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Hon. Catherine O'Hagan Wolfe
Clerk of the Court
United States Court of Appeals for the Second Circuit
40 Foley Square
New York, NY 10007

Re: *Higginbotham v. City of New York*, No. 16-3994

Dear Ms. Wolfe:

Pursuant to Rules 28(j) and 29 of the Federal Rules of Appellate Procedure, and with consent of all parties, *amici curiae* National Press Photographers Association and Media and Free Speech Organizations submit this letter brief to address the issue posed by this Court in its order of June 25, 2018 – specifically, "the issue of if and how" the Supreme Court's decision in *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 585 U.S. ___ (June 18, 2018) applies to this case.

Amici agree with Appellant that, in light of the *Lozman* decision, this Court can and should hold that probable cause does not operate as a bar to appellant's First Amendment retaliatory arrest claim. *Amici* believe the burden shifting test

articulated in *Mt. Healthy City Bd. Of Ed. v. Doyle*, 429 U.S. 274 (1977) more appropriately strikes the balance between law enforcement concerns and vital press freedoms. Indeed, lead *amicus* National Press Photographers Association, along with 25 other media and free speech organizations (many of whom are also *amici* in this case), made this same argument in a Supreme Court *amici* brief submitted in support of petitioner in the *Lozman* case. *See* [**DOCKET CITE TK**]. The arguments set forth below are drawn in large part from that *amicus* brief.[1]

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

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

Such interference with reportage cannot be remedied in full by *post hoc*

[1] Davis Wright Tremaine LLP and the Media Freedom & Information Access Clinic at Yale Law School acted as co-counsel on the Supreme Court *amici* brief in *Lozman*. *Amici* are grateful to the Media Freedom & Information Access Clinic (and its students) for its invaluable contribution to that brief, and consequently to this letter.

remedies. *See*, *e.g.*, *In re King World Prods., Inc.*, 898 F.2d 56, 59 (6th Cir. 1990) ("even minimal interference with first amendment freedoms causes an irreparable injury") (citing *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976)). Nonetheless, the ability to bring civil rights claims can help ameliorate these burdens. It is particularly important that a potential First Amendment remedy be available in cases where police officers attempt to dissuade reporters or photographers from covering events in which there exists the possibility of public disorder and clashes between citizens and police.

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

With the breadth of such laws and the ease of asserting probable cause for

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

The great latitude officers enjoy to make arrests where they can cite something – *anything* – that serves as probable cause is unduly magnified if legal recourse is blocked by such recitation. This creates the wrong kinds of incentives, and leaves journalists, photographers, citizen reporters and others with even less opportunity to vindicate their rights. It instructs law enforcement officers that, even if they know they are violating well-settled rights, no liability will attach so long as they can articulate some probable cause for arrest, even after-the-fact. This, in turn, creates disincentives to law enforcement agencies to prevent officers from making constitutionally infirm arrests. Altogether, these factors increase the incidence of arrests that interfere with the exercise of basic First Amendment rights.

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

Under standard First Amendment analysis, the government has no legitimate power to retaliate against individuals for engaging in constitutionally protected activity. Public schools may not fire teachers for criticizing administrators, *Perry v. Sindermann*, 408 U.S. 593 (1972); prison officials may not divert prisoners' mail as punishment for speaking to the press, *Crawford-El v. Britton*, 523 U.S. 574 (1998); and agencies may not demote employees for their political affiliations. *Heffernan v. City of Paterson,* 136 S. Ct. 1412 (2016). The bottom line is that official reprisal for protected activity "offends the Constitution," *Crawford-El*, 523 U.S. at 588 n.10, and is subject to recovery, *Hartman v. Moore*, 547 U.S. 250, 256 (2006). And in their principal brief, *amici* urged this Court to recognize that retaliation by the police against a photojournalist for filming police activity violates a clearly established constitutional right to record the police in public. *See* Dkt. No. 52 (Brief of *Amici Curiae*).

At the same time, courts have long been sensitive to the potential for retaliation lawsuits to hamstring effective administration of government. Permitting recovery whenever government action is motivated in any part by improper animus

risks preventing the government from acting in the public interest. *Mt. Healthy*, 429 U.S. at 285. So, too, the Supreme Court has acknowledged the unique evidentiary burdens that retaliation claims place on public officials. Improper animus is "easy to allege and hard to disprove." *Crawford-El*, 523 U.S. at 585. Retaliation suits therefore may be less amenable to summary disposition and "implicate[] obvious concerns with the social costs of subjecting public officials to discovery and trial, as well as liability for damages." *Id*.

To address these problems, the Supreme Court long ago fashioned a burden-shifting framework designed to "protect[] against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights." *Mt. Healthy*, 429 U.S. at 287. Under the *Mt. Healthy* test, the plaintiff bears the initial burden of demonstrating unconstitutional animus was a motivating factor of an adverse action; the burden then shifts to the defendant to demonstrate that even without the impetus to retaliate the defendant would have taken the action complained of. *Id.*; *Lozman*, 138 S. Ct. at 1952.

The *Mt. Healthy* test strikes the appropriate constitutional balance for the vast majority of retaliation claims. In effect, it narrows the availability of recovery to cases where unconstitutional animus is the but-for cause of official action, and

ensures that defendants have an adequate opportunity to secure dismissal of frivolous claims at the summary judgment stage. Most importantly, it ensures that an individual "is placed in no worse a position than if he had not engaged in the [protected] conduct." *Id.* at 285-86.

The *Mt. Healthy* test is particularly appropriate in First Amendment retaliatory arrest cases and neatly affords the presence or absence of probable cause due evidentiary weight. No doubt, officers offend the Constitution whenever they arrest an individual in order to inhibit or penalize the exercise of First Amendment freedoms. That is true regardless of whether there exists probable cause, if the arrest would not have occurred but for the protected activity. *Cf. Mt. Healthy*, 429 U.S. at 283-84 (even when a public employee may be discharged for no reason, the government may not discharge the employee because of their protected speech); *Perry*, 408 U.S. at 597 (the government may not deny plaintiff a benefit because of his protected speech, even if it could properly deny it for another reason).

Evidence of the presence or absence of probable cause to arrest will be available to officers in "virtually every retaliatory arrest case," *Reichle v. Howards*, 566 U.S. 658, 668 (2012), and an officer may raise probable cause as a defense to any claim of retaliation. Its presence may be "fatal" to a plaintiff's ability to prove the

requisite but-for causation element of a retaliation claim. *Id*. Under the standard *Mt. Healthy* framework, arrestees, like public employees, are left in no worse a position than if they had not engaged in protected conduct. In contrast, requiring arrestees to demonstrate an absence of probable cause would decisively tip the scales in favor of defendants, enabling police to indirectly censor and penalize the exercise of First Amendment freedoms in ways the government could not directly command. A rule that probable cause bars a retaliatory arrest claim would immunize government actions that plainly offend the First Amendment.[2]

Notably, retaliatory arrest claims feature none of the attributes of retaliatory *prosecution* claims that led the Supreme Court to impose a no-probable-cause requirement in *Hartman*, 547 U.S. 250. Unlike retaliatory prosecution plaintiffs, retaliatory arrest plaintiffs do not necessarily have access to a distinct body of highly valuable circumstantial evidence that is available and apt to prove or disprove probable cause, because retaliatory arrest plaintiffs often do not even know the

[2] That probable cause would bar a Fourth Amendment challenge is irrelevant. The Supreme Court already has made clear that an arrest which is lawful under the Fourth Amendment may nevertheless violate other constitutional rights. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Supreme Court acknowledged that the *Mt. Healthy* test governs retaliation claims premised on alleged racial discrimination. 429 U.S. 252, 270 n.21 (1977). And in *Whren v. United States*, it clarified that the Constitution prohibits selective law enforcement based on race, notwithstanding the existence of probable cause. 517 U.S. 806, 813 (1996); *see Reichle*, 566 U.S. at 664 n.5. If the existence of probable cause is no bar to an Equal Protection challenge to an arrest, it should not bar a First Amendment challenge.

reason for their arrest. *See Devenpeck v. Alford*, 543 U.S. 146, 155 (2004) (police officers not constitutionally required to state reasons for an arrest). More importantly, in contrast to retaliatory prosecution claims, there is generally no disconnect between animus and injury in retaliatory arrest claims – "it is the officer bearing the alleged animus who makes the injurious arrest." *Reichle*, 566 U.S. at 668-69. Nor is there any presumption of regularity accorded to police officers' arrest decisions that is akin to the presumption of prosecutorial regularity. *Id*.

Indeed, the *Lozman* Court recognized the particular suitability of the *Mt. Healthy* test in retaliatory arrest cases, noting that "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," in part because "the causation problem in retaliatory arrest cases is not the same as the problem identified in *Hartman*." *Lozman*, 138 S. Ct. at 1953. Thus, while the Supreme Court ultimately decided *Lozman* on narrow grounds, it nevertheless clearly endorsed an approach that takes into account the differing considerations at play in retaliatory prosecution cases on the one hand, and retaliatory arrest cases on the other. This reasoning calls into question the Second Circuit's decision in *Mozzochi v. Borden*, 959 F.2d 1174 (2d Cir. 1992) – relied upon by the lower court

here – in which this Court held that the existence of probable cause barred a retaliatory *prosecution* claim, and applied the same principal to a related retaliatory arrest claim without any examination of the differing considerations at play. *Id*. at 1179–80; *Higginbotham v. Sylvester*, 218 F. Supp. 3d 238, 245–46 (S.D.N.Y. 2016). *See also Blue v. Koren*, 72 F.3d 1075, 1083 n.5 (2d Cir. 1995) ("*Mozzochi* [is] troubling in that [it] appear[s] to negate the existence of a retaliation claim involving arrests."). If nothing else, *Lozman* makes clear that this Court is *not* bound to apply the same standard used in retaliatory prosecution cases to cases – like this one – involving retaliatory arrest claims.

In sum, First Amendment retaliatory arrest claims are best adjudicated under the standard *Mt. Healthy* rubric. That standard preserves police officers' ability to raise probable cause as a defense while ensuring they are not insulated from liability for purposefully abridging and penalizing the exercise of the freedoms guaranteed by the First Amendment.

Respectfully submitted,

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