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IN THE SUPREME COURT OF THE UNITED STATES  
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LUIS A. NIEVES, ET AL., )  
Petitioners, )  
v. ) No. 17-1174  
RUSSELL P. BARTLETT, )  
Respondent. )  
- - - - -  
Washington, D.C.  
Monday, November 26, 2018

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:  
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Anchorage, Alaska; on behalf of the Petitioners.  
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United States, as amicus curiae, supporting the  
Petitioners.  
ZANE D. WILSON, ESQ., Fairbanks, Alaska; on behalf  
of the Respondent.

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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next this morning in Case 17-1174, Nieves versus Bartlett.

Mr. Borghesan.

ORAL ARGUMENT OF DARIO BORGHESAN

ON BEHALF OF THE PETITIONERS

MR. BORGHESAN: Mr. Chief Justice, and may it please the Court:

This case shows why retaliatory arrest claims should be governed by the well-grounded common-law rule that the existence of probable cause would protect against liability for enforcing the criminal law.

First, these -- the determining causation in these claims is especially difficult for the reasons the Court recognized in *Lozman*. And, second, the law's tools for filtering out speculative claims and giving officers a margin for error don't work well in these cases.

And the Court doesn't want a rule where an officer can be haled into court on any routine arrest and forced to defend the purity

1 of his motives, however reasonable his actions.  
2 Nor should the Court want a rule that gives  
3 officers a reason to hesitate in situations  
4 where they should be able to act decisively.

5 I want to start with the point about  
6 complexity because I believe this case has all  
7 the elements the Court identified in Lozman.  
8 One, speech can be a valid consideration for  
9 the officers in deciding whether to effectuate  
10 an arrest.

11 JUSTICE SOTOMAYOR: So why doesn't  
12 qualified immunity take care of that? If -- if  
13 -- if, in fact, speech by its nature is  
14 disruptive or otherwise interferes with the  
15 actions of a police officer, that would give  
16 them qualified immunity, whether there was  
17 probable cause or not.

18 MR. BORGHEGAN: I don't believe that's  
19 the way that qualified immunity works, because,  
20 if the speech is protected, then the question  
21 is, well, was it clearly established that you  
22 couldn't retaliate against someone for their  
23 protected speech. And at -- if this Court  
24 rules in the Respondent's favor --

25 JUSTICE SOTOMAYOR: Well, no, my point

1 is that one of your arguments has been that  
2 almost all arrests involve speech, that in some  
3 form or another, speech is implicated in the  
4 incident of arrest.

5 But if it's truly integrated in this  
6 -- in the incident of arrest, something like,  
7 I'm going to blow up the President, that's  
8 going to give you probable cause, but, more  
9 importantly, it's going to give you qualified  
10 immunity.

11 MR. BORGHE SAN: Well, in the -- I  
12 think in the --

13 JUSTICE SOTOMAYOR: Here, the problem  
14 is that it wasn't implicated as a reason for  
15 arrest. It was a situation between the two,  
16 and it came about after the arrest, meaning the  
17 statement was made after the arrest.

18 MR. BORGHE SAN: Well --

19 JUSTICE SOTOMAYOR: So this is the  
20 unusual case, not the normal case.

21 MR. BORGHE SAN: Well, I think the way  
22 the Ninth Circuit applies qualified immunity, I  
23 actually think this is correct, is if the --  
24 it's a question of fact as to whether the  
25 officer actually was legitimately considering

1 the speech in deciding whether to arrest or  
2 whether the officer was not and simply was  
3 acting based on animus.

4 JUSTICE SOTOMAYOR: If Police Officer  
5 Wright --

6 MR. BORGHEAN: So I don't think  
7 except in the --

8 JUSTICE SOTOMAYOR: -- if Police  
9 Officer Wright wasn't present when Officer  
10 Nieves had his interaction with -- with the  
11 defendant, Respondent here, how could he have  
12 been animated by animus?

13 MR. BORGHEAN: Well, all the other  
14 speech that Mr. Bartlett was engaged in in the  
15 interaction with Mr. -- with Officer Weight,  
16 and the -- he was --

17 JUSTICE SOTOMAYOR: Weight. I'm  
18 sorry. I keep thinking Wright, but it is  
19 Weight.

20 MR. BORGHEAN: Yes, Officer Weight,  
21 and he was challenging Officer Weight's  
22 authority to do what he was doing. That is  
23 protected conduct, but at the same time, when  
24 paired with other conduct and the -- the sense  
25 of danger that Officer Weight perceived --

1 JUSTICE GINSBURG: But the question  
2 is, is animus on the part of what White --

3 MR. BORGHE SAN: I'm sorry, Justice  
4 Ginsburg?

5 JUSTICE GINSBURG: The question I  
6 thought Justice Sotomayor was asking was what  
7 is the -- what is the animus that -- with which  
8 White is charged?

9 MR. BORGHE SAN: So there are two  
10 theories of animus, and these were briefed in  
11 the -- in the -- in the district court and at  
12 the Ninth Circuit. For Officer Weight, the  
13 animus -- the alleged animus is that he was  
14 essentially retaliating because he didn't like  
15 Mr. Bartlett challenging his authority. For  
16 Officer Nieves, the -- the alleged retaliation  
17 is that he was retaliating and he was motivated  
18 because Mr. Bartlett didn't engage with his  
19 questioning earlier.

20 So you have two separate theories of  
21 retaliation. You have two different actors.  
22 You have a fast-paced situation. This is going  
23 to be an incredibly complex situation for the  
24 jury to disentangle.

25 JUSTICE SOTOMAYOR: Why is this any



1 more complex than racial discrimination?  
2 Meaning, in almost all situations involving  
3 racial discrimination or allegations thereof,  
4 it's complex. Mixed motive cases are the norm,  
5 not the exception.

6 So why should we treat this  
7 differently? We're now tiering things. We're  
8 tiering a right, the First Amendment, above --  
9 below racial discrimination. I -- I don't  
10 know, are you -- your rule would encompass  
11 religious discrimination, and so that's now  
12 less important than racial discrimination.

13 Should we be creating exceptions to  
14 the clear statutory command that any person who  
15 violates a constitutional right should be held  
16 responsible?

17 MR. BORGHE SAN: Well, to answer your  
18 -- your last point first, Justice Sotomayor,  
19 Section 1983 created -- created an action at  
20 law for violation of federal rights. And  
21 actions of law are subject to defenses and  
22 immunities, and the elements of these actions  
23 have claims, and all of these -- to prevent  
24 recovery even in some instances where we think  
25 that there would be -- there might have been an

1 actual violation of a constitutional right.

2 And the same is true with arrests. At  
3 common law, if an officer had lawful authority  
4 to make the arrest, then that was end of story  
5 and the arrest was privileged.

6 And that's the -- that's the principle  
7 that Congress didn't silently abrogate when it  
8 enacted Section 1983. And that rule also works  
9 well for these cases because they're a subset  
10 of First Amendment claims that involve an  
11 arrest. Same as --

12 JUSTICE ALITO: So this -- this is a  
13 difficult issue, which we've heard a couple of  
14 times now already, because there are a range of  
15 cases. And at one end, I think, there is a  
16 case that's sort of like this case, where  
17 you've got the disorderly person situation. A  
18 police officer arrives at the scene where two  
19 people or a -- two groups of people are  
20 shouting at each other, and in the course of  
21 the -- while the officer is present, one of  
22 them says something insulting to the officer,  
23 and that person ends up getting arrested.

24 And so you have the question of  
25 whether that's -- that has to go -- that may

1 have to go to trial as to the -- the officer's  
2 motivation, was it because the kind of fuzzy  
3 standard of disorderly conduct was met or was  
4 it because the person -- what the person said  
5 about the officer. So you've got that category  
6 maybe at one end.

7 At the other end, you have the case  
8 like a journalist has written something  
9 critical of the police department and then a  
10 couple of days later or a week later, two day  
11 -- two weeks later, whatever, some period of  
12 time, is arrested -- is given a citation for  
13 driving 30 miles an hour in a 20-mile --  
14 25-mile-an-hour zone.

15 So your rule -- what you ask us to do  
16 would create a problem in the latter situation.  
17 What the other side asks us to do may create a  
18 problem in the disorderly person situation. So  
19 do you have any way of solving this, other than  
20 asking us to decide which -- which rule --  
21 which of these unattractive rules we should  
22 adopt?

23 MR. BORGHESEAN: Well, I think the  
24 probable cause element actually does a good job  
25 of capturing the subset of these claims when

1 there actually is a First Amendment violation.  
2 And you have two -- two of the cases we cite in  
3 our brief survive summary judgment. There was  
4 probable cause for the arrest. And they went  
5 to a jury. These were cases involving  
6 journalists. And in both those cases, the jury  
7 returned a verdict for the defendants.

8 And so I think probable cause actually  
9 does sort well these --

10 JUSTICE KAGAN: But -- but I think  
11 what Justice Alito is suggesting is that in the  
12 second category of cases -- and you can think  
13 of it as the journalist case or you can think  
14 of it as a case where an individual police  
15 officer, you know, decides to arrest for  
16 jaywalking somebody wearing a Black Lives  
17 Matter T-shirt or, alternatively, a Make  
18 America Great Again cap or something like that,  
19 you know, that -- that -- that there might be  
20 probable cause. The person jaywalked. He  
21 jaywalked.

22 And the point is that there are so  
23 many laws that people can break that police  
24 officers generally look the other way, but, you  
25 know, you're saying something that the officer

1 doesn't much like, so he doesn't look the other  
2 way.

3 MR. BORGHE SAN: I think -- so, with  
4 the jaywalking cases, and I'd start by pointing  
5 out that at least in Alaska and probably the  
6 vast majority of states you can't arrest  
7 someone for jaywalking. And if someone did,  
8 they would likely be disciplined.

9 JUSTICE KAGAN: You know, they're  
10 driving and they have a bumper sticker that the  
11 police officer doesn't like and he pulls them  
12 over when he wouldn't otherwise pull them over  
13 because the person had failed to signal a turn.

14 MR. BORGHE SAN: And if you look  
15 through the cases that are cited by the parties  
16 in amici, the case of I pulled someone over and  
17 they had a Hillary 2016 bumper sticker and  
18 that's the alleged basis for the retaliation,  
19 you don't see them. Those cases are incredibly  
20 rare.

21 And the Court in Hartman decided that  
22 it wasn't going to design the rule for the  
23 vanishingly rare case. It was going to design  
24 the rule for the typical case.

25 JUSTICE BREYER: Well, we saw the

1 case --

2 JUSTICE GINSBURG: Let me clarify two  
3 things about your position.

4 Would you -- we have Lozman on one  
5 side. Would you say Lozman apart, no  
6 retaliatory arrest claim unless the plaintiff  
7 shows the absence of probable cause? Would you  
8 say that across the board for retaliatory  
9 arrest claims, save only the Lozman category?

10 MR. BORGHE SAN: That is our position,  
11 Justice Ginsburg.

12 JUSTICE GINSBURG: And then one other  
13 thing about your position. On the probable  
14 cause, probable cause for the charged offenses  
15 or probable cause for some offense that wasn't  
16 charged?

17 MR. BORGHE SAN: I think, in that  
18 respect, the Court's rule should recognize that  
19 police officers arrest based on the course of  
20 conduct and they aren't legal technicians.

21 So I think that, at a minimum, the  
22 Court's rule should -- the probable cause  
23 element should apply for the stated crime of  
24 arrest or the crimes charged or crimes closely  
25 related to those crimes.

1           And whether it has to go further to  
2           address a situation like the Court was dealing  
3           with in Lozman, I don't think this case  
4           presents that question.

5           JUSTICE BREYER:   What do you think of  
6           efforts to reach a compromise between the two  
7           cases that Justice Alito raised?   See, we saw  
8           in Lozman a case where, I think in the  
9           courtroom, someone said, well, surely there's  
10          some statute he violated.

11          Now that doesn't sound like a good  
12          case for your side.   So, among other things  
13          I've written down, we have, one, Mt. Healthy,  
14          plaintiff, he engaged in protected expression.  
15          That won't be too hard to show.

16          The defendant harbored retaliatory  
17          animus.   In a lot of these cases, he did, for  
18          political or racial maybe or other reasons.

19          Three, animus was a substantial factor  
20          motivating the decision.   That's a little  
21          tougher to show where there's probable cause.  
22          And then, even in the absence of the probable  
23          cause, even in the absence of protected  
24          conduct, he would have reached the same  
25          decision.   That's beside the point.

1           Suppose we added to that and we took  
2 what Justice Rehnquist said in Crawford-El,  
3 that if you get to the stage where you get  
4 through one, two, and maybe three, and there is  
5 probable cause for something, the plaintiff has  
6 to show with some objective evidence that the  
7 arrest was a pretext for retaliation. That's  
8 one way of doing it. That's Justice  
9 Rehnquist's way.

10           A second way is that you have to know  
11 that -- you at least have to know the arresting  
12 policeman, but there is a statute that forbids  
13 what he did, you can't find it out later, or no  
14 reasonable person would have arrested or no  
15 reasonable policeman without the animus would  
16 have arrested this person for this thing in the  
17 moment. That's after you prove that he had a  
18 bad motive, the policeman.

19           Now there might be others. But what  
20 I'm looking for, looking to what Chief Justice  
21 Rehnquist said, and others that come at the  
22 spur of the moment, is some way of guarding  
23 against the danger that Justice Alito said in  
24 his second example, without destroying and  
25 raising the huge problem that lay in his first



1 example.

2 So I give you three that I don't --  
3 I'm not buying the three I gave. I just want  
4 to set you on a track thinking of that.

5 MR. BORGHE SAN: Well, I think some of  
6 those rules or suggestions that you gave,  
7 Justice Breyer, I think would be very difficult  
8 for courts to administer. As, for example, the  
9 no reasonable police officer would arrest.  
10 Let's say now no reasonable police officer in  
11 Washington, D.C., no reasonable police officer  
12 in a specific neighborhood of Washington, D.C.

13 Facts of arrests are incredibly  
14 varied. Do the minor details matter? And I  
15 think that's going to be a very difficult  
16 analysis for courts to -- for courts to engage  
17 in.

18 And it's not a -- it's not a clear  
19 bright-line rule. So, in Crawford -- I'm  
20 sorry, not in Crawford-El -- in Armstrong, for  
21 cases of selective enforcement, the Court left  
22 open the possibility in a footnote that, if  
23 there were a direct admission of -- of  
24 discriminatory animus, then the plaintiff would  
25 not necessarily have to show that there was

1 similarly-situated people being treated  
2 differently, which is the normal thing that a  
3 plaintiff has to show for those types of  
4 claims.

5 I think the Court could do something  
6 similar. I think the problem with that is what  
7 the Court recognized in Hartman, is that the  
8 exception becomes, again, difficult to  
9 administer. What's a direct admission? And  
10 how does the court -- how does a court draw  
11 that line? And that's going to be litigated in  
12 a variety of cases.

13 I mean, I think the court obviously  
14 has carved out exceptions in the past, and most  
15 recently in Lozman, but I think those  
16 exceptions can be problematic. And I think the  
17 best rule, again, is the clear bright line of,  
18 if there was probable cause for the arrest,  
19 then there's no liability for a retaliatory  
20 arrest claim.

21 JUSTICE KAVANAUGH: You -- you base  
22 that in part on the practical and policy  
23 concerns that you started with, that you raise,  
24 and Justice Alito also points out, but the  
25 Ninth Circuit has had experience for a number

1 of years with a rule that has allowed suits  
2 like this to proceed, and, at least based on  
3 the briefing, it doesn't show any massive  
4 problem, or correct me if I'm wrong about that.

5 MR. BORGHE SAN: Well, I think -- I  
6 think the data is a little bit noisy because,  
7 until recently, you had qualified immunity that  
8 would bar a lot of these claims. And I think,  
9 if the Court rules in the Respondent's favor,  
10 as the consciousness of that rule trickles  
11 down, you'll have more and more retaliatory  
12 arrest claims being stated.

13 And I also think it's not just the --  
14 JUSTICE KAVANAUGH: Well, why wouldn't  
15 -- explain to me on the qualified immunity --  
16 Justice Sotomayor had raised that too -- why --  
17 why doesn't that solve the issue?

18 MR. BORGHE SAN: Well, I think  
19 qualified immunity works in the subset of cases  
20 -- and I think it's a narrow subset -- where  
21 it's not clearly established that the person's  
22 speech was protected, but in the -- I think  
23 that's going to be a subset of cases.

24 JUSTICE KAVANAUGH: Right. But the  
25 bottom line point is the Ninth Circuit, it's

1     been a number of years now, has had the rule  
2     contrary, and --

3             MR. BORGHE SAN:   It's at least --

4             JUSTICE KAVANAUGH:  -- I would have  
5     expected, if there were the problems that you  
6     articulate, and I understand why you articulate  
7     them, and maybe they will come about as a  
8     result of a decision from this Court in more  
9     numbers, but there hasn't been a huge problem.

10            MR. BORGHE SAN:  Well, I think they  
11     will.  And, you know, the rule was established,  
12     clearly established in the Ninth Circuit in  
13     2013, a lot of the decisions you have coming  
14     out involve conduct from before then.

15            And so that's why I think you haven't  
16     seen maybe the -- the rise in the number of  
17     cases that I think a ruling in the Respondent's  
18     favor will require.

19            And it's not just the -- the total  
20     quantity of claims.  It's also the fact that  
21     the Court's ruling on this issue has a  
22     potential to affect how police officers conduct  
23     themselves in the field.

24            And if there are no questions --

25            JUSTICE ALITO:  Am I correct that the

1 Ninth Circuit -- well, I don't want to take up  
2 your rebuttal time, but just very quickly, the  
3 Ninth Circuit has developed its own special  
4 qualified immunity rule for use in this  
5 particular situation?

6 MR. BORGHE SAN: I think it's more of a  
7 rule of summary judgment. It's the standard --

8 JUSTICE ALITO: Summary -- it's own  
9 summary judgment rule.

10 MR. BORGHE SAN: It's own summary  
11 judgment rule.

12 JUSTICE ALITO: And it doesn't seem to  
13 be really consistent with our summary  
14 judgment --

15 MR. BORGHE SAN: It doesn't --

16 JUSTICE ALITO: -- cases.

17 MR. BORGHE SAN: I apologize, Justice  
18 Alito.

19 JUSTICE ALITO: No, is that correct or  
20 not?

21 MR. BORGHE SAN: That's correct. I  
22 don't think it's consistent with Rule 56. I  
23 think it's the kind of procedural fudge that  
24 the Court rejected in Crawford-El, and I think  
25 it's also exactly what the D.C. Circuit was

1 doing in Hartman, which -- and the opinion of  
2 the Court overruled.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 Mr. Wall.

6 ORAL ARGUMENT OF JEFFREY B. WALL  
7 FOR THE UNITED STATES, AS AMICUS CURIAE,  
8 SUPPORTING THE PETITIONERS

9 MR. WALL: Mr. Chief Justice, and may  
10 it please the Court:

11 Two points. First, every similar  
12 constitutional tort claim under 1983 has an  
13 objective requirement that prevents a purely  
14 subjective inquiry into officers' motivations.

15 If anything, it is more important that  
16 claims of retaliatory arrest be subject to such  
17 a screen because, as the bipartisan states'  
18 brief from D.C. points out, they're easy to  
19 allege and difficult and expensive to defend  
20 against.

21 Second, of the --

22 JUSTICE KAGAN: Well, Mr. Wall, I  
23 mean, in the Fourth Amendment context, for  
24 example, the fact that there's a probable cause  
25 requirement is a function of the substance of

1 the Fourth Amendment. What's unusual about  
2 this case is that you're asking for a probable  
3 cause requirement that bears no relationship to  
4 the actual First Amendment violation.

5 In other words, it makes no difference  
6 to the First Amendment that there might have  
7 been probable cause for an arrest if, in fact,  
8 the arrest occurred as a result of retaliation  
9 for protected speech.

10 MR. WALL: So the plaintiff made  
11 exactly the same argument to this Court in  
12 Hartman, Justice Kagan, and the Court rejected  
13 it, I think for the reason that although, of  
14 course, what you're trying to get at is, was  
15 the officer's motivation the speech or the  
16 unlawful conduct, the probable cause evidence  
17 is the best way to get at that across the range  
18 of cases.

19 JUSTICE KAGAN: But, as I read  
20 Hartman, Hartman was very dependent on two  
21 factors, neither of which is here. The first  
22 is that the prosecutor is absolutely immune, so  
23 that you were dealing with upstream actors, and  
24 the causation was very difficult. And the  
25 second was that there was a presumption of

1 regularity that attached to prosecutorial  
2 action.

3           And the combination of both those  
4 things meant that the Court said, you know  
5 what, in the usual case or in the -- you know,  
6 in the more than usual case, in the almost  
7 always case, the prosecutor's action has  
8 cleansed whatever retaliatory -- retaliatory  
9 motive you can find further upstream.

10           And, here, neither one of those two  
11 things is true.

12           MR. WALL: So let me take them in  
13 turn, and I -- I think it -- it -- that isn't  
14 sort of fair to the other parts of Hartman  
15 because it did rely on other things that I  
16 think do apply equally here.

17           But just for those two, yes, the fact  
18 that you had multiple actors in Hartman and one  
19 of them was absolutely immune did make the  
20 causal inquiry difficult, but I don't think  
21 that we should understand Hartman as just a  
22 case about prosecutors. I think reading  
23 Justice Souter's opinion, although that was the  
24 reason why the causal inquiry was difficult,  
25 what he's focused on is the factual difficulty



1 of causation, and he says the body of probable  
2 cause evidence is the best way to get at that  
3 across the range of cases.

4 And although we don't have the same  
5 presumption of regularity for officers that we  
6 do for -- for prosecutors, we do have an even  
7 more iron-clad rule under the Fourth Amendment,  
8 which is that every arrest is per se reasonable  
9 for purposes of the Fourth Amendment where you  
10 have probable cause.

11 And so in the same way that you have  
12 -- the presumption of regularity gives you some  
13 reason with prosecutors to think it wasn't  
14 induced by the animus, I think the Moore rule  
15 gives you the same rule.

16 JUSTICE BREYER: Well --

17 MR. WALL: Where you have an arrest --

18 JUSTICE BREYER: Go ahead.

19 MR. WALL: -- that's supported by  
20 probable cause, I think that's a very good  
21 reason to think that's why the officer was  
22 doing what he was doing.

23 JUSTICE BREYER: Right. What if we  
24 try to sort of bell the cat here by -- by, at  
25 the moment, we've got speech and we have some

1 animus against speech and we have a rule that  
2 says: Officer, you have probable cause.  
3 That's it -- that's what you want -- that's it.  
4 Good-bye, plaintiff.

5 Now suppose we weaken that and simply  
6 say where there's probable cause, yes, that's  
7 it, unless there is objective evidence that it  
8 was a pretext. For example, when you have the  
9 judge six years later trying -- going through  
10 the statute books to try to find a statute that  
11 fit within probable cause for the arrest, that  
12 sounds pretty much like objective evidence of a  
13 pretext. Where the officer arrests him for  
14 something that was never -- nobody's ever been  
15 arrested before for that, in this circumstance,  
16 sounds like a pretext.

17 And so why not do that? That's a  
18 compromise. It gives some protection to the  
19 First Amendment, without avoiding the most  
20 horrible mess that you're afraid of, and it's  
21 been suggested before. So why not?

22 MR. WALL: So those are two very  
23 different things, Justice Breyer. The second  
24 may be real. I think the first is a -- is a  
25 paper tiger.

1           On the first, if the Court sets it up  
2           to say, look, probable cause is important  
3           evidentiarily to the officer's motive unless  
4           you have some evidence of pretext for all the  
5           rest, that's essentially --

6           JUSTICE BREYER: Objective evidence  
7           that it was a pretext.

8           MR. WALL: That's right, but if a case  
9           like this one, if facts like these get you to  
10          the jury, right, you come in with a statement  
11          and you say the officer indicated, because of  
12          his statement, which isn't captured on video,  
13          but you just allege it and you have to take it  
14          as true, if that gets you to a jury, I don't  
15          think that's actually going to do anything.

16          But the second -- the second thing you  
17          point to was different, right? That's the  
18          Devenpeck rule. That's the question of, which  
19          the Court at Lozman was -- was interested about  
20          last time, when do you have to identify the  
21          offenses? At the time of the arrest, shortly  
22          thereafter, or leading up to some criminal  
23          proceeding?

24          Now, you know, for the reasons in our  
25          brief, we'd urge the Court to adopt Devenpeck,

1 but I do think if the Court drew in that rule  
2 further away from the trial or limited it at  
3 the outset of a civil proceeding, I think that  
4 would be a meaningful limitation.

5 I just think that -- that the first  
6 one that you -- you sketched out where it's  
7 sort of the weighing of the evidence, I think,  
8 if you look through the cases, that's going to  
9 allow all these things to go to the jury.

10 And that was the one thing I wanted to  
11 say to you, Justice Alito, which is, look, I  
12 think we have by far the best reading of the  
13 common law in Hartman, but even if the Court  
14 disagrees with us doctrinally, if you look at  
15 the cases, you just do a simple Westlaw search  
16 for retaliatory arrest, hundreds and hundreds,  
17 about 250 in the Ninth Circuit alone, just  
18 post-Reichle, just in the last five years, the  
19 number of those that have credible allegations  
20 of your second scenario, very few. And every  
21 one of those has gone to a fact-finder. The  
22 fact-finder has rejected that it was  
23 retaliatory animus that drove the --

24 JUSTICE SOTOMAYOR: But that's the  
25 point, isn't it?

1           JUSTICE ALITO:  Whenever there's --  
2  whenever there's probable cause and there's a  
3  First Amendment allegation, what's really being  
4  complained about is discriminatory arrest.  So  
5  what if we were to say that a party making such  
6  a claim has to plead and ultimately prove that  
7  there is a comparator who engaged in similar  
8  conduct or people who were similar and they  
9  engaged in the same conduct, but they were not  
10 arrested?

11           MR. WALL:  So I -- I don't -- so the  
12 common law didn't have a rule, and the Court in  
13 Hartman didn't look there.  I think the reason  
14 it's going to be a problem is that you might be  
15 able to run the analysis in the riot and the  
16 protest cases, though those are a fairly small  
17 fraction of the cases, but in virtually all of  
18 them there's not going to be a comparator.

19           I mean, I'd encourage the Court to  
20 look at the video here, both of them, before --

21           JUSTICE ALITO:  Yeah.  Well, if  
22 there's no comparator, then the plaintiff is  
23 out of luck.

24           MR. WALL:  That's right, but I don't  
25 think that really is going to track the cases

1 that the Court's worried about on anybody's  
2 view. It's almost a too defendant-friendly  
3 view because you can have an arrest that isn't  
4 supported by probable cause that seems fairly  
5 obviously retaliatory, and there are some of  
6 those that go forward in lower cases -- lower  
7 courts and the plaintiffs prevail. But they  
8 won't be able to show a comparator because it  
9 was a one-on-one interaction with the officer.

10 So I just don't think that's going to  
11 pick up the right set of cases on --

12 JUSTICE SOTOMAYOR: Mr. Wall, how do  
13 we --

14 JUSTICE KAGAN: Can we go back to what  
15 you said about Devenpeck, Mr. Wall? Because  
16 I'm just not sure I understood it.

17 MR. WALL: Right.

18 JUSTICE KAGAN: You said you think  
19 that the government has the right view, which  
20 is that the Devenpeck rule should apply here,  
21 but -- there was a "but" at the end of the  
22 sentence.

23 MR. WALL: Yes.

24 JUSTICE KAGAN: And what was the  
25 "but"?

1           MR. WALL: I think the "but" is that  
2 if the Court wants to draw limits on these to  
3 try to get at cases where the officers or the  
4 prosecutors are just kind of inventing probable  
5 cause after the fact to paper over an arrest  
6 that was problematic, you could limit the  
7 probable cause inquiry to the -- some  
8 reasonable time frame after the arrest.

9           Now I don't think you can do just the  
10 arrest because, you know, you get back to the  
11 station house, you consult with the  
12 prosecutors, and it turns out the statute's  
13 different than the statute you thought, so it's  
14 not waving the weapon, it's reckless  
15 endangerment, but everybody knows it's the same  
16 course of conduct.

17           But you could set some timeline on it  
18 like that, and we suggested in our brief as a  
19 -- as a fallback from Devenpeck that where you  
20 have criminal charges, it's the charges  
21 identified up to and through the criminal  
22 complaint, or, in the absence of charges, it's  
23 the first stage in the civil litigation when  
24 the defendants say, look, you haven't shown a  
25 lack of probable cause, there was probable

1 cause for these offenses, and their response to  
2 the motion to dismiss, you could limit it there  
3 so you wouldn't end up with the Lozman-type  
4 situation where you have parties casting about  
5 at -- at trial.

6 JUSTICE SOTOMAYOR: Mr. Wall, the  
7 Lohman -- Lozman kind of situation, at least  
8 based on the cert petitions that we see, is not  
9 so uncommon: small municipalities where people  
10 are supporting one police chief over a  
11 different one or someone who has alleged that  
12 the police department in that municipality is  
13 corrupt, and all of a sudden they're getting a  
14 slew of, you know, 25 to 50 building code,  
15 jaywalking, crossing a yellow light, every  
16 misdemeanor, every violation humanly possible.

17 Your rule would insulate that  
18 behavior. So the question is, is the burden  
19 that you're speaking about of there being,  
20 perhaps, you've pointed to 10 examples, the  
21 briefs, of cases that in your view should not  
22 have gone to a jury in the -- in the -- in the  
23 Ninth Circuit, so less than half a percent of  
24 the cases that were filed alleging retaliatory  
25 arrests have actually gone to trial, is it



1     worth giving up the protections of 1983 for  
2     such a fundamental right as the freedom of  
3     speech right?

4             MR. WALL:   May I answer, Mr. Chief  
5     Justice?

6             CHIEF JUSTICE ROBERTS:   Sure.

7             MR. WALL:   So three very quick points.

8             The claims are common, but they are  
9     not often meritorious.  We don't want to  
10    insulate them from liability.  You just don't  
11    get damages under 1983, just as you didn't at  
12    the common law, but there are other mechanisms,  
13    and the reason it hasn't been a huge problem is  
14    because, until recently, you've had qualified  
15    immunity, which you won't have going forward.  
16    The Ninth Circuit has warped the summary  
17    judgment standard.  And a lot of these cases  
18    settle because they know in the Ninth Circuit  
19    they're going to have to go to a jury.

20            CHIEF JUSTICE ROBERTS:   Thank you,  
21    counsel.

22            Mr. Wilson.

23            ORAL ARGUMENT OF ZANE D. WILSON

24            ON BEHALF OF THE RESPONDENT

25            MR. WILSON:   Mr. Chief Justice, and

1 may it please the Court:

2 In *Lozman versus City of Riviera*, this  
3 Court rejected petitioners' absolute rule  
4 requiring proof of a lack of probable cause in  
5 all First Amendment retaliation cases.

6 As the Court did in *Lozman*, the Court  
7 should reject the rule here for three primary  
8 reasons.

9 First, it would bar meritorious First  
10 Amendment cases, retaliation cases, regardless  
11 of the evidence that proves supporting those  
12 cases. Second, it is not required to screen  
13 out meritless cases. And, lastly, it lacks any  
14 grounding in the common law as it existed in  
15 1871.

16 Excuse me.

17 Start with my first point.

18 Petitioners' rule requires dismissal of First  
19 Amendment retaliation cases with compelling  
20 evidence of retaliatory conduct.

21 JUSTICE GINSBURG: Can you clarify  
22 what is the First Amendment conduct that -- in  
23 which *Bartlett* engaged --

24 MR. WILSON: Yes.

25 JUSTICE GINSBURG: -- with respect to

1 both officers? What was the speech element?

2 MR. WILSON: With respect to Officer  
3 Nieves, Mr. Bartlett questioned why Officer  
4 Nieves wanted to speak with him. That angered  
5 Officer Nieves. And then he told Officer  
6 Nieves that he did not wish to speak with him  
7 and asked him to leave him alone.

8 JUSTICE GINSBURG: So the -- the  
9 speech is the right -- the expression interest  
10 is the right not to speak, is that it?

11 MR. WILSON: That was part of it. But  
12 it was also combined with an expression of, I  
13 haven't done anything wrong, please leave me  
14 alone.

15 JUSTICE GINSBURG: And how -- how  
16 about the other officer, Weight?

17 MR. WILSON: In reference to Officer  
18 Weight, Officer -- or, excuse me, Mr. Bartlett  
19 approached and expressed his opinion that  
20 Officer Weight did not have the right to speak  
21 with the minor who had accompanied him to this  
22 party without his parent being present.

23 And that angered Officer Weight, and  
24 -- and then led to the situation where about  
25 this time Officer Nieves arrives, and then you

1 have the video, what's left of the video  
2 picking up at that particular junction.

3 JUSTICE ALITO: I'm interested in the  
4 third point you made, I think it was, or maybe  
5 it was the second one, that there are other  
6 mechanisms for screening out the meritless  
7 cases. Is that right?

8 MR. WILSON: Yes, Your Honor.

9 JUSTICE ALITO: Was that Point 2 or 3  
10 there?

11 MR. WILSON: That was my last point  
12 that I can go to.

13 JUSTICE ALITO: Okay. On the last  
14 point, I assume that you believe that in this  
15 case your client's claim would survive  
16 qualified immunity and summary judgment, am I  
17 -- that it -- it survives -- it -- it satisfies  
18 Twombly and it would survive qualified  
19 immunity?

20 MR. WILSON: Yes, Your Honor.

21 JUSTICE ALITO: And that -- doesn't  
22 that refute your claim that -- that those  
23 doctrines would rule out the rather trivial  
24 cases?

25 MR. WILSON: In terms of --

1 JUSTICE ALITO: Did your client say  
2 anything that was of social importance? This  
3 is just -- he's not protesting some social  
4 issue or making some important point. He's  
5 involved in a personal dispute with a police  
6 officer.

7 MR. WILSON: Your Honor, my -- my  
8 client was expressing his disagreement with how  
9 the officer was conducting his -- his -- his  
10 investigation, what he was doing there.

11 In City of Houston versus Hill, this  
12 Court identified the right to criticize a  
13 police officer as one of the distinguishing  
14 features between a police state and a -- and a  
15 free country.

16 And so I would certainly submit to the  
17 Court that that is an extremely important  
18 interest.

19 JUSTICE KAGAN: But, Mr. Wilson, I  
20 think, you know, it's obvious what the paradigm  
21 case is that gives a problem to this side, but  
22 it's also obvious what the paradigm case is  
23 that gives a problem to you, and it's the one  
24 that Justice Alito mentioned earlier on.

25 It's an encounter between a police

1 officer and a citizen that goes south. And  
2 part of going south is that the person who is  
3 stopped engages in lots of back-talk to the  
4 police officer, which, in combination with some  
5 forms of conduct, gives the police officer  
6 reason to think that the person should be  
7 arrested to prevent some real harm.

8 So whether it's a resisting arrest  
9 arrest or whether, you know, it's a disorderly  
10 conduct or whatever it is, and there's likely  
11 to be speech involved in those problematic  
12 encounters where we think it's possible that  
13 the police officer should arrest the person in  
14 order to prevent any greater danger.

15 So -- so what do we do with that  
16 category of cases?

17 MR. WILSON: If the speech is in any  
18 way -- if there's any question whether or not  
19 the police officer has a right to take that  
20 speech into account, then the plaintiffs are  
21 going to lose those cases on the basis of  
22 qualified immunity.

23 And there's been a number of those  
24 cases. For example, the Fogel versus Collins  
25 case, where there was speech involved on the

1 van and it was talking about, I'm a bomber, or  
2 something like this, and the officer made  
3 contact with that individual, detained them,  
4 investigated them, et cetera, and the court  
5 said qualified immunity, you're -- you're  
6 entitled --

7 CHIEF JUSTICE ROBERTS: Well, aren't  
8 those --

9 MR. WILSON: -- as a police officer --

10 CHIEF JUSTICE ROBERTS: -- aren't  
11 those -- I don't mean to interrupt your answer,  
12 but aren't those going to be factual issues in  
13 dispute that won't be resolved until trial?

14 MR. WILSON: I don't -- in a lot of  
15 the cases, the -- the speech that was engaged  
16 in doesn't particularly seem to be in dispute.  
17 In Fogel versus Collins, the speech wasn't in  
18 dispute.

19 CHIEF JUSTICE ROBERTS: Well, it's a  
20 question of motive, right?

21 MR. WILSON: Well, there's two  
22 different things.

23 CHIEF JUSTICE ROBERTS: A question of  
24 animus or intent.

25 MR. WILSON: You -- you have issues

1 where there's the speech is a question. Then  
2 you shift to cases where the question of the  
3 officer's intent becomes relevant.

4 And this is one of my points that I  
5 think I haven't been able to answer, I want to  
6 come back to Justice Alito's question, but I  
7 want to answer Your Honor's question too.

8 At this time in the Court's history,  
9 we have a situation where the interactions  
10 between the citizen and the police officer are  
11 being subjected to increasing technology.

12 More and more in the future cases that  
13 come before this Court, you see it already in  
14 some of the cases that have been in front of  
15 this Court, the interaction between the citizen  
16 and the police officer is going to be  
17 videotaped, recorded, et cetera.

18 JUSTICE ALITO: Well, yeah, let's  
19 assume that case where it's all videotapes, and  
20 it's really high-quality video and you've got  
21 sound too, and what it shows is that the  
22 individual who's ultimately arrested is arguing  
23 with other people, and they're calling each  
24 other names and they're waving their arms, and  
25 the police officer arrives, and in the course



1 of this encounter, the person who's arrested  
2 says some insulting things to the police  
3 officer, and then some period of time goes by,  
4 maybe it's 30 seconds, maybe it's two minutes,  
5 maybe it's three minutes, the person is  
6 arrested. And the arrestee says: The only  
7 reason why I was arrested was because I  
8 exercised my free speech right to criticize the  
9 police officer.

10 That is a question of subjective  
11 intent, and I don't see how it is going to be  
12 weeded out at the pleadings stage or on  
13 qualified immunity or even on summary judgment.  
14 You explain to me how that could be weeded out,  
15 or --

16 MR. WILSON: Certainly.

17 JUSTICE ALITO: -- maybe you think it  
18 shouldn't be.

19 MR. WILSON: I think it can be weeded  
20 out and would be weeded out, Justice Alito.

21 JUSTICE ALITO: Okay. How?

22 MR. WILSON: Simply because an arrest  
23 -- a potential arrestee is rude or says  
24 offensive things does not establish that the  
25 officer retaliated against that arrestee for

1 that conduct.

2 And -- and whenever you have the  
3 interaction between the citizen documented,  
4 then, if there isn't any evidence that shows  
5 that the -- the officer retaliated, you can be  
6 rude, you can say the things that you want to,  
7 but that doesn't mean that the officer  
8 retaliated against you.

9 JUSTICE ALITO: But what if --

10 JUSTICE KAGAN: Well, what does that  
11 mean? What kind of evidence do you need? Do  
12 you need the -- the -- the person who is  
13 bringing the suit to say the officer said that  
14 he was arresting me because of something I  
15 said? Is that what you're looking for?

16 MR. WILSON: I don't think that --  
17 that that's what you necessarily need. I think  
18 what you need is to meet the Mt. Healthy test,  
19 both prongs of the Mt. Healthy test. You need  
20 to prove that, but for your speech, you would  
21 not have been arrested, and then the arresting  
22 officer certainly has the opportunity to say:  
23 Hey, we would have arrested you in any  
24 instance.

25 JUSTICE KAGAN: But that just sounds

1 like a jury question. So we would be sending  
2 every single one of these cases to a jury.

3 MR. WILSON: I -- I don't believe that  
4 you would be sending every one of these cases  
5 to the jury. And this, again, gets back to the  
6 fact that these cases are going to be  
7 documented. There's going to be a lot of  
8 evidence about this. And the Court can look at  
9 that evidence and evaluate that evidence in a  
10 summary judgment context.

11 CHIEF JUSTICE ROBERTS: Well, but  
12 they're not all going to be documented. I  
13 mean, you know, you take an event like this,  
14 you've got 10,000 mostly drunk people in the  
15 middle of nowhere and you've got eight police  
16 officers. I mean, how are all those going to  
17 be documented?

18 MR. WILSON: There's never going to be  
19 any situation where everything is documented,  
20 Chief Justice.

21 CHIEF JUSTICE ROBERTS: But 29,000 --  
22 if I got the number right -- 29,000 arrests  
23 every day, maybe I'm wrong, but I would  
24 anticipate that only the tiniest percentage of  
25 those are going to be documented, by which you

1 mean on film, right?

2 MR. WILSON: I mean audio, video,  
3 other means to document the interaction that  
4 took place. And let me just -- there's a  
5 couple things --

6 JUSTICE BREYER: The problem that I --  
7 I have the same problem. I don't see how  
8 summary judgment deals with this, because you  
9 would have thought you'd have a plaintiff, and  
10 on the one hand, the plaintiff would have said:  
11 I did interrupt the officer. I did criticize  
12 the arrest or criticize what he was doing. I  
13 said, you're unfair or worse.

14 Then you have a police officer who  
15 says, that isn't why I arrested him. Then you  
16 have the plaintiff who says, but I can show you  
17 that, given the look on his face, given what he  
18 said to his colleague, given what dah-dah,  
19 dah-dah, dah-dah, it is why he arrested me.

20 Now no one doubts that if the  
21 plaintiff is right, that is clearly a violation  
22 of the law. So what is summary judgment to do  
23 with it?

24 The jury either believes his story or  
25 believes the defendant's story. And that's why

1 we're thinking a large proportion will go to  
2 the jury, because -- I won't repeat myself.

3 MR. WILSON: Your Honor, I think it's  
4 telling in the State of Alaska, and this case  
5 in particular, the State of Alaska is not the  
6 cutting edge of technology.

7 And yet, in the State of Alaska, the  
8 evidence was, the testimony from Lieutenant  
9 Piscoya, who was the supervisor of both of the  
10 officers involved in this case, 95 percent of  
11 the interactions between police officers and  
12 citizens are recorded in the State of Alaska.

13 JUSTICE BREYER: Well, that has  
14 nothing to do with it, really, because, in some  
15 different state, the state of Oshkosh -- I  
16 don't know -- in a different state, there are a  
17 lot of people who do say rude things about  
18 police officers in their hearing.

19 And there are police officers who do  
20 sometimes arrest them. And there are a set of  
21 ambiguous circumstances as to what the true  
22 reason was. If the defendant is right, nothing  
23 wrong happened. If the plaintiff is right, it  
24 is a serious violation of the law. That's the  
25 issue in this case.

1           And you tell me there won't be cases  
2 like that? I find that hard to accept.

3           MR. WILSON: I'm not telling you there  
4 isn't going to be cases like that.

5           JUSTICE BREYER: No, but you're saying  
6 there aren't many. And after this opinion  
7 comes down in your favor, they're saying there  
8 will be more.

9           MR. WILSON: I think that the  
10 experience in the Ninth Circuit disproves the  
11 concern that the Court has expressed there.  
12 And I would just go back to a case, Tower  
13 versus Glover, that I think is very telling.

14           It -- you want to talk about something  
15 that's easy to say. It's easy to cry out that  
16 the sky is falling, that -- the hysteria.

17           CHIEF JUSTICE ROBERTS: I'm sorry,  
18 that what?

19           MR. WILSON: That the sky is falling,  
20 the hysterics. You know, if we -- if you allow  
21 this case, we're going to be overrun with  
22 cases.

23           Well, look at what they said in Tower  
24 versus Glover in the context of a client suing  
25 the public defender. One of the defenses in

1 that was, if you allow this case, we're going  
2 to be overrun with litigation against public  
3 defenders.

4 JUSTICE BREYER: That isn't quite the  
5 argument. The argument, as I understand it,  
6 is, one, yes, there will be more cases. Two,  
7 the jury might decide most of them correctly,  
8 by the way, but there will be some not. And,  
9 three, this will have a very, perhaps for  
10 better, perhaps for worse, an effect on  
11 policemen that they will be very careful and  
12 not arrest people whom they should arrest.

13 Now that's -- that's the kind of  
14 argument that I think is being made.

15 MR. WILSON: Certainly. And -- and  
16 the only thing that a police officer needs to  
17 be concerned about is to focus on enforcing the  
18 law. And as long as a police officer remains  
19 loyal to enforcing the law, then that -- this  
20 situation takes care of itself.

21 JUSTICE KAVANAUGH: Well, that's not  
22 --

23 CHIEF JUSTICE ROBERTS: That's a very  
24 -- maybe this is strong -- that's a very  
25 cavalier assertion. And I get back to the fact

1 you have eight officers and you have 10,000  
2 people, you have a lot of drinking.

3 I would say the police officers are  
4 worried about a lot of things. And one of the  
5 things they're worried about is the first time  
6 you get an in-your-face interaction with one of  
7 these people, you want to get them, you know,  
8 cuffed and out of the way if it's something  
9 within the range of disturbing or disorderly.  
10 You don't want to sit there and think about it  
11 too long.

12 MR. WILSON: That's fair enough as a  
13 general concern. It doesn't particularly, in  
14 our view, have much traction in light of the  
15 facts of this case.

16 Bear in mind that the only way you  
17 could communicate at this particular event was  
18 to get close to somebody and speak with them.  
19 There's a very different -- whenever you start  
20 talking about probable cause to arrest  
21 somebody, there's probable cause in a church  
22 and there's probable cause whenever you're in  
23 -- out in the middle of Alaska, next to a DJ  
24 that's blaring out music extremely loud.

25 Did -- did -- did Mr. MacCoy have



1 reason to fear Officer Weight when Officer  
2 Weight was standing half the distance that  
3 ultimately Officer Weight and Mr. Bartlett were  
4 standing?

5 Mr. Bartlett -- the evidence in this  
6 case from Mr. Bartlett's standpoint is he  
7 approached Officer Weight in a non-threatening  
8 manner and simply communicated with Officer  
9 Weight in a manner that accomplished him being  
10 able to hear that communication.

11 So the idea that this is people  
12 screaming at each other in a church simply  
13 isn't borne out by the facts of the case.

14 JUSTICE KAVANAUGH: But you said that  
15 an officer merely needs to enforce the law.  
16 But the problem, I think, is that, in a lot of  
17 interactions that lead to an arrest, there's  
18 going to be something critical said,  
19 potentially, of the police before the arrest is  
20 made.

21 MR. WILSON: That's certainly a  
22 potential, yes.

23 JUSTICE KAVANAUGH: Common sense,  
24 common understanding tells us that, that people  
25 say things critical in a hot situation, right?

1 MR. WILSON: That's correct.

2 JUSTICE KAVANAUGH: And so all of  
3 those cases, if it's more than rude and  
4 offensive, but rude and offensive with  
5 something critical of the police, will go to a  
6 jury. Why not?

7 MR. WILSON: Absolutely not.

8 JUSTICE KAVANAUGH: Why not?

9 MR. WILSON: Because a -- a potential  
10 suspect's obnoxious behavior does not form the  
11 basis of intent by the police -- even --

12 JUSTICE KAVANAUGH: I understand  
13 obnoxious, but obnoxious -- I'm sorry to  
14 interrupt -- obnoxious with something critical  
15 or skeptical of the police, which leads to the  
16 claim that I was arrested because I expressed  
17 my view of the police.

18 MR. WILSON: It's not going to get to  
19 the jury because it's not evidence of the  
20 officer's intent. And if you don't get  
21 evidence, you don't have sufficient evidence to  
22 establish the officer's intent was to retaliate  
23 against you for that free speech, then you  
24 lose.

25 JUSTICE BREYER: Do you mind putting

1 -- suppose you -- well, then the word that  
2 there has to be objective evidence that the --  
3 even though there was probable cause, there  
4 still has to be defeat the probable cause, if  
5 there is objective evidence that the probable  
6 cause was a pretext for the arrest.

7 That's the Rehnquist. I'm interested  
8 in what you think of alternatives.

9 Read through Mt. -- you're just saying  
10 in your briefs Mt. Healthy, but the two last  
11 parts of Mt. Healthy are worrying in this  
12 context because there are riots. They do  
13 exist. People do get hurt.

14 And the police have to somehow weed  
15 out the people who are engaged in serious,  
16 physical riotous behavior or, worse, from those  
17 who are the innocent bystanders or just are  
18 participating because of their beliefs, et  
19 cetera. That's very hard. That's why I'm  
20 looking for something that isn't quite Mt.  
21 Healthy but may be close.

22 MR. WILSON: Well, I think that the --  
23 the opinion that was written by Justice  
24 Ginsburg in Reichle, and the situation where  
25 you have on-the-spot safety issues, that those

1 generally would resolve in summary judgment  
2 because the truth, again, in our opinion, the  
3 truth comes out.

4           And the truth, as a trial attorney,  
5 one thing I would like to emphasize to this  
6 Court is the truth is a much more stubborn and  
7 powerful thing than I think this Court gives it  
8 credit for in many of its decisions. The truth  
9 has a way of exerting itself in these  
10 circumstances.

11           And the -- in those situations, that  
12 would ordinarily resolve in summary judgment  
13 because no reasonable juror is going to believe  
14 that whenever an officer is confronting an  
15 immediate, compelling safety issue, that,  
16 actually, the reason you -- you arrested this  
17 particular defendant is because he -- he made  
18 an insult about your haircut or about your  
19 mother.

20           JUSTICE ALITO: This is involving  
21 safety. The cases involving safety issues are  
22 not the ones that are troubling. They're the  
23 cases involving lesser crimes, like the one  
24 that your client was charged with.

25           And there are many -- there are areas

1 of the law where intent has to be proven, and  
2 in those areas of the law, direct evidence of  
3 an unlawful intent is often not present.

4 But is it not the case -- you can  
5 answer this as a trial lawyer -- is it not the  
6 case that intent is very often inferred based  
7 on a sequence of events? So someone exercises  
8 the First Amendment right to say something and,  
9 shortly after that, there's retaliation against  
10 -- some adverse action is taken against that  
11 person. Can you not infer intent based just on  
12 that sequence of events?

13 MR. WILSON: If the evidence is  
14 compelling enough to do so, I would say yes.  
15 But you have to bear in mind here, I've heard  
16 the saying that, you know, these are easy to  
17 make and hard to defend.

18 I would add some qualifications to  
19 that as a trial attorney. They may be --  
20 they're relatively easy to plead, but they're  
21 very hard to prove. Establishing somebody  
22 else's intent is not an easy thing to do. You  
23 need to have good evidence to do that.

24 JUSTICE GINSBURG: But evidence means  
25 a trial.

1           MR. WILSON: Well, I think you need to  
2 have it at summary judgment to defeat a summary  
3 judgment evidence. You need to have enough  
4 evidence to convince the court that a  
5 reasonable juror could find in your favor. And  
6 that evidence can take a wide variety of forms.

7           And we're certainly not here --

8           JUSTICE GINSBURG: Well, what would  
9 take -- this -- this category of case has been  
10 called "contempt of cop," as distinguished from  
11 a journalist who wrote something critical of  
12 the government.

13           And -- and, so in all of these  
14 encounters, there'll -- the -- there'll be rude  
15 behavior to the police officer and there'll be  
16 an arrest for whatever. And -- and you're  
17 saying -- well, where -- I still don't  
18 understand how you limit the cases that will go  
19 to trial and the ones that will be weeded out.

20           MR. WILSON: Let me -- let me start  
21 with the first point that's going to take care  
22 of a significant number of these cases. That  
23 is that if you bring the charges on cases where  
24 you have the proof that the crime's been  
25 committed and you prosecute the case and you

1 obtain a conviction, you've eliminated that  
2 entire class of cases because the damages go  
3 away, the -- the righteous indignation of I was  
4 wrongfully accused, I was unjustly attacked in  
5 the name of justice, you've eliminated those  
6 situations as a practical matter.

7           And I think that there's another area  
8 where these cases get screened out, and that is  
9 that, let's be honest, to -- to succeed or have  
10 a chance to succeed in one of these cases, you  
11 need to have an attorney who's going to take  
12 your case.

13           And I don't think that it's -- I think  
14 it's very telling that you take, for example,  
15 Ford versus City of Yakima or you take, for  
16 example, Mr. Bartlett's case, this case arises  
17 in the first instance from an attorney who  
18 represented both of those individuals in their  
19 criminal matter and got very familiar with what  
20 the facts of this case --

21           JUSTICE KAVANAUGH: Why do the damages  
22 --

23           CHIEF JUSTICE ROBERTS: Just to take  
24 your -- your first example --

25           MR. WILSON: Yes.

1 CHIEF JUSTICE ROBERTS: -- you say,  
2 well, you have to try them and get a  
3 conviction, I mean, the -- the officer's  
4 entitled to take the action he does on the  
5 basis of probable cause. And the fact that a  
6 prosecutor later on would decide, okay, at this  
7 particular moment in the middle of, you know,  
8 all that's going on, you can see in the video  
9 in this case that maybe the arrest was valid,  
10 but it's not worth prosecuting.

11 MR. WILSON: Sure. I didn't say that  
12 you have to. What I said is that, if you do,  
13 you've eliminated that entire category of  
14 cases.

15 CHIEF JUSTICE ROBERTS: Why?

16 JUSTICE KAVANAUGH: Why?

17 JUSTICE ALITO: Why?

18 MR. WILSON: Because, as a practical  
19 matter, number one, you don't see them. You  
20 read through all the cases that have been cited  
21 before this Court on First Amendment  
22 retaliation, there's very, very few that have  
23 any basis --

24 JUSTICE KAVANAUGH: But,  
25 theoretically, the person, even if they are



1 arrested, prosecuted, and convicted, could say  
2 I never would have been arrested in the first  
3 place but for the retaliatory motive.

4 MR. WILSON: Under Heck versus  
5 Humphrey, your damages --

6 JUSTICE KAVANAUGH: Is that correct or  
7 not?

8 MR. WILSON: I apologize, Your Honor,  
9 if you could restate the question for me.

10 JUSTICE KAVANAUGH: The person in your  
11 example who is arrested, then prosecuted, and  
12 convicted, you said that claim would never go  
13 forward. And I'm not understanding, at least  
14 theoretically, why that is so, because the  
15 person would say: I never would have been  
16 arrested in the first place, and everything  
17 that followed would never have occurred either,  
18 but for the retaliatory motive of the officer.

19 MR. WILSON: People can say what they  
20 want to say, but the fact of the matter is, in  
21 those circumstances, there's no damage. The  
22 damage -- whenever you've been convicted, under  
23 Heck versus Humphrey, you can't challenge  
24 anything that has -- in any way would impugn  
25 that -- the validity of that conviction and

1 that judgment.

2 JUSTICE KAVANAUGH: You -- you also  
3 said earlier that this Ninth Circuit experience  
4 on summary judgment had shown that this was not  
5 a huge problem, which I think is a -- a good  
6 point for you, but, as Justice Alito pointed  
7 out, hasn't the Ninth Circuit watered down the  
8 summary judgment standard in some ways to  
9 achieve that result?

10 MR. WILSON: Your Honor, what I --  
11 what I would describe the Ninth Circuit as  
12 doing is vigorously applying this Court's Mt.  
13 Healthy test and -- and -- and applying that in  
14 a summary judgment context.

15 And there's really, I don't think, any  
16 intellectual distinction between what the Ninth  
17 Circuit is doing and this Court's Mt. Healthy  
18 test, except it's focused on applying it in a  
19 summary judgment context. And it's taken all  
20 the evidence -- it remains truthful to the  
21 truth, seeking out the truth, which is all that  
22 Mr. Bartlett has ever asked to do, either in  
23 the criminal case or before this Court or the  
24 district court or the Ninth Circuit court, is  
25 that he be allowed to pursue the truth when he

1 has evidence to support his version of --

2 JUSTICE KAGAN: Mr. -- Mr. Wilson, I'm  
3 wondering what you make of Mr. Wall's proposal.  
4 Or maybe he wouldn't call it a proposal; maybe  
5 he would call it a fallback position. But the  
6 idea that there is a probable cause requirement  
7 but that it's limited in particular by getting  
8 rid of the Devenpeck rule, so it would be  
9 limited to crimes that are identified by a  
10 police officer around the time of the arrest.

11 MR. WILSON: Our belief is the best  
12 rule is that evidence of probable cause is one  
13 of the factors that the court should be looking  
14 at in this area, and in many instances, it very  
15 well may be a dispositive factor.

16 But, in many instances, it may not be  
17 and it isn't, because the -- the probative  
18 force of probable cause really varies depending  
19 on the severity of the offense.

20 I don't think that anybody's going to  
21 succeed in a First Amendment retaliation case  
22 because the officer arrested them because there  
23 was probable cause to believe they committed a  
24 homicide. It's just simply not credible in the  
25 circumstances.

1 JUSTICE SOTOMAYOR: So why don't we go  
2 back to the rule or why don't you advocate the  
3 rule that you set forth in your brief, that a  
4 probable cause requirement applies to felonies  
5 but not misdemeanors?

6 MR. WILSON: I -- I think the -- we're  
7 -- we are comfortable with that rule with one  
8 slight clarification, and that is that I think  
9 the use of the word "serious offenses" is a  
10 more apt description. But, certainly, it would  
11 exclude petty offenses. And that's really the  
12 only issue that the Court --

13 JUSTICE SOTOMAYOR: So you're thinking  
14 there are some misdemeanors that are fairly  
15 serious?

16 MR. WILSON: I -- I could imagine some  
17 that might be. Yes.

18 JUSTICE SOTOMAYOR: So I see -- I take  
19 your point.

20 MR. WILSON: But -- but, certainly,  
21 petty offenses -- and where this -- this issue  
22 arises is not in murder investigations. It  
23 arises where the officer's discretion is at its  
24 zenith in terms of him putting his -- his  
25 desire, his -- whether he wears his emotions on

1 his sleeve or whatever it is about an officer  
2 that motivates him to act in these situations,  
3 and -- and they involve petty offenses,  
4 obstructing the sidewalk, disorderly conduct,  
5 it amounts to nothing other than the officer's  
6 kind of way to retaliate in some circumstances  
7 against an individual because they've exercised  
8 their free speech rights.

9 CHIEF JUSTICE ROBERTS: Is -- is  
10 disorderly conduct always a petty offense?

11 MR. WILSON: I think, in most  
12 instance, it is, but there's some -- I could  
13 envision some that it may not be. If, in fact,  
14 disorderly conduct --

15 CHIEF JUSTICE ROBERTS: So it's not  
16 enough to just look at what the charge is?

17 MR. WILSON: I think that, again, what  
18 we're proposing is -- is that the court view  
19 probable cause in light -- as a significant  
20 factor but not necessarily a controlling factor  
21 in whether or not you can state a First  
22 Amendment retaliation case.

23 And that allows the court to stay  
24 focused on the truth, loyal to the wording of  
25 Section 1983, and at the same time get to the

1 bottom of these cases in an efficient manner.

2           And I want to talk, just if I could  
3 real -- real briefly, about the common law.  
4 And I'll make one other point before I get  
5 there. In Tower versus Glover, this Court  
6 talked about -- you know, said, well, the  
7 hysterics -- you know, the defense to this is  
8 that, if we allow this, the sky is going to  
9 fall, you're going to be overrun with this  
10 litigation.

11           The Court's answer to that in Tower  
12 versus Glover was: If that's true, you need to  
13 make that argument to Congress. You don't put  
14 this Court in a legislative role because you  
15 believe that the law as drafted by Congress is  
16 going to lead to an undesirable result.

17           In Tower versus Glover, the Court said  
18 that is up to Congress to decide, not this  
19 Court.

20           CHIEF JUSTICE ROBERTS: And what law  
21 is -- is Congress supposed to change?

22           MR. WILSON: The Section 1983. For  
23 example, in the Prisoner Litigation Reform Act.  
24 Whenever Congress perceived that prisoner  
25 litigation was out of control, they went back

1 and they amended Section 1983 to deal with that  
2 problem.

3 JUSTICE KAVANAUGH: The Congress  
4 argument -- the Congress argument can cut both  
5 ways, of course. If we were to follow the  
6 Hartman analogy here and to follow what the  
7 other side says is the common law, Congress  
8 could always change the law to expand. So I'm  
9 not sure that gets you that far.

10 MR. WILSON: Well, it gets us that far  
11 because the starting point is what does the  
12 statute say.

13 JUSTICE KAVANAUGH: Well, the starting  
14 point is precedent, what the statute says and  
15 what -- the precedent says we look at the  
16 common law. So we have two strands of  
17 precedent to look at. One, look at the common  
18 law analogies, and the other is just Hartman  
19 itself. And to do both those strands of  
20 precedent, I think you're about to respond to  
21 those, but I would like you to.

22 MR. WILSON: Sure. And -- and I guess  
23 there's an important concession, I believe, in  
24 this case by the Petitioners, and that  
25 concession is that at -- at the common law,

1 that there was no probable cause defense to a  
2 wrongful arrest for misdemeanors. There's no  
3 dispute amongst the parties as to that point.  
4 This is a misdemeanor offense.

5 The -- the common law rule would be  
6 no -- no defense of probable cause for a  
7 misdemeanor offense; the Petitioners lose in  
8 this case.

9 JUSTICE KAGAN: I think the  
10 Petitioners say that that was because there was  
11 no right to arrest at all.

12 MR. WILSON: But they're wrong about  
13 that. And as the first Restatement makes  
14 clear, you had -- a constable had the right to  
15 arrest for an affray and he also had the right  
16 to arrest for offenses that were committed in  
17 their presence. And so they did have the right  
18 to arrest. And, nonetheless, even though they  
19 had those rights, they were held liable if they  
20 got it wrong.

21 And so I think that the Court need no  
22 go -- go no further in this case than to look  
23 at the common law and say no PC defense -- no  
24 probable cause defense for misdemeanors at the  
25 common law. If you want to look to the common



1 law for guidance in this case of wrongful or  
2 retaliatory arrest, that means that the  
3 Petitioners lose.

4 JUSTICE ALITO: What approach have we  
5 taken in prior cases involving the necessary  
6 elements of proof in the 1983 action? Have we  
7 said that we will import the common law rule as  
8 of 1871 entirely, or has that been a  
9 consideration in our decision-making?

10 MR. WILSON: Justice Alito, it's been  
11 a consideration in that the Court does not --  
12 not necessarily just impart them in whole, but  
13 it can adopt various things as it sees in light  
14 of the intent of Section 1983.

15 JUSTICE ALITO: So do you think we  
16 should do that here? Or I thought you were  
17 arguing a minute ago that we should just adopt  
18 whatever the common law rule was.

19 MR. WILSON: My point was is if you go  
20 to the common law, our position is you start  
21 with the statute, the statute says we prevail  
22 in this case. You go to the common law, the  
23 common law says that we prevail in this case.

24 And even when you get into the felony  
25 area, the one case where this Court has spoken

1 in -- in that regard was Dinsman versus Wilkes.  
2 And it said in Dinsman versus Wilkes that the  
3 only defense where -- the only instance where  
4 probable cause was a defense is in a  
5 retaliatory prosecution case, which this Court  
6 has already addressed in the Hartman versus  
7 Moore circumstance.

8 So I don't think that if you go down  
9 that path it gets you where they want to go in  
10 any instance. So that's our analysis of the  
11 common law in kind of fitting those pieces  
12 together.

13 I did want to touch just real briefly  
14 on one kind of aspect of the -- actually, I'm  
15 out of time, sorry.

16 CHIEF JUSTICE ROBERTS: You can touch  
17 briefly on it.

18 MR. WILSON: I'll just say the typical  
19 case. I think it's very important for this  
20 Court to realize what the typical case is not.  
21 It's not the cases that are concerning this  
22 Court about this issue.

23 The typical case is where, like in  
24 Ford versus City of Yakima, there's actually --  
25 what drives these cases is hard evidence, solid

1 evidence that there's a retaliatory intent on  
2 the part of an officer, frequently recorded or  
3 otherwise documented firmly.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 Two minutes, Mr. Borghesan.

8 REBUTTAL ARGUMENT OF DARIO BORGHESEAN  
9 ON BEHALF OF THE PETITIONERS

10 MR. BORGHESEAN: Thank you. And I  
11 start out by pointing that this case in front  
12 of the Court is a typical arrest scenario that  
13 the Court needs to be concerned about in  
14 crafting the rule.

15 On the common law point, it's not  
16 correct that there was never authority to  
17 arrest based on probable cause for misdemeanors  
18 at common law. The authority depended on the  
19 specific law of the jurisdiction and statute,  
20 but the -- but the bigger point is that when  
21 the common law did authorize officers to arrest  
22 based on probable cause, then, if there were  
23 probable cause to make that arrest, the arrest  
24 was privileged and there'd be no liability.

25 And that's the rule we're asking for

1 here, where, today, virtually every officer is  
2 authorized to arrest based on probable cause.

3 A small point. It's -- I don't think  
4 it's correct that a -- that a conviction for a  
5 crime bars a retaliatory arrest lawsuit arising  
6 out of that crime. It's the *Meheilieichi*  
7 *v. Snyder* case. And I apologize, it's a  
8 Westlaw cite, and I don't know the citation off  
9 the top of my head, but one was made and  
10 survived summary judgment despite the fact that  
11 the plaintiff had been convicted of the  
12 offense.

13 And that makes sense for the reason  
14 Justice Kavanaugh was pointing out. Heck  
15 doesn't bar those claims, because, in Heck, the  
16 bar is would the civil litigation call into  
17 question the validity of the criminal judgment.

18 And a retaliatory arrest litigation  
19 doesn't call into question the validity of the  
20 criminal adjustment -- judgment. It just says  
21 that should have never happened or wouldn't  
22 have ever happened if not for the bad motive.

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 counsel. The case is submitted.

25

1                   (Whereupon, at 12:08 p.m., the case  
2 was submitted.)  
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## Official - Subject to Final Review

<b>1</b>	<b>address</b> <sup>[1]</sup> 14:2 <b>addressed</b> <sup>[1]</sup> 65:6 <b>adjustment</b> <sup>[1]</sup> 67:20 <b>administer</b> <sup>[2]</sup> 16:8 17:9 <b>admission</b> <sup>[2]</sup> 16:23 17:9 <b>adopt</b> <sup>[4]</sup> 10:22 26:25 64:13,17 <b>adverse</b> <sup>[1]</sup> 52:10 <b>advocate</b> <sup>[1]</sup> 59:2 <b>affect</b> <sup>[1]</sup> 19:22 <b>affray</b> <sup>[1]</sup> 63:15 <b>afraid</b> <sup>[1]</sup> 25:20 <b>ago</b> <sup>[1]</sup> 64:17 <b>ahead</b> <sup>[1]</sup> 24:18 <b>AL</b> <sup>[1]</sup> 1:3 <b>Alaska</b> <sup>[8]</sup> 1:18,23 12:5 44:4,5,7, 12 47:23 <b>ALITO</b> <sup>[3]</sup> 9:12 11:11 14:7 15:23 17:24 19:25 20:8,12,16,18,19 27:11 28:1,21 35:3,9,13,21 36:1,24 39:18 40:17,20,21 41:9 51:20 55:17 57:6 64:4,10,15 <b>Alito's</b> <sup>[1]</sup> 39:6 <b>allegation</b> <sup>[1]</sup> 28:3 <b>allegations</b> <sup>[2]</sup> 8:3 27:19 <b>allege</b> <sup>[2]</sup> 21:19 26:13 <b>alleged</b> <sup>[4]</sup> 7:13,16 12:18 31:11 <b>alleging</b> <sup>[1]</sup> 31:24 <b>allow</b> <sup>[4]</sup> 27:9 45:20 46:1 61:8 <b>allowed</b> <sup>[2]</sup> 18:1 57:25 <b>allows</b> <sup>[1]</sup> 60:23 <b>almost</b> <sup>[4]</sup> 5:2 8:2 23:6 29:2 <b>alone</b> <sup>[3]</sup> 27:17 34:7,14 <b>already</b> <sup>[3]</sup> 9:14 39:13 65:6 <b>alternatively</b> <sup>[1]</sup> 11:17 <b>alternatives</b> <sup>[1]</sup> 50:8 <b>although</b> <sup>[3]</sup> 22:13 23:23 24:4 <b>ambiguous</b> <sup>[1]</sup> 44:21 <b>amended</b> <sup>[1]</sup> 62:1 <b>Amendment</b> <sup>[19]</sup> 8:8 9:10 11:1 21:23 22:1,4,6 24:7,9 25:19 28:3 33:5,10,19,22 52:8 55:21 58:21 60:22 <b>America</b> <sup>[1]</sup> 11:18 <b>amici</b> <sup>[1]</sup> 12:16 <b>amicus</b> <sup>[3]</sup> 1:21 2:7 21:7 <b>among</b> <sup>[1]</sup> 14:12 <b>amongst</b> <sup>[1]</sup> 63:3 <b>amounts</b> <sup>[1]</sup> 60:5 <b>amounted</b> <sup>[1]</sup> 62:18 <b>analogy</b> <sup>[1]</sup> 62:6 <b>analysis</b> <sup>[3]</sup> 16:16 28:15 65:10 <b>Anchorage</b> <sup>[1]</sup> 1:18 <b>angered</b> <sup>[2]</sup> 34:4,23 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