No. 17-1174

IN THE

Supreme Court of the United States

LUIS A. NIEVES, ET AL.,
Petitioners,

v.

RUSSELL P. BARTLETT,
Respondent.

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

BRIEF OF *AMICI CURIAE* NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION AND 30 MEDIA AND FREE SPEECH ORGANIZATIONS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does the existence of probable cause defeat a First Amendment retaliatory arrest claim under 42 U.S.C. § 1983 as a matter of law?

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INTEREST OF *AMICI CURIAE*[1]

Amici, described in Appendix A, include a broad array of the nation's leading news organizations and press advocacy groups, including lead *amicus* National Press Photographers Association (NPPA). The membership of NPPA, the nation's leading professional organization for photojournalists, includes photographers, members of the press generally, and citizen journalists, on whose behalf the NPPA advocates in disputes involving interference with First Amendment rights to report on news and matters of public interest.

The interest of *Amici* in this case is to ensure that the crucial role members of the press and citizen reporters play in promoting discussion of matters of public concern is properly accounted for. The question presented in this case is of particular importance to the press, whose institutional role is to serve as a watchdog and check on government. If probable cause bars claims for retaliatory arrests, the government will be given unbridled discretion that can be used to chill and intimidate journalists.

SUMMARY OF ARGUMENT

This case arises from an arrest for disorderly conduct at a remote outdoor festival in Alaska, but the question presented—depending on how broadly

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[1] All parties have consented to this *amicus curiae* brief through letters of consent filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

or narrowly it is answered—may have far-reaching implications for freedom of the press. The specific factual circumstances giving rise to this case make it a poor vehicle for definitely resolving the question presented for a wide range of cases.[2] But if the mere existence of probable cause to make an arrest for any offense precludes constitutional claims alleging First Amendment retaliation for the exercise of free speech, police officers, public officials they act for, and the government obtain an insurmountable advantage in the balance of equities and the ability to turn a shield into a sword for use in deterring or suppressing public criticism.

These issues are of vital importance to members of the press, whose institutional role is to serve as a

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[2] *Amici* have serious concerns regarding whether the Court may have improvidently granted certiorari in this case. We note that Respondent Bartlett's First Amendment claim is premised largely on his assertion that he was arrested for refusing to speak with Sergeant Nieves. *See, e.g.*, J.A. 284-85. And it was this allegation that formed the basis of the Ninth Circuit decision under review. *See* Pet. App. at 6 ("Bartlett alleged that Sergeant Nieves said 'bet you wish you would have talked to me now' after his arrest. This statement, if true, could enable a reasonable juror to find that Sergeant Nieves arrested Bartlett in retaliation for his refusal to answer Sergeant Nieves' questions earlier in the evening."). There is, of course, a constitutional right under the *Fifth* Amendment to not speak to law enforcement officers, *Malloy v. Hogan*, 378 U.S. 1, 8 (1964), but this Court has never passed on whether the First Amendment also protects such refusal to speak with police. While *Amici* believe the question presented in this case—whether probable cause bars any First Amendment retaliatory arrest claim—is an important one which merits consideration by the Court, it should be decided on a more appropriate set of facts.

check on government. As Justice Black wrote, the Framers of the Constitution "gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government." *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring). When the press performs this vital role, "'the state has a special incentive to repress opposition and often wields a more effective power of suppression.'" *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.11 (1978) (quoting Thomas Emerson, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 9 (1966)). Given this dynamic, the threat of retaliatory arrests without constitutional recourse is particularly chilling, because "law enforcement officials … are granted substantial discretion that may be misused to deprive individuals of their liberties." *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011).

In the United States, numerous journalists have been subjected to arrest merely for doing their jobs. Although it is rare, newspaper publishers have been rousted from their homes in the middle of the night for exposing government corruption. More frequently, reporters and photographers have been swept up by police as they try to cover public demonstrations or to document various forms of police action. In 2017 alone, 34 journalists were arrested while trying to document or report the news, *see* U.S. PRESS FREEDOM TRACKER, *available at* https://pressfreedomtracker.us/arrest-criminal-charge (last visited Oct. 4, 2018), and in the past

several years, many more have been arrested covering such events as unrest during the presidential inauguration, the Occupy Wall Street demonstrations, confrontations in Ferguson, Missouri, and the Black Lives Matter movement. In almost all of those cases the charges against arrested journalists were either dropped or dismissed, regardless of probable cause.

Where arrests are motivated by hostility to the press or out of a desire to control news coverage, a holding that any probable cause defeats First Amendment protection would endanger vital First Amendment values. Generalized laws aimed at preserving public order—such as disorderly conduct or disturbing the peace—give police virtually uncabined discretion in deciding who should be arrested and who may be allowed to report without interference. This Court has held on numerous occasions that such discretion can be misused and First Amendment protections undermined, particularly where press coverage is unwelcome to those in authority.

If the Court reaches the merits, it should hold that probable cause does not strictly bar claims alleging First Amendment retaliation, and should adopt a standard that appropriately accommodates the needs of law enforcement while adequately preserving constitutional protections for free speech and press. Such a test was articulated in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), where, once a plaintiff has shown a censorial motive, the burden shifts to the government to show it would have taken the same action

regardless. Such an approach preserves police officers' ability to raise probable cause as a defense, but it does not extinguish First Amendment claims when government actors purposefully target members of the press.

ARGUMENT

I. FREEDOM OF THE PRESS IS AT RISK IF PROBABLE CAUSE SERVES AS AN ABSOLUTE BAR TO FIRST AMENDMENT RETALIATION CLAIMS

While *Amici* recognize that the case at bar does not concern press freedoms – and indeed only arguably presents a colorable First Amendment retaliation claim – both parties contend that the question presented is whether probable cause acts as a complete bar to *any* First Amendment retaliation claim under 42 U.S.C. § 1983. *See* Pet. Br. at i; Resp. Br. at i. Because members of the press are uniquely affected by police and government retaliation against their First Amendment-protected activities, the answer to this question will have an immediate, significant, and lasting impact upon *Amici*.

Because the very purpose of a free press is to act as a restraint on runaway governmental power in our system of checks and balances, it is commonplace for those who exercise that power to take offense. Such hostility to the press is not new, nor is it confined to any political party or level of government. The Obama Administration prosecuted more people for leaks to the press than all previous

presidential administrations combined;[3] President Nixon had his "Enemies List"[4] and approved direct and indirect assaults on the press;[5] Governor George Wallace of Alabama regularly castigated journalists;[6] and Louisiana Governor Huey Long tried to impose a special tax on urban newspapers that he

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[3] Joel Simon, *Barack Obama's Press Freedom Legacy*, COLUMBIA JOURNALISM REVIEW, (April 3, 2015), *available at* https://www.cjr.org/criticism/barack_obamas_press_freedom_legacy.php ("the Obama administration has prosecuted more leakers under the 1917 Espionage Act than all former presidents combined").

[4] List of White House 'Enemies' and Memo Submitted by White House Counsel John Dean to the Ervin Committee, Facts on File, Watergate and the White House, vol. 1, pp. 96-97, *available at* https://www.colorado.edu/AmStudies/lewis/film/enemies.htm (list included political enemies as well as more than 50 newspaper and TV reporters).

[5] James T. Hamilton, *Attacks on the Press Have Helped Bring Down a President Before*, WASHINGTON MONTHLY, (Jan. 12, 2017), *available at* https://washingtonmonthly.com/2017/01/12/nixon-and-trump-past-as-prologue (Nixon "approved illegal wiretaps to listen into the phone conversations of journalists critical of the administration. His Justice Department lodged antitrust charges against the three broadcast networks. He asked FBI Director J. Edgar Hoover to develop 'a run down on the homosexuals known and suspected in the Washington Press Corps.'").

[6] Howell Raines, *George Wallace, Segregation Symbol, Dies at 79*, NEW YORK TIMES, (Sept. 14, 1998), *available at* https://www.nytimes.com/1998/14/us/George-wallace-segregation-symbol-dies-at-79.html (Wallace's "expurgated list of demons" included "liberals, Communists, the Eastern press, Federal judges, [and] 'pointy-headed intellectuals.'").

called a "tax on lying."[7] The current occupant of the White House has branded the press as the "enemy of the American people" and posted videos of himself wrestling an anthropomorphized news network to the ground.[8]

A contentious relationship between government and the press is by design. However, it presents a constitutional problem if the government has at its disposal a legal means of facilitating acts of retaliation, and of defeating efforts to vindicate constitutional rights in court. In particular, news gathering can be disrupted where arrests can be used as a "catch and release" technique, and the press can be chilled into inaction even if there is no prosecution. Such concerns arise in a variety of circumstances.

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[7] Elizabeth Kolbert, *The Big Sleazy*, THE NEW YORKER, (June 12, 2006), *available at* www.newyorker.com/magazine/2006/06/12/the-big-sleazy ("Long proposed (and, of course, got passed) a tax on advertising sales by newspapers with a circulation exceeding twenty thousand. The tax affected primarily the large dailies in New Orleans, which had always opposed him."); *see Grosjean v. American Press Co., Inc.*, 297 U.S. 233, 250 (1936) ("[T]his is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press.").

[8] *See*, *e.g.*, Shelley Hepworth, *Tracking Trump-Era Assault on Press Norms*, COLUMBIA JOURNALISM REVIEW, (May 25, 2017), *available at* https://www.cjr.org/watchdog/tracking-trump-assault-press-freedom-media-attack.php; Michael M. Grynbaum, *Trump, in Latest Bout With Media, Conjures Physical Fight With a Foe*, NEW YORK TIMES, (July 3, 2017) at A10.

A. Retaliation for Unfavorable Press Coverage

In this country, it is rare for a public official to arrest a journalist for publishing a critical story—this is not Russia or Turkey—but it does happen. Sheriff Joe Arpaio of Arizona arrested the publishers of *Phoenix New Times* for publishing articles that probed the sheriff's commercial real estate holdings and that exposed the sheriff's abusive investigation of the newspaper. *Lacey v. Maricopa County*, 693 F.3d 896, 907-09 (9th Cir. 2012) (en banc). As the Ninth Circuit observed, "[i]t is hard to conceive of a more direct assault on the First Amendment than public officials ordering the immediate arrests of their critics." *Id.* at 917.

Sheriff Arpaio shopped around several county prosecutors until he found one willing to investigate the newspaper. A compliant Special Deputy Maricopa County Attorney was appointed who took action against *New Times*, first by sending subpoenas demanding, among other things, information on confidential sources, reporters' and editors' notebooks, memoranda and other documents for any story critical of Arpaio. *Id.* at 909. After *New Times* ran a story revealing the subpoena's demands, Arpaio's "Selective Enforcement Unit" staged a nighttime raid and arrested the publishers in their homes. *Id.* at 910.

The publishers brought a civil rights claim pursuant to 42 U.S.C. § 1983 and the Ninth Circuit denied the defendants' qualified immunity defense. The court did not address the issue raised in this case, whether a probable cause finding would have barred bringing any First Amendment retaliation

claims. 693 F.3d at 917 n.8. Ultimately, it found the arrests were not supported by probable cause. *Id.* at 919. However, if probable cause had existed to make an arrest, then First Amendment retaliation claims arguably would have been entirely barred even on these egregious facts.[9]

In *Reichle v. Howards*, 566 U.S. 658, 668-69 (2012), this Court stopped short of finding that probable cause was sufficient to bar First Amendment claims for retaliatory arrests for good reason. The Court observed that "in many retaliatory arrest cases, it is the officer bearing the alleged animus who makes the injurious arrest." *Id.* If probable cause were all that were needed to bar a First Amendment claim, then officials would be able to retaliate against members of the press with impunity.

B. Arrests While Covering Public Protests or Documenting Police Misconduct

The risk of retaliatory arrest is particularly acute for reporters and news photographers covering public protests or recording police activity. In 2017, at least 34 journalists were arrested while seeking to document or report news. *see* U.S. PRESS FREEDOM TRACKER, *available at*

[9] Arizona law prohibits unauthorized disclosure of matters relating to a grand jury proceeding, and *New Times* had published the substance of the subpoenas that had been issued pursuant to Arpaio's retaliatory investigation. However, the court held that probable cause was lacking because the subpoenas had not been validly issued as part of a grand jury proceeding. *Lacey*, 693 F.3d at 918-19. *See id.* at 923-24.

https://pressfreedomtracker.us/arrest-criminal-charge (last visited Oct. 4, 2018). The few examples provided below illustrate that it is not uncommon for police officers to arrest journalists for attempting to gather news from the midst of civil unrest, or for persistently asking questions of public officials or videotaping police as they perform duties in public.

Large-scale protests have become a defining feature of the last five years in the life of this nation, but dubious arrests have greatly hindered the ability of journalists "on the ground" to provide the public a much-needed window onto scenes of civil unrest. For instance, in early 2017, police arrested nine journalists covering the violent protests that attended President Trump's inauguration. *See* Jaclyn Peiser, *Journalist Swept Up in Inauguration Day Arrests Faces Trial*, NEW YORK TIMES (Nov. 14, 2017), *available at* https://www.nytimes.com/2017/11/14/business/media/alexei-wood-journalist-trial-inauguration.html. Prosecutors ultimately dropped the charges against seven of the nine journalists. One of *Amicus* NPPA's members was also arrested while covering that inauguration day protest. His cameras, film, and digital media files were seized, preventing those images from being timely published, and effecting a prior restraint on the materials. It was not until months later that prosecutors dropped all charges and returned most (but not all) of his equipment and digital files. *See* Tom Burton, *Photojournalists Arrested at Protests Work to Have Confiscated Gear Returned*, NPPA.ORG (Mar. 3, 2017), *available at* https://nppa.org/news/confiscated-cameras-returned. *See also* Sarah Matthews, PRESS FREEDOM TRACKER, *Press Freedoms*

in the United States 2017 at 4 (March 27, 2018), *available at* https://www.rcfp.org/sites/default/files/docs/20180403_100407_press_freedoms_in_the_us_2017.pdf (reporting that "85 percent of arrests [of journalists in 2017] occurred at protests").

These kinds of "catch and release" arrests are not unusual. Officers arrested a number of reporters covering Black Lives Matter protests in Ferguson and St. Louis, Missouri, including reporters for the *Washington Post* and *Huffington Post*, leading to dropped charges in each case. Nirajj Chokshi, *Ferguson-related charges dropped against Washington Post and Huffington Post reporters*, WASH. POST (May 19, 2016), *available at* https://www.washingtonpost.com/news/post-nation/wp/2016/05/19/ferguson-related-charges-dropped-against-washington-post-and-huffington-post-reporters/?utm_term=. c18183a7914a.

Between 2011 and 2012, more than 90 journalists were arrested while reporting at Occupy Wall Street protests that occurred around the country. Tasneem Raja, *Tracking Journalists Arrested at Occupy Protests*, MOTHER JONES (Nov. 18, 2011), *available at* https://www.motherjones.com/politics/2011/11/tracking-journalists-arrests-occupy-protests; *see also*, Sara Rafsky, *At Occupy Protests, U.S. Journalists Arrested, Assaulted*, COMM. TO PROTECT JOURNALISTS, (Nov. 11, 2011), *available at* http://bit.ly/2i2Mblp. A judge in North Dakota dismissed riot charges for lack of evidence after a radio journalist was arrested while covering protests against the Dakota Access pipeline. Erin McCann, *Judge Rejects Riot Charge against Amy Goodman of*

'Democracy Now' Over Pipeline Protest, NEW YORK TIMES (Oct. 17, 2016), *available at* https://www.nytimes.com/2016/10/18/ us/judge-rejects-riot-charge-against-amy-goodman-of-democracy-now-over-pipeline-protest.html. By retaliating against journalists, the police can—and all too often do—prevent journalists from reporting events occurring at the front lines of public protests, where violent confrontations with police are most likely to occur, and where press scrutiny is most needed.

Dubious arrests also have prevented journalists from tenaciously questioning government officials in public places. On May 9, 2017, a reporter was arrested in the West Virginia State Capitol building for shouting questions at the Secretary of the Department of Health and Human Services, Tom Price, as he walked through a public hallway with Counselor to the President of the United States, Kellyanne Conway. The reporter was charged with willful disruption of governmental processes, but this charge was dropped after prosecutors determined no crime had been committed. Matt Stevens, *Charge Dropped against Reporter Who Questioned Tom Price*, NEW YORK TIMES (Sept. 6, 2017), *available at* https://www.nytimes.com/2017/09/06/business/media/tom-price-journalist-arrest.html.

Photojournalists are particularly vulnerable to retaliatory arrests when filming police activity in public. In one instance, a news photographer was acquitted of disorderly conduct after being thrown to the ground and arrested for unobtrusively photographing police officers assisting the issuance of

liquor citations to two men. *See* Andrew Metcalf, BETHESDA MAG. (Mar. 8, 2017), *Montgomery County Settles First Amendment Lawsuit with Photographer, available at* http://www.bethesdamagazine.com/Bethesda-Beat/2017/Montgomery-County-Settles-First-Amendment-Lawsuit-with-Photographer. In another case, Detroit Police arrested a press photographer after she photographed officers escorting a suspect into a police car and confiscated her phone, although no charges were ever filed. WWJ/AP, *Freep Photographer Arrested While Recording An Arrest*, CBSLOCAL.COM (July 16, 2013), *available at* https://detroit.cbslocal.com/2013/07/16/freep-photographer-arrested-while-recording-an-arrest/. In yet another instance, a credentialed Long Island news videographer was arrested and charged with obstructing governmental administration for videotaping police activity from a public street in the midst of other bystanders. Steve Myers, *News Photographer Arrested on Long Island for Videotaping Police*, POYNTER, (Aug. 2, 2011), *available at* http://bit.ly/2i2zBmi (noting that the charge was later dropped). In August of 2012, a photographer on assignment for *The New York Times* was arrested and charged with obstructing government administration and resisting arrest for photographing the arrest of a teenage girl in the Bronx. *Times Photographer Is Arrested on Assignment*, NEW YORK TIMES, (Aug. 5, 2012), *available at* http://nyti.ms/ 2hk8W4U. Recently, Denver police officers arrested the editor of the *Colorado Independent* for taking photographs of those officers standing by a naked man whom they had handcuffed on a city sidewalk. Elise Schmelzer, *Denver Officer*

Accused of Detaining Colorado Journalist Faces No Charges, DENVER POST, (Aug. 23, 2018), *available at* https://www.denverpost.com/2018/08/23/denver-police-detained-journalist-no-charges/.[10]

Arrests such as these thwart the well-established First Amendment right to record police activity in public, which is a crucial function journalists perform in order to ensure that the police remain accountable to the public they serve.[11] All told, the risk of police interference with and arrest of

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[10] Retaliatory arrests are not limited to police officers trying to stop the filming of their own activities. Press photographers and videographers also have been arrested for unwelcome attempts to record public hearings and events. *See, e.g.*, Tom Sherwood, *Journalists Handcuffed, Removed from Taxi Commission Meeting*, NBC4 WASHINGTON (June 22, 2011), *available at* http://bit.ly/2h9JeLD; Matt Hamilton, *L.A. Times Photographer Arrested After Covering Nancy Reagan Funeral Motorcade*, L.A. TIMES, (March 9, 2016), *available at* http://lat.ms/1QFntAG; Tim Perry, *CBS News Journalist Relives His Arrest at a Chicago Trump Event*, CBSNEWS.COM, (Nov. 14, 2016), *available at* http://cbsn.ws/2i0ihvJ.

[11] *E.g.*, *Glik*, 655 F.3d at 82-83 ("Ensuring the public's right to gather information about their officials not only aids in the uncovering of abuses, but also may have a salutary effect on the functioning of government more generally.") (internal citations omitted). *See also Turner v. Lieutenant Driver*, 848 F.3d 678, 689 (5th Cir. 2017) ("Filming the police contributes to the public's ability to hold the[m] accountable, ensure that [] officers are not abusing their power, and make informed decisions about police policy."). "Every Circuit Court of Appeals to address this issue (First, Fifth, Seventh, Ninth, and Eleventh) has held there is a First Amendment right to record police activity in public" and "we join this growing consensus." *Fields v. City of Philadelphia*, 862 F.3d 353, 355-56 (3d Cir. 2017) (collecting cases).

journalists performing their duties is not an esoteric or hypothetical concern.

II. THE COURT SHOULD ADOPT A STANDARD THAT APPROPRIATELY BALANCES THE NEEDS OF LAW ENFORCEMENT WITH FIRST AMENDMENT VALUES

A. The Power to Make Arrests Can Disrupt Newsgathering and Other First Amendment Activities

The power to make arrests is the state's most direct and tangible limit on individual liberty. The impact of its misuse is magnified when employed to retaliate against and deter protected speech. When it comes to the press, arrests can be used to disrupt the exercise of First Amendment speech and press rights. Any retaliatory arrest immediately halts newsgathering activity and contemporaneous reporting of events. The cost, time commitment, effort and distraction imposed on journalists and press organizations to address the fallout of arrests also detract from reporting activity.

Such interference with reportage cannot be remedied in full by *post hoc* remedies. *See*, *e.g.*, *In re King World Prods., Inc.*, 898 F.2d 56, 59 (6th Cir. 1990) ("even minimal interference with first amendment freedoms causes an irreparable injury") (citing *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976)). However, the ability to bring civil rights claims can help ameliorate these burdens and provide much-needed deterrence of police misconduct—provided, of course, that presence of probable cause to arrest is

not a bar to doing so. It is particularly important that a potential First Amendment remedy be available where the government may attempt to dissuade reporters or photographers from covering events where there exists the possibility of public disorder and clashes between citizens and police.

In such circumstances, the police may be tempted to invoke general laws such as breach of peace (*i.e.*, disorderly conduct), obstructing public ways, failure to comply with a peace officer, or loitering to justify arrests, particularly where there may be unfavorable press coverage. Arrests based on probable cause for violating offenses of such generalized and broad scope can be especially threatening to First Amendment activities as they are "susceptible to abuses of discriminatory application." *E.g.*, *Cox v. Louisiana*, 379 U.S. 536, 551, 554-55 (1965). *See also Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 93 (1965) (amorphous offenses become "so broad as to evoke constitutional doubt of the utmost gravity").

With the breadth of such laws and the ease of asserting probable cause for their violation, minor offenses can easily be used as a pretext for a speech-halting arrest. As a consequence, the "lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not." *Cox*, 379 U.S. at 557. This creates "a device for the suppression of the communication of ideas and permits the official to act as a censor." *Id.* If the presence of asserted probable cause for such offenses were sufficient to serve as an absolute bar to First Amendment claims,

law enforcement would have far too much leeway to curtail protected expression.[12]

Indeed, the United States Department of Justice has noted that these kinds of "discretionary charges, such as disorderly conduct, loitering, disturbing the peace, and resisting arrest, are all too easily used to curtail expressive conduct or retaliate against individuals for exercising their First Amendment rights," such that "courts should view such charges skeptically." Dep't of Justice Statement of Interest, *Garcia v. Montgomery County*, 2013 WL 4539394 (D. Md. Aug. 23, 2013), No. JFM-12-3592, at 1. *See also Patterson v. United States*, 999 F. Supp. 2d 300, 314 (D.D.C. 2013) (citing propensity of "'contempt of cop' arrests" and "widespread practice of [] officers using [] disorderly conduct law to arrest … without a legitimate basis").

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[12] This Court has recognized the need to limit such discretion in numerous cases. *See*, *e.g.*, *City of Houston, TX, v. Hill*, 482 U.S. 451, 465 (1987) ("we have repeatedly invalidated laws that provide the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them"); *Kolender v. Lawson,* 461 U.S. 352, 360-61 (1983) (identification requirement unconstitutional because it accords police "full discretion"); *Smith v. Goguen,* 415 U.S. 566, 575 (1974) ("Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections" thereby "entrusting lawmaking 'to the moment-to-moment judgment of the policeman on his beat'") (quoting *Gregory v. Chicago,* 394 U.S. 111 (1969) (Black, J., concurring)); *Papachristou v. City of Jacksonville,* 405 U.S. 156, 170 (1972) (vagrancy ordinance "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure'") (quoting *Thornhill v. Alabama,* 310 U.S. 88, 97-98 (1940)).

Such concerns are magnified if the police can try to justify an arrest after-the-fact with "arguable probable cause." Here, for example, at the time of the arrest the officers told Bartlett that he was under arrest for harassment. The State never charged him with harassment, however, instead, charging him with disorderly conduct and resisting or interfering with arrest—before ultimately dropping all charges. Pet. App. 12-14. In *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945 (2018), the state likewise switched theories on what law Lozman supposedly had violated and for which they had probable cause for his arrest midway through the trial. *See id.* at 1950 (district court allowed defendants to raise a previously unraised charge). Similarly, in *Garcia*, although the plaintiff had been arrested (and acquitted) on charges of disorderly conduct, in the ensuing civil litigation the police claimed they should not be held to account on the theory that probable cause might have existed to bring other charges.[13] While retaliatory *prosecution* cases have a charging instrument that governs any probable cause inquiry, as *Garcia* illustrates, arresting officers are not similarly constrained, *see Garcia*, 145 F. Supp. 3d at 519 (citing *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004)), and Section 1983 law enforcement defendants are thus free to "move the goalposts" in ensuing civil litigation for retaliatory arrests.

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[13] *Garcia*, 145 F. Supp. 3d 492, 517-21 (D. Md. 2015) (rejecting County theories in ensuing civil case that arrest was justified by probable cause for hindering arrest of third parties and/or second degree assault, as lacking objectively reasonable bases).

The great latitude officers enjoy to make arrests where they can cite *something*—anything—that serves as probable cause is unduly magnified if legal recourse is blocked by such recitation; this creates the wrong kinds of incentives. Under qualified immunity principles, officers already are immunized from potential liability except where they knowingly violate clearly established constitutional rights, *Malley v. Briggs*, 475 U.S. 335, 341 (1986)—and this immunity extends to arrests made without probable cause, *see Reichle*, 566 U.S. at 664-65. So too, law enforcement agencies cannot be held liable unless an unlawful arrest is pursuant to department custom or policy. *Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). For cases that clear these hurdles, holding that probable cause to arrest defeats a First Amendment claim further contracts the ability of the press and public to remedy constitutional violations.

This leaves journalists, photographers, citizen reporters and others with even less opportunity to vindicate their rights. It also instructs law enforcement officers that, even if they know they are violating well-settled rights, no liability will attach so long as they can articulate some probable cause for arrest, even after the fact. This, in turn, emboldens police to make constitutionally infirm arrests and disincentivizes law enforcement agencies from properly training and disciplining their officers. Altogether, these factors increase the incidence of arrests that interfere with the exercise of basic First Amendment rights.

B. The Burden Shifting Framework of *Mt. Healthy City School District Board of Education v. Doyle* Strikes the Correct Constitutional Balance

Under longstanding First Amendment analysis, the government has no legitimate power to retaliate against individuals for engaging in constitutionally protected activity. Public schools may not fire teachers for criticizing administrators, *Perry v. Sindermann*, 408 U.S. 593 (1972); prison officials may not divert prisoners' mail as punishment for speaking to the press, *Crawford-El v. Britton*, 523 U.S. 574 (1998); and agencies may not demote employees for their political affiliations. *Heffernan v. City of Paterson*, 136 S. Ct. 1412 (2016). Bottom line, official reprisal for protected activity "offends the Constitution," *Crawford-El v. Britton*, 523 U.S. at 588 n.10, and is subject to recovery, *Hartman v. Moore*, 547 U.S. 250, 256 (2006).

At the same time, the Court has long been sensitive to the potential for retaliation lawsuits to hamstring effective administration of government. Permitting recovery whenever government action is motivated in any part by improper animus risks preventing the government from acting in the public interest. *Mt. Healthy*, 429 U.S. at 285. A school administration should not be disabled from terminating an underperforming teacher just because he (or she) happens to engage in protected speech with which the administration disagrees. *Id.*

So too has the Court acknowledged the costs of the unique evidentiary burdens retaliation claims place on public officials. Improper animus is "easy to

allege and hard to disprove." *Crawford-El*, 523 U.S. at 585. Retaliation suits therefore may be less amenable to summary disposition and "implicate obvious concerns with the social costs of subjecting public officials to discovery and trial, as well as liability for damages." *Id.*

To address these problems, this Court long ago fashioned a burden-shifting framework designed to "protect[] against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights." *Mt. Healthy*, 429 U.S. at 287. Under the *Mt. Healthy* test, the plaintiff bears the initial burden of demonstrating unconstitutional animus was a motivating factor of an adverse action; the burden then shifts to the defendant to demonstrate that even without the impetus to retaliate the defendant would have taken the action complained of. *Id.*

The *Mt. Healthy* test strikes the appropriate constitutional balance for the vast majority of retaliation claims. In effect, it narrows availability of recovery to cases where unconstitutional animus is the but-for cause of official action and ensures that defendants have an adequate opportunity to defend against frivolous claims at summary judgment. Most importantly, it ensures that an individual "is placed in no worse a position than if he had not engaged in the [protected] conduct." *Id.* at 285-86.

The *Mt. Healthy* test is particularly appropriate in First Amendment retaliatory arrest cases and neatly affords the presence or absence of probable cause due evidentiary weight. No doubt, officers offend the Constitution whenever they arrest an

individual in order to inhibit or penalize the exercise of First Amendment freedoms. That is true regardless of whether there exists probable cause, if the arrest would not have occurred but for the protected activity. *Cf. Mt. Healthy*, 429 U.S. at 283-84 (even when a public employee may be discharged for no reason, the government may not discharge the employee because of their protected speech); *Perry*, 408 U.S. at 597 (the government may not deny plaintiff a benefit because of his protected speech, even if it could properly deny it for another reason).

Evidence of the presence or absence of probable cause to arrest will be available to officers in "virtually every retaliatory arrest case," *Reichle*, 566 U.S. at 668, and an officer may raise it as a defense to any claim of retaliation. Indeed, the increased availability of video evidence, from police-worn body cameras, dashcams, surveillance video or bystanders who can record audio and/or video with cellphones, only strengthens the evidence that will be available to arresting officers. "Nearly every large police department" has either adopted police-worn body cameras or plans to.[14] More than three-quarters of Americans own a smartphone, which contain video-capable cameras as a matter of course.[15]

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[14] Mike Maciag, *Survey: Almost All Police Departments Plan to Use Body Cameras*, GOVERNING (Jan. 26. 2016), *available at* http://www.governing.com/topics/public-justice-safety/gov-police-body-camera-survey.html.

[15] *Mobile Fact Sheet*, PEW RESEARCH CTR. (Feb. 5, 2018), *available at* http://www.pewinternet.org/fact-sheet/mobile.

This widely available documentary evidence makes summary judgment dispositions significantly more likely. More than a decade ago, in *Scott v. Harris*, the Court explicitly held that a video documenting the events giving rise to a Section 1983 claim entitled the defendant police officer to summary judgment, notwithstanding the claimant's divergent statement of the facts. 550 U.S. 372, 380-81 (2007). Federal Courts of Appeals ruling on First Amendment retaliation claims have also recognized the exculpatory potential of video evidence as one of the broader public benefits served by its proliferation. *See Turner*, 848 F.3d at 689 ("Filming the police also frequently helps officers; for example, a citizen's recording might corroborate a probable cause finding or might even exonerate an officer charged with wrongdoing"). *See also Glik*, 655 F.3d at 82-83 (the ability to record police "serves a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs," and "not only aids in the uncovering of abuses, but also may have a salutary effect on the functioning of government more generally.") (citations and quotation marks omitted).[16]

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[16] Chief Justice Roberts recognized the potent evidentiary value of videography in First Amendment retaliation claims during oral argument in *Lozman*, commenting on a video of the petitioner's alleged unlawful arrest: "[R]egardless of what happened before or after, I found the video pretty chilling. I mean, the fellow is up there for about 15 seconds, and the next thing he knows, he's being led off in -- in -- in handcuffs, speaking in a very calm voice the whole time." Transcript of Oral Argument at 34:15-21, *Lozman*, 138 S. Ct. 1945 (No. 17-21).

The increasingly widespread availability of exculpatory video evidence may be "fatal" to many plaintiffs' ability to prove the requisite but-for causation element of a retaliatory arrest claim. *Reichle*, 566 U.S. at 668. And, where appropriate, courts presented with clear evidence will have little difficulty resolving claims at an early stage. In fact, only a few months ago the Second Circuit held that applying the *Mt. Healthy* standard would still require affirming summary judgment to a police officer in a Section 1983 retaliatory arrest claim, where the record could not support the plaintiff's claim that his First Amendment-protected activity was a "but-for" cause of his arrest. *See Higginbotham v. Sylvester*, No. 16-3994, 2018 WL 3559116, at *2 (2d Cir. July 25, 2018). Any concern that *Mt. Healthy* would open the "floodgates" of retaliatory arrest litigation is therefore misplaced. Under the *Mt. Healthy* framework, arrestees, like public employees, are left in no worse a position than if they had not engaged in protected conduct.

In contrast, requiring arrestees to demonstrate an absence of probable cause would decisively tip the scales in favor of defendants, enabling police to indirectly censor and penalize the exercise of First Amendment freedoms in ways the government could not directly command. A rule that probable cause bars a retaliatory arrest claim would immunize government actions that plainly offend the First Amendment.

That probable cause would bar a Fourth Amendment challenge is irrelevant. The Court already has made clear that an arrest which is lawful under the

Fourth Amendment may nevertheless violate other constitutional rights. In *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, this Court acknowledged that the *Mt. Healthy* test governs retaliation claims premised on alleged racial discrimination. 429 U.S. 252, 270, n.21 (1977). And in *Whren v. United States*, it clarified that the Constitution prohibits selective law enforcement based on race, notwithstanding the existence of probable cause. 517 U.S. 806, 813 (1996); *see Reichle*, 566 U.S. at 664 n.5. If the existence of probable cause is no bar to an Equal Protection challenge to an arrest, it should not bar a First Amendment challenge.

Notably, retaliatory arrest claims feature none of the attributes of retaliatory prosecution claims that left this Court comfortable in imposing the burden of alleging and proving lack of probable cause in retaliatory *prosecution* claims in *Hartman*, 547 U.S. 250. Unlike retaliatory prosecution plaintiffs (and retaliatory arrest defendants), retaliatory arrest plaintiffs do not always have access to a distinct body of highly valuable circumstantial evidence that is apt to prove or disprove probable cause, because retaliatory arrest plaintiffs often do not even know the reason for their arrest. *See Devenpeck*, 543 U.S. at 155 (police officers not constitutionally required to state reasons for an arrest). More importantly, in contrast to retaliatory prosecution claims, there is generally no disconnect between animus and injury in retaliatory arrest claims—"it is the officer bearing the alleged animus who makes the injurious arrest." *Reichle*, 566 U.S. at 668-69. Nor is any presumption of regularity accorded police officers' arrest decisions

that is akin to the presumption of prosecutorial regularity. *Id.*

For these reasons, First Amendment retaliatory arrest claims are best adjudicated under the standard *Mt. Healthy* rubric, and should not invariably be defeated by a failure to allege and then prove a lack of probable cause. The *Mt. Healthy* standard preserves police officers' ability to raise probable cause as a defense while ensuring they are not insulated from liability for purposefully abridging and penalizing the exercise of the freedoms guaranteed by the First Amendment.

CONCLUSION

The arrests of reporters and photographers described in this brief "may have taken place in America," but they belong "to a society much different and more oppressive than our own." *Rossignol v. Vookhaar*, 316 F.3d 516, 527-28 (4th Cir. 2003). The Court should adopt a legal standard that makes clear it is "not for law enforcement to summon the organized force of the sheriff's office to the cause of censorship." *Id.* at 528. Toward that end, this Court should affirm the decision below and hold that probable cause does not bar First Amendment claims for retaliatory arrests.

Respectfully submitted,

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