No. 22-1025

In the Supreme Court of the United States

SYLVIA GONZALEZ,
PETITIONER,

v.

EDWARD TREVINO, II, ET AL.,
RESPONDENTS.

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

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

Petitioner frames the questions presented as:

1. Whether the *Nieves* probable cause exception can be satisfied by objective evidence other than specific examples of arrests that never happened.

2. Whether the *Nieves* probable cause rule is limited to individual claims against arresting officers for split-second arrests.

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STATEMENT

This Court in *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), held that when probable cause supports an arrest, plaintiffs generally cannot maintain section 1983 retaliatory-arrest claims. Retaliation claims require plaintiffs to prove but-for causation, *i.e.*, that an adverse action would not have happened absent officials' animus against protected speech. But when the adverse action is arrest and probable cause supports the arrest, proving retaliatory causation is inherently difficult. As *Nieves* explained, officers ordinarily arrest people when there are reasonable, evidence-backed grounds to believe they committed a crime—regardless of the person's speech. Further, this Court looks to the common law to define section 1983's

contours. And at common law, probable cause completely defeated claims analogous to retaliatory arrest.

Nieves should resolve this case. A neutral judge issued a warrant for petitioner Sylvia Gonzalez's arrest for the crime of intentionally removing government documents. The judge found probable cause based on a warrant application that detailed witness statements and security footage capturing the theft—an application Gonzalez conceded was accurate. If probable cause ordinarily dooms retaliatory-arrest claims, going the extra mile to investigate and obtain a warrant should be dispositive. For any would-be retaliator, involving other officials and a neutral judge to flyspeck arrests is a recipe for exposure and failure. That goes doubly in States like Texas, where judges have discretion whether to issue warrants at all.

Arrests with warrants are far afield from this Court's two narrow exceptions to the probable-cause bar. *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), held that plaintiffs could surmount the probable-cause bar by showing an official municipal policy of retaliation—an extraordinarily rare situation that subjects only municipalities, not individual defendants like respondents, to liability. *Nieves* also created a limited exception for warrantless arrests for endemic infractions like jaywalking, where arrests are so abnormal that retaliation is the natural explanation. But this case involves an arrest with a warrant for the non-trivial crime of government-document theft. Thus, this Court need not even resolve whether plaintiffs must adduce comparator evidence of similarly situated people who were not arrested to satisfy *Nieves*' exception.

Gonzalez proceeds as if *Nieves* never happened. She first claims that probable cause *never* bars retaliatory-arrest claims involving investigations or warrants. Gonzalez (at 25, 32-34) labels arrests with warrants "premeditated

arrests," as if on par with premeditated murder. That would be news to the Founders, who waged a revolution to enshrine warrants as the paramount check on unbridled officer discretion.

That warrant-disfavoring approach would also wreak havoc on law enforcement, who seek hundreds of thousands, if not millions, of warrants every year. If investigating crimes before seeking a warrant *increases* officers' exposure to retaliatory-arrest damages claims, officers will be pushed to arrest first and deliberate never. No matter how clear the probable cause, anyone could second-guess any arrest that did not lead to prosecution by claiming that the plaintiff's outspoken political, religious, or social views—or unorthodox social-media posts or bumper stickers—motivated arrest. Prosecutors decline to prosecute up to 50% of charges for endless reasons. And retaliation is easily alleged and hard to disprove. Police officers cannot operate effectively if, before making arrests upon probable cause, they must balance their duty to enforce the law against the risk of reputation-destroying, financially ruinous liability.

Gonzalez alternatively contends that *Nieves*' exception for endemic infractions extends to *all* crimes. Even spotting that counterintuitive premise, Gonzalez is incorrect that plaintiffs can surmount the probable-cause bar by showing any objective evidence of retaliation. For this exception, *Nieves* mandated comparator evidence, *i.e.*, proof that similarly situated individuals were *not* arrested. But Gonzalez never alleges the existence of fellow citizens who steal government records without facing arrest. Gonzalez instead claims she was arrested for the "perfectly innocent conduct" of "accidentally gather[ing] up" papers—an inadvertent mistake everyone makes. Pet. Br. 3, 21, 49; *accord id.* at 6, 10-11, 17, 42-44. Using that framing, she

attacks an absurd-sounding comparator-evidence requirement, whereby plaintiffs must find examples of innocent people not being arrested for non-crimes. Pet. Br. 6, 11, 17, 35, 42-43. But Gonzalez has conceded probable cause for a real offense requiring intentional misconduct—government-document theft. She must thus rebut the commonsense notion that where probable cause exists, arrest ordinarily follows. If plaintiffs could claim that no one else is arrested when innocent, the probable-cause bar would bar nothing.

Gonzalez's other proffered evidence reinforces why comparator evidence is essential in retaliatory-arrest cases. She argues that she was arrested for purportedly violating a criminal statute one way (stealing government records at a city-council meeting), whereas most people violate the statute in purportedly more serious ways (like forging government documents). But legislatures decide what conduct is criminal, and law enforcement must have discretion to arrest based on probable cause. All crimes have their own facts and allegedly mitigating circumstances. If no plaintiff is similarly situated unless the facts match with Professor-Plum-in-the-study-with-the-candlestick specificity, every crime is sui generis, and every case is potential fodder for retaliatory-arrest plaintiffs.

A. The City-Council Meetings and Investigation

1. Castle Hills, Texas—population 4,000—is a 2.5-square-mile suburb within Bexar County, surrounded by San Antonio sprawl. The City boasts a supermarket, bakery, and park, plus services like twice-weekly trash collection. *See* Castle Hills, *Mayor's Welcome*, https://tinyurl.com/mss4bhr3.

Castle Hills' municipal government includes an elected five-member city council, plus an elected mayor

who presides over city-council meetings. Pet.App.92a-93a, 101a, 103a-104a. Day-to-day authority lies with a city manager, whom the city council appoints and can remove. Pet.App.104a; Castle Hills Code §§ 2-134, 2-135.

2. The following undisputed facts—taken from a warrant application that petitioner agreed was accurate and incorporated into her complaint—underlie this case. C.A. Oral Arg. 27:58-28:25; *see Quadvest, L.P. v. San Jacinto River Auth.*, 7 F.4th 337, 345 (5th Cir. 2021) (attachments are "part of the pleading for all purposes" (citation omitted)); U.S. Br. 26.

In June 2019, Castle Hills' police chief, respondent John Siemens, engaged respondent Alex Wright as a special detective to conduct a politically sensitive investigation for the City. Pet.App.101a; J.A.43-44. Detective Wright has spent over 20 years as a commissioned Texas peace officer and works as a police instructor and attorney. J.A.43. For over 15 years, Castle Hills has tapped Wright as a special detective to conduct independent "[i]nvestigations which might otherwise be considered sensitive, or delicate, either due to the nature of the crime or because of the parties involved." *See* J.A.43.

Here, the investigation was politically sensitive because Castle Hills' mayor, respondent JR Trevino, filed a criminal complaint alleging that petitioner, councilwoman Gonzalez, intentionally stole government documents at a May 22, 2019 council meeting. Pet.App.112a-113a; J.A.10. A Castle Hills police officer logged an incident report documenting the suspected theft and collected evidence, including close-range security video capturing the incident. J.A.5-9, 48. Given the sensitivities, Chief Siemens asked Detective Wright to investigate further. Pet.App.101a; J.A.44.

Detective Wright interviewed Mayor Trevino and other witnesses and reviewed the security footage. J.A.44, 48. Wright repeatedly reached out to Gonzalez, who declined to cooperate. J.A.53.

3. Wright's investigation uncovered the following, as he detailed in a lengthy sworn affidavit enclosed with the warrant application. *See* J.A.41-54. Gonzalez does not allege "that any of the information in the application was false." C.A. Oral Arg. 27:58-28:12.

In May 2019, newly elected councilwoman Gonzalez gathered signatures on a petition to remove Castle Hills' city manager. J.A.44. The petition, entitled "Fix Our Streets," urged the city council—on which she now sat—to reinstate a former city manager who "oversaw, from start to finish, over a dozen street projects" "on time and on budget." J.A.2, 45. "[V]arious" later city managers, the petition continued, had not "fixed a single street." J.A.2. The petition did not mention that reinstating the former manager would require firing the current manager. J.A.2.

At a May 21, 2019 city-council meeting, another resident submitted the petition to Mayor Trevino, making the petition an official city record. J.A.45; Castle Hills Code § 2-299. Multiple residents "testified against the petition." Pet.App.108a. One resident testified that Gonzalez came to her home to solicit her signature. J.A.45. The resident publicly "accused Gonzalez of misleading her regarding the actual nature and purpose of the petition[], and said that Gonzalez asked her to sign under false pretenses." J.A.45. Another resident later accused Gonzalez of urging him to forge his absent parents' signatures on the petition, which he did at Gonzalez's behest. J.A.56-59.

The meeting continued the next day. Mayor Trevino and Castle Hills Police Captain Steve Zuniga (whom Gonzalez does not accuse of animus) recounted the ensuing events to Detective Wright in sworn statements. J.A.52. Before the meeting, Mayor Trevino clipped the petition and signature pages together with a black binder clip and placed them in front of him on the dais. J.A.46. During the meeting, Mayor Trevino noticed the papers had disappeared, but assumed the city secretary, who maintains city records, had taken them. J.A.46. At the end of the hours-long meeting, the city secretary asked Mayor Trevino for the petition, prompting his realization that the secretary never took the petition. J.A.46. Mayor Trevino noticed a black binder clip in Gonzalez's binder that matched the petition's and asked Captain Zuniga to call Gonzalez over. J.A.46-47.

Gonzalez denied to Captain Zuniga that she took the petition. J.A.47. She "slowly flipp[ed] through [her binder's] contents, stopping before reaching the black binder clip," and again declared she did not have the petition. J.A.47. Then, Mayor Trevino and Captain Zuniga "both pointed to the clearly visible black binder clip" containing the petition. J.A.47. Gonzalez "pulled the black binder clip out of her 3-ring binder" and exclaimed that she thought these documents were "extras." J.A.47-48. Captain Zuniga (whom, again, Gonzalez does not accuse of animus) "found that statement odd" given that Gonzalez had just denied having the petition at all. J.A.48.

Detective Wright also watched security footage, which the warrant application details second-by-second

with timestamps. J.A.48-51.[1] Video taken before the meeting shows that the petition was originally on top of Mayor Trevino's binder. J.A.49. While the Mayor's back was turned, "Gonzalez approache[d] her seat on the dais." J.A.49. Gonzalez "then move[d] to her left in order to reach over Mayor Trevino's stack of documents." J.A.49. Gonzalez "look[ed] around," "pick[ed] up the [documents] from on top of Mayor Trevino's binder," and "quickly pull[ed] them toward her seat," J.A.49:

Gonzalez "flip[ped] through" the pages, "look[ing] at" the petition "directly." J.A.49. As Detective Wright swore to the judge, "[t]here is no mistake—Gonzalez [knew] what she [was] holding." J.A.49. She then laid the petition "down on the desk to the right of her binder," and

[1] Petitioner (at 8-9 nn.1-2) cites the security footage, which she apparently uploaded to YouTube. The City's account also hosts the footage: *#1 Security Footage from May 22, 2019 City Council Chambers*, YouTube, https://tinyurl.com/yen9b552; *#2 Security Footage from May 22, 2019 City Council Chambers*, YouTube, https://tinyurl.com/jpvktxwj.

"open[ed] her binder up so that the cover obscure[d] the Petition[.]" J.A.49. When Mayor Trevino turned around, the petition was gone. J.A.50.

Security footage from after the meeting captured the recovery of the petition from Gonzalez hours later and "confirm[ed] the accounts" of Mayor Trevino and Captain Zuniga. J.A.51. Confronted by Zuniga about the missing petition, Gonzalez "moved extremely slowly while looking through her 3-ring binder." J.A.51-52. She made "several furtive movements" and appeared to "purposefully avoid[] 'finding' the Petition[] by feigning her failure to notice the obvious binder clip which those around her could clearly see." J.A.51. Gonzalez "thumb[ed] through a few pages at a time," and "stopp[ed]" when she was about to reach the petition. J.A.51-52. Mayor Trevino and Captain Zuniga "finally just point[ed] to the obvious binder clip" holding the petition. J.A.51. When Gonzalez "could pretend no longer," "she simply pulled the Petition[] out of her binder without further hesitation." J.A.51.

B. Detective Wright's Warrant Application

Based on his investigation, Detective Wright found probable cause to believe that Gonzalez had violated Texas law. Multiple sources of evidence—including the security footage—demonstrated that she intentionally took and hid a government record, apparently motivated by a desire to avoid residents' accusations that she misleadingly solicited petition signatures.

Though Gonzalez's brief describes her conduct 15 times as the "perfectly innocent," "commonplace" act of "accidentally" "temporarily misplacing" and "mislay[ing] a government document," Pet. Br. 3, 6, 10-11, 17, 21, 42-44, 49, she has repeatedly conceded that probable cause supported the warrant application detailing a clear case of

intentional theft. C.A. Oral Arg. 18:28-18:48; En Banc Pet. 3, 13; Pet. Br. 49; *see* Pet.App.21a.

Intentionally taking government documents is a crime under multiple Texas statutes. First, theft is punishable up to a felony depending on the property's value. Tex. Penal Code § 31.03(a), (e). Further, willfully "remov[ing] without permission … public information" and abusing official powers by "intentionally or knowingly … violat[ing] a law relating to the public servant's office or employment" are misdemeanors. Tex. Gov't Code § 552.351(a)-(b); Tex. Penal Code § 39.02(a)(1), (b). Knowingly concealing records during official proceedings "with intent to impair [their] … availability as evidence" is a third-degree felony. Tex. Penal Code § 37.09(a)(1), (c). Finally, intentionally "remov[ing] … governmental record[s]" is a Class A misdemeanor. *Id.* § 37.10(a)(3), (c)(1).

After reviewing the statutory elements, Detective Wright found probable cause to believe that Gonzalez had violated section 37.10(a)(3)'s prohibition on intentionally removing government records. J.A.42-44, 53-54. That section makes it a crime to "intentionally destroy[], conceal[], remove[], or otherwise impair[] the verity, legibility, or availability of a governmental record." Other prohibited conduct under this section includes: (1) "knowingly" making false entries in, or "false alteration of," governmental records, Tex. Penal Code § 37.10(a)(1); (2) "mak[ing], present[ing], or us[ing] any record … with knowledge of its falsity and with intent that it be taken as a genuine governmental record," *id.* § 37.10(a)(2); (3) "possess[ing], sell[ing], or offer[ing] to sell a governmental record … with intent that it be used unlawfully," or "knowledge that it was obtained unlawfully," *id.* § 37.10(a)(4), (6); and (4) "mak[ing], present[ing], or

us[ing] a governmental record with knowledge of its falsity," *id.* § 37.10(a)(5). Wright determined that Gonzalez had "intentionally concealed and/or removed" the petition, a government record, "from being available." J.A.53.

As a sworn Texas peace officer, Texas law required Detective Wright to "give notice to some magistrate of all offenses committed within the officer's jurisdiction, where the officer has good reason to believe there has been a violation of the penal law." Tex. Code Crim. Proc. art. 2.13(b)(3). In Texas, elected judges and appointed magistrates both qualify as "magistrates" who may issue warrants. *Id.* art. 2.09. Wright prepared an affidavit to inform a state-court district judge of Gonzalez's apparent crime. J.A.54. His six-page affidavit included detailed summaries of his interviews, which discussed Gonzalez's role in obtaining signatures for the petition. J.A.42-54. As Wright explained under penalty of perjury, Gonzalez's solicitation of signatures "under false pretenses" offered a "motive for … Gonzalez' desire to steal the petition[.]" J.A.52.

C. The Judge's Decision to Issue an Arrest Warrant

Detective Wright presented the affidavit to a Texas district-court judge for an independent probable-cause determination. As Gonzalez acknowledges, "no requirement [existed] that [Wright] bring the case to someone in the district attorney's office before applying for a warrant." C.A. Oral Arg. 22:53-23:56. The judge, whom Gonzalez does not accuse of being "ill-motivated," *id.* at 28:25-28:45, agreed that probable cause existed to believe that Gonzalez had intentionally stolen the petition, in violation of Texas Penal Code § 37.10(a)(3). *See* Pet.App.71a.

Upon finding probable cause, Texas judges "may issue a warrant of arrest or a summons." Tex. Code Crim.

Proc. art. 15.03(a). Arrest warrants order officers to arrest defendants and "take" them before a magistrate. *Id.* arts. 15.01, 15.16(a). Summonses come "in the same form as the warrant," but order defendants "to appear before a magistrate at a stated time and place." *Id.* art. 15.03(b). The judge issued a warrant for Gonzalez's arrest. Pet.App.71a.

The next day, Gonzalez learned of the warrant from a neighbor. Pet.App.118a. She inexplicably did not use Bexar County's satellite booking process, which encourages individuals to "call to see if you qualify" "to expedite the booking and releasing process" and avoid jail time. *See* Bexar County, *Courthouse - Satellite Office*, https://tinyurl.com/5dtf34cu; Pet.App.103a. Instead, Gonzalez drove to the main county jail, turned herself in, and spent the day there. Pet.App.118a. Bexar County's district attorney ultimately decided against prosecuting the charges. Pet.App.122a-123a.

D. Proceedings Below

1. In September 2020, Gonzalez sued respondents—Detective Wright, Mayor Trevino, and Chief Siemens—alongside the City of Castle Hills in the U.S. District Court for the Western District of Texas. Pet.App.98a. Gonzalez alleged that they retaliated against her in violation of the First and Fourteenth Amendments by causing her arrest after she "champion[ed] the creation, signature, and submission of a nonbinding citizens' petition and urg[ed] the removal of [the] city manager." Pet.App.126a-129a. Gonzalez alleged that Mayor Trevino reported her theft to the police; Chief Siemens asked Detective Wright to investigate; and Detective Wright investigated and notified a judge of probable cause that Gonzalez committed the offense. Pet.App.101a, 112a-113a, 126a-128a.

Gonzalez separately alleged that the City "adopted and enforced an official policy or custom to retaliate against [her] for her First Amendment activities." Pet.App.129a. Gonzalez sought damages under 42 U.S.C. § 1983 for the "unconstitutional arrest." Pet.App.99a, 126a, 129a.

The district court denied respondents and the City's motion to dismiss. Pet.App.65a. As to respondents, the court acknowledged "that in most retaliatory arrest cases, the plaintiff must plead and prove the absence of probable cause." Pet.App.78a (citing *Nieves*, 139 S. Ct. at 1724, 1726). But the court recognized "an exception" "'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.'" Pet.App.79a (quoting *Nieves*, 139 S. Ct. at 1727). That exception applied here, the court reasoned, because Gonzalez "allege[d] that the misdemeanor offense for which she was charged has never been used in Bexar County to criminally charge someone for trying to steal a nonbinding or expressive document." Pet.App.80a (citation omitted).

The district court also denied qualified immunity to respondents, deeming a "First Amendment right to be free from a retaliatory arrest that is supported by probable cause" "clearly established." Pet.App.87a-88a.

As for the City, the court reasoned that the existence of probable cause does not bar "First Amendment retaliatory arrest claims brought against a municipality" based on "an official policy motivated by retaliation." Pet.App.74a (citing *Lozman*, 138 S. Ct. at 1954-55). The court rejected Gonzalez's contention that respondents were final "policymakers" whose actions established City policy. Pet.App.90a-93a. In Castle Hills, only the city council makes policy. Pet.App.93a. But, the court held,

Gonzalez adequately alleged an official City "policy or custom" of "cracking down on disfavored speech" based on two earlier incidents where officials allegedly threatened residents engaged in political speech. Pet.App.95a (citation omitted).

2. Respondents filed an interlocutory appeal from the denial of qualified immunity. Pet.App.24a.[2] A divided Fifth Circuit reversed. Pet.App.33a. The majority noted that Gonzalez conceded that probable cause existed, and emphasized *Nieves*' general rule that "a plaintiff must plead and prove the absence of probable cause." Pet.App.21a, 27a (citing 139 S. Ct. at 1724).

The Fifth Circuit rejected Gonzalez's argument that her case fit *Nieves*' "narrow exception" for offenses where officers "'typically exercise their discretion not'" to arrest. Pet.App.27a-28a (quoting 139 S. Ct. at 1727). The majority observed, *Nieves*' "plain language" "requires comparative evidence" of "'otherwise similarly situated individuals' who engaged in the 'same' criminal conduct but were not arrested." Pet.App.29a (quoting 139 S. Ct. at 1727). Gonzalez offered no "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. Gonzalez alleged only that other people prosecuted under the same statute committed the crime differently. Pet.App.29a. Under *Nieves*, that evidence "comes up short." Pet.App.29a.

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[2] Because municipalities cannot join interlocutory qualified-immunity appeals, *Williams v. City of Yazoo*, 41 F.4th 416, 421 (5th Cir. 2022), Gonzalez's municipal-liability claim against Castle Hills remains pending in district court, Pet.App.32a.

The Fifth Circuit distinguished Gonzalez's claim from *Lozman*, which permits "*Monell* claim[s] against the municipality itself" for "'[a]n official retaliatory policy.'" Pet.App.31a-32a (quoting *Lozman*, 138 S. Ct. at 1954); *see Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). That holding is "clearly limited to *Monell* claims" against municipalities and does not reach individual officers like respondents. Pet.App.31a-32a.

Judge Oldham dissented. Pet.App.34a. In his view, any "objective evidence" could show retaliation, even when probable cause supports an arrest. Pet.App.51a-53a. He would not require "*comparative* evidence showing that officers generally do not arrest people for the underlying crime." Pet.App.51a. He also questioned whether the rule that probable cause bars retaliatory-arrest claims should apply beyond "split-second warrantless arrests." Pet.App.54a.

3. The Fifth Circuit denied rehearing en banc over a dissent by Judge Ho. Pet.App.2a-3a. In Judge Ho's view, Gonzalez's crime of mishandling a government document—"with intent and without it"—is "commonplace." Pet.App.10a (citation omitted). Operating on the premise that even intentional theft is routine, he would have deemed sufficient Gonzalez's "evidence that the underlying statute had *never* been used under analogous circumstances" without requiring "comparator evidence." Pet.App.10a, 12a.

SUMMARY OF ARGUMENT

I. Under *Nieves*, probable cause presumptively defeats retaliatory-arrest claims. That rule applies here: probable cause supported Gonzalez's arrest, and a judge

issued a concededly valid warrant. The two narrow exceptions to the probable-cause bar are inapplicable, so Gonzalez's claim fails regardless of her evidence.

A. Valid warrants categorically foreclose retaliatory-arrest claims. *Nieves* reasoned that retaliatory-arrest cases inherently present complex causation quandaries in disentangling whether someone was arrested because they committed crimes, or to retaliate. Probable cause bars retaliatory-arrest claims in all but rare circumstances because officers presumptively arrest people whenever probable cause exists—even if officers harbor animus against someone's speech.

Warrants signal even more strongly that suspected crime—not protected speech—prompted an arrest. Warrants check officers' discretion and provide independent scrutiny of arrests. Warrants involve additional officials, like supervisors, attenuating each defendant's causal relationship to the arrest. Particularly, warrants involve magistrates and judges who, in some States, may deny warrants notwithstanding probable cause—severing any causal connection between officers and the arrest.

Gonzalez's view that *Nieves* applies only to "on-the-spot" police arrests defies common sense and *Nieves*, which held that the probable-cause bar generally governs retaliatory-arrest claims. Limiting the probable-cause bar to on-the-spot arrests would bizarrely incentivize police to arrest first and think later to avoid litigation.

The sprawling cast of characters that Gonzalez identifies as contributing to the warrant underscores the problems with suspending the probable-cause bar when warrants are concerned. Gonzalez sued only some involved officials—omitting the judge who made the final decision and other officers who provided independent evidence of

her offense. Gonzalez never connects the dots of how respondents' alleged animus caused her arrest given independent evidence establishing probable cause and Texas peace officers' legal duty to report crimes.

B. The common law confirms that warrants foreclose retaliatory-arrest claims. *Nieves* analogized to malicious prosecution and false imprisonment—common-law torts where valid warrants absolutely shielded against liability. *Nieves* did not adopt Gonzalez's inapt analogy to abuse of process—a common-law tort not defeated by probable cause. Abuse of process targeted *subsequent* abuses, not legally proper but maliciously motivated arrests.

C. Two exceptions to the probable-cause bar exist: (1) official municipal policies of retaliation (the *Lozman* exception); and (2) ubiquitous, minor offenses where police customarily exercise discretion not to arrest (the *Nieves* exception). Neither applies.

Lozman permits claims against a "City" for "an 'official municipal policy'" of retaliation. 138 S. Ct. at 1954 (quoting *Monell*, 436 U.S. at 691). By its terms, that exception is limited to municipalities—not individuals. That exception also requires an "official municipal policy"—another missing ingredient here.

Nieves offers a "narrow" exception for "endemic" crimes like jaywalking where police "typically exercise their discretion not to" arrest. 139 S. Ct. at 1727. When police ordinarily decline to arrest, probable cause no longer serves as a useful filter for identifying arrests that would have happened regardless of animus. But when police have probable cause for serious offenses like theft, rape, and murder, police ordinarily arrest, whatever their views on plaintiffs' speech. Gonzalez recasts her behavior as innocently misplacing a document, yet conceded that

probable cause existed for a serious crime. If *Nieves'* exception applies even to serious crimes, that limited exception would obliterate the probable-cause bar, and officers would be exposed to easily pled retaliation claims for virtually any arrest whenever plaintiffs offer any objective evidence.

II. Even if *Nieves*' exception applied to arrests pursuant to warrants for non-endemic crimes, Gonzalez could not meet the exception.

A. *Nieves* demands comparator evidence, *i.e.*, "objective evidence that [the plaintiff] was arrested when otherwise similarly situated individuals" were not. *Id.* That rule tracks *Nieves*' focus on causation: plaintiffs must prove that their speech, not their offense, caused the arrest. *Nieves* also cited *United States v. Armstrong*, 517 U.S. 456, 465 (1996), which imposes an analogous comparator requirement in the selective-prosecution context.

B. *Nieves*' comparator requirement assumes probable cause and requires identifying persons not arrested for similar conduct. Gonzalez made no such showing. She instead flips *Nieves* on its head by (1) attacking probable cause (by proclaiming innocence) and (2) focusing on people arrested for dissimilar conduct.

Moreover, Gonzalez's focus on people prosecuted for violating Texas Penal Code § 37.10 only underscores that officials *do* enforce Texas' statute, no matter how violated. Gonzalez's non-comparator evidence is also rife with apples-to-oranges problems, using Bexar County felony prosecution data that sheds no light on what caused her City of Castle Hills misdemeanor arrest.

Gonzalez's other evidence is further afield. References to her speech in the warrant application, allegedly non-standard arrest procedures, and actions by others she

has not sued have no bearing on whether alleged animus caused her arrest. Permitting plaintiffs to throw everything against the wall invites a deluge of meritless retaliation claims.

C. Neither the probable-cause bar nor *Nieves*' comparator requirement invites tyranny. Plaintiffs arrested without probable cause can sue. Other remedies deter rogue arrests. America endured centuries under a categorical probable-cause bar against retaliatory-arrest claims. *Nieves* crafted a limited exception to that rule five years ago. Just two years ago, this Court unanimously rejected *any* retaliation claims against federal officials, including for arrest with probable cause or without. *Egbert v. Boule*, 596 U.S. 482, 498 (2022); *id.* at 505 (Sotomayor, J., concurring in judgment in part). Contrary to Gonzalez's rhetoric, freedom still reigns.

ARGUMENT

I. Probable Cause Ordinarily Bars Retaliatory-Arrest Claims

Gonzalez alleges a First Amendment retaliatory-arrest claim. Five years ago, this Court held that "probable cause should generally defeat a retaliatory arrest claim." *Nieves*, 139 S. Ct. at 1727. Gonzalez concedes that probable cause supported her arrest, which a neutral judge confirmed when issuing the warrant. Pet.App.21a. Valid warrants offer even stronger grounds for barring retaliatory-arrest claims than probable cause alone. And the two exceptions to the probable-cause bar—official municipal policies of retaliation, and warrantless arrests for ubiquitous misdemeanors that never result in arrest—do not apply. Gonzalez's contrary rule, that probable cause bars only claims arising from "on-the-spot" warrantless arrests, would effectively overrule *Nieves*. That approach also

threatens constant retaliation suits and perversely punishes police for safeguarding individual rights by seeking warrants.

A. Valid Warrants Defeat Retaliatory-Arrest Claims

1. This case involves an arrest pursuant to a concededly valid warrant. That arrest falls in the heartland of *Nieves*, which held that "[t]he presence of probable cause should generally defeat a First Amendment retaliatory arrest claim." 139 S. Ct. at 1726. *Nieves* covers all arrests supported by probable cause, with warrants or without. Applying *Nieves*, courts of appeals have universally held that probable cause bars retaliatory-arrest claims in cases involving warrants or investigations.[3] The government (at 27) agrees that *Nieves* has no "carve-out for more deliberative arrests." Gonzalez's amici acknowledge "*Nieves*'s general probable cause bar." Lozman Br. 14; *see* Professors Br. 2.

The last place retaliatory-arrest claims should proceed is arrests pursuant to warrants. This Court has "a strong preference for warrants." *United States v. Leon*, 468 U.S. 897, 914 (1984). Warrants are the constitutionally

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[3] *E.g.*, *Meyers v. City of New York*, 812 F. App'x 11, 13, 15 (2d Cir. 2020) (offense "[o]ver the course of many weeks"); *Fehl v. Borough of Wallington*, 2023 WL 385168, at *1-2 (3d Cir. Jan. 25, 2023) (arrest after investigation); *Henderson v. McClain*, 2022 WL 704353, at *2-4 (4th Cir. Mar. 9, 2022) (warrant after 4 days); *Crossett v. Emmet County*, 2020 WL 8969795, at *1-3, *5 (6th Cir. Nov. 12, 2020) (warrant after 18 days); *Kitterman v. City of Belleville*, 66 F.4th 1084, 1088, 1091 (7th Cir. 2023) (years-long violation); *Fenn v. City of Truth or Consequences*, 983 F.3d 1143, 1146-47, 1149 (10th Cir. 2020) (arrest after 2 years); *Turner v. Williams*, 65 F.4th 564, 573-74, 581 (11th Cir. 2023) (warrant after 10 days); *see* Pet.App.23a-24a, 27a; *accord Ballentine v. Tucker*, 28 F.4th 54, 60-62 (9th Cir. 2022) (cited at Pet. Br. 33) (treating probable-cause bar as default for arrests with warrants; asking whether "narrow" "*Nieves* exception" was met).

enshrined bulwark of liberty—a "protection for which the Founders fought," so that neutral magistrates would confirm that specific allegations support probable cause. *Riley v. California*, 573 U.S. 373, 403 (2014). Texas' highest criminal court likewise "encourage[s] police officers to use the warrant process." *State v. Elrod*, 538 S.W.3d 551, 556 n.13 (Tex. Crim. App. 2017) (citation omitted).

By layering on additional process, warrants afford "[m]aximum protection of individual rights." *Gerstein v. Pugh*, 420 U.S. 103, 113 (1975); *see Ashcroft v. al-Kidd*, 563 U.S. 731, 738 (2011). Taking the time to deliberate before seeking a warrant guards against mistakes and encourages officers to seek out evidence and corroborating witnesses. Seeking a warrant also involves other decisionmakers—not only the magistrate or judge, but other officers or prosecutors involved in the investigation.

By contrast, warrantless arrests often involve a single officer's split-second decision, with no check on the officer's discretionary arrest power. *See Nieves*, 139 S. Ct. at 1724; *Atwater v. City of Lago Vista*, 532 U.S. 318, 346-47 (2001). Warrantless arrests sidestep "safeguards provided by an objective predetermination of probable cause, and substitute[] instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." *Beck v. Ohio*, 379 U.S. 89, 95 (1964).

As *Nieves* illustrates, that warrant-preferring calculus extends to First Amendment retaliation claims. *Nieves* erected a general probable-cause bar, then carved out a subset of discretionary "warrantless misdemeanor arrests," 139 S. Ct. at 1727, in keeping with this Court's long-running concern over the potential for "foolish, warrantless misdemeanor arrests," *Atwater*, 532 U.S. at 353;

accord Virginia v. Moore, 553 U.S. 164, 175 (2008). *Nieves* noted that the expansion of individual officers' warrantless-arrest powers to countless infractions after section 1983's enactment risked retaliatory abuse. 139 S. Ct. at 1727. *Nieves* crafted a narrow exception for warrantless arrests for low-level, endemic infractions where arrests never occur. *Id.* For all other arrests, probable cause remains an insuperable bar. Warrantless arrests merit a narrowly tailored guardrail; warrants remain preferred.

The same features that make warrants the gold standard reinforce why arrests by warrant are particular nonstarters for retaliation claims. Officers who swear affidavits under oath, detail evidence, and invite judicial scrutiny risk exposing any retaliatory animus through a lengthy paper trail. Officers bent on arresting someone for improper reasons presumptively do not seek out extra judicial checks.

Investigations involving warrants also frequently "involve multiple government actors"—a problem that exacerbates "the causal complexity" of whether probable cause or retaliation prompted an arrest. *Id.* at 1724. Retaliatory-arrest plaintiffs must "establish a 'causal connection' between the government defendant's 'retaliatory animus' and the plaintiff's 'subsequent injury.'" *Id.* at 1722 (quoting *Hartman v. Moore*, 547 U.S. 250, 259 (2006)). But for arrests backed by probable cause, it can be "particularly difficult to determine whether the adverse government action was caused by the officer's malice or the plaintiff's potentially criminal conduct." *Id.* at 1724. Police presumptively arrest people whenever probable cause exists, so probable cause generally shows that the arrest "would have occurred even without a retaliatory motive." *See id.* at 1723 (quoting *Hartman*, 547 U.S. at 261).

Proving causation is hard even for single-defendant retaliatory-arrest cases because officers can legitimately consider speech when making arrests. *Id.* But the warrant process often involves a chorus-sized cast, making it near-impossible to identify whose alleged animus caused the arrest. Take police procedure in neighboring San Antonio. The initial officer who learns about a theft writes a report with copies to the Department's Records Office and follow-up unit. San Antonio Police Dep't, *General Manual* § 605.07 (2023), http://tinyurl.com/yrh5mrfd. Detectives from the Property Crimes Task Force lead the investigation. *Id.* § 708.02. If "investigative factors … require specialized follow up unit expertise," the Financial Crimes Unit jumps in. *Id.* To obtain an arrest warrant, line investigators get sign-off from a supervisor before asking a magistrate. *Id.* Glossary. And a specialized three-officer team may execute the warrant. *Id.* § 503.07. Any animus by the officer originating the case is checked by downstream decision-makers who independently decide to press on.

Or take this case. Gonzalez (at 12) claims the "normal warrant process" encourages "coordinat[ion] with the district attorney's office," which could "prevent unlawful or problematic arrests." But she (at 18-34) simultaneously argues that probable cause never bars retaliatory-arrest claims arising from warrants, no matter how many actors, including prosecutors and judges, are involved.

Further, in some States, magistrates may have discretion to deny warrants even on a showing of probable cause. Because an independent decision-maker stands between the alleged animus and the arrest, that discretion breaks the causal chain needed to prove retaliation. *See Hartman*, 547 U.S. at 264; *Turner*, 65 F.4th at 581. In

Texas, magistrates (including judges) "*may* issue a warrant of arrest or a summons" when presented with probable cause. Tex. Code Crim. Proc. art. 15.03(a) (emphasis added). Absent a "clear indication from the Legislature that it intended otherwise," grants of authority to government actors with "may" "grant[] the power to" act, but "do[] not require execution of the power granted." *Dall. Cnty. Cmty. Coll. Dist. v. Bolton*, 185 S.W.3d 868, 873-74 (Tex. 2005); *accord Iliff v. Iliff*, 339 S.W.3d 74, 81 (Tex. 2011). So it is far from clear that magistrates must issue warrants whenever probable cause exists.

Other States invite similar discretion.[4] By contrast, others *require* magistrates who believe probable cause exists to issue warrants.[5] Still other States split the difference, requiring magistrates to issue warrants upon probable cause for felonies but offering discretion for misdemeanors. *E.g.*, Ohio Rev. Code Ann. § 2935.10(A)-(B); *see State ex rel. Blachere v. Tyack*, 210 N.E.3d 960, 967 (Ohio Ct. App. 2023). Treating warrants as a bar to retaliatory-arrest claims against individual officers avoids transforming section 1983 retaliatory-arrest claims into a patchwork of state variability depending on disparate laws about magistrates' discretion.

2. Gonzalez (at 4-6, 18-34) argues that probable cause should defeat retaliatory-arrest claims only for "on-the-spot" warrantless arrests. Even for those arrests, the probable-cause bar would not apply whenever plaintiffs offer any "objective evidence" of retaliation. *E.g.*, Pet. Br.

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[4] *E.g.*, Ga. Code § 17-4-40(a) ("magistrate may issue"); 725 Ill. Comp. Stat. 5/107-9(c) (similar); N.C. Gen. Stat. § 15A-304(b)(1) (similar).

[5] *E.g.*, Cal. Penal Code § 813(a) ("magistrate shall issue"); Fla. Stat. § 901.02(1) (similar); Va. Code § 19.2-72 (similar).

30, 35-36. For retaliatory-arrest claims where magistrates approved warrants or for split-second arrests where plaintiffs have any "objective evidence," probable cause would become just part of the evidentiary mix. Whenever plaintiffs made prima facie showings that animus was a substantial factor in the arrest, defendants would need to prove they would have arrested regardless. Pet. Br. 18-19, 23 (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)). In other words, Gonzalez would apply the probable-cause bar only to cases already doomed because plaintiffs lacked objective evidence supporting their claims.

Nieves sweepingly rejected that approach:

- "The plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest." 139 S. Ct. at 1724.
- "The presence of probable cause should generally defeat a First Amendment retaliatory arrest claim." *Id.* at 1726.
- "[P]robable cause should generally defeat a retaliatory arrest claim." *Id.* at 1727.
- "As a general matter, we agree" "that retaliatory arrest claims … warrant the same requirement that plaintiffs must plead and prove the absence of probable cause." *Id.* at 1723.
- "Absent such a showing" of no probable cause, "a retaliatory arrest claim fails." *Id.* at 1725.

The government (at 26-33) agrees that *Nieves* erects a general bar, not a special rule just for warrantless arrests.

Reinforcing the stare decisis problem, Gonzalez rehashes arguments that *Nieves* rejected. Gonzalez (at 4, 18-19, 22-24), like the *Nieves* dissent, emphasizes that

First Amendment retaliation claims generally employ *Mt. Healthy* burden-shifting. *See* 139 S. Ct. at 1736 (Sotomayor, J., dissenting). But *Nieves* declined to "extend *Mt. Healthy* … in the retaliatory arrest context." *Id.* at 1725 n.1 (majority op.).

Nor did *Nieves* limit probable cause to solving "unique evidentiary problems" from arrests on a "compressed timeline." *Contra* Pet. Br. 28. *Nieves*' "evidentiary problem[]" was that "protected speech is often a 'wholly legitimate consideration' for officers when deciding whether to make an arrest." 139 S. Ct. at 1724 (citation omitted). That problem applies with or without warrants: officers may legitimately consider speech.

For warrantless arrests, speech can reveal whether suspects present ongoing threats. *Id.* For investigations, speech can show whether suspects acted intentionally, as this case illustrates. Gonzalez allegedly stole the petition because, after its submission, a resident publicly accused Gonzalez of obtaining signatures under false pretenses. The warrant application thus reasoned that Gonzalez's desire to avoid scrutiny of her allegedly misleading communication with residents might have motivated the theft. *Infra* p. 37. And Gonzalez's obfuscation to Captain Zuniga about taking the petition underscored that the alleged theft was no accident. For some speech-related crimes, like election fraud, cyberstalking, campaign-finance violations, political corruption, or threatening government officials, it is virtually impossible to determine whether the suspect committed the offense without considering protected speech. *See* U.S. Br. 27.

Gonzalez (at 25) argues that *Lozman* treated probable cause as one consideration under the *Mt. Healthy* burden-shifting framework. No: *Lozman* left for "a different case" whether *Mt. Healthy* governs retaliatory-arrest

claims. 138 S. Ct. at 1954. That different case was *Nieves*, which resolved that probable cause ordinarily defeats retaliatory-arrest claims and described *Lozman* as a "limited" holding for "unusual," "official policies of retaliation." 139 S. Ct. at 1722.

Gonzalez (at 45) argues that section 1983's text does not mention probable cause. Again, the *Nieves* majority was unpersuaded. *See* 139 S. Ct. at 1730 (Gorsuch, J., dissenting in part). Section 1983 also does not mention the favorable-termination requirement or other longstanding features of section 1983 claims that reflect the statute's common-law roots.

3. The "highly counterintuitive," litigation-multiplying consequences of Gonzalez's approach reinforce its "fundamental flaws." U.S. Br. 32-33. Probable cause would defeat retaliatory-arrest claims involving warrantless arrests, apparently to protect split-second decision-making. And probable cause would defeat retaliatory-prosecution claims, reflecting extreme deliberation. *Hartman*, 547 U.S. at 265-66. Only arrests involving investigations would face greater liability, inexplicably punishing officers who deliberate one second too many.

Further, Gonzalez never delineates when "on-the-spot" arrests go off-the-spot. Sometimes (at 28) she says "probable cause and the arrest" must coincide "in a single event." Elsewhere (at 18) she says "crimes" must "unfold[] before" the officer. Or (at 19) arrests must be "executed under time pressure." But in no event (at 31) may officers "go back to the office and deliberate." Left unaddressed: What if officers call or text colleagues or lawyers for advice? Is a Zoom call more office-like? What if officers deliberate in the car or at a coffee shop? What if tag-teaming officers each see only part of the crime? If

officers increase their liability by delaying warrantless arrests a few minutes or by asking others anything, Gonzalez's rule would irrationally reward officers who arrest first, and ask questions later.

In this backwards universe, warrants—usually the bulwarks of liberty—would become disfavored to avoid "overwhelming litigation risks." *See Nieves*, 139 S. Ct. at 1725; U.S. Br. 33. There are 6.6 million active arrest warrants in the United States. Becki R. Goggins & Dennis A. DeBacco, *Survey of State Criminal History Information Systems, 2020* tbl.4 (2022). In 2022, 27% of Texas' 555,000 arrests involved warrants or previous incident reports. Tex. Dep't of Pub. Safety, *Arrest Distribution Report*, http://tinyurl.com/mrr8w5zw. Allowing retaliatory-arrest claims to proceed even when probable cause exists invites a torrent of claims. U.S. Br. 32-33. And "frivolous retaliation claim[s]" carry immense costs. *Egbert*, 596 U.S. at 499. Retaliatory motive "is 'easy to allege and hard to disprove.'" *Nieves*, 139 S. Ct. at 1725 (citation omitted). And retaliation claims invite "broad-ranging discovery" with "no clear end to the relevant evidence." *Id.* (citation omitted). Officers have difficult enough judgment calls in making arrests; adding the threat that deliberation and warrants would expose officers to easy-to-allege claims distracts officers from their duty.

Skewing officers' arrest calculus carries no discernible countervailing benefit. In the 13 years between *Hartman* and *Nieves*, the Ninth and Tenth Circuits adopted Gonzalez's rule and permitted retaliatory-arrest claims notwithstanding probable cause. *Ford v. City of Yakima*, 706 F.3d 1188, 1193 (9th Cir. 2013); *Howards v. McLaughlin*, 634 F.3d 1131, 1148-49 (10th Cir. 2011). During that window, apparently *no* jury found that animus caused an arrest backed by probable cause. U.S. Br. 24, *Nieves*, 139

S. Ct. 1715 (No. 17-1174). Plaintiffs have ample recourse when officers arrest without probable cause. *E.g.*, *Lacey v. Maricopa County*, 693 F.3d 896, 917-19, 923 (9th Cir. 2012) (en banc) (cited at RCFP Br. 13); *Wood v. Eubanks*, 25 F.4th 414, 428 & n.4 (6th Cir. 2022). Likewise, officers can be liable for obtaining an invalid warrant by filing a false warrant application. *See Mayfield v. Butler Snow, L.L.P.*, 75 F.4th 494, 500-01 (5th Cir. 2023). This Court should not drive a gaping hole in the probable-cause bar to solve an empirically unsubstantiated problem.

4. This case showcases how the warrant process generates the types of complex causation tangles that prompted *Nieves*' general probable-cause bar.

Start with Mayor Trevino, whom Gonzalez sued for filing the criminal complaint and sitting for an interview with Detective Wright. Pet.App.113a-114a. "[T]he filing of a criminal complaint" is itself protected by the First Amendment. *Entler v. Gregoire*, 872 F.3d 1031, 1043 (9th Cir. 2017) (collecting cases); *accord* Thomas M. Cooley, *Law of Torts* 180 (1880) (common-law "right … to institute or set on foot criminal proceedings wherever he believes a public offense has been committed"). And one official's protected speech about another cannot form the basis for a retaliation claim. *Hous. Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 478 (2022). So Mayor Trevino's report of a suspected crime at a city-council meeting over which he presided is off-limits. Regardless, his averments did not *cause* Gonzalez's arrest. Captain Zuniga—whom Gonzalez does not accuse of animus—confirmed Trevino's allegations, as did security footage; those two pieces of independent evidence could have prompted Gonzalez's arrest. Plus Detective Wright, not Mayor Trevino, sought the warrant, and the judge decided to issue it.

As to Chief Siemens, Gonzalez alleges he assigned an initial investigating officer, then transferred the matter to Detective Wright. Pet.App.112a-113a. But appointing special detectives is undisputedly proper for "sensitive" investigations. J.A.43. How that move caused Gonzalez's arrest is anyone's guess when multifarious evidence established probable cause; Wright, not Siemens, sought the warrant; and the judge independently decided to issue it.

Gonzalez also cannot show that any animus by Detective Wright caused her arrest. Once Wright was appointed, the die was cast. Another officer (whom Gonzalez has not sued) obtained security footage showing the theft. J.A.48. Two key witnesses—Mayor Trevino and Captain Zuniga—corroborated the video. J.A.51. Whatever Wright thought about Gonzalez's speech, any investigation would have turned up probable cause, at which point Texas law required Wright to notify a magistrate. Tex. Code Crim. Proc. art. 2.13(b)(3).

Moreover, Texas magistrates appear to enjoy independent discretion to deny warrants or summonses even if probable cause exists. *Supra* pp. 23-24. Like prosecutors' charging decisions, that independent decision breaks the causal chain regardless of any preceding animus, so long as the warrant application (as here) is accurate. *See Turner*, 65 F.4th at 581.

Gonzalez alleges a vast "months-long conspiracy" leading to her arrest. Pet. Br. 22; *see* Pet.App.111a. But Gonzalez does not allege that the judge, who made the final arrest decision, was a conspirator. She mentions countless other non-defendants—another councilmember; the city manager; the city attorney; the citizen who raised concerns about Gonzalez's improper methods obtaining signatures; and the citizens who later sued to remove her for malfeasance. And she cites other incidents

with those non-defendants (like the city attorney's concerns over her oathtaking and the citizens' lawsuit), despite conceding that the only event at issue in this retaliatory-arrest lawsuit is the arrest. C.A. Oral Arg. 17:14-17:38. Invoking a Broadway-sized cast of culpable actors allegedly engaged in Succession-level plotting makes the causal problems worse, not better.

Lumping everyone together under the umbrella of conspiracy does not solve causal complexities either. "Conspiracy requires an agreement—and in particular an agreement to do an unlawful act—between or among two or more separate persons." *Ziglar v. Abbasi*, 582 U.S. 120, 153 (2017). But Gonzalez never identifies any agreement between Trevino, Siemens, and Wright, let alone others. She just offers a conclusory allegation about "a comprehensive plan" that does not satisfy Rule 12(b)(6). *See* Pet.App.111a. Vague conspiracy allegations cannot substitute for proof that each defendant caused a retaliatory arrest. Figuring out who caused a retaliatory arrest should not be as complicated as distilling the causes of World War I.

B. The Common Law Confirms the Probable-Cause Bar

The common law circa 1871—which informs the contours of section 1983—did not recognize retaliatory arrest. *Nieves*, 139 S. Ct. at 1726. The "closest analog[ies]" were malicious prosecution and false imprisonment, which centered on wrongfully initiating legal process and detention without legal process. *Id.* For both torts, "probable cause was generally a complete defense for peace officers." *Id.*; *accord Lozman*, 138 S. Ct. at 1957 (Thomas, J., dissenting); U.S. Br. 28-31.

Warrants doomed malicious-prosecution and false-imprisonment claims. For malicious prosecution, valid

warrants confirmed the existence of probable cause, which foreclosed the claim. *See Wheeler v. Nesbitt*, 65 U.S. 544, 549-50, 552-53 (1861). Only when warrants were "illegally grant[ed]" without probable cause could an action lie. *Cox v. Kirkpatrick*, 8 Blackf. 37, 38 (Ind. 1846). For false imprisonment, even warrants issued "erroneous[ly]" *without* probable cause defeated liability, so long as the warrant was "on its face regular, and from a court or magistrate having the jurisdiction." Joel Prentiss Bishop, *Commentaries on the Non-Contract Law* 85 (1889). Section 1983 should not penalize warrants when the relevant common-law analogues treated warrants as a dispositive bar.

Gonzalez (at 45) analogizes retaliatory-arrest claims to the common-law tort of abuse of process, where probable cause did not defeat the claim. CAC Br. 19-23; LEAP Br. 16-18; NPAP Br. 5-13. But *Nieves* considered malicious prosecution and false imprisonment, not abuse of process, the relevant analogies. 139 S. Ct. at 1726; *see Nieves* U.S. Br. 10 n.2 (rejecting abuse-of-process analogue). Abuse of process is a poor fit for retaliatory-arrest claims, which target the initial arrest, not ensuing process. The gravamen of abuse of process "is not the wrongfulness of the prosecution, but some extortionate perversion of lawfully initiated process to illegitimate ends." *Heck v. Humphrey*, 512 U.S. 477, 486 n.5 (1994).

Abuse-of-process claims allege some "abuse in subsequent proceedings" that perverted the initial process—usually, extortion. *Jackson v. AT&T Co.*, 51 S.E. 1015, 1018 (N.C. 1905) (citation omitted); *see* Francis Hilliard, *The Law of Torts or Private Wrongs* 422 (1866); CAC Br. 21-23; NPAP Br. 9. Defendants would engineer the plaintiff's arrest, then demand payment in exchange for release. *E.g.*, *Grainger v. Hill*, 132 Eng. Rep. 769, 772 (1838). Because "taking the property"—the extortionary

payment—was "not within the scope of the process," an abuse-of-process claim lay whether or not probable cause supported the arrest. *Id.* at 773. But "maliciously doing that which the law allows" (*i.e.*, making an arrest) was malicious prosecution, not abuse of process. *Id.* at 774. Gonzalez acknowledges that her "claim is … limited to the arrest." C.A. Oral Arg. 17:14-17:38. At common law, probable cause defeated that claim absolutely. Any contrary rule would gut *Nieves* in all cases involving warrants.

C. This Court's Two Narrow Exceptions to the Probable-Cause Bar Are Inapplicable

This Court recognizes only two limited exceptions where probable cause does not defeat retaliatory-arrest claims: (1) official municipal policies of retaliation (the *Lozman* exception); and (2) endemic, low-level offenses where police customarily exercise discretion not to arrest (the *Nieves* exception). Neither applies here, regardless of comparator evidence.

1. **Official Municipal Policies.** *Lozman* recognized an "unusual" retaliatory-arrest claim that probable cause "does not categorically bar." *Nieves,* 139 S. Ct. at 1722. The plaintiff must show (1) the "City itself retaliated against [the plaintiff] pursuant to an 'official municipal policy' of intimidation" (2) for speech unrelated to the offense (3) that is "high in the [First Amendment] hierarchy," and (4) retaliation reflects a premeditated plan (5) established by "objective evidence." *Lozman*, 138 S. Ct. at 1954-55 (quoting *Monell*, 436 U.S. at 691); *see id.* at 1956 (Thomas, J., dissenting) (counting "five conditions"). Clearly, these claims are "far afield from the typical retaliatory arrest claim." *Id.* at 1954 (majority op.).

Gonzalez's claim does not fit this mold. *Contra* Pet. Br. 30-31. For starters, *Lozman* claims are against a

"City," not individual officers like respondents. 138 S. Ct. at 1954. As this Court described *Lozman*'s "holding": "[P]robable cause does not categorically bar a plaintiff from suing the *municipality*" for "arrests that result from official policies of retaliation." *Nieves*, 139 S. Ct. at 1722 (emphasis added). The government (at 16) thus agrees that Gonzalez's claims against respondents cannot proceed under *Lozman*. The circuits widely understand *Lozman* to permit claims against only municipalities.[6] Below, Gonzalez described *Lozman* as limited to municipalities. Mot. to Dismiss Opp. 6, D. Ct. Dkt. 17.

Moreover, *Lozman* claims require "an 'official municipal policy' of intimidation," *i.e.*, an official policy under *Monell*. *Lozman*, 138 S. Ct. at 1954 (quoting *Monell*, 436 U.S. at 691). Such an "[o]fficial municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Connick v. Thompson*, 563 U.S. 51, 61 (2011). *Lozman* likely satisfied that high bar because the city's lawmakers—the city council—allegedly reached an on-the-record "consensus" to "'intimidate' Lozman." 138 S. Ct. at 1949.

Gonzalez's allegations do not show an official policy; her brief does not contend otherwise. Defendants are not "lawmakers" or "policymaking officials." *See Connick*, 563 U.S. at 61. In Castle Hills, "the city council has final policymaking authority," not respondents. Pet.App.93a.

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[6] Pet.App.32a; *Novak v. City of Parma*, 932 F.3d 421, 429-30 (6th Cir. 2019); *Waters v. Madson*, 921 F.3d 725, 741-42 (8th Cir. 2019); *Jackson v. Cowan*, 2022 WL 3973705, at *8 (11th Cir. Sept. 1, 2022). No circuit holds otherwise; two merely sidestepped that threshold question and rejected individual-officer claims under other aspects of *Lozman*. *Turner*, 65 F.4th at 588; *Mayfield*, 75 F.4th at 501.

Gonzalez nowhere alleges that the city council (on which she sat) decided to retaliate.

Nor does she allege City practices "so persistent and widespread as to practically have the force of law." *See Connick*, 563 U.S. at 61. Below, the district court allowed Gonzalez's *Lozman* claim against the *City* to proceed based on two alleged previous retaliatory incidents. Pet.App.94a-95a. In one, a former mayor allegedly threatened an easement citation; in the other, Mayor Trevino supposedly "threatened" a resident. Pet.App.133a. But previous incidents create a *Monell* "policy" only if "widespread." *Connick*, 563 U.S. at 61. Two isolated incidents—neither involving an arrest—hardly show a city policy of arresting residents engaged in disfavored speech. *See Hildreth v. Butler*, 960 F.3d 420, 428 (7th Cir. 2020) (four incidents insufficient).

2. **Endemic Infractions That Never Prompt Arrest.** *Nieves* crafted a "narrow qualification" to the probable-cause bar "for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to" because the public widely commits the infraction. 139 S. Ct. at 1727. For these endemic offenses, *Nieves* deviated from the "unyielding" probable-cause bar because, when section 1983 was enacted in 1871, officers had "limited" authority to make "warrantless arrests for misdemeanors." *Id.* But today, all States "'permit warrantless misdemeanor arrests' in a much wider range of situations," even for "'very minor criminal offense[s].'" *Id.* (quoting *Atwater*, 532 U.S. at 344-45). Today's officers thus exercise far greater discretionary powers to make warrantless arrests for countless minor crimes. *Id.* at 1731 (Gorsuch, J., dissenting in part). As the government (at 12, 17, 19) notes, this exception reflects concerns about

"warrantless misdemeanor arrests" for "very minor criminal offenses."

Jaywalking, for instance, is "endemic" and "rarely results in arrest." *Id.* at 1727 (majority op.). There, "probable cause does little to prove or disprove the causal connection between animus and injury," *id.*, because police depart from the default of arresting upon probable cause. Hence, if officers single out an outspoken jaywalker for arrest, that targeting might suggest something nefarious. *Id.* But when "the plaintiff commit[s] a serious crime of the sort that would nearly always trigger an arrest regardless of the speech," no retaliatory inference attaches. *Id.* at 1732 (Gorsuch, J., dissenting in part).

It would be passing strange if *Nieves* silently created a massive exception to the common-law probable-cause bar for all crimes, no matter how serious and non-ubiquitous, like murder, rape, child pornography, burglary, tax evasion, securities fraud, political corruption, assault, forgery, and theft, where arrest upon probable cause is the norm. Expanding *Nieves*' "narrow" exception to all offenses risks "derail[ing]" this Court's "retaliation jurisprudence." *Id.* at 1729 (Thomas, J., concurring in part). Notwithstanding probable cause, if some "objective evidence" suggested retaliation, plaintiffs would be on to discovery and a jury trial. Pet. Br. 30. Opening the door for the "rare" case where animus might motivate an arrest would leave officers exposed to constant litigation threats. *See Hartman*, 547 U.S. at 264; *Nieves* U.S. Br. 25.

Here, intentionally stealing government documents is no "endemic," minor crime that "rarely results in arrest." *See Nieves*, 139 S. Ct. at 1727. Even the *Nieves* plaintiff's crime—disorderly conduct—does not fall within *Nieves*' exception. *See id.* at 1727-28. If being disorderly at a fes-

tival featuring "extreme alcohol consumption" is not "endemic," *id.* at 1720, 1727, serious offenses, like theft, do not qualify. Further, intentionally stealing government documents is a Class A misdemeanor, one notch below a felony and punishable by a year in jail. Tex. Penal Code §§ 12.21, 37.10(c)(1). Texas cares enough about proscribing such behavior that Texas statutes from theft, *id.* § 31.03, to "willfully … remov[ing] … public information," Tex. Gov't Code § 552.351, cover Gonzalez's alleged conduct too. *Supra* p. 10 (collecting additional statutes). Those serious, overlapping penalties make it inconceivable that officers do not arrest citizens who steal.

Gonzalez (at 3, 6, 10-11, 17, 21, 42-44, 49) recasts her offense as the commonplace act of accidentally, temporarily mis-shuffling government documents. Allowing plaintiffs to recast their conduct as innocent would vitiate *Nieves* by effectively requiring law enforcement to show that they arrest innocent people.

But accidentally moving papers is no crime, let alone the crime Gonzalez conceded there was probable cause to believe she committed. *Supra* pp. 9-10. Texas' government-document offense requires "intent[]." Tex. Penal Code § 37.10(a)(3). And Gonzalez had motive to intentionally steal: She had been accused of soliciting signatures "under false pretenses" and allegedly induced a resident to forge signatures on the petition. J.A.52, 57. Had she merely mislaid a document, any reasonable magistrate would have determined that no probable cause existed and refused a warrant. Gonzalez (at 49, 52) cannot simultaneously compare Castle Hills to a Kafkaesque "police state" where officers pursued her "perfectly innocent" conduct, yet concede probable cause for intentional theft.

Gonzalez's complaint underscores that Bexar County is no hotbed of unpunished government-document thefts.

Gonzalez cites 200+ felony grand-jury indictments, plus an unspecified number of misdemeanor charges under the broader tampering statute over the past 10 years. Pet.App.117a. For a county of two million, those numbers suggest that government-document offenses are neither ubiquitous nor rarely charged. For comparison, the County saw 249 murders and 289 arsons in 2022. Tex. Dep't of Pub. Safety, *Uniform Crime Reporting System*, http://tinyurl.com/hu4zd5xy. Denizens of Bexar County presumably jaywalk in droves, but they do not constantly tamper with government documents, commit murder, or light buildings on fire with impunity.

Gonzalez (at 37) objects that reserving *Nieves*' exception for unenforced misdemeanors would nullify it. But endemic offenses that never trigger arrest are common. Gonzalez (at 49) lists obstructing sidewalks and misusing turn signals. Others include "littering, riding a bicycle without a bell," eating on the subway, or letting your dog off-leash. *See Atwater*, 532 U.S. at 353 & nn.23-25; *Brown v. Polk County*, 141 S. Ct. 1304, 1306 (2021) (Sotomayor, J., respecting denial of certiorari). Intentionally stealing government documents is not a petty infraction everyone commits, much less without being arrested.

* * *

Probable cause generally dooms retaliatory-arrest claims—especially when police get a warrant, the most-favored protection against government abuse. Gonzalez conceded there was probable cause to arrest her for theft—a non-endemic crime. That should end the case. This Court therefore need not resolve what evidence of retaliation might surmount probable cause under *Nieves*' exception for endemic, unenforced infractions. Moreover, Gonzalez's downgrading of probable cause to one factor among many would apply in *all* arrests with warrants—

hundreds of thousands to millions per year. This Court should not transform *Nieves*' narrow exception into the default rule that *Nieves* rejected.

II. Only Comparator Evidence Satisfies *Nieves*' Exception

Even if the *Nieves* exception applied, *Nieves* requires "objective evidence that [the plaintiff] was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." 139 S. Ct. at 1727. Gonzalez presented no such comparator evidence. She has not identified anyone whose conduct supplied probable cause that they violated Texas' prohibition on intentionally removing government documents, yet was *not* arrested. Absent such comparators, Gonzalez cannot disprove that officers would have arrested her *regardless* of protected speech. Allowing plaintiffs to point to any purportedly objective evidence of retaliation would offer a roadmap for evading *Nieves*, exposing law enforcement to constant litigation without solving causation quandaries.

A. *Nieves* Requires Comparator Evidence

1. As the Fifth Circuit observed, *Nieves*' "plain language" requires comparators, Pet.App.29a: The plaintiff must show that "otherwise similarly situated individuals not engaged in the same sort of protected speech" were not arrested. 139 S. Ct. at 1727. Plaintiffs must identify others who committed analogous conduct, but were not arrested and did not engage in similar protected speech.

Nieves demanded comparators because retaliation plaintiffs must prove causation, *i.e.*, that "non-retaliatory grounds" (the potential crime) "were in fact insufficient to provoke the adverse consequences." *Id.* (cleaned up). Evidence of *animus*—like officers' "statements and motivations"—is irrelevant if officers would have arrested the

plaintiff anyway. *Id.* Testing whether probable cause invariably prompts arrest requires accounting for local enforcement norms. Big-city police might offer drug users treatment; small-town police might arrest anyone using drugs on Main Street. Only comparator evidence teases out whether officers ordinarily arrest.

Nieves' citation (139 S. Ct. at 1727) to *Armstrong*, 517 U.S. at 465, confirms the comparator requirement. In *Armstrong*, defendants alleged that their crack-cocaine prosecutions violated the equal-protection doctrine because prosecutors disproportionately prosecuted black people. *Id.* at 459. The defendants showed that every recent crack case in their public defender's office involved black defendants. *Id.* But *Armstrong* held that defendants needed to show "that similarly situated individuals of a different race were not prosecuted." *Id.* at 465. To exclude nondiscriminatory explanations, the defendants needed "to identify individuals who were not black and could have been prosecuted for the offenses" but were not, *i.e.*, actual comparators. *Id.* at 470.[7]

Comparators are likewise critical in retaliatory-arrest cases to discount the obvious explanation for every arrest—"the plaintiff's potentially criminal conduct." *See Nieves*, 139 S. Ct. at 1724. A warrant application that details suspected terrorists' anti-American messages while planning attacks on U.S. landmarks targets the suspects' speech, and might reflect animus against the message. But that reliance on speech does not support a retaliatory-arrest claim; police ordinarily arrest terrorists, whatever

[7] *Armstrong* reserved whether "direct admissions by prosecutors of discriminatory purpose" might suffice without comparators. 517 U.S. at 469 n.3 (cleaned up). But *Nieves* deemed officers' "statements" irrelevant in the retaliatory-arrest context. 139 S. Ct. at 1727. Regardless, Gonzalez offers no such direct admissions.

their views. Only by identifying similarly situated people who were not arrested can plaintiffs show that animus *caused* the arrest.

The government (at 24-26) acknowledges that *Nieves* relied on *Armstrong*, that *Armstrong* requires comparators, and that selective-prosecution and retaliatory-arrest claims are a "loose analogy." Yet the government urges this Court *not* to apply *Armstrong*'s comparator requirement to retaliatory-arrest claims by distinguishing the selective-prosecution context. That new position contradicts the government's sustained requests for "a stringent objective screen" for retaliatory-arrest claims (citing *Armstrong*). *Nieves* U.S. Br. 23; U.S. Br. 21 n.6, *Lozman*, 138 S. Ct. 1945 (No. 17-21); *see also* U.S. Br. 17, *Reichle v. Howards*, 566 U.S. 658 (2012) (No. 11-262); U.S. Br. 22-23, *Hartman*, 547 U.S. 250 (No. 04-1495).

As the government previously put it, *Armstrong* "requir[es] detailed proof that the government in fact treated similarly situated people differently." *Nieves* U.S. Br. 23. It would be "anomal[ous]" to offer less protection in retaliatory-arrest cases because officers may legitimately consider speech in making arrests, but prosecutors should virtually never consider race. *Id.* Now that the burdens of retaliatory-arrest lawsuits only fall on state and local, not federal officials, *Egbert*, 596 U.S. at 498; U.S. Br. 1, the government sings a different tune.

Regardless, the government (at 25) says prosecutors' actions, unlike police officers', enjoy a presumption of regularity. And the government (at 25) emphasizes the "constitutional and other procedural protections" in criminal prosecutions. Those features also differentiate retaliatory-prosecution and retaliatory-arrest claims. Yet *Nieves* still treated the two as close analogues and held

that probable cause generally defeats both. 139 S. Ct. at 1724.

2. Gonzalez (at 40-42) contends that courts consider "non-statistical evidence" to identify "improper government motive." True, but irrelevant. Gonzalez's cases illustrate that varied evidence might suggest *motive*, *i.e.*, animus.[8] But only comparator evidence shows that animus—not officers' presumptive inclination to arrest whenever probable cause exists—*caused* the arrest. *Nieves*, 139 S. Ct. at 1727.

Requiring plaintiffs to identify similarly situated comparators does not require statistical studies, let alone impose insuperable obstacles. *Contra* Pet. Br. 37-38. *Nieves* asks for "similarly situated individuals," not "laboratory-like controls." 139 S. Ct. at 1741 n.8 (Sotomayor, J., dissenting). Although Gonzalez presents *no* comparator evidence, selective-enforcement caselaw confirms comparator evidence in many forms would suffice.

For instance, plaintiffs could point to anecdotal evidence. Lower courts have deemed one comparator example enough under *Armstrong* if sufficiently analogous. *E.g.*, *Chavez v. Ill. State Police*, 251 F.3d 612, 636-37 (7th Cir. 2001) (Hispanic and white drivers traveled same highway at same time without committing infractions; only Hispanic driver pulled over); *Stemler v. City of Florence*, 126 F.3d 856, 861, 873 (6th Cir. 1997) (lesbian woman and heterosexual man drove drunk on residential street; only woman arrested). Or plaintiffs might offer photographs demonstrating that their conduct is commonplace but

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[8] *See Lozman*, 138 S. Ct. at 1951 (non-comparator evidence suggesting "official policy to retaliate"); *Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1168 (10th Cir. 2003) (non-comparator evidence supported "inference of discriminatory purpose").

rarely charged. *E.g.*, *Frederick Douglass Found., Inc. v. District of Columbia*, 82 F.4th 1122, 1138 (D.C. Cir. 2023) (graffiti).

The government (at 21) worries about "unjustified consequences," yet most cases the government thinks should go forward involve comparator evidence. In *Ballentine*, the Ninth Circuit found *Nieves*' exception met where the plaintiffs were arrested for chalking on sidewalks while "other individuals chalking [there] at the same time" went free. 28 F.4th at 62 (cited at Pet. Br. 39; U.S. Br. 23). Likewise, if a journalist filming police is arrested while "otherwise similarly situated persons who were not filming the officers were not," U.S. Br. 22, the others are comparators. So too if "the only individuals arrested out of a large group were the ones engaged in particular expressive activity." U.S. Br. 18. If a jaywalker initially gets off with a warning, but is arrested once he engages in speech, U.S. Br. 22, that earlier conduct could be the comparator. This Court should not create an any-evidence-goes approach when the existing comparator requirement allows well-pled retaliation claims.

B. Gonzalez's Other Evidence Does Not Demonstrate That Speech Caused Her Arrest

Gonzalez (at 39) urges courts to consider "equally probative, objective evidence" of disparate treatment beyond comparators. But if plaintiffs can survive motions to dismiss with any "objective evidence" of retaliatory animus, the *Nieves* exception would swallow the rule. This case exemplifies that risk.

1. **Other People Who Were Prosecuted.** Instead of identifying other people *not* arrested, Gonzalez (at 42-43) does the opposite, pointing to people prosecuted for violating Texas Penal Code § 37.10 who committed the offense

differently. She alleges that "data from Bexar County over the past decade" shows "215 grand jury felony indictments" and an unspecified number of "unremarkable" misdemeanor cases. Pet.App.117a. Again, she emphasizes that no one else was arrested for the "commonplace" "perfectly innocent conduct" of "accidentally gather[ing] up," "temporarily mislay[ing]," "temporarily misplacing," or "briefly misplacing" a petition, or "putting documents in the wrong pile." Pet. Br. 3, 6, 10-11, 17, 21, 42-44, 49.

That recharacterization of her offense is like plaintiffs arrested for arson citing the dearth of arrest records for people who innocently misplaced a lit match near incriminating papers. Gonzalez conceded there was probable cause to believe she committed the Class A misdemeanor of intentionally removing a government document. If the warrant application rested on "an extraordinary and unprecedented interpretation of the law," Pet. Br. 6, 20, she should have challenged probable cause. Instead she conceded the accuracy of a warrant application that painstakingly narrated her actions frame-by-frame from video footage and matched the evidence to each element of the Texas statute.

In any event, that the plaintiff's "conduct is itself unprecedented or uncommon" does not show retaliation; it just shows that the plaintiff committed a crime in an atypical way. U.S. Br. 19-20. Someone arrested for grand larceny after swiping a rare fossil from the Smithsonian cannot prove he was targeted for retaliation because most larcenists pilfer laptops from Best Buy.

Gonzalez (at 42-43) says that if other people committed the same offense in more serious ways, an arrest for a less-serious violation suggests retaliation. But Texas' legislature already decided that Gonzalez's crime was a serious Class A misdemeanor alongside other government-

document offenses. Stealing government documents is not inherently less serious than forging them. Gonzalez's approach would permit courts to second-guess law enforcement on what criminal conduct justifies an arrest for every offense, including disorderly conduct, threats, and assault. Other plaintiffs could argue that mitigating circumstances made their offense less serious—like self-defense in a bar fight or poverty as a basis for shoplifting. Plaintiffs arrested for attempt could claim their offense was harmless. Assigning post-hoc weight to whether other arrests purportedly look more serious would skew law-enforcement discretion. It could also perversely encourage over-arrests to create a track record of arrests for the least serious conduct covered by each statute.

Further, Gonzalez's evidence shows police *do* enforce this statute, regardless of how violated. Though most violations from Gonzalez's data apparently involve fake identification documents, others include "hiding evidence of murder, cheating on a government-issued exam," or "stealing banking information"—all presumably as uncommon and serious as public officials stealing official documents. Pet.App.117a.

Gonzalez's other-people-other-crimes approach illustrates the perils of cherrypicked data. She focuses on Bexar County statistics, but records for a county of two million shed little light on law-enforcement trends in Castle Hills, which barely registers 0.2% of Bexar County's population. Municipalities often have different norms, resources, and enforcement priorities, making county-level data meaningless.

Gonzalez's dataset also does not look at other arrests; she just covers "felony indictments" and "[m]isdemeanor data," apparently meaning misdemeanor *charges*. Pet.App.117a. That excludes other arrests that did not

culminate in prosecution—a potentially large pool given that prosecutors decline some 25-50% of all charges. Erik Luna, *Prosecutorial Decriminalization*, 102 J. Crim. L. & Criminology 785, 795 (2012). Cases proceeding past a grand jury may look different due to prosecutorial priorities, not unusual features of plaintiffs' arrests. Gonzalez's focus on felonies is particularly odd given her misdemeanor arrest. Someone arrested for felony murder cannot show retaliation by noting that first-degree murderers tend to commit more gruesome crimes.

Gonzalez's objection that others engaged in dissimilar conduct carries even less force because she apparently grouped *all* charges under Texas' broader tampering statute. Texas Penal Code § 37.10(a) has six subsections, ranging from Gonzalez's alleged offense (intentionally removing a governmental record) to falsely altering a governmental record or knowingly using a false record. Tex. Penal Code § 37.10(a)(1), (3), (5). That other people violated different provisions differently says nothing about what caused Gonzalez's arrest.

2. None of Gonzalez's other evidence (at 43-44) suggests that law enforcement would have ignored probable cause of intentional government-document theft had Gonzalez not spoken.

The Warrant Application. Gonzalez (at 10-11, 43) argues that, by referring to her speech, the warrant application reflects a "calculated choice" to retaliate. But as the application explains, Gonzalez's involvement in organizing the petition went to "motive." J.A.52. Gonzalez's claimed "accident[]" (at 3) taking the petition might be credible were she uninvolved. But because Gonzalez had been accused of soliciting signatures "under false pretenses," she had an explainable "desire to steal the petition[]" to avoid

further scrutiny. J.A.45, 52; *see* U.S. Br. 4 (noting this feature of warrant application). Speech is commonly relevant to probable cause and cannot be per se evidence of possible retaliation. *Supra* p. 26.

Uncommon Arrest Procedures. Gonzalez (at 44) contends that departures from normal police procedures show retaliation. But her investigation undisputedly was on a special track because of her elected office. Cities like Castle Hills appoint special detectives to conduct "sensitive" investigations to *avoid* political pressure. J.A.43. Gonzalez's examples where Detective Wright made lawful but supposedly unusual choices also misapprehend police procedure.

First, Gonzalez (at 12) faults Detective Wright for seeking a warrant, arguing that summonses are standard for nonviolent crimes. But warrants are available for all offenses, not just violent felonies. Tex. Code Crim. Proc. art. 15.03(a)-(b); *contra* Pet. Br. 44. Crucially, under Texas law, magistrates or judges—not officers—choose whether to issue a summons or a warrant. Even had Detective Wright sought a summons, the judge could have opted for a warrant.

Second, Gonzalez (at 12-13) alleges that Detective Wright departed from standard practice by not prescreening the warrant application with Bexar County's district attorney. But Texas law requires peace officers like Detective Wright to notify *magistrates* of offenses, as he did. Tex. Code Crim. Proc. art. 2.13(b)(3). Concededly, he had no legal obligation to consult the district attorney. C.A. Oral Arg. 22:53-23:56. Nothing suggests the district attorney would have declined to pursue a warrant where probable cause admittedly existed for government-document theft. The district attorney did not "immediately dismiss[]" that charge, *contra* Pet. Br. 12-13; he waited

over a month before determining that further investigation was needed and charges could be refiled later. Scott Huddleston & Emilie Eaton, *DA Dismisses Tampering Charge Against Former Castle Hills Councilwoman*, San Antonio Express-News (Aug. 23, 2019), http://tinyurl.com/4frr9k4r; *Case #619319*, County Clerk & District Clerk Records Search, https://tinyurl.com/2t5nms58.

The district attorney's ultimate decision not to *prosecute* does not suggest he would have blocked the arrest. As discussed, prosecutors decline 25-50% of charges for myriad reasons, from resources to lack of admissible evidence or witnesses to different priorities. *Supra* p. 46.

Third, Gonzalez (at 13) claims Detective Wright's decision not to go through the district attorney's office caused her to spend the day in jail instead of using a satellite booking procedure. How Gonzalez's arrest was processed has no bearing on *whether* she would be arrested, the only question relevant to her retaliatory-arrest claim. Gonzalez (at 50) emphasizes the indignities of jail. But her jail time stems from her own decision to drive to the central county jail without calling the satellite booking office—a call that may well have avoided any jail time. *Supra* p. 12.

Other Actors' Actions. Gonzalez points to actions by other individuals that she claims demonstrate wide-ranging animus against her. But adding to the cast of retaliatory characters compounds problems in demonstrating that *respondents*' alleged animus caused her arrest.

Gonzalez (at 9-10, 43) alleges that non-defendant Clyde McCormick, another city councilmember, launched the secret retaliatory "plan" in a city newsletter article. Gonzalez never explains why respondents would tele-

graph their intentions in *The Castle Hills Reporter*, sandwiched between a salon ad and a word jumble. *See* Pet.App.142a-157a. The "Council Comments" section gives all councilmembers space to air issues of their choosing. Gonzalez wrote about the zoning board. J.A.31-33. Another councilmember revealed his passion for "High-Powered Amateur Rocketry." J.A.29. McCormick mused on the city-manager form of government before clarifying a citizen's confusion over how Texas mayors and city councilmembers may be removed from office. J.A.25-29.

Gonzalez (at 15, 44) cites a citizens' lawsuit to remove her from office "for incompetence and official misconduct." Pet.App.122a. That lawsuit has nothing to do with Gonzalez's retaliatory-*arrest* claim. Gonzalez did not sue these citizens or tie them to respondents beyond asserting vague "connections." Pet.App.108a. While the citizens' lawsuit was ultimately dismissed, a Texas court found that the citizens "clearly provided factual support" for their allegations of "incompetence and misconduct." *See Wenger v. Flinn*, 648 S.W.3d 448, 457-58 (Tex. App. 2021).

Finally, Gonzalez (at 14-15, 43-44) points to the city attorney's assertion that her swearing-in did not comport with Texas law because an off-duty sheriff administered the oath. Gonzalez did not sue the city attorney here either, presumably because he had nothing to do with her arrest.

3. Gonzalez's anything-goes approach would let virtually any case proceed past pleadings. Every retaliatory-arrest plaintiff alleges that her case is special. The *Nieves* plaintiff claimed to have a "quite straightforward" case of retaliation. *Nieves* Resp. Br. 13, 36. The arresting officers allegedly disregarded their commanders' admonition to avoid arrests, turned off an audio recorder for "no reason" against "standard policy," shoved the plaintiff into the

snow, threatened to tase him, and remarked on his protected conduct. *Id.* at 2-4 (citation omitted).

If Gonzalez's evidence suffices to get past a motion to dismiss, "courts will be flooded with dubious retaliatory arrest suits." *See Lozman*, 138 S. Ct. at 1953; *Nieves* U.S. Br. 22. Anyone who smuggles classified documents in socks could claim retaliation by pointing out that their arrest was unique—most classified-document thefts involve hacking. For crimes that inherently involve speech, like vandalism, perjury, political corruption, and election tampering, investigators will be stymied as their inevitable consideration of speech could invite retaliation claims later. And when new administrations change enforcement priorities or legislatures enact new laws, plaintiffs will have ready-made cases; past data will inevitably not show similar prosecutions. *See* U.S. Br. 20.

Similarly, "a history of tense interactions with the plaintiff," U.S. Br. 20, might prove that the arresting officers did not like the plaintiff. But this Court has already rejected that kind of "subjective" inquiry into motive. *Nieves*, 139 S. Ct. at 1727. "There is almost always a weak inference of retaliation whenever a plaintiff and a defendant have had previous negative interactions." *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 901 (9th Cir. 2008). Letting such "unfounded claims" advance risks serious "disruption" for officials. *Id.* (citation omitted).

C. Affirmance Will Not Usher in Totalitarianism

Gonzalez (at 47-54) claims that applying the probable-cause bar to all retaliatory-arrest claims and relying on comparator evidence to show causation will make America a totalitarian dictatorship. But plaintiffs can sue when no probable cause exists—as Gonzalez could have done had she truly misplaced documents by accident and then been

arrested for intentionally stealing documents. And even when probable cause of minor infractions exists, anecdotal evidence, photographs, and affidavits can readily establish that a plaintiff was arrested when similarly situated others would go free. *Supra* pp. 42-43.

Beyond section 1983, criminal prosecution and federal civil-enforcement actions protect against retaliatory arrests. U.S. Br. 13. The government previously thought these tools so effective that "a damages remedy [wa]s not essential to deter police officers from making retaliatory arrests supported by probable cause." *Nieves* U.S. Br. 24. And the First Amendment independently guards against arrests for authoritarian favorites like "discrediting the … military," "endangering national security," or criticizing Dear Leader. Pet. Br. 52-53 (citation omitted).

America's history confirms that the comparator requirement is no primrose path to tyranny. At common law, *no* claims survived when probable cause existed. *Nieves*, 139 S. Ct. at 1726-27. Only in 1990 did the first court of appeals allow retaliatory-arrest claims notwithstanding probable cause. *See DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990). Before *Nieves* in 2019, most circuits categorically foreclosed retaliatory-arrest claims when probable cause existed. *See Lozman* Cert. Pet. 12-13. And today, no First Amendment retaliation claims whatsoever lie against federal officials, even without probable cause, as this Court unanimously held two years ago. *Egbert*, 596 U.S. at 498; *id.* at 505 (Sotomayor, J., concurring in judgment in part); U.S. Br. 1. America—home of the warrant, due process, and impartial courts—has never been a police state.

CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted,

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