No. _____

In the Supreme Court of the United States

JEREMIAH HENDERSON,

PETITIONER,

v.

AUSTIN K. McCLAIN,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Hartman v. Moore*, 547 U.S. 250 (2006), this Court held that probable cause always defeats as a matter of law a retaliatory *prosecution* claim under 42 U.S.C. § 1983 because prosecution, as opposed to *arrest*, involves a prosecutor's discretion. In *Reichle v. Howards*, 566 U.S. 658 (2012), the Court recognized that *Hartman* was "decided against a legal backdrop" that treated retaliatory arrest and prosecution claims similarly "when considering the relevance of probable cause." *Id.* at 667. In *Nieves v. Bartlett*, 139 S.Ct. 1715, 1735 (2019), eight justices agreed that probable cause alone does not always suffice to defeat a retaliatory *arrest* claim under § 1983. *Id.* at 1735 (Sotomayor, J., dissenting). Five justices ruled that a showing of probable cause will defeat a retaliatory prosecution claim unless the person arrested can show that "otherwise similarly situated individuals" whose speech differed from his were not arrested for the same criminal conduct. *Id.* at 1727. Justice Gorsuch did not interpret the majority's opinion to adopt a "rigid rule" that precluded plaintiffs "who can't prove the absence of probable cause" from presenting "other kinds of evidence" that they were arrested because of their speech. Justice Sotomayor correctly predicted that the majority opinion in *Nieves* created "a Frankenstein-like constitutional tort that does more harm than good," *id.* at 1738, and that would "shortchange[]" individuals' freedom to complain about police action "in the name of marginal convenience." *Id.* at 1742.

The question presented is:

Does probable cause defeat a retaliatory prosecution claim when there is strong circumstantial proof that a policeman initiated the prosecution to retaliate against the plaintiff's complaint against the policeman, the prosecution was initiated without the involvement of a prosecutor, and there is no "similarly situated individual[]" to be used as a comparator?

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PETITION FOR A WRIT OF CERTIORARI

Jeremiah Henderson respectfully petitions for a writ of certiorari to review the March 9, 2022 judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The per curiam opinion of the court of appeals, App. 1-13, is unreported, as is the opinion of the district court. App. 14-27.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 2022. App. 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that: "Congress shall make no law . . . abridging the freedom of speech . . . ; or the right of the people reasonably . . . to petition the Government for a redress of grievances." U.S. Const. amend. I.

The Fourth Amendment to the United States Constitution provides that: "The right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated . . . ." U.S. Const. amend. IV.

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . 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 . . . .

INTRODUCTION

In the past fifteen years, this Court has addressed in four separate cases (*Hartman v. Moore* (2006), *Reichle v. Howards* (2012), *Lozman v. City of Riviera Beach,* 138 S.Ct. 1945, 1955 (2018), and *Nieves v. Bartlett* (2019)) whether a § 1983 retaliatory arrest or

prosecution plaintiff must prove that there was no probable cause for his prosecution or arrest, even if there was evidence of retaliation for free speech. In the latest case, Nieves, eight Justices have agreed that probable cause alone does not always suffice to defeat a First Amendment retaliatory *arrest* claim under § 1983. 139 S.Ct. at 1735 (Sotomayor, J., dissenting). But the court's four precedents during the past fifteen years have nevertheless shut the courthouse doors to victims of retaliatory prosecution and arrest, even when there is evidence of retaliation, unless they can prove that there was no probable cause.

The court's precedents illogically conflate the First Amendment's protection of free speech with the Fourth Amendment's protection against "unreasonable" arrest and have effectively immunized police retaliation against free speech. This case is a good vehicle for this Court to rule that the *Mt. Healthy* framework, which still applies to § 1983 claims of government retaliation other than arrest and prosecution, and even applies to § 1983 retaliatory arrest claims against municipalities when the arrest was pursuant to a government policy, *see Lozman v. City of Riviera Beach*, 138 S.Ct. at 1955, also applies to § 1983 retaliatory prosecution and arrest claims.

STATEMENT OF THE CASE

1. *Factual Background.* On October 15, 2018, Jeremiah Henderson--a frail 75-year-old suffering from several health conditions, including chronic obstructive pulmonary disorder--exited a Walmart store in Roanoke, Virginia after paying for all of the items in his shopping cart. Walmart employee Jeanette Wheeler asked Henderson to see his receipt. Henderson could not find his receipt fast enough to satisfy Wheeler, who radioed for assistance, claiming that Henderson threatened her. Walmart employee Thomas Christopher Shelton responded and confronted Henderson. Police officer Austin McClain, who was at the store on a different matter, proceeded toward Henderson and Shelton, who were in mid-conversation a few feet behind Wheeler. Shelton told

McClain that he wanted Henderson "out of the store" and began to walk away. Henderson, who wanted to continue the conversation, reached out and briefly, and lightly, touched Shelton's arm. App. 2-3.

McClain immediately placed Henderson in handcuffs, forced him into the store's security office, and left him there handcuffed. McClain determined that Henderson had not shoplifted. Walmart, Wheeler, and Shelton declined to press any charge against Henderson. McClain gave Henderson a "trespass bar letter," prohibiting Henderson from returning to Walmart. App. 3-4. McClain did not make a report of the incident (as he was required to do if a crime occurred), arrest Henderson, or indicate in any way that he intended to arrest Henderson.

Henderson told McClain that he intended to file with the Roanoke Police Department a complaint about McClain's rough treatment of him. Two days later, on October 17, 2018, Henderson filed a "Citizen's Complaint" on the pre-printed form available at the Roanoke Police Department, complaining that McClain acted in an "aggressive, inappropriate, bias[ed], and prejudice[d]" manner. App. 4. Sergeant David Lovell, the supervisor responsible for investigating the complaint, told McClain of Henderson's complaint and told McClain to return to Walmart and again ask the Walmart employees if they wanted to press charges against Henderson. McClain went back to Walmart and spoke with Wheeler and Shelton. Wheeler again declined to press charges. Shelton also initially declined again, but he finally agreed to press charges after McClain told him about Henderson's complaint and implied that Henderson may have complained about Walmart. App. 4-5.

McClain went directly to the Magistrate's office to seek a misdemeanor arrest warrant against Henderson for assault and battery, based upon Henderson's slight touch of Shelton's arm on October 15, 2018. The magistrate issued an arrest warrant based upon McClain's sworn statement that he "observed Mr. Henderson in an agitated state

grab Mr. Shelton's arm to stop him from walking away as shown on [his] body worn camera video." App. 5.

Two days later, on October 19, 2018, Sergeant Lovell reported to the police chief that Henderson's complaint was "unfounded" and that McClain should "be exonerated." App. 6.

Several days later, no earlier than October 22, 2018, Sergeant Lovell called Henderson and asked him to come to the police station to tell "[his] side of the story," even though Lovell had closed his investigation of Henderson's complaint. App. 6. Henderson went to the police station to discuss his "Citizen's Complaint." When Henderson arrived at the police station, Lovell interrogated him about the incident but did not inform Henderson that he had already had a warrant for his arrest, that he had already concluded his investigation of Henderson's complaint and recommended that McClain be "exonerated," or give him Miranda warnings. After the interrogation, Lovell served the arrest warrant on Henderson. App. 6.

Under the procedure followed in Roanoke, the police department forwarded the Arrest Warrant directly to the Roanoke City General District Court Clerk's Office, which assigned a case number to the Arrest Warrant and scheduled it for trial. No prosecutor was involved in the case until it was called for trial.

On May 1, 2019, Henderson was tried for assault and battery of Shelton. The Roanoke General District Court found Henderson not guilty. App. 6.

2. *District Court Proceedings.* On September 20, 2019, Henderson filed suit against McClain in Roanoke Circuit Court, alleging, in Count II of his Complaint, that McClain violated 42 U.S.C. § 1983. Count II alleged that McClain obtained, through false and malicious swearing, a Warrant of Arrest against Henderson so that he could retaliate against Henderson for his . . . complaint against him" (District Court docket, ECF 1 at 4 (Case No. 7:19-cv-685-TTC, W.D. Va.)).

McClain removed the case to the United States District Court for the Western District of Virginia. On October 19, 2020, the federal district court granted McClain summary judgment, finding that McClain was entitled to qualified immunity because he did not violate Henderson's Fourth Amendment right to be free from unreasonable seizure because he had probable cause to believe that Henderson's touch of Shelton was assault and battery. App. 19.

The court also held that Henderson had not adequately pleaded a *retaliatory* prosecution, as opposed to a *malicious* prosecution, claim. App. 24-25. The district court wrote: "Had Henderson alleged, as a separate and distinct First Amendment claim for retaliatory arrest or prosecution, that his complaint was protected speech and McClain's retaliatory animus was the but for cause of his arrest, this case may have presented a closer question on the effect of probable cause and, relatedly, the application of qualified immunity." App. 25 n.4.

3. *Fourth Circuit appeal.* The Fourth Circuit affirmed the district court. It assumed, without deciding, that Henderson's complaint stated a claim for retaliatory *prosecution*, but held that probable cause defeated the retaliatory prosecution claim. App. 8. The Fourth Circuit cited this Court's decision in *Nieves v. Bartlett*, 139 S.Ct. 1715, 1727 (2019), this Court's precedent involving retaliatory *arrest*, as authority for its ruling. App. 8 n. 5.

REASONS FOR GRANTING THE PETITION

I. This Court's precedents have shut the courthouse door to victims of retaliatory prosecutions and arrests.

The Court wrote in *Lozman v. City of Riviera Beach*: ". . . it must be underscored that this Court has recognized 'the right to petition as one of the most precious of the liberties safeguarded by the Bill of Rights." *Id.* at 1954 (quoting *BE & K Constr. Co. v.*

NLRB, 536 U.S. 516, 524 (2002)). When government officials inflict harm on an individual because that individual has engaged in activity protected by the First Amendment, this retaliation "threatens to inhibit exercise of the protected right." *Crawford-El v. Britton*, 523 U.S. 574, 588 n.10 (1998).

Retaliatory arrests have a long history in the United States. For example, during the 1955 Montgomery Bus Boycott Martin Luther King, a leader of the boycott, was tailed from his office by the police, arrested, and jailed for driving twenty-five-miles-per-hour in a thirty-miles-per-hour zone after he picked up at the bus station and gave a ride to individuals who were boycotting the city buses. Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 Yale L.J. 999, 1028 (1989)(citing Garrow, *Bearing the Cross: Martin Luther King, Jr. and the Southern Christian Leadership Conference* 55 (1986)). Black motorists were also ticketed during the boycott in unprecedented numbers for speeding, waiting too long at stop signs, not waiting long enough, or overloading vehicles with passengers. *Id.* (citing Robinson, *The Montgomery Bus Boycott and the Women Who Started It* 123 (1987)).

At least one government investigation has empirically found that retaliatory arrests still occur during periods of racial unrest. *See* U.S. Dep't. of Justice, Civil Rights Div., *Investigation of the Baltimore City Police Department* 116-21 (Aug. 10, 2016) ("In sum, BPD takes law enforcement action in retaliation for individuals' engaging in protected speech or activity in violation of the First Amendment").

But this Court's precedents have shut the courthouse door to victims of retaliatory prosecutions and arrests. If the Montgomery Bus Boycott occurred today, Dr. King and the victims of retaliatory arrest and prosecution in Montgomery would be no more able to sue the arresting officers for § 1983 retaliatory arrest or prosecution than Henderson has been able to do, regardless of whether their injury was pleaded as retaliatory arrest or prosecution.

In both *Lozman* and *Nieves v. Bartlett*, eight justices agreed that probable cause alone does not always suffice to defeat a First Amendment retaliatory *arrest* claim under § 1983. *See Nieves*, 139 S.Ct. at 1735 (Sotomayor, J., dissenting). But the narrow exceptions[1] under which plaintiffs may sue for retaliatory arrest under § 1983 when there was probable cause for the arrest is so narrow that no one has qualified to sue under the exceptions.

This Court's *Hartman* decision, which prohibits all victims of retaliatory *prosecution* from suing under § 1983 unless they can prove there was no probable cause for the retaliatory prosecution, and this Court's *Nieves* decision, which require a victim of retaliatory arrest to prove the absence of probable cause except in almost non-existent exceptional circumstances, have had the effect of not allowing victims of such retaliation to sue under § 1983, belie the Court's hoary dicta that "the right to petition as one of the most precious of the liberties safeguarded by the Bill of Rights" and immunizes policeman McClain's retaliation against Henderson for his "Citizen's Complaint."

Barring access to the § 1983 remedy for police retaliation against protected free speech in every case (even in cases, like this one, where the prosecutor exercised no discretion in initiating the prosecution), and where retaliation can be proved, merely because there was probable cause for the prosecution or arrest, immunizes police retaliation against individuals who complain about the police through police-department-created complaint procedures. As Justice Gorsuch pointed out in his *Nieves* dissent, "almost anyone can be arrested for something." 139 S.Ct. at 1730 (Gorsuch, J.,

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[1] In *Lozman*, the Court held that the plaintiff could sue *the City* because the retaliatory arrest was pursuant to an official City policy of retaliation, 138 S.Ct. at 1955. In *Nieves*, the Court held that a notional plaintiff could sue an arresting officer if the plaintiff could show that "similarly situated individuals" who committed the same crime but who were not engaged in the same protected First Amendment activity were not arrested, 139 S.Ct. at 1727.

dissenting), but the Court's line of precedents since *Hartman* foreclose a remedy for retaliatory prosecution or arrest so long as the police can point to any illegal "something" as probable cause.

II. The application of *Hartman*'s and *Nieves*' proof-of-no-probable-cause requirement undermines First Amendment values.

A. The Court's retaliatory prosecution and arrest precedents conflate Fourth Amendment and First Amendment protections.

It is well-settled that probable cause does not allow the government to selectively prosecute racial minorities in violation of the Fourteenth Amendment's equal protection clause. For example, in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), this Court held that the selective prosecution of Chinese immigrants from operating laundries without permits violated the Fourteenth Amendment, even though there was probable cause that the Chinese immigrants committed the misdemeanor of operating laundries without permits. Arrests and prosecutions may pass Fourteenth Amendment, but fail Fourteenth Amendment, muster because the Amendments serve different purposes. *See Nieves*, 139 S.Ct. at 1731-32 (Gorsuch, J., dissenting). The Fourth Amendment prohibits "unreasonable" arrests, U.S. Const. amend. IV, while the First Amendment prohibits government abridgment of free speech and "the right . . . to petition the Government for a redress of grievances." Probable cause is relevant to whether an arrest is reasonable under the Fourth Amendment but it is not dispositive of whether the arrest was in retaliation for First Amendment protected speech.

As Justice Gorsuch pointed out in his *Nieves* dissent, the First Amendment "operates independently of the Fourth" Amendment, just as the First Amendment operates independently of the Fourteenth Amendment. *Id.* at 1731. Probable cause should not negate First Amendment protections any more than it negates Fourteenth Amendment protections, but this Court's retaliatory prosecution and arrest precedents

conflate the protections provided by the First and Fourth Amendments.

For this reason, the Court in *Nieves* created a narrow exception to the proof-of-no-probable-cause requirement it imposed on retaliatory arrest cases, allowing a plaintiff to assert a retaliatory arrest claim if he "present[s] objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." 139 S.Ct. at 1727. But, contrary to Justice Gorsuch's, *id.* at 1734, and Justice Sotomayor's, *id.* at 1741, hope that this exception would be applied "commonsensically," Justice Sotomayor's prediction that *Nieves* will "fetishize[] one specific type of motive evidence--treatment of comparators--at the expense of other types of proof," *id.* at 1739, has come true. ***No*** § 1983 retaliatory prosecution or arrest plaintiff has qualified under the *Nieves* exception, "leaving the public exposed potentially to flagrant abuses." *Id.* at 1737.

The Court's precedents apply what Justice Sotomayor called a "misguided" "mix-and-match approach to this area of constitutional law. *Nieves*, 139 S.Ct. at 1738 (Sotomayor, J., dissenting). The retaliatory prosecution and arrest precedents conflate Fourth Amendment and First Amendment protections by requiring plaintiffs who complain of retaliation against their exercise of free speech (a purely First Amendment concept) from recovering under § 1983 unless they prove that the absence of probable cause (a purely Fourth Amendment concept). Logically, the absence of probable cause should bar a purely Fourth Amendment claim because an arrest made with probable cause is not "unreasonable." But it is illogical that the presence or absence of probable cause would be relevant to a First Amendment claim if the arrest was made in retaliation for protected free speech. But that is the legal framework this Court's precedents have created.

In this case, the District Court held that Henderson did not state a retaliatory *prosecution* claim because his Complaint made only a conclusory allegation of McClain's

retaliatory motive. App. 24-25. The Fourth Circuit assumed, without deciding, that Henderson's Complaint stated a retaliatory prosecution claim, but held that such a retaliatory prosecution claim would be barred by *Nieves*'s absence-of-probable-cause requirement (even though *Nieves* applies only to retaliatory *arrests*). App. 8. But regardless of whether Henderson suffered retaliatory prosecution (because he was tried in court) or retaliatory arrest (because no prosecutor was involved in the decision to arrest and prosecute him), and regardless of whether he suffered First Amendment instead of Fourth Amendment constitutional injury, the proof-of-no-probable-cause requirement imposed by *Hartman* and *Nieves* immunizes McClain from § 1983 liability and nullifies the deterrence and compensation functions that Henderson could achieve with his § 1983 lawsuit, even though it is incontrovertible that McClain retaliated against Henderson for his Citizen's Complaint.

B. Mt. Healthy's burden-shifting framework should apply to retaliatory prosecution and arrest cases.

In *Mt. Healthy City School Dist. Bd. of Ed'n. v. Doyle*, 429 U.S. 274 (1977), this Court held that a plaintiff claiming retaliation for protected First Amendment activities must plead and prove three elements: first, he was engaged in constitutionally protected activity; second, that he was subjected to meaningfully adverse official action; and third, that his protected activity was a "motivating factor" behind that action. *Id.* at 287 (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270-71 & n. 21 (1977)).

But this Court has also recognized that government conduct is not always "motivated solely by a single concern." *Arlington Heights*, 429 U.S. at 265. Accordingly, the Court has held that "even if the government has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless defeat liability by demonstrating that it would have made the same decision absent the

forbidden consideration." *Texas v. Lesage*, 528 U.S. 18, 20-21 (1999).

Once a plaintiff has made out a case of unconstitutional retaliation, the burden of proof shifts to the defendant to rebut causation. The defendant must show it would have taken the same action "even in the absence of the protected conduct." *Mt. Healthy*, 429 U.S. at 287. The fact that the defendant articulates a legitimate basis that *could* have motivated its action is not enough; rather, it must show that the legitimate basis *did* motivate its action.

The virtue of this burden-shifting framework has long been recognized. *See Mt. Healthy*, 429 U.S. at 287. It holds public officials and municipalities liable unless they rebut the plaintiff's showing of a causal connection between his injury and their impermissible motive, thereby recognizing that "[o]fficial reprisal for protected speech 'offends the Constitution.'" *Hartman*, 547 U.S. at 256 (quoting *Crawford-El*, 523 U.S. 574, 588 n.10 (1998). But it also recognizes that "there is no cognizable injury warranting relief under § 1983" when "the government would have made the same decision" anyway. *Texas v. Lesage*, 528 U.S. 18, 21 (1999).

The *Mt. Healthy* burden-shifting framework still applies to claims of First Amendment retaliation other than prosecution and arrests. And it still applies to retaliatory arrests covered by the *Lozman* exception (allowing § 1983 retaliatory arrest suit against a municipality when the arrest was under an official policy, even if there was probable cause for the arrest).

C. The reasons stated in *Hartman v. Moore* for deviating from the Mt. Healthy burden-shifting framework do not apply here.

1. There is not a "complex connection," involving a prosecutor's discretion, between McClain's retaliatory animus and Henderson's injury.

In *Hartman v. Moore*, this Court carved out an exception to the *Mt. Healthy* burden-shifting framework governing "ordinary retaliation claims." 547 U.S. 259.

Under *Hartman*'s rule, a plaintiff alleging retaliatory *prosecution* in violation of the First Amendment must plead and prove that the charges were not supported by probable cause. 547 U.S. at 265-66. But none of the reasons this Court gave in *Hartman* for departing from the *Mt. Healthy* framework apply in this case.

There is not a "complex connection," involving a prosecutor's discretion, between McClain's retaliatory animus and Henderson's injury. In *Hartman*, the Court presumed that a prosecutor, exercising independent judgment, would always make the decision to prosecute and that the prosecutor would sometimes not have the same retaliatory animus as the "nonprosecuting government agent[]." *Id.* at 261. And the Court assumed that, since prosecutors enjoy absolute immunity from suit, the prosecutor who directly instituted the prosecution would never be the defendant in a retaliatory prosecution case. *Id.* at 263. So it would be difficult to discern whether an allegedly retaliatory prosecution was caused by the prosecutor's independent decision to prosecute because probable cause existed or the nonprosecuting agent's retaliatory animus The Court imposed the probable cause requirement to "bridge the gap between the nonprosecuting government agent's motive and the prosecutor's action. *Id.* at 261.

But there is no gap to bridge in Henderson's case. No prosecutor decided to prosecute Henderson. So the causal link between McClain's animus and the prosecution was direct: the Arrest Warrant was forwarded directly by the police department to the General District Court Clerk, who assigned a case number to the Arrest Warrant and scheduled the case for trial. No prosecutor exercised discretion in initiating the court case against Henderson.

And the causal connection between McClain's retaliatory animus is susceptible to direct proof of retaliation. McClain did not arrest Henderson at the time of the putative battery of Shelton; he made no record or report of a putative battery; days later, McClain was told of Henderson's Citizen's Complaint and was told by Lovell, the police Sergeant

investigating Henderson's Complaint, to go back to Walmart and see if the Walmart employees would press charges; McClain immediately went to Walmart and persuaded Shelton, who initially declined to press charges, to press charges because Henderson filed his Citizen's Complaint; McClain then went directly to the Magistrate and obtained an Arrest Warrant for Henderson by swearing that he "observed Mr. Henderson in an agitated state grab Mr. Shelton's arm to stop him from walking away as shown on [his] body worn camera video"; Lovell then called Henderson to the police station on the pretext that he was investigating Henderson's Citizen's Complaint; Lovell served the Arrest Warrant; the police department forwarded the served Arrest Warrant directly to the General District Court Clerk (without any involvement by the prosecutor's office); and the prosecution was ministerially but inexorably commenced when the General District Court Clerk assigned a case number to the Arrest Warrant and scheduled it for trial.

The concern that the causal connection between McClain's retaliatory animus and Henderson's injury is attenuated by an intervening prosecutor's legitimate concern only with the probable cause that Henderson committed assault and battery against Shelton is not a valid reason for deviating from the *Mt. Healthy* framework.

2. The "presumption of regularity accorded to prosecutorial decisionmaking" is not implicated here.

It is unclear from this Court's precedents whether an arrest made pursuant to a Magistrate-issued arrest warrant is a retaliatory arrest covered by *Nieves* or a retaliatory prosecution covered by *Hartman*. In *Reichle*, the Court suggested that the difference between retaliatory *prosecutions* covered by *Hartman* and retaliatory *arrests* is that *Hartman* applies only to cases in which a prosecutor made a "charging decision," while retaliatory arrest cases apply to warrantless arrests. 566 U.S. at 667-68.

Regardless, the "presumption of regularity accorded to prosecutorial decisionmaking," that this Court presumed in *Hartman* would apply to retaliatory

prosecutions, but presumed in *Reichle* did not apply to retaliatory arrests, is not implicated here. The prosecutor did not decide to prosecute Henderson. Presumably, the prosecutor could have moved the Court to dismiss the prosecution[2] once he received the Arrest Warrant from the General District Court Clerk in the courtroom. But, even if the prosecutor moved to dismiss the case, Henderson would have already suffered the injury of the retaliatory prosecution and the arrest.

3. *Hartman*'s proof-of-no-probable-cause requirement imposes a prohibitive cost on Henderson's retaliatory prosecution claim.

Hartman is based on a presumption that a prosecutor made an independent decision, free from retaliatory animus, to prosecute the plaintiff and would have prosecuted him even if the arresting officer had a retaliatory animus. The Court assumed that the issue of probable cause would arise in every retaliatory prosecution case because it is a "but for-fact in a prosecutor's decision to go forward" and "a requirement to plead and prove its absence will usually be cost free by any incremental reckoning." *id.* at 265. But *Hartman*'s assumption is invalid in Henderson's case. No one claims that a prosecutor decided to initiate the prosecution or go forward based on an independent assessment of probable cause.

If *Hartman*'s proof of the absence of probable cause requirement did not apply to Henderson's case, the only admissible evidence would be evidence probative of whether McClain retaliated against Henderson when he obtained the Arrest Warrant after he knew of the Citizen's Complaint. The evidence of whether probable cause would have supported McClain's arrest of Henderson days earlier, before the Citizen's Complaint, when McClain did not arrest Henderson, would have been irrelevant. In the economic

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[2] Va.Code § 19.2-265.3 allows the Court to dismiss a case upon motion by the prosecutor, "for good cause . . . shown."

terms this court applied in *Hartman*, the absence of probable cause requirement imposes not only an incremental cost, but a prohibitive incremental cost, on Henderson's retaliatory prosecution claim.

4. The floodgates would not open on § 1983 retaliatory arrest and prosecution claims.

Applying the *Mt. Healthy* burden-shifting framework to § 1983 retaliatory arrest and prosecution claims would not overwhelm the courts with such claims.

The federal court pleading rules enable district courts to weed out meritless claims quickly at minimal cost. The *Mt. Healthy* framework requires that the plaintiff show that retaliation was "a motivating factor" in the challenged government decision. *Arlington Heights*, 429 U.S. at 266. Only plaintiffs whose complaints "contain sufficient factual matter" to show a "plausible" entitlement to relief can survive a motion to dismiss. *Ashcroft v. Iqbal*, 566 U.S. 662 (2009). Summary judgment enables district courts to "weed out truly insubstantial lawsuits prior to trial." *Crawford-El*, 523 U.S. at 597, 599.

This Court observed in *Hartman* that the courts were not overwhelmed with § 1983 retaliatory prosecution cases in the period from 1977-2006, when *Mt. Healthy* applied to retaliatory prosecution claims. 547 U.S. at 258-259. And there is no evidence that courts in the circuits that applied the *Mt. Healthy* framework to retaliatory arrest claims in the thirteen years between *Hartman* and *Nieves* were overwhelmed with § 1983 retaliatory arrest cases.

III. This case is a good vehicle for reconsideration the proof-of-no-probable-cause requirement in both *Hartman* and *Nieves*.

The issue that this case raises (to wit, whether probable cause precludes a § 1983 claim for government retaliation by arresting and/or prosecuting an individual for his exercise of free speech) will not arise in a circuit split because *Hartman* and *Nieves* settled the circuit splits that previously existed about the issue. But two Justices

(Ginsburg and Breyer) dissented in *Hartman* from imposing a no-probable-cause requirement in retaliatory prosecution cases and three Justices (Ginsburg, Sotomayor, and Gorsuch) dissented in *Nieves* from imposing such a requirement in retaliatory arrest cases. And, as Justice Sotomayor pointed out, eight Justices have agreed that probable cause alone does not always suffice to defeat a First Amendment retaliatory *arrest* claim under § 1983. *Nieves*, 139 S.Ct. at 1735 (Sotomayor, J., dissenting).

In the sixteen years since *Hartman* was decided by this Court and the three years since *Nieves*, it has become clear that this Court's resolution of the issue was, in Justice Sotomayor's words, an illogical "mix-and-match" "Frankenstein" solution, *id.* at 1738 (Sotomayor, J., dissenting), that immunizes all arresting officers from § 1983 liability, regardless of the evidence proving retaliation. This case is a good vehicle for reconsideration of the proof-of-no-probable-cause requirement of both *Hartman* and *Nieves*. It includes both a retaliatory arrest (because McClain obtained an Arrest Warrant and he was arrested by Lovell, who served the Arrest Warrant) and prosecution (because Henderson was tried and acquitted). The causal connection between Henderson's Citizen's Complaint and his arrest and prosecution is clean and unattenuated. The facts regarding the circumstances of McClain's retaliation against Henderson have been fully developed. And the proof of retaliation focuses on one policeman's retaliation against one individual, not atypical settings where "similarly situated individuals" could be available as comparators (as in *Nieves*) or there was an official City policy of retaliation against an individuals' free speech (as in *Lozman*).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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June 7, 2022

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-2197

JEREMIAH HENDERSON,

Plaintiff - Appellant,

v.

AUSTIN K. MCCLAIN, in his individual capacity,

Defendant - Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Thomas T. Cullen, District Judge. (7:19-cv-00685-TTC)

Argued: January 26, 2022 Decided: March 9, 2022

Before MOTZ, THACKER and QUATTLEBAUM, Circuit Judges.

Affirmed by unpublished per curiam opinion.

ARGUED: Gary M. Bowman, Roanoke, Virginia, for Appellant. Timothy Ross Spencer, OFFICE OF THE CITY ATTORNEY FOR THE CITY OF ROANOKE, Roanoke, Virginia, for Appellee. **ON BRIEF:** Douglas P. Barber, Jr., OFFICE OF THE CITY ATTORNEY FOR THE CITY OF ROANOKE, Roanoke, Virginia, for Appellee.

PER CURIAM:

Jeremiah Henderson ("Appellant") appeals the district court's dismissal of his complaint brought pursuant to 42 U.S.C. § 1983, in which he alleged that Officer Austin McClain ("Appellee"), an officer with the Roanoke Police Department, violated his First and Fourth Amendment rights. Appellant asserted that Appellee violated his Fourth Amendment rights when he detained Appellant during an incident at a Walmart store and that he thereafter retaliated against Appellant in violation of the First Amendment by initiating criminal proceedings for assault and battery because Appellant filed a citizen's complaint about the incident with the Roanoke Police Department. The district court awarded summary judgment in Appellee's favor, holding that he was entitled to qualified immunity. For the reasons that follow, we affirm.

I.

In reviewing the district court's grant of summary judgment, we view the facts in the light most favorable to Appellant. *Estate of Jones v. City of Martinsburg*, 961 F.3d 661, 664 (4th Cir. 2020). The material facts underlying this dispute were captured on Appellee's body camera and are not genuinely contested.

On October 15, 2018, as Appellant -- a 70 year old man suffering from several health conditions, including chronic obstructive pulmonary disease -- exited the Walmart, a store associate, Jeannette Wheeler ("Wheeler"), asked to see his receipt. Appellant refused, and Wheeler radioed for assistance, contending he threatened her. Appellee, who was wearing a body camera and was at the store investigating an unrelated shoplifting incident, heard

the call and accompanied a store manager, Lindsay Peterson ("Peterson"), to the entrance to find Appellant and Wheeler.

It took Appellee and Peterson less than a minute to respond to Wheeler's request for assistance. In that time, an assistant manager, Christopher Shelton ("Shelton"), arrived and confronted Appellant. Upon arriving at the entrance, Appellee briefly spoke to Wheeler and then proceeded toward Shelton and Appellant, who were mid-conversation and positioned face to face a few feet behind Wheeler. Shelton told Appellee that he wanted Appellant removed from the store and began to walk away. Appellant, who wanted to continue the conversation, reacted quickly and reached out toward Shelton's arm. The bodycam footage clearly depicts Appellant contacting Shelton.[1]

Immediately thereafter, Appellee attempted to place Appellant in handcuffs. It took Appellee approximately 30 seconds to secure the handcuffs. During that time, Appellee twisted Appellant's right arm behind his back while ordering Appellant to stop resisting. Appellant, who was visibly confused at this point, asked Appellee why he was being detained and told Appellee that he was unable to breathe. After Appellee secured the handcuffs, he walked Appellant to the loss prevention office. Appellee informed Appellant that although he was being detained, he was not under arrest.

Shortly after entering the office, Appellee removed the handcuffs from behind Appellant's back and placed them in front so that Appellant could use his inhaler. Appellee

[1] Indeed, after reviewing the footage, Appellant admitted in his sworn declaration that he touched Shelton's left arm.

asked Peterson to determine whether Wheeler or Shelton wanted to press charges against Appellant. After speaking with both, Peterson confirmed that neither wished to press charges and only wanted Appellant barred from the property. Appellee immediately removed Appellant's handcuffs, completed a "trespass bar letter," and advised Appellant that if he returned to the Walmart, he would be arrested for trespass. J.A. 575.[2] Throughout his detention, which lasted approximately 25 minutes, Appellant repeatedly questioned Appellee's authority to detain him or bar him from the store and advised Appellee that he intended to file a complaint about the incident.

Two days later, on October 17, 2018, Appellant filed the promised complaint with a supervisor at the Roanoke Police Department. In the complaint, Appellant reported that he could not breathe as Appellee grabbed his arm so forcefully that Appellant had to seek medical treatment. Appellant also described Appellee as "aggressive, inappropriate, bias[ed], and prejudice[d]." J.A. 477. Sergeant David Lovell ("Sergeant Lovell"), the supervisor responsible for investigating the complaint, told Appellee that Appellant filed the complaint and instructed him to complete a full report and to ask the employees involved whether they wanted to press charges against Appellant. Sergeant Lovell testified that he could not recall whether Appellee advised him that at the time of the incident, the

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[2] Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

Pursuant to Virginia Code § 15.2-1717.1, an owner of real property may authorize local law enforcement to act as a "person lawfully in charge of the property" for the purpose of forbidding individuals from entering the property. Law enforcement officers exercise this authority by issuing a "trespass bar letter" to the individual.

employees were asked if they wanted to press charges, and they declined to do so. But in a sworn declaration, Appellee reported that Sergeant Lovell instructed him "to ask Mr. Shelton and Ms. Wheeler [himself] if they wanted to press criminal charges against Mr. Henderson *since* [he] did not personally ask[] them on October 15, 2018," which suggests that Appellee told Sergeant Lovell that the employees previously declined to press charges. *Id.* at 63 (emphasis supplied).

Appellee returned to the Walmart on October 19, 2018, to speak with Wheeler and Shelton. These interviews were also captured on Appellee's body camera. Wheeler again declined to press charges. Shelton also initially declined again, but he ultimately agreed to press charges after Appellee advised him about the complaint against the department. In this regard, as best we can discern from the bodycam footage, the following conversation between Shelton and Appellee transpired once Appellee asked Shelton if he wanted to press charges:

- **Mr. Shelton**: No, sir. Ya'll have enough.
- **Appellee**: Well, unfortunately the reason why I'm calling you is that he has made a complaint to the police department and I didn't write a full report, so . . .
- **Mr. Shelton**: Who is he complaining about?
- **Appellee**: The police department mostly, I don't know if he's complained about Walmart.
- **Mr. Shelton**: If he is giving ya'll crap, then I'll be glad to press charges.

J.A. 634.

Accordingly, that same day, Appellee sought a misdemeanor arrest warrant against Appellant for assault and battery. Appellee attested to a magistrate for the City of Roanoke that he "had observed Mr. Henderson in an agitated state grab Mr. Shelton's arm to stop him from walking away as shown on [his] body worn camera video," and the magistrate

issued the arrest warrant. J.A. 63. Thereafter, also on October 19, 2018, Sergeant Lovell concluded that Appellant's citizen's complaint was "unfounded," and that Appellee should "be exonerated." *Id.* at 579.

Several days later, no earlier than October 22, 2018,[3] Sergeant Lovell called Appellant and asked him to come to the police station to tell "[his] side of the story." J.A. 371. Sergeant Lovell did not inform Appellant that he had a warrant for his arrest or that he had already recommended Appellee "be exonerated." *Id.* at 579. At the end of the so-called interview, Sergeant Lovell served the arrest warrant.

The assault and battery charge remained pending against Appellant from October 19, 2018, until May 1, 2019, when the Roanoke City General District Court found Appellant not guilty after a bench trial. In September 2019, Appellant filed this 42 U.S.C. § 1983 lawsuit against Appellee in his individual capacity. Following discovery, Appellee moved for summary judgment based on qualified immunity.

The district court granted Appellee summary judgment. The court concluded that Appellee was entitled to qualified immunity on Appellant's false arrest, malicious prosecution, and excessive force claims because the October 15, 2018 detention and subsequent arrest were supported by probable cause and because Appellee used a reasonable amount of force to effect the detention. Although Appellant also asserted that he brought a retaliatory prosecution claim, the district court determined that he did not.

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[3] Appellant's sworn declaration and the executed "date of service" in the arrest warrant corroborate this timeline. *See* J.A. 497.

Appellant timely appealed.

II.

We review a district court's summary judgment decision based on qualified immunity de novo, "viewing the facts in the light most favorable to . . . the non-moving party." *Cox v. Quinn*, 828 F.3d 227, 235 (4th Cir. 2016). In conducting our review, we apply the same legal standards as the district court and view all facts and reasonable inferences in the light most favorable to the nonmoving party. *Ballengee v. CBS Broad., Inc.*, 968 F.3d 344, 349 (4th Cir. 2020). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "To create a genuine issue for trial, the nonmoving party must rely on more than conclusory allegations, mere speculation, the building of one inference upon another, or the mere existence of a scintilla of evidence." *Humphreys & Partners Architects, L.P. v. Lessard Design, Inc.*, 790 F.3d 532, 540 (4th Cir. 2015) (internal quotation marks omitted).

III.

A.

The district court held that Appellee was entitled to qualified immunity on his malicious prosecution, false arrest, and excessive force claims. The court further determined that Appellant had not brought a retaliatory prosecution claim. For the

purposes of this appeal, we assume, without deciding, that the complaint stated a claim for retaliatory prosecution.[4]

"Qualified immunity shields police officers who commit constitutional violations from liability when, based on clearly established law, they could reasonably believe that their actions were lawful." *Estate of Jones v. City of Martinsburg*, 961 F.3d 661, 667 (4th Cir. 2020) (internal quotation marks omitted). Thus, "[t]o determine whether qualified immunity applies, we conduct a two-step inquiry: (1) whether a constitutional violation occurred; and (2) whether the right was clearly established at the time of the violation." *Id.* If *either* inquiry is answered in the negative, the defendant official is entitled to summary judgment. *See Sheppard v. Visitors of Va. State Univ.*, 993 F.3d 230, 238 (4th Cir. 2021). We are permitted to address the two prongs of qualified immunity in either order. *Id.*

B.

Other than the excessive force claim, all of Appellant's claims require Appellant to demonstrate that Appellee lacked probable cause or lacked a reasonable belief that he had probable cause to arrest or detain Appellant for assault and battery. *See Nieves v. Bartlett*, 139 S. Ct. 1715, 1727 (2019) ("[P]robable cause should generally defeat a retaliatory arrest claim.");[5] *Hupp v. Cook*, 931 F.3d 307, 323–24 (4th Cir. 2019) ("[A] plaintiff must show

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[4] *See Vitol, S.A. v. Primerose Shipping Co.*, 708 F.3d 527, 545 (4th Cir. 2013) (assuming without deciding that the operative complaint adequately pled an element of the relevant claim).

[5] In *Nieves*, the Supreme Court created a narrow exception to this general rule "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." 139 S. Ct. at 1727. Appellant has presented no such evidence here.

that the defendant (1) caused (2) a seizure of the plaintiff pursuant to legal process unsupported by probable cause, and (3) criminal proceedings terminated in plaintiff's favor" to prove a § 1983 malicious prosecution claim. (internal quotation marks omitted)); *Sowers v. City of Charlotte*, 659 F. App'x 738, 739 (4th Cir. 2016) ("To state a claim for false arrest or imprisonment under § 1983, a plaintiff must demonstrate that he was arrested without probable cause." (citing *Street v. Surdyka*, 492 F.2d 368, 372–73 (4th Cir. 1974))). Thus, if Appellee had probable cause to detain and arrest Appellant for assault and battery, Appellee is entitled to qualified immunity on these claims.

"Probable cause to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed . . . an offense." *Humbert v. Mayor of Balt. City*, 866 F.3d 546, 555 (4th Cir. 2017) (internal alterations and quotation marks omitted). We evaluate probable cause under an objective standard, considering the totality of the circumstances known to the officers at the time of the alleged seizure. *Smith v. Munday*, 848 F.3d 248, 253 (4th Cir. 2017); *see Graham v. Gagnon*, 831 F.3d 176, 184 (4th Cir. 2016).

"Because the probable cause inquiry is informed by the 'contours of the offense' at issue, we are guided by . . . Virginia law in determining the scope of the offense . . . for which [Appellant] was arrested." *Hupp*, 931 F.3d at 318 (internal quotation marks omitted). Virginia defines battery as "contact done in a rude, insolent, or angry manner." *Simms v. Ruby Tuesday, Inc.*, 704 S.E.2d 359, 364 (Va. 2011) (internal quotation marks omitted); *Parish v. Commonwealth*, 693 S.E.2d 315, 319 (Va. Ct. App. 2010) (holding that

conduct and statements of the alleged offender may demonstrate whether contact was made in a "rude, insolent, or angry manner").

Here, the detention occurred immediately after Appellant was accused of making threats against one Walmart associate and touched another during a confrontational conversation. Given the somewhat chaotic and hostile scene, the undisputed facts -- specifically, that Appellant reached for and touched Shelton's arm to prevent Shelton from walking away -- could lead a reasonable officer to conclude that the contact was done in a rude, insolent, or angry manner. Thus, the totality of the circumstances was "sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed an offense." *Humbert*, 866 F.3d at 555 (internal quotation marks omitted).

Appellant contends that "[e]ven if [his] conduct . . . was sufficient to justify [Appellee] in seizing [him] to prevent him from taking some further action against Shelton, it was insufficient to support [Appellee's] initiation of a prosecution of [Appellant] for assault and battery under Virginia law on October 19--four days later." Opening Br. at 26. But probable cause did not disappear in the four days between the detention and arrest. Contrary to Appellant's suggestion otherwise, the mere fact that Shelton initially declined to press charges does not mean that Shelton felt no fear or apprehension of bodily harm. It simply means that he did not wish to press charges. Moreover, under Virginia law, such a feeling of fear or apprehension is only required for assault -- not for battery. *See Simms*, 704 S.E.2d at 364.

Appellant's remaining arguments are similarly unpersuasive. For example, Appellant contends that the district court erred by granting Appellee summary judgment on the malicious prosecution and false arrest claims based on the existence of probable cause because Appellee withheld material facts from the magistrate that issued the arrest warrant. The material fact allegedly omitted -- *Appellee's motive* for pursuing the charge -- is entirely irrelevant to whether, based on *Appellant's actions* at Walmart on October 15, 2018, there was probable cause for Appellee to believe that Appellant committed assault and battery as defined by Virginia law. Furthermore, even if Appellee omitted a material fact as Appellant contends, that omission would affect the weight the magistrate's finding of probable cause holds,[6] not whether a reasonable officer would have believed probable cause existed at the time of Appellant's arrest. Here, the district court -- which did not base its probable cause finding on the existence of the arrest warrant -- correctly determined that the undisputed facts established probable cause. *See Henderson v. McClain*, No. 7:19-CV-00685, 2020 WL 6136850, at *4 (W.D. Va. Oct. 19, 2020) ("The facts and circumstances known to Officer McClain plainly warranted a belief that Henderson had committed or was committing a battery against Shelton under Virginia law . . . . Because McClain had

[6] Ordinarily, a magistrate's probable cause finding "weighs heavily *toward* a finding that the defendant is immune from suit." *Hupp*, 931 F.3d at 324 (emphasis in original) (internal quotation marks omitted). However, "where an officer provides misleading information to the prosecuting attorney or where probable cause is 'plainly lacking,' the procedural steps taken by an officer no longer afford a shield against a Fourth Amendment claim." *Id.*

probable cause to suspect a battery, he is entitled to qualified immunity on Henderson's false arrest and malicious prosecution claims.").

Appellant also argues that there is a dispute of fact as to whether he touched Shelton in a rude, insolent, or angry manner. This argument reaches well beyond the probable cause determination before us to the merits of the assault and battery claim. Probable cause does not require evidence sufficient to secure a conviction. *Hupp*, 931 F.3d at 318. Nor does it require officers to act as "legal technicians" by, for example, analyzing at length when contact is rude, insolent, or angry. *See Kaley v. United States*, 571 U.S. 320, 338 (2014).

In sum, the undisputed evidence here, viewed in the light most favorable to Appellant, demonstrates that probable cause existed for his detention and arrest. Because Appellant has not produced sufficient evidence that Appellee lacked probable cause, his claims for malicious prosecution, retaliatory prosecution, and false arrest likewise fail.

C.

We turn now to the excessive force claim, the only claim not resolved on our probable cause determination. As the district court acknowledged, this court has held that the use of handcuffs rarely constitutes excessive force where the officer has probable cause for the underlying arrest. *E.W. v. Dolgos*, 884 F.3d 172, 186 (4th Cir. 2018) (citing *Brown v. Gilmore*, 278 F.3d 362, 369 (4th Cir. 2002)). Of course, there are exceptions to this general rule, as a "lawful arrest does not categorically legitimize binding a person's wrists in chains." *Id.* at 180. But this case is no exception.

Although the bodycam footage here is not of perfect quality or unambiguous in all respects, the record evidence puts beyond genuine dispute that, at a minimum, Appellant was initially physically resistant and noncompliant with Appellee's instructions during the handcuffing. It matters not whether his resistance was unintentional, as Appellant contends, because "[i]n evaluating excessive force claims, the reasonableness of the officer's belief as to the appropriate level of force should be judged from that on-scene perspective." *Brown*, 278 F.3d at 369 (internal quotation marks omitted). Indeed, "[f]or courts to fine-tune the amount of force used in a situation such as this would undercut the necessary element of judgment inherent in a constable's attempts to control a volatile chain of events." *Id.*

As Appellant's expert witness observed, one presumes that Appellee could have de-escalated the altercation between Appellant -- an elderly and visibly frail man -- and Shelton -- a middle aged man with no visible frailties -- in a non-forceful manner. But judging from an on-scene perspective, Appellee's action in handcuffing Appellant nonetheless passes constitutional muster.

IV.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

JEREMIAH HENDERSON,	)	
	)	
Plaintiff,	)	Civil Action No. 7:19cv00685
	)	
v.	)	**MEMORANDUM OPINION**
	)	
AUSTIN K. MCCLAIN,	)	By: Hon. Thomas T. Cullen
	)	United States District Judge
Defendant.	)	

Plaintiff Jeremiah Henderson filed this civil rights action against Officer Austin McClain of the Roanoke City Police Department alleging violations of 42 U.S.C. § 1983. Henderson contends that, during an encounter at a local Walmart, McClain falsely arrested him while using excessive force and later deceived a magistrate in order to procure a warrant for his arrest. McClain now moves for summary judgment based on qualified immunity. The parties have fully briefed and argued the issues related to summary judgment, and the matter is now ripe for decision. Because McClain's actions were objectively reasonable under the circumstances he encountered, the court will grant his motion for summary judgment.

I.

The material facts underlying this dispute were captured on Officer McClain's body camera and are not genuinely contested. On October 15, 2018, Officer McClain investigated an alleged shoplifting incident at the Valley View Walmart in Roanoke. While McClain interviewed Lindsay Peterson, the loss-prevention manager, a greeter, Jeannette Wheeler, called into the office on her radio expressing fear that a customer was about to strike her. (*See*

ECF No. 42, Ex. D (Incident Video) at 22:00).[1] Upon receiving the call, McClain and Peterson left the office and went to assist Wheeler. When they got to the entrance, Wheeler told them that a customer, Jeremiah Henderson, had been attempting to exit the store when Wheeler asked to see his receipt. Wheeler told McClain that Henderson had refused, eventually growing agitated and threatening to "slap" her and "kick [her] ass." (*Id.* at 22:34.)

While McClain conversed with Wheeler, Thomas Shelton, a Walmart assistant manager, spoke to Henderson. Several seconds later, Shelton informed McClain that he wanted Henderson removed from the store and turned to leave the conversation. As Shelton began to step away, Henderson reached out and grabbed Shelton's arm. Shelton responded by pulling his arm away and shouting: "Whoa whoa whoa!" (*Id.* at 22:51.) As Henderson released Shelton, McClain grabbed Henderson's wrist, telling him "don't put your hands on him." Henderson tried to pull away from McClain for several seconds, leading McClain to twist Henderson's wrist behind his back and instruct him to place both hands behind his back. Henderson continued to resist, stating, "I can't breathe," and requesting his inhaler. (*Id.* at 22:53–23:10.) Eventually, McClain was able to place Henderson in handcuffs, walk him back to the loss prevention office, and offer him his inhaler. McClain then asked Peterson to inquire whether any Walmart employees wished to press charges against Henderson based on the altercation. After speaking with Wheeler and Shelton, Peterson informed McClain that no one wished to press charges, only to bar Henderson from the property. McClain removed

[1] Citations to McClain's body-camera footage are in the style "minutes:seconds."

Henderson's handcuffs, gave him a trespass bar letter,[2] and informed him that he was no longer allowed at the Walmart. The entire incident, including the post-encounter exchanges, was captured clearly on McClain's body camera and lasted approximately 15 minutes. (*See* ECF No. 42, Ex. D.)

Four days later, on October 19, a supervisor at the Roanoke Police Department informed McClain that Henderson had filed a complaint against him based on the incident. The supervisor directed McClain to complete a full report of the incident and to inquire personally with Walmart staff about whether they wished to press criminal charges against Henderson. (*See* ECF No. 41-1 at 4.) That same day, McClain returned to Walmart to obtain statements from Peterson, Shelton, and Wheeler, and to ask whether they wished to press charges. These interviews were also captured by McClain's body camera. During his interview, Shelton expressed a desire to press criminal charges, saying: "If he's giving y'all crap, I'll be glad to press charges." (ECF No. 42, Ex. E at 14:58.) Later that day, McClain appeared before a magistrate and testified about the Walmart incident. McClain told the magistrate that he "observed Mr. Henderson in an agitated state grab Mr. Shelton's arm to stop him from walking away as shown on [McClain's] body worn camera video." (ECF No. 41-1 at 4.) The magistrate found probable cause and issued a misdemeanor arrest warrant against Henderson for assault and battery. On October 24, 2018, Roanoke Police served the summons to Henderson. The case was subsequently tried, and a local judge found Henderson not guilty.

[2] Under Virginia Code § 15.2-1717.1, an owner of real property may authorize local law enforcement to act as a "person lawfully in charge of the property" for the purpose of forbidding individuals from entering the property. Law enforcement officers exercise this authority by issuing a "trespass bar letter" to the individual.

After his acquittal, Henderson brought this suit against McClain in his individual capacity, seeking money damages under 42 U.S.C. § 1983 for false arrest, malicious prosecution, and use of excessive force. McClain now moves for summary judgment under the doctrine of qualified immunity, arguing that he should be shielded from suit. The court agrees with McClain and will grant his motion for summary judgment. McClain's detention of Henderson on October 15, 2018 was supported by probable cause, and he used a reasonable amount of force to effect that detention. Likewise, the arrest warrant sought by McClain was supported by probable cause to suspect Henderson had committed assault and battery.

II.

Under Rule 56(a), the court must "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Glynn v. EDO Corp.*, 710 F.3d 209, 213 (4th Cir. 2013). When making this determination, the court should consider "the pleadings, depositions, answers to interrogatories, and admissions on file, together with . . . [any] affidavits" filed by the parties. *Celotex*, 477 U.S. at 322. Whether a fact is material depends on the relevant substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* (citation omitted). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. If that burden has been met, the nonmoving party must then come forward and

establish the specific material facts in dispute to survive summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986).

In determining whether a genuine issue of material fact exists, the court views the facts and draws all reasonable inferences in the light most favorable to the nonmoving party. *Glynn*, 710 F.3d at 213 (citing *Bonds v. Leavitt*, 629 F.3d 369, 380 (4th Cir. 2011)). Indeed, "[i]t is an 'axiom that in ruling on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'" *McAirlaids, Inc. v. Kimberly-Clark Corp.*, 756 F.3d 307, 310 (4th Cir. 2014) (internal alteration omitted) (quoting *Tolan v. Cotton*, 572 U.S. 650, 651 (2014) (per curiam)). Moreover, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson*, 477 U.S. at 255. The nonmoving party must, however, "set forth specific facts that go beyond the 'mere existence of a scintilla of evidence.'" *Glynn*, 710 F.3d at 213 (quoting *Anderson*, 477 U.S. at 252). The nonmoving party must show that "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson*, 477 U.S. at 249. "In other words, to grant summary judgment the [c]ourt must determine that no reasonable jury could find for the nonmoving party on the evidence before it." *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 124 (4th Cir. 1990) (citing *Anderson*, 477 U.S. at 248). When the nonmoving party's version of the facts is clearly contradicted by video evidence, however, the court is not bound to accept its version of events. *See Scott v. Harris*, 550 U.S. 372, 380 (2007). Even when facts are not in dispute, the court cannot grant summary judgment unless there is "no genuine issue as to the inferences

to be drawn from" those facts. *World-Wide Rights Ltd. P'ship v. Combe, Inc.*, 955 F.2d 242, 244 (4th Cir. 1992).

III.

McClain's motion for summary judgment requires the court to consider whether qualified immunity protects him from Henderson's false arrest, malicious prosecution, and excessive-force claims. The court concludes that McClain should enjoy qualified immunity on all three claims because the uncontested evidence—specifically, the body-camera footage—does not show a violation of any constitutional right.

McClain argues that he is entitled to summary judgment because the doctrine of qualified immunity shields him from suit. It is well-established that qualified immunity "protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Stanton v. Sims*, 571 U.S. 3, 5–6 (2013) (cleaned up); *see Smith v. Gilchrist*, 749 F.3d 302, 307 (4th Cir. 2014); *Lucas v. Shively*, 31 F. Supp. 3d 800, 810 (W.D. Va. 2014). Overcoming qualified immunity requires a plaintiff to make two showings: (1) the allegations underlying the claim, if true, substantiate a violation of a federal statutory or constitutional right; and (2) the violation is of a clearly established right of which a reasonable person would have known. *Smith v. Munday*, 848 F.3d 248, 253 (4th Cir. 2017); *Durham v. Horner*, 690 F.3d 183, 188 (4th Cir. 2012). On summary judgment in a case involving qualified immunity, therefore, the initial question is whether, taking the facts in the light most favorable to the plaintiff, the facts alleged show the officer's conduct violated a constitutional right. *See Estate of Armstrong ex rel. Armstrong v. Vill. of Pinehurst*, 810 F.3d 892, 899 (4th Cir. 2016).

Taking the facts of this case in the light most favorable to Henderson (and keeping in mind the clear portrayal of the entire incident on McClain's body camera), the facts alleged do not show a violation of any constitutional right.

IV.

A.

Henderson cannot sustain the claimed violation of his Fourth Amendment right to be free from false arrest and malicious prosecution because McClain had a reasonable belief that Henderson had committed or was committing a battery. "The constitutional restrictions on arrest are derived from the Fourth Amendment's prohibition of unreasonable seizures." *Street v. Surdyka*, 492 F.2d 368, 371 (4th Cir. 1974). As in other unreasonable seizure cases, a plaintiff alleging false arrest must demonstrate that he was seized without probable cause. *See Dunaway v. New York*, 442 U.S. 200, 213 (1979); *Brown v. Gilmore*, 278 F.3d 362, 367 (4th Cir. 2002). The contours of this burden shift slightly when the defendant invokes qualified immunity. When evaluating whether an officer is immune from suit based on an allegedly false arrest, the inquiry is not whether probable cause for the arrest actually existed, but whether the officer had a reasonable belief that probable cause existed. *See Porterfield v. Lott*, 156 F.3d 563, 567 (4th Cir. 1998).

The test for malicious prosecution is much the same. A "malicious prosecution claim under § 1983 is properly understood as a Fourth Amendment claim for unreasonable seizure which incorporates certain elements of the common law tort" of malicious prosecution. *Lambert v. Williams*, 223 F.3d 257, 261 (4th Cir. 2000). To state a claim for malicious prosecution under § 1983, a plaintiff must allege that (1) the defendant seized the plaintiff

pursuant to legal process unsupported by probable cause, and (2) the resulting criminal proceedings terminated in the plaintiff's favor. *See Durham*, 690 F.3d at 188. Because Henderson prevailed in the relevant criminal proceeding, "the sole question at issue is whether there was probable cause to arrest." *Munday*, 848 F.3d at 253. Henderson's false arrest and malicious prosecution claims, therefore, turn on the same probable cause inquiry. *See Rogers v. Pendleton*, 249 F.3d 279, 294 (4th Cir. 2001) (recognizing that false arrest and malicious prosecution claims are often "so intertwined legally" as to rise and fall together for qualified immunity purposes). If McClain had probable cause to arrest Henderson, both claims fail.[3]

Probable cause is a "flexible, common-sense standard" and one that is determined by a "totality of the circumstances approach." *Florida v. Harris*, 568 U.S. 237, 240, 244 (2013) (citing *Illinois v. Gates*, 462 U.S. 213, 239 (1983)). "While probable cause requires more than bare suspicion, it requires less than that evidence necessary to convict." *Munday*, 848 F.3d at 253 (quoting *United States v. Gray*, 137 F.3d 765, 769 (4th Cir. 1998)). In determining whether an officer had probable cause, the reviewing court considers whether "the facts and circumstances known to the officer 'would warrant the belief of a prudent person that the arrestee had committed or was committing an offense.'" *Taylor v. Waters*, 81 F.3d 429, 434 (4th Cir. 1996) (quoting *United States v. Garcia*, 848 F.2d 58, 59–60 (4th Cir.), *cert. denied*, 488 U.S. 957 (1988)).

[3] The parties dispute whether McClain required probable cause to detain Henderson on October 15, but they agree that the initial encounter was justified based on reasonable suspicion, as set forth in *Terry v. Ohio*, 392 U.S. 1, 12 (1968). Because the parties agree on this point, and the court determines that Officer McClain meets the more demanding standard of probable cause, it need not analyze the encounter under *Terry*.

Officer McClain argues that he had probable cause to believe Henderson had committed the offense of assault and battery under Virginia Code § 18.2-57. (*See* ECF No. 41 at 13–14.) Because that statute does not define assault or battery, Virginia applies the common law definitions of the offenses. *See Clark v. Commonwealth*, 691 S.E.2d 786, 788–789 (Va. 2010). Under those definitions, Henderson committed an assault if he engaged in "an attempt or offer, with force and violence, to do some bodily hurt to another," *Harper v. Commonwealth*, 85 S.E.2d 249, 255 (Va. 1955), and committed a battery if he engaged in "a wil[l]ful or unlawful touching" of another, even if that touching did not "result in injury to the [victim's] corporeal person." *Wood v. Commonwealth*, 140 S.E. 114, 115 (Va. 1927). The Fourth Circuit has summarized Virginia battery law as holding that "the slightest touching of another, or of his clothes, or cane, or anything else attached to his person, if done in a rude, insolent or angry manner constitutes a battery." *Park v. Shiflett*, 250 F.3d 843, 852 (4th Cir. 2001) (citing *Crosswhite v. Barnes*, 124 S.E. 242, 243 (Va.1924)).

The facts and circumstances known to Officer McClain plainly warranted a belief that Henderson had committed or was committing a battery against Shelton under Virginia law. McClain arrived on scene having already heard that Henderson was "about to . . . hit" Wheeler. (ECF No. 42, Ex. D at 22:12.) After he arrived, Wheeler told McClain that Henderson had made multiple violent threats against her—specifically, that he had threatened to "slap" her and "kick [her] ass." (ECF No. 42, Ex. D at 22:34.) Seconds later, as Shelton attempted to leave his conversation with Henderson, McClain observed the agitated Henderson physically accost Shelton. Shelton's reaction to this physical contact, combined with the reported threats and already-threatening atmosphere, made it reasonable to believe that the contact did injury

to Shelton's "mind or feelings." *Wood*, 140 S.E. at 115. These facts, taken together, form the basis for a reasonable belief that Henderson had committed or was committing a battery. Because McClain had probable cause to suspect a battery, he is entitled to qualified immunity on Henderson's false arrest and malicious prosecution claims.

B.

Like Henderson's other two claims, the constitutional provision at issue in his excessive force claim is the Fourth Amendment's prohibition on unreasonable seizures. *See Graham v. Connor*, 490 U.S. 386, 394–396 (1989). *Graham* instructs that the relevant inquiry is whether a given use of force was objectively reasonable, something that depends on "the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396. Taking all these factors into account, the Fourth Circuit has held that the use of handcuffs "rarely" constitutes excessive force "where the officers were justified . . . in effecting the underlying arrest." *Brown v. Gilmore*, 278 F.3d 362, 369 (4th Cir. 2002).

This case is not an exception to that general rule. The three *Graham* factors weigh in McClain's favor. The first factor, the nature of the offense, supports the use of handcuffs because the underlying offense—assault and battery—is a violent one. *See E.W. v. Dolgos*, 884 F.3d 172, 180 (4th Cir. 2018). The second factor, whether the suspect poses a threat to the officer or others, also weighs strongly in McClain's favor. By the time Officer McClain handcuffed Henderson, he had already heard that Henderson had threatened to inflict bodily harm on one Walmart employee and had witnessed Henderson grab another employee. A

reasonable officer in McClain's position would suspect that a more serious disturbance was on the horizon. The third and final factor—whether Henderson was resisting or evading arrest—also cuts in McClain's favor, albeit not as strongly as the other two. Henderson resisted McClain's attempt to detain him, but McClain had already begun the process of handcuffing Henderson before any serious attempts at resistance. Because each of these factors—and the other facts and circumstances of the case—weigh in McClain's favor, his use of handcuffs was objectively reasonable. The reasonableness of his actions entitles him to qualified immunity from suit for use of excessive force.

V.

There are two additional issues before the court. First, Henderson argues that his complaint presents a retaliatory prosecution claim. Having carefully examined the pleadings and subsequent filings, the court can identify no such claim. In order to state a particular claim, a complaint must do at least two things. First, it must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Second, it must plead "more than labels and conclusions" such that its "[f]actual allegations [are] enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Applying that standard, Henderson's complaint alleges only false arrest, malicious prosecution, and excessive force. The complaint makes two conclusory accusations that McClain's motive in seeking arrest was retaliatory, but there are no specific factual allegations in the complaint relating to a retaliatory prosecution claim. Therefore, the complaint cannot be read to state a claim for relief under that theory.

Henderson cites *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), to argue that the court should nevertheless read a retaliatory prosecution claim into his complaint because such a claim is subsumed within his malicious prosecution claim. This argument is refuted by clear Supreme Court precedent. While some elements of malicious prosecution resemble elements of a retaliatory prosecution claim, they are analytically and legally distinct. *See Nieves*, 139 S. Ct. at 1726 (treating malicious arrest and retaliatory arrest as distinct claims); *Hartman v. Moore*, 547 U.S. 250, 258 (2006) (treating malicious prosecution and retaliatory prosecution as distinct claims). As noted above, malicious prosecution under § 1983 is based in the Fourth Amendment and requires a plaintiff to show that he was arrested without probable cause and prevailed in the subsequent legal proceeding. Retaliatory prosecution, in contrast, is a First Amendment claim and requires a plaintiff to show that they were subject to retaliatory action for engaging in protected speech, that the government defendant's retaliatory animus was the "but for" cause of the plaintiff's injury, and that "the decision to press charges was objectively unreasonable because it was not supported by probable cause." *Nieves*, 139 S. Ct. at 1722–23. Indeed, *Nieves* itself explicitly recognizes that malicious prosecution and retaliatory arrest are distinct torts. *See id.* at 1726. It would be improper, therefore, for the court to infer a retaliatory prosecution claim from Henderson's malicious prosecution pleadings.[4]

VI.

Finally, McClain has moved to enjoin related state-court proceedings that he contends were initiated in an attempt to thwart this removal action and undermine the court's authority.

[4] Had Henderson alleged, as a separate and distinct First Amendment claim for retaliatory arrest or prosecution, that his complaint was protected speech and McClain's retaliatory animus based on that complaint was the but for cause of his arrest, this case may have presented a closer question on the effect of probable cause and, relatedly, the application of qualified immunity.

(ECF No. 62). The motion is based on a putative amendment to Henderson's complaint that attempted to add a raft of state-law claims under this court's supplemental jurisdiction. Henderson withdrew his motion to add these state-law claims after McClain opposed the amendment and before the court could rule on the motion.[5] Henderson then filed those claims in Roanoke Circuit Court. In support of his motion to enjoin the state-court proceeding, McClain cites a number of cases wherein federal courts enjoined copycat state-court proceedings filed to subvert federal jurisdiction. *See e.g.*, *Kan. Pub. Emps. Ret. Sys. v. Reimer & Koger Assocs., Inc.*, 77 F.3d 1063 (8th Cir. 1996); *Faye v. High's of Balt.*, 541 F. Supp. 2d 752 (D. Md. 2008).[6] The facts of these cases are not analogous and do not lend support for the requested remedy. All of these cases fall into one of two categories: Either the plaintiffs' claims in state court were identical to claims in ongoing federal litigation, or the plaintiffs amended their federal complaint to withdraw state-law claims that they subsequently refiled in state court. Neither is true here. Henderson's state-court suit is composed entirely of state-law claims not present in this case and over which this court has never exercised jurisdiction. Without any overlap in the claims at issue, this court discerns no threat to its jurisdiction from the ongoing state-court litigation or an attempt by Henderson to undermine its jurisdiction over the federal claims. Absent these concerns, the court will not take the extraordinary step of enjoining a state-court proceeding. *Cf. Atl. Coast Line R. Co. v. Bhd. of Locomotive Eng'rs.*, 398

[5] The Hon. Glen E. Conrad initially presided over this case while this motion was pending. By the time Judge Conrad transferred the matter to the undersigned in September 2020, Henderson had withdrawn his motion.

[6] McClain also cites *Davis International, LLC v. New Start Group Corp.*, 488 F.3d 597 (3d Cir. 2007), claiming the Third Circuit in that case reversed a district court denial of an injunction. (*See* ECF No. 70 at 6–7.) The Third Circuit reached no such holding in that case, nor could it have. A district court's decision whether to enjoin state-court proceedings under the Anti-Injunction Act "is always discretionary." *Ackerman v. ExxonMobil Corp.*, 734 F.3d 237, 252 (4th Cir. 2013).

U.S. 281, 287 (1970) ("Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts."); *Younger v. Harris*, 401 U.S. 37, 45 (1971) ("[T]he normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions."); *Mitchum v. Foster*, 407 U.S. 225, 243 (1972) ("[T]he principles of equity, comity, and federalism ... must restrain a federal court when asked to enjoin a state court proceeding.").

The motion to enjoin will therefore be denied.

VII.

For all these reasons, McClain's motion for summary judgment will be granted, and McClain's motion to enjoin state court proceedings will be denied.

The clerk is directed to forward a copy of this Memorandum Opinion and accompanying Order to all counsel of record.

ENTERED this 19th day of October, 2020.

HON. THOMAS T. CULLEN
UNITED STATES DISTRICT JUDGE