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 THOMAS MORE SOCIETY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER


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## IDENTITY AND INTEREST OF THE AMICUS CURIAE[1]

*Amicus Curiae* **Thomas More Society** is a non-profit, national public-interest law firm dedicated to restoring respect in law for life, family, and religious liberty. The Thomas More Society provides legal services to clients free of charge and often represents individuals who cannot afford a legal defense with their own resources. Throughout its history, the Thomas More Society has advocated for the protection of First Amendment rights and has represented individuals retaliated against because of the exercise of rights protected by the First Amendment.

## SUMMARY OF THE ARGUMENT

The First Amendment bars the government from suppressing points of view. It also prohibits governmental retaliation against an individual because she exercised her First Amendment rights. These safeguards, including protections against retaliation, are vital to those whose views are disfavored by the government. Moreover, by ensuring the participation of these views in the marketplace of ideas, our system of governance is itself benefited.

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[1] Pursuant to S. Ct. Rule 37.6, this *amicus* states that no counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the *amicus curiae*, its members, or its counsel, made a monetary contribution for the preparation or submission of this brief.

The decision of the Fifth Circuit, however, misinterpreted this Court's relatively recent decision in *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), which governs certain claims that an arrest was made in retaliation for First Amendment activity. *Gonzalez v. Trevino*, 42 F.4th 487 (2022), *rehr'g denied*, 60 F.4th 906 (2023). First, the facts presented here—as discussed in the panel dissent by Judge Oldham—should place this case outside of the scope of *Nieves* because there is no disputing that the Petitioner sufficiently alleges government actors made a deliberate decision to target her in retaliation for her First Amendment activity. Second, the decision below unreasonably narrowed the type of evidence that may be used to show an arrest was made without probable cause and thus was retaliatory.

Therefore, this *amicus* respectfully asks that the decision of the Court of Appeals be reversed.

## ARGUMENT

### I. THE DEVELOPMENT OF FREE SPEECH DOCTRINE SHOWS THAT EFFECTIVE REMEDIES MUST BE AVAILABLE TO PROTECT AGAINST RETALIATION FOR THE EXERCISE OF FIRST AMENDMENT RIGHTS.

The law has come to recognize that, for the promise of the First Amendment to be fulfilled, there *should* be no disparity in treatment between favored and disfavored speech. *See* U.S. Const. amend. I ("Congress shall make no law . . . abridging the

freedom of speech.").[2] This principle was distilled in Justice Robert Jackson's magisterial pronouncement for this Court: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *see Texas v. Johnson*, 491 U.S. 397, 414 (1989). These limitations apply with equal force to state and local governments. *See, e.g., Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). Thus, no government or government actor has the "'power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)).

Nevertheless, neither doctrine nor practice has always been so protective of free speech. Indeed, history shows that individuals who exercise their First Amendment rights in ways disfavored by those holding governmental power face a heightened likelihood of retribution from the government. Even members of the founding generation enacted the Alien and Sedition Acts, though these laws were, of course, highly controversial at the time they were passed. *See N.Y. Times Co. v. Sullivan*, 376 U.S.

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[2] The Petitioner's protected conduct also involves the First Amendment right to petition the government. *See Gonzalez v. Trevino*, 42 F.4th 487, 498-500 (2022) (Oldham, J., dissenting) (discussing the historical right to petition the government, tracing it from the Magna Carta).

254, 276 (1964) ("Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history."); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1239-30 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (discussing contemporary constitutional criticism of the Alien Friends Act of 1798). As James Madison wrote anonymously in the Virginia Resolutions, the Sedition Act was "against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed, the only effectual guardian of every other right." James Madison, *Virginia Resolutions*, 21 December 1798, Founders Online, National Archives, *available at* https://founders.archives.gov/documents/Madison/01-17-02-0128 (last visited Dec. 17, 2023).

Governments attempted to control political expression long after the First Amendment was added to the Constitution. *See* Jacob Mchangama, *Free Speech: A History from Socrates to Social Media*, 158-69 (2022) ("Blackstonianism and sedition would rise again like zombies to torment Americans challenging the established order well into the twentieth century."); *cf., e.g., Fitts v. Kolb*, 779 F. Supp. 1502 (D.S.C. 1991) (declaring criminal libel statute unconstitutional in response to recent prosecution of plaintiff journalists). Especially during times of war, free speech has been readily sacrificed. *See, e.g., Abrams v. United States*, 250 U.S. 616 (1919) (holding that First Amendment did not bar conviction for inciting resistance to World War I and urging that war materiel production be curtailed); *Schenck v. United States*, 249 U.S. 47

(1919) (holding that First Amendment did not bar conviction for distributing flyers urging resistance to the draft); *see also Whitney v. California*, 274 U.S. 357 (1927) (holding that First and Fourteenth Amendments did not bar conviction based on membership in Communist Labor Party), *overruled by Brandenburg v. Ohio*, 395 U.S. 444 (1969); David T. Beito, *The New Deal's War on the Bill of Rights*, 202-03 (2023) ("Throughout World War II, [President Franklin] Roosevelt constantly probed the limits of his repressive power through such divisive schemes as sedition trials, tax audits, and a revival of lobbying investigations.").

Fortunately, our constitutional jurisprudence now firmly embraces freedom of speech, even when it is unpopular, and the law thus recognizes that "advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). "The right to speak freely and to promote diversity of ideas and programs . . . may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); *Snyder v. Phelps*, 562 U.S. 443, 460-61 (2011) ("As a Nation we have chosen . . . to protect even hurtful speech on public issues[.]"); *cf. Matal v. Tam*, 582 U.S. 218, 243 (2017) (plurality opinion) ("Giving offense is a viewpoint[.]").

Notwithstanding positive developments in these doctrines, First Amendment activity that is unpopular still finds itself targeted by governments.

*See, e.g., Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (state anti-discrimination commission found to have displayed anti-religious animus in hearing case against Christian baker); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (local ordinances targeted specific religious practices for suppression). To take as an example just one context in which disfavored speech is regularly curtailed, this Court is well aware of the ways governments attempt to restrict pro-life advocacy around facilities that provide abortions. *Compare McCullen v. Coakley*, 573 U.S. 464 (2014) (35-foot abortion clinic buffer zone held unconstitutional), *with Hill v. Colorado*, 530 U.S. 703 (2000) (bubble zone at abortion clinic held constitutional); *see, e.g., Sisters for Life v. Louisville-Jefferson County, Ky. Metro Government*, 56 F.4th 400 (6th Cir. 2022) (10-foot buffer zone around abortion clinic held unconstitutional). Pro-life advocacy is controversial speech to many, and many of those who find it controversial occupy politically influential positions in places where pro-life views are less than popular.

In these jurisdictions, retaliation against those exercising the First Amendment right to express pro-life views is often seen as politically expedient and potentially career-enhancing for those in government. And, because there are no negative electoral repercussions to be had from attacking those holding the minority point of view in these locations, officials are too often able to ride roughshod over free speech rights, unless and until a court intervenes to hold them accountable. *See, e.g., New York v. Griepp*, Case No. 17-CV-3706 (CBA),

2018 U.S. Dist. LEXIS 122169, at *4 (E.D.N.Y. July 20, 2018) ("[New York] Attorney General Eric Schneiderman[] [made a] statement, at a press conference held outside [the abortion clinic] to announce this action, that this is 'not a nation where you can choose your point of view.'"), *rehr'g granted*, 997 F.3d 1258 (2d Cir. 2021), *aff'd and remanded*, 11 F.4th 174 (2d Cir. 2021). Consequently, pro-life advocates are not infrequently the recipients of novel and strained interpretations of criminal law in efforts to stifle their speech. *See, e.g., Cities4Life, Inc. v. City of Charlotte*, 52 F.4th 576, 578 (4th Cir. 2022) ("[P]olice warned [pro-life advocates] that they would be violating the City's Picketing Ordinance if they stepped off the sidewalk to try to distribute literature to pedestrians and vehicles.").

Thus, when a government seeks to suppress First Amendment rights, proper legal remedies must be available so that the affected individuals may obtain judicial relief. The ability to bring suit for First Amendment retaliation is an essential means of providing a remedy when a government seeks to punish an individual for speaking out or taking a stand that is controversial or discomforting to those in political power. The Fifth Circuit's opinion in this case, however, makes the ability to pursue such relief less certain, and it should be reversed.

## II. THE FIFTH CIRCUIT'S DECISION UNDERMINES EXISTING PROTECTIONS AGAINST RETALIATION FOR THE EXERCISE OF FIRST AMENDMENT RIGHTS.

The Fifth Circuit here misread this Court's decision in *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019). The danger of the decision below is that it will permit government retaliation and chill First Amendment protected activity.

In *Nieves*, this Court held that "[a]lthough probable cause should generally defeat a retaliatory arrest claim, a narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so." 139 S. Ct. 1715, 1727 (2019). The Court explained the need for this exception by saying, "In such cases, an unyielding requirement to show the absence of probable cause could pose 'a risk that some police officers may exploit the arrest power as a means of suppressing speech.'" *Id.* (quoting *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1953 (2018)).

Application of *Nieves* to the present case, however, is erroneous. The Fifth Circuit should have followed the suggestion of the Sixth Circuit and held that the *Nieves* probable cause rule would not apply to these facts since this case involves a premeditated arrest where there was no doubt about the government's motives rather than a spontaneous arrest by law enforcement officers responding to potentially volatile situation. *See Novak v. City of*

*Parma*, 932 F.3d 421, 432 (6th Cir. 2019) ("Where a statute gives police broad cover to find probable cause on speech alone, probable cause does little to disentangle retaliatory motives from legitimate ones . . . [and it may be that] the general rule of requiring plaintiffs to prove the absence of probable cause should not apply[.]"). This was one of the concerns raised below in Judge Oldham's dissent from the panel decision, prompting him to question "what purchase *Nieves* has here." *See Gonzalez*, 42 F.4th at 504 (Oldham, J., dissenting). "*Nieves* designed a rule to reflect 'the fact that protected speech [or conduct] is often a legitimate consideration when deciding whether to make an arrest' and the fact that 'it is particularly difficult to determine whether the adverse government action was caused by the officer's malice or the plaintiff's potentially criminal conduct.' In this case, it's plainly impossible that [Petitioner's] speech and petitioning activity was a 'legitimate consideration[.]'" *Id.* at 503-04 (Oldham, J., dissenting) (quoting *Nieves*, 139 S. Ct. at 1724); *see id.* at 500-01 (Oldham, J., dissenting) ("This is not a case where we must guess about the Conspirators' motives . . . the Conspirators' animus plainly caused [Petitioner's] arrest."). As such, where there is governmental deliberation (especially by those who would be deemed policy makers), *Nieves* should not apply. Instead, application of *Nieves* should be limited to individual claims against officers for on-the-spot arrests.

Moreover, the Fifth Circuit erred in holding that only *specific* examples of non-arrests of individuals in precisely the *same* circumstances would satisfy the exception identified in *Nieves*.

*Gonzalez*, 42 F.4th at 492 (quoting *Nieves*, 139 S. Ct. at 1727) ("[T]he plain language of *Nieves* requires comparative evidence, because it required 'objective evidence' of 'otherwise similarly situated individuals' who engaged in the 'same' criminal conduct but were not arrested. The evidence [Petitioner] provides here comes up short."). In so holding, it diverged from the Seventh and Ninth Circuits, which both allow a more flexible and commonsense approach to determine whether the exception is satisfied. *See Lund v. City of Rockford*, 956 F.3d 938, 945 (7th Cir. 2020) ("We must consider each set of facts as it comes to us, and in assessing whether the facts supply objective proof of retaliatory treatment, we surmise that Justices Gorsuch and Sotomayor are correct—common sense must prevail."); *Ballentine v. Tucker*, 28 F.4th 54, 62-63 (9th Cir. 2022*); see also Lyberger v. Snider*, 42 F.4th 807, 813-14 (7th Cir. 2022). The need for flexibility in judging the applicability of *Nieves* is particularly pressing when the government arrests for an arcane or rarely enforced statute. In such instances, the retaliation is no less real simply because the law at issue has not often been the subject of a criminal charge.

The facts of the underlying case illustrate why an injunction restraining a law or an ongoing pattern of conduct may simply not be an available option for an individual whose First Amendment rights have been violated. The Petitioner in this case was the victim of a single (but dramatic) incident in which her rights were violated by an investigation and arrest. *Id.* at 489. And the pretext for the Petitioner's arrest was the allegation that she (as a sitting city council member) briefly misplaced a

citizen petition for a few minutes immediately after a city council meeting, returning the petition before she left the meeting room. *Id.* Accordingly, there is no law to be enjoined to prevent future deprivation of her rights. There is instead a government that must be held answerable in court for what is credibly alleged to be a deliberate plan to demean and humiliate the Petitioner using a fig leaf of technical legitimacy to hide its retaliatory motives.

Permitting these constitutional violations to escape judicial redress harms not only the rights of the silenced speaker, but also our system of government. "[F]ree speech is 'essential to our democratic form of government.' Without genuine freedom of speech, the search for truth is stymied, and the ideas and debates necessary for the continuous improvement of our republic cannot flourish." *Meriwether v. Hartop*, 992 F.3d 492, 503 (6th Cir. 2021) (Thapar, J.) (quoting and citing *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018)). Yet, when speaking out makes a person a target for ruinous humiliation through invocation of the criminal process over even the most picayune or captious allegation of unlawful conduct, the First Amendment cannot serve these vital ends.

This is the danger identified by then Attorney General and future Justice Robert Jackson:

> [T]he most dangerous power of the prosecutor . . . [is] that he will pick people that he thinks he should get, rather than pick cases that need to be

> prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone . . . It is in this realm, in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.

Robert H. Jackson, *The Federal Prosecutor*, 24 J. Am. Judicature Soc., 18, 19 (1940), *available at* https://www.roberthjackson.org/speech-and-writing/the-federal-prosecutor/ (last visited Dec. 17, 2023). There is little doubt that the Petitioner in this case made a sufficient showing that her prosecution had become "personal" and that her only "real crime" was advocating views disfavored by local officials who held the power to arrest and prosecute her on a hyper technicality.

Nonetheless, the decision of the Fifth Circuit closes its eyes to the stark realities identified by Justice Jackson over eighty years ago. When arrests and prosecutions are driven by invidious motives into

reliance on novel theories designed to retaliate against unpopular speech, the legal system abandons due process for the randomness of "being struck by lightning," *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring). The continued survival of First Amendment liberties demands more, especially when—as with the Petitioner's arrest—it can be said that "the process is the punishment."

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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