No. 11-262

IN THE

Supreme Court of the United States

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

—v.—

STEVEN HOWARDS,
Respondent.

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

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF COLORADO AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Colorado is one of its statewide affiliates. Since its founding in 1920, the ACLU has appeared before this Court in numerous cases involving the First Amendment, both as direct counsel and as *amicus curiae*.

The question in this case is whether law enforcement officials who arrest someone for exercising his First Amendment rights can ever be sued for money damages if the arrest is otherwise supported by probable cause. That question raises issues of substantial importance to the ACLU and its members because freedom from retaliation is an essential ingredient of freedom of speech.

STATEMENT OF THE CASE

In June 2006, then Vice President Cheney visited an outdoor mall in Beaver Creek, Colorado. *Howards v. McLaughlin*, 634 F.3d. 1131, 1135 (10th Cir. 2011). Plaintiff/respondent Steven Howards was visiting the mall and saw the Vice President "interacting with the gathering crowd, greeting patrons, shaking hands, and posing for photographs."

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[1] Letter of consent to the filing of this brief have been submitted to the Clerk of the Court pursuant to Rule 37.3. No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation of submission of this brief.

Id. at 1136. Mr. Howards was talking on his cell phone at the time, and said: "I'm going to ask him [the Vice President] how many kids he's killed today." *Id.* (alteration in original). Agent Doyle, one of the Secret Service agents accompanying the Vice President, overheard this conversation. He subsequently acknowledged that the comment "'disturbed him.'" *Id.*

Mr. Howards "waited for his turn" to speak to the Vice President. *Id.* When his turn came, he told the Vice President that "'his policies in Iraq [were] disgusting.'" *Id.* The Vice President responded, "'Thank you.'" *Id.* "As he departed, Mr. Howards touched the Vice President's right shoulder with his open hand." *Id.*[2] Although the record is unclear, it appears that Mr. Howards was carrying a bag during this encounter (as, presumably were others) and that he (and others) were approaching the Vice President without going through a magnetometer. *Id.* at 1137. The Secret Service agents who observed the encounter concluded that the touch was insufficient to provide probable cause to arrest Mr. Howards. *Id.* at 1136. Mr. Howards was allowed by all of the Secret Service agents to leave the vicinity though two of the agents recommended that the Secret Service "speak with [him]." *Id.*

Mr. Howards proceeded to join his family, who were attending a piano recital at the mall. When he arrived at the piano recital, his wife asked him to

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[2] For purposes of the qualified immunity motion, the Tenth Circuit accepted respondent's characterization that his touch of the Vice President was an "open-handed pat on the shoulder." 634 F.3d at 1136 n.2.

accompany their younger son home. On their way out of the mall, the younger son "wandered off." *Id.* at 1137. While looking for his son, Mr. Howards was approached by Agent Reichle, who "requested to speak" with him. *Id.* at 1137.[3] Mr. Howards initially declined, but when he attempted to leave and resume his search for his son, Agent Reichle blocked his way and prevented him from leaving. *Id.*

Agent Reichle then asked Mr. Howards if he had assaulted the Vice President. In response, Mr. Howards replied that he should not be questioned for sharing his opinions with the Vice President. *Id.* The agent became "'visibly angry'" when Mr. Howards expressed his views about the war in Iraq. *Id.* The agent asked Mr. Howards if he had touched the Vice President and Mr. Howards falsely denied doing so. *Id.*

Mr. Howards was then arrested by Agent Reichle for "assault" on the basis of "'premeditation, the conversation on the cell phone, the fact that Mr. Howards 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 he had unsolicited contact'" with the Vice President. *Id.* at 1137-38 (alteration in original). The Secret Service took no further action. Instead, Mr. Howards was immediately turned over to the local police, detained for several hours and given a ticket for harassment. The prosecutor later dismissed all charges. *Id.* at 1138.

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[3] The Tenth Circuit decision does not indicate how far Mr. Howards was from the Vice President at this point.

After the charges were dismissed, Mr. Howards filed an action pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that his First and Fourth Amendment rights had been violated by the actions of the Secret Service agents. Defendants moved for summary judgment, which was denied by the district court on the grounds that there were facts in dispute. Because the motions were in part based on qualified immunity, defendants appealed. *Id.* at 1138.

The Tenth Circuit affirmed in part and reversed in part. With regard to the Fourth Amendment claim, the court of appeals ruled that the agents had probable cause to arrest Mr. Howards for violation of 18 U.S.C. § 1001 (knowingly and willfully making a "materially false" statement), noting that Mr. Howards admitted that he had responded falsely when asked by Agent Reichle whether he had touched the Vice President. *Howards*, 634 F.3d. at 1141-42.[4]

However, the court allowed the First Amendment claim to proceed against Agents Reichle and Doyle, rejecting their argument that they could not be sued for retaliation because they had probable cause under § 1001 to arrest Mr. Howards for lying to a federal agent. Summarizing the evidence of retaliation in the record, the Tenth Circuit wrote:

> Mr. Howards has provided facts which suggest Agents Doyle and Reichle may have been substantially motivated by Mr. Howards' speech when he was arrested. Agent Doyle

[4] The Fourth Amendment issue is not before the Court.

> overheard Mr. Howards say into his cell phone, "I'm going to ask him how many kids he's killed today." He admitted the comment "disturbed" him. He believed it was not "healthy" and was "[not] quite right" for someone to make such a comment to the Vice President. Similarly, Agent Reichle was told by Agent Doyle about Mr. Howards' cell phone conversation. Mr. Howards testified that when he told Agent Reichle "about the way [he] felt about the war in Iraq, Mr. Reichle became visibly angry...." Agent Reichle also admitted he considered this cell phone conversation when deciding to arrest Mr. Howards. Agents Doyle and Reichle do not dispute the district court's determination that "there is a question of fact on this element [of retaliation].... [because] there are conflicting accounts regarding which defendant knew what about plaintiff's cell phone conversation, when defendants knew it, and whether the conversation should be used to support probable cause."

Id. at 1145 (alterations in original) (citations to the record omitted).[5] One judge dissented on the basis of qualified immunity without directly reaching the question of whether probable cause to arrest automatically defeated a claim for First Amendment retaliation by the arresting officers.

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[5] The Tenth Circuit did affirm the dismissal of the retaliation claim against two other agents absent any evidence that they had acted with a retaliatory motive. *Id.* at 1149-50.

This Court granted certiorari to decide, in part, "[w]hether . . . the existence of probable cause to make an arrest" bars a First Amendment retaliatory arrest claim.

SUMMARY OF ARGUMENT

This Court should deny the writ of certiorari as improvidently granted. The Questions Presented assume there was probable cause to arrest Mr. Howards, but petitioners do not rely on the statute cited by the court of appeals and the court of appeals did not consider the statute now relied on by petitioners. Specifically, the Tenth Circuit found that there was probable cause to arrest Mr. Howards for a violation of 18 U.S.C. § 1001. By failing even to discuss § 1001 in their merits brief, petitioners have waived any argument under that statute in this Court. *See* Pet'rs' Br. at 51. Instead, petitioners rely exclusively on an argument that they had probable cause to arrest Mr. Howards for a violation of 18 U.S.C. § 3056(d). Because neither of the lower courts addressed the existence of probable cause under § 3056(d), and because this Court cannot reach the Questions Presented without first addressing the applicability of § 3056(d), the petition should be dismissed as improvidently granted.

On the merits, the issue before the Court is a narrow one. Probable cause is plainly relevant in a retaliation suit, and no party is claiming otherwise. But probable cause does not provide absolute immunity for retaliation suits under the First Amendment. This Court has repeatedly held that the First Amendment bars government officials from retaliating against the expression of constitutionally

protected views. Those rules do not change because the retaliation takes the form of an arrest. Indeed, there is no more coercive power that the government can exercise.

Under *Whren v. United States*, 517 U.S. 806 (1996), the Fourth Amendment is satisfied as long as there is probable cause to arrest, regardless of the motive of the arresting officer. Significantly, however, *Whren* also recognized that probable cause does not justify discrimination under the Equal Protection Clause. *Id.* at 813. The same principle applies to a First Amendment retaliation claim. As this Court has often explained, the prohibition against viewpoint discrimination has its roots in both the Equal Protection Clause and the First Amendment.

To be sure, the existence of probable cause establishes a constitutionally valid base for arrest. An arrest supported by probable cause is nonetheless unconstitutional under the First Amendment if it would not have occurred but for the exercise of constitutionally protected free speech rights, just as a public employee who might have been subject to dismissal for work related reasons can prevail by demonstrating that his dismissal was in fact based on First Amendment retaliation. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

The United States argues that probable cause should be dispositive when a First Amendment retaliation claim rests on an allegedly unconstitutional arrest because an improper motive is too easy to allege and would subject law enforcement officials to vexatious litigation. That argument suffers from two fatal flaws. First, as this

Court explained in *Crawford-El v. Britton*, 523 U.S. 574 (1998), the concerns raised by the government are properly addressed through qualified immunity and not by altering the elements of a retaliation claim or raising the pleading standards. Second, the government's argument applies equally to race discrimination claims, which also require proof of discriminatory intent. *Whren* correctly rejected that argument, which would shield law enforcement officials who utilize their authority to engage in discriminatory behavior.

Petitioners and their *amici* make several other arguments that should likewise be rejected. The United States urges this Court to hold that federal officials cannot be sued under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for a violation of First Amendment rights. U.S. Br. at 10-21. This Court has declined to adopt that position in the past and should not do so here. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009) ("[W]e assume, without deciding, that respondent's First Amendment claim is actionable under *Bivens*."). Petitioners argue that a split in the circuits compels a finding of qualified immunity. Pet'rs' Br. at 41-43. This Court has said otherwise. *See Hope v. Pelzer*, 536 U.S. 730, 747-48 (2002) (rejecting the argument that disagreement by judges prevents a finding that the law is clearly established). While *amici* believe that neither of these arguments have merit, we do not address them separately in this brief.

ARGUMENT

I. THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

The threshold Question Presented in this case is whether "the existence of probable cause to make an arrest" bars a First Amendment retaliation suit. In order to reach that question, the Court first must determine if "probable cause to make an arrest" existed in this case. The Tenth Circuit found that probable cause did exist to arrest Mr. Howards for a violation of 18 U.S.C. § 1001. Although petitioners advanced that argument in the lower courts and in their Petition for Certiorari, they have now abandoned it and rely exclusively on 18 U.S.C. § 3056(d). Pet'rs' Br. at 45-51.[6] The only reference to § 1001 in petitioners' brief (other than description of the holding of the Court of Appeals) is found on page 51 and at that point petitioners urge the Court to decide the case "even without considering the agents' probable cause to arrest under 18 U.S.C. § 1001."

In *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 527 (1994), the Court identified three factors that lead the Court to conclude that the issues "are not properly before the Court." First, the "argument was neither raised in nor addressed by the Court of Appeals." *See also Lawn v. United States*, 355 U.S. 339, 362 n.16 (1958); *Devenpeck v. Alford*, 543 U.S. 146, 156 (2004) (declining to decide

[6] The Solicitor General posits an additional basis, 18 U.S.C. § 1751(e) but the petitioners do not even mention that statute. U.S. Br. at 5.

probable cause issue not passed upon by the lower courts). That is true here as to petitioners' § 3056(d) argument. Second, the "contentions were not presented in the petition for writ of certiorari." *Posters 'N' Things*, 511 U.S. 527. That is true here as to petitioners' § 3056(d) argument. Third, "petitioners' brief on the merits fails to address the issue and therefore abandons it." *Id.; United States v. IBM*, 517 U.S. 843, 855 & n.3 (1996). That is true of petitioners' § 1001 argument. *See United States v. Jones*, 132 S. Ct. 945, 954 (2012) (deeming "forfeited" an argument that was neither raised nor considered below).

Petitioners did cite § 3056 in their Tenth Circuit brief but only for the proposition that § 3056 authorizes the Secret Service to arrest someone for lying in violation of § 1001.[7] Thus, the § 3056 claim below was wholly derivative of the § 1001 claim that petitioners have abandoned in this court. Pet'rs' Br. at 51. Petitioners argument in this Court, by contrast, is that probable cause existed to arrest Mr. Howards under § 3056.

In making a probable cause determination, courts are not bound by the legal basis asserted for the arrest if the facts known by the arresting officer support probable cause on some other legal ground. *Devenpeck,* 543 U.S. at 153. In this case, however, counsel have abandoned any legal basis other than § 3056(d), including the basis relied upon by the lower courts. It would be unwise for this Court to

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[7] Brief of Appellants Reichle and Doyle at 12, *Howards v. McLaughlin*, 634 F.3d 1131 (10th Cir. 2011) (No. 09-1202). *See also* Reply Brief of Appellants Reichle and Doyle, at 3.

resolve an issue of law not addressed by the lower courts (§ 3056(d)), or an issue of law abandoned by the petitioners (§ 1001).

It would be particularly inappropriate for this Court to decide the § 3056(d) issue in this case. Not only have neither of the lower courts addressed the applicability of the statute to the facts of this case, but there is apparently only one published lower court case interpreting the statute. *McCabe v. Parker*, 608 F.3d 1068 (8th Cir. 2010). The statute criminalizes anyone who "knowingly and willfully obstructs, resists, or interferes with a Federal law enforcement agent engaged in the performance of the protective functions [assigned the Secret Service]." 18 U.S.C. § 3056(d). This is not an assault statute or an "unsolicited contact" statute, but requires a showing that Mr. Howards obstructed the agents from protecting the Vice President. It would be an expansive reading of this statute to find obstruction based solely on Mr. Howards' insistence that he did not wish to continue the conversation with the agents[8] or on the basis that he was carrying a bag that the agents apparently never asked to inspect. It would be an even more expansive reading to conclude that Mr. Howards obstructed the Secret Service based on his statements of disagreement with the Vice President's policies. This Court ought not to rule on the application of § 3056 to these facts in the

[8] *See* Pet'rs' Br. at 48, 51 (a Secret Service agent has grounds to arrest anyone who refuses to talk to the agent). Mr. Howards, of course, did talk to the agents.

first instance; it should instead dismiss the petition as improvidently granted.[9]

Mr. Howards' actions may well have provided a basis for the Secret Service to approach him and seek to speak with him. They might have provided a basis for the Secret Service to prevent him from approaching the Vice President a second time, or for observing him at close range to see if he suspiciously reached into his bag. But, it is quite another thing to conclude, without the benefit of serious briefing or lower court analysis, that they provided probable cause for an arrest under § 3056(d).

II. THE EXISTENCE OF PROBABLE CAUSE DOES NOT AND SHOULD NOT PRECLUDE EVEN THE POSSIBILITY OF A FIRST AMENDMENT RETALIATION CLAIM.

1. This Court has repeatedly and consistently recognized, over many decades, that the First Amendment prohibits the government from retaliating against the expression of constitutionally protected speech. That is true whether the allegation is that the government intentionally misplaced a prisoner's property to punish him for his outspoken views and legal advocacy, *Crawford-El*, 523 U.S. 574, or fired a public teacher because he had written a letter to the editor criticizing the school administration, *Pickering v. Board of Education of*

[9] The Court in *Devenpeck* remanded for further consideration of the probable cause issue, 543 U.S. at 156, but it was not confronted with the abandonment issue raised by this record. In any event, this case will be returned to the district court for trial if the Court dismisses certiorari as improvidently granted.

Township High School District 205, 391 U.S. 563 (1968), or threatened to discharge non-policy making employees based on their political affiliation, *Branti v. Finkel*, 445 U.S. 507 (1980).[10]

As the Court explained in *Crawford-El*, "[t]he reason why such retaliation offends the Constitution is that it threatens to inhibit exercise of the protected right." 523 U.S. 589 n.10. For that reason, the Court recognized, retaliation is "akin to an 'unconstitutional condition' demanded for the receipt of a government-provided benefit." *Id.*, citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). In each instance, the government's punitive response to disfavored views or political associations violates the principle of viewpoint neutrality that lies at the core of the First Amendment. *See Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011).

As long ago as 1959, the Court held that the government cannot engage in viewpoint discrimination. *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of N.Y.*, 360 U.S. 684 (1959). The *Kingsley* Court held that government could not "prevent the exhibition of a motion picture because that picture advocates an idea—that adultery under certain circumstances may be proper behavior." *Id.* at 688. Even viewpoints antithetical to democracy itself are protected under the Constitution. *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969) (invalidating a statute that, among other things, criminalized the "mere advocacy" of

[10] The same principle is reflected in the loyalty oath cases from a generation earlier. *See, e.g.*, *Wieman v. Updegraff*, 344 U.S. 183 (1952).

violence "'as a means of accomplishing industrial or political reform.'"). "[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

Viewpoint discrimination strikes "at the very heart of constitutionally protected liberty." *Kingsley*, 360 U.S. at 688. "[P]unishment [on the basis of viewpoint] would be an unconstitutional abridgment of freedom of speech" and "cannot survive in a country which has the First Amendment." *Schacht v. United States*, 398 U.S. 58, 63 (1970). *See also Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." (citation and internal quotation marks omitted)); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (holding that, even in a nonpublic forum, "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."); *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 325 (7th Cir. 1985) ("The state may not ordain preferred viewpoints. . . . The Constitution forbids the state to declare one perspective right and silence opponents."), *aff'd*, 475 U.S. 1001 (1986).

In this case, the viewpoint expressed by Mr. Howard's criticism of Vice President Cheney involves core political speech. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346-347 (1995); *R.A.V. v. City*

of St. Paul, 505 U.S. 377 (1992); *Texas v. Johnson*, 491 U.S. 397 (1989); *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring) (expression may not be forbidden "merely because public officials disapprove the speaker's views.").

2. In *Mt. Healthy*, 429 U.S. 274, the Court set forth the standards and procedures to be used in analyzing viewpoint discrimination that involves retaliation against individuals (or groups) for expressing their constitutionally protected views. Under those standards, a retaliation claim is difficult to prove.[11] A plaintiff must first establish that his First Amendment comments were a "substantial factor" in the decision challenged. The burden then shifts to the defendant to show that he would have taken the same action without regard to plaintiff's speech. Even if the First Amendment comments were a "substantial factor," the plaintiff cannot prevail if the defendant can show that the action would have occurred anyway. *Id.* at 287.

No party in this case disputes that an arresting officer can rely on the existence of probable cause to arrest in defending against a First Amendment retaliation claim. Indeed, that factor will be indisputably relevant. The question in this case is whether it will be conclusive, or whether the *Mt. Healthy* framework should apply.

In *Whren*, this Court held that an officer's subjective motive for an arrest is irrelevant to a

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[11] A public employee alleging discrimination has the additional burden of proving that he was punished for his speech as a citizen, not his speech as an employee. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

Fourth Amendment claim because the only legally relevant question is whether the arrest was supported by probable cause. 517 U.S. at 806. At the same time, the Court was careful to note that the existence of probable cause does not foreclose the analytically distinct question of whether the government acted with discriminatory intent in violation of the Equal Protection Clause. 517 U.S. at 813. ("We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race.")

There is no reason to treat First Amendment retaliation claims any differently. This Court has always understood the doctrine of viewpoint neutrality as resting on equality principles that have their roots in both the Equal Protection Clause and the First Amendment. For example, in *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972), the Court summarized its holding by stating that, "under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." 408 U.S. at 96. If petitioners' arguments succeed in extinguishing the First Amendment claim, the analytical overlap would likely also extinguish the equal protection claim. This implicit overruling of both *Whren* and *Mosley* should be rejected.

An example illustrates the dangers of the petitioners' arguments. Assume two sets of demonstrators, placed equidistant from an intended audience just outside a properly constituted security zone. Assume further that the police announce that

if the people holding one viewpoint cross over into the security zone they will be arrested, but if the people who hold the opposite viewpoint do so, they will not be arrested. In both instances the police would have probable cause to arrest, but the intent and effect would be for the government to punish those with whom it disagrees.[12] Under petitioners' argument, the persons arrested would have no First Amendment claim and, implicitly, no equal protection claim.

At the very least, the allegations in this case share certain characteristics with that hypothetical for reasons that led the district court to deny petitioners' summary judgment motion. The agents admitted that at least one factor in their decision to arrest Mr. Howards was his viewpoint. Many of the rationales for arresting Mr. Howards, other than his comment on his cell phone, applied to others on that day who were not arrested. Others touched the Vice President. Pet'rs' Br. at 3. Others were presumably carrying bags or purses or backpacks. Immediately prior to arresting Mr. Howards, the arresting officer became "visibly angry" upon hearing Mr. Howards' views on the Iraq war. And, of course, there were alternatives available to the agents other than arrest such as preventing Mr. Howards from approaching the Vice President.

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[12] This hypothetical is not implausible. *Pahls v. Bd. of Cnty. Comm'rs,* No. Civ. 08-53 LH/ACT (D.N.M. Feb. 22, 2011), *available at* http://www.nmcourt.fed.us/Drs-Web/view-file?unique-identifier=0003597662-0000000000 (denying summary judgment in case alleging Secret Service and local police treated pro-Bush demonstrators more favorably than anti-Bush demonstrators), *appeal docketed*, No. 11-2055 (10th Cir. Mar. 16, 2011), No. 11-2059 (10th Cir. Mar. 24, 2011).

3. The United States suggests that equal protection claims are somehow based on more objective criteria than First Amendment retaliation claims. U.S. Br. at 17. The United States would thus apparently view the statement in *Mosley* that cases such as this raise overlapping First and Fourteenth Amendment claims as error. But even without *Mosley*, the argument by the United States is without merit. As this Court discussed in *Crawford-El*, the need to establish a discriminatory motive is a common element of both First Amendment retaliation claims and equal protection claims. 523 U.S. at 585. Thus, the distinctions proffered by the United States cannot be sustained. A decision to eliminate a First Amendment claim would inevitably lead to elimination of equal protection claims as well. The Court should not reach that decision.

It is also unnecessary to go as far as the government suggests. *Crawford-El* makes clear that any concerns about subjecting law enforcement officials to unwarranted liability in the face of legal uncertainty can be fully addressed through the qualified immunity inquiry and not by altering the elements of a First Amendment retaliation claim.

Notwithstanding this long history of protecting against retaliation on the basis of viewpoint, petitioners and their *amici* argue that this Court's decision in *Hartman v. Moore*, 547 U.S. 250 (2006), is fatal to the First Amendment retaliation claim in this case. *Hartman* cannot be read so broadly. *Hartman* held that federal investigators could not be sued under *Bivens* for "inducing prosecution in retaliation for speech," *id.* at 252, without alleging

and proving that the underlying arrest lacked probable cause. The Court relied, in large part, on the fact that any improper motive of the officer could not be imputed to the prosecutor. *Id.* at 259, 262. As the Tenth Circuit correctly understood, the *Hartman* Court was not extinguishing long-established substantive law but applying equally fundamental law that no party can obtain recovery from a person who did not cause the harm. Based on this rationale, the Tenth Circuit correctly found that *Hartman* did not preclude a suit for false arrest under the First Amendment based on the officer's desire to punish viewpoints with which the officer disagreed.

4. Petitioners and their *amici* (including the United States) raise various additional factors in urging this Court to extend *Hartman* beyond its causation rationale. Like the claim that subjective motivation is easy to allege and hard to disprove, virtually all of those factors were considered and rejected in *Crawford-El*. Thus, Petitioners and the United States emphasize that Secret Service agents often have to make split-second decisions affecting the lives and safety of others. That is, of course, true. It is also true for prison guards and police. But, as the facts alleged in *Crawford-El* and this case demonstrate, law enforcement officials, including Secret Service agents, can also make decisions slowly and deliberately and may decide on occasion to retaliate against someone because they disagree with that person's views. The fear that offenders will speak up at the time of arrest to manufacture an unworthy First Amendment claim would be equally applicable to inmates and to anyone arrested on the street. In each of these contexts, the need for split-second decisionmaking may be powerful evidence

against a claim of retaliatory motive. It is not a reason to create a new set of rules that immunize even retaliatory action and leave its victims without any meaningful remedy.

Petitioners and their *amici* also assert that there are occasions when it is appropriate for law enforcement officials to consider protected speech when deciding whether to exercise their discretion to arrest. For example, the United States suggests that a trespasser who "belligerently states" that "the government has no right to own property" is less likely to cease trespassing when confronted by the police than someone who is just taking a shortcut home. U.S. Br. at 26.[13] That hypothetical cannot support the weight that the government wants to put on it. Assuming the existence of probable cause, the fact that a suspect's speech may sometimes support the decision to arrest does not mean that the decision to arrest based on a suspect's speech is always appropriate and never subject to review in a subsequent damages action. A slight twist in the government's hypothesized facts makes that distinction evident. Suppose that a trespasser accuses the government of exercising its power of eminent domain to serve the rich rather than the poor, and he does so quietly rather than belligerently as he is leaving the property. Then suppose that, under these circumstances, the police choose to exercise their discretion to arrest the trespasser for his discontinued trespass because they are offended by his political views. And suppose, further, that all

[13] See also *Amici Curiae* Br. for Int'l City/Cnty. Mgmt. Ass'n, *et. al.*, at 12 (t-shirt quoting Thomas Jefferson can properly form the decisive basis for an arrest based on probable cause).

criminal charges were later dropped. Under the government's theory, even an act of undisguised political retaliation could not give rise to a damages action if there was probable cause to arrest. That is nothing more than an assertion that the First Amendment permits a police officer to arrest someone (if they have cause) solely because the officer disagrees with the political views of the person involved. It is difficult to reconcile such an assertion with the First Amendment.

In rejecting the argument that subjective motives should be irrelevant in First Amendment retaliation (and other) cases, this Court's decision in *Crawford-El* identified a series of "countervailing concerns that must be considered." 523 U.S. at 591. Each of those concerns is equally applicable here and supports the decision below. First, "'an action for damages may offer the only realistic avenue for vindication of constitutional guarantees.'" *Id.* at 591 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). In this case, neither petitioners nor the United States are suggesting there is another avenue for vindication of constitutional rights. Second, the availability of qualified immunity "eliminates all motive-based claims in which the official's conduct did not violate clearly established law," 523 U.S. at 592, while allowing recovery when clearly established law is disregarded. Third, a defendant who violates clearly established law can still escape liability by showing that he "would have reached the same decision in the absence of the protected conduct." *Id.* at 593. Fourth, district court judges have a variety of procedural mechanisms available to them to weed out frivolous or meritless claims. *Id.* at 597-601. Those include "demanding more specific

allegations of intent," *id.* at 598, a requirement that has even more force since this Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Weighing all these considerations together, the Court in *Crawford-El* had little difficulty concluding that,

> "the improper intent element of various causes of action should not ordinarily preclude summary disposition of insubstantial claims. . . . [and there is no justification for] a rule that places a thumb on the defendant's side of the scales when the merits of a claim that the defendant knowingly violated the law are being resolved."

Id. at 593.

In short, the justifications offered for creating an irrebuttable presumption that retaliation was never the motivating factor when a police officer arrests an individual have been previously rejected by this Court and should be rejected again.

CONCLUSION

For the reasons stated above, the Writ of Certiorari should be dismissed as improvidently granted. Alternatively, the judgment below should be affirmed.

Respectfully Submitted,

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