No. 03-710

IN THE
Supreme Court of the United States

GERALD DEVENPECK, a Washington State Patrol Officer,
JOI HANER, a Washington State Patrol Officer,
and their marital communities,

Petitioners,

v.

JEROME ANTHONY ALFORD,

Respondent.

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

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Does an arrest violate the Fourth Amendment when a police officer has probable cause to make an arrest for one offense, if that offense is not closely related to the offense articulated by the officer at the time of the arrest?

2. For the purpose of qualified immunity, was the law clearly established when there was a split in the Circuits regarding the application of the "closely related offense doctrine", the Ninth Circuit had no controlling authority applying the doctrine, and Washington state law did not apply the doctrine?

TABLE OF CONTENTS

Contents

Contents

Contents

Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Cited Authorities

Cited Authorities

Cited Authorities

Cited Authorities

Cited Authorities

Cited Authorities

Cited Authorities

Cited Authorities

Cited Authorities

Cited Authorities

Cited Authorities

Cited Authorities

SUMMARY OF THE ARGUMENT

In this case, two State Troopers arrested Tony Alford for something that was, quite simply, not a crime – tape-recording his own traffic stop on a public highway. The officers' later attempts to justify the arrest based on conduct separate and distinct from that giving rise to the arrest were properly rebuffed by the Court of Appeals. Although officers can be entitled to qualified immunity for technical defects, such as using improper legal nomenclature in the charging or booking of criminal conduct, they are not entitled to rationalize a bad arrest by dredging up any illegal conduct they can later identify. This is the rule in the clear majority of Circuits that have considered the issue, and comports with the precedents, and spirit, of qualified immunity.

The Court of Appeals properly applied the inquiry of objective reasonableness to the predicate conduct that led to the arrest. In so doing, the Court of Appeals correctly struck a balance between the rights of the public and the practicalities of policing, allowing qualified immunity only where the same conduct for which the person was arrested furnishes probable cause to arrest. By doing so, the Ninth Circuit, in keeping with its own precedent and that of a majority of other circuits, adeptly avoided injecting an impermissible element of subjectivity into the qualified immunity analysis, and declined to engage in a journey down the rabbit hole to rationalize an obviously unlawful arrest.

Likewise, this analysis comported with this Court's precedents, and closely adhered to the policies underlying the doctrine of qualified immunity. In so doing, the lower court correctly declined to rewrite the doctrine of qualified immunity to allow either an inquiry into the officers'

subjective intentions, or an ex-post-facto search for justification for an arrest.

The law in the Ninth Circuit was clear that unrelated conduct could not be used by law enforcement to "cleanse" a bad arrest, as the Ninth Circuit had adopted the closely related offense doctrine several years prior to Mr. Alford's arrest.

I. ARGUMENT

THE CLOSELY-RELATED OFFENSE DOCTRINE CORRECTLY FOCUSES THE SCOPE OF THE OBJECTIVE REASONABLENESS INQUIRY CALLED FOR IN ADDRESSING QUALIFIED IMMUNITY CLAIMS. IT DOES THIS BY PROPERLY REQUIRING THAT PROBABLE CAUSE BE FOUND IN THE OSTENSIBLY CRIMINAL CONDUCT UPON WHICH THE OFFICERS ACTUALLY ACTED.

It is unfortunate, but inarguable, that so long as one man is given power over another, there will be abuses of that power.[1] Our Constitution, however, attempts to forestall such abuses by memorializing the "self-evident" rules derived from the common law and deemed to be inherent in a free society. To that end, the Fourth Amendment provides, in relevant part, that "the right of the people to be secure in their persons, houses, papers, and effects, against

1. Samuel Adams wrote that "Power is intoxicating; and men legally vested with it too often discover a disposition to make ill use of it and an unwillingness to part with it." Samuel Adams, *The Writings of Samuel Adams,* Harry Cushing, Ed. G.P. Putnam's Sons, New York Volume IV, 1904-1908, p. 214.

unreasonable searches and seizures, shall not be violated. . . ." U.S. Const. amend IV.[2]

This "core value"[3] of freedom from unreasonable search and seizure would be merely aspirational without some enforcement mechanism. Thus, in a society subject to the rule of law, recourse to the judicial system is viewed as "the only realistic avenue for vindication of constitutional guarantees." *Anderson v. Creighton,* 483 U.S. 635, 638 (1987) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 814 (1982)).[4]

Violations of these rights are actionable under 42 U.S.C. § 1983, which is derived from the Civil Rights Act of 1871. *Monroe v. Pape,* 365 U.S. 167, 180 (1961); *Wilson v. Garcia,* 471 U.S. 261, 276 (1985). The primary function of the statute

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2. The Fourteenth Amendment extends these protections to prohibit unreasonable searches and seizures by state actors. U.S. Const. amend XIV; *Elkins v. United States*, 364 U.S. 206, 213 (1960).

3. Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 San Diego L. Rev. 823, 825 (1986) (referring to this as a core value as determined by the text, structure, and history of the Constitution).

4. The possibility of other deterrents, such as criminal prosecutions and internal discipline of offending officers, is cold comfort, indeed. *See* Alison L. Patton, Note, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 is Ineffective in Deterring Police Brutality*, 44 Hastings L.J. 753, 787 (1993) ("The [internal affairs] division is located within the police department . . . and the entire process is concealed from the public"); *see also* Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L.Rev. 509, 535 (1994) (noting that prosecution occurred in only one quarter of 1% of cases of alleged police misconduct).

is simple: "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims is such deterrence fails." *Wyatt v. Cole,* 504 U.S. 158 (1992), citing *Carey v. Piphus*, 435 U.S. 247, 254-57 (1978). In the instant case, that promise of relief will be stripped if the "rationalization test" put forward by the Petitioners is adopted.

Liability requires proof of two essential elements: first, the conduct complained of was committed by a person acting under the color of state law;[5] second, that the conduct deprived the person of rights, privileges or immunities secured by the Constitution of laws of the United States. *Parratt v. Taylor,* 451 U.S. 527, 535, *overruled in part on other grounds, Daniels v. Williams,* 474 U.S. 327 (1986).[6] A search and seizure that violates the Fourth Amendment is actionable under 42 U.S.C. § 1983. *Soldal v. Cook County, Ill.,* 506 U.S. 56 (1992).

Even when these elements are proved, however, the judicially-created affirmative defense of qualified immunity "protects governmental officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or

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5. In Mr. Alford's case, the law enforcement agents involved were on duty, wore uniforms, and utilized their authority as State Patrol officers to effectuate the unlawful arrest. Thus, the "color of law" element for liability is established, and has not been contested. *See Tennessee v. Garner*, 471 U.S. 1, 5-7 (1985).

6. Since Mr. Alford was detained, arrested, and then incarcerated there is no question but that he was seized, and the protections of the Fourth Amendment were triggered. *See Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968); *California v. Hodari D.*, 499 U.S. 621, 628 (1991).

constitutional rights of which a reasonable person would have known." *Saucier v. Katz,* 533 U.S. 194 (2001).[7]

To determine whether an official is entitled to qualified immunity, the court "must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right . . . and, if so, proceed to determine whether that right was clearly established at the time of the alleged violation." *Conn v. Gabbert*, 526 U.S. 286, 290 (1999); *Bingham v. City of Manhattan Beach*, 341 F.3d 939, 945-46 (9th Cir. 2003).

A. *The Court of Appeals correctly found that Mr. Alford had a right not to be arrested for conduct that was not, in any sense, criminal. The Court of Appeals properly applied the standard of objective reasonableness only to the predicate acts that led to the arrest, and refused to engage in after-the-fact rationalization.*

Our government is founded on the principle of restraint – restraint of the government from interfering in the lives of citizens. "The right to life, liberty, property, and the pursuit of happiness is not a gift of the state to the individual, but precedes the state." William Ebenstein, *Today's Isms*, 132-33 (3d ed. 1962). "Life and liberty are regarded as standing substantially on one foundation; life being useless without liberty." *State v. Gum*, 69 S.E. 463, 464 (W.Va. 1910).

Courts recognize that arrest is a "severe intrusion on individual liberty," and carries numerous unpleasant consequences. *See Atwater v. City of Lago Vista,* 532 U.S.

7. A defendant's claim of qualified immunity is reviewed de novo. *Elder v. Holloway*, 510 U.S. 510, 516 (1994).

318, 364-65 (O'Connor, J., dissenting) (cataloguing consequences including bodily search, detention, and social stigma). Sadly, even our country has a history of "the use, and not infrequent abuse, of the power to arrest. . . ." *Wong Sun v. United States*, 371 U.S. 471, 479 (1963).

To stand as a bulwark against this, the Fourth Amendment prohibits unreasonable arrests, and protects us from "rash and unreasonable interferences with privacy and . . . unfounded charges of crime." *Brinegar v. United States*, 338 U.S. 160, 176 (1949). This Court has long held that the Fourth Amendment protects the "inestimable right of personal security," and belongs "as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs." *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968).

Typically, this right is protected by prohibiting the search and seizure by the police of an individual's person in the absence of probable cause. *Florida v. Royer*, 460 U.S. 491, 498 (1983); *Dunaway v. New York*, 442 U.S. 200, 208 (1979).

Police have probable cause to effect a warrantless arrest only when "the facts and circumstances within their knowledge and of which they [have] reasonably trustworthy information [are] sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Beck v. Ohio,* 379 U.S. 89, 91 (1964).

At its core, however, the "ultimate measure" of a search, or a seizure, is "reasonableness." *See Vernonia School District 47J v. Acton*, 515 U.S. 646, 652 (1995) ("As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a government search is

'reasonableness.'"); *Carroll v. United States*, 267 U.S. 132, 147 (1925) ("The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable").

Here, the Petitioners attempt to circumvent the reasonableness requirement of the Fourth Amendment by seeking qualified immunity in instances wherein arguable probable cause could be generated from actions unconnected with those actually underlying the arrest. If qualified immunity is applied in this manner, it can truly be viewed as a nothing more than an intellectual conceit designed, indeed, almost guaranteed, to allow deprivations of constitutional rights with no hope of redress.[8] This is eminently unreasonable, and does not comport with the history, or philosophy, of the Fourth Amendment or the doctrine of qualified immunity.

B. *The "same conduct" or "related offense" doctrine strikes a proper balance, utilizing the objective reasonableness standard required by this Court's precedent while honoring the goals of qualified immunity doctrine by refusing to attenuate the analysis to unrelated conduct.*

"Wading through the doctrine of qualified immunity is one of the most morally and conceptually challenging tasks federal appellate court judges routinely face." Charles R. Wilson, *"Location, Location, Location:" Recent Developments in the Qualified Immunity Defense*, 57 NYU

8. To put it bluntly, "[I]t is monstrous that courts should aid or abet the law-breaking police officer." *Harris v. New York*, 401 U.S. 222, 232 (1971) (Brennan, J., dissenting). If that is allowed to happen, both we, and the Fourth Amendment "are in danger of standing for nothing." T.S. Eliot, *The Idea of a Christian Society.*

Annual Survey of American Law 445, 447 (2000). Thankfully, the closely-related offense doctrine imposes a balancing that is based on common sense and sound judgment, is in keeping with the teachings of the common law, and is consonant with the aims of qualified immunity. By contrast, expanding qualified immunity unduly by adopting the proposed "rationalization test" would wreak havoc with these fundamental principles, and afford officers a near constitutional carte blanche.

1. *The contours of the "closely related offense" or "same conduct" doctrine.*

Under the "related offense" or "same conduct" doctrine, the inquiry into whether the actions of law enforcement were objectively reasonable is focused on the conduct that led to the arrest itself, and is not attenuated to unrelated conduct. The same conduct test is invoked only when the officers lacked objective probable cause for the crime for which the person was arrested. Thus, the relevant inquiry is: Viewed objectively, could the conduct that served as the basis of the arrest provide probable cause for another charge to a reasonable officer in the same situation? *Trejo v. Perez,* 693 F.2d 482, 485 (5th Cir. 1982).

This is "consistent with the teachings" of qualified immunity, as it precludes allowing an officer to argue about his intentions, or reasons, regarding charging, and focuses on the objective facts of the arrest itself, and an objective analysis of the predicate conduct. *Sheehy v. Plymouth*, 191 F.3d 15, 20 (1st Cir. 1999). However, it strikes a balance by still providing protection for the officer, as it insulates officers from liability for mere "erroneous legal description of the basis for an arrest" if another officer would have

concluded that "there was probable cause to arrest for a related offense on the basis of the same conduct." *Id*.

Limiting the inquiry to the "same conduct" as that which formed the basis for the actual arrest allows the officer to "choose which crime she will charge without having to charge every single offense sustainable on the facts," *Biddle v. Martin,* 992 F.2d 673, 677 (7th Cir. 1993), but prevents the officer from later offering "ex post facto extrapolations of all crimes that might have been charged. . . ." *Richardson v. Bonds,* 860 F.2d 1427, 1431 (7th Cir. 1988). The Courts well understand that such a broadening would "open the door" to endless explanations, rationalizations, and justifications. *Sheehy*, 191 F.3d at 21.

As the Fifth Circuit has pointed out, this inquiry does *not* depend upon a subjective component. By requiring a nexus between the charged offense and the later justification, the Court noted that the "related" requirement "obviates the need for a delicate subjective inquiry, likely to turn on little more than self-serving statements and speculation." *Trejo,* 693 F.2d at 486.[9]

9. Rejecting this "could have done" approach accords well with the cautionary words of this Court, which has stated that "we believe that 'sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.'" *United States v. Leon,* 468 U. S. 897, 922, n.23 (1984) (quoting *Massachusetts v. Painten,* 389 U. S. 560, 565 (1968) (per curiam) (White, J., dissenting)). Similarly, in *Whren v. United States,* 517 U.S. 806, 813–814 (1996), the Court noted the "evidentiary difficulty of establishing subjective intent." Despite this, Petitioners wish for courts in every § 1983 action to allow them to go through every fact, posit conduct that arguably could have provided probable cause, and then treat them as if they actually *did* arrest (or search) based on that conduct. This is the height, and nadir, of subjective self-indulgence.

Cases applying this doctrine show its eminent practicality. In *Sheehy v. Plymouth*, 191 F.3d 15 (1st Cir. 1999), the Court addressed an arrest made after a fight between neighbors. *Id.* at 17-18. The officer initially stated that Mr. Sheehy was under arrest for failing to give his name; by the time they reached the precinct, the charge had mutated to being disorderly and assault with a dangerous weapon. *Id*. at 18. These charges were dismissed. *Id*.

The District Court applied the related offense doctrine, and granted qualified immunity to the officer. 191 F.3d at 18. The Circuit Court agreed that the related crimes doctrine should be the standard, but noted that "the crime with which the arrestee is charged and the crime offered to the court as a justification for the arrest must relate to the same conduct." 191 F.3d at 19-20. Additionally, the two crimes must be "directed generally at prohibiting the same type of conduct." *Id.* The Court then found that "Sheehy's interaction with Officer Quinn was the sole basis for the arrest," and that Quinn "relied at the police station on prior conduct of Sheehy that unmistakably did not serve as the basis for the challenged arrest." *Id*. at 20-21.

In the Seventh Circuit, probable cause must exist on a "closely-related charge," that is, one that arises from "the same set of facts" that gave rise to the arrest. *United States v. Reed,* 349 F.3d 457, 462-63 (7th Cir. 2003). The Sixth Circuit has adopted this same position in allowing qualified immunity in a case where there was probable cause for a "related offense" that arose from the same conduct. *Avery v. King,* 110 F.3d 12 (6th Cir. 1997).

In the Eighth Circuit, "Where a defendant is arrested for the wrong offense, the arrest is still valid if probable cause

existed to arrest the defendant for a closely related offense." *United States v. Rambo,* 789 F.2d 1289, 1294 (8th Cir. 1986). Even in the Fifth Circuit, the "related offense" must arise from the same conduct as the charged offense. *See Vance v. Nunnery,* 137 F.3d 270 (5th Cir. 1998). These formulations are identical to that adopted by the Ninth Circuit in *Alford v. Haner*, 333 F.3d 972 (9th Cir. 2003). *See also Hernandez v. State*, 972 P.2d 730, 735 (Idaho Ct. App. 1999) (declining to "engage in ex post facto extrapolations of all crimes that might have charged on a given set of facts at the moment of arrest to retroactively validate an otherwise unlawful arrest"); *See Hopkins v. City of Westland*, No. 93-1096, 1994 WL 118116, at *4-*5 (6th Cir. Apr. 4, 1994) (adopting the "related charge" doctrine as a defense to claim that no probable cause existed for an arrest); *Biddle v. Martin*, 992 F.2d 673, 676 (7th Cir. 1993); *Foster v. Metropolitan Airports Comm'n*, 914 F.2d 1076, 1080 (8th Cir. 1990); *Sevigny v. Dicksey*, 846 F.2d 953, 956 n.4 (4th Cir. 1988); cf. *Wilkes v. Young*, 28 F.3d 1362, 1371 (4th Cir. 1994) (Phillips, J., dissenting) (stating that an arrest under a warrant charging an offense for which no probable cause exists should not be validated "so long as a post hoc search of the relevant criminal statutes can turn up some other offense for which the issuing official might properly have issued a warrant on the facts before him"), *cert. denied*, 115 S. Ct. 1103 (1995); *State v. Sparks*, 422 S.E.2d 293, 295 (Ga. Ct. App. 1992) (reversing suppression order as "the offense for which plaintiff was arrested and the offense for which probable cause to arrest existed were related"); *C-1 v. City of Horn Lake, Mississippi*, 775 F. Supp. 940, 946 (N.D. Miss. 1990) (failing to find the required "nexus" between a disorderly conduct arrest and the "unrelated" charge of trespassing arising from school melee).

The strength of this standard is that it is truly objective, that is, it is "based on real facts and not influenced by personal beliefs or feelings." Cambridge Advanced Learner's Dictionary (2004) (defining "objective"). The same conduct test does this by examining what is, in reality, a *fait accompli* – the arrest, and the conduct that purported to justify it.[10]

This standard is reminiscent of the words of Chief Justice Warren in *Wainwright v. City of New Orleans*, 392 U.S. 598 (1968) (dissenting from dismissal of writ of certiorari as improvidently granted.). In that case, Wainwright, a young law student was stopped by the police who were searching for a murder suspect. *Id.* at 600. When he refused to be "humiliated" by the police, he was arrested on a flimsy charge of vagrancy. *Id*. at 601-02. He later scuffled with the police at the station. *Id.*

In addressing whether there was probable cause to arrest Wainwright for murder, the Chief Justice wrote:

> I see no more justification for permitting the State to disregard its own booking record than for permitting any other administrative body to disregard its own records. Quite the contrary. In the "low-visibility" sphere of police investigatory practices, there are obvious and compelling reasons why official records should prevail over the second-guessing of lawyers and judges. Nor would holding the police to official records

10. In effect, Petitioners seek to indulge in the "20/20 vision of hindsight" that has been disavowed. *See, e.g.*, *Graham v. Connor*, 490 U.S. 386, 396 (1989) (declining to use hindsight in addressing excessive force).

> frustrate any legitimate interest of society. If the police in this case really believed that petitioner was the murder suspect, and if they had probable cause to so believe, all they had to do was to arrest and book him for murder. If they did not have such probable cause at the time they confronted petitioner on the street, they might have used techniques short of arresting him on a trumped-up charge [of vagrancy] to verify their suspicions.

392 U.S. at 605. Most tellingly, Chief Justice Warren observed that while Wainwright could obviously have later been charged with other crimes, "when a controversy arises over the legality of the arrest, the police should be held to the booked offense." *Id.* n.6. This seems in complete harmony with the same conduct test – qualified immunity should be limited, and the limits are those described by the police themselves in the objective fact of the arrest.

In short, the doctrine refuses to allow qualified immunity on the basis of mistaken interpretations that are not actually made, or actions not taken. "To shift the focus of the inquiry, as the officers would have us do, away from their actual actions to hypothetical decisions they would have faced had they behaved reasonably cannot be reconciled with the policy precepts underlying the qualified immunity doctrine." *Beier v. City of Lewiston,* 354 F.3d 1058, 1071 (9th Cir. 2004). Indeed, the Ninth Circuit has noted that according qualified immunity because the officers "might have" made a different, reasonable mistake with the same outcome "would be to encourage police officers to arrest citizens without ascertaining the applicable legal prohibitions, thereby compromising the protection of the constitutional rights of citizens, with no countervailing benefit in advancing the

public good." *Id*. at 1072 (addressing "incentive scheme" of qualified immunity).

2. *The same conduct test accords with the policies of qualified immunity, the common law, and societal concerns in a free society.*

a. The rationales underlying the qualified immunity defense are not disserved by the same conduct test.

As the Ninth Circuit stated in *Beir v. City of Lewiston,* "To shift the focus of the inquiry, as the officers would have us do, away from their actual actions to hypothetical decisions they would have faced had they behaved reasonably cannot be reconciled with the policy precepts underlying the qualified immunity doctrine." 354 F.3d at 1071.

Those "policy precepts" were identified, and adopted, in *Harlow*. First, the Court recognized the "strong public interest" in protecting public officials from incurring defense costs,[11] and served that interest by formulating a defense that "permits insubstantial lawsuits to be quickly terminated." *Crawford-El*, 523 U.S. at 590; *Harlow*, 457 U.S. at 814. Second, since subjective motivations are easy to allege, but almost impossible to disprove, use of an objective standard raises questions that can usually be disposed of on summary judgment. *Crawford-El*, 523 U.S. at 585, 590; *Harlow*, 457 U.S. at 817-19. Third, use of an objective standard prevents

11. The Court noted that these "social costs" include not only hard costs, but diversion of officials' energy and deterrence of office-seeking. *Id., citing Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

the "unfairness" of imposing liability on an official who could not fairly be said to "know" that the law forbade his conduct. *Crawford-El*, 523 U.S. at 590-91; *Harlow*, 457 U.S. at 818-19.

On the first point, cases in which the "same conduct" test might be invoked must, by definition, have merit, as extraneous conduct is not even examined unless it is shown (as in this case) that the actual basis for the arrest was unlawful. Thus, *a priori,* these can hardly be termed "insubstantial" claims, and do not fall within the purview of this rationale.

On the second point, only the "same conduct" test will obviate the necessity of conducting an "inherently subjective and highly fact specific" review of the police reports, memories of all involved, etc., all designed to see if probable cause existed for something – anything. *Thornton*, 124 S. Ct. at 2132. Thus, the policy of qualified immunity is served by the doctrine.

Finally, summary judgment will still be available, as the analysis is objective, the relevant conduct readily ascertainable, and liability will not flow unless the law is found to be clearly established. *See Alford v. Haner,* 333 F.3d 972 (9th Cir. 2003) *passim* (Pet. 1a).

b. Allowing qualified immunity based on conduct offered up after-the-fact would amount to a de facto resurrection of the general warrant.

It is inimical to our system to afford qualified immunity on the basis of an "arrest first – justify later" policy, as it would amount to a *de facto* resurrection of the general warrant. Ex post facto extrapolation of reasons for an arrest is evocative of this long-despised artifice.

"General warrants" encompassed two particular forms of legal (or illegal) evil. The first was a warrant that lacked specificity of whom to seize or where to search, leading to warrants for "suspicious persons" or searches of "suspicious places." *See* Davies, 98 Mich. L. Rev. n. 12. The second was a warrant that lacked an adequate showing of the justification for the arrest or search. *Id.* at n. 351. This type is typified in the Virginia Declaration of Rights, adopted in 1776, which described a general warrant as one in which the alleged offense "is not particularly described." Va. Decl. of Rights, art. X, available at. *http://www.yale.edu/lawweb/avalon/virginia.htm* (visited August 20, 2004).

The Framers were particularly concerned with general warrants, which led to searches that were "virtually unrestrained." J. Landynski, *Search and Seizure and the Supreme Court* 20 (1966). Thus, the Framers instituted a scheme designed to "extinguish general searches categorically." W. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* 1499 (1990) (Ph.D. Dissertation at Claremont Graduate School). This mistrust, embodied in both the reasonableness and warrant clauses, is still felt today. *See Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972)

("a direction by a legislature to the police to arrest all 'suspicious persons' would not pass constitutional muster").

In this instance, the actions of the police can only be justified by affording them a *de facto* general right of arrest. In their press to claim qualified immunity, Petitioners are in the uncomfortable position of arguing that they should be allowed to "arrest first, justify later" – this is the type of broad, unfettered exercise of power that was at the heart of the general warrant, and was most despised by the Framers.[12] Again, the Petitioners posit an untenable position that is almost *in haec verbae* with this two-hundred-year-old prohibition.

c. Qualified Immunity Jurisprudence does not favor unduly limiting the availability of redress, nor overly expanding the ability of officers to escape liability.

The Fourth Amendment should receive "a liberal construction." *Gouled v. United States*, 255 U.S. 298, 304 (1921), and "preserve that degree of respect for the privacy of persons . . . that existed when the provision was adopted." *Minnesota v. Dickerson*, 508 U.S. 366, 380 (1993) (Scalia, J., concurring). As this Court has made clear, although the very adoption of qualified immunity represented "a balance between the evils inevitable in any available alternative," *Harlow,* 457 U.S. at 813–14, maintaining that balance does

12. Framing Era lawyers "viewed any form of discretionary authority with unease – but delegation of discretionary authority to ordinary, 'petty,' or 'subordinate' officers was anathema. . . ." Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 578 (1999).

not require imposing "serious limitations" on the only practical remedy available. *Crawford-El v. Britton*, 523 U.S. 574, 591-92 (1998) (resisting efforts to raise the bar on qualified immunity by rejecting heightened pleading requirements).

The Court, recognizing the Framers' "pronounced distaste" for broad authority in law enforcement discretionary authority, Wayne A. Logan, *An Exception Swallows a Rule: Police Authority To Search Incident to Arrest*, 19 Yale Law & Policy Review 381, 382 (2001), has properly shown reluctance to craft, or recognize, expansions of police authority, recently cautioning that exceptions are not entitlements. *Thornton*, 124 S. Ct. at 2133 (O'Connor, J., concurring) (stating "lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception. . . ."); *Id.* at 2134 (Scalia, J., concurring) (observing "conducting a *Chimel* search is not the Government's right; it is an exception – justified by necessity – to a rule that would otherwise render the search unlawful.").

Recently, the Court held that qualified immunity was not available to an officer who conducted a search pursuant to a warrant that facially failed to particularize the items sought. *Groh v. Ramirez*, 124 S. Ct. 1284 (2004). Finding that the warrant was "plainly invalid," the Court rejected the officer's contention that the search was, nonetheless, reasonable. *Id.* at 1289-90.

As in this case, the officers were, in effect, asking the Court to craft a new exception, then claim qualified immunity because they reasonably relied on this previously-non-existent exception. The officers failed on both counts. Most

tellingly, in *Groh*, this Court rejected qualified immunity, finding that it was patently unreasonable to rely on "an expectation" that the Court would craft a new exception for the officers' conduct.

The same "general facilitation of police investigation and preservation of public order" rationales that were rejected as being insufficient to expand the limits of a *Terry* stop, *see Kolender v. Lawson*, 461 U.S. 352, 367 (1983), are all that are posited here; these certainly fall short of the mark needed to afford immunity in such instances.

d. The Same Conduct Test would promote public confidence by removing the implication that the law condones arbitrary arrest.

The "same conduct" test would serve the societal value of promoting public confidence in the police by respecting the protection from arbitrary arrest. *See e.g., Wyatt v. Cole,* 504 U.S. 158, 167 (1992) (noting the role of public policy concerns in qualified immunity rulings); Tom R. Tyler, *Multiculturalism and the Willingness of Citizens to Defer to Law and Legal Authorities,* 25 Law & Soc. Inquiry 983, 989 (2000) (observing that "the key to the effectiveness of legal authorities lies in creating and maintaining the public view that the authorities are functioning fairly."). On the other hand, turning our backs on the normative expectations that have served us so well since the Framing Era would subject us to "the inconstant, uncertain, unknown, arbitrary will" of

the police. John Locke, *The Second Treatise of Government* 126 (Everyman ed. 1993) (1689).[13]

These expectations form the "central concern of the Fourth Amendment," which is "to protect liberty and privacy from arbitrary and oppressive interference by government officials." *United States v. Ortiz*, 422 U.S. 891, 895 (1975). Despite this, arbitrariness is at the core of the Petitioners' "rationalization" test. It is hard to imagine that ordinary citizens would feel comforted by knowing that they could be falsely arrested, then denied redress if the police could, after the fact, rationalize the arrest based on unrelated conduct.

One of the clearest examples of the perils of the "anything goes" approach is *Kies v. City of Aurora,* 156 F. Supp.2d 970 (N.D.Ill. 2001). Mrs. Kies saw an officer break up a schoolyard fight by apparently beating one student unconscious. *Id*. at 974. She attempted to find out what was going on, and asked if the boy was all right. *Id*. at 975. She asked the officer why he had hit the boy. *Id*. When she tried to tell the boy to have his mother call her, the officer slapped her in the face. *Id*.

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13. Rather, ignoring the true reason for an arrest is hauntingly reminiscent of the abusive practices that led to the Petition of Right in 1628. Lord Coke condemned the king's orders for arrest of those refusing to pay a "loan" to Charles I as a violation of Magna Carta and the common law, stating that "It is against reason to send a man to prison and not show the cause." Stephen D. White, *Sir Edward Coke and The Grievances of the Commonwealth, 1621-1628*, at 231, 240 (1979) (citing *2 Commons Debates, 1628*, at 100-114 (Robert C. Johnson et al. eds. 1977). Are we now to return to a standard where the *causus* is immaterial?

Several weeks later, the officer swore out a complaint, alleging she had "obstructed" him. 156 F. Supp.2d at 975-76. These charges went to trial, where a judge entered a directed verdict. *Id*. at 976. In a § 1983 action, the officer tried to avoid liability for his atrocious actions by claiming he had probable cause for a litany of crimes, including: obstructing a peace officer, disorderly conduct (apparently for speaking loudly), criminal trespass (apparently for walking on the school sidewalk to check on the beaten lad), and disobeying a police officer (here, claiming he was "directing traffic" when dragging the half-unconscious boy into the school). *Id*. at 984-87. Allowing far-ranging extrapolation of qualified immunity for such unrelated conduct would be in complete derogation of the aims of the Fourth Amendment and the policies of qualified immunity.

Further, there is the specter of affording a shield to officers who engage in racial profiling. *See* Jeffrey Needle, *Driving While Black – DWB*, Trial News 3 (Dec. 1996) ("Young African-American males frequently report being stopped and detained for reasons that are superficially pretextual."). It is not mere speculation to posit that officers would quickly attempt to rationalize an illegal arrest by pointing to minor traffic infractions – infractions that can be found (or invented) in almost every car trip. *See* David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 Sup. Ct. Rev. 271, 273 ("Since virtually everyone violates traffic laws at least occasionally, . . . police officers, if they are patient, can eventually pull over almost anyone they choose. . . ."); Wesley MacNeil Oliver, *With An Evil Eye and An Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 Tul. L.Rev. 1409 (2000) (addressing consent decree with New Jersey to stamp out racial profiling).

In short, there is a profound interest in requiring officers to hew a close line. "In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously . . . If the government becomes a lawbreaker, it breeds contempt for law . . . ." *Olmstead v. United States*, 277 U.S. 438, 485 (Brandeis, J., dissenting).[14]

e. The Same Conduct test is consonant with the right to know the cause of the arrest, or the charges against you, at the time of arrest. This right, while somewhat eroded, was embodied in the common law and is still used in many states today.

One of the defining differences between a society based on the rule of law and one based on authoritarian rule is government accountability. Americans have the right to see their government in action, to question, and to challenge its actions. In keeping with that, it has long been the rule that when a warrantless arrest is effected, the officer must inform the arrestee of the officer's authority, and the cause of the arrest; if the arrest is pursuant to a warrant, but the officer does not have the warrant at the time of arrest, "he or she must then inform the defendant of the offense charged and of the fact that a warrant had been issued." *See, e.g., John Bad Elk v. United States*, 177 U.S. 529, 535, n. (1900) (reciting South Dakota law) ("When arresting a person

14. This is not to be confused with "mere" pretextual stops, which this Court has found to be governed by the same objective standard as other stops. *Whren v. United States*, 517 U.S. 806 (1996) (probable cause justifies stop regardless of officer's motivation). *Cf State v. Ladsen*, 979 P.2d 833 (Wash. 1999) (prohibiting pretextual stops under Washington state constitution).

without a warrant, the officer must inform him of his authority and the cause of the arrest . . .” and “He must, before making the arrest, inform the person to be arrested of the cause thereof, and require him to submit. . . .”); 5 Am.Jur.2d Arrest § 94 (“One who arrests without a warrant must generally inform the arrested person of the object and cause of his arrest.”); JA 145 (officer stating “You have to inform them and be sure that they understand that they are under arrest.”)

This has even been held to apply to the warrant of arrest itself. *See United States v. Salliey*, 360 F.2d 699 (4th Cir. 1966); *State v. Riley*, 846 P.2d 1365 (Wash. 1993) (holding that the crime must be stated with specificity in order to place limits on the warrant); 1 Fed. Prac. & Proc. Crim 3d § 55 (Wright & Miller) (addressing statement of charge); 5 Am.Jur.2d Arrest § 27 (“The arrest warrant must contain sufficient information to notify the defendant of the nature of the crime charged.”).

This doctrine maintains its vigor to this day. *See, e.g*. Iowa Code § 804.14 (requiring that “the reason for the arrest” be stated at the time of arrest); *Green v. State*, 525 S.E.2d 154, 158 (Ga. App. 1999) (similar requirement); Tex.Code Crim. Proc. Ann. § 15.26 (West Supp. 2004) (stating “If the officer does not have the warrant in his possession at the time of arrest he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued.”); *Williams v. Lee County Sheriff’s Dept.,* 744 So.2d 286, 294-95 (Miss. 1999) (addressing requirement that officer inform an accused of the “object and cause of the arrest without a warrant.”); Oregon Revised Stat. § 133.235 (same); Florida Stat. Ann. § 901.17; Ohio Rev. Code § 2935.07 (same); Idaho Code § 19-608 (requiring officer to inform the person of the “reason for the arrest”); *Roberts v. State,*

711 P.2d 1131, 1136 (Wyo. 1985) (stating that "The rule recognizes that people ought to know why they are being arrested."); New York Criminal Procedure Law § 140.15 ("The arresting police officer must inform such person of his authority and purpose and of the reason for such arrest unless he encounters physical resistance, flight or other factors rendering such procedure impractical.") Utah Code Ann. § 77-7-6 (same); *United States v. Kole*, 164 F.3d 164 (3rd Cir. 1998) (addressing Philippines law).

It is utterly incongruous to impose a higher standard for arrest made pursuant to a warrant than on those made solely at the instance of an exercise of authority that was so mistrusted at common law. *See also Groh v. Ramirez,* 124 S. Ct. 1284, 1292 (2004) (finding similar requirement for search warrant to be inherent in the "reasonableness" standard).

Only the "same conduct" test comports with the traditional notions of fairness that are inherent in this doctrine. The arrestee is given notice, at the time of arrest, of the conduct that formed the basis for his arrest, thereby affording him the ability to challenge a patently unlawful arrest, arrange for a lawyer, etc. Allowing the after-the-fact extrapolation proposed by Devenpeck is clearly at odds with this.

f. Allowing police to find potentially unlawful conduct after the fact of an unlawful arrest runs counter to the time-honored right of a citizen to resist an unlawful arrest.

We are adjured to look to the past, as the Fourth Amendment should not be construed in such a way as to provide *less* protection that was available at common law. *See County of Riverside v. McLaughlin,* 500 U.S. 44, 71 (1991) (Scalia, J., dissenting); *California v. Acevedo*, 500 U.S. 565, 583 (1991) (Scalia, J., concurring) (asserting "the first principle of the 'reasonableness' requirement of the Fourth Amendment affords the protection that the common law afforded"). Adoption of anything broader than the "same conduct" test would run counter to another common law tradition – the ability to resist an unlawful arrest. *See generally* Davies, 98 Mich. L. Rev. at 625.

This right was recognized three hundred years ago most famously in *Regina v. Tooley*, 2 Ld.Raym. 1296, 92 Eng. Rep. 349, 351-52 (Queen's Bench 1710). In *Tooley*, the court mitigated murder to manslaughter in a case involving the killing of a constable while effecting an unlawful arrest, stating that "where the liberty of the subject is invaded, it is a provocation to all the subjects of England," and "offensive to the Magna Charta." 92 Eng.Rep. at 352-53. This right to resist was imported into American common law. *See, e.g., Brown v. United States*, 159 U.S. 100 (1895); *Commonwealth v. Kennard*, 25 Mass. (8 Pick.) 133, 134-36 (1829); *State v. Bowen*, 234 P. 46 (Kan. 1925); *City of Columbus v. Holmes*, 152 N.E.2d 301 (Ohio 1958), *aff'd per curiam*, 159 N.E.2d 232 (1959).

As this Court stated, "If the officer had no right to arrest, the other party might resist the illegal attempt to arrest him, using no more force than was absolutely necessary to repel the assault constituting the attempt to arrest." *John Bad Elk v. United States*, 177 U.S. 529, 534-35 (1900); *See also United States v. Di Re*, 332 U.S. 581 (1948) ("One has an undoubted right to resist an unlawful arrest, and courts will uphold the right of resistance in proper cases.").

As late as 1966, 45 states recognized this "arrest rule." Max Hochanadel & Harry W. Stege, Note, *Criminal Law: The Right to Resist an Unlawful Arrest: An Out-Dated Concept?,* 3 Tulsa L.J. 40, 46 (1966). By 1997, the rule was still vital in 20 states. *See* Adam P. Wright, *Resisting Unlawful Arrests: Inviting Anarchy or Protecting Individual Freedom?,* 46 Drake L. Rev. 383, 387-88 & n.49 (1998) (collecting statutes and cases). Even in states that have modified this rule, resistance is *still* authorized when death or injury is likely in submitting to an unlawful arrest. *State v. Garcia*, 27 P.3d 1225 (Wash. App. 2001) (addressing modified "arrest rule").

Adopting the "rationalization" test would subject a citizen who exercises his or her right to resist "obvious injustice" to the possibility that, years after the fact, some malevolent scrivener could, by poring over yellowing police reports, find some other crime that *could have* served as the basis for the arrest, and file charges accordingly, thereby exposing the arrestee to criminal liability for obstruction or battery for resisting what was, on its face, an unlawful deprivation of liberty.[15]

15. The justification for this hoary right prove its vitality even today. As Aleksandr Solzhenitsyn wrote, had resistance begun "at the moment of the arrest itself," the Stalinist machine "would have ground to a halt." Aleksandr Solzhenitsyn, *The Gulag Archipelago*, at 15 (English Ed. 1973).

g. This Court's precedent under Fifth and Sixth Amendment jurisprudence show that separate occurrences are just that – separate.

The "same conduct" test is in accord with this Court's rulings in other areas of the law – namely, Miranda and the right to counsel. Most recently, in addressing whether Miranda rights had been observed, this Court distinguished between contact at the suspect's home and more in-depth questioning at the police station, stating that a reasonable person would realizes that it was "a new and distinct experience" *Missouri v. Seibert*, 529 U.S. at 14 (slip opinion) (citing *Oregon v. Elstad*, 470 U.S. 298 (1985). There is no principled reason to allow qualified immunity to flow between "distinct experience[s]" when Miranda rights generally do not.[16]

This same ability, and willingness, to delineate between events was shown in *Texas v. Cobb*, in which the Court held that the right to counsel under the Sixth Amendment is implicated on for the same offense, refusing to expand it even to related offenses unless they are identical under the *Blockburger* test. 532 U.S. 162 (2001); *Blockburger v. United States,* 284 U.S. 299 (1932). This same standard underlies double jeopardy precedent. *See Brown v. Ohio*, 432 U.S. 161 (1977). The "same conduct" test harmonizes well with those.

16. In *Seibert*, the Court found that the unwarned confession in the station house followed by a warned confession did *not* meet this "distinct experience" standard. *Id*.

h. Allowing ex-post-factor rationalization would increase litigation, and blur the bright lines between lawful, and unlawful, arrests.

Additionally, rather than clarifying the rules, allowing ex-post-facto searches through unrelated conduct would serve to obfuscate them. This Court has repeatedly stressed the need for "a clear rule, readily understood by police officers," *Thornton v. United States*, 124 S. Ct. 2127, 2133 (2004), that is "easily applied, and predictably enforced." *New York v. Belton*, 453 U.S. 454, 459 (1981). Indeed, this Court has eschewed rules that are "qualified by all sorts of ifs, and, and buts." *Belton*, 453 U.S. at 458.

Here, there is an institutional benefit to be gained by imposing a bright-line rule limiting the focus of inquiry to the same conduct. By delimiting the inquiry to an objective assessment of the conduct for which the person was arrested, there is no need to engage in "hair-splitting distinctions." *New York v. Quarles*, 467 U.S. 649, 664 (1984) (O'Connor, J., concurring).

Conversely, the "anything goes" test proposed by the Petitioners is similar in application to the "sensitive," case-by-case analysis proposed, and rejected, in *Atwater v. City of Lago Vista*, in favor of more "readily administrable rules," such as the "same conduct" test. 532 U.S. 318, 347 (2001). Much like in *Atwater*, while the case-by-case analysis suggested by the Petitioner in that case has a superficial appeal that seems to "respect the values of clarity and simplicity," in reality it would unduly complicate police work by injecting an element of uncertainty into the analysis, making it hinge on the outcome of a belated liability review

and legal analysis completely disconnected from the events on the scene. *See Atwater,* 532 U.S. at 347-348 (noting with disapproval prospect of adopting rule that hinges on "judicial second-guessing months and years after an arrest or search is made"); *Scott v. United States*, 436 U.S. 128, 135 (1978) (noting that post-hoc explanations are "prepared after the fact by a Government attorney and us[e] terminology and categories which were not indicative of the agents' thinking at the time. . . .") *See generally* Wayne A. Logan, *Street Legal: The Court Affords Police Constitutional Carte Blanche*, 77 Ind. L.J. 419 (2002).

Since roadside arrests are "frequently recurring," *Thornton v. United States*, 124 S. Ct. 2127, 2134 (2004) (Scalia, J., concurring), there is a profound interest in adopting an approach that streamlines, rather than attenuates, the analysis. Thus, the Court should eschew the rationalization approach for the "readily administrable" same conduct test.

i. Allowing the rationalization test would undermine the interests in suppressing the fruits of unlawful searches and seizures.

The leading Vermont case shows another problem inherent in the "anything goes" approach – namely, its use to justify the fruits of an illegal search. In *State v. Hollis*, police stopped a vehicle based on a tip that the driver was transporting cocaine. 633 A.2d 1362, 1363 (Vt. 1993). A records check showed the driver's license was suspended. *Id*. Although the officer did not arrest the driver for DLS, he conducted a vehicle search and found marijuana. *Id*. The officer then announced that the driver was being cited

for driving on a suspended license, and arrested for possession of marijuana. *Id*. At the station, an officer found a baggie of cocaine in the room with the waiting defendant, who was charged with possession of cocaine, marijuana, and DLS. *Id*.

Noting that "the arresting officer was aware that defendant had been operating a vehicle with a suspended license but chose not to arrest him on that charge," the Court found that the search of the vehicle was unlawful, as it was not incident to arrest. 633 A.2d at 1366. In applying the "same conduct" test, the Court observed that adopting the "could have" reasoning would "break the causal link" between the unlawful search and the subsequently discovered evidence, allowing evidence that was clearly seized unlawfully to nevertheless be admitted. Finding this to be anathemic to the deterrent purposes of the exclusionary rule, the Vermont Supreme Court upheld the suppression order. *Id*. at 1367.

j. This standard does not do a disservice to the (obviously) important societal goal of crime prevention.

The same conduct test does not represent a triumph of form over substance. It does not impose liability for mere clerical errors or technical imprecision in booking. *See Florida v. Royer,* 460 U.S. 491, 507 (1983) (plurality opinion); *Sibron v. New York,* 392 U.S. 40, 66-67 (1968). Instead, it allows "some latitude for honest mistakes," *see Maryland v. Garrison*, 480 U.S. 79, 87 (1987), by allowing qualified immunity even if the officer was wrong about the name or characterization of the predicate conduct. Several cases make this point eminently clear.

In North Dakota, an arrest for driving with an open container was held lawful based on the "same conduct" test. *State v. Smith*, 452 N.W.2d 86 (N.D. 1990). In that case, the police officer saw man with what appeared to be open beer bottle, but did not see him driving. *Id*. at 87. The officer drove to where the man had been standing outside his car, and found a cold beer bottle on the ground. *Id*. He then stopped the car for an "open container" violation, and saw numerous weapons in plain view (Smith was a felon, and not allowed to possess firearms). *Id*. In addressing whether the officer had reasonable suspicion to stop the car, the North Dakota Supreme Court approved the stop, noting that the empty bottle justified a citation for improper disposal (and, thus, a stop), and that the offenses "are related because they arise from the same set of factual circumstances." *Id*. at 89-90.

Likewise, *Ochana v. Flores* shows the proper balancing. In that case, police responded to a call and found Ochana unresponsive and in a stupor, with his car running, stopped at a traffic signal in Chicago. 199 F. Supp.2d 817, 823 (N.D. Ill. 2002). A bag with white powder was seen sticking from a backpack and a bottle that appeared to have an altered prescription. *Id*. at 824. He was charged with obstructing traffic, possession of a controlled substance, and altering a prescription. The latter two charges were dismissed after testing showed no illegal drugs. *Id*.

In a § 1983 action challenging the arrest, the district court found that there was probable cause to arrest Ochana for the closely-related crimes of driving under the influence, reckless driving, and negligent driving, as

> [a]ll three of these charges could reasonably be based on the same set of facts – that Ochana was

> asleep or unconscious at the wheel of his car, while at a stoplight in front of a line of traffic, with the gear of his car in drive and his foot on the brake – that gave rise to the arrest.

199 F. Supp.2d at 827, 833-34. *See also Price v. City of Westland*, 1995 WL 871202 (E.D. Mich) (finding qualified immunity in prosecutions for spousal abuse of two men because, even though old ordinance had been amended, the "hitting, biting and chasing" of one wife and running over the legs of the other "with a heavy piece of machinery" still violated the new ordinance and the state statute).

Additionally, in an Arkansas case involving an arrest for "horseback DUI," *w*hile agreeing that a person riding a horse could not reasonably be arrested for DUI, the Arkansas High Court found that probable cause did exist for the offense of public intoxication, which, likewise, arose from the same conduct. *Baldridge v. Cordes*, 85 S.W.3d 511, 516-17 (Ark. 2002); *See also Williams v. Jaglowski*, 269 F.3d 778, 784 (7th Cir. 2001) (finding obstruction of justice and failure to follow police rules were based on same facts in arrest of suspended police officer); *Parker v. Swansea*, 270 F. Supp.2d 92 (D.Mass. 2003) (finding qualified immunity in malicious prosecution claim due to "related offense" doctrine).

All told, it is evident that the societal benefits conferred by any expansion do not outweigh the costs "in terms of unremedied meritorious claims," *Crawford-El*, 523 U.S. at 1600-01 (Rehnquist, C.J., dissenting), and that the approach used by the Ninth Circuit is reasonable, appropriate, and constitutional.

C. *The law was clearly established that the Ninth Circuit would find the extrapolation of probable cause from unrelated conduct to be objectively unreasonable, and decline to accord qualified immunity.*

If the law is clearly established, qualified immunity normally fails, as a reasonably competent public official should know the law. *Harlow*, 457 U.S. at 818-19. "The entire jurisprudence of qualified immunity is premised on the proposition that well-trained, competent police officers will be aware of what constitutional rights have been established." *Henderson v. Mojave County,* 54 F.3d 592 (9th Cir. 1995).[17]

The question of whether the law is clearly established is a "pure question of law for the court to decide." *Mendoza v. Block*, 27 F.3d 1357, 1360 (9th Cir. 1994). The law need only be sufficiently clear that "a reasonable official would understand that what he is doing violates that right," that is, that he is given "fair warning" of the rights. *Anderson v. Creighton,* 483 U.S. 635, 640 (1987). "The determination whether the facts alleged could support a reasonable belief in the existence of probable cause or reasonable suspicion is also a question of law to be determined by the court." *Act Up!/Portland v. Bagley,* 988 F.2d 868, 873 (9th Cir. 1993).

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17. *See, e.g., Gaines v. McGraw,* 445 F.2d 393 (5th Cir. 1971) imposing liability on police officers stating,

> The officers undertook to arrest the appellant for something that was not a crime, which was not described in the statute to be a crime, by an ordinary reading of the language, and which the Supreme Court of the State of Alabama had almost in *haec verba* with the facts testified to here determined was not a crime.

The right not to be arrested or prosecuted without probable cause has, of course, long been a clearly established constitutional right. *Dunaway v. New York*, 442 U.S. 200 (1979). "It is now far too late in our constitutional history to deny that a person has a clearly established right not to be arrested without probable cause." *Cook v. Sheldon*, 41 F.3d 73, 78 (2d Cir. 1994).[18] It was also clear that the Ninth Circuit would not allow rationalization of an unlawful arrest by looking to unrelated conduct.

1. *Sources of law.*

In the Ninth Circuit, the inquiry begins by looking to binding precedent. *See Capoeman v. Reed*, 754 F.2d 1512, 1514 (9th Cir. 1985). If the right is clearly established by decisional authority of the Supreme Court or the Circuit, the inquiry should come to an end. On the other hand, when "there are relatively few cases on point, and none of them are binding," the inquiry becomes whether the Ninth Circuit or Supreme Court, at the time the out-of-circuit opinions were rendered, would have reached the same results. *See id*. at 1515. Thus, in the absence of binding precedent, the court must look to "whatever decisional law is available to ascertain whether the law is clearly established" for qualified immunity purposes, "including decisions of state courts, other circuits, and district courts." *Malik v. Brown*, 71 F.3d 724, 727 (9th Cir. 1995); *see also Dickerson v. McClellan*, 101 F.3d 1151, 1158 (6th Cir. 1996) (reiterating standard).

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18. This is well within the level of specificity needed to put the officers on notice of the lines they should not cross. *See generally Anderson*, 483 U.S. at 639-41 (addressing level of generality for identifying clearly established rights).

As Judge Posner has stated it,

> The fact that a statute has not been construed does not mean that there is no law, that anything goes. . . . The clearest violations may never generate an appeal, just because there is no nonfrivolous ground for an appeal; and without an appeal there will be no authoritative judicial interpretation of the statute. It would be a considerable paradox to say that public officers have a license to commit statutory violations so outlandish that they have never been the subject of a published appellate decision. . . . Suppose that the defendants had arrested [the plaintiff] for the possession of property given to him by his mother, on the theory that since mothers are notoriously soft-hearted any 'gift' from mother to son is actually a theft by the son. . . . No reported case . . . has ever addressed this imaginative theory.

Northern v. City of Chicago, 126 F.3d 1024, 1028 (7th Cir. 1997) (Posner, C.J.).

Thus,

> the absence of legal precedent addressing an identical factual scenario does not necessarily yield a conclusion that the law is not clearly established. . . . Indeed, it stands to reason that in many instances 'the absence of a reported case with similar facts demonstrates nothing more than widespread compliance with' the well-recognized applications of the right at issue on the part of government actors.

Johnson v. Newburgh Enlarged School District, 239 F.3d 246, 251 (2d Cir. 2001), quoting *Eberhardt v. O'Malley*, 17 F.3d 1023, 1028 (7th Cir. 1994). Cf., *Sh.A. v. Tucumcari Municipal Schools*, 321 F.3d 1285, 1288 (10th Cir. 2003).

2. *The Court of Appeals properly found that the law was clearly established that an on-duty traffic stop on a public highway was not, in any sense, a "private conversation."*

The Washington Privacy Act prohibits, *inter alia,* the recording of any "private communication" or "private conversation" without the consent of all parties. RCW 9.73.030(1)(a) & (b).[19] *See also Kadoranian v. Bellingham Police Dep't.,* 829 P.2d 1061 (Wash. 1992). The statute is "designed to protect private conversations from governmental intrusion," *State v. Clark,* 916 P.2d 384, 393 (Wash. 1996), and "reflects a desire to protect individuals from the disclosure of any secret illegally uncovered by law enforcement." *State v. Fjermestad,* 791 P.2d 897, 902 (Wash. 1990). Washington courts have held that if a conversation is

19. RCW 9.73.030 provides: (1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any: (a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication; (b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

not private, then any recording falls "outside the purview of the statute." *State v. D.J.W.,* 882 P.2d 1199, 1202 (Wash. Ct. App. 1994).

Washington's definition of a "private communication" is common sense itself. In *State v. Faford,* the Washington Supreme Court interpreted a private communication as one that is "secret," "not open or in public." 910 P.2d 447 (Wash. 1996). In keeping with that common-sense definition, the Court of Appeals held in *State v. Slemmer* that recording a public meeting at which minutes were taken was inherently not private. 738 P.2d 281, 285 (Wash. Ct. App. 1987), *impliedly overruled on other grounds, State v. Frohs*, 924 P.2d 384 (Wash. Ct. App. 1996). Other actions that have been found not to have any expectation of privacy are: phone calls, *State v. Faford*, 910 P.2d 447 (Wash. 1996) (expectation of privacy in use of cordless phone), telephone calls made to a police dispatcher, and even telephone calls that are accidentally answered by the police. *Washington v. Gonzales*, 900 P.2d 564 (Wash. Ct. App. 1995). The standard applied throughout is the same "reasonable expectation of privacy" that informs Fourth Amendment jurisprudence. *State v. Bonilla,* 598 P.2d 783 (Wash. Ct. App. 1979).

Washington has also firmly squashed any attempt by the government to use the Privacy Act against its own citizens, most notably in *State v. Flora,* 845 P.2d 1355 (Wash. Ct. App. 1992), in which Flora was arrested for secretly taping police who were investigating an allegation of violating a restraining order. 845 P.2d at 1355-56.

On appeal, however, the Court of Appeals was blunt – the officers had no expectation of privacy. 845 P.2d at 1357. In fact, the Court stated:

> The State urges us to adopt the view that public officers performing an official function on a public thoroughfare in the presence of a third party and within the sight and hearing of passersby enjoy a privacy interest which they may assert under the statute. We reject that view as wholly without merit.

Id. The Court continued, stating that there was "no persuasive basis" for according a privacy interest to law enforcement officers, and chastised the State for urging the Court to effectively "distort the rationale" of the Privacy Act and the case law interpreting it. *Id*.

This holding was cited with approval by the Washington Supreme Court in *State v. Clark,* in which the Court observed, in reviewing case law on the Privacy Act, "The officers in *Flora* had **no personal privacy interest** in statements made as public officers effectuating an arrest in public." 916 P.2d at 393 (emphasis added).

This same result was reached by the United States District Court for the Western District of Washington in *Fordyce v. Seattle,* 907 F. Supp. 1446 (W.D. Wa. 1995). Fordyce was arrested for videotaping part of a public demonstration in Seattle in 1990. *Id*. He sued, claiming that his arrest for violating the Privacy Act was improper. *Id*.

The Ninth Circuit found that the law on the state Privacy Act was "uncertain" in 1992, and found qualified immunity.

Fordyce v. Seattle, 55 F.3d 436 (9th Cir. 1995). On remand, the District Court issued declaratory relief reiterating that the Privacy Act does not criminalize recording audible conversations in a public street with a readily apparent device. 907 F. Supp. at 1448.

The undisputed facts put Mr. Alford's case squarely on all fours with the above opinions. As in *Flora*, the recording (and the interaction with the officers) took place on a public road, open to the eyes and ears of all passersby. 845 P.2d at 1356; JA 113, 124.

Even aside from the *Flora* opinion, the Court of Appeals correctly noted that no reasonable person believes that a police officer's interaction with the public is in any sense "private." They are public servants performing a public function with members of the public in public. The officers admitted to testifying in court about what transpires, and what is said, at traffic stops. JA 125-26. Likewise, there is no reasonable expectation of privacy in anything that is done in full view (and earshot) of the public. This point was made quite bluntly by the Washington Supreme Court in the *Clark* opinion, in which it stated that there was no expectation of privacy in anything done "in plain view and potentially within sight or hearing of anyone who might have passed by." 916 P.2d at 394.

As the Washington Supreme Court stated in *State v. Clark,* "a conversation on a public thoroughfare in the presence of a third party and within the sight and hearing of passersby is not private." 916 P.2d at 392. Based on this, there was no principled reason for Devenpeck to believe that he had any protection under the Privacy Act.

Since *Flora* was decided in 1992, and *Fordyce* in 1995, the law was clearly established that RCW 9.73.030 does not prohibit taping of police officers in a situation such as the present one. It was also clearly established that a person could not be criminally arrested, nor charged, nor incarcerated for violating RCW 9.73.030 for such conduct.[20]

Additionally, the law was clearly established that probable cause could not be established by an erroneous understanding of the law. While an officer may have reasonable suspicion or probable cause even where his reasonable understanding of the facts turns out to be mistaken, *see, e.g.*, *United States v. King*, 244 F.3d 736, 739 (9th Cir. 2001), courts have repeatedly held that a mistake about the law cannot justify a stop, let alone an arrest, under the Fourth Amendment. *United States v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000) (holding that officer had no reasonable suspicion for traffic stop where driver "simply was not" violating any law); *accord United States v. Mariscal*, 285 F.3d 1127, 1130 (9th Cir. 2002); *King*, 244 F.3d at 739; *United States v. Twilley*, 222 F.3d 1092, 1096 (9th Cir. 2000); *cf. United States v. Wallace*, 213 F.3d 1216, 1220-21 (9th Cir. 2000) (suggesting that no probable cause would exist in "cases in which the defendant's conduct does not in any way, shape or form constitute a crime").

As the Ninth Circuit explained in *Mariscal*: "If an officer simply does not know the law, and makes a stop based on objective facts that cannot constitute a violation, his suspicions cannot be reasonable. The chimera created by his

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20. *See also Dasey v. Anderson,* 304 F.3d 148 (1st Cir. 2002) (activity in the presence of others who owe no duty of confidentiality is hardly "private.")

imaginings cannot be used against the [suspect]." 285 F.3d at 1130. Those words are strangely echoed by the testimony of one of the officers in this case, who stated "Well, since the arrest we've been given the case statute [sic] and the way it's read, apparently he can do it." JA 130.[21] The officers knew, and admitted, the conduct for which Mr. Alford was arrested. JA 144, 163 (admitting that the real reason for the arrest was not the recording, but that "He was clandestinely recording the conversation"); 174 (stating that the decision to arrest was made "When I observed the tape recorder.") Just because they may be liable for that decision does not make the law unclear, nor does it entitle them to qualified immunity.

3. *The Ninth Circuit affirmatively adopted the closely-related offense rule in the Gasho case, making the law clearly established that unrelated conduct cannot supply missing probable cause.*

It is beyond peradventure that the Ninth Circuit adopted the closely related offense rule, and that this was the binding law in this Circuit at the time of Mr. Alford's unlawful arrest.

In *Gasho,* a couple sold their DC-3 to a Canadian corporation, and had changed its marking preparant to flying

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21. Amicus United States strays far afield from the questions on which certiorari was granted, arguing the bona fides of Mr. Alford's arrest under a hypothetical construct that ignores the closely-related offense doctrine. (Brief of U.S. at 24-26) These contentions were not presented in the petition for certiorari, are not properly before the Court, and are not addressed here. *See* Supreme Court Rule 14.1(a); *Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 253 (1999); *Meyer v. Holley*, 537 U.S. 280, 291 (2003).

it to Canada. *Gasho v. United States*, 39 F.3d 1420 (1994), *cert. denied*, 515 U.S. 1144 (1995). An FAA inspector had approved this. 39 F.3d at 1425-26. Customs agents seized the plane for "misleading" markings, but allowed Mrs. Gasho to remove the logbooks. *Id*. at 1426. Despite this, the agents then arrested the Gashos for "unlawful removal of property from Customs custody." *Id*.

In their subsequent *Bivens* action, it turned out that one reason the couple was arrested was because, as one officer put it, their refusal to turn over the logbooks "made us mad." 39 F.3d at 1427.[22] The Court of Appeals found that qualified immunity did not lie, and reversed summary judgment. *Id*. at 1438-39. In reviewing the government's claim that probable cause existed, the Court of Appeals specifically adopted, and applied, the "closely related offense" doctrine, adopting the rationale of *United States v. Rambo*, 789 F.2d 1289 (8th Cir. 1986). 39 F.3d at 1428 n.6. In its analysis, the Court specifically pointed out that "Here . . . the United States is citing a closely related offense for the *same* conduct by the arrestee." *Id*. Thus, the use of the doctrine was not mere *obiter dictum*, but was essential to the holding, and analysis,

22. This "contempt of cop" theme further underscores that no policy underlying qualified immunity is served by granting immunity in these instances. *Compare Houston v. Hill*, 482 U.S. 451, 462-63 (1987) ("The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.") *and Funnye v. Paragon Sporting Goods Co., LLC,* 2001 WL 300740 *3 (S.D.N.Y.) (when man asked for paper to write down badge numbers of investigating officers, officer immediately decided to arrest him). *See also Kies v. City of Aurora,* 156 F. Supp.2d 970 (N.D.Ill. 2001) (woman arrested after questioning why officer beat student to break up fight).

in the case. Thus, the "binding precedent" element was present, making the law clearly established.

This has been followed as precedent in this Circuit. In another case decided in the Ninth Circuit, a district court refused to retroactively justify an arrest for manufacturing methamphetamine "by the possible existence of probable cause to arrest" for an unconnected possession of a police baton. *Puliafico v. County of San Bernardino*, 42 F. Supp.3d 1000, 1012 (C.D. Cal. 1999). As the court noted, "The problem with this argument is that plaintiff was unequivocally not arrested for that (assumed) offense." *Id*. at 1017. Citing the "modern rule" as iterated in *Gasho*, *supra*, the court found that the baton-possession offense was "completely separate" from the predicate offense, and "cannot justify" the arrest. *Id*.; *see Seibert*, 529 U.S. at 14 (adopting "separate incidents" analysis)

Based on the clear language of *Gasho*, and the ease with which Ninth Circuit courts have addressed its treatment of the closely-related offense doctrine as binding precedent, it strains reason to claim that Devenpeck was not on notice of the boundaries of qualified immunity in the Ninth Circuit.

Further, although headnotes are not part of the opinion, they certainly should be considered in determining the notice given to the world. In the *Gasho* case, the headnote reads "Probable cause may exist for closely related offense, even if that offense was not invoked by arresting officer, as long as it involves the same conduct for which the suspect was arrested. . . ." 39 F.3d 1420, n.7.

This is in sharp contrast to the situation regarding media ride-alongs that was addressed in *Wilson v. Layne.* 526 U.S.

603 (1999). In *Wilson*, officers allowed a Washington Post reporter to accompany the execution of an arrest warrant. *Id.* at 607-08. While holding that this ride-along *was* a violation of the Fourth Amendment, the Court allowed qualified immunity to the officers, with the issue turning on whether the law was "clearly established" that such media ride-alongs would violate the Fourth Amendment. 526 U.S. at 614-16. This decision was compelled by the dearth of authority on the issue – there was no controlling authority from the relevant jurisdiction, there was no consensus of persuasive authority, there was, in fact, only one published opinion (from another state), and that actually *approved* of the practice. *Id*. at 616. Given this "undeveloped" state of the law, it is small wonder that it was not unreasonable for the police to believe the ride-along was lawful. *Id*. at 617. [23] That is simply not the case here.

Although Petitioners attempt to make much of several states that have failed to follow the federal precedents, this straw man is easily disposed of. Since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), it is irrelevant if state law purports to allow actions that are violative of federal rights; "The question in this Court upon review of a state-approved search or seizure 'is not whether the search (or seizure) was authorized by state law. The question is rather whether the

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23. Amazingly, Amicus National League of Cities misrepresents this holding as a "determination . . . that a conflict among appellate courts *establishes conclusively* that a legal issue is *not* clearly established." NLC Brief at 18 (emphasis supplied). That is certainly not the holding of *Wilson*, which had *no* controlling authority from the relevant jurisdiction, and is not relevant to the issues in this case, where the Ninth Circuit had already adopted the "same conduct" test in clear terms.

search (or seizure) was reasonable under the Fourth Amendment.'" *Sibron*, 392 U.S. at 60-61.

This principle (which is at the heart of federalism) was echoed in *Elkins v. United States,* in which the Court concluded that "the test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." 364 U.S. 206, 224 (1960). To put it bluntly, the Court has "never intimated . . . that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular state in which [it] occurs." *California v. Greenwood,* 486 U.S. 35, 43 (1988); *Bergstralh v. Lowe*, 504 F.2d 1276, 1277 (9th Cir. 1974) (lawfulness of arrest does not use state law if that law is "inconsistent with the federal Constitution"). *See Wilson*, 526 U.S. at 623 (Stevens, J., concurring in part and dissenting in part).

Thus, while Washington "is, of course, free to develop its own law of search and seizure to meet the needs of local law enforcement," *Sibron,* 392 U.S. at 60-61, it may not, in so doing, trench upon the Fourth Amendment protections as iterated by the Supreme Court, or the applicable federal Circuit.

CONCLUSION

This case does not tread on the "unsettled margins" of the Fourth Amendment – it implicates the core protections of freedom from unlawful and arbitrary arrest.

As one member of the Washington Supreme Court observed, there is no legitimate reason to "privilege[] government agents in the wrong to the prejudice of citizens in the right," as doing so would mean that "[I]n a society of equals, those who violate their public trust by stepping beyond the boundaries of their lawful authority are privileged to become the usurping masters of the public they were originally entrusted to serve." *Valentine v. State*, 935 P.2d at 1307 (Sanders, J. dissenting).

In this instance, the normative balance is struck only by validating the approach of the Ninth Circuit to impose common-sense limits on the ability of law enforcement to rely on unconnected conduct to validate an unlawful arrest. Given that the rules on qualified immunity laid down by this Court apply across many classes of plaintiffs and many types of damages actions, the expansion proposed by Petitioners herein is unwarranted, and potentially fatal to the vindication of fundamental rights. *See Butz v. Economou*, 438 U.S. 478, 500-04 (1978); *Crawford-El*, 523 U.S. at 585. Accordingly, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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