No. 24-504

# In the Supreme Court of the United States

JOSEPH M. HOSKINS, PETITIONER,

*v.*

JARED WITHERS; JESS L. ANDERSON.

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

## REPLY BRIEF FOR THE PETITIONER


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## REPLY BRIEF FOR THE PETITIONER

The Court should grant certiorari to settle a critical constitutional question that has left the lower courts in disarray: how qualified immunity applies in retaliation cases. Respondents' opposition—obfuscatory, flimsy, and fundamentally nonresponsive—offers no persuasive basis to deny review.

What respondents do not dispute speaks volumes. They do not deny that the lower courts are deeply fractured on this issue. They do not deny that this is a nationally important question, recurring in hundreds of constitutional retaliation cases every year. They do not deny that courts apply at least two competing tests: the approach taken below, which wrongly demands a prior case involving the exact same form of retaliation, and the correct rule applied in *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990) and *Bloch v. Ribar*, 156 F.3d 673, 681-82 (6th Cir. 1998), which holds that officials cannot retaliate against a clearly established constitutional right—full stop.

Respondents' only real argument against certiorari is to pretend the Tenth Circuit's decision does not actually raise the important issues in the petition. That is nonsense. The panel affirmed dismissal solely on the ground that there was no prior case clearly establishing that pointing a gun in retaliation for protected speech violates the First Amendment. The panel's approach presents precisely the question splintering the lower courts.

This case, which arises on a motion to dismiss, presents a pure legal question about the application of qualified immunity—one with broad implications across a wide range of cases. Respondents' attempt to downplay its significance is pure misdirection. The Court should take the case and resolve this conflict.

## ARGUMENT

### I. THE DECISION BELOW SQUARELY IMPLICATES THE QUESTION PRESENTED

The Tenth Circuit's decision squarely raises the core legal issue at stake: whether officials can escape liability for retaliation against a clearly established constitutional right simply because no prior case involved the exact same method of retaliation. Respondents' attempts to argue otherwise grossly mischaracterize the decision below and the procedural posture of petitioner's First Amendment claim. The panel explicitly granted qualified immunity not because the alleged retaliation was justified, but because it could not find a prior case where an officer retaliated specifically by pointing a gun. That implicates the precise, recurring question that has fractured the lower courts, and this Court should take the case to resolve it.

### A. The Tenth Circuit Granted Qualified Immunity Because "A Retaliatory Use of Force Hadn't Been Clearly Established as a First Amendment Violation"

The Tenth Circuit's ruling squarely implicates the core issue in this case, and respondents' attempts to dodge that reality are unconvincing. The Tenth Circuit's analysis unmistakably turned on whether qualified immunity shielded the officer's specific retaliatory act from liability. The panel's words speak for themselves. It even summarized the basis for its qualified immunity holding at the top of its opinion, writing "did the trooper violate a clearly established constitutional right by pointing a gun at the driver to retaliate for protected speech? We answer *no*." Pet. App. 3a. The Tenth Circuit's ruling could not be clearer. The court *explicitly* held that qualified immunity applied not because the officer's conduct was justified, but because there was no prior case precisely holding that pointing a gun in retaliation for speech violates the First Amendment. Pet. App. 24a.

The panel "assume[d]" that petitioner's speech was protected. Pet. App. 23a-24a. It also assumed that the officer's act of drawing his gun was motivated by retaliation against that speech. Pet. App. 24a. But then, in a single move, it wiped away the claim—not because the conduct was constitutional, but because "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. The officer's retaliation was shielded from liability because "a retaliatory use of force hadn't been clearly established as a First Amendment violation." Pet. App. 24a. That is how the court justified dismissing this case—by demanding a hyper-specific precedent prohibiting the exact *method* of retaliation the officer used.

Respondents' brief—to the extent that it even provides a coherent account of the decision below—appears to argue that the Tenth Circuit held the officer was justified in drawing his gun based on objectively reasonable safety concerns. *See* Opp. i, 4. That is a complete misrepresentation of the holding in this case and the Tenth Circuit's analysis.

Respondents ransack the opinion for out-of-context snippets, but their cherry-picked quotations have *nothing to do* with petitioner's First Amendment retaliation claim. They lift lines from the Tenth Circuit's distinct analysis of Fourth Amendment issues, where the court stated that a reasonable officer could have "reasonably fear[ed] that [petitioner] was going to pull out a handgun." Opp. 4 (citing Pet. App. 19a); *see also* Opp. 5 (citing Pet. App. 25a-26a). From these snippets, respondents try to spin the idea that the Tenth Circuit held that *Trooper Withers specifically* drew his gun to respond to officer safety concerns. *See* Opp. 8-9, 11-12.

But the Tenth Circuit held no such thing. Respondents' argument is a sleight of hand—they are relying on sections of the opinion applying Fourth Amendment law and trying to graft that analysis onto a First Amendment retaliation claim. But there is a *critical difference* between Fourth Amendment and First Amendment claims. Fourth Amendment claims turn on objective reasonableness—what a *reasonable* officer in the same situation would believe. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011).

First Amendment retaliation is completely different. A First Amendment retaliation claim turns on the official's *actual motive*. *See Nieves v. Bartlett,* 587 U.S. 391, 398 (2019); *Van Deelen v. Johnson*, 497 F.3d 1151, 1157 (10th Cir. 2007) (Gorsuch, J.). This is blackletter law. If the officer acted with the purpose of punishing protected speech, that is retaliation, even if a reasonable

officer's conduct could be justified under some alternative rationale. *See Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977); *Nieves*, 587 U.S. at 413 (Gorsuch, J., concurring in part and dissenting in part) ("Probable cause can't erase a First Amendment violation ...."). Respondents' attempt to collapse the distinct Fourth Amendment and First Amendment legal analyses in this case is not an argument—it is an evasion.

### B. This Case Ended on a Motion To Dismiss and the Complaint Plainly States a First Amendment Retaliation Claim

That this case comes on a motion to dismiss further demolishes respondents' attempt to retrofit an alternative rationale onto the Tenth Circuit's qualified immunity ruling. They try to muddy the waters by suggesting factual disputes, but there are none—because every inference must be drawn in petitioner's favor at this stage. *Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 181 (2024). Respondents can try to rewrite the facts all they want, but at this stage, the complaint controls—and it tells a story of blatant, unconstitutional retaliation.

The complaint spells it out plainly: before drawing his gun, the officer had already checked petitioner for weapons. Pet. App. 80a (¶ 65). And Trooper Withers turned his back to petitioner multiple times in the leadup to the incident, showing he was confident petitioner had no weapons. Pet. App. 83a (¶ 96). Indeed, just before he drew his gun Trooper Withers turned his back to petitioner and walked away. Pet. App. 82a (¶¶ 83-87). He suddenly spun around and pointed his gun at petitioner only after petitioner let out one final profanity. Pet. App. 82a (¶¶ 83-87). To be sure, he shouted "Get your hand out of your pocket!" as he spun around and drew his gun, but he did so knowing full well that his bodycam was recording his every move. Pet. App. 82a (¶ 89). The whole thing reeks of pretext—especially because, as the

complaint explains, petitioner's hand was not in his pocket. Pet. App. 82a (¶ 90). Drawing every reasonable inference in petitioner's favor, there is no ambiguity here: this was pure retaliation for speech, not a split-second decision for officer safety.

## II. THIS ISSUE HAS SUFFICIENTLY PERCOLATED

The approaches in the courts of appeals present two clear, polar-opposite choices about how to apply qualified immunity in retaliation cases. On one side are the cases like *DeLoach* and *Bloch*, that correctly focus on whether the right retaliated against was clearly established—recognizing that officials cannot escape liability simply by varying their methods of retaliation. Others, like the Tenth Circuit below, demand a factually identical precedent where the method of retaliation has been used before, turning qualified immunity into an ever-expanding shield against accountability. These competing frameworks are not just inconsistent—they are irreconcilable, outcome-determinative, and lead to wildly different results depending on which judges hear a case.

There is no reason to wait. The courts of appeals refuse to treat their approach to qualified immunity in retaliation cases as binding precedent, ensuring that further percolation will do nothing to resolve this conflict. The Court has everything it needs to settle this issue now, and this case is the perfect vehicle to do it.[1]

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[1] At a minimum, the Court should grant the second question presented in light of the undeniable conflict between this case and *Watson v. Boyd*, 119 F.4th 539 (8th Cir. 2024). *Contra* Opp. 7-8. As the Eighth Circuit held, the law does not require a judge to say "yes, retaliation by *gun* is illegal" before officials know they cannot do it.

### A. The Court Should Endorse the Qualified Immunity Analysis in *DeLoach* and *Bloch*

The right way to apply qualified immunity in retaliation cases is already clear, and *DeLoach v. Bevers*, 922 F.2d 618 (10th Cir. 1990), and *Bloch v. Ribar*, 156 F.3d 673 (6th Cir. 1998), lay out the blueprint. These decisions correctly adopt a "right retaliated against" approach: if the constitutional right at issue was clearly established, then officials cannot evade liability just because they chose a novel method of retaliation. *DeLoach*, 922 F.2d at 620; *Bloch*, 156 F.3d at 682. As the Tenth Circuit held in *DeLoach*, and has been reiterated by subsequent Tenth Circuit panels, 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." *DeLoach*, 922 F.2d at 620. The qualified-immunity analysis thus "requires *only* that the right retaliated against be clearly established." *Robbins v. Wilkie*, 433 F.3d 755, 767 (10th Cir. 2006) (emphasis added).

Had the Tenth Circuit followed its own holding in *DeLoach*, or that of the Sixth Circuit's decision in *Bloch*, petitioner would have overcome qualified immunity. The panel assumed that irrespective of the circumstances of the traffic stop petitioner engaged in constitutionally protected speech, Pet. App. 23a-24a, and respondents do not dispute that such speech is an exercise of a clearly established right, *see, e.g.*, *City of Houston v. Hill*, 482 U.S. 451, 461 (1987) ("[T]he First Amendment protects … verbal criticism and challenge directed at police officers."); *Guffey v. Wyatt*, 18 F.3d 869, 871 (10th Cir. 1994) (police officer may not punish individuals for "words or conduct an officer finds offensive"). As discussed above, the panel assumed Trooper Withers's act of drawing and pointing a gun was a "retaliatory use of force" against such speech. Pet. App. 23a-24a. Under *DeLoach*, *Bloch*,

and the cases following them, this would have been the end of the analysis.

### B. The Court Should Reject the Qualified Immunity Analysis Used in this Case

The Court should reject the rule used by the Tenth Circuit below, that an officer who retaliates against a person for exercising a constitutional right escapes liability unless a prior case has struck down that exact method of retaliation. To be sure, the rule is clear and workable in its own way—it offers a bright-line standard: if you do not have an identical case involving the same form of retaliation, the officer is immune.

But that approach is flatly inconsistent with this Court's qualified immunity precedents. This Court's cases hold that when a plaintiff is exercising a clearly established constitutional right, governmental officials are prohibited from intentionally retaliating against it. *See* Pet. 2, 4, 23-25. The retaliatory intent—not the literal act—is what defines the constitutional violation in a retaliation case. An official's "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, 320 (6th Cir. 2023) (quoting *Thaddeus-X v. Blatter,* 175 F.3d 378, 386 (6th Cir. 1999)).

Respondents argue that the Tenth Circuit's approach is necessary because otherwise plaintiffs could mount manufactured retaliation claims. Opp. 12. But this Court does not typically enlarge judge-made immunities simply to prevent plaintiffs from pleading fabricated claims. And qualified immunity does not exist to protect officials who, as here, intentionally retaliate against the exercise of constitutional rights. Respondents' approach would dramatically expand qualified immunity and free officials from liability provided that they intentionally retaliate in

sufficiently creative ways. That cannot be the purpose of the doctrine.

## III. RESPONDENTS' OTHER ARGUMENTS FOR DENYING REVIEW ARE MERITLESS

Rather than grappling with the petition or the actual questions at stake, respondents throw out a string of irrelevant distractions and hope the Court looks the other way. Their arguments are not just weak—they are non-sequiturs, untethered from the case. Not one of them provides a legitimate reason to deny review, and most are not even relevant.

**A.** Respondents insist that the qualified immunity cases cited in the petition are irrelevant because they are factually "dissimilar." Opp. 1. That argument misses the point entirely. The question presented is not about a specific fact pattern—it is about how qualified immunity should apply across the board in constitutional retaliation cases. The cases cited in the petition are all constitutional retaliation cases. *See, e.g.*, Pet. 9-22. Respondents do not dispute that these cases expose a deep fracture in the courts of appeals on how to apply qualified immunity in such cases. This circuit split is precisely what makes this Court's review necessary. The Court's silence has left lower courts in chaos, uncertain about how to apply qualified immunity in all constitutional retaliation cases—not just First Amendment cases, not just retaliatory use-of-force cases, and certainly not just First Amendment retaliatory use-of-force cases involving traffic stops.

**B.** Respondents argue the officer is entitled to qualified immunity because no prior case involved a retaliatory use of force in "a traffic stop where a felony suspect is cursing with his hands in or near his pockets." Opp. 5. That argument is nonsensical. None of these facts have anything to do with whether petitioner's speech was protected by the First Amendment (it plainly was). None of them are relevant to whether the method of

retaliation—pointing a gun at a person for speaking—was clearly unconstitutional. This argument rests on a fundamental misunderstanding of how qualified immunity works.

**C.** Respondents repeatedly reference the Fourth Amendment as if it affects the First Amendment analysis. *E.g.*, Opp. 1, 2, 5, 6, 9. It does not. Whether the officer's actions were unreasonable under the Fourth Amendment is an entirely different legal question than whether those actions were motivated by retaliatory intent. The case itself reflects this distinction: petitioner is not challenging the dismissal of his Fourth Amendment claims. Respondents' attempt to conflate the two is nothing more than misdirection.

**D.** Respondents' suggestion that Trooper Withers might have had a non-retaliatory basis for pulling his gun, Opp. 11, is also irrelevant. That was not the basis for the Tenth Circuit's decision, and it flies in the face of the complaint, which alleges that the officer specifically acted to retaliate.

## IV. THE COURT SHOULD RESOLVE THIS QUESTION IN THIS CASE

This is the right case and the right moment for the Court to settle this crucial question. Qualified immunity has strayed far from its historical roots—a fact frequently acknowledged by legal scholars and members of this very Court. *See, e.g.*, *Ziglar v. Abbasi*, 582 U.S. 120, 158 (2017) (Thomas, J., concurring) ("In further elaborating the doctrine of qualified immunity … we have diverged from the historical inquiry mandated by the statute."); Brief of the Cato Institute as *Amicus Curiae* 5-6, 11-12. As the criticism has mounted, this Court has been repeatedly urged to reconsider or abolish the doctrine entirely. *See, e.g.*, Petition for Certiorari at i, *Baxter v. Bracey*, 140 S. Ct. 1862 (2020) (No. 18-1287); Petition for Certiorari at i, *Rogers v. Jarrett*, 144 S. Ct. 193 (2023) (No. 23-93).

This case does not demand such sweeping relief. But it does offer a perfect opportunity to rein in an unwarranted and dramatic expansion of qualified immunity that has been adopted by numerous lower courts, based on faulty reasoning (and in the Tenth Circuit's case, in violation of directly applicable precedent). This case is an ideal vehicle, and further percolation will only increase the confusion. This Court's intervention is urgently needed.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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