No. 24- ____

IN THE

Supreme Court of the United States

OFFICER EDDIE BOYD, III AND
THE CITY OF FERGUSON, MISSOURI,

Petitioners,

v.

FRED WATSON,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Eighth Circuit affirmed summary judgment in favor of Petitioner Officer Eddie Boyd as to all of Respondent Fred Watson's 42 U.S.C. § 1983 claims except his First Amendment use-of-force retaliation claim, and reversed the grant of summary judgment favoring Petitioner City of Ferguson on his *Monell* claim. In so doing, the Eighth Circuit rejected Officer Boyd's qualified immunity defense.

The questions presented are:

1. Whether the Eighth Circuit's split decision violated this Court's "clearly established" law directives recognized in *Reichle* by relying on a generalized right not to be subjected to First Amendment retaliation, in the absence of factually analogous case law existing at the time of the encounter, and in direct conflict with the Tenth Circuit's holdings in *Hoskins v. Withers* and other circuit opinions.

2. Whether this Court's objective reasonableness standard established in *Hartman v. Moore* (for retaliatory prosecution) and *Nieves v. Bartlett* (for retaliatory arrest) should be extended to First Amendment retaliatory use-of-force cases.

3. Whether the but-for causation standard established by this Court, and expounded upon through the Eighth Circuit's "obvious alternative explanation" standard and other circuits' varying interpretations of the but-for causation standard, should be further clarified by this Court.

RELATED PROCEEDINGS

United States District Court (E.D. Mo.):
Watson v. City of Ferguson, 2022 WL 16569365 (E.D. Mo. Sept. 26, 2022) (*affirmed in part, vacated in part*) (Pet. App. 54a–93a)

Watson v. Boyd, 447 F. Supp.3d 924 (E.D. Mo. 2020), *vacated in part, appeal dismissed in part*)

United States Court of Appeals (8th Cir.):
Watson v. Boyd, 119 F.4th 539 (8th Cir. 2024) (*affirmed in part, reversed in part*) (*petition for rehearing by panel and by Court en banc denied on Nov. 26, 2024*) (*Watson II*) (Pet. App. 4a–52a)

Watson v. Boyd, 2 F.4th 1106 (8th Cir. 2021) (*Watson I*)

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The opinion of the court of appeals (Pet. App. 4a–52a) is reported at 119 F.4th 539 (8th Cir. 2024). The opinion of the district court (Pet. App. 54a–93a) is unreported but is available at 2022 WL 16569365 (E.D. Mo. Sept. 26, 2022).

JURISDICTION

The judgment of the court of appeals was entered on October 21, 2024. (Pet. App. 2a). The court of appeals denied a timely filed petition for rehearing by the panel and rehearing *en banc* on November 26, 2024. (Pet. App. 94a). On February 20, 2025, Justice Kavanaugh granted Petitioners until March 17, 2025 to file this Petition for Writ of Certiorari. (No. 24A800).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech . . ."

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes

> to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress . . .

STATEMENT OF THE CASE

A. Facts Regarding Stop, Search, Arrest and Charges.

On August 1, 2012, at about 8:17 p.m., Respondent Fred "Freddie" Watson ("Watson") was sitting in his vehicle parked in a City of Ferguson ("City") park cooling down after playing basketball. (Pet. App. 5a–6a). Watson sat in his car with the vehicle running, not wearing a seatbelt, with the headlights and air conditioner on, and the driver's side window partially down. (Pet. App. 5a). The vehicle was backed into a parking space with no front license plate, a Florida rear license plate and heavily tinted windows. (Pet. App. 6a, 9a). Both Missouri law and the City's Code of Ordinances restrict vision-reducing materials applied to the windows and windshield of a car, and Missouri law also requires license plates be fastened to the front and rear of motor vehicles. (Pet. App. 6a). Petitioner Eddie Boyd, III ("Officer Boyd") was patrolling the park, and, given information he had regarding "a spate of recent car break-ins," he decided to pull up to Watson's car, got out of his patrol car, and approached Watson's car on foot to investigate. (Pet. App. 5a–6a).

As he walked toward Watson's vehicle, Officer Boyd unsnapped his gun holster. (Pet. App. 6a). Officer Boyd testified that the vehicle windows were so dark he could not initially determine if anyone was inside. (Pet. App. 6a, n. 4). As Officer Boyd approached, Watson lowered the front driver's window more so they could "have an exchange." (Pet. App. 6a). Officer Boyd asked questions to determine Watson's identity and ultimately asked for his driver's license and registration. (Pet. App. 7a). At some point, Officer Boyd allegedly asked for Watson's social security number, which Watson refused to provide, and Watson asked for Officer Boyd's badge number. (Pet. App. 6a–7a). Officer Boyd refused to provide it, stating that it would be on the ticket he would be issuing. When Watson responded "[W]hat ticket[?] I have not broken any law," Officer Boyd responded, "I think your tint is too dark[,] and I could give you a ticket for that." (Pet. App. 7a). At some point, Officer Boyd became "visibly upset." (Pet. App. 7a). During this exchange, Watson's hands were on the steering wheel. (Pet. App. 7a).

After Officer Boyd informed Watson about the ticket, he removed his right hand from the steering wheel to reach for his cell phone located "next to the steering wheel . . . where the . . . navigation system [was]." (Pet. App. 7a). Officer Boyd then yelled, "[P]ut your f***ing phone down and put your hands on the steering wheel." He told Watson, "[B]ecause of police safety[,] don't start reaching around grabbing stuff." (Pet. App. 7a). Watson complied and "put it down." (Pet. App. 7a). Watson returned his hands to the steering wheel. (Pet. App. 7a). According to Watson, Officer Boyd then "pulled his gun" for ten

seconds, said, "I can shoot you right here" "[a]nd nobody will give a s**t," and re-holstered his firearm (Pet. App. 7a, 38a).

Watson refused Officer Boyd's request to throw out his car keys and refused Officer Boyd's request to exit the vehicle. (Pet. App. 7a–8a). Watson also failed to provide his driver's license, claiming it was in his pants in the back seat. (Pet. App. 8a). Watson also testified he told Officer Boyd that his registration was in the glove compartment. (Pet. App. 8a).

At some point, Officer Boyd asked Watson his name, and he replied "Fred Watson" even though his legal name is "Freddie Watson." (Pet. App. 8a). Officer Boyd also asked for Watson's address. (Pet. App. 8a). Watson gave a Florida address even though he was actually living in Illinois at the time of the stop. (Pet. App. 8a). According to Officer Boyd, he unsuccessfully tried to locate the name "Fred Watson" in REJIS, a computer system that law enforcement agencies use to identify individuals, including locating driver's license information. (Pet. App. 8a).

Once backup arrived, Watson exited the vehicle (kicking the door shut in the process), where he was placed in handcuffs and placed in Officer Boyd's patrol car. (Pet. App. 9a). During a search incident to the arrest, Officer Boyd located documentation indicating that Watson's legal name was "Freddie Watson," not "Fred Watson." (Pet. App. 9a). Officer Boyd then located "Freddie Watson" in REJIS and that REJIS search indicated Watson had "an expired operator's license through Missouri that

had not been surrendered to another state." (Pet. App. 9a).

Officer Boyd arrested Watson and issued him seven tickets: "no operator's license in possession; no proof of insurance; vision reducing material applied to windshield; expired state operator's license; no seat belt; failure to register an out[-]of[-]state motor vehicle within 30 days of residence; and no vehicle inspection." (Pet. App. 10a). Watson was charged with two more offenses written on complaints instead of tickets, including making a false statement and failure to obey the orders of a police officer. (Pet. App. 10a).

Watson contested the charges. (Pet. App. 10a). He subsequently received notice that the matters were either stayed or the tickets were paid off, despite Watson never pleading guilty to any of the charges or paying the fines. (Pet. App. 10a). The City ultimately dismissed all the charges. (Pet. App. 10a).

B. Watson's Claims, Summary Judgment Motions and Rulings, and Parties' Appeals.

Watson filed suit in federal court alleging the following § 1983 claims against Officer Boyd: (1) violation of his Fourth and Fourteenth Amendment rights to be free from unlawful searches, seizures, and force (Count I); (2) violation of his First Amendment right to be free from retaliation for requesting Officer Boyd's name and badge number (Count II); and (3) violation of his Fourth and Fourteenth Amendment rights to be free from malicious prosecution (Count

III). (Pet. App. 10a–11a). Watson also brought *Monell* claims against the City (Count IV) for (1) maintaining a custom of unconstitutional conduct by police officers; (2) failing to adequately screen Officer Boyd during the hiring process; (3) inadequately training Officer Boyd; and (4) failing to supervise or discipline Officer Boyd. (Pet. App. 11a).

Officer Boyd and the City jointly moved for summary judgment. (Pet. App. 11a). The district court concluded that Officer Boyd was not entitled to qualified immunity on Watson's claims of unlawful seizure, search, use-of-force, and retaliation, but did grant summary judgment for Officer Boyd based on qualified immunity as to Watson's malicious-prosecution claim. (Pet. App. 11a). The district court also denied the City's motion for summary judgment on Watson's *Monell* claims based on its finding that Officer Boyd was not entitled to qualified immunity for the underlying conduct and that a reasonable jury could find that the City had maintained a custom of unconstitutional conduct, failed to screen Officer Boyd, and failed to supervise or discipline Officer Boyd. (Pet. App. 11a–12a).

Officer Boyd and the City filed an interlocutory appeal of the district court's denial of qualified immunity and summary judgment (the *Watson I* appeal). (Pet. App. 12a). In that appeal, the Eighth Circuit concluded that the district court failed to undertake the necessary qualified immunity analysis (including, among other things, failing to articulate and apply the proper clearly established law standard or conduct the proper clearly established law analysis). The court also "vacate[d] the district court's

order and remand[ed] the case for a more detailed consideration and explanation of the validity, or not, of Officer Boyd's claim to qualified immunity in a manner consistent with [our] opinion." *Watson v. Boyd*, 119 F.4th 539, 546 (8th Cir. 2024) ("*Watson II*") (quoting *Watson v. Boyd*, 2 F.4th 1106, 1112–14 (8th Cir. 2021) (*affirmed in part, reversed in part*) (*petition for rehearing by panel and by Court en banc denied on Nov. 26, 2024*) ("*Watson I*")). (Pet. App. 12a). The court dismissed the City's appeal for lack of jurisdiction, concluding that the denial of its summary judgment motion was a non-appealable collateral order that was not "inextricably intertwined" with Officer Boyd's motion ruling. *Watson I*, 2 F.4th at 1114. (Pet. App. 12a).

On remand, Officer Boyd and the City filed a new motion for summary judgment based on qualified immunity and Watson's failure to establish constitutional violations (which failure would also absolve the City). (Pet. App. 12a). The district court granted summary judgment in favor of Officer Boyd and the City on all claims. (Pet. App. 12a). On the second review by the Eighth Circuit (now sought by Watson) (the *Watson II* appeal), the court affirmed the entry of summary judgment in favor of Officer Boyd on all claims appealed except the First Amendment retaliation claim. (Pet. App. 5a). In concluding that Officer Boyd was not entitled to qualified immunity, the court held "[i]t was clearly established at the time of the event that 'the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out.'" *Watson II*, 119 F.4th at 550 (quoting *Hartman v. Moore*, 547 U.S. 250, 256 (2006)). (Pet. App. 48a). Based on its reversal

of qualified immunity for Officer Boyd, the Eighth Circuit also reversed the entry of summary judgment in favor of the City. *Id.* at 562. (Pet. App. 48a).

Judge Gruender dissented, explaining that the panel majority's opinion "holds Officer Boyd to a higher standard than is required to obtain qualified immunity" and concluding, based on Eighth Circuit precedent, that "[c]ausation is missing because there exists an 'obvious alternative explanation' for Officer Boyd's use of force." *Watson II*, 119 F.4th at 536 (Gruender, J., dissenting) (quoting *Auer v. City of Minot*, 896 F.3d 854, 861) (8th Cir. 2018)). (Pet. App. 50a). In Judge Gruender's view, "[t]he entire sequence of events dispositively shows that Officer Boyd pointed his firearm at Watson due to Watson having reached for his phone. A reasonable factfinder could not conclude otherwise." *Watson II*, 119 F.4th at 536 (Gruender, J., dissenting). (Pet. App. 51a).[1]

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[1] Judge Gruender also reasoned that summary judgment should have been fully affirmed based on the following:

> Officer Boyd was required to make a "split-second judgment[]" in a "tense, uncertain, and rapidly evolving" circumstance. *Shelton v. Stevens*, 964 F.3d 747, 752 (8th Cir. 2020). Because Officer Boyd's use of force was justified by the existence of the intervening act (Watson reaching for his phone), Officer Boyd is entitled to qualified immunity on Watson's use-of-force retaliation claim. Accordingly, there is also no basis to hold the City liable on *Monell*. *See Edwards v. City of Florissant*, 58 F.4th 372, 376 (8th Cir. 2023) ("Absent a constitutional violation by a city employee, there can be no § 1983 or *Monell* liability for the City.").

REASONS FOR GRANTING THE PETITION

This Court's review is necessary to direct the Eighth Circuit to fully comply with this Court's "clearly established law" standard—"that the right allegedly violated must be established, 'not as a broad general proposition,' but in a 'particularized' sense so that the 'contours' of the right are clear to a reasonable official." *Reichle v. Howards*, 566 U.S. 658, 666 (2012). This Court should also permit review to resolve the clear conflict between the Eighth Circuit, the Tenth Circuit, and various other circuits regarding the precise nature of the "clearly established law" that must be present at the time of the incident to justify defeating an officer's qualified immunity defense in First Amendment retaliation use-of-force cases. *See Hoskins v. Withers*, 92 F.4th 1279 (10th Cir. 2024). (*See also* pending Petition for Writ of Certiorari in *Hoskins v. Withers*, No. 24-504).

Indeed, given the parallel legal issues and factual similarities between this case and *Hoskins*, Petitioners here respectfully submit that to the extent this Court should grant the petition in *Hoskins*, it should also grant this Petition. If both petitions are granted, they should ultimately be considered together for the purposes of that review.

Even if this Court rejects the petition filed in *Hoskins*, however, this Petition should be granted because the Eighth Circuit's decision—unlike the Tenth Circuit's decision—was legally incorrect and, if allowed to stand, will force Officer Boyd and the City to defend claims that should otherwise be barred. Moreover, unlike the petition filed in *Hoskins*, the

Petition here raises the additional and equally important question of whether an objective reasonableness standard should be employed for retaliatory use-of-force cases in the same fashion required by this Court for retaliatory prosecution and retaliatory arrest cases.

In this case, the Eighth Circuit held that "[i]t was clearly established at the time of the event that 'the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out.'" *Watson II*, 119 F.4th at 550 (quoting *Hartman*, 547 U.S. at 256). (Pet. App. 48a). However, this generalized identification of the "clearly established right" directly conflicts with *Reichle v. Howards* and its progeny. In *Reichle*, this Court rejected a similar attempt to utilize this *verbatim* generalized statement of law, holding that such a broad proposition is not sufficiently particularized such that a reasonable officer would understand the contours of the right. *Reichle*, 566 U.S. at 664–65. This Court explained:

> To be clearly established, a right must be sufficiently clear "that every 'reasonable official would [have understood] that what he is doing violates that right.'" [*Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)] (quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)). In other words, "existing precedent must have placed the statutory or constitutional question beyond debate." [*Ashcroft*, 563 U.S. at 741]. This "clearly established" standard protects the balance between

> vindication of constitutional rights and government officials' effective performance of their duties by ensuring that officials can "'reasonably . . . anticipate when their conduct may give rise to liability for damages.'" *Anderson*, *supra*, at 639, (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)).

Reichle, 566 U.S. at 664.

Pursuant to this Court's binding precedent, therefore, "the right in question is not the general right to be free from retaliation for one's speech, but the more specific right" to be free from a retaliatory use-of-force that is otherwise reasonable under the circumstances. *Id*. at 665. Such a right has never been clearly established, and certainly not in the context of a case such as this one—when an officer draws a firearm on a suspect for ten seconds where the officer "was facing a non-compliant occupant of a vehicle who made a movement within the vehicle" and had "an objectively reasonable concern for officer safety or suspicion of danger" when he pulled the firearm. *Watson II*, 119 F.4th at 548. (Pet. App. 17a).

Moreover, based on the state of the law in 2012, including this Court's holding in *Hartman*, 547 U.S. 250 (First Amendment retaliatory prosecution precluded by probable cause) and its subsequent ruling in *Reichle*, 566 U.S. at 664–65 (no clearly established First Amendment right to be free from retaliatory arrest otherwise supported by probable cause), a reasonable officer could, and most likely would, have concluded a use of force that is otherwise

objectively reasonable does not violate the First Amendment. This remains true today.

As this Court has not spoken on this precise question—that is, whether it is clearly established that a First Amendment retaliatory use-of-force claim may lie despite the use of force being objectively reasonable under the circumstances—and the circuits addressing the question have issued opinions in direct conflict with one another, this Court should grant the Petition. This important question cries out for review by this Court, particularly in the context of when an officer exercises his or her judgment in drawing a firearm (for either personal safety or public safety reasons), and the potential costly legal ramifications arising therefrom.

Additionally, the Eighth Circuit failed to address the second question presented here: whether a First Amendment retaliatory use-of-force claim may lie despite the use of force being objectively reasonable under the circumstances. Instead, the Eighth Circuit dismissed Petitioners' argument out of hand, stating: "if there is an argument for extending the *Nieves* no-probable-cause requirement beyond a claim of retaliatory Fourth Amendment seizure, . . . then [the defendants] ha[ve] not presented it." *Watson II*, 119 F.4th at 559 (quoting *Welch v. Dempsey*, 51 F.4th 809, 813 (8th Cir. 2022)). (Pet. App. 40a).

In *Nieves v. Bartlett*, 587 U.S. 391 (2019), this Court held that before a court may analyze whether an arrest is retaliatory, the plaintiff must first plead and prove that the conduct was objectively *un*reasonable under the circumstances. *Id.* at 400,

402–04, 408. This Court should grant this Petition to answer the additional question that *Nieves* answered following *Reichle*, but this time in the context of an alleged retaliatory use-of-force claim. That is, whether a retaliatory use of force that is otherwise objectively reasonable can nonetheless support a First Amendment retaliation claim. The failure to extend this threshold requirement to retaliatory use-of-force cases risks replacing the objective reasonableness standard with a subjective one, which is exactly what the Eighth Circuit employed here. This case provides the ideal vehicle for this Court to consider and resolve this question, as the Eighth Circuit held that Watson presented sufficient evidence to survive summary judgment on his First Amendment retaliatory use-of-force claim despite the district court's determination that the use of force at issue here was objectively reasonable in its Fourth Amendment use-of-force analysis. (Pet. App. 82a–85a). Watson did not challenge this determination (only appealing the summary judgment on the First Amendment retaliation claim, the Fourth Amendment unreasonable search claim and the *Monell* claim); as a result, that particular ruling was not disturbed on appeal. *Watson II*, 119 F.4th at 549. (Pet. App. 18a).

Lastly, *Nieves* also made clear that in determining but-for causation in the First Amendment retaliation context, "[i]t is not enough to show that an official acted with a retaliatory motive and that the plaintiff was injured—the motive must *cause* the injury." 587 U.S. at 398. "Specifically, it must be a 'but-for' cause, meaning that the adverse action against the plaintiff would not have been taken

absent the retaliatory motive." *Id.* at 399. In his dissent in this case, Judge Gruender pointed out that this Court's but-for causation standard should bar recovery given the "obvious alternative explanation" for Officer Boyd drawing his firearm only after Watson reached for his cell phone. *Watson II*, 119 F.4th at 535–36. (Pet. App. 49a–50a).

Clarity in this very important area is necessary to guide the Eighth Circuit and all federal courts as to the proper application of qualified immunity to First Amendment use-of-force retaliation claims, as well as to provide clear guidance to law enforcement personnel as to when they can and cannot rely on the qualified immunity defense for an otherwise objectively reasonable use of force. Only this Court can grant review to add clarity to this important and unsettled area of qualified immunity law.

Accordingly, this Court should grant this Petition and ultimately reverse the Eighth Circuit's ruling.

A. The Eighth Circuit erred in denying qualified immunity to Officer Boyd where it defined the "clearly established" right based upon broad generalizations, rather than factually analogous cases, in violation of this Court's holding in *Reichle,* and has generated an Opinion that conflicts with the Tenth Circuit's holding in *Hoskins v. Withers* and other circuits' decisions. (Question 1)

1. The Conflict with *Reichle* Alone Justifies Review.

Review by this Court is necessary to reaffirm its "clearly established" law standard—"that the right allegedly violated must be established, 'not as a broad general proposition,' but in a 'particularized' sense so that the 'contours' of the right are clear to a reasonable official[.]" *Reichle*, 566 U.S. at 664–65 (internal citation removed). While the Tenth Circuit got this Court's directives right in *Hoskins*—by seeking factually analogous cases, concluding there were none, and determining that the right to be free from the retaliatory pointing of a firearm is not clearly established—the Eighth Circuit widely missed the mark here.

The panel majority's opinion directly conflicts with this Court's mandate prohibiting "broad general proposition[s]" in determining whether a right is clearly established. *See Reichle*, 566 U.S. at 665. The panel majority improperly rejected qualified immunity for Officer Boyd on the grounds that "[i]t

was clearly established at the time of the event that 'the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out.'" *Watson II*, 119 F.4th at 562 (quoting *Hartman*, 547 U.S. at 256). (Pet. App. 48a). Reliance on this particular generalized right has been soundly rejected by this Court.

In *Reichle*, this Court granted certiorari to determine "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 Howards' arrest so held." 566 U.S. at 663. At the time of the arrest in *Reichle*, this Court had decided *Hartman v. Moore* wherein it held that a plaintiff could not state a claim for retaliatory *prosecution* in violation of the First Amendment if the charges were objectively reasonable, that is, supported by probable cause. *Reichle*, 566 U.S. at 666.

The plaintiff in *Reichle*, quoting *Hartman*, asserted it was well settled that, "as a general matter[,] the First Amendment prohibits government officials from subjecting an individual to retaliatory actions" for his speech. *Id.* at 665. As such, the plaintiff argued he stated a claim for retaliatory arrest despite the presence of probable cause to support the arrest. *Id*. This Court rejected this argument on the grounds "that the right allegedly violated must be established, 'not as a broad general proposition,' but in a 'particularized' sense so that the 'contours' of the right are clear to a reasonable official[.]" *Id.* (first quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (*per curiam*); then quoting

Anderson v. Creighton, 483 U.S. 635, 640 (1987)). This Court made clear that the right in question was "not the general right to be free from retaliation for one's speech, but the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause." *Id.*

This Court went on to conclude that it had never before held that there was a right to be free from a retaliatory arrest that was otherwise supported by probable cause, and that the Tenth Circuit precedent relied on by the court of appeals did not satisfy the clearly established law standard. *Id.* at 664–65. This Court also concluded that a reasonable officer could have interpreted *Hartman* to stand for the proposition that, just as in retaliatory prosecution cases, there is no right to be free from a retaliatory arrest if the arrest is objectively reasonable because it was supported by probable cause. *Id.* at 667–68. Accordingly, this Court concluded that the officer in *Reichle* was entitled to qualified immunity. *Id.* at 670.

Here, the panel majority again identified the "clearly established right" too broadly, using the exact general statement of law this Court expressly rejected in *Reichle*. *Id.* at 665. Moreover, the panel majority's opinion did not identify any specific Eighth Circuit precedent that would satisfy the clearly established law standard.[2] As the Petitioners pointed out, the

[2] The cases cited by the Eighth Circuit (and relied upon by Watson) (a) did not involve a finding that the alleged use-of-force was objectively reasonable, (b) were not factually analogous, and (c) were decided after Watson's arrest and thus could not constitute the kind of controlling authority necessary to the finding of a clearly established right. (*See* Pet. App. 38a–

obvious reason no such factually analogous case has been cited was (and remains) that there is no clearly established First Amendment right to be free from a retaliatory use of force that is objectively reasonable under the circumstances. (Pet. App. 38a).

Moreover, based on *Hartman* and *Reichle*, in August of 2012, a reasonable officer could have concluded that, just as having probable cause to prosecute (*Hartman*) and probable cause to arrest (*Reichle*) precludes a First Amendment retaliation claim, so too does the objective reasonableness of a use of force. *Id.* at 667–70.

Thus, the panel majority's opinion directly contradicts this Court's precedent.

2. The Conflict with the Tenth Circuit and Other Circuits Justifies Review.

Aside from this clear conflict with *Reichle*, the Eighth Circuit's formulation of the right at issue directly conflicts with the Tenth Circuit's determination in *Hoskins v. Withers*, a factually analogous case in which a petition for certiorari is

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40a). *Reichle*, 566 U.S. at 665–66; *see also Sanderlin v. Dwyer*, 116 F.4th 905, 915 (9th Cir. 2024) ("We ask whether the law was 'clearly established *at the time an action occurred*.' Subsequent legal developments cannot be used to impute knowledge upon officers, because the relevant inquiry is what the officer can 'fairly be said to 'know' at the time of the alleged violation.") (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (Brennan, J., concurring)).

pending currently with this Court (Supreme Court Case No. 24-504). 92 F.4th 1279. In *Hoskins*, the Tenth Circuit affirmed the dismissal of a First Amendment retaliatory use-of-force claim based on qualified immunity where the officer pointed his firearm at the plaintiff for approximately eight seconds during a stop in response to the suspect cursing at the officer. *Id.* at 1284, 1294. Contrary to the panel majority's ruling in this case, the Tenth Circuit held that a First Amendment claim for retaliatory use-of-force was not clearly established based on pulling a firearm for eight seconds, and further, that because a reasonable officer could have concluded his conduct was not a violation of the First Amendment, the officer was entitled to qualified immunity. *Id.* at 1294.[3]

Aside from the notable inconsistencies between the panel majority's conclusion and the Tenth Circuit's determination specifically, and in federal courts throughout the country on the qualified immunity/clearly established law question generally,[4] those inconsistencies likewise manifest ***in***

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[3] The instant case was submitted to the Eighth Circuit panel after argument on January 10, 2024, and decided on October 21, 2024 (Pet. App. 4a); *Hoskins* was decided on February 20, 2024, and was cited by the Petitioners in their petition for rehearing filed on November 4, 2024.

[4] *Compare Sharpe v. Winterville Police Dep't*, 59 F.4th 674, 683 (4th Cir. 2023), *cert. denied*, 144 S. Ct. 488, 217 L. Ed. 2d 256 (2023) ("So we must define the right at issue with specificity. [Citation omitted]. . . . A reasonable officer will be unable to 'determine how the relevant legal doctrine . . . will apply to the factual situation' if the circumstances differ too much from prior cases"), *and Puente v. City of Phoenix*, 123 F.4th

the two appellate court rulings issued in this very case. Contrary to the generalized right identified by the panel majority here, in *Watson I* (which reversed and remanded based on the failure to properly apply the clearly established law prong), a different Eighth Circuit panel succinctly set forth the clearly established law standard mandated by this Court:

> The district court defined the relevant law at too high a level of generality to conduct a proper clearly established analysis. *See N.S.* [*v. Kan. City Bd. of Police Comm'rs*, 933 F.3d 967, 970 (8th Cir. 2019)] ("Yet the Supreme Court has warned courts not to 'define clearly established law at [such] a high level of generality.'" (alteration in original) (quoting *Kisela v. Hughes*, [584 U.S. 100, 104] (2018) (per curiam))). "Although there need not be 'a case directly on point for a right to be clearly established, existing precedent must have placed the . . . constitutional question *beyond*

1035, 1063 (9th Cir. 2024) ("[W]e conclude that Plaintiffs have failed to identify any precedent that would clearly establish that Defendants violated Plaintiffs' rights in the context that they confronted."), *with Berge v. Sch. Comm. of Gloucester*, 107 F.4th 33, 39 (1st Cir. 2024) ("[H]e can also satisfy that [clearly established law] requirement by citing a 'general' standard 'already identified in the decisional law' that 'appl[ies] with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful[.]'").

> *debate*[ ]' . . . ." *Id.* (citation omitted). The law must be sufficiently clear such that "*every* 'reasonable [officer] would understand what he is doing is unlawful.'" *Dist. of Columbia v. Wesby*, [583 U.S. 48, 63] (2018) (emphasis added) (citation omitted); *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (per curiam) ("The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" (citation omitted)). . . .
>
> [T]he district court's excessive force analysis fails to identify a specific right or factually analogous cases. . . ." '[O]utside [of] an obvious case,' the [Supreme] Court has explained, it is not enough 'to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness.'" [Citation omitted]

Watson I, 2 F.4th at 1113–14.

Despite the fact that neither this Court nor any circuit court decision has ever recognized the specific right at issue here, particularly in a case involving the drawing of a firearm for safety reasons, the panel majority's opinion, in direct conflict with various other circuit court holdings, has concluded that the general right to be free from First Amendment

retaliation is all that is required to defeat a qualified immunity defense. That is not the law stated by this Court.

Because of these circuit conflicts, this Court should grant review, and, consistent with established law, reverse the ruling by the panel majority.

B. This Court's existing precedents in *Hartman v. Moore* (for retaliatory prosecution) and *Nieves v. Bartlett* (for retaliatory arrest) requiring a plaintiff to plead and prove that the conduct complained of was objectively unreasonable should be extended to First Amendment retaliatory use-of-force cases. (Question 2)

Although this Court has weighed in on the threshold objective unreasonableness requirement for bringing claims for First Amendment retaliatory prosecution (*Hartman v. Moore*) and First Amendment retaliatory arrest (*Nieves v. Bartlett*), it has not yet ruled on whether there is a threshold *un*reasonableness requirement to bring a First Amendment use-of-force claim. Consistent with *Hartman* and *Nieves*, however, such an analysis is necessary and even more appropriate for use-of-force cases, where it is "particularly difficult to determine whether the adverse government action was caused by the officer's malice" (*Nieves*, 587 U.S. at 402) or is otherwise reasonable under the circumstances because the reasonableness of an officer's actions in the use-of-force context must account "for the fact that police officers are often forced to make split-second

judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. 386, 397 (1989). This Court should grant the Petition to clarify whether a plaintiff must plead and prove that an alleged retaliatory use-of-force is objectively unreasonable under the circumstances as a threshold matter, just as this Court required in *Hartman* and *Nieves*.

In *Nieves*, this Court held that before a court may analyze whether an arrest is retaliatory, it must first make a threshold determination that the conduct at issue was objectively *un*reasonable under the circumstances. 587 U.S. at 400, 402–04, 408. This Court imposed an objective reasonableness requirement to satisfy its long-standing precedent that the conduct of law enforcement officers in various contexts is reviewed under an objective reasonableness standard for purposes of qualified immunity. *Id.* at 398–404. *See also Graham*, 490 U.S. at 397.

The plaintiff in *Nieves* sought to dispense with the objective standard, arguing that a subjective approach is appropriate because causation in retaliatory arrest cases "'is not inherently complex' because the 'factfinder simply must determine whether the officer intended to punish the plaintiff for the plaintiff's protected speech.'" *Nieves*, 587 U.S. at 402. This Court rejected this approach, explaining:

> Because a state of mind is "easy to allege and hard to disprove," [*Crawford-El v. Britton*, 523 U.S. 574, 585 (1998)], a

> subjective inquiry would threaten to set off "broad-ranging discovery" in which "there often is no clear end to the relevant evidence," [*Harlow*, 457 U.S. at 817]. As a result, policing certain events like an unruly protest would pose overwhelming litigation risks. Any inartful turn of phrase or perceived slight during a legitimate arrest could land an officer in years of litigation. Bartlett's standard would thus "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire v. Biddle*, 177 F.2d 579, 581 (C.A.2 1949) (Learned Hand, C.J.). It would also compromise evenhanded application of the law by making the constitutionality of an arrest "vary from place to place and from time to time" depending on the personal motives of individual officers. [*Devenpeck v. Alford*, 543 U.S. 146, 154 (2004)]. Yet another "predictable consequence" of such a rule is that officers would simply minimize their communication during arrests to avoid having their words scrutinized for hints of improper motive—a result that would leave everyone worse off. [*Id.* at 155.]

Id. at 403–04.

In this case, the Eighth Circuit dispensed with any objective reasonableness inquiry and skipped to

the question of whether Watson produced evidence sufficient to satisfy the elements of a retaliatory use-of-force claim and holding that Watson "has raised a genuine issue of material fact as to retaliatory motive." *Watson II*, 119 F.4th at 557. (Pet. App. 37a). The court concluded that because there was evidence that Officer Boyd's alleged use of force was motivated by Watson requesting Officer Boyd's badge number, "a reasonable factfinder could conclude that retaliation was a but-for cause of Officer Boyd pulling his weapon on Watson." *Id.* (Pet. App. 37a–38a). Accordingly, the Eighth Circuit reversed the district court and remanded the case for further proceedings on Watson's First Amendment retaliation claim against Officer Boyd and his *Monell* claim against the City. *Id.* at 535. (Pet. App. 48a–49a). The court did so, despite the fact that the alleged use of force had already been held reasonable under the circumstances in the context of the Fourth Amendment,[5] a decision that was not appealed by Watson. *Id.* at 548–49. (Pet. App. 17a–18a).

The Eighth Circuit justified its decision not to extend *Nieves* by distinguishing the retaliatory actions themselves, *i.e.*, the "act" of using force versus the "act" of an arrest, to reason that a retaliatory use of force does not necessarily implicate a Fourth Amendment seizure analysis. (Pet. App. 40a). In so doing, the court relied on *Welch v. Dempsey*, 51 F.4th

[5] The district court "concluded that Officer Boyd had 'an objectively reasonable concern for officer safety or suspicion of danger' when he pulled his gun because he 'was facing a non-compliant occupant of a vehicle who made a movement within the vehicle.'" *Watson II*, 119 F.4th at 548. (Pet. App. 16a–17a).

809, 812 (8th Cir. 2022). (Pet. App. 35a–36a). However, in *Welch* the plaintiff did not bring a Fourth Amendment claim and the defendant officer did not argue that the case involved a seizure, but the defendant officer nevertheless argued that "arguable probable cause" should defeat the plaintiff's First Amendment use-of-force claim. *Id*. Based on the specific context of that case, it is logical that the Eighth Circuit panel concluded the defendant officer failed to justify applying the Fourth Amendment arguable probable cause standard to the plaintiff's First Amendment claim.

But rejecting the need to made an objective reasonableness determination makes no sense here, where the Fourth Amendment seizure standard *is* implicated because the *very same* action—Officer Boyd pulling his firearm on Watson in response to him grabbing for his cell phone—formed the basis of both Watson's Fourth and First Amendment claims. *Watson II*, 119 F.4th at 546–47. (Pet. App. 12a–18a). Eliminating the objective reasonableness standard to allow a First Amendment use-of-force claim to proceed where a Fourth Amendment claim based upon the same conduct is barred undermines this Court's entire qualified immunity framework by "allowing even doubtful [use-of-force] suits to proceed based solely on allegations about an arresting officer's mental state." *See Nieves*, 587 U.S. at 403.

Although this Court has not addressed the precise issue here—whether a retaliatory use of force that is otherwise reasonable under the circumstances may nevertheless violate the First Amendment—the rationale for applying an objective reasonableness

standard is just as applicable, if not more so, in the retaliatory use-of-force context as it is in the retaliatory prosecution and retaliatory arrest contexts. Such a determination in the retaliatory use-of-force context would recognize and apply the long-accepted objective reasonableness standard utilized when determining whether an officer who makes a split-second decision regarding the amount of force necessary in a particular situation is entitled to qualified immunity, promoting the safety of both officers and the public. *See Graham*, 490 U.S. at 397.

As in other contexts, applying an objective reasonableness standard also serves to remove the burden of time-consuming litigation, add predictability, and permit open communications by officers. *See Nieves*, 587 U.S. at 403. Applying such a standard likewise facilitates evenhanded law enforcement practices by officers. *See Devenpeck*, 543 U.S. at 153 ("[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.") (citation omitted)). It would also "ensure that officers may go about their work without undue apprehension of being sued[.]" *Nieves*, 587 U.S. at 403.

Accordingly, this Court should grant review to extend this threshold objective reasonableness requirement in the use-of-force context, compelling plaintiffs to plead and prove the objective unreasonableness of the defendant's conduct before being permitted to pursue a retaliatory use-of-force claim.

C. Given this Court's determination that but-for causation is lacking if the action would have been taken anyway absent retaliatory animus, the panel majority's opinion clashes head on with Supreme Court authority and with circuit decisions, including Eighth Circuit decisions. (Question 3)

This Court should also grant review to address the issue of causation that triggered Judge Gruender's dissent: whether the panel majority properly applied the but-for causation standard established by this Court for First Amendment retaliation claims (and additionally, whether the panel's failure to do so conflicts with established Eighth Circuit law, which differs from that applied by other circuits).

First Amendment retaliation claims generally fail for a lack of causation "if that action would have been taken anyway." *Hartman*, 547 U.S. at 260 ("It may be dishonorable to act with an unconstitutional motive and perhaps in some instances be unlawful, but action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway."); *see also Nieves*, 587 U.S. at 398–99 ("It is not enough to show that an official acted with a retaliatory motive and that the plaintiff was injured—the motive must *cause* the injury. Specifically, it must be a 'but-for' cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive."); *Gonzalez v. Trevino*, 602 U.S. 653, 663 (2024) (Alito, J., concurring) (describing the second

step of *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 288 (1977) framework where burden then shifts to the defendant "to show that he would have taken the same adverse action even in the absence of the protected speech.").

Accepting review of this Petition issue also provides this Court with the opportunity to reconcile the ongoing conflict between the Eighth Circuit (applying an "obvious alternative explanation" element to the causation analysis, which was not but should have been applied by the panel majority) and other circuits (some of which closely adhere to *Nieves*' directive that causation is lacking if the action would have been taken absent retaliatory animus while others more readily bypass that analysis altogether).[6]

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[6] *Compare Batyukova v. Doege*, 994 F.3d 717, 730–31 (5th Cir. 2021) (plaintiff's First Amendment use-of-force retaliation claim failed because she could not "show that she would not have been shot absent her engagement in protected activity."), *and Ezell v. Hininger*, 23-7007, 2024 WL 1109057, at *3 (10th Cir. Mar. 14, 2024) ("No reasonable juror could find that Mr. Ezell's threats to file grievances and a lawsuit substantially motivated the recommendation that he be placed in maximum-security housing. . . . Mr. Ezell's behavior gave officials a legitimate reason to reconsider the appropriate level of security for him."), *with Lopez v. City of Glendora*, 811 Fed. Appx. 1016, 1018 n.7 (9th Cir. 2020) (Court, "without deciding that *Nieves* would apply to [the] case," explained "because a jury could conclude that no reasonable suspicion justified the pat-down and that the force was excessive, the *Nieves* requirements are satisfied."), *and Watson II*, 119 F.4th at 557 (Pet. App. 37a–38a) (without addressing any obvious alternative explanation, panel majority held a jury question arises regarding whether "Officer Boyd's use of force was motivated by Watson's exercise of his constitutional rights" and held "[b]ased on these facts, a reasonable factfinder could conclude that retaliation was a but-for cause of Officer Boyd pulling his weapon on Watson."), *and*

In his dissent, Judge Gruender specifically noted that until the underlying case here, the Eighth Circuit consistently held that "[i]f there exists an 'obvious alternative explanation'" for the officer's use of force, "causation is missing." *Watson II*, 119 F.4th at 536 (Gruender, J., dissenting); *see also Laney v. City of St. Louis*, 56 F.4th 1153, 1158 (8th Cir. 2023); *Auer*, 896 F.3d at 860. (Pet. App. 49a). In other words, the causation inquiry should end once an obvious alternative explanation that is sufficient to justify the action taken has been established.

Applying the test here, Judge Gruender concluded that, "[t]he entire sequence of events dispositively shows that Officer Boyd pointed his firearm at Watson due to Watson having reached for his phone. A reasonable factfinder could not conclude otherwise." *Watson II*, 119 F.4th at 536 (Gruender, J., dissenting). (Pet. App. 49a). By failing to apply its own precedent regarding the test for causation, he warned that the Eighth Circuit decision "holds Officer Boyd to a higher standard than is required to obtain qualified immunity." *Watson II*, 119 F.4th at 536 (Gruender, J., dissenting) (citing *Wesby*, 583 U.S. at 63 (stating that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law")). (Pet. App. 50a–51a).

Hundley v. Frunzi, 23-581-PR, 2024 WL 3886996, at *3 (2d Cir. Aug. 21, 2024) (determining that even though jury found use of physical force necessary, jury could have found the pat-frisk was the impermissible retaliatory action, but unclear if the court, or jury, considered whether the officers would have performed the pat-frisk notwithstanding the inmate filing grievances).

In a similar case involving pointing a firearm at a suspect, the Eighth Circuit properly applied the but-for causation test to reach the correct result. In *Clark v. Clark*, 926 F.3d 972 (8th Cir. 2019), the court rejected the plaintiff's First Amendment retaliation claim because he could not show "a causal connection between [the] defendant's retaliatory animus and [his] subsequent injury," which included "pointing a firearm at [the plaintiff] for a few seconds while removing him from his vehicle." *Id.* at 980. The court rejected the First Amendment retaliation claim because the officer "had sufficient reasonable and articulable suspicion to conduct an investigative seizure of [the plaintiff]" under the Fourth Amendment:

> To properly state a claim for First Amendment retaliation, Gregory is required to show "a causal connection between a defendant's retaliatory animus and [his] subsequent injury." *Osborne v. Grussing*, 477 F.3d 1002, 1005 (8th Cir. 2007) (quoting *Hartman*, 547 U.S. at 260). As discussed above, the initial encounter was consensual and Deputy Clark had sufficient reasonable and articulable suspicion to conduct an investigative seizure of Gregory. In light of Deputy Clark's legitimate motive to investigate, Clark has failed to draw the requisite causal connection to state a First Amendment retaliation claim.

Id. at 980.

Accordingly, this Court should also grant certiorari because this case provides the opportunity to resolve analytical variances amongst circuits on causation in use-of-force retaliation claims.

CONCLUSION

For all the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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