No. 11-262

In The
Supreme Court of the United States

VIRGIL D. "GUS" REICHLE, JR.,
DAN DOYLE,

Petitioners,

v.

STEVEN HOWARDS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

Petitioners, two Secret Service agents on protective detail, arrested respondent following an encounter with Vice President Richard Cheney. Petitioners had probable cause to arrest respondent, who, in violation of 18 U.S.C. § 1001, falsely denied making unsolicited physical contact with the Vice President. Respondent thereafter brought a First Amendment retaliatory arrest claim against petitioners.

The questions presented are:

1. Whether, as the Tenth Circuit siding with the Ninth Circuit held here, the existence of probable cause to make an arrest does not bar a First Amendment retaliatory arrest claim; or whether, as the Second, Sixth, Eighth, and Eleventh Circuits have held, probable cause bars such a claim, including under *Hartman v. Moore*, 547 U.S. 250 (2006).

2. Whether the Tenth Circuit erred by denying qualified and absolute immunity to petitioners where probable cause existed for respondent's arrest, the arrest comported with the Fourth Amendment, it was not (and is not) clearly established that *Hartman* does not apply to First Amendment retaliatory arrest claims, and the denial of immunity threatens to interfere with the split-second, life-or-death decisions of Secret Service agents protecting the President and Vice President.

PARTIES TO THE PROCEEDING

Respondent Steven Howards filed this action against five agents of the United States Secret Service: petitioners Virgil "Gus" Reichle and Dan Doyle; Daniel McLaughlin and Adam Daniels (who were effectively dismissed by the Tenth Circuit's opinion applying qualified immunity to their actions); and Kristopher Mischloney, who was dismissed in the district court.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The Tenth Circuit's opinion is reported at 634 F.3d 1131 and is reproduced in the appendix to the petition for certiorari ("Cert. App.") at 1-43.

The oral ruling of the United States District Court for the District of Colorado denying petitioners' motion for summary judgment on qualified immunity grounds is unreported and is reproduced at Cert. App. 46-61.

JURISDICTION

Respondent Steven Howards brought this action under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that petitioners, United States Secret Service Agents Virgil "Gus" Reichle and Dan Doyle, arrested him in retaliation for exercising his First Amendment rights in the course of Howards' encounter with former Vice President Richard Cheney. The District Court exercised federal question jurisdiction under 28 U.S.C. § 1331. Joint Appendix ("JA") 6, 179.

The Tenth Circuit exercised appellate jurisdiction under 28 U.S.C. § 1291 and *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (permitting interlocutory appeals from the denial of qualified immunity). Cert. App. 9. The judgment of the Tenth Circuit was entered on March 14, 2011. Cert. App. 1.

This Court granted certiorari on December 5, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech. . . ."

The relevant statutory provision involved is 18 U.S.C. § 3056, which provides:

> (a) Under the direction of the Secretary of Homeland Security, the United States Secret Service is authorized to protect the following persons:
>
> (1) The President, the Vice President (or other officer next in the order of succession to the Office of President), the President-elect, and the Vice President-elect.
>
> * * *
>
> (7) Major Presidential and Vice Presidential candidates and, within 120 days of the general Presidential election, the spouses of such candidates. . . .
>
> * * *
>
> (c)
>
> (1) Under the direction of the Secretary of Homeland Security, officers and agents of the Secret Service are authorized to – . . .

* * *

(C) make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony. . . .

* * *

(d) Whoever knowingly and willfully obstructs, resists, or interferes with a Federal law enforcement agent engaged in the performance of the protective functions authorized by this section or by section 1752 of this title shall be fined not more than $1,000 or imprisoned not more than one year, or both.

STATEMENT OF THE CASE

Because this case comes before the Court on interlocutory appeal from the denial of petitioners' motion for summary judgment on qualified immunity, the courts below considered the following facts in the light most favorable to respondent Steven Howards. Cert. App. 3 n.1.

On June 16, 2006, respondent Howards was taking his son to a piano recital in Beaver Creek, Colorado. While walking through the Beaver Creek Mall, an outdoor shopping center, Howards saw then-Vice President Cheney shaking hands and having his picture taken with members of the public. Howards

decided to approach the Vice President to protest the Administration's policies regarding Iraq. JA 7, 106-14.

On that day, petitioners Gus Reichle and Dan Doyle were part of the Secret Service detail protecting Vice President Cheney. JA 8-9. The area was "unmagged," meaning people had not been screened with a metal detector for weapons. JA 46. Agent Doyle heard Howards state into his cell phone, "I'm going to ask him [the Vice President] how many kids he's killed today." JA 83, 109, 166. The comment prompted Agent Doyle to "keep an eye" on Howards. JA 84. Agent Doyle also noted that Howards "appeared anxious about something," JA 83, and was moving quickly and erratically through the crowd. JA 84, 86-87. Agent Doyle did not know at the time that Howards had lost track of his young son, and was looking for him in the crowd throughout the episode. JA 133. Howards was also holding an opaque bag, which the agents later determined contained a pair of shoes. JA 46, 92, 124.

Howards approached the Vice President "in a determined fashion," JA 102, and told him that his "policies in Iraq are disgusting." JA 114-16. The Vice President responded, "Thank you." JA 116. As he departed, Howards made unsolicited physical contact with the Vice President by touching the Vice President's right shoulder with his open hand. JA 86, 117-18. Howards then walked away. JA 87, 120-21. Agent Doyle, several other Secret Service agents, and both the Vice President's photographer and aide witnessed the encounter. JA 86 (Agent Doyle), 258 and 416

(Agent Daniels), 261 and 343-46 (Agent McLaughlin), 358-63 (Agent Lee), 379-84 (Agent Wurst), 404 (photographer David Bohrer), 102-05 (vice presidential aide Charles Durkin).

As the Protective Intelligence Coordinator, Agent Reichle was called to investigate Howards' encounter with the Vice President. JA 36, 384. Agent Reichle did not witness the encounter, but Agent Doyle told Agent Reichle about Howards' "how many kids he's killed today" comment and Howards' interaction with the Vice President, including the physical contact. JA 39, 44, 88. Agent Reichle approached Howards, identified himself as a Secret Service agent, presented his badge, and asked to speak with Howards. JA 45, 89-90, 128. Howards initially refused and was "not cooperative." JA 45, 129, 131, 241-42, Cert. App. 7, 18.[1] Persisting, Agent Reichle asked Howards if he had assaulted the Vice President, and Howards responded that he had not. JA 131-32. Agent Reichle then asked Howards if he had touched the Vice President, and Howards again answered that he had not. JA 132-33,

[1] Howards testified that when Agent Reichle asked if he could talk to Howards, Howards simply responded "No, you can't." JA 241-42, 129; *see also* JA 247 (Howards felt he was under no obligation to speak to law enforcement). Agent Reichle, and the other witnesses to the encounter, offered a more colorful account of Howards' response. JA 45, 152, 160, 170, 173. Since there was no dispute that Howards was at least uncooperative, the Tenth Circuit accepted Howards' version under the summary judgment standard and characterized Howards as "not cooperative" with Agent Reichle's attempt to investigate the incident. Cert. App. 7, 18.

242, Cert. App. 7. As Howards would later admit at his deposition, this answer "wasn't accurate." *Id*.

Agent Reichle confirmed the falsity of Howards' statement with the Secret Service agents who had witnessed the encounter and the physical contact. JA 153, 173-74. Agent Reichle then determined that he had probable cause to arrest Howards, based on the fact that Howards had been heard saying "I'm going to ask [the Vice President] how many kids he's killed today" on his cell phone; the fact that the Vice President was interacting with people in an "unmagged" area, including Howards, who was carrying a bag; Howards' unsolicited physical contact with the Vice President; and Howards' refusal to cooperate with Agent Reichle's attempt to investigate the incident. JA 46, 63-64, 145, 152, Cert. App. 8.

Because the incident occurred on a Friday afternoon, if the agents had taken Howards to the U.S. Marshals Service in Denver he would have spent the weekend in jail before he could appear before a federal magistrate judge. JA 67. Agent Reichle therefore took Howards to the Eagle County Sheriff's Department, where he was charged with state law harassment and detained for a few hours until his wife posted a $500 bond. JA 67, 176, Cert. App. 8. The state charges were eventually dismissed and no federal charges were filed. JA 177, Cert. App. 8-9.

Howards sued Agents Reichle and Doyle and other Secret Service agents under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of Federal*

Bureau of Narcotics, 403 U.S. 388 (1971), alleging First and Fourth Amendment violations. JA 5-6. He alleged "that the Agents violated his Fourth Amendment rights by an unlawful search and seizure, and his First Amendment rights by retaliating against him for engaging in constitutionally protected speech." Cert. App. 9; JA 5-6. After discovery, the agents moved for summary judgment on immunity grounds. The district court denied their motion, ruling that disputed fact issues regarding the agents' immunity defenses precluded judgment as a matter of law. Cert. App. 49-57.

The agents took an interlocutory appeal to the Tenth Circuit. Agents Reichle and Doyle argued on appeal that they were entitled to qualified immunity because, *inter alia*, they had probable cause to arrest Howards. They also argued that they were entitled to heightened or absolute immunity by virtue of their status as Secret Service agents protecting the Vice President. The United States, represented by the United States Department of Justice, filed an *amicus* brief in support of the agents.

The Tenth Circuit affirmed in part and reversed in part. The panel unanimously rejected Howards' Fourth Amendment claim on the ground that the agents objectively had probable cause to arrest him. A majority of the panel, however, held that probable cause was not a bar to Howards' First Amendment retaliation claim against Agents Reichle and Doyle.

With respect to Howards' Fourth Amendment claim, the Tenth Circuit held that "there is no doubt that Agent Reichle possessed probable cause to arrest Mr. Howards for lying to a federal agent in violation of 18 U.S.C. § 1001." Cert. App. 18. "Agent Reichle received information from three different Secret Service Agents that Mr. Howards had made unsolicited physical contact with the Vice President," yet Howards "claimed, falsely, that he did not touch the Vice President." Cert. App. 18, 20. Indeed, as Howards "conceded in his deposition, he made factually inaccurate statements during his exchange with Agent Reichle." Cert. App. 18. Because the Tenth Circuit held that "the Agents had probable cause to arrest Mr. Howards for violating 18 U.S.C. § 1001," it did "not consider whether probable cause existed for any other offenses." Cert. App. 17-18 n.7.

Although the existence of probable cause barred Howards' Fourth Amendment claim, the panel majority held that probable cause was not fatal to Howards' First Amendment retaliatory arrest claim. Cert. App. 26. The majority observed that in *Hartman v. Moore*, this Court held that "to prevail on a *retaliatory prosecution* claim, a plaintiff must plead and prove the absence of probable cause." Cert. App. 27 (emphasis in original) (citing *Hartman v. Moore*, 547 U.S. 250, 259-60 (2006)). Yet the majority "decline[d] to extend *Hartman*'s 'no-probable-cause requirement' to this retaliatory arrest case." Cert. App. 32. Thus, the majority held that Howards may "proceed with his First

Amendment retaliation claim notwithstanding probable cause existed for his arrest." Cert. App. 34-35.

The majority acknowledged the existence of a circuit split on the question of whether probable cause bars a First Amendment retaliatory arrest claim. It noted that "[i]n the wake of *Hartman*, our sister circuits continue to be split over whether *Hartman* applies to retaliatory arrests." Cert. App. 31 (citing cases from the Sixth, Eighth, Ninth, and Eleventh Circuits). By holding that probable cause does not bar a retaliatory arrest claim, the Tenth Circuit sided with the Ninth Circuit, *see* Cert. App. 31 (citing *Skoog v. County of Clackamas*, 469 F.3d 1221 (9th Cir. 2006)), and rejected the contrary majority rule. *See* Cert. App. 34 n.14 (noting that "some of our sister circuits disagree with us on this issue").

Despite *Hartman* and the circuit split, the majority held that, at the time of Howards' arrest, Tenth Circuit law was "clearly established that an arrest made in retaliation of an individual's First Amendment rights is unlawful, even if the arrest is supported by probable cause." Cert. App. 31. The majority so held even while acknowledging that "a conflict among the circuits 'is relevant' to our determination of whether a right is clearly established." Cert. App. 34 n.14. The majority thus remanded the case for a public jury trial on Howards' retaliation claim.

In a footnote, the Tenth Circuit rejected petitioners' argument that, as Secret Service agents protecting the Vice President, they were entitled to

absolute immunity from liability for retaliatory arrest claims for arrests made to protect the Vice President's immediate physical safety. Cert. App. 13-14 n.6.

Finally, the panel rejected Howards' First Amendment claim as against two other Secret Service agents, Daniel McLaughlin and Adam Daniels, on the ground that Howards had offered no evidence of a retaliatory motive on the part of those agents. Cert. App. 36-39.

Judge Kelly concurred in part and dissented in part. In his view, "all of the agents should receive qualified immunity." Cert. App. 40. He noted that "[t]here is a strong argument that *Hartman v. Moore*, 547 U.S. 250 (2006), applies not only to retaliatory prosecutions, but also to retaliatory arrests." Cert. App. 40. And he disagreed with the panel majority's decision to "adopt[ ] a minority view based upon the rationale of *Skoog v. County of Clackamas*." Cert. App. 41. Judge Kelly concluded that Agents Reichle and Doyle should have been granted qualified immunity because "when the arrest in this case occurred, the law simply was not clearly established (nor is it now) that *Hartman* applied only to retaliatory prosecutions and not retaliatory arrests." Cert. App. 41. He reasoned: "Given that the officers are deemed to have probable cause, no objectively reasonable officer on June 16, 2006 would be on notice that probable cause was insufficient to overcome claims of First Amendment retaliation." Cert. App. 41-42.

Agents Reichle and Doyle petitioned for rehearing *en banc*, supported by the United States Department

of Justice and the attorneys general of six States. The Tenth Circuit summarily denied the petition for rehearing *en banc*. Cert. App. 62-63. This Court granted certiorari on December 5, 2011.

SUMMARY OF THE ARGUMENT

Government actors need the reasonable breathing room afforded by qualified immunity so they can perform their discretionary duties without fear of being sued. Probable cause has long served as an objective and workable standard for evaluating the actions of government officials, and for law enforcement officers in particular. This Court recently applied the probable cause standard in *Hartman v. Moore* to bar retaliatory prosecution claims where the prosecution is supported by probable cause.

The presence of probable cause should likewise bar First Amendment retaliatory arrest claims. A no-probable-cause requirement for retaliatory arrest claims would give officers in the field a clearly defined, objective and workable standard to determine when they can and cannot arrest an individual without fear of being sued for retaliation. Requiring such a showing at the outset of a claim would also further the goals of qualified immunity by filtering out unmeritorious claims before discovery and trial.

These protections are particularly important for Secret Service agents who guard the Nation's leaders. The Secret Service's mission requires agents to make

immediate, potentially life-or-death decisions whether to arrest individuals in order to protect the physical safety of the President or other leaders. When a Secret Service agent confronts a suspect who may pose a threat to the President, and the agent has probable cause to arrest that suspect, the agent should not hesitate to act for fear of a potential retaliation claim down the road. Nor should a court second-guess the agent's decision to make an arrest that is supported by probable cause.

Petitioners should also be protected by qualified immunity because the law here was unsettled. At the time of the arrest, several circuit courts had extended the no-probable-cause requirement to retaliatory arrest claims, but the Tenth Circuit had not yet addressed the question in the wake of *Hartman*. As Judge Kelly stated in his dissent from the Tenth Circuit's opinion, no objectively reasonable officer at the time of the arrest would have been on notice that probable cause was insufficient to bar a First Amendment retaliatory arrest claim. A Secret Service agent cannot and should not have to worry about which side of a circuit split a given circuit will join when making a decision whether to arrest a suspect to protect the Vice President's immediate physical safety. Probable cause should be enough.

Moreover, at the time of Howards' arrest, a reasonable Secret Service agent could not have anticipated the possibility of liability for retaliatory arrest in light of prior authoritative case law recognizing absolute immunity against such claims. And no court

had addressed the scope of a Secret Service agent's authority under 18 U.S.C. § 3056 to arrest a suspect who refuses to cooperate with the agent's investigation to determine whether the suspect does indeed pose a threat to the Vice President's safety.

ARGUMENT

I. The Absence of Probable Cause Is Already a Central Requirement in Analogous Retaliatory Prosecution Claims.

In *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), the Court laid out a general framework for constitutional retaliation torts. A plaintiff must show that the defendant took a significant adverse action against the plaintiff, and that the action was substantially motivated by the plaintiff's exercise of constitutionally protected conduct. Defendants will not be liable, however, if they can show that they would have reached the same decision even in the absence of the protected conduct. *Mt. Healthy*, 429 U.S. at 287; *see also Texas v. Lesage*, 528 U.S. 18, 21 (1999) ("The government can avoid liability by proving that it would have made the same decision without the impermissible motive.").

Through *Mount Healthy* and its progeny, this Court has undertaken to define constitutional torts, and to develop the corollary doctrine of qualified immunity, in a way that balances citizens' interest in unfettered exercise of protected constitutional freedoms

with the legitimate need for government actors to perform their discretionary duties without constant fear of damage suits. *See*, *e.g.*, *Pickering v. Board of Educ.*, 391 U.S. 563, 572-73 (1968); *Butz v. Economou*, 438 U.S. 478, 500-04 (1978); *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982); *Davis v. Scherer*, 468 U.S. 183, 195 (1984); *Crawford-El v. Britton*, 523 U.S. 574, 584-600 (1998).

Perhaps the most common type of retaliation is the adverse employment action, where a government employee is fired for speaking out on an issue of public concern, as in *Pickering*. The Court thus has most often examined the balancing of constitutional rights and government interests in the employment setting. *See*, *e.g.*, *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996); *Rankin v. McPherson*, 483 U.S. 378 (1987); *Bush v. Lucas*, 462 U.S. 367 (1983); *Connick v. Myers*, 461 U.S. 138 (1983). This case requires the Court to revisit the balancing of these same interests in retaliatory arrest and prosecution claims, a subject last addressed by the Court in *Hartman v. Moore*.

In *Hartman*, this Court recognized that retaliatory arrest and prosecution claims form a distinct case category because the government actors in these cases are law enforcement officers who must base their decisions on probable cause. *Hartman v. Moore*, 547 U.S. 250 (2006). The Court in *Hartman* addressed the constitutional tort of retaliatory prosecution – specifically, the liability of criminal investigators or other government actors who induce prosecutions in

retaliation for a person's exercise of constitutional rights. As with all retaliation claims, *Hartman* focused on causation, with a particular eye on the role of probable cause: "It may be dishonorable to act with an unconstitutional motive and perhaps in some instances be unlawful, but action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway." 547 U.S. at 260. This Court then refined *Mount Healthy*'s general burden-shifting framework for retaliation cases to fit the specifics of retaliatory prosecution and the central role of probable cause in determining causation:

> Like any other plaintiff charging official retaliatory action, the plaintiff in a retaliatory-prosecution claim must prove the elements of retaliatory animus as the cause of injury, and the defendant will have the same opportunity to respond to a prima facie case by showing that the action would have been taken anyway, independently of any retaliatory animus. *What is different about a prosecution case, however, is that there will always be a distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation, namely evidence showing whether there was or was not probable cause to bring the criminal charge.* Demonstrating that there was no probable cause for the underlying criminal charge will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for instigating the prosecution, while establishing the existence of probable cause will suggest

> that prosecution would have occurred even without a retaliatory motive.

Hartman, 547 U.S. at 260-61 (emphasis added).

The Court observed how the intervening actions of the prosecutor required that a causal connection be shown between the retaliatory animus of the defendant investigator and the action of the prosecutor, who has absolute immunity from suit. *Hartman*, 547 U.S. at 261-62. The Court therefore saw fit to require that a retaliatory prosecution plaintiff prove that he was prosecuted without probable cause in order to bridge this causal gap. *Id.* at 262-63. Given the "presumption of regularity accorded to prosecutorial decisionmaking," where there is probable cause and a prosecutor chooses to proceed with prosecution, a court can confidently conclude that the prosecutor would have prosecuted even without the retaliatory inducement of the defendant investigator. *Id.* at 263. This Court therefore defined the tort of retaliatory prosecution to require the absence of probable cause, but left open the question of whether a similar analysis would apply to retaliatory arrest situations. *Id.* at 265-66 ("Because showing an absence of probable cause will have high probative force, and can be made mandatory with little or no added cost, it makes sense to require such a showing as an element of a plaintiff's case, and we hold that it must be pleaded and proven."). This holding effectively confers qualified immunity from retaliation claims on all criminal investigators and other government actors who urge

prosecution, when the prosecution is supported by probable cause. *Id*.

II. Several Circuit Courts Hold that Probable Cause Bars Retaliatory Arrest Claims.

Guided by *Hartman*, six circuits have now explored the role that probable cause, or the lack of it, should play in the tort of retaliatory arrest. The Tenth Circuit's holding below that Howards can "proceed with his First Amendment retaliation claim notwithstanding probable cause existed for his arrest," Cert. App. 34-35, conflicts with the majority rule established in at least four other circuit court decisions.

A. The Second, Sixth, Eighth, and Eleventh Circuits Apply *Hartman*'s No-Probable-Cause Rule to Retaliatory Arrest Cases.

Decisions from the Second, Sixth, Eighth and Eleventh Circuits have applied *Hartman*'s no-probable-cause requirement to retaliatory arrest cases.

In *Golodner v. City of New London*, 2011 WL 5083503 (2d Cir. 2011) (unpublished), the Second Circuit held that "[e]ven if Golodner did not waive his retaliation claim, we affirm the District Court's dismissal on the alternate ground that the existence of probable cause is a complete defense to a claim of retaliatory arrest. The District Court found that all of Golodner's arrests were based on probable cause; therefore, his First Amendment claim fails on a retaliation theory as well." *Id.* at *2. *Accord Morgan v.*

County of Nassau, 720 F. Supp. 2d 229, 238 (E.D.N.Y. 2010) ("[I]f a police officer has probable cause to arrest a person, this will serve as a complete defense to any claim of First Amendment retaliation based on that arrest.") (citing the pre-*Hartman* decision of *Curley v. Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001) ("[B]ecause defendants had probable cause to arrest plaintiff, an inquiry into the underlying motive for the arrest need not be taken.")).

In *Barnes v. Wright*, 449 F.3d 709 (6th Cir. 2006), the Sixth Circuit reasoned that the justification for *Hartman* is broad and applies beyond the narrow field of retaliatory prosecution. In *Barnes*, the plaintiff was arrested for his confrontation with two police officers, based on a grand jury indictment. *Id.* at 712-13. In Barnes' subsequent retaliation lawsuit, the Sixth Circuit discussed whether the presence of probable cause for the arrest should confer qualified immunity upon the officers against Barnes' retaliatory arrest claim. Discussing *Hartman*, the *Barnes* court noted that "[t]he concerns regarding the intervening actions of a prosecutor do not apply in this case, because the officers themselves initiated the grand jury proceedings against Barnes." *Id.* at 720. The *Barnes* court nonetheless held that a plaintiff must still show a lack of probable cause in order to proceed with a First Amendment retaliation claim. The *Barnes* court reasoned that "*Hartman* appears to acknowledge that its rule sweeps broadly" and that "the [Supreme] Court noted that causation in retaliatory-prosecution cases is '*usually* more complex than it is in other retaliation

cases.'" *Id.* (emphasis supplied by *Barnes*.) *But see Kennedy v. City of Villa Hills*, 635 F.3d 210, 217 n.4 (6th Cir. 2011) (limiting *Barnes* to claims of wrongful arrest when "prosecution and arrest are concomitant.").

In *McCabe v. Parker*, 608 F.3d 1068 (8th Cir. 2010), two Secret Service agents faced retaliation claims for their decision to arrest protesters at a rally for former President George W. Bush, based on the protesters' refusal to follow a Secret Service agent's direction to move to a different location. The Eighth Circuit reasoned that *Hartman*'s rule should extend to retaliatory arrest claims, holding that both *Bivens* and § 1983 plaintiffs claiming First Amendment retaliatory arrest must "plead and prove a lack of probable cause for the underlying charge pursuant to the Supreme Court's decision in *Hartman v. Moore*." *Id.* at 1075. In so holding, the Eighth Circuit followed its earlier decision in *Williams v. City of Carl Junction*, in which it "agree[d] with the Sixth Circuit that the Supreme Court's holding in *Hartman* is broad enough to apply even where intervening actions by a prosecutor are not present." 480 F.3d 871, 876 (8th Cir. 2007).

In *Phillips v. Irvin*, 222 Fed. Appx. 928 (11th Cir. 2007), the Eleventh Circuit held that "arguable probable cause to arrest" was sufficient to confer qualified immunity against a First Amendment retaliation claim. *Id.* at 929. *Phillips* cited *Redd v. City*

of Enterprise, 140 F.3d 1378 (11th Cir. 1998), a pre-*Hartman* decision, which held:

> When a police officer has probable cause to believe that a person is committing a particular public offense, he is justified in arresting that person, even if the offender may be speaking at the time that he is arrested. Likewise, when an officer has *arguable* probable cause to believe that a person is committing a particular public offense, he is entitled to qualified immunity from suit, even if the offender may be speaking at the time that he is arrested.

Id. at 1383-84 (emphasis in original, citations omitted).

B. The Ninth and Tenth Circuits Permit Retaliatory Arrest Claims Despite Probable Cause to Arrest.

In *Skoog v. County of Clackamas*, 469 F.3d 1221 (9th Cir. 2006), a police officer, armed with a warrant, seized Skoog's video cameras that Skoog had used to record police activity and support his lawsuits against police officers. 469 F.3d at 1225-26. The officer commented at the time of the seizure that "people shouldn't sue cops." *Id.* at 1227. Because the search and seizure were supported by probable cause, the Ninth Circuit rejected Skoog's Fourth Amendment claim. *Id.* at 1231. On Skoog's First Amendment retaliation claim, the Ninth Circuit reviewed *Hartman*'s causation analysis and held that "the rationale for

requiring the pleading of no probable cause in *Hartman* is absent here. This case presents an 'ordinary' retaliation claim." *Id*. at 1234.

The Ninth Circuit retreated from *Skoog* somewhat in *Beck v. City of Upland*, 527 F.3d 853 (9th Cir. 2008), stating that "under *Hartman*, if a plaintiff can prove that the officials secured his arrest or prosecution without probable cause and were motivated by retaliation against the plaintiff's protected speech, the plaintiff's First Amendment suit can go forward." *Id.* at 863-64. In a footnote, the *Beck* court cited *Skoog* for the proposition that "plaintiffs stating 'ordinary' retaliation claims posing less complicated causation problems than that addressed in *Hartman*, including actions concerning retaliatory searches, need not allege and show the absence of probable cause." *Id.* at 864 n.12 (quotation marks and brackets omitted).

Most recently, in *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892 (9th Cir. 2008), the Ninth Circuit characterized *Skoog* as holding that Skoog's First Amendment retaliatory arrest claim survived summary judgment because "there was barely enough evidence to conclude that there was probable cause, while there was strong evidence of a retaliatory motive." 548 F.3d at 901. The *Dietrich* court then concluded that the claim before it was precluded because it "has very strong evidence of probable cause and very weak evidence of a retaliatory motive." *Id.*

The Ninth Circuit thus appears to be crafting a sliding scale and case-by-case rule of qualified immunity that requires courts to evaluate the relative strength of the probable cause to arrest, the relative strength of the retaliatory motive of the arresting officer, and the complexity of the causal link between the retaliatory motive and arrest. The Ninth Circuit has not addressed how courts are to develop and balance all of these factors consistent with the goal of "resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

In the case at bar, the Tenth Circuit recognized the circuit split and chose to side with the minority view articulated by the Ninth Circuit in *Skoog*, with no consideration of the Ninth Circuit's subsequent qualifications in *Beck* or *Dietrich*. Cert. App. 26-36. The Tenth Circuit grounded its holding on its understanding that all retaliation claims against arresting officers are necessarily "ordinary retaliation claim[s]" under *Hartman*'s analysis; and "unlike prosecutors, Secret Service Agents enjoy no presumption of regularity regarding their decisionmaking." Cert. App. 32-33.

III. Qualified Immunity Should Shield Against Retaliatory Arrest Claims Where the Arrest Was Supported by Probable Cause.

The question now before the Court is whether it should require a showing of the absence of probable

cause in retaliatory arrest cases, as it did in *Hartman* for retaliatory prosecution claims. Extending *Hartman* in this fashion would effectively confer qualified immunity from claims of retaliatory arrest on law enforcement officers when the arrest is supported by probable cause.

"Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (quoting *Harlow v. Fitzgerald*, 457 U.S. at 818). The doctrine of qualified immunity recognizes the "need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Harlow*, 457 U.S. at 807. The doctrine balances the interest of officials with the interest of citizens in the unfettered exercise of their constitutional rights. *Id.*; *Davis v. Scherer*, 468 U.S. at 195. The doctrine is intended to protect "all but the plainly incompetent or those who knowingly violate the law." *Al-Kidd*, 131 S. Ct. at 2085 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). *See also Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974) (recognizing that official immunity analysis considers the "scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action," which may include an "atmosphere of confusion, ambiguity, and swiftly moving events"), *modified by Harlow v.*

Fitzgerald, 457 U.S. 800 (1982). The doctrine recognizes the importance of giving government actors appropriate breathing room for discretionary decisions, rather than subjecting every decision to judicial second-guessing and thereby chilling government actors' willingness to perform their jobs due to constant liability concerns. *Hunter v. Bryant*, 502 U.S. at 229.

Moreover, because "the entitlement is an immunity from suit, rather than a mere defense to liability," the Court has repeatedly "stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. at 227 (citations and quotes omitted); *Harlow*, 457 U.S. at 818; *Davis v. Scherer*, 468 U.S. 183, 195 (1984); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Malley v. Briggs*, 475 U.S. at 341; *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987).

A. The Absence of Probable Cause Should Be a Required Element of All Retaliatory Arrest Claims.

As the majority of circuit courts facing the issue have done, this Court should extend *Hartman*'s no-probable-cause requirement to retaliatory arrest claims. This extension would define the tort of retaliatory arrest to recognize that law enforcement officers do not violate First Amendment rights by making an arrest based on probable cause.

To be sure, probable cause may be somewhat less probative of whether an arrest would have occurred

anyway, because law enforcement officers do not always arrest when they have probable cause to do so. *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760-62 (2005). There are several sound reasons unrelated to causation, however, for defining the tort of retaliatory arrest to require an absence of probable cause.

Even if probable cause may not be as probative of causation in the retaliatory arrest context as it is in retaliatory prosecution claims, it is still highly probative and thus serves to provide an important objective measure to properly balance a citizen's exercise of constitutional freedoms and government's legitimate public safety concerns. *See Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (probable cause standard "protects 'citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime,' while giving 'fair leeway for enforcing the law in the community's protection.'") (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)). *See also Zurcher v. Stanford Daily*, 436 U.S. 547, 563-67 (1978) (holding that First Amendment concerns were adequately protected by police officer's compliance with Fourth Amendment's probable cause requirement in search of newspaper's offices).

A no-probable-cause rule also has the advantage of being readily applied at the outset of a retaliatory arrest case. As this Court emphasized in *Hunter v. Bryant*, qualified immunity is an immunity from suit – including burdensome discovery – that should be applied at the earliest possible stage of proceedings. 502 U.S. at 227; *see also Crawford-El v. Britton*, 523

U.S. at 585, 588 (retaliation claims implicate "obvious concerns with the social costs of subjecting public officials to discovery and trial, as well as liability for damages" and "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad reaching discovery."). A no-probable-cause rule protects government officials from such social costs because it is an objective standard that can be applied as a threshold matter to eliminate untenable retaliation claims before government officials are required to submit to extensive discovery and summary judgment motions. *Compare Dietrich*, 548 F.3d at 901 (developing Ninth Circuit's approach of evaluating and weighing the relative strengths of probable cause, retaliatory motive, and causal link between the retaliatory motive and arrest, which presumably would require full discovery).

An objective no-probable-cause rule would also give law enforcement officers much needed clarity in the field. Unlike decisions to prosecute, a law enforcement officer's decision to arrest often involves *immediate* public safety considerations, and the qualified immunity doctrine recognizes that arresting officers are entitled to err on the side of protecting the public when forced to act decisively. *E.g.*, *Brosseau v. Haugen*, 543 U.S. 194, 198-201 (2004); *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Qualified immunity is particularly important for decisions at the margin. Facing a close call on whether to arrest a suspect is precisely when qualified immunity matters most. Thus, contrary to the Ninth Circuit's suggestion in *Dietrich*

that entitlement to qualified immunity should depend on the strength of probable cause, the whole point of qualified immunity is to offer protection where probable cause is present but not necessarily strong. *Harlow*, 457 U.S. at 807 (qualified immunity serves the legitimate "need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."); *Pierson v. Ray*, 386 U.S. 547, 555 (1967) ("A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does."). The objective nature of a no-probable-cause rule would allow officers in the field the confidence to make probable cause arrests without fear of potential retaliation claims.

The Court has forcefully articulated its commitment to objective standards in its pretext cases, particularly *Whren v. United States*, 517 U.S. 806 (1996). *Whren* involved a Fourth Amendment challenge based on the claim that police officers made a traffic stop for speeding as a pretext to search for drugs. 517 U.S. at 808-09. The Court rejected this challenge, explaining that only an "undiscerning reader" of the Court's pretext decisions "would regard these cases as endorsing the principle that ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause to believe that a violation of law has occurred." *Id.* at 811. The Court emphatically discussed the importance and value of probable cause as an objective standard to govern

police conduct: "We flatly dismissed the idea that an ulterior motive might serve to strip the agents of their legal justification" because "subjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional." *Id.* at 812-13 (citations omitted).

This analysis applies with equal force in the present context of retaliatory arrest claims. Law enforcement officers similarly need and deserve an objective, bright-line rule to apply in the field when deciding whether to arrest under circumstances that might give rise to a retaliation claim. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001) (a constitutional rule governing arrest "[o]ften enough . . . has to be applied on the spur (and in the heat) of the moment," and the object is "to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second guessing months and years after an arrest or search is made."); *New York v. Belton*, 453 U.S. 454, 458 (1981) (Fourth Amendment rules "ought to be expressed in terms that are readily applicable by the police . . . and not qualified by all sorts of ifs, ands, and buts") (quotations omitted). *See also Crawford-El v. Britton*, 523 U.S. 574, 612 (1998) (Scalia, J., dissenting) (defendants should be entitled to immunity from retaliation claims, regardless of their subjective intent, if some "objectively valid" legal ground exists for their action). Probable cause provides that objective standard.

For all these reasons, the Court should extend *Hartman*'s no-probable-cause rule to retaliatory arrests

by defining the tort to require a claimant to plead and prove the absence of probable cause. Such a rule would recognize that all law enforcement officers are entitled to qualified immunity from retaliatory arrest claims when their decision to arrest is supported by probable cause.

B. Qualified Immunity Is Particularly Important for Secret Service Agents Acting in Their Protective Capacity.

This Court takes care to approach qualified immunity analysis based on specific case categories, rather than to craft rules at a high level of generality. *E.g.*, *Al-Kidd*, 131 S. Ct. at 2084; *Brosseau*, 543 U.S. at 198-201; *Saucier*, 533 U.S. at 201; *Anderson v. Creighton*, 483 U.S. at 639-40. Here, a critically important and dispositive aspect is the fact that petitioners were not ordinary law enforcement officers performing ordinary law enforcement functions – they were Secret Service agents acting as the Vice President's personal bodyguards. This special function of Secret Service agents warrants application of a no-probable-cause rule when agents make an arrest in the course of protecting the immediate physical safety of the President, Vice President, or other officials.[2]

[2] Secret Service agents wear two hats: they serve as bodyguards to the President and other high officials, and they also perform criminal investigative functions. 18 U.S.C. § 3056. The qualified immunity argument advanced here would apply only to Secret Service agents functioning in their protective capacity.

(Continued on following page)

1. The Secret Service's Statutory Mission Merits Qualified Immunity.

Few events are more debilitating to the Nation than the assassination of the President. "The Nation undoubtedly has a valid, even overwhelming, interest in protecting the safety of its Chief Executive." *Watts v. United States*, 394 U.S. 705, 707 (1969) (per curiam). As Justice Breyer stated in *Rubin v. United States*, "[t]he physical security of the President of the United States has a special legal role to play in our constitutional system. . . . He is the head of state. He and the Vice President are the only officials for whom the entire Nation votes." 525 U.S. 990, 992 (1998) (Breyer, J., dissenting from denial of certiorari). It is an "obvious fact that serious physical harm to the President is a national calamity." *Id*. at 991.

Secret Service agents are charged with protecting the safety of the President, Vice President, presidential candidates and other specific persons. 18 U.S.C. § 3056. Secret Service agents on protective detail must make split-second decisions that could have life-or-death consequences for their charges, and dire consequences for the Nation. It is thus vitally important that Secret Service agents act without hesitation, including when deciding whether to arrest persons who appear to pose a threat. Indeed, Secret Service

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The argument might also apply to other duly authorized government bodyguards, such as U.S. Marshals protecting a federal judge or state troopers protecting a governor, but those situations are not before the Court.

agents are trained to be able to react instinctively and reflexively in these situations – they do not have the luxury to deliberate that prosecutors, investigators, and judges often do.

Of course, Secret Service agents will never consciously allow their critical protective duties to be compromised by fear of potential legal liability – if they will take a bullet for the President, they will certainly take a lawsuit. But even for Secret Service agents, qualified immunity may play a meaningful role at the margin, when an agent is faced with a close call in determining whether a political protester is harmless or might actually pose a threat to the President's safety. *Rubin*, 525 U.S. at 994 (Breyer, J., dissenting from denial of certiorari) (noting how "presidential security may turn on close questions of degree"). Therefore, applying a no-probable-cause rule for retaliatory arrest claims brought against Secret Service agents is especially justified. *See Hunter v. Bryant*, 502 U.S. at 229.

Hunter v. Bryant is particularly instructive because it is this Court's only decision directly addressing qualified immunity for Secret Service agents. There, James Bryant penned a rambling letter about a plot to assassinate President Reagan by a "Mr. Image." 502 U.S. at 224-25. When the letter reached Secret Service agents, President Reagan was traveling in West Germany and therefore not directly threatened by Bryant, who was in California. *Id.* at 225. Secret Service agents immediately located and interviewed Bryant, who "admitted writing and delivering

the letter, but refused to identify 'Mr. Image' and answered questions about 'Mr. Image' in a rambling fashion." *Id*. When Bryant continued to be uncooperative, the Secret Service agents arrested him. *Id.* at 225-26. After the government declined to prosecute Bryant, he filed a *Bivens* action against the arresting agents. *Id.* at 226. Bryant's suit was soon reduced to his claim for Fourth Amendment violations, which focused on whether the agents had probable cause to arrest him when they did. *Id.* The Ninth Circuit denied qualified immunity to the agents, holding that while Bryant's letter could be read as a threat to President Reagan, that was not the most reasonable interpretation of the letter. *Id.* at 227.

In reversing the Ninth Circuit, this Court focused on the unique responsibility of Secret Service agents in protecting the President:

> Our cases establish that qualified immunity shields agents Hunter and Jordan from suit for damages if a reasonable officer could have believed [Bryant's arrest] to be lawful, in light of clearly established law and the information the [arresting] officers possessed. *Even law enforcement officials who "reasonably but mistakenly conclude that probable cause is present" are entitled to immunity*. Moreover, because "[t]he entitlement is an immunity from suit, rather than a mere defense to liability, we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.
>
> * * *

> [Even if the agents were mistaken in their belief that they had probable cause to arrest Bryant], the agents nevertheless would be entitled to qualified immunity because their decision was reasonable, even if mistaken.
>
> The qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law. This accommodation for reasonable error exists because officials should not err always on the side of caution because they fear being sued. *Our national experience has taught that this principle is nowhere more important than when the specter of Presidential assassination is raised*.

Id. at 227-29 (emphases added; quotations and citations omitted). In a concurrence, Justice Scalia observed that while an erroneous immunity analysis might be mere error in other contexts, such an error should not be permitted to stand "with respect to those who guard the life of the President." 502 U.S. at 229 (Scalia, J., concurring).

Other cases from this Court and circuit courts similarly recognize the need for a broad rule of qualified immunity when the safety of the President or other high public officials is at stake. *See Saucier v. Katz*, 533 U.S. at 209 (military police officer who seized protestor approaching the Vice President was entitled to qualified immunity in light of his "duty to protect the safety and security of the Vice President of the United States from persons unknown in number"),

receded from on other grounds, *Pearson v. Callahan*, 555 U.S. 223 (2009); *McCabe v. Parker*, 608 F.3d 1068, 1075-78 (8th Cir. 2010) (Secret Service agents entitled to qualified immunity against protesters' retaliatory arrest claims, where protesters were arrested for violating 18 U.S.C. § 3056(d) based on protesters' refusal to cooperate with Secret Service agent's instructions to move out of a blocked-off location at a rally for former President George W. Bush).

Here, the decision to arrest Howards was based on considerations like those in *Hunter*, *Saucier* and *McCabe*. It is undisputed that Howards was uncooperative with Agent Reichle's efforts to evaluate whether he posed a threat; and when Howards did answer questions, he lied by denying that he had touched the Vice President. While Howards may not have directly raised the specter of assassination the way Bryant did, Agents Reichle and Doyle were faced with comparable concerns: the Vice President was interacting with the public in an open-air, unmagged area; Howards appeared to be acting suspiciously; and had the agents let Howards go without having satisfied themselves that he posed no threat, they did not know what Howards might do next. In such circumstances, the doctrine of qualified immunity provides breathing room precisely to allow Secret Service agents to eliminate even small potential risks to the Vice President's safety without fear of civil liability. When it comes to protecting the President, Vice President or other individuals singled out in 18 U.S.C. § 3056, there is no such thing as a small mistake.

In light of the need for Secret Service agents to exercise this exceptional degree of caution, the Court in *Hunter* held that qualified immunity would apply even if the agents *lacked* probable cause to arrest, as long as there was some reasonable basis for a Secret Service agent to assess some degree of threat to the President. 502 U.S. at 228-29. In the case at bar, it is undisputed that Agents Reichle and Doyle had a reasonable basis for arresting Howards, because the arrest was supported by probable cause.

2. Secret Service Agents on Protective Detail Should Enjoy a Presumption of Regularity.

The Court in *Hartman* grounded its qualified immunity rule in part on "the longstanding presumption of regularity accorded to prosecutorial decisionmaking." *Hartman*, 547 U.S. at 263. In declining to apply qualified immunity here, the Tenth Circuit commented that "unlike prosecutors, Secret Service Agents enjoy no presumption of regularity regarding their decisionmaking." Cert. App. 33. But they should.

The presumption of prosecutorial regularity is a common law construct, driven by the judiciary's respect for the commitment of prosecutorial decisions to the executive branch, and the "recognition that the decision to prosecute is particularly ill-suited to judicial review." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-90 (1999). The conduct of Secret Service agents in their role as

the President's personal bodyguards is similarly executive in nature and ill-suited for judicial review. A presumption of regularity is further supported by the extensive and thorough training that Secret Service agents undergo before they take up their positions as personal bodyguards.

The nature of the encounters between Secret Service agents and political protesters also supports the recognition of a presumption of "protective regularity" for their arrest decisions. This Court has generally recognized that public officials enjoy a presumption of validity for their actions. *Banks v. Dretke*, 540 U.S. 668, 696 (2004); *United States v. Armstrong*, 517 U.S. 456, 464 (1996). While this general presumption applies to all law enforcement officers, it applies with particular force to Secret Service agents acting in a protective capacity. The President and Vice President are frequent targets for political protesters, and Secret Service agents are trained to deal with these protests. Secret Service agents routinely encounter anonymous crowds of vocal, strident protesters who the agents expect will engage in speech that may be strongly critical of their protectee. In these charged situations, a Secret Service agent's only concern is being an effective bodyguard.

This dynamic stands in sharp contrast to the more routine police encounters that typically lead to retaliatory arrest claims. The retaliatory arrest cases that comprise the circuit split provide apt examples. In *Skoog v. County of Clackamas*, the arrestee had a long and contentious history of videotaping local

police and suing them, prompting the officer executing the search warrant and seizing Skoog's cameras to comment that "people shouldn't sue cops." 469 F.3d 1221, 1227 (9th Cir. 2006). *v. Wright* involved repeated, escalating encounters between a gun-toting outdoorsman and a Kentucky Department of Fish and Wildlife Resources officer. 449 F.3d 709, 711-12 (6th Cir. 2006). Other First Amendment retaliatory arrest cases involve similarly contentious encounters between police and local actors, of the sort that eventually prompt a police officer to warn: One more word out of you and you're under arrest! *See*, *e.g.*, *Alexis v. McDonald's Restaurants of Mass., Inc.*, 67 F.3d 341, 346 (1st Cir. 1995) ("You better shut up your [expletive] mouth before I arrest you too."); *King v. Ambs*, 2006 WL 800751 at *2 (E.D. Mich.) ("One more word and I will arrest you."), *aff'd*, 519 F.3d 607 (6th Cir. 2008). Secret Service arrests do not typically follow this pattern – not here or in any other reported Secret Service arrest cases. *Compare Hunter v. Bryant*, 502 U.S. at 225-26; *McCabe v. Parker*, 608 F.3d at 1072; *Galella v. Onassis*, 487 F.2d 986, 992 (2d Cir. 1973).

Thus, when highly-trained Secret Service agents decide to arrest suspects they believe may pose an immediate threat to the President's safety, those decisions deserve the same presumption of regularity that supported qualified immunity in *Hartman* – a presumption that the agents are acting out of genuine concern for the President's safety, rather than out of a desire to retaliate against citizens of differing political bent. The responsibility of Secret Service agents,

their commensurate training, and the nature of their encounters with political protesters all support such a presumption, which in turn supports application of qualified immunity here.

3. For Secret Service Agents on Protective Detail, Retaliatory Animus Cannot Be Inferred from the Content of a Protester's Speech.

Qualified immunity is also appropriate for Secret Service agents acting in their protective capacity because the very nature of their job requires them to consider the content of speech in evaluating potential threats. The content of a protester's speech will rarely if ever be probative of retaliatory animus for such agents. To the contrary, a Secret Service agent may justifiably consider the content of protected political speech when that speech has any possible implication for the immediate physical safety of the President.

Presidential assassins are usually politically motivated, and political motivations naturally manifest themselves through speech that will often be protected by the First Amendment. "Sic semper tyrannis" (thus always to tyrants) is protected political speech, and fully consonant with mainstream American political values – the phrase appears on the State Seal of Virginia. But if someone shouts this phrase during an "unmagged" event where the President is holding a public meet-and-greet, a Secret Service agent might justifiably stop and maybe even arrest that person

because of the obscure Latin phrase's close association with Booth's assassination of Lincoln. Secret Service agents should at least be entitled to consider this protected political speech in their assessment of whether the speaker poses a potential threat.

Here, Howards attracted the attention of the Secret Service when he was overheard saying "I'm going to ask him [the Vice President] how many kids he's killed today." That sort of language will justifiably garner the attention of a Secret Service agent on protective detail. Agent Doyle testified that Howards' statement prompted him "to keep an eye" on Howards, not because Agent Doyle took offense at Howards' language, but because the language indicated that Howards was upset with Vice President Cheney and was approaching him in an adversarial manner. A Secret Service agent may justifiably pay special attention to such a protester for purely protective reasons. JA 84.[3]

[3] For the same reasons, passengers in TSA security lines at airports know better than to talk about bombs or hijacking. It is of course possible to speak about bombs and hijacking with full First Amendment protection in this situation, but a passenger who chooses to do so assumes the risk of being detained for questioning and missing his flight, at the very least. This is not to suggest that a political protester should therefore refrain from criticizing the Vice President to his face when the opportunity arises – just that a protester who does so the way Howards did here similarly assumes the risk of a response from the Secret Service.

Thus, for Secret Service agents in a protective role, the content of a protester's protected political speech will generally provide no support for a First Amendment retaliation claim. *See Hartman*, 547 U.S. at 256 (retaliation claim is cognizable only where "non-retaliatory grounds are insufficient to provoke adverse consequences"). While Agents Doyle and Reichle could explain this to a jury and hope to be exonerated at trial, a key purpose of qualified immunity is to relieve them of this burden. *E.g.*, *Hunter v. Bryant*, 502 U.S. at 227.

IV. Agents Reichle and Doyle Should Be Protected by Qualified Immunity in This Particular Matter.

Based on the specific circumstances of this case, this Court should extend qualified immunity as a bar to this particular action because of the unsettled state of the law. At the time of Howards' arrest, only two months after this Court had issued its decision in *Hartman*, the law was unsettled in several dispositive respects: (a) it was unclear whether probable cause immunized an arresting officer from a claim for retaliatory arrest, as evidenced by the circuit split on this very issue that developed after Howards' arrest; (b) the only circuit case addressing the scope of a Secret Service agent's immunity from a claim for retaliatory arrest, *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973), recognized and applied absolute immunity; (c) the scope of a Secret Service agent's authority to require a suspect to answer an agent's questions posed

as part of an investigation to ensure the Vice President's safety under 18 U.S.C. § 3056 had never been addressed; and (d) the length and complexity of the Tenth Circuit's analysis itself shows that the law was not clearly settled for purposes of qualified immunity.

A. The Post-*Hartman* Circuit Split Shows that the Law Was Unsettled.

In *Wilson v. Layne*, 526 U.S. 603 (1999), the Court observed that when an alleged constitutional tort takes place and a circuit split then develops over whether that tort is cognizable, the existence of the split itself confirms that the law was not settled and qualified immunity applies:

> Between the time of the events of this case and today's decision, a split among the Federal Circuits in fact developed [over whether the conduct at issue gave rise to a constitutional claim]. *If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy*.

526 U.S. at 618 (emphasis added, citations omitted).

Here, the Tenth Circuit expressly acknowledged that a circuit split had developed after Howards' arrest. Cert. App. 31-32 ("In the wake of *Hartman*, our sister circuits continue to be split over whether *Hartman* applies to retaliatory arrests."). That observation should have led the Tenth Circuit to apply qualified immunity under *Wilson* because (as Judge

Kelly noted in his dissent) there was every reason to believe that the Tenth Circuit would join the majority side of the split and dismiss Howards' retaliation claim in light of the agents' probable cause to arrest.

Applying qualified immunity based on the subsequent circuit split is especially appropriate here in light of the national scope of the Secret Service's duties. *See Ashcroft v. Al-Kidd*, 131 S. Ct. at 2086-87 (Kennedy, J., concurring) (discussing the importance of uniform national rules to govern the conduct of government actors who work throughout the nation). Secret Service agents act as bodyguards throughout the country. They should not be expected to, and as a practical matter cannot, modify their operations depending on the particular circuit where they perform their protective duties.

Here, Agents Reichle and Doyle were protecting the Vice President in a circuit that had not yet addressed the scope of *Hartman* in the retaliatory arrest context. As Judge Kelly stated in his dissent, "no objectively reasonable officer on June 16, 2006 would be on notice that probable cause was insufficient to overcome claims of First Amendment retaliation." Cert. App. 41-42. Agents Reichle and Doyle should not be subjected to Howards' damages lawsuit because they followed the law of the majority of circuits in arresting Howards, rather than anticipating that the Tenth Circuit would adopt the minority view of the Ninth Circuit in *Skoog* (which even the Ninth Circuit has qualified in *Deitrich*).

B. Prior Case Law Conferring Absolute Immunity Contributed to the Law's Unsettled State.

The law was also unsettled at the time of the arrest because the most authoritative case addressing a Secret Service agent's potential liability stemming from an arrest to protect the immediate physical safety of a protectee recognized a rule of *absolute* immunity from suit. In *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973), paparazzo Ronald Galella repeatedly hounded Jacqueline Kennedy Onassis and her children John and Caroline, all of whom were protected by the Secret Service under 18 U.S.C. § 3056. The Secret Service arrested Galella after he jumped into the path of young John when he was biking in Central Park, nearly causing him to crash. 487 F.2d at 992. After Gallela was prosecuted and acquitted, he sued the Secret Service agents for false arrest. *Id.*

The Second Circuit held that the Secret Service agents were entitled to "an absolute privilege" as against Gallela's false arrest and malicious prosecution claims. 487 F.2d at 993 n.5. The Second Circuit explained:

> The protective duties assigned the agents under [18 U.S.C. § 3056] . . . require the instant exercise of judgment which should be protected. . . . The issue in each case is whether the public interest in a particular official's unfettered judgments outweighs the private rights that may be violated. The

> protective duties of the agents on assignments similar to this warrant this protection.

Id. at 993, 994 (footnotes and citation omitted). The Second Circuit added that "the duty of protecting the personages singled out by Congress as in need of this extraordinary shield from likely harm is *toto coelo* different from the normal police function of arrest for law violation on warrant or on probable cause as in *Bivens*." *Id.* at 994 n.9. *Accord Scherer v. Brennan*, 379 F.2d 609, 611 (7th Cir. 1967) (holding Treasury Department agents acting at direction of Secret Service "were immune from [plaintiff's] tort suit because their actions fell within the scope of their duties to protect the person of the President of the United States" under 18 U.S.C. § 3056), *cert. denied*, 389 U.S. 1021 (1967).

Galella has been recognized as articulating a rule of absolute immunity. *Martin v. Malhoyt*, 830 F.2d 237, 249 n.31 (D.C. Cir. 1987) (Ruth Bader Ginsburg, J.) (stating that the court in *Galella* held that "United States Secret Service agents carrying out special statutory duty [are] shielded by absolute immunity from common law false arrest liability"). This recognition came almost a decade after the Court's development of the modern jurisprudence of absolute immunity in *Butz v. Economou*, 438 U.S. 478 (1978). And *Galella*'s absolute immunity holding has never been questioned or criticized by this Court or the Tenth Circuit.

Galella was extensively discussed in the briefing before the Tenth Circuit. The Tenth Circuit might have

chosen to disagree with the Second Circuit's analysis in *Galella* (particularly since it predated this Court's modern jurisprudence of absolute immunity in *Butz*), but the Tenth Circuit could not ignore that *Galella* was the leading authority in 2006, and that under the absolute immunity holding of *Galella* petitioners did not violate clearly established law by arresting Howards. Thus, regardless of whether the analysis of *Galella* should apply here to confer absolute immunity (a position that petitioners have chosen not to advance), *Galella*'s authoritative analysis at the time of Howards' arrest provides another sound basis for recognizing qualified immunity.

C. Qualified Immunity Should Apply Because Agents Reichle and Doyle Arrested Respondent Howards Under the Special Statutory Authority of 18 U.S.C. § 3056.

At the time of the arrest, the law was also unsettled because no court had discussed the scope of a Secret Service agent's authority to arrest a protester who refuses to cooperate with an investigation under 18 U.S.C. § 3056.

In its bench ruling denying petitioners' motion for summary judgment on qualified immunity, the District Court stated:

> Defendants cannot seriously dispute the right to be free from unreasonable warrantless arrest and search was not clearly established

> at the time plaintiff was arrested and searched. Nor can defendants seriously dispute that plaintiff's right to be free from retaliation for exercise of his free speech rights was not clearly established.

Cert. App. 57. This description of the constitutional right at issue was precisely the sort of overly-generalized description that the Court has repeatedly directed lower courts to avoid. In the seminal case of *Anderson v. Creighton*, the Court held:

> The operation of [the qualified immunity] standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.

483 U.S. 635, 639 (1987). *See also Brosseau v. Haugen*, 543 U.S. 194, 200 (2004) (per curiam) (applying

Anderson to reverse denial of qualified immunity based on overly-generalized description of established law, and recharacterizing question more particularly as whether police could "shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight."); *Al-Kidd*, 131 S. Ct. at 2084; *Saucier*, 533 U.S. at 201-02.

Here, an appropriately "particularized" description of the legal right at issue is: when a Secret Service agent has some reason to believe that a protester may pose a threat to the Vice President's immediate physical safety and is trying to investigate that potential threat, and the protester refuses to cooperate with this investigation, may the agent arrest the uncooperative protester under 18 U.S.C. § 3056? Petitioners are not asking this Court to hold that a mere refusal to cooperate with a Secret Service investigation is an arrestable offense under § 3056. Rather, petitioners simply note that Howards' refusal to answer questions was one of several factors that led to his arrest, and the scope of a Secret Service agent's authority to arrest on this basis – under the authority of § 3056 – is not clearly established.

When a Secret Service agent is trying to quickly gather enough information to determine whether a suspect poses a potential threat to the President's safety, and the suspect refuses to cooperate with the agent (as Howards chose to do here), the plain language of 18 U.S.C. § 3056 appears to authorize the agent to arrest the uncooperative suspect. Specifically,

the statute directs the Secret Service "to protect" a select group of high ranking executive officials, including the President and Vice President, and their immediate families. 18 U.S.C. § 3056(a)(1) and (7). The statute also makes it an offense to "knowingly and willfully obstruct[ ], resist[ ], or interfere[ ] with a Federal law enforcement agent engaged in the performance of the protective functions authorized by this section. . . ." 18 U.S.C. § 3056(d). Lastly, the statute authorizes Secret Service agents to "make arrests without warrant for any offense against the United States committed in their presence." 18 U.S.C. § 3056(c)(1)(C). Thus, this plain statutory language appears to give Secret Service agents authority to arrest a protester who refuses to cooperate with an agent's legitimate investigation, such as refusing to answer questions that an agent asks in an effort to determine whether the protester poses a threat or not.

Precedents from this Court and the circuit courts confirm that this is not an unreasonable reading of § 3056. The law of ordinary policing recognizes that suspects generally have no obligation to cooperate with police investigations. *E.g.*, *Florida v. Royer*, 460 U.S. 491, 497-98 (1983). Protecting the President, however, is not ordinary policing. *E.g.*, *Galella*, 487 F.2d at 994 n.9 (Secret Service protective function "is *toto coelo* different from the normal police function of arrest for law violation."). And even in ordinary police encounters, potential suspects can be required to at least identify themselves. *See Hiibel v. Sixth Judicial Dist. Ct.*, 542 U.S. 177 (2004) (upholding conviction

against Fourth and Fifth Amendment challenge based upon a state statute making it illegal not to identify oneself during a *Terry* stop); *Risbridger v. Connelly*, 275 F.3d 565, 572 (6th Cir. 2002) (person subject to a lawful investigative stop has no clearly established constitutional right not to identify himself).

This expectation that citizens should give police at least a modicum of cooperation with investigations applies most forcefully in the present context, when a Secret Service agent is trying to quickly determine whether a protester poses a threat to a protected official's immediate physical safety. The Court has long recognized that citizens' interests in unfettered exercise of First and Fourth Amendment rights are lowest when the protection of the President or Vice President is at issue. The Court in *Hunter v. Bryant* recognized that Secret Service agents can properly take into account a suspect's refusal to cooperate with an investigation when deciding whether to arrest. 502 U.S. at 225-26 (conferring qualified immunity on Secret Service agents who arrested Bryant in part because Bryant was uncooperative with the agents' investigation, "refused to identify 'Mr. Image' and answered questions about 'Mr. Image' in a rambling fashion."). Likewise, the Court in *Saucier v. Katz* ratified the decision of a military police officer to seize a protestor approaching the Vice President, holding that the officer was entitled to qualified immunity in light of his "duty to protect the safety and security of the Vice President of the United States." 533 U.S. at 209. And in *McCabe v. Parker*, the Eighth Circuit

specifically held that 18 U.S.C. § 3056 authorized Secret Service agents to arrest protesters who had refused to cooperate with a Secret Service agent's directive to move to a different area at a presidential rally, and accordingly recognized that the agents were entitled to qualified immunity from the protesters' subsequent retaliatory arrest claims. 608 F.3d at 1075-78. *See also Stigile v. Clinton*, 110 F.3d 801, 803-04 (D.C. Cir. 1997) (rejecting Fourth Amendment challenge to drug testing by individuals with access to a building within the White House security perimeter based on the nation's overwhelming interest in protecting the President and the Vice President).

Here, Howards was clear in his deposition testimony that he did not cooperate with Agent Reichle's investigation because he felt he had no obligation to answer questions posed by a law enforcement officer. JA 241-42, 247. But this was not an ordinary voluntary encounter with law enforcement. The record in this case confirms that a reason (and perhaps the primary reason) for Agent Reichle's decision to arrest Howards was Howards' refusal to cooperate with Agent Reichle's investigation into whether Howards posed a threat to the Vice President. JA 46 (Reichle deposition testimony).[4]

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[4] Other Secret Service agents involved in the arrest expressed similar concerns that a suspect should not be permitted to ignore questions from a Secret Service agent under such circumstances. JA 145 (Mischloney deposition testimony), 152 (McLaughlin deposition testimony).

Thus, even without considering the agents' probable cause to arrest under 18 U.S.C. § 1001, Howards' refusal to cooperate with Agent Reichle's investigation might have provided a sufficient basis to arrest Howards for violating 18 U.S.C. § 3056.[5] Because no case has specifically addressed and established such a right of non-cooperation, and because the statute and cases like *Hunter* and *McCabe* provide support for arresting such an uncooperative suspect, Agents Reichle and Doyle should be entitled to qualified immunity for arresting Howards on this basis as well.

D. The Complexity of the Tenth Circuit's Analysis Alone Supports Qualified Immunity.

A final reason for determining that the law was not clearly established is the length and complexity of the Tenth Circuit's analysis. The Tenth Circuit panel majority required seven pages of dense legal analysis to ultimately conclude that Tenth Circuit law was clearly settled post-*Hartman*, despite the ongoing circuit split. 634 F.3d at 1143-49; Cert. App. 26-36. But the law of qualified immunity looks to what a

[5] Because the Tenth Circuit found that the agents had probable cause to arrest Howards under 18 U.S.C. § 1001, it did not consider whether the agents also had probable cause to arrest Howards for violating 18 U.S.C. § 3056 because of Howards' refusal to cooperate with the agents' investigation, or his assault or harassment of the Vice President based on the unsolicited physical contact. Cert.App. 17-18 n.7.

reasonable federal official would understand – it does not require a Secret Service agent to be a legal scholar or expert in constitutional torts. *See Hunter v. Bryant*, 502 U.S. at 229 (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law" – especially where "specter of Presidential assassination is raised"); *McCullough v. Wyandanch Union Free Sch. Dist.*, 187 F.3d 272, 278 (2d Cir. 1999) ("The question is not what a lawyer would learn or intuit from researching case law, but what a reasonable person in the defendant's position should know about the constitutionality of the conduct."); *Kompare v. Stein*, 801 F.2d 883, 887 (7th Cir. 1986) ("[A] reasonable person is not expected to act as a legal scholar and predict the future direction of the law.") So even if the Tenth Circuit majority's legal analysis were correct – which it is not – the very length of the discussion and the complexity of the reasoning shows that a pair of Secret Service field agents could not have known it to be "clearly established" Tenth Circuit law.

This is particularly so given how the Tenth Circuit majority's analysis focused on the history and development of the law of retaliatory arrest in the Tenth Circuit. Secret Service agents work across the nation and are trained to a national standard. They should not be expected to be trained on a circuit-by-circuit analysis of the law – particularly where, as here, a given circuit's law requires seven reporter pages to articulate. *See Ashcroft v. Al-Kidd*, 131 S. Ct. at 2086-87 (Kennedy, J., concurring) (discussing the importance of uniform national rules to govern the

conduct of government actors who work throughout the nation); Cert. App. 42 (Kelly, J., concurring in part and dissenting in part, noting that law is clearly established where the Supreme Court has clearly articulated it, but not when one circuit court is able to articulate its particular view of the law amidst competing circuit views).

There are thus four independent and compelling reasons for regarding the law as unsettled, none of which depend on *Hartman*'s probable cause analysis. Any one of these reasons provides a sufficient basis for applying qualified immunity here.

V. A *Bivens* Action for First Amendment Retaliation Has Never Been Recognized.

One final reason to reverse the underlying decision, brought to the fore by this Court's decision earlier this term in *Minneci v. Pollard*, No. 10-1104 (Jan. 10, 2012), is that this Court has never extended *Bivens* to a claim for First Amendment retaliatory arrest.

In *Bivens*, the Court recognized a claim directly under the Fourth Amendment for an improper search by FBI agents. *Bivens*, 403 U.S. at 389. In the years since, the Court has applied *Bivens* to only two other types of claims, recognizing a damages action implicit in the Fifth Amendment's Due Process Clause, *see Davis v. Passman*, 442 U.S. 228 (1979), and in the Eighth Amendment, *see Carlson v. Green*, 446 U.S. 14 (1980). Not only has the Court avoided any other direct extensions of *Bivens*, but it has expressed a clear

disinclination to do so, stating in *Ashcroft v. Iqbal* that "[b]ecause implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability 'to any new context or new category of defendants.'" 556 U.S. 662, 129 S. Ct. 1937, 1948 (2009) (quoting *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001)).[6]

Earlier this term, this Court again declined to extend *Bivens* in *Minneci v. Pollard*. The Court in *Minneci* applied the two-part test developed by the Court in *Wilkie v. Robbins*, 551 U.S. 537 (2007), for determining whether to recognize a *Bivens* remedy. Under the *Wilkie* test, a court first looks at whether the plaintiff has any alternative, adequate existing remedy. Second, "even in the absence of an alternative, a *Bivens* remedy is a subject of judgment: 'the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation.'" *Wilkie*, 551 U.S. at 550 (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)).

In the instant action, Howards' claim would extend *Bivens* to a new context: First Amendment retaliatory arrest. This Court's hesitancy to extend

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[6] *Hartman v. Moore* was postured as a *Bivens* claim, but the Court effectively terminated that claim based on its probable cause analysis, without expressly discussing whether *Bivens* actions should be cognizable for First Amendment retaliation.

Bivens, and the two-part *Wilkie* test, both counsel against any such extension here. Even if Howards lacks another forum for adjudicating his claim, the second *Wilkie* factor is plainly applicable. As discussed *supra*, subjecting Agents Reichle and Doyle to trial exposure and potential financial liability presents policy risks, not the least of which would be impeding the agents' need to be able to make split-second determinations, often based upon political speech, in furtherance of their job to protect the President and Vice President. *See*, *e.g.*, *Crawford-El v. Britton*, 523 U.S. at 590 (noting the "strong public interest in protecting public officials from the costs associated with the defense of damages actions" and recognizing that this "interest is best served by a defense that permits insubstantial lawsuits to be quickly terminated"). At a minimum, the presence of probable cause should bar Howards' *Bivens* claim, just as it did in *Hartman v. Moore*.

CONCLUSION

For the reasons set forth above, the Court should reverse the decision of the Tenth Circuit, hold that petitioners are entitled to qualified immunity from

respondent Howards' retaliatory arrest claim, and direct the lower courts to enter summary judgment for petitioners.

Respectfully submitted,

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