

No. 18 – \_\_\_\_

---

**In the Supreme Court of the United States**

\_\_\_\_\_  
AUSTIN GATES,

*Petitioner,*

v.

HASSAN KHOKHAR, J. BRAUNINGER,  
JAMES WAYNE WHITMIRE, OFFICERS OF THE  
CITY OF ATLANTA POLICE DEPARTMENT,

*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**

GERALD WEBER  
*Counsel of Record*  
Law Offices of Gerry  
Weber, LLC  
P.O. Box 5391  
Atlanta, Georgia 31107  
(404) 522-0507  
wgerryweber@gmail.com

SARAH M. SHALF  
Emory Law School  
Supreme Court  
Advocacy Program  
1301 Clifton Road  
Atlanta, Georgia 30322  
(404) 712-4652  
sarah.shalf@emory.edu

DANIEL J. GROSSMAN  
Law Office of Daniel J. Grossman  
1579 Monroe Drive, Suite F-138  
Atlanta, Georgia 30324  
(404) 654-0326  
dan@dangrossmanlaw.com

---

---

## **QUESTIONS PRESENTED**

1. Whether a court, in determining whether arguable probable cause exists to arrest for a state-law crime, must consider any narrowing decisions by the state supreme court.
2. Whether a showing of arguable probable cause under the Fourth Amendment bars a First Amendment claim when the alleged crime involves pure First Amendment activity.

## TABLE OF CONTENTS

<b>QUESTIONS PRESENTED.....</b>	<b>i</b>
<b>TABLE OF CONTENTS.....</b>	<b>ii</b>
<b>TABLE OF AUTHORITIES.....</b>	<b>v</b>
<b>OPINIONS BELOW.....</b>	<b>1</b>
<b>JURISDICTION.....</b>	<b>1</b>
<b>CONSTITUTIONAL AND STATUTORY PROVISIONS.....</b>	<b>1</b>
<b>SUMMARY OF THE ARGUMENT .....</b>	<b>3</b>
<b>STATEMENT OF THE CASE .....</b>	<b>5</b>
A. Austin Gates Attends Protest Wearing Mask.....	5
B. Georgia’s Qualified Prohibition on the Public Wearing Of Masks.....	5
C. Atlanta Police Department Officers Arrest Gates For “Wearing A Mask” .....	6
D. The District Court Found Officers Were Not Entitled To Qualified Immunity.....	7

E. The Eleventh Circuit Reversed, Finding That Officers Were Entitled To Qualified Immunity.....	8
--	---

## **REASONS FOR GRANTING THE WRIT .....9**

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CIRCUIT SPLIT AS TO WHETHER COURTS MUST LOOK TO STATE SUPREME COURT DECISIONS WHEN DETERMINING WHETHER OFFICERS HAD ARGUABLE PROBABLE CAUSE TO ARREST UNDER A STATE LAW.....	9
---	---

A. The Eleventh Circuit’s Decision in this Case Creates a Circuit Split about Whether a Court Must Consider a State Supreme Court’s Narrowing Construction in Determining Whether an Officer Has Arguable Probable Cause to Arrest.....	9
---	---

B. The Eleventh Circuit Failed to Consider the Essential Nature of this Intent Element in Maintaining the Constitutionality of the Anti-Mask Act.....	14
---	----

II. THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER A FIRST AMENDMENT CLAIM SURVIVES WHEN OFFICERS HAVE ARGUABLE PROBABLE CAUSE TO ARREST FOR A PURELY SPEECH-BASED CRIME.....	20
---	----

A. The Circuit Split that Existed Prior to this Court’s Decision in <i>Lozman</i> Has Not Been Fully Resolved, and this Case Presents the Court with an Opportunity to Fully Resolve that Split.....	20
 <b>III. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THESE CIRCUIT SPLITS DISCUSSED ABOVE, AND THIS CASE IMPLICATES FIRST AMENDMENT PROTECTIONS.....</b>	 23
<b>CONCLUSION.....</b>	<b>25</b>
<b>APPENDIX.....</b>	<b>1a</b>
 <i>Gates v. Khokhar</i> , 884 F.3d 1290 (11th Cir. 2018).....	 2a
 <i>Gates v. City of Atlanta</i> , 2017 U.S. Dist. LEXIS 219079 (N.D. Ga. 2017).....	 40a
 <i>Gates v. City of Atlanta</i> , 2018 U.S. App. LEXIS 19617 (11th Cir. July 16, 2018).....	 74a

## TABLE OF AUTHORITIES

### CASES

<i>A.W. v. Holmes</i> , 830 F.3d 1123 (10th Cir. 2016).....	12, 13
<i>Baribeau v. City Of Minneapolis</i> , 596 F.3d 465 (8th Cir. 2010).....	10, 11
<i>Brown v. City of Huntsville</i> , 608 F.3d 724 (11th Cir. 2010).....	19
<i>Daniels v. State</i> , 448 S.E.2d 185 (Ga. 2003).....	<i>passim</i>
<i>Darbisi v. City of Monroe</i> , 53 F.App'x. 159 (2nd Cir. 2002).....	13, 14
<i>District of Columbia v. Wesby</i> , 138 S. Ct. 577 (2018).....	18, 20
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982).....	4
<i>Hope v. Pelzer</i> , 536 U.S. 730 (2002).....	18
<i>Jenkins ex rel. Hall v. Talladega City Board of Education</i> , 115 F.3d 115 (11th Cir. 1997).....	18
<i>Lathrip v. State</i> , 218 S.E.2d 771 (Ga. 1975).....	15

<i>Lozman v. City of Riviera</i> , 138 S. Ct. 1945 (2018) .....	<i>passim</i>
<i>Malley v. Briggs</i> , 475 U.S. 335 (1986).....	4
<i>Pearson v. Callahan</i> , 555 U.S. 223 (2011).....	4
<i>Ross v. City of Jackson</i> , 897 F.3d 916 (8th Cir. 2018).....	12
<i>State v. Miller</i> , 398 S.E.2d. 547 (Ga. 1990).....	<i>passim</i>
<i>State v. Williams</i> , 534 A.2d 230 (Conn. 1987).....	13
<i>U.S. v. Lanier</i> , 520 U.S. 259 (1997).....	18
<i>Virginia v. Black</i> , 538 U.S. 343 (2003).....	17
<b>STATUTES</b>	
28 U.S.C. §1254(1).....	1
42 U.S.C. §1983.....	<i>passim</i>
C.G.S.A § 53a-167a.....	13
M.S.A. §609.72 .....	10

N.M.S.A. 1978 § 30-20-13 .....	12
O.C.G.A. §16-11-38.....	<i>passim</i>



## **PETITION FOR A WRIT FOR CERTIORARI**

---

Austin Gates 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 884 F.3d 1290. Appendix (“App”) at 2a. The order of the United States District Court for the Northern District of Georgia is unreported but the docket number is Docket 16-15118. App. at 42a.

---

## **JURISDICTION**

The judgment of the court of appeals was entered on March 13, 2018. The judgment of the Court of Appeals denying a rehearing *en banc* was entered on July 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.”

The Fourth Amendment of the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

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 . . . .”

O.C.G.A. § 16-11-38 (the “Anti-Mask Act”) states:

A person is guilty of a misdemeanor when he wears a mask, hood, or device by which any portion of the face is so hidden, concealed, or covered as to conceal the identity of the wearer and is upon any public way or public property or upon the private property of another without the written permission of the owner or occupier of the property to do so.

---

## SUMMARY OF THE ARGUMENT

The current political climate in the United States has inspired millions of Americans to engage in peaceful political protests nationwide. When officers arrest protestors, that conduct raises both Fourth Amendment concerns and, independently, First Amendment concerns. Cases involving the tension between state conduct and protestors’ constitutional rights are likely to come before this Court with greater frequency. This case offers the Court an opportunity to resolve important First Amendment issues likely to arise in such cases.

The doctrine of qualified immunity protects government officials “from liability or civil damages insofar as their conduct does not violate clearly

established statutory or constitutional rights of which a reasonable person should know.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2011) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

This Court has interpreted the doctrine further in the context of whether an arrest violates an individual’s Fourth Amendment rights, stating that officers are “...not entitled to qualified immunity unless the officer has an objectively reasonable basis for believing that the facts...are sufficient to establish probable cause.” *Malley v. Briggs*, 475 U.S. 335, 339 (1986).

Austin Gates was arrested for simply wearing a mask at a peaceful protest. The Eleventh Circuit ignored the First Amendment implications of this arrest when it found that arguable probable cause for the arrest existed under the Fourth Amendment.

Granting certiorari in this case would allow this Court to address key questions left unanswered by current precedent. First, this Court should grant review to make clear that, in determining whether arguable probable cause exists to arrest for a state-law crime, a court must consider any narrowing construction by the state supreme court that saves the statute’s facial constitutionality. Second, in the aftermath of last term’s decision in *Lozman v. City of Riviera Beach*, this Court should grant review to define the contours of when plaintiffs can vindicate their clear First Amendment rights in civil rights cases where there is arguable probable cause to arrest for a purely speech-based crime.

## STATEMENT OF THE CASE

### **A. Austin Gates Attends Protest Wearing Mask.**

On November 26, 2014, Austin Gates, Petitioner, attended a march in the city of Atlanta, protesting the grand jury decision in widely-publicized police shooting case in Ferguson, Missouri. App. at 4a. Gates was given a mask to wear during the protest by other protestors. *Id.* Gates wore the mask to express himself and his disagreement with the Ferguson grand jury's decision. App. at 4a-5a.

### **B. Georgia's Qualified Prohibition on the Public Wearing of Masks.**

O.C.G.A. § 16-11-38 (the "Anti-Mask Act") prohibits the wearing of masks, hoods or devices which conceal the identity of its wearer, with a few narrow exceptions. The Act states:

A person is guilty of a misdemeanor when he wears a mask, hood, or device by which any portion of the face is so hidden, concealed, or covered as to conceal the identity of the wearer and is upon any public way or public property or upon the private property of another without the written permission of the owner or occupier of the property to do so.

The constitutionality of this statute under the First Amendment has previously been called into question in Georgia state courts. The Georgia

Supreme Court held that for an arrest under the statute to be constitutional, the wearer of the mask must additionally know or reasonably should know that the wearing of the mask “provokes a reasonable apprehension of intimidation, threats or violence.” *State v. Miller*, 398 S.E.2d 547, 552 (Ga. 1990). The Court emphasized the constitutional basis for its rationale, stating “it would be absurd to interpret the statute to prevent non-threatening political mask-wearing, or to condone threatening mask-wearing conduct on a holiday.” *Id.* at 676.

The Georgia Supreme Court later affirmed its narrowing construction of the Anti-Mask Act in *Daniels v. State*, when it held that “for a violation of a statute to constitute a crime in Georgia...a mask-wearer must be criminally negligent of the possibility that his conduct will threaten, intimidate, or provoke the apprehension of violence.” 448 S.E.2d. 185, 188 (Ga. 1994).

### **C. Atlanta Police Department Officers Arrest Gates for “Wearing A Mask.”**

On November 26, 2014, the Atlanta Police Department deployed police officers to monitor and control the protest. App. at 5a. Before any arrests were made, Defendant Atlanta Police Department Major James Whitmire “gave the order over the radio to arrest anyone wearing a mask during the protest.” *Id.*

At around 10 p.m. that evening, a swarm of officers who had been trailing the group of protestors

pushed their way into the group of protestors without warning. *Id.* Officer Hassan Khokhar arrested Gates. *Id.* When Gates asked him why he was being arrested, Officer Khokhar told him because he was “wearing a mask” and nothing more. *Id.*

Later, Officer Khokhar drafted an offense report. App. at 6a. The report noted:

I observed Mr. Austin Gates wear a “V for Vendetta” mask. Mr. Gates was actively participating in a protest. The protest had been warned on the loud speakers multiple times that anyone wearing a mask will be arrested. This information was relayed by Unit 15 over the radio that anyone wearing a mask should be arrested. Mr. Gates still had his mask on. Mr. Gates was arrested for wearing a mask. . . No injuries were reported.

*Id.* Gates reported that he neither heard a general order to remove masks, nor was he given an individual warning to remove his own individual mask at any time. App. at 5a.

**D. The District Court Found the Officers Were Not Entitled to Qualified Immunity.**

Gates thereafter sued the City of Atlanta and the individual officers, asserting state law claims and claims under 42 U.S.C. §1983. App. at 6a-7a.

The individual officers moved to dismiss Gates’ § 1983 claims on the ground of qualified immunity.

App. at 41. The district court denied the motion. *Id.* In its decision, the district court agreed with the appellant that Officer Khokhar had probable cause to arrest Gates for violating the Georgia Anti-Mask Act *as written*. See App. At 54a. However, the district court emphasized that the Georgia Supreme Court had added an intent-to-intimidate element to the statute. *Id.* This intent-to-intimidate requirement requires that an officer can only have arguable probable cause to arrest under the statute if a reasonable officer could have believed that Gates was wearing the mask with an intent to intimidate. *Id.* The district court found that at the motion to dismiss stage, given the facts alleged, no reasonable officer could have found this intent element in Gates's conduct, and therefore, Officer Khokhar lacked even arguable probable cause to arrest. *Id.* The district court thus concluded that the officers were not entitled to qualified immunity under the First or Fourth Amendment. *Id.*

**E. The Eleventh Circuit Reversed, Finding that Officers Were Entitled to Qualified Immunity.**

On appeal, the Eleventh Circuit reversed the district court's denial of Officer Khokhar's motion to dismiss, finding that the officer had arguable probable cause to arrest for violation of the Georgia Anti-Mask Act. App. at 28a-29a. The court of appeals found that the officers "arguably had probable cause to arrest" and thus were entitled to qualified immunity on the Fourth Amendment claim. App. at 26a. This also automatically barred a First Amendment claim under



the Eleventh Circuit's pre-*Lozman* precedent. App. at 31a.

## REASONS FOR GRANTING THE WRIT

### I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CIRCUIT SPLIT AS TO WHETHER COURTS MUST LOOK TO STATE SUPREME COURT DECISIONS WHEN DETERMINING WHETHER OFFICERS HAD ARGUABLE PROBABLE CAUSE TO ARREST UNDER A STATE LAW

#### A. The Eleventh Circuit's Decision in this Case Creates a Circuit Split About Whether a Court Must Consider a State Supreme Court's Narrowing Constitutional Construction in Determining Whether an Officer Has Arguable Probable Cause to Arrest

In *Gates*, the Eleventh Circuit created a circuit split by ignoring a state supreme court's narrowing constitutional interpretation of a state statute when determining whether an officer had arguable probable cause to arrest.

The Second, Eighth and Tenth Circuits have all required that officers seeking a qualified immunity defense make a showing that they had arguable probable cause to arrest for violation of a state law under the state law *as interpreted* by the state's highest court, especially when this interpretation invokes the constitutionality of the statute.

In the Eighth Circuit case *Baribeau v. City of Minneapolis*, the court held that police officers did not have arguable probable cause to arrest festival-goers for violating a state's disorderly conduct ordinance because the festival goers' conduct did not fit the requirements of disorderly conduct as interpreted by the state's supreme court, where that interpretation was required to save the statute from constitutional challenge. 596 F.3d 465, 478 (8th Cir. 2010). In *Baribeau*, the plaintiffs were participating in a large public demonstration "to protest the 'mindless' nature of consumer culture by walking through the downtown area dressed as zombies." *Id.* at 470. Police received complaints that "plaintiffs were 'walking around, coming up close to people' and pedestrians were 'scooting away from them.'" *Id.*

Although they were ultimately charged with violating another statute, the plaintiffs were arrested by police for "disorderly conduct," in violation of Minnesota's disorderly conduct statute, M.S.A. § 609.72. *Id.* at 471. Previously, the Minnesota Supreme Court had determined that the statute *as written* was constitutionally impermissible, as it was vague and overbroad under the First and Fourteenth Amendments. *Id.* at 477. Thus, the Minnesota Supreme Court ruled that the statute only extended to "fighting words," or words "which by their every utterance inflict injury or tend to incite and immediate breach of the peace." *Id.* The plaintiffs sued for a violation of their First Amendment rights under § 1983, alleging that police acted without arguable probable cause because their conduct did not meet the narrower standard set by the Minnesota Supreme

Court. *Id.* at 472. The police officers disagreed, asserting that they were entitled to qualified immunity based, in part, on their showing of arguable probable cause. *Id.* at 473.

In its analysis, the Eighth Circuit Court of Appeals determined that the police officers did not have arguable probable cause to arrest under Minnesota's disorderly conduct statute to support a finding of qualified immunity. *Id.* at 478. The court based its reasoning on the Minnesota Supreme Court's previous interpretation of the disorderly conduct statute, and the officer's failure to show that they had arguable probable cause under this interpretation. *Id.*

The court noted that the officers could not reasonably think that the crowd of "zombie" protestors had reached the level of conduct required under the Supreme Court's "fighting words" requirement, noting "an objectively reasonable person would not think probable cause exists under the Minnesota disorderly conduct statute to arrest a group of peaceful people for engaging in artistic protest by playing music, broadcasting statements, dressing as zombies and walking erratically in downtown." *Id.* The court of appeals found that the officers were not entitled to qualified immunity. *Id.* at 478-89. In this way, the Eighth Circuit established that, to succeed on a qualified immunity defense, officers must show that they had arguable probable cause to arrest under the constitutional constraints placed on the statute by the highest state court.

Earlier this year, the Eighth Circuit affirmed its reliance on a state supreme court's interpretation to show arguable probable cause at the time of arrest. *Ross v. City of Jackson*. 897 F.3d 916 (8th Cir. 2018) Here, the Eighth Circuit held that officers did not have arguable probable cause to arrest a man for making threatening social media posts because officers could not have believed that the posts were "true threats" enough to meet the narrowing constitutional construction imposed on the arresting statute by the Missouri Supreme Court. *Id.* at 922.

The Tenth Circuit took a similar position to the Eighth Circuit in *A.W. v. Holmes*. 830 F.3d 1123, 1143-44 (10th Cir. 2016). Here, a campus police officer arrested a student for violating a New Mexico school conduct statute, N. M. S. A. 1978, § 30-20-13. *Id.* at 1130. The officer alleged that he had arguable probable cause to arrest the student because her disruptive behavior "willfully interfere[d] with the educational process," in direct violation of the plain language of the statute. *Id.* at 1139. The student sued under § 1983, and the officer asserted a defense of qualified immunity. *Id.* at 1132.

The Tenth Circuit eventually accepted the officer's defense, finding that the officer did have arguable probable cause to arrest under the New Mexico statute. *Id.* at 1147. However, the court of appeals determined arguable probable cause to arrest under the statute "through the lens of judicial decisions" from the New Mexico Supreme Court. *Id.* at 1143. Noting that the "[state] supreme court is the ultimate authority" on matters of interpreting state

law, the Tenth Circuit noted that previous New Mexico state precedent had established that the statute only covered conduct that interfered with the “actual functioning” of the school, and required a “more substantial, more physical invasion” than what the statute required on its face. *Id.* at 1143-44. Accordingly, although the Tenth Circuit ruled in favor of the officer, it did require the officer to show arguable probable cause to the state supreme court’s interpretation of state law.

Finally, the Second Circuit has similarly established that officers must show arguable probable cause to arrest under the interpretation of the statute by the state’s highest court. In *Darbisi v. Town of Monroe*, a man was arrested for interfering with an officer, in violation of Connecticut’s Code provision, C.G.S.A. § 53a-167a. 53 F.App’x. 159, 159 (2nd Cir. 2002). The Second Circuit agreed with the district court’s decision, which required that the officers show that they had arguable probable cause in conformity with the Connecticut Supreme Court’s interpretation of C.G.S.A. § 53a-167a. *Id.* The Connecticut Supreme Court had previously ruled that, to rise to the level of police interference, the conduct had to amount to “fighting words.” *State v. Williams*, 534 A.2d 230, 240 (Conn. 1987). The Second Circuit found that the arrestee’s conduct did not rise to the level of fighting words, so there was no way that the arresting officer could have had arguable probable cause to arrest under the statute as the state supreme court had interpreted it. *Darbisi*, 53 F.App’x. at 59. Therefore, the officers were not entitled to a qualified immunity defense. *Id.*

Across several circuits, courts require that officers show arguable probable cause based on the requirements of the arresting crime as determined by the highest court of the state, not just on the face of the statute. This lies in direct conflict with the Eleventh Circuit's ruling in *Gates*, which did not require that the arresting officer demonstrate arguable probable cause to arrest under the Georgia Anti-Mask Act as narrowed by the Georgia Supreme Court, which requires the officers to show evidence of intent to intimidate as an essential element of the law.

**B. The Eleventh Circuit Failed to Consider the Essential Nature of this Intent Element in Maintaining the Constitutionality of the Anti-Mask Act.**

The plain language of the Georgia Anti-Mask Act would indicate that wearing any mask that covers any portion of the face on public or private property is prohibited without permission of the owner or occupier of the property, and it does not exempt all expressive uses. Such a broad reading would violate the First Amendment. O.C.G.A. § 16-11-38; App. at 15a. Several Georgia State Supreme Court cases have interpreted the statute to bring it within constitutional bounds by adding an element necessary to make the statute constitutional. *Id.*

In *State v. Miller*, the Supreme Court of Georgia added a key element to the Anti-Mask Act. 398 S.E.2d at 552. In *Miller*, Defendant Shade Miller Jr. was

arrested for violating the statute by appearing in public in the Ku Klux Klan regalia, which included a mask that covered his face. *Id.* Miller alleged that the statute was unconstitutional because it violated his First Amendment right to freedom of speech. *Id.* at 549.

The Supreme Court of Georgia noted that the Anti-Mask Act was not intended to suppress constitutionally-protected expression:

The statute is content-neutral. It proscribes a certain form of menacing conduct without regard to the particular message of the mask-wearer. To the extent that the statute does proscribe the communicative aspect of mask-wearing conduct, its restriction is limited to threats and intimidation, which is not protected expression under the First Amendment.

*Id.* at 551 (citing *Lathrip v. State* 218 S.E.2d 771 (Ga. 1975)). The Supreme Court of Georgia further construed the statute “to apply only to mask-wearing conduct when the mask-wearing knows or reasonably should know that the conduct provokes reasonable apprehension of intimidation, threats, or violence.” *Id.* at 552. The Supreme Court of Georgia emphasized that only with this additional element did the Anti-Mask Act pass constitutional muster:

...[T]he Anti-Mask Act proscribes mask-wearing conduct that is intended to

conceal the mask-wearer's identity and that the wearer knows, or reasonably should know, gives rise to reasonable apprehension of intimidation, threats, or impending violence. So construed, the Act passes constitutional muster.

*Id.* at 553.

Four years after its decision in *Miller*, the Supreme Court of Georgia reaffirmed the Anti-Mask Act's intent element in *Daniels v. State*. 448 S.E.2d. at 188. In *Daniels*, the Georgia Supreme Court held that "for a violation of a statute to constitute a crime in Georgia...a mask-wearer must be criminally negligent of the possibility that his conduct will threaten, intimidate, or provoke the apprehension of violence." *Id.* at 188.

For "clarity", the court restated the standard:

"...[T]o obtain a conviction under the Anti-Mask Act, the state must show that the mask-wearer (1) intended to conceal his identity, and (2) either intended to threaten, intimidate, or provoke the apprehension of violence, or acted with reckless disregard for the consequences of his conduct or a heedless indifference to the rights and safety of others, with reasonable foresight that injury would probably result."



*Id.* at 189.

The Georgia Supreme Court's reasoning in *Miller* and *Daniels* tracks the same logic as this Court's decision in *Virginia v. Black*, another case arising from a Klan context. Ku Klux Klan members "were convicted separately of violating a Virginia statute that makes it a felony...to burn a cross." *Virginia v. Black*, 538 U.S. 343, 348 (2003). This Court noted that cross burnings have long been "inextricably intertwined with the history of the Ku Klux Klan" and the "Klan has often used cross burnings as a tool of intimidation and a threat of impending violence." *Id.* The Court in this case held that the First Amendment only "permits a State to ban 'true threats' which encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* at 344. This intent element is essential to constitutional enforcement of the statute, and properly balances the First Amendment values with protecting citizens from threats and intimidating speech.

In *Gates*, the Eleventh Circuit discussed the facts and its interpretation of the intent requirement established in *Miller* and *Daniels*. App. at 14a-15a. However, the court did not treat the intent requirement as being an essential element to its determination of arguable probable cause to arrest,

directly contravening the state Supreme Court's decisions in *Miller* and *Daniels*.<sup>1</sup>

The intent element, as articulated by the Georgia Supreme Court, was a limiting construction to preserve the statute's constitutionality by limiting the Act's scope to threats and intimidation which are not protected by the First Amendment. Gates's intent to peacefully protest a decision made in a police shooting case in Ferguson, Missouri, lies in stark contrast to the Ku Klux Klan's intent to terrorize racial and religious minorities.<sup>2</sup>

---

<sup>1</sup> There is considerable variation among the circuits as to what sources of authority courts must look to when determining whether law is "clearly established." In determining whether law is "clearly established," this Court has decided that courts must look to the decisions of this Court and the forum Circuit but has not decided whether courts must also look to decisions of the forum state's highest court. *U.S. v. Lanier*, 520 U.S. 259, 268- 69 (1997); *Hope v. Pelzer*, 536 U.S. 730, 756- 59 (2002); *D.C. v. Wesby*, 138 S. Ct. 577 (2018).

While the Eleventh Circuit has a narrower view than most circuits, this circuit has explicitly held that it must weigh state supreme court case law in its decisions in its qualified immunity decisions. *Jenkins ex rel. Hall v. Talladega City Board of Education*, 115 F.3d 821, 826 n.4 (11th Cir. 1997) ("[I]n this circuit, the law can be 'clearly established' for qualified immunity purposes only by decisions of the U.S. Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose."). Nevertheless, in this case, the Eleventh Circuit did not consider the narrowing construction of a state's highest court to be essential to its determination of arguable probable cause.

<sup>2</sup> The court of appeals in *Gates* attempted to emphasize facts that invoke the intent requirement in finding arguable probable cause to arrest, despite well-pleaded facts to the contrary. The court in *Gates* mentioned that, "like some other

It is clear from the allegations of the complaint in this motion to dismiss that the officers lacked arguable probable cause under the intent element of the Georgia Anti-Mask Act *as interpreted* by the Georgia Supreme Court. Gates was wearing the mask for purely expressive purposes, and the officers were acting under a blanket order to arrest anyone wearing a mask, regardless of their intent. In finding that the officers still had arguable probable cause to arrest under the statute, the Eleventh Circuit asserted that officers need not show “every element” of arguable probable cause- not even the constitutionally necessary intent element required by the Georgia Supreme Court. App. at 18a. This is in direct conflict with other circuits that treat these limiting

---

protestors, Plaintiff was wearing a mask that covered his entire face, and thus concealed his identity, during the night-time protest” and that conduct itself might be sufficient to suggest an intent to intimidate. App. at 18a. In addition, the court stated that “when the police repeatedly asked masked protestors to remove their masks” and Gates persisted, a “reasonable officer could infer that [Gates] intended to intimidate based on such conduct, or at the least, infer that [Gates] could reasonably foresee that his behavior would be viewed as intimidating.” App. at 20a. However, the court eventually offered that “showing arguable probable cause does not...require proving every element of a crime,” essentially negating the idea that the officers had to look to the intent requirement at all. App. at 18a (quoting *Brown v. City of Huntsville*, 608 F.3d 724, 735 (11<sup>th</sup> Cir. 2010). Furthermore, by failing to address the blanket order to arrest “anyone wearing a mask” made by the officer’s superior through the lens of the intent requirement clearly shows disregard to the intent requirement imposed on the statue by *Miller* and *Daniels*. App. at 5a.

constructions as essential to a finding of arguable probable cause.

Recently, in *District of Columbia v. Wesby*, this Court determined that an officer is entitled to qualified immunity when he is mistaken about whether an element of a crime is required to arrest. 138 S. Ct. 577, 593 (2018). However, *Wesby* did not involve an element that was required in order to render the state statute constitutional. In *Gates*, the officers ignored the very element of the crime that made the arrest constitutional. This Court should grant review to determine whether courts must look to these constitutional elements imposed by state supreme courts when deciding whether an officer had arguable probable cause to arrest.

## **II. THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER A FIRST AMENDMENT CLAIM SURVIVES WHEN OFFICERS HAVE ARGUABLE PROBABLE CAUSE TO ARREST FOR A PURELY SPEECH-BASED CRIME**

### **A. The Circuit Split that Existed Prior to this Court's Decision in *Lozman* Has Not Been Fully Resolved, and this Case Presents the Court with an Opportunity to Fully Resolve that Split.**

This case also raises issues left unresolved by this Court's decision in *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1951 (2018), specifically, whether arguable probable cause under the Fourth Amendment bars a plaintiff's claim under the First

Amendment when the alleged crime is a speech-based crime. This case is an ideal vehicle for this Court to further refine its holding in *Lozman*.

In *Lozman*, the Plaintiff was arrested at a city council meeting for allegedly violating its rules of procedure and failing to leave the podium when ordered to do so. *Id.* at 1949-50. He brought an action against the City under 42 U.S.C. § 1983, alleging that the arrest was in retaliation for past speech in violation of his First Amendment rights. *Id.* at 1950. Both parties conceded that there was arguable probable cause to arrest for this crime. *Id.* at 1949. The Eleventh Circuit held in *Lozman* that an unlawful arrest that was supported by probable cause defeated the plaintiff's First Amendment retaliation claims. *Id.* at 1950.

Before this Court granted certiorari in *Lozman*, circuits were split on whether arguable probable cause to arrest for criminal activity bars all First Amendment retaliatory arrest claims. In the Ninth and Tenth Circuits, a plaintiff could prevail on a First Amendment claim even if probable cause existed for the underlying arrest. *Id.* On the contrary, the Second, Fourth, Fifth, and Eighth Circuits were aligned with the Eleventh Circuit's holding that "the existence of probable cause to arrest" bars a First Amendment claim. *Id.*

This Court granted certiorari in *Lozman* to decide whether the existence of probable cause constituted a bar on a First Amendment claim where the plaintiff was arrested in retaliation for his earlier,

protected speech. *Id.* at 1951. This Court reversed the Eleventh Circuit decision and allowed the plaintiff to pursue his First Amendment claim, even though there was arguable probable cause to arrest for the crime under the Fourth Amendment. *Id.* at 1955. This Court held that the existence of probable cause does *not* automatically constitute a bar on a First Amendment claim. *Id.* at 1954-55.

*Lozman* concerned the plaintiff's allegedly retaliatory arrest under a City Council rule of procedure to remove citizens who disrupt city council meetings and arrest them for disorderly conduct. *Id.* at 1949. In other words, the plaintiff's alleged crime was not based purely on First Amendment activity; there was also a violation of a separate ordinance and it was a retaliatory arrest. As acknowledged by the court and by both parties, there was at least arguable probable cause to arrest the plaintiff under this ordinance because of his conduct. *Id.* However, this Court recognized the importance in allowing the plaintiff to maintain his First Amendment claims arising from the same arrest, regardless of the presence of arguable probable cause. *Id.* at 54-55. By granting review in *Gates*, this Court could expand upon this ruling by evaluating whether First Amendment claims can survive an arrest with arguable probable cause when the alleged crime itself is First Amendment protected conduct.

*Lozman* makes clear that retaliatory claims made under the First Amendment do not disappear with the presence of probable cause under the Fourth Amendment. *Id.* at 1954-55. However, *Lozman* was

silent on whether First Amendment claims can survive when there is arguable probable cause to arrest for purely speech-based crimes. This question implicates factual situations timely in our current national climate, including the rights of protestors to freedom of assembly, expression and speech balanced against the state's interest in law enforcement and public order.

By granting review of *Gates*, this Court could further answer questions left unresolved by *Lozman*, specifically whether a plaintiff can maintain a First Amendment claim after an arrest justified by arguable probable cause, specifically when a plaintiff is arrested for a purely speech-based crime.

### **III. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THESE CIRCUIT SPLITS, AND THIS CASE IMPLICATES FIRST AMENDMENT PROTECTIONS.**

The Eleventh Circuit determined that the officers who arrested Gates had arguable probable cause, without requiring them to show that they had arguable probable cause to arrest him under the narrowing constitutional construction imposed upon the Anti-Mask Act by the Georgia Supreme Court. This is in direct contrast to how other circuits treat these narrowing constitutional constructions on other state statutes.

Because the Eleventh Circuit's decision creates a split among the circuits as to how state supreme court interpretations of state statutes should impact

arguable probable cause analysis, this Court should grant certiorari to provide further guidance on this division.

Further, in *Lozman*, the plaintiff was arrested for disruption of public order at a city council meeting in retaliation for previous speech in violation of a municipal order – in other words, *Lozman*'s crime was not purely First Amendment activity.

In contrast, Austin Gates was arrested for engaging in expressive speech at the heart of the First Amendment. The fact that Gates was arrested for a speech-based crime that consisted purely of First Amendment activity raises exactly the type of question left unresolved by *Lozman*. Yet, the Eleventh Circuit, relying on pre-*Lozman* jurisprudence, decided that arguable probable cause defeated Gate's First Amendment claim because of the existence of arguable probable cause under the Georgia Anti-Mask Act. At the very least, this Court should grant, vacate and remand for reconsideration in light of *Lozman*. Alternatively, this Court should grant certiorari and expressly extend *Lozman* to plaintiffs like Gates, who was arrested for speech-based crimes which consist solely of First Amendment activity.

Austin Gates was arrested for wearing a mask at a peaceful protest, under a blanket order to arrest, without consideration of an intent to intimidate. The Eleventh Circuit ignored the First Amendment implications of this arrest when it found that arguable probable cause existed under the Fourth Amendment.



This case raises important and timely issues under the First Amendment and should be granted review.

### CONCLUSION

Petitioner respectfully requests that the Court grant the Petition for Certiorari in this case or, alternatively, grant, vacate and remand the case for further review by the Eleventh Circuit Court of Appeals in light of *Lozman*.

Respectfully submitted,

GERALD WEBER  
*Counsel of Record*  
Law Offices of Gerry  
Weber, LLC  
P.O. Box 5391  
Atlanta, Georgia 31107  
(404) 522-0507  
wgerryweber@gmail.com

SARAH M. SHALF  
Emory Law School  
Supreme Court  
Advocacy Program  
1301 Clifton Road  
Atlanta, Georgia 30322  
(404) 712-4652  
sarah.shalf@emory.edu

DANIEL J. GROSSMAN  
Law Office of Daniel J. Grossman  
1579 Monroe Drive, Suite F-138  
Atlanta, Georgia 30324  
(404) 654-0326  
dan@dangrossmanlaw.com

October 15, 2018