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' REPLY BRIEF

Margaret Ann McLetchie
Alina Maria Shell
MCLETCHIE LAW
701 East Bridger Avenue
Suite 520
Las Vegas, NV 89101
(702) 728-5300

Devi M. Rao
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
501 H Street NE, Suite 275
Washington, DC 20002
(202) 869-3434
devi.rao@macarthurjustice.org

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

SUMMARY OF THE ARGUMENT

Defendant-Appellee, Las Vegas Metropolitan Police Department ("Metro") Detective Christopher Tucker, issued declarations of arrest for Plaintiffs-Appellants Brian Ballentine, Catalino Dazo, and Kelly Patterson, for their chalking of anti-police messages on sidewalks in front of Metro's headquarters and the state courthouse. The only question in this appeal is whether Tucker is entitled to qualified immunity from Plaintiffs' First Amendment retaliation suit. He is not.

Plaintiffs explained at length in their opening brief why the district court was wrong to (reluctantly) follow this Court's nonprecedential decision in *Bini v. City of Vancouver*, 745 F. App'x 281 (9th Cir. 2018). At the time of their arrests, Plaintiffs had a clearly-established right to be free of retaliatory law enforcement action even if probable cause existed for that action. This principle was clearly established in this Circuit by *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). Detective Tucker has little to say in response, and nothing in his brief undermines Plaintiffs' analysis of this Court's precedent in *Skoog*, *Ford*, *Bini*, and *Acosta v. City of Costa Mesa*, 718 F.3d 800 (9th Cir. 2013).

Rather than engaging with Plaintiffs' legal analysis and this Court's precedent, Tucker tries two different tacks. First, Tucker invites the Court to wade into the facts and overturn the district court's conclusion that triable issues existed

as to whether Tucker violated Plaintiffs' constitutional rights. Notably, though, Tucker's argument blithely disregards the district court's factual determinations and ignores that the evidence must be viewed in the light most favorable to Plaintiffs. Second, Tucker disputes that the law in the Ninth Circuit was clearly established at the time of Plaintiffs' arrests in 2013, claiming that Plaintiffs frame the right at issue too broadly and that irrelevant cases muddied this Court's clearly-established law—he is wrong in both respects. The right to speak freely without experiencing retaliation by law enforcement—regardless of probable cause—is foundational to our democratic society, and that right was well-established in this Circuit in 2013 when Tucker issued the declarations of arrests for Plaintiffs' alleged "graffiti-ing" of anti-police messages in chalk on the public sidewalks.

ARGUMENT

I. Detective Tucker Is Not Entitled to Qualified Immunity.

A. The District Court Correctly Concluded that a Jury Could Find Detective Tucker Violated Plaintiffs' First Amendment Rights.

The district court determined that Plaintiffs "presented evidence from which a jury could find that Tucker violated their First Amendment rights." ER-13. That was correct, and this Court should decline Tucker's invitation to second-guess the district court's factual determinations.

To establish a First Amendment retaliation claim, Plaintiffs must demonstrate that (1) they engaged in a constitutionally protected activity; (2) as a result, they

were subjected to adverse action by the defendant that would chill a person of ordinary firmness from continuing to engage in the protected activity; and (3) there was a substantial causal relationship between the constitutionally protected activity and the adverse action. *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 543 (9th Cir. 2010); *see also* ER-10 (same). The district court held, and Tucker does not dispute, that the first two elements are satisfied here. *See* ER-10; Tucker Br. 20-26. Tucker contends only that Plaintiffs' retaliation claim fails under the third prong: causation. *See* Tucker Br. at 16, 21, 23-26.

As to causation, the district court explained that in *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), "the Supreme Court held that probable cause for an arrest will generally defeat a retaliatory arrest claim."[1] ER-10. That is because, usually, "the presence of probable cause suggests that the arrest was objectively reasonable and that the officer's animus is not what caused the arrest." *Id.* (citing *Nieves*, 139 S. Ct. at 1724-26). But, as the district court explained, the Supreme Court in *Nieves* recognized an exception for "circumstances 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 Supreme Court reasoned that a categorical rule

[1] The district court analyzed the constitutional violation under *Nieves* after this Court vacated and remanded Tucker's prior appeal in light of that decision. ECF 220 (*Ballentine v. Las Vegas Police Dep't*, 772 F. App'x 584 (9th Cir. 2019)).

requiring the absence of probable cause in every case would leave officers with too much leeway to "exploit the arrest power as a means of suppressing speech.'" *Nieves*, 139 S. Ct. at 1727 (quoting *Lozman v. City of Rivera Beach*, 138 S. Ct. 1945, 1953-54 (2018)). In order to plead a retaliatory arrest under the *Nieves* exception, "a plaintiff must show objective evidence that he was arrested for committing a crime (e.g., jaywalking) while engaged in protected speech while others committing the same crime but not engaged in protected speech were not arrested." ER-10-11 (citing *Nieves*, 139 S. Ct. at 1727).

Applying that rule to this case, the district court determined there was a genuine dispute of material fact as to whether Tucker unconstitutionally retaliated against Plaintiffs for their protected speech. *See* ER-11-13. Specifically, the district court determined that Plaintiffs "presented evidence from which a reasonable jury could conclude that they were arrested for chalking while others who chalked but did not engage in the same sort of protected speech had not been arrested." ER-11. To reach this conclusion, the district court found the following facts (among others), appropriately construed in favor of Plaintiffs as the non-moving party, from which a jury could conclude that Tucker's actions were retaliatory:

- "Tucker presents no evidence that Metro has *ever* arrested *anyone* besides the plaintiffs for chalking on the sidewalk." ER-12 (emphases added).
- "Tucker concedes that other Metro 'officers may have acted differently' when addressing an individual chalking on the sidewalk." ER-11.

- "The plaintiffs also presented evidence that other individuals were chalking at the RJC and there is no evidence those people were arrested." ER-11.

- "The plaintiffs[] attended at least nine chalking protests between 2011 and 2013 where they were not cited for chalking and were not told by law enforcement officers that chalking on a city sidewalk is illegal." ER-11.

- "The City Attorney declined to prosecute th[e June 8, 2013] citations because he found that sidewalk chalk did not fall within the graffiti statute and he was concerned about First Amendment issues related to the citations." ER-11.

In the face of all these facts, the district court determined, "a reasonable jury could find that officers typically exercise their discretion not to arrest someone for chalking on sidewalks," and "that the anti-police content of the chalkings was a substantial or motivating factor for the arrests." ER-12.

Tucker makes two arguments in response. The first is irrelevant, the second is unavailing.

First, Tucker argues that he had probable cause for Plaintiffs' arrests in this case. *See* Tucker Br. at 22-23. But that is irrelevant here. The district court *assumed* that Tucker had probable cause to arrest Plaintiffs, *see* ER-10, which is why it analyzed Plaintiffs' claims under the *Nieves* exception, when "the no-probable-cause requirement [does] not apply," *see* ER-10-13; *Nieves*, 139 S. Ct. at 1727. "[W]hen 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," probable cause for arrest does not defeat a retaliation claim. *Nieves*, 139 S. Ct. at

1727. This is just the sort of evidence—set out above—the district court determined Plaintiffs had presented.

Second, in an attempt to claim that Plaintiffs do not fall within the *Nieves* exception, Tucker takes on the district court's factual determinations, going so far as to boldly proclaim that "the evidence does not support Plaintiffs' allegations that they were singled out because of a retaliatory motive." Tucker Br. 24; *see also id*. at 16, 21, 23-26. But the time to make that argument is at trial. *See Ford*, 706 F.3d at 1194 n.3 (reversing grant of summary judgment on qualified immunity, discussing officer's claims that he did not retaliate against the plaintiff, and noting "the question whether the officers retaliated against [the plaintiff] or simply permitted him to retreat voluntarily from his *lèse-majesté* is ultimately a factual one that would have to be resolved at trial").

Tucker is free to tell the jury that "Plaintiffs essentially contend that Detective Tucker violated their rights by placing too much information in an arrest warrant," Tucker Br. at 24, or that he attempted "lesser options" and was "facing a difficult set of facts," but still engaged in "good police work" by obtaining a warrant and "choos[ing] to take the time to detail all known facts in" the warrant, *id.* at 25. But Tucker's dissatisfaction with the district court's determination that genuine disputes of material fact stand in the way of summary judgment leave nothing for this Court to resolve on these grounds. *See, e.g.*, *Mendocino Envtl. Ctr. v. Mendocino Cnty.*,

192 F.3d 1283, 1303 (9th Cir. 1999) ("The possibility that other inferences could be drawn that would provide an alternate explanation for the [defendant's] actions does not entitle them to summary judgment."). As the district court put it, "a jury may credit Tucker's explanations." ER-12. Or, on the other hand, "it could also disbelieve that Tucker would have arrested plaintiffs even in the absence of the[ir] protected speech." ER-12. But that's just it—these are arguments for the jury, not for summary judgment.

At this stage, the district court was merely entitled to consider whether the record evidence, construed in the light most favorable to the non-moving party (*i.e.*, Plaintiffs) left questions of fact for resolution by a jury. *See, e.g.*, *Tarabochia v. Adkins*, 766 F.3d 1115, 1120-21 (9th Cir. 2014) ("In determining whether genuine issues of material fact remain, we are required to view all evidence and draw all inferences in the light most favorable to the nonmoving party."); *see also Tolan v. Cotton*, 572 U.S. 650, 655-57 (2014) (reversing grant of summary judgment based on qualified immunity, where court of appeals failed to view evidence in the light most favorable to the nonmoving party). That is just what the district court held. ER-11. Tucker does not engage with the record while lodging his complaint that the district court erred in denying summary judgment under *Nieves*. In fact, Tucker does not—and cannot—cite a single factual determination undermining the district

court's holding. As a result, Tucker does not come close to meeting his burden to overturn the district court's factual determinations—mere bluster won't do.

B. The Clearly Established Ninth Circuit Law in 2013 Prohibited Detective Tucker's Conduct.

In 2013, when Tucker issued the declarations for Plaintiffs' arrests, this Court had clearly established that a police officer may not retaliate against individuals based on their speech. *See Skoog*, 469 F.3d at 1235; *Ford*, 706 F.3d at 1195-96.[2] The Supreme Court reaffirmed—but did not invent—that right in *Nieves*, 139 S. Ct. at 1727.

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*. Seven years later, in *Ford*, this Court reiterated that *Skoog* clearly established that right. 706 F.3d at 1195-96; *see* Opening Br. at 10-16. *Ford* leaves no room for doubt: "[T]his 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." *Ford*, 706 F. 3d at 1195-96. Because Plaintiffs' August 2013 arrests took

[2] This Court has explicitly held that its own caselaw can clearly establish the law; indeed, this is the first source this Court looks to. *See Boyd v. Benton County*, 374 F.3d 773, 781 (9th Cir. 2004) ("In the Ninth Circuit, we begin our inquiry by looking at binding precedent. If the right is clearly established by decisional authority of the Supreme Court or this Circuit, our inquiry should come to an end." (citation omitted)). Thus, there is no need to "assum[e]" this question "arguendo." Tucker Br. at 30.

place after this Court's decisions in *Skoog* and *Ford*, that should be the end of the inquiry.

Instead of engaging with the relevant law and Plaintiffs' clear explanation of those cases in their opening brief, Tucker puts forth two arguments to suggest the law was not clearly established. First, Tucker argues that Plaintiffs have defined the clearly established right at issue too broadly. Second, Tucker argues that other cases altered—*sub silentio*—the law clearly established by *Skoog* and explicitly confirmed by *Ford*. The precedent belies both of these arguments.

1. Plaintiffs Correctly Defined the Clearly Established Right at Issue.

Tucker argues that Plaintiffs' framing of the right at issue is too broad and phrased only in "general terms," but this argument is premised on a gross mischaracterization of Plaintiffs' articulation of the right. Tucker Br. at 28. Tucker claims that Plaintiffs alleged a clearly-established right to be free from "'retaliatory law enforcement action.'" Tucker Br. at 28 (quoting Opening Br. at 13-14). In reality, though, when Plaintiffs referred to "retaliatory law enforcement action," they consistently completed the thought with the phrase "even when probable cause existed," or the equivalent. *See, e.g.*, Opening Br. 9-10, 13-14, 16.

Properly read, Plaintiffs define the right at issue in *identical language* to the right already identified in this Court's cases.

Compare:

- Plaintiffs: "[T]he right to be free from retaliatory law enforcement action even if probable cause existed for that action." Opening Br. at 9-10.

With:

- *Skoog*: "In this case, we define the right as the right of an individual to be free of police action motivated by retaliatory animus but for which there was probable cause." 469 F.3d at 1235.
- *Ford*: "[T]his 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." 706 F.3d at 1195-96.

Tucker even *admits* that this is the way this Court has articulated the right. Tucker Br. at 33 (recognizing *Skoog* articulated the right "to be free from retaliatory police action, even if probable cause existed); *id.* at 35 ("The *Ford* Court held that an individual has a right to be 'free from police action motivated by retaliatory animus but for which there was probable cause.'").

True, in *Reichle v. Howards*, 566 U.S. 658 (2012), the Supreme Court rejected as too broad the rule that "the First Amendment prohibits government officials from subjecting an individual to retaliatory actions." Tucker Br. 28 (quoting *Reichle*, 566 U.S. at 665). But *Reichle* went on to describe the appropriate level of generality as *exactly* the one Plaintiffs advance here: "the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause." *Reichle*, 566 U.S. at 665. In other words, this Court has *already held* that this precise right is clearly

established, and the Supreme Court has *already described* the right the same way, so Tucker's complaints about Plaintiffs' articulation of the right ring hollow.

Tucker also claims minor factual differences between *Skoog*, *Ford* and this case mean that those cases cannot clearly establish the law. *See* Tucker Br. at 30-36. That is incorrect. To be clearly established, "'[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what [she] is doing violates that right,'" and a plaintiff "need not identify a prior identical action to conclude that the right is clearly established." *Ioane v. Hodges*, 939 F.3d 945, 956 (9th Cir. 2018) (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

Indeed, insignificant factual differences did not matter to the *Ford* Court and similarly do not matter here. The *Ford* Court explicitly considered the minor distinctions between *Skoog*, an earlier police retaliation case called *Duran v. City of Douglas*, 904 F.2d 1372 (9th Cir. 1990),[3] and the facts in *Ford*. *See Ford*, 706 F.3d at 1195-96. That *Skoog* involved a retaliatory search and seizure, *Duran* involved a retaliatory arrest during a traffic stop, and *Ford* involved a retaliatory arrest,

[3] In *Duran*, an officer stopped a vehicle, and ultimately arrested the driver, after the driver "was making obscene gestures toward him and yelling profanities in Spanish." 904 F.2d at 1377. This Court held that it was clearly-established "that government officials in general, and police officers in particular, may not exercise their authority for personal motives," and remanded for trial because "[t]here remain[ed] a material issue of fact" as to "whether [the officer] intended to hassle [the driver] as punishment for exercising his First Amendment rights." *Id.* at 1378.

booking, and jailing did not matter to this Court in *Ford*. *See id.* at 1196. The Court in *Ford* explained that "[a]fter *Duran*, any reasonable police officer would have known that it was unlawful to use his authority to retaliate against an individual because of his speech," and "any reasonable police officer would have understood that *Skoog*'s prohibition on retaliatory police action extended to typical police actions such as booking and jailing" such that the "case involved the kind of 'mere application of settled law to a new factual permutation' in which [the Court] assume[s] an officer had notice that his conduct was unlawful." *Id.* (citing *Eng v. Cooley*, 552 F.3d 1062, 1076 (9th Cir. 2009)). So too here. In Tucker's world, it seems, only a prior case involving chalkers writing the same words on the same public sidewalks under the same summer sun would be good enough to clearly establish the law. That's not the world the rest of us live in.

2. Detective Tucker's Attempts to Muddy the State of the Law Fail.

Tucker throws out a variety of cases to demonstrate an alleged lack of clarity in the law—notwithstanding *Skoog* and *Ford*. A brief explanation of each demonstrates that none of them undermines the clearly-established law in *Skoog* and recognized in *Ford*.

Nieves v. Bartlett. Tucker claims that the law could not have been clearly-established until the Supreme Court's 2019 decision in *Nieves*, 139 S. Ct. 1715. *See*

Tucker Br. at 17; *id.* at 29.[4] This assertion—on its face—ignores circuit precedent that predated *Nieves*. *Id.* at 30 (addressing circuit caselaw in a separate section). And for that reason, it is wrong.

Nieves recognized that "[a]lthough probable cause should generally defeat a retaliatory arrest claim," that is not true "where officers have probable cause to make arrests, but typically exercise their discretion not to do so." 139 S. Ct. at 1727. But the type of claims contemplated by this analysis in *Nieves* (retaliatory arrests with probable cause) were *already* clearly established by this Court's precedent.[5] Based on *Skoog* and *Ford*, a reasonable officer acting in 2013 would have known that he may not cause a person to be arrested in retaliation for their protected speech even

---

[4] Tucker (correctly) does not argue that *Nieves* could somehow retroactively *alter* the clearly-established law. As Tucker notes, "the Supreme Court decided *Nieves* years after the events in this" case, Tucker Br. at 28 (capitalization altered), and "[i]n assessing the clearly established law, courts consider the legal standards that existed at the time of the challenged actions," *id.* at 26 (citation omitted); *see also Sandoval v. Cnty. of San Diego*, 985 F.3d 657, 678 (9th Cir. 2021) (applying governing law at the first prong of qualified immunity, and the then-existing law at the time of the action in question for the second prong).

[5] It's true that *Nieves* abrogated *Ford* to the extent *Ford* suggested that probable cause was not relevant to the retaliatory arrest inquiry. 139 S. Ct. at 1721; Tucker Br. 29. Indeed, after *Nieves*, probable cause to arrest will usually be dispositive. *Nieves*, 139 S. Ct. at 1726 ("The presence of probable cause should generally defeat a First Amendment retaliatory arrest claim."). But, critical here, that is not the case "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." *Id.* at 1727. "In such a case, because probable cause does little to prove or disprove the casual connection between animus and injury," the existence of probable cause is not dispositive. *Id.*

if he had probable cause. *See Ford*, 706 F. 3d at 1195-96 ("[A]n individual has a right to be free from retaliatory police action, even if probable cause existed for that action."); ER-14 (observing that "a reasonable officer would know that he cannot use his authority to retaliate against someone based on the content of that person's speech" and "[t]hat remains true post-*Nieves*"). In other words, a reasonable officer in the Ninth Circuit would have known both before and after *Nieves* that probable cause does not excuse arresting a person in retaliation for protected speech.

Acosta v. City of Costa Mesa. Tucker does not dispute Plaintiffs' explanation of the timeline of arrests and decisions, yet nevertheless puzzlingly claims that *Acosta v. City of Costa Mesa*, 718 F.3d 800 (9th Cir. 2013), scuttles the clearly established law at the time of Plaintiffs' arrests in 2013. *Compare* Tucker Br. at 36-37, *with* Opening Br. 12, 17-19. No. *Acosta* is simply irrelevant to the state of the law in 2013—it was analyzing the law "at the time of challenged conduct" in *January 2006*, before this Court decided either *Skoog* or *Ford*. *Acosta*, 718 F.3d at 824-26; *see also* Opening Br. at 18; Figure 1, *infra* at 17. It does not matter that *Acosta* "did not specify that it's [sic] holding was limited to that time frame," or that it "was published months before the events in this case." Tucker Br. at 37. Because *Acosta* manifestly only addressed the state of the law in January 2006, before *Skoog* and *Ford*, it would not have provided any information to a reasonable officer in

Tucker's position about the state of the law *after Skoog* and *Ford*—*Skoog* and *Ford* did that. *See infra* at 20-21 (string cite of cases correctly analyzing the issue).

Reichle v. Howards. Tucker's reliance on *Reichle v. Howards*, 566 U.S. 658 (2012), is wrong for the same reason—and for an additional reason to boot. Tucker argues that *Acosta*'s citation to the Supreme Court's decision in *Reichle*, somehow "implied that the law was unsettled" after *Reichle*, notwithstanding *Skoog* and *Ford.* Tucker Br. at 37. But *Reichle*—which concerned what a reasonable secret service officer contemplating an arrest *in Colorado* would have known *at the time* about the applicable clearly-established law—is a red herring for at least two reasons: (1) it considered only Supreme Court precedent and Tenth Circuit precedent; and (2) it did so only for a particular window in time—June 2006.

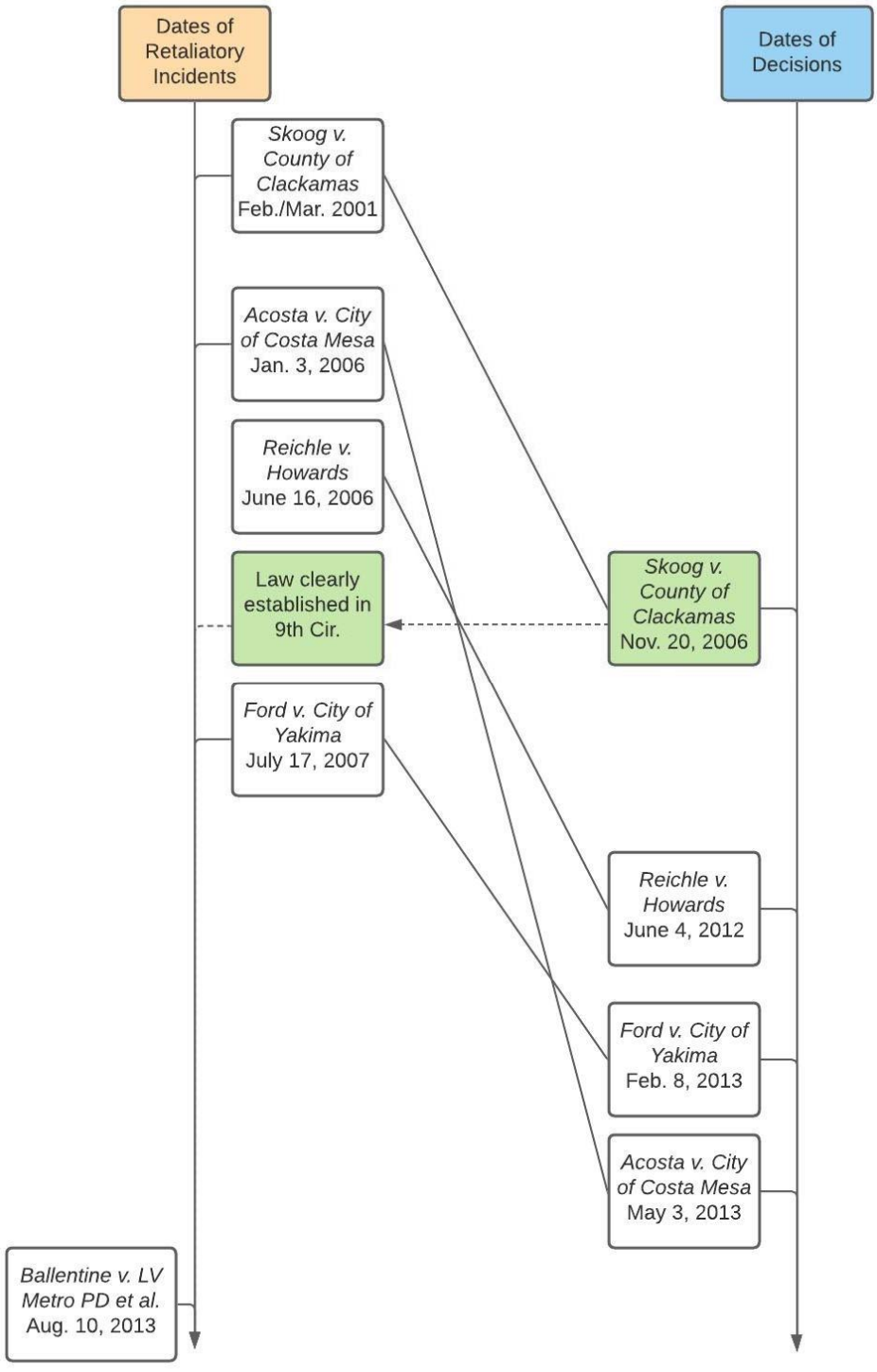
In *Reichle*, the Supreme Court considered whether secret service agents were entitled to qualified immunity from a suit stemming from their June 16, 2006 arrest of Mr. Howards at a Beaver Creek shopping mall, an arrest that predated Plaintiffs' by seven *years* and in a different circuit. *Id.* at 660-61. The Court held that "at the time of Howards' arrest, it was not clearly established that an arrest supported by probable cause could violate the First Amendment." *Id.* at 663. The Supreme Court, for its part, had "never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause." *Id.* at 664-65. Nor, the Supreme Court explained, had the Tenth Circuit—the relevant source to look for

clearly-established law for Mr. Howards' Colorado arrest. *Id.* at 665-66. So *Reichle* has nothing to say about *Ninth Circuit* law, and less-than-nothing to say about Ninth Circuit law that that post-dates the *Reichle* arrest—i.e., after this Court decided *Skoog* in November 2006. *See Ford*, 706 F.3d at 1195 (citing *Skoog*, 469 F.3d at 1235).[6]

Tucker's reliance on *Reichle*, then, is based on a similar mistake as his reliance on *Acosta* itself, relating to the timing of the action being addressed (and therefore the law being analyzed). To see, again, why this is true, reproduced below is the diagram from Plaintiffs' opening brief, with the addition of *Reichle*.

[6] The Supreme Court held that Tenth Circuit law was unsettled after the Court's decision in *Hartman v. Moore*, 547 U.S. 250 (2006), which addressed the relevance of probable cause in retaliatory *prosecution* suits. But this Court in *Skoog* addressed Hartman's impact on *Ninth* Circuit law, and explicitly rejected the contention that *Hartman* had either altered or confused this Court's precedent. *Skoog*, 469 F.3d at 1234 ("We conclude that the retaliation claim in this case does *not* involve multi-layered causation as did the claim in *Hartman*. . . . Thus, the rationale for requiring the pleading of no probable cause in *Hartman* is absent here.").

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
Reichle v. Howards June 16, 2006
Law clearly established in 9th Cir.
Ford v. City of Yakima July 17, 2007
Ballentine v. LV Metro PD et al. Aug. 10, 2013
Skoog v. County of Clackamas Nov. 20, 2006
Reichle v. Howards June 4, 2012
Ford v. City of Yakima Feb. 8, 2013
Acosta v. City of Costa Mesa May 3, 2013

So, it makes sense for this Court in *Acosta* to have cited and used the Supreme Court's decision in *Reichle* as a point of reference: both arrests (Mr. Acosta's on January 3, 2006 and Mr. Howards' on June 16, 2006) took place pre-*Skoog*. In other words, the *Reichle* Court and *Acosta* Court, on the one hand, and the *Ford* Court, on the other, were analyzing the state of the law in two distinct time periods—pre-*Skoog* and post-*Skoog*, respectively. It is the post-*Skoog* law, of course, that controls this case; pre-*Skoog* law is simply irrelevant.

Nor did the *Reichle* decision undermine this Court's preexisting rule in *Skoog*, as Tucker suggests. Tucker Br. at 29. Indeed, this Court already rejected that notion in *Ford*. This Court decided *Ford*—interpreting Ninth Circuit law as clearly-established in *Skoog*—on February 8, 2013, seven months *after* the Supreme Court decided *Reichle* (on June 4, 2012), and cited to *Reichle*. *Ford*, 706 F.3d at 1195. In short, this Court already addressed whether *Reichle* impacted the clearly-established law in *Skoog*, and concluded it did not.[7] Because Plaintiffs' arrests here took place in August 2013, after *Ford* held (after *Reichle*) that *Skoog* had clearly-established

[7] Judge Callahan dissented in *Ford* because, in her view, "[t]he clarity of [*Skoog*'s] rule" was "muddied by the spirit, if not the holding, of the Supreme Court's subsequent holding in *Reichle*." *Id.* at 1203. (Callahan, J., dissenting). The panel denied a petition for rehearing and rehearing en banc that likewise argued that the majority's decision conflicted with *Reichle*. Petition for Rehearing, *Ford*, 706 F.3d 1188 (No. 11-35319), ECF 28 (Mar. 8, 2013); Order Denying Petition for Rehearing, *Ford*, 706 F.3d 1188 (No. 11-35319), ECF 33 (May 28, 2013).

the law in the Ninth Circuit, there is no good argument 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 Plaintiffs' arrests in this case.

District court cases. Finally, Tucker attempts to rely on two unpublished district court cases to claim that the law was not clearly established. Tucker Br. at 38. Tucker cites to *Mihailovici v. Snyder*, No. 3:15-cv-01675-MO, 2017 WL 1508180 (D. Or. April 25, 2017), and *Blatt v. Shove*, No. C11-1711, 2014 WL 4093797 (W.D. Wash. Aug. 18, 2014), the only two cases cited in *Bini* for alleged "confusion" in the law. *Bini v. City of Vancouver*, 745 F. App'x 281, 282 (9th Cir. 2018). But one only need glance briefly at these cases to understand what went wrong—those courts, like Tucker, erred by not focusing on the state of the law *at the time of the relevant action*. *See Mihailovici*, 2017 WL 1508180, *6 (discussing, in the context of an arrest in September 2013, the holdings of *Skoog*, *Ford*, *Acosta*, and *Reichle* without focusing on the relative dates of the *arrests* in those cases); *Blatt v. Shove*, 2014 WL 4093797, at *5 (incorrectly applying *Acosta* when analyzing an arrest that took place in October 2008).

In contrast to these two decisions (and *Bini*), in which the court failed to consider that the date of *arrest*—not the date of decision—is dispositive when undertaking the clearly-established analysis, many district courts have analyzed this Court's clearly established law correctly, and properly held that neither *Acosta* nor

Reichle had any effect on the law clearly established by *Skoog* and confirmed by *Ford*. *See, e.g.*, *United States v. Maricopa Cnty.*, 151 F. Supp. 3d 998, 1036 (D. Ariz. 2015), *aff'd on other grounds*, 889 F.3d 648 (9th Cir. 2018) ("Since *Hartman* and *Reichle*, the Ninth Circuit has continued to hold 'an individual has a right "to be free from police action motivated by retaliatory animus but for which there was probable cause."'" (citing *Ford*, 706 F.3d at 1193; *Skoog*, 469 F.3d at 1235)); *Talib v. Nicholas*, No. 14-cv-05871-JAK(DFM), 2018 WL 9597443, at *11 n.7 (C.D. Cal. Mar. 7, 2018) (citing *Ford* and *Acosta* and concluding Ninth Circuit law was clearly established); *Johnson v. City of Atwater*, No. 16-CV-1636AWISAB, 2018 WL 534038, at *12-13 (E.D. Cal. Jan. 24, 2018) (analyzing claimed retaliation in 2015, citing *Acosta* for a different proposition, and still denying officers' summary judgment on qualified immunity based on *Skoog* and *Ford*); *Henneberry v. City of Newark*, No. 13-cv-05238-MEJ, 2017 WL 1493006, at *10-11 (N.D. Cal. Apr. 26, 2017) (analyzing April 18, 2013 arrest, citing *Acosta* for a different proposition, and finding *Ford* controlling); *Morse v. San Francisco Bay Area Rapid Transit Dist.*, 12-cv-5289JSC, 2014 WL 572352, at *12 (N.D. Cal. Feb. 11, 2014) ("The *Acosta* court provides no analysis as to why *Skoog* would not still apply. Further, the Ninth Circuit's decision in *Ford*—which included a dissent heavily reliant on *Reichle*—explicitly recognized *Skoog* as having clearly established the right at issue in this case. Even after *Acosta*, the Ninth Circuit has continued to cite *Skoog*'s holding as

good law." (citing *Ford* 706 F.3d at 1195; *Skoog*, 469 F.3d at 1235; *Martin v. NCIS*, 539 F. App'x 830, 831-32 (9th Cir. 2013))).

In sum, this Court's precedent unmistakably demonstrates that the right to be free from retaliatory law enforcement action even if probable cause existed was clearly established at the time of Plaintiffs' arrests in August 2013.

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.

Date: May 19, 2021

Respectfully Submitted,

/s/ Devi M. Rao

Devi M. Rao
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
501 H Street NE, Suite 275
Washington, DC 20002
(202) 869-3434
devi.rao@macarthurjustice.org

Margaret Ann McLetchie
Alina Maria Shell
MCLETCHIE LAW
701 East Bridger Avenue
Suite 520
Las Vegas, NV 89101
(702) 728-5300

Attorneys for Appellants

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(b) because this brief contains 5,050 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.

/s/ Devi M. Rao
Devi M. Rao

Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 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.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Devi M. Rao
Devi M. Rao

Attorney for Appellants