No. 17-21

IN THE
Supreme Court of the United States

FANE LOZMAN,
Petitioner,

v.

THE CITY OF RIVIERA BEACH, FLORIDA,
Respondent.

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

BRIEF *AMICI CURIAE* OF NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION AND 25 MEDIA AND FREE SPEECH ORGANIZATIONS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the existence of probable cause defeat a First Amendment retaliatory arrest claim as a matter of law?

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INTERESTS OF *AMICI CURIAE*[1]

Amici, as described in the Appendix, are twenty-six of the nation's leading news organizations and press advocacy groups, including The National Press Photographers Association ("NPPA"), The Reporters Committee for Freedom of the Press, and The Media Law Resource Center, Inc. ("MLRC").

The membership of NPPA, the nation's leading professional organization for photojournalists, includes photographers, members of the press generally and citizen journalists, on whose behalf the NPPA advocates in disputes involving interference with First Amendment rights to report on news and matters of public interest. The Reporters Committee for Freedom of the Press, a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media, has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970. The MLRC, a professional association founded in 1980 for content providers in all media and their defense lawyers, provides a wide range of resources on media and content law, as well as policy issues, including news and analysis of legal, legislative and regulatory developments; litigation

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[1] All parties have consented to this *amici curiae* brief. Petitioner has filed his consent with the Clerk, and Respondent consented directly to the undersigned counsel for *Amici*. No counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

resources and practice guides; and national and international media law conferences and meetings.

The interest in this case of the NPPA, Reporters Committee and MLRC, and other undersigned *Amici* is to ensure that the crucial role that journalists, members of the press, and citizen reporters play in promoting discussion of matters of public concern is not diminished. The question presented in this case is of particular importance to the press, whose institutional role is to serve as a critic and check on government. If probable cause bars all claims for retaliatory arrests, the government will be given a powerful weapon that can be used to chill and intimidate journalists.

STATEMENT

Petitioner Fane Lozman is an outspoken critic of the City of Riviera Beach, Florida. His disputes with the City Council, particularly over the use of the power of eminent domain, have spanned over a decade and already have resulted in one trip to this Court. *Lozman v. City of Riviera Beach*, 133 S. Ct. 735 (2013). This case arose from Lozman's attempt to address the City Council at an open meeting in 2006. He sought to speak on the subject of government corruption, but after just a few seconds the presiding councilmember attempted to silence him. Lozman continued talking, however, and was promptly arrested, ostensibly on charges of "disorderly conduct" and "resisting arrest without violence." Pet. App. 4a. This case squarely presents the issue of whether the existence of probable cause defeats a First Amendment retaliation claim as a matter of law.

It is not uncommon for gadflies like Lozman to arouse the ire of those they criticize and to face threats of arrest as a result. *See*, *e.g.*, *Huminski v. Corsones*, 396 F.3d 53 (2d Cir. 2004); *Iacobucci v. Boulter,* 193 F.3d 14 (1st Cir. 1999). Such cases raise important First Amendment questions, for as this Court has observed, "[t]he freedom of individuals verbally to oppose or challenge [the government] without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston v. Hill*, 482 U.S. 451, 462-63 (1987). *See also Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90-91 (1965) (disobeying a police command to move along cannot justify arrest; such a requirement would constitute "ever-present potential for arbitrarily suppressing First Amendment liberties," the "hallmark of a police state").

These issues are of vital importance to members of the press, whose institutional role is to serve as a check on government. As Justice Black wrote, the Framers of the Constitution "gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government." *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring). When the press performs this vital role, "'the state has a special incentive to repress opposition and often wields a more effective power of suppression.'" *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.11 (1978) (quoting Thomas Emerson, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 9

(1966)). Given this dynamic, the threat of retaliatory arrests without constitutional recourse is particularly chilling, because "law enforcement officials … are granted substantial discretion that may be misused to deprive individuals of their liberties." *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011).

Such concerns are vividly illustrated by the record of countries whose journalists lack the shield of the First Amendment. According to the Committee to Protect Journalists, 262 reporters and editors around the world were jailed in 2017 because of their work. Elana Beiser, *Record Number of Journalists Jailed as Turkey, China, Egypt Pay Scant Price for Repression*, December 13, 2017, https://cpj.org/reports/2017/12/journalists-prison-jail-record-number-turkey-china-egypt.php. This set a new record, outpacing 2016 when 259 journalists were arrested. Nearly three quarters of those detained were held on charges of being "anti-state" under various vague laws. *Id.*

What distinguishes the United States from these repressive regimes is our legacy of constitutional protections, especially the guarantees provided by the First Amendment. If the Constitution fails to provide sufficient breathing space from the threat of arbitrary arrests, then the freedoms of speech and press will be eviscerated. The decision in this case will have ramifications that extend far beyond the local politics of Riviera Beach, Florida.

SUMMARY OF ARGUMENT

This case arises from the arrest of a lone government critic, but the question to be decided has far-

reaching implications for freedom of the press. If the mere existence of probable cause to make an arrest for any offense can preclude constitutional claims alleging First Amendment retaliation, the government gains a powerful tool for suppressing critical news coverage.

In the United States, numerous journalists have been subjected to arrest merely for doing their jobs. Although it is rare, newspaper publishers have been rousted from their homes in the middle of the night for exposing government corruption. More frequently, reporters and photographers have been swept up by police as they try to cover public demonstrations or to document various forms of police action. According to the U.S. Press Freedom Tracker, in 2017 alone, 32 journalists were arrested while trying to document or report the news, *see U.S. Press Freedom Tracker*, https://pressfreedomtracker.us/arrest-criminal-charge, and in the past several years, many more have been arrested covering such events as unrest during the presidential inauguration, the Occupy Wall Street demonstrations, confrontations in Ferguson, Missouri, and the Black Lives Matter movement.

Where arrests are motivated by hostility to the press or out of a desire to control news coverage, a mere probable cause requirement is not sufficient to safeguard the vital First Amendment values at stake. Generalized laws aimed at preserving public order—such as disorderly conduct or disturbing the peace—give police virtually uncabined discretion in deciding who should be arrested and who may be allowed to report without interference. This Court

has held on numerous occasions that such discretion can be misused and First Amendment protections undermined, particularly where press coverage is unwelcome to those in authority.

The Court should hold that a finding of probable cause does not bar claims alleging First Amendment retaliation, and should adopt a standard that appropriately accommodates the needs of law enforcement without encroaching on constitutional protections for free speech and press. Such a test was articulated in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), where, once a plaintiff has shown a censorial motive, the burden shifts to the government to show it would have taken the same action regardless. Such an approach preserves police officers' ability to raise probable cause as a defense, but it does not extinguish First Amendment claims when government actors purposefully target members of the press.

ARGUMENT

I. FREEDOM OF THE PRESS IS AT RISK IF PROBABLE CAUSE SERVES AS AN ABSOLUTE BAR TO FIRST AMENDMENT RETALIATION CLAIMS

Because the very purpose of a free press is to act as an adversary to unchecked governmental power, it is commonplace for those who exercise that power to take offense. The current occupant of the White House has branded the press as the "enemy of the American people," and re-tweeted videos of himself wrestling an anthropomorphized news network to

the ground.[2] Such hostility to the press is hardly new, nor is it confined to any political party or level of government. The Obama Administration prosecuted more people for leaks to the press than all previous presidential administrations combined;[3] Nixon had his "Enemies List"[4] and approved direct and indirect assaults on press freedom;[5] Governor George Wallace of Alabama regularly castigated

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[2] *See*, *e.g.*, Shelley Hepworth, *Tracking Trump-Era Assault on Press Norms*, COLUMBIA JOURNALISM REV., May 25, 2017, https://www.cjr.org/watchdog/tracking-trump-assault-press-freedom-media-attack.php; Michael M. Grynbaum, *Trump, in Latest Bout With Media, Conjures Physical Fight With a Foe*, N.Y. TIMES, July 3, 2017, at A10.

[3] Joel Simon, *Barack Obama's Press Freedom Legacy*, COLUMBIA JOURNALISM REV., Apr. 3, 2015, https://www.cjr.org/criticism/barack_obamas_press_freedom_legacy.php ("[T]he Obama administration has prosecuted more leakers under the 1917 Espionage Act than all former presidents combined.").

[4] List of White House 'Enemies' and Memo Submitted by White House Counsel John Dean to the Ervin Committee, Facts on File, Watergate and the White House, vol. 1, pp. 96-97, https://www.colorado.edu/AmStudies/lewis/film/enemies.htm (list included political enemies as well as more than 50 newspaper and TV reporters).

[5] James T. Hamilton, *Attacks on the Press Have Helped Bring Down a President Before*, WASH. MONTHLY, January 12, 2017, https://washingtonmonthly.com/2017/01/12/nixon-and-trump-past-as-prologue (Nixon "approved illegal wiretaps to listen into the phone conversations of journalists critical of the administration. His Justice Department lodged antitrust charges against the three broadcast networks. He asked FBI Director J. Edgar Hoover to develop 'a run down on the homosexuals known and suspected in the Washington Press Corps.'").

journalists;[6] and Louisiana Governor Huey Long tried to impose a special tax on urban newspapers that he called a "tax on lying."[7]

The contentious relationship between government and the press occurs naturally and exists by design. However, it presents a constitutional problem if the government has at its disposal legal tools that can facilitate acts of retaliation. In particular, news gathering can be disrupted where arrests can be used as a "catch and release" technique, and the press can be intimidated into silence even if there is no prosecution. Such concerns arise in a variety of circumstances.

A. Retaliation for Unfavorable Press Coverage

In this country, it is rare for a public official to arrest a journalist for publishing a critical story—

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[6] Howell Raines, *George Wallace, Segregation Symbol, Dies at 79*, N.Y. TIMES, Sept. 14, 1998, http://www.nytimes.com/1998/09/14/us/george-wallace-segregation-symbol-dies-at-79.html (Wallace's "expurgated list of demons" included "liberals, Communists, the Eastern press, Federal judges, [and] 'pointy-headed intellectuals.'").

[7] Elizabeth Kolbert, *The Big Sleazy*, THE NEW YORKER, June 12, 2006, https://www.newyorker.com/magazine/2006/06/12/the-big-sleazy ("Long proposed (and, of course, got passed) a tax on advertising sales by newspapers with a circulation exceeding twenty thousand. The tax affected primarily the large dailies in New Orleans, which had always opposed him."); *see Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) ("[T]his is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press.").

this is not Russia or Turkey—but it does happen. Sheriff Joe Arpaio of Arizona arrested the publishers of *Phoenix New Times* for publishing articles that probed the sheriff's commercial real estate holdings and that exposed his abusive investigation of the newspaper. *Lacey v. Maricopa Cty.*, 693 F.3d 896, 907-09 (9th Cir. 2012). As the Ninth Circuit observed, "[i]t is hard to conceive of a more direct assault on the First Amendment than public officials ordering the immediate arrests of their critics." *Id.* at 917.

The arrests in that case were rationalized in part on the ground that the publishers of *New Times* had allegedly violated an Arizona statute that prohibits publication of personal information about a public official if such disclosure "pose[s] an imminent and serious threat" to the official's safety. But in a memo Sheriff Arpaio's Director of Legal Affairs made clear the real reason why *New Times* had been singled out despite publication of the same information on other websites: "[N]one of these other web cites [sic] are or have ever been historically anti-Arpaio." By contrast *New Times* "resorted to writing articles against the Sheriff, using language that is inflammatory, insulting, vituperative, and the like." *Id.* at 908.

The County also commenced an investigation of *New Times*, demanding, among other things, information on confidential sources, reporters' and editors' notebooks, memoranda, and other documents for any story critical of Arpaio. *Id.* at 909. After *New Times* ran a story revealing these demands, Arpaio's "Selective Enforcement Unit" staged a

nighttime raid and arrested the publishers in their homes. *Id.* at 910.

The publishers brought a civil rights claim pursuant to 42 U.S.C. § 1983 and the Ninth Circuit denied the defendants' qualified immunity defense. The court did not address the issue raised in this case, whether a probable cause finding would have barred bringing any First Amendment retaliation claims. *Id.* at 917 n.8. Ultimately, it found the arrests were not supported by probable cause. *Id.* at 919. However, if probable cause had existed to make an arrest, then First Amendment retaliation claims arguably would have been entirely barred even on these egregious facts.[8] In any event, it was a close case. The court suggested that the publishers' claims might have been precluded against the sheriff if the county attorney had "merely communicated that the statute had been violated, or represented that the subpoenas were valid." *Id.* at 923.

Although rare, this is not an isolated case. Just this month, a blogger in Texas was arrested on the felony charge of "misuse of official information" after she posted information about the suicide of a U.S. Customs and Border Protection employee in advance of its official release to the news media. The popular blogger regularly covers local law enforcement

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[8] Arizona law prohibits unauthorized disclosure of matters relating to a grand jury proceeding, and *New Times* had published the substance of the subpoenas sent as part of Arpaio's retaliatory investigation. However, the court held probable cause was lacking because subpoenas had not been validly issued pursuant to a grand jury proceeding. *Lacey*, 693 F.3d at 919. *See id.* at 923-24.

issues, but had a contentious relationship with some on the police force because of her widely-viewed reports from crime scenes.[9] Police may not often go so far as to jail their critics, but they have been known to use various methods to suppress unfavorable news coverage.[10] Ironically, if probable cause were recognized as a bar to retaliation claims, arrests may become a more common tool, as police would have a heightened ability to insulate themselves from liability.

These cases highlight why the requirement for probable cause is not sufficient standing alone, and why the victims of abusive arrests must have an available First Amendment remedy. As the Ninth Circuit suggested in *Lacey*, 693 F.3d at 923, probable cause might have been present had the facts been slightly different, yet the need for legal recourse would have been just as great. In *Reichle v. Howards*, 566 U.S. 658, 668-69 (2012), this Court

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[9] Derek Hawkins, *Popular Texas blogger scooped police on a story. They charged her with 2 felonies, searched her phone records*, WASH. POST, Dec. 22, 2017, *available at* https://www.washingtonpost.com/news/morning-mix/wp/2017/12/22/popular-texas-blogger-scooped-police-on-a-story-so-they-charged-her-with-2-felonies/?utm_ term=.2d97ded20883.

[10] *See*, *e.g.*, *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003) ("Defendants executed a systematic, carefully-organized plan to suppress the distribution of *St. Mary's Today* … to retaliate against those who questioned their fitness for public office and [] challenged many of them in the conduct of their official duties."); *Addison v. City of Baker City*, 258 F. Supp. 3d 1207, 1216-20 (D. Ore. 2017) (author of editorial asserting police had violated students' Fourth Amendment rights placed on watch list, subjected to police stops, and had prospective employers cautioned about his stability).

stopped short of finding that probable cause was sufficient to bar First Amendment retaliatory arrest claims for good reason. The Court observed that "in many retaliatory arrest cases, it is the officer bearing the alleged animus who makes the injurious arrest." *Id.* If probable cause were all that were needed to bar a First Amendment claim, given the ease with which it may be asserted to justify an arrest, officials would be able to retaliate against members of the press with impunity.

B. Arrests While Covering Public Protests or Documenting Police Misconduct

The risk of retaliatory arrest is particularly acute for reporters and news photographers covering public protests or recording police activity. As documented by the U.S. Press Freedom Tracker, so far in 2017, at least 32 journalists have been arrested while seeking to document or report news. *See U.S. Press Freedom Tracker*, https://pressfreedomtracker.us/arrest-criminal-charge. The examples provided below illustrate that it is not uncommon for police officers to arrest journalists for attempting to gather news from the midst of civil unrest, for persistently asking questions of public officials, or for videotaping police as they perform duties in public.

Large-scale protests have become a defining feature of the last five years in the life of this nation, but dubious arrests have greatly hindered the ability of journalists "on the ground" to provide the public a much-needed window onto scenes of civil unrest. For instance, earlier this year police arrested nine journalists covering the violent protests that attended President Trump's inauguration. *See* Jaclyn Peiser,

Journalist Swept Up in Inauguration Day Arrests Faces Trial, N.Y. TIMES, Nov. 14, 2017, https://www.nytimes.com/2017/11/14/business/media/alexei-wood-journalist-trial-inauguration.html. The journalists were swept up in the chaotic events of that day, and arrested together with more than two hundred protestors. Prosecutors subsequently dropped the charges against seven of the nine journalists.

These kinds of "catch and release" arrests are not unusual. Officers arrested a number of reporters covering Black Lives Matter protests in Ferguson and St. Louis, Missouri, including reporters for, respectively, the *Washington Post* and *Huffington Post*, leading to dropped charges in each case. Niraj Chokshi, *Ferguson-related charges dropped against Washington Post and Huffington Post reporters*, WASH. POST, May 19, 2016, https://www.washingtonpost.com/news/post-nation/wp/2016/05/19/ferguson-related-charges-dropped-against-washington-post-and-huffington-post-reporters/?utm_term=.c18183a7914a.

Between 2011 and 2012, more than 90 journalists were arrested while reporting at Occupy Wall Street protests that occurred around the country. Tasneem Raja, *Tracking Journalists Arrested at Occupy Protests*, MOTHER JONES, November 18, 2011, http://www.motherjones.com/politics/2011/11/tracking-journalists-arrested-occupy-protests; *see also* Sara Rafsky, *At Occupy protests, U.S. journalists arrested, assaulted*, Comm. to Protect Journalists, Nov. 11, 2011, http://bit.ly/2i2Mblp. A North Dakota judge dismissed riot charges for lack of evidence

after a radio journalist was arrested while covering protests against the Dakota Access pipeline. Erin McCann, *Judge Rejects Riot Charge against Amy Goodman of 'Democracy Now' Over Pipeline Protest*, N.Y. TIMES, Oct. 17, 2016, *available at* https://www.nytimes.com/2016/10/18/us/judge-rejects-riot-charge-against-amy-goodman-of-democracy-now-over-pipeline-protest.html. By indiscriminately arresting journalists together with protestors, the police can—and often do—prevent journalists from reporting events occurring at the front lines of public protests, where violent confrontations with police are most likely to occur and where press scrutiny is most needed.

Dubious arrests also have prevented journalists from tenaciously questioning government officials in public places. On May 9, 2017, a reporter was arrested in the West Virginia State Capitol building for shouting questions at the Secretary of the Department of Health and Human Services, Tom Price, as he walked through a public hallway with Counselor to the President, Kellyanne Conway. The reporter was charged with willful disruption of governmental processes, but this charge was dropped after prosecutors determined no crime had been committed. Matt Stevens, *Charge Dropped Against Reporter Who Questioned Tom Price*, N.Y. TIMES, Sept. 6, 2017, *available at* https://www.nytimes.com/2017/09/06/business/media/tom-price-journalist-arrest.html.

In a similar vein, a reporter was violently arrested and injured in November of this year after he refused to stop filming a campaign vehicle used by

Virginia gubernatorial candidate Ed Gillespie, and to stop posing questions to campaign members. Tom Kludt, *Reporter wounded during arrest at event with Virginia GOP candidate Ed Gillespie*, CNN, Nov. 1, 2017, *available at* http://money.cnn.com/2017/11/01/media/shareblue-reporter-mike-stark-arrested-ed-gillespie/index.html. The practice of arresting journalists for asking politicians unwanted questions in public is clearly repugnant to freedoms guaranteed by the First Amendment. Additionally, journalists have been arrested and handcuffed while engaged in newsgathering activities on college campuses, purportedly for "trespassing."[11]

Photojournalists are particularly vulnerable to retaliatory arrests when filming police activity in public. In one instance, a news photographer was acquitted of disorderly conduct after being thrown to the ground and arrested for unobtrusively photographing police officers assisting the issuance of liquor citations to two men. *See* Andrew Metcalf, *Montgomery County Settles First Amendment Lawsuit with Photographer*, BETHESDA MAGAZINE, March 8, 2017, http://www.bethesdamagazine.com/Bethesda-Beat/2017/Montgomery-County-Settles-First-Amendment-Lawsuit-with-Photographer. Similarly, in 2011, a videographer was pulled down from his vantage point and arrested by New York City Police officers after filming police as they cleared Zuccotti Park of demonstrators during Occupy Wall

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[11] Max Zahn, *'This is unprecedented': Public colleges limiting journalist access*, COLUMBIA JOURNALISM REV., Dec. 13, 2017, https://www.cjr.org/analysis/cuny-campus-journalist-crackdown.php.

Street protests. Editorial, *The right to record the NYPD*, N.Y. DAILY NEWS, Mar. 26, 2017, http:// www.nydailynews.com/opinion/record-nypd-article-1.3008500. Disorderly conduct charges against the videographer were later dropped.

In another case, Detroit Police arrested a press photographer after she photographed officers escorting a suspect into a police car and confiscated her phone, although no charges were ever filed. *Freep Photographer Arrested While Recording An Arrest*, CBSLocal.com, July 16, 2013, *available at* http://detroit.cbslocal.com/2013/07/16/freep-photographer-arrested-while-recording-an-arrest/. In yet another instance, a credentialed Long Island news videographer was arrested and charged with obstructing governmental administration for videotaping police activity from a public street in the midst of other bystanders. Steve Myers, *News Photographer Arrested on Long Island for Videotaping Police*, POYNTER, Aug. 1, 2011, http://bit.ly/2i2zBmi (noting that the charge was later dropped). And in August of 2012, a photographer on assignment for *The New York Times* was arrested and charged with obstructing government administration and resisting arrest for photographing the arrest of a teenage girl in the Bronx. *Times Photographer Is Arrested on Assignment*, N.Y. TIMES, Aug. 5, 2012, http://nyti.ms/2hk8W4U.[12]

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[12] Retaliatory arrests are not limited to police officers trying to stop the filming of their own activities. Press photographers and videographers also have been arrested for unwelcome attempts to record public hearings and events. *See, e.g.*, Tom Sherwood, *Journalists Handcuffed, Removed from Taxi*

Arrests such as these thwart the well-established First Amendment right to record police activity in public, which is a crucial function journalists must be able to perform in order to ensure that the police remain accountable to the public they serve.[13] More importantly, police would have a near-foolproof way to clear journalists from crime scenes if this Court were to adopt a rule barring First Amendment retaliation claims so long as officers could conjure some argument for probable cause, either at the time or even long after the fact. This is not an esoteric or hypothetical concern. Such arrests already are common. But if the possibility of constitutional remedies were removed entirely, such arrests would become a standard tool of controlling the press.

Commission Meeting, NBCWashington.com, June 23, 2011, http://bit.ly/2h9JeLD; David Becker, *Detroit Newspaper Photographer Arrested While Covering Police Action*, Petapixel (reprinted from Detroit Free Press), July 16, 2013, http://bit.ly/2hySmdC; Matt Hamilton, *L.A. Times photographer arrested after covering Nancy Reagan funeral motorcade*, L.A. TIMES, Mar. 9, 2016, http://lat.ms/1QFntAG; Tim Perry, *CBS News Journalist relives his arrest at a Chicago Trump event*, CBS News.com, Nov. 14, 2016, http://cbsn.ws/2i0ihvJ.

[13] *E.g.*, *Glik*, 655 F.3d at 82-83 ("Ensuring the public's right to gather information about their officials not only aids in the uncovering of abuses, but also may have a salutary effect on the functioning of government more generally."). *See also Turner v. Driver*, 848 F.3d 678, 689 (5th Cir. 2017) ("Filming the police contributes to the public's ability to hold the[m] accountable, ensure that [] officers are not abusing their power, and make informed decisions about police policy."). "Every Circuit Court of Appeals to address this issue (First, Fifth, Seventh, Ninth, and Eleventh) has held that there is a First Amendment right to record police activity in public" and "we join this growing consensus." *Fields v. City of Philadelphia*, 862 F.3d 353, 355-56 (3d Cir. 2017) (collecting cases).

II. THE COURT SHOULD ADOPT A STANDARD THAT APPROPRIATELY BALANCES THE NEEDS OF LAW ENFORCEMENT WITH FIRST AMENDMENT VALUES

A. The Power to Make Arrests Can Disrupt Newsgathering and Other First Amendment Activities

The power to make arrests is the state's most direct and tangible limit on individual liberty. The impact of its misuse is magnified when employed—as it was in this case—to curtail speech. When it comes to the press, arrests can be used to disrupt the exercise of First Amendment speech and press rights. Any retaliatory arrest immediately halts newsgathering activity and contemporaneous coverage of events. The cost, time commitment, and distraction imposed on journalists and/or their press organizations to address the fallout of arrests also detract from reporting activity.

Such interference with reportage cannot be remedied in full by *post hoc* remedies. *See*, *e.g.*, *In re King World Prods., Inc.*, 898 F.2d 56, 59 (6th Cir. 1990) ("even minimal interference with first amendment freedoms causes an irreparable injury") (citing *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976)). However, the ability to bring civil rights claims can help ameliorate these burdens. It is particularly important that a potential First Amendment remedy be available where the government may attempt to dissuade reporters or photographers from covering events where there exists the possibility of public disorder and clashes between citizens and police.

In such circumstances, the police may be tempted to invoke general laws such as breach of peace (*i.e.*, disorderly conduct), obstructing public ways, failure to comply with a peace officer, or loitering to justify arrests, particularly where there may be unfavorable press coverage. Arrests based on probable cause for violating offenses of such generalized and broad scope can be especially threatening to First Amendment activities as they are "susceptible to abuses of discriminatory application." *E.g.*, *Cox v. Louisiana*, 379 U.S. 536, 551, 554-55 (1965). *See also Shuttlesworth*, 382 U.S. at 93 (such amorphous offenses become "so broad as to evoke constitutional doubts of the utmost gravity").

With the breadth of such laws and the ease of asserting probable cause for their violation, minor offenses can easily be used as a pretext for a speech-halting arrest. As a consequence, the "lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not." *Cox*, 379 U.S. at 557. This creates "a device for the suppression of the communication of ideas and permits the official to act as a censor." *Id.* If the presence of asserted probable cause for such offenses were sufficient to serve as an absolute bar to First Amendment claims, law enforcement would have far too much leeway to curtail protected expression.[14]

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[14] This Court has recognized the need to limit such discretion in numerous cases. *See*, *e.g.*, *Hill*, 482 U.S. at 465 ("[W]e have repeatedly invalidated laws that provide the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them."); *Kolender v. Lawson,* 461 U.S. 352, 360-

Such concerns are especially applicable in cases like this. In *Garcia v. Montgomery Cty.*, 145 F. Supp. 3d 492 (D. Md. 2015), for example, police arrested a photojournalist for "disturbing the peace" when he photographed police activity on a public street. After he was acquitted of the charges, Garcia filed a Section 1983 claim asserting, among other things, violations of his First Amendment rights. The United States Department of Justice filed a Statement of Interest in support, noting that these kinds of "discretionary charges, such as disorderly conduct, loitering, disturbing the peace, and resisting arrest, are all too easily used to curtail expressive conduct or retaliate against individuals for exercising their First Amendment rights," such that "courts should view such charges skeptically." Dep't of Justice Statement of Interest, *Garcia v. Montgomery Cty.,* 2013 WL 4539394 (D. Md. Aug. 23, 2013), No. JFM-12-3592, at 1. *See also Patterson v. United States*, 999 F. Supp. 2d 300, 314 (D.D.C. 2013) (citing prevalence of "'contempt of cop' arrests" and "wide-spread practice of [] officers using [] disorderly conduct law to arrest … without a legitimate basis").

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61 (1983) (identification requirement unconstitutional because it accords police "full discretion"); *Smith v. Goguen,* 415 U.S. 566, 575 (1974) ("Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections" thereby "entrusting lawmaking 'to the moment-to-moment judgment of the policeman on his beat.'") (quoting *Gregory v. City of Chi.,* 394 U.S. 111, 120 (1969) (Black, J., concurring)); *Papachristou v. City of Jacksonville,* 405 U.S. 156, 170 (1972) (vagrancy ordinance "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure'") (quoting *Thornhill v. Alabama,* 310 U.S. 88, 97-98 (1940)).

The problem is magnified if the police can try to justify an arrest after-the-fact by asserting they had "arguable probable cause." In this case, for example, midway through Lozman's trial, the state switched theories on what law he supposedly had violated and for which they had probable cause for his arrest. Pet. App. 61a-62a (district court allowed defendants to raise a previously unraised charge). Similarly, in *Garcia*, although the plaintiff had been arrested (and acquitted) on charges of disorderly conduct, in the ensuing civil litigation the police claimed they should not be held to account on the theory that probable cause might have existed to bring other charges.[15] While retaliatory *prosecution* cases have a charging instrument that governs any probable cause inquiry, as *Garcia* illustrates, arresting officers are not similarly limited, *see Garcia*, 145 F. Supp. 3d at 519 (citing *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004)), and § 1983 law enforcement defendants are thus free to "move the goalposts" in ensuing civil litigation for retaliatory arrests.

The great latitude officers enjoy to make arrests where they can cite *something*—anything—that serves as probable cause is unduly magnified if legal recourse is blocked by such recitation; this creates the wrong kinds of incentives. Under qualified immunity principles, officers already are immunized from potential liability except where they are plainly incompetent or knowingly violate constitutional

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[15] *Garcia*, 145 F. Supp. 3d at 517-21 (rejecting County's arguments in ensuing civil case that officers had probable cause to arrest for hindering arrest of third parties and/or second degree assault, as lacking objectively reasonable bases).

rights. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). So too, law enforcement agencies cannot be held liable unless an unlawful arrest is pursuant to department custom or policy. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). For cases that clear these hurdles, holding that probable cause to arrest defeats a First Amendment claim further contracts the ability of the press and public to remedy constitutional violations.

This leaves journalists, photographers, citizen reporters and others with even less opportunity to vindicate their rights. It also instructs law enforcement officers that, even if they know they are violating well-settled rights, no liability will attach so long as they can articulate some probable cause for arrest, even after-the-fact. This, in turn, creates disincentives to law enforcement agencies to prevent officers from making constitutionally infirm arrests. Altogether, these factors increase the incidence of arrests that interfere with the exercise of basic First Amendment rights.

B. The Burden Shifting Framework of *Mt. Healthy City School District Board of Education v. Doyle* Strikes the Correct Constitutional Balance

Under standard First Amendment analysis, the government has no legitimate power to retaliate against individuals for engaging in constitutionally protected activity. Public schools may not fire teachers for criticizing administrators, *Perry v. Sindermann*, 408 U.S. 593 (1972); prison officials may not divert prisoners' mail as punishment for speaking to the press, *Crawford-El v. Britton*, 523

U.S. 574 (1998); and agencies may not demote employees for their political affiliations. *Heffernan v. City of Paterson,* 136 S. Ct. 1412 (2016). Bottom line, official reprisal for protected activity "offends the Constitution," *Crawford-El*, 523 U.S. at 588 n.10, and is subject to recovery, *Hartman v. Moore*, 547 U.S. 250, 256 (2006).

At the same time, the Court has long been sensitive to the potential for retaliation lawsuits to hamstring effective administration of government. Permitting recovery whenever government action is motivated in any part by improper animus risks preventing the government from acting in the public interest. *Mt. Healthy*, 429 U.S. at 285. For example, a school administration might be unable to terminate an underperforming teacher who happens to engage in protected speech with which the administration disagrees. *Id.*

So too has the Court acknowledged the costs of the unique evidentiary burdens that retaliation claims place on public officials. Improper animus is "easy to allege and hard to disprove." *Crawford-El*, 523 U.S. at 585. Retaliation suits therefore may be less amenable to summary disposition and "implicate[] obvious concerns with the social costs of subjecting public officials to discovery and trial, as well as liability for damages." *Id.*

To address these problems, this Court long ago fashioned a burden-shifting framework designed to "protect[] against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights." *Mt. Healthy*, 429 U.S. at 287. Under the *Mt.*

Healthy test, the plaintiff bears the initial burden of demonstrating unconstitutional animus was a motivating factor of an adverse action; the burden then shifts to the defendant to demonstrate that even without the impetus to retaliate the defendant would have taken the action complained of. *Id.*

The *Mt. Healthy* test strikes the appropriate constitutional balance for the vast majority of retaliation claims. In effect, it narrows availability of recovery to cases where unconstitutional animus is the but-for cause of official action and ensures that defendants have an adequate opportunity to defend against frivolous claims at summary judgment. Most importantly, it ensures that an individual "is placed in no worse a position than if he had not engaged in the [protected] conduct." *Id.* at 285-86.

The *Mt. Healthy* test is particularly appropriate in First Amendment retaliatory arrest cases and neatly affords the presence or absence of probable cause due evidentiary weight. No doubt, officers offend the Constitution whenever they arrest an individual in order to inhibit or penalize the exercise of First Amendment freedoms. That is true regardless of whether there exists probable cause, if the arrest would not have occurred but for the protected activity. *Cf. Mt. Healthy*, 429 U.S. at 283-84 (even when a public employee may be discharged for no reason, the government may not discharge the employee because of their protected speech); *Perry*, 408 U.S. at 597 (the government may not deny plaintiff a benefit because of his protected speech, even if it could properly deny it for another reason).

Evidence of the presence or absence of probable cause to arrest will be available to officers in "virtually every retaliatory arrest case," *Reichle*, 566 U.S. at 668, and an officer may raise it as a defense to any claim of retaliation. Its presence may be "fatal" to a plaintiff's ability to prove the requisite but-for causation element of a retaliation claim. *Id.* Under the standard *Mt. Healthy* framework, arrestees, like public employees, are left in no worse a position than if they had not engaged in protected conduct.

In contrast, requiring arrestees to demonstrate an absence of probable cause would decisively tip the scales in favor of defendants, enabling police to indirectly censor and penalize the exercise of First Amendment freedoms in ways the government could not directly command. *See supra* 9-10, 17-23. A rule that probable cause bars a retaliatory arrest claim would immunize these and other government actions that plainly offend the First Amendment.

That probable cause would bar a Fourth Amendment challenge is irrelevant. The Court already has made clear that an arrest which is lawful under the Fourth Amendment may nevertheless violate other constitutional rights. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, this Court acknowledged that the *Mt. Healthy* test governs retaliation claims premised on alleged racial discrimination. 429 U.S. 252, 270 n.21 (1977). And in *Whren v. United States*, it clarified that the Constitution prohibits selective law enforcement based on race, notwithstanding the existence of probable cause. 517 U.S. 806, 813 (1996); *see Reichle*, 566

U.S. at 664 n.5. If the existence of probable cause is no bar to an Equal Protection challenge to an arrest, it should not bar a First Amendment challenge.

Notably, retaliatory arrest claims feature none of the attributes of retaliatory *prosecution* claims that led the Court to impose a no-probable-cause requirement in *Hartman*, 547 U.S. 250. Unlike retaliatory prosecution plaintiffs (and retaliatory arrest defendants), retaliatory arrest plaintiffs do not always have access to a distinct body of highly valuable circumstantial evidence that is available and apt to prove or disprove probable cause, because retaliatory arrest plaintiffs often do not even know the reason for their arrest. *See Devenpeck*, 543 U.S. at 155 (police officers not constitutionally required to state reasons for an arrest). More importantly, in contrast to retaliatory prosecution claims, there is generally no disconnect between animus and injury in retaliatory arrest claims—"it is the officer bearing the alleged animus who makes the injurious arrest." *Reichle*, 566 U.S. at 668-69. Nor is there any presumption of regularity accorded to police officers' arrest decisions that is akin to the presumption of prosecutorial regularity. *Id.*

For these reasons, First Amendment retaliatory arrest claims are best adjudicated under the standard *Mt. Healthy* rubric. That standard preserves police officers' ability to raise probable cause as a defense while ensuring they are not insulated from liability for purposefully abridging and penalizing the exercise of the freedoms guaranteed by the First Amendment.

CONCLUSION

The arrests of reporters and photographers described in this brief "may have taken place in America," but they belong "to a society much different and more oppressive than our own." *Rossignol*, 316 F.3d at 527-28. The Court should adopt a legal standard that makes clear it is "not for law enforcement to summon the organized force of the sheriff's office to the cause of censorship." *Id.* at 528. Toward that end, this Court should reverse the decision below and hold that probable cause does not bar First Amendment claims for retaliatory arrests.

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‡ This brief has been prepared with the assistance of Yale Law School student Catherine Martinez '19.

APPENDIX

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to advancement of visual journalism in its creation, editing and distribution. The NPPA's approximately 6,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism community. Since its founding in 1946, the NPPA has been the *Voice of Visual Journalists*, vigorously promoting the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided assistance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Media Law Resource Center, Inc. ("MLRC") is a non-profit professional association for content providers in all media, and for their defense lawyers, providing a wide range of resources on media and content law, as well as policy issues. These include news and analysis of legal, legislative and regulatory developments; litigation resources and practice guides; and national and international media law conferences and meetings. The MLRC also works with its membership to respond to legislative and policy proposals, and speaks to the press and public on media law and First Amendment issues. The

MLRC was founded in 1980 by leading American publishers and broadcasters to assist in defending and protecting free press rights under the First Amendment.

American Society of News Editors ("ASNE") is an organization with some 500 members, that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York, and owned by its 1,500 U.S. newspaper members. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 300 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

Associated Press Media Editors ("APME") is a nonprofit, tax-exempt organization of newsroom leaders and journalism educators that works closely with The Associated Press to promote journalism excellence. APME advances the principles and practices of responsible journalism; supports and mentors a diverse network of current and emerging newsroom

leaders; and champions the First Amendment and promotes freedom of information.

Association of Alternative Newsmedia ("AAN") is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

The Authors Guild, Inc. was founded in 1912, and is a national non-profit association of more than 9,000 professional, published writers of all genres. The Guild counts historians, biographers, academicians, journalists and other writers of non-fiction and fiction as members. The Guild works to promote the rights and professional interests of authors in various areas, including copyright, freedom of expression, and taxation. Many Guild members earn their livelihoods through their writing. Their work covers important issues in history, biography, science, politics, medicine, business and other areas; they are frequent contributors to the most influential and well-respected publications in every field.

DKT Liberty Project is a nonprofit organization dedicated to promoting individual liberty. Founded in 1997, the Liberty Project is committed to guarding against encroachment by all levels of government and protecting the freedom of all citizens to engage in expression without government interference. DKT Liberty Project has filed numerous briefs supporting free speech rights.

Dow Jones & Company, Inc. is a global provider of news and business information, delivering content to consumers and organizations around the world across multiple formats, including print, digital, mobile and live events. Dow Jones has produced unrivaled quality content for more than 130 years and today has one of the world's largest newsgathering operations globally. It produces leading publications and products including the flagship Wall Street Journal; Factiva; Barron's; MarketWatch; Financial News; Dow Jones Risk & Compliance; Dow Jones Newswires; and Dow Jones VentureSource.

The Electronic Frontier Foundation ("EFF") is a member-supported, nonprofit civil liberties organization that works to protect free speech and privacy in the digital world. Founded in 1990, EFF has over 37,000 members. EFF represents the interests of technology users in both court cases and broader policy debates surrounding the application of law to technology. EFF has filed amicus briefs on many First Amendment issues, including the right to record police. *See Fields v. City of Philadelphia*, No. 16-1650 (3d Cir.).

First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

First Look Media Works, Inc. is a new non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting.

Freedom of the Press Foundation is a non-profit organization that supports and defends public-interest journalism focused on transparency and accountability. The organization works to preserve and strengthen First and Fourth Amendment rights guaranteed to the press through a variety of avenues, including public advocacy, legal advocacy, the promotion of digital security tools, and crowd-funding.

The Freedom to Read Foundation is an organization established by the American Library Association to promote and defend First Amendment rights, foster libraries as institutions that fulfill the promise of the First Amendment, support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and establish legal precedent for the freedom to read of all citizens.

Media Coalition Foundation, Inc. is a non-profit organization, which works to protect the First Amendment and the public's right to access the broadest possible range of information, opinion and entertainment. The Foundation monitors potential threats to freedom of speech and engages in education and litigation to protect free speech rights.

The Media Consortium is a network of the country's leading, progressive, independent media outlets. Our mission is to amplify independent

media's voice, increase our collective clout, leverage our current audience and reach new ones.

MPA – The Association of Magazine Media is the industry association for multi-platform magazine companies. Established in 1919, MPA represents about 100 domestic magazine media companies with close to 1000 national publications that span an enormous range of genres, from nationally known household brands to local and niche enthusiast titles. In addition to domestic magazine media companies, MPA's membership includes international magazine media companies and associate members that support the industry throughout the supply chain. MPA is a non-profit organization representing magazine media, print and digital. MPA provides an organized forum in which publishers can advance their common interests. MPA has a long history of defending free speech and the First Amendment. MPA is the primary advocate and voice for the magazine media industry, driving thought leadership and game-changing strategies to promote the medium's vitality, increase revenues and grow market share. MPA is headquartered in New York City, with a government affairs office in Washington.

New York News Publishers Association ("NYNPA") is the non-profit trade association representing the newspapers of New York State, which have a combined readership of more than five million people. NYNPA is the principal professional association representing New York State's newspaper industry in governmental, regulatory, and other matters.

The New York Press Club is an association of and for working journalists and media professionals. Founded in 1948, its membership includes professionals from all types of news organizations including the Web, television, radio, wire services, daily newspapers, weekly and monthly publications, as well as professionals from the fields of communications, public relations and public affairs.

The New York Press Photographers Association was founded in 1915 and is dedicated to visually documenting the world around us and serving the truth through our images.

The New York State Broadcasters Association, Inc. is a not for profit trade association representing more than 400 radio and television stations throughout the state of New York. Providing news and information to the citizens of New York State is a cornerstone of our public interest obligation to serve our local communities. In order to fulfill this vital role under the First Amendment, The New York State Broadcasters Association, Inc. has a direct interest in ensuring that its members are able to obtain access to information.

Online News Association ("ONA") is the world's largest association of online journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. ONA's more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the

Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

Reporters Without Borders has been fighting censorship and supporting and protecting journalists since 1985. Activities are carried out on five continents through its network of over 150 correspondents, its national sections, and its close collaboration with local and regional press freedom groups. Reporters Without Borders currently has 10 offices and sections worldwide.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists, and protects First Amendment guarantees of freedom of speech and press.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.