No. 17-1174

In The Supreme Court of the United States

LUIS A. NIEVES AND BRYCE L. WEIGHT,

Petitioners,

v.

RUSSELL P. BARTLETT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND NATIONAL SHERIFFS' ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities is dedicated to helping city leaders build better communities. The League is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,400 cities. Each city is represented in USCM by its chief elected official, the mayor.

The International City/County Management Association ("ICMA") is a non-profit professional and educational organization consisting of more than 11,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

The National Sheriffs' Association is a 26 U.S.C. § 501(c)(4) non-profit association formed in 1940 to promote the fair and efficient administration of criminal justice throughout the United States, and to promote the public safety of our nation's local communities. The Association has some 21,000 individual members and is a strong advocate for our nation's over 3,000 Departments/Offices of Sheriff who are directly elected by the people in their local parish, county or city. The Association promotes the public-interest goals and policies of law enforcement in our nation and it participates in judicial processes where the vital interests of the public, law enforcement, and its members are being affected.

Amici curiae are national organizations representing elected and appointed officials of state and local

governments. Members of these organizations employ law enforcement officers who keep the peace and protect public order and safety. State and local law enforcement officers frequently encounter situations similar to the one at issue in this case.

SUMMARY OF THE ARGUMENT

This case presents this Court's most recent opportunity to craft definitional elements for the federal tort of First Amendment retaliatory arrest. In particular, a decision on the merits would allow this Court to resolve a circuit split regarding whether First Amendment retaliatory arrest claimants in a typical case must plead and prove the absence of probable cause for their arrest—a question that this Court left open in *Reichle v. Howards*, 566 U.S. 658 (2012), and did not resolve in *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018).

Reichle and *Lozman* lie at endpoints on the continuum of retaliatory arrest scenarios. The instant case presents a more typical scenario: one where police arrive in the midst of a complicated and fluid situation, and must make quick decisions to maintain public safety. *Amici* submit that the best rule for the "mine run" of retaliatory arrest claims, like this one, is to require the absence of probable cause. Law enforcement requires knowledge of the law, but law enforcement officers are (typically) not attorneys, or judges. The legal standard of probable cause is constitutional, clear,

objective, and what law enforcement officers are trained on so they can make arrests in the heat of complicated, rapidly evolving and sometimes violent situations without having to pause for analysis. The no-probable-cause rule is therefore the right rule for the mine run of cases. It is also the only workable rule. Only a no-probable-cause rule can prevent the sort of *post-hoc* factual and legal deconstruction that every claimed retaliatory arrest situation will inevitably invite, as even this "typical" retaliatory arrest scenario confirms.

In adopting such a rule, the Court can take comfort from the fact that retaliatory arrest claimants will not necessarily be put out of court by the existence of probable cause for their arrest. Claimants are free to pursue state-law claims, allowing the states to develop and refine the law in this area. Free speech retaliatory arrest is a tort claim, and tort law ordinarily develops through the states' common-law process. The 50 state constitutions offer meaningful protections against the abridgment of the freedom of speech, and nothing prevents plaintiffs from pressing their rights under appropriate state law.

STATEMENT OF THE CASE

Amici adopt Petitioners' statement of the case. *Amici* note that the facts of this case—an alcohol-fueled party on the last night of Alaska's Arctic Man extreme winter sports festival—fit well within what

this Court described as the "mine run" of cases that it was concerned with in *Lozman*. *See Lozman*, 138 S. Ct. at 1954. This case presents a version of the "bar fight" scenario Justice Kennedy described at oral argument in *Lozman*:

> You have people that are fighting in a bar and the—the policeman has to get some order and the—one of the more difficult suspects says something bad to the policeman, and he arrests him. Under your view, that's a violation [of the First Amendment]?

Lozman oral argument transcript at 5:23–6:3.

This Court's two most recent retaliatory arrest cases, by contrast, did not produce a general rule because they presented facts at the opposing ends of the continuum of cases. In *Reichle*, a Secret Service agent had to decide on the spot whether to arrest someone who had just shoved the Vice President in an unsecure environment, lied about it, and was otherwise uncommunicative. The claimant asserted that even though he had assaulted the Vice President and then lied about it, the supposedly *real* reason the agent arrested him was for expressing his displeasure with the administration's foreign policy. It is hard to imagine a less credible claim of retaliatory motive for the arrest. Lozman's retaliation claim arguably lies on the other end of the spectrum. After viewing the video of Lozman's arrest just a few seconds into his calm remarks at a city council meeting, and considering it in light of the city council's prior discussion of "intimidating"

him, it is hard to imagine a more credible allegation of retaliatory motive.[2]

This case, by contrast, presents a version of the "bar fight" scenario that Justice Kennedy recognized lies in the middle of the continuum of cases, and which this Court's rules must address.

ARGUMENT

This Court has understandably struggled to craft a retaliatory arrest rule that properly balances free speech values with a desire to spare police and other law enforcement from easily-alleged and often meritless or trivial retaliation claims. *See Lozman*, 138 S. Ct. 1953–54 (discussing the inherent tensions in crafting a rule that accommodates these competing values).

Amici support Petitioners' position that the existence of probable cause should defeat a retaliatory arrest claim as a matter of law, using the analytical framework of *Hartman v. Moore*, 547 U.S. 250 (2006), rather than *Mount Healthy City Board of Education v.*

[2] Even Lozman's retaliatory arrest claim can be squared with a no-probable-cause rule. Lozman had his day in court. He asked for a jury, and chose to represent himself in front of that jury. The court submitted the question of probable cause to the jury. The jury may well have rejected Lozman's retaliatory arrest claim for any of the myriad reasons juries do—*e.g.*, because perhaps they just didn't like Mr. Lozman—and the jury's questionable probable cause determination may have been the vehicle to reach this outcome.

Doyle, 429 U.S. 274 (1977). The no-probable-cause rule is consistent with the constitutional principles at stake, closely tracks general tort principles, accommodates the distinctive features of retaliatory arrest claims, and is consonant with First Amendment values. A no-probable-cause rule also gives law enforcement clear guidance in the field, something this Court prefers when crafting constitutional rules to govern police conduct. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). This rule also will better weed out frivolous retaliatory arrest claims early on—or better yet, will dissuade plaintiffs from asserting meritless claims at all. And the no-probable-cause rule avoids the sort of *post-hoc* deconstruction of arrest scenarios that inevitably arise when the parties lawyer up, but is only likely to obscure rather than elucidate an arresting officer's true motives.

Additionally, in crafting a federal tort of retaliatory arrest cognizable through Section 1983, this Court should be mindful that similar claims can be brought under available state law. States are free to develop their own versions of the tort of retaliatory arrest pursuant to state constitutions and the common law process. States are not constrained by Section 1983's importation of 19th-century tort principles, but are free to develop the law in this area as they see fit. Adopting the no-probable-cause rule for federal Section 1983 claims will still leave courthouse doors open for claimants who present claims deemed worthy under state law.

A. The Ninth Circuit stands alone in permitting retaliatory arrest claims despite probable cause.

This Court is familiar with the circuit split on whether to apply a no-probable-cause rule to retaliatory arrest claims from *Reichle* and *Lozman*. The Ninth Circuit appears to stand alone in permitting retaliatory arrest claims despite probable cause, per *Ford v. City of Yakima*, 706 F.3d 1188, 1195-96 (9th Cir. 2013).[3] The fact that the large majority of circuits have lined up on the other side of this issue is itself persuasive authority that the no-probable-cause requirement is the better rule.

B. Qualified immunity does not provide adequate protection.

This Court has identified two key problems with relying on qualified immunity to act as a safeguard against frivolous or meritless First Amendment retaliatory arrest claims.

First, the nature of a First Amendment retaliatory arrest claim naturally lends itself to easily manufactured factual disputes regarding the subjective

[3] The Tenth Circuit sided with the Ninth in *Reichle*, but that decision was effectively reversed by this Court in an opinion which noted how the Tenth Circuit's own case law did not clearly reject a no-probable-cause rule. *Reichle*, 566 U.S. at 670, n.7. The Tenth Circuit has not re-sided with the Ninth on this issue since its correction in *Reichle*.

motivation of the police officer. As Justice Alito noted during oral argument in *Lozman*:

> [I]f there is in a case a genuine issue about the officer's motivation, I don't see how the officer will ever be able to get dismissal based on qualified immunity. . . . And if there's any evidence, circumstantial evidence, of—of retaliatory motives, such as the person who's arrested saying something that's insulting to the officer, you're going to be able to infer that.

Lozman oral argument transcript at 21:23-22:2; 22:14-19.

Because retaliatory arrest cases, by their very nature, require the fact-finder to delve into the officer's subjective motivation for the arrest, courts will always be inclined to send these cases to a jury rather than dispose of them through qualified immunity.

Second, lower courts' failure to apply qualified immunity has fairly compelled this Court to take the extraordinary step of summarily reversing the lower courts on a number of occasions. *See*, *e.g.*, *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (*per curiam*); *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018); *White v. Pauly*, 138 S. Ct. 577 (2017) (*per curiam*); *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (*per curiam*); *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015). In reversing these erroneous denials of qualified immunity, the Court has "repeatedly stressed that courts must not define clearly established law at a high level of generality, since doing so avoids the crucial

question whether the official acted reasonably in the particular circumstances that he or she faced." *Wesby*, 138 S. Ct. at 590.

The fact that this Court has needed to continually summarily reverse the lower courts because of their failure to properly follow the Court's directives regarding qualified immunity strongly suggests that the doctrine is not serving as an adequate shield from liability for reasonable police officers making arrests based on probable cause. Chief Justice Roberts noted as much at oral argument in *Lozman*:

> Well, we get a lot of cases, particularly from where you've said, the cases you have looked at, where qualified immunity is applied in a case where we found it necessary to—to reverse. I'm not sure that it's as solidly established a doctrine as—as you suggest to protect—to—to leave—we can allow this action because qualified immunity will take care of the—the problems.

Lozman oral argument transcript at 17:14-23.

The Ninth Circuit's failure to apply qualified immunity to Respondent Bartlett's retaliatory arrest claim provides yet another example of this phenomenon. The Ninth Circuit saw fit to withhold qualified immunity from the Petitioners because it viewed its circuit law rejecting the no-probable-cause rule for retaliatory arrest claims as established, based on *Ford*. But even where a particular circuit's law is settled, the existence of a split among the circuits supports the

application of qualified immunity. *See Wilson v. Layne* 526 U.S. 603, 618 (1999) (noting that where circuits are split, "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."). This Court could therefore summarily reverse the Ninth Circuit in this case based on its failure to apply qualified immunity, as it did in *Kisela* and *Sheehan*, and as it reversed other circuits in the above cases.

But this Court's resources are obviously better used by announcing a general substantive rule of law that appropriately precludes claims that should not be brought in the first place, such as a no-probable-cause rule for First Amendment retaliatory arrest cases. Having declined to announce a general rule for these claims in *Reichle* and *Lozman*, the time has clearly come for this Court to announce this rule here, in this mine-run type retaliatory arrest case.

C. Permitting retaliatory arrest claims despite probable cause will hinder the operations of state and local governments.

A rule permitting retaliation lawsuits in the face of probable cause will significantly affect the ability of state and local law enforcement to perform their protective functions. Law enforcement officers face unfamiliar and potentially life-threatening situations every day. Similar to the decision whether to use force when making an arrest, the decision to make an arrest in the first place—determining whether probable

cause exists—is made "not in the courtroom but at the scene," often in a "split second." *Wong Sun v. United States*, 371 U.S. 471, 499 (1963) (Clark, J., dissenting). An officer must respond to a situation he or she encounters then and there, without the luxury of consulting an attorney beforehand to determine whether an arrest will later embroil him or her in a lawsuit. Where an officer has probable cause, the decision to arrest is not one this Court should force an officer to second guess on pain of personal liability simply because a judge or jury, years later, may see the situation differently. The stakes are too high to impose such a burden on officers.

An officer who, based on instinct, training, and (most importantly) probable cause, decides it is appropriate to arrest someone should not face personal liability for that decision simply because the arrestee thinks he or she was arrested for his or her speech—or because the arrestee likes to sue police officers. As this Court noted during questioning in *Reichle*, such claims would be easy enough to set up—a claimant need only put an "I hate the police" bumper sticker on his car. *See Reichle* oral argument transcript at 39:6-12. Claimants without cars could for example wear "Make America Great Again" hats and "Black Lives Matter" t-shirts—a sartorial combination that could provide a basis for a speech-based retaliation lawsuit in most any situation. And, as *Reichle* makes clear, the speech component of any and every political protest can supply a basis for retaliation claims by those arrested. *See*, *e.g.*, Tyler Layne, "575 people arrested during immigration

protest in D.C." (June 28, 2018); Hayden Ristevski & Stephan Johnson, "LMPD arrests 9 Occupy ICE protesters for blocking Immigration Court" at (July 26, 2018); CBS News, "Anti-gun violence protesters shut down part of Chicago freeway" (July 7, 2018).[4] These recent political protests resulting in substantial arrests can be counted upon to generate their share of retaliatory arrest lawsuits.

While easily manufactured, retaliation claims cannot be weeded out with similar ease for the simple reason that retaliatory arrest situations always provide a rich source of speech and conduct that claimants can use to survive procedural hurdles. While this Court's recent tightening of pleading standards in *Twombly* and *Iqbal* discounts mere conclusory allegations, it is hard to imagine a police encounter resulting in an arrest that will not supply enough speech and conduct to permit a claimant to survive a challenge under Rule 12(b)(6).

Rule 56 is similarly ill-equipped to screen out meritless claims, given the obligation to view facts in the light most favorable to the non-moving claimant, who sees every act as motivated by retaliatory animus. Petitioners' brief provides an illustrative list of

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[4] Available respectively at https://dcw50.com/2018/06/28/575-people-arrested-during-immigration-protest-in-d-c/; http://www.wdrb.com/story/38737760/occupy-ice-protesters-blocking-entrance-to-louisvilles-immigration-court; and https://www.cbsnews.com/news/chicago-interstate-94-dan-ryan-expressway-protesters-to-draw-attention-to-gun-violence-2018-07-07/. All three web pages last visited August 20, 2018.

retaliatory arrest cases of dubious merit that, under the Ninth Circuit's minority rule, must go to trial in order to be disposed of.

Even when claimants are entirely sincere, an arrest's temporal proximity to the speech makes it easy for an arrestee to *perceive* the speech as motivating the arrest. Officers may have difficulty rebutting the inference that speech caused the arrest. *See New York v. Quarles*, 467 U.S. 649, 656 (1984) (noting the "kaleidoscopic situation[s]" officers face, where "spontaneity" is "necessarily the order of the day" and officers must respond "out of a host of different, instinctive, and largely unverifiable motives"). Petitioners' brief catalogues the many ways that speech attendant to an arrest may be irrelevant to the arrest, or legitimately taken into account by law enforcement, but nonetheless wrongly perceived by an arrestee as motivated by a desire to retaliate against the arrestee's protected speech.

In addition to Petitioners' litany of sound reasons for imposing a no-probable-cause rule, there is the inevitable *post-hoc* deconstruction of an arrest. Every encounter that leads to an arrest with attendant speech will provide a rich canvas for later deconstruction by lawyers. Here, for example, Respondent Bartlett claims that Officer Nieves retaliated against his exercise of First Amendment rights when Nieves allegedly said, *after* making the arrest: "bet you wish you would have talked to me now." Although this alleged comment was not captured on any of the arrest video, and was disputed, the Ninth Circuit held that this allegation supported Bartlett's First Amendment retaliation

claim. This illustrates how retaliatory arrest cases are often constructed *post-hoc*, and thus can bear little if any relation to the actual facts, conduct, and motivations of the participants at the scene. The *post-hoc* constructed nature of Respondent Bartlett's position is further emphasized by how his narrative arguably implicates Fifth Amendment rights more than First Amendment ones.[5] Respondent's apparent constitutional confusion in this case, echoed by the Ninth Circuit, is testament to how any situation resulting in an arrest will provide a rich source of speech, conduct and potential motivation for later deconstruction and *post-hoc* reconstruction into a retaliation lawsuit.

Permitting retaliation claims in the face of probable cause would prompt officers to second-guess themselves in tense and rapidly evolving situations like the one here. Officers would have to stop to ask themselves whether they truly are making an arrest based on a concern that a crime has been or is about to be committed, or instead whether their personal views of the arrestee's speech are motivating the decision in some

[5] This Court has recognized that citizens have a right to ignore the police when questioned, and police lack probable cause or reasonable suspicion to support the questioning. *Florida v. Royer*, 460 U.S. 491, 498 (1983). *Royer*, however, did not ground this right in the First Amendment. The right would appear to be better grounded in the Fifth Amendment right to remain silent in the face of law enforcement officers' investigatory questioning. Respondent Bartlett did not sue for Fifth Amendment retaliation, and there is no legally cognizable theory of Fifth Amendment retaliation for an arrestee who declines to answer a police officer's investigatory questions, but nonetheless supplies probable cause for his arrest.

way. And when officers are confident in the righteousness of their motives and legal analysis, they may still choose not to make a justifiable and prudent arrest because they know their decisions will be misconstrued by the arrestee—perhaps honestly, perhaps deliberately, but likely inevitably.

Finally, beyond the direct financial costs they consume (*e.g.*, attorney's fees, lost employee productivity due to depositions and other case preparations), frivolous or meritless retaliation lawsuits can also impose significant reputational harm on both the officer and local government. The prospect of facing personal liability for actions taken in the line of duty contributes to police departments' struggle to fill and maintain their ranks. *See* Sean Curtis, *4 reasons why police departments are struggling to fill their ranks*, Policeone.com (Oct. 12, 2017).[6] Rejecting the no-probable-cause rule would amplify this recruitment and retention problem.

D. The First Amendment is not the sole bulwark against retaliatory arrests; the 50 State Constitutions also protect free speech.

Justice Thomas's thorough and incisive dissent in *Lozman* provides the analytical framework for a federal no-probable-cause rule that should apply to this

[6] Available at https://goo.gl/5KLKjx (last visited August 20, 2018).

case and the mine run of retaliatory arrest cases. *Lozman*, 138 S. Ct. at 1955-59 (Thomas, J., dissenting).

Justice Thomas's dissent, however, is necessarily framed by Section 1983 and its 19th-century federalization of certain areas of tort law. *See Lozman*, 138 S. Ct. 1956–57 (discussing how Section 1983 claims are "a species of tort liability" that the Court develops through the common law process). Since *Erie*, this Court has properly left development of tort law to the states, and generally eschewed the notion of federal common law save in those narrow areas where such a process is called for, such as defining Section 1983 claims. This rare dive into tort law through Section 1983 serves as a reminder that the states are the traditional and primary fonts for tort claims, and developers of theories of tort liability.

By adopting a no-probable-cause rule for the mine run of Section 1983 retaliatory arrest claims as a federal matter, this Court would not prevent the states from developing this area of tort law differently. All 50 State Constitutions include provisions that protect against speech abridgment.[7] The various state

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[7] *See* Ala. Const. art. 1, § 4; Alaska Const. art. I, § 5; Ariz. Const. art. 2, § 6; Ark. Const. art. 2, § 6; Cal. Const. art. 1, § 2(a); Colo. Const. art. II, § 10, Conn. Const. art. I, § 4; Del. Const. art. I, § 5; Fla. Const. art. I, § 4; Ga. Const. art. I, § 1, ¶ 5; Haw. Const. art. I, § 4; Idaho Const. art. I, § 9; Ill. Const. art. I, § 4; Ind. Const. art. 1, § 9; Iowa Const. art. I, § 7; Kan. Const. Bill of Rights § 11; Ky. Const. § 8; La. Const. art. I, § 7; Me. Const. art. I, § 4; Md. Const. Declaration of Rights, art. 10; Mass. Const. Pt. 1, art. XXI; Mo. Const. art. I, § 8; Mont. Const. art. II, § 7; Neb. Const. art. I-5; Nev. Const. art. 1, § 9; N.H. Const. Pt. I, art. 22; N.J. Const.

formulations do not always mirror the First Amendment, but all provide rich safeguards for speech.[8]

This Court has long acknowledged that its interpretation of the First (and Fourteenth) Amendments does not limit "the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."

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art. I, § 6; N.M. Const. art. II, § 17; N.Y. Const. art. I, § 8; N.C. Const. art. I, § 14; N.D. Const. art. I, § 4; Ohio Const. art. I, § 11; Okla. Const. § II-22; Or. Const. art. I, § 8; Pa. Const. art. I, § 7; R.I. Const. art. I, § 21; S.C. Const. art. I, § 2; S.D. Const. art. VI, § 5; Tenn. Const. art. 1, § 19; Tex. Const. art. I, § 8; Utah Const. art. I, § 15; Vt. Const. ch. I, art. 13; Va. Const. art. I, § 12; Wash. Const. art. I, § 5; W. Va. Const. art. III, § 7; Wis. Const. art. I, § 3; Wyo. Const. art. I, § 20.

[8] *Compare*, *e.g.*, Cal. Const. art. 1, § 2(a) ("Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."); Me. Const. art. I, § 4 ("Every citizen may freely speak, write and publish sentiments on any subject, being responsible for the abuse of this liberty."); N.H. Const. Pt. I, art. 22 ("Free speech and liberty of the press are essential to the security of freedom in a state: They ought, therefore, to be inviolably preserved."); Or. Const. art. I, § 8 ("No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."); R.I. Const. art. I, § 21 ("No law abridging the freedom of speech shall be enacted."); Va. Const. art. I, § 12 ("That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press.").

Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980); *see also Kelo v. City of New London*, 545 U.S. 469, 489 (2005) (saying same thing with respect to Fifth Amendment Takings Clause); *Oregon v. Hass*, 420 U.S. 714, 719 (1975) (same for Fifth Amendment protection against self-incrimination).

Some states have taken the Court's statements to heart by construing their constitutions to protect more speech than the First Amendment does. *See*, *e.g.*, *Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm'n*, 773 P.2d 455, 459 (Ariz. 1989) ("Indeed, this court has previously given art. 2, § 6 [of the Arizona Constitution] greater scope than the first amendment."); *People ex rel. Arcara v. Cloud Books, Inc.*, 503 N.E.2d 492, 557–58 (N.Y. 1986) ("[T]he minimal national standard established by the Supreme Court for First Amendment rights cannot be considered dispositive in determining the scope of this state's constitutional guarantee of freedom of expression.").

Some states have also taken the lead in construing their constitutions to protect against abridgment of speech by private actors. For example, the New Jersey Supreme Court has held that the New Jersey Constitution's free-speech clause is "available against unreasonably restrictive or oppressive conduct on the part of private entities that have otherwise assumed a constitutional obligation not to abridge the individual exercise of such freedoms." *State v. Schmid*, 423 A.2d 615, 628 (N.J. 1980) (reversing on state constitutional grounds a trespass conviction for distributing political literature at Princeton without permission); *see*

Dublirer v. 2000 Linwood Ave. Owners, Inc., 103 A.3d 249, 251 (N.J. 2014) (sustaining on state-law grounds a challenge to private high-rise cooperative apartment building's "home rule" barring soliciting and distributing written materials in the building).

The California Supreme Court has similarly construed California's state constitution, by holding that a privately owned shopping mall is a public forum where visitors can exercise their freedom of speech the same way they would be entitled to do on a city sidewalk. *Robins v. Pruneyard Shopping Center*, 592 P.2d 341, 347 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980); *see Fashion Valley Mall, LLC v. NLRB*, 172 P.3d 742 (Cal. 2007) (holding that the right to free speech embodied in the California Constitution even includes the right to urge customers in a private shopping mall to boycott one of its stores). *Accord Bock v. Westminster Mall Co.*, 819 P.2d 55, 56 (Colo. 1991) ("Within the public spaces of the Mall, Article II, Section 10 [of the Colorado Constitution] protects petitioners' rights to distribute political pamphlets and to solicit signatures pledging nonviolent dissent from the federal government's foreign policy toward Central America.").

Adopting a no-probable-cause rule for First Amendment retaliatory arrest claims under Section 1983 does not prevent states from taking a different approach under their respective state constitutions. This Court can take the opportunity of its decision in this case to remind retaliatory arrest claimants that their rights can be vindicated through state law just as effectively (and perhaps more effectively) than through federal

law, which is necessarily more constrained than state common law due to its grounding in Section 1983 and attendant 19th-century principles of tort law. *See* Jeffrey S. Sutton, *Why Teach—and why Study—State Constitutional Law*, 34 Okla. City U. L. Rev. 165, 173–76 (2009) (describing the many advantages of developing rights as a matter of state constitutional law). If, however, this Court takes Respondents' proposed route of applying the *Mt. Healthy* framework even in the face of probable cause, claimants will continue bringing their retaliatory arrest claims in federal court because federal courts will always be the most accommodating forum, and this area of state tort law will likely remain forever undeveloped.

CONCLUSION

Now that it is presented with a mine-run retaliatory arrest case, this Court should hold that probable cause for the arrest defeats a claim for First Amendment retaliation as a matter of law, reverse the Ninth Circuit's contrary rule, and seal the federal circuit split. This Court can also remind claimants that they can bring state law retaliatory arrest claims in state courts, where the common law process is not constrained the way it is in federal court.

Respectfully submitted,

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