No. 11-262

In the Supreme Court of the United States

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

v.

STEVEN HOWARDS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF FBI AGENTS ASSOCIATION AND FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION AS AMICI CURIAE SUPPORTING PETITIONERS

J. BRETT BUSBY
Counsel of Record
J. MARK LITTLE
E. DEE MARTIN
JOSHUA C. ZIVE
Bracewell & Giuliani LLP
711 Louisiana, Ste. 2300
Houston, TX 77002
(713) 223-2300
Brett.Busby@bgllp.com
Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

INTEREST OF AMICI CURIAE[1]

The FBI Agents Association (FBIAA), formed in 1981, is a non-profit professional association representing over 12,000 active and retired FBI Special Agents, including approximately three-quarters of current FBI Special Agents. The Federal Law Enforcement Officers Association (FLEOA), formed in 1977, is a nonpartisan and non-profit professional association exclusively representing federal law enforcement officers. FLEOA currently represents over 25,000 federal law enforcement officers from 65 federal agencies.

FBIAA and FLEOA were both formed to represent the interests of their members in legislative, regulatory, and judicial fora. FBIAA and FLEOA serve as advocates for their members on matters ranging from pay and benefits to the policies necessary for Agents and other federal law enforcement officers to be most effective in their efforts to combat crime, terrorism, and other threats to the public.

FBIAA and FLEOA members are directly involved in the arrest and detention of persons and the investigation of crimes that threaten the security and safety of the United States and its citizens. FBIAA and FLEOA members are required to use their skills and education to make quick decisions in complex situations. Requiring them to defend against allegations that an arrest supported by

---

[1] Pursuant to Rule 37.6, Amici certify that no counsel for a party authored this brief in whole or in part, and that no person or party, other than Amici or their counsel, made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk.

probable cause had an improper retaliatory motive would undermine their effectiveness, introducing unnecessary second-guessing and risk of personal liability into the law enforcement process. Accordingly, FBIAA and FLEOA submit that, consistent with the holdings of the Second, Sixth, Eighth, and Eleventh Circuits, their members should be immune from retaliatory arrest claims when probable cause exists for the underlying arrest.

SUMMARY OF THE ARGUMENT

The tens of thousands of law enforcement officers represented by Amici dedicate their lives to protecting public safety. In doing so, they are called upon to use their skills and experience to make difficult and time-sensitive decisions. These officers need to be able to perform their duty of protecting the public without the constant fear of being sued. That is why this Court has developed objective, bright-line rules to govern law enforcement conduct. The probable cause standard is the chief example. Time and again the Court has applied this workable rule in the law enforcement context. And it has resisted the temptation to complicate this clear standard with subjective inquiries or endless exceptions.

The Court once again took this prudent path in *Hartman v. Moore*, 547 U.S. 250 (2006), holding that retaliatory prosecution claims cannot proceed when the prosecution is supported by probable cause. The subjective intentions of the officer urging prosecution or the special circumstances of the case are of no moment. If there was objective probable cause, that is the end of the inquiry.

The same legal and policy considerations that drove the *Hartman* analysis apply with equal force

in the retaliatory arrest context. And the same rule should apply as well: if probable cause supported the arrest, a retaliatory arrest claim cannot proceed. By adopting such a rule, this Court can stay true to the letter and spirit of *Hartman* and honor its long tradition of objective, bright-line rules for law enforcement conduct.

ARGUMENT

I. The *Hartman* rationales apply with equal force to retaliatory arrest claims.

Hartman v. Moore dictates the outcome of this case. In *Hartman*, this Court held that a retaliatory prosecution plaintiff must plead and prove the absence of probable cause. 547 U.S. at 265-66. The Court focused its opinion on the causation element of a retaliatory prosecution claim, considering the unique causal aspects of such a claim and observing that the probable cause inquiry "will have high probative force" on the causation issue. *Id.* at 260-65. This Court also injected practicality into the analysis by noting that requiring a showing of no probable cause would have "little or no added cost." *Id.* at 265. Because the absence of probable cause was a highly probative factor that could be made an element of a retaliatory prosecution claim virtually cost-free, the Court added this element to the claim. *Id.* at 265-66.

These same rationales for the *Hartman* decision support adding a no-probable-cause element to a retaliatory arrest claim. From the unique causal considerations to the cost-benefit analysis, there is no meaningful distinction between retaliatory arrest claims and the retaliatory prosecution claims addressed in *Hartman*.

A. *Hartman*'s twin pillars support extending its rule to retaliatory arrest claims.

Hartman relied on two unique causal aspects of retaliatory prosecution claims in reaching its holding. First, the presence or absence of probable cause offers "a distinct body of highly valuable circumstantial evidence" on whether retaliatory animus was the cause of the injury. *Hartman*, 547 U.S. at 260-61. Second, retaliatory prosecution claims involve complex causal relationships because the defendant is not the prosecutor, but rather an official who, because of retaliatory animus, induced the prosecutor to proceed with the case. *Id.* at 261-64. While the *Hartman* Court discussed these causal issues in the context of retaliatory prosecution claims, both of them are present in retaliatory arrest claims as well.

1. First, probable clause provides a legitimate basis for both prosecution and arrest. *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004) (arrest); *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (prosecution). Thus, whether arrest or prosecution is the harm at issue, the probable cause inquiry often disposes of the question whether retaliatory animus or legitimate considerations caused the harm. "[E]stablishing the existence of probable cause will suggest that prosecution would have occurred even without a retaliatory motive," *Hartman*, 547 U.S. at 261; the same can be said for an arrest. Likewise, "evidence showing whether there was or was not probable cause" is "apt to prove or disprove retaliatory causation" (*id.*) in both the arrest and prosecution contexts.

Given this close relationship between the causation issue and probable cause in both retaliatory

prosecution and retaliatory arrest claims, adding a no-probable-cause element "will usually be cost free by any incremental reckoning." *Id.* at 265. Indeed, "[t]he 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.* Thus, the cost-benefit balance favors the inclusion of a no-probable-cause element in a retaliatory arrest claim.

2. Furthermore, as with retaliatory prosecution claims, the causation analysis for retaliatory arrest claims is "usually more complex than it is in other retaliation cases." *Id.* at 262. One complicating factor in the retaliatory arrest context is that a suspect's speech often provides probable cause for making an arrest. *See, e.g.*, *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (per curiam) (finding a suspect's statements relevant to whether there was probable cause to arrest him for threatening the President).

Even when the expressive activity falls short of producing probable cause, such speech may legitimately inform an officer's discretionary decision whether to arrest an individual when he has probable cause to do so. *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005) (recognizing the "deep-rooted nature of law-enforcement discretion"). For example, when an officer pulls someone over for speeding, he is "authorized (not required, but authorized) to make a custodial arrest" because there is "probable cause to believe that [the suspect] committed a crime in his presence." *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). A suspect's speech in this situation informs the officer's discretion. If the suspect offers a sincere apology for the infraction, it stands to reason that that individual will

comply with traffic laws in at least the immediate future. If, on the other hand, the suspect aggressively announces his belief that speed limits are an unconstitutional restraint on liberty, that is one factor to consider in evaluating whether he will be a continuing threat to public safety.

Thus, the court's task in the retaliatory arrest context is to separate legitimate speech-based arrests from illegitimate ones motivated by retaliatory animus. This task may be impossible when legitimate safety considerations and alleged retaliatory animus arise from the same speech, as is so often the case.

Additionally, the major causation complexity that *Hartman* identified in retaliatory prosecution cases can also arise in retaliatory arrest cases. While some retaliatory arrest claims concern the retaliatory animus of the person making the arrest, others involve "the retaliatory animus of one person and the action of another." *Hartman*, 547 U.S. at 262. For an example, one need look no further than the claim against Agent Doyle in this case. Agent Reichle is the one who arrested respondent. JA 46. Yet respondent also brought a retaliatory arrest claim against Agent Doyle, presumably based on the theory that Agent Doyle, out of retaliatory animus, influenced Agent Reichle to make the arrest. *See* JA 12-13; 63-64. Thus, the same causal complexity that this Court identified in retaliatory prosecution claims can also apply to retaliatory arrest claims. As in *Hartman*, this complexity counsels in favor of making the absence of probable cause an element of a retaliatory arrest claim.

B. An additional consideration in *Hartman*, the presumption of regularity, also is present in the retaliatory arrest context.

Another consideration the *Hartman* Court found important was that prosecutors enjoy a presumption of regularity, meaning that they are presumed to have legitimate grounds for their actions. *Hartman*, 547 U.S. at 263-65. A plaintiff must overcome this considerable presumption to prove that the nonprosecuting official's retaliatory animus "infected the prosecutor's decision to bring the charge." *Id.* This burden further complicates the causation analysis.

A close examination reveals that a similar presumption applies in the arrest context. There is no general presumption that law enforcement conduct is legitimate. But there is such a presumption when probable cause supports an officer's actions. This Court repeatedly has held that when objective probable cause supports a law enforcement officer's actions, the inquiry ends there: "We ask whether 'the circumstances, viewed objectively, justify [the challenged] action.' If so, that action was reasonable 'whatever the subjective intent' motivating the relevant officials." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (internal citations omitted); *see also Devenpeck*, 543 U.S. at 153 ("Our cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause."); *Whren v. United States*, 517 U.S. 806, 813 (1996) (reviewing cases). This presumption extends

even to areas where Fourth Amendment considerations run up against First Amendment concerns. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 565 (1978) ("Properly 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.").

This presumption of regularity when there is probable cause presents the same issue in the retaliatory arrest context that the similar presumption does with retaliatory prosecution claims. The plaintiff must overcome this strong preference for ending law enforcement challenges at the probable cause stage if he is to prevail on a retaliatory arrest claim.

* * *

The very same causation considerations that form the basis of *Hartman* are also present in the retaliatory arrest context. The causation analysis can be just as complex in retaliatory arrest cases as in retaliatory prosecution cases. And the complexities arise for many of the same reasons in both situations. Additionally, the absence of probable cause is highly relevant to the causation question in both claims. Therefore, based on the reasoning of *Hartman*, this Court should adopt a no-probable-cause element for retaliatory arrest claims.

II. Applying the *Hartman* rule to retaliatory arrest claims is in keeping with this Court's tradition of embracing objective rules for law enforcement conduct.

A. This Court has repeatedly applied bright-line rules to law enforcement conduct.

This Court has a long tradition of applying objective, bright-line rules to law enforcement conduct. Case after case has refused to take the inquiry beyond objective analysis, particularly when there is probable cause, and has resisted the temptation to carve out exceptions to cover every conceivable situation. *See Ashcroft*, 131 S. Ct. at 2080; *Devenpeck*, 543 U.S. at 153; *Whren*, 517 U.S. at 813; *Zurcher*, 436 U.S. at 565. In doing so, the Court has shown admirable discipline in "respect[ing] the values of clarity and simplicity." *Atwater*, 532 U.S. at 347.

1. Objective, workable rules are of special import in the law enforcement context because they must "be applied on the spur (and in the heat) of the moment." *Id.* As this Court recently recognized in discussing the need for qualified immunity for warrantless entries, law enforcement officers must make split-second judgments in difficult and uncertain situations, and "judges should be cautious about second-guessing a police officer's assessment . . . of the danger presented by a particular situation." *Ryburn v. Huff*, No. 11-208, slip op. at 8 (U.S. Jan. 23, 2012) (per curiam).

The need for swift application raises more concerns with retaliatory arrest claims than it does with retaliatory prosecution claims. Whereas an officer has days, weeks, or even months to quietly contem-

plate whether to recommend an individual for prosecution, decisions to arrest must be made in mere minutes or seconds in the midst of danger and uncertainty. Intricate, specialized rules that second-guess an officer's actions on the basis of subjective factors have no place in such situations. They would cause dangerous hesitation and lead to deadly results.

Faced with the unique challenges that come with crafting rules for these tense situations, this Court has announced as its goal "to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made." *Id.* It also has been mindful that "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." *Horton v. California*, 496 U.S. 128, 138 (1990). The Court has developed and fine-tuned the probable cause standard with these interests in mind.

Probable cause is an objective rule that focuses on whether actions were reasonable based on the information known at the time. In the arrest context, for instance, the dispositive question is "whether at [the] moment [of the arrest] the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964). Such a rule gives guidance and comfort to officers in the field, for law enforcement officers do not begrudge being held to a transparent, objective standard of conduct. What causes them concern, instead, is the

specter of a judge or jury searching their psyche, in hindsight, for evidence of ill motives. Because this speculative inquiry offers no practical guidance on how to conduct oneself in the field, law enforcement officers must take all manner of precautions if they hope to avoid a lawsuit. Worse, they must do so even when their actions are objectively reasonable. The probable cause rule avoids all these problems because as long as the objective facts support an officer's actions, no further scrutiny is necessary.

2. As importantly, rules for law enforcement conduct must apply across the board rather than being riddled with exceptions. Exceptions impair the benefits of clear, bright-line rules. *See Devenpeck*, 543 U.S. at 154 (declining to adopt a Fourth Amendment rule that resulted in "arbitrary variable protection"). For law enforcement officers in the field, exceptions add additional steps to an already rushed inquiry, injecting hesitation and confusion into a dangerous situation. Exceptions also burden the judicial system by complicating and multiplying the factual and legal issues in dispute. Judicial reconstruction of these heated law enforcement encounters is already difficult enough without these added burdens. The frailties of human memory manifest themselves when trying to recall the precise details of a dynamic, tense situation that occurred far in the past. Adding more complexity to this already challenging analysis may make reaching the correct outcome a nearly impossible task.

Additionally, the proposed exception to the probable cause standard in this case—that First Amendment retaliatory arrest claims can proceed in the face of probable cause—is much broader than it may appear. *Cf. Davis v. Scherer*, 468 U.S. 183, 195

(1984) ("Appellee proposes that his new rule for qualified immunity be limited by requiring that plaintiffs allege clear violation of a statute or regulation that advanced important interests or was designed to protect constitutional rights. Yet, once the door is opened to such inquiries, it is difficult to limit their scope in any principled manner."). Political speech may be the most salient beneficiary of First Amendment protection, but it is not the only one. In fact, the First Amendment covers a vast range of expressive activity. Even belligerent expressive conduct towards law enforcement officers often finds sanctuary in the First Amendment. *City of Houston v. Hill*, 482 U.S. 451, 461 (1987) ("[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers."); *see, e.g.*, *Greene v. Barber*, 310 F.3d 889, 895-96 (6th Cir. 2002) (First Amendment protects swearing at an officer); *Posr v. Court Officer Shield No. 207*, 180 F.3d 409, 415-16 (2d Cir. 1999) (First Amendment protects threatening an officer with "one day you're gonna get yours").

It is of course not uncommon for the subject of an arrest to hurl insults at the arresting officer. If the *Hartman* rule does not extend to retaliatory arrest claims, then the officers in every one of these instances will face the burdensome prospect of defending retaliatory arrest claims even if their actions were objectively reasonable. The exception will have swallowed the rule.

3. The policy benefits of objective, bright-line rules attain special significance in the qualified immunity setting. "[B]ecause '[t]he entitlement is an immunity from suit rather than a mere defense to liability,' [this Court] repeatedly [has] stressed the

importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter*, 502 U.S. at 227 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). An objective, bright-line standard like probable cause is well-suited for this purpose because it lends itself to an earlier disposition. By contrast, a rule that permits exceptions or demands investigation into an officer's subjective motivations falls short in this regard, for it creates fact issues that often cannot be resolved until trial.

A second aspect of qualified immunity that merits attention is the doctrine's recognition of the chaotic, confusing environment in which law enforcement conduct often takes place. The Special Agents and other federal law enforcement officers represented by Amici are trained and skilled at evaluating risks quickly and efficiently in order to take actions to prevent and investigate serious threats to public safety and national security. Subjecting these decision-making processes to an academic deconstruction through litigation will fail to capture the real exigencies of the situation faced by the officers, and could discourage law enforcement officers from taking the decisive actions that are often essential to protect the public. Officers "should not err always on the side of caution" and default to inaction in these tense situations, for that would create a paralysis that does more harm than good. *Davis*, 468 U.S. at 196; *see also id.* ("[O]fficials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office." (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 245 (1974) (internal quotation marks omitted)). For law enforcement officers to be able to protect and serve without constantly looking

over their shoulder, second-guessing in the face of objective reasonableness must be avoided. *Atwater*, 532 U.S. at 347. This Court has done just that in the qualified immunity context, providing law enforcement officers with necessary breathing room by giving them the benefit of the doubt when they act with probable cause.

B. *Hartman* follows in this tradition, and so should this case.

Hartman is an apt example of this Court's commitment to objective, bright-line rules in the law enforcement context. The Court showed fidelity to objective rules for law enforcement conduct by ending the retaliatory prosecution inquiry when probable cause exists, thereby excluding subjective motivations from the analysis. *Hartman*, 547 U.S. at 265-66. Additionally, the *Hartman* Court favored a bright-line rule, as opposed to one riddled with exceptions. *Id.* at 264 & n.10. The Court cast aside calls to structure a complex rule that took into account various unlikely situations. *Id.* Such an endeavor "would seem a little like proposing that retirement plans include the possibility of winning the lottery." *Id.* at 264 n.10. And the Court knew the harm that would follow "if any exemption to a no-probable-cause requirement is allowed." *Id.* That is why the *Hartman* Court adopted a clear, simple rule with no exceptions, one that covers the vast majority of situations without becoming bogged down in endless permutations.

The Court should continue its commitment to objective, bright-line rules in this case. The same policy considerations that informed *Hartman* speak with force here as well. The perils of subjective review of

law enforcement actions loom large here as they did in *Hartman*. Similarly, the prospect of a bright-line rule is just as attractive here as it was in *Hartman*. And finally, the special concerns of the qualified immunity doctrine tip the scales in favor of an objective, bright-line rule in this case just as they did in *Hartman*. Given these policy parallels between *Hartman* and this case, both should reach the same result.

* * *

While no standard is perfect, the probable cause rule has provided clear guidance to law enforcement. The Court has repeatedly resisted the temptation to water down this objective rule with exceptions customized for every conceivable set of facts. This tradition continued with *Hartman*, and it would be imprudent to abandon this time-tested rule now.

III. Limiting the *Hartman* rule to retaliatory prosecution claims would have adverse consequences.

Yet another reason the Court should extend the *Hartman* rule to retaliatory arrest claims is that failing to do so would have detrimental effects. Because the First Amendment protects insulting and belligerent speech, as discussed above, allowing retaliatory arrest claims to proceed in the face of probable cause favors individuals who engage in antagonistic behavior towards law enforcement over those who cooperate. Such a rule creates perverse incentives for individuals dealing with law enforcement. It encourages combative behavior and discourages cooperation. Not only would these incentives make the job of law enforcement officers that much harder, they also defy common sense. If anything, amicable

conduct is what should be rewarded, not belligerence.

Rewarding insulting speech also harms the First Amendment itself by cheapening the sacred right of free speech. Freedom of expression becomes nothing more than a lottery ticket, a chance to cash in when one is arrested. And in time the public may come to view the First Amendment not as a venerable guarantee of freedom, but as a bothersome technicality, a loophole exploited by those who refuse to accept the consequences of their actions. Though the risk of such a reversal of public sentiment may seem remote, one cannot deny that the danger exists. And if it did come to pass, the damage done would be all too real.

CONCLUSION

For the foregoing reasons, the judgment of the U.S. Court of Appeals for the Tenth Circuit should be reversed.

Respectfully submitted.

J. BRETT BUSBY
Counsel of Record
J. MARK LITTLE
E. DEE MARTIN
JOSHUA C. ZIVE
Bracewell & Giuliani LLP
711 Louisiana, Ste. 2300
Houston, TX 77002
(713) 223-2300
Brett.Busby@bgllp.com
Counsel for Amici Curiae

JANUARY 2012