NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

HASHEEM BOUDJERADA; DAMON COCHRAN-SALINAS; ERIN GRADY; TYLER HENDRY; KIRTIS RANESBOTTOM,

Plaintiffs - Appellees,

v.

SARAH MEDARY; Chief CHRIS SKINNER,

Defendants - Appellants,

and

CITY OF EUGENE, SAMUEL STOTTS, BO RANKIN, WILLIAM SOLESBEE, TRAVIS PALKI, MICHAEL CASEY, RYAN UNDERWOOD, CRAIG WRIGHT, CHARLES SALSBURY,

Defendants.

No. 24-2419

D.C. No.
6:20-cv-01265-AA

MEMORANDUM[*]

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, District Judge, Presiding

Argued and Submitted February 4, 2025
Portland, Oregon

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: BEA, KOH, and SUNG, Circuit Judges.

This matter arises from a series of protests in Eugene, Oregon in May 2020. Relevant to this appeal, Hasheem Boudjerada, Damon Cochran-Salinas, Erin Grady, Tyler Hendry, and Kirtis Ranesbottom (collectively, "Plaintiffs") sued Eugene City Manager Sarah Medary and Police Chief Chris Skinner (collectively, "Defendants") for their conduct concerning the protests.[1] Defendants appeal the district court's denial of summary judgment and assert that they are entitled to qualified immunity. Having jurisdiction under 28 U.S.C. § 1291, we reverse the district court and remand for further consideration as discussed below.

"We review *de novo* a denial of summary judgment predicated upon qualified immunity." *Cox v. Roskelley*, 359 F.3d 1105, 1109 (9th Cir. 2004). On interlocutory appeal from the denial of qualified immunity, we have jurisdiction to resolve a defendant's "purely legal . . . contention that [his or her] conduct did not violate the [Constitution] and, in any event, did not violate clearly established law." *Est. of Anderson v. Marsh*, 985 F.3d 726, 731 (9th Cir. 2021) (alterations in original) (citation and internal quotation marks omitted). "We must affirm the district court's denial of qualified immunity if, resolving all factual disputes and drawing all inferences in [Plaintiffs'] favor, [Defendants'] conduct (1) violated a

[1] As the parties are familiar with the facts, we do not recount them here except as necessary to explain our decision.

constitutional right (2) that 'was clearly established at the time of [their] alleged misconduct.'" *Rosenbaum v. City of San Jose*, 107 F.4th 919, 924 (9th Cir. 2024) (citation omitted).

Defendants contend that the district court erred in denying qualified immunity as to Plaintiffs' First Amendment challenge to the city-wide curfew order (the "Curfew Claim") and Plaintiffs' First Amendment retaliation claim (the "Retaliation Claim"). We address each claim in turn.

1. Adopting the findings and recommendations of the magistrate judge, the district court denied qualified immunity as to the Curfew Claim because it concluded that *Collins v. Jordan*, 110 F.3d 1363 (9th Cir. 1996), clearly established Defendants' city-wide curfew order on May 31, 2020, violated the First Amendment.

We disagree. In *Collins*, we held that "[t]he law is clear that First Amendment activity may not be banned simply because prior similar activity led to or involved instances of violence." *Id.* at 1372. There, the San Francisco Police Chief and Mayor had enacted a prospective ban on "all demonstrations" in response to violence during a previous day's protest. *Id.* Those facts are distinguishable from the circumstances here. In this case, Defendants imposed a limited, seven-hour nighttime curfew in response to ongoing unrest, not an indefinite ban on all First Amendment activity based upon previous violence. Thus,

the legal principle that *Collins* held to be clearly established—that "the occurrence of limited violence and disorder on one day is not a justification for banning all demonstrations, peaceful and otherwise, on the immediately following day (or for an indefinite period thereafter)"—does not clearly establish the unconstitutionality of Defendants' conduct here. *Id.*

Moreover, *Collins* explicitly distinguished the order at issue in that case from time-limited curfews like the curfew at issue here.[2] *Id.* at 1374. *Collins* explained that "[p]roclaiming a curfew that requires people to remain at home during certain hours is obviously an entirely different matter from prohibiting only specific First Amendment activities during those or other hours." *Id. Collins* also expressly reserved the question of whether "a time limited ban on all demonstrations might be lawful" in cases of "widespread *continuing* violence that appears to be beyond the ability of the police to control." *Id.* at 1373 (emphasis added). Given these explicit caveats, we are not convinced that *Collins* made clear to "every reasonable officer" that a time-limited curfew violates the First Amendment under the specific factual circumstances present in this case. *See District of Columbia v. Wesby*, 583 U.S. 48, 66 (2018). The district court's

[2] Plaintiffs also cite our decision in *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 950 (9th Cir. 1997), for the proposition that curfew orders implicate First Amendment activities. That is correct. However, the permanent juvenile curfew at issue in *Nunez* was far more extensive than the limited curfew at issue here. *Id.* at 938.

decision denying qualified immunity on this claim is reversed.

2. As to the Retaliation Claim, the magistrate judge recommended denying summary judgment because it concluded that "Plaintiffs are entitled to have a jury evaluate the circumstances present here and determine whether protestors' viewpoints were a substantial or motivating cause behind the City Defendants' decision to *impose* a City-Wide Curfew[.]" (Emphasis added.) The magistrate judge did not address whether that conduct violated clearly established law at the time of the incident. The district judge adopted the magistrate judge's recommendation and denied qualified immunity because it concluded that "Plaintiffs['] right to be free of retaliation for the exercise of their right to protest was clearly established at the time of the challenged conduct."

We conclude that the district court conducted its qualified immunity analysis regarding the retaliatory imposition of the curfew at too high a level of generality. The Supreme Court has "repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) (citation omitted). In articulating the right at issue, the district court relied upon cases that either did not address retaliatory animus, *see Collins*, 110 F.3d at 1371, or stated the test for retaliation in general terms, *see Mendocino Env't Ctr. v. Mendocino County*, 192 F.3d 1283, 1300-01 (9th Cir. 1999). Those cases are insufficiently specific to clearly establish

the right at issue here, which is the right to be free from a retaliatory imposition of a limited nighttime curfew that is otherwise supported by legitimate reasons. *See Reichle v. Howards*, 566 U.S. 658, 665 (2012) (rejecting a similarly broad articulation of the right to be free of "retaliatory actions"). Even drawing all inferences in Plaintiffs' favor, Plaintiffs can establish, at best, only mixed motives for the curfew's imposition due to the ongoing concerns about unrest.

On appeal, Plaintiffs have the burden of citing controlling case authority showing the rights allegedly violated were "clearly established." *Shafer v. County of Santa Barbara*, 868 F.3d 1110, 1118 (9th Cir. 2017). "For a right to be clearly established, case law must ordinarily have been earlier developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the [D]efendant[s'] place, that what [they are] doing violates federal law." *Id.* at 1117.

Plaintiffs fail to cite any such case law here. For example, Plaintiffs rely upon *O'Brien v. Welty*, 818 F.3d 920 (9th Cir. 2016). There, university administrators allegedly initiated disciplinary proceedings against a student and limited his involvement in student groups in response to his First Amendment activity on campus. *Id.* at 934. That case does not provide the "factually defined context to make it obvious to all reasonable government actors, in the [Defendants'] place," that the imposition of the curfew in the specific

circumstances of this case violated clearly established law. *Shafer*, 868 F.3d at 1117. Nor do the specific circumstances here constitute an "obvious case" such that every reasonable official should have realized that the imposition of the curfew violated the Constitution absent on point case law. *See Perez v. City of Fresno*, 98 F.4th 919, 927 (9th Cir. 2024) (explaining such cases are "extraordinarily rare"). The district court's decision denying qualified immunity on the imposition portion of the Retaliation Claim is therefore reversed.

We note, however, that the precise scope of Plaintiffs' Retaliation Claim is unclear. Plaintiffs' operative complaint suggests that the Retaliation Claim against Skinner and Medary encompasses both the *imposition* of the curfew and the retaliatory *enforcement* of the curfew by other law enforcement officers pursuant to Skinner and Medary's orders.[3] The parties did not clarify the scope of the Retaliation Claim before the district court. Given the parties' presentation below, the district court never considered whether qualified immunity applies for the retaliatory enforcement of the curfew. As a result, the contours of the enforcement Retaliation Claim are still vague. At oral argument, for example, Plaintiffs stated for the first time that, despite language in their operative complaint to the contrary,

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[3] Plaintiffs did not allege their Retaliation Claim against the individual officers who personally arrested Plaintiffs. Instead, Plaintiffs alleged a Fourth Amendment claim against those officers, and the district court granted summary judgment in favor of those officers on that claim.

they alleged their claim for retaliatory enforcement of the curfew against only Skinner and not against Medary.

As we have explained, "[u]sually, an appellate court does not consider legal issues in the first instance but instead has the benefit of the district judge's initial analysis." *Ecological Rts. Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1154 (9th Cir. 2000). This is because "[o]ur judicial system generally assumes that consideration of an issue at both the trial court and appellate court level is more likely to yield the correct result, because the issue will be more fully aired and analyzed by the parties, because more judges will consider it, and because trial judges often bring a perspective to an issue different from that of appellate judges." *Id.* Plaintiffs insist there is a retaliatory enforcement claim, but this claim has been modified on appeal and was neither adequately explained in the operative complaint nor addressed below. Given these considerations, we remand the enforcement portion of the Retaliation Claim to the district court for consideration of qualified immunity in the first instance.

REVERSED AND REMANDED.

The parties shall bear their own costs and fees on appeal.