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.

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

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

Amicus curiae the State of Texas has an interest in this case, which raises the specter that *even if* state, city, and county law enforcement obtain a proper warrant, they can be subject to civil suit so long as a plaintiff can allege that she was arrested for her speech and not her illegal conduct. "[B]ecause protected speech is often a 'wholly legitimate consideration' for officers when deciding whether to make an arrest," *Nieves v. Bartlett*, 139 S. Ct. 1715, 1724 (2019), such a theory raises fundamental concerns relating to state governance and public safety. That is particularly so in a world where a 24-hour news cycle all too often leads to simple misjudgments or accidents being portrayed as deliberate misconduct.

To be clear, the State of Texas reveres the First Amendment and believes government officials should not abuse their authority to punish its exercise. But neither sentiment justifies innovation in an area of the law that has developed over decades to balance competing interests—particularly when doing so will result in rules insulated from change by *stare decisis* and unmoored from the common law.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case arises from a dispute among members of local government in Castle Hills, Texas, a tiny suburb of San Antonio. Sylvia Gonzalez, the petitioner, collected several petitions with signatures of Castle Hills citizens who supported removing the city manager, Pet.App.99a, but one citizen claimed Gonzalez had sought her signature under false pretenses, Pet.App.108a, 159a. The next day, Castle Hills Mayor Edward Trevino II noticed the petitions—26 in total—were missing from where he had placed them while reviewing them for the council

meeting. Pet.App.159a. Eventually, Gonzalez admitted she had taken the petitions, although only after the Mayor and another meeting attendee—a police captain—pointed to where she had placed the documents in her binder. Pet.App.159a-160a. Video of the meeting shows Gonzalez sifting through a pile of petitions placed before the Mayor while the Mayor's back was turned, taking several from that stack, and inserting them into her binder. Pet.App.161a-162a. After an initial investigation, the Mayor and Police Chief asked Special Detective Alexander Wright to investigate and charge Gonzalez for the incident. Pet.App.158-159a. His investigation resulted in a warrant for Gonzalez's arrest for a violation of Texas Penal Code section 37.10, which proscribes stealing or tampering with government documents. Pet.App.112a-113a, 158a; J.A. 45. Gonzalez learned of the warrant and turned herself in, resulting in her spending a night in jail. Pet.App.114a-115a, 118a.

Gonzalez admits that there was probable cause for her arrest. *See* C.A. Oral Arg. 27:58-28:23. The warrant was obtained from a neutral magistrate based on an investigation by a peace officer with twenty years' experience. *See* J.A.43; Pet.App.158a. In addition, the Mayor chose Special Detective Wright because of his independence, to address any concerns of a conflict of interest in the Mayor's involvement in any potential criminal charges brought against Gonzalez, a fellow council member. *See* J.A.43. According to Gonzalez, however, she was *really* arrested—and spent an ignominious night in jail—due to a city-wide conspiracy to discourage her political activism. J.A.2, 45. With respect to the claims before this Court, she accuses three individuals—Mayor Trevino, then-Police Chief John Siemens, and Special Detective Wright—of arresting her in retaliation for her exercise

of her First Amendment rights. Pet'r Br. 7; Pet.App.99a. Gonzalez's claims fail under well-established precedent.

I. To prove a claim against an arresting officer for an unconstitutional retaliatory arrest, ordinary rules of causation require that Gonzalez show that she was arrested due to her speech—and not her illegal conduct. That "causal inquiry is complex," *Nieves*, 139 S. Ct. at 1723, because in this case, the individual who ordered her arrest is not the individual who arrested her, and only an arrest done with an unconstitutional motive is cognizable. And because the source of any alleged animus against Gonzalez—her political petitions—is also the source of her criminal conduct, the question of whether the motive for her arrest was preventing crime or preventing further speech becomes just as important as it is difficult to discern. Because those causal complexities increase the risk of law enforcement being unfairly accused of retaliation, this Court in *Hartman v. Moore*, 547 U.S. 250 (2006), and *Nieves* held that the plaintiff must prove the absence of probable cause. Under *Nieves*, requiring probable cause ensures that the arrest is at least reasonable and justified by the plaintiff's criminal actions. The same standard should apply here.

II. Instead of showing that other individuals who violated the same criminal law as Gonzalez were *not* arrested, Gonzalez wishes to provide other evidence to prove retaliatory motive—namely, that no officer has arrested someone for tampering with a government petition using the law at issue in this case in the past ten years. But *Nieves* requires comparative evidence about individuals who are similarly situated to Gonzalez yet received different treatment to support a presumption of unconstitutional conduct. Allowing Gonzalez to evade

this requirement because she views her conduct differently from other forms of tampering with government documents that have led to arrests would effectively excuse her from all of the elements required to prove her retaliation claim under *Nieves*.

III. The Court should be particularly reluctant to grant Gonzalez's request (at 32) to create different rules of causation when a law enforcement officer conducts an arrest that is "premeditated"—that is, when rather than making a split-second decision about probable cause, the officer obtains a warrant from a neutral magistrate. Fashioning constitutional law based on the incentives—rather than constitutional text, structure, and history—is always perilous, but relying on those incentives here would yield terrible results. As with the most difficult *Nieves* case examples, the protected speech Gonzalez claims gave rise to the defendants' retaliatory intent was part and parcel of the criminal conduct that led to her arrest. That is precisely when the Constitution suggests that an officer *should* seek guidance from a judge. At the very least, the Court should be reluctant to create different causation rules that penalize an officer for doing so.

IV. Expanding civil liability and reducing the importance of probable cause in First Amendment retaliation suits threatens to upset the delicate balance between vindicating federal rights and noninterference with States' legitimate activities. Recent experience demonstrates on a national scale the importance of law enforcement as a reassuring, rather than antagonistic, presence in society. Texas, like other States, has developed and continues to develop strategies at the local and state level to improve the relationship between law enforcement and civilians. But exposing officers to greater potential civil liability based on arrests justified by

probable cause will upset the careful, unique strategies employed by each State. This Court should be reluctant to enable retaliation claims that do not require the absence of probable cause.

ARGUMENT

I. *Hartman* and *Nieves* Correctly Held That the Absence of Probable Cause Is Necessary to Connect "Animus to Injury."

At bottom, Gonzalez asks for an exception from the no-probable-cause requirement in her suit against Respondents because she cannot meet it. In fact, Gonzalez admits that her claim "could not be further from the on-the-spot arrest that justified deference in *Nieves*." Pet'r Br. 6.

Gonzalez alleges that although her conduct in tampering with or taking the petitions sufficed as probable cause for a charge under Texas Penal Code section 37.10, Respondents' decision to arrest her was based on a scheme to retaliate against her for her political efforts against the city manager. *See* Pet'r Br. 6. Specifically, she claims the Mayor, who saw her take the petitions, and then-Police Chief, who assigned an officer to investigate her after she reluctantly returned them, instructed the Special Detective who next investigated her to do so with the intent to retaliate against her exercise of her First Amendment rights, rather than because of her criminal conduct. *Id.* at 6, 10.

As this Court recognized nearly twenty years ago, however, "the need to prove a chain of causation from animus to injury . . . provides the strongest justification for the no-probable-cause requirement." *Hartman*, 547 U.S. at 259. And for First Amendment retaliation, causation is essential: Although "[i]t may be dishonorable to act with an unconstitutional motive and perhaps in some

instances be unlawful," the Court has explained, "action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway." *Id.* at 260. Retaliation must be the "but-for cause" of the injury to establish the necessary "causal connection between unconstitutional motive and resulting harm," regardless of whether there is some other "proof of some retaliatory animus in the official's mind." *Id.* And the same reasons that proving such a chain of causation was difficult in *Hartman* and *Nieves* apply to this case.

A. As *Nieves* explains, retaliatory prosecution cases present a "problem of causation" because "the official with the malicious motive does not carry out the retaliatory action himself." 139 S. Ct. at 1723. Instead, the decision to bring charges is made by a prosecutor, "who is generally immune from suit and whose decisions receive a presumption of regularity." *Id.* Thus, "even when an officer's animus is clear, it does not necessarily show that the officer 'induced the action of a prosecutor who would not have pressed charges otherwise.'" *Id.* (quoting *Hartman*, 547 U.S. at 263).

Showing that the arrest was also objectively unreasonable—in that it lacked probable cause, *see Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011)—ties the impermissible motive to the impermissible act. *Nieves*, 139 S. Ct. at 1724. If an officer arrests an individual knowing there is no probable cause to do so, a plaintiff can reasonably attribute the impermissible animus to that officer. *See id.*

Although this case involves a retaliatory arrest, not a prosecution, the causation problem remains. In *Reichle v. Howards*, Justices Ginsburg and Breyer, concurring, suggested that in the "usual" retaliatory arrest case there is "no gap to bridge between one government

official's animus and a second government official's action," so the no-probable-cause requirement from *Hartman* is "inapplicable." 566 U.S. 658, 671 (2012) (Ginsburg, J., concurring in judgment). The Court was right to reject that reasoning. True, Texas law permits peace officers to arrest individuals they see committing crimes. Tex. Code Crim. Proc. arts. 2.13(b)(4), 14.01. But outside of those circumstances (which typically will not involve a warrant), a line officer is just as likely to be arresting the person due to the direction of a commanding officer, prosecutor, or other powerful official as a prosecutor is to be prosecuting the person at someone else's behest.

In addition, "protected speech is often a 'wholly legitimate consideration' for officers when deciding whether to make an arrest," *Nieves*, 139 S. Ct. at 1723-24 (quoting *Reichle*, 566 U.S. at 668), because "the content and manner of a suspect's speech," for example, "may convey vital information" such as "if he is 'ready to cooperate' or rather 'present[s] a continuing threat,'" *id.* at 1724 (quoting *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1953 (2018)). In fact, the "suspect's untruthful and evasive answers to police questioning could support probable cause." *Id.* (quoting *District of Columbia v. Wesby*, 138 S. Ct. 577, 587 (2018)).

"[R]egardless of the source of the causal complexity, the ultimate problem remains the same" in retaliatory prosecution and retaliatory arrest cases: the difficulty of determining "whether the adverse government action was caused by the officer's malice or the plaintiff's potentially criminal conduct." *Id.* "Because of the 'close relationship' between the two claims, their related causal challenge should lead to the same solution," namely, "[t]he plaintiff pressing a retaliatory arrest claim must

plead and prove the absence of probable cause for the arrest." *Id.* (citation omitted).

B. Gonzalez was arrested because Special Detective Wright—assigned as lead investigator by then-Police Chief Siemens—obtained a warrant for her arrest. Pet.App.67a; J.A.44. Gonzalez's allegations are that "Mayor Trevino tasked Police Chief Siemens with investigating and charging her for a criminal offense." Pet.App.67a. Siemens hired Wright. Pet.App.67a. Gonzalez claims that Wright's citations to her petition "show[] that Sylvia's speech was the motivation behind defendant Wright's investigation." Pet.App.116a. But other than the fact that the other respondents are his employers and allegedly his friends, she fails to explain why Wright would share their motive to silence her. Thus, the "gap" discussed in *Reichle* between the person ordering an arrest and carrying out the arrest is alive and well here—as is the justification for preserving the no-probable-cause requirement that might reduce that gap in a retaliatory arrest case. *See Reichle*, 566 U.S. at 671 (Ginsburg, J., concurring).

Nevertheless, Gonzalez insists that she is entitled to recover monetary damages from Respondents because she was arrested for her prior criticism of "certain city officials." Pet.App.67a. She also admits for purposes of this suit that there was probable cause for her arrest for tampering with a government document under Texas Penal Code section 37.10(a)(3), and (c)(1). Pet.App.26a. And she did not challenge either the constitutionality of section 37.10 or the neutrality of the magistrate. *See* Pet.App.20a-97a. Thus, her potentially protected speech is both a legitimate focus of law enforcement and dangerous ground in terms of potential First Amendment lawsuits. These same facts were at work in *Nieves* and were

correctly described by the Court as giving rise to complexity similar to that of retaliatory prosecutions, justifying a no-probable-cause requirement. 139 S. Ct. at 1724.

C. In another attempt to evade the no-probable-cause requirement, Gonzalez emphasizes (at 31-32) this Court's discussion of criminal speech in *Nieves*, where the Court noted that "[o]fficers frequently must make 'split-second judgments' when deciding whether to arrest." *Nieves*, 139 S. Ct. at 1724. She argues that the no-probable-cause requirement is unnecessary when the decision to make an arrest is "premeditated," rather than the result of an on-the-spot assessment. Pet'r Br. 32.

But the Court was not simply excusing officers from following the Constitution because they made their decisions in a hurry. The majority's point was that when an officer arrives at a scene, he has to decide whether or not to make an arrest, "and the content and manner of a suspect's speech may convey vital information" influencing his decision. *Nieves*, 139 S. Ct. at 1724. That is, the complexity arises because the Court has observed that "[a]n officer might bear animus toward the content of a suspect's speech. But the officer may decide to arrest the suspect because his speech provides evidence of a crime or suggests a potential threat." *Reichle*, 566 U.S. at 668. "[I]t can be difficult to discern whether an arrest was caused by the officer's legitimate or illegitimate consideration of speech." *Lozman*, 138 S. Ct. at 1953. "And the complexity of proving (or disproving) causation in these cases creates a risk that the courts will be flooded with dubious retaliatory arrest suits." *Id.*

True, Justices Ginsburg and Breyer concurred in the judgment in *Reichle* because the case did not involve "ordinary law enforcement officers," 566 U.S. at 670

(Ginsburg, J., concurring), but Secret Service Agents "duty bound to take the content of [the plaintiff's] statements into account in determining whether he posed an immediate threat to the Vice President's physical security," *id.* at 672. Thus, they concluded, "[r]etaliatory animus cannot be inferred from the assessment they made"—that the plaintiff should be interrogated, and then arrested—"in that regard." *Id.* "If rational, that assessment should not expose them to claims for civil damages." *Id.* But the concurrence's distinction between types of law enforcement does not hold water. Regardless of whether an officer is protecting the Vice President or elementary students, "the content and manner of a suspect's speech may convey *vital information* about whether an individual should be arrested." *Nieves*, 139 S. Ct. at 1724 (emphasis added). Nothing in the case Gonzalez brings before this Court refutes the conclusions this Court has already reached on this question or justifies reaching a different result and excusing the presence of probable cause now.

II. Gonzalez's Expansion of *Nieves*'s Exception Would Swallow the Rule.

The existence of probable cause gives rise to a presumption that even without the incentive to retaliate against an individual's speech, the arrest would have occurred. *Id.* at 1725. The *Nieves* Court added only "a *narrow* qualification"—that probable cause would not bar a claim of First Amendment retaliation "where officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Id.* at 1727 (emphasis added). When an individual who engaged in protected speech is arrested "[i]n such a case, . . . probable cause does little to prove or disprove the causal connection between animus and injury." *Id.* For example, "jaywalking

is endemic but rarely results in arrest," so if there is objective evidence that an individual "was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been," that "establish[es] that 'non-retaliatory grounds are in fact insufficient to provoke the adverse consequences.'" *Id.* (quoting *Hartman*, 547 U.S. at 256).

A. Gonzalez argued before the court of appeals that, although individuals had been arrested for violating section 37.10, none had engaged in conduct similar to hers. Pet.App.23a. But the panel held that this did not suffice to meet the "exception" in *Nieves*. Pet.App.28a-29a. Specifically, Gonzalez did "not offer evidence of other similarly situated individuals who mishandled a government petition but were not prosecuted under Texas Penal Code § 37.10(a)(3)." Pet.App.28a-29a. The panel held that "the plain language of *Nieves* requires comparative evidence" between individuals "who engaged in the 'same' criminal conduct but were not arrested," but Gonzalez has provided no information about other individuals who have tampered with or taken political petitions. Pet.App.29a. To be sure, other circuits have adopted what the Fifth Circuit called a "more lax reading of the exception," but similar approaches were suggested by the separate writings of the concurring and dissenting Justices, and impliedly rejected. Pet.App.29a-30a.

As Justice Thomas observed, this exception is nowhere in the common law. *Nieves*, 139 S. Ct. at 1729-30 (Thomas, J., concurring). But even if, as Justice Gorsuch suggested, the need for an exception lies in the fact that the common law did not provide this type of remedy "to guard against officers who *abuse* their authority by making an otherwise lawful arrest for an unconstitutional *reason*," *id.* at 1731 (Gorsuch, J., concurring in part and

dissenting in part), the problem remains that *Nieves*'s probable-cause exception, if taken beyond its limited scope, is undefined and likely to be abused until the exception swallows the probable cause rule. *Id.* at 1729-30 (Thomas, J., concurring).

B. Gonzalez argues that the Fifth Circuit's holding "will give government officials a green light to arrest their critics under the most tenuous showings of probable cause and after deliberate calculation," and engage in a campaign of "picking the man and then searching the lawbooks." Pet'r Br. 6 (quoting Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC'Y 18, 19 (1940)). Interestingly, leaving room for plaintiffs to bring retaliation claims in cases with "weak probable cause" was a suggestion made by the *dissent* in *Hartman*. 547 U.S. at 267 (Ginsburg, J, dissenting). The fact that Gonzalez's arguments require this Court to backtrack on standards it has already considered and rejected illustrates just how far afield from precedent Gonzalez would have this Court go to allow her claim.

C. In addition, Gonzalez's claim is complicated by virtue of artful pleading—specifically, the degree of specificity with which she describes her conduct. With regard to similarly situated individuals, she says only that "in the ten years preceding her arrest, no one had ever been charged under the Texas government records law for temporarily misplacing a document." Pet'r Br. 3. According to Gonzalez, "the overwhelming majority of the 215 grand jury felony indictments obtained under the statute involved accusations of using or making fake government identification." *Id.*

She cannot show that individuals who tampered with or stole government documents were not arrested, so she describes her own crime as misplacing a government

petition, and thus entirely outside the universe of offenses typically prosecuted under section 37.10 of the Texas Penal Code. *See id.* Thus, in her view, she was arrested pursuant to "respondents' extraordinary and unprecedented interpretation" of Texas Penal Code section 37.10. *Id.* at 6. But many plaintiffs could describe their conduct with a sufficient degree of specificity to have their arrest seem based on a novel use of a state criminal statute, making the other individuals arrested under the statute incomparable to the plaintiff.

D. There is also nothing "extraordinary" or "unprecedented," *id.*, about using section 37.10 to address a circulator's garnering false signatures on government petitions. Section 37.10 prohibits tampering with government records. "A basic violation of that section is a misdemeanor, and misdemeanor arrest warrants are issued in Texas." *Johnson v. Norcross*, 565 Fed. App'x 287, 290 (5th Cir. 2014) (citing *Gordon v. State*, 801 S.W.2d 899, 915 (Tex. Crim. App. 1990)). Certain culpable intent converts a section 37.10 violation into a felony. *See* Tex. Penal Code § 37.10(c)(1). The statute covers a broad range of conduct, from security guards misreporting their hours at the Waco Housing Authority, *Johnson*, 565 Fed. App'x at 288, to law enforcement making a false statement in an arrest report, *see Tex. Dep't of Pub. Safety v. Caruana*, 363 S.W.3d 558, 561-62 (Tex. 2012). Thus, the conduct for which individuals have been arrested under section 37.10 also varies widely.

However, the Legislature surely had election-related misconduct in mind when it passed section 37.10: pursuant to subsection (c)(5), "[a]n offense under [section 37.10] is a Class B misdemeanor if the governmental record is an application for a place on the ballot." Tex. Penal Code § 37.10(c)(5). In other words, the offense of

falsifying political documents is expressly addressed in the statute. And Gonzalez does not contest that the petitions she took were the type of governmental records protected by section 37.10. *See* Pet.App.21a. The State has a strong interest in the authenticity of petitions purporting to represent the will of the voting public. *See Fishman v. Schaffer*, 429 U.S. 1325, 1330 (1976) (Marshall, J., in chambers). It is unsurprising, therefore, that in cases involving falsifying such documents, section 37.10 applies.

In fact, while Gonzalez refuses to look beyond 10 years in Bexar County in her search for similar arrests, *see* Pet'r Br. 11-12, this Court is not obligated to take such a limited view. In the City of San Juan, Texas, several individuals alleged to have included invalid signatures in petitions to recall four city commissioners were arrested under section 37.10 for tampering with governmental records. Brief of Defendants-Appellees, *Navarro v. City of San Juan*, 624 Fed. App'x 174 (5th Cir. 2015) (No. 14-41410), 2015 WL 3529980, at *27. The commissioners who were the subject of the recall petition noticed that "the petition contained signatures of friends and relatives, whom they believed would never knowingly sign such a document." *Navarro*, 624 Fed. App'x at 176. The city attorney hired a private investigator, who "interviewed sixty petition signers and obtained fifty-two affidavits indicating non-compliance with the city charter provisions." *Id.* at 177. Some signatories had not signed in the presence of the circulator of the petition, and others were "misled or misinformed" about the petition. *Id.* Indeed, some believed the petition was for a taco truck. *Id.* at 176. City officials sought help from law enforcement concerning the misconduct, leading to the arrest of the individuals seeking the recall, but a grand jury

failed to return an indictment, ending the prosecution. *Id.* at 177. Those individuals then brought suit alleging a violation of their Fourth Amendment rights due to the commissioners' alleged conspiracy to have them wrongfully arrested. *Id.* at 177-178. As in this case, however, the plaintiffs could not show there was no probable cause for their arrest, and their claims were dismissed. *See id.*

III. An Officer Should Not Be Penalized for Obtaining Judicial Approval Before an Arrest.

Gonzalez argues that Wright's obtaining a warrant for her arrest after his investigation of her entitles her to an exemption from *Nieves*. Pet'r Br. 30. In her view, her arrest was not the result of an "on-the-spot" decision by police officers, because it did not "arise within a single event," and it did not take place in a "time-pressured situation[]." *Id.* at 5. Thus, Gonzalez argues, "the universe of available evidence, other than state-of-mind evidence," is not so limited as when an officer is conducting an on-the-spot arrest. *Id.* (citing *Nieves*, 139 S. Ct. at 1724). Gonzalez argues that, because her arrest was predetermined pursuant to a warrant, *Nieves* and its no-probable-cause requirement should not apply. *Id.* at 5-6. Gonzales is wrong both on the law and on policy.

A. To start, although Gonzalez cites *Nieves* for the proposition that *more* evidence will be available when the arrest is planned, *Nieves* asserts only that "[o]fficers frequently must make 'split-second judgments' when deciding whether to arrest, and the content and manner of a suspect's speech may convey vital information." 139 S. Ct. at 1724. In other words, the significance of the "on-the-spot" nature of an arrest is that the officer's decision to arrest is based on the words that the plaintiff is communicating to or within the hearing of the officer. In *Nieves*, the Court observed that the potentially

protected speech may be the impetus for a legitimate arrest, which would complicate a jury's analysis as to whether the arrest was a reasonable or unreasonable response to the plaintiff's speech—thus, the importance of probable cause to ensure the arrest was reasonable. *See id.*

B. Moreover, it would be particularly odd to allow greater latitude for suit under the circumstances here than in *Nieves* because "[i]t is well settled that if facts supporting an arrest are placed before an independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation for false arrest, insulating the initiating party." *Wilson v. Stroman*, 33 F.4th 202, 208 (5th Cir.), *cert. denied sub nom. Reyna v. Wilson*, 143 S. Ct. 425 (2022); *see also Snider v. Lee*, 584 F.3d 193, 206 (4th Cir. 2009) (Stamp., J., concurring) ("A law enforcement officer who presents all relevant probable cause evidence to a prosecutor . . . is insulated from a malicious prosecution claim where such intermediary makes an independent decision[.]"); *Hector v. Watt*, 235 F.3d 154, 164 (3d Cir. 2000), *as amended* (Jan. 26, 2001) (Nygaard, J., concurring) (listing cases).

Because judges (state and federal) are presumed to act in good faith and in conformity with the Constitution, "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 v. Millender*, 565 U.S. 535, 546 (2012) (quoting *United States v. Leon*, 468 U.S. 897, 922-23 (1984)). And, if the officer acted in a good-faith belief that Gonzalez committed a crime, then it can hardly be said that her arrest was caused by retaliatory animus.

Of course, if a prosecutor or law enforcement determines to arrest an individual based on past criminal conduct and obtains a warrant, there may be sufficient time to find copious information separate from the content of any speech. But that ignores that sometimes the criminal act *is comprised* of spoken or written words. Under such circumstances, the sole evidence supporting the arrest may be the statements that the plaintiff made when he or she committed the crime justifying the arrest. *E.g.*, *Wayte v. United States,* 470 U.S. 598, 600-01 & n.2 (1985) (letters explaining refusal to register with Selective Service).

That is essentially what happened here: According to the complaint, a resident submitted a series of petitions spearheaded by Gonzalez to remove the current city manager. J.A.52. After one signatory alleged that she had been misled into signing, J.A.52, Gonzalez "intentionally conceal[ed] and remov[ed] the Petitions," J.A.50, which were in the Mayor's pile of belongings, placing them in her binder, then only reluctantly revealing their whereabouts when the Mayor and Police Chief happened to spot them there, J.A.50-51. Although no one arrested her during the meeting, the Mayor later sought to have her investigated and arrested for removing the petitions without consent. Pet.App.22a. She also alleges that her arrest was in retaliation for her "exercising her right to petition." Pet.App.49a. Thus, the speech and the criminal conduct—the petitions—are inextricably intertwined.

Under such circumstances, society *wants* a reasonable officer to seek "the approval of a neutral Magistrate, who issued the requested warrant." *Messerschmidt*, 565 U.S. at 554. It would be perverse to hold that a plaintiff must show the absence of probable cause in a warrantless arrest, *Nieves*, 139 S. Ct. at 1725, but withhold that

protection when an officer "t[akes] every step that could reasonably be expected of them,'" triggering the independent-intermediary exception, *Messerschmidt*, 565 U.S. at 554 (quoting *Massachusetts v. Sheppard*, 468 U.S. 981, 989 (1984)).

IV. This Court Should Not Abandon Common-Law Rules Regarding Causation.

Because Gonzalez could not show that there was no probable cause for her arrest, and she could not show that others engaging in the same criminal conduct had not been arrested, she argues that she should be able to bring other comparisons to bear. Pet'r Br. 6. The circumstances of this case, however, show why there is no justification for abandoning the test this Court has developed.

States are perfectly capable of addressing the concerns voiced by the dissenting and concurring justices in this Court's First Amendment retaliation precedents about government use of arrests to silence the public. For example, if law enforcement were deliberately using Texas Penal Code section 37.10 to justify an arrest based on conduct outside the approved scope of that statute—preventing plaintiffs from demonstrating different treatment of similarly situated individuals—the legislature could pass legislation clarifying the law's scope. *See Nieves*, 139 S. Ct. at 1729 (Thomas, J., concurring). But there is no support in "history, precedent, [or] sound policy" for changing *Nieves*'s exception from "narrow" to broad now. *Id.* at 1730.

A. Although *Nieves* is not very old, the common-law probable-cause requirement for malicious prosecution claims is. *See, e.g.*, *Wheeler v. Nesbitt*, 65 U.S. 544, 544-45 (1860) (requiring "want of probable cause" to prove malicious criminal prosecution). States have long relied

on probable cause to weed out malicious-prosecution-type claims. *Munns v. DeNemours*, 17 F. Cas. 993, 995 (C.C.D. Pa. 1811) (requiring a malicious prosecution charge be brought "maliciously," "without probable cause"); *see* 3 William Blackstone, *Commentaries* 127 (1768). Texas has since at least 1890. *See, e.g.*, *Shannon v. Jones*, 13 S.W. 477, 477 (Tex. 1890) (suit for malicious prosecution requiring probable cause). Thus, state and local police officers have been able to rely on the presence of probable cause to assure themselves of the legality of their actions. *Pierson v. Ray*, 386 U.S. 547, 555 (1967) ("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.").

"States have a strong interest in protecting public safety by taking into custody those persons who are reasonably suspected of having engaged in criminal activity, even where there has been no opportunity for a prior judicial determination of probable cause." *County of Riverside v. McLaughlin,* 500 U.S. 44, 52 (1991). Among its other purposes, a custodial arrest "ensures that a suspect appears to answer charges and does not continue a crime." *Virginia v. Moore*, 553 U.S. 164, 173 (2008). As this Court has noted time and again, judicially changing law enforcement civil liability will have tangible results for law enforcement, local governments, and the citizens those governments protect. *Camreta v. Greene*, 563 U.S. 692, 704 (2011). It is therefore essential that "the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44 (1971).

B. To the extent that parties such as Gonzalez seek to expand the *Nieves* exception or disregard the probable-cause requirement, this Court is right to be cautious. Litigation can lead to a myopic focus on one alleged wrongdoer—one police officer—rather than evaluating systemic reforms. That broader approach has been taken by Texas and other States and local governments, who have been experimenting with carrots and sticks to develop a police force that can accomplish its mission while upholding our most important values and interests. For example, San Antonio, where the events in this case took place, has a "cite-and-release program," which permits officers to cite rather than arrest individuals who committed certain misdemeanor offenses, resulting in a later hearing before a judge rather than a night in jail. Cite and Release Program 1st Quarter Report (July 1 to September 30, 2022) at 1, San Antonio Police Department (Dec. 06, 2022).[1]

States have also been far from silent in addressing concerns with how arrests may be misused. In 2021, Texas Governor Gregg Abbott approved a police reform bill that "raises training standards and creates a model curriculum for officers who train recruits," and "requires the release of termination and discipline records when officers apply at another department across the state or nation." Shaun Rabb, *Texas police reform bill signed into law by Gov. Abbott*, Fox4News.com (July 12, 2021).[2]

More and more often, legislators seek state and local solutions. *See, e.g.*, Tex. Gov't Code ch. 425 (originally H.B. 3858, 88th Leg., R.S. (2023)) (establishing mental

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[1] Available at https://www.sa.gov/files/assets/main/v/3/sapd/citerelease-quarterlyreport-1stqtr-202209.pdf.

[2] Available at https://www.fox4news.com/news/texas-police-reform-bill-signed-into-law-by-gov-abbott.

health wellness units within certain law enforcement agencies). This past June, Governor Abbott signed legislation expanding the Texas Commission on Law Enforcement's authority to set standards for law enforcement hiring, licensing, and oversight. David Barer, *TCOLE reform signed into law, expanding authority to set police standards*, KXAN Austin (June 19, 2023).[3] The law instructs the commission to (among other things) establish model policies for investigating alleged police misconduct; ensure that officers' personnel files provide descriptions of misconduct in which they were found to engage; develop a policy for examining their psychological and medical fitness for duty; and allow officers' emergency suspension for up to 90 days. *Id.* Such legislative responses aim at preventing the type of abuse alleged here *before* it happens—without constitutionalizing a cause of action that carries the potential for severe adverse results.

C. Those potential adverse results, combined with principles of *stare decisis*, counsel in favor of keeping the existing rule. Claims for retaliation ultimately turn on animus—why an officer took an otherwise lawful action. *See Hartman*, 547 U.S. at 259. Such questions of intent are "easy to allege and hard to disprove." *Crawford-El v. Britton*, 523 U.S. 574, 584–85 (1998). And this Court has long held in the Fourth Amendment context "that even-handed law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer" that might allow "even doubtful retaliatory arrest suits to proceed." *Nieves*, 139 S. Ct. at 1725. Although this case involves the First Amendment, not the

[3] Available at https://www.kxan.com/investigations/tcole-reform-signed-into-law-expanding-authority-to-set-police-standards.

Fourth, the importance of avoiding "'broad-ranging discovery,' in which 'there often is no clear end to the relevant evidence,'" "overwhelming litigation risks," and "years of litigation" is just as great. *Id.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 80, 817 (1982)).

Nearly any interaction with police involves some amount of protected speech, which means that "[a] plaintiff can turn practically any adverse action into grounds for a retaliation claim." *Egbert v. Boule*, 596 U.S. 482, 499 (2022). Under Gonzalez's rule, any means of expression—a car bumper sticker, for example—can be used to level a charge that the officer was not arresting the person because of what he did, but what he "said." And to the extent people take guidance from lawsuits, a person facing arrest is thus *incentivized* to use abusive and confrontational language with law enforcement. At worst, he faces the pre-determined outcome of an arrest. At best, he receives a handsome payout from the government and five minutes of fame. Such a state of affairs "would thus 'dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.'" *Nieves*, 139 S. Ct. at 1725 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Learned Hand, C.J.)).

And, "[b]ecause an official's state of mind is easy to allege and hard to disprove, insubstantial claims that turn on [retaliatory] intent may be less amenable to summary disposition." *Egbert*, 596 U.S. at 499 (quoting *Crawford-El*, 523 U.S. at 584–85). "Even a frivolous retaliation claim 'threaten[s] to set off broad-ranging discovery in which there is often no clear end to the relevant evidence.'" *Id.* (quoting *Nieves*, 139 S. Ct. at 1725). An officer cannot show his thoughts to prove that the arrest occurred because the outspoken arrestee broke the law,

not because of the insults hurled at the officer during the encounter. The more abusive the arrestee, the easier it would be for him to allege retaliation, and the more difficult it would be for even the very best officers to prove otherwise.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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