No. 25-981

IN THE
Supreme Court of the United States

KYLER NEWBY,
Petitioner,
v.
GABRIEL J. BASSFORD,
Respondent.

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

BRIEF OF *AMICUS CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The International Municipal Lawyers Association ("IMLA") has a significant interest in this petition. Founded in 1935, IMLA is the nation's largest organization devoted solely to local government law. IMLA is a nonpartisan, nonprofit professional association of counsel encompassing more than 2,500 local government entities represented through their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an advocate and international clearinghouse for legal information relevant to municipal matters. IMLA advocates for the responsible development of municipal law and presents the collective viewpoint of local governments around the country in lawsuits that affect their interests.

IMLA respectfully submits this brief in support of granting *certiorari* to emphasize the negative impact that the Ninth Circuit's decision has had both in creating a circuit split, as well as in undercutting the clarity and consistency that is necessary for the evaluation of qualified immunity.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's decision has created a circuit split on the metes and bounds of qualified immunity. Such a split not only means that the constitutionality of an arrest now varies "from place to place and from

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No one other than IMLA funded preparation of this brief. *Amicus Curiae* certify that, pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of the intent to file this brief.

time to time," *Devenpeck v. Alford*, 543 U.S. 146, 154 (2004), but it also undercuts the fundamental purpose and goal of qualified immunity.

The Ninth Circuit's failure to consider "arguable probable cause" in its qualified immunity analysis in the context of a First Amendment retaliatory arrest claim greatly expands liability for law enforcement officers and muddies the boundaries between permissible and impermissible conduct—boundaries which require clarity to both achieve the goals and respect the limitations of qualified immunity.

This Court has already grappled with the unique challenges posed by claims arising under the First Amendment in *Nieves*, which created a separate exception to safeguard citizens' First Amendment rights. The Ninth Circuit's decision represents a second and separate expansion that is, at best, duplicative of *Nieves*, and at worst, a substantial and unbounded departure from its framework.

Lastly, the purpose of qualified immunity is undermined by a lack of clarity. The Ninth Circuit's decision does not just create a landscape where parties' rights vary from jurisdiction to jurisdiction: it creates inappropriate vagueness within the Ninth Circuit itself. This result will lead to negative outcomes both for law enforcement officers as well as citizens seeking to lawfully exercise their fundamental rights.

ARGUMENT

I. This Court should grant certiorari to resolve a substantial circuit split.

Before addressing the now-existing divide between the circuits, it is useful to identify where the circuits are aligned. Ninth Circuit case law recognizes that the

qualified immunity analysis in the Fourth Amendment context asks "whether it is *reasonably arguable* that there was probable cause for arrest." *Rosenbaum v. Washoe Cnty.*, 663 F.3d 1071, 1076 (9th Cir. 2011). This standard is often referred to as "arguable probable cause."

Arguable probable cause is generally called a "reasonable officer standard," providing that "[a]lthough officers might seem to lack probable cause under the prudent person standard, especially when we evaluate their actions *post hoc*, a reasonable officer on the ground might perceive the situation differently." *Johnson v. Barr*, 79 F.4th 996, 1005 (9th Cir. 2023). This standard "exists where 'a reasonable police officer in the same circumstances and with the same knowledge and possessing the same knowledge as the officer in question *could* have reasonably believed that probable cause existed in light of well-established law.'" *Felders ex rel. Smedley v. Malcom*, 755 F.3d 870, 879 (10th Cir. 2014) (citation omitted); *accord Humphrey v. Staszak*, 148 F.3d 719, 725 (7th Cir. 1998).

Indeed, this Court has generally recognized this standard, albeit in slightly different terms. *See Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (recognizing qualified immunity where law-enforcement officers "reasonably but mistakenly conclude that probable cause is present[.]"). Courts thus appear aligned on the metes and bounds of arguable probable cause.

Where the circuits are now split, however, is over an issue that has not yet been explicitly addressed by this Court: "whether arguable probable cause would trigger qualified immunity on a First Amendment retaliation claim[.]" *Detreville v. Gurevich*, No. 24-1427, 2025 WL 1874587, at *6 (10th Cir. July 8, 2025)

(cleaned up).[2] When it decided *Detreville* in July 2025, the Tenth Circuit surveyed existing case law and concluded that "the circuits that have addressed the issue have granted officers qualified immunity on a retaliatory arrest claim when they had arguable probable cause for the arrest." *Id.* (collecting cases).

In the Fourth Circuit, for example, an officer "is entitled to qualified immunity on" a First Amendment retaliatory arrest claim where "an objectively reasonable officer could have found probable cause to arrest." *Somers v. Devine*, 132 F.4th 689, 698 (4th Cir. 2025). The Fourth Circuit explained that qualified immunity turned on whether the officer "was objectively reasonable in believing that probable cause existed" for the arrest. *Id.* at 697. In essence, this is arguable probable cause. *See Thurston v. Frye*, 99 F.4th 665, 676 & n.11 (4th Cir. 2024) ("see[ing] no distinction between the 'arguable probable cause' test and the Supreme Court's formulation of . . . whether a probable-cause belief is 'reasonable'") (citation omitted).

The same is true in the Fifth Circuit. In *Roy v. City of Monroe*, the court applied qualified immunity on a First Amendment retaliation claim where the plaintiff fails to "establish[] that the absence of probable cause would have been apparent to any reasonable officer." 950 F.3d 245, 255 (5th Cir. 2020). This was not a one-off decision. *See, e.g.*, *Rucker v. Marshall*, 119 F.4th

[2] As explained in Part II, this Court has considered similar but distinct issues. *See, e.g.*, *Nieves v. Bartlett*, 587 U.S. 391, 407 (2019) (except for "a narrow qualification," "probable cause should generally defeat a retaliatory arrest claim"); *Reichle v. Howards*, 566 U.S. 658, 664–65 (2012) (for qualified immunity, "[t]his Court has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause").

395, 402 (5th Cir. 2024) (citing *Roy* and holding the officer "is protected by qualified immunity as to [the] retaliatory arrest claim"); *Davidson v. City of Stafford*, 848 F.3d 384, 391–93 (5th Cir. 2017).

The Sixth Circuit has taken a similar approach to situations involving First Amendment claims where "probable cause [] may be difficult" even when "qualified immunity is not." *See Novak v. City of Parma*, 33 F.4th 296, 305 (6th Cir. 2022). The court in *Novak* stressed that "qualified immunity protects officers who 'reasonably pick one side or the other' in a debate where judges could 'reasonably disagree.'" *Id.* (cleaned up). According to the court, "[t]hat's just what the officers did—they reasonably found probable cause in an unsettled case judges can debate." *Id.* Thus, even when it may be a close call whether probable cause supported the arrest of an individual whose speech may be protected by the First Amendment, qualified immunity applies because "the officers had good reason to believe they had probable cause," even if that belief ultimately proves mistaken. *Id.*

The Eighth Circuit provides the firmest authority for arguable probable cause triggering qualified immunity on a First Amendment retaliation claim. In *Just v. City of St. Louis*, the court held that "a First Amendment retaliatory arrest claim is defeated by a showing of probable cause (*or arguable probable cause*)." 7 F.4th 761, 768 (8th Cir. 2021) (emphasis added). The Eighth Circuit also has noted that while a plaintiff must show no probable cause to prevail on a First Amendment retaliation claim, an officer will nonetheless be entitled to qualified immunity where the officer had arguable probable cause for the arrest. *Quraishi v. St. Charles Cnty.*, 986 F.3d 831, 836 (8th Cir. 2021). Therefore, to overcome qualified immunity

on a First Amendment retaliation claim, the plaintiff must show that "the defendant lacked probable cause or arguable probable cause to arrest." *Nieters v. Holtan*, 83 F.4th 1099, 1110 (8th Cir. 2023); *see Brown v. City of St. Louis*, 40 F.4th 895, 903 (8th Cir. 2022) ("when determining whether an officer is entitled to qualified immunity, we account for objectively reasonable mistakes"); *see also Watson v. Boyd*, 119 F.4th 539, 551–56 (8th Cir. 2024) (similar), *cert. denied*, 146 S. Ct. 280 (2025).

Finally, for more than 25 years, the Eleventh Circuit has held that "when an officer has *arguable* probable cause to believe that a person is committing a particular public offense, he is entitled to qualified immunity from suit, even if the offender may be speaking at the time that he is arrested." *Redd v. City of Enterprise*, 140 F.3d 1378, 1384 (11th Cir. 1998); *see also Gates v. Khokhar*, 884 F.3d 1290, 1298 (11th Cir. 2018) ("Even without actual probable cause, however, a police officer is entitled to qualified immunity if he had only 'arguable' probable cause to arrest the plaintiff.").

After surveying this case law, the Tenth Circuit in *Detreville* "agree[d] with the majority of circuits holding that when probable cause is lacking at prong one, arguable probable cause for an arrest entitles a defendant to qualified immunity at prong two." 2025 WL 1874587, at *6. Accordingly, the Tenth Circuit joined

the Second,[3] Fourth, Fifth, Sixth, Seventh,[4] Eighth, and Eleventh Circuits in holding that arguable probable cause triggers qualified immunity on a First Amendment retaliation claim.

The Ninth Circuit nonetheless split from the majority of circuits less than two months after the Tenth Circuit decided *Detreville*. *See Bassford v. Newby*, No. 24-5525, 2025 WL 2452367 (9th Cir. Aug. 26, 2025). The Ninth Circuit below held that arguable probable cause does not trigger qualified immunity on a First Amendment retaliatory arrest claim for the simple reason that neither this Court nor the "Ninth Circuit have . . . [yet] imported arguable probable cause from the Fourth Amendment unlawful arrest context into the First Amendment retaliatory arrest context." *Id.* This decision not only split from other circuits but also among its three-judge panel. *Compare id.* at *2 ("a finding of *arguable* probable cause would not necessarily defeat" a First Amendment retaliatory arrest claim), *with id.* at *3–4 (Fitzwater, J., dissenting) (arguing an officer is entitled to qualified immunity when "a reasonable officer could have believed" the arrest was lawful).

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[3] *See Rupp v. Buffalo*, 91 F.4th 623, 642 (2d Cir. 2024) ("qualified immunity is available where officers of reasonable competence could disagree on whether the probable cause test was met, . . . *i.e.*, where the existence of probable cause for an arrest was at least reasonable and arguable").

[4] *See Thayer v. Chiczewski*, 705 F.3d 237, 253 (7th Cir. 2012) (officer entitled to qualified immunity on First Amendment retaliation claim when there was "*arguable* probable cause to arrest"), *overruled on other grounds by Lozman v. Riviera Beach*, 585 U.S. 87, 101 (2018).

In sum, the Ninth Circuit fashioned a rule that is at odds with precedent applied in other circuits. *See Prospero v. Sullivan*, 153 F.4th 1171, 1188–89 (11th Cir. 2025) ("the existence of *arguable* probable cause entitles" the officers "to qualified immunity as to" the "First and Fourth Amendment claims premised on [the plaintiff's] arrest"); *Kampas v. City of St. Louis*, 157 F.4th 937, 945 (8th Cir. 2025) (similar). And while the weight of the split currently tilts away from the Ninth Circuit, its decision signals a potentially deepening divide among Article III judges. Indeed, for courts that have yet to weigh in—e.g., the First, Third, and D.C. Circuits—the Ninth Circuit's reasoning may prove persuasive. *See Bassford*, 2025 WL 2452367, at *3 ("there is good reason to treat Fourth Amendment unlawful arrest claims differently than First Amendment retaliatory arrest claims"); *see also Nieves v. Bartlett*, 587 U.S. 391, 415 (2019) (Gorsuch, J., concurring) ("[A] First Amendment retaliatory arrest claim serves a different purpose than a Fourth Amendment unreasonable arrest claim, and that purpose does not depend on the presence or absence of probable cause.").

Therefore, because similar disputes will inevitably make their way through the judicial system and continue to sow doubt regarding the rights of individuals and the authority of officers on a national level,[5] now

[5] As explained in Part III, disharmony among federal courts negatively affects actors at all levels and on all sides of these issues—it not only may impair recruitment and retention efforts of local, state, and federal officers, but also leave law-abiding citizens seeking to justly exercise their constitutional rights adrift as to their own rights and the rights of officers seeking to maintain the peace. This counsels in favor of granting certiorari

is an ideal and ripe opportunity for this Court to grant certiorari and align the courts without further fracturing on this issue. *Cf. Stanley v. City of Sanford*, 606 U.S. 46, 60 (2025) (Gorsuch, J.) (granting certiorari "to resolve a circuit split").

II. The *Nieves* framework should be preserved.

In *Nieves*, this Court recognized that retaliatory arrest claims present a distinct challenge: because probable cause and retaliatory motive can coexist in the same arrest, an officer's objectively lawful conduct may nevertheless violate fundamental rights. *See* 587 U.S. at 398–99. The Court's solution to this problem in *Nieves* was measured and deliberate, holding that "probable cause . . . generally defeat[s] a retaliatory arrest claim," while carving out a narrow exception for those rare circumstances where officers have probable cause but "typically exercise their discretion not to" make an arrest. *Id.* at 406. This framework was carefully designed to protect individuals from genuine retaliation, while also protecting law enforcement from the burden and chilling effect of litigation over routine, lawful arrests.

The Ninth Circuit's decision in *Bassford v. Newby* undermines the balance struck by this Court in *Nieves*. The court used the *Nieves* exception as a logical springboard to conclude that arguable probable cause has no role in the First Amendment retaliatory arrest analysis. *Bassford*, 2025 WL 2452367, at *2 (9th Cir. Aug. 26, 2025). But the Ninth Circuit's logical predicate is flawed and conflicts with this Court's

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and deciding whether arguable probable cause triggers qualified immunity on a First Amendment retaliation claim.

longstanding precedent, namely, when an officer has probable cause to arrest an individual for an offense that is routinely enforced, a First Amendment retaliatory arrest claim cannot stand.

The *Nieves* exception exists to address a specific and limited problem: officers may conceal retaliatory motive behind technically valid probable cause findings when they arrest someone for legal violations they typically decline to enforce. 587 U.S. at 406–07. To invoke it, a plaintiff must present "objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Id.* at 407. Simply put, the exception applies in the rare case where the law is seldom enforced and probable cause therefore provides maximum cover for retaliatory motive. It is a carefully circumscribed departure from an otherwise dispositive general rule, not a license to challenge any arrest made in the presence of protected expression.

The Ninth Circuit believed that *Nieves*[6] precluded the importation of arguable probable cause into the First Amendment retaliatory arrest context because

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[6] The Ninth Circuit also relied on *Gonzalez v. Trevino*, 602 U.S. 653 (2024) (per curiam) to substantiate this point, but the case is irrelevant. *See Bassford*, 2025 WL 2452367, at *2. In *Gonzalez*, the Court clarified the plaintiff's evidentiary burden under *Nieves*, holding that plaintiffs need only present objective evidence showing that officers usually decline to arrest in similar circumstances rather than identifying nearly identical comparators. 602 U.S. at 658. Although the petitioner asked the Court to resolve whether "the *Nieves* no-probable-cause rule applies only to claims predicated on split-second arrests, rather than deliberative ones", the Court declined to address it. *Id.* at 658–59.

Neives "discuss[es] probable cause, not *arguable* probable cause." *Bassford*, 2025 WL 2452367, at *2 (emphasis added). But that conclusion does not follow. The general rule is that the existence of probable cause defeats a retaliatory arrest claim. *Nieves*, 587 U.S. at 406. And the "narrow" exception identified by this Court in *Nieves* attaches liability where officers have probable cause but typically do not make arrests. *Id.* The modifier "arguable" does not displace the general rule, and where the exception does not apply, the general rule controls. *Id.* at 401–02.

Arguable probable cause does not define the constitutional violation. It defines the officer's entitlement to immunity even despite the violation. *See District of Columbia v. Wesby*, 583 U.S. 48, 65 (2018) (concluding that qualified immunity protected officers who "reasonably but mistakenly concluded that probable cause was present."). It asks not whether the arrest was constitutionally permissible, but whether the officer's belief, mistaken or not, was nonetheless objectively reasonable. Conversely, the question in retaliatory arrest cases is whether the plaintiff's expressive conduct motivated the officer to make the arrest. *Nieves*, 587 U.S. at 398. Probable cause bears on that question only insofar as it bears on the plausibility of a retaliatory motive: an officer who had genuine grounds to arrest is less likely to have been acting out of animus toward protected speech. *See id.* at 406. The mere fact that an officer's reasonable, good-faith assessment of probable cause later proved incorrect does not establish, or even suggest, that the arrest was motivated by retaliation.

The Ninth Circuit's reluctance to import arguable probable cause into the First Amendment retaliatory arrest context is particularly difficult to square with *Nieves*' own methodology. Far from treating such claims as a doctrinal island insulated from Fourth Amendment principles, *Nieves* itself drew directly on Fourth Amendment objective reasonableness considerations to resolve a First Amendment question, concluding that a police officer's subjective intent is not an appropriate consideration in determining whether a retaliatory arrest occurred. *Nieves*, 587 U.S. at 403 (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011)). The Court's willingness to transplant Fourth Amendment principles into First Amendment retaliatory arrest cases fatally undermines the Ninth Circuit's premise that the two doctrinal areas are or must be kept entirely separate.

If this Court saw no barrier to applying Fourth Amendment objective reasonableness standards in the retaliatory arrest context where it promotes of functional clarity, the Ninth Circuit's refusal to apply arguable probable cause—itself an objective standard—in the same context was error. The practical consequence of the Ninth Circuit's reading is an unjustifiable asymmetry. An officer who makes a good-faith, objectively reasonable judgment that probable cause exists—a judgment that later turns out to be wrong—is categorically denied the protection of qualified immunity in a First Amendment retaliatory arrest case in the Ninth Circuit, even though that same officer would be fully protected in a Fourth Amendment unlawful arrest case arising from identical facts. Nothing in *Nieves* supports that disconnect.

Properly understood, *Nieves* provides a clear and objective tool to local governments defending retaliatory arrest claims: demonstrate that probable cause existed, and—absent the narrow exception—the claim fails as a matter of law. *Id.* at 406. The Ninth Circuit's standard takes away that tool whenever the arresting officer mistakenly believed there was actual probable cause, even if his belief was entirely reasonable and objectively grounded. Officers often must make rapid judgments about probable cause in the field, and until now, qualified immunity has consistently shielded those decisions from judicial second-guessing. *See, e.g.*, *District of Columbia v. Wesby*, 583 U.S. 48, 65 (2018) (confirming that qualified immunity applies to officers who "reasonably but mistakenly concluded that probable cause was present."); *accord Hunter v. Bryant*, 502 U.S. 224, 227 (1991). *See also Landry v. Berry*, 533 Fed. App'x 702, 703 (9th Cir. 2013); *Blankenhorn v. City of Orange*, 485 F.3d 463, 475 (9th Cir. 2007). The Ninth Circuit's standard upsets this Court's settled precedent by exposing these officers to personal liability, and the local governments that employ them to institutional liability.

Despite citing this Court's exception in *Nieves*, the Ninth Circuit's decision does not arise out of that exception but rather weakens this Court's settled standard that "probable cause should generally defeat a First Amendment retaliatory arrest claim." *Nieves*, 587 U.S. at 405.

III. The Ninth Circuit's decision undercuts the purpose and goal of qualified immunity.

The doctrine of qualified immunity "balances two important interests—the need to hold public officials

accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Qualified immunity is designed to protect officials from the burden of litigation unless their actions in the line of duty violate "clearly established" law. *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004). In other words, unless a government official "knowingly violate[s] the law," or acts in a way that is "plainly incompetent," he is entitled to qualified immunity and a suit against him should be promptly dismissed. *Stanton v. Sims*, 134 S. Ct. 3, 5 (2013) (cleaned up).

As this Court recognized in *Nieves*, allowing claims to proceed based almost entirely on allegations about the arresting officer's subjective intent would threaten wide-ranging and expansive discovery in even doubtful retaliatory arrest claims. *See* 587 U.S. at 403–04. But the Ninth Circuit's refusal to incorporate arguable probable cause into the qualified immunity analysis has just such a result.

The consequences of such a decision are clear. Law enforcement officials now lack the necessary clarity to understand the bounds of permissible and impermissible actions. As a result, and as this Court has noted, "policing certain events like an unruly protest would pose overwhelming litigation risks." *Id.* at 404.

The chilling effect of that risk is real and well-documented. When officers face uncertain liability for arrests made in the presence of any expressive activity, hesitation follows—and hesitation in law enforcement carries consequences for the safety of officers and communities alike. Retaliatory arrest claims are among

the most common civil rights claims brought against law enforcement officers, and expanding officer and local government exposure in this context will predictably result in more litigation, higher costs, and a suppression of legitimate enforcement activity across the largest federal circuit in the country.

Similar burdens will also be felt by citizens seeking to lawfully exercise their constitutional rights. Maintaining spaces for lawful protest requires that agents who use their law enforcement authority to stifle free expression be held accountable.

Regardless of the outcome reached by the lower courts or this Court, clarity and consistency are necessary elements to fulfill the purpose of the qualified immunity standard and, as a result of the Ninth Circuit's deviation from its sister circuits, both are now lacking.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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