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 a Writ of Certiorari to the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

At the heart of respondents' BIO is an expectation that, because they laundered their First Amendment retaliation through probable cause, they cannot be held accountable for it. But as *Nieves* v. *Bartlett* explains, "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.'" 139 S. Ct. 1715, 1725 (2019) (quoting *Lozman* v. *City of Riviera Beach*, 138 S. Ct. 1945, 1953–1954 (2018)). That's precisely the reason for the *Nieves* exception to the probable cause rule. The two remaining issues are: 1. whether the exception can only be satisfied by comparative evidence of non-arrests, as the Fifth Circuit insists below and 2. whether the *Nieves* rule even applies outside of individual claims against arresting officers for split-second arrests, as Judge Oldham's dissent questions.

Respondents do not address these issues other than to insist that there is no circuit split, despite the panel opinion and both dissents' recognizing that there is. Pet. App. 29a; *id*. at 60a (Oldham, J., dissenting); *id*. at 12a (Ho, J., dissenting from the denial of rehearing en banc). Respondents ignore that inconvenience by arguing instead that opinions from the Seventh and Ninth Circuits are consistent with the opinion below. They are not. The opinion below requires plaintiffs to identify non-critics "who engaged in the same criminal conduct [as the plaintiff] but were not arrested." Pet. App. 29a. Whereas the Seventh and Ninth Circuits explicitly permit "a wide range of other objective evidence of retaliation," including that no one else has been arrested for similar

conduct. *Lyberger* v. *Snider*, 42 F.4th 807, 813–814 (7th Cir. 2022); see also *Ballentine* v. *Tucker*, 28 F.4th 54, 62 (9th Cir. 2022).

In addition to denying the existence of an admitted circuit split, respondents mischaracterize the case as one involving the independent intermediary doctrine. But neither *Nieves* nor this case have anything to do with the doctrine. *Nieves* assumes the existence of probable cause and explains that, even where there is probable cause for an arrest, a plaintiff can still proceed with her retaliation claim if she presents objective evidence of disparate treatment, 139 S. Ct. at 1727, which is exactly what Gonzalez did here.

Finally, respondents argue that *Nieves* did not provide them with fair warning that an arrest supported by probable cause can still violate a person's First Amendment rights. But the decision below never reached the question of whether the First Amendment violation was clearly established. (The district court held it was, Pet App. 88a, and the Fifth Circuit did not disturb that holding.). Instead, the Fifth Circuit, much to its regret, *id*. at 33a, held that the objective evidence Gonzalez provided was not the specific type needed to overcome *Nieves*'s probable cause requirement; Gonzalez could point to no instance of another person who, without criticizing the government, misplaced a petition but was not arrested for it. Contra *Nieves*, 139 S. Ct. at 1727.

At bottom, the panel opinion and both dissents agree there is a circuit split on the scope of the *Nieves* exception to the probable cause rule. The panel opinion and both dissents also agree that resolving this

split is exceptionally important. See Pet. App. 33a (acknowledging "a forceful case for why the Constitution ought to provide a claim here, particularly given that Gonzalez's arrest was in response to her exercise of her right to petition"). As the seven amicus briefs in support of certiorari confirm, without a broad, "commonsensical[]" application of the *Nieves* exception, *Nieves*, 139 S. Ct. at 1734 (Gorsuch, J., concurring in part and dissenting in part), "[t]he presence of literally thousands of criminal offenses as well as broadly worded ones open to creative applications" means that "government officials [have] an overabundance of probable cause against virtually any individual." Texas Public Policy Foundation Amicus Br. 2. If the Fifth Circuit's decision stands, there is effectively no *Nieves* exception and "probable cause will prove little more than a speed bump to an official determined to retaliate against an individual in their jurisdiction." *Ibid*. The Court should grant certiorari and reverse.

I. The circuits are split over the applicable standards for retaliatory arrest claims.

A. The Fifth Circuit split from the Seventh and Ninth Circuits over the *Nieves* probable cause exception.

To satisfy the *Nieves* probable cause exception and allay *Nieves*'s concerns about the "causal complexity" of retaliatory arrest claims, 139 S. Ct. at 1724, Gonzalez's complaint alleged three types of objective evidence. First, Gonzalez sorted through ten years' worth of felony and misdemeanor data showing that no one in Bexar County was ever arrested under the tampering statute for misplacing a document during

a meeting. Pet. 10. Second, Gonzalez pointed to the face of the arrest affidavit, which lists Gonzalez's views critical of the city manager as facts warranting her arrest, even though speech is not an element of the tampering statute. *Id.* at 8. Third, Gonzalez showed how the actions taken by respondents departed drastically from normal county procedures. Notably, respondents went around the district attorney entirely and sought an arrest warrant instead of a summons for the nonviolent misdemeanor, resulting in a 72-year-old councilmember's gratuitous imprisonment. *Id.* at 8–9. In light of this overwhelming objective evidence, there is no complexity to untangle.

Had Gonzalez provided this evidence to the Seventh or Ninth Circuits, her retaliatory arrest claim would have been allowed to proceed, because the evidence clearly shows that it was the retaliatory motive and not probable cause that drove the decision-making. In the Fifth Circuit, however, the only evidence that could have satisfied *Nieves* was pointing to another person who misplaced papers, did not criticize the government, and was not arrested for it. Because, just like a hypothetical jaywalker in *Nieves*, Gonzalez did not have that evidence, her claim was thrown out. Pet. App. 53a (Oldham, J., dissenting) ("[U]nder today's opinion, I am afraid the very jaywalking plaintiff invoked by the Supreme Court to illustrate part two of the *Nieves* rule would lose for lack of nonexistent comparative evidence.").

Respondents say there is no circuit split over the *Nieves* exception. BIO 10. Respondents attempt to square contrary decisions by the Seventh and Ninth Circuits. They can't.

To begin with, the Ninth Circuit in *Ballentine* emphatically did *not* "examine[] disparate treatment of individuals who chalked and engaged in anti-police speech and those who chalked but did not engage in antipolice speech." BIO 12. Instead, it relied on two pieces of evidence: (1) the police had never before applied the law to any chalking activity and (2) the police had not applied the law to the exact same plaintiffs when they criticized the police in the past. 28 F.4th at 62; see also *Ballentine* v. *Las Vegas Police Dep't*, 480 F. Supp.3d 1110, 1116 (D. Nev. 2020).

Gonzalez's evidence is at least as strong as the evidence in *Ballentine*—neither in *Ballentine* nor in the case below was there an example of another person who engaged in similar conduct *without criticizing* the government and was *not* arrested for it. The Ninth Circuit nonetheless held that plaintiffs provided "the kind of evidence required by the *Nieves* exception." *Ballentine*, 28 F.4th at 62. The Fifth Circuit says that evidence here "comes up short." Pet. App. 29a.

The Seventh Circuit's decisions in *Lund* and *Lyberger* also directly contradict the decision below. Respondents claim that they don't because the plaintiff in *Lund* also did not provide comparative evidence, and the Seventh Circuit also ruled against him. BIO 12. But unlike the Fifth Circuit, the Seventh has explicitly rejected "a rigid rule that requires, in all cases, a particular form of comparison-based evidence." *Lund* v. *City of Rockford*, 956 F.3d 938, 945 (7th Cir. 2020). Had Lund presented an actual admission to the court, instead of a mischaracterization of one, *ibid.* at 945, shown that "the police rarely make arrests for driving the wrong way on a one-sway

street," *id*. at 945–946, or "demonstrated retaliation in some other way," *ibid*., Lund's claim would have proceeded. The same goes for plaintiffs in *Lyberger*. 42 F.4th at 814 (reasoning that the retaliation claim could have proceeded had plaintiffs "pointed to similarly-situated comparators, statements from arresting officers or other police officials, or a wide range of other objective evidence of retaliation") (cleaned up).

Unlike Lund or the plaintiffs in *Lyberger*, Gonzalez unquestionably "demonstrated retaliation in some other way," by presenting three independently sufficient types of objective evidence to untangle probable cause from improper motive. See Pet. 8–11; 22. Because the Fifth Circuit rejected the Seventh Circuit's "more lax reading of the [*Nieves*] exception," Pet. App. 29a, it threw out Gonzalez's individual claims.

B. In contrast with the Fifth Circuit, the Sixth Circuit and dissenting Judge Oldham have persuasively explained that *Nieves* should not apply outside of split-second arrests.

In her petition, Gonzalez explains that the Fifth Circuit also has disagreed with the Sixth Circuit on whether *Nieves* applies outside of split-second decisions made by arresting police officers. Pet. 25. Respondents misunderstand this argument. BIO 13.

Unlike *Lund*, *Lyberger*, and *Ballentine*, *Novak* adds nothing to the circuit split on the scope of the *Nieves* probable cause exception. It does, however, support Judge Oldham's alternative position in his dissent that, because "[t]he *Nieves* Court framed the

entirety of [the] two-part rule to accommodate the necessities of split-second decisions to arrest," it should not bar retaliation claims in a case like this, where desk-bound bureaucrats schemed for months to find a crime to (roughly) fit the circumstances presented to them when Gonzalez mistakenly misplaced the petition in her binder. Pet. App. 54a–55a (Oldham, J., dissenting). After all, the backbone of *Nieves* is the Court's concern with on-the-beat police officers making "quick decisions in circumstances that are tense, uncertain, and rapidly evolving." *Id.* at 54a (citation omitted). The "causation difficulties that might arise in the mine run of arrests made by police officers," *id.* at 57a (cleaned up), are not present when "there's zero difficulty or complexity in figuring out whether it was animus or * * * purportedly criminal conduct that caused [the] arrest," *id.* at 55a.

In *Novak*, writing for a unanimous panel, Judge Thapar came to the same conclusion, stating that in an appropriate case the court should grapple with what to do when "thorny causation issue[s]" so relevant to split-second decisions to arrest are not present. *Novak* v. *City of Parma*, 932 F.3d 421, 431-432 (6th Cir. 2019). In the Sixth Circuit's view, some situations, like arresting an individual weeks after he made fun of his police department on Facebook, are "prime ground" for "exploit[ing] the arrest power as a means of suppressing speech." *Id.* at 431 (cleaned up). In these types of cases, *Lozman*, and not *Nieves*, should control. See *id.* at 432.

Judge Oldham and the Sixth Circuit point to an alternative avenue for this Court to resolve the problem of pretextual arrests by clarifying that *Nieves*

only applies to circumstances involving split-second arrests made by police officers.

II. Respondents' objections are beside the point.

At the heart of respondents' objections is an expectation that as long as their retaliatory scheme leading to Gonzalez's arrest was supported by probable cause, they cannot be held to account for intentionally violating the Constitution. Respondents can't wrap their head around the idea that even when government officials are sufficiently conniving as to manufacture probable cause to arrest the critic, the First Amendment can still stand in the way.

Thus, respondents continue to insist that because a judge made "an independent determination that there was probable cause and issued an arrest warrant," they cannot be sued. BIO 8. They even bring *Malley* v. *Briggs*, 475 U.S. 335 (1986), and *Franks* v. *Delaware*, 438 U.S. 154 (1978), into the discussion, spending much ink on arguments—readily accepted by Gonzalez—that neither one of the two precedents apply to undermine the fact that the judge signed the warrant. BIO 9–10.

But Gonzalez does not argue that there was a deficient warrant application (*Malley*) or that probable cause in the affidavit was the result of a material misrepresentation (*Franks*). In fact, the only time she ever cited to either case was in response to this very same argument by respondents below.

Gonzalez's point is that even if probable cause existed for her arrest, *Nieves* lets her proceed with her

retaliation claims by piercing through it. The existence of probable cause cannot undermine an overwhelming amount of objective evidence that the only reason for arrest was respondents' desire to punish Gonzalez and shut her up. Probable cause is not preclearance to violate the First Amendment.

Ironically, respondents claim the mantle of "[c]ommon sense" in justifying their arrest of a 72-year-old councilwoman with not as much as a traffic ticket to her name. BIO 7. Forgetting that respondent Trevino himself originally admitted that Gonzalez "probably picked [the petition] up by mistake," Pet. App. 36a (Oldham, J., dissenting), respondents now argue "[i]t strains credulity to represent that any Texas city would fail to prosecute persons who conceal or steal governmental records." BIO 7.

But common sense is in favor of recognizing Gonzalez's claim, not denying it. As dissenting Judge Oldham explained, "government employees routinely—with intent and without it—take stacks of paper before, during, and after meetings." Pet. App. 60a (Oldham, J., dissenting). If Texas cities are so committed to cracking down on this occurrence, "there should be dozens if not hundreds of arrests of officeholders and staffers during every legislative biennium." *Ibid*. Yet, there has been only one: Gonzalez's. *Ibid*.

The panel majority below was not persuaded by this "commonsense," approach to the *Nieves* exception. *Ibid*. In its view, the only way to overcome probable cause is by identifying individuals who didn't criticize the government, did misplace documents, but were not arrested for it. This approach, which

requires courts to blind themselves to obvious evidence of retaliatory motive, is inconsistent with *Nieves* and should be reversed.

III. No vehicle issues exist in this important case.

To sully this case as a vehicle, respondents falsely bring up the fair warning standard incorporated into step two of the qualified immunity analysis. BIO 14–16. The Fifth Circuit decision, however, has nothing to do with it. "The question before us," said the Fifth Circuit in the opinion below, "is whether Gonzalez has alleged a violation of her constitutional rights when probable cause existed for her allegedly retaliatory arrest." *Id*. at 26a. Despite Gonzalez providing the court with objective evidence to disentangle respondents' improper motive from probable cause, the court, in an explicit departure from the Seventh Circuit, interpreted the *Nieves* exception very narrowly and held that "Gonzalez fail[ed] to establish a violation of her constitutional rights." Pet. App. 21a.

That's precisely why this case is such a compelling vehicle. The district court denied respondents' motion to dismiss, holding that Gonzalez stated a constitutional violation and that the violation was clearly established. The Fifth Circuit did not disturb the district court's judgment on clearly established law and instead held only that Gonzalez could not overcome *Nieves*'s probable cause exception. If this Court were to reverse the Fifth Circuit's judgment and hold that *Nieves* does not preclude Gonzalez's First Amendment claim, the district court's ruling would be upheld and

the case would return to that court for further motion practice and discovery.

Reversing the Fifth Circuit's judgment is also extremely important. Respondents complain of the injustice *they* would suffer if this Court were to recognize Gonzalez's right to criticize her government without being arrested, but it is Gonzalez, and government critics like her, who pay the highest price in the Fifth Circuit.

Far from making "an unsupported allegation that * * * her arrest was prompted by retaliatory intent," BIO 1, Gonzalez presented at least three types of objective evidence clearly showing that it was respondents' malice towards Gonzalez's speech and not probable cause that caused Gonzalez's arrest. See Pet. 8–11; 22. If the evidence provided by Gonzalez is not sufficient to state a retaliation claim, what is? *Nieves*, 139 S. Ct. at 1734 (Gorsuch, J., concurring in part and dissenting in part) ("I do not understand the majority" as "adopting a rigid rule * * * that First Amendment retaliatory plaintiffs who can't prove the absence of probable cause must produce comparison-based evidence in every case.").

As the two dissents in this case and seven amicus briefs in support of certiorari confirm, letting the decision below stand would undermine the very essence of our republic, which does not "allow the police to arrest and jail our citizens for having the temerity to criticize or question the government." Pet. App. 3a (Ho, J., dissenting from the denial of rehearing en banc); see also Alexander Solzhenitsyn, 1 The Gulag Archipelago 19 (describing his own arrest after he

criticized the government in a private correspondence with a friend). That's why "courts must be vigilant in preventing officers from concocting legal theories to arrest citizens for stating unpopular viewpoints." *Id.* at 4a; see also Thomas More Society Amicus Br. 9 ("[A] government * * * must be held answerable in court for what is credibly alleged[] 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."); Law Professors Amicus Br. 2 ("[P]robable 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.").

The petition presents an excellent opportunity for this Court to make it clear that, despite the Fifth Circuit's holding below, *Nieves* is not an endorsement of Lavrentiy Beria's shameful boast, "Show me the man and I'll find you the crime."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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