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No. 11-262

In The
Supreme Court of the United States

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

Petitioners,

v.

STEVEN HOWARDS,

Respondent.

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

BRIEF FOR RESPONDENT

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OTHER AUTHORITIES

Brandt J. Goldstein, *Panhandlers at Yale: A Case Study in the Limits of Law*, 27 IND. L. REV. 295 (1993)..23

David A. Harris, *The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection*, LAW & CONTEMP. PROBS., 71 (Summer 2003)..21

Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997) 23

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STATEMENT OF THE CASE

I. Decision Below and Facts.[1]

Petitioners grossly abused the extraordinary powers granted them as Secret Service Agents by arresting Respondent Steven Howards in retaliation for his constitutionally protected speech on issues of national concern. The unconstitutional arrest involved no dire emergencies, no split-second decision making and no threat to the Vice President, then under Secret Service protection.[2] By their own testimony, after this unconstitutional arrest, Petitioners engaged in a cover-up and ended up accusing each other and their colleagues of having committed multiple federal crimes in conjunction with this case.[3]

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[1] Generally, Respondent agrees with Petitioners' rendition of the facts, save for these important additions.

[2] Petitioners and *Amicus* United States speak of agents making "split-second judgments in highly charged environments." (*Amicus* Br. of United States 8.) Petitioners continue by stating that agents must "make immediate, potentially life-or-death decisions whether to arrest individuals in order to protect the physical safety of the President and other leaders." (Pet'rs Br. 11-12.) They argue that affirmance by this Court could cause an Agent to hesitate to act, while also stating that "[o]f course, Secret Service agents will never consciously allow their critical protective duties to be compromised by fear of potential legal liability." (Pet'rs Br. 11-12, 31.)

[3] These incredible allegations were outlined in a front-page story in the New York Times, January 18, 2008. *See* Kirk Johnson, *2006 incident involving Cheney leads to internal strife in Secret Service*, N.Y. Times, Jan. 18, 2008, at A1. (*See also* http://www.nytimes.com/2008/01/18/world/americas/18iht-18colorado.9327408.

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Special Agent Mike Lee, the Agent in charge of the protective detail, was standing within eight inches of the Vice President when this encounter occurred. (JA 368.) He overheard the verbal exchange and saw the entire incident, yet made no move to detain Howards. He testified that he observed no crime being committed (JA 360, 365), he perceived no threat posed to the Vice President (JA 362, 375)and he had no probable cause to arrest Howards. (JA 371.) Special Agent Adam Daniels witnessed the incident and agreed that there was no probable cause to believe any crime had occurred. (JA 417.) Nevertheless, Petitioners arrested Howards, seeking to charge him with assaulting the Vice President. (JA 60.)

After Howards was arrested, Agent Daniels testified that he was present when Agent McLaughlin got a call from Agent Reichle. McLaughlin related to Daniels that Reichle had asked them to change their testimony and reports to match his own. (JA 351, 427.) Shocked at this request, McLaughlin would not discuss the incident with Reichle and actually hung up on him. (JA 289.) McLaughlin was also an eyewitness who saw no probable cause to arrest Howards. (JA 344.) Reichle has accused McLaughlin and the "protective detail" of being engaged in a "cover-up." (JA 352.) When Reichle made this accusation the morning after the arrest, McLaughlin believed Reichle had "taken a giant leap away from his good senses." (JA 352.) McLaughlin believed that Reichle,

html?scp=3&sq=%22David%20Lane%22%20and%20%22Secret%20Service%22&st=cse (last visited February 17, 2012).

in requesting that he falsify his reports and change his story, was asking him to commit several federal crimes. (JA 352-53.) Reichle, on the other hand, believed that McLaughlin and Daniels were lying under oath, filing false reports and covering up a crime. Reichle went so far as to ask his supervisor to polygraph his fellow agents. (JA 282.) According to Reichle, his supervisor continued the cover-up by saying, "Don't go there Gus." (JA 282.) Reichle thought that his superior believed that "putting Agents on the box" (polygraph), would "stir up a hornet's nest." (JA 301.) Reichle testified that McLaughlin told him he had been ordered not to talk about this incident or cooperate with Reichle. (JA 285.) Reichle has subsequently been transferred to Guam and stated that he did not make the decision not to file federal charges. (JA 308, 317.)

II. Analysis Below.

The Tenth Circuit determined that because Howards had lied to the Secret Service, probable cause existed to charge him with violating 18 U.S.C. § 1001, making a false statement to a federal investigator.[4] Based upon this fact, the court below

[4] This was hotly contested at oral argument in the court below. Undersigned counsel argued that there was no materiality to Howards' telling the Agent that he had not touched the Vice President as the misstatement was in context of an assault and, further, there is nothing illegal about touching the Vice President. Indeed, numerous people were shaking his hand and touching him on the mall in Beaver Creek on that day. The

(Continued on following page)

dismissed Howards' Fourth Amendment claim. Despite this finding of probable cause, however, the court below has permitted Howards to continue his First Amendment retaliatory arrest claim on the grounds that he has presented credible evidence that the actual motives of the defendants in arresting him were to punish him for his protected speech.

The court below acknowledged that there is a split in the circuits on this issue, and took care in distinguishing this Court's holding in *Hartman v. Moore*, 547 U.S. 250 (2006), involving a retaliatory *prosecution* case wherein this Court determined that the absence of probable cause in that circumstance necessarily must be proved in order to sustain a First Amendment retaliatory *prosecution* lawsuit, from the present case involving a retaliatory *arrest*.

The essential holding of the court below was:

> Even if an official's action would be "unexceptionable if taken on other grounds," when retaliation against constitutionally-protected speech is the but-for cause of that action, this retaliation is actionable and "subject to recovery." *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (*citing Crawford-El v. Britton*, 523 U.S. 574, 593 (1998); *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977)); *see also DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990) ("An act taken in retaliation

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district court's order permitted a trial on the Fourth Amendment issue as well as the First Amendment issue. (Pet. App. 46-61.)

> for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper." (internal quotation marks omitted)); *cf. Whren v. United States*, 517 U.S. 806, 813 (1996) (explaining that although the constitutionality of a seizure under the Fourth Amendment does not depend on the motivations of the officers involved, "selective enforcement of the law based on considerations such as race" violates the Equal Protection Clause). "Official reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right.'" *Hartman*, 547 U.S. at 256 (*quoting Crawford-El*, 523 U.S. at 588 n.10) (alteration in original). Moreover, "the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." *Id.*; *see also Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (noting government may not punish a person or deprive him of a benefit due to his "constitutionally protected speech").

(Pet. App. 22-23.)

The court below refused to extend *Hartman* to the case presently before this Court. The Tenth Circuit distinguished the present situation involving a retaliatory *arrest* from that confronting this Court in *Hartman*, involving a retaliatory *prosecution*, by noting that "[u]nlike the plaintiff in *Hartman*, Mr. Howards does not attack prosecutorial discretion

based on the bad motive of a third person." (*Id.* at 32.) Because the arresting agents were the retaliating officers, this case involved "the quintessential 'ordinary retaliation claim' as outlined in *Hartman* – a claim in which the agent allegedly harboring the unconstitutional animus is the same individual who carries out the adverse action. *Hartman*, 547 U.S. at 259-60." (*Id.* at 32-33.) The court below also noted that "unlike prosecutors, Secret Service Agents enjoy no presumption of regularity regarding their decision-making." (*Id*. at 33.) Given these distinctions, the Tenth Circuit was "not persuaded *Hartman* applies to the circumstances here."[5] (*Id*.)

The court below went on to hold that because *Hartman* "did not disturb our earlier precedent on ordinary retaliation cases, when Howards was arrested it was clearly established that an arrest made in retaliation of an individual's First Amendment right is unlawful, even if the arrest is supported by probable cause." (*Id.* at 34.) The court below denied qualified immunity and permitted "Howards to proceed with his First Amendment retaliation claim notwithstanding probable cause existed for his arrest." (*Id.* at 34-35.)

[5] The court below cited to John Koerner, Note, *Between Healthy and Hartman: Probable Cause in Retaliatory Arrest Cases*, 109 COLUM. L. REV. 755, 771 (2009) ("[T]he Court did not signal that it was rejecting [the *Mt. Healthy*] standard in general. Instead, the Court stressed three factors that supported a heightened pleading standard in retaliatory prosecution cases: complex causation, evidentiary concerns, and the presumption of prosecutorial regularity."). (Pet. App. 33.)

SUMMARY OF THE ARGUMENT

I. A Lack of Probable Cause Should Not be an Element of a First Amendment Retaliatory Arrest Lawsuit.

A First Amendment retaliatory arrest suit should lie regardless of whether the arresting officer possessed probable cause to make an arrest when that officer was actually motivated by personal animus toward the protected speech. Put another way, it must remain the law of the land that "[e]ven if an official's action would be 'unexceptionable if taken on other grounds,' when retaliation against Constitutionally-protected speech is the but-for cause of that action, this retaliation is actionable and 'subject to recovery.'" (*Id.* at 22 (quoting *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (citing *Crawford-El v. Britton*, 523 U.S. 574 (1998); *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977)).)

II. The Doctrine of Qualified Immunity Provides Adequate Protection for the Secret Service Agents in this Case and it Should Neither be Converted into Absolute Immunity Generally nor Should Qualified Immunity Shield the Agents in this Case.

Hartman did not suddenly cast doubt on whether the law is clearly established that a retaliatory prosecution is unlawful. It was a decision made by this Court to engraft a Fourth Amendment element onto a First Amendment retaliatory prosecution case due to

the unique nature of the decision-making process involved in launching a prosecution, and in order to obtain damages, a plaintiff must plead and prove an absence of probable cause. Contrary to Petitioners' argument, the presence of probable cause does not legalize a retaliatory prosecution. Similarly, it is equally clearly established that retaliatory arrests are unlawful with or without probable cause. The only issue before this Court is whether similar considerations in the context of a retaliatory arrest will dictate the same result. As a general proposition, the doctrine of qualified immunity adequately protects Petitioners and familiar, well-settled principles of law should be applied to the analysis in this case.

ARGUMENT

I. *Hartman* Should Not be Extended.

A. Holding in *Hartman*.

This Court's essential holding in *Hartman* is quite clear: In complex causation cases involving multiple and remote actors resulting in a criminal prosecution allegedly in retaliation for protected speech, a plaintiff must plead and prove an absence of probable cause in order to proceed on a First Amendment retaliatory prosecution theory.

The Tenth Circuit as well as this Court carefully distinguished between the "complex" causation chain inherent in a retaliatory prosecution case versus that of "'ordinary retaliation claims, where the

government agent allegedly harboring the animus is also the individual allegedly taking the adverse action.' " (Pet. App. 30 (quoting *Hartman*, 547 U.S. at 259).) This, coupled with the fact that there is a "long-standing presumption of regularity accorded to prosecutorial decision-making," *Hartman*, 547 U.S. at 263, which this Court does "not lightly discard," *id*., caused this Court to conclude that absent a finding of no probable cause, a retaliatory prosecution case could not proceed.

Given the convoluted, complex causation chain necessary to proceed with a malicious prosecution-type of retaliation claim, this Court held that once probable cause has been found, the inquiry into the subjective motives of distant actors who may have played a role in motivating the prosecution is too attenuated from the myriad reasons for the decision made by a prosecutor to prosecute, thus foreclosing a retaliatory prosecution suit.

B. Split in the Circuits.

Whether *Hartman* should be extended to retaliatory arrest cases has engendered a split in the circuits. However, each circuit that has unilaterally extended *Hartman* into the retaliatory arrest arena has done so without undertaking the rigorous analysis of the court below. Generally where *Hartman* has been extended, there has been no effort made to

distinguish retaliatory prosecution cases from those alleging a retaliatory arrest.[6]

In addition to the Ninth and Tenth Circuits' refusal to extend *Hartman,* more recently, the D.C. Circuit stated in *Moore v. Hartman*, 644 F.3d 415, 424 (D.C. Cir. 2011),[7] that there is "nothing about the First Amendment's right to free speech . . . [that] suggests any connection between the right and criminal 'probable cause.'"

The Ninth, Tenth and D.C. Circuits looked to the core of *Hartman* in determining its breadth. They correctly recognize that *Hartman* hinges on causation. In simple causation cases where the arresting officer with probable cause was actually motivated by personal animus based upon protected speech, and that officer caused plaintiff's injury with no intervening party complicating causation, the "ordinary

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[6] These decisions *sub silentio* have adopted Justice Scalia's dissent in *Crawford-El v. Britton*, 523 U.S. 574, 612 (1998) (Scalia, J., dissenting), arguing that, "once the trial court finds that the asserted grounds for the official action were objectively valid (*e.g.*, the person fired for alleged incompetence was indeed incompetent), it would not admit any proof that something other than those reasonable grounds was the genuine motive (*e.g.*, the incompetent person fired was a Republican)." This dissent is premised upon the idea that Section 1983 has been stretched beyond recognition by this Court. The majority of this Court rejected Justice Scalia's "objective test" as "unprecedented." *Id.* at 594.

[7] This case is *Hartman* on remand from this Court with a *cert.* petition currently pending. No. 11-836. (*Amicus* Br. of William Moore 18.)

retaliation" framework applies. *Hartman,* 547 U.S. at 259. The absence of probable cause is not necessary to "bridge the gap" in divining causation. *Id*. at 263. Instead, it is left to play a role of "powerful evidentiary significance." *Id*. at 261.

With virtually no analysis, two circuits have extended *Hartman*'s no-probable-cause requirement to retaliatory arrests and two have left undisturbed their pre-*Hartman* cases requiring the same. The two circuits that have extended *Hartman* to retaliatory arrest have done so in cases of complex causation. Neither case supports the extension of *Hartman* to this "quintessential 'ordinary retaliation claim,'" where no intervener complicates causation. (Pet. App. 32.)

In *Barnes v. Wright*, 449 F.3d 709 (6th Cir. 2006), the Sixth Circuit's first case extending *Hartman*, the court only observed, summarily, that:

> *Hartman* appears to acknowledge that its rule sweeps broadly; the Court noted that causation in retaliatory-prosecution cases is "*usually* more complex than it is in other retaliation cases." [*Hartman*, 547 U.S. 250] at 1704 (emphasis added). Regardless of the reasoning, it is clear that the *Hartman* rule . . . applies in this case.

Id. at 720.

The Sixth Circuit has been inconsistent in extending *Hartman*. *See Kennedy v. City of Villa Hills*, 635 F.3d 210, 217 n.4 (6th Cir. 2011) ("The Sixth

Circuit has not decided whether the lack of probable cause is an element in wrongful-arrest claims after the Supreme Court's ruling in *Hartman v. Moore*."). *But see Everson v. Calhoun Cnty.*, 407 F. App'x 885, 888 (6th Cir. 2011) (holding that whether probable cause existed was a jury question).

The Eighth Circuit has extended *Hartman* to retaliatory arrest claims, but its reasoning is equally unpersuasive. *Williams v. City of Carl Junction*, 480 F.3d 871 (8th Cir. 2007), merely adopted *Barnes* wholesale in a case of complex causation.

The Eleventh and Second Circuits have left undisturbed their pre-*Hartman* holdings that the absence of probable cause is an element of any retaliatory arrest claim. Neither Circuit has applied *Hartman* by analyzing causation and prosecutorial presumptions. Both Circuits are best characterized as having a pre-*Hartman* no-probable-cause requirement for retaliatory arrest claims, and an undeveloped post-*Hartman* precedent.

While there is a split in the circuits, the "split" is largely one of outcome and not analysis. In sum, the inter-circuit conflict identified by Petitioners exists, but only superficially. The cases requiring probable cause as an element of retaliatory arrest claims do not persuasively argue for resolution in their favor. This Court should resolve the split by recognizing the distinctions noted in *Hartman* between retaliatory prosecution and retaliatory arrest claims.

C. The *Mt. Healthy* Test Is the Appropriate Standard for Determining a First Amendment Retaliatory Arrest Claim.

The historical approach taken by the court below is entirely consistent with this Court's decisions in First Amendment retaliation cases. Over thirty years ago in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), this Court set forth the proper test for determining whether a plaintiff may prevail on a First Amendment retaliation claim. A plaintiff must show that he or she was engaged in protected speech and the defendant's conduct was substantially motivated by retaliation for plaintiff's exercise of First Amendment rights. The burden then shifts to the defendant to prove that the same action would have been undertaken "even in the absence of the protected conduct." *Id*. at 287.

The *Mt. Healthy* test has proven to be a workable test for more than three decades. While theoretically, every person arrested could allege a retaliatory arrest for protected speech, only a tiny fraction of those arrested ever raise such an allegation.[8] Petitioners do not attempt to mount a "floodgates" argument as

[8] Using the LEXIS search terms "'first amendment' /s retaliat! /s arrest /s (1983 or bivens)" with no time restriction, 15 substantive decisions involving retaliatory arrests were reported in all federal appellate courts. *See also Hartman*, 547 U.S. at 258-59, finding no need to "screen out" retaliation claims based on concern of "volume of litigation" given the relative paucity of such claims to date.

none can legitimately be raised. History has vindicated the *Mt. Healthy* test and it has functioned precisely as it was intended.[9]

It is only at the narrow margin where the arresting officer's broad discretion regarding whether or not to arrest in any given situation collides with provocative speech that the issues presented here commonly arise. It is difficult to conceive of a case wherein a convicted felon could successfully prosecute a retaliatory arrest claim and prove that but for the protected speech, he would not have been arrested for a felony. Rather, such cases arise almost exclusively in the context of petty offenses where flimsy probable cause to arrest confronts actual subjective unconstitutional motivations, which lead to civil rights lawsuits.

While Petitioners complain about the burden litigation imposes upon them (Pet'rs Br. 40), this Court should not erect additional hurdles for plaintiffs in order to accommodate Petitioners' concern that they not be bothered defending many meritorious lawsuits which interfere with their executive powers. As Justice Kennedy powerfully commented in his concurring opinion in *Crawford*, "We must guard against disdain for the judicial system. As Madison reminds us, if the Constitution is to endure, it must

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[9] " '[I]f it ain't broke, don't fix it.' " *United States v. Natanel*, 938 F.2d 302, 310 (1st Cir. 1991); *Denmark v. Liberty Life Assur. Co.*, 481 F.3d 16, 40 (1st Cir. 2007) (quoting *Natanel*, 938 F.2d at 310).

from age to age retain 'the veneration which time bestows.'" *Crawford-El v. Britton*, 523 U.S. 574, 601 (1998) (Kennedy, J., concurring) (quoting THE FEDERALIST NO. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961)).

D. Impact of Extending *Hartman* to Retaliatory Arrests.

It is not difficult to imagine the societal impact of this Court extending *Hartman*. This Court has vindicated the unfettered exercise of First Amendment protected speech over decades in many extremely controversial cases. Flag burning is political speech. *United States v. Eichman*, 496 U.S. 310, 315, 318-19 (1990). If *Hartman* is extended, it is easy to imagine a rarely-or-never enforced prohibition on open fires resulting in the arrest of a flag-burner by an enraged officer whose sole motive is to stop the protected conduct. This Court has held that virulent ethnic and religious epithets are protected speech. *Terminiello v. Chicago*, 337 U.S. 1, 3-4 (1949). If an officer is motivated to arrest based upon the content of the speech, the unconstitutional arrest should not be excused simply because the speaker momentarily steps off the sidewalk and is thereby jay-walking. This Court has upheld vulgar repudiations of government policies. *Cohen v. California*, 403 U.S. 15, 26 (1971). If a protestor were to symbolically rip up a copy of legislation and throw it into the wind, with an assist from *Hartman* a littering arrest would cause this Court to turn its back to the fact that the officer was motivated

by animus toward the speech. This Court has protected scurrilous caricatures of prominent people. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988). If a protestor posts offensive drawings on a telephone pole in violation of a municipal ordinance prohibiting posting bills and an offended officer is merely looking for any excuse to make an arrest, this Court should not simply blind itself to the violation of the First Amendment. This Court has permitted horrific speech that offends virtually all rational people in the context of protests at military funerals. *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011). If *Hartman* is extended, however, protestors need be mindful not to briefly put down a sign or a bottle of water on the sidewalk thereby violating rules on blocking sidewalks or an outraged officer has a green light to make an arrest. Conceivable probable cause cannot justify a demonstrable First Amendment violation.

If this Court extends *Hartman* as Petitioners urge, the basic vitality of the First Amendment will be "bureaucratized" into irrelevancy, as it will consistently be trumped by the pettiest of offenses. It will embolden and encourage rogue officers seeking to punish protected speech to search for any legal justification in support of a *post hoc* judicial finding of probable cause to support the suppression of our most fundamental freedom. The violation of an almost-never-enforced petty ordinance if bolstered by the new-and-improved "Super Fourth Amendment" will be sufficient to render meaningless the First and Fourteenth Amendments. If *Hartman* is extended,

there would be no logical reason to permit any other constitutional claim to proceed when confronted with a petty violation of the law supported by probable cause. Logically there is no significant distinction between a First Amendment retaliatory arrest suit and an Equal Protection suit against a racist officer who, while possessing probable cause for a seat belt violation arrests only African-American traffic violators while ignoring all other violators. If one is foreclosed, both should be. The point is that neither claim should yield simply because the Fourth Amendment happened to not be violated.

If Petitioners prevail and *Hartman* is extended to on-street encounters between political protestors and the police, the "'bedrock principle underlying the First Amendment . . . that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable,'" *Eichman*, 496 U.S. at 318-19 (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)), will be severely crippled. Gone will be the notion expressed so eloquently by Justice Holmes that "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought – not free thought for those who agree with us but freedom for the thought that we hate." *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting), *overruled on other grounds by Girouard v. United States*, 328 U.S. 61 (1946). Instead, our most precious right to free speech, "the matrix, the indispensable condition, of

nearly every other form of freedom," *Palko v. Connecticut*, 302 U.S. 319, 327 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969), will be hostage to the unlawful motives of officers on the beat ostensibly enforcing the plethora of rules, regulations, statutes and ordinances permeating our society.[10] "[S]peech on 'matters of public concern' . . . is 'at the heart of the First Amendment's protection.'" *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 758-59 (1985) (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)). As Americans, the First Amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). This is so because "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964). Accordingly, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotation marks omitted); *see also Snyder*, 131 S. Ct. at 1215. Any form of retaliation for protected speech is simply intolerable. "[T]he First Amendment . . . protects . . . from even an act of retaliation as trivial as failing to hold a

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[10] "Bureaucracy, the rule of no one, has become the modern form of despotism." Mary McCarthy, *The Vita Activa*, THE NEW YORKER (Oct. 18 1958).

birthday party for a public employee . . . when intended to punish her for exercising her free speech rights." *Rutan v. Republican Party*, 497 U.S. 62, 76 n.8 (1990) (internal quotation marks omitted).

To extend *Hartman* is to make the Fourth Amendment a "Super Amendment" trumping all other constitutional protections. There is no theory of constitutional jurisprudence, or logic, where the mere existence of probable cause to arrest under the Fourth Amendment for the most minor offense eradicates and supplants any and all other constitutional rights. The mere fact that an officer *could* have arrested someone for the commission of a petty offense, but actually *did* arrest someone in retaliation for protected speech should not result in this Court abandoning its illustrious history of protecting the First Amendment. Neither Steven Howards nor any other citizen should pay with their freedom for having criticized any public official and be left with no legal recourse for this assault on the Constitution.

E. Pervasive Police Discretion in Arresting Would Severely Undermine the First Amendment if *Hartman* Is Extended.

The police have virtually unfettered discretion to arrest or not arrest once probable cause is determined. Under Petitioners' theory, because probable

cause is so readily found[11] for the most minor offenses, the vitality of the First Amendment will be inexorably linked to the most mundane petty offenses. It is simply true that "the power to be lenient [also] is the power to discriminate." *McCleskey v. Kemp*, 481 U.S. 279, 312 (1987) (internal quotation marks omitted). It is equally true that:

> under our democratic system of government, lawmaking is not entrusted to the moment-to-moment judgment of the policeman on his beat. . . . To let a policeman's command become equivalent to a criminal statute comes dangerously near making our government one of men rather than of laws. There are ample ways to protect the domestic tranquility without subjecting First Amendment freedoms to such a clumsy and unwieldy weapon.

Gregory v. Chicago, 394 U.S. 111, 120-21 (1969) (internal citation omitted).

If *Hartman* is extended, each of this Court's precedents outlined *supra* could be circumvented simply through the discriminatory enforcement of

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[11] " 'By statute the power of peace officers to arrest without a warrant is often extended to all misdemeanors committed in their presence. Such a statute is constitutional.' " *Atwater v. City of Lago Vista,* 532 U.S. 318, 344 (2001) (quoting J. Beale, *Criminal Pleading and Practice* § 21, p. 20, and n.7 (1899)).). "[Probable cause could be found to] indict a 'ham sandwich.' " *United States v. Navarro-Vargas*, 408 F.3d 1184, 1195 (9th Cir. 2005) (citation omitted).

petty offenses, and the First Amendment as we know it will wither. "[I]t would permit unethical officers to target their enemies or critics with a litany of citations for petty violations that would be ignored if committed by anyone else. Mark A. Edwards, *Law and the Parameters of Acceptable Deviance*, 97 J. CRIM. L. & CRIMINOLOGY 49, 87 (Fall 2006) (arguing that risk of selective enforcement is greatest when conduct is 'formally illegal' but within zone of 'acceptable deviance,' such as [minor driving infractions])." *Gullick v. Ott*, 517 F. Supp. 2d 1063, 1069-70 (W.D. Wis. 2007).

It can be said with virtually complete certainty that almost every driver will violate some traffic ordinance on the way home this evening, perhaps including members of this Court.[12] Under *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), incarceration for driving one mile-per-hour over the speed limit would be legal. Under *County of Riverside v. McLaughlin,* 500 U.S. 44 (1991), 48 hours in the county jail with no probable cause determination and no bond set is permitted. Historically, those who espouse unpopular views are frequently the targets of police retaliation. If a police officer did this to any member of this Court in retaliation for an opinion with which the officer disagreed, under Petitioners'

[12] "Everyone violates some aspect of the traffic code in some way during any short drive." David A. Harris, *The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection,* LAW & CONTEMP. PROBS., 71, 95 (Summer 2003).

scheme, there would be no recourse of any kind for this egregious First Amendment violation.[13] "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston v. Hill*, 482 U.S. 451, 462-63 (1987). In this Orwellian vision of America, the only people who would thrive in a police state are the police.

If the mere presence of probable cause actually triggered arrests in this country, virtually no one would remain unincarcerated. It is for this reason that this Court has consistently upheld the use of discretion by the police in law enforcement. In *Atwater,* where Petitioner was arrested for a seat belt violation, this Court held that the police may exercise "judgment in choosing between the discretionary leniency of a summons in place of a clearly lawful arrest." 532 U.S. at 350. Lower courts have echoed this sound finding.[14] Numerous commentators have

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[13] Newt Gingrich calls for the arrest of "activist" judges. Sam Stein, *Gingrich Says He Would Arrest Judges With Capitol Police Or U.S. Marshals*, HUFFINGTON POST, Dec. 18, 2011, http://www.huffingtonpost.com/2011/12/18/gingrich-judges_n_1156405.html (last visited Feb. 4, 2012).

[14] *John v. City of El Monte*, 515 F.3d 936, 940 (9th Cir. 2007) ("[An] officer's subjective intention in exercising his discretion to arrest is immaterial in judging whether his actions were reasonable for Fourth Amendment purposes."); *see also Hedgepeth v. Wash. Metro. Area Transit Auth.,* 386 F.3d 1148 (D.C. Cir. 2004); *Hughes v. City of Guntown*, No. 1:04CV386-D-D, 2006 U.S. Dist. LEXIS 99287 (N.D. Miss. Mar. 23, 2006).

long noted the indispensible nature of police discretion in law enforcement.[15] *Town of Castle Rock v. Gonzales,* 545 U.S. 748, 760-61 (2005), held that even a "mandatory arrest" statute was not truly mandatory. The police retain virtually unbridled discretion to arrest or refrain from arresting. As Justice Scalia opined for the *Gonzales* majority, there exists a "well established tradition of police discretion," and

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[15] JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR 31 (1968); *see* Egon Bittner, *The Police on Skid-Row: A Study of Peace Keeping*, 32 AM. SOC. REV. 699, 710 (1967); Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1, 7 (2004) (noting that in disorderly conduct situations, "arrests were not the primary means used by police officers to 'keep the peace' "); Brandt J. Goldstein, *Panhandlers at Yale: A Case Study in the Limits of Law*, 27 IND. L. REV. 295, 337, 337-41, 350 (1993) (finding police generally refrain from using arrests when other means for controlling panhandler activity are available); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 589 (1997) (noting arrest can actually interfere with officer's primary goal of maintaining order because it takes officer off beat for a time); *see also Martin v. Malhoyt*, 830 F.2d 237, 268 (D.C. Cir. 1987) ("[E]veryday experience suggests that officers do (and should) limit themselves to a warning in many instances of relatively technical violations."). Allowing a victim to play a role in deciding whether or not the offender will be arrested can empower the victim and may reduce the incidence of future crime. *See* Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention,* 113 HARV. L. REV. 550, 565-70 (1999) (arguing that mandatory arrest statutes disempower victims of domestic violence and lead to increased abuse). The criminal justice system relies heavily on criminal informants. *See* Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 564 (1999) (arguing that current use of informant information is excessive).

this flows from the "deep-rooted nature of law-enforcement discretion." *Id*. It is, the Court proclaimed, simply "common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances." *Id*. at 761 (internal quotation marks omitted). As Justice Scalia aptly pointed out, in the minds of some officers there are some ordinances and violations that are simply "too insignificant to pursue." *Id*. at 761 n.8.

As important as police discretion is, unfettered bureaucratic or police discretion in context of enforcing the First Amendment is intolerable. In *Lakewood v. Plain Dealer Publishing Co*., 486 U.S. 750, 759 (1988), this Court overturned a flawed statute that gave a town mayor discretion to determine which newspapers could be placed on racks on city property and which could not. This Court had no trouble in holding that "a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." *Id*. Similarly, in *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 137 (1992), this Court struck down as over-broad an ordinance allowing for content-based discrimination in the awarding of parade permits. In *Leathers v. Medlock*, 499 U.S. 439, 458 (1991), this Court condemned the risk of governmental abuse in the form of "covert censorship," where some media were favored over others. This Court held that "the 'power to tax'

does *not* include 'the power to discriminate' when the press is involved." *Id*. at 464.

Given that probable cause for the most minor violation can readily be found, it is a frightening prospect to contemplate our most essential freedom – freedom to speak – being subsumed and eliminated simply through the ostensible "enforcing" of the pettiest of ordinances.

It is well established that an act that is lawful under the Fourth Amendment, or some other constitutional provision, may still violate other provisions of the Constitution. In *Whren v. United States*, 517 U.S. 806, 809 (1996), this Court held that a traffic stop supported by probable cause would not violate the Fourth Amendment regardless of the subjective motive of the officer for the stop. The two African-American defendants in *Whren* conceded that the police had probable cause to believe that they had violated local traffic laws, but argued the traffic stop nonetheless should be held unreasonable under the Fourth Amendment, because the stop was pretextual and no reasonable officer would have stopped them for those traffic violations. *Id*. at 810. This Court held "[s]ubjective intentions [of police] play no role in ordinary, probable-cause Fourth Amendment analysis" therefore the traffic stop did not violate the Fourth Amendment. *Id*. at 813. This Court pointedly noted, however, that "the Constitution prohibits selective enforcement of the law based on considerations such as race," and as such, "the constitutional basis for objecting to intentionally discriminatory

application of laws is the Equal Protection Clause, not the Fourth Amendment." *Id*.

The *Whren* analysis has been applied countless times. As the court below held, "[a] reasonable search and seizure is thus not inoculated against all constitutional scrutiny. Significantly, *Hartman* did not overrule *Whren*, nor did it undermine this important principle." (Pet. App. 35.)

There is no principled distinction to be made between the *Whren* analysis bifurcating Fourth and Fourteenth Amendment claims and the decision below in this case bifurcating Fourth and First Amendment claims. "If probable cause acts as an absolute bar for any retaliation claim against a police officer, this would provide immunity for even the most egregious examples of selective enforcement." *Gullick*, 517 F. Supp. 2d at 1069. This Court has long held that a statute valid on its face is no longer valid if it is enforced in a discriminatory fashion. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Consistent with longstanding principles affirmed by this Court, an official should not be able to "take refuge in a pretextual justification that in fact had nothing to with his actions." *Gullick*, 517 F. Supp. 2d at 1069.

The cases applying *Whren* provide a framework for holding here that the existence of probable cause does not preclude Respondent's First Amendment retaliatory arrest claim. Wrongful and retaliatory arrests are, and must be, separately analyzed constitutional causes of action. Assuming probable cause,

"if the plaintiffs can show that they were subjected to unequal treatment based upon their race or ethnicity [or protected speech] during the course of an otherwise lawful traffic stop, that would be sufficient to demonstrate a violation of the Equal Protection Clause [or the First Amendment]." *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 533 (6th Cir. 2002). Just as "the Equal Protection Clause of the Fourteenth Amendment provides citizens a degree of protection independent of the Fourth Amendment protection against unreasonable searches and seizures," *id*. (internal quotation marks omitted), so too, must the First Amendment. Because they arise from different constitutional provisions, the analysis of a First Amendment retaliation claim must be "wholly separate" from any Fourth Amendment probable cause inquiry. *Carrasca v. Pomeroy*, 313 F.3d 828, 836 (3d Cir. 2002) (declining to credit district court's dismissal of discriminatory enforcement Equal Protection Claim based solely on finding of probable cause for arrest). "'The fact that there was no Fourth Amendment violation does not mean that one was not discriminatorily selected' for enforcement of a law." *Id*. (quoting *Bradley v. United States*, 299 F.3d 197, 205 (3d Cir. 2002)).

Logically, this analysis makes perfect sense. It is a *non-sequitur* to hinge the violation of one constitutional right on the enforcement of another. Simply because an official's action would be "unexceptionable if taken on other grounds," when retaliation against constitutionally-protected speech is the but-for cause

of that action, this retaliation is actionable and "subject to recovery." *Hartman*, 547 U.S. at 256 (citing *Crawford-El*, 523 U.S. at 574; *Mt. Healthy*, 429 U.S. at 283-84).

This Court has historically ensured that citizens retain *all* of their constitutional rights. In the context of a criminal case this Court has held that "it [is] intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons v. United States*, 390 U.S. 377, 394 (1968). Absent some sort of mutual exclusivity,[16] however, no one may be forced to abandon a fundamental constitutional right. *See, e.g. United States v. Jackson*, 390 U.S. 570, 572 (1968) (holding that it is unconstitutional to punish a defendant for the exercise of the right to a jury trial).

In innumerable contexts this Court has analyzed ostensibly legal actions undertaken by both public and private parties and examined the actual intent of the actor in order to determine whether a constitutional violation has occurred.[17] In *Wilkie v. Robbins*,

[16] For example, a criminal defendant cannot simultaneously exercise the constitutional right to both testify and remain silent at a trial.

[17] In *Waters v. Churchill*, 511 U.S. 661, 690-91 (1994) (Scalia, J., concurring) Justice Scalia cited the following examples: "*See, e.g. Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 484 (1992) (antitrust laws); *Hernandez v. New York*, 500 U.S. 352, 363-364 (1991) (plurality opinion) (constitutionality of peremptory challenges); *Patterson v. McLean Credit Union*, 491 U.S. 164, 187-188 (1989) (employment discrimination suit

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551 U.S. 537 (2007), this Court held that "we have established methods for identifying the presence of an illicit reason (in competition with others), not only in retaliation cases but on claims of discrimination based on race or other characteristics." *Id.* at 556 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). Determining the intent of defendants in both criminal and civil cases occurs daily in thousands of courtrooms across the land. It is a fundamental function of the Anglo-American justice system and has been successfully undertaken by courts and juries for hundreds of years.

Clearly, an employee-at-will can legally be fired for any reason at all. Virtually every Title VII case, however involves an examination of the employer's *actual* reasons for terminating the employee. It has never been the law that it is permissible to single out for firing an employee *because* that employee is a Republican or a member of a protected class (even if

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under 42 U.S.C. § 1981); *New York v. Burger*, 482 U.S. 691, 716-717, n.27 (1987) (Fourth Amendment challenge to administrative searches); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 895-896, n.6 (1984) (unfair labor practice suit under the National Labor Relations Act); *Geduldig v. Aiello*, 417 U.S. 484, 496-497, n.20 (1974) (Equal Protection Clause sex-discrimination claim against legislation); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-805 (1973) (discrimination claim under Title VII)." In First Amendment contexts this Court has similarly examined pretext. *See*, *e.g. Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986) (holding that zoning laws restricting the location of movie theaters do not violate the First Amendment unless they are a pretext for preventing free speech).

the fired employee was actually incompetent). Whether or not a termination is legal ultimately depends solely upon the actual intent of the actor.[18]

In a free society the vitality of the First Amendment cannot be dependent upon whether or not an arresting officer determines that the pettiest municipal ordinance has been violated. While Petitioners argue that law enforcement officers need "breathing room" to make discretionary decisions (Pet'rs Br. 11), this Court has repeatedly held that it is the "First Amendment freedoms [that] need breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433 (1963); *Citizens United v. FEC*, 130 S. Ct. 876, 892 (2010); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468-69 (2007) (quoting *Button*, 371 U.S. at 433). Simply put, a free society cannot tolerate incursions into free speech simply because a law enforcement officer happens to be offended by the speech and has a readily available excuse to make an arrest. "Official reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right.'" *Hartman*, 547 U.S. at 256 (quoting *Crawford-El*, 523 U.S. at 588 n.10). It is equally certain that "the law is settled that as a general

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[18] "Even though he could have been discharged for no reason whatever . . . he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms." *Mt. Healthy*, 429 U.S. at 283-84 (citing *Perry v. Sindermann*, 408 U.S. 593 (1972)).

matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." *Id.*; *see also Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

II. Qualified Immunity Adequately Protects Secret Service Agents Generally and in this Case Specifically.

As is unfortunately commonplace in our society, Petitioners invoke the mantra of "security" in seeking a diminution of civil rights. It must be firmly kept in mind that Steven Howards did nothing to get arrested but publicly criticize the Vice President. Despite the finding by the Tenth Circuit that he *could* have been arrested for a Section 1001 violation, he was *not* arrested for lying to the agents. He was permitted to freely walk away from the scene of the "assault" which later morphed into a charge of "harassment." Many people were having "unsolicited contact" (also known as "touching" or "shaking hands") with the Vice President. The only person arrested, however, was Respondent who was also the only person who publicly criticized the Vice President. This case involved no "split-second" decisions relating to life or death or highly-trained agents thrown into the crucible of a dangerously charged political demonstration. This case, however does involve allegations of criminal activity leveled between Secret Service Agents, including lying under oath, filing false reports and covering up a crime, all stemming from their having

arrested a man who had done nothing wrong, by their own accounts, but who had simply criticized the Vice President.

"It is a delusion to think that the nation's security is advanced by the sacrifice of the individual's basic liberties." *Beilan v. Bd. of Pub. Educ.*, 357 U.S. 399, 415 (1958) (internal quotation marks omitted). The balance between safety and civil liberties was struck over two hundred years ago. It is imperative that in times of crisis "our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship." *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1012 (N.D. Cal. 2009). It is in the name of our national identity that this Court held:

> [W]e must preserve our commitment at home to the principles for which we fight abroad. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164-165 (1963) ("The imperative necessity for safeguarding these rights . . . under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action"); *see also United States v. Robel*, 389 U.S. 258, 264 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile").

Hamdi v. Rumsfeld, 542 U.S. 507, 532 (2004).

This Court has recognized that expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values." *Carey v. Brown*, 447 U.S. 455, 467 (1980). "Speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison*, 379 U.S. at 74-75. There is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Sullivan*, 376 U.S. at 270; *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Sullivan*, 376 U.S. at 270); *see also Bond v. Floyd*, 385 U.S. 116, 136 (1966) ("Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected.").

This case, better than most, illustrates why *Hartman* should not be extended and why qualified immunity sufficiently protects Petitioners. When Howards wandered back into view of the agents having been gone for several minutes, Petitioners had at their disposal all the legal tools necessary to ensure the protection of the Vice President. They could have simply asked (or forced) Howards to show them the contents of his bag and either patted him down or wanded him for weapons if they had any actual concerns. *See Terry v. Ohio,* 392 U.S. 1 (1968). They did nothing of the sort. Abundant evidence exists that the agents arrested him because they were entirely unhappy with his protected speech and his attitude

toward them. Qualified immunity is more than sufficient when law enforcement officers so grossly abuse their power.

A. Qualified Immunity Sufficiently Protects Secret Service Agents.

"In most cases, qualified immunity is sufficient to 'protect officials who are required to exercise their discretion and the related public interest in encouraging vigorous exercise of official authority.'" *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978)). This Court has repeatedly explained the rationale behind this standard, and emphasized that behavior falling outside of the scope of qualified immunity should be deterred – deterrence that cannot be effectuated through the application of absolute immunity. With respect to police officers, this Court has said:

> [T]he judicial process will on the whole benefit from a rule of qualified rather than absolute immunity. We do not believe that the *Harlow* standard, which gives ample room for mistaken judgments, will frequently deter an officer from submitting an affidavit when probable cause to make an arrest is present.

Malley v. Briggs, 475 U.S. 335, 343 (1986). Similarly, when determining that qualified, rather than absolute, immunity should be afforded to prosecutors with

respect to their actions in giving police officers legal advice, this Court expressed the same reasoning:

> As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law. . . . [W]here an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate.

Burns v. Reed, 500 U.S. 478, 494-95 (1991) (internal quotation marks omitted) (emphasis in original).

Law enforcement agents have long been protected by qualified immunity, *see*, *e.g. Anderson v. Creighton*, 483 U.S. 635, 644 (1987), including Secret Service agents.[19] *Hunter v. Bryant*, 502 U.S. 224, 228 (1991); *Unus v. Kane*, 565 F.3d 103, 125 (4th Cir. 2009). Appropriately, Secret Service agents have been denied the protection of qualified immunity where they have violated clearly established constitutional

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[19] Adding to the adequacy of the protection provided to Secret Service agents by qualified immunity, Secret Service agents are indemnified by the Department of Homeland Security "for any verdict, judgment or other monetary award rendered against such employee, provided the Secretary determines that (1) the conduct giving rise to such verdict, judgment or award was within the scope of the employee's employment and (2) such indemnification is in the interest of the United States." Dep't Homeland Sec., M.D. No. 0415 (Sept. 26, 2005).

rights. *See Ayeni v. Mottola*, 35 F.3d 680, 686 (2d Cir. 1994).[20]

This Court has explained that an officer will "not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that [the action complained of should be undertaken]; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley*, 475 U.S. at 341. Law enforcement, including the Secret Service, has been well-protected by this standard for decades.

The immunity standard in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), itself offers great protection to Petitioners and forecloses all claims regardless of motive in which the official's conduct did not violate clearly established law. Even if the law is clearly established, normal standards applied to First Amendment cases provide ample protection to Petitioners. For example, when the subject matter of the speech does not impact on a matter of public concern, there is no First Amendment claim. *Pickering v. Bd. of Educ.,* 391 U.S. 563 (1968); *Connick,* 461 U.S. at 146. Even if the speech is protected, all that defendant officers need do to defeat a claim is to show that regardless of the speech, an arrest would have been made anyway. *Mt. Healthy*, 429 U.S. at 287. "Various

[20] The Second Circuit denied qualified immunity to a Secret Service agent for a Fourth Amendment violation with nary a mention of *Galella v. Onassis,* 487 F.2d 986 (2d Cir. 1973).

procedural mechanisms already enable trial judges to easily weed out baseless claims that feature a subjective intent element." *Crawford-El*, 523 U.S. at 593. This Court has made clear that "firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits." *Butz v. Economou*, 438 U.S. 478, 508 (1978). The procedural mechanisms available to defendants include filing a motion to dismiss or asserting immunity or "some other common-law or constitutional privilege on summary judgment." *Id*. at 507-08 & n.35.

Because qualified immunity sufficiently protects Secret Service agents, including Petitioners, from liability where appropriate, the Tenth Circuit's opinion with respect to absolute immunity should be affirmed.

B. Petitioners Are Not Entitled to Qualified Immunity Because the Law Was Clearly Established.

Petitioners are mischaracterizing an absolutely crucial point in the debate over whether the law is or is not clearly established. *Hartman* was simply an acknowledgement by this Court that when a retaliatory prosecution is alleged in response to protected speech, an essential element of the constitutional tort includes the absence of probable cause due to the complexity of the decision-making process necessarily engaged in prior to launching a prosecution. If

probable cause exists, one element of the claim is thus unprovable therefore a retaliatory prosecution lawsuit is foreclosed. At no time did this Court hold that a First Amendment violation did not occur in *Hartman*. Retaliatory prosecutions supported by probable cause were not somehow legalized by this Court. This Court merely precluded a lawsuit for the First Amendment violation by adding a Fourth Amendment element to the cause of action.

Qualified immunity protects government officials "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." *Harlow*, 457 U.S. at 818. A right is clearly established if a reasonable officer would understand that what he or she is doing violates that right and "the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640. The test is whether an officer is on notice that the conduct is unlawful – not whether they may eventually be liable for damages for their unlawful conduct. *Hartman* simply held that a suit for such clearly established misconduct will be foreclosed when probable cause is found. Similarly, *Hartman* did not throw into disarray well-established law that a retaliatory arrest is unlawful. "Unlawful" is not the same as "not-actionable." Prosecutors, for example, are completely immune from civil liability for violations under *Brady v. Maryland,* 373 U.S. 83 (1963) during the prosecutorial phase of a case however this by no means casts uncertainty as to the well-established law regarding their *Brady* obligations to

divulge exculpatory evidence in a criminal case. Petitioners ignore this vital distinction.

Petitioners have no colorable claim to qualified immunity because, as *Hartman* itself recognized, the unconstitutionality of a law enforcement action taken to punish First Amendment rights is long settled. *Hartman* teaches that "*the law is settled* that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." 547 U.S. at 256 (emphasis added) (citing cases).

An officer's entitlement to qualified immunity turns on whether "[a] Government official's *conduct* violates clearly established law." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011) (emphasis added). Here, any reasonable Secret Service agent plainly would have understood that individuals could not be arrested in retaliation for exercising their First Amendment rights. Petitioners therefore cannot claim qualified immunity for arresting Respondent in retaliation for having exercised his First Amendment rights.

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. Petitioners erroneously claim that they are entitled to qualified immunity because lower federal courts are divided over "whether th[is] tort is cognizable" in a damages action. (Pet'rs Br. 41 (citing *Wilson v. Layne*, 526 U.S. 603

(1999).) But nothing in *Wilson*, or any of this Court's qualified immunity cases, suggests that the existence or absence of a civil damages remedy for unconstitutional conduct has any relevance to qualified immunity. To the contrary, *Wilson* upheld qualified immunity because the officers there reasonably could have believed their conduct was "lawful." 526 U.S. at 615. Whether or not these Petitioners might have hoped or believed they might avoid a later damages lawsuit for their unconstitutional conduct, no reasonable officer could have believed that the underlying conduct was itself "lawful."

The Tenth Circuit correctly noted that "no party [asserted] on appeal that the law on retaliatory arrests was not 'clearly established' in this circuit either before or after *Hartman*," and correctly concluded that the law regarding retaliatory arrests is and has been well established. (Pet. App. 34 n.14.) To establish a First Amendment retaliation claim, the court below stated that "a plaintiff must show that (1) he was engaged in constitutionally protected activity, (2) the government's actions caused him injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the government's actions were substantially motivated as a response to his constitutionally protected conduct." (*Id*. at 23). The Tenth Circuit determined that throughout the course of this litigation, Petitioners had never argued that the law on retaliatory arrests was not well-settled. (*Id*. at 34 n.14). The Court of Appeals also noted that Petitioners never argued that

Howards had not established the elements of a retaliatory arrest claim. (*Id.* at 35). Putting aside the fact that they have actually waived the argument by advancing it in this Court for the first time, Petitioners mistakenly conflate the concepts of what *defines* clearly established unlawful conduct with what this Court deems *actionable*. Petitioners' concession below that Howards is able to prove the elements of a retaliatory arrest satisfies the *Mt. Healthy* test and is sufficient to establish the existence of a constitutional violation.

C. Howards Had a Clearly Established Right to be Free From Retaliatory Arrest in Violation of the First Amendment.

Adopting Petitioners' erroneous argument *arguendo* that the law prohibiting retaliatory arrests was not well-settled on a national level as correct, the fact remains that within the Tenth Circuit, it was clearly established that a lack of probable cause was not a necessary element of a retaliatory arrest claim. (Pet. App. 34 n.14 (citing *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990)).) As previously explained, the *Hartman* opinion makes clear that it applies only to retaliatory prosecutions and casts no doubt upon the continuing illegality of retaliatory arrests. The fact that other circuit courts have unilaterally extended *Hartman* has no impact on the clearly established law within the Tenth Circuit. *See Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2644

(2009) ("We would not suggest that entitlement to qualified immunity is the guaranteed product of disuniform views of the law in the other federal, or state, courts, and the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear if we have been clear.").

Because *Hartman* did not affect the state of the law with respect to retaliatory arrest, the *DeLoach* court's holding that a lack of probable cause is not a necessary element of a retaliatory arrest claim remains controlling in the Tenth Circuit. That holding has been clearly established since at least 1990, when the *DeLoach* opinion was published. Petitioners therefore violated Howards' clearly established constitutional right to be free from retaliatory arrest, and they are not entitled to qualified immunity.

D. There Is no Common Law Tradition of Affording Secret Service Agents Absolute Immunity.

For decades, this Court has strenuously avoided extending immunity by judicial fiat. Government agents may be entitled to one of two types of immunity for claims brought against them: absolute or qualified. *Harlow*, 457 U.S. at 807. "For executive officials in general, however, [this Court's] cases make plain that qualified immunity represents the norm." *Id.* This Court has made clear that absolute immunity is only warranted where "an official claiming immunity

under § 1983 can point to a common-law counterpart to the privilege he asserts." *Malley*, 475 U.S. at 339-40. Even where there is a common-law tradition of immunity, this Court "[has] considered whether § 1983's [or *Bivens*'] history or purposes nonetheless counsel against recognizing the same immunity in [these] actions." *Buckley*, 509 U.S. at 269 (internal quotation marks omitted). In evaluating Section 1983's purpose, this Court's "cases have followed a 'functional' approach to immunity law," considering whether an official's "functions require absolute immunity." *Harlow*, 457 U.S. at 810-11. "In most cases, qualified immunity is 'sufficient to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.'" *Buckley*, 509 U.S. at 268 (quoting *Butz*, 438 U.S. at 506).

Petitioners have not provided – and cannot provide – any authority establishing a common-law tradition of the extension of absolute immunity to Secret Service agents or any other law enforcement officers. Further, the functions of Secret Service agents do not warrant absolute immunity nor a presumption of regularity as argued by Petitioners. (Pet'rs Br. 36.) The claim that these agents function as elite law enforcement officers who "stand in sharp contrast to the more routine police encounters" and are "supported by extensive and thorough training" rings hollow in light of the facts of this case. (*Id.*)

This Court has consistently made clear that it does not have the authority to create new absolute

immunities out of whole cloth based on its own policy preferences:

> Although we have found immunities in § 1983 that do not appear on the face of the statute, "we do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy." *Tower v. Glover*, 467 U.S. 914, 922-23 (1984). "Our role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice." *Malley v. Briggs*, 475 U.S. 335, 342 (1986).

Buckley, 509 U.S. at 268; *see also Burns*, 500 U.S. at 493. This Court looks to common-law tradition in search of a history of granting absolute immunity for the functions performed. *See Burns*, 500 U.S. at 498 (Scalia, J., concurring in the judgment and dissenting in part) ("Where we have found that a tradition of absolute immunity did not exist as of 1791, we have refused to grant such immunity under § 1983.").

This Court has found a common-law tradition of immunity for a narrow category of government officials, including prosecutors "for actions that are connected with the prosecutor's role in judicial proceedings," *Burns*, 500 U.S. at 494; "legislators, in their legislative functions, and [for] judges, in their judicial functions," *Harlow*, 457 U.S. at 807; and the President of the United States, "from damages liability predicated on his official acts." *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982).

Where this Court has been unable to identify a common-law tradition of immunity, however, this Court has declined to afford officials absolute immunity. *Burns*, 500 U.S. at 493 ("Absent a tradition of immunity comparable to the common-law immunity from malicious prosecution, which formed the basis for the decision in *Imbler*, we have not been inclined to extend absolute immunity from liability under § 1983."). For example, this Court has declined to extend absolute immunity to "federal executive officials exercising discretion," including members of the President's Cabinet, determining that such officials are entitled only to qualified immunity. *Butz*, 438 U.S. at 507. Consistent with *Butz*, this Court has denied absolute immunity even to Cabinet members, reasoning:

> Members of the Cabinet are direct subordinates of the President, frequently with greater responsibilities, both to the President and to the Nation, than White House staff. . . . It is no disparagement of the offices held by petitioners to hold that Presidential aides, like Members of the Cabinet, generally are entitled only to a qualified immunity.

Harlow, 457 U.S. at 809.

This Court's precedents make clear that absolute immunity is available only where there has been, at a minimum, a common-law tradition of granting immunity to the officials in question. Petitioners' reliance on *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973), for the proposition that Secret Service agents

are entitled to absolute immunity is unavailing and incorrect. It appears that even the Second Circuit has backed away from *Galella*. The court in *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), held a Secret Service Agent liable for a Fourth Amendment violation for allowing the media to enter a private home.

The Second Circuit's outlying opinion completely ignored this Court's mandate that "our initial inquiry, the first and crucial question, is whether the common law recognized [the absolute immunities asserted]." *Burns*, 500 U.S. at 499 (Scalia, J., concurring in the judgment and dissenting in part) (internal quotation marks and citations omitted) (alteration in original). The Second Circuit engaged in precisely the type of "freewheeling policy choice" that this Court's precedents forbid. *Malley*, 475 U.S. at 342.

Because there is no common-law tradition of granting immunity to Secret Service agents, Petitioners are not entitled to absolute immunity, and the Tenth Circuit's opinion with respect to the absolute immunity issue should be affirmed. "[I]f application of the principle [of common-law immunity] is unclear, the defendant simply loses." *Buckley*, 509 U.S. at 281 (Scalia, J., concurring).

E. The Functions of Secret Service Agents Do Not Warrant Absolute Immunity.

Even where there is a common-law tradition of affording absolute immunity to the government

officials in question – and there is no such tradition with respect to Secret Service agents – this Court has still insisted on evaluating the history and purposes of Section 1983 in order to determine whether absolute immunity is warranted. *Malley*, 475 U.S. at 339-40. "Not surprisingly, [this Court has] been quite sparing in recognizing absolute immunity for state actors in this context." *Buckley*, 509 U.S. at 269 (internal quotation marks omitted). In evaluating the history and purpose of Section 1983, this Court has "followed a 'functional' approach to immunity law." *Harlow*, 457 U.S. at 810.

It is clear that law enforcement agents serve a function entitled only to qualified immunity, and this Court has refused to extend absolute immunity to other officials with respect to actions similar to those engaged in by law enforcement. *See*, *e.g. Burns*, 500 U.S. at 495; *Buckley*, 509 U.S. at 274 ("[I]f a prosecutor plans and executes a raid on a suspected weapons cache, he has *no greater claim to complete immunity than activities of police officers allegedly acting under his direction*." (emphasis added) (internal quotation marks omitted)); *id* at 276 ("When the functions of prosecutors and detectives are the same, as they were here, the immunity that protects them is also the same.").

Even if there were a common-law tradition of extending absolute immunity to law enforcement agents – and there is not – "[Section] 1983's history [and] purposes nonetheless counsel against recognizing the same immunity" for law enforcement agents,

including Secret Service agents. *Buckley*, 509 U.S. at 269. As a result, the Tenth Circuit's opinion with respect to absolute immunity should be affirmed.

III. A First Amendment Retaliatory Arrest Claim Is Cognizable Pursuant to *Bivens*.[21]

Because this Court has indicated a willingness to allow First Amendment claims against federal agents pursuant to *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), and because the two-part test for *Bivens* actions announced in *Wilkie v. Robbins*, 551 U.S. 537 (2007), applies in this case, the decision below should be affirmed.

At the outset it should be noted that Petitioners admitted *Bivens* jurisdiction in their answers to the complaint. (JA 16, 26.) They continued to admit that this case is appropriately filed as a *Bivens* action in

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[21] Petitioners and *Amicus* United States, contend, for the first time on this appeal, that Howards' First Amendment claim for retaliatory arrest is not authorized pursuant to *Bivens.* (Pet'rs Br. 53-55.) At the outset, Respondent objects to this argument as it was neither raised in the Petition for a Writ of *Certiorari,* nor formed any part of the *cert.* grant. Previously, this Court has addressed issues not raised below however, only after noting that the "respondent does not object." *Carlson v. Green,* 446 U.S. 14, 17 n.2 (1980). It is clear that this Court does "not normally decide issues not presented below," *id.,* although the Court is not precluded from doing so. *See, e.g. Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam). While Respondent objects to this argument, in an abundance of caution will nevertheless provide a response.

the Final Pretrial Order. (JA 179 ("If this Court finds, as Defendants contend, that Defendants were acting under color of federal law instead of state law pursuant to 42 U.S.C. § 1983, the Court has jurisdiction under *Bivens.*").) Reichle's and Doyle's Motion for Summary Judgment, Docket Entry 155: page 8 argued that "[t]he facts of this case require analysis under *Bivens*."

A. This Court Has Indicated that a First Amendment Claim May be Brought Pursuant to *Bivens*.

When confronted with First Amendment claims pursuant to *Bivens*, this Court has repeatedly "assume[d], without deciding, that [a] First Amendment claim is actionable under *Bivens*." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009); *see also Bush v. Lucas*, 462 U.S. 367, 373 (1983) ("Thus, we assume, a federal right has been violated and Congress has provided a less than complete remedy for the wrong."). This Court has explicitly recognized, with respect to First Amendment *Bivens* claims, that "Congress has not expressly precluded the creation of such a remedy by declaring that existing statutes provide the exclusive mode of redress." *Id*.

Further, this Court has indicated the availability of *Bivens* for claims pursuant to the First Amendment:

> The factors necessary to establish a *Bivens* violation will vary with the constitutional

> provision at issue. Where the claim is invidious discrimination in contravention of the *First and Fifth Amendments*, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose.

Iqbal, 129 S. Ct. at 1948 (emphasis added). In *Hartman*, this Court indicated that *Bivens* is available for First Amendment retaliation by federal law enforcement officers: "[T]he law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out. . . . When the vengeful officer is federal, he is subject to an action for damages on the authority of *Bivens*." *Hartman*, 547 U.S. at 256.

Petitioners' reliance on this Court's recent opinion in *Minneci v. Pollard*, 132 S. Ct. 617 (2012), for the proposition that there is resistance to any extension of *Bivens* to First Amendment claims, is misplaced. This Court held that, "[b]ecause we believe that in the circumstances present here state tort law authorizes adequate alternative damages action – actions that provide both significant deterrence and compensation," a *Bivens* claim could not be asserted under those circumstances. *Id.* at 620. That conclusion was not based on the idea that an Eighth Amendment violation is not actionable pursuant to *Bivens*, *see Carlson v. Green*, 446 U.S. 14 (1980), but on the fact that alternative remedies were available to the claimant in that case. As discussed below, this

Court has recognized that no such alternative remedies are available for a federal agent's violation of the First Amendment's guarantee of free speech. *Minneci* is therefore inapposite.

Where this Court has assumed without deciding that a *Bivens* action is available for a First Amendment violation but gone on to deny the claim, it has done so based on the availability of alternative remedies. *See Lucas*, 462 U.S. at 368 ("Because such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States, we conclude that it would be inappropriate for us to supplement that regulatory scheme with a new judicial remedy."). Historically, this Court has recognized the importance of giving litigants a forum to pursue constitutional claims:

> [W]e presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights. "The very essence of civil liberty," wrote Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch 137, 163 (1803), "certainly consists in the right of every individual to claim the protection of the

> laws, whenever he receives an injury. One of the first duties of government is to afford that protection."

Davis v. Passman, 442 U.S. 228, 242 (1979). Howards' First Amendment retaliation claim certainly falls under the purview of justiciable constitutional rights, as, "the mention of retaliation brings with it a tail-wind of support from our longstanding recognition that the Government may not retaliate for exercising First Amendment speech rights." *Wilkie*, 551 U.S. at 555.

This Court should reject the government's contention that individuals selectively arrested in violation of the First Amendment by federal officials have no *Bivens* remedies. The government concedes that this Court has allowed a *Bivens* remedy against federal officials engaged in "discrimination in violation of the Due Process Clause of the Fifth Amendment," and accordingly that *Bivens* might "provide[ ] a cause of action for at least some plaintiffs who allege that their arrest violated equal-protection principles." (*Amicus* Br. of United States 10, 14 (citing *Davis v. Passman*, 442 U.S. 228 (1979) (gender discrimination).)

A First Amendment retaliatory arrest claim is analytically identical to a due process/equal protection already held cognizable under *Bivens* in *Davis v. Passman*. As this Court has written, "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most

basic sort.'" *United States v. Goodwin*, 457 U.S. 368, 372 (1982) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)). It is for this reason this Court has judged claims of unconstitutional selectivity by law enforcement officers – whether based on protected exercise of First Amendment rights or on a person's race or nationality – "according to ordinary equal protection standards." *Wayte v. United States*, 470 U.S. 598, 608 (1985) (alleged selective prosecution in violation of First Amendment); *accord United States v. Armstrong*, 517 U.S. 456, 464-65 (1996) (alleged selective prosecution based on race); *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886) (unconstitutional selective enforcement of law based on nationality).

Thus, by definition, 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 of the laws: but for the unconstitutional consideration, that person (like those otherwise similarly situated) would not have been arrested. Whether analyzed directly under the First Amendment, or under the Equal Protection component of the Fifth Amendment Due Process Clause, a person selectively arrested based on constitutionally protected activity is entitled to a *Bivens* remedy.

B. Howards' Claim Meets the Two-Part Test Set Forth in *Wilkie* for *Bivens* Claims.

"*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." *Carlson*, 446 U.S. at 18. This Court has established a two-part test for determining whether a *Bivens* action may be brought for a particular constitutional violation. The first step involves determining "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." *Wilkie,* 551 U.S. at 550. The second step "is a subject of judgment: the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation." *Id*. (internal quotation marks omitted). Because there is no alternative process for protecting Howards' rights under the First Amendment, and because no "special factors counsel[ ] hesitation before authorizing" a First Amendment *Bivens* claim in this case, *id*., the decision below should be affirmed.

This Court has declined to permit *Bivens* actions for constitutional violations based on the availability of alternative processes for protecting the constitutional rights implicated. *See, e.g. Minneci*, 132 S. Ct.

at 620. In the context of First Amendment claims, this Court has recognized that "Congress has not expressly precluded the creation of [a *Bivens*] remedy by declaring that existing statutes provide the exclusive mode of redress." *Lucas*, 462 U.S. at 373. Indeed, with respect to a federal law enforcement agent's retaliation based on speech protected by the First Amendment, this Court has noted that such a federal agent "is subject to an action for damages under the authority of *Bivens*," *Hartman*, 547 U.S. at 256, thus at least implicitly recognizing that no alternative process is available to pursue such claims.

Outside of a *Bivens* action, Howards has no vehicle to pursue a remedy for the violation of his First Amendment rights in this case. As such, the first *Wilkie* factor weighs in favor of allowing Howards' *Bivens* action and affirming the decision below.

C. No Special Factors Counsel Against Allowing a First Amendment *Bivens* Claim.

Petitioners contend that special factors exist in this case, stemming from the importance of Secret Service agents' responsibilities to protect the President and the Vice President. (Pet'rs Br. 55.) To the extent that Petitioners need some protection from litigation involving allegations of First Amendment retaliation, the doctrine of qualified immunity provides that protection. *See Buckley*, 509 U.S. at 268 ("In most cases, qualified immunity is sufficient to 'protect officials who are required to exercise their

discretion and the related public interest in encouraging vigorous exercise of official authority.'" (quoting *Butz*, 438 U.S. at 506)); *Burns*, 500 U.S. at 494-95 ("[Qualified immunity] provides ample protection to all but the plainly incompetent or those who knowingly violate the law."). Qualified immunity has, in fact, protected federal officials from liability in *Bivens* actions where appropriate. *See, e.g. Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011).

This Court has found special factors counseling against allowing a *Bivens* action where, for example, the Court has been unable to discretely define the type of claim brought (as distinguished from a discrete claim that may result in a multitude of litigation). *Wilkie*, 551 U.S. at 561 n.11.

Here, Petitioners contend that subjecting Secret Service agents to litigation for First Amendment retaliatory arrest will impede their ability to protect the President because of the possibility of lawsuits stemming from their action. (Pet'rs Br. 55.) This is precisely the type of factor that this Court has rejected. *See Wilkie*, 551 U.S. at 561 n.11. Petitioners do not – and cannot – contend that First Amendment retaliatory arrest claims are so hard to define that "no one can tell in advance what claim might qualify or what might not." *Id*. There are therefore no "special factors counseling" against allowing a *Bivens* action for retaliatory arrest in violation of the First Amendment, and the decision below should be affirmed.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the judgment of the Tenth Circuit Court of Appeals and remand this case for a trial on Respondent's First Amendment retaliatory arrest claim.

Respectfully submitted,

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