

Syllabus

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SUPREME COURT OF THE UNITED STATES

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REICHLER ET AL. v. HOWARDS**CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT**

No. 11–262. Argued March 21, 2012—Decided June 4, 2012

Petitioners Reichle and Doyle were members of a Secret Service detail protecting Vice President Richard Cheney while he greeted members of the public at a shopping mall. Agent Doyle overheard respondent Howards, who was speaking into his cell phone, state that he “was going to ask [the Vice President] how many kids he’s killed today.” Doyle and other agents observed Howards enter the line to meet the Vice President, tell the Vice President that his “policies in Iraq are disgusting,” and touch the Vice President’s shoulder as the Vice President was leaving. After being briefed by Doyle, Agent Reichle interviewed and then arrested Howards, who was charged with harassment. After that charge was dismissed, Howards brought an action against petitioners and others under 42 U. S. C. §1983 and *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388. Howards claimed that he was arrested and searched without probable cause, in violation of the Fourth Amendment, and that the arrest violated the First Amendment because it was made in retaliation for Howards’ criticism of the Vice President. Petitioners moved for summary judgment on the ground that they were entitled to qualified immunity, but the Federal District Court denied the motion. On appeal, the Tenth Circuit reversed the immunity ruling with respect to the Fourth Amendment claim because petitioners had probable cause to arrest Howards, but the court affirmed with regard to the First Amendment claim. In doing so, the court rejected petitioners’ argument that, under *Hartman v. Moore*, 547 U. S. 250, probable cause to arrest defeats a First Amendment retaliatory arrest claim. It concluded instead that *Hartman* applied only to retaliatory prosecution claims and thus did not upset prior Tenth Circuit precedent holding that a retaliatory arrest violates the First Amendment even if supported by probable

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cause.

Held: Petitioners are entitled to qualified immunity because, at the time of Howards' arrest, it was not clearly established that an arrest supported by probable cause could give rise to a First Amendment violation. Pp. 5–12.

(a) Courts may grant qualified immunity on the ground that a purported right was not “clearly established” by prior case law. *Pearson v. Callahan*, 555 U. S. 223, 236. To be clearly established, a right must be sufficiently clear “that every ‘reasonable official would [have understood] that what he is doing violates that right.’” *Ashcroft v. al-Kidd*, 563 U. S. ___, ___. Pp. 5–6.

(b) The “clearly established” standard is not satisfied here. This Court has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause; nor was such a right otherwise clearly established at the time of Howards' arrest. P. 6.

(c) At that time, *Hartman*'s impact on the Tenth Circuit's precedent was far from clear. Although *Hartman*'s facts involved only a retaliatory prosecution, reasonable law enforcement officers could have questioned whether its rule also applied to arrests. First, *Hartman* was decided against a legal backdrop that treated retaliatory arrest claims and retaliatory prosecution claims similarly. It resolved a Circuit split concerning the impact of probable cause on retaliatory prosecution claims, but some of the conflicting cases involved both retaliatory prosecution and retaliatory arrest claims and made no distinction between the two when considering the relevance of probable cause. Second, a reasonable official could have interpreted *Hartman*'s rationale to apply to retaliatory arrests. Like in retaliatory prosecution cases, evidence of the presence or absence of probable cause for the arrest will be available in virtually all retaliatory arrest cases, and the causal link between the defendant's alleged retaliatory animus and the plaintiff's injury may be tenuous. Finally, decisions from other Circuits in the wake of *Hartman* support the conclusion that, for qualified immunity purposes, it was at least arguable at the time of Howards' arrest that *Hartman* extended to retaliatory arrests. Pp. 7–12.

634 F. 3d 1131, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, ALITO, and SOTOMAYOR, JJ., joined. GINSBURG, J., filed an opinion concurring in the judgment, in which BREYER, J., joined. KAGAN, J., took no part in the consideration or decision of the case.

Opinion of the Court

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SUPREME COURT OF THE UNITED STATES

No. 11–262

VIRGIL D. “GUS” REICHLER, JR., ET AL., PETITIONERS
v. STEVEN HOWARDS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

[June 4, 2012]

JUSTICE THOMAS delivered the opinion of the Court.

This case requires us to decide whether two federal law enforcement agents are immune from suit for allegedly arresting a suspect in retaliation for his political speech, when the agents had probable cause to arrest the suspect for committing a federal crime.

I

On June 16, 2006, Vice President Richard Cheney visited a shopping mall in Beaver Creek, Colorado. A Secret Service protective detail accompanied the Vice President. Petitioners Gus Reichler and Dan Doyle were members of that detail.

Respondent Steven Howards was also at the mall. He was engaged in a cell phone conversation when he noticed the Vice President greeting members of the public. Agent Doyle overheard Howards say, during this conversation, “I’m going to ask [the Vice President] how many kids he’s killed today.” Brief for Petitioners 4. Agent Doyle told two other agents what he had heard, and the three of them began monitoring Howards more closely.

Agent Doyle watched Howards enter the line to meet

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the Vice President. When Howards approached the Vice President, he told him that his “policies in Iraq are disgusting.” *Ibid.* The Vice President simply thanked Howards and moved along, but Howards touched the Vice President’s shoulder as the Vice President departed.¹ Howards then walked away.

Several agents observed Howards’ encounter with the Vice President. The agents determined that Agent Reichle, who coordinated the protective intelligence team responsible for interviewing individuals suspected of violating the law, should question Howards. Agent Reichle had not personally heard Howards’ comments or seen his contact with the Vice President, but Agent Doyle briefed Agent Reichle on what had happened.

Agent Reichle approached Howards, presented his badge and identified himself, and asked to speak with him. Howards refused and attempted to walk away. At that point, Agent Reichle stepped in front of Howards and asked if he had assaulted the Vice President. Pointing his finger at Agent Reichle, Howards denied assaulting the Vice President and told Agent Reichle, “if you don’t want other people sharing their opinions, you should have him [the Vice President] avoid public places.” *Howards v. McLaughlin*, 634 F. 3d 1131, 1137 (CA10 2011) (internal quotation marks omitted). During this exchange, Agent Reichle also asked Howards whether he had touched the Vice President. Howards falsely denied doing so. After confirming that Agent Doyle had indeed seen Howards touch the Vice President, Reichle arrested Howards.

The Secret Service transferred Howards to the custody of the local sheriff’s department. Howards was charged by local officials with harassment in violation of state law.

¹The parties dispute the manner of the touch. Howards described it as an open-handed pat, while several Secret Service agents described it as a forceful push. This dispute does not affect our analysis.

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The charge was eventually dismissed.

II

Howards brought this action in the United States District Court for the District of Colorado under Rev. Stat. §1979, 42 U. S. C. §1983, and *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971).² Howards alleged that he was arrested and searched without probable cause, in violation of the Fourth Amendment. Howards also alleged that he was arrested in retaliation for criticizing the Vice President, in violation of the First Amendment.

Petitioners Reichle and Doyle moved for summary judgment on the ground that they were entitled to qualified immunity. The District Court denied the motion. See App. to Pet. for Cert. 46–61. On interlocutory appeal, a divided panel of the United States Court of Appeals for the Tenth Circuit affirmed in part and reversed in part. 634 F. 3d 1131.

The Court of Appeals held that petitioners enjoyed qualified immunity with respect to Howards' Fourth Amendment claim. The court concluded that petitioners had probable cause to arrest Howards for making a materially false statement to a federal official in violation of 18 U. S. C. §1001 because he falsely denied touching the Vice President. 634 F. 3d, at 1142. Thus, the court concluded that neither Howards' arrest nor search incident to the arrest violated the Fourth Amendment.³ *Id.*, at 1142–1143.

However, the Court of Appeals denied petitioners qualified immunity from Howards' First Amendment claim.

²Howards named several Secret Service agents as defendants, but only Agents Reichle and Doyle are petitioners here. We address only those parts of the lower courts' decisions that involve petitioners Reichle and Doyle.

³Howards does not challenge the Court of Appeals' probable-cause determination.

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