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 Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL POLICE ACCOUNTABILITY PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Police Accountability Project (NPAP) was founded in 1999 to address allegations of misconduct by law-enforcement and detention-facility officials. NPAP's approximately six hundred attorney members practice in every region of the United States. It provides training and support for these attorneys and other legal workers, public education and information on issues related to law-enforcement and detention-facility misconduct and accountability, and resources for nonprofit organizations and community groups involved with victims of such misconduct. NPAP supports legislative efforts aimed at increasing law-enforcement and detention-facility accountability, and appears regularly as *amicus curiae* in cases such as this presenting issues of particular importance for its member lawyers and their clients.

This case involves the standard that governs actions brought under 42 U.S.C. § 1983 to challenge retaliatory arrest. Because such suits invariably involve allegations of serious police misconduct, and because the standard applied by the Fifth Circuit often will leave no effective remedy, *amicus* submits this brief to assist the Court in the resolution of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Nieves* v. *Bartlett*, 139 S. Ct. 1715 (2019), the Court recognized the right to challenge retaliatory arrests under Section 1983, while also seeking to establish rules that would preserve leeway for legitimate

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

law enforcement activity. The decision below, however, offers a reading of the *Nieves* rule that is irrationally rigid and restrictive. That holding is inconsistent with instructive nineteenth-century common-law standards and is not necessary to preserve modern law-enforcement flexibility.

A. In determining the availability of a right of action under Section 1983, the Court has looked to the contours of analogous common-law tort actions at the time of Section 1983's enactment. Here, the appropriate analogy is provided by the tort of abuse of process. In the late nineteenth century, that tort was available when the defendant (1) brought to bear some form of legal process, criminal or civil, upon the plaintiff; (2) with an ulterior or collateral motive; and (3) misused the process for an objective outside the regular and lawful bounds of such legal mechanisms. An absence of probable cause was not necessary to bring an abuse-of-process claim. Here, Ms. Gonzalez satisfies each of these elements and could have brought such a claim in 1871—which strongly supports her entitlement to sue under Section 1983.

B. In addition, a plaintiff in Ms. Gonzalez's position also could have brought a tort claim for malicious prosecution in 1871. Although a malicious prosecution plaintiff was required to show lack of probable cause, nineteenth-century courts used a searching standard of reasonableness to determine whether probable cause existed, such that "a man of ordinary caution and prudence [would] believe and entertain an honest and strong suspicion that the person is guilty." Under that standard, a court in 1871 likely would have found no probable cause in Ms. Gonzalez's case. Moreover, there is no doubt that malice exists in this case under

nineteenth-century standards: courts resolving malicious prosecution claims looked to an expansive array of both objective *and* subjective evidence of malice, including not only want of probable cause, but also all the circumstances surrounding the prosecution. Even if the malicious-prosecution tort could not have been established on facts like those here, courts' willingness to consider subjective evidence of intent at the time of Section 1983's enactment suggests that the Fifth Circuit's rigid and categorical approach in this case is inconsistent with nineteenth-century practice.

C. The current reality of policing shows that recognition of a Section 1983 action like the nineteenth-century abuse-of-process tort is necessary. Retaliatory arrests that do not involve on-the-spot law-enforcement decisions—or that otherwise present objective suggestions of improper motive—occur with sufficient frequency to make the need for an effective remedy compelling. At the same time, the course of retaliatory-arrest litigation also indicates that the availability of such a remedy would not threaten the ability of law enforcement officers to operate effectively.

ARGUMENT

I. Abuse of process represents the closest nineteenth-century tort analog to Ms. Gonzalez's Section 1983 claim.

In determining whether a plaintiff has stated a claim under Section 1983, the Court has placed substantial weight on whether the common law provided a right of action for analogous claims at the time of the statute's enactment. In *Nieves*, the Court suggested that the relevant analogy for Section 1983 retaliatory arrest claims is provided by the torts of malicious

prosecution or false imprisonment. 139 S. Ct. at 1726. On examination, however, at least in a case such as this one, the proper nineteenth-century common-law analogy actually is the tort of abuse of process—and that tort *would* have provided a right of action to a plaintiff in Ms. Gonzales's circumstances. She therefore should be permitted to proceed under Section 1983.

A. Nineteenth-century tort standards provide guidance on the contours of Section 1983 causes of action.

Enacted as part of the 1871 Ku Klux Klan Act, Section 1983 provides a general cause of action to redress constitutional violations. Rather than delineate all violations that might fall under the statute, Congress drafted broad language—with gaps that this Court fills using common-law tort principles.

In one of its first twentieth-century Section 1983 cases, *Tenney* v. *Brandhove*, 341 U.S. 367 (1951), the Court indicated that the statute preserves nineteenth-century common-law traditions that are "well grounded in history." *Id.* at 376. *Tenney* spoke of common-law immunities, but the Court has repeatedly reaffirmed that the common law of torts "provide[s] the appropriate starting point for * * * inquir[ies] under § 1983" more broadly. *Carey* v. *Piphus*, 435 U.S. 247, 257-58 & 258 n.13 (1978); see *Imbler* v. *Pachtman*, 424 U.S. 409, 418 (1976); *Heck* v. *Humphrey*, 512 U.S. 477, 484 (1994). Most recently, the Court took that approach in *Nieves*, "turn[ing] to the common law torts that provide the 'closest analogy' to retaliatory arrest claims." 139 S. Ct. at 1726 (quoting *Heck*, 512 U.S. at 484).

Under this doctrine, nineteenth-century common-law torts are a "starting point," not the be-all and end-all of Section 1983 analysis. Nevertheless, satisfaction of nineteenth-century tort standards can provide persuasive evidence that a Section 1983 claim is valid. Here, Ms. Gonzalez's claim comports with all the elements of a successful prima facie abuse-of-process cause of action under nineteenth-century standards.

B. A reasonable plaintiff in Ms. Gonzalez's shoes circa 1871 would have brought an abuse-of-process claim.

Selecting a tort analog requires assessing whether a reasonable plaintiff would have brought such a tort claim in 1871. A rational nineteenth-century plaintiff would assess the facts of their case and find the tort with criteria that most closely match those facts. Therefore, the proper tort analog for Section 1983 purposes is one in which, viewing the facts most favorably to the plaintiff, the plaintiff would have a chance at prevailing on the merits. If a litigant cannot meet the basic threshold standards for a particular tort, that tort is an inappropriate analog. Of course, if there were *no* tort that would have provided a cause of action, that conclusion would militate against recognition of a Section 1983 claim. But here, there was such a tort: abuse of process.

1. Ms. Gonzalez's case satisfies the three principal criteria for a nineteenth-century abuse-of-process action.

Abuse of process in the nineteenth century (and still today) required a showing that a defendant (1) brought to bear some form of legal process, criminal or civil, upon the plaintiff; (2) possessed an

ulterior or collateral motive for bringing such process; and (3) misused the process for an objective outside the regular and lawful bounds of such legal mechanisms. See *Bonney* v. *King*, 66 N.E. 377, 378 (Ill. 1903) (describing the second and third elements, and implying the first); *Pittsburg, J., E. & E.R. Co.* v. *Wakefield Hardware Co.*, 55 S.E. 422, 424 (N.C. 1906); *McClenny* v. *Inverarity*, 103 P. 82, 83 (Kan. 1909); *Kool* v. *Lee*, 134 P. 906, 909 (Utah 1913); *Glidewell* v. *Murray-Lacy & Co.*, 98 S.E. 665, 668 (Va. 1919); see also, Thomas Cooley, *A Treatise on the Law of Torts, or The Wrongs Which Arise Independent of Contract* 354-356 (3d ed. 1906) (quoting *Bonney* verbatim). Although malice was not necessary to make out a prima facie case of abuse of process (see*, e.g.*, Thomas Cooley, *A Treatise On The Law of Torts, or The Wrongs Which Arise Independent of Contract* 189 (1879) (hereinafter "Cooley") ("In these cases, proof of actual malice is not important, except as it may tend to aggravate damages.")), evidence probative of malice could help satisfy the ulterior-motive criterion discussed below.

The *first* criterion, that defendants brought to bear some form of legal process upon the plaintiff, was an oft unspoken, easy-to-satisfy requirement. By definition, an arrest warrant constitutes legal process. Ms. Gonzalez therefore satisfies this threshold element.

Second, an ulterior motive must exist (see *Phoenix Mut. Life Ins.* v. *Arbuckle*, 52 Ill. App. 33, 38 (1893); see also *Waters* v. *Winn*, 82 S.E. 537, 538 (Ga. 1914) (rejecting a frivolous abuse-of-process complaint where the plaintiff did not allege an ulterior motive)), and must be one not justified on the face of the process. Legal process, including warrants, are intended

for specific purposes authorized by statute or by the issuing court. Any deviation in purpose from that original intention represents an ulterior motivation. See *Docter* v. *Riedel*, 71 N.W. 119, 120 (Wis. 1897) ("The capias was a valid writ, regularly issued upon a good cause of action, but it was used to effect an ulterior and illegitimate purpose; and for that use there was held to be a remedy in tort * * *."); *Dishaw* v. *Wadleigh*, 44 N.Y.S. 207, 210 (App. Div. 1897) ("If process is willfully made for a purpose not justified by the law, this is an abuse for which an action will lie."). This ulterior-purpose threshold also was easy to satisfy.

Here, respondents' only facially legitimate motive would be a genuine desire to enforce Texas Penal Code §§ 37.10(a)(3) and (c)(1). But in Ms. Gonzalez's case, respondents had three potential (and likely) ulterior purposes: to (1) silence her dissent and potentially quash her petition, (2) have her removed from office, and (3) punish her dissent by subjecting her to indignities and reputational harm. That defendants never explicitly acknowledged these goals has no bearing on the case. Motive need not be explicit in an abuse-of-process claim: In the nineteenth century, plaintiffs and courts could infer motive from the types of misuse of process observed. See *Jeffery* v. *Robbins*, 73 Ill. App. 353, 361 (1898).

Moreover, it would not matter even if (improbably) respondents had been motivated in part by an actual interest to enforce Texas's criminal law. Although "[a] spite motive will not be enough for abuse of process when the process is used immediately only for the purpose for which it was designed and intended" (Restatement (Second) of Torts § 682 reporter's note (Am.

L. Inst. 1977)), it is plain that respondents here did not use process only for that immediate purpose. To the contrary, there is no real doubt that respondents' principal objective was stifling protected speech and ensuring that Ms. Gonzalez would not serve as a councilwoman. And "[o]ne who uses a legal process, whether criminal or civil, against another *primarily to accomplish a purpose* for which it is not designed, is subject to liability to the other for harm caused by the abuse of process." *Id.* § 682 (emphasis added).

Third, defendants must misuse the process to achieve an objective "not lawfully or properly attainable under it." *Bartlett* v. *Christhilf*, 14 A. 518, 521 (Md. 1888). "An abuse is where the party employs it for some unlawful object, not the purpose which it is intended by the law to effect; in other words, a perversion of it." *Mayer* v. *Walter*, 64 Pa. 283, 285-86 (1870); see Restatement (Second) of Torts § 682. Although this principle has existed for centuries, common-law courts in the United States and England typically trace its elaboration to *Grainger* v. *Hill*, 4 Bing. N.C. 212 (Q.B. 1838). In that case, the defendants arrested a ship captain under a writ of capias for failure to pay certain mortgage payments. But they used the arrest as leverage to coerce the captain into relinquishing the ship's register, an item not within the terms of the mortgage security or the writ and that he had previously refused to surrender. The Court of Queen's Bench determined that using the writ in this fashion constituted an abuse of process tantamount to using lawful procedures to carry out theft and conversion. *Id.* at 216. Under this understanding, defendants may not "prostitute[] [process] to an illegal purpose." 2 Charles Greenstreet Addison, *The Law of Torts* § 868 (H.G. Wood, ed. 1878).

Common misuses of arrest warrants in the nineteenth century included arresting individuals in order to secure their presence within the jurisdiction of a state for the purposes of personal service, coercing debt payments, seizing property, and ensuring that plaintiffs would miss other legal proceedings. See sources cited *infra* at 19-20. But common-law misuses encompassed even broader categories of behavior. The Supreme Judicial Court of Massachusetts outlined many such abuses, including those related to arrests, such as when a plaintiff is "subjected to *unwarrantable insult and indignities*, is treated with cruelty, is deprived of proper food, or is otherwise treated with oppression and undue hardship." *Wood* v. *Bailey*, 11 N.E. 567, 576 (Mass. 1887) (emphasis added). "Perhaps the most frequent form of such abuse," the court elaborated, "is by working upon the fears of the person under arrest, for the purpose of extorting money or other property, or of compelling him to sign some paper, *to give up some claim, or to do some other act* * * *." *Ibid*. Even securing a mere promise, which a defendant has no power to effect, may constitute possible grounds for an abuse-of-process claim. *Jeffery*, 73 Ill. App. at 362. These illegitimate endpoints, particularly those of (1) coercing retreat from a claim, (2) compelling another to act, or (3) subjection to "unwarrantable insult and indignities," encompass a wide spectrum of behavior that is not facially unlawful. Instead, the purpose of abuse of process was not to penalize criminal behavior, but rather to ensure that individuals do not derive more private, collateral benefit from legal process than such process expressly grants.

In this case. respondents used legal process in multiple ways that nineteenth-century courts plainly

would have regarded as abusive. For one, they circumvented standard procedures in a variety of ways. See Pet. Br. 9-14. For another, even had respondents followed proper procedure, nineteenth-century courts assessed "misuse" by looking at the defendants' ultimate goal. Here, that endpoint was (1) punishing and stifling dissent, (2) removal from office, and (3) damage to Ms. Gonzales's reputation. These are all goals that lay outside the proper use of legal process, involving "use of process for the purpose of compelling the defendant to do some collateral thing which he could not lawfully be compelled to do." *Johnson* v. *Reed*, 136 Mass. 421, 423 (1884).

Respondents cannot escape liability under nineteenth-century standards merely by securing a legitimate end while simultaneously pursuing an ulterior purpose. Nineteenth-century courts were alert to this danger. They assumed that when defendants obtain an "unlawful collateral end," the "legal use of [process]" was but "ostensible, while the real design was to pervert its force and efficiency to the success of the unlawful collateral design." *Phoenix Mut. Life Ins.*, 52 Ill. App. at 38; see *Sneeden* v. *Harris*, 13 S.E. 920, 923 (N.C. 1891) (""The law is just and good," and "[cannot] * * * be made the tool of trickery and cunning."). Consequently, Texas Penal Code §§ 37.10(a)(3) and (c)(1) provide respondents no safe harbor under traditional tort standards, even if Ms. Gonzales is thought to have committed some technical violation.

2. The harms for which Ms. Gonzalez seeks remediation could be redressed through an abuse-of-process claim.

In *Heck*, the Court suggested that, when determining a tort analog, it will consider whether the

injuries alleged are the type that a court could traditionally remedy under the proposed analog. 512 U.S. at 486 n.5. There, the Court explained that it did not regard abuse of process as the best analogy because the tort would not afford the plaintiff the ability to remediate harms stemming from "conviction or confinement," as were there at issue. *Id.* at 486.

But Ms. Gonzalez does not assert injuries arising from "conviction or confinement." Rather, the harms she alleges in her complaint are directly related to the "perversion of the lawfully initiated process": (1) [t]he harm to [her] reputation," (2) "to her future opportunities," (3) "to her pocketbook," (4) "to her faith in the criminal justice system," and (5) "to her physical health * * * brought on by the worry about her criminal prosecution." Complaint and Jury Demand at ¶ 136, *Gonzalez* v. *City of Castle Hills*, No. 20-cv-1151 (W.D. Tex. Sept. 29, 2020), ECF No. 1. All of those are harms that can be remedied through an abuse-of-process claim.

3. Unlike malicious prosecution and false imprisonment, abuse of process does not require a showing of want of probable cause.

Finally, abuse of process did not require a threshold showing that defendants lacked probable cause. At least Connecticut, Illinois, Kentucky, Maine, Maryland, Massachusetts, New Hampshire, New York, North Carolina, Pennsylvania, Vermont, and Wisconsin took this view in the years before and shortly after Section 1983's enactment. See*, e.g.*, *Drake* v. *Chester*, 2 Conn. 473, 476 (1818); *Allen* v. *Greenlee*, 13 N.C. 370, 371 (1830); *Pierson* v. *Gale,* 8 Vt. 509, 512 (1836); *Breck* v. *Blanchard*, 20 N.H. 323, 328 (1850); *Page* v.

Cushing, 38 Me. 523, 527 (1854); *Kennedy* v. *Barnett*, 64 Pa. 141, 143-44 (1870); *Wicker* v. *Hotchkiss*, 62 Ill. 107, 110 (1871); *Grigsby's Ex'r* v. *Ratecan*, 1872 WL 6428, at *1 (Ky. Dec. 29, 1872); *Hazard* v. *Harding*, 1882 WL 11435 (Sup. Ct. N.Y. Cnty. Jan. 1, 1882); *Emery* v. *Ginnan,* 24 Ill. App. 65, 68 (1887); *Mudrock* v. *Killips*, 28 N.W. 66, 68 (Wis. 1886); *Wood*, 11 N.E. at 576; *Bartlett*, 14 A. at 521; *Docter*, 71 N.W. at 120; see also 2 Addison, at § 868; 1 Edward A. Jaggard, *Handbook on the Law of Torts* § 203 (1895); William B. Hale, *Handbook on the Law of Torts* § 185 (1896).

* * *

Against this background, abuse of process is the proper tort analog here, and one that is satisfied on the facts of this case. Indeed, the Court previously recognized that abuse of process may represent a reasonable tort analog under Section 1983. *Wyatt* v. *Cole*, 504 U.S. 158, 164 (1992).[2] The goals of Section 1983 and the abuse-of-process tort are parallel: the protection of "private defendants [from] unjustified harm arising out of the misuse of governmental processes." *Ibid.* Justice Souter, joined by Justices Blackmun, Stevens, and O'Connor, recognized this similarity in

[2] *Wyatt*, however, appears to have misstated the elements of the abuse-of-process tort. 504 U.S. at 165 ("defendants could defeat a malicious prosecution or abuse of process action if they acted without malice and with probable cause"). This confusion is not unique to *Wyatt*. See Charles G. Bretz Jr., *Abuse of Process—A Misunderstood Concept*, 20 Clev. St. L. Rev. 401, 401-02 (1971). Despite their strong overlap in subject matter, the torts of abuse of process and malicious prosecution are distinct. Malicious prosecution is the cause of action for initiating legal process wrongly, while abuse of process presupposes lawful process. See *infra*, at 14-21.

Heck: "If * * * the common law were the master of statutory analysis, not the servant * * * we would find ourselves with two masters to contend with here, for we would be subject not only to the tort of malicious prosecution but to the tort of abuse of process as well, *Heck*, 512 U.S. at 494-95 (opinion of Souter, J.).

Although *Nieves* did not invoke abuse of process, that likely was because neither the parties nor the *amici* in that case raised the point in their briefs or at argument; and because the challenged conduct at issue was a split-second arrest, making it unlikely that a premeditated ulterior motive existed. *Nieves*'s choice of tort analog therefore should not be thought to resolve the question for this case.

II. As applied in the nineteenth century, the tort of malicious prosecution also would support the claim in this case.

Although the abuse-of-process analogy is sufficient to establish the propriety of Ms. Gonzalez's claim, that is not the only way in which nineteenth-century common law could bear on the question here: the Court also could consider the tort of malicious prosecution. That tort is relevant in two respects. First, properly understood, the malicious-prosecution tort likewise provides an available and analogous nineteenth-century right of action for conduct like that at issue in this case. And second, even if the malicious-prosecution tort were thought to have been unavailable on facts like those here, it is apparent that courts at the time of Section 1983's enactment deemed broad and subjective inquiries into the existence of malice both proper and manageable. The Fifth Circuit's extremely rigid approach to determining

retaliatory intent therefore cannot be reconciled with practice at the time of Section 1983's enactment.

A. Nineteenth-century courts relied on a broad standard of reasonableness to determine whether probable cause existed.

In the nineteenth century, three elements were required for bringing a malicious-prosecution claim: (1) "[a] suit or proceeding has been instituted without any probable cause therefor"; (2) "[t]he motive in instituting it was malicious"; and (3) "[t]he prosecution has terminated in acquittal or discharge of the accused." Cooley, *supra*, at 181. See *Wheeler* v. *Nesbitt*, 65 U.S. 544, 549-550 (1860). In *Nieves*' consideration of malicious prosecution, the Court highlighted the requirement that probable cause for arrest be absent, suggesting that such a tort would be hard to establish. 139 S. Ct. at 1726.[3]

But the standard of probable cause that treatise writers and jurists recognized in the nineteenth century was one with sharper teeth than that applied today. Cooley noted that "a mere belief * * * that cause exists is insufficient." Cooley, *supra*, at 182. Instead, it was understood that "there must be grounds on belief as would influence the mind of a reasonable person, and nothing short of this could justify a serious and formal charge against another." *Ibid.* All the cases to which Cooley cited emphasize that this inquiry—unlike that into malice—was an objective one: "Probable cause is such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe, or entertain an honest and

[3] No party contests that the third element is satisfied here. The malice prong is addressed below.

strong suspicion that the person arrested is guilty." *Ibid.* (quoting *Bacon* v. *Towne*, 58 Mass. 217, 238-39 (1849)). See also *Faris* v. *Starke*, 42 Ky. 4, 6 (1842) (holding that probable cause exists if the officer has "such ground as would induce a man of ordinary prudence and discretion to believe in the guilt and to expect the conviction of the person suspected, and if he acts in good faith on such belief and expectation"); *Broad* v. *Ham*, 5 Bing. (N.C.) 722, 725 (1839) (holding that "there must be probable cause, such as would operate on the mind of a reasonable man").

Some of the cases to which Cooley cited articulate an even stronger standard of probable cause.[4] In *Page*, 38 Me. at 526, the Supreme Judicial Court of Maine held that "there can be no such thing as probable cause for a prosecution to accomplish a purpose, known to the prosecutor to be unlawful." And in *Barron* v. *Mason*, 31 Vt. 189 (1858), the Vermont Supreme Court held that public officers can establish probable cause only when they "have information with such directness and certainty, as to gain credit with prudent men, of the existence and susceptibility of proof of such facts as show guilt." *Id.* at 195. "It is not enough to show that [proof of probable cause] appeared sufficient to this particular party, but it must be sufficient to induce a sober, sensible and discreet person to act

[4] The Court has paid particular attention to Cooley's treatise. See, *e.g.*, *Bogan* v. *Scott-Harris*, 523 U.S. 44, 51 (1998) (describing Cooley's treatise as "influential"); Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 Stan. L. Rev. 1337, 1344 (2021) (of nineteenth-century treatises, "the Supreme Court has relied on former Michigan Supreme Court Justice Cooley's treatise the most"). Decisions cited by Cooley therefore can be thought to set forth a national standard for tort law.

upon it, or it must fail as a justification for the proceeding." *Id.* at 197.

Under this standard, it is doubtful that probable cause to arrest Ms. Gonzalez would have been thought present in 1871. At a contentious city council meeting, she appeared to have accidentally placed a petition calling for the removal of the city manager in her binder. Shortly thereafter, a police officer approached her and directed her to the mayor, who asked her where the petition was. When he told her to look for the petition in her binder, Ms. Gonzalez found it there, not having realized that she had placed it in the binder. The misunderstanding was quickly resolved. See Pet. Br. 8-9. But Ms. Gonzalez nevertheless was arrested for "intentionally destroy[ing], conceal[ing], remov[ing], or otherwise impair[ing] the verity, legibility, or availability of a governmental record." Texas Penal Code §§ 37.10(a)(3) & (c)(1). See Pet. Br. 10. As Judge Oldham suggested in dissent, respondents' assertion of probable cause in these circumstances borders on absurd. *Gonzalez* v. *Trevino*, 42 F.4th 487, 495-496 (5th Cir. 2022) (Oldham, J., dissenting).

Indeed, the circumstances here are reminiscent of the malicious-prosecution claim in *Page*, where the Maine court held that "there can be no such thing as probable cause for a prosecution to accomplish a purpose, known to the prosecutor to be unlawful." *Page*, 38 Me. at 526. Unlike in *Nieves*, where the Court found the arresting officers to have had probable cause to arrest based on "on a combination of the content and tone of [the plaintiff's] speech, his combative posture, and his apparent intoxication" (139 S. Ct. at 1724), no such evidence—either direct or

circumstantial—existed here to support probable cause for an arrest.

Accordingly, there is every reason to believe that a nineteenth-century court would have found probable cause to be absent and a malicious-prosecution claim to be available on the facts of this case. Although the issue was not argued below, in light of this more thorough review of the nineteenth-century law of malicious prosecution, this point could be presented on remand or, in any event, in other cases involving similar circumstances.

B. In establishing malice, nineteenth-century courts looked to an expansive array of both objective *and* subjective evidence.

Moreover, nineteenth-century courts considered a wide array of evidence—both objective and subjective—in determining whether the malice prong of the malicious-prosecution tort had been established. Consequently, even if it is thought that an absence of probable cause cannot be shown here and that the malicious-prosecution tort therefore is unavailable, the Fifth Circuit's highly blinkered approach to establishing improper intent cannot be squared with practice at the time of Section 1983's adoption.

Nineteenth-century treatise writers noted the broad grounds on which plaintiffs could prove that a prosecution had been initiated against them with malice. Cooley, for instance, wrote that malice required merely a "showing that the proceeding was instituted from any improper or wrongful motive"—it was not even "essential that actual malevolence or corrupt design be shown." Cooley, *supra*, at 185. Bishop's 1889

treatise similarly defined malice broadly as "not necessarily, while it may be, ill will to the individual, but * * * any evil or unlawful purpose, as distinguished from that of promoting the justice of the law." Joel Bishop, *Commentaries on Non-contract Law* § 232 (1889). Bishop further noted that, "being thus a condition of the mind, an intent, and not an outward act," malice could most easily be proved as an "inference from other things"—including testimony from "the party himself." *Id.*, at § 234. Establishing malice was "never a question of law for the court, but * * * always to be found by the jury." *Ibid.* See also 2 Simon Greenleaf, *A Treatise on the Law of Evidence* § 453 (9th ed. 1863); *Page*, 38 Me. at 526; *Barron*, 31 Vt. at 202.

Want of probable cause was one way to prove malice by inference. See 2 John Bouvier, *Institutes of American Law* 520 (2d ed. 1854); Cooley, *supra*, at 185. The Court recognized this principle in *Nieves*: "Demonstrating that there was no probable cause for the underlying criminal charge will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for instigating the prosecution." 139 S. Ct. at 1723 (citation omitted).

But other paths to proving malice were also available in the nineteenth century. Greenleaf noted that "[m]alice may also be proved by evidence of the defendant's conduct and declarations, and his forwardness and activity in exposing the plaintiff." Greenleaf, *supra*, at § 453 (1848). Cooley wrote simply that "[s]ometimes the accompanying circumstances show the bad motive very clearly," such as when "an arrest on an unfounded criminal charge was made use of to compel" some unlawful outcome. Cooley, *supra*, at 185

(using "the surrender of securities to which both parties were equally entitled" as an example). Malice based on bad motive was "sufficiently common to need special attention." *Ibid.* The Vermont Supreme Court in *Barron* states that "whatever tends to prove or disprove [malice] is competent to be received." 31 Vt. at 202.

In *Page*, the Maine Supreme Judicial Court fleshed out this standard, holding that plaintiffs could marshal both "malice in a popular and in a legal sense" to prove their claim. 38 Me. at 526. Unlike popular malice (which stems from a bad motive), legal malice could be found where unlawful acts are injurious to a plaintiff regardless of whether the subjective motive was good or bad: "One may prosecute a laudable purpose with an honest intention, but in such a manner, and in such disregard of the rights of others, as to render his acts unlawful. Prosecutions may be instituted and pursued with pure motives, to suppress crimes, but so regardless of established forms of law, and of judicial proceedings, as to render the transactions illegal and malicious." *Id.* at 526. Ultimately, what mattered for the purpose of establishing malice was whether the defendants "conspired and confederated to accomplish a purpose which they knew to be unlawful, and by their acts done in effecting such unlawful purpose, they occasioned damage to the plaintiffs." *Id.* at 527.

In *Barron*, the Vermont Supreme Court further defined legal malice as "nothing more than bad faith, and, as applied to the subject of malicious prosecution, the want of sincere belief of the plaintiff's guilt of the crime for which the prosecution was instituted." 31 Vt. at 198. Malice, the court explained, "regards the mind

and judgment of the defendant" (*id.* at 198), "is judged of with reference to the party" (*id.* at 197), and can be either "express or implied." *Id.* at 198. The court held that the grounds for establishing malice were unconstrained: "whatever fairly tends to show that [the defendant] acted with good faith, and without malice, must be received." *Id.* at 197

In Ms. Gonzalez's case, the "accompanying circumstances show the bad motive very clearly." Cooley, *supra*, at 185. That is made clear beyond dispute by the background recounted in Ms. Gonzalez's brief to this Court (at 7-16) and in Judge Oldham's dissent below. The Fifth Circuit's refusal to take account of any of this evidence is inconsistent with nineteenth-century practice.

III. There is need for an effective cause of action to challenge retaliatory arrests.

Nineteenth-century common law thus demonstrates that when Section 1983 was enacted, misconduct like retaliatory arrest was actionable in tort. And the current reality of policing shows that recognition of such a cause of action is necessary under Section 1983 in circumstances like those in this case. Retaliatory arrests that do not involve on-the-spot law enforcement decisions—or that otherwise present objective indicia of improper motive—occur with sufficient frequency as to make the need for an effective remedy compelling. At the same time, the relative rarity of retaliatory-arrest litigation also indicates that the availability of such a remedy would not threaten the ability of law enforcement officers to perform their important duties effectively.

A. Retaliatory arrests are a significant problem.

1. At the outset, and recognizing that law enforcement officers generally act diligently and in good faith, there is no doubt that retaliatory arrests do occur. "[C]riminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something." *Nieves*, 139 S. Ct. at 1730 (Gorsuch, J., concurring in part and dissenting in part)). For example, municipalities have criminalized public spitting,[5] picnicking,[6] dressing not "neatly,"[7] and crossing the street while looking at a cell phone.[8]

Novel criminalization continues today. At the federal level, researchers estimate that the number of sections of the U.S. Code creating a federal crime has

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[5] Riverbank, C.A., Code of Ordinances § 130.07, https://bit.ly/3tk6SzW ("It is unlawful for any person to spit or expectorate any secretion, saliva, or other substance in any place open to the public . . .").

[6] Corona, C.A., Municipal Code § 12.24.030, https://bit.ly/3v08W0t ("No person shall perform any of the acts hereafter specified in or upon any public street, alley, sidewalk, parkway, public park, recreation building or facility, or other city facility, except as otherwise provided herein. * * * Cook or prepare any meal, barbecue or picnic except in the areas designated for such use * * *).

[7] Port Allen, L.A., Code of Ordinances § 54-13, https://bit.ly/41ugzbF ("It is the policy of the City of Port Allen for all persons to be properly dressed whenever they appear in public view on private or public property * * * in a manner that is neat and appropriate for recreation, school or work.").

[8] Honolulu, Haw., Rev. Ordinances § 15024.23 (2017), https://bit.ly/3H5qtY9 ("No pedestrian shall cross a street or highway while viewing a mobile electronic device.").

increased by 36% since 1994. GianCarlo Canaparo et al., *Count the Code: Quantifying Federalization of Criminal Statutes*, The Heritage Foundation (Jan. 7, 2022), https://herit.ag/48lQfTc. Forty-five states have considered and forty-two have enacted laws that restrict the rights of protestors, often authorizing arrest in a broader array of circumstances than previously permitted. International Center for Not-for-Profit Law, *U.S. Protest Law Tracker* (Oct. 26, 2023), https://bit.ly/482cvlu. In addition to idiosyncratic municipal ordinances, broadly worded, run-of-the-mill provisions—such as those prohibiting disorderly conduct, unlawful assembly, and unreasonable noise—increase opportunities for retaliatory arrest. See Rachel Moran, *Doing Away with Disorderly Conduct*, 63 B.C. L. Rev. 65, 88 (2022) ("[w]hen broadly worded statutes intersect with minor misconduct, law enforcement discretion is at its height."). See also John Inazu, *Unlawful Assembly as Social Control*, 64 UCLA L. Rev. 2, 7 (2017).

2. Given the sweep of opportunities to arrest, it is not surprising that retaliatory arrests have been well-documented. For example, in pattern-or-practice investigations into municipal police departments, the U.S. Department of Justice repeatedly has uncovered systematic retaliatory practices:

- In Ferguson, Missouri, the Justice Department found that the Police Department "interfere[s] with individuals' rights to protest and record police activities," citing one instance where police abruptly arrived at a peaceful protest, announced that everyone would be arrested, and moved people with cameras away with the threat of arrest for

failure to obey. United States Department of Justice, *Investigation of the Ferguson Police Department* 27-28 (2015), https://bit.ly/3RM9ct8. The Police Department "retaliate[d] against individuals for using language that, while disrespectful, is protected by the Constitution." *Id*. at 25.

- In Baltimore, "[o]fficers frequently detain and arrest members of the public for engaging in speech the officers perceive to be critical or disrespectful." United States Department of Justice, *Investigation of the Baltimore City Police Department* 9 (2016), https://bit.ly/3GIb7Zk. In one instance, an officer pursued a man who used a profanity, demanded identification, grabbed him, and arrested him. *Id.* at 117. "The officer's pursuit, detention, and eventual arrest was an unlawful exercise of government power to exact personal vengeance for a perceived slight." *Ibid*.
- The Justice Department uncovered similar practices in Louisville, finding that the Louisville Metro Police Department (LMPD) abridged the rights of citizens, both during protests and in non-protest encounters, through retaliatory arrest. United States Department of Justice, *Investigation of the Louisville Metro Police Department* 54-57 (2023), https://bit.ly/3TocILp. Further, LMPD officers engaged in content-based discrimination in their planned responses to various protesting groups. *Id*. at 58.

B. Although retaliatory arrest claims are rare, it is important that remedies be available to address this disturbing form of misconduct.

1. Against the background of such misconduct, the Court in *Nieves* correctly recognized the "'risk that some police officers may exploit the arrest power as a means of suppressing speech.'" 139 S. Ct. at 1725 (quoting *Lozman* v. *Riviera Beach*, 138 S. Ct. 1945, 1953-1954 (2018)). The Court nevertheless expressed concern that use of an excessively broad or subjective liability standard in retaliatory arrest cases could "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Id.* at 1725. Experience in the years since *Nieves*, however, demonstrates that retaliatory arrest claims are made with relative infrequency and are hard to establish, even under a standard broader than that applied below in this case. The Court therefore need not fear that a ruling for Ms. Gonzalez will lead to an avalanche of retaliatory-arrest claims that would impede legitimate police activity.

To establish the universe of cases claiming retaliatory arrest since the decision in *Nieves*, we conducted a search of Westlaw and found only approximately 1,100 published decisions nationwide citing *Nieves* for *any* purpose in the more than four years between that decision and December 6, 2023. To identify cases with fact patterns that could be affected by the decision in this case, we then isolated those that cited the portion of *Nieves* recognizing entitlement to sue even in the presence of probable cause to arrest, finding 200 decisions concerning 178 unique cases. And of these, only seventeen cases survived past the motion-to-dismiss

and summary-judgment stages—including in jurisdictions, such as the Seventh and Ninth Circuits (see, *e.g.*, *Ballentine* v. *Tucker,* 28 F.4th 54 (9th Cir. 2022); *Nilsson* v. *Baker Cnty.*, *Oregon,* 2022 WL 17156771 (D. Or. Nov. 21, 2022)), that apply the standard advocated by Ms. Gonzalez here.[9]

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[9] The published decisions in fifteen of these cases were on motions to dismiss or summary judgment: *Mix* v. *West*, 2023 WL 2654175, at *1 (W.D. Ky. Mar. 27, 2023); *Imani* v. *City of Baton Rouge*, 614 F. Supp. 3d 306, 357 (M.D. La. 2022); *Nilsson* v. *Baker Cnty.*, Oregon, 2022 WL 17156771, at *8 (D. Or. Nov. 21, 2022), report and recommendation adopted, 2022 WL 17170713 (D. Or. Nov. 22, 2022); *Balcom* v. *Figueroa*, 2022 WL 1126051, at *7 (W.D. Pa. Feb. 28, 2022), report and recommendation adopted as modified sub nom. *Balcom* v. *City of Pittsburgh*, 2022 WL 950039 (W.D. Pa. Mar. 30, 2022); *Haywood* v. *City of El Paso, Texas*, 2021 WL 5072029, at *13 (W.D. Tex. Oct. 26, 2021); *Bledsoe* v. *Ferry Cnty., Washington*, 499 F. Supp. 3d 856, 878 (E.D. Wash. 2020); *Lull* v. *Cnty. of Sacramento*, 2019 WL 6908046, at *2 (E.D. Cal. Dec. 19, 2019), report and recommendation adopted, 2020 WL 1139485 (E.D. Cal. Mar. 9, 2020); *Goodwin* v. *D.C.*, 579 F. Supp. 3d 159, 172-73 (D.D.C. 2022); *Hassan* v. *City of Atlanta*, 2022 WL 1778211, at *6 (N.D. Ga. June 1, 2022); *Henagan* v. *City of Lafayette*, 2022 WL 4553055, at *13–14 (W.D. La. Aug. 16, 2022), 2022 WL 4546721 (W.D. La. Sept. 27, 2022); *Lail* v. *Caesar*, 2022 WL 20581966, at *10 (E.D. Va. Dec. 9, 2022); *Akindes* v. *City of Kenosha*, 2021 WL 4482838, at *13 (E.D. Wis. Sept. 30, 2021); *Rideout* v. *Shelby Twp.*, 2023 WL 5917392, at *4 (E.D. Mich. Sept. 11, 2023); *Deis* v. *Mitchell*, 2020 WL 7024696, at *6 (E.D. Mich. Nov. 30, 2020); *Enoch* v. *Hamilton Cnty. Sheriff*, 2022 WL 2073292, at *3 (S.D. Ohio June 9, 2022), appeal dismissed sub nom. *Enoch* v. *Hamilton Cnty., OH Sheriff's Off.*, 2023 WL 3476630 (6th Cir. Feb. 21, 2023). The plaintiff prevailed at trial in one of the remaining cases, *Ballantine* v. *Tucker*, 28 F.4th 54 (9th Cir. 2022). In the other, *Nieves* had not yet been decided at the time of the arrest at issue, so the officer prevailed on qualified immunity grounds. *Nigro* v. *City of New York*, 2020 WL 5503539, at *4 (S.D.N.Y. Sept. 11, 2020).

2. Although most of these cases involved on-the-spot arrests, it is important to recognize that Ms. Gonzalez's circumstances are not unique: There are additional cases that also involved delayed or otherwise aberrant arrests that were executed for improper purposes. It is crucial that retaliatory-arrest rules provide meaningful opportunities to challenge this type of serious, premeditated misconduct.

In one such case, a journalist who routinely criticizes law enforcement was arrested six months after she purportedly violated the Texas Penal Code by calling the City of Laredo Police Department to confirm the identity of people involved in accidents. *Villarreal* v. *City of Laredo, Texas*, 44 F.4th 363, 376 (5th Cir.) (allowing First Amendment claim to proceed), reh'g en banc granted, opinion vacated, 52 F.4th 265 (5th Cir. 2022). Because the journalist could not identify others who had made similar calls to the police department but escaped arrest, the claim would be precluded if the Fifth Circuit applied the standard it did in this case.

Similar cases occur outside of the Fifth Circuit. Anthony Novak was arrested for violating a law against using a computer to disrupt or impair police functions, spending four days in jail before he made bond; he had run a parody Facebook page mocking the Parma Police Department. Although the court resolved the case on qualified immunity grounds, it recognized that "this case strikes at the heart of a problem the Court has recognized in the recent retaliation cases * * * that some police officers may exploit the arrest power as a means of suppressing speech." *Novak* v. *City of Parma*, 932 F.3d 421, 431 (6th Cir. 2019). But that case, too, would fail under the standard applied by Fifth Circuit in this case.

And in yet another case, Willie Rideout participated in protests, held on July 1 and July 15, 2020, against a local sheriff who had made racist social media posts. *Rideout*, 2023 WL 5917392, at *1. On July 20, 2020, Rideout gave an interview to the local media, calling for the sheriff's resignation. He was later arrested for his conduct during the protests, even though he had helped "control the crowd" and "assist[ed] the police officers," at one point even being "thanked by one of the police officers for that assistance." *Id.*, at *2. Here again, although the district court allowed the claim to proceed, Rideout's failure to identify protest leaders who acted similarly but escaped arrest means that his claim likely would fail under the standard applied below.

3. Finally, apart from cases (like this one and those described above) that do not concern on-the-spot arrests, there are additional categories of cases involving retaliatory arrests that both are especially problematic and have objective indicia tending to show an improper motive.

For one, arrests of members of the press, especially while they are reporting on protest activities, are likely both to be motivated by an intent to suppress unfavorable publicity and to discourage constitutionally protected activity. Such arrests occur often enough to be a cause for concern: It appears that there have been 299 incidents of arrest or criminal charges filed against members of the press since 2017. U.S. Press Freedom Tracker, *Incident Database*, https://bit.ly/47UE5RA (last visited Dec. 16, 2023). Such retaliatory arrest of members of the press while they are filming or reporting "poses a unique concern * * * since the act of an arrest—regardless of whether

charges are filed—impedes newsgathering and dissemination, perhaps irreversibly so." John S. Clayton, *Policing the Press: Retaliatory Arrests of Newsgatherers after* Nieves v. Bartlett, 120 Colum. L. Rev. 2275, 2291 (2020).

Similarly, arrest of people engaged in peaceful demonstrations, especially those against the police, is an area where special scrutiny may be warranted. In its investigation of the Louisville Metro Police Department, for example, the Justice Department uncovered viewpoint discrimination against groups protesting for police reform, as compared with protesters who purported to support police. *Investigation of the Louisville Metro Police Department* 54-57. Similarly, in Kenosha, Wisconsin, pro-reform protestors reported differential treatment, including arrest for curfew violations, as compared to pro-police protestors. *Akindes*, 2021 WL 4482838 at *2.

Although the Court need not resolve such claims in the context of this case, they involve circumstances that distinguish them from the typical on-the-spot arrest. Cf. *Nieves*, 139 S. Ct. at 1724-25 (noting 29,000 arrests made daily in the United States). The Court's resolution of this case should take care not to foreclose meaningful remedies in such cases.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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