No. 17-1455

IN THE
Supreme Court of the United States

DWIGHT E. JORDAN,
Petitioner,
v.
CITY OF DARIEN, GEORGIA, Et al.
Respondents.

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

SUPPLEMENTAL BRIEF IN SUPPORT OF GRANTING THE WRIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

SUPPLEMENTAL BRIEF

After both parties had finished briefing for certiorari in this case, the Court decided *Lozman v. Riviera Beach*, 138 S. Ct. 1945 (2018). *Lozman* presented the question of whether the existence of probable cause bars a claim for retaliatory arrest—the same issue presented here. The Court ruled that despite the existence of probable cause to support his arrest, *Lozman* presented "objective evidence of a policy motivated by retaliation" that allowed him to maintain a claim of retaliatory arrest. *Id.* at 1954-55. The Court did not address the elements required to prove a retaliatory arrest claim in other circumstances. *Id.* at 1955. The Court also did not determine whether the approach developed in *Hartman v. Moore*, 547 U.S. or the test developed in *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. should apply in a "typical retaliatory arrest claim." *Id.* at 1954.

Here, the Court should grant certiorari for three reasons. First, because the courts below relied on Eleventh Circuit precedent that has since been called into question by *Lozman*, the basis on which Jordan was denied relief is no longer valid law. Second, this case presents an issue ripe for review regarding what is needed to state a retaliatory arrest claim based on the animus of the arresting officer. Third, because Jordan's claims against the City of Darien are nearly identical to Lozman's claim against the City of Riviera

Beach, the Court should grant certiorari, vacate, and remand for reconsideration in light of *Lozman*.

Respondents assert in their Brief in Opposition to Petition for Writ of Certiorari that the presence of a warrant bars Jordan's claim for retaliatory arrest and that the issue presented was not preserved for review. Neither of those arguments bar Jordan's claim nor are those reasons to deny certiorari.

ARGUMENT

I. The Basis on which the Courts Below Denied Jordan's Claim is no Longer an Absolute Bar to a Retaliatory Arrest Claim and Respondents Failed to Meet Their Burden for Summary Judgment.

In this case, respondents prevailed on summary judgment because Eleventh Circuit precedent held that probable cause is an absolute bar to claims for false or retaliatory arrest—a holding that has since been overturned by the Court. App. at 11-a. The District Court in this case was clear. "The existence of probable cause, however, is an absolute bar to both claims [under sec. 1983 and sec. 1985]. … Therefore the issue of whether the officers had arguable probable cause to arrest Plaintiff is dispositive of this matter." (Citations omitted.) App. at 11-a.

In *Lozman*, the Court reaffirmed the rule from *Hartman* that probable cause acts as complete bar to claims for retaliatory *prosecution*. 138 S. Ct. at 1952. However, the Court stopped short of applying this rule

to claims for retaliatory *arrest* and recognized that "there are substantial arguments that *Hartman*'s framework is inapt in retaliatory arrest cases." *Id.* at 1953.

Like Lozman, Jordan is not required to "prove the absence of probable cause to maintain a claim of retaliatory arrest." *Id.* at 1955. Therefore, in order to have successfully moved for summary judgment against Jordan, respondents should have been required to demonstrate that the presence of probable cause under these circumstances barred Jordan's claim for retaliatory arrest. Because the court below granted summary judgment based on the erroneous assumption that probable cause alone automatically bars a claim for retaliatory arrest without the requisite showing from respondents, the Court should grant certiorari and reverse.

II. The Court Should Grant Certiorari on the Unresolved Question of What Standard Should Apply to a Retaliatory Arrest Claim Based on the Animus of the Arresting Officer.

As the officer in *Lozman* did not possess retaliatory animus against Lozman, the Court determined that whether *Hartman* or *Mt. Healthy* applies in a retaliatory arrest claim against the officer must await consideration in a different case. 138 S. Ct. at 1954. This case presents that very question.

Respondents do not contest that Jordan's arrest was driven by a retaliatory motive. There is

substantial evidence that the officers involved in the investigation into the incident, the application for the arrest warrant, and the subsequent arrest possessed retaliatory animus against Jordan as they disliked the black Democrat who addressed issues of race and police misconduct head-on.

Unlike the officer in *Lozman*, who acted under Councilmember Wade's direction and did not have "any knowledge of Lozman's prior speech or any motive to arrest him," 138 S. Ct. at 1954, Officer Roundtree conducted a month-long investigation and became familiar with Jordan's speech and policy positions. App. at 6a. His admission that Jordan's arrest was not due to the incident in the parking lot but "pretty much ha[s] to do with his election that's coming up" demonstrates that he had knowledge and a motive to arrest Jordan. Cir. App. at 77-5. Additionally, Officer Roundtree's active involvement in the decision to arrest Jordan, inclusion of Caldwell in that decision, and drafting of an unprecedented press release about Jordan's arrest further demonstrate a retaliatory animus. Cir. App. at 77-35, 99-19, 99-17, 77-41, 77-42, 99-32, 77-8.

The other officers involved also possessed retaliatory animus. Chief Howard communicated with School Board Chair Bonita Caldwell and other witnesses about the case outside of official investigations. Cir. App. at 77-27, 63, 77-15, 99, 77-8, 77-37. Officer Brown told Jordan that he was criminally trespassing at the meeting, even though Jordan was an elected member of the board,

instructed him to leave or it would "get ugly," and adopted a threatening posture by putting his hand on his firearm. App. at 5a-6a; Cir. App. 77-3, 77-23, 77-22. Officer Davis threatened to arrest Jordan at the meeting, told Brown he "should have locked him up," and listed Caldwell as a witness even though she was not present. Cir. App. at 77-22, 77-17, 62, 75-12.

Based on these facts, a jury could reasonably conclude that these officers possessed retaliatory animus against Jordan. The Court should use this case as an opportunity to decide an issue that remains unresolved after *Lozman* by granting certiorari.

III. In the Alternative, the Court Should Grant Certiorari, Vacate, and Remand the Case for Reconsideration in Light of *Lozman*.

Putting aside the issue of the Officers' animus, the circumstances surrounding Jordan's arrest indicate that there was an official policy to retaliate against him for his prior protected speech and policy positions. Because an official policy can be "long term and pervasive," "difficult to dislodge," and provides those who have been retaliated against "little practical recourse," the Court held that "objective evidence of a policy motivated by retaliation" will survive a motion for summary judgment. *Id.* at 1954. Since this case presents similar facts to *Lozman*, the Court should

grant certiorari, vacate, and remand for reconsideration.

First, Jordan was retaliated against pursuant to an "'official municipal policy' of intimidation." *Lozman*, 138 S. Ct. at 1954 (quoting *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 691 (1978)). The School Board, the Officers, and Caldwell disliked Jordan for his passionate representation of his constituents, and his policy of directly addressing race and police misconduct issues. Cir. App. at 77-1, 77-6. Acting in her official capacity, Caldwell schemed to undermine Jordan and planned to "shut him up" and "embarrass him." *Id.* at 77-5. As Officer Roundtree admitted, Jordan was arrested because "people [were] pushing this, and they want him off the board." Id. Officer Brown also told Jordan that "they want to ban you from the property" as he was escorting Jordan away from the Board of Education building. Cir. App. at 77-23.

Second, Jordan's arrest was the result of a "premeditated plan" to interfere with his re-election prospects. *Lozman*, 138 S. Ct. at 1954. In addition to the evidence of the official municipal policy above, there is evidence that a member of the School Board communicated with Donnie Howard, the Chief of the Darien Police Department, after the contentious school board meeting. Cir. App. at 77-5a. Officer Davis was able to arrive on the scene just two minutes

after receiving a phone call from Chief Howard. App at a-6a; Cir. App. at 77-18.

Further, Jordan's arrest for disorderly conduct was not due to an "ad hoc, on-the-spot decision by an individual officer," who only has split seconds to determine whether the content of the speech was threatening, *Lozman*, 138 S. Ct. at 1953-54, but was rather the culmination of a plan by the School Board, Chief Howard, and the other Officers after a month-long "investigation" into Jordan's conduct. App. at 6a-7a.

Third, Officer Roundtree's admission that "this situation pretty much ha[s] to do with his election that's coming up, and there's other people that's pushing this, and they want him off the board" provides "objective evidence" that Jordan's arrest was motivated by retaliation. Cir. App. at 77-5; *Lozman*, 138 S. Ct. at 1954. Similarly, Officer Brown's statement to Jordan that "they want to ban you" provides even more concrete evidence that this was a premeditated policy motivated by retaliation. Cir. App. at 77-23. These are even more specific actions than the vague plan to "intimidate" Lozman. 138 S. Ct. at 1949.

Fourth, the purported reason for Jordan's arrest for disorderly conduct bears "little relation" to his protected speech at the Board meeting. *Id.* at 1954. Any legitimate consideration of the disorderly conduct or threatening nature of Jordan's speech was significantly weakened by the passage of time from

the incident in the parking lot to Jordan's arrest a month later. Just as it was inappropriate for the councilmember to consider Lozman's past criticisms of the city in determining whether to arrest him, it was improper to consider Jordan's prior behavior at the board meeting in assessing whether he was being disorderly in the parking lot. Id.

Fifth, like Lozman's right to petition the City, Jordan's right to debate public issues as an elected official is "high in the hierarchy of First Amendment values." *Lozman*, 138 S. Ct. at 1955. The "manifest function of the First Amendment" allows wide latitude for representatives to express their views in an "uninhibited, robust, and wide-open" manner. *Bond v. Floyd*, 385 U.S. 116, 135-36 (1966) (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)). Even the "provocative and challenging" language Jordan is accused of using when addressing Davis is protected by the First Amendment. *Houston v. Hill*, 482 U.S. 451, 461 (1987).

IV. Particularly after *Lozman*, the Existence of the Arrest Warrant Does Not Bar Jordan's Claim for Retaliatory Arrest.

Jordan has stated a retaliatory arrest claim. The lower courts addressed and ruled upon the case as a retaliatory arrest claim. App at a-11a. The Court has never held that an arrest pursuant to a warrant bars a false or retaliatory arrest claim. After *Lozman*, such a holding would make little sense. The job of the magistrate considering issuance of a warrant is to

make a probable cause determination. *See Illinois v. Gates*, 462 U.S. 213, 236 (1983). The job of the magistrate is *not* to assess whether there is "an official policy motivated by retaliation." *Lozman*, 138 S. Ct. at 1954. Because since *Lozman*, the mere existence of probable cause is not determinative of whether a wrongful arrest claim can proceed, a magistrate's determination of the existence of probable clause likewise cannot be determinative of whether a wrongful arrest claim can proceed.

The Circuit Court cases that respondents cite for the proposition that issuance of a warrant precludes a wrongful arrest claim are based on the erroneous assumption that the existence of probable cause absolves officers, and municipalities, from wrongful arrest claims.[1] That assumption has since been negated, at least in part, by the Court's ruling in *Lozman*. Thus, a warrant based on probable cause does not bar a retaliatory arrest claim when the plaintiff can show the "existence and enforcement of

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[1] *See, e.g.*, *Kingsland v. City of Miami*, 382 F.3d 1220, 1226 (11th Cir. 2004) ("The existence of probable cause at the time of arrest, however, constitutes an absolute bar to a section 1983 action for false arrest."); *Singer v. Fulton Cty. Sheriff*, 63 F.3d 110, 118 (2d Cir. 1995) ("There can be no federal civil rights claim for false arrest where the arresting officer had probable cause.").

an official policy motivated by retaliation." 138 S. Ct. at 1954.

As evidenced by the Court's decision in *Lozman*, the good faith of the officers does not attenuate animus when it is part of a broader retaliatory policy. 138 S. Ct. at 1954. Even in *Reichle*, the Supreme Court stopped short of requiring the arresting officer to be the same defendant who possessed the retaliatory animus in order to state a claim for a retaliatory arrest. *Reichle v. Howards*, 566 U.S. 658, 668-69 (2012). The Court acknowledged that in some contexts, the arresting officer may not be the same actor that bore the retaliatory animus. *Id.* ("in *many* retaliatory arrest cases, it is the officer bearing the alleged animus who makes the injurious arrest") (emphasis added). Thus, even if some actors involved acted in good faith, it does not prevent a claim for retaliatory arrest.

Jordan, like *Lozman*, has alleged "more governmental action than simply an arrest." 138 S. Ct. at 1954. That the official policy at issue here extended to an in-depth and extended investigation and subsequent warrant application does not weaken (and in fact strengthens) Jordan's claim that his arrest was the culmination of an official policy to intimate him and hamper his re-election prospects.

Finally, even if respondents are right that the existence of an arrest warrant affects the type of claim that Jordan can bring, it is not a reason for the Court to deny certiorari. This is the first time this issue is

being presented and has not been briefed or argued below.

CONCLUSION

Petitioner respectfully requests that the Court grant the Petition for Certiorari in this case in light of the Court's decision in *Lozman*. Alternatively only, Petitioner request that the Court grant certiorari, vacate and remand in light of *Lozman*.

Respectfully submitted,

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