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 AMICUS CURIAE THE NATIONAL SHERIFFS' ASSOCIATION IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF THE AMICUS CURIAE

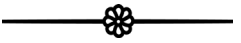
The NATIONAL SHERIFFS' ASSOCIATION (the "NSA") is a non-profit association formed under 26 U.S.C. § 501(c)(4). Formed in 1940 the NSA seeks to promote the fair and efficient administration of criminal justice throughout the United States and in particular to advance and protect the Office of Sheriff throughout the United States. The NSA has over 20,000 members and is the advocate for 3,083 sheriffs throughout the United States. The NSA also works to promote the public interest goals and policies of law enforcement throughout the nation. It participates in the judicial process where the vital interests of law enforcement and its members are affected.[1]

SUMMARY OF ARGUMENT

This Court has only recently clearly established the burden of proof required for a retaliatory arrest claim under the First Amendment in *Nieves v. Bartlett*, 139 S.Ct. 1715, 204 L.Ed.2d 1 (2019). After a half century of upholding various defenses to such claims against law enforcement, this Court carefully and thoughtfully carved out a needed narrow exception to the probable cause defense without encumbering public safety in *Nieves*. There this Court explained that even

[1] This brief was not authored in whole or in part by counsel for any party. No person or entity other than amicus curiae made a monetary contribution to this brief's preparation or submission.

with probable cause for an arrest, law enforcement cannot selectively enforce a law against someone in retaliation for free speech. Consistent with *Nieves*, if Petitioner could prove that Respondents treated other similarly situated persons as Petitioner differently under the law, Petitioner could overcome immunity. However, Petitioner was unable to do so. Now, only 5 years since this Court's pronouncement in *Nieves*, Petitioner seeks to expand *Nieves* and include other exceptions to the probable cause defense. Such an expansion of *Nieves* would be detrimental to public safety by allowing questionable and frivolous retaliatory arrest claims to proceed against law enforcement at crippling costs to taxpayers.



ARGUMENT

I. Law Enforcement Needs Protections Against Frivolous and Questionable Lawsuits for Public Safety.

Petitioner seeks to ease the burden of proof mandated by this Court in *Nieves v. Bartlett*, 139 S.Ct. 1715, 1722, 204 L.Ed.2d 1 (2019) for First Amendment retaliation claims against law enforcement and disregard qualified immunity, probable cause and good faith defenses to her claim as established by this Court. In support of Petitioner's position, she refers to facts and circumstances surrounding the arrest which they claim justify a departure from this Court's ruling in *Nieves*. These self-serving assertions fail to consider the far-reaching detrimental effects to law enforcement and public safety which would occur as a result of

diminishing the burden of proof for alleged civil rights lawsuits against law enforcement and other public servants.

Law enforcement in the United States make about 10 million arrests per year [*F.B.I. Uniform Crime Report 2019 Crime Statistics*]. Often, as a result of these arrests, law enforcement agencies and officers are sued for alleged civil rights violations of various kinds. Many lawsuits against law enforcement are justified and serve the purpose of obtaining compensation for persons whose civil rights have been abridged. Many more lawsuits are unjustified yet proceed through the legal system at crippling costs to law enforcement and taxpayers to defend even frivolous lawsuits.

To protect the taxpayers against this unnecessary expense and allow law enforcement the leeway to enforce laws for public safety without fear of civil liability at every step, this Court has established several defenses for law enforcement against frivolous or questionable civil rights lawsuits. These defenses, among others, include the "qualified immunity defense", the "probable cause defense", and the "good faith defense" which can apply individually or in combination to defeat a frivolous claim of a constitutional violation.

II. This Court Has for Over a Half Century Steadfastly Granted Law Enforcement Defenses Against Frivolous and Questionable Lawsuits for Public Safety.

As early as 1967, this Court has held that the above defenses, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, are also available to

them in an action under § 1983. *Pierson v. Ray*, 386 U.S. 547 (April 11, 1967).

This Court in *Pierson* explained that the common law has never granted police officers an absolute and unqualified immunity. *Id.* at 555. In that case, officers claim is rather that they should not be liable if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid. *Id.* This Court explained that under the prevailing view in this country, a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved. *Id.*, *citing*, RESTATEMENT, SECOND, TORTS § 121 (1965); 1 Harper & James, THE LAW OF TORTS § 3.18, at 277-278 (1956); *Ward v. Fidelity & Deposit Co. of Maryland*, 179 F.2d 327 (C. A. 8th Cir. 1950). "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Pierson*, 386 U.S. at 555.

And in *Davis v. Scherer*, 468 U.S. 183 (June 28, 1984), this Court explained that under *Harlow*, officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Davis*, 468 U.S. at 191, *citing Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Further, "[w]hether an official may prevail in his qualified immunity defense depends upon the objective reasonableness of his conduct as measured by reference to clearly established law." *Id.* This Court stated, "No other 'circumstances' are relevant to the issue of qualified immunity." *Id.*

At least since *Davis* in 1984, this Court has consistently adhered to the reasoning in *Davis* to allow law enforcement the minimum leeway it needs to protect the public by enforcing laws without fear of retribution.

This Court noted the qualified immunity defense in *Messerschmidt v. Millender*, 565 U.S. 535 (February 22, 2012). There, this Court stated, "The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Messerschmidt*, 565 U.S. at 546, *citing*, *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (*quoting Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). This Court in *Messerschmidt* reasoned that qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments," and "protects all but the plainly incompetent or those who knowingly violate the law." *Messerschmidt*, 565 U.S. at 546, *citing*, *Ashcroft v. al-Kidd*, 563 U.S. 731, 743, 131 S.Ct. 2074, 2081, 179 L.Ed.2d 1149, 1157 (2011) (*quoting Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)). Further, the Court in *Messerschmidt* stated, "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Messerschmidt*, 565 U.S. at 546, *citing*, *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).

"Where the alleged Fourth Amendment violation [and, by analogy in the present case, a First Amendment violation] involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or, as we have sometimes put it, in 'objective good faith.'" *Messerschmidt*, 565 U.S. at 546, *citing*, *United States v. Leon*, 468 U.S. 897, 922-923, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). In *Messerschmidt*, the Court explained that, nonetheless, under our precedents, the fact that a neutral magistrate has issued a warrant authorizing the allegedly unconstitutional search or seizure does not end the inquiry into objective reasonableness. Rather, we have recognized an exception allowing suit when it is obvious that no reasonably competent officer would have concluded that a warrant should issue. *Messerschmidt*, 565 U.S. at 547, *citing*, *Malley*, 475 U.S., at 341, 105 S.Ct. 1092, 89 L.Ed.2d 271. "The 'shield of immunity' otherwise conferred by the warrant, will be lost, for example, where the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Messerschmidt*, 565 U.S. at 547, *citing*, *Leon*, 468 U.S., at 923, 104 S.Ct. 3405, 82 L.Ed.2d 677.

The *Messerschmidt* Court further provided;

> Our precedents make clear, however, that the threshold for establishing this exception is a high one, and it should be. As we explained in *Leon*, "[i]n the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination" because "[i]t is the magistrate's responsibility

> to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment." *Id*., at 921, 104 S.Ct. 3405, 82 L.Ed.2d 677; *see also Malley*, 475 U.S., at 346, n. 9, 106 S.Ct. 1092, 89 L.Ed.2d 271 ("It is a sound presumption that the magistrate is more qualified than the police officer to make a probable cause determination, and it goes without saying that where a magistrate acts mistakenly in issuing a warrant but within the range of professional competence of a magistrate, the officer who requested the warrant cannot be held liable."

Messerschmidt, 565 U.S. at 547-548.

Messerschmidt makes clear that an officer acting in good faith who obtains a warrant from an impartial magistrate who finds probable cause cannot be liable for a constitutional violation. In addition, officers are entitled to qualified immunity unless the alleged constitutional violation is clearly established.

This Court recently explained and upheld the qualified immunity defense in *City of Tahlequah v. Bond*, 142 S.Ct. 9 (October 18, 2021).

In *Bond*, this Court explained that the doctrine of qualified immunity shields officers from civil liability so long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Bond*, 142 S.Ct. at 11, *citing*, *Pearson v. Callahan*, 555 U. S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). The Court in *Bond* explained, qualified immunity protects "all but

the plainly incompetent or those who knowingly violate the law." *Bond*, 142 S.Ct. at 11, *citing*, *District of Columbia v. Wesby*, 583 U. S. ___, ___-___, 138 S.Ct. 577, 199 L.Ed.2d 453, 456 (2018) (*quoting Malley v. Briggs*, 475 U. S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)).

The *Bond* Court further stated, "We have repeatedly told courts not to define clearly established law at too high a level of generality." *Bond*, 142 S.Ct. at 11, *citing*, *Ashcroft v. al-Kidd*, 563 U. S. 731, 742, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011). "It is not enough that a rule be suggested by then-existing precedent; the rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Bond*, 142, S.Ct. at 11, *citing*, *Wesby*, 583 U. S., at ___, 138 S.Ct. 577, 199 L.Ed.2d 453, at 467 (*quoting Saucier v. Katz*, 533 U. S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)).

In the instant case, *Nieves v. Bartlett*, 139 S.Ct. 1715, 1722, 204 L.Ed.2d 1 (2019) represented the "clearly established law" as it pertains to Respondents. Accordingly, Respondents were entitled to qualified immunity even if Petitioner's First Amendment rights were violated, which is specifically denied, with one exception. Consistent with *Nieves*, if Petitioner could prove that Respondents treated other similarly situated persons as Petitioner differently under the law, Petitioner could overcome immunity. However, Petitioner was unable to do so.

In addition to qualified immunity, Respondents were also entitled to the probable cause defense. This Court has explained how officers are shielded from liability where they obtain a warrant in a good faith

objective belief that probable cause exists. In *Malley v. Briggs*, 475 U.S. 335, 475 U.S. 335 (March 5, 1986), this Court provided:

> As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law. At common law, in cases where probable cause to arrest was lacking, a complaining witness' immunity turned on the issue of malice, which was a jury question. Under the *Harlow* standard, on the other hand, an allegation of malice is not sufficient to defeat immunity if the defendant acted in an objectively reasonable manner. The *Harlow* standard is specifically designed to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment," and we believe it sufficiently serves this goal. Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized.

Malley, 475 U.S. at 341.

The *Malley* Court further provided, "Accordingly, we hold that the same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon*, *supra*, defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest." *Malley*, 475 U.S. at 344. "Only where the warrant application is so lacking in indicia of probable cause as

to render official belief in its existence unreasonable, will the shield of immunity be lost." *Malley*, 475 U.S. at 344-345.

After a half century of upholding the various defenses for law enforcement, this Court carefully and thoughtfully carved out a needed narrow exception to the probable cause defense without encumbering public safety in *Nieves*. There this Court explained that even with probable cause for an arrest, law enforcement cannot selectively enforce a law against someone in retaliation for free speech.

Petitioner is not satisfied with this Court's exception to the probable cause defense. Unable to prove that Respondents selectively enforced the law by showing evidence of others not arrested for the same offense, she wants the Court to make it easier to proceed against law enforcement for a First Amendment retaliation claim. Such a ruling would certainly benefit Petitioner. However, law enforcement and the public throughout the Country would foot the bill. Specifically, law enforcement would have to defend against an increasing number of frivolous or questionable retaliation claims with little or no objective evidence to disprove a retaliatory intent behind arrests.

In sum, this Court's decision in *Nieves* strikes the needed balance between upholding First Amendment rights against retaliation and the need of law enforcement to enforce laws for public safety without fear of retribution for a lawful arrest. Easing the burden of proof for such claims does not justify the detrimental impact to law enforcement and public safety.

III. The Eleventh Circuit Recently Recognized the Wisdom of *Nieves* in Providing Law Enforcement Protections Against Frivolous and Questionable Lawsuits for Public Safety.

In *Turner v. Williams*, 65 F.4th 564 (11th Cir. April 7, 2023), the Eleventh Circuit provided that to prevail on a First Amendment retaliation claim, a plaintiff must establish a 'causal connection' between the government defendant's 'retaliatory animus' and the plaintiff's 'subsequent injury.' *Turner*, 65 F.4d at 581, *citing*, *Nieves v. Bartlett*, 139 S.Ct. 1715, 1722, 204 L.Ed.2d 1 (2019) (*quoting Hartman v. Moore*, 547 U.S. 250, 259, 126 S.Ct. 1695, 1703, 164 L.Ed.2d 441 (2006)). "In other words, it is insufficient for the Complaint to allege that Williams 'acted with a retaliatory motive' and that Turner was harmed—Williams's 'motive must cause [Turner's] injury.'" *Turner*, 65 F. 4th at 581. The court explained that this means that, taking Turner's alleged facts as true, it must be plausible that, had Williams not had any ill will toward Turner, the latter would not have been arrested. *Turner*, 65 F.4d at 581. In addition, the *Turner* court explained, "The independent actions of the assistant state attorney and the judge broke any causal chain between Williams's alleged motive and the alleged constitutional tort." *Turner*, 65 F.4th at 581.

The court in *Turner* explained the burden of proof of a retaliatory state of mind. The court stated, "In view of the 'but-for' cause requirement for a First Amendment retaliatory arrest claim, the Supreme Court has instructed that a plaintiff 'must plead and prove the absence of probable cause for the arrest.'" *Turner*, 65 F. 4th at 581. The court explained that

"requiring a plaintiff to plead an absence of probable cause keeps the relevant inquiry objective." *Id.* "Because a state of mind is 'easy to allege and hard to disprove,' a subjective inquiry would threaten to set off 'broad-ranging discovery' in which 'there often is no clear end to the relevant evidence.'" *Turner*, 65 F. 4th at 581, *citing, Nieves*, 139 S.Ct. at 1725 (*quoting Crawford-El v. Britton*, 523 U.S. 574, 585, 118 S.Ct. 1584, 1590, 140 L.Ed.2d 759 (1998) and *Harlow v. Fitzgerald*, 457 U.S. 800, 817, 102 S.Ct. 2727, 2737, 73 L.Ed.2d 396 (1982)).

The *Turner* court explained that probable cause only requires that there be a substantial chance of criminal activity. *Turner*, 65 F. 4th at 581-582. "We do not require there be proof beyond a reasonable doubt of an arrestee's guilt, or even that there be a preponderance of evidence to support arrest. In other words, probable cause 'is not a high bar.'" *Id.* at 582, *citing*, *Wesby*, 138 S.Ct. at 586 (*quoting Kaley v. United States*, 571 U.S. 320, 338, 134 S.Ct. 1090, 1103, 188 L.Ed.2d 46 (2014)). The court stated that since the Complaint must allege a lack of probable cause, Turner faces a high bar. The *Turner* court emphasized that the "bar only rises higher by the fact that Turner was arrested under the authority of a warrant." *Turner*, 65 F. 4th at 582-583.

The *Turner* court reasoned that while we conclude that Turner's Complaint fails to plead the absence of probable cause required by *Nieves*, the Supreme Court provides two narrow exceptions where a plaintiff need not carry that burden. *Turner*, 65 F. 4th at 585. "The first is when the 'unique' five factual circumstances from *Lozman v. City of Riviera Beach*, 138 S.Ct. 1945, 201 L.Ed.2d 342 (2018), are all present." *Turner*, 65 F.

4th at 585, *citing*, *DeMartini v. Town of Gulf Stream*, 942 F.3d 1277, 1297 (11th Cir. 2019).[2]

In *Turner*, the court explained that since *Lozman* only provides a narrow exception, it is not enough that the Complaint's allegations satisfy up to three of the five considerations the Supreme Court weighed in deciding *Lozman*. *Turner*, 65 F. 4th at 588. The Complaint's allegations must satisfy all of them according

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[2] Because we have already decided that Turner's Complaint does not adequately allege an absence of probable cause, we look to the five considerations the Supreme Court analyzed in *Lozman*:

> (1) plaintiff Lozman had alleged "more governmental action than simply an [officer's] arrest" because he claimed that the City "itself retaliated against him pursuant to an 'official municipal policy' of intimidation"; (2) the plaintiff had alleged that the City's retaliation plan was "premeditated" and formed months earlier (before the arrest); (3) the plaintiff had "objective evidence" of a policy motivated by retaliation, as he had a transcript of a closed-door meeting where a Councilmember stated that the City should use its resources to "intimidate" Lozman and others who filed lawsuits against the City; (4) there was less of a concern about the causation problem and opening the floodgates of frivolous retaliation claims because the City's official policy of retaliation was formed months earlier, there was little relation between the "protected speech that prompted the retaliatory policy and the criminal offense (public disturbance) for which the arrest was made," and "it was unlikely that the connection between the alleged animus and injury will be weakened by an official's legitimate consideration of speech"; and (5) the plaintiff's speech—the right to petition—was "one of the most precious of the liberties safeguarded by the Bill of Rights" and was "high in the hierarchy of First Amendment values." *DeMartini*, 942 F.3d at 1294 (alterations in original) (emphasis omitted) (*quoting Lozman*, 138 S.Ct. at 1949, 1954-55).

to the *Turner* court. *Id*. Due to the lack of allegations pointing to objective evidence of a retaliatory plan and an absence of allegations indicating that Williams cooked up such a plan well in advance of the arrestable conduct, the court stated that Turner cannot avail himself of the *Lozman* exception to having to allege an absence of probable cause. *Id*.

Finding that the unique circumstances in *Lozman* did not apply, the *Turner* court analyzed the second narrow exception allowed by this Court. The second exception "is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Turner*, 65 F. 4th at 588, *citing*, *Nieves*. The *Turner* court provided that to avail himself of this second exception, a plaintiff must present "objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Turner*, 65 F. 4th at 585-586, *citing Nieves*, 139 S.Ct. at 1727.

In *Turner*, the court concluded that Petitioners had not proven the unique circumstances in *Lozman* or the narrow exception in *Nieves*. Accordingly, the court dismissed the First Amendment claim against officers. This Court is urged to adopt the same reasoning in the instant case. Petitioner has failed to prove the unique circumstances in *Lozman* or the narrow exception in *Nieves*. Accordingly, this Court should dismiss the First Amendment claim.

CONCLUSION

Petitioner has failed to prove Respondents violated her First Amendment right to free speech by showing that Respondents had a retaliatory animus in making the arrest as required by *Nieves*. Changing this Court's required burden of proof for such claims where probable cause exists for the arrest would hamper future law enforcement efforts to protect the public by bogging law enforcement down defending frivolous and questionable lawsuits. Accordingly, this Court's holding in *Nieves* should be affirmed and Petitioner's claim dismissed.

Respectfully submitted,

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