No. 17-1174

IN THE

Supreme Court of the United States

LUIS A. NIEVES, *et al.*,
Petitioners,
v.
RUSSELL P. BARTLETT,
Respondent.

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

BRIEF OF THE DISTRICT OF COLUMBIA AND THE STATES OF COLORADO, IDAHO, INDIANA, KANSAS, LOUISIANA, MAINE, MISSISSIPPI, MONTANA, NEW MEXICO, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, UTAH, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In *Hartman v. Moore*, 547 U.S. 250 (2006), this Court held that probable cause defeats a First Amendment retaliatory-prosecution claim under 42 U.S.C. § 1983 as a matter of law. Does probable cause likewise defeat a First Amendment retaliatory-arrest claim under Section 1983?

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INTEREST OF *AMICI CURIAE*

The ability to enact, administer, and enforce criminal laws is at the heart of a State's sovereignty. Most crimes fall under state rather than federal jurisdiction, making law enforcement a primary function for state and local governments. In protecting the safety of their residents, States have a vital interest in ensuring that law enforcement officers can arrest based on probable cause. Where a State has authorized arrest for a crime, and that arrest is based on probable cause, arresting officers should not fear that they will be subject to liability for a First Amendment retaliatory-arrest claim. State law enforcement would be impaired if officers were deterred from making arrests by the prospect of defending their subjective motivations years later in a subsequent civil lawsuit.

The *Amici* States urge this Court to reverse the court of appeals' decision and, consistent with its decision in *Hartman v. Moore*, 547 U.S. 250 (2006), determine that the absence of probable cause is an element of a First Amendment retaliatory-arrest claim.

SUMMARY OF ARGUMENT

As petitioner explains, it follows from this Court's precedent and common-law analogues that 42 U.S.C. § 1983 requires a plaintiff to show a lack of probable cause to recover damages for an arrest allegedly in violation of the First Amendment. The *Amici* States write to highlight two additional points.

1. The Ninth Circuit's contrary rule creates immense practical difficulties for law enforcement. If a litigant need not prove the absence of probable cause, virtually every arrest would give rise to a potentially viable retaliatory-arrest lawsuit for damages. It would be

easy for any arrestee to claim that he engaged in protected speech contemporaneous with his arrest and thus that the arrest was in retaliation for the speech. Suspects routinely speak to police during encounters, make other reported or overheard statements, and display speech on their clothing, possessions, or vehicles. Unless the speech itself constitutes a crime, virtually all of it would be protected under the Ninth Circuit's rule.

It would similarly be easy for an arrestee to allege that the arrest was motivated, in part, by the officer's disagreement with that speech. Much of an arrestee's speech might be critical and outspoken. Suspects will naturally object to police inquiry, protest their innocence, or communicate their displeasure in other ways. This can turn hostile. On a daily basis, police are required to withstand insults and verbal abuse. Arrestees may also choose to break a law either as a chosen means of protest or to state their objections to the law itself, and may therefore argue that their unlawful conduct was "expressive." Additionally, a suspect's speech may be inculpatory. It may suggest the requisite state of mind, a motive, or other facts relevant to guilt. In all those situations, an arrestee could readily claim that the speech was a motivating factor in his arrest.

Because retaliation would be so easy to claim, a retaliatory-arrest standard that lacks the absence of probable cause as an element would discourage officers from enforcing the law. Without the protection of an objective, probable-cause test, arresting officers would fear a suit that likely could not be decided without burdensome discovery and a trial. They would also correctly foresee a real threat of liability inherent in a jury trying to reconstruct their subjective

motivations. Because police often must make arrest decisions quickly and under difficult and tense circumstances, the threat of such litigation would cause them to hesitate to arrest, even when supported by probable cause and the need to protect the public. Adopting the Ninth Circuit's rule would also make police encounters more dangerous by encouraging hostility toward officers as a tactic to avoid arrest.

It is unclear how, under the Ninth Circuit's rule, a court or jury could objectively evaluate whether an arrestee's speech or unlawful conduct caused her arrest. Some have suggested focusing liability on whether the officer, in his defense, can show that police generally arrest for the relevant offense. But an officer cannot realistically know, on the scene, whether an offense is one that is or is not commonly enforced. Any arrest, then, would be made under a cloud of potential liability, at the officer's own peril. Put simply, there is no practical method for making a determination about the "frequency" of arrests for a particular crime, even for purposes of the officer's defense at trial.

Moreover, a test focusing on what some hypothetical, average officer would have done in the same circumstance would impair the ability of police to address localized community problems. Factoring liability on whether police generally arrest for an offense would gradually pressure police, as suits are litigated, to categorize each offense as either one for which they always arrest or never arrest. Among other problems, this frustrates the application of community policing, which encourages police to act with greater discretion, continually using input from the community on what problems warrant police resources and what responses are effective.

2. The Ninth Circuit's rule is also unnecessary to protect First Amendment interests. States and localities can take effective remedial action in response to citizen complaints of police misbehavior, including alleged retaliation. Law enforcement agencies have an important duty, as well as a direct interest, in ensuring that citizen complaints against officers are thoroughly investigated and appropriate disciplinary action is taken. Such internal review is a vital component of managing a police department and maintaining the public trust upon which law enforcement depends. State and local governments can flexibly adopt solutions that promote law enforcement accountability and effectiveness.

Additionally, many forms of external review of citizen complaints have been implemented throughout the nation. In many cities, citizen review boards with subpoena powers directly investigate complaints of officer misconduct and make findings and recommendations. Other jurisdictions have independent oversight agencies that closely review a police department's handling of its own internal affairs investigations. Though the mechanisms may vary, each locality can select the administrative process that best addresses its own situation. State governments have their own oversight role, too, and can enact legislation and policies to ensure that citizen complaints are appropriately handled.

States may also afford additional protections against retaliatory arrest by limiting the arrest power and establishing alternatives to arrest. States generally prohibit warrantless arrests for misdemeanors unless the crime is committed in the officer's presence. States have also circumscribed the power to arrest by providing for release on citation or summons, in lieu of

a full custodial arrest, for certain crimes or under certain circumstances. The policies of local governments and police departments may establish additional standards and guidelines for citation in lieu of arrest, thus limiting the potential of retaliatory arrests for such crimes. First Amendment interests are important, but the Ninth Circuit's highly flawed and impractical rule is not the only option for protecting them.

ARGUMENT

I. The Ninth Circuit's Rule Inhibits Effective Policing By Discouraging Justified Arrests, Heightening The Peril Of Arrest Situations, And Limiting The Ability Of The Police To Respond To Community Problems.

As the Second, Fourth, Fifth, Eighth, and Eleventh Circuits have correctly recognized, the existence of probable cause defeats a claim for retaliatory arrest. *Mozzochi v. Borden*, 959 F.2d 1174, 1180 (2d Cir. 1992) (if "probable cause to arrest exist[s] independent of the defendants' motive," a retaliatory-arrest claim fails); *Pegg v. Herrnberger*, 845 F.3d 112, 119 (4th Cir. 2017), (where officer had probable cause to arrest plaintiff, "his arrest was not retaliatory"); *Keenan v. Tejeda*, 290 F.3d 252, 261-62 (5th Cir. 2002) (the "objectives of law enforcement take primacy over the citizen's right to avoid retaliation"); *McCabe v. Parker*, 608 F.3d 1068, 1075 (8th Cir. 2010) ("Lack of probable cause is a necessary element" of a First Amendment retaliatory-arrest claim); *Dahl v. Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002) ("the existence of probable cause to arrest" bars a First Amendment retaliation claim). That conclusion makes sense as a legal matter, *see* Pet. Br. 16-41, but it also furthers important public safety goals. If officers find probable cause to arrest under the totality of the circumstances, they should be

entitled to make that arrest—and thereby protect public safety—without fear that they will later be subject to a suit challenging their subjective motivations. The threat of such suits would not only make officers' already difficult and dangerous jobs even more harrowing, but would also hinder law enforcement agencies from taking custody of dangerous offenders and implementing effective community policing.

A. Under the Ninth Circuit's rule, nearly all arrestees could sue—and likely force a trial—by questioning the officers' subjective motivations.

1. Retaliatory arrest could easily be claimed in most instances given the prevalence of suspects' protected speech.

Under the Ninth Circuit's rule, an arrestee may subject his arresting officers to a burdensome lawsuit simply by alleging a retaliatory motive. Such claims will be easy to advance because an arrestee will almost always be able to identify protected speech contemporaneous with his arrest. There is a "vast realm" of protected speech, and content-based restrictions on protected speech are limited to just a few traditional categories (such as fraud, fighting words, and true threats). *United States v. Alvarez*, 567 U.S. 709, 717-18 (2012) (plurality op.); *see also Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 790-91 (2011) (outlining the exceptions "in a few limited areas" to the rule that speech is generally protected). As a result, in virtually every case where an arrestee speaks *at all*, she will have engaged in protected speech.

Suspects rarely remain completely silent during a police encounter. Those who have broken the law are

not happy to be apprehended and often speak critically of police. Hoping to frustrate the police investigation and ultimately avoid arrest, they routinely protest their innocence to officers or criticize the propriety of police action. *See, e.g.*, *Holguin v. City of San Diego*, 135 F. Supp. 3d 1151, 1162-63 (S.D. Cal. 2015) (plaintiff, arrested for being intoxicated and uncooperative, alleged that his arrest was in retaliation for asking police to "take it easy"). They may also engage in speech that is highly offensive but nevertheless protected, such as by hurling insults and profanities at police officers. Indeed, this Court has suggested that additional First Amendment protection for such speech may be warranted in part *because* police officers are trained not to respond to such abuse. *Houston v. Hill*, 482 U.S. 451, 461-62 (1987). Most courts agree and hold police to a higher standard. *See, e.g.*, *State v. Baccala*, 163 A.3d 1, 9 (Conn. 2017) (citing cases).

Perversely, if the Court were to adopt the Ninth Circuit's rule, a suspect's insults and profanities may well suggest—especially to lay jurors—that officers responded in a retaliatory manner. After all, such words are designed to provoke, and if spoken to an average citizen would ordinarily prompt an angry and perhaps violent response. Even a suspect's more tempered criticism or disapproval of the officers could easily be alleged to have motivated an arrest.

An arrestee could also readily allege retaliatory motive when his lawbreaking is directly tied to purported expressive conduct or protest. Persons may break a law to express disagreement with the law itself or related governmental policy. *See Wayte v. United States*, 470 U.S. 598, 600-01 & n.2 (1985) (letters explaining refusal to register with Selective Service). Or they may violate the law simply to

express themselves in a manner of their own choosing. For example, protestors may encamp unlawfully on public space, using such continued occupation to expound their message. *See Dukore v. District of Columbia*, 799 F.3d 1137, 1138-39 (D.C. Cir. 2015). Protestors may also trespass on the private property of entities whose practices or views they oppose. *See, e.g.*, *Logsdon v. Hains*, 492 F.3d 334, 337-38 (6th Cir. 2007) (abortion protestors); *Joyce v. Crowder*, 480 F. App'x 954, 955 (11th Cir. 2012) (environmental activists). Because of the close connection between the offense and the expression of protest, an arrestee could well claim retaliation in these circumstances—thereby deterring officers from making legitimate and often necessary arrests for trespassing or disorderly conduct within the encampment. *See, e.g.*, *Dukore*, 799 F.3d at 1139.

Even speech that provides evidence of criminal activity may be protected. A suspect's own speech might place him at the scene of the crime, reveal a motive, or indicate that he acted with the requisite intent. But under the Ninth Circuit's standard, an officer who relies on such inculpatory statements would then become subject to a retaliatory-arrest claim. After all, the content of the arrestee's speech would admittedly be a motivating factor in such an arrest. This would apply even in the extreme circumstance where a suspect is *confessing to a crime*: For example, if a person is arrested after stating that he has burned his draft card because of his beliefs, then he could claim that his arrest was retaliatory. *E.g.*, *United States v. O'Brien*, 391 U.S. 367 (1968). To avoid liability in such a circumstance, the officer would have to show something more than probable cause—such as, for example, that police generally make arrests when they observe evidence of the alleged crime. It is not clear, however, how an arresting officer

could possibly prove this, and even if he could, there is no reason why an officer who arrests a suspect based on the suspect's own inculpatory statements should be forced to litigate in that circumstance.

The risk of a subsequent suit for retaliatory arrest exists even in the rare case where the suspect says nothing to the officer directly. Officers often overhear, or receive reports of, statements made by the suspect. And even where the suspect himself is entirely silent, he could later claim that something as simple as the bumper sticker on his car or a slogan on his t-shirt was protected speech giving rise to the arrest.

2. Adopting the Ninth Circuit's rule would effectively transform the standard for arresting officers' liability, including qualified immunity, from an objective test into a subjective one.

Because a showing of protected speech poses little obstacle, a test for retaliatory-arrest claims that fails to incorporate probable cause as an element would turn on the subjective motivations of the arresting officers. It would thereby supplant the objective standards that this Court has firmly established for assessing the constitutionality of an arrest. "[T]his Court has long taken the view that 'evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.'" *Kentucky v. King*, 563 U.S. 452, 464 (2011) (quoting *Horton v. California*, 496 U.S. 128, 138 (1990)).

Qualified immunity would provide arresting officers little protection if it too turned on their subjective motivations. Qualified immunity is designed "to spare a defendant not only unwarranted liability, but

unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). As this Court has established, an objective standard for assessing officers' actions is needed to ensure that burdensome lawsuits do not occupy an unwarranted amount of law enforcement's time and attention. *See Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982). That is because "[j]udicial inquiry into subjective motivation . . . may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues." *Id.* at 817. After extensive discovery, arresting officers would then likely have to undergo a trial, since "questions of subjective intent so rarely can be decided by summary judgment." *Id.* at 816. As the *Harlow* Court concluded, basing qualified immunity on an officer's subjective motivations "has proved incompatible with [this Court's] admonition . . . that insubstantial claims should not proceed to trial." *Id.* at 815-16.

Under the Ninth Circuit's rule, an officer with retaliatory motive would not be entitled to qualified immunity even if the arrest were objectively reasonable, *i.e.*, supported by probable cause. To be sure, if it were unclear whether the speech was protected, qualified immunity would apply. Otherwise, though, the retaliatory motive establishing a First Amendment violation might defeat qualified immunity, as plaintiffs will no doubt argue, and thus qualified immunity would provide officers no added protection.

If needed, this Court could (and should) hold that, to the contrary, the existence of probable cause, or arguable probable cause, entitles an officer to qualified immunity on a First Amendment retaliatory-arrest claim. *See Crawford-El v. Britton*, 523 U.S. 574, 612

(1998) (Scalia, J., dissenting). Such a holding would preserve that doctrine's protections for official acts that are objectively reasonable, whatever the subjective intent. But, especially without such an extension of qualified immunity, the Ninth Circuit's rule would institute a profound and unwarranted shift in assessing officers' liability for arrests. It would replace well-established objective standards with an open-ended inquiry into an officer's subjective motivations.

B. A subjective test would discourage officers from enforcing the law and heighten the volatility of arrest situations.

The resulting litigation over officers' subjective motivations for arrests would impose significant societal costs. These would be beyond just the "general costs of subjecting government officials to the risks of trial," such as the "distraction of officials from their governmental duties." *Harlow*, 457 U.S. at 816. First, adopting the Ninth Circuit's standard would have a particularly adverse effect on the ability of states to protect their citizens from crime. "States have a strong interest in protecting public safety by taking into custody those persons who are reasonably suspected of having engaged in criminal activity, even where there has been no opportunity for a prior judicial determination of probable cause." *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991). Among its other purposes, a custodial arrest "ensures that a suspect appears to answer charges and does not continue a crime." *Virginia v. Moore*, 553 U.S. 164, 173 (2008).

The threat of damages claims based on an officer's subjective motivations would dissuade officers from making legitimate arrests. Officers who acted without retaliatory animus would still have reason to fear not only the burdens of litigation, but also the potential

liability that could result. They would be aware that a retaliatory motive is "easy to allege and hard to disprove." *Crawford-El*, 523 U.S. at 584-85. They also often must act "on the spur (and in the heat) of the moment." *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). Yet an officer would undoubtedly hesitate to act decisively knowing that a court or jury would later dissect the constitutionality of his actions based on its own reconstructed view of his thought processes. Officers would thus be incentivized to forgo arrest even when such action is appropriate to secure public safety. *See Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 337-38 (2012) (explaining rejection of proposed rule for warrantless arrests because "the risk of violating the Constitution would have discouraged [officers] from arresting criminals in any questionable circumstances").

Additionally, police encounters with suspects would become more perilous. Criminals would learn that confrontational speech could be particularly effective in forestalling arrest because of its added value for a potential lawsuit and the deterrent effect that would have on all but the most resolute officers. Indeed, from the lawbreaker's perspective, the more confrontational and incendiary the speech, the better. Officers meanwhile might reasonably perceive that the suspect's hostility could turn violent. Potential arrest situations are already tense, uncertain, and subject to sudden escalation. Adding a further element of provocation into such a fraught situation would increase the risk of harm to all involved.

As this Court acknowledged in *Lozman v. City of Riviera Beach,* 138 S. Ct. 1945 (2018), "[i]n deciding whether to arrest, police officers often make split-second

judgments." *Id.* at 1953. And "[t]he content of the suspect's speech might be a consideration in circumstances where the officer must decide whether the suspect is ready to cooperate, or, on the other hand, whether he may present a continuing threat to interests that the law must protect." *Id.* (citing *District of Columbia v. Wesby*, 138 S. Ct. 577, 587 (2018) ("suspect's untruthful and evasive answers to police questioning could support probable cause")). The "complexity of proving (or disproving) causation in these cases creates a risk that the courts will be flooded with dubious retaliatory arrest suits," absent the requirement that a plaintiff allege a lack of probable cause. *Id.* And the prospect of a flood of suits will no doubt have a strong deterrent effect on officers navigating already-fraught pre-arrest encounters with dangerous suspects. For those reasons, a bright-line rule incorporating lack of probable cause as an element of a retaliatory-arrest claim is necessary.

C. Reliance on other factors, such as whether a law is commonly enforced, is not an adequate substitute for proving a lack of probable cause.

In the past, plaintiffs have suggested that the causal role of retaliatory animus could be proven by the frequency or infrequency with which suspects are arrested for a given offense, rather than by the presence or absence of probable cause. *See* Brief for Petitioner at 35-36, *Lozman*, 138 S. Ct. 1945 (No. 17-21), 2017 WL 6616986 (Dec. 22, 2017) ("*Lozman* Br."). But such a standard would only compound the problem. To protect themselves from suit, officers would need to know whether the offense for which they have probable cause is commonly enforced. This would place arresting officers in an impossible position. Whether

a law is generally enforced is not a test that an officer can apply on the scene, especially in the brief time available to decide whether to arrest. *See Florence*, 566 U.S. at 338 ("Officers who interact with those suspected of violating the law have an essential interest in readily administrable rules." (internal quotation marks omitted)).

Under that standard, some plaintiffs have opined that where a "serious crime" has been committed there will be no liability, since presumably police arrest for such crimes virtually every time they can. *Lozman* Br. 35-36. But this does little, if anything, to ease an officer's predicament. Only an estimated 5% of arrests are for violent felonies (murder and nonnegligent manslaughter, rape, robbery, and aggravated assault). Federal Bureau of Investigation, *Crime in the United States 2016*, https://tinyurl.com/yatbcyox (last visited Aug. 24, 2018). Most arrests are presumably for misdemeanors. *See id.*; Cal. Dep't of Justice, *Arrests Reported from 2007-2016*, https://openjustice.doj.ca.gov/2016/arrests (reporting twice as many misdemeanor arrests as felony arrests in California).

Not only would a rule based on the frequency of arrests for particular crimes be impossible for an officer to apply in the field, it would be very difficult for him to meet in his own defense at trial. Identifying a workable, meaningful measure of how commonly a law is enforced through arrest is a tall order. The requisite statistics for any such measure may not be generally available. Beyond those insurmountable obstacles, a stream of other complications would arise in trying to measure whether police generally arrest for an offense. Is the relevant geographic pool nationwide, or by state, police department, or police district? How narrowly or broadly should the relevant

offense be categorized? How is the measure affected when multiple or overlapping offenses are involved? The list goes on.[1]

What is more, a standard that looks to whether a law is generally enforced to determine liability, rather than looking to probable cause, would inhibit the flexibility of police to address particular community problems as they arise. It would instead encourage police to divide criminal offenses into two categories: those for which they should always arrest and those for which they should never arrest. After all, to the extent that a law is enforced at every possible opportunity through an arrest, then officers would have a strong, if not airtight, defense to a retaliatory-arrest claim. Conversely, police would be inclined to forgo an arrest if the criminal law that has been violated will not, or cannot, be regularly enforced at all other times and locations. Fearing a retaliatory-arrest claim, officers would be especially hesitant to make legitimate arrests for many types of offenses that might not be considered "commonly enforced" or clearly "serious."

Among other problems, this inflexible, "all or nothing" approach is antithetical to the concept of community-oriented policing and other proactive policing strategies. Such a rule would reinforce an

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[1] Similar problems arise with a standard based on whether the officer must make a "singularly swift, on the spot, decision" when "the safety of [a] person" or property "is in jeopardy." *Reichle v. Howards,* 566 U.S. 658, 671 (2012) (Ginsburg, J., concurring). In a plethora of cases—ranging from trespass to the violation of noise ordinances—such a standard would offer no protection to officers. And plaintiffs would invariably allege factual disputes about whether the safety of persons or property was truly in jeopardy, making the standard unworkable in practice.

outdated view of policework: one that is basically reactive, waiting for a crime to be reported or observed and then responding in some automatic fashion based on the seriousness of the offense under the criminal code. *See* Alafair Burke, *Policing, Protestors, and Discretion*, 40 Fordham Urb. L.J. 999, 1009-10 (2013); *see generally* Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 Calif. L. Rev. 1513 (2002) (contrasting community policing strategies with the more reactive, traditional model); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 Colum. L. Rev. 551 (1997) (describing community and problem-oriented policing).

By contrast, community-oriented policing emphasizes that "[l]aw enforcement agencies should work with community residents to identify problems and collaborate on implementing solutions that produce meaningful results for the community." *Final Report of the President's Task Force on 21st Century Policing* 45 (2015), http://www.theiacp.org/Portals/0/taskforce_finalreport.pdf. Community policing calls for decentralized decision-making, involving "increasing tolerance for risk taking in problem-solving efforts, and allowing officers discretion in handling calls." Office of Community Oriented Policing Servs., U.S. Dep't of Justice, *Community Policing Defined* 5-6 (2014), https://tinyurl.com/y7gows48. It also envisions continually identifying and prioritizing problems, designing responses, and evaluating their effectiveness. *Id*. at 10-12.

The mistaken premise of a frequency-of-arrest-based approach is that certain offenses are too minor, or result too infrequently in arrest, such that any

arrest for those offenses would be inherently suspect. Far from it. Sometimes heightened enforcement of certain "minor" criminal laws can be quite important to a community. "[T]he narrow focus of the past on the seeming triviality of incidents of minor disorder ignores the communal harms that can be visited upon a neighborhood when these incidents multiply into a neighborhood problem." Livingston, *supra*, at 591. "[I]n community policing, police often exercise their discretion by addressing low-level crimes that might not warrant attention in comparison to more serious crimes, but which the community views as detrimental to their quality of life." Burke, *supra*, at 1010-11. Potential community concerns are manifold and could include, as just a few examples, late-night noise and disorderly conduct, trespassing, graffiti, illegal dumping, or package theft.

At the same time, a community-oriented approach encourages police "to think innovatively" and "view making arrests as only one of a wide array of potential responses." *Community Policing Defined*, *supra*, at 10. By seeking the community's input as to both problems and responses, "community policing tends to be extremely localized." Burke, *supra*, at 1011. Any demand that arresting officers show that police generally arrest for the offense would ignore the dynamic nature of community policing and undercut its application. *See* Livingston, *supra*, at 650-70 (arguing that political and administrative tools are more apt mechanisms for managing police discretion in the era of community policing than judicial review).

II. States And Localities Have Effective Mechanisms For Ensuring That Officers Do Not Make Retaliatory Arrests.

Allowing a retaliatory-arrest claim to proceed despite the existence of probable cause is especially unwarranted given the comprehensive procedures that state and local jurisdictions have developed to address police misconduct and control the power of arrest. Those safeguards can ably protect against retaliatory arrests without eliminating the objective, probable-cause standard for an arrest's constitutionality and opening the floodgates to damages suits. State and local governments are better situated to fashion flexible remedies that balance effective law enforcement with proper restraints on police officers and redress for their misdeeds.

A. Administrative review of police conduct provides an effective alternative for addressing allegations of retaliation through courts.

State and local jurisdictions are capable of handling citizen complaints against officers for improper conduct, including retaliatory arrests. Of course, judicial safeguards will always remain, such as when an arrest is made without probable cause or where criminal laws lack "minimal guidelines to govern law enforcement." *Chicago v. Morales*, 527 U.S. 41, 60 (1999). But regardless of the potential for civil liability, officers who arrest or take other actions for improper reasons are subject to disciplinary action. Both internal and external administrative processes exist throughout the nation to provide an efficient and effective response to complaints against officers who violate the law or local policies. This provides a valuable check against retaliatory arrests.

Law enforcement agencies, including through internal affairs units, receive and resolve citizen complaints as an important part of their law enforcement functions. There is widespread recognition among law enforcement that holding officers accountable for their actions is essential to maintain the public legitimacy that police need to be effective. Int'l Ass'n of Chiefs of Police, *Building Trust Between the Police and the Citizens They Serve* 5-7 (2009) ("*Building Trust*"), https://ric-zai-inc.com/Publications/cops-p170-pub.pdf; *see also* Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help Police Fight Crime in Their Communities*?, 6 Ohio St. J. Crim. L. 231, 233-38 (2008) (citing procedural fairness as a source of police legitimacy, and legitimacy as a major factor in the success of law enforcement). Indeed, such public accountability is another component of community-oriented policing. *Building Trust*, *supra*, at 5-7. Citizen complaints also assist a police department in supervising and managing its officers. Those complaints not only help identify officers who should be monitored more closely, disciplined, or removed for misconduct, but also reveal areas where better training or enhanced supervision is needed. In short, police departments have an interest as well as a duty in appropriately investigating citizen complaints.

Citizen review boards, or other types of external review, are another mechanism to address citizen complaints. "[C]ivilian oversight has been increasingly institutionalized as a regular feature of policing in cities and counties across the U.S." Joseph De Angelis et al., *Civilian Oversight of Law Enforcement: Assessing the Evidence* 49 (2016), https://tinyurl.com/y94aelhc (identifying "more than 140 civilian oversight agencies, with almost all large cities having some sort of civilian oversight"). There is a wide range

of civilian oversight—from "limited authority to review[ ] and mak[e] recommendations to boards that have investigative and subpoena powers"—and each community may consider its own form of civilian oversight that meets its needs. *The President's Task Force on 21st Century Policing Implementation Guide* 7 (2015), https://tinyurl.com/ycznok28. Among its features, civilian oversight can provide independent review of citizen complaints.

In the District of Columbia, for example, a citizen may file a complaint with the independent Office of Police Complaints, which is overseen by a publicly appointed board. D.C. Code §§ 5-1104, 5-1105. The Office of Police Complaints investigates complaints of harassment (among other types of complaints), which broadly includes arrests in violation of the law or internal police guidelines. D.C. Mun. Regs. tit. 6A, §§ 2104.1, 2199.1. It has the power to subpoena witnesses and documents. D.C. Code § 5-1111(c). The Office of Police Complaints even has direct and immediate access to the videos from body-worn cameras that all D.C. Metropolitan Police Department patrol officers now use. D.C. Office of Police Complaints, *Annual Report 2017*, at 18-19 (Oct. 31, 2017), https://tinyurl.com/ycvouesc. If the Office sustains a complaint, it refers the matter to the Metropolitan Police Department to recommend, and the police chief to decide, the imposition of discipline. D.C. Code § 5-1112. Generally, the police chief may not reject the merits determination of the Office of Police Complaints. *Id.* § 5-1112(e), (g).

Other cities have similar review boards that investigate citizen complaints against police officers. In New York City, an independent Civilian Complaint Review Board with subpoena power investigates several types of complaints—including complaints of abuse of

authority—and makes merits findings. N.Y.C., N.Y., Rules tit. 38A, §§ 1-02(a), 1-23(d). If it substantiates the allegations, the Board recommends a type of discipline and, in the most serious cases, can prosecute disciplinary charges against the officer at an administrative trial. *See* N.Y.C. Civilian Complaint Rev. Bd., *Police Discipline*, https://www1.nyc.gov/site/ccrb/prosecution/police-discipline.page (last visited Aug. 24, 2018). If the police commissioner intends to impose discipline at a level below that recommended by the board or administrative tribunal, the commissioner must provide a detailed explanation of the reasons and allow the board an opportunity to respond. N.Y.C., N.Y., Rules tit. 38A, § 1-46(f).[2]

External review can take other forms, such as review of a department's internal affairs investigations. For example, the Los Angeles Police Department has an independent inspector general, who is selected by a civilian Board of Police Commissioners. L.A., Cal., Charter vol. I, § 571(b)(4). The inspector general's office oversees the police department's handling of complaints of police misconduct. L.A., Cal., Charter vol. I, § 573. It receives copies of every complaint filed,

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[2] These civilian review agencies in the District of Columbia and New York City regularly report on complaint dispositions, including discipline and other remedial actions. *See* D.C. Office of Police Complaints, *Annual Report 2017*, *supra*, at 32, https://tinyurl.com/ycvouesc; N.Y.C. Civilian Complaint Rev. Bd., *Semi-Annual Report, Jan.-June 2017*, at 25-31 (Dec. 6, 2017), https://tinyurl.com/yc7wjjcz. Of course, disciplinary action is imposed in many other instances directly through police departments. Civilian review agencies also attempt to resolve complaints through mediation, which is held if both parties agree and can be very effective. *Annual Report 2017*, *supra*, at 22-23; *Semi-Annual Report, Jan.-June 2017*, *supra*, at 32-36. As the statistics show, civilian complaints produce meaningful outcomes, not empty processes.

audits selected investigations, and conducts systemic reviews of the disciplinary system. *See* L.A. Police Dep't, *Office of the Inspector General*, http://www.lapdonline.org/police_commission/content_basic_view/1076 (last visited Aug. 24, 2018). It also has subpoena power to conduct its own investigations. L.A. Bd. of Police Comm'rs, Policies and Authority Relative to the Inspector General § VII (approved Nov. 21, 2000), https://tinyurl.com/y7dab2vd.

Moreover, through legislation and policymaking, states can provide oversight of local citizen complaint processes. *See, e.g.*, Cal. Penal Code § 832.5(a) (requiring each police department to establish and publicize its procedure to investigate civilian complaints); *id.* § 837.2(e)(1) (requiring that the complainant receive timely, written notification of the complaint's disposition); Cal. Dep't of Justice, *Policy Governing Citizen Complaints Against Law Enforcement* (Jan. 2017), https://tinyurl.com/ycqvhuy2 (establishing that the Attorney General will review citizen complaints against local law enforcement agencies for possible investigation after exhaustion of local processes).

Some states have also directed that commissions develop detailed standards that law enforcement agencies must implement to investigate citizen complaints. In Connecticut, as specified by statute, those standards address issues such as the manner of acceptance of complaints, investigation protocols, and the documentation of the receipt of complaints and their dispositions. *See* Conn. Gen. Stat. § 7-294bb; Conn. Police Officer Standards & Training Council, *Mandatory Uniform Policy: Complaints that Allege Misconduct by Law Enforcement Agency Personnel* (May 14, 2015), https://tinyurl.com/y93qdw3y. Other

states have similar statutes. *See* Me. Rev. Stat. tit. 25, § 2803-B; Md. Code Ann., Pub. Safety § 3-519; N.J. Stat. § 40A:14-181; Vt. Stat. Ann. tit. 20, § 2402; *see also* R.I. Gen. Laws § 21.2-8.

Regardless of the particular mechanism in each jurisdiction, administrative processes are available to thoroughly investigate complaints of retaliatory arrest and impose appropriate disciplinary action, thus making a damages remedy unnecessary for deterrence and retribution.

B. Additional protections exist through limitations on the arrest power and through policies on arrest alternatives.

To ensure that the power of arrest is used appropriately, states may also limit officers' authority to conduct a warrantless arrest. States generally preclude arrest without a warrant for misdemeanors committed outside of an officer's presence. *See Atwater*, 532 U.S. at 355-60 (listing statutes). Many states have also chosen "more restrictive safeguards through statutes limiting warrantless arrest for minor offenses." *Id.* at 352. Such safeguards include provision for release on a citation or summons, with a promise to appear later to answer the charge, in lieu of a full custodial arrest. By statute or court rule, almost all states provide for citation release for some misdemeanors (and occasionally even felonies). Nat'l Conference of State Legislatures, *Citation in Lieu of Arrest* (updated Oct. 23, 2017), https://tinyurl.com/yd9wsf9d (providing summary chart of state laws).

Twenty-four states create at least "a presumption to issue citations for certain crimes or under certain circumstances." *Id.* For example, this Court's decision in *Moore* arose because of a Virginia statute that

generally directs officers to issue citations for most misdemeanor traffic offenses. 553 U.S. at 167; *see* Va. Code § 46.2-936. Another Virginia statute generally requires citations for most misdemeanors that are not punishable by a jail sentence. Va. Code § 19.2-74. These and other similar state statutes typically have exceptions permitting a custodial arrest, such as where there are reasonable grounds to believe that the person will not appear to answer the citation, will continue the offense, or poses a danger to persons or property. *Citation in Lieu of Arrest, supra.*

Where state law might not create a presumption or otherwise establish guidelines for citation release, localities may set their own policies. For example, New York City officials announced that police will issue summonses and "no longer arrest individuals who commit [low-level] offenses—such as littering, public consumption of alcohol, or taking up two seats on the subway—unless there is a demonstrated public safety reason to do so." Press Release, *District Attorney Vance, Commissioner Bratton, Mayor De Blasio Announce New Structural Changes to Criminal Summonses Issued in Manhattan* (Mar. 1, 2016), https://tinyurl.com/ybcwe806. Other local governments have taken similar measures. *See, e.g.*, Edward Sheehy et al., *Greenville Police to Issue Citations for Small Crimes Instead of Arrests*, WITN.com News (Oct. 9, 2017), https://tinyurl.com/y9ow3ll9. While discretionary determinations about public safety will still likely be involved in the decision whether to issue a citation in lieu of arrest, guidelines and policies can ensure that those determinations are based on only proper considerations.

As this Court has recognized, "it is in the interest of the police to limit petty-offense arrests, which carry

costs that are simply too great to incur without good reason." *Atwater*, 532 U.S. at 352. States too recognize those costs and have fashioned laws and policies to achieve an appropriate balance of interests. *Citation in Lieu of Arrest, supra*. The arrest limitations adopted by states and localities further reduce any potential for retaliatory arrests.

CONCLUSION

This Court should reverse the decision of the court of appeals.

Respectfully submitted,

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