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 RUTHERFORD INSTITUTE AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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## INTEREST OF *AMICUS CURIAE*[1]

*Amicus* The Rutherford Institute, a nonprofit civil-liberties organization, is deeply committed to protecting the constitutional freedoms of every American and the fundamental human rights of all people. The Rutherford Institute advocates for protection of civil liberties and human rights through *pro bono* legal representation and public education on a wide spectrum of issues affecting individual freedom in the United States and around the world.

As a central part of its mission, The Rutherford Institute advocates against government infringement of citizens' rights to freely express themselves, seeking redress in cases where citizens have faced retaliation for exercising their First Amendment right to free speech. To ensure the vitality of the First Amendment, The Rutherford Institute believes that the existence of probable cause should not bar recovery in cases where citizens would not have been arrested but for engaging in constitutionally protected speech. Instead, the Court should confirm that the burden-shifting approach set out in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977), strikes the proper balance between the right to freedom of speech and the right of officers to make legitimate arrests that

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[1] Letters expressing the parties' consent to the filing of *amicus* briefs have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

merely coincide with, but are not motivated by, an individual's exercise of First Amendment rights.

## SUMMARY OF THE ARGUMENT

The history of the enactment of the First Amendment and its modern interpretation by this Court both underscore the essential role of freedom of speech as a bulwark against tyranny. As the Court reaffirmed last term, free speech "is essential to our democratic form of government, and it furthers the search for truth." *Janus v. Am. Fed'n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2464 (2018) (citations omitted). "Whenever the Federal Government or a State prevents individuals from saying what they think on important matters . . . it undermines these ends." *Id.*

Yet that is precisely the danger petitioners' proposed test invites, enhancing the government's ability to silence speech by insulating retaliatory arrests from review whenever there is probable cause to believe the speaker also has committed a crime of any kind. *See* Pet. Br. 16 ("To maintain a damages claim for retaliatory arrest in violation of the First Amendment, a plaintiff must plead and prove the absence of probable cause for the arrest."). Rather than allowing the existence of probable cause to eradicate retaliatory-arrest claims, as petitioners advocate, probable cause should be balanced against the speaker's right to freedom of speech through the

traditional, burden-shifting framework articulated by this Court in *Mt. Healthy*, 429 U.S. at 287. The probable-cause-based exception to *Mt. Healthy* recognized in *Hartman v. Moore*, 547 U.S. 250, 265 (2006), is uniquely suited to retaliatory-prosecution claims and should not be imported into the distinct context of retaliatory arrests.

In departing from the traditional *Mt. Healthy* framework and adding a no-probable-cause element to retaliatory-prosecution claims, this Court in *Hartman* cited practical and legal characteristics that inhere in prosecutions, *id.* at 259-65, but do not exist in the distinct context of arrests. While prosecutors enjoy a presumption of regularity in their prosecutorial discretion, *see id.* at 263, officers are granted no such presumption in connection with arrests. And a retaliatory arrest does not present the complicated causation issues inherent in a prosecution allegedly induced by the animus of an actor other than the prosecutor. *See id.* at 261-63. Additionally, the scope of the probable-cause element in a retaliatory-prosecution case is limited by the crime documented in the charging instrument underlying the prosecution, *see id.* at 261, whereas defendants in retaliatory-arrest cases would not be limited by that constraint.

In light of the wide array of arrestable offenses—including commonplace crimes like jaywalking and littering—it would not be difficult for officers to target speakers for their speech and then insulate the arrests from challenge by pointing to some misdemeanor offense for which probable cause arguably existed.

Because the existence of probable cause, alone, would require dismissal of a retaliatory-arrest claim under petitioners' proposed rule, *e.g.*, Pet. Br. at 16, it would not matter if the crime for which probable cause existed did not actually motivate the arrest; and it would not matter if the person arrested did not actually *commit* that crime. Speakers would have no avenue for redressing retaliatory arrests under petitioners' approach, the purpose of § 1983 would be defeated, and valuable speech would be chilled.

To ensure that freedom of speech continues to serve its vital role in our democracy, the Court should decline petitioners' invitation to create a per se, probable-cause barrier to retaliatory-arrest claims. The *Mt. Healthy* framework already successfully balances the interests of speakers and governmental actors when animus-based claims arise in a wide variety of constitutional contexts, and neither the legal nor practical realities of retaliatory-arrest claims require an exception to that longstanding rule.

## ARGUMENT

### I. LIMITING THE REDRESSABILITY OF ARRESTS MADE IN RETALIATION FOR PROTECTED SPEECH WOULD UNDERMINE THE PURPOSE OF THE FIRST AMENDMENT.

The probable-cause test proposed by petitioners would significantly limit the ability of speakers to hold

officers accountable for unconstitutional retaliation whenever an officer has probable cause to arrest a speaker for any offense, even if it can be shown that the officer would not have made an arrest were it not for unconstitutional animus. A lack of redress for such an arrest both removes an incentive for officers to avoid retaliation and chills the speech of those who will fear arrest. That result cannot be squared with the purpose of the First Amendment and the vital role of speech in the American democratic system.

The Founders created a government where power was derived solely from the people, who possessed absolute sovereignty. JAMES MADISON, THE VIRGINIA REPORT OF 1799-1800, *reprinted in* VIRGINIA GENERAL ASSEMBLY HOUSE OF DELEGATES, THE VIRGINIA REPORT OF 1799-1800, TOUCHING THE ALIEN AND SEDITION LAWS; TOGETHER WITH THE VIRGINIA RESOLUTIONS OF DECEMBER 21, 1798, INCLUDING THE DEBATE AND PROCEEDINGS THEREON IN THE HOUSE OF DELEGATES OF VIRGINIA AND OTHER DOCUMENTS ILLUSTRATIVE OF THE REPORT AND RESOLUTIONS 196 (Leonard W. Levy ed., Da Capo Press 1970) (1850) [hereinafter "THE VIRGINIA REPORT"]. This popular sovereignty necessitated that people remain free to criticize the government. *See id*. As Benjamin Franklin put it, "[f]reedom of speech is a principal pillar of a free government; when this support is taken away, the constitution of a free society is dissolved, and tyranny is erected on its ruins." BENJAMIN FRANKLIN, *On Freedom of Speech and the Press*, PA. GAZETTE (Nov. 1737), *reprinted in* 2 BENJAMIN FRANKLIN, MEMOIRS OF BENJAMIN FRANKLIN 431 (1840).

According to Franklin, speech provided the citizenry's check on the government—"[r]epublics and limited monarchies derive their strength and vigor from a popular examination into the action of the magistrates." *Id.* (cautioning that "an evil magistrate intrusted with power *to punish for words* would be armed with a weapon the most destructive and terrible").

The same recognition of the importance of freedom of speech as a means of preventing tyranny can be found in state constitutions from the time of the Nation's founding. *See* PA. CONST. of 1776, declaration of rights, § XII, AVALON PROJECT (Sept. 28, 1776), http://avalon.law.yale.edu/18th_century/pa08.asp ("That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained."); VT. CONST. of 1777, ch. 1, cl. 14, AVALON PROJECT (July 8, 1777), http://avalon.law.yale.edu/18th_century/vt01.asp (including the same recognition that "the people have a right to freedom of speech, and of writing, and publishing their sentiments"); *see also* DAVID L. HUDSON, THE FIRST AMENDMENT: FREEDOM OF SPEECH 4-5 (2012) (discussing provisions safeguarding free speech in the constitutions of Virginia, Pennsylvania, North Carolina, and Vermont from 1776-1777). And the Preamble to the Bill of Rights emphasized an intent to enshrine freedom of speech among the individual liberties to be protected from governmental "misconstruction or abuse," to instill "public confidence in the Government" and "best ensure the beneficent ends of its institution." U.S. CONST., amend. I-X pmbl.,

THE NAT'L ARCHIVES (1789), https://www.archives.gov/founding-docs/bill-of-rights-transcript#toc-the-preamble-to-the-bill-of-rights.

To fulfill the anti-tyranny purpose of the First Amendment, the Founders rejected the English common-law approach to speech, which demonstrated suspicion of disfavored ideas and a willingness to silence speech perceived as dangerous to society. As Blackstone explained, expression that had an "immoral or illegal tendency" was grounds for legal punishment. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *150-52 (1783). While such constraints on speech may have been compatible with Britain's parliamentary form of government, unchecked by popular will, they could not be reconciled with America's new democratic model, which derived its power from the people's sovereignty. America's departure from the parliamentary model therefore necessitated a rejection of English common-law constraints on speech, allowing speech to flourish, unrestrained, as a check on government power. *See* THE VIRGINIA REPORT, *supra*, at 220-21;[2] *see also* DAVID

[2] Some Founding Fathers resisted this notion, including John Adams, who supported the now-infamous Alien and Sedition Acts of 1798 that punished speech critical of the government. *See Adams Passes First of Alien and Sedition Acts*, HISTORY.COM (Nov. 16, 2009), https://www.history.com/this-day-in-history/adams-passes-first-of-alien-and-sedition-acts; *An Act Respecting Alien Enemies*, THE AVALON PROJECT (July 6, 1798), http://avalon.law.yale.edu/18th_century/alien.asp. Even at that time, however, there was notable debate as to the Acts' constitutionality. *See Adams Passes First of Alien and Sedition Acts, supra* (noting "strong political opposition to these acts"); THE VIRGINIA REPORT,

M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS, 1870-1920 194 (1997). As James Madison, drawing on Radical Whig philosophy, stated: "If we advert to the nature of a Republican Government, we shall find that the censorial power is in the people over the government, and not in the government over the people." JAMES MADISON, JAMES MADISON'S "ADVICE TO MY COUNTRY" 95 (David B. Mattern ed., 1997). Therefore, the Framers concluded that governmental restrictions on speech, even disfavored speech, must be rejected.

Modern First Amendment jurisprudence reinforces the vital role of free speech as a bulwark against tyranny and as a core value to protect. This Court has repeatedly emphasized the importance of free speech to political freedom and representative government. *See*, *e.g.*, *Janus*, 138 S. Ct. at 2464 (reaffirming that freedom of speech "is essential to our democratic form of government"). Freedom of speech is "essential to free government" because its abridgment would "impair[] those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government." *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

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*supra*, at 219 (stating that the Acts were "positively forbidden by one of the amendments to the Constitution"). And the Acts since have been repudiated and viewed as an aberration from America's core commitment to freedom of speech. *See*, *e.g.*, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) (recognizing that "the attack upon [the Sedition Act's] validity has carried the day in the court of history").

This Court has stated that speech on public issues "should be uninhibited, robust, and wide-open," even if it includes "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Sullivan*, 376 U.S. at 270. And, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). To the contrary, "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). Even speech that advocates violations of the law is protected if not directed at inciting imminent lawless action. *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969) (per curiam).

This protection of critical, disfavored, or even offensive speech extends also to speech that "interrupts" police officers in their duties. *See City of Houston v. Hill*, 482 U.S. 451, 455, 471-72 (1987). As this Court stated:

> [I]n the face of verbal challenges to police action, officers and municipalities must respond with restraint. We are mindful that the preservation of liberty depends in part upon the maintenance of social order. But the First Amendment recognizes, wisely we think, that a certain amount of expressive disorder

> not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive.

*Id*. (citation omitted).

A probable-cause shield that makes it easier for police officers to arrest speakers in retaliation for speech that offends or upsets an officer would not only squash expressive disorder at the cost of individual freedom, but also silence debate on controversial issues of public concern. That approach would result in less protection for precisely the type of speech that needs protection most. Because "[f]reedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth," *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled in part by Brandenburg*, 395 U.S. at 449, the Court should not adopt a test that would insulate retaliatory motives from review, undermine the redressability of violations of First Amendment rights, and thereby chill speech vital to American democracy.

## II. IMPORTING A PROBABLE-CAUSE TEST INTO THE RETALIATORY-ARREST CONTEXT IS UNJUSTIFIED AND UNNECESSARY TO WEED OUT INSUBSTANTIAL CLAIMS.

This Court need not create a new rubric for retaliatory-arrest claims because the burden-shifting framework articulated in *Mt. Healthy*, 429 U.S. at 287,

provides a suitable test for determining whether a plaintiff can recover for an action allegedly taken based on unconstitutional animus. This test has been applied successfully by this Court to a range of animus-infused constitutional claims and will work equally well in retaliatory-arrest cases. The unique characteristics that led this Court in *Hartman*, 547 U.S. at 259-65, to add a threshold, no-probable-cause element to retaliatory-prosecution claims are not present in the retaliatory-arrest context; and procedural rules, as well as the substantive defense of qualified immunity, already provide safeguards against officers' being burdened by insubstantial cases.

### A. The Default *Mt. Healthy* Test Works Well When Applied To A Range Of Intent-Based Claims And Would Be Equally Effective For Analyzing Claims Alleging Retaliatory Arrests.

In *Mt. Healthy*, this Court considered how to evaluate whether an adverse governmental action was taken because of an individual's speech—in violation of the First Amendment—or occurred for independent, legitimate reasons. *See* 429 U.S. at 287. To prevail, an individual claiming unconstitutional retaliation must show that the exercise of a constitutionally protected right was a "substantial" or "motivating factor" for governmental action taken against the individual. *Id.* at 287. Once the individual has made such a showing,

the government will be held liable unless it shows "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct." *Id.*

This Court has applied *Mt. Healthy*'s burden-shifting test over a wide range of retaliation and other mixed-motive cases—from racial discrimination to various employment-related claims. *See Texas v. Lesage*, 528 U.S. 18, 20-21 (1999) (per curiam) (applying *Mt. Healthy* in a racial-discrimination case involving a university's admission decision); *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 677, 685 (1996) (applying *Mt. Healthy* to claims by at-will independent contractors alleging termination for exercising free-speech rights); *Hunter v. Underwood*, 471 U.S. 222, 232 (1985) (applying *Mt. Healthy* to a claim that Alabama law disenfranchising people convicted of crimes involving moral turpitude was enacted as a result of racial discrimination); *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 870-72 & n.22 (1982) (plurality) (applying *Mt. Healthy* to a viewpoint-discrimination case involving a school board's decision to remove certain books from libraries); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-66, 270-71 & n.21 (1977) (applying *Mt. Healthy* reasoning in an equal-protection

case to determine that a rezoning denial was impermissibly motivated by a discriminatory purpose).[3]

A test that has successfully been used to assess government decisions regarding zoning, employment, and university admissions, among others, is a good place for this Court to start in determining the best test for allegedly retaliatory arrest decisions. The *Mt. Healthy* test acts to protect plaintiffs who have been acted against on the basis of unconstitutional animus, even when there could have been other bases for the governmental action at issue. *See, e.g.*, *Umbehr*, 518 U.S. at 674, 677; *Hunter*, 471 U.S. at 231-32. At the same time, it prevents the imposition of liability when governmental officials take actions they would have taken in any event, even if there was also animus present. *E.g.*, *Lesage*, 528 U.S. at 20-21 (holding that, under *Mt. Healthy*, a public university is not liable for racial animus in its admissions process if it would have made the same decision absent discrimination). This

[3] The courts of appeals have also successfully used versions of *Mt. Healthy*'s but-for test to evaluate a wide range of claims alleging that a governmental actor had an impermissible motive for its action. *See*, *e.g.*, *Maben v. Thelen*, 887 F.3d 252, 267 (6th Cir. 2018) (prisoner's punishment allegedly resulting from his verbal complaint to a prison official); *McCue v. Bradstreet*, 807 F.3d 334, 338-39, 344-45 (1st Cir. 2015) (government commissioner's alleged use of regulations to retaliate based on a dairy farmer's speech in an earlier business dispute between the two); *Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 817-18, 821, 823 (6th Cir. 2007) (police stop and search of a pro-life policy-and-advocacy group's "billboard trucks"); *Graham v. Henderson*, 89 F.3d 75, 79-81 (2d Cir. 1996) (prisoner's claims that prison officials discriminated against him based on race and speech).

structure, particularly when combined with the procedural and substantive protections already given to officers (as discussed in Part II.D, *infra*), strikes a balance between preserving the right to recover for unconstitutional retaliation and weeding out insubstantial cases that could unduly burden officers. *See Crawford-El v. Britton*, 523 U.S. 574, 591-92 (1998) (holding that balancing the interests of plaintiffs and defendants in retaliation cases does not necessitate altering the cause of action).

### B. *Hartman*'s Retaliatory-Prosecution Rule Is Based On Unique Circumstances Not Present In Retaliatory-Arrest Cases.

This Court's addition of a new element and additional pleading requirement for retaliatory-prosecution claims should not be imported into the very different context of retaliatory-arrest claims. Reaffirming that a "standard case" for unconstitutional retaliation requires only a showing that retaliatory animus was a but-for cause of the challenged harm, this Court in *Hartman* determined that a plaintiff in a retaliatory-prosecution case, by contrast, must make a threshold showing of the absence of probable cause to support the crime charged. 547 U.S. at 265-66.

This Court identified three key characteristics of retaliatory-prosecution cases that justified this additional requirement: 1) the existence of probable

cause will always be a highly probative piece of evidence in evaluating why a prosecution occurred; 2) the causation analysis is uniquely complex because in most cases the individual alleged to harbor retaliatory animus is the same person who inflicts the challenged harm, whereas in retaliatory-prosecution cases the individual alleged to harbor the retaliatory animus (typically the arresting officer) is not the person who inflicts the challenged harm (by definition, the prosecutor); and 3) prosecutorial decisionmaking is afforded a strong presumption of regularity that the Court may not lightly discard. *Id.* at 261-63. None of those characteristics are present in the distinct context of retaliatory arrests.

The unusual causation analysis in retaliatory-prosecution cases underscores why the departure from *Mt. Healthy* in that context has no analog to warrant a similar departure in the very different context of retaliatory arrests. Because prosecutors enjoy absolute immunity, *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976), a plaintiff alleging retaliatory prosecution must look elsewhere for recovery, suing a different official for what this Court described as the "successful retaliatory inducement to prosecute." *Hartman*, 547 U.S. at 262. "Thus, the causal connection required here [in the retaliatory-prosecution context] is not merely the retaliatory animus of one person and that person's own injurious action, but between the retaliatory animus of one person and the action of another." *Id.* That is, a plaintiff "must show that the nonprosecuting

official acted in retaliation, and must also show that he induced the prosecutor to bring charges that would not have been initiated without his urging." *Id.*

Probable cause has a natural and inevitable role to play in that inducement analysis. When an officer arrests someone for a crime for which probable cause exists, the existence of probable cause reinforces the presumption of regularity that attaches to any prosecution that follows. By contrast, if a prosecutor brings charges despite the absence of probable cause, that scenario suggests that something irregular must have induced the prosecution. And that irregularity, in turn, opens the door to considering whether the officer's retaliatory animus motivated the prosecutorial harm. As such, want of probable cause "bridge[s] the gap between the nonprosecuting government agent's motive and the prosecutor's action, and [it] address[es] the presumption of prosecutorial regularity" otherwise afforded to a prosecutor's decisions. *Id.* at 263. Thus, in a retaliatory-prosecution claim, this Court did not view it as particularly burdensome—as a practical matter—to depart from *Mt. Healthy* and require a showing that probable cause is absent, because "[p]robable cause or its absence will be at least an evidentiary issue in practically all such cases" and "can be made mandatory with little or no added cost." *Id.* at 265-66.

By contrast, retaliatory-arrest cases do not involve circumstances that justify departing from the *Mt. Healthy* framework. First, the strong presumption of regularity accorded to prosecutorial decisions does not

apply to police making arrests. *Reichle v. Howards*, 566 U.S. 658, 669 (2012). Second, the causation that must be proved is straightforward: The governmental actor with the allegedly retaliatory animus is the same person who makes the challenged decision to arrest. Indeed, in *Hartman*, this Court expressly distinguished retaliatory-prosecution claims from "ordinary retaliation" claims where the individual harboring the retaliatory animus is also the individual taking the adverse action. 547 U.S. at 259. Retaliatory-arrest claims fit the "ordinary retaliation" model for which the *Mt. Healthy* test was designed, *see id.*, and should remain governed by that established framework.

Finally, the burden on a plaintiff of showing a lack of probable cause is less cabined and more onerous in retaliatory-arrest cases than in retaliatory-prosecution cases. In the context of a criminal prosecution, the government must have already committed to its theory of criminal liability and proffered evidence of probable cause in connection with the charging instrument. By contrast, a police officer need not commit to a theory of criminal liability to proceed with an arrest; indeed, the police may not come up with a theory of criminal liability—and therefore a theory of probable cause—until well after litigation of a retaliatory-arrest claim has already commenced. *See Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1950 (2018) (noting that the city first brought up the statute forming the basis of the city's theory of probable cause during the retaliatory-arrest litigation). To successfully plead that

there was no probable cause for arrest, the plaintiff in a retaliatory-arrest case would theoretically have to pore over every possible crime for which he could have been arrested, alleging the absence of probable cause for each of them. *See infra* Part III; *see also Devenpeck v. Alford*, 543 U.S. 146, 153, 155 (2004) (stating that arrests do not violate the Fourth Amendment when probable cause exists under the facts known to the officer, regardless of the crime ultimately charged or even contemplated at the time of arrest). This not only renders the existence of probable cause less probative, but also creates a significantly greater burden on the retaliatory-arrest plaintiff compared to the retaliatory-prosecution plaintiff who must establish lack of probable cause only for those crimes included in the charging instrument.

### C. The Common Law Does Not Provide Guidance For The Elements Of A Retaliatory-Arrest Claim Or Support The Addition Of A No-Probable-Cause Requirement.

Although the common law is an appropriate starting point for "defining the contours and prerequisites of a § 1983 claim," common-law torts are informative only to the extent they are analogous to—and thus provide redress for—the deprivation of the constitutional right at issue. *See*, *e.g.*, *Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017). No common-law tort addressed violations of freedom of speech through

retaliatory arrests; therefore, there is no appropriate common-law analog, and no viable common-law rationale, for departing from the traditional *Mt. Healthy* approach to animus-related § 1983 claims merely because an arrest is at issue.

As this Court noted in *Hartman*, "we certainly are ready to look at the elements of common-law torts when we think about elements of actions for constitutional violations, but the common law is best understood here more as a source of inspired examples than of prefabricated components of" constitutional claims. 547 U.S. at 258 (citation omitted). Lacking a common-law tort clearly analogous to a retaliatory prosecution in violate of the First Amendment, this Court did not look to the common law in *Hartman* when defining the elements of a retaliatory-prosecution claim. *See id.* at 258-59. Instead, in determining that a plaintiff should have to prove a lack of probable cause, the Court looked at the practical and legal realities of prosecution-based claims, not at prosecution-related, common-law torts. *See id.* at 259-65. And, as previously discussed, no comparable realities exist in the arrest context. *See* Part II.B.

Just as the common law contributed no guidance for defining the elements of a retaliatory-prosecution claim, so too is the common law uninformative when analyzing First Amendment rights in the arrest context. As even petitioners acknowledge, there was no common-law tort for retaliatory arrest in violation of freedom of speech at the time § 1983 was enacted.

Pet. Br. 43 (citing *Lozman*, 138 S. Ct. at 1957 (Thomas, J., dissenting)). The absence of such a tort is unsurprising given that the American law of freedom of speech was a conscious departure from that of the English common law, not a continuation of it. *See* Part I, *supra* (discussing America's rejection of Blackstone's conception of speech as potentially dangerous and worthy of punishment and America's adoption, instead, of a democratic model that values speech as a reflection of popular sovereignty). Moreover, First Amendment protection of speech had not even been incorporated as applicable to state governments when § 1983 was enacted in 1871. *See Gitlow v. New York*, 268 U.S. 652, 660 (1925) (stating, for the first time, that the First Amendment applies to the States).

None of the common-law torts invoked by petitioners—malicious arrest, malicious prosecution, and false imprisonment (Pet. Br. 43)—were designed to protect free-speech rights. Those torts are therefore neither analogous to nor sufficiently protective of speech rights to serve as models for retaliatory-arrest claims that invoke the First Amendment and are designed to protect speech. Section 1983 was not intended to be a static codification of common-law causes of action. *Rehberg v. Paulk*, 566 U.S. 356, 366 (2012). To the contrary, "[t]he purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action." *Carey v. Piphus*, 435 U.S. 247, 258 (1978).

As in *Hartman*, this Court should look to the practical and legal realities of the arrest context when analyzing retaliatory-arrest crimes. But whereas the practical and legal realities of prosecutions were deemed to warrant proof of a probable-cause element, *Hartman*, 547 U.S. at 259-65, the practical and legal realities of officers' authority to make arrests are very different, and importing *Hartman*'s probable-cause requirement into the arrest context would create unwarranted obstacles to protecting and vindicating First Amendment rights.

### D. The Law Already Includes Ways To Screen Out Insubstantial Retaliatory-Arrest Claims Without Imposing Additional Elements.

Fear of unmeritorious, burdensome litigation does not warrant creating a new element for retaliatory-arrest claims that requires plaintiffs to prove the absence of probable cause for the arrest in question. To do so would transform *Hartman*'s prosecution-cabined exception to *Mt. Healthy* into the general rule for motive-based constitutional claims—an approach this Court has already rejected. *See Crawford-El*, 523 U.S. at 592, 594 (determining that the burden on governmental officials sued for motive-based, constitutional violations "does not justify a judicial revision of the law to bar claims that depend on proof of an official's motive" and to do so "would stray far from the traditional limits on judicial authority"). Indeed, when previously faced with a proposal like

petitioners' that would prevent courts from admitting evidence of subjective motive once a governmental defendant asserted an alternative, objective explanation, *id.* at 612 (Scalia, J., dissenting), this Court flatly refused, explaining that it would be "unprecedented" for the law "to immunize all officials whose conduct is 'objectively valid,' regardless of improper intent." *Id.* at 594.

The Court should be particularly wary of imposing an additional pleading and proof requirement that would impose "serious limitations upon 'the only realistic' remedy for the violation of [a] constitutional guarantee[]." *See id.* at 591. As discussed in Part III, *infra*, requiring a plaintiff alleging a retaliatory arrest to plead and prove the absence of probable cause—prior to permitting any consideration of the officer's alleged motive to retaliate for protected speech—would drastically limit the redressability of these types of First Amendment violations, given the vast array of commonplace offenses that could be used by an officer to justify a retaliatory arrest. And the addition of such an element is not necessary because existing substantive and procedural rules already weed out insubstantial claims.

Insubstantial retaliatory-arrest claims—despite their element of subjective motive—are still amenable to dismissal or summary disposition. *See id.* at 593. A retaliatory motive by itself is insufficient to establish a claim for retaliatory arrest; a plaintiff must also show causation. *Id.* So, to survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a

plaintiff in a retaliatory-arrest case must allege sufficient facts to allow the court to draw the plausible inference that officers not only harbored animus toward the plaintiff because of the plaintiff's engagement in protected speech, but also that this animus was a substantial or motivating factor for the plaintiff's arrest. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."); *Mt. Healthy*, 429 U.S. at 287; *see also* FED. R. CIV. P. 12(b)(6). Merely alleging that the plaintiff engaged in protected speech and was arrested, without additional factual allegations to support causation, would fall short of showing that the plaintiff had a plausible claim for relief. *See Iqbal*, 556 U.S. at 678. Accordingly, insubstantial retaliatory-arrest claims will be susceptible to dismissal under Rule 12(b)(6), notwithstanding allegations that an officer harbored speech-related animus.

The but-for causation required to state a viable claim under the *Mt. Healthy* test also demonstrates why fears are unfounded that individuals engaging in criminal conduct will be able to shield themselves from arrest at the last minute by shouting some form of protected speech once arrest becomes imminent. *See*, *e.g.*, Brief for the District of Columbia, *et al.* as *Amici Curiae* Supporting Petitioner, *Nieves v. Bartlett* (No. 17-1174) 6-7 (noting that arrestees often criticize or insult police while being placed under arrest). If a

plaintiff alleges nothing more than engagement in protected speech while being arrested, that speech could not plausibly have motivated the arrest, which already was in motion when that plaintiff spoke.

Even if a complaint survives a Rule 12(b)(6) motion, there are a number of additional ways that insubstantial cases may be eliminated without the burden of a full trial. Officers still have the affirmative defense of qualified immunity in cases where the facts would not have led a reasonable officer to believe she was violating clearly established rights by making the arrest, *see Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982), and a denial of qualified immunity may be interlocutorily appealed when the ruling presents an issue of law. *See Behrens v. Pelletier*, 516 U.S. 299, 311 (1996). A court can also order the plaintiff to file a reply to the defendant's answer or grant a defendant's motion for a more definite statement prior to allowing discovery. *Crawford-El*, 523 U.S. at 598. In the event discovery does occur, district judges have broad discretion to limit the scope of discovery and dictate its course. *Id.* at 598-99. Furthermore, the defendant can prevail at summary judgment by showing that no genuine disputes of material fact would permit a juror to conclude that the arrest would not have occurred but for the plaintiff's protected speech. *Id.* at 593. When the subjective-motive element of a retaliatory-arrest claim is paired under the *Mt. Healthy* test with a but-for-causation requirement, there is no need to import an additional element requiring plaintiffs to prove absence of probable cause for the arrest to ensure that

insubstantial claims can be weeded out without subjecting officers to the burdens of trial. *See id.*

## III. IMPORTING A PROBABLE-CAUSE REQUIREMENT WOULD PROVIDE OFFICERS WITH AN AUTOMATIC ESCAPE FROM TOO MANY RETALIATORY-ARREST SUITS, UNDERMINING THE CAPACITY OF § 1983 TO PROTECT FREE SPEECH.

Police officers enjoy tremendous discretion to arrest someone whenever there is probable cause to believe a crime has been committed. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). That rule applies even to misdemeanors—including those that carry only small fines as possible penalties. *See id.* (holding that arrest for a misdemeanor seatbelt offense punishable only by a fine was supported by probable cause and therefore did not violate the Fourth Amendment); *see also id.* at 366 (O'Connor, J., dissenting) (observing that the decision gives police officers "constitutional carte blanche to effect an arrest whenever there is probable cause to believe a fine-only misdemeanor has been committed"). Many Americans, though they may not know or intend it, break the law daily by committing crimes that go largely unrecognized, such as jaywalking, exceeding the speed limit, or failing to signal before making a turn. Even calling in sick to work could be a federal crime. *See*

*Sorich v. United States*, 555 U.S. 1204, 1205-06 (2009) (Scalia, J., dissenting from denial of certiorari) (noting that 18 U.S.C. § 1346 arguably criminalizes a salaried employee's phoning in sick to attend a ball game).

Although these types of crimes may not often result in an arrest, the fact remains that an officer possesses the authority to arrest someone whenever probable cause exists to believe that person committed *any* crime.[4] *See Atwater*, 532 U.S. at 354. That means that in almost any circumstance in which a person might publicly exercise First Amendment rights—and potentially experience retaliation for that speech in the form of an arrest—the arresting officer could likely identify some violation of law, however trivial, and claim probable cause existed to justify the arrest. And even if the arrest were motivated by the officer's animus toward the speaker and would not otherwise have occurred, the existence of probable cause would defeat the First Amendment claim outright under petitioners' proposed test. Indeed, that would be the result even if the speaker did not actually break any law, since under petitioners' rule the plaintiff would have to prove that there was not even *probable cause* to believe the infraction occurred. *See*, *e.g.*, Pet. Br. 16.

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[4] Arrests for misdemeanor crimes have become increasingly prevalent. *See* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1314-15 (2012) ("An estimated ten million misdemeanor cases are filed annually, flooding lower courts, jails, probation offices, and public defender offices.").

Suppose a person brings suit because she was arrested while handing out pamphlets on a public street and believes the arrest was made to retaliate against her in violation of her First Amendment rights. Before getting an opportunity to prove that her speech substantially motivated the officer's arrest, she might find herself having to prove, first, that the officer lacked probable cause to believe that she littered (*did a pamphlet accidentally slip out of her grasp?*)[5] or jaywalked (*did she see a break in traffic and dash across an empty intersection into a Starbucks?*).[6]

A speaker who is arrested while driving might have an even more difficult time showing that there was no probable cause for the arrest. Suppose a driver with a bullhorn mounted on his car is arrested while broadcasting speech; or maybe there is no bullhorn, but an arrest occurs when a bumper sticker offends the arresting officer. The driver might have to show that his actions gave the officer no reason to believe he was exceeding the posted speed limit,[7] was driving closer than reasonable to another car,[8] failed to come to a complete stop before proceeding through a flashing red

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[5] *E.g.*, ALA. CODE § 13A-7-29.

[6] *E.g.*, GA. CODE ANN. §§ 40-6-1, 40-6-92.

[7] *E.g.*, N.M. STAT. ANN. §§ 66-7-3, 66-7-301; TEX. TRANSP. CODE ANN. §§ 542.301, 543.001, 545.352.

[8] *E.g.*, VA. CODE ANN. §§ 46.2-816, 46.2-937.

signal,[9] failed to wear a safety belt,[10] or engaged in "careless driving."[11]

And some road-related crimes are so nebulous and subjective that it would be nearly impossible for a plaintiff to disprove the existence of probable cause. In Colorado, for example, it is a misdemeanor to drive "without due regard for the width, grade, curves, corners, traffic, and use of the streets and highways and all other attendant circumstances." COLO. REV. STAT. ANN. § 42-4-1402. It would not be difficult for an officer to mask a retaliatory motive by asserting probable cause to arrest the speaker for driving without due regard for the grade of the street. *See id.* Whereas the *Mt. Healthy* test would require the officer to show he would have made that same arrest regardless of the driver's speech, *see* 429 U.S. at 287, petitioners' probable-cause test would require dismissal of the claim without any consideration of the role speech played in the officer's decision.

Additional examples abound. A person exercising First Amendment rights at a rally who is then arrested while riding her bicycle home might have to plead that the officer lacked probable cause to believe she was not riding as far to the right of the roadway as

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[9] *E.g.*, S.D. CODIFIED LAWS § 32-38-7.

[10] *E.g.*, TEX. TRANSP. CODE ANN. § 545.413.

[11] *E.g.*, N.J. STAT. ANN. §§ 39:4-97, 39:4-104; N.M. STAT. ANN. § 66-8-114.

practicable,[12] rode more than two abreast,[13] or failed to give a hand signal continuously during the last 100 feet traveled before a turn or failed to continuously use a hand signal while stopped and waiting to turn.[14] Many of these rules—like their motor-vehicle equivalents, disorderly conduct, or even littering violations—give officers wide latitude to make subjective judgment calls when it comes to arrest. And that latitude, under petitioners' probable-cause proposal, would make it easy for an officer to defeat a retaliatory-arrest claim by articulating a belief that the rally speaker failed to continuously use a hand signal while stopped on her bike, waiting to turn. A § 1983 claim alleging an arrest made in retaliation for protected speech should not be dismissed based exclusively on the speaker's biking conduct without any consideration of the biker's speech.

To hold that an officer, even one patently acting on retaliatory animus, can escape liability merely by showing that he had probable cause to believe the plaintiff committed one of the crimes above, or one of the hundreds (if not thousands) of other potential misdemeanors, *see* Natapoff, *supra*, at 1314-15, would make it too easy for officers to escape liability for retaliatory arrests. Although this Court determined

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[12] *E.g.* GA. CODE ANN. §§ 40-6-1, 40-6-294(b); W. VA. CODE §§ 17C-11-1, 17C-11-5(a).

[13] *E.g.* GA. CODE ANN. §§ 40-6-1, 40-6-294(c); W. VA. CODE §§ 17C-11-1, 17C-11-5(c).

[14] *E.g.*, S.D. CODIFIED LAWS § 32-20B-6.

that adding a probable-cause element to retaliatory-*prosecution* claims would neither burden plaintiffs nor diminish § 1983's capacity to vindicate First Amendment rights, *see Hartman*, 547 U.S. at 265-66, the same cannot be said in the context of retaliatory arrests. To protect freedom of speech and ensure that speakers have a meaningful opportunity to seek redress for retaliatory arrests in violation of the First Amendment, this Court should reject petitioners' probable-cause proposal and continue to apply the tried-and-true *Mt. Healthy* framework that successfully balances the interests of speakers and governmental actors when animus-based claims arise in a wide variety of constitutional contexts.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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