No. 25-981

IN THE

Supreme Court of the United States

KYLER NEWBY,

Petitioner,

v.

GABRIEL J. BASSFORD,

Respondent.

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

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Law enforcement "officers conduct approximately 29,000 arrests every day—a dangerous task that requires making quick decisions in 'circumstances that are tense, uncertain, and rapidly evolving.'" *Nieves v. Bartlett*, 587 U.S. 391, 403 (2019) (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)). As a consequence, "it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). In such circumstances, the doctrine of qualified immunity immunizes an officer's objectively reasonable, albeit mistaken, decision to arrest, *id.*, so "that officers may go about their work without undue apprehension of being sued." *Nieves*, 587 U.S. at 403.

The Ninth Circuit's decision below rejects this legal framework. Under the Ninth Circuit's reasoning, when an officer reasonably but mistakenly decides there is probable cause to arrest someone, the officer may be subjected to years of litigation for making the wrong call. Pet. for Certiorari at 18–22; *see also* Brief in Opposition ("Opp.") at 16 (asserting that "the existence of probable cause is irrelevant to the second prong of qualified immunity for a First Amendment retaliatory arrest claim"). But this Court has emphasized that federal courts must analyze police officers' "conduct under objective standards of reasonableness." *Nieves*, 587 U.S. at 403. Indeed, the Court explicitly rejected any rule that would "land an officer in years of litigation" for an "inartful turn of phrase or perceived slight during a legitimate arrest." *Id.* at 404.

The weight of authority from other circuits recognizes the importance of this approach in the First Amendment context. Specifically, the Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have all noted that a retaliatory arrest claim is not cognizable if an officer reasonably but mistakenly believed there was probable cause for the arrest—i.e., where there is arguable probable cause. In his brief, Respondent attempts to distinguish those decisions. But his arguments miss the mark, as explained below.

Indeed, the courts that have held that arguable probable cause defeats a retaliatory arrest claim did so for good reason—it is the result supported by this Court's precedent. This Court has, contrary to Respondent's assertions, long applied the same probable cause and qualified immunity standards in the Fourth and First Amendment contexts. There is no reason to diverge from that approach on the facts of this case.

The Court should grant a writ of certiorari and settle this important issue that is highly consequential to law enforcement officers across our country.

I. Circuit Split

The Ninth Circuit's decision sharply diverges from caselaw in the Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits, notwithstanding Respondent's assertions to the contrary.

A. Fifth Circuit

In *Davidson v. City of Stafford*, 848 F.3d 384 (5th Cir. 2017), the Fifth Circuit directly recognized that arguable

probable cause can defeat a retaliatory arrest claim. In deciding whether to affirm the district court's decision granting qualified immunity to the defendant officers, the Fifth Circuit explained that there were two inquiries. First is whether the officers had "actual probable cause"—if they did, they were entitled to qualified immunity from false arrest and retaliatory arrest claims. *Id.* at 392. But the Fifth Circuit explained that there was another reason officers may be entitled to qualified immunity: if it was not "objectively unreasonable" to "believe[e] that there was probable cause," even if there was none, the officers were still entitled to qualified immunity. *Id.* In deciding the case, the Fifth Circuit focused on this second approach, and assessed whether the officers "had 'arguable' probable cause." *Id.* at 392.

This is a well-established approach in the Fifth Circuit. *See Rucker v. Marshall*, 119 F.4th 395 (5th Cir. 2024) ("Our court has repeatedly explained that a police officer is protected by qualified immunity against a First Amendment retaliatory arrest claim '[i]f probable cause existed . . . or if reasonable police officers could believe probable cause existed.'" (quoting *Roy v. City of Monroe*, 950 F.3d 245, 255 (5th Cir. 2020))); *see Miller v. Salvaggio*, No. 23-50894, 2024 WL 5116799, at *8 (5th Cir. Dec. 16, 2024) (dismissing retaliatory arrest claims where the defendant officers arrested the plaintiff "based on their objectively reasonable belief that [a fake] gun was real"); *cf. Roy*, 950 F.3d at 256 (dismissing a retaliatory arrest claim because the plaintiff had not shown his arrest "was unsupported by probable cause or, much less, *that a reasonable officer would have known that it was unsupported*" (emphasis added)). Indeed, over two decades ago the Fifth Circuit recognized that a First Amendment retaliation claim cannot proceed "if

reasonable police officers could believe probable cause existed" for their actions. *Keenan v. Tejeda*, 290 F.3d 252, 262 (5th Cir. 2002).

Respondent's arguments overlook this two-question approach. For example, Respondent characterizes *Rucker* as a case where the plaintiff's First Amendment claim failed because the officer had probable cause. Opp. at 6–7. But in the Fifth Circuit's own words, the analysis was an either or: the defendants were entitled to qualified immunity "if probable cause existed" or, citing *Davidson*, if "reasonable police officers could believe probable cause existed." *Rucker*, 119 F.4th at 402–03. That the Fifth Circuit resolved the claim on the presence of probable cause has no bearing on whether arguable probable cause is part of the First Amendment analysis. The Fifth Circuit, as it has repeatedly shown, believes that it is.

B. Sixth Circuit

Likewise, the Sixth Circuit also grants qualified immunity from retaliatory arrest claims to officers who "reasonably, even if mistakenly" believe probable cause exists. *Novak v. City of Parma*, 33 F.4th 296 (6th Cir. 2022). In *Novak*, the court explained that "while probable cause [] may be difficult," the question of "qualified immunity is not." *Id.* at 305. Because the defendants "had good reason to believe they had probable cause," the court affirmed that qualified immunity barred the retaliatory arrest claims. *Id.*

Although Respondent attempts to distinguish *Novak* by emphasizing that the district court here found a factual dispute as to the existence of probable cause, this argument

is a red herring. The district court held that regardless whether Officer Newby had actual probable cause to arrest Respondent, he "reasonably but mistakenly believed" there was probable cause. App. at 32a. So too in *Novak*, where the court dismissed a retaliatory arrest claim based on arguable probable cause. The Sixth Circuit's caselaw thus conflicts with the Ninth Circuit's decision here.

C. Seventh Circuit

The Seventh Circuit has been explicit: arguable probable cause defeats a retaliatory arrest claim. *Thayer v. Chiczewski*, 705 F.3d 237, 253 (7th Cir. 2012), o*verruled on other grounds by Lozman v. Riviera Beach*, 585 U.S. 87 (2018). In *Thayer*, two plaintiffs—Thayer and Lyttle—sued the defendant police officers for First Amendment retaliatory arrest. *Id.* at 246. The Seventh Circuit affirmed the grant of qualified immunity to the officers on Lyttle's claims because it had "found that the officers had arguable probable cause to arrest Lyttle" and it saw "no reason to distinguish *Reichle*." *Id.* at 253. In short, because the officers had arguable probable cause to make the arrest, they were entitled to qualified immunity from Lyttle's First Amendment claim.

In other words, Respondent is correct that the Seventh Circuit "did a full, separate" analysis of the plaintiffs' First Amendment claims. Opp. at 8. Respondent just overlooks that the analysis of Lyttle's claim turned on arguable probable cause. Courts in the Seventh Circuit have taken that lesson to heart. *See, e.g.*, *Brown v. Robinett*, No. 1:19-cv-02336, 2021 WL 663378, at *9 (S.D. Ind. Feb. 19, 2021) ("Accordingly, having previously determined that arguable probable cause existed for her

arrest, we hold that [the defendant officer] is entitled to qualified immunity on [the plaintiff's] First Amendment retaliation claim."); *Turner v. Miller*, No. 4:20-cv-00152, 2021 WL 396622, at *9 (S.D. Ind. Feb. 4, 2021) ("Even if there were no actual probable cause to arrest [the plaintiff], qualified immunity shields the [defendants] from suit because arguable probable cause existed to arrest him based on the facts and circumstances before them at the time of the arrest."). The Seventh Circuit therefore is not aligned with the Ninth Circuit's decision here.

D. Eighth Circuit

As Respondent acknowledges, the Eighth Circuit has held that "a First Amendment retaliatory arrest claim is defeated by a showing of probable cause (*or arguable probable cause*)." *Just v. City of St. Louis*, 7 F.4th 761, 768 (8th Cir. 2021) (emphasis added); *see also Brown v. City of St. Louis*, 40 F.4th 895, 903 (8th Cir. 2022) ("[W]e find that [the defendants] had arguable probable cause to arrest and then initiate prosecution against [the plaintiff], meaning that it was not clearly established that doing so would violate [his] right to be free from unlawful seizure, malicious prosecution, or First Amendment retaliation."); *Quraishi v. St. Charles Cnty.*, 986 F.3d 831, 839 (8th Cir. 2021) (collecting "cases of persuasive authority . . . clearly establish[ing] that using an arrest (that lacks arguable probable cause) to interfere with First Amendment activity is a constitutional violation").

Respondent questions the Eighth Circuit's robust body of caselaw holding that arguable probable cause defeats a retaliatory arrest claim, pointing out that "the Eighth Circuit has declined to transfer over an

arguable-probable-cause defense" for First Amendment retaliatory *use-of-force* claims. Opp. at 9. But the Eighth Circuit has explained that use-of-force claims are easily "distinguishable" from retaliatory arrest claims because they do not "concern seizures." *Watson v. Boyd*, 119 F.4th 539, 558 (8th Cir. 2024) (quoting *Welch v. Dempsey*, 51 F.4th 809, 812 (8th Cir. 2022)); *Welch*, 51 F.4th at 813 (noting there is no good reason "for extending the *Nieves* no-probable-cause requirement" to a First Amendment use-of-force claim). In the end, Respondent merely disagrees with the Eighth Circuit's jurisprudence, which counsels in favor of granting, not denying, certiorari to settle this important issue.

E. Tenth Circuit

Although unpublished, the Tenth Circuit has readily agreed that arguable probable cause bars a retaliatory arrest claim. *Detreville v. Gurevich*, No. 24-1427, 2025 WL 1874587, at *6 (10th Cir. July 8, 2025). The Tenth Circuit did so after reviewing the state of the law across the country, explaining 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.* at *6 (collecting cases). And the court explicitly "agree[d] with the 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." *Id.* Quite simply, *Detreville* conflicts with the Ninth Circuit's decision here, and also demonstrates the deep split between the Ninth Circuit and other circuit courts.

F. Eleventh Circuit

Finally, the Eleventh Circuit also holds that arguable probable cause will defeat a retaliatory arrest claim: "Because we hold that the officers had arguable probable cause to arrest [the plaintiffs] for disorderly conduct, we must hold that the officers are also entitled to qualified immunity from the plaintiffs' First Amendment claims." *Redd v. City of Enterprise*, 140 F.3d 1378, 1383 (11th Cir. 1998).

Respondent attempts to distinguish *Redd* by arguing that it "involved a direct First Amendment chilling claim" rather than a retaliatory arrest claim. Opp. at 9. But *Redd* is not the only Eleventh Circuit case on this topic. In the last year, the court reiterated that the "existence of *arguable* probable cause entitles" defendant officers to qualified immunity from retaliatory arrest claims. *Prospero v. Sullivan*, 153 F.4th 1171, 1188 (11th Cir. 2025); *see also Reynolds v. Calhoun*, No. 1:21-cv-00649, 2024 WL 419431, at *15 (M.D. Ala. Sep. 13, 2024) (granting qualified immunity against a retaliatory arrest claim because the defendant officer "had arguable probable cause to arrest" the plaintiff). And though Respondent argues the Eleventh Circuit followed a different rule in *Carr v. Cadeau*, 658 F. App'x 485 (11th Cir. 2016), that case merely stands for the commonsense notion that a plaintiff's lawful speech, in itself, cannot "establish arguable probable cause to arrest her." *Id.* at 489. In short, the Eleventh Circuit's cases clearly hold that arguable probable cause can defeat a retaliatory arrest claim.

* * *

The above authority demonstrates that the Ninth Circuit's decision represents a significant departure from the law in other circuits. The Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have all held, to varying degrees, that arguable probable cause defeats a retaliatory arrest claim. The Court should grant review to settle this important issue.

II. Respondent's arguments on the merits demonstrate that certiorari should be granted.

Respondent's primary argument is that the Ninth Circuit's decision is more consistent with this Court's precedent than the contrary decisions in other circuits. *See* Opp. at 10–18. The Petition sets out a different view, arguing that this Court's precedent shows that, outside of the *Nieves* exception (which is not implicated here), a retaliatory arrest claim cannot proceed if an objective officer reasonably but mistakenly believed there was probable cause for the arrest. *See* Pet. for Certiorari at 14–23. This rift about what the Court's cases say demonstrate why this case is important. If Respondent is right and circuits across the country have misinterpreted this Court's precedent on retaliatory arrest and qualified immunity, this Court should intervene. If the Ninth Circuit got it wrong, this Court should settle the issue before other courts follow the Ninth Circuit's lead.

III. There is no other reason to delay settling this important issue.

In his brief, Respondent states that this Court should not grant certiorari because (1) the Ninth Circuit's decision is unpublished, Opp. at 4, 6, 10, and (2) Officer Newby has

not argued this issue is important, Opp. at 10. Neither assertion provides any good reason to deny certiorari.

First, it is immaterial that the Ninth Circuit's decision was unpublished. So too was the Ninth Circuit decision that this Court reviewed in *Nieves*. *See Bartlett v. Nieves*, 712 F. App'x 613, 614 (9th Cir. 2017). Indeed, this Court has noted the fact that a challenged decision "is unpublished carries no weight in [its] decision to review the case." *Comm'r v. McCoy*, 484 U.S. 3, 7 (1987). The Court's analysis in granting certiorari should not turn on the Ninth Circuit panel's choice not to publish its decision—rather, it should turn on the importance of settling the question presented by the Ninth Circuit's wayward decision.

Second, this is an important question that requires this Court's resolution. *See* Pet. at 10 ("This Court should grant a writ of certiorari to resolve the circuit split and clarify the law governing this important issue concerning law enforcement officers' immunity from suit."); Br. of Amicus Curiae Int'l Mun. Laws. Assoc. at 14–15 ("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."); Br. of Amicus Curiae Nat'l Sheriff's Assoc. at 5 (explaining this issue is important because "the denial of qualified immunity where the law is unclear will not only impact law enforcement directly, but also law enforcement's ability to provide public safety to society as a whole").

Qualified immunity serves an important purpose—it provides some protection for law enforcement officers who frequently "find it difficult to know how the general standard of probable cause applies in the precise situation encountered." *District of Columbia v. Wesby*, 583 U.S. 48, 64 (2018) (citation omitted). The Ninth Circuit's decision injects uncertainty into the qualified immunity analysis by shifting focus to "an officer's subjective intent" for making an arrest, which is "something this Court has 'almost uniformly rejected.'" Pet. at 21 (quoting *Nieves*, 587 U.S. at 403).

Although the Ninth Circuit's decision is the first to depart from the consensus rule in other circuits, there is a real possibility that other circuits may follow the Ninth Circuit's lead. *See* Pet. at 13–14 (discussing contradictory authority in the D.C. Circuit); Opp. at 10–18 (maintaining that the Ninth Circuit's decision was correct); *Villarreal v. City of Laredo*, 134 F.4th 273, 280 (5th Cir. 2025) (Oldham, J., concurring) (arguing the "no-probable-cause rule" established in *Nieves* is irrelevant to qualified immunity). Where law enforcement officers make tens of thousands of arrests every day, Pet. at 17, it is vitally important for this Court to define the limits of an officer's liability for an allegedly "retaliatory" arrest. *See* Br. of Amicus Curiae Int'l Mun. Laws. Assoc. at 1 (emphasizing "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"). Accordingly, the Court should grant certiorari because this case provides an excellent vehicle to clarify how qualified immunity operates in the retaliatory arrest context.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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