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SUPREME COURT, U.S.

No. 26-563

In The
Supreme Court of the United States

JAY FOLSE,
Petitioner,

v.

JOHN McCUSKEY, JR.; G. RUSSELL ROLLYSON, JR.; WALLACE LOONEY; LISA HOPKINS; STEPHEN CONNOLLY; MICHAEL NUSBAUM; AND KEVIN FOREMAN,
in their individual and official capacities,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner criticized West Virginia's State Auditor and a deputy over the office's refusal to deliver tax deeds he had purchased. A state magistrate's personal safety order barred him from "verbal contact" with the Auditor's office and directed that "[a]ll communication shall be via email or USPS." A Capitol Police officer then swore out a criminal complaint charging petitioner with violating that order. The sworn basis was four acts: petitioner sued the Auditor and the deputy, noticed their depositions, criticized the Auditor on the Auditor's public Facebook page, and emailed the deputy. A magistrate issued an arrest warrant. Petitioner was arrested at a public tax auction and jailed, and the prosecutor then dismissed the charge. When petitioner sued under 42 U.S.C. § 1983, both courts below held that the warrant established probable cause and that probable cause defeated every claim against every defendant.

The questions presented are:

1. Whether a magistrate's probable-cause finding conclusively insulates the officials who procured an arrest warrant from First Amendment retaliation and Fourth Amendment malicious-prosecution claims—a question that has divided the courts of appeals—even when the warrant application describes only protected petitioning and speech.

2. Whether a court may hold at summary judgment, as a matter of law, that a citizen criminally violated a court order by sending emails the order's own terms expressly permitted.

3. Whether qualified immunity may be granted without identifying the constitutional right at issue or deciding whether that right was clearly established.

PARTIES TO THE PROCEEDINGS

Petitioner Jay Folse was the plaintiff in the district court and the appellant in the court of appeals.

Respondents, each sued in his or her individual and official capacities, were the defendants in the district court and the appellees in the court of appeals: John McCuskey, Jr., then Auditor of the State of West Virginia; G. Russell Rollyson, Jr., Deputy Commissioner of Delinquent and Non-entered Lands of the West Virginia State Auditor's Office; Lisa Hopkins, Senior Deputy Commissioner of Securities and General Counsel of that office; Stephen Connolly, then Deputy State Auditor and General Counsel; Michael Nusbaum, Associate General Counsel and Senior Regulatory Counsel; Kevin Foreman, Director of the West Virginia Division of Protective Services (Capitol Police); and Wallace Looney, a sergeant with the Capitol Police.

Petitioner is an individual, so no corporate disclosure statement is required. See Sup. Ct. R. 29.6.

RELATED PROCEEDINGS

Folse v. McCuskey, No. 2:22-cv-00171, U.S. District Court for the Southern District of West Virginia. Judgment entered October 22, 2025.

Folse v. McCuskey, No. 25-2401, U.S. Court of Appeals for the Fourth Circuit. Judgment entered July 27, 2026.

TABLE OF CONTENTS

QUESTIONS PRESENTED....i
PARTIES TO THE PROCEEDINGS....ii
RELATED PROCEEDINGS....ii
TABLE OF AUTHORITIES....v
PETITION FOR A WRIT OF CERTIORARI....1
INTRODUCTION....1
OPINIONS BELOW....2
JURISDICTION....2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED....3
STATEMENT OF THE CASE....4
A. The Tax-Sale Dispute And The Personal Safety Order....4
B. The Criminal Complaint, The Arrest Warrant, And Petitioner's Arrest....6
C. The District Court's Decision....8
D. The Fourth Circuit's Decision....11
REASONS FOR GRANTING THE PETITION....11
I. The Courts Below Treated The Magistrate's Finding As Conclusive, In Conflict With *Malley* And On A Question That Has Divided The Courts Of Appeals....12
II. Probable Cause Cannot Rest On Protected Petitioning And Speech, And This Case Presents The Question Left Open In *Gonzalez*....14
III. The Qualified-Immunity And Summary-Judgment Rulings Conflict With *Harlow*, *al-Kidd*, And *Tolan*....18
IV. The Questions Presented Are Important And Recurring, And This Case Is A Suitable Vehicle....21

CONCLUSION.....23
APPENDIX
Appendix A: Opinion of the United States Court of Appeals for the Fourth Circuit (July 27, 2026).....1a
Appendix B: Memorandum Opinion and Order of the United States District Court for the Southern District of West Virginia (Oct. 22, 2025).....3a
Appendix C: Proposed Findings and Recommendation of the Magistrate Judge, adopted by the district court (May 14, 2025).....26a
Appendix D: Personal Safety Order Following Final Hearing, Magistrate Court of Kanawha County, West Virginia (Aug. 20, 2021).....56a
Appendix E: Warrant for Arrest and Criminal Complaint, Magistrate Court of Kanawha County, West Virginia (Oct. 19, 2021).....63a
Appendix F: Statutory Provision Involved —W. Va. Code § 53-8-11.....68a

TABLE OF AUTHORITIES

Cases

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).....16, 20

Ashcroft v. al-Kidd, 563 U.S. 731 (2011).....19

Baxter v. Bracey, 140 S. Ct. 1862 (2020) (Thomas, J., dissenting from denial of certiorari).....21

BE&K Constr. Co. v. NLRB, 536 U.S. 516 (2002).....15

Borough of Duryea v. Guarnieri, 564 U.S. 379 (2011).....15

Buehler v. City of Austin/Austin Police Dep't, 824 F.3d 548 (5th Cir. 2016).....13

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).....15

City of Houston v. Hill, 482 U.S. 451 (1987).....16

Franks v. Delaware, 438 U.S. 154 (1978).....11, 12

Gonzalez v. Trevino, 602 U.S. 653 (2024) (per curiam).....2, 11, 14, 17, 18, 22, 23

Hand v. Gary, 838 F.2d 1420 (5th Cir. 1988).....13, 22

Harlow v. Fitzgerald, 457 U.S. 800 (1982).....18, 19

Hartman v. Moore, 547 U.S. 250 (2006).....11, 17, 18

Hoggard v. Rhodes, 141 S. Ct. 2421 (2021) (Thomas, J., statement respecting denial of certiorari).....21

Hupp v. Cook, 931 F.3d 307 (4th Cir. 2019).....9, 13, 14, 19

J.F. v. G.R., No. 21-0813, 2022 WL 17592199 (W. Va. Dec. 13, 2022).....6

Lozman v. City of Riviera Beach, 585 U.S. 87 (2018).....11, 18, 22

Malley v. Briggs, 475 U.S. 335 (1986).1, 11, 12, 13, 23

Messerschmidt v. Millender, 565 U.S. 535 (2012).....11, 12

New York Times Co. v. Sullivan, 376 U.S. 254 (1964).....16

Nieves v. Bartlett, 587 U.S. 391 (2019)...2, 11, 17, 18, 22, 23

Pearson v. Callahan, 555 U.S. 223 (2009).....19

Smith v. Gonzales, 459 U.S. 1005 (1982) (White, J., dissenting from denial of certiorari).....14

Somers v. Devine, 132 F.4th 689 (4th Cir. 2025).....10

Suarez Corp. Industries v. McGraw, 202 F.3d 676 (4th Cir. 2000).....19

Thompson v. Clark, 596 U.S. 36 (2022).....18

Thurston v. Frye, 99 F.4th 665 (4th Cir. 2024).....20

Tolan v. Cotton, 572 U.S. 650 (2014) (per curiam).....2, 18, 20, 23

Trulock v. Freeh, 275 F.3d 391 (4th Cir. 2001).....19

Ziglar v. Abbasi, 582 U.S. 120 (2017) (Thomas, J., concurring in part and concurring in the judgment).....21

Constitutional Provisions

U.S. Const. amend. I.....i, 3, 8, 14, 15

U.S. Const. amend. IV.....i, 3, 8, 18, 19

U.S. Const. amend. XIV, § 1.....3

Statutes

28 U.S.C. § 1254(1).....2

42 U.S.C. § 1983.....i, 3, 4, 8, 12, 17, 18, 21, 22
W. Va. Code § 53-8-11.....4, 6, 15

Rules

Sup. Ct. R. 13.1.....2
Sup. Ct. R. 29.6.....ii

PETITION FOR A WRIT OF CERTIORARI

Petitioner Jay Folse respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

INTRODUCTION

Jay Folse sued two West Virginia officials over tax deeds their office would not deliver. He noticed their depositions in that lawsuit. He criticized the elected State Auditor on the Auditor's own public Facebook page. And he emailed the Auditor's deputy—the precise channel a magistrate's protective order prescribed when it directed that "[a]ll communication shall be via email or USPS." App. D at 2. For those four acts, and no others, a Capitol Police sergeant swore out a criminal complaint. A magistrate issued a warrant. Petitioner was arrested at a public tax auction and jailed. The prosecutor dismissed the charge.

When petitioner sought a civil remedy, the courts below ended the case with a syllogism: a magistrate found probable cause, so probable cause existed; and probable cause "defeats retaliatory arrest, unlawful arrest, and malicious prosecutions claims alike," so every claim against every defendant failed. App. B at 24. The district court rested probable cause solely on the emails—without ever mentioning the email clause it had quoted nineteen pages earlier—and disposed of qualified immunity in a single sentence. The Fourth Circuit affirmed in one substantive paragraph, unpublished and without argument.

That result cannot be reconciled with *Malley v. Briggs*, which holds that a magistrate's signature does not shield an officer whose application, taken as true,

fails to establish probable cause. It gives the magistrate's finding the very conclusive effect that has divided the courts of appeals for four decades—the causal-chain-breaking rule of the Fifth Circuit's independent-intermediary doctrine, which the Fourth Circuit itself purports to reject. It cannot be reconciled with *Nieves v. Bartlett* and *Gonzalez v. Trevino*, which police the use of arrests against speakers, or with *Tolan v. Cotton*, which forbids resolving disputed facts against the nonmovant at summary judgment. And it squarely presents a question this Court granted certiorari to decide in *Gonzalez* but did not reach: whether the *Nieves* probable-cause bar governs deliberate, warrant-based arrests at all. Review—or at minimum summary reversal—is warranted.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is unpublished. The memorandum opinion and order of the district court (App. B) is unreported, as is the magistrate judge's proposed findings and recommendation that the district court adopted (App. C). Citations in this petition to App. A through App. F refer to the internal pagination of each document, which is indicated in the appendix by bold bracketed numerals.

JURISDICTION

The court of appeals entered its judgment on July 27, 2026. App. A. This petition is timely filed within 90 days of that judgment. Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 1 of the Fourteenth Amendment provides in relevant part that no State shall "deprive any person of life, liberty, or property, without due process of law."

Title 42, United States Code, Section 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . 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 proceeding for redress . . . .

West Virginia Code § 53-8-11(a) provides in relevant part: "An individual who fails to comply with the relief granted in a temporary personal safety order or a final personal safety order entered pursuant to this article is guilty of a misdemeanor . . . ." The full provision is reproduced at App. F.

STATEMENT OF THE CASE

This case arises from petitioner's arrest—at a public auction, on a warrant sworn out by a state Capitol Police sergeant—for the misdemeanor of violating a personal safety order. The criminal complaint identified four acts as the violation: petitioner filed a lawsuit against two state officials, noticed their depositions in that lawsuit, posted critical comments on the State Auditor's public Facebook page, and sent emails to the Auditor's deputy. The order itself directed that "[a]ll communication shall be via email or USPS." App. D at 2. The prosecutor voluntarily dismissed the charge. App. B at 6. Yet when petitioner sued under 42 U.S.C. § 1983, both courts below held that the warrant conclusively established probable cause and thereby immunized every respondent from every claim.

A. The Tax-Sale Dispute And The Personal Safety Order

Petitioner purchases tax liens at delinquent-land sales conducted by the West Virginia State Auditor's Office, and his claims "stem from interactions between" him and respondents "in connection with [his] purchase of tax liens" from that office, following what the district court described as a "years-long

breakdown of relationship." App. B at 3. Petitioner alleges that respondents refused to issue tax deeds he had purchased, prompting extensive litigation, and that they then "collectively conspired to file for a [personal safety order] for the improper purpose to exclude [him] from tax sales, to bar him from obtaining tax deeds to properties he already purchased, and to put him in a catch 22 situation." App. B at 5 (quoting Am. Compl. ¶ 43).

On August 12, 2021, respondent Rollyson petitioned the Magistrate Court of Kanawha County for a personal safety order ("PSO"), asserting that petitioner had made "repeated credible threats of bodily injury." App. B at 3. After a hearing at which petitioner appeared, Magistrate Shelton issued a one-year "Personal Safety Order Following Final Hearing" on August 20, 2021, naming Rollyson as the only protected person. App. D at 1–2. As the district court recognized, the order "prescribed the following two pertinent restrictions, the first relating to the Auditor's Office and its General Counsel, and the second related specifically to the petitioner Rollyson":

> (1) Respondent [Folse] shall not have verbal contact with the WVSAO or the General Counsel. All communication shall be via email or USPS.
>
> (2) Respondent [Folse] shall refrain from contacting, attempting to contact, or harassing the person(s) named above [Rollyson], directly or indirectly, or through third party, regardless of whether those third parties know of this Order.

App. B at 4. The first restriction is a case-specific finding entered by hand on the form; the second is a pre-printed check-box provision of the standard form

promulgated by the Supreme Court of Appeals of West Virginia. App. D at 2. Reviewing the order on appeal, the Supreme Court of Appeals of West Virginia described it as "limiting petitioner's communication with those offices to e-mail and the United States Postal Service." App. B at 4–5 (quoting *J.F. v. G.R.*, No. 21-0813, 2022 WL 17592199, at *1 (W. Va. Dec. 13, 2022)).*

B. The Criminal Complaint, The Arrest Warrant, And Petitioner's Arrest

On September 13, 2021, petitioner sued Rollyson and McCuskey in the Circuit Court of Ohio County, West Virginia, seeking deeds for five tax liens he had purchased, and he filed a notice to take both defendants' depositions, which the circuit court quashed by order of October 15, 2021. App. B at 7.

Four days later, on October 19, 2021, respondent Looney—a sergeant with the West Virginia Capitol Police—swore out a criminal complaint in the Magistrate Court of Kanawha County charging petitioner with the misdemeanor of failing to comply with a personal safety order, W. Va. Code § 53-8-11(a). App. E at 2. The complaint quoted both provisions of the PSO, including its directive that "[a]ll communication shall be via email or USPS," and added that the issuing magistrate had "verbally admonished" petitioner "that any interaction shall be professional in nature." App. E at 3. The complaint then identified the conduct said to constitute the crime:

> Defendant [Folse] filed a lawsuit against Deputy Auditor Rollyson and Auditor McCuskey. Defendant attempted to notice a

> multi-day deposition of both individuals. On October 18, 2021, the Circuit Court of Ohio County issued an Order quashing the deposition notice as Defendant's ". . . attempt to take these depositions was undertaken for an improper purpose." Later that day, Defendant began posting comments on State Auditor J.B. McCuskey's personal Facebook page. Said comments were numerous and clearly done with the intent to abuse, harass and violate the terms of the Final Personal Safety Order entered by Magistrate Shelton. Further, Defendant has emailed Deputy Auditor Rollyson on several occasions since the issuance of the Final PSO in what can be characterized as an unprofessional and harassing manner.

App. E at 3; see App. B at 5–6. That is the complaint's entire factual basis. As the district court put it, the complaint's "uncontested facts . . . can be distilled into four alleged violations": (1) petitioner "filed a lawsuit" against Rollyson and McCuskey; (2) petitioner "filed a notice in that lawsuit . . . unilaterally noticing the depositions" of both men; (3) petitioner "posted 'numerous' comments on defendant McCuskey's personal Facebook page," which Looney "characterized . . . as posted 'with the intent to abuse, harass and violate' the PSO"; and (4) petitioner "sent several emails directly to defendant Rollyson," which Looney "characterized . . . as 'harassing.'" App. B at 19.

McCuskey—an elected constitutional officer—was not a protected person under the PSO; the order named Rollyson alone. App. D at 2. The Facebook comments criticized McCuskey's performance in office on his own public page, in posts "regarding his actions or thoughts on his position as State Auditor"—for example, "Maybe instead of driving all over the state

trying to win votes you could learn about what's going on in your office and what your job responsibilities are." C.A. Informal Br. 7–8; see JA 12–13 (Am. Compl. ¶¶ 59–64). The emails to Rollyson concerned the litigation and the PSO itself; the district court quoted three of them, each caustic in tone, and none verbal. App. B at 20–21.

On the strength of Looney's complaint, Magistrate Brent Hall found probable cause and issued a warrant directing petitioner's arrest "[f]orthwith." App. E at 1; App. B at 6. Petitioner was arrested before the start of a tax auction in Marion County that he was attending; he alleges the magistrate refused to let him post bond although he was immediately able to do so, and he was held in the North Central Regional Jail. JA 12 (Am. Compl. ¶¶ 54–56); App. B at 6. "Ultimately, the charges against plaintiff were voluntarily dismissed by the Kanawha County prosecutor." App. B at 6.

C. The District Court's Decision

Petitioner, proceeding pro se, sued respondents under § 1983 in April 2022, asserting First Amendment retaliatory arrest and prosecution, Fourth Amendment claims, and state-law claims. App. B at 2. Following motions to dismiss, his § 1983 claims for retaliatory prosecution and malicious prosecution against respondents in their individual capacities proceeded, along with a state-law claim for intentional infliction of emotional distress and requests for declaratory and injunctive relief. See JA 254–58; C.A. Informal Br. 2–3.

On October 22, 2025, the district court adopted the magistrate judge's recommendation and granted summary judgment to all respondents. App. B at 27–

28. The court acknowledged the Fourth Circuit's rule that "a defendant to a malicious prosecution claim is not absolved from liability when the magistrate's probable-cause finding is predicated solely on a police officer's false statements," App. B at 17 (quoting *Hupp v. Cook*, 931 F.3d 307, 324 (4th Cir. 2019)), but held that rule "readily distinguishable" because petitioner did not claim Looney misstated the historical facts—only that Looney "made false statements that [petitioner's] actions violated the [PSO]." App. B at 17. On that view, the state magistrate "made an independent determination that the relevant PSO was violated based on the factual circumstances alleged by Officer Looney," and that determination controlled. Ibid.

Turning to the four charged acts, the court gave "no weight to the mere fact plaintiff filed a lawsuit against defendants Rollyson and McCuskey while the PSO was active," because "[n]othing in the PSO precluded plaintiff from the use of the courts to seek redress of plaintiff's claims." App. B at 19. It acknowledged that Looney's "characterization of the Facebook comments as posted 'with the intent to abuse, harass and violate' the PSO and his characterization of plaintiff's direct emails to defendant Rollyson as 'harassing' are conclusory." App. B at 22. It nonetheless held, "without regard to defendant Looney's conclusory characterizations or the other three alleged violations, that plaintiff sent several email correspondences directly to defendant Rollyson was itself a clear violation of the PSO which specifically barred plaintiff from 'contacting [or] attempting to contact' Rollyson. Thus, probable cause existed for plaintiff's arrest." App. B at 23–24. The

court's analysis nowhere mentioned—much less construed—the order's directive that "[a]ll communication shall be via email or USPS," a provision the court had itself quoted in its statement of the background. Compare App. B at 4 with App. B at 18–24. Nor did the court address that the criminal process "did not proceed past the plaintiff's arrest" except to say that this was "of no moment to the determination of probable cause." App. B at 23.

That single probable-cause holding then resolved the entire case. Quoting *Somers v. Devine*, 132 F.4th 689, 696–97 (4th Cir. 2025), for the propositions that the qualified-immunity analysis "turns on the question of whether [the officer] was objectively reasonable in believing that probable cause existed" and that "the presence of probable cause defeats retaliatory arrest, unlawful arrest, and malicious prosecutions claims alike," the court concluded: "Inasmuch as probable cause did exist for plaintiff's arrest, the police defendants are entitled to qualified immunity." App. B at 24. The remaining respondents were immunized derivatively: "Inasmuch as the court has determined that probable cause did exist for plaintiff's arrest, there has been found no constitutional violation in which the auditor defendants could have participated." App. B at 25. The state-law claim failed because "defendants' routine facilitation of plaintiff's arrest for which there was probable cause cannot rise to the level of 'extreme and outrageous' conduct," and the equitable claims were moot because the PSO had expired. App. B at 26.

D. The Fourth Circuit's Decision

The court of appeals affirmed in an unpublished per curiam opinion of a single substantive paragraph. It stated that it had "reviewed the district court's order in conjunction with the arguments Folse raises in his informal brief"—which challenged the grant of qualified immunity "based solely on the existence of an arrest warrant," the reliance on "a fact which is in dispute," and the finding of probable cause—and found "no reversible error." App. A at 3; C.A. Informal Br. 1. The court dispensed with oral argument. App. A at 3.

REASONS FOR GRANTING THE PETITION

In *Hartman v. Moore*, 547 U.S. 250 (2006), *Lozman v. City of Riviera Beach*, 585 U.S. 87 (2018), *Nieves v. Bartlett*, 587 U.S. 391 (2019), and *Gonzalez v. Trevino*, 602 U.S. 653 (2024) (per curiam), this Court has carefully calibrated the role that probable cause plays when a citizen claims that officials turned the criminal process against him for his speech and petitioning. And in *Malley v. Briggs*, 475 U.S. 335 (1986), *Franks v. Delaware*, 438 U.S. 154 (1978), and *Messerschmidt v. Millender*, 565 U.S. 535 (2012), the Court has held that a magistrate's decision to issue a warrant does not end the inquiry into an officer's objective reasonableness. The decision below collapses all of those decisions into a single rule: if a magistrate signs a warrant, and the officer's recitation of historical facts is accurate, then probable cause exists and every claim fails. Every official involved—the affiant, his director, and the officials who set the process in motion—is immune. And it does not matter that the

"facts" recited are a lawsuit, a deposition notice, Facebook criticism of an elected official, and emails sent through the very channel a court order prescribed.

That rule decided this case, expressly and at every step. It is irreconcilable with this Court's precedents, it reflects the strictest side of a long-running division among the courts of appeals over the insulating force of an intermediary's finding, it will recur wherever officials obtain protective orders against their critics, and this case presents it cleanly on undisputed documents.

I. The Courts Below Treated The Magistrate's Finding As Conclusive, In Conflict With *Malley* And On A Question That Has Divided The Courts Of Appeals.

An officer who applies for a warrant is not shielded from § 1983 liability merely because a magistrate issues it. The question under *Malley* is "whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." 475 U.S. at 345. The officer "cannot excuse his own default by pointing to the greater incompetence of the magistrate." Id. at 346 n.9. *Messerschmidt* reaffirmed that while a neutral magistrate's approval is "the clearest indication" of objective reasonableness, it "does not end the inquiry," and the "shield of immunity" is lost where "it is obvious that no reasonably competent officer would have concluded that a warrant should issue." 565 U.S. at 546–47 (quoting *Malley*, 475 U.S. at 341). And *Franks* strips a warrant of its protective force where it

was procured through material misstatements or omissions. 438 U.S. at 155–56.

The district court inverted that framework. Because petitioner did not accuse Looney of misrepresenting the historical facts—only of falsely swearing that those facts "violated the [PSO]"—the court held that the magistrate's "independent determination that the relevant PSO was violated" controlled and that *Hupp*'s false-statement rule was "readily distinguishable." App. B at 17. On that logic, an officer is immune whenever his affidavit truthfully describes innocent—indeed, constitutionally protected—conduct and simply mislabels it a crime. The more baseless the legal theory, the stronger the immunity, because there is no factual falsehood for the plaintiff to contest. *Malley* holds the opposite: where the application, taken as true, "failed to establish probable cause," the officer who submits it is not objectively reasonable, and the magistrate's error does not launder his own. 475 U.S. at 345–46 & n.9. A truthful affidavit reciting that a citizen attended church, voted, or—as here—sued a public official is not probable cause of anything.

How much insulation an intermediary's probable-cause finding provides has long divided the lower courts, and the division decides cases like this one. The Fifth Circuit holds that once the facts are placed before a magistrate or grand jury, the intermediary's finding "breaks the causal chain" and insulates even "an officer who acted with malice," absent proof that the intermediary was tainted. *Hand v. Gary*, 838 F.2d 1420, 1427–28 (5th Cir. 1988); see *Buehler v. City of Austin/Austin Police Dep't*, 824 F.3d 548, 554–55 (5th Cir. 2016) (adhering to that rule). A Member of this

Court flagged that approach more than four decades ago. See *Smith v. Gonzales*, 459 U.S. 1005, 1005–06 (1982) (White, J., dissenting from denial of certiorari). The Fourth Circuit nominally stands on the other side: a magistrate's finding is "but a factor" and does "not end the qualified immunity inquiry." *Hupp*, 931 F.3d at 324. Yet the decision below gave the magistrate's finding precisely the conclusive, chain-breaking effect that circuit law disclaims—and an unpublished affirmance let it stand. Without this Court's intervention, the strictest version of warrant immunity operates by default, even in circuits that reject it.

The error was not harmless or peripheral; it supplied the rule of decision for the whole case. The probable-cause holding disposed of the First Amendment claims, the malicious-prosecution claim, the claims against the auditor respondents (who were found incapable of participating in a violation that "has been found" not to exist), the state-law claim, and the equitable claims. App. B at 24–26. The court of appeals affirmed in a single substantive paragraph without engaging the question. App. A at 3. Left standing, the decision announces to officers in the Fourth Circuit that the path to immunity is candor about the facts and audacity about the law.

II. Probable Cause Cannot Rest On Protected Petitioning And Speech, And This Case Presents The Question Left Open In *Gonzalez*.

Probable cause is measured against "the contours of the offense thought to be committed." App. B at 18 (quoting *Hupp*, 931 F.3d at 318). The offense here was failure "to comply with the relief granted in" the PSO.

W. Va. Code § 53-8-11(a). Measured against the order's actual terms, none of the four charged acts could support an objectively reasonable belief that petitioner committed that offense—and each is activity the First Amendment protects.

First and *second*, the lawsuit and the deposition notice are petitioning. The right "to petition the Government for a redress of grievances" is "among the most precious of the liberties safeguarded by the Bill of Rights," and access to the courts is one aspect of it. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (internal quotation marks omitted); see *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 524–25 (2002); *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387–88 (2011). The district court itself gave the lawsuit "no weight" because "[n]othing in the PSO precluded plaintiff from the use of the courts to seek redress." App. B at 19. The deposition notice was a filing within that lawsuit. When the state court concluded the notice was premature and improperly motivated, it applied the ordinary litigation remedy: it quashed the notice. App. B at 19–20. Litigation conduct has litigation remedies. It is not a protective-order crime—yet four days after the quashing order, it appeared in a sworn criminal complaint as evidence of one. App. E at 3.

Third, the Facebook comments are core political speech: criticism of an elected state auditor's job performance, posted publicly on the official's own page. This Nation is committed "to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York*

Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); see *City of Houston v. Hill*, 482 U.S. 451, 461 (1987). McCuskey, moreover, was not a protected person under the PSO at all; the order named Rollyson alone. App. D at 2. Public comments to McCuskey about McCuskey were not "contact" with Rollyson—direct, indirect, or through third parties—and in any event they were written, not "verbal." Ibid.

Fourth, the emails—the sole ground on which the district court ultimately rested probable cause, "without regard to" everything else, App. B at 23—were sent through the very channel the order prescribed: "All communication shall be via email or USPS." App. D at 2. The Supreme Court of Appeals of West Virginia read the order the same way, describing it as "limiting petitioner's communication with those offices to e-mail and the United States Postal Service." App. B at 4–5. Respondent Looney's own criminal complaint quoted that clause. App. E at 3. What the complaint actually alleged was that the emails were "unprofessional and harassing" in manner, ibid.—a characterization the district court agreed was "conclusory," App. B at 22, and a standard (professional tone) that appears nowhere in the written order. Whether sharp-tongued emails sent through an authorized channel amounted to prohibited "harassing" contact, rather than permitted written communication, was at the very least a genuinely disputed question of fact and of the order's meaning. It could not be resolved against petitioner at summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Instead, the district court pronounced the emails "itself a clear violation" of the no-contact clause without ever mentioning the email

clause it had quoted nineteen pages earlier. Compare App. B at 4 with App. B at 23–24.

This Court's retaliation framework does not tolerate that shortcut. *Hartman* requires a retaliatory-prosecution plaintiff to plead and prove the absence of probable cause because probable cause for a genuine offense suggests the prosecution would have occurred regardless of animus. 547 U.S. at 265–66. *Nieves* adopted the same threshold for retaliatory arrests, but preserved claims where the criminal law is wielded selectively—where "officers have probable cause to make arrests, but typically exercise their discretion not to do so." 587 U.S. at 406–07. And in *Gonzalez*, the Court summarily corrected a court of appeals that took too "demanding" a view of the objective evidence that can satisfy the *Nieves* exception—in a case involving the warrant-based arrest of a local critic on a rarely invoked theory. 602 U.S. at 657–58.

Gonzalez also granted certiorari on a second question: whether the *Nieves* no-probable-cause rule is limited to split-second, warrantless arrests, or instead extends to deliberate arrests procured by warrant. The Court resolved the case on the evidentiary question alone and did not reach that one. See 602 U.S. at 656–58; see also *id.* (Alito, J., concurring) (*Nieves* "applies to all retaliatory-arrest claims brought under § 1983"). The question remains open in this Court, the Members of the Court have expressed differing views on it, and it is squarely presented here. Respondent Looney swore his complaint two months after petitioner filed the protected lawsuit and four days after the deposition ruling, on a deliberate application to a magistrate.

Nothing about this arrest was split-second. This case therefore lets the Court decide, on undisputed documents, how *Hartman*, *Nieves*, and *Gonzalez* apply when officials procure a warrant against a critic at leisure.

This case presents the *Gonzalez* pattern one step further: an arrest, by warrant, of a persistent critic, on a charge that—so far as this record discloses—has never been deployed this way against anyone else, and that the prosecutor himself declined to pursue. App. B at 6, 23. Yet the courts below never engaged the *Nieves* exception or *Hartman*'s rationale. They never addressed *Lozman*'s recognition that premeditated official retaliation presents a distinct problem. 585 U.S. at 98–101. And they never asked the antecedent question: whether the charged "offense," as construed, could constitutionally reach this conduct at all. Where the only conduct alleged is protected petitioning and permitted expression, there is no probable cause of a crime; there is a description of citizenship.

The Fourth Amendment claim was equally viable. The prosecution ended without a conviction when the prosecutor voluntarily dismissed the charge, App. B at 6, which satisfies the favorable-termination element of a § 1983 malicious-prosecution claim. *Thompson v. Clark*, 596 U.S. 36, 49 (2022). It, too, was extinguished solely by the warrant-equals-probable-cause syllogism. App. B at 24.

III. The Qualified-Immunity And Summary-Judgment Rulings Conflict With *Harlow*, *al-Kidd*, And *Tolan*.

Qualified immunity turns on two questions: whether the official violated a constitutional right,

and whether that right was clearly established at the time. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). Courts have discretion in sequencing the two steps, *Pearson v. Callahan*, 555 U.S. 223, 236 (2009), but they must actually decide them. Here, the district court's complete qualified-immunity analysis was one sentence: "Inasmuch as probable cause did exist for plaintiff's arrest, the police defendants are entitled to qualified immunity." App. B at 24. The court never identified the rights at issue—the Petition Clause right to sue the government, the free-speech right to criticize officials, the Fourth Amendment right against seizure without probable cause—and never asked whether a reasonable officer could have believed that suing, deposing, criticizing, and emailing (through the ordered channel) public officials was a crime. The auditor respondents were immunized wholly derivatively. App. B at 25. The court of appeals added nothing. App. A at 3.

Had the right question been asked, the answer was clearly established. "It is well established that a public official may not misuse his power to retaliate against an individual for the exercise of a valid constitutional right." *Trulock v. Freeh*, 275 F.3d 391, 404 (4th Cir. 2001) (citing *Suarez Corp. Industries v. McGraw*, 202 F.3d 676, 686 (4th Cir. 2000)). Two years before petitioner's arrest, the Fourth Circuit in *Hupp* denied qualified immunity to a West Virginia officer whose warrant-backed arrest lacked probable cause, explaining that a magistrate's finding is "but a factor" in assessing the officer's overall reasonableness and does "not end the qualified immunity inquiry." 931 F.3d at 324. And the circuit has since reiterated that a

"warrant lacks evidentiary value" for objective reasonableness where "no reasonable officer would have sought it given the known exculpatory facts." *Thurston v. Frye*, 99 F.4th 665, 670 (4th Cir. 2024). The known exculpatory fact here was quoted in the officer's own affidavit: "All communication shall be via email or USPS." App. E at 3. The decision below cannot be squared with those precedents; an unpublished affirmance should not be permitted to hollow them out.

The summary-judgment errors independently warrant this Court's intervention. In *Tolan v. Cotton*, 572 U.S. 650 (2014) (per curiam), this Court summarily vacated a qualified-immunity judgment because the lower courts had failed to view the evidence in the light most favorable to the nonmovant and had resolved disputed facts in the movant's favor. Id. at 655–60. The same happened here. The district court construed a facially two-directional order against the nonmovant without acknowledging its email clause; it deemed hostile-but-written communications "harassing" as a matter of law based on their "sheer volume" and tone, App. B at 21–22; and it drew every inference—including the inference that the auditor respondents, one of whom was the complaining witness, played no role in procuring the arrest—in the movants' favor, App. B at 25. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson*, 477 U.S. at 255.

Finally, this case illustrates concerns Members of this Court have voiced about the qualified-immunity doctrine itself. Justice Thomas has explained that the

"clearly established law" test lacks grounding in the text of § 1983 or the common law against which it was enacted, and that "[i]n an appropriate case, we should reconsider our qualified immunity jurisprudence." *Ziglar v. Abbasi*, 582 U.S. 120, 159–60 (2017) (Thomas, J., concurring in part and concurring in the judgment); accord *Baxter v. Bracey*, 140 S. Ct. 1862, 1864–65 (2020) (Thomas, J., dissenting from denial of certiorari). He has asked, in particular, why officials "who have time to make calculated choices" should "receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting." *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., statement respecting denial of certiorari). This case is that concern made concrete. The officials here did not act in a dangerous instant; they deliberated for weeks with the order's text in hand—and received immunity in a single sentence, derivatively, without analysis of the right or the law. Petitioner accordingly preserves the argument that, if qualified immunity permits this result, the doctrine should be narrowed or reconsidered. But the Court need not reach that question: respondents violated law that was clearly established under any formulation of the doctrine, and the judgment below fails on the doctrine's own terms.

IV. The Questions Presented Are Important And Recurring, And This Case Is A Suitable Vehicle.

Protective and restraining orders are among the most commonly issued instruments in American courts, and criminal enforcement of them is routine. Under the decision below, any official who obtains a

civil protective order against a persistent critic acquires a tool of extraordinary power. A police affidavit that truthfully lists the critic's petitions and publications, plus a magistrate's signature, ends any § 1983 suit at summary judgment—for the affiant, for his supervisors, for the officials who set the process in motion, and for state-law claims besides. That roadmap is not hypothetical; it is this case, in which the arrest was executed at the very tax auction from which petitioner alleges respondents had long sought to exclude him. JA 12 (Am. Compl. ¶ 54); App. B at 5. The problem will recur wherever local gadflies, journalists, and self-represented litigants clash with the officials they criticize—the settings of *Lozman* and *Gonzalez* alike. And two of the questions presented intersect issues this Court has already treated as worthy of review: *Gonzalez* granted certiorari on whether the *Nieves* bar is limited to split-second arrests and left the question open, and the insulating force of an intermediary's probable-cause finding has divided the courts of appeals since at least *Hand v. Gary*.

This case is a clean vehicle for resolving the questions presented. The operative documents—the PSO, the criminal complaint, and the warrant—are in the record and undisputed. App. D; App. E. The district court's reasoning is explicit and rests entirely on the legal propositions challenged here, and every claim in the case fell with the probable-cause ruling, so the questions are outcome-dispositive. The issues were pressed and passed upon: petitioner's informal brief argued that qualified immunity could not be granted "based solely on the existence of an arrest warrant and finding of probable cause by a

magistrate," that the district court "relied on a fact which is in dispute," and that probable cause was lacking; the court of appeals confined its review to that brief and affirmed. C.A. Informal Br. 1; App. A at 3.

At a minimum, the Court should grant the petition, vacate the judgment, and remand—or summarily reverse, as it did in *Tolan* and *Gonzalez*—with instructions to apply *Malley*'s objective-reasonableness standard, the *Nieves* framework including its exception, and ordinary summary-judgment principles.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court should summarily reverse or vacate the judgment below and remand for further proceedings.

Respectfully submitted,

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