NO. 22-1025

IN THE

Supreme Court of the United States

SYLVIA GONZALEZ,

Petitioner,

V.

EDWARD TREVINO, II, ET AL.,

Respondents.

ON 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
Aubre G. Dean
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

INTEREST OF THE *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 6

I. Probable cause is insufficient to shield government officials from liability when other objective evidence demonstrates the targeting of citizens for harassment and retaliation 8

II. The Fifth Circuit's conflation of objective evidence with empirical statistics is wrong......................15

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Atwater v. *City of Lago Vista*,
532 U.S. 318 (2001) 13

Bd. of Cnty. Comm'rs, Wabaunsee Cnty., Kan. v. *Umbehr*,
518 U.S. 668 (1996) 15

Carter v. *United States*,
530 U.S. 255 (2000) 13

Church of Lukumi Babalu Aye v. *Hialeah*,
508 U.S. 520 (1993) 14

County of Sacramento v. *Lewis*,
523 U.S. 833 (1998) 11

Dombrowski v. *Pfister*,
380 U.S. 479 (1965) 14

Entick v. *Carrington*,
19 Howell's State Trials 1029 (1765).................... 12

Gonzalez v. *Trevino*,
42 F.4th 487 (5th Cir. 2022) 8, 9

Gonzalez v. *Trevino, et al.*,
No. 21-50276 (5th Cir. 2023) 5, 8, 9, 15, 18

Graham v. *Connor*,
490 U.S. 386 (1989) 2, 4, 5, 10

Hicks v. *Miranda*,
422 U.S. 332 (1975) 14

Hoggard v. *Rhodes*,
141 S. Ct. 2421 (2021) 11

Lozman v. *City of Riviera Beach*,
138 S. Ct. 1945 (2018) 4, 7, 12, 14, 15

Matal v. *Tam*,
582 U.S. 218 (2017) 15

McDonnell v. *United States*,
579 U.S. 550 (2016) 13

Mills v. *Alabama*,
384 U.S. 214 (1966) 1

Mt. Healthy City Sch. Dist. Bd. of Educ. v. *Doyle*,
429 U.S. 274 (1977) 15

Nieves v. *Bartlett*,
139 S. Ct. 1715 (2019)
...............................2, 3, 4, 5, 7, 8, 10, 15, 17, 18, 19

Oestereich v. *Selective Serv. Sys. Loc. Bd. No. 11, Cheyenne, Wyo.*,
393 U.S. 233 (1968) 14

Ramos v. *Louisiana*,
140 S. Ct. 1390 (2020) 14

Shaw v. *Garrison*,
467 F.2d 113 (5th Cir. 1972) 14

Tsombanidis v. *W. Haven Fire Dep't*,
352 F.3d 565 (2d Cir. 2003) 13

Utility Air v. *E.P.A.*,
573 U.S. 302 (2014) 13

Whren v. *United States*,
517 U.S. 806 (1996) 11

Wilkes v. *Woods*,
98 Eng. Rep. 489 (1763) 12

Yates v. *United States*,
574 U.S. 528 (2015) 13

STATUTES

Tex. Penal Code § 37.10(a)(3) 9

OTHER AUTHORITIES

Harvey A. Silverglate, *Three Felonies a Day: How the Feds Target the Innocent* (2009) 3

Jud Campbell, *Natural Rights and the First Amendment*, 127 Yale L. J. 246 (2017).................. 5

Tim Wu, American Lawbreaking: Introduction, Slate.com (October 14, 2007) 2, 8

INTEREST OF THE *AMICI CURIAE*

Amici curiae are eleven (11) law professors who write and teach on the First Amendment and criminal justice. *Amici* have no personal interest in the outcome of 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

"Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such *219 matters relating to political processes." *Mills* v. *Alabama*, 384 U.S. 214, 218–19 (1966).

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 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. This led the Court in *Nieves* v. *Bartlett*, 139 S. Ct. 1715 (2019), to hold that the existence of probable cause is generally sufficient to shield an arresting officer from civil liability for retaliatory arrest. It based this decision, not on the text of the First Amendment, which has no probable cause requirement, but as a matter of policy, given the "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, the *Nieves* Court held, should therefore reciprocally protect 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, coupled with 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 civil liability protection that the existence of probable cause confers. 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, *Nieves* does not apply because the presumption that police conduct is directed at the good faith enforcement of criminal laws is overcome because the objectively arbitrary exercise of enforcement discretion betrays the intent to suppress speech.

This vital qualification to *Nieves*' general holding 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 presented asks what showing plaintiffs must make to demonstrate that they were arrested while others were not. The Fifth Circuit's rule, which requires plaintiffs to come forward with empirical data demonstrating a routine failure to arrest similarly situated individuals, requires

plaintiffs to prove a negative and thus imposes an impossible burden. It also imposes a perverse burden, since the very novelty of a prosecution is often the strongest evidence of a deviation from routine policing from which the only reasonable inference is an intent to retaliate.

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 policymakers done with the intent to retaliate against those who criticize their government.

Nieves' elevation of probable cause to arrest as a general shield from liability was predicated on the presumptions that law enforcement arrests turn on

"split-second judgments." But when government officials instead work deliberately over a substantial 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 *Nieves*' policy-based liability shield 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 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 Court should not only correct the Fifth Circuit's doctrinal error but also take the opportunity to highlight the kinds of "facts and circumstances" that do and do not establish "a causal connection between animus and injury." This case illustrates many of the factors that do.

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 Petitioner's political enemies, not "split-second judgments" 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. This case presents extraordinary circumventions of usual processes and channels of decision-making, not the routine work of policing. And it contains public records, subject to judicial notice, clearly reflecting an intent to retaliate. All these factors are objective, recognized in this Court's case law as relevant to demonstrating any pretextual use of government authority, and illustrated by the astonishing facts of this case.

ARGUMENT

The First Amendment commands that "discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled." *Beauharnais* v. *Illinois*, 343 U.S. 250, 264 (1952). The government may not use its awesome powers of arrest to silence or deter its critics. If public servants violate the First Amendment by pretextually arresting citizens who criticize the government, they can be – and should be – liable to those against whom they have abused their power.

In *Nieves* v. *Bartlett*, this Court held the existence of probable cause generally shields an arresting officer from any civil liability predicated upon retaliatory arrest. In making that general holding, however, this Court was careful to qualify the scope of that protection. A plaintiff can still sustain a First Amendment retaliatory arrest claim against an arresting officer, even where probable cause exists, so long as the 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." 139 S. Ct. at 1727.

In applying this standard, this Court should adopt the approach of the Seventh and Ninth Circuits and permit a plaintiff to meet this burden with any reliable, objective evidence of retaliation. This Court should reject the Fifth Circuit's insuperable demand that a plaintiff present comparative data proving that others who did not engage in protected speech, but engaged in the same conduct, were not arrested. Such a rule places a near impossible burden 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 generally be 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 (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 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 a rule that forecloses all civil liability upon a mere showing of probable cause threatens 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."). In some prosecutors' offices it has become a parlor game to "figure out a plausible crime for which to indict" even the most revered and blameless public figures. Tim Wu, *American Lawbreaking: Introduction*, Slate.com (October 14, 2007). Hence, in *Nieves*, this Court recognized that the general rule that probable cause shielded the police from civil liability for 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 illustrate precisely why this Court was careful to qualify the rule *Nieves* announced. As alleged in her complaint, Petitioner organized a petition calling for the replacement of a 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. *Ibid.* 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 her 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 clumsy paper shuffling at a city council meeting was sufficient to establish probable cause. Yet, any objective evaluation of the decision-making process 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, why did officers not arrest Petitioner on the spot as the officer in *Nieves* did? Why did it take city officials another month to build their case against Petitioner? Why did the charging document allege, among other things, that she was "openly antagonistic to the city manager . . . wanting desperately to get him fired?" *Gonzalez*, 42 F.4th at 490. The objectively reasonable answer to all these

questions is the same. Her arrest for mishandling government documents was a pretext for retaliating against Petitioner for her legitimate, political speech.

As discussed below, the Fifth Circuit improperly narrowed its inquiry to a singular demand that plaintiffs offer empirical evidence of non-prosecution. While such statistical insights might be probative when available, the Fifth Circuit ignored at least five other objective factors that other circuits and this Court have long relied upon when evaluating the objective reasonableness of government conduct.[1]

First, and most significant, the general rule announced in *Nieves* is tailored to deal with the exigencies of routine policing. *Nieves*, for its part, built upon this Court's prior decision in *Graham*, and its injunction that the reasonableness of a police officer's use of force against a criminal suspect should not be viewed with the "20/20 vision of hindsight" because law enforcement "are often forced the make split-second judgments in circumstances that are tense, uncertain and rapidly evolving." *Nieves*, 139 S. Ct. at 1725 (quoting *Graham*, 490 U.S. at 397).

The farther the decision-making process leading to an arrest is from the "split-second decisions" that law enforcement officers must make in the context of routine policing, the less relevance the courts should place on the defendants' bare ability to conjure probable cause.[2] This follows principally from the fact

---

[1] 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.

[2] 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 high-speed automobile

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 made clear, shielding police officers from liability for retaliatory arrest when they can show probable cause did not mean that the First Amendment had not been violated. Rather, this Court determined that against the entitlement to civil recovery there was a countervailing policy need for objective standards in policing generally, and when determining whether a police officer's retaliatory motive was the causal basis for an arrest specifically. 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* was that probable cause is irrelevant once government officials' concerted,

---

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).

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 deliberate courses of official conduct that retaliate against disfavored speakers, even when that course of conduct had not quite gelled into an "official retaliatory policy." In the pre-Founding era, British courts sustained civil claims for trespass against government officials who, under the authority of a general warrant, searched citizens' homes and offices for pamphlets believed to be critical of the King.

In *Wilkes* v. *Woods*, 98 Eng. Rep. 489, 498-99 (1763), the Court of Common Pleas concluded that a warrant which did not name the suspected author of the pamphlet or specify the location of the search but instead granted the King's messengers broad authority to search for evidence related to the publication of the pamphlet impermissibly impacted "the person and property of every man in [the] kingdom [ ] and [was] totally subversive to liberty[.]" *Ibid.* Allowing the King's "messengers to search wherever suspicions may chance fall" without fear of liability risked the liberty of every person. *Ibid.*

Likewise, in *Entick* v. *Carrington*, 19 Howell's State Trials 1029 (1765), Lord Candem 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. 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." *Ibid.*

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).

Fourth, 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).

Finally, public records reflecting governmental deliberations can offer highly probative objective evidence of a retaliatory motive. *Lozman*, 138 S. Ct. at 1954; *cf. Church of Lukumi Babalu Aye* v. *Hialeah*, 508 U.S. 520, 535 (1993). The content of such records will ordinarily be subject to judicial notice. And by virtue of their public character, excluding such evidence from judicial consideration diminishes the public's confidence in the judiciary as a safeguard of citizens' First Amendment rights by making a requirement for "objective evidence" of retaliatory intent into "the art of methodically ignoring what everyone knows to be true." *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1405 (2020).

In sum, the Court should confirm that, in the First Amendment context, a plaintiff can still sustain a

First Amendment claim for retaliatory arrest, even where probable cause exists, so long as the plaintiff "presents objective evidence" – any reliable, 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.

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

Under the First Amendment "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). State actors are therefore presumptively liable 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 (1977). *Nieves* created a narrow exception to this general entitlement to recovery for constitutional injury that was rooted in the countervailing policy considerations that arise from routine law enforcement activity.

As Judge James C. Ho noted below in dissent, "[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).

The Fifth Circuit, however, treated the immunity conferred by *Nieves* as a rule to which exceptions must be proven. And to prove that exception, 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.[3] A plaintiff must, in other words, prove a negative to overcome even the most obviously pretextual invocations of probable cause.

This does not simply reverse the priority that should be given to the First Amendment and the prerogatives of law enforcement. It perversely insulates the most egregious retaliatory conduct from scrutiny. The most compelling objective evidence of pretext will often be the enforcement of an obscure criminal prohibition, if only because the police will rarely have a legitimate reason to detour from their public safety responsibilities to search the crannies of the criminal code. The Fifth Circuit's rule incentivizes government officials to abuse the criminal justice system and to make pretextual arrests for obscure crimes their preferred means of suppressing the speech of their critics.

---

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

The Fifth Circuit's expansive application of *Nieves* is contrary to *Nieves* itself, which 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 a bona fide jaywalker, but this Court acknowledged that barring a First Amendment retaliation claim on these facts would be "insufficiently protective of First Amendment rights[.]" *Ibid.* 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 situated individuals.' But what if there are no similarly situated individuals?

Amy L. Moore, *Plausible Retaliation*, 23 U. Pa. J. Const. L. 1032, 1049–50 (2021).

The Fifth Circuit's demand for empirical evidence of non-arrests will also perversely bar the most meritorious retaliation claims. 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 uniquely within police officers' knowledge and control — not the ordinary citizens'.

To try to meet this burden in this case, 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. The novelty of her arrest on such charges 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.

The burden of proof to allege a meritorious claim of retaliatory arrest cannot be so high that a 72-year-old woman can be arrested, jailed, and barred from ever holding local office again because she failed to strike paydirt in a dig through the city archives. That is not what *Nieves* or common sense requires.

CONCLUSION

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.

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. This Court should therefore clarify that, outside of the context of time-stressed law enforcement decision-making, any objective, reliable evidence of retaliatory motive is sufficient to sustain a civil claim for retaliatory arrest.

Respectfully submitted,

Michel Paradis
Counsel of Record
Aubre G. Dean
CURTIS, MALLET-PREVOST,
COLT & MOSLE LLP
101 Park Avenue
New York, NY 10178
(212) 696-6078
mparadis@curtis.com

Counsel for Amici Curiae

DECEMBER 2023

APPENDIX

APPENDIX

LIST OF AMICI

Brandon L. Garrett 2a
Thomas Healy 2a
Brenner M. Fissell 2a
Colin Miller 2a
Amy Moore 2a
Sheldon Nahmod 3a
Karen Pita Loor 3a
Joanna Schwartz 3a
Seth W. Stoughton 3a
Laurence Tribe 4a
Rebecca Tushnet 4a

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.

Amy L. Moore is a Professor of Law and the Director of Advocacy at Belmont University College of Law. She teaches and writes in the areas of Constitutional Law, Civil Procedure, and Administrative Law.

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 (2023–2024 Edition), A Section 1983 Civil Rights Anthology (1993), and Constitutional Torts (5th ed. 2020).

Karen Pita Loor is a Clinical Professor of Law and Michaels Faculty Research Scholar at the Boston University School of Law, where she directs the Criminal Clinic and teaches Criminal Law. She researches, writes, and serves as an expert on protest policing and criminal law and procedure.

Joanna Schwartz is a Professor of Law at UCLA School of Law and the Faculty Director of the David J. Epstein Program in Public Interest Law and Policy. She is one of the country's leading experts on police misconduct litigation and the author of Shielded: How the Police Became Untouchable (2023).

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.

Laurence Tribe is the Carl M. Loeb University Professor and Professor of Constitutional Law Emeritus at Harvard University. He writes and teaches on constitutional law, criminal law, and jurisprudence. He is the author of more than eighteen books, including the leading treatise on American Constitutional Law.

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.