No. 17-1174

IN THE

Supreme Court of the United States

LUIS A. NIEVES AND BRYCE L. WEIGHT,
Petitioners,

v.

RUSSELL P. BARTLETT,
Respondent.

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

BRIEF OF THE FIRST AMENDMENT FOUNDATION AND FANE LOZMAN AS AMICI CURIAE IN SUPPORT OF RESPONDENT

GINGER D. ANDERS
Counsel of Record
CHRISTOPHER M. LYNCH
MUNGER, TOLLES & OLSON LLP
1155 F Street NW, 7th Floor
Washington, DC 20004
(202) 220-1107
ginger.anders@mto.com

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INTEREST OF AMICI CURIAE[1]

The First Amendment Foundation is a nonprofit organization dedicated to promoting government openness and transparency throughout Florida, at both the state and local government levels. In addition to working with volunteers to audit government compliance with open meetings, public records, and other "sunshine" laws, the Foundation educates government officials, journalists, and the public about citizens' rights to obtain information from their governments. The Foundation also operates a hotline to answer questions about open government laws, handling more than 150 inquiries per month. Some of these inquiries come from members of the public expressing concerns about government retaliation or intimidation after exercising their right to request information.

A number of the Foundation's members have reported facing intimidation or retaliation for exercising their First Amendment rights. For instance, one member told the Foundation that she submitted a public records request at a police station as part of one of the Foundation's compliance audits—and was followed home by the police. Another member reported to the Foundation that he requested public records, and went to City Hall to pick them up—and was arrested for trespass upon arriving. And yet another informed the Foundation that, after he request-

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[1] Counsel for all parties have consented to the filing of this brief. In accordance with Rule 37.6, amici confirm that no party or counsel for any party authored this brief in whole or in part, and that no person other than amici or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

ed public records in order to investigate a potential public safety hazard, he was almost arrested; was invoiced for nearly $1,000; and was threatened by the city clerk.

In light of its mission and the reported experiences of its members, the Foundation has a strong interest in the public's ability to exercise its First Amendment rights, such as the right to request information from government officials. Accordingly, the Foundation has an interest in this case.

Fane Lozman was the petitioner in *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), which presented last term the same question presented in the instant case. Mr. Lozman was subjected to retaliatory arrest when speaking at a city council meeting in Riviera Beach, Florida, after a council member who had previously suggested that the city use its resources to "intimidate" Mr. Lozman for suing the city ordered him "carr[ied] out" of the meeting. *Id.* at 1949-50. Mr. Lozman has an interest in this case as someone who has previously been subjected to retaliatory arrest, litigated this issue, and whose ongoing political activity and dispute with the City of Riviera Beach lead him to believe he may be subjected to retaliatory arrest in the future.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

It is a bedrock principle of First Amendment law that government officials may not retaliate against individuals for engaging in constitutionally protected speech. In a variety of contexts, this Court has recognized that when government officials take an ad-

verse action against an individual for the purpose of punishing or suppressing her speech—whether the government deprives the speaker of a government contract, dismisses her from public employment, or treats her unfavorably in prison—the government unlawfully chills expression. *See, e.g.*, *Board of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 685 (1996); *Branti v. Finkel*, 445 U.S. 507, 515 (1980); *Crawford-El v. Britton*, 523 U.S. 574, 578, 588 n.10 (1998). Under the established framework for analyzing such retaliation claims, government defendants will be liable for violating the First Amendment if the factfinder concludes that the defendants would not have taken action against the plaintiff but for their intent to punish or suppress protected expression. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

As the Court recognized last term, there are "substantial arguments" that this standard should apply to retaliatory arrest claims, particularly because "there is a risk that some police officers may exploit the arrest power as a means of suppressing speech." *Lozman*, 138 S. Ct. at 1953. But despite those concerns, the Court was not required to confront that issue in Mr. Lozman's case, because there the Court understood the source of the retaliation to be "official policy" rather than the abuse of power of individual police officers. *Id.* at 1954. Nonetheless, the Court held that the standard retaliation test should apply in the retaliatory arrest context for claims like Mr. Lozman's. *Id.* at 1954-55.

This case squarely presents the troubling context recognized by the Court last term, where police officers may have exploited the arrest power to penalize a

member of the public for his speech activity. Two police officers arrested Respondent after interactions in which he (a) declined to be interviewed by one; and (b) questioned the authority of the other to question a minor outside the presence of a parent or guardian. *Bartlett v. Nieves*, No. 4:15-cv-00004-SLG, 2016 WL 3702952, at *1 (D. Alaska July 7, 2016). Such retaliatory arrests are an especially potent means of chilling First Amendment activity, for two reasons. First, retaliatory arrests not only silence the individual in question, but also send the message to others in the community that expression of disfavored views or questioning police misconduct may result in being taken into law enforcement custody. Second, the power to arrest individuals, including for minor offenses, is particularly susceptible to misuse for retaliatory purposes. As a practical matter, police and other officials have broad discretion to arrest, or order the arrest of, individuals for an exceedingly wide range of infractions, however minor. The sheer breadth of that discretion has made retaliatory arrests in response to protected First Amendment activity a serious problem, as recent media reports and retaliatory arrest cases demonstrate.

In many cases, the only way for a citizen to deter such government retaliation, and to seek redress for past retaliation, is through an after-the-fact damages action. In order to ensure that such suits remain an effective check on all retaliatory arrests, this Court should hold that the *Mt. Healthy* framework applies in this context, as it does in Equal Protection challenges to racially motivated arrests, to First Amendment and Equal Protection challenges to other government actions that single out citizens for disfavored treatment for impermissible motives, and to retalia-

tory arrest claims like Mr. Lozman's. That framework properly recognizes that the governmental motive behind any restriction on speech is "a hugely important—indeed, the most important—explanatory factor in First Amendment law." Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 415 (1996). In fact, the Court has explicitly held that illicit motive is the key consideration in evaluating government retaliation for an individual's exercise of First Amendment rights. *See Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1418 (2016) (affirming the primacy of official motivation where the government took adverse action against an individual based on the mistaken belief that he had engaged in protected speech). And just last term, this Court concluded in Mr. Lozman's case that the *Mt. Healthy* framework applies in retaliatory arrest cases where a plaintiff alleges an official policy of retaliation for petitioning activities undertaken prior to and separate from the events of the plaintiff's arrest. 138 S. Ct. at 1954-55. The same rule should apply here.

By contrast, holding that the existence of probable cause renders official intent irrelevant would provide standing pretext for governmental officials to single out and punish dissenters without consequence. In light of the innumerable minor infractions contained in state and local codes, and the relative ease of demonstrating probable cause, government defendants will almost always be able to point to one or more offenses for which probable cause existed. This case provides a particularly salient example: Petitioners defeated Respondent's claim in the district court by establishing that his arrest was supported by probable cause of the offense of harassment—an

offense different than the one for which he was arrested and charged. Compare *Bartlett*, 2016 WL 3702952 at *3 with *id.* at *11. If probable cause defeats a First Amendment retaliatory arrest claim, then, municipalities and officials will be insulated from liability for most retaliatory arrest claims.

The danger of being arrested in retaliation for engaging in protected speech—without recourse—chills the exercise of core First Amendment rights, such as questioning or otherwise criticizing the government. The chilling effect is likely to be especially acute in smaller towns and cities or other small, isolated communities across America, where vocal critics often continuously interact with local officials and where there are likely to be fewer neutral figures with the power to prevent or discourage retaliation. This Court should therefore reverse the decision below and hold that probable cause, standing alone, does not automatically defeat a First Amendment claim for retaliatory arrest.

ARGUMENT

A RULE THAT PROBABLE CAUSE, STANDING ALONE, AUTOMATICALLY DEFEATS A FIRST AMENDMENT RETALIATORY ARREST CLAIM WOULD SEVERELY UNDERMINE FREEDOM OF EXPRESSION.

The First Amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *N.Y. Times Co. v. Sul-*

livan, 376 U.S. 254, 270 (1964). Reflecting this "profound national commitment" to the freedom of expression, *id.*, "the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out[.]" *Hartman v. Moore*, 547 U.S. 250, 256 (2006). The ability to bring a damages action when such "retaliatory actions" occur, *id.*, serves as both an important check on government abuse, and an opportunity—often the only one—for the individual to vindicate her rights. *See, e.g.*, 42 U.S.C. § 1983; *Robertson v. Wegmann*, 436 U.S. 584, 590–91 (1978).

Adopting the rule advocated by Petitioners would severely limit the effectiveness of this check because it would bar a plaintiff from stating a claim for retaliatory arrest where there is probable cause that she has committed *any* infraction, no matter how strong the evidence of retaliatory motive, or how minor the infraction. Given the myriad federal, state, and local laws and regulations that govern everyday activities, most people routinely—and unintentionally—commit minor infractions. Under the decision below, probable cause to believe a person has committed any of these infractions will immunize a retaliatory arrest from First Amendment challenge, leaving citizens with no effective means of addressing the chilling effect such arrests create.

A. Arrests Carried Out In Retaliation For Protected Speech Are A Serious Problem.

Given the wide range of offenses that can lead to arrest, officers can almost always identify some probable cause sufficient to justify an arrest. That is a

serious problem, not only in theory, but also as borne out by the experience of citizens across the country.

1. Most individuals, often inadvertently, commit some sort of arrestable infraction on a regular, if not daily, basis. Consider these observations about the typical American traffic code:

> There is no detail of driving too small, no piece of equipment too insignificant, no item of automobile regulation too arcane to be made the subject of a traffic offense. Police officers in some jurisdictions have a rule of thumb: the average driver cannot go three blocks without violating some traffic regulation. . . . For example, in any number of jurisdictions, police can stop drivers not only for driving too fast, but for driving too slow. In Utah, drivers must signal for at least three seconds before changing lanes; a two second signal would violate the law. In many states, a driver must signal for at least one hundred feet before turning right; ninety-five feet would make the driver a[n] offender. . . . Many states have made it a crime to drive with a malfunctioning taillight, a rear-tag illumination bulb that does not work, or tires without sufficient tread. They also require drivers to display not only license tags, but yearly validation stickers, pollution control stickers, and safety inspection stickers; driving without these items displayed on the vehicle in the proper place violates the law.

David A. Harris, *"Driving While Black" and All Other Traffic Offenses*, 87 J. Crim. L. & Criminology 544, 557–59 (1997) (citations omitted).

Such intricate regulatory systems are not unique to the traffic code—thousands of federal and state laws criminalize a wide range of activity. *See, e.g.*, *Overcriminalization*, Nat'l Ass'n of Criminal Def. Lawyers[2] (observing that there are "over 4,450 crimes scattered throughout the federal criminal code, and untold numbers of federal regulatory criminal provisions"); *Overcriminalization*, Right on Crime[3] (observing that Texas alone has more than 1,700 crimes on the books).

Officers have wide discretion under state and federal law to arrest individuals for these offenses, however minor. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 323, 344 & nn.12–13, 355–60 (2001); U.S. Dep't of Justice Civil Rights Division, Investigation of the Ferguson Police Dep't 82 (2015)[4] (discussing the Ferguson Police Department's "aggressive enforcement of even minor municipal infractions"). "The breadth of street crime violations—loitering, trespassing, gang injunctions, and the like—confers vast power on urban police that permits widespread arrests for petty offenses." Alexandra Natapoff, *Misdemeanors*, 85 S. Cal. L. Rev. 1313, 1359 (2012).

And even if an individual is not arrested at the time of an infraction, she may be subject to later arrest for a missed court appearance or missed payment relating to that infraction. *See* Investigation of the Ferguson Police Dep't 55; *see also id.* ("The large number of warrants issued by the court . . . is due ex-

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[2] https://www.nacdl.org/overcrim/ (last visited Oct. 4, 2018).

[3] http://rightoncrime.com/category/priority-issues/overcriminalization/ (last visited Oct. 4, 2018).

[4] https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

clusively to the fact that the court uses arrest warrants and the threat of arrest as its primary tool for collecting outstanding fines for municipal code violations."); *id.* at 56 ("From 2010 to December 2014, the offenses (besides Failure to Appear ordinance violations) that most often led to a municipal warrant were: Driving While License Is Suspended, Expired License Plates, Failure to Register a Vehicle, No Proof of Insurance, and Speed Limit violations.").

The sheer breadth of police discretion gives rise to a significant danger that officers or other officials will sometimes decide to arrest individuals for improper reasons—including in retaliation for their protected speech.

2. That danger is hardly hypothetical, as a survey of current events demonstrates. For instance, last year, a federal court granted a preliminary injunction in favor of plaintiffs alleging that police had engaged in unconstitutional conduct in connection with protests following a state-court criminal case verdict, enjoining defendant City of St. Louis from, among other things, "[d]eclar[ing] an unlawful assembly": (1) "when the persons against whom it would be enforced are engaged in expressive activity, unless the persons are acting in concert to pose an imminent threat to use force or violence or to violate a criminal law with force or violence," or (2) "for the purpose of punishing persons for exercising their constitutional rights to engage in expressive activity." *See Ahmad v. City of St. Louis*, No. 4:17 CV 2455 CDP, 2017 WL 5478410, at *1, *10, *18 (E.D. Mo. Nov. 15, 2017).

This problem reaches not only protesters but also journalists. For example, also last year, Public News

Service reporter Dan Heyman was reportedly arrested based on alleged willful disruption of a state-government process, after asking then-Health and Human Services Secretary Tom Price about health care policy. *See* Yasmeen Serhan, *The Arrest of a Journalist Asking About Health Care*, The Atlantic (May 10, 2017).[5] Reportedly, one condition of Mr. Heyman's bail was that he "had to keep away from the state capitol"—impinging on his ability to work. *See Reporter Arrested for Shouting Questions at Trump Cabinet Official*, U.S. Press Freedom Tracker (updated Sept. 6, 2017).[6] The charges against Mr. Heyman have since been dropped. *Id.* According to the U.S. Press Freedom Tracker, Mr. Heyman is one of 34 journalists to have been arrested on the job in 2017. *See Arrest/Criminal Charge*, U.S. Press Freedom Tracker.[7] Six journalists currently face criminal charges. *Id.*

3. Reported cases from around the country further demonstrate that retaliatory arrests based on protected First Amendment activity are a serious concern—and underscore the dangers of the rule advocated by Petitioners. This troubling practice often arises, as it does in this case, in the context of police arrests of individuals that result from those individuals' exercise of their First Amendment right to question or disagree with the police in non-exigent circumstances.

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[5] https://www.theatlantic.com/news/archive/2017/05/the-arrest-of-a-west-virginia-journalist/526149/.

[6] https://pressfreedomtracker.us/all-incidents/reporter-dan-heyman-arrested-shouting-questions-hhs-secretary/ (last visited Oct. 4, 2018).

[7] https://pressfreedomtracker.us/arrest-criminal-charge/ (last visited Oct. 3, 2018).

a. In *Allen v. Cisneros*, 815 F.3d 239 (5th Cir. 2016), a Houston street preacher alleged that he had been subjected to two retaliatory arrests in violation of his First Amendment rights. *Id.* at 241–43. Both times, he was arrested after preaching on the street carrying a shofar, which "is a trumpet-like instrument made from a ram's horn" that is "used in Judaism to mark the holidays of Rosh Hashanah and Yom Kippur." *Id.* at 241–43 & n.1. The preacher and the defendants had differing versions of the events that transpired, with the preacher alleging that, each time, he had been arrested after trying to film the police. *See id.* at 242–43. But because the plaintiff's "possession of his shofar independently provided reasonable suspicion for his detention" based on a "city ordinance" that "specifically prohibited 'carry[ing] or possess[ing] while participating in any demonstration' objects that 'exceed three-quarters inch in their thickest dimension,'" *id.* at 245 (alterations in original), the Fifth Circuit held that the officers should prevail as a matter of law. *See id.* at 245–47.

b. In *Alston v. City of Darien*, --- F. App'x ----, No. 17-15692, 2018 WL 4492422 (11th Cir. Sept. 19, 2018), the plaintiff was initially pulled over because his windows were tinted and portions of his license plate were obstructed. *Id.* at *1. The officer gave the plaintiff citations for the incident, but when he heard the plaintiff say to his wife on the phone that "[t]his is the reason I don't come to McIntosh County because it's f***ed up over here," he pulled out his taser, ordered the plaintiff out of the car, handcuffed, and arrested him. *Id.* at *1-2. The arresting officer told a second officer that he was "getting [the plaintiff] because of how he acted in the car with his wife, and he was cussing me so I will call his job and have

him fired." *Id.* at *2. The officer did in fact call and complain to the plaintiff's employer, although plaintiff was not disciplined as a result. *Id.* The Eleventh Circuit summarily affirmed dismissal of the plaintiff's retaliatory arrest claim on the ground that his arrest was supported by probable cause based on the vehicle issues for which he was pulled over, and the officers thus had qualified immunity. *Id.* at *6.

c. In *Baldauf v. Davidson*, No. 1:04-cv-1571-JDT-TAB, 2007 WL 2156065 (S.D. Ind. July 24, 2007) (hereinafter *Baldauf II*), the plaintiff was arrested after a confrontation with a police officer at a convenience store. *Id.* at *1. At one point, the officer pointed a finger at the plaintiff, but she pushed it aside. *Id.* After the confrontation, the officer told the plaintiff that "he was not going to arrest her and that she could leave." *Id.* But as the plaintiff "was leaving, she told [the officer] that she was going to file a complaint with" the police chief. *Id.* The officer then arrested her when she was talking to the police chief at the station. *Id.* The district court determined that, although the plaintiff may have had an "otherwise worthy [retaliatory arrest] claim," it was barred by the existence of probable cause that she had committed battery when she had earlier pushed aside the officer's finger. *Id.* at *1, *4; *see also Baldauf v. Davidson*, No. 1:04-cv-1571-JDT-TAB, 2007 WL 1202911, at *4 (S.D. Ind. Apr. 23, 2007) (hereinafter *Baldauf I*) (existence of probable cause as to battery). The court accordingly granted summary judgment in the defendant's favor. *Baldauf II*, 2007 WL 2156065, at *6.

d. In *Collins v. Hood*, No. 1:16-cv-00007-GHD-DAS, 2018 WL 1055526 (N.D. Miss. Feb. 26, 2018),

the plaintiff was pulled over for speeding and given a citation. *Id.* at *1. She questioned why she was being ticketed and after the citation was issued, told the officer she "would be calling his boss." *Id.* Although the officer initially ordered her to drive away, as she did so he ordered her to stop the vehicle, ordered her out of the vehicle, and ultimately arrested her. *Id.* The court denied the officer's motion to dismiss the plaintiff's retaliatory arrest claim, because once he had told her to drive away, the traffic stop had ended and he needed new probable cause to pull her over again. *Id.* at *5. The court also noted that the officer's contention that she called him a "'racist mother-----'" as he was walking away was not sufficient grounds to arrest her. *Id.* at *6.

e. In *Laning v. Doyle*, No. 3:14-cv-24, 2015 WL 710427 (S.D. Ohio Feb. 18, 2015), a 63-year-old woman was directed to pull over in a strip mall parking lot for a traffic violation. *Id.* at *1. She did not immediately stop once the officer "activated the lights on his police cruiser"; instead, she kept driving through the parking lot and parked outside of her office. *Id.* After the plaintiff stepped out of her car, the defendant officer pointed his taser at her. *Id.* "[S]he asked why she was being detained," but he did not respond and instead forcefully arrested her, allegedly in retaliation for her question. *Id.* at *1, *14. On the way to the jail, the plaintiff alleged, the officer drove erratically—doing donuts in a parking lot—and verbally taunted her. *Id.* at *1. The court held that while it was not clearly established that the officer lacked probable cause to arrest the plaintiff for failing to comply with an officer based on her failure to immediately pull over, *id.* at *7–9, the allegations viewed in the light most favorable to her could sup-

port a finding that the officer retaliated against her for exercising her First Amendment right to "question[] why he had pulled her over," *id.* at *15.

f. In *Sebastian v. Ortiz*, No. 16-20501-CIV-MORENO, 2017 WL 4382010 (S.D. Fla. Sept. 29, 2017), the plaintiff was pulled over for speeding, but refused to grant the police permission to search his car. *Id.* at *2. The police then removed the plaintiff from the car and handcuffed him. *Id.* The plaintiff told the police that they could not search his car because they did not have a warrant. *Id.* One of the officers "responded by asking him if he was a 'YouTube lawyer' or 'constitutionalist' and that they 'didn't need a warrant.'" *Id.* After a search revealed a gun that the plaintiff was licensed to carry as a security guard employed by Miami-Dade County, he was charged with two counts of resisting or obstructing an officer without violence, and one count of reckless display of a firearm. *Id.* at *2–3. The charges were abandoned, but the plaintiff pled guilty to speeding. *Id.* at *3. Following his arrest, the plaintiff lost his job and was unable to find another one as an armed security guard. *Id.* When the plaintiff brought suit alleging that "he was arrested in retaliation for asserting his rights," the court dismissed the claim on qualified immunity grounds, solely on the basis that there was probable cause that the plaintiff had been speeding. *Id.* at *5–6.

4. First Amendment retaliatory arrest actions are not limited to the context of police confrontations. As Mr. Lozman's case last term and the examples below demonstrate, such arrests often target citizens for criticizing the government.

a. In *Lozman*, Mr. Lozman had long been an outspoken critic of the City of Riviera Beach's development policy. 138 S. Ct. at 1949. In addition to speaking against the policy at city council meetings, he filed a lawsuit against the city challenging some of the council's actions to advance that policy. *Id.* At one council meeting, a council member suggested that the city "intimidate" Mr. Lozman and other councilmembers "responded in the affirmative" when asked whether there was "a consensus on what [the first council member] is saying." *Id.* When Mr. Lozman appeared and began to speak at a subsequent council meeting, the councilmember who had suggested "intimidat[ing] Mr. Lozman ordered him to be arrested. *Id.* at 1949-50. This Court held that Mr. Lozman "need not prove the absence of probable cause to maintain a claim of retaliatory arrest against the City," and remanded to the Court of Appeals, where his case is still pending, to determine the proper next steps for Mr. Lozman's claim under the correct standard. *Id*. at 1955.

b. In *Roper v. City of New York*, No. 15 Civ. 8899 (PAE), 2017 WL 2483813 (S.D.N.Y. June 7, 2017), two photographers filed First Amendment retaliatory arrest claims after being arrested during a Black Lives Matter protest in Times Square. *Id*. at *1, *3. One plaintiff was arrested "for standing in the street" after being told by police "to move from the street to the sidewalk"—but he could not do so because police barricades and other officers were in the way. *Id.* at *1 (citing First Amended Complaint). The second plaintiff, a photojournalist, had crossed the street to find a restroom—but was arrested for disorderly conduct after he failed to use a crosswalk, even though police were blocking the crosswalks. *Id.* Because the

police had probable cause to arrest the "plaintiffs for violating . . . traffic rules" relating to sidewalk use, the plaintiffs' retaliatory arrest claims had to be dismissed under Second Circuit law, "even assuming that compliance with the . . . [police's] dispersal orders was not realistically possible." *Id.* at *3–5.

c. In *Morse v. San Francisco Bay Area Rapid Transit District (BART)*, No. 12-cv-5289 JSC, 2014 WL 572352 (N.D. Cal. Feb. 11, 2014), a journalist brought a retaliatory arrest claim after he was arrested by a Bay Area Rapid Transit ("BART") Deputy Police Chief while documenting a peaceful protest. *Id.* at *1. The plaintiff had a history of writing and publishing articles critical of the BART police, even "openly mock[ing] and ridicul[ing] the agency and its officers." *Id.* at *1–4, *9. By the time of the plaintiff's arrest, he was "'personally acquainted' with leaders of the BART organization," leading the police to, before the protest where the plaintiff was arrested, distribute flyers identifying him and give orders to arrest him if he "'incite[d] a riot or act[ed] in a criminal manner.'" *Id.* at *2, *4. Ultimately, the plaintiff was the sole member of the media arrested for standing in front of a fare gate—even though his conduct was indistinguishable from that of other journalists at the protest. *Id.* at *6–7, *9–10. Although the officer had probable cause to arrest the plaintiff for hindering the operation of a rail line, the district court, after identifying the ample evidence suggestive of defendants' retaliatory motive, denied the defendants' motion for summary judgment on the plaintiff's retaliatory arrest claim under Ninth Circuit law. *Id.* at *9–15.

d. In *Fernandes v. City of Jersey City*, Civ. No. 2:16-cv-07789-KM-JBC, 2017 WL 2799698 (D.N.J. June 27, 2017), a plaintiff brought a First Amendment retaliation claim after being forcibly removed from a City Council meeting at the mayor's request. *Id.* at *3, *9–11. A few months before that removal, the plaintiff and his wife obtained a construction permit and began to remodel their home. *Id.* at *2. But within days, City officials came onsite and ordered them to stop, "resulting in weather damage" to their home when they were unable to continue the project. *Id.* at *1–2. The plaintiff began attending City Council meetings and other public meetings to complain about the City's conduct. *Id.* at *3. At "one such meeting," the City Council President "accosted" the plaintiff; at another, the plaintiff was forcibly removed at the mayor's request even though, according to the plaintiff, he had not done anything to cause a disturbance. *Id.* The defendants argued that they did, in fact, have probable cause to remove him for causing a disturbance. *Id.* at *11. The court concluded that there was a genuine issue of material fact as to the existence of probable cause, and denied the defendant officers' motion to dismiss on qualified immunity grounds. *Id.* at *11, *15–16.

e. In *Galarnyk v. Fraser*, 687 F.3d 1070 (8th Cir. 2012), a bridge safety consultant criticized a government agency on a number of national news networks after a bridge collapsed in Minnesota, and later visited the collapse investigation command center to discuss his concerns with officials. *Id.* at 1071–72. After meeting with an official in one of the command center's trailers, he entered another trailer without permission and further criticized the government. *Id.* at 1072. He was asked to leave, and did. *Id.* But he

was stopped by a law enforcement officer after he had begun to leave the site, and was arrested shortly thereafter. *Id.* at 1073. Despite the plaintiff's allegations that the officer who stopped him repeatedly commented to a colleague that the plaintiff needed to be "locked up" for speaking out about the bridge collapse on national television, *id.*, the Eighth Circuit affirmed the dismissal of the safety consultant's claim on summary judgment because there was probable cause that he had trespassed, *id.* at 1076.

f. In *Ballentine v. Las Vegas Metropolitan Police Department*, No. 2:14-cv-01584-APG-GWF, 2017 WL 3610609 (D. Nev. Aug. 21, 2017), members of an activist group filed First Amendment retaliation claims after they were arrested for chalking anti-police messages on the sidewalks near a police station and a courthouse. *Id*. at *1–4, *6. Two officers had cited the plaintiffs, but encouraged them to protest in other ways, such as through holding signs. *Id.* at *2. The Court granted summary judgment in the officers' favor, in light of the lack of evidence of any retaliatory intent on their part in issuing the citations. *Id.* at *6. The court denied summary judgment, however, to a third officer who prepared the declaration of arrest for the plaintiffs. *Id*. Among other things, he included the chalked messages' anti-police content in his declaration ("f*** pigs" and "f*** the cops"), and when he had encountered the plaintiffs chalking, instead of telling them to stop, "he took pictures of their activities and challenged the content of their messages by disputing with the protestors the accuracy of their speech." *Id*. Even though the officer had reason to believe that there was probable cause that the plaintiffs had violated an anti-graffiti statute, *id*. at *1, *12, the court held that the retaliation claim survived

under Ninth Circuit law because "a reasonable jury could conclude that [the officer] intended to chill the plaintiffs' anti-police messages . . . and that he would not have sought the warrants but for the content of the plaintiffs' speech," *id*. at *6.

g. In *Abujayyab v. City of New York*, 15 Civ. 10080 (NRB), 2018 WL 3978122 (S.D.N.Y. Aug. 20, 2018), the plaintiff was punched in the face by a police officer and subsequently arrested in the course of participating nonviolently in a Black Lives Matter protest against police brutality. *Id.* at *1-2. The court dismissed his retaliatory arrest claim because, among other reasons, the officers had probable cause to arrest him for violating a New York traffic law which prohibits pedestrians from walking on a roadway when sidewalks are present, even when no traffic is present. *Id.* at *10-11.

Importantly, although each of these cases presents an example of officials using arrest in order to punish plaintiff's acts criticizing the government, this Court's decision in Mr. Lozman's case from last term would not necessarily prevent courts from dismissing cases like many of the above without probable cause. While the plaintiffs in these cases share with Mr. Lozman the fact that they were exercising their First Amendment right to criticize official conduct, they could not all necessarily demonstrate that (a) they were subjected to an official retaliatory policy, rather than an individual officer's retaliatory act; (b) they were not suing the arresting officer; and (c) their activity qualifies as petitioning activity. *See Lozman*, 138 S. Ct. at 1954-55.

B. Requiring A Plaintiff To Demonstrate The Absence Of Probable Cause Would Effectively Immunize Officials And Municipalities From Liability For Retaliatory Arrests.

1. The sheer number of minor infractions described above—carrying a shofar, failing to step onto a sidewalk, speeding, blocking a fare gate, entering a trailer, driving with tinted windows, or speaking at a city council meeting—demonstrates that many retaliatory arrests will likely be supported by probable cause that the arrestee committed some offense, however minor. Thus, contrary to Petitioners' suggestion that their proposed rule "might preclude . . . meritorious claims in rare instances," Pet. Br. 48, adopting a rule that the existence of probable cause bars the plaintiff's claim entirely will effectively immunize potentially retaliatory arrests from judicial scrutiny. The breadth of that immunity is confirmed by two additional, significant consequences of the Petitioners' proposed rule.

First, because probable cause is an objective inquiry, *see Devenpeck v. Alford*, 543 U.S. 146, 153 (2004), defendants can raise multiple theories of probable cause in the hope that the court accepts one, pointing to alleged infractions that were not even on the officer's mind, or communicated to the plaintiff, at the time of arrest. So in *Roper*, while the officers had originally arrested the plaintiffs for disorderly conduct at the Black Lives Matter protest, the court upheld the existence of "probable cause to arrest" them "for offenses relating to pedestrian traffic." 2017 WL 2483813, at *3–4. The court explained that "the relevant inquiry is 'whether probable cause existed to ar-

rest for *any* crime,' not necessarily for the crimes cited by the officers or ultimately charged." *Id.* at *3 (emphasis added) (quoting *Marcavage v. City of New York*, 689 F.3d 98, 109 (2d Cir. 2012)). And so the existence of probable cause that the plaintiffs had "violat[ed] . . . traffic rules" precluded their claim as a matter of law. *Id.* at *3–4.

The instant case serves as a prime example of the troubling consequences of allowing probable cause to be a moving target. Respondent was arrested for and charged with disorderly conduct and resisting arrest (charges that were subsequently dropped). *See* J.A. 10, J.A. 20-21, J.A. 24-25, J.A. 245. But the district court found that the officers had probable cause to arrest him for "harassment," despite that charge appearing nowhere in the contemporaneous records of his arrest. *Compare* J.A. 17 (contemporaneous arrest report of Petitioner Nieves stating "I… advised [Respondent] that he was under arrest for disorderly conduct.") *with* J.A. 142 (declaration of Petitioner Nieves in support of summary judgment motion stating "I informed [Respondent] that he was going to jail for harassing an officer.").[8]

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[8] That Petitioners relied on harassment as the offense for which they have probable cause underscores the problems with Petitioners' proposed rule discussed *supra* at 9-15: That offense can be satisfied by "taunt[ing] or challeng[ing] another person"—in other words, challenging the authority of a police officer—"in a manner likely to provoke an immediate violent response." AS 11.61.120(a)(1). The district court found this second element met by the officers' "violent[]" acts arresting Mr. Bartlett. 2016 WL 3702952 at *5. In short, at least under the rationale of the district court, one could *never* make out a claim for retaliatory arrest against a police officer in Alaska if one's speech "challenge[d]" the officer and the *officer* responded aggressively.

Mr. Lozman's case last term presented a disturbingly similar pattern. A few months after Mr. Lozman filed a lawsuit against the City of Riviera Beach alleging the violation of government transparency laws, Mr. Lozman tried to speak at a City Council meeting. When he did so, a Councilmember who had previously stated a desire to "intimidate" Mr. Lozman in response to the lawsuit ordered his arrest. *Lozman*, 138 S. Ct. at 1949-50.

Like Respondent here, Mr. Lozman was charged with disorderly conduct and resisting arrest.[9] *Id*. at 1950. But just as the district court did here, the lower courts in Mr. Lozman's case relied on the finding that probable cause existed for a wholly separate offense in order to support a judgment against Mr. Lozman on his retaliatory arrest claim. Initially, the district court determined that, as a matter of law, there was no probable cause as to *either* offense. *See* Joint Appendix, *Lozman v. City of Riviera Beach,* No. 17-21, at J.A. 108 (S. Ct. Dec. 22, 2017). So the city switched gears *during trial*, at the district court's encouragement, alleging probable cause for two additional offenses that had not been raised up to that point, one of which was disturbance of a lawful assembly. *See id.* at J.A. 108-121; J.A. 131-134. The Eleventh Circuit accepted that the existence of probable cause as to the newly identified offense of disturbance of a lawful assembly meant that Mr. Lozman's retaliatory arrest claim failed as a matter of law. *Lozman v. City of Riviera Beach*, 681 F. App'x 746, 750-752 (11th Cir. 2017). In both this case and Mr. Lozman's, therefore, the defendants were able to

[9] Also as in the instant case, the prosecutor in Mr. Lozman's case never pursued the charges. 138 S. Ct. at 1950.

defeat the plaintiff's claim by testing theories of probable cause until they hit on one that stuck.

Second, the Petitioners' "no probable cause" rule bars First Amendment retaliatory arrest claims in the face of probable cause even where there is strong evidence of a retaliatory motive. In other contexts, however, this Court has recognized that the touchstone of the First Amendment retaliation inquiry is the government's motive: "the government's reason for [taking adverse action] is what counts." *Heffernan*, 136 S. Ct. at 1418. That is because the government inflicts the relevant "constitutional harm"—discouraging citizens from engaging in protected speech—whenever it acts because of retaliatory animus. *Id.* at 1419.

Yet the "no probable cause" rule renders irrelevant evidence of retaliatory intent, no matter how overwhelming. In this case, the court of appeals concluded that Respondent had sufficiently alleged that Petitioners acted with retaliatory intent, based on respondent's assertion that Sergeant Nieves said "bet you wish you would have talked to me now" after his arrest. Pet. App. 6. And in Mr. Lozman's case, his arrest was just one event in a longer string of reprisals committed by the City pursuant to a councilmember's stated desire to "intimidate" him because of his lawsuit against the City. *Lozman*, 138 S. Ct. at 1949. Yet even though the Eleventh Circuit concluded that Mr. Lozman "seems to have established a sufficient causal nexus between [the councilmember] and the alleged constitutional injury of his arrest," it held that the existence of probable cause rendered that conclusion irrelevant. *Lozman,* 681 F. App'x at 752. Although this Court held that the specific circum-

stances of Mr. Lozman's case did not require him to make a showing of probable cause to prevail on his retaliatory arrest claim, plaintiffs in other contexts making equally strong showings of retaliatory intent would still be barred from recovery under Petitioners' proposed rule.

Similarly, the *Roper* plaintiffs could not pursue a retaliatory arrest claim even though one plaintiff, before he was arrested at the Black Lives Matter protest, "heard an NYPD supervisor instruct his officers to '[j]ust take somebody and put them in handcuffs.'" 2017 WL 2483813, at *1 (alteration in original). Galarnyk, the plaintiff bridge consultant, could not survive summary judgment on his retaliatory arrest claim despite the fact that one officer asserted repeatedly that Galarnyk needed to be "locked up" for sharing his views about the bridge collapse on national television. *Galarnyk*, 687 F.3d at 1073. And Baldauf, the plaintiff involved in a confrontation with a small-town police officer could not withstand summary judgment on her retaliatory arrest claim, even though the officer had told her following the confrontation that he was not going to arrest her, but changed course after she threatened to—and did—report the officer to the police chief. *Baldauf II*, 2007 WL 2156065, at *1, *4; *Baldauf I*, 2007 WL 1202911, at *1.

Because journalist Morse was arrested in California, his First Amendment retaliatory arrest claim against the BART Police could proceed despite the existence of probable cause for interfering with a rail line. *Morse*, 2014 WL 572352, at *11–15. But if he had been arrested in Florida instead—where Mr. Lozman was arrested last year and where the Elev-

enth Circuit has adopted Petitioners' "no probable cause" rule—his claim would have failed as a matter of law—notwithstanding Morse's presentation of evidence that BART police officers knew of inflammatory articles he had written about them; had circulated flyers with an image of his face prior to the protest; and preemptively ordered his arrest if he did anything criminal. *Id.* at *3–4.

2. The more nuanced rule advocated by Respondent would avoid effectively immunizing retaliatory arrests, while giving factfinders the ability to distinguish between legitimate law enforcement activities and improper retaliation. Under the *Mt. Healthy* framework, the existence of probable cause would still be relevant evidence of the defendant's lack of retaliatory intent. *See* Resp. Br. 38-39, 50-52. But the existence of probable cause, without more, would not categorically bar a plaintiff who is able to establish that she was in fact arrested in retaliation for her speech from seeking redress for that constitutional injury.

For instance, imagine that a police officer pulled over a driver for the stated reason that the car displayed a political bumper sticker that the officer found offensive. Upon checking the driver's information, the officer realized that the driver was subject to an outstanding felony warrant, and arrested her. If the driver subsequently brought a retaliatory arrest claim, the police officer would prevail under the *Mt. Healthy* framework (despite the direct evidence of retaliatory intent), because he would be readily able to demonstrate that he would have arrested the driver even in the absence of retaliatory animus. *See* Resp. Br. 38, 51-52; *Mt. Healthy*, 429

U.S. at 287. If, however, the driver is able to establish that the outstanding warrant was one for which she ordinarily would not have been arrested (for instance, because it had been automatically issued for a minor offense such as failure to appear), the outcome might be different. In that situation, the warrant would not establish that the officer would have made the arrest in the absence of retaliatory intent. *See* Resp. Br. 39.

The *Mt. Healthy* framework thus permits factfinders to consider probable cause, and to conclude based on the nature of that probable cause, as well as the surrounding circumstances, that the arrest should not give rise to liability because it reflected legitimate law enforcement concerns—even if retaliatory animus played some role in the encounter. But where the existence of probable cause does not rebut the inference that the arrest was driven by retaliatory intent rather than law enforcement objectives, Respondent's approach enables the factfinder to hold the defendant liable. Doing so in that circumstance furthers First Amendment values without undermining legitimate government interests.

This balancing will be easier as more and more police departments use body cameras to record their officers and as members of the public increasingly have cellular phones able to record video of arrests. Indeed, increased availability of video of arrests will, in general, reduce the "causation problem" that concerned the Court in Mr. Lozman's case, i.e., that there can be difficulty determining the connection between the defendant's alleged animus and plaintiff's injury. 138 S. Ct. 1954; *see id.* at 1953. As the Court acknowledged—contrary to Petitioners' central ar-

gument here, see Pet. Br. 13-14—this problem is less of an issue in the retaliatory arrest context than in the retaliatory prosecution context. *Lozman*, 138 S. Ct. at 1953 (noting that "in retaliatory prosecution cases, the causal connection between the defendant's animus and the prosecutor's decision to prosecute is weakened by the 'presumption of regularity accorded to prosecutorial decisionmaking'" but that this "presumption does not apply in [the retaliatory arrest] context"). While video may not capture all the relevant evidence of motive, it will undoubtedly capture significant evidence in many cases, enabling courts and juries to evaluate the connection for themselves. *See, e.g.*, Alberto R. Gonzales & Donald Q. Cochran, *Police-Worn Body Cameras: An Antidote to the "Ferguson Effect"?,* 82 Mo. L. Rev 299, 311 (Spring 2017) ("Police-worn body cameras contribute to a sense of fairness and justice when they assist in resolving what would otherwise be suspect officer-citizen encounters by creating an 'objective and reviewable record.'"). By contrast, under Petitioners' "no probable cause" rule, increased availability of video recordings of arrests can be expected to produce more cases in which documented police retaliation is nonetheless immunized from suit, running the risk of increasing public unrest and frustration at perceived injustices.

3. By contrast, the consequence of permitting the existence of probable cause of any infraction to categorically bar First Amendment retaliatory arrest claims would be to give officials a blank check to use such arrests to punish disfavored speech. Given that officials would rarely, if ever, face liability for retaliatory arrests, such arrests could become an attractive means of punishing or deterring criticism of the government.

That danger would be exacerbated by the relative ease with which officials may order or undertake an arrest. As in Mr. Lozman's case, for example, a single official may order or execute an on-the-spot arrest of an individual who is engaging in speech. In that respect, retaliatory arrests are a much more readily available means of punishing speech than retaliatory prosecutions. As the Court explained in *Hartman*, to institute a retaliatory prosecution, an official with retaliatory animus must persuade the prosecutor to institute criminal process and to devote state resources to the prosecution. 547 U.S. at 261–64. Thus, *Hartman*'s holding that the plaintiff in a retaliatory prosecution case must establish the lack of probable cause does not give officials a particularly attractive means of retaliating against disfavored speech: prosecutions remain a cumbersome and costly mechanism for doing so. In the arrest context, however, applying *Hartman*'s "no probable cause" requirement would effectively insulate from liability the use of a readily available means of punishing speech.

C. Adopting Petitioners' Proposed "No Probable Cause" Requirement Would Chill The Exercise Of First Amendment Rights.

It is beyond dispute that the threat of being arrested for engaging in protected speech will deter First Amendment activities. Indeed, the very reason that "[o]fficial reprisal for protected speech" is prohibited is because "it threatens to inhibit exercise of the protected right." *Hartman*, 547 U.S. at 256 (quoting *Crawford-El*, 523 U.S. at 588 n.10); *Ford v. City of Yakima*, 706 F.3d 1188, 1194 (9th Cir. 2013) ("[A] person of ordinary firmness would be chilled from fu-

ture exercise of his First Amendment rights if he were booked and taken to jail in retaliation for his speech."). And such chilling extends beyond the target of government reprisal; retaliation against one individual "tells the others that they engage in protected activity at their peril." *Heffernan*, 136 S. Ct. at 1419.

An individual's ability to bring a First Amendment retaliatory arrest claim against vindictive government officials serves as an important check on such reprisal and the resultant chilling of protected activity. *See generally Morse*, 2014 WL 572352 (plaintiff journalist's claim for retaliatory arrest by BART police could move forward); *Ballentine v. Las Vegas Metro. Police Dep't*, 2017 WL 3610609 (plaintiff protestors' claim against officer who prepared declaration of arrest could move forward based on the officer's fixation on the content of the plaintiffs' messages); *see also Naveed v. City of San Jose*, No. 15-cv-05298-PSG, 2016 WL 2957147, at *1, *5–6 (N.D. Cal. May 23, 2016) (permitting First Amendment retaliatory arrest claim to proceed, despite the existence of probable cause to support the arrest, where the plaintiffs were arrested after attempting to film the police; and concluding that defendant officers' alleged "conduct would chill a person of ordinary firmness from future First Amendment activity"). Such suits help deter retaliatory conduct, making it less likely to happen in the future. And from the plaintiff's perspective, an after-the-fact damages suit is generally the only means she has to vindicate her rights after a retaliatory arrest.

But in jurisdictions where probable cause bars a First Amendment retaliatory arrest claim as a matter

of law, this check is effectively absent. Without the ability to pursue litigation against officials who have targeted them for their speech, citizens around the country could very well conclude that the danger of being arrested (and being taken to the police station, booked, and jailed) is simply too high a price to pay for the privilege of commenting on government policies, protesting the justification for their arrest, intervening to protect other citizens from what is perceived as inappropriate or unlawful police activity, or otherwise engaging in protected activity. *See, e.g.*, *Sebastian*, 2017 WL 4382010, at *2–3 (recounting that, after the police arrested the plaintiff, who worked as a security guard for Miami-Dade Transit, the police told him that "he would never return to his job with Miami-Dade County"; the plaintiff was, indeed, terminated from his job following the arrest). That chilling effect is precisely what the First Amendment guards against.

This risk of self-censoring is particularly acute in interactions between individuals and their local governments—especially in smaller cities and towns and in other small, isolated community environments like in the instant case. In smaller towns and communities, citizens are much likelier to interact with government officials or individual police officers on a regular basis. Government critics and dissenters are more likely to be known to officials, and officials are more likely to have relationships with one another such that it is less likely for there to be any "neutral" officials to which an individual targeted for retaliation can appeal. It is no coincidence that, in a number of the examples discussed above, the retaliatory arrests at issue were effected by local government officials in smaller cities and towns. *See, e.g.*, Public

Data, Google, goo.gl/dh55sP (last visited Oct. 3, 2018) (Riviera Beach, Florida, where Mr. Lozman was arrested in retaliation for his speech activity, has a population of 34,674; Pittsboro, Indiana, where plaintiff Baldauf got into an altercation with a police officer in a convenience store, has a population of 3,375; Huber Heights, Ohio, where 63-year-old plaintiff Laning was pulled over, arrested, and forced to ride in a police car while the officer did "donuts," has a population of 37,986); *see also* Pet. Br. at 2-3 ("upwards of 10,000 people gathering at "multi-day" Arctic Man festival). The greater degree of interaction between citizens of smaller towns and their local governments and closer relationships between government officials in those areas give rise to both increased opportunities for retaliation and more severe chill when retaliation occurs.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Respondent's brief, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

GINGER D. ANDERS
Counsel of Record
CHRISTOPHER M. LYNCH
MUNGER, TOLLES & OLSON LLP
1155 F Street NW,
7th Floor
Washington, DC 20004
(202) 220-1107
ginger.anders@mto.com

October 9, 2018