No.

In the Supreme Court of the United States

JOSEPH M. HOSKINS, PETITIONER,

v.

JARED WITHERS; JESSE ANDERSON.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case concerns the application of qualified immunity in constitutional retaliation cases. The courts of appeals are deeply fractured about how to apply qualified immunity in such cases.

Constitutional retaliation cases always involve two things: (1) a constitutional right and (2) retaliation for exercising that right. Courts are radically torn over how qualified immunity applies to those elements. Some courts hold that qualified immunity is overcome if the *right itself* is clearly established. Others hold that qualified immunity bars the claim unless this specific right has been *retaliated against in this specific way* before. Here, the Tenth Circuit panel took the latter tack, deepening the longstanding confusion on this issue.

A law enforcement officer pointed a loaded gun at the plaintiff (petitioner here) in retaliation for petitioner cursing at him. No one disputes that the First Amendment right here is clearly established. But the panel below granted the officer qualified immunity because the Tenth Circuit had, at the time of the incident, "no precedents finding a First Amendment violation when an officer points a gun at a suspect to retaliate for protected speech."

The questions presented are:

1. Whether qualified immunity shields government officials from liability even in cases where they retaliate against a person for exercising a clearly established constitutional right.

2. Whether, even assuming a plaintiff must show that retaliatory conduct is clearly unlawful, qualified immunity should have been denied because the retaliatory conduct here was clearly unlawful.

RELATED PROCEEDINGS

United States District Court (D. Utah):

Hoskins v. Withers, No. 2:20-CV-00749, 2022 WL 3576276 (D. Utah, Aug. 18, 2022) (order granting motion to dismiss)

United States Court of Appeals (10th Cir.):

Hoskins v. Withers, No. 22-4081, 92 F.4th 1279 (10th Cir. 2024) (affirming dismissal), *rehearing denied* (June 3, 2024)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued Page(s)

Cases—Continued Page(s)

Cases—Continued Page(s)

Constitutional Provisions and Statutes

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 92 F.4th 1279 (10th Cir. 2024). The opinion of the district court (Pet. App. 33a-58a) is unreported but available at 2022 WL 3576276 (D. Utah Aug. 18, 2022). The order of the court of appeals denying rehearing *en banc* (Pet. App. 59a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2024. Pet. App. 1a. The court of appeals denied a timely petition for rehearing *en banc* on June 3, 2024. Pet. App. 59a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant statutory provision, 42 U.S.C. § 1983, is reproduced in the petition appendix, Pet. App. 60a.

STATEMENT OF THE CASE

This case presents an important and recurring question over which the courts of appeals are deeply divided: Whether it is enough to overcome qualified immunity to show that a state official retaliated against a person for exercising a clearly established constitutional right.

No court of appeals consistently uses any one approach to the application of qualified immunity in constitutional retaliation cases. The rule should be clear and obvious under this Court's precedents: once a plaintiff establishes that he was exercising a clearly established constitutional right, qualified immunity should have no role to play. That is what this Court's cases say: an official

who retaliates against a person for exercising a clearly established constitutional right knows by definition that "what he is doing is unlawful." *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018) (cleaned up). But rather than apply that straightforward rule, courts are all over the map, some applying rules that look to whether the particular form of retaliation has been held to be unlawful before, and some focusing even more granularly on whether the *specific* constitutional right at issue has ever been retaliated against in the same *specific* way. Those tests, although divorced from this Court's qualified immunity precedents, are rampant in the lower courts.

The decision below illustrates the nationwide confusion. For decades, the Tenth Circuit held that a plaintiff alleging retaliation needs only to establish the right he exercised was clearly established. That rule followed from the plain fact that, so long as an underlying constitutional right is clearly established, every reasonable government official knows that retaliating against a person for its exercise is unlawful. *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990) ("The unlawful intent inherent in … retaliatory action places it beyond the scope of a police officer's qualified immunity if the right retaliated against was clearly established."). But, in this case, the Tenth Circuit panel found it insufficient that the right was clearly established: petitioner needed to also show that the particular retaliatory action had been used to retaliate against a person for the exercise of the same right in a previous case.

This case satisfies all the criteria for granting review. This question recurs hundreds of times in constitutional retaliation cases nationwide every year, often resulting in erroneous grants of qualified immunity in important cases. Courts are all over the map on the question, applying qualified immunity differently from panel to panel and case to case. The doctrine in this area is so

splintered it is not even possible to define a circuit conflict on the issue—the situation in the courts of appeals is worse than a mere circuit conflict. As this case exemplifies, not only is the law being administered in the lower courts lacking in uniformity, but it is incoherent. The effect is to transform constitutional retaliation cases into a kind of judicial lottery in which the particular judge (and later appellate panel) dictates whether qualified immunity applies. *See, e.g.*, *Watson v. Boyd*, No. 22-3233, -- F.4th --, 2024 WL 4531400, at *13-14 (8th Cir. Oct. 21, 2024) (denying qualified immunity in a case factually indistinguishable from petitioner's).

Further percolation is futile: courts that have been squarely presented with these issues (like the Tenth Circuit below) have failed to grapple with them. Meanwhile, the arguments are fully developed, the confusion is entrenched, and there is no genuine likelihood that the fractured circuits will coalesce on the same standard. The question presented affects thousands of civil rights plaintiffs and would-be civil rights plaintiffs each year. The state of confusion in the lower courts is so pronounced, so pervasive, and so longstanding that it cannot possibly resolve without this Court's intervention. Because this case presents an ideal vehicle for resolving a deeply important question, this petition should be granted.

A. Legal Background

1. This Court has long recognized that a constitutional right can be violated not only by directly infringing the right but also by retaliating against a person for its exercise. *See Wilkie v. Robbins*, 551 U.S. 537, 555-56 (2007) (collecting cases for the "longstanding recognition that the Government may not retaliate for exercising" rights "of constitutional rank"). Such retaliatory action "offends the Constitution [because] it

threatens to inhibit exercise of the protected right." *Crawford-El v. Britton*, 523 U.S. 574, 588 n.10 (1998).

This Court has not clarified the precise elements necessary to establish a retaliation claim, but the courts of appeals have settled on a consensus framework for when a plaintiff alleges constitutional retaliation.[1] Under that framework, a litigant makes out a retaliation claim by establishing (1) that they exercised a constitutional right; (2) that a government official took a retaliatory action to punish that person for exercising that right; and (3) that the retaliatory action was sufficiently serious to chill a person of ordinary firmness from exercising the right. *See, e.g.*, *Van Deelen v. Johnson*, 497 F.3d 1151, 1155 (10th Cir. 2007) (Gorsuch, J.).

Retaliation cases often arise in constitutional tort suits under 42 U.S.C. § 1983 where qualified immunity operates as an overlay. Thus, courts often must decide whether a defendant against whom retaliation is alleged is entitled to qualified immunity. Under this Court's qualified immunity precedents, an officer is shielded from liability for violating a constitutional right unless they are incompetent or malevolent. *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018). A plaintiff can only defeat a defendant's invocation of a qualified immunity defense by establishing that (1) the officer violated a federal statutory or constitutional right, and (2) the right at issue

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[1] *See, e,g,*, *Worrell v. Henry*, 219 F.3d 1197, 1212-13 (10th Cir. 2000); *Bloch v. Ribar*, 156 F.3d 673, 678 (6th Cir. 1998); *Connell v. Signoracci*, 153 F.3d 74, 79 (2d Cir. 1998); *Naucke v. City of Park Hills*, 284 F.3d 923, 927-28 (8th Cir. 2002); *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002); *Eichenlaub v. Township of Indiana*, 385 F.3d 274, 282 (3d Cir. 2004).

was clearly established such that every reasonable officer would know violating that right was unlawful. *Id.* at 62-63.

The application of qualified immunity to cases involving allegations of the direct violation of a person's constitutional rights—for instance, engaging in an unlawful seizure, subjecting her to cruel and unusual punishment, denying her access to counsel—is relatively straightforward notwithstanding some difficulty at the margins. This Court has issued dozens of opinions clarifying the application of qualified immunity in cases involving allegations of the direct infringement of constitutional rights. *See, e.g.*, *Taylor v. Riojas*, 592 U.S. 7, 8-9 (2020) (alleging violation of Eighth Amendment's prohibition on cruel and unusual punishment); *Wesby*, 583 U.S. at 62-63 (false arrest in violation of Fourth Amendment); *Chavez v. Martinez*, 538 U.S. 760, 773 (2003) (Fifth Amendment right to be free from self-incrimination). This Court has applied this same uniform framework to each of these cases, regardless of the right at issue. The Court has never stated that any specific type of claim is subject to a different framework.

But this Court has never meaningfully grappled with how to apply qualified immunity to retaliation cases. This Court has no cases where the question of what, exactly, must be clearly established in a retaliation case has been squarely presented and resolved. And as explained below, *infra* Section I, the courts of appeals are in exceptional disarray over what must be clearly established for a plaintiff to overcome qualified immunity in a retaliation case.

B. Factual and Procedural Background

1. In 2018, during highway patrol, respondent Officer Jared Withers stopped petitioner Joseph M. Hoskins

because of a minor "equipment violation": petitioner's car's license plate frame partially obscured the issuing state. Pet. App. 34a, 62a-63a. Petitioner cooperated with respondent, proving he was unarmed and even sitting in the patrol vehicle while respondent wrote a citation for equipment violation. Pet. App. 34a-35a.

The traffic stop escalated when, instead of simply issuing the citation, respondent continued to detain petitioner. Pet. App. 35a-36a. He led a trained narcotics dog in a search of the exterior of petitioner's car, where the dog repeatedly jumped on petitioner's vehicle. Pet. App. 4a-5a, 77a. The dog's conduct began to unsettle petitioner, who was understandably worried about damage to his car. Pet. App. 77a, 79a. Respondent then decided to conduct a search of the interior of the car. Pet. App. 5a, 35a. He instructed petitioner to exit the patrol car, put his cell phone on the hood, and stand nearby. Pet. App. 35a-36a. Petitioner complied. Pet. App. 5a, 79a-80a. Respondent then saw petitioner using another cell phone; the officer grabbed it and physically pushed petitioner. Pet. App. 36a.

Frustrated by the prolonged traffic stop and the dog's damage to his car during the search, petitioner cursed at respondent, including a heated exclamation of "fuck your mom!" Pet. App. 81a. In retaliation, respondent drew his gun and pointed it directly at petitioner. Pet. App. 36a. Body camera footage captured respondent later telling a fellow officer that he "[did not] like" petitioner after what he said about respondent's mom, feeling that comment was particularly "below the belt." Pet. App. 36a.

With his gun drawn and aimed at petitioner, respondent told petitioner to take his hands out of his

pockets and place them on the back of his head. Petitioner, shocked and frightened, replied: "I don't have anything. My hands are out of my pockets." Pet. App. 82a. Petitioner complied with respondent's orders. Pet. App. 36a. Petitioner was then handcuffed and detained in a patrol vehicle while respondent and backup officers searched his car. Pet. App. 36a-37a. No criminal charges were ever brought against petitioner. Pet. App. 37a-38a.

2.a. In 2020, petitioner filed a case under 42 U.S.C. § 1983 against respondent in his individual capacity, alleging two constitutional violations surrounding the traffic stop: Fourth Amendment unreasonable search and seizure, and First Amendment retaliation. Pet. App. 63a, 91a-94a. The First Amendment retaliation claim alleged that respondent used "unreasonable force" in retaliation for petitioner's protected speech. Pet. App. 93a. The unreasonable force "[took] the form of" respondent "drawing his gun" and aiming it at petitioner after petitioner did nothing more than speak his mind and express his frustration. Pet. App. 93a. Respondent moved to dismiss the two constitutional claims on the basis of qualified immunity. Pet. App. 23a, 39a.

b. The district court granted the motion to dismiss, holding that petitioner failed to state a First Amendment retaliation claim. Pet. App. 23a, 54a-55a. The holding rested on the court's application—or rather, extension—of *Nieves v. Bartlett*, 587 U.S. 391 (2019). Pet. App. 54a-55a. In *Nieves*, this Court announced: "If an official takes adverse action against someone based on that forbidden [retaliatory] motive, and non-retaliatory grounds are in fact insufficient to provoke the adverse consequences," the plaintiff generally states a First Amendment

retaliation claim. 587 U.S. at 398. Applying the "same rule" from *Nieves* even though it "involved an arrest rather than the use of force," the district court concluded that respondent had "non-retaliatory grounds" for drawing his gun on petitioner. Pet. App. 55a.

c. A panel of the Tenth Circuit affirmed the dismissal on a different basis—namely, on the basis of qualified immunity. Pet. App. 23a. The court held that respondent had qualified immunity on the First Amendment claim because he had not violated a "clearly established protection against a retaliatory use of force." Pet. App. 24a-25a. The panel assumed that petitioner had engaged in constitutionally "protected speech," and that respondent's action was a "retaliatory use of force" against that speech. Pet. App. 23a-24a.

After assuming petitioner stated a plausible First Amendment claim, the panel then turned to whether respondent's particular actions had been clearly established as a violation of the First Amendment. Pet. App. 24a. To the panel, the question on appeal was: Did respondent "violate a clearly established constitutional right by pointing a gun at [petitioner] to retaliate for protected speech?" Pet. App. 3a. The panel "answer[ed] no," Pet. App. 3a, reasoning that it "had no precedents finding a First Amendment violation when an officer points a gun at a suspect to retaliate for protected speech," Pet. App. 24a.

d. Petitioner filed a timely petition for a rehearing *en banc* on April 4, 2024, and the court denied the petition on June 3, 2024. Pet. App. 59a.

REASONS FOR GRANTING THE PETITION

This Court's intervention is necessary to bring uniformity to federal law on a critically important and recurrent issue. Lower courts are in utter disarray over how to apply qualified immunity in constitutional retaliation cases. This issue is critically important, arising (at least) hundreds of times each year in civil rights cases across the United States. Qualified immunity is frequently the outcome-determinative legal issue in constitutional retaliation cases brought under 42 U.S.C. § 1983. The legal framework governing how qualified immunity applies in such cases should be clear and uniform.

I. THE APPLICATION OF QUALIFIED IMMUNITY IN RETALIATION CASES IS THE SUBJECT OF NATIONWIDE CONFUSION

The federal courts of appeals are in complete chaos over how to apply qualified immunity to constitutional retaliation claims.

Sometimes, courts look only to whether the plaintiff was engaged in the exercise of a clearly established constitutional right. If so, that is the end of the inquiry, and qualified immunity provides no defense. Other times, courts look to whether the particular retaliatory conduct used has ever been found to be retaliatory in the past (that is, that it is "clearly established" to be retaliatory). If so, and assuming the constitutional right is also clearly established, they will hold that qualified immunity is overcome. And still other times, as in this case, courts look to whether the *specific right* alleged to have been retaliated against has been retaliated against in the same *specific way* it was retaliated against in the case at bar. Only if the plaintiff can show that a prior retaliation case

matches his fact pattern exactly can the plaintiff overcome the qualified immunity bar.

The disarray in the courts of appeals is damaging to civil rights plaintiffs and civil rights enforcement nationwide. It leads to wildly divergent qualified immunity analyses, and wildly divergent outcomes, in cases presenting identical facts. It transforms efforts to hold officials accountable for retaliating against the exercise of clearly established constitutional rights into a guessing game. This Court's review of this question is desperately warranted.

A. Tenth Circuit. The confusion (and divergent outcomes) in the Tenth Circuit exemplifies the confusion nationwide over how to apply qualified immunity in retaliation cases.

For decades, the Tenth Circuit has required retaliation plaintiffs to show that their constitutional rights were "clearly establish[ed]" in order to withstand a qualified immunity defense, as set forth in *DeLoach v. Bevers*, 922 F.2d 618 (10th Cir. 1990).

In *DeLoach*, the plaintiff retained counsel during a criminal investigation into the death of an infant who died while in the plaintiff's care. *Id.* at 619. The plaintiff alleged that in retaliation for the plaintiff retaining counsel during the investigation, a police detective filed a false affidavit that led to the plaintiff's arrest on murder charges. *Id.* The Tenth Circuit held that qualified immunity was no defense to the plaintiff's retaliation suit because the plaintiff's "right to retain and consult with an attorney" was "clearly established." *Id.* at 619-20. There was no need for the plaintiff to establish that the right to counsel had been retaliated against in precisely that way before: the "unlawful intent inherent in … a retaliatory action places it beyond the scope of a police officer's qualified

immunity if the *right retaliated against was clearly established*." *Id.* at 620 (emphasis added).

Over the years, the Tenth Circuit has sporadically applied *DeLoach*. For example, the court reaffirmed the *DeLoach* standard in *Worrell v. Henry*, 219 F.3d 1197 (10th Cir. 2000), holding that once the defendant's retaliatory intent is shown "[u]nder [the *DeLoach*] framework," then the qualified immunity analysis rests on whether "the right retaliated against was clearly established." *Id.* at 1215-16. The Tenth Circuit also applied *DeLoach* in *Robbins v. Wilkie*, a case alleging retaliation for the exercise of Fifth Amendment rights, stating the qualified immunity analysis "requires *only* that the right retaliated against be clearly established." 433 F.3d 755, 767 (10th Cir. 2006) (emphasis added).

The Tenth Circuit also used this framework (albeit without citation) in its seminal decision in *Van Deelen v. Johnson*, 497 F.3d 1151, 1154 (10th Cir. 2007) (Gorsuch, J.). In *Van Deelen*, government officials allegedly intimidated and threatened to shoot the plaintiff in retaliation for filing tax assessment challenges. 497 F.3d at 1154. The panel concluded that qualified immunity was overcome by looking *solely* at whether the right at issue was clearly established. *See id.* at 1158 (explaining "the right at issue—to petition the government for the redress of tax grievances—has been with us and clearly established since the Sons of Liberty visited Griffin's Wharf in Boston").

More recently, in *Irizarry v. Yehia*, 38 F.4th 1282 (10th Cir. 2022), the Tenth Circuit denied qualified immunity to a police officer who retaliated against a plaintiff for filming a traffic stop by shining a flashlight into the camera and using his body to obstruct the view. *Id.* at 1297 ("Because filming police conduct in public is a

clearly established First Amendment right, it would be obvious to a reasonable officer that blocking Mr. Irizarry's filming, shining a flashlight into the camera lens, and driving a police car at him in response to that filming would infringe First Amendment protected activity and chill its exercise.").

The qualified immunity analysis used by the Tenth Circuit below is irreconcilable with the analysis in those cases. The panel stated that it could "assume for the sake of argument that the cursing and complaints constituted protected speech." Pet. App. 23a-24a. But "[e]ven with this assumption, however, we had no precedents finding a First Amendment violation when an officer points a gun at a suspect to retaliate for protected speech." Pet. App. 24a. According to the panel, "[e]ven if Trooper Withers had scoured the case law, he might reasonably have concluded that the First Amendment wouldn't prevent him from pointing his gun at Mr. Hoskins in the face of his cursing and complaints." Pet. App. 24a. As of the date of the incident, "a retaliatory use of force hadn't been clearly established as a First Amendment violation" in the Tenth Circuit. Pet. App. 24a & n.12. Thus, qualified immunity barred petitioner's claim. Pet. App. 23a-25a.[2]

B. Other Circuits. The other circuits are similarly all over the map in their approaches to qualified immunity in constitutional retaliation cases. Virtually every circuit has cases that use contradictory approaches to qualified immunity analysis—with some panels holding that only the right needs to be clearly established, and others holding both that the right must be clearly established

[2] Petitioner raised the intra-circuit conflict in a petition for rehearing but the panel denied rehearing and the full Tenth Circuit denied rehearing *en banc*. Pet. App. 59a.

and that the method of retaliation must be previously held to be unlawful.

First Circuit. In *Berge v. School Committee of Gloucester*, 107 F.4th 33, 35 (1st Cir. 2024), the First Circuit denied qualified immunity to a public official that threatened a citizen-journalist with legal action if he did not remove a video from Facebook. *Id.* at 35. The court denied qualified immunity because the "complaint plausibly alleges that the threat constituted First Amendment retaliation in violation of his *clearly established right*." *Id.* at 44 (emphasis added). The plaintiff had "pled a violation of a clearly established right to publish on a topic of public interest," and the defendants threatened him with legal action after he exercised that right. *Id.* That was sufficient to overcome qualified immunity.

The First Circuit used a similar approach in *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014), in reaching the conclusion that a police officer retaliating against a person for having attempted to film a law enforcement encounter by charging her with illegal wiretapping was clearly unlawful because the right to film police was already clearly established in the First Circuit. *Id.* at 6-10.

In stark contrast, in *Barton v. Clancy,* 632 F.3d 9 (1st Cir. 2011), the First Circuit granted qualified immunity because "it was not clearly established that the loss of an unpaid volunteer position could form the basis of a First Amendment retaliation claim." *Id.* at 26-27. While the Court found that "retaliatory actions may tend to chill individuals' exercise of constitutional rights" and that "as a general matter, the government may not deprive an individual of a 'valuable government benefit[]' in retaliation for his or her exercise of First Amendment rights," the Court found that even as to retaliatory

harassment, the defendant "lacked 'fair warning that his particular conduct was unconstitutional.'" *Id.* at 23, 30 (citations omitted).

Second Circuit. In *Golodner v. Berliner*, 770 F.3d 196 (2d Cir. 2014), the Second Circuit denied qualified immunity to city officials that allegedly retaliated against the plaintiff by discontinuing a city contract with the plaintiff because the plaintiff filed a lawsuit alleging the city had an unconstitutional arrest policy. *See id.* at 199, 206. The Second Circuit denied qualified immunity because "'the First Amendment right of public employees to be free from retaliation for speech on matters of public concern' is beyond debate." *Id.* at 206 (citation omitted).

In direct conflict, in *Lynch v. Ackley*, 811 F.3d 569 (2d Cir. 2016), the Second Circuit granted qualified immunity to a police chief that allegedly retaliated against an officer by (among other things) encouraging an investigative reporter to seek out and publish derogatory information about the officer because the officer engaged in speech critical of the police chief's performance. *Id.* at 573, 580. In granting qualified immunity the Second Circuit explained that "there was no clear law as to whether [the police chief's] alleged retaliatory actions constituted *prohibited* retaliation." *Id.* at 579; *see also id.* at 579-83.

Third Circuit. In *Starnes v. Butler County Court of Common Pleas*, 971 F.3d 416 (3d Cir. 2020), the Third Circuit denied qualified immunity where the defendant allegedly denied the plaintiff employment perks because she had denied his romantic advances and filed an EEOC complaint against him. *Id.* at 423. In denying immunity, the court looked solely to whether the right was clearly established and held that it was; it thus followed automatically that the retaliation was unlawful. *See id.* at 427-29. The court did not assess whether precedent

established that retaliation in that precise manner was already clearly established as unconstitutional. *See id.*

In sharp contrast, in *Mirabella v. Villard*, 853 F.3d 641 (3d Cir. 2017), the court granted qualified immunity to a defendant that retaliated against the plaintiffs by barring them from contact with city officials. *Id.* at 650-51. The Third Circuit specifically held that it was granting qualified immunity because it was not "clearly established that the defendant's act was retaliatory." *Id.* at 653. Finding no case on point that had previously established a "right to be free from a retaliatory restriction on communication with one's government, when the plaintiff has threatened or engaged in litigation against the government" the Third Circuit granted the defendant qualified immunity. *Id.*

Fourth Circuit. In *Booker v. South Carolina Department of Corrections*, 855 F.3d 533 (4th Cir. 2017), the Fourth Circuit denied qualified immunity to a prison official who had retaliated against the plaintiff for filing a prison grievance. *Id.* at 535-36. The court denied qualified immunity because it found that inmates possess a clearly established right "to be free from retaliation in response to filing a prison grievance." *Id.* at 540-41, 544. The court made absolutely no inquiry into the method by which the retaliation was effectuated. *See also Martin v. Duffy*, 858 F.3d 239, 251 (4th Cir. 2017) (same for retaliatory act of placing the plaintiff in administrative segregation).

In direct conflict, in *Sharpe v. Winterville Police Department*, 59 F.4th 674 (4th Cir. 2023), the Fourth Circuit granted qualified immunity to a police officer who retaliated against a vehicle passenger for livestreaming him during a routine traffic stop. *Id.* at 678-79. Despite holding that the right to film police is clearly protected, the Fourth Circuit found qualified immunity barred the

claim because the plaintiff could not "show that a reasonable official in [the officer's] shoes would understand that his [retaliatory] actions"—physically grabbing the plaintiff's seatbelt and threatening him with future arrest—"violated the First Amendment." *Id.* at 684.

Sixth Circuit. The Sixth Circuit (like the Tenth) has an announced rule for adjudicating qualified immunity in constitutional retaliation cases: plaintiffs alleging unconstitutional retaliation in the Sixth Circuit overcome qualified immunity "if the right retaliated against was clearly established." *Bloch v. Ribar*, 156 F.3d 673, 682 (6th Cir. 1998) (quoting *DeLoach*, 922 F.2d at 620).

The Sixth Circuit has numerous cases applying that rule. Recognizing that "government actions, which standing alone do not violate the Constitution, may nonetheless be[come] constitutional torts if motivated in substantial part … to punish an individual for exercise of a constitutional right," *MacIntosh v. Clous*, 69 F.4th 309, 316 (6th Cir. 2023) (quoting *Thaddeus-X v. Blatter*, 175 F.3d 378, 386 (6th Cir. 1999)), the Sixth Circuit will deny qualified immunity so long as there is a showing of retaliatory intent by the defendant, *see Campbell v. Mack*, 777 F. App'x 122, 136 (6th Cir. 2019).

In *Bloch v. Ribar*, 156 F.3d 673 (6th Cir. 1998), for example, the Sixth Circuit denied qualified immunity to a sheriff that allegedly retaliated against a rape victim for criticizing the sheriff's lack of diligence in investigating the crime by holding a press conference to release the confidential and highly personal details of the victim's rape by an unknown assailant. *Id.* at 676. The court denied qualified immunity because the "right to criticize public officials is clearly established" so "if the [plaintiffs] can prove that the [sheriff acted] in order to retaliate against

their criticism, a reasonable officer should have known that the action violated the [plaintiffs'] rights and therefore cannot benefit from the doctrine of qualified immunity." *Id.* at 683; *see also Campbell*, 777 F. App'x at 135-36 (denying qualified immunity for tightening plaintiff's handcuffs after plaintiff protested during a traffic stop); *Josephson v. Ganzel*, 115 F.4th 771, 789-90 (6th Cir. 2024) (denying qualified immunity to university employees alleged to have decided not to renew a colleague's contract after he expressed unpopular opinions on a panel).

But judges on the Sixth Circuit have questioned the Circuit's approach. In *MacIntosh v. Clous*, 69 F.4th 309 (6th Cir. 2023), a concerned citizen urged the Grand Traverse County Commissioners to speak out against the Proud Boys' violent behavior, and one commissioner responded by producing a high-powered rifle and displaying it on the video call. *Id.* at 312-13. The court affirmed the denial of qualified immunity because the "law's proscription of 'adverse action' plainly encompasses threatening a speaker" with a weapon. *Id.* at 320. Thus, "it was clearly established that [the] *conduct* violated [the plaintiff's] First Amendment rights." *Id.* at 321 (emphasis added). In a footnote, the panel insisted that its "qualified immunity analysis historically focused on whether a defendant intended to retaliate against a plaintiff for *clearly established* First Amendment-protected activity." *Id.* at 320 n.3 (citing *Bloch*, 156 F.3d at 682, and *DeLoach*, 922 F.2d at 620) (emphasis added).

Chief Judge Sutton dissented. *Id.* at 321-26. Wrote Judge Sutton: "The question . . . is not whether MacIntosh had a clearly established right to be free from retaliation for exercising her First Amendment rights; it is whether she had a clearly established right to be free from the

display of a rifle (or equivalent actions) during a virtual Board of Commissioners meeting." *Id.* at 324 (Sutton, C.J., dissenting).

Seventh Circuit. In *Kristofek v. Village of Orland Hills*, 832 F.3d 785 (7th Cir. 2016), the Seventh Circuit denied qualified immunity to a police chief who allegedly retaliated against a police officer by firing him for raising concerns with other officers and the FBI that the police chief and local politicians may have engaged in misconduct. *Id.* at 790. The Seventh Circuit denied qualified immunity without any analysis of whether the specific retaliatory conduct was clearly established to be retaliatory—all that mattered was that the Seventh Circuit had "long recognized that an employer may not retaliate against an employee for expressing his views about matters of public concern." *Id.* at 798 (citation omitted); *see also Rasho v. Elyea*, 856 F.3d 469, 479 (7th Cir. 2017) (finding qualified immunity overcome without inquiry into whether method of retaliation had previously been held unlawful); *Hobgood v. Ill. Gaming Bd.*, 731 F.3d 635, 648 (7th Cir. 2013) (same).

In stark contrast, in *Siddique v. Laliberte*, 972 F.3d 898 (7th Cir. 2020), the Seventh Circuit granted qualified immunity to university officials that retaliated against a student by denying him a student-government position because he took critical stances against members of the University administration who worked with the student government and who were involved with the application process. *Id.* at 900. The Seventh Circuit held that the plaintiff had "not met his burden in coming forward with clearly established federal law" showing that retaliating against a student for his speech by denying him a student-government position violates the First Amendment. *Id.* at 903-05; *see also, e.g.*, *Volkman v. Ryker*, 736 F.3d 1084,

1090 (7th Cir. 2013) (finding it insufficient to overcome qualified immunity to show that "that the First Amendment right against retaliation, writ large, is clearly established").

Eighth Circuit. In *Solomon v. Petray*, 795 F.3d 777 (8th Cir. 2015), the Eighth Circuit denied qualified immunity to federal officials that allegedly threatened and struck a prisoner, in retaliation for the prisoner writing a derogatory letter to a judge. *Id.* at 783-84. In holding that the officers could not claim qualified immunity the Eighth Circuit held that the officers violated the prisoner's "right to be free from retaliation for exercising his right to expression." *Id.* at 787-88; *see also id.* at 788-89. The Eighth Circuit held that "[t]his right is clearly established as it is well-settled that as a general matter, the First Amendment prohibits government officials from subjecting an individual to retaliatory actions on the basis of his constitutionally protected speech." *Id.* at 787-88 (cleaned up). The Eighth Circuit made no inquiry at all into whether the specific manner of threatening a prisoner or striking him employed by the defendants had been clearly established as retaliatory in a prior case. *See id.* at 787-89; *see also Brandy v. City of St. Louis*, 75 F.4th 908, 914 (8th Cir. 2023) (applying a similar analysis in holding that there is a "right to exercise First Amendment rights without facing retaliation from government officials").[3]

[3] Recently, the Eighth Circuit decided a case alleging facts indistinguishable from those at issue here and declined to grant qualified immunity at summary judgment—in direct conflict with the holding in this case. The plaintiff alleged that he asked a police officer for his name and badge number during a traffic stop, and, in retaliation for that speech, the police officer pulled out his gun, pointed it at the plaintiff, and told the plaintiff he could "shoot [him]

In direct conflict, in *J.T.H. v. Missouri Department of Social Services Children's Division*, 39 F.4th 489 (8th Cir. 2022), two parents sued a child-welfare investigator for allegedly retaliating against them by initiating an investigation against them for threatening to sue a law enforcement official who sexually abused their child. *Id.* at 490-91. In granting the defendant investigator qualified immunity the Eighth Circuit explained that the fact that the method of retaliation was not clearly established as unlawful meant that qualified immunity was required: "even if there is a general right to be free of retaliation, the law is not clearly established enough to cover the specific context of the case: retaliatory investigation." *Id.* at 493 (cleaned up).

Ninth Circuit. In *Capp v. County of San Diego*, 940 F.3d 1046 (9th Cir. 2019), the Ninth Circuit denied qualified immunity to a social worker that allegedly retaliated against the plaintiff for questioning the abuse allegations against him and the legal basis for the social worker's interviews by coercing the plaintiff's ex-wife to apply to take custody of their children and by placing the plaintiff on the Child Abuse Central Index. *Id.* at 1050-52. The Ninth Circuit denied the defendant social worker qualified immunity because "it was clear at the time [the defendant] acted that a government actor could not take action that would be expected to chill protected speech out

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right here and nobody will give a s**t." *Watson v. Boyd*, No. 22-3233, -- F.4th --, 2024 WL 4531400, at *13-14 (8th Cir. Oct. 21, 2024) (cleaned up). The events in *Watson* preceded the events in this case by half a decade, but the Eighth Circuit nonetheless held that it was, by that time, already clearly established as unlawful for an officer to retaliate by "pull[ing] his gun and point[ing] it at" a person. *Id.* at *5, *14. This Court should, at least, grant the second question presented to resolve the conflict between *Watson* and this case.

of retaliatory animus for such speech." *Id.* at 1059. "A reasonable official would have known that taking the serious step of threatening to terminate a parent's custody of his children, when the official would not have taken this step absent her retaliatory intent, violates the First Amendment." *Id.* "Because Plaintiffs have alleged that retaliatory animus was the but-for cause of [the defendant's] conduct, [he] is not entitled to qualified immunity." *Id.*

In stark contrast, in *Riley's American Heritage Farms v. Elsasser*, 32 F.4th 707 (9th Cir. 2022), the Ninth Circuit granted qualified immunity in a case where the plaintiffs claimed that a school retaliated against them for their social media posts by canceling the business relationship between the school and the plaintiffs. *Id.* at 729-30. In granting qualified immunity, the Ninth Circuit focused on the nature of the retaliatory conduct, asking "whether in September 2018, when these events occurred, it was clearly established that a school district could not cease patronizing a company providing historical reenactments and other events for students because the company's principal shareholder had posted controversial tweets that led to parental complaints." *Id.*; *see also Moore v. Garnand*, 83 F.4th 743, 752 (9th Cir. 2023) (granting qualified immunity, finding that there was "no caselaw that clearly established that a retaliatory investigation per se violates the First Amendment").

Eleventh Circuit. In *Bennett v. Hendrix*, 423 F.3d 1247 (11th Cir. 2005), the Eleventh Circuit denied qualified immunity to a sheriff and his deputies who allegedly retaliated against the plaintiffs by carrying out a campaign of police harassment and retaliation after plaintiffs supported a county referendum opposed by the sheriff. *Id.* at 1248. In denying qualified immunity the

Eleventh Circuit explained "that the law was clearly established at the time of the defendants' alleged actions that retaliation against private citizens for exercising their First Amendment rights was actionable." *Id.* 1255-56. "Because this Court has held since at least 1988 that it is 'settled law' that the government may not retaliate against citizens for the exercise of First Amendment rights . . . we hold that the defendants were on notice and had 'fair warning' that retaliating against the plaintiffs for their support of the 1998 referendum would violate the plaintiffs' constitutional rights and, if the plaintiffs' allegations are true, would lead to liability under § 1983." *Id.* (citation omitted).

In direct conflict, in *Echols v. Lawton*, 913 F.3d 1313 (11th Cir. 2019), the Eleventh Circuit granted qualified immunity to a district attorney that allegedly retaliated against a former prisoner by defaming him in retaliation for the former prisoner seeking legislative compensation for his wrongful convictions. *Id.* at 1317-18. In granting the prosecutor qualified immunity against the claim, the Eleventh Circuit explained that "no controlling precedent . . . would have provided [the prosecutor] fair notice that his conduct would violate the First Amendment." *Id.* at 1324.

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There are nearly as many governing standards for when officials are entitled to qualified immunity in constitutional retaliation cases as there are panels adjudicating cases. There is no clear law, only confusion. Such disparate treatment among similarly situated plaintiffs based on nothing except the panel or judge that hears a case is intolerable. Only this Court's intervention

can provide clarity and uniformity to federal law on this critically important issue.

II. THE QUESTIONS PRESENTED ARE IMPORTANT AND WARRANT REVIEW IN THIS CASE

The question of the proper standard for assessing qualified immunity in retaliation cases is exceedingly important and warrants this Court's review. The question of the proper scope of qualified immunity in retaliation cases has the potential to arise every time a public official interacts with the public. The first question presented is recurring, and the confusion in the lower courts is pervasive. The second question presented reveals a direct circuit split, wherein different circuits have come to different outcomes on materially identical facts. There are no obstacles to this Court's review. The approaches in the circuits will remain fractured and unpredictable without this Court's intervention.

A. The qualified immunity analysis employed by the Tenth Circuit below contravenes this Court's precedents. This Court's cases establishes that where a person exercises a clearly established constitutional right, any retaliation for the exercise of that right is automatically unlawful and thus not shielded by qualified immunity. *See Wesby*, 583 U.S. at 63-64. After all, a person who knowingly takes an action to punish a person for exercising a clearly established constitutional right has, by the very act of intentionally retaliating, violated that clearly established right. The method by which the retaliation is carried out should have no role to play in that qualified immunity analysis. Retaliation cases allege that the official knew that a person was engaging in constitutionally protected conduct but nevertheless purposely punished them for it. The officials in these cases

are already on notice that their conduct is unlawful by virtue of the fact that they are acting to intentionally thwart the exercise of a constitutional right.

The approach to qualified immunity employed below is also inconsistent with the fundamental purposes of qualified immunity. This Court has recognized that "[q]ualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Immunizing police officers who penalize the exercise of clearly established constitutional rights simply because there is no existing case law establishing that *specific* act constitutes unconstitutional retaliation tips the scales too far from accountability and threatens fundamental rights. This case is the paradigm example. The reason there are "no precedents finding a First Amendment violation when an officer points a gun at a suspect to retaliate for protected speech," Pet. App. 24a, is that such outrageous conduct is unthinkable to most officers. *See, e.g.*, *Outlaw v. City of Hartford*, 884 F.3d 351, 367 (2d Cir. 2018) ("[T]he easiest cases don't even arise" because "[t]he unconstitutionality of outrageous conduct obviously will be unconstitutional." (citation omitted)).

The approach used by the Tenth Circuit below also makes it easy for officials to avoid accountability by simply coming up with novel ways to retaliate against the exercise of clearly established constitutional rights. An officer may know he cannot point a loaded gun at an angry motorist, so he may opt to point a taser instead. A detective may know she cannot have officers surveil a former suspect who spoke badly about her online, so she

could choose to place the former suspect's picture in new suspect photo lineups instead. A mayor can learn that the law prohibits him from deploying tear gas against reporters camped outside city hall, so he could instead turn off all street lights to prevent filming. A high school principal could know she cannot fire a teacher for lawfully carrying a concealed handgun during school hours, so she could instead have school resource officers repeatedly search his classroom. The possibilities are endless.

B. The correct analysis of qualified immunity in retaliation cases is an issue of critical nationwide importance. Retaliation for the exercise of core constitutional rights is common, ranging from issues of the highest constitutional importance to minor disputes between citizens and local government officials. *See, e.g.*, *Irizarry*, 38 F.4th 1282; *Van Deelen*, 497 F.3d 1151. Hundreds of civil rights actions are brought in federal court every year alleging constitutional retaliation.[4] Qualified immunity is often a dispositive question in those suits. Few issues could be more critical to civil rights enforcement nationwide than clarity regarding the correct analysis of qualified immunity in the context of constitutional retaliation claims.

C. This case is an ideal vehicle to address the question presented. It was decided on a motion to dismiss below, and the question presented was dispositive. The panel correctly recognized that the officer's use of force was retaliatory and that petitioner's speech was protected by the First Amendment. Pet. App. 23a-24a. As a result, the question here turns *only* on whether respondent was

[4] For example, a Westlaw search for § 1983 cases alleging retaliation returned 1,036 decisions in federal district and circuit cases in 2023.

entitled to qualified immunity when he retaliated against the exercise of a clearly established right in a way that had not previously been recognized as unconstitutionally retaliatory. There are no factual or procedural obstacles to resolving the questions presented; the relevant facts are undisputed and directly implicate the circuit conflict and circuit confusion. Petitioner would have prevailed in the Eighth Circuit, and may have prevailed in front of a different panel in the Tenth Circuit or nearly any other circuit. This clean presentation is the perfect case to decide this exceedingly important, frequently recurring question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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