No. 20-16805

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIAN BALLENTINE; CATALINO DAZO; KELLY PATTERSON,

Plaintiffs-Appellants,

and

GAIL SACCO,

Plaintiff,

v.

CHRISTOPHER T. TUCKER, Detective,

Defendant-Appellee,

and

LAS VEGAS METROPOLITAN POLICE DEPARTMENT; MIKE WALLACE, Sergeant; JOHN LIBERTY, Lieutenant,

Defendants.

On Appeal from the U.S. District Court for the District of Nevada
No. 2:14-cv-01584-APG-EJY
Hon. Andrew P. Gordon, *District Judge*

APPELLANTS' OPENING BRIEF

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INTRODUCTION

Defendant Detective Christopher Tucker of the Las Vegas Metropolitan Police Department issued declarations of arrest for Plaintiffs Brian Ballentine, Catalino Dazo, and Kelly Patterson under a Nevada graffiti ordinance after they wrote anti-police messages in chalk on the sidewalk in front of the Las Vegas Metropolitan Police Department headquarters and the state courthouse. The state dropped the charges and Plaintiffs brought this suit alleging they were arrested in retaliation for their speech. The district court granted qualified immunity. This appeal presents a single question: whether, at the time Detective Tucker issued declarations for Plaintiffs' arrests in August 2013, their constitutional right to be free from retaliatory law enforcement action for which probable cause existed was clearly established. It was.

JURISDICTIONAL STATEMENT

The United States District Court for the District of Nevada had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3). On August 20, 2020, the district court entered an order granting Defendant Tucker's motion for summary judgment, effectively disposing of all claims before the court. ER-4-17. The district court entered final judgment on August 21, 2020. ER-3. Plaintiffs filed a timely notice of appeal from the final judgment on September 16, 2020. ER-39-40; *see also* Fed. R. App. P. 4(a)(1)(A) (providing that a notice of appeal must be filed within

thirty days of the entry of the order from which the appeal is taken). This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

ISSUE PRESENTED FOR REVIEW

Whether, at the time Detective Tucker issued declarations for Plaintiffs' arrests in August 2013, the constitutional right to be free from retaliatory law enforcement action even if probable cause existed for that action was clearly established in the Ninth Circuit.

STATEMENT OF THE CASE

I. Factual Background

Plaintiffs Brian Ballentine, Catalino Dazo, and Kelly Patterson[1] ("Plaintiffs") are activists and members of the "Sunset Activist Collective." ER-5. Since 2011, Plaintiffs have carried out protests by chalking various messages, some of which involved themes that were critical of law enforcement, on Las Vegas sidewalks. ER-5. Until 2013, Plaintiffs were never arrested or cited for chalking despite prior interaction with officers of the Las Vegas Metropolitan Police Department ("Metro"). *See* ER-5. Indeed, in October 2012, marshals at the Regional Justice Center ("RJC"), the local state courthouse, even gave Plaintiffs express permission to chalk messages on the sidewalk in front of the RJC. ER-5.

[1] Gail Sacco, originally a plaintiff in this action, passed away on August 27, 2019, and was subsequently dismissed from the case. *See* ER-4 n.1.

On June 8, 2013, unlike the numerous prior occasions, Plaintiffs received citations under Nevada Revised Statutes § 206.330, Nevada's graffiti statute, for chalking messages in front of Metro's headquarters. ER-5. On that day, Sergeant Mike Wallace approached Plaintiffs while they were chalking, told them that graffiti on the sidewalk was against the law, and asked them to stop. ER-5. During this encounter, Plaintiffs requested to speak with Sergeant Wallace's supervisor and so Wallace called Lieutenant John Liberty. ER-5. After Lieutenant Liberty and Plaintiffs discussed whether chalking violated Nevada law and Plaintiffs refused to clean up the chalk, Sergeant Wallace issued the citations. ER-20. Detective Christopher Tucker was assigned to investigate the citations. ER-6. As part of his investigation, Tucker examined the anti-police messages Plaintiffs had chalked, as well as the contents of Plaintiffs' social media accounts to track their activities. ER-6.

On July 13, 2013, Plaintiffs again chalked messages critical of the police in front of Metro headquarters and, despite the fact that at least one officer witnessed Plaintiffs' actions and officers were aware of Plaintiffs' June 8 citations, no officer addressed, stopped, or cited Plaintiffs. ER-6.

On July 18, 2013, Plaintiffs appeared at the RJC for their hearing related to the June 8 citation and the state declined to prosecute the citation. ER-7. Immediately after the hearing, Plaintiffs chalked more messages on the sidewalk in front of the RJC that were critical of the police. ER-7. Detective Tucker was present at the RJC

while Plaintiffs chalked messages and interacted with Plaintiffs, but he did not tell Plaintiffs to stop nor did he issue citations. ER-7. Detective Tucker commented on the content of Plaintiffs' messages, telling Plaintiffs that their messages contained inaccurate information. ER-7.

Following the chalk protests on July 13 and July 18, Detective Tucker prepared declarations of arrest for both occasions in which he referred to the content of Plaintiffs' chalked messages. ER-7. On August 9, again referencing the content of Plaintiffs' chalked messages, the state filed a criminal complaint against Plaintiffs for conspiracy to commit placing graffiti and placing graffiti on or otherwise defacing property. ER-7-8. Police arrested Plaintiffs the following day, August 10, 2013, after encountering them at another protest. ER-8.

Subsequently, the Clark County District Attorney dropped the all charges against Plaintiffs. ER-8. Plaintiffs then filed this civil rights lawsuit against Detective Tucker, Sergeant Wallace, Lieutenant Liberty, and Metro. ER-8.

II. Proceedings Below

Plaintiffs filed their initial complaint in this civil rights lawsuit on September 26, 2014, asserting claims under 42 U.S.C. § 1983, the Nevada Constitution, and Nevada law against Defendants Metro, Liberty, Tucker, and Wallace ("Defendants"). ER-4. After Defendants moved to dismiss the complaint, ECF 6, the court granted in part and denied in part that motion and permitted Plaintiffs to file

an amended complaint, ECF 36. On May 18, 2015, Plaintiffs filed their first amended complaint. ECF 43. After lengthy discovery, the court granted Metro's motion for partial dismissal of Plaintiffs' first amended complaint and again granted Plaintiffs leave to file an amended complaint. ECF 129. Plaintiffs filed their second amended complaint on April 6, 2016. ECF 140. After further discovery, Defendants moved for summary judgment. ECF 174, 183.

On August 21, 2017, the district court granted in part and denied in part Defendants' motion. ER-18-38. The court granted summary judgment to Defendants for all of Plaintiffs' claims except their § 1983 claim for First Amendment retaliation against Detective Tucker. ER-27-28. As to that claim, the district court concluded that Detective Tucker was not entitled to qualified immunity because a reasonable jury could conclude that he retaliated against Plaintiffs because of the content of their speech. ER-27. Moreover, relying on two of this Court's decisions—*Skoog v. County of Clackamas*, 469 F.3d 1221 (9th Cir. 2006), and *Ford v. City of Yakima*, 706 F.3d 1188 (9th Cir. 2013) (per curiam)—the district court held that the constitutional right to be free from retaliatory law enforcement action even if probable cause existed for that action was clearly established at the time of Plaintiffs' arrests in August 2013. ER-27-28.

Detective Tucker appealed the district court's denial of his motion for summary judgment to this Court. ECF 208. This Court issued a memorandum

opinion vacating and remanding in light of the Supreme Court's then-recent decision in *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), which addressed the pleading standard for retaliatory arrest claims under § 1983. ECF 220; *see also Ballentine v. Las Vegas Metro. Police Dep't*, 772 F. App'x 584 (9th Cir. 2019).

On remand to the district court, Detective Tucker again moved for summary judgment on qualified immunity grounds. ECF 227. The district court again held that Plaintiffs had raised triable issues as to their retaliation claim, and that probable cause cannot defeat such a claim "'where officers have probable cause to make arrests, but typically exercise their discretion not to do so.'" ER-10 (quoting *Nieves*, 139 S. Ct. at 1727). The district court concluded that "plaintiffs have presented evidence from which a jury could find that Tucker violated their First Amendment rights." ER-12-13.

Moving to the second prong of the qualified immunity analysis, however, the district court held, contrary to its 2017 summary judgment order, that the right at issue was not clearly established in August 2013 when Detective Tucker prepared declarations for Plaintiffs' arrests. ER-17. As a result, the district court granted summary judgment to Detective Tucker on qualified immunity grounds. To come to the opposite conclusion of its 2017 order, the district court conducted a close analysis of this Court's precedent.

First, the district court stated that in 2006, *Skoog* had "established that police action motivated by retaliatory animus was unlawful, even when probable cause existed for that action." ER-15. Second, the district court explained that this Court's decision in *Ford* "ruled that although the officers had probable cause for the arrest, *Skoog* clearly established that probable cause does not defeat a retaliatory arrest claim." ER-15. The district court emphasized that "[b]oth *Skoog* and *Ford* pre-date the August 2013 arrests in this case." ER-16.

The district court next discussed this Court's decision in *Acosta v. City of Costa Mesa*, 718 F.3d 800 (9th Cir. 2013) (per curiam), which likewise addressed a claim of retaliatory police action. ER-16. Noting that the *Acosta* Court had granted qualified immunity to the officers in that case, the district court nevertheless stated: "I do not believe *Acosta* created an intra-circuit split because that case evaluated whether there was clearly established law at the time of the January 2006 arrest[] . . . before the Ninth Circuit's decisions in *Skoog* and *Ford*," but "by the time Tucker acted in 2013, the law in the Ninth Circuit was clearly established, based on *Skoog* and *Ford*." ER-16.

Finally, the district court addressed this Court's unpublished opinion in *Bini v. City of Vancouver*, 745 F. App'x 281 (9th Cir. 2018), another retaliatory arrest case, issued while Detective Tucker's appeal was pending. *See* ER-16-17. The district court reported that *Bini* held the right at issue was *not* clearly established

because *Acosta* interjected confusion into *Ford*'s holding. ER-16. The district court went on to discuss and endorse Judge Watford's dissent in *Bini* because Judge Watford, like the district court, believed *Acosta* had not in any way affected the holdings in *Skoog* or *Ford*. *See* ER-17.

Despite the district court's agreement with Judge Watford's dissent in *Bini*, however, the district court ultimately felt obligated to heed the *Bini* majority. *See* ER-17 ("While I agree with the [*Bini*] dissent's analysis, I do not feel free to ignore the majority's conclusion that the law was not clearly established under *Skoog* and *Ford*."). As a result, the district court granted summary judgment to Detective Tucker on qualified immunity grounds. ER-17.

The district court issued its final judgment on August 21, 2020. ER-3. Plaintiffs then filed this timely notice of appeal on September 16, 2020. ER-39-40.

SUMMARY OF THE ARGUMENT

It is one of the hallmarks of a free society that its citizens have the right to criticize their government and the agents of that government. Indeed, the Supreme Court has repeatedly held that criticism of police officers is protected speech under the First Amendment. *See, e.g.*, *City of Houston v. Hill*, 482 U.S. 451, 461-62 (1987). Nevertheless, law enforcement officers have, at times, retaliated against people engaged in the exercise of this protected First Amendment right and citizens have filed civil claims for these constitutional violations. Resolution of these retaliation

claims often involves an inquiry into whether probable cause existed for the law enforcement action at issue. The only issue presented in this appeal is whether the right to be free of retaliatory law enforcement action, *whether or not* probable cause existed for that action, was clearly established in August 2013, when Detective Tucker issued declarations for Plaintiffs' arrests.

The right to be free of retaliatory law enforcement action even if probable cause existed for that action was clearly established by this Court's 2006 decision in *Skoog v. County of Clackamas*, 469 F.3d 1221 (9th Cir. 2006), as this Court recognized and explicitly held in *Ford v. City of Yakima*, 706 F.3d 1188 (9th Cir. 2013) (per curiam). Critically, *Acosta v. City of Costa Mesa*, 718 F.3d 800 (9th Cir. 2013) (per curiam), which involved alleged retaliation that predated *Skoog*, in no way affected the holdings in *Skoog* or *Ford*—*Acosta* did not create an intra-circuit split as Detective Tucker argued below and as the panel majority in the unpublished decision in *Bini v. City of Vancouver*, 745 F. App'x 281 (9th Cir. 2018), believed. Indeed, Judge Watford, writing in dissent in *Bini*, correctly reasoned that *Acosta* had no bearing on the state of the law after *Skoog* was decided. *Bini*, 745 F. App'x at 283 (Watford, J., dissenting in part).

Plaintiffs ask this Court to issue a published opinion to reaffirm what would have been clear to a reasonable officer in Detective Tucker's shoes: In 2006, *Skoog* clearly established the right to be free from retaliatory law enforcement action even

if probable cause existed for that action; *Ford* recognized and explicitly held that *Skoog* had clearly established that right; and *Acosta* in no way affected either *Skoog* or *Ford*.

STANDARD OF REVIEW

This court reviews *de novo* a district court's summary judgment ruling, including rulings based on qualified immunity. *See Tarabochia v. Adkins*, 766 F.3d 1115, 1120 (9th Cir. 2014).

The qualified immunity analysis involves two steps: (1) whether the facts that a plaintiff has alleged make out a violation of a constitutional right; and (2) whether that right was clearly established at the time of the incident. *Id.* at 1121. To determine whether a right was clearly established, a court looks at Supreme Court and Ninth Circuit law as it existed at the time of the alleged act. *Id.* at 1125.

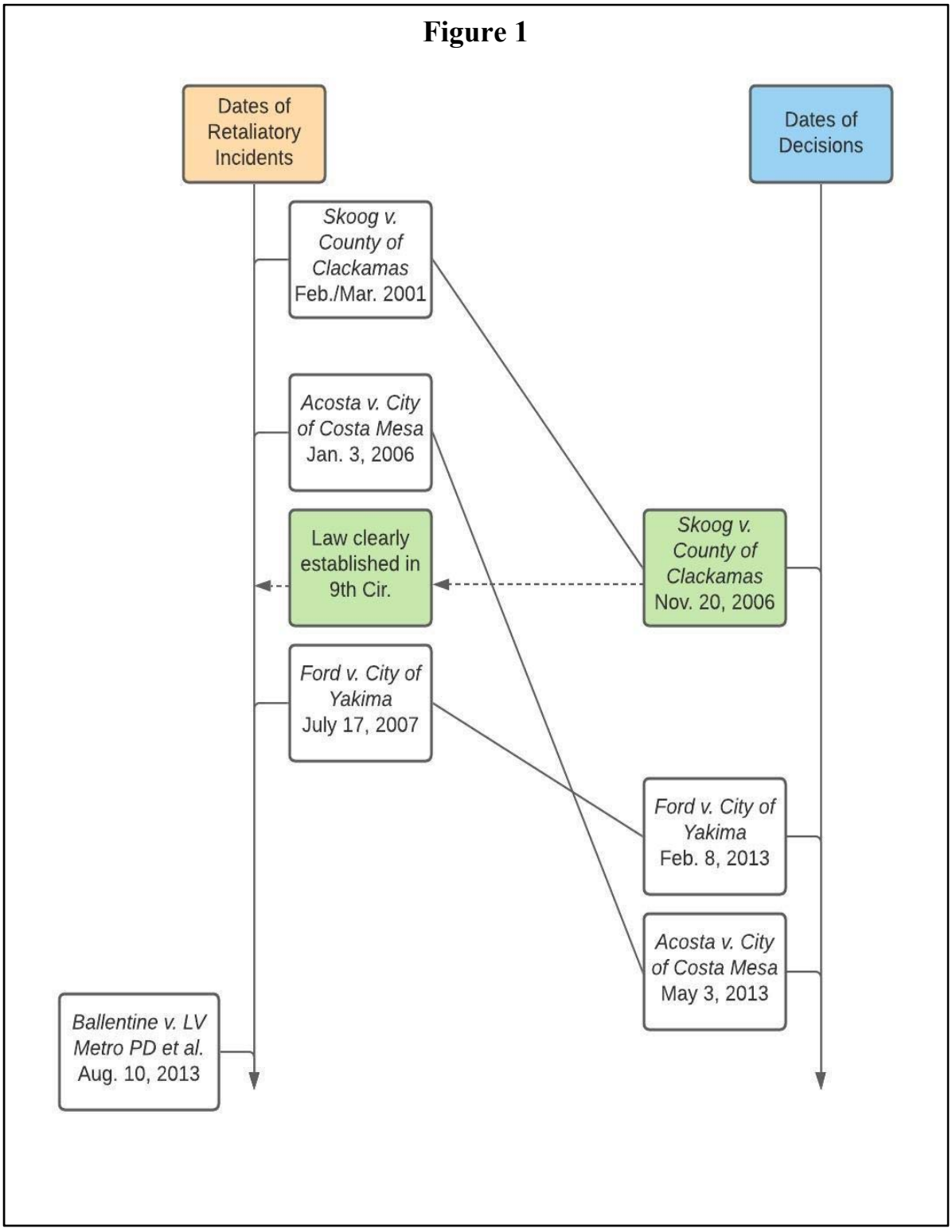
ARGUMENT

I. Clearly Established Law Prohibited Detective Tucker's Actions Against Plaintiffs in Retaliation for Their Protected Speech.

The law in the Ninth Circuit was clearly established at the time Detective Tucker issued Plaintiffs' declarations of arrests in August, 2013. That is, a reasonable officer in Detective Tucker's position would have known that the Constitution prohibited arresting someone for the content of their speech, notwithstanding probable cause. *See Hope v. Pelzer*, 536 U.S. 730, 739 (2002); *Tarabochia*, 766 F.3d at 1125. Because the relevant inquiry at the clearly-established

step of the qualified immunity analysis is whether an officer had "fair warning" that their conduct was unlawful, the focus of the inquiry turns on the state of the law at the time of the events in question. *See Hope*, 536 U.S. at 741 (noting that the salient question is the state of the law at the time of the alleged act); *see also id.* at 739 (discussing importance of fair notice to officials). Because it is crucial to this Court's analysis to understand the dates of alleged law enforcement actions and the dates of this Court's decisions, a diagram is included for reference. *See* Figure 1, on the following page.

Figure 1


Dates of Retaliatory Incidents
Dates of Decisions
Skoog v. County of Clackamas Feb./Mar. 2001
Acosta v. City of Costa Mesa Jan. 3, 2006
Law clearly established in 9th Cir.
Skoog v. County of Clackamas Nov. 20, 2006
Ford v. City of Yakima July 17, 2007
Ford v. City of Yakima Feb. 8, 2013
Acosta v. City of Costa Mesa May 3, 2013
Ballentine v. LV Metro PD et al. Aug. 10, 2013

A. The Right to Be Free from Retaliatory Law Enforcement Action Even When Probable Cause Exists Was Clearly Established in the Ninth Circuit at the Time of Plaintiffs' Arrests in August 2013.

By August, 2013, when Detective Tucker issued declarations for Plaintiffs' arrests, this Court's November 2006 decision in *Skoog v. County of Clackamas*, 469 F.3d 1221 (9th Cir. 2006), had previously clearly established that a person had the right to be free from retaliatory law enforcement action even when probable cause existed for that action. Moreover, this Court's decision in *Ford v. City of Yakima*, 706 F.3d 1188 (9th Cir. 2013) (per curiam), recognized and explicitly held that *Skoog* had clearly established this right in November 2006. A brief summary of both cases is in order.

1. *Skoog v. County of Clackamas*

This Court clearly established the right to be free from retaliatory law enforcement action even when probable cause existed for that action in its 2006 decision in *Skoog*.

After a DUI arrest in December 2000, Mr. Skoog began filming and recording police activities. *Skoog*, 469 F.3d at 1225. One day, Mr. Skoog filmed Officer Royster talking to a store cashier as part of a police sting operation. *Id.* Officer Royster confronted Mr. Skoog and informed him that he may have committed a misdemeanor by recording Royster without his permission. *Id*. at 1225-26. Mr. Skoog refused to turn over the video recording, but agreed to make a copy for Officer

Royster. *Id*. at 1226. When Officer Royster watched the video and discovered that Mr. Skoog had given him only a partial copy, Royster obtained a search warrant for Mr. Skoog's computer, video equipment, and still camera. *Id.* at 1226-27. In early March 2001, Officer Royster and eleven other officers executed the search warrant at Mr. Skoog's office with guns drawn. *Id.* at 1227. Mr. Skoog brought suit alleging, among other claims, that Officer Royster's decision to seek a warrant and his subsequent execution of that warrant were in retaliation for Mr. Skoog's protected First Amendment activities. *Id.* On the retaliation claim, the district court granted summary judgment in part, and both parties cross-appealed. *Id*. at 1228.

On appeal, this Court first considered the constitutional question and "conclude[d] that a plaintiff need not plead the absence of probable cause in order to state a claim for retaliation," and, therefore, held that Mr. Skoog had "stated all the elements necessary for a retaliation claim." *Id.* at 1232, 1235. The *Skoog* Court then turned to the second step of the qualified immunity analysis, under which it asked whether "the right of an individual to be free of police action motivated by retaliatory animus but for which there was probable cause" was clearly established. *Id.* at 1235. This Court held that "[a]t the time of the search, the right we have just defined was far from clearly established" and affirmed summary judgment in favor of the officer. *Id.*

In other words, the *Skoog* Court held in November 2006 that "a right exists to be free of police action for which retaliation is a but-for cause *even if probable cause exists for the action*," but nevertheless granted Officer Royster qualified immunity because this right, first established in the *Skoog* decision itself, was not clearly established at the time of the search and seizure of Mr. Skoog's office in 2001. *Id.* (emphasis added).

2. *Ford v. City of Yakima*

In *Ford*, this Court recognized and explicitly held that in November 2006 *Skoog* had clearly established the right to be free from retaliatory action by law enforcement even when probable cause existed for that action. *Ford*, 706 F.3d at 1195-96.

On July 7, 2007, while driving to work, Mr. Ford noticed a police car closely following him through traffic and exited his car at a red light to ask the officer why police were tailing him. *Id.* at 1190. The officer instructed Mr. Ford to get back in his car and, after Mr. Ford complied, the officer initiated a traffic stop. *Id*. Mr. Ford then confronted the officer again. *Id.* The officer arrested Mr. Ford and booked him for violating a noise ordinance. *Id.* at 1191. After the municipal court acquitted Mr. Ford of the noise ordinance charge, Mr. Ford filed a § 1983 action including, as relevant here, claims for retaliatory arrest. *Id*. The district courted granted summary

judgment to the officers based on qualified immunity, and this Court reversed. *Id.* at 1192, 1196.

As to the constitutional violation, this Court quoted *Skoog* for the proposition that "[i]n this Circuit, an individual has a right 'to be free from police action motivated by retaliatory animus but for which there was probable cause.'" *Id.* at 1193 (quoting *Skoog*, 469 F.3d at 1235). This Court also held, relying on *Skoog*, that the right to be free from retaliatory law enforcement action even if probable cause existed for that action was clearly established at the time of Mr. Ford's arrest in July 2007. *See id.* at 1195-96. Indeed, the *Ford* Court explicitly stated *twice* that *Skoog* had established this right in 2006. *See id*. at 1195-96 ("Moreover, this Court's 2006 decision in *Skoog* established that an individual has a right to be free from retaliatory police action, even if probable cause existed for that action."); *id*. at 1196 ("*Skoog* clearly established that a police action motivated by retaliatory animus was unlawful, even if probable cause existed for that action.").

Therefore, this Court unambiguously and plainly read *Skoog* as having clearly established in 2006 that an individual has a right to be free from law enforcement action in retaliation for their speech even if probable cause existed for that action. Thus, any reasonable officer in the Ninth Circuit acting at the time Detective Tucker issued declarations for Plaintiffs' arrests in August 2013 would have known that arresting an individual in retaliation for that individual's speech constituted a First

Amendment violation even if probable cause existed. *See Tarabochia*, 766 F.3d at 1121 ("Qualified immunity protects government officials from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (internal quotation marks and citations omitted)).

B. This Court's Opinion in *Acosta v. City of Costa Mesa* Did Not Affect the State of the Law as Clearly Established by *Skoog v. County of Clackamas.*

This Court's decision in *Acosta v. City of Costa Mesa*, 718 F.3d 800 (9th Cir. 2013) (per curiam), analyzing an arrest that preceded *Skoog*, in no way conflicts with *Skoog* or *Ford. See* Figure 1, *supra* at 12.

This Court's decision in *Acosta* stemmed from events that took place on January 3, 2006. *See* 718 F.3d at 808-09. After the City of Costa Mesa proposed entering into agreement with U.S. Immigration and Customs Enforcement (ICE) to have its police officers designated as immigration agents, the city council considered the issue at two separate public meetings. *Id.* at 807-08. At both of these meetings, Mr. Acosta spoke publicly and stated his opposition to the proposal. *Id*. At the second meeting, on January 3, 2006, the mayor recessed the meeting after Mr. Acosta refused to stop asking members of the public stand and support him. *Id*. at 808-09. Mr. Acosta continued speaking to the crowd until officers told Mr. Acosta to step down from the podium, escorted him from the chamber, and eventually arrested him

outside the building. *Id*. at 809. Mr. Acosta then brought a series of claims including, as relevant here, a § 1983 claim for First Amendment retaliation against the arresting officers. *Id*.

The district court granted summary judgment in favor of the officers on qualified immunity, *id.* at 810, and this Court affirmed, *id.* at 825-26. The Court assumed without deciding that Mr. Acosta had pled a retaliation claim, but held that the right to be free from retaliatory law enforcement action even if probable cause existed for that action was not clearly established at the time of Mr. Acosta's arrest in January 2006. *Id*. at 825.

Critically, the law enforcement action at issue in *Acosta* took place on January 3, 2006—*before* this Court had decided *Skoog*. *See Skoog*, 469 F.3d 1221 (decided November 20, 2006); *see also* Figure 1, *supra* at 12. And, consistent with the appropriate inquiry under qualified immunity, the Court in *Acosta* considered whether the law was clearly established "*at the time of the challenged conduct*." 718 F.3d at 824 (emphasis added). The *Acosta* Court never cited either *Skoog* or *Ford*, nor did either party cite either case.[2] This makes sense: neither *Skoog* nor *Ford* were decided at the time of Mr. Acosta's arrest in January 2006, so *Acosta* had no reason to address either case when considering whether the law was clearly established at

[2] *See* Br. of Appellant, *Acosta*, 718 F.3d 800 (No. 10-56854), 2011 WL 9686613; Reply Br. of Appellant, *Acosta*, 718 F.3d 800 (No. 10-56854), 2011 WL 9686615; Br. of Appellees, *Acosta*, 718 F.3d 800 (No. 10-56854), 2011 WL 9686614.

that time. In short, *Acosta* speaks *only* to the state of the law before *Skoog* (specifically, in January 2006 when Mr. Acosta was arrested); it is irrelevant to the state of the law after *Skoog*.

C. This Court's Nonprecedential Opinion in *Bini v. City of Vancouver* Incorrectly Held that Ninth Circuit Law Was Not Clearly Established.

In a nonprecedential opinion in *Bini v. City of Vancouver*, 745 F. App'x 281 (9th Cir. 2018), this Court held that *Acosta* interjected uncertainty into the state of law that this Court's 2006 decision in *Skoog* clearly established and that this Court's 2013 decision in *Ford* explicitly confirmed. *See id.* at 282. That was incorrect.

Mr. Bini's claims arose out of an extended dispute with Cheryl Smith, the wife of Garrett Smith, over a blog published and maintained by Mr. Bini and his girlfriend which discussed Mr. Smith's pending criminal case for the attempted murder of Ms. Smith. *See Bini v. City of Vancouver*, No. C16-5460BHS, 2017 WL 2226233, at *1 (W.D. Wash. May 22, 2017).[3] After Mr. Bini and his girlfriend refused to stop blogging about Mr. Smith's case, Ms. Smith received a temporary anti-harassment order against Mr. Bini. *Id.* at *2. Based on her belief that Mr. Bini violated the anti-harassment order, Officer Aldridge arrested Mr. Bini for cyberstalking on May 7, 2014. *Id.* at *2. When the city attorney declined to prosecute

[3] These facts are drawn from the district court opinion because this Court's unpublished memorandum disposition does not include a factual recitation.

Mr. Bini, however, Officer Aldridge did not remove the "Be on the Look Out" (BOLO) advisory against Mr. Bini from the city computer system. *Id*. at *2-3. The BOLO advised officers that there was probable cause to arrest Mr. Bini. *Id*. at *2-3. Based on the BOLO left in the system, another officer arrested Mr. Bini on October 24, 2014. *Id*. at *3. Mr. Bini subsequently brought multiple claims against Officer Aldridge and the city, including, as relevant here, a First Amendment retaliation claim against Officer Aldridge. *Id*. at *1, *8.

Based on its conclusion that this Court's decision in *Acosta* contradicted this Court's decision in *Ford*, the district court in *Bini* held that the right at issue was not clearly established and, as a result, granted summary judgment to Officer Aldridge on qualified immunity grounds. *See id.* at *8.

On appeal, in an unpublished memorandum disposition, this Court affirmed, agreeing that *Acosta* was in tension with *Ford*. *Bini*, 745 F. App'x at 282. "It is true," the *Bini* majority stated, "that we held in *Ford* . . .—more than a year before Bini's first arrest in 2014—that such a right was clearly established in this circuit." *Id.* (citing *Ford*, 706 F.3d at 1196). "But," the Court went on, "a month later we held that the same right had *not* been clearly established." *Id.* (citing *Acosta*, 718 F.3d at 808). As a result, the *Bini* majority held, "[a]t the time of Bini's arrests, it was not clearly established in this circuit that an arrest supported by probable cause, but made in retaliation for protected speech, violated the Constitution." *Id*.

Judge Watford, writing in dissent in *Bini*, came to the opposite conclusion regarding the state of the law at the time of Mr. Bini's arrest. Examining *Acosta* and *Ford*, Judge Watford concluded that "[i]n 2014, when Officer Aldridge arrested Bini, the law in our circuit was clearly established in the respect relevant here." *Id.* at 283 (Watford, J., dissenting) (citing *Ford*, 706 F.3d at 1193). Critically, and relevant to the appeal in this case, Judge Watford correctly recognized that *Acosta* had no bearing on the state of the law as it existed in the Ninth Circuit at the time of Mr. Bini's arrest. *See id*. ("[I]n *Acosta* we were determining the state of the law as it stood in 2006, when Acosta was arrested. The decision has nothing to say about the state of the law in 2014, when Bini was arrested." (citing *Acosta*, 718 F.3d at 808)).

The *Bini* majority was wrong. *Acosta* did not affect the state of law. In November 2006, *Skoog* clearly established the right to be free from retaliatory law enforcement action even if probable cause existed for that action. *Skoog*, 469 F.3d at 1235. *Ford* recognized and explicitly held that *Skoog* had clearly established that right in November 2006. *Ford*, 706 F.3d at 1195-96. By contrast, this Court's decision in *Acosta*, analyzing Mr. Acosta's arrest in January 2006, concerned the state of the law before *Skoog*. *See Acosta*, 718 F.3d at 825; *see also* Figure 1, *supra* at 12.

When analyzing whether the law was clearly established, courts focus on the date of the government action at issue. *See Hope*, 536 U.S. at 741; *Tarabochia*, 766

F.3d at 1125. This focus on the date of the alleged action is based on fundamental notions of fairness—notice—for government officials. *See Hope*, 536 U.S. at 739 ("[Q]ualified immunity operates 'to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.'"). This is precisely why the clearly established inquiry asks what a reasonable officer would have understood *at the time*. *See Hope*, 536 U.S. at 741; *Tarabochia*, 766 F.3d at 1125.

The majority in *Bini* went wrong by focusing on the relative dates of the *Ford* and *Acosta* decisions, rather than the dates of the alleged law enforcement actions. The *Bini* Court noted that *Ford* held that the law barring retaliatory police action was clearly established, but then "a month later" *Acosta* came to the opposite conclusion. *Bini*, 745 F. App'x at 282.[4] That the *Acosta* decision post-dated the *Ford* decision, however, is irrelevant because each case looked back in time to the law as it existed when the law enforcement actions in question took place. Between the time of the arrests in *Acosta* (January 2006) and *Ford* (July 2007), this Court decided *Skoog* (November 2006). *See* Figure 1, *supra* at 12. Stated differently, when officers arrested Mr. Acosta (in January 2006), this Court had not yet decided *Skoog* (November 2006), but by the time officers arrested Mr. Ford (in July 2007), *Skoog* had clearly established the law. *See* Figure 1, *supra* at 12.

[4] *Ford* was decided on February 8, 2013 and *Acosta* was decided on May 3, 2013.

In sum, the *Acosta* Court and the *Ford* Court analyzed the state of the law in two distinct time periods—pre-*Skoog* and post-*Skoog*, respectively—and it makes no difference that this Court rendered its decision in *Ford* first. Therefore, the majority in *Bini* incorrectly concluded that *Acosta* interjected uncertainty into the inquiry and that, as a result, Bini's right to be free from retaliatory police action (in October 2014) was not clearly established.[5]

* * *

This Court's November 2006 decision in *Skoog* clearly established the right to be free from retaliatory law enforcement action even if probable cause existed for that action; this Court's May 2013 decision in *Ford* recognized and explicitly held that *Skoog* had clearly established the law in November 2006; and *Acosta*, dealing with events preceding *Skoog*, is irrelevant to the state of law after *Skoog*. Therefore, in 2013, when Detective Tucker issued declarations for Plaintiffs' arrests in retaliation for their speech, it had been clearly established for years that such law

[5] The proper analysis on similar facts is reflected in *Martin v. NCIS*, 539 F. App'x 830 (9th Cir. 2013). In *Martin*, the alleged retaliatory police action took place in 2009. *See Martin v. NCIS*, No. 10-cv-1879WQH(MDD), 2011 WL 13142108, at *1-*3 (S.D. Cal. Aug. 3, 2011) (reciting factual background). Critically, relying on *Skoog* and *Ford*, the Court held that "[o]ur precedent has long provided notice to law enforcement officers 'that it is unlawful to use their authority to retaliate against individuals for their protected speech,' 'even if probable cause exists for' the challenged law enforcement conduct." 539 F. App'x at 832 (quoting *Ford*, 706 F.3d at 1195 and *Skoog*, 469 F.3d at 1235). The Court came to this conclusion *after* this Court issued its opinion in *Acosta*, yet appropriately did not cite *Acosta*—*Acosta*, as noted above, is simply irrelevant to the inquiry.

enforcement action was unconstitutional whether or not probable cause existed for that action.

Although the district court in this case "agree[d] with the [*Bini*] dissent's analysis," it "[did] not feel free to ignore the majority conclusion that the law was not clearly established." ER-16-17. But this Court is not so constrained. *See* 9th Cir. R. 36-3(a) ("Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.").

Therefore, this Court should take this opportunity to issue a published opinion reiterating that this Court's 2006 decision in *Skoog* clearly established the law, that *Acosta* has no bearing whatsoever on *Skoog* or *Ford*, and that the *Bini* opinion incorrectly found uncertainty in the state of the law where none existed.

CONCLUSION

For the reasons stated above, this Court should reverse the district court's grant of summary judgment on qualified immunity grounds and remand the case to the district court. Because the district court believed itself bound to this Court's incorrect analysis of *Acosta* in *Bini*, this Court should issue a published opinion to put the issue to rest.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32 and 9th Circuit Rule 32, I certify that:

This brief complies with the type-volume limitation of 9th Circuit Rule 32-1(a) because this brief contains 5,466 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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