

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; JOHN SIEMENS,
CHIEF OF THE CASTLE HILLS POLICE DEPARTMENT,
SUED IN HIS INDIVIDUAL CAPACITY, ALEXANDER
WRIGHT, SUED IN HIS INDIVIDUAL CAPACITY,

Respondents.

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

**BRIEF FOR *AMICUS CURIAE* THE RODERICK
& SOLANGE MACARTHUR JUSTICE CENTER
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*¹

The Roderick & Solange MacArthur Justice Center (RSMJC) is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC attorneys have played a key role in civil rights battles in areas including issues concerning police misconduct, the rights of protestors, and compensation for those whose constitutional rights have been violated. RSMJC has an interest in the sound and fair administration of the criminal legal system, and in ensuring those who have been treated unfairly by that system are able to bring suit to vindicate their rights.

Amicus files this brief to situate this case within the broader context of retaliatory government action.

¹ No party has authored this brief in whole or in part, and no one other than *amicus* and its counsel have paid for the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The Fifth Circuit incorrectly interpreted Ms. Gonzalez’s claims under *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), and in a way that will make it almost impossible to assert the important exception set out in that case.

To understand the full consequences of the majority’s erroneous application and interpretation of the *Nieves* exception, it is critical to situate Ms. Gonzalez’s experience in the broader context of retaliatory government actions against individuals for exercising their First Amendment rights to free speech and to petition their government. These retaliatory actions are, sadly, common—and fall disproportionately on communities of color.

An appropriate interpretation of the *Nieves* exception is critical in protecting First Amendment rights, and to stop retaliatory arrests of protestors and the civically-engaged like Ms. Gonzalez.

ARGUMENT

Illegal Arrests for Disfavored Speech Are a Serious and Systemic Problem That Disproportionately Impacts Communities of Color.

A. Retaliatory Arrests for Political Opposition to Local Government Leaders.

“[T]he most heinous act in which a democratic government can engage is to use its law enforcement machinery for political ends.” Pet. App. 3a (Ho, J., dissenting from denial of rehearing en banc) (quoting Laurence H. Silberman, Hoover’s Institution, WALL

ST. J., July 20, 2005). Yet it is not uncommon for public officials, notably members of city councils, to target citizens, like Ms. Gonzalez, who use their First Amendment rights to criticize and hold accountable their government leaders.

Fane Lozman, the plaintiff in *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1949 (2018), for example, was “an outspoken critic” of his local city council. In 2006, councilmembers held a closed-door session, and one councilmember “suggested that the City use its resources to ‘intimidate’” Lozman. *Id.*; see also Pet. Br. 40. Five months later, Lozman attended a city council meeting and— “[a]s he had done on earlier occasions and would do more than 200 times over the coming years”—“stepped up to the podium to give remarks” about government corruption. *Lozman*, 138 S. Ct. at 1949. That same councilmember interrupted Lozman, and told him to stop speaking, but he continued. *Id.* The councilmember called for officer assistance, and a police officer then asked Lozman to leave the podium, but Lozman refused and kept speaking. *Id.* The councilmember directed the officer to “carry him out,” and “[t]he officer handcuffed Lozman and ushered him out of the meeting.” *Id.* at 1949-50. At oral argument Chief Justice Roberts described the video of the arrest as “chilling.” Transcript of Oral Argument at 34, *Lozman*, 138 S. Ct. 1945 (No. 17-21).²

Another instance of city-council retaliation occurred in *Holley v. Town of Carp Hill*, 351 F. Supp.

² https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-21_ljgm.pdf. The video of the encounter is also available at https://www.supremecourt.gov/media/video/mp4files/Lozman_v_RivieraBeach.mp4.

3d 1359 (M.D. Ala. 2018). Frank Holley, the former mayor of Carp Hill, was a frequent critic of then-mayor Danny Evans, and would criticize him publicly at city council meetings. *Id.* at 1361-62. Evans told officers to target Holley in retaliation; the police chief testified that Evans told him to “set [Holley] up” and to do “anything you can do to arrest that b---ard, put his old a-- in jail.” *Id.* at 1362. Holley was eventually arrested for a traffic violation and subsequently sued the town, alleging his arrest was in retaliation for his speech. *Id.* at 1363.

Other examples from the caselaw abound. *See, e.g., Acosta v. City of Costa Mesa*, 718 F.3d 800, 809 (9th Cir. 2013) (speaker at city council arrested following his refusal to comply with councilmember’s order to stop talking); *Henneberry v. City of Newark*, No. 13-cv-05238, 2017 WL 1493006, at *2-3 (N.D. Cal. Apr. 26, 2017) (frequent critic of city council arrested at a luncheon); *Fernandes v. City of Jersey City*, No. 2:16-cv-7789, 2017 WL 2799698, at *3 (D.N.J. June 27, 2017) (citizen who criticized government officials at city council meetings forcibly removed from a council meeting); *McLin v. Ard*, 866 F.3d 682 (3d Cir. 2017) (after citizen posted “critical comments” about several councilmembers on a public Facebook page, councilmembers swore out criminal complaints against him).

The Department of Justice has recognized this problem. In a 2011 report, DOJ determined that the Maricopa County, Arizona Sheriff’s Office (MSCO) “sought to silence individuals who have publicly spoken out and participated in protected demonstrations against the [Office’s] policies and practices” regarding immigration. Letter from

Thomas E. Perez, Assistant Attorney General, to Bill Montgomery, County Attorney, Maricopa County, at 13 (Dec. 15, 2011).³ During two separate meetings of the County Board of Supervisors, deputies arrested several individuals who expressed criticism of MSCO. *Id.* at 14. The DOJ concluded: “The arrests and harassment undertaken by MCSO have been authorized at the highest levels of the agency and constitute a pattern of retaliatory actions intended to silence MCSO’s critics.” *Id.* Thus, what Ms. Gonzalez experienced is, unfortunately, not an outlier.

B. Retaliatory Arrests for Perceived “Anti-Police” Speech.

Retaliatory arrests against individuals on the basis of their speech are all-too-common. In particular, and notwithstanding the First Amendment, some police departments systematically arrest people in retaliation for their perceived “anti-police” speech. For example, in a 2015 report, the Department of Justice found that “suppression of speech” by the Ferguson, Missouri Police Department (FPD) “reflects a police culture that relies on the exercise of police power—however unlawful—to stifle unwelcome criticism.” U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 28 (2015) (hereinafter “Ferguson DOJ Report”).⁴ The report noted that despite a settlement agreement and a consent decree in two separate cases regarding protest activities, “it appears that FPD

³ https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf.

⁴ https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

continues to interfere with individuals' rights to protest and record police activities." *Id.* at 27. For instance, on February 15, 2015, the six-month anniversary of the shooting death of Michael Brown, when "protesters stood peacefully" in front of the police department, police responded with the retaliatory arrests of six people, including two people—one in a wheelchair—for capturing the action on camera. *Id.* at 27-28.⁵

The DOJ made similar findings regarding the Baltimore Police Department (BPD): "BPD violates the First Amendment by retaliating against individuals engaged in constitutionally protected activities. Officers frequently detain and arrest members of the public for engaging in speech the officers perceive to be critical or disrespectful." U.S. DEPT' OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 9 (2016) (hereinafter "Baltimore DOJ Report").⁶ The report also detailed BPD officers improperly interfering with individuals' rights to videotape arrests and other police activity and using unreasonable force against individuals who engage in speech critical of law enforcement. *See id.* at 118-20.

Likewise, the St. Louis Police Department responded with retaliatory arrests to peaceful protests triggered by the acquittal of Officer Jason Stockley for

⁵ FPD also responded to protected First Amendment activity with excessive force, including tear gas and rubber bullets. Justin Hansford & Meena Jagannath, *Ferguson to Geneva: Using the Human Rights Framework to Push Forward a Vision for Racial Justice in the United States After Ferguson*, 12 HASTINGS RACE & POVERTY L.J. 121, 131 (2015).

⁶ <https://www.justice.gov/crt/file/883296/download>.

the fatal shooting of Anthony Lamar Smith. *Ahmad v. City of St. Louis*, No. 17-cv-2455, 2017 WL 5478410, at *1 (E.D. Mo. Nov. 15, 2017), *modified on other grounds*, *Ahmad v. City of St. Louis*, 995 F.3d 635 (8th Cir. 2021). When St. Louis police encountered these protestors, who were expressing frustration with both the verdict and “broader issues, including racism and the use of force by police officers,” officers declared an “unlawful assembly” and carried out mass arrests. As petitioner notes, such retaliatory arrests are a uniquely pernicious form of government abuse because they are particularly harmful—and particularly chilling. Pet. Br. 48-51.

C. “Contempt of Cop” Arrests.

One common form of retaliation is known as the “contempt of cop” arrest. In these cases, a police officer may have probable cause to believe an offense has occurred, but the suspect’s speech, perceived as disrespectful, is the real reason for the arrest or citation. Matthew Heins, *Contempt of Cop is Not a Legal Charge and Neither is Trumping Up Other Charges to Support an Arrest!*, LAW ENFORCEMENT ACTION FORUM (Michigan Municipal League), Mar. 2018 at 1.⁷

A report by then-New Jersey Attorney General John J. Farmer identified “contempt of cop” citations as a “problem” in “law enforcement nationwide.” JOHN J. FARMER, JR. & PAUL H. ZOUBEK, FINAL REPORT OF THE STATE POLICE REVIEW TEAM 93-94 (1999).⁸ “Simply put,” the report explained, “it is the tendency

⁷ http://www.mml.org/insurance/risk_resources/publications/leaf_newsletter/2018_06.pdf.

⁸ https://www.state.nj.us/lps/Rpt_ii.pdf.

for certain police officers to approach the public with an attitude that they, the officer, are in no way to be challenged or questioned.” *Id.* at 94.

Consistent with this evaluation, the DOJ found that Newark Police Department officers often arrest people for contempt of cop, identifying “numerous instances of the [department’s] inappropriate responses to individuals who engage in constitutionally protected First Amendment activity, such as questioning or criticizing police actions.” U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 13 (2014).⁹ In one instance, for example, “an individual was arrested after he questioned officers’ decision to arrest his neighbor.” *Id.*

Similarly, in the Ferguson Report, the DOJ concluded that “officers frequently make enforcement decisions based on what subjects say, or how they say it,” “are quick to overreact to challenges and verbal slights,” and “belie[ve] that arrest is an appropriate response to disrespect.” Ferguson DOJ Report at 25.

Likewise, the DOJ report about the Baltimore Police Department recounted an incident where a young African-American man was ordered to leave an area because he “had no respect for law enforcement,” and then was arrested fifteen minutes later for failure to obey. Baltimore DOJ Report at 116. These are mere samples of the arrests that happen on a daily basis across the country.

Indeed, this Court has acknowledged the existence of such arrests. The *Nieves* opinion posits “an

⁹ https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf.

individual who has been vocally complaining about police conduct” and “is arrested for jaywalking.” 139 S. Ct. at 1727. This Court should reverse the Fifth Circuit because under its reasoning individuals in such circumstances will almost never be able to litigate their claims.

**D. Communities of Color Are
Disproportionately Impacted by
Retaliatory Police Action.**

Retaliatory actions by government officials have historically disproportionately affected people of color—effectively meaning that the First Amendment does not protect everyone’s speech equally. *See* Justin Hansford, *The First Amendment Freedom of Assembly as a Racial Project*, 127 YALE L.J. FORUM 685, 688 (2018). Black Americans have long been retaliated against for speaking out against abusive state and police practices. For example, following the end of the Civil War, a group of African Americans attempted to convene a conference to amend the state constitution to extend voting rights to Black men and repeal the racially discriminatory “Black Codes”—a prototypical political activity. Bryan Stevenson, *A Presumption of Guilt: The Legacy of America’s History of Racial Injustice*, in *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT* 10 (Angela J. Davis ed., 2017). When the delegates convened, a “white mob, backed by police, many of them Confederate veterans,” responded with unyielding violence. RON CHERNOW, *GRANT* 574-75 (2017). Following the attack, 37 people were killed and at least 160 were wounded. *Id.*

Police retaliation against Black protestors continued into the Civil Rights Era. Although the

examples of police retaliation are countless, the tragic events at Selma highlight police animus towards Black political speech. Hundreds of protestors crossed the Edmond Pettus Bridge in order to protest the murder of Jimmie Lee Jackson by state police. SARA BULLARD, *FREE AT LAST: A HISTORY OF THE CIVIL RIGHTS MOVEMENT AND THOSE WHO DIED IN THE STRUGGLE* 30 (1993). On the opposite end of the bridge, a wall of Alabama state troopers, billy clubs in hand, waited for the protestors. Christopher Klein, *How Selma's 'Bloody Sunday' Became a Turning Point in the Civil Rights Movement*, HISTORY (July 18, 2020).¹⁰ Alabama governor George Wallace commanded his state troopers to “use whatever measures [were] necessary to prevent a march.” *Id.* The police attacked the peaceful protestors, firing tear gas, trampling protestors with horses, and beating them with their clubs. TAYLOR BRANCH, *AT CANAAN'S EDGE: AMERICA IN THE KING YEARS 1965-68*, 51 (2006).

Native American protest has historically drawn a similar level of police resentment. In 1890, federal troops and the national guard were sent to the Northern Plains to dismantle the Ghost Dance movement. NICK ESTES, *OUR HISTORY IS THE FUTURE: STANDING ROCK VERSUS THE DAKOTA ACCESS PIPELINE, AND THE LONG TRADITION OF INDIGENOUS RESISTANCE* 127-28 (2019). The Ghost Dance was an inter-tribal resistance movement that protested the Dawes Act, which allowed the Federal government to seize and break-up tribal lands. *Id.* at 120. In order to stifle the movement, the federal government's Seventh Cavalry massacred between 270 to 300 native

¹⁰ <https://www.history.com/news/selma-bloody-sunday-attack-civil-rights-movement>.

people, most of whom were women and children. *Id.* at 128.

In short, police officers across jurisdictions have historically abused—and continue to abuse—their ability to arrest individuals, particularly people of color, who dare question the police or others in positions of authority.

Indeed, Ms. Gonzalez’s case showcases the serious risks faced by people of color for criticizing and opposing their political leaders. Sylvia Gonzalez was a community organizer who ran for city council on a promise that she would create a non-binding citizens’ petition demanding the removal of city manager. Pet. App. 21a. She then became the first Hispanic councilwoman elected in the history of Castle Hills. Pet. App. 66a. The retaliatory action she experienced is consistent with the historical evidence: people of color who dare speak out against those in power are frequently subject to unlawful punishment for their speech.

CONCLUSION

For the foregoing reasons, and those in the petitioner's brief, the Court should reverse to correct the panel majority's application and erroneous and disastrously narrow interpretation of *Nieves*, which will have enduring consequences for our civil society.

Respectfully submitted,

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