No. 22-1025

IN THE

Supreme Court of the United States

SYLVIA GONZALEZ,

Petitioner,

v.

EDWARD TREVINO, II, MAYOR OF CASTLE HILLS, SUED IN HIS INDIVIDUAL CAPACITY; JOHN SIEMENS, CHIEF OF THE CASTLE HILLS POLICE DEPARTMENT, SUED IN HIS INDIVIDUAL CAPACITY; ALEXANDER WRIGHT, SUED IN HIS INDIVIDUAL CAPACITY,

Respondents.

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

BRIEF OF THE LAW ENFORCEMENT ACTION PARTNERSHIP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

The Law Enforcement Action Partnership ("LEAP") is a nonprofit organization whose members include police, prosecutors, judges, corrections officials, and other law enforcement officials advocating for criminal justice and drug policy reforms that will make our communities safer and more just. Founded by five police officers in 2002 with a sole focus on drug policy, today LEAP's speakers bureau numbers more than 300 criminal justice professionals advising on police-community relations, incarceration, harm reduction, drug policy, and global issues. Through speaking engagements, media appearances, testimony, and support of allied efforts, LEAP reaches audiences across a wide spectrum of affiliations and beliefs, calling for more practical and ethical policies from a public safety perspective.

This case presents an important opportunity to ensure that officers who abuse their power to engage in premeditated retaliatory arrests are held accountable. That accountability is essential to maintaining the integrity of law enforcement, building trust in the police, and ultimately keeping the public safe. LEAP and its members thus have an interest in ensuring that the courts remain open to victims of police misconduct and that individuals enjoy robust protections against retaliation for exercising their constitutional rights.

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[1] Pursuant to Supreme Court Rule 37.2, because this brief is filed at least 10 days prior to the deadline, the brief itself suffices as notice. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus* or its counsel made a monetary contribution to this brief 's preparation.

INTRODUCTION AND SUMMARY OF ARGUMENT

Sylvia Gonzalez was a dedicated city councilwoman who made the wrong enemies: her city's mayor and its police chief. To punish her for trying to root out government corruption, they found an excuse to arrest her and send her to jail on a ginned-up misdemeanor charge of tampering with records. Even though the retaliatory intent behind their actions was apparent, the Fifth Circuit held Gonzalez could not make out a First Amendment retaliation claim because there was probable cause to arrest her. Nothing in this Court's precedents compels that remarkable result, and the Fifth Circuit's decision would allow corrupt officers to use their arresting power to punish constitutionally protected speech and conduct with impunity.

In *Nieves v. Bartlett*, this Court held that a First Amendment retaliatory-arrest claim may not lie against an officer who has probable cause to make an arrest under circumstances that require "split-second judgments." 139 S. Ct. 1715, 1724 (2019). Under those limited circumstances, "the content and manner of a suspect's speech may convey vital information—for example, if he is 'ready to cooperate' or rather 'present[s] a continuing threat,'" and an officer's reliance on that information can confound a court's ability to determine whether the arrest was made in retaliation against First Amendment activity.[2] *Ibid.* (citations omitted).

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[2] *Nieves* recognized a "narrow qualification" to its requirement that a retaliatory-arrest plaintiff show the absence of probable cause "for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so."

But this Court has never held that probable cause defeats a claim for First Amendment retaliation when, far from making split-second judgments, government officials act under a plainly "premeditated plan to intimidate [a plaintiff] in retaliation for [her] criticisms of city officials." *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1954 (2018). To the contrary, this Court made clear in *Lozman* that "retaliatory-arrest plaintiffs *can* prevail even when their arrests are supported by probable cause." Pet. App. 63a (Oldham, J., dissenting).

Here, despite a months-long campaign by respondents to gin up an excuse to arrest Gonzalez and send her to jail as punishment for her activism against corruption in her local government, the Fifth Circuit held that Gonzalez's First Amendment retaliation claim could not proceed because she could not show a lack of probable cause for her arrest. *See* Pet. App. 21a. That conclusion is supported neither by this Court's precedents nor by the doctrinal and practical considerations underpinning *Nieves*'s no-probable-cause rule. Outside of the context of split-second arrests made in the face of potential danger, the ordinary rule applies: "[I]f the First Amendment clearly establishes anything, it's that the government cannot arrest a citizen for her petition"—or, for that matter, for any other activity protected by the First Amendment. Pet. App. 61a (Oldham, J., dissenting). And here, there is no doubt that is what happened. At every step of the way, respondents flouted norms and

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139 S. Ct. at 1727. *Amicus* agrees with Gonzalez that this Court should grant review to address the scope of that exception, a significant issue that has divided the courts of appeals. Cert. Pet. i. But *Amicus* focuses on the second, equally important question presented here: whether *Nieves* applies to this case at all. *Ibid.*

abused legal loopholes to ensure that Gonzalez would pay the price for exercising her First Amendment rights. Because this case presents none of the "thorny causation issue[s]" that justify the *Nieves* rule, "probable cause alone" should not have barred Gonzalez's claim. *Novak v. City of Parma*, 932 F.3d 421, 431 (6th Cir. 2019) (Thapar, J.).

The implications of the Fifth Circuit's decision are stark. The ever-growing list of local, state, and federal offenses gives officers a sizeable menu of options if they want to find a pretext for arresting a person engaged in speech, petition, worship, or journalism that they dislike. That arresting discretion can be particularly dangerous to disfavored speakers and members of minority communities, who are especially likely to face official retaliation. Many victims of such retaliation will lack a civil remedy if they are forced to prove the absence of probable cause, depriving them of a valuable tool to hold bad actors accountable. That, in turn, will fray public trust in law enforcement, undercutting police-community relationships and harming public safety in the process. And it will chill First Amendment activity, as individuals will hesitate to freely exercise their rights out of fear that they will be hauled off to jail.

These dangers make it all the more important to be "vigilant" in making sure that officers cannot "concoct[] legal theories to arrest citizens for stating unpopular viewpoints" or exercising their constitutional rights in a way that displeases those in power. Pet. App. 4a (Ho, J., dissenting from denial of rehearing en banc). The Court should grant certiorari.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THAT PROBABLE CAUSE DOES NOT BAR FIRST AMENDMENT CHALLENGES TO PREMEDITATED RETALIATORY ARRESTS.

Viewing itself as constrained by "Supreme Court precedent," the Fifth Circuit held that probable cause defeats a First Amendment retaliatory-arrest claim even when the claim is based on a calculated, premeditated decision to arrest the plaintiff for constitutionally protected behavior. Pet. App. 33a. But nothing in this Court's precedents, which have consistently held that retaliation against protected speech or conduct violates the First Amendment, compels that result. This Court should step in and clarify that the *Nieves* rule—requiring a showing of no probable cause for an allegedly retaliatory arrest—applies only to cases involving split-second arrests, which present uniquely challenging questions regarding causation. Outside of that context, *Nieves* did not disturb the well-settled principle that the government may not arrest a person for exercising her First Amendment rights. *See Wilkie v. Robbins*, 551 U.S. 537, 555 (2007) (underscoring "our longstanding recognition that the Government may not retaliate for exercising First Amendment speech rights").

What Gonzalez experienced here was no split-second decision, and certainly no response to imminent danger. Instead, respondents engaged in a months-long campaign to concoct grounds that would justify arresting her and sending her to jail to punish her for speaking out against corruption. They ultimately succeeded—and so humiliated her that she gave up public office altogether. Given respondents' clearly retaliatory design, this Court's decisions make clear that

Gonzalez's claim should proceed, notwithstanding the fact that her persecutors could come up with probable cause to arrest her under a rarely enforced statute. This case therefore presents an ideal vehicle for this Court to clarify that the *Nieves* rule requiring a plaintiff to prove the absence of probable cause does not apply outside the context of split-second decisions.

A. The First Amendment Prohibits Deliberate, Calculated Retaliatory Arrests Regardless Of Probable Cause.

As Judge Oldham correctly explained, Pet. App. 54a, *Nieves* recognized an exception to the normal rule that the First Amendment prohibits government actors from retaliating against individuals for engaging in protected speech and activity. *Nieves* premised its holding on the fact that officers making arresting decisions in the heat of the moment while facing danger may legitimately need to rely on protected speech to figure out whether to make the arrest, blurring the causal connection between animus and arrest. But neither this Court's precedents nor first principles justify the Fifth Circuit's extension of *Nieves* to deliberate and premeditated retaliatory arrests.

"[T]he law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions" for "engaging in protected" speech or activity. *Nieves*, 139 S. Ct. at 1722; *Hartman v. Moore*, 547 U.S. 250, 256 (2006). That foundational protection against "[o]fficial reprisal for protected speech" reflects the principle that retaliation "offends the Constitution [because] it threatens to inhibit exercise of the protected right." *Hartman*, 547 U.S. at 256 (quoting *Crawford-El v. Britton*, 523 U.S. 574, 589 n.10 (1998)) (alteration in original).

Determining whether government action is in fact retaliatory turns on whether the official acted "based on . . . a retaliatory motive"—in other words, whether "retaliatory animus" "cause[d] the injury." *Nieves*, 139 S. Ct. at 1722. That analysis typically requires a standard but-for causation inquiry. *Ibid.*

In the context of certain allegedly retaliatory arrests, though, this Court has held that the causal chain can be hard to untangle, because an arrest can be motivated either by "animus toward the content of a suspect's speech" or by "wholly legitimate consideration of speech"—like when the speech "suggests a potential threat." *Reichle v. Howards*, 566 U.S. 658, 668 (2012). So, in those cases, the Court has adopted a proxy for a causal link to retaliatory animus: the absence of probable cause for the arrest. If an officer had probable cause, the arrest was likely legitimate, but if he did not—necessarily meaning that his actions were objectively unreasonable—that is "weighty evidence that [his] animus caused the arrest." *Nieves*, 139 S. Ct. at 1723–24.

The Court's holding marked only a narrow departure from the usual rule that retaliation against First Amendment-protected activity is categorically unlawful. In particular, the requirement that a plaintiff show the absence of probable cause was crafted "to accommodate the necessities of split-second decisions to arrest." Pet. App. 54a (Oldham, J., dissenting). Because officers "frequently must make split-second judgments when deciding whether to arrest," the Court observed, it can be hard to wind the clock back on those judgments and assess if an arrest was made to punish protected speech, or because the speech showed that the suspect "present[ed] a continuing

threat." *Nieves*, 139 S. Ct. at 1724 (cleaned up) (citation omitted); *see also id.* at 1725 (noting that the task of conducting an arrest "requires making quick decisions" and so should be reviewed objectively).

Those same concerns do not arise, however, outside the context of split-second decisions made quickly to respond to threats to life or limb. This Court has thus underscored that a claim based on a "premeditated plan to intimidate [the plaintiff] in retaliation for his criticisms of city officials" is "far afield from the typical retaliatory arrest claim." *Lozman*, 138 S. Ct. at 1954. In such circumstances, the causal "difficulties that might arise" in "the mine run of arrests"—which involve "ad hoc, on-the-spot decision[s] by . . . individual officer[s]"—"are not present." *Ibid.*

This distinction between spur-of-the-moment and planned-out arrests makes sense. Determining the cause of an arrest that is made as part of a deliberate premeditated effort to interfere with constitutionally protected activity—such as speech, petition, worship, or newsgathering—is a far more straightforward task than untangling the motivations behind an officer's instantaneous reaction to potential or actual danger. After all, "[w]hen public officials are forced to make split-second, life-and-death decisions in a good-faith effort to save innocent lives, they deserve some measure of deference." *Wearry v. Foster*, 52 F.4th 258, 259 (5th Cir. 2022) (Ho, J., concurring in denial of rehearing en banc). Because they must make those "split-second judgments" in "circumstances that are tense, uncertain, and rapidly evolving," it is often difficult—and inappropriate—to scrutinize their motivations "with the 20/20 vision of hindsight." *Plumhoff v. Rickard*, 572 U.S. 765, 774–75 (2014) (citation omitted).

By contrast, "when public officials make the deliberate and considered decision to trample on a citizen's constitutional rights," the causal link between animus and injury is far more likely to be clear, in which case "they deserve to be held accountable." *Wearry*, 52 F.4th at 259 (Ho, J., concurring in denial of rehearing en banc); *see also Cole v. Carson*, 935 F.3d 444, 472 (5th Cir. 2019) (Willett, J, dissenting) (similar). In other words, officials who "have time to make calculated choices" about infringing on constitutional rights should not "receive the same protection as a police officer who makes a split-second decision" to initiate an arrest to head off or stop danger. *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., concurring in denial of certiorari).

The Fifth Circuit failed to recognize this vital distinction, instead holding that *Nieves* applies across the board regardless of whether an arrest occurred in the heat of the moment or as part of a premeditated scheme. Pet. App. 27a–29a. But "[t]he *Nieves* Court framed the *entirety* of [its] rule" around the causal challenges presented by split-second arresting decisions. Pet. App. 54a (Oldham, J., dissenting) (citing *Nieves*, 139 S. Ct. at 1724–25). There is thus no reason to apply its absence-of-probable-cause requirement—which the Court "designed for split-second warrantless arrests"—to a "deliberative, premedi[t]ated, weeks-long conspiracy." Pet. App. 54a (Oldham, J., dissenting).

Instead, the governing rule in cases involving calculated retaliatory arrests is *Lozman*'s recognition that "premeditated plan[s]" to arrest individuals for their constitutionally protected activity do not present the same challenges in determining whether retaliatory animus caused an arrest. 138 S. Ct. at 1954. The

simple rule there is the one that generally governs in retaliation cases: "[T]he First Amendment prohibits government officials from retaliating against individuals for engaging in protected speech." *Id.* at 1949.

The Fifth Circuit recognized the "forceful case" for that conclusion, which Judge Oldham persuasively laid out in dissent. Pet. App. 33a. But the majority believed itself "bound" by its misguided reading of *Nieves*. *Ibid.* This Court alone can steer the law back on course by clarifying the meaning of *Nieves*. The Court should grant the petition and do just that.

B. This Case Illustrates The Absurd Consequences Of Applying *Nieves* To Calculated Retaliatory Arrests.

This lawsuit exemplifies how determining whether an arrest was caused by retaliatory animus is far more "straightforward" outside the context of split-second arrests. *Nieves*, 139 S. Ct. at 1722. And the startling result in this case underscores why review is warranted.

Gonzalez's arrest for exercising her First Amendment rights to free speech and petition presents none of the "causal complexities" that may hinder the resolution of retaliation claims in the context of split-second arrest decisions. *Id.* at 1723. From start to end, respondents planned out ways to evade protocol and common practice in order to retaliate against Gonzalez for her First Amendment activity. Pet. App. 102a–103a. The blatant impropriety of this extensive misconduct makes evident that the arrest was purely retaliatory and had no basis in legitimate law-enforcement efforts—even though respondents found a pretext for probable cause. This case therefore provides

a compelling opportunity for this Court to address the scope and limits of *Nieves*.

After Gonzalez was elected to the Castle Hills city council, she helped organize a petition calling for the removal of the corrupt city manager. Pet. App. 106a–107a. In response, the city manager—in cahoots with political and law-enforcement leaders—put in motion a criminal investigation to find an excuse to charge Gonzalez with a crime, all so that they could remove her from office. *Id.* at 99a–100a.

The improper—and retaliatory—nature of the investigation is obvious through and through. The officer initially assigned to the matter came up with nothing after a month investigating Gonzalez. *See* Pet. App. 112a–114a. Police Chief John Siemens refused to let a proper investigation get in his way, though. Instead, he brought in a trusted friend to investigate anew: Alex Wright, a private attorney whom he named Special Detective. *Id.* at 113a.

Whatever the merits in other contexts of recruiting outside help to investigate, the decision here was plainly driven by a desire to retaliate. Police departments will turn to special detectives with expertise in areas such as interviewing, maintaining relationships with witnesses and suspects, and identifying sources of intelligence. *See* Anthony A. Braga et al., *Moving the Work of Criminal Investigators Towards Crime Control* 3 (2011), bit.ly/3NmwP9w. "With their special knowledge and skill set, investigators can advise uniformed patrol officers on the nature of local crime problems and supplement their crime-control efforts with their expertise." *Ibid.*

Here, however, Chief Siemens did not select Wright for any special expertise; there was nothing uniquely challenging about the investigation that

warranted a call for outside help. Rather, he brought on Wright precisely because of their close personal relationship. Pet. App. 113a–114a.

And the move produced its intended result: Wright recommended a misdemeanor charge for tampering with a government record, on the basis that Gonzalez had attempted to steal the very petition she participated in creating and organizing. Pet. App. 107a–110a, 114a. Wright's affidavit to support the warrant application left no doubt as to the role of Gonzalez's constitutionally protected activity in the decision to arrest her: It explicitly cited Gonzalez's public criticism of the city manager—i.e., her speech and petition—to justify it. *Id.* at 115a–116a.

The conspirators needed a criminal act with which to charge Gonzalez. And so Castle Hills Mayor Edward Trevino and Chief Siemens collaborated with councilmembers and the police to ensure that Gonzalez would be caught with the petition in her possession, so they could accuse her of attempting to take it out of government offices. *Id.* at 107a–110a.

That close-knit scheming between the mayor and the police department raised additional red flags. The Texas Administrative Code emphasizes that a law enforcement officer "is never the arm of any political party or clique" and should not act under the influence of any special favors or allegiances. 37 Tex. Admin. Code § 1.113(1), (9) (2023). And a mayor likewise has a number of law enforcement responsibilities—including an obligation to "actively ensure that the laws and ordinances of the city are properly carried out." Tex. Mun. League, *2022 Handbook for Mayors and Councilmembers* 18 (2022), bit.ly/3Lbnmzv.

Rather than heed their duties, Mayor Trevino and his collaborators weaponized the police department to

further their crusade against Gonzalez. The mayor coordinated with a police captain to question Gonzalez about her petition and catch her with the document in her possession. Pet. App. 108a–112a. And Chief Siemens abused his authority by acting as the extended arm of the mayor and giving him special consideration at Gonzalez's expense.

The conspirators also took multiple unorthodox steps to ensure that they could arrest Gonzalez and send her to jail—even if briefly—to further punish her for her anti-corruption campaign. For instance, Wright opted to secure a bench warrant for Gonzalez's arrest to ensure that she would have to go to jail. Pet. App. 114a–116a. In Texas, warrants are usually reserved for apprehending violent offenders. *E.g.*, *Rodriguez v. State*, 2018 WL 4225018, at *3 (Tex. Ct. App. Sept. 6, 2018) (arrest warrant issued for suspected capital murder). People suspected of nonviolent crimes, meanwhile, typically receive a summons instead, which "serve[s] the same purpose" as an arrest warrant but "spar[es] the defendant embarrassment" by allowing them to avoid a jail trip and "save[s] the State time, effort, and expense." *Gallegos v. State*, 971 S.W.2d 626, 628 (Tex. Ct. App. 1998). Gonzalez's alleged crime was obviously nonviolent, but Wright flouted law-enforcement norms to guarantee that she would spend time in a jail cell.

To ensure they would get a bench warrant and not a summons, Wright and his collaborators left the district attorney's office out of the loop when seeking the warrant—"even though [involving prosecutors is] the normal procedure." Pet. App. 39a (Oldham, J., dissenting); *cf., e.g.*, *State v. Drummond*, 501 S.W.3d 78, 80 (Tex. Crim. App. 2016) (assistant district attorney presenting probable cause affidavit to magistrate to

obtain an arrest warrant for the offense of official oppression). They instead relied on a procedure "typically reserved for violent felonies or emergency situations" and went straight to a magistrate judge with their warrant application. Pet. App. 39a (Oldham, J., dissenting). *But see, e.g.*, *Flores v. State*, 367 S.W.3d 697, 698 (Tex. Ct. App. 2012) (even in murder case, assistant district attorney involved in arrest warrant process).

This maneuver allowed the police chief and his conspirators to evade the independent-minded scrutiny of a prosecutor and pull off the arrest and incarceration without interference. "[T]here can be little doubt that the DA [district attorney] would've stopped [the scheme] if given the chance: After all, when the DA's office finally learned of the charges and reviewed them, it immediately dismissed them." Pet. App. 39a (Oldham, J., dissenting).

The conspirators' failure to consult with the district attorney's office was highly unorthodox and further evidence of improper motives. District attorneys play a key part in the investigatory process; because the decision to charge is the prosecutor's, national guidelines recommend that they be intimately involved with investigations even before charges are filed. *See* Nat'l Dist. Att'ys Ass'n, *National Prosecution Standards* § 2-5.6 (3d ed. 2009), bit.ly/3AsBgIv (prosecutors "should serve in . . . an advisory capacity" during "the investigation of criminal cases" "to promote lawful investigatory methods that will withstand later judicial inquiry"). And even when officers can initiate criminal proceedings directly, they "should be required to present the complaint for prior review by the prosecutor." Am. Bar Ass'n, *Criminal Justice Standards: Prosecution Function* § 3-4.1

(2017), bit.ly/3oE0UqZ. All those norms went out the window here.

Bypassing the district attorney advanced respondents' scheme to put Gonzalez in jail in more ways than one. It also prevented Gonzalez from invoking the satellite booking function, which enables those with outstanding warrants for nonviolent offenses to be processed without physically going to jail. Pet. App. 39a (Oldham, J., dissenting); Pet. App. 115a.

As a result of this carefully devised scheme, respondents made certain that the 72-year-old Gonzalez would spend time behind bars. Even though all charges were eventually dropped, Gonzalez came away humiliated, and her physical and mental health suffered. *See* Pet. App. 125a, 129a. She then withdrew from public participation, giving up her council seat—and dropping her engagement in her community's civic life. Pet. App. 123a–125a. Just as respondents hoped all along.

The allegations here leave no doubt that this arrest was indeed retaliatory. Respondents collaborated to ensure that Gonzalez would be caught with the petition in her possession; they relied on a "special investigator" who was a friend of the police chief to manufacture a sham criminal charge; and they circumvented the district attorney and ordinary rules of the road in order to maintain their plot and ensure Gonzalez landed up in a jail cell. On the pleadings, it is difficult to imagine a stronger claim of retaliatory animus. Yet the Fifth Circuit's strained reading of *Nieves* rendered that claim a nonstarter on the ground that the arrest was supported by probable cause. Granting certiorari is essential to preventing future arrests like this one from suppressing First Amendment activity.

II. THE FIFTH CIRCUIT'S RULE WILL HAVE SIGNIFICANT NEGATIVE RAMIFICATIONS FOR LAW ENFORCEMENT AND THE PUBLIC.

The dramatic expansion of criminal codes across the country has made it easier than ever for a law enforcement officer who wishes to punish a person for engaging in protected First Amendment activity to find probable cause for *some* criminal violation on which to base an arrest. Civil lawsuits against officers who are engaged in premeditated, retaliatory arrests serve as a critical check on this kind of misconduct.

Unless this Court intervenes, however, the Fifth Circuit's decision will insulate officers from accountability in many cases of deliberate retaliation. Allowing that shield to stand will in turn undermine public trust in law enforcement, making it harder for the vast majority of honest officers to do their job and keep their communities safe. It will also chill First Amendment-protected speech and activity, especially among those who hold views disfavored by government actors. These dangers illustrate why the decision below cannot stand.

A. Barring Civil Liability Will Deprive The Public Of A Key Deterrent Against The Growing Threat Of Retaliatory Arrests.

Retaliatory arrests have become an increasingly common occurrence. *See* Pet. App. 4a (Ho, J., dissenting from denial of rehearing en banc) (the risk of retaliatory arrests "has never been more prevalent than today"); Amanda D'Souza et al., *Federal Investigations of Police Misconduct: A Multi-City Comparison*, 71 Crime, L., & Soc. Change 461, 474 (2019) ("[a] troublesome finding in all [federal investigations over the past two decades] was officers' retaliatory actions

against citizens"). This trend is a byproduct of the ever-growing size of modern criminal codes. *See* GianCarlo Canaparo et al., Heritage Found., *Count the Code: Quantifying Federalization of Criminal Statutes* 3 (2022), bit.ly/3Lcpve2 (showing that the number of statutory provisions creating a federal crime increased by 36% between 1994 and 2019); James R. Copland & Rafael A. Mangual, Manhattan Inst., *Overcriminalizing America* 4 (2018), bit.ly/41CLNfT ("common problems in state criminal law" include "[t]oo many crimes on the books"). Coupled with the growth of the administrative state—which has made crimes out of all manner of regulatory infractions—the number of crimes on the books that a person might commit has steadily risen for decades. *See* Susan E. Dudley, *Milestones in the Evolution of the Administrative State*, Daedalus, Summer 2021, at 33, 33 ("The modern administrative state, as measured by the number of agencies . . . and the number of regulations they issue, has grown significantly over the last hundred years.").

An officer who may be inclined to punish a disfavored speaker—or journalist, or petitioner, or worshipper—can therefore readily find a minor offense they committed and use that to justify an arrest. For instance, this Court recently observed that jaywalking is "endemic but rarely results in arrests." *Nieves*, 139 S. Ct. at 1727. But an officer seeking to punish, for example, "an individual who has been vocally complaining about police conduct" can exercise his discretion and arrest that person if they jaywalk. *Ibid.*

Broad arresting powers in the wrong hands can be used to disproportionately burden disfavored groups. As here, public officials acting in bad faith can use their law-enforcement discretion "to arrest citizens for

stating unpopular viewpoints"—even though the expression of dissenting perspectives "is essential to our form of self-government." Pet. App. 4a (Ho, J., dissenting from denial of rehearing en banc); *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038, 2049 (2021) (Alito, J., concurring). And the ill effects of retaliatory arrests are especially likely to fall on individuals in minority communities. *See* Ellen S. Podgor, *The Dichotomy Between Overcriminalization and Underregulation*, 70 Am. Univ. L. Rev. 1061, 1065 (2021) (observing that overcriminalization "provides increased choices to prosecutors," which "can result in disparities, especially to poor and minority members of society").

Civil lawsuits are a vital check against police officers engaging in premeditated retaliatory arrests. Indeed, this Court has repeatedly recognized that civil suits help "to hold public officials accountable when they exercise power irresponsibly." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *accord Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (acknowledging "the importance of a damages remedy to protect the rights of citizens"). This element of accountability ensures that the "government will respond to the will of the people." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 301 (1964) (Goldberg, J., concurring); *cf. Harris v. Pittman*, 927 F.3d 266, 282–83 (4th Cir. 2019) (Wilkinson, J., dissenting) ("Police officers do overreach. And when they do, the law must hold them to account.").

The Fifth Circuit's rule would close the courthouse doors on many deserving plaintiffs who are deliberately punished for exercising their First Amendment rights by officers who—despite having probable cause for an arrest—clearly acted on retaliatory animus.

That outcome would only further contribute "to the deep deficit in police accountability throughout our country." Joanna C. Schwartz, *After Qualified Immunity*, 120 Colum. L. Rev. 309, 312 n.8, 313 (2020). And the lack of accountability would harm police departments, too: Exposure to civil liability provides incentives to improve police performance and reduce constitutional violations; allows them to gather information about misconduct and illegal uses of force; and helps gather data that fills gaps in internal reporting systems, such as unearthing more conclusive evidence in excessive-force lawsuits. Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 Cardozo L. Rev. 841, 845–46 (2012).

Other consequences for rogue officers—such as internal discipline—are inadequate alone to stamp out bad-faith, unconstitutional behavior. *See id*. at 862–74; *Crouse v. Town of Moncks Corner*, 848 F.3d 576, 589 (4th Cir. 2017) (Motz, J., concurring) ("Serious allegations of misconduct sometimes go unanswered, and officers who abuse their power sometimes go undisciplined."). Failing to clarify the limits of *Nieves* would deprive many individuals of a crucial way to hold accountable officers who retaliate against them for engaging in constitutionally protected behavior.

B. The Fifth Circuit's Decision Will Undermine Trust In The Police And Interfere With Public Safety.

Allowing officers who carry out deliberate, premeditated retaliatory arrests to avoid liability will diminish the public's trust in and cooperation with good-faith law enforcement efforts. Trust in the police has already been on the decline over the past two decades, especially in minority communities. *See* Jeffrey M. Jones, *In U.S., Black Confidence in Police Recovers*

From 2020 Low, Gallup (Jul. 14, 2021), bit.ly/3V9qb8H. But police officers are supposed to "occupy positions of great public trust and high public visibility." *Gilbert v. Homar*, 520 U.S. 924, 932 (1997). If those who violate that trust are not held responsible—a likely consequence of the Fifth Circuit's ruling—that will only exacerbate existing tensions between law-abiding police officers and their communities. That, in turn, will undermine law enforcement's ability to maintain public safety.

"Effective police work, including the detection and apprehension of criminals, requires that the police have the trust of [their] community" and that the public believe that police departments "will use [their] powers responsibly and adequately discipline officers who do not." *Reynolds v. City of Chicago*, 296 F.3d 524, 530 (7th Cir. 2002) (Posner, J.); *Crouse*, 848 F.3d at 589 (Motz, J., concurring). Members of the public need to believe in the good faith of officers so they feel comfortable calling on law enforcement to help in emergencies and aiding police investigations. *See Duncan v. Becerra*, 970 F.3d 1133, 1161 (9th Cir. 2020) (noting that "some people, especially in communities of color, do not trust law enforcement and are less likely . . . to call 911 even during emergencies"), *overruled on other grounds*, 142 S. Ct. 2985 (2022). And police officers need to feel trusted by the people they serve to do their jobs effectively. *See Harris*, 927 F.3d at 286–87 (Wilkinson, J., dissenting).

Those police-community relations fray, however—and the public's trust is diminished—when officers engage in misconduct without facing any consequences. Even the bad acts of a small number of officers will hinder community trust in the police, the vast majority of whom carry out their jobs with dignity and

honor. U.S. Dep't of Justice, *Building Trust Between the Police and the Citizens They Serve* 17 (2009), bit.ly/3LwqCGS. The Fifth Circuit's rule, by shielding from liability officers who "exploit the arrest power as a means of suppressing speech," *Lozman*, 138 S. Ct. at 1953, will further undermine trust in the police and officers' ability to fulfill their duties to the public.

This loss of trust will have major downstream effects. If people do not feel comfortable calling on the police in a crisis, that will threaten public safety. Andrew Goldsmith, *Police Reform and the Problem of Trust*, 9 Theoretical Criminology 443, 443 (2005) ("Without public trust in police, 'policing by consent' is difficult or impossible and public safety suffers."). And if community members are less likely to cooperate in police investigations, police officers will find it harder to conduct their duties in the future. *See, e.g.*, David S. Kirk et al., *The Paradox of Law Enforcement in Immigrant Communities: Does Tough Immigration Enforcement Undermine Public Safety?*, 641 Annals of Am. Acad. of Pol. & Soc. Sci. 79, 79 (2012) (lawless actions by officers "undermine[] individuals' willingness to cooperate with the police and engage in the collective actions necessary to socially control crime"). These costs are likely to be significant: A lack of trust in the police is correlated with an increase in gun violence in communities, which in turn fuels a cycle of over-enforcement of minor misdemeanors, further eroding trust in the police and fueling violence in communities. Abene Clayton, *Distrust of Police is Major Driver of U.S. Gun Violence, Report Warns*, Guardian (Jan. 21, 2020), bit.ly/41CFwAV. A rule that promotes accountability for the minority of bad-faith actors in law enforcement, by contrast, promotes public confidence in the integrity of the criminal justice system.

C. Failing To Prohibit Premeditated Retaliatory Arrests Will Chill First Amendment-Protected Activity.

The Fifth Circuit's holding is likely to have a chilling effect on speech and other activity protected by the First Amendment. Individuals may choose to abstain from speaking—or petitioning the government, or conducting newsgathering activities, or engaging in religious exercise—if they fear that law enforcement may punish them with impunity for exercising their constitutional rights.

When the government takes adverse action based on an individual's First Amendment activity, their "exercise of [protected] freedoms" is "in effect . . . penalized and inhibited." *Perry v. Sinderman*, 408 U.S. 593, 597 (1972). And "[t]o state that arresting someone in retaliation for their exercise of free speech rights is sufficient to chill speech is an understatement." *Lacey v. Maricopa County*, 693 F.3d 896, 917 (9th Cir. 2012) (cleaned up) (citations omitted). This case exemplifies those effects: For Gonzalez, the experience of being arrested for lawful speech and petitioning was so harrowing that she abandoned her legislative efforts entirely and withdrew from public service. Pet. App. 124a.

The free exchange of ideas will also be hampered unless individuals know they can exercise their First Amendment rights free from government penalty—and that if they are punished, they will have legal recourse against it. Open and active discussion of matters of public import is "a fundamental principle of our constitutional system," *Stromberg v. California*, 283 U.S. 359, 369 (1931), but it cannot flourish if government actors can stomp out disfavored voices. *See Matal v. Tam*, 582 U.S. 218, 253–54 (2017) (Kennedy,

J., concurring in part and concurring in judgment) ("A law that . . . can be turned against minority and dissenting views" works "to the detriment of all.").

It therefore "falls on the judiciary" to "make certain that law enforcement exercise their significant coercive powers to combat crime—not to police political discourse." Pet. App. 5a (Ho, J., dissenting from denial of rehearing en banc). The First Amendment demands nothing less.

CONCLUSION

The petition for a writ of certiorari should be granted.

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