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 CONSTITUTIONAL ACCOUNTABILITY CENTER AND INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

MARY B. MCCORD
KELSI BROWN CORKRAN
SHELBY CALAMBOKIDIS
INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
Georgetown University Law Center
600 New Jersey Avenue NW
Washington, D.C. 20001
(202) 662-9042

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
BRIAN R. FRAZELLE
MIRIAM BECKER-COHEN
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amici Curiae

* Counsel of Record

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INTEREST OF *AMICI CURIAE*[1]

Constitutional Accountability Center is a think tank and public-interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. The Institute for Constitutional Advocacy and Protection is a public-interest law group housed at Georgetown University Law Center, whose mission is to use the power of the courts to defend American constitutional rights and values. *Amici* have a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text and history, and in the proper interpretation of 42 U.S.C. § 1983, a landmark law enacted to vindicate the rights guaranteed by the Constitution. Accordingly, they have an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), this Court aimed to strike a balance that would shield "[p]olice officers" from "doubtful retaliatory arrest suits . . . based solely on allegations about an arresting officer's mental state" while still preventing "police officers" from "exploit[ing] the arrest power as a means of suppressing speech." *Id.* at 1725, 1727 (quotation marks omitted). To reconcile those goals, *Nieves* combined a general rule with an important exception: "probable cause should generally defeat a retaliatory arrest claim," but not in "circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Id.* at 1727.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

The decision below unravels this Court's handiwork, extending *Nieves*'s probable-cause rule to contexts where it does not apply and then compounding that error by reading its exception out of existence. To ensure fidelity to the text and history of Section 1983, and to *Nieves* itself, this Court should correct both errors.

Nieves fashioned a probable-cause barrier only for suits that seek to make law enforcement officers liable for their decisions to make warrantless, on-the-spot arrests. Outside of that context, *Nieves* does not apply. By its own terms, the probable-cause rule is limited to claims that challenge "an arresting officer's mental state." *Id.* at 1725. And the rule rests on considerations unique to situations in which these officers, acting in the moment, "exercise their discretion" about whether to arrest someone. *Id.* at 1727. Neither the language nor the logic of *Nieves* applies when other types of government officials conspire to obtain an arrest warrant against the victim of their retaliation.

Moreover, even when the probable-cause rule of *Nieves* does apply, the exception to that rule does not require the type of "comparative" data the Fifth Circuit demanded. Pet. App. 29a. That unrealistic requirement turns the exception into a mirage.

By getting both points wrong, the Fifth Circuit has fostered an impunity for viewpoint discrimination that *Nieves* tried to avoid. It is essential that this Court correct both mistakes, clarifying the proper sphere for *Nieves* and confirming that its exception is not merely illusory.

Section 1983, after all, was enacted in part to curb precisely the kind of viewpoint retaliation by government officials on display in this case. According to Petitioner Sylvia Gonzalez, Respondents secured a

warrant for her arrest on a pretextual misdemeanor charge to silence her political advocacy. Seeking relief under Section 1983, which declares that state and local officials "shall be liable" for causing a deprivation of constitutional rights, 42 U.S.C. § 1983, she alleges a violation of the First Amendment.

Section 1983 was meant to provide redress in exactly this type of scenario. Among the abuses it was enacted to combat was politically motivated retaliation by Southern officials against those who dared to speak out against the vestiges of slavery and the Confederacy in the Reconstruction era. Rather than protecting those speakers from violent reprisals by the Ku Klux Klan, government officials instead targeted them for arrest, using "civil and criminal prosecutions to punish and intimidate." David Achtenberg, *With Malice Toward Some:* United States v. Kirby*, Malicious Prosecution, and the Fourteenth Amendment*, 26 Rutgers L.J. 273, 275 (1995). "Vigorously enough are the laws enforced against Union people," complained one Senator. "They only fail in efficiency when a man of known Union sentiments, white or black, invokes their aid." Cong. Globe, 42d Cong., 1st Sess. 505 (1871). As a result, one congressman protested, "our fellow-citizens are deprived of the enjoyment of the fundamental rights of citizens" because of "their opinions on questions of public interest." *Id.* at 332.

That situation mirrored the antebellum period, still fresh in memory, in which Southern officials relentlessly utilized the "suppression of the constitutional right of free speech as a tool to maintain slavery and racial subjugation." William M. Carter, Jr., *The Second Founding and the First Amendment*, 99 Tex. L. Rev. 1065, 1087 (2021). One of Congress's goals in enacting Section 1983 was to end the speech-stifling effects of retaliatory arrests and prosecutions, a regime

under which "every person who dared to lift his voice in opposition . . . found his life and his property insecure." Cong. Globe, 42d Cong., 1st Sess. 333 (1871).

The Fifth Circuit's misreading of *Nieves* cannot be reconciled with the statute Congress enacted. Apart from wrongly extending *Nieves* beyond the context of police officers' warrantless, on-the-spot arrests, the court below made the *Nieves* exception all but impossible to satisfy. It did so by ignoring the purpose of the exception: preventing officers from "exploit[ing] the arrest power as a means of suppressing speech," *Nieves*, 139 S. Ct. at 1727 (quoting *Lozman v. Riviera Beach*, 138 S. Ct. 1945, 1953-54 (2018)), by allowing claims to proceed when plaintiffs have "objective evidence" that "'non-retaliatory grounds [we]re in fact insufficient'" to cause their arrests, *id.* (quoting *Hartman v. Moore*, 547 U.S. 250, 256 (2006)). The point is not to foreclose liability for First Amendment retaliatory arrest, but merely to address the "causal complexity" that would arise in these cases under a "purely subjective approach," which would allow even the most dubious claims to prompt "years of litigation." *Id.* at 1724-25.

Diverging from that balanced approach, the Fifth Circuit has essentially made probable cause an absolute bar to accountability for retaliatory arrests. That blunt result cannot be squared with the text and history of Section 1983.

First, that result is not "consistent with the values and purposes of the constitutional right at issue." *Thompson v. Clark*, 142 S. Ct. 1332, 1337 (2022) (quotation marks omitted). It forecloses claims if there was probable cause to arrest the plaintiff, but the First Amendment's protection from speech retaliation does not evaporate simply because an officer was otherwise entitled to take the retaliatory action—that is precisely when it comes into play. The Constitution's

prohibition on retaliation does not ask whether there was legal authority for a decision but, rather, whether that authority was exploited to punish speech. It focuses on "forbidden motive." *Nieves*, 139 S. Ct. at 1722.

Accordingly, the gravamen of a retaliation claim is that the victim's expression of a particular viewpoint was the motivating force behind an otherwise lawful government action. *Hartman*, 547 U.S. at 256. But under the decision below, retaliatory motive—the very crux of the matter—is erased from the picture, even when it was the decisive factor prompting an arrest. Courts implementing Section 1983 must tailor their rules to "the specific constitutional right alleged to have been infringed," *Reed v. Goertz*, 143 S. Ct. 955, 961 (2023), not nullify that right.

Second, an insuperable probable-cause barrier is at odds with the common law's approach to analogous torts when Section 1983 was enacted.

In 1871, probable cause defeated liability only for torts that focused on whether defendants had sufficient legal grounds for their actions—not torts that focused on the motive behind those actions. False imprisonment, for instance, was defined as "detention without sufficient authority," Martin L. Newell, *A Treatise on the Law of Malicious Prosecution, False Imprisonment, and the Abuse of Legal Process* 56 (1892), and was aimed at "causeless arrests," Thomas M. Cooley, *A Treatise on the Law of Torts* 175 (1879). What mattered, therefore, was only whether the defendant had a right to detain the plaintiff, not his reasons for doing so. Likewise, malicious prosecution asked whether the defendant prosecuted the plaintiff "without reasonable or probable cause." *Ahern v. Collins*, 39 Mo. 145, 150 (1866). Malice was typically inferred from a lack of probable cause and simply meant "a wrongful act done intentionally without just cause

or excuse." Joel Prentiss Bishop, *Commentaries on the Non-Contract Law* 92-93 (1889). Under both of these torts, probable cause shielded officers from liability in order to give them some leeway for mistaken but reasonable judgments about the legal sufficiency of their actions.

In contrast, the tort of abuse of process involved exploiting otherwise lawful authority to achieve a forbidden purpose—it was the "perversion of lawfully initiated process to illegitimate ends." *Heck v. Humphrey*, 512 U.S. 477, 486 n.5 (1994). Significantly, probable cause was no defense to this tort, nor did plaintiffs need to establish its absence. Newell, *supra*, at 7. Indeed, it was "perfectly immaterial" whether the defendant's actions were otherwise legally justified. 2 C.G. Addison, *A Treatise on the Law of Torts* 82 (H.G. Wood ed., 1881). It was enough that legal process was "willfully made use of for a purpose not justified by the law." Cooley, *supra*, at 189. And a common example of this tort was the instigation of "arrests for an ulterior purpose." *Id.* at 190.

First Amendment retaliatory arrest is likewise defined by an officer's misuse of lawful authority for illegitimate ends: punishing the expression of protected speech. Although *Nieves* applied the probable-cause rule of false imprisonment and malicious prosecution to claims of retaliatory arrest, it did so only in part. Tailoring that rule to the constitutional right at issue, *Nieves* created an exception making retaliatory motive actionable when plaintiffs support their accusations with objective evidence. 139 S. Ct. at 1727. By upsetting that compromise and making probable cause the only consideration in retaliatory arrest cases—displacing any inquiry into the arresting officer's motive—the categorical rule adopted below is out of step with the common law's approach to analogous torts.

Finally, as explained above, one of the abuses that Section 1983 was specifically meant to eliminate was the use of retaliatory arrests by state and local officials to suppress free speech. By interpreting the *Nieves* exception so narrowly that it virtually never applies, the court below wiped that protection from the statute. In doing so, it licensed government officers to exploit the arrest power to punish the expression of views they dislike—so long as they, or their lawyers, can identify some legitimate pretext for the arrest. This Court should reverse that flawed and dangerous ruling.

ARGUMENT

I. *Nieves* Applies to Police Officers Who Make Warrantless Arrests in the Field, Not to Other Types of Officials or Other Types of Arrests.

By its own terms, *Nieves* does not apply to the retaliatory arrest alleged in this case.

Nieves governs Section 1983 claims that are based on "an arresting officer's mental state." 139 S. Ct. at 1725. In other words, it applies when someone challenges the reasons behind a police officer's on-the-spot decision to make a warrantless arrest. The probable-cause rule and its exception were both designed for that scenario, and they make no sense outside of it. Only when law enforcement officers exercise their judgment about "whether to make an arrest," *id.* at 1724 (quotation marks omitted), can their mental state have any bearing on the arrest's legitimacy. *Nieves* recognized a need to insulate these officers from dubious litigation when they exercise that judgment.

But Gonzalez is not suing any law enforcement officers over their decision to make a warrantless arrest. She is therefore not challenging "an arresting officer's mental state." *Id.* at 1725. Instead, she is challenging

a conspiracy to secure a warrant for her arrest. Neither the holding nor the reasoning of *Nieves* applies here.

As *Nieves* explains, when police officers are sued for retaliation over their warrantless arrest decisions, these cases generate "complex causal inquiries" that risk exposing officers to frivolous but protracted litigation. *Id.* at 1724. To "ensure that officers may go about their work without undue apprehension of being sued," this Court fashioned a threshold requirement: plaintiffs must demonstrate either a lack of probable cause for their arrest or "objective evidence" that they were treated differently from "otherwise similarly situated individuals." *Id.* at 1725, 1727.

The reasons this Court gave for that rule all relate exclusively to warrantless arrest decisions made on the spur of the moment by law enforcement officers.

First, the "causal inquiry is complex" in these cases "because protected speech is often a wholly legitimate consideration for officers when deciding whether to make an arrest." *Id.* at 1723-24 (quotation marks omitted). Speech can help indicate, for example, whether a suspect presents a threat of violence. *Id.* at 1724; *see, e.g.*, *Reichle v. Howards*, 566 U.S. 658, 671-72 (2012) (Ginsburg, J., concurring in the judgment). Exacerbating that problem, warrantless arrests often require "split-second judgments," *Lozman*, 138 S. Ct. at 1953, "in circumstances that are tense, uncertain, and rapidly evolving," *Nieves*, 139 S. Ct. at 1725 (quotation marks omitted).

Second, it is "easy to allege" but "hard to disprove" that an arresting officer had retaliatory motives. *Id.* (quotation marks omitted). Such allegations may be based on nothing more than an "inartful turn of phrase or perceived slight" but can "land an officer in years of

litigation." *Id.* Thus, "the complexity of proving (or disproving) causation in these cases creates a risk that the courts will be flooded with dubious retaliatory arrest suits," *Lozman*, 138 S. Ct. at 1953, which could "dampen the ardor" of many officers, *Nieves*, 139 S. Ct. at 1717 (quoting *Gregoire v. Biddle*, 177 F. 2d 579, 581 (2d Cir. 1949)).

Third, and finally, this Court concluded that a "purely subjective approach" to these claims could diminish the Fourth Amendment standards that shield police officers from scrutiny of their motives. *Id.* at 1725. Because the Fourth Amendment "regulates conduct rather than thoughts," *Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011), a "particular officer's state of mind . . . provides 'no basis for invalidating an arrest,'" *Nieves*, 139 S. Ct. at 1725 (quoting *Devenpeck v. Alford*, 543 U.S. 146, 155 (2004)). Permitting retaliatory arrest suits "based solely on allegations about an arresting officer's mental state" would "undermine" that principle. *Id.*

All of these considerations relate exclusively to suits against police officers for their on-the-spot decisions to make warrantless arrests. *Cf. Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001) (similarly accommodating the challenges faced by police officers exercising their "discretionary judgment in the field," which "has to be applied on the spur (and in the heat) of the moment"). None of these considerations applies when other types of officials conspire to engineer the procurement of an arrest warrant as a means of retaliation.

In addition to practical concerns, *Nieves* also relied on "the common law approach to similar tort claims," 139 S. Ct. at 1726, and here too this Court emphasized warrantless arrests by law enforcement officers. "At common law, peace officers were privileged to make

warrantless arrests based on probable cause," which "was generally a complete defense for peace officers" against suits for false imprisonment. *Id.* Because "arresting officers were protected from liability" for warrantless arrests made with probable cause, *Nieves* gave arresting officers a similar protection under Section 1983. *Id.*

The exception to *Nieves*'s probable-cause rule is likewise geared toward warrantless arrests by law enforcement officers. This Court crafted that exception to mitigate "a risk that some *police officers* may *exploit the arrest power* as a means of suppressing speech." *Id.* at 1727 (emphasis added) (quoting *Lozman*, 138 S. Ct. at 1953-54). And the very terms of the exception are tailored to the context of police officers exercising their warrantless arrest authority: the exception applies "*where officers have probable cause* to make arrests, but typically *exercise their discretion* not to do so." *Id.* (emphasis added).

Nieves also buttressed this part of its holding with reference to law enforcement officers' traditional common law privilege "to make warrantless arrests." *Id.* Because misdemeanor arrests were permissible "only in limited circumstances" when Section 1983 was enacted, but today cover "a much wider range of situations," this Court declined to impose the common law's probable-cause standard without modification—instead converting it into a general rule, subject to the *Nieves* exception. *Id.*

If all this were not enough, *Nieves* further explains that its demand for objective evidence "avoids the significant problems that would arise from reviewing *police conduct* under a purely subjective standard." *Id.* (emphasis added). "Because this inquiry is objective, the statements and motivations of *the particular*

arresting officer are irrelevant." *Id.* (emphasis added and quotation marks omitted).

Clearly, therefore, *Nieves* addresses suits against law enforcement officers over their decisions to make warrantless arrests in the field. It does not encompass all retaliatory arrest claims under Section 1983. This Court already confirmed that in *Lozman*, permitting a retaliatory arrest claim against a municipality based on its official policy. *See* 138 S. Ct. at 1951 (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978)). *Lozman* demonstrates that not all First Amendment claims for retaliatory arrest require an absence of probable cause. The only decision imposing such a requirement is *Nieves*. And *Nieves* concerned a police officer's liability for his own warrantless arrest, citing justifications unique to that context.

As in *Lozman*, the facts here are "far afield" from the typical retaliatory arrest suit involving a police officer's warrantless arrest. 138 S. Ct. at 1954. Unsurprisingly, therefore, none of the factors *Nieves* discussed to explain its probable-cause rule are implicated here:

- Gonzalez is not suing a police officer who arrested her.
- Her arrest did not result from a police officer's judgment, much less a spur-of-the-moment decision amid rapidly unfolding events.
- Her claims are not based on stray remarks allegedly made during a single encounter, but rather on a long series of documented actions taken to silence and disempower her.
- The speech for which she claims she was targeted (advocating the replacement of the city manager) was not intertwined with the conduct

> for which she was arrested (allegedly stealing a government record), avoiding any need to disentangle permissible and impermissible consideration of speech.

In short, cases like this do not implicate the difficulties that arise when plaintiffs target "an ad hoc, on-the-spot decision by an individual officer." *Id.* Here, as in *Lozman*, "probable cause does little to prove or disprove the causal connection between animus and injury." *Nieves*, 139 S. Ct. at 1727.

Moreover, the conduct alleged here represents a serious incursion on the First Amendment, different in kind from arrests made by police officers acting on their own initiative in the heat of the moment. When influential government officials embark on a scheme to intimidate and silence those who disagree with their policies, the harms to free speech are indistinguishable from those arising under an official municipal policy. And as this Court recognized in *Lozman*, "[a]n official retaliatory policy is a particularly troubling and potent form of retaliation, for a policy can be long term and pervasive" as well as "difficult to dislodge." 138 S. Ct. at 1954; *see id.* ("A citizen who suffers retaliation by an individual officer can seek to have the officer disciplined or removed from service, but there may be little practical recourse when the government itself orchestrates the retaliation."). In those circumstances, "there is a compelling need for adequate avenues of redress." *Id.* So too here, for the same reasons.

In sum, *Nieves*'s probable-cause rule is limited to warrantless arrest decisions made on the spot by law enforcement officers. Neither the language nor the logic of *Nieves* applies here.

II. The *Nieves* Exception Requires Objective Evidence of Retaliation, Not Any Specific Kind of Comparative Data.

Although the preceding discussion offers reason enough for reversal, this Court should also correct the other critical error in the decision below—the issue that has divided the circuits. For all practical purposes, the Fifth Circuit eliminated the exception to *Nieves*'s general rule, making probable cause an impenetrable barrier to accountability for retaliatory arrests. That is not what *Nieves* prescribes, and it undermines the careful balancing of interests this Court sought to achieve.

Even as *Nieves* established a new hurdle for retaliatory arrest claims, it recognized that "an unyielding requirement to show the absence of probable cause" would be "insufficiently protective of First Amendment rights." 139 S. Ct. at 1727. This Court therefore allowed suits to proceed when plaintiffs furnish "objective evidence" that they were arrested while "otherwise similarly situated individuals" were not. *Id.* By failing to consider the point of this exception, the Fifth Circuit misconstrued its scope.

The *Nieves* exception serves two functions, as this Court explained. First, in tandem with the probable-cause rule from which it is a carveout, it ameliorates the causal difficulties that arise in retaliation suits against arresting officers. The exception offers a means for plaintiffs to show, objectively, that "non-retaliatory grounds [we]re in fact insufficient" to cause their arrests. *Id.* (quoting *Hartman*, 547 U.S. at 256). Second, the availability of this exception—the threat of liability it preserves—deters law enforcement officers from "exploit[ing] the arrest power as a means of suppressing speech." *Id.* (quoting *Lozman*, 138 S. Ct. at 1953-54).

Faithfulness to *Nieves* requires construing the exception sensibly in light of these functions. But the court below instead treated the exception like an arbitrary test. Fixating on the phrasing of one sentence in *Nieves* while ignoring the surrounding discussion, the Fifth Circuit disregarded this Court's explanation of why it created the exception in the first place.

Nieves does not say that its exception can be satisfied only by documentation that other people engaged in the exact same conduct as the plaintiff without arrest. The point of the exception, after all, is simply to "establish that non-retaliatory grounds" were "insufficient" to provoke the arrest. *Id.* (quotation marks omitted). By requiring "objective evidence" to clear this threshold, the *Nieves* exception "avoids the significant problems that would arise from reviewing police conduct under a purely subjective standard." *Id.* The exception thus addresses the "causal concern" in retaliatory arrest cases by allowing claims to proceed only if they are based on something more than assertions about the "statements and motivations of the particular arresting officer." *Id.*

Had the Fifth Circuit heeded that explanation, it would have recognized that Gonzalez's allegations easily fit within the *Nieves* exception. Evidence that the misdemeanor for which she was charged has never been used against anyone for conduct like hers, *see* Pet. App. 29a, is precisely the type of "objective evidence" regarding "similarly situated individuals" that *Nieves* calls for, 139 S. Ct. at 1727. And evidence that people who are accused of this misdemeanor are not typically arrested or jailed, *see* Pet. App. 22a (describing the "atypical" process used by Respondents "to secure a warrant, rather than a summons"), further marks this as a scenario "where officers have probable

cause to make arrests, but typically exercise their discretion not to do so," *Nieves*, 139 S. Ct. at 1727.

In sum, the data Gonzalez cites is objective evidence that she would not have been arrested but for the retaliatory motive she alleges, and that people who have not criticized the city government have never been charged in circumstances like hers. That is all *Nieves* requires.

The Fifth Circuit's contrary ruling makes the *Nieves* exception virtually impossible to satisfy, a chimera that will never deter officials from "exploit[ing] the arrest power as a means of suppressing speech." *Id.* (quoting *Lozman*, 138 S. Ct. at 1953-54). Indeed, the ruling is a license for officials to use novel and creative criminal accusations as a pretext for speech-based arrests. The more unprecedented the accusation, after all, the less likely that any records will exist of other people engaging in the same conduct without arrest, because no one will have previously imagined this conduct could amount to a crime. For instance, if city council members have never been arrested for anything like moving a citizen petition from one part of the council table to another part, *see* Pet. App. 67a ("the petition never left the council table"), there is unlikely to be any record of other people taking that action.

Were that enough to foreclose a retaliation claim, the *Nieves* exception would be drained of all force, upending the balance this Court attempted to strike and empowering government officials to suppress dissent without fear of liability. That is not a tenable reading of *Nieves*.

III. The Fifth Circuit's Constriction of the *Nieves* Exception Flouts the Text and History of Section 1983.

In addition to being foreclosed by *Nieves* itself, the evisceration of the *Nieves* exception in the decision below is at odds with the text and history of Section 1983. It undermines the values and purposes of the constitutional right at issue, finds no support in the common law of 1871, and enables the very type of viewpoint discrimination that Section 1983 was meant to eliminate.

A. The Decision Below Is Incompatible with the Values and Purposes of the First Amendment Right at Issue.

Construing Section 1983 is a matter of "statutory construction," *Wood v. Strickland*, 420 U.S. 308, 316 (1975), not devising federal general common law, crafting a *Bivens* action, or making a "freewheeling policy choice," *Rehberg v. Paulk*, 566 U.S. 356, 363 (2012) (quoting *Malley v. Briggs*, 475 U.S. 335, 342 (1986)). And the plain text of Section 1983 imposes liability for violating "any rights" secured by the Constitution. 42 U.S.C. § 1983. That categorical language makes "no reference to the presence or absence of probable cause as a precondition or defense to any suit." *Nieves*, 139 S. Ct. at 1730 (Gorsuch, J., concurring in part and dissenting in part). Indeed, it makes "no mention of defenses or immunities" of any kind. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and concurring in the judgment). Instead, the text unequivocally commands that officials who deprive someone of a constitutional right "shall be liable" to that person. 42 U.S.C. § 1983.

To be sure, implementing Section 1983 requires courts to "determine the elements of, and rules associated with, an action seeking damages for its violation."

Manuel v. City of Joliet, 580 U.S. 357, 370 (2017). But those judicially devised rules—which merely fill in the gaps left by Congress—must be "consistent with the values and purposes of the constitutional right at issue." *Thompson*, 142 S. Ct. at 1337 (quotation marks omitted). Courts therefore must focus "on the specific constitutional right alleged to have been infringed," *Reed*, 143 S. Ct. at 961, to ensure that these rules are "tailored to the interests protected by the particular right," *Carey v. Piphus*, 435 U.S. 247, 259 (1978); *accord McDonough v. Smith*, 139 S. Ct. 2149, 2158-61 (2019); *Wallace v. Kato*, 549 U.S. 384, 389 (2007).

The court below violated these precepts by construing the *Nieves* exception so narrowly that it will never be satisfied—fatally undermining the values and purposes of the First Amendment right at issue.

The Fifth Circuit did not identify any plausible scenario in which a retaliatory arrest plaintiff could overcome its unrealistic demand for "comparative evidence" of other people "who engaged in the same criminal conduct but were not arrested." Pet. App. 29a (quotation marks omitted). Even the example this Court provided in *Nieves* to illustrate the exception—jaywalkers singled out for arrest because of their speech—would fizzle under the Fifth Circuit's test, given the unlikelihood of "available comparative evidence of jaywalkers that weren't arrested." *Id.* at 53a (Oldham, J., dissenting).

The upshot of the decision below and its gutting of the *Nieves* exception is that retaliatory arrest claims are foreclosed whenever there was probable cause to arrest the plaintiff for any offense, no matter how minor, and no matter that the real reason for the arrest was the officer's desire to punish the victim for expressing a particular viewpoint. As long as a legitimate pretext for an arrest can be dreamt up—if

necessary, by lawyers long after the fact—retaliatory motive becomes irrelevant, even when it was the deciding factor that prompted the arrest.

That construction of Section 1983 flouts "the values and purposes of the constitutional right at issue." *Thompson*, 142 S. Ct. at 1337 (quoting *Manuel*, 580 U.S. at 370). The First Amendment "prohibits government officials from retaliating against individuals for engaging in protected speech," *Lozman*, 138 S. Ct. at 1949, and that prohibition has nothing to do with whether the retaliating official had legal authority to carry out the challenged action. Indeed, it is assumed that retaliatory actions were otherwise within an official's lawful authority. *See, e.g.*, *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) ("the government is entitled to terminate [an employee] for no reason at all" but may not do so "'on a basis that infringes his constitutionally protected . . . freedom of speech'" (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972))).

First Amendment retaliation is about "forbidden motive." *Nieves*, 139 S. Ct. at 1722. The crux of a claim is that the victim's expression of a particular viewpoint was the deciding factor behind an otherwise lawful action. In other words, "when nonretaliatory grounds are in fact insufficient to provoke the adverse consequences, . . . retaliation is subject to recovery as the but-for cause of official action offending the Constitution." *Hartman*, 547 U.S. at 256.

The essence of the wrong, therefore, is not a lack of legal authority for a decision but rather the abuse of that authority to punish speech, which enables the government to "produce a result which (it) could not command directly," *Perry*, 408 U.S. at 597 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)), and "threatens to inhibit exercise of the protected right,"

Crawford-El v. Britton, 523 U.S. 574, 588 n.10 (1998). Regardless of whether officials have legitimate grounds for a decision—like the choice to make an arrest—the victim is entitled to redress if the decision was motivated "by reason of his exercise of constitutionally protected First Amendment freedoms." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977); *see Nieves*, 139 S. Ct. at 1727 (even if officers have probable cause for an arrest, there is "a risk that some police officers may exploit the arrest power as a means of suppressing speech" (quotation marks omitted)).

In sum, "the specific constitutional right alleged to have been infringed" in retaliatory arrest cases, *Reed*, 143 S. Ct. at 961, is freedom from the misuse of *otherwise lawful* government authority to inhibit one's speech. Making probable cause a total bar to recovery in these cases erases the very concept of retaliation from the First Amendment. That is not "consistent with the values and purposes of the constitutional right at issue." *Thompson*, 142 S. Ct. at 1337 (quotation marks omitted).

B. The Decision Below Is at Odds with the Common Law of 1871.

When fleshing out the contours of a Section 1983 action, this Court looks to analogous common law torts from the time the statute was enacted. *See id.* That approach further undermines the decision below and its unyielding requirement to show an absence of probable cause.

In 1871, probable cause shielded defendants from liability only for torts that focused on whether they had sufficient legal grounds for their actions. It was irrelevant in torts that focused on the purpose behind a defendant's actions.

Nieves drew inspiration from two common law torts with a probable-cause component: false imprisonment and malicious prosecution. 139 S. Ct. at 1726-27. Unlike retaliatory arrest, however, those torts were defined by an *absence of legal grounds* for the defendant's actions. Accordingly, while *Nieves* analogized to those torts, it did not borrow their probable-cause rule wholesale. Treating them "more as a source of inspired examples than of prefabricated components," *Manuel*, 580 U.S. at 370 (quoting *Hartman*, 547 U.S. at 258), *Nieves* tempered their probable-cause rule by crafting the exception at issue here.

By essentially eliminating that exception, the Fifth Circuit made probable cause an insuperable barrier to recovery. But the common law imposed no such rule on torts that, like retaliatory arrest, were based on a defendant's illicit motive. Instead, probable cause was dispositive only in torts that penalized acting without legal authority. It offered defendants some leeway for mistaken but reasonable judgments about the legal sufficiency of their actions.

False imprisonment concerned a defendant's entitlement to imprison the plaintiff (or lack thereof), not his reasons for doing so. It was defined as "detention without sufficient authority," Martin L. Newell, *A Treatise on the Law of Malicious Prosecution, False Imprisonment, and the Abuse of Legal Process* 56 (1892), or in other words, "the *unlawful* restraint of a person," 1 Francis Hilliard, *The Law of Torts or Private Wrongs* 195 (1866) (emphasis added); *see Burns v. Erben*, 40 N.Y. 463, 466 (1869) ("an *illegal* arrest and detention" (emphasis added)). The tort was directed at "causeless arrests," Thomas M. Cooley, *A Treatise on the Law of Torts* 175 (1879), that were inflicted "without any legal authority," 2 C.G. Addison, *A Treatise on the Law of Torts* 13 (H.G. Wood ed., 1881). Indeed, it

was sometimes even referred to as "[u]nlawful or false imprisonment." Newell, *supra*, at 56. Motive was thus irrelevant. A defendant's bad intent could not impair the legality of an otherwise-lawful arrest, *Rohan v. Sawin*, 59 Mass. 281, 285 (1850), and "if the arrest was unlawful," a defendant was liable "however pure his motives may have been," *Chrisman v. Carney*, 33 Ark. 316, 321 (1878).

Malicious prosecution also centered on whether a defendant had a sufficient legal basis for a particular act. The "essential ground" of this tort was "a legal prosecution against the plaintiff without reasonable or probable cause." *Ahern v. Collins*, 39 Mo. 145, 150 (1866). While "malice" was also required, that simply meant "a wrongful act done intentionally without just cause or excuse." Joel Prentiss Bishop, *Commentaries on the Non-Contract Law* 92 (1889); *see* 1 Hilliard, *supra*, at 446 ("any unlawful act, which is done willfully and purposely"). Malice could therefore be inferred from a lack of probable cause, *see Wheeler v. Nesbitt*, 65 U.S. 544, 552 (1860); Cooley, *supra*, at 185, and courts made that inference "almost as a matter of course," Bishop, *supra*, at 93. The reverse was not true, so "whatever may be the motive of [the defendant] . . . he is free from danger if there [was] probable cause for the accusation." *Hogg v. Pinckney*, 16 S.C. 387, 393 (1882); *see Wheeler*, 65 U.S. at 550 ("a person actuated by the plainest malice may nevertheless . . . have a justifiable reason for the prosecution").

Unlike these two torts, which hinged on whether defendants had lawful authority for their actions, abuse of process asked whether defendants exploited their otherwise-lawful authority to achieve a forbidden purpose. Although not discussed in *Nieves*, this tort was arguably the common law's "closest analogy," 139 S. Ct. at 1726, to First Amendment retaliatory arrest.

And significantly, it did not require plaintiffs to show a lack of probable cause for the actions taken against them.

The "gravamen" of abuse of process was "not the wrongfulness of the prosecution" but a "perversion of lawfully initiated process to illegitimate ends." *Heck*, 512 U.S. at 486 n.5. Like retaliatory arrest, this tort imposed liability for acts that would otherwise be legally justified if they were taken "to accomplish a purpose known to be unlawful." 1 Hilliard, *supra*, at 422. As Cooley put it, when legal process "is willfully made use of for a purpose not justified by the law, this is abuse for which an action will lie." Cooley, *supra*, at 189; *see* 2 Addison, *supra*, at 82 ("Whoever makes use of the process of the court for some private purpose of his own . . . is amenable to an action for damages for an abuse of the process of the court."). In short, the "abuse" of legal process was "where the party employs it for some unlawful object, not for the purpose which it is intended by law to effect; in other words, it is a perversion of it." Newell, *supra*, at 7.

Notably, abuse of process included "arrests for an ulterior purpose." Cooley, *supra*, at 190. A typical scenario involved procuring someone's arrest and detention to coerce them into surrendering money or property. *See id.* (citing the leading case *Grainger v. Hill*, 132 Eng. Rep. 769 (C.P. 1838)); *e.g.*, *Prough v. Entriken*, 11 Pa. 81, 84 (1849) ("The prosecutor, from the first, held out the temptation, that, if the money alleged to be due was paid, he should not be imprisoned, or further prosecuted."); *see also Hewit v. Wooten*, 52 N.C. 182, 183-84 (1859); 1 Hilliard, *supra*, at 422, 452; 2 Addison, *supra*, at 82. Such misuse of arrest authority was actionable despite there being a valid justification for the arrest. "For example, if a man is arrested . . . in order to extort money from him, even though it

be to pay a just claim . . . there is an action for such malicious abuse of process." Newell, *supra*, at 7.

Because this tort concerned only the motive behind a defendant's action, probable cause did not bar a claim for abuse of process. *Hartman*, 547 U.S. at 258; *see Page v. Cushing*, 38 Me. 523, 527 (1854) ("In an action for abuse of legal process it is not necessary to aver or prove, that the process . . . was sued out . . . without probable cause."); *accord* Newell, *supra*, at 7; 1 Hilliard, *supra*, at 422, 452; 2 Simon Greenleaf, *A Treatise on the Law of Evidence* 402-03 (10th ed. 1868).

Thus, under the common law of 1871, "when the complaint [was] that the process of the law has been abused and prostituted to an illegal purpose, it [was] perfectly immaterial whether or not it issued for a just cause of action." 2 Addison, *supra*, at 82. All that mattered was whether process was "willfully made use of for a purpose not justified by the law." *Antcliff v. June*, 81 Mich. 477, 492 (1890).

First Amendment retaliatory arrest claims likewise target "forbidden motive," *Nieves*, 139 S. Ct. at 1722, rather than a lack of authority for the arrest. Although *Nieves* imposed a probable-cause rule on such claims, it qualified that rule, leaving an opening for plaintiffs who can support their claims objectively. The decision below essentially takes back that qualification and makes probable cause an absolute bar to recovery. That is inconsistent with Section 1983's common law backdrop and the rules that governed its "most analogous" torts, *Thompson*, 142 S. Ct. at 1337.

C. The Decision Below Facilitates the Viewpoint Retaliation that Section 1983 Was Meant to Eliminate.

Not only is the Fifth Circuit's ruling at odds with the First Amendment and the common law, it enables

a type of speech retaliation that Congress specifically meant to combat when it enacted Section 1983. This landmark statute—one of the "crucial ingredients in the basic alteration of our federal system accomplished during the Reconstruction Era," *Patsy v. Bd. of Regents*, 457 U.S. 496, 503 (1982)—was motivated in part by an epidemic of retaliation across the South, where state and local officials used pretextual arrests and prosecutions to target anyone who spoke out against the vestiges of slavery and the Confederacy.

The right to free speech was long intertwined with the struggle to end slavery and secure justice in its aftermath. The First Amendment was "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes." *Roth v. United States*, 354 U.S. 476, 484 (1957). But in the antebellum period, Southern governments widely criminalized abolitionist publications, sometimes even making them punishable by death. *See* Akhil Reed Amar, *The Bill of Rights* 160-61 (1998). As Frederick Douglass wrote, these laws reflected the notion that "[o]ne end of the slave's chain must be fastened to a padlock in the lips of northern freemen." David W. Blight, *Frederick Douglass: Prophet of Freedom* 272 (2018) (quotation marks omitted). Slave codes also tried to stifle speech and expression, outlawing even things such as interacting with free people of color. *E.g.*, Ala. Slave Code § 36 (1833).

On top of these laws, Southern governments often supported private mobs that "retaliated against Black and antislavery speech through violence and other extralegal means." Carter, *supra*, at 1084-85; *see* Cong. Globe, 39th Cong., 1st Sess. 1066 (1866) (Rep. Price) ("[F]or the last thirty years a citizen of a free State dared not express his opinion on the subject of slavery in a slave State."). Thus, under the shadow of slavery,

"[t]he press has been padlocked, and men's lips have been sealed. . . . Submission and silence were inexorably exacted." Cong. Globe, 38th Cong., 1st Sess. 1202 (1865).

After the Civil War, with these abuses fresh in memory and with Southern states still disregarding individual liberties, Americans ratified the Fourteenth Amendment and "fundamentally altered our country's federal system," *McDonald v. Chicago*, 561 U.S. 742, 754 (2010), to secure "the civil rights and privileges of all citizens in all parts of the republic," Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess. xxi (1866). The Amendment's Framers "were intimately familiar with the suppression of the constitutional right of free speech as a tool to maintain slavery," Carter, *supra*, at 1087, and sought "to require states to respect the rights set out in the First Amendment," Michael Kent Curtis, *Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History* 357 (2000). Without the Amendment's new protections, advocates warned, "[f]reedom of speech, as of old, is a mockery." Cong. Globe, 39th Cong., 1st Sess. 783 (1866); *see* Carter, *supra*, at 1075 (ratification debates reveal that Americans were "concerned with ensuring that the new constitutional order would protect against the lynchings, murders, and prosecutions inflicted post hoc upon abolitionists and slaves in retaliation for their speech").

Lacking an enforcement mechanism, however, the Fourteenth Amendment proved insufficient. Several years after its ratification, Southern states were still "permit[ting] the rights of citizens to be systematically trampled upon." Cong. Globe, 42d Cong., 1st Sess. 375 (1871). Among other things, they were still targeting disfavored viewpoints, suppressing the speech and associational rights of formerly enslaved people and

their allies by retaliating against those who supported federal policies or advocated for equality.

This problem took two forms. First, Southern officials were selectively withholding the law's protection from groups with unpopular views, specifically Black citizens advocating for their rights and Union supporters of the Reconstruction effort. One Senator observed that while crimes of the Ku Klux Klan went unpunished, "[v]igorously enough are the laws enforced against Union people. They only fail in efficiency when a man of known Union sentiments, white or black, invokes their aid." *Id.* at 505; *see id.* at 155 (testimony describing attack in which the Klan "made all the colored men promise they would never vote the Radical ticket again"). As one Congressman protested, "our fellow-citizens are deprived of the enjoyment of the fundamental rights of citizens" because of "their opinions on questions of public interest." *Id.* at 332.

Second, state and local officials were directly retaliating against unpopular viewpoints by instigating "civil and criminal prosecutions to punish and intimidate." Achtenberg, *supra*, at 275; *see Mitchum v. Foster*, 407 U.S. 225, 240 (1972) ("state courts were being used to harass and injure"). Congress learned, for instance, about an incident in which "warrants were issued for the arrest of peaceable and well-disposed negroes upon the charge of 'using seditious language'" after they protested the Klan's impunity. Cong. Globe, 42d Cong., 1st Sess. 321 (1871); *see also* Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess., at xviii (1866) ("prosecutions have been instituted in State courts against Union officers for acts done in the line of official duty, and similar prosecutions are threatened elsewhere").

These retaliatory prosecutions "proved potent instruments of harassment" because of the arrests and

detention they triggered. Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. Pa. L. Rev. 793, 829 (1965). By 1871, Congress had responded with new laws expanding habeas corpus and the ability to remove prosecutions to federal court. *Id.* But abuses continued. To address these violations and other deprivations of fundamental liberties, Congress empowered victims to vindicate their constitutional rights by holding the perpetrators accountable. *See* Cong. Globe, 42d Cong., 1st Sess. 333 (1871) ("Suppose that . . . every person who dared to lift his voice in opposition . . . found his life and his property insecure. . . . In that case I claim that the power of Congress to intervene is complete and ample.").

The text that Congress enacted makes "no reference to the presence or absence of probable cause as a precondition or defense to any suit." *Nieves*, 139 S. Ct. at 1730 (Gorsuch, J., concurring in part and dissenting in part). This Court added that requirement in *Nieves* to reduce litigation against police officers by weeding out dubious claims. *See id.* at 1725 (majority opinion). But this Court balanced that pragmatic choice by leaving the courthouse doors open to victims who furnish "objective evidence" that "non-retaliatory grounds [we]re in fact insufficient" to provoke their arrests. *Id.* at 1727 (quotation marks omitted). If Sylvia Gonzalez's evidence does not meet that standard, virtually nothing will. A fair reading of *Nieves* refutes that narrow interpretation—as does the text of Section 1983, its common law backdrop, and the values and purposes of the First Amendment right at stake.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
BRIAN R. FRAZELLE
MIRIAM BECKER-COHEN
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

MARY B. MCCORD
KELSI BROWN CORKRAN
SHELBY CALAMBOKIDIS
INSTITUTE FOR CONSTITUTIONAL
ADVOCACY AND PROTECTION
Georgetown University Law Center
600 New Jersey Avenue NW
Washington, D.C. 20001
(202) 662-9042

Counsel for Amici Curiae

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