No. 11-262

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

BRIEF OF AMICI CURIAE COLORADO AND TWENTY OTHER STATES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

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.

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INTEREST OF AMICUS CURIAE

The State of Colorado and the twenty other amici states, respectfully submit this brief as *amici curiae* in support of the Petitioners. There is a deep split among the circuit courts regarding whether probable cause bars a First Amendment retaliatory arrest claim. In this case, the Tenth Circuit held that despite the fact that an arresting officer has probable cause for an arrest, the arrestee may still assert a First Amendment claim for retaliatory arrest. The Tenth Circuit's analysis misreads *Hartman v. Moore,* 547 U.S. 250 (2006), and deepens a circuit split by aligning Tenth Circuit law with the minority Ninth Circuit, and against the Sixth, Eighth and Eleventh Circuits.

The question presented is of great national importance to the interests of the *amici* states.

Protecting the public is one of the primary duties of state government, if not its primary duty. The twenty-one states represented in this brief employ thousands of law enforcement officials who enforce the laws and regulations, exercise powers of custody and arrest, restrain persons suspected of unlawful behavior, detect criminal activity, investigate complaints, incidents and accidents, interview witnesses, gather evidence, respond to emergencies and requests for assistance, write appropriate citations and reports, and testify in court proceedings. States have a vital interest in ensuring that their law enforcement personnel can make arrests based on probable cause without the fear that they will be forced to defend alleged subjective motives in court.

SUMMARY OF THE ARGUMENT

In *Hartman v. Moore,* 547 U.S. 250 (2006), this Court held that the existence of probable cause bars a claim for retaliatory prosecution brought under the First Amendment. This case presents the question of whether *Hartman* applies not only to retaliatory prosecutions, but also to retaliatory arrests.

There is a deep split among the circuit courts regarding whether probable cause bars a First Amendment retaliatory arrest claim. In this case, the Tenth Circuit held that, despite the fact that an arresting officer has probable cause for an arrest, the arrestee may still assert a First Amendment claim for retaliatory arrest. The Tenth Circuit's analysis misreads *Hartman*, and deepens a circuit split by aligning Tenth Circuit law with the minority Ninth

Circuit, and against the Sixth, Eighth and Eleventh Circuits.

There are several reasons why the *Hartman* rationale should apply to retaliatory arrest claims. To the extent a plaintiff's injuries stem from the filing of charges, the plaintiff is, in essence, claiming retaliatory prosecution and under *Hartman* must show the absence of probable cause. To the extent plaintiff's injuries derive from the seizure of his person, then a retaliatory arrest claim differs little from a traditional Fourth Amendment claim for which this Court has repeatedly held that an officer's subjective motivations are irrelevant.

To establish a First Amendment retaliatory arrest claim, a plaintiff must show that the arrest was substantially motivated by retaliation. An arrest is unlikely to be substantially motivated by retaliation when it is supported by probable cause.

There is simply no valid reason to consider an officer's subjective motives in a retaliatory arrest case because the existence of probable cause is so highly probative of causation.

Law enforcement officials are often called upon to make quick decisions in complicated situations. Applying the probable cause standard to First Amendment retaliatory arrest claims—instead of subjectively examining an officer's motivations—will provide law enforcement officers with clearer guidance, thus ensuring that their actions do not violate constitutional rights. The Court should grant the petition for certiorari and apply the *Hartman* rationale to retaliatory arrest claims.

REASONS FOR GRANTING THE PETITION

I. The split in the circuits has created inconsistency on an important question of qualified immunity.

In *Hartman*, this Court held that a plaintiff bringing a cause of action for retaliatory prosecution must prove as an element of his case that the prosecution was not supported by probable cause: "Because showing an absence of probable cause will have high probative force, and can be made mandatory with little or no added cost, it makes sense to require such a showing as an element of a plaintiff's case, and we hold that it must be pleaded and proven." *Hartman*, 547 U.S. at 266. The circuits are split on the scope of that decision, creating confusion for law enforcement officials that only the intervention of this Court can resolve.

The circuit courts have divided on the question of whether *Hartman* extends to claims of retaliatory arrest. The Sixth, Eighth, and Eleventh Circuits have held that lack of probable cause is a necessary element of a retaliatory arrest claim under the First Amendment. *McCabe v. Parker,* 608 F.3d 1068, 1079 (8th Cir. 2010); *Williams v. City of Carl Junction,* 480 F.3d 871, 876 (8th Cir. 2007); *Barnes v. Wright*, 449 F.3d 709, 720 (6th Cir. 2006); *Phillips v. Irvin*, 222 Fed. Appx. 928, 929, 2007 WL 914254 (11th Cir. March 28, 2007). The Tenth Circuit, however, joined the Ninth Circuit and "decline[d] to extend Hartman's "no-probable-cause" requirement to this retaliatory arrest case." *Howards v. McLaughlin*, 634 F.3d 1131 (10th Cir. 2011); *Skoog v. Cnty. Of Clackamus*, 469 F.3d 1221 (9th Cir. 2006); *but see*, *Dietrich v. Nugget*, 548 F.3d 892 (9th Cir. 2008). The Tenth Circuit majority

acknowledged the existence of the split amongst the circuits, noting, "[i]n the wake of *Hartman*, our sister circuits continue to be split over whether *Hartman* applies to retaliatory arrests." 634 F.3d at 1147.

The Second Circuit has not addressed this issue since *Hartman*, but traditionally has required the absence of probable cause as an element in a retaliatory arrest claim. *Curley v. Village of Suffern*, 268 F.3d 65, 73 (2nd Cir. 2001) ("As to the second element, because defendants had probable cause to arrest plaintiff, an inquiry into the underlying motive for the arrest need not be undertaken.").

The Eighth Circuit addressed the application of *Hartman* to retaliatory arrests when the Secret Service arrested two women who refused to leave a secure area during a campaign rally. *McCabe*, 608 F.3d at 1070. The court held that "[l]ack of probable cause is a necessary element of all the claims [the

plaintiffs] brought arising from the allegedly unlawful arrests." *Id.* at 1075. The court supported this finding by citing *Hartman* for the proposition that "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." *Id.* This interpretation of this Court's precedent conflicts squarely with the Tenth Circuit's recent holding that, "[i]n light of the care the Supreme Court took to distinguish between complex and ordinary retaliation claims, we are not persuaded Hartman applies to" retaliatory arrest claims. *Howards,* 634 F.3d at 1148.

The Eleventh Circuit confronted this question when William Joseph Phillips sued Officer B.E. Irvin for retaliatory arrest after a traffic stop dispute. The circuit court assumed that if there was probable

cause for the arrest, then the officer enjoyed qualified immunity. The court addressed the related problem of arrests that were almost supported by probable cause, finding that the officer "only needed to establish *arguable* probable cause" not "*actual* probable cause." *Phillips*, at *1.

The Sixth Circuit is also on the majority side of the split, although a recent dictum suggests that, like the Ninth Circuit, it may suffer from some internal dispute about the scope of its rule. The key Sixth Circuit case is *Barnes v. Wright*. In *Barnes*, plaintiff claimed that he was arrested and indicted in violation of his First Amendment rights after he angrily accused the police of dereliction of duty. (The police maintained that the actual reason for his arrest was that he was waving a gun at them. *Barnes*, 449 F.3d at 712.) The Sixth Circuit held, "*Hartman* appears to acknowledge that its rule

sweeps broadly" and "Barnes' First Amendment retaliation claim fails as a matter of law" because "the defendants had probable cause to seek an indictment and to arrest Barnes on each of the criminal charges in this case." *Barnes*, 449 F.3d at 720. *See also*, *Everson v. Calhoun County*, 2011 WL 204453, 3 (6th Cir. 2011) (not selected for publication) (The plaintiff "is correct that § 1983 claims for retaliatory prosecution and arrest fail as a matter of law if the defendant had probable cause.").

But a subsequent case demonstrates that even within the Sixth Circuit, however, there is inconsistency about the application of *Hartman*. Another recent panel included a footnote saying, in dictum, that "[t]he Sixth Circuit has not decided whether lack of probable cause is an element in wrongful-arrest claims after the Supreme Court's ruling in *Hartman* which made lack of probable

cause an element for claims of malicious prosecution." *Kennedy v. City of Villa Hills, Ky*. 635 F.3d 210, 217, fn 4 (6th Cir. 2011) (citation omitted). The footnote distinguished *Barnes* by claiming, "*Barnes* governs the applicability of *Hartman* to claims of wrongful arrest only when prosecution and arrest are concomitant." *Id*.

The Ninth and Tenth Circuits disagree with the Second, Sixth, Eighth, and Eleventh Circuits on this important question of federal law. The Ninth Circuit first staked out the minority position, which the Tenth Circuit has joined, in *Skoog v. Clackamus*, 469 F.3d 1221 (9th Cir. 2006): "After close review of the relevant precedent we conclude that a plaintiff need not plead the absence of probable cause in order to state a claim for retaliation." *Skoog*, 469 F.3d at 1232. The Ninth Circuit then diluted this holding in a subsequent case, *Dietrich v. Nugget*, 548

F.3d 892 (9th Cir. 2008). The plaintiff in *Dietrich* was asked to leave the West Nugget Rib Cook-Off, a barbeque organized by a private party on public property, and complained to the ACLU and the event organizers. Two days later, she was issued a traffic citation that she claimed was retaliatory. The Ninth Circuit held that the plaintiff did have a First Amendment right to engage in political activities at this cook-off but that no reasonable juror could find that the traffic citation was retaliatory. The Ninth Circuit in *Dietrich* characterized the holding in *Skoog* as a decision "that the retaliatory First Amendment claim survived summary judgment *when there was barely enough evidence to conclude that there was probable cause*, while there was strong evidence of a retaliatory motive." *Dietrich*, 469 F.3d at 901 (emphasis added).

The Tenth Circuit, by squarely holding, contrary to the position of the Second, Sixth, Eighth, and Eleventh Circuits, that Mr. Howard may "proceed with his First Amendment retaliation claim notwithstanding probable cause existed for his arrest," has now widened this split. This Court should grant the petition for certiorari to establish national uniformity on this important law enforcement issue, straighten out the confusion in the lower courts, and clarify the meaning of its precedent.

II. The minority position of the Tenth and Ninth Circuits has made it more difficult for law enforcement officials to perform their duties.

This circuit split is not over a minor issue of merely intellectual interest. For its safety, the public relies on the hard work of the police, secret service agents, and numerous other law enforcement

officials. Every day, these men and women must balance their responsibility to enforce the law and prevent crime with their duty to respect the constitutional rights of the people. Qualified immunity provides invaluable protection to law enforcement professionals by ensuring that if they do not violate a clearly identified constitutional right, they will not be forced to defend their actions in court on pain of personal liability.

As this Court has explained, "permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638, 3038 (1987).

These concerns are especially troubling when courts examine not the objective fact that probable

cause is established, but the subjective motivation of law enforcement. “There are special costs to ‘subjective’ inquiries,” because “the judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions...entail[ing] broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues" which "can be peculiarly disruptive of effective government." *Harlow v. Fitzgerald*, 457 U.S. 800, 816-17 (1982).

This type of second-guessing is especially problematic in the context of an arrest, when law enforcement officials are often called upon to make quick decisions in complicated situations. What the Court has said about the Fourth Amendment in the arrest context is equally true when the claims relating to an arrest derive from the First

Amendment: The Constitutional rule "[o]ften enough… has to be applied on the spur (and in the heat) of the moment," and the object is "to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made." *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). The probable cause standard, on which these employees are already trained and required to follow, provides clearer guidance to our law enforcement than complicated inquiry into subjective motives.

This is not an obscure question that will apply only to political protestors who create probable cause for an arrest. Many arrests, including arrests for very ordinary crimes, have a potential to implicate First Amendment claims. Criticizing the Vice President, just like cursing the police at a traffic

stop, is a fundamental constitutional right, but this speech by the arrestee should not deprive the secret service agents or police of their qualified immunity when they do their duty and make an arrest that is fully supported by probable cause.

This Court should grant certiorari to provide clear guidance to our secret service, police, and investigators about the standards governing their actions when faced with a person who has performed an act which creates cause for an arrest but also, as so often happens, made remarks which the law enforcement officer finds offensive.

III. The Tenth Circuit misapplied this Court's precedent, creating an unjustified and confusing exception to the availability of qualified immunity for claims of false arrest.

In *Hartman,* this Court held that the absence of probable cause must be alleged and proven by a

plaintiff bringing a § 1983 or *Bivens* suit for retaliatory prosecution. *Hartman* 547 U.S. at 265-66. The Tenth Circuit was wrong to exclude retaliatory arrest allegations from this rule.

The *Hartman* Court offered two reasons for requiring that plaintiffs in retaliatory prosecution cases establish that there was no probable cause. First, the issue of probable cause will likely be relevant in "any retaliatory prosecution case." 527 U.S. at 261. Second, "the requisite causation between the defendant's retaliatory animus and the plaintiff's injury is usually more complex than it is in other retaliation cases." *Id.*

As to the first reason, this Court explained, "there will always be a distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation, namely evidence showing whether there was or was not

probable cause to bring the criminal charge." *Id.* Thus, the issue of probable cause will necessarily have "powerful evidentiary significance." *Id.* This Court stated, "[b]ecause showing an absence of probable cause will have high probative force, and can be made mandatory with little or no added cost, it makes sense to require such a showing as an element of a plaintiff's case, and we hold that it must be pleaded and proven." *Id.* at 265-66.

With regard to the second reason, this Court emphasized that a § 1983 or *Bivens* action is brought against an official who "may have influenced the prosecutorial decision but did not himself make it" rather than against the prosecutor, *id.* at 261-62, and that "requisite causation between the defendant's retaliatory animus and the plaintiff's injury is usually more complex than it is in other retaliation cases." *Id.* at 261. The Court explained,

"[s]ome sort of allegation ... is needed both to bridge the gap between the nonprosecuting government agent's motive and the prosecutor's action, and to address the presumption of prosecutorial regularity." *Id.* at 263. That "connection, to be alleged and shown, is the absence of probable cause." *Id.*

In this case, the panel majority appeared to believe that *Hartman* did not apply because it covers only cases in which causation issues are highly complex. This, however, is mistaken. As the Sixth Circuit recognized, the *Hartman* Court "appear[ed] 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.'" *Barnes v. Wright*, 449 F.3d at 720 (quoting *Hartman,* 527 U.S. at 261) (emphasis in *Barnes*). The Sixth and Eighth Circuits have concluded that *Hartman's* ruling sweeps "broad[ly]

enough to apply even where intervening actions by a prosecutor are not present." *Williams,* 480 F.3d at 876 (adopting the reasoning of *Barnes*). *See also McCabe v. Parker,* 608 F.3d at 1079 (Secret service agent had arguable probable cause to arrest such that agent had qualified immunity in arrestees' action alleging violation of their First and Fourth Amendment rights); *see also Phillips,* 222 Fed. Appx. at 929 (applying similar reasoning even where arresting officers had only *arguable* probable cause).

This Court's ruling in *Hartman* should "sweep broadly" and apply to retaliatory arrest claims. Causation is not always complex even in retaliatory prosecution cases, and can be exceedingly complex in retaliatory arrest cases. While arrests are sometimes made by a single law enforcement officer, arrests are also often made based on information supplied to the arresting officer by other officers,

witnesses, and victims. The arresting officer must rely on these accounts to determine whether probable cause for the arrest exists. Thus, the "requisite causation between the defendant's retaliatory animus and the plaintiff's injury" will often be as complex in a claim for retaliatory arrest as in one alleging retaliatory prosecution.

There are several reasons why the *Hartman* rationale should apply to retaliatory arrest claims. At the outset, the distinction between a retaliatory prosecution claim and a retaliatory arrest claim is somewhat artificial. In both types of cases, the defendants are necessarily the arresting or investigating officers because of the prosecutor's absolute immunity. *Hartman*, 527 U.S. at 261-62. Moreover, an arrest is merely the first step in a prosecution. Insofar as the plaintiff's injuries stem from the filing of charges, the plaintiff, in essence, is

claiming retaliatory prosecution, and therefore under *Hartman*, must show the absence of probable cause.

Further, to the extent that a plaintiff's injuries derive from the seizure of his or her person, then the retaliatory arrest claim differs little from a traditional Fourth Amendment claim, for which this Court has repeatedly held that an officer's subjective motivations are irrelevant. *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (stating, "an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause"); *Whren v. United States,* 517 U.S. 806, 813 (1996) (declaring "[s]ubjective intentions play no role in ordinary, probable cause Fourth Amendment analysis."). The mere existence of probable cause will bar a claim arising under the Fourth Amendment.

To establish a First Amendment retaliation claim, a plaintiff must show that the arrest was "substantially motivated" by retaliation. *Howards,* 534 F.3d at 1144. Because the issue of probable cause will necessarily have "powerful evidentiary significance," and "[b]ecause showing an absence of probable cause will have high probative force," *Hartman,* 527 U.S. at 261, an arrest is unlikely to have been substantially motivated by retaliation when supported by probable cause, and the officer's subjective motives should be irrelevant.

Allowing consideration of an arresting officer's subjective motivations despite the existence of probable cause would allow innumerable plaintiffs to turn what would heretofore have been untenable Fourth Amendment claims into First Amendment retaliation claims. Any arrestee could claim that despite an officer's probable cause to believe the

arrestee had committed a crime, the *actual* reason for the arrest was retaliation for protected speech made or political position held by the arrestee. This would provide a perverse incentive to individuals who might be arrested: by making insulting or otherwise provocative statements, they could escape the *Whren* rule and provide themselves with a convenient basis for a § 1983 suit. It is not difficult to imagine a defense lawyer recommending the initiation of such a claim, if for no other reason than to influence the charging decision. For all practical purposes, qualified immunity for arresting officers would be eviscerated.

In *Hartman*, this Court cautioned that "[i]t may be dishonorable to act with an unconstitutional motive and perhaps in some instances be unlawful, but action colored by some degree of bad motive does not amount to a constitutional tort if that action

would have been taken anyway." 527 U.S. at 260. For Fourth Amendment claims and retaliatory prosecution claims, the existence of probable cause is sufficient proof that the action would have been taken anyway. Similarly, when a law enforcement officer makes an arrest fully supported by probable cause, the officer's alleged subjective motives do not amount to a constitutional violation because the arrest would have happened anyway. There is simply no valid reason to consider an officer's subjective motives in such circumstances because the existence of probable cause is so highly probative of causation.

Finally, subjecting law enforcement officers to potential liability when they make an arrest with objectively reasonable probable cause will in no way affect their future conduct, unless it is to make them

less willing to do their duties. *Cf. United States v. Leon,* 468 U.S. 897, 919-920 (1984).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari and reverse the decision below.

Respectfully submitted,

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