PLAUSIBLE RETALIATION: USING MODERN PLEADING STANDARDS AS A BLUEPRINT FOR FIRST AMENDMENT RETALIATION CLAIMS

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ABSTRACT

To effectively maintain a First Amendment retaliatory arrest claim, a plaintiff should plead the elements the Supreme Court identified in Mt. Healthy *to the modern standard of plausibility. This approach is preferable to the one adopted by the Court in 2019 in* Nieves v. Bartlett, *which ignored pleading standards and instead added another element to the cause of action. Under that approach a plaintiff must prove a lack of probable cause to recover unless she fits into a small exception that is almost impossible to prove. This article reviews Supreme Court precedent on the retaliatory arrest issue, the circuit split that developed over the same time, and Supreme Court precedent on pleading standards to argue that the existence of probable cause should not bar a plaintiff's claims. Plaintiffs must plead and prove the subjective, retaliatory animus of arresting officers to make their case, and they should do so plausibly under* Twombly.

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INTRODUCTION

When the Supreme Court adds an element to a cause of action, that addition inevitably has a ripple effect on the litigation scheme of the claim. Adding any element impacts every stage of litigation: from the very beginning stages of pleading, to the gatekeeping of summary judgment, to trial with jury instructions and judgments as a matter of law. In 2006, the Supreme Court added an element to retaliatory prosecution claims; it asserted that plaintiffs must prove a lack of probable cause to advance their claims. Since then, the circuits have been divided, and the Supreme Court has been cagey about whether it would extend this element to retaliatory arrest claims as well. In 2019, the Supreme Court was finally clear that it would add this element (lack of probable cause) to retaliatory arrest claims with a small exception. The solution of the Court provides a bar to most retaliatory arrest claims and precludes recovery for plaintiffs who suffer from these types of arrests so long as there is even a threadbare, arguable probable cause to arrest them. Pleading requirements, especially as those requirements have also evolved, should color whether a new element is necessary.

There are two jurisprudential doctrines that have evolved along different tracks at the same time. The first important historical track is the Court identifying the necessary elements of a retaliatory arrest cause of action and the divergence of that claim with the similar claim of retaliatory prosecution. Part of this historical inquiry must explore Supreme Court precedent over this time and part of the inquiry must trace how the doctrine has similarly developed into a sharp circuit split. While the retaliatory arrest doctrine has been created and expanded, a second historical track had also been developing as modern pleading standards emerged. Read together, these two doctrines may symbiotically evolve. As it becomes necessary for plaintiffs to plead the plausibility of their claims, courts can still preserve the burden-shifting framework of retaliation claims. This outcome would allow a plaintiff to prove that law enforcement arrested her because of retaliation, even if there were probable cause for that arrest. In turn, this would provide a necessary check on abuse of power from police officers and a more fact-intensive inquiry into the nature of the arrest outside the Fourth Amendment context.

I. SUPREME COURT PRECEDENT OF PROBABLE CAUSE AND RETALIATORY ARRESTS

The Supreme Court enunciated the elements of retaliatory action against First Amendment protected speech and created a burden-shifting framework in 1977 when it decided *Mt. Healthy City School District Board of Education v. Doyle*.[1] Mr. Doyle sued the school district after they refused to renew his contract, claiming in part that the action was in retaliation for protected speech.[2] After wading through jurisdictional and immunity issues in the case, the Court addressed the merits.[3] On the retaliation issue, the District Court found that the school board illegally based a "substantial part" of its decision not to rehire Mr. Doyle upon his constitutionally protected speech.[4] The lower court's causation analysis was an example of "mixed motive" causation where a mix of motives may cause the retaliation to occur, some permissible and some impermissible. For the lower court, if *any* retaliatory animus was found, that was enough to taint the process and render it unconstitutional. The Supreme Court objected to this view of causation, explaining

> [a] rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing.[5]

This type of flawed result led the Court to search for a different test for causation. The majority cited cases it found illustrative, noting that in other areas of constitutional law, it had been "necessary to formulate a test of causation which distinguishe[d] between a result caused by a constitutional violation and one not so caused."[6] The Court used these cases to establish a test that simultaneously protected against the invasion of constitutional rights and prevented unnecessary and undesirable consequences.[7]

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1 429 U.S. 274 (1977).

2 *Id.* at 276.

3 *Id.* at 281 ("[W]e now proceed to consider the merits of respondent's claim under the First and Fourteenth Amendments.").

4 *Id.* at 283–84.

5 *Id.* at 285.

6 *Id.* at 286-87. The Court then cited cases it found to be illustrative: Lyons v. Oklahoma, 322 U.S. 596 (1944); Wong Sun v. United States, 371 U.S. 471 (1963); Nardone v. United States; 308 U.S. 338 (1939); Parker v. North Carolina, 397 U.S. 790 (1970).

7 *Mt. Healthy*, 429 U.S. at 287.

In the *Mt. Healthy* case the Court directed the proper burden first on the plaintiff to show that the constitution protected his conduct and that this protected conduct was a substantial or motivating factor (not merely a factor) in the decision not to rehire him.[8] Once he met that burden, the lower court *should* have shifted the burden to the defendant and assessed by a preponderance of the evidence whether the defendant would have reached the same decision about employment even without the plaintiff's protected conduct.[9] The lower court's error was in not conducting this second part of the analysis after properly shifting the burden.

This correction of the lower court decision consolidates two key ideas: first, the Court is identifying and laying out the correct elements of a First Amendment retaliation claim; and second, the Court is adopting a burden-shifting framework to show the existence of the causation element. The Court identified the core elements of a First Amendment retaliation claim: protected speech and retaliatory animus *because* of that speech that creates an injury. In the arrest context this would mean that a plaintiff must plead and prove that (1) she engaged in protected speech, and (2) the officer arrested her *because* of that speech. Perhaps the plaintiff might only be able to allege that retaliatory animus existed and that the injury occurred – those allegations would still be enough under *Mt. Healthy* to trigger the burden-shifting framework.

Under the *Mt. Healthy* approach, once a plaintiff has properly pleaded the elements, the burden shifts to the defendant to argue that the injury would have resulted even without the protected speech. Then it is up to a court to determine, using preponderance of the evidence, whether retaliation *caused* the injury. Thus, the retaliatory animus must be the "but-for" cause of the injury rather than one of many motivating factors. This framework treats proving lack of but-for causation as an affirmative defense rather than proving the existence of but-for causation as a prima facie element of the claim.

The Court also acknowledged that the proper standard for causation was "but-for" causation. That is, *but for* the retaliatory animus, the arrest would not have taken place. In 1989, the Court made this clear when it used the precedent from *Mt. Healthy* and observed that "[a] court that finds for a

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8 *Id.*

9 *Id.*

plaintiff under this standard [from *Mt. Healthy*] has effectively concluded that an illegitimate motive was a "but-for" cause of the employment decision."[10]

The Supreme Court altered the elements necessary for a case of retaliatory prosecution in 2006, almost 30 years after it crafted the *Mt. Healthy* framework. In the interim period, a circuit split had grown over whether a plaintiff must plead and prove lack of probable cause as an element of a retaliatory prosecution or arrest.[11] The Court only decided the prosecution issue in *Hartman v. Moore*.[12] The case concerned a *Bivens* action filed by Michael Hartman against officers of the federal government that he believed conspired with the prosecutor to instigate a baseless criminal prosecution against him in retaliation for his use of free speech.[13] The Court narrowed the issue to "whether a plaintiff in a retaliatory prosecution action must plead and show the absence of probable cause for pressing the underlying criminal charges."[14] After acknowledging the current circuit split on whether lack of probable cause ought to be an element of retaliatory prosecution,[15] the Court determined that plaintiffs would indeed have to plead lack of probable cause.

The government argued that probable cause must be a prima facie element of a retaliatory prosecution claim because (1) the traditional tort of malicious prosecution also required a lack of probable cause, and (2) retaliation was too easy to allege and too difficult to defend against, requiring an objective component.[16] The Court did not mandate a specific common law tort parallel, stating, "the common law is best understood here more as a source of inspired examples than of prefabricated components of *Bivens* torts."[17] It also suggested that in debating common-law analogs the closer example might be an abuse of process, which did not require a showing of a lack of probable cause.[18] On the litigation issue, the Court recalled that the number of retaliatory prosecution cases had been historically small and evenly split between circuits that required a showing of lack of probable cause

10 Price Waterhouse v. Hopkins, 490 U.S. 228, 249 (1989).

11 *See*, *infra* III.

12 547 U.S. 250 (2006).

13 *Id.* at 254 n.2. A *Bivens* action is essentially the federal analog to a § 1983 action.

14 *Id.* at 256–57.

15 *Id*. at 255–56.

16 *Id.* at 257–58.

17 *Id.* at 258.

18 *Id.*

and those that did not.[19] The Court was ultimately unconvinced on both points and quickly shifted to discussion of what it saw as the main issue: the causation problem.

Any plaintiff in a *Bivens* action or in a § 1983 case for retaliation must show a causal relationship between animus and injury, but the Court found the showing of causation more complicated in a prosecution case.[20] In a prosecution case, the Court claimed, there will always be a body of "highly valuable circumstantial evidence" about the bringing of a criminal charge, "namely" evidence showing whether there was probable cause to bring it.[21] In other words, this evidence will almost always be present as a way for the plaintiff to prove that retaliation existed—if a plaintiff can show there was no reason to bring the charge, that alone would reinforce the implication of a bad act. Moreover, aside from the "powerful evidentiary significance"[22] of the lack of probable cause, the causation itself that the plaintiff would have to prove is more complex.

The usual reason for requiring but-for causation, the Court explained, is that "it may be dishonorable to act with an unconstitutional motive and perhaps in some instances be unlawful, *but action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway*."[23] That said, in a prosecution case, the action is not against the prosecutor, who is absolutely immune from liability for the decision to prosecute, but against someone else who may have influenced the prosecutorial decision.[24] This gap in the chain of causation is larger—it "is not merely between the retaliatory animus of one person and that person's own injurious action, but between the retaliatory animus of one person and the action of another."[25] Evidence must bring those two things together and the Court admitted that lack of probable cause is "not necessarily dispositive."[26] Still the Court argued "[t]he issue is so likely to be raised by some party at some point that treating it as important enough to be an element will be a way to address the issue of causation without adding to time

19 *Id.* at 258–59.
20 *Id*. at 259.
21 *Id.* at 261.
22 *Id.*
23 *Id.* at 260 (emphasis added).
24 *Id.* at 261–62.
25 *Id.* at 262.
26 *Id*.

or expense."[27] This view blurs the line between pleading and proof, making the existence of probable cause outcome determinative no matter how much evidence there is of retaliatory animus or how scant or spurious the basis for probable cause.

Justice Ginsburg dissented and Justice Breyer joined in her writing.[28] She reasoned that the Court of Appeals had properly used the burden-shifting framework from *Mt. Healthy v. Doyle*.[29] The majority of the Court's reasoning, however, "saddles plaintiff—the alleged victim—with the burden to plead and prove lack of probable cause" and would check "only *entirely* baseless prosecutions."[30] This reformulation for the burdens of causation would provide no costs to would-be retaliators and substantial costs to victims in reputation and speech, with no ability to find compensation. While providing this higher barrier to entry for litigation claims of retaliatory prosecutions, the holding did not suggest it would apply to retaliatory arrests, which had less complexity in their causal chains.

In 2012, the Supreme Court seemed poised to resolve the renewed circuit split and answer whether lack of probable cause was a required element of a retaliatory-arrest claim. Yet in *Reichle v. Howards*, Justice Thomas focused the issue on "whether two federal law enforcement agents are immune from suit for allegedly arresting a suspect in retaliation for his political speech, when the agents had probable cause to arrest the suspect for committing a federal crime."[31] As the question hinged on the *immunity* and not the elements of the claim, resolving the split was unnecessary.

In *Reichle*, Steven Howards was at a shopping mall in 2006 where Vice President Dick Cheney was visiting.[32] Dan Doyle, a secret service agent, overheard Howards say that during the meet and greet he planned to ask the Vice President how many kids he'd killed that day.[33] While meeting with the Vice President, Howards instead said his policies in Iraq were disgusting and touched the Vice President's shoulder before walking away.[34] Another secret

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27 *Id.* at 265.

28 *Id.* at 266 (Ginsburg, J., dissenting). Chief Justice Roberts and Justice Alito took no part in the consideration or decision of the case. *Id.*

29 *Id.* (Ginsburg, J., dissenting).

30 *Id.* at 266–67 (Ginsburg, J., dissenting) (emphasis in original) (internal quotations omitted).

31 566 U.S. 658, 660 (2012).

32 *Id.*

33 *Id.*

34 *Id.* at 660–61.

service agent, Gus Reichle, then asked Howards whether he had touched the Vice President.[35] Howards lied and said he had not.[36] After Agent Reichle confirmed with Agent Doyle that law enforcement had seen Howards touching the Vice President, he arrested Howards.[37] Howards sued both agents under § 1983 and *Bivens*, claiming that the agents arrested and searched him without probable cause and in violation of the First Amendment.[38]

The District Court denied a motion for summary judgment on the issue of whether the officers had qualified immunity.[39] On interlocutory appeal, the Tenth Circuit held that because undisputed probable cause existed for Howards' arrest, the Fourth Amendment claim was properly dismissed.[40] Even so, this same fact did not defeat the claim for retaliatory arrest, as the Court of Appeals had precedent that a retaliatory arrest could violate the First Amendment *even if* supported by probable cause.[41] Although the Supreme Court granted certiorari on two issues: (1) whether a First Amendment retaliation claim may exist despite probable cause, and (2) whether that fact was clearly established, it elected to address only the second issue.[42] The claim was disposed of because the law was not "clearly established," and the arresting officers were entitled to qualified immunity.

Howards argued that it was clearly established law that the First Amendment prohibited retaliatory arrests. But the Court responded that the right at issue was not "the general right to be free from retaliation for one's speech, but the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause. This Court has never held that there is such a right."[43] Moreover, "[a]t the time of Howards' arrest, *Hartman*'s impact on the Tenth Circuit's precedent governing retaliatory arrests was far from clear" because "reasonable officers could have questioned whether the

35 *Id.* at 661.

36 *Id.*

37 *Id.*

38 *Id.* at 662.

39 *Id.*

40 *Id.* This is a clear example of a lower court differentiating a Fourth Amendment claim from a First Amendment claim.

41 *Id.* at 663.

42 *Id.*

43 *Id.* at 665.

rule of *Hartman* also applied to arrests."[44] In fact, the Court distanced *Hartman* from arrest claims: "we do not suggest that *Hartman*'s rule in fact extends to arrests. Nor do we suggest that every aspect of *Hartman*'s rationale could apply to retaliatory arrests."[45] One reason not to extend *Hartman* logic to arrests is that the causal connections can be very different. In arrests the causation is less attenuated because often "it is the [same] officer bearing the alleged animus who makes the injurious arrest."[46]

Through this careful analytical process of leaving the probable cause element unresolved, the Court noted that the lower court had shown a misplaced reliance on the Supreme Court precedent of *Whren v. United States*.[47] In that case, a traffic stop was supported by probable cause but the Court held that, even so, "the Equal Protection clause would prohibit an officer from selectively enforcing the traffic laws based on race."[48] The Tenth Circuit cited specifically to *Whren* and concluded that "it is well established that an act which is lawful under the Fourth Amendment may still violate other provisions of the Constitution."[49] Yet for purposes of qualified immunity, the Court now explained that "*Whren*'s discussion of the Fourteenth Amendment does not indicate, much less "clearly establish," that an arrest supported by probable cause could nonetheless violate the First Amendment."[50] This explanation seemed to cast doubt on the basic premise of the holding in *Whren*, that an arrest may be constitutional under one provision but unconstitutional under another.

Justice Ginsburg, joined by Justice Breyer, concurred in the judgment, writing that if the defendants had been ordinary law enforcement officers, qualified immunity should not protect them through *Hartman*.[51] The *Hartman* rule for retaliatory prosecution presumed a unique problem of attenuated causation—imputing the animus of the arresting officer to the prosecutor. She reasoned that as the "usual retaliatory-arrest case" has "no gap to bridge

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44 *Id.* at 666. Other courts exacerbated this confusion by applying the *Hartman* rationale to arrests. *Id.* at 669 (citing Barnes v. Wright, 449 F.3d 709, 720 (2006); McCabe v. Parker, 608 F.3d 1068, 1075 (8th Cir. 2010); Phillips v. Irvin, 222 F. Appx. 928, 929 (11th Cir. 2007)).

45 *Id.* at 668.

46 *Id.* at 669.

47 *Id.* at 665 n.5.

48 *Id.* (citing Whren v. United States, 517 U.S. 806 (1996)).

49 *Id.* (citing Howards v. McLaughlin, 634 F.3d 1131, 1149 n.15 (10th Cir. 2011)).

50 *Id.*

51 *Id.* at 670 (Ginsburg, J., concurring).

between one government official's animus and a second government official's action, *Hartman*'s no-probable-cause requirement is inapplicable."[52] But here the secret service agents in question were securing the Vice President's physical person, and therefore the Court should not infer retaliatory animus to their rational actions to protect him.[53]

In 2018, the Supreme Court tried again and decided the case of *Lozman v. The City of Riviera Beach, Florida*.[54] Despite repeatedly articulating that the certified issue of the case was "whether the presence of probable cause bars [a] retaliatory arrest claim,"[55] it ultimately left that question unanswered. The Court admitted that it had considered this issue in *Reichle v. Howards*, yet because the Court decided *Reichle* on other grounds, the issue remained unsolved.[56]

Fane Lozman filed a § 1983 suit against the City of Riviera Beach contending that city officials "adopted a plan to retaliate against him for protected speech and then ordered his arrest when he attempted to make remarks during the public-comment portion of a city council meeting."[57] The District Court instructed the jury that Lozman had to prove that retaliatory animus motivated the arresting officer to arrest ***and*** that the officer lacked probable cause to make the arrest.[58] The Eleventh Circuit affirmed.[59] The appellate court assumed that the jury instruction was in error because it said that the officer, rather than the city, must have held the improper animus, but ultimately that error was harmless.[60] The reason the

52 *Id.* at 671 (Ginsburg, J., concurring).

53 *Id.* (Ginsburg, J., concurring).

54 138 S. Ct. 1945 (2018).

55 *Id*. at 1948 ("This case requires the Court to address the intersection of principles that define when arrests are lawful and principles that prohibit the government from retaliating against a person for having exercised the right to free speech."); *id*. at 1950-51 ("This Court granted certiorari, on the issue of whether the existence of probable cause defeats a First Amendment claim for retaliatory arrest under § 1983."); *id.* at 1951 ("The question this Court is asked to consider is whether the existence of probable cause bars that First Amendment retaliation claim."); *id.* at 1955 ("The petition for certiorari asked us to resolve whether 'the existence of probable cause defeats a First Amendment retaliatory-arrest claim as a matter of law.' That question has divided the federal courts for decades.") (Thomas, J., dissenting).

56 *Id*. at 1951.

57 *Id*. at 1949. It was clear that the § 1983 claim was against only the city or municipality based on the actions of the members of the city council and not the arresting officers. *Id.* at 1951.

58 *Id*. at 1950.

59 *Id*.

60 *Id*.

error did not matter was that "under precedents which the Court of Appeals deemed controlling, the existence of probable cause defeated a First Amendment claim for retaliatory arrest."[61] Rather than correct or affirm the Court of Appeals on whether the existence of probable cause was outcome determinative, the Supreme Court focused instead on the unique facts at issue.

The Court noted "two major precedents could bear on this point"; that is, whether lack of probable cause should be an element in retaliatory arrest claims.[62] But the lower courts were split on which precedent should come to bear: the parties argued whether to apply the Court's jurisprudence from *Mt. Healthy* or *Hartman*.[63]

While acknowledging that *Mt. Healthy* was a civil rather than a criminal case, the Court described its own holding in relationship to the tort liability under § 1983. Thus, in that case "the Court held that even if retaliation might have been a substantial motive for the board's action, still there was no liability unless the alleged constitutional violation was a but-for cause of the employment termination."[64] The City contended in opposition that the controlling precedent was the more-recent *Hartman*, when the Court found it necessary to inquire into probable cause because the link between the retaliatory animus and the injury is usually more complex.[65] The Court took time to note the "undoubted force" in the City's position because "it can be difficult to discern whether an arrest was caused by the officer's legitimate or illegitimate consideration of speech."[66] Even so, "there are substantial arguments that *Hartman*'s framework is inapt in retaliatory arrest cases, and that *Mt. Healthy* should apply without a threshold inquiry into probable cause."[67] For example, the causation problem that exists with retaliatory prosecution was not the same problem that existed in the retaliatory arrest context and "there is a risk that some police officers may exploit the arrest power as a means of suppressing speech."[68] Ultimately, and maddeningly, the Court still concluded that when faced with a retaliatory arrest case,

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61 *Id*.
62 *Id*. at 1952.
63 *Id*.
64 *Id.*
65 *Id.* at 1952–53.
66 *Id.* at 1953.
67 *Id.*
68 *Id.*

whether "the *Hartman* approach should apply, thus barring a suit where probable cause exists, or, on the other hand, the inquiry should be governed only by *Mt. Healthy* is a determination that must await a different case."[69]

In Lozman's case, because his claim against the city hinged on a finding of a specific, official policy for arrest, it was "separate[] . . . from the typical retaliatory arrest claim."[70] These types of claims did not require a petitioner to prove the lack of probable cause and could instead easily default to *Mt. Healthy* analysis.[71]

Justice Thomas penned the single dissent, exhibiting frustration with the Court for not answering a question that has "divided the federal courts for decades" and "widened" since the holding in *Reichle*.[72] Thomas framed the majority's rule as having five conditions necessary to trigger it: (1) an official policy of intimidation, (2) the policy must exist before the arrest, (3) objective evidence of the policy must exist, (4) there can be little relationship between the protected speech that prompted the policy and the criminal offense that triggers the arrest, and (5) the protected speech must be valuable in the context of the First Amendment.[73] He noted that even Lozman's case was not a good fit for these long and cumbersome requirements.[74]

While Justice Thomas did not believe that Congress embedded any First Amendment retaliatory-arrest claim in § 1983,[75] if one existed he would hold that any plaintiff bringing such a claim must plead and prove a lack of probable cause.[76] As courts have repeatedly cited § 1983 as a source of a species of tort liability, he compared a retaliatory arrest claim to the three closest analogs in common-law torts: false imprisonment, malicious prosecution, and malicious arrests.[77] In all three cases, "the common law recognized probable cause as an important element for ensuring that arrest-based torts did not unduly interfere with the objectives of law enforcement."[78] Because "police officers need the safe harbor of probable cause in the First

69 *Id.* at 1954.

70 *Id.*

71 *Id.* at 1955. The Court was clear that it "need not, and does not, address the elements required to prove a retaliatory arrest claim in other contexts."

72 *Id.* at 1955 (Thomas, J., dissenting).

73 *Id.* at 1956 (Thomas, J., dissenting).

74 *Id.* (Thomas, J., dissenting).

75 *Id.* at 1956 n.2 (Thomas, J., dissenting).

76 *Id.* at 1956 (Thomas, J., dissenting).

77 *Id.* at 1956-57 (Thomas, J., dissenting).

78 *Id.* at 1958 (Thomas, J., dissenting).

Amendment context to be able to do their jobs effectively" and often exchange words with a suspect before arrest, claims that did not allege a lack of probable cause "would permit plaintiffs to harass officers with the kind of suits that common-law courts deemed intolerable."[79]

In May 2019, the Supreme Court decided *Nieves v. Bartlett*, and while it answered part of the question about whether lack of probable cause was an element to a retaliatory arrest action, the opinions raised even more questions about the issue.[80] Chief Justice Roberts wrote the majority opinion, joined by Justices Breyer, Alito, Kagan, and Kavanaugh. Justice Thomas partially joined the opinion and filed a separate concurrence. Justice Gorsuch and Justice Ginsburg filed separate opinions to concur in part and dissent in part while Justice Sotomayor firmly dissented.

Russell Bartlett sued his two arresting officers, alleging that his arrest was retaliatory.[81] The officers argued that they had probable cause to arrest him and that this fact defeated his claim entirely.[82] Bartlett, at the time of the arrest, was attending a festival in Alaska known for "extreme sports and extreme alcohol consumption."[83] There was some dispute over the factual details of the arrest, but the Court found the parties to agree "on the general course of events" that led to the arrest.[84] Officer Nieves asked some festival attendants to move a beer keg into their RV because minors had been making off with alcohol, and Bartlett intervened, directing the RV owners not to talk to the officer.[85] When Officer Nieves approached Bartlett directly, he either was drunk and belligerent or merely refused to speak to the officer.[86] Later, Bartlett saw another police officer, Trooper Weight, speaking to a minor about whether he had been drinking.[87] Again, Bartlett intervened, and stood close to Trooper Weight.[88] Officer Nieves, seeing this interaction, initiated the arrest and possibly said to him, "[b]et you wish you would have

79 *Id.* at 1958 (Thomas, J., dissenting).
80 139 S. Ct. 1715 (2019).
81 *Id.* at 1718.
82 *Id.*
83 *Id.* at 1720.
84 *Id.*
85 *Id.*
86 *Id.*
87 *Id.*
88 *Id.*

talked to me now."[89] Bartlett was charged with disorderly conduct and resisting arrest and released a few hours later.[90]

The criminal charges against him were dismissed, but Bartlett sued the officers under § 1983 for retaliatory arrest.[91] He claimed that his protected speech was the refusal to speak with Officer Nieves earlier in the evening and his intervention with Trooper Weight and the minor.[92] The officers claimed that "they arrested Bartlett because he interfered with an investigation and initiated a physical confrontation with [Trooper] Weight," and thus had probable cause to do so.[93] The District Court granted summary judgment for the officers, finding "the existence of probable cause precluded [a] First Amendment retaliatory arrest claim."[94] The Ninth Circuit reversed, claiming that Bartlett needed to show that the officers' conduct would chill an ordinary person from future First Amendment activity and the officers' desire to chill speech was a "but-for" cause of his arrest.[95] If a jury believed Bartlett's allegation about what Officer Nieves had said, it might conclude that the officers arrested Bartlett in retaliation for his statements earlier that night, which was enough to overturn summary judgment.[96]

The Court tackled whether probable cause defeated a claim for retaliatory arrest by first acknowledging that it had left that very question unanswered in both *Reichle v. Howards* and *Lozman v. Riviera Beach*.[97] That said, while the Court had placed distance between retaliatory prosecution and retaliatory arrest previously by refusing to directly extend *Hartman*,[98] in *Nieves* the Court used it as the first cited case in the analysis.[99] The majority used it to support the proposition that the First Amendment prohibits government

89 *Id.* at 1721. There was also a claim that Bartlett was slow to comply with the arrest, so the officers in tandem forced him to the ground and threatened to tase him. *Id.* His explanation of slow compliance was he did not want to aggravate an existing back injury. *Id.*

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.*

94 *Id.*

95 *Id.* The Ninth Circuit relied on its own precedent, holding that a plaintiff can prevail on a First Amendment retaliatory arrest claim even if the arrest had probable cause. *Id.* (citing Ford v. Yakima, 706 F.3d 1188, 1193 (9th Cir. 2013)).

96 *Nieves*, 139 S. Ct. at 1721.

97 *Id.* at 1721–22.

98 Lozman v. City of Riviera Beach, Fla., 138 S. Ct. 1945, 1953 (2018); Reichle v. Howards, 566 U.S. 658, 668 (2012).

99 *Nieves*, 139 S. Ct. at 1722.

officials from retaliatory actions against those engaging in protected speech, and pulled the "but-for" analysis from that case, using *Mt. Healthy* as a mere "example" of this phenomenon.[100] The Court then re-explained the logic from *Hartman*, recalling the issue of complex causation and the solution of requiring plaintiffs to plead and prove a lack of probable cause as a prima facie element of the claim.[101] The Court reminded that "*Hartman* requires plaintiffs in retaliatory prosecution cases to show more than the subjective animus of an officer and a subsequent injury; plaintiffs must also prove as a threshold matter that the decision to press charges was *objectively unreasonable* because it was not supported by probable cause."[102] This brand-new injection of subjective and objective language into the *Hartman* holding where there had been no mention of it set the stage for all of the analytical work to follow.[103]

The first step in the majority's chain of reasoning was to close the gap between retaliatory prosecutions and arrests that the Court had widened. The Court reversed course on causation because "retaliatory arrest claims involve causal complexities akin to those we identified in *Hartman*, and thus warrant the same requirement."[104] The Court cited several reasons for the complexity of the causal inquiry of retaliatory arrests: including speech as a legitimate consideration for arrests, the split-second judgments officers must make, and the possibility that the content and manner of a suspect's speech may contain vital information for an officer.[105] As a result, the Court contended that the presence or absence of probable cause would be available

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100 *Id.*

101 *Id.* at 1722–1723.

102 *Id.* at 1723 (emphasis added).

103 The words objective and subjective do not appear in the Court's formulation of the requirement in *Hartman*. *See* Hartman v. Moore, 547 U.S. 250, 265–66 (2006) ("Because showing an absence of probable cause will have high probative force, and can be made mandatory with little or no added cost, it makes sense to require such a showing as an element of a plaintiff's case, and we hold that it must be pleaded and proven."). While there is some mention of the objective/subjective terminology, it is framing the parties' arguments and not the Court's reasoning. *Id.* at 257 ("The inspectors argue on two fronts that the absence of probable cause should be an essential element. Without such a requirement, they first say, the *Bivens* claim is too readily available. A plaintiff can afflict a public officer with disruption and expense by alleging nothing more, in practical terms, than action with a retaliatory animus, a *subjective* condition too easy to claim and too hard to defend against.") (emphasis added); *Id.* at 257 ("In the inspectors' view, some *objective* burden must be imposed on these plaintiffs, simply to filter out the frivolous.") (emphasis added).

104 *Nieves*,139 S. Ct. at 1723 (citation omitted).

105 *Id.* at 1723–24.

in virtually every case and provide weighty evidence one way or the other.[106] Even though arrests are not subject to a presumption of regularity or necessarily involve multiple government actors (like prosecutions), causation is still "particularly difficult."[107] Because the causes of action were closely related in this area of complex causation, the same solution was required: "the plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest."[108] The Court straightforwardly presented this analogy, but with zero real explanation as to why the Court had carefully separated the concepts of retaliatory prosecution and arrest since at least 2006 with *Hartman*, only to throw up its hands and call them inextricably linked in 2019.

The Court identified the "problem" with these claims as the same, in that "it is particularly difficult to determine whether the adverse government action was caused by the officer's malice or the plaintiff's potentially criminal conduct."[109] Still, it does not follow that a similar difficulty of proof means that the correct solution in both cases is that the plaintiff must simply prove lack of probable cause. In creating a prima facie element requirement and injecting this through the summary judgment standard, the Court really deprives a jury from determining the thorny *factual* causation issue. A jury should be able to (or at least allowed to) determine whether an officer's malice or the plaintiff's potentially criminal conduct actually caused the arrest. At that point it seems to be more a matter of fact than a matter of law.

The next step in the Court's reasoning insisted that because courts usually analyze arrests through an objective lens under *Fourth Amendment* analysis, courts must also analyze arrests through an objective lens under *First Amendment* analysis. The majority affirmed that "[i]n the Fourth Amendment context, however, we have almost uniformly rejected invitations to probe subjective intent . . . [a] particular officer's state of mind is simply irrelevant and it provides no basis for invalidating an arrest."[110] The Court also argued that it must resist a subjective inquiry into intent that would "set-off broad-ranging discovery in which [there often would be] no clear end to the

106 *Id.* at 1724.

107 *Id.*

108 *Id*.

109 *Id.*

110 *Id.* at 1724–25 (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 737 (2011), and Devenpeck v. Alford, 543 U.S. 146, 153, 155 (2004)). This is certainly the well-established rule under the Fourth Amendment but does not answer what is required under the First Amendment.

relevant evidence."[111] The Court alleged that a subjective standard would chill law enforcement from making arrests, compromise evenhanded application of the law, and even chill law enforcement communication during arrests.[112]

The Court then concluded, without connecting the dots in any way, that because *Hartman*'s no-probable-cause rule would address these concerns about future litigation and arrests, it was the appropriate standard.[113] It is only if the plaintiff can establish a lack of probable cause that the *Mt. Healthy* standard would be appropriate. Still, it is unclear why the *Mt. Healthy* standard would even be helpful at that point; if the plaintiff can prove a lack of probable cause for the arrest what other reason could there be other than retaliation or some other impermissible motive?[114] By suggesting that inquiry into subjectivity is inappropriate when there is probable cause but appropriate when there is no probable cause transmogrifies the First Amendment inquiry into a Fourth Amendment one. Moreover, the sudden resistance to a subjective inquiry for a retaliatory arrest claim is exasperating. The essence of a retaliatory arrest is that it occurred for *subjective* reasons: that is, it would not have occurred *but for* the subjective, inappropriate, and retaliatory animus of the government actor.

The third step in the Court's reasoning again turned to the analogy of tort law to gain elements for retaliatory arrest under § 1983. As there was no common law tort for retaliatory arrest based on protected speech, the parties argued over whether false imprisonment or malicious prosecution was a better fit.[115] That said, the Court asserted that the presence of probable cause would defeat either cause of action, and so the presence of probable cause should also prevent a First Amendment retaliatory arrest claim.[116]

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111 *Id.* at 1725 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982)).

112 *Id.*

113 *Id.*

114 An arrest without probable cause would also already be obviously unconstitutional under the Fourth Amendment.

115 *Nieves*, 139 S. Ct. at 1726.

116 *Id.* As historical reference, the Court notes that malicious prosecution required the plaintiff to show that the criminal charge was unfounded or made without probable cause and that for claims of false imprisonment the presence of probable cause was generally a complete defense for peace officers. *Id.* This sentiment also ignores the Court's earlier analysis from *Hartman* that abuse of power, which did not require lack of probable cause, was a possible candidate, and that common-law tort claims should not thought of as "prefabricated components of . . . torts." Hartman v. Moore, 547 U.S. 250, 258 (2006).

Taking an unexpected turn in analysis, the majority's final section (which is the section not assented to by Justice Thomas) carved out a "narrow qualification" for the rule that they had just announced.[117] This qualification was for "circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so."[118] The majority yielded this ground because it found a "risk that some police officers may exploit the arrest power as a means of suppressing speech,"[119] which, some may argue, is the entire reason to have a restriction against retaliatory arrests in the first place. The example the Court gave was of an individual vocally complaining about the police who the police later arrested for jaywalking.[120] The Court admitted that "[i]n such a case, because probable cause does little to prove or disprove the causal connection between animus and injury, applying *Hartman*'s rule would come at the expense of applying *Hartman*'s logic."[121] Yet the *very next sentence* explained that "[f]or those reasons, we conclude that the no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been."[122] The majority believed that because this would be "objective evidence" of pretextual arrest; it did not violate the earlier mandate to view retaliatory arrest claims on an objective rather than subjective basis.[123] That said, even the given example of the jaywalker would fail unless she could provide concrete evidence of other similarly situated jaywalkers who went unprosecuted and did not engage in protected speech.[124] This is a fundamental problem of whether lack of probable cause as an element is a

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117 *Id.* at 1727-28.

118 *Id.* at 1727.

119 *Id.* (quoting Lozman v. City of Riviera Beach, 138 S. Ct. 1945, 1953–54 (2018)).

120 *Id.*

121 *Id.*

122 *Id.* Here, the majority cites United States v. Armstrong, which Justice Gorsuch clings to as expanding this "narrow qualification" in his concurrence. *Id.* at 1727, 1730, 1733–1734 (citing United States v. Armstrong, 517 U.S. 456, 465 (1996)).

123 *Id.* at 1727. The Court says, "[b]ecause this inquiry is objective, the statements and motivations of the particular arresting officer are 'irrelevant' at this stage." *Id.* This is false, however, because the challenge for the plaintiff is to use this "objective" evidence so that she has a chance to argue about the improper subjective motive of the officer.

124 The majority does not clarify what this exception would look like in practice. Would the jaywalker need to identify other jaywalkers at the time of her arrest? Or overall at other times? Would not this objective evidence come at the price of expensive discovery into the process of law enforcement, the very thing the majority is seeking to avoid?

hard-stop question of law or whether it is a balancing and weighted factual inquiry. If it is a hard stop, then a jury will almost *never* be able to consider situations in which the arrest was supported by probable cause, but retaliatory animus was still the but-for cause of the arrest. The exception, of course, is for when a plaintiff can show "objective" evidence of "similarly situated individuals." But what if there are no similarly situated individuals? What if the officer looks the arrestee in the eye and admits that arrest is for retaliatory animus but "it's a good thing I also have probable cause"?[125] Are such claims dead in the water? The majority was far from clear, but the answer seemed weighted toward a requirement for lack of probable cause as a prima facie element necessary for retaliatory arrest claims.[126] It makes little sense to draw a hard line and then create an almost nonsensical and ill-drawn exception.

This exception is, of course, why Justice Thomas did not join on to this last portion of the majority opinion. He wrote that the qualification "has no basis in either the common law or [the Court's] First Amendment precedents."[127] This position emanates from a comparison to the common law in place when Congress enacted § 1983.[128] He quoted the majority from *Lozman* explaining that "the common law recognized probable cause as an important element for ensuring that arrest-based torts did not unduly interfere with the objectives of law enforcement."[129] Justice Thomas considered false imprisonment, malicious prosecution, *and* malicious arrest and found that "[t]he existence of probable cause generally excused an officer from liability from these three torts, without regard to the treatment

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125 In her dissent, Justice Sotomayor gives the example of a reporter investigating corruption in a police unit. An officer from that unit follows the reporter until she exceeds the speed limit by five miles per hour, then delivers a steep ticket and an explicit message: "Until you find something else to write about, there will be many more where this came from." *Nieves*, 139 S. Ct. at 1741 (Sotomayor, J., dissenting). She suggests that this evidence would be irrelevant under the majority's rule and the reporter would have no claim of retaliation. *Id.* (Sotomayor, J., dissenting).

126 In fact, for Bartlett's case, the Court determines succinctly that it cannot succeed "because [the officers] had probable cause to arrest him . . . his retaliatory arrest claim fails as a matter of law." *Id.* at 1728. There seems to be no room here for him to amend his claim to include other festival goers in similar situations who the police did not arrest but also engaged in protected speech, should there be any.

127 *Id.* at 1728 (Thomas, J., concurring in part and concurring in the judgment).

128 *Id.* (Thomas, J., concurring in part and concurring in the judgment).

129 *Id.* (Thomas, J., concurring in part and concurring in the judgment) (citing *Lozman*, 138 S. Ct. at 1958).

of similarly situated individuals."[130] To Justice Thomas, this historical evidence ended the matter, and the "majority's exception lacks the support of history, precedent, and sound policy."[131]

Justice Thomas argued that the majority imported its qualification from selective-prosecution claims in *United States v. Armstrong*.[132] He pointed out that selective-prosecution claims rely on equal protection standards and not First Amendment standards and a court cannot transmute these standards. For this proposition he cited *Whren v. United States* for the language that states "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause."[133] Yet he did not refer to the Court's holding that an arrest permissible on Fourth Amendment grounds may be impermissible on other constitutional grounds. His rule would completely overlay *Hartman* and retaliatory prosecutions onto retaliatory arrests and require a lack-of-probable-cause element for both.

Justice Gorsuch filed a separate opinion, concurring in part with the majority and dissenting in part. His opinion opened with the notion that the parties agreed on two concepts: (1) that an officer can violate someone's First Amendment rights by arresting her in violation of her protected speech and (2) the presence of probable cause does not undo that violation or erase its significance.[134] While he may be right on the second point, it seems that the majority and the officers *did believe* that the existence of probable cause mostly does undo at least *liability* for any such violation. Justice Gorsuch went to the text of § 1983 to begin his analysis by searching for a linguistic hook for the elements of retaliatory arrest in the statute. Finding none, he commented that you can "look at that statute as long as you like and you will find no reference to the presence or absence of probable cause as a precondition or defense to any suit."[135] To be fair, there is no language to be found specifically about retaliatory arrest either, as the section is only 145 words and critically provides relief to:

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130 *Id.* at 1728–1729 (Thomas, J., concurring in part and concurring in the judgment).

131 *Id.* at 1730.

132 *Id.* at 1729 (Thomas, J., concurring in part and concurring in the judgment).

133 *Id.* (Thomas, J., concurring in part and concurring in the judgment) (citing Whren v. United States, 517 U.S. 806, 813 (1996)).

134 *Id.* at 1730 (Gorsuch, J., concurring in part and dissenting in part). It is not clear that the parties do agree on this, with the officers and the majority using lack of probable cause as a barrier to a cause of action for retaliatory arrest.

135 *Id.* (Gorsuch, J., concurring in part and dissenting in part).

> [e]very 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 . . . .[136]

With no language to guide the way, Justice Gorsuch also looked to the common law that was in place when Congress adopted the statute to help divine the legislature's intent.[137] At that time, courts could not hold law enforcement agents who made a lawful arrest liable for the torts of false arrest or false imprisonment, but those agents also usually needed warrants to make arrests.[138] Now, more warrantless arrests occur as long as there is probable cause to believe a crime has been committed, so it does not follow for Justice Gorsuch that probable cause should be a bar to recovery.[139] The point of the common law claims, he explained, was to remedy arrests and imprisonments effected *without lawful authority*.[140] For that reason, probable cause should defeat a claim that an arrest occurred without legal authority, a proper Fourth Amendment claim. In contrast, the point of a First Amendment claim "isn't to guard against officers who *lack* lawful authority to make an arrest. Rather, it's to guard against officers who *abuse* their authority by making an otherwise lawful arrest for an unconstitutional *reason*."[141] The First and Fourth Amendments, explicitly and intentionally, offer different protections.[142] The Fourth protects against unlawful authority for arrests. The First protects the freedom of speech.

As an example of these different constitutional protections, Justice Gorsuch pointed to other Supreme Court precedent: *Yick Wo v. Hopkins* and *Whren v. United States*.[143] In the first case, police jailed Chinese immigrants for operating coin laundries without permits with no similar actions against

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136 42 U.S.C. § 1983.

137 *Nieves*, 139 S. Ct. at 1730–31 (Gorsuch, J., concurring in part and dissenting in part).

138 *Id.* at 1731 (Gorsuch, J., concurring in part and dissenting in part).

139 *Id.*

140 *Id.*

141 *Id.* (Gorsuch, J., concurring in part and dissenting in part).

142 *Id.* (Gorsuch, J., concurring in part and dissenting in part).

143 *Id*.

Caucasian owners.[144] This violated the Fourteenth Amendment, even if there were probable cause to believe the Chinese immigrants had broken the law.[145] In the second case, racially selective arrests were taking place and this too violated equal protection guarantees.[146] In implementing this holding, the lower courts have explicitly said: "simply because a practice passes muster under the Fourth Amendment . . . does not mean that unequal treatment with respect to that practice is consistent with equal protection."[147] While this is a compelling reading of *Whren*, the Court had explicitly disavowed this reading as clearly established in *Reichle*, calling the Tenth Circuit's reasoning misplaced and instead stated that the case's "discussion of Fourteenth Amendment d[id] not indicate . . . that an arrest supported by probable cause could nonetheless violate the First Amendment."[148] As a result, it was not the common ground that Justice Gorsuch believed it to be. In adopting probable cause as a bar to relief in most cases, the majority did in fact equate lawfulness under the Fourth Amendment with lawfulness under the First.

While Justice Gorsuch did not believe the presence of probable cause to be outcome determinative, neither did he believe it to be "entirely irrelevant to the analysis."[149] He explained that it may "bear on the claim's viability in at least two ways that warrant explanation in future cases." The first of these was causation, where that causation might be a question for the jury to determine, given any number of plausible reasons why retaliation triggered the arrest instead of probable cause.[150] He pointed out that if there was

144 *Id.* (Gorsuch concurring and dissenting) (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)). Scholars consider this to be a foundational immigration law case that extended equal protection to foreign nationals located geographically inside the United States. *See, e.g.*, Gabriel J. Chin, *Unexplainable on Grounds of Race: Doubts about* Yick Wo, 2008 U. ILL. L. REV. 1359, 1359 ("*Yick Wo v. Hopkins* is . . . celebrated as a classic equal protection case. . . .").

145 *Id.* (Gorsuch, J., concurring and dissenting).

146 *Id.* at 1738 (Gorsuch, J., concurring in part and dissenting in part) (citing Whren v. United States, 517 U.S. 806, 813 (1996)).

147 *Id.* at 1731 (Gorsuch, J., concurring in part and dissenting in part) (quoting Hedgepeth v. Wash. Metro. Area Transit Auth., 386 F.3d 1148, 1156 (D.C. Cir. 2004)).

148 Reichle v. Howards, 566 U.S. 658, 665 n.5 (2012). While this case was heard during then Judge Gorsuch's term on the Tenth Circuit, he was not one of the presiding judges. *See* Howards v. McLaughlin, 634 F.3d 1131, 1135 (10th Cir. 2011) (noting that Tenth Circuit Judges Kelly, Seymour, and Lucero presided over this case).

149 Nieves v. Bartlett, 139 S. Ct. 1715, 1732 (2019) (Gorsuch, J., concurring in part and dissenting in part).

150 *See id.* (noting that if the officer "couldn't identify a crime for which probable cause to arrest existed" or claimed that probable cause rested on a "minor infraction" that would not "normally trigger an arrest," a jury may question whether retaliation led to an arrest).

probable cause to think the plaintiff committed a serious crime that "would nearly always trigger an arrest regardless of speech" then generally that case could likely be dismissed on the pleadings or through summary judgment.[151] He also argued that *Hartman* was a different case and it was "equally clear that its reasoning did *not* extend to 'ordinary retaliation claims, where the government agent allegedly harboring the animus is also the individual allegedly taking the adverse action.'"[152]

The second issue for Justice Gorsuch was whether "probable cause may play a role in light of the separation of powers and federalism."[153] In *United States v. Armstrong*, the Court held that "to respect the separation of powers and federalism, a plaintiff must present 'clear evidence' of discrimination when a federal or state official possesses probable cause to support his prosecution."[154] That case dealt with racially selective prosecutions that could violate the Equal Protection clause even if they complied with probable cause and the Fourth Amendment. The Court in that case said that this clear evidence looked like evidence of a prosecutor failing to charge similarly situated persons or direct admissions of discriminatory purpose.[155] The majority in *Nieves* imported one of these exceptions without the other, and gave no language leaving the door open to *any* other exceptions.[156] Even so, because the majority included a citation to only *Armstrong* in announcing its exception, Gorsuch "retain[ed] hope" that lower courts would apply the decision "commonsensically, and with sensitivity to competing arguments about whether and how *Armstrong* might apply in the arrest setting."[157] Given the text of the majority's holding, his hope seems misplaced.

Justice Ginsburg wrote a very brief opinion concurring in part of the judgment and dissenting in part. She asserted that because police may abuse their arrest authority, "[i]f failure to show probable cause defeats an action

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151 *Id.* In this way, lack of probable cause as an element is not the only way to perform a gatekeeping function against trivial claims.

152 *Id.* at 1733 (Gorsuch, J., concurring in part and dissenting in part) (quoting Hartman v. Moore, 547 U.S. 250, 260 (2006)).

153 *Id.* (Gorsuch, J., concurring in part and dissenting in part).

154 *Id.* (Gorsuch, J., concurring in part and dissenting in part) (citing United States v. Armstrong, 517 U.S. 456, (1996)).

155 *Id.*

156 *Id.* at 1715 (majority opinion).

157 *Id.* at 1734 (Gorsuch, J., concurring in part and dissenting in part) (citation omitted).

under § 1983, only entirely baseless arrests will be checked."[158] Justice Ginsburg would continue to follow the precedent laid out in *Mt. Healthy*, when the plaintiff alleges retaliation was a motivating factor in the arrest and then the burden shifts to the defendant to prove that even without any impetus to retaliate, the defendant would have arrested the plaintiff.[159] In the case at issue, the plaintiff did not allege retaliatory animus for Trooper Weight and only some evidence existed in Sergeant Nieves' statement of "bet you wish you would have talked to me now."[160] That said, Justice Ginsburg would not "use this thin case to state a rule that will leave press members and others exercising First Amendment rights with little protection against police suppression of their speech."[161]

Justice Sotomayor dissented but started with the common ground that eight justices seemed to share; the existence of probable cause should not *always* defeat a First Amendment retaliatory arrest claim.[162] She noted, "[t]here is no basis in § 1983 or in the Constitution to withhold a remedy for an arrest that violated the First Amendment solely because the officer could point to probable cause that some offense, no matter how trivial or obviously pretextual, has occurred."[163] The correct approach; however, would be to apply the "well-established, carefully calibrated standards that govern First Amendment retaliation claims" and not to use the majority's slim exception that "risks letting flagrant violations go unremedied."[164]

This careful calibration stems from the *Mt. Healthy* precedent, in which the plaintiff must establish that constitutionally protected conduct was a substantial or motivating factor in the challenged action, shifting the burden to the government actor to prove that the decision would have occurred regardless of the protected conduct.[165] This "timeworn standard is by no

158 *Id.* (Ginsburg, J., concurring in part and dissenting in part). This is similar to her contention in *Hartman*. 547 U.S. 250, 266–67 (2006) (Ginsburg, J., dissenting) (stating that saddling the plaintiff with the burden of pleading and proving lack of probable cause checks "only *entirely* 'baseless prosecutions'") (citation omitted).

159 *Id.* at 1735 (Ginsburg, J., concurring in part and dissenting in part).

160 *Id*. Thus, she would dismiss the claim against Trooper Weight and thinks it possible that Nieves would still prevail on summary judgment.

161 *Id.*

162 *Id.* at 1735 (Sotomayor, J., dissenting).

163 *Id.*

164 *Id.*

165 *Id.* at 1736 (Sotomayor, J., dissenting).

means easily satisfied,"[166] which should alleviate the worries about excess litigation or protracted discovery. If there is "sufficient evidence of retaliatory motive and sufficiently *weak* evidence of probable cause . . . *Mt. Healthy* is surmountable."[167]

It is the majority's oddly crafted exception that worried Justice Sotomayor the most because it "arbitrarily fetishizes one specific type of motive evidence—treatment of comparators—at the expense of other modes of proof."[168] This would mean that "[p]laintiffs who would rely on other evidence to prove a First Amendment claim would be out of luck, even if they could offer other, unassailable proof of an officer's unconstitutional 'statements and motivations.'"[169] At the very least, "[p]laintiffs should have a meaningful opportunity to prove such claims when they arise," and a procedural bar of this magnitude would never provide that opportunity.[170] Even inside this exception, "[w]hat exactly the Court means by 'objective evidence,' 'otherwise similarly situated' and 'the same sort of protected speech' is far from clear."[171] This lack of clarity makes the narrow exception even harder to apply. And while the majority spent "much of its opinion . . . analogizing to *Hartman* and to common-law privileges . . . that reasoning is not sound."[172] Although the causation from animus to arrest might be complex, "[t]hat is true of most unconstitutional motive claims, yet we generally trust that courts are up to the task of managing them."[173] She argued that trials on this point are rare and even accepting that on occasion "a police officer who made a legitimate arrest might have to explain that arrest to a jury . . . is insufficient reason to curtail the First Amendment."[174] Again, this is a crucial point; the jury should be involved in a fact-based inquiry, while the majority relegates not pleading lack of probable cause as decisive as a matter of law. The majority "shortchanges that hard-earned wisdom [of First Amendment protection] in the name of marginal convenience."[175]

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166 *Id.*

167 *Id.* (Sotomayor, J., dissenting) (emphasis added).

168 *Id.* at 1739 (Sotomayor, J., dissenting).

169 *Id.* at 1736 (Sotomayor, J., dissenting).

170 *Id.*

171 *Id.* at 1741 (Sotomayor, J., dissenting).

172 *Id.* at 1737 (Sotomayor, J., dissenting).

173 *Id.*

174 *Id.* at 1737–38 (Sotomayor, J., dissenting).

175 *Id.* at 1742 (Sotomayor, J., dissenting).

Even if these more practical concerns were valid, Justice Sotomayor asserted they are no reason for "the Court's mix-and-match approach to constitutional law" that creates a "Frankenstein-like constitutional tort that may do more harm than good."[176] She noted that in *Whren,* the Court explained that while "'subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis,' that does not make evidence of an officer's 'actual motivations' any less relevant to claims of 'selective enforcement' under the Equal Protection Clause."[177] Both an Equal Protection claim and a First Amendment claim require an inquiry into the motives of an official, and require a separate analysis from any Fourth Amendment irregularities.[178] In these other contexts, "when the ultimate question is *why* a decisionmaker took a particular action, the Court considers the decisionmakers' own statements (favorable or not) to be highly relevant evidence."[179] So why not here? Instead, the "comparison-based evidence is the sole gateway through the probable-cause barrier that [the majority] otherwise erects."[180]

As to Justice Gorsuch's hope that a future court could borrow a clear evidence rule from *United States v. Armstrong* to allow other evidence to overcome a lack of probable cause, Justice Sotomayor is unconvinced.[181] Borrowing this principle would take a doctrine about equal protection in a criminal proceeding with prosecutors and smashing that into a context of First Amendment principles in a civil suit with police officers.[182] That would be far more complex remedy than merely using the already available, already relevant, already proven approach of *Mt. Healthy*.[183]

II. CIRCUIT COURT SPLITS OVER RETALIATORY ARREST ELEMENTS

To understand the trajectory of circuit-level case law while the Supreme Court was developing its jurisprudence in the area of retaliatory arrests, a

176 *Id.* at 1738 (Sotomayor, J., dissenting).
177 *Id.* (Sotomayor, J., dissenting) (quoting Whren v. United States, 517 U.S. 806, 813 (1996)).
178 *Id.* (Sotomayor, J., dissenting).
179 *Id.* at 1739 (Sotomayor, J., dissenting) (emphasis added)
180 *Id.* at 1740 (Sotomayor, J., dissenting).
181 *Id.* at 1741–42 (Sotomayor, J., dissenting).
182 *Id.* at 1742 (Sotomayor, J., dissenting).
183 *Id*.

review of relevant case law is necessary.[184] Before *Nieves*, four circuits: the Second, Fifth, Eighth, and Eleventh, found that the existence of probable cause would bar recovery on a retaliatory arrest claim. Conversely, two circuits, the Ninth and Tenth, found that probable cause was not a bar. Five circuits never squarely answered the inquiry because of intervening issues of qualified immunity or the fact that plaintiffs continually argued a lack of probable cause anyway. Lastly, the Sixth Circuit showed the most change over time in line with changing Supreme Court precedent, but it also extended *Hartman* to arrests before commanded to by *Nieves*. Interestingly, the circuits that allowed cases to proceed despite the existence of probable cause saw no more cases than those who barred such actions.[185] In fact, the Eighth Circuit, which barred such claims outright, had the most cases.[186]

Before breaking down each circuit, it is necessary to explain the overlap of qualified immunity with many of these cases. Arrested plaintiffs who experience a violation of their constitutional rights can directly challenge the criminal action but can also mount a suit through *Bivens* or § 1983 against federal or state officers respectively for damages they have accrued.[187] Qualified immunity protects these federal or state officers from the suit itself "unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct."[188] Courts need not resolve the two-step protocol in order, and "[t]he judges of district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."[189]

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184 This search was performed using Westlaw using the following search protocol: (adv: "first amendment" /p "retaliat!" /p "arrest" /p "probable cause"). All cases were read and evaluated for relevancy. Eighty-six reported, relevant cases were identified across twelve circuits. Many cases included claims for lack of probable cause and made parallel First and Fourth Amendment claims, which required no other analysis on the need for the lack of probable cause for a claim. During the editing phase later cases were added that cited to *Nieves* that are not included in the initial count.

185 Forty cases were found in circuits that barred claims and only seventeen in circuits that did not bar claims. Sixteen were found in circuits that had not resolved the issue, and thirteen were found in the Sixth Circuit which changed over time.

186 Seventeen cases were found in the Eighth Circuit.

187 *See* 33 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 8388 (2d ed. 1998) (describing *Bivens* actions).

188 Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

189 Pearson v. Callahan, 555 U.S. 223, 236 (2009).

As a result, if a court finds that the issue of whether probable cause bars recovery is unclear, it can use that to find that the right was not "clearly established" and provide qualified immunity *whether or not* it can determine that a constitutional violation occurred. For example, the Second Circuit noted "[f]ew issues related to qualified immunity have caused more ink to be spilled than whether a particular right has been clearly established, mainly because courts must calibrate, on a case-by-case basis, how generally or specifically to define the right at issue."[190] If the issue is whether a reasonable officer "'could have believed that [the challenged conduct] was within the bounds of appropriate police responses,' the defendant officer is entitled to qualified immunity."[191] For many lower courts, once the Supreme Court announced in *Reichle* that it had never been clear about whether a right to be free from an arrest supported by probable cause existed and then refused to articulate whether such a right existed, the issue was effectively terminated. Many courts require a plaintiff to cite Supreme Court or circuit precedent to prove that a right was clearly established.[192] The Supreme Court never explicitly granted this right, and many circuits skirted the issue (so it was unclear) or did not recognize the right at all.

The first category of circuits, those who barred claims based on probable cause, doubled down on this bar with evolving Supreme Court support. The Second, Fifth, Eighth, and Eleventh Circuits used probable cause as a proxy for causation analysis before the Supreme Court even decided *Hartman* in 2006.

The Second Circuit, in 1992, found in a prosecution case that "because there was probable cause . . . to believe that [the plaintiff] violated the harassment statute" there was no need to "examine the defendant's motives in reporting [the plaintiff's] actions to the police for prosecution."[193] Just a few years later, in 1995, the court explicitly applied this holding to the arrest

190 Golodner v. Berliner, 770 F.3d 196, 205 (2d Cir. 2014).

191 Zalaski v. City of Hartford, 723 F.3d 382, 389 (2d Cir. 2013) (quoting Saucier v. Katz, 533 U.S. 194, 208 (2001)).

192 *See e.g.*, A.M. v. Holmes, 830 F.3d 1123, 1134–35 (10th Cir. 2016) (noting that a plaintiff must "identify[] an on-point Supreme Court or published Tenth Circuit decision"). Alternatively, the plaintiff can satisfy this "heavy two-part burden" by the "clearly established weight of authority from other courts [that have] found the law to be as [she] maintains." *Id.* at 1135.

193 Mozzochi v. Borden, 959 F.2d 1174, 1179–80 (2d Cir. 1992).

context,[194] and by 2001, it was a perfunctory part of the application.[195] In 2019, the Second Circuit imported this decision to disregard motive analysis to another context.[196] In discussing congressional inquiry, the court noted, "[i]n this respect, the guiding principle is the same as that applicable when an arrest is supported by probable cause and is ruled valid *despite* the arresting officer's motive to retaliate against a suspect for exercising a First Amendment right."[197]

The Fifth Circuit, as far back as 1984, acknowledged the probable cause issue as an open question and signified that the motive of the arresting officer may be the determinative factor.[198] For example, motives may be relevant when "the arrestee's First Amendment rights are called into question where the officer's otherwise valid arrest is motivated by his desire to retaliate against the arrestee for making a particular political speech."[199] In 1992, the Fifth Circuit admitted that "the probable cause question is intertwined at least in part with the First Amendment inquiry but also includes additional factual issues. This query must go to the trier of fact."[200] A few short years later, in 1995, the circuit court solved this issue by requiring a showing of probable cause.[201] In a retaliatory arrest case, the court said that an officer could defeat a claim by showing, via a preponderance of evidence, that the plaintiff "would have been arrested even if his political opinions or speech activities had not been considered, *i.e.*, because there existed probable

194 *See* Singer v. Fulton Cty. Sheriff, 63 F.3d 110, 120 (2d Cir. 1995) ("We have held previously that if the officer either had probable cause or was qualifiedly immune from subsequent suit (due to an objectively reasonable belief that he had probable cause), then we will not examine the officer's underlying motive in arresting and charging the plaintiff.").

195 *See* Curley v. Vill. of Suffern, 268 F.3d 65, 73 (2d Cir. 2001) ("As to the second element, because defendants have probable cause to arrest plaintiff, an inquiry into the underlying motive for the arrest need not be undertaken.").

196 *See* Trump v. Deutsche Bank AG, 943 F.3d 627, 663 (2d Cir. 2019) (holding that "the guiding principle" of a congressional inquiry is the same as that in an arrest context).

197 *Id.*

198 *See* Brown v. Edwards, 721 F.2d 1442, 1453 (5th Cir. 1984) (discussing the motivation of the arresting officer).

199 *Id.* The court later said that the case did not implicate this issue. *See id.* at 1455–56 (holding that the plaintiff "makes no complaint that [the arresting officer] did or threatened to do anything 'more than carry out the process to its authorized conclusion'").

200 Enlow v. Tishomingo Cty., 962 F.2d 501, 510 (5th Cir. 1992). The plaintiff asserted a lack of probable cause violating his First and Fourth Amendment rights. *Id.*

201 *See* Starling v. Fuller, 49 F.3d 1092, 1100 (5th Cir. 1995) (approving a jury instruction requiring the jury to find probable cause at this stage of the analysis).

cause."[202] More than a decade later, in 2002, the Fifth Circuit had a chance to reify this decision.[203] In 2016, the court explained:

> a retaliation claim is only applicable "when non-retaliatory grounds are in fact insufficient to provoke the adverse consequences." As a result, even where a citizen believes that he has been subject to a retaliatory detention or arrest, if there was reasonable suspicion or probable cause for an officer to seize the citizen, "*the objectives of law enforcement take primacy over the citizen's right to avoid retaliation*."[204]

By 2020, the Fifth Circuit noted that according to the Supreme Court in *Nieves v. Bartlett*, there can be no claim for an arrest that violates the First Amendment without a claim that the arrest first violates the Fourth Amendment.[205]

In 1989, the Eighth Circuit dealt with a case in which an arrest took place and "a reasonable officer could have believed that probable cause existed."[206] This fact provided qualified immunity for the police officer.[207] In a dissent, Judge Lay insisted that "the reason for [the] arrest was material to determining whether a constitutional violation had occurred."[208] For that reason, "it was for the *jury* to decide" whether the arrest occurred because of the plaintiff's speech or for the alleged crime.[209] If probable cause is outcome determinative, it does not always help the plaintiff to have a fact-finder determine it.

More than a decade later, the Eighth Circuit was the only circuit court to use the subjective/objective distinction to overlay its understanding of the test: "the officers' judgment was objectively reasonable. Therefore, the claim

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202 *Id.*

203 Keenan v. Tejeda, 290 F.3d 252, 260 (5th Cir. 2002) ("Constable Tejeda is entitled to summary judgment only if the ultimate finding of probable cause is not the subject of a genuine, material factual dispute.").

204 Allen v. Cisneros, 815 F.3d 239, 244–45 (5th Cir. 2016) (emphasis added) (quoting Hartman v. Moore, 547 U.S. 250, 256 (2006); *Keenan*, 290 F.3d at 261–62).

205 *See* Mayfield v. Currie, 976 F.3d 482, 486 n.1 (5th Cir. 2020) (noting that the plaintiff's claims against the arresting officer fall under the Fourth Amendment). In fact in 2021 the Fifth Circuit concluded that absence of probable cause is the *first* element necessary in a retaliatory arrest claim. Kokesh v. Curlee, 14 F.4th 382, 396 (5th Cir. 2021) ("When asserting a claim for retaliatory arrest, a plaintiff must first establish the absence of probable cause, and then demonstrate that the retaliation was a substantial or motivating factor behind the arrest.").

206 Gorra v. Hanson, 880 F.2d 95, 97 (8th Cir. 1989).

207 *See id.* at 98 (holding that because the arresting officers' interpretation of the relevant statute was no unreasonable, the officers are entitled to qualified immunity).

208 *Id.* at 99 (Lay, C.J., dissenting).

209 *Id.* at 99–100 (emphasis added).

of pretext is immaterial."[210] After all, "[pretext] would not nullify the finding of probable cause," and therefore no inquiry into pretext was necessary.[211] After the Supreme Court decided *Hartman v. Moore* in 2006, the Eighth Circuit found that "the Supreme Court's holding in *Hartman* [was] broad enough to apply even where intervening actions by a prosecutor are not present" and lack of probable cause was a "necessary element" for a claim of retaliation.[212]

Even when a lack of probable cause can be established, that fact alone may not be enough for plaintiffs to recover. In 2010, the Eighth Circuit decided a case in which plaintiffs claimed violations of First and Fourth Amendment rights for a lack of probable cause.[213] The lack of probable cause clearly "violated the plaintiffs' Fourth Amendment rights," and thus qualified immunity was inappropriate.[214] Yet *even without probable cause*, there was not enough evidence in the record to support a finding of retaliation, and the court could not say "that a reasonable jury could find that retaliatory animus was a substantial factor or 'but-for' cause of the plaintiffs' arrest and detention."[215]

By 2014, the Eighth Circuit had added lack of probable cause to its list of elements for a retaliatory arrest claim.[216] In retaliatory arrest cases, the plaintiff must be (1) engaged in protected activity, (2) the government action would chill an ordinary person, and (3) the protected activity motivated the government action; and (4) "lack of probable cause or arguable probable cause."[217] Interestingly, in the same case the court explained that "[t]he causal connection is generally a jury question . . . [unless] the question is so

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210 Smithson v. Aldrich, 235 F.3d 1058, 1063 (8th Cir. 2000).

211 *Id.*

212 Williams v. City of Carl Junction, 480 F.3d 871, 876–77 (8th Cir. 2007). This was a case about citations and not an arrest. *See id.* at 873 (describing plaintiff's acclaims that he was improperly issued citations for municipal-ordinance violations). The court based this decision in part, on the Sixth Circuit's similar behavior in Barnes v. Wright. *See id.* at 876 (citing Barnes v. Wright, 449 F.3d 709 (6th Cir. 2006)) (agreeing with the Sixth Circuit that *Hartman* applies to cases where there are no intervening actions by a prosecutor).

213 *See* Baribeau v. City of Minneapolis, 596 F.3d 465, 470 (8th Cir. 2010) (noting that the plaintiffs alleged violations of First, Fourth, Fifth, and Fourteenth Amendments).

214 *Id.* at 478.

215 *Id.* 481. The officers thus received qualified immunity. *Id.*

216 Peterson v. Kopp, 754 F.3d 594, 602 (8th Cir. 2014) (adding another prong for evaluating retaliatory arrest claims).

217 *Id.* (citing Galarnyk v. Fraser, 687 F.3d 1070, 1076 (8th Cir. 2012)).

free from doubt as to justify taking it from the jury."[218] But by using probable cause as a roadblock to causation, the jury never needs to hear any arguments about pretext. In 2019, the court adopted *Nieves* and said broadly that "[a]n arrest generally does not violate the Fourth Amendment or the First Amendment when it is supported by probable cause."[219] The Eighth Circuit had a chance to address the *Nieves* "narrow qualification" in 2021 but as the arrested party did not offer sufficient evidence, it was inapplicable.[220]

The Eleventh Circuit has not given much analysis to the issue, noting in a few, sparse cases that probable cause defeats a First Amendment retaliation claim without elaboration and confirming that the Supreme Court in *Nieves* expanded *Hartman*.[221]

Even the circuit courts that began their jurisprudence with a desire not to require plaintiffs to prove lack of probable cause to recover on a retaliatory arrest claim eventually came in line with the high court over time.

The Ninth Circuit, in a seizure case in 2006, answered the then open question of whether lack of probable cause was a required element for a retaliatory arrest claim.[222] While lack of probable cause foreclosed the plaintiff's *Fourth Amendment* claim, the court explained "a right exists to be free of police action for which retaliation is a but-for cause even if probable cause exists for that action."[223] The Supreme Court decided *Hartman* while the appeal was pending in the case, but the lower court reasoned that the retaliation claim "does not involve multi-layered causation as did the claim in *Hartman*. . . . Thus, the rationale for requiring the pleading of no probable cause in *Hartman* is absent here. This case presents an 'ordinary' retaliation claim."[224] The court believed that Supreme Court precedent dictated that

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218 *Id.* at 603 (quoting Revels v. Vincenz, 382 F.3d 870, 876 (8th Cir. 2004)).

219 Johnson v. McCarver, 942 F.3d 405, 409 (8th Cir. 2019). Here, there was disagreement about whether even "arguable probable cause" exists and whether the "First Amendment retaliation claim remains viable." *Id.* at 410, 413.

220 Just v. City of St. Louis, Missouri, 7 F.4th 761, 768 n.4 (8th Cir. 2021).

221 *See* DeMartini v. Town of Gulf Stream, 942 F.3d 1277, 1294–98 (11th Cir. 2019) (analyzing *Nieves*); Dahl v. Holley, 312 F.3d 1128, 1235 (11th Cir. 2002) (holding that the officers had probable cause to arrest the plaintiff); Redd v. City of Enterprise, 140 F.3d 1378, 1383 (11th Cir. 1998) (holding that the officers had probable cause for arrest and thus are entitled to qualified immunity).

222 *See* Skoog v. Cty. of Clackamas, 469 F.3d 1221, 1232 (9th Cir. 2006) ("Whether a plaintiff must plead the absence of probable cause . . . is an open question in this circuit.").

223 *Id.* at 1235. Yet because the issue was decided that day, it was not clearly established at the time of Skoog's arrest, and qualified immunity was still appropriate. *Id.*

224 *Id.* at 1234.

"[t]he requirements of a cause of action should not be confused with the doctrine designed to protect government officials: the doctrine of qualified immunity."[225] In other words, even though protecting the government from suit was a legitimate interest, it should not draw the lines of what was necessary to state a claim and override the prima facie elements of the case.

Just two years later, in 2008, the Ninth Circuit faced an arrest case.[226] The court noted that "the fact that Defendants had probable cause is not dispositive. But it undoubtedly ha[s] high probative force."[227] Putting that probative force to good use, the appellate court determined it should weigh evidence of retaliatory motive and probable cause together—the First Amendment claim should survive summary judgment when evidence of retaliatory motive was high and evidence of probable cause was threadbare.[228] The First Amendment claim should not survive when there was "very strong evidence of probable cause and very weak evidence of a retaliatory motive."[229] If this was not the case, then "nearly every retaliatory First Amendment claim would survive summary judgment."[230] This would prevent the court from "protecting government officials from the disruption caused by unfounded claims."[231] This weighing of evidence at the summary judgment stage was properly reminiscent of the *Mt. Healthy* framework.

That said, because courts decide many of these claims on the issue of qualified immunity, and because *Reichle* inevitably found its way into the Ninth Circuit's lexicon, the possibility of a First Amendment retaliatory arrest claim became smaller and then almost non-existent.[232] The Ninth Circuit parroted the Supreme Court's finding that "it had never recognized,

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225 *Id.* at 1232 (citing Crawford-El v. Britton, 523 U.S. 574, 589 (1998)).

226 *See* Dietrich v. John Ascuaga's Nugget, 548 F.3d 892, 894 (9th Cir. 2008) (describing the plaintiff's challenge of a traffic citation that was issued in alleged violation of her First Amendment right).

227 *Id.* at 901 (quoting *Hartman*, 547 U.S. at 265).

228 *See id.* (holding that *Skoog* does not apply because the present action "has very strong evidence of probable cause and very weak evidence of a retaliatory motive").

229 *Id.*

230 *Id.*

231 *Id.* (quoting Skoog v. Cty. of Clackamas, 469 F.3d 1221, 1232 (9th Cir. 2006)). The court determined that "no reasonable juror could find from the undisputed facts that Defendants acted in retaliation for Plaintiff's First Amendment activities when [the o]fficer . . . gave her a traffic citation." *Id.*

232 *See* Acosta v. City of Costa Mesa, 718 F.3d 800, 826 (9th Cir. 2013) (holding that the arresting officers' use of force was objectively reasonable). Later this same year, the court decided *Ford v. City of Yakima*, in which the majority and dissent disagreed over whether it was still possible to get qualified immunity on this issue, consonant with *Reichle.* 706 F.3d 1188, 1193–1195.

nor was there a clearly established First Amendment right to be free from a retaliatory arrest that is otherwise supported by probable cause."[233] Until the right was found or enunciated, any claims of qualified immunity on this ground would likely succeed, insulating police officers for retaliatory arrests. In a child custody case in 2019, the Ninth Circuit acknowledged the instructive nature of *Nieves* for causation purposes, writing:

> if the plaintiff demonstrates that the arresting officer lacked probable cause, that showing bridges the causal gap by "reinforc[ing] the retaliation evidence and show[ing] that retaliation was the but-for basis" of the official's action. . . . A plaintiff who shows differential treatment addresses the causal concern by helping to establish that non-retaliatory grounds were in fact insufficient to provoke the adverse consequences.[234]

Unfortunately, these were the only two paths the Supreme Court had left open to prove causation in this context.

By 1998, the Tenth Circuit had also recognized that subjective motive evidence was relevant to a retaliation claim even when using a qualified immunity analysis.[235] Nearly two decades later, the court struggled to apply this concept because it found "where a question of ultimate fact . . . cannot be resolved as a matter of law, the law is not clearly established and qualified immunity is appropriate."[236] Thus, the intersection of qualified immunity and the necessary subjective component of a retaliatory arrest claim was problematic. The court in 2011 understood the *Hartman* precedent as requiring a heightened pleading standard because of "complex causation, evidentiary concerns, and the presumption of prosecutorial regularity."[237] As the Supreme Court had taken pains to distinguish complex from ordinary retaliation claims,[238] the court of appeals insisted there must be a difference, because "[e]ven if an official's action would be 'unexceptionable if taken on

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233 *Id.* at 825 (citing Reichle, 566 U.S. at 670).

234 Capp v. Cty. of San Diego, 940 F.3d 1046, 1056 (9th Cir. 2019) (quoting *Nieves*, 139 S. Ct. at 1723, 1727). In 2021, the Ninth Circuit found that *Nieves* did not apply to an immigration bond context as it was not a criminal arrest. Bello-Reyes v. Gaynor, 985 F.3d 696, 700 (9th Cir. 2021).

235 Coen v. Runner, 854 F.2d 374, 378 (10th Cir. 1988) ("[W]hen intent or motive is an element of the plaintiff's constitutional claim against governmental officials, the wholly objective approach suggested by *Harlow* is inappropriate.").

236 Nielander v. Bd. of Cty. Comm'rs of Republic, 582 F.3d 1155, 1169 (10th Cir. 2009).

237 Howards v. McLaughlin, 634 F.3d 1131, 1148 (10th Cir. 2011). This was the case that the Supreme Court overturned in *Reichle*. The dissent argued that there was a strong argument that *Hartman* applies to arrests because of the similar presence of immunity and the fact that evidence on probable cause would always be available and relevant. *Id.* at 1151–52 (Kelly, J., dissenting).

238 *See id.* (analyzing the Supreme Court's decision in *Hartman*).

other grounds,' when retaliation against Constitutionally-protected speech is the but-for cause of that action, this retaliation is actionable and 'subject to recovery.'"[239] The Supreme Court found no such recognized right and thus would mandate qualified immunity in that very case.[240] By 2020 the Tenth Circuit had adopted the precedent of the Supreme Court and now found that "[t]he presence of probable cause is . . . a bar to a First Amendment retaliation claim."[241]

Several circuits, including the First, Third, Fourth, Seventh, and D.C. Circuits, did not have the chance in reported, relevant cases to definitively resolve the issue of whether lack of probable cause was a required element of a retaliatory arrest claim.

The First Circuit reported no relevant cases on the intersection of probable cause and First Amendment retaliation. In a District of Massachusetts case, the court cited *Holland v. City of Portland* for First Circuit support that "[a]ctual motive sometimes does play a role in section 1983 actions. There may be probable cause to arrest, but arrest in fact was triggered only by a desire to chill First Amendment rights."[242] In that case, the First Circuit had explained the Supreme Court's holding in *Whren v. United States*, discussing the decision to arrest.[243] The Supreme Court was clear that subjective intentions played no role in ordinary, probable-cause Fourth Amendment analysis and "[t]he decision to arrest, where probable cause exists, is a discretionary one informed by many considerations. And any attempt to untangle the ascribed motive from a skein of others . . . would invite exactly the inquiry into police motivation condemned by *Whren*."[244] But that did not mean that "probable cause forecloses every possible challenge to an arrest."[245] Regrettably, the Supreme Court "does not say what facts would be needed to support such a challenge."[246]

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239 *Id.* at 1143.

240 Reichle v. Howards, 566 U.S. 658, 670 (2012) (holding that *Hartman*'s ambiguity on retaliatory arrests meant that the plaintiff's arrest was supported by probable cause).

241 Fenn v. City of Truth or Consequences, 983 F.3d 1143, 1149 (10th Cir. 2020).

242 Britton v. Maloney, 981 F. Supp. 25, 52 (D. Mass. 1997) (citing Holland v. City of Portland, 102 F.3d 6, 10 (1st Cir. 1996)).

243 Holland v. City of Portland, 102 F.3d 6, 10 (1st Cir. 1996).

244 *Id.* at 10.

245 *Id.* at 11.

246 *Id.*

In 2012, the district court called the issue an "open question,"[247] but by 2019, it cited *Nieves* for the proposition that "'[t]he plaintiff pressing a retaliatory arrest claim must [also] plead and prove the absence of probable cause for the arrest.' 'Absent such a showing, a retaliatory arrest claim fails.' But '[i]f the plaintiff proves the absence of probable cause, then the *Mt. Healthy* . . . test governs.'"[248]

The Third Circuit noted in 2013 in an unpublished case that it had "not decided whether the logic of *Hartman* applies to retaliatory arrest claims."[249] However, it need not decide the issue for purpose of qualified immunity as "*Reichle* . . . conclusively disposes of this inquiry . . . [holding] it was not clearly established that an arrest supported by probable cause could give rise to a First Amendment violation."[250] The Fourth Circuit also saw this issue through the lens of qualified immunity and found "the *Reichle* principle is fully controlling."[251] The qualified immunity issue almost transforms into a content issue with the court articulating without explanation right after the discussion of qualified immunity that "[plaintiff's violation] gave [the officer] probable cause to arrest [plaintiff]; therefore his arrest was not retaliatory."[252] The D.C. Circuit heard the case that led to *Hartman*.[253] The court continued to litigate over its meaning and the later cases, and almost a decade later in 2013, still found that "retaliatory arrest and retaliatory prosecution are distinct constitutional violations."[254]

The Seventh Circuit declined to address whether "probable cause is a complete defense . . . in the context of an arrest" in a 2002 case in which the plaintiff had established no evidence of retaliatory motive.[255] This left the question open. Still, the court noted that "even if a defendant was brimming

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247 Turkowitz v. Town of Provincetown, 914 F. Supp. 2d 62, 73 (D. Mass. 2012).

248 Cass v. Town of Wayland, 383 F. Supp. 3d 66, 85–86 (D. Mass. 2019).

249 Primrose v. Mellot, 541 F. Appx. 177, 180 n.2 (3d Cir. 2017).

250 Karns v. Shanahan, 879 F.3d 504, 522 (3d Cir. 2018).

251 Pegg v. Hernberger, 845 F.3d 112, 119 (4th Cir. 2017).

252 *Id.* In the only other relevant, reported, circuit case the plaintiff pled lack of probable cause so the issue was irrelevant. *See* Tobey v. Jones, 706 F.3d 379 (4th Cir. 2013).

253 Moore v. Hartman, 388 F.3d 871 (D.C. Cir. 2004).

254 Moore v. Hartman, 704 F.3d 1003, 1004 (D.C. Cir. 2013). Judge Kavanaugh dissented, as he argued that precisely because the law was not clear, the defendants were entitled to qualified immunity on the issue. *See id.*

255 Abrams v. Walker, 307 F.3d 650, 657 (7th Cir. 2002). The court abrogated this case in *Spiegla v. Hull* when the court found that burden shifting required the plaintiff to allege retaliation as a motivating factor and then the burden shifts to the defendant to prove that the same action would have occurred in the absence of the protected conduct. 371 F.3d 928, 942 (7th Cir. 2004).

over with unconstitutional wrath against a § 1983 plaintiff, that plaintiff cannot prevail unless he or she establishes that the challenged action would not have occurred 'but for' the constitutionally protected conduct."[256] In 2012, the court held that "probable cause, if not a complete bar to [plaintiff's] retaliatory arrest claim, provides strong evidence that he would have been arrested regardless of any illegitimate animus."[257] As in other circuits, the Seventh Circuit saw the unsettled case law over whether probable cause was a complete bar to these claims, but because the Supreme Court reified the lack of clarity in *Reichle*, qualified immunity was appropriate.[258] By 2019, the door was closed and arrest "cannot be challenged if supported by probable cause."[259] In 2020, the court stated, "probable cause defeats a claim of retaliatory arrest. No further analysis of causation, motive, or injury is required. *Nieves* has left nothing further to discuss."[260]

The Sixth Circuit has perhaps had the most contentious relationship with lack-of-probable-cause as an element to a First Amendment retaliatory arrest claim. In 2001, the Sixth Circuit corrected a lower district court which had admitted that "[i]t was not clearly established that the First Amendment prohibited an officer from effectuating an otherwise valid arrest if that officer was motivated by a desire to retaliate against the arrestee's assertion of First Amendment rights."[261] The circuit court found it was clearly established that retaliation against the exercise of First Amendment rights *was* inappropriate and because there was a lack of probable cause, claims under the First and Fourth Amendment could proceed.[262] In that case, the dissent argued that applying the *Mt. Healthy* retaliation framework would be inappropriate "because *Mt. Healthy* did not involve a police officer's decision to arrest, an obligation at the core of the officer's responsibilities and necessarily made on the spot without the luxury of investigation."[263] This was the only judge to suggest that the peculiarities of arrest should allow a court to disregard the traditional burden-shifting framework.

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256 *Abrams*, 307 F.3d at 654 (internal quotation marks omitted).

257 Thayer v. Chiczerski, 705 F.3d 237, 252 (7th Cir. 2012).

258 *Id.*

259 Frederickson v. Landeros, 943 F.3d 1054, 1058 (2019).

260 Lund v. City of Rockford, 956 F.3d 938, 944 (7th Cir. 2020).

261 McCurdy v. Montgomery Cty., 240 F.3d 512, 520 (6th Cir. 2001). In this particular case, because "no rational jury" could find probable cause, there was the potential for a retaliation claim. *Id.* at 522.

262 *Id.* at 522.

263 *Id.* at 526 (Engel, J., dissenting).

Just one year later in 2002, the Sixth Circuit found that "[t]he existence of probable cause is *not determinative* of the constitutional question if, as alleged here, the plaintiff was arrested in retaliation for his having engaged in constitutionally protected speech."[264] For purposes of qualified immunity, the court went as far as to reiterate that "[t]he law is well-established that an action taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper."[265]

Yet after the Supreme Court decided *Hartman v. Moore*, the ground shifted for the Sixth Circuit. Even though at that point its "precedents d[id] not require [a plaintiff] to prove lack of probable cause in order to go forward with his First Amendment retaliation claim,"[266] the circuit precedents could not stand alone. In the wake of *Hartman*'s ruling on retaliatory *prosecutions*, and "regardless of the reasoning, it [was] clear that the *Hartman* rule modifies [the] holdings and applies in this case."[267] Applying *Hartman*, the First Amendment claim failed as a matter of law.[268] By the time the Supreme Court decided *Nieves*, the Sixth Circuit claimed it was clear "if there is a showing of probable cause, a retaliatory arrest claim fails."[269]

Even with *Nieves* firmly in place as a roadblock to retaliatory arrest claims, the Sixth Circuit still encountered a case that "may not be subject to the general rule of *Nieves*."[270] In *Novak v. City of Parma*, the plaintiff created a parody Facebook page to mock the local police department.[271] The police department arrested Novak for unlawfully impairing the function of the department.[272] Novak went to trial and was ultimately acquitted before filing multiple claims against the police department, including a First Amendment retaliatory arrest claim.[273] The defendants moved to dismiss these claims and

264 Greene v. Barber, 310 F.3d 889, 895 (6th Cir. 2002) (emphasis added).

265 *Id.*

266 Barnes v. Wright, 449 F.3d 709, 718–19 (6th Cir. 2007). The court took care to note that the precedents relied on *Mt. Healthy*. *See id.* at 718.

267 *Id.* at 720.

268 *Id.*

269 Hartman v. Thompson, 931 U.S. 471, 484–85 (6th Cir. 2019).

270 Novak v. City of Parma, 932 F.3d 421, 431 (6th Cir. 2019).

271 *Id.* at 424.

272 *Id.* at 425.

273 *Id.* at 426

also claimed qualified immunity for their actions.[274] The Sixth Circuit conceded:

> [i]f the police *did not* have probable cause to arrest Novak, then he may bring a claim of retaliation. To prevail on this claim, Novak will need to show that the officers arrested him based on a forbidden retaliatory motive. But retaliatory motive is often difficult to prove . . . A plaintiff alleging retaliatory motive must disentangle . . . wholly legitimate considerations of speech from any wholly illegitimate retaliatory motives.[275]

The court also acknowledged that the Supreme Court in 2012 had disavowed recognizing a First Amendment right to be free from retaliatory arrest that was supported by probable cause and "it remains true today."[276] That said, the presented factual situation was unique because the sole basis for probable cause *was* the protected speech that Novak made.[277] The causation issue was, thus, not as "thorny" because there was no "mix of protected speech and unprotected conduct."[278] The court also found that "this case strikes at the heart of a problem the [Supreme] Court has recognized in recent retaliation cases. There is a risk that some police officers may exploit the arrest power as a means of suppressing speech."[279] In a case in which speech itself causes the arrest, it "at least raises a concern that probable cause does little to prove or disprove the connection between Novak's criticism of the police and his arrest."[280] This is a clear indication that *Nieves* did not completely solve the relationship between probable cause and retaliatory arrest claims.

It would be expected for circuit courts of appeals to analogize *Hartman* more deeply and to explore how arrests differ from or are similar to prosecutions. It would help unpack retaliation claims and distinguish complex from ordinary causation and explain how these items, with the distracting wrinkle of qualified immunity, created a cause of action for retaliatory arrest. Yet most circuit courts that precluded relief collapsed the inquiry into arrests more generally—concluding that a Fourth and First Amendment claim are legally identical. Even the courts that pushed for

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274 *Id.*

275 *Id.* at 429.

276 *Id.* This means that Novak's right was not clearly established (and neither was the minute *Nieves* exception) so the officers would ultimately receive qualified immunity. *See id.* at 430–31.

277 *Id.* at 431.

278 *Id.*

279 *Id.*

280 *Id.* at 432.

protection under the First Amendment were unable to stem the tide of qualified immunity that shielded officers who may have engaged in arrests based on pretext.

III. SUPREME COURT PRECEDENT AND SHIFTING PLEADING STANDARDS:

While the Supreme Court was crafting its jurisprudence in the area of retaliatory arrest claims, [281] and the circuits were slogging through application,[282] another track of jurisprudence was concurrently developing and changing. In 2007, just one year after its decision in *Hartman v. Moore*, the Supreme Court changed the essence of pleading under Federal Rule of Civil Procedure 8.[283] This shift from factual allegations that were possible to those that were plausible, with a standard that excised conclusory allegations changed the face of complaints and motions to dismiss.[284]

To see the depth of the change in this area, it is necessary to go back to *Conley v. Gibson*, where the Supreme Court had reified the standard of notice pleading.[285] In that case, employees alleged through a class action violations of the Railway Labor Act.[286] The complaint alleged several facts: (1) the plaintiffs' status as employees, (2) the status of the union as the designated bargaining agent under the act, (3) the existence of a contract between the union and the railroad, (4) a breach of that contract when the railroad "abolished" jobs but really only engaged in racially discriminatory hiring and retention practices, and (5) the union's failure to protect the employees from those actions.[287] Part of the procedural response of the defendants was a

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281 *See supra* Section I.

282 *See supra* Section II.

283 *See* Bell Atl. Corp. v. Twombly 550 U.S. 544 (2007) (holding that allegations of parallel conduct must be paired with enough factual context to raise a plausible suggestion of an agreement in order to state a valid claim under the Sherman Act § 1).

284 *See generally* Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010) (proposing a new theory to reconcile *Twombly* with the Federal Rules of Civil Procedure and prior Court precedents); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821 (2010) (discussing the Court's shift in *Twombly* from a minimal notice pleading regime to one of strict gatekeeping); Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473 (2010) (discussing *Twombly's* connections to prior cases and proposing ways to limit its impact).

285 *See* 355 U.S. 41 (1957).

286 *Id.* at 42.

287 *Id.* at 43.

motion to dismiss that claimed the complaint failed to state a claim upon which relief could be granted.[288]

The Court recounted that "the accepted rule [is] that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief."[289] To the complaint at hand, if its allegations were proven true, the Court would find a "manifest breach of the Union's statutory duty to represent fairly and without hostile discrimination all of the employees in the bargaining unit."[290]

The Union argued the problem with the language of the complaint was that it "failed to set forth specific facts to support its general allegations of discrimination" and that this made the dismissal ultimately proper.[291] That said, the Court found "[t]he decisive answer to this [was] that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim."[292] The point of the rule was to "give the defendant *fair notice* of what the plaintiff's claim is and the grounds upon which it rests."[293] This kind of pleading, termed "notice pleading" by the Court could exist because of all of the other procedural backstops in the federal rules that allowed for later precision on "the basis of both claim and defense" and more narrow definition of "the disputed facts and issues."[294] In their entirety, the Court recognized that the "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel

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288 *Id.* Another part of the procedural response was about whether the National Railroad Adjustment Board had exclusive jurisdiction over the controversy. *See id.* The District Court dismissed the complaint, and the Fifth Circuit affirmed the dismissal on this jurisdictional ground. *See id.* at 43–44. The Supreme Court found it was an error to dismiss for lack of jurisdiction based on the layout of the lawsuit, between the employees and the union and not the employees and the employer. *See id.* at 44. Once jurisdiction was established, the Court advanced to other considerations over whether the dismissal was appropriate. *See id.* at 45.

289 *Id.* at 45–46 (emphasis added).

290 *Id.* at 46. This "no set of facts" language would become critical to the standard's ultimate dismantling.

291 *Id.* at 47.

292 *Id.*

293 *Id.* (emphasis added).

294 *Id.* at 47–48. The Court referred to in a footnote these several other procedural devices including "Rule 12(e) (motion for a more definite statement); Rule 12(f) (motion to strike portions of the pleading); Rule 12(c) (motion for judgment on the pleadings); Rule 16 (pre-trial procedure and formulation of issue); Rules 26–37 (depositions and discovery); Rule 56 (motion for summary judgment): Rule 15 (right to amend)." *See id.* at 48 n.9.

may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."[295]

Notice pleading held for fifty years until the tides turned for pleading standards and the Supreme Court decided *Bell Atlantic Corp. v. Twombly* in 2007.[296] The plaintiffs filed suit for a determination of whether certain major telecommunications providers violated the Sherman Antitrust Act.[297] To be found liable under the relevant statute, the telecommunications providers had to have a contract or conspiracy to restrain trade or commerce.[298] Mr. Twombly represented a class of subscribers to the telecommunications services that alleged such a conspiracy through parallel conduct in each provider's respective service area to inhibit competition.[299] The second portion of the complaint alleged an agreement between the providers to refrain from competing against one another that could be *inferred* from a failure to engage in meaningful opportunities in contiguous markets.[300] With the data available to the subscribers, and no evidence of an actual agreement to refrain from competition, the petitioners sued.

In an opinion penned by Justice Souter, the Court narrowed the issue to one of pleading and framed it as "whether a . . . complaint can survive a motion to dismiss when it alleges that . . . providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement as distinct from identical, independent action."[301] The Court granted certiorari "to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct."[302]

Federal Rule of Civil Procedure 8(a)(2) governed the standard for pleading in the civil complaint. The Court again conceded that a plaintiff "does not need detailed factual allegations," but also implored that there must be "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action [would] not do."[303] The standard the Court now read into Rule 8 was for "[f]actual allegations . . . enough to raise a right

295 *Id.* at 48.
296 *See* 550 US. 544 (2007).
297 *See id.* at 548.
298 *See id.*
299 *See id.* at 550.
300 *See id.* at 551.
301 *Id.* at 548–49.
302 *Id.* at 553.
303 *Id.* at 555.

to relief above the speculative level."[304] As applied here, the Court noted that "[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[305] That hinge on the concept of *plausibility*, as more and distinct from *Conley*'s notion of *possibility*, turned the dial up on what was required from a plaintiff's pleading. Parallel conduct of the telecommunications companies was "admissible circumstantial evidence,"[306] but it "[fell] short of conclusively establishing" a violation of the law.[307] It led to two equal conclusions: innocent behavior or nefarious conspiracy. The complaint needed more factual allegations to "nudge" that line of equality closer to conspiracy to survive the motion to dismiss.[308]

This request for allegations *plausibly* suggesting a violation of the law dovetailed with the nature of the threshold inquiry of Federal Rule of Civil Procedure 8, "that the plain statement possess enough heft to show that the pleader is entitled to relief."[309] Moreover, creating a greater burden (or interpreting one in) at the pleading stage was helpful because "antitrust discovery can be expensive."[310] While the plaintiffs argued that this holding contradicted the notice pleading of *Conley v. Gibson*, the Court balked at the lower court's reading of *Conley* that "would dispense with any showing of a reasonably founded hope that a plaintiff would be able to make a case."[311] Because of this perceived repeated misunderstanding, the Court noted that the "no set of facts" language "ha[d] earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading

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304 *Id.* (citing 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216, pp. 235–36 (3d ed. 2004)).

305 *Twombly*, 550 U.S. at 556.

306 *Id.* at 553.

307 *Id.*

308 *Id.* at 557. The Court framed it thus: "[a]n allegation of parallel conduct is thus much like a naked assertion of conspiracy in a . . . complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of entitlement to relief." *Id.*

309 *Id.* at 557.

310 *Id.* at 558. The Court felt it was probable that "only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the discovery process will reveal relevant evidence." *Id.* at 559.

311 *Id.* at 562.

standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."[312]

The lower court's real error was in finding "the *prospect* of unearthing direct evidence of conspiracy sufficient to preclude dismissal, even though the complaint [did] not set forth a single fact in a context that suggest[ed] an agreement."[313] Pleading based on "optimism" and "reasonably founded hope that a plaintiff would be able to make a case" was insufficient.[314] In the context of an antitrust conspiracy, the Court found resisting competition to be routine market conduct and that "if alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a . . . violation against almost any group of competing businesses would be a sure thing."[315]

Justice Stevens dissented in *Twombly*, partially joined by Justice Ginsburg.[316] He wrote that if the real issue was whether parallel conduct was enough to violate the Sherman Act, "the answer to that question has been settled for more than 50 years."[317] A previous case had held that "parallel conduct is circumstantial evidence admissible on the issue of conspiracy, but it is not itself illegal."[318] The plaintiffs alleged this conduct "has long been recognized as a classic *per se* violation of the Sherman Act" and the Court would require no discovery or even an answer before dismissing the complaint.[319] The very equality of outcomes that the majority posited – that the allegation evidence equally supported unlawful conspiracy and innocent conduct—meant that a possibility of illegal agreement existed. Because these allegations describe unlawful conduct, "the Federal Rules of Civil Procedure, [the Court's] longstanding precedent, and sound practice mandate that the District Court at least require some sort of response from petitioners before

312 *Id.* at 563. "*Conley*, then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival." *Id.*

313 *Id.* at 561–62 (emphasis added).

314 *Id.* at 562.

315 *Id.* at 566.

316 *See id.* at 570 (Stevens, J., dissenting). Justice Ginsburg did not sign on to Part IV of his opinion, where Justice Stevens discussed Congressional intent in the matter. *See id.* at 595–97 (Stevens, J., dissenting).

317 *Id.* at 570–71 (Stevens, J., dissenting).

318 *Id.* at 571 (citing Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540–42 (1954)).

319 *Id.* at 572 (Stevens, J., dissenting).

dismissing the case."[320] Justice Stevens pointed out the two practical concerns he felt motivated the majority's decision: the expensive nature of antitrust litigation and the risk of juror confusion over this type of conduct.[321] He concluded that these concerns,

> merit careful case management, including strict control of discovery, careful scrutiny of evidence at the summary judgment stage, and lucid instructions to juries; ***they do not***, however, justify the dismissal of an adequately pleaded complaint without even requiring the defendants to file answers denying a charge that they in fact engaged in collective decisionmaking. ***More importantly***, they do not justify an interpretation of Federal Rule of Civil Procedure 12(b)(6) that seems to be driven by the majority's appraisal of the *plausibility* of the ultimate factual allegation rather than its *legal sufficiency*.[322]

Justice Stevens drew a compelling distinction between plausibility and possibility that would allow allegations, assumed to be true, to survive the complaint stage and engage in some level of answer and discovery before potentially being resolved either through summary judgment or trial. Federal Rule 8 was, in fact, drafted and approved with an intentionality to avoid reference to "facts, or evidence, or conclusions."[323] The idea was to keep litigants in court as opposed to out, and to sort out the merits of a claim "during a flexible pretrial process and, as appropriate, through the crucible of trial."[324] It was in this history that the Court should understand *Conley*, he argued.[325] *Conley*'s "no set of facts" language "permits outright dismissal only when proceeding to discovery or beyond would be futile."[326] Yet even with all this protest, Justice Stevens admitted that "[e]verything today's majority says would . . . make perfect sense if it were ruling on a Rule 56 motion for summary judgment and the evidence included nothing more than the Court

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320 *Id.* at 573 (Stevens, J., dissenting).

321 *See id.* (Stevens, J., dissenting). He later explained, "if I had been the trial judge in this case, I would not have permitted the plaintiffs to engage in massive discovery based solely on the allegations in this complaint. On the other hand, I surely would not have dismissed the complaint without requiring the defendants to answer the charge." *Id.* at 593 (Stevens, J., dissenting).

322 *Id.* (Stevens, J., dissenting) (emphasis added).

323 *Id.* at 575 (Stevens, J., dissenting).

324 *Id.* (Stevens, J., dissenting).

325 *See id.* at 576 (Stevens, J., dissenting).

326 *Id.* at 577 (Stevens, J., dissenting). Justice Stevens later said that if *Conley*'s no set of facts language was "to be interred, let it not be without a eulogy." *Id.* (Stevens, J., dissenting). He noted that the Court had never questioned the language and it was supported by several lower courts and state courts and even the petitioners in the case. *See id.* at 578–79 (Stevens, J., dissenting).

has described."[327] It was the stage of the proceeding that was critical – complaints were for allegations and summary judgment and beyond for evidence. But the ruling was not on summary judgment but on a motion to dismiss, and Justice Stevens wrote that the majority's "plausibility standard is irreconcilable with Rule 8 and with our governing precedents."[328]

After the *Twombly* Court shifted pleading standards toward plausibility, the question remained whether this new formulation would apply to all complaints or just complex ones involving antitrust.[329] Two years later in *Ashcroft v. Iqbal*, the Court clarified that the decision in *Twombly* was, in reality, an interpretation of Federal Rule 8 and thus "expounded the pleading standard for all civil actions, and it applies to antitrust and discrimination suits alike."[330]

In that case, police arrested Javaid Iqbal, a Muslim from Pakistan, after September 11, 2001 on criminal charges and federal officials detained him.[331] Part of his complaint against the federal government included allegations that they had targeted him "on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments to the Constitution."[332] The pleading named Attorney General John Ashcroft and FBI Director Robert Mueller specifically as crafting and executing a policy of discrimination respectively.[333] The defendants "moved to dismiss the complaint for failure to state sufficient allegations to show their own involvement in clearly established unconstitutional conduct."[334] The District Court used *Conley* to decide the matter and denied the motion, but while the appeal was pending, the Supreme Court decided *Twombly*, "which discussed

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327 *Id.* at 586 (Stevens, J., dissenting).

328 *Id.* (Stevens, J., dissenting). Another problem here was ignoring the will of Congress. Justice Stevens explained that "[t]his is a case in which the intentions of three important sources of law— the Sherman Act, the Telecommunications Act of 1996, and the Federal Rules of Procedure—all point unmistakably in the same direction, yet the Court marches resolutely the other way." *Id.* at 596 (Stevens, J., dissenting).

329 *See* John P. Sullivan, Twombly *and* Iqbal*: The Latest Retreat From Notice Pleading*, 43 SUFFOLK U. L. REV. 1, 4 (2009) (discussing the impact of the Twombly decision and the lack of clarity on how to apply it); Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After* Bell Atlantic Corp. v. Twombly, 41 SUFFOLK U. L. REV. 851, 858–59 (2008) (explaining how district courts and commentators believed *Twombly* could be interpreted in multiple ways).

330 556 U.S. 662, 684 (2009).

331 *Id*. at 666.

332 *Id.* at 668–69.

333 *See id.* at 669.

334 *Id.*

the standard for evaluating whether a complaint is sufficient to survive a motion to dismiss."[335]

After concluding that it had appropriate jurisdiction over the case,[336] the Court, as it had done in *Twombly*, began "by taking note of the *elements* a plaintiff *must plead* to state a claim of unconstitutional discrimination against officials entitled to assert the defense of qualified immunity."[337] One element incumbent on the plaintiff to plead and prove was that the defendant acted with discriminatory purpose.[338] To act with discriminatory purpose a defendant must take an action *because* it will create adverse effects on an identifiable group.[339]

To see if this element was sufficiently pleaded, the Court turned to the complaint.[340] The Court clarified, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face."[341] While "the pleading standard Rule 8 announces does not require detailed factual allegations . . . it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation."[342] This interpretation of the Rule led the Court to develop a two-step analysis based on *Twombly* and derived from its principles: (1) a court must accept factual allegations in the complaint as true but not legal conclusions and (2) only a complaint that then stated a plausible claim for relief would survive a motion to dismiss.[343]

In the complaint at hand, the Court determined that the pertinent allegations were "bare assertions, much like the pleading of conspiracy in *Twombly*, [which] amount[ed] to nothing more than a formulaic recitation of

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335 *Id.*

336 *Id.* at 675 ("The District Court's order denying petitioner's motion to dismiss is a final decision under the collateral-order doctrine over which the Court of Appeals had, and this Court has, jurisdiction. We proceed to consider the merits of petitioners' appeal.").

337 *Id.* (emphasis added). This language tends toward elements pleading.

338 *See id.* at 676.

339 *See id.* at 676–77. Respondent was arguing instead for a theory of vicarious liability, which the Court declined to use. *Id.*

340 *See id.*

341 *Id.* at 678. The Court also explained that two principles girded the decision from *Twombly*: (1) that a court must accept factual allegations in the complaint as true but not legal conclusions and (2) only a complaint that states a plausible claim for relief would survive a motion to dismiss. *See id.* at 678–79.

342 *Id.*

343 *See id.* at 678–79. This process echoes the well-pleaded complaint rule from Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908).

the elements of a constitutional discrimination claim."[344] The Court did not reject these allegations "on the ground that they are unrealistic or nonsensical . . . [i]t is the conclusory nature of the respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth."[345] Under the first step of *Twombly*, the Court need not consider these allegations because they were conclusory.

The second step of *Twombly* required a reading of whether the real, factual allegations of the respondent's complaint *plausibly* suggested an entitlement to relief.[346] While the factual allegations of arrest and detention of thousands of Arab Muslim men as part of the investigation of the events of September 11th and the highly restrictive detention of those men were "consistent with" the claims of discrimination, they were not sufficient.[347] The Court found that "given more likely explanations, [the allegations] do not plausibly establish [discriminatory] purpose."[348] The Court reasoned that as nineteen Arab Muslim hijackers perpetrated the September 11th attacks, it was likely that a legitimate policy to investigate those attacks "would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims."[349] Moreover, even if the complaint's allegations were sufficient for plausible discrimination on Iqbal's arrest, that was not his claim.[350] His claim was that there was a policy in place of discrimination, and his complaint failed to establish that claim.[351] In sum, because the "complaint does not contain any factual allegation sufficient to plausibly suggest petitioners' discriminatory state of mind . . . [h]is pleadings . . . do not meet the standard necessary to comply with Rule 8."[352] Even the promise of minimal discovery from the lower court could not help Iqbal's case, as the Court found that "[b]ecause respondent's complaint is deficient under Rule 8, *he is not entitled to discovery*, cabined or otherwise."[353]

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344 *Id.* at 681.

345 *Id.*

346 *See id.*

347 *Id.*

348 *Id.*

349 *Id.* at 682.

350 *See id.*

351 *See id.*

352 *Id.* at 683.

353 *Id.* at 686 (emphasis added).

This time, not only did Justice Stevens and Justice Ginsburg dissent as they had in *Twombly*, but Justice Breyer and Justice Souter joined them.[354] Justice Souter wrote the dissent here but had written the majority opinion in *Twombly*. He asserted that the majority "misapplie[d] the pleading standard under . . . *Twombly*"[355] Tracing to the allegations of the complaint, Justice Souter pointed out that it "alleges, at a bare minimum that Ashcroft and Mueller knew of and condoned the discriminatory policy their subordinates carried out."[356] The defendants argued that this was not enough to satisfy the plausibility standard of *Twombly*, but Justice Souter noted that "*Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be."[357] Unlike the facts of *Twombly*, Justice Souter argued that "the allegations in the complaint are neither confined to naked legal conclusions nor consistent with legal conduct."[358] The complaint alleged discrimination on account of race, religion, and national origin and also alleged the knowledge and indifference that even Ashcroft and Mueller conceded were sufficient for liability: enough for plausibility.[359] While both the dissent and the majority agreed that *Twombly* should be applied in all pleading cases, the disagreement came from how to determine which allegations the court should find "conclusory" and excise from the complaint as extraneous to a plausibility calculation.[360]

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354 *See id.* at 687 (Souter, J., dissenting). Justice Breyer also wrote a separate dissent focused on the argument that other protections existed besides this use of *Twombly* to protect the government from unwarranted litigation. *Id.* at 699–700.

355 *Id.* at 688. He also argued that the majority does away with supervisory liability under *Bivens*. *See id.* at 687–88 (Souter, J., dissenting). This is intertwined with the pleading issue because it changes what the respondent ought to have pleaded.

356 *Id.* at 695 (Souter, J., dissenting).

357 *Id.* at 695–96 (Souter, J., dissenting). Justice Souter concedes that "[t]he sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel. This is not what we have here." *Id.*

358 *Id.* at 696–97 (Souter, J., dissenting).

359 *See id.* at 697 (Souter, J., dissenting). This is evidence of a disagreement with the majority about the required elements as well.

360 *Id.* at 699 (Souter, J., dissenting).

IV. HARMONIZING PLEADING REQUIREMENTS WITH PROPER ELEMENTS FOR A FIRST AMENDMENT RETALIATORY ARREST CLAIM

Plaintiffs seeking to recover for a retaliatory arrest must plead facts that support each element of a retaliatory arrest claim, including causation.[361] The Supreme Court identified the core elements of a First Amendment retaliation claim in *Mt. Healthy*, and as adapted by circuit courts in the context of arrest, those elements have been fairly static. A First Amendment retaliation claim may occur when a plaintiff engages in protected speech and when retaliatory animus *because* of that speech creates an injury. In the arrest context, this means a plaintiff must plead and prove (1) she engaged in protected speech, and (2) the officer arrested her *because* of that speech.[362] The proper causation standard is "but-for" causation.[363] That is, *but for* the retaliatory animus, the arrest would not have taken place.

The causation element has always been the most crucial and the most tenuous. It can be extremely difficult to prove why someone was arrested. And while a lack of probable cause can at least partially serve as a proxy for causation, because without probable cause it is far more likely that an officer based the arrest on some illegitimate motive like retaliation, it is not the *only* way to prove causation. There is the *Nieves* exception, of course, that a plaintiff might prove with empirical data that others were in a similar situation but were not similarly arrested.[364] But more possibilities exist. For example, several circuits mention the suspicious nature of "temporal

361 It is true that notice pleading is usually not synonymous with elements pleading, but the allegations have to line up to make the overall cause of action plausible which usually sorts into elements. *See, e.g.*, Mark Anderson & Max Huffman, Iqbal, Twombly, *and the Expected Cost of False Positive Error*, 20 CORNELL J.L. & PUB. POL'Y 1 (2010) (describing the requirements of *Twombly* and *Iqbal*).

362 *See e.g.*, McLin v. Ard, 866 F.3d 682, 696 (5th Cir. 2017) (explaining that while most recitations of this test include another element, that the officer's action must cause the plaintiff "to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity," that element is usually satisfied by an arrest). Some courts, like the Eighth Circuit, add a fourth element of lack of probable cause or arguable probable cause. *See* Thurairajah v. City of Ft. Smith, 925 F.3d 979, 984–85 (8th Cir. 2019).

363 *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 249 (1989) ("A court that finds for a plaintiff under this standard [from *Mt. Healthy*] has effectively concluded that an illegitimate motive was a 'but-for' cause of the employment decision.").

364 Nieves v. Bartlett, 139 S. Ct. 1715, 1727 (2019).

proximity" between the protected speech and the ultimate arrest.[365] Many things could fall into this second bucket of facts sufficient to overcome probable cause and prove retaliatory animus motivated the arrest.[366] But at least where evidence of competing motivations exists, it should be a fact-finder's job to resolve the issue.

The Court's burden-shifting framework originally envisioned in *Mt. Healthy* was crafted to invite competing evidence of causation, where it existed, to determine the truth of causation.[367] In that framework, a plaintiff would plead that retaliation was a substantial or motivating factor of the arrest and then the burden would shift to the defendant to show that the same action would occur without the retaliatory animus. This framework treated proving lack of but-for causation as an affirmative defense rather than an element of the claim.

When *Mt. Healthy* was decided, courts were still beholden to the pleading standards from *Conley*, when a plaintiff could plead any set of facts which made her claim conceivable. This would allow a plaintiff to allege an arrest and use these allegations to flip the burden to the defense to prove that the arrest was proper and not motivated by retaliation for protected speech. But the pleading landscape has evolved, and the Supreme Court has clarified its pleading jurisprudence. Now courts require plaintiffs to plead facts that make their claims "plausible." The facts of *Twombly* itself highlight this shift. In *Twombly*, the plaintiff alleged two equally likely possibilities: the defendant was responding with a legal motive or an illegal one. The Supreme Court said that equality was not enough to survive a motion to dismiss, and the plaintiff must nudge her claim from merely possible, to plausible.[368]

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365 *See, e.g.*, Hoyland v. McMenomy, 869 F.3d 644, 657 (8th Cir. 2017) ("Temporal proximity is relevant, even if not dispositive in situations like this."); Mirabella v. Villard, 853 F.3d 641, 652 (3d Cir. 2017) ("One method of proving a causal link, applicable here, is unusually suggestive temporal proximity . . . [which] would normally be enough to carry a complaint across the starting line in the face of a Rule 12(b) (6) motion."); Tobey v. Jones, 706 F.3d 379, 387 (4th Cir. 2013) ("[T]he temporal proximity of his peaceful protest and his arrest . . . shows Appellants engaged in impermissible retaliation.").

366 *See* John Koerner, *Between* Healthy *and* Hartman*: Probable Cause in Retaliatory Arrest Cases*, 109 COLUM. L. REV. 755, 794 (2009) (identifying five forms of alternative evidence available in the arrest context that are unavailable in the prosecution context to overcome probable cause: verbal threats, verbal statements of intent, motive to retaliate, disproportionate impact, and temporal proximity).

367 *See* 429 U.S. 274, 286–87 (1977).

368 Even in this context, the Ninth Circuit has remembered "the Supreme Court's admonition that an allegation is not plausible where there is an obvious alternative explanation for alleged misconduct." Capp v. Cty. of San Diego, 940 F.3d 1046, 1055 (9th Cir. 2019).

Thus, the burden-shifting framework may have made sense under a conceivability standard, because if the plaintiff merely alleged retaliation as one motive, it was conceivable the arrest was retaliatory. Yet for the retaliation to be plausible as the 'but-for' cause of the arrest, the plaintiff must now plead more. Causation can no longer be treated as an affirmative defense.

Critically, this shift in pleading standards took place after the Supreme Court decided *Hartman v. Moore*, which dominated the later conversation about retaliatory arrests. During this time, the modern doctrine on qualified immunity also evolved.[369] Because courts now identify qualified immunity as immunity from suit itself and not merely damages,[370] more and more decisions are happening at the summary judgment stage.[371] The Supreme Court's adopting of lack of probable cause as an *element* overburdens the plaintiff while simultaneously not recognizing the built-in burden the plaintiff already suffers under the new pleading regime. Thus, it is unnecessary. A plaintiff should have to plead, under *Twombly* and conforming to the *Mt. Healthy* framework, factual allegations which make it *plausible* that her arrest was because of retaliation. She could do this by accessing two tracks: she could prove lack of probable cause *or* some other allegation of pretext despite probable cause that still made it plausible that she was arrested for the purpose of retaliation. In essence, the original elements from *Mt. Healthy* are preserved, but made to serve plausible pleading standards. Of course, for this approach to succeed given qualified immunity, the Supreme Court will have to acknowledge the sound principle that there *is* a right to be free from a retaliatory arrest that is supported by probable cause if the animus is still the 'but-for' cause of the arrest.

What makes this a preferable solution to the one the Supreme Court settled on in *Nieves*? First, by holding the plaintiff to a plausibility pleading standard, labor is properly divided among the parties and a court may reinforce the concept of burden-shifting. This allows the plaintiff to overcome a motion to dismiss and engage in at least some level of discovery before summary judgment, hopefully explaining the true nature of the arrest.

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369 *See* Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 231 (2006) (noting the impact of Harlow v. Fitzgerald and the Supreme Court adopting an objective test).

370 *See* Lacey v. Maricopa Cty., 693 F.3d 896, 915 (9th Cir. 2012).

371 As denials of summary judgment on the grounds of qualified immunity are appealable final judgments, this encourages their use at this stage. *See* Behrens v. Pelletier, 516 U.S. 299, 307 (1996).

The Court has never overturned the burden-shifting framework for retaliation cases, and it is the preferred framework of Justices Ginsburg and Sotomayor, even in *Nieves*. There is a reason the burden-shifting framework was created; police officer defendants are in the better position both to prove the reason for the arrest and their personal motivations, and this account should be compared to the plaintiffs. There must be more for plaintiffs to argue than they are statistically unlike other would-be arrestees, a fact that would be far too difficult to prove. Retaliatory arrest is a cause of action based on motive. Thus, motive *must* be alleged, scrutinized, and proven, not waved away under the objective guise of probable cause. While complex causation can be an issue, a pleading-focused approach avoids any undue comparisons to retaliatory prosecutions which always involve a chain of actors. This approach sharpens the focus in "ordinary retaliation" claims with cleaner causation where a police officer encounters speech and engages in a subsequent arrest.

A second benefit to this approach is that it tracks the pleading landscape of *Twombly* and *Iqbal*, because it reinforces the plausible nature of the claim. It does not allow a plaintiff to allege arrest where it *could* be true that the arrest was retaliatory (as any arrest *could* be) but forces the plaintiff to nudge her claim from possible to plausible. It could even be true that if a plaintiff did not allege a lack of probable cause that her burden would be slightly higher, that to overcome probable cause the allegations of pretext would have to be weightier. If probable cause itself is an absolute or near-absolute ban, then complaints never see the light of trial after a cutting 12(b)(6) motion. And that means that some arrests truly based in pretext go un-remedied and un-redressed.

Third, this approach still provides for gatekeeping of trivial claims with summary judgment. Thus, although keeping the bar low at the initial complaint stage means that more complaints will see success, the higher bar of summary judgment can still serve its function by allowing the assessment of evidentiary support. There can be some discovery and a showing that either proves the existence or lack of retaliation or provides a genuine issue of material fact to proceed to a jury. It does not curtail the inquiry by finding "as a matter of law" that probable cause ends the matter entirely.

Finally, and most importantly, retaining the original elements of the retaliatory arrest claim allows for recovery when arrests are pretextual, but a level of probable cause still exists. Although the Supreme Court refused to

acknowledge this in *Reichle*, and birthed a qualified immunity roadblock to retaliatory arrest claims, this can be reversed. Using the original tools in place, a burden-shifting framework and proper pleading requirements, plaintiffs can suitably allege a retaliatory arrest. The Supreme Court does not have to close the door on retaliatory arrest claims when it should be allowing the judicial system to check any abuse of power in an arresting officer.