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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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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 the 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. BORGHE SAN: 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. BORGHE SAN: 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. BORGHE SAN: 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. BORGHESAN: 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. BORGHESAN: 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. BORGHESEAN: 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 elements of these actions have
23 claims, and all of these -- to prevent recovery
24 even in some instances where we think that
25 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 --
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, which
21 of these unattractive rules, we should adopt?

22 MR. BORGHE SAN: Well, I think that
23 probable cause element actually does a good job
24 of capturing the subset of these claims when
25 there actually is a First Amendment violation.

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

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

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

21 And the point is that there are so
22 many laws that people can break that police
23 officers generally look the other way, but, you
24 know, you're saying something that the officer
25 doesn't much like, so he doesn't look the other

1 way.

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

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

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

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

24 JUSTICE BREYER: Well, we saw the
25 case --

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

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

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

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

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

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

25 And whether it has to go further to

1 address a situation like the Court was dealing
2 with in Lozman, I don't think this case
3 presents that question.

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

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

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

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

25 Suppose we added to that and we took

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

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

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

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

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

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

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

1 differently, which is the normal thing that a
2 plaintiff has to show for those types of
3 claims.

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

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

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

1 like this to proceed, and, at least based on
2 the briefing, it doesn't show any massive
3 problem, or correct me if I'm wrong about that.

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

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

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

23 JUSTICE KAVANAUGH: Right. But the
24 bottom line point is the Ninth Circuit, it's
25 been a number of years now, has had the rule

1 contrary, and --

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

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

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

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

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

23 And if there are no questions --

24 JUSTICE ALITO: Am I correct that the
25 Ninth Circuit -- well, I don't want to take up

1 your rebuttal time, but just very quickly, the
2 Ninth Circuit has developed its own special
3 qualified immunity rule for use in this
4 particular situation?

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

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

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

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

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

15 JUSTICE ALITO: -- cases.

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

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

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

1 the Court overruled.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Mr. Wall.

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

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

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

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

20 Second, of the --

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

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

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

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

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

1 action.

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

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

11 MR. WALL: So let me take them in
12 turn, and I -- I think it -- it -- that isn't
13 sort of fair to the other parts of Hartman
14 because it did rely on other things that I
15 think do apply equally here. But just for
16 those two, yes, the fact that you had multiple
17 actors in Hartman and one of them was
18 absolutely immune did make the causal inquiry
19 difficult, but I don't think that we should
20 understand Hartman as just a case about
21 prosecutors. I think reading Justice Souter's
22 opinion, although that was the reason why the
23 causal inquiry was difficult, what he's focused
24 on is the factual difficulty of causation, and
25 he says the body of probable cause evidence is

1 the best way to get at that across the range of
2 cases.

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

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

15 JUSTICE BREYER: Well --

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

17 JUSTICE BREYER: Go ahead.

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

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

1 says: Officer, you have probable cause.
2 That's it -- that's what you want -- that's it.
3 Good-bye, plaintiff.

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

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

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

25 On the first, if the Court sets it up

1 to say, look, probable cause is important
2 evidentiarily to the officer's motive unless
3 you have some evidence of pretext for all the
4 rest, that's essentially --

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

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

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

23 Now, you know, for the reasons in our
24 brief, we'd urge the Court to adopt Devenpeck,
25 but I do think if the Court drew in that rule

1 further away from the trial or limited it at
2 the outset of a civil proceeding, I think that
3 would be a meaningful limitation.

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

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

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

25 JUSTICE ALITO: Whenever there's --

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

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

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

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

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

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

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

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

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

16 MR. WALL: Right.

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

22 MR. WALL: Yes.

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

25 MR. WALL: I think the "but" is that

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

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

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

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

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

16 Your rule would insulate that
17 behavior. So the question is, is the burden
18 that you're speaking about of there being,
19 perhaps, you've pointed to 10 examples, the
20 briefs, of cases that in your view should not
21 have gone to a jury in the -- in the -- in the
22 Ninth Circuit, so less than half a percent of
23 the cases that were filed alleging retaliatory
24 arrests have actually gone to trial, is it
25 worth giving up the protections of 1983 for

1 such a fundamental right as the freedom of
2 speech right?

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

5 CHIEF JUSTICE ROBERTS: Sure.

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

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Mr. Wilson.

22 ORAL ARGUMENT OF ZANE D. WILSON

23 ON BEHALF OF THE RESPONDENT

24 MR. WILSON: Mr. Chief Justice, and
25 may it please the Court:

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

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

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

15 Excuse me.

16 Start with my first point.
17 Petitioners' rule requires dismissal of First
18 Amendment retaliation cases with compelling
19 evidence of retaliatory conduct.

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

23 MR. WILSON: Yes.

24 JUSTICE GINSBURG: -- with respect to
25 both officers? What was the speech element?

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

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

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

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

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

22 And that angered Officer Weight, and
23 -- and then led to the situation where about
24 this time Officer Nieves arrives, and then you
25 have the video, what's left of the video

1 picking up at that particular junction.

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

7 MR. WILSON: Yes, Your Honor.

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

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

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

19 MR. WILSON: Yes, Your Honor.

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

24 MR. WILSON: In terms of --

25 JUSTICE ALITO: Did your client say

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

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

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

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

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

24 It's an encounter between a police
25 officer and a citizen that goes south. And

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

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

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

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

22 And there's been a number of those
23 cases. For example, the Fogel versus Collins
24 case, where there was speech involved on the
25 van and it was talking about, I'm a bomber, or

1 something like this, and the officer made
2 contact with that individual, detained them,
3 investigated them, et cetera, and the court
4 said qualified immunity, you're -- you're
5 entitled --

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

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

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

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

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

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

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

24 MR. WILSON: You -- you have issues
25 where there's the speech is a question. Then

1 you shift to cases where the question of the
2 officer's intent becomes relevant.

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

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

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

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

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

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

15 MR. WILSON: Certainly.

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

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

20 JUSTICE ALITO: Okay. How?

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

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

8 JUSTICE ALITO: But what if --

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

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

24 JUSTICE KAGAN: But that just sounds
25 like a jury question. So we would be sending

1 every single one of these cases to a jury.

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

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

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

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

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

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

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

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

23 The jury either believes his story or
24 believes the defendant's story. And that's why
25 we're thinking a large proportion will go to

1 the jury, because -- I won't repeat myself.

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

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

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

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

25 And you tell me there won't be cases

1 like that? I find that hard to accept.

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

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

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

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

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

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

22 Well, look at what they said in Tower
23 versus Glover in the context of a client suing
24 the public defender. One of the defenses in
25 that was, if you allow this case, we're going

1 to be overrun with litigation against public
2 defenders.

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

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

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

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

22 CHIEF JUSTICE ROBERTS: That's a very
23 -- there may be a -- that's a very cavalier
24 assertion. And I get back to the fact you have
25 eight officers and you have 10,000 people and

1 you have a lot of drinking.

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

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

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

24 Did -- did -- did Mr. MacCoy have
25 reason to fear Officer Weight when Officer

1 Weight was standing half the distance that
2 ultimately Officer Weight and Mr. Bartlett were
3 standing?

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

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

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

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

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

25 MR. WILSON: That's correct.

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

6 MR. WILSON: Absolutely not.

7 JUSTICE KAVANAUGH: Why not?

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

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

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

24 JUSTICE BREYER: Do you mind putting
25 -- suppose you -- well, then the word that

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

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

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

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

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

1 because the truth, again, in our opinion, the
2 truth comes out.

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

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

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

24 And there are many -- there are areas
25 of the law where intent has to be proven. And

1 in those areas of the law, direct evidence of
2 an unlawful intent is often not present.

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

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

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

22 You need to have good evidence to do
23 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 -- where -- I still don't understand how
18 you limit the cases that will go to trial and
19 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 -- of a significant number of these cases.
23 And that is that if you bring the charges on
24 cases where you have the proof that the crime's
25 been committed and you prosecute the case and

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

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 is
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 1, you don't see them. You read
20 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 applying that in a
14 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 Devenpeck rule, so it would be limited
9 to crimes that are identified by a police
10 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 is 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.

12 And that's really the only issue that
13 the Court --

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

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

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

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

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

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

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

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

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

24 And that allows the court to stay
25 focused on the truth, loyal to the wording of

1 Section 1983, and at the same time get to the
2 bottom of these cases in an efficient manner.

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

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

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

21 CHIEF JUSTICE ROBERTS: What law is --
22 is Congress supposed to change?

23 MR. WILSON: The Section 1983. For
24 example, in the Prisoner Litigation Reform Act.
25 Whenever Congress perceived that prisoner

1 litigation was out of control, they went back
2 and they amended Section 1983 to deal with that
3 problem.

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

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

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

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

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

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

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

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

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

1 common law. If you want to look to the common
2 law for guidance in this case of wrongful or
3 retaliatory arrest, that means that the
4 Petitioners lose.

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

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

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

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

25 And even when you get into the felony

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

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

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

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

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

24 The typical case is where, like in
25 Ford versus City of Yakima, there is

1 actually -- what drives these cases is hard
2 evidence, solid evidence that there is a
3 retaliatory intent on the part of an officer,
4 frequently recorded or otherwise documented
5 firmly. Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Two minutes, Mr. Borghesan.

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

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

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

1 And that's the rule we're asking for
2 here, where today virtually every officer is
3 authorized to arrest based on probable cause.

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

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

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

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

1 (Whereupon, at 12:08 p.m., the case
2 was submitted.)
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