

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

CHRISTOPHER RUSANOWSKY,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil No. 3:22-CV-01132-K
	§	
THE CITY OF DALLAS and SGT.	§	
ROGER A. RUDLOFF, individually and	§	
in his official capacity as a Dallas Police	§	
Department Officer,	§	
	§	
Defendants.	§	

**MEMORANDUM OPINION AND ORDER**

Before the Court are Plaintiff Christopher Rusanowsky’s Motion for Partial Summary Judgment (“Mr. Rusanowsky’s Motion for Summary Judgment”) and Appendix in support thereof, Doc. Nos. 46–47, Defendant Sgt. Roger A. Rudloff’s Response to Plaintiff’s Motion for Partial Summary Judgment, Doc. No. 58, Mr. Rusanowsky’s Reply in Support of His Motion for Partial Summary Judgment, Doc. No. 61, Sgt. Rudloff’s Motion for Summary Judgment Based on Qualified Immunity (“Sgt. Rudloff’s Motion for Summary Judgment”) and Brief and Appendix in support thereof, Doc. Nos. 49–51, Mr. Rusanowsky’s Response in Opposition to Defendant Roger A. Rudloff’s Motion for Summary Judgment and Appendix in support thereof, Doc. No. 56–57, Sgt. Rudloff’s Reply Brief in Support of His Motion for Summary Judgment Based on Qualified Immunity, Doc. No. 62, Sgt. Rudloff’s Motion to Strike Plaintiff’s Summary Judgment Evidence (the “Motion to Strike”), Doc. No. 63,

Mr. Rusanowsky's Response to Defendant's Motion to Strike Plaintiff's Summary Judgment Evidence, Doc. No. 64, Sgt. Rudloff's Reply in Support of His Motion to Strike Plaintiff's Summary Judgment Evidence, Doc. No. 65, Mr. Rusanowsky's Opposed Motion for Leave to File Cured Declarations (the "Motion for Leave"), Doc. No. 66, Sgt. Rudloff's Response to Plaintiff's Opposed Motion for Leave to File Cured Declarations, Doc. No. 67, and Mr. Rusanowsky's Reply in Support of His Opposed Motion for Leave to File Cured Declarations. Doc. No. 68.

The Court **GRANTS** Mr. Rusanowsky's Motion for Leave to file amended declarations in support of his motion for partial summary judgment. The proposed amendments simply conform the declarants' attestations of their testimony's truth to the statutory model provided in 28 U.S.C. § 1746(2). Doc. No. 66 at 3; *see Hibernia Nat'l Bank v. Administracion Cent. Sociedad Anonima*, 776 F.2d 1277, 1281 (5th Cir. 1985); *BHL Boresight, Inc. v. Geo-Steering Sols., Inc.*, 2017 WL 3634215, at \*4 (S.D. Tex. Aug. 24, 2017). The Court correspondingly **DENIES** as moot Sgt. Rudloff's Motion to Strike the unamended declarations based on the form of the attestations.

Upon consideration of the submissions properly before it, the Court **GRANTS** Sgt. Rudloff's Motion for Summary Judgment. Mr. Rusanowsky is a professional freelance photographer who documented protests in Dallas following the death of George Floyd. While Mr. Rusanowsky was photographing protesters on Interstate 35, Sgt. Rudloff and his fellow police officers attempted to clear them from the highway. As he was doing so, Sgt. Rudloff noticed Mr. Rusanowsky, who was admittedly walking

the wrong way down the shoulder of the interstate. After Sgt. Rudloff, the other police officers, several protesters, and Mr. Rusanowsky all reached a grassy area off the interstate, Sgt. Rudloff and the officers arrested Mr. Rusanowsky and the protesters. Mr. Rusanowsky alleges that Sgt. Rudloff arrested him because he was photographing the protesters' arrests and contends that his arrest violated his constitutional rights. He asserts claims for arrest without probable cause ("false" arrest) and malicious prosecution in violation of the Fourth Amendment and retaliatory arrest in violation of the First Amendment. Sgt. Rudloff enjoys qualified immunity from all three claims because his conduct did not violate clearly established law. Since Sgt. Rudloff arguably had probable cause to arrest Mr. Rusanowsky, Mr. Rusanowsky's false and retaliatory arrest claims cannot succeed. Mr. Rusanowsky's stroll the wrong way down the interstate was a misdemeanor under Texas law unless it was impossible for him to avoid walking as he did. Sgt. Rudloff might well have believed that Mr. Rusanowsky could have crossed the interstate, then blocked by protesters, to walk the correct way, and Sgt. Rudloff could reasonably have concluded and that Mr. Rusanowsky's decision not to do so justified his arrest. Qualified immunity likewise protects Sgt. Rudloff from Mr. Rusanowsky's claim for malicious prosecution. Sgt. Rudloff could reasonably rely on legal authorities refusing to recognize such a claim at the time of the parties' encounter. Having found that Sgt. Rudloff is immune from Mr. Rusanowsky's claims, the Court **DENIES** Mr. Rusanowsky's Motion for Summary Judgment because Mr. Rusanowsky asks the Court to find qualified immunity lacking.

## I. BACKGROUND

Christopher Rusanowsky is a professional freelance photographer specializing in documentary photography. Doc. No. 66-1 ¶¶ 2–3. At the end of May 2020, Mr. Rusanowsky decided to photograph protests in Dallas inspired by the death of George Floyd. *Id.* ¶ 6. He followed a crowd of protesters as they transited Reunion Boulevard East toward Interstate 35 East. *Id.* ¶ 17. The crowd approached an incline leading up and onto the interstate, and some of the protesters climbed it. *Id.* Mr. Rusanowsky trailed them until he reached a barrier separating the incline from the interstate where he paused to photograph protesters milling about the interstate singly and in groups. *Id.* ¶ 20; *id.* at 18–24.

More people continued to arrive at the barrier, and Mr. Rusanowsky says he became concerned that he did not have an exit from the crowd “if anything were to happen.” *Id.* 66-1 ¶ 21. According to Mr. Rusanowsky, maintaining an exit route is standard journalistic practice. *Id.* ¶¶ 21–22. He scaled the barrier, stepped onto the shoulder of the interstate, and began walking along the barrier with the flow of traffic. *Id.* ¶¶ 22–23.

His path would soon intersect with Sgt. Roger A. Rudloff’s. That evening, Sgt. Rudloff and a team of fellow members of the Dallas Police Department (“DPD”) had learned that people on Interstate 35 had blocked part of the roadway. Doc. No. 51-1 at 1, 4, 7. Sgt. Rudloff and his team traveled to the interstate to clear it. *Id.*

Once they reached their destination, Sgt. Rudloff and two DPD corporals saw Mr. Rusanowsky on the highway. *Id.*

The DPD team began trying to clear the road, and Sgt. Rudloff recalls that someone told the people on the interstate to disperse without success, although no other witness recalls hearing a dispersal order. *Id.* at 1. Some people started throwing rocks and bottles at the team and shouted at them, but the extent of this activity is unclear. *Id.* Mr. Rusanowsky did not observe it, and he describes the scene as “largely orderly.” Doc. No. 66-3 ¶¶ 8–12. At some point, Sgt. Rudloff radioed a superior to ask “what [to] do with the people on the freeway,” and the superior told him, roughly, “We need to round those folks up.” Doc. No. 51-1 at 1.

Before any arrest documented in the record, the crowd on the interstate finally started to move in earnest. According to Mr. Rusanowsky and a journalist acquaintance, the crowd broke up when it heard a loud noise that Mr. Rusanowsky compares to gunfire. Doc. No. 66-1 ¶ 25; Doc. No. 66-2 ¶ 9. Some protesters began “fleeing” the noise. Doc. No. 66-2 ¶ 9. Some departed the interstate but attempted to return to it. Doc. No. 51-1 at 7. Mr. Rusanowsky left the shoulder of the interstate by climbing back over its barrier, and he hid behind a nearby pillar to avoid the crowd. Doc. No. 66-1 ¶ 25. After emerging from behind the pillar, Mr. Rusanowsky spotted protesters trying to assist a woman who had fallen. *Id.* ¶ 26. He began photographing them and followed them to a grassy area away from the interstate. *Id.* ¶¶ 26–27.

There he encountered Sgt. Rudloff and his team, who apparently arrived from another direction and sprang into action. *Id.* ¶¶ 27–31, 39–40; Doc. No. 51-1 at 4. Sgt. Rudloff arrested one of the protesters who had assisted the fallen woman. Doc. No. 66-1 ¶ 33. He shot another protester with non-lethal PepperBall rounds when he believed she adopted a “fighting stance” while approaching him. *Id.* ¶ 35; Doc. No. 51-1 at 2. He also helped a fellow officer arrest a third protester by kneeling the protester in the stomach when he failed to comply with orders. Doc. No. 66-1 ¶¶ 37–38; Doc. No. 51-1 at 2. Mr. Rusanowsky photographed all of the arrests from a distance of about ten feet. Doc. No. 66-1 ¶ 41.

Although the parties do not agree about the precise sequence of events, it is undisputed that Sgt. Rudloff subsequently had an exchange with Mr. Rusanowsky and that a DPD corporal handcuffed Mr. Rusanowsky. *Id.* ¶¶ 44–48; Doc. No. 51-1 at 2. Between the beginning of the exchange and the arrival of an escort to take Mr. Rusanowsky to jail, Mr. Rusanowsky informed Sgt. Rudloff that he was a photojournalist. Doc. No. 66-1 ¶ 45; Doc. No. 51-1 at 2. He also wore press badges that were visible to Sgt. Rudloff. Doc. No. 66-2 ¶ 15; Doc. No. 66-1 ¶ 45. After learning that Mr. Rusanowsky was a member of the press, Sgt. Rudloff retorted, “Yeah yeah, press press. You are going to jail.” Doc. No. 66-1 ¶ 46. He added that Mr. Rusanowsky “still had no right to be illegally on the freeway.” Doc. No. 51-1 at 2.

Two photojournalists observed the interaction between Mr. Rusanowsky and Sgt. Rudloff, one of whom captured photographs showing Sgt. Rudloff pointing at

something off camera while standing close to Mr. Rusanowsky and then grabbing Mr. Rusanowsky's shirt and forcibly pulling it. Doc. No. 61 ¶ 47; Doc. No. 66-2 ¶¶ 8–17; Doc. No. 66-2 at 40–44. Sgt. Rudloff threatened to arrest both photojournalists, and they departed the scene in response. Doc. No. 66-2 ¶ 17. Other observers included protesters throwing objects at the DPD officers. Doc. No. 51-1. It is unclear whether the officers arrested or threatened to arrest these protesters.

Mr. Rusanowsky spent twenty-six hours in jail after his arrest. Doc. No. 66-1 ¶ 26. In an incident report, DPD officers accused him of riot participation, and in an affidavit for an arrest warrant, they accused him of obstructing a highway. Doc. No. 47-4 at 30–32; Doc. No. 51-1 at 13. Sgt. Rudloff did not contribute to either document, and the State of Texas declined to charge Mr. Rusanowsky. *See* Doc. No. 51-1 at 2; Doc. No. 47-4 at 21. Mr. Rusanowsky says that his arrest and incarceration exposed him to COVID-19 in a crowded jail and prevented him from obtaining the highest possible royalties from his photographs of the protests by delaying their circulation. Doc. No. 66-1 ¶ 55. He also says that the arrest has negatively affected his mental health and discouraged him from accepting assignments requiring him to photograph events featuring a substantial police presence. *Id.* ¶¶ 55–61.

Mr. Rusanowsky sued Sgt. Rudloff under 28 U.S.C. § 1983, alleging that Sgt. Rudloff violated his Fourth and First Amendment rights. Doc. No. 1. He brings two variations of his Fourth Amendment claim. One variation is a claim for “false” arrest without probable cause, and one is a claim for malicious prosecution of the

charges against him that the State of Texas declined to pursue. *Id.* ¶¶ 96–10. The First Amendment claim is that Sgt. Rudloff arrested him because he photographed Sgt. Rudloff’s interactions with protesters. *Id.* ¶¶ 86–95. Mr. Rusanowsky also sued the City of Dallas and asserted Fourth and First Amendment claims against it that are not currently at issue. *Id.* ¶¶ 111–17.

Sgt. Rudloff moved for summary judgment on all claims against him on the basis that he enjoys qualified immunity from suit, Doc. No. 49, and Mr. Rusanowsky moved for partial summary judgment denying Sgt. Rudloff qualified immunity. Doc. No. 46.

## II. LEGAL STANDARD

The Court grants motions for summary judgment when there is no genuine dispute between the parties about any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A genuine dispute of material fact exists if a reasonable jury could resolve the parties’ factual disagreement in favor of either party and the resolution could affect the outcome of the suit they are litigating. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986).

As a public official sued in his individual capacity for taking discretionary action, Sgt. Rudloff enjoys qualified immunity from civil damages unless he violated clearly established law of which he reasonably should have known. *Kinney v. Weaver*, 367 F.3d 337, 349 (5th Cir. 2004) (en banc). Mr. Rusanowsky has the burden to point out the clearly established law Sgt. Rudloff purportedly violated and to show that there is at least a genuine dispute of material fact about whether the violation occurred. *Kokesh v.*



*Curlee*, 14 F.4th 382, 392 (5th Cir. 2021). In assessing whether Mr. Rusanowsky has carried that burden, the Court views the facts in the light most favorable to him. *Melton v. Phillips*, 875 F.3d 256, 261 (5th Cir. 2017) (en banc).

### III. DISCUSSION

The Court grants Sgt. Rudloff summary judgment on Mr. Rusanowsky's false arrest, retaliatory arrest, and malicious prosecution claims. The primary obstacle to the first two claims is that each stems from Mr. Rusanowsky's arrest near Interstate 35, and Sgt. Rudloff had reason to believe there was probable cause to make the arrest. The Court first discusses why Mr. Rusanowsky's false arrest claim cannot surmount this obstacle and then explains why his retaliatory arrest claim cannot either. The Court concludes its discussion with a review of Mr. Rusanowsky's remaining claim for malicious prosecution and finds that Sgt. Rudloff is immune from the claim because it was not cognizable at the time of the arrest.

Throughout its discussion, the Court will assume that Sgt. Rudloff arrested Mr. Rusanowsky. Although Sgt. Rudloff denies responsibility for the arrest because his superior ordered him to "round. . . up" people on Interstate 35 and another officer handcuffed Mr. Rusanowsky, the Court's decision does not turn on the nature of Sgt. Rudloff's involvement in the arrest. Doc. No. 58 at 41–42.

#### A. False Arrest

The existence of facts arguably showing that Sgt. Rudloff had probable cause to arrest Mr. Rusanowsky makes Sgt. Rudloff qualifiedly immune from Mr. Rusanowsky's

false arrest claim. A warrantless false arrest violates the Fourth Amendment’s prohibition on unreasonable seizures because an arrest without a warrant or probable cause is unreasonable. *See Club Retro LLC v. Hilton*, 568 F.3d 181, 204 (5th Cir. 2009); *Loftin v. City of Prentiss*, 33 F.4th 774, 780 (5th Cir. 2022). If a reasonable person could conclude from the facts known to the arresting officer that the arrested person had committed or was committing an offense, probable cause exists, and the infirmity in the arrest disappears. *Loftin*, 33 F.4th at 780. Since Sgt. Rudloff reasonably could have believed he had probable cause to arrest Mr. Rusanowsky for walking the wrong way down Interstate 35, he did not violate Mr. Rusanowsky’s clearly established Fourth Amendment rights by arresting him. *Voss v. Goode*, 954 F.3d 234, 239 (5th Cir. 2020).

Sgt. Rudloff observed Mr. Rusanowsky on the interstate while Mr. Rusanowsky was walking on its rightmost shoulder with the flow of traffic. Doc. No. 51-1 at 1; Doc. No. 66-1 at 4, 18–26. At the time of Mr. Rusanowsky’s arrest, Section 552.006(b) of the Texas Transportation Code directed a “pedestrian walking along and on a highway” without a sidewalk to walk, “if possible,” on “the left side of the roadway”—meaning the leftmost portion of the highway other than the shoulder—or “the shoulder of the highway facing oncoming traffic.” Tex. Transp. Code §§ 541.302(11), 552.006(b). The Code defined a highway to include its shoulder. *Id.* §§ 541.302(5)–(6), (15).

Under the Code’s directive, Mr. Rusanowsky was walking the wrong way on the interstate. While Mr. Rusanowsky expresses surprise that Sgt. Rudloff observed his misconduct, Sgt. Rudloff explicitly testifies that he saw Mr. Rusanowsky on the

interstate, and Mr. Rusanowsky confirms that as “soon as [he] stepped onto the shoulder, [he] walked tightly along the inside of the barrier” at the edge of the shoulder “with the flow of traffic” for “approximately one minute” before jumping to the other side of the barrier. Doc. No. 51-1 at 1, 10; Doc. No. 66-1 ¶ 23. So long as it was possible for Mr. Rusanowsky to walk a different way, his conduct was a misdemeanor for which Sgt. Rudloff had statutory authority to arrest him without a warrant. Tex. Transp. Code §§ 542.301, 543.001; *see State v. Jackson*, 2010 WL 1532404, at \*3 (Tex. App.—Dallas Apr. 19, 2010, no pet.); *Martinez-Cornelio v. State*, 2019 WL 4891710, at \*4 (Tex. App.—Texarkana Oct. 4, 2019, pet. ref’d).

Mr. Rusanowsky makes a colorable argument that it was impossible, as a practical matter, to walk on the proper side of the interstate. Doc. No. 61 at 10–11. Mr. Rusanowsky’s photographs show a number of cars on the roadway, and one ordinarily does not cross an interstate when cars are approaching. *See, e.g.*, Doc. No. 66-1 at 18–26.

There were nonetheless circumstances from which Sgt. Rudloff could have inferred that a crossing was possible. Under Texas law, a pedestrian may cross a highway without using a crosswalk if he yields to vehicles when crossing might result in a collision with them. Tex. Transp. Code §§ 541.401(8), 552.005(a). Conditions on Interstate 35 indicated that a collision between a vehicle and a crossing pedestrian was unlikely. Mr. Rusanowsky admits that traffic on the interstate had stopped, and Sgt. Rudloff personally observed the same thing. Doc. No. 66-1 ¶ 20; Doc. No. 51-1 at 1.

While he was on or near the interstate, Mr. Rusanowsky photographed numerous protesters walking or standing across the breadth of the interstate. Doc. No. 66-1 at 18–26. Sgt. Rudloff himself crossed the interstate. Doc. No. 51-1 at 1. Even if Mr. Rusanowsky was wise to be cautious about a crossing, Sgt. Rudloff reasonably could have expected him to venture one.

The absence of legal authority instructing Sgt. Rudloff to reach a different conclusion is decisive of the issue. Under qualified immunity principles, Sgt. Rudloff could believe without fear of damages liability that there was probable cause to arrest Mr. Rusanowsky for walking the wrong way down the interstate unless prevailing authority “obviously” dictated that there was no probable cause under the specific circumstances confronting him. *District of Columbia v. Wesby*, 583 U.S. 48, 64 (2018); *Loftin*, 33 F.4th at 781–82. The only authority Mr. Rusanowsky cites that interprets the relevant provision of the Texas traffic statutes is *McBride v. State*, which held that a police officer had probable cause to arrest a pedestrian when the officer witnessed the pedestrian “walking on the wrong side of the street.” 359 S.W.3d 683, 693 (Tex. App.—Houston [14th Dist.] 2011, pet. ref’d). Other opinions have similar holdings. See, e.g., *Martinez v. City of Rosenberg*, 2023 WL 7290471, at \*3 (S.D. Tex. Sept. 27, 2023) (granting qualified immunity from false arrest claim); *State v. Patterson*, 291 S.W.3d 121, 123 (Tex. App.—Amarillo 2009, no pet.); *Martinez-Cornelio*, 2019 WL 4891710, at \*4; *Grisham v. State*, 2017 WL 1130371, at \*5 n.7 (Tex. App.—Austin Mar. 23, 2017, no pet.). These opinions do not explicitly address Mr. Rusanowsky’s

argument that Sgt. Rudloff should have known crossing the interstate was impossible, but for that reason they do not obviously establish that Sgt. Rudloff would have erred in concluding otherwise. *See Villarreal v. City of Laredo*, --- F.4th ---, 2024 WL 244359, at \*7 (5th Cir. Jan. 23, 2024) (en banc).

Mr. Rusanowsky responds by deriding the testimony of DPD officers who saw him on Interstate 35 as “untrustworthy” and “conclusory” and the affidavit for his arrest as “false.” Doc. No. 56 at 15, 29. Sgt. Rudloff does not seriously dispute that there may be errors in the affidavit, and the Court has not relied on it as evidence of probable cause, so the Court sets that issue aside. *See* Doc. No. 62 at 23. The Court has relied on the officers’ testimony—more precisely, Sgt. Rudloff’s—because it cannot agree with Mr. Rusanowsky’s characterization of that testimony.

There is no indication that Sgt. Rudloff’s testimony or the testimony of his fellow officers is untrustworthy in any material respect. Mr. Rusanowsky doubts their testimony because he believes that Sgt. Rudloff contradicted the other officers. It is true that a contradiction of this sort might require the Court to deny Sgt. Rudloff summary judgment, but only if a jury could find in favor of Mr. Rusanowsky by accepting one of the competing testimonial accounts. *Royal v. Spragins*, 575 F. App’x 300, 304 (5th Cir. 2014); *Mills v. Patten*, 2019 WL 8138429, at \*5 (S.D. Miss. Dec. 2, 2019), *rep. & rec. adopted*, 2020 WL 1046823 (S.D. Miss. Mar. 4, 2020). The Court does not find any inconsistencies in the officers’ testimony satisfying that standard.

Some of the alleged inconsistencies in the officers' testimony have little to do with Mr. Rusanowsky's claims. For example, Sgt. Rudloff recalls subduing a male protester before shooting a female protester with PepperBall rounds, while a corporal on the scene appears to recall these events occurring in the opposite order. *Compare* Doc. No. 51-1 at 4, *with id.* at 6. Whatever the correct order may be, it is immaterial to whether Sgt. Rudloff arrested Mr. Rusanowsky in violation of clearly established Fourth Amendment principles. Mr. Rusanowsky makes other arguments purporting to find inconsistencies in the sequence of events recounted by the officers, and all suffer from the same defect. Doc. No. 56 at 20.

The remaining alleged inconsistencies in the officers' testimony do not seem to be inconsistencies on closer inspection. Mr. Rusanowsky understands Sgt. Rudloff to testify that his DPD team trailed behind the protesters on Interstate 35 and a fellow officer to testify that the team moved in front of the protesters, but even if this point is relevant, Sgt. Rudloff's testimony does not support Mr. Rusanowsky's interpretation. Doc. No. 56 at 18. Sgt. Rudloff testified that the team arrested individuals "coming from the highway" once the team reached a grassy area off the interstate. Doc. No. 51-1 at 3. The Court is similarly unconvinced by Mr. Rusanowsky's attempt to oppose Sgt. Rudloff's testimony to another officer's testimony that the individuals in the grassy area "appeared to be coming back to the highway." Doc. No. 56 at 19-20; Doc. No. 51 at 9. The individuals could only be "coming back to the highway" if they had

previously been “coming from the highway.” The DPD officers have described continuous rather than conflicting movements by these individuals.

Insofar as Mr. Rusanowsky brands the officers’ testimony “conclusory” rather than inconsistent, he appears to misunderstand what the term means at the summary judgment stage. Because the officers state that they saw Mr. Rusanowsky on the interstate without offering much additional detail, Mr. Rusanowsky contends that their testimony is “conclusory on the one fact that arguably matters the most: whether these officers actually witnessed [him] on the highway.” Doc. No. 56 at 15, 30–31; Doc. No. 55-1 at 1, 6, 9. He asks the Court to ignore this testimony or give it “little weight.” Doc. No. 56 at 21–22.

This would be strange treatment of testimony describing direct personal observations. The type of conclusory summary judgment testimony the Court generally disregards is testimony that draws factual inferences or reaches legal conclusions without providing a factual basis for the inferences or conclusions. *See Favela v. Collier*, 91 F.4th 1210, 1213 (5th Cir. 2024); *Reese v. Anderson*, 926 F.2d 494, 499 (5th Cir. 1991). Ignoring such testimony ensures that there is evidence rather than unfounded assertions for the jury to consider at trial. The officers’ observations of Mr. Rusanowsky are not inferences or conclusions but facts declared to be true. A jury could accept those observations and find that the officers spotted Mr. Rusanowsky on the interstate. The officers’ testimony on this point is proper summary judgment evidence. *Cf. Walker v. Norris Cylinder Co.*, 2005 WL 2278080, at \*7 (N.D. Tex. Sept. 19, 2005) (Fitzwater, J.)

(overruling objection to testimony that declarant witnessed employee's presence during improper weighing of products).

Having found that Sgt. Rudloff could reasonably have believed he had probable cause to arrest Mr. Rusanowsky for walking the wrong direction on the interstate and having rejected Mr. Rusanowsky's criticisms of Sgt. Rudloff's evidence, the Court grants Sgt. Rudloff summary judgment on Mr. Rusanowsky's false arrest claim.

### **B. Retaliatory Arrest**

The Court's ruling on Mr. Rusanowsky's false arrest claim is practically dispositive of his First Amendment retaliation claim. Mr. Rusanowsky asserts that Sgt. Rudloff arrested him in retribution for photographing Sgt. Rudloff subduing protesters. Doc. No. 1 ¶¶ 86–95. The First Amendment protected Mr. Rusanowsky's efforts to photograph Sgt. Rudloff, but Sgt. Rudloff remained free to arrest Mr. Rusanowsky upon finding probable cause to think he had committed or was committing a crime. *See Turner v. Driver*, 848 F.3d 678, 690 (5th Cir. 2017) (First Amendment right); *Nieves v. Bartlett*, 139 S. Ct. 1715, 1725 (2019) (probable cause). The Court has found that Sgt. Rudloff could reasonably have believed he had probable cause to arrest Mr. Rusanowsky for walking the wrong way on the interstate under contemporaneous legal authority. *Supra* Section III.A. It must conclude that clearly established law stopped short of prohibiting the arrest regardless of Mr. Rusanowsky's photography. *See Roy v. City of Monroe*, 950 F.3d 245, 255 (5th Cir. 2020); *Chuttoo v. Horton*, 627 F. Supp. 3d 655, 677 (E.D. Tex. 2022).



Mr. Rusanowsky tries to show that an exception to the probable cause bar applies. He points to the Supreme Court’s statement that a First Amendment retaliatory arrest claim can proceed despite the existence of probable cause for the arrest “where officers have probable cause to make arrests, but typically exercise their discretion not to do so.” *Nieves*, 139 S. Ct. at 1727; Doc. No. 56 at 47; *see also* *Murphy v. Schmitt*, 2023 WL 5748752, at \*2 (8th Cir. Sept. 6, 2023) (per curiam) (applying this rule and finding qualified immunity where officer arrested plaintiff for walking on the wrong side of the street), *reh’g en banc denied*, No. 22-1726 (8th Cir. Dec. 12, 2023). The Supreme Court added that probable cause is not dispositive “when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.” *Nieves*, 139 S. Ct. at 1727. The circuits differ somewhat in their interpretation of the Supreme Court’s pronouncements, and the Supreme Court has granted certiorari to review the Fifth Circuit’s interpretation. *See* *Gonzalez v. Trevino*, 42 F.4th 487, 493 (5th Cir. 2022) (rejecting the Seventh Circuit’s more permissive interpretation in *Lund v. City of Rockford*, 956 F.3d 938, 944 (7th Cir. 2020)), *cert. granted*, 144 S. Ct. 325 (2023). Whatever the Supreme Court may decide, it is unlikely to affect the analysis of Mr. Rusanowsky’s claim. He relies on the type of comparative evidence that the circuits widely agree may show selective enforcement of the law against individuals exercising First Amendment rights. Doc. No. 56 at 47; *see, e.g.,* *Villarreal*, 2024 WL 244359, at \*14–15; *Gonzalez*, 42 F.4th at 493; *Turner v. Williams*, 65 F.4th 564, 588–89 (11th Cir. 2023); *Ballentine*

*v. Tucker*, 28 F.4th 54, 62 (9th Cir. 2022); *Fenn v. City of Truth or Consequences*, 983 F.3d 1143, 1149 (10th Cir. 2020); *Lund*, 956 F.3d at 945–46.

The trouble with Mr. Rusanowsky’s evidence is that it does not actually show selective enforcement. He distinguishes between two groups of individuals, primarily protesters, who had been on Interstate 35 with him. Doc. No. 56 at 48–49. The first, including Mr. Rusanowsky, moved to a grassy area off the interstate, and Sgt. Rudloff arrested them. *Id.* The second threw objects at Sgt. Rudloff’s team, and Sgt. Rudloff apparently did not arrest them. *Id.* Since there is no indication that any of the arrested protesters were photographing or filming Sgt. Rudloff, comparing the two groups shows the opposite of what Mr. Rusanowsky hopes it will. Sgt. Rudloff arrested Mr. Rusanowsky and the protesters who reached the grassy area without distinguishing between individuals who recorded him and individuals who did not. Although Sgt. Rudloff threatened to arrest other photographers who did not reach the grassy area, it is undisputed that he ultimately declined to arrest them. *See* Doc. No. 66-2 ¶¶ 17–19.

Mr. Rusanowsky’s suggestion that Sgt. Rudloff arrested the group in the grassy area because only this group exercised rights protected by the First Amendment does not withstand scrutiny. Doc. No. 56 at 49. Mr. Rusanowsky may be correct that the other group engaged in unprotected violence by throwing objects. *Id.* He nonetheless acknowledges that both groups largely comprised protesters, so, excepting the photographers in the groups, both still engaged in similar protected conduct. *Id.* at 48–49.

Sgt. Rudloff's decision to arrest some but not all protesters suspected of traffic violations hardly demonstrates an intent to retaliate against individuals for protesting. *See Powelson v. Sausalito Police Dep't*, --- F. Supp. 3d ---, 2023 WL 7392289, at \*12 (N.D. Cal. Nov. 8, 2023); *cf. also Spoon v. Bayou Bridge Pipeline, LLC*, --- F. Supp. 3d ---, 2023 WL 4569543, at \*26 (M.D. La. July 17, 2023) (finding no exception to the probable cause bar on retaliatory arrest claims where officers arrested at least some protesters other than plaintiffs). Mr. Rusanowsky cites no evidence indicating that Sgt. Rudloff targeted the arrested protesters instead of the other protesters based on differences in their expressed opinions or any other suspicious circumstance. *Cf. Ballentine*, 28 F.4th at 62; *Akindes v. City of Kenosha*, 2021 WL 4482838, at \*13 (E.D. Wis. Sept. 30, 2021).

There is no reason to exempt Mr. Rusanowsky's First Amendment retaliatory arrest claim from the general rule that arguable probable cause to arrest is a valid defense. The Court grants Sgt. Rudloff summary judgment on the claim.

### **C. Malicious Prosecution**

The Court lastly grants Sgt. Rudloff summary judgment on Mr. Rusanowsky's malicious prosecution claim because malicious prosecution was not a cognizable claim under the Fourth Amendment at the time Sgt. Rudloff arrested Mr. Rusanowsky.

Mr. Rusanowsky says Sgt. Rudloff maliciously prosecuted him because, after Sgt. Rudloff arrested Mr. Rusanowsky, other DPD officers swore out an affidavit for an arrest warrant falsely charging Mr. Rusanowsky with highway obstruction to justify jailing him overnight. *See* Doc. No. 56 at 50; Doc. No. 47-7 at 16.

As Sgt. Rudloff notes, the Fifth Circuit historically held that there is no “free-standing constitutional right to be free from malicious prosecution.” *Castellano v. Fragozo*, 352 F.3d 939, 945 (5th Cir. 2003) (en banc); Doc. No. 50 at 37. The Supreme Court did not abrogate this holding until it issued its decision in *Thompson v. Clark*, two years after Mr. Rusanowsky’s arrest. 596 U.S. 36, 42 (2022); see also *Armstrong v. Ashley*, 60 F.4th 262, 279 (5th Cir. 2023). Mr. Rusanowsky nonetheless relies on *Thompson* and later authority in support of his malicious prosecution claim. Doc. No. 56 at 49–50. Assuming he is correct that Sgt. Rudloff maliciously prosecuted him under current legal standards, these authorities still do not show that Sgt. Rudloff violated law clearly established at the time he arrested Mr. Rusanowsky. For that reason, Sgt. Rudloff has qualified immunity from Mr. Rusanowsky’s claim. *Guerra v. Castillo*, 82 F.4th 278, 289 (5th Cir. 2023); *Wallace v. Taylor*, 2023 WL 2964418, at \*6 (5th Cir. Apr. 14, 2023).

Although Mr. Rusanowsky at best obliquely raises it, the Court addresses one additional point in the interest of completeness. Prior to *Thompson*, the Fifth Circuit recognized that a claim for Fourth Amendment malicious prosecution might survive if it was not freestanding, meaning that the maliciously instituted proceedings led to an independent Fourth Amendment violation such as a detention based on a warrant procured by fraudulent affidavit. See *Winfrey v. Rogers*, 901 F.3d 483, 492 (5th Cir. 2018). To the extent Mr. Rusanowsky tries to bring his malicious prosecution claim within this rule, it does not fit. Before and after *Thompson*, Courts have recognized that

liability for malicious prosecution extends only to defendants who commit their wrongdoing by legal process. An arrest pursuant to a warrant counts, but a warrantless arrest does not. It is not legal process. *See, e.g., Baker v. Sebastian*, 2023 WL 6393886, at \*7 (S.D. Tex. Sept. 30, 2023); *Williams v. Aguirre*, 965 F.3d 1147, 1158 (11th Cir. 2020); *Harrington v. City of Nashua*, 610 F.3d 24, 32 (1st Cir. 2010); *Reed v. City of Chi.*, 77 F.3d 1049, 1053 (7th Cir. 1996); *Singer v. Fulton Cnty. Sheriff*, 63 F.3d 110, 117 (2d Cir. 1995). Sgt. Rudloff arrested Mr. Rusanowsky without a warrant. *See* Doc. No. 51-1 at 13. He had nothing to do with the affidavit that other officers later prepared in hopes of securing a warrant to hold Mr. Rusanowsky in jail. Doc. No. 51-1 at 2. Even if Mr. Rusanowsky could show that the affidavit was false or failed to establish probable cause for arrest, that would not be a basis for holding Sgt. Rudloff liable. *See Melton*, 875 F.3d at 262–65; *Baker*, 2023 WL 6393886, at \*7; *Reed*, 77 F.3d at 1053.

#### IV. CONCLUSION

The Court **GRANTS** Sgt. Rudloff’s Motion for Summary Judgment and **DENIES** Mr. Rusanowsky’s Motion for Summary Judgment. The Court **DISMISSES** Mr. Rusanowsky’s claims against Sgt. Rudloff with prejudice in their entirety. In a footnote, Sgt. Rudloff argues that dismissal of Mr. Rusanowsky’s claims against him requires dismissal of the Mr. Rusanowsky’s claims against the City of Dallas, but the City has not filed a motion for summary judgment. Doc. No. 50 at 10 n.1. The City **MAY FILE** a motion for summary judgment no later than twenty-one days after the entry of this order. The City shall confine its arguments in support of any such motion

to ones that depend on the dismissal of the claims against Sgt. Rudloff and shall not otherwise raise arguments it could have but chose not to assert by earlier summary judgment motion. The Court will defer reopening this case in view of the possibility of a further summary judgment motion.

**SO ORDERED.**

Signed March 4<sup>th</sup>, 2024.

  
\_\_\_\_\_  
ED KINKEADE  
UNITED STATES DISTRICT JUDGE