No. 24-5525

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GABRIEL BASSFORD,
Plaintiff-Appellee,

v.

KYLER NEWBY, ET AL.,
Defendants-Appellants,

and

CITY OF MESA, ET AL.,
Defendants.

On Appeal from the United States District Court
for the District of Arizona
No. 2:22-cv-00572-JAT
Hon. James A. Teilborg, *District Judge*

PLAINTIFF-APPELLEE'S RESPONSE BRIEF

Devi M. Rao
Warrington Sebree
RODERICK & SOLANGE MACARTHUR
JUSTICE CENTER
501 H Street NE, Suite 275
Washington, D.C. 20002
(202) 869-3434
warrington.sebree@macarthurjustice.org

Attorneys for Appellee Gabriel Bassford

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INTRODUCTION

Clearly established law prohibits police officers from arresting individuals in retaliation for exercising their First Amendment rights, which includes filming police performing their public duties. Defendant-Appellee, Officer Kyler Newby of the Mesa Police Department, violated this law when he arrested Plaintiff-Appellant, Gabriel Bassford, because he was filming police performing an investigation at a Circle K gas station.

The district court denied Newby qualified immunity, concluding that a jury could find that Newby lacked probable cause to arrest Mr. Bassford and exhibited retaliatory animus, and that the law prohibiting such retaliatory arrests was clearly established.

This interlocutory appeal presents a single question: whether the district court properly denied Newby qualified immunity in light of Mr. Bassford's clearly established right to be free from a retaliatory arrest that is unsupported by probable cause. It did, and this Court should affirm.

STATEMENT OF JURISDICTION

This Court's jurisdiction over an interlocutory appeal from the denial of qualified immunity is limited to "abstract issue[s] of law . . . [as to] whether the federal right allegedly infringed was 'clearly established'" *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996). Questions of "evidence sufficiency," or "which facts a party may, or may not, be able to prove at trial," are not appealable or properly raised in an interlocutory appeal from the denial of qualified immunity. *Johnson v. Jones*, 515 U.S. 304, 313 (1995). Instead, this Court's jurisdiction over an interlocutory appeal from the denial of qualified immunity at summary judgment is limited to the question of "whether the defendant would be entitled to qualified immunity as a matter of law, assuming all factual disputes are resolved, and all reasonable inferences are drawn, in plaintiff's favor." *Ballou v. McElvain*, 29 F.4th 413, 421 (9th Cir. 2022).

ISSUE PRESENTED

Whether the district court properly denied Newby qualified immunity because clearly established law prohibited Newby from arresting Mr. Bassford in retaliation for exercising his First Amendment rights.

STATEMENT OF THE CASE

I. Factual Background

On the night of October 9, 2021, Plaintiff, Gabriel Bassford, and three other individuals saw multiple Mesa Police Department (MPD) officers investigating a matter outside a Circle K gas station and stopped to film the police activity. ER-8. Mr. Bassford parked his car on the street, away from the investigation; started filming on a nearby public sidewalk; and continued recording as he slowly walked onto the station's parking lot. ER-8. As Mr. Bassford approached the station, MPD officers met with the station's security guard, John Dreschler. ER-8.

MPD Officer Kyler Newby was one of the officers investigating at the station. ER-8. Once Newby noticed Mr. Bassford filming, he pointed him out to Dreschler and said, "[Y]ou have six new customers out here. These guys are waiting to buy something with all their cameras." ER-8. Dreschler asked Newby if he knew who the individuals recording them were. ER-8. Newby told Dreschler that Mr. Bassford and others were "First Amendment 'auditors.'" ER-9.

During this encounter, Mr. Bassford was filming in the parking lot roughly forty-six feet away from the gas station's "No Trespassing" sign.

ER-9. The sign's text read only "NO TRESPASSING–A.R.S. 13-1502." ER-11. At any rate, the sign was not legible from the distance at which Mr. Bassford was standing, and was hidden by a "blue Amazon Pick Up Box." ER-11. Newby asked Mr. Bassford if he had seen the "No Trespassing" sign, and Mr. Bassford responded that he had not. ER-11. Mr. Bassford was never asked to leave, but would have been willing to if he was asked. ER-11. Regardless, Newby placed Mr. Bassford in handcuffs and later informed Mr. Bassford that he was arrested for trespassing. ER-10. As he sat on the curb in handcuffs, Newby seized Mr. Bassford's camera and placed it in Mr. Bassford's lap—effectively preventing Mr. Bassford from filming Newby. ER-11.

Officers transported Mr. Bassford to the Mesa Holding Facility and charged him with one count of third-degree criminal trespass in violation of Arizona Revised Statutes § 13-1502(A)(1), which requires "[k]nowingly" entering or remaining on property "after a reasonable request to leave." ER-10. The charge was ultimately dismissed. ER-11.

II. Procedural Background

Mr. Bassford, proceeding pro se, brought a 42 U.S.C. § 1983 action asserting federal constitutional claims and claims under Arizona state

law, against the City of Mesa; the City of Mesa Police Department, Sergeant Joseph Adams; City of Mesa Prosecutors John Doe and Lauren Ramirez; John Dreschler; and Officers Kyler Newby, Phillip Clark, and Michael Destefino. ER-6; Doc. 9 at 4-5. Screening Mr. Bassford's First Amended Complaint under 28 U.S.C. § 1915(e), the court held that he stated two Fourth Amendment claims for false arrest and unlawful imprisonment, a First Amendment retaliation claim, and a municipal liability claim. ER-7. The court dismissed Mr. Bassford's other claims, which are not at issue in this appeal. ER-7.

Despite the district court ruling that Mr. Bassford stated two Fourth Amendment claims, a First Amendment retaliation claim, and a municipal liability claim, defendants nevertheless moved to dismiss these claims, on both the merits and on qualified immunity grounds. Doc. 31 at 1. The court denied the motion, holding again that Mr. Bassford stated these claims and also that it was premature to determine whether the officers were entitled to qualified immunity. Doc. 47 at 4-5.

Defendants City of Mesa, Sergeant Adams, and Officers Newby, Clark, and Destefino moved for summary judgment on the merits of Mr. Bassford's First and Fourth Amendment claims and also asserted their

entitlement to qualified immunity. ER-6.[1] As relevant here, with respect to Mr. Bassford's false arrest claim, the district court found genuine disputes of material fact regarding whether Newby had probable cause to arrest Mr. Bassford for trespassing. ER-18. The district court carefully reviewed the record and, viewing the evidence in the light most favorable to Mr. Bassford, concluded that a jury could find that he did not see the "No Trespassing" sign (and told Newby this), did not know he was trespassing, and was willing to leave if asked. ER-18. On these facts, the district court found a reasonable jury could conclude that "Newby did not have sufficient knowledge or information" to reasonably believe that Mr. Bassford knowingly trespassed. ER-18. The court nevertheless granted Newby qualified immunity on this claim because, in the district court's view, if Newby mistakenly believed that Mr. Bassford knew he was trespassing, there is no law clearly establishing that such mistaken belief is unlawful under the circumstances. ER-20.

As to Mr. Bassford's First Amendment retaliation claim, however, the district court denied Newby's motion for summary judgment. The

[1] At one point, the district court order stated that Mr. Bassford brought a claim against the City of Yuma, ER-7, but this was a typographical error.

court recognized that "the First Amendment prohibits government officials from subjecting an individual to retaliatory actions for engaging in protected speech." ER-22 (citing *Nieves v. Bartlett*, 587 U.S. 391, 398 (2019)) (internal citation and quotation omitted). To make out a retaliation claim, the court noted that a plaintiff must generally first "plead and prove the absence of probable cause." ER-22 (citing *Nieves*, 587 U.S. at 401). The district court held that Mr. Bassford satisfied this element as "the [c]ourt ha[d] already determined there [were] genuine disputes of material fact regarding whether Defendant Newby had probable cause to arrest [Mr. Bassford]." ER-23. On causation, the district court concluded that a reasonable jury could find that Newby exhibited retaliatory animus to Mr. Bassford filming when he told the station's security guard, Officer Dreschler, that Mr. Bassford and others were "First Amendment auditors" and "not customers." ER-23.

Having held that a jury could find for Mr. Bassford on his First Amendment retaliation claim, the district court turned to whether the law was clearly established. ER-24. Newby argued he was "entitled to qualified immunity because there was no clearly established right for a person to continue recording while arrested and on private property

where the company posted 'No Trespassing' signs, where the person was not a store customer, and where the store's Security Officer determined that the individual was trespassing." ER-24 (quoting Doc. 77 at 13, Newby's Mot. for Summ. J). The district court concluded that Newby "mischaracterize[d] the right at issue." ER-24. At the appropriate level of generality, the district court held, the question is whether clearly established law protects Mr. Bassford's "right to be free from arrest for engaging in First Amendment activity . . . where there is no probable cause for the arrest." ER-24.

The district court answered this question in the affirmative. Citing two Supreme Court cases, *Nieves v. Bartlett*, 587 U.S. at 398; and *Hartman v. Moore*, 547 U.S. 250, 256 (2006), the district court concluded that "[i]t was clearly established in 2021 that in the absence of probable cause, a police officer cannot arrest an individual who is engaging in First Amendment activity in retaliation for engaging in that activity." ER-24. As a result, the court held that Newby was not entitled to qualified immunity on Mr. Bassford's First Amendment retaliation claim. ER-24.[2]

[2] The district court granted the City of Mesa summary judgment on Mr. Bassford's municipal liability (*Monell*) claim, concluding that Mr.

Newby noticed this interlocutory appeal challenging the district court's denial of qualified immunity. ER-4. This Court requested briefing on jurisdiction as well as on the merits. Dkt. 7.

SUMMARY OF THE ARGUMENT

Officer Newby arrested Mr. Bassford for exercising his First Amendment rights and without probable cause. The sole question raised in this appeal is whether Officer Newby is entitled to qualified immunity. He is not.

The district court properly conducted the qualified immunity inquiry under this Court's precedent. On the merits, the district court held that Mr. Bassford alleged sufficient facts to show that Newby lacked probable cause to arrest him and did so in retaliation to Mr. Bassford filming him. These factual determinations are not at issue in this interlocutory appeal. As to whether the law was clearly established, the district court correctly recognized that the law of the Supreme Court and this Circuit clearly established that "in the absence of probable cause, a

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Bassford did not present evidence that he suffered an injury because of Mesa Police Department Policy. ER-17. The court also granted summary judgment to Defendant Clark, concluding that there was no evidence of Clark's personal involvement in Mr. Bassford's arrest. ER-12. Neither ruling is at issue in this appeal.

police officer cannot arrest an individual who is engaging in First Amendment activity in retaliation for engaging in that activity." ER-24 (citing *Nieves*, 587 U.S. at 398; *Hartman*, 547 U.S. at 256). Accordingly, in a straightforward application of clearly established law, the district court denied Newby qualified immunity.

Rather than engage with this Court's clearly established precedent, Newby relies on non-binding and unpersuasive law in asserting two arguments, neither of which is persuasive.

First, Newby maintains that individuals' right to be free from retaliatory arrest does not extend to speech that occurs at a privately-owned business. This is doubly wrong. To start, this is not the level of generality at which this Court has articulated the clearly established law for this cause of action. And anyway, this Court has recognized that the government is prohibited from retaliating against someone for exercising their First Amendment rights at privately owned businesses such as an animal production facility, a shopping mall, a bank, and—as particularly relevant here—a gas station.

Second, Newby argues that he is entitled to qualified immunity on Mr. Bassford's First Amendment retaliation claim simply because the

district court granted him qualified immunity on Mr. Bassford's Fourth Amendment false arrest claim, and both claims touch on issues of probable cause. But, Newby fails to understand that qualified immunity for a false arrest claim is analytically distinct from a retaliatory arrest claim. The former centers around probable cause; the latter does not. In short, decades of this Circuit's clearly established law is more than enough for Newby to have known that retaliatory arrests because of First Amendment activities are a no-no. As such, the district court properly denied Newby qualified immunity. This Court should affirm.

ARGUMENT

I. Clearly established law prohibited Newby from arresting Mr. Bassford in retaliation for exercising his First Amendment rights.

A. The district court correctly concluded that the law was clearly established.

The district court held that "[i]t was clearly established in 2021 that in the absence of probable cause, a police officer cannot arrest an individual who is engaging in First Amendment activity in retaliation for

engaging in that activity." ER-23-24 (citing *Nieves*, 587 U.S. at 398; *Hartman*, 547 U.S. at 256). This holding was correct.[3]

In *Hartman*, a retaliatory prosecution case, the Supreme Court made clear that it is settled law that "the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out." *Hartman*, 547 U.S. at 256 (citing *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998)). More recently, in 2019, the Court in *Nieves* reiterated—this time in a retaliatory arrest case—that "'the First Amendment prohibits government officials from subjecting an individual to retaliatory actions' for engaging in protected speech." *Nieves*, 587 U.S. at 398 (quoting *Hartman*, 547 U.S. at 256).

This Court has also held the same, recognizing in *Ballentine v. Tucker*, 28 F.4th 54, 61 (9th Cir. 2022), that "[t]he First Amendment forbids government officials from retaliating against individuals for

[3] To the extent that Newby appears to dispute factual determinations made by the district court on its way to concluding that probable cause existed, *see, e.g.*, Opening Brief 34 [hereinafter OB] ("Officer Newby was not required to believe that Plaintiff—standing in the same location as Officer Newby while wearing spectacles—was unaware of the NO TRESPASSING signage approximately 15 yards away from Plaintiff[] . . . ."), this is not appropriate in this interlocutory appeal, *See Ballou*, 29 F.4th at 421, as Newby appears to concede elsewhere, OB 10.

speaking out." *See also Knox v. Southwest Airlines*, 124 F.3d 1103, 1107 (9th Cir. 1997) ("Unsurprisingly, it is clearly established that an arrest without probable cause violates a person's Fourth Amendment rights. It is equally clear that the First Amendment protects a significant amount of criticism against police." (internal citation omitted)).

And even prior to *Nieves*, in which the Supreme Court settled a circuit split and held that a plaintiff in a retaliatory arrest case must generally "plead and prove the absence of probable cause," *Nieves*, 587 U.S. at 402, this Circuit's precedent was even broader. In 2006, this Court in *Skoog*—which, notably, involved a retaliatory arrest for recording police at a gas station—established "the right of an individual to be free of police action motivated by retaliatory animus but for which there was probable cause." *Skoog v. Cnty. of Clackamas*, 469 F.3d 1221, 1235 (9th Cir. 2006); *see also Ford v. City of Yakima*, 706 F.3d 1188, 1195-96 (9th Cir. 2013) (recognizing that "[t]his Court's 2006 decision in *Skoog* established that an individual has a right to be free from retaliatory police action, even if probable cause existed for that action."); *Ballentine*, 28 F.4th at 66 ("*Skoog* established the First Amendment right to be free from retaliatory law enforcement action even where probable cause

exists.").[4] In other words, for decades "binding Ninth Circuit precedent gave fair notice that it would be unlawful to arrest Plaintiff[] in retaliation for [his] First Amendment activity." *Id.* at 65. The district court was thus correct in denying Newby qualified immunity.

B. Newby's arguments to the contrary are not persuasive.

In the face of this straightforward application of the qualified immunity doctrine and decades of biding precedent, Newby makes two arguments. Neither is persuasive.

1. Newby is wrong that clearly established law does not protect speech that occurs on private property.

Newby argues that the law of the Ninth Circuit was not "sufficiently clear that every reasonable officer would understand that what he is doing is unlawful," OB 21, because "[t]his Court's case law did not extend that protected right to film police from private lands owned by a private

[4] As this Court recognized in *Ballentine*, "*Nieves* abrogated *Ford* and *Skoog* to the extent those cases held that a plaintiff can prevail on a First Amendment retaliatory arrest claim regardless of whether probable cause existed for the arrest." *Ballentine*, 28 F.4th at 67 n.1. But the point is just that this Circuit has broadly recognized for nearly twenty years a clearly-established right to be free from retaliation for exercising one's First Amendment rights.

business." OB 15 (emphasis removed). But, as the district court concluded, Newby "mischaracterize[s] the right at issue." ER-24.

In fact, this Court in *Ballentine* rejected the very same argument that Newby advances here—that the law on retaliatory arrests was not clearly established because "the facts of then-existing case law are distinguishable from the facts of this case." *Ballentine*, 28 F.4th at 66. This Court reiterated that "[a] right can be clearly established despite a lack of factually analogous preexisting case law . . . ." *Id.* (citing *Ford*, 706 F.3d at 1195). "The question is not whether an earlier case mirrors the specific facts here." *Id.* Rather, the clearly established inquiry focuses on whether "the state of the law at the time gives officials fair warning that their conduct is unconstitutional." *Id.* (quoting *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1064 (9th Cir. 2013)). *Ballentine* and the cases it cites demonstrates that in retaliatory arrest cases, the clearly established inquiry does not turn on matching the facts of the arrest in question to the arrests in prior cases because the prohibition on retaliation for First Amendment activity is so clear that "any reasonable officer would understand that police action" undertaken in retaliation "falls squarely within the prohibition." *Id.*

Newby's case support for an alleged need for additional "specificity" are not on point. OB 21-22. The cases Newby cites are almost uniformly in the Fourth Amendment context, in which the Supreme Court has "stressed that the specificity of the rule is especially important . . . ." *District of Columbia v. Wesby*, 583 U.S. 48, 64 (2018) (internal quotation and citation omitted). This specificity may be appropriate for defining clearly established law for Fourth Amendment claims due to the "hazy border between excessive and acceptable force . . . ." *Kisela v. Hughes*, 584 U.S. 100, 105 (2018). However, for First Amendment retaliation claims, the question is not whether there was a clearly established right to record the police in this particular situation, but, as the district court appropriately concluded, whether it was clearly established that "in the absence of probable cause, a police officer cannot arrest an individual who is engaging in First Amendment activity in retaliation for engaging in that activity." ER-24.

At any rate, even on its face, Newby's assertion that Mr. Bassford lost First Amendment protections because he was on private property is incorrect. That is, if what Newby requires is a case where a First Amendment retaliation claim is premised on protected activity on private

property, *Reichle v. Howards,* 566 U.S. 658 (2012), puts this argument to rest.

In *Reichle*, the plaintiff was arrested in a shopping mall after approaching Vice President Richard Cheney and sharing his disapproval of the Bush administration's foreign policy. *Id.* at 660-61. The Court did not disturb the Tenth Circuit's conclusion that the plaintiff survived summary judgment on his First Amendment retaliatory arrest claim, since there was "a material factual dispute regarding whether [defendants] were substantially motivated by [the plaintiff's] speech when they arrested him." *Id.* at 662-63. That is, it took as a given that a retaliatory arrest claim can arise on private property—here, the mall.

And *Reichle* is doubly instructive here, because it provides another example of the appropriate level of generality at which courts should approach the clearly established inquiry. *See supra* Section I.A. Specifically, as to qualified immunity, the Court in *Reichle* defined the right as simply the "right to be free from a retaliatory arrest that is otherwise supported by probable cause." *Reichle*, 566 U.S. at 665. Indeed, the Court described this articulation of the right in question as

"particularized." *Id.*[5] That is, the articulation of clearly established law was at the same level as the district court appropriately analyzed it here—asking not about the individualized facts of the arrest.

Instead of grappling with any of this precedent, Newby instead cites largely non-binding, out-of-circuit district court cases in his plea for qualified immunity. OB 14-15. And to the extent he cites precedent from the Supreme Court and this Court, they are off-base. Take *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 567-70 (1972), which Newby highlights (at OB 14). That case rejected a direct First Amendment speech claim—not a retaliation claim—against a private company that restricted the distribution of handbills on its property, and the Court noted that the First Amendment "safeguard[ed] the rights of free speech and assembly by *limitations on state action*, not on action by the owner of private property used nondiscriminatorily for private purposes only." *Id.* at 567

[5] Ultimately, the Court granted the officer qualified immunity because the Court or relevant circuit precedent had "never recognized a First Amendment right to be free from a retaliatory arrest *that is supported by probable cause*." *Reichle*, 566 U.S. at 664-65 (emphasis added). Because the district court determined a jury could find that Newby *lacked* probable cause to arrest Mr. Bassford, ER-18, this ruling is irrelevant to the question at hand, and Newby's conduct was clearly established by *Hartman*, 547 U.S. at 256, and *Nieves*, 587 U.S. at 398. *See supra* at 12.

(emphasis added). For the same reason, Newby's citation (at OB 14) to *Manhattan Cmty Access Corp. v. Halleck*, 587 U.S. 802, 813 (2019) is of no avail. That case also rejected a First Amendment speech claim against a private corporation, and the Court similarly noted that "the Free Speech Clause prohibits only *governmental* abridgment of speech." *Id.* at 808. Here, there is no question that Newby being a police officer makes him a government actor. As such, *Lloyd* and *Manhattan* are irrelevant because police officers are subject to the prohibitions of the First Amendment regardless of where their conduct takes place.[6]

And in fact, decades of this Court's precedent confirms that the government is prohibited from infringing on First Amendment-protected activity that takes place at private businesses. *See Knox*, 124 F.3d at 1108 (holding that the First Amendment protects "demanding that the police

[6] Newby's use (at OB 15) of *Askins v. U.S. Dep't. of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018), also fails to persuade. The case is irrelevant because the claim at issue was a First Amendment prior restraint claim, not a retaliation claim. *Id.* at 1043. Additionally, the Court's identification of places that are public forums was illustrative, not exhaustive. *Id.* at 1044 (identifying "[t]he government's ability to regulate speech in [] traditional public forum[s], *such as* a street, sidewalk, or park . . . ." (emphasis added)). And in any event, this exemplary list is dicta, since the Court issued no holding with regard to what a public forum is—rather, the Court remanded for factual determinations. *Id.* at 1038.

identify themselves" in an airport after being ordered to leave.); *see also Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184, 1190 (9th Cir. 2018) (holding that a statute banning audio and video recordings of a food production facility's operations was unconstitutional because it "cover[ed] protected speech under the First Amendment . . . ."), *abrogated on other grounds by Project Veritas v. Schmidt*, 125 F.4th 929, 945-46 (9th Cir. 2025); *Beck v. City of Upland*, 527 F.3d 853, 868 (9th Cir. 2008) (holding triable issue on First Amendment retaliation claim premised on "brusque comments to [Police Chief] at the bank opening party."). These cases show that this Court is concerned with *why* an officer exercises their discretion—was it in retaliation?—not *where* it happened.

Additionally, if Newby is claiming that the even narrower *right to record the police*—including on private property—is not clearly established in this Circuit, *see* OB 17-18, he is wrong. Nearly twenty years ago in *Skoog*, this Court recognized that an individual *at a gas station* had a First Amendment right to record the police and be free from police action motivated by retaliatory animus.

See Skoog, 469 F.3d at 1235.[7] And indeed, more recently, this Court confirmed that individuals have a clearly established right to record police officers performing their duties "where he undoubtedly had the right to be." *Bernal v. Sacramento County Sheriff's Department*, 73 F.4th 678, 699 (9th Cir. 2023) (holding that the plaintiff, who stood in the front yard of his home, had a clearly established right to record police).

In the face of this Circuit's settled law, Newby's version of qualified immunity would absurdly require Mr. Bassford to point to a clearly established "First Amendment right to film from private land displaying No Trespassing signage and containing the private company's security guard who determined that [Mr. Bassford] and the others filming from the property were trespassing and loitering." OB 23. However, this Circuit has been clear that when a case involves "mere application of settled law to a new factual permutation . . . we assume an officer had

[7] In *Skoog*, the officer was granted qualified immunity because, at that time, the law was not clearly established. *See Skoog*, 469 F.3d at 1235. However, this is not relevant to this case because *Skoog* itself clearly established the law. *Id.* (stating "[i]n this case, we define the right as the right of an individual to be free of police action motivated by retaliatory animus but for which there was probable cause."); *see also Ballentine*, 28 F.4th at 66 ("*Skoog* established the First Amendment right to be free from retaliatory law enforcement action even where probable cause exists.").

notice that his conduct was unlawful." *Ford*, 706 F.3d at 1196 (citing *Eng v. Cooley*, 552 F.3d 1062, 1076 (9th Cir. 2009)) (internal quotation and citation omitted). As the district court concluded, a jury could find that Mr. Bassford was not trespassing at the time of his arrest because he had a right to be at the Circle K and, like the plaintiffs in *Skoog* and *Bernal*, he had a clearly established right to record the police. ER-18. And because officers are not required to be "aware of the fine points of First Amendment law," this is enough for Newby "to have known that he was exercising his authority in violation of well-established constitutional rights." *Duran v. City of Douglas, Ariz*, 904 F.2d 1372, 1378 (9th Cir. 1990).

2. Newby's attempt to launder the district court's false arrest qualified immunity analysis into the analysis for Mr. Bassford's First Amendment retaliation claim fails.

Newby contends that because he received qualified immunity on Mr. Bassford's false arrest claim, he should also be entitled to qualified immunity on Mr. Bassford's First Amendment retaliation claim. OB 27. Specifically, Newby argues that because the district court concluded that the lack of probable cause to arrest Mr. Bassford for trespassing would not have been clear to every reasonable officer for purposes of Mr.

Bassford's false arrest claim, the law could not possibly be clearly established as to his retaliatory arrest claim. OB 24. But Newby's attempt to equate the probable cause analysis for purposes of a Fourth Amendment claim and a First Amendment claim fails. That is because, for purposes of assessing clearly established law, probable cause functions very differently in a Fourth Amendment false arrest claim than in a First Amendment retaliation claim.

Start with a false arrest claim. The Fourth Amendment requires an arrest to be supported by probable cause. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Id.* So, for a false arrest claim to succeed under the Fourth Amendment, a plaintiff must plead and prove that there was *not* probable cause to arrest him. *See Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1097 (9th Cir. 2013) ("A claim for unlawful arrest is cognizable under § 1983 as a violation of the Fourth Amendment, provided that the arrest was without probable cause or other justification."). In short, since a false arrest claim is premised on the falsity of that arrest, the existence or

absence of probable cause is the whole ball game. Because of this, when courts reach prong two of the qualified immunity analysis for a false arrest claim, this Court has explained, as the district court noted, that "qualified immunity applies when it was objectively reasonable for an officer to believe that he or she had probable cause to make the arrest." ER-20 (quoting *Hill v. City of Fountain Valley*, 70 F.4th 507, 516 (9th Cir. 2023)). "Framing the reasonableness question somewhat differently, the question in determining whether qualified immunity applies is whether all reasonable officers would agree that there was no probable cause in this instance." *Hill*, 70 F.4th at 516.

Contrast a First Amendment retaliatory arrest claim. For such a claim, lack of probable cause is not the be-all-and-end-all, but merely a "threshold showing . . . ." *Nieves*, 587 U.S. at 408. Indeed, the Supreme Court has made clear that a First Amendment retaliatory arrest claim can proceed even where probable cause to arrest exists. *Id.* at 406.[8]

[8] Specifically, in *Nieves*, the Court announced an exception to the general requirement that a plaintiff prove the absence of probable cause when "officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Nieves*, 587 U.S. at 407. The Court carved out this exception to counter the "risk that some police officers may exploit the arrest power as a means of suppressing speech." *Id.* at 406 (citing

Because probable cause is a "threshold showing" *Id.* at 408, and not the central question in a retaliatory arrest case, at prong two of the qualified immunity analysis the question is whether the law is sufficiently clear such that "[a] reasonable officer . . . had fair notice that the First Amendment prohibited arresting [p]laintiffs for the content of their speech, notwithstanding probable cause." *Ballentine*, 28 F.4th at 67.

Newby, though, without grappling with these distinctions, would have this Court port over the qualified immunity ruling from one claim to another. The alleged case support he provides are non-binding, unpersuasive, and, to make matters worse, are actually unfavorable to his position. For example, Newby cites *Keenan v. Tejeda*, 290 F.3d 252, 262 (5th Cir. 2002), OB 29; however, in that case, the Fifth Circuit actually *denied* the defendants qualified immunity on plaintiff's First Amendment retaliation claim because factual issues existed as to whether probable cause existed—exactly the posture of this case. Additionally, Newby's block quote (at OB 28) from the unpublished

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Lozman v. Riviera Beach, 585 U.S. 87, 99 (2018)); *see also Gonzalez v. Trevino*, 602 U.S. 653, 658 (2024) (clarifying that although the exception applies if there is "very specific comparator evidence," courts should not require "virtually identical and identifiable comparators . . . .").

opinion in *Jennings v. Smith*, No. 23-14171, 2024 WL 4315127, at *1, *2 (11th Cir. Sept. 27, 2024), is irrelevant as that passage pertains to *a false arrest claim*, not a First Amendment retaliation claim. Furthermore, the Eleventh Circuit in *Jennings* actually allowed the plaintiff's retaliatory arrest claim to proceed because the plaintiff provided sufficient evidence for a jury to find that "speech [was] a motivating factor for the arrest"—again, exactly the posture of this case. *Id.* at *5. Finally, *Just v. City of St. Louis*, 7 F.4th 761, 769 (8th Cir. 2021), *see* OB 29, is distinguishable because, upon finding that the officer had probable cause to arrest, the court held that the plaintiff's retaliatory arrest claim failed on the merits, so the court did not reach the question of whether the officer violated clearly established law.

In contrast, here, the district court concluded that "there are genuine disputes of material fact regarding whether Defendant Newby had probable cause to arrest [Mr. Bassford]," ER-23, and properly went on to consider whether Newby violated clearly established law. In short, these cases—in addition to being out-of-circuit—are irrelevant to the question at hand. Because the law of this Circuit clearly established that "the First Amendment prohibit[s] arresting [p]laintiffs for the content of

their speech, notwithstanding probable cause," *Ballentine*, 28 F.4th at 67, Newby is not entitled to qualified immunity.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Date: February 12, 2025

Respectfully Submitted,

/s/ Warrington Sebree

Devi M. Rao
Warrington Sebree
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
501 H Street NE, Suite 275
Washington, D.C. 20002
(202) 869-3434
warrington.sebree@macarthurjustice.org

Attorneys for Appellee Gabriel Bassford

CERTIFICATE OF COMPLIANCE

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

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/s/ Warrington Sebree
Warrington Sebree

Attorney for Appellee
Gabriel Bassford

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Appellee agrees that there are no cases related to this appeal.

/s/ Warrington Sebree
Warrington Sebree

Attorney for Appellee
Gabriel Bassford

CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2025, 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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Warrington Sebree

Attorney for Appellee
Gabriel Bassford

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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