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 FANE LOZMAN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statute

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae is Fane Lozman, whose disputes with the City of Riviera Beach have brought him before this Court on two separate occasions. Both times, Mr. Lozman has prevailed. *Lozman v. City of Riviera Beach*, 568 U.S. 115 (2013) (holding that Mr. Lozman's floating home did not qualify as a "vessel" subject to maritime jurisdiction); *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018) (reversing dismissal of First Amendment retaliatory arrest claim under 42 U.S.C. § 1983).

The precedent Mr. Lozman helped to establish through his second victory in this Court is directly applicable to petitioner's claims here. In *Lozman*, this Court held that the existence of probable cause did not bar a Section 1983 retaliatory-arrest claim brought by Mr. Lozman against the City of Riviera Beach, in light of evidence that his arrest was the result of an official plan by city council members to retaliate against him for his ongoing criticism of the city and its policies. *Lozman*, 138 S. Ct. at 1955. In so holding, this Court recognized a particularly pernicious class of First Amendment retaliatory arrests—those orchestrated by government officials as part of official policies of retaliation against citizens for engaging in speech critical of them and their offices.

The similarities between the facts underlying *Lozman* and those of this case are striking. Mr. Lozman

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel have made any monetary contribution intended to fund the preparation or submission of this brief.

has an interest in ensuring that courts (unlike the court of appeals below) apply the precedent he helped establish to similar claims. Mr. Lozman submits this brief in support of petitioner because the Fifth Circuit's decision below failed to apply this Court's precedent in *Lozman* to this case, and thus removed an important disincentive (in the form of personal liability) against unconstitutional retaliation by government officials against their critics.

SUMMARY OF THE ARGUMENT

The issue in this case is the same as that addressed in *Lozman*—whether the existence of probable cause acts as an absolute bar against a First Amendment retaliatory arrest claim. In *Lozman*, the Court considered whether "notwithstanding the presence of probable cause, [Lozman's] arrest . . . violated the First Amendment because the arrest was ordered in retaliation for his earlier, protected speech." *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1951 (2018). Likewise, the question below was whether petitioner "has alleged a violation of her constitutional rights when probable cause existed for her allegedly retaliatory arrest." Pet. App. 26a. And it is not just the issue but the facts in this case that are "materially identical" to those in *Lozman*. *Id.* at 55a (Oldham, J., dissenting) ("[*Lozman*] involved materially identical facts to [Gonzalez's case]."). In both cases, the plaintiffs alleged that they were subject to arrest in retaliation for their political speech, based on the alleged existence of a government policy sanctioning such retaliation, and argued that they should be allowed to prosecute their First Amendment retaliation claims

under Section 1983 despite the existence of probable cause for their arrests.

It should thus go without saying that the rule announced in *Lozman*—that probable cause for an arrest does not negate a First Amendment retaliation claim under Section 1983 when evidence of an official policy of retaliation tends to prove that the arrest was, in fact, done for retaliatory reasons—applies to this case. After all, if the legal and factual circumstances of this case are materially identical to those in *Lozman*, then the rule of law that the Court announced in *Lozman* to govern in such circumstances should plainly apply.

Yet the court of appeals determined that *Lozman* was inapplicable because *Lozman* involved a Section 1983 claim against a municipality under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), whereas petitioner asserted her Section 1983 claims against government officials in their personal capacities. The Fifth Circuit's decision makes no sense and should be reversed.

The elements of a First Amendment retaliation claim seeking to hold a government official personally liable are fully encompassed by those of a claim seeking to hold a municipality liable for the actions of that official—the plaintiff must show that the government official retaliated against the plaintiff for the plaintiff's protected speech, and that this retaliation caused the plaintiff injury. It is true that the plaintiff must make *an additional* showing to sustain a claim against the municipality under *Monell—viz.*, the existence of an official policy established by the municipality such that the municipality itself can be said to

be the driving force behind the constitutional violation committed by the official.

But the rule in *Lozman* has nothing to do with that latter showing. Rather, *Lozman* is about the elements shared by personal-capacity and municipal suits—*i.e.*, whether the plaintiff has alleged a constitutional violation by showing retaliation that caused injury. After all, the question in *Lozman* is whether the existence of probable cause for amicus's arrest cut off the causal chain between the government conduct and amicus's injury, and the Court held that it did not. It is illogical to apply that rule (about the elements of a retaliation claim needed to show a constitutional violation) when the defendant is a municipality, but not apply the same rule to a suit involving identical facts and alleging identical retaliatory conduct, with the only difference being that the suit is brought against the retaliating government officials in their personal capacities, rather than the municipality that employs them. Whether a constitutional violation has been sufficiently alleged should in no way depend on the capacity (personal or official) in which the perpetrating officials are sued.

Petitioner alleges here that, in retaliation for organizing a petition critical of the city manager, city officials engineered a plan to arrest her and remove her from office, based on the pretext that she had intentionally concealed the very petition she had organized. Pet. App. 111a-12a. Again, petitioner's allegations of retaliatory arrest according to an official plan, are "materially identical" to those in *Lozman*, and the same rule should govern this case as governed that

one. Yet the court of appeals held, contrary to *Lozman*, that the existence of probable cause for petitioner's arrest was an absolute bar to her recovery. That holding demonstrates not only a clear misunderstanding of *Lozman*'s holding but also a worrisome grant of power to municipal officials to engage in pretextual retaliatory arrests without any fear of personal consequence. By encouraging such pernicious vindictiveness by government officials against their critics (such as petitioner experienced here), the court of appeals' decision risks chilling speech vital to our system of democracy—dissent and criticism of government. The Court should reverse.

ARGUMENT

A. The Fifth Circuit's Decision Evinces a Clear Misunderstanding of *Lozman*

In *Lozman*, this Court recognized a class of First Amendment retaliatory-arrest claims under which the existence of probable cause does not act as a bar. *See Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1955 (2018). In holding that Lozman's claim fell within this class, the Court highlighted four important characteristics: (i) "Lozman d[id] not sue the officer who made the arrest," *id.* at 1954; (ii) Lozman alleged the existence of "a premeditated plan to intimidate him in retaliation for his criticisms of city officials," *id.*; (iii) the "retaliation [was] for prior, protected speech bearing little relation to the criminal offense for which [Lozman's] arrest [was] made," *id.*; and (iv) the retaliation was for Lozman's exercise of the right to petition, which is "high in the hierarchy of First Amendment values," *id.* at 1955.

Each of those characteristics is also present here; petitioner sued the city officials whom she alleges orchestrated her arrest as part of a premeditated plan to remove her from office in retaliation for organizing a petition critical of the city manager. Pet. App. 57a. (Oldham, J., dissenting). Indeed, as Judge Oldham recognized in his dissenting opinion below, Gonzalez's claims "involved materially identical facts" to those at issue in *Lozman*. Pet. App. 55a (Oldham, J., dissenting).

Yet, despite the clear parallels between the two cases, the Fifth Circuit dismissed the applicability of *Lozman* to petitioner's First Amendment retaliation claims on the ground that "*Lozman*'s holding was clearly limited to *Monell* claims"—*i.e.*, claims against the municipality—whereas petitioner sought to hold the officials who had retaliated against her personally liable for their actions. Pet. App. 32a.

But while it is true that *Lozman*'s direct holding involved "arrests that result from official policies of retaliation," *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019), nothing in *Lozman* or this Court's ensuing Section 1983 jurisprudence justifies limiting *Lozman*'s applicability to only those claims seeking to hold a municipality liable for its officials' retaliatory actions, as opposed to claims seeking to impose personal liability on those officials themselves. The court of appeals' imposition of such a limitation evinces a clear misunderstanding of *Lozman*, which did not turn on the identity of the defendants being sued but rather on the constitutional right—*i.e.*, the right against unconstitutionally retaliatory arrests—that was being vindicated by the lawsuit.

That much becomes obvious after comparing the elements of personal-capacity claims, on the one hand, and official-capacity claims against a municipality on the other.

When government officials violate an individual's constitutional right, the victim of that violation may seek redress under Section 1983 against (i) the officials themselves (through personal-capacity claims seeking to hold the officials personally liable), and/or (ii) the governmental entity employing those officials (through *Monell* claims—including official-capacity claims against the officials—seeking to hold the entity liable for the actions of its employees), *see, e.g.*, *Monell*, 436 U.S. at 690 n.55 ("[O]fficial-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent."). To succeed under either type of claim, the plaintiff must at least establish the existence and violation of the constitutional right. *See, e.g.*, *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). In the context of a First Amendment retaliatory arrest claim, a plaintiff must show that (1) she was engaged in constitutionally protected speech, (2) the government official took adverse actions against the plaintiff in retaliation for that speech, and (3) a "causal connection" exists between "the [official]'s retaliatory animus and the plaintiff's subsequent injury." *Nieves*, 139 S. Ct. at 1722 (quotation omitted).

But while those showings suffice to support suit against an individual defendant, a plaintiff seeking to hold the employing entity liable must additionally show that the entity itself was a "moving force" behind those actions. *Graham*, 473 U.S. at 166; *Monell*,

436 U.S. at 692 (rejecting the applicability of vicarious liability to Section 1983 claims). Thus, to succeed on a *Monell* claim, the plaintiff also must show that the actions taken by the officials in inflicting the constitutional injury were done pursuant to "some official policy" established by the defendant government entity. *Monell*, 436 U.S. at 692.

Thus, the question of whether *Lozman* applies to all First Amendment retaliation actions, or only those brought against a municipality under *Monell*, depends on whether the rule of law announced in *Lozman* applies to one or more elements shared by both types of claims (*i.e.*, the existence of a constitutional injury caused by the retaliatory actions of government officials), or if the *Lozman* rule turns only on the element unique to *Monell* claims (*i.e.*, the existence of an official policy of retaliation sufficient to hold the governmental entity liable for the retaliatory actions of its officials). If *Lozman* applied only to the official-policy element unique to *Monell* claims, then the Fifth Circuit would be correct that *Lozman* is relevant only to *Monell* claims. But, *Lozman*, in fact, applies to the elements common to both individual and *Monell* suits. So, the Fifth Circuit was wrong.

As this Court explained in *Lozman*, "[t]he issue before the Court is a narrow one . . . [whether], notwithstanding the presence of probable cause, [Lozman's] arrest at [a] city council meeting violated the First Amendment because the arrest was ordered in retaliation for his earlier, protected speech." *Lozman*, 138 S. Ct. at 1951. In other words, the *Lozman* rule applies to the retaliation element of the cause of action common to both individual and *Monell* suits. Indeed,

to remove any doubt that the Court was only considering whether Lozman could establish that he had suffered a constitutional injury at the hands of city officials, and not whether he had pled facts sufficient to allege the existence of an official policy of retaliation, the Court took the existence of such an official policy as a given: "The Court assumes in the discussion to follow that the arrest was taken pursuant to an official city policy, but whether there was such a policy and what its content may have been are issues not decided here." *Id*. *Lozman* could not have been unique to *Monell* claims when the one element unique to *Monell* claims was not even analyzed but rather assumed by the Court.

Thus, the rule announced in *Lozman* is just as applicable to petitioner's claim against individual government officials as it was to *amicus*'s claim against the City of Riviera Beach under *Monell*. *See, e.g.*, *Los Angeles Cnty. v. Humphries*, 562 U.S. 29, 38 (2010) (rejecting argument that, because *Monell* involved claims for damages, its holding was inapplicable to claims seeking an injunction because "[a] holding. . . can extend through its logic beyond the specific facts of the particular case"). In other words, petitioner had to prove First Amendment retaliation despite the existence of probable cause, and the rule of law that applies in determining whether a plaintiff in petitioner's circumstances can prevail on such a claim even when there is probable cause was established in *Lozman*. That is the rule the court of appeals should have applied below, just as Judge Oldham's dissent explained. Pet. App. 55a-58a (Oldham, J., dissenting).

The court of appeals' contrary decision is illogical—it means that when a government official allegedly retaliates against a plaintiff for the plaintiff's speech, a suit against the official's municipal employer could proceed under *Lozman* while, at the same time, the identical allegations against the government official personally could fail based on the existence of probable cause because *Lozman* would be inapplicable. Nothing in *Lozman*—certainly, nothing in the First Amendment or Section 1983—would warrant that bizarre result.

The court of appeals nevertheless believed that *Lozman* applies only to *Monell* claims because *Lozman*'s holding rested on the alleged existence of an official policy of retaliation. Pet. App. 31a ("[T]he Supreme Court allowed Lozman's claims to proceed not because of the unusual facts of the case, but because he was asserting a *Monell* claim against the municipality itself, rather than individuals."). But the Fifth Circuit failed to appreciate that in *Lozman*, the importance the Court placed on the presence of the official policy of retaliation was not in establishing that it was the city itself that was the "moving force" behind its officials' actions; indeed, as explained above, the Court took that as a given. *Lozman*, 138 S. Ct. at 1951 ("The Court assumes . . . that the arrest was taken pursuant to an official city policy. . . ."). Rather, this Court relied on *Lozman*'s allegations of an official policy of retaliation to establish a causal connection between Lozman's arrest and the city council members' retaliatory animus towards him sufficient to plead the existence of a First Amendment injury despite the existence of probable cause. *Id.* at 1953–54

(discussing the problem in typical retaliatory arrest cases of establishing a "causal connection between the defendant's alleged animus and the plaintiff's injury," and explaining that such "causation problem . . . is not of the same difficulty where, as is alleged here, the official policy is retaliation for prior, protected speech bearing little relation to the criminal offense for which the arrest is made" (quotations omitted)).

The alleged presence of an official retaliatory policy in *Lozman* thus served two separate and distinct purposes: (1) it established that the city itself was the "moving force" behind the retaliatory actions of its officials (an element unique to *Monell* claims); and (2) it helped establish that the city officials had inflicted a First Amendment injury on Lozman (an element shared by both *Monell* and personal-capacity claims), by providing a causal link between his arrest and their retaliatory animus. Nothing in *Lozman* suggested that a plaintiff who relies in part on an official policy to prove the elements of a First Amendment retaliation claim *must* sue the city rather than the individual officials who violated her constitutional rights. Accordingly, while the holding in *Lozman* is "limited . . . to arrests that result from official policies of retaliation," *Nieves*, 139 S. Ct. at 1722, it does not follow that "*Lozman*'s holding [is] clearly limited to *Monell* claims," Pet. App. 32a, as the Fifth Circuit held below. That erroneous decision should be reversed.

B. Where Objective Evidence of Retaliatory Motive for an Arrest Exists, Probable Cause Should Not Bar Recovery

It is well-established that "the First Amendment prohibits government officials from subjecting an individual to retaliatory actions" for engaging in protected speech. *Hartman v. Moore*, 547 U.S. 250, 256 (2006). Thus, where evidence exists that an individual's arrest was driven by a retaliatory animus, there is no basis to foreclose recovery under Section 1983.

Petitioner's arrest in this case is unlike that in a typical retaliatory arrest case. Similar to the facts in *Lozman*, petitioner alleges that her arrest was the result of retaliatory animus for prior First Amendment activity that was in no way relevant to the offense for which she was arrested. Thus, the "causation problem" present in typical retaliatory arrest cases, where the decision whether to arrest often involves "split-second judgments . . . [for which] the content and manner of a suspect's speech may convey vital information," does not pose the same difficultly here. *Lozman*, 138 S. Ct. at 1953; *Nieves*, 139 S. Ct. at 1724.

In typical retaliatory arrest cases, the existence or lack of probable cause for the arrest generally provides the only objective evidence relevant to the retaliatory arrest causation inquiry. As this Court explained in *Nieves*, "evidence of the presence or absence of probable cause for the arrest will be available in virtually every retaliatory arrest case. . . . And because probable cause speaks to the objective reasonableness of an arrest . . . its absence will . . . generally provide weighty evidence that the officer's animus caused the arrest, whereas the presence of probable

cause will suggest the opposite." *Nieves*, 139 S. Ct. at 1724 (citations omitted).

At the same time, using the presence of probable cause for an arrest as an absolute bar to recovery under Section 1983 risks unduly precluding actual victims of retaliatory arrests from recovering for their injuries. Thus, the Court has established several exceptions to *Nieves*'s general rule when evidence exists that cuts against *Nieves*'s general presumption—*i.e.*, that where probable cause exists, an arrest is objectively reasonable. For example, *Nieves*'s jaywalking exception holds that the existence of probable cause is not sufficient to defeat a retaliatory arrest claim "where officers have probable cause to make arrests, but typically exercise their discretion not to do so." 139 S. Ct. at 1727. And, as Justice Gorsuch recognized in his concurring opinion in *Nieves*, the *Armstrong* case relied upon by the *Nieves* majority in support of its jaywalking exception "expressly left open the possibility that other kinds of evidence, such as admissions, might be enough to allow a claim to proceed." *Id.* at 1734 (Gorsuch, J. concurring in part and dissenting in part) (citing *United States v. Armstrong*, 517 U.S. 456, 465 (1996)).

Another exception is the fact pattern recognized by the Court in *Lozman*. Evidence of an official retaliatory policy in *Lozman* convinced the Court not to bar Lozman's claims, despite his admission that probable cause existed for his arrest. *See Lozman*, 138 S. Ct. at 1954. In declining in such cases to impose "an unyielding requirement to show the absence of probable cause," this Court recognized the danger posed by decisions foreclosing avenues for redress of First

Amendment injuries—namely, incentivizing "exploit[ation] [of] the arrest power as a means of suppressing speech." *Nieves*, 139 S. Ct. at 1727 (quoting *Lozman*, 138 S.Ct. at 1953-54).

Under *Lozman*, petitioner's allegation of an official policy of retaliation orchestrated against her by respondents suffices to demonstrate (at least at the pleadings stage) that her arrest was the product of respondents' retaliatory animus. The Fifth Circuit should thus have applied *Lozman*'s probable cause exception, and not *Nieves*'s general probable cause bar, to petitioner's claims and allowed them to proceed.

The Fifth Circuit's error, moreover, is endemic of a wider problem in the lower courts, which have radically overprotected law enforcement officials at the expense of citizens with valid claims that they were subjected to retaliation for exercising their First Amendment rights. While *Lozman*'s probable cause exception and *Nieves*'s jaywalking exception provide *examples* of objective evidence sufficient to support a retaliatory arrest claim, that obviously does not mean those are the only types of objective evidence that can suffice to save a retaliatory arrest claim from dismissal. Yet that is precisely what many lower courts have held. The consequence is that even when there is "powerful testimony that public officials used the criminal justice system to punish [] political opponents," and even when it is obvious that the "[retaliatory] actions [at issue] would never have been taken against a citizen who held views favored by those in power," relief is denied. *Mayfield v. Butler Snow, L.L.P.*, 78 F.4th 796, 800 (5th Cir. 2023) (Ho, J., dissenting from denial of rehearing en banc).

That state of affairs is intolerable. For the vast majority of arrests, no plausible objective evidence—*e.g.*, evidence separate from allegations of the arresting officer's state of mind while making the arrest—will exist at the pleading stage. The *Nieves* probable cause bar applies in those circumstances as a matter of administrative necessity—it sacrifices the First Amendment rights of a few (*i.e.*, those who, through discovery, might have been able to uncover objective evidence that their arrest was a product of retaliation for their protected speech) in favor of protecting law enforcement from being unduly hampered through vexatious litigation brought against arresting officers who have done nothing wrong. But applying the *Nieves* probable cause bar in those rare instances where objective evidence of a retaliatory motive behind an arrest *does* exist—even if the evidence does not take the same form as (or is presented in a slightly different factual context than) that identified in this Court's *Lozman* and *Nieves* precedents—will necessarily result in the dismissal of meritorious retaliation claims without any significant benefit on the other side of the scale. That result has no basis in the Constitution, and this Court should reject it.

As with other lower court decisions that have dismissed retaliatory arrest claims despite allegations of objective evidence of retaliatory motive, the Fifth Circuit's decision below gives government officials all but free reign to intimidate and silence their critics, without any fear of personal liability, through retaliatory arrests based on any number of "criminal laws [that] have grown so exuberantly and come to cover so much

previously innocent conduct" that they reach the conduct of almost everyone. *Nieves*, 139 S. Ct. at 1730 (Gorsuch, J. concurring in part and dissenting in part). There is no basis to allow the sort of pernicious government retaliation alleged here to proceed unsanctioned. The Court should reverse.

CONCLUSION

For the foregoing reasons, as well as those stated in Petitioner's brief, the judgment below should be reversed.

Respectfully submitted,

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