No. 11-262

IN THE

Supreme Court of the United States

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

v.

STEVEN HOWARDS,
Respondent.

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

BRIEF FOR THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND UNITED STATES CONFERENCE OF MAYORS, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Whether a person who is arrested upon probable cause is barred from bringing a First Amendment retaliatory arrest claim against the arresting officer?

Whether the Secret Service agents in this case were properly denied qualified immunity?

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE* [1]

Amici and their members represent all levels and aspects of state and local government including law enforcement agencies such as state police, county sheriff departments, and municipal police forces. *Amici* and their members have an interest in ensuring that the police officers they employ to protect the public safety are able to arrest citizens based upon probable cause without fearing the officers will be sued for money damages for First Amendment violations. *Amici* and their members likewise have an interest in ensuring that police officers are granted qualified immunity when the law isn't clearly established as their members may pay the money damages.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 of appointed chief executives and assistants serving cities, counties, towns, and regional entities. Its mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici* and their counsel, has made a monetary contribution intended to fund the preparation or submission of this brief. *See* Rule 37.

international clearinghouse for legal information and cooperation on municipal legal matters.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. NACo provides essential services to the nation's 3,068 counties through advocacy, education, and research.

Founded in 1908, the National Governors Association (NGA) is the collective voice of the nation's governors. Its members are the governors of the 50 states, three territories, and two commonwealths.

The National League of Cities (NLC), founded in 1924, is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with 49 state municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with populations of more than 30,000. There are over 1,200 such cities in the country today. Each of these cities is represented in the Conference by its chief elected official, the mayor.

STATEMENT

This case arises from the arrest of Steven Howards following an encounter with Vice President Dick Cheney at an outdoor shopping mall. Pet. App. at 5. Petitioners Gus Reichle and Dan Doyle were part of the Secret Service team assigned to protect the Vice President. *Id.* The mall had not been screened for weapons. *Id.*

Prior to the encounter, Agent Doyle overhead Mr. Howards speaking into his cell phone, "I'm going to ask him how many kids he's killed today." *Id.* Mr. Howards approached the Vice-President holding an opaque bag, told the Vice-President that his policies in Iraq were disgusting, and then made unsolicited physical contact with the Vice President. *Id.*

The foregoing information was relayed to Agent Reichle who then approached Mr. Howards, presented his badge, and asked to speak with Mr. Howards. *Id.* at 5-6. Mr. Howards was initially uncooperative, and then did not answer truthfully when asked whether he had made contact with the Vice President. *Id.* at 6. Mr. Howards was arrested for harassment, held for a few hours, then released. *Id.* State charges were dismissed. No federal charges were filed. *Id.*

Mr. Howards brought a *Bivens* action against the Petitioners and others alleging that he was arrested without probable cause in violation of the Fourth Amendment and in retaliation for the exercise of his First Amendment rights. *Howards v. McLaughlin*, 634 F.3d 1131 (10th Cir. 2011). Petitioners moved for summary judgment on the basis of qualified immunity, but the motion was denied. 634 F.3d at 1138. Petitioners took an interlocutory appeal.

The Court of Appeals for the Tenth Circuit reversed in part, holding that taking the facts in the light most favorable to Mr. Howards, Petitioners had probable cause to arrest him for lying to them. *Id.* at 1142. Therefore, Petitioners were entitled to qualified immunity on Mr. Howards' Fourth Amendment claim. *Id.*

Nonetheless, the court of appeals held that prior circuit precedent permitted a plaintiff to pursue a

First Amendment retaliatory arrest claim notwithstanding the existence of probable cause to make the arrest. *Id.* at 1148-49. The court then held that this Court's decision in *Hartman v. Moore*, 547 U.S. 250 (2006), which held that a plaintiff bringing a retaliatory prosecution claim must plead and prove a lack of probable cause, did not affect or even unsettle prior circuit precedent. Therefore, the court affirmed the trial court's denial of the Petitioners' motion for summary judgment on the First Amendment claim. 634 F.3d at 1148.

SUMMARY OF ARGUMENT

In this case this Court must balance the rights of citizens to speak with the rights of state and local police officers to make arrests where probable cause is present. This balance should weigh in favor of police officers who may otherwise be the victim of lawsuits for money damages, which may arise often and are difficult to defend. Retaliatory arrest claims are easy for a citizen to allege and difficult for a police officer to disprove. If First Amendment retaliatory arrest claims are allowed to go forward even where probable cause is present, state and local police officers may be disinclined to make arrests, which will be detrimental to public safety. And the rationale for the no-probable-cause requirement for First Amendment retaliatory prosecution claims adopted by this Court in *Hartman v. Moore*, 547 U.S. 250 (2006), applies equally to retaliatory arrest claims.

The Secret Service agents in this case should have been granted qualified immunity. The impact of *Hartman* on previous Tenth Circuit retaliatory arrest case law was unknown until the Tenth Circuit ruled in this case. Because not even experienced lawyers

could predict how the Tenth Circuit would apply *Hartman* to retaliatory arrests claims, qualified immunity should be granted to police officers asked, practically speaking, to do just that.

ARGUMENT

I. PROBABLE CAUSE SHOULD BAR FIRST AMENDMENT RETALIATORY ARREST CLAIMS.

A. State and Local Law Enforcement Will Be Significantly Impeded If First Amendment Retaliatory Arrest Claims Are Permitted When Probable Cause Supported The Arrest.

The guarantees of the Free Speech Clause prohibit government officials from taking retaliatory action against an individual because of an exercise of his or her free speech rights. *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998). Persons who believe that government officials retaliated against them for an exercise of their free speech rights may bring an action for money damages and attorney fees pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1988. Consistent with this framework, citizens who have been arrested *without probable cause* in retaliation for constitutionally protected expression state a valid First Amendment claim. *See generally Kennedy v. City of Villa Heights*, 635 F.3d 210 (6th Cir. 2011) (denying summary judgment to police officer where arrest of citizen lacked probable cause); *Jones. v. Parmley*, 465 F.3d 46 (2d Cir. 2006) (same). This case, however, arises out of a narrow species of First Amendment retaliation suits in which the plaintiff was lawfully arrested *based upon an objective showing of probable cause*.

While the facts in this case involve federal officers protecting the Vice President of the United States, the vast majority of cases addressing this issue involve local law enforcement officials. *See, e.g., Kennedy v. City of Villa Hills*, 635 F.3d 210 (action against municipal police officer); *Mesa v. Prejean*, 543 F.3d 264 (5th Cir. 2008) (same); *Beck v. City of Upland*, 527 F.3d 853 (9th Cir. 2008) (same); *King v. Ambs*, 519 F.3d 607 (6th Cir. 2008) (action against township police officer); *Williams v. City of Carl Junction*, 480 F.3d 871, 874-75 (8th Cir. 2007) (action against mayor and police chief); *Leonard v. Robinson*, 477 F.3d 46 (6th Cir. 2007) (action against municipal police officer); *Skoog v. County of Clackamas*, 469 F.2d 1221 (9th Cir. 2006) (action against county sheriff); *Jones v. Parmley*, 465 F.3d 46 (action against sheriff's deputies); *Barnes v. Wright*, 449 F.3d 709, 711-13 (6th Cir. 2006) (action against conservation officer); *Keenan v. Tejeda*, 290 F.3d 252, 256-57 (5th Cir. 2002) (action against county constables); *Curley v. Village of Suffern*, 268 F.3d 65, 68, 73 (2d Cir. 2001) (action against municipal police officers); *Smithson v. Aldrich*, 235 F.3d 1058, 1060 (8th Cir. 2000) (same); *Reed v. City of Enterprise*, 140 F.3d 1378 (11th Cir. 1998) (same); *Singer v. Fulton County Sheriff*, 63 F.3d 110, 12-13 (2d Cir. 1995) (action against county sheriff); *Mozzochi v. Borden*, 959 F.2d 1174 (2d Cir. 1992) (action against town manager and police officer).

State and local police officers protect the public peace in a variety of ways, ranging from working in conjunction with federal authorities on security arrangements for the President and Vice President to removing protesters from public spaces when they have violated the law. As discussed in more detail below, in almost every interaction a police officer has,

he or she encounters speech protected by the First Amendment. As a result, the Court's disposition of this case will significantly affect the policing practices of state and local law enforcement officers.

This Court acknowledged in *Crawford-El* that a government official's motives are "easy to allege and hard to disprove." 523 U.S. at 585. So it is easy for an arrestee who called an officer a "fat slob" to claim this was the "real" reason the officer arrested him. And it is hard for the officer to prove she "really" arrested him for loitering in violation of a local ordinance. In this case this Court must strike a balance between the rights of citizens to express themselves and the rights of police officers to make lawful arrests. This Court should strike this balance in favor of state and local police officers who will otherwise be subject to lawsuits for money damages that are difficult to disprove.

1. Almost Every Persons Arrested Might Be Able To Subject Officers To A First Amendment Retaliation Claim.

In *Hartman v. Moore*, 547 U.S. 250, 258-59 (2006), this Court was skeptical that the volume of litigation involving retaliatory prosecutions in violation of the First Amendment was a reason to require the absence of probable cause. But arrests are very different from prosecutions when it comes to free speech. Most people facing prosecution have not spoken publically about a matter related to their prosecution like the Respondent in *Hartman*. By contrast, almost every arrest involves some verbal exchange between the officer and the arrestee.

Law enforcement officers patrol the streets, sidewalks, and parks—spaces that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Education Association v. Perry Local Educators' Association*, 469 U.S. 37, 45 (1983). Virtually all speech that an officer encounters is protected by the First Amendment even if it is hostile,[2] profane,[3] or intended to cause discomfort.[4] And much of that abrasive speech is directed toward law enforcement officers. *See City of Houston v. Hill*, 482 U.S. 451, 462 (1987) (police must exhibit a higher degree of restraint responding to "fighting words"). So, every arrest could involve a possible First Amendment claim unless the arrestee is totally silent. And arrestees don't even have to speak to be protected by the First Amendment; an expressive message on a t-shirt, hat, or bumper sticker also may be protected by the First Amendment.[5]

Lower court case law reveals the range of speech that has accompanied lawful arrests. Examples include the lawful arrest of a local activist/publisher for taking goods from a local market,[6] the lawful issuance of more than two dozen citations to a self-described "pain in the neck,"[7] the lawful arrest of an unsuccessful mayoral candidate for assault in a

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[2] *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

[3] *Cohen v. California*, 403 U.S. 15 (1971).

[4] *Texas v. Johnson*, 491 U.S. 397 (1989).

[5] *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969).

[6] *Singer*, 63 F.3d at 12-13.

[7] *Williams*, 480 F.3d at 874-75.

barroom brawl,[8] the lawful arrest of a bar owner for playing amplified music without a permit after he incited the disappointed crowd to begin an obscene chant,[9] the lawful arrest of a sidewalk preacher for disorderly conduct,[10] and the lawful arrest of a gun brandishing citizen who accused a conservation officer of failing to do his job.[11]

There are probably no better and more current examples of the potential for myriad First Amendment retaliatory arrest claims than cases arising out of the "Occupy" movement. OccupyArrests.com tracks the "total number of Occupy protesters arrested around the U.S. since Occupy Wall Street began on September 17, 2011." OccupyArrests.com (Jan. 16, 2012), http:/cupyarrests.moonfruit.com/. As of January 11, 2012, the number was nearly 6,000. *Id*. Anecdotal evidence suggests that many of these arrests are supported by probable cause. *See, e.g.*, Associated Press, *Occupy Protestors Arrested at Iowa Campaign Offices*, NPR, Dec. 31, 2011, http://www.npr.org/2011/12/31/144528950/occupy-protesters-arrested-at-iowa-campaign-offices (trespass); James Lynch, *At Least Eleven Occupy Protesters Arrested in Clashes at Port of Seattle*, Q13 FOX NEWS, Dec. 12, 2011, http://www.q13fox.com/news/kcpq-occupy-protests-plan-to-blockade-port-of-seattle-20111208,0,1713059.story (throwing bags of paint at officers and police-mounted horses); *Mass Arrest at 'Occupy' Protest in Chicago*, RT.COM, Oct. 16, 2011, http://rt.com/news/chicago-protest-arrest-police-971/ (refusing to leave

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[8] *Curley*, 268 F.3d at 65.

[9] *Smithson*, 235 F.3d at 1060.

[10] *Reed*, 140 F.3d at 1380.

[11] *Barnes*, 449 F.3d at 711-13.

a park after 11PM in violation of an ordinance). Despite these violations, any "Occupy" protester could claim he or she was "really" arrested for protesting—not trespass, disorderly conduct, an ordinance violation, etc. The "Occupy" protesters represent only a small (but rapidly growing) subset of arrestees who will have a First Amendment retaliatory arrest claim unless this Court disallows such claims if the arrest was supported by probable cause.

2. Officers Who Arrest Someone for Probable Cause Rather Than His or Her Speech Will Have Difficulty Defending Themselves.

If probable cause does not bar First Amendment retaliatory arrest claims, courts will apply *Mt. Healthy* mixed-motive analysis to determine if the officer is liable. *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 287 (1977). Under *Mt. Healthy*, a plaintiff must demonstrate that he or she engaged in protected speech and that the speech was a motivating factor in the defendant's decision. The defendant can defend itself by demonstrating "that it would have reached the same decision . . . in the absence of the protected conduct." 429 U.S. at 287.

As mentioned above, motivation is easy to allege but hard to disprove. It is especially hard to disprove at the summary judgment stage where the presence of protected speech in conjunction with the contested action may be sufficient to create a genuine issue of material fact. State and local police officers absorb the speech they hear—like everything else they encounter—through a public safety filter. So if a speaker is denouncing his spouse, his child, a stranger, a well-known politician, or even the officer, the officer is going to be wondering whether such

statements could lead to domestic violence, are indicative of child abuse, might lead to a breach of the peace, or are indicative of intoxication.

It is difficult for a police officer to explain—and for a court to sort out—whether the officer hearing the speech in the above paragraph was motivated by concern a crime had been or would be committed based on instincts and experience—or because the officer simply found the speech offensive. Police officers—unlike almost every other public employee other than perhaps teachers—routinely hear offensive speech and encounter offensive behavior that is often directed at them personally. It may be difficult to believe any person would not react negatively to such speech. Yet police generally have training and experience to expect this speech and not react to it or take it personally—even if it is personal. *See King*, 519 F.3d at 607 ("King's statements were not directed at Officer Ambs in any personal way, and King offers no evidence to suggest that Officer Ambs was motivated by the content of King's statements rather than the fact of the repeated obstruction.").

A second reason officers who arrest someone for probable cause and not protected speech will have difficulty defending themselves is that in the fast moving events of the streets, arrests often transpire in minutes, or even seconds. An officer has to respond to a situation he or she encounters then and there. Particularly if the arrestee is potentially dangerous, the officer will have no time to document his or her "real" reasons for the arrest. And the officer will have no time before the arrest to first consult with a colleague, a supervisor, or a therapist about whether personal bias, hurt feelings, or subconscious feelings generated by speech might "really" be

motivating the arrest rather than the obvious legal violation.

State and local police officers will have particular difficulty defending themselves when they properly rely on constitutionally protected speech in the determining whether there is probable cause to make an arrest. Probable cause is a totality of the circumstances inquiry. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Protected speech is not exempt from the probable cause inquiry. Indeed, there are circumstances in which constitutionally protected speech *is* the "but-for" cause of a lawful arrest.

For example, Thomas Jefferson's aphorism "From time to time, the tree of liberty must be watered with the blood of patriots and tyrants" is constitutionally protected speech. Yet, when that aphorism appears on the T-shirt of a driver who has been pulled over for expired license plates shortly after a federal office building has been bombed, the constitutionally protected speech on the shirt may suggest that the young man wearing the shirt had something to do with the bombing. Was the protected speech a motivating factor in the arrest? Certainly. Would the arrest have been made in the absence of the protected speech? Perhaps not. Under the *Mt. Healthy* framework, how will the officer in this situation be able to defend a First Amendment claim when constitutionally protected speech was relied on in the probable cause inquiry—and properly so?

3. The Presence of Constitutionally Protected Speech May Deter Officers From Making Lawful Arrests.

If this Court rules First Amendment retaliatory arrest claims are not barred by probable cause a state

or local police officer will know that a shop lifter or even a bank robber wearing an "Cops Suck" t-shirt may later "realize" he or she has a First Amendment retaliatory arrest claim. Officers, who usually have discretion to not arrest, should not be put in the position where doing the right thing—making the arrest regardless of the speech—will possibly subject them to a lawsuit for money damages.

Officers might be most reticent to arrest where, as described in the section immediately above, the constitutionally protected speech is a contributing factor to the probable cause analysis because these claims will be the hardest to defend. However, case law suggests that constitutionally protected speech often is indicative of the possibility a very serious crime may be committed. *See, e.g., Fogel v. Collins*, 531 F.3d 824, 827 (9th Cir. 2008) (police called to investigate van with the words "I AM A FUCKING SUICIDE BOMBER COMMUNIST TERRORIST" "PULL ME OVER, I DARE YA" written on back); *Ponce v. Socorro Independent School District*, 508 F.3d 765, 767 n. 1 (5th Cir. 2007) (high school student arrested after discovery of notebook that, among other things, detailed plans for Columbine style attack on local high school). Similarly, political assassination and crimes of terror are crimes of ideology that may be revealed through the constitutionally protected statements of the perpetrator. State and local police officers may be deterred from making arrests particularly where constitutionally protected speech contributes to the probable cause analysis of very serious possible crimes, unless this Court adopts a no-probable-cause rule for retaliatory arrest claims.

4. Savvy Arrestees May Purposefully Engage in Constitutionally Protected Speech to Avoid Arrest.

Unfortunately, many arrestees may be savvy, having been arrested multiple times. *See Recidivism*, OFFICE OF JUSTICE PROGRAMS, http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=17 (last visited Jan. 16, 2012) ("[o]f the 272,111 persons released from prisons in 15 states in 1994, an estimated 67.5% were rearrested for a felony or serious misdemeanor within 3 years"). A savvy arrestee—particularly one who has been arrested for a petty or more vague offense (like disorderly conduct)—will know that he or she can create a First Amendment case by simply stating something awful or politically charged to the officer, unless this Court bars First Amendment retaliatory arrest claims based on probable cause.

The officer might think twice about arresting the person in light of a possible lawsuit. Even if the officer knows he or she likely would win because a First Amendment case would be weak, defending any lawsuit will be expensive, time consuming, and damaging to his or her career. At best, a savvy arrestee will now have a bargaining chip—a potential First Amendment lawsuit—in negotiating a sentence for his or her underlying offense, which will lead to a lower sentence. At worst, the police officer will simply abandon the arrest. Either result is detrimental to public safety and illustrates how the legitimate authority of state and local police is undermined.

B. True Victims of First Amendment Retaliatory Arrest Claims Have Recourse Other Than Litigation.

Where a police officer admits the real reason he or she arrested a person was protected First Amend-

ment speech or it is completely obvious (for example, the only drunken college students a campus police officer arrested for the entire year wore t-shirts with similar political messages), litigation is not the citizen's only option for seeking consequences for the First Amendment violation. The citizen also may complain to the police department employing the officer about the First Amendment violation. If the complaint has merit, the offending officer likely will be disciplined.

State and local law enforcement officers are required to comply with federal and state laws, local ordinances, and department rules and regulations or they are subject to discipline. Most police departments—in big and small cities—have established procedures for receiving and processing complaints against police officers. *See, e.g., How to File a Complaint*, CITY OF CHICAGO INDEPENDENT REVIEW AUTHORITY, http://www.iprachicago.org/howtofile.html (last visited Jan. 16, 2012); *Forms and General Information*, CITY OF MT. PLEASANT, MICHIGAN, http://www.iprachicago.org/howtofile.html (last visited Jan. 16, 2012) (Mt. Pleasant, Michigan is a city of about 26,000 people). Big cities like Washington, D.C., have entire offices dedicated to receiving and investigating complaints against police officers. OFFICE OF POLICE COMPLAINTS (Jan. 16, 2012), http://policecomplaints.dc.gov/occr/site/default.asp. At least one state, California, requires all police departments in the state to adopt written complaint procedures. *See Personnel Complaint Procedure*, SACRAMENTO POLICE DEPARTMENT, http://www.sacpd.org/contact/complaint/ (last visited Jan. 16, 2012) (discussing CAL. PENAL § 832.5(a) which states: "Each department or agency in this State which employs peace officers shall establish a procedure to investi-

gate citizens' complaints against the personnel of such departments or agencies, and shall make a written description of the procedure available to the public."). Police department websites generally explain when and how to file a complaint, provide a complaint form, explain when and how the complaint is investigated, what the results of the investigation might be, when and how the complainant will be notified of the results, and what appeal procedure is available. *See, e.g., City of Rochester*, ROCHESTER POLICE DEPARTMENT CITIZEN COMPLAINT PROCESS, http://www.cityofrochester.gov/rpdcomplaintprocess/ (last visited Jan. 16, 2012).

Violation of federal law generally appears to be grounds for a valid complaint against a police officer. *See, e.g., Police Department*, TOWN OF MADISON, http://www.town.madison.wi.us/police/complaint.html (last visited Jan. 16, 2012) ("Complaints can be filed if you believe a police officer employed by the Town of Madison has violated a department rule, town ordinance, state or federal law, or standards of acceptable conduct."). Consequences for a valid complaint generally include disciplinary action against the offending officer or criminal charges if appropriate or a change in department policy. *See, e.g., Citizen Complaints*, CITY OF MILWAUKEE, http://city.milwaukee.gov/Police/CitizenComplaints.htm (last visited Jan. 16, 2012) ("If the Chief of Police determines there is a violation of Department Rules and Procedures, federal or state laws, ordinances of the city of Milwaukee, or policies and procedures of the Milwaukee Police Department, criminal charges will be sought, disciplinary action and or a change of policy may result.").

In short, where a police officer admits (or it is obvious) he or she arrested a citizen in violation of his or her First Amendment rights—even if probable cause exists for the arrest—in most, if not all, jurisdictions a citizen will be able to bring a complaint to the police department about the violation. If violations of federal law are actionable under the department's complaint procedure it is likely the offending officer will be disciplined. While a sustained complaint against a police officer will not result in money damages it may lead to a change in behavior by the arresting officer and even the entire police department.

C. The Rationale of *Hartman* Extends to Retaliatory Arrest Claims.

In *Hartman*, this Court held that a plaintiff could not maintain a retaliatory prosecution action unless he or she could show the absence of probable cause for bringing the underlying criminal charges. The Court based this conclusion on three grounds: (1) evidence of probable cause is relevant to determining the motive for the prosecution, 547 U.S. at 259-61; (2) evidence of probable cause can help bridge a chain of causation, *id*. at 261-65; and (3) there is a presumption of prosecutorial regularity, *id.* at 263. All three grounds also justify holding that an absence of probable cause to arrest is an element of a retaliatory arrest claim.

First, evidence of probable cause supports the validity of a challenged arrest every bit as much as it supports the validity of a challenged prosecution. "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." *Hartman*, 547 U.S. at 265-66.

Second, evidence of probable cause helps bridge the chain of causation in retaliatory arrest cases. As this case demonstrates, the notion that retaliatory arrest cases inevitably will have a direct chain of causation ignores that arrests often are the product of teamwork, and the arresting officer may well be acting on information provided by others. So this factor weighs in favor of extending *Hartman* to retaliatory arrest claims.

Third, the objective presence of probable cause creates an evidentiary presumption of regularity that should be extended to the first line in the criminal justice system (arrests) if it has been afforded to the second (prosecutions). Because arrest is an inevitable precursor to prosecution, and even conviction, there is something anomalous about sanctioning an officer for arresting someone who may be validly arrested, prosecuted, and convicted, while all the other representatives in the criminal justice process—prosecutor, presiding judge, and jury—have absolute immunity.

II. THE TENTH CIRCUIT ERRED IN DENYING QUALIFIED IMMUNITY TO PETITIONERS.

At the very least, Petitioners are entitled to qualified immunity. When, as here, circuit court case law has been called into question by Supreme Court case law on a related subject, that old circuit court case law cannot be deemed "clearly established" when the circuit court has yet to rule on the impact of the new Supreme Court precedent. If it is, the fundamental purposes of qualified immunity are undermined and

lay persons are effectively required to accurately predict the legal rulings of judges.

Qualified immunity is available to a government defendant so long as the defendant's actions do not violate clearly established law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Three judgments underlie the doctrine of qualified immunity. First, there is a strong public interest in protecting public officials from the costs associated with litigation. 457 U.S. at 816. Qualified immunity allows public officials to terminate meritless claims at the earliest possible point. *Id*. at 814. Second, allegations of subjective motivation can be used to shield baseless claims from summary judgment. *Id.* at 817-18. Therefore, qualified immunity allows the public official to terminate the litigation by showing that his or her conduct was *objectively* reasonable. Finally, the objective legal reasonableness standard avoids the unfairness of imposing liability where the law is uncertain. *Id.* at 819.

All of these rationales for qualified immunity are undermined by denying it to the officers in this case who had no way of knowing the Tenth Circuit would not extend *Hartman* to retaliatory arrest claims. Tenth Circuit precedent on retaliatory arrests was no longer clearly established post-*Hartman*. Indeed, just days before the events in question here, the Sixth Circuit, which previously had agreed with the Tenth Circuit[12] that the presence of probable cause does not bar First Amendment retaliatory arrest claims, *Greene v. Barber*, 310 F.3d 889, 895-97 (6th Cir. 2002), held that *Hartman* modified its precedent, and that *Hartman*'s rule extended to First Amend-

[12] *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990).

ment retaliatory arrest claims. *Barnes*, 449 F.3d at 719-20.

Police officers and other government officials are lay people not legal scholars or legal psychics. The Tenth Circuit's prior position that probable cause does not bar First Amendment retaliatory arrest claims had been a minority position;[13] *Hartman* arose out of a species of cases that included both retaliatory prosecutions and arrest; and one of the other minority circuits had changed its position in light of *Hartman*. Given this, it is highly doubtful that any careful attorney advising a plaintiff on the likelihood of prevailing on a First Amendment retaliatory arrest claim in the Tenth Circuit after *Hartman* would tell the client anything other than it will depend upon how the Tenth Circuit applies *Hartman*. In short, until this Court or the Tenth Circuit addressed the

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[13] *Keenan*, 290 F.2d at 262 (Fifth Circuit holding that "If probable cause existed, however, or if reasonable police officers could believe that probable cause existed, they are exonerated"); *Curley*, 268 F.3d at 73 (Second Circuit holding "because defendants had probable cause to arrest plaintiff, an inquiry into the underlying motive for the arrest need not be taken"); *Smithson*, 235 F.3d at 1063 (Eighth Circuit holding "even if this pretextual argument were proven at trial, it would not nullify the finding of probable cause to believe that Smithson was violating the sound ordinance, nor would it prevent the application of the qualified immunity defense"); *Merkle v. Upper Durbin School District*, 211 F.3d 782, 794 (3d Cir. 2000) (noting that while police had probable cause to arrest teacher based on information provided by school authorities, issue of fact remained as to whether school authorities had probable cause to pursue teacher's prosecution); *Reed*, 140 F.3d at 1383 (Eleventh Circuit stating "Because we hold that the officers had arguable probable cause to arrest Anderson for disorderly conduct, we must also hold that the officers are also entitled to qualified immunity from the plaintiff's First Amendment claims").

effect of *Hartman* on retaliatory arrest cases, the law in the Tenth Circuit would remain unsettled. Petitioners here made the arrest while the law was still unsettled and should have been afforded qualified immunity.

CONCLUSION

In *Hartman*, this Court held that a plaintiff bringing a cause of action claiming that he or she was prosecuted in retaliation for an exercise of his or her First Amendment rights must plead and prove the absence of probable cause to support the prosecution. For the reasons stated above, there is no basis for applying a different rule to retaliatory arrest cases.

The decision below should be reversed.

Respectfully submitted,

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