No. 23-61

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 Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent, TOWN OF GULF STREAM ("Town"), responds in opposition to the Petition for a Writ of Certiorari filed by the Respondents, MARTIN E. O'BOYLE; JONATHAN O'BOYLE; and WILLIAM RING.

STATEMENT OF THE CASE

In October 2014, the Town, a small municipality with a handful of administrative employees, was in a dire situation. It had spent the last thirteen months responding to more than 1,500 public records requests and defending against 36 lawsuits resulting from those requests. The Town's legal fees in responding to those requests and in defending the lawsuits exceeded $370,000, a figure all the more staggering given the Town's small size and limited number of employees.

The Town believed that the vast majority of the 1,500 public records requests came from two Town residents, Martin O'Boyle and Christopher O'Hare, or entities they controlled, and the court dockets demonstrated that many of the lawsuits were initiated by Martin O'Boyle and O'Hare. The O'Boyle Law Firm – a law firm operated by Martin O'Boyle's son (Jonathan O'Boyle) and longtime associate (William Ring) represented Martin O'Boyle and O'Hare in nearly all of the lawsuits. The Town, through its own investigation and through documents and evidence provided by a whistleblower, came to believe that the requests were

part of a fraudulent scheme designed to extort money from governmental entities through fraudulent public records requests, false settlement demands, and subsequent lawsuits designed to obtain attorney's fees rather than to secure public records (the "Windfall Scheme"). The Windfall Scheme transformed Florida's Public Records Act into a tool for extorting the payment of unreasonable attorney's fees to Martin O'Boyle's affiliated law firm, the O'Boyle Law Firm, operated by Martin O'Boyle's son, Jonathan O'Boyle, and his longtime attorney, William Ring.

In response and on the advice of outside counsel, the Town elected to file a civil lawsuit against Martin O'Boyle, Jonathan O'Boyle, William Ring, and others seeking judicial relief under the Racketeer Influenced and Corrupt Organizations Act directed at stopping the Windfall Scheme ("RICO Lawsuit"). *See Town of Gulf Stream v. Martin E. O'Boyle*, 15-cv-80182-KAM. In addition, the Town filed complaints with the Florida Bar against Jonathan O'Boyle and William Ring, both attorneys that had been admitted to practice law in the state of Florida ("Bar Complaints").

After the District Court dismissed the RICO Lawsuit, the Eleventh Circuit affirmed. The Eleventh Circuit concluded that, regardless of the scope and scale of the public records litigation, courts are equipped with procedures to deal with parties that file frivolous lawsuits and, therefore, determined that a threat to file litigation against the government does not trigger liability under the Hobbs Act. *Town of Gulf Stream v. O'Boyle*, 654 F. App'x 439, 443 (11th Cir. 2016)

("*O'Boyle I*"). Nonetheless, the Eleventh Circuit characterized the alleged activities of Martin O'Boyle, Jonathan O'Boyle, William Ring, and others as "troubling." *Id.* at 441.

The Bar Complaints also resolved in favor of Jonathan O'Boyle and William Ring. While the Florida Bar investigated the allegations, it ultimately closed the investigations without finding any violation of the rules governing attorney conduct.

After the Eleventh Circuit affirmed the dismissal of the RICO Lawsuit and the Florida Bar dismissed the Bar Complaints, the Plaintiffs filed a lawsuit asserting a claim under 42 U.S.C. § 1983 for First Amendment retaliation based on three events: (1) being named as defendants in the RICO Lawsuit, (2) the filing of the Bar Complaint against Jonathan O'Boyle and William Ring, and (3) having criminal charges filed against Martin O'Boyle in response to his conduct on September 22, 2015, at Town Hall ("Criminal Charges").

The District Court granted summary judgment in favor of the Town finding (1) that the Town had probable cause for each of the alleged retaliatory acts and (2) that the Plaintiffs were unable to come with the narrow exception to the probable cause requirement recognized in *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 201 L. Ed. 2d 342 (2018). After the Plaintiffs appealed, the Eleventh Circuit affirmed. The *sole* issue raised by the Plaintiffs before the Eleventh Circuit was whether they had presented sufficient evidence to come within *Lozman*'s exception to the probable cause requirement.

This is not the first time that issues related to the Town's RICO Lawsuit, probable cause, and *Lozman* are before this Court on a petition for writ of certiorari. In *DeMartini v. Town of Gulf Stream*, 942 F.3d 1277 (11th Cir. 2019), Denise DeMartini, another long-time employee of Martin O'Boyle, who was also named as a defendant in the RICO Lawsuit, asserted a First Amendment retaliation claim against the Town based upon the filing of the RICO Lawsuit. In that matter, the Eleventh Circuit (1) found that a plaintiff seeking to assert a First Amendment retaliation claim based upon a civil lawsuit must plead and prove an absence of probable cause and (2) rejected the plaintiff's effort to invoke *Lozman* as a means of avoiding the need to plead and prove an absence of probable cause. *Id.* at 1306-1307. Just as in this case, DeMartini sought review by this Court, and the Court declined to accept jurisdiction. *DeMartini v. Town of Gulf Stream, Fla.*, S.C. Case No. 19-1436. The Plaintiffs have provided no valid basis for the Court to reconsider its decision in *DeMartini* or the Eleventh Circuit's decision in this lawsuit.

ARGUMENT

I. THE PETITIONERS' FACTUAL OMISSIONS AND MISSTATEMENTS

The Petitioners make at least two significant factual omissions and misstatements in their Petition. First, the Petitioners fail to mention the public record Windfall Scheme, the driving force behind the Town's

efforts to seek judicial and administrative relief. Second, the Petitioners inaccurately claim that the case below involved an official policy of retaliation.

A. The Petitioners Abused Florida's Public Records Law to Obtain Excessive Attorneys' Fees

Following the entry into a 2013 settlement agreement, Martin O'Boyle, Jonathan O'Boyle, and William Ring orchestrated a scheme to abuse Florida's broad public records law to obtain unearned attorney's fees.

1. The Petitioners Created the O'Boyle Law Firm and CAFI

As an initial step, the Petitioners created two entities. First, in mid-January 2014, Jonathan R. O'Boyle, P.C., filed an application with the Florida Division of Corporations asking to have the O'Boyle Law Firm, P.C., Inc. ("the O'Boyle Law Firm"), registered as a foreign corporation to transact business in Florida. *See* Respondent's Answer Brief from *O'Boyle v. Com. Grp., Inc.*, No. 22-10865 (hereinafter "Ans. Br.") at 5. Jonathan O'Boyle, then admitted to practice law only in the state of Pennsylvania, was listed as the President and sole officer of the O'Boyle Law Firm. *Id.*

Second, the Citizens Awareness Foundation, Inc. ("CAFI"), was incorporated on January 27, 2014. The officers of CAFI had all served as long-time employees of entities associated with Martin O'Boyle, including William Ring and Denise DeMartini. Ans. Br. at 6.

Martin O'Boyle funded the initial setup of the O'Boyle Law Firm and the operations of CAFI. Ans. Br. at 5-6. Both the O'Boyle Law Firm and CAFI utilized 1280 West Newport Center Drive as their principal places of business. *Id.* This address was also the address of the Commerce Group, another business owned by Martin O'Boyle. *Id.*

2. Pre-Election Public Records Requests and Litigation Against the Town

Between January 1, 2014, and March 11, 2014, the Town received 257 records requests. Ans. Br. at 8. Fifty of those requests were submitted by Martin O'Boyle or persons or entities associated with him like the Commerce Group, CAFI, or Johnathan O'Boyle. *Id.* The remaining records requests during this time were submitted by another Town resident, Christopher O'Hare, or persons associated with him (like his attorney, Lou Roeder, Esq.). *Id.*

The early 2014 records requests resulted in ten lawsuits being filed by Martin O'Boyle or O'Hare before March 11, 2014. Ans. Br. at 8. In all of the lawsuits filed between January 1, 2014, and March 11, 2014, Martin O'Boyle and O'Hare were represented by the O'Boyle Law Firm. *Id.*

3. Scott Morgan Becomes Town Mayor

On March 11, 2014, Town voters elected Scott Morgan to the Town Commission and, following the election, the Town Commission voted to appoint him Mayor on April 11, 2014. Ans. Br. at 8-9.

4. Joel Chandler's Concerns Regarding Illegal and Improper Conduct at CAFI

According to Joel Chandler ("Chandler"), Martin O'Boyle recruited him to lead CAFI in early 2014. Ans. Br. at 6-7. Chandler had experience in promoting open government and in issuing public records requests. *Id.*

During the time he served as CAFI's Executive Director, Chandler became convinced that CAFI was being used for improper purposes and was engaged in potentially fraudulent and illegal activities. Ans. Br. at 9.

Chandler's concerns regarding CAFI were as follows:

> (a) Martin O'Boyle was using CAFI to pursue personal vendettas,
>
> (b) CAFI was required to engage the O'Boyle Law Firm as its exclusive litigation team,
>
> (c) CAFI had issued public records requests without Chandler's approval,
>
> (d) CAFI had initiated lawsuits without Chandler's approval, and

> (e) CAFI was being used as part of an improper windfall scheme to generate excessive attorney's fees.

Ans. Br. at 9.

With respect to the Windfall Scheme, Chandler explained that CAFI (and other entities), with Martin O'Boyle's approval and direction, issued deliberately vague and ambiguous public records requests to the Town and other entities. Upon the requestee's delay or failure to respond to the request in a timely manner (as specifically intended by virtue of the request's vague and ambiguous nature), the O'Boyle Law Firm would be relied upon to demand excessive attorney's fees, costs, and other amounts to settle the dispute. The demands were based upon threats that expensive and burdensome litigation would be initiated or based upon threats that pending litigation would be made more expensive and burdensome. Ans. Br. at 10; *see Citizens Awareness Found., Inc. v. Wantman Grp., Inc.*, 195 So. 3d 396, 397 (Fla. 4th DCA 2016); *see also DeMartini v. Town of Gulf Stream*, 942 F.3d 1277, 1282-1284 (11th Cir. 2019); *DeMartini v. Town of Gulf Stream*, No. 16-81371-CIV, 2017 WL 6366763, at *10 (S.D. Fla. Aug. 9, 2017).

The deliberately vague and ambiguous public records requests were referred to as "kill-shots." Ans. Br. at 11; *Citizens Awareness Found., Inc.*, 195 So. 3d at 397.

After learning of a specific settlement demand he considered "awfully high" in light of his experience in

prosecuting public records lawsuits, Chandler spoke with Jonathan O'Boyle and William Ring. Ans. Br. at 11-12. Both confirmed that settlement offers were issued by the O'Boyle Law Firm on behalf of CAFI that exceeded the amount of fees actually incurred. *Id.*

Chandler's concerns escalated over several months, culminating in his resignation from CAFI on June 30, 2014. Ans. Br. at 12.

5. The Town Hires Sweetapple

The Town hired Robert Sweetapple, Esq., as special counsel in April 2014 initially to assist in dealing with the large number of public records requests being submitted to the Town by Martin O'Boyle, Christopher O'Hare, and others. Ans. Br. at 12.

During his representation of the Town, Sweetapple became aware of information he believed showed that, as of May 30, 2014, Jonathan O'Boyle had improperly used a Pennsylvania professional corporation to establish a regular presence in Florida without being admitted to the Florida Bar and was thereby engaged in the unlicensed practice of law in Florida. Ans. Br. at 13. The Town retained Gerald Richman, Esq. ("Richman"), as a consultant regarding this issue. *Id.*

At that time, Richman and Richman Greer, P.A. ("Richman Greer"), were already aware of CAFI through the firm's representation of a private company involved in a public records lawsuit brought by CAFI. Ans. Br. at 13.

Based on the information acquired by Sweetapple, the Town filed a motion on May 30, 2014, requesting that the O'Boyle Law Firm be disqualified as counsel for Martin O'Boyle. Ans. Br. at 13.

6. Chandler "Blows the Whistle" on CAFI

Following his June 30, 2014, resignation from CAFI, Chandler sent an email to the media announcing his separation from CAFI and copied his communications to numerous individuals, including Sweetapple. Ans. Br. at 13-14.

Chandler contacted Sweetapple (who he had never met) because Chandler knew that Sweetapple represented the Town and believed the Town was being "victimized" by Martin O'Boyle and the O'Boyle Law Firm. Ans. Br. at 14.

Chandler then spoke with Town Attorney Joanne O'Connor and advised her of his beliefs regarding CAFI, Martin O'Boyle, and the O'Boyle Law Firm. Ans. Br. at 14. Chandler provided evidence of what he believed to be fraudulent and criminal conduct on the part of CAFI, Martin O'Boyle, and the O'Boyle Law Firm to Sweetapple, and he voluntarily met with Sweetapple. *Id.*

Chandler met with Sweetapple on July 23, 2014, and provided Sweetapple with documents and a sworn statement detailing the fraudulent conduct. Ans. Br. at 14. Eventually, on October 27, 2014, Chandler provided

Sweetapple with an affidavit which also detailed the fraudulent conduct. *Id.*

After obtaining the sworn statement from Chandler, Sweetapple compared it to the information he had already obtained through his own investigation and research and, based upon this review, came to believe that Chandler was a credible witness. Ans. Br. at 15.

In July 2014, William Ring left CAFI and became employed by the O'Boyle Law Firm. Ans. Br. at 15.

7. The Complaints to the Florida Bar

Based upon the information obtained from Chandler and through the Town's independent research, Mayor Morgan – on behalf of the Town – submitted the Bar Complaints on August 25, 2015, against Jonathan O'Boyle, William Ring, and other attorneys at the O'Boyle Law Firm. Ans. Br. at 15-6. The conduct described in the Bar Complaints focused on the conduct that made up the Windfall Scheme described by Chandler. *Id.* The Bar Complaints identified the following potential violations: (a) the sharing of space with non-lawyers and the sharing of client confidences, (b) the captive law firm and feeder relationships, (c) the Windfall Scheme described by Chandler, and (d) the unlicensed practice of law by Johnathan O'Boyle. *Id.*

8. The Filing of the RICO Lawsuit

In addition, on October 10, 2014, the Town conducted a regular meeting of its Commissioners to

consider, among other issues, "filing a RICO action & retaining special counsel to represent the Town." Ans. Br. at 16. Attorney Joanne O'Connor spoke first and advised the Commission:

> (a) that more than 1,500 public records requests had been submitted to the Town since August 27, 2013,
>
> (b) that the Town believed an "overwhelming majority" of those requests were submitted by Martin O'Boyle, Christopher O'Hare, or entities they controlled,
>
> (c) that these requests resulted in 36 lawsuits, and
>
> (d) that the Town had expended $370,000 since January 2014 in legal fees in defending the actions and responding to the requests. *Id.*

The Town had also identified 31 other governmental entities, 43 not-for-profit entities, and 47 corporations that were subjected to public records requests and lawsuits initiated by CAFI. Ans. Br. at 17.

Richman then spoke because the Town was "considering filing a RICO action and retaining [his] firm as special counsel." Ans. Br. at 17. He opined that "the best way to counteract what the [T]own [wa]s going through [wa]s to file a RICO action in federal court." *Id.* Richman explained that the "purpose of the action would be ultimately to seek injunctive relief and damages against the enterprise they have which would include the law firm, would include individuals, and include [CAFI] where they [we]re conjunctively involved

in bringing this whole series of actions which [he] believe[d] ha[d] no merit." *Id.*

Discussion during the October 10, 2014, meeting included comments from individual Commissioners and members of the public. Ans. Br. at 17.

After the presentations and discussion, the Commission voted to retain Richman as special counsel. Ans. Br. at 18.

On February 12, 2015, the Town and another entity sought judicial relief by filing the RICO Lawsuit against the Petitioners, CAFI, the O'Boyle Law Firm, and others. Ans. Br. 18. The Town sought "whatever orders the Court deem[ed] necessary to divesting [sic] the Defendants from their interest in the enterprise and imposing reasonable restrictions on the future activities or investments of the Defendants to prohibit them from engaging in a similar type endeavor." *Id.*

Beginning in January 2015, the Town also filed counterclaims naming the Petitioners and others as third-party defendants in already-pending state court actions that had been brought against the Town by Martin O'Boyle, Christopher O'Hare, or entities they controlled alleging violations of Florida's public records law. Ans. Br. at 18.

According to Mayor Scott Morgan and the Town's attorneys, the Town's litigation efforts were intended to secure judicial relief in response to an illegal extortion effort being pursued by the Petitioners, CAFI, and the other named defendants. Ans. Br. at 18-19.

9. The September 2015 Notice to Appear

On September 22, 2015, an incident occurred at Town Hall involving Martin O'Boyle after a Town Commission meeting. Ans. Br. at 19. The following day, Gulf Stream Police Department Sgt. John Passeggiata filed documents with the Palm Beach State Attorney's Office, including an Arrest/Notice to Appear form and witness statements. *Id.*

Neither Mayor Morgan nor any other member of the Town Commission directed Sgt. Passeggiata to engage with Martin O'Boyle on September 22, 2015, or to file charges the following day. Ans. Br. at 19.

On September 28, 2015, the Palm Beach State Attorney's Office filed an Information in *State of Florida v. Martin E. O'Boyle*, Case No. 2015MM012872A, charging Martin O'Boyle with resisting an officer without violence (a first-degree misdemeanor) in violation of § 843.92, Florida Statutes, and disorderly conduct (a second-degree misdemeanor) in violation of § 877.03, Florida Statutes. Ans. Br. at 19-20. After the case was reassigned, the Broward State Attorney's Office filed an Amended Information on December 9, 2015, in *State of Florida v. Martin E. O'Boyle*, Case No. 2015MM012872A adding a charge of trespass (a first-degree misdemeanor) in violation of § 810.08, Florida Statutes. *Id.*

B. No Official Policy of Retaliation

In addition to the factual omission regarding the Windfall Scheme, the Petitioners also claim incorrectly that the Town adopted an official policy of retaliation. The Petitioners' contention is not supported by the record.

The retaliatory conduct identified in the Second Amended Complaint allegedly arose from two votes of the Town Commission: (1) the October 10, 2014, vote to a retain Richman as special counsel for the purpose of pursuing the RICO Lawsuit and (2) the December 12, 2014, vote to ratify Mayor Morgan's filing of the Bar Complaints. *See* Ans. Br. at 1. Neither vote represented the adoption of an official policy of intimidation or retaliation. Instead, the votes represented a *response* to the ongoing Windfall Scheme, conduct the Town legitimately believed to constitute a RICO violation and violations of the Rules Governing the Florida Bar, beliefs that the Petitioners conceded were supported by probable cause and were therefore "reasonable." Voting to seek judicial and administrative remedies for conduct currently occurring based upon a good faith belief that the conduct violates federal law and the Florida Bar rules is not the equivalent of adopting a policy to "intimidate" a citizen in the future for past unrelated First Amendment activities.

None of the comments attributed to Town Mayor Scott Morgan evidence or establish an official policy of intimidation. Instead, Mayor Morgan's comments merely represented a new approach to defending

ongoing lawsuits being brought by the Petitioners, entities under their control, or their associates (like Christopher O'Hare). For example, the Petitioners focus their argument on a June 2, 2014, letter send by Mayor Morgan to Town residents. In relevant part, Mayor Morgan's June 2, 2014, letter states:

> In response to this continuing problem, the Commission is **stepping up its defense of the O'Boyle and O'Hare litigation**. Special counsel has been hired to assist our other attorneys in this regard. The Commission believes strongly that a **firm stance is necessary to limit the detrimental effects that these lawsuits are having** on staff morale and Town reserves. This approach does cost money, however, and this is your money, so we have an obligation to keep you informed.

Ans. Br. at 50 (emphasis added).

According to the June 2, 2014 letter, the "firm stance" was merely a new litigation approach through which the Town would be "stepping up" its defense. *Id.* The "continuing problem" was (1) the reduction in the Town's general fund reserves as a result of a "dramatic[ ]" rise in legal fees "due to [the Town] defending over 20 lawsuits filed by two residents, Mr. O'Boyle and Mr. O'Hare," stemming from their more than 800 public records requests, and (2) the impact these requests were having on the limited Town staff, including low morale, a resignation, and extended work hours. *Id.*

The so-called "firm stance" in responding to pending litigation is easily distinguishable from an

affirmative policy of targeted personal intimidation. The "firm stance" amounted to an overall litigation strategy – "stepping up [the Town's] defense" – without any personal intimidation.

II. THE ELEVENTH CIRCUIT'S REASONING BELOW

In the decision below, the Eleventh Circuit focused its analysis of the First Amendment retaliation claims on "whether a reasonable factfinder could conclude that Gulf Stream's lawsuit and bar complaints – or O'Boyle's criminal charges – were causally connected to the O'Boyles' and Ring's protected activity." *O'Boyle v. Com. Grp., Inc.*, No. 22-10865, 2023 WL 2579134, at *3 (11th Cir. Mar. 21, 2023) (*O'Boyle II*").

To satisfy the causation element of a First Amendment retaliation claim, the Eleventh Circuit explained that "a plaintiff must establish a causal connection between the government defendant's retaliatory animus and the plaintiff's subsequent injury." *Id.* at *4 (quoting *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019) (marks and citation omitted). However, "where the government actor can show it had probable cause to take legal action against the plaintiff's protected activity, a retaliation claim will usually 'fail[ ] as a matter of law.'" *Id.* (quoting *Nieves*, 139 S. Ct. at 1728.).

The Eleventh Circuit recognized two exceptions to the probable cause rule. First, where the government has selectively punished the plaintiff but not others engaged in similar conduct, probable cause will not bar

the claim. *O'Boyle II*, 2023 WL 2579134 at *4 (quoting *Nieves*, 139 S. Ct. at 1727). Second, probable cause will not bar the claim if the plaintiff can satisfy the "unique" circumstances presented in *Lozman*. *O'Boyle II*, 2023 WL 2579134 at *4 (citing *DeMartini*, 942 F.3d at 1293).

With respect to the second exception, the Eleventh Circuit analyzed *Lozman* as follows:

> Under the *Lozman* exception, the existence of probable cause does not defeat a First Amendment retaliation claim where several conditions are satisfied. A plaintiff must show, for example, that he suffered retaliation as the result of an "'official municipal policy' of intimidation." [*DeMartini*, 942 F.3d at 1293] (quoting *Lozman*, 138 S. Ct. at 1954). And he 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. *Id.* at 1294 (applying *Lozman*, 138 S. Ct. at 1954-55). In *Lozman*, the plaintiff was arrested for disorderly conduct at a town hall meeting for objecting to the arrest of a former town official, but he alleged that the arrest was actually part of a municipal policy to intimidate him for criticizing the city's eminent domain activities. 138 S. Ct. at 1949-50. His "prior, protected speech" about eminent domain, Lozman explained, bore "little relation to the criminal offense for which the arrest [was] made," so his lawsuit could proceed

> regardless whether there was probable cause for his disorderly conduct arrest. Id. at 1954.

O'Boyle II, 2023 WL 2579134 at *4.

Based on this analysis, the Eleventh Circuit then affirmed the order granting summary judgment in favor of the Town finding that the "district court correctly found that Gulf Stream's civil litigation fell outside the *Lozman* exception" because "[t]he town filed the RICO suit and state-court counterclaims as a direct response to the hundreds of public records requests, and multiple lawsuits, that were draining municipal resources and manpower." *Id.* at *5 (citing *O'Boyle I*, 654 F. App'x at 442). While "ultimately unsuccessful, the [T]own was attempting to pursue legitimate goals: preventing harassment and minimizing public expenditures on legal fees." *Id.* The Eleventh Circuit even addressed Mayor Morgan's June 2, 2015, letter and the speech he gave during the September 2015 town hall meeting, finding that "the letter actually highlights the connection between the town's legal actions, the public records requests, and the public records litigation." "The letter thus shows that the town's litigation strategy bore more than 'little relation' to the public records requests." *Id.*

The Eleventh Circuit – like the district court – applied the same reasoning to the Bar Complaints, finding them "closely related to their public records litigation activity" because "[t]he bar complaints included as potential ethics violations: (1) Jonathan O'Boyle's appearance in the public records litigation

cases without a license from The Florida Bar; (2) The O'Boyle Law Firm's 'feeder relationship' with Martin O'Boyle and the businesses he created to carry out his public records litigation; and (3) the firm's 'windfall fee scheme' of threatening Gulf Stream with litigation unless it agreed to settlements in excess of The O'Boyle Law Firm's actual fees and costs." *Id.* "All of these bases for the bar complaints were intimately linked to Ring and the O'Boyles' protected activity – asking for public records and filing lawsuits about the requests." *Id.*

As to the third alleged act of retaliation – the filing of the Criminal Charges – the Eleventh Circuit affirmed finding that it also fell outside the *Lozman* exception because "false prosecution claims are governed not by *Lozman* but by *Hartman v. Moore*, 547 U.S. 250 (2006)." *O'Boyle II*, 2023 WL 2579134 at *5. "Because the State Attorney's decision to charge O'Boyle added a layer of independent judgment between a government official's alleged retaliatory motive and the criminal charges filed, *Hartman* made 'showing an absence of probable cause' a necessary 'element[] of the tort'" of retaliatory prosecution. *Id.* (quoting *Hartman*, 547 U.S. at 263).

III. THE TOWN'S RESPONSE TO THE PETITION

A. The Petitioners Have Not Identified A Valid Basis for Granting Certiorari

Supreme Court review is limited and typically exercised to resolve conflicts between the lower appellate courts, to correct a decision that conflicts with a prior decision of the Supreme Court, or addressing important questions of federal law that should have been settled by the Supreme Court. *See* Rule 10. The Petition does not satisfy the basic standard of Rule 10.

1. There is No Split Among the Circuits Regarding Any Issue Framed in the Petition

Framing the issues as "(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," the Petitioners argue that Supreme Court review is needed because federal courts are split on these questions. Pet. at 16-25. None of the purported conflict cases squarely address the issues.

a. No Circuit Court Has Deviated from the Eleventh Circuit's Approach to the Probable Cause Issue

In *DeMartini*, the Eleventh Circuit held that "the presence of probable cause will generally defeat a § 1983 First Amendment retaliation claim based on a civil lawsuit as a matter of law." 942 F.3d at 1304. In *O'Boyle II*, the Eleventh Circuit extended its reasoning about probable cause to the filing of the Bar Complaints. *See* 2023 WL 2579134 at *5. The Petitioners have not cited any case that *conflicts* with the Eleventh Circuit's holding.

For example, in *Frederickson v. Landeros*, the plaintiff asserted *an equal protection claim* alleging that a police officer had singled him out for unfavorable treatment and had otherwise used his official position to harass the plaintiff purely out of personal dislike. 943 F.3d 1054, 1056 (7th Cir. 2019). On appeal, the Seventh Circuit addressed whether the district court had properly denied the defendant officer *qualified immunity* by considering if "the facts show a violation of a constitutional right, and if so, whether that constitutional right was clearly established at the time of the alleged violation, in the context presented by the case." *Id.* at 1059. Thus, *Frederickson* considered a different constitutional claim (equal protection) and a direct issue (qualified immunity).

Moreover, the majority in *Frederickson* did not address *Lozman* and only mentioned *Nieves* to explain why *Nieves* would not apply to the various forms of

alleged differential treatment under consideration. According to the Seventh Circuit, *Nieves* did not apply because the "complaint goes well beyond" alleged merely false arrests and instead alleged a "combative" relationship between the plaintiff and defendant police officer. 943 F.3d at 1067. The Seventh Circuit noted that "[p]robable cause has nothing to do with those [interactions]." *Id.*

The defendant's actions in *Frederickson* are readily distinguishable from the Town's decision to seek judicial and administrative remedies for the Windfall Scheme by filing the RICO Lawsuit and the Bar Complaints. As result, *Frederickson* does not conflict with *O'Boyle II* and provides no basis for certiorari review.

In *Bello-Reyes v. Gaynor*, the Ninth Circuit considered whether *Neives* "applie[d] to a noncitizen's claim that Immigration and Customs Enforcement ('ICE') unconstitutionally retaliated against him for his speech when revoking his bond and re-arresting him." 985 F.3d 696, 698 (9th Cir. 2021). There, the plaintiff "had been detained by ICE and released on bond in 2018," but "ICE revoked his bond and re-arrested him" thirty-six hours after he read a poem critical of ICE at a rally. *Id.* The government asserted that, since ICE had probable cause to arrest the plaintiff, the retaliatory arrest argument failed under *Nieves*. *Id.* The Ninth Circuit disagreed noting that "the distinctions between *Nieves* and [the plaintiff's] habeas petition indicate that *Nieves* should not control in this case." *Id.*

The type of alleged retaliation in *Bello-Reyes* – involving an immediate arrest and deprivation of liberty – is not akin to the Town's filing of a civil lawsuit or a bar complaint, both of which involved a request for relief from an independent third-party as a remedy against the Windfall Scheme. More importantly, the remedy sought was release from confinement through a petition for habeas corpus. *Id.* at 701. As noted in *Bello-Reyes*, the problems of causation "are less acute" in such proceedings and more acute in § 1983 suits, where the no-probable-cause standard was assumed by the Court to be appropriate. *Id.* at 700-701. As a result, *Bello-Reyes* creates no conflict with the Petitioners' claims under § 1983.

In the only other two *circuit* court decisions cited by the Petitioners – *Rudd v. City of North Shores* and *Welch v. Dempsey* – the Sixth and Eighth Circuits did not address the question of whether a showing of probable cause is required in the context of an allegedly retaliatory civil lawsuit or bar complaint. *See Rudd v. City of Norton Shores*, 977 F.3d 503, 516 (6th Cir. 2020) (explaining that it "need not consider whether a probable-cause element extends to civil suits (or motions filed within them) because the defendants make no probable-cause argument on appeal."); *Welch v. Dempsey*, 51 F.4th 809, 812 (8th Cir. 2022) (noting that the plaintiff failed to "explain why the asserted existence of 'arguable probable cause' would be dispositive as a matter of law on a claim alleging retaliatory use of force in violation of the First Amendment.").

The Petitioners also cite several unpublished district court decisions from within the Seventh and Ninth Circuits. Pet. at 19, 20. However, review on a writ of certiorari is typically limited to conflicts among "United States court[s] of appeal[s]" or among "state court[s] of last resort." S.C. Rule 10. Under Rule 10, unpublished district court decisions are irrelevant to the Court's consideration of whether to exercise jurisdiction.

b. No Circuit Court Decision Conflicts with the Eleventh Circuit's Interpretation of *Lozman*

The Petitioners argue that a conflict exists among the circuit courts regarding the application of *Lozman*. Pet. at 21-25. They also claim that the Eleventh Circuit misinterpreted *Lozman* by improperly requiring the application of a five-part test, including a showing of "little relation between the protected speech that prompted the retaliatory policy and the actions that triggered an allegedly retaliatory response." Pet. at 23. Neither argument has merit.

First, the Eleventh Circuit correctly interpreted *Lozman* as establishing a five-part test. The *Lozman* decision was not based upon the presence of an official policy of retaliation as argued by the Petitioners. Instead, *Lozman* identified a more comprehensive test that, when satisfied, justified allowing Lozman's First Amendment retaliation claim to proceed even though his arrest was supported by probable cause: (1) Lozman

alleged "more governmental action than simply an [officer's] arrest" because Lozman claimed that the City "itself retaliated against him pursuant to an 'official municipal policy' of intimidation"; (2) Lozman alleged that the City's retaliation plan was "premeditated" and adopted months before that plan was later executed through the arrest; (3) Lozman relied upon "objective evidence" of the City's policy by virtue of a transcript of a meeting during which a councilmember stated that the City should use its resources to "intimidate" Lozman; (4) there was a clear separation between the protected speech that prompted the adoption of the earlier policy of intimidation and the later arrest, allowing the focus to remain on the City's illegitimate conduct rather than on the arresting "officer's legitimate consideration of speech"; and (5) the form of Lozman's speech – the right to petition – was "one of the most precious of the liberties safeguarded by the Bill of Rights" and was "high in the hierarchy of First Amendment values." *Id.* at 1949, 1954-55.

As to the fourth element, this Court explained the temporal separation issue as follows:

> The causation problem in arrest cases is not of 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. In determining whether there was probable cause to arrest Lozman for disrupting a public assembly, it is difficult to see why a city official could have legitimately considered that

> Lozman had, *months earlier*, criticized city officials or filed a lawsuit against the City.

Id. at 1954 (emphasis added). Thus, the Eleventh Circuit's interpretation of *Lozman* is supported by the text of the opinion.

The Eleventh Circuit was not alone in its identification of a five-factor test. In his dissenting opinion, the Honorable Justice Clarence Thomas noted the need to satisfy each of the five-factors to invoke the *Lozman* exception. *Id.* at 1955 (Thomas, J., dissenting).

Second, none of the cases cited by the Petitioners conflict with the Eleventh Circuit's interpretation or application of *Lozman*. Two of the cases cited by the Petitioners do not engage in a detailed analysis of *Lozman* and merely mention its holding in parentheticals. *See Waters v. Madson*, 921 F.3d 725, 741-42 (8th Cir. 2019) ("*But see Lozman v. City of Riviera Beach*, ___ U.S. ___, 138 S. Ct. 1945, 1955, 201 L. Ed. 2d 342 (2018) (allowing 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 premeditated plan [by the municipality and its legislators] to intimidate him')."); *Phillips v. Blair*, 786 F. App'x 519, 529 (6th Cir. 2019) (" . . . *cf. Lozman v. City of Riviera Beach*, ___ U.S. ___, 138 S. Ct. 1945, 1954-55, 201 L. Ed. 2d 342 (2018) (recognizing a narrow exception to the requirement to show a lack of probable cause where the plaintiff alleges an official municipal policy of retaliation).").

The other two cases cited by the Petitioners also fall short of establishing a conflict. In *Higginbotham v. Sylvester*, the Second District noted only what *Lozman* did *not* address. *Lozman* "left open the question of whether *Mount Healthy* applies where, as here, the defendants are individual police officers, rather than a municipality." 741 F. App'x 28, 31 (2d Cir. 2018) (stating 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.").

Finally, in *Gonzalez v. Trevino*, the plaintiff relied upon *Lozman* "to argue that her claim may proceed notwithstanding probable cause." 42 F.4th 487, 493 (5th Cir. 2022). The Fifth Circuit rejected this argument because in *Lozman* the plaintiff "was asserting a *Monell* claim against the municipality itself, rather than individuals." *Id.* at 494. It noted that "*Lozman*'s holding was clearly limited to *Monell* claims." *Id.* The Fifth Circuit did not otherwise address the specific elements needed to invoke the *Lozman* exception.

In sum, none of the cases cited by the Petitioners conflict with *O'Boyle II* because none of them specifically considered whether a plaintiff was required to satisfy the five-factor test. The Petitioners' cases broadly cited *Lozman* and failed to apply it based upon the distinction between municipal defendants and individual defendants. The cases did not hold that a

plaintiff seeking to rely upon *Lozman* need only establish the adoption of an official policy of retaliation.

B. *O'Boyle II* Was Decided Correctly

The Petitioners argue that *O'Boyle II* was wrongly decided because (1) the additional no-probable-cause requirement should not extend beyond retaliatory prosecutions and arrests, Pet. at 25-30, and (2) the additional no-probable-cause requirement should not apply when a plaintiff shows that a municipality retaliated pursuant to an official policy. Pet. at 31-33. Several defects undermine the Petitioners' arguments.

1. *DeMartini* Decided the No-Probable-Cause Requirement

As a threshold matter, the question of whether the no-probable-cause requirement should be extended beyond criminal prosecutions and arrests was not presented to the Eleventh Circuit below. The only issue raised by the Petitioners was whether the district court erred in finding that their claim did not fit within the *Lozman* exception to the probable cause requirement. *See* Petitioners' Initial Brief from *O'Boyle v. Com. Grp., Inc.*, No. 22-10865. The issue of whether the no-probable-cause requirement should be extended beyond the context of arrests and criminal prosecutions was decided by the Eleventh Circuit in *DeMartini*, a case this Court declined to review. *DeMartini, Fla.*, S.C. Case No. 19-1436. Because the Petitioners did not raise – and the Eleventh Circuit did not address – the

probable cause issue in *O'Boyle II*, no basis exists for the Petitioners to seek review on this issue.

2. The Eleventh Circuit Correctly Extended the No-Probable-Cause Requirement to Civil Lawsuits and Bar Complaints

Even if it was appropriate for the Petitioners to raise the issue, the Eleventh Circuit properly extended the no-probable-cause requirement to matters beyond criminal prosecutions and arrests in *DeMartini*. The Eleventh Circuit's holding in *DeMartini* arose from a detailed analysis of the Supreme Court cases addressing First Amendment retaliation, including *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 285-87, 97 S. Ct. 568, 575-76, 50 L. Ed. 2d 471 (1977), *Hartman*, *Lozman*, *Nieves*, and several circuit court opinions addressing First Amendment retaliation in the context of civil lawsuits. *See DeMartini*, 942 F.3d at 1290-1300. Then, based upon its analysis and "the factors discussed in the Supreme Court's *Hartman* and *Nieves* decisions, [the Eleventh Circuit] conclude[d] that, as with § 1983 First Amendment retaliation arising in the criminal prosecution and arrest context, the presence of probable cause will generally defeat a § 1983 First Amendment retaliation claim based on a civil lawsuit as a matter of law." *DeMartini*, 942 F.3d at 1304.

The Eleventh Circuit also noted the following six factors in support of its conclusion: (1) the involvement

of counsel, *DeMartini*, 942 F.3d at 1304, (2) that "the absence of probable cause will have high probative force and adds little to no cost, as the facts surrounding the Town's prior civil RICO lawsuit are already known by DeMartini," *Id.* at 1304-05, (3) that the plaintiff's alleged protected speech was the same conduct "for which the Town had its own legitimate, objective reasons and motivation for challenging by filing its civil RICO lawsuit," *Id.* (4) "that [the plaintiff]'s protected speech was a 'wholly legitimate consideration' for the Town when deciding to file the civil RICO lawsuit also renders the causation landscape more complex, just like it did in *Nieves*." *Id.* at 1305, (5) that the Town also had a right to access courts to address its legitimate concerns, and (6) that the closest common law approximation of a First Amendment retaliation claim was a wrongful civil proceeding for which "[i]t has long been settled law . . . that wrongful civil proceedings claims require proving the absence of probable cause." *Id.* at 1309.

The Petitioners argue that the Eleventh Circuit erred (in *DeMartini*) in extending the no-probable-cause requirement from *Hartman* and *Nieves* to civil lawsuits because of the inherent differences between those acts and criminal prosecutions and arrests. Pet. at 28. As to a criminal prosecution, they argue that "[u]nlike 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" because the private attorneys were

hired by the Town. Pet. at 28. Their argument lacks merit.

While not identical, private attorneys and public prosecutors are more similar than the Petitioners are willing to admit. As recognized by the Eleventh Circuit, private attorneys, like the two hired by the Town here, were "(1) required to 'exercise independent professional judgment and render candid advice' to the Town, (2) limited to the filing of a claim having 'a basis in law and fact . . . that is not frivolous,' and (3) prohibited from 'us[ing] the law's procedures . . . to harass and intimidate others.'" *DeMartini*, 942 F.3d at 1304 (quoting R. Reg. Fla. Bar, 4-2.1, 4-3.1, Preamble). An attorney admitted to practice in the state of Florida, when confronted with a request to file a baseless lawsuit solely to harass and intimidate someone, was obligated – like a public prosecutor – to decline to file such a case.

In *DeMartini*, the Eleventh Circuit recognized that, whether a plaintiff would be required to plead and prove an absence of probable cause, was "**dependent on the *type* of alleged retaliation at issue**." *DeMartini*, 942 F.3d at 1289 (emphasis added). Where "the governmental defendant has utilized the legal system to arrest or prosecute the plaintiff," courts "require the plaintiff to plead and prove an absence of probable cause as to the challenged retaliatory arrest or prosecution in order to establish the causation link between the defendant's retaliatory animus and the plaintiff's injury." *DeMartini*, 942 F.3d at 1289. The analysis to be applied is not, as argued by the

Petitioners, dependent upon whether a prosecutor or a private attorney was involved, but rather the type of retaliatory conduct being claimed.

The Petitioners argue that *Nieves* is distinguishable because it involved a split-second arrest, while the Town's filing of the RICO Lawsuit and Bar Complaints involved "months of deliberation." Pet. at 29. However, the Eleventh Circuit did not compare a civil lawsuit and an arrest in terms of the need to make a split-second decision. Instead, the Eleventh Circuit compared the filing of a civil lawsuit with an arrest because in both situations the alleged retaliator had a "wholly legitimate" basis for considering the protected speech. *DeMartini*, 942 F.3d at 1305-06. This "causal complexity warrant[ed] that a plaintiff, like [the *DeMartini* plaintiff and the *Nieves* plaintiff], must plead and prove the absence of probable cause for her First Amendment retaliation claim to move forward. Otherwise, it would be extremely difficult, if not impossible, to determine whether the filing of the RICO lawsuit was caused by the Town's legitimate consideration of the protected speech, its alleged retaliatory animus, or both." *DeMartini*, 942 F.3d 1277 at 1305-06 (alteration added).

Finally, the Petitioners assert that the no-probable-cause requirement in *Hartman* and *Nieves* should not be applied in the civil context because "the probable cause standard in a civil action is far different from the probable cause standard in a criminal action." But nothing in *Hartman* or *Nieves* indicated that the Court was focused on the level of proof needed to establish

probable cause in the criminal context. Moreover, utilizing a higher probable cause standard in criminal situations like *Hartman* and *Nieves* was logical given that the plaintiffs' liberty interests were at stake. While the Petitioners were potentially subject to civil penalties, including monetary damages and suspension of their bar licenses, none were exposed to deprivation of their liberty.

Extending the no-probable-course requirement to civil lawsuits is not without precedent. Historically the common law has required a plaintiff to plead and prove an absence of probable cause in claims for wrongful civil action and malicious prosecution. The Supreme Court has instructed that "[w]hen defining the contours of a claim under § 1983, [it] look[s] to 'common-law principles that were well settled at the time of its enactment.'" *Nieves*, 139 S. Ct. at 1726 (quoting *Kalina v. Fletcher*, 522 U.S. 118, 123, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997)); *see also Manuel v. Joliet*, 580 U.S. ___, ___, 137 S. Ct. 911, 1920-1921, 197 L. Ed. 2d 312 (2017) (common law principles "guide" the definition of claims under § 1983). In *DeMartini*, the Eleventh Circuit noted that "wrongful civil proceedings claims require[d] proving the absence of probable cause" and found them to be the most analogous common law claim to a claim for First Amendment retaliation. 942 F.3d at 1304, 1309. The result in *DeMartini* marks no departure from settled principle of common law.

3. The *Lozman* Exception Requires More than Just an Official Policy

The Petitioners argue that the Eleventh Circuit erred in *O'Boyle II* by following *DeMartini* and claim that the Eleventh Circuit incorrectly held "that a municipality's lawsuit against a citizen filed pursuant to an official municipal policy of retaliation [*alone*] was insufficient to invoke *Lozman*." Pet. at 31. According to the Petitioners, "[t]his Court in *Lozman* did not establish any multipart test." *Id.* This argument is unavailing for at least two reasons.

First, the undisputed evidence below did not establish "an official policy of retaliation." As previously explained, the retaliatory conduct identified in the Second Amended Complaint allegedly arose from only two votes of the Town Commission: (1) the October 10, 2014, vote to a retain Richman as special counsel for the purpose of pursuing the RICO Lawsuit and (2) the December 12, 2014, vote to ratify Mayor Morgan's filing of the Bar Complaints. Neither vote represented the adoption of an official policy of intimidation to be implemented later as in *Lozman*. Rather, the votes represented a response to the already-existing Windfall Scheme which the Town legitimately believed to represent RICO violations and violations of the Rules Governing the Florida Bar. Again, the Petitioners conceded that the Town's concerns were supported by probable cause and were "reasonable." Voting to seek judicial and administrative remedies for conduct currently occurring based upon a good faith belief that it violates federal law and the Florida bar rules

cannot be equated with seeking to "intimidate" a citizen in the future for past unrelated First Amendment activities. The Town's votes simply did not fit within *Lozman*'s conception of adopting a policy of future intimidation.

Second, the Petitioners' argument demonstrates a fundamental misunderstanding of *Lozman*. The *Lozman* decision was not based exclusively upon the presence of an official policy of retaliation, but a more comprehensive five-part test associated with an exceptionally narrow fact pattern. *Lozman*, 138 S. Ct. at 1954-55.

In *DeMartini*, the Eleventh Circuit explained – in detail – why *Lozman* did not apply to the undisputed facts in that case, involving the same lawsuits that are at issue here. *DeMartini*, 942 F.3d at 1306-07. The Petitioners have offered no response to the comprehensive analysis or reasoning in *DeMartini*. Their failure to raise any new arguments is fatal to their efforts to seek review.

The Petitioners also claim that "[u]nder 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." Pet. at 32. To the contrary, the no-probable-cause rule should be preserved in this matter.

Whether a plaintiff should be required to plead and prove an absence of probable cause is "dependent on the *type* of alleged retaliation at issue," and in cases involving retaliation through the use of the legal system (e.g., criminal prosecutions, arrests, or civil lawsuits), the plaintiff should be required to plead and prove the absence of probable cause. *DeMartini*, 942 F.3d at 1289. Other types of alleged First Amendment retaliation would remain subject to the *Mt. Healthy* test.

Indeed, it is the Petitioners' proposed test that would "swallow the rule." Municipalities like the Town often serve as both investigator and prosecutor in code enforcement actions. Without a requirement that a plaintiff plead and prove an absence of probable cause, typical code enforcement actions are readily converted into First Amendment retaliation claims. Property owners would even have an incentive to create disputes with the local government as part of an effort to secure a potential advantage when planning ambitious improvements. Such incentives are eliminated by the Eleventh Circuit's decision in *DeMartini*.

CONCLUSION

The Petitioners' case is not appropriate for review. The Petitioners unquestionably implemented their Windfall Scheme, "an extortionate scheme involving

fraudulent public records requests, false settlement demands, and subsequent multiple lawsuits designed to obtain attorney's fees as opposed to the requested records." *DeMartini*, 942 F.3d at 1301. The Petitioners have never challenged the scope or purpose of the Windfall Scheme. Indeed, it is conspicuously ignored in their Petition.

The Eleventh Circuit properly applied its precedent, *DeMartini*, and concluded that the Petitioners were unable to invoke *Lozman*'s exception to the general requirement that they plead and prove an absence of probable cause before asserting a First Amendment retaliation claim based on an allegedly retaliatory civil lawsuit or bar complaint. No other issue was decided by the Eleventh Circuit in *O'Boyle II*. In finding that the Petitioners were unable to satisfy the requirements of *Lozman*, the Eleventh Circuit relied upon the analysis of *DeMartin* in which the Court had addressed the same question on the same facts. The Eleventh Circuit's analysis is not subject to any legitimate dispute, and none of the cases cited by the Petitioners conflict with the Eleventh Circuit's interpretation of *Lozman* or its approach to claims seeking damages for alleged First Amendment retaliation under § 1983. Before the Supreme Court considers the role of probable cause, it should first allow other appellate courts to address the issue. At this point, the Petitioners merely disagree with the results below.

As a result, their Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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