No. 17-1174

In the Morris Tyler Moot Court of Appeals at Yale

LUIS A. NIEVES & BRYCE L. WEIGHT, PETITIONERS

V.

RUSSELL V. BARTLETT, RESPONDENT

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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Alaska State Troopers Luis A. Nieves and Bryce L. Weight arrested Russell P. Bartlett because they had probable cause to believe he committed harassment pursuant to Alaska law.[1] Despite affirming the district court's conclusion that the troopers had probable cause to arrest Bartlett, the Ninth Circuit reversed its grant of summary judgment on Bartlett's First Amendment retaliatory-arrest claim and held that the case must be resolved at trial.

The question presented is whether the Ninth Circuit erred in holding that probable cause is insufficient to defeat a First Amendment retaliatory-arrest claim under 42 U.S.C. § 1983 (2018).

[1] Nieves and Weight are the Petitioners. Bartlett is the Respondent.

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The unpublished decision of the Ninth Circuit is reported at 712 F. App'x 613. The district court's opinion is unreported but is available at 2016 WL 3702952.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on October 20, 2017. A petition for certiorari was timely filed and granted on June 28, 2018. This Court's jurisdiction rests on 28 U.S.C. § 1254(1) (2018).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution states that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I. The remaining significant statutory provision, 42 U.S.C. § 1983 (2018), is available in the Appendix.

STATEMENT OF THE CASE

A. Factual Background

On the final night of Arctic Man 2014, an event characterized by a "remote location, large crowds, and . . . high levels of alcohol use," Alaska State Troopers Luis Nieves and Bryce Weight were investigating reports of underage drinking. *Bartlett v. Nieves*, 4:15-CV-00004-SLG, 2016 WL 3702952, at *1 (D. Alaska July 7, 2016). After seeing Russell Bartlett at one of Arctic Man's parties, Nieves asked to speak with him. *Id.* Bartlett rebuffed Nieves, so he walked away. *Id.* "Shortly thereafter, at approximately 1:30 AM," Bartlett saw Weight conversing with M.W., a minor with whom Bartlett had attended the party. *Id.* Bartlett approached the pair and stood very close to Weight, allegedly to "communicate over the loud music." *Id.* Bartlett claimed that Weight did not have "the authority" to speak with M.W. "without a parent or guardian present." *Id.* Weight responded "no." *Id.*

Videos shot by a local news organization show that Bartlett then raised his right hand "within inches of Trooper Weight's face." *Id.* at *2. In response, Weight pushed Bartlett backwards. *Id.* Viewing the altercation, Nieves assisted Weight, and the troopers together subdued Bartlett and arrested him for harassment under Alaska law. *Id.* Bartlett alleges that after his arrest, Nieves said to him "[b]et you wish you would have talked to me now." *Id.* Alaska charged Bartlett "with disorderly conduct and resisting or interfering with arrest" but eventually "dismissed the charges." *Id.* at *3. Bartlett subsequently filed a § 1983 action against the troopers, alleging eight theories including that they falsely arrested and imprisoned him in violation of the Fourth Amendment and retaliated against him for exercising his First Amendment rights. *Id.*

B. Prior Proceedings

The district court granted summary judgment to the troopers on all of Bartlett's claims. *Id.* at *12. After viewing the videos of the arrest, the district court found that Bartlett's hand movement could "be interpreted by a reasonable officer as a challenge or taunt sufficient to support probable cause to arrest Mr. Bartlett for harassment." *Id.* at *5. The district court concluded that "[p]articularly given the troopers' heightened challenges while investigating underage drinking at 1:30 a.m. at a crowded, large, remote event like Arctic Man," they could have "interpret[ed] a loud person acting as depicted in the videos as having committed harassment." *Id.* The district court also held that "even if Mr. Bartlett's speech motivated the troopers' actions," its finding of probable cause entitled the troopers to summary judgment on the First Amendment claim. *Id.* at *11 (citing *Whren v. United States*, 517 U.S. 806, 813 (1996)).

The Ninth Circuit reversed the district court on the retaliation claim. *Bartlett v. Nieves*, 712 F. App'x 613, 616 (9th Cir. 2017). The court of appeals "agree[d] with the district court"

that there was probable cause to arrest Bartlett for "harassment, disorderly conduct, resisting arrest, or assault under Alaska law." *Id.* at 615. That was because "[w]hen Sergeant Nieves initiated Bartlett's arrest, he knew that Bartlett had been drinking, and he observed Bartlett speaking in a loud voice and standing close to Trooper Weight . . . [and he] saw Trooper Weight push Bartlett back." *Id.*

Despite finding that the troopers had probable cause to arrest Bartlett, the court noted that it had "previously held that a plaintiff can prevail on a retaliatory-arrest claim even if the officers had probable cause to arrest." *Id.* at 616 (citing *Ford v. City of Yakima*, 706 F.3d 1188, 1195-96 (9th Cir. 2013)). It therefore concluded that "[w]hen the troopers arrested Bartlett at Arctic Man in 2014, it was clearly established that 'an individual has a right to be free from retaliatory police action, even if probable cause existed for that action.'" *Id.* (quoting *Ford*, 706 F.3d at 1195-96).

The Ninth Circuit further held that the case must be resolved by a jury. *Id.* "Construing the facts in the light most favorable to Bartlett," the court found that he had "advanced sufficient evidence" for "a jury to find that the officers' retaliatory motive was a but-for cause of their action." *Id.* (citation omitted). Hence, "the issue of causation ultimately should be determined by a trier of fact." *Id.* (citation omitted). The Ninth Circuit noted that Bartlett's "[m]ost important[]" allegation was that Nieves "said 'bet you wish you would have talked to me now' after his arrest." *Id.* "[I]f true," the court of appeals concluded, that statement "could enable a reasonable jury to find that Sergeant Nieves arrested Bartlett in retaliation for his refusal to answer Sergeant Nieves's questions earlier in the evening." *Id.*

SUMMARY OF ARGUMENT

Police officers acting in an objectively reasonable manner should not be subjected to the burdens of litigation. By denying officers the safe harbor of probable cause, the Ninth Circuit's

holding contradicts this common-sense rule without historical, doctrinal, or practical justification. The Ninth Circuit is wrong, and this Court should reverse.

I. Because there was no First Amendment retaliatory-arrest claim at common law, the closest analogs—false imprisonment, malicious prosecution, and malicious arrest—are the proper place for this Court to begin its inquiry. In suits against peace officers for these arrest-based torts, common-law courts emphasized the no-probable-cause requirement because they recognized that the public interest required constables to act undeterred by the threat of a damages suit. Courts' concern was not just that officers would risk liability but also that the cost of defending a suit would itself dissuade the officers from acting zealously to protect the public interest. These rationales apply just as forcefully today as they did in the nineteenth century, so there is no persuasive reason to depart from the common-law understanding.

This Court's decisions in *Hartman v. Moore*, 547 U.S. 250 (2006), and *Reichle v. Howards*, 566 U.S. 658 (2012), provide further support for the no-probable-cause requirement in retaliatory-arrest cases. *Hartman* held that plaintiffs in retaliatory-prosecution cases must prove an absence of probable cause because of the evidentiary significance of that showing and the difficulties of proving causation between a plaintiff's injury and a defendant's animus. *Reichle* noted that these same factors are present in retaliatory-arrest cases. The no-probable-cause requirement is even more important here than in *Hartman* because without it, courts will be overwhelmed with retaliatory-arrest litigation. For those reasons, requiring retaliatory-arrest plaintiffs to prove a lack of probable cause is a logical extension of this Court's precedents.

II. The costs of the Ninth Circuit's rule also outweigh its benefits. On the cost side of the ledger, application of the burden-shifting framework established in *Mt. Healthy City Sch. Dist.*

Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), to retaliatory-arrest claims is in tension with two important doctrines.

First, applying *Mt. Healthy* here substantially weakens the protections of qualified immunity because it forces litigation of police officers' subjective intent at trial in many retaliatory-arrest cases. It is essentially costless for plaintiffs to allege that police officers retaliated against them for exercising their First Amendment rights. And when plaintiffs make that allegation, the case must ordinarily be resolved by a factfinder because courts cannot resolve factual disputes about a police officer's motivation on a motion for summary judgment. That is particularly true in retaliatory-arrest cases because the very fact that the plaintiff was arrested is relevant circumstantial evidence that supports an allegation of retaliatory intent.

This is a case in point: The Ninth Circuit held that Bartlett's allegation that Nieves told him "bet you wish you would have talked to me now" after his arrest—unsupported by direct evidence but accepted as true for purposes of summary judgment—required a trial to determine whether Nieves made that statement and if so, his motivation for arresting Bartlett. Because qualified immunity is an immunity from suit, even if they prevail at trial, the troopers will have lost its protections—at great social cost. By contrast, the no-probable-cause requirement allows courts to weed out insubstantial claims before they proceed to trial, in keeping with the objectives of qualified immunity.

Second, applying *Mt. Healthy* here requires an inquiry into the subjective motivations of police officers, a step this Court has repeatedly rejected because objective standards promote efficiency and fairness and conserve judicial resources in the criminal sphere. The Ninth Circuit's rule particularly disrupts this Court's Fourth Amendment jurisprudence. As police officers and

suspects typically speak to one another before an arrest, it is not difficult for plaintiffs to refashion traditional Fourth Amendment claims as First Amendment retaliation claims. As in this case, litigants can thus use retaliation claims to circumvent this Court's repudiation of subjective inquiries into officers' motivations.

Weighed against these costs, the benefits of the Ninth Circuit's rule are modest. Because most suspects are arrested for offenses like assault and larceny that are unlikely to involve speech on issues of public significance, the mine-run retaliatory arrest claim does not implicate strong First Amendment interests. As in *Hartman*, this Court should refuse to design a cause of action for the exceptional contrary case. The interest balance called for by this Court's precedents thus conclusively supports the no-probable-cause requirement.

ARGUMENT

I. The no-probable-cause requirement for First Amendment retaliatory-arrest claims comports with history and precedent.

A. Probable cause was a complete defense to the common-law analogs of First Amendment retaliatory-arrest claims.

We begin with first principles. Because § 1983 "creates a species of tort liability," *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976), this Court "look[s] first to the common law of torts" to "defin[e] the contours and prerequisites of a § 1983 claim." *Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017). As there was no common-law First Amendment retaliatory-arrest claim, "the appropriate starting point" is with the common-law tort that is the "closest analogy." *Heck v. Humphrey*, 512 U.S. 477, 483-84 (1994) (citation omitted). "The closest analogs" in this case, as in *Lozman v. City of Riviera Beach* which presented the same question, "are the three arrest-

based torts under the common law: false imprisonment, malicious prosecution, and malicious arrest." 138 S. Ct. 1945, 1957 (2018) (Thomas, J., dissenting). "In defining the elements of these three torts," nineteenth-century courts "emphasized the importance of probable cause." *Id.*

Common-law courts stressed that constables acting on probable cause were immune from liability to ensure that they were not deterred from discharging their public duties. These courts recognized that "no one would willingly undertake to vindicate a breach of the public law" if doing so might expose an officer to liability. *Id.* at 1958 (quoting *Ventress v. Rosser*, 73 Ga. 534, 541 (1884)). The "ill consequences to the public," *id.* (quoting *Ventress*, 73 Ga. at 541), of a contrary rule led courts to "excuse[] police officers from liability for false imprisonment "if they had 'made [the arrest] on reasonable grounds of belief'—*i.e.*, probable cause." *Id.* at 1957 (second alteration in original) (quoting Thomas Cooley, *Law of Torts* 175 (1880)). The importance of public safety "outweighed 'the mischief and inconvenience to the public'" that might flow from the arrest of a suspect who was not ultimately convicted of a crime. *Id.* (quoting *Ledwith v. Catchpole*, 2 Cald. 291, 295 (K.B. 1783).

Nineteenth-century courts used the probable-cause requirement to protect peace officers not just from liability but also "from suits for acts done within the scope of their duty." *Id.* (quoting *Chesley v. King*, 74 Me. 164, 175 (1882)); *cf. Plumhoff v. Rickard*, 134 S. Ct. 2012, 2019 (2014) ("Qualified immunity is 'an immunity from suit rather than a mere defense to liability.'") (brackets omitted) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). Courts would not permit "every one who chooses to imagine or assert that he is aggrieved" by the actions of law enforcement officials "to harass them with suits on that ground." *Lozman*, 138 S. Ct. at 1958 (quoting *Chesley*, 74 Me. at 175-76). That was because a constable could not perform effectively

"with the prospect of an annoying suit staring him in the face." *Id.* (quoting *Ventress*, 73 Ga. at 541).

This Court should not depart from historical practice for retaliatory-arrest claims. Although the common law serves "more as a source of inspired examples than of prefabricated components" in § 1983 cases, *Hartman*, 547 U.S. at 258, the need for law enforcement officers to act expeditiously to protect the public interest is as great today as it was in the nineteenth century. There is thus "no justification for deviating from the historical practice simply because an arrest claim is framed in terms of the First Amendment." *Lozman*, 138 S. Ct. at 1958. As it has done in the past, this Court should continue to reject "unprecedented change[s]" imposed by a court of appeals which "lack any common-law pedigree." *Crawford-El v. Britton*, 523 U.S. 574, 595 (1998).

B. This Court's precedents support extending the no-probable-cause requirement to First Amendment retaliatory-arrest claims.

1. Precedent further reinforces the argument for requiring plaintiffs to prove the absence of probable cause in retaliatory-arrest cases. In *Hartman*, this Court decided that plaintiffs must make that showing where the allegation is of retaliatory prosecution. 547 U.S. at 265-66. The *Hartman* Court emphasized the difficulties of proving causation in these cases. *See id.* at 259-66. And because "the significance of probable cause or the lack of it looms large" for retaliatory-prosecution claims, "a requirement to plead and prove its absence will usually be cost free by any incremental reckoning." *Id.* at 265.

Reichle recognized that these rationales apply to claims of retaliatory arrest. Like "retaliatory prosecution cases, evidence of the presence or absence of probable cause for the arrest will be available in virtually every retaliatory arrest case." *Reichle*, 566 U.S. at 668. Similarly, as with retaliatory-prosecution claims, "the connection between alleged animus and injury may be

weakened in the arrest context by a police officer's wholly legitimate consideration of speech." *Id.* Although *Reichle* acknowledged that "not every aspect of *Hartman*'s rationale could extend to arrests," this Court noted that "retaliatory arrest cases also present a tenuous causal connection between the defendant's alleged animus and the plaintiff's injury." *Id.* Hence, extending *Hartman* to retaliatory-arrest claims is a natural outgrowth of its principles.

2. The no-probable-cause requirement is more important here than in *Hartman* because there are far more arrests—"about 29,000" per day in 2016—than there are prosecutions. *Lozman*, 138 S. Ct. at 1953 (majority opinion) (citing Fed. Bureau Investigation, *Persons Arrested, Crime in the United States, 2016*, U.S. Dep't Just. (Sep. 2017), http://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/persons-arrested).[2] *Hartman* recognized the fear that allowing plaintiffs to proceed without proving the absence of probable cause would "unduly put upon" courts with a "high volume of litigation." 547 U.S. at 258. *Hartman*'s concern is amplified in the retaliatory-arrest context.

3. As in *Hartman*, this Court should "refus[e] to carve out an exception for unusual cases." *Lozman*, 138 S. Ct. at 1958 (Thomas, J., dissenting). The *Hartman* Court noted the possibility of extreme hypotheticals—such as a "prosecutor's disclosure of retaliatory thinking on his part"—that might have supported a decision "to give no special prominence to an absence of probable cause" in proving a retaliatory-prosecution claim. 547 U.S. at 264. But this Court rejected that argument as "like proposing that retirement plans include the possibility of winning the lottery" because "these examples are likely to be rare and consequently poor guides in structuring a cause of action." *Id.* at 264 & n.10. This Court concluded that "[u]nambiguous admissions" are unlikely, and "hassles over the adequacy of admissions will be the predictable result,

[2] While there is no precise estimate of the number of prosecutions at every level of government, it is reasonable to assume—as *Lozman* did—that there are far more arrests than prosecutions. *See id.*

if *any* exemption to a no-probable-cause requirement is allowed." *Id.* at 264 n.10 (emphasis added).

This reasoning applies to retaliatory-arrest claims. Retaliatory-arrest cases in which there is direct evidence of retaliatory animus are rare. As in this case, the more typical claim will involve disputes over whether a law enforcement officer harbored retaliatory intent. As with retaliatory prosecutions, "hassles over the adequacy of admissions"—such as what Nieves allegedly said to Bartlett—are the key issues in retaliatory-arrest cases. *Id.* The "predictable result" this Court warned of in *Hartman* is no less certain, and no less damaging, in the retaliatory-arrest context. *Id.*

II. The Ninth Circuit's rule is unreasonable.

While history and precedent are sufficient reason to extend the no-probable-cause requirement to retaliatory-arrest claims, the cost of the opposite rule prompts the same conclusion. The Ninth Circuit applies the *Mt. Healthy* "burden-shifting framework" to retaliatory-arrest claims. *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 179 n.6 (2009).

To meet the initial *Mt. Healthy* burden in a retaliatory-arrest case, an arrestee must allege that his speech "was constitutionally protected" and that the arresting officer harbored a retaliatory intent that was a "substantial" or "motivating" factor in her decision to arrest. 429 U.S. at 287. If a plaintiff makes allegations sufficient to meet the preliminary burden, the onus shifts to the officer to show "by a preponderance of the evidence" that she would have effected the arrest "even in the absence of the protected conduct." *Id.* Applying *Mt. Healthy* to retaliation claims, this Court has instructed that "the propriety of a proposed procedure must turn on the particular context in which the question arises—on the cost of the procedure and the relative magnitude

and constitutional significance of the risks it would decrease and increase." *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion).

The costs of the Ninth Circuit's rule are substantial. It is in great tension with this Court's qualified immunity and criminal law jurisprudence. On the other hand, its benefits are slight. The speech at issue in most retaliatory-arrest cases is of limited First Amendment value. The costs of the Ninth Circuit's rule thus outweigh its benefits.

A. The Ninth Circuit's rule is costly.

1. Application of the *Mt. Healthy* framework to First Amendment retaliatory-arrest claims undermines the protections of qualified immunity.

a. Created to ensure that fear of personal liability does not "dampen the ardor of all but the most resolute, or the most irresponsible, public officials in the unflinching discharge of their duties," *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (opinion of Hand, C.J.)), the doctrine of qualified immunity rests "on the special policy concerns involved in suing government officials." *Wyatt v. Cole*, 504 U.S. 158, 167 (1992). Chief among these concerns, litigation against government officials "can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials" charged with protecting public safety. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017) (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)).

As officials could not otherwise avoid the "costs and expenses of trial," *Saucier v. Katz*, 533 U.S. 194, 200 (2001), qualified immunity "turns on the 'objective legal reasonableness' of the official's acts," *Abbasi*, 137 S. Ct. at 1866 (quoting *Harlow*, 457 U.S. at 819). Prior to *Harlow*, the prevailing immunity test had "both an 'objective' and a 'subjective' aspect." 457 U.S. at 815. But "an official's subjective good faith [was] considered to be a question of fact" that "in-

herently requir[ed] resolution by a jury." *Id.* Among others, the resulting costs included "inhibition of discretionary action, and deterrence of able people from public service." *Id.* at 816. Considering these costs, this Court "purged qualified immunity doctrine of its subjective components," *Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985), and adopted an "objective reasonableness test." *Saucier*, 533 U.S. at 199.

A key consequence of this decision, as this Court has repeatedly stressed, is that "[q]ualified immunity is 'an immunity from suit rather than a mere defense to liability,'" *Plumhoff*, 134 S. Ct. at 2019 (quoting *Pearson*, 555 U.S. at 231), about which "questions should be resolved at the earliest possible stage of a litigation." *Creighton*, 483 U.S. at 646 n.6. And although *Harlow* involved high-level presidential aides, this Court has since clarified that qualified immunity applies "across the board" and does not "turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated." *Id.* at 643. In sum, "because qualified immunity is important to society as a whole and because as an immunity from suit, qualified immunity is effectively lost if a case is erroneously permitted to go to trial," *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam) (citations and quotation marks omitted), this Court often reverses lower courts—"and the Ninth Circuit in particular," *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)—when they wrongly expose officers to the risk of liability.

b. Because of the ease with which plaintiffs can meet their preliminary burden, *Mt. Healthy*'s application to retaliatory-arrest claims largely erodes the protections of qualified immunity. Most speech, including "a significant amount of verbal criticism and challenge directed at police officers," *Houston v. Hill*, 482 U.S. 451, 461 (1987), is "constitutionally protected," *Mt. Healthy*, 429 U.S. at 287, and police officers and suspects will generally speak to one another before an arrest. The only remaining barrier to most arrestees meeting their initial burden is thus

the allegation that a police officer had a "motivating" retaliatory intent. *Id.* That barrier is insubstantial. As this Court has recognized, "an official's state of mind is easy to allege." *Crawford-El*, 523 U.S. at 585 (citation and quotation marks omitted). Accordingly, many arrestees can meet their initial *Mt. Healthy* burden.

Under *Mt. Healthy*, retaliatory-arrest cases must be resolved at trial once a plaintiff has met her preliminary burden. This is because, as the court below held in this case, "once a plaintiff has provided 'sufficient evidence for a jury to find that the officers' retaliatory motive was a but-for cause of their action,' 'the issue of causation ultimately should be determined by a trier of fact.'" *Bartlett*, 712 F. App'x at 616 (quoting *Ford*, 706 F.3d at 1194). That result is unsurprising because it is well established that "claims requiring a determination regarding intentions or motives are particularly unsuitable for summary adjudication." 10B Charles Alan Wright et al., *Federal Practice & Procedure* § 2732.2 (4th ed. 2018); *see also Crawford-El*, 523 U.S. at 584-85 (recognizing this problem in the context of damages suits against government officials); *Harlow*, 457 U.S. at 815-16 (same). Where, as here and "[i]n the standard retaliation case," the "only question is the defendant's purpose" for taking an action, a factfinder must resolve the dispute. *Wilkie v. Robbins*, 551 U.S. 537, 558 n.10 (2007).

Even relative to other cases turning on questions of intent, retaliatory-arrest cases governed by *Mt. Healthy* are especially unamenable to pretrial disposition. This Court has admonished that plaintiffs must produce more than a mere "scintilla of evidence" to survive summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). For that reason, "bare allegations of malice" are generally insufficient to carry a plaintiff to trial. *Crawford-El*, 523 U.S. at 588. But this holding loses its force in retaliatory-arrest cases because the plaintiff's arrest is pertinent circumstantial evidence that supports an allegation of retaliation. Consequently, an arrestee

often must do no more than allege that an officer made a disparaging comment about his speech or lack thereof to get past summary judgment.

That is precisely what transpired in this case, and it demonstrates the high price of the Ninth Circuit's rule. The court below focused on Bartlett's allegation that Nieves told him "'bet you wish you would have talked to me now' after his arrest." *Bartlett*, 712 F. App'x at 616. There is not a shred of direct evidence in the record to support that claim; the only evidence Bartlett has offered is the evidence of his arrest. But the Ninth Circuit held that this evidence, when paired with Bartlett's conclusory allegation that Nieves taunted him after his arrest, is adequate to permit a jury to find that Nieves harbored a retaliatory motive. So, on the Ninth Circuit's view, this case must be resolved by a "trier of fact." *Id.*

This case is not an aberration. First Amendment retaliatory-arrest claims against law enforcement officers where there is at least arguable probable cause to arrest often require resolution by a factfinder in the Ninth Circuit. *See, e.g.*, *Redmond v. San Jose Police Dep't*, 14-CV-02345-BLF, 2017 WL 5495977, at *7-13 (N.D. Cal. Nov. 16, 2017); *Henneberry v. City of Newark*, 13-CV-05238-MEJ, 2017 WL 1493006, at *11-12 (N.D. Cal. Apr. 26, 2017); *McComas v. City of Rohnert Park*, 16-CV-02705-TEH, 2017 WL 1209934, at *3-7 (N.D. Cal. Apr. 3, 2017); *Ballentine v. Las Vegas Metro. Police Dep't*, 214CV01584APGGWF, 2017 WL 3610609, at *6-12 (D. Nev. Aug. 21, 2017); *Armstrong v. City of San Jose*, 5:16-CV-02938-EJD, 2017 WL 167710, at *4 (N.D. Cal. Jan. 17, 2017). These cases—all decided recently in a single circuit—are inimical to the principles animating this Court's qualified immunity jurisprudence.

c. On the facts of this case, the troopers stand a strong chance of prevailing at trial. *Mt. Healthy* calls for them to show "by a preponderance of the evidence" that they would have arrested Bartlett for his behavior even if he had not refused to answer Nieves' questions earlier in the evening. 429 U.S. at 287.

The troopers can almost certainly make this showing. Bartlett approached "and st[ood] close to Trooper Weight" while "speaking in a loud voice." *Bartlett*, 712 F. App'x at 615. It is undisputed that Bartlett "had been drinking," *id.*, at an event known for its "high levels of alcohol use." *Nieves*, 2016 WL 3702952, at *1. Bartlett's behavior led both the district court, *id.*, and the Ninth Circuit, *Bartlett*, 712 F. App'x at 615, to hold that there was probable cause for his arrest. Given his behavior, the evidence is compelling that the troopers would have arrested Bartlett even if Nieves had never interacted with him before he approached Weight.

d. Even if the troopers win at trial, *Mt. Healthy*'s application in this case is costly. Because it is an "*immunity from suit*," *Mitchell*, 472 U.S. at 526, the troopers' qualified immunity protections are "effectively lost" if this case moves forward, *White*, 137 S. Ct. at 551 (quoting *Pearson*, 555 U.S. at 231). Indeed, qualified immunity was adopted "precisely in order to 'permit the defeat of insubstantial claims without resort to trial.'" *Behrens v. Pelletier*, 516 U.S. 299, 306 (1996) (quoting *Harlow*, 457 U.S. at 819). Yet, even if they have a strong likelihood of success, the Ninth Circuit's rule forces government officials like the troopers to be subjected to the "burdens of trial." *Johnson v. Fankell*, 520 U.S. 911, 915 (1997).

That result thwarts the "strong public interest in protecting officials from the costs associated with damages actions." *Crawford-El*, 523 U.S. at 590. The "substantial social costs" of these actions are demonstrated here: Under the Ninth Circuit's rule, police officers will be less likely to investigate criminal activity for fear that they will have to defend a meritless retaliation

claim. *Abbasi*, 137 S. Ct. at 1866 (quoting *Creighton*, 483 U.S. at 638). For those reasons, applying *Mt. Healthy* to retaliatory-arrest claims "disrupt[s] the balance" this Court has decided to "strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties." *Id.* at 1867 (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)).

e. In contrast to the Ninth Circuit's rule, the no-probable-cause requirement accords with this Court's qualified immunity jurisprudence. The existence or absence of probable cause based on alleged facts is a legal question amenable to summary disposition. *See, e.g.*, *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). Much as this Court eliminated the pre-*Harlow* subjective-good-faith test for qualified immunity to allow courts to dismiss insubstantial claims, it should impose the no-probable-cause requirement as a filtering mechanism. And given the "powerful evidentiary significance" of probable cause in rebutting a plaintiff's prima facie showing of retaliation, in most cases it will not prejudice plaintiffs to prove its absence. *Hartman*, 547 U.S. at 261. The no-probable-cause requirement thus harmonizes the test for liability in retaliatory-arrest cases with qualified immunity doctrine.

2. Application of the *Mt. Healthy* framework to First Amendment retaliatory-arrest claims is inconsistent with this Court's rejection of subjective inquiries into police officers' intent.

Imposition of *Mt. Healthy*'s framework to retaliatory-arrest claims also conflicts with this Court's aversion toward subjective inquiries into police officers' intent. *Mt. Healthy* requires an inquiry into a police officer's motivation for effecting an arrest. *See* 429 U.S. at 287. That is contrary to this Court's "rejection of subjective inquiries" into police officers' motivations "in other areas of criminal law." *Michigan v. Bryant*, 562 U.S. 344, 360 n.7 (2011) (rejecting subjective inquiry into officer's intent in Sixth Amendment Confrontation Clause case) (citing *Whren*, 517

U.S. at 813 (same as to whether seizure was reasonable under Fourth Amendment); *New York v. Quarles*, 467 U.S. 649, 655-56 & n.6 (1984) (same as to whether the public safety exception to *Miranda v. Arizona*, 384 U.S. 436 (1966), applies); *Rhode Island v. Innis*, 446 U.S. 291, 301-02 (1980) (same as to whether officer's questions were "interrogation" under Fifth Amendment)); *see also United States v. Robinson*, 414 U.S. 218, 236 & n.7 (1973) (same as to whether search-incident-to-arrest exception to the Fourth Amendment's warrant requirement applies). Although retaliatory-arrest cases do not involve the imposition of criminal liability, *Lozman* recognized that the question presented in this case "ar[ises] in the criminal sphere." 138 S. Ct. at 1952 (majority opinion). By contrast, *Mt. Healthy* "arose in a civil, not criminal, context." *Id.* This Court should here uphold the well-established rule that it will not probe the subjective intent of police officers.

a. This Court has articulated the rationales for measuring the conduct of law enforcement officers by an objective standard most clearly in the Fourth Amendment context. An objective inquiry promotes "[e]fficient and evenhanded application of the law." *al-Kidd*, 563 U.S. at 740. Moreover, the law governing arrests must be "sufficiently clear and simple to be applied" by officers who are not experts in constitutional law. *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). And this Court has been reluctant to embark on "an expedition into the minds of police officers" because doing so "would produce a grave and fruitless misallocation of judicial resources." *United States v. Leon*, 468 U.S. 897, 922 n.23 (1984) (citation omitted).

These rationales counsel in favor of the no-probable-cause requirement. *Mt. Healthy*'s framework would introduce into the criminal law the "arbitrarily variable protection" that this Court has long deemed unacceptable. *Devenpeck v. Alford*, 543 U.S. 146, 154 (2004). It subjects officers who must make "split-second judgments—in circumstances that are tense, uncertain, and

rapidly evolving," *Kentucky v. King*, 563 U.S. 452, 466 (2011) (citation omitted) to "judicial second-guessing" of their motivations, *Atwater*, 532 U.S. at 347. And, in addition to officers and governments, it forces upon courts the "substantial costs" that inevitably "attend the litigation of the subjective good faith of government officials." *Harlow*, 457 U.S. at 816.

b. The Ninth Circuit's rule is especially disruptive of this Court's Fourth Amendment jurisprudence because it allows litigants to evade the Fourth Amendment's objective focus. This Court has long held that "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent" of the arresting officer. *Whren*, 517 U.S. at 814. "Indeed," this Court has "never held . . . that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment." *King*, 563 U.S. at 464. But because "[p]olice officers almost always exchange words with suspects before arresting them," *Lozman*, 138 S. Ct. at 1958 (Thomas, J., dissenting), the Ninth Circuit's rule allows litigants to reframe a Fourth Amendment claim in the guise of First Amendment retaliation.

This case, in which Bartlett raised his First Amendment claim alongside multiple claims under the Fourth Amendment, is illustrative. The gravamen of Bartlett's claim is that Nieves and Weight arrested him because of an illicit subjective motivation. That is exactly the kind of challenge this Court has "repeatedly rejected." *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006). If it opens the door to subjective inquiries into a police officer's motivation under the First Amendment, litigants will use the opening to circumvent this Court's Fourth Amendment holdings. This Court should not allow litigants to do via the First Amendment what it has long held they cannot do via the Fourth.

c. Even suspects who cannot now raise First Amendment retaliation claims might change their behavior in response to the Ninth Circuit's rule. For example, a suspect might engage in

protected speech to deter officers concerned about the cost of mounting a defense from arresting him. Officers will not be immune from this distortionary effect. Fearing a retaliation claim, an officer will be more likely to arrest and question the suspect later, instead of speaking with her to dispel the officer's suspicion. These behavioral distortions further raise the cost of the Ninth Circuit's rule.

B. The Ninth Circuit's rule does not protect strong First Amendment interests.

Against the costly effects described above, this Court must balance the First Amendment interests in the speech of arrestees.[3] In most retaliatory-arrest cases, these interests are likely to be modest.

1. In evaluating the strength of First Amendment interests, the content of the speech is the most important factor. Although "[e]ven 'wholly neutral futilities come under the protection of free speech,'" *United States v. Stevens*, 559 U.S. 460, 479-80 (2010) (brackets and ellipsis omitted) (quoting *Cohen v. California*, 403 U.S. 15, 25 (1971)), this Court has recognized that "[n]ot all speech is of equal First Amendment importance," *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988)).

Most pertinent here, this Court has distinguished between "speech on public issues" and on "purely private matters." *Id.* (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)). While "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection," there is a "limited First Amendment interest" in "speech on private matters." *Connick*, 461 U.S. at 145, 147, 154 (citation and quotation marks omitted). "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community or when it is a subject of legitimate

[3] Because Bartlett chose to "remain[] silent," there is no dispute that the First Amendment is implicated here. *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 574 (1995).

news interest; that is, a subject of general interest and of value and concern to the public." *Snyder*, 562 U.S. at 453 (citations and quotation marks omitted). On the other hand, speech deals with private matters when it is "solely in the individual interest of the speaker" or "d[oes] nothing to inform the public about any aspect of" government's "functioning or operation." *Id.* (citations omitted).

Beyond content, this Court has emphasized that it will not consider speech "in a vacuum." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). A statement's "context," including its "manner, time, and place," is an essential element of the inquiry. *Id.* Hence, in deciding whether to apply the no-probable-cause requirement to retaliatory-arrest claims, this Court should evaluate both the likely content of the speech at issue and the circumstances in which these claims are likely to arise.

2. The no-probable-cause requirement is unlikely to chill speech of significant First Amendment value. Most speech occurring between an officer and a suspect takes place in the context of an investigation into run-of-the-mill criminal activity. Although it may be of considerable interest to the officer and the suspect, this speech will not often be about a "matter of political, social, or other concern to the community" or "a subject of legitimate news interest." *Snyder*, 562 U.S. at 453 (citations omitted). Consequently, this private speech is of "limited" First Amendment value. *Connick*, 461 U.S. at 154.

Although there are exceptions to this rule, they are rare. Of the more than 10.5 million arrests made in 2016, the overwhelming majority were for offenses that are unlikely to involve expression on public matters. *See* Fed. Bureau Investigation, *supra* (listing "drug abuse violations," assaults, and "larceny-thefts" as the highest-arrest categories). And "[t]here is a cost to yielding to the desire to correct the extreme case, rather than adhering to the legal principle."

Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 899 (2009) (Roberts, C.J., dissenting). "That cost has been demonstrated so often that it is captured in a legal aphorism: 'Hard cases make bad law.'" *Id.*

Hartman and *Lozman* recognized the danger of crafting rules based on exceptional cases. The *Hartman* Court rejected the argument that it should give "no special prominence to probable cause" in retaliatory-prosecution cases because there might be an unusual case where evidence showed, for example, that "a prosecutor was nothing but a rubber stamp for his investigative staff or the police." 547 U.S. at 264. Because examples like this were "likely to be rare," they were "poor guides in structuring a cause of action." *Id.* Similarly, the *Lozman* Court refused to design a cause of action for all retaliatory-arrest claims because the facts of that case were "far afield from the typical retaliatory arrest." 138 S. Ct. at 1954 (majority opinion).

This case is demonstrative. Nieves did not ask Bartlett about a matter of public concern. Quite to the contrary, he sought only information about underage drinking at Arctic Man. While many members of the public would doubtless applaud the troopers for investigating underage drinking allegations at a "crowded, large, [and] remote event like Arctic Man" to insure the safety of those at the event, *Nieves*, 2016 WL 3702952, at *5, it was hardly a subject "of value and concern to the public," *Snyder*, 562 U.S. at 453 (citation omitted). Accordingly, the First Amendment value in Bartlett's speech, as in the typical retaliatory-arrest case, was "limited." *Connick*, 461 U.S. at 154.

* * *

The outcome of the interest balancing called for by this Court's precedents accords with common-law history and this Court's precedents. Where all these factors point in the same direction, the conclusion is clear: This Court should require plaintiffs to prove a lack of probable cause in First Amendment retaliatory-arrest cases.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

Competitor ID: 909690425
September 25, 2018

APPENDIX

42 U.S.C. § 1983 (2018) provides in full:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.