No. 18-1291

In the
Supreme Court of the United States

LINDA THURMAN AND COURTNEE CARROLL,

Petitioners,

v.

JUDICIAL CORRECTION SERVICES, INC. AND CORRECTIONAL HEALTHCARE COMPANIES, INC.,

Respondents.

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

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF FANE LOZMAN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OF FANE LOZMAN AS AMICUS CURIAE

Under Rule 37.3(b), Fane Lozman respectfully asks for leave to file the accompanying brief as *amicus curiae* in support of petitioners. Counsel for all parties received notice of Lozman's intent to file when he sought consent for the filing, via email. Petitioners have consented to the filing but respondents said they do not consent.

Fane Lozman is a concerned citizen who resides within the jurisdiction of the U.S. Court of Appeals for the Eleventh Circuit, from which petitioners are petitioning. Lozman was nearly denied justice several years ago, due to a district court's misapplication of the *Rooker-Feldman* doctrine. The Eleventh Circuit corrected that error in Lozman's case, and this Court eventually vindicated Lozman's First Amendment rights in *Lozman v. City of Riviera Beach, Florida*, --- U.S. ---, 138 S.Ct. 1945 (2018). Lozman now wishes to highlight the importance of clarifying the *Rooker-Feldman* doctrine to prevent the dismissal of otherwise meritorious cases involving important constitutional or statutory rights.

For these reasons, Lozman respectfully asks the Court for leave to file the accompanying brief.

Respectfully submitted,

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QUESTION PRESENTED

Under the *Rooker-Feldman* doctrine, federal district courts lack jurisdiction to hear cases seeking review of judgments issued by state courts. In this case, the purported state-court judgments—municipal-court probation orders—were issued by employees of a private probation-supervision contractor and were not reviewed, approved, or signed by a state-court judge.

The question presented, on which the circuits are split, is: Whether the *Rooker-Feldman* doctrine applies when the underlying state-court judgment is void *ab initio*.

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INTEREST OF *AMICUS CURIAE*[1]

Fane Lozman is a concerned citizen who resides within the jurisdiction of the U.S. Court of Appeals for the Eleventh Circuit, from which petitioners are petitioning. Lozman himself was nearly denied justice due to a district court's misapplication of the *Rooker-Feldman* doctrine. Happily, the Eleventh Circuit corrected that error and this Court eventually vindicated Lozman's First Amendment rights in *Lozman v. City of Riviera Beach, Florida*, --- U.S. ---, 138 S.Ct. 1945 (2018). Lozman now writes as *amicus curiae* to remind the Court about his case and to underscore the importance of clarifying the *Rooker-Feldman* doctrine to prevent the dismissal of otherwise meritorious cases involving important constitutional or statutory rights.

SUMMARY OF ARGUMENT

The *Rooker-Feldman* doctrine strips federal district courts of jurisdiction—but only in limited circumstances. When properly applied, the doctrine

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[1] The parties received notice of this filing. Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or his counsel made a monetary contribution to its preparation or submission.

helps maintain the balance between state and federal jurisdiction. But its misapplication too often sidelines or extinguishes valid claims before they can be heard on the merits.

This almost happened in Lozman's case against the City of Riviera Beach, when the City arrested Lozman in retaliation for his outspoken criticism of City policies and corruption. Happily, the Eleventh Circuit rejected the district court's misapplication of *Rooker-Feldman* in Lozman's case, which enabled this Court to eventually vindicate Lozman's right to petition his local government—one of the most cherished liberties guaranteed under our Constitution.

Lozman was lucky. Thousands of cases involving meritorious claims like Lozman's get sidelined by the misapplication of *Rooker-Feldman*. Indeed, petitioners' case involves a situation that affects over 13,000 citizens. Pet. 4, 17. And the Eleventh Circuit even cited Lozman's case when it mistakenly affirmed the district court's misapplication of *Rooker-Feldman*. Pet. App. 2a, 27a. To prevent courts from continuing to dismiss meritorious cases involving important constitutional or statutory rights, the Court should grant the petition and resolve the longstanding circuit split over *Rooker-Feldman*.

ARGUMENT

I. Introduction

As a judge-made, jurisdiction-stripping doctrine, *Rooker-Feldman* is intentionally narrow in scope. *Lozman v. City of Riviera Beach, Florida*, 713 F.3d 1066, 1072 (11th Cir. 2013). Its application is "confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283 (2005).

Though the Court has expressly limited the doctrine's application—*e.g.*, *ibid.*; *Lance v. Dennis*, 546 U.S. 459 (2006)—and though the Court has warned that overextending the doctrine risks "overriding Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts, and superseding the ordinary application of preclusion law pursuant to 28 U.S.C. § 1738," lower courts have nevertheless continued to apply the doctrine "beyond the contours of the Rooker and Feldman cases." *Exxon Mobil Corp.*, 544 U.S. at at 280–281, 283. This is precisely what the district court and the Eleventh Circuit have done in petitioners' case.

In Lozman's case, the district court's misapplication of the *Rooker-Feldman* doctrine nearly denied Lozman his First Amendment right to petition his local government—a government that had arrested and charged Lozman with a crime for speaking out against City policies and public corruption.

Lozman's case was saved by the Eleventh Circuit—but here, petitioners weren't so lucky. Here, the Eleventh Circuit cited Lozman's case (Pet. App. 2a, 27a), but then expanded the *Rooker-Feldman* doctrine in a way that not only strips federal courts of jurisdiction to hear meritorious constitutional claims but also invites state courts to surrender their own jurisdiction over important legal proceedings—condemning thousands of cases, like petitioners', to a black hole of remedylessness.

The Court should grant the petition and solve this problem by clarifying the contours of the *Rooker-Feldman* doctrine.

II. The Court was able to vindicate important rights in Lozman's case because Lozman

avoided a misapplication of *Rooker-Feldman*.

A. The district court's misapplication of *Rooker-Feldman* threatened to deny Lozman the opportunity to vindicate his First Amendment rights.

Lozman's case against the City of Riviera Beach arose from the City's decision to exercise its power of eminent domain to seize waterfront homes, to make space for private development. *Lozman v. City of Riviera Beach, Fla.*, *Lozman*, --- U.S. ---, 138 S.Ct. 1945, 1949 (2018). Having recently settled into his waterfront slip in the City's marina, Lozman began speaking out against the City's plans at city council meetings. *Ibid.* But Lozman's criticism of the City's plans did not stop there. To expose the City's approval of a development agreement that violated Florida's open-meeting laws, Lozman filed a "sunshine suit" in state court. *Ibid.* And the City countered by filing an action to evict Lozman from the City-owned marina where he lived. *Lozman*, 713 F.3d at 1070.

At a city council meeting held in June 2006, Councilmember Elizabeth Wade suggested that the City "intimidate" Lozman—and other councilmembers agreed. *Lozman*, 138 S.Ct. at 1949. This intimidation policy was then implemented at another city council meeting five months later. At that meeting,

Lozman stepped to the podium and began expressing his concerns about the recent arrest of a former county official; Councilmember Wade interrupted Lozman and instructed him to stop speaking; when Lozman continued, Wade requested the assistance of a police officer, who approached Lozman and asked him to back away from the podium; when Lozman stood his ground, Wade instructed the officer to "carry him out"; the officer then handcuffed Lozman, forcibly removed him from the meeting, and drove him to police headquarters. *Id.* at 1949–1950. There, Lozman was charged with disorderly conduct and resisting arrest without violence, and promptly released.[2] *Id.* at 1950. The State's attorney determined that the police had probable cause to arrest Lozman, but the charges were dismissed.

Proceeding *pro se*, Lozman answered the City's eviction suit and asserted counterclaims against the City for bringing the eviction suit in retaliation for Lozman's sunshine suit. Specifically, Lozman's second amended counterclaim alleged that the City had violated Lozman's rights by filing the eviction suit in

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[2] The arrest was captured on video, which is available at https://www.supremecourt.gov/media/video/mp4files/Lozman_v_RivieraBeach.mp4.

retaliation for Lozman's sunshine suit, and by retaliating against his speech at public meetings. *Lozman*, 713 F.3d at 1070.

The following sequence of events was key to the application of the *Rooker-Feldman* doctrine. In March 2007, a jury found that Lozman's protected speech was a substantial or motivating factor in the City's decision to terminate his lease at the marina, and thus returned a verdict in Lozman's favor. *Ibid.* The court then entered a "Final Order Denying Eviction"—but did not enter a decision on Lozman's counterclaims for deprivation of his First Amendment rights. Instead, on January 14, 2008—acting on an agreement between counsel—the state court dismissed Lozman's second amended counterclaim without prejudice. *Ibid.*

On February 8, 2008, Lozman filed a complaint in federal district court, under § 1983, alleging deprivation of his Constitutional rights, retaliation, harassment, and false arrest by the City and several officials. *Ibid.* The federal court stayed proceedings pending resolution of Lozman's state-court eviction action. And in August 2010, the state court dismissed the eviction suit, including Lozman's counterclaims, with prejudice. *Ibid.* Lozman then moved to reopen his case in federal court and to amend his complaint. *Ibid.* In the amended complaint, Lozman alleged violations of his First Amendment rights,

based on the City's policy of censoring him in retaliation for his sunshine suit and for publically criticizing the City's development efforts. *Id.* at 1071.

Based on the state court's dismissal of the eviction suit, and applying *Rooker-Feldman* and *res judicata* principles, the federal district court dismissed all but one of Lozman's claims. *Ibid.*

B. The Eleventh Circuit rejected the district court's misapplication of *Rooker-Feldman*.

On appeal, Lozman argued that *Rooker-Feldman* did not apply because (1) he had filed his First Amendment claims in federal court before the dismissal of his counterclaims in state court, and (2) his First Amendment claims in the federal case did not seek relief from the state court's judgment in the eviction case, so he was not a "state court loser" and *Rooker-Feldman* did not bar his claims.

The Eleventh Circuit agreed. Focusing on the timing of Lozman's federal complaint, the Eleventh Circuit held that, "at the time of the commencement of the federal action" in February 2008, "the state court had not yet finally resolved the First Amendment issues." *Id.* at 1073. The state court did not dismiss Lozman's counterclaims until two years later. Thus, because the state-court proceedings were still pending and there was no state-court ruling when

Lozman filed his complaint in federal court, *Rooker-Feldman* did not apply to strip the federal court of jurisdiction to consider Lozman's constitutional claims. *Id.* at 1074.

C. Having avoided *Rooker-Feldman*, Lozman was able to pursue his claims and the Court eventually vindicated his rights in an important First Amendment decision.

Nearly seven years after the district court had dismissed Lozman's claims based on its misapplication of *Rooker-Feldman*, and after the district court had again ruled against Lozman—this time on the merits of his First Amendment claims—this Court reviewed Lozman's case and held that the district court had (again) gotten it wrong. At the trial on the merits, the district court had instructed the jury that Lozman had to prove that the arresting officer was motivated by impermissible animus against Lozman's protected speech, and that the officer had lacked probable cause to make the arrest. Under this standard, the jury had entered a verdict for the City and the Eleventh Circuit had affirmed that verdict. *Lozman*, 138 S.Ct. at 1950.

The Court granted certiorari to determine whether the existence of probable cause defeats a First Amendment claim for retaliatory arrest under

§ 1983. The Court observed that Lozman's retaliatory-arrest claim was "unique" and that the City's intimidation policy was "particularly troubling" as a "potent form of retaliation" that "can be long term and pervasive." *Id.* at 1954. In contrast to situations where a citizen who has suffered retaliation from an individual officer can seek to have the officer disciplined or removed, the Court noted "there may be little practical recourse when the government itself orchestrates the retaliation." *Ibid.* Thus the Court recognized that, when retaliation against protected speech is "elevated to the level of official policy, there is a compelling need for adequate avenues of redress." *Ibid.* On this basis, the Court held that Lozman did not need to prove the absence of probable cause to succeed on his constitutional claim against the City. *Id.* at 1955.

With this, the Court clarified the standard for proving retaliatory-arrest claims against municipalities. This is important—not just for Lozman but also for every citizen who might face potential First Amendment violations from an aggressive or hostile local government. Indeed, the Court emphasized the importance of the First Amendment question that had been raised in Lozman's case. See *id.* at 1953–1954. And the Court's 2018 decision has already been cited in at least 33 other cases.

But without the Eleventh Circuit's previous rejection of the district court's misapplication of *Rooker-Feldman*, the Court would not have had the opportunity to hear Lozman's case and to protect the First Amendment rights of all U.S. citizens.

III. The court should grant the petition and clarify *Rooker-Feldman* to prevent its continuing misapplication in other cases.

The district court's misapplication of *Rooker-Feldman* in Lozman's case cost Lozman dearly—by adding several years and the attendant costs to his pursuit of justice. But at least Lozman's First Amendment rights were eventually vindicated.

Thousands of other citizens are not so lucky. The misapplication of *Rooker-Feldman* can cost others even more dearly—by sidelining or extinguishing their claims so that they are never properly resolved on the merits by any court. As petitioners have noted, there are over 13,000 citizens who face circumstances—and who potentially have claims—identical to petitioners'. Pet. 4, 17. But in petitioners' case, the lower courts' misapplication of *Rooker-Feldman* is so extreme that it preemptively prevents even the preliminary determination of whether a state-court ruling has been made that might trigger *Rooker-Feldman*. See *id.* at 7. This means 13,000 citizens (and counting) who might have meritorious claims for relief have no avenue for that relief.

And this isn't counting the untold number of other cases involving other citizens in other circumstances, wherein the misapplication of *Rooker-Feldman* threatens to sideline or extinguish meritorious claims that ought to be properly resolved by a federal court. See *Carmona v. Carmona*, 603 F.3d 1041, 1051 (9th Cir. 2010) (recognizing *Rooker-Feldman* is "often misapplied"); Dustin E. Buehler, *Revisiting* Rooker-Feldman*: Extending the Doctrine to State Court Interlocutory Orders*, 36 Fla. St. U. L. Rev. 373, 384 (2009) (same); Thomas McLemore, *The* Rooker-Feldman *Doctrine: Did* Exxon *Rein in the Doctrine or Leave Lower Federal Courts with as Little Guidance as Before?*, 31 Okla. City U. L. Rev. 361, 366–367, 377 (2006) (same); Adam McLain, Comment, *The* Rooker-Feldman *Doctrine: Toward a Workable Role*, 149 U. Pa. L. Rev. 1555, 1573 (2001) (same); Rachel Thomas Rowley, *The* Rooker-Feldman *Doctrine: A Mere Superfluous Nuance or a Vital Civil Procedure Doctrine?*, 78 Denv. U. L. Rev. 321, 321 (2000) (same); *e.g.*, *KIPP Academy Charter Sch. v. United Federation of Teachers, AFT NYSUT, AFL-CIO*, 723 F. App'x 26, 29 (2d Cir. 2018) (holding district court misapplied *Rooker-Feldman*); *Wood v. Midland Funding, LLC*, 698 F. App'x 260, 264 (6th Cir. 2017) (same); *Howe v. Litwack*, 579 F. App'x 110, 113 (3d Cir. 2014) (same); *Kathrein v. McGrath*, 166 F. App'x 858, 862 (7th Cir. 2006) (same).

Lozman was lucky to draw an Eleventh Circuit panel that corrected the district court's misapplication of *Rooker-Feldman*. Petitioners weren't so lucky. But a citizen's access to justice and right to a remedy should not depend on which circuit she resides in, or on which panel she draws in that circuit. The Court should grant petitioners' petition to clarify the proper application of *Rooker-Feldman*. Without the Court's intervention, important rights will continue to go unprotected, as cases like petitioners'—and like Lozman's, but for a happy stroke of good luck—continue to fall through the cracks created by the deepening split over this court-created doctrine.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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