No. 11-262

In The Supreme Court of the United States

VIRGIL D. "GUS" REICHLE, JR., DAN DOYLE,
Petitioners,

v.

STEVEN HOWARDS,
Respondent.

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

MOTION OF THE RUTHERFORD INSTITUTE FOR LEAVE TO FILE AN *AMICUS* BRIEF AND *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENT

John W. Whitehead
Counsel of Record
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888

Counsel for Amicus Curaie

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

No. 11-262

IN THE
SUPREME COURT OF THE UNITED STATES

VIRGIL D. "GUS" REICHLE, JR., DAN DOYLE,
Petitioners,

v.

STEVEN HOWARDS,
Respondent.

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

MOTION OF THE RUTHERFORD INSTITUTE FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

Comes now The Rutherford Institute and files this motion pursuant to Sup. Ct. R. 37.3(b), for leave to file an *amicus curiae* brief in support of the Respondents in the above-styled case presently before this Court for oral argument.

In support of this motion, The Rutherford Institute first avers that it requested the consent to the filing of an *amicus curiae* brief from each of parties to this case, but written consent was not obtained from Respondent Steven Howards.

The Rutherford Institute requests the opportunity to present an *amicus curiae* brief in this

case because the Institute is keenly interested in protecting the civil liberties of individuals from interference and infringement by the government. The issue presented in this case, *i.e.*, the remedies available to citizens who are targeted for arrest by law enforcement officials because of the exercise of First Amendment rights, will have an important impact upon the freedom of individuals and organizations to engage in speech that is unpopular or critical of the government. These individuals and members of these groups have historically faced the wrath of government officials who desire to squelch criticism. If a remedy for retaliatory arrests is made practically unavailable, government officials will feel emboldened to target their critics and unpopular speech will be chilled. It is crucial that an effective deterrent remain in place to prevent invidious discrimination on the basis of the exercise of freedom of speech.

As a civil liberties organization, The Rutherford Institute and the brief set forth, *infra*, brings a discerning analysis to the issues presented in this case. The Institute specializes in protecting the constitutional rights of individuals and its experience in these matters will bring to light matters which will assist the Court in reaching a just solution to the questions presented.

Moreover, The Rutherford Institute specializes in advocating for individual rights and the proposed brief will allow the Court to better understand the interests of government critics in safeguarding their rights to expression. The Petitioners have already received the support of

three *amicus curiae* briefs, and the Court will obtain a more balanced analysis of the issues in this case if the Institute's brief in support of the Respondent is accepted.

Wherefore, The Rutherford Institute respectfully requests that its motion for leave to file an *amicus curiae* brief be granted.

Respectfully submitted,

John W. Whitehead
Counsel of Record
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

Since its founding over 29 years ago, The Rutherford Institute has emerged as one of the nation's leading advocates of civil liberties and human rights, litigating in the courts and educating the public on a wide variety of issues affecting individual freedom in the United States and around the world.

The Institute's mission is twofold: to provide legal services in the defense of civil liberties and to educate the public on important issues affecting their constitutional freedoms. Whether our attorneys are protecting the rights of parents whose children are strip-searched at school, standing up for a teacher fired for speaking about religion, or defending the rights of individuals against illegal searches and seizures, The Rutherford Institute offers assistance—and hope—to thousands.

The case now before the Court concerns the Institute because it will affect the ability of citizens to feel free to engage in open and robust political expression. Particularly when such speech is unpopular or critical of the government, citizens run the risk of government retaliation that will deter such speech in the future. If claims for retaliatory arrest do not remain a viable option for citizens, few, if any, checks will remain to deter government

---

[1] No counsel to any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* and its counsel have contributed monetarily to its preparation or submission.

officials from employing intimidating tactics designed to chill the exercise of unpopular or critical political speech.

SUMMARY OF THE ARGUMENT

This Court has long adhered to the rule that, even with respect to decisions in which executive officers of the government have broad discretion, the Constitution forbids the law from being "applied and administered . . . with an evil eye and unequal hand" in derogation of individual rights enshrined in our fundamental law. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886). Such invidious discrimination in the enforcement of laws is forbidden not only where the intent of officials is to discriminate on the basis of race, but also where it is based upon the exercise of the First Amendment right of expression. *See Wayte v. United* States, 470 U.S. 598, 608 (1985) ("In particular, the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification, . . ., *including the exercise of protected statutory and constitutional rights*.") (emphasis added; citations and internal quotations omitted).

If this guarantee against invidious enforcement of the law is to remain a potent check upon the abuse of power by executive officials, this Court must reject the Petitioners' claim that to prevail on a First Amendment retaliatory arrest claim, a plaintiff is required to prove that the arresting officers lacked probable cause to arrest him or her. The retaliatory arrest claim under 42 U.S.C.

§ 1983 or *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), must remain available to protect against the chilling effect that retaliatory arrests create and to prevent third parties from experiencing such chilling effects. Its contours should be established so that it serves the same purpose as this Court's other protections against government actions that create chilling effects on First Amendment rights. Petitioners' suggested addition to the elements of the First Amendment retaliatory arrest cause of action would increase the difficulty of a plaintiff's prevailing on a retaliatory arrest claim to the point of deterring nearly all such claims and sharply curtailing the protections that this Court has put in place against chilling effects on First Amendment rights.

Protecting against chilling effects is particularly important in the present case. The ability of citizens to communicate with the President, the Vice President, and presidential candidates is embodied within the First Amendment's right to petition the government and is a fundamental attribute of American democracy. Without the deterrent effect upon law enforcement officials the retaliatory arrest cause of action provides, citizens will be less willing to engage in this direct communication and will self-censor the subjects that they discuss. Self-censorship, the result of a chilling effect, harms the President, the Vice President, and presidential candidates.

ARGUMENT

I. Claims Under the First Amendment for Retaliatory Arrest Deter Government Officials from Imposing Chilling Effects on Speech

A. The First Amendment Protects Against Chilling Effects

In order to realize fully the guarantee to freedom of speech contained in the First Amendment, that provision has been construed to prevent not only outright censorship and prior restraints, but also chilling effects on speech. Restrictions on speech run afoul of the First Amendment when they produce a fear of punishment or sanction that inhibits the exercise of protected speech, even if the restrictions would otherwise be permissible.

This Court has recognized chilling effects broadly in First Amendment contexts. As long as it is not purely subjective, a chilling effect on First Amendment rights constitutes injury-in-fact for the purposes of Article III standing. *Younger v. Harris*, 401 U.S. 37, 42 (1971); *cf. Meese v. Keene*, 481 U.S. 465, 473 (1987). A chilling effect provides the substantive basis for facial overbreadth challenges to statutes and regulations inhibiting speech. *See, e.g.*, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255–57 (2002); *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963). This Court has concluded that plaintiffs need not risk arrest in order to bring claims seeking to vindicate and protect First Amendment rights. *See Steffel v. Thompson*, 415 U.S. 452, 459 (1974).

Further, because of the chilling effect created by the prospect of civil liability for defamation, this Court has imposed constitutional restraints on the imposition of liability for libel and slander. Thus, heightened standards of proof apply in defamation actions which either involve public officials and figures, *New York Times Co. v. Sullivan*, 376 U.S. 254, 300–01 (1964) (Goldberg, J., concurring), or which involve speech on matters of public concern. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986).

B. Retaliatory Arrest Claims Protect Against Chilling Effects

The availability of claims for retaliatory arrest serves to prevent and deter the government from imposing a chilling effect upon the speech of citizens. As such, it serves the same First Amendment interests as this Court's other chilling effect jurisprudence. Indeed, a chilling effect is an element of the retaliatory arrest tort. To prevail, a plaintiff must prove, *inter alia*, that "the government's actions caused [the plaintiff] injury that would chill a person of ordinary firmness from continuing to engage in" the protected First Amendment activity engaged in by the plaintiff. *Howards v. McLaughlin*, 634 F.3d 1131, 1144 (10th Cir. 2011). The cause of action does not primarily protect against any violation of First Amendment rights that attends an arrest, but is intended to reach government conduct that would have the effect of chilling others' current and future exercise of their First Amendment rights.

As such, the retaliatory arrest's purpose is prospective in nature. Recognition of a retaliatory arrest cause of action serves as a deterrent upon law enforcement officials who might use their power to prevent and intimidate persons from criticizing the government. It is, of course, an action for damages, but it only awards damages to the plaintiff who was actually injured by the retaliatory arrest to the extent that the award of damages cures the chill on third parties' First Amendment free speech rights. The tort deters government agents from making arrests on account of the content of speech so that non-parties to the lawsuit need not risk arrest in order to vindicate their First Amendment rights.

C. Requiring That an Absence of Probable Cause Be Established by a Plaintiff Would Prevent the First Amendment Retaliatory Arrest Claim from Protecting Against Chilling Effects

Adding a "no probable cause" requirement to to elements of a retaliatory arrest claim is inconsistent with this Court's chilling effect jurisprudence and will limit the tort's protections of First Amendment rights.

When this Court has enjoined the enforcement of overbroad statutes and regulations that produce chilling effects, it has done so on the basis of the chill that they produced. This Court has not required those challenging the laws to have been arrested without probable cause and prosecuted in order to issue an injunction. Rather, the presence of a chilling effect has been sufficient to lead this Court to enjoin the enforcement of such

statutes and regulations. In *Ashcroft v. Free Speech Coalition*, for example, this Court found overbroad provisions of the Child Pornography Prevention Act of 1996 to be unconstitutional, even though the plaintiffs had not been arrested pursuant to the Act. *Free Speech Coalition*, 535 U.S. at 258.

Further, in *Younger v. Harris*, where this Court considered whether a criminal defendant had standing to challenge on First Amendment grounds the statute under which he was being prosecuted, this Court concluded that the violation of his First Amendment rights constituted cognizable injury even though he did not prove that he had been arrested without probable cause. *Younger*, 401 U.S. at 42.

Adding a "no probable cause" requirement to the elements of the retaliatory arrest claim would change the purpose the claim is meant to serve. If the Petitioners' argument is followed and the reasoning of *Hartman v. Moore*, 547 U.S. 250 (2006), extended to retaliatory arrest claims, such actions would emphasize—and seek to correct—the harm to the individual plaintiff from a wrongful arrest more than it would protect the public from the violations of their First Amendment rights. The additional element that Petitioners propose deals specifically with the facts and circumstances of the arrest. It requires additional retrospective inquiry not only into the arrest itself, but also into the plaintiff's conduct at the time of the arrest. In doing so, it redefines the claim's understanding of injury from an arrest that would chill the exercise of First Amendment rights to an arrest that would both chill

First Amendment rights *and* was actually effected in a particular manner, without probable cause.

Such a proposal is an attempt to make First Amendment retaliatory arrest protect the same interests already protected by the common law tort of false arrest and a constitutional claim under the Fourth Amendment, namely, injury to the plaintiff because of an unreasonable arrest without probable cause. However, the tort of First Amendment retaliatory arrest should be tailored and defined in a way that protects interests other than the plaintiff-arrestee's right to be free from an unreasonable arrest, *i.e.*, the right to be free from government targeting because of one's exercise of First Amendment rights. Only then will the existence of the retaliatory arrest cause of action serve to deter the application and enforcement of the law with an "evil eye" toward suppressing or punishing speech. In this case, under Petitioners' proposal, the result of litigation would turn on the absence of probable cause, rather than on what the tort has been designed to protect, namely First Amendment rights. Those whose First Amendment interests have been chilled because of the Secret Service's arrest of Howards would continue to be chilled with respect to these rights.

In imposing a requirement that plaintiffs in retaliatory prosecution actions show that there was no probable cause to prosecute for the specific offense with which they were charged, this Court reasoned in *Hartman*, 547 U.S. at 265, that such a showing would be effectively "cost free." Here, Petitioners proposed no probable cause requirement

would be far from cost free. It would add substantially to the plaintiff's burden and likely would prevent almost any plaintiff from prevailing on a retaliatory arrest claim or attempting to prove this element. As the facts of this case show, where the Petitioners claim they were justified in arresting the Respondent for a federal crime because Respondent inaccurately stated he had not touched the Vice President, it is difficult to steer clear of any conduct that can be plausibly deemed a crime, especially in the face of officers determined to retaliate and intimidate persons expressing critical or unpopular views. This is even more difficult for persons who are passionate about their views and are compelled to enter the public arena to do so.

The Petitioners and the United States have argued, and the Tenth Circuit understood, that the proposed "no probable cause" element would require the plaintiff to show that, at the time of the arrest, there was no probable cause to arrest the plaintiff not for the crime for which he or she was arrested, but for *any* crime.[2] Effectively, this would require the plaintiff to prove not just that he or she was innocent of every existing crime at the time of the arrest, but that there was no reason even to believe that he or she committed any crime at all. Even a

---

[2] As the Tenth Circuit noted: "[Agents Reichle and Doyle] assert that '[i]f an officer had probable cause to arrest a plaintiff for *any crime*, it is irrelevant that a plaintiff may have engaged in protected speech prior to or during the arrest.'" *Howards v. McLaughlin*, 634 F.3d 1131, 1145 (10th Cir. 2011) (quoting Reichle/Doyle Br. at 15) (emphasis added); *see also* Brief of the United States at 30–31.

focused, *Hartman*-like requirement would increase the plaintiff's burden and would deter most plaintiffs from pursuing litigation. The effort and expense involved with making such a showing with respect to every crime would deter all but the most ardent plaintiffs from bringing retaliatory arrest claims.

II. The Freedom of Citizens to Engage and Petition Leaders and Candidates Will Suffer If the Availability of the Retaliatory Arrest Cause of Action Is Restricted

Direct contact between senior government officials and individual, private citizens characterizes American government. Such direct contact has both constitutional and political foundations. The First Amendment guarantees citizens the right to petition at the very least the Legislative and Executive branches, as Justice Scalia has recently observed. *See Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2503 (2011) (Scalia, J., concurring) ("There is abundant historical evidence that 'Petitions' were directed to the executive and legislative branches of government [.]"). This right has no clearer expression than in petitions made directly and in person to senior officials. Indeed, this is just the situation embodied in the petition that led to the Magna Carta. *See id.* at 2499 (majority opinion).

Direct contact between the holders of high government office and private citizens is further rooted in the democratic nature of American government. Citizens vote for their Representatives to Congress and their Senators. The President and Vice President are elected after a nationwide, popular election and also after nationwide party nominating contests. Responsiveness to citizen concerns is the hallmark of American government. With the exception of term-limited Presidents, elected officials retain their positions only with the continued support of the people who elect them. Candidates for office only prevail after convincing individual citizens to vote for them.

Even in an age of social media and television advertisements, direct citizen contact has retained its importance for office-holders and candidates alike and remains a fundamental part of American political life. Indeed, such direct citizen contact is an essential feature of the presidency of Barack Obama. As the White House website describes a recent presidential bus tour:

> From August 15-18, President Obama traveled through the Midwest, meeting with Americans in rural towns and communities in Minnesota, Iowa and Illinois. The purpose of his trip, dubbed the Economic Rural Tour 2011, was to talk to people from different walks of life about what is happening in our country right now. The President was there to talk, but also to listen.

Rural Bus Tour 2011, The White House, http://www.whitehouse.gov/administration/eop/rural-council/rural-tour-2011 (last visited Feb. 22, 2012).

Direct citizen contact is no less essential for candidates for office. In the early party nominating contests, in the Iowa Caucuses and the New Hampshire Primary, candidates campaign substantially by greeting and interacting with citizens, one-on-one or in small groups, in coffee shops and restaurants. Office holders and candidates do not meet directly with citizens with the expectation that citizens will agree fully with policies that they promote or whose adoption they urge. Rather, they meet with citizens with the understanding that they are—or hope to become—public servants and must learn about the concerns of citizens in order to serve them.

Chilling this activity strikes at the very core of the American tradition of representative democracy. It deprives citizens of their right to petition and it also deprives office holders and candidates from learning the true concerns of those who will choose whether to cast votes in favor of them. A President cannot respond to a concern that a citizen is afraid to share with him, and a candidate cannot promise to fix a problem if citizens are afraid to say that it exists.

Allowing Secret Service agents to arrest a citizen with impunity because of the content of political speech that he or she engages in with the President, the Vice President, or presidential

candidates, simply because some plausible ground exists for the arrest, will produce just such a chilling effect. In the present case, the Tenth Circuit recognized that Howards alleged cognizable First Amendment injury for the purposes of the retaliatory arrest tort, and Petitioners do not challenge the Tenth Circuit's conclusion before this Court. *See Howards*, 634 F.3d at 1144.

More broadly, the citizen of ordinary firmness cannot know when the actions that he or she takes when speaking to the President, Vice President, or presidential candidates will legally constitute probable cause. A complex set of laws surrounds the protection of the President and Vice President. *See* 18 U.S.C. § 871; *see also* 18 U.S.C. § 3056. They are protected from assault and threats far more than are private citizens. The average citizen, however, has no reason to familiarize himself or herself with the exact contours of these laws—meeting the President or Vice President is not an ordinary event for most—and cannot be charged with knowing the *legal* standard for what constitutes probable cause for arrest pursuant to them. Not knowing the contours of these laws, but learning that the law allows the Secret Service to make retaliatory arrests, so long as they are justified by probable cause, the citizen of ordinary firmesss will, in order to avoid arrest, have to avoid giving offense to the Secret Service.

To be sure, the Secret Service serves an essential purpose, protecting the President, the Vice President, presidential candidates, and others. *See* 18 U.S.C. § 871. As *amici* point out, such protection

is necessary. *See* Brief of the United States at 20. However, the Secret Service does not protect the President or the Vice President simply for the purpose of ensuring that they are secure in their persons. This could be achieved by removing them to secluded, undisclosed locations. *See* Ed Pilkington, *Inside the World of Obama's Secret-Service Bodyguards*, The Guardian (March 7, 2010), http://www.guardian.co.uk/world/2010/mar/08/obama-secret-service-bodyguards (last visited Feb. 22, 2012) (quoting a former Secret Service agent who protected President Reagan as saying "The secret service would want to take the president to Camp David straight after the inauguration and keep him there out of any contact with the public for the next four years. But they know that's not possible"). Rather, the Secret Service protects the President and the Vice President so that they can fulfill their constitutionally and politically mandated duties, including responding to citizen concerns and meeting directly with citizens. Indeed, the Secret Service itself recognizes this principle: It provides its agents with specialized training so that they can protect the President, Vice President, presidential candidates, and other protectees in public. *See United States Secret Service: Frequently Asked Questions*, United States Secret Service, http://www.secretservice.gov/faq.shtml#faq23 (last visited Feb. 22, 2012) (describing the training received by Secret Service agents). Likewise, this Court should recognize and affirm this principle.

CONCLUSION

As a practical matter, the prospect of a civil action for retaliatory arrest is the only deterrent against law enforcement officers who desire to intimidate citizens who engage in critical or unpopular speech and chill that expression. Limiting that cause of action to situations where officers have no probable cause for an arrest on any basis will virtually eliminate that deterrent. This Court has long recognized that even facially-legitimate exercises of government authority must be limited if there is a danger it is being used to curtail or inhibit the expressive and associational activities of politically unpopular groups. *See Gibson v. Fla. Leg. Investigation Comm.*, 372 U.S. 539, 556-57 (1963) and *Button*, 371 U.S. at 435-36 (recognizing that the civil rights movement engendered intense resentment and that even a statute even-handed in its terms may become a weapon for oppression). In order to preserve and protect that principle, this Court should affirm the judgment and opinion below and reject the idea that arrests in retaliation for the exercise of First Amendment rights are actionable only if undertaken without probable cause.

Respectfully submitted,

John W. Whitehead
Counsel of Record
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888

Counsel for *Amicus Curiae*