No. 11-262

In the Supreme Court of the United States

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

v.

STEVEN HOWARDS

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

SRI SRINIVASAN
Deputy Solicitor General

BETH S. BRINKMANN
Deputy Assistant Attorney General

ERIC J. FEIGIN
Assistant to the Solicitor General

BARBARA L. HERWIG
TEAL LUTHY MILLER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

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

STATEMENT OF COMPLIANCE WITH SUPREME COURT RULE 37.2(a)

Counsel of record received timely notice of the United States' intent to file this amicus curiae brief ten days before the due date. Pursuant to Rule 37.4, the consent of the parties is not required for the United States to file this brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution and statutes:

Statutes—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 11-262

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

v.

STEVEN HOWARDS

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The court of appeals held in this case that two Secret Service agents on the Vice President's protective detail may be liable under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for retaliatory arrest in violation of the First Amendment, when the arrest was supported by probable cause. The United States has a substantial interest in the proper resolution of that issue. The United States Secret Service is a federal agency required by statute to protect the President and Vice President (and, if applicable, the President-elect and Vice President-elect) and authorized by statute to protect other listed persons, including certain political candidates and foreign dignitaries. 18 U.S.C. 3056(a) (2006 & Supp. II 2008). The court of appeals' decision imposes potential

constitutional-tort liability on agents performing those vital duties. The decision also more generally affects the standards applicable to other law-enforcement agents carrying out arrests for federal crimes.

STATEMENT

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

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

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

Id. at 5 (citations and brackets omitted). Agent Doyle did not overhear the conversation between respondent and the Vice President, but he did see the physical contact. *Ibid.*

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

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

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

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

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

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

3. The court of appeals reversed in part and affirmed in part. Pet. App. 1-43. The court concluded that respondent's Fourth Amendment claim should have been dismissed because, even "[r]eviewing the facts

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

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

The court rejected petitioners' argument that the existence of probable cause defeated respondent's retaliatory-arrest claim. The court of appeals recognized that, under this Court's decision in *Hartman* v. *Moore*, 547 U.S. 250 (2006), a plaintiff must plead and prove the absence of probable cause in order to maintain a First Amendment claim seeking damages for retalia-

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

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

4. The court of appeals denied rehearing en banc. Pet. App. 62-63.

DISCUSSION

This Court should grant certiorari to review the court of appeals' decision. The decision is incorrect and fails to take proper account of this Court's decision in *Hartman* v. *Moore*, 547 U.S. 250 (2006). It directly conflicts with decisions in the Second, Eighth, and Eleventh

Circuits, none of which would expose law-enforcement officers to liability in these circumstances. And it concerns an issue of exceptional importance, threatening to impose unwarranted personal liability on Secret Service agents for performing their critical protective duties and to chill federal, state, and local law-enforcement activities more generally.

A. The Court Of Appeals Erred In Permitting Respondent's Retaliatory-Arrest Claim To Proceed Despite The Presence Of Probable Cause

The court of appeals correctly determined (Pet. App. 17) that probable cause supported petitioners' arrest of respondent. The arrest was therefore lawful under the Fourth Amendment, regardless of petitioners' subjective motivations. *Ibid.*; see, *e.g.*, *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2080-2081 (2011); *Devenpeck* v. *Alford*, 543 U.S. 146, 153 (2004); *Whren* v. *United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."). As this Court has recognized, the Fourth Amendment's focus on objective circumstances, rather than subjective intent, "promotes evenhanded, uniform enforcement of the law." *al-Kidd*, 131 S. Ct. at 2080.

The court of appeals concluded, however, that respondent could sidestep the Fourth Amendment's objective focus on probable cause by challenging his arrest under the First Amendment. That conclusion, which would potentially permit a constitutional claim any time the circumstances of an otherwise-lawful arrest happen to implicate expressive activity, was incorrect.

1. As this Court has recognized, the particularized requirements of the Fourth Amendment already provide significant protections in circumstances involving First

Amendment interests. In *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978), the Court rejected the argument that First Amendment concerns require the application of special procedures, above and beyond the Fourth Amendment's protections, when police seek to search a newspaper's offices. *Id.* at 563-567. The Court stated that, "[p]roperly administered, the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness—should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices." *Id.* at 565.

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

This Court has recognized that the existence of probable cause supporting a law-enforcement action substantially addresses concerns about a motivation to suppress protected expression. In *Hartman* v. *Moore*, *supra*, the Court addressed the requirements for a plaintiff to re-

cover damages under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), based on a claim that criminal investigators had violated his First Amendment rights by inducing a criminal prosecution in retaliation for his protected speech. The Court noted that in such retaliatory-prosecution cases, "there will always be a distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation, namely evidence showing whether there was or was not probable cause to bring the criminal charge." *Hartman*, 547 U.S. at 261. "Demonstrating that there was no probable cause for the underlying criminal charge," the Court explained, "will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for instigating the prosecution." *Ibid.* Conversely, "establishing the existence of probable cause will suggest that prosecution would have occurred even without a retaliatory motive." *Ibid.*

The Court held that a plaintiff asserting a constitutional-tort claim for retaliatory prosecution must both plead and prove the absence of probable cause. *Hartman*, 547 U.S. at 252. The Court noted that, while "retaliatory actions * * * for speaking out" are constitutionally forbidden "as a general matter," *id.* at 256, recovery is appropriate only where retaliation is the "but-for cause" of the official's action. *Id.* at 256, 260; see *id.* at 260 ("It 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."). The Court explained that "the need to prove a chain of causation from animus to injury, with details specific to retaliatory-

prosecution cases, * * * provides the strongest justification for [a] no-probable-cause requirement" in the context of a constitutional-tort claim alleging retaliatory prosecution. *Id.* at 259.

The Court identified two primary features of retaliatory-prosecution cases that distinguish them from "standard" retaliation cases, *Hartman*, 547 U.S. at 260, and that support a requirement to prove an absence of probable cause. First, "litigating probable cause will be highly likely in any retaliatory-prosecution case, owing to its powerful evidentiary significance" on the issue of causation. *Id.* at 261. The Court reasoned that "[t]he issue is so likely to be raised by some party at some point that treating it as important enough to be an element will be a way to address the issue of causation without adding to time or expense." *Id.* at 265.

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

2. The court of appeals erred in deeming *Hartman* inapplicable to this case. Assuming that *Bivens* authorizes a private damages claim alleging that a law-enforcement officer arrested a suspect for retaliatory reasons, *Hartman*'s no-probable-cause requirement would apply to such a claim. Retaliatory-arrest cases, like retaliatory-prosecution cases, are materially distinct from "standard" retaliation cases. *Hartman*, 547 U.S. at 260. Retaliatory-arrest cases likewise will present "a distinct body of highly valuable circumstantial" probable-cause evidence that is "apt to prove or disprove retaliatory causation." *Id.* at 261. Thus, as in retaliatory-prosecution cases, the issue of probable cause is "likely to be raised by some party at some point" in a retaliatory-arrest case, and a showing of its absence "can be made mandatory with little or no added cost." *Id.* at 265.

In addition, in retaliatory-arrest cases, as in retaliatory-prosecution cases, the retaliation inquiry "is usually much more complex than it is in other retaliation cases," therefore "support[ing] a requirement that no probable cause be alleged and proven." *Hartman*, 547 U.S. at 261. A plaintiff's burden to "show a causal connection between a defendant's retaliatory animus and subsequent injury," *id.* at 259, raises particular complications in the retaliatory-arrest context because speech can be an entirely legitimate consideration in deciding whether to make an arrest. For starters, expressive activity may provide evidence of a crime and thus be directly relevant to the probable-cause determination. See, *e.g.*, *Hunter* v. *Bryant*, 502 U.S. 224, 228 (1991) (per curiam) (considering suspect's statements in addressing probable cause to arrest him for threatening the President); *Wayte* v. *United States*, 470 U.S. 598, 612-613

(1985) (noting that protest letters written to the Selective Service "provided strong, perhaps conclusive evidence" of an element of the criminal offense of failing to register for the draft).

Additionally, expressive activity is often relevant to an officer's decision about whether an arrest would make sense under the circumstances. Officers do not—and could not—arrest every person as to whom probable cause exists, and there is accordingly a "well established tradition of police discretion" in deciding whether a custodial arrest is warranted. *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 760 (2005); see also *Chicago* v. *Morales*, 527 U.S. 41, 62 n.32 (1999) (observing that it is "common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances"). The Court has never held that officers are forbidden from considering a suspect's speech in making that discretionary decision, nor would such a rule make sense. In deciding whether to arrest someone for trespassing on government property, for example, an officer should be able to consider that a suspect who belligerently states, "the government has no right to own property," is less likely to leave promptly of his own accord than a suspect who immediately apologizes for a mistaken intrusion. Cf. *Wayte*, 470 U.S. at 614 (rejecting interpretation of the First Amendment that "would allow any criminal to obtain immunity from prosecution simply by reporting himself and claiming that he did so in order to 'protest' the law").

At least in cases where the suspect's expressive activity is relevant to the arrest decision, the difficulty of determining whether legitimate or potentially illegitimate speech-related considerations caused the arrest means that the retaliation inquiry will "usually [be]

more complex than it is in other retaliation cases." *Hartman*, 547 U.S. at 261; cf., *e.g.*, *Pickering* v. *Board of Educ.*, 391 U.S. 563, 572-573 (1968) (noting that certain potentially legitimate reasons for considering speech in firing public employee were "neither shown nor can be presumed"). As in *Hartman*, the complexity "should be addressed specifically in defining the elements of the tort," 547 U.S. at 261, because the jury (and the district court, when it addresses a dispositive motion) will otherwise lack any consistent, objective criteria for distinguishing tortious from non-tortious government action. And as in *Hartman*, "[b]ecause showing an absence of probable cause will have high probative force, and can be made mandatory with little or no added cost, it makes sense to require such a showing as an element of a plaintiff's case." *Id.* at 265-266.[*]

3. In light of the likelihood that significant complexity will exist, the potential difficulty of deciding whether an individual case happens to lack such complexity, and the low probability that there will ever be conclusive evidence of retaliation, a requirement to plead and prove the absence of probable cause is fully justified in retaliatory-arrest cases. See *Hartman*, 547 U.S. at 261, 264 & n.10 (applying a blanket no-probable-cause requirement in retaliatory-prosecution cases based on sim-

---

[*] In addition to the complexity of distinguishing legitimate from potentially illegitmate speech-related considerations, retaliatory-arrest cases can also involve the same complexity that was present in *Hartman*: a lack of identity between the defendant alleged to have a retaliatory motive and the official who decided to take the challenged action. See 547 U.S. at 262. Respondent's suit against Agent Doyle is an example. Agent Reichle made the decision to arrest respondent, Pet. App. 8, and the claim against Agent Doyle appears to be premised on the theory that Agent Doyle encouraged that decision.

ilar considerations). Unlike "standard" retaliation cases—which may involve questions of, for example, public employment—retaliatory-arrest cases by nature implicate public safety. That context supports conditioning liability on demonstrating a lack of probable cause, a standard that strikes the appropriate balance between the interest in protecting individuals from unreasonable law-enforcement interference and the interest in enabling officers to preserve the public safety. *E.g.*, *Pringle*, 540 U.S. at 370.

A no-probable-cause requirement is particularly warranted in the circumstances of this case. Petitioners were tasked with the critically important job of guarding the Vice President's safety. 18 U.S.C. 3056(a)(1); cf. *Watts* v. *United States*, 394 U.S. 705, 707 (1969) (per curiam) ("The Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive."). This Court has recognized that when a person presents a potential threat to the Vice President, an officer guarding the Vice President is "required to recognize the necessity to protect the Vice President by securing [the person] and restoring order to the scene." *Saucier* v. *Katz*, 533 U.S. 194, 208 (2001), overruled in part on other grounds by *Pearson* v. *Callahan*, 555 U.S. 223 (2009); see 533 U.S. at 197-198. It was not merely legitimate, but prudent, for petitioners to take account of respondent's vocal criticism of the Vice President as part of the totality of circumstances in assessing whether respondent presented a threat and should be arrested and removed from the area. The Secret Service can reasonably conclude that someone whose disagreement with the Vice President has already led to unsolicited physical contact presents more of a security risk than someone who, for example, bumped

into the Vice President accidentally. See Pet. App. 8 (Agent Reichle's testimony that he arrested respondent based upon his "premeditation, the conversation on the cell phone, the fact that [respondent] would not talk to him, the fact that he's walking around with a bag in his hand in an [area without a metal detector], and the fact that [Agent Doyle said] he had unsolicited contact" with the Vice President) (brackets omitted). The court of appeals erred in subjecting petitioners to potential damages liability for exercising their professional judgment about the need for an arrest to ensure the Vice President's safety.

The court of appeals compounded its error by denying petitioners qualified immunity from respondent's claims. "[T]o ensure that fear of liability will not 'unduly inhibit officials in the discharge of their duties,'" the qualified-immunity doctrine provides that "so long as they have not violated a 'clearly established' right," officials "are shielded from personal liability." *Camreta* v. *Greene*, 131 S. Ct. 2020, 2030-2031 (2011) (citations omitted). This Court has never held that an arrest supported by probable cause can nonetheless violate the First Amendment, and, as discussed below, the circuits are divided on that question. To the extent that the court of appeals believed the issue to have been settled by its pre-*Hartman* precedent, see Pet. App. 34 n.14, an officer could reasonably conclude that *Hartman* altered the legal landscape. The qualified-immunity doctrine thus should protect petitioners from respondent's suit. Cf. *Hunter*, 502 U.S. at 229 (observing that qualified immunity's "accommodation for reasonable error" is "nowhere more important than when the specter of Presidential assassination is raised").

B. The Court Of Appeals' Decision Conflicts With The Holdings Of Other Circuits

As the court of appeals itself recognized (Pet. App. 29, 31-32), its conclusion in this case conflicts with the decisions of several other circuits. Three circuits categorically foreclose a First Amendment damages claim for retaliatory arrest against an officer whose actions are supported by probable cause. Among the courts that have squarely addressed the question, only the court of appeals here—and possibly, in some circumstances, the Ninth Circuit—would allow such a claim to proceed.

1. Even before *Hartman*, both the Second and Eleventh Circuits had held that an officer who has probable cause to arrest a suspect may not be found liable under the First Amendment for retaliatory arrest. In *Curley* v. *Village of Suffern*, 268 F.3d 65 (2001), the Second Circuit rejected a former political candidate's claim that his arrest was in retaliation for his criticism of the police commissioner and police chief, reasoning that "because defendants had probable cause to arrest plaintiff, an inquiry into the underlying motive for the arrest need not be undertaken." *Id.* at 73. Similarly, the Eleventh Circuit in *Dahl* v. *Holley*, 312 F.3d 1228 (2002), held that "the existence of probable cause to arrest Dahl defeat-[ed]" her claim that "she was arrested in retaliation for her constitutionally protected speech against the police department's recruitment and use of confidential informants." *Id.* at 1236.

Indeed, under both circuits' precedent, a law-enforcement officer would likely receive qualified immunity from First Amendment retaliatory-arrest liability in any case where there is "arguable" probable cause. The Eleventh Circuit has squarely held, and the Second Circuit has suggested, that qualified immunity is appro-

priate in any case where an officer in the defendant's position could reasonably believe that probable cause supported the arrest, even if such a belief would be mistaken. See *Redd* v. *City of Enterprise*, 140 F.3d 1378, 1383 (11th Cir. 1998) ("Because we hold that the officers had arguable probable cause to arrest Anderson for disorderly conduct, we must hold that the officers are also entitled to qualified immunity from the plaintiffs' First Amendment claims."); *Singer* v. *Fulton County Sheriff*, 63 F.3d 110, 120 (2d Cir. 1995) ("[I]f the officer either had probable cause or was qualifiedly immune from subsequent suit (due to an objectively reasonable belief that he had probable cause), then we will not examine the officer's underlying motive in arresting and charging the plaintiff."), cert. denied, 517 U.S. 1189 (1996); see also *Phillips* v. *Irvin*, 222 Fed. Appx. 928, 929 (11th Cir. 2007) (post-*Hartman* decision relying on *Redd* for the proposition that to receive qualified immunity from a First Amendment retaliatory-arrest claim, the defendant "only needed to establish *arguable* probable cause").

Following *Hartman*, the Eighth Circuit reached a similar conclusion. The Eighth Circuit's decision in *McCabe* v. *Parker*, 608 F.3d 1068 (2010), like the court of appeals' decision here, involved an arrest initiated by Secret Service agents in their protective capacity—in that case, at a political rally where then-President George W. Bush was scheduled to speak. *Id.* at 1070-1073. The court held in *McCabe* that the plaintiffs' First Amendment retaliatory-arrest claim failed because "[t]he totality of the circumstances present in this case support[ed] a finding of arguable probable cause" to believe that the plaintiffs had violated 18 U.S.C. 3056(d), which prohibits resisting federal law-enforcement offi-

cers in the performance of their statutorily authorized protective functions. 608 F.3d at 1078-1079; see also *id.* at 1075 (citing *Williams* v. *City of Carl Junction*, 480 F.3d 871, 876 (8th Cir. 2007), for the proposition that *Hartman* applies to retaliatory-arrest claims). Thus, under the Eighth Circuit's rule, as well as the similar rules in the Second and Eleventh Circuits, petitioners in this case would not be facing constitutional liability for a retaliatory arrest.

2. The court of appeals purported (Pet. App. 32) to find support for its contrary conclusion in the Ninth Circuit's decision in *Skoog* v. *County of Clackamas*, 469 F.3d 1221 (2006). The Ninth Circuit in that case found *Hartman*'s no-probable-cause requirement inapplicable to a plaintiff's claim that a police officer had obtained and executed a warrant in retaliation for filing a lawsuit. *Id.* at 1231-1235. Subsequent Ninth Circuit decisions, however, have sometimes treated the absence of probable cause as an element of a First Amendment retaliatory-arrest claim. Compare *Beck* v. *City of Upland*, 527 F.3d 853, 863-864, 866, 869 (2008) (treating the absence of probable cause as an element of the plaintiff's retaliatory-arrest claim), with *Dietrich* v. *John Ascuaga's Nugget*, 548 F.3d 892, 900-901 (2008) (concluding that the absence of probable cause was not an element of the plaintiff's retaliatory-arrest claim). Although the Ninth Circuit appears to believe that its precedents on this issue are consistent, see *id.* at 901 n.5 (citing *Skoog* and *Beck*), the precise set of circumstances in which the Ninth Circuit will apply a no-probable-cause requirement is not entirely clear.

In any event, regardless whether the Ninth Circuit would agree with the decision of the court of appeals here, the conflict between that decision and the deci-

sions of the Second, Eighth, and Eleventh Circuits warrants this Court's review. There is little chance that the court of appeals, which denied en banc review in this case despite its awareness of a circuit conflict, see Pet. App. 29, 31-32, 62-63, will resolve that conflict on its own. And the facts of this case highlight the difficulty that the conflict presents for federal law-enforcement officers. Secret Service agents may be called upon to perform their protective duties in any jurisdiction in the United States, and their training is intended to apply nationwide. It is untenable for an agent on a traveling protective detail to feel comfortable arresting suspects based on probable cause in some locations, but in other locations to have to worry about a lawsuit, a trial, and potential monetary liability. Cf. *al-Kidd*, 131 S. Ct. at 2087 (Kennedy, J., concurring) ("If national officeholders were subject to personal liability whenever they confronted disagreement among appellate courts, those officers would be deterred from full use of their legal authority."). Other federal law-enforcement agents who must act across jurisdictional lines—including, for example, agents of the Federal Bureau of Investigation, the Drug Enforcement Administration, or the Internal Revenue Service—would face similar concerns. This Court's intervention is necessary to ensure that federal law-enforcement officers can carry out their duties consistently and without concern about unwarranted *Bivens* suits.

C. The Petition Presents A Question Of Recurring Importance

The question presented in this case is of broad significance to law-enforcement officers in general and the Secret Service in particular. The Court granted certio-

rari in *Hartman* to address a similar circuit conflict concerning the requirements to plead and prove a First Amendment retaliatory-prosecution claim. 547 U.S. at 255-256. The analogous issue in the context of allegedly retaliatory arrests potentially has far greater importance. In the most recent year for which final data are available, state and local law-enforcement agencies alone made more than 13.5 million arrests. Federal Bureau of Investigation, *Crime in the United States, 2009*, http:// www2.fbi.gov/ucr/cius2009/data/table_29.html (Sept. 2010). Furthermore, in the common scenario where there is both an arrest and a prosecution, the court of appeals' decision enables a plaintiff to avoid *Hartman*'s no-probable-cause requirement simply by reframing his claim as one for retaliatory arrest rather than retaliatory prosecution.

The impact of the court of appeals' decision is not limited to cases in which a law-enforcement officer actually acts with a retaliatory motive, but instead extends to any case in which a plaintiff might plausibly claim that the officer has done so. Under the court of appeals' decision, if a suspect's comments form part of the backdrop against which the arrest takes place, and disturb or appear to anger the arresting officer, a trial is warranted. Pet. App. 25-26. On that view, practically anyone arrested for violating a valid time, place, or manner restriction, or any arrestee who directs a slur at officers before his arrest, could potentially proceed all the way to trial on a retaliatory-arrest claim. And "[b]ecause an official's state of mind is easy to allege and hard to disprove, insubstantial claims that turn on improper intent may be less amenable to summary disposition than other types of claims against government officials." *Crawford-El* v. *Britton*, 523 U.S. 574, 584-585 (1998)

(internal quotation marks and citation omitted). Indeed, the court of appeals' decision gives suspects the perverse incentive to make statements designed to anger officers in the hope that fear of constitutional-tort liability will deter arrest.

The court of appeals' decision creates especially difficult problems for Secret Service agents, who frequently operate in politically-charged environments. Cf. *Hunter*, 502 U.S. at 229 (Scalia, J., concurring in the judgment) (agreeing that Court should reverse even fact-bound error in *Bivens* suit against Secret Service agents because it is "worthwhile to establish that this Court will not let such a mistake stand with respect to those who guard the life of the President"). Those agents protect not only the President and Vice President, 18 U.S.C. 3056(a)(1), but also other political figures such as foreign heads of state (and, potentially, other foreign dignitaries), 18 U.S.C. 3056(a)(5)-(6), as well as presidential and vice-presidential candidates, 18 U.S.C. 3056(a)(7). They also sometimes provide security at "special events of national significance," 18 U.S.C. 3056(e)(1), which can include political activities like major-party presidential nominating conventions. In all of these situations, there is a high likelihood that the circumstances surrounding a potential arrest will involve expressive activity. See, *e.g.*, *Saucier*, 533 U.S. at 197-198 (detention of political protestor). In deciding whether the arrest is warranted, these agents "should not err always on the side of caution because they fear being sued." *Hunter*, 502 U.S. at 229 (internal quotation marks and citation omitted). To prevent that possibility, and for the other reasons discussed above, this Court should grant certiorari and reverse the court of appeals' decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
TONY WEST
Assistant Attorney General
SRI SRINIVASAN
Deputy Solicitor General
BETH S. BRINKMANN
Deputy Assistant Attorney General
ERIC J. FEIGIN
Assistant to the Solicitor General
BARBARA L. HERWIG
TEAL LUTHY MILLER
Attorneys

SEPTEMBER 2011