No. 17-21

IN THE

Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

THE CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

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

BRIEF OF NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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January 29, 2018

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF THE AMICI CURIAE[1]

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities ("NLC") is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,400 cities. Each city is represented in USCM by its chief elected official, the mayor.

The International City/County Management Association ("ICMA") is a non-profit professional and educational organization consisting of more than 11,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

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[1] The parties have consented to the filing of this brief. Petitioner has filed a blanket consent to the filing of amicus briefs in this case. Counsel of record for all parties received notice at least 10 days prior to the due date of amici curiae's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to its preparation or submission.

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and State supreme and appellate courts.

Amici curiae are national organizations representing elected and appointed officials of state and local governments. Members of these organizations employ law enforcement officers who keep the peace and protect public order and safety. State and local law enforcement officers frequently encounter situations similar to the one at issue in this case.

SUMMARY OF THE ARGUMENT

The Court should hold that pleading and proving the absence of probable cause is a required element of all First Amendment retaliatory-arrest claims. Adopting Fane Lozman's contrary rule will have significant negative effects on state and local governments. It will make it more difficult to maintain order and safety at local-government meetings, public protests and demonstrations, and political rallies. Also, because alleging municipal liability is a fairly easy thing to do, local governments, in addition to their officers, will face an increased likelihood of defending against meritless lawsuits based on lawful arrests. Courts will be less able to weed such claims out early in the case. Lastly, because Lozman's proposed rule will lead to more lawsuits (as virtually *anyone* will be

able to manufacture a claim simply by speaking before an arrest), the rule will make recruiting and retaining police officers more difficult.

Additional protections from retaliatory arrests exist besides the First Amendment. The 50 State constitutions offer meaningful protections against the abridgment of the freedom of speech. Nothing prevents plaintiffs from pressing their rights under these State constitutions. State courts can choose to adopt a greater degree of protection to guard against retaliatory arrests.

In addition to the State constitutions, internal disciplinary measures within state and local police departments offer meaningful remedies for true victims of retaliation at the hands of untrained (or untrainable, problem) officers. These measures can lead to systemic change.

ARGUMENT

Amici fully support Respondent's persuasive argument that the existence of probable cause should defeat a retaliatory-arrest claim as a matter of law. Respondent's proposed rule is consistent with the constitutional principles at stake, closely tracks general tort principles, accommodates the distinctive features of retaliatory-arrest claims, and is consonant with First Amendment values. Moreover, a no-probable-cause rule gives law enforcement clear guidance in the field, something this Court prefers when crafting constitutional rules to govern police conduct. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). This rule also will better weed out frivolous retaliatory-arrest claims early on—or better yet, dissuade plaintiffs from asserting meritless claims at all. The Court should embrace it.

I. Adopting Lozman's formulation for retaliatory-arrest claims will hinder the operations of state and local governments.

Adopting Lozman's contrary rule will significantly affect the ability of state and local law enforcement to perform their protective functions. Law enforcement officers face unfamiliar and potentially life-threatening situations every day. Similar to the decision whether to use force when making an arrest, the decision to make an arrest in the first place—determining whether probable cause exists—is made "not in the courtroom but at the scene," often in a "split second." *Wong Sun v. United States*, 371 U.S. 471, 499 (1963) (Clark, J., dissenting). An officer must respond to a situation he or she encounters then and there, without the luxury of consulting an attorney beforehand to determine whether an arrest will later embroil the officer in a lawsuit. Where an officer has probable cause, the decision to arrest is not one this Court should force an officer to second-guess on pain of personal liability simply because a judge or jury, years later, may see the situation differently. The stakes are too high to impose such a burden on officers.

A. Lozman's proposed rule will make it more difficult to maintain safety and order at local-government meetings, public protests, and political rallies.

A city council meeting is one of the best places to observe vigorous exercise of the right of free speech. This Court "has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)). That is especially true

when the public issue pertains to "the stewardship of public officials." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 274–75 (1964). Almost nowhere else is the exercise of that "fundamental" right, *id.*, more on display than at local-government meetings, where the public is invited to address members of local government directly.

For better or worse, however, emotions can run high at public meetings. *See* Rick Neale, *Emotions high at Palm Bay City Council Meeting*, Florida Today (May 5, 2017).[2] *See also* Matthew Bramlett, *City council meeting draws belligerence, disagreements*, Claremont Courier (Jan. 26, 2017).[3] Emotions can lead to chaos and violence in some cases. *See* Chris Suarez, *Three arrested as councilors vote to shroud Confederate statues at meeting overwhelmed by anger*, The Daily Progress (Aug. 22, 2017).[4] And at times these strong emotions can lead to tragedy. *See* Greg Johnson, *6 dead in shootings at Kirkwood City Hall*, St. Louis Post-Dispatch (Feb. 7, 2008).[5] Maintaining order at these meetings can unintentionally abridge speech, as where a citizen must be removed because he or she is causing a disturbance.

Protests and demonstrations present similar difficulties for law enforcement. Like speech at local-government meetings, protests almost always target public issues and nearly everything a participant says

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[2] Available at https://goo.gl/PKEEBg.

[3] Available at https://goo.gl/QsifC8.

[4] Available at https://goo.gl/3eVTQg.

[5] Available at https://goo.gl/Dr2UVd.

will qualify as protected speech. The chaos that unfolded in Charlottesville, Virginia just last year is a painful reminder that emotions at demonstrations can lead to violence and death, at times with little or no warning. *See also* Scott Schwebke, *Anti-Trump protesters clash with Santa Ana police, demonstrate at three O.C. campuses*, Orange County Register (Nov. 11, 2016).[6] Police already struggle at times to strike an appropriate balance between liberty and safety, even without the prospect of a lawsuit. *See* Martin Kaste, *Police Struggle To Balance Public Safety With Free Speech During Protests*, National Public Radio (Aug. 26, 2017).[7] To protect the right of peaceful protesters to speak, it is imperative that trained law enforcement be permitted the breathing space to perform their duties without fear of a lawsuit if they decide to arrest when they have probable cause to do so. *See Reichle v. Howards*, 566 U.S. 658, 668 (2011).

Political rallies pose perhaps the greatest difficulties for law enforcement. Free-speech rights reach their zenith at rallies because the speech involves matters of public concern, in particular "the stewardship of public officials." *N.Y. Times*, 376 U.S. at 274–75; *see Connick*, 461 U.S. at 145; *R.A.V. v. City of St. Paul*, 505 U.S. 377, 429 (1992) (noting that "First Amendment protection is at its zenith" when government regulates "political speech or the expression of editorial opinion on matters of public importance" (cleaned up)). Officers at such rallies are exposed to high concentrations of core political speech, as people feel free to speak their minds and are encouraged to do so. Yet rallies can also pose serious safety concerns

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[6] Available at https://goo.gl/hr5Vaz.

[7] Available at https://goo.gl/An3rUD.

because of the emotions they can stir. *See* Meghan Keneally, *The History of Violence on Presidential Campaign Trails*, ABC News (Mar. 14, 2016).[8]

An officer who, based on instinct, training, and (most importantly) probable cause, decides it is appropriate to arrest someone should not face personal liability for that decision simply because the arrestee thinks he or she was arrested for his or her speech. Lozman's proposed rule may cause officers to second-guess themselves in tense and rapidly evolving situations arising at these and other public venues. Under Lozman's proposal, officers would have to stop to ask themselves whether they truly are making an arrest based on a concern that a crime has been or is about to be committed, or instead whether their personal views of the arrestee's speech are motivating the decision in some way. It may be difficult for a court or jury, given time for reflection and deliberation after hearing all of the evidence at a trial, to sort out what motivated the officer's decision. How much more difficult will it be for the officer to sort that out in the moment they decide to arrest someone? *See New York v. Quarles*, 467 U.S. 649, 656 (1984) (noting the "kaleidoscopic situation[s]" officers face, where "spontaneity" is "necessarily the order of the day" and officers must respond "out of a host of different, instinctive, and largely unverifiable motives"). And even if the speech is not personally motivating the officer's arresting decision, given the arrest's temporal proximity to the speech, it is easy for an arrestee *to perceive* the speech as motivating the arrest. Officers may have difficulty rebutting the inference that speech caused the arrest.

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[8] Available at https://goo.gl/j91D3e.

B. Alleging *Monell* liability is easy to do, and *Twombly* and *Iqbal* offer inadequate protection from frivolous lawsuits.

Adopting Lozman's rule will make it easier to state frivolous claims not only against officers for retaliatory arrest but against local governments as well, based on those arrests. That is because *Monell* claims, generally speaking, are relatively simple to state, even under the pleading requirements of *Iqbal* and *Twombly*.

"Plaintiffs who seek to impose liability on local governments under § 1983 must prove that 'action pursuant to official municipal policy' caused their injury." *Connick v. Thompson*, 563 U.S. 51, 60–61 (2011). An "official municipal policy" can be made through "the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Id.* at 61.

If a claim against the officer survives a Rule 12(b)(6) motion, chances are high that a *Monell* claim against the officer's employer will as well, given the relative ease in asserting one. Consider, for example, the allegations in *Owens v. Baltimore City State's Attorney's Office*, 767 F.3d 379 (4th Cir. 2014), which the Fourth Circuit said were enough for the *Monell* claim to proceed. James Owens sued a number of city officers for withholding *Brady* material. He also asserted a § 1983 claim against the Baltimore City Police Department. The district court found the allegations against the police department wanting. The Fourth Circuit disagreed and reinstated the claim. It began by contrasting the difficulty in prevailing on a *Monell* claim, which "is no easy task," with "simply alleging such a claim," which is "easier." *Id.* at 402–03. To that

end, the court found that Owens had sufficiently pleaded that the police department "maintained a custom, policy, and/or practice" of condoning its officers' conduct in knowingly, consciously, and repeatedly withholding and suppressing exculpatory evidence, because Owens had alleged the existence of (1) "[r]eported and unreported cases" of *Brady* violations, and (2) "a number of motions [that] were filed and granted" around the same time. *Id.* at 403.

Other recent decisions from the federal courts of appeals further show the ease with which a plaintiff can sue a local government under § 1983. *See, e.g.*, *Hoefling v. City of Miami*, 811 F.3d 1271, 1280–81 (11th Cir. 2016) (reversing dismissal of *Monell* claim, pointing to allegation that others apparently received similar treatment by city "as a result of the City['s] and [the marine patrol officers'] failure to adhere to law and appropriate procedures regarding the investigation and destruction of potentially derelict vessels"); *Haley v. City of Boston*, 657 F.3d 39, 53 (1st Cir. 2011) (reversing dismissal in view of "wholly unexplained" nature of city police officers' suppression of evidence and the alleged (but not identified) "volume of cases" involving similar violations in the Boston Police Department).

These cases illustrate that surviving a local government's motion to dismiss in this context requires a plaintiff simply to allege that others have been arrested by officers in the same department in retaliation for exercising their freedom of speech. Especially because Lozman's proposal would create a regime in which legitimate arrests nearly always can be dressed up as retaliatory ones, pleading the existence of other such arrests will be "easy." *See Nat'l Archives & Records Admin. v. Favish,* 541 U.S. 157, 175 (2004).

C. Frivolous claims for retaliatory arrest impose reputational harms, which make recruiting and retaining police officers more difficult.

Beyond the direct financial costs they create (*e.g.*, attorney's fees, lost employee productivity due to depositions and other case preparations), frivolous § 1983 lawsuits impose significant reputational harms—on both the officer and the city. It bears repeating: allegations of government misconduct are easy to allege and hard to disprove. Adopting Lozman's rule will only increase the harm these lawsuits bring, as they will become easier to assert and no less difficult to disprove. And because motivation and causation are questions of fact, the cases will have to be tried if not settled, instead of being resolved by motion practice. Regardless whether the officers and local governments ultimately win, the publicity of the litigation is likely to unfairly erode confidence in law enforcement.

The prospect of facing personal liability for actions taken in the line of duty also contributes to police departments' struggle to fill and maintain their ranks. *See* Sean Curtis, *4 reasons why police departments are struggling to fill their ranks*, Policeone.com (Oct. 12, 2017).[9] By making it easier to sue officers for their arrests, Lozman's proposed rule threatens to amplify these recruitment and retention problems.

[9] Available at https://goo.gl/5KLKjx.

II. State and local governments respect the importance of their citizenry's freedom of speech and afford meaningful protections against its infringement.

A. The First Amendment is not the sole bulwark against retaliatory arrests; the 50 State Constitutions also protect the right of citizens to speak freely without the threat of retaliation.

Many may forget that the U.S. Constitution is not alone in protecting the freedom of speech—State constitutions protect as well. All 50 State constitutions include provisions that protect against speech abridgment.[10] Although there is diversity in the way States formulate this protection, all provide rich safeguards nonetheless.[11]

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[10] *See* Ala. Const. art. 1, § 4; Alaska Const. art. I, § 5; Ariz. Const. art. 2, § 6; Ark. Const. art. 2, § 6; Cal. Const. art. 1, § 2(a); Colo. Const. art. II, § 10; Conn. Const. art. I, § 4; Del. Const. art. I, § 5; Fla. Const. art. I, § 4; Ga. Const. art. I, § 1, ¶ 5; Haw. Const. art. I, § 4; Idaho Const. art. I, § 9; Ill. Const. art. I, § 4; Ind. Const. art. 1, § 9; Iowa Const. art. I, § 7; Kan. Const. Bill of Rights § 11; Ky. Const. § 8; La. Const. art. I, § 7; Me. Const. art. I, § 4; Md. Const. Declaration of Rights, art. 10; Mass. Const. Pt. 1, art. XXI; Mo. Const. art. I, § 8; Mont. Const. art. II, § 7; Neb. Const. art. I-5; Nev. Const. art. 1, § 9; N.H. Const. Pt. I, art. 22; N.J. Const. art. I, § 6; N.M. Const. art. II, § 17; N.Y. Const. art. I, § 8; N.C. Const. art. I, § 14; N.D. Const. art. I, § 4; Ohio Const. art. I, § 11; Okla. Const. § II-22; Or. Const. art. I, § 8; Pa. Const. art. I, § 7; R.I. Const. art. I, § 21; S.C. Const. art. I, § 2; S.D. Const. art. VI, § 5; Tenn. Const. art. 1, § 19; Tex. Const. art. I, § 8; Utah Const. art. I, § 15; Vt. Const. ch. I, art. 13; Va. Const. art. I, § 12; Wash. Const. art. I, § 5; W. Va. Const. art. III, § 7; Wis. Const. art. I, § 3; Wyo. Const. art. I, § 20.

[11] *Compare, e.g.*, Cal. Const. art. 1, § 2(a) ("Every person may freely speak, write and publish his or her sentiments on all

This Court has long acknowledged that its interpretation of the First (and Fourteenth) Amendments does not limit "the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980); *see also Kelo v. City of New London*, 545 U.S. 469, 489 (2005) (saying same thing with respect to Fifth Amendment Takings Clause); *Oregon v. Hass*, 420 U.S. 714, 719 (1975) (same for Fifth Amendment protection against self-incrimination).

Some States have taken the Court's statements to heart, construing their constitutions to protect more speech than the First Amendment does. *See, e.g.*, *Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm'n*, 773 P.2d 455, 459 (Ariz. 1989) ("Indeed, this court has previously given art. 2, § 6 [of the Arizona

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subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."); Me. Const. art. I, § 4 ("Every citizen may freely speak, write and publish sentiments on any subject, being responsible for the abuse of this liberty."); N.H. Const. Pt. I, art. 22 ("Free speech and liberty of the press are essential to the security of freedom in a state: They ought, therefore, to be inviolably preserved."); Or. Const. art. I, § 8 ("No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."); R.I. Const. art. I, § 21 ("No law abridging the freedom of speech shall be enacted."); Va. Const. art. I, § 12 ("That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press.").

Constitution] greater scope than the first amendment."); *People ex rel. Arcara v. Cloud Books, Inc.*, 503 N.E.2d 492, 557–58 (N.Y. 1986) ("[T]he minimal national standard established by the Supreme Court for First Amendment rights cannot be considered dispositive in determining the scope of this State's constitutional guarantee of freedom of expression."); *Beach v. Shanley*, 465 N.E.2d 304, 312 (N.Y. 1984) ("The fact that the Supreme Court has held the First Amendment applicable to the States does not eliminate the right or the need of this State to provide a distinct guarantee of freedom of the press under the State Constitution.").

Going further, some States have even construed their constitutions to protect against abridgment of speech by private actors. For example, the New Jersey Supreme Court has held that the New Jersey Constitution's free-speech clause is "available against unreasonably restrictive or oppressive conduct on the part of private entities that have otherwise assumed a constitutional obligation not to abridge the individual exercise of such freedoms." *State v. Schmid*, 423 A.2d 615, 628 (N.J. 1980) (reversing on state constitutional grounds a trespass conviction for distributing political literature at Princeton without permission); *see Dublirer v. 2000 Linwood Ave. Owners, Inc.*, 103 A.3d 249, 251 (N.J. 2014) (sustaining on state-law grounds a challenge to private high-rise cooperative apartment building's "home rule" barring soliciting and distributing written materials in the building).

The California Supreme Court has similarly construed California's constitution, by holding that a privately owned shopping mall is a public forum where visitors can exercise their freedom of speech the same way they would be entitled to do on a public sidewalk.

Robins v. PruneYard Shopping Ctr., 592 P.2d 341, 347 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980); *see Fashion Valley Mall, LLC v. NLRB*, 172 P.3d 742 (Cal. 2007) (holding that the right to free speech embodied in the California Constitution even includes the right to urge customers in a private shopping mall to boycott one of its stores).

Other States have said likewise. *See, e.g.*, *Bock v. Westminster Mall Co.*, 819 P.2d 55, 56 (Colo. 1991) ("Within the public spaces of the Mall, Article II, Section 10 [of the Colorado Constitution] protects petitioners' rights to distribute political pamphlets and to solicit signatures pledging non-violent dissent from the federal government's foreign policy toward Central America."). And still some have reserved the question whether their constitutions' free-speech guarantees extend protection against private action. *See Roman v. Trustees of Tufts Coll.*, 964 N.E.2d 331, 338 (Mass. 2012).

Adopting Respondent's rule as a federal matter will not prevent state courts from interpreting their constitutions to offer a greater degree of protection than the federal Constitution provides, regardless of the significant downsides of doing so, as described in Respondent's merits brief and this brief.

B. Internal disciplinary measures supply additional protection against retaliatory arrests.

In addition to bringing a claim under state law, a person who believes he or she was arrested in retaliation for exercising the freedom of speech has another effective remedy, one less costly to public safety and order than suing the officer for damages. He or she can pursue a complaint with the police

department's disciplinary or internal affairs unit. If an investigation finds that the complaint has merit, the officer will be disciplined. If more than a few complaints are sustained, it could lead to more vigorous department-wide training or even systemic change in policing practices, where needed.

State and local law enforcement officers must comply with federal and state laws, local ordinances, and department rules and regulations or they are subject to discipline. Most police departments—in big and small cities alike—have established procedures for receiving and processing citizen complaints against the police. Some have entire departments dedicated to police oversight and accountability. Chicago, for example, established the Civilian Office of Police Accountability, replacing the Independent Police Review Authority as the civilian oversight agency of the Chicago Police Department. COPA works alongside the Chicago Police Department's Bureau of Internal Affairs and investigates all complaints of improper arrest, among other forms of misconduct. Through that process, COPA seeks to identify and address patterns of police misconduct and makes policy recommendations to improve the Chicago Police Department, thereby reducing incidents of misconduct. COPA's website offers citizens multiple ways to file a complaint, explains the investigative process, and tracks individual investigations and outcomes. *See Civilian Office of Police Accountability*, http://www.chicagocopa.org (last visited Jan. 25, 2018).

The City of St. Louis's Civilian Oversight Board operates in much the same way, "conducting independent, impartial, thorough and timely investigations" into allegations of police misconduct made against the St. Louis City Metropolitan Police Department

officers. COB reviews, analyzes, investigates, and makes independent findings and recommendations on these complaints. Its website offers instructions (and a two-part video) on how to file a complaint, says what to expect during the process, and includes a link to the complaint form itself. *See* How To File a Complaint Against a St Louis Metropolitan Police Officer, *Civilian Oversight Board*.[12]

Some States even require police departments statewide to issue written procedures for citizens to follow for making a complaint, making the process easier. *See* Cal. Penal Code § 832.5(a)(1) ("Each department or agency in this state that employs peace officers shall establish a procedure to investigate complaints by members of the public against the personnel of these departments or agencies, and shall make a written description of the procedure available to the public.").

A complaint that is sustained following an investigation can mar the officer's record; require the officer to receive remedial training; or lead to reassignment, suspension, or, where warranted, termination. These are serious consequences that serve to deter misconduct but that do not also threaten the officer with potential financial ruin.

Complaints also can lead to systemic changes in policing practices. Civilian oversight boards or departmental internal affairs units can track complaints, recognize problem officers or practices, observe trends in policing, and recommend appropriate changes at the policy-making level. In the very rare situation where needed changes are not implemented from within, the U.S. Department of Justice's Civil Rights

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[12] Available at https://goo.gl/gCeRUF.

Division can intervene. *See, e.g.*, United States Department of Justice – Civil Rights Division, *Investigation of the Ferguson Police Department* (Mar. 4, 2005).[13]

CONCLUSION

The Court should hold that probable cause defeats a claim for First Amendment retaliatory arrest as a matter of law and thus affirm the judgment below.

Respectfully submitted,

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January 29, 2018

[13] Available at https://goo.gl/bMmpT3.