AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Democratic Rights/Free Speech

**Lozman v. City of Riviera Beach, Fla., \_\_\_ U.S. \_\_\_** (2018)

*Fane Lozman regularly criticized the members of the Riviera Beach city council at public meetings and filed a lawsuit against an agreement the Council made with local developers. During a closed council meeting, one member suggested officials attempt to “intimidate” Lozman, a sentiment shared by other council members. Five months after that closed council meeting, Lozman was arrested after he refused to leave the podium when requested at an open city council meeting. Lozman then filed a lawsuit against the city county under* [*42 U.S.C. § 1983*](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=42USCAS1983&originatingDoc=I6f2c85c372c611e8bc5b825c4b9add2e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))*. He claimed that his arrest was in retaliation for his speaking out against the council and council members. A federal district court ruled that Lozman could not make a claim for retaliatory arrest because the police had probable cause to take him into custody and that decision was sustained by the Court of Appeals for the Eleventh Circuit. Lozman appealed to the Supreme Court of the United States.*

*The Supreme Court by an 8-1 vote remanded the case to the lower federal court. Justice Anthony Kennedy’s majority opinion held that Lozman could collect damages if he could prove that the city council ordered his arrest as retaliation for his political speeches, even if there was probable cause for arrest at the time Lozman was taken into custody. Kennedy emphasized that the court did not rule on whether probable cause barred claims of retaliatory arrest in most situations. Rather, he insisted that Lozman could make his cause in the particular circumstances of his case. What are those circumstances? Why do they matter? Should they matter? Justice Clarence Thomas in dissent maintains the court should have ruled that probable cause bars claims of retaliatory arrest. Why does he make that claim? Should a constitutional difference exists when police make arrests in part because persons are exercising constitutional rights then when they are making arrests for other reasons independent of the evidence that a crime has been committed?*

JUSTICE [KENNEDY](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0243105201&originatingDoc=I6f2c85c372c611e8bc5b825c4b9add2e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) delivered the opinion of the Court.

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Two major precedents could bear on this point [“whether the conceded existence of probable cause for the arrest bars recovery regardless of any intent or purpose to retaliate for past speech], and the parties disagree on which should be applicable here. The first is this Court's decision in *Mt. Healthy City Bd. of Ed. v. Doyle* (1977). The second is this Court's decision in *Hartman v. Moore* (2006).

*Mt. Healthy* arose in a civil, not criminal, context. A city board of education decided not to rehire an untenured school teacher after a series of incidents indicating unprofessional demeanor. One of the incidents was a telephone call the teacher made to a local radio station to report on a new school policy. Because the board of education did not suggest that the teacher violated any established policy in making the call, this Court accepted a finding by the District Court that the call was protected speech. The Court went on to hold, however, that since the other incidents, standing alone, would have justified the dismissal, relief could not be granted if the board could show that the discharge would have been ordered even without reference to the protected speech. . . .

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The background in *Hartman* was that a company and its chief executive, William Moore, had engaged in an extensive lobbying and governmental relations campaign opposing a particular postal service policy.  Moore and the company were later prosecuted for violating federal statutes in the course of that lobbying. After being acquitted, Moore filed suit against five postal inspectors, alleging that they had violated his First Amendment rights when they instigated his prosecution in retaliation for his criticisms of the Postal Service. This Court held that a plaintiff alleging a retaliatory prosecution must show the absence of probable cause for the underlying criminal charge. If there was probable cause, the case ends. . . .

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The City's argument here is that, just as probable cause is a bar in retaliatory prosecution cases, so too should it be a bar in this case, involving a retaliatory arrest. . . . In deciding whether to arrest, police officers often make split-second judgments. The content of the suspect's speech might be a consideration in circumstances where the officer must decide whether the suspect is ready to cooperate, or, on the other hand, whether he may present a continuing threat to interests that the law must protect. For these reasons retaliatory arrest claims, much like retaliatory prosecution claims, can “present a tenuous causal connection between the defendant's alleged animus and the plaintiff's injury.” That means it can be difficult to discern whether an arrest was caused by the officer's legitimate or illegitimate consideration of speech. And the complexity of proving (or disproving) causation in these cases creates a risk that the courts will be flooded with dubious retaliatory arrest suits.

At the same time, there are substantial arguments that *Hartman* 's framework is inapt in retaliatory arrest cases, and that *Mt. Healthy* should apply without a threshold inquiry into probable cause. For one thing, the causation problem in retaliatory arrest cases is not the same as the problem identified in *Hartman*. *Hartman* relied in part on the fact that, in retaliatory prosecution cases, the causal connection between the defendant's animus and the prosecutor's decision to prosecute is weakened by the “presumption of regularity accorded to prosecutorial decisionmaking.” That presumption does not apply in this context. In addition, there is a risk that some police officers may exploit the arrest power as a means of suppressing speech.

Here Lozman does not sue the officer who made the arrest. . . . Instead Lozman alleges more governmental action than simply an arrest. His claim is that the City itself retaliated against him pursuant to an “official municipal policy” of intimidation. In particular, he alleges that the City, through its legislators, formed a premeditated plan to intimidate him in retaliation for his criticisms of city officials and his open-meetings lawsuit. And he asserts that the City itself, through the same high officers, executed that plan by ordering his arrest at the November 2006 city council meeting.

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.

In addition, Lozman's allegations, if proved, alleviate the problems that the City says will result from applying *Mt. Healthy* in retaliatory arrest cases. The causation problem in arrest cases is not of the same difficulty where, as is alleged here, the official policy is retaliation for prior, protected speech bearing little relation to the criminal offense for which the arrest is made. In determining whether there was probable cause to arrest Lozman for disrupting a public assembly, it is difficult to see why a city official could have legitimately considered that Lozman had, months earlier, criticized city officials or filed a lawsuit against the City. So 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, moreover, 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. There is thus little risk of a flood of retaliatory arrest suits against high-level policymakers.

As a final matter, it must be underscored that 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.

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JUSTICE THOMAS, dissenting.



We granted certiorari to decide “whether the existence of probable cause defeats a First Amendment claim for retaliatory arrest under [[42 U.S.C.] § 1983](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=42USCAS1983&originatingDoc=I6f2c85c372c611e8bc5b825c4b9add2e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).” Instead of resolving that question, the Court decides that probable cause should not defeat a “unique class of retaliatory arrest claims.” To fall within this unique class, a claim must involve objective evidence, of an official municipal policy of retaliation, formed well before the arrest, in response to highly protected speech, that has little relation to the offense of arrest. No one briefed, argued, or even hinted at the rule that the Court announces today. Instead of dreaming up our own rule, I would have answered the question presented and held that plaintiffs must plead and prove a lack of probable cause as an element of a First Amendment retaliatory-arrest claim. . . .

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I would hold that plaintiffs bringing a First Amendment retaliatory-arrest claim must plead and prove an absence of probable cause. This Court has “repeatedly noted that [42 U.S.C. § 1983](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=42USCAS1983&originatingDoc=I6f2c85c372c611e8bc5b825c4b9add2e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) creates ‘“a species of tort liability.‘“ Accordingly, we “defin[e] the contours and prerequisites of a [§ 1983](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=42USCAS1983&originatingDoc=I6f2c85c372c611e8bc5b825c4b9add2e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) claim” by “look[ing] first to the common law of torts.” When [§ 1983](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=42USCAS1983&originatingDoc=I6f2c85c372c611e8bc5b825c4b9add2e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) was enacted, there was no common-law tort for retaliatory arrest in violation of the freedom of speech. I would therefore look to the common-law torts that “provid[e] the closest analogy” to this claim. The closest analogs here are the three arrest-based torts under the common law: false imprisonment, malicious prosecution, and malicious arrest. In defining the elements of these three torts, 19th-century courts emphasized the importance of probable cause.

Consider first the tort of false imprisonment. Common-law courts stressed the need to shape this tort with an “indulgence” for peace officers, who are “specially charged with a duty in the enforcement of the laws.” Accordingly, private citizens were always liable for false imprisonment if the arrestee had not actually committed a felony, but constables were “excused” if they had “made [the arrest] on reasonable grounds of belief”—*i.e.,* probable cause. As Lord Mansfield explained, it was “of great consequence to the police” that probable cause shield officers from false-imprisonment claims, as “it would be a terrible thing” if the threat of liability dissuaded them from performing their official duties. . . . As one court put it, “How, in the great cities of this land, could police power be exercised, if every peace officer is liable to civil action for false imprisonment” whenever “persons arrested upon probable cause shall afterwards be found innocent?”

Courts also stressed the importance of probable cause when defining the torts of malicious prosecution and malicious arrest. For the tort of malicious prosecution, courts emphasized the “necessity” of both the “allegation” and “proof” of probable cause, in light of the public interest “that criminals should be brought to justice.” Similarly, if the element of probable cause were not “strictly guarded,” “ill consequences would ensue to the public, for no one would willingly undertake to vindicate a breach of the public law and discharge his duty to society, with the prospect of an annoying suit staring him in the face.” . . .

In sum, when [§ 1983](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=42USCAS1983&originatingDoc=I6f2c85c372c611e8bc5b825c4b9add2e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) was enacted, the common law recognized probable cause as an important element for ensuring that arrest-based torts did not unduly interfere with the objectives of law enforcement. Common-law courts were wary of “throw[ing] down the bars which protect public officers from suits for acts done within the scope of their duty and authority, by recognizing the right of every one who chooses to imagine or assert that he is aggrieved by their doings, to make use of an allegation that they were malicious in motive to harass them with suits on that ground.”

Applying that principle here, it follows that plaintiffs bringing a First Amendment retaliatory-arrest claim under [§ 1983](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=42USCAS1983&originatingDoc=I6f2c85c372c611e8bc5b825c4b9add2e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) should have to plead and prove a lack of probable cause. I see no justification for deviating from the historical practice simply because an arrest claim is framed in terms of the First Amendment. Even under a First Amendment theory, “the significance of probable cause or the lack of it looms large.” The presence of probable cause will tend to disprove that the arrest was done out of retaliation for the plaintiff's speech, and the absence of probable cause will tend to prove the opposite. Because “[p]robable cause or its absence will be at least an evidentiary issue in practically all such cases” and “[b]ecause showing [its] absence ... will have high probative force, and can be made mandatory with little or no added cost,” the absence of probable cause should be an “element” of the plaintiff's case.

Moreover, as with the traditional arrest-based torts, police officers need the safe harbor of probable cause in the First Amendment context to be able to do their jobs effectively. Police officers almost always exchange words with suspects before arresting them. And often a suspect's “speech provides evidence of a crime or suggests a potential threat. If probable cause were not required, the threat of liability might deter an officer from arresting a suspected criminal who, for example, has a political bumper sticker on his car, is participating in a politically tinged protest, or confronts and criticizes the officer during the arrest of a third party, Allowing plaintiffs to bring a retaliatory-arrest claim in such circumstances, without pleading and proving a lack of probable cause, would permit plaintiffs to harass officer with the kind of suits that common-law courts deemed intolerable.

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