No. 22-55861

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRISTOPHER HARBRIDGE,
Plaintiff-Appellant,

v.

REED, Captain in Charge of Facility-C, CSP-LAC
Defendant-Appellee,

and

ARNOLD SCHWARZENEGGER; et al,
Defendants.

On Appeal from the United States District Court
for the Central District of California
No. 2:07-cv-04486-GW-AS
Hon. George H. Wu, *District Judge*

APPELLANT'S OPENING BRIEF

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INTRODUCTION

Christopher Harbridge speaks up when he sees injustice. When he arrived in California prison, that habit gained him a reputation as a persistent advocate for himself and his fellow prisoners.

The First Amendment celebrates his advocacy, but prison officials do not always follow suit. Captain Reed of the California State Prison in Los Angeles County (CSP-LAC) took note of Mr. Harbridge's campaigns for fairer treatment, and threatened to transfer him to a different prison as a result. Mr. Harbridge believes that Reed levied her threat in retaliation for his advocacy—and to deter him from continuing it.

The district court agreed, holding that a reasonable jury could find that Reed's threat violated the First Amendment's prohibition on retaliation for protected conduct. But it granted Reed qualified immunity because it believed—wrongly—that this Court didn't clearly proscribe threats like Reed's until 2009, six years too late. Precedent and logic alike contradict the district court's holding, which relied on irrelevant distinctions this Court had already rejected. By 2003, clearly established law forbade Reed's threat to transfer Mr. Harbridge to a different prison in retaliation for his First Amendment-protected advocacy.

JURISDICTIONAL STATEMENT

Mr. Harbridge filed this action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Central District of California. The district court had jurisdiction over Mr. Harbridge's claims under 28 U.S.C. §§ 1331 and 1343. The district court dismissed the case against Defendant Reed on August 10, 2022. ER-3. Mr. Harbridge timely noticed this appeal on September 4, 2022. ER-347. *See* Fed. R. App. P. 4(a)(1)(A). This court has jurisdiction to review the district court's final order under 28 U.S.C. § 1291.

ISSUE PRESENTED

Whether, by 2003, clearly established law forbade a prison official from threatening to transfer a prisoner to a different institution in retaliation for his First Amendment-protected conduct.

STATEMENT OF THE CASE[1]

I. Factual Background[2]

Before his imprisonment, Christopher Harbridge had experience as a journalist. ER-15 n.14. Incarceration didn't deter Mr. Harbridge's tendency to speak up; after he arrived at the California State Prison in Los Angeles County (CSP-LAC), he gained "a reputation for filing grievances and writing complaint letters." ER-230 ¶ 14.

In June 2003, Mr. Harbridge wrote and distributed a letter to California Department of Corrections and Rehabilitation officials, government officials, prisoner advocate groups, and the media, alleging that CSP-LAC employees were committing fraud. ER-14 n.13; ER-233 ¶ 16; ER-64-71. Subsequently, Mr. Harbridge was found guilty of a

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[1] The substantive order under review in this appeal is the magistrate judge's report and recommendation, ER-5, which the district court subsequently adopted, ER-3. For ease of reference, this brief refers to the substantive order under review as that of the "district court."

[2] As the district court explained, "[m]any of the facts underlying [Mr. Harbridge's] claim are undisputed." ER-8. This brief principally relies on the district court's recitation of those facts, but where relevant, relies on additional facts as set out by Mr. Harbridge in his opposition to summary judgment and related factual filings, consistent with the standard of review at this stage.

disciplinary charge—in retaliation, he believed, for his advocacy—and placed in segregation. ER-214 ¶ 34; ER-102, ER-138.

Mr. Harbridge filed a grievance complaining that the charge and confinement were done in retaliation. ER-101-02; *see also* ER-113-18.[3] For the next three months, Mr. Harbridge filed multiple grievances with the prison, and assisted other prisoners in doing the same. He again contacted California state entities and elected officials, including the Department of Corrections, Internal Affairs, Senator Gloria Romero, the Inspector General, the Regional Director, Warden Yarborough, and Defendant Captain S.L. Reed, alleging misconduct within the prison. *See* ER-101-02, ER-106-09, ER-120-21, ER-124-25, ER-129-30, ER-134, ER-138, ER-175-76, ER-180-81, ER-193-94, ER-196-97.

A little over a month after his last letter, on October 21, 2003, Reed called Mr. Harbridge to her office. ER-13; ER-52-53.[4] There, Reed "recited

[3] Mr. Harbridge generally referred to his grievance submissions as "citizen's complaints," but they were properly-filed grievances on Form 602. *See* ER-15 & n.15.

[4] As the district court noted, Reed denies that this meeting occurred. ER-16. But, as the district court also noted, determining whose version of the facts is correct is a classic "credibility determination[] [that is] for the jury, not a court ruling on a summary judgment motion." *Id.*

a speech" wherein she commented that Mr. Harbridge had "filed several complaints and written many letters complaining about various procedures and acts of misconduct" at CSP-LAC. ER-52. She stated that he "must not be very happy" and "therefore she [was] going to transfer [him] to another institution." ER-13; ER-52.

Mr. Harbridge objected, responding that if she "transfer[red] [him] it would be retaliation" for exercising his rights to "fil[e] complaints and writ[e] letters." ER-13-14; ER-53. He reminded Reed that transfer to another prison would mean his father, who had a documented medical hardship, wouldn't be able to visit him. ER-53. Mr. Harbridge—who knew that Reed "would have no problem" transferring him if she wanted, ER-53; ER-220 ¶¶ 59(a), 59(b)—believed that Reed was "attempting to intimidate him to get him to stop writing letters and complaints." ER-22 n.19; ER-53.

As a result of Reed's threat, Mr. Harbridge "didn't do nearly as much activism type of work," and the grievances and letters he filed "were few and far between," so as not to risk retaliation. ER-243-44 ¶ 34. He stated that the fear of retaliation caused him to "think twice about whether [he] wanted to [file a grievance] or do another letter or whether

it was worth it," *id.*, and it "made him not want to publish anything," ER-15.

II. Procedural Background

Mr. Harbridge filed this action, pro se, against a number of prison and state officials, raising various claims including "systemic intimidation and retaliation against inmates who exercise their constitutional rights to complain about officer misconduct or to expose prison conditions." ER-267; ER-307. As relevant here, Mr. Harbridge alleged that Reed threatened to transfer him to another prison, farther from his family, in retaliation for his complaints. ER-307 ¶¶ 74-75; *see also* ER-8.

The district court adopted the magistrate's amended recommendation, over Mr. Harbridge's objections, and dismissed this claim. It held that Mr. Harbridge had failed to state a First Amendment claim because he alleged "no more than verbal threats against him," and therefore "his First Amendment activities were not chilled," because "he suffered no cognizable effects, as none of the threats alleged were carried out." ER-283. Ultimately, the district court dismissed all of Mr.

Harbridge's claims—either on a motion to dismiss or at summary judgment—and entered judgment against him.[5]

On appeal, this Court affirmed in part, reversed in part, and remanded. ER-254; *Harbridge v. Schwarzenegger*, 752 F. App'x 395 (9th Cir. 2018). It held that the district court erred by dismissing Mr. Harbridge's retaliation claim. *Harbridge*, 752 F. App'x at 398. The district court was wrong to conclude that Mr. Harbridge "failed to allege an adverse action that chilled his speech"; Reed's threat of transfer was "sufficiently adverse to state a retaliation claim even if the threat was never carried out." *Id.*

On remand, at summary judgment, the district court recognized that Mr. Harbridge presented a triable claim on the merits. ER-22-23. That is, Mr. Harbridge had presented enough evidence that a reasonable jury could find he had satisfied each prong of the five-part test for a prisoner retaliation claim: "that (1) 'a state actor took some adverse action . . . (2) because of (3) [the] prisoner's protected conduct, . . . that such action (4) chilled [his] exercise of his First Amendment rights, and

[5] ECF 101 at 43-44; ECF 106; ECF 144; ECF 146; ECF 243; ECF 248; ECF 249.

(5) the action did not reasonably advance a legitimate correctional goal.'" ER-19.

As to adverse action, the court declined Reed's invitation to "not consider the context" of the threat and instead held that "a reasonable jury could conclude that Reed's alleged statement was an implied threat to transfer Plaintiff if he continued writing complaints and filing grievances." ER-22. To hold otherwise, the court noted, would require "ignor[ing] Reed's alleged statement itself as well as Plaintiff's perception of it." ER-21 n.17.[6] As to causation—the requirement that Reed took the action "because of" Mr. Harbridge's speech or with the intent to chill it—a jury could find that Reed acted with "a retaliatory motive" and threatened Mr. Harbridge "because of his First Amendment activities." ER-30. As to protected conduct, the First Amendment guarantees the right to file prison grievances. ER-19. As to the chilling effect, a "jury could certainly find that [Reed's] threat . . . would chill a 'person of

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[6] And the court noted that Mr. Harbridge certainly perceived it as a threat: "Among other things, the day after the alleged threat was made, [Mr. Harbridge] filed a [grievance] against Reed . . . reciting Reed's alleged statement . . . and complaining that Reed . . . attempt[ed] to intimidate him to get him to stop writing letters and complaints." ER-22 n.19.

ordinary firmness' from exercising his First Amendment rights." ER-28. And as to the absence of a legitimate correctional goal, if (as a jury could find) Reed made the threat in retaliation for Reed's advocacy, that threat lacked a legitimate purpose. ER-26.

In sum, Mr. Harbridge put forth enough "evidence that Reed threatened him with transfer to a different prison if he continued to file grievances or write letters of complaint" to defeat summary judgment. ER-21-30. But notwithstanding the merits, the district court granted Reed summary judgment on qualified immunity grounds, holding that it was not clearly established until 2009 that "a correctional official's implicit threat to transfer an inmate for exercising his First Amendment rights constituted an adverse action sufficient to chill a person of ordinary firmness from pursuing future First Amendment activities." ER-36.

The court recognized that "the prohibition against retaliatory punishment was already clearly established law in the Ninth Circuit, for qualified immunity purposes," well before 2003. ER-35 (cleaned up). So was the prohibition against retaliatory prison transfer. *Id.* (citing *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995)). But the court believed that

statement of the law was insufficiently specific to alert Reed that the First Amendment would prohibit her retaliatory threat. In distinguishing Reed's conduct from earlier case law prohibiting similar conduct, the court drew two main distinctions. It believed that a reasonable officer in Reed's shoes wouldn't have known that her conduct would violate the Constitution because (1) some earlier cases involved *attempts* to transfer rather than *threats* to transfer; and (2) some earlier cases involved (in the court's estimation) *explicit* retaliatory threats rather than *implicit* ones. ER-38 n.29, ER-29. Those distinctions, the court believed, immunized Reed from liability. ER-41.[7] This appeal followed.[8]

[7] Mr. Harbridge objected to the magistrate judge's initial report and recommendation and Reed responded to those objections. ECF 302; ECF 305; ECF 308. The magistrate judge issued an amended, final, report and recommendation, ER-5, that was adopted by the district court, ER-3.

[8] The district court noted that Mr. Harbridge did not appear to seek injunctive relief against Reed and, in any event, that relief would be moot as Mr. Harbridge was transferred to another prison in 2005 and Reed has since retired. ER-41 n.32. Mr. Harbridge does not challenge this ruling on appeal.

SUMMARY OF THE ARGUMENT

The Constitution prohibits threats to retaliate for First Amendment-protected activity because such threats risk "chilling" constitutionally valuable speech. *Gomez v. Vernon*, 255 F.3d 1118, 1127-28 (9th Cir. 2001) (citing *Hines v. Gomez*, 108 F.3d 265, 269 (9th Cir. 1997)).

In 2001—two years before Reed's threat—this Court held that retaliatory threats to transfer a prisoner violate the First Amendment. *See Gomez*, 255 F.3d at 1127-28. That holding was no legal innovation; this Court would later hold that it was already "clearly established" by 2000 that retaliatory threats to transfer a prisoner would violate the First Amendment—indeed, that such threats contributed to "the very archetype" of a First Amendment claim. *See Rhodes v. Robinson*, 408 F.3d 559, 567-70 (9th Cir. 2005). And well before that, a long line of cases held that (1) retaliatory prison transfers violate the First Amendment and (2) credible threats to retaliate can violate the First Amendment. By 2003, then, Reed had more than "fair warning," *see Ballentine v. Tucker*, 28 F.4th 54, 64 (9th Cir. 2022), that the First Amendment would not

countenance her threat to transfer Mr. Harbridge in retaliation for his prison advocacy.

The district court—which recognized that Mr. Harbridge stated a trial-worthy claim on the merits—held otherwise because it believed that this Court didn't clearly proscribe Reed's conduct until *Brodheim v. Cry*, 584 F.3d 1262 (9th Cir. 2009), six years after Reed threatened Mr. Harbridge. It reached this conclusion by drawing novel and nonsensical distinctions: attempts to do something versus threats to do something, and explicit threats versus so-called "implicit threats." Neither distinction makes a constitutional difference. Case law and logic alike made clear that attempted or threatened action—all threatened action, whether blunt or nuanced—cause the same unconstitutional chill.

STANDARD OF REVIEW

This Court reviews de novo a district court's grant of qualified immunity at summary judgment. *Ballentine*, 28 F.4th at 61. Summary judgment on qualified immunity grounds is not proper unless the evidence allows for only one reasonable conclusion. *Id.*

To overcome qualified immunity, a plaintiff must show that the defendant (1) violated a federal statutory or constitutional right; and

(2) the plaintiff's rights were clearly established at the time the defendant acted. *Id.* at 61, 64. There does not need to be a prior case directly on point, but existing precedent must have placed the constitutional question beyond debate such that a reasonable official would have "fair warning" that the Constitution forbids her conduct. *Id.* at 64.

ARGUMENT

I. Clearly Established Law Prohibited Defendant Reed's Threat to Retaliate Against Mr. Harbridge for His Protected Conduct.

When she acted in 2003 to silence Mr. Harbridge's protected conduct, Reed had more than "fair warning" that her retaliatory threat would violate the First Amendment. The district court held otherwise only by drawing irrelevant distinctions.

A. By 2003, Clearly Established Law Forbade Threatening to Transfer a Prisoner in Retaliation for Protected Conduct.

In 2001—two years before Reed's threat—this Court held that retaliatory "threats of transfer" to a different prison facility violated the First Amendment. *See Gomez*, 255 F.3d at 1127-28.

In *Gomez*, this Court observed that prison advocacy is "not necessarily a risk-free proposition." *Id.* at 1122. The unconstitutional

"retaliatory acts" at issue in *Gomez* took a few forms. Prison officials transferred prisoners, "threatened to confine and discipline" one, fired two others from prison employment, and "intimidated" another into withdrawing a grievance. *Id.* at 1122-23.

In 1997, Bob Jones became a victim of another "retaliatory act": a threat to transfer. Jones had raised concerns with prison staff about the management of the prison law library. *Id.* at 1123. In response, prison staff attempted to transfer him to a different facility—but they never did transfer him. *Id.* at 1127. Instead, Jones yielded: "in the face of repeated threats of transfer because of his complaints," Jones "eventually quit his law library job." *Id.*

The *Gomez* decision did not equivocate about whether or why the threats against Jones offended the Constitution. "[A] retaliation claim," this Court reiterated, "may assert an injury no more tangible than a chilling effect on First Amendment rights." *Id.* (citing *Hines*, 108 F.3d 265). "It is the chilling effect" resulting from "threats of transfer," the Court concluded, that constituted "retaliat[ion] . . . in violation of [Jones's] First Amendment rights." *Id.* at 1127-28.

Gomez alone gave Reed "fair warning" that the Constitution forbade threatening to transfer Mr. Harbridge for his protected conduct. But *Gomez* resulted from a long line of cases that predetermined its result. These cases held that the First Amendment prohibited (1) retaliatory prison transfer; and (2) credible threats of retaliatory action. *See Pratt v. Rowland*, 65 F.3d 802, 807 (9th Cir. 1995) (retaliatory transfer); *Schroeder v. McDonald*, 55 F.3d 454, 461 (9th Cir. 1995) (same); *Rizzo v. Dawson*, 778 F.2d 527, 531 (9th Cir. 1985) (same); *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) (threats of retaliatory action "such as 'the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation'"); *Valandingham v. Bojorquez*, 866 F.2d 1135, 1141 (9th Cir. 1989) (threats of disciplinary action). Thus, even independent of *Gomez*, "the relevant principles were all clearly established long before the events in question, such that 'every reasonable official would have understood that what he is doing violate[d]' [Mr. Harbridge's] First Amendment right to be free from retaliation." *See Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1075 (9th Cir. 2012).

This Court's longstanding precedent holding that retaliatory transfers violate the First Amendment was enough to clearly establish the law for Reed's purposes. *See Schroeder*, 55 F.3d at 461 ("Specifically, the law clearly established that defendants cannot transfer a prisoner from one correctional institution to another in order to punish the prisoner for exercising his First Amendment right[s].").[9] That's because the First Amendment has long embraced the victims of unrealized threats—not only realized ones—within its protection. The First Amendment requires courts to "look through forms to the substance" of censorship to recognize that "the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" can offend the Constitution just like "formal legal sanctions" can. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66-67 (1963).

[9] *See also Rizzo*, 778 F.2d at 531 (holding that a prisoner stated a retaliation claim where he alleged "that his reassignment and subsequent transfer" to a different prison "were done in retaliation" for complaining about prison conditions); *Pratt*, 65 F.3d at 807 ("[I]t would be illegal for DOC officials to transfer and double-cell [the plaintiff] solely in retaliation for his exercise of protected First Amendment rights."); *Wood v. Beauclair*, 692 F.3d 1041, 1051 (9th Cir. 2012) (explaining that *Rizzo* "recogniz[ed] a First Amendment right of prisoners to be free from prison transfers or reassignments made in retaliation for filing grievances").

Accordingly, even apart from *Gomez*, this Court had held numerous times before 2003 that threats alone, independent of any actual punishment, violate the First Amendment if made in retaliation for, or to silence anticipated, protected conduct.

Consider *Valandingham*, decided in 1989. There, an officer "threatened" the plaintiff "with disciplinary action" if he continued to receive affidavits from fellow prisoners. *Valandingham*, 866 F.2d at 1141. He warned the plaintiff that "if he didn't shut his mouth he would . . . be removed from the law library" and told him that he "was not to communicate with any other inmates" about given topics. *Id.* (cleaned up). That threat triggered First Amendment protection.[10]

In 2000, this Court reaffirmed the same principle in *White*. There, it held that an abandoned retaliatory investigation violated the First Amendment. The Court recognized that the investigating agency "did not ban or seize" any property and "ultimately decided not to pursue either criminal or civil sanctions." *White*, 227 F.3d at 1228. But that didn't

[10] *Valandingham* also found a separate First Amendment violation where the defendant officers didn't even make any threats themselves but instead merely made the plaintiff vulnerable "to the threat of physical violence from other inmates" by labeling him a "snitch." 866 F.2d at 1138.

defeat the claim: "Informal measures, such as 'the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation,' can violate the First Amendment also." *Id.* (quoting *Bantam Books*, 372 U.S. at 67). The investigation, which consisted of nothing more than threats—"accusations of law-breaking, threatened subpoenas, improper broad demands for documents and information, and admonishments to cease nonfrivolous litigation"—violated clearly established law "founded on bedrock First Amendment principles and legal rules that this court and the Supreme Court have applied for decades, if not centuries." *Id.* at 1239.

In fact, threats—and their accompanying chilling effect—arguably constitute the heartland of the First Amendment's prohibition on retaliation, with actual retaliatory punishment as a sort of corollary. In *Shepard v. Quillen*, 840 F.3d 686 (9th Cir. 2016), for instance, the plaintiff's actual retaliatory placement in solitary confinement took a back seat. Instead, the Court focused on the *threat* of solitary: it asked what retaliation the plaintiff reasonably feared "at the time [he was] threatened," and decided that causing the plaintiff to "face[] the possibility" of administrative segregation satisfied the adverse action and

chilling effect prongs of a retaliation claim. *Id.* at 691.[11] *See also Hines*, 108 F.3d at 269 ("[T]he injury asserted is the retaliatory accusation's chilling effect on [the plaintiff's] First Amendment rights, not the additional confinement or the deprivation of the television.").

This mode of analysis makes sense for the same reason that prior restraints present "the most serious and the least tolerable" form of First Amendment repression, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976), more repugnant to free speech than punishment: somebody who has not yet been punished faces more incentive to self-censor than somebody whose punishment has come and gone. An already-transferred prisoner has no incentive to remain quiet. Indeed, if Reed *had* actually transferred Mr. Harbridge away from his family, what was left for him to fear? Because "the injury asserted" in this type of claim is the threat's "chilling effect" rather than an independent injury, *Hines*, 108 F.3d at 269, a credible threat is, if anything, a more worrying violation than a more conventional form of retaliation. *Cf. Brodheim*, 584 F.3d at 1271

[11] Both the decision and the conduct at issue in *Shepard* postdate the conduct at issue here, so *Shepard* did not (and need not) establish anything for our purposes. Rather, it illustrates the threat-centric way this Court often analyzes First Amendment retaliation claims.

("The power of a threat lies not in any negative actions eventually taken, but in the apprehension it creates in the recipient of the threat.").

No surprise, then, that in *Rhodes*, this Court held that a retaliatory "threat[] to transfer" a prisoner to another institution violated law "clearly established" as of 2000. *Rhodes*, 408 F.3d at 568-70.[12] Indeed, the *Rhodes* Court called the allegations in that case "the very archetype of a cognizable First Amendment retaliation claim." *Id.* at 568.

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The district court believed this Court didn't clearly proscribe Reed's threat until 2009 in *Brodheim*. *See* ER-38-39 ("[I]t was not until *Brodheim* in 2009 that the Ninth Circuit held that an implicit threat could be sufficient to qualify as an adverse action for purposes of a First

[12] The events at issue in *Rhodes* began in November 2000. *See* Appellees' Br. at 2, No. 03-15335, *Rhodes v. Robinson*, 408 F.3d 559 (9th Cir. 2005). As the district court recognized, "[e]ven though *Rhodes* was decided in 2005, *Rhodes* is relevant to the extent it addressed qualified immunity" because "the events in *Rhodes* predated Reed's alleged threat," ER-39 n.29, meaning that *Rhodes* evaluated the state of the law of which Reed had notice. *See also Sampson v. Cnty. of Los Angeles*, 974 F.3d 1012, 1020 (9th Cir. 2020) ("Although *Capp* was decided in 2019, it held that the right at issue was clearly established by August 2015. Therefore, under *Capp*, Sampson's First Amendment right was clearly established on November 2015—the relevant date here.") (internal citations omitted). In fact, *Rhodes*'s "clearly established" holding is itself a "binding opinion from [this] court" which this panel "must follow." *Id.* at 1021 n.4.

Amendment retaliation claim[.]'"). But, because of cases like *Gomez*, *Pratt*, *Valandingham*, *White*, and *Rhodes*, *Brodheim* did not understand itself to "establish" anything. Instead, *Brodheim* observed that this Court had "stated multiple times" that "a retaliation claim may assert an injury no more tangible than a chilling effect on First Amendment rights," citing exclusively pre-2003 cases for that proposition. *Brodheim*, 584 F.3d at 1269-70 (citing *Gomez*, 255 F.3d at 1127; *Hines*, 108 F.3d at 269; *Burgess v. Moore*, 39 F.3d 216, 218 (8th Cir. 1994)). And it explained that it saw "no reason" to apply "a different standard" to the context at hand. *Brodheim*, 584 F.3d at 1270. *Brodheim* added to the heap of cases making clear that the Constitution would forbid Reed's threat. But the heap well predated *Brodheim*—and the threat.

B. The District Court's Distinctions Fail.

In erroneously concluding that the law was not clearly established, the district court opinion seemed to draw two distinctions from this precedent. Neither distinction makes a constitutional difference. First, the district court concluded that, although *attempting* to transfer a prisoner in retaliation was a clearly established constitutional violation, *threatening* a transfer was not. *See* ER-38-39 n.29 (distinguishing *Gomez*

and *Rhodes* because they "involved retaliatory *action*"—failed attempts to transfer—rather than threats) (emphasis in original). Second, the district court concluded that, although *explicitly* threatening a prisoner with retaliatory transfer was a clearly established constitutional violation, "*implicitly*" doing so was not. *See* ER-38-39 ("[I]t was not until *Brodheim* in 2009 that the Ninth Circuit held that . . . an inmate 'need not establish that [a prison official's] statement contained an explicit, specific threat of discipline or transfer if he failed to comply.'").

The first line of reasoning simply misstates the law; the second mischaracterizes the facts and, in any event, draws a nonsensical distinction between explicit and so-called "implicit" threats.

i. The district court wrongly held that clearly established law forbade retaliatory attempts to transfer but not retaliatory threats to do the same.

To the extent the district court rested its qualified immunity analysis on a threats-versus-attempts distinction, it misunderstood the law. As explained above, clearly established First Amendment law as of 2003 forbade retaliatory threats, not merely actions.

The district court's sole ground for distinguishing *Gomez* and *Rhodes*—that they involved "*action*"—attempted transfer—rather than

threats, ER-38 n.29 (emphasis in original)—misreads those precedents and the line of Ninth Circuit law they generated.[13] In *Gomez*, the defendants argued that they didn't violate the First Amendment because they took no retaliatory action: "the transfers never took place." *Gomez*, 255 F.3d at 1127. But this Court disagreed. An attempt to transfer conveys a "threat[]" to transfer, and that "threat[]" causes "a chilling effect on First Amendment rights." *Id.* "It is the chilling effect" resulting from the "threats" of transfer—and not any actual punishment—that caused the relevant constitutional injury. *Id.* Same in *Rhodes*, where a retaliatory "scheduled transfer" that never occurred amounted to a "threat[] to transfer." *Rhodes*, 408 F.3d at 564, 568. It was that "threat"—and not the act of "schedul[ing]"—that violated the First Amendment. *Id.* at 568.

Both cases recognize that distinguishing "attempts" from "threats" makes little logical sense. Like a threat, the power of a failed attempt

[13] It also relies on a factual assumption that may or may not be accurate: that Reed did not, in fact, attempt to transfer Mr. Harbridge. She may have made such an attempt; Mr. Harbridge has no way of knowing. *See* ECF 305 at 7; ER-32 n.25. Regardless, what matters is that she intentionally caused Mr. Harbridge to fear transfer. She caused the same constitutional injury whether she instilled that fear via threat or attempt.

"lies not in any negative action[] eventually taken"—because none is—"but in the apprehension it creates" in its recipient. *Brodheim*, 584 F.3d at 1271. Because the chilling effect depends on the plaintiff's reasonable perception, that the *Gomez* and *Rhodes* defendants attempted rather than only threatened transfer was immaterial to the results in those cases.[14] Indeed, an attempt carries constitutional significance only insofar as it conveys a threat.

For that reason, this Court and district courts in the Circuit cite *Gomez* for the proposition that retaliatory threats—not only attempts—to transfer violate the First Amendment. *See, e.g.*, *Rhodes*, 408 F.3d at 568 (describing *Gomez* as "holding that 'repeated threats of transfer . . .' were sufficient to ground a retaliation claim"); *Brodheim*, 584 F.3d at 1269-70 (relying on *Gomez* for the proposition that "the mere *threat* of harm can be an adverse action, regardless of whether it is carried out") (emphasis in original); *Guardado v. Nevada*, No. 2:17-CV-00879-JCM (BNW), 2021 WL 4341942, at *2 (D. Nev. Sep. 23, 2021) (citing *Gomez* for

[14] If anything, failed attempts to transfer might embolden a plaintiff, who might begin to doubt an officer's ability to make good on her threat.

the proposition that "an implied threat of punishment is enough to chill").[15]

In fact, the district court itself appears to recognize the identity between threats and attempts. The district court believed that *Brodheim* established the unconstitutionality of threats to transfer. *See* ER-38-39. But *Brodheim*, like *Gomez* and *Rhodes*, involved a failed *attempt* to transfer. *Brodheim*, 584 F.3d at 1264, 1266. True, the defendant in *Brodheim* also levied a written threat—but because that threat merely "warn[ed]" the plaintiff "to be careful" without specifying a consequence, the only "threat to transfer" came from the failed transfer attempt. *See id.* at 1266. *Brodheim* and the district court's own reading of it, then, reinforce the constitutional insignificance of the distinction between attempts and threats.

[15] *See also Becker v. Carney*, No. 3:16-cv-05315-RBL-JRC, 2020 WL 5519342, at *6, *9 (W.D. Wash. July 15, 2020) ("In *Gomez v. Vernon*, the Court held that repeated (albeit ultimately unsuccessful) threats to have plaintiff transferred could form the basis for a retaliation claim."); *Miller v. Catlett*, No. 08-CV-2428 DMS PCL, 2009 WL 5811438, at *5 (S.D. Cal. Nov. 10, 2009) (citing *Gomez* for the proposition that "[a]dverse actions that are sufficient to ground a First Amendment retaliation claim include . . . repeatedly threatening 'transfer because of [the prisoner's] complaints about the administration of the [prison] library'"), *report and recommendation adopted in part, rejected in part*, 2010 WL 444734 (S.D. Cal. Feb. 1, 2010).

Here, Reed caused the exact same injury that offended the Constitution in *Gomez* and *Rhodes* (and *Brodheim*): she threatened Mr. Harbridge that she would transfer him to a different facility in retaliation for his complaints. Whether transfer was threatened or attempted, a reasonable person in Mr. Harbridge's shoes could have believed—as Mr. Harbridge in fact believed—that continued advocacy would result in transfer. And a reasonable officer in Reed's shoes would have understood that, just as she could not initiate a retaliatory transfer, neither could she threaten one.

ii. The district court drew a meaningless line between "explicit" and "implicit" threats.

To the extent the district court rested its qualified immunity analysis on an explicit-versus-implicit distinction, it both mischaracterized the facts and drew a nonsensical legal distinction.

First, the facts: Reed *explicitly* threatened Mr. Harbridge. Reed commented that Mr. Harbridge "must not be very happy" at the facility because he had "filed several complaints and written many letters complaining" about misconduct, and that "*therefore* she [was] going to transfer [him] to another institution." ER-13; ER-52 (emphasis added).

This Court already characterized these same allegations as alleging that "Reed threatened [Mr. Harbridge] with a prison transfer if he continued to write letters of complaint." *Harbridge*, 752 F. App'x at 398.[16] That was correct. It didn't take great deductive powers to interpret as a threat Reed's comment that Mr. Harbridge was complaining and that "therefore" Reed would transfer him. And the threat was far more explicit than the threat this Court characterized as "implicit" in *Brodheim*, 584 F.3d at 1266 ("I'd . . . like to warn you to be careful what you write."). *See also Okwedy v. Molinari*, 333 F.3d 339, 342 (2d Cir. 2003) (finding an unconstitutional "implicit threat" where the defendant pointed out that the plaintiff "derives substantial benefits from" billboards over which the defendant had authority and "call[ing]" on the plaintiff "to discuss further").

[16] That this Court previously considered the verified complaint rather than the summary judgment record makes no difference; the district court recognized that Mr. Harbridge's "description of the statement Reed allegedly made has remained constant" since that complaint. ER-23 n.21. Additionally, because Mr. Harbridge verified his complaint, *see* 28 U.S.C. § 1746, it operates as an affidavit for summary judgment purposes, ER-9 n.5; *Lopez v. Smith*, 203 F.3d 1122, 1132 n.14 (9th Cir. 2000) (en banc).

Next, the law: Courts rarely specify whether threats are explicit or "implicit" because it is an unhelpful distinction.[17] The power of a threat lies in the "apprehension" it creates in its recipient. *Brodheim*, 584 F.3d at 1271. As the district court itself noted, two identically phrased statements will carry entirely different meanings—and can therefore either create or alleviate "apprehension"—depending upon context. For instance, "whether we view a statement as threatening may turn on what we know about the *speaker*"; to "assess[] the threat level" of the statement "I'm going to take care of you," "it helps to know whether the speaker is Florence Nightingale or Tony Soprano." ER-23 n.20 (quoting *United States v. Hussaini*, 2022 WL 138474, at *8 (S.D. Fla. 2022)). And there "are countless, unseen" other factors "that inform how our brains come to perceive a situation as threatening." *Id.* An "otherwise-innocuous statement" might morph into a threat "only because of the 'tone of the

[17] Where courts do specify that a threat was implicit, they generally do so only to explain that an implicit threat would of course be unconstitutional. *See, e.g.*, *Okwedy*, 333 F.3d at 342 ("Plaintiffs' Free Speech Clause claim turns on the question of whether [the defendant's] letter . . . was an unconstitutional 'implied threat[ ] to employ coercive state power to stifle protected speech,' or a constitutionally-protected expression . . . of his own personal opinion." (quoting *Hammerhead Enters., Inc. v. Brezenoff*, 707 F.2d 33, 39 (2d Cir. 1983))).

[speaker's] voice,'" or "the speaker's affect, or because of something the speaker is holding . . . or doing . . . ." *Id.*

In other words, a threat derives its power from a dynamic interaction between two humans, not dead words on a page. A retaliation analysis focused only on phrasing, therefore, would be both over- and under-inclusive. It would risk imposing liability for statements neither intended nor perceived as threats, and it would immunize statements—like Reed's—both intended and perceived as threats. Instead, what matters is the fate threatened and why. Here, Reed conveyed both: transfer for speech.

Though it makes no sense even on the merits of the constitutional violation, the district court's "implicit" distinction is especially ill-suited as a ground for qualified immunity. Qualified immunity shields "mistaken but reasonable decisions," not "knowing" violations. *Hardwick v. Cnty. of Orange*, 844 F.3d 1112, 1119 (9th Cir. 2017).[18] But a retaliatory

[18] *Cf. Benavidez v. Cnty. of San Diego*, 993 F.3d 1134, 1152 (9th Cir. 2021) (where an officer intentionally "provides false information to obtain a search warrant . . . their judicial deception alone is sufficient to overcome their qualified immunity").

threat—made with the intent to silence First Amendment activity—is an equally "knowing" violation whether subtle or heavy-handed.

Thus, the admonition that qualified immunity is not an empty exercise in finding "an earlier case [that] mirrors the specific facts" at issue, *Ballentine*, 28 F.4th at 66, rings especially true in retaliation cases, where "[t]he precise nature of the retaliation is not critical to the inquiry," *Coszalter v. City of Salem*, 320 F.3d 968, 974-75 (9th Cir. 2003). Instead, distinctions from precedent bestow immunity only if a reasonable officer could believe they make a constitutional difference; otherwise, the law has achieved the qualified immunity touchstone of "fair warning." *Ballentine*, 28 F.4th at 66. Here, if Reed took "action designed to retaliate against and chill political expression," *Coszalter*, 320 F.3d at 975, she had more than "fair warning" that the First Amendment would condemn her threat—no matter the precision with which she articulated it.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand for trial.

Date: January 9, 2023

Respectfully Submitted,

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STATEMENT OF RELATED CASES

There are no related cases pending before this Court.

Date: January 9, 2023

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,948 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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