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

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

In this case, Judge James C. Ho dissented from the denial of en banc review, disagreeing with the Fifth Circuit's newly announced rule—challenged in this petition—that a plaintiff cannot proceed on a First Amendment retaliation claim unless she points to examples of individuals who engaged in similar activity, without criticizing the government, and were not arrested for it. Pet. App. 3a–19a; Pet. App. 28a–29a.

On August 23, Judge Ho provided additional criticisms of this rule, dissenting in another case centered on an arrest of a government critic. *Mayfield* v. *Butler Snow*, 78 F.4th 796, 796 (5th Cir. 2023) (per curiam) (*Mayfield 2*) (Ho, J., dissenting).

Like this case, *Mayfield* involved claims for First Amendment retaliation. A Tea Party activist, who participated in "a scheme to take a picture of Senator Thad Cochran's late wife" in a nursing home, was "arrested at his office," under a statute that prohibited "posting of messages through electronic media for the purpose of causing injury to any person with lewd intent." *Mayfield* v. *Butler Snow*, 75 F.4th 494, 497–500 (5th Cir. 2023) (per curiam). The arrest generated bad publicity, causing the activist to lose his biggest client and "stop his political activities for the Tea Party." *Id.* at 499. The activist committed suicide three days after Senator Cochran was reelected. *Ibid.*

Despite compelling witness testimony acknowledging that the arrest was motivated by the desire to punish activists with opposing political views, *Mayfield 2*, 78 F.4th at 796, the Fifth Circuit held that

probable cause for the activist's arrest precluded the retaliation claim, *Mayfield*, 75 F.4th at 499–500.

In his dissent from the denial of en banc review, Judge Ho emphasized that he has "no quarrel with how my distinguished colleagues on the per curiam panel decided" *Mayfield*. *Mayfield 2*, 78 F.4th at 796 n.1. "After all, we were bound by circuit precedent," namely this case, *Gonzalez* v. *Trevino*. *Ibid*.

But, Judge Ho explained, "*Gonzalez* significantly under-protects freedom of speech," "ties our hands," and "requires us to deny relief—no matter how obvious it is that [retaliatory] actions would never have been taken against a citizen who held views favored by those in power." *Ibid*. As a result, "citizens in our circuit are now vulnerable to public officials who choose to weaponize criminal statutes against citizens whose political views they disfavor." *Ibid*.

Emphasizing the absurdity of the Fifth Circuit's rule requiring comparative evidence of non-arrests, Judge Ho asked: "Exactly how is Mayfield's family supposed to track down other scenarios where a citizen provided similar information to another person, but was not arrested—as *Gonzalez* requires?" *Ibid*.

Judge Ho's opinion in *Mayfield 2* further confirms that the Fifth Circuit was wrong to split from the Seventh and Ninth Circuits, Pet. 15–25, and interpret *Nieves* v. *Bartlett*, 139 S. Ct. 1715 (2019), so narrowly that the jaywalking exception to the *Nieves* probable cause rule is effectively meaningless. See Pet. App. 28a–29a. But because it did, the Fifth Circuit is now in the unenviable position of having to blind itself to

even "substantial record evidence" supporting the "common-sense inference" that had it not been for a critic's political views, there would have been no arrest at all. *Mayfield 2*, 78 F.4th at 796.

This is all the more reason for the Court to grant Gonzalez's petition and address the circuit split the Fifth Circuit has admittedly created. Pet. App. 29a.

Respectfully submitted,

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