No. 23-55812

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOLIE SAVAGE,
Plaintiff-Appellee,

vs.

PAUL SEGURA, et al.,
Defendants-Appellants,

and

JEFF PIPER, et al.
Defendants.

On Appeal from the United States District Court
For the Central District of California

Civil Case No. 2:21-cv-08067-VAP-PD
The Honorable Virginia A. Phillips, District Judge

CORRECTED ANSWERING BRIEF OF PLAINTIFF-APPELLEE

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INTRODUCTION

On July 28, 2020, Jolie Savage attended a peaceful protest against police brutality outside the Whittier Police Station. The protest was a counter-demonstration to a "Police Appreciation Parade" being held at the same time. Whittier Police Department (hereinafter "WPD") officers closed down the street in front of the station to regular vehicular traffic to allow for the car caravan of pro-police demonstrators. Pedestrians were allowed to walk through the street, including between cars, freely.

Throughout the event, WPD officers fraternized with the pro-police demonstrators. Several pro-police demonstrators became aggressive with the counter protesters, physically pushing and yelling threats of violence at them. They also repeatedly violated the vehicle code. No pro-police demonstrators were arrested or cited during the event.

During the protest, Savage, along with other counterdemonstrators, verbally expressed her criticism of law enforcement by yelling at law enforcement officers and pro-police demonstrators, including yelling obscenities. Savage did not engage in violence or threaten to engage in violence. At one point, Savage briefly stood in front of two cars, both of which were traveling at a very slow speed in the pro=police car caravan and came to a stop when Savage approached. Savage yelled

at the cars, expressing her opinions on law enforcement. No officer instructed Savage to move away from the cars or otherwise intervened at that time.

Appellants Zuhlke and Robert observed the parade and counter-protest from the roof of the WPD station. They radioed to Appellants Przybyl and Segura that Savage should be arrested for blocking traffic. Upon receiving this information, Appellants Przybyl and Segura ordered that Savage be arrested. Segura formed an arrest team of Appellants Draper and Goodman, and instructed them to arrest Savage. The underlying alleged offense used to justify the arrest of Savage was tantamount to "jaywalking" (Vehicle Code 21954(A)).

As seen on video, Draper and Goodman intentionally approached Savage by surprise, forcefully grabbed her by her arms and dragged her a few feet. Appellants Draper and Goodman pushed Savage onto the ground. Once Savage was on the ground, Draper and Goodman continued to restrain her by holding onto her arms and wrists. Goodman moved his hand close to Savage's nose and mouth, causing her to fear that he was going to cover her nose and mouth. Fearing for her life, Savage attempted to bite Goodman's hand. Goodman then smashed Savage's face into the ground by pushing his forearm into her face.

Draper and Goodman turned Savage over onto her stomach while tightly gripping her arms. Draper used his bodyweight to push his knee into her back for

approximately eight seconds, causing Savage to struggle to breathe. Draper and Goodman then handcuffed Savage so tightly that it caused her arm to bleed.

As a result of the force used in arresting Savage, she was diagnosed with an elbow fracture and nerve damage, which required surgery to release nerve compression in her elbow. She also suffered multiple cuts and bruising on her arms, wrists, elbow and lips.

Recognizing the fact-intensive nature of Savage's claims, Judge Phillips denied summary judgment on Savage's unlawful arrest, excessive force, and First Amendment retaliation claims. (2-ER-085:7-106:3, 110:16-114:17). Judge Phillips also denied summary judgment on the basis of qualified for these claims because Savage's constitutional rights were clearly established at the time of her violent arrest. (2-ER-106:5-110:14, 114:19-115:14).

STATEMENT OF JURISDICTION

This Court has jurisdiction over an interlocutory appeal of the District Court's denial of qualified immunity to Appellants Segura, Goodman, Draper, Przybyl, Zuhkle, and Robert to the extent the appeal involves questions of law; which here is limited to the question of whether Appellee Savage's rights were clearly established at the time Appellants forcefully arrested her. Dkt. No. 2 at 1 ("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.'" (quoting *Ballou v. McElvain*, 29 F.4th 413, 421 (9th Cir. 2022) (citation and quotations omitted))).

This Court "may not review any 'portion of a district court's summary judgment order that, though entered in a 'qualified immunity' case, determines only a question of 'evidence sufficiency,' i.e., which facts a party may, or may not, be able to prove at trial.'" *Peck v. Montoya,* 51 F.4th 877, 885 (9th Cir. 2022). Arguments that the court's findings regarding material facts are not supported by the record, or that, contrary to the District Court's opinion, a factual dispute does or does not exist, are "categorically unreviewable on interlocutory appeal," and must be dismissed for lack of jurisdiction. *George v. Morris*, 736 F.3d 829, 836 (9th Cir. 2013).

In this appeal, the Court's review is limited to the question of whether Savage's rights were clearly established at the time Appellants forcefully arrested her because the District Court ruled that there were genuine issues of material fact that precluded granting summary judgment on Savage's Fourth Amendment unlawful arrest and excessive force and First Amendment retaliation claims. (2-ER-098:9-11, 106:1-3, 111:8-11, 111:17-18). Where "the district court found genuine issues of fact concerning the reasonableness of [Appellants'] actions, [this

Court's] review is limited to determining whether clearly established law existed at the time of the incident that [Appellants'] actions could have violated." *Watkins v. City of Oakland*, 145 F.3d 1087, 1091 (9th Cir. 1998); *see, e.g.*, *Cunningham v. Gates*, 229 F.3d 1271, 1288 (9th Cir. 2000), *cert. denied*, 538 U.S. 960 (2003) ("Because the district court found material factual disputes . . . we lack jurisdiction to review whether the shooting officers are entitled to qualified immunity. (citation omitted) Thus, for purposes of this opinion, we must assume that the plaintiffs can prove that they suffered a constitutional injury.").

STATEMENT OF THE ISSUES

Appellee submits the following statement of issues:

1. Whether the District Court correctly denied Appellants qualified immunity based on finding it no reasonable officer would believe they had probable cause to arrest a protester who was standing around on the street after briefly standing in front of two slow moving cars in a car caravan demonstration, did not disobey any police order to move away from the cars, and never engaged in violence?
2. Whether the District Court correctly denied Appellants qualified immunity based on finding that it was clearly established, as of July 2020, that a Fourth Amendment violation can exist where officers forcefully grab an individual by surprise, drag them, push them to the

ground, forcefully restrain them, push their face into the ground, push a knee into their back, and tightly handcuff back?

3. Whether the District Court correctly denied Appellants qualified immunity based on finding that it was clearly established, as of July 2020, that a First Amendment violation can exist where officers arrest an individual in retaliation for verbally expressing criticism of law enforcement?

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

On July 28, 2020 Jolie Savage attended a peaceful protest against police brutality outside the Whittier Police Station and the blocks surrounding the police station. (Appellants' Motion to Transmit Physical Exhibits ("Motion to Transmit"), Ex. 2 at 2:10-4:17). The protest was a counterdemonstration to an unpermitted "Police Appreciation Parade" car caravan being held at the same time. (*Id.*; 3-ER-572 at ¶¶5-6, 8). Prior to the event, Appellant Przybyl created an Operations Plan that detailed how the Whittier Police Department (hereinafter "WPD") would respond to the anti-police demonstrators. (2-ER-289-303). WPD officers closed down Washington Avenue to regular vehicular traffic to allow for the car caravan of pro-police demonstrators. (Motion to Transmit, Ex. 2 at 2:10-4:17; 3-ER-573, ¶9).

The cars drove at a slow pace down the street. (Motion to Transmit, Ex. 6 at 9:48-11:47, Ex. 7 at 0:52-10:11). Many vehicles in the caravan voluntarily stopped to speak to, wave to, honk for, or otherwise show support for the WPD officers who were standing outside the station. (Motion to Transmit, Ex. 8 at 0:00-0:08, 1:40-2:00, 5:52-6:02, 6:35-6:40, 7:38-9:14, Ex. 6 at 0:48-59, 1:54-2:00, Ex. 7 at 1:08-2:13; 2:45-6:51, 9:33-39). Both pro-police demonstrators and the counterdemonstrators were allowed to walk through the street, including between cars, freely. (2-ER-255:3-9; Motion to Transmit, Ex. 5). Numerous demonstrators stood in front of the cars. (Motion to Transmit, Ex. 9 at 6:55-7:25; 2-ER-255:3-9). Savage felt physically safe in the middle of the street because the street was closed off to traffic. (2-ER-287 at 130:7-14). She would not have stood in the street had it not been blocked off to traffic. (2-ER-287 at 130:12-14).

WPD officers allowed vehicles in the pro-police caravan to violate numerous vehicle code sections in the street. (Motion to Transmit, Ex. 6 at 1:02-1:19, 2:52-3:00, 5:22-6:14, 11:07-11:47, Ex. 7 at 1:45-2:14; 3:44-4:56, Ex. 9 at 3:07-4:20, 4:48-5:54). For example, WPD officers allowed vehicles in the pro-police caravan to drive in the opposing lane of traffic and make u-turns in the middle of the street. (*Id*). *See* Cal. Veh. Code §§ 21651(b), 22102. Throughout the event, WPD officers fraternized with the pro-police demonstrators, hugging, fist bumping, cheering for, talking with, and waving to them. (Motion to Transmit, Ex.

8 at 0:00-0:08, 1:40-2:00, 5:52-6:02, 6:35-6:40, 7:38-9:14, Ex. 6 at 0:48-59, 1:54-2:00, Ex. 7, Ex. 9). Several pro-police motorists involved in the parade became aggressive with the protesters, physically pushing and yelling threats of violence at anti-police demonstrators. (Motion to Transmit, Ex. 9 at 3:07-4:20, 4:48-5:54, Ex. 6 at 5:22-6:14; 2-ER-249:16-251:8, 252:22-253:19). No pro-police demonstrators were arrested or cited during the event. (2-ER-306:9-309:6).

During the protest, Savage, along with the numerous other demonstrators, walked down Washington Avenue, in the street and next to the cars, as others walked in between the cars. (Motion to Transmit, Ex. 9 at 6:55-7:25, Ex. 5 at 4:00-6:36; 2-ER-279 at 43:4-45:19; 2-ER-255:3-9). Savage verbally expressed her criticism of law enforcement by yelling at law enforcement officers and pro-police demonstrators, including yelling obscenities. (Motion to Transmit, Ex. 5 at 4:00-6:36; 2-ER-279 at 43:4-45:19). Savage did not engage in violence or threaten to engage in violence. (2-ER-312:12-23; 2-ER-318:16-23; 2-ER-247:21-24). As the pro-police car caravan was proceeding down Washington Avenue, Savage briefly stood in front of two cars. (Motion to Transmit, Ex. 1 at 0:05-0:09, Ex. 2 at 4:26-6:37). The first car that Savage stood in front of began to travel at a very slow speed and came to a stop as Savage walked towards the car. (Motion to Transmit, Ex. 5 at 4:24-5:32). The second car likewise was traveling at a very slow speed and came to a stop before Savage walked in front of it. (Motion to Transmit, Ex. 5 at

5:54-6:26). Savage yelled at the cars, expressing her opinions on law enforcement. (Motion to Transmit, Ex. 5 at 4:24-6:26, Ex. 12). Savage never threatened any of the motorists or engaged in violence against the motorists. (2-ER-312:12-15; 2-ER-318:16-23; 2-ER-247:21-24). While Savage stood in front of the cars, other vehicles and pedestrians also blocked the cars' ability to proceed. (Motion to Transmit, Ex. 5 at 4:24-6:26, Ex. 12). No Appellant or WPD officer instructed Savage to move away from the two cars, warned her that such conduct would subject her to arrest or force, or informed her that they intended to arrest her. (2-ER-326:3-6; 2-ER-326:17-22; 2-ER-310:24-311:9; 2-ER-318:25-319:8; 2-ER-331:5-15). No Appellant or WPD officer ever issued a dispersal order or otherwise declared an unlawful assembly. (2-ER-324:3-10; 2-ER-254:10-17; 2-ER-287 at 133:19-21). After approximately two minutes, Savage walked away and the motorists continued in the car caravan. (Motion to Transmit, Ex. 2 at 6:39-6:47).

Appellants Zuhlke and Robert observed the parade and counter-protest from the roof of the WPD station. (3-ER-562, ¶5; 3-ER-550, ¶5). They radioed to Appellants Przybyl and Segura that Savage should be arrested for blocking traffic. (3-ER-551, ¶9; 3-ER-555, ¶9). Upon receiving this information, Przybyl ordered that Savage be arrested. (2-ER-325:6-7). Segura formed an arrest team of Appellants Draper and Goodman and instructed them to arrest Savage by approaching her while she stood on the other side of the police skirmish line and

pull her behind the line to handcuff her. (Motion to Transmit, Ex. 5 at 6:30-7:05; 2-ER-256:19-258:4; 2-ER-313:9-17; 2-ER-274:24-276:12.). The underlying alleged offense used to justify the arrest of Savage was tantamount to "jaywalking" (Vehicle Code 21954(A)). (3-ER-551, ¶9; 3-ER-555, ¶9; 3-ER-569, ¶34; 3-ER-544:9-23).

Draper and Goodman intentionally approached Savage by surprise, forcefully grabbed her by her arms and dragged her a few feet. (Motion to Transmit, Ex. 5 at 7:49-57; 2-ER-264:21-265:6; 2-ER-271:3-13; 2-ER-281 at 88:19-25; 2-ER-282 at 90:22-24, 91:5-15; Motion to Transmit, Ex. 15 at 0:00-06). At this time, Savage was standing on the street, behind a police skirmish line which separated her and the ongoing car caravan. (Motion to Transmit, Ex. 5 at 7:49-54; 2-ER-201 at 53:21-54:6). Savage was not blocking traffic nor presenting a threat to any motorists, pedestrians, or officers. (*Id*). Savage is a petite woman and Draper and Goodman are both men who are substantially larger than her. (Motion to Transmit, Ex. 3 at 0:04-0:34). Savage did not attempt to flee and complied and did not resist when Draper and Goodman apprehended her and dragged her. (2-ER-281 at 88:19-25; 2-ER-282 at 90:22-24, 91:5-15; Motion to Transmit, Ex. 15 at 0:00-06).

Draper and Goodman then pushed Savage onto the ground. (2-ER-281 at 88:19-25, 90:22-24; Motion to Transmit, Ex. 15 at 0:00-08, Ex. 5 at 7:57-8:00).

Once Savage was on the ground on her back, Draper and Goodman continued to restrain her by holding onto her arms and wrists. (Motion to Transmit, Ex. 15 at 0:06-15; 2-ER-267 at 59:25-60:3). Goodman moved his hand close to Savage's nose and mouth, causing her to fear that he was going to cover her nose and mouth. (2-ER-282 at 92:24-93:5; 2-ER-283 at 98:23-99:4). Fearing for her life, Savage attempted to bite Goodman's hand. (2-ER-282 at 92:24-93:5; 2-ER-283 at 98:23-99:4; 3-ER-568, ¶23). The bite did not make contact with Goodman. (*Id.*). Goodman then smashed Savage's face into the ground by pushing his forearm into Savage's face, cutting and bruising her lip. (Motion to Transmit, Ex. 15 at 0:14-22; 2-ER-280 at 79:11-21; 2-ER-348). After the bite, Savage continued to comply and did not resist throughout her interactions with Appellants. (Motion to Transmit, Ex. 3 at 0:20-0:34).

Draper and Goodman turned Savage over onto her stomach while tightly gripping her arms. (Motion to Transmit, Ex. 3 at 0:26-0:29). Draper used his bodyweight to push his knee into her back for approximately eight seconds, causing Savage to struggle to breathe. (Motion to Transmit, Ex. 15 at 0:16-25; 2-ER-283 at 99:5-12). Savage screamed, "I can't breathe!" (3-ER-579, ¶29). Draper released his knee off her back. (3-ER-579, ¶29). Draper and Goodman then pulled Savage's arms behind her back and handcuffed her so tightly that it caused her arm to bleed. (2-ER-285 at 107:10-22).

Draper and Goodman then stood Savage upright and walked her to the police station. (Motion to Transmit, Ex. 3 at 8:53-9:03). She was charged with violating Vehicle Code section 21954(a), jaywalking, Penal Code section 148(a)(1), resisting arrest or obstructing or delaying a police officer, and Penal Code section 243(b), battery of a peace officer. (3-ER-569, ¶34; 3-ER-544:9-23).

As a result of the force used in arresting Savage, she was diagnosed with an elbow fracture and nerve damage, which required surgery to release nerve compression in her elbow. (2-ER-353-354; 2-ER-356). In addition, Savage suffered multiple cuts and bruising on her arms, wrists, elbow, and lips. (2-ER-334-351).

B. PROCEDURAL BACKGROUND

On October 10, 2021, Plaintiff/Appellee Jolie Savage filed this lawsuit against Defendant/Appellants Paul Segura, Mark Goodman, John Draper, Michael Przybyl, and Jason Zuhlke.

On July 17, 2023, Appellants moved for summary judgment on all of Savage's claims. (3-ER-432-466). Savage opposed Appellants' motion [2-ER-206-239] and the District Court heard argument on the motion on August 28, 2023.

On August 30, 2023, in a lengthy order, the District Court denied Appellants' motion for summary judgment on Savage's Fourth Amendment unlawful arrest, Fourth Amendment excessive force (as to Appellants Goodman,

Draper, and Segura), First Amendment, and conspiracy claims. (2-ER-070-131). The District Court ruled that Appellants were not entitled to qualified immunity on Savage's Fourth Amendment unlawful arrest, Fourth Amendment excessive force, and First Amendment claims. (2-ER-106:5-110:14, 114:19-115:11).

On September 27, 2023, Appellants filed a notice of appeal from the District Court's denial of their claim of qualified immunity in its summary judgment order. (2-ER-065-66).

SUMMARY OF ARGUMENT

The issue on interlocutory appeal is whether the District Court correctly determined that Savage's rights under the Fourth and First Amendments were sufficiently established at the time Appellants violently arrested her to preclude granting qualified immunity to Appellants at the summary judgment stage. Appellate jurisdiction to review the District Court's order on an interlocutory basis is limited to questions of law: Did the District Court properly apply "clearly established" law to the disputed and undisputed facts as determined by it?

The District Court correctly ruled that Savage's right to be free from unlawful arrest was clearly established because no reasonable officer would believe they had probable cause to arrest Savage for the statutes cited by Appellants. There was no probable cause for the relevant cited vehicle code sections because Savage did not create an immediate hazard when she briefly stood

in front of two cars that that were traveling at very slow speeds and came to a stop before or as Savage walked in front of them. Appellants' new argument that there was probable cause to arrest Savage for Penal Code section 647c fails because there is no basis for this Court to consider this argument. Likewise, Appellants' argument that there was probable cause to arrest Savage for Penal Code section 148(a)(1) fails because there is no evidence that Savage disobeyed any order from an officer to not stand in front of the cars. The District Court's holding is supported by statutory interpretation and case law.

The District Court correctly ruled that Savage's right to be free from excessive force was clearly established by case law that rules it was unconstitutional to forcefully grab Savage by surprise, drag her a few feet, push her to the ground, forcefully restrain her, push her face into the ground, push a knee into her back, and tightly handcuff her when she was suspected of jaywalking, did not present any threat, offered only minimal and justified resistance, and Appellants never warned her before using force. Appellants waived their argument that they did not use excessive force by failing to offer an argument that takes the facts in the light most favorable to Savage.

The District Court also correctly ruled that Savage's free speech right was clearly established by case law that rules it was unconstitutional to arrest Savage in retaliation for verbally expressing criticism of the police where there was not

probable cause. Appellants waived their argument that Savage's criticism of the law enforcement was not a substantial or motivating factor in their forceful arrest of her by failing to offer an argument that takes the facts in the light most favorable to Savage. Nonetheless, the facts that Appellants arrested Savage by surprise moments after she expressed her anti-police views, fraternized with the pro-police demonstrators, and allowed the pro-police demonstrators to violate the law with impunity establish that her speech was a substantial or motivating factor in her arrest.

STANDARD OF REVIEW

This Court reviews a denial of qualified immunity at summary judgment *de novo*. *Hopkins v. Bonvicino*, 573 F.3d 752, 762 (9th Cir. 2009). On interlocutory appeal, "we ask whether the defendants would be entitled to qualified immunity as a matter of law, assuming all factual disputes, and all reasonable inferences are drawn, in plaintiff's favor." *Estate of Lopez v. Gelhaus*, 871 F.3d 998, 1006 (9th Cir. 2017).

ARGUMENT

A. QUALIFIED IMMUNITY STANDARD

In resolving whether Appellants are entitled to qualified immunity on summary judgment, the Court first asks whether the facts, viewed in the light most favorable to Savage, demonstrate that Appellants violated a constitutional right.

Tolan v. Cotton, 572 U.S. 650, 655-56 (2014) (per curiam). The Court then asks whether that right was "clearly established" at the time of the alleged constitutional violation. *Id.* However, at its discretion, the Court may first evaluate whether Savage's constitutional rights were clearly established. *See District of Columbia v. Wesby*, 138 S. Ct. 577, 589 n. 7 (2018).

Clearly established for purposes of qualified immunity means that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). "Specific precedent is not required in order to overcome a qualified immunity defense, but the law in question must be sufficiently clear that the unlawfulness of the action would have been apparent to a reasonable official." *Chew v. Gates*, 27 F.3d 1432, 1446-47 (9th Cir. 1994). Courts apply this principle with special care in excessive force cases, because "[i]f qualified immunity provided a shield in all novel factual circumstances, officials would rarely, if ever, be held accountable for their unreasonable violations of the Fourth Amendment." *Mattos v. Agarano*, 661 F.3d 433, 442 (9th Cir. 2011).

B. THE DISTRICT COURT PROPERLY DENIED QUALIFIED IMMUNITY ON SAVAGE'S UNLAWFUL ARREST CLAIM

1. Appellants did not have probable cause to arrest Savage

Probable cause for an arrest exists when "under the totality of circumstances known to the arresting officer, a prudent person would have concluded that there was a fair probability that [the suspect] had committed a crime." *United States v. Smith*, 790 F.2d 789, 792 (9th Cir. 1986).

a. Vehicle Code § 21950(e)(1) was enacted after Appellants arrested Savage

Appellants' contention that they had probable cause to arrest Savage for violating Vehicle Code section 21950(e)(1) fails because subsection (e) of Vehicle Code § 21950 was added to the code section on September 30, 2022, over two years after they arrested Savage. Appellants could not have had probable cause to arrest Savage for a violation that did not exist at the time.

b. Appellants did not have probable cause to arrest Savage for Vehicle Code §§ 21954(a) or 21950(b)

Section 21954(a) states "every pedestrian upon a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles on the highway so near as to constitute an immediate hazard." Cal. Veh. Code § 21954(a). Section 21950(b) states "[n]o pedestrian may suddenly leave a curb or other place of safety and walk or run into the path of a vehicle that is so close as to constitute an immediate hazard." Cal. Veh. Code § 21950(b).

i. Appellants waived their argument that Savage created an immediate hazard

Appellants waived their primary argument in support of probable cause for sections 21954(a) and 21950(b) when they failed to draw all reasonable factual inferences in Savage's favor and incorrectly concluded that "Savage was objectively creating 'an immediate hazard to others on the road' . . . that could have led to an accident or even a riot." Dkt. No. 18 at 20; *NeSmith v. Olsen*, 808 F. App'x. 442, 444 (9th Cir. 2020) (holding where Appellants "[i]n arguing that [the Appellee] did not establish a constitutional violation, . . . fail to present the facts in the light most favorable to [the Appellee]," they waive this argument). In fact, the District Court found that based on the undisputed facts, "a reasonable jury could determine . . . that the caravan cars did not constitute 'immediate hazards'" per section 21954(a). (2-ER-096:2-10).

a. Savage did not create an immediate hazard

Contrary to Appellants' assertion, when viewing the facts in the light most favorable to Savage, it could not be reasonably inferred that her actions ever constituted an immediate hazard. When Appellants arrested Savage by surprise apprehension, Savage was not blocking traffic nor presenting a threat to any motorists, pedestrians, or officers. (Motion to Transmit, Ex. 5 at 7:49-54; 2-ER-201 at 53:21-54:6.). Prior to her arrest, Savage briefly stood in front of two cars

that were in the car caravan, both of which were traveling at a very slow speed and came to a stop before or as Savage walked towards the car. (Motion to Transmit, Ex. 1 at 0:05-0:09, Ex. 2 at 4:26-6:37). The fact that no Appellant or WPD officer intervened to ensure the safety of Savage, the vehicle occupants, or other pedestrians while she stood in front of the vehicles makes clear that Appellants did not consider there to be an immediate hazard. (2-ER-326:3-6; 2-ER-326:17-22; 2-ER-310:24-311:9; 2-ER-318:25-319:8; 2-ER-331:5-15). Furthermore, the vague potential for an eventual car accident or a riot that Appellants claim Savage could have created is entirely unsubstantiated by the record and is certainly not an immediate hazard. *See* Dkt. No. 18 at 20.

The bar to establish an immediate hazard per section 21950(b) is even higher, and clearly cannot be met. This statute "was intended to apply to those situations where a pedestrian unexpectedly asserts his right-of-way in an intersection at a time when the vehicle is so close that it is virtually impossible to avoid an accident." *Spann v. Ballesty*, 276 Cal.App.2d 754, 761 (1969) ("Typical situations include when a pedestrian steps, jumps, walks or runs directly in front of a vehicle travelling in lanes which are adjacent to the curb or other place of safety occupied by the pedestrian."); *See United States v. Pennington*, No. 21-50193, 2022 U.S. App. LEXIS 18598, at *3–4 (9th Cir. July 6, 2022) (finding that a pedestrian walking in the street towards a car does not establish reasonable

suspicion for section 21950(b)). Savage briefly standing in front of the two cars cannot plausibly be described as "virtually impossible to avoid an accident." *Spann*, 276 Cal.App.2d at 761.

ii. The District Court *properly relied on Ramirez* to find there was no probable cause for section 21954(a)

Appellants' argument that the District Court relied too heavily on *Ramirez* in determining that they did not have probable cause to arrest Savage for violating section 21954(a) also fails. *See People v. Ramirez*, 140 Cal.App.4th 849, 852 (2006) (holding "the only practical effect of subdivision (a) of 21954 is that a pedestrian crossing outside a crosswalk must yield the right of way to passing automobiles so that he does not constitute an immediate hazard.). *Ramirez* makes clear that, as is the case here, "[t]he fact that [the plaintiff] was not in a crosswalk while a car was on the roadway does not mean he was crossing in violation" or automatically created an immediate hazard per section 21954(a). *Id.* at 852. The immaterial facts that Appellants rely on, such as that the *Ramirez* officer knew the defendant or that the defendant fled, fail to meaningfully distinguish *Ramirez* from the present case because they were not relevant to the court's determination that the there was no immediate hazard. *Id.*

In fact, *Ramirez* is particularly helpful in this analysis because it provides guidance to the Court on its interpretation of section 21954(a). The court in *Ramirez* held that when determining if there is probable cause to arrest pursuant to § 21954(a), the circumstances and conditions of the road must be considered. *See Ramirez*, 140 Cal.App.4th at 852. Here the circumstances and conditions of the road weigh against a finding of probable cause. This was not a typical street filled with normal vehicular traffic travelling at high speeds. Quite the opposite: WPD had closed Washington Avenue to regular vehicular traffic and allowed pedestrians to walk through the street, including between cars, freely. (Motion to Transmit, Ex. 2 at 2:10-4:17; 3-ER-573, ¶9; 2-ER-255:3-9; Motion to Transmit, Ex. 5). Further, it was clear that WPD was not enforcing traffic laws that are commonly used to regulate the safe flow of both vehicular and pedestrian traffic. (Motion to Transmit, Ex. 6 at 1:02-1:19, 2:52-3:00, 5:22-6:14, 11:07-11:47, Ex. 7 at 1 :45-2:14; 3:44-4:56, Ex. 9 at 3:07-4:20, 4:48-5:54). There was no probable cause for a violation of section 21954(a) in these circumstances.

iii. There was no probable cause for section 21950(b) because Savage did not leave a curb or place of safety

Savage did not violate section 21950(b) because she did not "suddenly leave a curb or other place of safety." Cal. Veh. Code § 21950(b); *See Spann*, 276

Cal.App.2d at 762 (holding section 21950(b) did not apply where the plaintiff had already crossed four lanes of traffic when he was hit by a car, reasoning "We cannot see how section 21950 subdivision (b) applies to these facts unless it is held that a car anywhere on a street constitutes an immediate hazard to a pedestrian anywhere else on the same street.").

c. There is no basis for this Court to review Appellants' new argument that they had probable cause to arrest Savage for Penal Code § 647c

Appellants cannot argue for the first time on appeal, albeit a mention in their reply, that they had probable cause to arrest Savage for Penal Code section 647c. "Absent exceptional circumstances, [this Court] generally will not consider arguments raised for the first time on appeal." *Baccei v. United States*, 632 F.3d 1140, 1149 (9th Cir. 2011). The Court "may exercise this discretion (1) to prevent a miscarriage of justice; (2) when a change in law raises a new issue while an appeal is pending; and (3) when the issue is purely one of law." *Id.*

Appellants have offered no argument that any of these exceptional circumstances are present here or that the District Court erred in failing to consider this argument. Accordingly, Appellants have forfeited their argument that they had probable cause to arrest Savage for section 647c. *See Shiferaw v. City & Cnty. of San Francisco*, No. 22-15599, 2023 U.S. App. LEXIS 26458 at *3 (9th Cir. Oct. 5,

2023) ("Normally, we do not consider arguments advanced for the first time on appeal. . . . Shiferaw has failed to address any of the exceptions to this general rule. . . . Thus, Shiferaw has forfeited this argument." (citations omitted)).

i. Appellants did not have probable cause to arrest Savage for section 647c

In the event that this Court does consider Appellants' argument, it will find that there is no indication that Savage had the requisite malicious intent. Section 647c states that "[e]very person who willfully and maliciously obstructs the free movement of any person on any street, sidewalk, or other public place or on or in any place open to the public is guilty of a misdemeanor." Cal. Penal Code § 647c. To establish malice under this statute a defendant must have acted with either "a wish to vex, annoy, or injure" another person, or "an intent to do a wrongful act." *Ramey v. Murphy*, 165 Cal.App.3d 502, 510 (1985).

Appellants cannot substantiate their argument that Savage's conduct established her malicious intent. Neither the "two competing groups of demonstrators exchanging obscenities," nor the "impassioned demonstrators," nor "Savage block[ing] oncoming vehicles for two minutes" are reflective of Savage's intent. Dkt. No. 18 at 21. Appellants state that "a 'push' occurred between Savage and an officer," but this is an inaccurate representation of Savage's factual assertion that an officer pushed her and is irrelevant because Appellants cannot

establish that any of them had knowledge of the push at the time they arrested Savage. *Id*.; (2-ER-312:12-23; 2-ER-318:16-23; 2-ER-247:21-24); *see U.S. v. Martin*, 509 F.2d 1211, 1213 (9th Cir. 1975).

The facts taken in the light most favorable to Savage establish that she did not act with malice. Throughout the protest, Savage never engaged in violence or threatened to. (2-ER-312:12-23; 2-ER-318:16-23; 2-ER-247:21-24). She only briefly stood in front of two cars participating in a car caravan and then walked away as the car caravan continued. (Motion to Transmit, Ex. 1 at 0:05-0:09, Ex. 2 at 4:26-6:37).

d. Appellants did not have probable cause to arrest Savage for Penal Code § 148(a)(1)

Appellants offer no authority to support their ludicrous assertion that if there is probable cause to arrest someone for a vehicle code or penal code section, there is automatically probable cause to arrest them for violating Penal Code section 148(a)(1). This argument is moot because, as discussed above, Appellants did not have probable cause to arrest Savage for Vehicle Code sections 21950(e)(1), 21954(a), or 21950(b) or Penal Code section 647c.

Further, Appellants do not offer any facts which suggest that prior to her arrest, Savage violated section 148(a)(1) by "willfully resisting, delaying, or

obstructing any . . . officer . . . in the discharge or attempt to discharge any duty of his or her office or employment." Cal. Penal Code § 148(a)(1).

e. This Court does not have jurisdiction to review Appellants' argument that they lawfully arrested Savage because the District Court found that there are genuine disputes of material fact as to the existence of probable cause

It is clear that Appellants are attempting to obtain a reversal not only of the District Court's ruling denying qualified immunity but also of the District Court's ruling that "Savage has raised genuine disputes of material fact as to whether Individual Defendants had probable cause to arrest her" by inaccurately portraying their arguments as questions regarding clearly established law. (2-ER-098:9-11). Where "the district court found genuine issues of fact concerning the reasonableness of [Appellants'] actions, [this Court's] review is limited to determining whether clearly established law existed at the time of the incident that [Appellants'] actions could have violated." *Watkins*, 145 F.3d at 1091; *see also Cunningham*, 229 F.3d at 1288 ("Because the district court found material factual disputes . . . we lack jurisdiction to review whether the shooting officers are entitled to qualified immunity. (citation omitted) Thus, for purposes of this

opinion, we must assume that the plaintiffs can prove that they suffered a constitutional injury.").

While the District Court exercised its discretion to deny qualified immunity after only determining that Savage's right to be free from unlawful arrest was clearly established, it conducted a thorough analysis of the merits of Savage's unlawful arrest claim and determined that when construing the evidence in the light most favorable to Savage, numerous genuine disputes of material fact precluded summary judgment on the existence of probable cause. *See* 2-ER-092:15-098:11. This is the same analysis that would be conducted under the first prong of the qualified immunity test and "where the officers' entitlement to qualified immunity depends on the resolution of disputed issues of fact in their favor, and against the non-moving party, summary judgment is not appropriate." *Wilkins v. City of Oakland*, 350 F.3d 949, 956 (9th Cir. 2003); *see Tolan*, 572 U.S. at 655-56. Therefore, because the Court cannot resolve the first prong without depending on disputed material facts, this Court does not have jurisdiction to hear Appellants' argument that for the purpose of qualified immunity, they did not violate Savage's constitutional right by arresting her without probable cause.

2. Savage's right to be free from unlawful arrest was clearly established at the time of her arrest

"[Since] the standard for probable cause is well settled, the question with respect to whether an unlawful arrest violated clearly established law is 'whether it is reasonably arguable that there was probable cause for arrest—that is, whether reasonable officers could disagree as to the legality of the arrest such that the arresting officer is entitled to qualified immunity.'" *Sialoi v. City of San Diego*, 823 F.3d 1223, 1233 (9th Cir. 2016) (citation omitted).

a. No reasonable officer would believe that they had probable cause to arrest Savage for violating the statutes offered by Appellants

When a statute is unambiguous and the facts, taken in the light most favorable to the plaintiff, do not establish a reasonable belief of probable cause, the defendants are not entitled to qualified immunity. *Rosenbaum v. Washoe County*, 663 F.3d 1071, 1079 (9th Cir. 2011); *see, e.g.*, *Beck v. City of Upland,* 527 F.3d 853, 858-59, 866 (9th Cir. 2008) (finding the plaintiff "made the probable cause showing necessary to support both his First and Fourth Amendment causes of action" because there was no probable cause for the statute he was arrested for). Appellants' arrest of Savage "is not a case where courts disagree about the contours of a constitutional right or where officers may be confused about what is

required of them under various circumstances. . . . the statute[s] [cited by Appellants are] unambiguous." *Rosenbaum*, 663 F.3d at 1078. The District Court correctly observed that "Defendants have provided no authority or argument suggesting that any reading of [the statutes] would have led a reasonable officer to believe on these facts that Savage had committed a crime at the time of her arrest." DC. Dkt. No. 97 at 39:14-17.

Vehicle Code section 21950(e)(1) did not exist at the time Appellants arrested Savage, so no reasonable officer would believe they had probable cause to arrest her for this statute. 2022 Cal AB 2147. Likewise, as Savage's actions did not constitute an immediate hazard or make avoiding an accident virtually impossible, she did not leave a place of safety, and the road was closed to normal traffic, no reasonable officer would believe they had probable cause to arrest Savage for violating Vehicle Code sections 21954(a) or 21950(b). As discussed above, this Court does not have a basis to review Appellants' argument regarding Penal Code section 647c. Nonetheless, no reasonable officer would believe they had probable cause to arrest Savage for this offense because there is no evidence that she acted maliciously. Finally, as no officer instructed Savage to move away from the two cars and there is no evidence that Savage took any actions that delayed or obstructed an officer prior to her arrest, no reasonable officer would believe they

had probable cause to arrest her for Penal Code section 148(a)(1). (2-ER-326:3-6; 2-ER-326:17-22; 2-ER-310:24-311:9; 2-ER-318:25-319:8; 2-ER-331:5-15).

b. Case law clearly establishes Savage's right to be free from unlawful arrest

Nicholas v. City of Los Angeles clearly established Savage's right to be free from unlawful arrest because there was no probable cause to arrest her when she "w[as] unarmed, posed no threat to anyone, and w[as] not engaged in any criminal activity." 935 F.3d 685, 689 (9th Cir. 2019). While the setting of the probable cause inquiry in *Nicholson* is distinct from the arrest of Savage, the factual inferences that the Court relied on to determine that the defendants violated the plaintiffs' clearly established rights are clearly similar: Savage was unarmed, she did not pose a threat to anyone as she did not engage in violence with anyone or threaten to do so, and, as discussed above, was not engaged in any criminal activity. (2-ER-312:12-15; 2-ER-318:16-23; 2-ER-247:21-24). The factual distinctions that Appellants highlight in an attempt to distinguish *Nicholson* from the present case are immaterial to the probable cause analysis. Dkt. No. 18 at 22-23.

Dirks v. Grasso clearly established Savage's right to be free from arrest for verbally criticizing law enforcement. 449 F. App'x. 589 (9th Cir. 2011). In *Dirks*, the Ninth Circuit ruled that a reasonable officer could not have concluded that

there was probable cause to arrest the plaintiff, who like Savage was non-violent but was verbally criticizing law enforcement, for resisting arrest or disturbing the peace because "verbal criticism of police officers and refusal to respond promptly to police orders do not support probable cause for a violation of §148." *Id.* at 591; *see also Fortson v. City of Los Angeles*, 628 F. Supp. 3d 976, 989 (C.D. Cal. 2022) (stating that the plaintiff who was walking in an intersection with vehicular traffic during a protest "was not engaging in any criminal activity").

This clearly established right is confirmed by *Beck v. City of Upland,* where the Ninth Circuit held that the police did not have probable cause to arrest the plaintiff after he verbally confront police officers at an event but did not threaten them with violence. 527 F.3d at 858-59, 866.

Dunn v. Hyra supports that no reasonable officer would believe there is probable cause to arrest a peaceful protester who only verbally criticizes law enforcement and that qualified immunity must be denied when no reasonable officer would believe there is probable cause for any of the offenses offered by defendants. 676 F. Supp. 1172, 1188-89 (W.D. Wash. 2009). Appellants cannot identify a reason why *Dunn*'s unlawful arrest qualified immunity analysis is not applicable to Savage's similar claim. Appellants only attempt to distinguish the case by identifying that the *Dunn* plaintiffs also brought a First Amendment claim. In *Dunn*, the court denied qualified immunity because no reasonable officer would

believe they had probable cause to arrest the protester plaintiffs for the statutes cited by the defendants when one asked police to return a flag they seized, took photos, and "encourag[ed] the attendees at the rally to 'witness suppression of free speech'" by police and the other walked around and took photos near officers. *Id.* This case clearly applies to Savage, whose actions of only peacefully protesting law enforcement, cannot establish probable cause for the offenses Appellants offer.

Adams v. Kraft further endorses that qualified immunity must be denied when there is no reasonable belief of probable cause for the criminal statutes offered by the defendants. 828 F. Supp. 2d 1090, 1115-16 (N.D. Cal. 2011). Similar to Savage, the *Adams* plaintiff "verbally protest[ed]" the officers' actions but did not make any threatening gestures or any physical moves to resist arrest. *Id.* at 1106. Appellants' superficial attempt to distinguish *Adams* ignores the principle which the *Adams* court relied upon: Defendants were not entitled to qualified immunity because, viewing the facts in the light most favorable to the plaintiff, no reasonable officer would have believed that they had probable cause to arrest the plaintiff for the statutes cited by the defendants. *Id.* at 1114-15. Appellants' argument, which is a summary of the probable cause analysis for the criminal threats offense, has no bearing on this principle and omits the relevant section 148(a)(1) probable cause analysis.

c. Appellants Zuhlke, Przybyl, and Robert were on notice of Savage's clearly established right be free from unlawful arrest

Appellants attempt to seek a reversal of the District Court's ruling denying their argument that Appellants Zuhlke, Przybyl, and Robert cannot be held liable for the unlawful arrest because they did not physically carry out Savage's arrest by disguising it as a qualified immunity argument. *See* 2-ER-085:19-087:17; 3-ER-450:17-20. The District Court correctly ruled that "a reasonable jury could conclude that all six Individual Defendants were integral to the unlawful arrest Savage alleges . . . . All individual Defendants therefore may be held liable under § 1983 for Plaintiff Savage's alleged unlawful arrest." (2-ER-086:20-21, 087:15-17). The court cited *Lacey v. Maricopa County* (693 F.3d 896, 918 (9th Cir. 2012)) and *Nicholson v. City of Los Angeles* (935 F.3d at 692) which hold that officials who "ordered or otherwise procured" an arrest or "consulted with [other officers] in that decision" may be held liable for unlawful arrest. Appellants did not directly challenge this ruling and this Court does not have jurisdiction to review it. *See, e.g.*, *Peck,* 51 F.4th at 885.

Further, it is clearly established that "'integral participation' does not require that each officer's actions themselves rise to the level of a constitutional violation," *Boyd v. Benton Cnty*., 374 F.3d 773, 780 (9th Cir. 2004), "but it does require some

fundamental involvement in the conduct that allegedly caused the violation," *Blankenhorn v. City of Orange*, 485 F.3d 463, 481 n.12 (9th Cir. 2007), that would make the official more than a "'a mere bystander' who had 'no role in the unlawful conduct,'" *Boyd*, 374 F.3d at 780.

C. THE DISTRICT COURT CORRECTLY DENIED APPELLANTS QUALIFIED IMMUNITY ON SAVAGE'S EXCESSIVE FORCE CLAIM

1. Draper and Goodman violated Savage's constitutional right to be free from excessive force.

a. Appellants waived their argument that they did not violate Savage's constitutional right to be free from excessive force because they failed to advance an argument that takes the facts in the light most favorable to Savage

If an appellant "fail[s] to advance an argument that takes the facts in the light most favorable to [the appellee]," when "challeng[ing] the district court's holding that the fact, taken in the light most favorable to [the appellee], establish that the [appellants] violated the Constitution," they waive this argument. *NeSmith*, 808 F. App'x. at 444; *see also George*, 736 F.3d at 837 (declining to hear the appellants' argument that they were entitled to qualified immunity because the

appellee's right was not clearly established because they did "not advance[] an argument as to why the law is not clearly established that takes the facts in the light most favorable to [the appellee]."); *Maddox v. City of Sandpoint*, 732 F. App'x. 609, 610 (9th Cir. 2018); *K.J.P. v. Cty. Of San Diego*, 800 F. App'x. 545, 546 (9th Cir. 2020); *Adams v. Speers*, 473 F.3d 989, 990, 991 (9th Cir. 2007).

Appellants waive their argument that they did not use excessive force because they blatantly disregarded their obligation to present the facts in a light most favorable to Savage. Appellants state that "Officers Goodman and Draper approached Savage while she stood behind the skirmish line," and omit that they did so by surprise, which the District Court found to be undisputed. (Dkt. No. 18 at 29; 2-ER-082:9-10). Appellants next state that "Goodman used one hand to grab the upper part of one of Savage's arms near her bicep," again omitting the undisputed fact that the grab was "forceful[]." (Dkt. No. 18 at 29; 2-ER-082:11-13). Appellants state that they "escorted" Savage, while Savage alleges that they "dragged" her. (Dkt. No. 18 at 29; 2-ER-216:8). Again, Appellants state that "Savage fell to the ground on her back," and omit Savage's key allegation that "Draper and Goodman pushed Ms. Savage onto the ground." (Dkt. No. 18 at 29; 2-ER-216:8-9).

Appellants next state that while on the ground, "Savage attempted to bite Officer Goodman's right forearm as he tried to gain control of her arms," but omit

the critical context that "Defendant Goodman moved his hand close to Savage's nose and mouth, causing her to fear that he was going to cover her nose and mouth" and Savage attempted to bite Goodman's hand because she "fear[ed] for her life." (Dkt. No. 18 at 30; 2-ER-216:11-13). Appellants then state that "Officer Goodman held Savage's face against the ground," despite the fact that the District Court specifically found that based on the evidence, it was undisputed that Goodman "pushed Savage's face into the ground." (Dkt. No. 18 at 30; 2-ER-083:1, n. 7).

Appellants state that Draper and Goodman "eventually turned [Ms. Savage] onto her stomach," omitting Savage's allegation that they "tightly gripp[ed] her arms" while doing so. (Dkt. No. 18 at 30; 2-ER-216:16). Next, Appellants state that Draper "placed his knee on Savage's back . . . for three to four seconds or approximately eight seconds." (Dkt. No. 18 at 30). Appellants ignore Savage's allegation that "Draper used his bodyweight to push his knee into her back" for eight seconds, not three to four, and ignore the District Court's finding that it is undisputed that Draper's action "caused Savage to struggle breathing." (2-ER-216:16-17; 2-ER-083:3-4). Appellants also improperly state that Draper did so "for the purpose of controlling her body," which Savage disputes and the District Court did not find to be undisputed. (Dkt. No. 18 at 30).

Further, Appellants neglect to include Savage's allegation that they handcuffed her "so tightly that it caused her arm to bleed." (2-ER-216:19-20). Appellants also do not address Savage's factual allegations regarding her injuries, which are relevant to reasonableness inquiry. *Id.* at 2:22-25; *see, e.g.*, *Rice v. Morehouse*, 989 F.3d 1112, 1121 (9th Cir. 2021).

b. Viewing the facts in the light most favorable to Savage, Draper and Goodman violated her Fourth Amendment right to be free from excessive force

Nonetheless, if the Court considers Appellants' argument, it will easily find that Draper and Goodman used excessive force. Courts analyze excessive force claims under the Fourth Amendment's reasonableness standard. *Byrd v. Phoenix Police Dep't*, 885 F.3d 639, 642 (9th Cir. 2018). When analyzing whether a use of force is objectively unreasonable, courts consider the severity of the intrusion on the individual's rights as determined by the type and amount of force; the government's interests as determined by the severity of the crime, whether the suspect posed an immediate threat to officer or public safety, and whether the suspect was resisting arrest or attempting to escape; and balance the gravity of the intrusion against the government's need for that intrusion. *Espinosa v. City and Cnty of S.F.*, 598 F.3d 528, 537 (9th Cir. 2010). Further, the Ninth Circuit has held that "the giving of a warning or the failure to do so is a factor to be considered in

applying the Graham balancing test." *Deorle v. Rutherford*, 272 F.3d 1272, 1284 (9th Cir. 2001) (reasoning that the absence of warning made use of force more unreasonable under the circumstances).

i. The force Draper and Goodman used on Savage was severe

The force Draper and Goodman used against Savage was far from minimal, as Appellants claim. Draper and Goodman forcefully grabbed Savage by surprise, dragged her by her arms, and pushed her to the ground. (Motion to Transmit, Ex. 5 at 7:49-57; 2-ER-264:21-265:6, 2-ER-271:3-13; 2-ER-281 at 88:19-25; 2-ER-282 at 90:22-24, 91:5-15; Motion to Transmit, Ex. 15 at 0:00-06); *See Rice v. Morehouse*, 989 F.3d 1112, 1121 (9th Cir. 2021) (tripping plaintiff while holding his arms so that he would fall to the ground involved a "substantial" and "aggressive use" of force); *Santos v. Gates*, 287 F.3d 846, 848, 853 (9th Cir. 2002) (holding a reasonable jury could find that the force used when officers grabbed the plaintiff's arms and "guided" him to the ground "was both substantial and excessive."); *see also Andrews v. City of Henderson*, 35 F.4th 710, 716 (9th Cir. 2022). Once she was on the ground, Appellants continued to restrain Savage by holding onto her arms and wrists. (Motion to Transmit, Ex. 15 at 0:06-15; 2-ER-267 at 59:25-60:3). Goodman pushed Savage's face into the ground using his forearm. (Motion to Transmit, Ex. 15 at 0:14-22; 2-ER-280 at 79:11-21; 2-ER-

348); *see Ballew v. City of Pasadena*, 642 F. Supp. 3d 1146, 1173 (C.D. Cal. 2022) (holding the officer's act of "smash[ing] [the plaintiff's] face into the asphalt . . . . constitutes a substantial and aggressive use of force that is 'capable of inflicting significant pain and causing serious injury.'" (quoting *Young v. Cnty. of Los Angeles*, 655 F.3d 1156, 1161 (9th Cir. 2011))). Draper used his bodyweight to push his knee into her back for approximately eight seconds, causing Savage to struggle to breathe. (Motion to Transmit, Ex. 15 at 0:16-25; 2-ER-283 at 99:5-12); *see LaLonde v. Cnty. of Riverside*, 204 F.3d 947, 958-59 & n.17, 962 (9th Cir. 2000) (reversing the district court's finding that officer digging knee into plaintiff's back could not constitute excessive force); *Serrato v. City of Long Beach*, No. 2:04-cv-08634-ABC-AJWx, 2009 U.S. Dist. LEXIS 41324, at *7 (C.D. Cal. Mar. 25, 2009) (finding a genuine factual dispute regarding excessive force where officer pressed a plaintiff's face into the ground with his elbow and placed his knee on the plaintiff's back). Appellants continued to violently restrain Savage's arms and handcuffed her so tightly that her arm bled. (2-ER-285 at 107:10-22); *LaLonde*, 204 F.3d at 960 ("A series of Ninth Circuit cases has held that tight handcuffing can constitute excessive force.").

The severity of the force Draper and Goodman used on Savage is underscored by the fact that as a result of this violent arrest, Savage was diagnosed with an elbow fracture and nerve damage and had to undergo surgery to release

nerve compression in her elbow. (2-ER-353-354; 2-ER-356); *see Bryan v. MacPherson*, 630 F.3d 805, 824-25 (9th Cir. 2010) ("The presence of non-minor physical injuries . . . is certainly relevant in evaluating the degree of the Fourth Amendment intrusion."); *Close v. City of Vacaville*, 846 F. App'x 513, 515 (9th Cir. 2021) ("A reasonable jury could find that the amount of force used, enough to fracture her arm, was significant."). Savage also suffered pain as well as bruising and cuts on her arms, wrists, elbow, and lip as a result of the force. (2-ER-334-351).

ii. Appellants arrested Savage for minor offenses

Appellants initiated the arrest of Savage based upon California Vehicle Code section 21954(a), jaywalking, an infraction, which she contests the existence of probable cause for. (3-ER-551, ¶9; 3-ER-555, ¶9; 3-ER-569, ¶34; 3-ER-544:9-23); *see Bryan*, 630 F.3d at 828 ("Traffic violations generally will not support the use of a significant level of force."); *Young*, 655 F.3d at 1164. Appellants also charged Savage with violating California Penal Code section 148(a)(1), resisting arrest, presumably for her alleged resistance after Draper and Goodman began using force on her, which she contests, and for Penal Code section 243(b), battery on a peace officer, for the attempted bite of Goodman after Appellants forcefully took her to the ground, which she also contests. (3-ER-569, ¶34; 3-ER-544:9-23); *see People v. White*, 101 Cal.App.3d 161, 168 (1980) ("where the officer uses excessive force,

the defendant cannot be guilty of sections 245, subdivision (b), 243 or 148 and where the jury finds reasonable force was properly used in self-defense, the defendant may not be convicted of any crime."). Regardless, these low-level misdemeanor offenses did not warrant the severe force used by Draper and Goodman. *Bryan*, 630 F.3d at 828-29 ("the commission of a misdemeanor offense . . . militates against finding the force used to effect an arrest reasonable where the suspect was also nonviolent and posed no threat to the safety of the officers or others."); *Young*, 655 F.3d at 1164 (holding section 148(a)(1) is not an "inherently dangerous or violent offense.").

iii. Savage did not present an immediate threat

This most important factor in this analysis strongly weighs in favor of a finding of excessive force. *See Longoria v. Pinal Cnty.*, 873 F.3d 699, 705 (9th Cir. 2017). At the time that Draper and Goodman, two large policemen, approached Savage, a petite young woman, and forcefully grabbed her by surprise to arrest her, Savage had walked away from the pro-police car caravan and was just standing in the street, behind the police skirmish line, which separated her from the caravan. (Motion to Transmit, Ex. 3 at 0:04-0:34; Motion to Transmit, Ex. 5 at 7:49-57; 2-ER-264:21-265:6, 2-ER-271:3-13; 2-ER-281 at 88:19-25; 2-ER-282 at 90:22-24, 91:5-15; Motion to Transmit, Ex. 15 at 0:00-06). She presented no threat to any pedestrians or motorists. (Motion to Transmit, Ex. 5 at 7:49-54; 2-ER-201 at

53:21-54:6.). While she passionately expressed her opinions verbally throughout the protest, Savage was entirely peaceful. (*Id.*). She was not armed and she never engaged in violence or threatened to do so. (*Id.*).

iv. Savage only resisted minimally, because she reasonably feared for her life

Savage never attempted to flee. (2-ER-281 at 88:19-25; 2-ER-282 at 90:22-24, 91:5-15; Motion to Transmit, Ex. 15 at 0:00-06). Savage complied and did not resist when Draper and Goodman apprehended her by surprise and forcefully grabbed her, dragged her by her arms, and pushed her to the ground. (*Id.*).

Once she was on the ground in their grasp, Goodman moved his hand toward Savage's nose and mouth, causing her to believe that he was going to cover her nose and mouth so she could not breathe, which reasonably made her fear for her life. (2-ER-282 at 92:24-93:5; 2-ER-283 at 98:23-99:4). For her own safety, so that she could continue breathing, Savage attempted to bite Goodman's hand, but the bite did not make contact with him. (2-ER-282 at 92:24-93:5; 2-ER-283 at 98:23-99:4; 3-ER-568, ¶23). The reasonably perceived threat to Savage's safety and the force that was being exerted on her by Draper and Goodman rendered her resistance minimal and justified. *See Blankenhorn*, 485 F.3d at 479.

The force that followed Savage's act of self-protection, including Goodman pushing her face into the concrete, Draper using his bodyweight to push his knee

into her back[1], and both officers violently restraining her and tightly handcuffing her, were "still be excessive when considering the level of resistance, the severity of the force used, and "*all* the relevant circumstances." *Hammer v. Gross*, 932 F.2d 842, 846 (9th Cir. 1991).

v. Appellants never warned Savage prior to using severe force on her

No Appellant or other WPD officer told Savage that she needed to move while she was standing in front of the two cars, warned her that such conduct would subject her to arrest or force, or informed her that they intended to arrest her. (2-ER-326:3-6; 2-ER-326:17-22; 2-ER-310:24-311:9; 2-ER-318:25-319:8; 2-ER-331:5-15). Further, prior to her arrest, no WPD officer issued a dispersal order or declared an unlawful assembly. (2-ER-324:3-10; 2-ER-254:10-17; 2-ER-287 at 133:19-21). Quite the contrary, Draper and Goodman did not want Savage to know that they were planning to violently arrest her; they intentionally apprehended her by surprise. (Motion to Transmit, Ex. 5 at 7:49-57; 2-ER-264:21-265:6, 2-ER-

[1] In their Motion for Summary Judgment, Appellants claimed that Draper "plac[ed] a knee on Plaintiff's back to control her movements in order to handcuff" her. (3-ER-454:26-27). Appellants now claim for the first time on appeal that "Draper [] briefly put his knee on her back in order to prevent Savage from using her mouth as a weapon against the officers." (Dkt. No. 18 at 31). Plaintiff disputes this assertion. Further, Appellants cannot raise new disputed facts on appeal that are not contained in the District Court record. Therefore, the Court should disregard this statement.

271:3-13; 2-ER-281 at 88:19-25; 2-ER-282 at 90:22-24, 91:5-15; Motion to Transmit, Ex. 15 at 0:00-06).

In contrast to the severity of the force Appellants used on Savage, the government's interests were de minimis. It cannot be reasonably disputed that Appellants' uses of force were excessive, in violation of Savage's Fourth Amendment right.

c. This Court Does Not Have Jurisdiction To Review Appellants' Argument That They Used Reasonable Force Because The District Court Found That There Are Genuine Disputes Of Material Fact As To Whether The Force Used Was Excessive

Once again, Appellants are attempting to obtain a reversal not only of the District Court's denial of qualified immunity but also of the District Court's ruling that "genuine issues of fact remain regarding whether the force used in arresting Savage was excessive" by inaccurately portraying their arguments as questions regarding clearly established law. (2-ER-106:1-3). While the District Court exercised its discretion to deny qualified immunity after only determining that Savage's right to be free from excessive force was clearly established, it conducted a thorough analysis of the merits of Savage's excessive force claim and determined that when construing the evidence in the light most favorable to Savage, numerous

genuine disputes of material fact precluded summary judgment. *See* 2-ER-098:13-106:3. Therefore, as discussed in Section B(i)(f), *supra*, this Court does not have jurisdiction to hear Appellants' argument that for the purpose of qualified immunity, they did not violate Savage's constitutional right by using excessive force on her. *See Watkins*, 145 F.3d at 1091.

2. Savage's rights to be free from excessive force were clearly established

a. It was clearly established that pushing his knee into Savage's back violated her Fourth Amendment right

i. Ninth Circuit precedent clearly established that pushing a knee into Savage's back violated her constitutional right

LaLonde v. Cnty. of Riverside clearly establishes that "forcefully put[ting] a knee into [a plaintiff]'s back" can violate the Fourth Amendment. 204 F.3d at 958-59 & n.17, 962; *see also Barnard v. Las Vegas Metro. Police Dep't*, 310 F. App'x. 990, 993 (9th Cir. 2009) (holding that *LaLonde* clearly established that pushing a knee into a non-resisting arrestee's back violated the Fourth Amendment). In *LaLonde*, the Ninth Circuit overturned a grant of qualified immunity where the defendant officer, who suspected the plaintiff of committing a noise violation, a low-level offense, grabbed the plaintiff, knocked him to the ground, and

"forcefully put a knee into [plaintiff]'s back," after the plaintiff resisted arrest, holding the force could be found to be excessive. The facts critical to the use of force analysis mirror the use of force against Savage: she was suspected of committing the minor offense of jaywalking, she only minimally resisted arrest (in a reasonable manner due to Goodman's actions), and after Draper and Goodman forcefully took her to the ground, Draper used his bodyweight to forcefully push his knee into her back. (3-ER-551, ¶9; 3-ER-555, ¶9; 3-ER-569, ¶34; 3-ER-544:9-23; 2-ER-282 at 92:24-93:5; 2-ER-283 at 98:23-99:4; 3-ER-568, ¶23; Motion to Transmit, Ex. 15 at 0:16-25; 2-ER-283 at 99:5-12).

Further, the Ninth Circuit has held that as of 2019, when an officer used his bodyweight to push his knee into the back of an individual, "Our caselaw makes clear that any reasonable officer should have known that bodyweight force on the back of a prone, unarmed person who is not suspected of a crime is constitutionally excessive." *Scott v. Smith*, 109 F.4th 1215, 1226, 1220-22 (9th Cir. 2024); *see also Barnard v. Theobald,* 721 F.3d 1069, 1073, 1076 (9th Cir. 2013); *Valenzuela v. City of Anaheim*, No. 20-55372, 2021 U.S. App. LEXIS 22933, at *5 (9th Cir. Aug. 3, 2021). It was also clearly established that it was unconstitutional to apply "continued force against a suspect who has been brought to the ground" or "no longer posed an immediate threat." *Zion v. Cty. of Orange,* 874 F.3d 1072, 1076 (9th Cir. 2017).

ii. Rivas-Villegas does not entitle Appellants to qualified immunity

As a preliminary matter, Appellants cannot raise new disputed facts on appeal that are not contained in the District Court record and introduce a new alleged justification for Draper pushing his knee into Savage's back with his bodyweight for eight seconds: that he did so "in order to prevent Savage from using her mouth as a weapon against the officers." *See Ramirez v. Galaza*, 334 F.3d 850, 859 n.6 (9th Cir. 2003); Dkt. No. 18 at 31. In their Motion for Summary Judgment, Appellants originally claimed that Draper "plac[ed] a knee on Plaintiff's back to control her movements in order to handcuff" her. (3-ER-454:26-27). Savage disputes this new unfounded factual allegation and it is not within this Court's purview to adjudicate this dispute. *See Shiferaw*, 2023 U.S. App. LEXIS 26458 at *3.

Likewise, Appellants cannot raise a new argument with new authority for the first time on appeal. *See* 3-ER-454:14-455:2; *Baccei*, 632 F.3d at 1149. For the first time, Appellants argue that *Rivas-Villegas v. Cortesluna* entitled them to qualified immunity. 595 U.S. 1 (2021). Appellants make no argument that any of the exceptions to the bar on new arguments apply, and none do. *See, e.g.*, *Greisen v. Hanken*, 925 F.3d 1097, 1115 (9th Cir. 2019) (holding that the Court could not review an argument that is waived because it was raised for the first time in a reply

brief because while it was 'is ultimately a legal question, . . . its resolution often entails underlying factual disputes.'" (citation omitted)). Accordingly, Appellants have forfeited their argument that *Rivas-Villegas* entitles them to qualified immunity.

If the Court does consider Appellants' argument regarding *Rivas-Villegas,* it will nonetheless quickly see that the case is vastly distinct from the present facts and does not entitle Appellants to qualified immunity. In *Rivas-Villegas,* officers responded to a 911 call regarding the plaintiff who had a chainsaw and was attempting to harm his girlfriend and her two children. 595 U.S. at 3. Once the officers arrived and confronted the plaintiff, they saw a knife sticking out of his pocket. *Id.* at 4. The plaintiff refused to follow the officers' orders. *Id.* Once the plaintiff was on the ground, an officer placed his knee on the left side of the plaintiff's back, near the knife, for eight seconds, while another officer removed the knife. *Id.*

The Supreme Court held that *LaLonde* was too dissimilar from *Rivas-Villegas* to clearly establish that the officers' actions violated the plaintiff's constitutional rights. *Id.* at 7-8. The distinctions identified by the Supreme Court are directly applicable to the present case and demonstrate why *LaLonde* is in fact applicable while *Rivas-Villegas* is not: in *LaLonde*, the "officers were responding to a mere noise complaint, whereas here they were responding to a serious alleged

incident of domestic violence possibly involving a chainsaw," "LaLonde was unarmed [while the plaintiff], in contrast, had a knife protruding from his left pocket for which he had just previously appeared to reach," and "Rivas-Villegas placed his knee on [the plaintiff] for no more than eight seconds and only on the side of his back near the knife that officers were in the process of retrieving [while] LaLonde, in contrast, testified that the officer deliberately dug his knee into his back when he had no weapon and had made no threat when approached by police." *Id.* at 7. Similarly, Appellants arrested Savage for low-level infraction and misdemeanor offenses, rather than a serious, violent offense. Savage was unarmed, unlike the *Rivas-Villegas* plaintiff. (3-ER-569, ¶34; 3-ER-544:9-23; 2-ER-312:12-15; 2-ER-318:16-23; 2-ER-247:21-24). Finally, Draper used his bodyweight to push his knee into Savage's back for no justifiable reason as she had no weapon and presented no threat to the officers while the *Rivas-Villegas* defendant put his knee near the knife while the officers retrieved the weapon. (Motion to Transmit, Ex. 15 at 0:16-25; 2-ER-283 at 99:5-12).

b. It was clearly established that using significant force on a suspect who was suspected of a minor crime, posed no threat, and minimally resisted was unconstitutional

In *Young v. County of Los Angeles*, the Ninth Circuit held that "The

principle that it is unreasonable to use significant force against a suspect who was suspected of a minor crime, posed no apparent threat to officer safety, and could be found not to have resisted arrest, was thus well-established in 2001." 655 F.3d at 1168. *Young* is clearly applicable to the force used on Savage because the government interests in the present case and *Young* are substantially similar. In both *Young* and the present case, the plaintiffs was suspected of committing a low-level traffic violation and later of resisting arrest, they did not present any threat to the officer or the public, they both minimally resisted, in a manner that was reasonable given the officers' conduct, and the officers failed to provide a warning regarding a potential arrest or use of force. (3-ER-569, ¶34; 3-ER-544:9-23; 2-ER-312:12-15; 2-ER-318:16-23; 2-ER-247:21-24; 2-ER-282 at 92:24-93:5; 2-ER-283 at 98:23-99:4; 3-ER-568, ¶23; 2-ER-326:3-6; 2-ER-326:17-22; 2-ER-310:24-311:9; 2-ER-318:25-319:8; 2-ER-331:5-15). *Young*, 655 F.3d at 1163-66.

Appellants cannot meaningfully distinguish *Young* from the present case. Their argument that different types of force were used in both cases is not dispositive of *Young*'s relevance. *See Mattos*, 661 F.3d at 442. Likewise, the fact that the *Young* plaintiff verbally refused to follow the officer's command only strengthens the application of *Young* because the government interest was higher in *Young*.

Furthermore, it is clearly established that "non-trivial force [is] not justified in the face of passive or even minimal resistance" (*Rice*, 989 F.3d at 1126) and that "a person has the 'limited right to offer reasonable resistance to an arrest that is the product of an officer's personal frolic.'" *Blankenhorn*, 485 F.3d at 479 (quotation omitted).

c. It was clearly established that grabbing Savage, pushing her to the ground, and tightly handcuffing her violated her constitutional rights

i. Meredith clearly established this right

In *Meredith v. Erath*, the Ninth Circuit held that an officer grabbing a woman by her arms, forcibly throwing her to the ground, and tightly handcuffing her violated clearly established Fourth Amendment law. 342 F.3d 1057, 1061 (9th Cir. 2003). The officer's uses of force are strikingly similar to those Savage alleges against Draper and Goodman. Appellants argue that *Meredith* is distinct, but fail to identify any reason why.

ii. Santos clearly established this right

Santos v. Gates clearly established "that grabbing a plaintiff's arm and bringing them to the ground raises a triable issue as to excessive force." 287 F.3d 846, 854 (9th Cir. 2002). The government's interests in *Santos* mirror those here: in *Santos*, the officers suspected the plaintiff of the minor offense of public

intoxication, he did not present any threat, and he primarily complied with the officers. *Id.* at 854. Likewise in both cases, the officers' use of force caused significant injury to the plaintiffs, in *Santos*, to his back requiring surgery and here causing an elbow fracture and nerve damage, which required surgery. *Id.* at 853-54; (2-ER-353-354; 2-ER-356). The difference in the type of injuries is immaterial and does not render *Santos* inapplicable as Appellants claim because both injuries were severe, enough so that they both required surgery.

d. Savage does not need to identify a single case to defeat qualified immunity

Appellants do not cite any authority that supports their contention that Savage must identify one case that is entirely analogous to hers in order for her rights to be clearly established. The case Appellants rely upon, *Sheehan v. City and County of San Francisco*, does not support their argument. 575 U.S. 600 (2015). To the contrary, *Sheehan* found no error in assuming that *Graham*, *Deorle*, and *Alexander* could be viewed together to clearly establish that the challenged conduct was unreasonable where there was no need for immediate action. *Id.* at 615-16.

D. THE DISTRICT COURT CORRECTLY DENIED APPELLANTS QUALIFIED IMMUNITY ON SAVAGE'S FIRST AMENDMENT CLAIM

1. Viewing the facts in the light most favorable to Savage, Appellants violated her right to free speech

a. Appellants waived their argument that they did not violate Savage's First Amendment right by failing to present the facts in the light most favorable to Savage

As discussed above, in the Ninth Circuit, if an appellant "fail[s] to advance an argument that takes the facts in the light most favorable to [the appellee]," when "challeng[ing] the district court's holding that the fact, taken in the light most favorable to [the appellee], establish that the [appellants] violated the Constitution," they waive this argument. *NeSmith*, 808 F. App'x. at 444; *George*, 736 F.3d at 837.

In their argument that they did not violate her First Amendment rights, Appellants again blatantly disregard this obligation, including by frequently omitting relevant undisputed facts, inserting unsubstantiated factual allegations that Savage disputes, and misrepresenting a disputed fact. Appellants claim that WPD officers shut down the streets to regular traffic to facilitate "each group's First Amendment activities," but the District Court ruled that it was undisputed that they

did so "to allow the pro-police caravan to proceed along its route." (Dkt. No. 18 at 37; 2-ER-080:2-4). Appellants also claim that "Savage admitted that she intentionally blocked traffic in order to suppress the pro-police caravan member's free speech rights." (Dkt. No. 18 at 37, 38). While Savage does not dispute that she intentionally stood in front of two cars, she did not do so with the intent to suppress the occupants' free speech rights, and the record does not support this factual allegation. Appellants also claim that "Had Savage protested on the sidewalk or remained in the street but avoided blocking vehicular traffic, she would not have been arrested." *Id.* at 38. Again, Savage disputes this fact, and it is not supported by the record. Appellants assert that "Savage does not dispute that she engaged in a push with an officer." *Id.* This misrepresents this material disputed fact—Savage contends that the officer pushed her and she did not push the officer. *See* 2-ER-084:5-7. Further, Appellants were not aware of this fact when they arrested Savage, so it is not relevant to this analysis. *Graham v. Connor*, 490 U.S. 386, 397 (1989). Appellants omit the material facts that Draper and Goodman forcefully arrested Savage by surprise within minutes of her voicing her anti-police opinions and that WPD officers fraternized with the pro-police demonstrators, allowed pro-police demonstrators to violate traffic laws, push counter-protesters, and yell threats of violence with impunity, and only created a pre-event operations plan to manage the anti-police demonstration. (Motion to Transmit, Ex. 5 at 7:49-57; 2-

ER-264:21-265:6, 2-ER-271:3-13; 2-ER-281 at 88:19-25; 2-ER-282 at 90:22-24, 91:5-15; Ex. 15 at 0:00-06; Ex. 8 at 0:00-0:08, 1:40-2:00, 5:52-6:02, 6:35-6:40, 7:38-9:14, Ex. 6 at 0:48-59, 1:54-2:00, 5:22-6:14, Ex. 7; Ex. 9; 2-ER-249:16-251:8, 252:22-253:19; 2-ER-306:9-309:6; 2-ER-289-303). Given the scope of Appellants' failure to present the facts in the light most favorable to Savage, this Court should find that they waived their argument that they did not violate her First Amendment rights.

b. Savage's conduct was a substantial or motivating factor for Appellants' violent arrest of her

If the Court does consider Appellants' argument that Savage's conduct was not a substantial or motivating factor in her violent arrest, it will nonetheless find that it fails. To establish a First Amendment retaliation claim, Savage must prove that her constitutionally protected activity "was a substantial or motivating factor" in Appellants' conduct, in addition to proving that she was "engaged in a constitutionally protected activity" and that Defendant's actions "would chill a person of ordinary firmness from continuing to engage in the protected activity." *Index Newspapers LLC v. United States Marshals Serv.*, 977 F.3d 817, 827 (9th Cir. 2020).

Appellants' argument that they arrested Savage because she engaged in criminal conduct, and not because she criticized the police fails for a number of

reasons. First, as discussed at length in Section B(1), *supra*, Appellants did not have probable cause to arrest Savage. Second, even if Appellants did have probable cause to arrest Savage, this is not dispositive of a finding of First Amendment retaliation. *See O'Brien v. Welty*, 818 F.3d 920, 936 (9th Cir. 2016) ("there is a right to be free from retaliation even if a non-retaliatory justification exists for the defendants' action."); *Nieves v. Bartlett*, 139 U.S. 1715, 1727 (2019).

Third, the facts clearly demonstrate that Savage's protest of law enforcement was a substantial or motivating factor motivating Appellants' forceful arrest of her. Draper and Goodman forcefully arrested Savage by surprise within minutes of her voicing her anti-police opinions. (Motion to Transmit, Ex. 5 at 7:49-57; 2-ER-264:21-265:6, 2-ER-271:3-13; 2-ER-281 at 88:19-25; 2-ER-282 at 90:22-24, 91:5-15; Motion to Transmit, Ex. 15 at 0:00-06); *see Ulrich v. City & Cnty. Of San Francisco*, 308 F.3d 968, 980 (9th Cir. 2002) (considering "proximity in time between the protected speech and the alleged retaliation" in assessing third element of First Amendment retaliation claim). During the event, WPD officers shut down the streets to regular traffic to facilitate the pro-police car caravan parade. (Motion to Transmit, Ex. 2 at 2:10-4:17; 3-ER-573, ¶9). WPD officer hugged, fist bumped, cheered for, talked with, and waved to the pro-police demonstrators. (Motion to Transmit, Ex. 8 at 0:00-0:08, 1:40-2:00, 5:52-6:02, 6:35-6:40, 7:38-9:14, Ex. 6 at 0:48-59, 1:54-2:00, Ex. 7; Ex. 9). *See Coszalter v. City of Salem*, 320 F.3d 968,

977 (9th Cir. 2003) (considering a defendant's expressed opposition to a plaintiff's speech in assessing causation for retaliation). Prior to the event, Appellants only created a pre-event operations plan to manage the anti-police demonstration despite having advance notice of both groups' events. (2-ER-289-303). The officers allowed pro-police demonstrators to violate traffic laws, push counter-protesters, and yell threats of violence with impunity. (Motion to Transmit, Ex. 6 at 1:02-1:19, 2:52-3:00, 5:22-6:14, 11:07-11:47, Ex. 7 at 1 :45-2:14; 3:44-4:56, Ex. 9 at 3:07-4:20, 4:48-5:54; 2-ER-249:16-251:8, 252:22-253:19; 2-ER-306:9-309:6). *See Capp v. County of San Diego*, 940 F.3d 1046, 1056-57 (9th Cir. 2019) (crediting evidence of differential treatment in assessing First Amendment retaliatory animus); *Ballentine v. Tucker*, 28 F.4th 54, 62 (9th Cir. 2022).

b. This Court does not have jurisdiction to review Appellants' argument that they arrested Savage because she engaged in unlawful conduct because the District Court found that there are disputes of material fact as to the existence of probable cause

Again, Appellants are attempting to obtain a reversal of the District Court's denial of summary judgment on Savage's First Amendment claim by arguing that they are entitled to qualified immunity because they arrested Savage because she engaged in unlawful conduct which they had probable cause for, not in retaliation

for her speech. Dkt. No. 18 at 37-38. The District Court's denial of summary judgment on the First Amendment claim was based in part on the determination that "Savage has demonstrated genuine issues of material fact regarding whether probable cause existed for her arrest." (2-ER-111:9-11). Therefore, as discussed in Section B(i)(f), *supra*, this Court does not have jurisdiction to hear Appellants' argument that for the purpose of qualified immunity, they arrested Savage because she violated the law and they did not violate Savage's First Amendment right. *See Watkins*, 145 F.3d at 1091.

2. Savage's right to protest the police was clearly established

Since 1987, it has been clearly established that persons have a right to level substantial criticism at the police without being arrested. *Houston v. Hill*, 482 U.S. 451, 461 (1987). The cases cited by the District Court sufficiently put Appellants on notice that forcefully arresting Savage in these circumstances would violate her clearly established First Amendment right.[2]

a. *MacKinney* clearly establishes that arresting Savage would violate her First Amendment right

[2] Appellants state that the District Court "acknowledged that 'more specific case law' may be required." Dkt. No. 18 at 39. This statement misrepresents the court's statement; the full quote from the decision states: "Even if more specific case law is required, there are sufficiently analogous cases that clearly establish Savage's right to be free from retaliatory arrest given the circumstances of her case." (2-ER-115:3-6).

In *MacKinney v. Nielsen*, the Court found that the plaintiff's right to "verbally to oppose or challenge police action without thereby risking arrest" was clearly established when he wrote an anti-police message on the sidewalk in chalk and briefly refused to comply with the officer's orders. 69 F.3d 1002, 1004-07 (9th Cir. 1995) (quoting *Hill*, 482 U.S. at 462-63).

Appellants fail to meaningfully distinguish *MacKinney* from the present case. The arrest of Savage is clearly similar to that in *MacKinney*: as in *MacKinney*, Appellants arrested Savage for a low-level offenses, including resisting arrest, after she verbally conveyed an anti-police message. *See* 69 F.3d at 1004. While it is unclear, Appellants appear to argue that the cases are distinct because there was no probable cause to arrest the *MacKinney* plaintiff. However, Savage also contends that there was no probable cause for her arrest. Further, the existence of probable cause does not automatically defeat a First Amendment retaliation claim. *Nieves*, 139 U.S. at 1727. Appellants also argue that the cases are distinct because that Savage "intentionally interfered with others' First Amendment rights," which is a factual and legal claim that Savage disputes. Dkt. No. 18 at 41. Appellants state that contrary to *MacKinney*, Savage "was involved in push with an officer," which, as discussed above, misrepresents Savage's version of this fact and is irrelevant as it was unknown to Appellants at the time of her arrest. *Id.* Appellants also state that Savage resisted her arrest. *Id.* As

previously discussed, Savage's limited resistance was reasonable, and further, it occurred after she was already placed under *de facto* arrest, so it is not relevant to the inquiry of whether her arrest was retaliatory. Appellants' only two legitimate factual distinctions, the Savage blocked traffic for two minutes and yelled obscenities at pro-police demonstrators actually demonstrate the similarity that both plaintiffs were expressing anti-police messages before their arrests.

b. *Duran* clearly establishes that arresting Savage would violate her First Amendment right

Duran v. City of Douglas clearly establishes that it is unconstitutional to arrest an individual for criticizing law enforcement. 904 F.2d 1372, 1378 (9th Cir. 1990) ("Whether or not officer Aguilar was aware of the fine points of First Amendment law . . . we hold that he ought to have known that he was exercising his authority in violation of well-established constitutional rights."). In *Duran*, an officer stopped the plaintiff after he made obscene gestures and yelled at the officer. 904 F.2d at 1374. The plaintiff then refused to comply with the officer and a scuffle between the two ensured. *Id.* The officer arrested the plaintiff for disorderly conduct. *Id.* The Court ruled that there was a genuine dispute of material fact regarding whether the officer violated the plaintiff's right to free speech and ruled that the officer was not entitled to qualified immunity because the plaintiff's First Amendment right was clearly established. *Id.* at 1378. The Ninth Circuit has

repeatedly relied on *Duran* to deny qualified immunity in cases where police arrest individuals because they expressed criticism of law enforcement in different contexts because "Police officers have been on notice at least since 1990 that it is unlawful to use their authority to retaliate against individuals for their protected speech." *Ford v. City of Yakima*, 706 F.3d 1188, 1195 (9th Cir. 2013), *abrogated on other grounds by Nieves*, 139 S. Ct. at 1723-25; *see, e.g.*, *Beck*, 527 F.3d at 871 (9th Cir. 2008); *MacKinney*, 69 F.3d at 1007; *see also Albanese v. City of Oroville*, No. 2:22-cv-1131-KJN, 2022 U.S. Dist. LEXIS 186562, at *19 (E.D. Cal. Oct. 12, 2022); *Lull v. Cty. of Sacramento*, No. 2:17-cv-1211-TLN-EFB, 2019 U.S. Dist. LEXIS 34236, at *18 (E.D. Cal. Mar. 4, 2019).

Like in *Duran*, Savage was arrested for a minor offense after expressing verbal criticism of the police. (3-ER-551, ¶9; 3-ER-555, ¶9; 3-ER-569, ¶34; 3-ER-544:9-23). The distinctions, that she did not refuse to comply or engage in violence with Appellants, weigh in her favor in finding a First Amendment violation because there was even less purported justification for her arrest and do not render *Duran* inapplicable.

Appellants' argument that *Duran* is distinguishable is circular and conclusory—they argue that "Savage was not arrested for any conduct related to her protected activity in criticizing the police, as in *Duran,*" yet Savage brings this First Amendment retaliation claim because she believes that Appellants arrested

her for her conduct related to criticizing the police. Dkt. No. 18 at 42. Therefore, it is clear that *Duran* applies and sufficiently put Appellants on notice that their forceful arrest of Savage would violate her First Amendment right.

CONCLUSION

The District Court correctly denied qualified immunity to Appellants at summary judgment, concluding that Savage's Fourth Amendment and First Amendment rights were clearly established at the time. For the reasons set forth above, this Court should affirm the District Court's order.

DATED: October 10, 2024

Respectfully submitted,
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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