No. 17-____

IN THE
Supreme Court of the United States

DWIGHT E. JORDAN,
Petitioner,

v.

CITY OF DARIEN, GEORGIA, ET AL.
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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I

QUESTION PRESENTED

Does the existence of probable cause defeat a First Amendment retaliatory arrest claim as a matter of law?

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PETITION FOR A WRIT OF CERTIORARI

Dwight E. Jordan respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 698 F. App'x 576. The order of the United States District Court for the Southern District of Georgia granting summary judgment to respondents is unreported but available at 2016 WL 6841077.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 2017. The court denied rehearing on December 15, 2017. An extension of time to file this Petition was granted through and including April 16, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

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 or Territory or the District of Columbia, 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, suit in equity, or other proper proceeding for redress . . . ."

STATEMENT OF THE CASE

This case presents the same issue, from the same Circuit Court, as *Lozman v. City of Riviera Beach*, 681 F. App'x 746 (11th Cir. 2017), which is currently before this Court on a writ of certiorari.

This is a case about a conspiracy to push an outspoken black leader from office on false charges. Dwight E. Jordan, Petitioner, was a veteran school board member. Jordan was first elected in 1998. Cir. App. at 77-3. He was reelected in 2002, 2006, and 2010. *Id.* At all times relevant, Jordan served as the only black board member. App. at 4a. He gained a

reputation for passionately representing his constituents and often addressed race issues head-on, frustrating or discomforting people. Cir. App. at 77-1, 77-6.

For those reasons, Bonita Caldwell, the board chair, reviled Jordan. *Id.* at 77-1, 77-4, 77-10, 77-11. She had been actively working to undermine him and explicitly expressed to certain voters during her campaign that she would "shut him up" and "embarrass him." *Id.* at 77-5. The culmination of her plan was set into motion on April 18, 2013, when Jordan was removed from a board meeting for "cursing" during a recess. App. at 4a. Five weeks later, Jordan was arrested for his alleged conduct surrounding the meeting. *Id.* at 7a.

Only a few days after Jordan was arrested, Officer Nick Roundtree admitted the real reason for his arrest: "[T]his situation pretty much ha[s] to do with his election that's coming up, and there's other people that's pushing this, and they want him off the board." Cir. App. at 77-5.

A. At the board meeting, Jordan is removed, and the incident reports are written.

On April 18, 2013, the Board of Education convened. App at 4a. At that meeting, the board began discussing the issue of school uniforms, a topic important to Jordan's constituents. *Id.* While Jordan was talking, Caldwell interrupted him and began talking over him. Cir. App. at 77-14, 99. A verbal altercation between the two escalated. App. at 4a–5a.

Members of the Board began to leave. Eventually, the Board went into recess. *Id.* at 5a. Afterward, a member of the Board called Donnie Howard, the Chief of the Darien Police Department. *Id.* The district court stated that this informant was Assistant Superintendent Larry Day. *Id.* However, other evidence in the record indicates it could have been Caldwell. Cir. App. at 77-28, 77-31, 99, 99-1.

Outside the building, Officer Davis arrived in the parking lot just two minutes after Chief Howard called him. App. at 5a–6a; Cir. App. at 77-18. There, he saw Jordan talking with Larry Day and a local parent, Cassandra Walton. Cir. App. at 77-3. During that conversation, Jordan recalls he may have used the word "goddamn." *Id.* at 77-3, 77-17. Davis then approached Jordan and directed him not to curse. App. at 6a. Both Day and Walton testified that he cursed once in private conversation with them and did not curse again. Cir. App. at 77-19, 77-21.

After a momentary exchange with Jordan, Officer Davis walked away. *Id.* at 77-3, 77-16. Officer Brown then arrived and told Jordan that Jordan would have to leave the property because he was criminally trespassing. *Id.* at 77-3. Jordan was permitted to retrieve his belongings and left without further incident. App. at 6a. As he was being escorted out and protesting the officers' actions, Brown told Jordan that "they want to ban you from the property . . . you can be banned." Cir. App. at 77-23.

Afterward, the officers filled out police reports. Jordan, Walton, and Day all dispute the officers' characterization of the event. *Id.* 77-19, 77-21.

Furthermore, Davis listed Caldwell as a witness, even though she had not witnessed the event. *Id.* at 77-17, 62, 75-12. Davis did not list Walton as a witness, although Walton had been standing next to Jordan during the entire event. *Id.* 77-21.

B. The month-long "investigation" includes interested parties and discussions off-the-record.

Following the incident, Officer Roundtree began investigating Jordan at the direction of Chief Howard. App. at 6a. Howard had spoken with Caldwell off-the-record the morning after Jordan's removal. Cir. App. at 77-27, 63. During the investigation, Roundtree conducted multiple interviews, including interviews with Caldwell, Day, and other members of the board. App. at 6a–7a. During Roundtree's interviews with Caldwell, the two discussed the possible crimes with which Jordan could be charged, and Caldwell's plans to trigger state-level action against Jordan. Cir. App. at 77-35. 99-19, 99-17. Roundtree also looked into decades–old information about Jordan's employment history—requesting records from the Department of Labor and the Board of Pardons and Paroles. *Id.* 77-41, 77-42, 77-31. At the same time, on his own and off the record, Chief Howard discussed the case with two witnesses. *Id.* 77-15, 99, 77-8, 77-37. Eventually, Roundtree swore out an affidavit claiming that probable cause existed to arrest Jordan. App. at 8a.

C. Jordan is arrested and the conspirators achieve their goals.

On May 22, 2013, Officer Roundtree sought a warrant to arrest Plaintiff for disorderly conduct and disrupting a lawful meeting. *Id*. A warrant was issued and Jordan voluntarily surrendered. *Id.* Roundtree called media within an hour of the arrest and drafted an unprecedented press release at the direction of Chief Howard. Cir. App. at 99, 99-32, 99-31, 77-8. Jordan was subsequently released. App. at 9a. Ultimately, a year later, the disorderly conduct charge was dismissed. *Id.*

D. The district court grants the Defendants' motions for summary judgment.

Jordan filed suit against the City of Darien, Bonita Caldwell, Chief Donnie Howard, and Officers Roundtree, Davis, and Brown on March 16, 2015, seeking declaratory relief and damages under 42 U.S.C. §§ 1983 and 1985 for violations of the First and Fourth Amendments, the Georgia Constitution, and the Georgia Open Meetings Act. Cir. App. at 1. On March 17, 2016, Jordan amended his complaint, with leave of the court, to clarify his original allegations. *Id.* at 41. On May 17, 2016, Jordan moved for partial summary judgment and all defendants moved for summary judgment. App. at 3a–4a.

On November 18, 2016, the district court granted Defendants' summary judgment motions and denied Jordan's. *Id.* at 20a. In so doing, it found the officers were entitled to qualified immunity, *Id.* at 10a–18a,

the claims of Jordan against the City were barred by the Eleventh Circuit's rule that probable cause for an arrest is an absolute bar to liability for retaliatory arrest, *Id.* at 12a, and the conspiracy claim was unsupported by the evidence, *Id.* at 19a–20a.

E. The Eleventh Circuit affirms.

The Eleventh Circuit summarily affirmed on September 28, 2017. *Id.* at 2a. A motion for rehearing and rehearing en banc was denied on December 15, 2017. *Id.* at 21a.

REASONS FOR GRANTING THE WRIT

I. This Court has already granted certiorari on this issue in a case arising from the same circuit, recognizing that this rule creates a circuit split on an important issue.

The Eleventh Circuit's decision implicates a circuit split over whether a First Amendment retaliatory-arrest claim can be categorically defeated by the presence of probable cause. This split intensified following this Court's decisions in *Hartman v. Moore*, 547 U.S. 250 (2006), and *Reichle v. Howards*, 566 U.S. 658 (2012). In *Hartman*, this Court held that 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. Subsequently, the Court granted certiorari in *Reichle* to determine whether "the reasoning in *Hartman*" should apply to retaliatory *arrests* as well. *See* 566 U.S. at 670. However, the Court did not decide that question, because it concluded that the individual defendants in that case were entitled to qualified immunity. *See Id*. This question has not been resolved yet.

This Court has already recognized the importance of this question by granting certiorari in *Lozman v. City of Riviera Beach*, No. 17-21. *See also Lozman v. City of Riviera Beach*, 681 F. App'x 746 (11th Cir. 2017) (holding that "probable cause 'constitutes an absolute bar' to a claim for false arrest[regardless of] whether the false arrest claim is brought under the

First Amendment, the Fourth Amendment, or state law") (internal citations omitted).

A. The circuits are pervasively split on this issue.

In the Ninth and Tenth Circuits, a plaintiff can prevail in a First Amendment retaliatory-arrest claim even if probable cause existed for the underlying arrest. *See Ford v. City of Yakima*, 706 F.3d 1188, 1196 (9th Cir. 2013) (holding that an arrest "motivated by retaliatory animus" is unlawful, "even if probable cause existed for that action"); *Howards v. McLaughlin*, 634 F.3d 1131, 1148 (10th Cir. 2011) (holding that "an arrest made in retaliation of an individual's First Amendment rights is unlawful, even if the arrest is supported by probable cause").

Conversely, four other circuits (the Second, Fourth, Fifth, and Eighth) are aligned with the Eleventh Circuit in holding that "the existence of probable cause to arrest" bars a First Amendment retaliation claim. *Dahl v. Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002). *See Mozzochi v. Borden*, 959 F.2d 1174, 1180 (2d Cir. 1992) (holding that, when "probable cause to arrest exist[s] independent of the defendants' motive," that motive "need not be examined," and a plaintiff's retaliatory-arrest claim fails as a matter of law); *Pegg v. Herrnberger*, 845 F.3d 112 (4th Cir. 2017) (holding that the existence of probable cause for the plaintiff's arrest meant that "his arrest was not retaliatory"); *Keenan v. Tejeda*, 290 F.3d 252, 261 (5th Cir. 2002) (holding that the "objectives of law enforcement take primacy over the

citizen's right to avoid retaliation" in situations where "law enforcement officers might have a motive to retaliate," but there is also probable cause); *McCabe v. Parker*, 608 F.3d 1068, 1075 (8th Cir. 2010) (holding that the "[l]ack of probable cause is a necessary element" of a First Amendment retaliatory-arrest claim).

Four other circuits (D.C., Third, Sixth, and Seventh) have addressed the question of whether a retaliatory-arrest First Amendment claim is precluded by the presence of probable cause for an arrest but have failed to adopt a clear rule. *See Dukore v. District of Columbia*, 799 F.3d 1137, 1145 (D.C. Cir. 2015) (noting the "widespread instability in the law on the precise question of probable-cause arrests"); *Primrose v. Mellott*, 541 F. App'x 177 (3d Cir. 2013) (stating the Third Circuit had "not decided whether the logic of *Hartman* applies to retaliatory arrest claims"); *Credico v. West Goshen Police*, 574 F. App'x 126, 128 (3d Cir. 2014) (reading *Hartman* to bar retaliatory-arrest claims when "there was probable cause"); *Wesley v. Campbell*, 779 F.3d 421, 435 (6th Cir. 2015) (noting that the Sixth Circuit has "not resolved whether lack of probable cause is an element" of such retaliatory-arrest claims); *Thayer v. Chiczewski*, 705 F.3d 237, 253 (7th Cir. 2012) (noting that the Seventh Circuit recognized that there is a circuit split on "whether probable cause is a complete bar to First Amendment retaliatory arrest claims" but resolving the case on qualified immunity grounds *sua sponte*).

B. The issue presented is important.

The problem of retaliatory arrests is not new. History is replete with examples of government officials pretextually enforcing minor laws against individuals who have exercised core First Amendment rights. In 1965, for example, police officers in Montgomery, Alabama, arrested and jailed Dr. Martin Luther King, Jr., for driving thirty miles per hour in a twenty-five mile-per-hour zone. *See* Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1028 (1989). This is precisely the sort of enforcement Justice Kagan referenced during oral argument in *Lozman*: "[J]ust the nature of our lives and the nature of our criminal statute books, there's a lot to be arrested for. So you follow somebody around and they commit a traffic violation of a pretty minor kind, and all of a sudden you're sitting in jail for 48 hours before they decide to release you. So that's a pretty big problem, it seems to me, and it's right here in kind of the facts of this case." Transcript of Oral Argument at 31, *Lozman v. City of Riviera Beach* (No. 17-21).

Recently, there has been a surge of civic engagement, much of which involves criticism of the government. *See e.g.* Ray Sanchez, *Flint Residents Rally in Michigan's Capital Against End of Bottled Water Program*, CNN (April 11, 2018), https://tinyurl.com/yd5qk6bz; Holly Yan & Tristan Smith, *Oklahoma Teachers' Walkout Gains Momentum in its 2nd Week*, CNN (April 9, 2018), https://tinyurl.com/yaoqe5z2; *Protest in Southern Virginia Follows a Fatal Shooting*, N.Y. TIMES (April

9, 2018), https://tinyurl.com/y7j7epyq. Thus, the risk of retaliatory arrests remains a pressing concern. However, the "widespread instability in the law on the precise question of probable-cause arrests" leaves municipalities in an untenable position. *Dukore*, 799 F.3d at 1145.

This Court should make clear that speakers' rights cannot be violated under the guise of probable cause for a minor offense. An individual arrested in Selma, Alabama, because he exercised his First Amendment rights cannot prevail on a Section 1983 claim if there was probable cause to arrest him for a minor infraction. *See Dahl*, 312 F.3d at 1236 (Eleventh Circuit rule that probable cause is an absolute bar). However, an individual arrested for the same reasons in Selma, California, can. *See Ford*, 706 F.3d at 1196 (Ninth Circuit rule that there is no bar). An individual's ability to vindicate his or her rights should not be left to a geographic accident. *Miller v. California*, 413 U.S. 15, 30 (1973) (noting that "fundamental First Amendment limitations on the power of the States do not vary from community to community").

C. This Court should apply the *Mt. Healthy* standard since it is the test most in line with this Court's jurisprudence and the important First Amendment values at risk.

A plaintiff claiming retaliation for protected First Amendment activities ordinarily must plead and prove three elements: first, that he was engaged in a constitutionally protected activity; second, that he

was subjected to a meaningfully adverse official action; and, third, that his protected activity was a "motivating factor" behind that action. *Mt. Healthy City Sch. Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270-71, 270 n.21 (1997)).

In *Hartman*, this Court added an additional element to that framework in cases alleging retaliatory prosecution. It held that, in such cases, the absence of probable cause "must be pleaded and proven" as "an element of a plaintiff's case." *Hartman*, 547 U.S. at 266.

None of the justifications underlying this Court's decision in *Hartman* warrant extending its rule to retaliatory-arrest claims. To the contrary, the standard framework is both workable and more consistent with the First Amendment values at stake. Since probable cause has never barred challenges to racially discriminatory arrests, it should not bar First Amendment retaliatory-arrest claims either.

In *Hartman*, this Court said the "strongest justification for the no-probable-cause requirement" was the complex causal connection inherent in retaliatory-prosecution claims. *Id.* The Court suggested that proof of the absence of probable cause can help to "bridge the gap between the nonprosecuting government agent's motive and the prosecutor's action." *Id.* By contrast, "there is no gap to bridge" in retaliatory-arrest cases. *Reichle v.*

Howards, 566 U.S. 658, 671 (2012) (Ginsburg, J., concurring).

Further, in *Hartman*, this Court noted the "presumption of regularity accorded to prosecutorial decisionmaking" as a reason for imposing an additional burden on plaintiffs claiming retaliatory prosecution. *Hartman*, 547 U.S. at 263. This Court has already declared that this presumption "does not apply" in the context of retaliatory arrests. *Reichle*, 566 U.S. at 669. The presumption therefore provides no basis for extending the *Hartman* rule to retaliatory-arrest cases.

In *Hartman*, this Court stated that requiring a plaintiff to plead and prove a lack of probable cause in a retaliatory-prosecution case would impose "little or no added cost" on the plaintiff. *Hartman*, 547 U.S. at 256–66. However, differences between arrests and prosecutions cut strongly against placing these burdens on the plaintiff in a retaliatory-arrest case. In a retaliatory-prosecution case, the plaintiff will have a charging instrument that cabins the scope of the probable-cause inquiry, and thus any burdens of pleading or proof, by identifying a specific crime. That will not be the case in lawsuits claiming retaliatory arrest since an arresting officer is not required to state the crime for which he made the arrest. *See Davenpeck v. Alford*, 543 U.S. 146, 155 (2004). Thus, when, as often happens, a plaintiff was arrested but was never formally charged, it may be unclear for which crimes he should be expected to plead, and later prove, the absence of probable cause. This problem is particularly acute because contemporary federal, state, and municipal codes

criminalize a wide range of behavior that Americans regularly engage in.

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 v. Britton*, 523 U.S. 574, 588 n.10 (1998)). However, it also recognizes that "there is no cognizable injury warranting relief under § 1983" when "the government would have made the same decision" in any event. *Texas v. Lesage*, 528 U.S. 18, 21 (1999).

II. This case is an ideal vehicle for deciding this issue.

This case presents an especially clean opportunity for the Court to answer this important question. In fact, it surpasses *Lozman* as a vehicle for deciding this issue. While it addresses the same issue from the same circuit as *Lozman*, it avoids certain case-specific factual issues this Court discussed in oral argument in *Lozman*.

A. This case is an equal—if not superior—vehicle for deciding this issue compared to *Lozman*.

First, like in *Lozman*, the defendant in this case is a municipality. In *Owen v. City of Independence*,

445 U.S. 622 (1980), this court held that municipalities cannot assert qualified immunity. *Id.* at 657. Thus, there is no possibility that if this Court grants certiorari it will end up resolving the case on qualified immunity grounds. By contrast, many retaliatory-arrest cases are brought against individual government officials, often line-level police officers. Because defendants in those cases will usually seek, and frequently be entitled to, qualified immunity, many courts decline to resolve the question whether probable cause defeats a damages claim arising from a retaliatory arrest. That is what happened before this Court in *Reichle*.

Second, in this case, petitioner's speech at the board meeting and during his tenure as an official—the real reason for his arrest—is at the heart of what the First Amendment protects. *See Bond v. Floyd*, 385 U.S. 116, 135–36 (1966) ("The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy."). The core of the First Amendment is that "debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 136 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)). Even the "provocative and challenging" language Jordan is accused of using when addressing Davis would be protected. *Houston v. Hill*, 428 U.S. 451, 461 (1987) ("[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers.").

In comparison to *Lozman*, this case is an even better vehicle to resolve this important issue. The

district court in this case decided the issue on a motion for summary judgment, expressly citing the rule at issue in *Lozman* as the basis for its ruling. App. 12a. Since it was decided as a matter of law, the underlying factual issues seen in *Lozman* are not present and nothing has been decided by a jury, as occurred in *Lozman*. Specifically, an issue in *Lozman* was the propriety of the district court's instruction that, to find for Lozman, the jury had to find that the officer possessed a retaliatory animus, rather than the councilperson. *See* 681 F. App'x at 751. The Eleventh Circuit, in *Lozman*, noted that the argument was "compelling" but found any error harmless in light of the probable cause finding. *Id.* at 752. Nevertheless, that issue is not present as a potential complication here.

B. If *Lozman* were decided adversely to Petitioner, it would not necessarily resolve this case.

This case is sufficiently similar to *Lozman* that a ruling in favor of Lozman should require the Court to vacate and remand in this case. However, this case is unlike *Lozman* in one important aspect: This case lacks the factual issues presented by *Lozman* that might give the Court pause. During oral argument in *Lozman*, the Court collectively expressed concern that the actions of the police officer could or should be insulated from liability due to the fact that he was acting on instructions from the council chairperson and was not otherwise actively involved in the alleged underlying conspiracy. Justice Kennedy, for example, expressed that he was "very concerned about police officers in—in difficult situations where

they have to make quick" decisions. Transcript of Oral Argument at 6, *Lozman v. City of Riviera Beach* (No. 17-21). *See also Id.* at 14–15 (asking whether it was a special case when "the police officer is a young police officer [who] acts based on their—on—on their orders"). Those concerns were echoed by many other members of the Court. *See Id.* at 7–9, 11, 19–20 (Breyer), 10 (Ginsburg), 10–11, 21–22 (Alito), 13, 17 (Roberts), 16–17, 20–21 (Kagan).

Those concerns do not exist in this case. Lozman was immediately arrested following his alleged criminal conduct. Here, however, five weeks passed between the alleged criminal conduct and Jordan's arrest. App. at 7a. The officers were simply not in a situation where they had to make a quick decision.

In addition, there was no strong evidence that the arresting officer possessed retaliatory animus against Lozman. However, in this case, there is substantial evidence that the officers involved possessed retaliatory animus against Jordan. Officer Roundtree was actively involved in the decision to bring charges, included Caldwell in those decisions, sought out evidence of Jordan's alleged wrongdoing, and drafted an unprecedented press release for Chief Howard. Cir. App. at 77-35, 99-19, 99-17, 77-41, 77-42, 77-31, 99-32, 99-31, 77-8. Just two days later he admitted what was really going on, telling a witness whom he did not interview: "[T]his situation pretty much ha[s] to do with his election that's coming up, and there's other people that's pushing this, and they want him off the board." *Id.* at 77-5. Similarly, Police Chief Donnie Howard had multiple conversations with different witnesses in the investigation—

something he testified was "improper"—before concealing those conversations by deleting his messages and testifying that he had never spoken with them. *Id.* at 77-27, 63, 77-15, 99, 77-8, 77-37. Officer Anthony Brown told Jordan he was criminally trespassing at the board meeting, despite him being an elected member of that board, instructed Jordan to leave or "it's going to get ugly," and told Jordan that "they want to ban you from the property" while placing his hand on his firearm. App. at 5a–6a; Cir. App. 77-3, 77-23, 77-22. Officer Davis threatened to arrest Jordan at the meeting, told Brown he "should have locked him up," and listed Caldwell as a witness on the police report despite the fact that Caldwell was not present. Cir. App. at 77-22, 77-17, 62, 75-12. Under these facts, a jury could reasonably conclude that the officers possessed retaliatory animus against Jordan. Put simply, they disliked the black Democrat who addressed issues of race and police misconduct head-on. For that, they sought to get him off the board by any means necessary.

While this Court may be concerned about creating a rule that finds police officers liable when they are simply following direct orders from other members of government, those are not the facts present in this case. As a result, if this Court holds that this aspect of *Lozman* prevents an inference of retaliatory arrest, the absence of that factual problem renders this case a better vehicle.

An additional reason an adverse decision in *Lozman* would not control this case is that the district court found that the officers were not liable

because they had "arguable probable cause" and, as a result, were entitled to qualified immunity. App. at 14a–19a. The district court did not endeavor to determine whether there was actual probable cause, finding that "the issue of whether the officers had *arguable* probable cause to arrest Plaintiff is dispositive of this matter." App. at 12a (emphasis added). However, a split has developed among the circuits over whether arguable probable cause—also part of an officer's qualified immunity analysis—entitles the city to summary judgment.[1] This makes this case even more ripe for resolution by this Court.

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[1] The Second, Fourth, and Eighth circuits have held that it does. *See Escalera v. Lunn*, 361 F.3d 737, 749 (2d Cir. 2004) ("[B]ecause each of the individual defendants had arguable probable cause, the County is likewise entitled to summary judgment in its favor."); *Temkin v. Frederick County Commissioners*, 945 F.2d 716, 724 (4th Cir. 1991) ("Because of a lack of section 1983 liability on [the officer's] part, the entry of summary judgment in the Commissioners' favor was proper."); *Schaffer v. Beringer*, 842 F.3d 585, 597 (8th Cir. 2016) ("Because the officers had arguable probable cause, the Schaffers cannot show that the alleged policy or failure to train was the moving force behind or the actual cause of the alleged violation.").

The Third, Sixth, Ninth, and Tenth Circuits have disagreed. *See Fagan v. City of Vineland*, 22 F.3d 1283, 1294 (3d Cir. 1994) ("[T]he City's liability does not depend upon the liability of any police officer"); *Doe v. Sullivan County*, 956 F.2d 545, 554 (6th Cir. 1992) ("[T]he dismissal of a claim against an officer asserting qualified immunity in no way logically entails that the plaintiff suffered no constitutional deprivation, nor, correspondingly, that a municipality (which, of course, is not entitled to qualified immunity) may not be liable for that

The facts of both *Lozman* and this case are extremely concerning. The Eleventh Circuit's rule has created a circuit split of vast importance and has improperly prohibited vindication of First Amendment rights. For that reason, both cases should be reversed. This case, however, provides a clearer and cleaner set of facts on which to build that ruling.

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deprivation."); *Gibson v. County of Washoe*, 290 F.3d 1175, 1186 n.7 (9th Cir. 2002) (finding that, even though "the individual deputy defendants are not liable for violating Gibson's constitutional rights," the city is not necessarily absolved); *Medina v. City and County of Denver*, 960 F.2d 1493, 1499–1500 (10th Cir. 1992) (finding that "there is no inherent inconsistency in allowing a suit alleging an unconstitutional policy or custom to proceed against the city when the individuals charged with executing the challenged policy . . . have been relieved from individual liability")

CONCLUSION

Petitioner respectfully requests that the Court grant the Petition for Certiorari in this case or, alternatively only, hold it pending the resolution of *Lozman*.

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