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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 BORGHE SAN

ON BEHALF OF THE PETITIONERS

MR. BORGHE SAN: 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 pro -- 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 forever -- for error don't work well in these cases.

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

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

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

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

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

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

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

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

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

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

25 JUSTICE SOTOMAYOR: Why is this any

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

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

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

17 MR. 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 the elements of these actions
23 have claims, and all of these -- to prevent
24 recovery even in some instances where we think
25 that there would be -- there might have been an

1 actual violation of a constitutional right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE BREYER: Well, we saw the

1 case --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 example.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 And if there are no questions --

25 JUSTICE ALITO: Am I correct that the

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

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

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

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

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

15 MR. BORGHEGAN: It doesn't --

16 JUSTICE ALITO: -- cases.

17 MR. BORGHEGAN: I apologize, Justice
18 Alito.

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

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

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

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Mr. Wall.

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

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

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

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

21 Second, of the --

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

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

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

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

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

1 regularity that attached to prosecutorial
2 action.

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

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

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

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

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

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

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

16 JUSTICE BREYER: Well --

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

18 JUSTICE BREYER: Go ahead.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 MR. WALL: Right.

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

23 MR. WALL: Yes.

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

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

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

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

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

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

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

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

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

6 CHIEF JUSTICE ROBERTS: Sure.

7 MR. WALL: So three very quick points.

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

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Mr. Wilson.

23 ORAL ARGUMENT OF ZANE D. WILSON

24 ON BEHALF OF THE RESPONDENT

25 MR. WILSON: Mr. Chief Justice, and

1 may it please the Court:

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

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

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

16 Excuse me.

17 Start with my first point.

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

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

24 MR. WILSON: Yes.

25 JUSTICE GINSBURG: -- with respect to

1 both officers? What was the speech element?

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

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

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

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

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

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

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

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

8 MR. WILSON: Yes, Your Honor.

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

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

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

20 MR. WILSON: Yes, Your Honor.

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

25 MR. WILSON: In terms of --

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

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

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

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

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

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

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

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

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

24 And there's been a number of those
25 cases. For example, the Fogel versus Collins

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

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

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

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

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

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

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

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

1 MR. WILSON: You -- you have issues
2 where there's the speech is a question. Then
3 you shift to cases where the question of the
4 officer's intent becomes relevant.

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

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

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

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

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

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

17 MR. WILSON: Certainly.

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

20 MR. WILSON: I think it can be weeded
21 out and would be weeded out --

22 JUSTICE ALITO: Okay. How?

23 MR. WILSON: -- Justice Alito. Simply
24 because an arrest -- a potential arrestee is
25 rude or says offensive things does not

1 establish that the officer retaliated against
2 that arrestee for that conduct.

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

10 JUSTICE ALITO: But what if --

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

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

1 instance.

2 JUSTICE KAGAN: But that just sounds
3 like a jury question. So we would be sending
4 every single one of these cases to a jury.

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

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

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

23 CHIEF JUSTICE ROBERTS: But 29,000, if
24 I got the number right, 29,000 arrests every
25 day, maybe I -- I'm wrong, but I would

1 anticipate that only the tiniest percentage of
2 those are going to be documented, by which you
3 mean on film, right?

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

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

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

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

1 The jury either believes his story or
2 believes the defendant's story. And that's why
3 we're thinking a large proportion will go to
4 the jury, because -- I won't repeat myself.

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

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

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

21 And there are police officers who do
22 sometimes arrest them. And there are a set of
23 ambiguous circumstances as to what the true
24 reason was. If the defendant is right, nothing
25 wrong happened. If the plaintiff is right, it

1 is a serious violation of the law. That's the
2 issue in this case.

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

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

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

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

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

19 CHIEF JUSTICE ROBERTS: I'm sorry,
20 that what?

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

25 Well, look at what they said in Tower

1 versus Glover in the context of a client suing
2 the public defender. One of the defenses in
3 that was, if you allow this case, we're going
4 to be overrun with litigation against public
5 defenders.

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

15 Now that's -- that's the kind of
16 argument that I think is being made.

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

23 JUSTICE KAVANAUGH: Well, that's not
24 --

25 CHIEF JUSTICE ROBERTS: That's a very

1 -- maybe this is strong -- that's a very
2 cavalier assertion. And I get back to the fact
3 you have eight officers and you have 10,000
4 people, you have a lot of drinking.

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

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

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

1 that's blaring out music extremely loud.

2 Did -- did -- did Mr. MacCoy have
3 reason to fear Officer Weight when Officer
4 Weight was standing half the distance that
5 ultimately Officer Weight and Mr. Bartlett were
6 standing?

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

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

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

23 MR. WILSON: That's certainly a
24 potential, yes.

25 JUSTICE KAVANAUGH: Common sense,

1 common understanding tells us that, that people
2 say things critical in a hot situation, right?

3 MR. WILSON: That's correct.

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

9 MR. WILSON: Absolutely not.

10 JUSTICE KAVANAUGH: Why not?

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

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

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

1 lose.

2 JUSTICE BREYER: Do you mind putting
3 -- suppose you -- well, then the word that
4 there has to be objective evidence that the --
5 even though there was probable cause, there
6 still has to be defeat the probable cause, if
7 there is objective evidence that the probable
8 cause was a pretext for the arrest.

9 That's the Rehnquist. I'm interested
10 in what you think of alternatives.

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

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

24 MR. WILSON: Well, I think that the --
25 the opinion that was written by Justice

1 Ginsburg in Reichle, and the situation where
2 you have on-the-spot safety issues, that those
3 generally would resolve in summary judgment
4 because the truth, again, in our opinion, the
5 truth comes out.

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

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

22 JUSTICE ALITO: This is involving
23 safety. The cases involving safety issues are
24 not the ones that are troubling. They're the
25 cases involving lesser crimes, like the one

1 that your client was charged with.

2 And there are many -- there are areas
3 of the law where intent has to be proven, and
4 in those areas of the law, direct evidence of
5 an unlawful intent is often not present.

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

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

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

1 JUSTICE GINSBURG: But evidence means
2 a trial.

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

9 And we're certainly not here --

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

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

22 MR. WILSON: Let me -- let me start
23 with the first point that's going to take care
24 of a significant number of these cases. That
25 is that if you bring the charges on cases where

1 you have the proof that the crime's been
2 committed and you prosecute the case and you
3 obtain a conviction, you've eliminated that
4 entire class of cases because the damages go
5 away, the -- the righteous indignation of I was
6 wrongfully accused, I was unjustly attacked in
7 the name of justice, you've eliminated those
8 situations as a practical matter.

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

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

23 JUSTICE KAVANAUGH: Why do the damages
24 --

25 CHIEF JUSTICE ROBERTS: Just to take

1 your -- your first example --

2 MR. WILSON: Yes.

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

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

17 CHIEF JUSTICE ROBERTS: Why?

18 JUSTICE KAVANAUGH: Why?

19 JUSTICE ALITO: Why?

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

1 JUSTICE KAVANAUGH: But,
2 theoretically, the person, even if they are
3 arrested, prosecuted, and convicted, could say
4 I never would have been arrested in the first
5 place but for the retaliatory motive.

6 MR. WILSON: Under Heck versus
7 Humphrey, your damages --

8 JUSTICE KAVANAUGH: Is that correct or
9 not?

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

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

21 MR. WILSON: People can say what they
22 want to say, but the fact of the matter is, in
23 those circumstances, there's no damage. The
24 damage -- whenever you've been convicted, under
25 Heck versus Humphrey, you can't challenge

1 anything that has -- in any way would impugn
2 that -- the validity of that conviction and
3 that judgment.

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

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

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

1 district court or the Ninth Circuit court, is
2 that he be allowed to pursue the truth when he
3 has evidence to support his version of --

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

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

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

22 I don't think that anybody's going to
23 succeed in a First Amendment retaliation case
24 because the officer arrested them because there
25 was probable cause to believe they committed a

1 homicide. It's just simply not credible in the
2 circumstances.

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

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

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

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

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

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

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

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

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

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

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

25 And that allows the court to stay

1 focused on the truth, loyal to the wording of
2 Section 1983, and at the same time get to the
3 bottom of these cases in an efficient manner.

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

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

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

22 CHIEF JUSTICE ROBERTS: And what law
23 is -- is Congress supposed to change?

24 MR. WILSON: The Section 1983. For
25 example, in the Prisoner Litigation Reform Act.

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

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

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

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

24 MR. WILSON: Sure. And -- and I guess
25 there's an important concession, I believe, in

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 The typical case is where, like in

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

6 Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Two minutes, Mr. Borghesan.

10 REBUTTAL ARGUMENT OF DARIO BORGHE SAN

11 ON BEHALF OF THE PETITIONERS

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

17 On the common law point, it's not
18 correct that there was never authority to
19 arrest based on probable cause for misdemeanors
20 at common law. The authority depended on the
21 specific law of the jurisdiction and statute,
22 but the -- but the bigger point is that when
23 the common law did authorize officers to arrest
24 based on probable cause, then, if there were
25 probable cause to make that arrest, the arrest

1 was privileged and there'd be no liability.

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. The case is submitted.

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

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