No. 18-511

In the Supreme Court of the United States

AUSTIN GATES,

Petitioner,

v.

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

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. The Eleventh Circuit, consistent with the Second, Eighth, and Tenth Circuits, considered the narrowing decision of the state's highest court when determining arguable probable cause in this matter. Petitioner's quarrel with the Eleventh Circuit rests in the manner in which the Eleventh Circuit applied this narrowed interpretation. Does the manner in which the Eleventh Circuit applied the state's narrowing decision warrant this Court's attention, even if resolution of the issue is not outcome determinative?

2. The Eleventh Circuit, consistent with well settled law, held that the Respondents were entitled to qualified immunity because the Eleventh Circuit found that probable cause existed for Petitioner's arrest and the clearly established law, at the time of the arrest, did not put the Respondents on notice of a constitutional violation. Petitioner asks this Court to hold that arrests supported by probable cause can give rise to a First Amendment violation. Should this Court address this issue, the Respondents will still be entitled to qualified immunity under the clearly established law at the time of the arrest. Does this case present a meaningful case for review when the result will not be affected by this Court's holding?

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RESPONDENTS' BRIEF IN OPPOSITION

Officer Khokhar, Sergeant Brauninger, and Major Whitmire (collectively the "Individual Officers") respectfully oppose the Petition for a Writ of Certiorari ("Petition") to review the judgment of the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit"), issued March 13, 2018, reproduced in the appendix to the Petition at Appendix ("Pet. App.") 1a through Appendix 39a and reported as *Gates v. Khokhar et al.*, 884 F.3d 1290 (11th Cir. 2018). The District Court's opinion is reproduced at Pet. App. 40a through 73a. The July 16, 2018 order of the Eleventh Circuit denying Petitioner's Petition for Rehearing is reproduced at Pet. App. 74a through 75a.

STATEMENT OF THE CASE

I. PROCEDURAL POSTURE

This action arises from Petitioner's arrest for violating Georgia's Anti-Mask Act, O.C.G.A. § 16-11-38, during a protest in downtown Atlanta, Georgia on November 26, 2014. Pet. App. at 3a. Petitioner brought action against the City of Atlanta and the three Individual Officers, in their individual capacities, under 42 U.S.C. § 1983 for alleged violations of his rights under the First and Fourth Amendment of the United States Constitution and various other state law claims. *Id*. at 45a-46a. The City of Atlanta and the Individual Officers filed a Motion to Dismiss all claims in the United States District Court for the Northern District of Georgia (District Court). *Id.* at 46a. The Individual Officers moved for dismissal on the basis of qualified and official immunity. *Id.* at 46a, 64a. The District Court dismissed the state law claims against

the City of Atlanta and denied the remainder of the motion. *Id.* at 73a. The Individual Officers appealed the District Court's decision with respect to qualified and official immunity. *Id.* at 3a. The Eleventh Circuit reversed, holding that the Individual Officers were entitled to qualified immunity for all the federal claims because probable cause existed for Petitioner's arrest and the clearly established law, at the time of the arrest, did not put the Respondents on notice of a constitutional violation. *Id*. at 4a. This Court also held that Respondents were entitled to official immunity for the state law claims. *Id.* at 4a. Petitioner then sought rehearing before the Eleventh Circuit, which was denied. *Id.* at 75a. Now, before this Court, Petitioner seeks review of the Individual Officers grant of qualified immunity for the First Amendment claims only.

II. RELEVANT FACTS

On November 26, 2014, Petitioner participated in a march in downtown Atlanta, Georgia to protest the grand jury's decision in the Ferguson, Missouri police-shooting case.[1] *Id.* at 4a. During the march, Petitioner wore a "V for Vendetta" mask. *Id.* The mask is designed to cover the entire face and was a stylized image of the Guy Fawkes character from the movie "V for Vendetta." *Id.*

At some point during the protest Major Whitmire ordered all protesters to remove their masks over a

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[1] As this appeal arises out of a motion to dismiss under Federal Rule 12(b)(6), the facts as alleged in the *Complaint* are accepted as true. The Individual Officers do not agree with all the facts as alleged by Petitioner.

loudspeaker, multiple times. *Id.* at 5a. Major Whitmire also announced over the loudspeaker, multiple times, that any person wearing a mask during the protest would be arrested. *Id.* Major Whitmire subsequently ordered the arrest of anyone wearing a mask. *Id.*

After Major Whitmire issued multiple orders to remove the masks to the protesters, over a loudspeaker, and also advised, via loudspeaker, that anyone wearing a mask would be arrested, Officer Khokhar observed Petitioner wearing a mask. *Id.* at 6a. Officer Khokhar then arrested Petitioner, who was still wearing the mask, for violation of Georgia's Anti-Mask Act. *Id.* Sergeant Brauninger, Officer Khokhar's supervisor, reviewed and authorized the offence report for Petitioner's arrest. *Id.*

REASONS FOR DENYING PETITIONER'S WRIT

I. THE PETITION SHOULD BE DENIED BECAUSE NO CIRCUIT-SPLIT EXISTS.

A. The Eleventh Circuit, consistent with the Second, Eighth, and Tenth Circuits, showed deference to the highest state court in determining whether arguable probable cause existed.

Petitioner contends that the Eleventh Circuit created a circuit-split by ignoring a state supreme court's narrowing interpretation of a state statute when determining whether an officer had arguable probable cause to arrest. Pet. at 9. Petitioner contends that this creates a conflict with the Second, Eighth, and Tenth Circuits. Pet. at 9. Petitioner misreads the Eleventh Circuit's opinion. In reaching its decision below, the Eleventh Circuit conducted a similar

analysis to those used in the Second, Eighth, and Tenth Circuits by looking to the state supreme court's jurisprudence when determining whether arguable probable cause existed to entitle the respective officers to qualified immunity. Pet. App. at 15a-23a.

In line with the holdings of the Second, Eighth and Tenth Circuits, the Eleventh Circuit, in this matter, showed deference to the highest state court's precedent in determining whether the Individual Officers were entitled to qualified immunity. The Eleventh Circuit relied upon the Georgia Supreme Court's holdings in *State v. Miller*, 260 Ga. 669 (1990) and *Daniels v. State*, 264 Ga. 460 (1994), in analyzing Georgia's Anti-Mask Act, O.C.G.A. § 16-11-38. Pet. App. at 15a-23a. The Court underscored that "[i]n addition to the statutory exceptions, the Georgia mask statute must be read in light of the limitations placed on it by the Georgia Supreme Court in *Miller* and *Daniels*." *Id.* at 15a (internal citations omitted). Thus, the Eleventh Circuit, in acknowledging the Georgia Supreme Court's narrowing construction, gave deference to the Georgia Supreme Court's interpretation of the mask statute. This show of deference to Georgia's highest court is consistent with the approaches used by the Second, Eighth, and Tenth Circuits.

The analysis of the Second, Eighth, and Tenth Circuits are in line with the Eleventh Circuit:

In *Darbisi v. Town of Monroe*, No. 3:00CV1446 (RNC) (D. Conn. Jan. 14, 2002), the United States District Court for the District of Connecticut relied upon the Connecticut Supreme Court's holding in *State v. Williams*, 205 Conn. 456 (1987) to interpret Connecticut General Statute § 53a-167a(a). Ratifying

the District Court's reliance upon the Connecticut Supreme Court's interpretation of the statute, the Second Circuit affirmed the judgment of the District Court "substantially for the reasons stated in the [District Court's] opinion." *Darbisi v. Town of Monroe*, 53 F. App'x 159 (2002). In affirming the District Court's ruling, the Second Circuit rejected Defendant Officer Torreso's claim of qualified immunity. *Id.*

In *Baribeau v. City of Minneapolis*, 596 F.3d 465 (2010), the Eighth Circuit took a similar approach by deferring to the Minnesota Supreme Court's jurisprudence in determining whether probable cause existed to arrest under a Minnesota statute. The Eighth Circuit specifically held that "[t]he interpretation of the disorderly conduct statute is a question of Minnesota state law" and "[w]hen interpreting Minnesota's statutes, we are bound by the decisions of the Minnesota Supreme Court." *Id*. at 475. The Eighth Circuit found that the Minnesota Supreme Court's holding in *State v. Machholz*, 574 N.W.2d 415, 419 (Minn. 1998), would apply to narrow the construction of the disorderly conduct statute to expressive conduct. *Baribeau*, 596 F.3d at 476-77. In adhering to the Minnesota Supreme Court's narrowing construction in *Machholz* and *In re Welfare of S.L.J.*, 263 N.W.2d 412 (Minn.1978), the Eighth Circuit concluded that officers "Merkel and Weber did not have arguable probably cause to arrest the plaintiffs." *Baribeau*, 596 F.3d. at 478.

The Tenth Circuit, in *A.M. v. Holmes*, 830 F.3d 1123, 1129-30 (2016), decided whether the Defendants, an Officer of the Albuquerque Police Department and two school administrators, were entitled to qualified

immunity after arresting F.M., a minor, for violating New Mexico's "interference-with-educational-process statute." After finding no state supreme court case deciding the issue of whether Officer Acosta lacked probable cause to arrest F.M., the Second Circuit proclaimed that, "[w]hen a state supreme court has not spoken on the question at issue, we assume (without deciding) that a reasonable officer would seek guidance regarding the scope of proper conduct at least in part from any on-point decisions of the state's intermediate court of appeals." *Id.* at 1140. Upon reviewing the New Mexico Court of Appeals' holding in *State v. Silva*, 86 N.M. 543 (N.M. Ct. App. 1974), the Second Circuit held that "it would not have been clear to a reasonable officer in Officer Acosta's position that his arrest of F.M. under N.M. Stat. Ann. § 30-20-13(D) would have been lacking in probable cause and thus violative of F.M.'s Fourth Amendment rights." *Holmes*, 830 F.3d at 1150.

Therefore, there is no conflict among the Circuits.

B. The Eleventh Circuit applied the Georgia Supreme Court's narrowing decisions in *Miller* and *Daniels* to determine whether the individual officers were entitled to qualified immunity.

Next, the Eleventh Circuit applied the Georgia Supreme Court's precedent to the specific facts of this case. Pet. App. at 17a-23a. The Eleventh Circuit identified the holdings in *Miller* and *Daniels*, which narrowly construed Georgia's Anti-Mask Act by adding an intent requirement necessary for conviction, and applied the narrowing construction to the facts of this

matter. *Id.* The Court found that given the circumstances surrounding Plaintiff's arrest, "[a] reasonable officer could infer that Plaintiff intended to intimidate based on [Plaintiff's failure to remove his mask], or at the least, infer that Plaintiff could reasonably foresee that his behavior would be viewed as intimidating." *Id.* at 20a.

After applying Georgia's Anti-Mask Act, as narrowed by the Georgia Supreme Court, to the facts of this matter, the Eleventh Circuit held that, "[t]aking into account the statutory elements of O.C.G.A. § 16-11-38, as interpreted by the Georgia Supreme Court in *Miller* and *Daniels*, we conclude that Defendants had probable cause to arrest Plaintiff for violating the mask statute under the circumstances alleged in the complaint." *Id.* at 17a. Therefore, the argument that the Eleventh Circuit did not apply and analyze the facts of this matter in light of the Georgia Supreme Court's holdings in *Miller* and *Daniels* is in conflict with the clear language of the Eleventh Circuit's opinion. The Eleventh Circuit dedicated a significant portion of its analysis to outlining the limitations placed upon Georgia's Anti-Mask Act by the Georgia Supreme Court in *Miller* and *Daniels*. *Id.* at 15a-23a Consistent with the analysis conducted by the Second, Eighth, and Tenth Circuits, the Eleventh Circuit analyzed the state statute, as construed by the highest state court, in determining whether the officers lacked probable cause to arrest.

C. Petitioner's arguments regarding the "essential element" do not warrant a different outcome.

This Court has consistently held that, "only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause." *Illinois v. Gates*, 462 U.S. 213, 235 (1983) (quoting *Spinelli v. United States*, 393 U.S. 410, 419 (1969). Probable cause "means less than evidence which would justify condemnation … it imports a seizure made under circumstances which would warrant suspicion." *Id.* In interpreting this Court's precedent regarding probable cause and qualified immunity, the Eleventh Circuit has held that "[e]ven without actual probable cause, however, a police officer is entitled to qualified immunity if he had only 'arguable' probable cause to arrest the plaintiff." *Lee v. Ferraro*, 284 F.3d 118, 1195 (11th Cir. 2002). "Arguable probable cause exists where reasonable officers in the same circumstances and possessing the same knowledge as the defendant *could* have believed that probable cause existed to arrest." *Redd v. City of Enterprise*, 140 F.3d 1378, 1383-84 (11th Cir. 1998) (emphasis added). In the Eleventh Circuit, a showing of "arguable probable cause does not require proving every element of a crime." *Brown v. City of Huntsville, Ala.*, 608 F.3d 724, 735 (11th Cir. 2010). "To require an arresting officer to prove every element of a crime 'would negate the concept of probable cause and transform arresting officers into prosecutors.'" *Lee*, 284 F.3d at1195. In addition, the Eleventh Circuit, has held that an arresting officer needs no specific evidence of a suspect's intent before determining that probable cause exists to support a valid arrest. *Jordan v. Mosley*, 487

F.3d 1350, 1355 (11th Cir. 2007). As this Court held in *Pearson v. Callahan*, 555 U.S. 223, 244-45 (2009), "[p]olice officers are entitled to rely on existing lower court cases without facing personal liability for their actions." *Id.* Therefore, relying upon Eleventh Circuit precedent on arguable probable cause, the Individual Officers were not required to prove every element of the charged crime or "intent" to commit the crime to lawfully arrest Petitioner and are entitled to qualified immunity.

Contrary to the clearly established law of the Eleventh Circuit, Petitioner requests this Court to overturn the Eleventh Circuit's precedent, ignore its own previous holdings, and require that every element of the charged offense, including the "essential element," be proven by the Individual Officers before arrest. Pet. 17-19. Petitioner argues that because the Individual Officers "lacked arguable probable cause under the intent element of the Georgia Anti-Mask Act," no probable cause to arrest existed. *Id.* at 19. Petitioner's "essential element" argument would require an officer to prove a prima facie showing of each element of a charged offense in order to prove probable cause. This requirement would overrule this Court's extensive body of law concerning probable cause and require that officers demonstrate more than a "probability or substantial chance of criminal activity." Petitioner's contentions are also unsupported by clearly established law which, in the Eleventh Circuit, would not have placed the Individual Officers on notice that their actions violated Petitioner's First or Fourth Amendment Rights. Given this Court's and the Eleventh Circuit's consistent and long-standing jurisprudence in the area of probable cause,

Petitioner's arguments regarding the "essential element" are inconsistent with this Court's precedent and, therefore, do not warrant further review.

II. THE PETITION SHOULD BE DENIED BECAUSE THE INDIVIDUAL OFFICERS ENFORCED A VALID STATE LAW AND ARE ENTITLED TO QUALIFIED IMMUNITY.

A. Georgia's Anti-Mask Act is a valid state law.

Petitioner claims that the Eleventh Circuit failed to consider intent and thus also failed to maintain the constitutionality of Georgia's Anti-Mask Act. Pet. at 14. However, the constitutionality of Georgia's Anti-Mask Act is not an issue here. The only question before the Eleventh Circuit was whether the Individual Officers were entitled to qualified immunity when enforcing a valid state law.

The Georgia Supreme Court has upheld the constitutionality of Georgia's Anti-Mask Act twice. *Miller*, 260 Ga. at 676; *Daniels*, 264 Ga. at 464. On its face, Georgia's Anti-Mask Act prohibits wearing a mask that conceals the wearer's identity, outside of the four narrow exceptions, and does not include an element of *mens rea*. O.C.G.A. § 16-11-38. In upholding the constitutionality of Georgia's Anti-Mask Act, the Supreme Court of Georgia interpreted the Anti-Mask Act through a reading of the "Statement of Public Policy," that preceded the Anti-Mask Act, thereby adding the element of *mens rea* to the Act's enforcement. *Miller*, 260 Ga. at 674; *Daniels*, 264 Ga. at 463. Though originally established by the *Miller*

Court, the *Daniels* Court restated the applicable *mens rea* standard "for clarity" purposes, prescribing that conviction requires either "intention or criminal negligence." *Daniels*, 264 Ga. at 464.

> [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.*

The standard put forth in *Miller* and *Daniels* focused on the standard for conviction, not arrest. In *Miller*, however, the Georgia Supreme Court did opine that Miller's arrest for wearing Ku Klux Klan regalia, including a mask, in public was constitutional. *Miller*, 260 Ga. at fn.1. Both *Daniels* and *Miller* clearly establish that Georgia's Anti-Mask Act was a valid state law at the time of Petitioner's arrest, and that arrests pursuant to Georgia's Anti-Mask Act were constitutional at the time of Petitioner's arrest.[2]

B. The clearly established analysis warrants affirming the Eleventh Circuit's holding.

Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or

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[2] As of the date of this filing, Georgia's Anti-Mask Act still remains a valid state law and no ruling of any Court has struck it down.

constitutional right, and (2) that the right was "clearly established" at the time of the challenged conduct. *See, Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Assuming *arguendo* that the Individual Officers violated a constitutional or statutory right, they remain entitled to qualified immunity if the right was not "clearly established" at the time of arrest. *Anderson v. Creighton*, 483 U.S. 635, 639-640 (1987).

In the present case, Petitioner failed to satisfy the "clearly established" prong of the qualified immunity analysis.

> A clearly established right is one that is sufficiently clear that *every* reasonable official would have understood that what he is doing violates that right. We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question *beyond debate*. Put simply, qualified immunity *protects all but the plainly incompetent or those who knowingly violate the law*. *Mullenix v. Luna*, __ U.S. __, 136 S.Ct. 305, 308 (2015) (emphasis added) (internal citations omitted).

To determine whether a right is "clearly established" in the Eleventh Circuit officers "look to law as decided by the Supreme Court, the Eleventh Circuit, or the Supreme Court of Georgia." *Leslie v. Hancock Cnty. Bd. of Educ.*, 720 F.3d 1338, 1345 (11th Cir. 2013). A right can be clearly established in one of three ways:

> First, if judicial precedents in an area are tied to particular facts, [the plaintiff] must show that a

> materially similar case has already been decided. Second, if judicial precedents are not tied to particular facts, [the plaintiff] may point to a broader, clearly established principle that should control the novel facts of the situation. To succeed under this approach, the principle must be established with obvious clarity by the case law so that *every* objectively reasonable government official facing the circumstances would know that the official's conduct did violate federal law when the official acted. Third, in a narrow category of matters, the conduct involved in the case may so obviously violate the constitution that prior case law is unnecessary. *Id*. at 1345-1346 (internal citations omitted).

Here, the judicial precedents that are most similar to Petitioner's arrest are *Daniels* and *Miller*. These cases fail to provide "fair warning" to the Officers that arrest for violation of Georgia's Anti-Mask Act would violate Petitioner's First Amendment rights. *See Vineyard v. Wilson*, 311 F.3d 1340, 1350 (2002). In fact, the opposite is true. *Daniels* and *Miller* explicitly uphold the constitutionality of the Anti-Mask Act and the enforcement thereof. *Daniels*, 264 Ga. at 464.; *Miller*, 260 Ga. at 671.

There is *no* judicial precedent regarding enforcement of the Anti-Mask Act during a demonstration such as the one in which Petitioner participated. In the absence of precedent containing the "particular facts" of Petitioner's arrest, and with the existence of *Daniels* and *Miller*, the case law does not establish the legal principle asserted by Petitioner with "obvious clarity." *Leslie*, 720 F.3d at 1345. The First

Amendment rights raised by Petitioner were not clearly established at the time of his arrest. The Individual Officers were not "plainly incompetent" nor "knowingly violat[ing] the law." *Mullenix*, 136 S. Ct. at 308. Thus, even if this Court chose to accept Petitioner's argument regarding the "essential element," it would not have been clearly established at the time of Petitioner's arrest and the Individual Officers would still be entitled to qualified immunity. Therefore, this case is not a meaningful case for the Court to review.

III. THE PETITION SHOULD BE DENIED BECAUSE THIS MATTER IS NOT THE APPROPRIATE VEHICLE TO EXPAND *LOZMAN*.

A. The unique and narrow application of *Lozman* is not applicable here.

This Court's recent decision in *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018) addresses a unique class of retaliatory arrest claims. In *Lozman*, Mr. Lozman brought an action against a Florida municipality, under 42 U.S.C. § 1983, for his arrest while speaking in a city council meeting. *Id.* at 1949-50. Mr. Lozman alleged that "his arrest at the city council meeting violated the First Amendment because the arrest was ordered in retaliation for his earlier, protected speech: his open-meeting lawsuit and his prior public criticism of city officials." *Id.* at 1951. Mr. Lozman conceded that there was probable cause to arrest him. *Id.* In addition, Mr. Lozman did "not sue the officer who made the arrest." *Id.* at 1954.

> Instead Lozman alleges more governmental action than simply an arrest. His claim is that the City itself retaliated against him pursuant to an "official municipal policy" of intimidation. In particular, he alleges that the City through its legislators, formed a premeditated plan to intimidate him in retaliation for his criticisms of city officials and his open meetings lawsuit. And he asserts that the City itself, through the same high officers, executed that plan by ordering his arrest at the November 2006 city council meeting. *Id.* (internal citations omitted).

This Court found that "[t]he fact that Lozman must prove the existence and enforcement of an official policy motivated by retaliation separates Lozman's claims from the typical retaliatory arrest claim." *Id.* This Court further explained that

> [a] citizen who suffers retaliation by an individual officer can seek to have the officer disciplined or removed from service, but there may be little practical recourse when the government itself orchestrates the retaliation. For these reasons, when retaliation against protected speech is elevated to the level of official policy, there is compelling need for adequate avenues of redress. *Id.*

Therefore, this Court held that the presence of probable cause for Lozman's arrest would not be a barrier to his First Amendment claim, provided that objective evidence of a policy motivated by retaliation were presented. *Id.* at 1954-55.

The unique facts, which necessitated the creation of an alternative avenue for redress in *Lozman*, do not exist in this matter. Here, Petitioner is challenging the Eleventh Circuit's grant of qualified immunity to Officer Khokhar, Sergeant Brauninger, and Major Whitmire only. While the City of Atlanta remains in the lawsuit, the Eleventh Circuit's ruling from which Petitioner appeals does not address the City of Atlanta's liability. The only issue before the Eleventh Circuit was qualified and official immunity for each of the Individual Officers.

In addition, Petitioner has not alleged that his arrest was part of a specific premeditated policy, nor was such an issue before the Eleventh Circuit. Finally, Petitioner does not assert that he had prior speech which caught the ire of any of the Respondents in this matter nor that his arrest was motivated by such prior speech. Simply put, the unique circumstances present in *Lozman* are not present here. Therefore, there is no compelling need to create an additional avenue for redress, because, as this Court pointed out in *Lozman*, one already exists.

B. This Court's analysis in *Hartman* provides the proper foundation for resolution of this matter.

While the Individual Officers assert that the qualified immunity analysis utilized by the Eleventh Circuit was proper and no additional review is needed, should the Court disagree, the Individual Officers assert that this Court's analysis in *Hartman et al. v. Moore*, 547 U.S. 250 (2006), is appropriate.

In *Hartman*, the petitioner, Mr. Moore, brought a *Bivins* action against federal prosecutors and postal service inspectors alleging malicious and retaliatory prosecution. *Id.* While Mr. Moore asserted several causes of action, the cause of action relevant to this Court's *Hartman* decision was "the claim that the prosecutor and the inspectors had engineered his criminal prosecution in retaliation for criticism of the Postal Service, thus violating the First Amendment." *Id.* at 254. Hartman and his fellow Inspectors moved for summary judgment arguing that they were entitled to qualified immunity from a retaliatory-prosecution suit because the underlying criminal charges were supported by probable cause. *Id.* at 255. This Court granted certiorari to answer "whether a plaintiff in a retaliatory-prosecution action must plead and show the absence of probable cause for pressing the underlying criminal charges." *Id.* at 256-57. This Court held that yes, the plaintiff was required to plead and prove the absence of probable cause to bring a successful retaliatory prosecution claim. *Id.* at 266.

In reaching this decision, this Court placed specific emphasis on the evidence needed at trial to prove a retaliatory-prosecution claim. *Id.* at 260-66. Specifically, this Court noted that because *Hartman* was a retaliatory-prosecution case "the causal connection required here is not merely between the retaliatory animus of one person and that person's own injurious action, but between the retaliatory animus of one person and the action of another." *Id.* at 262. At trial "some evidence must link the retaliatory official to a prosecutor whose action has injured the plaintiff. The connection, to be alleged and shown, is the absence of probable cause." *Id.* at 263. This Court noted that

probable cause is a potential feature in every case, with obvious evidentiary value. *Id.* at 265. This Court concluded that "showing an absence of probable cause will have high probative force, and can be mandatory with little or no added cost, it makes sense to require such a showing as an element of a plaintiff's case, and we hold that it must be pleaded and proven." *Id.* at 265-66. The same holds true under the facts at hand.

Here, Petitioner was arrested for violating Georgia's Anti-Mask Act. Petitioner has not asserted that his arrest was motivated by retaliation for his prior speech. All of Petitioner's allegations relevant to the matter before the Court occurred on the night of his arrest. Therefore, any alleged animus in this matter would be borne by the Individual Officers now before the Court. Certainly, the presence or absence of probable cause would have probative force in determining if the Individual Officers actually bore the unconstitutional animus complained of. As noted in *Hartman*, this showing can be mandatory with little or no added cost. It is also true that, showing an absence of probable cause would be vital evidence to proving that the unconstitutional motive was the but-for cause of the arrest and not plaintiff's violation of a valid law. As this Court stated in *Hartman* "[i]t may be dishonorable to act with an unconstitutional motive and perhaps in some instances be unlawful, but action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway." *Hartman*, 547 U.S. at 260. Requiring Petitioner to show an absence of probable cause makes sense here as it did in *Hartman*.

IV. THE PETITION SHOULD BE DENIED BECAUSE VIOLATIONS OF THE FIRST AMENDMENT FOR ARRESTS SUPPORTED BY PROBABLE CAUSE ARE NOT CLEARLY ESTABLISHED.

In *Pearson v. Callahan*, 555 U.S. at 236, this Court held that courts may grant qualified immunity on the ground that a purported right was not "clearly established" by prior case law, without resolving whether the purported right exists at all. *Id*. at 227. This approach is consistent with this Court's reluctance from deciding constitutional questions unnecessarily. *Reichle v. Howard*, 566 U.S. 658, 664 (2012). This Court followed this approach in *Reichle* and the same approach is applicable here.

In *Reichle*, this Court was asked to resolve two questions: "whether a First Amendment retaliatory arrest claim may lie despite the presence of probable cause to support the arrest, and whether clearly established law at the time of the [Plaintiff's] arrest so held." *Id.* at 663. This Court elected to only address the second question regarding clearly established law. *Id.*

> To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he was doing violates that right. In other words, existing precedent must have placed the statutory or constitutional question beyond debate. This "clearly established" standard protects the balance between vindication of constitutional rights and government officials' effective performance of their duties by ensuring that officials can reasonably anticipate when their

conduct may give rise to liability for damages. *Id.* at 664 (internal citations omitted).

In *Reichle*, this Court noted that it "has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause; nor was such a right otherwise clearly established at the time of [plainitff's] arrest." *Id.* at 664-65. This statement is still true today. This Court also noted that *Hartman* injected uncertainty into the law governing retaliatory arrests. *Id.* at 670. No subsequent decisions of this Court have clarified this uncertainty. The *Hartman* uncertainty coupled with the complete absence of prior legal precedent moved this Court to hold that, at the time of the arrest in *Reichle*, it was not clearly established that an arrest supported by probable cause could give rise to a First Amendment violation.

Here, Petitioner was arrested on November 26, 2014. Pet. App. at 4a. At the time of his arrest, it was not clearly established that an arrest supported by probable cause could give rise to a First Amendment violation. Therefore, this Court, in keeping with its practice not to decide constitutional questions unnecessarily and in following the established legal precedent, need only address the Individual Officer's entitlement to qualified immunity. The issue is easily resolved because at the time of Petitioner's arrest it was not clearly established that an arrest supported by probable cause could give rise to a First Amendment violation. Thus, the Individual Officers would be entitled to qualified immunity as the Eleventh Circuit held.

CONCLUSION

Respondents respectfully request that the Court deny the Petition for Certiorari.

Respectfully submitted,

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