No. 17-21

In the Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

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

BRIEF OF *AMICI CURIAE* FOR MARION B. BRECHNER FIRST AMENDMENT PROJECT AND BRECHNER CENTER FOR FREEDOM OF INFORMATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISION

STATUTE

OTHER AUTHORITIES

INTERESTS OF *AMICI CURIAE*[1]

The Marion B. Brechner First Amendment Project (the "Project") in the College of Journalism and Communications at the University of Florida in Gainesville is an endowed project dedicated to contemporary issues affecting the First Amendment freedoms of speech, press, thought, assembly and petition. The Project pursues its mission through a wide range of scholarly and educational activities benefiting scholars, students and the public. The Project's scholarly and educational interest in filing this amicus brief is to bring to the Court's attention important First Amendment principles on First Amendment retaliation claims, political speech, speech about matters of public concern, viewpoint discrimination and the right to petition the government for a redress of grievances. The Project is exercising the academic freedom of its faculty to express their scholarly views, and is not submitting this brief on behalf of the University of Florida or the University of Florida Board of Trustees.

The Brechner Center for Freedom of Information (the "Brechner Center") in the College of Journalism and Communications at the University of Florida in Gainesville exists to advance understanding, appreciation and support for freedom of information in

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for either party in this case authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amici curiae* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

the state of Florida, the nation and the world. The Center's focus on encouraging public participation in government decision-making is grounded in the belief that a core value of the First Amendment is its contribution to democratic governance. Since its founding in 1977, the Brechner Center has served as a source of academic research and expertise about the law of gathering news, and the Center's legal staff is frequently called on to offer interpretive guidance about the rights of journalists in Florida and throughout the country. The Center is exercising the academic freedom of its faculty to express their scholarly views, and is not submitting this brief on behalf of the University of Florida or the University of Florida Board of Trustees.

Additionally, both the Project and the Center, as Florida-headquartered organizations, have a special interest in this case because it directly affects the First Amendment speech and petition rights of a Floridian, Fane Lozman.

SUMMARY OF ARGUMENT

This case is about much more than a retaliatory arrest and probable cause. At its heart, it is about twin fundamental First Amendment rights. The first is the right of all citizens to speak out as citizen-critics of government officials and to freely engage in speech about matters of public concern. See *Lane v. Franks*, 134 S. Ct. 2369, 2377 (2014) ("Speech by citizens on matters of public concern lies at the heart of the First Amendment . . ."); Frank LoMonte, *Legal Analysis: Can School Boards Restrict Public Comments?*, Student Press Law Center, Feb. 21, 2017, http://bit.ly/2pbdyPg ("The ability to speak directly to a government board –

a city council, a school board, college trustees – is perhaps the purest and most basic form of citizen participation.")

The second is the right of all citizens to petition the government for a redress of grievances with neither fear nor trepidation of retaliation or retribution for expressing their viewpoints, regardless of how disagreeable or disturbing those stances may be to government officials. See *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

If this Court holds that the existence of probable cause to make an arrest defeats a First Amendment retaliation claim, then the speech and petition rights of citizen-critics everywhere will be more easily quashed by government officials harboring nefarious, self-serving motives. Additionally, the chilling effect would be immense on aspiring, would-be citizen-critics who might steer well clear of controversy – and a degrading, humiliating arrest that can haunt one's life forever, even if the charges are later dropped – by engaging in self-censorship. See *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) ("Even if you are innocent, you will now join the 65 million Americans with an arrest record and experience the 'civil death' of discrimination by employers, landlords, and whoever else conducts a background check"). And, unfortunately, arrests for speaking up and attempting to speak up at city council meetings are not rare. See, e.g., Hailey Branson-Potts, *Man Sues City After His*

Arrest, L.A. Times, Dec. 3, 2017, at B4 (describing the arrest of Arthur Christopher Schaper at a June 2017 meeting of the Huntington Park, California, City Council on suspicion of two misdemeanor counts of disturbing a public meeting and disobeying a police officer); Bob Dunn, *State Drops Disturbing-the-Peace Charges Against Craig C. Gaetani*, Berkshire Eagle (Pittsfield, Mass.), Dec. 16, 2017, at B10 (describing the arrest of Craig C. Gaetani at a North Adams, Massachusetts, "City Council meeting after he allegedly caused a disturbance after being denied the opportunity to air comments after the public comment portion of that meeting had closed").

Instead of adding a probable cause hurdle to the citizen-critic's retaliatory-arrest burden, the well-established, burden-shifting test articulated by this Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), has provided a workable framework for four decades that strikes an appropriate equilibrium between the competing interests.

The *Mt. Healthy* standard comports with this Court's recognition of importance of protecting speech critical of the government. As the Court explained more than a half-century ago, there is a "privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer." *New York Times Co. v. Sullivan*, 376 U.S. 254, 282 (1964). Fane Lozman is the quintessential citizen-critic of government. He was exercising his right and duty to decry and condemn perceived government misconduct and corruption when his arrest at a city council meeting was orchestrated by the respondent.

Perhaps even more troubling, this case involves viewpoint-based discrimination by the government against the speech of a citizen-critic. Specifically, an arrest occurred because a citizen's views were critical of, rather than favorable to, the government.

This Court "disfavors viewpoint-based discrimination." *Wood v. Moss*, 134 S. Ct. 2056, 2061 (2014). As Justice Anthony Kennedy explained just last term, viewpoint discrimination is "a form of speech suppression so potent that it must be subject to rigorous constitutional scrutiny." *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (Kennedy, J., concurring).

Had Fane Lozman been lauding or praising the government, he would not have been arrested. But because he was critical of the government, he was arrested. As Justice Kennedy put it in *Tam*, this "reflects the Government's disapproval of a subset of messages it finds offensive. This is the essence of viewpoint discrimination." *Ibid.* at 1766. Put differently, only speech favorable to the government was permitted in the political marketplace of ideas that is a city council meeting. That smacks of dictatorship, not democracy.

Additionally, this is a case about political speech, centering on an arrest made at a city council meeting once a citizen began to talk during the public comment period about alleged local government corruption. Political speech is at the core of the First Amendment. As this Court recently observed, "Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people." *Citizens United v. Federal Election Commission*, 558 U.S. 310, 339 (2010). Simply put, respondent did not want petitioner to hold

government officials – itself, in other words – accountable.

Alleged government corruption is, of course, a matter of public concern. Speech about matters of public concern, in turn, is perched at the top of the hierarchy of First Amendment values, meriting special protection. *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011). In fact, "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

Finally, this case raises First Amendment free press concerns, not simply free speech and petition interests. That's because its outcome will directly affect journalists who are arrested by police in retaliation for covering protests about alleged police misconduct and other issues. Recent years have seen journalists arrested on charges such as trespass and interference with police merely because law enforcement officials either did not like or were afraid of the negative media publicity. Katherine Grace Howard, *You Have the Right to Free Speech: Retaliatory Arrests and the Pretext of Probable Cause*, 51 Ga. L. Rev. 607, 625-26 (2017). Furthermore, common citizens, acting as citizen-journalists and armed with nothing more than smartphones, have suffered retaliatory actions, including arrests and having their phones smashed, simply for filming police in public places performing their jobs. See generally Clay Calvert, *The Right to Record Images of Police in Public Places: Should Intent, Viewpoint, or Journalistic Status Determine First Amendment Protection?*, 64 UCLA L. Rev. Disc. 230 (2016); Clay Calvert, *The First Amendment Right to*

Record Images of Police in Public Places: The Unreasonable Slipperiness of Reasonableness & Possible Paths Forward, 3 Tex. A&M L. Rev. 131 (2015). The rule this Court adopts here thus will directly impact the ability of both professional reporters and citizen-journalists to hold police accountable for possible misconduct.

In summary, this case involves core political speech, matters of public concern and, regrettably, viewpoint discrimination in the marketplace of ideas exercised by government officials that led to the retaliatory arrest of a consummate citizen-critic. Requiring the citizen-critic to prove the arrest was not premised upon probable cause unnecessarily tilts the scales of justice against the citizen-critic and in favor of the government. This Court's burden-shifting test from *Mt. Healthy* provides a workable doctrinal standard that much more fairly balances the interests of the citizen-critic and the government.

ARGUMENT

I. Core First Amendment Rights of Citizen-Critics Speaking in Dissent Must be Protected from Retaliatory Arrests and Viewpoint Discrimination

Petitioner Fane Lozman was arrested for exercising his core First Amendment rights of speech and petition during the public comment period at a city council meeting. Philosopher and educator Alexander Meiklejohn famously used "the traditional American town meeting" more than sixty-five years ago to emphasize that the primary purpose of free speech "is self-government." Alexander Meiklejohn, *Free Speech*

and Its Relation to Self-Government 22-23 (1948). As Meiklejohn explained, "Every man is free to come. They meet as political equals. Each has a right and a duty to think his own thoughts, to express them, and to listen to the arguments of others. The basic principle is that the freedom of speech shall be unabridged." Ibid. at 22.

Respondent, however, had the petitioner ejected from the meeting via arrest. Clearly respondent failed to treat petitioner as a political equal in a nation where, as Meiklejohn put it, "[t]here is only one group – the self-governing people. Rulers and ruled are the same individuals." Ibid at 6. Instead, respondent treated petitioner as a thorn in its side, ready to be tweezed for removal.

Justice Kennedy observed last term that "[a] fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). Yet petitioner was denied access via arrest by respondent to speak at precisely a place where dissenting speech is most needed – a public meeting of a governmental entity.

Put differently, respondent objected to petitioner's thoughts as expressed through speech. This is decidedly dangerous. As Justice Kennedy explained more than fifteen years ago, "First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234,

253 (2002). The "impermissible end" in petitioner's case was to stifle his criticism and dissent of the government.

It also is important to recognize that this Court's crucial case carving out special protection for the citizen-critic of government, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), hinged on an advertisement that questioned the validity of the arrests of Martin Luther King, Jr. The advertisement asserted, in pertinent part, that "[a]gain and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times for 'speeding,' 'loitering' and similar 'offenses.'" Ibid. at 257-58. As the scare quotes surrounding the words speeding, loitering and offenses make clear, arrests targeting individuals who oppose governmental authorities can be easily conjured up, regardless of merit. Indeed, this was precisely the case with the arrest of petitioner Fane Lozman.

Furthermore, and in terms of the larger First Amendment context and climate today, this case arrives at the Court when citizen-critics of government officials are under siege. President Donald J. Trump, for example, routinely blocks from his Twitter account individuals who criticize him, sparking First Amendment free speech and petition concerns and, in turn, a lawsuit. David Pierson, *Trump is Sued for Blocking Some Twitter Followers*, L.A. Times, July 12, 2017, at C2. Sad, but his actions are not isolated.

For instance, Maryland Governor Larry Hogan has blocked at least 450 people from posting on his

Facebook page. Ovetta Wiggins & Fenit Nirappil, *Hogan Team Busy Blocking Facebook Posts Since Trump Order*, Wash. Post, Feb. 9, 2017, at B1. Maine Governor Paul LePage was sued in 2017 for "blocking two critical commenters from his Facebook page and deleting their comments." Michael Shepherd, *ACLU Sues LePage for Blocking Facebook Critics*, Bangor Daily News, Aug. 8, 2017, https://bangordailynews.com/2017/08/08/politics/aclu-sues-lepage-for-blocking-facebook-critics/. During a campaign rally in March 2016, then-candidate Trump yelled "Get 'em out of here" at protestors who, in turn, were assaulted by several Trump supporters. *In re Donald J. Trump*, 874 F.3d 948, 950 (6th Cir. 2017).

The bottom line is that a decision by this Court adding a probable-cause hurdle to the plaintiff's burden in a retaliatory-arrest case – especially given the deference often paid to the decisions of law enforcement officials – provides the government with much wider and, in fact, unnecessary berth to engage in viewpoint-based discrimination against core political speech with which it disagrees. As the next part explains, the test from *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), already provides an appropriate, workable framework for analyzing such cases.

II. The *Mt. Healthy* Test Strikes the Appropriate Balance Between First Amendment Interests and Legitimate Arrests Without the Addition of a Probable Cause Hurdle

In *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), this Court developed a burden-shifting framework for addressing First Amendment

retaliation claims within the context of employer-employee relationships. Under this test, plaintiffs initially carry the burden of demonstrating that they were exercising a constitutionally protected right and that, in turn, the exercise of this right was a motivating factor for a meaningfully adverse retaliatory action taken by the government. Ibid. at 287. More simply put, plaintiffs must show three elements in a First Amendment retaliation case – speech, causation and injury. In other words, their exercise of a protected First Amendment right (speech) was a motivating factor (causation) that resulted in harm (injury) suffered at the hands of the government.

Clearing this threshold in the face of a government motion to dismiss is not a simple matter for plaintiffs today, particularly after this Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Plaintiffs now must plead something greater than just "labels and conclusions" and something "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. In fact, "only a complaint that states a plausible claim for relief survives a motion to dismiss." Ibid. at 679. To reach this crucial threshold of plausibility – a level higher than mere conceivability – plaintiffs must set forth "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ibid. at 678.

If plaintiffs satisfy these steps of the *Mt. Healthy* test, then the burden shifts to the government to show "by a preponderance of the evidence that it would have reached the same decision" against the plaintiffs "even

in the absence of the protected conduct." Ibid. The government is welcome here to raise the issue of probable cause to make an arrest as evidence that it would have arrested an individual regardless of her exercising First Amendment protected rights. But the existence of probable cause here under a *Mt. Healthy* analysis is not outcome determinative or case killing.

The *Mt. Healthy* standard appropriately balances the interests in retaliatory arrest cases. It initially imposes burdens on the plaintiff. Only if the plaintiff satisfies those hurdles does the burden eventually shift to the government.

Furthermore, imposing any greater burden on plaintiffs is counterintuitive, given that the actions of the government respondent in this case involve viewpoint-based discrimination targeting political expression and speech about matters of public concern. Statutes targeting political speech are content based and thus are subject to the rigorous strict scrutiny standard of judicial review. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) ("Content-based laws – those that target speech based on its communicative content – are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."). Viewpoint-based statutes – a subset of content-based statutes – are even more reprehensible. *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) ("A law found to discriminate based on viewpoint is an 'egregious form of content discrimination,' which is 'presumptively unconstitutional.'") (Kennedy, J., concurring) (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995)). To ratchet up the burden on

plaintiffs in First Amendment retaliatory arrest cases like this via a probable cause hurdle thus contradicts the intensive, searching scrutiny to which government actions like those engaged in here would be subjected if they took the form of statutes. In other words, given this Court's special concerns with protecting political speech and its longstanding doctrinal stance against both content-based laws and viewpoint censorship, adding an additional hurdle to plaintiffs' burdens beyond the *Mt. Healthy* test would be anomalous.

Finally, the *Mt. Healthy* framework substantially tracks the formula deployed by most state statutes designed to counteract the chilling effect of strategic lawsuits against public participation (SLAPPs). At bottom, a retaliatory arrest based on the exercise of the First Amendment rights of free speech or petition is tantamount to a criminal, rather than civil, SLAPP suit. Its purpose is to squelch criticism on issues of public concern. With a SLAPP suit, "[c]itizen-activists lose because they become disenfranchised from the democratic process by lawsuits." Robert D. Richards, *Freedom's Voice: The Perilous Present and Uncertain Future of the First Amendment* 26 (1998). Indeed, just as the endgame of a SLAPP is to stifle First Amendment rights, in a "claim for retaliatory arrest, the injury occurs not because of the arrest itself, but by the suppression of a constitutionally guaranteed right through means of an arrest." Randolph A. Robinson II, *Policing the Police: Protecting Civil Remedies in Cases of Retaliatory Arrest*, 89 Denv. L. Rev. 499, 514 (2012).

For instance, California's anti-SLAPP statute allows the victim of a SLAPP to make a speedy motion to strike a complaint if, initially, the victim can

demonstrate that she was exercising the "right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." Cal. Code Civ. Proc. § 425.16 (b) (1) (2017). If the target of a SLAPP satisfies this hurdle, then the burden shifts to the plaintiff – the SLAPPer, as it were – to establish "there is a probability" that it will prevail on the underlying claim. Ibid. This burden shifting is consistent with that embraced in the *Mt. Healthy* test for retaliatory First Amendment claims.

CONCLUSION

For all of these reasons, which strike at the heart of the First Amendment rights of speech, petition and press, and which affect core political expression and speech about matters of public concern engaged in by citizen-critics of government, amici curiae respectfully request that this Court hold that *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977) supplies the appropriate framework for analyzing First Amendment retaliatory-arrest claims and that the existence of probable cause does not defeat a First Amendment retaliatory-arrest claim as a matter of law.

Respectfully submitted.

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