No. 17-1174

In the Supreme Court of the United States

LUIS A. NIEVES, ET AL., PETITIONERS

v.

RUSSELL P. BARTLETT

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a claim for damages based on an alleged retaliatory arrest in violation of the First Amendment, brought under 42 U.S.C. 1983, is foreclosed when the arrest was supported by probable cause and the plaintiff does not allege that he was subjected to an official policy of retaliation against protected speech.

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INTEREST OF THE UNITED STATES

This case concerns whether a constitutional tort claim for damages under 42 U.S.C. 1983, predicated on an alleged retaliatory arrest in violation of the First Amendment, is foreclosed when the arrest was supported by probable cause and the plaintiff does not allege that he was subjected to an official policy of retaliation against his protected speech. The United States participated as amicus curiae in *Lozman* v. *City of Riviera Beach*, 138 S. Ct. 1945 (2018), which reserved that question. The United States also participated as amicus curiae in *Reichle* v. *Howards*, 566 U.S. 658 (2012), which presented the same issue in the context of a claim against federal officers under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The United States has a substantial interest in the circumstances in which federal

officers may be held liable for damages in civil actions for alleged violations of constitutional rights. It also has a substantial interest in safeguarding those rights, including through the use of federal criminal and civil enforcement authorities.

STATEMENT

1. In *Lozman* v. *City of Riviera Beach*, 138 S. Ct. 1945 (2018), this Court held that an individual can state a First Amendment retaliatory-arrest claim under 42 U.S.C. 1983 in the "unique" circumstance where he was arrested pursuant to an "official policy motivated by retaliation" against his protected speech. 138 S. Ct. at 1954. The Court recognized, however, that "the typical retaliatory arrest claim" does not involve an official policy of retaliation. *Ibid.* It involves instead an "ad hoc, on-the-spot decision by an individual officer" who may legitimately consider the arrestee's speech for law-enforcement purposes, making it "difficult to discern whether an arrest was caused by the officer's legitimate or illegitimate consideration of speech." *Id.* at 1953-1954. The Court in *Lozman* did not resolve whether, for the "mine run of arrests," the plaintiff must plausibly plead and prove the absence of probable cause to bring a retaliatory-arrest claim under Section 1983. *Id.* at 1954. This case presents that question.

2. "Arctic Man" is an extreme ski and snowmobile event held annually in the Hoodoo Mountains near Paxson, Alaska. Pet. App. 8. The event features a "remote location, large crowds, and . . . high levels of alcohol abuse." *Ibid.* On the last night of Arctic Man in April 2014, Alaska State Troopers Bryce Weight and his supervisor, Sergeant Luis Nieves, were there investigating underage drinking at a party. *Ibid.* Trooper

Weight began conversing with a minor whom he suspected of consuming alcohol. J.A. 224. While Weight and the minor were talking, respondent Russell Bartlett approached with a can of beer in hand, stood face-to-face in close proximity to Weight, and loudly stated that Weight had no authority to speak to the minor. Pet. App. 9; J.A. 224-225. Trooper Weight testified later that respondent was "obviously intoxicated," that respondent used an "escalating voice" and "hostile" body language, and that respondent's continued interruptions "prevented [Weight] from conducting [his] investigation" of the minor. J.A. 225.

What happened next was captured on a private party's videotape that has been entered into the record in this case. Pet. App. 11. According to Trooper Weight's testimony, respondent raised his right hand toward Weight's face, which, coupled with respondent's angry demeanor and signs of intoxication, caused Weight to "perceive[ ] [respondent] to be a clear threat." J.A. 225. Weight responded by pushing respondent backward with open palms in order to create space for himself (a tactic Weight testified he had learned in training). *Ibid.*; Pet. App. 9. A slow-motion version of the videotape briefly shows respondent's hand held high and within inches of Weight's face at the moment of the push, Pet. App. 12, although the parties dispute whether respondent raised his hand before the push or because of it, *id.* at 9.

At the moment of the push, Sergeant Nieves was approaching. Pet. App. 9. He "observed [respondent] speaking in a loud voice and standing close to Trooper Weight." *Id.* at 3. Immediately upon seeing Weight push respondent, Nieves grabbed respondent's left arm and Weight grabbed respondent's right arm, and both

officers ordered respondent to get on the ground. *Id.* at 9. Respondent did not initially comply (he testified that he feared aggravating a previous back injury), and went down only after the officers threatened to use a Taser, at which point the officers handcuffed him. *Id.* at 9-10.

When respondent asked why he was being arrested, Sergeant Nieves said it was "[f]or harassing my trooper." Pet. App. 10. Respondent alleges, however, that the real reason for the arrest was retaliation for an interaction between himself and Nieves earlier in the evening, *id.* at 36, when Nieves had asked the owners of a keg of beer to move the beer inside their recreational vehicle so that minors would not have access to it, J.A. 140-141. The parties dispute what was said between Nieves and respondent, but they agree that respondent refused to talk with Nieves about the beer. Pet. App. 8-9; J.A. 141. After respondent was arrested, he alleges that Nieves said, "Bet you wish you would have talked to me now," a statement that respondent takes as evidence that his arrest was motivated by retaliation for his earlier lack of cooperation. Pet. App. 36-37. This alleged statement by Nieves was not captured on video and is disputed.

The next morning, Trooper Weight prepared an incident report, J.A. 10-19, and a criminal complaint, J.A. 20-30, charging respondent with disorderly conduct in violation of Alaska Stat. § 11.61.110(a) (2014), and resisting arrest in violation of Alaska Stat. § 11.56.700(a) (2014). Those charges were dismissed several months later, although the prosecutor stated that he believed probable cause existed to charge respondent with disorderly conduct, resisting arrest, and assault. Pet. App. 14; J.A. 245-246.

3. Respondent filed an action seeking damages from the officers under 42 U.S.C. 1983 (and another statute) for alleged violations of his constitutional rights. Pet. App. 15. He claimed false arrest and false imprisonment, excessive force, malicious prosecution, retaliatory arrest, and violations of the Due Process and Equal Protection Clauses. *Ibid.* The district court granted summary judgment to the officers on all claims. *Id.* at 7-39. As relevant here, the court held that respondent could not meet "the requirements necessary to support his First Amendment claim" for retaliatory arrest, because even "[c]onstruing all the facts in [his] favor," the officers "still had probable cause to arrest [him] for the crime of harassment." *Id.* at 37.

The court of appeals affirmed summary judgment for the officers on all claims except retaliatory arrest. Pet. App. 1-6. The court agreed that the officers "had at least arguable probable cause to arrest [respondent] for harassment, disorderly conduct, resisting arrest, or assault under Alaska law." *Id.* at 2-3. But the court reaffirmed that "a plaintiff can prevail on a retaliatory arrest claim even if the officers had probable cause to arrest." *Id.* at 4 (citing *Ford* v. *City of Yakima*, 706 F.3d 1188, 1195-1196 (9th Cir. 2013) (per curiam)). Because that court had established by 2014 that "an individual has a right to be free from retaliatory police action, even if probable cause existed for that action," *id.* at 5 (citation omitted), the court rejected the officers' qualified-immunity defense. Finally, the court remanded for trial, pointing to respondent's allegation "that Sergeant Nieves said 'bet you wish you would have talked to me now' after [the] arrest," which the court said a jury could conclude showed animus based on respondent's refusal to speak with Nieves earlier in the evening. *Id.* at 6.

SUMMARY OF ARGUMENT

In a typical constitutional tort action against police officers for retaliatory arrest in violation of the First Amendment, where the plaintiff does not allege that he was subjected to any official policy of retaliation, the plaintiff must plead and prove the absence of probable cause for the arrest as an element of the cause of action.

A. The common law, which provides valuable guidance on the requirements of constitutional tort actions, did not permit damages liability for a retaliatory arrest supported by probable cause. The closest common-law analogues to a retaliatory-arrest claim are the torts of malicious prosecution, which has as an element the absence of probable cause, and false imprisonment, to which the presence of probable cause provides a complete defense. Neither tort would authorize damages liability in a case like this one, where respondent's arrest was supported by probable cause but was allegedly induced by the arresting officer's retaliatory animus.

B. The common-law rules are consistent with this Court's reasoning in *Hartman* v. *Moore*, 547 U.S. 250 (2006), which held that a plaintiff bringing a constitutional tort claim of retaliatory prosecution in violation of the First Amendment must prove, as an element of the cause of action, the absence of probable cause to charge him with a criminal offense. As with retaliatory-prosecution claims, probable-cause evidence will be readily available and especially probative in a retaliatory-arrest case to prove or disprove the critical contention that the arrest was brought about by retaliatory animus. And as with retaliatory-prosecution claims, proof of the absence of probable cause provides a necessary objective screen for what would otherwise be a very difficult inquiry into causation.

In some retaliatory-arrest cases, the causation inquiry is complex because the plaintiff alleges that the arresting officer lacked animus but was induced to make the arrest by another person who did have animus. In virtually all cases, the causation inquiry is complicated because an arrest involves an "ad hoc, on-the-spot decision by an individual officer" who may legitimately consider the arrestee's speech for law-enforcement purposes, making it "difficult to discern whether an arrest was caused by the officer's legitimate or illegitimate consideration of speech." *Lozman* v. *City of Riviera Beach*, 138 S. Ct. 1945, 1953-1954 (2018). Given that "[t]here are on average about 29,000 arrests per day in this country," respondent's approach would force police officers and departments to defend against, and courts to adjudicate, a "flood[ ] [of] dubious retaliatory arrest suits"—burdensome litigation that often could not be resolved without a jury trial. *Id.* at 1953.

C. Respondent contends that adopting a no-probable-cause requirement in retaliatory-arrest cases would effectively license officers to engage in retaliation by making arrests that are supported by probable cause. But experience does not indicate that such retaliatory arrests are commonplace, and this Court should design the cause of action under 42 U.S.C. 1983 for the "mine run of arrests," not exceedingly rare cases. *Lozman*, 138 S. Ct. at 1954. Moreover, respondent is incorrect that a private damages remedy is the only way to deter such arrests. Federal, state, and local governments have enforcement tools at their disposal to remedy the First Amendment violation that occurs when an official retaliates against an individual for protected speech.

ARGUMENT

A TYPICAL DAMAGES CLAIM OF RETALIATORY ARREST IN VIOLATION OF THE FIRST AMENDMENT REQUIRES THE PLAINTIFF TO PLEAD AND PROVE THE ABSENCE OF PROBABLE CAUSE

The common law and this Court's cases strike a balance between protecting citizens against retaliation for protected expression and ensuring the ability of police officers to perform their duties free from the burdens of crippling litigation. That balance requires a plaintiff asserting a typical claim of retaliatory arrest to plead and prove the absence of probable cause. Respondent's contrary rule would enable virtually any plaintiff to get to a jury merely by alleging that the arresting officer engaged in some conduct that could plausibly be taken as evidence of retaliatory animus. This case is a good example: Despite video evidence showing that respondent was arrested immediately after an altercation with a police officer, the court of appeals held that the case must go to a jury because respondent alleges that a second officer harbored animus against him based on an earlier interaction. Pet. App. 3, 6.

A. Analogous Common-Law Torts Support Requiring Proof Of The Absence Of Probable Cause As An Element Of A Typical Retaliatory-Arrest Claim

The Court has recognized that "over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights," and those preexisting rules provide valuable guidance in defining the contours of constitutional torts. *Carey* v. *Piphus*, 435 U.S. 247, 257 (1978); see

Manuel v. *City of Joliet*, 137 S. Ct. 911, 921 (2017) (noting that "[c]ommon-law principles are meant to guide * * * the definition of [42 U.S.C.] § 1983 claims"). The Court accordingly acknowledged in *Hartman* v. *Moore*, 547 U.S. 250 (2006), that the common law may serve "as a source of inspired examples," *id.* at 258, in the context of claims against state and local officers under Section 1983 and against federal officers under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

1. a. The closest common-law analogues to respondent's claim—arising from a fairly typical warrantless arrest followed by the filing of a criminal complaint—are tort claims for false imprisonment or malicious prosecution. At common law, "[t]he gist" of false imprisonment "is an unlawful detention," *Director Gen. of R.Rs.* v. *Kastenbaum*, 263 U.S. 25, 27 (1923)—*i.e.*, a restraint on the plaintiff's freedom without lawful authorization, see Restatement (Second) of Torts §§ 35, 41 (1965) (Restatement); see also *Wallace* v. *Kato*, 549 U.S. 384, 389 (2007) ("[F]alse imprisonment is detention without legal process.") (emphasis omitted).[1] Malicious prosecution requires that the criminal charge against the plaintiff "was unfounded, and that it was made without reasonable or probable cause, and that the defendant in making or instigating it was actuated by malice." *Wheeler* v. *Nesbitt*, 65 U.S. (24 How.) 544, 549-550 (1860); see

[1] When the challenged detention involves an arrest, some jurisdictions refer to the common-law tort of false imprisonment as "false arrest" or "malicious arrest," whereas others draw slight distinctions in "the particular circumstances which give rise" to each tort. 35 C.J.S. *False Imprisonment* § 2, at 521-522 (2009 & Supp. 2018). The terms, however, are "virtually synonymous," and any differences are not relevant here. *Ibid.*

Thomas M. Cooley, *A Treatise on the Law of Torts* 181 (1880) (Cooley); Restatement § 653 (1977). The basic difference between the torts is whether the defendant initiates a criminal proceeding against the plaintiff, which occurs either by procuring a warrant for the plaintiff's arrest, by inducing the return of an indictment or information, or when the plaintiff is validly arrested on a criminal charge, even without a warrant. Restatement § 654 & cmts. c and e (1977). If the plaintiff's arrest is valid or the defendant is prosecuted (both conditions are satisfied here), then the plaintiff's "remedy is by an action for malicious prosecution," whereas if the arrest is not valid and the plaintiff is released "without any further proceeding," then "his remedy is an action for false imprisonment." Restatement § 654 cmt. e (1977).[2]

Neither common-law tort would allow respondent to recover in this case, where the officers had probable cause to arrest him. It is well settled that the absence of probable cause is an element of a malicious-prosecution claim. Restatement § 653 (1977); see, *e.g.*, *Hartman*, 547 U.S. at 258; *Brown* v. *Selfridge*, 224 U.S. 189, 191 (1912) ("It is settled law that in an action of this kind the burden of proving malice and the want of probable cause is upon the plaintiff."); *Wheeler*, 65 U.S. at 550 ("Want of reasonable and probable cause is as much an

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[2] In *Hartman*, this Court considered whether a claim under Section 1983 for retaliatory prosecution was more like a common-law claim for malicious prosecution or abuse of process. 547 U.S. at 258. A retaliatory-arrest claim is not analogous to the tort of abuse of process, which "is concerned with the wrongful use of process after it has been issued," whereas malicious prosecution concerns the wrongful initiation of criminal proceedings in the first instance. 54 C.J.S. *Malicious Prosecution* § 4, at 738 (2010).

element in the action for a malicious criminal prosecution as the evil motive which prompted the prosecutor to make the accusation * * * and must be proved by the plaintiff by some affirmative evidence."); *Hogg* v. *Pinckney*, 16 S.C. 387, 393 (1882); *Turner* v. *O'Brien*, 5 Neb. 542, 543-544 (1877); *Boyd* v. *Cross*, 35 Md. 194, 196 (1872); *Ahern* v. *Collins*, 39 Mo. 145, 150 (1866); see also Cooley 181, 184.

For false imprisonment, the presence of probable cause is a complete defense. A defendant in a false-imprisonment case can avoid liability by showing that he made a "privileged" arrest, Restatement § 118 & cmt. b (1965); see 1 Dan B. Dobbs et al., *The Law of Torts* § 94, at 289-290 (2d ed. 2011) (Dobbs), and a "peace officer" is privileged to arrest someone whom he "reasonably suspects" has committed an offense in his presence, Restatement §§ 114, 119(b)-(c), 121 (1965); see Dobbs § 94, at 291-293 (warrantless arrest supported by probable cause is privileged); see also *Kastenbaum*, 263 U.S. at 27 ("[T]he burden is on the defendant to establish probable cause for the arrest."); *Fox* v. *McCurnin*, 218 N.W. 499, 502 (Iowa 1928); *Rohan* v. *Sawin*, 59 Mass. (5 Cush.) 281, 287-288 (1850).[3]

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[3] Some jurisdictions traditionally limited the authority to make warrantless arrests for minor offenses, see *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 328-332 (2001), leading some state courts to say that probable cause does not provide a full justification against a claim for false imprisonment. See, *e.g.*, *Adair* v. *Williams*, 210 P. 853, 857 (Ariz. 1922); see also Pet. Br. 44 (stating that "[p]robable cause *usually* defeated a claim of false imprisonment at common law" and noting exceptions involving arrests by "private citizens" as opposed to "peace officers") (emphasis added). It would be more precise to say that, in those cases, the arrest was not *privileged*

For either tort at common law, the officer's motives were irrelevant if probable cause existed. It has long been the rule that "if there was probable cause, an action for malicious prosecution will not lie, although the party who procured the arrest or indictment was actuated by malicious motives." *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390, 402 (1852); see 3 William Blackstone, *Commentaries on the Laws of England* 127 (1768). And for false imprisonment, "the fact that [an officer] has an ulterior motive * * * does not make the arrest unprivileged," provided the arrest is made in the course of enforcing the law. Restatement § 127 cmt. a (1965). So, for example, if "A, a traffic officer, arrests B for driving at the rate of 20 miles an hour through a town in which the rate of speed is fixed by an ordinance at 15 miles an hour," A has not falsely imprisoned B, even if A made the arrest "because B was a personal enemy, or because B had previously reported him for his failure to arrest persons driving at 25 miles an hour." Restatement § 127 cmt. a, illus. 1 (1965).

Courts at common law treated the absence of probable cause as central to claims of false imprisonment or malicious prosecution because it would not "be wise as a matter of public policy, to throw down the bars which protect public officers from suits for acts done within the scope of their duty and authority, by recognizing the right of every one who chooses to imagine or assert that

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under the governing law, despite probable cause. See *Yeatts* v. *Minton*, 177 S.E.2d 646, 649 (Va. 1970). By contrast, all arrests supported by probable cause are privileged for purposes of the federal Constitution. See *Virginia* v. *Moore*, 553 U.S. 164, 171 (2008) (explaining that a "long line of cases" holds that a warrantless arrest supported by probable cause, even for a "minor" offense, is "constitutionally reasonable" under the Fourth Amendment).

he is aggrieved by their doings, to make use of an allegation that they were malicious in motive to harass them with suits on that ground." *Chesley* v. *King*, 74 Me. 164, 175-176 (1882); see Cooley 175. The danger of respondent's approach, courts recognized when applying the common law, is that "[l]itigation would be endless if the motives of those who are simply enforcing a legal claim were made the subjects of inquiry." *Chesley*, 74 Me. at 175; see *Ledwith* v. *Catchpole*, 2 Cald. 291, 295 (K.B. 1783) (probable-cause bar to damages was necessary to prevent the threat of liability from dissuading an officer from performing his duties).

b. Some supporters of respondent's rule have attempted to ground their approach in common-law authorities. For instance, the plaintiff in *Lozman* v. *City of Riviera Beach*, 138 S. Ct. 1945 (2018), conceded that probable cause was a complete bar to common-law claims of malicious prosecution, but relied on language in *Dinsman*, 53 U.S. at 402, to argue that the common law treated probable cause as merely an evidentiary consideration in false-imprisonment cases. See, *e.g.*, Merits Reply Br. at 3-4, *Lozman*, *supra* (No. 17-21). *Dinsman*, however, had nothing to do with an arrest for a criminal offense supported by probable cause: the plaintiff was a military sailor imprisoned in a fort by his commander for refusing to perform his duty. 53 U.S. at 402-403. Although *Dinsman* noted that evidence of the commander's motive was potentially relevant to whether his military discipline of the plaintiff was proper, see *id.* at 402, that is not the common-law standard for peace officers effecting arrests.

Nor does it matter that the common law may have allowed a false-imprisonment claim if the defendant

never intended "to bring [the plaintiff] before a magistrate for commitment," but made the arrest only to extort some action by the arrestee in return for his release. Restatement § 127 cmt. a, illus. 2 (1965); see Merits Reply Br. at 4-5, *Lozman*, *supra* (No. 17-21). First, no such allegation exists here: Trooper Weight filed a criminal complaint against respondent promptly after his arrest, J.A. 20-30, and respondent does not dispute that he was later arraigned before a magistrate. Second, even when a person is arrested with probable cause but is released without charge, he typically claims that the arrest was retaliatory (for instance, retribution for protected expression)—not that the arrest was meant to induce some other action. Challenging a "catch-and-release" arrest as an attempt at leverage is not the same as alleging that an officer who *did* intend to pursue charges and had probable cause for doing so nevertheless acted from a retaliatory motive. However the common law treated the former, it did not permit a plaintiff to recover damages for the latter.

2. The common law is less clear on whether an officer is required, at the time of arrest or shortly thereafter, to correctly state the crime for which probable cause existed. Compare Dobbs § 94, at 291 ("The defendant attempting an arrest without a warrant must normally state his intention to make an arrest and the grounds for it, although he need not accurately state the precise crime involved."), with Annotation, 64 A.L.R. 653 (1930) ("A person unlawfully arresting another for one offense cannot, when sued for false imprisonment, justify on the ground that the one arrested was guilty of some other offense, for which the arrest under the circumstances would have been legal, or because reasonable grounds existed for an arrest for such other

offense."). That issue is not presented here, because within hours of respondent's arrest Trooper Weight charged him with disorderly conduct and resisting arrest, J.A. 20-30, and the court of appeals affirmed that probable cause existed for those offenses (plus two others), Pet. App. 2-3.

Should the Court nevertheless reach the question, it should adopt the same rule that applies to challenges to arrests under the Fourth Amendment: probable cause for an offense justifies an arrest even if the officer did not specify that offense at the time of the arrest. See *Devenpeck* v. *Alford*, 543 U.S. 146, 153-155 (2004). That rule is sound because officers are trained to make arrests based on a course of conduct, not to master the elements of each offense in the legal code. See *Illinois* v. *Gates*, 462 U.S. 213, 231-232 (1983) (probable cause arises from "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act") (citation omitted); *Heien* v. *North Carolina*, 135 S. Ct. 530, 539 (2014) (noting "the reality that an officer may 'suddenly confront' a situation in the field as to which the application of a statute is unclear—however clear it may later become") (citation omitted). For that reason, if the Court departs from *Devenpeck* at all, it should require a retaliatory-arrest plaintiff to show the absence of probable cause for those offenses charged before the plaintiff's criminal trial or asserted at the pleading stage of the civil litigation.

B. This Court's Decision In *Hartman* Supports Requiring Proof Of The Absence Of Probable Cause As An Element Of A Typical Retaliatory-Arrest Claim

The common-law rules emphasizing the importance of probable cause accord with this Court's decision in *Hartman*, which held that the absence of probable

cause is an element of a claim of retaliatory prosecution in violation of the First Amendment brought under *Bivens* and Section 1983. 547 U.S. at 265-266. The Court relied on two features of retaliatory-prosecution claims. First, "evidence showing whether there was or was not probable cause to bring the criminal charge" will "always" provide "a distinct body of highly valuable circumstantial evidence available and apt to prove or disprove" the critical question of "retaliatory causation." *Id.* at 261. Second, the Court observed that "the requisite causation between the defendant's retaliatory animus and the plaintiff's injury" in a retaliatory-prosecution case "is usually more complex than it is in other retaliation cases." *Ibid.* Both of those considerations weigh in favor of requiring the plaintiff to plead and prove a lack of probable cause as an element of a retaliatory-arrest tort action. See *Reichle* v. *Howards*, 566 U.S. 658, 667 (2012) (noting "the close relationship between retaliatory arrest and prosecution claims").

1. As in the context of retaliatory prosecution, a claim of retaliatory arrest will implicate "a distinct body of highly valuable circumstantial" probable-cause evidence that is "apt to prove or disprove retaliatory causation." *Hartman*, 547 U.S. at 261; see *Reichle*, 566 U.S. at 668 ("Like retaliatory prosecution cases, evidence of the presence or absence of probable cause for the arrest will be available in virtually every retaliatory arrest case."). And no less than for a criminal prosecution, probable cause for an arrest provides an objective standard by which to judge the propriety of that arrest; the existence of probable cause generally provides a "legal justification" for an arrest under the Fourth Amendment irrespective of the "actual motivations of the individual officers involved." *Whren* v. *United States*, 517 U.S.

806, 812-813 (1996) (defendant challenging his arrest in a criminal proceeding must establish the absence of probable cause); see *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 354 (2001) (same for constitutional tort plaintiff challenging his arrest under 42 U.S.C. 1983). This Court has explained that "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." *Devenpeck*, 543 U.S. at 153 (citation omitted).

"[E]stablishing the existence of probable cause" in a retaliatory-arrest case will therefore "suggest that [the arrest] would have occurred even without a retaliatory motive," whereas demonstrating "that there was no probable cause for the [arrest] will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for" the arrest. *Hartman*, 547 U.S. at 261. Probable cause is no less forceful in assessing the reason for an arrest than in assessing the reason for a criminal prosecution. Moreover, as with claims of retaliatory prosecution, the issue of probable cause is "likely to be raised by some party at some point" in a retaliatory-arrest case, "owing to its powerful evidentiary significance," so it adds little, if any, practical burden to require a plaintiff to demonstrate the absence of probable cause. *Id.* at 261, 265.

2. Retaliatory-arrest cases also resemble retaliatory-prosecution cases with regard to the complexity of the causal connection between animus and the challenged action. In both types of cases, the retaliation inquiry "is usually more complex than it is in other retaliation cases," thus "support[ing] a requirement that no probable cause be alleged and proven." *Hartman*, 547 U.S. at 261; see *Reichle*, 566 U.S. at 668 (noting that both

retaliatory-arrest and retaliatory-prosecution cases are susceptible to a "tenuous causal connection between the defendant's alleged animus and the plaintiff's injury").

a. A retaliatory-arrest claim may involve the same specific complexity present in *Hartman*: a lack of identity between the person alleged to have a retaliatory motive and the official who took the challenged action. In retaliatory-prosecution cases, of course, the reason for the lack of identity is that the claim "will not be brought against the prosecutor, who is absolutely immune," but instead against someone else for allegedly inducing the prosecution. *Hartman*, 547 U.S. at 262. Similarly, plaintiffs sometimes allege that they were arrested by an officer who lacked retaliatory animus but who was induced to make the arrest by another official with such animus. See, *e.g.*, *Curley* v. *Village of Suffern*, 268 F.3d 65, 68, 72-73 (2d Cir. 2001) (allegation that police officers' decision to arrest plaintiff in connection with a bar fight was induced by local officials' retaliatory animus against plaintiff); see also *Mocek* v. *City of Albuquerque*, 813 F.3d 912, 920-921 (10th Cir. 2015) (allegation that federal agent of the Transportation Security Administration (TSA) induced an arrest by a local police officer in retaliation for plaintiff's repeated refusal to provide his identification at an airport checkpoint); TSA Management Directive No. 1100.88-1 (TSA agents lack arrest authority).

This case demonstrates the difficulties of assessing causation when multiple officers are involved in an arrest. The court of appeals held that respondent had introduced evidence sufficient for a jury to conclude that, well before his arrest, Sergeant Nieves developed retaliatory animus against respondent for refusing to talk with him about a keg of beer. See Pet. App. 6. But

it was *Trooper Weight* who was the target of respondent's later belligerent behavior, see *id.* at 3, 9, and it was Weight, not Nieves, who identified himself as the primary officer on the arrest report and signed the criminal charges against respondent, see J.A. 10-19, 20-30. Insofar as Weight is responsible for the arrest, respondent's claim that the arrest was induced by Nieves's retaliatory animus involves the same difficulty in "bridging the causal gap" that the Court noted in *Hartman*. 547 U.S. at 264.

The Court in *Hartman* gave as an "added" reason to require proof of probable cause in retaliatory-prosecution cases the "presumption of regularity" afforded to "prosecutorial decisionmaking." 547 U.S. at 263. That presumption does not apply in the same way in cases involving arrests, *Reichle*, 566 U.S. at 669, but its absence does not diminish the "powerful evidentiary significance" of probable cause in that context, *Hartman*, 547 U.S. at 261. Moreover, this Court has held that the existence of probable cause establishes as a matter of law that "the balanc[e] of private and public interests" favors an arrest and that an officer's decision to arrest is "constitutionally reasonable" under the Fourth Amendment. *Virginia* v. *Moore*, 553 U.S. 164, 171 (2008). Thus, in much the same way that the presumption of regularity for prosecutions cuts against a suspect's claim that his criminal charges grew out of animus, the fact that an arrest supported by probable cause is *per se* reasonable cuts against a suspect's claim that his arrest was induced by animus.

b. Even when only one officer is involved in an arrest, the causation inquiry is typically even more difficult than in a retaliatory-prosecution case for at least two reasons. First, whereas the initiation of criminal

proceedings generally affords time for legal analysis that undercuts claims of retaliation, police officers are "often" called upon to make "split-second judgments" "[i]n deciding whether to arrest." *Lozman*, 138 S. Ct. at 1953. This case is emblematic: Trooper Weight testified that he perceived respondent's behavior as "hostile and aggressive" and "combative in nature," Pet. App. 10 (citation omitted), and he made an on-the-spot judgment for his own safety to shove respondent backward, which precipitated respondent's arrest, see *id.* at 3; J.A. 225-226. Warrantless arrests frequently call for similar judgments about when a suspect's behavior rises to a level that justifies arrest, but the nature of those subjective judgments means that, without the objective screen of probable cause, police officers will usually lack the sort of evidence that would conclusively demonstrate that animus played no role in the arrest.

Second and relatedly, in deciding whether to make an arrest, it is often entirely legitimate, and even necessary, for a police officer to consider "[t]he content of the suspect's speech." *Lozman*, 138 S. Ct. at 1953; see *Reichle*, 566 U.S. at 668 ("Like retaliatory prosecution cases, * * * the connection between alleged animus and injury may be weakened in the arrest context by a police officer's wholly legitimate consideration of speech."). The suspect's expressive activity may itself provide the probable cause for an arrest. See, *e.g.*, *Wayte* v. *United States*, 470 U.S. 598, 612-613 (1985) (protest letters sent to Selective Service "provided strong, perhaps conclusive evidence" of an element of the criminal offense of failing to register for the draft); *Dukore* v. *District of Columbia*, 799 F.3d 1137, 1139 (D.C. Cir. 2015) (plaintiffs claimed retaliation when they were arrested, after multiple warnings, for staging a protest by sitting in

tents outside an office building in downtown Washington, D.C., in violation of temporary-abode regulation); see also 40 U.S.C. 6135 ("It is unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display in the Building and grounds a flag, banner, or device designed or adapted to bring into public notice a party, organization, or movement.").

Other times, the content and manner of the suspect's expression bears directly on an officer's decision "whether the suspect is ready to cooperate, or, on the other hand, whether he may present a continuing threat to interests that the law must protect." *Lozman*, 138 S. Ct. at 1953; see *District of Columbia* v. *Wesby*, 138 S. Ct. 577, 587 (2018) ("[T]he vagueness and implausibility of the [suspects'] stories * * * suggested a guilty mind."). That is what happened here: Trooper Weight testified that he perceived respondent to be a threat based on a combination of the content of respondent's speech, his body language, and his inebriated state. See J.A. 225.

These circumstances of everyday policing distinguish retaliatory-arrest claims from other settings where there is usually more time for decisionmaking, speech may not be a relevant consideration, and defendants may be able to offer objective evidence of a nonretaliatory motive. See, *e.g.*, *Board of Cnty. Comm'rs* v. *Umbehr*, 518 U.S. 668, 677-680 (1996) (contract termination); *Rankin* v. *McPherson*, 483 U.S. 378, 383-384 (1987) (termination or denial of public employment); *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972) (denial or withholding of public benefits). In those cases, the burden-shifting framework of *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977),

requires the plaintiff to come forward with prima facie evidence that protected speech was a "substantial" or "motivating" factor in bringing about the adverse action, *id.* at 287, which shifts the burden to the defendant to prove by a preponderance of the evidence that he would have taken the same action "even without the impetus to retaliate," *Hartman*, 547 U.S. at 260 (citing *Mt. Healthy*, 429 U.S. at 287).

Applying the *Mt. Healthy* framework to retaliatory-arrest cases, however, would routinely shift the burden to defendants, because "an official's state of mind is 'easy to allege and hard to disprove.'" *Crawford-El* v. *Britton*, 523 U.S. 574, 584-585 (1998) (citation omitted). Without the objective screen of probable cause, it will be "difficult to discern whether an arrest was caused by the officer's legitimate or illegitimate consideration of speech," *Lozman*, 138 S. Ct. at 1953, and such "questions of subjective intent so rarely can be decided by summary judgment," *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816 (1982). Given that "[t]here are on average about 29,000 arrests per day in this country," *Lozman*, 138 S. Ct. at 1953, the consequences of respondent's approach for law enforcement and the judiciary would be severe. Police officers and departments would be forced to defend against, and courts would be required to adjudicate, a "flood[ ] [of] dubious retaliatory arrest suits." *Ibid.* By contrast, requiring an analysis of probable cause at the earliest possible stage of the case as an element of the plaintiff's cause of action would protect officers in such cases from the serious burdens of discovery and trial. See *Crawford-El*, 523 U.S. at 585.

c. A police officer's need to permissibly consider speech in deciding whether to arrest also distinguishes claims of retaliatory arrest in violation of the First

Amendment from equal-protection claims under the Fourteenth Amendment. This Court has noted that although an officer's subjective motivation is irrelevant to whether an arrest supported by probable cause is lawful under the Fourth Amendment, equal-protection principles would still "prohibit[ ] selective enforcement of the law based on considerations such as race" in similar circumstances. *Whren*, 517 U.S. at 813. But that observation does not indicate that an arrest supported by probable cause could give rise to damages liability in a tort action for retaliatory arrest in violation of the First Amendment. Unlike expressive activity, immutable characteristics such as race will "seldom provide a relevant basis for disparate treatment." *Fisher* v. *University of Tex. at Austin*, 133 S. Ct. 2411, 2418 (2013) (citations omitted).

Moreover, an equal-protection claim based on such disparate treatment already includes a stringent objective screen, requiring detailed proof that the government in fact treated similarly situated people differently. See *United States* v. *Armstrong*, 517 U.S. 456, 458 (1996). The anomaly of respondent's approach is that retaliatory-arrest claims alone would lack an objective screen under Section 1983. Plaintiffs who bring Section 1983 actions for other alleged violations of the First Amendment (*e.g.*, retaliatory prosecution) or Fourth Amendment have to plausibly plead and prove the absence of probable cause; and those who allege violations of the Fourteenth Amendment have to plausibly plead and prove differential treatment of similarly situated people. By contrast, the court of appeals here held that respondent was entitled to go to the jury based solely on an allegation that one officer made an

ambiguous statement that could be interpreted as evidence of improper motive. Pet. App. 6. Respondent and the court of appeals have pointed to no reason why retaliatory-arrest claims alone should involve nothing more than a subjective inquiry into officers' motives.

C. A Damages Remedy Is Not Essential To Deter Police Officers From Making Retaliatory Arrests Supported By Probable Cause

This Court should not depart from the reasoning of the common law and *Hartman* to guard against the possibility that police officers will retaliate against speakers with unpopular views by arresting them for minor offenses supported by probable cause. Evidence from reported cases suggests that, although allegations of retaliation are common, actual retaliatory arrests supported by probable cause are relatively rare, and other civil and criminal enforcement tools can guard against potential abuses.

1. Respondent has not pointed to any evidence that retaliatory arrests supported by probable cause are prevalent. First, there is no indication that the common-law rule for analogous torts produced a flood of retaliatory arrests. Second, most courts of appeals to address the question have required retaliatory-arrest plaintiffs to establish the absence of probable cause, and there is no indication that approach has produced a great many retaliatory arrests. Third, even in the minority of circuits that use the *Mt. Healthy* standard for First Amendment retaliatory-arrest claims, the government has not located a single case since *Hartman* in which a jury actually found that retaliation was the but-for cause of the plaintiff's arrest although the arrest was supported by probable cause.

To be sure, there are rare cases in which a jury reasonably could so find based on evidence of retaliation against protected expression. See *Stone* v. *Juarez*, No. 05-cv-508, 2006 WL 1305039, at *14 (D.N.M. Apr. 23, 2006) (arresting officer admitted that, although he had probable cause, he did not intend to arrest the plaintiff until the plaintiff used an expletive in a crowded mall with families present). But even granting such rare cases, the Court should define the elements of a retaliatory-arrest claim under Section 1983 to account for the "mine run of arrests." *Lozman*, 138 S. Ct. at 1954. The Court in *Hartman* recognized that a constitutional tort claim should not be structured around exceptional instances of retaliatory animus. See 547 U.S. at 264; see also *Atwater*, 532 U.S. at 353-354. Indeed, the Court refused to "dispens[e] with [the] requirement to show no probable cause [even] when a plaintiff has evidence of a direct admission" of retaliatory animus, because such an "exemption" would quickly swallow the rule and simply move the parties' debate to "hassles" over whether the defendant had made an adequately clear admission. *Hartman*, 547 U.S. at 264 n.10.

2. a. The vast bulk of reported cases in which plaintiffs have alleged retaliatory arrests in violation of the First Amendment despite the existence of probable cause can be grouped into three categories. Surveying the categories demonstrates why respondent's approach is an invitation to a "flood[ ] [of] dubious retaliatory arrest suits." *Lozman*, 138 S. Ct. 1953.[4]

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[4] This case will not affect retaliatory-arrest claims where officers lacked probable cause for the arrest or where factual disputes preclude a determination regarding probable cause. See, *e.g.*, *Tobey* v. *Jones*, 706 F.3d 379, 392 (4th Cir. 2013).

In the first category, the suspect refused to comply with a lawful instruction from an officer or another governmental official. Sometimes this refusal was part of a protest, as with the plaintiff who refused to vacate his unlawful sidewalk tent in *Dukore*, 799 F.3d at 1139. Other times, the plaintiff refused to comply with an officer's attempt to protect public safety or preserve order. See, *e.g.*, *Mocek*, 813 F.3d at 920-921 (plaintiff repeatedly refused to provide his identification to a TSA agent at an airport checkpoint); *McCabe* v. *Parker*, 608 F.3d 1068, 1072, 1076 (8th Cir. 2010) (plaintiffs refused instructions from the Secret Service regarding where they were allowed to stand at a Presidential rally); *Johnson* v. *Hollins*, 716 Fed. Appx. 248, 250 (5th Cir. 2017) (per curiam) (plaintiff refused officer's instruction to leave the area of a car accident after acting belligerently toward another driver).

In the second category, the suspect was arrested following behavior that was disorderly, disruptive, or threatening. For example, in *Wilson* v. *Village of Los Lunas*, 572 Fed. Appx. 635 (10th Cir. 2014), the plaintiff was arrested after he refused an officer's instructions at a traffic stop, then resisted and kicked the officer, *id.* at 636, but he alleged that he was arrested because, during the stop, he complained about his prior experience with the police, *id.* at 642. In *Lash* v. *Lemke*, 786 F.3d 1 (D.C. Cir. 2015), a protestor confronted police officers by challenging their presence and purpose, shouting obscenities, and tearing down some of the officers' public notices. *Id.* at 3-4. He then resisted when officers tried to subdue him and was arrested and charged with disorderly conduct. *Ibid.* And here respondent was arrested both for disorderly conduct (based on conduct that Trooper Weight and Sergeant Nieves perceived to

be threatening and harassing) and resisting arrest. Pet. App. 3.

In the third category, the arrest was facially unrelated to protected expression, but the plaintiff alleged that the arrest was in retaliation for earlier speech. For example, in *Curley* v. *Village of Suffern*, the plaintiff admitted to a police officer that he had hit another person during a bar fight, so he was arrested for assault and disorderly conduct. 268 F.3d at 69. The plaintiff alleged, however, that the officers arrested him in retaliation for accusations that he had made months earlier during his unsuccessful mayoral campaign. *Id.* at 73. In *Galarnyk* v. *Fraser*, 687 F.3d 1070 (8th Cir. 2012), the plaintiff entered without authorization a governmental trailer at the site of a collapsed bridge, interrupted a meeting, and criticized the officials present. *Id.* at 1072. He was arrested for trespass, *id.* at 1074, but alleged that the arrest was in retaliation for his previous public criticisms of the government's handling of the bridge incident, *id.* at 1072-1073.

b. As all of these cases illustrate, unless the absence of probable cause is an element of a First Amendment retaliatory-arrest claim under Section 1983, there will be little to prevent a plaintiff from pressing the factual question of an officer's motive all the way to a jury. Motions to dismiss are unlikely to be effective, because a plaintiff's factual allegations must be taken as true at the pleading stage, including allegations that the arresting officer made a statement or engaged in conduct plausibly evidencing a retaliatory motive. See *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). Summary judgment will typically be unavailable for similar reasons, because factual inferences must be drawn in favor of the nonmoving party and causation is usually an issue of fact.

See *Harlow*, 457 U.S. at 816; Pet. App. 5-6. Likewise, qualified immunity will not be available, because the parties' dispute will not be over whether it is lawful to make an arrest supported by probable cause for the purpose of retaliating based on the exercise of First Amendment rights, but whether in fact that is what the officer did in a particular case. See Pet. App. 5.

The court of appeals has recognized that its rule would likely defeat summary judgment in almost every retaliatory-arrest case, and thereby increase "the disruption caused" to police officers "by unfounded claims." *Dietrich* v. *John Ascuaga's Nugget*, 548 F.3d 892, 901 (9th Cir. 2008) (citation omitted). That court has attempted to mitigate those harms by holding that summary judgment may be appropriate in cases where evidence of probable cause is "strong" and evidence of retaliatory motive is "weak." *Ibid.*; see, *e.g.*, *Maidhof* v. *Celaya*, 641 Fed. Appx. 734, 735 (9th Cir. 2016) (reversing denial of summary judgment based on *Dietrich* because "[p]laintiffs' evidence of retaliatory intent [was] weak"). The Ninth Circuit has thus altered the rules of summary judgment to compensate for the damage done by an overbroad conception of the Section 1983 tort. Rather than manipulate the summary-judgment standard for retaliatory-arrest claims, the proper course is to define the elements of that claim in the same way as a First Amendment retaliatory-prosecution claim or a Fourth Amendment unreasonable-seizure claim. See *supra*, pp. 15-24.

3. a. Finally, respondent is mistaken that only a private damages remedy will deter governmental officials from using probable cause for minor offenses as a pretext for retaliatory arrests. Although the First Amendment confers a "general right to be free from retaliation

for one's speech, *Reichle*, 566 U.S. at 665; see *Hartman*, 547 U.S. at 256, not every violation of that right necessitates the particular remedy of a tort action for damages. For example, in the context of suits against federal officers under *Bivens*, the Court has held that a judicially created damages remedy is not appropriate for every constitutional violation—indeed, "in most instances" this Court has "found a *Bivens* remedy unjustified." *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007); see, *e.g.*, *Bush* v. *Lucas*, 462 U.S. 367, 390 (1983) (declining to recognize a damages remedy under *Bivens* for violation of a federal employee's First Amendment rights); see also *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1857 (2017) (listing numerous constitutional claims for which the Court has declined to create an implied damages remedy).

The Court has likewise interpreted Section 1983 to authorize damages only for acts found to "violat[e] * * * constitutional rights *and to have caused compensable injury*." *Carey*, 435 U.S. at 255 (quoting *Wood* v. *Strickland*, 420 U.S. 308, 319 (1975)). The Court has explained that "the elements of, and rules associated with, an action seeking damages" for such injuries under Section 1983 may reflect practical considerations and limitations that preclude monetary recovery even if "'the specific constitutional right' at issue" has been violated. *Manuel*, 137 S. Ct. at 920 (citation omitted); see *id.* at 920-921 (noting that limitations on damages actions for malicious prosecution may preclude recovery for Fourth Amendment violations in some circumstances). The Court has thus rejected (as did the common law) the premise of respondent's view: that a private cause of action for damages is necessary to protect the First Amendment right to be free from retaliatory arrests.

b. Although the Court in *Hartman* did not expressly decide whether its no-probable-cause requirement for retaliatory-prosecution claims was a limitation on the scope of the First Amendment, see *Reichle,* 566 U.S. at 669 n.6, it clearly conceived of that requirement as restraining a plaintiff's ability to obtain damages in a constitutional tort suit alleging retaliatory prosecution. The Court stated that its "holding d[id] not go beyond a definition of an element of the tort," *Hartman*, 547 U.S. at 257 n.5, and it relied heavily on the practical difficulties in pleading and proving that tort in determining that it "makes sense to require" the absence of probable cause "as an element of a plaintiff's case," *id.* at 265-266. The Court observed that the presence or absence of probable cause is not perfect evidence of whether a constitutional violation occurred, but is sufficiently probative of causation to warrant requiring that showing as a prerequisite to recovering damages. See *id.* at 265.

Because the no-probable-cause requirement is a limitation on the availability of a damages action under Section 1983, rather than on the scope of the First Amendment itself, there are other available remedies if officers engage in retaliatory arrests notwithstanding the existence of probable cause. The United States, for example, can prosecute officers who willfully violate individuals' constitutional rights under color of law (or who conspire to do so) by subjecting citizens to arrest in retaliation for their protected speech, even if those arrests are supported by probable cause. See 18 U.S.C. 241, 242. The United States can also bring civil actions against state and local law-enforcement agencies under 34 U.S.C. 12601 (formerly codified at 42 U.S.C. 14141 (2012)) to remedy a pattern or practice of retaliatory

arrests by law-enforcement officers, including in circumstances where probable cause may have existed for individual arrests. Several States also have statutes that may authorize criminal prosecution of police officers who violate individuals' rights under color of law.[5] Particularly in light of the increasing use of video cameras by police departments, there is no reason to assume that clear instances of retaliation will frequently escape sanction.[6]

Government enforcement actions under the statutes identified above are appropriately limited by proof requirements that do not exist in the context of individual tort suits under Section 1983 or *Bivens*. Criminal prosecutions under 18 U.S.C. 242 require the government to establish "willful[ness]" and to prove unlawful

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[5] See, *e.g.*, Ark. Code Ann. § 5-52-107 (Supp. 2017); Colo. Rev. Stat. § 18-8-403 (2017); Del. Code Ann. tit. 11, § 1211 (2015); 720 Ill. Comp. Stat. Ann. 5/33-3 (West Supp. 2018); Iowa Code Ann. § 721.2(3) (West 2013); Ky. Rev. Stat. Ann. §§ 522.020, 522.030 (LexisNexis 2014); Minn. Stat. Ann. § 609.43 (West 2018); Mont. Code Ann. § 45-7-401 (2017); Neb. Rev. Stat. Ann. § 28-926 (LexisNexis 2015); N.H. Rev. Stat. Ann. § 643:1 (LexisNexis 2015); N.J. Stat. Ann. § 2C:30-2 (West 2016); N.Y. Penal Law § 195.00 (McKinney 2010); N.D. Cent. Code § 12.1-14-05 (2012); 18 Pa. Cons. Stat. Ann. § 5301 (West 2015); Tenn. Code Ann. § 39-16-403 (2014); Tex. Penal Code Ann. § 39.02 (West 2016); Utah Code Ann. § 76-8-201 (LexisNexis 2017); Wash. Rev. Code Ann. § 9A.80.010 (West 2015). Some States further authorize the state attorney general to bring civil suits against police departments for patterns or practices that violate individual rights. See Cal. Civ. Code § 52.3(b) (West 2007); Fla. Stat. Ann. § 760.021 (West 2016).

[6] See, *e.g.*, U.S. Dep't of Justice, *Department of Justice Awards Over $20 Million to Law Enforcement Body-Worn Camera Programs* (Sept. 6, 2016), https://www.justice.gov/opa/pr/department-justice-awards-over-20-million-law-enforcement-body-worn-camera-programs.

retaliation beyond a reasonable doubt. A pattern-or-practice claim requires the government to show a "systemwide" violation of constitutional rights, not simply "isolated" or "sporadic" acts. *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 336 (1977) (discussing pattern or practice of employment discrimination). And the appropriate exercise of prosecutorial discretion ensures that the public interest will be weighed in determining whether a civil or criminal action is appropriate under the circumstances.

Those factors guard against unwarranted intrusions on the ability of police officers to make arrests, while ensuring that, in the limited class of cases where both probable cause and retaliatory motive exist, constitutional rights receive protection. The absence of those factors in private damages suits, however, underscores the need for the objective screen provided by *Hartman*'s no-probable-cause requirement. Cf. *Maryland* v. *Pringle*, 540 U.S. 366, 370 (2003) ("The long-prevailing standard of probable cause protects citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime, while giving fair leeway for enforcing the law in the community's protection.") (citation and internal quotation marks omitted). The lack of probable cause is therefore an appropriate element in a retaliatory-arrest tort action, but it need not license retaliatory arrests supported by probable cause. Governmental civil and criminal enforcement continues to be an important backstop for safeguarding constitutional rights even where limitations on private causes of action for damages do not permit individual tort claims.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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