No. 17-1174

IN THE
Supreme Court of the United States

LUIS A. NIEVES, *et al.*,

Petitioners,

v.

RUSSELL P. BARTLETT,

Respondent.

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

BRIEF OF THE NATIONAL POLICE ACCOUNTABILITY PROJECT, RODERICK & SOLANGE MACARTHUR JUSTICE CENTER, AMERICAN CIVIL LIBERTIES UNION, AND ACLU OF ALASKA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 1.5 million members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The ACLU of Alaska is a state affiliate of the national ACLU. Since its founding in 1920, the ACLU has frequently appeared before this Court in First Amendment cases, both as direct counsel and as amicus curiae. Many landmark civil rights decisions of the 1950s and 1960s arose out of free speech controversies, and involved the government's attempted use of its arrest powers to silence ideas and movements critical of government. *See, e.g.*, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). History demonstrates that governmental efforts to retaliate against particular viewpoints are often aimed at those who challenge and criticize the status quo. The preservation of the principle of viewpoint neutrality is therefore of immense concern to the ACLU, its civil rights clients seeking justice, and its members and donors.

The National Police Accountability Project (NPAP) was founded in 1999 by members of the National Lawyers Guild to address allegations of misconduct by law-enforcement and detention-facility officials through coordinating and assisting civil-rights lawyers representing their victims. NPAP has approximately six hundred attorney members

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

practicing in every region of the United States. NPAP provides training and support for these attorneys and other legal workers, public education and information on issues related to law-enforcement and detention-facility misconduct and accountability, and resources for non-profit organizations and community groups involved with victims of such misconduct. NPAP supports legislative efforts aimed at increasing law-enforcement and detention-facility accountability, and appears regularly as an amicus curiae in cases such as this one presenting issues of particular importance for its member lawyers and their clients, who include protesters and victims of police misconduct.

The Roderick and Solange MacArthur Justice Center (RSMJC) is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC has offices at the Northwestern Pritzker School of Law, at the University of Mississippi School of Law, in New Orleans, in St. Louis, and in Washington, D.C. RSMJC attorneys have led civil rights battles in areas that include police misconduct, the rights of the indigent in the criminal justice system, compensation for the wrongfully convicted, and the treatment of incarcerated men and women.

SUMMARY OF ARGUMENT

"The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston v. Hill*, 482 U.S. 451, 462–63 (1987).

Police officers sometimes arrest people in retaliation for protected expression. Speech that triggers police retaliation takes two principal forms. First, officers retaliate with arrests when protesters direct their outrage at police misconduct. Second, in "contempt of cop" arrests, police retaliate against people who disagree with or criticize them for actions or attitudes in the course of their employment, making arrests for technical infractions that would normally result in citation and release or no citation at all.

This Court recognized in *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), that the existence of probable cause does not immunize government actors against First Amendment claims for retaliatory arrest in all circumstances. The Court should now hold that such circumstances include instances where police officers arrest someone with the purpose to silence or punish protected speech.

If a person can be arrested for speech so long as there happens to be probable cause to arrest for something else, police can arrest people solely because of speech they disfavor. It is easy to find a pretext for arrest because statutes and ordinances forbid a wide range of unremarkable human activity—like wearing saggy pants, crossing the street while reading a text message, and barbecuing in a front yard.

More specifically, ordinary protest activities commonly violate an array of statutes and municipal ordinances that prohibit a wide range of broadly defined activities, such as blocking sidewalks, amplifying sound, unlawful assembly, and disorderly conduct. These laws extend to so much behavior that

police frequently have probable cause to believe that a protestor has broken a law. Therefore, if probable cause categorically defeats a retaliatory arrest claim, the police will acquire the power to arrest protesters for the very purpose of silencing disfavored messages.

ARGUMENT

I. ILLEGAL ARRESTS FOR DISFAVORED SPEECH ARE A SYSTEMIC PROBLEM IN MANY LAW ENFORCEMENT AGENCIES.

Recent years have witnessed a series of well-documented findings that certain police departments systemically arrest people in retaliation for their speech. Two types of protected speech commonly trigger retaliatory arrests: (1) protests and demonstrations perceived as "anti-police," and (2) "contempt of cop" encounters in which an officer feels slighted or insulted.

In a 2015 report, the Department of Justice found that "suppression of speech" by the Ferguson, Missouri Police Department (FPD) "reflects a police culture that relies on the exercise of police power—however unlawful—to stifle unwelcome criticism." UNITED STATES DEPARTMENT OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 28 (2015).[2] The report noted that despite a settlement agreement and a consent decree in two separate cases regarding protest activities, "it appears that FPD continues to interfere with

[2] Available at https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

individuals' rights to protest and record police activities." *Id.* at 27. For example, on February 15, 2015, the six-month anniversary of the shooting death of Michael Brown, "protesters stood peacefully in the police department's parking lot, on the sidewalks in front of it, and across the street." *Id.* The police responded with retaliatory arrests:

> Video footage shows that two FPD vehicles abruptly accelerated from the police parking lot into the street. An officer announced, "everybody here's going to jail," causing the protesters to run. Video shows that as one man recorded the police arresting others, he was arrested for interfering with police action. Officers pushed him to the ground, began handcuffing him, and announced, "stop resisting or you're going to get tased." It appears from the video, however, that the man was neither interfering nor resisting. A protester in a wheelchair who was live streaming the protest was also arrested. . . . Six people were arrested during this incident. It appears that officers' escalation of this incident was unnecessary and in response to derogatory comments written in chalk on the FPD parking lot asphalt and on a police vehicle.

Id. at 27–28.

Similarly, in 2011, the Department of Justice issued a findings letter regarding the Maricopa County Sheriff's Office (MCSO) in Arizona:

> We find that MCSO command staff and deputies have engaged in a pattern or practice

> of retaliating against individuals for exercising their First Amendment right to free speech. Under the direction of Sheriff Arpaio and other command staff, MCSO deputies have sought to silence individuals who have publicly spoken out and participated in protected demonstrations against the policies and practices of MCSO—often over its immigration policies.

Letter from Thomas E. Perez, Assistant Attorney General, to William R. Jones, Counsel, Maricopa County Sheriff's Office, at 13 (Dec. 15, 2011).[3] For example, during two separate meetings of the County Board of Supervisors, deputies arrested several individuals who expressed criticism of the MCSO. *Id.* at 14. None of the protesters were convicted. *Id.* The Department of Justice concluded: "The arrests and harassment undertaken by MCSO have been authorized at the highest levels of the agency and constitute a pattern of retaliatory actions intended to silence MCSO's critics." *Id.*

The Department of Justice made similar findings regarding the Baltimore Police Department in 2016: "BPD violates the First Amendment by retaliating against individuals engaged in constitutionally protected activities. Officers frequently detain and arrest members of the public for engaging in speech the officers perceive to be critical or disrespectful." UNITED STATES DEPARTMENT OF JUSTICE,

[3] Available at https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf.

INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 9 (2016).[4]

A recent preliminary injunction decision issued by the United States District Court for the Eastern District of Missouri analyzes the St. Louis Police Department's response to protests triggered by the acquittal of Officer Jason Stockley for the fatal shooting of Anthony Lamar Smith. *Ahmad v. City of St. Louis*, No. 17-cv-2455, 2017 WL 5478410, at *1 (E.D. Mo. Nov. 15, 2017). These protests, which began on Friday, September 15, 2017, were directed at both the verdict and "broader issues, including racism and the use of force by police officers." *Id.* "The participants often express[ed] views critical of police." *Id.*

As the protests continued on Sunday, September 17, there were reports of protesters damaging property, and some protesters put on goggles and masks (likely because of concerns about tear gas or mace). *Id.* at *3.

In an illustration of the manner in which very broad laws empower the police to retaliate against speakers, the police declared an "unlawful assembly" and then carried out a mass arrest. *Id.* at *3–5. In fact, Lieutenant Timothy Sachs testified that officers have sole discretion to declare an assembly unlawful because there are no policies or guidelines defining when it is appropriate to do so. *Id.* at *6.

After declaring an unlawful assembly, and giving orders to disperse, police blocked off points of egress and trapped the protesters in an intersection by marching toward it. *Id.* at *4–5. Then they made a

[4] Available at https://www.justice.gov/crt/file/883296/download.

mass arrest of everyone trapped in the intersection, even though the protesters complied with police commands. *Id.* at *5.

Ultimately, the district court issued a preliminary injunction. *Id.* at *17–18. One provision enjoins the police from declaring "an unlawful assembly . . . for the purpose of punishing persons for exercising their constitutional rights to engage in expressive activity." *Id.* at *18.

One particularly common form of retaliation occurs when police arrest people for what has come to be called "contempt of cop." In these cases, a police officer has probable cause to believe an offense has occurred, but the suspect's speech, perceived as disrespectful, is the real reason for the arrest, as opposed to a citation and release. Notably, *Police Magazine*, which bills itself as "the law enforcement magazine" and a "community for cops[,]" has a glossary of "cop slang" which defines "Contempt of Cop" as "the true underlying behavior of disrespect toward an officer leading to an expensive ticket or arrest for an offense that actually is a law violation." *Contempt of Cop*, POLICE MAGAZINE: COP SLANG.[5]

A 1999 review of the New Jersey State Police by then-New Jersey Attorney General John J. Farmer documented a common phenomenon of arresting people for "contempt of cop":

> The single most common allegation among all the allegations reviewed was improper attitude and demeanor. This is true in law enforcement nationwide. We observed in

[5] Available at http://www.policemag.com/cop-slang/contempt-of-cop.aspx (last visited Oct. 4, 2018).

> several cases a problem which, for lack of a better term, may be called "occupational arrogance." The discussion of this problem is by no means unique to the New Jersey State Police. In fact, internal affairs detectives at one municipal police department, noting its prevalence, termed this phenomenon "contempt of cop." Simply put, it is the tendency for certain police officers to approach the public with an attitude that they, the officer, are in no way to be challenged or questioned. Among the cases we reviewed, several seem to illustrate this phenomenon.

FINAL REPORT OF THE STATE POLICE INTERVIEW TEAM 93–94 (1999).[6]

More recently, the Department of Justice found that Newark Police Department officers often arrest people for contempt of cop: "The [Newark Police Department's] arrest reports and [internal affairs] investigations . . . reflect numerous instances of the [department's] inappropriate responses to individuals who engage in constitutionally protected First Amendment activity, such as questioning or criticizing police actions." UNITED STATES DEPARTMENT OF JUSTICE, INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 13 (2014).[7] In one instance, for example, "an individual was arrested after he questioned officers' decision to arrest his neighbor." *Id.*

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[6] Available at https://pdfs.semanticscholar.org/649c/a046a3baca0f9ebafa2641b744c8a2b80e06.pdf.

[7] Available at https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf.

Similarly, in the Ferguson report, the Department of Justice found that police not only retaliated against demonstrators, but also that officers routinely made "contempt of cop" arrests:

> [O]fficers frequently make enforcement decisions based on what subjects say, or how they say it. Just as officers reflexively resort to arrest immediately upon noncompliance with their orders, whether lawful or not, they are quick to overreact to challenges and verbal slights. These incidents—sometimes called "contempt of cop" cases—are propelled by officers' belief that arrest is an appropriate response to disrespect.

UNITED STATES DEPARTMENT OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 25 (2015). Notably, the breadth of offenses contained in Feguson's municipal code made it easy to come up with charges: "These arrests are typically charged as a Failure to Comply, Disorderly Conduct, Interference with Officer, or Resisting Arrest." *Id.*

II. BROAD REGULATIONS MAKE IT ALL TOO EASY TO FIND PROBABLE CAUSE TO ARREST PEOPLE FOR DISFAVORED SPEECH.

If the existence of probable cause, standing alone, defeats a retaliatory arrest claim, the police will acquire vast discretion to punish dissent by arresting protesters with whom they disagree. Many laws are so broadly written and prohibit so much activity that it is very easy for police to arrest people in retaliation for their speech. In various municipalities across the United States, it is illegal to wear saggy

pants,[8] to cross a street while viewing a cell phone,[9] and to have a barbecue in one's front yard.[10]

This Court has long recognized the threat of censorship posed by laws that endow the police with excessive discretion. In *City of Houston v. Hill*, the Court noted that an ordinance challenged in the case "criminalizes a substantial amount of constitutionally protected speech, and accords the police unconstitutional discretion in enforcement. The ordinance's plain language is admittedly violated scores of times daily, yet only some individuals—those chosen by the police in their unguided discretion—are arrested." 482 U.S. 451, 466–67 (1987).

To be sure, the vagueness and overbreadth doctrines provide a partial antidote to laws that confer wide discretion to trench on protected speech. That said, courts cannot be in the business of

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[8] Abbeville, Louisiana Code of Ordinances § 13-25 ("It shall be unlawful for any person in a public place or in view of the public to wear pants or a skirt in such a manner as to expose their underlying garments."); *see also* William C. Vandivort, Note, *I See London, I See France: The Constitutional Challenge to "Saggy" Pants Laws*, 75 BROOK L. REV. 667, 673 (2009) (cataloging similar saggy pants ordinances across the country).

[9] Revised Ordinances of Honolulu § 15-24.23, https://www.honolulu.gov/rep/site/ocs/roh/ROH_Chapter_15a21_28_.pdf ("No pedestrian shall cross a street or highway while viewing a mobile electronic device.").

[10] Berkeley, Missouri Code of Ordinances § 210.2250 ("Subject to certain exceptions mentioned hereinbelow, no person shall be permitted to barbecue or conduct outdoor cooking in front of the building line of any single-family dwelling, multi-family dwelling or commercial structure."); *see also* Pagedale, Missouri Code of Ordinances § 210.750(A).

invalidating every law that prohibits some protected conduct or could be worded more lucidly. "Invalidating any rule on the basis of its hypothetical application to situations not before the Court is 'strong medicine' to be applied 'sparingly and only as a last resort.'" *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 743 (1978) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). Some laws are broad enough that the threat of retaliatory enforcement is quite serious, but not so broad as to warrant the "strong medicine" of facial invalidation.

Furthermore, the vagueness and overbreadth doctrines apply only to laws that regulate speech. Most laws, of course, do not regulate speech. Thus, for example, if an officer arrests a motorist driving one mile over the speed limit because the officer dislikes a political bumper sticker on the car, the motorist cannot make a First Amendment vagueness or overbreadth challenge to the speeding law. In cases where the offense of arrest does not regulate speech, the only remedy for an individual is to bring a First Amendment retaliation claim demonstrating that the arrest was carried out solely to punish the expression of a disfavored viewpoint.

A. Laws Affecting Protest Provide Probable Cause For Arrest In A Wide Range Of Circumstances.

Protesters often violate broad statutes and ordinances that prohibit a wide range of activity, such as blocking sidewalks, unlawful assembly, violating noise ordinances, and disorderly conduct. Because these laws encompass so much conduct, the police have probable cause to arrest large numbers of protesters. For example, in *Ahmad*, the court noted

that in St. Louis, "an individual officer can decide, in his or her discretion, to declare an unlawful assembly, and there are no guidelines, rules, or written policies with regard to when an unlawful assembly should be declared." 2017 WL 5478410, at *6.

Even leaving aside the constitutional validity of such laws affecting protests, selective enforcement of such laws can provide a cover for viewpoint discrimination by police. Where there is evidence that police have chosen to enforce such laws only against critics they disagree with, or to punish certain viewpoints, the existence of probable cause should not categorically bar a retaliation claim. If probable cause categorically defeats a retaliatory arrest claim, the police will be able to wield the power to arrest protesters for the very purpose of silencing disfavored messages.

1. Unlawful Assembly And Failure To Disperse

Under typical "unlawful assembly" ordinances, "officials can disperse a protest as long as they conclude that participants are at some point planning to engage in forceful or violent lawbreaking." John Inazu, *Unlawful Assembly as Social Control*, 64 U.C.L.A. L. Rev. 2, 7 (2017). Because these statutes grant police the power to disperse gatherings that could lead to force or violence, officers "are forced to rely on judgments and inferences about future acts" by protesters or bystanders. *Id.* at 6–7. In fact, some unlawful assembly statutes allow the police to disperse a protest where they believe the demonstrators will engage in an act that is illegal but nonviolent. *Id.* at 7.

The ability to declare an unlawful assembly based solely on predictions about the intent of the protesters, and in the absence of any observed violence or illegality, vests the police with too much power to shut down protests with which they disagree. For example, the California Penal Code defines "unlawful assembly" to include two or more people gathering for the purpose of committing an act that is unlawful, but non-violent: "Whenever two or more persons assemble together to do an unlawful act, or do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an unlawful assembly." Cal. Penal Code § 407. Unlawful assembly is a misdemeanor. Cal. Penal Code § 408.[11]

Police have used their discretion under unlawful assembly laws to "target citizens across the political spectrum, including civil rights workers, antiabortion demonstrators, labor organizers, environmental groups, Tea Party activists, Occupy protesters, and antiwar protesters." Inazu, *supra*, at 5.

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[11] *See also* Idaho Code §§ 18-6404, 18-6405 (2017) (stating that the misdemeanor of unlawful assembly occurs "[w]henever two or more persons assemble together to do an unlawful act, and separate without doing or advancing toward it, or do a lawful act in a violent, boisterous or tumultuous manner . . ."); Iowa Code § 723.2 (2017) ("An unlawful assembly is three or more persons assembled together, with them or any of them acting in a violent manner, and with intent that they or any of them will commit a public offense. A person who willingly joins in or remains a part of an unlawful assembly, knowing or having reasonable grounds to believe that it is such, commits a simple misdemeanor.").

2. Blocking Roads And Sidewalks

State and local governments often prohibit blocking roads, highways, and sidewalks. For example, the Code of the District of Columbia provides that "[i]t is unlawful … [t]o crowd, obstruct, or incommode … [t]he use of any street, avenue, [or] alley." D.C. Code § 22–1307(a) (2016).[12]

The police use these laws to arrest protesters. For example, following the police shooting of Alton Sterling, police arrested numerous protesters in Baton Rouge under Louisiana's obstruction of a highway law. Third Amended Complaint at 4–6, *Tennart v. City of Baton Rouge*, No. 17-179-JWD-EWD (M.D. La. filed July 13, 2017). The plaintiffs in the *Tennart* case allege that they were arrested on "the pretext that the protesters had violated a state law proscribing obstruction of highways and public roads." *Id.* at 3.[13]

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[12] *See also* Ga. Stat. § 16-11-43 (2017) ("A person who, without authority of law, purposely or recklessly obstructs any highway, street, sidewalk, or other public passage in such a way as to render it impassable without unreasonable inconvenience or hazard and fails or refuses to remove the obstruction after receiving a reasonable official request or the order of a peace officer that he do so, is guilty of a misdemeanor."); La. Rev. Stat. § 14:97 (2017) ("Simple obstruction of a highway of commerce is the intentional or criminally negligent placing of anything or performance of any act on any railway, railroad, navigable waterway, road, highway, thoroughfare, or runway of an airport, which will render movement thereon more difficult.").

[13] Roderick and Solange MacArthur Justice Center attorneys are among the counsel for the *Tennart* plaintiffs.

3. Disorderly Conduct Ordinances

Police also arrest protesters under disorderly conduct ordinances. In *Lewis v. City of Tulsa*, "prolife activists were picketing an abortion clinic." 775 P.2d 821, 822 (Okla. Crim. App. 1989). Clayton Lewis and other activists stood 50-60 feet away from the entrance to the clinic and yelled at people entering that "it was murder. You should feel guilty about what you are doing." *Id.* For these lawful activities, Mr. Lewis was arrested and convicted under Tulsa's disorderly conduct ordinance. *Id.* The Oklahoma Court of Criminal Appeals ultimately reversed his conviction. *Id*.

4. Noise Ordinances

Noise ordinances typically impose limits on the amplification of sound. For example, the Chicago Municipal Code provides:

> No person on the public way shall employ any device or instrument that creates or amplifies sound, including but not limited to any loudspeaker, bullhorn, amplifier, public address system, musical instrument, radio or device that plays recorded music, to generate any sound, for the purpose of communication or entertainment, that is louder than average conversational level at a distance of 100 feet or more, measured vertically or horizontally, from the source.

Chicago Mun. Code § 8-32-070(a) (2017).[14]

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[14] *See also, e.g*, Norfolk Code of Ordinances § 26-4 (2017) ("Operating, playing or permitting the operation or playing of any . . . bullhorn, megaphone, sound amplifier or similar device which produces, reproduces or amplifies sound in such

Police often use noise and amplification provisions to arrest protesters. For example, Stephen Nylen, alleges in a case proceeding in the United States District Court for the Western District of Michigan that police have repeatedly threatened him with arrest under a noise and amplification ordinance. Second Amended Compl. at 5, *Nylen v. City of Grand Rapids*, No. 17-cv-716 (W.D. Mich. filed Nov. 20, 2017). Roughly half of these arrest threats occurred while Mr. Nylen was speaking about his faith on a public sidewalk near an abortion clinic. *Id.* at 5.

Similarly, in the aftermath of the shooting of Michael Brown in Ferguson, Missouri, three plaintiffs were arrested for failure to comply with a police order during a peaceful protest that followed a candlelight vigil. First Amended Compl. at 4, *Powers v. City of Ferguson*, No. 16-cv-1299 (E.D. Mo. filed August 9, 2016). Three days later, another plaintiff was arrested for violating a noise ordinance while waiting for the police to release Antonio French, an alderman arrested during the protests. Powers was acquitted of the charges at trial. *Id.* at 5. In 2015, protesters demanding expanded Medicaid coverage were threatened with arrest for noise violations for singing outside the chambers of the Florida House of Representatives. *20 Arrested at North Carolina*

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a manner as to create noise disturbance across a real property line boundary or within a noise sensitive zone set forth in table I, 'Maximum Sound Pressure Levels,' shall constitute a violation of this section, unless allowed pursuant to an exception established by ordinance.").

Legislature Protest in April Face Judge, 11 ABC News (Jun. 8, 2017).[15]

B. Police Officers Exploit The Discretion Created By Broad Laws To Arrest Protesters With Whom They Disagree.

Police officers have used the discretion provided by broad statutes and ordinances to retaliate against speakers and demonstrators with whom they disagree. For example, in September of 2015, Michael Picard was protesting legally near a DUI checkpoint with a sign that read "Cops Ahead. Keep Calm and Remain Silent." Amy Wang, *Cops Accidentally Record Themselves Fabricating Charges Against Protester, Lawsuit Says*, Wash. Post (Sept. 20, 2016). He was also legally recording the police with his cell phone. *Id.* One of the officers slapped Picard's cell phone out of his hand and confiscated it. *Id.* The officer inadvertently allowed the cell phone camera to continue recording as he and other officers discussed charging Picard. *Id.*

The transcript of the video provides a rare glimpse into how police officers (in this case, Master Sergeant Patrick Torneo, Sergeant John Jacobi, and Trooper John Barone) sometimes fabricate charges to retaliate against a protester. Torneo is heard saying: "Have that Hartford lieutenant call me, I want to see if he's got any grudges."[16] Barone asks: "You want me to punch a number [slang for opening an

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[15] Available at http://abc11.com/politics/20-arrested-at-nc-legislature-face-judge/772567/.

[16] The full video is available here: https://www.washingtonpost.com/news/post-nation/wp/2016/09/20/cops-accidentally-record-themselves-fabricating-charges-against-protester-lawsuit-says.

investigation] on this either way? Gotta cover our ass."[17]

The officers proceed to debate how to charge Picard, illustrating how broad statutes and ordinances often grant the police vast discretion to effectuate retaliatory arrests:

> Jacobi: So, we can hit him with reckless use of the highway by a pedestrian and creating a public disturbance, and whatever he said.
>
> Barone: That's a ticket?
>
> Jacobi: Two tickets.
>
> Barone: Yeah.
>
> Jacobi: That's a ticket with two terms, yeah. It's 53a-53-181, something like that for—
>
> Barone: I'll hit him with that, I'll give him a ticket for that.
>
> Jacobi: Crap! I mean, we can hit him with creating a public disturbance.
>
> Jacobi: All three are tickets-
>
> Torneo: Yep.
>
> Jacobi: We'll throw all charges three on the ticket.

[17] *See supra* n.14.

> Torneo: And then we claim that, um, in backup, we had multiple people, um, they didn't want to stay and give us a statement, so we took our own course of action. [18]

The Department of Justice Ferguson report also illustrates the phenomenon of police creatively charging people in order to retaliate against them for protected speech. In one case, "a police officer arrested a business owner on charges of Interfering in Police Business and Misuse of 911 because she objected to the officer's detention of her employee." UNITED STATES DEPARTMENT OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 25 (2015). Indeed, the officer made the arrest after the business owner attempted to call the police chief, which "suggests that [the officer] may have been retaliating against her for reporting his conduct." *Id.* In another instance, an officer arrested a man for violating an extremely broad "Manner of Walking in Roadway" ordinance because the man cursed at the officer. *Id.*

Similarly, in *Allee v. Medrano*, this Court found a "persistent pattern of police misconduct," in the enforcement of Texas statutes, including an unlawful assembly law, against activists seeking to organize a farmworkers' union. 416 U.S. 802, 815 (1974). The Court noted that the district court found that "the defendants selectively enforced the unlawful assembly law … treating as criminal an inoffensive union gathering…." *Id.* at 808 (citation omitted).

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[18] *See supra* n.14.

In *Ford v. City of Yakima*, 706 F.3d 1188, 1191 (9th Cir. 2013), an officer arrested and jailed a motorcyclist under a noise ordinance. The officer decided to make the arrest because he became irritated with the motorist for (lawfully) talking back. *Id.* at 1190–91. Prior to the arrest, the officer made a series of statements that included, "[i]f you run your mouth, I will book you in jail for it. Yes, I will, and I will tow your car," and "[i]f you have diarrhea of the mouth, you will go to jail." *Id.* The officer also said: "A lot of times we tend to cite and release people for [noise ordinance violations] or we give warnings. However ... you acted a fool ... and we have discretion whether we can book or release you. You talked yourself—your mouth and your attitude talked you into jail." *Id.*

CONCLUSION

In protests against the police, some see courage and dissent, while others see insult, exaggeration, and ingratitude. Freedom of expression lives and breathes in that clash of ideologies, a reflection of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

The First Amendment commands that conflicts of ideas must be resolved through public discourse—not through retaliatory arrests intended to silence one side of the conversation. For that reason, this Court should affirm the judgment below.

Respectfully submitted,

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