NO. 22-1025

IN THE

Supreme Court of the United States

SYLVIA GONZALEZ,

Petitioner,

v.

EDWARD TREVINO, II, ET AL.,

Respondents.

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

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Michel Paradis
Counsel of Record
Rebecca Meyer
CURTIS, MALLET-PREVOST, COLT & MOSLE LLP
101 Park Avenue
New York, NY 10178
(212) 696-6078
mparadis@curtis.com
Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are seven law professors who write and teach on the First Amendment and criminal justice. *Amici* have no personal interest in this case. *Amici's* sole interest is in the rational and coherent development of the law governing law enforcement practices targeted at conduct that implicates core First Amendment rights.

A full list of *Amici* is provided in the appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

Sylvia Gonzalez, a 72-year-old retired woman, became involved in local politics only to be arrested and harassed for espousing her and hundreds of her constituents' views through normal political channels. Taking her allegations in the complaint as true, Ms. Gonzalez was plainly arrested in retaliation for her political speech. In barring her from seeking redress from those local government officials who were responsible for this retaliatory arrest, the Fifth Circuit misconstrued this Court's precedent in a way that, if upheld, would have grave consequences for Americans' First Amendment rights.

This Court has traditionally looked to the probable cause requirement as the constitution's principal protection against arbitrary arrest, which led the

---

[1] Because the brief is being filed at least 10 days prior to the deadline, the brief itself serves as notice to counsel of record for all parties. No counsel for any party authored this brief in whole or in part, and no person or entity made a monetary contribution intended to fund the preparation or submission of this brief, which was prepared and submitted by counsel for the named law professors on a *pro bono* basis.

Court in *Nieves* v. *Bartlett*, 139 S. Ct. 1715 (2019), to hold that probable cause is generally sufficient to defeat a civil claim for retaliatory arrest. It based this ruling, not on the text of the First Amendment, which has no probable cause requirement, but in deference to "split-second judgments" police officers must make when confronting criminal suspects and the importance of objective standards in regulating the "dangerous task" of policing, when officers are forced to make "quick decisions in 'circumstances that are tense, uncertain, and rapidly evolving.'" *Nieves*, 139 S. Ct. at 1727 (quoting *Graham* v. *Connor*, 490 U.S. 386, 397 (1989)). In the context of day-to-day law enforcement, the probable cause requirement ensures that policing is subject to objective standards of reasonableness and reciprocally protects police officers from personal liability for real-time judgments about what public safety requires.

But probable cause is not a meaningful constraint when governmental actors have the time and incentive to search the criminal code for pretexts to target disfavored individuals and groups. *Nieves*, 139 S. Ct. at 1730 (Gorsuch, J., concurring in part and dissenting in part) ("[C]riminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something."); Tim Wu, *American Lawbreaking: Introduction*, Slate.com (October 14, 2007) (there are "incredibly broad yet obscure crimes that populate the U.S. Code like a kind of jurisprudential minefield"); Harvey A. Silverglate, *Three Felonies a Day: How the Feds Target the Innocent*, Introduction (2009) ("[T]he average busy professional in this country wakes up in the morning, goes to work, comes home, takes care of personal and family obligations, and then goes to sleep, unaware than he or she likely committed

several crimes that day."). The vast array of federal, state, and municipal crimes, as well as the voluminous regulatory provisions backed by criminal penalties ensure that a crime can be found for anyone.

Probable cause is a necessary condition to ensure individual liberty, but it is far from sufficient when it is so easily conjured. Hence, in *Nieves*, this Court was careful to qualify the general rule of immunity that police officers enjoy from civil liability when their arrests are supported by probable cause. Where "a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been[,]" then probable cause alone is not enough. *Nieves*, 139 S. Ct. at 1725. In such cases, the presumption that police conduct is directed at the good faith enforcement of the criminal laws is overcome because the objectively identifiable arbitrariness of enforcement discretion betrays the intent to suppress speech.

This vital limit on *Nieves*, announced by the Court when it decided the case, is essential to ensure that government officials mere ability to manufacture probable cause does not become a license to infringe citizens' First Amendment rights.

The question that divides the circuits and which this Court must resolve is what showing plaintiffs must make to demonstrate that they were arrested when others were not. The Fifth Circuit's rule, which requires plaintiffs to come forward with specific empirical evidence demonstrating a routine failure to arrest similarly situated individuals, requires plaintiffs to prove a negative and thus imposes an impossible burden.

The proper focus of the relevant inquiry, as this Court held in *Nieves*, is the identification of objective circumstances that "prove or disprove the causal connection between animus and injury." *Nieves*, 139 S. Ct. at 1725. While empirical comparators may, in certain circumstances, be relevant and even sufficient to demonstrate such a connection, this Court has never held that an objective inquiry into reasonableness rises or falls on a plaintiff's capacity to muster statistics. Instead, in every other context, it asks whether the government officials' actions were "objectively reasonable in light of the facts and circumstances confronting them." *Graham*, 490 U.S. at 397.

That objective reasonableness inquiry cannot be made to depend on crime statistics that will only rarely (if ever) exist. It must depend, as it does in every other comparable context, on the facts and circumstances surrounding the decision-making process. That is particularly important in a case like this one, which does not involve routine policing, but instead, like *Lozman* v. *City of Riviera Beach*, 138 S. Ct. 1945 (2018), involves concerted action between law enforcement and policy makers done with the intent to chill and retaliate against speech.

Nieves is predicated on the idea that government officials are making "split-second judgments." But when government officials instead work deliberately over a prolonged period of time (in Petitioner's case for weeks on end) in circumstances that are decidedly *not* "tense, uncertain, and rapidly evolving," *Nieves*, 139 S. Ct. at 1727 (quoting *Graham*, 490 U.S. at 397), the animating rationale for the insultation provided by *Nieves* is absent. And when those officials work with the singular motive of directing the awesome power of

the criminal justice system at a citizen to retaliate for that citizen's exercise of constitutional rights, their ability to trawl a statute book until they can conjure probable cause for an arrest does not – and cannot – shield them with immunity from accountability. To find otherwise would turn the First Amendment on its head, for "[i]f the freedom of speech meant anything to our nation's Founders, it meant that it was beyond the power of the government to punish speech that criticized the government in good faith." *Gonzalez* v. *Trevino, et al.,* No. 21-50276 at *3 (5th Cir. 2023) (Ho, J., dissenting) (citing Jud Campbell, *Natural Rights and the First Amendment*, 127 Yale L. J. 246, 309 (2017)).

This case is an exceptionally good vehicle not just to correct the Fifth Circuit's doctrinal error, but also to highlight the kinds of "facts and circumstances" that do and do not establish "a causal connection between animus and injury." For example, this case presents an obscure and broadly worded regulatory provision that by its nature invites expansive discretion, not a routine arrest for a common and well-defined crime. This case presents a month-long conspiracy by government officials who declared themselves to be the Petitioner's political enemies, not "split-second judgements" made on the street and proximate to the perpetration of a crime. This case presents a concerted choice to misuse law enforcement and the humiliation of arrest itself to embarrass, harass, and deter citizens who seek a change in their political leaders, not the orderly enforcement of the criminal code. And this case presents extraordinary circumventions of usual processes and channels of decision-making, not the routine work of policing. All of these factors are objective, recognized in this Court's case law as reflective of the pretextual use of

government authority, and illustrated by the astonishing facts of this case.

Certiorari should therefore be granted.

ARGUMENT

In *Nieves* v. *Bartlett*, this Court held that an individual could sustain a First Amendment retaliatory arrest claim against a police officer who had probable cause to make the arrest if the individual "presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." 139 S. Ct. at 1727. The so-called "*Nieves* exception" must be read as interpreted by the Seventh and Ninth Circuits to permit reliable, objective evidence of retaliation precisely because probable cause is so easy to conjure.

This Court should not uphold the Fifth Circuit's conflicting requirement that a plaintiff present specific, comparative evidence that others who did not engage in protected speech, but engaged in the same conduct, were not arrested. That reading places an impossible standard of proof on aggrieved plaintiffs to prove a negative. It is also contrary to *Nieves* itself, in which this Court 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 (citing *Lozman*, 138 S. Ct. at 1953).

To be sure, probable cause will be generally sufficient to defeat a retaliatory arrest claim where police make an arrest for a common and well-defined crime under circumstances that are time-stressed and implicate the unique demands of real-time law

enforcement decision making (as in *Nieves*). But armed with enough time and resources, any government official can contrive probable cause to arrest anyone. Regardless of how *Nieves* applies in situations where police officers need to make "split-second judgments[,]" 139 S. Ct. at 1724, therefore, probable cause cannot shield government officials in cases lacking time pressure, where it can be objectively demonstrated that a contrived arrest's sole purpose was to silence political opponents.

I. Probable cause is insufficient to shield government officials from liability when other objective evidence demonstrates the targeting of citizens for harassment and retaliation.

Ms. Gonzalez's case is a clear example of how deference to probable cause in situations that are not time-stressed is a threat to First Amendment rights. The criminal code is so prolix that government officials need not struggle, if given time and ingenuity, to find probable cause to arrest anyone. *Nieves*, 139 S. Ct. at 1730 (Gorsuch, J., concurring in part and dissenting in part); see also *Gonzalez,* No. 21-50276 at *4 (Ho, J., dissenting) ("Prosecutors can find some arguable federal crime to apply to just about any one of us, even for the most seemingly innocuous conduct."). It has become a parlor game in some prosecutors' offices to "figure out a plausible crime for which to indict" someone – anyone. Tim Wu, *American Lawbreaking: Introduction*, Slate.com (October 14, 2007). Hence, in *Nieves*, this Court recognized that the general rule that probable cause relieved the police of liability from accusations of retaliatory arrest needed to yield, when it could be demonstrated objectively that probable cause was a mere pretext for retaliating

against a citizen for exercising their First Amendment rights.

The facts of Petitioner's case are illustrative of precisely why this Court was careful to qualify the rule *Nieves* announced in the first place. Petitioner organized a petition calling for the replacement of an unpopular city manager. *Gonzalez* v. *Trevino*, 42 F.4th 487, 489 (5th Cir. 2022). Her petition was presented at a city council meeting, at the end of which she put the petition (her petition) back in her binder. *Id.* She evidently did this inadvertently and when the mayor alerted her that she had scooped up the petition along with her other papers, she returned it immediately. See *Gonzalez,* No. 21-50276 at *6 (Ho, J., dissenting). Her mistake was rectified before she even left the building.

Yet, Petitioner's clumsy handling of her papers provided her political adversaries – the very subject of her petition – an opportunity to retaliate against her specifically and to send a chilling message to the rest of the community. Over the course of a month-long conspiracy, Petitioner's political opponents launched a special investigation, *Gonzalez*, 42 F.4th at 489, involving dozens of man hours, and ultimately arrested Petitioner for violating § 37.10(a)(3) of the Texas Penal Code which prohibits "intentionally destroy[ing], conceal[ing], remov[ing], or otherwise impair[ing] the verity, legibility, or availability of a government record." *Gonzalez*, 42 F.4th at 489 (citing Tex. Penal Code § 37.10(a)(3)).

Petitioner's inadvertent paper shuffling at a city council meeting was sufficient to establish probable cause. Yet, any objective evaluation of the decision-making process leading to her arrest leaves no doubt about what prompted her arrest. No testimony about

anyone's subjective state of mind is required. If the integrity of the city council's paperwork was genuinely at risk, officers could have arrested Petitioner on the spot as the officer in *Nieves* did. Instead, officials conspired for a month with the singular intent to retaliate against her for her decision to speak out in favor of replacing the city manager. Indeed, the very document justifying Petitioner's arrest explained, among other things, that she was "openly antagonistic to the city manager . . . wanting desperately to get him fired." *Gonzalez*, 42 F.4th at 490.

Petitioner was targeted and arrested in retaliation for her legitimate, political speech. An objective inquiry into the reasonableness of the decision to arrest Petitioner allows no other conclusion. Petitioner's case therefore offers this Court an ideal opportunity to provide clarity on how the so-called *Nieves* exception is to be applied, a question that has divided the circuits.

As discussed below, the Fifth Circuit improperly narrowed its inquiry to a singular demand that plaintiffs offer empirical evidence of non-prosecutions. While such statistical insights might be probative when available, the Fifth Circuit ignored at least four other objective factors that other circuits and this Court have long relied upon when evaluating the objective reasonableness of government conduct.[2]

First, and most significant, the general rule announced in *Nieves* is tailored to deal with the exigencies of day-to-day policing. The farther the decision-making process leading to an arrest is from

---

[2] In the analogous excessive force context, this Court has declined to defer to probable cause where the search or seizure was objectively unreasonable. *Graham*, 490 U.S. at 396–399.

the "split-second decisions" that can occur in routine policing, the less relevance the courts should place on the defendants' bare ability to conjure probable cause.[3]

This follows principally from the fact that probable cause's constitutional relevance is, strictly speaking, limited to the Fourth Amendment. This Court has long recognized that the existence of probable cause is not, in and of itself, sufficient to satisfy other constitutional provisions, such as the First Amendment. See *Whren* v. *United States*, 517 U.S. 806, 813 (1996). As *Nieves* itself recognized, its general rule of immunity did not arise because the Constitution had not been violated, but because of the need for objective standards for establishing that a police officer's retaliatory motive was the causal basis for an arrest. Members of this Court have already questioned whether it is reasonable to defer to "calculated choices about enacting or enforcing unconstitutional policies." See *Hoggard* v. *Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., respecting denial of cert.) ("[W]hy should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting?"). And the premise of this Court's decision in *Lozman*

---

[3] Making a distinction between situations that are or are not time-stressed in the context of policing draws support from this Court's precedent in other contexts. In substantive due process cases concerning high-speed automobile chases, police officers are subject to liability where they "cause[] death through deliberate or reckless indifference to life" unless the officer did not have time to deliberate—in that latter case, the standard for liability is a higher "purpose to do harm" standard. See *County of Sacramento* v. *Lewis*, 523 U.S. 833, 836, 851–855 (1998).

was that probable cause is irrelevant once government officials' concerted, deliberate course of conduct reaches the point of "an official retaliatory policy." *Lozman*, 138 S. Ct. at 1954.

History and tradition also support heightened scrutiny of courses of official conduct that retaliate against disfavored speakers, even if that course of conduct had not quite gelled into an "official retaliatory policy." For example, in 1765 in the English case *Entick* v. *Carrington*, the King's Bench sustained a civil claim for trespass after a government official ordered the search of a journalist's home and the seizure of any evidence that the journalist was responsible for a series of weekly papers published under a pseudonym criticizing the King. 19 Howell's State Trials 1029 (1765). The Court found that the general warrant was "illegal and void," in no small part because it invited arbitrary enforcement, where "half the kingdom would be guilty in the case of a favourable libel, if libels may be searched for and seized by whomsoever and wheresoever the Secretary of State thinks fit." *Id.*

Second, the nature of the law used to establish probable cause can offer objective evidence of the retaliatory nature of the arrest. Probable cause to arrest an individual for a violent crime naturally carries with it a presumption of regularity that arresting someone for certain misdemeanors (like jaywalking) does not. When government officials resort to laws that are obscure and rarely enforced, *Tsombanidis* v. *W. Haven Fire Dep't*, 352 F.3d 565, 580 (2d Cir. 2003), or invoke the criminal code's vaguest prohibitions, see, *e.g.*, *Skilling* v. *United States*, 561 U.S. 358, 412–413 (2010), or take a statute's broadest terms out of context, *Yates* v.

United States, 574 U.S. 528 (2015), or "discover in a long-extant statute an unheralded power to regulate," their conduct warrants "a measure of skepticism." *Utility Air* v. *E.P.A.*, 573 U.S. 302, 324 (2014). And the nature of the law invoked is especially probative of the objective reasonableness of government officials' conduct when, as here, it is deployed to punish common, *McDonnell* v. *United States*, 579 U.S. 550, 575 (2016), or "seemingly innocent conduct," *Carter* v. *United States*, 530 U.S. 255, 269 (2000), such as Petitioner's mishandling of papers.

Third, the manner of enforcement can offer objective evidence of the retaliatory nature of the arrest. As this Court recognized in *Nieves*, actual arrests for certain misdemeanors, like jaywalking or the misdemeanor offense at issue here, are exceedingly rare. While police have the uncontested authority to arrest individuals for misdemeanors, *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 354 (2001), the decision to arrest when a summons would be standard practice is objective evidence that government officials are using "criminal process without any hope of ultimate success, but only to discourage" constitutionally protected activity. *Dombrowski* v. *Pfister*, 380 U.S. 479, 490 (1965).

Finally, government officials' circumvention of the usual processes and channels of decision-making can offer objective evidence of the retaliatory nature of the arrest. In a variety of contexts, government officials' improper targeting of individuals is made evident by their failure to follow routine enforcement practices. *Oestereich* v. *Selective Serv. Sys. Loc. Bd. No. 11, Cheyenne, Wyo.*, 393 U.S. 233, 237 (1968); *Shaw* v. *Garrison*, 467 F.2d 113 (5th Cir. 1972). Conversely, officials' use of the ordinary channels of decision-

making, and submission to the ordinary checks-and-balances of the criminal justice system can rebut claims of harassment. *Hicks* v. *Miranda*, 422 U.S. 332, 351 (1975).

In sum, this case affords this Court the opportunity to confirm that, in the First Amendment context, probable cause only entitles officers to immunity when they are making split-second decisions during routine policing. Outside of that context, this Court should clarify that government officials are not entitled to immunity but rather will be subject to accountability if they abuse their official powers to suppress political speech.

II. The Fifth Circuit's conflation of objective evidence with empirical statistics is wrong.

The Fifth Circuit interpreted *Nieves* incorrectly, creating a circuit split that this Court should now resolve. *Nieves* itself is an exception to the general rule under the First Amendment "that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys." *Matal* v. *Tam*, 582 U.S. 218, 248 (2017) (Kennedy, J., concurring). And state actors are generally liable in § 1983 actions for using official power to retaliate against citizens for the content of their speech. See, *e.g.*, *Lozman*, 138 S. Ct. at 1953; *Board of Cnty. Comm'rs, Wabaunsee Cnty., Kan.* v. *Umbehr*, 518 U.S. 668 (1996); *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). *Nieves* simply recognized that this general entitlement to recovery for constitutional injury is subject to narrow limits tailored to accommodate the unique exigencies police confront when engaged in routine law enforcement activity. By

treating *Nieves* as a rule to which exceptions must be proven, the Fifth Circuit does not simply reverse the priority of the First Amendment and law enforcement, it perversely incentivizes government officials to abuse the criminal justice system and to treat pretextual arrests as their preferred means of suppressing the speech of their critics.

Judge James C. Ho, in his dissent from the Fifth Circuit's denial of Petitioner's petition for a rehearing *en banc*, explained that "[a]ll *Nieves* requires is 'objective evidence that [the plaintiff] was arrested when otherwise similarly situated individuals . . . had not been.'" *Gonzalez,* No. 21-50276 at *10 (Ho, J., dissenting) (citing *Nieves*, 139 S. Ct. at 1727).

Yet the Fifth Circuit majority adopted an artificially restrictive reading of *Nieves*, under which a plaintiff must prove a negative to overcome even the most obviously pretextual invocations of probable cause. Under the Fifth Circuit's test, a plaintiff must come forward with comparative evidence that establishes to some unspecified degree of statistical certainty that persons engaged in the same conduct giving rise to probable cause in plaintiff's case (but not the same protected speech) were not arrested.[4] Such a

[4] The Fifth Circuit's evidentiary standard essentially requires plaintiffs to prove that there was an official retaliatory policy under a given statute. While the circumstances in *Lozman* were sufficient to defeat the existence of probable cause in First Amendment retaliatory arrest cases, existence of an official retaliatory policy is not the only set of circumstances that can defeat probable cause. Yet requiring empirical evidence of similarly situated individuals – as the Fifth Circuit would require – elevates the official policy or custom requirement to a necessary condition. Even assuming that requirement is necessary in municipal liability cases, it is most definitely not

standard renders the so-called *Nieves* exception meaningless.

For example, this Court provided as an example a person who complained of police conduct and then was arrested for jaywalking—a crime that is "endemic but rarely results in arrest." *Nieves*, 139 S. Ct. at 1727. An officer would certainly have had probable cause to arrest the jaywalker, but this Court acknowledged that barring a First Amendment retaliation claim on these facts would be "insufficiently protective of First Amendment rights[.]" *Id.* As one scholar observed, under a rule like that adopted by the Fifth Circuit:

> even the given example of the jaywalker would fail unless she could provide concrete evidence of other similarly situated jaywalkers who went unprosecuted and did not engage in protected speech. This is a fundamental problem of whether lack of probable cause as an element is a hard-stop question of law or whether it is a balancing and weighted factual inquiry. If it is a hard stop, then a jury will almost *never* be able to consider situations in which the arrest was supported by probable cause, but retaliatory animus was still the but-for cause of the arrest. The exception, of course, is for when a plaintiff can show 'objective' evidence of 'similarly

---

appropriate in cases concerning the individual liability of officers and officials.

> situated individuals.' But what if there are no similarly situated individuals?

Amy L. Moore, *Plausible Retaliation: Using Modern Pleading Standards as a Blueprint for First Amendment Retaliation Claims*, 23:5 J. Const. Law 1032, 1049–50 (December 2021), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1774&context=jcl.

Only in the rarest cases will there even be comparative evidence of similarly situated individuals in "circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Nieves*, 139 S. Ct. at 1727. And, of course, such evidence of ignored conduct and non-conducted investigations is within police officers' knowledge and control—but not citizens'. The Fifth Circuit's reading of *Nieves* would all but preclude First Amendment retaliatory arrest claims, including the claim by the jaywalker who led this Court to cabin *Nieves* in the first place.

The Fifth Circuit's demand for empirical evidence of non-arrests will also bar the most meritorious claims. To try to meet this impossible burden, Petitioner combed through a decade of grand jury felony indictments. *Gonzalez,* No. 21-50276 at *8 (Ho, J., dissenting). And yet, she failed to find a single piece of comparative evidence that any person had *ever* been arrested under "the misdemeanor tampering statute, nor its felony counterpart . . . for allegedly trying to steal a nonbinding or expressive document, such as the petition at issue in this case." *Id.,* at *8–9. Petitioner's arrest, in short, was unprecedented under the statute under which probable cause was established. That fact should have been treated as

strong prima facie evidence that she was impermissibly targeted for retaliation. Instead, the Fifth Circuit faulted her for failing to carry her burden of production.

The burden of proof for the *Nieves* exception cannot be so high that a 72-year-old woman who was arrested, jailed, and barred from ever holding local (or any) office again – all because she organized a petition calling for the ouster of a government official – was then forced to dive into city archives to demonstrate that her arrest was based on a retaliatory intent. That is not what *Nieves* or common sense requires.

CONCLUSION

The circuits are divided on when probable cause immunizes public officials from scrutiny when they bring the full force of the criminal code against citizens with the intent to retaliate for and suppress political speech. *Nieves* is best read, as the Ninth and Seventh circuits do, to apply differently (1) where police legitimately need to make split-second judgments in response to rapidly evolving situations, as opposed to (2) where officials have ample time to conspire, deliberate, and plan. In that latter situation, probable cause may be relevant to whether officials are liable for engaging in a retaliatory arrest, but it cannot be dispositive. The Fifth Circuit improperly treats probable cause to arrest as dispositive in nearly all – if not all – circumstances that are ever likely to occur.

Public officials face a great temptation to use the criminal code to suppress their critics. If all they must do to retaliate against their opponents' speech with impunity is effectively play a parlor game that can sweep any citizen into its maw, the right to speak

freely is tenuous indeed. Petitioner's case presents a nationally important question squarely and on uncontested facts. Certiorari is therefore warranted.

Respectfully submitted,

Michel Paradis
Counsel of Record
Rebecca Meyer
CURTIS, MALLET-PREVOST, COLT & MOSLE LLP
101 Park Avenue
New York, NY 10178
(212) 696-6078
mparadis@curtis.com
Counsel for Amicus Curiae

MAY 2023

APPENDIX

LIST OF AMICI

Brandon L. Garrett is the inaugural L. Neil Williams, Jr. Professor of Law and director of the Wilson Center for Science and Justice at Duke Law School. He writes and teaches about criminal justice, evidence, and constitutional law. He is the author of six books on the criminal justice system and criminal procedure.

Thomas Healy is the Board of Visitors Distinguished Professor at Seton Hall Law School. He teaches and writes about constitutional law, freedom of speech, federal courts, legal history, and civil rights. He is the author of The Great Dissent: How Oliver Wendell Holmes Changed His Mind – and Changed the History of Free Speech in America, and Soul City: Race, Equality, and the Lost Dream of an American Utopia.

Brenner M. Fissell is Associate Professor of Law at Villanova University. Fissell's research focuses on the political theory of criminal law and policing, especially as it relates to the criminal law of local governments.

Colin Miller is a Professor of Law at the University of South Carolina School of Law. His areas of expertise include Evidence, Criminal Law and Procedure, and Civil Procedure.

Sheldon Nahmod is the University Distinguished Professor Emeritus, Professor of Law Emeritus at the Chicago-Kent College of Law. He teaches and writes about constitutional law, the First Amendment, civil rights and liberties and the law of Section 1983. He is

the author of Civil Rights and Civil Liberties Litigation: The Law of Section 1983 (2022–2023 Edition), A Section 1983 Civil Rights Anthology (1993), and Constitutional Torts (5th ed. 2020).

Seth W. Stoughton is a Professor of Law at the University of South Carolina School of Law. He studies the regulation of policing and teaches Criminal Law and Procedure and Police Law & Policy.

Rebecca Tushnet is the Frank Stanton Professor of the First Amendment at Harvard Law School. She writes and teaches on the First Amendment and intellectual property law. She is the author of Advertising & Marketing Law (6th ed. 2022) among many other scholarly publications.