# **DECLARATION OF JOANNA HALL**

I, Joanna Hall, hereby declare and state:

1. I am a student at Southern Gould University, where I just finished my junior year. I am twenty-one years old and scheduled to graduate in spring 2014. This declaration is being submitted in support of Plaintiff's Motion to Compel Production of Evidence and Plaintiff's Opposition to Defendants' Motion for Summary Judgment, which are being filed simultaneously.

2. I am the president of SGU's Black Student Assembly. I was elected at the beginning of my junior year. The BSA works to create a strong community at SGU by providing academic, social, and professional support to students. We also contribute to the surrounding community through service projects and outreach.

3. The SGU campus is located in University Heights, a neighborhood where about 90% of the residents are either black or Latino. However, only 5% of the student body at SGU is black.

4. Recently, my friends in the BSA and I have noticed an increase in racial tension in the area near campus, specifically with members of the Gould City Police Department. Several BSA members have been stopped while riding their bikes, trying to enter their dorms, or driving. The police often treat us like

criminals, even when we are wearing backpacks and SGU gear. I have never heard of this happening to any of my white friends.

5. On May 4, 2013, one of my friends organized a graduation party at his house on University Avenue, which I attended. The party was registered with the SGU Campus Police, student IDs were checked at the door, and there were no fights or violence of any kind. Most of the students at the party were black. Apparently, someone in the neighborhood made a noise complaint, and at about 11:30 p.m., more than seventy GCPD police officers showed up at the house in riot gear. There was also a police helicopter overhead. The police stormed the house and arrested ten students, all of whom were black. They were eventually released, but only after being cuffed in front of everyone at the party and taken to the station.

6. I was extremely upset after this incident, especially since there was a party of similar size a few blocks away, hosted by white students, where no one was arrested. I believe the arrests were racially motivated.

7. On May 7, 2013, I helped organize a demonstration on campus to protest racial profiling by the police. There were about fifty students at the demonstration, most of whom were black and Latino. Some of my friends had signs that said, "We are scholars, not criminals!" I had a sign that said, "No racist pigs!" with a picture of a pig in a police hat.

8. Some police officers came to campus while we were protesting. Because of their uniforms, I knew they were from the GCPD, not the SGU campus police. They stayed about twenty to thirty feet away from the protest and stood with their arms crossed. There were five or six of them. I did not want anyone to get arrested, but I also thought it was important for us to be heard. The protest was peaceful. At one point, I made a speech, talking about how it was unfair that black students are made to feel unsafe on our own campus just because of our race, and how we should not be treated like criminals.

9. On May 8, the next day, the school newspaper and one local paper ran articles about the protest. Both articles quoted my speech, and the school newspaper had a picture of me with a few other students holding our signs. The articles were both critical of the GCPD and mentioned that there might be an investigation because of what had happened at the party.

10. On May 11, 2013, I was at a friend’s house near where the May 4th party had taken place. We were sitting on my friend’s front porch drinking a few beers. Everyone there was legal-drinking age. At about 10:30 p.m., one of the neighbors came over to complain about the noise we were making. I’m not sure if he was the same person who made the noise complaint about the May 4th party. He was very rude and told us we were

being “really fucking loud” and that we had not learned our lesson about bothering people.

11. When the neighbor came over, a few of my friends and I stood up to talk to him to see if we could work things out. He remained confrontational, had an angry tone, and commented that “people like us” should not be allowed in the neighborhood.

12. Soon after, two GCPD officers showed up in a patrol car. When they came up to the yard, five or six of us were standing in a circle with the angry neighbor, who was still shouting and waving his finger in my face. I never touched him or made any kind of threats.

13. The officers separated us from the neighbor. One of them talked to the neighbor, while the other talked to my friends and me. I recognized at least one of the officers from the rally a few days earlier. He was the officer who interviewed me. While he was interviewing me, he asked why I was trying to start a fight with the neighbor. I was very irritated with the situation and the GCPD. During the questioning, I told the officer that he was a racist and that he should either arrest me or leave me alone.

14. After I was interviewed, the officer took me over to the patrol car, cuffed me, read me my Miranda rights, told me I was being arrested for disturbing the peace, and took me to the station. They did not arrest the neighbor. I found out later

the neighbor told them I had been trying to start a fight with him, which was not true.

15. Prior to this incident, I had never been arrested. I was fingerprinted and strip-searched when I was brought in, which was traumatizing. I had to call my mother from the police station (on the day before Mother's Day) and tell her what had happened. I was crying and scared. I believe that the police arrested me because they recognized me from the protest and were trying to teach me and the other black students a lesson.

16. I spent the night in jail and was released the next day. Four days later, the case against me was dismissed. I was really shaken up by everything that had happened.

17. On May 15, 2013, I read a follow-up article, which was written by Chris Ramos, in the student paper. The article included a quote from an anonymous GCPD officer who had admitted to the reporter that there were problems with racial profiling by GCPD officers but added that most GCPD officers do not take the issue very seriously. The source stated that the officer who had arrested me had told the source that he had recognized me as a "troublemaker" from the protest before he arrested me. A copy of the article is attached to this declaration as Exhibit A.

18. After reading the May 15th article, I contacted an attorney and asked that he file a complaint for retaliatory

arrest against the GCPD and Officer Michael Hart, who arrested me. He filed the complaint and issued a subpoena to Christopher Ramos asking him to produce information and records relating to his anonymous source. Ramos's attorney responded by sending written objections, refusing to produce any information about the confidential source and claiming that the information was privileged.

18. I hereby declare under penalty of perjury that the foregoing is true and accurate. Executed this 10th day of June, 2013 in Gould City, Gould.

Joanna Hall

JOANNA HALL

**EXHIBIT A**

# SGU Student Arrested as Accusations of Racial Profiling Against GCPD Continue

by Christopher Ramos

May 15, 2013

Accusations of racial profiling against the Gould City Police Department continue to develop after another black student was arrested this week a few blocks from the Southern Gould University campus.

Earlier this month, the GCPD sent more than 70 officers to break up a house party hosted by black students, resulting in 10 arrests. Saturday, Black Student Assembly President Joanna Hall, a junior at SGU, was arrested just a few houses away from the party's location after police say they received a noise complaint.

Hall had spoken out at a student rally protesting racial profiling on last Wednesday, May 7. The *Gouldian* ran a photo of the protest that featured Hall holding a sign that said "No racist pigs!" Students who know Hall say her arrest was shocking. "I can't believe Jay [Hall] would ever do anything violent or threatening. There's no way this arrest was legitimate," said SGU senior Mera Baker.

Other students have speculated that Hall's arrest was motivated by her participation in the protest. And that speculation may well be correct. One GCPD officer, who spoke on the condition of anonymity, said that the arresting officer, Michael Hart, told him that he had recognized Hall from the earlier protest before he arrested her. "I heard [Hart] talking about 'that troublemaker from the protest' at the station [after the arrest]. Then, [Hart] says, 'Maybe this will teach her to keep her mouth shut,'" said the source. After hearing those comments, the source was convinced, "No way [Hart] would have arrested her if she hadn't gotten under his skin at that rally."

Baker agreed. "Disturbing the peace? Really? Don't the cops have anything better to do in this neighborhood?" she asked, referring to the recent uptick in violent crime in the University Heights area. "It's profiling, pure and simple," Baker said.

The GCPD would not comment on the accusations. SGU student leaders and community leaders are calling for an investigation into the recent police conduct. The officer who commented, however, is doubtful that any such investigation will get results. "Sure, there'll be an investigation," the source said. "We've had them before. People don't take it very seriously. Nothing really changes."

**DECLARATION OF MICHAEL HART**

I, Michael Hart, hereby declare and state:

1. I am a police officer with the Gould City Police Department. I have worked for the GCPD for five years. This declaration is being submitted in support of Defendants' Motion for Summary Judgment.

2. For the past two years, I have been assigned to work in the University Heights neighborhood. University Heights is a two-square-mile area in Gould City. It contains the Southern Gould University campus, as well as mixed residential and commercial areas. The residential population of the neighborhood is about 90% black and Latino. The student body at SGU is mostly white, with about 5% of the students being black.

3. The University Heights neighborhood is a relatively high-crime area, at least in comparison to the surrounding neighborhoods. A lot of these crimes are what you would expect for a campus surrounded by a low-income area, including numerous petty thefts of bikes, iPods, purses, and other similar crimes. There is also gang activity in the area, though it mostly occurs on the edge of the neighborhood away from campus. Recently, however, there has been an increase in violent crime in the area near campus. In early February of this year, two SGU students were shot and killed a few blocks from campus. In March, there

was an incident involving a local resident who brought a gun to a student party and fired a few shots, though fortunately no one was injured.

4. Since the two shooting incidents, the GCPD has been working closely with SGU administration to make the neighborhood safer. The university has instituted precautionary policies, such as requiring student parties to be registered with the campus police and to have student identification checked at the door. On weekends, however, there are often unregistered parties, and the SGU campus police are usually quite busy dealing with those parties, as well as their other duties.

5. In the weeks before May 4, 2013, my fellow GCPD officers and I responded to an increasing number of calls about unregistered parties, probably about two or three a week. Some residents expressed concerns to me about the possibility of another shooting incident. Most of the students I encountered were very resistant to following the rules, despite the violence of the past few months.

6. I was on duty the night of May 4, 2013. Several calls came into the station about a huge, unauthorized party on University Avenue that was spilling out into the street and getting out of control. The head of my GCPD unit was extremely concerned that there might be gang activity going on near the party, and that there would be another shooting incident. I was

one of the seventy officers who were dispatched to shut down the party. Our goal was to secure the area as quickly and efficiently as possible to avoid any violent events occurring. About ten arrests were made that night, although I did not make any myself.

7. I was also on duty on May 7, 2013 when another incident occurred. I was sent to campus when reports came in about a student demonstration that was getting heated. When I arrived with my partner and a few other officers, there were about fifty students milling around with signs about how police are "racist pigs." I thought the signs were immature and disrespectful, but I also recognized that the protesters were not breaking any laws. It did not seem like there was any violence brewing, so my fellow officers and I kept our distance. There was some press coverage of the demonstration over the next few days, but I did not closely read any of the articles.

8. On May 11, 2013, I was patrolling the SGU campus with my partner, Ian Henry. At approximately 10:37 p.m., we received a call about a noise complaint and possible fight a few blocks from our location. I turned on the siren and drove the few blocks to University Avenue, where the call originated.

9. When we arrived on the scene, six or seven people were gathered on the lawn of a house located at 123 University Avenue, Gould City, Gould. It looked like a fight was brewing.

I parked the patrol car in front of the house. When I exited the vehicle, I could hear shouting. When I walked closer, I saw a woman and a man standing about a foot apart and shouting at each other, surrounded by several other people. I now know the woman to be Plaintiff Joanna Hall. Hall is also the president of a student group that was involved in the protests on campus on May 7, 2013. I remembered seeing her make a speech at that event.

10. My partner and I identified ourselves as GCPD officers and separated the group. My partner spoke to the man. After the interview, my partner told me that the man said that he lived next door. He stated that the people on the lawn were students who had been making a lot of noise, so he had gone over to ask them to be quiet. He acknowledged that he had used some coarse language when talking to the students, but he also said that Hall had gotten quite heated, that she was the one who had initiated the shouting, and that he had feared for his safety, especially since he was outnumbered. He was calm and polite when speaking to us.

11. In the meantime, I spoke to Hall. I could see that she was still very agitated, speaking loudly, and had her fists clenched. She claimed that the neighbor’s complaint was unfounded and argued that we were just harassing her. At one

point during the interview, she shouted, “I’m black, and you’re all racists, so arrest me already or leave me the fuck alone.”

12. Based on the interviews and Hall’s conduct while I was at the location, I concluded that Hall and her friends had been making enough noise to disturb the neighborhood, and that Hall had behaved in a threatening way to the neighbor. I decided to arrest Hall and bring her to the station to calm down. I brought her to the patrol car, informed her she was under arrest for disturbing the peace, cuffed her, and read her the Miranda warnings. My partner and I then drove her to the station for booking. I filled out an arrest report.

13. Based on my report, the Gould City District Attorney’s Office decided to charge Hall with disturbing the peace, in violation of Gould Penal Code, section 541. Several days after the arrest, a Deputy District Attorney called to inform me that the charges were being dropped in the interest of justice.

14. I hereby declare under penalty of perjury that the foregoing is true and accurate. Executed this 6th day of June, 2013 in Gould City, Gould.

Michael Hart

Michael Hart

**DECLARATION OF CHRISTOPHER RAMOS**

I, Christopher Ramos, hereby declare and state:

1. I am a student at Southern Gould University. I am also a staff member of SGU's student-run newspaper, the *Gouldian*. This declaration is being submitted in support of my Opposition to Plaintiff's Motion to Compel Production of Evidence.

2. I recently wrote an article about police activity in and around the SGU campus, including SGU student Joanna Hall's arrest. The article was published in the *Gouldian* on May 15, 2013. A true and correct copy of that article was attached to Plaintiff's Motion as Exhibit A.

3. As part of my research for the article, I interviewed a confidential source at the Gould City Police Department. The source spoke to me on the condition of anonymity. The source was concerned that if his or her identity were to be revealed, it could lead to retaliation by the source's supervisors or other members of the GCPD. I promised not to reveal the source's identity.

4. On June 3, 2013, I was served with a subpoena from Plaintiff Hall, demanding the name of my source, my notes from the interview, and any recordings or transcripts of the interview. I hired an attorney, who sent written objections to Plaintiff Hall, refusing to provide any documents or information

in response to the subpoena because that information is privileged because I am a journalist.

I hereby declare under penalty of perjury that the foregoing is true and accurate. Executed this 14th day of June, 2013 in Gould City, Gould.

*Christopher Ramos*

CHRISTOPHER RAMOS

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF GOULD

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| JOANNA HALL,<br><br>Plaintiff,<br><br>v.<br><br><br>MICHAEL HART, and<br>GOULD CITY POLICE DEPARTMENT,<br><br>Defendants.<br>______________________________ | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | CV No. 13-014-AF<br><br>ORDER DENYING PLAINTIFF'S MOTION TO COMPEL THE PRODUCTION OF EVIDENCE |

This matter comes before the Court on Plaintiff Joanna Hall's Motion to Compel the Production of Evidence. Plaintiff's motion seeks to compel a non-party journalist, Christopher Ramos, to reveal the identity of a confidential source, as well as to produce any transcripts and recordings of interviews with the source. Mr. Ramos has filed an opposition to the motion. For the reasons set forth below, Plaintiff's motion is DENIED.

## I. Factual Background

Based on the declarations submitted by the parties in support of their various pretrial motions, the Court hereby finds that the following facts are undisputed and relevant.

1. Plaintiff is a rising senior at Southern Gould University and president of the school's Black Student Assembly.

2. On May 11, 2013, she was arrested for allegedly disturbing the peace, in violation of Gould Penal Code, section 541, following a complaint by a neighbor that an off-campus student gathering was making excessive noise. She was released the next day, and soon thereafter, the charges against her were dropped in the interest of justice.

3. On May 15, 2013, an article in SGU's student-run newspaper, the, *Gouldian* alleged that Defendant Michael Hart, who is a Gould City Police Department officer, had arrested Plaintiff because he recognized her as a "troublemaker" from a protest that took place a week before her arrest and he thought the arrest might teach her to "keep her mouth shut." The protesters, including Plaintiff, were protesting the racial-profiling practices of the GCPD. The article in the *Gouldian* was based on information received from an anonymous source who was allegedly a GCPD employee.

4. On May 31, 2013, Plaintiff filed a complaint in the above-captioned matter, alleging that Defendant Hart arrested her in retaliation for her exercise of her First Amendment right to protest police misconduct, in violation of 42 U.S.C. § 1983.

5. On June 3, 2013, Plaintiff served a timely subpoena on the author of the article, Christopher Ramos, demanding that he reveal the identity of his source, as well as produce any notes, transcripts, or recordings made in connection with the

interview. Ramos responded with written objections, refusing to comply with the subpoena on the grounds that the information was protected by the journalist's privilege.

6. Plaintiff now moves to compel the production of the subpoenaed evidence, and Mr. Ramos opposes that motion.

## II. Legal Analysis

Generally, "if no claim of privilege applies, a non-party can be compelled to produce evidence regarding any matter 'relevant to the subject matter involved in the pending action' or 'reasonably calculated to lead to the discovery of admissible evidence.'" Shoen v. Shoen, 5 F.3d 1289, 1292 (9th Cir. 1993) ("Shoen I") (quoting Fed. R. Civ. P. 26(b)(1)).

On the other hand, privileged information should not be automatically disclosed. In particular, the Ninth Circuit has held that "facts acquired by a journalist in the course of gathering news" are protected by a qualified privilege. Id.; see also Shoen v. Shoen, 48 F.3d 412, 415-16 (9th Cir. 1995) ("Shoen II"). Recognition of this privilege is merited because "society's interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public, is an interest 'of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.'" Shoen I, 5 F.3d at 1292 (quoting Herbert v. Lando, 441 U.S. 153, 183

(1979) (Brennan, J., dissenting) (quoting McCormick on Evidence 152 (2d ed. 1972)).

When the information sought from the journalist is not confidential, a plaintiff can overcome the privilege and compel disclosure of the information only if it is "(1) unavailable despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an important issue in the case." Shoen II, 48 F.3d at 416. In Shoen I, sons who were suing their father for defamation subpoenaed an investigative book author, demanding the author's notes and tapes of interviews with their father. 5 F.3d at 1290-91. The author successfully asserted the journalist's privilege because the sons had not exhausted other means of obtaining the requested information, including deposing their father. Id. at 1297-98. The case was remanded, the sons deposed the father, and they then renewed their demand for the author's notes. Shoen II, 48 F.3d at 414. The trial court granted the sons' motion to compel the author, who appealed the order. Id. The Ninth Circuit once again upheld the journalist's privilege, finding that although the exhaustion prong had been met, the sons had not shown that the information was clearly relevant to the disputed issue, which was whether the father acted with malice. Id. at 417.

In this case, unlike in Shoen I and II, Plaintiff is asking Ramos to disclose confidential information, rather than

nonconfidential information. Unfortunately, the Ninth Circuit has not explicitly decided what a civil litigant must show to compel a journalist to disclose confidential information. Further, the controlling cases make it clear that the extent of a journalist's right not to disclose his or her sources differs depending on the particular context and circumstances. For example, in the criminal context, the Supreme Court held that journalists' agreements to conceal the criminal activity of their sources do not give rise to a constitutional testimonial privilege, meaning that journalists can be compelled to testify before a criminal grand jury about their sources. Branzburg v. Hayes, 408 U.S. 665, 690-91 (1972).

Yet, the Ninth Circuit has subsequently interpreted Branzburg as still recognizing "some First Amendment protection of news sources" and held that courts must balance "the claimed First Amendment privilege" against "the opposing need for disclosure," in light of the specific circumstances of each case. Farr v. Pitchess, 522 F.2d 464, 467-69 (9th Cir. 1975) (holding due process rights of criminal defendant outweighed journalist's First Amendment rights so journalist must comply with court order to disclose identity of confidential sources).

In the civil context, the Ninth Circuit held that the same due process concerns do not exist, so once the privilege is properly invoked, "the burden shifts to the requesting party to

demonstrate a sufficiently compelling need for the journalist's materials to overcome the privilege." Shoen I, 5 F.3d at 1296. Although it has not explicitly decided how that burden can be met in civil cases involving confidential sources, in dicta, in Shoen II, the court did cite with approval a test used by the Second Circuit to determine when a requesting party has demonstrated a sufficiently compelling need to overcome the journalist's privilege as to confidential information. 48 F.3d at 416 (citing In re Petroleum Prod. Antitrust Litig., 680 F.2d 5, 7 (2d Cir. 1982)); see also Condit v. Nat'l Enquirer, Inc., 289 F.Supp.2d 1175, 1177 (E.D. Cal. 2003) (applying Second Circuit test). Under this test, to compel a journalist to disclose confidential information, a litigant must show the information (1) is relevant, (2) cannot be obtained by other means, and (3) is critical to the case. Id. at 1177. This test has also been adopted by other circuits. See, e.g., LaRouche v. Nat'l Broad. Co., Inc., 780 F.2d 1134, 1139 (4th Cir. 1986).

This Court agrees that this test should be applied to determine if a journalist can be compelled to disclose confidential information. In this case, Plaintiff fails two prongs of that test; she has failed to show that (1) the information cannot be obtained by other means and (2) it is critical to her case. Specifically, Plaintiff has presented no evidence at all indicating that she has made any effort to

obtain this information from any other source or that it is otherwise unavailable. Nor has she shown that it is critical to her case. While disclosure of the source's identity might reveal favorable evidence, the identity of the source is not at the heart of her claims. Rather, the critical issue in this case is what motivated Defendant Hart to arrest her. One short after-the-fact comment about Plaintiff being a "troublemaker" who needed to be taught to "keep her mouth shut" is not going to be critical in proving whether Defendant Hart arrested Plaintiff because of retaliatory animus. The comments in question are simply too vague to be critical; Defendant Hart may have been talking about Plaintiff being taught not to insult police at protest rallies, but just as plausibly, he may have been talking about Plaintiff needing to be taught not to disturb the peace and not to threaten her neighbors.

Additionally, the Court believes that it must always consider any harm that might be caused by its orders. See Southwell v. S. Poverty Law Ctr., 949 F. Supp. 1303, 1312 (W.D. Mich. 1996) (potential harm from disclosure of a confidential source is an implicit factor that must be considered in proper balance of interests). In this case, significant harm could result if this Court were to order Ramos to reveal his source. First, the source could face retaliation and ostracism for speaking out against wrongdoing by his or her co-workers.

Furthermore, forcing Ramos to break his promise of confidentiality could have a chilling effect on journalists' ability to gather news, inhibiting the free flow of information to the public.

Accordingly, the Court finds that Plaintiff's interests are outweighed by both constitutional and prudential concerns, and the information is protected by the journalist's privilege.

**III. Conclusion**

For the foregoing reasons, Plaintiff's Motion to Compel the Production of Evidence is DENIED.

Dated: June 21, 2013

Amani Floyd

AMANI FLOYD
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF GOULD

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| JOANNA HALL<br><br>Plaintiff,<br><br>v.<br><br>MICHAEL HART, and<br>GOULD CITY POLICE DEPARTMENT,<br><br>Defendants. | CV No. 13-014-AF<br><br>ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT |

This matter comes before the Court on Defendants Michael Hart and Gould City Police Department's Motion for Summary Judgment. Defendants moved for summary judgment on the grounds that Defendant Hart had probable cause to arrest Plaintiff Joanna Hall on May 11, 2013, and the existence of probable cause is an absolute bar to Plaintiff's claim under 42 U.S.C. § 1983.

Based on the following Findings of Fact and Conclusions of Law, Defendants' Motion for Summary Judgment is GRANTED.

## I. Findings of Fact

Based on the declarations submitted by the parties in support of their various pretrial motions, the Court hereby finds that the following facts are undisputed and relevant.

1. On May 4, 2013, a large graduation party was hosted by a Southern Gould University student at his residence in the

University Park area of Gould City. Most of the students who attended the party were black. A neighbor complained that the party was excessively noisy, and officers from the Gould City Police Department responded to the complaint. Approximately seventy GCPD officers, some in riot gear, entered the house where the party was being held and arrested ten students for disturbing the peace, in violation of Gould Penal Code, section 541. All ten were black. Plaintiff was not one of the students arrested at that time.

2. On May 7, 2013, Plaintiff and several other SGU students organized a rally at SGU to protest the GCPD's alleged practice of racial profiling. At the rally, many of the students, including Plaintiff, were carrying signs stating that the GCPD was full of racist officers, who were guilty of racial profiling. Many of the signs contained highly inflammatory and offensive language. Plaintiff made a speech at the rally and accused the GCPD of using improper racial profiling. Defendant Michael Hart and several other GCPD officers were present at the rally, but no laws were broken and no arrests were made.

3. On May 11, 2013, the GCPD received another noise complaint about excessive noise at a different residence in the University Park area. Defendant Hart and his partner responded to the call. Upon arriving at the scene, Defendant Hart witnessed Plaintiff shouting back and forth with her neighbor,

who had reported the noise complaint. The neighbor was interviewed by Defendant Hart's partner. The neighbor said that Plaintiff was being belligerent and would not comply with his requests to keep the noise down.

4. Meanwhile, Defendant Hart spoke to Plaintiff at the scene, while she was still upset. After a few moments speaking with Defendant Hart, she said, "I'm black, and you're all racist, so arrest me already or leave me the fuck alone." Shortly thereafter, Defendant Hart arrested Plaintiff for disturbing the peace, in violation of Gould Penal Code, section 541.

5. Plaintiff was released the next day and the charges against her were dropped in the interest of justice.

## II. Conclusions of Law

The issue before this Court is whether the existence of probable cause at the time of an arrest is a complete bar to a lawsuit under 42 U.S.C. § 1983 for retaliatory arrest, in violation of a plaintiff's First Amendment right to free speech.

### A. Elements of Retaliatory Arrest

The Court's analysis of the law concerning retaliatory arrests in violation of a plaintiff's First Amendment rights must begin with the Supreme Court's decision in Mt. Healthy School District Board of Education v. Doyle, 429 U.S. 274 (1977). In Mt. Healthy, the Court held that to prove a First

Amendment violation, the burden is on the plaintiff to show that his or her conduct was constitutionally protected and that the conduct was a "motivating factor" in the government's subsequent action. Id. at 287. If that burden is met, the burden shifts to the government to show by a preponderance of the evidence that it would have taken the same action even in the absence of the protected conduct. Id.

The Supreme Court has applied the Mt. Healthy rule to cases alleging retaliatory prosecution in violation of defendants' First Amendment rights. See Hartman v. Moore, 547 U.S. 250, 256-66 (2006). In Hartman, the chief executive of a company engaged in a lobbying campaign urging the United States Postal Service to adopt his company's mail-sorting system. Id. at 252-53. After the Postal Service adopted the system, Postal inspectors investigated the chief executive and the company for being involved in a kickback scheme and improperly influencing the search for a new Postmaster General. Id. at 253. The government filed federal charges, but after six weeks of trial, a district court concluded there was "a complete lack of evidence" connecting the defendants to any criminal wrongdoing and granted their motion for judgment of acquittal. Id. at 253-54. The chief executive sued the inspectors and the prosecutor, alleging that they had acted in retaliation for his criticism of the Postal Service. Id. When the matter reached the Supreme

Court, it held that some sort of allegation was required to connect the animus of the inspectors to the prosecutor's decision to bring charges. Id. at 263. A lack of probable cause would be highly probative in proving retaliatory animus and could provide that connection. Id. at 263-66. Thus, the Court held that to prove a retaliatory prosecution claim, plaintiffs must show that there was no probable cause to believe that they committed the charged crime. Id. at 265-66.

The Supreme Court has, however, explicitly declined to reach the issue of whether plaintiffs alleging retaliatory arrest by a police officer must also prove a lack of probable cause, see Reichle v. Howards, __ U.S. __, 132 S. Ct 2088, 2096 (2012),[1] and the circuits are divided on the issue, compare Skoog v. County of Clackamas, 469 F.3d 1221, 1232 (9th Cir. 2006), with McCabe v. Parker, 608 F.3d 1068, 1075 (8th Cir. 2010); Barnes v. Wright, 449 F.3d 709, 720 (6th Cir. 2006).

On one side of this split, the Ninth Circuit has said that a plaintiff need not plead the absence of probable cause to state a claim for retaliatory actions by police officers. Skoog, 469 F.3d at 1232; see also Ford v. City of Yakima, 706

[1] In Reichle, the Supreme Court was faced with the question of whether two federal law enforcement officers were entitled to qualified immunity from retaliatory arrest claims because they had probable cause to arrest the plaintiff. 132 S. Ct. at 2091. The Court ruled in favor of the officers, but it did so without reaching the question of whether a constitutional violation had taken place; instead it merely held that the right was not clearly established, meaning that the officers were entitled to qualified immunity. Id. at 2093-97.

F.3d 1188, 1196 (9th Cir. 2013) (holding defendant's criticism of police was protected speech that provided possible evidence of retaliatory animus and existence of probable cause to arrest did not preclude possible retaliatory motive so officers not entitled to qualified immunity). In Skoog, the Ninth Circuit distinguished Hartman because retaliatory actions by police officers do not involve the same type of "multi-layered causation" as retaliatory prosecutions, id. at 1234, and held that a plaintiff need not plead the absence of probable cause to state a claim for retaliatory actions taken by police officers, id. at 1235.

The Ninth Circuit has not, however, been unanimous in supporting that position. In her dissent in Ford, Judge Callahan agreed with the other circuits that the rule in Hartman should apply to retaliatory arrests as well as prosecutions, and argued that the Supreme Court's comments in Reichle supported that position. 706 F.3d at 1199 (Callahan, J., dissenting) (noting that Reichle "expressed a preference for requiring the showing of the absence of probable cause and approvingly cited decisions by other circuit courts requiring a showing of a lack of probable cause" in retaliatory arrest cases) (citing Reichle, 132 S. Ct. at 2096)).

Other circuits have agreed and held that plaintiffs must show a lack of probable cause to arrest to survive summary

judgment. For example, in Barnes, the Sixth Circuit reversed a trial court's denial of a motion for summary judgment in a case involving a plaintiff who brought a retaliatory arrest claim after he had been arrested and indicted on several gun charges. 449 F.3d at 720. The Sixth Circuit cited Hartman and concluded that because the defendants had probable cause to arrest Barnes, his "First Amendment retaliation claim" failed "as a matter of law." Id. For similar reasons, the Eighth Circuit also requires plaintiffs to show a lack of probable cause in retaliatory arrest cases. McCabe, 608 F.3d at 1075.

**B. Elements of Qualified Immunity**

Even if a plaintiff can show that he or she was arrested in retaliation for exercising his or her constitutional rights, the arresting officer may still be entitled to qualified immunity. Qualified immunity shields government officials from civil liability unless the official violates a "constitutional right that was clearly established at the time of the challenged conduct." Reichle, 132 S. Ct. at 2093. A right is clearly established if a "'reasonable official would [have understood] that what he is doing violates that right.'" Id. (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

As discussed above, in Reichle, the Court held that the officers were entitled to qualified immunity because neither its own precedent nor the Tenth Circuit's precedent had "clearly

established" a First Amendment right to be free from a retaliatory arrest that was supported by probable cause. Id. at 2093-97.

### C. Application to this Case.

After analyzing the relevant precedent, this Court is persuaded that the dissent in Ford and the majority of the circuits are correct that the rule from Hartman should be applied to retaliatory arrests. Just as in retaliatory prosecution cases, the presence or absence of probable cause will always be highly probative as to whether an arrest was the result of animus on the part of the arresting officer. In addition, it will often be entirely legitimate for an officer to consider a defendant's speech in deciding whether to make an arrest. Thus, if the officer had probable cause, it should bar any retaliatory arrest claim.

Here, Defendant Hart had probable cause to arrest Plaintiff. Section 541 of the Gould Penal Code provides in relevant part, "a person is guilty of disorderly conduct when, in a public place and with intent to cause public inconvenience, annoyance, or alarm, or wantonly creating a risk thereof, he [or she] . . . [e]ngages in fighting or in violent, tumultuous, or threatening behavior; [or] [m]akes unreasonable noise." Gould Pen. Code § 541. Defendant Hart responded to a noise complaint and encountered a party that had disrupted the neighboring

house. Plaintiff was shouting at the neighbor when the officers arrived. She continued to be confrontational, loud, and rude when speaking with Officer Hart. The Court therefore finds that probable cause existed to arrest Plaintiff for disorderly conduct. Because Defendant Hart had probable cause to arrest Plaintiff, her First Amendment retaliatory arrest claim is barred.

Alternatively, even if we were to find that the existence of probable cause does not automatically bar a retaliatory arrest claim, the Defendants are still entitled to qualified immunity because the law is not clearly established as to whether probable cause bars a retaliatory arrest claim given that the circuits are divided and the Supreme Court has not decided this specific issue. Accordingly, the Defendants are still entitled to qualified immunity.

**III. Conclusion**

Based on the foregoing, Defendants' Motion for Summary Judgment is GRANTED.

Dated: June 21, 2013

Amani Floyd
AMANI FLOYD
United States District Judge

**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE**

**NINTH CIRCUIT**

Case No. 13-432

Decided August 22, 2013

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JOANNA HALL,

Plaintiff-Appellant,

v.

MICHAEL HART, and
GOULD CITY POLICE DEPARTMENT,

Defendant-Appellees,

CHRISTOPHER RAMOS,

Appellee.

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APPEAL from a Judgment of the United States District Court for the District of Gould. Before Idol, Joseph, and Zonne. Opinion by Zonne, J. Reversed.

## I. INTRODUCTION

Plaintiff-Appellant Joanna Hall appeals from the denial of her motion to compel the disclosure of information concerning a journalist’s confidential source and the grant of Defendant-Appellees Michael Hart and Gould City Police Department’s summary judgment motion. The District Court denied Hall’s motion to compel, holding that a federal journalist’s privilege exists and that it protects the confidential source of Appellee Christopher Ramos, who is a journalist. It granted the Defendants’ motion for summary judgment, finding that Defendant Hart, who was a GCPD officer, was entitled to qualified immunity because he had probable cause to arrest Hall, and that the existence of probable cause bars a claim for retaliatory arrest under the First Amendment. In the alternative, the trial court held that even if probable cause were not to be viewed as an absolute bar to a claim of retaliatory arrest, the Defendants were still entitled to qualified immunity because the law concerning this issue was not clearly established. Hall now contends that both rulings were in error. For the reasons discussed below, we agree and accordingly reverse.

As to the denial of Hall’s motion to compel, she argues that (1) a federal journalist’s privilege has not been recognized by the Supreme Court and should not be recognized by

this Court, and (2) even if a journalist's privilege exists, it is a qualified privilege that should yield in the circumstances of this case, as it did in Branzburg v. Hayes, 408 U.S. 665 (1972) ("Branzburg"). We agree. While we recognize that prior opinions by this Court have not agreed, we read Branzburg as disallowing any federal journalist's privilege. Additionally, even if the privilege exists, it must, at very least, be a qualified one, and Hall has successfully demonstrated that her interests in compelling the information outweigh any constitutional protections afforded to Ramos and his source. The denial of Hall's motion to compel was in error.

Hall also argues that the District Court erred in granting Defendants' summary judgment motion. Specifically, Hall argues that there was no probable cause to arrest her; even if there was probable cause to arrest her, that fact does not bar her claim because probable cause is just another piece of evidence in a retaliatory arrest claim; and finally, that the law regarding this issue was clearly established in the Ninth Circuit so the Defendants were not entitled to qualified immunity. We agree. We hold that the existence of probable cause to believe that an arrestee committed a crime may provide valuable evidence of whether the arrest was motivated by animus on the part of the arresting officer, but it should not automatically bar the arrestee from bringing a claim for

retaliatory arrest. Accordingly, it does not need to be pled or proven by a plaintiff alleging retaliatory arrest under the First Amendment. We further find that the law regarding this issue was clearly established in this circuit at the time of Hall's arrest, so the Defendants were not entitled to qualified immunity.

## II. FACTS AND PROCEDURAL HISTORY

On May 4, 2013, a large party attended mostly by black students from Southern Gould University was broken up by nearly seventy police officers from the Gould City Police Department. Many of the officers were in full riot gear, and ten students were arrested on various charges.

On May 7, 2013, a rally was held on SGU's campus to protest the alleged racial profiling occurring within the Gould City Police Department. Hall, the president of SGU's Black Student Assembly, was one of the rally's main organizers. At the rally many students carried signs accusing the GCPD of racist practices. Many of the signs were inflammatory and derogatory toward police officers, including signs saying "no racist pigs." Hall made a speech at the rally accusing the police of racial profiling. Several GCPD officers, including Hart, were present, but no arrests were made.

On May 11, 2013, Hart and another GCPD officer responded to a noise complaint in the neighborhood surrounding SGU. Upon

arriving, they saw Hall outside with several other young people and an older man. Hall and the man were arguing and shouting at one another. While his partner interviewed the man, who said that Hall had threatened him when he complained about the noise she and her friends were making, Hart interviewed Hall. During that interview, Hall told Hart that he was a racist who should either leave her alone or arrest her. After the interviews, Hart decided to arrest Hall for disturbing the peace, in violation of Gould Penal Code, section 541. Hall was charged with disturbing the peace, but the charges were dropped a few days later.

On May 15, 2013, Appellee Christopher Ramos, a staff member of SGU's student newspaper, wrote an article about the recent events. The article quoted an anonymous source from within the GCPD, who stated that Hart had admitted that he recognized Hall as a "troublemaker from the protest" before he arrested her and that he hoped that "this" would "teach her to keep her mouth shut." Based on those comments, the source believed that Hall's arrest was made in retaliation for her involvement with the protest.

On May 31, 2013, Hall filed a complaint pursuant to 42 U.S.C. § 1983, alleging that her arrest was retaliatory and violated her First Amendment right to free speech. Three days later, she served a subpoena on Ramos, seeking the identity of

his confidential source, his notes from the interview, and any transcripts or recordings of the interview.

Ramos responded with written objections to the subpoena, asserting that all of the requested information was privileged. Hall then filed a motion asking the District Court to compel Ramos to produce the evidence. The District Court denied the motion, finding that the requested information was protected by the federal journalist's privilege.

Meanwhile, on June 6, 2013, the Defendants moved for summary judgment, arguing that Hart had probable cause to arrest Hall, and that her retaliatory arrest claim therefore failed as a matter of law. The District Court agreed and granted summary judgment and dismissed the complaint. Hall now appeals both of the District Court's rulings.

## III. DISCUSSION

### A. Standard of Review

A district court's discovery rulings are reviewed for abuse of discretion. Shoen v. Shoen, 5 F.3d 1289, 1300 (9th Cir. 1993) ("Shoen I"). A district court abuses its discretion when it applies an incorrect legal rule. See Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 34 (2d Cir. 2010).

A district court's disposition of summary judgment is reviewed de novo. Ford v. City of Yakima, 706 F.3d 1188, 1192

(9th Cir. 2013). When deciding a motion for summary judgment, we must view the facts in the light most favorable to the non-moving party and then determine whether the district court correctly applied the substantive law. Id. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id.

### B. The District Court Abused Its Discretion in Holding that Information Regarding a Confidential Source Was Protected by a Journalist's Privilege

The Supreme Court has never recognized a federal journalist's privilege. To the contrary, in Branzburg, the Court held that requiring journalists to appear and testify before a grand jury does not abridge the First Amendment freedoms of speech and press. 408 U.S. at 667. As the Court noted in Branzburg, that holding was consistent with precedent at the time—a journalist's claim that he or she should be exempt from compelled disclosure of confidential information pursuant to a subpoena in a civil suit was first rejected in 1958 in Garland v. Torre, 259 F.2d 545, 550 (2d Cir. 1958). Branzburg, 408 U.S. at 685-86. In Branzburg, the Supreme Court agreed and explicitly declined to interpret the First Amendment as granting "newsmen a testimonial privilege that other citizens do not enjoy." Id. at 690.

Despite that ruling in Branzburg, many circuits have since recognized some form of qualified privilege for journalists. However, the circuits vary as to the basis for finding that such a privilege exists. For example, the Third Circuit has discussed the privilege as being rooted in Rule 501 of the Federal Rules of Evidence. United States v. Cuthbertson, 630 F.2d 139, 146 (3d Cir. 1980). In contrast, the Eighth Circuit has held that a qualified privilege exists and that it is grounded in general constitutional freedoms and "the basic philosophy at the heart of the summary judgment doctrine." Cervantes v. Time, Inc., 464 F.2d 986, 992-93 (8th Cir. 1972). Interestingly, it held that despite having previously held "that the First Amendment does not grant to reporters a testimonial privilege to withhold news sources." Id.

Several other circuits, including this circuit in Farr v. Pitchess, 522 F.2d 464, 467-68 (9th Cir. 1977), have seen the source of the privilege as coming from Branzburg itself, though Branzburg delineates no such privilege. These circuits usually justify their opinion by citing Justice Powell's brief and enigmatic concurring opinion in Branzburg. See, e.g., LaRouche v. Nat'l Broad. Co., Inc., 780 F.2d 1134, 1139 (4th Cir. 1986) (finding a need to "balance" the constitutional and societal interests involved in a libel case).

More recently, however, other circuits interpreted Branzburg in a very different way. For example, the Sixth Circuit held that finding a journalist's privilege in Branzburg essentially substitutes the dissent for the majority's holding. In re Grand Jury Proceedings, 810 F.2d 580, 584 (6th Cir. 1987). Similarly, the D.C. Circuit held that Branzburg "in no uncertain terms" rejected a First Amendment reporter's privilege. In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1146-47 (D.C. Cir. 2006). And the Fourth Circuit recently found that while Branzburg "did not preclude recognition of a qualified reporter's privilege," neither did it establish such a privilege. United States v. Sterling, No. 11-5028, 2013 WL 3770692, at *5 (4th Cir. July 19, 2013).

We find the logic of these more recent cases persuasive. The only part of Branzburg that arguably supports the District Court's opinion in this case is Justice Stewart's dissent, in which he articulates a test that is essentially the same as the three-part test the District Court applied in this case. See Branzburg v. Hayes, 408 U.S. 665, 743 (1972) (Stewart, J., dissenting). That test was not accepted by the majority. Accordingly, we agree with the Sixth Circuit that it would be improper to "rewrite" Branzburg as recognizing a journalist's privilege—even a qualified one.

Additionally, even the circuits that have recognized a journalist's privilege do not agree as to its scope or the showing needed to overcome it. Our own cases are inconclusive. The first time this circuit interpreted Branzburg, it found that while Branzburg "recognizes some First Amendment protection of news sources," it "likewise indicates that the privilege is a limited or conditional one." Farr, 522 F.2d at 467. Although the court made the general finding that Branzburg "seems to require" judicial weighing of the First Amendment privilege claim against the need for disclosure in non-grand-jury cases, it did not articulate how courts should conduct that weighing. Id. at 468. Further, the Court also held in Farr that the journalist's privilege was outweighed by the accused's due process rights. Id. at 469.

More recently, in Shoen v. Shoen, 48 F.3d 412, 416 (9th Cir. 1995) ("Shoen II"), this Court clarified its holdings in this area, announcing that when nonconfidential information is sought from a journalist, it should be disclosed if it is: (1) "unavailable despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an important issue." Yet, even in Shoen II, this Court did not decide whether that test could or should be used in other situations or only in civil cases that involve nonconfidential information.

Nor has there been agreement among other circuits as to the scope or weight to be accorded to the journalist's privilege in different circumstances. For example, the Second Circuit posited a "demanding" burden for disclosure of journalists' confidential sources. United States v. Burke, 700 F.2d 70, 77 (2d Cir. 1983). Other circuits have set the bar for overcoming the privilege much lower, and have thus compelled journalists to reveal information about their confidential sources. For example, the Fifth Circuit declined to apply the privilege in a libel case where disclosure was the only way for the plaintiff to establish malice and prove his case, noting that "[e]videntiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances." Miller v. Transamerican Press, Inc., 621 F.2d 721, 725 (5th Cir. 1980) (quoting Herbert v. Lando, 441 U.S. 153, 155 (1979)). Similarly, the D.C. Circuit noted that the privilege is not "an absolute First Amendment barrier to the compelled disclosure by a newsman of his confidential sources under any circumstances" and ordered disclosure of a journalist's sources in a civil case. Carey v. Hume, 492 F.2d 631, 639 (D.C. Cir. 1974). Likewise, the Third Circuit upheld a contempt citation against a journalist who refused to disclose his source, finding that "[b]ecause the privilege is qualified,

there may be countervailing interests that will require it to yield in a particular case." Cuthbertson, 630 F.2d at 148.

Considering all of these authorities, we hereby hold that the District Court erred in denying Hall's motion to compel for several reasons. First, we believe that both the District Court and the courts in Farr and Shoen II misconstrued Branzburg as recognizing a journalist's privilege, when the majority in Branzburg in fact declined to do so. Therefore, the District Court was in error when it granted Ramos a testimonial journalist's privilege that does not extend to other citizens.

Second, even if we were to accept that there is a qualified journalist's privilege and apply it to Ramos, the privilege would not protect the information sought by Plaintiff in this case under the Second-Circuit test applied by the District Court below. The test used by the District Court requires a plaintiff to show that the requested information is relevant, cannot be obtained by other means, and is critical to the case. In this case, the record amply demonstrates that the requested information is relevant to Hall's case. As discussed in more detail below, to prove a claim of retaliatory arrest, plaintiffs must show that the officer's decision to arrest the plaintiff was motivated by animus toward the plaintiff because of the plaintiff's exercise of his or her free speech rights. Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287

(1977). Clearly, Officer Hart's admissions to the source that, before he arrested Hall, he recognized her as a "troublemaker" from the protest and that he wanted to "teach her to keep her mouth shut" are not only relevant but also would be critical evidence tending to show that Hart's decision to arrest Hall was motivated by animus toward her. Further, based on the evidence in the record, it appears that this evidence could not be obtained by other means. The source appears to be the only person who heard that admission and is therefore the sole possible source for this evidence. Finally, it is unrealistic to expect the Plaintiff to try to depose every possible GCPD officer in an attempt to find this one officer, who has already expressed a reluctance to come forward.

Accordingly, in this case, we find that the societal interest in disclosure of the information outweighs any constitutional interests at stake. The District Court abused its discretion, and its denial of Hall's motion to compel must be reversed.

### C. The District Court Erred in Granting the Defendants' Summary Judgment Motion

The First Amendment prevents Congress, and through the Fourteenth Amendment, the States, from abridging the freedom of speech. U.S. Const. amend. I; Gitlow v. New York, 268 U.S. 652, 666 (1925). Among other things, the First Amendment prohibits

government officials from subjecting an individual to retaliatory actions for speaking out. Crawford-El v. Britton, 523 U.S. 574, 592 (1998). A plaintiff claiming government retaliation for the exercise of First Amendment rights must show that government's retaliatory action was motivated by the exercise of his or her right to free speech. Mt. Healthy, 429 U.S. at 287.

More specifically, in cases alleging retaliatory prosecution, the plaintiff must, as a matter of law, plead and prove a lack of probable cause to prosecute. Hartman v. Moore, 547 U.S. 250, 265-66 (2006). In Hartman, the chief executive of a company that developed a system for sorting mail engaged in a lobbying campaign, urging the United States Postal Service to adopt its system. Id. at 252-53. After the Postal Service adopted the system, postal inspectors investigated the company's chief executive for allegedly being involved in a kickback scheme and having an improper role in the search for a new Postmaster General. Id. at 253. After the company and the executive were charged and tried, a district court concluded there was "a complete lack of evidence" connecting the defendants to any criminal wrongdoing and granted their motion for judgment of acquittal. Id. at 253-54. The executive then sued the inspectors for retaliatory prosecution, but the Supreme Court held that the suit was barred because the charges brought

against the company and the executive were supported by probable cause. Id. at 262-3.

In analyzing the retaliatory prosecution claim in Hartman, the Supreme Court recognized "the requisite causation between the defendant's retaliatory animus and the plaintiff's injury is usually more complex than it is in other retaliation cases, and the need to show this more complex connection supports a requirement that no probable cause be alleged and proven." Id. at 261.

Since Hartman, the circuits that have addressed the issue are split on the question of whether the rule from Hartman should control retaliatory arrests as well as prosecutions. For example, in Barnes v. Wright, 449 F.3d 709, 720 (6th Cir. 2006), the Sixth Circuit applied the rule from Hartman to retaliatory arrests. Similarly, the Eighth Circuit held that "the Supreme Court's holding in Hartman is broad enough to apply even where intervening actions by a prosecutor are not present." Williams v. City of Carl Junction, 480 F.3d 871, 876 (8th Cir. 2007).

The issue whether probable cause bars a retaliatory arrest claim was also raised but not decided in the recent Supreme Court case Reichle v. Howards, __ U.S. __, 132 S. Ct 2088 (2012). In Reichle, defendant officers argued, among other things, that they were immune from retaliatory arrest claims because they had probable cause to arrest the plaintiff. Id. at

2093. The Court, however, declined to answer that issue, holding instead that because the law in both the Supreme Court and the Tenth Circuit was unclear as to whether probable cause provides a complete defense to retaliatory arrest claims, the officers were entitled to qualified immunity. Id. at 2097.

Qualified immunity shields government officials from civil liability unless the official violates a "constitutional right that was clearly established at the time of the challenged conduct." Reichle, 132 S. Ct. at 2093. A right is clearly established if a "'reasonable official would [have understood] that what he is doing violates that right.'" Id.

In this case, the District Court believed that certain dicta in Reichle supports reading the rule in Hartman broadly enough to encompass retaliatory arrests as well as retaliatory prosecutions. It found that probable cause supported Hall's arrest, so the Defendants were entitled to qualified immunity, and it dismissed Hall's suit. We disagree with that holding because we disagree with the District Court's interpretation of Reichle. Despite its failure to reach the ultimate question of whether Hartman applies to retaliatory arrests, the Court in Reichle made several important and relevant observations that undermine the District Court's conclusions. Specifically, the Court in Reichle noted that retaliatory arrest cases, as opposed to retaliatory prosecutions, do not have the same issues with

attenuated causation because "it is the officer bearing the alleged animus who makes the injurious arrest." Id. at 2096. It further distinguished retaliatory arrest cases from retaliatory prosecutions when it noted "that in retaliatory prosecution cases, the causal connection between the defendant's animus and the prosecutor's decision is further weakened by the 'presumption of regularity accorded to prosecutorial decision-making.'" Id.

Recognizing a difference between retaliatory arrests and retaliatory prosecutions, this circuit previously held that the existence of probable cause does not bar a plaintiff from going forward with a retaliatory arrest claim. Skoog v. County of Clackamas, 469 F.3d 1221, 1235 (9th Cir. 2006). Earlier this year, we further found that this rule was "clearly established" within the circuit. Ford v. City of Yakima, 706 F.3d 1188, 1196 (9th Cir. 2013).

Accordingly, the District Court erred when it extended the rule from Hartman to retaliatory arrest claims and when it found, in the alternative, that even if one were to disagree with its holding, the rule regarding retaliatory arrest claims was at very least not clearly established, so the Defendants were entitled to qualified immunity. To the contrary, we continue to hold that the existence of probable cause does not bar a plaintiff from stating a claim for retaliatory arrest. We

affirm our holding in Ford that a person has the right to be free from retaliatory arrest even when the arrest is supported by probable cause, and we find that this rule was clearly established in this circuit at the time of Hall's arrest. Accordingly, the Defendants were not entitled to qualified immunity, and the District Court erred in granting the Defendants' summary judgment motion.

We believe that this holding is amply justified by not only our own precedent, but also by the Supreme Court's comments in Reichle and by prudential concerns. As noted above, in retaliatory arrests, there is no attenuated causation. It is well-established that police officers are not entitled to the same "presumption of regularity" in decision-making as prosecutors. It is certainly plausible that, under some circumstances, a plaintiff's arrest would be a violation of his or her First Amendment rights even if supported by probable cause, and that may be true in this case. Hall may be able to prove that Hart's decision to arrest her was motivated by her having protested racism within the Gould City Police Department. The burden would then be on the Defendants to prove that Hart would have still arrested Hall absent that protected speech. For the foregoing reasons, the District Court's grant of summary judgment must be reversed and the matter remanded to the District Court for further proceedings.

## IV. CONCLUSION

In denying Hall's motion to compel, the District Court misconstrued Branzburg and abused its discretion. Although this circuit has previously recognized a qualified journalist's privilege, for the reasons discussed above, we disagree with the reasoning of those cases. The Supreme Court has never recognized a journalist's privilege, and we decline to do so here.

In the alternative, even if a qualified journalist's privilege exists, in this case, the balance of the interests favors Hall because the information sought is critical to her case and cannot be obtained from other sources. The allegations made by Hall are serious, and the judicial process would be significantly hampered by allowing Defendants to rely on an ill-defined and controversial privilege to keep out critical evidence. Therefore, the District Court erred in denying Hall's motion to compel Ramos to disclose the identity of his source and all notes or recordings of the source's statements.

Additionally, the District Court erred in granting the Defendants' motion for summary judgment. The right to be free from retaliatory arrest even if the arrest was supported by probable cause has been clearly established in this Circuit. Retaliatory arrest claims do not have the same kind of evidentiary issues that are present in retaliatory prosecutions.

While the existence or lack of probable cause for the underlying arrest is likely to be highly probative as to whether an arrest would have been made absent the constitutionally protected speech, we do not believe that there should be a blanket rule preventing plaintiffs from going forward without first showing that no probable cause existed to arrest them. This rule was clearly established in this circuit at the time of Hall's arrest, so the Defendants were not entitled to qualified immunity. Moreover, in viewing the facts in the record in the light most favorable to Hall, we find it questionable at best whether her arrest was, in fact, supported by probable cause. Accordingly, the Defendants' summary judgment motion should not have been granted.

The judgment below is REVERSED, and the matter is REMANDED for further proceedings consistent with this opinion.

**IN THE SUPREME COURT OF THE UNITED STATES**

October Term, 2013

No. 13-56789

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MICHAEL HART,
GOULD CITY POLICE DEPARTMENT, and
CHRISTOPHER RAMOS,

Petitioners,

v.

JOANNA HALL,

Respondent.

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The petition for writ of certiorari is granted, limited to consideration of the following questions presented:

1. Did the District Court abuse its discretion when it denied a motion to compel the disclosure of information identifying a journalist’s confidential source, using a three-part test to determine that the information sought was protected by a federal journalist’s privilege?

2. Did the District Court err in granting the Defendants’ summary judgment motion on the ground that, as a matter of law, the existence of probable cause to arrest bars an arrestee’s claim under 42 U.S.C. § 1983 for retaliatory arrest in violation of the First Amendment?