No. 17-21

IN THE

Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Officer Francisco Aguirre, a City of Riviera Beach police officer, arrested Fane Lozman based on his independent determination that he had probable cause to do so. Lozman sued the City, under 42 U.S.C. § 1983, arguing that the arrest violated his constitutional rights. In light of the rule that municipalities may not be held vicariously liable under § 1983 for their employees' conduct, *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690, 694 (1978), does Lozman's claim fail as a matter of law?

2. In *Hartman v. Moore*, 547 U.S. 250 (2005), this Court held that probable cause defeats a First Amendment retaliatory-prosecution claim as a matter of law. Does probable cause likewise defeat a First Amendment retaliatory-arrest claim?

PARTIES TO THE PROCEEDING

The plaintiff in the District Court was Fane Lozman. The defendants were:

1. The City of Riviera Beach;
2. Michael Brown;
3. George Carter;
4. Judy Davis;
5. Norma Duncombe;
6. Bruce Guyton;
7. Ann Iles;
8. Vanessa Lee;
9. Dawn Pardo;
10. Riviera Beach Community Redevelopment Agency;
11. Gloria Shuttlesworth;
12. Cedrick Thomas; and
13. Elizabeth Wade.

The only parties to the Eleventh Circuit appeal below, and to this proceeding in the Supreme Court of the United States, are Fane Lozman and the City of Riviera Beach.

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INTRODUCTION

Fane Lozman's petition asks whether probable cause defeats a First Amendment retaliatory-arrest claim as a matter of law. To answer that question, the Court would have to overlook Lozman's failure to raise it in the Eleventh Circuit. The Court would also have to overlook an alternative basis for affirming the Eleventh Circuit—one that rests on statutory grounds, and that would make it unnecessary to address the constitutional question Lozman presents. And it would have to do all of this in a case where the petitioner's rights were not even violated, because probable cause *does* defeat a First Amendment retaliatory-arrest claim as a matter of law. The Court should deny Lozman's petition for a writ of certiorari.

STATEMENT

1. Fane Lozman moved to the City of Riviera Beach in 2006. Petn. 16a. He has spent much of the time since protesting, and filing lawsuits in opposition to, local policies and local officials.

Lozman is a particularly outspoken critic of the former mayor and members of the City Council. He began regularly attending the City Council's bimonthly meetings in 2006. *See* ECF No. 820, *Lozman v. City of Riviera Beach*, No. 08-cv-80134 (S.D. Fla.) ("Dkt.") (videos of meetings introduced as exhibits at trial). He often exercised his right to speak during the portion of those meetings dedicated to public comment. The Council permitted him to do so, despite his using the time to make accusatory, often *ad hominem* harangues. *Id.* Lozman's presentations threatened local

officials with jail time based on vague accusations of "corruption." *See, e.g.*, Dkt. 820, Ex. 5 (July 19, 2006 meeting). In a September 2006 address, Lozman charged the mayor's brother with having bitten someone, and asked whether the mayor would require his brother to be muzzled. *Id.*, Ex. 7 (September 6, 2006 meeting). And on another occasion, he accused the mayor of having "spew[ed] … racist bile" toward then-Governor Jeb Bush. *Id.*, Ex. 5. In each instance, however, the Council permitted Lozman to make his statements during the allotted time.

Lozman, as he usually did, attended the Council's November 15, 2006 meeting. And Lozman, as he usually did, chose to address the Council during the time for public comment. But rather than focusing on his usual targets—the mayor and the City Council—Lozman began addressing corruption on the part of Palm Beach County officials. *See Activist Arrested at Riviera Beach Council Meeting*, YOUTUBE (Sept. 15, 2009), https://tinyurl.com/lbj5qqj. The City of Riviera Beach is located within Palm Beach County, but the County and the City are distinct entities. Thus, Lozman's address had nothing to do with City business. (Lozman's petition obscures this, by describing his speech as relating to "local government corruption in Palm Beach County," without specifying *whose* corruption. Petn. 5.)

This caused Councilmember Elizabeth Wade to speak up. She did not ask Lozman to stop speaking altogether, but she did attempt to redirect him, instructing that he would not be permitted to "stand up and go through that kind of …." Before

she could finish, Lozman interrupted her by exclaiming "Yes, I will." Wade responded that he would not, and, when Lozman resumed his discussion of corruption by County officials, Wade called for an "officer." *See Activist Arrested at Riviera Beach Council Meeting*, https://tinyurl.com/lbj5qqj.

At this point, Officer Francisco Aguirre—a rookie policeman who had never heard of Lozman, never worked at or even attended a Council meeting, and never met the councilmembers—approached Lozman and quietly asked him to come outside. Lozman refused ("I'm not finished"). Officer Aguirre asked again, stating: "You're going to be arrested if you don't walk outside." Lozman responded that he was "not walking outside," because he had not "finished [his] comments." At this point, Councilmember Wade interjected that, if Lozman would not walk outside, Officer Aguirre should "carry him out." Even before Wade finished making that request, Officer Aguirre reached for his handcuffs. He placed Lozman under arrest, and escorted him out of the meeting. *Id.*; *see also* Petn. 4a.

Despite Wade's request, the decision to arrest Lozman was Officer Aguirre's to make. Under an ordinance that was then in effect, the City Council Chairperson was assigned responsibility for "preserv[ing] order and decorum within the Chambers." Dkt. 805 at 60. But, as confirmed by uncontroverted evidence from two separate witnesses at trial, neither the Chairperson nor the Council had authority to order a speaker's arrest. Instead, police officers alone had discretion to

decide whether to make an arrest, and could do so only upon independently determining that there was probable cause to do so. *See* Dkt. 770, Day 3 Tr. 174:1–6, 219:9–15; Dkt. 772, Day 5 Tr. 11:13–22. In any event, the council member who called for Officer Aguirre's assistance—Councilmember Wade—was neither the Council's Chairperson nor its Vice Chairperson. Dkt. 770, Day 3 Tr. 14:5–8, 224:14–17. So she would have lacked authority to order Lozman's arrest even if there had been an ordinance authorizing the Chairperson to issue such an order.

2. The first round of litigation over this incident began in Florida state court, when the City sued to evict Lozman. In response, Lozman raised a slew of counterclaims, including one accusing the City of violating his First Amendment rights by arresting him at the November 15 meeting. As the case progressed, "the state court dismissed" this counterclaim "without prejudice based upon an agreement between counsel." *Lozman v. City of Riviera Beach (Lozman I)*, 713 F.3d 1066, 1070 (11th Cir. 2013).

While the remainder of Lozman's counterclaims remained pending in the state action, Lozman filed this federal suit against the City and numerous others. Once the state suit wrapped up, the District Court *sua sponte* ruled that Lozman's federal suit was effectively an appeal of the state court's earlier judgment, and dismissed for lack of jurisdiction under the *Rooker-Feldman* doctrine. But the Eleventh Circuit reversed that ruling, and remanded the case to the District Court for a jury trial. *Lozman I*, 713 F.3d at 1073–74.

The City and Lozman disputed numerous legal issues in the District Court. The City, for example, argued that it was entitled to summary judgment under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 690, 694 (1978), which held that municipalities are not vicariously liable in § 1983 suits for their employees' conduct. *See* Dkt. 383 at 2–11. And over the course of the trial, the parties presented evidence and made arguments on the many issues underlying Lozman's claims. In the end, the case went to the jury, which was instructed that Lozman, to succeed on his First Amendment retaliatory-arrest claim, had to prove that Office Aguirre lacked probable cause to arrest him. Ultimately, the jury returned a verdict for the City. *See* Dkt. 786, Day 19 Tr. 56:10–58:5.

3. Lozman retained appellate counsel and appealed to the Eleventh Circuit. There, he argued that he was entitled to a new trial because "the jury's verdict finding probable cause to arrest … was against the great weight of the evidence." Petn. 7a. (Lozman also challenged two jury instructions, but neither is relevant to the question presented.) Lozman failed to dispute—and thus implicitly conceded—that he was obligated to prove a lack of probable cause as an element of his First Amendment retaliatory-arrest claim.

The City responded to each of Lozman's arguments for reversal. But it also pointed to an alternative basis for affirmance: As it did in the District Court, the City argued that Lozman's retaliatory-arrest claim failed as a matter of law because he was attempting to hold the City

vicariously liable for the conduct of its employees, which is impermissible under § 1983. *See* Ans. Br. of Appellee City of Riviera Beach 28–32, *Lozman*, 713 F.3d 1066 (No. 15-10550).

The Eleventh Circuit affirmed the District Court. In addressing Lozman's new-trial argument, the Eleventh Circuit followed Lozman's lead by relying unquestioningly on circuit precedent requiring retaliatory-arrest plaintiffs to prove lack of probable cause. *See* Petn. 7a (citing *Dahl v. Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002)). It treated the issue as undisputed, and nowhere noted any attempt by Lozman to preserve the issue for further appeal. So rather than grappling with this issue—or with the alternative ground for affirmance proposed by the City—the Eleventh Circuit found that the evidence supported the jury's no-probable-cause finding, rejected Lozman's jury-instruction arguments, and affirmed. Petn. 9a, 14a.

Lozman's petition for certiorari followed.

REASONS FOR DENYING CERTIORARI

This Court should deny Lozman's petition for a writ of certiorari for three reasons. First, Lozman waived his argument by failing to make it in the Eleventh Circuit. Second, because Lozman seeks to hold the City liable for its employees' conduct, and because § 1983 does not permit liability in these circumstances, *Monell*, 436 U.S. at 690, 694, there is an alternative statutory basis for resolving this case. The Court should therefore decline to resolve the constitutional question that Lozman's petition presents. Finally, Lozman was properly denied

relief because probable cause defeats a First Amendment retaliatory-arrest claim as a matter of law.

I. LOZMAN WAIVED HIS ARGUMENT BY FAILING TO RAISE IT IN THE ELEVENTH CIRCUIT.

Lozman's petition for certiorari presents a single question: "Does the existence of probable cause defeat a First Amendment retaliatory-arrest claim as a matter of law?" Petn. i. He argues that the answer is "no." But he never made that argument before the Eleventh Circuit. To the contrary, he assumed that lack of probable cause *was* an element of his claim: He accepted without question jury instructions that required the jurors to find the absence of probable cause, and he argued that there was insufficient evidence to support the jury's probable cause finding. *See* Opening Br. of Appellant 23–34, *Lozman*, 713 F.3d 1066 (No. 15-10550). Because Lozman's "argument was not raised below, it is waived." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002); *see also Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210 (2015) (party waived argument by failing to raise it in the Court of Appeals); *United States v. Jones*, 565 U.S. 400, 413 (2012) (argument neither raised in nor addressed by the Court of Appeals was "forfeited").

It is true that circuit precedent foreclosed Lozman's argument. *See Dahl*, 312 F.3d at 1236. It is also irrelevant. The Eleventh Circuit can and does overrule circuit precedent, *see, e.g.*, *McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1080 (11th Cir. 2017) (en banc),

and nothing prevented Lozman from asking it to do so. Even if he thought the argument hopeless—and surely it is not hopeless to ask a court to reconsider precedent implicated in a circuit split—he could have expressly preserved the argument for further review, as others have done before petitioning this Court for a writ of certiorari. *See, e.g.*, *United States v. Voisine*, 778 F.3d 176, 186 (1st Cir. 2015), *cert. granted in part*, 136 S. Ct. 386 (2015), *aff'd*, 136 S. Ct. 2272 (2016) (party preserved for review before the Supreme Court an argument foreclosed by circuit precedent); *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 2545 (2016) (granting certiorari to review argument that petitioner conceded was foreclosed by precedent, but that it nonetheless preserved).

The circumstances of this case make forgiving Lozman's waiver especially hard to justify. As this brief explains below in Section II, Lozman's retaliatory-arrest claim fails as a matter of law on statutory grounds unrelated to the question presented. The Eleventh Circuit did not address this alternative basis for affirmance, even though the City briefed it. But had Lozman raised his constitutional argument, the Eleventh Circuit might have resolved the case on that alternative statutory ground. The City, the Eleventh Circuit, and the District Court should not have to further litigate a case that might well be over had Lozman raised the question presented at some point before seeking a writ of certiorari.

II. LOZMAN'S RETALIATORY-ARREST CLAIM FAILS AS A MATTER OF LAW, REGARDLESS OF THE ANSWER TO THE QUESTION PRESENTED.

According to Lozman, this is an "ideal vehicle" for resolving the question presented because municipalities such as the City are ineligible for qualified immunity. Petn. 18–19 (citing *Owen v. City of Independence*, 445 U.S. 622, 657 (1980)). This, Lozman says, means the Court will reach the question presented, unlike in *Reichle v. Howards*, 566 U.S. 658, 670 (2012), where the Court granted certiorari to address the same question presented here but ultimately reversed on qualified-immunity grounds.

This vehicle argument overlooks an alternative, statutory basis for affirming the Eleventh Circuit. To be sure, municipalities are ineligible for qualified immunity in § 1983 cases. *Owen*, 445 U.S. 622 at 657. But a distinct body of law protects them from liability. Under *Monell*, municipalities may not be held vicariously liable in § 1983 cases for their employees' conduct. 436 U.S. at 690. Rather, a municipality may be held liable under § 1983 only when its own "policy or custom … inflicts the injury" for which relief is sought. *Id*. at 694.

Here, Lozman's arrest was caused not by the City's own policies, but rather by the independent decisions of a City employee. His § 1983 claim against the City thus fails as a matter of law, *without regard* to whether the arrest violated his constitutional rights. This means that Lozman's

case is no better a vehicle for resolving the question presented than was *Reichle*. It also means that resolving the question presented requires overriding this Court's "usual practice" of avoiding "the unnecessary resolution of constitutional questions." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009).

A. Section 1983 imposes liability on "[e]very *person* who, under color of" state law, "subjects, or causes to be subjected, any citizen of the United States … to the deprivation of any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983 (emphasis added). The word "person" includes municipalities and local governments, so they can be sued under § 1983. *Monell*, 436 U.S. at 694.

Municipalities are not, however, vicariously liable for the tortious conduct of their employees. This follows from § 1983's legislative history, *id.* at 690, and its text, which imposes liability only for those deprivations of rights to which citizens are "*subject[ed]*, or *cause[d]* to be subjected," by the "person" being sued. 42 U.S.C. § 1983 (emphasis added); *Monell*, 436 U.S. at 691. Because § 1983 is keyed to the conduct of the "person" being sued, municipalities "are responsible only for 'their *own* illegal acts.'" *Connick v. Thompson*, 563 U.S. 51, 60 (2011) (quoting *Pembaur v. Cincinnati*, 475 U.S. 469, 479 (1986)). That is, "[p]laintiffs who seek to impose liability on local governments under § 1983 must prove that 'action pursuant to official municipal policy' caused their injury." *Id.* (quoting *Monell*, 436 U.S. at 691.)

"Official municipal policy includes the decisions of a government's lawmakers," along with "practices so persistent and widespread as to practically have the force of law." *Id.* at 61. It also includes "the acts of its policymaking officials." *Id.* That is, a municipality may be liable for actions taken by someone with "final policymaking authority … concerning the action alleged to have caused the particular constitutional or statutory violation at issue." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989). Whether an official has such authority is a question of law. So, in a § 1983 case, a court is required to identify, under state law, those officials or governmental bodies with final policymaking authority. *McMillian v. Monroe Cty.*, 520 U.S. 781, 786 (1997).

B. Lozman says the City violated his First Amendment rights when Officer Aguirre arrested him during his address to the City Council. Whether that alleged violation can be attributed to the City depends on whether it was performed pursuant to official municipal policy.

It was not. No written policy or informal custom required Officer Aguirre to arrest Lozman based on Wade's request to have Lozman removed. Nor was Wade a "final policymaking authority" concerning the question whether to perform an arrest. *Jett*, 491 U.S. at 737. Rather—as established by the uncontroverted testimony of two witnesses, including Officer Aguirre—officers *cannot* take orders from councilmembers regarding whom to arrest, and may perform an arrest only after independently deciding to do so. *See* Dkt. 770, Day 3 Tr. 174:1–6, 219:9–15; Dkt. 722, Day 5 Tr. 11:13–

22. To be sure, a city ordinance empowered the Council Chairperson to "preserve order and decorum within the Chambers." Dkt. 805 at 60. But there is no evidence that this included authority to order an arrest. And in any event, Wade was neither the Chair nor the Vice Chair.

The decision to arrest Lozman came not from "the policymaking level of government," but rather from a single "police officer" alleged to have "made an illegal arrest." *Vodak v. City of Chicago*, 639 F.3d 738, 747 (7th Cir. 2011). Officer Aguirre's independent decision to perform a single arrest does not constitute "official municipal policy," and so is not attributable to the City. *Id*. While Officer Aguirre had final *decisionmaking* authority regarding whether to arrest Lozman at the November 2006 meeting, he lacked any authority to set official municipal arrest policy. *See Valle v. City of Houston*, 613 F.3d 536, 543–44 (5th Cir. 2010) (drawing the same distinction in holding that municipality could not be held liable for officer's discretionary decision that resulted in an allegedly illegal search and seizure). Lozman's First Amendment retaliatory-arrest claim therefore fails as a matter of law, *without regard* to whether there was probable cause to arrest him.

C. "'[I]t is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.'" *United States v. Resendiz-Ponce*, 549 U.S. 102, 104 (2007) (quoting *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)). Here, the Eleventh Circuit can be affirmed on statutory

grounds without reaching the First Amendment question that Lozman's petition presents.

This case does not present circumstances that would justify deviating from the "usual practice" of avoiding unnecessary constitutional rulings. *Nw. Austin*, 557 U.S. at 197. It has been more than five years since this Court decided *Reichle* without resolving the question presented by Lozman's petition. 566 U.S. at 670 (reversing on qualified-immunity grounds). Nothing in the five years since *Reichle* suggests this circuit split is particularly in need of Supreme Court resolution. It follows that the Court ought not reach the question presented.

III. LOZMAN IS NOT ENTITLED TO RELIEF BECAUSE LACK OF PROBABLE CAUSE IS AN ELEMENT OF A FIRST AMENDMENT RETALIATORY-ARREST CLAIM.

Below, the Eleventh Circuit recognized that probable cause for an arrest defeats a retaliatory-arrest claim as a matter of law. Petn. 7a–8a. Lozman argues that the burden-shifting framework announced in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), should apply to First Amendment retaliatory-arrest claims. This Court created the *Mt. Healthy* framework for cases in which public employees claim to have been fired (or never hired) for exercising their First Amendment rights. It has three steps: *First*, the plaintiff must show "that his conduct was constitutionally protected." *Id.* at 287. *Second*, he must show that his protected conduct was a "motivating factor" in the employer's adverse employment decision. *Finally*, if the plaintiff

makes both of these showings, the burden shifts to the government employer to prove "by a preponderance of the evidence that it would have reached the same decision … even in the absence of protected conduct." *Id*.

Applied to the retaliatory-arrest context, the *Mt. Healthy* framework would mean that officers violate the First Amendment whenever they make an arrest that they would not have made but for the arrestee's protected speech. The question presented, therefore, boils down to whether the First Amendment forbids such arrests. This Court's case law, along with historical and practical considerations, confirm that it does not.

A. This Court's Precedent Supports Requiring Retaliatory-Arrest Plaintiffs To Prove Lack of Probable Cause.

In *Hartman v. Moore*, 547 U.S. 250 (2006), this Court held that plaintiffs alleging retaliatory *prosecution* in violation of the First Amendment must plead and prove lack of probable cause. *Id*. at 256. It gave two primary reasons for doing so, both of which apply to the retaliatory-arrest context.

First, the Court noted that causation will always be at issue in a retaliatory-prosecution case, because the plaintiff will have to make (at least) a *prima facie* case that retaliatory animus caused him to be prosecuted. Evidence regarding probable cause is "highly valuable" to proving or disproving "retaliatory causation." *Id*. at 261. It is also always readily available. *Id*. Thus, the no-probable-cause requirement imposed little cost, since it obligated the plaintiff only to litigate a

highly relevant fact that is certain to be litigated anyway. *Id.*

The same logic applies to retaliatory arrests: "Like retaliatory prosecution cases, evidence of the presence or absence of probable cause for the arrest will be available in virtually every retaliatory arrest case." *Reichle*, 566 U.S. at 668. And this evidence is similarly critical, "given that retaliatory arrest cases also present a tenuous causal connection between the defendant's alleged animus and the plaintiff's injury." *Id.* While "[a]n officer might bear animus toward the content of a suspect's speech," he may also "decide to arrest the suspect because his speech provides evidence of a crime or suggests a potential threat." *Id.*; *see also infra* 17–19. Evidence of probable cause is readily available and critically important to determining whether the arrest really was retaliatory. *Reichle*, 566 U.S. at 668.

The second reason *Hartman* gave for recognizing a no-probable-cause element is "that the requisite causation between the defendant's retaliatory animus and the plaintiff's injury is usually more complex than it is in other retaliation cases." 547 U.S. at 261. The complexity stems from the fact that prosecutors are absolutely immune from suit, and are subject to the "presumption of prosecutorial regularity," under which they are presumed to discharge their duties in good faith. Because of all this, "the defendant" in a retaliatory-prosecution case "will be a nonprosecutor … who may have influenced the prosecutorial decision but did not himself make it." *Id.* at 262. As a result, retaliatory-prosecution plaintiffs must prove "that

the nonprosecuting official acted in retaliation, and must also show that he induced the prosecutor to bring charges that would not have been initiated without his urging." *Id.* Requiring plaintiffs to prove a lack of probable cause helps "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.

The no-probable-cause element serves the same function in the retaliatory-arrest context. To be sure, the causal chain in a retaliatory-arrest case *may* involve the conduct of a single person, since the arresting officer and the officer with retaliatory animus may be one and the same. Often, however, the chain will often be a good deal more complicated; the arresting officer may have no animus whatsoever, and may decide to perform an arrest while simultaneously being urged to do so by someone else (for example, a supervisor or a fellow officer). Indeed, that is precisely what Lozman alleges happened here: He says Officer Aguirre performed the arrest at the urging of Councilmember Wade, and that *Wade* is the one who wished to retaliate against Lozman. The very same problem that arises in the retaliatory-prosecution case—the need to bridge the gap between one person's animus and another's conduct—arose here, and will arise often in arrest situations. As in the retaliatory-prosecution context, lack of probable cause helps bridge the causal gap between one person's animus and another's action, and thus helps justify the

conclusion that retaliatory animus really did cause the plaintiff's arrest.

B. A Rule Prohibiting Officers from Making Arrests Deviates from Longstanding Practice.

The Eleventh Circuit's no-probable-cause requirement is further supported by longstanding practice and practical concerns. If Lozman is right that the *Mt. Healthy* framework applies to First Amendment retaliatory-arrest claims, then everyday, uncontroversial policing tactics are unconstitutional. Speech protected by the First Amendment often "provides evidence of a crime or suggests a potential threat." *Reichle*, 566 U.S. at 668. In some circumstances, protected speech might even create probable cause for an arrest. In *Wayte v. United States*, 470 U.S. 598 (1985), for example, petitioner David Wayte "wrote several letters to Government officials, including the President, stating that he had not registered" for the Selective Service "and did not intend to do so." *Id.* at 601. Wayte indisputably had a right to send these letters. Nonetheless, this Court rejected his First Amendment challenge to his conviction. Wayte's letters "provided strong, perhaps conclusive evidence of the nonregistrant's intent not to comply—one of the elements of the offense" of failing to register for the draft. *Id.* at 612–13. And if Wayte were right that the Government had to prove "that it would have prosecuted him without his letter," "any criminal [could] obtain immunity from prosecution simply by reporting himself and claiming that he did so in order to 'protest' the law." *Id.* at 614.

Even when protected speech does not create probable cause for an arrest, it is frequently relevant to the decision whether to arrest a lawbreaker. Officers cannot enforce every violation of every law; they must "use some discretion in deciding when and where" to do so. *City of Chicago v. Morales*, 527 U.S. 41, 62 n.32 (1999). Often, a potential arrestee's protected speech will inform the exercise of that discretion.

The facts of *Reichle* illustrate the point. There, Secret Service agents arrested Steven Howards after he touched Vice President Dick Cheney on the shoulder during an exchange at a Colorado mall. 566 U.S. at 661. Howards' touching the Vice President gave them probable cause to arrest him for assault. But the real reason the agents performed the arrest likely had nothing to do with the assault; rather, they concluded that Howards posed a danger based on some combination of three statements he made, each protected by the First Amendment: *First,* Howards explained on a phone call, made before meeting Cheney, that he would "ask [the Vice President] how many kids he's killed today." *Id*. at 660. *Second*, Howards told Cheney that "his 'policies in Iraq [were] disgusting.'" *Id*. at 661. *Finally*, when confronted by a Secret Service agent about his having touched Cheney, Howards stated that the Service should "have [the Vice President] avoid public places" if it did not "want other people sharing their opinions." *Id*. The First Amendment entitled Howards to make each of these statements. But the same statements indicated a hostility toward the Vice President that, at least when coupled with the mall's lack of

security, reasonably led the agents to conclude that arresting Howards was necessary to protect the Vice President and those in his vicinity. As a result, they arrested Howards for conduct that surely would not have led to his arrest but for his protected speech.

More mundane examples illustrate just how common (and legitimate) such considerations are. For example, an officer might consider whether a drunk is making aggressive statements—and thus is more likely to be a threat to public safety—in deciding to perform an arrest for public intoxication or an open-container violation. *See, e.g.*, *Martin v. City of Oklahoma City*, 180 F. Supp. 3d 978, 984 (W.D. Okla. 2016); *Valdez v. City of San Jose*, No. C 09-0176 CW, 2013 WL 752498, at *2 (N.D. Cal. Feb. 27, 2013); *Legan v. State*, 889 N.E.2d 928 (Ind. Ct. App. 2008). That's good policing, not a constitutional tort.

It is thus easy to imagine myriad circumstances in which officers perform arrests that they would not have performed but for the arrestee's speech. Under Lozman's proposed rule, every one of them would be unconstitutional. He is therefore wrong in arguing that "[t]he *Mt. Healthy* framework is well-suited to retaliatory-arrest claims." Petn. 23. "[P]olice officers are often forced to make split-second judgments," and to do so "in circumstances that are tense, uncertain, and rapidly evolving." *Graham v. Connor*, 490 U.S. 386, 397 (1989). Their ability to do so would be greatly impaired by subjecting them to *personal liability* for relying on potential arrestees' speech.

Indeed, the *Mt. Healthy* framework would not just impair police work; it would make it more dangerous than it already is. If this Court were to adopt the *Mt. Healthy* framework, arrestees would have an incentive to verbally abuse officers when facing the possibility of arrest, as their doing so would expose the arresting officer to the threat of liability and so decrease the odds of an arrest. In addition to needlessly deterring legitimate arrests, giving citizens greater incentive to exhibit hostility toward the police will create more dangerous (and perhaps deadly) situations. Just as the First Amendment "confers no … immunity from prosecution" on those who report themselves to "'protest' the law," *Wayte*, 470 U.S. at 614, it should confer no immunity from arrest on those who antagonize the police and their fellow citizens.

Finally, adopting Lozman's rule would create a federal case almost every time an officer arrests someone, as there is almost always *some* verbal interaction between officer and arrestee. It is no answer to say that there have been relatively few retaliatory-arrest suits to date. A Supreme Court decision in Lozman's favor would receive exponentially more attention and encourage exponentially more copycat suits than circuit-court decisions doing the same. More critically, adopting Lozman's rule would destroy the qualified-immunity defense now available in many situations because it would clearly establish the law. With that, the odds of prevailing—and the number of claims filed—will increase dramatically.

C. The Equal Protection Clause Has No Bearing on This Case.

In *Whren v. United States*, 517 U.S. 806, 813 (1996), this Court explained that an arrest motivated by race would violate the Equal Protection Clause *even if* it were supported by probable cause. This recognition does not support Lozman's theory. Petn. 33. The Equal Protection Clause exists to prohibit government actors from making otherwise-valid enforcement decisions based on race and other irrelevant considerations—that is, "to secure every person within the State's jurisdiction against intentional and arbitrary discrimination." *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 352 (1918). As a result, Equal Protection challenges are often necessarily subjective; whether a violation occurred comes down to what motivated the government actor. To prevent the Equal Protection Clause from accomplishing nothing with respect to the arbitrary enforcement decisions it is supposed to prohibit, probable cause is neither an element of nor a defense to an Equal Protection challenge.

The First Amendment is different. Protecting against retaliatory arrests is but a small fraction of what the First Amendment does. *Hartman* recognized as much by requiring retaliatory-*prosecution* plaintiffs to prove lack of probable cause. *See* 547 U.S. at 256, 265–66. Retaliatory-*arrest* plaintiffs are no different. To be sure, an arrest motivated by protected speech may constitute an arbitrary enforcement decision that gives rise to an Equal Protection claim. But

Lozman has not made such an argument, and so the Court need not address the issue here.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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