CASE NO.: 20-16805

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Brian Ballentine; Catalino Dazo; Kelly Patterson, Plaintiff-Appellants, vs. Christopher T. Tucker, Detective, Defendant-Appellee, vs. Las Vegas Metropolitan Police Department; Mike Wallace, Sergeant; John Liberty, Lieutenant, Defendants.

Appeal from the United States District Court
District of Nevada, Las Vegas
Case No.: 2:14-cv-01584-APG-EJY

DEFENDANT-APPELLEE CHRISTOPHER T. TUCKER'S ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Defendant/Appellee Christopher T. Tucker is an individual.

Dated this 29th day of March, 2021.

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By /s/ Craig R. Anderson

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I. JURISDICTIONAL STATEMENT

Jurisdiction is proper pursuant to 28 U.S.C. §1291 because the Plaintiffs-Appellants, Brian Ballentine ("Ballentine"), Catalino Dazo ("Dazo"), and Kelly Patterson ("Patterson") (collectively "Plaintiffs"), appealed from a final order granting summary judgment in favor of the Defendant-Appellee, Detective Christopher T. Tucker ("Detective Tucker").

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did the District Court properly grant summary judgment in favor of Detective Tucker where (1) Plaintiffs did not produce sufficient evidence of constitutional violation under the *Nieves* standard and (2) no "clearly established" law in 2013 would have informed a reasonable officer that an otherwise valid arrest supported by probable cause and a warrant violates the First Amendment if animus was the "but for" reason for the arrest.

III. STATEMENT OF THE CASE

A. INTRODUCTION.

Throughout 2011 to 2013, Plaintiffs "chalked" city sidewalks with messages regarding topics of concern. Regardless of the contents of the messages, Plaintiffs' chalking was so extensive that clean-up created an economic loss in excess of $1,000.

In June 2013, LVMPD Sergeant Michael Wallace ("Sergeant Wallace") observed Plaintiffs working on a chalking activity that already spanned around eighty feet. Sergeant Wallace explained to Plaintiffs that chalking constitutes graffiti in violation of Nevada law. After Plaintiffs repeatedly refused to clean up the mess and cease chalking, Sergeant Wallace's supervisor, Lieutenant John Liberty ("Lieutenant Liberty"), contacted a prosecuting attorney to confirm that the conduct in question amounted to criminal defacement. Plaintiffs were then issued citations.

The citations were assigned to LVMPD's graffiti unit for investigation. Over the course of the next month, Detective Tucker learned that Plaintiffs were undeterred by their June 8th citations and planned to continue to chalking sidewalks in Las Vegas. On July 13, 2013, Plaintiffs participated in another event where they chalked over 1,200 feet of government property.

Due to the continued economic loss and Plaintiffs' refusal to clean up after themselves, Detective Tucker submitted a warrant request. After reviewing Detective Tucker's detailed description of the facts—including facts that implicated First Amendment concerns—a judge issued arrest warrants for the Plaintiffs. The District Attorney's Office charged two of the Plaintiffs with two counts of gross misdemeanor defacement in violation of NRS 206.330, and Plaintiffs were arrested.

The District Attorney's Office ultimately declined to prosecute the charges. Plaintiffs then initiated litigation in which they asserted 42 U.S.C. §1983 claims and state law claims against LVMPD and three officers.

After years of motion practice and an appeal to this Court, Plaintiffs' case was whittled down to one defendant (Detective Tucker) and claims for First Amendment retaliation / chilling. The District Court then granted summary judgment on the basis of qualified immunity. In the instant appeal, Plaintiffs challenge that decision.

As explained in more detail below, this Court should AFFIRM because the District Court properly "conducted a close analysis" before determining that rights allegedly violated were not clearly established in August 2013. This Court may also affirm on alternative grounds because probable cause and the undisputed evidence defeat Plaintiffs' First Amendment claims.

B. STATEMENT OF FACTS.

1. The Parties.

Plaintiffs are members of the "Sunset Activist Collective" who refer to themselves as the "Sunset 3." ER-5; *see also* 6-SER-1640. In or around 2011, Plaintiffs began "chalking," *i.e.*, writing and drawing in chalk, to express their views on topics of concern and display their artistic abilities. *Id.* Plaintiffs did not clean up the chalk after their various protests. 5-SER-1235; 5-SER-1122.

Detective Tucker has been an officer with LVMPD since 2001. 6-SER-1571. During the course of his employment, LVMPD has never received a citizen complaint against Detective Tucker for selective enforcement. 6-SER-1495-1496. He has never been the subject of any internal affairs investigation or discipline related to selective enforcement. 6-SER-1496. During the relevant time period, Detective Tucker was assigned to LVMPD's graffiti section. 6-SER-1574.

2. June 8, 2013, Citations.

On June 8, 2013, LVMPD Sergeant Wallace encountered the Plaintiffs as he was pulling out of the parking lot of the LVMPD headquarters located at 400 South Martin Luther King Boulevard. 6-SER-1441-1442. Before Sergeant Wallace made it to the street, he saw what appeared to be people on their hands and knees. *Id.* Sergeant Wallace could not see what they were doing, so he parked his patrol car and watched for about a minute from a distance. *Id.* During this time, Sergeant Wallace observed three individuals (later identified as Ballentine, Patterson and Dazo) with chalk in their hands writing on the sidewalk. *Id.* The existing chalk on the sidewalk spanned approximately 80 feet. 6-SER-1577. At this point, Sergeant Wallace informed LVMPD dispatch that he planned to make contact. 6-SER-1441-1442.

Sergeant Wallace walked up to one of the individuals and introduced himself. *Id.* He explained that applying graffiti on the sidewalk is against the law.

6-SER-1443-1444; 5-SER-1235-1236; 5-SER-1277-1278. The person closest to him (with the description matching that of Ballentine) began to challenge whether or not he was under arrest. 6-SER-1443-1444. The other Plaintiffs joined Ballentine in the line of questioning. *Id*.

Sergeant Wallace simply wanted Plaintiffs to cease their unlawful actions. *Id.*; 5-SER-1235. Because Sergeant Wallace recognized that the Plaintiffs were apparently protesting something, he explained that he believed in their right to protest. 6-SER-1443-1444. However, Sergeant Wallace conveyed that protests must be done lawfully. *Id*. One of the Plaintiffs responded something to the effect of "We don't want to do that. We don't have the time. It's too hot out here." *Id.* Sergeant Wallace attempted to explain that those reasons are not an excuse to not comply with the law. *Id.*

As Sergeant Wallace explained that Plaintiffs' conduct constituted graffiti, one of the Plaintiffs began to circle around Sergeant Wallace. 6-SER-1449; 5-SER-1322-1323 (response request for admission no. 23). Collectively, the Plaintiffs were openly "really antagonistic" toward Sergeant Wallace.[1] So, for his

[1] *See* YouTube video titled "Interview with Nevada cop Block Editor, Kelly W. Patterson, RE: 'Second Saturday' Graffiti citations, https://www.youtube.com/user/EYEAM4ANARCHY, at minute mark 15:11-15:30 (stating Plaintiffs were "really antagonistic towards him [Sgt. Wallace]…I want to ruin his day, I want to make this the worst day he has had in a long time.").

safety, Sergeant Wallace called for backup. 6-SER-1449. LVMPD Detective William Matchko arrived a short time later. *Id*.

Sergeant Wallace was aware that the City of Las Vegas wanted to prosecute the people who apply graffiti because the mess created an economic loss to the City. 6-SER-1445. Nevertheless, Sergeant Wallace politely encouraged the Plaintiffs to cease their unlawful actions. 6-SER-1444; 5-SER-1320-21 (response to request for admission no. 21).[2]

When the Plaintiffs refused to stop, Sergeant Wallace briefly detained them to prepare citations. 6-SER-1448, 6-SER-1454. Patterson requested an LVMPD supervisor. 6-SER-1454; 5-SER 1235. Lieutenant Liberty, the watch commander on duty, responded to the request. 6-SER-1454; 6-SER-1515-1516 and 6-SER-1522-1524; 5-SER 1236-37.

Because he was not an expert in graffiti, Lieutenant Liberty contacted the on-call district attorney. 6-SER-1527-1528. By mistake, Lieutenant Liberty's call was patched through to a Justice Court Judge Janiece Marshall. *Id*. Judge Marshall told Lieutenant Liberty that all of the elements for defacement were met.

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[2] *See* YouTube video titled "Interview with Nevada cop Block Editor, Kelly W. Patterson, RE: 'Second Saturday' Graffiti citations, https://www.youtube.com/watch?v=xGVXJjhdclw, at minute mark 12:41-12:58 (Patterson's comments that Sergeant Wallace encouraged Plaintiffs to leave without a citation but they refused).

Id. Lieutenant Liberty then called the on-call district attorney, Christopher Lalli. *Id.* Mr. Lalli also confirmed that all of the elements of the crime had been met. *Id.*; 5-SER-1355.

After receiving confirmation from Judge Marshall and Mr. Lalli, Lieutenant Liberty explained to the Plaintiffs that their chalking violated Nevada's graffiti statute. *Id.*; 6-SER-1537. Lieutenant Liberty also conveyed that no citations would be issued if Plaintiffs cleaned up their chalk. *Id*. Again, Lieutenant Liberty and Sergeant Wallace calmly attempted to walk Plaintiffs through the applicable graffiti statute. 6-SER-1454-1455; 5-SER-1236-37. Lieutenant Liberty also encouraged the Plaintiffs to use signs so the City would not incur the cost of cleaning the sidewalks. 6-SER-1539; 5-SER-1239-1240. Plaintiffs were not interested in the discussion or the options that were presented. *Id*. Ultimately, the Plaintiffs were cited for their refusal to stop committing the act of graffiti. 6-SER-1554-1555.

3. Plaintiffs' Graffiti was a Prosecutable Offense.

On or around June 13, 2013, LVMPD officers consulted prosecuting attorneys to assess whether use of chalk can constitute graffiti. *See*, *e.g.*, 4-SER-969. Then-chief deputy district attorney Scott Mitchell, a case screener with the Clark County District Attorney's Office, researched the relevant statutes. 4-SER-964, 4-SER-1009; *see also* 5-SER-1359 (describing the role of a screener). Based

on his understanding of the conduct in question, Mr. Mitchell concluded that the use of chalk could amount to a "defacement" under NRS 206.330. 4-SER-995-1012-1013. Mr. Mitchell noted that whether his office would prosecute such an offense depends on the amount of damage. 4-SER-999-1000. Mr. Mitchell did not consider the actual messages, if any, that the Plaintiffs were writing. 4-SER-970. Instead, when he rendered his opinion to LVMPD, Mr. Mitchell noted:

> …free speech is free speech, and there's no question that whatever was being written fell within the definition of free speech. But that being the case, free speech rights don't trump property rights. They don't just mean that you can deface somebody's property at will against their will and put the cost of cleanup on them. So yeah, the actual messages or content of the graffiti was irrelevant to me.

Id.

4. <u>Subsequent Graffiti Violations: July 13 and July 18, 2013.</u>

The graffiti citations that Sergeant Wallace issued were assigned to Detective Tucker to investigate. 6-SER-1576. A couple of days later, Detective Tucker also saw that the chalk writings were still on the sidewalk in front of the LVMPD headquarters. 6-SER-1577.

Detective Tucker began the investigation just like every other investigation. 6-SER-1578. He identified the individuals involved, researched their history, checked their social media, including Facebook, and began compiling information regarding the criminal behavior. *Id.*

Detective Tucker identified the City of Las Vegas as the victim for the Plaintiffs' crimes since the City owns the sidewalk and is ultimately responsible for the maintenance of the sidewalk. 6-SER-1584. The cost to the City for removal of 240 square feet of chalk that was placed on July 13, 2013 was $300.00. 4-SER-1050-1052; 6-SER-1585-1586.

On July 13, 2013, Detective Matchko informed Detective Tucker that Ballentine and Patterson were again applying chalk to the sidewalk in front of the LVMPD headquarters. 4-SER-1090. On that date, Detective Matchko declined to make contact with Ballentine and Patterson because of his caseload.

During his investigation, Detective Tucker learned from Plaintiffs' social media postings that Plaintiffs planned another chalking event on July 18, 2013, at the Regional Justice Center. 6-SER-1586; 5-SER-1218-1219. On July 18, 2013, Detective Tucker went to the Regional Justice Center where he observed the Plaintiffs and two other individuals chalking. 6-SER-1588-1589; 5-SER-1139. Detective Tucker briefly asked Ballentine if the Sunset 3 were going to clean up the chalk after they were done. 6-SER-1591; 5-SER-1140. Ballentine refused to answer. *Id.*

After Plaintiffs left the area, the City of Las Vegas arrived and cleaned off the chalk with brooms and a pressure washer. 6-SER-1592. Again, the City of Las Vegas was the victim of Plaintiffs' actions because the City abatement team

incurred the cost of clean-up. 6-SER-1593. Given the extensive amount of City property covered in chalk—approximately 1,250 feet—the cost of graffiti abatement exceeded $1,000. 4-SER-1068-1069; 6-SER-1593; 4-SER-1096-1097

5. Warrants for Plaintiffs' Arrests.

Since the Plaintiffs repeatedly refused to cease their unlawful actions, Detective Tucker compiled information and drafted warrants for submission to the District Attorney's Office for review and approval. 6-SER-1593. Detective Tucker learned through his experience with LVMPD's graffiti section that warrants must be detailed so they do not get rejected by the District Attorney's Office. 6-SER-1595. With that in mind, Detective Tucker prepared the subject warrants with an eye towards specificity. He carefully outlined Plaintiffs' prior graffiti offenses, a description of the graffiti, what was used to apply the graffiti, and the surfaces where Plaintiffs applied chalk. 6-SER-1596-1600; *see also* 1-SER-207-211, Declaration of Warrants (LVMPD 000416-420) at Exhibit 7 to Tucker Depo.

The District Attorney's Office accepted the warrants and submitted them to a judge. 6-SER-1601; 3-SER-747. After completing an independent review of the facts, a justice of the peace approved arrest warrants for each of the Plaintiffs. 6-SER-1601; 3-SER-747.

6. The Criminal Charges.

On August 9, 2013, the District Attorney's Office filed a criminal complaint which charged Ballentine and Patterson with two counts of gross misdemeanor conspiracy to place graffiti or otherwise deface property. The criminal complaints centered on the chalking incidents on July 13 and July 18. In the criminal complaints, the District Attorney's Office noted that the alleged graffiti included "derogatory statements and profanity."

The following day, Ballentine and Patterson publicly announced via Facebook that they planned to go to the LVMPD headquarters to chalk once again. Given the active arrest warrants, Patterson and Ballentine were arrested and taken into custody. 5-SER-1244. After the arrests, Clark County District Attorney Steve Wolfson and Plaintiffs' then-counsel, Robert Langford, participated in a closed-door meeting. 3-SER-750; 5-SER-1361. During that meeting, prosecutors learned that a Court Marshal had directed some of the Sunset Activist Collective to graffiti outside of / away from the Regional Justice Center. 3-SER-747. The new information undermined a necessary element of the crime—acting without permission. 5-SER-1361. As a result, the District Attorney's Office decided to drop all charges against the Plaintiffs. *Id.*

C. PROCEDURAL HISTORY.

1. Plaintiffs' claims and early history (2014-2016).

On September 26, 2014, Plaintiffs filed their original complaint against LVMPD, Detective Tucker, Sergeant Wallace, and Lieutenant Liberty (collectively the "LVMPD Defendants"). *See generally* ECF No. 1.

On April 27, 2015, the District Court granted the LVMPD Defendants' motion for partial dismissal on the basis of qualified immunity. *See generally* ECF Nos. 6, 36. In doing so, the District Court held that a reasonable officer could find that using chalk on a public sidewalk constituted defacement under NRS 206.330 (the defacement statute). ECF No. 36. Accordingly, probable cause supported the warrant and the Plaintiffs' arrests.

On April 6, 2016, Plaintiffs filed the second amended complaint that is the operative complaint in this matter. *See generally* 6-SER-1636-1661. In the operative complaint, Plaintiffs asserted 42 U.S.C. §1983 claims based on alleged deprivation of (1) freedom of speech; (2) freedom of speech / chilling; (3) right to assembly; and (4) equal protection. Plaintiffs also asserted state law claims for: (5) deprivation of free speech under the Nevada constitution; (6) negligent training, supervision, and retention; (7) intentional infliction of emotional distress; and (8) negligent infliction of emotional distress.

2. The First Motion for Summary Judgment (December 2016).

On December 9, 2016, after the close of discovery, the LVMPD Defendants moved for summary judgment on the merits and on the basis of qualified immunity. *See* 7-SER-1846-1886.

On August 21, 2017, the District Court granted in part and denied in part the motion. ER-18-38. In its order, the Court found there was no evidence to support any of the claims against LVMPD, Sergeant Wallace, and Lieutenant Liberty. ER-25-26; ER-32-33; ER-36-38. The District Court also determined that Plaintiffs failed to present sufficient evidence to support their equal protection and state law claims against Detective Tucker. *See* ER-26 (noting Plaintiffs could not "show that Tucker treated any similarly situated sidewalk chalker differently"); *see also* ER-35-38.

The District Court denied summary judgment as to Plaintiffs' claims against Detective Tucker for First Amendment retaliation / chilling and assembly. ER-38. In doing so, the Court noted four allegations that could, if viewed in the light most favor to Plaintiffs, support their claims. ER-27-28. Additionally, the Court denied qualified immunity on the First Amendment claim(s) because *Ford v. City of Yakima*, 706 F.3d 1188 (9th Cir. 2013), "clearly established" that it is unconstitutional to arrest an individual for retaliatory motive, even if probable cause exists. ER-26-27.

3. The First Appeal to this Court (2017-2019).

Detective Tucker timely appealed the District Court's denial of qualified immunity. *See generally* case number 17-16728.

After the appeal was fully briefed, the Supreme Court of the United States issued its decision in *Nieves v. Bartlett*, 587 U.S. ___, 139 S. Ct. 1715 (2019). In *Nieves*, the Court abrogated this Court's decision in *Ford* and held that a plaintiff who claims First Amendment retaliation must, barring a limited exception, plead and prove the absence of probable cause. *Id*., 139 S. Ct. at 1723-24.

This Court ordered supplemental briefing. Thereafter, on July 2, 2019, the Court (Judges W. Fletcher, Watford, and Hurwitz), issued a memorandum disposition which vacated and remanded for further proceedings in light of *Nieves*. *See Ballentine v. Las Vegas Metro. Police Dep't*, 772 F.App'x 584 (9th Cir. 2019).

4. The Second Motion for Summary Judgment (2019-2020).

On remand, the parties stipulated that an additional round of motion practice was appropriate. ECF No. 225. Detective Tucker (the only remaining Defendant) then moved for summary judgment on the basis of qualified immunity. *See generally* 1-SER-59-82.

Consistent with *Nieves*, Detective Tucker argued that Plaintiffs could not state a constitutional violation given the undisputed findings that officers had probable cause and warrants for Plaintiffs' arrests. 1-SER-71-76. Detective

Tucker also explained that the limited exception recognized in *Nieves* did not apply because Plaintiffs failed to produce sufficient, objective evidence that retaliation was the "but for" reason for their arrests.

Alternatively, Detective Tucker argued for qualified immunity because the relevant law was not "clearly established" in August 2013. The 2019 *Nieves* decision proved as much by abrogating the *Ford* decision upon which the District Court relied in its previous order. Further, while Circuit decisions broadly discussed retaliatory arrest, Detective Tucker highlighted Plaintiffs' failure to identify a sufficiently similar case where a judge issued an arrest warrant with knowledge of the plaintiff's alleged First Amendment activity.

After briefing, the District Court granted Detective Tucker's motion on the basis of qualified immunity. *See generally* ER-4-17. In its order, the District Court candidly admitted that the question of whether *Nieves* changed the scope of clearly established law was "a difficult one." ER-14. Rather than resolving the "difficult" issue, the Court focused on decisions from this Circuit. After a careful discussion of three retaliatory arrest decisions (*Ford*, *Skoog*, and *Acosta*), the District Court acknowledged the apparent confusion that existed in this Circuit in 2013. ER-15-16. Though not cited for its precedential value, the District Court also noted a recent memorandum disposition where a Panel of this Court reasoned, "[i]t appears self-evident that, if district courts in our circuit have had significant

difficulty identifying the rule established by our cases, our precedent did not 'place [ ] the . . . constitutional question beyond debate.'" ER-17 (citing *Bini v. City of Vancouver*, 745 Fed. App'x 281 (9th Cir. 2018)). The District Court, thus, concluded that Plaintiffs could not meet their burden of showing that the right allegedly violated was "clearly established" in August 2013. ER-13 (citing *LSO, Ltd. v. Stroh*, 2015 F.3d 1146, 1157 (9th Cir. 2000)).

Plaintiffs appealed from the District Court's order.

IV. SUMMARY OF ARGUMENT

Qualified immunity is designed to protect "all but the plainly incompetent or those who knowingly violate the law." *City and Cnty. of San Francisco v. Sheehan*, 575 U.S. ___, ___, 135 S. Ct. 1765, 1774 (2015) (citations omitted).

Here, Detective Tucker was neither incompetent nor malicious. Detective Tucker poured extra effort into investigating Plaintiffs' criminal behavior and obtaining an arrest warrant to ensure that his actions were proper. To the extent that Detective Tucker erred by documenting exhaustive details regarding Plaintiffs' graffiti, qualified immunity is designed to cover such reasonable mistakes. Accordingly, for the reasons discussed below, this Court should AFFIRM the District Court's order granting summary judgment because the undisputed evidence does not show that Detective Tucker conduct violated Plaintiffs' constitutional rights.

Yet, even if Detective Tucker should have omitted details from the warrant request or sought out other chalkers—as Plaintiffs seem to suggest—a reasonable officer in Detective Tucker's position would not have understood the contours of First Amendment retaliation at the time. "Common sense dictates that a right cannot be both 'clearly established' and 'previously undecided' for qualified immunity purposes." *Kruse v. State of Hawai'i*, 857 F. Supp. 741, 756 (D. Haw. 1994). So, given that the *Nieves* Court did not clarify the relevant standard for First Amendment retaliation until 2019, the law certainly was not "clearly established" in 2013. And, as such, this Court should also AFFIRM the District Court's correct decision to grant qualified immunity on the basis of the "clearly established law" prong.

V. STANDARDS OF REVIEW

This Court reviews a district court's decision granting summary judgment de novo. *United States v. City of Tacoma*, 332 F.3d 574, 578 (9th Cir. 2003); *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002).

Accordingly, this Court's review is governed by the standards set forth in Federal Rule of Civil Procedure 56(c). *See, e.g., Fontana v. Haskin*, 262 F.3d 871, 876 (9th Cir. 2001); *Suzuki Motor Corp. v. Consumers Union of U.S., Inc.*, 330 F.3d 1110, 1131-32 (9th Cir. 2003) ("We must therefore determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are

any genuine issues of material fact and whether the district court correctly applied the relevant substantive law."); *In re Brazier Forest Prod., Inc.*, 921 F.2d 221, 223 (9th Cir. 1990) ("[I]f the nonmoving party bears the burden of proof on an issue at trial, the moving party need not produce affirmative evidence of an absence of fact to satisfy its burden. The moving party may simply point to the absence of evidence to support the nonmoving party's case.") (internal citation omitted).

It is important to note, however, that this Court may "affirm a grant of summary judgment on any ground supported by the record." *Simo v. Union of Needletrades, Indus. & Textile Employees, Sw. Dist. Council*, 322 F.3d 602, 610 (9th Cir. 2003). So, even if this Court disagrees with some of the reasons that the District Court granted summary judgment in favor of Detective Tucker, it may, nevertheless, affirm based on its independent review of this case. *Id.* Further, because "[i]t is elementary that appellate courts do not presume error," this Court should affirm the District Court's order unless "it is made affirmatively to appear that error has been committed." *Williamson v. Richardson*, 205 F. 245, 246 (9th Cir. 1913).

VI. ARGUMENT

A. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF DETECTIVE TUCKER.

1. Qualified Immunity Standard.

The Supreme Court has explained that the "[t]he doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 815 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982)). Qualified immunity shields an officer from liability even if his or her action resulted from "'mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" *Id*. (quoting *Groh v. Ramirez*, 540 U.S. 551, 557, 124 S. Ct. 1284, 1295 (2004)). So, the purpose of qualified immunity is to strike a balance between the competing "need to hold officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id*. Qualified immunity is designed to protect "all but the plainly incompetent or those who knowingly violate the law." *City and Cnty. of San Francisco v. Sheehan*, 575 U.S. ___, ___, 135 S. Ct. 1765, 1774 (2015) (citations omitted).

A defendant officer is entitled to qualified immunity unless: (1) "'the facts alleged, taken in the light most favorable to the party asserting the injury, show that the official's conduct violated a constitutional right'" and (2) the right at issue "was clearly established 'in light of the specific context of the case.'" *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1100 (9th Cir. 2011) (quoting *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156 (2001)). Negating either prong precludes liability. Accordingly, in assessing qualified immunity, courts have discretion in deciding which of the two prongs to consider first. *Pearson*, 555 U.S. at 236, 129 S. Ct. at 818.

In the following two sections, Detective Tucker will address the violation prong followed by the clearly established prong. Although the District Court granted summary judgment on the "clearly established" prong, both prongs support the District Court's ruling.

2. Detective Tucker Did Not Violate Plaintiffs' Right to Freedom from Retaliatory Arrest.

The first prong of the qualified immunity inquiry analyzes the alleged constitutional violation against the specific standard that governs the right(s) in question. *Graham v. Connor*, 490 U.S. 386, 394, 109 S. Ct. 1865, 1871 (1989). Because qualified immunity recognizes that reasonable mistakes can be made in the field, the analysis is deferential and mindful of the perspective of a

reasonable—though not perfect—officer. *Saucier v. Katz*, 533 U.S. 194, 205, 121 S. Ct. 2151, 2158 (2001).

Here, Plaintiffs asserted 42 U.S.C. §1983 claims against Detective Tucker for First Amendment retaliation / chilling. Prior to *Nieves*, this Court held that "to establish a claim of retaliation in violation of the First Amendment, [the plaintiff's] evidence must demonstrate that the officers' conduct would chill a person of ordinary firmness from future First Amendment activity" and "the evidence must enable [the plaintiff] ultimately to prove that the officers' desire to chill his speech was a but-for cause of their allegedly unlawful conduct." *Ford v. City of Yakima*, 706 F.3d 1188, 1195-96 (9th Cir. 2013) (citing *Lacey v. Maricopa Cty.*, 693 F.3d 896, 916-17 (9th Cir. 2012) (en banc). *Nieves* has since clarified that, barring a limited exception, "[t]he plaintiff pressing a retaliatory arrest claim must [also] plead and prove the absence of probable cause for the arrest." 587 U.S. at ___, 139 S. Ct. at 1724.

In this case, (a) probable cause defeats Plaintiffs' arguments that Detective Tucker violated their constitutional right(s). In addition, (b) the limited exception identified in *Nieves* is inapplicable because Plaintiffs cannot show that retaliation was a substantial or motivating factor for their arrests.

a. Detective Tucker had Probable Cause and a Warrant.

Nevada law provides that "graffiti" is "any unauthorized inscription, word, figure or design that is marked, etched, scratched, drawn, painted on or affixed to the public or private property, real or personal, of another, which defaces the property." NRS 206.005. "Deface" is defined as

> 1. To mar or destroy (a written instrument, signature, or inscription) by obliteration, erasure, or superinscription. 2. To detract from the value of (a coin) by punching, clipping, cutting, or shaving. 3. To mar or injure (a building, monument, or other structure). — defacement.

BLACK'S LAW DICTIONARY (9th ed. 2009). Accordingly, inscribing or marking messages in chalk is "graffiti" as defined in NRS 206.005. *See e.g.*, *Mahoney v. Doe*, 642 F.3d 1112, 1115 (D.C. Cir. 2011) (interpreting a similarly worded defacement statute as applied to using chalk to deface public property).

Although chalking differs from the spray paint "tags" that are more conventionally associated with graffiti, the chalk in this case created a significant mess on City property. In light of the costs for clean-up and other relevant facts, multiple prosecuting attorneys and a neutral judge agreed that there was probable cause to arrest and charge Plaintiffs for violating NRS 206.005.

The warrant is particularly strong evidence of probable cause. *Illinois v. Gates*, 462 U.S. 213, 236, 103 S. Ct. 2317, 2331 (1983); *see also, e.g.*, *New York v. P.J. Video, Inc.*, 475 U.S. 868, 875, 106 S. Ct. 1610, 1615 (1986). Throughout the

lengthy history of this case, no one has questioned the validity of the warrant or the accuracy of the statements made in Detective Tucker's application. Instead, even Plaintiffs seem to admit that probable cause supported their arrest and the criminal charges.

It bears noting that the District Attorney's decision to later drop the charges is immaterial to the probable cause determination because "[t]he Constitution does not guarantee that only the guilty will be arrested." *Baker v. McCollan*, 443 U.S. 137, 144, 99 S. Ct. 2689, 2695 (1979)). So, while it is undisputed that Plaintiffs were not tried for graffiti, that determination has nothing to do with the "historical facts" or "events leading up to the arrest." *Maryland v. Pringle*, 540 U.S. 366, 371, 124 S. Ct. 795, 800 (2003) ("We examine the events leading up to the arrest"); *see also Ornelas v. U.S.*, 517 U.S. 690, 696, 116 S. Ct. 1657, 1661-62 (1996); *White v. Pauly*, 580 U.S. ___, ____, 137 S. Ct. 548, 550 (2017) ("[T]he Court considers only the facts that were knowable to the defendant officers.").

Thus, at all relevant times, Detective Tucker has proper probable cause for his actions. And, under *Nieves*, probable cause defeats retaliatory arrest claims in all but the most egregious of cases.

b. The *Nieves* Exception is Inapplicable.

The presence of probable cause will defeat most claims, unless 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* 587 U.S. ___, 139 S. Ct. at 1727. The rationale behind this exception is to deter officers who "may exploit the arrest power as a means of suppressing speech.'" *Id.* at 1727 (quoting *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1953 (2018)).

Here, the evidence does not support Plaintiffs' allegations that they were singled out because of a retaliatory motive. Plaintiffs highlight Detective Tucker's description of their graffiti, including the anti-police messages stated therein, as proof of a retaliatory motive. In so arguing, Plaintiffs essentially contend that Detective Tucker violated their rights by placing too much information in an arrest warrant. This Court's precedent holds just the opposite: the more evidence an independent judge receives; the better informed his or her probable cause determination will be. *See e.g., United States v. Stanert*, 762 F.2d 775, 781 (9th Cir. 1985) ("By reporting less than the total story, an affiant can manipulate the inferences a magistrate will draw."); *United States v. Gourde*, 440 F.3d 1065, 1071 (9th Cir. 2006) (en banc). Indeed, Detective Tucker's inclusion of plaintiffs' anti-police affiliations and messages allowed the judge to recognize and evaluate any First Amendment issues related to the arrest.

The fact that Detective Tucker used his discretion to obtain warrants to perform a custodial arrest rather than issuing more citations also does not evidence

animus. The June 2013 citations had no effect on Plaintiffs' criminal behavior. Efforts to talk to Plaintiffs and encourage alternatives also had no impact. Thus, lesser options had already failed.

Regardless, obtaining warrants is also good police work. In Fourth Amendment settings, this Court has long stated that it is best practice for officers to obtain a warrant when time and circumstances permit. *See e.g., United States v. Sherman*, 430 F.2d 1402, 1406 (9th Cir. 1970). Likewise, consulting with prosecuting attorneys regarding the situation and the relevant law was also good police work inconsistent with animus. *See Ewing v. City of Stockton*, 588 F.3d 1218, 1231 (9th Cir. 2009) (observing that although "an officer's consultation with a prosecutor is not conclusive[] . . . it is evidence of good faith" that may "tip[] the scale in favor of qualified immunity."); *see also Dixon v. Wallowa Cnty.*, 336 F.3d 1013, 1019 (9th Cir. 2013) (discussing reliance on advice of counsel).

In other words, Detective Tucker acted in a manner that should be commended—not criticized. Detective Tucker recognized he was a facing a difficult set of facts that potentially implicated the First Amendment. However, rather than rush to action and just arrest the Plaintiffs, Detective Tucker chose to take to the time to detail all known facts in an arrest warrant and allow a neutral magistrate to review and evaluate whether the arrests were lawful. Detective Tucker only arrested the Plaintiffs after the neutral magistrate reviewed the

evidence (including the First Amendment speech) and concluded that the arrests were lawful.

Qualified immunity, thus, was warranted because Detective Tucker actively took steps to do what was right and required under the Constitution. Although Plaintiffs attempted to contort his actions into evidence of animus, this Court can—and should—affirm because the totality of the circumstances confirms that Detective Tucker did not violate the Plaintiffs' constitutional rights.

3. The Contours of the Right to Freedom from Retaliatory Arrest were not Clearly Established in August 2013.

The second prong of the qualified immunity analysis questions whether the alleged constitutional violation was "'sufficiently clear' that every 'reasonable official would have understood that what he [was] doing violate[d] that right[?]'" *Mattos v. Agarano*, 661 F.3d 433, 446 (9th Cir. 2011) (en banc) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 2083 (2011)). In assessing the clearly established law, courts consider the legal standards that existed at the time of the challenged actions. *See*, e.g., *Tuuamalemalo v. Greene*, 946 F.3d 471, 480 (9th Cir. 2019); *Mitchell v. Forsyth*, 472 U.S. 511, 528, 105 S. Ct. 2806, 2816 (1985).

In recent years, the Supreme Court of the United States "has repeatedly told courts – and the Ninth Circuit in particular – not to define clearly established law at

a high level of generality." *al-Kidd*, 563 U.S. at 742, 131 S. Ct. at 2084 (citing *Brosseau v. Haugen*, 543 U.S. 194, 198-99; 124 S. Ct. 596, 598-99 (2004)); *City and Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, ___, 135 S. Ct. 1765, 1775-76 (2015); *see also District of Columbia v. Wesby*, 583 U.S. ____, ____, 138 S. Ct. 577, 590 (2018) ("We have repeatedly stressed that courts must not 'define clearly established law at a high level of generality'") (quoting *Plumhoff v. Rickard*, 572 U.S. 2012, 2023, 134 S. Ct. 2012, 2013 (2014)); *Pauly*, 580 U.S. at ___, 137 S. Ct. at 552 ("[I]t is again necessary to reiterate the longstanding principle that clearly established law should not be defined at a high level of generality.") (internal quotation marks and citation omitted).

In so ruling, the Supreme Court has emphasized that the clearly-established inquiry "'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" *Mullenix v. Luna*, 577 U.S. 7, 11, 136 S. Ct. 305, 308 (2015) (per curiam) (quoting *Brosseau*, 543 U.S. at 198, 125 S. Ct. at 599)).

It is, thus, not enough for a plaintiff to generally cite to a constitutional principle, but, rather, the plaintiff must prove that the "rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he [or she] confronted." *Wesby*, 583 U.S. at ____, 138 S. Ct. at 590 (quoting *Saucier*, 533 U.S. at 202, 121 S. Ct. at 2157)); *see also LSO, Ltd. v. Stroh*,

205 F.3d 1146, 1157 (9th Cir. 2000) (confirming that plaintiffs bear the burden of proving the law was clearly established).

In this case, Plaintiffs attempt to describe the "clearly established" right in general terms like "retaliatory law enforcement action." AOB 13-14. Their approach is wholly inconsistent with what the Supreme Court requires of the "clearly established" analysis. *See, e.g., Reichle v. Howards*, 566 U.S. 658, 665, 132 S. Ct. 2088, 2094 (2012) (rejecting as too broad clearly established law described as "the First Amendment prohibits government officials from subjecting an individual to retaliatory actions."). Accordingly, this Court should consider whether reasonable officers would have understood in August 2013 that an otherwise valid arrest supported by probable cause and a warrant violates the First Amendment if animus was the "but for" reason for the arrest. As explained below, no officer could have known this was the legal standard in 2013 when the various courts charged with interpreting and applying the law were unsure of the legal standard.

a. The Supreme Court decided *Nieves* Years After the Events in this Court.

In *Reichle*, the Supreme Court noted that it had never recognized "the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause." *Reichle v. Howards*, 566 U.S. 658, 665, 132 S. Ct. 2088, 2094

(2012). At the time of Plaintiffs' arrests thirteen months later, a reasonable officer versed in *Reichle* would not have suspected that an arrest supported by probable cause could give rise to a First Amendment violation. After all, the Supreme Court of the United States is the final arbiter of federal constitutional law. *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803). So, even if Circuit Courts held differently, Supreme Court precedent in 2013 did not "clearly establish" a right to freedom from retaliatory arrest without regard for probable cause.

In the 2019 *Nieves* decision, the Supreme Court explicitly held that "[t]he plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest." 587 U.S. ___, 139 S. Ct. at 1724. In so ruling, the Court explained that "state of mind is 'easy to allege and hard to disprove.'" *Id*. at 1725 (quoting *Crawford-El v. Britton*, 523 U.S. 574, 585, 118 S. Ct. 1584, 1590 (1998)). A focus on an officer's subjective intent is, thus, inconsistent with the objective standards by which law enforcement conduct is typically reviewed. *Id*. at 1725 (citing *Atwater v. City of Lago Vista*, 532 U.S. 318, 372, 121 S. Ct. 1536, 1567 (2001)). So, unless a §1983 plaintiff can point to objective evidence of animus, "probable cause should generally defeat a retaliatory arrest claim." *Id*. at 1727. The decision in *Nieves*, thus, overturned Circuit precedent, including *Ford*, which held that probable cause—or lack thereof—has no bearing on the First Amendment right to freedom from a retaliatory arrest.

Here it is doubtful that Plaintiffs' claim(s) fall within the narrow exception identified in *Nieves*. *See* Subsection IV(A)(2)(b), *supra*. It is also questionable whether the standard in *Nieves* is sufficiently similar to this case given undisputed evidence that Detective Tucker obtained a warrant from a neutral magistrate who understood the First Amendment implications of Plaintiffs' criminal conduct. Nevertheless, even if the exception is theoretically applicable, the law stated in the 2019 *Nieves* opinion certainly was not clearly established in 2013. Instead, *Nieves* conveys that the state of the law was, at best, unclear. So, because the relevant legal standard was neither clear nor plainly established until 2019, Detective Tucker is entitled to qualified immunity. *See, e.g.*, *Plumhoff*, 572 U.S. at 779, 134 S. Ct. at 2023 ("We did not consider later decided cases because they "could not have given fair notice to [the officer].") (quoting *Brosseau*, 543 U.S. at 200 n.4, 125 S. Ct. at 600 n.4)); *Novak v. City of Parma*, 932 F.3d 421, 430 (6th Cir. 2019) (the *Nieves* exception "does not apply here because the officers would not have been aware of it at the time of [plaintiffs'] arrest since the case was decided later.")

b. Circuit Cases Did Not Clearly Establish the Law.

The Supreme Court has not clearly addressed when, if ever, circuit precedent can constitute clearly established federal law. But, assuming arguendo that circuit court decisions are controlling in the absence of Supreme Court precedent, the "clearly established" analysis must still "be undertaken in light of the specific

context of the case, not as a broad general proposition." *Brosseau*, 543 U.S. at 198, 125 S. Ct. at 599; *see also, e.g., Kisela v. Hughes*, 583 U.S. ____, ____, 138 S. Ct. 1148, 1154 (2018).

In August 2013, the law in this Circuit did not define the contours of the First Amendment right to freedom from retaliatory arrest or other retaliatory police conduct. Indeed, even if a reasonable officer in Detective Tucker's position carefully reviewed the decisions that were then in existence, the law was not "clearly established" for qualified immunity purposes because the three precedential cases were varied and distinguishable from the facts in this case.

***Skoog v. County of Clackamas*, 469 F.3d 1221 (9th Cir. 2006)**

Plaintiff Skoog was involved in ongoing civil litigation against the county and a law enforcement officer after an alleged use of excessive force and deprivation of medical treatment. 469 F.3d at 1226. Skoog also "had been photographing and videotaping police activities for some time." *Id*. at 1225. After the defendant officer, Officer Royster, observed Skoog recording a tobacco sting operation at a gas station, officers went to Skoog's office to collect a copy of the tape. *Id*. at 1226. There, Skoog took photos of the officers and provided a partial copy of the tape. *Id*.

Afterward, Officer Royster requested a search warrant on the basis of a local statute that made it a misdemeanor to intercept oral communications without prior

consent. *Id*. at 1226-27. Twelve armed officers executed the warrant at Skoog's office. *Id*. at 1227. They seized Skoog's cameras and related equipment. *Id*. Officers also copied the hard drive of Skoog's computer. *Id*. While they were doing so, Officer Royster made comments to the effect of "people shouldn't sue cops" or "it wasn't right to sue an officer." *Id*.

After finding that the warrant was issued without probable cause and that officers improperly viewed materials that were subject to attorney-client privilege, a judge later dismissed the earlier charge for DUI. *Id*. Skoog then asserted civil claims in which he alleged that the officers obtained the warrant in retaliation and executed the warrant in a retaliatory manner. *Id*. In turn, Officer Royster moved for summary judgment on the basis of qualified immunity. *Id*.

On appeal, this Court found there was little evidence in the record that supported probable cause and strong evidence of a retaliatory motive. *Id*. at 1234-35. Nevertheless, the Court determined that the defendant officer was entitled to qualified immunity because the "right of an individual to be free of police action motivated by retaliatory animus but for which there was probable cause" was not clearly established. *Id*. at 1235.

Specifically, the *Skoog* Court noted "[w]hether a plaintiff must plead the absence of probable cause in order to . . . state a claim for retaliation is an open

question in this circuit and the subject of a split in the other circuits." *Id*. at 1232. So,

> At the time of the search, the right we have just defined was far from clearly established in this Circuit or in the nation. We have decided only today that a right exists to be free of police action for which retaliation is a but-for cause even if probable cause exists for that action. At some future point, this right will become clearly established in this Circuit. At the time [the officer] acted, however, the law was far from clear.

Id. at 1235. Accordingly, even if the defendant officer's "primary motivation" for seizing Skoog's camera was retaliation for Skoog's exercise of his rights, the Court concluded that the officer was entitled to qualified immunity because the law was not "clearly established." *Id*.

Skoog, thus, articulated a general right "to be free from retaliatory police action, even if probable cause existed." Although *Nieves* calls *Skoog*'s holding into question, this general principle set a starting point for retaliatory-arrest claims in the Ninth Circuit.

The clearly-established inquiry, however, "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Mullenix*, 577 U.S. at 11, 136 S. Ct. at 308. An officer in Detective Tucker's position, thus, would not have understood the parameters of the right in question when faced with the facts in this case.

After all, the warrant request in *Skoog* generically mentioned that the police were seeking "to obtain evidence of [an Oregon statute] that makes it a misdemeanor to intercept oral communications when 'none of the parties to the communication has given prior consent to the interception." 469 F.3d at 1227. At least one judge determined that the warrant was issued without probable cause. And, to make matters worse, the officers in *Skoog* were hostile toward the plaintiff and plainly conveyed that animus was the driving force that motivated the investigation and search. In short, *Skoog* stands for the proposition that an officer violates the First Amendment when he performs an official act pursuant to a warrant supported by weak probable cause and when there is substantial evidence of a retaliatory motive.

Thus, *Skoog* is easily distinguishable from this case because Detective Tucker included all extensive information in his arrest warrant request to ensure the judge could independently assess probable cause and the First Amendment issues. The warrant was never called into question, and even Plaintiffs admit there was probable cause for their arrests. Moreover, there is no evidence that Detective Tucker sought to retaliate because of the contents of Plaintiffs' messages. Instead, the record confirms that Detective Tucker simply wanted Plaintiffs to stop making a mess at the City's expense.

***Ford v. City of Yakima*, 706 F.3d 1188 (9th Cir. 2013)**

Ford involved a traffic stop where an officer stopped an unruly driver for violation of a noise ordinance. Ford became verbal with the officer during the stop. 706 F.3d at 1189-90. The officer told Ford he would only receive a ticket if he stopped "running his mouth." *Id*. at 1190-91. Alternatively, the officer told Ford he would be arrested and his vehicle would be towed if he did not "shut his mouth." *Id*. Ford continued to "run his mouth" and was arrested. *Id*. at 1191. On the way to jail, Ford questioned the arrest and cited the First Amendment. *Id.* The officer informed Ford that he was being arrested for playing his music too loud and because he "acted a fool." *Id*. During a later deposition, the officer explained that he arrested Ford pursuant to his discretion to "book a person 'if I feel like it.'" *Id*.

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" and that the officer in question violated this right. *Id*. at 1193-97. Based on the facts of the case, the Court further held that the officer's conduct would chill speech, and that a desire to chill speech was the but-for cause of the officer's unlawful conduct. *Id.*

Again, *Nieves* calls into question Circuit law which does not require absence of probable cause. Regardless, the facts in this case are also easily distinguishable from the *Ford* case. First, *Ford* did not involve an arrest warrant signed by a

neutral judge who reviewed all known facts including the potentially protected speech. Second, the case involved evidence that the defendant officer expressly informed Ford that his custodial arrest was based upon his speech. Third, the officer in *Ford* "felt like" arresting Ford and had made no effort to use lesser alternatives.

So, even if *Ford* built upon the right to be free from retaliatory police action, the general principles in *Ford* were not "sufficiently clear" such that a reasonable officer in Detective Tucker's position would have understood that his actions were unlawful. After all, Detective Tucker completed a thorough investigation, sought input from others, and made a calm decision after lesser alternatives failed to deter Plaintiffs' behavior.

***Acosta v. City of Costa Mesa*, 718 F.3d 800 (9th Cir. 2013)**

In *Acosta*, the plaintiff was removed from a city council meeting after engaging in "disorderly, insolent, or disruptive behavior." 718 F.3d at 806. Acosta alleged, amongst other claims, that he was wrongfully arrested in retaliation for questioning officers about the reasons for his removal. *Id*. at 824. Assuming Acosta accurately described the facts, this Court concluded that the arresting officers were entitled to qualified immunity because the relevant law was not clearly established. *Id*. at 824-25. In so reasoning, the Court cited to the Supreme Court's then-recent decision in *Reichle* where it found that the right to freedom

from a retaliatory arrest was not clearly established. *Id*. at 825 (quoting *Reichle*, 566 U.S. at 664-65, 132 S. Ct. at 2093).

Acosta created some uncertainty as to the law in this Circuit. Although *Acosta* did not explicitly overturn—or even address—the previous decisions in *Skoog* and *Ford*, the Court's reliance on *Reichle* confirmed that the constitutional question was not "beyond debate" as is required to deny qualified immunity. *See Reichle*, 566 U.S. at 664 (a Court must identify "[e]xisting precedent [that has] placed the statutory or constitutional question beyond debate.").

Acosta was published months before the events in this case. Although the alleged constitutional violations in Acosta took place in 2005, the decision did not specify that it's holding was limited to that time frame. Instead, by citing *Reichle*, the Court implied that the law was unsettled as of 2012.

Accordingly, a reasonable officer in Detective Tucker's position would not have known the contours of the relevant right(s) when this Court's decisions conveyed uncertainty. The apparent difference between this Court's precedents and the Supreme Court's ruling in *Reichle* also cuts strongly against any argument that the law was clearly established. As such, the District Court correctly granted qualified immunity after its "close analysis" of the case law confirmed that the law in this Circuit was not clearly established.

c. Other Authorities Confirm that the Contours of First Amendment Retaliation were not Clearly Established.

"If judges thus disagree on a constitutional question, it is unfair to subject [officers] to money damages for picking the losing side of the controversy." *See Wilson v. Layne*, 526 U.S. 603, 618, 119 S. Ct. 1692, 1701 (1999). Stated a bit differently, a right is not clearly established if even the courts within a circuit are split on the issue. *See, e.g., Wilson v. Arpaio*, No. CV-14-01613-PHX-JAT, 2015 WL 3960879, at *12 (D. Ariz. June 30, 2015). After all, such discussions show that the constitutional question is neither apparent nor beyond debate. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039 (1987) ("in the light of pre-existing law the unlawfulness must be apparent."); *al-Kidd*, 563 U.S. at 741, 131 S. Ct. at 2084 ("[E]xisting precedent must have placed the statutory or constitutional question beyond debate.").

In 2013, the contours of the right to freedom from retaliatory arrest were still subject to debate. As noted above, this Court's decision in *Acosta* revealed the difference between the standard stated in *Reichle* and the general standard that this Court articulated in *Skoog* and *Ford*. Around the same time period, district court decisions reached varied conclusions despite the courts' genuine efforts to apply the law. *See, e.g., Bini v. City of Vancouver*, No. C16-5460 BHS, 2017 WL 2226233, at *8 (W.D. Wash. May 22, 2017) ("The conflict between these two

cases is sufficient to indicate that a person does not have a clearly established First Amendment right to be free from retaliatory arrests otherwise supported by probable cause"); *Mihailovici v. Snyder*, 2017 WL 1508180, *6-7 (D. Or. April 25, 2017) ("One can hardly argue that the question is 'beyond debate' when not even the Ninth Circuit has been able to settle on one position."); *Blatt v. Shove*, No. C11-1711, 2014 WL 4093797, at *5 (W.D. Wash. Aug. 18, 2014).

Against this backdrop, this Court observed that the holdings in *Ford* and *Acosta* "have resulted in some confusion about the state of the law in this circuit." *Bini v. City of Vancouver*, 745 F. App'x 281, 282 (9th Cir. 2018). After discussing district court decisions that reached different conclusions, the panel sensibly concluded "[i]t appears self-evident that, if district courts in our circuit have had significant difficulty identifying the rule established by our cases, our precedent did not 'place[ ] the . . . constitutional question beyond debate.'" *Id.* (quoting *al-Kidd*, 563 U.S. at 741, 131 S. Ct. at 2084)).

In granting summary judgment in this case, the District Court cited the *Bini* decision as evidence of the confusion that was rampant in August 2013. Although Plaintiffs claim that the District Court wrongly relied upon an unpublished authority, the District Court correctly understood that Bini reflected a larger legal problem. Indeed, the District Court did not grant summary judgment because Bini required the Court to do so. Instead, the District Court correctly recognized that

Detective Tucker would not have understood that what he was doing violated Plaintiffs' rights when learned jurists were unsure of the relevant legal standard.

Thus, the District Court correctly held that Detective Tucker was entitled to qualified immunity because the contours of the right to freedom from retaliatory arrest were not clearly established in August 2013.

VII. CONCLUSION

Qualified immunity is important to society as a whole. *White v. Pauly*, 580 U.S. ___, ____, 137 S. Ct. 548, 551 (2017). For the foregoing reasons, this Court should AFFIRM the District Court's Order granting summary judgment in favor of Detective Tucker on the basis of qualified immunity.

Dated this 29th day of March, 2021.

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STATEMENT OF RELATED CASES

Defendant-Appellee Christopher T. Tucker is not aware of any related cases before this Court, and it is believed that there are no related cases under Ninth Circuit Rule 28-2.6.

Dated this 29th day of March, 2021.

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Dated this 29th day of March, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **DEFENDANT-APPELLEE CHRISTOPHER T. TUCKER'S ANSWERING BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on the 29th day of March, 2021.

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Leah Dell, an employee of
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