No. 17-21

IN THE

Supreme Court of the United States

FANE LOZMAN,

Petitioner,

—v.—

CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

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

BRIEF FOR *AMICUS CURIAE* INSTITUTE FOR FREE SPEECH IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: PAGE

Periodicals:

Statutes and Regulations:

BRIEF OF INSTITUTE FOR FREE SPEECH AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The Institute for Free Speech, previously known as the Center for Competitive Politics, is a nonpartisan, nonprofit organization that exists to protect and defend the First Amendment rights of speech, press, assembly, and petition. As part of that mission, the Institute represents individuals and civil society organizations *pro bono* in cases raising First Amendment objections to protected speech. The Institute has an interest in this case because arrests made in retaliation for the exercise of First Amendment rights are a particularly chilling form of governmental response to constitutionally protected but officially disfavored speech. It would imperil First Amendment interests of the most significant nature if such governmental misconduct, however egregious and whatever the circumstances, were immunized from judicial scrutiny whenever probable cause of a violation of law may be said to have existed.

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[1] Pursuant to Sup. Ct. Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Petitioner's blanket consent to the filing of *amicus* briefs, filed with the Court on December 19, 2017, and Respondent's written consent to the filing of this brief have been filed concurrently with this brief.

To avoid that result and to vindicate First Amendment principles of the highest order, the Institute for Free Speech submits this brief in support of petitioner Fane Lozman.

INTRODUCTION: *MT. HEALTHY* AND ITS PROGENY

The Court has long since articulated the framework within which the central issue of this case should be addressed. In *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), the Court determined that to state a claim for First Amendment retaliation, a plaintiff must show that: (1) her speech was constitutionally protected; (2) she suffered adverse conduct that would likely deter a person of ordinary firmness from engaging in such speech; and (3) in part, plaintiff's constitutionally protected activity motivated defendant's adverse action. *See id.* at 285-287. That decision further provides that once the plaintiff shows that her protected conduct was a motivating factor triggering the defendant's adverse conduct, the burden shifts to the defendant to show that it would have taken the same action in the absence of the protected conduct, in which case the defendant cannot be held liable. *Id.* at 287.

Application of *Mt. Healthy* neither requires nor permits lower courts to ignore the issue of probable cause. Rather, a court deciding a case governed by *Mt. Healthy* considers whether probable cause existed as a factor in its holistic assessment of the circumstances triggering the arrest. The more plausible the submission that the

cause of an arrest was official disapproval of protected speech, the more likely it is that a First Amendment retaliation claim will succeed. The less plausible, the less likely a juridical determination will follow that a First Amendment claim will carry the day.

Mt. Healthy focuses on the issue of motivation. What it does not do—what it rejects—is the notion that so long as there was probable cause for an arrest, it necessarily follows in all circumstances that a retaliation claim must fail. That result is all the more important in a nation awash in criminal statutes, one in which, as the brief submitted by the Institute for Justice in this case points out, an average Florida driver could easily be arrested for at least one moving violation every time she drives. Br. of *Amicus Curiae* Institute for Justice In Supp. of Pet. for Cert., 10-11.

In *Hartman* v. *Moore*, 547 U.S. 250 (2006), the Court deviated from the *Mt. Healthy* standard, adding a no-probable-cause element to retaliatory prosecution claims. In so holding, the Court emphasized that its rationale for deviating from the *Mt. Healthy* analysis was the "distinct problem of causation" naturally present in all retaliatory prosecution claims. *Id*. at 263. The causation problem identified by this Court is that a plaintiff bringing a retaliatory prosecution claim necessarily "must show that the nonprosecuting official acted in retaliation, and must also show that he induced the prosecutor to bring charges that would not have been initiated without his urging." *Id*. at 262. By its nature, such a showing is exceedingly difficult because "the longstanding presumption of regularity accorded to

prosecutorial decisionmaking," *id.* at 263, makes the prosecutor's mind a black box—the court may not inquire into the subjective motivation of the prosecutor who brought the charges. As a result, the court must proceed on the basis that so long as probable cause for the prosecution existed, the underlying motivation of the state in commencing the prosecution may not be challenged without intruding into long-protected decisionmaking areas. There is no such "legal obstacle," as the court in *Hartman* put it, to inquiries into whether police or authorities who decide whether to arrest people for any of the multitudes of potential offenses that are embodied in legislation did so with the motivation of suppressing or punishing constitutionally protected speech. *See id.*

Mt. Healthy remains firmly established and is routinely applied in cases involving claims of First Amendment retaliation. Application of *Mt. Healthy* does not guarantee the success of a plaintiff alleging unconstitutional retaliation; application of *Hartman* assures its failure in any situation in which probable cause is held to exist. The core legal issue in this case is whether the *Mt. Healthy* standard should be applied in retaliatory arrest cases or whether the *Hartman* exception should carry the day. We urge the former result for reasons set forth in this submission.

ARGUMENT

I. SIGNIFICANT DEPRIVATIONS OF FIRST AMENDMENT RIGHTS WILL OCCUR IF THE EXISTENCE OF PROBABLE CAUSE FOR AN ARREST BARS, UNDER ALL CIRCUMSTANCES, ALL RETALIATORY ARREST CLAIMS

The answer to the question posed above is, we submit, most easily reached by reviewing a number of cases already decided by this Court and by various lower courts. The facts set forth in those cases illustrate the magnitude of the speech-destructive impact of a rule that a First Amendment retaliation claim may not be juridically entertained when probable cause exists of the violation of law by the party asserting the claim. We set forth the facts of four recent cases—one in a court of appeals and three in federal district courts—in the pages that follow. Before doing so, however, we consider the potential impact of such a rule in two cases previously heard and determined by this Court.

In both *Hill* v. *Colorado*, 530 U.S. 703 (2000) and *McCullen* v. *Coakley*, 134 S. Ct. 2518 (2014) this Court considered the constitutionality of state statutes that established buffer zones in which speech was significantly limited near abortion clinics. Both cases involved facial challenges under the First Amendment but both could, just as well, have arisen in the context of First Amendment retaliation claims. In the first case, individuals who sought to engage in "'sidewalk counseling'" for the asserted purpose of educating, counseling, persuading, or informing passersby

"'about abortion and abortion alternatives'" challenged the constitutionality of the statute. *Hill*, 530 U.S. at 708. In the second case, individuals who sought "to engage women approaching the clinics in . . . 'sidewalk counseling,' which involves offering information about alternatives to abortion" offered similar challenges to the statute. *McCullen*, 134 S. Ct. at 2527. This Court affirmed the constitutionality of the former statute and a dozen years later held the latter statute unconstitutional.

We do not seek in this brief to relitigate the constitutionality of either statute but simply to put before the Court the question of how it would have dealt with either case if the constitutionality of both statutes had been affirmed and if pro-life speakers had been able to demonstrate that while they had spoken within the designated zones in a matter inconsistent with the governing standard—thus providing a basis for a determination of probable cause of a violation—the statutes were, in practice, only being enforced as to them because of their views—thus providing a basis for determinations of retaliation against them for the exercise of their First Amendment rights. In fact, the dissenting opinions of Justices Scalia and Kennedy in *Hill* (530 U.S. at 741, 765) and the concurring opinions of Justices Scalia and Alito in *McCullen* (134 S. Ct. at 2541, 2548) urged that the statutes at issue were viewpoint-based and thus at odds with the First Amendment. Majorities on the Court in the two cases concluded that the statutes need not be so read. But had the anti-abortion activists whose speech was limited by the statutes at issue been victimized by retaliatory arrests based on the content of their speech,

adherence to the approach of the Eleventh Circuit in the *Lozman* case would have required dismissal of any First Amendment retaliation claims they might have asserted, simply because of the presence of probable cause of violations of those laws.

We do not believe such result is consistent with the First Amendment. But that is precisely what would be required if the Eleventh Circuit ruling in this case were affirmed. A review of lower court cases leads to the identical conclusion. We turn to those cases.

A. *Ford* v. *City of Yakima*, 706 F.3d 1188 (9th Cir. 2013)

In *Ford* v. *City of Yakima*, 706 F.3d 1188, 1190 (9th Cir. 2013), plaintiff Eddie Ford was listening to music while driving when he noticed a police car, driven by defendant Officer Ryan Urlacher, following him.[2] Ford stepped out of his car at a red light and asked Officer Urlacher why he was following him so closely. *Id.* Officer Urlacher told Ford to get back into his car and "go." *Id*. Moments later, Officer Urlacher pulled Ford over. *Id*. After parking, Ford emerged from his car yelling and told Office Urlacher that he believed the stop was racially motivated. *Id*. Officer Urlacher warned Ford to stay in the car or he would go to jail. *Id.* Ford heeded Officer Urlacher's warning. *Id*.

Officer Urlacher proceeded to tell another officer, "'I think I'm going to arrest [Ford] for [a]

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[2] The facts in the *Ford* case and others discussed in this brief are set forth in the opinions and court filings cited.

city noise ordinance violation right now. He might only get a ticket if he cooperates. But with that attitude, he's going to get cuffed.'" *Id*. Officer Urlacher next handcuffed Ford and made the following statements to him: "'Stop running the mouth and listen'"; "'If you talk over me, you are going to go to jail, sir. Do not talk over me'"; "'If you cooperate, I may let you go with a ticket today. If you run your mouth, I will book you in jail for it. Yes, I will, and I will tow your car'"; "'If you cooperate and shut your mouth, I'll give you a ticket and you can go.'" *Id*. at 1190-1191. Ford stopped yelling and proceeded to answer Officer Urlacher's questions with, "'Uh-huh'" and "'You do what you want.'" *Id*. at 1191.

After Ford expressed concern about getting to work, Officer Urlacher told him:

> "'Well that's not going to happen if you don't—if you keep running your mouth. Okay? If you have diarrhea of the mouth, you will go to jail. If you cooperate with us and treat us like human beings, we will treat you like a human being. Do you understand me?'" *Id*.

Officer Urlacher proceeded to tell a backup officer, "'I don't know if I'm going to book him yet. I'll see if he's going to shut up'" before telling fellow defendant Lieutenant Nolan Wentz, "'So he's under arrest for the city ordinance right now. If he shuts up, I'll let him go with a ticket.'" *Id*. Wentz then advised taking Ford to jail; Ulracher agreed.

While being driven by Officer Urlacher to the booking facility, Ford invoked his right to free

speech. In response, Officer Urlacher replied, in part:

> "'You're going to jail for numerous reasons. The crime you're going to jail for is the city noise ordinance. A lot of times we tend to cite and release people for that or we give warnings. However . . . you acted a fool . . . and we have discretion whether we can book or release you. *You talked yourself—your mouth and your attitude talked you into jail. Yes, it did.*'" *Id.* (emphasis in original).

Ultimately, the Ninth Circuit concluded that, because "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" that "a rational jury could find that the officers deterred or chilled the future exercise of Ford's First Amendment rights." *Id.* at 1194. The court then determined that "the facts establish[ed] that the officers' alleged conduct violated [Ford's] right to be free from police action motivated by retaliatory animus, even if probable cause existed for that action." *Id.* at 1195. After finding that the defendant officers were not entitled to qualified immunity, the court reversed the district court's granting of summary judgment and allowed Ford's claim to proceed to trial because he "put forth facts sufficient to allege a violation of his clearly established First Amendment right to be free from police action motivated by retaliatory animus, even if probable cause existed for that action." *Id.* at 1196.

B. *Gullick* v. *Ott*, 517 F. Supp. 2d 1063 (W.D. Wis. 2007)

In *Gullick* v. *Ott*, 517 F. Supp. 2d 1063 (W.D. Wis. 2007), plaintiff Thomas Gullick sued defendant deputy sheriff Terry Ott in his individual capacity for issuing him a citation in retaliation for supporting a particular political candidate. Gullick was well-known as a supporter of town-sheriff candidate Richard Bradner, and was "disliked by supporters of" Bradner's opponent, Dennis Richards. *Id* at 1065. Ott, on the other hand, was an avid supporter of Richards. *Id.* In fact, Ott's support was so strong that even before the incident giving rise to this case, another officer warned Gullick to "look out for" Ott. *Id.* at 1066. In this warning, the other officer said that Ott would treat Gullick unfairly were the two to ever have a dispute, because of their opposing political views. *Id.*

The interaction giving rise to the suit started when Ott saw Gullick standing on the side of the road near a sign that read: "Richards for Sheriff." *Id*. Ott pulled off to the side of the road, approached Gullick, and asked him why he was near the sign. *Id.* Gullick maintained he said that he was examining the sign to see whether it had been placed illegally on a public right of way; according to Ott, Gullick responded that he went near the sign to urinate. *Id.*

Shortly thereafter, Ott told Gullick to wait in his car while he took a look around. *Id*. Ott surveyed the area, and then contacted the sheriff's dispatch center to discuss the situation. *Id.* Ott identified Gullick to the dispatcher, and then described what he had seen. *Id*. In that

description Ott noted that the "Richards for Sheriff" sign was "bent over onto the ground." (Ott's supervisor, however, visited the scene later that night and found no such damage to the sign). *Id.*

With Gullick still waiting in his car, Ott started text-message conversations with two other officers. In one of the conversations, the other officer wrote that Gullick was "'a political fanatic,'" and that Ott should call him. *Id.* at 1067. Ott responded that he could not make the call, but that he was in search of the statute on public urination. *Id.* In the other conversation, the other officer asked whether Ott thought Gullick was the person responsible for the anti-Richards fliers that were placed around town.[3] *Id.*

After his conversation, Ott returned to Gullick, issued him a citation for public urination, and asked whether he could search his car for anti-Richards fliers.[4] *Id.* Gullick consented, and Ott searched Gullick's car to no avail. *Id.* All in all, the stop lasted a little over one hour. *Id.*

The court analyzed the absence of probable cause as one factor in its larger inquiry into whether the arrest was motivated by retaliatory animus, in accordance with the *Mt. Healthy*

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[3] While the stop was ongoing, Richards called his campaign manager to tell him that Gullick had been caught "'peeing on a sign or bending a sign.'" The manager responded that "'they finally caught'" Gullick. *Id.*

[4] In his police report, Ott wrote that he had searched Gullick's car for anti-Richards fliers in pursuit of "'evidence to support [his] case of criminal damage to a political sign.'" *Id.*

framework. The court found that parties' diametrically opposing viewpoints, the ominous warning to Gullick, the infrequency with which public-urination statutes are enforced (especially in rural areas), the dispute of fact as to the absence of probable cause, and the groundless search of Gullick's car all suggested that the factor driving Ott's decision to give Gullick a citation was actually Gullick's support of Bradner. *Id.* Summary judgment was thus denied to deputy sheriff Ott.

C. *Marlin* v. *City of New York*, 2016 WL 4939371 (S.D.N.Y. Sept. 7, 2016)

In *Marlin* v. *City of New York*, 2016 WL 4939371, at *2 (S.D.N.Y. Sept. 7, 2016), plaintiff Jason Marlin participated in the Occupy Wall Street demonstrations in New York City's Union Square. According to Marlin, he was aware that the park closed at midnight because fellow protestors had "mentioned it" to him. *Id.* at *2. However, he claimed that he did not believe that the part of Union Square in which he stood that night closed at midnight because it was not part of the park; plaintiff asserted that he was standing outside the park entrance in a public right-of-way. *Id.* at *2, *11.

Marlin alleged that he was arrested because police officers believed he was assisting another protestor who criticized the police. A female protestor standing next to Marlin was arrested after yelling, "'You should be ashamed of yourselves'" at the officers. *Id.* at *3. Seconds after the female protestor's arrest, one of the defendant officers alleged that Marlin was "helping" her and ordered his arrest. *Id.* Police affidavits maintained

that Marlin interfered with an ongoing arrest, and that he resisted arrest by refusing to place his arms behind his back and falling to the ground. *Id*. at *4.

Marlin had been charged with resisting arrest and obstruction of governmental administration. *Id*. The district court's analysis of his First Amendment retaliation claim focused entirely on the presence of probable cause for his commission of a different offense—violation of New York City park rules—because in the Second Circuit, "[t]he existence of probable cause will defeat a First Amendment claim, 'premised on the allegation that defendants prosecuted a plaintiff out of a retaliatory move.'" *Id*. at *14 (quoting *Fabrikant* v. *French*, 691 F.3d 193, 215 (2d Cir. 2012)). In its prior analysis of plaintiff's claim for false arrest, the court had already found that the defendant officers had probable cause to arrest Marlin for violating R.C.N.Y. § l-03(a), which prohibits being in a city park after it is closed to the public. *Id*. at *9-*10. Reasoning that plaintiff was at least near "an entrance to the park" and that thus "arguable probable cause" existed for this violation, the court held that it saw no need to decide whether there was probable cause to arrest Marlin for a violation of any of the other park rules at issue or for the charges actually cited at the time of his arrest. *Id*. at *10-*11. So long as probable cause existed for *any* violation, the court concluded, the question was settled and no retaliation claim could survive. *Id*. at *10- *11, *14.

D. *Cranford* v. *Kluttz*, 2017 WL 4358761 (M.D.N.C. Sept. 30, 2017)

In *Cranford* v. *Kluttz,* 2017 WL 4358761, at *1 (M.D.N.C. Sept. 30, 2017), plaintiff Brian D. Cranford, a Christian "street preacher" who traveled his local area professing his interpretation of the Christian Bible on public streets, began preaching at the "Farmers' Day Festival," a street fair featuring a farmer's market and other local vendors. Defendant local police Chief Eddie Kluttz reassigned defendant Detective Reese Helms from general patrol duty and instructed him to observe Cranford, telling Detective Helms that "if [plaintiff] violates any law, he should be arrested." Excerpts of Dep. of Reese Helms at 17, 20, *Cranford* v. *Kluttz*, No. 15-cv-00987 (M.D.N.C., Dec. 1, 2016), ECF No. 31-3. When Detective Helms told Cranford he could not preach on Festival grounds or pass out literature inside festival grounds because he had not registered for a vendor booth, Cranford elected to stand near the boundary of the festival grounds, and preach to passersby, focusing on the topic that women who did not dress modestly were "whores and prostitutes." 2017 WL 4358761, at *17-*19.

After Cranford's preaching precipitated a "contentious" conversation with a specific festivalgoer, Detective Helms approached Cranford and told him, "'[y]ou're not gonna be disrespectful'" and "'don't start causing issue with the people. You can preach, but that has nothing to do with talking about people.'" *Id*. at *2. Detective Helms' instructions were evidently based on the North Carolina state statute prohibiting "[d]isorderly conduct," which included causing a public disturbance by "[m]ak[ing] or

us[ing] any utterance, gesture, display or abusive language which is intended and plainly likely to provoke violent retaliation." N.C. Gen. Stat. § 14–288.4(a)(2); 2017 WL 4358761, at *20.

Cranford continued to preach on the topic that women should dress modestly, at times addressing his comments to specific festivalgoers and at one point gesturing to Detective Helms' wife and family, stating

> "'All you ladies need to learn how to put on some clothes, too. I'm talkin' to her. I'm talkin' to your family members. And all of those ladies over there. The Bible says that a woman should dress modestly. See a lot of ladies out here dressed like tramps and whores and prostitutes today. The Bible says you dress modestly. Today all you ladies who's dressed half-nekkid out here.'" *Id.* at *3, *19.

Immediately before Cranford's arrest, he and Detective Helms had the following exchange:

> "Defendant Helms interrupted him, 'Sir, you cannot call people whores and prostitutes.' [Cranford] immediately responded, 'The Bible says it calls 'em whores and prostitutes.' Defendant Helms said, "If you say that one more time, I'ma place you under arrest' and [Cranford] again immediately responded, 'You can't be whores and prostitutes, you can't be.'" *Id.* at *3 (internal citations omitted).

Cranford filed multiple claims relating to his arrest, including a claim for First Amendment retaliation. In considering other claims, the court

found sufficient probable cause to confer qualified immunity on the defendants for a possible Fourth Amendment violation. *Id.* at *17-*19. The court acknowledged that the statements that precipitated Cranford's arrest could have been general professions of his interpretation of Biblical principles, but it also found that it was reasonable to conclude that Cranford may have intended his statements to provoke specific individuals. *Id.* at *17. The court found probable cause to arrest on the basis that Cranford was ultimately convicted of disorderly conduct by a state court. *Id.*

The court concluded that notwithstanding that it was "possible, at least theoretically, that Defendant Helms also acted in retaliation for [Cranford's] exercise of his First Amendment rights," *id.* at *21, Cranford could not state a claim against Detective Helms for retaliatory arrest due to the existence of probable cause.

* * * * *

The above cases, one from a court of appeals and three others from district courts, illustrate not only the wide range of circumstances in which claims of retaliatory arrests occur, but the vice of a *per se* rule barring all First Amendment retaliation claims so long as probable cause for an arrest existed. Marlin may have had a more attractive claim than Ford, Cranford than Gullick, but the enforcement of a rigid legal bar to the assertion of a retaliatory arrest claim in all four cases is indefensible.

II. ABSENT THE SPECIFIC CIRCUMSTANCES TRIGGERING THE *HARTMAN* EXCEPTION, *MT. HEALTHY* SHOULD BE APPLIED TO PERMIT VINDICATION OF CRITICAL FIRST AMENDMENT INTERESTS

The above cases also reveal that the framework articulated by this Court in *Mt. Healthy,* which considers probable cause, but does not allow its existence, in and of itself, to defeat a retaliatory arrest claim, should be followed. The *Mt. Healthy* framework, unlike that set forth in *Hartman*, allows the Court to make crucial inquiries into whether the communicative impact of protected speech impermissibly motivated an arrest. Courts cannot protect First Amendment rights using a mode of inquiry that does not permit them even to examine whether protected speech was targeted based on its communicative impact.

A. Retaliatory Arrest Cases Do Not Present Special Circumstances Requiring Absence of Probable Cause as a Proxy Inquiry

Most retaliatory arrest cases do not need the "gap-filling" analysis required in *Hartman* because, as illustrated by the cases above, the arresting officer and the government official with purported animus are one and the same. *See, e.g.*, *Ford* v. *City of Yakima*, *supra*; *Cranford* v. *Kluttz, supra*. Like the "ordinary retaliation claims" that the Court differentiated retaliatory prosecution claims from in *Hartman*, in these types of claims "the government agent allegedly harboring the animus is also the individual allegedly taking the adverse action." *Hartman,* 547 U.S. at 259. As the

government official harboring the animus is the executor of the arrest, there is no need to inquire into absence of probable cause to determine his motivation via a proxy analysis—his motivation can be examined directly.

The instant case, where another official instructed the arresting officer to effect Mr. Lozman's detention, may seem to present a different situation that involves the need to fill a gap because multiple actors are involved. However, in this and similar situations involving multiple government officials participating in and influencing the decision to arrest, unlike in a retaliatory prosecution claim, the court may still consider the actual motivation of the arresting officer. The "absence of probable cause" inquiry is not needed as a proxy where the court can inquire into the motivation of the arresting officer. The court can directly examine whether the governmental official making the arrest was substantially influenced by his or another government official's desire to retaliate against protected speech with which they disagreed. In retaliatory arrest cases, requiring plaintiff to negate the existence of probable cause fills no important function, and only serves to cut off the court from inquiring into whether the arrest was motivated by the communicative impact of protected speech.

B. The *Mt. Healthy* Framework Allows Courts to Determine Whether State Action Was Taken to Punish Protected Speech Because of Its Communicative Impact

The burden-shifting framework considers absence of probable cause as an element of the third *Mt. Healthy* factor: whether plaintiff's constitutionally protected activity motivated defendant's adverse action. This allows courts to consider absence of probable cause as an element of the inquiry, together with the officer's motivation, in order to determine the true motivation of the arrest. Where the court is not bound to search for any possible probable cause, and terminate its inquiry if probable cause is found, it is able better to assess whether the arrest was retaliatory. Permitting the court to consider absence of probable cause as just one element of the inquiry into the officer's motivation allows the court to more accurately assess whether the speech that triggered the arrest was protected or unprotected speech, and whether the arrest was based on the speech's message. *Ford* is illustrative of the benefits of formulating the inquiry in this fashion. There, the arresting officer explicitly told Ford that the real reason for his arrest was his argumentative attitude—not his violation of the noise ordinance. Ford was plausibly arrested not for his unprotected speech that triggered the arrest, but rather based on his later, protected speech, due to its message. Because the court did not have to stop its analysis once it found probable cause, it was able to determine that a jury could find that Ford was arrested for an impermissible retaliatory motive against his protected speech.

Gullick too shows that the *Mt. Healthy* framework allows the court to determine whether the arrest was actually triggered by retaliatory animus towards plaintiff's protected speech. Because the court understood that it was permitted to consider the existence of probable cause to arrest as part of its larger inquiry into the officer's motivation for arresting, it was able to determine that an officer who had demonstrated animus towards Gullick for his political speech and who had to look up the statute that was the basis for his charge could in fact have had a retaliatory motive

Gullick also demonstrates how examining the existence of probable cause as part of the larger inquiry into the arresting officer's motivation can reveal that the officer exercised discretion on a charge wholly unrelated to speech *because of* the arrestee's protected speech in a separate incident. Gullick pleaded facts supporting the proposition that the arresting officer was upset with his protected political speech prior to the incident for which he was arrested. In fact, other law enforcement officers had warned Gullick to look out for the officer who arrested him because of their political dispute. He was then arrested for public urination, a charge wholly unrelated to speech, which the court noted was very rarely enforced. By considering probable cause as part of the inquiry into the motivation to arrest, the court was able to take into account whether the discretionary decision to arrest was based on his protected speech. This Court has repeatedly found unconstitutional laws that provide the police with "unfettered discretion to arrest individuals for words or conduct that annoy or offend them," *City*

of Houston v. *Hill*, 482 U.S. 451, 465 (1987). The *Gullick* ruling was consistent with that determination.

C. Focusing Only on the Existence of Probable Cause Does Not Allow Courts to Consider Whether a State Action Was Taken to Punish Protected Speech Because of Its Communicative Impact

The First Amendment is not easily vindicated in circuits where the courts consider absence of probable cause not as a factor in its holistic assessment of the circumstances motivating an arrest, but as a single determinative element on which plaintiff's retaliation claim turns. In these circuits, the court may not even inquire into whether the arresting officer was at all influenced by the speaker's message, so long as probable cause exists for *any* reason—even a reason other than the charges cited at the time of arrest. *See, e.g.*, *Marlin*, 2016 WL 4939371. In determining whether probable cause exists for an arrest, courts evaluate whether the facts known by the arresting officer at the time of the arrest objectively provided probable cause to arrest. *Devenpeck* v. *Alford*, 543 U.S. 146, 153 (2004). Whether probable cause existed for the charge actually invoked by the arresting officer at the time of the arrest is irrelevant. *Id.* at 153-54. Once the court finds probable cause, the inquiry ceases, and the First Amendment retaliation claim is defeated, without the court even looking at whether the plaintiff had engaged in speech possibly deserving of constitutional protection, or if the officer took action based on the message plaintiff conveyed.

See Marlin, 2016 WL 4939371, at *14. Such a cursory inquiry runs contrary to this Court's First Amendment jurisprudence.

The First Amendment demands that courts must at least inquire into whether state action (1) targets protected speech, and (2) whether that speech was targeted because of its communicative impact. *See NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 915-16 (1982) ("The fact that [a non-violent, politically motivated boycott] is constitutionally protected, however, imposes a special obligation on this Court to examine critically the basis on which liability was imposed."). Even where this Court has upheld restrictions on conduct that have secondary effects on speech, it has first, as a threshold matter, analyzed whether or not the application of the law targeted the communicative impact of the conduct. *See United States* v. *O'Brien,* 391 U.S. 367, 381–82 (1968) ("In other words, both the governmental interest and the operation of the 1965 Amendment are limited to the noncommunicative aspect of O'Brien's conduct . . . . For this noncommunicative impact of his conduct, and for nothing else, he was convicted.").

As the above cases illustrate, for courts to analyze a cause of action for violation of First Amendment rights without even engaging in any of the most fundamental and basic inquiries this Court has developed to define the contours of that right is to slam the door on the First Amendment altogether.

In *Marlin*, the court did not even consider whether a protestor exercising his First Amendment rights in public, arguably on the

public sidewalk, was engaging in protected speech. It did not have to—indeed, was not permitted to—resolve the dispute between the protestors' version of events and the police officers' version, nor whether there was probable cause for the violations cited at the time of plaintiff's arrest. The court stopped considering the First Amendment retaliation claim once it concluded that there was only *arguable* probable cause that plaintiff broke a *different* law than the police cited at the time of his arrest. Protection of First Amendment rights requires greater judicial attention—especially as the increased prevalence of citizen recordings of the police provides courts with evidence of what truly occurred. *Cf.* Linda Zhang, *Retaliatory Arrests and the First Amendment*: *The Chilling Effects of* Hartman *v.* Moore *on Freedom of Speech in the Age of Civilian Vigilance*, 64 UCLA L. REV. 1328, 1363 (2017).

Cases such as *Marlin* demonstrate that in the circuits that bar retaliation claims unless probable cause is negated, the pro-life activists in the hypothetical we posited at the very beginning of this discussion would have no recourse to pursue such claims. If a clash of pro-choice and pro-life activists sparked a riot, the police would be free to arrest only the pro-life activists because of the presence of probable cause. Even if an officer acknowledged to all the pro-life activists that he rounded up, "I'm arresting only pro-life people because I think you're wrong," or "I'm arresting all you pro-life people because it's always you that start the trouble," the arrest could not be considered retaliatory so long as probable cause for the violation of law existed.

Cranford highlights a more nuanced problem presented by requiring the negation of probable cause as a prerequisite to asserting a retaliation claim. Since the court must tightly focus on whether probable cause existed at the point plaintiff was arrested, it may not consider whether the arresting officer's retaliatory animus shaped the entire scenario leading up to the arrest. In *Cranford*, the court confronted a situation where another court had already determined that Cranford's professions of his religious beliefs did ultimately cross the line into unprotected "fighting words." However, Cranford's unprotected statements were uttered *after* Cranford had already been targeted by and had verbal exchanges with law enforcement. Chief Kluttz had told Detective Helms to target Cranford for arrest. Detective Helms removed Cranford from the festival grounds, and had issued his own judgment on the content and viewpoint of Cranford's speech, telling him it was "disrespectful." Presumably, the speech that was "disrespectful" was protected speech that did not violate the disorderly conduct statute, as Detective Helms did not yet arrest Cranford at that point. Despite the potentially significant facts suggesting retaliatory motive, the court was not permitted to even consider whether Detective Helms and Chief Kluttz targeted Cranford based on their knowledge of his prior preaching and provoked him into ultimately violating the disorderly conduct statute, for, in the Fourth Circuit, once probable cause to arrest for any reason is found, the court may inquire no further. That is precisely why a rule imposing the far more holistic *Mt. Healthy* approach is needed.

CONCLUSION

For the reasons stated above, the Institute for Free Speech respectfully submits that this Court should reject any mode of analysis for First Amendment retaliatory arrest claims that ignores whether protected speech actually was or was not targeted based on its message. If the presence of probable cause alone defeats the existence of a First Amendment retaliatory arrest claim under all circumstances, arrests rooted in an effort to stifle protected speech will become judicially unscrutinized and undisturbed throughout the nation. Such a result risks impairing public confidence in both law enforcement and the judiciary at the same time it is irreconcilable with this Court's duty to protect First Amendment rights.

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Respectfully submitted,

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