No. 17-21

IN THE

Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

THE CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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The City does not deny the "widespread instability in the law" regarding whether the existence of probable cause categorically defeats a First Amendment retaliation claim when the retaliation is accomplished through an arrest, *Dukore v. District of Columbia*, 799 F.3d 1137, 1145 (D.C. Cir. 2015). *See* BIO 8, 13 (acknowledging the circuit split). The conflict among the circuits has deepened since this Court reserved the question in *Reichle v. Howards*, 566 U.S. 658 (2012). *See* Pet. 10-16. Nor does the City challenge petitioner's argument that the issue has special importance today. *See id.* 16-18; Br. of Amicus Curiae First Amendment Foundation 7-14 (providing numerous recent examples, including ones involving citizens being targeted for criticizing the government); Br. of Amicus Curiae Institute for Justice 5-6 (discussing the problem the no-probable-cause rule poses for contemporary critics of local governments).

The City nevertheless argues that certiorari should be denied because this case suffers from two vehicle defects. First, it asserts that the question presented is not properly before this Court because petitioner did not press it in the Eleventh Circuit. BIO 7-8. Second, it proffers "an alternative, statutory basis" for affirmance, *id.* 9, arguing that petitioner cannot meet the requirements for municipal liability under 42 U.S.C. § 1983. *See id.* 9-13. The City is wrong on both counts.

As for the City's merits arguments, they are both unpersuasive and inconsistent. In any event, given that the "circuits are split," *Thayer v. Chiczewski*, 705

F.3d 237, 253 (7th Cir. 2012), those arguments provide no reason to deny review.

I. Because the Court of Appeals squarely passed upon the question presented, the City's waiver argument fails.

The City claims that petitioner cannot raise the question presented in this Court because, in the face of binding circuit precedent, he did not include the issue in his briefing to the Eleventh Circuit. *See* BIO 7-8. Not so.

This Court has repeatedly held that it can grant review with respect to "[a]ny issue 'pressed or passed upon below' by a federal court." *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 530-31 (2002) (quoting *United States v. Williams*, 504 U.S. 36, 41 (1992)). "[T]his rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *Williams*, 504 U.S. at 41. And this Court has also rejected the City's suggestion, *see* BIO 7-8, that a party must "demand overruling of a squarely applicable" circuit precedent before this Court can "grant[] certiorari upon an issue decided by a lower court," *Williams*, 504 U.S. at 44. Accordingly, when a court of appeals has addressed an issue, this Court can grant review "even if" the issue was not "raised by petitioner below." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *see also Citizens United v. FEC*, 558 U.S. 310, 330 (2010).

Here, there is no doubt that the Court of Appeals "expressly ruled on the question, in an appropriate exercise of its appellate jurisdiction." *Williams*, 504 U.S. at 42-43 (citation omitted). In fact, the Eleventh Circuit's ruling on the question is indispensable to its

decision. Petitioner claimed that the City Council decided to retaliate against him for exercising his First Amendment rights, and that Councilperson Wade later executed that decision "by summoning Officer Aguirre to the podium and then directing Officer Aguirre to 'carry [Lozman] out.'" Pet. App. 10a. The Court of Appeals found that petitioner had offered a "compelling" argument that the district court "erred by instructing the jury" to look at Officer Aguirre's state of mind rather than the Councilmembers'. *Id.* It nonetheless affirmed the judgment because, under binding circuit precedent, "probable cause defeats Lozman's First Amendment retaliatory arrest claim as a matter of law." *Id.* at 10a-11a (citing *Dahl v. Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002)).

This case is a textbook example of the principle articulated in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991), that granting review is appropriate when "the court below passed on the issue presented, particularly where the issue is, we believe, in a state of evolving definition and uncertainty, and one of importance to the administration of federal law," *id.* at 1099 n.8 (internal citations and quotation marks omitted). Especially given the other ways this case is an ideal vehicle, Pet. 18-21, this Court should grant review.[1]

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[1] The City offers the far-fetched claim that, had petitioner pressed the probable cause issue on direct appeal, the Eleventh Circuit might have affirmed on alternative grounds. *See* BIO 8. A circuit panel cannot ignore binding circuit precedent, and *Dahl* is so directly on point that the panel needed to go no further. It is especially implausible that the Eleventh Circuit would have affirmed on the City's purported "alternative." *See infra* Part II.

II. The City's assertion that it cannot be held responsible for petitioner's arrest provides no basis for denying review.

The City's second vehicle argument is that the question presented has no legal consequence to petitioner because he cannot, "as a matter of law," establish municipal liability. BIO 9. According to the City, this is because "[t]he decision to arrest Lozman came not from 'the policymaking level of government,' but rather from a single 'police officer' alleged to have 'made an illegal arrest.'" *Id.* 12 (quoting *Vodak v. City of Chicago*, 639 F.3d 738, 747 (7th Cir. 2011)).

The City admits that "[t]he Eleventh Circuit did not address this alternative basis for affirmance." BIO 8. Consistent with this Court's role as "a court of review, not of first view," it should simply decide the question presented, and leave this issue to be "decide[d] on remand." *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1949 (2015) (citation omitted).

This is especially true because, contrary to the City's framing, whether the arrest decision was caused by city policymakers or the "independent decisions" of a line-level "City employee," BIO 9, is actually a question of fact that was hotly contested and has not yet been resolved.

The district court denied the City's motion for summary judgment expressly because, on "the issue of the City's *Monell* liability," Pet. App. 30a, it found "sufficient circumstantial evidence" to make it a "jury question" whether the alleged retaliatory actions were "taken with the support of at least three [of the five]

council persons," *id.* 32a, who "harbored illicit motivation to punish and deter Lozman based on his exercise of free speech and petition of government," *id.* 31a.

At trial, petitioner presented evidence that Councilperson Wade proposed to "intimidate" him in response to his exercising his First Amendment rights, Pet. App. 3a; that a second councilmember agreed that "what Ms. Wade says is right. We do have to beat this thing, and whatever it takes, I think we should do it," *id.*; and that when a third councilmember asked whether "we have a consensus of what Ms. Wade is saying," the fourth and fifth councilmembers each said "Okay." ECF 805, at 45.[2] Petitioner also showed a videotape of the council meeting at which he was arrested. That videotape, which this Court should view for itself, https://tinyurl.com/lbj5qqj (at 0:30), shows Wade temporarily chairing the session, *see* Tr. 9-10 (11/18/2014), ECF 771, "summon[ing]" Officer Aguirre within seconds of petitioner's beginning to speak, and, when petitioner insisted on continuing to speak, directing Aguirre to "carry him out," Pet. App. 4a.

At the jury instruction conference, petitioner pressed his theory that Councilperson Wade "directed" the arrest. Tr. 191 (12/11/2014), ECF 783; *see also* Tr. 10 (12/12/2014), ECF 784. The district court recognized that "the facts of this case are susceptible to analysis that the officer, a young officer, present in a city council meeting, hearing a councilwoman—and frankly, a councilwoman like Ms. Wade, who is a very persuasive person just simply followed her direction."

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[2] This document contains the transcript of the closed-door City Council meeting. *See* Pet. 5 n.2.

Tr. 14 (12/12/2014), ECF 784. But the district court nonetheless instructed the jury that it should "consider the court's instruction on municipal liability," Pet. App. 62a, only if it first found both that Officer Aguirre "had an impermissible animus" against petitioner, *id.* 60a, and that there was "a lack of probable cause" for the arrest, *id.* 62a.

Because the jury found probable cause, it never got to the municipal liability instruction, which is where it would have determined whether the decision to arrest petitioner was either "directed, authorized, or agreed to" by a majority of the City Council, Jury Instructions at 20-21, ECF 732, or "ratified" by it, *id.* at 21. Thus, although "whether Wade ordered the arrest or the officer made his own decision to arrest Lozman was a factual question for the jury," the instruction, "[a]s given," kept "the jury from making that decision." Pl. C.A. Br. 21-22.[3]

The Eleventh Circuit decided Lozman's appeal of his First Amendment retaliatory arrest claim based solely on its no-probable-cause rule. Pet. App. 10a-11a. If this Court grants certiorari and reverses that decision, it can remand the case for the courts below to undertake the "deeply factbound analysis" into whether petitioner's arrest was instigated or ratified by City policymakers, *Wellness Int'l Network*, 135 S. Ct. at 1949. Although that issue will require further litigation, this is not a vehicle argument: Rather, it

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[3] Because petitioner proceeded on the theory that his arrest was directed, approved, or ratified by City policymakers, the City's disquisition on "informal custom" and "city ordinance[s]," BIO 11-12, is a red herring.

describes this Court's "ordinary practice of remanding," for reconsideration "under the proper standard." *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2131 (2014).

III. This Court should not extend *Hartman*'s rule to retaliatory arrest claims.

1. The City argues that the "two primary reasons" this Court gave in *Hartman v. Moore*, 547 U.S. 250 (2006), for why plaintiffs in retaliatory prosecution cases must plead and prove lack of probable cause both "apply to the retaliatory-arrest context." BIO 14. They do not.

First, the City confuses whether evidence is relevant with whether it is available. Yes, the existence of probable cause can be relevant in a retaliatory arrest case to whether there is a retaliatory motive in the first place or to whether that motive is the but-for cause of the plaintiff's arrest. Pet. 25; BIO 14. But as petitioner has already explained, many arrests never produce a charging document (while all prosecutions do). And probable cause can be established under this Court's Fourth Amendment doctrine by pointing to offenses that are neither "'closely related' to," nor "based on the same conduct as, the offense identified by the arresting officer at the time of arrest." *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004); *see* Pet. 28-30. Thus, even if evidence regarding the existence of probable cause will at some point become "available" in retaliatory arrest cases, *Reichle v. Howards*, 566 U.S. 658, 668 (2012), this does not mean that the *plaintiff* can be expected to have this evidence at the pleading stage or to know for which crimes he must address

probable cause. The defendant is better situated in both respects.

The City offers no response to these points. Indeed, the City ignores the fact that, in this very case, the offense for which petitioner was required to prove the absence of probable cause—disturbing a lawful assembly—"popped up" midway through a multiweek civil trial, Tr. 8 (12/12/2014), ECF 784, eight years after the underlying arrest. Pet. 8, 29-30.

Second, the City misunderstands *Hartman*'s discussion of the "distinct problem of causation," 547 U.S. at 263. As this Court explained, given absolute prosecutorial immunity from suit, the defendant in such cases is a nonprosecuting official sued not "strictly for retaliatory prosecution, but [rather] for successful retaliatory inducement to prosecute." *Id.* at 262. A prosecutor cloaked in the "presumption of regularity accorded to prosecutorial decisionmaking," *id.* at 263, independently makes the decision whether to maintain the prosecution. Thus, "[t]he intervening decision of the third-party prosecutor widens the causal gap between the defendant's animus and the plaintiff's injury." *Reichle*, 566 U.S. at 668.

Retaliatory arrest cases are more straightforward. In many cases, the unconstitutional motive is harbored by the arresting officer himself. The causal connection between motive and injury is not "attenuated" in any way. *Reichle*, 566 U.S. at 668. And because the presumption of regularity "does not apply" to retaliatory arrests, *id.* at 669, it makes sense to place the burden on the officer-defendant to show that he would have arrested the plaintiff even absent his impermissible motive. The standard framework for First Amendment retaliation cases laid out in *Mt.*

Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), gives him a full and fair opportunity to do so. *See* Pet. 22-25.

To be sure, there are retaliatory arrest cases where the plaintiff alleges a retaliatory motive on the part of a supervisor or a municipality, not the officer who directly effected the arrest. BIO 16. Unlike prosecutors, police officers often make arrests at a higher-level official's command (as allegedly happened here). But those cases can be decided using standard principles for determining supervisory or municipal liability. There is nothing about the fact that an injury involves an arrest, rather than denial of a promotion or a parade permit, that would justify giving the municipality greater protection here.

2. The City's threat that applying the *Mt. Healthy* framework to retaliatory arrest claims will prohibit "everyday, uncontroversial policing tactics," BIO 17, is simple bluster.

The rule petitioner proposes has operated within the Ninth Circuit for over a decade. Pet. 24-25. The City points to nothing to suggest it has hampered effective policing there. Moreover, as petitioner already explained, *see* Pet. 24-25, pleading rules and the *Mt. Healthy* framework relieve all but the most blatantly retaliatory officers of the risk of "*personal liability* for relying on potential arrestees' speech," BIO 19—particularly given the backstop of qualified immunity.

The City's argument rests on a straw man. Petitioner has never argued that speech cannot be taken into account in deciding whether to make an arrest.

What he argues—and what the *Mt. Healthy* framework requires—is that the arrest not be the product of (1) *retaliatory animus* against (2) *protected* speech.

To begin with, some of the speech the City points to in other cases is not protected by the First Amendment. The City ignores the principle that "[s]pecific criminal acts are not protected speech even if speech is the means for their commission." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). Thus, if police decide to arrest for public intoxication a "drunk [who] is making aggressive statements" that lead them to believe he is "likely to be a threat to public safety," BIO 19, the drunkard's claim will fail at the first step of the *Mt. Healthy* inquiry.

And even with respect to protected speech, if that speech "provides evidence of a crime," BIO 17 (quoting *Reichle*, 566 U.S. at 668), plaintiffs will lose so long as police generally make arrests for that crime—as they no doubt do when faced with evidence of serious felonies or dangers to the public. In such cases, plaintiffs will lose under *Mt. Healthy* because the police "would have made the same decision absent the forbidden consideration." *Texas v. Lesage*, 528 U.S. 18, 20-21 (1999).

But petitioner's case is materially different. The district court held, and the City has never disputed, that petitioner engaged in protected First Amendment activity when he offered "public criticism" of City redevelopment projects, "expressed" views "about perceived public corruption in the City," and "fil[ed] a 'Government in the Sunshine' suit against the City," Pet. App. 52a. The City has never suggested that any of these actions—none of which coincided with petitioner's arrest—provided *any* evidence of a crime or a threat.

Even if officers "cannot enforce every violation of every law" and "must 'use some discretion in deciding when and where' to do so," BIO 18 (citation omitted), the City's declaration that "[o]ften, a potential arrestee's protected speech will inform the exercise of [police officers'] discretion," *id.*, is chilling. The City tellingly offers no defense of why governments should be entitled to enforce minor offenses only against individuals whose speech (or religion or associations, for that matter) they do not like. The City attacks petitioner's prior criticisms of City officials, BIO 1-2, and asserts its entitlement to cut off petitioner's allotted three-minute period for commenting because his first words did not directly mention municipal corruption, *see id.* 2. This Court should make clear that the City cannot revive the discredited doctrines of seditious libel and prior restraint by wrapping them in the cloak of an arrest for whatever offense its lawyers can years later conjure from the Florida Code.

3. The City's argument with respect to the Equal Protection Clause undercuts its other arguments on the merits. The City's proffered distinction between that clause and the First Amendment—that the former "exists to prohibit government actors from making otherwise-valid enforcement decisions based on race and other irrelevant considerations," while "[p]rotecting against retaliatory arrests is but a small fraction of what the First Amendment does," BIO 21—makes no sense. *Both* constitutional provisions exist to prohibit government from imposing otherwise acceptable burdens on the basis of forbidden criteria. And protecting against retaliatory arrests is but a small fraction of what *either* provision is designed to accomplish.

Still worse, the City suggests with apparent approval that "an arrest motivated by protected speech may constitute an arbitrary enforcement decision that gives rise to an Equal Protection claim" even when there is probable cause, BIO 21. If the City is comfortable with addressing these claims through the Equal Protection Clause, it should not resist having them adjudicated more straightforwardly under the First Amendment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 18, 2017