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 5th Circuit

BRIEF OF AMICUS CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus the Reporters Committee for Freedom of the Press ("Reporters Committee") is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970, when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect the newsgathering and publication rights of journalists around the country.

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[1] Pursuant to Supreme Court Rule 37, counsel for *amicus curiae* states that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than the *amicus curiae*, its members or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The right to gather the news, while "supremely precious," is also "delicate and vulnerable." *NAACP v. Button*, 371 U.S. 415, 433 (1963). When government retaliation chills reporting on matters of core public concern—when, for instance, an unlawful arrest drives a journalist from the scene of a newsworthy event—the impact on First Amendment freedoms is "immediate and irreversible," similar to a classic prior restraint. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Nothing can, at that point, restore to the public news never gathered or photographs never taken. And for just that reason, this Court has repeatedly warned that "some police officers may exploit the arrest power as a means of suppressing speech," in order to insulate themselves from public scrutiny of the performance of their duties. *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1953 (2018). The right to report depends critically on an adequate deterrent to those abuses.

In this case, the U.S. Court of Appeals for the Fifth Circuit placed arbitrary hurdles in the path of journalists seeking to vindicate their right to be free from retaliatory arrest. As this Court explained in *Nieves v. Bartlett*, even an arrest supported by probable cause gives rise to a First Amendment claim where "objective evidence" suggests that an individual was "arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." 139 S. Ct. 1715, 1727 (2019). And this Court has made clear, too, that probable cause is no defense where an arrest reflects premeditated "retaliatory policy," *Lozman*, 138 S. Ct.

at 1954, rather than a "split-second judgment[]," *Nieves*, 139 S. Ct. at 1724 (internal citation omitted). Both of those carve-outs are vital because of the sheer breadth of the criminal code: It isn't difficult for a law enforcement officer with animus towards the press to argue that a journalist covering a political rally, say, has momentarily obstructed the sidewalk, and to allege that probable cause for an arrest has been met. *See, e.g.*, *Hassan v. City of Atlanta*, No. 1:21-cv-4629-TWT, 2022 WL 1778211 (N.D. Ga. June 1, 2022) (journalist adequately presented claim under *Nieves* for discriminatory enforcement of vague curfew order). And both of those safeguards must be interpreted flexibly to avoid jeopardizing the rights of "press members and others" who would make tempting targets for retaliatory detention, *Nieves*, 139 S. Ct. at 1735 (Ginsburg J., concurring in the judgment in part and dissenting in part), like the dogged reporter "investigating corruption in a police unit," *id.* at 1741 (Sotomayor, J., dissenting).

In rejecting Petitioner Sylvia Gonzalez's claim that she was arrested in retaliation for organizing a petition critical of her town's city manager, the Fifth Circuit substantially undermined both principles and the protection they afford the news media. For one, the panel read *Nieves* woodenly to require not just objective evidence of retaliation but "comparative evidence" in particular—specific examples of other individuals "who engaged in the same criminal conduct but were not arrested." Pet. App. 29a. The absurd implication of that rule would be that no retaliation claim lies where law enforcement officers arrest the only journalist—or every journalist—covering a protest for a fleeting trespass, because no

example of a reporter who had *not* been arrested would be readily available. *See Nieves*, 139 S. Ct. at 1740 (Sotomayor, J., dissenting). To avoid that outcome, this Court should make clear that the analysis asks "whether the facts supply objective proof of retaliatory treatment," *Lund v. City of Rockford*, 956 F.3d 938, 945 (7th Cir. 2020), not whether the press and the public can produce a randomized controlled trial that replays the events under laboratory-like conditions.

Compounding the harm, the Fifth Circuit held Ms. Gonzalez to a duty to prove the absence of probable cause despite evidence that her arrest was the result of a "a premeditated plan to retaliate against [her]." Pet. App. 57a (Oldham, J., dissenting). But this Court has made clear that the need for such a showing is a safeguard for line officers making "split-second judgments when deciding whether to arrest," *Nieves*, 139 S. Ct. at 1724 (internal quotation marks omitted), not high-ranking policymakers executing premeditated unlawful schemes. Otherwise, as members of this Court have warned, officials could lie in wait for a journalist to trip the boundaries of the criminal code's broadest, vaguest offenses before seizing the opportunity to jail perceived opponents in the press. *See Nieves*, 139 S. Ct. at 1741 (Sotomayor, J., dissenting). This year's egregious police raid on the *Marion County Record*, notionally justified on a sweeping misreading of computer-crime laws, underlines that the risk is troublingly concrete. *See* Shannon Najmabadi, *Authorities to Return Materials Seized from Kansas Newspaper*, Wall St. J. (Aug. 16, 2023), https://perma.cc/2U6U-EA64; Jessica McMaster,

Police Chief Sought Arrests of Marion Newspaper Reporters Amid Backlash from Raid, KSHB 41 (Nov. 7, 2023), https://bit.ly/40TYoMa.

For the reasons given herein, *amicus* respectfully urges this Court to correct both errors. Strong protections against retaliatory arrest are vital to a free, independent press, and the judgment of the Fifth Circuit should be reversed.

ARGUMENT

I. Retaliatory arrests cause irreparable harm to the newsgathering process and the free flow of information to the public.

"[T]here is practically universal agreement" that the First Amendment exists "to protect the free discussion of governmental affairs," *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966), and "information relating to alleged governmental misconduct" in particular "has traditionally been recognized as lying at the core" of that purpose, *Butterworth v. Smith*, 494 U.S. 624, 632 (1990). Our Constitution therefore expects that the press will vigorously "guard[] against the miscarriage of justice by subjecting the police"—and the important powers they exercise—"to extensive public scrutiny." *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966). But for much the same reason, reporters working to surface information about the operations of government and the performance of public officials are especially threatened by the "risk that some police officers may exploit the arrest power as a means of suppressing speech." *Lozman*, 138 S. Ct. at 1953.

When reporters cover the law enforcement response to major public events, for instance, "officials have great incentive to blindfold the watchful eyes of the Fourth Estate"—to insulate their own activities against any possibility of public scrutiny by retaliating against the journalists attempting to document them. *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012). Any reporter successfully driven from the scene "is irrevocably prevented from capturing a unique set of images that might otherwise hold officials accountable." John S. Clayton, Note, *Policing the Press: Retaliatory Arrests of Newsgatherers After* Nieves v. Bartlett, 120 Colum. L. Rev. 2275, 2289 (2020). The information to be gathered may no longer exist, or the moment at which the public "would be most receptive" to hearing it may have passed—throttling disclosure on matters of core public concern "as effectively . . . as if a deliberate statutory scheme of censorship had been adopted." *Bridges v. California*, 314 U.S. 252, 269 (1941); *cf. Int'l News Serv. v. Associated Press*, 248 U.S. 215, 235 (1918) ("The peculiar value of news is in the spreading of it while it is fresh[.]"). To put it bluntly: If an official's goal is to muzzle the press, retaliatory arrests are attractive because they work.

That reality is hardly lost on law enforcement. Too often, officers policing newsworthy events take a "catch-and-release" approach to deterring press coverage—arresting journalists for offenses that will never stand up to scrutiny, with confidence that detention will shut down reporting in the meantime. PEN America, *Press Freedom Under Fire in Ferguson* 10 (2014); *see also* Joel Simon, *Covering Democracy:*

Protests, Police, and the Press, Knight First Amend. Inst. (June 20, 2023), https://perma.cc/8A2Y-32RJ. As the Department of Justice has warned, in those instances where officials would rather not let the facts of their conduct be reported, the fig-leaf cover of vague public-order offenses is "all too easily used to curtail expressive conduct or retaliate against individuals for exercising their First Amendment rights." Statement of Interest of the United States at 1–2, *Garcia v. Montgomery County*, No. 8:12-cv-03592 (D. Md. Mar. 4, 2013), https://perma.cc/V4CC-G8BB.

The experience of journalists documenting protests in recent years reflects as much: While a staggering number of reporters were detained in connection with their coverage, vanishingly few of those arrests resulted in *bona fide* criminal charges. *See* Sarah Matthews et al., *Press Freedoms in the United States 2020*, Reporters Comm. for Freedom of the Press, at 12 (2021), https://perma.cc/KE9J-LWXH. Fewer still proceeded to trial, to say nothing of actual conviction. *See, e.g.*, Concepción de León, *D.A. Won't Prosecute Reporter Arrested While Covering Shooting of Deputies*, N.Y. Times (Sept. 24, 2020), https://perma.cc/RG8A-44CG; *Iowa Jury Finds Des Moines Register Reporter Andrea Sahouri Not Guilty on All Charges*, Reporters Comm. for Freedom of the Press (Mar. 2, 2021), https://perma.cc/44C3-LCN3. But acquittal is cold comfort, because each arrest still prevented a journalist from bringing the public the news that day. The harm to the newsgathering process, and with it the free flow of information to the public, is irreparable.

As a result, for the right to gather the news about law enforcement to advance its core function—"to serve as a powerful antidote to any abuses of power by governmental officials," *Mills*, 384 U.S. at 219—officers must be adequately deterred from inflicting those harms in the first place. An injunction cannot restore footage that a reporter never had the chance to take, and other remedial avenues are often closed as well. For one, officers who retaliate against press coverage—even through unwarranted arrests or assaults—virtually never face prosecution for doing so, and internal discipline, too, is regrettably rare. *See, e.g.*, Marty Schladen, *More than a Year Later, No Discipline for Cop Who Pepper-Sprayed Journalists*, Ohio Cap. J. (July 12, 2021), https://perma.cc/3JG7-ENTM. That leaves one key line of defense for the right to report on policing: suits seeking damages for retaliation in violation of the First Amendment.

If *Nieves* were wrongly read to narrow that path to accountability, the right to gather news about law enforcement would be undermined—and officers would be invited to "exploit the arrest power as a means of suppressing speech." *Lozman*, 138 S. Ct. at 1953. This Court should reject that chilling result.

II. To safeguard a free press, courts can and should consider all objective evidence that an arrest was driven by retaliation.

As this Court has often explained, "the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions" for exercising their rights, including the right to gather the news.

Hartman v. Moore, 547 U.S. 250, 257 (2006). In *Nieves*, this Court recognized that retaliatory arrests can nevertheless raise "complex causal inquiries" where a detention was supported by probable cause. 139 S. Ct. at 1724. But this Court carefully declined to impose "an unyielding requirement to show the absence of probable cause," a hurdle that the press and the public need not clear in those circumstances "where probable cause does little to prove or disprove the causal connection between animus and injury," *id.* at 1727. A key example is the case of "a journalist arrested for jaywalking," *id.* at 1741 (Sotomayor, J., dissenting)—that is, the retaliatory enforcement of broad laws where officers would "typically exercise their discretion" not to make an arrest, *id.* at 1727 (majority opinion). In such cases, in lieu of demonstrating a lack of probable cause, reporters can rely on other "objective evidence" that they were singled out because of their journalism. *Id.*

Here, the Fifth Circuit dramatically narrowed that road to demonstrating animus by insisting that plaintiffs present not just objective evidence but "comparative evidence"—proof of individuals engaged in identical conduct who were not arrested. Pet. App. 29a. Petitioner Sylvia Gonzalez momentarily misplaced a petition she organized that criticized the city manager of Castle Hills, Texas, *see* Pet. App. 108–09a, and alleged that as a result she was arrested for tampering with a government record. *See* Tex. Penal Code § 37.10(a)(3). But even though Petitioner's review of a decade's worth of felony indictments showed no evidence the statute had ever been enforced against similar conduct, *see* Pet. App. 117a, and even though the affidavit for her arrest expressly

incorporated the illicit consideration that she had "been openly antagonistic to the city manager," *id.* at 116a, the panel concluded that Petitioner had failed to provide the objective evidence *Nieves* requires because she could not point to another citizen who misplaced a petition but was not arrested.

That result makes little sense, and it would leave the news media without protection against retaliatory arrests in an important class of cases. For one, as members of this Court noted in *Nieves* itself, the first journalist to arrive on the scene of a newsworthy event—or the reporter keeping "a lonely vigil"—would be "out of luck" under a too-literal approach to the analysis *Nieves* requires, no matter how much other objective evidence of retaliation they could put forward. 139 S. Ct. at 1740 (Sotomayor, J., dissenting). But this Court surely did not intend to limit the First Amendment's protections to journalists who gather the news surrounded by "a crowd" of their colleagues. *Id.*

The same troubling result would hold where officers arrest *every* journalist covering an event. That dynamic is dangerously common in the protest context, where—too often—multiple journalists are detained at one time under broad public-order statutes. *See, e.g.*, Kevin Rector, *Reporters, Legal Observers Cry Foul After Being Caught Up in LAPD's Mass Arrests at Echo Park Protest*, L.A. Times (Mar. 26, 2021), https://perma.cc/JFU5-D9EH; *see also* Simon, *supra*. Consider Josie Huang, a reporter for NPR member station LAist 89.3, who was unlawfully detained by L.A. County Sheriff's Deputies while covering a protest in 2020. *See Public Radio*

Journalist Reaches $700,000 Settlement with LA County Sheriff's Department, Reporters Comm. for Freedom of the Press (Nov. 2023), https://perma.cc/4AVH-UYPV.[2] The deputies on the scene not only attempted to prevent Huang from recording the arrests they made that night but tried, too, to prevent the *other* reporters present from recording Huang's arrest. *See id.* Common-sense makes clear that trying to suppress all reporting on the night's events makes the deputies' conduct more rather than less offensive to the Constitution—but under the Fifth Circuit's rule, none of the three journalists whose rights were violated that night would be able to provide the necessary example of a fellow reporter who was treated better.

Nothing in *Nieves* requires that absurd result. *See Nieves*, 139 S. Ct. at 1734 (Gorsuch, J., concurring in part and dissenting in part) (noting that "I do not understand the majority" as requiring "comparison-based evidence" (internal citation omitted)). This Court contrasted the necessary "objective inquiry" with the "significant problems that would arise from reviewing police conduct under a *purely* subjective standard." *Id.* at 1727 (majority opinion) (emphasis added). But other objective evidence may exist beyond the Fifth Circuit's too-limited reading that, when present, avoids the concern of inquiring directly into the mind "of the particular arresting officer." *Id.* For instance, clear "visual identifiers" that a journalist was present in a newsgathering capacity can and should contribute to a finding that the press corps was

[2] A California court determined that Huang was factually innocent of the offense for which she had been detained. *See id.*

targeted for detention. *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 823, 827–28 (9th Cir. 2020); *Goyette v. City of Minneapolis*, 3338 F.R.D. 109, 118 (D. Minn. 2021) (same); *see also, e.g.*, Doreen St. Felix, *In Minneapolis, the Shocking Arrest of the Journalist Omar Jimenez Live on CNN*, New Yorker (May 29, 2020), https://perma.cc/TT3L-RYGV.

The key point, as other lower courts have held, is that "common sense must prevail" when "assessing whether the facts supply objective proof of retaliatory treatment." *Lund*, 956 F.3d at 945. This Court need not "predict in advance every factual scenario which might meet the Court's 'objective evidence' standard," *id.*, to make clear that the Fifth Circuit's insistence on comparator evidence is too cramped—and the risks that it poses to the rights of the press too serious to tolerate.

III. Premediated retaliation against the press raises especially grave concerns that require more searching judicial inquiry.

In a related error, the Fifth Circuit failed to recognize that probable cause likewise "does little to prove or disprove the causal connection between animus and injury," *Nieves*, 139 S. Ct. at 1727, when an arrest is "premeditated" rather than the result of "an ad hoc, on-the-spot decision by an individual officer," *Lozman*, 138 S. Ct. at 1954. When an official shadows a journalist until an arguable basis for arrest can be contrived—like the officer who patiently "follows [a] reporter until the reporter exceeds the speed limit by five miles per hour," *Nieves*, 139 S. Ct. at 1741 (Sotomayor, J., dissenting)—there should be

little doubt that impermissible animus was the driving force in the detention. And the presence of probable cause, under those circumstances, does nothing to excuse the damage done to press rights. On the contrary, that sort of patient conspiracy represents "a particularly troubling and potent form of retaliation." *Lozman*, 138 S. Ct. at 1954.

That safeguard is necessary too because the statute books are well-stocked with broad, vague offenses that could be used pretextually to chill newsgathering. Consider computer-crime offenses. As this Court recently recognized in *Van Buren v. United States*, the government has often read statutes intended to criminalize hacking to "attach criminal penalties to a breathtaking amount of commonplace computer activity," including routine "journalism activity." 141 S. Ct. 1648, 1661 (2021) (citing Br. for Reporters Comm. for Freedom of the Press et al. as *Amici Curiae* at 10–13). And no surprise, then, that officials have increasingly cited loosely-worded computer-crime laws in efforts to investigate or prosecute journalists for garden-variety newsgathering. *See* Bruce D. Brown & Gabe Rottman, *Claiming a 'Computer Crime' Shouldn't Give Police a Free Pass to Raid Newspapers*, L.A. Times (Aug. 31, 2023), https://perma.cc/4GHD-3QE5; Elahe Izadi, *Missouri Governor Accuses Journalist Who Warned State About Cybersecurity Flaw of Criminal 'Hacking'*, Wash. Post (Oct. 14, 2021), https://perma.cc/U6XK-ZEMS. Other broad prohibitions, read too literally, can and have been misused in the same way. *See Lacey v. Maricopa County*, 693 F.3d 896, 907–10 (9th Cir. 2012) (en banc) (newspaper raid notionally predicated on prohibition

on disseminating personal information of police). It would be troubling in the extreme if *Nieves* were read to bar a remedy for those calculated reprisals.

The Fifth Circuit, without seriously gainsaying that Petitioner's arrest was the product of "a deliberative, premeditated, weeks-long conspiracy," Pet. App. 54a (Oldham, J., dissenting), nevertheless held that *Lozman*'s insight was limited to municipal liability claims under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). But *Lozman* did not turn on the formality of whose pockets would furnish a money judgment. Instead, this Court underlined the fundamentally distinct questions of causation raised by "a premeditated plan to intimidate" and an "ad hoc, on-the-spot decision." *Lozman*, 138 S. Ct. at 1954. At base, extending officials who "make calculated choices . . . the same protection as a police officer who makes a split-second decision" invites invidious retaliation, *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (statement of Thomas, J., respecting denial of certiorari), while doing "little to prove or disprove the causal connection between animus and injury," *Nieves*, 139 S. Ct. at 1727. This Court should underline that—to protect the rights of journalists whose coverage risks drawing the ire of public officials—courts must look beyond probable cause where premeditated retaliation is adequately alleged.

* * *

In each respect, the Fifth Circuit's interpretation of *Nieves* unreasonably sharpens the "risk that some police officers may exploit the arrest power as a means of suppressing speech." *Lozman*,

138 S. Ct. at 1953. The First Amendment insists on stricter safeguards—guardrails that restrain the worst impulses of the "vengeful officer" who would rather inconvenient news not reach the public, *Hartman*, 547 U.S. at 256, and that deny officials the power to "censor the press" when it "censure[s] the Government," *N.Y. Times Co. v. United States*, 403 U.S. 713, 717, 724 (1971) (Black J., concurring). The Fifth Circuit's decisions would undermine those core constitutional values; this Court should reverse.

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges this Court to reverse the judgment below.

Respectfully submitted,

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