No. 17-1174

IN THE

Supreme Court of the United States

LUIS A. NIEVES, ET AL.,

Petitioners,

v.

RUSSELL P. BARTLETT,

Respondent.

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

BRIEF FOR RESPONDENT

Jeffrey L. Fisher
Pamela S. Karlan
Leah M. Litman
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Kerri L. Barsh
GREENBERG TRAURIG
333 S.E. Second Avenue
Miami, FL 33131

Zane D. Wilson
Counsel of Record
Tyler P. Broker
CSG, INC.
714 Fourth Avenue
Suite 200
Fairbanks, AK 99701
(907) 452-1855
zane@alaskalaw.com

QUESTION PRESENTED

When a plaintiff in a Section 1983 damages action claims that a police officer retaliated against his First Amendment-protected expression by arresting him for a misdemeanor, and he presents sufficient evidence from which a jury could find the officer acted with a retaliatory motive, does the existence of arguable probable cause for the arrest bar his claim?

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BRIEF FOR RESPONDENT

Respondent Russell Bartlett respectfully requests that this Court affirm the judgment of the U.S. Court of Appeals for the Ninth Circuit.

INTRODUCTION

In *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), this Court reiterated that "the First Amendment prohibits government officials from retaliating against individuals for engaging in protected speech" by arresting them for their "expressive activities." *Id.* at 1949, 1954. It rejected the proposition that the presence of probable cause for an underlying arrest serves as an absolute bar to a First Amendment retaliation claim under 42 U.S.C. § 1983. *Lozman*, 138 S. Ct. at 1955.

Petitioners and the United States respond by offering this Court two proposals. Petitioners would permit recovery under Section 1983 against "individual officers" for only the subset of First Amendment violations where plaintiffs can prove a lack of probable cause for the arrest. Petr. Br. 17. The Government suggests a different subset: Plaintiffs can recover damages under Section 1983 for First Amendment violations either where there is a lack of probable cause or where the retaliation stems from an official policy. U.S. Br. 6.

The two proposals are unsupported by statutory text, history, precedent, or practical considerations. This Court should instead affirm the rule the Ninth Circuit applied here: A plaintiff "can prevail on a retaliatory arrest claim even if the officers had probable cause to arrest" if he "prove[s] that the officers' desire to chill his speech was a but-for cause"

of the officers' action, Pet. App. 4, 6 (quoting *Ford v. City of Yakima*, 706 F.3d 1188, 1193 (9th Cir. 2013)).

STATEMENT OF THE CASE

Petitioners and the United States recognize the presence of numerous factual "disputes" concerning the events at issue here. *See, e.g.*, Petr. Br. 5, 7; U.S. Br. 3, 4. Nevertheless, their statements of the case ignore this Court's repeated directive that at the summary judgment stage, the facts must be viewed "in the light most favorable to the nonmoving party"—in this case, respondent. *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2017 (2014).

1. Arctic Man is a multiday snowmobile and ski race event that occurs each spring in the Hoodoo Mountains of Alaska. Respondent Russell Bartlett—the son of a retired Alaska State Trooper—attended the 2014 Arctic Man, along with more than 10,000 other spectators.

Alaska State Troopers patrol Arctic Man to ensure public safety. Because of the remoteness of the event and the relatively small patrol force, the commanding officers "don't encourage arrests." J.A. 164. Rather, they are expected to defuse problems they encounter.

Mr. Bartlett spent the event camping out with friends. On the final night, he ate dinner and drank two or three beers at his campsite before walking over to a party at an adjacent campsite later in the evening. J.A. 272, 431.[1]

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[1] Mr. Bartlett weighed approximately 235 pounds, J.A. 147, so the beers he had consumed earlier in the evening did not make him intoxicated during the relevant time period, *id.* 272.

While Mr. Bartlett was standing at the party, he was approached by petitioner Luis Nieves, a sergeant in the Alaska State Troopers, who was investigating underage drinking. Although it is standard policy for officers to use their digital audio recorders when conducting noncustodial interviews, J.A. 536, and more than 90 to 95 percent of criminal cases in Alaska include such recordings, *id.* 435, Sergeant Nieves did not do so here. *Id.* He offered no "reason why I didn't activate my recorder"—"I just didn't think of activating it." *Id.* 73.

Sergeant Nieves tapped Mr. Bartlett on the shoulder and asked to talk to him. When Mr. Bartlett asked him, "What for?," Pet. App. 8, the sergeant's demeanor "changed," J.A. 363, and his voice took on a "more aggressive tone" that took Mr. Bartlett "aback," *id.* at 364. Mr. Bartlett stated he did not want to speak and asked whether he was "free to go" or was "being detained." *Id.* At that point, the sergeant considered whether to remain on the chance that Mr. Bartlett might "end[] up crossing that line and becoming disorderly" leading to an arrest. *Id.* 188. But instead he turned and walked away.

Some minutes later, Mr. Bartlett observed another trooper, petitioner Brice Weight, questioning a teenager who was staying at respondent's campsite. Believing that Trooper Weight was not authorized to question the teenager without his parent or guardian, Mr. Bartlett approached the trooper. J.A. 370. As he was expressing his concern, Sergeant Nieves returned.

Neither officer activated his recording device. But a portion of the ensuing events was captured on videotape by a local television station, whose reporter

and cameraman had been filming Sergeant Nieves all evening.[2]

The enhanced version of the videotape shows that as the sergeant approached, Trooper Weight looked over, stepped forward, and shoved Mr. Bartlett. Pet. App. 9; J.A. 370.

As Mr. Bartlett fell backwards, his arm went into the air. Sergeant Nieves grabbed the arm and Trooper Weight did a "leg sweep" that brought respondent "down on one knee." Pet. App. 12. Even after he was on his hands and knees, petitioners "tried to force Mr. Bartlett to the ground; he hesitated so as to not aggravate an earlier back injury." *Id.* 9. Petitioners threatened to use a Taser on him. He then lay fully on the snow with his hands behind his back. *Id.* 9-10.

Mr. Bartlett was placed in a trooper vehicle, and Sergeant Nieves informed him that he was "going to jail." Pet. App. 10. He then remarked, "Bet you wish you would have talked to me now." *Id.*

The criminal complaints filed against Mr. Bartlett by the State charged him with disorderly conduct and resisting arrest, both misdemeanors under Alaska law. *See* J.A. 21-26 (alleging violations of Alaska Stat. Ann. §§ 11.61.110(a)(6) and 11.56.700(a)(1)).

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[2] Most of the video was destroyed before respondent learned of its existence. J.A. 82. The remaining video is in the record. The district court observed that "[c]ertain aspects of the video are indeed susceptible to more than one interpretation" given the location from where it was shot, Pet. App. 11. A copy of the video was lodged with the Court as Appendix 1 to respondent's brief at the certiorari stage. An enhanced version of the key interaction was lodged with the Court as Appendix 2 to that brief.

Shortly thereafter, Mr. Bartlett's defense counsel sought discovery of the audiotapes usually available for arrests. Trooper Weight told the district attorney's office that he had not activated his recorder. J.A. 448. Two months later, having received no reply, defense counsel asked whether the prosecution had contact information for anyone who might have taken videotape of the episode. Although Sergeant Nieves told the prosecutor's office he believed the television station had such tape, *id.* 453, the prosecutor failed to disclose this belief and told defense counsel there was no audiotape, *id.* 457.

Some months later, Mr. Bartlett fortuitously found footage of his arrest on YouTube and forwarded the link to his counsel. J.A. 458-59. After the assistant district attorney watched the video clip, he emailed Sergeant Nieves that he "[did]n't like the editing of it. I would like to get the original footage." *Id.* 460. (By then, the remaining videotape had been deleted by the television station.) Earlier, when defense counsel sought to have the charges against him dismissed, the State had responded that it would do so only if Mr. Bartlett would agree not to sue petitioners. *Id.* 245. But two months after viewing the video clip, the State dismissed the case against respondent without obtaining any release.

2. Respondent then filed this damages action against petitioners. As is relevant here, he invoked 42 U.S.C. § 1983, J.A. 35, and alleged that petitioners had violated his "federal" constitutional right to be free from an "unreasonable" seizure and his right to "freedom of speech," *id.* In addition to his First and Fourth Amendment claims, respondent raised several other claims not directly relevant here.

Petitioners moved for summary judgment. They argued that the Fourth Amendment-based false-arrest claim should fail both because there was probable cause for several different offenses, *see* J.A. 101-11, and because qualified immunity would bar respondent's false arrest claim in any event, *id.* 112-17. With respect to the First Amendment retaliation claim, petitioners did not dispute that Mr. Bartlett had a First Amendment right not to talk to Sergeant Nieves. And while they asserted that Mr. Bartlett's comments to Trooper Weight went beyond constitutionally protected criticism, *id.* 112, their central argument was that "even if" the arrest were motivated by Mr. Bartlett's protected speech, his First Amendment claim should fail because they had probable cause for the arrest, *id.* Petitioners did not assert qualified immunity on the First Amendment claim.

Mr. Bartlett opposed the motion. With respect to his Fourth Amendment claim, he argued that petitioners lacked probable cause to arrest him for any of the offenses petitioners claimed justified the arrest. *See* J.A. 277-95.

With respect to his First Amendment claim, Mr. Bartlett argued that petitioners had violated his "constitutional right to freely speak his mind." J.A. 296. He pointed to evidence in the record showing that Sergeant Nieves had been angered by his earlier and lawful refusal to speak, and that the two troopers subsequently "retaliate[ed]" against him "for challenging their authority." *Id.* 257, 296. He pointed out that although the sergeant had claimed in his deposition that he did not make charging decisions based on whether individuals are cooperative or

uncritical, *id.* 382, the videotape showed him earlier that evening declining to ticket a motorist for a moving violation because the individual was "so polite," *id.* 262. Mr. Bartlett argued that this contradiction—in conjunction with the sergeant's assertion that Mr. Bartlett's initial refusal to speak with him was "arguably disorderly conduct," *id.* 144, and the sergeant's statement after the arrest that he "[b]et" Mr. Bartlett "wish[ed] you would have talked to me now," *id.* 376—could justify a jury's finding retaliatory animus.

Mr. Bartlett identified numerous ways in which petitioners' statements in their initial arrest reports contradicted the later-discovered television station videotape. *See* J.A. 260-72. This, he argued, reinforced the conclusion that the arrest was pretextual.[3]

Finally, Mr. Bartlett presented an expert report by a police practices consultant, who had served decades as a Chief of Police, concluding that the arrest "was more probably than not an example of what is known in the police vernacular as "'*contempt of cop*'" or "'*having failed the attitude test.*'" Opp. to Mot. for

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[3] At oral argument before the Ninth Circuit, a member of the court characterized "the affidavit attached to the complaint in this case [as] full of fabrications and facts—alleged facts—that are plainly contradicted by the video that happened to have been taken." Petitioners' counsel responded by admitting that it was "certainly fair to say that the police reports have some inaccuracies and inconsistencies." *See* Oral Argument at 15:14-16:12, Nieves v. Bartlett, 712 F. App'x 613 (9th Cir. 2017) (No. 16-35631), https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000012294.

Summ. J., Exh. F, at 10, ECF No. 57-7; *see also* J.A. 260 n.13.

3. The district court granted petitioners' motion. With respect to the Fourth Amendment unjustifiable arrest claim, the district court addressed only whether there was probable cause to arrest Mr. Bartlett for harassment. It observed that under Alaska law, a person who "insults, taunts, or challenges another person in a manner likely to provoke an immediate violent response," commits harassment. Pet. App. 20 (quoting Alaska Stat. Ann. § 11.61.120(a)(1)). The court recognized that "viewing all the facts in the light most favorable to" respondent, a jury could find that Mr. Bartlett "did not intend to threaten Trooper Weight and his hand gesture occurred because of [Trooper Weight's earlier] shove." *Id.* 21. But it nonetheless agreed with petitioners that a reasonable officer could have interpreted Mr. Bartlett's actions as a taunt or challenge designed to provoke violence and "could suspect that Mr. Bartlett's conduct was illegal harassment," *id.* 22.

The district court also held that "even if" there was no probable cause, "reasonable officers could disagree about the legality of the arrest." Pet. App. 22. Therefore, petitioners were "entitled to qualified immunity" on the false-arrest claim in any event. *Id.* 22-23.

Having analyzed the Fourth Amendment claim with respect to the offense of harassment, the district court announced that it would not "address whether probable cause also existed to arrest Mr. Bartlett for disorderly conduct, assault, and/or resisting arrest." Pet. App. 22 n.72.

With respect to Mr. Bartlett's First Amendment retaliation claim, the district court did not address the evidence of retaliatory motive. Instead, the district court held that because the troopers had probable cause to arrest Mr. Bartlett for harassment, his claim would fail as a matter of law "even if" his protected speech "motivated the troopers' actions." Pet. App. 37.

4. On appeal, the Ninth Circuit affirmed in part, reversed in part, and remanded the case for further proceedings.

With respect to Mr. Bartlett's Fourth Amendment false-arrest claim, the Ninth Circuit did not hold that probable cause existed for the arrest.[4] Rather, it affirmed the district court's grant of summary judgment solely "on the ground of qualified immunity." Pet. App. 2. It was "at least arguable" that there was "probable cause to arrest Bartlett for harassment." *Id.* 2-3. And although the district court had addressed only whether probable cause existed with respect to the offense of harassment, the court of appeals also stated, without explanation, that petitioners were entitled to qualified immunity because it was also "arguable" that petitioners had probable cause to arrest respondent for disorderly conduct, resisting arrest, or assault. *Id.* 3.

But the court of appeals reversed the district court's grant of summary judgment on the First Amendment retaliation claim. It held that "the district court [had] erred in concluding that Bartlett's retaliatory arrest claim fails simply because the troopers had probable cause to arrest him." Pet. App.

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[4] The Government's statement to the contrary, U.S. Br. 15, is simply incorrect.

5. Under controlling Ninth Circuit precedent, "an individual has a right to be free from retaliatory police action, even if probable cause existed for that action." *Id.* 4-5 (quoting *Ford v. City of Yakima*, 706 F.3d 1188, 1195-96 (9th Cir. 2013)).

The court of appeals then explained why this error was not harmless. "Construing the facts in the light most favorable to Bartlett," the court explained that he had pointed to "sufficient evidence" from which a jury could "'find that the officers' retaliatory motive was a but-for cause of their action.'" Pet. App. 6 (quoting *Ford*, 706 F.3d at 1194). The court of appeals did not review the evidence in detail, but simply identified the allegation that Sergeant Nieves had said "bet you wish you would have talked to me now" after Mr. Bartlett's arrest as one especially "importan[t]" piece of evidence. *Id.*

SUMMARY OF THE ARGUMENT

Petitioners do not dispute that when a police officer arrests an individual because he disapproves of that individual's protected expression, the officer violates the First Amendment. Instead, sweeping aside this Court's decision last Term in *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), petitioners argue that 42 U.S.C. § 1983 provides no remedy for this First Amendment violation unless the plaintiff can show that the arrest was without probable cause. Neither Section 1983's text, nor its common-law background, nor precedent, nor experience with the Ninth Circuit rule at issue in this case supports that argument.

This Court's responsibility in Section 1983 cases is to interpret the text Congress provided and not to

make a freewheeling policy choice. In Section 1983, Congress directed that when a "person" acting under color of law, like a police officer, deprives an individual of a right "secured by the Constitution," like the First Amendment's protection against retaliation for protected expression, the officer "shall be liable to the party injured in an action at law." Section 1983's plain language provides no basis for this Court to carve out a subset of First Amendment violations for which no remedy is available. Nor, contrary to the Government's suggestion, does the language permit this Court to impose a "policy" requirement.

The common law background to Section 1983 provides no support for requiring plaintiffs like Mr. Bartlett to prove a lack of probable cause. Even if this Court were to look to the common law of false arrest—and it should not—the Court should affirm the judgment here. While at common law an officer could arrest someone for a misdemeanor that was committed in his presence, the officer could defend against a suit for false imprisonment only by showing that the person he arrested had *actually* committed the misdemeanor for which he was arrested. Probable cause alone was insufficient. And even with respect to arrests for more serious offenses, the common law supports the Ninth Circuit's rule.

Contrary to petitioners' argument, requiring plaintiffs to prove a lack of probable cause will undermine "First Amendment values," Petr. Br. 50, in an area where such protection is especially needed. The arrest power is a readily available and highly effective means of deterring protected expression. This Court has already held that the Equal Protection Clause imposes an independent limitation even on

arrests for which there is probable cause. Accordingly, courts of appeals have uniformly recognized that plaintiffs who bring Section 1983 damages actions alleging a racially discriminatory arrest do not have to show a lack of probable cause. Just as the presence of probable cause for a seizure is not dispositive of a Section 1983 claim against a racially discriminatory arrest, so too probable cause does not determine whether the government is abusing its arrest power to retaliate against protected speech.

Moreover, this Court's decision in *Hartman v. Moore*, 547 U.S. 250 (2006), does not support injecting a no-probable-cause element into Section 1983 damages actions for retaliatory arrests. The Court's decision there flowed from the values that undergird absolute prosecutorial immunity. Safeguarding an absolute immunity plays no role whatsoever in retaliatory-arrest cases.

Nor does any "causal complexity," Petr. Br. 23, justify injecting a no-probable-cause element into Section 1983 retaliatory-arrest cases. First, causation in many such cases, including Mr. Bartlett's, is quite straightforward. Second, the fact that there are *some* cases in which protected speech plays a legitimate role in an arrest decision does not necessitate petitioners' proposed rule.

In truth, petitioners and the Government are not seeking to apply *Hartman*'s rule, which requires plaintiffs only to prove no probable cause for a charged offense. They are actually seeking a far more aggressive rule under which probable cause for *any* offense, even if never charged, defeats a First Amendment claim. There is no justification for this move. And in this case, no court has ever found that

there is probable cause to believe Mr. Bartlett committed either of the offenses for which he was charged. That the Ninth Circuit held that petitioners were entitled to qualified immunity on Mr. Bartlett's Fourth Amendment claim should not entitle them to defeat a First Amendment-based claim, where the clear unconstitutionality of their actions does not hinge on whether there was probable cause.

Experience within the Ninth Circuit shows that the Circuit's rule works well. The Circuit has been using the rule it applied in respondent's case for more than a decade. Yet petitioners have identified precisely *seven* cases to support their claim of unwarranted litigation. A careful review of those cases, plus the cases petitioners' counsel here identified last Term in their *amicus* brief in *Lozman*, undercuts any claim that existing law is insufficient to weed out meritless cases. Existing doctrines governing pleading, summary judgment, and qualified immunity are entirely capable of handling that concern. And changes in technology that provide recordings of police-civilian interactions will provide additional protection in the future to officers who use their arrest power properly.

That being said, the reported cases and episodes described by *amici* reveal occasional but disturbing use of the arrest power against journalists, protesters, and ordinary citizens like Mr. Bartlett who exercise their First Amendment rights. This Court should not adopt a rule that precludes using Section 1983 to remedy this unconstitutional conduct.

ARGUMENT

There is "longstanding recognition that the Government may not retaliate for exercising First Amendment speech rights." *Wilkie v. Robbins*, 551 U.S. 537, 555 (2007). Thus when a police officer arrests an individual whom he would not have arrested but for his disapproval of that individual's protected expression, the officer has violated the First Amendment. Neither petitioners nor the Government dispute this point. Instead, they argue that 42 U.S.C. § 1983 provides no remedy for this First Amendment violation unless the plaintiff can show that the arrest was without probable cause (or, for the Government, pursuant to an official policy of retaliation). Their arguments fly in the face of Section 1983's plain language, the historical backdrop, precedent, and practical reality.

I. Section 1983's text does not support the rules proposed by petitioners and the United States.

It is unintentionally telling that petitioners omit the plain language of Section 1983 from their list of the "sources of authority that guide" this Court's inquiry into whether respondent can maintain his suit. Petr. Br. 13. But this Court's analysis must "begin[], as always, with the statutory text." *United States v. Gonzales*, 520 U.S. 1, 4 (1997). That language, which petitioners never confront, supports the conclusion that police officers who deprive individuals of their First Amendment rights should be amenable to suit.

1. Section 1983's plain text is unequivocal: "*Every* person" who "under color of" law subjects a citizen or a person within the jurisdiction of the United States to

"the deprivation of *any* rights" which are "secured by the Constitution" faces damages liability. 42 U.S.C. § 1983 (emphasis added).

Police officers are undeniably "persons," *see* 1 U.S.C. § 1, who act "under color of" law.

The First Amendment's prohibition on official retaliation is a right "secured by the Constitution." Indeed, "[t]he freedom of individuals verbally to oppose or challenge police action 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), and is therefore "high in the hierarchy of First Amendment values," *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1955 (2018).[5]

Moreover, Section 1983 creates a damages cause of action for the deprivation of "any" constitutional right. That language provides no basis for requiring that a plaintiff who has shown a violation of one constitutional right—here, the First Amendment—prove an additional element to recover under Section 1983. *See* U.S. Br. 30 (making this argument). Still less does anything in the text of Section 1983 authorize this Court to inject an element—proof that there was no probable cause for the arrest—that amounts to requiring a Section 1983 plaintiff alleging

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[5] Long ago this Court recognized that if "there is any fixed star in our constitutional constellation, it is that no official, high or petty" can compel citizens to speak. *W. Va. State Bd. of Educ. v. Barnette* 319 U.S. 624, 642 (1943). Mr. Bartlett therefore had a First Amendment right to decline to cooperate with the sergeant's investigation and to "go about his business," *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000).

a First Amendment violation to prove the equivalent of a Fourth Amendment violation as well. *See also infra* pages 27-34 (discussing why compliance with the Fourth Amendment cannot shield an arrest from a First Amendment claim).

Neither petitioners nor the Government provides any support for the idea that this Court has the power to "design the cause of action under 42 U.S.C. 1983," U.S. Br. 7, to circumvent the plain language. To the contrary: this Court's responsibility is to interpret the text Congress provided and "not to make a freewheeling policy choice." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). And in Section 1983, Congress has provided that when persons acting under color of law, like police officers, deprive individuals of their constitutional rights they "shall be liable to the person injured in an action at law," 42 U.S.C. § 1983. This provides a "directive" to courts that "is both mandatory and comprehensive," *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018), to adjudicate those claims.[6]

The Government's proposed rule—under which a plaintiff *can* bring a Section 1983 damages action for a retaliatory arrest even if there is probable cause so long as the arrest is pursuant to official "policy," *see* U.S. Br. i, 1, 6—does additional violence to the plain language of Section 1983. Recall where the "policy" requirement in Section 1983 suits originated. In

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[6] When Congress wants to change Section 1983's remedial rules, it knows how to do so. For example, in 1996, it amended Section 1983 to provide that courts cannot grant injunctive relief against a judicial officer "unless a declaratory decree was violated or declaratory relief was unavailable." Federal Courts Improvement Act of 1996, § 309(c), 110 Stat. 3847.

Monell v. Department of Social Services, 436 U.S. 658 (1978), this Court held that Section 1983's use of the word "person" includes municipal corporations. It then held that these persons, unlike natural persons, can be held liable for damages only if "official municipal policy of some nature caused [the] constitutional tort." *Id.* at 691.

By focusing on policy, the Government in essence proposes a construction of Section 1983 under which *only* municipalities would be liable for a category of First Amendment violations (retaliatory arrests where there is probable cause). But the idea that "the word 'person' may *extend* and be applied to bodies politic," *Monell*, 436 U.S. at 688 (quoting Act of Feb. 25, 1871, § 2, 16 Stat. 431) (emphasis added), hardly supports *withdrawing* Section 1983's application to "natural persons" like petitioners, *id.* at 687.[7]

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[7] And the distinction between single acts and "policy" is nowhere near as clean as the Government and petitioners try to make it. A single act by a government official with final decisionmaking authority in a particular area (a "policymaker") is sufficient to trigger municipal liability. *See Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). In *Lozman*, the plaintiff's claim rested on this theory, rather than on a formal document or a widespread practice. *See Lozman*, 138 S. Ct. at 1951.

There is an even more serious flaw in the Government's argument. Under the Government's theory, a single retaliatory arrest, even if effected or ordered by the chief of police, would be not be actionable under Section 1983, unless the chief was a final municipal policymaker. *See McMillian v. Monroe County*, 520 U.S. 781, 786 (1997) (holding that even when the county sheriff directed the plaintiff's arrest, the county could not be sued because the sheriff was a *state-level* policymaker, not a municipal one). Indeed, even an explicit *policy* of retaliatory arrests ordered

As this Court explained in its foundational decision in *Monroe v. Pape*, 365 U.S. 167 (1961), Congress intended "to enforce provisions of the Fourteenth Amendment [and the incorporated protections of the Bill of Rights] against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Id.* at 171-72. That is personal liability on the part of natural persons.[8]

2. To be sure, this Court has interpreted Section 1983 to exclude certain categories of natural persons from damages liability altogether. But that exclusion rests on the proposition that those persons were entitled to absolute immunity at common law. *Burns v. Reed*, 500 U.S. 478, 497 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part). That explains why officials performing judicial or legislative functions cannot be sued for damages under Section 1983. *See Bogan v. Scott-Harris*, 523 U.S. 44 (1998); *Stump v. Sparkman*, 435 U.S. 349 (1978); *Tenney v. Brandhove*, 341 U.S. 367 (1951).

But "[t]he common law has never granted police officers an absolute and unqualified immunity" of the

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by such an official would be insulated from Section 1983 damages actions. The Government nowhere defends this result.

[8] *Monroe* also provides a response to the Government's proposal for an official-policy element in retaliatory-arrest cases where probable cause exists. *Monroe* held that police officers who are actually acting in violation of official policy are nonetheless acting "under color of" law for purposes of Section 1983. *See Monroe*, 365 U.S. at 183-87. The Government provides no argument for why "under color of law" means one thing for every constitutional right other than the First Amendment, and something different for First Amendment claims.

kind accorded judges or legislators. *Pierson v. Ray*, 386 U.S. 547, 555 (1967). Given that clear historical fact, this Court cannot exempt police officers who are alleged to have made retaliatory arrests from the "[e]very person" language of Section 1983. The Court "do[es] not have a license to establish immunities from § 1983 actions in the interests of what [it] judge[s] to be sound policy. It is for Congress to determine whether § 1983 litigation has become too burdensome to state or federal institutions and, if so, what remedial action is appropriate." *Tower v. Glover*, 467 U.S. 914, 922-23 (1984).[9]

II. The common law background relevant to Section 1983 does not support the rules proposed by petitioners and the United States.

Petitioners and the Government also argue that this Court should look to the common-law torts of false arrest, false imprisonment, and malicious prosecution and borrow from them a requirement that a plaintiff bringing a First Amendment retaliatory-arrest claim under Section 1983 plead and prove the absence of probable cause. Petr. Br. 42-48; U.S. Br. 8-14. First, their arguments are conceptually flawed because they ignore the central purpose of the First Amendment. Second, even assuming for the sake of argument that this Court should look to the common law of false

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[9] The "qualified immunity" that police officers can invoke is fundamentally different from the absolute immunity discussed here. Qualified immunity operates with respect to particular claims, and does not insulate police officers from liability when they violate clearly established constitutional prohibitions, as absolute immunity would do. Respondent addresses the relevance of qualified immunity *infra* pages 41-42, 52-54.

arrest, the common law at the time Section 1983 was enacted would not support requiring plaintiffs to prove a lack of probable cause, particularly to challenge a warrantless misdemeanor arrest

1. This Court has repeatedly cautioned against plucking "'prefabricated components'" from common-law torts to "control the definition of § 1983 claims." *Manuel v. City of Joliet*, 137 S. Ct. 911, 921 (2017) (quoting *Hartman v. Moore*, 547 U.S. 250, 258 (2006)). This is especially true for Section 1983 claims involving the First Amendment.

Petitioners acknowledge that "[a]t the time of § 1983's enactment, there was no common-law tort for retaliatory arrest in violation of the freedom of speech." Petr. Br. 43. That is an understatement. The First Amendment actually represents a repudiation of common-law doctrine. At common law, criticism that threatened to undermine respect for the government or public officials constituted the crime of seditious libel. But as this Court explained in *Bridges v. California*, 314 U.S. 252 (1941), "one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press." *Id.* at 264 (citation omitted).

Thus, while common-law doctrines regarding false arrest may provide a useful starting point in understanding Fourth Amendment constraints—because both bodies of law address whether a person's conduct provides grounds for seizing him—they should not apply to First Amendment claims. The relevant First Amendment interest is not directed at arrests; rather, it condemns the use of governmental powers to inflict any form of official reprisal for protected expression. This Court should not limit that remedy

by borrowing an "element," U.S. Br. 30, from tort causes of action not directed at vindicating free speech interests.

2. But even if this Court were to look to the common law, it would not justify reversal. False arrest is a closer analogy than malicious prosecution to a retaliatory-*arrest* claim. But the common law of false arrest/false imprisonment[10] does not support injecting a no-probable-cause element into Section 1983 cases.

The arrest and criminal charges here involve only misdemeanors. *See* J.A. 21-26. Petitioners and the Government ignore completely the common-law rules that governed this category of offenses.

The "ancient common-law rule" was that "a peace officer was permitted to arrest without a warrant for a misdemeanor" that was "committed in his presence." *United States v. Watson*, 423 U.S. 411, 418 (1976). But in a suit for false imprisonment, the officer could defend only by showing that the person he arrested had *actually* committed the misdemeanor for which he was arrested. Probable cause alone was insufficient. *See* Horace L. Wilgus, *Arrest Without a Warrant,* 22 Mich. L. Rev. 673, 704 n.561 (1924) (citing cases). So, for example, in *Stearns v. Titus*, 85 N.E. 1077 (N.Y. 1908), the police arrested the plaintiff because they believed he was about to destroy evidence, a misdemeanor under New York law. He brought suit for false imprisonment. On appeal, the New York high court explained that "[t]o justify an arrest without a warrant, for the commission of that offense, the crime

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[10] Respondent agrees with the Government that the terms "false arrest" and "false imprisonment" are "virtually synonymous" with one another. U.S. Br. 9 n.1.

must be actually committed or attempt be made to commit it in the presence of the officer; reasonable suspicion or probable cause to believe its commission is not sufficient" to avoid liability. *Id.* at 1078.

So, too, in *Cook v. Hastings*, 150 Mich. 289 (1907). Hastings, a Detroit police officer, arrested Cook because "he believed and had reason to believe" that Cook was the man who had been exposing himself, a misdemeanor under state law. *Id.* at 290. The Michigan Supreme Court nevertheless held that Cook was entitled to a directed verdict in his favor on his claim of false imprisonment because "[t]here was not only no reasonable ground to believe, but there was not even a suspicion, that plaintiff was a felon or was about to commit a felony. (For the offense of which he was suspected was not a felony.)" *Id.*

And in *Adair v. Williams*, 210 P. 853 (Ariz. 1922), the plaintiffs brought a false-arrest suit after they were arrested for cohabitation in violence of a city ordinance, at most a misdemeanor. The trial court instructed the jury that "a police officer is protected in making an arrest if at the time of the arrest there is probable cause to believe that such person is at the time of said arrest violating any such ordinance." *Id.* at 854. The Arizona Supreme Court disagreed. Evidence of probable cause to arrest for a misdemeanor, the court explained, was "admissible in mitigation of a claim for punitive or exemplary damages. But where plaintiff seeks only compensation for his actual injury the rule is different. In such an action evidence of reasonable and probable cause for defendant's belief in plaintiff's guilt, or other worthy motive, is not admissible in mitigation of the actual damage sustained." *Id.* at 856.

The first Restatement confirms that probable cause was not a defense to a false arrest claim arising out of a misdemeanor arrest. In a comment to the Restatement subsection describing when a warrantless arrest for a non-felony is privileged, it states that "[t]o create the privilege to arrest another, it is not enough that the actor—whether a private person or a peace officer—reasonably suspects that the other is committing a breach of the peace"—the type of non-felony for which warrantless arrests were privileged—unless the actor "is a peace officer and he arrests a participant in an affray"—that is, for public fighting. Restatement (First) of Torts § 119, comment *o* (1934). "If in fact no breach of the peace has been committed, a mistaken belief on the part of the actor, whether induced by a mistake of law or of fact and however reasonable, that a breach of the peace has been committed by the other, does not confer a privilege to arrest" for a non-felony. *Id.*

The common law background thus cannot justify requiring plaintiffs to prove a lack of probable cause in order to prevail on a Section 1983 claim seeking damages for a retaliatory misdemeanor arrest.

3. Even with respect to arrests for more serious offenses, the common law supports the Ninth Circuit's rule.

Twenty years before the enactment of Section 1983, this Court set out its understanding of the common law in *Dinsman v. Wilkes*, 53 U.S. (12 How.) 390 (1852). There, it explained that in a suit "for a malicious prosecution," a plaintiff can prevail only where the prosecution "has been carried on without a probable cause." *Id.* at 402. But it emphasized that "the action for a malicious prosecution is the *only* one

in which the party is not liable, although he acts from malicious motives, and has inflicted unmerited injury upon another." *Id.* (emphasis added). It then contrasted actions for malicious prosecution with actions for "assault [or] false imprisonment." *Id.* As to *these* causes of action, "probable cause or not is of no further importance than as evidence to be weighed by them in connection with all the other evidence in the case, in determining whether the defendant acted from a sense of duty or from ill-will to the plaintiff." *Id.* That evidence of probable cause is probative, but not dispositive, is precisely the position taken by the Ninth Circuit.

Having last Term argued to this Court that *Dinsman* set out this Court's understanding of the common law, *see* U.S. Br. at 25, *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), the Government now switches gears to suggest that *Dinsman* is somehow inapposite because the plaintiff in that case was a sailor suing his commander. U.S. Br. 13. That distinction simply will not wash: the Court expressly stated it was describing the contours of the tort of "false imprisonment." *Dinsman*, 53 U.S. at 402.

Even as to felonies, common-law decisions that mention probable cause as a defense to the tort of false arrest presupposed that the arrest was "*bona fide*"—that is, not "by design or malice and ill will." *Ledwith v. Catchpole*, 2 Cald. 291, 294 (K.B. 1783). Leading legal treatises at the time that Section 1983 was adopted agree: "[A]n action will not lie against a peace officer, for arresting a person *bona fide* on a charge of felony, without warrant, though it turn out that no felony was committed." 1 Francis Hilliard, The Law of Torts or Private Wrongs 222 (1859). "[I]n the case of

actual felony, an officer or a private person may, *without malice* and upon probable cause, arrest a suspected person, without warrant, in order to bring him before a magistrate." *Id.* at 224 (emphasis added). Almost definitionally, an arrest made for the purpose of retaliating against an individual for exercising his First Amendment rights cannot qualify as "without malice" regardless whether there was probable cause.

In short, the Ninth Circuit's rule—that probable cause for an arrest can be evidence with "'high probative force'" of the "lack of retaliatory animus," but is "not dispositive" as a matter of law, *Ford v. City of Yakima*, 706 F.3d 1188, 1194 n.2 (9th Cir. 2013) (quoting *Dietrich v. John Ascuaga's Nugget,* 548 F.3d 892, 901 (9th Cir. 2008))—is entirely faithful to Section 1983's common-law antecedents.[11]

4. The evolution in this Court's qualified immunity decisions reinforces the proposition that traditionally an officer who made an arrest in bad faith could be held liable regardless of the presence of probable cause.

In *Pierson v. Ray*, 386 U.S. 547 (1967), the first decision in this thread, a multiracial group of clergymen sought damages under Section 1983 from

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[11] Even if this Court were to decide for some reason to depart from the common-law understanding with respect to serious crimes, because it thinks the historical evidence more ambiguous with respect to false-imprisonment claims involving warrantless *felony* arrests, *see Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1957 (2018) (Thomas, J., dissenting), or because it thinks retaliation is a far less plausible explanation for arrests involving serious crimes, it should retain the common-law understanding with respect to misdemeanor arrests and affirm the judgment in this case.

police officers who arrested them for breach of the peace when they protested segregation in a bus terminal. The Court held that the officers were entitled to raise "the defense of good faith and probable cause." *Id.* at 557. It explained that "[i]f the jury believed the testimony of the officers" and "found that the officers reasonably believed in good faith that the arrest was constitutional, then a verdict for the officers would follow even though the arrest was in fact unconstitutional." *Id.* Thus, the officers' protection from liability depended on good faith—that is, on whether they were acting for legitimate purposes.

Over the next decade, the Court repeatedly acknowledged that the common law-derived defense was unavailable to defendants who willfully violated a plaintiff's constitutional rights. In *Scheuer v. Rhodes*, 416 U.S. 232 (1974), for example, the Court emphasized that "[w]hen a court evaluates police conduct relating to an arrest" under Section 1983, "its guideline is 'good faith *and* probable cause.'" *Id.* at 245 (emphasis added) (quoting *Pierson*, 386 U.S. at 557). And as the Court explained in *Crawford-El v. Britton*, 523 U.S. 574 (1998), the common law-derived defense the Court engrafted onto Section 1983 claims enabled a plaintiff to prevail "in two different ways, *either* if" (1) the defendant's conduct was objectively unreasonable—the current standard for qualified immunity—"*or* (2) 'he took the action with the malicious intention to cause a deprivation of constitutional rights.'" *Id.* at 587 (emphasis added) (quoting *Wood v. Strickland,* 420 U.S. 308, 322 (1975)).

It was precisely because common law-derived defenses were unavailable to government officials with improper motives (even if those motives did not

themselves rise to the level of a constitutional violation) that this Court decided in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), to craft the contemporary, wholly objective doctrine of qualified immunity, which asks only whether the constitutional violation was clearly established at the time. There are some First Amendment retaliatory arrest cases for which the contemporary form of qualified immunity is undoubtedly available. *See infra* pages 52-54. But the modern, judicially created doctrine provides no support for the argument that in 1871 the common law would have barred plaintiffs plaintiffs from suing police officers who willfully violated the First Amendment merely because it was possible to identify, perhaps years later, some petty offense for which there was probable cause to make an arrest.

III. Compliance with the Fourth Amendment cannot shield an arrest from First Amendment scrutiny.

An arrest made without probable cause is always a Fourth Amendment violation. *Beck v. Ohio*, 379 U.S. 89, 91 (1964). Petitioners argue that this Court should make a lack of probable cause a necessary "element" of First Amendment-based retaliatory-arrest claims brought under Section 1983 as well. Petr. Br. 17. In effect, they would make proof of a Fourth Amendment violation an indispensable element of a First Amendment claim. This requirement undermines the central protections provided by the First Amendment and is inconsistent with this Court's decisions regarding constitutional rights generally and the First and Fourth Amendments in particular.

1. Petitioners do not contest the proposition that a retaliatory arrest violates the First Amendment. But by insisting that Section 1983 provides a remedy for that First Amendment violation only if the arrest was made without probable cause, they confuse the prohibitions of the First and Fourth Amendments.

To begin, the interests the two amendments protect are not the same. The Fourth Amendment protects one's right to be left alone, while the First Amendment protects one's ability to communicate one's beliefs, not least to government officials.

This Court has never required an individual seeking to prove that one constitutional right has been violated to prove that the government has violated a second constitutional prohibition as well. To the contrary, "[c]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands." *Soldal v. Cook County*, 506 U.S. 56, 70 (1992). When this is the case, the Court "examine[s] each constitutional provision in turn." *Id.* (citing *Hudson v. Palmer*, 468 U.S. 517 (1984); *Ingraham v. Wright*, 430 U.S. 651 (1977)). Thus, in *Soldal*, this Court rejected the court of appeals' refusal to entertain a Fourth Amendment claim because that court thought the due process clause provided a more straightforward way to challenge the seizure of the plaintiff's mobile home. Both claims were actionable.

The plain language of Section 1983 confirms this approach. It entitles plaintiffs to a remedy for the violation of "any rights" secured by the Constitution. And "[i]n this context, as in so many others, 'any' means 'every.'" *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1353 (2018).

2. *Whren v. United States*, 517 U.S. 806 (1996), confirms that probable cause for petitioner's arrest should not bar his First Amendment claim.

In *Whren*, this Court addressed the issue of pretextual traffic stops. It held that as long as such stops are based on "probable cause to believe [a driver] has committed a civil traffic violation," 517 U.S. at 808, they are permissible as a matter of Fourth Amendment law, even if the basis for the stop is different from the officer's motivation for making it. *Id.* at 813. Nonetheless, the Court explained, the *Fourteenth* Amendment imposes an independent prohibition against "selective enforcement of the law based on considerations such as race." *Id.*

Adhering to this guidance, the courts of appeals have uniformly recognized that plaintiffs who bring Section 1983 damages actions alleging a racial discriminatory arrest do not have to show a lack of probable cause. *See, e.g.*, *Holland v. City of Portland*, 102 F.3d 6, 11 (1st Cir. 1996); *Gibson v. Superintendent of N.J. Dep't of Law & Pub. Safety*, 411 F.3d 427, 440-41 (3d Cir. 2005), *overruled on other grounds sub nom. Dique v. N.J. State Police*, 603 F.3d 181 (3d Cir. 2010); *Vakilian v. Shaw*, 335 F.3d 509, 521 (6th Cir. 2003); *Chavez v. Ill. State Police*, 251 F.3d 612, 635 (7th Cir. 2001); *Johnson v. Crooks*, 326 F.3d 995, 999-1000 (8th Cir. 2003); *Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1166-67 (10th Cir. 2003).

Petitioners' proposed rule is inconsistent with all this caselaw. Neither petitioners nor the Government offer any explanation of how the Congress that enacted Section 1983 would have had one rule regarding probable cause for racially discriminatory

arrests and another rule regarding probable cause for retaliatory arrests (or, for that matter, arrests based on an individual's religion).

Just as the presence of probable cause for a seizure is not dispositive of a Section 1983 claim against a racially discriminatory arrest, so too probable cause does not determine whether the government is abusing its arrest power to retaliate against protected speech. Dr. Martin Luther King, Jr., was arrested and jailed for driving five miles above the speed limit outside Montgomery, Alabama. *See* Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 Yale L.J. 999, 1028 (1989). Had Dr. King sued for damages under Section 1983, it should not have mattered whether he had alleged that he was arrested because he was African American or due to his advocacy of racial equality. Either way, he would have had a cause of action.

3. Not even all *Fourth* Amendment Section 1983 lawsuits require plaintiffs to prove a lack of probable cause. Excessive use of force that violates the Fourth Amendment can support a Section 1983 damages suit "notwithstanding the existence of probable cause to arrest." *Graham v. Connor*, 490 U.S. 386, 394 (1989); *see Tennessee v. Garner*, 471 U.S. 1, 7-9 (1985).

Petitioners ignore this reality. They point to *Mam v. City of Fullerton*, 2014 WL 12573550 (C.D. Cal. 2014), and *Holland v. City of San Francisco*, 2013 WL 968295 (N.D. Cal. 2013), as examples of the problem with the Ninth Circuit's rule that probable cause for an arrest is not a categorical defense to a retaliatory arrest claim. Petr. Br. 37, 38. But in both those cases, the plaintiffs not only had a First Amendment

retaliatory-arrest claim, but they also had an excessive force claim that would have gone to trial under any rule. *Mam*, 2014 WL 12573550, at *1; *Holland*, 2013 WL 968295, at *4-5. In the face of this reality, petitioners can state no principled or pragmatic reason for extinguishing claims under the First Amendment.

4. Contrary to petitioners' argument, Petr. Br. 48-51, injecting a no-probable cause element into Section 1983 retaliatory arrest cases will undermine "First Amendment values," *id.* at 50. Their cavalier assertion that "arrest decisions made by individual offers are not so potent a means of suppressing speech," *id.* at 51, blinks reality.

Two features of arrests, whatever the rank of the officer who physically restrains an individual, make them an especially serious threat to First Amendment freedoms. First, the arrest power provides an opportunity for the government to retaliate against virtually every member of the public. Second, the consequences of arrests may be especially chilling.

More than seventy-five years ago, Justice Jackson warned that "[w]ith the law books filled with a great assortment of crimes," there is a "fair chance of finding at least a technical violation of some act on the part of almost anyone." When the government "pick[s] the man and then search[es] the law books," government abuse of power becomes most dangerous. "It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group." Robert H. Jackson, The Federal Prosecutor 4-5 (1940), https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf.

Given the breadth of offenses in modern criminal codes, virtually every citizen has violated some law—or, more precisely, there is probable cause (or even more loosely, "arguable" probable cause, Pet. App. 3) to believe he has done so. And once there is probable cause to believe a person has committed "even a very minor criminal offense" for which the only punishment is a fine, this Court permits custodial arrest. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001); *see also id.* at 355-60 (listing statutes that permit warrantless misdemeanor arrests).

Such minor crimes are legion. Individuals interact with police officers on a daily basis. Disturbing the peace and disorderly conduct offenses are notoriously plastic and can, as in Mr. Bartlett's case, give rise to arrest for "contempt of cop." *See supra* page 7. *See also* Brief of the Roderick and Solange Macarthur Justice Center as Amicus Curiae in Support of Respondent. And "very few drivers can traverse any appreciable distance without violating some traffic regulation"; thus, "virtually everyone who ventures out onto the public streets and highways" may be subject to arrest as well. 3 Wayne R. LaFave, Search and Seizure § 5.2(e), at 156 (5th ed. 2012) (internal quotation marks and citation omitted). Even members of this Court have admitted to speeding. *See* Tr. of Oral Arg. 9, *Reichle v. Howards*, 566 U.S. 658 (2012) (No. 11-262) ("I might sometimes have driven 60 miles an hour in a 55-mile zone"); Tr. of Oral Arg. 27, *Maslenjak v. United States*, 137 S. Ct. 1918 (2017) (No. 16-309) ("I drove 60 miles an hour in a 55-mile-an-hour zone.").

Moreover, petitioners' blithe assertion that there is "little danger" that officers will "carry out a premeditated plan to target speech" they do not like,

Petr. Br. 51, is unfounded. In small jurisdictions, or jurisdictions where an officer regularly patrols in a particular neighborhood, police may have repeated interactions with residents whose views they finds objectionable. *See, e.g.*, *Beck v. City of Upland*, 527 F.3d 853, 856-57 (9th Cir. 2008). In a similar vein, as several *amici* in support of respondent point out, police often are aware of the journalists who cover police activity during demonstrations, and may have a motive to sideline those reporters.

The short- and long-term consequences of being arrested make arrest an especially powerful deterrent. "[A] person of ordinary firmness would be chilled from future exercise of his First Amendment rights if he were booked and taken to jail in retaliation for his speech." *Ford v. City of Yakima*, 706 F.3d 1188, 1194 (9th Cir. 2013) (per curiam); Pet. App. 6 (citing *Lacey v. Maricopa County*, 693 F.3d 896, 917 (9th Cir. 2012)).

Once a person is arrested, he may end up spending two days in jail before any neutral magistrate reviews the arrest. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56-57 (1991). Even individuals "suspected of committing minor offenses" can be repeatedly strip searched. *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 330 (2012).

Arrests also have long term consequences even if an individual is never prosecuted. Arrests become a matter of public record. A host of outside actors routinely review and use arrest records in making decisions about how to treat individuals. Among them are "immigration enforcement officials, public housing authorities, public benefits administrators, employers, licensing authorities, social services providers, and education officials." Eisha Jain, *Arrests as Regulation*,

67 Stan. L. Rev. 809, 810 (2015). A prior arrest—even one that took place long ago and resulted in no charges—can permanently affect a person's livelihood. Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, Wall St. J. (Aug. 18, 2014), http://on.wsj.com/2lV1viR.

The deterrent effects of an arrest also extend far beyond the individual who was arrested. Mr. Bartlett's arrest, for example, was filmed, broadcast on local television, and made available on the internet. *See supra* pages 4-5. Viewers who saw that arrest may be chilled from making their own First Amendment-protected challenges to police practices.

IV. This Court's decision in *Hartman v. Moore* does not support injecting a no-probable-cause element into Section 1983 damages actions for retaliatory arrests.

Petitioners and the United States misconstrue *Hartman v. Moore*, 547 U.S. 250 (2006). Contrary to their arguments, the differences between suits alleging retaliatory prosecutions and ones alleging retaliatory arrests outweigh the similarities. As this Court recognized in *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), "there are substantial arguments that *Hartman*'s framework," which governs malicious prosecution cases, "is inapt in retaliatory arrest cases." *Id.* at 1953.[12]

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[12] It is worth remembering that *Hartman* was a *Bivens* case. Given that *Bivens* actions are a creation of this Court (rather than Congress), *see Ziglar v. Abbasi*, 137 S. Ct. 1843, 1854 (2017),

1. The Court's decision in *Hartman* flowed from the values that undergird absolute prosecutorial immunity. Prosecutors themselves, of course, are absolutely immune from Section 1983 damages liability even if they decide to maintain a prosecution for entirely unconstitutional reasons. But even a Section 1983 retaliatory-prosecution suit against a "nonprosecutor" can undermine prosecutorial immunity, because winning will require the plaintiff to show how the vengeful nonprosecutor "influenced" the formally immune prosecutor's decision to proceed, *See Hartman*, 547 U.S. at 262. Even these suits will involve precisely the inquiry into prosecutorial decisionmaking that absolute prosecutorial immunity is designed to forestall: the parties in the Section 1983 suit are almost sure to seek information from "the prosecutor's mind," *id.* at 263, and his files to prove (or rebut) causation.

This Court was willing to permit Section 1983 suits to proceed if plaintiffs can plead and prove the absence of probable cause because then the claim can be litigated without intruding on prosecutorial decisionmaking. The lack of probable cause provides a "prima facie inference that the unconstitutionally

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this Court is free to craft their elements based on its view of wise policy. (Indeed, in *Reichle v. Howards*, 566 U.S. 658 (2012), this Court observed that it had not yet decided whether "*Bivens* extends to First Amendment retaliatory arrest claims" at all. *Id.* at 663 n.4.) But this Court is not similarly free to "design the cause of action under 42 U.S.C. 1983," *see* U.S. Br. 7. There, "[t]he role of this Court is to apply the statute as it is written—even if [it] think[s] some other approach might accor[d] with good policy." *Burrage v. United States*, 571 U.S. 204, 218 (2014) (internal quotation marks omitted).

motivated inducement infected the prosecutor's decision to bring the charge." *Hartman*, 547 U.S. at 265. This solves the "distinct problem of causation" that might otherwise exist. *Id.* at 263. The Court's citation to *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999), and *United States v. Armstrong*, 517 U.S. 456 (1996)—which both involved prosecutorial decisionmaking—to identify that problem shows that absolute prosecutorial immunity is the explanation for why the Court struck the balance it did. *See id.* at 263.

2. Safeguarding an absolute immunity plays no role whatsoever in retaliatory-arrest cases. Police officers lack absolute immunity; they possess only qualified immunity. *See Scheuer v. Rhodes*, 416 U.S. 232, 245-48 (1974). The independent decisionmaking of prosecutors is a far cry from the "competitive enterprise of ferreting out crime" and arresting suspects. *Giordenello v. United States*, 357 U.S. 480, 486 (1958) (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)). Arrest decisions (unlike prosecutorial ones) are opened up to judicial scrutiny every day. And the "'presumption of regularity accorded to prosecutorial decisionmaking'" simply "does not apply." *Reichle v. Howards*, 566 U.S. 658, 669 (2012) (quoting *Hartman*, 547 U.S. at 263).

Nor does any "causal complexity," Petr. Br. 23, justify injecting a no-probable-cause element into Section 1983 cases involving retaliatory-arrest claims. This is so for several reasons.

First, causation in retaliatory-arrest cases is not inherently complex. Many cases, like this one, are quite straightforward. In suits where the plaintiff alleges that the arresting officer harbored the

retaliatory animus, there is "no [causal] gap to bridge" at all. *Reichle v. Howards*, 566 U.S. 658, 671 (2012) (Ginsburg, J., concurring in the judgment). The factfinder simply must determine whether the officer intended to punish the plaintiff for the plaintiff's protected speech.

Petitioners stress that respondent has advanced "distinct theories of retaliatory animus" against each of them. Petr. Br. 22. But that creates no complexity with regard to *causation*; it simply demands that the jury assess each petitioner's alleged motive individually. Only if respondent proves to the jury that each of them was motivated by a desire to retaliate can he recover against them both. If he shows such a motive with respect to only one of them, then only that petitioner will be liable. Nothing very complex about that.

Second, the fact that there are *some* cases in which speech "plays a legitimate role in an officer's decision whether to arrest someone," Petr. Br. 23, does not necessitate petitioners' proposed rule. In both *Lozman* and this case some of the protected speech was temporally removed from the arrest and thus provides no basis for the arrest. *See Lozman*, 138 S. Ct. at 1954; Petr. Br. 22; *see also infra* page 48 (pointing to other cases where the protected speech preceded the encounter that led to the arrest).

This is equally so in several of the cases on which petitioners try to rely. For example, in *Morse v. San Francisco Bay Area Rapid Transit District*, 2014 WL 572352 (N.D. Cal. 2014), *see* Petr. Br. 37, the protected speech involved articles published by the plaintiff, a journalist, beginning in 2009, roughly *two years* before the arrest at issue. 2014 WL 572352, at *1. Similarly,

in *Eberhard v. California Highway Patrol*, 2015 WL 6871750 (N.D. Cal. 2015), *see* Petr. Br.38-39, the plaintiff had interacted with patrol officers and supervisors for many months before the arrest. 2015 WL 6871750, at *2.

Even when speech shortly precedes an officer's decision to arrest, other doctrines respond sufficiently to the concern that officers will shirk from effectuating legitimate arrests where speech is in the mix. A plaintiff must show that his arrest-inducing speech was constitutionally protected or he has no First Amendment claim regardless whether there was probable cause for his arrest. Speech that itself proposes or constitutes a crime is unprotected. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). Examples of this category include true threats, extortion, and fraud. So, too, for speech that confesses to a crime. A person who "state[s] to FBI agents that he ha[s] burned his [draft] registration certificate because of his beliefs" can be prosecuted for destroying the certificate. *United States v. O'Brien*, 391 U.S. 367, 369, 382 (1968). And speech that flouts valid time, place, or manner restrictions can be restricted consistent with the First Amendment.

To be sure, evidence regarding probable cause can be *relevant* to a retaliatory-arrest claim. When there is probable cause to believe the plaintiff committed a serious crime, his assertion that he was arrested because of some protected expression will likely fail because his arrest is entirely "consistent," *Bell Atlantic Corp. v. Twombly*, 550 U.S 544, 557 (2007), with legitimate law enforcement activity. *See also infra* pages 47, 50-51 (discussing how pleading rules can weed out meritless retaliatory-arrest claims).

On the other hand, even when there *is* probable cause, there are offenses for which police so rarely make arrests that the presence of probable cause will have little probative weight in the face of evidence of a retaliatory motive. For example, in two of the cases cited by petitioner, Petr. Br. 37, individuals engaged in protected speech were arrested (but never prosecuted) while individuals who were simultaneously engaged in the same behavior but who had not engaged in protected speech were not. *See, e.g.*, *Morse*, 2014 WL 572352, at *9-10; *Mam v. City of Fullerton*, 2013 WL 951401, at *5 (C.D. Cal. 2013). These catch-and-release arrests are especially troubling under the First Amendment. And when they involve sidelining journalists, such arrests deprive the public as a whole of valuable information, as the *amicus* briefs filed in support of respondent by news organizations explain.

3. Moreover, the Court's assumption in *Hartman* that proving the absence of probable cause would be "cost free" to both the plaintiff and the court, 547 U.S., at 265, does not carry over to the retaliatory-arrest context either.

In retaliatory prosecution cases, the putative plaintiff will have an indictment or charging instrument that cabins the probable cause inquiry by identifying a specific crime. The plaintiff need only plead and prepare to prove a lack of probable cause for the crimes actually charged. For example, Hartman was charged with offenses involving mail and wire fraud and stolen postal property. He was not required also to show that there would have been no probable cause to prosecute him for, say, RICO or violations of the federal bribery or false-statement statutes.

But when it comes to *arrests* and Fourth Amendment claims, courts are not restricted to assessing probable cause with respect to offenses formally charged. Under *Devenpeck v. Alford*, 543 U.S. 146 (2004), an arrest satisfies the Fourth Amendment so long as the "known facts provide probable cause" for *any* offense, not just the one in the officer's mind or in an initial charging document, *id.* at 153. Therefore, if petitioners and the Government were candid, they would acknowledge that they are not seeking to apply *Hartman*'s no-probable-cause-for-the-charged-offense rule to retaliatory-arrest claims. They are actually seeking a far more aggressive rule.

There is no justification for this move. *Devenpeck* rests on a construction of substantive Fourth Amendment law: if there is probable cause to arrest for any crime, there is no Fourth Amendment violation for Section 1983 to remedy. By contrast, a retaliatory arrest violates the First Amendment regardless whether there was probable cause for the arrest; the only question is the remedial one.

So if this Court were to engraft a no-probable cause requirement, it would be doing so as a matter of Section 1983 law, not constitutional law. There is no reason any such requirement must track Fourth Amendment doctrine.

As respondent has already explained, probable cause for the charged offense can provide a common-sense basis for believing the officer made the arrest in good faith. The Ninth Circuit's rule, which recognizes that probable cause can be "probative" of the lack of animus, *see supra* page 25—fully respects that intuition. But when counsel for the officer in a Section 1983 case tries to defeat a colorable First Amendment

claim by substituting a claim of probable cause for a never-charged offense, that assumption is untenable. The true motivation for an arrest cannot be an offense unthought of by the arresting officer at the time he acted.[13]

4. In any event, the Court should affirm the judgment here. The criminal complaints filed against Mr. Bartlett charged him with disorderly conduct and resisting or interfering with arrest in violation of Alaska Stat. Ann. §§ 11.61.110(a)(6) and 11.56.700(a). J.A. 21, 25. No court has ever found that there is probable cause to believe he committed either of these offenses.

The circumstances of Mr. Bartlett's case introduce yet a further wrinkle that militates in favor of affirmance. Contrary to the assumption underlying the Government's argument, U.S. Br. 15, and blurred by petitioners, *see* Petr. Br. 12, the Ninth Circuit never held that there was probable cause with respect to *any* offense. Rather, because the court of appeals affirmed the district court's grant of summary judgment to petitioners on Mr. Bartlett's Fourth Amendment false arrest claim solely "on the ground of qualified immunity," Pet. App. 2, at most there is nothing more

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[13] The Government floats a proposal that if the Court decides not to mechanically apply *Devenpeck*, "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." U.S. Br. 15. The latter suggestion ignores the fact that an offense first identified by a creative lawyer in response to a Section 1983 suit may have no bearing on whether the officer had a retaliatory motive. In any event, petitioners here did not identify any offense in their answer.

than a finding of "arguable probable cause," *id.* at 3, something another step further removed from actual criminal culpability.

As this Court explained in *Anderson v. Creighton*, 483 U.S. 635 (1987), "it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present." *Id.* at 641. These officers are entitled under those circumstances to qualified immunity on a Fourth Amendment-based claim because it is not clear that they violated the Constitution. But that hardly entitles them to summary judgment on a First Amendment-based claim, where the *constitutionality* of their actions does not hinge on whether there was probable cause. *All* retaliatory arrests are unconstitutional and petitioners have not argued otherwise.

V. Experience within the Ninth Circuit shows that the Circuit's rule works well.

Petitioners and their *amici* contend that without a requirement that Section 1983 plaintiffs plead and prove a lack of probable cause, the courts will be flooded with meritless retaliatory-arrest claims. But as this Court trenchantly observed in *Hartman v. Moore*, 547 U.S. 250 (2006), with respect to a similar prediction about malicious-prosecution claims, there is no "leverage" to that fear when "the slate is not blank." *Id.* at 258. The Ninth Circuit has been using the rule it applied in respondent's case for more than a decade. *See Skoog v. County of Clackamas*, 469 F.3d 1221 (9th Cir. 2006); *see also* Pet. App. 4 (citing *Ford v. City of Yakima*, 706 F.3d 1188, 1195-96 (9th Cir. 2013)). And

its experience shows that the rule is both eminently fair and entirely workable.

1. Petitioners have identified precisely *seven* cases to support their claim of an unwarranted deluge of litigation within the Ninth Circuit.

Petitioners cite three cases for the proposition that "almost any time" protected speech occurs "'contemporaneously to[] criminal activity,'" citizens will be able to tie up police officers in litigation because a "possible inference of retaliation will exist." Petr. Br. 26 (quoting *Lozman*, 138 S. Ct. at 1953-54). Those cases prove no such thing. In *White v. County of San Bernadino*, 503 Fed. App'x 551 (9th Cir. 2013), the district court in fact granted summary judgment to the defendants on the plaintiff's First Amendment retaliation claim, even though it permitted other claims to go to trial, and the court of appeals affirmed. *See id.* at 553, 554. In *Dell'Orto v. Stark*, 123 F. App'x 761 (9th Cir. 2005), the district court erroneously denied defendants' motion for summary judgment on the plaintiff's *Fourth* Amendment claim, *id.* at 762. The court of appeals opinion makes clear that any reasonable officer would have arrested the plaintiff, who was drunk and about to place his key in the ignition of his car. *Id.* So under the Ninth Circuit's but-for test, had the district court properly decided the Fourth Amendment question, the plaintiff's First Amendment claim would have been knocked out on summary judgment at the latest. As for *Maidhof v. Celaya*, 641 Fed. App'x 734 (9th Cir. 2016), the court of appeals held that the plaintiffs had failed to present "'specific, nonconclusory' evidence" of a retaliatory motive, *id.* at 735 (quoting *Jeffers v. Gomez*, 267 F.3d 895, 903, 907 (9th Cir. 2001)); thus the defendant—a

police chief who "directed" the arrests, *id.* at 734-35, and not a line-level officer—was entitled to judgment as a matter of law. None of these cases suggests the need for a more stringent rule.

As for the four cases petitioners cite that went to trial on a retaliatory arrest claim, *see* Petr. Br. 37-39, they do not justify petitioners' position either.

Two cases involved arrests of journalists after their extensive criticism of the government, rather than speech made in close proximity to the arrest.

In *Morse v. San Francisco Bay Area Rapid Transit*, 2014 WL 572352 (N.D. Cal. 2014), officers were told ahead of time to watch for the plaintiff at upcoming demonstrations and to arrest him if they could. *Id.* at *9. Of the approximately two dozen journalists covering the protest, Morse was the only one arrested. *Id.* at *5, *7. The arresting officer did "not arrest other journalists whose conduct may have been virtually indistinguishable from Plaintiff's." *Id.* at *15. Furthermore, Morse "was subject to a custodial arrest, rather than the cite-and-release procedure used for other arrestees at the protest." *Id.* at *11.

In *Eberhard v. California Highway Patrol*, 2015 WL 6871750 (N.D. Cal. 2015), the plaintiff, a photojournalist, was arrested for trespassing at a protest. No charges were filed against him, and he was not prosecuted. *Id.* at *2. When Eberhard "protested to [the arresting officer] that he was just trying to do his job as a journalist," the officer "smiled" and responded that "'he had heard about [the] prior incidents'" where Eberhard tangled months earlier with an officer who tried to prevent him from covering a highway project. *Id.* at *7.

The final two cases on which petitioners rely would have gone to trial even under petitioners' preferred rule, because both plaintiffs had excessive use of force claims. In *Mam v. City of Fullerton*, 2013 WL 951401 (C.D. Cal. 2013), after finding the plaintiff's excessive force claim could proceed to trial, the court explained that the absence of a police report, the brutality of the arrest, the officer's effort to prevent Mam from recording police behavior, and the fact that many other people were standing near Mam, but only Mam—the sole person recording the incident—was arrested, made it a jury question whether the arrest was retaliation for recording an event of public interest. *Id.* at *5.

In *Holland v. City of San Francisco*, 2013 WL 968295 (N.D. Cal. 2013), the plaintiff was arrested after her outspoken challenge to the police officers' decision to arrest another protestor. As she watched the protester being taken away, she raised her hands to her head and her elbow struck an officer's shoulder. *Id.* at *1. She claimed that officers then surrounded her, "grabbed her arms from behind, kicked her in the shins, kicked her off her feet, threw her face first onto the ground, and put a knee on her head and neck." *Id.* The next day, after being strip searched and held overnight, she was released and the charge that she had disobeyed the instructions of an officer directing traffic was dismissed. *Id.* at *2. Although the district court found probable cause for the arrest, *id.* at *3, it denied summary judgment on Holland's excessive force claim, based on a video of the arrest, *id.* at *4-5. And it allowed her First Amendment claim to proceed because it found that "[a] reasonable juror could infer from this testimony that Holland would not have been

arrested or subjected to excessive force had it not been for her persistent questioning of the officers and verbal challenges to their authority." *Id.* at * 5.

Presumably, petitioners cherry picked these cases from among the cases within the Ninth Circuit because they are the strongest examples of the problems they assert. If so, their proposed rule is a solution without a problem.

2. Last Term, the State of Alaska (whose attorneys represent petitioners here), identified 27 cases in the Ninth Circuit after *Skoog* where plaintiffs pressed First Amendment retaliatory-arrest claims. *See* Br. for the State of Alaska as Amicus Curiae in Support of Respondent at 17-18, *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018). Respondent has reviewed each of those cases. Setting aside the present case and two cases where the arrests antedated *Skoog*,[14] two dozen cases remain. Taken as a group, these cases provide no support for the claim that the Ninth Circuit's rule results in unjustifiable litigation.

In five of the cases, the Ninth Circuit concluded that there was no probable cause for the underlying arrest.[15] In two others, the plaintiff had an excessive

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[14] *See Ra El v. Crain*, 399 F. App'x 180, 182 (9th Cir. 2010); *Scallion v. City of Hawthorne*, 280 F. App'x 671, 673 (9th Cir. 2008).

[15] *See Beck v. City of Upland*, 527 F.3d 853, 857 (9th Cir. 2008); *Dirks v. Grasso*, 449 F. App'x 589, 591 (9th Cir. 2011); *Lacey v. Maricopa County*, 693 F.3d 896, 916-17 (9th Cir. 2012) (en banc); *Sharp v. Orange County*, 871 F.3d 901, 910 (9th Cir. 2017) (but finding qualified immunity because the absence of

use of force claim as well as a retaliatory-arrest claim.[16] In four others, the Ninth Circuit held that there was a genuine factual dispute over whether there was probable cause for the underlying arrest.[17] So these eleven cases—nearly half the cases in the set Alaska provided—would still have gone forward even under petitioners' proposed rule.

In eight other cases, the district court either dismissed the case on the pleadings or granted summary judgment, and the Ninth Circuit affirmed, usually on the grounds that the plaintiff had not provided sufficient nonconclusory evidence from which a reasonable jury could find that a retaliatory motive was the but-for cause of the plaintiff's arrest.[18] Here, petitioners' proposed rule is unnecessary.

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probable cause was not clearly established); *Tarr v. Maricopa County*, 256 F. App'x 71, 73 (9th Cir. 2007).

[16] *See Jackson v. City of Pittsburg*, 518 F. App'x 518, 520-21 (9th Cir. 2013) (Section 1983 plaintiff prevailed on retaliation claim after trial); *Nichols v. City of Portland*, 622 F. App'x 679, 679 (9th Cir. 2015) (Section 1983 plaintiff lost on both excessive force and retaliation claims after trial).

[17] *See Adkins v. Limtiaco*, 537 F. App'x 721, 722 (9th Cir. 2013); *Reed v. Lieurance*, 863 F.3d 1196, 1206 (9th Cir. 2017) (involving issuance of misdemeanor citation without arrest); *Vohra v. City of Placentia*, 683 F. App'x 564, 566 (9th Cir. 2017); *Wilson v. City of San Diego*, 462 F. App'x 683, 685 (9th Cir. 2011).

[18] See *Blomquist v. Town of Marana*, 501 F. App'x 657, 659 (9th Cir. 2012); *Glair v. City of Los Angeles*, 437 F. App'x 581, 582 (9th Cir. 2011); *Gutierrez v. County of Los Angeles*, 545 F. App'x 701, 701 (9th Cir. 2013); *Ikei v. City & County of Honolulu*, 441 F. App'x 493, 495 (9th Cir. 2011); *Kubanyi v. Covey*, 391 F. App'x 620, 620–21 (9th Cir. 2010); *Tahraoui v. Brown*, 539 F. App'x 734,

But what the cases do reveal is that petitioners and the Government are simply wrong in how they characterize the typical retaliatory-arrest claim. In four cases (and Mr. Bartlett's as well), the Ninth Circuit pointed to direct evidence of the arresting officer's retaliatory motive.[19] In several of those cases, as well as three others, the protected speech occurred significantly before the challenged arrest.[20] And as the captions of the cases reflect, many of the defendants

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734 (9th Cir. 2013); *White*, 503 F. App'x at 553; *Willes v. Linn County*, 650 F. App'x 444, 444 (9th Cir. 2016).

[19] *See Beck*, 527 F.3d at 868 (after months of escalating disputes over contracting practices by the city, police chief told the plaintiff "we should have taken care of you a long time ago"); *Ford*, 706 F.3d at 1190–91 (after telling the plaintiff that he had "discretion" whether to book or release the plaintiff for violating a city noise ordinance by playing his car radio too loudly, the officer arrested the plaintiff and said, "*You talked yourself—your mouth and your attitude talked you into jail. Yes, it did.*"); *Sharp*, 871 F.3d at 908 (when plaintiff who was mistakenly handcuffed and detained when police thought he, rather than his son, was the person named in an arrest warrant, swore at the deputies and threatened to sue them, the deputy who arrested him replied, "If you weren't being so argumentative, I'd probably just put you on the curb"); *Vohra*, 683 F. App'x at 567 (when plaintiff who had written several letters to the chief of police criticizing police practices asked why he had been arrested, arresting officer allegedly replied, "So you can write another letter to the chief of police").

[20] *See Lacey*, 693 F.3d at 916 (plaintiff's newspaper had been publishing articles critical of Sheriff Joe Arpaio for years before trumped-up arrest); *Reed*, 863 F.3d at 1201, 1203 (the plaintiff's non-profit conservation organization filed a lawsuit challenging the park's treatment of buffaloes several weeks before the plaintiff was arrested); *Martin v. Naval Criminal Investigative Serv.*, 539 F. App'x 830, 831 (9th Cir. 2013).

were municipalities or higher-level officials, not line-level officers.

To be sure, there were three cases (out of 24) where there was probable cause for the underlying arrest and a district court permitted the plaintiff nonetheless to proceed on a retaliatory-arrest claim only for the Ninth Circuit to hold that there was insufficient evidence of a retaliatory motive to support a First Amendment claim.[21] But that result shows that the Ninth Circuit is being careful to protect police against marginal claims, not that this Court should throw out the Ninth Circuit's rule.[22]

3. It is hardly surprising that petitioners could find little real-world evidence to vindicate their fears.

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[21] *See Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 901–02 (9th Cir. 2008); *Maidhof*, 641 F. App'x at 736-37; *Picray v. Duffitt*, 652 F. App'x 497, 499 (9th Cir. 2016).

[22] The Government's criticism of the Ninth Circuit's approach in *Dietrich*, see U.S. Br. 28, is misplaced. In that case, the Ninth Circuit found that the plaintiff had failed to produce any evidence that the officer who arrested her was even aware of her protected speech. *See Dietrich*, 548 F.3d at 901. In then writing that a combination of very weak evidence of motive combined with strong evidence of probable cause was insufficient to let her case proceed, the Ninth Circuit was not manipulating summary judgment law. Rather, it was concluding only that "no reasonable juror could find from the undisputed facts that Defendants acted in retaliation for Plaintiff's First Amendment activities." *Id.*

The plausibility of a plaintiff's theory can of course be taken into account at the summary judgment stage. It is a "settled principle[] that if the factual context renders [a plaintiff's] claim implausible," then the plaintiff "must come forward with more persuasive evidence to support [his] claim than would otherwise be necessary." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Existing doctrines governing pleading, summary judgment, and qualified immunity are entirely capable of weeding out meritless cases while permitting plaintiffs with legitimate retaliation claims to vindicate their First Amendment rights.

Pleading rules do a sound job of throwing out meritless claims at the motion to dismiss stage. A plaintiff's complaint will be dismissed unless it pleads facts "plausibly suggesting" that the defendant's retaliatory animus was a cause of the arrest. *See Bell Atlantic Corp. v. Twombly*, 550 U.S 544, 557 (2007). If a plaintiff pleads nothing more than facts "merely consistent" with retaliation, the complaint will not survive. *See id.* In *Twombly* itself, the telephone companies' alleged behavior was equally consistent with activity prohibited and permitted by the Sherman Act. The Court therefore held that the facts alleged in the complaint were not enough to state a claim. *Id.* at 553-57; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678-80 (2009). Thus, allegations that are equally consistent with both forbidden retaliation and legitimate law enforcement activity do not state a claim.

The framework for retaliation claims articulated by this Court in *Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1974), requires proof of retaliatory "animus" toward protected speech, *Hartman*, 547 U.S. at 260, not simply consideration of such speech. Thus, it is not enough for a plaintiff to allege merely that he was engaged in protected speech at the time of his arrest. Cases will quickly get knocked out absent plausible allegations that government officials directly expressed animus or sufficiently detailed allegations regarding a course of

dealing between the plaintiff and the government that provides strong circumstantial evidence of hostility to the substance of the plaintiff's First Amendment activity.

Particularly in cases involving arrests for serious felonies, courts are likely to grant judgment to defendants once they determine that there was probable cause for the arrest because they will conclude that no reasonable jury would reject the defendant's same-decision defense.

Petitioners are thus mistaken in claiming that a plaintiff in the Ninth Circuit could have succeeded on a stylized version of *Kilpatrick v. United States*, 432 Fed. App'x 937 (11th Cir. 2001). Petr. Br. 24. The van at issue in that case displayed a sign saying "Remember the Children of Waco!" *id.* at 939, and parked by the Federal Building on the anniversary of the Waco incident, which was also the anniversary of the Oklahoma City bombing. The "van was reminiscent of the one used in the Oklahoma City bombing, it had tinted windows, and it was of a size capable of containing explosives." *Id.* Furthermore, "[o]fficers had received a tip linking the driver of the anti-ATF van to an incident involving the gun dealer who had previously supplied David Koresh, leader of the Branch Davidians, with weapons." *Id.*

Even if the plaintiff in such a case could plausibly allege animus against the message displayed on the van and somehow get her suit past the motion to dismiss stage—and that hypothesis is itself questionable—defendants would almost certainly receive summary judgment on their "same decision defense." Any officer, regardless of his or her views "toward the content of unpopular speech challenging

authority," Petr. Br. 24, would have made a stop under similar circumstances. Courts taking a common-sense approach to summary judgment are entirely capable of ensuring that cases like *Kilpatrick* are resolved early.

And technological developments mean that in the future, summary judgment may be even easier for defendants to obtain in weak cases. As petitioners' supervisor acknowledged, J.A. 435, 536, it is now standard practice for troopers to audiotape their encounters with civilians. The Government too points to "the increasing use of video cameras by police departments." U.S. Br. 31. When the entire encounter leading to an arrest is recorded, it will be easy for courts to grant summary judgment when the recording undercuts the plaintiff's claim of retaliatory animus. *Cf. Scott v. Harris*, 550 U.S. 372 (2007). By contrast, in this case, the videotape evidence strengthens Mr. Bartlett's claim. *See supra* pages 4, 7.

Finally, this Court's qualified immunity doctrine provides sufficient protection to officers called upon to make time-pressured decisions. Qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). There is no need for additional immunities that are unsupported by the text of Section 1983. A sensible application of qualified immunity to cases claiming retaliatory arrests shields officers from damages if the court finds that under the circumstances, a reasonable officer would have made the arrest irrespective of the speech, or that the speech itself made the arrest reasonable, or that it was unclear that the speech was protected.

Lozman, which held that a plaintiff does not need to plead and prove absence of probable cause, "[o]n facts like these," 138 S. Ct. at 1955, represents a case-by-case approach to situations in which government retaliation for protected speech takes the form of the arrest. Qualified immunity therefore will protect law enforcement officials in all situations in which there is no binding precedent clearly establishing that it violates the First Amendment to take particular speech into account.

Fogel v. Collins, 531 F.3d 824 (9th Cir. 2008), provides a clear example of this point and squarely rebuts petitioners' reliance on *Kilpatrick*. The plaintiff in *Fogel* challenged his arrest because it was based in part on his van's bearing the words "A FUCKING SUICIDE BOMBER COMMUNIST TERRORIST!" with "W.O.M.D. ON BOARD." *Id.* at 827. While the court determined that this speech was not a true threat—and thus was protected by the First Amendment—the court nonetheless concluded that the officers were entitled to qualified immunity because under the circumstances it was unclear whether "all reasonable officers would have concluded that Fogel's speech was protected." *Id.* at 834.

This Court's robust qualified immunity strikes a more justifiable balance than petitioners' proposed rule. The consequence of petitioners' rule would be to immunize officers from Section 1983 liability even if they expressly declare on camera that they dislike an individual's protected expression and they intend to arrest him to make him pay for exercising his rights. Arrests for minor violations in which law enforcement officials openly proclaim that they are targeting people who support certain candidates for office, hold

particular religious beliefs, or object to government policies have an enormous chilling effect on the population at large. There should be no immunity in such cases.

VI. Alternative possibilities for addressing retaliatory arrests cannot justify limiting Section 1983.

Petitioners, the Government, and various *amici* claim that Section 1983 damages suits for retaliatory arrests are unnecessary because there are other mechanisms to "deter" officers, such as "internal investigation and discipline." Petr. Br. 52-53; ; *see also* U.S. Br. 30-32; Br. of D.C. et al. 18-23 ("D.C. Br,"); Br. of Nat'l Ass'n of Counties et al. 20-21 ("NAC Br."). The amount of space they devote to this issue implicitly concedes the need to deter arrests that violate the First Amendment, even if those arrests do not violate the Fourth Amendment as well. But none of the alternatives they identify comes anywhere close to a meaningful substitute for Section 1983 suits.

1. The possibility of criminal prosecution for officers who "engage in retaliatory arrests notwithstanding the existence of probable cause," U.S. Br. 30, fails to provide a meaningful alternative to Section 1983 damages actions. For one thing, it provides no direct remedy to the individual who suffered violation of his constitutional rights. And it is telling that the United States points to not a single case in which the Department of Justice has brought a prosecution against any police officer for a retaliatory arrest. This is not because the Department is unaware that police officers retaliate against protected expression. *See* U.S. Dep't of Justice, Civil

Rights Div., *Investigation of the Baltimore City Police Department* 116-21 (Aug. 10, 2016), https://tinyurl.com/kzm8las ("In sum, [the Baltimore Police Department] takes law enforcement action in retaliation for individuals' engaging in protected speech or activity in violation of the First Amendment.").

2. All the citations, by the United States and other *amici*, to potential responses to unconstitutional arrests provided by state law or municipal policy are entirely beside the point. *See* Petr. Br. 53, U.S. Br. 31 n.5; D.C. Br. 18-23; NAC Br. 17-18.

This Court could not have been clearer in its landmark decision in *Monroe v. Pape*, 365 U.S. 167 (1961), which "rejected the view" that Section 1983 "does not reach abuses of state authority that are forbidden by the State's statutes or Constitution or are torts under the State's common law." *Zinermon v. Burch*, 494 U.S. 113, 124 (1990). It is simply "no answer" to a Section 1983 damages claim "that the State has a law which if enforced would give relief." *Monroe*, 365 U.S. at 183.

Still less can state laws that *do not* provide relief defeat a Section 1983 damages claim. Although the National Association of Counties lists all fifty states' parallels to the First Amendment, NAC Br. at 17-18 n.7, it offers no evidence that state law has provided effective remedies to individuals subjected to retaliatory arrests. The impetus for Section 1983's enactment in the first place was the failure of state law to provide full protection of constitutional rights. If the presence of practical considerations, potential criminal liability, and state-law correctives do not immunize other constitutional challenges to arrests or

other First Amendment claims from scrutiny under Section 1983—and they do not—then they should not preclude suits like Mr. Bartlett's either.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

Zane D. Wilson
Counsel of Record
Tyler P. Broker
CSG, INC.
714 Fourth Avenue
Suite 200
Fairbanks, AK 99701
(907) 452-1855
zane@alaskalaw.com

Jeffrey L. Fisher
Pamela S. Karlan
Leah M. Litman
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Kerri L. Barsh
GREENBERG TRAURIG
333 S.E. Second Avenue
Miami, FL 33131

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