No. 22-1025

IN THE

SYLVIA GONZALEZ,

Petitioner,

—v.—

EDWARD TREVINO, II, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF TEXAS, CATO INSTITUTE, FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION, AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The **American Civil Liberties Union (ACLU)** is a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Texas is a state affiliate of the national ACLU. The ACLU and its affiliates have frequently appeared before this Court in First Amendment cases, both as direct counsel and as amici curiae, including in cases involving the government's use of its arrest powers to silence speech. *See, e.g.*, *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019) (amicus); *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018) (amicus). History demonstrates that such efforts are often aimed at those who challenge and criticize the government and the status quo. *See, e.g., Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). The preservation of retaliatory arrest claims is therefore of immense concern to the ACLU, its clients seeking justice, and its members and donors.

The **Cato Institute** is a nonpartisan public-policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice, founded in 1999, focuses on the scope of substantive criminal liability, the proper role of police in their communities, the protection of constitutional safeguards for criminal suspects and defendants, citizen participation in the

[1] No party has authored this brief in whole or in part, and no one other than amici, their members, and their counsel have paid for the preparation or submission of this brief.

criminal justice system, and accountability for law enforcement.

The **Foundation for Individual Rights and Expression (FIRE)** is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended expressive rights nationwide through public advocacy, targeted litigation, and amicus curiae participation. *See, e.g.*, *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038 (2021) (amicus); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022) (amicus); *Counterman v. Colorado*, 600 U.S. 66 (2023) (amicus). As part of its mission, FIRE directly represents individuals in Section 1983 lawsuits who were arrested because of their protected speech. Because of that experience, FIRE is keenly aware of the need for a robust remedy for retaliatory arrests. That need is especially great today, as public officials continue to selectively enforce criminal statutes against critics and dissenters, often employing obscure criminal statutes in obviously unconstitutional ways.

The **National Association of Criminal Defense Lawyers (NACDL)** is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide

professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

SUMMARY OF ARGUMENT

"The freedom of individuals verbally to oppose or challenge [government] action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston v. Hill*, 482 U.S. 451, 462–63 (1987). That freedom requires not only striking down unconstitutional laws, but also, as in this case, protecting critics from retaliatory arrests.

Arrest is a particularly potent form of retaliation. It deprives critics of their physical liberty, and can trigger a host of negative long-term consequences beyond the period of custody, from hurting job and salary prospects to limiting access to public housing. At the same time, as this Court has recognized, broad and open-ended criminal laws make it possible for government actors to identify probable cause to arrest almost anyone for almost anything. As a result, though criticizing government action and challenging public officials lies at the zenith of First Amendment protection, a public official seeking to retaliate against critics will have an easy time finding something for which to arrest them. And that arrest is likely to have its intended effect, chilling the arrested individuals and other would-be speakers from speaking up again.

The First Amendment prohibits the government from retaliating against individuals for protected speech, including through arrests. To challenge retaliation, plaintiffs must typically plead that they engaged in protected speech and that the government subjected them to an adverse action as a result. Different kinds of evidence may be relevant to drawing the causal link between protected speech and adverse action, from timing to a lack of plausible

alternative explanations, to the full history of the relationship between the plaintiffs and defendants—but there is generally no presumption that the adverse action was proper.

When police undertake on-the-spot, warrantless arrests, however, it can be unusually hard to tell whether their reliance on speech was retaliatory or legitimate. The interaction between the officer and the suspect is limited, and what a suspect says in the encounter may be relevant in assessing the need to arrest. Given that complexity, this Court held in *Nieves v. Bartlett* that the existence of probable cause will presumptively bar a retaliation claim arising from an officer's ad hoc decision to arrest. 139 S. Ct. 1715, 1727 (2019).

This case does not involve an officer's on-the-spot decision to arrest, and so *Nieves*' narrow exception to the ordinary rules governing First Amendment retaliation claims does not apply. Where, as here, the decision to arrest was not made by an officer under time constraints or with necessarily limited information, there is a far greater risk that a government official will have the time and opportunity to use an arrest to retaliate against a critic or a political opponent. In addition, there is no reason to presume regularity based on the officer's probable cause determination.

The *Nieves* exception should not be extended beyond on-the-spot warrantless arrests where the speech and the conduct giving rise to probable cause arise in a single incident or encounter. Indeed, this Court has already held that retaliatory arrest claims may proceed under the ordinary First Amendment rules where government actors form a "premeditated

plan to intimidate [a speaker] in retaliation for his criticisms of [the government]" via an arrest. *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1954 (2018). This includes instances where, as here, the protected speech that allegedly motivated the arrest was not part of, or contemporaneous with, the allegedly arrest-worthy conduct. *Id.* at 1953–54. And it also reaches situations in which the decision to arrest was not the result of an officer's on-the-spot judgment—for example, where the arrest was made at the direction of other government officials, *id;* where probable cause and the arrest did not arise within a single encounter; or where officials first secured a warrant.

Even if this Court were to expand *Nieves*' exception to reach premeditated arrests, Petitioner's claim should be allowed to proceed because she has alleged objective evidence of retaliatory treatment that suffices to overcome *Nieves*' presumptive probable-cause bar. Contrary to the Fifth Circuit's holding below, *Nieves* does not require plaintiffs to allege that others who were engaged in identical conduct, but not the same expression, have not been arrested. Instead, it allows a claim to proceed notwithstanding the presence of probable cause as long as the plaintiff alleges objective evidence of retaliatory treatment. 139 S. Ct. at 1727.

Limiting the universe of objective evidence to specific comparative examples would be illogical and would require courts to ignore other clear indicia of retaliation. Where, as here, a criminal statute has never before been used for purportedly illegal yet commonplace conduct (here, putting a petition in a folder), the absence of other arrests should suffice. Evidence that government officials bypassed regular

procedures, also present in this case, similarly offers objective indicia that the government treated the critic differently without necessitating intrusive or speculative inquiries into the arresting officer's state of mind.

Holding otherwise would have devastating consequences for speakers. With respect to rarely-used or creatively-applied criminal provisions, plaintiffs typically will not be able to identify specific individuals who engaged in identical conduct but were not arrested for it, leaving them with no recourse. There is often no readily discoverable record of an arrest that could have but did not happen; and, even where there is, it may not be available to a plaintiff at the pleading stage. Any critic censored through novel applications of broad or vague criminal laws—including the plethora that apply to protest-adjacent conduct—would face this nearly insurmountable barrier. This Court should reverse the court below to prevent that result.

ARGUMENT

I. *Nieves'* presumptive probable-cause bar is limited to an officer's ad hoc, on-the-spot decision to arrest.

A. Retaliation claims are typically not subject to heightened pleading standards.

The First Amendment prohibits the government from retaliating against people for engaging in protected speech or activity, and "the injured person may generally seek relief by bringing a First Amendment claim." *Nieves*, 139 S. Ct. at 1722. To plead such a claim, plaintiffs must allege that they

engaged in protected speech or activity, that the government took an adverse action against them, and that there was "a 'causal connection' between the government defendant's 'retaliatory animus' and the plaintiffs['] subsequent injury." *Id.* (quoting *Hartman v. Moore*, 547 U.S. 250, 259 (2006)).

In some cases, alleging causation will be straightforward. "[I]n the public employment context," for example, "evidence of the motive and the discharge" alone may suffice. *Id.* In other contexts, a range of factors may be relevant, including: timing; the government actor's knowledge of the relevant protected speech, *id*. at 1728; the absence of any other plausible justification for the adverse action, *Lozman*, 138 S. Ct. at 1952 (discussing *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 285–87 (1977)); and the full history of interactions between the plaintiff and the government official. The Court has required more only where "proving the link between the defendant's retaliatory animus and the plaintiff's injury . . . is usually more complex than it is in other retaliation cases." *Nieves,* 139 S. Ct. at 1723 (quoting *Lozman*, 138 S. Ct. 1945 at 1953).

In *Nieves*, this Court concluded that a warrantless, on-the-scene arrest "immediately initiated" after a physical confrontation between the plaintiff and an officer, and "[s]everal minutes" after the plaintiff uttered the relevant protected speech, fell into this "usually more complex" category. 139 S. Ct. at 1720–21, 23. But in *Lozman*, it held that an arrest effected pursuant to an official city policy, in retaliation "for prior, protected speech bearing little relation to the criminal offense for which the arrest is made" did not. 138 S. Ct. at 1954. The Court explained

that the causation problems present in the former scenario did not present "the same difficulty" in the latter. *Id.*

Many types of arrests involving speech also lack those causation problems: those in which the allegedly motivating speech is not "made in connection with, or contemporaneously to, [the relevant] criminal activity," *id.* at 1953–54; those where the arrests are not the result of "an ad hoc, on-the-spot decision by an individual officer," *id.* at 1954; those made at the direction of other officials, *see id.*; or arrests conducted pursuant to a warrant. Assessing causation in such circumstances should not be unusually difficult, and so the general rule for First Amendment retaliation claims—which includes no presumptive bar against allowing such a claim to proceed—should govern.

This case offers a clear example. According to the complaint, Ms. Gonzalez, a then-72-year-old, first-time city council member, spoke out against the city manager and organized a nonbinding citizen's petition to remove him. After she mistakenly placed the petition in her binder, the mayor, the police chief (who was appointed by the city manager), and a deputized special detective (who was appointed by the police chief) spent nearly two months investigating this "infraction." Pet. App. 102a–103a, 104a.

Ultimately, the special detective filed an arrest warrant alleging that Ms. Gonzalez had violated a law that makes it a crime to "intentionally destroy[], conceal[], remove[], or otherwise impair[] the verity, legibility, or availability of a governmental record." Tex. Penal Code § 37.10(a)(3). Though not relevant to the elements of the crime, the accompanying probable cause affidavit detailed Ms. Gonzalez's past criticisms

of the city manager and her role in organizing the petition against him.

B. Where an arrest is allegedly motivated by prior, unrelated protected speech, the causal inquiry is not unusually complex.

Causation can be difficult to establish in retaliation cases where the relevant speech "is made in connection with, or contemporaneously to [the relevant] criminal activity." *Lozman*, 138 S. Ct. at 1953–54. It may be difficult to disentangle, for example, whether a protester arrested for violating a noise ordinance after chanting into a megaphone was in fact arrested because of the decibel level or the message of the chant.

"The content of the suspect's speech might [also] 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." *Id.* at 1953. The same is true for the "manner of a suspect's speech." *Nieves*, 139 S. Ct. at 1724. "[U]ntruthful and evasive answers to police questioning," for example, "could support probable cause." *Id.* (citing *District of Columbia v. Wesby*, 583 U.S. 48, 60 (2018)); *see also Reichle v. Howards*, 566 U.S. 658, 661 (2012). In *Nieves*, for example, "[t]he officers testified that they perceived [the plaintiff] to be a threat based on a combination of the content and tone of his speech, his combative posture, and his apparent intoxication." 139 S. Ct. at 1724. In all these situations, the arresting officer makes a probable cause determination based on the facts in the moment.

But no comparable difficulty exists where the protected speech that allegedly motivated the arrest is removed—in substance or time—from on-the-spot conduct giving rise to an arrest. In *Lozman*, for example, this Court found it "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," when he was arrested for refusing to leave the podium at a public meeting. 138 S. Ct. at 1954. This case offers another example: The content of Petitioner's speech—her criticism of the city manager and her support for his ouster—could not have legitimately served as a basis to arrest her. If anything, it makes the idea that she intended to tamper with the petition, which she supported, implausible.

Where the relevant speech is not contemporaneous with the conduct for which the plaintiff is arrested, "it is unlikely that the connection between the alleged animus and injury will be 'weakened by an official's legitimate consideration of speech,'" for it is unlikely that any consideration of the protected speech will be legitimate. *Id.* (quoting *Reichle*, 566 U.S. at 668 (cleaned up)).

C. Where an arrest is not the result of an ad hoc, on-the-spot decision by an officer, the causal inquiry is not unusually complex.

The same is true for arrests that are not the result of "an ad hoc, on-the-spot decision by an individual officer." *Lozman*, 138 S. Ct. at 1954. Ad hoc arrests are often "dangerous" and "require[ ] making quick decisions in 'circumstances that are tense,

uncertain, and rapidly evolving.'" *Nieves*, 139 S. Ct. at 1725 (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)). Their exigent nature makes them a special case. As noted above, if an officer "must make 'split-second judgments' when deciding whether to arrest, . . . a suspect's speech may convey vital information." *Id.* at 1724 (citation omitted). At the same time, because "[a]ny inartful turn of phrase or perceived slight during a legitimate arrest could land an officer in years of litigation," allowing retaliatory arrest claims to proceed where probable cause supported the arrest and no objective evidence supports a retaliatory motive "would simply minimize [officers'] communication during arrests to avoid having their words scrutinized for hints of improper motive—a result that would leave everyone worse off." *Id.* at 1725.

These same concerns are not present where an arrest is not ad hoc or on-the-spot, but is instead made at the direction of other officials, pursuant to a warrant, or some time after the events establishing probable cause occurred. When the universe of relevant plaintiff-government interactions is bigger, a plaintiff can allege "more governmental action than simply an arrest." *Lozman*, 138 S. Ct. at 1954. In *Lozman* for example, the plaintiff alleged "a premeditated plan to intimidate him." *Id.* The passage of time is also relevant, for "if the officer couldn't identify a crime for which probable cause existed until well after the arrest[,] then causation might be a question for the jury." *Nieves*, 139 S. Ct. at 1732 (Gorsuch, J., concurring in part and dissenting in part).

Allowing such claims to proceed does not dissuade officers from communicating with suspects or other members of the public. Because the claim arises from more than that single interaction, the words uttered by an officer during the arrest will typically carry less weight. In addition, the claim may not implicate the arresting officer at all; in *Lozman*, for example, the petitioner "d[id] not sue the officer who made the arrest" or even allege that the officer acted in bad faith. 138 S. Ct. at 1954. Here, too, the allegations detail a premeditated plan between a group of government officials, not including any arresting officer.

D. Prohibiting retaliatory arrest claims in such cases would deny important First Amendment protections.

On the other hand, if this Court were to presumptively prohibit such claims from proceeding, it could prevent plaintiffs from bringing claims even in cases where disentangling proper and improper reliance on speech for the arrest is not difficult, including where multiple government actors together concocted a retaliatory plan or where past protected speech clearly played a role. This Court has repeatedly recognized that "an unyielding requirement to show the absence of probable cause could pose 'a risk that some police officers may exploit the arrest power as a means of suppressing speech.'" *Nieves*, 139 S. Ct. at 1727 (quoting *Lozman*, 138 S. Ct. at 1953–54). Extending the *Nieves* exception to reach beyond ad hoc arrests would make that risk particularly acute.

For example, where an arrest results from a plan by multiple government officials, "there may be little practical recourse." *Lozman*, 138 S. Ct. at 1954. "A citizen who suffers retaliation by an individual officer can seek to have the officer disciplined or removed from service," but the options are less obvious when more orchestrated retaliation is afoot. *Id*.

The risks are also stark where there is a gap in time between the arrest and the relevant speech, or after the events that purportedly gave rise to the probable cause occurred. The fact that "criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something" can make it too easy to arrest a critic on the spot. *Nieves*, 139 S. Ct. at 1730 (Gorsuch, J., concurring in part and dissenting in part). And the risk becomes even greater as time passes. Though "there are more criminal laws than anyone could know," Paul Larkin & Michael Mukasey, *The Perils of Overcriminalization*, The Heritage Foundation 2 (Feb. 12, 2015), https://thf_media.s3.amazonaws.com/2015/pdf/LM146.pdf, a suitably motivated government official can come to know more and more of them with enough time.

This includes laws targeting everyday, innocuous activity. For example, laws across the United States make it illegal to wear saggy pants,[2] spit in a public

[2] *See, e.g.*, Abbeville, La. Code of Ordinances § 13-25; William C. Vandivort, *The Constitutional Challenge to "Saggy" Pants Laws*,

park,[3] or barbecue in one's front yard.[4] *See generally* Arielle W. Tolman & David M. Shapiro, *From City Council to the Streets: Protesting Police Misconduct After* Lozman v. City of Riviera Beach, 13 Charleston L. Rev. 49, 60–61 (2018). Traffic laws, too, provide officers with "essentially unfettered" discretion to arrest. *See* Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 Vand. L. Rev. 1497, 1503 (2007).

The laws that often govern mass assemblies are also capacious, placing protesters at particular risk. Typical "unlawful assembly" ordinances, for example, require only a conclusion that the "participants are at some point planning to engage in forceful or violent lawbreaking." John Inazu, *Unlawful Assembly as Social Control*, 64 UCLA L. Rev. 2, 7 (2017).[5] Such ordinances allow police to use their discretion to arrest upon an inference of "*possible* future illegal activity." Olalekan N. Sumonu, *Shot in the Streets, Buried in*

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75 Brook. L. Rev. 667, 673 (2009) (cataloging saggy pants ordinances across the country).

[3] *See, e.g.*, N.Y. Comp. Codes R. & Regs. Tit. 21, § 9003.21 ("It shall be unlawful for any person to spit or expectorate in any park."); Goodyear, Al. Code of Ordinances § 11-1-15 ("It is unlawful for any person to spit upon any of the public sidewalks or crosswalks in the City . . . or any park in the City.").

[4] *See, e.g.*, Berkeley, Mo. Code of Ordinances § 210.2250, https://ecode360.com/31778191.

[5] *See, e.g.*, Idaho Code § 18-6404 ("Whenever two or more persons assemble together to do an unlawful act, and separate without doing or advancing toward it, or do a lawful act in a violent, boisterous or tumultuous manner, such assembly is an unlawful assembly").

Courts: An Assault on Protester Rights, 52 Seton Hall L. Rev. 1569, 1577 (2022). In St. Louis, for example, "an individual officer can decide, in his or her discretion, to declare an unlawful assembly, and there are no guidelines, rules, or written policies with respect to when an unlawful assembly should be declared." *Ahmad v. City of St. Louis*, No. 4:17-cv-2455, 2017 WL 5478410, at *6 (E.D. Mo. Nov. 15, 2017), *modified on other grounds*, 995 F.3d 635 (8th Cir. 2021).

Police have used their discretion under unlawful assembly ordinances to target "civil rights workers, antiabortion demonstrators, labor organizers, environmental groups, Tea Party activists, Occupy protesters, and antiwar protesters." Inazu, *supra*, at 5; *see also* Civ. Rts. Div., U.S. Dep't of Just., *Investigation of the Ferguson Police Department* 27 (Mar. 4, 2015) (reporting that in 2014, the City of Ferguson "settled a[] suit alleging that it had abused its loitering ordinance . . . to arrest people who were protesting peacefully on public sidewalks").[6]

The same is true of disorderly conduct ordinances. For example, police arrested an antiabortion protester under Oklahoma's disorderly conduct ordinance for picketing outside an abortion clinic and saying "abortion is murder." *Lewis v. City of Tulsa*, 775 P.2d 821, 823 (Okla. Crim. App. 1989). The morning of the trial, the City amended the charge to Disturbing the Peace by Abusive or Violent Language,

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[6] Available at https://www.justice.gov/sites/default/files/opa/pressreleases/attachments/2015/03/04/ferguson_police_department_report.pdf.

and at the end of trial, the City amended it back to Disorderly Conduct. *Id.* The Oklahoma Court of Criminal Appeals ultimately reversed the protester's conviction, reaffirming that "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* (quoting *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972)).

Thus, government actors seeking to chill speech or retaliate against dissidents will have little difficulty finding probable cause to arrest protestors for something—particularly if given enough time.

II. Even if *Nieves* applies beyond ad hoc arrests, the objective evidence necessary to overcome the probable-cause bar is not limited to direct comparative evidence.

Even if this Court were to expand the *Nieves* exception to apply beyond on-the-spot, warrantless arrests, Petitioner's claim should be allowed to proceed because, even though she does not allege a lack of probable cause for her arrest, she has alleged objective evidence of retaliatory treatment.

Mindful of imposing "unyielding requirement[s]" that would be "insufficiently protective of First Amendment rights," this Court held in *Nieves* that retaliation claims arising from ad hoc arrests can proceed even where plaintiffs allege that "officers have probable cause to make arrests," as long as they also allege that officers "typically exercise their discretion not to do so." *Nieves*, 139 S. Ct. at 1727. The Court specifically called for allegations of "objective" evidence, resisting inquiries that would look at the arresting officer's subjective intent. *Id.* (using the

word "objective" three times). But, unlike the court below, it did not limit that universe only to "comparative evidence" of individuals "who engaged in the 'same' criminal conduct but were not arrested." Pet. App. 29a.

In order to show that the arrest at issue in this case was retaliatory, Ms. Gonzalez alleged that the documents-tampering law had never before been used to charge *anyone* for purportedly attempting to steal (or misplacing) a nonbinding expressive document, much less a petition they themselves had prepared. *Id.* at 23a. She also alleged that the defendants skirted ordinary procedures to ensure that, rather than go through typical processing and booking processes, she would have to spend time in jail. *Id.* at 114a–115a.

These allegations should have been enough. But under the Fifth Circuit's view they were not, because Ms. Gonzalez failed to "offer evidence of other similarly situated individuals who mishandled a government petition but were not prosecuted under the [document-tampering statute]." *Id.* at 11a. Her allegations "that virtually everyone prosecuted under [the law] was prosecuted for conduct different from hers," the court held, did not suffice because it would have required drawing an "inference . . . that because no one else has been prosecuted for similar conduct, her arrest must have been motivated by her speech"—something the court read *Nieves* to foreclose. *Id.* at 29a.

This interpretation of *Nieves* is unduly restrictive. It would require dismissal of many claims initiated by plaintiffs arrested for commonplace activity that typically goes unpunished.

This is perhaps most obvious, where, as here, the rule is applied to conduct that is not easily visible to others. As Judge Oldham noted in dissent below, "government employees routinely—with intent and without it—take stacks of papers before, during, and after meetings." *Id.* at 10a. Thus, "there should be dozens if not hundreds of arrests of officeholders and staffers during every single legislative biennium—to say nothing of the hundreds if not thousands of arrests during the more-frequent local-government meetings across the State." *Id.* at 60a. Instead, there was only one: Ms. Gonzalez's.

Traffic violations offer another illustrative example. Many infractions—not wearing a seatbelt or driving with an open container—occur within the privacy of one's own vehicle, and interactions that occur during traffic stops are typically not publicly observable. Thus, it would be exceedingly difficult, if not impossible, for an individual arrested during a traffic stop to obtain evidence that others who were pulled over for the same traffic infraction but who were not known critics of the government were not arrested.

Even when it comes to more public activity, including the hypothetical jaywalker that this Court used to illustrate the necessity of allowing objective evidence of retaliation to overcome the probable-cause bar, "[i]t's not clear that there will always (or ever) be available comparative evidence." Pet. App. 12a (Oldham, J., dissenting). Such a rule could require plaintiffs to gather, for example, video of other jaywalkers at the same crosswalk in similar traffic conditions who were not arrested, or testimony from officers demonstrating the number of instances in

which they let jaywalkers pass by. Rather than rely on such evidence, "the retaliatory-arrest-jaywalking plaintiff always (or almost always) must appeal to the commonsense proposition that jaywalking happens all the time, and jaywalking arrests happen virtually never (or never)." *Id.*

Besides creating a functionally insurmountable barrier for many plaintiffs, diminishing *Nieves'* requirement of objective evidence to only direct comparators would force courts to ignore glaring objective indicators of differential treatment—including, as here, significant procedural irregularities with punitive effects. That defies logic, and, if adopted, would drastically diminish the very First Amendment protections the *Nieves* Court sought to preserve.

Retaliatory-arrest plaintiffs will often be unable to prove that other people have engaged in the exact same conduct that they themselves did for the simple reason that that evidence is often unavailable—especially at the pleading stage. How is Ms. Gonzalez supposed to allege, let alone prove, that other people placed petitions in binders and were not prosecuted? In a situation where the relevant statute has *never* been applied to prosecute similar commonplace behavior, it logically follows that the government has not sought to prosecute others for similar acts. And where ordinary procedures are bypassed to punitive effect, objective evidence suggests that the government has chosen to treat a critic differently.

The Fifth Circuit's rule would also exclude some of the most troubling examples of retaliatory arrest—cases like this one, where officers rely on a novel reading of a criminal law for the first time to arrest a

critic for innocuous conduct (a city council member placing a document she is discussing into a folder). It would incentivize officers to stretch the bounds of vague and broad laws to skirt liability for such arrests. And it could even encourage the introduction of new laws to be used against critics. Such a restriction on the universe of objective evidence that can overcome the presumptive probable-cause bar would leave individuals like Ms. Gonzalez "vulnerable to public officials who choose to weaponize criminal statutes against citizens whose political views they disfavor." Pet. App. 14a.

III. These rules are critically important because the risk that public officials will exploit their discretion to punish critics is real.

The risk that police might exploit their vast discretion to arrest people with whom they disagree is not hypothetical. *See, e.g.*, *Allee v. Medrano*, 416 U.S. 802, 815 (1974) (finding a "persistent pattern of police misconduct" in the enforcement of Texas statutes, including an unlawful assembly law, against activists seeking to organize a farmworkers union).

The U.S. Department of Justice has often found evidence of routine retaliatory arrests in certain departments. DOJ's 2015 report on the Ferguson Police Department (FPD), for example, revealed that "FPD arrests people for a variety of protected conduct: people are punished for talking back to officers, recording public police activities, and unlawfully

protesting perceived injustices."[7] DOJ similarly found that officers of the Baltimore Police Department routinely "unlawfully stop[] and arrest[] individuals for speech they perceive to be disrespectful or insolent."[8] And employees of the Maricopa County Sheriff's Office (MCSO) in Arizona were found to have "engaged in a pattern or practice of retaliating against individuals for exercising their First Amendment right to free speech,"[9] including arresting members of "an organization highly critical" of them.[10]

A recent investigation of the Louisville Metro Police Department (LMPD) similarly revealed that "LMPD officers engage in . . . retaliatory practices against lawful, verbal challenges to police action in different settings against different kinds of people."[11] For example, during the 2020 protests in response to the killings of Breonna Taylor and George Floyd, "LMPD arrested some protesters . . . for vague

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[7] Civ. Rts. Div., U.S. Dep't of Just., *Investigation of the Ferguson Police Department* 24 (Mar. 4, 2015), https://s3.documentcloud.org/documents/1681202/ferguson-police-department-report.pdf.

[8] Civ. Rts. Div., U.S. Dep't of Just., *Investigation of the Baltimore City Police Department* 116 (Aug. 10, 2016), https://www.justice.gov/opa/file/883366/download.

[9] Letter from Thomas E. Perez, Assistant Attorney General, to William R. Jones, Counsel, Maricopa Sheriff's Office, at 13 (Dec. 15, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf.

[10] *Id.* at 14.

[11] Civ. Rts. Div., U.S. Dep't of Just., *Investigation of the Louisville Metro Police Department and Louisville Metro Government* 56 (Mar. 8, 2023), https://www.justice.gov/opa/press-release/file/1573011/download.

subjective reasons, like causing 'annoyance,' 'alarm,' or 'inconvenience.'"[12] And in 2021, nine LMPD officers arrested a Black man "for obstructing a roadway" after he had stood in a crosswalk with a cross protesting police violence earlier that day.[13]

These findings highlight how easy it is for public officials to arrest critics—and illustrate the need for this Court to decline Respondents' invitation to extend Nieves' exception to ordinary First Amendment pleading rules beyond ad hoc arrests.

Specific cases reveal similar dangers. For example, in 2015, Michael Picard was protesting legally near a DUI checkpoint with a sign reading "Cops Ahead: Keep Calm and Remain Silent."[14] Officers brainstormed how they might charge Picard, with one directing another to "have that Hartford lieutenant call me . . . to see if he's got any grudges" against Picard.[15] Another officer suggested, "we can hit him with reckless use of the highway by a pedestrian and creating a public disturbance."[16] After settling on those charges, they resolved to "claim that . . . in backup, we had multiple people . . . they didn't want to stay and give us a statement, so we took our

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[12] *Id.* at 55.

[13] *Id.* at 57.

[14] Amy B. Wang, *Cops Accidentally Record Themselves Fabricating Charges Against Protester, Lawsuit Says*, Wash. Post (Sept. 20, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/09/20/cops-accidentally-record-themselves-fabricating-charges-against-protester-lawsuit-says/.

[15] *Id.* (video at 00:00:50).

[16] *Id.* (video at 00:01:09).

own course of action."[17] Prosecutors indeed charged Mr. Picard with reckless use of a highway by a pedestrian and creating a public disturbance, but eventually dropped the charges. Mem. of Decision on Cross Mots. for Summ. J., *Picard v. Toreno*, No. 3:16-cv-01564-WIG, at 7–8 (D. Conn. Sept. 16, 2019), ECF 92.[18]

Similar abuses also arise in *Nieves*-like situations. Specific examples of such arrests underscore the hazards of requiring direct comparator evidence even for ad-hoc arrests, because victims of retaliation will too often be unable to show that people who engaged in identical conduct but expressed different views were not arrested.

Under the Fifth Circuit's rule, a man arrested in Ferguson for violating a broad "Manner of Walking in Roadway" ordinance because he used profanities with the officer[19] would have to identify individuals who

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[17] *Id.* (video at 00:01:50).

[18] Mr. Picard brought a retaliatory arrest claim against the officers, arguing (in part) that police charged him in retaliation for protesting. *Id.* at 1. On defendants' motion for summary judgment, the court found that "disputed issues of fact preclude[d] a determination that probable cause existed as a matter of law," and "Plaintiff ha[d] adduced evidence from which a reasonable jury could determine that defendants charged plaintiff with an improper retaliatory intent." *Id.* at 23–24. The parties settled in 2020, with the State of Connecticut Agreeing to pay Picard $50,000. *See Picard v. Torneo, Jacobi, Barone*, ACLU of Connecticut, https://www.acluct.org/en/cases/picard-v-torneo-jacobi-barone.

[19] Civ. Rts. Div., U.S. Dep't of Just., *Investigation of the Ferguson Police Department* 4 (Mar. 4, 2015), https://s3.documentcloud.org/documents/1681202/ferguson-police-department-report.pdf.

similarly violated the ordinance but used cleaner language when stopped by an officer or were silent.

Similarly, a man cited for violating a Pontiac noise ordinance while parked at a gas station playing a song titled "Fuck the Police" at a high volume, *Webb v. Slosson*, No. 19-CV-12528, 2020 WL 4201178, at *1 (E.D. Mich. July 22, 2020), and another motorist arrested and jailed under a noise ordinance for talking back to an officer, *Ford v. City of Yakima*, 706 F.3d 1188, 1190–91 (9th Cir. 2013), [20] *abrogated by Nieves*, 139 S. Ct., would have to find examples of others making equally loud noise while communicating different messages who were not arrested.

And "a business owner [arrested] on charges of Interfering in Police Business and Misuse of 911 because she objected to the officer's detention of her employee"[21] could not pursue a First Amendment claim unless she could show that similarly situated business owners who did not seek to report police misconduct were not arrested—an impossible bar.

In order for the First Amendment to protect individuals from one of the most potent forms of government retaliation, this Court should reverse the Fifth Circuit and hold that the existence of probable cause does not bar a retaliatory arrest claim where an

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[20] Before the arrest, the officer stated, "[i]f you run your mouth, I will book you in jail for it," and "you acted a fool . . . and we have discretion whether we can book or release you . . . *your mouth and your attitude talked you into jail*." *Id.*

[21] Civ. Rts. Div., U.S. Dep't of Just., *Investigation of the Ferguson Police Department* 25 (Mar. 4, 2015), https://s3.documentcloud.org/documents/1681202/ferguson-police-department-report.pdf

arrest is allegedly motivated by prior or unrelated speech, where an arrest is not the result of an ad hoc, on-the-spot decision by an officer, and where objective evidence shows retaliatory treatment.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

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Respectfully submitted,

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