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

REPLY BRIEF FOR PETITIONERS

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

TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 4

I. The Federal Courts Are Split on the Role of Probable Cause in First Amendment Retaliation Claims 4

II. The Questions Presented Are Squarely Presented and Exceptionally Important 9

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

Cases

Bello-Reyes v. Gaynor,
985 F.3d 696 (9th Cir. 2021).....6

Cate v. Oldham,
450 So. 2d 224 (Fla. 1984) 11

DeMartini v. Town of Gulf Stream,
942 F.3d 1277 (11th Cir. 2019).....9, 10

Ewing Indus. Corp. v. Bob Wines Nursery, Inc.,
795 F.3d 1324 (11th Cir. 2015).....10

Frederickson v. Landeros,
943 F.3d 1054 (7th Cir. 2019).....6

Hartman v. Moore,
547 U.S. 250 (2006).....3, 5

Higginbotham v. Sylvester,
741 F. App'x 28 (2d Cir. 2018).....9

Lozman v. City of Riviera Beach,
138 S. Ct. 1945 (2018).....3, 8

Mayfield v. Butler Snow, L.L.P.,
78 F.4th 796 (5th Cir. 2023) 12

Miranda v. Ponce Fed. Bank,
948 F.2d 41 (1st Cir. 1991) 11

Monell v. Dep't of Soc. Servs.,
436 U.S. 658 (1978).....8

Mt. Healthy City School District Board of Education v. Doyle,
429 U.S. 274 (1977).....4, 5

Nieves v. Bartlett,
139 S. Ct. 1715 (2019).....1, 3, 5

Novak v. City of Parma,
932 F.3d 421 (6th Cir. 2019).....7

Rudd v. City of Norton Shores,
977 F.3d 503 (6th Cir. 2020).....7

Town of Gulf Stream v. O'Boyle,
No. 15-80182, 2015 U.S. Dist. LEXIS 84778 (S.D. Fla. June 30, 2015), *aff'd* 654 F. App'x 439 (11th Cir. 2016).....11

Waters v. Madson,
921 F.3d 725 (8th Cir. 2019).....8, 9

Welch v. Dempsey,
51 F.4th 809 (8th Cir. 2022).....7

INTRODUCTION

For years, the federal courts have grappled with the question of when a First Amendment retaliation plaintiff is required to show that the government lacked "probable cause" for its actions. In *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), this Court held that a plaintiff's failure to show that a police officer lacked probable cause for a split-second arrest foreclosed the plaintiff's First Amendment retaliation claim against the officer. Last month, this Court granted certiorari on the following question:

> Whether the *Nieves* probable cause rule is limited to individual claims against arresting officers for split-second arrests?

Gonzalez v. Trevino, No. 22-1025 (Oct. 13, 2023).[1]

This case also involves the question of when a First Amendment retaliation plaintiff is required to show that the government lacked probable cause for its actions. Petitioners brought a First Amendment retaliation claim against the Town of Gulf Stream (the "Town"), which had filed a civil RICO action and attorney bar complaints against Petitioners intending to "put a stop" to Petitioners' speech critical of the Town and their petitioning activities, including the flying of banners, posting of signs, and filing of public

---

[1] The Court also granted certiorari on the more specific question of "Whether the *Nieves* probable cause exception can be satisfied by objective evidence other than specific examples of arrests that never happened." No. 22-1025 (Oct. 13, 2023).

record requests. Pet.App.90a; Pet.App.81a-82a. Although the Town's civil RICO action and bar complaints were unsuccessful in the courtroom, the Town accomplished its goal—it effectively chilled Petitioners' speech and petitioning activities. Relying on *Nieves*, the Eleventh Circuit held that Petitioners' retaliation claim failed because Petitioners could not show that the Town lacked probable cause for its civil RICO action and bar complaints. Petitioners thus brought the following questions to this Court:

1. Whether the no-probable-cause requirement[2] extends beyond claims for retaliatory *criminal* prosecution and arrest and applies to claims for retaliatory *civil* litigation?

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

Both questions are encompassed within the broad question this Court will address in *Gonzalez*. If this Court holds that the *Nieves* probable cause rule is limited to individual claims against arresting officers for split-second arrests, that would answer both questions presented here. Specifically, if the *Nieves* probable cause rule is limited to individual claims against arresting officers for split-second arrests, then the rule does not apply to claims for retaliatory *civil* litigation, and the rule does not apply to claims involving a *municipal policy* of retaliation.

---

[2] The *Gonzalez* petition referred to the no-probable-cause requirement as the "*Nieves* probable cause rule."

However, if the Court does not limit the *Nieves* probable cause rule to individual claims against arresting officers for split-second arrests, the question of how far the rule extends beyond the facts of *Nieves* and *Gonzalez* will remain. As this Petition asserts, the rule should *not* extend to claims for retaliatory *civil* litigation or claims involving a *municipal policy* of retaliation.

The question of how to treat probable cause in the context of a First Amendment retaliation claim has persisted from *Hartman v. Moore*, 547 U.S. 250 (2006), to *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), to *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019). With its recent grant of certiorari in *Gonzalez*, this Court took an important step towards providing the needed clarity on this issue. By granting certiorari on the questions presented in this case as well, the Court can ensure that it resolves this issue for good and provide the clarity the lower courts need.

The Town, for its part, does not address this Court's order granting certiorari in *Gonzalez*. Instead, the Town tries to avoid the questions presented. Its main argument is that Petitioners engaged in what the Town calls a "Windfall Scheme" that, according to the Town, justified its retaliatory actions. Toward that end, the Town spends the first ten pages of its Argument trying to convince the Court that the Town had probable cause to file a civil lawsuit against Petitioners—a point that is not disputed. As the Town would have it, because it filtered its First Amendment retaliation through probable cause, it cannot be held accountable. But that begs the question presented.

This Court has never adopted an unyielding requirement that a plaintiff show the absence of probable cause for First Amendment retaliation. The question is whether the no-probable-cause requirement *should* apply where the retaliation comes in the form of civil lawsuits (in contrast to a criminal prosecution or arrest) and where the claim is asserted against a municipality that deliberated its decision (in contrast to a police officer that made a split-second decision).

The Court should grant certiorari and hear this case separately from *Gonzalez* or grant certiorari and hear this case "in tandem" with *Gonzalez*.[3] Alternatively, Petitioners request that the Court hold this case pending disposition of *Gonzalez*.

ARGUMENT

I. The Federal Courts Are Split on the Role of Probable Cause in First Amendment Retaliation Claims

The role of probable cause in proving causation for First Amendment retaliation claims has evolved through this Court's decisions. In *Mt. Healthy City*

---

[3] For example, this past term, the Court granted certiorari on First Amendment questions presented in *O'Connor-Ratcliff v. Garnier*, No. 22-324, and *Lindke v. Freed*, No. 22-611, that were very similar, and the Court later heard the cases on the same day. Also, this past month, the Court granted certiorari in *Relentless, Inc. v. Department of Commerce*, No. 22-1219, and stated, "The Clerk is directed to establish a briefing schedule that will allow this case to be argued in tandem with No. 22-451, *Loper Bright Enterprises, et al. v. Raimondo, Sec. of Comm., et al.* …."

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; the plaintiff is not required to show that the government lacked probable cause for its action. 429 U.S. 274, 287 (1977). In *Hartman*, this Court held that a retaliatory prosecution claim involves an additional causation element: a lack of probable cause. 547 U.S. at 259, 265-66. In *Nieves*, this Court extended the additional causation element to retaliatory arrest claims against police officers who make split-second decisions. 139 S. Ct. at 1725. After *Nieves*, the question remains whether the probable cause rule applies beyond retaliatory prosecution claims and retaliatory arrest claims against police officers who make split-second decisions.

The Eleventh Circuit, in this case, took the probable cause rule far past the circumstances in which this Court has applied it. The Eleventh Circuit applied the rule in a case involving municipal retaliation through a civil RICO suit and bar complaints. The actions here were not taken by a neutral prosecutor (*Hartman*) or an arresting police officer in the heat of the moment (*Nieves*); instead, they were taken by a municipality that decided to pursue civil litigation after deliberation.

The Town does not dispute that this Court has never applied the probable cause rule in a situation like this. Instead, the Town contends that no case "conflicts" with the Eleventh Circuit's holding. Opp. 22. That is not true.

As relevant to the first question presented, courts have declined to apply the *Nieves* probable cause rule outside the context of retaliatory prosecutions and arrests. In *Frederickson v. Landeros*, the plaintiff did not allege retaliatory prosecution or arrest—instead, the plaintiff alleged that an officer prevented him from updating his sex offender registration. 943 F.3d 1054, 1056 (7th Cir. 2019). The Seventh Circuit rejected the officer's argument that the *Nieves* probable cause rule applied. *Id.* at 1058, 1066-67. In its Opposition, the Town contends that *Frederickson* is inapposite because it involved qualified immunity. Opp. 22. But nothing about the qualified immunity standard played a part in the Seventh Circuit's conclusions that "[t]his incident had nothing to do with an arrest and thus did not trigger the *Nieves* rule," *Frederickson*, 943 F.3d at 1058, and "[i]f Frederickson were complaining only about arrests supported by probable cause, we freely concede that *Nieves* would require a different result," *id.* at 1066-67.

In *Bello-Reyes v. Gaynor*, the plaintiff did not allege retaliatory prosecution or arrest—instead, the plaintiff alleged that the government revoked his bond in retaliation for his speech. 985 F.3d 696, 698 (9th Cir. 2021). The government contended that the plaintiff's claim failed under *Nieves* because the government had probable cause to revoke the bond. *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 emphasized that "*Nieves* does not apply here because it arose out of the criminal arrest context …." *Id.* at 700-01. The

Town argues that the type of 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." Opp. 24. But this makes Petitioners' point. If anything, the situation in *Bello-Reyes* was more like *Nieves* than this case was like *Nieves*, but the court in *Bello-Reyes* still held that the *Nieves* probable cause rule did not apply.

In *Novak v. City of Parma*, the plaintiff alleged that police officers arrested him in retaliation for creating a parody social media page; the arrest was not a split-second decision. 932 F.3d 421, 424, 426 (6th Cir. 2019). The Sixth Circuit affirmed the denial of the officers' motion to dismiss. *Id.* at 426, 437. The court stated, "this case raises new questions under *Nieves*" and "[i]t may be that, based on the Supreme Court's reasoning in that case and others, the general rule of requiring plaintiffs to prove the absence of probable cause should not apply here." *Id.* at 432. One year later, the Sixth Circuit again recognized the controversy over the reach of the *Nieves* probable cause rule. *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"); *see also Welch v. Dempsey*, 51 F.4th 809, 811, 813 (8th Cir. 2022) (recognizing open question about whether the probable cause rule extends beyond claims for retaliatory prosecution or arrest).

Thus, contrary to the Town's contention, other courts are not in accord with the Eleventh Circuit's extension of the probable cause rule beyond retaliatory prosecutions and split-second arrests—and for good reason. While retaliatory prosecutions and split-

second arrests present difficulties in proving causation, no such problem exists when a municipality, after deliberation, files a civil lawsuit to get back at a citizen for exercising his First Amendment rights. Moreover, the probable cause rule is ill-suited for retaliation claims based on civil lawsuits. The probable cause standard applicable to civil litigation is a low bar that is more easily cleared than the standard applicable to criminal prosecutions and arrests—and thus would insulate a wide swath of retaliatory government lawsuits against its citizens.

As relevant to the second question presented, courts have acknowledged that the probable cause rule does not extend to claims involving a municipal policy of retaliation. In *Lozman*, this Court recognized that "a city or other local governmental entity cannot be subject to liability at all unless the harm was caused in the implementation of 'official municipal policy.'" 138 S. Ct. at 1951 (quoting *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978)). The Court then 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.

The Eleventh Circuit misconstrued *Lozman* as creating a multi-part test. Pet.App.9a-15a. The Eleventh Circuit reasoned that a plaintiff is relieved of proving the lack of probable cause only if he can satisfy a five-part test based on facts identified by the dissent in *Lozman*. Pet.App.10a. Other courts, however, do not treat *Lozman* as creating a five-part test. *See Waters*

v. Madson, 921 F.3d 725, 741-42 (8th Cir. 2019) (describing *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'"); *Higginbotham v. Sylvester*, 741 F. App'x 28, 31 (2d Cir. 2018) ("*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.").

Thus, contrary to the Town's contention, other courts are not in accord with the Eleventh Circuit's holding that *Lozman* creates a multi-part test—and for good reason. The Eleventh Circuit's conclusion 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.

Accordingly, contrary to arguments of the Town, the federal courts are split on the questions presented.

II. The Questions Presented Are Squarely Presented and Exceptionally Important

The Town's vehicle arguments lack merit. On the first question presented, the Town contends that because the Eleventh Circuit decided that the *Nieves* probable cause rule extends beyond criminal prosecutions and arrests in *DeMartini v. Town of Gulf*

Stream, 942 F.3d 1277 (11th Cir. 2019)—and Petitioners did not ask the Eleventh Circuit to overrule *DeMartini*—the question is not properly presented. Opp. 29-30.

The Town, however, cannot dispute that Petitioners have maintained from day one that the probable-cause rule should not apply here; nor can the Town dispute that the Eleventh Circuit disagreed with Petitioners based on *DeMartini* and its flawed reading of this Court's case law. Pet.App.2a ("Ring and the O'Boyles argue that they did not need to show a lack of probable cause to show retaliation. But, under our precedent, they did."); Pet.App.9a-15a (analyzing precedent). Petitioners were not required to argue (pointlessly) that the Eleventh Circuit should overrule its prior precedent. *See Ewing Indus. Corp. v. Bob Wines Nursery, Inc.*, 795 F.3d 1324, 1328 (11th Cir. 2015) ("Under our prior precedent rule, a panel cannot overrule a prior panel's holding"). This Court, however, can overrule Eleventh Circuit precedent, and Petitioners have squarely presented the issue for this Court's review.

On the second question presented, the Town argues that it did not have an official policy of retaliation because its vote to stop Petitioners' activities through a civil RICO action and bar complaints "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." Opp. 35.[4] But the Town's purported "legitimate belief" does not change the fact that the Town deliberated before deciding to file the lawsuit and stated that it filed suit to "put a stop" to Petitioners' First Amendment activities. Pet.App.90a; Pet.App.81a-82a. Indeed, the Town's argument only begs the question of whether the Town's "legitimate belief" should immunize it from liability in these circumstances. Moreover, this was not a mere "response" by the Town. The Town essentially sought a prior restraint on First Amendment activities when it asked for a restriction on Petitioners' political speech through its civil RICO suit, "the litigation equivalent of a thermonuclear device." *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991).

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 impose harm—financial and reputational—on citizens who exercise their First Amendment rights contrary to the liking of a local

---

[4] The district court that dismissed the Town's civil RICO action stated that the Town's 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, 654 F. App'x 439 (11th Cir. 2016). Nor could the petitioning activities at issue constitute a common law violation. *See Cate v. Oldham*, 450 So. 2d 224 (Fla. 1984) (holding that, under the common law, neither a governmental entity nor an official could lodge a claim for malicious prosecution).

government. As Judge Ho of the Fifth Circuit aptly observed in a recent case involving these issues, "[t]he First Amendment doesn't mean much if you're only allowed to express views favored by the government." *Mayfield v. Butler Snow, L.L.P.*, 78 F.4th 796, 798 (5th Cir. 2023) (Ho., J., dissenting from denial of rehearing en banc).[5] Judge Ho went on to explain the dangerous path that is charted by allowing probable cause to shield government action motivated by an effort to squelch dissenting views. "In a country that claims to be free, *any* politically-motivated prosecution should be well out of bounds." *Id.* at 800 (emphasis in original). "But just as we would never accept probable cause as a defense to a racially motivated prosecution, we shouldn't accept probable cause as a defense to a politically motivated one, either." *Id.*

CONCLUSION

This Court should grant the petition for a writ of certiorari and hear this case separately or in tandem with *Gonzalez v. Trevino*, No. 22-1025. Alternatively, at the very least, this Court should hold this case pending disposition of *Gonzalez*.

---

[5] Judge Ho was joined by Judge Smith of the Fifth Circuit in his dissent from the denial of rehearing en banc in *Mayfield*, 78 F.4th 796.

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

November 7, 2023