

No. 17-

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

—◆—
LUIS A. NIEVES and BRYCE L. WEIGHT,

Petitioners,

v.

RUSSELL P. BARTLETT,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

—◆—
PETITION FOR A WRIT OF CERTIORARI
—◆—

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QUESTION PRESENTED

In *Hartman v. Moore*, 547 U.S. 250 (2006), this Court held that probable cause defeats a First Amendment retaliatory-prosecution claim under 42 U.S.C. § 1983 as a matter of law. Does probable cause likewise defeat a First Amendment retaliatory-arrest claim under § 1983?

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PETITION FOR A WRIT OF CERTIORARI

The Alaska Attorney General, on behalf of Alaska State Troopers Luis Nieves and Bryce Weight, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.



OPINIONS BELOW

The memorandum opinion and order of the court of appeals, App. 1-6, is not yet reported. The opinion of the district court, App. 7-39, is unreported.



JURISDICTION

The judgment of the court of appeals was entered on October 20, 2017. App. 1. A petition for rehearing was denied on November 21, 2017. App. 40. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).



**CONSTITUTIONAL AND
STATUTORY PROVISIONS INVOLVED**

The First Amendment to the United States Constitution provides that “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.

42 U.S.C. § 1983 provides, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

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STATEMENT OF THE CASE

Following his arrest for disorderly conduct and harassment, respondent Russell Bartlett sued the arresting officers, petitioners Luis Nieves and Bryce Weight, for damages under 42 U.S.C. § 1983, alleging false arrest and imprisonment, excessive force, malicious prosecution, retaliatory arrest, and violations of the right to due process and equal protection. App. 15. The district court granted summary judgment in favor of the officers on all claims. App. 39. On appeal, the circuit court affirmed dismissal of all claims except for retaliatory arrest. App. 2-7. Despite ruling that there was probable cause to arrest the respondent, the court reasoned that the existence of probable cause does not bar a retaliatory-arrest claim, distinguishing this Court’s

decisions in *Reichle v. Howards*, 566 U.S. 658 (2012), and *Hartman v. Moore*, 547 U.S. 250 (2006). App. 3, 5-6. The circuit court reversed summary judgment on the retaliatory-arrest claim and remanded it for trial. App. 6.

1. Every spring, thousands of extreme skiers, snowmobilers, and spectators gather in the remote Hoodoo Mountains of interior Alaska for Arctic Man, a multi-day festival centered around a high-speed ski and snowmobile race. App. 8. Campers congregate at night to drink and party, and rampant alcohol use compounds safety concerns at the event. C.A. S.E.R. 374-76.

On the last day of Arctic Man in 2014, Troopers Luis Nieves and Bryce Weight were on duty, patrolling a large outdoor party where minors appeared to be drinking alcohol. App. 8. Nieves encountered respondent Russell Bartlett at the party and attempted to speak with him, but Bartlett declined to talk to Nieves. App. 8. Meanwhile, Trooper Weight spotted a minor who appeared to be drinking alcohol and began speaking to him at the edge of the crowd. App. 9. Bartlett marched up to Weight, loudly demanding that Weight stop talking to the minor. App. 9.

The district court, reviewing video footage of the incident, found that “Trooper Weight, Mr. Bartlett, and the minor [were] standing very close together exchanging words” and that “Bartlett’s right hand was at roughly shoulder height within inches of Trooper

Weight's face."¹ App. 11-12. The 5'9", 240-pound Bartlett, who at the time of the incident was too intoxicated to drive, C.A. S.E.R. 413, 416, later maintained that his close proximity to Trooper Weight and loud voice were appropriate given the volume of music at the party, but Trooper Weight viewed Bartlett's "escalating voice, his look of anger, [and] his body language" as "hostile" "pre-assault indicators." C.A. E.R. 89. To create a safe space for himself, Trooper Weight placed his open palms on Bartlett's chest and pushed him back. App. 9; C.A. E.R. 89.

Trooper Nieves, believing that Bartlett posed a danger to Weight, ran to help. C.A. E.R. 69-70. Following a struggle, the troopers were able to subdue and arrest Bartlett. App. 12.

He was released without injury after a few hours in the "drunk tank." App. 10; C.A. S.E.R. 412. Bartlett was charged with disorderly conduct and resisting arrest. App. 12-13. The prosecution later dismissed the case for budgetary reasons, but the assigned prosecutor stated to the district court that he believed probable cause existed to charge Bartlett for disorderly conduct, resisting arrest, and assault. App. 14; C.A. E.R. 110.

2. Bartlett sued Troopers Weight and Nieves, asserting false arrest and imprisonment, excessive force, malicious prosecution, retaliatory arrest, and violations

¹ The camera's view of Bartlett's hand was partially blocked, so the video does not show, and the parties dispute, whether Bartlett raised his hand to Weight's face before the trooper pushed him back or after. App. 9, 12.

of due process and equal protection under 42 U.S.C. § 1983, as well as conspiracy under 42 U.S.C. § 1985. App. 15. The district court granted summary judgment in favor of petitioners on all claims. App. 39.

On the false arrest and imprisonment claims, the court ruled there was probable cause to arrest Bartlett for harassment, so the officers were entitled to summary judgment. App. 22. The court ruled that the existence of probable cause also barred respondent's First Amendment retaliatory-arrest claim, noting that this Court "has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause." App. 36 (quoting *Reichle*, 566 U.S. at 664-65).

The district court dismissed the excessive force claim after concluding that no reasonable jury could find the troopers' use of force unconstitutionally excessive, App. 34-35, and dismissed the malicious prosecution claim as unsupported by any evidence, App. 26-27. It dismissed respondent's Fourteenth Amendment claim (based on his allegation that the troopers failed to preserve third-party video footage of the incident) because the respondent was not subject to a lengthy period of detention, there was no evidence that the footage was withheld or concealed, and the footage was not exculpatory anyway. App. 38. Finally, the court granted summary judgment to the officers on the conspiracy claim, concluding that respondent failed to allege the class-based animus that is the predicate for an equal protection claim under § 1985. App. 38-39. The court also reasoned that the legal inadequacy of his

§ 1983 claims precluded § 1985 conspiracy claims predicated on the same allegations. App. 39. Accordingly, the district court entered summary judgment in petitioners' favor on all claims and dismissed the case with prejudice. App. 39.

3. Respondent appealed the district court's decision to the Court of Appeals for the Ninth Circuit. App. 2. The Ninth Circuit affirmed on all claims except for retaliatory arrest. App. 2-7. The appellate court ruled that the troopers had probable cause to arrest Bartlett for assault, disorderly conduct, harassment, and resisting arrest. App. 3. Nevertheless, the court reiterated its earlier holding in *Ford v. City of Yakima*, 706 F.3d 1188, 1196 (9th Cir. 2013), that the existence of probable cause for an arrest does not bar a plaintiff's claim that the arrest was retaliatory in violation of the First Amendment. App. 4-5. Pointing to respondent's allegation (uncorroborated by other witness testimony, audio or video recording) that Trooper Nieves said after the arrest, "Bet you wish you would have talked to me now," the court ruled that a jury might be persuaded that Bartlett was arrested for his earlier refusal to assist with the investigation, rather than for his harassing and belligerent conduct. App. 6, 10-12, 36-37. The court thus reversed the grant of summary judgment on the retaliatory-arrest claim and remanded for trial. App. 6.

Bartlett moved for reconsideration of the court's judgment, but the court denied his motion. App. 40.



REASONS FOR GRANTING THE PETITION

This Court recently granted certiorari in *Lozman v. City of Riviera Beach, Florida*, No. 17-21, to decide whether probable cause to arrest defeats a First Amendment retaliatory-arrest claim under 42 U.S.C. § 1983 as a matter of law. Because this petition seeks review of the same question presented in *Lozman*, the Court should grant this petition and hold it for disposition in accordance with the Court's decision in the *Lozman* case.

**CONCLUSION**

This petition for a writ of certiorari should be held pending this Court's decision in *Lozman v. City of Riviera Beach, Florida*, No. 17-21, and disposed of in accordance with the Court's decision in that case.

Respectfully submitted,

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