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

AMICUS CURIAE BRIEF OF TEXAS PUBLIC POLICY FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE *AMICUS CURIAE*[1]

The Texas Public Policy Foundation ("TPPF") is a nonprofit, nonpartisan research foundation dedicated to promoting and defending liberty, personal responsibility, and free enterprise throughout Texas and the nation. For decades, TPPF has worked to advance these goals through research, policy advocacy, and impact litigation. Right On Crime is a national campaign of TPPF, which supports conservative solutions for reducing crime, restoring victims, reforming offenders, and lowering taxpayer costs. Right On Crime advocates on behalf of criminal justice policies that are fair, effective, and consistent with constitutional safeguards.

INTRODUCTION AND SUMMARY OF ARGUMENT

A retaliatory arrest in response to an individual's exercise of their First Amendment rights represents a clear violation of rights that can nevertheless be tough to discern from a valid exercise of authority. As the Court noted in *Nieves v. Bartlett*, "it is particularly difficult to determine whether the adverse government action was caused by the officer's malice or the

[1] The parties were timely notified of the intention to file. No counsel for a party authored 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 other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

plaintiff's potentially criminal conduct." 139 S. Ct. 1715, 1723 (2019). The Court has therefore turned to the existence of probable cause to help separate potentially meritorious claims from "doubtful retaliatory arrest suits." *Id.* at 1724. Yet, it carved an exception in *Nieves* to this general rule, "where officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Id*. at 1727-28.

The *Nieves* exception recognized that the presence of irregularly enforced statutes and broad law enforcement discretion means that the existence of probable cause alone is not always dispositive on the question of retaliation. It is an exception urgently needed in the face of a startingly expansive criminal code limited at times only by the imaginations and prudence of law enforcement officials. The presence of literally thousands of criminal offenses as well as broadly worded ones open to creative applications has provided government officials with an overabundance of probable cause against virtually any individual and meant that "most Americans are criminals and don't know it." A. Kozinski & M. Tseytlin, You're (Probably) a Federal Criminal, In the Name of Justice 43, 44 (T. Lynch ed. 2009). In many instances, probable cause will prove little more than a speed bump to an official determined to retaliate against an individual in their jurisdiction.

An overly narrow reading of the *Nieves* exception would create a nearly impossible hurdle even in cases of clear retaliation and reward premeditation in retaliation cases. The government makes records and frequently aggregates data on arrests and prosecutions,

but understandably rarely does so in instances where no official action was taken. Further, numerous statutes criminalize conduct that occurs with few witnesses or little reason for memorialization. In the search for objective evidence, there will be readily available official government records demonstrating arrest patterns, whereas evidence of other lawbreakers who did not espouse similar First Amendment views and faced no official repercussions for their actions will either not exist or be beyond the reach of most plaintiffs. Ignoring the former and requiring the latter will effectively bar valid claims of retaliation and make it easier for retaliation-minded officials to pursue an arrest strategy involving more obscure offenses, dubious interpretations of more common offenses, or other offenses that take advantage of this evidentiary shortcoming.

The preservation of a legal remedy in these cases through a meaningful exception to a default rule deferring to probable cause is crucial because overcriminalization has left most individuals unable to directly protect themselves from a probable cause-supported retaliatory arrest. The volume of criminal prohibitions, the susceptibility of many to be creatively applied to a variety of relatively routine occurrences, and the existence of obscure and regulatory offenses that do not necessarily connote moral wrongness (and thus may be difficult to intuit), make it exceedingly difficult to avoid inadvertently violating one law or another. After all, "[i]f it is true that lawyers, law professors, and judges do not know all of the laws that impose criminal liability, it is utterly unreasonable to expect that the

average person has that knowledge." Paul J. Larkin, Jr., Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law, 42 Hofstra L. Rev. 745, 750 (2014). Even where totally law-abiding behavior may be possible, the act of carefully treading around these criminal pitfalls would so infringe upon a person's liberty as to make a mockery of it. There is, practically speaking, little that a person can do to avoid generating probable cause for all possible offenses, thereby foreclosing the possibility of nominally legally justified retaliatory arrests.

Certiorari should therefore be granted.

ARGUMENT

I. OVERCRIMINALIZATION HAS MADE THE AVAILABILITY OF THE *NIEVES* EXCEPTION ESPECIALLY IMPORTANT

The existence of probable cause provides a legal basis for an arrest and thus presents a legitimate rationale for an allegedly retaliatory arrest. The ensuing rule that probable cause should generally foreclose a suit for retaliatory arrest recognizes this reality as well as the closely related one that once a legitimate basis for an arrest has been established, it is exceedingly difficult to determine but-for causation should there also be evidence that an illegitimate motive was also present. *Nieves*, 139 S. Ct. at 1722-23. Specifically, these cases alleging a retaliatory arrest "present a tenuous causal connection between the defendant's

alleged animus and the plaintiff's injury." *Reichle v. Howards*, 566 U.S. 658, 668 (2012).

The true evidentiary value of probable cause in these cases rests in no small part on the notion that it is a reasonably difficult evidentiary hurdle deserving of significant deference and the sense that "probable cause speaks to the objective reasonableness of an arrest." *Nieves*, 139 S. Ct. at 1722-24 (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011)). This objective reasonableness itself derives largely from the assumption that criminal process is the natural, almost inevitable, outgrowth of probable cause, with the Court stating in the context of a retaliatory prosecution case that "establishing the existence of probable cause will suggest that prosecution would have occurred even without a retaliatory motive." *Hartman v. Moore*, 547 U.S. 250, 261 (2006). While perhaps true in many situations, the Court in *Nieves* through its jaywalking example acknowledges that for some offenses, this may not be the case. As a result, the Court articulated the "*Nieves* exception," asserting that "the no-probable cause requirement should not apply when 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." *Nieves*, 139 S. Ct. at 1728.

Overcriminalization has rendered the jaywalking scenario a relatively common occurrence in modern life, making the *Nieves* exception—and subsequent interpretations of it—especially important. Overcriminalization is a problem so vast that it has defied a

single definition capable of encapsulating it in its entirety, though one more succinct attempt describes it as "the overuse and misuse of the criminal law to punish conduct traditionally deemed morally blameless." Larkin, 42 Hofstra L. Rev. at 745. Another outlines the primary manifestations of overcriminalization as: "(1) untenable offenses; (2) superfluous statutes; (3) doctrines that overextend culpability; (4) crimes without jurisdictional authority; (5) grossly disproportionate punishments; and (6) excessive or pretextual enforcement of petty violations." Erik Luna, The Overcriminalization Phenomenon, 54 Am. U. L. Rev. 703, 716 (2004).

It is a problem that begins with the sheer volume of criminal offenses and penalties that every person in America must navigate daily. The federal government epitomizes the staggering scale of this issue: nobody, not even agencies or actors within the federal government, knows how many penalties exist across the entire federal code. *See* Larkin, 42 Hofstra L. Rev. 745. Interested parties have only been able to estimate this total, with one study placing the number of offenses detailed in the U.S. code at 5,199. GianCarlo Canaparo et al., Heritage Found., *Count the Code: Quantifying Federalization of Criminal Statutes* (2022). Other observers, looking beyond the U.S. code at regulatory based offenses, have speculated there may be as many as 300,000 possible federal offenses or regulations susceptible to criminal enforcement. John C. Coffee, Jr., Does "Unlawful" Mean "Criminal"?: Reflections on the

Disappearing Tort/Crime Distinction in American Law, 71 B. U. L. Rev. 193, 216 (1991).

To a large extent, this situation is replicated at the state level. In Texas, for example, where the events of this case occurred, there are, by one count, roughly 1,700 criminal offenses, of which only about 300 are found in the penal code. Marc Levin, Texas Pub. Policy Found., *Time to Rethink What's a Crime: So-Called Crimes are Here, There, and Everywhere* (2010). Nor is this a purely Texas phenomenon. A 2014 review of Michigan's code discovered at least 3,102 crimes and that over the previous six years the legislature had enacted 45 new crimes annually. James R. Copland et al., Mackinac Ctr. and Manhattan Inst., *Overcriminalizing the Wolverine State* (2014). A similar report on North Carolina found that at least 1,150 different criminal offenses had actually been charged in that state, and the legislature enacted another 34 new offenses annually, on average. James R. Copland & Rafael A. Mangual, Manhattan Inst., *Overcriminalizing the North Star State* (2016).

The nature of overcriminalization cannot be understood fully through these numbers alone, however. In Texas, an individual can be arrested for any felony or misdemeanor offense. Tex. Code of Crim. Proc. §§14.01-14.06 & 15.03. This includes Class C misdemeanors that do not even carry the possibility of a jail sentence, a grant of authority that Texas law enforcement officers have made use of in recent years in support of tens of thousands of arrests for Class C traffic offenses. Nikki Pressley, Right On Crime, *Non-Jailable*

Misdemeanors: The Unfinished Business of the Sandra Bland Act of 2017 (2023). Ultimately, an individual in Texas must face the specter of a possible arrest for even the most minor violations of nearly any of those 1,700 offenses. These arrestable violations include offenses such as: selling imitation honey, Tex. Ag. Code §131.083; pointing a laser pointer at a security guard, Tex. Pen. Code §42.13; obstructing a sidewalk, Tex. Pen. Code §42.03; failure to mark a bale of hay, Tex. Ag. Code §111.007; recklessly taunting a police animal, Tex. Pen. Code §38.151; and dozens of minor violations of the traffic code. Tex. Transp. Code §545.001 et seq.

However, the greatest risk of overcriminalization frequently does not rest with these more obscure offenses, but with more familiar ones susceptible to myriad interpretations. *See* Stephen F. Smith, Overcoming Overcriminalization, 102 J. Crim. L. & Criminology 537 (2013). Necessarily, offenses such as simple assault or fraud are relatively open-ended; it is impossible for any legislature to envision all possible manifestations of these kinds of crimes and likely undesirable to narrow them so as to exclude undeniably immoral or harmful conduct. However, this places an inordinate amount of power in the hands of the law enforcement official tasked with determining, in the first instance, whether a given set of conduct qualifies under a particular statute. An assault, for example, in the popular imagination connotes a violent encounter such as a viciously delivered punch. In Texas, however, all that one form of assault requires is that a person "intentionally

or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative." Tex. Pen. Code §22.01(a)(3). A government official could likely find probable cause for this offense many times over at any crowded space in the state.

The issue of overcriminalization is further compounded by the diffusion of arrest authorities across an array of law enforcement agencies. There are roughly 18,000 law enforcement agencies in the United States, employing over one million full-time sworn officers. U.S. Dep't. of Justice, *National Sources of Law Enforcement Employment Data*, 1-2 (2016). In any given jurisdiction, a person may have to contend with federal agents, state police and regulatory enforcement officials, local police, a county sheriff, and deputized private officers (such as in a university police force). In other words, there is no shortage of possible sources of a potential retaliatory arrest.

With so many statutes to choose from, ways to apply those statutes, and individuals who could theoretically search for and act on probable cause, the mere existence of probable in many instances will be relatively unremarkable. An ordinary activity such as going to the grocery store could conceivably result in the violation of multiple traffic misdemeanors (perhaps speeding or failure to signal a turn appropriately, given prevailing societal driving practices), an assault at the grocery store as the individual reaches past and bumps into another person for a hard-to-get item, and

shoplifting after the person fails to act upon the discovery of a lime lurking at the bottom of their cart. We would not expect an individual to be arrested or prosecuted for any single one of these infractions, but it would not be for a lack of probable cause.

II. THE FIFTH CIRCUIT'S RULE WOULD MAKE IT VIRTUALLY IMPOSSIBLE TO HOLD A DETERMINED GOVERNMENT OFFICIAL ACCOUNTABLE FOR A RETALIATORY ARREST

The Fifth Circuit narrowly interpreted the *Nieves* exception's call for "objective evidence" as requiring a plaintiff to assert comparative evidence involving individuals who engaged in similar conduct, did not similarly engage in First Amendment protected conduct, and were not arrested. Pet. App. 29a. It found that providing, as the petitioner here did, evidence of all arrests and prosecutions for a given offense and demonstrating that no other individual so arrested or prosecuted engaged in similar conduct was not sufficient. *Ibid*. In effect, the Fifth Circuit denied the ability of the petitioner to satisfy *Nieves* by leveraging a negative assertion to support a positive inference. *Id.* at 59a-60a (Oldham, J., dissenting).

In so doing, the Fifth Circuit rejected the use of one of the most readily available and reliable types of objective evidence possible in retaliatory arrest cases: arrest and related court records. These official government records can paint a complete picture of how

relevant authorities have chosen to enforce a particular criminal offense. Texas, for example, maintains a state database that includes information on arrests, prosecutions, and other court actions for all criminal offenses except those punishable by a fine only. *See* Tex. Code of Crim. Proc. §66.001 et seq. Further, these types of records are typically publicly available and created prior to the controversy at issue, helping insulate them from any investigative bias on the part of a plaintiff or later issues with a witness' recollections. It is difficult to see how these could possibly fall outside of the realm of the "objective evidence" required under *Nieves*.

Yet, that is exactly what the Fifth Circuit would do and, more egregiously, they would trade this relatively low-cost, high-quality evidence for a plaintiff-driven canvassing campaign. Comparative evidence of individuals who were never arrested will be inherently much more difficult to secure. There is, generally speaking, no government record accompanying a decision not to arrest, nor is the individual in question likely to take any special pains to memorialize this nonevent in contrast to the fallout from an arrest. Further, whereas a government database may aggregate arrest records, there is no central repository that a plaintiff may search for nonarrests. Instead, this evidence will require plaintiff to laboriously search for similarly situated individuals and then convince them to generate a record of that nonevent. To many plaintiffs, this will surely be a prohibitively high bar.

A troubling interpretation of *Nieves* from a purely logical standpoint, the Fifth Circuit's rule is even more

problematic in light of rampant overcriminalization. As noted above, government actors contemplating a retaliatory arrest will potentially have a variety of statutes from which to choose, or the ability to apply a single, broadly worded statute to numerous distinct acts of a given individual. There is relatively little that the official can do to avoid or obscure previous arrest or prosecution records (short of committing a criminal offense or other official misconduct themselves), and even where possible it would be exceedingly difficult for a single official to achieve at the scale necessary to frustrate a retaliatory arrest claim. However, with multiple avenues for a potential retaliatory arrest, given time for premeditation, they could select whichever path appears most likely to impair an aggrieved plaintiff's case. For example, they could arrest based on conduct that typically occurs with few witnesses, is largely unmemorable, or otherwise leaves little record.

Whatever relevance the Fifth Circuit's rule holds for a split-second arrest decision, it disappears in the face of premeditation. Overcriminalization provides wayward government officials with too many routes to pursue unconstitutional exercises of their authority. Given the time to research and strategize, probable cause will fail to erect a meaningful obstacle to these officials in too many cases. Even if the Court decides to extend the Fifth Circuit's understanding of the *Nieves* exception to on-the-spot arrests, it should therefore clarify that it does not apply in cases involving premeditation.

III. MAINTAINING THE AVAILABILITY OF LEGAL REMEDIES IS ESSENTIAL BECAUSE CITIZENS HAVE NO REASONABLE MEANS OF AVOIDING A PROBABLE CAUSE-SUPPORTED RETALIATORY ARREST

The Court illustrated the necessity of the *Nieves* exception through a scenario involving jaywalking. *Nieves*, 139 S. Ct. at 1728. This offense is commonly perpetrated yet very rarely (and likely never in some jurisdictions) enforced. Most individuals are likely aware of its illegality and equally cognizant of the social norm that condones reasonable violations of it. All of which, the Court reasoned, would help undermine the evidentiary value of probable cause in a retaliatory arrest involving a jaywalking offense because "probable cause does little to prove or disprove the causal connection between animus and injury." *Ibid*. Hence, the *Nieves* exception.

Jaywalking, however, is merely the tip of the iceberg when it comes to overcriminalization and the evidentiary value of probable cause in a First Amendment retaliatory arrest case. Although jaywalking demonstrates the ease with which probable cause can be found against large portions of the public, it ends up serving as a poor representative of the sheer difficulty of living a probable cause-free lifestyle. Exactly because individuals are aware of the general nature of jaywalking prohibitions, they could theoretically avoid ever violating the relevant provision. A person can, in effect, protect themselves from a probable

cause-supported retaliatory arrest for jaywalking with relative ease (putting aside momentarily whether such a defensive action should be necessary in a free society).

The same is not true, or at least practicable, for many other offenses. If the federal government cannot keep track of all of its criminal penalties, it stands to reason that the average American will struggle mightily to do the same. The diffuse and disorganized placement of criminal penalties across the code "makes it difficult for even specialists in criminal law to find the law, much less ordinary citizens trying to determine their legal obligations." Smith, 102 J. Crim. L. & Criminology at 566. Neither is a person likely to foresee all the possible legal interpretations of many of the offenses of which they are aware. Ignorance of the law may not excuse a violation, but it will almost certainly help cause them under this kind of expansive criminal legal regime.

Even were an enterprising legal savant able to read every statute in his or her state and across thousands of pages of federal codes and regulations as well as consider every possible application of them, this knowledge would still not prove sufficient. Seeing a web will not prevent ensnarement if it is so tightly wound as to preclude any unmolested path forward. Short of a person becoming a hermit (while still studiously paying relevant taxes and observing land use regulations, of course), it is difficult to envision how they could avoid inadvertently giving rise to probable cause on at least one occasion. Were they somehow able

to do so, their lifestyle would be unrecognizable in and offensive to a free society.

This pervasive overcriminalization further demonstrates the necessity of the *Nieves* exception and highlights the risks of the Fifth Circuit's overly narrow reading that would eliminate it in nearly every instance. The ubiquity of probable cause for one offense or another—even if in many instances it would clearly violate the spirit, though not the letter, of the underlying law to find it—means that an individual cannot eliminate their exposure to probable cause-supported retaliatory arrests through reasonable preventative measures. If a government official has the time and energy to surveil an opponent, there is little doubt that they will eventually find probable cause for an offense, if only a minor one. Corrective legal action via a First Amendment based retaliatory arrest claim may therefore be the only means of securing any kind of meaningful accountability and deterrence. This Court should reject any attempt to unnecessarily limit its availability.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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