No. 25-981

IN THE
Supreme Court of the United States

KYLER NEWBY,

Petitioner,

v.

GABRIEL BASSFORD,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, in the unpublished and nonprecedential memorandum below, the Ninth Circuit correctly concluded that clearly-established circuit law prohibited Petitioner's warrantless arrest of Respondent without probable cause and in retaliation for engaging in protected First Amendment activity.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Other Authorities

STATEMENT OF THE CASE

I. Factual Background

On the night of October 9, 2021, Respondent Gabriel Bassford and three other individuals saw multiple Mesa Police Department (MPD) officers investigating a matter outside a Circle K gas station and stopped to film the police activity. Pet. App. 14a-15a. Respondent parked away from the investigation, and started filming as he slowly walked onto the station's parking lot from a nearby public sidewalk. Pet. App. 15a. As Respondent approached, MPD officers met with the station's security guard, John Dreschler. Pet. App. 14a-15a.

Petitioner, MPD Officer Kyler Newby, was one of the officers investigating at the station. Pet. App. 14a-15a. Once Petitioner noticed Respondent filming, he pointed him out to Dreschler and said, "[Y]ou have six new customers out here. These guys are waiting to buy something with all their cameras." Pet. App. 15a. When Dreschler asked Petitioner if he knew who the individuals recording them were, Petitioner said that Respondent and others were "First Amendment 'auditors.'" *Id*.

During this encounter, Respondent was filming in the parking lot roughly forty-six feet away from the gas station's "No Trespassing" sign. Pet. App. 15a-16a. The sign's text read only "NO TRESPASSING–A.R.S. 13-1502." Pet. App. 18a. At any rate, the sign was not legible from the distance at which Respondent was standing, and was hidden by a "blue Amazon Pick Up Box." *Id*. Indeed, when Petitioner asked Respondent if he had seen the "No Trespassing" sign, Respondent said that he had not. Pet. App. 18a-19a.

Respondent was never asked to leave, but would have been willing to if he was asked. Pet. App. 19a. Regardless, Petitioner placed Respondent in handcuffs and later informed Respondent that he was arrested for trespassing. Pet. App. 17a-18a. As Respondent sat on the curb in handcuffs, Petitioner took Respondent's camera and placed it in his lap—effectively preventing Respondent from filming. Pet. App. 19a.

Officers transported Respondent to the MPD's holding facility and charged him with one count of third-degree criminal trespass in violation of Arizona Revised Statutes § 13-1502(A)(1), which requires "[k]nowingly" entering or remaining on property "after a reasonable request to leave." Pet. App. 18a, 22a. The charge was ultimately dismissed. Pet. App. 18a.

II. Procedural History

As relevant here, Respondent, proceeding *pro se*, brought a 42 U.S.C. § 1983 action against Petitioner asserting a Fourth Amendment false arrest claim and a First Amendment retaliatory arrest claim. Pet. App. 12a. Petitioner moved for summary judgment on the merits and asserted his entitlement to qualified immunity. Pet. App. 11a.

On the merits of Respondent's Fourth Amendment false arrest claim, the district court concluded that there were genuine disputes of material fact regarding whether Petitioner had probable cause to arrest Respondent. Pet. App. 29a. The court nevertheless granted Petitioner qualified immunity on this claim because, even if Petitioner did not have probable cause to arrest Respondent, a reasonable officer could mistakenly think that he did because the

law as to probable cause in such a situation was not clearly established. Pet. App. 32a.

As to Respondent's First Amendment retaliation claim, however, the district court denied Petitioner's motion for summary judgment. Pet. App. 37a-38a. Following this Court's precedent in *Nieves v. Bartlett*, 587 U.S. 391, 398 (2019), the district court recognized that "the First Amendment prohibits government officials from subjecting an individual to retaliatory actions for engaging in protected speech." Pet. App. 35a (cleaned up). The court noted that, to make out a retaliation claim, a plaintiff must generally first "plead and prove the absence of probable cause." *Id.* (citing *Nieves*, 587 U.S. at 401). The district court held that Respondent satisfied this requirement as "the [c]ourt ha[d] already determined there [were] genuine disputes of material fact regarding whether [] Newby had probable cause to arrest" Petitioner. Pet. App. 36a. On causation, the district court concluded that a reasonable jury could find that Petitioner exhibited retaliatory animus to Respondent filming when he told the station's security guard, Officer Dreschler, that Respondent and others were "First Amendment auditors" and "not customers." Pet. App. 37a.

The district court held that it was clearly established "that in the absence of probable cause, a police officer cannot arrest an individual who is engaging in First Amendment activity in retaliation for engaging in that activity." Pet. App. 38a. Petitioner took an interlocutory appeal challenging the district court's denial of qualified immunity on Respondent's First Amendment retaliation claim. Pet. App. 2a.

The Ninth Circuit affirmed in an unpublished memorandum. Pet. App. 1a-2a. The panel (Judges Rawlinson and Koh), held that the district court correctly concluded that a jury could find Petitioner arrested Respondent in retaliation for his exercise of his First Amendment-protected rights—and without probable cause. Pet. App. 3a. In other words, the panel agreed with the district court's conclusion that a reasonable jury could find that Petitioner did not have probable cause to arrest Respondent for trespassing, and that Respondent's First Amendment activity was a substantial or motivating factor behind his arrest. Pet. App. 36a.

Moving to prong two of qualified immunity, the panel held that it would have been clear to any reasonable officer that, under longstanding Ninth Circuit law, it was unlawful to arrest Respondent in retaliation for his protected activity without probable cause. Pet. App. 4a. The panel found "unpersuasive" Petitioner's contention that "arguable probable cause"—sufficient to defeat Respondent's false arrest claim at prong two of qualified immunity—has any bearing on the clearly-established-law analysis as to his First Amendment retaliation claim. Pet. App. 4a-5a.

First, relying on this Court's opinion in *Nieves*, 587 U.S. at 406, the panel explained that because *actual* probable cause does not necessarily defeat a First Amendment retaliation claim, "*arguable* probable cause would not necessarily defeat the claim" either. Pet. App. 5a. Second, the panel observed that neither the Ninth Circuit nor this Court have "imported arguable probable cause from the Fourth Amendment unlawful arrest context into the First Amendment retaliatory arrest context." Pet. App. 6a. Third, the

panel noted that this Court's two recent First Amendment retaliatory arrest cases—*Nieves* and *Gonzalez v. Trevino*, 602 U.S. 653 (2024) (per curiam)—"discuss probable cause, not arguable probable cause." Pet. App. 6a. Fourth, the panel explained that "there is good reason to treat Fourth Amendment unlawful arrest claims differently than First Amendment retaliatory arrest claims," since the point of the latter is "to guard against officers who *abuse* their authority by making an otherwise lawful arrest for an unconstitutional *reason*." Pet. App. 7a (quoting *Nieves*, 587 U.S. at 414 (Gorsuch, J., concurring in part and dissenting in part)).

District Judge Fitzwater, sitting by designation, dissented. *See generally* Pet. App. 8a-10a. Despite the district court's determination that a jury could conclude Petitioner did not have probable cause for arrest, he would have granted Petitioner qualified immunity on Respondent's First Amendment retaliation claim because, in his view, "a reasonable officer could have believed that he had probable cause to arrest" Respondent. Pet. App. 9a. Judge Fitzwater recognized that Fourth and First Amendment "claims are different," but "found no distinction in the case law between what is required for probable cause for purposes of a false arrest claim and what is required for purposes of a First Amendment retaliatory arrest claim." Pet. App. 10a.

Petitioner filed a petition for rehearing en banc, pressing the same issue he raises to this Court: that despite a triable issue as to probable cause and the clarity of the law that prohibited retaliatory arrests for First Amendment activity, he should nevertheless be granted qualified immunity because the law as to probable cause to arrest was not clearly established.

See generally Pet. for En Banc Reh'g, *Bassford v. Newby*, No. 24-5525 (9th Cir. Sept. 9, 2025), ECF No. 46. The full Ninth Circuit was advised of the petition for rehearing en banc, and no judge requested a vote on the petition. Pet. App. 41a.

Petitioner now seeks certiorari.

REASONS FOR DENYING THE PETITION

I. At most, a single circuit has sided with Petitioner in a published opinion—and without analysis.

Petitioner's claimed circuit split is wildly overblown. To start, of course, since the decision below is an unpublished memorandum, it does not reflect binding Ninth Circuit precedent and therefore cannot possibly be counted in a circuit conflict. And on the "other side" of the purported split, if you squint there is maybe one court with precedential decisions doing what Petitioner asked the Ninth Circuit to do: grant him qualified immunity on a First Amendment retaliatory arrest claim based on a lack of clearly-established law as to *probable cause* to arrest, notwithstanding the clarity of the law prohibiting retaliatory arrests for the protected speech in question. And that circuit—the Eighth—has done so without meaningful analysis.

Fifth Circuit. In *Rucker v. Marshall*, 119 F.4th 395 (5th Cir. 2024), the plaintiff's retaliatory arrest claim failed on the merits (*i.e.*, prong 1 of qualified immunity) because "the undisputed video evidence show[ed]" that the officers *had* probable cause to arrest him. *Id.* at 402-03; *see also id.* at 400 n.2 (noting "the district court's error on the first qualified

immunity prong").[1] Contrast that with this case, where there was disputed evidence such that a jury could conclude Petitioner *lacked* probable cause, and still Petitioner seeks the protection of qualified immunity. Pet. App. 4a. And in *Davidson v. City of Stafford*, 848 F.3d 384 (5th Cir. 2017), the Fifth Circuit held that the officers *were not* entitled to qualified immunity, noting "there was fulsome case law clearly establishing that an arrest without probable cause violates" a plaintiff's First Amendment rights. *Id.* at 393. Just like the decision below. Pet. App. 3a-4a.

Sixth Circuit. The court in *Novak v. City of Parma*, 33 F.4th 296 (6th Cir. 2022), concluded that the officers were entitled to qualified immunity because whether, as a matter of law, the plaintiff's conduct was protected speech at all was "a difficult question," and the officers, who sought and obtained an arrest warrant, therefore "reasonably found probable cause in an unsettled case judges can debate." *Id.* at 305.[2] Here, though, Petitioner would have himself entitled to qualified immunity on a warrantless retaliatory arrest claim where *factual* questions—the traditional province for the jury—exist as to probable cause, and no questions exist as to whether Respondent's *activity* was protected by the

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[1] *See also Roy v. City of Monroe*, 950 F.3d 245, 256 (5th Cir. 2020) ("Roy has not shown that Booth's issuance of the summons was unsupported by probable cause.").

[2] Additionally, the perceived centrality of probable cause to the clearly-established-law inquiry was based on Novak's briefing choices, which had framed prong 2 of qualified immunity to turn on this question. *See* Brief for Appellant at 42-44, *Novak v. City of Parma*, 33 F. 4th 296 (6th Cir. 2022) (No. 21-3290), 2021 WL 3411579.

First Amendment. What is more, in *Novak*, "[b]oth the City's Law Director and the judges who issued the warrants agreed with" the officers that probable cause existed. *Id.*

Seventh Circuit. In *Thayer v. Chiczewski*, 705 F.3d 237 (7th Cir. 2012), the Seventh Circuit did just the *opposite* of what Petitioner says the law should require. The court there noted that "arguable probable cause to arrest [the plaintiff]"—which was not disputed—"is an absolute bar to his § 1983 claim for unlawful arrest" under the Fourth Amendment, *id.* at 251-52; then, for the plaintiffs' First Amendment retaliation claims, it did a full, separate clearly-established law analysis on the state of the law, *id.* at 252-53.

Eighth Circuit. The Eighth Circuit—the one court that seems to have applied Petitioner's preferred rule in a published opinion—has not been squarely presented with arguments on this issue. In *Just v. City of St. Louis*, 7 F.4th 761 (8th Cir. 2021), and *Brown v. City of St. Louis*, 40 F.4th 895 (8th Cir. 2022), the plaintiffs briefed the First and Fourth Amendment arrest claims together,[3] which allowed the court to port over the concept of arguable probable cause from the Fourth Amendment to the First Amendment retaliatory arrest context without considering whether that made sense, or could possibly be analytically correct in light of *Nieves*. *See*

[3] *See* Brief of Appellee Jeffery Just at *3-4, *Just v. Kuykendall*, 7 F.4th 761 (8th Cir. 2021) (No. 20-1049), 2020 WL 7634975, (arguing Fourth and First Amendment claims together); Appellant's Brief, *Brown v. Trump* at *24-29, 40 F.4th 895 (8th Cir. 2022) (No. 21-2460), 2021 WL 5406111 (same).

infra Section II. Then *Watson v. Boyd*, 119 F.4th 539 (8th Cir. 2024), just applied that law.

Critically, though, in First Amendment claims relating to the retaliatory use of force, the Eighth Circuit has declined to transfer over an arguable-probable-cause defense. *See Molina v. City of St. Louis*, 59 F.4th 334, 343 (8th Cir. 2023); *Welch v. Dempsey*, 51 F.4th 809, 812-13 (8th Cir. 2022). And that court has not yet been asked to grapple with how to reconcile its apparent vastly different treatment of two species of First Amendment retaliation claims when it comes to qualified immunity.

Tenth Circuit. Not only is the Tenth Circuit order Petitioner cites not binding precedent, but the court was not required to meaningfully analyze the issue—it was affirmatively conceded by the plaintiff. *See Detreville v. Gurevich*, No. 24-1427, 2025 WL 1874587, at *6 n.6 (10th Cir. July 8, 2025) (noting issue conceded in briefing).

Eleventh Circuit. *Redd v. City of Enterprise*, 140 F.3d 1378 (11th Cir. 1998), is not on-point because it involved a direct First Amendment chilling claim, under which the state may enforce content-neutral time, place, and manner restrictions—not a retaliatory arrest claim. *See id.* at 1381 (setting out claims); *id.* at 1383 (analysis); *see also Carr v. Cadeau*, 658 F. App'x 485, 490 (11th Cir. 2016) (rejecting the reading of *Redd* Petitioner advances, and concluding the law was clearly established "that retaliation against private citizens for exercising their First Amendment rights was actionable"). *Prospero v. Sullivan*, 153 F.4th 1171 (11th Cir. 2025), involved an arrest based on a warrant, *see id.* at 1184, and the plaintiff acceded to the "arguable probable cause"

framing of the clearly-established-law inquiry in that context. *See generally* Appellee's Response Brief, *Prospero v. Sullivan*, 153 F.4th 1171 (11th Cir. 2025) (No. 24-10086), 2024 WL 3373669.[4]

In all, Petitioner cites *zero* courts of appeals to have explained why probable cause has anything to do with the clearly-established inquiry for a First Amendment retaliatory arrest claim—especially after *Nieves*. It's no surprise, then, that Petitioner does not even attempt to argue that this is an "important" issue for this Court to review. *See* Sup. Ct. Rule 10(a).

II. The decision below is consistent with this Court's precedent.

Petitioner accepts that the Ninth Circuit's unpublished, nonbinding decision does not conflict with Supreme Court caselaw. *See* Pet. 14 (recognizing that this issue "has not been directly addressed by this Court"). And although he claims that this Court would agree with his preferred vision of the law, *see* Pet. 15-20, the Court's precedent points in the opposite direction.

1. It is true, of course, that probable cause is a relevant concept for both Fourth Amendment false

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[4] Petitioner does not even attempt to put the Second and Fourth Circuits squarely in his split, and even the "indicat[ions]" Petitioner points to here are far-fetched. Pet. 13. The language Petitioner quotes from *Rupp v. Buffalo*, 91 F.4th 623, 642 (2d Cir. 2024), is just the court's rough approximation of the qualified immunity standard—complete with an "*i.e.*," lead-in. *Id.* at 642; *see also Garcia v. Does*, 779 F.3d 84, 96 (2d Cir. 2015) (same). *Somers v. Devine*, 132 F.4th 689, 696-97 (4th Cir. 2025), loosely lumps together several claims for qualified immunity purposes, characterizing them as "all implicat[ing] effectively the same right."

arrest claims and First Amendment retaliatory arrest claims. *See* Pet. 16. But, critically, Petitioner ignores that probable cause functions very differently in the two contexts.

Start with a false arrest claim. The Fourth Amendment requires an arrest to be supported by probable cause. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). So "[a] warrantless arrest is reasonable if the officer has probable cause to believe that the suspect committed a crime in the officer's presence." *District of Columbia v. Wesby*, 583 U.S. 48, 56 (2018). In assessing whether probable cause exists, courts "examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause." *Id.* at 56-57 (cleaned up). In short, since a false arrest claim is premised on the falsity of that arrest, the existence or absence of probable cause is the whole ball game. *See, e.g., id.* at 54 (noting plaintiffs' Fourth Amendment false arrest "claims were all predicated upon the allegation that they were arrested without probable cause" (cleaned up)).

Contrast that with a First Amendment retaliatory arrest claim. For such a claim "a plaintiff must establish a 'causal connection' between the government defendant's 'retaliatory animus'"—a subjective question—and the plaintiff's injury. *Nieves*, 587 U.S. at 398.[5] In some types of retaliation cases

[5] Petitioner's assertion that in both types of claims "this Court has 'uniformly rejected invitations to probe subjective intent'" is just wrong. Pet. 17 (quoting *Nieves*, 587 U.S. at 403). The quoted language from *Nieves* is about "the Fourth Amendment context."

this causation inquiry "is straightforward." *Id.* at 399. But for retaliatory prosecution or arrest cases, it gets more complicated, since there is "a presumption of regularity" in the officials' actions. *Id.* at 400.

"To account for this 'problem of causation,'" plaintiffs bringing retaliatory arrest or prosecution claims must generally "plead and prove the absence of probable cause for the underlying criminal charge," because that "will tend to … show that retaliation was the but-for basis" for the official conduct. *Id.* Importantly, here, lack of probable cause is not the be-all-and-end-all, but merely a "threshold showing" that plaintiffs must make before pursuing such claims. *Id.* at 408.[6] If a plaintiff makes such a showing, the *Mt. Healthy* test applies. *See id.* at 404; *Hartman v. Moore*, 547 U.S. 250, 259-60 (2006).

And this no-probable-cause threshold showing is not even required for all retaliatory arrest claims. In *Nieves*, the Court carved out an exception to the no-probable-cause requirement "for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so." 587 U.S. at 406. In such a situation, "probable cause does

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Nieves, 587 U.S. at 403. *Compare also* Pet. 16, 21 (quoting language in *Nieves* describing the threshold inquiry of probable cause), *with Nieves*, 587 U.S. at 403 (noting substantive "consideration of the subjective intent of the officers").

[6] As noted above, the district court held that Respondent had satisfied this requirement for purposes of opposing summary judgment. Pet. App. 36a ("[T]here are genuine disputes of material fact regarding whether Defendant Newby had probable cause to arrest Plaintiff."); *see also* Pet. App. 3a ("[T]he district court correctly concluded that a jury could find Officer Newby arrested Bassford in violation of the First Amendment and without probable cause.").

little to prove or disprove the causal connection between animus and injury." *Id.* at 407; *see also Gonzalez*, 602 U.S. at 658 (clarifying application of exception). As the memorandum opinion pointed out, since "a plaintiff can establish a First Amendment retaliatory arrest claim even when an officer has *actual* probable cause," it makes no sense to conclude for qualified immunity purposes that "a finding of *arguable* probable cause would … necessarily defeat the claim." Pet. App. 5a.

2. The difference in what the probable-cause inquiry is doing in these contexts reflects the substantive distinctions between these claims. *See* Pet. App. 7a ("[T]here is good reason to treat Fourth Amendment unlawful arrest claims differently than First Amendment retaliatory arrest claims."). A false arrest claim is aimed at arrests "effected *without lawful authority*." *Nieves*, 587 U.S. at 414 (Gorsuch, J., concurring in part and dissenting in part). In contrast, "[t]he point" of a First Amendment retaliatory arrest claim "isn't to guard against officers who *lack* lawful authority to make an arrest," but instead "to guard against officers who *abuse* their authority by making an otherwise lawful arrest for an unconstitutional *reason*." *Id.*

This makes sense because these claims arise from different parts of the Bill of Rights. The Fourth Amendment protects against unreasonable seizures, of which a warrantless arrest unsupported by probable cause is one. *See, e.g.*, *Manuel v. City of Joliet*, 580 U.S. 357, 364 (2017). "But the *First* Amendment operates independently of the Fourth" and "seeks not to ensure lawful authority to arrest but to protect freedom of speech." *Nieves*, 587 U.S. at 414

(Gorsuch, J., concurring in part and dissenting in part).

In all, the no-probable-cause requirement exists not as a substantive element of First Amendment retaliation, *contra* Pet. at 16, but goes to the availability of a remedy. *See Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 179 n.6 (2023) (noting *Nieves* addressed only "the contours of a § 1983 claim" (cleaned up)); *Nieves*, 587 U.S. at 405 ("defining the contours of a claim under § 1983"); *Id.* at 412 (Gorsuch, J., concurring in part and dissenting in part) (noting both sides agree "that the presence of probable cause does not undo th[e] violation").

3. Of particular relevance here, the differences between the two types of claims show up when asking whether the law was "clearly established" at the second step of the qualified immunity analysis. The overall inquiry is the same, of course. It asks whether a "reasonable official would have understood that what he is doing violates" the right in question. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (cleaned up); Pet. 16-17.

For a Fourth Amendment warrantless arrest claim, the key clearly-established-law question is "whether the circumstances with which the particular officer was confronted constitute[s] probable cause." *Wesby*, 583 U.S. at 64 (cleaned up). And this Court has explained that the "specificity" of the rule in question is "especially important in the Fourth Amendment context." *Id.* (quoting *Mullenix v. Luna*, 577 U.S. 7, 12 (2015)). In this context, then, even if "officers lacked actual probable cause," they "are entitled to qualified immunity" where they could "reasonably but

mistakenly conclude that probable cause was present." *Id.* at 65 (cleaned up).

The clearly-established inquiry for a First Amendment retaliation claim likewise requires that a right be "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle v. Howards*, 566 U.S. 658, 664 (2012). But the "right" looks quite different in this situation. In *Reichle*, a First Amendment retaliatory arrest case, this Court explained that at the time neither this Court nor the Tenth Circuit—the circuit relevant in that case—had clearly established the "*specific* right to be free from a retaliatory arrest that is otherwise supported by probable cause." *Id.* at 665 (emphasis added).[7] Here, though, Ninth Circuit law—framed at the equivalent level of specificity—put Petitioner on notice that it would be unlawful for him to arrest Respondent in retaliation for his First Amendment activity without probable cause. Pet. App. 4a (relying on *Ballentine v. Tucker*, 28 F.4th 54 (9th Cir. 2022), *Skoog v. Cnty. of Clackamas*, 469 F.3d 1221 (9th Cir. 2006), and *Ford v. City of Yakima*, 706 F.3d 1188 (9th Cir. 2013) (per curiam), *abrogated on*

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[7] Relying on *Reichle* and Ninth Circuit precedent, the memorandum opinion rejected Petitioner's argument that the district court framed the right in question at too high a level of generality. Pet. App. 4a-5a. Petitioner does not re-up that argument here, perhaps because this Court has often and recently denied cert petitions on this question. *See, e.g.*, Pet. for Cert., *Craig v. Krueger* (No. 25-604), 2025 WL 3286260, *cert. denied* 2026 WL 795050 (2026); Pet. for Cert., *Miller v. Rock* (No. 24-919), 2024 WL 5435213, *cert. denied* 146 S. Ct. 88 (2025); Pet. for Cert., *Diaz v. Polanco* (No. 23-722), 2023 WL 9116988, *cert. denied* 144 S. Ct. 2520 (2024); Pet. for Cert., *Emily v. Welters* (No. 22-1005), 2023 WL 3006857, *cert. denied* 144 S. Ct. 74 (2023).

other grounds by *Nieves v. Bartlett*, 587 U.S. 391 (2019)).[8]

Since, as noted above, *supra* at 14, "the absence of probable cause is not an element of the free speech right allegedly violated" when it comes to First Amendment retaliation, its presence—or arguable presence—"has no bearing on whether a defendant has violated a clearly established constitutional *right* of which a reasonable person would have known." *Moore v. Harman*, 644 F.3d 415 (D.C. Cir. 2011), *reaffirmed at* 704 F.3d 1003 (D.C. Cir. 2013); *see also Villarreal v. City of Laredo*, 134 F.4th 273, 280 (5th Cir. 2025) (Oldham, J., concurring) ("[A]n officer can invoke qualified immunity only when the constitutional *right* is unclear at the time of his actions."). That is because the inquiry is "whether the officer had fair notice that [their] *conduct* was unlawful." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (emphasis added).

In short, the existence of probable cause is irrelevant to the second prong of qualified immunity for a First Amendment retaliatory arrest claim. There is good reason, then, that this Court "ha[s] not imported arguable probable cause from the Fourth Amendment unlawful arrest context into the First Amendment retaliatory arrest context." Pet. App. 6a.

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[8] Petitioner briefly takes issue with the Ninth Circuit's holding that the law was clearly-established based on its own precedent. Pet. 21-22. These concerns are misplaced. Although *Ballentine* was decided after the arrest in question, it analyzed the state of law from nearly a decade prior, holding that "in July 2013," well before Petitioner's arrest of Respondent, "binding Ninth Circuit precedent gave fair notice that it would be unlawful to arrest Plaintiffs in retaliation for their First Amendment activity, notwithstanding the existence of probable cause." 28 F.4th at 65.

4. There are also administrability and policy reasons to steer clear of Petitioner's request to migrate the arguable-probable-cause inquiry from the Fourth Amendment to the First Amendment when it comes to assessing clearly-established law.

First, adopting Petitioner's position would create baffling inconsistencies in applying qualified immunity to First Amendment retaliatory arrest claims. Petitioner's rule on its face relates only to such claims where the "threshold" requirement of proving the absence of probable cause is required, *see* Pet. i, and acknowledges his preferred version of qualified immunity just does not fit for cases involving the *Nieves* exception, *see* Pet. 19 ("But whatever the qualified immunity analysis might be when the *Nieves* exception applies…"). So Petitioner would require two different versions of the clearly-established-inquiry for First Amendment retaliatory arrest claims. Even worse, his rule would effectively "mean an individual has no First Amendment right to be free from a retaliatory arrest if the police had probable cause[, b]ut somehow that same individual's First Amendment right to be free from a retaliatory arrest would spring back to life if it turns out the police do not arrest other people." *Villarreal*, 134 F.4th at 280 (Oldham, J., concurring).

Second, granting qualified immunity on the basis of "arguable probable cause," after the district court determined that a jury could find the *absence* of probable cause, Pet. App. 36a, would be the equivalent of "resolv[ing] disputed issues in favor of the moving party," which this Court has explained is not allowed when assessing whether a defendant violated clearly established law, *Tolan v. Cotton*, 572 U.S. 650, 657

(2014). And it would take a "threshold showing" and supercharge it into the cornerstone for potential liability, *Nieves*, 587 U.S. at 403, exposing more Americans to the "risk that some police officers may exploit the arrest power as a means of suppressing speech," *id.* at 406 (quoting *Lozman v. Riviera Beach*, 585 U.S. 87, 99 (2018)).

Third, granting qualified immunity to defendants like Petitioner—who the district court concluded a jury could find exhibited retaliatory animus when he noted Respondent was a "First Amendment auditor" and that Respondent's First Amendment activity was a motivating factor behind his arrest, Pet. App. 36a-37a—would bestow qualified immunity upon exactly the type of officer this Court explained should *not* be entitled to the defense: someone who "knowingly violate[s] the law." *al-Kidd*, 563 U.S. at 743.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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