No. _____

In The
Supreme Court of the United States

VIRGIL D. REICHLE, JR., and DAN DOYLE,

Petitioners,

v.

STEVEN HOWARDS,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

The questions presented are:

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

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

PARTIES TO THE PROCEEDING

Petitioners, Virgil D. "Gus" Reichle, Jr., and Dan Doyle, agents of the United States Secret Service, were defendants-appellants in the court below. Two other Secret Service agents, Daniel McLaughlin and Adam Daniels, were also defendants-appellants in the court below. A third Secret Service agent, Kristopher Mischloney, was dismissed in the district court. Respondent Steven Howards was the plaintiff-appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Virgil D. "Gus" Reichle, Jr., and Dan Doyle respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Tenth Circuit is reported at 634 F.3d 1131 and is reproduced in the appendix hereto ("App.") at App. 1-43.

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

JURISDICTION

The judgment of the Tenth Circuit was entered on March 14, 2011. App. 1. The Tenth Circuit denied a timely petition for rehearing *en banc* on April 25, 2011. App. 62. On July 12, 2011, Justice Sotomayor extended the time to petition for certiorari to and including August 25, 2011. App. 70. The jurisdiction of the Tenth Circuit was based on 28 U.S.C. § 1291. App. 9. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

18 U.S.C. § 3056 provides in relevant part:

> Powers, authorities, and duties of United States Secret Service
>
> (a) Under the direction of the Secretary of Homeland Security, the United States Secret Service is authorized to protect the following persons:
>
> (1) The President, the Vice President (or other officer next in the order of succession to the Office of President), the President-elect, and the Vice President-elect.
>
> * * *
>
> (c)
>
> (1) Under the direction of the Secretary of Homeland Security, officers and agents of the Secret Service are authorized to –
>
> * * *
>
> (C) make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has

committed or is committing such felony; * * *.

INTRODUCTION

In *Hartman v. Moore*, 547 U.S. 250 (2006), this Court held that the existence of probable cause bars a claim of retaliatory *prosecution* brought under the First Amendment. This case presents the question *Hartman* left open: whether probable cause bars a First Amendment retaliatory *arrest* claim. Six circuits are split on that question even after *Hartman*.

In this case, the Tenth Circuit held in a 2-1 decision that respondent could "proceed with his First Amendment retaliation claim notwithstanding probable cause existed for his arrest." App. 34-35. In so doing, the Tenth Circuit sided with Ninth Circuit precedent. But the Second, Sixth, Eighth, and Eleventh Circuits have all held to the contrary that probable cause bars such a claim. This deep circuit split was expressly recognized by the court below. *See* App. 31 ("In the wake of *Hartman*, our sister circuits continue to be split over whether *Hartman* applies to retaliatory arrests") (citing cases).

Judge Kelly dissented from this part of the panel majority's decision, concluding that "there is a strong argument that *Hartman v. Moore* applies not only to retaliatory prosecutions, but also to retaliatory arrests." App. 40 (citation omitted). The Tenth Circuit denied rehearing *en banc* over the objection of the

United States and six States participating as *amici curiae*.

The issue before the Court is one of great national importance. Not only will the decision below have a severe chilling effect on law enforcement generally, but could impact the safety of the President and Vice President. Petitioners, two Secret Service agents on protective detail, arrested respondent after he stated on a cell phone his intention to ask then-Vice President Richard Cheney "how many kids he's killed today," made unsolicited physical contact with the Vice President, and then lied about doing so. Respondent now seeks to hold petitioners personally liable for arresting him *with probable cause*.

The Tenth Circuit's rule, which is also the law of the Ninth Circuit, threatens to interfere with the split-second decisions of Secret Service agents that can mean the difference between the life and death of the President and Vice President. Arrests for probable cause will often be preceded by an expressive outburst, especially when the arrest follows an encounter with an elected official. While Secret Service agents will never allow concerns over potential legal liability to compromise their solemn and critical duty to protect the President, Vice President and presidential candidates, concerns over personal liability for making a probable cause arrest should not weigh into agents' decisions in the field.

STATEMENT OF THE CASE

The court below considered the following facts "in a light most favorable to" respondent Steven Howards. App. 3 n.1. On June 16, 2006, Howards was taking his son to a piano recital in Beaver Creek, Colorado. While walking through the Beaver Creek Mall, an outdoor shopping center, Howards saw then-Vice President Cheney shaking hands and having his picture taken with members of the public. Howards decided to approach the Vice President to protest the Administration's policies regarding Iraq. App. 3-4.

On that day, petitioners Gus Reichle and Dan Doyle were part of the Secret Service detail protecting Vice President Cheney. App. 3. The area was "unmagged," App. 8, meaning people had not been screened with a metal detector for weapons. Agent Doyle heard Howards state into his cell phone, "I'm going to ask him [the Vice President] how many kids he's killed today." App. 4. Agent Doyle acknowledged at his deposition that the comment "disturbed" him. App. 4.

Howards, who was holding a bag, App. 8, approached the Vice President and told him that his "policies in Iraq are disgusting." App. 4-5. The Vice President responded, "Thank you." App. 5. As he departed, Howards "made unsolicited physical contact with the Vice President," App. 18, by touching the Vice President's right shoulder with his open hand. App. 5. Agent Doyle told Agent Reichle, the Protective Intelligence Coordinator, about Howards'

"how many kids he's killed today" comment and Howards' interaction with the Vice President, including the physical contact. App. 6. Agent Reichle approached Howards, identified himself as a Secret Service agent, presented his badge, and asked to speak with Howards. App. 7. Howards initially refused and was "not cooperative." App. 7, 18. Reichle asked Howards if he had touched the Vice President, and Howards answered that he had not. App. 7. Howards admitted at his deposition that his answer "wasn't accurate." App. 7. Agent Reichle confirmed the falsity of Howards' statement with Agent Doyle, who had witnessed the encounter, and then arrested Howards. App. 8. Howards was detained for a few hours at the Eagle County Sheriff's Department. App. 8. Howards was charged with harassment under state law, but the state charges were dismissed and no federal charges were filed. App. 8-9.

Howards sued Agents Reichle and Doyle and other Secret Service agents under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging First and Fourth Amendment violations. App. 9. He alleged "that the Agents violated his Fourth Amendment rights by an unlawful search and seizure, and his First Amendment rights by retaliating against him for engaging in constitutionally protected speech." App. 9. After discovery, the agents moved for summary judgment on immunity grounds. The district court denied their motion, ruling that fact issues regarding the agents' immunity defense precluded

judgment as a matter of law. App. 9; *see also* App. 49-57.

The agents took an interlocutory appeal to the Tenth Circuit. Agents Reichle and Doyle argued on appeal that they were entitled to qualified immunity because, *inter alia*, they had probable cause to arrest Howards. They also argued that they were entitled to heightened or absolute immunity by virtue of their status as Secret Service agents protecting the Vice President. The United States, represented by the United States Department of Justice, filed a brief *amicus curiae* in support of the Secret Service agents and contended that the District Court had erred in denying qualified immunity. *See* U.S. CA10 *Amicus* Br. 11-30.

The Tenth Circuit affirmed in part and reversed in part. The panel unanimously rejected Howards' Fourth Amendment claim on the ground that the agents objectively had probable cause to arrest Howards. By a 2-1 vote, however, the panel held that probable cause was not a bar to Howards' First Amendment retaliation claim.

With respect to Howards Fourth Amendment claim, the Tenth Circuit held that "there is no doubt that Agent Reichle possessed probable cause to arrest Mr. Howards for lying to a federal agent in violation of 18 U.S.C. § 1001." App. 18. "Agent Reichle received information from three different Secret Service Agents that Mr. Howards had made unsolicited physical contact with the Vice President," yet

Howards "claimed, falsely, that he did not touch the Vice President." App. 18, 20. Indeed, as Howards "conceded in his deposition, he made factually inaccurate statements during his exchange with Agent Reichle." App. 18. Because the Tenth Circuit held that "the Agents had probable cause to arrest Mr. Howards for violating 18 U.S.C. § 1001," it did "not consider whether probable cause existed for any other offenses." App. 17-18 n.7.

Although the existence of probable cause barred Howards' Fourth Amendment claim, the panel majority held that probable cause was not fatal to Howards' First Amendment retaliatory arrest claim. App. 26. The majority observed that in *Hartman v. Moore*, this Court had held that "to prevail on a *retaliatory prosecution* claim, a plaintiff must plead and prove the absence of probable cause." App. 27 (emphasis in original) (citing *Hartman*, 547 U.S. at 259-60). Yet the majority announced that "[w]e decline to extend *Hartman*'s 'no-probable-cause requirement' to this retaliatory arrest case." App. 32. Thus, the majority held that Howards may "proceed with his First Amendment retaliation claim notwithstanding probable cause existed for his arrest." App. 34-35.

The majority acknowledged that the existence of a circuit split on the question whether probable cause bars a First Amendment retaliatory arrest claim. It noted that "[i]n the wake of *Hartman*, our sister circuits continue to be split over whether *Hartman* applies to retaliatory arrests." App. 31 (citing cases from the Sixth, Eighth, Ninth, and

Eleventh Circuits). By holding that probable cause does not bar a retaliatory arrest claim, the Tenth Circuit sided with the Ninth Circuit, *see* App. 31 (citing *Skoog v. County of Clackamas*, 469 F.3d 1221 (9th Cir. 2006)), and rejected the contrary majority rule. *See* App. 34 n.14 (noting that "some of our sister circuits disagree with us on this issue").

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

In a footnote, the Tenth Circuit rejected petitioners' argument that, as Secret Service agents protecting the Vice President, they were entitled to absolute immunity from Howards' claims. App. 13-14 n.6. In another footnote, the Tenth Circuit held that even though Howards' arrest comported with the Fourth Amendment it could still violate the First Amendment. App. 35 n.15.

Finally, the panel rejected Howards' First Amendment claim as against two other Secret Service agents, Daniel McLaughlin and Adam Daniels, on the ground that Howards had offered no evidence of

a retaliatory motive on the part of those agents. App. 36-39.

Judge Kelly concurred in part and dissented in part. In his view, "all of the agents should receive qualified immunity." App. 40. He noted that "[t]here is a strong argument that *Hartman v. Moore*, 547 U.S. 250 (2006), applies not only to retaliatory prosecutions, but also to retaliatory arrests." App. 40. And he disagreed with the panel majority's decision to "adopt[ ] a minority view based upon the rationale of *Skoog v. County of Clackamas*, 469 F.3d 1221 (9th Cir. 2006)." App. 41. Judge Kelly concluded that Agents Reichle and Doyle should have been granted qualified immunity because "when the arrest in this case occurred, the law simply was not clearly established (nor is it now) that *Hartman* applied only to retaliatory prosecutions and not retaliatory arrests." App. 41. He reasoned: "Given that the officers are deemed to have probable cause, no objectively reasonable officer on June 16, 2006 would be on notice that probable cause was insufficient to overcome claims of First Amendment retaliation." App. 41-42.

Agents Reichle and Doyle petitioned for rehearing *en banc*. The United States supported their petition. In its *amicus* brief, the Justice Department noted that "[t]his case presents a question of exceptional importance," that "the panel majority's decision misapplied" *Hartman*, that "the decision puts Secret Service agents" in an "untenable position," and that "the decision exacerbates a circuit conflict." U.S. CA10 *Amicus* Reh'g Br. 1. In addition, six States –

Colorado, Oklahoma, Utah, Wyoming, South Carolina, and Vermont – through their Attorneys General jointly filed an *amici* brief supporting rehearing *en banc*. The States advised the court below that the panel majority's decision "deepens a Circuit split by aligning Tenth Circuit law with the minority Ninth Circuit, and against the Sixth, Eighth, and Eleventh Circuits" and that "[t]he confusion wrought by the majority's opinion will have a significant impact on the *Amici* states." States CA10 *Amicus* Reh'g Br. 2.

The Tenth Circuit denied the petition for rehearing *en banc*. App. 62-63. The panel, however, granted petitioners' motion to stay the mandate. App. 44-45.

REASONS FOR GRANTING THE PETITION

This Court should review the decision below for four reasons. First, this Court should resolve the post-*Hartman* circuit split on the question whether probable cause bars a retaliatory arrest claim. In *Hartman*, this Court resolved a similar circuit split on the question whether probable cause bars a retaliatory prosecution claim. But the circuit courts are still at odds on the applicability of *Hartman* to arrest claims.

Second, the questions presented are of great national importance. The rule governing the Ninth and Tenth Circuits exposes Secret Service agents to the risk of burdensome litigation and potential personal liability each time they confront a potential threat to

the President, Vice President or other protectee. Because nearly every confrontation between a member of the public and the President or Vice President is attended by expressive activity, the minority view of the Ninth and Tenth Circuits undermines the ability of Secret Service agents on protective detail to react quickly and instinctively in the face of potential threats that could have national and historic consequences.

Third, the panel majority erred in denying qualified immunity to Agents Reichle and Doyle for making an arrest with probable cause. Because Howards was arrested based on probable cause, petitioners did not violate his First (or Fourth) Amendment rights. Furthermore, at the time of the arrest, it was not clearly established (and still is not clearly established) that *Hartman*'s no-probable-cause requirement did not apply to retaliatory arrest claims.

Fourth, the panel majority, in conflict with a Second Circuit decision, erred in failing to extend absolute immunity to Secret Service agents who make an arrest in furtherance of their duty to protect the President or Vice President under 18 U.S.C. § 3056.

I. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUIT COURT DECISIONS ON THE QUESTION WHETHER PROBABLE CAUSE BARS A FIRST AMENDMENT RETALIATORY ARREST CLAIM AFTER *HARTMAN*.

Before *Hartman*, the circuits were split over whether the absence of probable cause was a required element in retaliatory arrest and retaliatory prosecution cases. *Hartman* resolved the split as to prosecution cases, but the circuits are still divided about the application of *Hartman* to arrest cases. As one commentator wrote three years after *Hartman* was decided, "[r]etaliatory arrest case law is a mess, with some courts siding entirely with *Hartman*, others rejecting *Hartman* outright, and still others having yet to take a position." John Koerner, Note, *Between* Healthy *and* Hartman: *Probable Cause in Retaliatory Arrest Cases*, 109 Colum. L. Rev. 755, 775 (2009); *see also id*. at 755 (noting the "circuit split concerning retaliatory arrest claims"). This Court should grant certiorari to resolve this inter-circuit conflict. *See Braxton v. United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals").

In *Hartman*, this Court observed that "[t]he Courts of Appeals have divided on the issue of requiring evidence of a lack of probable cause in 42 U.S.C. § 1983 and *Bivens* retaliatory-prosecution suits" and "granted certiorari to resolve the Circuit

split." *Hartman*, 547 U.S. at 256 (citation omitted). This Court held that in retaliatory prosecutions suits the "want of probable cause must be alleged and proven." *Id*. at 252.

After *Hartman*, the circuit courts remain split over whether the *Hartman* rule applies to retaliatory arrest claims just as it does to retaliatory prosecution claims. The Tenth Circuit panel opinion expressly acknowledged the circuit split: "In the wake of *Hartman*, our sister circuits continue to be split over whether *Hartman* applies to retaliatory arrests." App. 31 (citing cases from the Sixth, Eighth, Ninth, and Eleventh Circuits). And in "declin[ing] to extend *Hartman*'s 'no-probable-cause requirement' to this retaliatory arrest case," App. 32, the Tenth Circuit noted that "some of our sister circuits disagree with us on this issue." App. 34 n.14. *Accord Moore v. Hartman*, ___ F.3d ___, 2011 WL 2739835, at *5 n.8 and *7 n.10 (D.C. Cir. July 15, 2011) (acknowledging circuit split regarding whether *Hartman* requires a no-probable-cause showing for retaliatory arrest claims).

The Tenth Circuit expressly embraced the Ninth Circuit's holding in *Skoog v. County of Clackamas*, 469 F.3d 1221 (9th Cir. 2006). *See* App. 31-32. As Judge Kelly noted, "[t]he court adopt[ed] a minority view based upon the rationale of *Skoog*." App. 41. *Skoog* involved First and Fourth Amendment retaliation claims brought against a police officer. While the officer was performing his duties, plaintiff Skoog recorded him without his consent with a video

camera. The Ninth Circuit held that the officer had probable cause to search Skoog's office and seize the camera and other equipment pursuant to a state statute making it unlawful to intercept oral communications without prior consent. Because the search and seizure was performed with probable cause, the Ninth Circuit rejected Skoog's Fourth Amendment claim. 469 F.3d at 1231. Turning to Skoog's First Amendment claim, The Ninth Circuit noted that "[w]hether a plaintiff must plead the absence of probable cause in order to * * * state a claim for retaliation is an open question in this circuit and the subject of a split in the other circuits." *Id.* at 1232 (footnotes omitted). The Ninth Circuit "conclude[d] that a plaintiff need not plead the absence of probable cause to state a claim for retaliation." *Id.* The *Skoog* court observed that in *Hartman* "the Supreme Court considered whether the absence of probable cause should be an element of a particular subcategory of retaliation claims: retaliatory prosecution claims." *Id*. at 1233. Yet the Ninth Circuit concluded that "the rationale for requiring the pleading of no probable cause in *Hartman* is absent here. This case presents an 'ordinary' retaliation claim." *Id*. at 1234.

The Ninth Circuit addressed *Hartman* and *Skoog* in a subsequent retaliatory arrest case, *Beck v. City of Upland*, 527 F.3d 853 (9th Cir. 2008). In *Beck*, the Ninth Circuit stated that "under *Hartman*, if a plaintiff can prove that the officials secured his arrest or prosecution without probable cause and were motivated by retaliation against the plaintiff's protected

speech, the plaintiff's First Amendment suit can go forward." *Id.* at 863-64. In a footnote, the *Beck* court cited *Skoog* for the proposition that "plaintiffs stating 'ordinary' retaliation claims posing less complicated causation problems than that addressed in *Hartman*, including actions concerning retaliatory searches, need not allege and show that absence of probable cause." *Id.* at 864 n.12 (quotation marks and brackets omitted) (citing *Skoog*, 469 F.3d at 1234).

The Tenth Circuit's holding that Howards can "proceed with his First Amendment retaliation claim notwithstanding probable cause existed for his arrest," App. 34-35, conflicts with the majority rule established in several other circuit court decisions, including decisions by the Eighth, Eleventh, Sixth and Second Circuits. *See Koerner*, 109 Colum. L. Rev. at 755 ("In most circuits, a defendant police officer cannot be held liable for retaliatory arrest if the arrest was made with probable cause").

The decision below squarely conflicts with *McCabe v. Parker*, 608 F.3d 1068 (8th Cir. 2010), which arose in a similar factual context. Plaintiffs showed up at campaign rally for President George W. Bush's re-election to protest the Iraq war. Plaintiff McCabe carried a sign which read "Bad War No More" and had a "W" with a slash through it. After failing to obey the repeated orders of Secret Service agents to move out of a restricted area, plaintiffs were arrested and charged with trespass under state law. Plaintiffs asserted, *inter alia*, First Amendment retaliatory arrest claims against two Secret Service agents.

The Eighth Circuit rejected plaintiffs' claims, holding that that "[l]ack of probable cause is a necessary element of all the claims McCabe and Nelson brought arising from the allegedly unlawful arrests." *Id.* at 1075. The court concluded that "there was arguable probable cause to arrest McCabe and Nelson for violating 18 U.S.C. § 3056(d), which prohibits a person from resisting a federal law enforcement agent who is performing protective services for the President." 608 F.3d at 1078. The Eighth Circuit indicated that, under its prior decision in *Williams v. City of Carl Junction*, 480 F.3d 871, 876 (8th Cir. 2007), "a plaintiff asserting a *Bivens* or § 1983 claim for an alleged unlawful citation arising from the exercise of First Amendment rights must plead and prove a lack of probable cause for the underlying charge pursuant to the Supreme Court's decision in *Hartman v. Moore*." *McCabe*, 608 F.3d at 1075. *See also id*. at 1079.

The Eleventh Circuit has likewise applied the *Hartman* rule to claims for retaliatory arrest. In *Redd v. City of Enterprise*, 140 F.3d 1378 (11th Cir. 1998), a sidewalk preacher arrested for disorderly conduct brought a First Amendment retaliatory arrest claim against police officers. The Eleventh Circuit rejected the claim on the ground that the officers had arguable probable cause to make the arrest. The court explained:

> Because we hold that the officers had arguable probable cause to arrest [the preacher] for disorderly conduct, we must hold that the

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

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

Although *Redd* was decided before *Hartman*, the Eleventh Circuit has applied *Redd* in a post-*Hartman* decision. *See Phillips v. Irvin*, 222 Fed. Appx. 928 (11th Cir. 2007). The *Phillips* court held that, because Officer "Irvin had arguable probable cause to arrest [plaintiff] Phillips, we reverse the district court's denial of qualified immunity to Irvin on Phillip's First Amendment retaliation claim." *Id*. at 929. The Eleventh Circuit added that, "[u]nder our precedent Irvin only needed to establish *arguable* probable cause, which Irvin did." *Id*. (emphasis in original) (citing *Redd*, 140 F.3d at 1383).

The Sixth Circuit has applied *Hartman*'s no-probable-cause requirement to a First Amendment retaliatory arrest claim. *See Barnes v. Wright*, 449 F.3d 709 (6th Cir. 2006). Although the Sixth Circuit's

prior precedents did "not require [plaintiff] Barnes to prove a lack of probable cause in order to go forward with this First Amendment retaliation claim," *id*. at 718-719, the Sixth Circuit said that *Hartman* required such proof. The *Barnes* court said that "it is clear that the *Hartman* rule modifies our [prior] holdings * * * and applies in this case." *Id*. at 720. The Sixth Circuit held that "the defendants had probable cause to seek an indictment and to arrest Barnes on each of the criminal charges in this case. Barnes' First Amendment retaliation claim accordingly fails as a matter of law." *Id*.

In a subsequent case, *Kennedy v. City of Villa Hills*, 635 F.3d 210 (6th Cir. 2011), the Sixth Circuit stated in dicta that "*Barnes* governs the applicability of *Hartman* to claims of wrongful arrest only when prosecution and arrest are concomitant." *Id*. at 217 n.4. The *Kennedy* court said that a plaintiff who raises "an ordinary retaliation claim * * * may not need to demonstrate a lack of probable cause to succeed on his claim of wrongful arrest." *Id*. But the court said that it would "defer resolution of this question * * * because it does not decide this appeal." *Id*. The arresting officer "lacked probable cause for the arrest," and thus the Sixth Circuit "declin[ed] to decide whether probable cause is an element" of an ordinary retaliatory arrest claim. *Id*.

The decision below is also contrary to the Second Circuit's rule. In *Curley v. Village of Suffern*, 268 F.3d 65 (2d Cir. 2001), the Second Circuit rejected a First Amendment retaliatory arrest claim because, among

other reasons, the arrest was based on probable cause. After noting that one of the required elements of a retaliatory arrest claim is proof that "defendants' actions were motivated or substantially caused by [plaintiff's] exercise of [a First Amendment] right," the Second Circuit held that "because defendants had probable cause to arrest plaintiff, an inquiry into the underlying motive for the arrest need not be taken." *Id.* at 73. The Second Circuit went on to say that "[s]ince plaintiff's arrest was made on probable cause and had no effect on his exercise of First Amendment rights, summary judgment was properly granted to defendants on this cause of action." *Id. Curley* preceded *Hartman*, but it remains the law in the Second Circuit. *See*, *e.g.*, *Morgan v. County of Nassau*, 720 F. Supp. 2d 229, 238 (E.D.N.Y. 2010) ("[I]f a police officer has probable cause to arrest a person, this will serve as a complete defense to any claim of First Amendment retaliation based on that arrest.") (citing *Curley*, 268 F.3d at 73).

In sum, there is a clear inter-circuit conflict, expressly acknowledged by the court below, on the question whether *Hartman*'s requirement that a retaliatory prosecution plaintiff must prove the absence of probable cause also extends to retaliatory arrest cases. In the decision below, the Tenth Circuit, aligning itself with the Ninth Circuit's decision in *Skoog*, held that the *Hartman* probable cause requirement does not apply to retaliatory arrest claims. The Tenth Circuit's holding conflicts with decisions of the Second, Sixth, Eighth, and Eleventh Circuits, which

have held that a retaliatory arrest plaintiff must demonstrate an absence of probable cause. The fact that recent Sixth and Ninth Circuit cases may draw a distinction between "ordinary" retaliatory arrest cases and other such cases is further reason for this Court to clarify the law governing retaliatory arrest claims, just as it did in *Hartman* concerning retaliatory prosecution claims.

II. THE QUESTIONS PRESENTED IN THIS CASE ARE OF GREAT NATIONAL IMPORTANCE.

Whether the absence of probable cause is a required element of a § 1983 or *Bivens* retaliatory arrest claim is an important and frequently recurring legal question. *See* States CA10 *Amici* Br. 3 (noting that "states have a vital interest in ensuring that their law enforcement officials remain free to perform their important duties, and thereby protect the safety and well-being of the general public, without the unnecessary fear or threat of lawsuits stemming from arrests made on the basis of probable cause"). But that question rises to the level of great national importance in a case that involves agents of the United States Secret Service protecting the President or Vice President.

There is nothing more debilitating to the Nation than the assassination of the President. "The Nation undoubtedly has a valid, even overwhelming, interest in protecting the safety of its Chief Executive." *Watts*

v. United States, 394 U.S. 705, 707 (1969) (per curiam). As Justice Breyer stated in *Rubin v. United States*, 525 U.S. 990 (1998), "[t]he physical security of the President of the United States has a special legal role to play in our constitutional system. * * * He is the head of state. He and the Vice President are the only officials for whom the entire Nation votes." *Id.* at 992 (Breyer, J., dissenting from denial of certiorari). It is an "obvious fact that serious physical harm to the President is a national calamity." *Id*. at 991. "And presidential security may turn on close questions of degree." *Id*. at 994.

Secret Service agents on protective detail must make split-second decisions that could have life-or-death – and historic – consequences. It is vitally important, therefore, that Secret Service agents act without hesitation. Indeed, this Court has recognized that government agents should not "err always on the side of caution because they fear being sued. Our national experience has taught us that this principle is nowhere more important than when the specter of Presidential assassination is raised." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (quotation marks and citation omitted). Those who protect the President and Vice President have qualified immunity so that they will not hesitate in the face of potential threats to their protectees. *See Saucier v. Katz*, 533 U.S. 194, 209 (2001) (military police officer who seized protestor approaching the Vice President had qualified immunity in light of his "duty to protect the safety and security of the Vice President of the

United States from persons unknown in number"), *receded from on other grounds*, *Pearson v. Callahan*, 555 U.S. 223 (2009). And as Justice Scalia has observed, while an erroneous immunity analysis might be mere error in other contexts, such an error should not be permitted to stand "with respect to those who guard the life of the President." *Hunter v. Bryant*, 502 U.S. at 229 (Scalia, J., concurring).

As the United States explained in its brief filed in the court below in support of rehearing *en banc*, this case "presents a question of exceptional importance: whether a United States Secret Service agent protecting the Vice President who had probable cause to arrest a suspect for violating federal law might nevertheless be subjected to trial on a claim for personal money damages." U.S. CA10 *Amicus* Reh'g Br. 1. The Tenth Circuit's decision, in answering that question in the affirmative, "significantly erodes the protections of qualified immunity for Secret Service agents" and "will directly and adversely affect the sensitive and critical role that the Secret Service plays in protecting the President and Vice President." *Id*. at 5, 6. "It will impede Secret Service agents' ability to make on-the-spot judgments about threats to these officials without fear of having those judgments subject them to trial or civil liability." *Id*. at 6.

The decision below has the potential to affect the behavior of Secret Service agents, not only when they are traveling with the President and Vice President within the Tenth Circuit, but in every jurisdiction. Secret Service agents follow their charges all over the

country, often in the course of a single day, and therefore conform their conduct (and training) to a national standard. The Secret Service should not be expected to, and as a practical matter simply cannot, modify its operations depending on what circuit its agents happen to be in. *Cf. Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2086-87 (2011) (Kennedy, J., concurring, discussing need for uniform national standards for certain federal officials). Yet as the United States explained in support of *en banc* review, the Tenth Circuit's decision puts Secret Service agents "in the untenable position of applying two different standards when deciding whether to arrest a suspect, forcing them to consider not only whether an arrest is justified based on the objective facts known to them, but also whether any of the facts developing around them as they interact with a suspect might subject them to trial based on allegations concerning their subjective motivations." U.S. CA10 *Amicus* Reh'g Br. 1.

III. THE TENTH CIRCUIT ERRED IN DENYING QUALIFIED IMMUNITY TO AGENTS REICHLE AND DOYLE.

"Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Al-Kidd*, 131 S. Ct. at 2080 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818

(1982)). The doctrine of qualified immunity recognizes the legitimate "need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Harlow*, 457 U.S. at 807. The doctrine is intended to protect "all but the plainly incompetent or those who knowingly violate the law." *Al-Kidd*, 131 S. Ct. at 2085 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). *See also Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974) (recognizing that official immunity analysis considers the "scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action," which may include an "atmosphere of confusion, ambiguity, and swiftly moving events"), *modified by Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

A. Agents Reichle and Doyle Had Probable Cause to Arrest Howards.

As the Tenth Circuit held, "there is no doubt that Agent Reichle possessed probable cause to arrest Mr. Howards for lying to a federal agent in violation of 18 U.S.C. § 1001." App. 18. Just as the existence of probable cause is a bar to a retaliatory prosecution claim, probable cause ought to bar a retaliatory arrest claim. *See* App. 40 (Kelly, J., concurring and dissenting) ("There is a strong argument that *Hartman v. Moore* applies not only to retaliatory prosecutions, but also to retaliatory arrests.") (citation omitted). The *Hartman* doctrine should apply to Secret Service

agents because they perform a protective function under 18 U.S.C. § 3056 and should enjoy a presumption of "protective" regularity akin to prosecutors' presumption of prosecutorial regularity which undercuts the causal link between the content of the protester's speech and his arrest. *See Hartman*, 547 U.S. at 259-65.

The presumption of prosecutorial regularity is a common law construct, driven by the judiciary's respect for the commitment of prosecutorial decisions to the executive branch, and the "recognition that the decision to prosecute is particularly ill-suited to judicial review." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-90 (1999). The conduct of Secret Service agents in their unique role as the President's and Vice President's personal bodyguards is similarly executive in nature and ill-suited for judicial review. Also, Secret Service agents' protective training is premised on the dynamics of the political protests frequently encountered by the President, Vice President and presidential candidates. Retaliatory arrest caselaw illustrates how ordinary police officers' encounters with familiar actors can lead to a dynamic in which retaliatory animus can be seen or inferred. *See*, *e.g.*, *Skoog, supra*; *Barnes, supra*. Secret Service agents, by contrast, are specifically trained to deal with and routinely encounter anonymous crowds of vocal, sometimes strident political protesters criticizing the agents' protectee. An agent's only concern in these charged situations is being an effective bodyguard. This Court

can and should recognize that when a highly trained Secret Service agent decides to arrest someone who he believes poses an immediate threat to the President's safety, that decision deserves a similar presumption of regularity – *i.e.,* a presumption that the agent is acting out of genuine concern for the President's safety, rather than out of a desire to retaliate against a protester because of her political viewpoint or expression.

Applying *Hartman* to this type of arrest scenario would comport with the interests *Hartman* sought to protect. When a Secret Service agent makes an arrest to protect the President's immediate physical safety, and that arrest is supported by probable cause, the inquiry should end. As in *Hartman*, this Court should define the constitutional tort of retaliatory arrest in the Secret Service's § 3056 context to require claimants to plead and prove an absence of probable cause. Since Howards cannot do that here, Agents Reichle and Doyle did not deprive Howards of a constitutional right and enjoy qualified immunity.

B. The Law Was Not Clearly Established at the Time of Howards' Arrest.

The Tenth Circuit held in this case that probable cause is not a defense to a retaliatory arrest claim, despite *Hartman*. It also held that this was clearly established law on June 16, 2006. Not so.

This case arises from events that took place less than two months after this Court decided *Hartman*.

In light of the persistent split which led to *Hartman*, and the fact that the *Hartman* Court expressly reserved the question of retaliatory arrest claims for another day, it is fair to say that the retaliatory arrest and prosecution rules were far from clear at the time of
Howards' arrest. As Judge Kelly observed, Agents Reichle and Doyle would have been fully justified in expecting the Tenth Circuit to extend *Hartman* to the retaliatory arrest circumstance, as many other circuits have. *See* App. 41-43.

The Tenth Circuit panel majority spent seven reporter pages of dense legal analysis to explain how it perceived the law to be clearly settled post-*Hartman*, despite the circuit split. App. 24-36. The law of qualified immunity, however, looks to what a reasonable federal official would understand – it does not require a Secret Service agent to be a legal scholar. *See Hunter*, 502 U.S. at 229 (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law" – especially where "specter of Presidential assassination is raised"). So even if the Tenth Circuit majority's legal analysis is not seen as erroneous, the analysis is far too erudite to expect a pair of Secret Service field agents to have understood it as reflecting clearly established law in the Tenth Circuit.

Also instructive is this Court's holding in *Wilson v. Layne* that when an alleged constitutional tort takes place and a circuit split then develops over whether that tort is cognizable, the existence of the

split itself confirms that the law was not settled and qualified immunity applies:

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

Wilson v. Layne, 526 U.S. 603, 618 (1999) (emphasis added, citations omitted).

Here, the Tenth Circuit expressly acknowledged the existence of a circuit split. App. 31-32. That observation should have been followed by the conclusion that qualified immunity necessarily applies under *Wilson*, since, as Judge Kelly noted in his dissent, there was every reason to believe that the Tenth Circuit would join the majority side of the split and hold Howards' retaliation claim uncognizable in light of the agents' probable cause to arrest. App. 41-43.

IV. THE TENTH CIRCUIT ERRED IN DENYING ABSOLUTE IMMUNITY TO AGENTS REICHLE AND DOYLE FOR ACTIONS UNDERTAKEN IN THEIR PROTECTIVE CAPACITY.

In the court below, Agents Reichle and Doyle argued that they are entitled to heightened or absolute

immunity because Howards' retaliatory arrest claim arose out of the performance of their duty to protect the Vice President under 18 U.S.C. § 3056. *See* Appellants Br. 15-17. The agents cited the Second Circuit's decision in *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973), in support of their argument. The panel majority, however, summarily rejected the argument without discussing *Galella*. App. 13-14 n.6.

Although qualified immunity from damages liability is "the general rule for executive officials charged with constitutional violations," this Court's "decisions recognize that there are some officials whose special functions require a full exemption from liability." *Butz v. Economou*, 438 U.S. 478, 508 (1978). Such officials enjoy absolute immunity because of "the special nature of their responsibilities." *Id*. at 511. *See Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) ("For officials whose special functions or constitutional status requires complete protection from suit, we have recognized the defense of 'absolute immunity.'"). In *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), this Court held that the President of the United States "is entitled to absolute immunity from damages liability predicated on his official acts." *Id*. at 749.

Although absolute immunity is not "an incident of the office of every Presidential subordinate based in the White House," *Harlow*, 457 U.S. at 809, Secret Service agents safeguarding the President, Vice President, or other persons enumerated in 18 U.S.C. § 3056(a), perform the sort of "special functions" that

warrant "full exemption from liability." *Butz*, 438 U.S. at 508. That statute – captioned "Powers, authorities, and duties of United States Secret Service," authorizes the Secret Service "to protect" the President, Vice President, and certain other persons. 18 U.S.C. § 3056(a). Notably, the statute provides that Secret Service protection may *not* be declined by the President or Vice President. *Id*. The statute further authorizes Secret Service agents to "make arrests without warrant for any offense against the United States committed in their presence." *Id*. § 3056(c)(1)(C). Other federal statutes also reflect the overriding national policy to protect the life and physical security of the President. *See* 18 U.S.C. §§ 871, 1751, and 1752.

The "special functions" undertaken by Secret Service agents involve making split-second decisions to arrest persons that, to a highly trained agent, appear to pose a threat to the immediate physical safety of the President or other protectee. Indeed, Secret Service agents are trained to be able to react instinctively and reflexively in these situations – they do not have the luxury to deliberate, as prosecutors or judges do. Absolute immunity for Secret Service agents on protective detail is justified by "the prospect that damages liability may render an official unduly cautious in the discharge of his official duties." *Nixon*, 457 U.S. at 752 n.32.

While the decision below rejected petitioners' request for absolute immunity in this case, the Second Circuit in *Galella* held that Secret Service

agents may not be held liable for making an alleged false arrest in connection with their protective responsibilities. Indeed, as then-Judge Ruth Bader Ginsburg noted in a subsequent case, *Galella* stands for the proposition that "United States Secret Service agents carrying out [their] special statutory duty [are] shielded by absolute immunity from common law false arrest liability." *Martin v. Malhoyt*, 830 F.2d 237, 249 n.31 (D.C. Cir. 1987).

Galella involved self-described "paparazzo" Ronald Galella, who hounded Jacqueline Kennedy Onassis and her children John and Caroline, all of whom were Secret Service protectees under 18 U.S.C. § 3056. The Secret Service interrogated and arrested Galella after he jumped into the path of young John Kennedy while he was biking in Central Park, creating concern for John's safety. 487 F.2d at 992. The Second Circuit held that the agents were entitled to "an absolute privilege" (*id*. at 993 n.5) as against Galella's false arrest and malicious prosecution claims. The court explained that "[t]he protective duties assigned the agents under [18 U.S.C. § 3056] * * * require the instant exercise of judgment which should be protected. * * * The issue in each case is whether the public interest in a particular official's unfettered judgments outweighs the private rights that may be violated. The protective duties of the agents on assignments similar to this warrant this protection." *Id*. at 993, 994 (footnotes and citation omitted). The Second Circuit added that "the duty of protecting the personages singled out by Congress as

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

Galella supports the application of absolute immunity here. As personal bodyguards of the President, Secret Service agents must be able to make split-second decisions regarding whether to defuse potential threats to the President's personal safety by making arrests. These decisions should be accorded the widest possible latitude and not second-guessed by judges or juries.

Galella also provides an additional basis for qualified immunity. Presuming, *arguendo*, that this Court would not adopt *Galella*'s absolute immunity analysis here, the fact remains that *Galella* was the only circuit-level case on point in 2006, and its analysis and holding have never been questioned or criticized by this Court or the Tenth Circuit. Particularly in light of this Court's directive to consider immunity based on narrow case categories rather than at a high level of generality, *see Saucier*, 533 U.S. at 201; *Al-Kidd*, 131 S. Ct. at 2084, *Galella* appeared to supply the controlling precedent on Secret Service agents'

immunity in 2006. Thus, with *Galella* standing as authoritative precedent to the contrary, the Tenth Circuit could hardly conclude that the law was settled as conferring no immunity at all for Howards' retaliatory arrest claim. At a minimum, this legal landscape confers qualified immunity. *Al-Kidd*, 131 S. Ct. at 2080 (law must be clearly established); *Harlow*, 457 U.S. at 818 (same).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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