No. 22-1025

In the Supreme Court of the United States

SYLVIA GONZALEZ, PETITIONER

v.

EDWARD TREVINO, II, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING NEITHER PARTY

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QUESTIONS PRESENTED

In *Nieves* v. *Bartlett*, 139 S. Ct. 1715 (2019), this Court held that a claim for retaliatory arrest in violation of the First Amendment generally requires a plaintiff to plead and prove the absence of probable cause, subject to a "narrow" exception for certain cases where "a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Id.* at 1727. The questions presented are:

1. Whether *Nieves*'s exception can only be satisfied by evidence that law-enforcement authorities were aware of, but declined to arrest, other individuals who engaged in the same behavior as the plaintiff but did not engage in the same First Amendment activities.

2. Whether the general no-probable-cause requirement applies outside the context of split-second arrests.

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This case presents two issues about the application of *Nieves* v. *Bartlett*, 139 S. Ct. 1715 (2019), to a First Amendment retaliatory-arrest claim for damages under 42 U.S.C. 1983. The first issue concerns the type of proof that will permit such a claim when the plaintiff cannot show the absence of probable cause for the arrest. The second issue is whether the general requirement to show the absence of probable cause applies outside the context of a split-second arrest. Although federal officers are not subject in their individual capacity to First Amendment claims of retaliatory arrest, see *Egbert* v. *Boule*, 596 U.S. 482, 498-501 (2022), the United States has a substantial interest in ensuring that *Nieves* does not impede the federal government's own ability to safeguard First Amendment rights through criminal and civil enforcement. It also has a substantial interest in ensuring that *Nieves* is carefully calibrated to protect

individuals' First Amendment rights without overly chilling the federal government's state and local law-enforcement partners. The United States has participated as amicus curiae in multiple cases raising questions about the scope of First Amendment retaliatory-arrest claims. See *Nieves*, *supra*; *Lozman* v. *City of Riviera Beach*, 138 S. Ct. 1945 (2018); *Reichle* v. *Howards*, 566 U.S. 658 (2012).

STATEMENT

1. Over the past two decades, this Court has decided several cases in which plaintiffs have sought damages based on a claim that government officers violated the First Amendment by taking a law-enforcement action against them in retaliation for protected activities.

In *Hartman* v. *Moore*, 547 U.S. 250 (2006), the Court held that a plaintiff bringing a constitutional tort claim on the theory that he was prosecuted in retaliation for his speech is required to plead and prove the absence of probable cause. *Id.* at 252. Subsequently, in *Lozman* v. *City of Riviera Beach,* 138 S. Ct. 1945 (2018), the Court permitted a plaintiff to avoid such a showing for a particular First Amendment damages claim under 42 U.S.C. 1983 alleging a retaliatory arrest (as opposed to retaliatory prosecution) if he could "separate[] [his] claim from the typical retaliatory arrest claim" by "prov[ing] the existence and enforcement of an official policy motivated by retaliation." 138 S. Ct. at 1954; see *id.* at 1951, 1955. And in *Nieves* v. *Bartlett*, 139 S. Ct. 1715 (2019), the Court explicitly "[a]dopt[ed] *Hartman*'s no-probable-cause rule" for constitutional damages claims alleging retaliatory prosecutions as the "general[]" rule in the "closely related context" of damages claims under Section 1983 alleging a retaliatory arrest. *Id.* at 1725-1726.

Nieves described only one exception to that general rule: a "narrow qualification," applicable only in circumstances "where officers have probable cause to make arrests, but typically exercise their discretion not to do so," such as "jaywalking at * * * an intersection." 139 S. Ct. at 1727. "In such a case," the Court explained, "because probable cause does little to prove or disprove the causal connection between animus and injury, applying *Hartman*'s rule would come at the expense of *Hartman*'s logic." *Ibid.* The Court therefore "conclude[d] that the no-probable-cause requirement should not apply when a plaintiff" in such a case "presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Ibid.*

2. Petitioner is a retiree in her seventies who unseated an incumbent and was elected to the city council of Castle Hills, Texas. Pet. App. 102a-106a. After petitioner was elected, she organized a nonbinding citizen petition calling for the removal of the city manager, which was signed by over 300 city residents. *Id.* at 106a-107a, 136a. At petitioner's first council meeting, a resident submitted the petition to the council. *Id.* at 107a. Numerous residents testified against the petition, including one resident who did not sign the petition but claimed that petitioner "asked her to sign the petition 'under false pretenses.'" *Id.* at 108a.

At the council meeting, petitioner sat next to the mayor of Castle Hills, Edward Trevino II. Pet. App. 101a, 108a. Petitioner alleges that, when the meeting concluded, she picked up all the papers on her side of the table, placed them in her binder, and then stepped away. *Id.* at 108a-109a. A few minutes later, a police officer approached her, informed her that Trevino

wished to speak with her, and escorted her back to the table. *Id.* at 109a. According to petitioner, Trevino then asked her to look for the petition; she found it in her binder and handed it to Trevino; and Trevino acknowledged that she had "probably picked it up by mistake." *Id.* at 110a.

A few days after the council meeting, Trevino filed a criminal complaint alleging that petitioner had attempted to steal city records. Pet. App. 113a, 137a-141a. The chief of police, John Siemens, ultimately assigned the investigation to Alexander Wright, a private attorney who at times served as a special detective for the police department. *Id.* at 101a, 113a-114a, 158a. Following a month-long investigation—and nearly two months after the incident at the council meeting—Wright obtained an arrest warrant for petitioner based on misdemeanor tampering with a government record, in violation of Texas Penal Code § 37.10(a)(3) and (c)(1) (West 2015). Pet. App. 114a; see 108a, 118a, 158a-163a. In the affidavit supporting his request for a warrant, Wright documented his investigation, including his interviews with people involved and his summary of the video recording of the incident. *Id.* at 158a-163a. Wright also identified a possible "motive for [petitioner]'s desire to steal the petition[]," namely a hope of preventing consideration of the claim that she asked a resident to sign the petition under false pretenses. *Id.* at 162a.

After learning of the arrest warrant, petitioner turned herself in and spent a day in jail, where she was required to sit handcuffed on a cold metal bench. Pet. App. 118a. Petitioner alleges that Trevino, Siemens, and Wright proceeded in a manner that would ensure that she would spend time in jail: (1) they obtained a warrant instead of a summons, which is the procedure

normally used for nonviolent crimes and does not require jail time; (2) they circumvented the district attorney and sought a warrant directly from a magistrate, a process usually reserved for violent felonies or emergencies; and (3) by bypassing the district attorney, they ensured that petitioner could not use the satellite booking function, which would have allowed her to avoid spending time in jail. *Id.* at 114a-115a.

The district attorney ultimately dismissed the charges against petitioner. Pet. App. 115a. But because of her experience, petitioner resigned from the city council and has stated that she will never again run for political office or organize a petition. *Id.* at 123a-124a.

3. Petitioner filed a constitutional tort action under 42 U.S.C. 1983, seeking (among other things) damages from Trevino, Siemens, and Wright, who are respondents in this Court. Pet. App. 98a-163a. Petitioner alleged that she was unlawfully arrested in retaliation for exercising her First Amendment rights, including her right to organize a petition to remove the city manager. *Id.* at 99a, 117a-118a. Petitioner further alleged that the prior misdemeanor tampering charges in the county in which Castle Hills is located "involved the use of fake social security numbers, driver's licenses, and green cards," rather than citizen petitions. *Id.* at 117a. And she alleged that, "[o]f 215 grand jury felony indictments obtained under the tampering statute at issue in this case, not one had an allegation even closely resembling the one mounted against [petitioner]." *Ibid.* According to petitioner, "[b]y far the largest chunk of the [felony] indictments involved accusations of either using or making fake government identification documents"; a "few others concerned the misuse of financial information, like writing of fake checks or stealing banking

information"; and the remaining ones "concern[ed] hiding evidence of murder, cheating on a government-issued exam, and using a fake certificate of title." *Ibid.*

Respondents filed a motion to dismiss, which the district court denied. Pet. App. 65a-97a. The court "f[ound] that the *Nieves* exception applies in this case and [petitioner] need not plead or prove the absence of probable cause" because she "alleges the existence of objective evidence that she was arrested when 'otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.'" *Id.* at 80a-81a (quoting *Nieves*, 139 S. Ct. at 1727).

4. The court of appeals reversed. Pet. App. 20a-64a.

The court of appeals disagreed with the district court and concluded that petitioner "cannot take advantage of the *Nieves* exception because she has failed to * * * offer evidence of other similarly situated individuals who mishandled a government petition but were not prosecuted under Texas Penal Code § 37.10(a)(3)." Pet. App. 28a-29a. The court of appeals acknowledged that petitioner offered evidence "that virtually everyone prosecuted under § 37.10(a)(3) was prosecuted for conduct different from hers." *Id.* at 29a. But the court reasoned that *Nieves*'s "comparative evidence" exception did not permit it to infer "that because no one else has been prosecuted for similar conduct, her arrest must have been motivated by her speech." *Ibid.*

The court of appeals also rejected petitioner's argument that *Lozman*'s "'official policy'" alternative to the no-probable-cause requirement "is applicable here because * * * she was not arrested by an officer making a 'split-second' decision." Pet. App. 31a (citation omitted). The court observed that "*Lozman*'s holding was clearly limited to" claims of municipal liability under

Monell v. *Department of Social Services*, 436 U.S. 658 (1978), and did not extend to individual municipal officers like respondents. Pet. App. 32a.

Judge Oldham dissented. Pet. App. 34a-64a. In his view, *Nieves* did not require a particular type of "comparative evidence"; instead, it "simply require[d] objective evidence." *Id.* at 51a (emphasis omitted). Judge Oldham also suggested that the "relevant rule appears to come from *Lozman*"—not *Nieves*—because petitioner was not subject to a "split-second warrantless arrest[]." *Id.* at 54a-55a.

5. The court of appeals denied en banc rehearing. Pet. App. 1a-2a. Judge Ho dissented from that denial, *id.* at 3a-19a, stating that "it makes little sense to read *Nieves* to require comparative evidence" of the type required by the panel majority, *id.* at 12a.

SUMMARY OF ARGUMENT

Petitioner contends that the court of appeals erred in applying the general rule of *Nieves* v. *Bartlett*, 139 S. Ct. 1715 (2019)—that a plaintiff bringing a First Amendment retaliatory-arrest claim must plead and prove the absence of probable cause—to her claim here. The court did err in applying an unduly strict form-of-evidence requirement to determine whether petitioner had properly invoked *Nieves*'s exception to that rule. But it did not err in rejecting her argument that *Nieves*'s general rule is limited to split-second arrests. This Court should vacate and remand to allow the lower courts to apply the correct standard in the first instance.

I. As a threshold matter, the Court should make clear in this case that the no-probable-cause requirement is an aspect of a constitutional damages tort—not the First Amendment itself. *Nieves* drew its no-

probable-cause requirement from *Hartman* v. *Moore*, 547 U.S. 250 (2006), which expressly "d[id] not go beyond a definition of an element of the tort," *id.* at 257 n.5. And nothing in *Nieves* transforms the requirement into a limitation on First Amendment rights. Making that explicit will reinforce that the *Nieves* rule does not apply to alternative mechanisms for enforcing constitutional rights under federal and state criminal and civil statutes, which contain their own separate limits. See, *e.g.*, 18 U.S.C. 241, 242; 34 U.S.C. 12601.

II. With respect to individual claims like petitioner's, the court of appeals misconstrued *Nieves*'s "narrow qualification" to the "general[]" no-probable-cause rule, 139 S. Ct. at 1727, in one respect. That exception is limited to cases where "a plaintiff presents objective evidence that [she] was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been," *ibid.*, but does not limit the *form* of that evidence. The court of appeals' decision, however, appears to preclude plaintiffs from qualifying for the exception unless their evidence shows that other similarly situated individuals engaged in identical (but nonexpressive) conduct but were not arrested. That approach would inappropriately leave plaintiffs without a Section 1983 remedy in otherwise-meritorious cases where the evidence to satisfy that requirement takes a different form.

While the type of evidence envisioned by the court of appeals is certainly one form of evidence that could satisfy the exception, it is not the only one. In particular cases, the evidence might, for example, take the form of proof that all other arrests for violating a particular statute were for behavior far different from the plaintiff's own, or that the only individuals arrested out of a

large group were those engaged in particular expressive activity. Or in some cases, the factfinder might be allowed to infer that similarly situated individuals were treated differently based on the commonsense proposition that certain minor crimes (such as jaywalking) occur all the time but are seldom or never arrested.

A plaintiff may well need to plead and prove additional objective evidence of retaliation; indeed, the fact that an arrest is novel will often be insufficient in itself unless accompanied by additional objective evidence that corroborates the necessary causal link to an unconstitutional motive. But the *Nieves* exception is not governed by the stricter evidentiary requirements for dismissing a criminal indictment on equal-protection grounds, as defined in this Court's decision in *United States* v. *Armstrong*, 517 U.S. 456 (1996), which rest on additional weighty concerns. Instead, the *Nieves* exception should be applied so as to allow individuals to vindicate their First Amendment rights, while adhering to *Nieves*'s salutary substantive restrictions on unduly exposing to suit officers carrying out lawful and important law-enforcement activities.

III. That balance, and with it *Nieves* itself, applies just as much to deliberative arrests as to on-the-spot ones. Neither *Nieves* nor the decisions of this Court on which it relies drew a distinction between the two types of arrests. Such a distinction is also absent from the two common-law claims that *Nieves* identified as most analogous to retaliatory arrest—malicious prosecution and false imprisonment—each of which imposed a no-probable-cause requirement regardless of whether a claim arose in the context of a split-second arrest. And as a matter of first principles, petitioner's proposed carveout for deliberative decisions would create difficult

line-drawing questions and perversely incentivize snap judgments.

ARGUMENT

This case provides the Court with the opportunity to clarify three issues relating to First Amendment claims of retaliatory arrest that were not expressly addressed in *Nieves* v. *Bartlett*, 139 S. Ct. 1715 (2019). First, the Court should make clear that in *Nieves* and other cases addressing such claims, the Court construed the limits of an individual's constitutional claim for damages, rather than the First Amendment itself or other forms of civil and criminal enforcement of the rights that the First Amendment guarantees. Second, the Court should reaffirm the substantive limitations that *Nieves* imposes on such damages claims but reject the court of appeals' unduly restrictive view of the form of proof necessary to fit within the exception to *Nieves*'s general rule. Third, the Court should hold that the approach adopted in *Nieves* applies equally to split-second and deliberative arrests. With those clarifications, the Court should vacate the court of appeals' decision and remand for the lower courts to apply the correct standard to this case in the first instance.

I. THE GENERAL REQUIREMENT THAT A PLAINTIFF MUST PLEAD AND PROVE THE ABSENCE OF PROBABLE CAUSE IS A LIMIT ON CONSTITUTIONAL RETALIATORY-ARREST DAMAGES CLAIMS, NOT THE FIRST AMENDMENT ITSELF

In *Nieves*, this Court addressed a claim seeking damages under 42 U.S.C. 1983 for an arrest alleged to be in retaliation for the exercise of First Amendment rights. 139 S. Ct. at 1721. The Court held that a "plaintiff pressing a retaliatory arrest claim must plead and

prove the absence of probable cause for the arrest." *Id.* at 1724. As the Court can and should make clear in this case, that is a requirement for a damages claim under Section 1983, not a limitation on the First Amendment itself, or on other types of criminal and civil actions.

A. *Nieves* drew its no-probable-cause requirement from *Hartman* v. *Moore*, 547 U.S. 250 (2006), which had applied such a rule to "a *Bivens* [v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971),] action against criminal investigators for inducing prosecution in retaliation for speech." *Hartman*, 547 U.S. at 252; see *id.* at 265-266; *Nieves*, 139 S. Ct. at 1723-1724. Although *Hartman* did not expressly explain whether its no-probable-cause requirement for retaliatory-prosecution claims was a limitation on the scope of the First Amendment, see *Reichle* v. *Howards*, 566 U.S. 658, 669 n.6 (2012), the Court stated that its "holding d[id] not go beyond a definition of an element of the tort," *Hartman*, 547 U.S. at 257 n.5. And the Court relied heavily on the practical difficulties in pleading and proving that tort when determining that it "makes sense to require" the absence of probable cause "as an element of a plaintiff's case." *Id.* at 265-266.

In adopting that constitutional-tort requirement in the retaliatory-arrest context, *Nieves* did not suggest that it was transforming the requirement into a limitation on the First Amendment. To the contrary, the Court viewed its task as "defining the contours of a claim under § 1983." *Nieves*, 139 S. Ct. at 1726. And it therefore "look[ed] to" the "'common-law principles that were well settled at the time of [Section 1983's] enactment,'" *ibid.* (citation omitted)—which is what the Court does when "defining the contours and prerequisites of a § 1983 claim," *Manuel* v. *City of Joliet*, 580

U.S. 357, 370 (2017). When articulating the limited exception to the general no-probable-cause requirement, moreover, the Court discussed the increase in warrantless misdemeanor arrests since Congress adopted Section 1983—a discussion that would be out of place if the issue were the scope of the First Amendment itself. See *Nieves*, 139 S. Ct. at 1727; see also *id.* at 1730 (Gorsuch, J., concurring in part and dissenting in part) (observing that the dispute was limited to constitutional damages claims); *id.* at 1735 (Sotomayor, J., dissenting) (same).

Reading *Nieves* as limited to the Section 1983 context comports with this Court's broader recognition that although the First Amendment confers a "general right to be free from retaliation for one's speech," *Reichle*, 566 U.S. at 665, not every violation of that right necessitates the particular remedy of a tort action for damages, cf., *e.g.*, *Egbert* v. *Boule*, 596 U.S. 482, 498-501 (2022) (declining to recognize a damages remedy under *Bivens* for a First Amendment retaliation claim against a federal officer). The Court has accordingly interpreted Section 1983 to authorize damages only for acts found to "violat[e] * * * constitutional rights *and to have caused compensable injury*." *Carey* v. *Piphus*, 435 U.S. 247, 255 (1978) (citation omitted). The Court has explained that "the elements of, and rules associated with, an action seeking damages" for such injuries under Section 1983 may reflect practical considerations and limitations that preclude monetary recovery even if "'the specific constitutional right' at issue" has been violated. *Manuel*, 580 U.S. at 370 (citation omitted); see *id.* at 370-372 (noting that limitations on damages actions for malicious prosecution may preclude recovery for Fourth Amendment violations in some circumstances).

B. Clarifying that the no-probable-cause rule is a limit only on a damages claim under Section 1983—not the First Amendment itself—will ensure the availability of alternative remedies in certain cases in which officers have retaliatory motives for making probable-cause supported arrests. Those remedies include federal prosecutions of officers who willfully violate individuals' constitutional rights under color of law (or who conspire to do so), see 18 U.S.C. 241, 242, and similar state prosecutions.[1] They also include federal civil enforcement actions against state and local law-enforcement agencies under 34 U.S.C. 12601 (formerly codified at 42 U.S.C. 14141 (2012)) to remedy a pattern or practice of retaliatory arrests by law-enforcement officers, and similar suits brought by States.[2]

Rather than incorporating the limits on individual damages actions under Section 1983—such as the no-probable-cause requirement for retaliatory-arrest and prosecution claims—the federal enforcement actions under the statutes identified above contain their own context-specific limits. Criminal prosecutions for unlawful retaliation under Section 242 require, for example,

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[1] See, *e.g.*, Ark. Code § 5-52-107 (West 2023); Colo. Rev. Stat. § 18-8-403 (West 2023); Del. Code tit. 11, § 1211 (West 2023); 720 Ill. Comp. Stat. 5/33-3 (West 2023); Iowa Code § 721.2(4) (West 2023); Ky. Rev. Stat. §§ 522.020, 522.030 (West 2023); Minn. Stat. § 609.43 (West 2023); Mont. Code § 45-7-401 (West 2023); Neb. Rev. Stat. § 28-926 (West 2023); N.H. Rev. Stat. § 643:1 (West 2023); N.J. Stat. § 2C:30-2 (West 2023); N.Y. Penal Law § 195.00 (McKinney 2023); N.D. Cent. Code § 12.1-14-05 (West 2023); 18 Pa. Cons. Stat. § 5301 (West 2023); Tenn. Code § 39-16-403 (West 2023); Tex. Penal Code § 39.02 (West 2023); Utah Code § 76-8-201 (West 2023); Wash. Rev. Code § 9A.80.010 (West 2023).

[2] See, *e.g.*, Cal. Civ. Code § 52.3(b) (West 2023); Fla. Stat. § 760.021 (West 2023).

that the government establish "willful[ness]" and prove its case beyond a reasonable doubt. 18 U.S.C. 242. Similarly, civil enforcement actions under Section 12601 require the government to show "a pattern or practice of conduct by law enforcement officers" that "deprives persons of" their constitutional rights, 34 U.S.C. 12601(a), a requirement that is satisfied by proving "systemwide" violations, not simply "isolated" or "sporadic" acts, *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 336 (1977) (construing similar statutory requirement for employment-discrimination claims). Those limits are tailored to each statute, supply the constraints that Congress deemed necessary, and differ from the separate limits on an individual constitutional damages claim.

II. THE COURT OF APPEALS IMPOSED UNWARRANTED RESTRICTIONS ON THE FORM OF PROOF NECESSARY TO QUALIFY FOR *NIEVES*'S "SIMILARLY SITUATED INDIVIDUALS" EXCEPTION

While government prosecutions and civil actions further important enforcement goals, the legal and practical limitations on them leave individual suits under Section 1983 with a critically important role in protecting constitutional rights. As the Court recognized in *Nieves*, that role can include certain cases in which an arrest *is* supported by probable cause, but the treatment of similarly situated persons provides a compelling objective basis for inferring that the arrest was retaliatory. *Nieves* appropriately limits the scope of that exception to that small subset of cases. But the court of appeals' decision unduly restricts the form of proof that a plaintiff may use to establish that her case is one of them.

A. *Nieves* Recognized Only A Narrow Exception To The General No-Probable-Cause Requirement

This Court has made clear that any exception to the no-probable-cause requirement must remain grounded in objective evidence, avoid reintroducing difficult issues of causality, and minimize the risk of unduly expansive litigation that might burden officers and negatively affect routine and lawful policing. The Court has emphasized that the *Nieves* exception has those features.

1. *Nieves* adopted its general no-probable-cause requirement for First Amendment retaliatory-arrest claims to take proper account of the "tenuous causal connection between the defendant's alleged animus and the plaintiff's injury." 139 S. Ct. at 1723 (citation omitted). As the Court recognized, "protected speech is often a 'wholly legitimate consideration' for officers when deciding whether to make an arrest" and "the content and manner of a suspect's speech may convey vital information—for example, if he is 'ready to cooperate' or rather 'presents a continuing threat.'" *Id.* at 1724 (brackets and citation omitted). And "because probable cause speaks to the objective reasonableness of an arrest, its absence will—as in retaliatory prosecution cases—generally provide weighty evidence that the officer's animus caused the arrest, whereas the presence of probable cause will suggest the opposite." *Ibid.* (citation omitted).

The Court in *Nieves* also recognized that a general no-probable-cause requirement avoids "'dampen[ing] the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties'" and guards against "overwhelming litigation risks" in "policing certain events like an unruly protest." 139

S. Ct. at 1725 (citation omitted). "There are on average about 29,000 arrests per day in this country," and a relaxed causation requirement would "create[] a risk that the courts will be flooded with dubious retaliatory arrest suits." *Lozman* v. *City of Riviera Beach*, 138 S. Ct. 1945, 1953 (2018). Also, "[b]ecause a state of mind is 'easy to allege and hard to disprove,' a subjective inquiry would threaten to set off 'broad-ranging discovery' in which 'there often is no clear end to the relevant evidence.'" *Nieves*, 139 S. Ct. at 1725 (citations omitted).

2. Because of those concerns—and in accord with the most "analog[ous]" common-law torts, *Nieves*, 139 S. Ct. at 1726; see pp. 28-29, *infra* (describing those torts)—this Court has narrowly cabined the exceptions to the no-probable-cause requirement. In *Lozman*, the Court permitted a Section 1983 claim against "a city or other local governmental entity" that adopts and "enforce[s] * * * an official policy motivated by retaliation." 138 S. Ct. at 1951, 1954; see *id.* at 1951 (citing *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658, 691 (1978)). But it did so on the express understanding that causation issues are "not of the same difficulty where * * * the official policy is retaliation for prior, protected speech bearing little relation to the criminal offense for which the arrest is made." *Id.* at 1954.

Nieves, in turn, carved out a "narrow qualification" to the "general[]" no-probable-cause rule for suits against individual officers. 139 S. Ct. at 1727. Specifically, the Court "conclude[d] that the no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Ibid.* That exception

was grounded in the Court's determination that it was both justified and sufficiently limited in its own way. The Court observed that in "circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so," the no-probable-cause requirement "does little to prove or disprove the causal connection between animus and injury." *Ibid.* And the Court emphasized that "like a probable cause analysis," the limitations on the qualification would "provide[] an objective inquiry that avoids the significant problems that would arise from reviewing police conduct under a purely subjective standard." *Ibid.*

B. The *Nieves* Exception Can Be Satisfied With Various Types Of Evidence

While the *Nieves* exception must remain "narrow" to avoid swallowing a significant piece of the general rule, it plays a necessary role in identifying a small but important set of cases where officers may have "'exploit[ed] the arrest power as a means of suppressing speech'" and would otherwise avoid detection, 139 S. Ct. at 1727 (quoting *Lozman*, 138 S. Ct. at 1953). The court of appeals' unduly restrictive limits on the manner of showing that a case fits within the exception would leave plaintiffs without a Section 1983 remedy in some cases that involve troubling and objective evidence that they were arrested in retaliation for exercising their First Amendment rights.

1. The court of appeals' decision appears to preclude plaintiffs from qualifying for the exception unless they have some "'comparison-based evidence'" that "other similarly situated individuals" engaged in identical conduct—in this case, "mishandl[ing] a government petition"—and "were not prosecuted." Pet. App. 28a-29a (citation omitted). That form-of-proof requirement,

in addition to being amorphous as to the exact level of generality for a valid comparator, is unjustifiably constrictive. While the type of evidence that the court focused on is certainly one form of evidence that could satisfy the exception, other forms could also provide an objective basis for a sufficiently compelling inference that a plaintiff "was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Nieves*, 139 S. Ct. at 1727.

In some cases, "[e]vidence that an arrest has *never* happened before (*i.e.*, a negative assertion) can support the proposition that there are instances where similarly situated individuals not engaged in the same protected activity hadn't been arrested (*i.e.*, a positive inference)." Pet. App. 59a (Oldham, J., dissenting) (emphasis added). In others, evidence that all other arrests for violating a particular statute were for behavior far afield of the plaintiff's own behavior will provide a sufficiently powerful inference of differential treatment. And in still other cases, a showing that the only individuals arrested out of a large group were the ones engaged in particular expressive activity (for example, filming the police) might suffice—even if on prior occasions, individuals engaged in similar behavior *were* arrested, but so was the rest of the group.

Nieves's own identification of one type of case that could fit within the exception—in which "an individual who has been vocally complaining about police conduct is arrested for jaywalking" at an intersection where "jaywalking is endemic but rarely results in arrest," 139 S. Ct. at 1727—provides yet another example. A plaintiff seeking to fit such a case within the exception would not necessarily need to supply actual video evidence of other individuals in the same time frame who did not

engage in the same speech but jaywalked in front of police officers. Instead, a factfinder may be able to rely on "the commonsense proposition," for intersections shown to be of a certain type, "that jaywalking happens all the time, and jaywalking arrests happen virtually never (or never)." Pet. App. 53a (Oldham, J., dissenting); see *Oil Co.* v. *Van Etten*, 107 U.S. 325, 334 (1882) ("The very spirit of trial by jury[] is that the experience, practical knowledge of affairs, and common sense of jurors, may be appealed to."). And the jaywalking example further suggests that arrests for other "very minor criminal offense[s]," *Nieves*, 139 S. Ct. at 1727 (citation omitted), may likewise not invariably require direct proof that violations by nonexpressive persons are commonly ignored.

2. Evidence in forms other than the one described by the court of appeals may also be necessary precisely because, in many cases, direct evidence about prior arrests will not, in itself, be sufficient to infer meaningfully differential treatment. See *Nieves* 139 S. Ct. at 1727 (emphasizing that a plaintiff must ultimately plead and prove "that 'non-retaliatory grounds were in fact insufficient to provoke the adverse consequences' ") (quoting *Hartman*, 547 U.S. at 256) (brackets omitted); *Lozman*, 138 S. Ct. at 1952 ("The plaintiff must show that the retaliation was a substantial or motivating factor behind the prosecution, and, if that showing is made, the defendant can prevail only by showing that the prosecution would have been initiated without respect to retaliation."). The fact that an arrest is novel will often be insufficient unless accompanied by additional objective evidence that corroborates the necessary causal link to an unconstitutional motive.

Most obviously, if the plaintiff's particular conduct is itself unprecedented or uncommon, the absence of prior similar arrests will show little, if anything. This Court has also recognized that "[i]n light of inevitable resource constraints and regularly changing public-safety and public-welfare needs" executive decisionmakers "must balance many factors when devising arrest * * * policies." *United States* v. *Texas*, 599 U.S. 670, 680 (2023); see *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 761 (2005) (recognizing the "deep-rooted nature of law-enforcement discretion"). Accordingly, a new executive may choose to adopt different enforcement priorities from her predecessor—including by directing arrests for types of infractions that were previously ignored. Novelty may likewise be insufficient in cases where the arrest in itself suggests a nonretaliatory motive—*e.g.*, a jaywalking arrest of someone who, while expressive, also created a dangerous traffic hazard. And when an officer obtains a warrant, which embodies a neutral decisionmaker's agreement that an arrest is objectively justified, that will also provide support for an arrest's propriety.

In cases presenting those types of circumstances, in addition to direct evidence of similar conduct not resulting in arrest, a plaintiff will need objective evidence permitting an inference that she was singled out. Such evidence could, for example, include officers' employment of an unusual, irregular, or unnecessarily onerous arrest procedure. Cf. *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977). The timing of and events leading up to a plaintiff's arrest may also be relevant: if the police have a history of tense interactions with the plaintiff, or if they do not arrest her until she engages in protected activity—and

then arrest her and no one else—such facts may imply that her arrest was retaliatory. And if officers falsely document the arrest or include other indicia of retaliatory motive in arrest-related documents, that too might suggest meaningfully differential treatment.

3. Allowing Section 1983 plaintiffs to rely on different forms of evidence to satisfy the *Nieves* exception will not broaden the exception to either invite the thorny causal problems that the exception avoids or upset the careful balance between vindication of rights and overdeterrence of law enforcement. Regardless of its form, sufficient evidence that a plaintiff was subjected to differential treatment would "address[] *Hartman*'s causal concern by helping to establish that 'non-retaliatory grounds were in fact insufficient to provoke the adverse consequences.'" *Nieves*, 139 S. Ct. at 1727 (quoting *Hartman*, 547 U.S. at 256) (brackets omitted). And recognizing the existence of compelling outlier cases need not unduly widen the *Nieves* exception to allow nonobjective evidence, over-deter law enforcement, or invite excessive and invasive litigation.

Instead, allowing evidence in various forms would simply maintain the balance that the Court struck in *Nieves*, see 139 S. Ct. at 1727 (describing exception's purpose and limitations), by avoiding unjustified consequences that would appear to follow from the court of appeals' constrictive requirements. If, for example, a State criminalized trespass on certain government property after 9 p.m., but commonly ignored violations, the court's rule would seem to bar a Section 1983 claim by a known anti-police advocate arrested while quietly handing out anti-police flyers, unless she could put forward direct evidence that: other individuals were present on the property after 9 p.m., those individuals were

observed by police, and those individuals were not arrested. But there is no good reason to bar at the outset a claim with such strong objective evidence of a retaliatory motive.

Properly understood, the *Nieves* exception would also cover other troubling fact patterns. For example, police might arrest for unlawful assembly a journalist who announced himself as press and was actively filming officers.[3] Even if probable cause supported that arrest, the journalist should be able to proceed with a retaliatory-arrest claim if, for example, he provides evidence that otherwise similarly situated persons who were not filming the officers were not arrested on that day (regardless of historical arrest patterns) and evidence that the officers made false statements when documenting the arrest. In a similar vein, officers might stop someone for peacefully dancing in the middle of an empty street; tell him after a check for outstanding warrants that he is free to go; but then change course after he responds with profanities and arrest him for walking in a roadway.[4] Although the arrest would be supported by probable cause, a retaliatory-arrest claim might nevertheless be justified by the officers' suspiciously timed backtracking, particularly if accompanied by other objective indications that the arrest was retaliatory.

The benefits of an approach more tailored to the circumstances of individual cases are not simply

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[3] See Civ. Rights Div. & Civ. Div. U.S. Att'y's Office, Dist. of Minn., U.S. Dep't of Justice, *Investigation of the City of Minneapolis and the Minneapolis Police Department* 51 (June 16, 2023), https://perma.cc/46C6-J9BG.

[4] See Civ. Rights Div., U.S. Dep't of Justice, *Investigation of the Ferguson Police Department* 25 (Mar. 4, 2015), https://perma.cc/83N6-WHF2.

hypothetical, as other lower-court cases show. In *Ballentine* v. *Tucker*, 28 F.4th 54 (2022), for example, the Ninth Circuit acknowledged that probable cause supported the arrest of the plaintiffs on a graffiti charge for writing chalk messages critical of the police, but allowed a retaliatory-arrest claim based on a combination of the absence of prior arrests and the non-arrest of "other individuals chalking [in the same area] at the same time." *Id.* at 62; see *id.* at 61-64. The court also relied on the defendant officer's own objective behavior, which included "challenging" the messages' substance in a previous encounter, listing the plaintiffs' "association with anti-police groups and the critical content of their messages" in his "declarations of arrest," and seeking arrest warrants instead of issuing citations. *Id.* at 63.[5]

Similarly, in *Henneberry* v. *City of Newark*, No. 13-cv-5238, 2019 WL 4194275 (N.D. Cal. Sept. 4, 2019), the district court permitted a retaliatory-arrest claim brought by a longstanding critic of the city, who was arrested for attending the mayor's "State of the City address" at a hotel without first obtaining a "reservation." *Id.* at *2. The court pointed to the "rar[ity]" of citations or arrests for the "offenses for which [the defendant] was arrested and jailed"; the absence of any "check [of] whether [attendees] had reservations until [police] noticed [the plaintiff] in attendance"; and the irregularity of holding him in jail for more than 30 hours, rather than just citing and releasing him. *Id.* at *2, *7; see *id.* at *3-*4, *9. As in *Ballentine*, a combination of various forms

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[5] Contrary to petitioner's suggestion (Br. 33-34), *Ballentine*'s determination that the retaliatory-arrest claim could proceed did not indicate, let alone hold, that the general no-probable-cause rule applies only to split-second arrests.

of objective evidence supported an inference of meaningfully differential treatment, suggestive of a retaliatory motive.

C. The Stricter Evidentiary Approach For Equal-Protection Claims Raised As A Defense To Federal Criminal Prosecutions Should Not Apply To The *Nieves* Exception

In describing its exception to the no-probable-cause rule, *Nieves* included a "cf." citation to *United States* v. *Armstrong*, 517 U.S. 456 (1996). *Nieves*, 13 S. Ct. at 1727. Although that citation reflects a loose analogy between the two cases, the context-specific strictness of the *Armstrong* inquiry does not translate to the substantially different context at issue here.

In *Armstrong*, the Court considered the "showing necessary for a defendant to be entitled to discovery on a claim," advanced in a motion to dismiss a criminal indictment, "that the prosecuting attorney singled him out for prosecution on the basis of his race." 517 U.S. at 458; see *id.* at 459. The Court emphasized that "'the presumption of regularity supports' * * * prosecutorial decisions" and that, "'in the absence of clear evidence to the contrary, courts presume [prosecutors] have properly discharged their official duties.'" *Id.* at 464 (brackets and citation omitted). The Court accordingly held that such a defendant must "produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not." *Id.* at 469. And the Court applied that standard to find that—notwithstanding evidence that all similar cases closed by the prosecuting office in a year involved Black defendants, *id.* at 458-459—the defendants there had "failed to identify individuals who were not black and could have been prosecuted for the offenses for which

[the defendants] were charged, but were not so prosecuted," *id.* at 470.

The *Nieves* exception, however, appropriately has a broader compass than *Armstrong*—and, in some cases, will allow a retaliatory-arrest claim to proceed based on evidence that a statute has not previously been the basis for an arrest or on common-sense inferences about particular arrest patterns. That distinction comports with the differences between First Amendment retaliatory-arrest claims and equal-protection challenges to prosecutorial decisions. A "presumption of regularity" is "accorded to prosecutorial decisionmaking." *Hartman*, 547 U.S. at 263; see *Nieves*, 139 S. Ct. at 1723; *Armstrong*, 517 U.S. at 464-465. And particularly strong "[j]udicial deference" is owed "executive officers" making "'the decision whether to prosecute.'" *Armstrong*, 517 U.S. at 465 (citation omitted). "[R]etaliatory arrest cases," in contrast, "do not implicate the presumption of prosecutorial regularity." *Nieves*, 139 S. Ct. at 1724.

The absence of an explicit *Nieves*-like exception to the no-probable-cause rule for retaliatory-prosecution cases in *Hartman* illustrates the differences between the prosecution and arrest contexts. Furthermore, the differences between *Armstrong* and *Nieves* include not only the type of claim, but also the procedural posture. *Armstrong* involved whether an individual was entitled to discovery in support of an equal-protection defense to a federal criminal indictment—not pleading and proof requirements for a civil Section 1983 retaliatory-arrest claim. The constitutional and other procedural protections that attend a federal criminal prosecution have no analogue in the civil context. Accordingly, as at least three courts of appeals have recognized, "*Armstrong*'s rigorous discovery standard for selective

prosecution cases does not apply strictly to discovery requests in selective enforcement claims." *United States* v. *Sellers*, 906 F.3d 848, 855 (9th Cir. 2018); see *United States* v. *Washington*, 869 F.3d 193, 219-221 (3d Cir. 2017), cert. denied, 583 U.S. 1081 (2018); *United States* v. *Davis*, 793 F.3d 712, 719-723 (7th Cir. 2015) (en banc). And *Armstrong*'s strict standard likewise does not apply here.

III. *NIEVES*'S GENERAL NO-PROBABLE-CAUSE REQUIREMENT APPLIES TO ALL SECTION 1983 RETALIATORY-ARREST CLAIMS

Because the court of appeals applied an unduly narrow understanding of the evidence required for the *Nieves* exception, the Court should vacate the judgment below and remand to allow the lower courts to apply the correct approach. The lower courts are better situated to, for example, "examine * * * documents incorporated into the complaint by reference, and matters of which a court may take judicial notice," *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007), which may include the video of the incident in question and the magistrate-approved warrant. To aid the lower courts' consideration and avoid a potential second trip to this Court, however, the decision in this case should also resolve the second question presented by clarifying that *Nieves*'s general no-probable-cause requirement is not limited to "on-the-spot decisions to arrest." Pet. Br. 18. Neither this Court's decisions nor analogous common-law torts support such a rule, which would expose law-enforcement officers to expansive litigation and create perverse incentives.

A. This Court Has Not Suggested That *Nieves*'s General No-Probable-Cause Rule Is Limited To Split-Second Or On-The-Spot Arrests

As the court of appeals correctly recognized (Pet. App. 30a n.6), "nothing" in *Nieves* "cabins" its general no-probable-cause requirement "to actions of officers in the line of duty" who make split-second arrest decisions. Instead, *Nieves* addressed "causal complexities" in retaliatory-arrest claims as a class by prescribing a "general" requirement that a plaintiff plead and prove the absence of probable cause. 139 S. Ct. at 1723; see *id.* at 1723-1728.

That rule does not have a carve-out for more deliberative arrests. The only "qualification" that the Court provided is the one discussed above, which has nothing to do with a limitation to on-the-spot arrests. The same "causal complexities" can exist in split-second and more deliberative arrests alike. See, *e.g.*, *Hunter* v. *Bryant*, 502 U.S. 224, 228 (1991) (per curiam) (considering suspect's statements in addressing probable cause to arrest him for threatening the President); *Wayte* v. *United States*, 470 U.S. 598, 612-613 (1985) (noting that protest letters written to the Selective Service "provided strong, perhaps conclusive evidence" of an "element[]" of the criminal offense of failing to register for the draft).

The decisions on which *Nieves* relied likewise do not distinguish between the split-second and deliberative scenarios. As previously noted, the Court adopted the no-probable-cause rule from *Hartman*, which involved the inherently deliberative scenario of a prosecution. The absence of a "presumption of prosecutorial regularity," *Nieves*, 139 S. Ct. at 1724, in the arrest context reflects differences between police and prosecutors, not

between deliberative decisions and on-the-spot ones. And contrary to petitioner's assertions (Br. 24-25, 30-31), *Lozman* does not draw her preferred distinction, either. The Court there distinguished between an "ad hoc, on-the-spot decision by an individual officer" and the sui generis situation of "an official *policy* motivated by retaliation," 138 S. Ct. at 1954 (emphasis added)—not between types of arrests. And the Court's reasons for doing so turned on the absence of "practical recourse" for embedded retaliation, *ibid.*, which does not depend on the manner of a particular arrest.

B. Analogous Common-Law Torts Refute Any Distinction Between Split-Second And More Deliberative Arrests

History likewise undermines the distinction that petitioner would have this Court create. "When defining the contours of a claim under § 1983" the Court "look[s] to 'common-law principles that were well settled at the time of its enactment,'" examining "similar tort claims." *Nieves*, 139 S. Ct. at 1726 (quoting *Kalina* v. *Fletcher*, 522 U.S. 118, 123 (1997)); see *Manuel*, 580 U.S. at 370; *Carey*, 435 U.S. at 257-259. The Court in *Nieves* accordingly identified the two "common law torts that provide the 'closest analogy' to retaliatory arrest claims": malicious prosecution and false imprisonment. 139 S. Ct. at 1726 (citation omitted).[6] The Court found that both types of claims required the absence of probable cause, *id.* at 1726-1727, and therefore "suggest" that "[t]he

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[6] Petitioner's assertion (Br. 45) that abuse of process is "[t]he closest common-law analogue" to retaliatory arrest disregards *Nieves*'s contrary determination. 139 S. Ct. at 1726. Moreover, *Hartman* imposed a no-probable-cause requirement in the retaliatory-prosecution context notwithstanding "debat[ablity]" about whether abuse of process was a "closer" analogue than malicious prosecution. 547 U.S. at 258.

presence of probable cause should generally defeat a First Amendment retaliatory arrest claim," *id.* at 1726. A similar analysis here reveals that, at common law, the presence of probable cause could generally defeat a malicious-prosecution or false-imprisonment claim even if the claim arose out of an arrest pursuant to a warrant—which, by its nature, is not a split-second arrest.

1. To bring a common-law claim for malicious prosecution, a plaintiff was required to prove, among other things, that "the proceedings * * * were initiated * * * without probable cause." Restatement (First) of Torts § 653(1)(a)(i) (1938) (Restatement); see *Nieves*, 139 S. Ct. at 1726; Thomas M. Cooley, *A Treatise on the Law of Torts* 181 (1880). And "[c]riminal proceedings are initiated by making a charge before a public official or body in such form as to require the official or body to determine whether process shall or shall not be issued against the accused"—often by obtaining a "warrant of arrest." Restatement § 653 cmt. a; see 1 Francis Hilliard, *The Law of Torts or Private Wrongs* 457 n.(*a*) (1859) ("[I]n general, a charge, falsely and maliciously preferred, *that will authorize a justice to issue his warrant*, and have the accused brought before him for examination, touching a matter that will subject him to a criminal prosecution, is sufficient to sustain an action on the case for a malicious prosecution.") (emphasis added); Hilliard 493-494.

Decisions from this Court and lower courts around the time of Section 1983's enactment accordingly show that malicious-prosecution claims arising out of arrests pursuant to warrants—or other fact patterns without on-the-spot decisions—were subject to the requirement that the plaintiff demonstrate the absence of probable

cause. In *Wheeler* v. *Nesbitt*, 65 U.S. (24 How.) 544 (1861), for example, the Court applied the rule that a plaintiff must demonstrate "that the charge" against him "was made without reasonable or probable cause" where the defendants had procured a warrant to arrest the plaintiff for stealing horses. *Id.* at 549; see *id.* at 546-547. Analogously, in *Brown* v. *Selfridge*, 224 U.S. 189 (1912), the Court affirmed the trial court's directed verdict for the defendant on a malicious-prosecution claim, based on the plaintiff's failure to "show[] * * * want of probable cause," where officers had obtained a warrant to search the plaintiff's boarding house. *Id.* at 190.

State-court decisions involving malicious-prosecution claims likewise applied the no-probable-cause requirement to warrant-based and other deliberative arrests. See, *e.g.*, *Hogg* v. *Pinckney*, 16 S.C. 387, 388-389, 392-394 (1882) (arrest pursuant to a warrant for fraud in contracting a debt); *Heyne* v. *Blair*, 62 N.Y. 19, 20-22 (1875) (per curiam) (arrest pursuant to a warrant based on complaint made well after alleged forgery occurred); *Long* v. *Rogers*, 17 Ala. 540, 544 (1850) (arrest pursuant to a warrant based on alleged kidnapping); *Cox* v. *Kirkpatrick*, 8 Blackf. 37, 37-38 (Ind. 1846) (per curiam) (arrest pursuant to a warrant for larceny of a horse); *Faris* v. *Starke*, 42 Ky. (3 B. Mon.) 4, 4 (1842) (arrest and trial pursuant to warrant based on defendant's investigation into a break-in at his home); Hilliard 456-457 n.(*a*) (providing examples of viable malicious-prosecution claims, many of which did not involve split-second decisionmaking or warrantless arrests).

2. Common-law false-imprisonment claims likewise were not limited to split-second law-enforcement actions. As this Court explained in *Nieves*, "[f]or claims

of false imprisonment, the presence of probable cause was generally a complete defense for peace officers" and "[i]n such cases, arresting officers were protected from liability if the arrest was 'privileged.'" 139 S. Ct. at 1726. *Nieves* noted one category of arrests that were "privileged": "warrantless arrests based on probable cause of the commission of a felony or certain misdemeanors." *Ibid.* But the common law clearly articulated another category of "privileged" arrests: those made "under a warrant if such warrant [wa]s either valid or fair on its face." Restatement § 122 (1934); see Cooley 175 ("Where process issues, the proceedings required in obtaining it constitute a sufficient precaution against causeless arrests: the magistrate decides on the facts presented to him that sufficient reason exists.").

Thus, around the time of Section 1983's enactment, the Court broadly stated that "[t]he general doctrine that the person who procures the arrest of another *by judicial process*, by instituting and conducting the proceedings, is liable to an action for false imprisonment, *where he acts without probable cause*, is not to be controverted." *Kilbourn* v. *Thompson*, 103 U.S. 168, 200 (1881) (emphases added); see *Wheeler*, 65 U.S. (24 How.) at 546-547, 549-550 (indicating that the absence of probable cause was necessary for plaintiff to bring both a malicious-prosecution and a false-imprisonment claim where plaintiff was arrested and incarcerated pursuant to a warrant). False-imprisonment claims, like malicious-prosecution claims, thus illustrate that petitioner's distinction (Br. 18) between "on-the spot" and deliberative acts in applying the no-probable-cause rule is a false dichotomy.

C. Excusing Section 1983 Plaintiffs From Demonstrating An Absence Of Probable Cause In Cases Other Than Those Involving On-The-Spot Warrantless Arrests Will Hamper Law Enforcement And Create Perverse Incentives

Petitioner's dichotomy between "on-the-spot" and deliberative decisions is also unsound as a matter of first principles. As a threshold matter, it raises vexing line-drawing questions of how to define an "on-the-spot" arrest. Indeed, petitioner herself mixes and matches alternative formulations with variant implications: "on-the-spot" (*e.g.*, Br. 18), "split-second" (*e.g.*, Br. i), and "single event" (*e.g.*, Br. 28). It is unclear, for example, whether an arrest made after a brief consultation among officers would fall within petitioner's new exception. The lack of clarity would also arise for arrests where an officer checked with his supervisor beforehand. Nor, for that matter, would there be a clear time limit on when an individual officer's solo actions would be considered "on-the-spot." And even if petitioner were to propose a rule that addresses all of the necessary scenarios, it is far from clear what basis such fine-grained distinctions would have.

That uncertainty, moreover, only exacerbates the deeper issues with petitioner's approach, which would allow any retaliatory arrest that is not "on-the-spot"—including apparently cases in which arrests are made pursuant to a warrant—to potentially provide the basis for an individual-capacity claim against the arresting officer. See Pet. Br. 30-34. Such broad liability would invite the very problems that this Court has consistently sought to avoid in defining Section 1983 retaliatory-arrest claims: officers will face "overwhelming litigation risks" that will "'dampen the ardor of all but the

most resolute, or the most irresponsible, in the unflinching discharge of their duties,'" *Nieves*, 139 S. Ct. at 1725 (citation omitted), and "courts will be flooded with dubious retaliatory arrest suits," *Lozman*, 138 S. Ct. at 1953.

Petitioner's approach would also create perverse incentives: officers who take the time to obtain a warrant will have *less* protection from suit than those who make split-second decisions. That would incentivize officers to make warrantless arrests, depriving arrestees of a probable-cause assessment by a neutral magistrate. That highly counterintuitive result—which both this Court's precedents and the common law carefully avoid—is a potent illustration of the fundamental flaws in petitioner's distinction between "on-the-spot" and other arrests. The Court should accordingly reject that distinction and limit its remand solely to the issue identified in the first question presented.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings.

Respectfully submitted.

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