injury. Specifically, it must be a 'but-for' cause, meaning that the

1 adverse action against the plaintiff would not have been taken absent the retaliatory motive.” *Id.*
2 (citing *Hartman*, 547 U.S. at 260).

3 As Judge James previously ruled, Fredstrom had probable cause to arrest Henneberry
4 under California Penal Code section 602.1(a). MSJ Order at 8-12. The Court finds Judge James’s
5 decision well-reasoned and adopts it here. However, she also found evidence of a retaliatory
6 motive in that

7 (1) Fredstrom knew Plaintiff from prior encounters at City Council
8 and City Planning Meetings, where he had found Plaintiff “very loud”
9 and disruptive; (2) as a result of these past interactions, Fredstrom in
10 fact recognized Plaintiff by name when he was dispatched to the
11 Hilton Hotel during the Conference; (3) Lawson instructed Fredstrom
12 to detain Plaintiff, but he did not direct Fredstrom to arrest Plaintiff;
and (4) even after arresting Plaintiff, Fredstrom had the discretion to
cite and release him from the Newark Police Station, but he made the
decision not to do so and instead drove Plaintiff to be booked at the
Fremont City Jail.

13 *Id.* at 19. Based on this evidence, she determined that “[a] reasonable trier of fact also could find
14 this type of arrest would chill a person of ordinary firmness from future First Amendment
15 activities.” *Id.* at 21 (citing *Ford*, 706 F.3d at 1193). Judge James thus denied summary judgment
16 as to Henneberry’s First Amendment retaliation claim because Defendants failed to rebut the
17 circumstantial evidence of retaliatory motive. *Id.*

18 Defendants now argue that, in light of *Nieves*, the fact that Fredstrom had probable cause
19 to arrest Henneberry defeats any claim that his arrest was in retaliation for speech protected by the
20 First Amendment. Mot. at 6. In *Nieves*, the Supreme Court recognized the Ninth Circuit’s
21 previous holding that a plaintiff could prevail on a First Amendment retaliatory arrest claim even
22 in the face of probable cause for arrest. 139 S. Ct. at 1721 (citing *Bartlett v. Nieves* 712 Fed. App’x
23 613 (9th Cir. 2017)). However, the Supreme Court determined that such an evaluation, in the face
24 of a finding of probable cause, is improper, holding that a plaintiff’s First Amendment retaliation
25 claim related to arrest cannot succeed where the defendant officers had probable cause to arrest
26 plaintiff. *Id.* at 1728 (“Because there was probable cause to arrest [plaintiff], his retaliatory arrest
27 claim fails as a matter of law.”) In doing so, the Court found that “probable cause speaks to the
28 objective reasonableness of an arrest” and that “its absence will . . . generally provide weighty

1 evidence that the officer’s animus caused the arrest, whereas the presence of probable cause will
2 suggest the opposite.” *Id.* at 1724 (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011)).
3 Additionally, the Supreme Court reiterated that “when reviewing an arrest, we ask ‘whether the
4 circumstances, viewed objectively, justify [the challenged] action,’ and if so, conclude ‘that action
5 was reasonable *whatever* the subjective intent motivating the relevant officials.’” *Id.* at 1725
6 (alteration and emphasis in original) (quoting *al-Kidd*, 563 U.S. at 736).

7 Given that Fredstrom had probable cause to arrest Henneberry, it is clear that *Nieves* would
8 not permit Henneberry to pursue a First Amendment retaliation claim based on that arrest.
9 Defendants argue Henneberry also cannot satisfy *Nieves*’s no probable cause requirement as to the
10 subsequent actions because they were tied to the initial arrest. Reply at 4. However, it is not clear
11 that *Nieves* protects an officer from all subsequent action after an arrest, which here includes
12 Fredstrom’s decision to transport Henneberry to the Newark Police Department, his decision not
13 to “field cite” him at the Newark Police Station and to instead transport him to Fremont City Jail,
14 and Henneberry’s ultimate transfer to Santa Rita Jail, where he was jailed for 30 hours.
15 Henneberry alleges these actions were all in retaliation for his speech. As Judge James observed
16 in her decision, Henneberry’s claim is based on the “narrow question: whether Fredstrom’s desire
17 to chill Plaintiff from engaging in future First Amendment activities was a but for cause of his
18 decision not to cite and release Plaintiff from the Newark Police Department.” MSJ at 29. Given
19 the post-arrest conduct at issue here, it is not clear that *Nieves* prohibits such claims.

20 **2. *Nieves* Exception**

21 Even if *Nieves* were to immunize all post-arrest conduct, Henneberry argues his claims fall
22 within an exception to *Nieves*’s general rule. Mot. at 11-12. In *Nieves*, the Court emphasized that
23 “[a]lthough probable cause should generally defeat a retaliatory arrest claim,” there is an exception
24 when officers have probable cause but typically exercise their discretion not to make arrests. 139
25 S. Ct. at 1727. Thus, the “no-probable-cause requirement should not apply when a plaintiff
26 presents objective evidence that he was arrested when otherwise similarly situated individuals not
27 engaged in the same sort of protected speech had not been.” *Id.* Henneberry contends that is the
28 case here because Newark Police records show they rarely cite or arrest individuals for the

1 offenses for which he was arrested and jailed. Mot. at 11. He cites to records showing that from
2 2012 to present, there were only 14 citations or bookings for violations of California Penal Code
3 sections 602(o) or 602.1(a) by the Newark Police. *Id.* at 11-12 (citing Horn Decl., Ex. A (Newark
4 Police Records), ECF No. 228-1). Thus, even if the Court were to conclude that Henneberry's
5 First Amendment retaliation claim is a retaliatory arrest claim like that in *Nieves*, he argues this
6 exception applies and he is not required to plead and prove an absence of probable cause. *Id.* at
7 12. Alternatively, if the Court finds that the Newark Police records do not establish that his claim
8 falls within *Nieves*'s exception, Henneberry argues Defendants' motion still should be denied or
9 deferred pursuant to Federal Rule of Civil Procedure 56(d) for additional discovery related to
10 police records and discretion regarding arrests under California Penal Code section 602.

11 While the standard for this "narrow qualification" has not been further clarified since
12 *Nieves*, the Supreme Court used the example of jaywalking, which "is endemic but rarely results
13 in arrest." *Nieves*, 139 S. Ct. at 1727. The Court reasoned that "[i]f an individual who has been
14 vocally complaining about police conduct is arrested for jaywalking at such an intersection, it
15 would seem insufficiently protective of First Amendment rights to dismiss the individual's
16 retaliatory arrest claim on the ground that there was undoubted probable cause for the arrest." *Id.*
17 That could be the case here, where it is undisputed that for several years leading up to the Event,
18 Henneberry attended many, if not every, City Council meeting held by the City of Newark, that he
19 actively criticized City officials, and that he was well known to Defendants Becker, Fredstrom,
20 and Ashley because he was disruptive and complained too much. Within a few minutes of
21 Henneberry sitting down in the gallery, Ashley informed him he needed to leave because he had
22 not made a reservation, yet Ashley did not check whether persons in the gallery had reservations.
23 After Henneberry stated he felt he was entitled to attend the meeting under the Brown Act,
24 Fredstrom was dispatched to the Event "because there was some type of disturbance involving Mr.
25 Henneberry." There is no evidence he was loud, used inappropriate language, was
26 confrontational, or abusive. There is also no dispute that, while Henneberry was seated,
27 Fredstrom and Lawson grabbed him by the hands and arms and escorted him out of the building
28 using a rear wrist lock, handcuffed him and arrested him. Given Henneberry's reputation as a

1 vocal critic of City officials, coupled with his proffered evidence regarding Newark Police’s
2 citations for trespass in similar circumstances, the Court finds the *Nieves* exception could apply.

3 **3. Qualified Immunity**

4 As part of their renewed motion, Defendants request the Court reconsider Judge James’s
5 previous ruling that Fredstrom is not entitled to qualified immunity. Mot. at 12-14; MSJ Order at
6 22-23. Defendants note that Judge James relied upon *Ford* but argue that case has been abrogated
7 by *Nieves*. Mot. at 13. However, while *Nieves* did reverse *Ford*, it did so solely on the ground
8 that a plaintiff cannot sustain a retaliatory arrest claim if there is probable cause for the arrest. The
9 Court did not address qualified immunity. Regardless, Judge James did not rely solely on *Ford*
10 and there is no indication that the law on qualified immunity has changed since the time of her
11 ruling.

12 “The doctrine of qualified immunity protects government officials from liability for civil
13 damages ‘unless a plaintiff pleads facts showing (1) that the official violated a statutory or
14 constitutional right, and (2) that the right was ‘clearly established’ at the time of the challenged
15 conduct.’” *Wood v. Moss*, 572 U.S. 744, 745 (2014) (quoting *al-Kidd*, 563 U.S. at 735). In
16 *Saucier v. Katz*, the Supreme Court set forth a two-part approach for analyzing qualified
17 immunity: (1) “Taken in the light most favorable to the party asserting the injury, do the facts
18 alleged show the officer’s conduct violated a constitutional right?”; and (2) if the court determines
19 that a constitutional violation could be made out based on the parties’ submissions, it must ask
20 “whether the right was clearly established.” 533 U.S. 194, 201 (2001). “The relevant, dispositive
21 inquiry in determining whether a right is clearly established is whether it would be clear to a
22 reasonable officer that his conduct was unlawful in the situation he confronted.” *Id.* at 202. “The
23 protection of qualified immunity applies regardless of whether the government official’s error is ‘a
24 mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.’”
25 *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Groh v. Ramirez*, 540 U.S. 551, 567
26 (2004) (Kennedy, J., dissenting)).

27 The Supreme Court has stated that a “clearly established” constitutional right “should not
28 be defined ‘at a high level of generality.’” *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (quoting *al-*

1 *Kidd*, 563 U.S. at 742). Rather, it must be “particularized” to the facts of the case. *Id.* (quoting
2 *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Defining the right at too high a level of
3 generality “avoids the crucial question whether the official acted reasonably in the particular
4 circumstances that he or she faced.” *Plumhoff v. Ricard*, 572 U.S. 765, 779 (2014). “[A]
5 defendant cannot be said to have violated a clearly established right unless the right’s contours
6 were sufficiently definite that any reasonable official in the defendant’s shoes would have
7 understood that he was violating it.” *Id.* “In other words, ‘existing precedent must have placed
8 the statutory or constitutional question’ confronted by the official ‘beyond debate.’” *Id.* (quoting
9 *al-Kidd*, 563 U.S. at 741). “A right can be clearly established despite a lack of factually analogous
10 preexisting case law, and officers can be on notice that their conduct is unlawful even in novel
11 factual circumstances.” *Ford*, 706 F.3d at 1195 (citation omitted); *see also Hope v. Pelzer*, 536
12 U.S. 730, 741 (2002) (“officials can still be on notice that their conduct violates established law
13 even in novel factual circumstances.”). “The relevant inquiry is whether, at the time of the
14 officers’ action, the state of the law gave the officers fair warning that their conduct was
15 unconstitutional.” *Ford*, 706 F.3d at 1195 (citing *Hope*, 536 U.S. at 741 (“[T]he salient question
16 that the Court of Appeals ought to have asked is whether the state of the law in 1995 gave
17 respondents fair warning that their alleged treatment of Hope was unconstitutional.”)).

18 As discussed above, Henneberry has established the existence of genuine dispute as to
19 whether Fredstrom violated his First Amendment rights by retaliating against him for his free
20 speech activities. Thus, the Court must determine whether Fredstrom violated clearly established
21 law at the time of his actions. Judge James found it was “clearly established in April 2013 that
22 officers could not exercise their discretion to ‘automatically’ book individuals even though they
23 had probable cause to arrest them if the booking officer was retaliating against the individual for
24 exercising his or her First Amendment rights.” MSJ Order at 23 (citing *Ford*, 706 F.3d at 1196).
25 In *Ford*, the court found that “[a] reasonable officer would have understood that he did not
26 automatically possess the authority to book and jail an individual upon conducting a lawful arrest
27 supported by probable cause.” 706 F.3d at 1196. *Ford*, decided in February 2013, concerned an
28 officer’s decision to book an arrestee in 2007. *Id.* at 1995. The Court noted that “[a]t the time the

1 officers acted in 2007, the law in this Circuit gave fair notice that it would be unlawful to jail Ford
2 in retaliation for his First Amendment activity.” *Id.* In this case, as the allegations took place in
3 April 2013, the Court finds this right was clearly established at that time and a reasonable officer
4 in Fredstrom’s position would have known in April 2013 that he could not exercise his discretion
5 in retaliation for Henneberry’s First Amendment activity.

6 Finally, the Court must determine whether Fredstrom “reasonably but mistakenly” could
7 have believed his conduct did not violate his rights. Qualified immunity applies whether the error
8 is a mistake of law or fact, or mixed question of law and fact. *See Pearson*, 555 U.S. at 231.
9 Judge James found “there is nothing in the record that suggests Fredstrom reasonably believed his
10 conduct did not violate Plaintiff’s rights.” MSJ Order at 23. She noted the only evidence
11 Defendants presented was Fredstrom’s “conclusory declaration that he did not intend to interfere
12 with” Henneberry’s First Amendment rights, but such evidence “does not establish the grounds for
13 reasonable mistake; at most, it creates a triable issue of fact whether Fredstrom acted in
14 retaliation.” *Id.* Defendants provide no additional evidence on this issue in their renewed motion.
15 Accordingly, the Court agrees with Judge James’s decision and therefore finds Defendants have
16 not established Fredstrom is entitled to qualified immunity.

17 **4. Conclusion**

18 Based on this analysis, the Court **DENIES** Defendants’ renewed motion for summary
19 judgment as to Henneberry’s First Amendment retaliation claim.

20 **B. Bane Act Claim**

21 The Bane Act provides a private right of action against a person who interferes by “threats,
22 intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion, with the
23 exercise or enjoyment by any individual or individuals of rights secured by the Constitution or
24 laws of the United States, or of the rights secured by the Constitution or laws of this state”
25 Cal. Civ. Code § 52.1. “There are two distinct elements for a section 52.1 cause of action. A
26 plaintiff must show (1) intentional interference or attempted interference with a state or federal
27 constitutional or legal right, and (2) the interference or attempted interference was by threats,
28 intimidation or coercion.” *Allen v. City of Sacramento*, 234 Cal. App. 4th 41, 67 (2015), *as*

1 *modified on denial of reh'g* (Mar. 6, 2015) (citations omitted). “[W]here coercion is inherent in
2 the constitutional violation alleged, such as an alleged false arrest or unlawful detention, section
3 52.1 requires a showing of coercion independent from the inherent coercion in the alleged
4 violation.” *Spindler v. City of Los Angeles*, 2018 WL 6136791, at *13 (C.D. Cal. Mar. 12, 2018)
5 (citing *Lyall v. City of Los Angeles*, 807 F.3d 1178, 1196 (9th Cir. 2015) (unlawful detention and
6 search); *Allen*, 234 Cal. App. 4th at 69 (false arrest); *Shoyoye v. City of Los Angeles*, 203 Cal.
7 App. 4th 947, 959-60 (2012) (unlawful detention)).

8 Defendants argue Henneberry’s Bane Act is barred because he cannot establish that
9 Fredstrom’s conduct constituted a violation of any his constitutional or legal rights. Mot. at 14.
10 However, as discussed above, genuine issues exist as to whether Fredstrom violated his First
11 Amendment rights. As Judge James found, “[a] reasonable jury could further find that
12 Fredstrom’s refusal to cite and release Plaintiff for this misdemeanor from the Newark Police
13 Department and instead to book him at the Fremont City Jail constitutes threats, intimidation, or
14 coercion.” MSJ at 28-29. Judge James also found the City “would be vicariously liable for any
15 damages resulting from Fredstrom’s actions.” *Id.* at 29 (citing *Robinson v. Solano Cty.*, 278 F.3d
16 1007, 1016 (9th Cir. 2002)). The Court finds Judge James’s decision well-reasoned and adopts it
17 here. Accordingly, the Court **DENIES** Defendants’ renewed motion for summary judgment as to
18 Henneberry’s Bane Act claim.

19 **V. CONCLUSION**

20 Based on the analysis above, the Court hereby **DENIES** Defendants’ renewed motion for
21 summary judgment. The Court shall conduct a case management conference on September 26,
22 2019 at 10:00 a.m. in Courtroom A, 15th Floor, 450 Golden Gate Avenue, San Francisco. The
23 parties shall file an updated joint case management statement by September 19, 2019. No
24 chambers copy is required.

25 **IT IS SO ORDERED.**

26 Dated: September 4, 2019

27 
28 THOMAS S. HIXSON
United States Magistrate Judge