

Nos. 26-1637, 26-1671

**In the United States Court of Appeals
for the Fourth Circuit**

THESLET BENOIR, *ET AL.*
Plaintiffs-Appellees / Cross-Appellants,

v.

TOWN OF PARKSLEY, VIRGINIA, *ET AL.*
Defendants-Appellants / Cross-Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia

Amicus Brief of The Cato Institute
***in Support of Plaintiffs-Appellees/Cross-Appellants and Reversal
of the District Court's Decision on First Amendment Retaliation***

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Amicus Curiae the Cato Institute is a nonprofit corporation. It has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public. No publicly held corporation has a direct financial interest in the outcome of this litigation due to amicus's participation.

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Interest of Amicus Curiae¹

The Cato Institute is a nonpartisan public-policy research foundation established in 1977, dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files amicus briefs.

Cato Institute scholars have published extensive research on constitutional law and government overreach. This case interests the Cato Institute because it concerns the legality of a contested exercise of government power that threatens freedom of speech. This amicus brief seeks to help the Court by explaining the doctrinal error that the district court made in evaluating Plaintiffs' First Amendment retaliation claim and by outlining how the district court's approach will make it more difficult for citizens to vindicate their First Amendment rights.

¹ All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than amicus contributed money intended to fund the brief's preparation or submission.

Introduction

Whoever would overthrow the liberty of the nation,
must begin by subduing the freedom of speech
[It] is the great bulwark of liberty; they prosper
and die together: And it is the terror of traitors and
oppressors, and a barrier against them.

-Cato's Letters, No. 15.²

In this case, a family in Parksley, Virginia, ran into an onslaught of opposition to their food truck from their local government. This resulted in an October 2023 ordinance specifically banning food trucks. But in enacting this ordinance, the Town committed to Plaintiffs that they could continue to operate their food truck until May 2024 when their business license expired. Order 13.³

Plaintiffs then dared to complain about the food-truck ban to the press. The Mayor saw this as a “betrayal” and became “angry . . . for the media attention that depicted Parksley’s government in a negative light.” Order 14, 19. In direct response to Plaintiffs’ protected speech, the Mayor

² Thomas Gordon, Cato’s Letter No. 15 (Feb. 4, 1720), FIRE, <https://www.fire.org/research-learn/catos-letter-no-15>; *see also* *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 599 (7th Cir. 2012) (describing Letter No. 15 as “one of the most famous eighteenth-century essays on the freedom of speech”).

³ “Order” refers to the district court’s summary-judgment decision. *Benoir v. Town of Parksley*, No. 24-cv-64 (E.D. Va. Mar. 31, 2026), ECF No. 70.

instructed the Town Attorney to renege on the Town's commitment and send Plaintiffs a cease-and-desist letter requiring them to immediately shut down their business. Order 14–15, 43. As the Town Attorney was drafting the letter, he stumbled across a previously unknown catch-all zoning ordinance that prohibited anything not expressly permitted (including food trucks). Order 15.

On this fact alone, the district court denied Plaintiffs' First Amendment retaliation claim. Even though Plaintiffs were engaged in protected speech, even though the Town "intended to punish them for their protected speech, and indeed prepared to do so," and even though the Town only discovered the second ordinance *after* making that decision, the district court concluded that Plaintiffs could not establish causation because the ordinance authorized the government action. Order 45. This fundamentally misunderstood First Amendment retaliation caselaw, which requires a court to discern *why* the government took the adverse action. It does not permit the government to evade scrutiny by showing that its actions were otherwise authorized under local law or hide behind pretext.

If allowed to stand, the district court’s approach will quash many legitimate retaliation claims, encourage government mischief, and threaten the “great bulwark of liberty.” *See* Cato’s Letter No. 15.

Argument

Freedom of speech is fundamental to our Republic. Like life, liberty, and the pursuit of happiness, free speech is an inalienable right. 303 *Creative LLC v. Elenis*, 600 U.S. 570, 584 (2023).⁴ Indeed, “[a]s early as 1722, Benjamin Franklin . . . railed against the ‘wretched Countries’ that so regulated speech: [w]here a Man cannot call his Tongue his own[.]” *Polk v. Montgomery Cnty. Pub. Schs.*, 166 F.4th 400, 422 (4th Cir. 2026) (Wilkinson, J., dissenting).

In our system of self-government, each citizen is expected to exercise their own reason and judgment, convey that judgment to their elected representatives, and speak out when their elected representatives fall short. *See* 303 *Creative*, 600 U.S. at 584 (“[Freedom of speech] is indispensable to the discovery and spread of political truth.”). Thus, “[a] bedrock First Amendment principle is that citizens have a

⁴ Unless otherwise indicated, internal quotation marks, alterations, and citations have been omitted from quotations throughout.

right to voice dissent from government policies.” *Tobey v. Jones*, 706 F.3d 379, 391 (4th Cir. 2013). And, in a pluralistic society like ours, free speech serves as an essential safety valve, providing an outlet for disagreements and disparate views in “an uninhibited marketplace of ideas.” *McCullen v. Coakley*, 573 U.S. 464, 476 (2014).⁵

Simply, freedom of speech is an “indispensable condition” on which “nearly every other form of freedom” relies. *Palko v. Connecticut*, 302 U.S. 319, 326–27 (1937). And so, as the Supreme Court has famously said: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

But the First Amendment’s guarantees become meaningless if the government is free to punish citizens for speech it dislikes. Such retaliation “is uniquely harmful to a free and democratic society.” *NRA v. Vullo*, 602 U.S. 175, 187 (2024). Yet, here, the district court allowed

⁵ See also Christian Bjørnskov & Jacob Mchangama, *Freedom of Expression and Social Conflict*, Rsch. Inst. of Indus. Econ., Working Paper No. 1473 (Sept. 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4578663 (empirical study finding that greater freedom of expression reduces social conflict).

flagrant retaliation to go unanswered. It deployed an erroneous standard of causation that glossed over evidence of retaliatory intent and allowed the government to immunize itself merely by showing that its retaliation was authorized by local law. This Court should correct the mistake.

I. The district court failed to properly apply *Mt. Healthy* and missed the importance of discerning intent.

To succeed on a First Amendment retaliation claim, a plaintiff must prove that (1) they were engaged in protected speech, (2) the government took an adverse action against them, and (3) the speech was the but-for cause of the adverse action. *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 686 (4th Cir. 2000); *Penley v. McDowell Cty. Bd. of Educ.*, 876 F.3d 646, 654 (4th Cir. 2017). As to causation, courts are supposed to apply a burden-shifting framework. *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Penley*, 876 F.3d at 654. The plaintiff must first make out a *prima facie* case by showing that the protected speech was a substantial or motivating factor in the retaliation. *Penley*, 876 F.3d at 654. The burden then shifts to the government to prove by a preponderance of the evidence that it would have made the same decision even absent the protected speech. *Id.* This burden-shifting framework

helps address mixed-motive cases and strikes the appropriate balance between the parties. *Mt. Healthy*, 429 U.S. at 285–86.

Here, the district court found that Plaintiffs engaged in protected speech when they expressed opposition to the Town’s food-truck ban to the media. Order 45. Rightly so; political speech to the press is at the very core of the First Amendment. *See, e.g., Rossignol v. Voorhaar*, 316 F.3d 516, 521–22 (4th Cir. 2003) (noting that the discussion of public issues and freedom of the press are core to the First Amendment). The district court also found that the Mayor viewed the protected speech as a “betrayal” and, in response, reneged on the Town’s prior commitment and directed the Town Attorney to send Plaintiffs a cease-and-desist letter requiring Plaintiffs to immediately shut down their business. Order 14–15, 19, 45. Plaintiffs thus “demonstrated that Parksley intended to punish them for their protected speech.” Order 45. At this point, the district court should have shifted the burden to the Town to prove that it would have still required Plaintiffs to immediately shut down their business absent the protected speech. Of course, the Town could not have done so, as the district court had already found that the only reason the Town decided to renege on its commitment and send the cease-and-desist

letter in the first place was to punish Plaintiffs for their constitutionally protected speech.

Instead, the district court let the Town off the hook. After the Town had already decided to punish Plaintiffs and while in the process of drafting the cease-and-desist letter, the Town Attorney stumbled across a previously undiscovered zoning ordinance that prohibited food trucks. Thus, because the Town “had an independent legal basis to require Plaintiffs to cease operation,” “Plaintiffs [could not] establish that their protected speech was the but-for cause of the letter.” Order 43. This misunderstood the retaliation inquiry. The question is *why* the government took the challenged action, not whether some ordinance authorized the action. Or, in *Mt. Healthy*’s language, the question is whether the government “*would* have reached the same decision,” not whether the government *could* have made the same decision for some hypothetical legitimate reason. 429 U.S. at 287 (emphasis added).

For example, in *Martin v. Duffy*, a prisoner alleged that he had been placed in administrative segregation as unconstitutional retaliation for filing a grievance. 977 F.3d 294, 297 (4th Cir. 2020). In part, the defendant argued that the claim failed under *Mt. Healthy*’s same-decision

test because the prison had a blanket policy of segregating complaining inmates. *Id.* at 305. Although this Court did not address the issue directly, it “reemphasize[d] the well-settled principle that an action motivated by retaliation for the exercise of a constitutionally protected right is actionable, even if the act, when taken for a different reason, might have been legitimate.” *Id.* at 306.

The Supreme Court’s recent decision in *NRA v. Vullo* stands for the same principle. 602 U.S. 175 (2024). A New York official overseeing insurance companies initiated investigations into insurers affiliated with the NRA for violations of state law and sent them threatening letters encouraging them to break ties with the NRA. *Id.* at 181–84. There was no dispute that the insurers had violated state law. *Id.* at 196. Nonetheless, the Supreme Court explained that “the conceded illegality of the NRA-endorsed insurance programs does not insulate [the government] from First Amendment scrutiny.” *Id.* “[A]lthough [the government] can pursue violations of state insurance law, [it] cannot do so in order to punish or suppress the NRA’s protected expression.” *Id.*

The principle that an unconstitutional intent can infect an otherwise authorized government action is nothing new. For example,

otherwise permitted government actions can run afoul of the Free Exercise clause if motivated by religious animus. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 584 U.S. 617 (2018); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). Prosecutors generally have blanket authority to strike jurors via peremptory challenges—but not when done for the purpose of racial discrimination. *Batson v. Kentucky*, 476 U.S. 79 (1986). Similarly, “a facially neutral law” is nonetheless “abhorrent” and “unconstitutional” if “motivated by invidious racial discrimination.” *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 220 (4th Cir. 2016); accord *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–266 (1977). And an otherwise constitutional act will violate the Bills of Attainder Clause if the motive is to target a specific individual. See *Ameur v. Gates*, 759 F.3d 317, 329 (4th Cir. 2014) (describing motivational test).

The district court’s approach—which glossed over the fact that the Town “intended to punish [Plaintiffs] for their protected speech” and instead considered only whether an ordinance justified the end result in a vacuum—is impossible to square with precedent from this Court and the Supreme Court. Order 45. And it relegated First Amendment

retaliation claims to second-class status where, unlike other constitutional rights, a court cannot be bothered to identify the government's real motive.

II. *Hartman* and its progeny do not and should not apply.

The district court's error seems to stem from an attempt to graft on the framework from *Hartman v. Moore*, 547 U.S. 250 (2006), which requires a plaintiff to show that the government lacked probable cause. The district court anchored its understanding of causation around *Hartman* and for all practical purposes imposed a version of *Hartman*'s no-probable-cause requirement by finding the ordinance dispositive. Order 43–45. This was a mistake. Unlike *Hartman*, this case does not involve a retaliatory prosecution, does not implicate any of the causation concerns identified in *Hartman*, and does not center around probable cause in the same way.⁶

In *Hartman*, the Supreme Court concluded that retaliatory-prosecution claims presented two difficulties beyond the typical

⁶ Strangely, the district court seemed to recognize as much, reasoning that *Gonzalez v. Trevino*, 602 U.S. 653 (2024) and *Nieves v. Bartlett*, 587 U.S. 391 (2019) did not apply because they arose in “a distinct doctrinal context.” Order 44 n.13. But what the district court missed was that *Gonzalez* and *Nieves* are *Hartman*'s progeny and the same logic extends to *Hartman* itself.

retaliation claim. 547 U.S. at 260–261. First, the issue of probable cause is typically central to the litigation. *Id.* at 261. Second, the causal connection between the protected conduct and the retaliation “is usually more complex than it is in other retaliation cases” because the plaintiff must connect the retaliatory animus of an officer with a prosecutor’s decision to bring the case, which is complicated further by the “longstanding presumption of regularity accorded to prosecutorial decisionmaking.” *Id.* at 261–63. “Some sort of allegation, then, is needed both to bridge the gap between the nonprosecuting government agent’s motive and the prosecutor’s action, and to address the presumption of prosecutorial regularity.” *Id.* at 263. Thus, in the specific context of an alleged retaliatory prosecution, a plaintiff must usually prove that there was no probable cause supporting the prosecution. *Id.*

Hartman’s no-probable-cause requirement has been extended to retaliatory arrests and retaliatory searches, which likewise exist at the intersection of the First and Fourth Amendments. *Nieves v. Bartlett*, 587 U.S. 391 (2019) (arrests); *Stanley v. Bocock*, 160 F.4th 573 (4th Cir. 2025) (searches). But this Court should extend it no further. *See Hartman*, 547 U.S. at 259–60 (explaining that its reasoning does not extend to “ordinary

retaliation claims”). There is “no legitimate basis for engrafting a no-probable-cause requirement onto a First Amendment [retaliation] claim.” *Nieves*, 587 U.S. at 415 (Gorsuch, J., concurring in part).

First, as Justices Gorsuch and Sotomayor have explained, *Hartman*’s no-probable-cause requirement has no basis in the text of either the First Amendment or Section 1983. *Id.* at 413 (Gorsuch, J., concurring in part); *id.* at 422 (Sotomayor, J., dissenting). “[L]ook at that statute as long as you like and you will find no reference to the presence or absence of probable cause as a precondition or defense to any suit.” *Id.* at 413 (Gorsuch, J., concurring in part).

Second, because “the First Amendment operates independently of the Fourth and provides different protections,” it makes little sense to allow a government official to immunize First Amendment violations through Fourth Amendment compliance. *Id.* at 414 (Gorsuch, J., concurring in part).

Third, the no-probable-cause requirement makes courts ignore “smoking-gun evidence” and the sort of “direct admissions” that are often “the best available evidence of unconstitutional motive.” *Id.* at 428 (Sotomayor, J., dissenting). As discussed above, this also departs from

the many other areas of constitutional law where such statements are “highly relevant evidence.” *Id.* at 428 (Sotomayor, J., dissenting). And the approach “risks licensing even clear-cut abuses.” *Id.* at 431 (Sotomayor, J., dissenting). Indeed, this case shows as much. The district court found that the Town “intended to punish [Plaintiffs] for their protected speech” but nonetheless reasoned that “no reasonable juror could find, as a matter of law, that [the Town] retaliated against Plaintiffs in violation of their First Amendment rights.” Order 45.

Further, demonstrating the difficulties of meeting *Hartman*’s standard, in the various cases applying the no-probable-cause requirement, this Court has held that the plaintiff failed the requirement in all but one case. *Stanley v. Bocock*, 160 F.4th 573 (4th Cir. 2025); *Somers v. Devine*, 132 F.4th 689 (4th Cir. 2025); *Nazario v. Gutierrez*, 103 F.4th 213 (4th Cir. 2024); *Pegg v. Herrnberger*, 845 F.3d 112 (4th Cir. 2017); *Henderson v. McLain*, No. 20-2197, 2022 WL 704353 (4th Cir. Mar. 9, 2022); *Gardner v. Momon*, No. 24-1424, 2025 WL 2206325 (4th Cir. Aug. 4, 2025). *But see Tobey v. Jones*, 706 F.3d 379 (4th Cir. 2013).

III. The district court's approach imposes an unduly burdensome standard for retaliation claims.

Already, under *Mt. Healthy*, citizens face significant hurdles in bringing a First Amendment retaliation claim. They must show that they were engaged in protected speech, that the government took an adverse action against them, and a causal relationship between the two. *Penley*, 876 F.3d at 654. This standard “is by no means easily satisfied.” *Nieves*, 587 U.S. at 423 (Sotomayor, J., dissenting); accord *Ridpath v. Bd. of Gov’rs Marshall Univ.*, 447 F.3d 292, 318 (4th Cir. 2006) (describing the standard as “rigorous”).

On top of that, a plaintiff must get past qualified immunity. This, too, is no small feat. As a 2024 report from the Institute for Justice found, courts of appeals denied qualified immunity in only 22% of cases.⁷ Or as Judge Willett of the Fifth Circuit put it: “The real-world functioning of modern immunity practice—essentially heads government wins, tails plaintiff loses—leaves many victims violated but not vindicated.” *Cole v. Carson*, 935 F.3d 444, 471 (5th Cir. 2019) (Willett, J., dissenting).

⁷ Jason Tiezzi et al., *Unaccountable: How Qualified Immunity Shields a Wide Range of Government Abuses, Arbitrarily Thwarts Civil Rights, and Fails to Fulfill Its Promises*, INSTITUTE FOR JUSTICE (Feb. 2024), <https://ij.org/wp-content/uploads/2023/11/Unaccountable-qualified-immunity-web.pdf>.

The district court's any-pretext-will-do approach makes things more difficult still. The government need only identify some authority for its retaliatory action to immunize itself, regardless of whether that authority had any impact on the actual intent of the adverse decision. In an era of overcriminalization and overregulation, that will often be easily done.

[C]riminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something. If the state could use these laws not for their intended purposes but to silence those who voice unpopular ideas, little would be left of our First Amendment liberties, and little would separate us from the tyrannies of the past or the malignant fiefdoms of our own age.

Nieves, 587 U.S. at 412 (Gorsuch, J., concurring in part).

This case is a perfect example. The district court relied on a zoning ordinance to deny Plaintiffs' First Amendment claim. Order 45. But the Town had no idea this ordinance even existed until the Town Attorney happened across it while in the process of drafting the retaliatory cease-and-desist letter. The district court's standard thus encourages government officials to comb the voluminous and ever-expanding tomes of regulations to find a *post hoc* justification that can whitewash retaliation. The First Amendment's protections are much too important

to be so easily evaded. And the public's faith in the Constitution and the courts is ill-served by allowing the system to be duped by obvious pretext.

Conclusion

“The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (Marshall, C.J.). Yet, here, government retaliation to free speech—which “is uniquely harmful to a free and democratic society,” *Vullo*, 602 U.S. at 187—went unanswered because of a fundamental misunderstanding of what the First Amendment requires. This Court should remedy the error and reverse the district court's decision on retaliation.

Dated: September 15, 2026

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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e)(2)(B) and 29(a)(5) because it contains 3,352 words, excluding the parts of the motion exempted by rule; and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Word (the same program used to calculate the word count).

/s/ Jeremy Calsyn
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Certificate of Service

I hereby certify that on September 15, 2026, I electronically filed a true and correct copy of the foregoing document using this Court's CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ *Jeremy Calsyn*
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