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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Petitioners, Secret Service agents acting in their protective capacities, arrested Respondent Howards after he made unsolicited contact with the Vice President in an open, unmagged area. Howards brought a *Bivens* claim against the Secret Service agents, alleging that the arrest was retaliatory and violated his First and Fourth Amendment rights. The court below found that Petitioners had probable cause to arrest Howards, and dismissed his Fourth Amendment claim. Howards has not challenged that ruling.

The court below should have also dismissed Howards' First Amendment claim because Petitioners were acting with probable cause. Just as this Court did with regard to retaliatory prosecution claims in *Hartman v. Moore*, 547 U.S. 250 (2006), this Court should hold that the absence of probable cause is a required element of a retaliatory arrest claim. Howards also lacks a cause of action because *Bivens* has not been, and should not be, extended to First Amendment retaliatory arrest claims.

Even if Howards had a cognizable claim, Petitioners are entitled to qualified immunity. In the wake of *Hartman*, several circuit courts split over whether the absence of probable cause was an element of a retaliatory arrest claim. In light of this split, it was certainly not clearly established whether Howards was required to prove that he was arrested without probable cause, and thus Petitioners should be protected by qualified immunity from Howards' claim.

Although Howards dwells on irrelevant facts and allegations, the operative facts are straightforward: Howards made unsolicited contact with the Vice President in an open, unsecured area; Howards lied to Secret Service agents about the contact; and there was probable cause for his arrest.

STATEMENT OF THE CASE

Howards accepts Petitioners' statement of the case, but nonetheless discusses several theories that he claims reveal Petitioners' supposed retaliatory motive and a cover-up.

Howards states that his interaction with the Vice President was like a handshake. Br. at 31 ("Many people were having 'unsolicited contact' (also known as 'touching' or 'shaking hands') with the Vice President"). There is no dispute, however, that Howards' contact was not a handshake or similar consensual contact. Howards described the contact as an open-handed "pat." Joint Appendix ("JA") 117–18. The only difference in the other witnesses' characterizations was over the amount of force involved. Agents Doyle and Daniels, and photographer David Bohrer, called it a "slap." JA 86, 416, 404. Agent Lee characterized the contact as a "shove." JA 379. Agent Wurst used the term "push-off move." JA 404. Agent McLaughlin described the contact as "very forceful," JA 344, and confirmed that it was not a handshake. JA 360–61. Because an assault has no minimum force requirement, this deliberate and nonconsensual contact could reasonably be regarded as an assault even when viewed through Howards' lens.[1]

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[1] *See, e.g.*, *United States v. Calderon*, 655 F.2d 1037, 1038 (10th Cir. 1981) (affirming assault conviction of protester who threw eggs at Congressman, under parallel statute); *United States v. Lewellyn*, 481 F.3d 695, 697–99 (9th Cir. 2007) (assault under parallel federal statute can be premised on a "seemingly slight, but intentional, offensive touching").

Howards argues that if Agent Doyle believed that Howards had assaulted the Vice President, Agent Doyle should have immediately arrested Howards rather than allow him to walk away. Br. at 31 ("[Howards] was permitted to freely walk away from the scene of the 'assault' "). Agent Doyle explained in his deposition that it was Secret Service policy not to arrest an individual immediately under these circumstances, because conduct like Howards' might be a feint or diversion. JA 95 ("He could have been probing the crowd for an incident that could have taken place further"). Additionally, Howards was moving away from the Vice President. JA 91, 94 ("I didn't want to escalate the situation any further than it was with the Vice President being in proximity . . . but I wanted to separate the Vice President and Mr. Howards as much as possible"). Agent Doyle's job was to continue protecting the Vice President. The job of questioning and, if appropriate, arresting Howards fell to Agent Reichle as the intelligence coordinator. JA 334–35.

Agent Reichle arrived on the scene within minutes, JA 90–91, and understood that something serious had happened. JA 265–66 (calling the protective intelligence coordinator is "like picking up the phone and dialing 9-1-1"). Agent Reichle's fellow agents told him that Howards had gone "hands-on" with the Vice President. JA 73, 369–71. Agent Reichle tried to speak with Howards to determine whether Howards posed a threat. This effort was stymied by Howards' refusal to cooperate, which ultimately forced Agent Reichle to make an immediate decision whether to arrest Howards based on the limited information available and without yet being able to

determine whether Howards posed a threat. JA 44–46, 241–42, 271.

Throughout the incident, Howards was looking for his son in the crowd. JA 220–25. However, because Howards refused to speak with the agents, they did not know this. JA 227. From the agents' perspective, Howards appeared to be moving erratically and trying to evade them. JA 83 (Howards was "talking on his cell phone and walking quickly—quickly throughout the crowd. He was very anxious about something."); JA 86–87 (Howards "was acting very erratic within the crowd and he was moving around the crowd very quickly." "All his movements were very quick and erratic." "He had no set line to follow."). The agents were also concerned about the bag Howards was carrying. JA 87 (Howards was never more than 20 yards away from the Vice President); JA 91 ("Plus he had a package in his hands, which I thought was a—a threat and I wanted him to step away from the Vice President in case there was something in that package that could harm the Vice President.").

Lastly, Howards mischaracterizes the agents' post-arrest discussions and disagreement regarding how to proceed as a "cover-up." Br. at 2–3, 31–32. Howards' contact did not injure the Vice President, or disrupt his plans or schedule. It was in this context that Agents Reichle and McLaughlin testified about their respective perceptions hours after the arrest. At the time of the arrest, Agent McLaughlin raised no objection to the arrest. Agent Reichle was later instructed not to pursue it further. Importanly, Howards offers no explanation of how this supposed "cover-up" relates to the issues before

this Court. Rather, Howards' merely attempts to parlay irrelevant details into a nefarious sounding conspiracy.

ARGUMENT

I. THE EXISTENCE OF PROBABLE CAUSE BARS FIRST AMENDMENT RETALIATORY ARREST CLAIMS.

A. This Court Should Apply *Hartman* to Retaliatory Arrest Claims by Making the Absence of Probable Cause a Required Element.

This Court has repeatedly emphasized the need for objective standards in determining causation in retaliation claims. In *Hartman v. Moore*, this Court recognized the particular difficulty of making a causation determination in certain retaliation actions and held that adding the absence of probable cause as an element of a First Amendment retaliatory prosecution claim would effectively bridge the causal gap by linking the complained-of action to the government actor's retaliatory animus. 547 U.S. 250, 259 (2006).

In *Hartman*, this Court discussd how retaliation claims arising out of criminal contexts differ significantly from civil claims—"[w]hen the claimed retaliation for protected conduct is a criminal charge, however, a constitutional tort action will differ from this standard case[.]" *Id.* at 260. Specifically, the *Hartman* Court explained

> [w]hat 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.

Id. at 261. *See also id.* at 265 ("the significance of probable cause or the lack of it looms large, being a potential feature of every case, with obvious evidentiary value"). In cases, like the one before this Court, where there is a particular complexity of causation, "showing an absence of probable cause will have high probative force" and "must be pleaded and proven." *Id.* at 265–66.

Just as *Hartman*'s rule provided a bridge for the causal gap in retaliatory prosecution claims, the same rule should be applied here, in retaliatory arrest claims. Both retaliatory prosecution and arrest claims ultimately turn on the motive of the government actor. Both claims require a plaintiff to prove that retaliatory motive was the but-for cause of the complained-of action. Both claims often involve difficult causation problems due to the presence of numerous actors. And, importantly, this Court has routinely observed the importance of affording certain deference to government actors making the decision to prosecute or arrest.

As the Court noted earlier this term, courts should hesitate to second-guess police officers who must

make urgent decisions with serious implications: because "lawful conduct may portend imminent violence" and "a combination of events each of which is mundane when viewed in isolation may paint an alarming picture, . . . judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation." *Ryburn v. Huff,* 132 S. Ct. 987 (2012). The well-established probable cause standard employed by the *Hartman* would provide an objective metric by which to judge, but not second guess, arrest decisions. Indeed, the deference this Court extended to police officers in *Ryburn* should likewise extend to Secret Service agents acting in their protective capacities.

Extending *Hartman*'s absence of probable cause rule also comports with the Court's decision in *Crawford-El*, *cf.* Br. at 10 n.6, because it is not an overly-broad rule making *all* retaliation claims harder to prove. *Crawford-El v. Britton*, 523 U.S. 574 (1998). Rather, the proposed rule is narrow and employs a pre-existing, objective and highly probative piece of evidence (the presence or absence of probable cause) as its filter.

Howards posits that extending *Hartman* to retaliatory arrest claims will result in "the basic vitality of the First Amendment [being] 'bureaucratized' into irrelevancy, as it will consistently be trumped by the pettiest of offenses." Br. at 16. In support of such rhetoric, Howards trots out a parade of horribles that would allegedly occur under such a rule. For the same reasons that this Court rejected this very argument in *Hartman*, it should do so here.

In *Hartman*, the respondent argued that the absence of probable cause should not be an element of a retaliatory prosecution claim because it "would result in virtually no protection from unconstitutionally motivated investigations and prosecutions, because the government will almost always be able to fabricate a colorable claim of probable cause." Brief of Respondent at 1, *Hartman*, 547 U.S. 250 (No. 04-1495), 2005 WL 2653949 (Oct. 14, 2005) ("*Hartman* Resp. Br."). "Consequently, under Petitioners' rule, the government could, free from any constitutional restraint, engage in a naked policy of prosecuting only political opponents of the President or the District Attorney for those less serious offenses that are normally not prosecuted." *Id.* at 29. *See also id.* at 30 ("The Court should not open the door to authorizing such political and racial profiling."). Howards makes the identical argument as the *Hartman* respondent.

The *Hartman* Court rejected such fears, seeing fit to hold that the absence of probable cause is an element of a retaliatory prosecution claim. Were there a basis for Howards' fears, he would be able to point to post-*Hartman* examples of such abuses in the retaliatory prosecution context. Howards would also be able to provide examples of such draconian law enforcement actions occurring within the circuits that extended *Hartman* to retaliatory arrests. Howards' resort to hypothetical examples shows that in the wake of both *Hartman* and its extension, the First Amendment has not lost its importance or vitality.

Petitioners could likewise suggest extreme ramifications that could occur under Howards' rule.

To wit, Howards candidly concedes that "theoretically, every person arrested could allege a retaliatory arrest for protected speech[.]" Br. at 13. Thus, under the contrary rule proposed by Howards and his *amicus*, the ACLU, in which there would be no filtering of claims based on probable cause, a protester would be entitled to bring a claim of retaliation if he is arrested for refusing to leave a restricted area, so long as he makes political comments. In such circumstances, Howards' rule would not permit a Secret Service agent to remove the individual without the risk of incurring a lawsuit or personal liability. *Hartman*'s rule provides an objective standard that would apply in just such circumstances to prevent frivolous claims, and is particularly fitting for Secret Service agents acting in their protective capacities in highly visible fora.[2]

In the matter currently before this Court, a retaliatory inference is especially weak, and cannot be readily inferred from Howards' comment that the Vice President's policies in Iraq were disgusting. While some viscerally offensive speech might be expected to engender a strong retaliatory response (*e.g.* flag-burning, picketing soldiers' funerals), it is

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[2] Such an extension of *Hartman* to Secret Service agents is particularly appropriate because any time an agent is acting in a protective capacity, it is a serious matter. The offenses at issue here were both felonies. 18 U.S.C. § 1751(e); 18 U.S.C. § 1001. *Accord* John Koerner, *Between* Healthy *and* Hartman: *Probable Cause in Retaliatory Arrest Cases*, 109 Colum. L. Rev. 755, 794 (2009) (suggesting that *Hartman*'s no-probable-cause rule apply to arrests for serious infractions like felonies, where it can be presumed that the claimant would have been arrested anyway).

hard to believe that highly trained Secret Service agents, who regularly deal with strident and hostile political protesters, would have retaliated against Howards for this speech.

Finally, Howards spends significant time arguing that this Court should *not* extend *Hartman* because the circuit courts that have extended *Hartman* to retaliatory arrest claims have written shorter opinions than the two circuits that have refused to extend *Hartman*. Br. at 9 ("each circuit that has unilaterally extended *Hartman* into the retaliatory arrest arena has done so without undertaking the rigorous analysis of the court below"). Needless to say, Howards offers no authority to support the proposition that the length of a circuit court's decision is a barometer of its validity.

B. Reliance on *Mt. Healthy* Is Insufficient.

Howards argues that this Court should not extend *Hartman* to First Amendment retaliatory arrest claims because this Court's holding in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 273 (1977), offers sufficient protection for a defendant in a First Amendment retaliatory arrest matter. Br. at 13–15. In *Mt. Healthy*, this Court held that a plaintiff alleging unconstitutional retaliation must show that his conduct was constitutionally protected and that the protected conduct was a "motivating factor" in the alleged retaliatory action. 429 U.S. at 287 (internal quotations omitted). Under *Mt. Healthy*, once a plaintiff satisfies that burden, the defendant must show by a preponderance of the evidence that he would have undertaken the same action or decision "even in the absence of the protected conduct." *Id.*

Howards avers that this "has proven to be a workable test for more than three decades" and that "[h]istory has vindicated the *Mt. Healthy* test and it has functioned precisely as it was intended." Br. at 13–14.

Howards' reliance on *Mt. Healthy* is curious. If the 1977 *Mt. Healthy* test were sufficient, this Court would have had no need to create the rule it did in *Hartman*. Significantly, the respondent in *Hartman* advanced the exact same argument, which this Court rejected. *Hartman* Resp. Br. at 23 ("Petitioners completely miss the mark in arguing that precedents such as *Mt. Healthy* prohibiting improperly motivated public employment decisions do not provide appropriate guidance in the context of retaliatory investigations and prosecutions") (internal citation omitted). The *Hartman* Court determined that *Mt. Healthy*'s approach was *not* sufficient for examining causation in every retaliation claim. 547 U.S. at 260. As discussed *supra*, the *Hartman* Court specifically built upon *Mt. Healthy*'s burden-shifting framework when the retaliation claims arise from the criminal context, by adding its absence of probable cause rule. At no point in his explanation of why *Mt. Healthy* supposedly offers sufficient protection does Howards explain why, decades after *Mt. Healthy* was decided, this Court saw the need to revise *Mt. Healthy*'s framework in *Hartman*.

C. This Case Does Not Involve an Equal Protection Clause Claim.

Howards argues that First Amendment retaliation should be treated the same as Equal Protection Clause claims, and that Petitioners' proposed rule

would all but do away with Equal Protection claims of retaliatory arrest. Br. at 25–30; ACLU *Amicus* Br. at 15–18. This case, however, does not involve an Equal Protection claim. Furthermore, First Amendment claims and Equal Protection claims are different. *See, e.g.*, *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (in an Equal Protection action, a plaintiff must show disparate treatment amongst similarly situated individuals). The rule Petitioners propose here would only apply to retaliatory arrest claims based upon the First Amendment.

Under Petitioners' proposed rule, if probable cause exists for an arrest, there is no First Amendment retaliatory arrest claim. But that does not foreclose an Equal Protection Clause claim if the individual can show the requisite differential treatment.

II. PETITIONERS ARE ENTITLED TO QUALIFIED IMMUNITY

Should this Court determine that the absence of probable cause is not an element of a retaliatory arrest claim, the Petitioners here should nonetheless be protected by qualified immunity from liability. This Court explained in *Harlow v. Fitzgerald* that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" and "[i]f the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." 457 U.S. 800, 818 (1982).

Likewise, this Court, in *Anderson v. Creighton*, explained that the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." 483 U.S. 635, 640 (1987).

Howards argues that the law prohibiting retaliatory arrests was clearly established and that *Hartman* cannot be viewed as having "legalized" retaliatory arrests, thus foreclosing Petitioners' qualified immunity argument. Br. at 37–41. Howards is no doubt correct that retaliatory arrests were and remain actionable. The operative question, though, is what the required elements are for a First Amendment retaliatory arrest claim and whether a reasonable Secret Service agent in June 2006 would have understood that he could be liable for a retaliatory arrest when he acted with probable cause.

Any reasonable Secret Service agent who read *Hartman* and its progeny would have been uncertain whether arresting someone with probable cause could constitute a retaliatory arrest under the First Amendment, or rather whether the elements of a retaliatory arrest claim included the absence of probable cause. Judge Kelly stated as much in his dissent in the court below: "[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." Pet. App. at 40.

The question of whether the absence of probable cause was an element of a claim of retaliatory arrest certainly must be considered unclear for Secret Service agents when learned judges of several circuit courts have answered the exact same question

differently. *Compare Williams v. City of Carl Junction*, 480 F.3d 871, 876 (8th Cir. 2007) ("We agree 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, and we conclude that the *Hartman* rule applies in this case"), *with Skoog v. County of Clackamas*, 469 F.3d 1221, 1234 (9th Cir. 2006) ("the rationale for requiring the pleading of probable cause in *Hartman* is absent here. This case presents an 'ordinary' retaliation claim."). The circuit split on this issue makes qualified immunity unquestionably appropriate under *Wilson v. Layne*. 526 U.S. 603, 618 (1999) ("[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy"). Thus, because the applicability of *Hartman* to a retaliatory arrest claim was not clearly settled, qualified immunity applies to Petitioners with regard to Howards' claims.

Howards misconstrues Petitioners' qualified immunity arguments and the relevant rules themselves. Br. at 39 ("Qualified immunity does not turn, as Petitioners and the government would have it, on whether the existence of a damages *remedy* for clearly unconstitutional *conduct* is settled"). Based on his misunderstanding, Howards argues that there was no circuit split and thus no weight should be given to this Court's holding in *Wilson*. Br. at 39–40. As noted above, Petitioners' argument is that, at the time of the arrest, it was not clearly established whether the absence of probable cause was an element of a First Amendment retaliatory arrest claim or, rather, whether an arrest with probable

cause was permissible.[3] Petitioners do not, as Howards posits, argue that it was the existence of a damages remedy that was not clearly established. As such, Howards' contention notwithstanding, the underlying circuit split warrants qualified immunity under this Court's decision in *Wilson*.[4]

The purpose of qualified immunity, especially in the context of the Secret Service's protection of the Vice President's immediate physical safety, is to foreclose retaliation lawsuits where a decision to arrest is reasonable, even if mistaken. *Hunter v. Bryant*, 502 U.S. 224, 228–29 (1991); *accord Saucier v. Katz*, 533 U.S. 194, 205 (2001), *receded from by Pearson v. Callahan*, 555 U.S. 223 (2009), ("An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense."). Here, it must be considered reasonable to arrest someone who engaged in nonconsensual contact with the Vice President, initially refused to answer questions about the interaction, and then lied to federal officials about the incident.

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[3] Indeed, even *Skoog*, upon which Howards relies so heavily, defined the constitutional right in question as "the right of an individual to be free of police action motivated by retaliatory animus *but for which there was probable cause*." 469 F.3d at 1235 (emphasis added).

[4] Likewise, the possibility that absolute immunity could apply as an affirmative defense under *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973), is enough to confer qualified immunity here. *See* Opening Br. at 43–45.

Importantly, qualified immunity is addressed as of the time of the arrest. *E.g.*, *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (qualified immunity analysis considers information available to a government actor at the time of the adverse action, not later); *Graham v. Connor*, 490 U.S. 386, 396 (1989) (reasonableness is judged from the perspective of a reasonable officer at the scene). Although Howards attempts to make much out of a supposed after-the-fact cover-up, Howards provides no suggestion of how the supposed disagreement among Secret Service agents has any bearing on whether the decision to arrest was arguably justified at the time, and therefore subject to qualified immunity.

III. THIS COURT SHOULD NOT EXTEND *BIVENS* TO FIRST AMENDMENT RETALIATORY ARREST CLAIMS

This Court should decline to extend *Bivens* to First Amendment retaliatory arrest claims. This Court has created a *Bivens* cause of action for three types of constitutional violations. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (Fourth Amendment); *Davis v. Passman*, 442 U.S. 228 (1979) (Due Process Clause of the Fifth Amendment); and *Carlson v. Green*, 446 U.S. 14 (1980) (Eighth Amendment's Cruel and Unusual Punishment Clause). It should go no further in this case.

A. The *Bivens* Issue Is Properly Before This Court.

Howards argues that the *Bivens* issue was improperly raised for the first time in this Court, and objects to this Court considering it. Br. at 48

n.21. Howards is mistaken. This Court's rules provide that "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein." S. Ct. R. 14.1(a). *See also Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 56 (2006) ("our review may, in our discretion, encompass questions 'fairly included' within the question presented"); *Ohio v. Robinette*, 519 U.S. 33, 38 (1996) (when a question of law is a "predicate to an intelligent resolution of the question presented," it is considered "fairly included therein") (internal quotations omitted).

In *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), this Court decided that "the argument that Amtrak is a Government entity is fairly embraced within the question set forth in the petition for certiorari" because "it is quite impossible to consider whether the Government connections are sufficient to convert private-entity Amtrak into a Government actor without first assuming that Amtrak is a private entity. . . . The question of private-entity status is, in other words, a prior question." *Id.* at 379–80, 381 (emphasis omitted). Importantly, the *Lebron* petitioner argued for the first time in his merits brief that Amtrak is not a private entity. *Id.* at 379. Further, he had argued the opposite position in the appellate court. *Id.* at 378–79. That notwithstanding, the *Lebron* Court determined that the question of whether Amtrak was a government entity was a necessary predicate of the question presented and thus considered fairly included in the questions presented. *Id.* at 378.

In this matter, the question of whether a *Bivens* cause of action for a First Amendment retaliatory arrest claim exists is a fairly included and necessary prior question. *See* Opening Br. at i ("[w]hether . . . the existence of probable cause to make an arrest . . . bars [a First Amendment retaliatory arrest] claim"). As the United States points out, "[r]esolution of this threshold issue"—whether a *Bivens* action for First Amendment retaliatory arrest claims exists—"which could obviate the need to determine the precise contours of claims like respondent's, would further the interest of judicial economy." Brief for United States as *Amicus Curiae* 12 (quoting *Carlson*, 446 U.S. 14, 17 n.2 ("the interests of judicial administration will be served by addressing viability of *Bivens* action, even though not raised in the lower courts") (internal quotations omitted)).

In addition to arguing that the question is unrelated, Howards suggests that Petitioners admitted *Bivens* jurisdiction in the proceedings below. Br. at 48. Not so. Petitioners' brief in the Tenth Circuit put this argument in play: "In fact, it is unclear whether a *Bivens* claim may be pursued for an alleged First Amendment violation at all." Appellants' Opening Br. at 14 n.5 (citing *Ashcroft v. Iqbal,* 129 S. Ct. 1937 (2009)). Howards bases his contention that Petitioners admitted *Bivens* jurisdiction in this matter on a few out-of-context quotations from the district court proceedings where Petitioners referred to this matter as dealing with *Bivens*. Br. at 49. When this matter was before the district court, the Fourth Amendment retaliatory arrest claim was very much alive and well. As such,

it is axiomatic that Petitioners would have discussed *Bivens* in their filings.

B. This Court Should Not Extend *Bivens* to Reach Howards' First Amendment Claim.

This Court should not extend *Bivens* to First Amendment retaliatory arrest claims for three reasons: This Court has made a clear and consistent practice of limiting *Bivens*' reach; alternative fora existed for Howards to redress his alleged injuries; and special factors counsel against extending *Bivens* in this instance.

First, this Court has very rarely found it proper to extend *Bivens*' reach. Throughout the entire forty years of relevant jurisprudence, this Court has found an implied cause of action for damages against federal officials in only three limited circumstances. *See supra* p. 17. This is not for lack of opportunities. Rather, this Court has had many opportunities to further expand *Bivens*' reach since 1971, but has consistently refused to do so. *See, e.g.*, *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001); *United States v. Stanley*, 483 U.S. 669, 683 (1987) (refusing to extend *Bivens* for injuries related to military service); *FDIC v. Meyer*, 510 U.S. 471, 486 (1994) (refusing to extend *Bivens* to a claim that a bank employee lost his job at a federal banking agency in violation of the Fifth Amendment's Due Process Clause); and *Chappell v. Wallace*, 462 U.S. 296, 299 (1983) (refusing to extend *Bivens* for denials of Social Security benefits).

Howards attempts to blur the lines between what this Court has and has not done. As noted *supra*,

this Court has refused to expand *Bivens* beyond three specific instances. Howards, however, repeatedly points to instances where this Court has "assume[d], without deciding, that [a] First Amendment claim is actionable under *Bivens*." Br. at 49. If such dicta stood for the proposition that there was now a fourth type of *Bivens* action, this Court would have said so in its recent *Minneci* decision, *Minneci v. Pollard*, 132 S. Ct. 617 (2012). But it did not do so. At most, these cases show this Court's willingness to proceed to other portions of the matter without explicitly deciding the question of whether to extend *Bivens*. Notably, Howards does not cite a single instance where this Court extended *Bivens* remedies to First Amendment retaliation claims.

Howards cites to this Court's decision in *Bush v. Lucas*, 462 U.S. 367 (1983), for the proposition that this Court's practice is to permit *Bivens* claims of First Amendment retaliation to proceed. Br. at 49. However, this Court has expressly disagreed with such a proposition: "In [*Lucas*], we declined to create a *Bivens* remedy against individual Government officials for a First Amendment violation . . . [and] [i]n 30 years of *Bivens* jurisprudence we have extended its holding only twice[.]" *Malesko*, 534 U.S. at 68–70.

Howards would also have this Court believe that "an individual complaining of unconstitutional selective law enforcement based on the exercise of that person's First Amendment rights is claiming a violation of the due process right to equal protection under the law[.]" Br. at 53. The important difference between an equal protection *Bivens* action

and a First Amendment *Bivens* action is that the equal protection claims are already judged by objective criteria (disparate treatment), *see supra* pp. 12–13, and Howards' proposed rule employs wholly subjective criteria.

Second, notwithstanding Howards' contention to the contrary, he had several alternative fora in which to seek redress for his alleged injury.[5] Howards claims that "[o]utside of a *Bivens* action, Howards has no vehicle to pursue a remedy for the violation of his First Amendment rights in this case." Br. at 55. This contention is directly undercut by Howards' action in this matter. Howards was able to seek redress through a Fourth Amendment *Bivens* claim. Based on a finding of probable cause, the courts below foreclosed that option. This Court's *Bivens* test does not inquire whether, after failing in several other actions, an individual has further alternative processes for seeking a remedy for an alleged injury. *See Malesko*, 534 U.S. at 71–73 (refusing to extend *Bivens* where an alternative process existed, even though that process was no longer available because it was not timely pursued). Rather, the question is whether Howards had alternative mechanisms with which to seek redress. The answer is unquestionably yes.

Third, should this Court find that the alternative processes are insufficient, there are myriad practical reasons for refusing to extend *Bivens* relief to this claim. As discussed in Petitioners' opening brief and the United States government's *amicus* brief, any benefit Howards may receive by being granted a new

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[5] *See* Brief for United States as *Amicus Curiae* at 13–15.

judicially-created forum in which to seek redress is substantially outweighed by the risks such a new rule would pose, both specifically to Petitioners, as well as more generally to similarly-situated Secret Service agents. *See, e.g.*, Brief for United States as *Amicus Curiae* at 15–21. Most notably, creating a new *Bivens* cause of action for First Amendment retaliatory arrest claims could impede a Secret Service agent's ability to effectively protect the President and Vice President.

Under Howards' proposed rule, a person who poses a direct threat to an agent's protectee may set themselves up for a future *Bivens* action by making a simple political comment as he is being arrested. In such a circumstance, Howards' rule would permit the arrestee to bring a *Bivens* suit against the agents, irrespective of the existence of probable cause. This is dangerous not only for the fact that those charged with protecting government officials might be subject to extensive and expensive litigation, but also because of the frightening possibility that an agent might hesitate to make an otherwise permissible arrest out of a fear of litigation, subjecting his protectee to potential danger.

For all these reasons, this Court should continue its practice of not extending *Bivens* relief to new causes of action.

CONCLUSION

For the foregoing reasons, as well as those set forth in Petitioners' opening brief, the judgment of the court below should be reversed.

Respectfully submitted,

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