POLICING THE POLICE: PROTECTING CIVIL REMEDIES IN CASES OF RETALIATORY ARREST

For over two hundred years, the First Amendment to the United States Constitution has served as the bedrock of our democratic system of government. The First Amendment has long been viewed as the quintessential guarantee of freedom, enabling individuals to voice contrary and unpopular opinions without fear of reprisal. It is these most fundamental American rights—the right to free speech, to free press, and to free assembly—that we associate with the greatness of our nation. These freedoms hold an elevated place not only in our system of government and political discourse, but also in our everyday lives. Accordingly, as a nation we have long sought to protect these fundamental rights against encroachment from both external and internal threats. In seeking to protect these rights, Congress passed 42 U.S.C. § 1983,[1] granting the federal courts jurisdiction over constitutional tort actions. Congress's intent in passing § 1983 was to utilize the federal courts to protect the constitutionally guaranteed rights of individuals in the face of governmental oppression.[2] Over time, the judicially created doctrines of absolute and qualified immunity have narrowed the ability of individuals to gain redress against governmental actors for constitutional violations.[3]

Reichle v. Howards,[4] a case recently heard by the Supreme Court—on appeal from the Tenth Circuit—provided the Court with the opportunity to decide whether law enforcement officials should be immune from civil suits for arrests made in retaliation against an individual exercising free speech.[5] In an earlier case, *Hartman v. Moore*,[6] the Court ruled that probable cause did bar civil actions alleging retaliatory prosecution.[7] Varying interpretations of the *Hartman* decision have resulted in

1. 42 U.S.C. § 1983 (2006) provides that any person who, under color of law, deprives another of his constitutional rights, privileges, or immunities can be held liable in a suit of law or equity. Enacted by Congress to enforce the provisions of the Fourteenth Amendment as part of the Ku Klux Klan Act of 1871, the original purpose of the legislation was to provide protection to black citizens who were being discriminated against, abused, and murdered, oftentimes at the hands of, or with the permission of local government and police officials. This protection has, over time, been expanded to provide all individuals the ability to seek civil redress against governmental actors who violate their constitutionally guaranteed rights. *See infra* Part I.A.

2. *See* Michael T. Burke & Patricia A. Burton, *Defining the Contours of Municipal Liability Under 42 U.S.C. § 1983:* Monell *Through* City of Canton v. Harris, 18 STETSON L. REV. 511, 512–13 (1989).

3. *See* James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1602 (2011); *see also* David Rudovski, *Running in Place: The Paradox of Expanding Rights and Restricting Remedies*, 2005 U. ILL. L. REV. 1199, 1213 (2005).

4. 132 S. Ct. 2088 (2012).

5. *Id.* at 2091.

6. 547 U.S. 250 (2006).

7. *Id.* at 252.

some courts applying *Hartman* to retaliatory arrest cases, while others limit *Hartman*'s application to cases of retaliatory prosecution.[8] Instead of either explicitly extending or restricting *Hartman*, the *Reichle*'s Court held only that the arresting officers were entitled to qualified immunity because at the time of arrest the arrestee did not have a "clearly established right."[9] In doing so, the Court punted on the more important legal issue,[10] thereby insuring a continued circuit split, and continued debate as to the role that probable cause should play in civil suits for retaliatory arrests.

Prior to the case reaching the Supreme Court, the Tenth Circuit in *Howards v. McLaughlin*,[11] provided a definitive statement of its treatment of probable cause in retaliatory arrest cases. Because the Supreme Court decision fails to reach this important legal question, this Comment will analyze the Tenth Circuit's holding, and argue that while probable cause should be a consideration, it should not axiomatically provide officers with immunity for arrests executed with the intention of quelling free speech. Part I of this Comment will examine the genesis of constitutional tort law, the evolution of retaliatory case law, and the current split among the federal circuits as to whether the absence of probable cause is a requirement in retaliation cases. Part II summarizes the facts, procedural history, and opinions of the Tenth Circuit case *Howards v. McLaughlin*. Part III argues that the Tenth Circuit was correct, and probable cause should not be a bar to retaliatory arrest claims because the existence of probable cause does not preclude retaliatory causation. Part III also addresses the current circuit split by distinguishing *Howards* from the Supreme Court's earlier holding in *Hartman*. Lastly, Part IV analyzes the arguments presented to the Supreme Court, and gives insight into how the Court should ultimately rule on this issue.

I. BACKGROUND

A. History of Constitutional Tort Law

Section 1983[12] and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[13] provide civil remedies when any person acting

8. *See infra* note 58 and accompanying text.

9. *See Reichle*, 132 S. Ct. at 2093.

10. *See id.* ("We granted certiorari on two questions: whether a First Amendment retaliatory arrest claim may lie despite the presence of probable cause to support the arrest, and whether clearly established law at the time of the Howards' arrest so held. If the answer to either question is 'no,' then the agents are entitled to qualified immunity. We elect to address only the second question." (citations omitted)).

11. 634 F.3d 1131 (10th Cir. 2011), *rev'd sub nom.* Reichle v. Howards, 132 S. Ct. 2088 (2012). The Tenth Circuit held that the district court erred in denying Agents Daniels and McLaughlin's motion for qualified immunity and for judgment as a matter of law, as neither took any action that demonstrated a retaliatory intent. Therefore, the case name was changed on petition to the Supreme Court to *Reichle v. Howards*.

12. 42 U.S.C. § 1983 (2006) (creating a private right of action for violations of an individual's rights under the color of *state* law).

under color of law deprives another of his constitutional rights, privileges, or immunities. Together, § 1983 and *Bivens* serve as the basis of what legal commentators have labeled "constitutional tort litigation."[14] Constitutional tort litigation gives individuals the ability to bring actions against police and other governmental actors outside of the limited confines of state law tort systems.[15] Section 1983 was initially passed by Congress as § 1 of Civil Rights Act of 1871, and was intended to enforce the provisions of the Fourteenth Amendment.[16] The legislation originally sought to provide protection to black citizens against discrimination from government and police officials by giving them access to the federal court system to seek redress for constitutional violations committed under the color of state law.[17]

The modern interpretation of § 1983 was articulated by the Supreme Court's 1961 decision in *Monroe v. Pape*,[18] where, for the first time, the Court held that § 1983 did not require an action taken under an express state law or custom.[19] Instead, the Court held that § 1983 provides remedies when an official acting based on the power afforded them by state law violates an individual's rights under the Constitution or federal law.[20] This decision significantly expanded the scope of actions that could be brought under § 1983, thereby extending the expansive remedies available in constitutional tort cases. The Court's 1971 decision in *Bivens* further expanded constitutional tort law by recognizing the existence of an implied cause of action for individuals whose constitutional rights were violated under the color of federal law.[21]

While the Court's decisions in *Monroe* and *Bivens* significantly expanded constitutional tort law, the Court's actions over the past half century in restricting remedies have dramatically limited the practical application of these rights.[22] The language of the Civil Rights Act of 1871 had no provision for absolute or qualified immunity.[23] However, the judicially created doctrines of absolute and qualified immunity have, over time, carved out numerous exceptions to the statutory liability of § 1983. These immunity doctrines limit who can be sued under the statute, while at the same time providing defendants with ever more expansive tools to

13. 403 U.S. 388, 392–97 (1971) (recognizing an implied cause of action for individuals whose constitutional rights are violated under the color of *federal* law).

14. *See* Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 643–44 (1987).

15. *Id.* at 645 ("In cases involving government officials and constitutional rights, section 1983 actions supplement, if not replace, traditional state law tort systems.").

16. *See* Burke & Burton, *supra* note 2, at 512.

17. *Id.* at 513.

18. 365 U.S. 167 (1961), *overruled by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

19. *Id.* at 173–75, 192.

20. *Id.*

21. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392–97 (1971).

22. *See* Rudovski, *supra* note 3, at 1206.

23. *See* Butz v. Economou, 438 U.S. 478, 502 (1978).

deflect liability.[24] Today, judges and prosecutors enjoy absolute immunity,[25] and other government agents (including law enforcement) are afforded qualified immunity.[26] The Court has placed further restrictions on remedies by only recognizing municipal liability in very narrow circumstances, and by putting in place extensive exhaustion of remedies requirements.[27] Recent decisions indicate the Court's continued deference to governmental actors in all but the most egregious cases of misconduct.[28]

B. Retaliatory Framework: Mt. Healthy City School District Board of Education v. Doyle

The framework for proving retaliatory claims for violations of constitutional rights was established by the Supreme Court's 1977 decision in *Mt. Healthy City School District Board of Education v. Doyle*.[29] The case involved a public school teacher who was fired by the local school board after leaking the contents of an internal memorandum to a local radio station.[30] The teacher brought suit under 42 U.S.C. § 1983, claiming that the board terminated him in retaliation for exercising his rights under the First and Fourteenth Amendments.[31] The lower court found that the teacher's speech was a "substantial factor" in him not being rehired, and thereby held that the Board had violated his First Amendment rights.[32]

The Supreme Court did not overturn the lower court's holding; however, it did articulate a two-part burden shifting analysis for proving retaliatory claims.[33] First, the plaintiff has the burden of demonstrating a prima facie case of retaliation by showing that his conduct was constitutionally protected, and that the constitutionally protected conduct was a "substantial factor" in the action taken against him.[34] Once the plaintiff demonstrates a prima facie case, the burden shifts to the defendant, who must show that in the absence of the protected conduct, it would have taken the same action.[35] While this burden shifting test continues to hold

24. *See* David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497, 500–02 (1992) (explaining the many different approaches the Court has used to formulate the doctrine of qualified immunity).

25. *Id.* at 511–12.

26. *Butz*, 438 U.S. at 508 ("[Q]ualified immunity from damages liability should be the general rule for executive officials charged with constitutional violations . . . .").

27. *See* Rudovski, *supra* note 3, at 1213–29.

28. *Id.* at 1254–55; *see also* Thompson v. Connick, 131 S. Ct. 1350, 1365–66 (2011) (holding that neither a district attorney nor a municipality can be held civilly liable under § 1983 when a prosecutor intentionally withholds evidence that leads to eighteen years of wrongful incarceration).

29. 429 U.S. 274 (1977).

30. *See id.* at 281–82.

31. *Id.* at 276.

32. *Id.* at 283.

33. *Id.* at 287.

34. *Id.*

35. *Id.*

sway over most retaliatory claims, subsequent court decisions have carved out exceptions to this framework. Often these exceptions are plagued by circuit splits, as evident in prisoner cases, where some courts continue to apply *Mt. Healthy*, while other courts have abandoned the framework.[36] Similarly, cases involving retaliatory counterclaims are treated differently depending on the circuit in which they are decided.[37] Recently, the conflicting analysis between circuits regarding retaliatory prosecution cases forced the Supreme Court to address the issue.[38]

*C. The Pre-*Hartman *Split*

Outside of the above noted exceptions, the *Mt. Healthy* framework for retaliatory claims continues to be largely applied by the courts.[39] However, there is a split among the circuits as to the required pleading standard for claims against law enforcement officers for retaliatory arrest.[40] Before the Court's decision in *Hartman v. Moore*, the Second, Fifth, Eighth, and Eleventh Circuits had clearly articulated decisions that required a plaintiff to prove that the arrest occurred in the absence of probable cause.[41] However, the D.C. and the Tenth Circuits expressly permitted claims for retaliatory arrests to be brought irrespective of the absence of probable cause.[42] The Court's decision in *Hartman*, articulating the pleading standards for retaliatory prosecution cases, has prompted new debate as to what standards should be applied in retaliatory arrest cases.[43]

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36. *See* John Koerner, *Between* Healthy *and* Hartman*: Probable Cause in Retaliatory Arrest Cases*, 109 COLUM. L. REV. 755, 764–65 (2009) (citing McDonald v. Hall, 610 F.2d 16, 18 (1st Cir. 1979) (noting that the plaintiff has a substantial burden to prove that the transfer was motivated by retaliatory animus)); Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996) (applying the *Mt. Healthy* burden shifting analysis to a prison case).

37. *See* Koerner, *supra* note 36, at 766–67 (citing Greenwich Citizens Comm., Inc. v. Cnty. of Warren Indus. Dev. Agency, 77 F.3d 26, 31 (2d Cir. 1996) (holding that plaintiffs were "nevertheless required to persuade the jury that the counterclaims were filed, not as a legitimate response to litigation, but as a form of retaliation")). *But see* Venable v. Keever, 263 F.3d 162, 2001 WL 803565, at *2 (5th Cir. June 12, 2001) (unpublished table decision) (dismissing claim as frivolous).

38. *See* Hartman v. Moore, 547 U.S. 250, 252 (2006).

39. *See* Howards v. McLaughlin, 634 F.3d 1131, 1146 (10th Cir. 2011), *rev'd sub nom.* Reichle v. Howards, 132 S. Ct. 2088 (2012).

40. Petition for Writ of Certiorari at *13, Reichle v. Howards, 634 F.3d 1131 (10th Cir. 2011), *cert. granted*, 80 U.S.L.W. 3114 (U.S. Aug. 25, 2011) (No. 11–262), 2011 WL 3809375.

41. *See, e.g.*, Williams v. City of Carl Junction, 480 F.3d 871, 876 (8th Cir. 2007); Wood v. Kesler, 323 F.3d 872, 883 (11th Cir. 2003); Keenan v. Tejeda, 290 F.3d 252, 260 (5th Cir. 2002); Mozzochi v. Borden, 959 F.2d 1174, 1179–80 (2d Cir. 1992).

42. *See, e.g.*, Poole v. Cnty. of Otero, 271 F.3d 955, 961 (10th Cir. 2001), *abrogated by Hartman*, 547 U.S. 250; Haynesworth v. Miller, 820 F.2d 1245, 1256–57 (D.C. Cir. 1987), *abrogated by Hartman*, 547 U.S. 250.

43. *See, e.g.*, Colin P. Watson, *Limiting a Constitutional Tort Without Probable Cause: First Amendment Retaliatory Arrest After* Hartman, 107 MICH. L. REV. 111, 111 (2010) ("*Hartman* neither requires nor supports a rule that the presence of probable cause for effectuating the underlying arrest precludes a claim for First Amendment retaliatory arrest."); Koerner, *supra* note 36, at 777 ("*Hartman* and its requirement of no–probable–cause pleading should apply only to a subset of retaliatory arrest cases—cases of complex causation where a retaliating government official induces the police offer to arrest the plaintiff.").

D. Hartman v. Moore

In 2006, the Supreme Court in *Hartman v. Moore* resolved a long-standing circuit split regarding whether plaintiffs were required to plead and prove the absence of probable cause when bringing a claim of retaliatory prosecution.[44] The *Hartman* Court addressed this question in the context of a dispute between a private business and the United States Postal Service.[45] During the 1980's, William Moore, the CEO of Recognition Equipment Incorporated (REI), was aggressively urging the Postal Service into using REI's multi-line scanning equipment.[46] At that time, top officials within the Postal Service were advocating for the continued use of single-line scanners.[47] In seeking to advance the cause of his business, and despite requests by the Postmaster General to be silent on the issue, Mr. Moore hired a public-relations firm to lobby Congress for the adoption of a multi-line scanning standard.[48] These efforts proved successful, and in 1985 the Postal Service adopted multi-line technology.[49]

Following the Postal Service decision, REI was not awarded any of government contracts, and instead became the subject of two separate investigations by Postal Service inspectors.[50] Ultimately, the United States Attorney's office prosecuted Moore and REI.[51] The Court, citing what it called a "complete lack of direct evidence," granted defendant's motion for judgment of acquittal.[52] Following the criminal trial, Moore brought a civil action for liability under *Bivens*,[53] claiming, *inter alia*, that the prosecutor and postal inspectors had prosecuted him in retaliation for his criticism of the United States Postal Service, thereby violating his First Amendment rights.[54]

In seeking to resolve the existing circuit split on the probable cause issue, the Court held that in a retaliatory prosecution action, the plaintiff must plead and prove an absence of probable cause.[55] The Court's decision rested on three grounds: (1) the analysis of the causation requirement necessary to prove discriminatory animus; (2) the uniqueness of the causation chain in retaliatory prosecution cases; and (3) the strong pre-

44. 547 U.S. 250 (2006).
45. *Id.* at 254.
46. *Id.* at 252–53.
47. *Id.* at 252.
48. *Id.* at 253.
49. *Id.*
50. *Id.*
51. *Id.* at 253–54.
52. *Id.* at 254.
53. For the purpose of retaliatory claims, courts draw no distinction between analyzing a claim brought under 42 U.S.C. § 1983 and *Bivens*. Harlow v. Fitzgerald, 457 U.S. 800, 818 n.30 (1982) (quoting Butz v. Economou, 438 U.S. 478, 500 (1978) ("[I]t would be 'untenable to draw a distinction for the purposes of immunity law between suits brought against state officials § 1983 and suits brought directly under the Constitution against federal officials.'")).
54. *Hartman*, 547 U.S. at 254.
55. *Id.* at 265–66.

sumption of prosecutorial regularity that has long existed in our common law jurisprudence.[56] Stating that the "presumption that a prosecutor has legitimate grounds for the action he takes is one we do not lightly discard," the Court held that plaintiffs must prove the absence of probable cause to overcome the presumptive deference given to prosecutorial decisions.[57]

E. Post-Hartman *Split*

While the *Hartman* Court articulated a clear rule regarding the need to plead the absence of probable cause in retaliatory prosecution cases, the impact of its decision on retaliatory arrest cases remains unclear.[58] The Second, Fifth, Eighth, and Eleventh Circuits have interpreted *Hartman*'s heightened pleading standard as being applicable to all retaliatory constitutional tort claims.[59] The Tenth Circuit, interpreting *Hartman* as only applicable to cases of prosecutorial retaliation, continues to allow retaliation claims to be brought even when there is evidence of probable cause.[60] The confusion, however, does not end there. The Ninth Circuit, which prior to *Hartman* had no precedent addressing this issue, has since adopted the Tenth Circuit's view that the existence of probable cause is not a barrier to First Amendment retaliation claims.[61] The Sixth Circuit, which prior to *Hartman* had not required plaintiffs to prove an absence of probable cause, initially reversed itself, applying *Hartman* to all retaliatory claims (not simply retaliatory prosecution claims).[62] However, more recent decisions show the Sixth Circuit may be moving away from this bright-line rule.[63]

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56. *Id.* at 260–63.

57. *Id.* at 263, 265–66.

58. Koerner, *supra* note 36, at 775 ("Retaliatory arrest case law is a mess, with some courts siding entirely with Hartman, others rejecting Hartman outright, and still others having yet to take a position.").

59. *See, e.g.*, McCabe v. Parker, 608 F.3d 1068, 1075 (8th Cir. 2010) ("Lack of probable cause is a necessary element of all the claims McCabe and Nelson brought arising from the allegedly unlawful arrest."); Phillips v. Irvin, 222 F. App'x 928, 929 (11th Cir. 2007) (requiring a showing of no probable cause); Williams v. City of Carl Junction, 480 F.3d 871, 876 (8th Cir. 2007) (holding that retaliatory arrest falls under *Hartman*); Curley v. Vill. of Suffern, 268 F.3d 65, 73 (2d Cir. 2001) ("[B]ecause defendants had probable cause to arrest plaintiff, an inquiry into the underlying motive for the arrest need not be undertaken.").

60. Howards v. McLaughlin, 634 F.3d 1131, 1148 (10th Cir. 2011) ("[W]e are not persuaded *Hartman* applies to the circumstances here."), *rev'd sub nom.* Reichle v. Howards, 132 S. Ct. 2088 (2012).

61. *See* Skoog v. Cnty. of Clackamas, 469 F.3d 1221, 1232 (9th Cir. 2006) ("[W]e conclude that a plaintiff need not plead the absence of probable cause in order to state a claim for retaliation.").

62. Barnes v. Wright, 449 F.3d 709, 720 (6th Cir. 2006).

63. *See* Leonard v. Robinson, 477 F.3d 347, 355 (6th Cir. 2007); Kennedy v. City of Villa Hills, 635 F.3d 210, 217 n.4 (6th Cir. 2011) (suggesting that an "ordinary retaliation claim may not need to demonstrate a lack of probable cause to succeed on his claim or wrongful arrest").

II. *HOWARDS V. MCLAUGHLIN*

In *Howards v. McLaughlin*, the Tenth Circuit sought to determine the bounds of qualified immunity for law enforcement officials in a retaliatory arrest context.[64] Steven Howards initiated a civil action against four Secret Service agents (the Agents) under 42 U.S.C. § 1983, or alternatively under *Bivens*, claiming, *inter alia*, violations of his First and Fourth Amendment rights.[65] The Fourth Amendment claim was dismissed as settled law and, therefore, will receive only cursory treatment in this Comment.[66] The court found that, because the Agents had probable cause to arrest Howards, the arrest and subsequent search of Mr. Howards was lawful and not in violation of Mr. Howards's Fourth Amendment rights.[67]

The more complex and interesting question before the court was whether the existence of probable cause, at the time of the arrest, provided the Agents with immunity from civil liability for arresting Mr. Howards in retaliation for exercising his First Amendment rights. While the court recognized the existence of probable cause for the arrest, it held that a plaintiff bringing an action for violation of his First Amendment rights under § 1983 or *Bivens* need not plead the absence of probable cause.[68] In doing so, the Tenth Circuit made clear that it will construe the Supreme Court's decision in *Hartman* as applicable only in cases of retaliatory prosecution.[69] In following this interpretation, the Tenth Circuit allows plaintiffs in retaliatory arrest cases to pursue civil remedies despite the presence of probable cause and ensures a continued circuit split on this issue.[70]

A. Facts

On June 16, 2006, Mr. Howards was attending a piano recital at the Beaver Creek Mall in Beaver Creek, Colorado.[71] At the same time, Vice President Dick Cheney was also at the mall with a full Secret Service security detail.[72] Agent Gus Reichle was in charge of the Secret Service Protective Intelligence Team that included Agents Dan Doyle, Adam Daniels, and Daniel McLaughlin.[73] While on his way to the piano recital, Mr. Howards saw the Vice President and stated into his cell phone, "I'm going to ask him [the Vice President] how many kids he's killed to-

64. *Howards*, 634 F.3d at 1147.
65. *Id.* at 1138.
66. *Id.* at 1143.
67. *Id.*
68. *Id.* at 1148.
69. *Id.* ("We decline to extend *Hartman*'s 'no–probable–cause' requirement to this retaliatory arrest case.").
70. *Id.* at 1148–49 ("Accordingly, our prior precedent permits Mr. Howards to proceed with his First Amendment retaliation claim notwithstanding probable cause existed for his arrest.").
71. *Id.* at 1135.
72. *Id.*
73. *Id.*

day."[74] Agent Doyle overheard this comment and subsequently relayed the content of Mr. Howards's statement to Agent McLaughlin, directing Agent McLaughlin to "pay particular attention to [Mr. Howards]."[75] Agent McLaughlin then relayed this information, including the directive to monitor Mr. Howards, to Agent Daniels. Agent Doyle later admitted that Mr. Howards's statement "disturbed" him, and that he found it "not quite right."[76]

After waiting in a gathering crowd, Mr. Howards approached the Vice President and told him that his "policies in Iraq are disgusting." The Vice President responded, "thank you," and Mr. Howards departed the area.[77] While leaving, Mr. Howards made physical contact with the Vice President's right shoulder.[78] The parties dispute the nature of the contact, but all parties concede that Mr. Howards did make physical contact with the Vice President.[79] Agents Daniels, McLaughlin, and Doyle did not hear Howards's statement to the Vice President, but did observe Mr. Howards touch the Vice President.[80] Agents Daniels and McLaughlin both testified that they did not believe the touch of the Vice President provided the probable cause necessary to arrest Mr. Howards.[81] Two other agents, Mike Lee and Andrew Wurst, were close enough to hear the verbal exchange between Mr. Howards and the Vice President, and together decided to dispatch the Protective Intelligence Team to speak with Mr. Howards.[82]

Although he had neither heard Mr. Howards's statements nor witnessed the touching of the Vice President, Agent Reichle, as the intelligence coordinator, had the responsibility of interviewing Mr. Howards.[83] Before reaching Mr. Howards, Agent Doyle briefed Agent Reichle on the situation and the statements made by Mr. Howards.[84] Agent Reichle then approached Mr. Howards and presented his badge.[85] At that time Mr. Howards refused to speak to Agent Reichle and attempted to step away.[86] Agent Reichle then stepped in front of Mr. Howards and a heated conversation ensued.[87] Upon hearing Mr. Howards's opinion on the Iraq War, Agent Reichle became "visibly angry."[88] Agent Reichle then asked

74. *Id.* at 1136 (stating that Mr. Howards later clarified that this comment was in reference to Vice President Cheney's role in the ongoing war in Iraq).
75. *Id.*
76. *Id.* at 1145.
77. *Id.* at 1136.
78. *Id.*
79. *Id.* at 1136 n.2.
80. *Id.* at 1136.
81. *Id.*
82. *Id.*
83. *Id.* at 1137.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*

Mr. Howards if he had touched the Vice President, to which Mr. Howards responded that he had not.[89] Upon receiving confirmation from Agent Doyle that Mr. Howards had in fact touched the Vice President, Agent Reichle arrested Mr. Howards for assault on the Vice President.[90] Agents Doyle, Daniels, and McLaughlin assisted in the arrest, and subsequently turned Mr. Howards over to the Eagle County Sherriff's Department where Mr. Howards was charged with harassment under Colorado state law.[91] Mr. Howards was later released from custody, the state charges were dropped, and no federal charges were ever filed.[92]

B. Procedural History

Mr. Howards filed a civil action, under 42 U.S.C. § 1983, or alternatively, under *Bivens*, in federal district court, charging, that the Agents deprived him of his constitutional right to free speech by arresting him in retaliation for his comments to Vice President Cheney regarding the war in Iraq.[93] Mr. Howards further charged that the arrest violated his Fourth Amendment right against unlawful search and seizure.[94] The defendants moved for summary judgment, claiming that because the arrest was supported by probable cause, they were protected by qualified immunity.[95] The probable cause arose not out of the verbal exchange between Mr. Howards and the Vice President, nor out of the physical touch of the Vice President by Mr. Howards.[96] Instead, the Agents argued that by stating that he had not touched the Vice President, Mr. Howards made a false statement to a federal official in violation of 18 U.S.C. § 1001.[97]

C. Majority Opinion

In addressing the Fourth Amendment claim, Judge Seymour, writing for the majority, held that "there is no doubt that Agent Reichle possessed probable cause to arrest Mr. Howards for lying to a federal agent in violation of 18 U.S.C. § 1001."[98] Based on this finding, the court unanimously held that because the Agents had probable cause for the

89. *Id.*
90. *Id.* at 1137–38.
91. *Id.* at 1138.
92. *Id.*
93. *Id.* (§1983 creates a cause of action against federal officials who violate an individual's constitutional rights while acting in concert with state officials).
94. *Id.*
95. *Id.*
96. *Id.* at 1142.
97. *Id.* at 1141. Section 1001 provides that "whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . makes any materially false, fictitious, or fraudulent statement . . . shall be fined under this title, imprisoned not more than 5 years . . . or both." 18 U.S.C. § 1001 (2006).
98. *Howards*, 634 F.3d at 1142.

arrest, there was no violation of Mr. Howard's Fourth Amendment rights.[99]

The court then addressed the First Amendment claim. The Agents argued that the Tenth Circuit's prior holding that plaintiffs are not required to demonstrate a lack of probable cause in First Amendment retaliation cases had been overruled by the Court in *Hartman*.[100] Judges Seymour and Lucero were not persuaded, holding plaintiffs are not required to demonstrate a lack of probable cause in retaliatory arrest cases.[101] The court distinguished *Howards* from *Hartman* by recognizing the narrow applicability of *Hartman* to the unique circumstances of retaliatory prosecution cases.[102]

By holding that *Hartman* applies only in the retaliatory prosecution context, the Tenth Circuit drew a clear distinction between "ordinary" retaliation claims and retaliatory prosecution claims.[103] The court articulated two ways in which cases of prosecutorial retaliation differ from other retaliatory claims. First, there will generally be substantial circumstantial evidence to prove or disprove probable cause, and therefore, requiring plaintiffs to demonstrate the absence of probable cause does not impose a significant burden.[104] Second, the complexity inherent in the causation analysis is vastly different.[105] In a prosecutorial retaliation case "the causal connection required . . . 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 and the action of another."[106] That is, in a case of retaliatory prosecution, the plaintiff is not required to prove the prosecutor was retaliating against him, but rather, that a third-party who harbored retaliatory intent induced the prosecutor into filing the charges.[107] It is this additional link in the causation chain that sets retaliatory prosecution cases apart from other retaliation cases, including retaliatory arrest cases. In looking to these two differences, the *Howards* court cast the decision in *Hartman* as a heightened pleading standard, necessary only in cases that require the more complex causation analysis.[108]

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99. While the court was divided on the First Amendment issue, the court was unanimous in its dismissal of the Fourth Amendment issue. *Id.* at 1143.

100. *See* DeLoach v. Bevers, 922 F.2d 618, 620 (10th Cir. 1990).

101. *Howards*, 634 F.3d at 1148.

102. *Id.* (holding that "extending the 'no-probable-cause' requirement to this ordinary retaliatory arrest case and dismissing Mr. Howards' suit, would result in the Court's *limited exception devouring the rule*" (emphasis added)).

103. *Id.* ("In light of the care the Supreme Court took to distinguish between complex and ordinary retaliation claims, we are not persuaded *Hartman* applies to the circumstances here.").

104. *See Howards*, 634 F.3d at 1147 (quoting Hartman v. Moore, 547 U.S. 250, 260–61 (2006)).

105. *Id.* at 1146.

106. *Hartman*, 547 U.S. at 262.

107. *Id.*

108. *Howards*, 634 F.3d at 1148.

D. Dissenting Opinion

Judge Kelly's dissent argues that all of the Agents were entitled to qualified immunity based on the presence of probable cause for the arrest.[109] The dissent argues that the Supreme Court's holding in *Hartman* not only requires a pleading of the absence of probable cause in retaliatory prosecution cases, but also in retaliatory arrest cases.[110] In supporting this view, Judge Kelly articulates three arguments. First, he argues that "[p]robable cause evidence will be readily available and relevant in most retaliatory arrest cases."[111] Second, Judge Kelly argues that while the causation chain may not be as complex in retaliatory arrest cases as it is in retaliatory prosecution cases, this alone should not eliminate the consideration of probable cause as an element of the claim.[112]

Lastly, the dissent argues that the Agents were entitled to qualified immunity because the law was unclear at the time of the incident.[113] The Supreme Court has long held that public officials are entitled to qualified immunity when their actions violate a constitutional right that is not clearly established at the time of violation.[114]On this point, Judge Kelly argues that due to the current circuit split, and the absence of a ruling from the Tenth Circuit following *Hartman*, it would be unreasonable to expect that the Agents knew that probable cause was insufficient to establish qualified immunity in a retaliatory arrest case.[115] It is this third rationale that is ultimately adopted by the Supreme Court, and provides the basis for the Court to avoid answering whether probable cause cuts off liability for retaliatory arrests.[116]

III. ANALYSIS

The *Howards* decision illustrates the Tenth Circuit's continued adherence to its view that probable cause does not, in and of itself, defeat a retaliatory arrest claim.[117] There are two principal reasons that the Tenth Circuit was correct in not applying heightened pleading standard from *Hartman* in a retaliatory arrest context. First, the existence of probable cause—while probative—does not prove that the contested action by the arresting officer was not taken for retaliatory reasons. Second, retaliatory

109. *See id.* at 1151 (Kelly, J., concurring in part and dissenting in part).
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 1152.
114. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").
115. *Id.*
116. *See* Reichle v. Howards, 132 S. Ct. 2088, 2097 (2012) ([W]hen Howards was arrested it was not clearly established that an arrest supported by probable cause could give rise to a First Amendment violation. Petitioners Reichle and Doyle are thus entitled to qualified immunity.").
117. *Howards*, 634 F.3d at 1148 (majority opinion).

arrest cases can be distinguished from retaliatory prosecution cases because both the complex causation chains and assumption of prosecutorial regularity inherent in prosecutorial retaliation cases are absent from most retaliatory arrest cases.

A. Probable Cause Does Not Preclude Retaliatory Causation

The existence of probable cause does not demonstrate a lack of retaliatory causation because probable cause is an objective standard, viewed independent of the arresting officer's intent.[118] Perhaps a simple way to understand the idea of probable cause as an objective standard is through a hypothetical. In this hypothetical, John Doe, a law abiding citizen becomes outraged after seeing video on the local news of police beating peaceful protestors. In response, John organizes a protest at the local police station. The next day, several hundred protestors arrive at the local police station carrying signs and singing protest songs. John is soon identified as the leader of the protests and is asked by the local police chief to put an end to the protest. John refuses to end the protest, which incenses the police chief and the multitude of police officers observing the peaceful protest. After walking away from the police chief, John attempts to cross the street to rejoin the protest. However, John crosses against the light. There are no cars on the road when John crosses the street; nonetheless, John is immediately arrested by the police, who charge him with jay-walking, disrupting traffic, and causing a public disturbance. While placing the handcuffs on John, the arresting officer remarks, "I hope this teaches you and your friends to keep your mouths shut and stay at home."

After reviewing the police report, the district attorney determines that there is insufficient evidence to pursue a conviction and subsequently drops all charges. Once John receives the news that all criminal charges have been dropped, he quickly hires an attorney and files a § 1983 action against the arresting officer, the Police Chief, and the city. Unfortunately for John, he lives in New York, where the federal courts are bound by Second Circuit precedent, which requires pleading the absence of probable cause in retaliatory arrest cases brought under § 1983.[119] Because John was crossing against the light, a statutory violation, the police possessed probable cause at the time of his arrest. Unable to demonstrate a lack of probable cause, John's claim is defeated on summary judgment.

While the police technically had probable cause to arrest John, the arrest was clearly in retaliation for his leadership of the protest. This hypothetical illustrates two distinct problems associated with requiring plaintiffs to plead the absence of probable cause in retaliatory arrest cases. First, the existence of probable cause provides only one possible ra-

118. *See id.*
119. *See* Mozzochi v. Borden, 959 F.2d 1174, 1179–80 (2d Cir. 1992).

tionale for the challenged arrest and in no way demonstrates that the arrest was not motivated by retaliatory intent.[120] Second, the standard for probable cause is minimal, falling below even a prima facie showing of criminal activity.[121]

By arguing that probable cause should bar civil actions for retaliatory arrest, the Agents are essentially asking the Court to abandon the legal principal of causation.[122] This argument is logical if one believes that arrests are only motivated by a single factor: that factor being the existence of probable cause. In such a simplified world there would be no need for courts to examine an officer's motivation because probable cause would be the only causal factor for arresting an individual. However, we do not live in a simple, single-factor world. While probable cause is a legal requirement to arrest an individual, in many cases it is not the only factor motivating the arresting officer's decision, thereby creating a multiple-factor causation problem.[123] This problem can be illustrated by returning to the earlier hypothetical. Imagine that John is not immediately arrested, but instead leads a peaceful crowd of 200 people on a march through town. After several blocks, the police stop the march and tell the protestors that they are violating a city ordinance by marching without a permit. The police then begin arresting protestors; however, they don't arrest all of the protestors, instead arresting only those who were leading the chants and protest songs. While there were 200 people participating in the protest—all in violation of the statute—only the four leaders are arrested. Identical probable cause existed for the arrests of all members of the protest, yet the police clearly targeted the four individuals who were the most vocal in their opposition to police brutality. Under the *Hartman* heightened pleading standard, the arrested protestors would be barred from bringing a civil action against the police because they cannot plead a lack of probable cause.[124] This example illustrates that even in a situation where probable cause is present; it may not be the determinative causal factor in an arrest.

120. *See* DeLoach v. Bevers, 922 F.2d 618, 620 (10th Cir. 1990) (quoting Matzker v. Herr, 748 F.2d 1142, 1150 (7th Cir. 1984) ("An act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper.")).

121. *See* Spinelli v. United States, 393 U.S. 410, 419 (1969) (citing Beck v. Ohio, 379 U.S. 89, 96 (1964) ("[O]nly the probability, and not a prima facie showing, of criminal activity is the standard of probable cause….")).

122. *See* 57A AM. JUR. 2D *Negligence* § 517 (2011) ("Under the Restatement, in order for a plaintiff to recover damages, a defendant's negligence need not be the sole cause or factor contributing to the injury, or even the primary factor in bringing the injury about, but need only have been a substantial factor in bringing it about. If the defendant's negligence was a substantial factor in producing the plaintiff's injuries, the defendant will not be relieved from liability for those injuries even though another force concurred to produce them." (citations omitted)).

123. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, *but upon probable cause*, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (emphasis added)).

124. Hartman v. Moore, 547 U.S. 250, 252 (2006).

The multiple-factor causation problem is not unique to retaliatory arrest cases, and other areas of the law can shed light on how to best approach this issue.[125] Multiple-factor causation is often present in Title VII employment discrimination cases where the employer articulates a legitimate nondiscriminatory reason for taking action against an employee.[126] This assertion of a legitimate nondiscriminatory reason is akin to the existence of probable cause in a retaliatory arrest context. While both probable cause and a legitimate nondiscriminatory reason may demonstrate that the defending party was justified in its action, it does not foreclose the possibility that the action taken—by the employer or police officer—was not motivated by other factors.[127] While there continues to be much debate as to which causal framework should be applied in Title VII actions,[128] all of the frameworks utilized by the courts provide plaintiffs with some ability to demonstrate that an employer's stated legitimate nondiscriminatory purpose is actually a pretext to discrimination.[129] Similarly, in a retaliatory arrest context, the existence of probable cause should place the burden of proof on the plaintiff to demonstrate a discriminatory animus was a motivating factor in the arrest, but should not serve as a complete bar to suit.[130]

Multiple-factor causation is also an inherent problem in traditional tort litigation, forcing states to enact comparative negligence statutes to address the problem.[131] To date, forty-six states have abandoned the tra-

125. *See id.* at 258 ("As for the invitation to rely on common-law parallels, we certainly are ready to look at the elements for common-law torts when we think about elements of actions for constitutional violations . . . .").

126. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 240–42 (1989).

127. *Id.* at 241 ("[W]e also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations.").

128. My discussion of the causation standards in Title VII actions is at best cursory. It is only designed to demonstrate the analogous relationship between a legitimate nondiscriminatory purpose in a challenged employment action, and the existence of probable cause in a retaliatory arrest context. For an in-depth discussion of Title VII causation, see Martin J. Katz, *Reclaiming* McDonnell Douglas, 83 NOTRE DAME L. REV. 109, 109–37 (2007).

129. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973) (articulating a three–part burden shifting test which provides that after the plaintiff has proven a prima facie case and the defendant has demonstrated a legitimate nondiscriminatory purpose, the plaintiff has an opportunity to demonstrate that the articulated legitimate nondiscriminatory purpose is pretextual). *McDonnell Douglas* was called into question in *Price Waterhouse v. Hopkins*, 490 U.S. at 261–79 (O'Connor, J., concurring) (articulating a two-part test which provides that after the plaintiff has proven a prima facie case, the defendant can be relieved of all liability by showing that it would have made the "same decision" irrespective of the protected status of the plaintiff). Congress, rejecting *Price Waterhouse*, passed the Civil Rights Act of 1991, which provided that plaintiffs need only show that a protected trait was a "motivating factor." Upon such a showing, the employer can seek to prove that it would have made the "same decision" even in the absence of the protected trait. Such a showing does not bar liability, but can limit damages. 42 U.S.C. § 2000e-2(m) (2006).

130. *See* Howards v. McLaughlin, 634 F.3d 1131, 1148 (10th Cir. 2011), *rev'd sub nom.* Reichle v. Howards, 132 S. Ct. 2088 (2012).

131. *See* Peter Nash Swisher, *Virginia Should Abolish the Archaic Tort Defense of Contributory Negligence and Adopt a Comparative Negligence Defense in Its Place*, 46 U. RICH. L. REV. 359, 360–61 (2011) (arguing that Virginia's contributory negligence standard is outmoded and does not "fairly recognize and apportion damages according to the bedrock underlying tort legal principles of accountability, deterrence, and distribution of loss").

ditional concept of contributory negligence, which held that any culpability on the part of the plaintiff was a complete bar to recovery, and instead have adopted a comparative negligence standard.[132] At first glance the analogy between comparative negligence and probable cause in a retaliatory arrest case may not be clear. The concept of comparative negligence recognizes that one's liability for a tortious act that injures another should not be excused simply because the injured party may be partially at fault.[133] Comparative negligence recognizes the need to analyze and weigh multiple causal factors by assigning fault to each party on a fractional basis.[134] Similarly, a claim for the violation of an individual's civil rights due to a retaliatory arrest should not be dismissed simply because the plaintiff's actions created probable cause.[135] This would be akin to not imparting liability to a driver who runs a red light simply because the car he hit was missing a tail light cover.

In a § 1983 claim for retaliatory arrest, the injury occurs not because of the arrest itself, but by the suppression of a constitutionally guaranteed right through means of an arrest.[136] If courts were to apply the same theory that underpins comparative negligence to cases of retaliatory arrest, it would require an examination of the relative weight of causal factors not of the arrest itself, but of the arresting officer's motivation. Under such a formulation, probable cause would create a strong presumption that the arresting officer's motivation was within legal parameters, while still providing plaintiffs with an opportunity to demonstrate, based on specific facts, that other causal factors should be given more weight.

The argument that the presence of single causal factor should bar plaintiffs from recovering in retaliatory arrest cases is even more troubling when the single factor being advocated for as determinative is probable cause.[137] The standard for probable cause is extremely low, allowing police officers the ability to detain virtually any person at any time, simply by alleging a minor violation or infraction.[138] Courts that have held that the existence of probable cause forecloses the arrestee's ability to recover civil damages in retaliatory arrest cases have adopted a rule that assumes probable cause is the only causation of the arrest. Such a default is problematic because the low standard for establishing proba-

132. *Id.* at 360.
133. *Id.* at 365–67.
134. *Id.*
135. *See Howards*, 634 F.3d at 1148.
136. 42 U.S.C. § 1983 (2006).
137. *See Howards*, 634 F.3d at 1141.
138. *See* Brian J. Foley, *Policing From the Gut: Anti-Intellectualism in American Criminal Procedure*, 69 MD. L. REV. 261 (2010) ("In many cases, these people were not arrested because of investigations; rather, they were swept off the street by a modern police force that has at its disposal a multiplicity of minor offenses, a low standard of probable cause, and broad search and arrest powers. In fact, anybody driving a car is subject to arrest and at least a limited search, either by committing a minor offense or by being accused by the police of committing a minor offense." (citations omitted)).

ble cause will almost always provide an arresting officer with immunity, regardless of what truly motivated the arrest.

B. Distinguishing Retaliatory Prosecution from Retaliatory Arrest

1. Lack of Complex Causation Chains

The *Hartman* Court held that because prosecutors are absolutely immune from liability for decisions to prosecute,[139] proving a retaliatory prosecution claim does not require a showing by the plaintiff that the prosecutor was retaliating in violation of his constitutionally guaranteed rights.[140] Instead, the plaintiff must prove that a third-party actor was successful in inducing the prosecutor to prosecute based on a retaliatory animus.[141] It is because of this complex causation chain that claims for prosecutorial retaliation require the plaintiff to plead and prove a lack of probable cause. Returning to the earlier hypothetical, to prove a retaliatory arrest John would not need to overcome a complex causation chain. To show that his constitutionally guaranteed rights were violated, John does not have to demonstrate that the arresting officer's retaliatory animus motivated the prosecutor to pursue criminal charges; instead John need only prove that the arresting officer's action in arresting him was based on a retaliatory motive.[142]

This is not to say that probable cause—or the absence thereof—is not a relevant consideration in a retaliatory arrest context.[143] There are many cases in which the absence of probable cause would significantly rebut the plaintiff's contention that he was arrested based on the retaliatory animus of the officer.[144] However, the standard for proving retaliation is not foreclosed by the probable cause. Based on long established case law, plaintiffs need only prove that the retaliatory animus was "a substantial factor."[145] By adding the requirement that plaintiffs plead and prove the absence of probable cause, courts have implemented a new heightened pleading standard. While this may be appropriate in retaliatory prosecution cases, no court has articulated a compelling policy reason for such a heightened standard in retaliatory arrest cases.[146]

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139. *See* Imbler v. Pachtman, 424 U.S. 409, 431 (1976).

140. *See* Hartman v. Moore, 547 U.S. 250, 261–62 (2006).

141. *Id.* at 262.

142. Baldauf v. Davidson, 2007 WL 2156065, No. 1:04-cv-1571-JDT-TAB, at *2 (July 24, 2007) ("[N]o such complex causation problems are present when a person brings a retaliatory arrest claim that focuses entirely on an officer's bodily seizure of a plaintiff through the power of arrest.").

143. *See Howards*, 634 F.3d at 1149–50 (stating that Agents Daniels and McLaughlin were entitled to summary judgment because they had probable cause for the arrest and Howards presented no evidence of a retaliatory motive on their part).

144. *See Hartman*, 547 U.S. at 265 ("[S]howing an absence of probable cause will have high probative force . . . .").

145. *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

146. *See* Watson, *supra* note 43, at 128 ("Neither existing legal doctrine nor controlling precedent recommend imposing the no-probable cause rule in actions for retaliatory arrest, and no court or

2. Prosecutorial Presumption

The *Hartman* Court held that the long-recognized presumption of regularity attached to prosecutorial decisions was a key factor in requiring plaintiffs to prove a lack of probable cause in retaliatory prosecution cases.[147] This deference is grounded in the fact that courts are reticent to regulate the decision making process of a prosecutor.[148] With this deference in mind, the Supreme Court has held that those wishing to pursue claims based on selective prosecution have a heightened standard of proof.[149] Also inherent in the assumption of prosecutorial regularity is the belief that prosecutors—as legal professionals and officers of the court—have an intimate understanding of individual rights.[150] Based on this knowledge, and the ethical standards that hold them to account, prosecutors are presumed to make informed and ethical decisions when moving forward with a prosecution.[151]

This rationale logically applies to retaliatory arrest cases because these claims carry with them the implicit accusation that the prosecutor abused his authority in bringing the case. In such cases it is reasonable to require plaintiffs to overcome the heightened standard of proof to demonstrate that a prosecution was in fact motivated by a retaliatory animus.[152] However, the differences of retaliatory arrest cases provide at least two compelling arguments as to why a presumption of regularity should not be extended to retaliatory arrest cases. First, in a retaliatory arrest case, there is no accusation of misuse of prosecutorial power. Instead, the claim is based on the misuse of law enforcement power in violation of an individual right.[153] Not only is there no presumption of regularity regarding law enforcement, but our criminal justice system has gone to considerable lengths to restrict police power. In most circumstances police are required to have warrants before arresting or searching a person or property.[154] Police must read suspects *Miranda* rights when they are arrested, and must follow strict rules when interrogating sus-

scholar has yet articulated sufficiently persuasive policy argument in favor of applying the rule to retaliatory-arrest claims.").

147. *See Hartman*, 547 U.S. at 263.

148. Wayte v. United States, 470 U.S. 598, 607–08 (1985) ("This broad discretion [afforded the Executive] rests largely on the recognition that the decision to prosecute is particularly ill–suited to judicial review.").

149. Reno v. American–Arab Anti-Discrimination Comm., 525 U.S. 471, 489 (1999) ("Because such claims invade a special province of the Executive–its prosecutorial discretion—we have emphasized that the standard for proving them is particularly demanding . . . .").

150. *See* Andrew Horwitz, *Police Prosecution in Rhode Island: The Unauthorized Practice of Law*, 54 R.I.B.J. 5, 31 (2006).

151. *See* Connick v. Thompson, 131 S.Ct. 1350, 1361–62 (2011) (holding that all licensed attorneys are "subject to an ethical regime designed to reinforce the profession's standards" and that "[t]raining is what differentiates attorneys from average public employees").

152. *See Hartman*, 547 U.S. at 265–66.

153. *Id.* at 262.

154. U.S. CONST. amend. IV.

pects.[155] All of these protections are in place to serve as an independent check on the decision making authority of law enforcement officials.[156]

The second reason why the presumption of prosecutorial regularity should not be extended to law enforcement officials in retaliatory arrest cases is that prosecutors receive far more expansive training in the legal system than their law enforcement counterparts.[157] As discussed above, due to this lack of training, law enforcement officials are confined by more rigid rules and do not enjoy the same level of discretion as prosecutors in discharging their duties. Taken together, these two fundamental differences between prosecutors and law enforcement officials serve as further support that the presumption of prosecutorial regularity should not be extended to law enforcement officials. Absent this presumption, the argument for requiring a pleading of no probable cause in a retaliatory arrest claim is further weakened.

IV. THE SUPREME COURT

In December 2011, the Supreme Court granted Agents Reichle and Doyle's Petition for Writ of Certiorari.[158] In their petition, Agents Reichle and Doyle advance four arguments as to why the Court should reverse the Tenth Circuit Court's decision: (1) the ongoing circuit split on the issue of probable cause in the retaliatory arrest context is an issue that requires a judicial resolution that only the Supreme Court can provide; (2) the issue is one of great national importance, and that Secret Service agents deserve special protection; (3) the presumption of regularity which the Supreme Court cites prominently in *Hartman* should be applicable not only to prosecutors, but also to Secret Service agents; and (4) at the time of the incident the law concerning retaliatory arrest was unclear, thus the agents were reasonable in assuming that *Hartman* would be applied to retaliatory arrest cases.[159]

Writing for the Court, Justice Thomas states that "at the time of Howards' arrest it was at least arguable that *Hartman's* rule extended to retaliatory arrest."[160] In support of this holding, Justice Thomas notes that "*Hartman* was decided against a legal backdrop that treated retaliatory arrest and prosecution claims similarly," and "[a] reasonable official also could have interpreted *Hartman's* rationale to apply to retaliatory ar-

155. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) ("Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.").

156. *Id.* at 447 ("Unless a proper limitation upon custodial interrogation is achieved—such as these decisions will advance—there can be no assurance that practices of this nature will be eradicated in the foreseeable future.").

157. *See* Horwitz, *supra* note 150, at 5.

158. Reichle v. Howards, No. 11-262, 2011 WL 3812626, at *1 (U.S. Dec. 5, 2011).

159. Petition for Writ of Certiorari, *supra* note 40, at *11–12.

160. Reichle v. Howards, 132 S. Ct. 2088, 2096 (2012). .

rests."[161] However, at the time of the incident, the established law in the Tenth Circuit did not require a showing of the absence of probable cause in retaliatory arrest cases.[162] In fact, no Tenth Circuit opinion regarding retaliatory arrest had ever applied the *Hartman* test. Because *Hartman* was clear in distinguishing prosecutorial retaliation cases from "ordinary retaliation" cases, the Tenth Circuit's precedent in reference to the latter was undisturbed.[163]

Although the Supreme Court ultimately found for the Agent's based on the lack of a clearly established right, it is worth examining the Agents' other arguments in the larger conversation of what role probable cause should play in a retaliatory arrest analysis.

The Agents' characterization of the current circuit split is neither correct nor accurate. The Agents argue that the Tenth Circuit holding that probable cause does not bar a retaliatory arrest claim "conflicts with the majority rule established in several other circuit court decisions, including decisions by the Eighth, Eleventh, Sixth, and Second Circuits."[164] This assertion is misleading in its entirety, and plain wrong on at least one point. In seeking to cast the Tenth Circuit as a lone wolf in allowing retaliation claims irrespective of the presence of probable cause, the Agents ignore similar opinions issued by the Ninth and D.C. Circuits.[165] More troubling is the Agents' assertion that the Sixth Circuit has implemented a no probable cause pleading requirement.[166] As discussed above, the Sixth Circuit's treatment of retaliatory arrest cases is far from clear, as Sixth Circuit courts have at times applied *Hartman* broadly to all retaliatory claims, while at other times held that "ordinary retaliation" claims are not barred due to the presence of probable cause.[167] The Agents also attempt to cast dispersion on the *Howards* court, by implying the decision was based exclusively on the Ninth Circuit's decision in *Skoog v. County of Clackamas*.[168] While the *Howards* court does look to *Skoog*, it is important to note that unlike the Ninth Circuit, the Tenth Circuit has

161. *Id.* at 2095.

162. *See* DeLoach v. Bevers, 922 F.2d 618, 620 (10th Cir. 1990).

163. *See* Howards v. McLaughlin, 634 F.3d 1131, 1148 n.12 (10th Cir. 2011) ("Unlike the Ninth Circuit, our circuit has prior binding precedent that a plaintiff need not plead the absence of probable cause to bring a retaliatory arrest claim."), *rev'd sub nom.* Reichle v. Howards, 132 S. Ct. 2088 (2012).

164. Petition for Writ of Certiorari, *supra* note 40, at *16.

165. *See* Skoog v. Cnty. of Clackamas, 469 F.3d 1221, 1232 (9th Cir. 2006). It should be noted that the D.C. Circuit has yet to decide a retaliatory arrest claim post–*Hartman*, and therefore, it is still bound by the precedent set forth in *Haynesworth v. Miller*, 820 F.2d 1245, 1256–57 (D.C. Cir. 1987).

166. Petition for Writ of Certiorari, *supra* note 40, at *18–19.

167. *See* Leonard v. Robinson, 477 F.3d 347, 355 (6th Cir. 2007); Kennedy v. City of Villa Hills, 635 F.3d 210, 217 (6th Cir. 2011) ("[A]n ordinary retaliation claim . . . may not need to demonstrate a lack of probable cause to succeed on his claim of wrongful arrest.").

168. *Skoog*, 469 F.3d at 1232; Petition for Writ of Certiorari at *14, Reichle v. Howards, 2011 WL 3809375 (2011) (No. 11–262).

long-established precedent stating that probable cause is not a bar to retaliatory arrest cases; therefore, absent a clear ruling from the Supreme Court on this issue, the *Howards* court was bound to apply the Tenth Circuit rule.[169]

The Agents also argued that their case deserved consideration from the Supreme Court because it is an issue of "great national importance."[170] They are correct in stating that this issue does have national implications; however, the faulty basis of their argument is that Secret Service agents deserve special legal protection.[171] While it would be easy to impart special legal protection to the agents who risk their lives to defend our elected leaders, such protections are inconsistent with the stated purpose of § 1983 and *Bivens*, which is to ensure that an individual's constitutional rights are not intruded upon by those acting under color of the law.[172]

Unfortunately, it appears that Justice Ginsberg agrees with this argument. In her concurrence, she states that "[w]ere defendants ordinary law enforcement officers, I would hold that *Harman v. Moore*, does not support their entitlement to qualified immunity."[173] Justice Ginsberg is quick to differentiate retaliatory arrest from retaliatory prosecution based on the lack of a complex causation chain.[174] However, she voted with the majority in its grant of qualified immunity to the officers based on her belief that "[o]fficers assigned to protect public officials must make singularly swift, on the spot, decisions whether the safety of the person they are guarding is in jeopardy."[175] Pursuant to this rationale, Justice Ginsberg believes that the Agents were justified in arresting Mr. Howards.[176]

On the narrow facts of this case such a determination appears rationale; however, a blanket protection afforded to all officers tasked with protecting public figures could open the door to a more insidious type of action on the part of governmental actors, giving political leaders the opportunity to exploit their protective services to squash unpopular speech. While the prospect of the President or Vice Presdient of the United States using the Secret Service as mechanism to root out political dissenters may seem far-fetched, Justice Ginsberg's recognition of a special rule for Secret Service agents places this scenario squarely within the realm of possibility.

169. *See* DeLoach v. Bevers, 922 F.2d 618, 620 (10th Cir. 1990).
170. Petition for Writ of Certiorari, *supra* note 40, at *21.
171. *Id.* at *22.
172. *See supra* notes 1, 12.
173. Reichle v. Howards, 132 S. Ct. 2088, 2097 (2012) (Ginsberg, J. dissenting) (citations omitted).
174. *Id.*
175. *Id.*
176. *Id.*

In reality, the Agents presented a false choice by framing the argument as a contest between insulating Secret Service agents against litigation versus protecting an individual's right to recover for retaliatory arrest. Nothing in the *Howards* decision should or would prevent any law enforcement official from fulfilling his duty to protect any member of the public, including elected officials. However, the *Howards* decision does provide redress for individuals who can prove that their constitutional rights were infringed upon based on a retaliatory animus.[177] Such a rule would not prevent Secret Service agents from taking action to prevent an assassination attempt or other threat, but will encourage agents to take pause to ensure that arrests of individuals are not based on a discriminatory intent. Further, while the Tenth Circuit's decision in *Howards* opened the door to claims of retaliatory arrest irrespective of probable cause, the reality is that the presence of probable cause creates a strong presumption in favor of the arresting officer.[178] Such a presumption in and of itself provides a strong measure of protection to arresting officers, as it will not easily be overcome.

In briefs before the Supreme Court, the Agents also argued that Secret Service agents should be entitled to the same presumption of regularity that the courts have extended to prosecutors.[179] It is this presumption that the Court cites in *Hartman* as one of the factors leading to its holding that probable cause forecloses the right to bring suit for retaliatory prosecution.[180] The Agents argue that Secret Service officers are specifically trained to deal with potential threats to public officials and, therefore, should enjoy a presumption of regularity in their actions.[181] While on its face this argument is plausible, it fails to take into account the underlying reasons why prosecutors have long enjoyed this presumption. The case law is clear that there is a "longstanding presumption of regularity accorded to the prosecutorial decisionmaking."[182] The presumption of prosecutorial regularity is grounded in the "recognition that the decision to prosecute is particularly ill-suited to judicial review," due to the myriad of factors that a prosecutor must consider when deciding to bring charges.[183] Despite the Agents' arguments to the contrary, there is no history of such deference being extended to law enforcement officials, and their roles as peace officers should not entitle them to such deference. Prosecutors are charged with representing the interest of the people and prosecuting those who commit crimes against the people or the state. In contrast, law enforcement officials are charged strictly enforcement

177. *See* Howards v. McLaughlin, 634 F.3d 1131, 1148 (10th Cir. 2011), *rev'd sub nom.* Reichle v. Howards, 132 S. Ct. 2088 (2012).
178. *See* Hartman v. Moore, 547 U.S. 250, 267 (2006).
179. Petition for Writ of Certiorari, *supra* note 40, at *25–27.
180. *Hartman*, 547 U.S. at 263.
181. Petition for Writ of Certiorari, *supra* note 40, at *26–27.
182. *Hartman*, 547 U.S. at 263.
183. Wayte v. United States, 470 U.S. 598, 607–08 (1985).

and do not require, nor enjoy, the latitude to determine when to exercise their authority and when to withhold it.

CONCLUSION

Congress's purpose in enacting § 1983, as well as the public policy rationale underpinning the Supreme Court's holding in *Monroe*, was to protect the constitutional rights of individuals from infringement by those acting under color of law. In order to maintain public faith in law enforcement officials, citizens must have a mechanism for seeking redress when police power is used to quash individual rights. This is how a civilized society holds accountable the law enforcement agents to whom it granted special powers, explicitly for the purpose of providing society protection. If by simply establishing probable cause, law enforcement officials are allowed to act with impunity in suppressing the rights of individual citizens, then the fundamental purpose of § 1983—protecting individual rights against the power of the state—will be rendered meaningless. Allowing law enforcement officials to suppress an individual's right to free speech, while hiding behind a shield of probable cause, will directly erode the public confidence in the very people who are sworn to protect us. In holding that probable cause does not bar civil liability in retaliatory arrest cases, the Tenth Circuit has recognized the importance of protecting individual rights; we can only hope that one day soon the Supreme Court will do the same.

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