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, ET AL.,

Respondents.

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

BRIEF OF THE THOMAS MORE SOCIETY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE[1]

Amicus Curiae Thomas More Society is a non-profit, national public-interest law firm dedicated to restoring respect in law for life, family, and religious liberty. The Thomas More Society provides legal services to clients free of charge and often represents individuals who cannot afford a legal defense with their own resources. Throughout its history, the Thomas More Society has advocated for the protection of First Amendment rights and has represented individuals retaliated against because of the exercise of rights protected by the First Amendment.

INTRODUCTION AND SUMMARY OF ARGUMENT

The First Amendment bars the government from suppressing points of view. It also prohibits governmental retaliation against an individual because she exercised her First Amendment rights. These safeguards, including protections against retaliation, are vital to those whose views are disfavored by the government. Moreover, by ensuring the participation of these views in the marketplace of ideas, our system of governance itself is served.

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[1] Pursuant to S. Ct. Rule 37.2, this *amicus* states that all parties' counsel received timely notice of the intent to file this brief. Pursuant to S. Ct. Rule 37.6, *amicus* states that no counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amicus curiae* or its counsel, has made a monetary contribution to this brief's preparation or submission.

The decision of the Fifth Circuit here, however, misinterpreted this Court's relatively recent decision in *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), which governs at least some claims that an arrest was made in retaliation for First Amendment activity. First, the decision below narrowed the type of evidence that can be used to show an arrest was made without probable cause and thus was retaliatory. Second, the facts of this case—as argued in the panel dissent by Judge Oldham—should place this case outside the scope of *Nieves* because there is no question that government actors in this case targeted the Petitioner in retaliation for her First Amendment activity.

Therefore, this case presents an excellent opportunity to clarify the type of evidence required under *Nieves* as well as to clarify whether *Nieves* applies to retaliation cases where the intent to retaliate is not reasonably susceptible to doubt. For these reasons, this *amicus* respectfully asks that the petition for certiorari be granted.

I. GOVERNMENTAL RETALIATION FOR THE EXERCISE OF FIRST AMENDMENT RIGHTS IS A LONGSTANDING AND PERSISTENT PROBLEM IN THIS COUNTRY.

History teaches that individuals who exercise their First Amendment rights in ways disfavored by those wielding governmental power face a dramatically increased likelihood of retribution from the government. *See, e.g., Abrams v. United States*,

250 U.S. 616 (1919) (holding that First Amendment did not bar conviction for inciting resistance to World War I and urging that war materiel production be curtailed); *Schenck v. United States*, 249 U.S. 47 (1919) (holding that First Amendment did not bar conviction for distributing flyers urging resistance to the draft); *see also Whitney v. California*, 274 U.S. 357 (1927) (holding that First and Fourteenth Amendments did not bar conviction based on membership in Communist Labor Party), *overruled by Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Though not without difficulty, the law has come to recognize that, for the promise of the First Amendment to be fulfilled, there *should* be no disparity in treatment between favored and disfavored speech. *See* U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech."). "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Otto v. City of Boca Raton*, 981 F.3d 854, 872 (11th Cir. 2020) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)). These limitations apply with equal force to state and local governments. *See, e.g., Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). Accordingly, "a government, including a municipal government vested with state authority, 'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (quoting

Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972)).

Notwithstanding positive developments in these doctrines, First Amendment activity that is unpopular still finds itself targeted by governments, sometimes in quite pointed ways. *See, e.g., Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (state anti-discrimination commission found to have displayed anti-religious animus in hearing case against Christian baker). To take, as an example, just one context in which disfavored speech is regularly curtailed, this Court is well aware of the ways governments attempt to restrict pro-life advocacy in and around facilities that provide abortions. *Compare McCullen v. Coakley*, 573 U.S. 464 (2014) (35-foot abortion clinic buffer zone held unconstitutional), *with Hill v. Colorado*, 530 U.S. 703 (2000) (buffer zone around abortion clinic held constitutional); *see, e.g., Sisters for Life v. Louisville-Jefferson County, Ky. Metro Government*, 56 F.4th 400 (6th Cir. 2022) (10-foot buffer zone around abortion clinic held unconstitutional). Pro-life advocacy is controversial speech to many, and many of those who find it controversial occupy politically influential positions in places where pro-life views are less than popular.

In these jurisdictions, censoring and retaliating against those exercising their First Amendment rights to express pro-life views is often seen as politically expedient and potentially career-enhancing for those in government. And, because there are no negative electoral repercussions to be

had from attacking those holding the minority point of view in these locations, officials are too often able to ride roughshod over free speech rights, unless and until a court intervenes to hold them accountable. *See, e.g., New York v. Griepp*, Case No. 17-CV-3706 (CBA), 2018 U.S. Dist. LEXIS 122169, at *4 (E.D.N.Y. July 20, 2018) ("[New York] Attorney General Eric Schneiderman[] [made a] statement, at a press conference held outside [the abortion clinic] to announce this action, that this is 'not a nation where you can choose your point of view.'"), *aff'd*, 997 F.3d 1258 (2d Cir. 2021), *aff'd and remanded*, 11 F.4th 174 (2d Cir. 2021). Consequently, pro-life advocates are not infrequently the recipients of novel and strained interpretations of criminal law in efforts to stifle their speech. *See, e.g., Cities4Life, Inc. v. City of Charlotte*, 52 F.4th 576, 578 (4th Cir. 2022) ("[P]olice warned [pro-life advocates] that they would be violating the City's Picketing Ordinance if they stepped off the sidewalk to try to distribute literature to pedestrians and vehicles.").

Fortunately, the First Amendment prohibits both direct censorship and retaliation for the exercise of rights the Amendment protects, even if the speech at issue is unpopular, controversial, or offensive. *See Matal v. Tam*, 582 U.S. 218, 243 (2017) (plurality opinion) ("Giving offense is a viewpoint[.]"); *Snyder v. Phelps*, 562 U.S. 443, 460-61 (2011) ("As a Nation we have chosen . . . to protect even hurtful speech on public issues[.]"); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) ("[A]dvocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression"); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) ("The

right to speak freely and to promote diversity of ideas and programs . . . may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.").

Thus, when a government seeks to suppress First Amendment rights, proper legal remedies must be available so that the affected individuals may obtain judicial redress. The ability to bring suit for First Amendment retaliation is an essential means of providing relief when a government seeks to punish an individual (as it did with the Petitioner here) for speaking out or taking a stand that is controversial or discomforting to those in political power. The Fifth Circuit's opinion in this case, however, makes the ability to pursue such relief less certain.

II. THE FIFTH CIRCUIT'S DECISION IN THIS CASE THREATENS TO UNDERMINE EXISTING PROTECTIONS AGAINST RETALIATION FOR THE EXERCISE OF FIRST AMENDMENT RIGHTS.

The danger of the Fifth Circuit's decision below, *Gonzalez v. Trevino*, 42 F.4th 487 (2022), *rehr'g denied*, 60 F.4th 906 (2023), is not a failure to expand protection from First Amendment retaliatory arrests. To the contrary, it is a misreading of the decision rendered by this Court a mere four years ago in *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019). It is this misreading of the Court's precedent that must be corrected before other courts follow its lead.

In *Nieves*, this Court held that "[a]lthough probable cause should generally defeat a retaliatory arrest claim, a narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so." 139 S. Ct. 1715, 1727 (2019). The Court explained the need for this exception by saying, "In such cases, 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.'" *Id.* (quoting *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1953 (2018)).

The Fifth Circuit below erred in its application of *Nieves*. First, the Fifth Circuit held that only specific examples of non-arrests of individuals in the same circumstances would satisfy the exception identified in *Nieves*. *Gonzalez*, 42 F.4th at 492 (quoting *Nieves*, 139 S. Ct. at 1727) ("[T]he plain language of *Nieves* requires comparative evidence, because it required 'objective evidence' of 'otherwise similarly situated individuals' who engaged in the 'same' criminal conduct but were not arrested. The evidence [Petitioner] provides here comes up short."). In so holding, it diverged from the Seventh and Ninth Circuits, which both allow a more flexible and commonsense approach to determining whether the exception is satisfied. *See Lund v. City of Rockford*, 956 F.3d 938, 945 (7th Cir. 2020); *Ballentine v. Tucker*, 28 F.4th 54, 60 (9th Cir. 2022*); see also Lyberger v. Snider*, 42 F.4th 807, 813-14 (7th Cir. 2022).

Additionally, the Fifth Circuit should have followed the suggestion of the Sixth Circuit and held that the *Nieves* probable cause rule would not apply to these facts since this case involves a premeditated arrest where there was no doubt about the government's motives rather than a spontaneous arrest by law enforcement officers responding to a potentially volatile situation. *See Novak v. City of Parma*, 932 F.3d 421, 432 (6th Cir. 2019) ("Where a statute gives police broad cover to find probable cause on speech alone, probable cause does little to disentangle retaliatory motives from legitimate ones . . . [and it may be that] the general rule of requiring plaintiffs to prove the absence of probable cause should not apply[.]"). This was one of the concerns raised below in Judge Oldham's dissent from the panel decision, prompting him to wonder "what purchase *Nieves* has here." *See Gonzalez*, 42 F.4th at 503 (Oldham, J., dissenting). "*Nieves* designed a rule to reflect 'the fact that protected speech [or conduct] is often a legitimate consideration when deciding whether to make an arrest' and the fact that 'it is particularly difficult to determine whether the adverse government action was caused by the officer's malice or the plaintiff's potentially criminal conduct.' In this case, it's plainly impossible that [Petitioner's] speech and petitioning activity was a 'legitimate consideration[.]'" *Id.* at 503-04 (Oldham, J., dissenting) (quoting *Nieves*, 139 S. Ct. at 1724); *see id.* at 500-01 (Oldham, J., dissenting) ("This is not a case where we must guess about the Conspirators' motives . . . the Conspirators' animus plainly caused [Petitioner's] arrest.").

The facts of the underlying case illustrate well why an injunction restraining a law or an ongoing pattern of conduct may simply not be an option available to give redress to an individual whose First Amendment rights have been violated. The Petitioner in this case was the victim of a single (but dramatic) incident in which her rights were allegedly violated by an investigation and arrest. (Pet. 6-10.) And the pretext for the Petitioner's arrest was the allegation that she (as a sitting city council member) briefly misplaced a citizen petition for a few minutes immediately after a city council meeting, returning the petition before she left the meeting room. (*Id.* 6-7.) As such, there is no law to be enjoined to prevent future deprivation of her rights. Instead, there is a government that must be held answerable in court for what is credibly allegedly to be a deliberate plan to demean and humiliate the Petitioner using a fig leaf of technical legitimacy to hide its true invidious and retaliatory motives. (*See id.* 7-8.)

Permitting these constitutional violations to escape judicial scrutiny harms not only the rights of the silenced speaker, but also our very system of government. "[F]ree speech is 'essential to our democratic form of government.' Without genuine freedom of speech, the search for truth is stymied, and the ideas and debates necessary for the continuous improvement of our republic cannot flourish." *Meriwether v. Hartop*, 992 F.3d 492, 503 (6th Cir. 2021) (Thapar, J.) (quoting and citing *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018)). Yet, when speaking out makes someone a target for ruinous

humiliation through invocation of the criminal process over even the most picayune or captious allegation of unlawful conduct, the First Amendment cannot serve these ends so vital to our system of self-governance.

Such is the danger identified by then Attorney General and future Justice Robert Jackson:

> [T]he most dangerous power of the prosecutor . . . [is] that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone . . . It is in this realm, in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.

Robert H. Jackson, *The Federal Prosecutor*, 24 J. Am. Judicature Soc., 18, 19 (1940), *available at* https://www.roberthjackson.org/speech-and-writing/the-federal-prosecutor/ (last visited May 23, 2023). There is little doubt that the Petitioner in this case

made a sufficient showing that her prosecution had become "personal" and that her only "real crime" was advocating views disfavored by local officials who held the power to arrest and prosecute her on a hyper technicality.

Nonetheless, the decision of the Fifth Circuit closes its eyes to the stark realities identified by Justice Jackson over eighty years ago and in so doing misinterprets *Nieves*. When arrests and prosecutions are driven by invidious motives into reliance on novel theories to retaliate against unpopular speech, the legal system abandons due process for the randomness of "being struck by lightning," *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring). The continued survival of First Amendment liberties demands more.

In sum, this *amicus* respectfully submits that the petition here presents an excellent opportunity to address the current circuit split on what evidence is required to satisfy the exception identified by this Court in *Nieves*. Similarly, the Court may use this case as a vehicle to clarify whether *Nieves* applies only in more limited circumstances, as the Sixth Circuit has held.

CONCLUSION

For the foregoing reasons, in addition to those reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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