No. 17-21

# In the Supreme Court of the United States

FANE LOZMAN, PETITIONER

*v.*

CITY OF RIVIERA BEACH, FLORIDA

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

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT**

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## QUESTION PRESENTED

Whether a claim for damages based on an alleged retaliatory arrest in violation of the First Amendment, brought under 42 U.S.C. 1983, is foreclosed when the arrest was supported by probable cause.

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and rules: Page

Statutes and rules—Continued: Page



Miscellaneous:

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## INTEREST OF THE UNITED STATES

This case concerns whether a constitutional tort claim for damages under 42 U.S.C. 1983, predicated on an alleged retaliatory arrest in violation of the First Amendment, is foreclosed when the arrest was supported by probable cause. The United States participated as amicus curiae in *Reichle* v. *Howards*, 566 U.S. 658 (2012), which presented the same issue in the context of a claim against federal officers under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The United States has a substantial interest in the circumstances in which federal officers may be held liable for damages in civil actions for alleged violations of constitutional rights. It also has a substantial interest in safeguarding those rights, including through the use of federal criminal and civil enforcement authorities.

**STATEMENT**

1. "[A]s a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions * * * for speaking out." *Hartman* v. *Moore*, 547 U.S. 250, 256 (2006). In a "standard" constitutional tort action seeking damages for such retaliation—such as a claim involving an adverse employment action or the denial of government benefits—a burden-shifting framework is used to determine whether the government's action against the plaintiff was taken because of the plaintiff's protected speech. *Id.* at 260. Under that framework, the plaintiff must establish a prima facie case that protected speech was a substantial or motivating factor in bringing about the adverse action, at which point the burden shifts to the defendant to prove that the same action would have occurred without the retaliatory motive. *Ibid.*; see *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 287 (1977).

This Court has modified that approach in cases where the alleged retaliation takes the form of a criminal prosecution. In *Hartman*, the Court held that a plaintiff bringing a constitutional tort claim for retaliatory prosecution based on the exercise of First Amendment rights must plead and prove, as an element of the cause of action, the absence of probable cause. 547 U.S. at 252. The Court did not clarify in *Hartman* whether the same requirement would apply to claims alleging retaliatory arrest. That question was presented in *Reichle* v. *Howards*, 566 U.S. 658 (2012), but the Court resolved that case on the alternative ground of qualified immunity. *Id.* at 664-665.

2. This case presents the issue left open in *Reichle*. Petitioner is a resident of the City of Riviera Beach,

Florida (City), and an "outspoken critic" of the City's waterfront redevelopment plan. Pet. App. 2a.[1] In June 2006, petitioner filed a lawsuit seeking to invalidate the redevelopment plan. *Id.* at 2a-3a. Shortly thereafter, the City Council held a closed-door session during which one councilmember, Elizabeth Wade, expressed her frustration with the lawsuit and proposed taking steps to "intimidate" petitioner and others who supported it. *Id.* at 17a (citation omitted). Near the end of the meeting, the councilmembers agreed to do "whatever it takes" to "beat" petitioner's lawsuit. *Id.* at 18a (citation omitted).

On November 15, 2006, the City Council held a regular public meeting. Pet. App. 3a. Petitioner sought and received permission to address the Council during the "public comment period" of that meeting. *Id.* at 3a & n.2. Petitioner began his remarks by chiding the City's mayor and one of the councilmembers for not being present to hear his comments. *Id.* at 4a. The councilmembers did not interrupt those statements. *Ibid.* He then proceeded to make several allegations about corruption among officials in Palm Beach County, a separate jurisdiction, that were not germane to City business. *Ibid.* Councilmember Wade informed petitioner that he was not allowed to "stand up and go through that," to which petitioner replied, "Yes, I will." *Ibid.* Councilmember Wade again instructed petitioner not to address issues related to Palm Beach County, but petitioner ignored that instruction and "continued with his allegations." *Ibid.*

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[1] Petitioner has had other disputes with the City over the years. See, *e.g.*, *Lozman* v. *City of Riviera Beach*, 568 U.S. 115, 118-119 (2013) (describing dispute between petitioner and the City over petitioner's decision to dock his houseboat at a City marina).

At that point, Councilmember Wade summoned a police officer. Pet. App. 4a. As the officer approached the lectern where petitioner was standing, petitioner began "speaking louder" and asserted his right to "inform[] the citizens" about his allegations. *Ibid.* The officer gestured to petitioner and said, "Will you walk outside with me[?] I need to talk to you." *Ibid.* (brackets in original). Petitioner told the officer, "I'm not finished," and continued speaking about the alleged corruption in Palm Beach County. *Ibid.* The officer responded that petitioner would "be arrested" if he did not go outside. *Ibid.* Petitioner again refused, stating "I'm not walking outside, I haven't finished my comments." *Ibid.* Councilmember Wade then asked the officer to "carry him out." *Ibid.*

Petitioner was arrested and charged with disorderly conduct and resisting arrest. Pet. App. 4a. The state's attorney concluded that the arrest was supported by probable cause but nonetheless dismissed the charges. *Id.* at 4a-5a.

3. Petitioner filed a constitutional tort action seeking damages from the City under 42 U.S.C. 1983. Pet. App. 5a. He claimed, among other things, that his arrest was unlawful retaliation for the exercise of his First Amendment rights, including his criticisms of the redevelopment plan, the filing of his lawsuit seeking to invalidate the plan, and his efforts to expose public corruption. *Id.* at 5a, 52a, 59a.

The district court denied the parties' motions for summary judgment and held a trial on petitioner's complaint. See Pet. App. 15a-50a. In its jury instructions, the court stated that petitioner's retaliatory-arrest claim required him to prove that his speech was protected by the First Amendment and that the officer who

arrested him (1) acted under color of law; (2) was "motivated" to make the arrest by "impermissible animus" and a desire "to retaliate" against petitioner because of his speech; and (3) "lacked probable cause to believe that [petitioner] had or was committing a crime." *Id.* at 59a-60a. The court instructed the jury that, as a matter of law, petitioner's speech was constitutionally protected and that the officer acted under color of law. *Id.* at 60a. As for the probable-cause element, the court had earlier determined that probable cause did not exist for either of the charges initially cited as grounds for petitioner's arrest (disorderly conduct and resisting arrest). J.A. 105, 108. It instructed the jury on the elements of a different offense—disturbing a lawful assembly, in violation of Fla. Stat. § 871.01(1) (2006)—that the City had identified for the first time during trial. Pet. App. 61a; see J.A. 95, 120-121.[2]

The jury returned a verdict in favor of the City on all of petitioner's claims, including the First Amendment retaliatory-arrest claim. Pet. App. 6a.

4. The court of appeals affirmed. Pet. App. 1a-14a. Petitioner argued that a finding of probable cause was against the weight of the evidence and that the district court had erred in instructing the jury that the arresting officer—and not the City or its councilmembers—

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[2] Section 871.01 makes it a misdemeanor to "willfully interrupt[] or disturb[] * * * any assembly of people met * * * for any lawful purpose." Fla. Stat. § 871.01(1) (2006). The district court instructed the jury that, "to have probable cause to arrest a person for th[at] crime," reasonable grounds must exist to support a finding that (1) the person intended to impede the assembly or acted "with reckless disregard of the effect of his behavior"; (2) "a reasonable person would expect" the acts "to be disruptive"; and (3) the "acts did, in fact, significantly disrupt the assembly." Pet. App. 61a-62a; see *S.H.B.* v. *State*, 355 So. 2d 1176, 1178 (Fla. 1977).

had to have a retaliatory motive. Pet. C.A. Br. 23-39. The court rejected those arguments. It inferred from the verdict that the jury had found probable cause, Pet. App. 8a-9a, which the court concluded was consistent with the evidence, *id.* at 9a (finding that a reasonable officer could have believed that petitioner was disrupting the meeting "or was about to" do so based on his refusal to comply with repeated requests to yield the floor). The court further held that, "even assuming" the district court's instructions impermissibly required the jury to find that the officer acted out of a retaliatory motive, rather than the City or its councilmembers, any error was harmless because the presence of probable cause "defeats [a] First Amendment retaliatory arrest claim as a matter of law." *Id.* at 10a-11a (citing *Dahl* v. *Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002)).[3]

**SUMMARY OF ARGUMENT**

A. In *Hartman* v. *Moore*, 547 U.S. 250 (2006), this Court held that a plaintiff bringing a constitutional tort claim of retaliatory prosecution in violation of the First Amendment must prove, as an element of the tort, the absence of probable cause to charge him with a criminal offense. The Court emphasized the highly probative nature of probable-cause evidence in determining whether

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[3] Petitioner agrees with the court of appeals' assertion that the jury's verdict was based on the existence of probable cause. See Pet. Br. 13 ("The jury found probable cause for petitioner's arrest * * * and returned a verdict for the City."). It is not evident, however, why the jury's general verdict necessarily rested on the existence of probable cause, rather than on a lack of retaliatory motive or a failure of proof that the City was responsible for the officer's actions. See J.A. 143-147 (verdict form); see also J.A. 132, 136-139 (describing retaliatory-motive element and requirements for municipal liability).

a prosecution is valid and in resolving the complex questions of causation that arise when a prosecutor's actions are alleged to have been induced by another official's animus. The Court concluded that making the absence of probable cause an element of the claim was an efficient method of resolving those complex issues.

Similar considerations apply to retaliatory-arrest claims. As with retaliatory-prosecution claims, probable-cause evidence will be readily available to help prove or disprove the contention that the arrest was brought about by retaliatory animus. And, as with retaliatory-prosecution claims, proof of the absence of probable cause provides a necessary objective screen for what would otherwise be a complex inquiry into causation. A claim of retaliatory arrest may, as here, involve an allegation that a police officer who lacked retaliatory animus was induced to make an arrest by another person who did have such animus. And even when an officer's own alleged animus is at issue, questions of causation are still more complicated than in other retaliation contexts because officers may have entirely legitimate reasons for taking speech into account in deciding whether to make an arrest.

As in *Hartman*, requiring a plaintiff to prove the absence of probable cause in order to succeed on a claim of retaliatory arrest provides a clear and objective basis on which judges and juries may resolve complex questions of causation and strikes an appropriate balance between the interest in protecting individuals from unreasonable law-enforcement interference and the public-safety interest in allowing officers to enforce the law without fear of being subjected to unfounded tort claims. Given the central importance of probable-cause evidence to virtually every claim of retaliatory arrest, it

"makes sense" to formalize the issue as an element of the tort. *Hartman*, 547 U.S. at 265-266.

B. The common law, which plays an important role in shaping the contours and requirements of constitutional tort actions, also supports extending *Hartman*'s no-probable-cause requirement to the context of retaliatory arrests. The closest analogues to petitioner's retaliatory-arrest claim are the common-law torts of malicious prosecution and false imprisonment. The absence of probable cause is an element of a malicious-prosecution claim and an affirmative defense to a claim of false imprisonment. In neither case would a claim like petitioner's, involving an arrest supported by probable cause but allegedly induced by another person's retaliatory animus, result in damages liability for the arresting officer. No sound reason exists to expose officers to greater liability under Section 1983.

C. Petitioner contends that adopting a no-probable-cause requirement in retaliatory-arrest cases would effectively license officers to make arrests that are supported by probable cause but are nonetheless retaliatory. That concern presumes, however, that a private damages remedy is the only way to deter such arrests. Federal, state, and local governments have enforcement tools at their disposal to remedy the underlying First Amendment violation that occurs whenever an official retaliates against an individual for having engaged in protected speech. Defining the elements of a retaliatory-arrest tort to preclude damages recovery if probable cause exists, as a means of addressing the practical concerns and complexities posed by such claims, does not imply a similar limitation on the scope of the underlying First Amendment right.

## ARGUMENT

### A DAMAGES CLAIM FOR RETALIATORY ARREST IN VIOLATION OF THE FIRST AMENDMENT REQUIRES THE PLAINTIFF TO PLEAD AND PROVE THE ABSENCE OF PROBABLE CAUSE

Petitioner argues at length (Br. 17-39) that First Amendment protections for expressive activity are important, that government retaliation on the basis of expressive speech is forbidden, and that the Court should apply its usual burden-shifting framework when analyzing claims of retaliatory arrest. Those same general arguments were advanced in *Hartman* v. *Moore*, 547 U.S. 250 (2006), in the context of a retaliatory-prosecution claim, and this Court was not persuaded. The Court held in *Hartman* that, because of the causal complexity posed by such claims and the acute relevance of probable-cause evidence to that causation inquiry, the existence of probable cause defeats a tort claim for damages based on alleged retaliatory prosecution in violation of the First Amendment. See *id.* at 261-266.

The question in this case is whether the same considerations that led the Court to require the absence of probable cause as an element of a claim of retaliatory prosecution also apply to a claim of retaliatory arrest. They do. In both contexts, the existence of probable cause provides an objective and independent legal ground for the challenged action that is "apt to * * * disprove retaliatory causation." *Hartman*, 547 U.S. at 261. Indeed, the case for requiring plaintiffs to prove the absence of probable cause in the context of a retaliatory arrest is stronger because the common law would not have permitted damages liability for the analogous torts of false imprisonment or malicious prosecution

when the officer had probable cause to arrest. Petitioner lacks any persuasive distinction for *Hartman* (Br. 39-48), and does not address the common law at all.

Petitioner is left to claim that, absent a damages remedy for plaintiffs under 42 U.S.C. 1983, States and localities could engage in widespread retaliatory arrests. Setting aside that the Court did not find that same concern compelling in *Hartman* with respect to retaliatory prosecutions, petitioner's concern can be addressed by treating the absence of probable cause as an element of a retaliatory-arrest tort, rather than as a limit on the scope of the First Amendment right itself. Doing so would protect officers against unfounded claims of retaliation while mitigating any risk that abusive practices could go unchecked.

### A. Retaliatory Arrest, Like Retaliatory Prosecution, Requires A Plaintiff To Prove The Absence Of Probable Cause

1. Government action undertaken to retaliate against individuals for speech protected by the First Amendment is constitutionally forbidden "as a general matter." *Hartman*, 547 U.S. at 256; see *Wilkie* v. *Robbins*, 551 U.S. 537, 555 (2007). A plaintiff seeking damages for such retaliation in a constitutional tort action, however, must show that retaliatory animus was the "but-for cause" of the action. *Hartman*, 547 U.S. at 256, 260. As this Court has explained, "action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway." *Id.* at 260.

To establish the required causal relationship between retaliatory animus and government action in a "standard" case, this Court employs a burden-shifting

framework. *Hartman*, 547 U.S. at 260. Under that approach, the plaintiff must come forward with prima facie evidence that protected speech was a "substantial" or "motivating" factor in bringing about the adverse action. *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 287 (1977). Once the plaintiff makes that showing, the burden shifts to the defendant to prove by a preponderance of the evidence that it would have taken the same action "even without the impetus to retaliate." *Hartman*, 547 U.S. at 260 (citing *Mt. Healthy*, 429 U.S. at 287).

2. In *Hartman*, this Court identified two primary features of retaliatory-prosecution cases that distinguish them from "standard" retaliation cases, 547 U.S. at 260, and that support requiring the plaintiff to prove an absence of probable cause as an element of a retaliatory-prosecution tort. First, the Court observed that in retaliatory-prosecution cases, the probable-cause inquiry "will always be a distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation." *Id.* at 261. "Demonstrating that there was no probable cause for the underlying criminal charge," the Court explained, "will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for instigating the prosecution." *Ibid.* Conversely, "establishing the existence of probable cause will suggest that prosecution would have occurred even without a retaliatory motive." *Ibid.* The Court reasoned that the probable-cause issue "is so likely to be raised by some party at some point that treating it as important enough to be an element will be a way to address the issue of causation without adding to time or expense." *Id.* at 265.

Second, the Court observed that "the requisite causation between the defendant's retaliatory animus and the plaintiff's injury" in a retaliatory-prosecution case "is usually more complex than it is in other retaliation cases." *Hartman*, 547 U.S. at 261. A constitutional tort action for retaliatory prosecution, the Court noted, "will not be brought against the prosecutor, who is absolutely immune," but instead against someone else "who may have influenced the prosecutorial decision but did not himself make it." *Id.* at 262. Thus, the Court explained, "the causal connection required" in such a suit "is not merely between the retaliatory animus of one person and that person's own injurious action, but between the retaliatory animus of one person and the action of another," *ibid.*, whose prosecutorial decisions, moreover, would be entitled to a "presumption of regularity," *id.* at 263. The presence or absence of probable cause would have "obvious evidentiary value" in assessing whether another official's retaliatory animus induced the prosecutor's charging decision. *Id.* at 265.

The Court acknowledged that it could have chosen to permit a plaintiff to try to bridge that causal gap and show retaliatory prosecution using such "proof as the circumstances allow" in any given case, even when the prosecution was supported by probable cause. *Hartman*, 547 U.S. at 264. But, the Court concluded, "the very significance of probable cause means that a requirement to plead and prove its absence will usually be cost free by any incremental reckoning," and thus it "makes sense to require such a showing" as an element of the tort. *Id.* at 265-266. Balancing the benefits of that rule against the costs, the Court held that a lack of probable cause is necessary for a successful retaliatory-prosecution claim as a matter of law. *Id.* at 264 n.10.

3. Similar considerations counsel in favor of requiring the plaintiff to plead and prove a lack of probable cause as an element of a retaliatory-arrest tort action. See *Reichle* v. *Howards*, 566 U.S. 658, 667 (2012) (noting "the close relationship between retaliatory arrest and prosecution claims"). Retaliatory-arrest cases, like retaliatory-prosecution cases, are distinct from "standard" retaliation cases in the same two respects emphasized by the Court in *Hartman*.

a. As in the context of retaliatory prosecution, a claim of retaliatory arrest will implicate "a distinct body of highly valuable circumstantial" probable-cause evidence that is "apt to prove or disprove retaliatory causation." *Hartman*, 547 U.S. at 261; see *Reichle*, 566 U.S. at 668 ("[E]vidence of the presence or absence of probable cause for the arrest will be available in virtually every retaliatory arrest case."). Probable cause is an objective standard, the existence of which generally provides a "legal justification" for an arrest irrespective of the "actual motivations of the individual officers involved." *Whren* v. *United States*, 517 U.S. 806, 812-813 (1996); cf. *Virginia* v. *Moore*, 553 U.S. 164, 171 (2008) (explaining that a warrantless arrest supported by probable cause, even for a "minor" offense, is "constitutionally reasonable" under the Fourth Amendment). As in the case of a criminal prosecution, the existence of probable cause for an arrest provides an objective and independent ground for the challenged action.

"[E]stablishing the existence of probable cause" in a retaliatory-arrest case will therefore "suggest that [the arrest] would have occurred even without a retaliatory motive," whereas demonstrating "that there was no probable cause for the [arrest] will tend to reinforce the retaliation evidence and show that retaliation was the

but-for basis for" the arrest. *Hartman*, 547 U.S. at 261. Moreover, as in retaliatory-prosecution cases, the issue of probable cause is "likely to be raised by some party at some point" in a retaliatory-arrest case, and it would impose little, if any, practical burden to require a plaintiff to demonstrate its absence. *Id.* at 265.

Petitioner contends (Br. 46-47) that requiring a plaintiff in a retaliatory-arrest case to plead and prove the absence of probable cause will present an impractical burden because, unlike the prosecutor in a retaliatory-prosecution case, arresting officers need not specifically identify the crime for which an arrest is being made. Accordingly, petitioner argues, a plaintiff would have to plead and prove the absence of probable cause for any hypothetical crime.

That requirement is neither new nor impractical. A plaintiff already must plead and prove the absence of probable cause to arrest for any crime—including ones not initially relied upon for the arrest—in order to prevail on a Fourth Amendment constitutional tort claim challenging a warrantless arrest. See *Devenpeck* v. *Alford*, 543 U.S. 146, 153-154 (2004). Petitioner offers no reason why that requirement, already commonplace in constitutional tort actions challenging arrests, would be impractically burdensome when the underlying claim of a constitutional violation arises under the First Amendment. Indeed, in addition to his First Amendment retaliatory-arrest claim, petitioner also alleged in his complaint a Fourth Amendment claim under Section 1983 (just as many plaintiffs do) and a false-arrest claim under state law, contending that he was "arrested * * * without probable cause" and "had not committed *any* crime." J.A. 38 (emphasis added); see J.A. 31. Petitioner was required to prove, in connection with those

claims, that his arrest was not supported by probable cause to believe that he had committed any offense. He does not explain why requiring the exact same proof in the context of his First Amendment claim would have been impractical and burdensome.

Petitioner similarly contends (Br. 47-48) that incorporating the absence of probable cause for any offense as an element of a constitutional tort claim based on alleged retaliatory arrest creates a "shifting" target during litigation and prevents plaintiffs from knowing which potential offenses are at issue. That assertion is misplaced. For one thing, a plaintiff bringing such a claim based on his own arrest presumably will be aware of the circumstances that led to that arrest, and thus close familiarity with "the entire criminal code" is not necessary to identify the limited number of offenses that may have been committed. Pet. Br. 47. Petitioner, for example, states no reason why his arrest on a charge of disorderly conduct did not provide a reasonable basis to consider the related (and more specific) offense of disturbing a lawful assembly.

In any event, the Federal Rules of Civil Procedure provide a civil litigant like petitioner with ample opportunities to introduce and contest the introduction of evidence, and to ascertain and respond to his opponent's legal arguments. See, *e.g.*, Fed. R. Civ. P. 12 (notice of defenses), 26 (discovery), 43 (testimony), 51 (jury instructions), 56 (summary judgment). Petitioner does not contend that he lacked timely notice of the City's assertion that probable cause existed for the offense of disturbing a lawful assembly or that he was unfairly limited in his ability to present evidence or arguments to prove otherwise. Indeed, the extensive arguments and

evidence concerning probable cause in this case underscore the fact that, as in retaliatory-prosecution cases, such evidence is readily available in retaliatory-arrest cases. *Hartman*, 547 U.S. at 261.

b. Retaliatory-arrest cases also resemble retaliatory-prosecution cases with regard to the second feature emphasized by the Court in *Hartman*: the complexity of the causal connection between animus and the challenged action. In both types of cases, the retaliation inquiry "is usually more complex than it is in other retaliation cases," thus "support[ing] a requirement that no probable cause be alleged and proven." *Hartman*, 547 U.S. at 261; see *Reichle*, 566 U.S. at 668 (noting that a "tenuous causal connection between the defendant's alleged animus and the plaintiff's injury" exists in retaliatory-arrest and retaliatory-prosecution cases).

i. Retaliatory arrest may involve the same specific complexity present in *Hartman*: a lack of identity between the person alleged to have a retaliatory motive and the official who took the challenged action. See 547 U.S. at 262.[4] Petitioner's case is a good example. Petitioner alleged in his complaint that the members of the City Council, and specifically Councilmember Wade, harbored retaliatory animus against him and induced a police officer to arrest him because of that animus. See, *e.g.*, J.A. 26, 31. As petitioner acknowledged below, it is "undisputed" that the officer who arrested him "had no animus against [petitioner]." Pet. C.A. Br. 35; see *ibid.*

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[4] See, *e.g.*, *Archer* v. *Chisholm*, 870 F.3d 603, 611, 618-619 (7th Cir. 2017) (allegation that local officials' retaliatory animus against plaintiff induced police officers' decision to arrest); *Beck* v. *City of Upland*, 527 F.3d 853, 868-869 (9th Cir. 2008) (same); *Curley* v. *Village of Suffern*, 268 F.3d 65, 68, 72-73 (2d Cir. 2001) (same).

("[I]t was Councilwoman Wade who had the retaliatory animus.").

If petitioner had brought a retaliatory-*prosecution* claim asserting that the councilmember's allegedly retaliatory animus ultimately induced a prosecutor to bring criminal charges against him, *Hartman* would have required petitioner to plead and prove the absence of probable cause as a means of bridging the causal gap between the councilmember's animus and the prosecutor's action. It would be incongruous to permit petitioner to proceed on a retaliatory-*arrest* claim similarly premised on the councilmember's alleged retaliatory animus and the injurious actions of another person (here, the arresting officer) without any need to demonstrate the absence of probable cause in order to bridge that same causal gap. In both circumstances, one person's injurious action is said to have been induced by another person's retaliatory animus, and evidence of probable cause provides an objective screen for determining whether but-for causation likely exists.

Petitioner contends (Br. 40, 43) that retaliatory-prosecution claims are "unique" in their causal complexity because prosecutors are absolutely immune from liability for their prosecutorial decisions, whereas police officers receive only qualified immunity for their decisions to arrest. But *Hartman*'s probable-cause requirement did not turn on prosecutorial immunity. Rather, the Court explained that its rule was intended to address the unusually complex questions that arise when plaintiffs allege a "causal connection * * * between the retaliatory animus of one person and * * * the action of another." 547 U.S. at 262. Prosecutorial immunity explains why that causal gap arises in the context of a retaliatory-prosecution claim, but the same gap can and

does arise for other reasons in the context of an arrest, as this case demonstrates. This case thus presents the same complex question of causation that faced the Court in *Hartman*.

Petitioner further notes (Br. 42) that a "presumption of regularity" attaches to prosecutorial decisions but not to arrests. As this Court explained in *Hartman*, that presumption provides an "added" reason to require proof of a lack of probable cause in retaliatory-prosecution cases. 547 U.S. at 263. But the absence of such a presumption in cases involving arrests does not diminish the "powerful evidentiary significance" of probable cause in that context. *Id.* at 261. In any event, this Court has held that the existence of probable cause establishes as a matter of law that "the balanc[e] of private and public interests" favors an arrest and that an officer's decision to arrest is "constitutionally reasonable" under the Fourth Amendment. *Moore*, 553 U.S. at 171. The fact that an arrest supported by probable cause is by definition reasonable informs whether a third party's animus induced the officer's decision to arrest, just as the presumption of regularity for prosecutions supported by probable cause informs whether a third party's animus induced a prosecutor's decision to pursue criminal charges.

ii. As petitioner correctly notes (Br. 43), retaliatory-arrest cases need not involve third parties. But even where only a single officer's animus and arrest are at issue, the causation inquiry will still "usually [be] more complex than it is in other retaliation cases." *Hartman*, 547 U.S. at 261. Unlike in contexts where speech is not relevant to government decisionmaking, and thus proof

of a but-for causal relationship between speech and adverse action establishes unlawful retaliation,[5] a criminal suspect's expressive activity may be an entirely legitimate, or even necessary, factor for the officer to consider in deciding whether to make an arrest. "Like retaliatory prosecution cases, then, the connection between alleged animus and injury may be weakened in the arrest context by a police officer's wholly legitimate consideration of speech." *Reichle*, 566 U.S. at 668.

Speech may, for example, provide evidence of a crime and thus bear directly on the probable cause determination. See, *e.g.*, *Hunter* v. *Bryant*, 502 U.S. 224, 228 (1991) (per curiam) (considering suspect's statements, including some that were constitutionally protected, in addressing probable cause to arrest him for threatening the President); *Wayte* v. *United States*, 470 U.S. 598, 612-613 (1985) (holding that protest letters sent to Selective Service "provided strong, perhaps conclusive evidence" of an element of the criminal offense of failing to register for the draft). The same may be true where a suspect's statements, though not directly implicating him in a crime, support an inference that he is or has engaged in criminal conduct. See *District of Columbia* v. *Wesby*, No. 15-1485, slip op. 10 (Jan. 22, 2018) (explaining that "untruthful and evasive" answers to police questioning "suggest[] a guilty mind" and may support probable cause) (citation omitted).

Even if probable cause otherwise exists, expressive activity may be relevant to an officer's decision whether

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[5] See, *e.g.*, *Board of Cnty. Comm'rs* v. *Umbehr*, 518 U.S. 668, 677-680 (1996) (contract termination); *Rankin* v. *McPherson*, 483 U.S. 378, 383-384 (1987) (termination or denial of public employment); *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972) (denial or withholding of public benefits).

to exercise her discretion to make an arrest. See Resp. Br. 19-21 (collecting examples). Officers may properly conclude, for example, that an individual who physically touches a public official after making critical comments about the official's positions is more likely to pose a threat than a person who made supportive or neutral comments. See *Reichle*, 566 U.S. at 661; see also *id.* at 671 (Ginsburg, J., concurring in the judgment) ("Officers assigned to protect public officials * * * [may] rightly take into account words spoken to, or in the proximity of, the person whose safety is their charge."). Similarly, when a person fails to heed a request to yield the floor of a city council meeting, an officer could rightly consider the person's past statements indicating his belief that the council is "wag[ing] a campaign" to "silence and discredit" him in deciding whether he is likely to persist in efforts to disrupt the meeting unless he is arrested. J.A. 22 (petitioner's complaint). The difficulties that judges and juries inevitably would face in attempting to distinguish permissible consideration of speech from retaliation in the context of an arrest provide further support for applying *Hartman*'s reasoning to retaliatory-arrest cases.[6]

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[6] A police officer's ability to permissibly consider speech in deciding whether to arrest also distinguishes claims of retaliatory arrest in violation of the First Amendment from equal-protection claims under the Fifth or Fourteenth Amendment. See Pet. Br. 30. This Court has noted that although an officer's subjective motivation is irrelevant to whether an arrest supported by probable cause is lawful under the Fourth Amendment, equal-protection principles would still "prohibit[] selective enforcement of the law based on considerations such as race" in similar circumstances. *Whren*, 517 U.S. at 813. But that observation "does not indicate * * * that an arrest supported by probable cause could nonetheless violate the First

c. As in *Hartman*, the complex questions of causation inherent in claims of retaliatory arrest "should be addressed specifically [by] defining the elements of the tort" to require the absence of probable cause. 547 U.S. at 265. That element provides the judge and jury with a consistent, objective standard for determining whether the requirements for relief on a claim of retaliation are met. Without that objective screen, the causal complexities inherent in retaliatory-arrest cases and the challenges they pose for the factfinder will create significant uncertainty in each case. Cf. Resp. Br. 12-15 (describing the importance of objective standards for police conduct).

As this Court has recognized, "potentially serious problem[s]" arise from subjective-intent standards in constitutional-tort litigation because "an official's state of mind is 'easy to allege and hard to disprove,'" *Crawford-El* v. *Britton*, 523 U.S. 574, 584-585 (1998) (citation omitted), and "questions of subjective intent so rarely can be decided by summary judgment," *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816 (1982). An officer's honest admission that expressive activity played a role in his arrest decision could easily—and unfairly—be used against him. Conversely, an officer may be improperly discouraged from arresting a suspect who has engaged

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Amendment," *Reichle*, 566 U.S. at 665 n.5, much less that it could give rise to damages liability in a tort action for retaliatory arrest. Unlike expressive activity, immutable characteristics such as race will "seldom provide a relevant basis for disparate treatment." *Fisher* v. *University of Tex. at Austin*, 133 S. Ct. 2411, 2418 (2013) (citation omitted). And an equal-protection claim based on such disparate treatment already includes a stringent objective screen, requiring detailed proof that the government in fact treated similarly situated people differently. See *United States* v. *Armstrong*, 517 U.S. 456, 458 (1996).

in protected speech, notwithstanding the existence of probable cause, out of fear that an arrest will result in drawn-out litigation and personal liability.

Those are not idle concerns: as respondent explains (Br. 23-31), retaliation is easily alleged in virtually any case where police officers make an arrest after observing provocative speech, and federal courts have repeatedly found that those claims present disputed factual issues that must be tried. Requiring a plaintiff to prove a lack of probable cause would help resolve those concerns by conditioning liability on an objective principle that is already universally applied in the context of arrests, thus providing appropriate protection against the "social costs" of unnecessarily "subjecting public officials to discovery and trial, as well as liability for damages." *Crawford-El*, 523 U.S. at 585.

The Court should make the no-probable-cause requirement a rule for all retaliatory-arrest cases, including those that arise in circumstances involving more straightforward issues of causation, rather than invite difficult line-drawing problems about which cases are sufficiently complex to require such a showing. See *Hartman*, 547 U.S. at 261, 264 & n.10. Unlike in other retaliation contexts, probable cause is a legal issue that will be of critical importance to "practically all" claims of retaliatory arrest given the strong tendency of that evidence to answer one of the central factual questions in such cases. *Id.* at 265; see *Reichle*, 566 U.S. at 668. Although "showing an absence of probable cause may not be *conclusive*" proof that an arrest was retaliatory, and "showing its presence does not *guarantee*" that retaliatory animus "was not the but-for fact in [an officer's] decision" to arrest, *Hartman*, 547 U.S. at 265 (emphases added), the "powerful" and "highly valuable"

nature of probable- cause evidence in the context of an arrest virtually assures that the issue will need to resolved in every case, *id.* at 261. It therefore "makes sense," as in *Hartman*, to formalize the issue as an element of the tort. *Id.* at 265-266.

### B. Analogous Common-Law Torts Support Requiring Proof Of The Absence Of Probable Cause As An Element Of A Retaliatory-Arrest Claim

This case also presents an additional consideration, not present in *Hartman*, that counsels in favor of requiring a plaintiff to plead and prove the absence of probable cause: the common law's reliance on that factor in analogous contexts. This Court has recognized that "over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights," and that those preexisting rules provide valuable guidance in defining the contours of constitutional torts. *Carey* v. *Piphus*, 435 U.S. 247, 257 (1978); see *Manuel* v. *City of Joliet*, 137 S. Ct. 911, 921 (2017) (noting that "[c]ommon-law principles are meant to guide * * * the definition of § 1983 claims"). The Court accordingly acknowledged in *Hartman* that the common law may serve "as a source of inspired examples" in the *Bivens* and Section 1983 contexts. 547 U.S. at 258. In that case, however, the Court found no clear guidance from the common law, observing that "we could debate whether the closer common-law analog to retaliatory prosecution is malicious prosecution (with its no-probable-cause element) or abuse of process (without it)." *Ibid.*

But at least for retaliatory-arrest cases that, like this one, do not involve a warrant, the common-law analogues are much clearer. A warrantless arrest would

not provide the basis for a common-law abuse-of-process claim because it does not involve the subversion of legal "process," which generally is defined to require some sort of interaction with a court. See Restatement (Second) of Torts § 682 (1977) (element of abuse-of-process torts is "us[ing] a legal process"); *Black's Law Dictionary* 1034, 1399 (10th ed. 2014) (defining "legal process" to mean "[a] summons or writ, esp. to appear or respond in court," and defining "criminal process" by reference to a warrant); see also 3 Dan B. Dobbs et al., *The Law of Torts* § 594, at 420-422 (2d ed. 2011) (discussing definition of "process" in context of abuse-of-process tort). Rather, a warrantless arrest might be actionable at common law in one of two ways. First, the arrestee might allege that he was arrested without legal authority, in which case his claim would be for false imprisonment. Restatement §§ 35, 41 (1965), 654 cmt. e (1977); see 1 Dobbs § 41, at 104. Second, the arrestee might allege that even if there was legal authority to arrest him, that authority was invoked maliciously, in which case his claim would be for malicious prosecution. Restatement § 654 cmt. e (1977).

Neither common-law tort would impose damages liability on an officer who made a warrantless arrest based on probable cause. The absence of probable cause is an element of a malicious-prosecution tort. Restatement § 653 (1977); see, *e.g.*, *Hartman*, 547 U.S. at 258; *Heck* v. *Humphrey*, 512 U.S. 477, 485 n.4 (1994). And the presence of probable cause is a defense to a false-imprisonment tort. A defendant in a false-imprisonment case can avoid liability by showing that he made a "privileged" arrest, Restatement § 118 & cmt. b (1965); see 1 Dobbs § 94, at 289-290, and a "peace officer" would be privileged to arrest someone whom he

"reasonably suspects" has committed an offense in his presence. Restatement §§ 114, 119(b)-(c), 121 (1965); see 1 Dobbs § 94, at 291-293 (noting that a warrantless arrest supported by probable cause is privileged).

In a common-law action, therefore, any retaliatory motive that an officer might have in making a warrantless arrest would be irrelevant if probable cause were present. It has long been the rule that "if there was probable cause, an action for malicious prosecution will not lie, although the party who procured the arrest or indictment was actuated by malicious motives." *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390, 402 (1852); see 3 William Blackstone, *Commentaries on the Laws of England* 127 (1768). And in the false-imprisonment context, "the fact that [an officer] has an ulterior motive * * * does not make the arrest unprivileged" so long as the arrest is made in the course of enforcing the law. Restatement § 127 cmt. a (1965). So, for example, if "A, a traffic officer, arrests B for driving at the rate of 20 miles an hour through a town in which the rate of speed is fixed by an ordinance at 15 miles an hour," the arrest is privileged (and thus no false-imprisonment liability attaches), even if A made the arrest "because B was a personal enemy, or because B had previously reported him for his failure to arrest persons driving at 25 miles an hour." *Id.* § 127 cmt. a, illus. 1.

Under petitioner's proposed rule, however, a plaintiff in those circumstances could impose liability on the officer by couching his claim in constitutional terms. There is no reason why the definition of the constitutional tort should so sharply depart from the common law's guidance. Particularly given the central significance of probable cause in resolving questions about what caused an arrest, it makes sense to adopt a rule in

this case that, consistent with *Hartman*, incorporates probable cause as an element of the claim. The same practical considerations that have informed the development of the common law are equally present here. See Resp. Br. 17-19. And requiring consideration of probable cause at the earliest possible stage of the case protects innocent officers from the serious burdens of discovery and trial. See *Crawford-El*, 523 U.S. at 585.

### C. A Damages Remedy Is Not Essential To Deter Police Officers From Making Retaliatory Arrests Supported By Probable Cause

Petitioner argues (Br. 22-23, 26) that extending *Hartman* to the arrest context would provide inadequate protection for speech because police might use their authority to arrest for minor offenses, see *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 354 (2001), in order to retaliate against speakers with unpopular views even in circumstances where probable cause for some offense exists. But that concern depends on the mistaken view that only a private damages remedy will deter governmental officials from making retaliatory arrests. Federal, state, and local governments have other civil and criminal enforcement tools available to guard against potential abuses. As long as the existence of probable cause is recognized as a limitation on a retaliatory-arrest tort action, and not the First Amendment itself, petitioner's concern is substantially mitigated.

1. The First Amendment confers a "general right to be free from retaliation for one's speech." *Reichle*, 566 U.S. at 665; see *Hartman*, 547 U.S. at 256. But constitutional tort actions need not provide a remedy for every violation of that right. For example, in the context of suits against federal officers under *Bivens* v. *Six*

*Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court has held that a judicially created damages remedy is not appropriate for every constitutional violation—indeed, "in most instances" this Court has "found a *Bivens* remedy unjustified." *Wilkie*, 551 U.S. at 550; see, *e.g.*, *Bush* v. *Lucas*, 462 U.S. 367, 390 (1983) (declining to recognize a damages remedy under *Bivens* for violation of a federal employee's First Amendment rights). The Court has likewise interpreted Section 1983 to authorize damages only for acts found to "violat[e] * * * constitutional rights *and to have caused compensable injury*." *Carey*, 435 U.S. at 255 (quoting *Wood* v. *Strickland*, 420 U.S. 308, 319 (1975)). The Court has explained that "the elements of, and rules associated with, an action seeking damages" for such injuries under Section 1983 may reflect practical considerations and limitations that preclude recovery even if "'the specific constitutional right' at issue" has been violated. *Manuel*, 137 S. Ct. at 920 (citation omitted); see *id.* at 920-921 (noting that limitations on damages actions for malicious prosecution may preclude recovery for Fourth Amendment violations in some circumstances).

Although the Court in *Hartman* did not expressly decide whether its no-probable-cause requirement was a limitation on the scope of the First Amendment, see *Reichle*, 566 U.S. at 669 n.6, it clearly conceived of that requirement as restraining a plaintiff's ability to obtain damages in a constitutional tort suit alleging retaliatory prosecution. The Court stated that its "holding d[id] not go beyond a definition of an element of the tort," 547 U.S. at 257 n.5, and it relied heavily on the practical difficulties in pleading and proving that tort in determining that it "makes sense to require" the absence of

probable cause "as an element of a plaintiff's case," *id.* at 265-266; see *id.* at 265 (explaining that "the complexity of causation in a claim that prosecution was induced by an official bent on retaliation should be addressed specifically in defining the elements of the tort"). The Court observed that the presence or absence of probable cause is not perfect evidence of whether a constitutional violation occurred, see *id.* at 265 ("[S]howing an absence of probable cause may not be conclusive that the inducement succeeded, and showing its presence does not guarantee that inducement was not the but-for fact in a prosecutor's decision."), but is sufficiently probative of causation to warrant requiring that showing as a prerequisite to recovering damages, *ibid.* Similarly, in this case, the Court should hold that the elements of a retaliatory-arrest tort require a plaintiff to establish the absence of probable cause.

2. Recognizing the absence of probable cause as an element of a retaliatory-arrest tort, and not as a limit on the scope of the First Amendment, mitigates petitioner's concerns about the possibility that officers may engage in retaliatory arrests notwithstanding the existence of probable cause. The United States, for example, may prosecute officers who willfully violate individuals' constitutional rights under color of law (or who conspire to do so) by subjecting them to arrest in retaliation for their protected speech, even if those arrests are supported by probable cause. See 18 U.S.C. 241, 242. The United States may also bring civil actions against state and local law-enforcement agencies under 34 U.S.C. 12601 to remedy a pattern or practice of retaliatory arrests by law enforcement officers, including in circumstances where probable cause may have existed for in-

dividual arrests. Those tools would have obvious application if, as petitioner imagines, a municipality were to implement "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." Br. 26.[7]

Governmental enforcement actions under the statutes identified above are appropriately limited by proof requirements that do not exist in the context of individual tort suits under Section 1983 or *Bivens*. Criminal prosecutions under 18 U.S.C. 242 require the government to establish willfulness and to prove unlawful retaliation beyond a reasonable doubt. A pattern-or-practice claim requires the government to show a "systemwide" violation of constitutional rights, and not simply "isolated" or "sporadic" acts. *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 336 (1977) (discussing pattern or practice of employment

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[7] Several States have statutes that may authorize criminal prosecution of police officers who violate individuals' rights under color of law. See, *e.g.*, Ark. Code Ann. § 5-52-107 (Supp. 2017); Colo. Rev. Stat. § 18-8-403 (2017); Del. Code Ann. tit. 11, § 1211 (2015); 720 Ill. Comp. Stat. Ann. 5/33-3 (West Supp. 2017); Iowa Code Ann. § 721.2(3) (West 2013); Ky. Rev. Stat. Ann. §§ 522.020, 522.030 (LexisNexis 2014); Minn. Stat. Ann. § 609.43 (West 2009); Mont. Code Ann. § 45-7-401 (2015); Neb. Rev. Stat. Ann. § 28-926 (LexisNexis 2015); N.H. Rev. Stat. Ann. § 643:1 (LexisNexis 2015); N.J. Stat. Ann. § 2C:30-2 (West 2016); N.Y. Penal Law § 195.00 (McKinney 2010); N.D. Cent. Code § 12.1-14-05 (2012); 18 Pa. Cons. Stat. Ann. § 5301 (West 2015); Tenn. Code Ann. § 39-16-403 (2014); Tex. Penal Code Ann. § 39.02 (West 2016); Utah Code Ann. § 76-8-201 (LexisNexis 2017); Wash. Rev. Code Ann. § 9A.80.010 (West 2015). Some States further authorize the state attorney general to bring civil suits against police departments for patterns or practices that violate individual rights. See Cal. Civ. Code § 52.3 (West 2007); Fla. Stat. Ann. § 760.021 (West 2014).

discrimination). And the appropriate exercise of prosecutorial discretion ensures that the public interest will be weighed in determining whether a civil or criminal action is appropriate under the circumstances.

Those factors guard against unwarranted intrusions on the ability of police officers to make arrests while ensuring that, in the limited class of cases where both probable cause and retaliatory motive exist, constitutional rights are protected. The absence of those factors in private damages suits, however, underscores the need for the objective screen provided by *Hartman*'s no-probable-cause requirement. Cf. *Maryland* v. *Pringle*, 540 U.S. 366, 370 (2003) ("The long-prevailing standard of probable cause protects citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime, while giving fair leeway for enforcing the law in the community's protection.") (citation and internal quotation marks omitted).

Accordingly, while a no-probable-cause rule is an appropriate element in a retaliatory-arrest tort action to address the challenges that arise from litigation in that context, it need not license retaliatory arrests supported by probable cause. Governmental civil and criminal enforcement continues to be an important backstop for safeguarding constitutional rights even where limitations on private causes of action for damages do not permit individual tort claims.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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* The Solicitor General is recused in this case.