

## SCOTUS on First Amendment: Probable Cause for an Arrest Does Not Bar a First Amendment Claim

### Description

On June 18, 2018 the United States Supreme Court issued its decision in *Lozman v. City of Riviera Beach* (No. 17-21), 585 US \_\_\_\_ (2018), holding that the existence of probable cause for an arrest, does not bar a First Amendment retaliation claim.

In 2006, petitioner Fane Lozman (Lozman) towed his floating home into a slip in the City-owned marina, where he became a resident. Soon after his arrival, Lozman became an outspoken critic of the City's plan to use its eminent domain power to seize homes along the waterfront for private development. Lozman often spoke during the public-comment period at city council meetings and criticized public employees, including the mayor. He also filed a lawsuit alleging that the Council's approval of an agreement with developers violated Florida's open-meetings laws. In June 2006, the Council held a closed-door session, in part to discuss the open-meetings lawsuit that Lozman recently had filed. According to the transcript of the meeting, one councilmember suggested that the City use its resources to "intimidate" Lozman and others who had filed lawsuits against the City. Later in the meeting, a different councilmember asked whether there was "a consensus of what Ms. Wade is saying," and others responded in the affirmative. Lozman alleges that these remarks formed an official plan to intimidate him. The City, on the other hand, maintains that the only consensus reached during the meeting was to invest the money and resources necessary to prevail in the litigation against it.

The dispute that led to this litigation took place in 2006. In November of that year, five months after the closed-door meeting where the "intimidate" comment was made, the City Council held a public meeting. The agenda included a public-comment session in which citizens could address the Council for a few minutes. As he had done on earlier occasions and would do more than 200 times over the coming years, Lozman stepped up to the podium to give remarks. He began to discuss the recent arrest of a former county official. A councilmember interrupted Lozman, directing him to stop making those remarks. Lozman continued speaking, this time about the arrest of a former official from the city of West Palm Beach. The councilmember then called for the assistance of the police officer in attendance. The officer approached Lozman and asked him to leave the podium. Lozman refused. The officer was instructed to "carry him out", so he handcuffed Lozman and ushered him out of the meeting.

Lozman was charged with disorderly conduct and resisting arrest. The charges were dismissed because, although there was probable cause to effect the arrest, there was "no reasonable likelihood of a successful prosecution."

Lozman sued the City under 42 U.S.C. §1983 alleging that the City arrested him in retaliation for his opposition to the City's redevelopment plan, in violation of the First Amendment. The complaint described a number of alleged incidents that, under Lozman's theory, showed the City's purpose to harass him in different ways. These ranged from a city employee telling Lozman that his dog needed a muzzle to the City's initiation of an admiralty lawsuit against Lozman's floating home. The evidence and arguments presented by both parties with respect to all the matters alleged in Lozman's suit consumed 19 days of trial before a jury. The jury returned a verdict for the City on all of the claims. Lozman

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appealed to the Eleventh Circuit Court of Appeals, and the Court affirmed the District Court's judgment. The Court of Appeals held that the jury found that there was probable cause to arrest Lozman and such finding defeated his First Amendment retaliatory arrest claim as a matter of law.

Lozman appealed to the United States Supreme Court. He claimed that, notwithstanding the presence of probable cause, his arrest at the city council meeting violated the First Amendment because the arrest was ordered in retaliation for his earlier, protected speech.

The issue before the Supreme Court is whether the existence of probable cause bars a First Amendment retaliation claim under §1983. The Court vacated the Court of Appeals' decision and decided that it does not, on the following grounds:

1. The court first stated that this is not a typical retaliatory arrest claim because Lozman did not contest the arrest itself or the officer's action of arresting him. Lozman alleges that the City itself, not the officer, was the one who retaliated against him pursuant to an "official municipal policy" of intimidation.
2. The fact that Lozman must prove the existence and enforcement of an official policy motivated by retaliation separates Lozman's claim from the typical retaliatory arrest claim. An official retaliatory policy is a particularly troubling and potent form of retaliation, for a policy can be long term and pervasive, unlike an ad hoc, on-the-spot decision by an individual officer. An official policy also can be difficult to dislodge. A citizen who suffers retaliation by an individual officer can seek to have the officer disciplined or removed from service, but there may be little practical recourse when the government itself orchestrates the retaliation. For these reasons, when retaliation against protected speech is elevated to the level of official policy, there is a compelling need for adequate avenues of redress.
3. In a case like this one, it is unlikely that the connection between the alleged animus and injury will be weakened by an official's legitimate consideration of speech. This unique class of retaliatory arrest claims, will require objective evidence of a policy motivated by retaliation to survive summary judgment. Lozman, for instance, cites a transcript of a closed-door city council meeting and a video recording of his arrest.
4. This Court has recognized the "right to petition as one of the most precious of the liberties safeguarded by the Bill of Rights." Lozman alleges the City deprived him of this liberty by retaliating against him for his lawsuit against the City and his criticisms of public officials. Thus, Lozman's speech is high in the hierarchy of First Amendment values. Lozman need not prove the absence of probable cause to maintain a claim of retaliatory arrest against the City. The Court need not, and does not, address the elements required to prove a retaliatory arrest claim in other contexts.

Lastly, the court remanded the case to the Court of Appeals so they can consider:

1. Whether any reasonable juror could find that the City actually formed a retaliatory policy to intimidate Lozman during its June 2006 closed-door session;
2. Whether any reasonable juror could find that the November 2006 arrest constituted an official act by the City; and
3. Whether, under Mt. Healthy, the City has proved that it would have arrested Lozman regardless of any retaliatory animus—for example, if Lozman's conduct during prior city council meetings had also violated valid rules as to proper subjects of discussion, thus explaining his arrest here.

## Date Created

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