No. 17-21

IN THE

Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

When a plaintiff claims that the government retaliated against his First Amendment-protected expression by arresting him, does the existence of probable cause for the arrest operate as an absolute bar to his claim?

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BRIEF FOR PETITIONER

Petitioner Fane Lozman respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, Pet. App. 1a, is unreported but is available at 2017 WL 765771. The order of the United States District Court for the Southern District of Florida denying respondent's motion for summary judgment, Pet. App. 15a, is reported at 39 F. Supp. 3d 1392.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on February 28, 2017. Pet. App. 1a. On May 15, 2017, Justice Thomas extended the time to file the petition for a writ of certiorari to and including June 28, 2017. *See* No. 16A1100. Petitioner filed his petition that day, and this Court granted it on November 13, 2017. This Court has jurisdiction under 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

This case arises from a dispute over municipal policy between petitioner and the City of Riviera Beach that culminated in petitioner's arrest in November 2006. Petitioner claims that the arrest was the product of the City's hostility toward his First Amendment-protected activity. Pet. App. 5a. The Eleventh Circuit acknowledged that at trial petitioner had "established a sufficient causal nexus" between his arrest and retaliatory animus on the part of the City Council. *Id.* 10a. Nonetheless, it held that petitioner could not recover because the jury's finding that a police officer had probable cause to arrest him for disturbing a lawful assembly—a crime with which he was never charged—created an "'absolute bar'" to his First Amendment retaliation claim, *id.* 7a.

1. *Factual background.* In early 2006, petitioner, a former United States Marine Corps officer and a financial trader, moved to the City with his floating home and leased a slip in the municipally-owned marina. Pet. App. 16a. Shortly thereafter, petitioner learned that the City planned to redevelop its waterfront area. Among other things, the City planned to

seize "thousands of homes through the power of eminent domain" and transfer property "to a private developer." *Id.*

Petitioner became an outspoken critic of the plan. As the City was finalizing its agreement with the developers, the Florida Legislature passed a bill prohibiting the use of eminent domain for private development. Pet. App. 2a. But the day before the Governor was scheduled to sign that bill into law, the Riviera Beach City Council convened an "eleventh-hour" meeting to approve the agreement. *Id.* 3a.[1]

In response, petitioner filed a lawsuit alleging that the agreement was invalid because the City had violated Florida's "Government in the Sunshine Law," Fla. Stat. ch. 286. One of that law's requirements is that governments within the state provide reasonable public notice before holding a meeting at which official action will be taken. Fla. Stat. § 286.011; *see* Pet. App. 2a-3a.

After petitioner filed his lawsuit, members of the City Council came under investigation by the Florida Department of Law Enforcement. Pet. App. 3a. Members of the Council perceived a connection

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[1] According to the City's official website, "Riviera Beach has a Mayor-Council-Manager form of government, in which the City Council appoints the City Manager as the chief executive officer to manage the day-to-day operations of the city." The Manager reports directly to the Council (not to the Mayor) and the members of the Council "also sit as the Board of the Community Redevelopment Agency." City of Riviera Beach, Your Elected Officials, https://tinyurl.com/1721RBGOV (last visited Dec. 19, 2017).

between petitioner's lawsuit and the investigation. *See* J.A. 171, 175.

On June 28, 2006, the City Council held a closed-door meeting to discuss petitioner's lawsuit.[2] Councilmembers expressed their anger at petitioner. Councilmember Elizabeth Wade proposed that the City "intimidate" him and make him "feel the same kind of unwarranted heat that we are feeling." J.A. 176. After further discussion, a second councilmember asked whether "we have a consensus of what Ms. Wade is saying"—namely, to send petitioner a "message." *Id.* 181 (Councilmember Iles). A third councilmember agreed that "what Ms. Wade says is right. We do have to beat this thing, and whatever it takes, I think we should do it." *Id.* (Councilmember Jackson). A fourth councilmember and the City Attorney each replied "Okay." *Id.* at 182 (Councilmember Duncombe and City Attorney Ryan). *See* Pet. App. 18a.

The City soon took a series of actions against petitioner. One example already familiar to this Court involved efforts to evict him from the municipal marina, where petitioner was living on his floating home. *See Lozman v. City of Riviera Beach*, 568 U.S. 115 (2013). The City first brought eviction proceedings against petitioner in state court. But a jury returned a verdict in his favor. The jury found "that Lozman's protected speech was a substantial or motivating factor in the City's decision to terminate his lease." *Lozman v.*

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[2] Florida's Sunshine Law allows city councils to hold closed-door meetings to discuss pending litigation. Fla. Stat. § 286.011(8). These meetings, however, must be transcribed and the transcripts made public once the litigation concludes. *Id.* § 286.011(8)(c), (e).

City of Riviera Beach, 713 F.3d 1066, 1070 (11th Cir. 2013).

Undeterred by these "unsuccessful efforts," *Lozman*, 568 U.S. at 118, the City turned to federal admiralty law to evict petitioner. Invoking that law's special rules allowing *in rem* actions against vessels, the City seized, and ultimately destroyed, petitioner's floating home. *Id.* at 120. But this Court held that the seizure was improper because petitioner's floating home was not a "vessel." *Id.* at 118.

2. *Petitioner's arrest.* This case springs from yet another action the City took against petitioner. The City Council met in regular public session on November 15, 2006. Immediately before the meeting, the City had finally abandoned its plans to redevelop the waterfront. *See* William Cooper, *Fears Fail to Ease Over Loss of Land*, Palm Beach Post (Nov. 17, 2006).[3]

The meeting, as usual, included a non-agenda public comment period. During that portion of a meeting, there are no subject-matter limitations on a speaker. J.A. 123. As one city councilmember explained, "when you come to the microphone and you're speaking, you have your three minutes to really express yourself on how you feel about what's going on with reference to the City, community, just whatever is going on at that time." *Id.* (testimony of Councilmember Davis). A speaker can talk about county issues. *Id.* Indeed, he can "read a nursery

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[3] Available at https://tinyurl.com/1721PBP (last visited Dec. 21, 2017). Shortly thereafter, petitioner dismissed his Sunshine Law case.

rhyme for three minutes as long as [he does] not use profanity." *Id.* 124.[4]

The events that followed were, as the court of appeals noted, captured on video. Pet. App. 3a. For a currently available version of the video, see *Activist Arrested at Riviera Beach City Council Meeting*, YouTube (Sept. 15, 2009), https://tinyurl.com/lbj5qqj (at 0:30).[5]

At his allotted time, petitioner approached the lectern and began to speak about public corruption in Palm Beach County, where Riviera Beach is located. After a few seconds, Councilmember Wade, who was presiding at the time, *see* J.A. 115, attempted to cut him off, Pet. App. 4a. When petitioner continued his remarks, she summoned Riviera Beach Police Officer Francisco Aguirre, who was on duty at the meeting. Petitioner told Officer Aguirre that he was not finished speaking. Councilmember Wade then ordered the officer to "carry him out." *Id.* At that point petitioner was arrested, handcuffed, and removed from the meeting. *Id.* The City Council's official minutes described the event this way: "Fane Lozman, City Marina, was escorted out to [sic] the meeting at the request of Councilperson Wade." City of Riviera Beach, Regular

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[4] The official city council minutes refer to the time limit for non-agenda public comments as being two minutes, *see, e.g.*, City of Riviera Beach, Regular City Council Meeting Minutes at 3 (Nov. 15, 2006), https://tinyurl.com/RBMin1115, but that time difference is immaterial to this case.

[5] Per City Council policy, all meetings are broadcast live and posted on the City of Riviera Beach's website for later viewing. City of Riviera Beach, RBTV, https://tinyurl.com/1721RBTV (last visited Dec. 20, 2017).

City Council Meeting Minutes at 4 (Nov. 15, 2006), https://tinyurl.com/RBMin1115.

Petitioner was taken to the police station and placed in a holding cell. When he was released, he was given a notice to appear. Ultimately, that notice contained two charges: "disorderly conduct," *see* Fla. Stat. § 877.03, and "resisting arrest without violence," *see id.* § 843.02; Pet. App. 4a.

The state's attorney, however, soon dismissed both charges on the basis that there was "no reasonable likelihood of successful prosecution." Pet. App. 4a-5a (quoting Pl. Ex. 12).

3. *District court proceedings.* Petitioner filed this Section 1983 lawsuit in the U.S. District Court for the Southern District of Florida. As is relevant here, he alleged that the City violated the First Amendment's Petition and Free Speech Clauses by directing his arrest in retaliation for his Sunshine Law suit and his public criticism of city officials and policies. Pet. App. 29a; J.A. 31.[6]

To prevail on his First Amendment retaliation claim, petitioner was required to prove three elements common to all such claims. First, petitioner had to show that he had engaged in protected First Amendment expression. Second, he had to show that the action he was challenging—here, his arrest—is the kind of action that would chill a person of ordinary firmness from exercising First Amendment rights.

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[6] Petitioner brought several other claims under the First, Fourth, and Fourteenth Amendments, as well as under state law. Pet. App. 22a-23a; J.A. 32, 38-41. Those claims, which have been finally resolved, are not at issue here.

Third, he had to show that animus against his protected expression motivated the City's action. *See Bennett v. Hendrix*, 423 F.3d 1247, 1250 (11th Cir. 2005).

But because petitioner was challenging retaliation that took the form of *an arrest*, Eleventh Circuit precedent required that he prove a fourth element as well—that there was no probable cause for that arrest. *Dahl v. Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002).

The district court held before trial that petitioner satisfied the first two elements. First, "the record plainly show[ed]" that he "was engaged in expressive political speech, as well as the valid exercise of his right to petition the government." Pet. App. 32a. And there was no dispute that the prospect of an arrest could deter a person of ordinary firmness from exercising his First Amendment rights.

But the district court determined that a trial was necessary to resolve the third and fourth elements of petitioner's claim. The court saw "sufficient circumstantial evidence" in the record to make the existence of an "unlawful motivation behind the City's actions" a "jury question." Pet. App. 32a. That evidence would permit the jury to find that a majority of the City Council "harbored illicit motivation to punish and deter Lozman based on his exercise of free speech and petition of government." *Id.* 31a. It was also a jury

question whether the alleged retaliatory actions were "taken with [their] support." *Id.* 32a.[7]

With respect to the final element, the court likewise identified "a genuine issue of material fact on the question of whether City of Riviera Beach police officers had probable cause to arrest Plaintiff for disorderly conduct or resisting arrest without violence." Pet. App. 30a.

The trial in this case lasted nineteen days, with petitioner proceeding *pro se*. Along with other evidence, petitioner introduced the videotape of the public City Council meeting at which he was arrested. He also introduced the transcript of the closed-door meeting called to address his Sunshine Law case, at which councilmembers had expressed their animosity toward petitioner and their consensus to respond forcefully. J.A. 175, 180-81.

Beginning on the eighth day of trial, the district court held lengthy, repeated discussions with the parties regarding the question whether there was probable cause for petitioner's arrest. The starting point was the two offenses that had been listed on the notice to appear petitioner had received after his arrest. The court pointed out that there was no dispute over

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[7] Section 1983 provides a remedy when a city government "causes" a person "to be subjected" to a deprivation of a constitutional right. Under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), a city may be held liable under Section 1983 for acts taken "pursuant to official municipal policy of some nature." *Id.* at 691. This Court has held it "plain that municipal liability may be imposed for a single decision by municipal policymakers." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986).

"exactly what happened on November 15th of 2006 because we have a video clip, with both sight and sound." J.A. 105. Taking that evidence "in the light most favorable to the City" with respect to those offenses, the court found a lack of probable cause as a matter of law. *Id.* 105, 108. There was "nothing there that would establish the crime of disorderly conduct." *Id.* 105. Nor, despite the City attorney's "interesting" and "intriguing" arguments, *id.*, did the crime of "resisting or obstructing a police officer appl[y] to what happened here," *id.* 108.

But the district court did not find the absence of probable cause as to the offenses listed on the notice to appear to be dispositive of whether petitioner had established the fourth element of his retaliation claim. Instead, consistent with *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004)—which holds that the Fourth Amendment's "probable-cause inquiry" is not "confined" to "the offense actually invoked at the time of arrest"—the court declared that "the real issue" was whether Officer Aguirre had "probable cause to arrest [petitioner] for *anything*." J.A. 100 (emphasis added). Accordingly, it asked the City "[w]hat else" it might have—that is, whether there were other laws for which there might have been probable cause to arrest petitioner. *Id.* 105.

The City identified two new candidates. The first was "trespass after warning." J.A. 86; *see* Fla. Stat. § 810.08(1) ("Whoever, . . . having been authorized, licensed, or invited [into any structure], is warned by the owner or lessee of the premises, or by a person authorized by the owner or lessee, to depart and refuses to do so, commits the offense of trespass in a structure or conveyance."). The putative theory here

was that "the Chair of the City Council certainly has a right to withdraw [an] invitation" to the lectern "if the Chair concludes that the speaker is not abiding by the rules." J.A. 110.

The second option the City proffered was Florida Statutes Section 871.01(1), J.A. 95. That statute provides that "[w]hoever willfully interrupts or disturbs any school or any assembly of people met for the worship of God or for any lawful purpose commits a misdemeanor of the second degree." Fla. Stat. § 871.01(1).

The court wrestled for several days with whether either of these statutes could support petitioner's arrest. On the tenth day of trial, it expressed some doubt that the disturbance statute could apply. In order "to meet constitutional standards," behavior that qualified as disturbance of an assembly had to be "somewhat akin" to the behavior covered by the disorderly conduct statute. J.A. 108. And the court had already held as a matter of law that the evidence did not support probable cause for disorderly conduct. *Id.* 105.

The court therefore suggested that the trespass after warning statute was the only one that potentially "applie[d]" to petitioner. J.A. 108. The court recognized difficulties with applying that statute to petitioner's conduct. But it explained that "it bothers me" that once Councilmember Wade had directed petitioner to stop talking, "we could leave that policeman and say there's not really a law that he's capable of enforcing." *Id.* 113. According to the district court, "there must be some law in the Florida statutes that covers this kind of situation." *Id.*

On the thirteenth day of trial, the court backtracked. Although it had earlier given the City's attorney an "A for effort" with respect to the argument for applying the trespass statute, J.A. 89, the district court announced that now it was "really thinking that the crime that we ought to focus on is the disturbing the public meeting." *Id.* 120. "[I]f we had to pick a statute, that really is the statute that I think is at play here." *Id.* The next day, the court announced itself "well-satisfied that if there's any crime, it's the disturbance crime." *Id.* 121. Ultimately, Section 871.01(1) was the only offense as to which the jury was asked to assess probable cause with respect to petitioner's arrest. J.A. 133-34.

At the close of evidence, the district court instructed the jury that, as a matter of law, petitioner's litigation under the Sunshine Law and his public criticism of the City in the months leading up to his arrest were protected First Amendment activity. J.A. 127. With respect to the question of retaliatory animus, petitioner had requested an instruction that the jury consider the city councilmembers' state of mind. But over petitioner's objection, the district court instead instructed the jury to consider only whether *Officer Aguirre* had "impermissible animus" against petitioner. *Id.* 132.

Finally, in keeping with Eleventh Circuit law, the district court also instructed the jury that petitioner had to prove that there was no probable cause to arrest him for disturbing a lawful assembly. J.A. 133-34 (requiring proof that there was "a lack of probable cause" for the arrest). Under the court's instructions, any animus by the City would become relevant if and only if the jury found that Aguirre himself acted with

retaliatory animus in arresting petitioner without probable cause. *See id.* 136-39.

The jury found probable cause for petitioner's arrest, Pet. App. 7a, and returned a verdict for the City. Based on the jury's verdict, the court entered judgment for respondent.

4. *Eleventh Circuit appeal.* On appeal, petitioner argued, among other things, that the jury instruction had erroneously directed the jury's attention to Officer Aguirre's intent rather than the city councilmembers'. The court stated that petitioner's argument was "compelling, as he seems to have established a sufficient causal nexus between Councilperson Wade and the alleged constitutional injury of his arrest." Pet. App. 10a. Even though Officer Aguirre had made the actual arrest, the court pointed out that Section 1983 imposes liability "for conduct which 'subjects, *or causes to be subjected*' the complainant to a deprivation of a right secured by the Constitution and laws." Pet. App. 10a (quoting *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976), and 42 U.S.C. § 1983) (emphasis added by the court of appeals)).

But the Eleventh Circuit concluded that any error with regard to the jury instruction was immaterial in light of the Eleventh Circuit's "absolute bar" rule. Pet. App. 7a (quoting *Rankin v. Evans*, 133 F.3d 1425, 1435 (11th Cir. 1998)). The fact that "the arrest was supported by probable cause defeat[ed] Lozman's First Amendment retaliatory arrest claim as a matter of law." *Id.* 11a (citing *Dahl*, 312 F.3d at 1236).

With respect to the existence of probable cause in this case, the court of appeals held that "the video footage of Lozman's conduct at the City Council meeting"

permitted the jury to find that "Officer Aguirre reasonably believed Lozman was committing, or was about to commit, the offense of Disturbing a Lawful Assembly." Pet. App. 9a. As the Eleventh Circuit put it, the video showed that petitioner had "interrupted and refused to listen to Councilperson Wade when she tried to admonish him." *Id.* It also showed that petitioner declined to leave the lectern when asked to do so by Officer Aguirre. Accordingly, the court of appeals concluded "Officer Aguirre could have reasonably believed" that petitioner was violating Section 871.01(1)—"or was about to." Pet. App. 9a.

SUMMARY OF ARGUMENT

The First Amendment's guarantees of freedom of speech and the right to petition for redress of grievances would mean little if governments and government officials were free to retaliate against individuals who exercise those rights. The Eleventh Circuit's decision in this case, however, provides a license to use the arrest power to carry out such retaliation.

The Eleventh Circuit's rule that probable cause "constitutes an absolute bar" to any First Amendment retaliation claim involving an arrest, Pet. App. 7a, both erodes First Amendment protection in an area where such protection is especially needed and is irreconcilable with the most closely related constitutional precedents. The arrest power is a readily available and highly effective means of deterring protected expression. This Court repeatedly has recognized that government actions can implicate—and violate—more than one right. This Court has already held that the Equal Protection Clause imposes an independent limitation on arrests: Probable cause that satisfies the Fourth Amendment

does not bar a claim that an arrest was racially discriminatory. It should likewise hold that the fact that an arrest comports with the Fourth Amendment does not immunize it from scrutiny under the First.

This Court has a "well-established framework" for analyzing retaliation claims involving First Amendment-protected expression. *Texas v. Lesage*, 528 U.S. 18, 20 (1999) (per curiam). In the forty years since the framework was articulated in *Mount. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), it has been applied to First Amendment retaliation claims across a broad range of contexts—from the firing of government employees to the termination of government contracts, and from removing books in school libraries to disciplining prisoners.

Under this standard framework, a plaintiff alleging retaliation must show that he engaged in First Amendment-protected expression, that the defendant harbored retaliatory animus against that expression, and that the animus was a substantial factor in the government decision he is challenging. If a plaintiff meets this burden—and it is a substantial one indeed—the government defendant can still defeat liability by showing that the challenged decision would have been the same even absent the retaliatory animus.

This well-established framework should govern First Amendment claims when a plaintiff alleges that retaliation took the form of an arrest. The framework properly balances core First Amendment rights and legitimate government decisionmaking. In particular, the framework is well equipped to handle evidence regarding whether there was probable cause for the

challenged arrest. In some cases, probable cause will be close to dispositive on the question whether there was retaliatory animus or causation. But in other cases the existence of probable cause may have little evidentiary value. The facts of petitioner's case and of *Reichle v. Howards*, 566 U.S. 658 (2012), show why the Eleventh Circuit's absolute bar rule is both unnecessary and pernicious.

The Eleventh Circuit's rule finds no support in this Court's decision in *Hartman v. Moore*, 547 U.S. 250 (2006). There, the Court created an exception to the *Mt. Healthy* framework for lawsuits in which the alleged form of retaliation involves a criminal prosecution. But the analysis in *Hartman* rests entirely on the fact that prosecutors themselves are absolutely immune from suit. That immunity, and a special "presumption of regularity" for prosecutorial decisionmaking, is the source of the causal complexity that led this Court to require that "want of probable cause must be alleged and proven" in a retaliatory prosecution case, *id.* at 252. There is no such complexity in cases involving arrests. There is no barrier to a plaintiff suing the actor who arrested him, or who "cause[d him] to be subjected" to an arrest, 42 U.S.C. § 1983. And this Court has already stated that the presumption of regularity simply "does not apply" to arrests. *Reichle*, 566 U.S. at 669. Finally, this Court's decision in *Devenpeck v. Alford*, 543 U.S. 146 (2004), and the lack of an instrument like an indictment or an information that can anchor the probable cause inquiry, makes it unworkable and unfair to extend the *Hartman* exception to cases involving arrests.

ARGUMENT

I. Petitioner's Sunshine Law suit and his public criticism of city policies and city officials are entitled to the highest level of First Amendment protection.

The litigation and civic involvement that sparked the city councilmembers' antagonism toward petitioner and preceded the order to arrest him lie at the heart of the First Amendment.

1. The First Amendment right to "petition the Government for a redress of grievances" is so fundamental as to be "implied by '[t]he very idea of a government, republican in form.'" *BE&K Const. Co. v. NLRB*, 536 U.S. 516, 524-25 (2002) (quoting *United States v. Cruikshank*, 92 U.S. 542, 552 (1876)). This right is "one of 'the most precious of liberties safeguarded by the Bill of Rights.'" *Id.* at 524 (quoting *United Mine Workers of Am. v. Ill. St. Bar Ass'n*, 389 U.S. 217, 222 (1967)). And the ability to seek redress *from the courts* is a central aspect of the Petition Clause. *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011). "[U]nder the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances." *NAACP v. Button*, 371 U.S. 415, 430 (1963).

Indeed, petitioner's action against the City under Florida's Sunshine Law is the epitome of a lawsuit protected by the Petition Clause. The Sunshine Law requires that local governments hold their meetings publicly and with proper notice. It is designed to ensure a "marketplace of ideas" in which government has "sufficient input from the citizens who are going to be affected by the subsequent action of the

municipality." *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 475 (Fla. 1974). The Sunshine Law enables citizens to monitor the work of their representatives. It instantiates Justice Brandeis's axiom that sunlight is the best disinfectant. Louis D. Brandeis, Other People's Money and How the Bankers Use It 92 (1914). In short, petitioner's lawsuit is protected precisely because of, and not despite, its consequences for city officials, *see* Pet. App. 3a, 17a-18a.

2. So, too, with respect to petitioner's criticisms of city policies and city officials over the months leading up to the November 2006 meeting. This sort of expression lies at the heart of the speech the First Amendment protects. Because "the Constitution created a form of government under which '[t]he people, not the government, possess the absolute sovereignty,'" the "right of free public discussion of the stewardship of public officials" is "fundamental." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 274-75 (1964) (quoting James Madison, Report of 1800, *in* 4 Elliot's Debates on the Federal Constitution 569 (1863)).

3. Precisely because litigation and public criticism are essential to holding government accountable, this Court "has frequently reaffirmed that speech on public issues occupies the 'highest rung on the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Meyers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware*, 458 U.S. 886, 913 (1982)). This is particularly true where, as here, the expression comes from a private citizen.

Relying on this principle, this Court has explained that "[s]uch speech cannot be restricted simply because it is upsetting." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011). It is "a bedrock principle underlying the

First Amendment" that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Even less can it suppress expression on the ground that the expression is upsetting, offensive, or disagreeable *to government officials*. "[D]ebate on public issues should be uninhibited, robust, and wide-open," and "it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *N.Y. Times Co.*, 376 U.S. at 270. This Court long ago repudiated the doctrine of seditious libel in favor of a "'theory of our Constitution,' which values free speech as essential to, not subject to the vicissitudes of, our political system." *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 681 (1996) (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

II. The First Amendment forbids the government from abusing its arrest power to retaliate against protected activity.

Governments cannot use their legitimate powers to retaliate against individuals who exercise their First Amendment rights. This longstanding prohibition on retaliation is particularly important when it comes to arrests, both because the arrest power is so sweeping and because the prospect of an arrest is so chilling of protected expression. The fact that a particular arrest does not *also* violate the Fourth Amendment—because information known to the arresting officer can support a finding of probable cause with respect to some offense—should not shield the responsible actor(s) from liability under the First Amendment. This Court has repeatedly held, in a variety of contexts, that a particular official action can

"implicate more than one of the Constitution's commands." *Soldal v. Cook County*, 506 U.S. 56, 70 (1992). Since the concerns at which the First and Fourth Amendments are directed are distinct, it is entirely possible for an arrest to violate one amendment but not the other. When it does, the plaintiff's ability to recover under Section 1983 for the violation of his rights under one amendment should not be foreclosed by the absence of a second constitutional violation.

A. Government cannot use its otherwise lawful powers to punish or deter protected expression.

Governments engage in myriad interactions with their citizens. This gives a government or official motivated by animus a variety of opportunities for retaliation against protected expression. A municipality might improperly deny an easement given to other property owners on account of "ill will resulting from the [owners'] previous filing of an unrelated, successful lawsuit against the Village." *Village of Willowbrook v. Olech*, 528 U.S. 562, 563 (2000) (per curiam). Or a county constable might improperly fire a clerical employee because she expressed distasteful views about the recent attempted assassination of the president. *Rankin v. McPherson*, 483 U.S. 378, 380-82 (1987).

The prospect that the government may deny benefits or impose burdens based on a person's protected expression may deter that individual from exercising his First Amendment rights. The consequences of that deterrence radiate outward to injure individuals beyond the aspiring speaker himself be-

cause the public has a stake in individuals' contributions to the marketplace of ideas. When government deters protected expression, it "limit[s] the stock of information from which members of the public may draw"—something the First Amendment directly "prohibit[s]." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978).

Accordingly, this Court has held, across a wide range of domains, that governmental actions "that fall short of a direct prohibition against the exercise of First Amendment rights" can still violate the Constitution. *Laird v. Tatum*, 408 U.S. 1, 11 (1972). Take, for example, *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996). There, a local government terminated a trash hauler's contract because he was an "outspoken critic" of the local government who had alleged violations "of the Kansas Open Meetings Act." *Id.* at 671. Even though local governments have broad discretion over their contracting, the Court held that terminating a contract purely to retaliate against protected expression violates the First Amendment. *Id.* at 686. These sorts of adverse actions are prohibited because they "allow the government to 'produce a result which [it] could not command directly.'" *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

In short, 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). And the Court has further held that Section 1983 provides a cause of action for individuals who have been subjected to such retaliation. *See, e.g.*, *Umbehr*, 518 U.S. at 674-75; *Perry*, 408 U.S. at 597.

B. Use of the arrest power for retaliatory reasons is especially pernicious.

The right to criticize the government "without thereby risking arrest" is a "principal characteristic[] by which we distinguish a free nation from a police state." *City of Houston v. Hill*, 482 U.S. 451, 462-63 (1987). Two features of arrests 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—and not just individuals who work for, or seek benefits from, the government. Second, the consequences of arrests may be especially chilling.

1. 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 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 is enough to justify a custodial arrest. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354

(2001); *see also id.* at 355-60 (listing statutes in all fifty states and the District of Columbia that permit warrantless misdemeanor arrests).

Such minor crimes are legion. In Florida, for example, a person can be arrested if there is probable cause to believe he has taken some computer paper home from the office without permission, Fla. Stat. § 815.06(2)(c); has buried his child's dead hamster less than two feet below ground level, Fla. Stat. § 823.041(1); has played a casual game of poker with friends, Fla. Stat. § 849.08; or has participated in his office's NCAA tournament pool, Fla. Stat. § 849.14. And beyond the sheer number of crimes, many offenses are so broad as to potentially support probable cause in a wide variety of circumstances. *See, e.g.*, Fla. Stat. § 823.01 (criminalizing "all nuisances that tend to annoy the community").

And that does not even count traffic offenses. "[V]ery 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 seizure 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.").

2. 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).

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). And for some people, the psychological effects of arrest are severe. *See* Robert I. Simon, *The Psychological and Legal Aftermath of False Arrest and Imprisonment*, 21 Bull. Am. Acad. Psychiatry & L. 523 (1993).

The long-term consequences of an arrest are severe enough to deter expression even if, as here, formal charges are never filed. 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." Elisha 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. Arrests often

occur in public. Petitioner's arrest, for example, was filmed, broadcast on local television, and later posted on the City's website for everyone to see. *See* Riviera Beach TV, https://tinyurl.com/1721RBTV (last visited Dec. 20, 2017). By arresting petitioner on camera, the City was able to "send [the] message," J.A. 180, 181, that any person in Riviera Beach who contemplates challenging city actions in court or criticizing city officials in public should think twice before doing so. And even beyond Riviera Beach, members of the public who read about or see what happened to Fane Lozman may hesitate to speak out in their own communities.

C. 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). By holding that the presence of probable cause is an "absolute bar" to a retaliatory arrest claim "brought under the First Amendment," Pet. App. 7a, the Eleventh Circuit's rule in effect makes 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. The Eleventh Circuit's absolute bar rule gives carte blanche for governments and government officials to undermine the First Amendment. It allows them to use arrests to retaliate against their critics or against individuals who engage in other forms of protected expression. Indeed, under the Eleventh

Circuit's rule, it does not matter how strong the proof is of a retaliatory motive.

To see how this is so, imagine a slightly different version of *Cohen v. California*, 403 U.S. 15 (1971). Instead of being arrested for disturbing the peace by wearing his famous jacket, this Paul Cohen is arrested for jaywalking on his way to the courthouse by an officer who announces, "I usually don't arrest people for this, but I hate you anti-war protesters." The Eleventh Circuit would impose an absolute bar on any Section 1983 claim as long as the officer had probable cause. In fact, even if it turned out that the officer lacked probable cause to believe Cohen had jaywalked, he would escape liability if it turned out there was probable cause for *any* offense in the statute book.

What is more, the Eleventh Circuit's rule would seem to permit a town to adopt a formal policy directing its police department to enforce a jaywalking statute against only those jaywalkers who are engaged in particular First Amendment-protected expression—say, wearing Black Lives Matter t-shirts or Make America Great Again hats. Because no individual arrested under the policy would have a First Amendment damages claim (since, after all, there would be probable cause for each individual arrest), it is unclear how anyone could sue to enjoin the policy. *See, e.g.*, *Rizzo v. Goode*, 423 U.S. 362 (1976); *O'Shea v. Littleton*, 414 U.S. 488 (1974).[8]

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[8] And the Eleventh Circuit's absolute bar is not limited to Petition Clause or Speech Clause cases. By its terms, it governs all "First Amendment claim[s]." *Dahl v. Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002). Therefore, a city with an ordinance

Under the Eleventh Circuit's rule, the only arrestees who can vindicate their right to be free from retaliation are those injured by governments whose counsel prove so inept that they cannot find a single offense for which probable cause arguably exists. The Eleventh Circuit leaves unremedied arrests that have no valid law enforcement purpose and that concededly would never have occurred absent the desire to retaliate against protected expression.

2. The Eleventh Circuit's absolute bar confuses 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's Free Speech and Petition Clauses protect one's ability to communicate with others. Thus, the First Amendment is about "more than [simply] self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). A particular arrest can easily violate one provision but not the other. For example, in *Florida v. Royer*, 460 U.S. 491 (1983), the arrest of a nervous young man carrying heavy luggage who paid cash for his ticket violated the Fourth Amendment, because these facts did not give rise to probable cause to believe he had committed a crime. *Id.* at 507. It did not, however, violate the First Amendment, since Royer was not engaged in any protected expression.

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generally prohibiting animal slaughter within municipal limits is free to harass practitioners of Santeria by engaging in a series of catch-and-release arrests, even if it would never enforce the anti-slaughtering law against anyone else. *Cf. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

Conversely, in *City of Houston v. Hill*, 482 U.S. 451 (1987), this Court struck down a municipal ordinance that made it unlawful to interrupt a police officer in the performance of his or her duties. The ordinance was "admittedly violated scores of times daily." *Id.* at 466. The First Amendment infirmity came from the danger that, in selecting whom to arrest from among the individuals for whom there was probable cause, police would choose individuals who were engaged in "constitutionally protected speech." *Id.* Thus, the ordinance was unconstitutionally overbroad.

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*, 506 U.S. at 56. 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)).

In *Soldal* itself, the court of appeals had barred the plaintiff from challenging a seizure of his mobile home under the Fourth Amendment; it thought that the more "straightforward way for a plaintiff to mount a challenge under section 1983" was to "claim[] he was deprived of his property without due process of law." *Soldal v. Cook County*, 942 F.2d 1073, 1075 (7th Cir. 1991) (en banc). This Court rejected that approach. It explained that when a government act implicates more than one constitutional right, courts should reject the "habit" of identifying "the claim's 'dominant' character." *Soldal*, 506 U.S. at 70. They should,

instead, entertain every constitutional claim that fits the facts.[9]

This same directive applies in the context of First Amendment claims. In *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), the defendant argued that because it could ban all newsracks if it chose to, it necessarily had the power to ban newsracks for particular publications. The Court was unpersuaded, recognizing that this "'greater-includes-the-lesser' syllogism" has no place in the First Amendment. *Id.* at 762-68.

The Eleventh Circuit's absolute bar rule contravenes this precedent. It rests on the proposition that because the government can arrest anyone for whom there is probable cause, there is no problem when the government arrests only the subset of people against whom it also possesses retaliatory animus. It is true that petitioner has no categorical right to be free from an arrest supported by probable cause. But he *does* have the First Amendment right not to be singled out for such an arrest based on his protected expression.

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[9] Similarly, in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), the Court emphasized that the First Amendment retaliation claim did not depend on establishing another constitutional violation. The government employee had "no constitutional right to a hearing" under the Due Process Clause before he was fired because, as an untenured employee, he had no property interest in the job. Yet the Court recognized that he "may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally-protected First Amendment freedoms." *Id.* at 283-84.

3. This Court's decision in *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 probable cause cannot immunize racially discriminatory law enforcement practices from equal protection scrutiny. *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*, *Dique v. N.J. State Police*, 603 F.3d 181 (3d Cir. 2010); *United States v. Miller*, 146 F.3d 274, 279 n.3 (5th Cir. 1998); *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).

The Eleventh Circuit's absolute bar is inconsistent with *Whren* and all of this case law. Respondent has acknowledged as much, suggesting that "an arrest motivated by protected speech may

constitute an arbitrary enforcement decision that gives rise to an equal protection claim," and that an equal protection challenge to an arrest can be brought "*even if* it were supported by probable cause." BIO 21. But if respondent is prepared to litigate the equal protection claim without requiring the plaintiff to show a lack of probable cause, there is no basis for imposing that requirement on an identical First Amendment claim.

Just as the presence of probable cause for a seizure is not dispositive of a race discrimination claim, it also 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 had alleged that he was arrested due to his advocacy of racial equality. *See generally* Harry Kalven, Jr., The Negro and the First Amendment (1965).

III. Plaintiffs are entitled to a remedy when an arrest would not have occurred but for government officials' intent to retaliate for First Amendment activity.

1. This Court has a "well-established framework" for analyzing retaliation claims involving First Amendment-protected expression. *Texas v. Lesage*, 528 U.S. 18, 20 (1999) (per curiam). For forty years,

that framework has been applied to First Amendment retaliation claims across a broad range of contexts—from employment to government contracting to school library deacquisition policies to prison operations. *See, e.g.*, *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (employment); *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 685 (1996) (contracting); *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 871 (1982) (libraries).

The framework was first articulated in *Mt. Healthy*, 429 U.S. 274. In that case, a school board decided not to renew a schoolteacher's contract in "substantial part" because he had called a radio station to complain about school district policy. The call was "protected by the First Amendment." *Id.* at 283. But this Court held that those facts alone did not entitle the teacher to relief. Instead, the Court announced a two-step "test of causation." *Id.* at 286.

First, a plaintiff must show that his protected expression was a "motivating factor" with respect to the adverse action taken against him. *Mt. Healthy*, 429 U.S. at 287. That is, the plaintiff must prove "a [causal] connection between the retaliatory animus" and the government action he is challenging. *Hartman v. Moore*, 547 U.S. 250, 260 (2006).

If the plaintiff satisfies this burden, the defendant can still prevail if it can "show[] by a preponderance of the evidence that it would have reached the same decision" anyway. *Mt. Healthy*, 429 U.S. at 287. This "same-decision" defense establishes that "retaliation was not the but-for cause" of the challenged action. *Hartman*, 547 U.S. at 260. If the defense makes this showing, "the claim fails for lack of causal connection

between unconstitutional motive and resulting harm, despite proof of some retaliatory animus in the official's mind." *Id.*

2. In a First Amendment retaliation case involving an arrest, the *Mt. Healthy* framework fairly allocates burdens between the parties. The plaintiff must plead and prove: (1) that he engaged in First Amendment-protected activity, (2) that the defendant harbored retaliatory animus, and (3) that the animus was a substantial factor in the decision to arrest him. At that point, if the plaintiff has met his burden, the government defendant can try to show (4) that the arrest would have occurred even absent the retaliatory animus. For several reasons, these elements help to properly "distinguish[] between a result caused by a constitutional violation and one not so caused." *Mt. Healthy*, 429 U.S. at 286.

First, there will be cases where the plaintiff's expression is not protected by the Constitution. 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 fraud, extortion, blackmail, true threats, and price-fixing conspiracies. And in particular circumstances, otherwise protected speech will lose its protection. For example, if a speaker during the non-agenda portion of a Riviera Beach City Council meeting refused to yield the floor after his allotted minutes, the fact that he was speaking about city zoning policies would not save him from arrest for disobeying that plainly valid, content-neutral time, place, and manner restriction. 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).

By contrast, much expression *is* protected by the First Amendment. Petitioner's lawsuit, his months of criticism against the city redevelopment policy, and his comments at the November 15 meeting itself were entirely protected. *See supra* at 17-19. Nothing in any of his expression either constituted a crime or provided evidence of one.

Second, pleading and proof standards make it difficult for plaintiffs to establish animus. A bare assertion of an impermissible motive will not even survive the pleading 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. Plaintiffs will therefore need to do more than allege a temporal nexus between some protected speech and a subsequent arrest.

In short, it will be the rare case where a plaintiff can do something like petitioner did here: cite in his complaint an official transcript where government actors announced their intent to "intimidate" him or

"send a message." J.A. 176, 180-181. And even when a case survives a motion to dismiss, the plaintiff will still need to prove his allegations through the totality of the evidence.

Third, with respect to causation, the existence or nonexistence of probable cause can be highly probative. In a case where the plaintiff can prove both retaliatory animus and the absence of probable cause, his First Amendment claim is strong indeed. And even if there *is* probable cause, there are offenses for which police so rarely make arrests that the presence of probable cause will say almost nothing about whether a retaliatory motive caused the arrest. For example, when a government whistleblower is arrested for taking a few sheets of paper out of his office printer, Fla. Stat. § 815.06(2)(c), a factfinder may well conclude that animus led to the arrest.[10]

On the other hand, 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," *Twombly*, 550 U.S. at 557, with legitimate law enforcement activity. For example, imagine a warehouse owner who brings a lawsuit challenging a municipal zoning ordinance as a regulatory

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[10] Publicly available statistical information can be helpful in determining whether certain crimes are commonly enforced. *See National Incident-Based Reporting System User-Manual*, Uniform Crime Reporting, 4-5, https://ucr.fbi.gov/nibrs/nibrs-user-manual (listing data entries collected by local police departments to report to the FBI, including "Offense Code" (indicating the nature of the crime) and "Type of Arrest" (indicating whether a citation was given or a custodial arrest took place)).

taking. If the warehouse burns to the ground and the police have probable cause to believe he committed arson, he will lose any First Amendment retaliation claim, however protected his takings lawsuit may have been.

Fourth, with respect to the same-decision defense, evidence regarding the presence of probable cause can likewise be relevant. Suppose a police officer sees a parked car bearing an anti-police bumper sticker. Angered at the message, the officer runs the plates, discovers that the owner is wanted for armed robbery, and arrests him. Even though there was retaliatory animus and some causal connection, the plaintiff's claim will fail. The discovery of probable cause with respect to a serious crime provides a "sufficient intervening event to break the causal chain." *Utah v. Strieff*, 136 S. Ct. 2056, 2061-62 (2016). This is because there is little doubt that an officer who had not noticed the bumper sticker but had run the plates would have made the exact same decision.

But probable cause will not always establish a same-decision defense. Petitioner's experience shows why. At the time Councilmember Wade ordered Officer Aguirre to arrest him, no one thought petitioner had violated Fla. Stat. § 871.01(1)—indeed, there is no evidence that anyone on the scene knew the statute existed. That is hardly surprising: There is only one other reported case in which this prohibition on "[d]isturbing schools and religious or other assemblies" has come into play with regard to events in a city council meeting. That case was decided over a quarter century before petitioner's arrest. Moreover, it actually reversed the conviction of a citizen whose vociferous criticism precipitated a brawl in the council

chambers. *See Weidner v. State*, 380 So. 2d 1286 (Fla. 1980).[11]

In light of the caselaw under Section 871.01(1), it is therefore unlikely that the City could establish a same-decision defense. If the jury is persuaded that petitioner's arrest was the product of retaliatory animus, it is unlikely the City will be able to persuade the jury that petitioner would have been arrested even had he been a random citizen or a booster of the redevelopment plan, rather than an outspoken critic.

3. The facts in *Reichle v. Howards*, 566 U.S. 658 (2012), further illustrate why imposing an absolute bar is unnecessary as well as improper. If *Bivens* even permits the litigation of First Amendment claims, the *Mt. Healthy* framework, as informed by the *Twombly/Iqbal* standard, will weed out claims like Howards'. When a person lays hands on the Vice President and then lies about it to Secret Service agents, a court should conclude that the plaintiff has not made out a prima facie case that retaliatory *animus* toward his protected criticism of the Vice President caused the arrest. And even if a court were to conclude that dislike of Howards' views played some role, it will almost certainly conclude that the physical contact and unprotected speech of making a false statement under 18 U.S.C. § 1001 show that the arresting officers would have made the same decision regardless. Finally, as *Reichle* illustrates, qualified immunity can provide an additional layer of protection

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[11] There is a paucity of reported prosecutions of any kind under Section 871.01(1): Westlaw contains only four decisions.

when it is not clearly established that arresting someone under particular circumstances constitutes forbidden retaliation.

4. Neither of the Eleventh Circuit's cases giving rise to its absolute bar rule provided any basis for abandoning the *Mt. Healthy* framework either. *Dahl v. Holley*, 312 F.3d 1228 (11th Cir. 2002), the sole case on which the Eleventh Circuit relied in its decision here, Pet. App. 7a, 11a, devoted only a single sentence to the question. *See* 312 F.3d at 1236. And *Dahl* involved an arrest *and full prosecution* on a felony charge of bribing a witness. *See id.* at 1231-32. The sole Eleventh Circuit decision *Dahl* cited in turn—*Redd v. City of Enterprise*, 140 F.3d 1378 (11th Cir. 1998)—involved an arrest for disorderly conduct that was "content-neutral; nothing in the record indicate[d] that the plaintiffs were selectively arrested for engaging in religious speech while non-religious speakers went unmolested." *Id.* at 1383. Both of these cases would fail under the *Mt. Healthy* standard, for reasons petitioner has already explained.

5. Since its inception, the *Mt. Healthy* framework has applied both to First Amendment cases alleging retaliation and to Fourteenth Amendment cases alleging purposeful racial discrimination. *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 n.21 (1977); *Texas v. Lesage*, 528 U.S. 18, 21 (1999) (per curiam). Thus federal courts have uniformly applied the framework to claims involving racially discriminatory arrests. And they have done so without regard to whether those arrests violate the Fourth Amendment as well. *See supra* at 30. As a matter of doctrinal consistency, this Court should therefore hold that the *Mt. Healthy* framework applies

to First Amendment-based cases challenging arrests as well as to Fourteenth Amendment-based ones. The framework takes probable cause into account as one piece of potentially probative evidence, but imposes no absolute bar against challenging arrests supported by probable cause.

IV. *Hartman v. Moore* provides no basis for an absolute bar rule in cases involving arrests.

The Eleventh Circuit's absolute bar rule gives governments and government officials a blueprint for retaliating against citizens who exercise their First Amendment rights. If the government actor retaliates by terminating a contract or denying a zoning variance to someone who has exercised his Petition Clause right, it faces damages liability under Section 1983. *See Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668 (1996); *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). But if a government actor uses its arrest power to retaliate against him, the actor gets off scot free, so long as its lawyer can later identify some obscure, minor offense for which there might be probable cause. *See* Pet. App. 7a.

In *Hartman v. Moore*, 547 U.S. 250 (2006), this Court created an exception to the *Mt. Healthy* framework: "[A] plaintiff in a retaliatory-prosecution action must plead and show the absence of probable cause for pressing the underlying criminal charges." *Id.* at 257. The City has argued that *Hartman* should be extended to suits in which the form of retaliation is an arrest. BIO 14-16. But a careful reading of *Hartman* shows why its rule cannot be extended to the context of arrests. As petitioner has already explained, *see supra*

at 22-31, a rule that precludes suits challenging retaliatory arrests unless plaintiffs can prove a lack of probable cause—as both the Eleventh Circuit's absolute bar rule and an extension of *Hartman* would do—seriously erodes First Amendment protections. And it does so for no reason: The questions of causation that motivated *Hartman* do not apply to cases involving arrests. Nor would the *Hartman* rule be workable or fair in arrest-related cases.

A. Absolute prosecutorial immunity makes "retaliatory prosecution" claims unique.

1. This Court's decision in *Hartman* rested on the need to reconcile First Amendment retaliation doctrine with the unique concerns that make exercise of prosecutorial power immune from review in civil cases.

The linchpin of this Court's analysis in *Hartman* is a simple fact: prosecutors are "absolutely immune from liability for the decision to prosecute." 547 U.S. at 262. This means that a plaintiff claiming he was prosecuted in retaliation for exercising First Amendment rights cannot sue the official who actually conducted the prosecution against him. Even in a case where a prosecutor decides to press charges for purely retaliatory reasons, Section 1983 provides no cause of action against him. Instead, the available remedies with respect to the prosecutor are dismissal of criminal charges on the basis of a defense of selective prosecution and discipline against the prosecutor as

an "officer of the court," *Imbler v. Pachtman*, 424 U.S. 409, 431 n.33 (1976).[12]

So the category "retaliatory prosecution case" is actually a misnomer. As this Court explained, the defendant in such cases is a "nonprosecuting official" who is sued not "strictly for retaliatory prosecution, but [rather] for successful retaliatory inducement to prosecute." *Hartman*, 547 U.S. at 262. Liability for inducement falls comfortably within the scope of Section 1983, which provides a cause of action against a government actor that either "subjects, or causes to be subjected" any person to a deprivation of his constitutional rights. 42 U.S.C. § 1983.

Showing that someone has engaged in retaliatory inducement of a prosecution has two elements. First, as with any retaliation case, the defendant's actions must be based on animus against the plaintiff's protected expression. Second, the defendant's actions must actually have induced the prosecution—that is, the plaintiff has to show that absent the

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[12] Absolute prosecutorial immunity protects the prosecutorial function, not the prosecutor as a person. If a prosecutor violates an individual's constitutional rights while "perform[ing] the investigative functions normally performed by a detective or a police officer," he faces damages liability. *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993). It is "'neither appropriate nor justifiable'" to confer absolute immunity in these circumstances. *Id.* (quoting *Hampton v. Chicago*, 484 F.2d 602, 608 (7th Cir. 1973)).

Furthermore, under the logic of this Court's decision in *Forrester v. White*, 484 U.S. 219 (1988), "a district attorney who hires and fires assistant district attorneys" is acting in his "administrative capacity" and is thus amenable to suit under Section 1983 if he engages in First Amendment retaliation while "making such employment decisions." *Id.* at 229.

nonprosecuting official's having acted on his animus, there would have been no prosecution.

It is at this second point that a "chain of causation" problem comes into play. *See Hartman*, 547 U.S. at 262-63. Prosecutors are expected to act with "independence." *Imbler*, 424 U.S. at 423 (quoting *Pearson v. Reed*, 44 P.2d 592, 597 (Cal. Dist. Ct. App. 1935)). This entails their making their own judgment as to whether prosecution is warranted, rather than relying on the decisions of complainants or law-enforcement officials. Prosecutorial immunity rests on a "presumption of regularity" that attaches "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute." *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14 (1926), and *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)).

When there is probable cause for a prosecution, allowing a retaliation suit to proceed would undermine prosecutorial independence. The plaintiff in such a suit could prove inducement only by persuading the court that the probable cause was not the real reason the prosecutor decided to proceed. To do that would require looking into the prosecutor's motives and decisionmaking—precisely the inquiry absolute prosecutorial immunity forestalls. Thus, in order to protect prosecutorial independence, courts must accept that the explanation for a prosecution for which there is probable cause is that a prosecutor made an independent judgment that the prosecution was warranted. That is what this Court meant in *Hartman* when it referred to the "presumption of regularity." 547 U.S. at 263. The "intervening decision of the third-party

prosecutor widens the causal gap between the defendant's animus and the plaintiff's injury." *Reichle*, 566 U.S. at 668.

By contrast, when there is no probable cause for a prosecution, by definition courts know that something in the prosecutorial decisionmaking process has failed. To allow a Section 1983 damages lawsuit against a nonprosecuting official to proceed under these circumstances does not require courts to examine the prosecutor's decisionmaking. The only question is whether the nonprosecuting official who has been sued induced the prosecution—that is, filed the initial complaint or brought the case to the prosecutor's attention—and whether he did so to retaliate against the plaintiff's protected expression. If he did, he should be held liable.[13]

2. A case in which a plaintiff challenges an arrest on the grounds that it was the product of retaliatory animus is altogether different.

In an arrest case, there is no question of absolute immunity preventing an aggrieved person from suing the actor who arrested him, or who "cause[d him] to be subjected" to an arrest, 42 U.S.C. § 1983. In many cases, the defendant will be the actual line-level officer who took the plaintiff into custody. These officers are not entitled to absolute immunity. *Pierson v. Ray*, 386 U.S. 547, 555 (1967). In these cases, the animus and the injury are united entirely in a single actor.

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[13] Theoretically, there might be a case in which a malicious nonprosecuting official could show that the prosecutor would have gone forward without probable cause in any event. But it is difficult to imagine this happening in practice.

And even when the defendant is a municipality or a higher-level official instead of (or in addition to) the arresting officer, there is no potentially responsible actor whose decisions are beyond scrutiny. Whereas every "retaliatory prosecution" suit must proceed without the prosecutor—and without probing the decision to prosecute—when *arrests* are challenged as retaliatory, there is no issue of staging Hamlet without the Prince. All responsible actors are subject to suit for constitutional violations, and the causal chain is straightforward. In contrast to a prosecutor, who is presumed to act as a brake on any animus held by actors further back in the causal chain, there is no reason to assume that an arresting officer has acted as an independent check on his supervisors or his employer.

Petitioner's case illustrates the point. The district court described the facts as supporting an inference that "the officer, a young officer, present in a city council meeting, hearing a councilwoman—and frankly, a councilwoman like Ms. Wade, who is a very persuasive person just simply followed her direction" to arrest petitioner. Tr. 14 (12/12/2014), ECF No. 784. The City Council's official minutes stated that petitioner "was escorted out to [sic] the meeting at the request of Councilperson Wade." City of Riviera Beach, Regular City Council Meeting Minutes at 4 (Nov. 15, 2006), https://tinyurl.com/RBMin1115. No one would expect an officer in this situation to conduct an independent assessment of probable cause and then tell the presiding city councilmember, "No, I refuse to 'carry him out,' because I am not sure whether I have probable cause to do so."

By contrast, prosecutors are never required to act in the moment when they decide whether to prosecute. And they frequently decline prosecutions. 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)).

Indeed, this case shows the stark difference between prosecutors and other government actors. Once the state's attorney came into the picture, the charges against petitioner were dismissed because "there was 'no reasonable likelihood of successful prosecution,'" Pet. App. 5a. Indeed, the district court seconded that decision when it concluded that there was no probable cause for either of the charges listed on the notice to appear. *See* J.A. 105, 108. On the other hand, petitioner was arrested without any government official having the faintest idea what criminal law he might have violated. There is no justification for giving the City prosecutorial immunity from liability or extending *Hartman*'s exception.

Courts regularly look behind the decisions of police officers and municipalities to determine whether or not they acted with a constitutionally forbidden motivation. Thus, the "legal obstacle" present in *Hartman* does not exist in retaliation-by-arrest cases. *Hartman*, 547 U.S. at 263. And because there is no such obstacle, once a plaintiff carries his burden under *Mt. Healthy*, the burden should shift to the defendant to show that he would have made the arrest regardless.

B. Litigating probable cause in retaliatory arrest cases is entirely different from litigating the issue in retaliatory prosecution cases.

In *Hartman*, this Court distinguished retaliatory prosecution cases from "ordinary" retaliation cases by noting that in the former, "there will always be a distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation, namely evidence showing whether there was or was not probable cause to bring the criminal charge." *Hartman*, 547 U.S. at 261. The Court also reasoned that pleading and proving the absence of probable cause would be "cost free" to both the plaintiff and the court. *Id.* at 265. Petitioner's case offers a textbook example of why those assumptions do not carry over to First Amendment retaliation cases involving arrests.

1. Far from there being a "distinct body" of evidence with respect to "the criminal charge," petitioner's trial shows how First Amendment arrest cases can produce a shifting morass of potential charges.

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. In *Hartman* itself, this meant the seven counts in the indictment, which involved mail and wire fraud, theft of property used by the Postal Service, and receiving stolen property. *See* Petrs' Br. 7, *Hartman v. Moore*, 547 U.S. 250 (No. 04-1495) (describing the counts in the indictment). Hartman 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 in retaliation cases involving *arrests*, the "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause." *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004). Therefore, a plaintiff cannot know, short of reading the entire criminal code, the range of possible crimes for which he must establish an absence of probable cause. Even if the plaintiff were to have an arrest report or similar document alleging specific crimes, that document would not cabin the probable cause inquiry. So long as the facts known to the arresting official support probable cause for *some* crime—however minor, and regardless whether the crime was the actual reason for the arrest—the probable cause standard is satisfied.

2. Petitioner's case illustrates the problem the *Devenpeck* rule creates in the context of a lawsuit claiming an arrest in retaliation for First Amendment activity. City officials did not need to think of a crime for which there was probable cause to arrest petitioner. They could confidently assume that the City's lawyers would be able to dig up *some* statute that might retroactively provide probable cause. Years after the arrest, and weeks into petitioner's trial, the Eleventh Circuit's absolute-bar rule required petitioner to respond to a shifting set of possible offenses for which there might conceivably have been probable cause. Surely, petitioner should not have been required to plead the lack of probable cause to believe he had "willfully interrupt[ed] or disturb[ed] any school or any assembly of people met for the worship

of God or for any lawful purpose" in violation of Florida Statutes Section 871.01(1), when he had never been charged with violating that statute, or given notice that it might apply to his conduct.[14]

And if petitioner was not required to plead the absence of probable cause to arrest him pursuant to Section 871.01(1), how can it be that he was required to disprove probable cause under that provision when it "popped up" midway through a multiweek civil trial, Tr. 8 (12/12/2014), ECF No. 784, eight years after his arrest? The mind reels at the sprawling mess such a rule makes of the pleading, discovery, and trial processes. Whatever else is true, this can hardly be the "cost free" regime *Hartman* saw in retaliatory prosecution cases, 547 U.S. at 465.

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[14] *Cf.* John Jay Osborne, Jr., The Paper Chase xii (40th anniversary ed. 2011) (quoting the fictitious case *Rex v. Haddock*, Misl. Cas. C. Law at 31) ("[C]itizens who take it upon themselves to do unusual actions which attract the attention of the police should be careful to bring these actions into one of the recognized categories of crimes and offenses for it is intolerable that the police should be put to the pains of inventing reasons for finding them undesirable…").

CONCLUSION

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

Respectfully submitted,

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