No. _____

IN THE
Supreme Court of the United States

MARTIN E. O'BOYLE, JONATHAN O'BOYLE, AND WILLIAM RING,
PETITIONERS,

V.

TOWN OF GULF STREAM,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

M. PATRICK YINGLING
REED SMITH LLP
10 SOUTH WACKER DR.
40TH FLOOR
CHICAGO, IL 60606
(312) 207-2834
mpyingling@reedsmith.com

KIM M. WATTERSON
Counsel of Record
REED SMITH LLP
225 FIFTH AVE.
SUITE 1200
PITTSBURGH, PA 15222
(412) 288-7996
kwatterson@reedsmith.com

QUESTIONS PRESENTED

Petitioners brought a First Amendment retaliation claim under 42 U.S.C. § 1983 against a municipality that had filed civil litigation against Petitioners pursuant to an official policy to stop their speech and petitioning activities. The Eleventh Circuit held that Petitioners' claim failed as a matter of law because they did not prove the absence of probable cause for the civil litigation.

In *Hartman v. Moore*, 547 U.S. 250 (2006), this Court recognized that—in contrast to an "ordinary" retaliation claim—a retaliatory prosecution claim requires proof of an additional causation element: a lack of probable cause. In *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), this Court extended this requirement to retaliatory arrest claims. The question presented is:

1. Whether the no-probable-cause requirement extends beyond claims for retaliatory *criminal* prosecution and arrest and applies to claims for retaliatory *civil* litigation?

In *Nieves*, this Court recognized that the existence of probable cause "does not categorically bar" a retaliation claim when an adverse action is taken "pursuant to an alleged 'official municipal policy' of retaliation." 139 S. Ct. at 1722 (quoting *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1954 (2018)). The question presented is:

2. Whether the no-probable-cause requirement applies when a plaintiff has proved an official municipal policy of retaliation?

PARTIES TO THE PROCEEDING

Petitioners Martin O'Boyle, Jonathan O'Boyle, and William Ring were the plaintiffs in the district court and the appellants in the Eleventh Circuit.

Respondent Town of Gulf Stream was the defendant in the district court and the appellee in the Eleventh Circuit.

STATEMENT OF RELATED PROCEEDINGS

Martin E. O'Boyle et al. v. Town of Gulf Stream, No. 22-10865 (11th Cir. Mar. 21, 2023) (affirming grant of summary judgment for defendant and denying panel rehearing); and

Martin E. O'Boyle et al. v. Town of Gulf Stream, No. 9:19-cv-80196 (S.D. Fla. Feb. 17, 2022) (granting summary judgment for defendant).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of Supreme Court Rule 14.1(b)(iii).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constituitonal and Statutory Provisions

Other Authorities

IN THE
Supreme Court of the United States

MARTIN E. O'BOYLE, JONATHAN O'BOYLE, AND WILLIAM RING,
PETITIONERS,

V.

TOWN OF GULF STREAM,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners Martin O'Boyle, Jonathan O'Boyle, and William Ring respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The original opinion of the court of appeals is available at 2023 U.S. App. LEXIS 3085. When it denied panel rehearing, the court of appeals issued a substitute opinion, which is available at 2023 U.S. App. LEXIS 6665. Pet.App.1a-15a. The opinion of the United States District Court for the Southern District

of Florida denying motions for summary judgment is available at 2022 U.S. Dist. LEXIS 56144. Pet.App.18a-70a. The district court's amended order granting the Town's summary judgment motion is available at 2022 U.S. Dist. LEXIS 56153. Pet.App.71a-74a.

JURISDICTION

The court of appeals issued its original opinion on February 8, 2023. The court denied panel rehearing, issued a substitute opinion, and entered judgment on March 21, 2023. Pet.App.1a-17a. On May 26, 2023, Justice Thomas extended the time to file this petition to July 19, 2023. No. 22A1023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, which 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." U.S. Const. amend. I.

This case also involves the Fourteenth Amendment to the United States Constitution, which provides in relevant part: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

This case also involves 42 U.S.C. § 1983, which provides in relevant 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 …." 42 U.S.C. § 1983.

STATEMENT

As a tenet of basic freedom, the First Amendment prohibits government entities from retaliating against individuals for engaging in protected speech and exercising their rights to petition the government for redress. Martin O'Boyle ("O'Boyle") exercised his First Amendment rights by engaging in speech critical of leadership in the Town of Gulf Stream (the "Town"). He used banners, signs, and pamphlets to express his disagreements with Town leadership. O'Boyle also filed public records requests with the Town. When the Town failed to respond, O'Boyle sued the Town pursuant to Florida's strong public records law. In response, Town leaders publicly stated their intent to take action against O'Boyle. Among other things, before and after his election, the mayor stated

publicly that the Town should pursue "a very strong, aggressive" strategy against O'Boyle to "put a stop" to O'Boyle filing lawsuits and engaging in other activities, including his speech critical of the Town. The mayor also wrote a letter to Town residents stating that the Town Commission would be "stepping up" its efforts against O'Boyle and taking the "firm stance" that the Commission believed was "necessary."

The Town mounted a three-pronged, scorched-earth attack to make good on its plan to "put a stop" to O'Boyle's First Amendment activities. *First*, the Town filed counterclaims against O'Boyle and his lawyers (his son, Jonathan O' Boyle, and his son's law partner, William Ring) in the public records lawsuits. *Second*, the Town again went after O'Boyle's lawyers by filing bar complaints against them. *Third*, the Town sued O'Boyle and his lawyers under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1962(c), 1964(c). Additionally, following a disagreement over O'Boyle writing a message on a bulletin board after a Town meeting, Town leaders initiated criminal charges that led to the prosecution of O'Boyle for trespass, resisting arrest, and disorderly conduct.

The Town did not prevail in any of its actions. The courts dismissed the Town's public records counterclaims, the Town's RICO complaint, and the Town's bar complaints against O'Boyle's lawyers. Additionally, the criminal court judge dismissed O'Boyle's trespassing and resisting arrest charges; and the jury found O'Boyle not guilty of disorderly conduct.

The O'Boyles and Ring then brought this action against the Town under 42 U.S.C. § 1983 based on the Town's retaliation against them for their First Amendment activities. The district court granted summary judgment to the Town, reasoning that Petitioners could not prove a causal link between their protected activity and the Town's actions, and the Eleventh Circuit affirmed. The court of appeals held that Petitioners were required to show a lack of probable cause for each of the Town's actions, including its retaliatory civil litigation and bar complaints. Also, according to the court of appeals, a showing of an "official municipal policy" of retaliation did not relieve Petitioners from showing a lack of probable cause for the Town's retaliatory actions.

This Court has addressed the causation element of Section 1983 First Amendment retaliation claims. In *Mt. Healthy City School District Board of Education v. Doyle*, this Court held that—for ordinary retaliation claims—the plaintiff must show that his constitutionally protected conduct was a "motivating factor" in the government's decision to act against him. 429 U.S. 274, 287 (1977). In *Hartman v. Moore*, this Court held that—in contrast to "ordinary" retaliation claims—a retaliatory prosecution claim involves an additional causation element: a lack of probable cause. 547 U.S. 250, 259, 265-66 (2006). In *Nieves v. Bartlett*, this Court extended this additional causation element to retaliatory arrest claims. 139 S. Ct. 1715, 1725 (2019). And, in *Lozman v. City of Riviera Beach*, this Court held that a plaintiff asserting a claim against a municipality based on an "'official municipal policy'" of retaliation need not prove a lack of probable cause for the retaliatory action. 138 S. Ct.

1945, 1954 (2018) (quoting *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978)). But this Court has never addressed the questions the Eleventh Circuit grappled with in this case—questions on which the lower courts are divided.

On the first question presented, the Eleventh Circuit held that Petitioners were required to prove the absence of probable cause for the Town's civil lawsuits. But this Court has never held that the additional no-probable-cause requirement that applies in retaliatory prosecution and arrest cases (*Hartman* and *Nieves*) extends to a case involving retaliatory *civil actions*. On examination, the additional requirement is not needed in these circumstances, and there are good reasons not to import the additional requirement into the analysis.

First, in *Hartman* and *Nieves*, this Court noted that retaliatory prosecutions and arrests present difficulties in proving causation. For these types of cases, the Court stated that establishing the causal connection between a defendant's animus and a plaintiff's injury is "more complex than it is in other retaliation cases" and concluded that a probable cause inquiry solves the problem. No such problem exists when the retaliatory action is undertaken by a municipality that itself harbors the retaliatory motive and files a civil lawsuit to get back at a citizen for exercising his First Amendment rights.

Second, the "probable cause" standard used in cases involving retaliatory criminal arrests and prosecutions cannot be easily imported into the analysis

of retaliatory civil actions. As compared to the probable cause standard applicable to arrests and prosecutions, the probable cause standard typically applied in the context of civil litigation is a low bar that easily is cleared and thus would insulate a wide swath of retaliatory government lawsuits against its citizens. This Court did not have the civil law standard in mind when deciding *Hartman* and *Nieves*, nor did it rule that the additional no-probable-cause requirement applies to retaliatory civil lawsuits.

The lower federal courts are split on the question. In contrast to the Eleventh Circuit, other circuits have expressly declined to extend the no-probable-cause requirement beyond retaliatory prosecution and arrest cases. Still others have recognized the controversy and stated that it is an open question whether the no-probable-cause requirement applies to claims based on retaliatory civil actions. This Court should grant certiorari and answer that question once and for all and instruct that the no-probable-cause requirement does not extend beyond retaliatory prosecution and arrest.

On the second question presented, the Eleventh Circuit held that the no-probable-cause requirement of *Hartman* and *Nieves* applied here, even though the Town had expressly stated its intent to "put a stop" to O'Boyle's First Amendment protected activity. The court reasoned that the *Lozman* exception requires more than an action based on an official municipal policy of retaliation and, in particular, that Petitioners were also required to show that there was "little relation" between the protected speech that prompted

the retaliatory policy and the actions that triggered the retaliatory response.

That conclusion effectively guts *Lozman*, is unfaithful to this Court's reasoning in that case, and imposes an additional requirement on the plaintiff that this Court has never articulated or endorsed. In *Lozman*, this Court was focused on the fact that the plaintiff filed the Section 1983 lawsuit against a *municipality* that had an official policy of retaliation, in contrast to an individual government actor. The Court recognized that "[a]n official retaliatory policy is a particularly troubling and potent form of retaliation, for a policy can be long term and pervasive, unlike an ad hoc, on-the-spot decision by an individual officer." 138 U.S. at 1954.

The circuits are divided on this question too. As the Eleventh Circuit reads *Lozman*, to invoke an official policy of retaliation as a basis to excuse the plaintiff from proving an absence of probable cause, the plaintiff must prove each of the particular circumstances of the plaintiff's case in *Lozman*. Other federal courts, by contrast, have recognized that the application of *Lozman* rises and falls solely on whether the plaintiff sues a municipality (instead of an individual) and shows an "official municipal policy" of retaliation. This Court should grant certiorari on this question and instruct that *Lozman* requires only that suit be filed against a municipality (instead of an individual) based an "official municipal policy" of retaliation.

In short, this case squarely presents important questions on which the circuits are divided:

(1) Whether the additional probable cause requirement that applies to Section 1983 claims based on retaliatory arrests and prosecutions also applies to claims asserting that a municipality filed retaliatory civil lawsuits?; and (2) Whether a plaintiff subjected to a civil lawsuit brought pursuant to a municipality's avowed plan to punish or stop the plaintiff's speech and petitioning activity must prove the absence of probable cause? Consistent with this Court's jurisprudence, the answers to both questions should be "no."

Here, however, the Eleventh Circuit held that "probable cause" doomed Petitioners' Section 1983 claim and, in so doing, created a roadmap for those in power to chill First Amendment activity and punish citizens who exercise their First Amendment rights to petition the government and engage in speech critical of the government. Only this Court can set things straight, and this case presents an ideal vehicle for this Court to do so.

A. Factual Background

Martin O'Boyle is a Gulf Stream resident who has exercised his First Amendment rights—using banners, signs, and pamphlets—to express his disagreement with Town leadership. In 2013, the Town denied O'Boyle a building permit to renovate his home. Pet.App.3a. O'Boyle then arranged for cartoon images depicting Town officials in caricature to be painted on his home. *Id.* O'Boyle also submitted public record requests to the Town under Florida's strong public records law. *Id.* When the Town failed to respond, O'Boyle filed 17 public records state court lawsuits against the Town. Pet.App.4a. O'Boyle additionally

filed a state court petition based on the Town's rejection of his building application, as well as a federal court complaint alleging that the Town violated his First Amendment rights by threatening to punish him over the political cartoons on his home. Pet.App.20a. William Ring and O'Boyle's son Jonathan O'Boyle—both attorneys—represented O'Boyle and his affiliated companies in these lawsuits. Pet.App.4a; Pet.App.19a-20a.

In July 2013, O'Boyle and the Town settled the First Amendment lawsuit relating to the cartoons, the state court action regarding the building application, and 16 of the public records cases.[1] Pet.App.21a. The Town apologized to O'Boyle and agreed to pay him $180,000 and apply his interpretation of the Town Code to his home renovation. *Id.* The Town formally stated that the "Town recognizes the stress and strife that the O'Boyle family has endured as a result of the Town's conduct," and that it "believes that O'Boyle's actions will ultimately result in Gulf Stream being a better and friendlier place to live." *Id.*

In 2014, O'Boyle announced his candidacy for Town Commission. During his candidacy, O'Boyle expressed critical opinions about Town leaders using airplane banners and affixing signs to a pickup truck he arranged to be parked in the town hall public parking lot. Pet.App.23a-24a. When Town officials removed his campaign signs, O'Boyle filed additional public records requests and state court lawsuits against the Town, as well as a federal lawsuit alleging

[1] O'Boyle voluntarily dismissed the 17th public records case. Pet.App.22a.

that the Town's removal of his campaign signs constituted unlawful restrictions on his speech. Pet.App.22a; Pet.App.100a-101a ¶¶ 16-17. The Town later paid O'Boyle $145,000 to settle the signs case. Pet.App.101a ¶ 17.

O'Boyle's opponent in the election, Scott Morgan, described O'Boyle's public record suits as part of "the most important problem facing Gulf Stream." Pet.App.94a. Morgan described the Town's July 2013 settlement with O'Boyle as a costly "embarrassment," Pet.App.96a, and stated that finding a way to help the Town deal with O'Boyle was a "primary motivation" in his decision to run for election to the Town Commission. Pet.App.81a.

Before and after the March 11, 2014 election, which resulted in Morgan being elected to Town Commission, Morgan said publicly that the Town should take a "proactive approach" and pursue "a very strong, aggressive" strategy against O'Boyle. Pet.App.24a; Pet.App.93a-94a. Morgan said the Town leaders should "focus our attention" on O'Boyle, whom Morgan considered to be the "leader" of a campaign against the Town. Pet.App.50a.

At a special meeting on March 28, 2014, Morgan's first act as a Commissioner was to move for the Town to retain special counsel to help the Town respond to the O'Boyle post-2013 public records cases. Pet.App.24a. On April 11, 2014, then-Mayor Joan Orthwein nominated Morgan to take over as mayor because he was the "one person who has shown leadership in helping Gulf Stream navigate through some difficult and challenging times ahead." Pet.App.25a.

In a letter dated June 2, 2014, Morgan informed Town residents that the Town Commission would be "stepping up" its efforts in opposition to O'Boyle and taking the "firm stance" that the Commission believed was "necessary." Pet.App.4a; Pet.App.27a.

Morgan stated that he hoped the Town's proactive plan would "put a stop" to O'Boyle's public records requests and lawsuits and "stop the—the other things that he was doing that upset residents," specifically his banners and signs. Pet.App.81a-82a; Pet.App.90a. Morgan publicly said "some of" O'Boyle's public records suits had merit but that did not matter because "the point" was that "the lawsuits [were] being brought" at all. Pet.App.101a ¶ 40.

Starting in early 2015, the Town and its outside counsel undertook a three-pronged approach to target Petitioners' speech and petitioning activities. Pet.App.4a. *First*, the Town filed counterclaims against O'Boyle and his attorneys in pending state court public records lawsuits and moved for sanctions against Ring and Jonathan O'Boyle based on the banners and signs the Town felt demeaned its outside counsel. Pet.App.4a-5a. *Second*, Mayor Morgan, acting on the Town's behalf, filed bar complaints against Ring and Jonathan O'Boyle alleging the two had violated various legal ethics rules. Pet.App.5a; Pet.App. 29a-30a. *Third*, the Town sued the O'Boyles, Ring, and several others in federal court, asserting RICO claims under 18 U.S.C. §§ 1962(c), 1964(c). Pet.App.5a; Pet.App.28a-29a. In the RICO suit, the Town characterized O'Boyle's efforts to campaign for office and influence Town decision-making as the promotion of mutiny-styled rallies, and the Town alleged

that O'Boyle's publication of a newsletter, the Gulf Stream Patriot, amounted to extortion.

The Town did not prevail in any of its legal actions. Pet.App.5a. The Florida Bar dismissed the Town's complaints against Ring and Jonathan O'Boyle, concluding that disciplinary proceedings would be "inappropriate," and the state court rejected the Town's request to sanction them. Pet.App.30a; Pet.App.5a. The state court also dismissed the Town's counterclaims in the public records cases. *Id.* In addition, the federal district court dismissed the RICO suit, stating that the complaint "fails because on the most fundamental level, the entire factual underpinning of the Plaintiffs' case cannot, under any circumstances, constitute a RICO violation," *Town of Gulf Stream v. O'Boyle*, No. 15-80182, 2015 U.S. Dist. LEXIS 84778, at *12 (S.D. Fla. June 30, 2015), and the Eleventh Circuit affirmed, *Town of Gulf Stream v. O'Boyle*, 654 F. App'x 439 (11th Cir. 2016); *see also* Pet.App.5a. Nonetheless, the Town's actions chilled Petitioners' First Amendment activities. Mayor Morgan boasted that, because of the Town's actions, the public records requests "eventually whittled down." Pet.App.83a. The public records lawsuits similarly ceased for several years, with Morgan calling such a result "a success." *Id.*

After a Town meeting in September 2015, Gulf Stream Police Sergeant John Passeggiata saw O'Boyle writing on a bulletin board in the lobby of the town hall. Pet.App.6a. Passeggiata and his boss, Police Chief Garrett Ward, confronted O'Boyle and eventually took O'Boyle to the door of the building. *Id.* Passeggiata asked Ward if he should arrest O'Boyle, but

Ward ordered Passeggiata to "leave it alone." Pet.App.78a. Shortly thereafter, however, Ward whispered to Passeggiata to file charges against O'Boyle. Pet.App.79a. The State Attorney later filed an information against O'Boyle for trespass, resisting arrest, and disorderly conduct. Pet.App.6a. In August 2021, a state court judge dismissed the trespassing and resisting arrest charges, and a jury found O'Boyle not guilty of disorderly conduct. *Id.*

B. Proceedings Below

The O'Boyles and Ring sued the Town under 42 U.S.C. § 1983 for retaliating against their First Amendment protected activity. Pet.App.6a. The complaint identified three forms of retaliation: (1) the Town's RICO lawsuit; (2) the bar complaints filed against Ring and Jonathan O'Boyle; and (3) O'Boyle's prosecution. *Id.* After discovery closed, both sides moved for summary judgment. *Id.* The Town argued that Petitioners' claim was foreclosed because the Town had *civil* probable cause to file the RICO suit and bar complaints and because the State Attorney had *criminal* probable cause to prosecute O'Boyle. *Id.* The O'Boyles and Ring, in turn, argued that they were not required to show a lack of probable cause. Pet.App.6a-7a.

The district court initially denied both sides' summary judgment motions. Pet.App.7a; Pet.App.18a-70a. Although the court agreed with the Town that Petitioners were required to show a lack of probable cause and that Petitioners could not show a lack of probable cause for the civil lawsuits and bar complaints, Pet.App.41a; Pet.App.49a-61a, the court held

that there were factual disputes as to the Town's probable cause for some of its other actions. Pet.App.65a-69a. After that ruling, the parties filed a joint stipulation that the Town had probable cause for the remaining actions. Pet.App.8a. The district court then entered an amended order granting summary judgment to the Town. Pet.App.71a-74a.

On appeal, the Eleventh Circuit affirmed. Pet.App.1a-15a. Relying on its prior precedent, the court of appeals held that Petitioners were required to show a lack of probable cause for each of the government's alleged retaliatory activities, including those involving the Town's civil litigation and bar complaints. Pet.App.7a; Pet.App.10a (citing *DeMartini v. Town of Gulf Stream*, 942 F.3d 1277, 1304 (11th Cir. 2019)). The court also held that *Lozman* did not apply. Pet.App.10a-13a. According to the court, in addition to showing an "official municipal policy" of retaliation, a plaintiff "*must* also show that there was 'little relation between the protected speech that prompted the retaliatory policy' and the actions that triggered an allegedly retaliatory response." Pet.App.10a (quoting *Lozman*, 138 S. Ct. at 1954-55) (emphasis added). And, on this interpretation of *Lozman*, the court concluded that Petitioners needed to prove probable cause—despite the official policy of retaliation—because the Town's civil litigation activities and bar complaints were directly related to Petitioners' protected speech that prompted the retaliatory policy. Pet.App.12a-13a.

REASONS FOR GRANTING THE PETITION

This case presents important, recurring First Amendment questions that independently warrant this Court's review. The Eleventh Circuit held that Petitioners' First Amendment retaliation claim failed because Petitioners did not prove that the Town lacked probable cause for the multiple civil lawsuits—all ultimately unsuccessful—that it brought against Petitioners. The court first held that the additional no-probable-cause requirement that applies to claims based on retaliatory criminal prosecutions and arrests also applies to claims based on retaliatory civil lawsuits. It also held that proving an official municipal policy of retaliation is insufficient to qualify for an exception to the no-probable-cause requirement. Other circuits disagree with each of these holdings, and still others have noted the controversy that exists. Only this Court can set the law straight on both questions.

As explained below, (I) the Eleventh Circuit's decision deepened multiple circuit splits; (II) the Eleventh Circuit's decision is wrong; and (III) the questions presented are exceptionally important and squarely presented.

I. The Eleventh Circuit's Decision Deepened Multiple Circuit Splits

This Court should resolve the questions of (A) whether the additional no-probable-cause requirement extends beyond retaliatory criminal prosecutions and arrests to retaliatory civil lawsuits; and

(B) whether the additional no-probable-cause requirement applies when a plaintiff shows that a municipality retaliated pursuant to an official policy.

A. This Court Should Resolve the Question of Whether the Additional No-Probable-Cause Requirement Extends Beyond Retaliatory Criminal Prosecutions and Arrests to Retaliatory Civil Lawsuits

In an "ordinary" First Amendment Section 1983 retaliation claim, the plaintiff must show that his constitutionally protected conduct was a "motivating factor" in the government's decision to act against him. *Mt. Healthy*, 429 U.S. at 287; *Hartman*, 547 U.S. at 259 (referring to an "ordinary" retaliation claim in contrast to a retaliatory prosecution claim). If the plaintiff carries that burden, the governmental defendant must show "that it would have reached the same decision" even in the absence of the protected conduct. *Mt. Healthy*, 429 U.S. at 287. In 2006, this Court held that a plaintiff asserting a retaliatory prosecution claim must establish an extra causation element: a lack of probable cause for the prosecution. *Hartman*, 547 U.S. at 259. Then, in 2019, this Court extended the no-probable-cause requirement to retaliatory arrest. *Nieves*, 139 S. Ct. at 1728.

The federal courts are split on whether the no-probable-cause requirement extends beyond retaliatory prosecution and arrest. The Eleventh Circuit has held that the no-probable-cause requirement extends to claims of retaliatory civil lawsuits and bar complaints. *See DeMartini*, 942 F.3d at 1306. The Eleventh Circuit has stated:

> [W]e conclude that applying the objective, lack-of-probable cause requirement to a § 1983 First Amendment retaliation case predicated on the filing of a civil lawsuit is appropriate because it strikes the proper balance between protecting a plaintiff's important First Amendment rights while, at the same time, ensuring that the Town has a similar ability to access the courts to protect itself and its citizens from non-meritorious litigation.

Id. In this case, the Eleventh Circuit followed this circuit precedent and held that the O'Boyles and Ring were required to show a lack of probable cause for the Town's retaliatory civil actions. Pet.App.10a-13a.

Other federal courts, however, have declined to extend the no-probable-cause requirement of *Hartman* and *Nieves* beyond retaliatory prosecution and arrest.

In *Frederickson v. Landeros*, the Seventh Circuit addressed a plaintiff's allegation that an officer prevented him from updating his sexual offender registration and otherwise used his official position to harass the plaintiff. 943 F.3d 1054, 1056 (7th Cir. 2019). The court reasoned: "If [plaintiff] were complaining only about arrests supported by probable cause, we freely concede that *Nieves* would require a different result. But his complaint goes well beyond that." *Id.* at 1066-67. As the court noted, the officer not only arrested the plaintiff but repeatedly refused to correct the name of the plaintiff's employer and plaintiff's status as an independent contractor on the plaintiff's registration. *Id.* at 1067.

District courts in the Seventh Circuit also routinely decline to apply the no-probable-cause requirement outside the context of retaliatory prosecution and arrest. In *Powell v. Page*, a plaintiff alleged that a prison psychologist disciplined him in retaliation for refusing mental health services. No. 17 C 8083, 2021 U.S. Dist. LEXIS 80399, at *1-2 (N.D. Ill. Apr. 27, 2021). The court rejected the defendant's summary judgment argument that the plaintiff was required to show a lack of probable cause, stating, "probable cause is an element a plaintiff must prove in a First Amendment case involving retaliatory arrest, not the present type of retaliation lawsuit." *Id.* at *11 (citing *Nieves*, 139 S. Ct. at 1724); *see also Turner v. Boughton*, No. 17-cv-203-jdp, 2021 U.S. Dist. LEXIS 60750, at *49-50 (W.D. Wis. Mar. 30, 2021) (rejecting argument that "prison discipline is similar to law enforcement, and that the same concerns that motivated the Court in *Nieves* apply here").

The Ninth Circuit also has refused to apply the no-probable-cause requirement outside the context of retaliatory prosecution or arrest. In *Bello-Reyes v. Gaynor*, the court addressed a detainee's claim that, after he read a poem at a rally criticizing Immigration and Customs Enforcement ("ICE"), ICE revoked his bond and re-arrested him. 985 F.3d 696, 698 (9th Cir. 2021). The government contended that ICE had probable cause to arrest the plaintiff and thus the plaintiff's claim failed under *Nieves*. *Id.* The Ninth Circuit disagreed: "We conclude that *Nieves*, a suit for damages brought under 42 U.S.C. § 1983 and arising out of a criminal arrest, should not be extended to Bello's habeas challenge to his bond revocation." *Id.* at 700.

The Ninth Circuit reasoned that, in contrast to retaliatory arrest in *Nieves*, "problems of causation that may counsel for a no probable cause standard are less acute in the habeas context" and "*Nieves* does not apply here because it arose out of the criminal arrest context where 'evidence of the presence or absence of probable cause for the arrest will be available in virtually every retaliatory arrest case.'" *Id.* at 700-01 (quoting *Nieves*, 139 S. Ct. at 1724). "Since the *Nieves* rule depended on this objective benchmark of a reasonable arrest, extending it to his situation would effectively eliminate almost any prospect of obtaining release on habeas for actually retaliatory, unconstitutional immigration bond revocation." *Id.* at 701. "Because *Nieves* does not control, we remand to the district court to apply the *Mt. Healthy* standard, the default rule for First Amendment retaliation claims." *Id.* at 702.

District courts in the Ninth Circuit also routinely decline to apply the no-probable-cause requirement outside the context of retaliatory prosecution and arrest. *See Nilsson v. Baker Cnty*, No. 2:19-cv-01250-HL, 2022 U.S. Dist. LEXIS 211367, at *20 n.3 (D. Or. Nov. 21, 2022) ("In *Nieves*, the Supreme Court extended the requirement of pleading and proving the absence of probable cause to claims for retaliatory *arrests*. *Nieves* was silent on the issue of retaliatory *searches*.") (citation omitted); *Colonies Partners LP v. County of San Bernardino*, No. EDCV 18-420 JGB (SHKx), 2020 U.S. Dist. LEXIS 160672, at *63 (C.D. Cal. July 28, 2020) ("It would be incongruous to extend *Hartman* and *Nieves*'s severe rule on causation to officials' investigative or administrative acts.").

The Sixth and Eighth Circuits have recognized the controversy on whether the additional no-probable-cause requirement from *Hartman* and *Nieves* applies outside the context of retaliatory prosecution or arrest. *See Rudd v. City of Norton Shores*, 977 F.3d 503, 516 (6th Cir. 2020) (recognizing the open question of "whether a probable-cause element extends to civil suits"); *Welch v. Dempsey*, 51 F.4th 809, 811, 813 (8th Cir. 2022) (stating "[w]hen a claim alleges a retaliatory arrest, which is not the assertion here, a plaintiff also must show as a general matter that the officer acted without probable cause to arrest" and questioning "if there is an argument for extending the *Nieves* no-probable-cause requirement beyond a claim of retaliatory Fourth Amendment seizure").

This Court should grant the petition to resolve this issue on which the lower federal courts have shown disagreement and uncertainty.

B. This Court Should Resolve the Question of Whether the Additional No-Probable-Cause Requirement Applies When a Plaintiff Shows That a Municipality Retaliated Pursuant to an Official Policy

In *Lozman*, this Court addressed a plaintiff's Section 1983 suit against a municipality for arresting him pursuant to an official municipal policy of intimidation. 138 S. Ct. at 1949. This Court recognized that "in a § 1983 case a city or other local government entity cannot be subject to liability at all unless the harm was caused in the implementation of 'official municipal policy.'" *Id.* at 1951 (quoting *Monell*, 436 U.S. at 691). The Court held that the plaintiff was not

required to show a lack of probable cause because "[t]he fact that Lozman must prove the existence and enforcement of an official policy motivated by retaliation separates Lozman's claim from the typical retaliatory arrest claim." *Id.* at 1954.

As this Court explained, "[a]n official retaliatory policy is a particularly troubling and potent form of retaliation, for a policy can be long term and pervasive, unlike an ad hoc, on-the-spot decision by an individual officer." *Lozman*, 138 S. Ct. at 1954. "An official policy also can be difficult to dislodge" and "[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." *Id.* "For these reasons," this Court stated, "when retaliation against protected speech is elevated to the level of official policy, there is a compelling need for adequate avenues of redress." *Id.* This Court added its observation that "[t]he causation problem [that exists] in arrest cases [does not present] the same difficulty where, as is alleged here, the official policy is retaliation for prior, protected speech bearing little relation to the criminal offense for which the arrest is made." *Id.*

The Eleventh Circuit has interpreted *Lozman* as providing an exception to the no-probable-cause requirement only where "five factual circumstances … exist together," including (1) an "official municipal policy" of intimidation; (2) a premediated retaliation plan; (3) objective evidence of a policy motivated by retaliation; (4) "little relation" between the protected activity that prompted the retaliatory policy and the

protected activity that prompted the retaliatory action; and (5) the plaintiff engaged in "safeguarded" First Amendment activity. *DeMartini*, 942 F.3d at 1294, 1297. The Eleventh Circuit applied this interpretation here and held that an official municipal policy of intimidation alone is insufficient to invoke the *Lozman* exception. Pet.App.10a. In particular, the court reasoned that Petitioners were required to show "little relation between the 'protected speech that prompted the retaliatory policy' and the actions that triggered an allegedly retaliatory response" to be relieved from establishing the additional no-probable-cause element. Pet.App.10a (citation omitted).

Several other courts of appeals, however, do not treat *Lozman* as creating a five-part test that includes this "little relation" requirement. Instead, other courts of appeals regard *Lozman* as applying whenever a plaintiff shows that the municipality was acting pursuant to an official policy of retaliation. The Eighth Circuit has described *Lozman* as "allowing [the] plaintiff to maintain a First Amendment retaliatory arrest claim against a municipality without showing the absence of probable cause when the claim was premised on 'a premediated plan … to intimidate him.'" *Waters v. Madson*, 921 F.3d 725, 741-42 (8th Cir. 2019) (quoting *Lozman*, 138 S. Ct. at 1955). For its part, the Sixth Circuit has described *Lozman* as acknowledging an "exception to the requirement to show a lack of probable cause where the plaintiff alleges an official municipal policy of retaliation." *Phillips v. Blair*, 786 F. App'x 519, 529 (6th Cir. 2019). The Second Circuit likewise has stated that "*Lozman* holds that a plaintiff may prevail on a civil claim for

damages for First Amendment retaliation for an arrest made pursuant to a retaliatory official municipal policy, even if there was probable cause for the arrest, if 'the alleged constitutional violation was a but-for cause' of the arrest.'" *Higginbotham v. Sylvester*, 741 F. App'x 28, 31 (2d Cir. 2018) (quoting *Lozman*, 138 S. Ct. at 1952). And, finally, the Fifth Circuit has stated:

> [T]he Supreme Court allowed Lozman's claims to proceed not because of the unusual facts of the case, but because he was asserting a *Monell* claim against the municipality itself, rather than individuals. It held that "[t]he fact that Lozman must prove the existence and enforcement of an official policy motivated by retaliation separates Lozman's claim from the typical retaliatory arrest claim."

Gonzalez v. Trevino, 42 F.4th 487, 493-94 (5th Cir. 2022) (quoting *Lozman*, 138 S. Ct. at 1954).

Commentators as well have acknowledged the debate and noted that *Lozman* does not establish some multi-part elemental test. *See* Arielle W. Tolman and David M. Shapiro, *From City Council to the Streets: Protesting Policy Misconduct After Lozman v. City of Riviera Beach*, 13 Charleston L. Rev. 49, 78-79 (2018) (disagreeing with characterization of *Lozman* opinion "as a five-factor conjunctive test in which a retaliatory-arrest claim can survive probable cause only if all five factors favor the plaintiff"); Cynthia Lee, *Probable Cause with Teeth*, 88 Geo. Wash. L. Rev. 269, 274 n.24 (2020) ("If a case involves an arrest pursuant to an official policy of retaliation, probable

cause to arrest will not categorically bar a defendant from claiming retaliatory arrest.") (citing *Lozman*, 138 S. Ct. at 1954-55).

This Court should grant the petition to resolve this additional issue on which the lower federal courts have shown disagreement and uncertainty.

II. The Eleventh Circuit's Decision is Wrong

As explained below, (A) the additional no-probable-cause requirement does not extend beyond retaliatory prosecutions and arrests; and (B) the additional no-probable-cause requirement does not apply when a plaintiff shows that a municipality retaliated pursuant to an official policy.

A. The Additional No-Probable-Cause Requirement Does Not Extend Beyond Retaliatory Prosecutions and Arrests

This case arises out of a municipality's use of civil litigation to retaliate against a citizen for his First Amendment activities. The First Amendment, of course, prohibits the government from retaliating against people for engaging in protected speech and exercising their rights to petition the government for redress. This Court, in fact, has long recognized that "[o]fficial reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit the exercise of a protected right.'" *Hartman*, 547 U.S. at 256 (citation omitted). This Court addressed the causation standard for retaliation claims (such as this one) in *Mt. Healthy*, where this Court held that—for ordinary retaliation claims—the plaintiff must show that his constitutionally protected conduct was a "motivating

factor" in the government's decision to act against him. 429 U.S. at 287.

This Court, however, added an additional causation requirement when the plaintiff asserts a retaliatory prosecution claim: a lack of probable cause. *See Hartman*, 547 U.S. at 265-66. This Court in *Hartman* reasoned that establishing the causal connection between a defendant's animus and a plaintiff's injury is "more complex than it is in other retaliation cases." *Id.* at 261. "Unlike most retaliation cases, in retaliatory prosecution cases the [government] official with the malicious motive does not carry out the retaliatory action himself—the decision to bring charges is instead made by a prosecutor, who is generally immune from suit and whose decisions receive a presumption of regularity." *Nieves*, 139 S. Ct. at 1723. To account for this "problem of causation" in retaliatory prosecution claims, *Hartman* adopted the requirement that plaintiffs prove the absence of probable cause for the underlying criminal charge. 547 U.S. at 263.

In *Nieves*, decided thirteen years after *Hartman*, this Court recognized that "retaliatory arrest claims face some of the same challenges we identified in *Hartman*." 139 S. Ct. at 1723. "Like retaliatory prosecution cases, 'retaliatory arrest cases also present a tenuous causal connection between the defendant's alleged animus and the plaintiff's injury." *Id.* (citation omitted). "The causal inquiry is complex because protected speech is often a 'wholly legitimate consideration' for officers when deciding whether to make an arrest." *Id.* at 1723-24 (citation omitted). "Officers fre-

quently must make 'split-second judgments' when deciding whether to arrest, and the content and manner of a suspect's speech may convey vital information—for example, if he is 'ready to cooperate' or rather 'present[s] a continuing threat.'" *Id.* at 1724 (citation omitted).

The *Nieves* Court reasoned that "regardless of the source of the causal complexity, the ultimate problem remains the same. For both claims, it is particularly difficult to determine whether the adverse government action was caused by the officer's malice or the plaintiff's potentially criminal conduct." 139 S. Ct. at 1724. For this reason, the *Nieves* Court held that "[t]he plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest." *Id.*

Here, the Eleventh Circuit incorrectly interpreted this Court's precedents and extended the no-probable-cause requirement beyond claims for retaliatory prosecution and arrest. That was error. This Court imposed a no-probable-cause requirement in cases involving criminal prosecutions and arrests to solve a problem that exists uniquely in those cases and does not exist here. Moreover, the civil probable cause analysis is entirely different from the criminal probable cause analysis—both in terms of the standard and who is charged with making the probable cause determination is the first place. Thus, imposing a no-probable-cause requirement when the claimed retaliation is a civil lawsuit will unacceptably insulate government action motivated by a citizen's constitutionally protected activity.

First, the no-probable-cause requirement is unique to claims for retaliatory prosecution and arrest because of the inherent nature of those claims. Both *Hartman* and *Nieves* held that a no-probable-cause requirement is necessary because assessing causation is very difficult when prosecutions and arrests are involved. *See Hartman*, 547 U.S. at 263; *Nieves*, 139 S. Ct. at 1724. With respect to retaliatory prosecution claims, this Court in *Hartman* explained that establishing the causal connection between a defendant's animus and a plaintiff's injury is "more complex than it is in other retaliation cases." 547 U.S. at 261. That is because "[u]nlike most retaliation cases, in retaliatory prosecution cases the official with the malicious motive does not carry out the retaliatory action himself—the decision to bring charges is instead made by a prosecutor, who is generally immune from suit and whose decisions receive a presumption of regularity." *Nieves*, 139 S. Ct. at 1723.

But that is not the case with civil lawsuits like the one here. Unlike cases involving an alleged retaliatory prosecution, there was no separation between the persons who harbored the retaliatory motive and an independent-minded prosecutor who took the alleged retaliatory action. Here, Town leaders, who had stated an intent "stop" O'Boyle and his lawyers, announced a plan use civil litigation to do exactly that. Pet.App.28a; Pet.App.81a-82a. Those same Town leaders hired private lawyers to take the retaliatory action. Pet.App.28a-30a. Private lawyers, while subject to ethics rules, fundamentally serve as representatives of their clients and are not bound by the same constraints as government prosecutors, nor do they enjoy the same independence. Unlike government

lawyers who prosecute criminal actions, private lawyers can pursue civil actions without facing the obstacle of an initial review by a neutral magistrate. This Court's observation about the difference between criminal and civil RICO actions is particular apt here: "In the context of civil RICO, … the restraining influence of prosecutors is completely absent." *Sedima v. Imrex Co.*, 473 U.S. 479, 504 (1985).

With respect to retaliatory arrest claims, this Court in *Nieves* reasoned that "retaliatory arrest claims face some of the same challenges we identified in *Hartman*." 139 S. Ct. at 1723. "Like retaliatory prosecution cases, 'retaliatory arrest cases also present a tenuous causal connection between the defendant's alleged animus and the plaintiff's injury.'" *Id.* (citation omitted). "Officers frequently must make split-second judgments when deciding whether to arrest, and the content and manner of a suspect's speech may convey vital information—for example, if he is 'ready to cooperate' or rather 'present[s] a continuing threat." *Id.* at 1724 (citation omitted). And, as *Nieves* also explained, a bright-line probable cause rule was needed due to the practical needs of policing, where application of a subjective standard would present "overwhelming litigation risks" for police officers making split-second decisions. 139 S. Ct. at 1724-25.

But none of that applies here. Unlike cases involving an alleged retaliatory arrest, no split-second determination by a police officer was involved in the Town's retaliation against the O'Boyles and Ring. The Town's retaliatory action, including its civil litigation, followed months of deliberation. The bright-line probable cause requirement is not needed, and there is no

reason to require anything more than the *Mt. Healthy* but-for causation test.

Second, the probable cause standard in a civil action is far different from the probable cause standard in a criminal action. Because of this contrast, the probable cause requirement established in *Hartman* and *Nieves* cannot be easily imported into cases alleging retaliatory civil actions. In the criminal context, the government must show a "substantial chance" of criminal activity to establish probable cause. *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018). In contrast, "[p]robable cause to institute civil proceedings requires no more than a reasonable belief that there is a chance that a claim may be held valid upon adjudication." *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indu., Inc.*, 508 U.S. 49, 62-63 (1993) (citation omitted); *DeMartini*, 942 F.3d at 1300-01. Moreover, a civil litigant can establish probable cause based on "an objectively good faith argument for the extension, modification, or reversal of existing law." *Prof'l Real Estate Inv'rs*, 508 U.S. at 65 (citation omitted). This Court did not have this more relaxed civil law standard in mind when deciding *Hartman* and *Nieves*, two cases that involved probable cause in the criminal context. And this matters because the probable cause standard applied in the context of civil litigation is a low bar that easily is cleared and thus would result in insulating a wide swath of retaliatory government lawsuits.

For these reasons, the additional no-probable-cause requirement does not—and should not—extend beyond retaliatory prosecution and arrest.

B. The Additional No-Probable-Cause Requirement Does Not Apply When a Plaintiff Shows That a Municipality Retaliated Pursuant to an Official Policy

As noted, the Eleventh Circuit has interpreted *Lozman* as creating a multi-part test, such that a plaintiff is excused from proving the absence of probable cause only where "five factual circumstances … exist together," including "little relation" between the protected speech that formed the basis for the retaliatory policy and the protected speech that led to the retaliatory action. *See DeMartini*, 942 F.3d at 1294, 1297. Adhering to that precedent here, the Eleventh Circuit held that a municipality's lawsuit against a citizen filed pursuant to an official municipal policy of retaliation was insufficient to invoke *Lozman*. Pet.App.10a. That's wrong.

This Court in *Lozman* did not establish any multi-part test. To the contrary, this Court was clear that the existence of the official municipal policy was the key to the holding. "[W]hen retaliation against protected speech is elevated to the level of official policy, there is a compelling need for adequate avenues of redress." 138 S. Ct. at 1954.

Nor has this Court ever characterized *Lozman* as establishing some sort of multi-part test. Indeed, this Court's later characterization of *Lozman* shows the flaws in the Eleventh Circuit's interpretation of that case. For example, in *Nieves*, this Court described *Lozman* as follows:

> *Lozman* involved unusual circumstances in which the plaintiff was arrested pursuant to an alleged "official municipal policy" of retaliation. Because those facts were "far afield from the typical retaliatory arrest claim," we reserved judgment on the broader question presented and limited our holding to arrests that result from official policies of retaliation. In such cases, we held, probable cause does not categorically bar a plaintiff from suing the municipality.

Nieves, 139 S. Ct. at 1722 (citations omitted).

It makes no sense to say that a plaintiff who shows an official policy of retaliation can prevail only if it *also* shows that there is "little relation" between the protected speech that formed the basis for the retaliatory policy and the protected speech that triggered the retaliatory action. Indeed, that gets it exactly backwards by permitting plaintiffs to prevail *only* when there is indirect retaliation and *not* when there is direct retaliation based on a policy. That is contrary to this Court's holding in *Mt. Healthy* that—in ordinary retaliation claims—the plaintiff can prevail if he shows that his constitutionally protected conduct was a "motivating factor" in the government's decision to act against him. 429 U.S. at 287. Under the Eleventh Circuit's reading, the additional requirement to show a lack of probable cause (imposed to address the specific causation problems in *Hartman* and *Nieves*) has, to use what might be a shop-worn statement, swallowed the rule.

For these reasons, *Lozman* (and its holding that a plaintiff need not show that the government lacked probable cause) applies whenever a Section 1983 plaintiff sues a municipality and shows that the municipality retaliated pursuant to an official policy—nothing more is required.

III. The Questions Presented are Exceptionally Important and Squarely Presented

This is the paradigmatic case *Mt. Healthy* envisions—a citizen's exercise of his First Amendment rights was a motivating factor in the government's decision to act against the citizen. Here, there was no question that such a causal connection existed—the government said it would use litigation to "stop" Petitioners' protected activity, and that's exactly what it did. Nevertheless, the Eleventh Circuit held that Petitioners' retaliation claim was defeated by an additional no-probable-cause requirement that this Court has applied only in cases involving criminal prosecution and arrests. The Eleventh Circuit reached this conclusion even though this Court has held that the additional no-probable-cause requirement does not apply when the government action is part of an "official retaliatory policy"—which this Court has characterized as "a particularly troubling and potent form of retaliation." *Lozman*, 138 S. Ct. at 1954.

Leaving the Eleventh Circuit's ruling in place will have far-reaching, unacceptable consequences. It creates a roadmap for those in power to chill First Amendment activity and inflict harm—financial and reputational—on citizens who exercise their First Amendment rights. There is no dispute that O'Boyle

was a long-time critic of the Town and that the Town, in turn, adopted an official policy to deal with him and his legal team. As part of that policy, the Town filed a meritless RICO action against O'Boyle and his legal team premised entirely on their First Amendment protected activities. As courts have recognized, "[c]ivil RICO is an unusually potent weapon—the litigation equivalent of a thermonuclear device." *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991). A RICO lawsuit certainly has the potential to dissuade a citizen from engaging in constitutionally protected activity: "The very pendency of a RICO suit can be stigmatizing and its consummation can be costly; a prevailing plaintiff, for example, stands to receive treble damages and attorneys' fees." *Id.* Here, through the meritless RICO action, the Town was able to stop First Amendment protected activity and indirectly "produce a result which [it] could not command directly." *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

This case is an ideal vehicle for resolving the important questions presented, which were outcome-determinative below. No factual development is needed. The issues have percolated sufficiently in the lower courts, and the decisions reflect a divide. To be sure, in the immediate wake of *Nieves*, the plaintiff in *DeMartini* attempted to bring to this Court the question of whether the no-probable-cause requirement extends beyond claims for retaliatory prosecution and arrest, but the *DeMartini* case was the first time any court had touched on the issue post-*Nieves*. Since then, other lower courts have addressed the question with some reaching a conclusion different than the Eleventh Circuit's, and others acknowledging the controversy that exists.

It is this Court's particular role to provide guidance on important issues. Until this Court resolves the questions presented, nothing will prevent other municipalities from taking a page from the Town of Gulf Stream's playbook and suing a citizen in an official public effort stop the citizen from engaging in First Amendment activity and then disclaiming liability on grounds that suit was not technically frivolous, even though it otherwise lacked all merit.

Only this Court can provide the guidance that is needed, and this case presents a perfect opportunity for this Court to do so.

CONCLUSION

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

Respectfully submitted,

KIM M. WATTERSON
Counsel of Record
REED SMITH LLP
225 Fifth Ave.
Suite 1200
Pittsburgh, PA 15222
(412) 288-7996
kwatterson@reedsmith.com

M. PATRICK YINGLING
REED SMITH LLP
10 South Wacker Dr.
40th Floor
Chicago, IL 60606
(312) 207-2834
mpyingling@reedsmith.com

July 19, 2023