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 THREE INDIVIDUAL ACTIVISTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

The present *Amici Curiae*, Mary Eng, Nydia Tisdale, and Timothy "Chaz" Stevens (hereinafter, "*Amici*"),[1] constitute advocates championing the First Amendment right to free speech. As diverse members of the public amidst ever-increasing scrutiny of law enforcement officers, *Amici* have witnessed retaliatory arrests meant simply to suppress citizens' First Amendment freedom of speech.

Ms. Eng, a writer and "YouTube™-er," has dedicated her career to exposing police brutality of the mentally disabled in Portland, Oregon. Ms. Eng participated in the lawsuit of *U.S. v. City of Portland*, No. 3:12-CV-02265-SI (Dist. Or. Feb. 19, 2013), regarding patterns of abuse by law enforcement officers of mentally disabled persons, which resulted in a significant settlement with the City. As a result of her criticism of the police and city council, law enforcement officers retaliated against Ms. Eng. Ms. Eng was arrested for speaking out at a city council meeting, under the false probable cause pretext that she "brandished a corkscrew." Fortunately, video evidence proved the arrest to be purely a sham, exculpating Ms. Eng from all charges.

Ms. Tisdale, a citizen journalist, frequently attends and video records public local government events and meetings in Cumming, Georgia. Ms. Tisdale has been involved in multiple victorious lawsuits against the

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[1] No party or its counsel authored this brief in whole or in part. No party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. *See* S. Ct. R. 37.6. Blanket consents to submit *amicus curiae* briefs have been filed with the Court by Petitioners and Respondent. *See* S. Ct. R. 37.3(a).

City for violating the Georgia Open Meetings Act.[2] Ms. Tisdale has experienced first-hand attempts by law enforcement officers to suppress her rights. Ms. Tisdale was arrested for recording a public political rally in Dawson County, Georgia under the probable cause pretexts of "criminal trespass" and "obstructing an officer." Ms. Tisdale has sought recourse against the Dawson County law enforcement officers who arrested her, pursuant to a civil lawsuit for retaliatory arrest.[3]

Mr. Stevens, an outspoken critic and citizen investigator, actively participates in city commission meetings in Deerfield Beach, Florida. Mr. Stevens' investigations resulted in three city officials being removed from office for ethical violations and a former mayor's exposure of misconduct. As a result, the City subjected Mr. Stevens to retaliation through harassing investigations and blocking his email from its system, stifling Mr. Stevens' speech.

Amici understand that citizen participation in the various processes of federal, state and local government remains of the utmost importance in the preservation of a free nation by enabling crucial checks and balances. Arrests of citizens for their constitutional exercise of free speech unequivocally deters citizen participation in government. Consequently, citizens

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[2] *See Tisdale v. Gravitt*, 51 F. Supp. 3d 1378 (N.D. Ga. 2014); *see also* Samuel S. Olens, *Attorney General Sam Olens Prevails in Lawsuit Defending Open Government*, OFFICE OF ATT'Y GEN. CHRIS CARR (Aug. 26, 2014), https://law.georgia.gov/press-releases/2014-08-26/attorney-general-sam-olens-prevails-lawsuit-defending-open-government.

[3] *See Tisdale v. Wooten*, *et al.*, Case No. 2:16-CV-00092-WCO (N.D. Ga. May 9, 2016), stayed pending the outcome of the instant action.

should not feel fear of repercussions for exercising their constitutional rights and law enforcement officers should not be given free rein to arbitrarily arrest citizens for simply voicing their dissents.

Likewise, requiring proof of a lack of probable cause in a claim for retaliatory arrest not only unduly burdens plaintiffs, but has far-reaching consequences, severely hindering citizen participation in government and the growth of our nation, and acquiescing to retaliatory arrests without repercussion. Permitting immunized retaliatory arrests would transform our nation into that of a police state and wholly undermines the Constitution of the United States.

This brief will seek to illuminate the immense dangers of requiring an absence-of-probable-cause element in a First Amendment retaliatory arrest claim. *Amici* have a significant interest in protecting their own rights and those of their fellow citizens. *Amici* wish to supplement Respondent's Brief and lend support as to why this Court should affirm the Ninth Circuit Court of Appeals' decision, 712 Fed. Appx. 613 (9th Cir. 2017), and declare as entirely unworkable, the absence-of-probable-cause element in retaliatory arrest cases.

SUMMARY OF THE ARGUMENT

Public concern regarding police misconduct has grown exponentially in recent years, with police brutality cases becoming increasingly high-profile. A review of the United States Department of Justice (hereinafter "USDOJ") findings for various cities across the nation evidences patterns and practices of retaliatory arrests of citizens, causing extraordinarily chilling effects on First Amendment rights. In the instant case, *Amici* submit that this Court should

adopt the *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), framework and affirm the Ninth Circuit's decision for three main reasons:

I. The Ninth Circuit's rule has not triggered an increase in frivolous lawsuits against law enforcement officers. Petitioners and their *Amici Curiae* erroneously contend that not requiring a *prima facie* absence-of-probable-cause element for retaliatory arrest claims will open the floodgates to dubious and costly lawsuits against law enforcement officers and hinder the discharge of their duties. Pet. Br. 14, 19, 31, 36, 39; Br. for National Association of Counties, *et al.* as *Amici Curiae* 7, 11; Br. for District of Columbia, *et al.* as *Amici Curiae* 1-2, 6, 10, 13; Br. for United States as *Amicus Curiae* 8, 22, 25, 27. However, the Ninth Circuit has adopted the *Mt. Healthy*, 429 U.S. 274 (requiring plaintiffs to prove substantial motivation in ordinary retaliation claims) framework, rather than the *Hartman v. Moore*, 547 U.S. 250 (2006) (compelling plaintiffs to prove lack of probable cause to succeed in retaliatory prosecution claims) framework, and has not experienced a surge in unwarranted lawsuits against law enforcement officers. Thus, implementing the *Mt. Healthy* framework in retaliatory arrest cases will not deluge law enforcement officers with unmerited lawsuits.

II. Alternative avenues for plaintiffs arrested in retaliation to obtain recovery from law enforcement officers do not exist or are so insufficient that they essentially do not exist. Petitioners and their *Amici Curiae* mistakenly allege that other avenues than 42 U.S.C. § 1983

exist for plaintiffs to recover against law enforcement officers. Pet. Br. 16, 52-53; Br. for District of Columbia, *et al.* as *Amici Curiae* 4, 18-23; Br. for United States as *Amicus Curiae* 7. The USDOJ has determined complaint and review board procedures in numerous cities across the country to be wholly ineffective. Accordingly, enabling probable cause to defeat retaliatory arrest claims will eradicate plaintiffs' means of redress for violations of their constitutional rights.

III. The common law does not support an absence-of-probable-cause element in retaliatory arrest cases. Petitioners and their *Amici Curiae* misguidedly assert that the common law demands an absence-of-probable-cause element in retaliatory arrest claims, as opined by Justice Thomas in his dissent in *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1957 (2018). Pet. Br. 13, 15, 16, 42-48; Br. for District of Colombia, *et al.* as *Amici Curiae* 1; Br. for United States as *Amicus Curiae* 6, 8-10, 13, 15. However, the common law does not endorse the imposition on plaintiffs the burden to prove lack of probable cause. In fact, the common law emphasizes malice and bad motive of law enforcement officers as an exception to requiring probable cause and places the burden on defendants to establish probable cause. Therefore, the common law does not necessitate an absence-of-probable-cause element in retaliatory arrest cases.

ARGUMENT

I. The Ninth Circuit's Rule Has Not Triggered An Increase In Frivolous Lawsuits Against Law Enforcement Officers.

The *Mt. Healthy*, 429 U.S. 274, framework should be adopted because the contrary assertions in Petitioners' Brief that substantial costs will be incurred and government officials will not be protected from disruption caused by unfounded claims are meritless. Pet. Br. 36, 39. Petitioners cite to only one case in the California Central District Court and three cases in the California Northern District Court during the period of 2013 to 2015.

In the California Northern District Court, 7,549 cases were filed in 2013; 7,239 cases were filed in 2014; and 6,884 cases were filed in 2015. *See Federal Court Management Statistics Judicial Caseload Profile* (hereinafter "*Fed. Stats.*"), U.S. COURTS (June 30, 2018), http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2018.pdf. Based on a case search,[4] only five cases were related to retaliatory arrests.[5] Furthermore, 1,393 civil rights lawsuits were filed in the California Northern District Court in 2018. *Fed. Stats.*, *supra*. Based on a case search,[6]

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[4] LexisNexis® search of "retaliatory arrest" from January 1, 2013 to December 31, 2015 (N.D. Cal.).

[5] All figures represent approximations based exclusively on the figures provided by the United States Federal Court Management System and those cases published on LexisNexis® as of October 3, 2018. An analysis into cases not published on LexisNexis® was not undertaken.

[6] LexisNexis® search of "retaliatory arrest" from January 1, 2017 to December 31, 2018 (N.D. Cal.).

merely three cases involved retaliatory arrests. Likewise, in the California Central District Court, 17,464 cases were filed in 2013; 16,952 cases were filed in 2014; and 16,275 cases were filed in 2015. *Fed. Stats.*, *supra*. Based on a case search,[7] just one case related to retaliatory arrest. In 2018, 3,832 civil rights lawsuits were filed in the Central District Court of California. *Fed. Stats.*, *supra*. Based on a case search,[8] only five cases related to retaliatory arrests. Although Petitioners do not cite to any other district court cases in the Ninth Circuit, it is worth noting that:

- In the Alaska District Court, of the 515 cases filed in 2013; 518 cases filed in 2014; 510 cases filed in 2015; 653 cases filed in 2016; 585 cases filed 2017; and 676 cases filed in 2018, *Fed. Stats.*, *supra*; only 1 case—that at issue in the instant case—involved retaliatory arrest.[9] Furthermore, of the 62 civil rights lawsuits filed in 2018, *Fed. Stats.*, *supra*, none related to retaliatory arrests.[10]
- In the Arizona District Court, of the 10,417 cases filed in 2013; 13,745 cases filed in 2014; 9,458 cases filed in 2015; 11,213 cases filed in 2016; 11,718 cases filed in 2017; and 12,105 cases filed in 2018, *Fed. Stats.*, *supra*; merely 4 cases related to retaliatory arrests.[11] Additionally, of the 601 civil rights lawsuits

[7] *Id.* from January 1, 2013 to December 31, 2015 (C.D. Cal.).

[8] *Id.* from January 1, 2017 to December 31, 2018 (C.D. Cal.).

[9] *Id.* from January 1, 2013 to December 31, 2018 (D. Alaska).

[10] *Id.* from January 1, 2017 to December 31, 2018 (D. Alaska).

[11] *Id.* from January 1, 2013 to December 31, 2018 (D. Ariz.).

filed in 2018, *Fed. Stats.*, *supra*, none involved retaliatory arrests.[12]

- In the California Eastern District Court, of the 6,096 cases filed in 2013; 6,024 cases filed in 2014; 5,772 cases filed in 2015; 5,477 cases filed in 2016; 5,457 cases filed in 2017; and 5,870 cases filed in 2018, *Fed. Stats.*, *supra*; only 4 cases involved retaliatory arrests.[13] Additionally, of the 897 civil rights cases filed in 2018, *Fed. Stats.*, *supra*, just 1 case involved retaliatory arrest.[14]
- In the California Southern District Court, of the 10,458 cases filed in 2013; 9,522 cases filed in 2014; 8,527 cases filed in 2015; 8,169 cases filed in 2016; 7,885 cases filed in 2017; and 10,436 cases filed in 2018, *Fed. Stats.*, *supra*; only 3 cases related to retaliatory arrests.[15] Further, of the 491 civil rights lawsuits filed in 2018, *Fed. Stats.*, *supra*, none involved retaliatory arrests.[16]
- In the Hawaii District Court, of the 1,137 cases filed in 2013; 1,197 cases filed in 2014; 997 cases filed in 2015; 1,051 cases filed in 2016; 1,090 cases filed in 2017; and 933 cases filed in 2018, *Fed. Stats.*, *supra*; just 2 involved retaliatory arrests.[17] Furthermore, of the 156 civil rights

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[12] *Id.* from January 1, 2017 to December 31, 2018 (D. Ariz.).

[13] *Id.* from January 1, 2013 to December 31, 2018 (E.D. Cal.).

[14] *Id.* from January 1, 2017 to December 31, 2018 (E.D. Cal.).

[15] *Id.* from January 1, 2013 to December 31, 2018 (S.D. Cal.).

[16] *Id.* from January 1, 2017 to December 31, 2018 (S.D. Cal.).

[17] *Id.* from January 1, 2013 to December 31, 2018 (D. Haw.).

lawsuits filed in 2018, *Fed. Stats.*, *supra*, merely 1 related to retaliatory arrest.[18]

- In the Nevada District Court, of the 3,802 cases filed in 2013; 3,707 cases filed in 2014; 3,742 cases filed in 2015; 4,258 cases filed in 2016; 4,822 cases filed in 2017; and 3,953 cases filed in 2018, *Fed. Stats.*, *supra*; only 2 related to retaliatory arrests.[19] Moreover, of the 480 civil rights lawsuits filed in 2018, *Fed. Stats.*, *supra*, none involved retaliatory arrests.[20]
- In the Oregon District Court, of the 3,364 cases filed in 2013; 3,342 cases filed in 2014; 3,183 cases filed in 2015; 3,577 cases filed in 2016; 3,068 cases filed in 2017; and 3,241 cases filed in 2018, *Fed. Stats.*, *supra*; merely 6 cases involved retaliatory arrests.[21] Additionally, of the 361 civil rights lawsuits filed in 2018, *Fed. Stats.*, *supra*, just 3 cases related to retaliatory arrests.[22]
- In the Washington Western District Court, of the 4,364 cases filed in 2013; 4,198 cases filed in 2014; 3,887 cases filed in 2015; 3,931 cases filed in 2016; 3,775 cases filed in 2017; and 3,934 cases filed in 2018, *Fed. Stats.*, *supra*; simply 8 cases related to retaliatory arrests.[23] Additionally, of the 393 civil rights lawsuits

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[18] *Id.* from January 1, 2017 to December 31, 2018 (D. Haw.).

[19] *Id.* from January 1, 2013 to December 31, 2018 (D. Nev.).

[20] *Id.* from January 1, 2017 to December 31, 2018 (D. Nev.).

[21] *Id.* from January 1, 2013 to December 31, 2018 (Dist. Or.).

[22] *Id.* from January 1, 2017 to December 31, 2018 (Dist. Or.).

[23] *Id.* from January 1, 2013 to December 31, 2018 (W.D. Wash.).

filed in 2018, *Fed. Stats.*, *supra*, merely 3 cases involved retaliatory arrests.[24]

In all of the district courts in the Ninth Circuit and the Ninth Circuit Court of Appeals,[25] fifty-seven cases involved retaliatory arrest in the period from January 1, 2013 to December 31, 2018.[26] Justice Kennedy, writing for the majority in *Lozman*, 138 S. Ct. at 1953 (citing Dept. of Justice-FBI, Uniform Crime Report, Crime in the United States, 2016 (Fall 2017)), stated that "[t]here are on average about 29,000 arrests per day in this country." Furthermore, there are approximately 765,000 law enforcement officers employed in the United States. *See* Brian A. Reeves, *Census of State and Local Law Enforcement Agencies, 2008*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS (July 2011), https://www.bjs.gov/content/pub/pdf/csllea08.pdf.

Accordingly, of the 765,000 law enforcement officers employed; 10,585,000 arrests per year; and 48,008 civil cases—of which 8,666 involve civil rights—filed in 2018 in the district courts within the Ninth Circuit, *Fed. Stats.*, *supra*, only 16 cases involved retaliatory

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[24] *Id.* from January 1, 2017 to December 31, 2018 (W.D. Wash.).

[25] In the Ninth Circuit, the total "Other" appeals filed, not categorized as criminal, prisoner or administrative, are as follows: in 2013, 4,208 appeals; in 2014, 4,106 appeals; in 2015, 4,072 appeals; in 2016, 4,200 appeals; in 2017, 4,088 appeals; and in 2018, 3,894 appeals. *See U.S. Court of Appeals – Judicial Caseload Profile Ninth Circuit*, U.S. COURTS (June 30, 2018), http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appprofile0630.2018.pdf. Petitioners cite to merely three appellate cases in the Ninth Circuit to support their contentions.

[26] LexisNexis® search of "retaliatory arrest" from January 1, 2013 to December 31, 2018 in the Ninth Circuit Court of Appeals and district courts within the Ninth Circuit.

arrests.[27] The concerns for enabling groundless lawsuits against law enforcement officers and hindering law enforcement officers from performing their duties do not outweigh plaintiffs' entitlements to redress for violations of their First Amendment rights. The Ninth Circuit has implemented the *Mt. Healthy*, 429 U.S. 274, framework for retaliatory arrests since 2013 and before then, determined that probable cause did not defeat a claim for retaliatory arrest. *See Ford v. City of Yakima*, 706 F.3d 1188, 1194-95 (9th Cir. 2013); *Skoog v. Cnty. of Clackamas*, 469 F.3d 1221, 1232 (9th Cir. 2006). The statistics unquestionably prove that law enforcement officers in the Ninth Circuit have not been inundated with "a flood of suits," Br. for District of Columbia, *et al.* as *Amici Curiae* 13.

Justice Kennedy, writing for the majority in *Lozman*, 138 S. Ct. at 1953 (citing Brief for District of Columbia, *et al.* as *Amici Curiae* 5-11 (Jan. 29, 2018) (No.17-21)), stated, "the complexity of proving (or disproving) causation in these cases creates a risk that the courts will be flooded with dubious retaliatory arrest suits." Justice Kennedy recognized that "the causation problem in retaliatory arrest cases is not the same as the problem identified in *Hartman*" because the prosecutorial presumption of regularity does not apply in retaliatory arrest cases. *Id.* Thus, although without a threshold inquiry into probable cause there may theoretically be a risk of arrestees filing meritless retaliatory arrest lawsuits against law enforcement officers, said risk has not presented itself in the Ninth Circuit. The Tenth Circuit courts have likewise not experienced a rise in retaliatory arrest claims. Cases arising out of the Tenth Circuit illustrate the

[27] *Id.* from January 1, 2017 to December 31, 2018 in the district courts within the Ninth Circuit.

procedural mechanisms by which frivolous retaliatory arrest claims may be filtered out prior to trial.[28] Greater risks exist of chilling a plaintiff's speech and eliminating a plaintiff's right to redress for his damages.

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[28] *See Lee v. Tucker*, No. 16-CV-01569-NYW, 2017 U.S. Dist. LEXIS 102662, at *20 (D. Colo. July 3, 2017), in which the District Court of Colorado found that probable cause did not defeat a retaliatory arrest claim but concluded that the plaintiff's claim failed on the merits because the plaintiff failed to create a genuine issue of material fact that his insults directed at the officer substantially motivated his arrest. *See also Titus v. Ahlm*, 297 Fed. Appx. 796, 801-02 (10th Cir. 2008), in which the Tenth Circuit held that even if the plaintiff need not plead the absence of probable cause, the plaintiff's claim nevertheless failed because he could not demonstrate that the officer's conduct was substantially motivated by his prior protected speech. According to *Fed. Stats.*, *supra*, and a LexisNexis® search of "retaliatory arrest" from January 1, 2017 to December 31, 2018, in the District Court of Colorado, 618 civil rights lawsuits were filed in 2018, with only 2 involving retaliatory arrests; in the District Court of New Mexico, 265 civil rights lawsuits were filed in 2018, with merely 1 relating to retaliatory arrest; in the District Court of Utah, 306 civil rights lawsuits were filed in 2018, with just 1 involving retaliatory arrest. In the Tenth Circuit, the total "Other" appeals filed, not categorized as criminal, prisoner or administrative, are as follows: in 2013, 962 appeals; in 2014, 853 appeals; in 2015, 864 appeals; in 2016, 1,272 appeals; in 2017, 896 appeals; and in 2018, 811 appeals. *See U.S. Court of Appeals – Judicial Caseload Profile Tenth Circuit*, U.S. COURTS (June 30, 2018), http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appprofile0630.2018.pdf. Based on a LexisNexis® search of "retaliatory arrest" from January 1, 2013 to December 31, 2018, in the Tenth Circuit, only 8 cases involved retaliatory arrests.

II. Alternative Avenues For Plaintiffs Arrested In Retaliation To Obtain Recovery From Law Enforcement Officers Do Not Exist Or Are So Insufficient That They Essentially Do Not Exist.

The *Mt. Healthy*, 429 U.S. 274, framework should be adopted in retaliatory arrest cases to allow plaintiffs an adequate remedy against law enforcement officers for First Amendment constitutional violations. Petitioners contend that retaliatory arrests may be remedied and deterred in other ways than 42 U.S.C. § 1983, such as through internal investigation and discipline. Pet. Br. 52-53. Likewise, the District of Columbia, *et al.* as *Amici Curiae* allege that state and local jurisdictions have developed "comprehensive procedures . . . to address police misconduct and control the power of arrest." Br. for District of Columbia, *et al.* as *Amici Curiae* 18. Although police departments publicly recognize the importance of responding to citizen complaints and holding law enforcement officers accountable, Pet. Br. 53; Br. for District of Columbia, *et al.* as *Amici Curiae* 19, in practice, citizens in various cities across the nation have significant difficulty filing complaints against law enforcement officers.

For example, an undercover television investigator attempted to obtain citizen complaint forms at thirty-eight police departments throughout South Florida and continuously experienced significant intimidation, harassment and verbal and physical threats as a result of the requests. Respectfully, the Court is urged to view the video documenting the investigator's report. *See* CBS4 News, *What Happens When You Try to File a Complaint Against a Police Officer*, YOUTUBE™ (Mar. 28, 2017), https://www.youtube.

com/watch?v=vnJ5f1JMKns&feature=youtu.be. The referenced composite video includes additional undercover investigations conducted at various police departments across the nation. Said investigations also reveal a consistent pattern and practice of police intimidation, harassment and verbal and physical threats, including arrest, merely resulting from an undercover investigator's request for a complaint form.

These investigations do not constitute isolated events. *See* Ryan J. Reilly, *Here's What Happens When You Complain to Cops About Cops*, HUFFINGTON POST (Oct. 9, 2015, 1:43 PM), https://www.huffingtonpost.com/entry/internal-affairs-police-misconduct_us_5613ea2fe4b022a4ce5f87ce (noting that St. Louis County Police reported receiving just a single formal complaint about officer behavior during the protests of August 2014, which was determined by the USDOJ as resulting from the difficulty or impossibility of lodging complaints); *Contacts Between Police and the Public, 2008*, OFFICE OF JUSTICE PROGRAMS BUREAU OF JUSTICE STATISTICS (Oct. 2011) 12, https://www.bjs.gov/content/pub/pdf/cpp08.pdf (estimating that 83.9 percent of individuals who experienced force or the threat of force felt that the police acted improperly and of those, only 13.7 percent filed complaints against the law enforcement officers).

Furthermore, the USDOJ has investigated numerous police departments across the country, finding substantial practices and patterns of ineffective complaint procedures and retaliation:

- In the USDOJ's Report on the Ferguson Police Department (hereinafter "FPD"), USDOJ Civil Rights Div., *Investigation of the Ferguson Police Department*, found at THE WASH. POST (Mar. 4, 2015),

http://apps.washingtonpost.com/g/documents/national/department-of-justice-report-on-the-ferguson-mo-police-department/1435/, the USDOJ found, *inter alia*, as follows:

- FPD's approach to enforcement results in violations of individuals' First Amendment rights. FPD arrests citizens for a variety of protected conduct, including talking back to officers, recording public police activities and lawfully protesting perceived injustices. *Id.* at 24. These "contempt of cop" cases are propelled by officers' beliefs that arrest is an appropriate response to disrespect and are generally charged as a failure to comply, disorderly conduct, interference with an officer or resisting arrest. *Id.* at 25.
- Furthermore, FPD lacks a meaningful system for holding officers accountable when they violate laws or policies and discourages individuals from making complaints. *Id.* at 82. "[I]t serves to contrast FPD's tolerance for officer misconduct against the Department's aggressive enforcement of even minor municipal infractions, lending credence to a sentiment . . . heard often from Ferguson residents: that a 'different set of rules' applies to Ferguson's police than to its African-American residents, and that making a complaint about officer misconduct is futile." *Id.*
- Moreover, even where FPD investigates a complaint, FPD consistently takes the word of officers over the word of complainants, even if the officer's version of events clearly contradicts the objective evidence. "On the

rare occasion that FPD does sustain an external complaint of officer misconduct, the discipline it imposes is generally too low to be an effective deterrent." *Id.* at 85.

- In the USDOJ's Report on the Chicago Police Department (hereinafter "CPD"), USDOJ Civil Rights Div., *Investigation of the Chicago Police Department*, U.S. DEP'T OF JUSTICE (Jan. 13, 2017), https://www.justice.gov/opa/file/925846/download, the USDOJ determined, *inter alia*, as follows:
  - CPD received over 30,000 complaints of police misconduct during the 5 years preceding the USDOJ's investigation, but fewer than 2 percent were sustained. *Id.* at 7.
  - Further, CPD fails to investigate the majority of cases. *Id.* at 8. The USDOJ's review of hundreds of investigative files revealed that the investigations by the Independent Police Review Authority and the Bureau of Internal Affairs, "with rare exception, suffer from entrenched investigative deficiencies and biased techniques." *Id.* at 56.
- In the USDOJ's Draft Report on the Milwaukee Police Department (hereinafter "MPD"), Collaborative Reform Team, *Collaborative Reform Initiative Milwaukee Police Department Assessment Report*, found at JOURNAL SENTINEL (Aug. 30, 2017), https://graphics.jsonline.com/jsi_news/documents/doj_draftmpdreport.pdf; *see also* Ashley Luthern and Mary Spicuzza, *Alderman Take Up Draft Department of Justice Report on Milwaukee Police Department*, JOURNAL SENTINEL (Sept. 14, 2017, 6:07 PM), https://www.jsonline.com/story/news/

crime/2017/09/14/aldermen-take-up-draft-department-justice-report-milwaukee-police-department/667448001/ (reporting that the Police Chief stated that the draft contained inaccuracies, but it raised valid concerns that needed to be addressed), the USDOJ found, *inter alia*, as follows:

- MPD policy does not provide for appropriate oversight. Draft Report, *supra* at 123. MPD's policy regarding complaints from community members allows a supervisor to determine whether a complaint form shall be completed, allowing too much discretion and creating conflicts of interest. *Id.*
- Additionally, MPD's complaint investigation files are poorly organized, lack consistency and are often incomplete. *Id.* at 125. "Many community members expressed frustration and distrust in the citizen complaint process and oversight of MPD." *Id.*

- In the USDOJ's Report on the San Francisco Police Department (hereinafter "SFPD"), *Collaborative Reform Initiative An Assessment of the San Francisco Police Department*, CMTY. ORIENTED POLICING SERVS. U.S. DEP'T OF JUSTICE (Oct. 2016), https://ric-zai-inc.com/Publications/cops-w0817-pub.pdf, the USDOJ determined, *inter alia*, as follows:
  - "At present, the culture of SFPD is not directed toward building an environment of accountability. Policies are disregarded and investigations are not robust. The lack of coordination between institutional partners for investigations is a real challenge to

building trust within the community." *Id.* at 157.

- In the USDOJ's Report on the Baltimore City Police Department (hereinafter "BPD"), USDOJ Civil Rights Div., *Investigation of the Baltimore City Police Department*, U.S. DEP'T OF JUSTICE (Aug. 10, 2016), https://www.justice.gov/crt/file/883296/download, the USDOJ found, *inter alia*, as follows:
  - BPD violates the First Amendment by retaliating against individuals engaged in constitutionally protected activities. *Id.* at 9.
  - Furthermore, "a cultural resistance to accountability has developed and been reinforced within the Department." *Id.* at 139. BPD lacks adequate systems to investigate complaints and impose discipline. *Id.* Furthermore, BPD discourages members of the public from filing complaints against officers and BPD officers . . . actively discourage citizens from filing complaints . . . ." *Id.* at 140.
  - Moreover, BPD officers expressly discourage citizens from filing complaints, "sometimes mocking or humiliating them in the process. Some civilians wishing to alert BPD to officer misconduct had to endure verbal abuse and contact BPD multiple times before investigators would move forward with any investigation." *Id.* at 140-141. "BPD's internal culture is resistant to effective discipline" and "BPD has allowed violations of policy to go unaddressed even when they are widespread or involve serious misconduct." *Id.* at 149.

- In the USDOJ's Report on the Calexico Police Department (hereinafter "CaPD"), *Collaborative Reform* Initiative *An Assessment of the Calexico Police Department*, CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE (2016), https://ric-zai-inc.com/Publications/cops-w0804-pub.pdf, the USDOJ determined, *inter alia*, as follows:
    - CaPD's policy language as to complaints "suggests that the complainant must furnish proof that the alleged misbehavior was indeed misconduct before a complaint may even be filed." *Id.* at 38-39.
    - Further, CaPD does not sufficiently make complaint forms accessible to the public. *Id.* at 44.
- In the USDOJ's Report on the Philadelphia Police Department (hereinafter "PPD"), *Collaborative Reform* Initiative *An Assessment of Deadly Force in the Philadelphia Police Department*, CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE (2015), https://ric-zai-inc.com/Publications/cops-w0753-pub.pdf, the USDOJ found, *inter alia*, as follows:
    - "Distrust in the ability of PPD to investigate itself pervades segments of the community," primarily due to past and present scandals, high-profile officer-involved shootings and a lack of transparency in investigative outcomes. *Id.* at 122.
- In the USDOJ's Report on the Cleveland Division of Police (hereinafter "CDP"), USDOJ Civil Rights Div., U.S. Atty's Office N. Dist. of Ohio, *Investigation of the Cleveland Division of Police*, U.S. DEP'T OF JUSTICE (Dec. 4, 2014),

https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf, the USDOJ determined, *inter alia*, as follows:

- CDP has a pattern and practice of unreasonable force that is "significantly out of proportion to the resistance encountered and officers too often escalate incidents with citizens instead of using effective and accepted tactics to de-escalate tension." *Id.* at 4. The force is applied "as punishment for the person's earlier verbal or physical resistance to an officer's command, and is not based on a current threat posed by the person, which is not legally justified." Id.
- Additionally, the Charter of the City of Cleveland requires the Office of Professional Standards to conduct "a full and complete investigation" of each police misconduct complaint filed by a citizen. *Id.* at 38. CDP's policies recognize that there should be a readily accessible procedure to submit complaints of misconduct to ensure that officers serve in an accountable manner. *Id.* at 38. However, CDP fails to adequately investigate civilian complaints and CDP does not implement appropriate corrective measures. *Id.* at 37. It "is apparent that the reality falls far short of the written policies on these matters." Moreover, CDP's complaint investigations "are neither timely nor thorough, . . . civilians face a variety of barriers to completing the complaint process, and . . . the system as a whole lacks transparency. As a result, CDP falls woefully

short of meeting its obligation to ensure officer accountability and promote community trust." *Id.*

- In the USDOJ's Report on the Albuquerque Police Department (hereinafter "AlPD"), USDOJ Civil Rights Div., Findings Letter *Re: Albuquerque Police Department*, U.S. DEP'T OF JUSTICE (Apr. 10, 2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/04/10/apd_findings_4-10-14.pdf, the USDOJ found, *inter alia*, as follows:
  - AlPD's "independent oversight structure could . . . do far more to involve the community . . . ." *Id.* at 38. Citizen complaints are subject to strict limitations that keep the Police Oversight Commission from being able to address potentially serious allegations of misconduct. *Id.*
  - Furthermore, "the Review Officer is more closely aligned with the department than with the community that the Review Officer serves" as evidenced by a failure "to find violations of department policy in cases where it is more likely than not that violations clearly occurred and . . . interpreted the department's policies in ways that are contrary to the policies themselves but favorable to officers." *Id.* at 39.
- In the USDOJ's Report on the Newark Police Department (hereinafter "NPD"), USDOJ Civil Rights Div., U.S. Atty's Office Dist. of N.J., *Investigation of the Newark Police Department*, U.S. DEP'T OF JUSTICE (July 22, 2014), https://www.justice.gov/sites/default/files/crt/lega

cy/2014/07/22/newark_findings_7-22-14.pdf, the USDOJ determined, *inter alia*, as follows:

- "[T]here is reasonable cause to believe that the NPD has engaged in a pattern or practice of unconstitutional arrests for behavior perceived as insubordinate or disrespectful to officers—often charged as obstruction of justice, resisting arrest, or disorderly conduct." *Id.* at 11-12. In its Report, the USDOJ illustrates one such response, eerily similar to the instant case: an individual was arrested after he questioned the officers' decision to arrest his neighbor. *Id.* The individual alleged that the officers immediately proceeded to use force against him. *Id.* at 13. The officers' own version of events, reporting that the individual told them loudly and "in a belligerent manner" that they could not arrest his neighbor, did not establish probable cause for the officers' decision to arrest the man for obstructing the administration of law. *Id.*

- Moreover, NPD's system for investigating complaints is "structured to curtail disciplinary action and stifle investigations into the credibility of the City's police officers." *Id.* at 35. NPD has "serious deficiencies" in its handling of complaints "that translate to a lack of accountability for serious misconduct." *Id.* For instance, NPD has intimidated and discouraged victims' and witnesses' participation in the complaint process. *Id.* at 41.

- In the USDOJ's Report on the Seattle Police Department (hereinafter "SPD"), USDOJ Civil Rights Div., U.S. Atty's Office W. Dist. of Wash.,

Investigation of the Seattle Police Department, U.S. DEP'T OF JUSTICE (Dec. 16, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/12/16/spd_findletter_12-16-11.pdf, the USDOJ found, *inter alia*, as follows:

- "SPD engages in a pattern or practice of using excessive force against individuals who express discontent with, or 'talk back to,' police officers." *Id.* at 14.
- Additionally, SPD's Early Intervention System and internal affairs departments "do not provide the intended backstop for the failures of the direct supervisory review process" because the Office of Professional Accountability (hereinafter "OPA") disposes of two-thirds of citizens' complaints by sending them to SPD's precincts, where the quality of investigations is "appalling" and OPA overuses and improperly uses the finding of "Supervisory Intervention," resulting in the disposal of serious allegations "simply to avoid the 'stigma' of a formal finding." *Id.* at 5.

- In the USDOJ's Report on the Maricopa County Sheriff's Office (hereinafter "MCSO"), USDOJ Civil Rights Div., Findings Letter *Re: United States' Investigation of the Maricopa County Sheriff's Office*, U.S. DEP'T OF JUSTICE (Dec. 15, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf, the USDOJ determined, *inter alia*, as follows:
  - MCSO's law enforcement officers and staff unlawfully retaliate against citizens who complain about or criticize MCSO. *Id.* at 2,

4-5. "MCSO deputies have sought to silence individuals who have publicly spoken out and participated in protected demonstrations against the policies and practices of MCSO." *Id.* at 13.

- Furthermore, MCSO has failed to put in place meaningful oversight and accountability structures, including a system for handling complaints. *Id.* at 12. "Further, because deputy misconduct often reflects poorly on the actions or inactions of the first-line supervisor, MCSO's reliance on first-line supervisors places the critical determination of whether to go forward with an investigation in the hands of someone who has an inherent conflict of interest in having a matter thoroughly investigated." *Id.*

- In the USDOJ's Report on the Puerto Rico Police Department (hereinafter "PRPD"), USDOJ Civil Rights Div., *Investigation of the Puerto Rico Police Department*, U.S. DEP'T OF JUSTICE (Sept. 5, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/09/08/prpd_letter.pdf, the USDOJ found, *inter alia*, as follows:

  - There are pervasive and longstanding deficiencies in PRPD's civilian complaint process, particularly, the intake procedure discourages civilians from filing complaints; the protocols are insufficient to ensure complete and timely investigations; and investigators lack training and resources to complete adequate investigations. *Id.* at 68.

  - Moreover, the average length of an investigation is nearly four years, with some

investigations taking up to ten years or more to complete. *Id.* at 70.

- In the USDOJ's Report on the New Orleans Police Department (hereinafter "NOPD"), USDOJ Civil Rights Div., *Investigation of the New Orleans Police Department*, U.S. DEP'T OF JUSTICE (Mar. 16, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf, the USDOJ determined, *inter alia*, as follows:
  - NOPD's system for receiving, investigating, and resolving misconduct complaints does not effectively hold law enforcement officers accountable. *Id.* at xvii-xviii. "Discipline and corrective action are meted out inconsistently and, too often, without sufficient consideration of the seriousness of the offense and its impact on the police-community relationship." *Id.* at xviii.
  - Additionally, the use of retaliatory force is widely accepted within NOPD. *Id.* at 5. "[T]he perceived lack of integrity and effectiveness of the misconduct complaint process was a theme that we heard from many community members, who frequently expressed reluctance to make complaints against specific officers out of fear of retaliation and reprisal." *Id.* at 38.

Furthermore, the American Civil Liberties Union (hereinafter "ACLU") has found:

- With respect to Connecticut police agencies, "many . . . in the state fail to clearly post their complaint policies and forms online, refuse to accept anonymous complaints, and include threats of prosecution in their complaint intake

protocols." *Earning Trust: Addressing Police Misconduct Complaints in Connecticut*, ACLU OF CONN. (Jan. 26, 2017), https://www.acluct.org/en/news/earning-trust-addressing-police-misconduct-complaints-connecticut.

- In Rhode Island, police agencies have made it more difficult for complainants to locate complaint procedures, "and to have the kind of trust in the internal affairs process that is critical to facilitate feedback about police conduct." *Public Access to Police Complaint Forms and Procedures An Update*, ACLU OF R.I. (Sept. 2014) 3, http://riaclu.org/images/uploads/Police_Complaint_Procedures_2014_Update_Report_final1.pdf. For instance, five police departments have no complaint forms or procedures posted online, *id.* at 2; nineteen of the departments that follow procedures in accordance with the law fail to accept complaints in the legally required manner, *id.* at 3; at least two departments require a complainant's social security number, and at least one requires the complaint to be notarized, *id.*; at least eleven departments make "selective cautionary statements" or require complainants to sign disclaimers, suggesting the complainants will be under investigation, *id.*; and "[s]everal departments give only a perfunctory explanation of their complaint process, barely adhering to the law and providing virtually no guidance to complainants." *Id.*

The Office of the City Auditor's Report on the Austin Police Department (hereinafter "APD"), Office of the City Auditor, *Audit of the Austin Police Department's Handling of Complaints*, ASS'N OF LOCAL GOV'T AUDITORS (Sept. 2016), https://algaonline.org/Docu

mentCenter/View/5394, determined, *inter alia*, as follows:

- "[T]here are barriers to filing complaints and APD's policies and practices make it difficult to ensure that complaints are handled consistently." *Id.*
- Furthermore, the complaint process is not accessible and issues exist with how the APD handles complaints. *Id.* at 3. A 2007 U.S. Department of Justice memorandum to APD identified many of the same issues along with several recommendations to resolve them but the issues have yet to be addressed. *Id.*

Based on the foregoing reports, it is clear that citizens retaliated against by law enforcement officers have no remedy in the complaint procedures of police departments throughout the nation. If this Court adopts the *Hartman*, 547 U.S. 250, framework and determines that probable cause defeats a 42 U.S.C. § 1983 retaliatory arrest claim, any remedy for citizens arrested in retaliation for their exercise of free speech will be extinguished. Such a rule immunizes law enforcement officers for chilling citizens' freedoms of speech, enables selective enforcement and provides no accountability for law enforcement actions. Accordingly, the *Mt. Healthy*, 429 U.S. 274, framework should be adopted in retaliatory arrest cases to allow plaintiffs a fighting chance at recovering against law enforcement officers for constitutional violations.

III. The Common Law Does Not Support An Absence-Of-Probable-Cause Element In Retaliatory Arrest Claims.

The common law bolsters the adoption of the *Mt. Healthy*, 429 U.S. 274, framework rather than an

absence-of-probable-cause element, contrary to the arguments advanced by Petitioners and their *Amici Curiae*. Pet. Br. 16, 52-53; Br. for District of Columbia, *et al.*, as *Amici Curiae* 4, 18-23; Br. for United States as *Amicus Curiae* 7. Justice Thomas' dissent in *Lozman*, 138 S. Ct. at 1957, noted that probable cause defeated the common law torts most analogous to a First Amendment retaliatory arrest claim, consisting of malicious prosecution, malicious arrest and false imprisonment. Pet. Br. 42-44.

In support of their contention that most courts at common law held that probable cause defeated false imprisonment claims, Petitioners cite to *Dir. Gen. of R.R.s v. Kastenbaum*, 263 U.S. 25 (1923) and *Fagan v. Pittsburgh Terminal Coal Corp.*, 149 A. 159 (Pa. 1930). Pet. Br. 45. However, the Court in *Kastenbaum* held that the *defendant* had the burden to establish probable cause for the arrest and that probable cause constituted a mixed question of law and fact to be submitted to the jury. *Kastenbaum*, 263 U.S. at 27-28. Furthermore, *Fagan* involved a complaint against a railroad company alleging that the company directed the officers as its agents to arrest the plaintiff. *Fagan*, 149 A. at 162. The Court found that the plaintiff produced no such evidence and the officers acted as public officials with probable cause. *Id.* at 163. *Fagan* involved a complex chain of causation, with the plaintiff instigating a lawsuit against the railroad company rather than the law enforcement officers. Thus, *Fagan* does not lend support to ordinary retaliatory arrest cases.

Petitioners similarly cite to *Hawley v. Butler & Marcellus*, 54 Barb. 490 (N.Y. 1868). Pet. Br. 45. However, the Court made clear in *Hawley* that "where there is probable cause, whether it appear from

extrinsic circumstances, or from the conduct, falsehoods or contradictions of the party arrested, the officer, acting *without malice or bad motive*, will be protected, if acting in the line of his duty . . . ." *Hawley*, 54 Barb. at 504 (emphasis added). The Court further stated, "it sometimes happens that the same act, done by the same person, proceeding from an evil or bad motive, is actionable, which would not be so actionable, if proceeding from the honest intent to discharge a public duty." *Id.* at 492. Based on the Court's analysis, an officer acting with malice or bad motive will clearly not be protected by probable cause against a lawsuit. This reasoning is consistent with the evaluation by Justice Kennedy, writing for the majority, in *Lozman*, 138 S. Ct. at 1954, that the petitioner would not have succeeded because the officer appeared to have acted in good faith with no knowledge of the petitioner's constitutionally protected activities.

Furthermore, Petitioners opine that in thirty-eight states and the District of Columbia, probable cause is a bar or an affirmative defense to false imprisonment cases. Pet. Br. 45. However, only four of the cases cited occurred within a fifty-year period of the enactment of 42 U.S.C. § 1983 in 1871, and many occurred within the past thirty years. Accordingly, the other thirty-five cited cases are wholly irrelevant to the common law analysis, as the common law analysis centers around "the state of the common law at the time § 1983 was enacted." *Lozman*, 138 S. Ct. at 1957 (Thomas, J. dissenting) (citing *Heck v. Humphrey*, 512 U.S. 477, 491 (1994) (Thomas, J. concurring)). In his dissent in *Lozman*, 138 S. Ct. at 1957, Justice Thomas focused his examination on nineteenth century court decisions. Subsequent to the nineteenth century, court decisions involving false imprisonment claims have no

weight of authority as the state of the common law at the time 42 U.S.C. § 1983 was enacted.

The four nineteenth century common law cases cited by Petitioners do not form the basis for establishing an absence-of-probable-cause element in retaliatory arrest claims. Pet. Br. 45. Petitioners cite to *Beebe v. De Baun*, 8 Ark. 510 (1848). *Beebe* involved a writ of replevin with a capias clause that was issued against the plaintiff, commanding the sheriff to seize the plaintiff's slaves and if the slaves could not be found, then to arrest the plaintiff. *Beebe*, 8 Ark. 510. *Beebe* can be better analogized to an officer obtaining a warrant from a magistrate to arrest a particular person. In said situation, an additional complication is present, creating a complex chain of causation not found in ordinary retaliatory arrest claims.

Petitioners further cite to *McCaffrey v. Thomas*, 56 A. 382 (Del. Super. Ct. 1903), *Jackson v. Knowlton*, 173 Mass. 94 (1899), and *Mikelberg v. Phila. Rapid Transit Co.*, 16 Pa. D. 906 (Pa. Com. Pl. 1907). The Court in *McCaffrey*, 56 A. at 383, explained that "where an arrest is made by an officer without warrant the burden is upon the officer, in a case like this, to show reasonable cause or grounds for the arrest." The Court left the decision as to probable cause to the jury. *Id.* at 383-84. Similarly, the Court in *Jackson* held that the jury instruction placing the burden on the plaintiff to show lack of probable cause was erroneous and that the burden instead rested with the defendant to establish probable cause. *Jackson*, 173 Mass. at 95, 96-97 (quoting *Bassett v. Porter*, 64 Mass. 418, 420 (1852)) ("Every imprisonment of a man is *prima facie* a trespass; and in an action to recover damages therefor, if the imprisonment is proved or admitted, the burden of justifying it is on the defendant."). The Court quoted

Badkin v. Powell, 2 Cowp. 476, 478 (1776): "[a] gaoler if he has a prisoner in custody is *prima facie* guilty of imprisonment; and therefore must justify." *Jackson*, 173 Mass. at 94-95. The Court likewise quoted *Holroyd v. Doncaster*, 11 Moore 440, 3 Bing. 492 (1826), "[w]here a man deprives another of his liberty, the injured party is entitled to maintain an action for false imprisonment, and it is for the defendant to justify his proceeding by showing that he had legal authority for doing that which he had done." *Jackson*, 173 Mass. at 95.

Equally, the Court in *Mikelberg*, 16 Pa. D. 906, held that in an action for false arrest, the burden rests with the defendant to prove that the arrest arose from probable cause. Therefore, as acknowledged by Petitioners, Pet. Br. 45, *McCaffrey*, *Jackson* and *Mikelberg* place the burden of proving probable cause on the defendant, rather than as an element of the plaintiff's *prima facie* case. *McCaffrey*, *Jackson* and *Mikelberg* support the adoption of the *Mt. Healthy*, 429 U.S. 274, framework in retaliatory arrest cases, allowing a defendant to utilize probable cause as evidence of a defendant's lack of retaliatory animus. *See Ford*, 706 F.3 at 1194, n.2 (citing *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 901 (9th Cir. 2008)); Br. for Pet. at 15-16, 39, *Lozman*, 138 S. Ct. 1945 (Dec. 22, 2017) (No. 17-21).

Additionally, the Court in *Dinsman v. Wilkes*, 53 U.S. 390, 402 (1852), in an action by a marine against his commanding officer for false imprisonment, explained that,

> [W]hether the acts charged were done or not, and what motives actuated the defendant, are questions of fact exclusively for the jury; and probable cause or not is of no further

> importance than as evidence to be weighed by them in connection with all the other evidence in the case, in determining whether the defendant acted from a sense of duty or from ill-will to the plaintiff.

The Court further determined that if the jury believed,

> [T]hat the defendant, in all the acts complained of, was actuated alone by an upright intention to maintain the discipline of his command and the interest of the service in which he was engaged, then the plaintiff is not entitled to recover. But, if they find that the punishment of the plaintiff was in any manner or in any degree increased or aggravated by malice or a vindictive feeling towards him on the part of [the commanding officer], or by a disposition to oppress him, then the plaintiff is entitled to recover.

Id. at 404-05.

The Court has recognized *Dinsman* as standing for the proposition that where a party procured the arrest of an individual maliciously and without probable cause, that party could be held liable. *See Rehberg v. Paulk*, 566 U.S. 356, 365 (2012) (citing *Dinsman* as finding no immunity "where a party had maliciously, and without probable cause, procured the plaintiff to be indicted or arrested for an offense of which he was not guilty"); *U.S. v. Stanley*, 483 U.S. 669, 699 (1987) (quoting *Wilkes v. Dinsman*, 48 U.S. 89, 123 (1849), after remand, *Dinsman v. Wilkes*, 53 U.S. 390 (1852)) ("It must not be lost sight of . . . that, while the chief agent of the government, in so important a trust, when conducting with skill, fidelity, and energy, is to be

protected under mere errors of judgment in the discharge of his duties, yet he is not to be shielded from responsibility if he acts out of his authority or jurisdiction, or inflicts private injury either from malice, cruelty, or any species of oppression, founded on considerations independent of public ends."); *Malley v. Briggs*, 475 U.S. 335, 340-41, n.3 (1986) (explaining that in 1871, "the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause").

Accordingly, *Dinsman* represents the state of the common law at the time 42 U.S.C. § 1983 was enacted and further supports the *Mt. Healthy* framework that probable cause may be established by defendants as evidence of a lack of retaliatory animus. *See Ford*, 706 F.3d at 1194, n.2; Br. for Pet. at 15-16, 39, *Lozman*, 138 S. Ct. 1945 (2017) (No. 17-21).

Furthermore, Petitioners and their *Amici Curiae* cite to the Restatement (First) of Torts § 127 (Am. Law. Inst. 1934), particularly an illustration in Restatement § 127, for the proposition that if the arrest was for the proper purpose of bringing the arrestee before the courts and securing the administration of justice, the arrest was privileged regardless of whether the officer had an ulterior motive in making the arrest. Pet. Br. 45-47; Br. for United States as *Amicus Curiae* 12-14; RESTATEMENT § 127 cmt. a., illus. 1. The next illustration in Restatement § 127 limits the scope of an officer's privilege, such that if the officer's purpose is not to bring the arrestee before a court, then the arrest is not privileged. RESTATEMENT § 127 cmt. a., illus. 2. Accordingly, Restatement § 127 does not provide a

privilege to officers who detain arrestees for purposes of harassment or deterrence for their protected speech, rather than for the administration of the law.

Restatement § 127 does not mention "probable cause" or "reasonable belief" or any other similar language. Rather, Restatement § 127 states that if a law enforcement officer makes an arrest for the purpose of bringing a citizen before a court, the fact that he has an ulterior motive in arresting the citizen does not render the arrest unprivileged. RESTATEMENT § 127 cmt. a. Additionally, Restatement § 127 cmt. a. provides, "where upon the evidence the actor's purpose is doubtful, the other must establish the existence of an improper purpose. If the actor has followed up the arrest by taking the proper steps to bring the person arrested before the proper tribunal, the burden is upon the other to show that such conduct was an afterthought." *Id.* Restatement § 127 comports with the *Mt. Healthy*, 429 U.S. 274, framework because *Mt. Healthy*, 429 U.S. 274, does not propose that if a law enforcement officer arrests a citizen ostensibly in retaliation, he is automatically stripped of his qualified immunity. Instead, the plaintiff must establish his constitutional right and prove that his arrest was substantially motivated by his exercise of that right. Said standard contemplates that the proper purpose of preventing crime may have constituted the arresting officer's afterthought, especially evident in situations where the officer, subsequent to the arrest, scours the statutes for applicable crimes to justify the arrest. *See* Br. for Pet. at 47-48, *Lozman*, 138 S. Ct. 1945 (2017) (No. 17-21).

Continuing with the Restatement (First) of Torts, one could analogize First Amendment retaliatory

arrest claims with Restatement § 865, Interference with a Right to Vote or Hold Office,[29] providing,

> A person who by a consciously wrongful act intentionally deprives another of a right to vote in a public election . . . is liable to the other in an action of tort.

This section applies "where a person with knowledge that another has a right to vote in a public election . . . does an act either for the purpose of preventing the other from exercising the right or with knowledge that his act will result in the failure of the other to exercise the right." RESTATEMENT § 865 cmt. a. (Am. Law Inst. 1939). Such wrongful conduct may include "the use of tortious force, fraud, or duress against either the other or a third person, bribery of a third person, or the use of an official position to prevent the exercise of the right." *Id.* A retaliatory arrest claim may be analogized to a Restatement § 865 claim because the basis for a retaliatory arrest claim involves a law enforcement officer who, through the use of an official position, consciously and intentionally deprives a citizen of his right to free speech by arresting him for an improper purpose.

Furthermore, no element of probable cause or other such reasonable belief exists in the text of Restatement § 865. Thus, the defenses provided in Restatement § 890 apply. Restatement § 890 provides that "[m]ost of the privileges . . . are conditioned upon

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[29] The right to vote may be considered an extension of the freedom of speech. *See* Armond Derfner & J. Gerald Hebert, *Voting Is Speech*, 34 YALE L. & POL'Y REV. 471, 485 (2016) (arguing that the right to vote is fundamental and should be deserving of full First Amendment protection because it serves a clear expressive function).

their being performed for the purpose of protecting the interest for which the privilege was given . . . [which] is illustrated in cases where force is used . . . in the prevention of crime . . . .” RESTATEMENT § 890 cmt. c. (Am. Law Inst. 1939). Consequently, in a Restatement § 865 claim, a law enforcement officer using his official position would not be privileged if he intentionally prevented an individual from voting for a purpose other than the prevention of crime. This may be applied to a retaliatory arrest claim, in which an arrest made substantially for the improper purpose of retaliation rather than for the proper purpose of preventing crime would not be excused, similar to *Hawley*, 54 Barb. 490, as discussed *supra*, with respect to a law enforcement officer acting with malice or bad motive. A retaliatory arrest claim, therefore, need not be supported by lack of probable cause; rather, a plaintiff need only establish that the arrest was substantially motivated by the improper purpose of retaliating against the plaintiff for his exercise of free speech.

Accordingly, the common law and Restatement (First) of Torts support the Ninth Circuit rule and entirely harmonize with the *Mt. Healthy*, 429 U.S. 274, framework.

CONCLUSION

Amici respectfully submit that this Court should affirm the Ninth Circuit's decision and reject Petitioners' argument that an absence-of-probable-cause element should be required in a 42 U.S.C. § 1983 First Amendment retaliatory arrest claim.

Respectfully submitted,

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