No. 17-1455

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD K. STRICKLAND
Counsel of Record
EMILY R. HANCOCK
BROWN, READDICK, BUMGARTNER, CARTER, STRICKLAND & WATKINS LLP
Post Office Box 220
Brunswick, Georgia 31521-0220
(912) 264-8544
rstrickland@brbcsw.com
ehancock@brbcsw.com
Attorneys for Respondents City of Darien, Ga., Donnie Howard, Archie Davis, and Anthony Brown

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

INTRODUCTION

At the conclusion of a month-long police investigation, a judge issued a warrant for the arrest of Dwight Jordan. Jordan was arrested pursuant to the warrant. In this suit, he alleges that the arrest violated his rights under the First and Fourth Amendments. Although Jordan styled his Fourth Amendment claim as one for false arrest, and his First Amendment claim as one for retaliatory arrest, his characterizations are incorrect. Because Jordan was arrested pursuant to a warrant, his Fourth Amendment claim is in fact a claim for malicious prosecution, and his corollary First Amendment claim is for retaliatory prosecution.

The petition consequently does not actually present the question of whether the existence of probable cause defeats a First Amendment retaliatory arrest claim as a matter of law. Instead, it presents the question of whether probable cause defeats a First Amendment retaliatory *prosecution* claim. The Court has already answered this question in the affirmative in *Hartman v. Moore*, 547 U.S. 250 (2006). The petition presents no issue for review and should be denied.

RESPONSE TO PETITIONER'S STATEMENT OF THE CASE

The fact most critical to the Court's analysis of the petition is accurately presented – Officer Roundtree sought a warrant for Jordan's arrest, the warrant was issued, and Jordan was subsequently arrested

pursuant to the warrant. However, there are several significant factual inaccuracies and omissions in the petition, which Respondents are obligated to bring to the Court's attention.

I. Jordan is removed from the board meeting.

The petition states that "a member of the Board called Donnie Howard," and accuses the District Court of ignoring evidence that Bonita Caldwell, rather than Larry Day, may have been the person who made the call. This is not what the record evidence establishes.[1] Assistant Superintendent Larry Day – a friend and political ally of Jordan – testified unequivocally that he texted Chief Howard at some point during the April 18, 2013 meeting to remind Howard that he was supposed to send over an officer, and to inform him that no one had arrived.[2] Upon receiving Day's text, Chief Howard called Officer Archie Davis and told him to "go around [the Board of Education] and see what was going on."[3] The undisputed evidence is that it was a text from Day, not a call from a member of the school board, that prompted Chief Howard to dispatch Davis to the meeting.

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[1] In support of the statement that there is evidence in the record indicating that Caldwell may have called Donnie Howard, the petition cites to four entire docket entries totaling 190 pages. Respondents do not know to which portions of those docket entries the petition is referring, but note that there is no evidence anywhere in the record to support Petitioner's assertion.

[2] R. 65, 15:4-16:3.

[3] R. 66, 31:21-23, R. 77-25, 46:10-13.

Omitted from the petition's statement that "Officer Davis arrived in the parking lot just two minutes after Chief Howard called him" is the fact that Officer Davis lives two minutes from the Board of Education and arrived in civilian clothes. More importantly, the statement that Officer Brown "arrived and told Jordan that Jordan would have to leave the property because he was criminally trespassing" leaves out the fact that, immediately after his arrival on scene, Brown was informed by Davis – his superior officer – that Jordan "was being disorderly."[4] Brown took this to mean that Jordan had committed the offense of disorderly conduct in Davis's presence.[5]

II. Chief Howard asks Officer Roundtree to investigate what occurred on April 18, 2013.

The statement that "Officer Roundtree began investigating Jordan at the direction of Chief Howard" is incorrect. After speaking with his officers to get their account of what had transpired the previous evening, Howard instructed Officer Roundtree to "look into what had happened, the whole matter."[6] Roundtree conducted an investigation in an attempt to determine both whether Jordan had acted unlawfully, and whether any officer misconduct or violation of Jordan's rights had occurred.[7]

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[4] R. 61, 16:7-17:1.

[5] *Id.*

[6] R. 66, 43:6-8.

[7] R. 70, 79:25-88:7.

Likewise, the statement that "Chief Howard discussed the case with two witnesses" is not supported by the record. There is evidence that Howard had a single discussion about the board meeting with Bonita Caldwell.[8] This discussion preceded Caldwell's actual participation in the investigation, and the investigator was able to probe the veracity of the statement that Caldwell had previously made to Howard about the incident for himself.[9] There is no evidence that Howard spoke to any other witness about the investigation while it was underway.

Respondents will address here a related, and egregiously untrue, factual claim made in the argument section of the petition. Specifically, the petition alleges that "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." This statement contains at least four demonstrable misrepresentations. First, Howard testified that it would be improper to speak to a witness about the investigation while the investigation was ongoing, but freely admitted that he still engaged in "day-to-day" conversation not related to the investigation.[10] Second, again, the record evidence establishes that Howard had a single conversation about the investigation with

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[8] R. 75-4, 36:3-37:7.

[9] *Id.*

[10] R. 77-25, 42:11-24.

a single witness, during which the witness relayed to Howard her account of a portion of the board meeting.[11] Howard passed that account on to Roundtree to investigate.[12]

Third, even if there had been "multiple conversations with different witnesses," which there were not, Petitioner's claim that Howard "conceal[ed]" conversations "by deleting his messages" and testifying that the conversations had never occurred is patently false. Howard testified that text messages and voice mails on his phone, as well as the phones of all other officers at the time of the events at issue in this case, were lost when the City switched from Alltel to Verizon as its phone service provider.[13] Finally, Howard did not testify that he had "never spoken with" witnesses; his testimony, three years after the fact and before having his memory refreshed with phone records, was that he "may have" had a conversation with Caldwell but that he did not remember it.[14]

III. Jordan is arrested.

As noted above, the petition correctly states that Officer Roundtree sought a warrant for Jordan's arrest at the conclusion of his month-long investigation, that a judge issued the warrant, and that Jordan was subsequently arrested. On this point, Respondents wish

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[11] R. 75-4, 36:3-37:7.

[12] *Id.*

[13] R. 77-28, 34:9-35:5.

[14] R. 66, 116:11-17, 50:3-12.

only to clarify that although Roundtree sought warrants for both disorderly conduct and disrupting a lawful meeting, a valid warrant was issued only for the former offense, and the arrest was made pursuant to that warrant.

REASONS FOR DENYING THE PETITION

I. Petitioner's claim is for retaliatory prosecution, not retaliatory arrest, and this case is consequently controlled by *Hartman v. Moore*, 547 U.S. 250 (2006).

The Court in *Heck v. Humphrey* distinguished arrest-based Fourth Amendment claims from prosecution-based Fourth Amendment claims: "unlike the related cause of action for false arrest or imprisonment, [malicious prosecution] permits damages for confinement imposed pursuant to legal process." 512 U.S. 477, 484 (1994). "The interest at stake in a malicious prosecution claim is the right to be free from deprivations of liberty interests caused by unjustifiable criminal charges and procedures. In contrast, false arrests infringe upon the right to be free from restraints on bodily movement." *Calero-Colon v. Betancourt-Lebron*, 68 F.3d 1, 3–4 (1st Cir. 1995). These same interests are implicated in the corollary First Amendment claims of retaliatory arrest and retaliatory prosecution, and the line between those claims falls in the same place as the line between the Fourth Amendment claims: the point where legal process comes into play.

Generally, a claim for false arrest arises where a *warrantless* arrest is made without probable cause. *See Kingsland v. City of Miami*, 382 F.3d 1220, 1226 (11th Cir. 2004); *Calero-Colon v. Betancourt-Lebron*, 68 F.3d 1, 3–4 (1st Cir. 1995). On the other hand, "seizures following the institution of a prosecution, such as an arrest pursuant to a warrant, generally serve as the basis for a [42 U.S.C.] § 1983 claim for malicious prosecution." *Whiting v. Traylor*, 85 F.3d 581, 585–86 (11th Cir. 1996) (internal quotation marks omitted); *Calero–Colon*, 68 F.3d at 4 ("The critical inquiry that distinguishes malicious prosecution from false arrest in the present context is whether the arrests were made pursuant to a warrant."); *Singer v. Fulton County Sheriff*, 63 F.3d 110, 115–16 (2d Cir. 1995). Thus, if a person is seized in a manner that violates his rights under the First and Fourth Amendments, his claims are for false arrest and retaliatory arrest if he was seized without a warrant, or malicious prosecution and retaliatory prosecution if the seizure occurred pursuant to a warrant.

In this case, Officer Roundtree performed a month-long investigation of the events of the April 18, 2013 meeting of the McIntosh County School Board. At the conclusion of that investigation, Roundtree determined that there was probable cause to arrest Dwight Jordan for disorderly conduct as a result of his actions on that day. Roundtree applied to a state-court judge for a warrant for Jordan's arrest, and the judge issued the warrant. Jordan was arrested pursuant to the warrant.

Although Jordan has couched his Fourth Amendment claims as false-arrest claims, they are in fact malicious-prosecution claims, because he was arrested pursuant to legal process. Likewise, his First Amendment claims are for retaliatory prosecution, not for retaliatory arrest – again, because the arrest occurred subsequent to, and as the result of, the institution of legal process against Jordan. This case presents the same issue decided by the Court in *Hartman v. Moore*: whether probable cause defeats a claim for retaliatory *prosecution* as a matter of law.

The Court's discussion, in *Reichle v. Howards*, 566 U.S. 658 (2012), of the reasons that *Hartman*'s rationale does not necessarily apply to retaliatory arrests, confirms that this case is one to which *Hartman* squarely applies. One distinction made by the Court in *Reichle* between retaliatory-prosecution and retaliatory-arrest cases is that "the causal connection in retaliatory prosecution cases is attenuated because those cases necessarily involve the animus of one person and the injurious action of another, but in many retaliatory arrest cases, it is the officer bearing the alleged animus who makes the injurious arrest." 566 U.S. at 668–69 (citation and punctuation omitted). To the extent that Jordan alleges he was retaliated against for his speech, any retaliatory animus would be on the part of the persons to whom that speech was directed: Bonita Caldwell, Archie Davis, and Anthony Brown. Officer Roundtree did not witness Jordan's speech and was not a target of it; he has never been accused of having any retaliatory animus. This attenuation between the

alleged animus of the persons to whom Jordan's speech was directed, and the injurious action set into effect by Officer Roundtree and the state-court judge, marks Jordan's claim as one for retaliatory prosecution.

Likewise, *Reichle* notes that "in retaliatory prosecution cases, the causal connection between the defendant's animus and the prosecutor's decision is further weakened by the presumption of regularity accorded to prosecutorial decisionmaking." *Id.* at 669, quoting *Hartman*, 547 U.S. at 263. Judicial proceedings are likewise accorded a presumption of regularity. *Von Moltke v. Gillies*, 332 U.S. 708, 737 (1948) ("The essential presumption of regularity which attaches to judicial proceedings is not lightly to be rebutted.") (Burton, J., dissenting). *See also United States v. Leon*, 468 U.S. 897, 914 (1984) ("Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause, and we have thus concluded that the preference for warrants is most appropriately effectuated by according "great deference" to a magistrate's determination.").

The *Reichle* court noted two characteristics of retaliatory-prosecution cases that distinguish them from retaliatory-arrest cases and prevent the rationale of *Hartman v. Moore* from applying automatically to the latter. Both of those characteristics are present in this case. The attenuated connection between Roundtree and the persons allegedly harboring retaliatory animus toward Jordan, and the deference accorded to the state-court judge's decision to issue a warrant for Jordan's arrest, leave no question that this case is

controlled by the Court's decision in *Hartman*. The petition presents no issue for the Court's review, and should be denied.

II. The issue presented by Petitioner was not preserved for the Court's review.

Because the issue presented by this case is one that has already been addressed by the Court, Respondents will not belabor the two additional reasons that the petition should be denied, but will touch on each of them briefly. Mindful that they will waive this argument if they fail to present it now, Respondents show that even if the petition truly presented the issue it purports to present, that issue was not preserved for review by this Court. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 815–16 (1985).

To be clear, the question actually presented by the petition – whether probable cause bars a claim for retaliatory prosecution as a matter of law – is not one that could have been preserved for review, as it has already been decided by the Court in *Hartman v. Moore*. The question that the petition purports to present, however – whether probable cause bars a claim for retaliatory arrest – is one that could have been raised below. But *Reichle*, in which the Court notes that it has yet to rule on the latter issue and suggests that such a ruling would not necessarily mirror *Hartman*, was never mentioned below.

In fact, neither the question actually presented nor the question purported to be presented was

preserved – Petitioner made no argument, either in the District Court or before the Court of Appeals, that he might have a claim for violation of his First Amendment rights that was independent in any way from his claims for violations of his Fourth Amendment rights. Respondents Howard, Davis, Brown, and City of Darien noted this in their brief to the Court of Appeals, stating that Jordan had "abandoned his First Amendment claim to the extent that it is not coextensive with his Fourth Amendment claim." App. Br. at 35. Jordan made no response to this statement in his reply brief, and he did not attempt to contradict it, either in his written submissions to the Court or at oral argument.

The Court has suggested that denial of a petition for certiorari is proper where the petitioner's positions with respect to the question presented have been "inconsistent" and "inexact." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 383–85 (1989). Here, Jordan's positions with respect to the question presented have been entirely absent. He raises the issues contained in his petition for the first time before this Court, after making no objection to Respondents' assertion to the Court of Appeals that he had abandoned those issues. Even if the petition actually presented an issue for resolution by the Court, it would be properly denied due to Jordan's failure to preserve that issue for review.

III. Even if this case presented the issue of whether probable cause bars a retaliatory-arrest claim, it would be an inferior vehicle to *Lozman* for the resolution of this issue.

There can be no question that the issue the petition purports to present is one that the Court wishes to address, as the Court has already granted certiorari in *Lozman v. City of Riviera Beach, Fla.* on that issue. 138 S. Ct. 447 (2017). Because *Lozman* has already been argued, Jordan is constrained to argue that this case presents a superior vehicle for resolution of the issue presented by *Lozman*. As shown above, however, this case is not a vehicle for that issue at all. *Lozman*, in which the plaintiff was arrested without a warrant as he spoke at a City Council meeting, allows the Court to determine whether probable cause bars a claim for retaliatory arrest. This case, in which the plaintiff was arrested pursuant to a warrant following a month-long investigation into the conduct of multiple persons during a school board meeting, presents only the settled issue of whether probable cause bars a claim for retaliatory prosecution.

Even if this case raised the issue that the petition claims it does, however, it would be an inferior vehicle to *Lozman* for resolving that issue, because it is unclear exactly what speech is at issue here. The petition states that "the real reason" for Jordan's arrest was his "speech at the board meeting and during his tenure as an official," and notes that the speech of legislators "on issues of policy" is of particular concern under the First

Amendment. But because Jordan was arrested following a month-long investigation that reviewed hours worth of speech by Jordan, both during and after the meeting and in both public and private settings, the causal connection between any particular element of Jordan's speech and his arrest is highly tenuous.

Much of Jordan's speech on April 18, 2013, even during the meeting itself, was not "on issues of policy"; Jordan spent considerable time attacking the character of Bonita Caldwell and airing his frustrations with her. Similarly, a good deal of the speech was entirely private. Under Jordan's own testimony, which provides the operative set of facts because Jordan appealed the trial court's grant of Respondents' motion for summary judgment, Jordan was involved in a private conversation when officers arrived on scene, during which he spoke in a conversational tone and did not intend to be overheard. The majority of the speech at issue in this case does not invoke the concern that "debate on public issues should be uninhibited, robust, and wide-open." *Bond v. Floyd*, 385 U.S. 116, 136 (1966). And more importantly, because Jordan's arrest was remote in time from all of the speech, it is difficult if not impossible to link the arrest to retaliatory animus stemming from specific portions of that speech.

This case involves an allegedly retaliatory action that was remote in time from the speech at issue, numerous types of speech entitled to varying degrees of protection, a lack of identity between the persons perceiving the speech and the person taking the action, and an intervening determination by a judge that is

entitled to significant deference. None of these elements were present in *Lozman*, which presents a straightforward claim arising from an arrest that occurred while the speech at issue was still underway. For these reasons, this case would be an inferior vehicle to *Lozman* if it were a retaliatory-arrest case, but for these same reasons, it is in fact a retaliatory-prosecution case controlled by *Hartman v. Moore*.[15]

[15] Additionally, it is worth noting that each of the individual Respondents would be entitled to qualified immunity from suit, even if Petitioner is correct in his assertion that the "circuits are pervasively split" on this issue. Pet. at 9. *See Pearson v. Callahan*, 555 U.S. 223, 232 (2009); *Redd v. City of Enterprise*, 140 F.3d 1378, 1383 (11th Cir. 1998). As Petitioner implicitly acknowledges that the law was not clearly established, that serves as an additional basis upon which to deny the petition.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD K. STRICKLAND
Counsel of Record
EMILY R. HANCOCK
BROWN, READDICK, BUMGARTNER,
CARTER, STRICKLAND & WATKINS LLP
Post Office Box 220
Brunswick, Georgia 31521-0220
(912) 264-8544
rstrickland@brbcsw.com
ehancock@brbcsw.com
Attorneys for Respondents
City of Darien, Ga., Donnie Howard,
Archie Davis, and Anthony Brown