No. 11-262

In the Supreme Court of the United States

VIRGIL D. "GUS" REICHLE, JR., ET AL., PETITIONERS

v.

STEVEN HOWARDS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether petitioners, Secret Service agents on the Vice President's protective detail, may be personally liable for money damages under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), on a claim of retaliatory arrest in violation of the First Amendment, when the arrest was supported by probable cause.

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INTEREST OF THE UNITED STATES

The court of appeals held in this case that two Secret Service agents on the Vice President's protective detail may be liable under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for retaliatory arrest in violation of the First Amendment, notwithstanding that the arrest was supported by probable cause. The United States has a substantial interest in the proper resolution of that issue. The United States Secret Service is a federal agency required by statute to protect the President and Vice President (and, if applicable, the President-elect and Vice President-elect) and authorized by statute to protect other listed persons, including certain political candidates and foreign dignitaries. 18 U.S.C. 3056(a) (2006 & Supp. IV 2010). The court of appeals' decision im-

poses potential constitutional-tort liability on agents performing those vital duties. The decision also more generally affects the constitutional standards applicable to other law-enforcement agents carrying out arrests for federal crimes. The United States filed an amicus brief at the petition stage supporting certiorari.

STATEMENT

1. This case arises out of a June 16, 2006 visit by then-Vice President Richard Cheney to a mall in Beaver Creek, Colorado. Pet. App. 3. Petitioners are Secret Service agents—Protective Intelligence Coordinator Gus Reichle and Special Agent Dan Doyle—who were assigned to guard the Vice President during that visit. *Ibid.*

Respondent, who was also at the mall that day, was arrested by the Secret Service following a physical encounter with the Vice President. Pet. App. 3-9. Respondent first came to the attention of the Vice President's Secret Service detail when Agent Doyle overheard him say into his cellphone, "I'm going to ask [the Vice President] how many kids he's killed today." *Id.* at 4 (brackets in original). Respondent was carrying a bag, and there were no metal detectors in the area. *Id.* at 8; Appellants' C.A. App. 112, 126.

Respondent waited in line to meet the Vice President, approached the Vice President, and told the Vice President that his "policies in Iraq are disgusting." Pet. App. 4-5. As respondent departed, he brought his hand into contact with the Vice President's shoulder. *Id.* at 5. Respondent characterizes the contact as "an open-handed pat," *id.* at 5 n.2, but that characterization is disputed. Other witnesses described the contact as a "'push[] off' the Vice President's shoulder," "'a get-your-attention-type touch,'" "a 'slap,'" "a 'forceful

touch,'" and "a strike that caused 'the Vice President's shoulder to dip.'" *Ibid.* (citations and brackets omitted). Agent Doyle did not overhear the conversation between respondent and the Vice President, but he did see the physical contact. *Id.* at 5.

Two other agents on the protective detail who had witnessed the incident decided that it warranted investigation by a Secret Service protective intelligence team. Pet. App. 5. Agent Reichle was dispatched to interview respondent. *Id.* at 6. Agent Reichle had neither overheard respondent's cellphone statement nor observed respondent's encounter with the Vice President, and thus relied on Agent Doyle to bring him up to speed. *Ibid.*

Respondent briefly went to another part of the mall after his encounter with the Vice President, but then returned to the area, at which point Agent Reichle approached him. Pet. App. 6. Unbeknownst to Agent Reichle, respondent was looking for his son, who had wandered off. *Ibid.* Agent Reichle presented his Secret Service badge, identified himself, and asked to speak with respondent. *Id.* at 7. Respondent refused. *Ibid.* Agent Reichle then stepped in front of respondent and asked respondent if he had assaulted the Vice President. *Ibid.* Respondent pointed his finger at Agent Reichle, denied assaulting the Vice President, and said, "if you don't want other people sharing their opinions, you should have [the Vice President] avoid public places." *Ibid.* (brackets in original). According to respondent, Agent Reichle became "visibly angry" when respondent voiced his opinion about the war in Iraq. *Ibid.*

Agent Reichle asked respondent whether he had touched the Vice President. Pet. App. 7. Respondent falsely stated that he had not. *Ibid.* Agent Reichle

asked nearby agents whether they had witnessed the incident. *Id.* at 8. Agent Doyle confirmed that he had witnessed it and performed a demonstration (the accuracy of which is disputed) of petitioner's physical contact with the Vice President. *Id.* at 8 & n.3.

Based upon respondent's "premeditation, the conversation on the cell phone, the fact that [respondent] would not talk to [him], the fact that he's walking around with a bag in his hand in an unmagged [no metal detector] area, and the fact that [Agent Doyle told him] that [respondent] had unsolicited contact," Agent Reichle decided to arrest respondent for assaulting the Vice President. Pet. App. 8 (second and third sets of brackets in original). Agent Doyle and other agents assisted in restraining respondent during the arrest. *Ibid.* Respondent was turned over to local law enforcement and detained for several hours. *Ibid.* He was charged with state-law harassment, but the charges were later dismissed. *Id.* at 8-9.

2. Respondent filed a suit against petitioners and other Secret Service agents under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that he had been arrested unlawfully and seeking money damages. Pet. App. 9. He claimed that his arrest violated the Fourth Amendment, because the agents lacked probable cause to believe he had committed a crime. *Ibid.* He also claimed that the arrest violated the First Amendment, because the agents arrested him in retaliation for his protected speech. *Ibid.* Petitioners and the other defendants moved for summary judgment, which the district court denied. *Ibid.*; see *id.* at 48-57.

3. The court of appeals reversed in part and affirmed in part. Pet. App. 1-43. The court concluded that

respondent's Fourth Amendment claim should have been dismissed because, even "[r]eviewing the facts through [respondent's] lens, there was probable cause to arrest him for a suspected violation of" 18 U.S.C. 1001, which prohibits making a materially false statement to a federal officer in a matter that falls within the jurisdiction of the federal government. Pet. App. 17. The court observed that respondent himself had conceded during his deposition that he had lied to Agent Reichle about whether he had touched the Vice President. *Id.* at 18-19. Because the court found that there was probable cause to arrest respondent for violating Section 1001, the court did not reach the question whether there was probable cause to arrest him for other offenses, such as assault on the Vice President (18 U.S.C. 1751(e)). Pet. App. 17 n.7.

The court of appeals concluded, however, that respondent's First Amendment retaliatory-arrest claim against petitioners could proceed to trial. Pet. App. 22-36. The court believed that respondent had made out a First Amendment claim against petitioners because (1) respondent had engaged in protected speech; (2) arrest is an injury that would tend to chill speech; and (3) the facts, taken in the light most favorable to respondent, "suggest[ed]" that petitioners (although not the other defendants) "may have been substantially motivated by [respondent's] speech when [respondent] was arrested." *Id.* at 23-26; see *id.* at 36-39 (concluding that the remaining defendants were entitled to qualified immunity on respondent's First Amendment claim).

The court rejected petitioners' argument that the existence of probable cause for the arrest defeated respondent's retaliatory-arrest claim. The court of appeals recognized that, under this Court's decision in *Hartman* v. *Moore*, 547 U.S. 250 (2006), a plaintiff must

plead and prove the absence of probable cause in order to maintain a First Amendment claim seeking damages for retaliatory *prosecution*. Pet. App. 29-31. It also recognized that several courts of appeals, both before and after *Hartman*, have applied a similar rule in the context of a First Amendment claim seeking damages for retaliatory arrest. *Id.* at 29, 31-32. But the court of appeals disagreed with those decisions and declined to apply *Hartman* in the context of retaliatory arrests, reasoning that retaliatory-arrest claims meaningfully differ from retaliatory-prosecution claims. *Id.* at 31-33. The court additionally refused to grant petitioners qualified immunity, *id.* at 35-36, concluding that the law on this issue was clearly established by pre-*Hartman* circuit precedent, *id.* at 34 n.14.

Judge Kelly concurred in part and dissented in part. Pet. App. 40-43. He would have held that petitioners enjoyed qualified immunity from the retaliatory-arrest claim, because, "when the arrest in this case occurred, the law simply was not clearly established (nor is it now) that *Hartman* only applied to retaliatory prosecutions and not retaliatory arrests." *Id.* at 41. He stated that there "is a strong argument" that *Hartman*'s absence-of-probable-cause requirement applies in both contexts, and he emphasized the existence of a circuit conflict on the issue. *Id.* at 40.

SUMMARY OF ARGUMENT

Petitioners arrested respondent in the course of carrying out their critical statutory obligation to protect the Vice President. Not only was the arrest supported by probable cause, but respondent did, in fact, commit a federal crime by lying to federal agents about his physical contact with the Vice President. The court of appeals erred in concluding that petitioners should never-

theless face the prospect of personal damages liability under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), based on respondent's allegation that his otherwise-lawful arrest was undertaken in retaliation against him for his expression of political views.

I. As a threshold matter, the Court should decline to authorize judicially-created damages claims under *Bivens* against individual federal officers by plaintiffs alleging that they were arrested in retaliation for expressive conduct. For over 30 years, this Court has repeatedly declined to extend the scope of *Bivens* actions beyond the circumstances of the original trio of cases in which such actions were first recognized. The considerations that have motivated the Court's consistent refusal to extend *Bivens*—the existence of alternative remedies and "special factors counselling hesitation" in judicial, rather than congressional, lawmaking, *Minneci* v. *Pollard*, No. 10-1104 (Jan. 10, 2012), slip op. 3-4 (citation omitted)—are equally, if not more, forceful here.

Multiple potential remedies are already available to a plaintiff who believes he has been unlawfully arrested by a federal officer. In addition to his ability to defend himself in any criminal proceedings that result from the arrest, he can bring a Fourth Amendment *Bivens* claim, and might potentially be able to bring an equal-protection *Bivens* claim—including a claim alleging that he was treated differently from similarly situated people based on his expressive activity. Allowing such a plaintiff also to bring a *Bivens* claim alleging that his arrest was motivated by retaliation for protected speech would come at the high cost of exposing officers to unpredictable liability and deterring legitimate law enforcement. Unlike suits based on the Fourth Amendment or equal-

protection principles, both of which rely on objective evidence (of probable cause or of differential treatment of similarly situated people), a First Amendment retaliatory-arrest suit will typically turn on a jury's subjective assessment of the credibility of an officer's testimony about his motivation for the arrest. Trial will therefore be difficult to avoid, and the outcome will be uncertain. The upshot will be that even officers with no bad intentions might refrain from carrying out otherwise lawful arrests in circumstances in which they might later be alleged to have acted in retaliation against expressive activity.

Such situations are all too common for Secret Service agents like petitioners, who perform the vital function of protecting the safety of political figures and who often must make split-second judgments in highly charged environments (speeches, protests, etc.) marked by a range of expressive activity. Even if the Court were to authorize retaliatory-arrest *Bivens* claims in certain circumstances, courts lack the necessary institutional resources to reliably tailor appropriate remedies in the field of Secret Service protection.

II. Even assuming that *Bivens* authorizes respondent's retaliatory-arrest claim against petitioners, that claim should fail because respondent's arrest was supported by probable cause.

A. This Court held in *Hartman* v. *Moore*, 547 U.S. 250 (2006), that a *Bivens* plaintiff who alleges that federal agents induced his prosecution in retaliation for expressive activity must plead and prove the absence of probable cause. The Court emphasized the difficulty of determining the cause of a particular prosecution, and concluded that making the absence of probable cause an element of the claim is an efficient method of requiring

a plaintiff to demonstrate a likelihood that his prosecution was caused by retaliatory animus as opposed to legitimate law-enforcement objectives.

Similar considerations apply to retaliatory-arrest claims like this one. As in the retaliatory-prosecution context, it is much less likely that the decision to arrest a plaintiff was caused by retaliatory animus when the action was objectively justified by probable cause. And as in the retaliatory-prosecution context, proof of the absence of probable cause provides a necessary objective anchor for what would otherwise be an overly complex inquiry into causation. The causation inquiry is particularly complicated in retaliatory-arrest cases because an officer will often have entirely legitimate reasons for taking speech into account in deciding whether to effect an arrest. A suspect's explanation of his conduct, statement of future intent to violate the law, or other expressive activity may properly play a role in determining whether an arrest would be a useful investment of limited law-enforcement resources. In this case, for example, petitioners reasonably took account of respondent's statements as part of the totality of the circumstances in assessing whether an arrest was warranted to protect the Vice President's safety. Probable-cause evidence will be extremely helpful in sorting out whether an officer's speech-related considerations in the arrest context were legitimate, and requiring such evidence adds at most a negligible burden on the plaintiff.

Guidance from the common law, which often plays a role in shaping the parameters of constitutional-tort actions, also counsels in favor of recognizing a no-probable-cause requirement for retaliatory-arrest cases, at least when the arrest was made without a warrant. An officer who makes a warrantless arrest supported by

probable cause would generally be protected from damages liability at common law, even if he harbored a retaliatory motive. There is no sound reason for exposing officials to greater liability under the First Amendment.

B. Even if federal officers may in some circumstances face *Bivens* liability for arrests supported by probable cause, petitioners should at the very least receive qualified immunity from respondent's claims. Reasonable officers in petitioners' position could have concluded, as multiple courts of appeals have, that a probable-cause-supported arrest would not violate the First Amendment.

ARGUMENT

I. THIS COURT SHOULD DECLINE TO EXTEND *BIVENS* TO FIRST AMENDMENT CLAIMS ALLEGING RETALIATORY ARREST

A. This Court Has Never Authorized First Amendment Retaliatory-Arrest Claims Against Individual Federal Officers

This Court has recognized an implied cause of action for damages against a federal official alleged to have violated the Constitution in only three circumstances. First, in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court held that federal law-enforcement officers may face personal monetary liability for participating in a search or seizure that violates the Fourth Amendment. Next, in *Davis* v. *Passman*, 442 U.S. 228 (1979), the Court extended *Bivens* to permit a damages suit against a Congressman for gender discrimination in violation of the Due Process Clause of the Fifth Amendment. Finally, in *Carlson* v. *Green*, 446 U.S. 14 (1980), the Court permitted a *Bivens* claim against individual federal prison

officials for an alleged violation of the Eighth Amendment's Cruel and Unusual Punishment Clause.

In the three decades since *Carlson*, the Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001); see *Minneci* v. *Pollard*, No. 10-1104 (Jan. 10, 2012), slip op. 1, 5-6. The Court has explained that *Bivens* was a product of its "previous willingness to imply a cause of action where Congress has not provided one." *Malesko*, 534 U.S. at 67 n.3. In light of its more recent jurisprudence recognizing that "implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability." *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1948 (2009). The Court has, for example, disapproved *Bivens* claims for injuries arising out of military service, see *United States* v. *Stanley*, 483 U.S. 669 (1987); *Chappell* v. *Wallace*, 462 U.S. 296 (1983); denials of Social Security disability benefits, see *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988); and retaliation against the exercise of ownership rights, see *Wilkie* v. *Robbins*, 551 U.S. 537 (2007). The Court has recognized that Congress "is in a far better position than a court" to make policy judgments about whether a damages remedy is warranted and what the scope of that remedy should be. *Id.* at 562 (citation omitted).

This Court has never authorized a *Bivens* action of the type that respondent asserts here. Although the Court has on occasion heard cases that involve damages suits against federal officers based on First Amendment violations, it has never expressly held that *Bivens* extends to such claims. See *Iqbal*, 129 S. Ct. at 1948 ("[W]e assume, without deciding, that respondent's First Amendment claim is actionable under *Bivens*.");

Hartman, *supra* (containing no discussion of whether *Bivens* extends to First Amendment retaliatory-prosecution claims). Indeed, in the only case in which the Court has squarely confronted the issue, which involved a federal employee's claim that he had been demoted in retaliation for his speech, the Court "declined to extend *Bivens* to a claim sounding in the First Amendment." *Iqbal*, 129 S. Ct. at 1948 (discussing *Bush* v. *Lucas*, 462 U.S. 367 (1983)); see *Minneci*, slip op. 5 (similar).

B. Extending *Bivens* To First Amendment Retaliatory-Arrest Claims Is Unwarranted

The Court should similarly decline to extend *Bivens* to the First Amendment retaliatory-arrest claim raised by respondent here. Although the specific issue of the availability of a *Bivens* cause of action was not addressed below, it is logically antecedent to the question presented, and the Court has jurisdiction to decide it. See *Wilkie*, 551 U.S. at 549 n.4; *Carlson*, 446 U.S. at 17 n.2. Petitioners argue (Pet. Br. 53-55) that the Court should decline to extend *Bivens* to the First Amendment claim at issue. Compare *Iqbal*, 129 S. Ct. at 1948 ("assum[ing], without deciding, that respondent's First Amendment claim is actionable under *Bivens*" because "[p]etitioners do not press this argument"). Resolution of this threshold issue, which could obviate the need to determine the precise contours of claims like respondent's, would further the interest of judicial economy. See *Carlson*, 446 U.S. at 17 n.2 (concluding that "the interests of judicial administration will be served" by addressing viability of *Bivens* action, even though not raised in the lower courts). And it would also provide useful guidance to lower courts. See, *e.g.*, *Air Sunshine, Inc.* v. *Carl*, 663 F.3d 27, 35 (1st Cir. 2011) (questioning

whether *Bivens* extends to First Amendment retaliation claims).

The test for determining whether to extend *Bivens* to a new context "may require two steps." *Minneci*, slip op. 3 (quoting *Wilkie*, 551 U.S. at 550). First, "there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Ibid.* (quoting *Wilkie*, 551 U.S. at 550). Second, "even in the absence of such 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 counselling hesitation," including deference to the institutional advantages Congress enjoys in addressing questions of policy, "before authorizing a new kind of federal litigation." *Id.* at 3-4 (quoting *Wilkie*, 551 U.S. at 550); see *Wilkie*, 551 U.S. at 562. Here, those factors militate against adding a new branch to *Bivens*.

1. Multiple remedies are potentially available to someone who believes that he has been arrested in retaliation for the exercise of his First Amendment rights. To begin with, this Court's decision in *Wilkie* v. *Robbins* indicates that in cases where an arrest leads to a criminal charge, the opportunity to defend against that charge in court constitutes an alternative remedy for *Bivens* purposes, because it provides a "means to be heard." 551 U.S. at 552. The plaintiff in *Wilkie* (Robbins) claimed, analogously to respondent here, that the government was vindictively bringing administrative and criminal charges against him in retaliation for his assertion of his property rights. *Id.* at 543-546 (noting

allegation that an agency employee "was told by his superiors to 'look closer' and 'investigate harder' for possible trespasses and other permit violations by Robbins"); see *id.* at 551. Because Robbins had been able to contest those charges either in agency proceedings or in court (at a jury trial on the criminal charges), the Court was satisfied that "[f]or each charge, * * * Robbins had some procedure to defend and make good on his position." *Id.* at 552.

In addition to his ability to defend himself in any criminal proceedings—and in addition to any remedies he may have against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b)(1)—someone who believes that federal officers have made a retaliatory arrest may have one or more damages claims against those officers based on the categories of *Bivens* actions that this Court already has recognized. See *Wilkie*, 551 U.S. at 551 (recognizing that tort suits constitute an alternative remedy for *Bivens* purposes); *Malesko*, 534 U.S. at 72-74 (same). First, *Bivens* itself would authorize a damages suit for a Fourth Amendment violation, such as an arrest without probable cause. See 403 U.S. at 396. Second, although the Court has never addressed the issue and it is not presented here, it is possible that the Court might conclude that *Davis* v. *Passman* provides a cause of action for at least some plaintiffs who allege that their arrests violated equal-protection principles. Such a claim could permit a plaintiff to recover damages based on proof that an officer made unlawful distinctions between similarly situated people in making arrest decisions—such as, potentially, distinctions based on the exercise of First Amendment rights. See *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972) (noting that claim of discrimination in viola-

tion of the Equal Protection Clause was "closely intertwined with First Amendment interests"); see also *United States* v. *Armstrong*, 517 U.S. 456, 464-470 (1996) (emphasizing that equal-protection claims in the law-enforcement context require proof that similarly situated people were treated differently).

2. Regardless of the availability of preexsisting remedies, there are significant "special factors counselling hesitation," *Minneci*, slip op. 3-4 (citation omitted), in authorizing a First Amendment-based damages claim against an individual federal officer for an allegedly retaliatory arrest. Any potential benefit of extending *Bivens* is substantially outweighed by the practical problems that such an extension would create.

The benefit would be limited because the remedies discussed above would provide significant protections for First Amendment concerns, even in the absence of a retaliatory-arrest *Bivens* claim. See *Malesko*, 534 U.S. at 70 (recognizing that a deterrent is "adequate[] * * * for *Bivens* purposes no matter that [the federal officers] may enjoy qualified immunity, are indemnified by the employing agency or entity, or are acting pursuant to an entity's policy") (citation omitted). As a threshold matter, insofar as the Court might conclude that officers are subject to equal-protection *Bivens* claims in the arrest context, plaintiffs could raise a claim of speech-related discrimination through that framework, see *Mosley*, 408 U.S. at 95, and thereby vindicate largely the same constitutional principles that a First Amendment claim would.

The Court has also recognized an overlap between the First Amendment and the Fourth Amendment. In *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978), for example, the Court rejected the argument that First

Amendment concerns require the application of special procedures, above and beyond the Fourth Amendment's protections, when police seek to search a newspaper's offices. *Id*. at 563-567. The Court stated that, "[p]roperly administered, the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness—should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices." *Id*. at 565.

Although *Zurcher* focused on warrants, it is similarly true that the Fourth Amendment's requirement of probable cause as a prerequisite to an arrest imposes a significant limitation on any use of the arrest power to suppress expressive activity. An officer cannot simply arrest anyone whose speech displeases him; rather, he may lawfully arrest a suspect only when the circumstances, "'viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause" to believe the suspect has committed a crime. *Maryland* v. *Pringle*, 540 U.S. 366, 371 (2003) (quoting *Ornelas* v. *United States*, 517 U.S. 690, 696 (1996)). That 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.'" *Id.* at 370 (quoting *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949)).

Even assuming there were a significant public benefit in deterring arrests not actionable on other grounds, fashioning a retaliatory-arrest tort under *Bivens* would come at too high a cost. Such a tort would tend to deter legitimate law-enforcement conduct, because officers will lack reliable criteria for determining when they might be liable. Absent an extension of *Bivens* to First

Amendment claims alleging retaliatory arrests, an officer deciding whether to arrest someone has all of the information he needs to make a reasonably accurate assessment of whether he may face *Bivens* liability for doing so. The Fourth Amendment analysis of probable cause depends upon a purely objective evaluation of the circumstances surrounding the arrest. See, *e.g.*, *Whren* v. *United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."). And insofar as arrests may be held to give rise to equal-protection *Bivens* claims, an equal-protection analysis would depend upon objective evidence that the officer treated other similarly situated persons differently. *Armstrong*, 517 U.S. at 465-470.

By contrast, the retaliatory-arrest tort contemplated by the court of appeals in this case lacks any such objective anchor that would enable the officer to predict his future liability. Instead, the critical factor for determining liability would be the jury's after-the-fact assessment of the officer's subjective motivation for making the arrest. Pet. App. 22-23. That factor is inherently unknowable to the officer. Even if the officer is making the arrest for legitimate reasons, he may worry that circumstantial evidence would cause a jury to think otherwise. There might, for example, be a history of animosity between the officer and the suspect; the suspect might argue with the officer during the encounter; or (as in this case) probable cause may arise while the suspect is engaged in expressive activity. Indeed, a suspect who wishes to deter arrest or lay the groundwork for a lawsuit can do so simply by, for example, directing an anti-police slur at the officer before the arrest in the hopes of making the officer angry.

Under the court of appeals' decision, an officer in those circumstances would face an unpleasant choice between, on one hand, forgoing the arrest and, on the other, inviting litigation by carrying it out. If he elects the latter, and is sued, trial will be difficult to avoid. "Because an official's state of mind is easy to allege and hard to disprove, insubstantial claims that turn on improper intent may be less amenable to summary disposition than other types of claims against government officials." *Crawford-El* v. *Britton*, 523 U.S. 574, 584-585 (1998) (internal quotation marks and citation omitted). Even the qualified-immunity doctrine would provide little useful protection. An official receives such immunity only if his conduct "does not violate clearly established statutory or constitutional rights about which a reasonable person would have known." *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999) (citation omitted). If this Court were to clearly establish a rule that retaliatory arrests like the one alleged here violate the First Amendment, then there would be little work for the qualified-immunity doctrine to do, and retaliatory-arrest cases like this would turn on a purely factual inquiry into the credibility of an officer's testimony about a non-retaliatory motive.

There is no sound policy reason why plaintiffs unable to make out an objective case under the Fourth Amendment—or, potentially, equal-protection principles—should nonetheless be permitted to subject federal officers to lengthy and unpredictable litigation about their subjective motivations. Cf. *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (observing that Fourth Amendment's objective focus "promotes even-handed, uniform enforcement of the law"). The interests of public safety would be ill-served by recognizing a tort

that could cause officers to shy away from making legitimate arrests simply because the background context involves expressive activity.

3. The considerations counseling hesitation before recognizing a *Bivens* remedy apply with particular force where, as here, the protective functions of the Secret Service are at issue. This Court has previously limited the scope of *Bivens* not only by declining to recognize certain types of substantive claims, but also by declining to allow suit against certain categories of defendants. See *Malesko*, 534 U.S. at 63; *FDIC* v. *Meyer*, 510 U.S. 471, 484-486 (1994); see also *Minneci*, slip op. 7-8 (recognizing that "the nature of the defendant" can bear on the propriety of recognizing *Bivens* liability). Even if the Court believes that retaliatory-arrest liability under *Bivens* may be appropriate in certain circumstances, it should nevertheless hold that such claims cannot be brought against Secret Service agents engaged in their vital protective duties.

Secret Service agents frequently operate in politically-charged environments. They protect not only the President and Vice President, 18 U.S.C. 3056(a)(1), but also other political figures such as foreign heads of state (and, potentially, other foreign dignitaries), 18 U.S.C. 3056(a)(5)-(6), as well as presidential and vice-presidential candidates, 18 U.S.C. 3056(a)(7). They also sometimes provide security at "special events of national significance," 18 U.S.C. 3056(e)(1), which can include political activities like major-party presidential nominating conventions. There is accordingly a high likelihood that, as in this case, the circumstances surrounding an arrest or detention will involve expressive activity. See, *e.g.*, *Saucier* v. *Katz*, 533 U.S. 194, 197-198 (2001) (*Bivens* claim against military policeman by political

protester detained at rally where Vice President was scheduled to appear), overruled in part on other grounds by *Pearson* v. *Callahan*, 555 U.S. 223 (2009); *McCabe* v. *Parker*, 608 F.3d 1068, 1070-1073 (8th Cir. 2010) (*Bivens* claim against Secret Service agents by political protester arrested at rally where President was scheduled to appear).

Secret Service agents in these situations are performing a critically important public function. Cf. *Watts* v. *United States*, 394 U.S. 705, 707 (1969) (per curiam) ("The Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive."). This Court has recognized that when a person presents a potential threat to the Vice President, an officer guarding the Vice President is "required to recognize the necessity to protect the Vice President by securing [the person] and restoring order to the scene." *Saucier*, 533 U.S. at 208. In taking such action to ensure a protected individual's safety, agents "should not err always on the side of caution because they fear being sued." *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (internal quotation marks and citation omitted).

Those considerations counsel against courts' recognition of a judicially-implied cause of action in this area. Courts are not well positioned to predict with the necessary degree of precision the impact of recognizing liability on the primary conduct of agents in the field, or to fine-tune any available remedies to assure that important public-safety goals are not unduly compromised. Rather, "Congress is in a far better position than a court to evaluate the impact of a new species of litigation against those who act on the public's behalf" and "can tailor any remedy to the problem perceived." *Wilkie*, 551 U.S. at 562 (internal quotation marks and citation

omitted). In such circumstances, the Court should decline to recognize a *Bivens* claim.

II. THE COURT OF APPEALS ERRED IN PERMITTING RESPONDENT'S RETALIATORY-ARREST CLAIM DESPITE THE PRESENCE OF PROBABLE CAUSE

Even assuming that *Bivens* authorizes a private damages claim alleging that a law-enforcement officer arrested a suspect for retaliatory reasons, the court of appeals erred in concluding that such a claim may proceed even when probable cause supported the arrest. This Court has previously held that the presence of probable cause defeats a First Amendment retaliatory-prosecution claim, and similar considerations dictate that it should also defeat a First Amendment retaliatory-arrest claim. At the very least, petitioners should receive qualified immunity, because a reasonable officer could have believed that an arrest supported by probable cause does not violate the First Amendment.

A. A Plaintiff Raising A First Amendment Retaliatory-Arrest Claim Should Be Required To Plead And Prove The Absence Of Probable Cause

1. In *Hartman* v. *Moore*, the Court addressed the requirements for a plaintiff to prevail on a *Bivens* claim alleging that criminal investigators had violated the plaintiff's First Amendment rights by inducing a criminal prosecution in retaliation for his protected speech. The Court (without addressing whether *Bivens* extends to such a claim in the first place) held that the plaintiff must plead and prove the absence of probable cause. 547 U.S. at 252.

The Court noted that, while "retaliatory actions * * * for speaking out" are constitutionally forbidden "as a general matter," *Hartman*, 547 U.S. at 256, a

plaintiff in a retaliation case must show that retaliation was the "but-for cause" of the official's action. *Id.* at 256, 260. As the Court explained, "[i]t 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." *Id.* at 206; see *Wilkie*, 551 U.S. at 558 n.10 (rejecting the proposition that "the presence of malice or spite in an official's heart renders any action unconstitutionally retaliatory, even if it would otherwise have been done" for legitimate reasons). And the Court reasoned that "the need to prove a chain of causation from animus to injury, with details specific to retaliatory-prosecution cases, * * * provides the strongest justification for [a] no-probable-cause requirement" in the context of a constitutional-tort claim alleging retaliatory prosecution. *Hartman*, 547 U.S. at 259.

The Court identified two primary features of retaliatory-prosecution cases that distinguish them from "standard" retaliation cases, *Hartman*, 547 U.S. at 260, and that support a requirement to prove an absence of probable cause. First, the Court observed that in retaliatory-prosecution cases, "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." *Id.* at 261. "Demonstrating that there was no probable cause for the underlying criminal charge," the Court explained, "will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for instigating the prosecution." *Ibid.* Conversely, "establishing the existence of probable cause will suggest that prose-

cution would have occurred even without a retaliatory motive." *Ibid.* The Court reasoned that the issue "is so likely to be raised by some party at some point that treating it as important enough to be an element will be a way to address the issue of causation without adding to time or expense." *Id.* at 265.

Second, the Court observed that "the requisite causation between the defendant's retaliatory animus and the plaintiff's injury" in a retaliatory-prosecution case "is usually more complex than it is in other retaliation cases." *Hartman*, 547 U.S. at 261. "A *Bivens* (or § 1983) action for retaliatory prosecution," the Court noted, "will not be brought against the prosecutor, who is absolutely immune," but instead against a non-prosecutor official "who may have influenced the prosecutorial decision but did not himself make it." *Id.* at 261-262. "Thus," the Court explained, "the causal connection required [in such a suit] is not merely between the retaliatory animus of one person and that person's own injurious action, but between the retaliatory animus of one person [the investigator] and the action of another [the prosecutor]," *ibid.*, whose prosecutorial decisions, moreover, would be entitled to a "presumption of regularity," *id.* at 263. Proof of the absence of probable cause would provide an evidentiary "link" to "bridge [that] gap," *ibid.*, in that the absence (or presence) of probable cause would have "obvious evidentiary value" in assessing whether the non-prosecutor official's retaliatory animus induced the prosecutor's charging decision, *id.* at 265.

2. The court of appeals erred in deeming *Hartman* inapplicable to this case. Retaliatory-arrest cases, like retaliatory-prosecution cases, are materially distinct from "standard" retaliation cases in the same two respects emphasized by the Court in *Hartman*. First,

retaliatory-arrest cases likewise will present "a distinct body of highly valuable circumstantial" probable-cause evidence that is "apt to prove or disprove retaliatory causation." 547 U.S. at 261. As in retaliatory-prosecution cases, the issue of probable cause is "likely to be raised by some party at some point" in a retaliatory-arrest case, and it would impose little, if any, practical burden to require a plaintiff to demonstrate its absence. *Id.* at 265. And as in retaliatory-prosecution cases, demonstrating "that there was no probable cause for the [arrest] will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for" the arrest, whereas "establishing the existence of probable cause will suggest that [the arrest] would have occurred even without a retaliatory motive." *Id.* at 261.

Second, in retaliatory-arrest cases, as in retaliatory-prosecution cases, the retaliation inquiry "is usually more complex than it is in other retaliation cases," thus "support[ing] a requirement that no probable cause be alleged and proven." *Hartman*, 547 U.S. at 261. As a threshold matter, a number of retaliatory-arrest cases will involve the same specific complexity present in *Hartman*: a lack of identity between the defendant alleged to have a retaliatory motive and the official who decided to take the challenged action. See *id.* at 262. Respondent's suit against Agent Doyle is an example: Agent Reichle made the decision to arrest respondent, Pet. App. 8, and the claim against Agent Doyle appears to be premised on the theory that Agent Doyle induced the decision to arrest. If respondent had brought a retaliatory-prosecution claim asserting that Agent Doyle's allegedly retaliatory animus induced the prosecutor to bring the charges that were filed against him, *ibid.*, *Hartman* indisputably would require respondent

to plead and prove the absence of probable cause. It would be incongruous to permit respondent to proceed on a retaliatory-arrest claim similarly premised on Agent Doyle's allegedly retaliatory animus without any need to demonstrate the absence of probable cause. See *Hartman*, 547 U.S. at 262-263 (citing cases raising challenges to prosecutions based on inducement of police officers).

More fundamentally, even when only a single officer's actions are at issue, the causation inquiry in arrest cases—as in prosecution cases—will still "usually [be] more complex than it is in other retaliation cases." *Hartman*, 547 U.S. at 261. For instance, in the case of a standard retaliation claim by a public employee "that he was fired for speech criticizing the government," *id.* at 259, a close temporal proximity between the plaintiff's expressive activity (say, a letter to a newspaper editor) and the adverse governmental action will typically provide at least some support for the plaintiff's prima facie claim of unlawful retaliation, see *id.* at 259-260. The same is not true in the arrest context. Rather, a suspect's expressive activity will often be an entirely legitimate, or even necessary, factor for the officer to take into account in deciding whether to make an arrest.

In some cases, expressive activity may provide evidence of a crime and thus bear directly on the probable-cause determination. See, *e.g.*, *Hunter*, 502 U.S. at 228 (considering suspect's statements in addressing probable cause to arrest him for threatening the President); *Wayte* v. *United States*, 470 U.S. 598, 612-613 (1985) (noting that protest letters written to the Selective Service "provided strong, perhaps conclusive evidence" of an element of the criminal offense of failing to register for the draft). Even more frequently, expressive activity

will be relevant to an officer's decision concerning whether an arrest would make sense under the circumstances. Officers do not—and could not—take into custody every person whom they could lawfully arrest, and there is accordingly a "well established tradition of police discretion" in deciding whether a custodial arrest is warranted. *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 760 (2005); see also *Chicago* v. *Morales*, 527 U.S. 41, 62 n.32 (1999) (observing that it is "common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances"). The Court has never held that officers are forbidden from considering a suspect's expressive activity in making that discretionary decision, nor would such a rule be sensible. Cf. *Wayte*, 470 U.S. at 614 (rejecting interpretation of the First Amendment that "would allow any criminal to obtain immunity from prosecution simply by reporting himself and claiming that he did so in order to 'protest' the law").

In deciding whether to arrest someone for trespassing on government property, for example, an officer should be able to consider that a suspect who belligerently states, "the government has no right to own property," is less likely to leave promptly of his own accord than a suspect who immediately apologizes and explains that he was simply taking a shortcut home. Similarly, in this case, it was both legitimate and prudent for petitioners to take account of respondent's vocal criticism of the Vice President as part of the totality of circumstances in assessing whether respondent presented a threat to the Vice President and should be arrested and removed from the area. Secret Service agents can reasonably, and lawfully, conclude that someone whose disagreement with the Vice President has already led to

unsolicited physical contact presents more of a security risk than someone who, for example, bumped into the Vice President accidentally. See Pet. App. 8 (Agent Reichle's testimony that he arrested respondent based upon his "premeditation, the conversation on the cell phone, the fact that [respondent] would not talk to [him], the fact that he's walking around with a bag in his hand in an [area without a metal detector], and the fact that [Agent Doyle said] that he had unsolicited contact" with the Vice President).

It will often be quite difficult, however, for judges and juries to distinguish permissible arrest-related consideration of expressive activity from retaliation. An officer's honest admission that expressive activity played a part in his arrest decision can easily be used against him. Indeed, the court of appeals in this case construed such an admission by Agent Reichle as evidence supporting an inference of retaliation. Pet. App. 26. This complexity in establishing causation renders the reasoning of *Hartman* fully applicable to retaliatory-arrest cases.

As in *Hartman*, the complexity "should be addressed specifically in defining the elements of the tort," 547 U.S. at 265, because the jury (and the district court, when it addresses a dispositive motion) will otherwise lack any consistent, objective criterion for distinguishing lawful from unlawful government action. As the Court explained in *Hartman*, "[b]ecause 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." *Id.* at 265-266. And also as in *Hartman*, the Court should make that requirement a blanket rule for all retaliatory-arrest cases (including those that may not

present the same degree or kind of causal complexity as this one), rather than invite difficult line-drawing problems about which cases are sufficiently complex to necessitate it. *Id.* at 261, 264 & n.10. Indeed, a probable-cause standard would have significant benefits even in relatively straightforward cases, because it provides a well-established and easily administrable way of striking the appropriate balance between the interest in protecting individuals from unreasonable law-enforcement interference and the public-safety interest in enabling officers to enforce the law. *E.g.*, *Pringle*, 540 U.S. at 370.

3. This case, moreover, presents an additional consideration, not present in *Hartman*, that counsels in favor of requiring a plaintiff to plead and prove the absence of probable cause: the common law's reliance on that factor in analogous contexts. The Court has recognized that "over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights," and that those preexisting rules are often useful in defining the contours of constitutional torts. *Carey* v. *Piphus*, 435 U.S. 247, 257-258 (1978); see *Heck* v. *Humphrey*, 512 U.S. 477, 483 (1994). The Court accordingly acknowledged in *Hartman* that the common law can at least serve "as a source of inspired examples" in the *Bivens* context. 547 U.S. at 258. In that case, however, the Court found no clear guidance from the common law, observing that "we could debate whether the closer common-law analog to retaliatory prosecution is malicious prosecution (with its no-probable-cause element) or abuse of process (without it)." *Ibid.*

But at least for retaliatory-arrest cases that, like this one, do not involve a warrant, the common-law analogue is much clearer. A warrantless arrest would not provide the basis for a common-law abuse-of-process claim, because it does not involve legal "process," which generally is defined to require some sort of interaction with a court. See Restatement (Second) of Torts § 682 (1977) (element of abuse-of-process torts is "us[ing] a legal process") (Second Restatement); *Black's Law Dictionary* 1085 (5th ed. 1979) (defining "legal process" to mean "a summons, writ, warrant, mandate, or other process issuing from a court" and defining "criminal process" by reference to a warrant); see also 3 Dan B. Dobbs et al., *The Law of Torts* § 594, at 420-422 (2d ed. 2011) (discussing definition of "process" in context of abuse-of-process tort) (Dobbs). Rather, a warrantless arrest might be actionable at common law in one of two ways. First, the arrestee might allege that there was no legal authority to arrest him, in which case his claim would be for false imprisonment. Second Restatement §§ 35, 41 (1965), 654 cmt. e; see also Dobbs § 41, at 104. Second, the arrestee might allege that even if there was legal authority to arrest him, that authority was invoked maliciously, in which case his claim would be for malicious prosecution. Second Restatement § 654 cmt. e.

Neither common-law option would generally impose damages liability on an officer who made a warrantless arrest based on probable cause. The absence of probable cause is an element of a malicious-prosecution tort. Second Restatement § 653; see, *e.g.*, *Hartman*, 547 U.S. at 258; *Heck*, 512 U.S. at 485 n.4. And the presence of probable cause is a defense to a false-imprisonment tort. A defendant in a false-imprisonment case can avoid liability by showing that he made a "privileged" arrest,

Second Restatement § 118 & cmt. b (1965); Dobbs § 94, at 289-290, and a "peace officer" would be privileged to arrest someone whom he "reasonably suspects" has committed a felony or who breaches the peace in his presence. Second Restatement §§ 114, 119(b)-(c), 121(a)-(b) (1965); see also Dobbs § 94, at 291-293.*

Any retaliatory motive that an officer might have in making a warrantless arrest would typically be irrelevant if probable cause were present. It has long been the rule that "if there was probable cause, an action for malicious prosecution will not lie, although the party who procured the arrest or indictment was actuated by malicious motives." *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390, 402 (1851); see also 3 William Blackstone, *Commentaries* 127 (1768). And in the false-imprisonment context, "the fact that [an officer] has an ulterior motive * * * does not make the arrest unprivileged" so long as the arrest is made in the course of enforcing the law (and not, say, simply to pressure the suspect into performing a service for the officer as a condition of release). Second Restatement § 127 cmt. a (1965). So, for example, if "A, a traffic officer, arrests B for driving at

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* The common-law rule arguably could be read to require that the officer subjectively intend to arrest the suspect for the specific crime for which probable cause objectively existed. This Court has, however, rejected such a requirement in the Fourth Amendment context. See *Devenpeck* v. *Alford*, 543 U.S. 146 (2004). And even if such a requirement applied here, petitioners would still be shielded from liability, because respondent's unsolicited physical contact with the Vice President provided probable cause for the assault crime that petitioners had in mind when they arrested him. See Pet. App. 8; 18 U.S.C. 1751(e) (criminalizing an "assault[]" on the Vice President); Wayne R. LaFave, *Criminal Law* §§ 16.2-16.3, at 816, 823 (4th ed. 2003) (traditional definition of "assault" includes "attempted battery," and traditional definition of "battery" includes "offensive touching").

the rate of 20 miles an hour through a town in which the rate of speed is fixed by an ordinance at 15 miles an hour," the arrest is privileged (and thus no false-imprisonment liability attaches), even if A made the arrest "because B was a personal enemy, or because B had previously reported him for his failure to arrest persons driving at 25 miles an hour." *Id.* § 127 cmt. a, illus. 1 (1965).

Under the court of appeals' decision, however, a plaintiff in those circumstances could impose liability on the officer by couching his claim in constitutional terms. There is no reason why the definition of the constitutional tort should so sharply depart from the common law's guidance. Particularly in light of *Hartman*'s causation-related considerations, it makes sense to incorporate the probable-cause inquiry in the constitutional context not merely as an affirmative defense (as it is for false imprisonment), but as an element of the claim (as it is for malicious prosecution). The same practical considerations that have informed the development of the common law are equally present here. See *Heck*, 512 U.S. at 483. And requiring consideration of probable cause at the earliest possible stage of the case protects innocent officers to the maximum extent from the burdens of discovery and trial. See *Iqbal*, 129 S. Ct. at 1945-1947.

B. At A Minimum, Petitioners Are Entitled To Qualified Immunity Because They Reasonably Could Have Believed Their Conduct Was Lawful

Not only did the court of appeals err in concluding that an arrest supported by probable cause could give rise to a retaliatory-prosecution claim, but it compounded that error by denying petitioners qualified immunity. "[T]o ensure that fear of liability will not 'unduly inhibit officials in the discharge of their duties,'" the qualified-immunity doctrine provides that "so long as they have not violated a 'clearly established' right," officials "are shielded from personal liability." *Camreta* v. *Greene*, 131 S. Ct. 2020, 2030-2031 (2011) (citations omitted).

This Court has never held that an arrest supported by probable cause can violate the First Amendment. The court of appeals therefore relied solely on its own circuit precedent to conclude that the unconstitutionality of petitioners' conduct was "clearly established" and that qualified immunity was unavailable. See Pet. App. 34-35 & n.14. Its reasoning was critically flawed in two primary respects. First, the circuit precedent on which it relied predated *Hartman*, whereas the arrest in this case did not. See *id.* at 34 n.14; compare *Hartman*, 547 U.S. at 250 (decided April 2006), with Pet. App. 3 (respondent's arrest in June 2006). Even if this Court were to reject the contention that *Hartman*'s reasoning translates equally well (if not better) to retaliatory-arrest claims, see Part II.A, *supra*, that decision certainly could have led a reasonable officer to believe that an arrest supported by probable cause does not violate the First Amendment.

Second, multiple courts of appeals both before and after *Hartman* have either held or suggested that an

officer is entitled to qualified immunity from a First Amendment retaliatory-arrest claim so long as it would have been reasonable to believe that probable cause supported the arrest. See *McCabe*, 608 F.3d at 1079; *Redd* v. *City of Enterprise*, 140 F.3d 1378, 1383 (11th Cir. 1998); *Singer* v. *Fulton County Sheriff*, 63 F.3d 110, 120 (2d Cir. 1995), cert. denied, 517 U.S. 1189 (1996); see also *Phillips* v. *Irvin*, 222 Fed. Appx. 928, 929 (11th Cir. 2007) (per curiam). Those courts' treatment of the absence of probable cause as an element of a First Amendment retaliatory-arrest violation demonstrates that a contrary conclusion would not have been clear to officers in the field like petitioners. See *Safford Unified Sch. Dist. No. 1* v. *Redding*, 129 S. Ct. 2633, 2644 (2009) (judicial differences of opinion can suggest that law is not clearly established).

The court of appeals' unilateral declaration of clarity was especially inappropriate in light of the protective function that petitioners were performing when they arrested respondent. The protective duties of the Secret Service are not confined to a particular geographic locale, but instead follow the protected individuals wherever they may be. It is unreasonable, undesirable, and unrealistic to expect agents to modify their performance of their duties based on the law of the local court of appeals, or to "abide by the most stringent standard adopted anywhere in the United States." *al-Kidd*, 131 S. Ct. at 2087 (Kennedy, J., concurring). As this Court has recognized, the qualified-immunity doctrine's "accommodation for reasonable error" is "nowhere more important than when the specter of Presidential assassination is raised." *Hunter*, 502 U.S. at 229.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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