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 OF *AMICI CURIAE* TEXAS ASSOCIATION OF COUNTIES AND MAJOR COUNTY SHERIFFS OF AMERICA IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The Texas Association of Counties (TAC) is a Texas nonprofit corporation formed to improve and promote the value of county government statewide. 253 of 254 Texas counties are members of the TAC, and each county office is represented on the TAC's Board of Directors. This cooperative effort unites state leaders, including law-enforcement and correctional officials, helping them understand the operation and value of county government to serve Texans more effectively on the municipal scale.

The Major County Sheriffs of America (MCSA) is a professional law enforcement association of the 100+ largest Sheriff's Offices, representing counties or parishes of 500,000 population or more. MCSA is dedicated to preserving the highest integrity in law enforcement and the elected Office of Sheriff. The membership of MCSA represents more than 130 million citizens. It is a united, powerful voice of community leaders on issues of public concern through sense of urgency, communication, education, advocacy, and research.

Amici have a strong interest in this case because the rule Petitioner asks this Court to adopt would expose *amici* and their members to additional and unwarranted lawsuits. *Amici* thus urge the Court to affirm the decision below.

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In May 2019, officers sought a warrant to arrest city councilwoman Sylvia Gonzalez for allegedly stealing a government document from the Mayor at a public meeting. Detective Wright—the officer assigned to the case—investigated the matter, reviewed incriminating videotape, and found probable cause to believe that Gonzalez had violated Texas law. He then obtained a warrant for Gonzalez's arrest from a neutral magistrate, and after learning of the warrant, Gonzalez turned herself in.

In September 2020, Gonzalez sued the Mayor, Detective Wright, and other local officials, alleging they plotted her arrest in relation for exercising her First Amendment Right to free speech. The Fifth Circuit rejected her argument, holding that Gonzalez "fail[ed] to establish a violation of her constitutional rights," because the existence of probable cause bars her retaliatory arrest claim. App. 21a.; 26a.

Gonzalez contends that the common law supports her claim that probable cause should not bar her retaliation suit. It doesn't. She argues that the "closest analogy" to a First Amendment retaliatory arrest claim is abuse of process. *Nieves v. Bartlett*, 139 S. Ct. 1715, 1726 (2019); Pet. Br. 45. But this Court has never held that abuse of process is the proper analog. In fact, the Court has repeatedly recognized that malicious prosecution or false imprisonment are closer analogs. *Id.* Both those torts permit claims only in the absence of probable cause. *Id.* But even if the Court were writing on a blank slate, abuse of process would still be the wrong analog. Such claims at common law

dealt with extortion or misuse of procedural powers arising from a lawfully filed suit, not allegations of a wrongful arrest.

Moreover, the scheme Gonzalez asks this Court to adopt will harm law enforcement departments and divert important resources from already under-resourced local governments. Upending the probable cause rule and subjecting officers to liability despite the presence of probable cause or when a plaintiff offers a microcosm of "objective evidence" suggesting retaliation will over-deter and distract them from efficiently carrying out their duties. Gonzalez's approach will also increase costs to already under-resourced city and county governments. Those costs, in turn, will divert important public resources away from governance and toward frivolous litigation.

The Court should affirm.

ARGUMENT

I. The common law does not support Gonzalez's retaliation claim.

Probable cause "generally defeat[s] a First Amendment retaliatory arrest claim." *Nieves*, 139 S. Ct. at 1726. Petitioner Sylvia Gonzalez "does not dispute that probable cause existed to arrest her" here. Pet. App. 26a. The existence of probable cause therefore bars her claim unless it fits into one of two narrow exceptions: (1) the municipality had an official policy of retaliation, *see Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1951 (2018); or (2) the crime was a minor "endemic" offense (like jaywalking) that "rarely results in arrest," *Nieves*, 139 at 1727. Because her claim doesn't fit either exception, Gonzalez invokes the common law to argue that her retaliatory arrest suit

should proceed despite the presence of probable cause. *See* Pet. Br. 45-47.

The common law provides no such support. This Court has never held that abuse of process is analogous to First Amendment retaliatory arrest claims. In fact, the Court has already recognized that malicious prosecution or false imprisonment are closer analogs. *Nieves*, 139 S. Ct. at 1726. And those torts permit claims only in the absence of probable cause. *Id.* But even if the Court were writing on a blank slate, abuse of process would still be the wrong analog. Such claims at common law dealt with extortion or misuse of procedural powers arising from a lawfully filed suit, not allegations of a wrongful arrest. *See* Jeffrey J. Utermohle, *Look What They'e Done to My Tort, Ma: The Unfortunate Demise of Abuse of Process in Maryland*, 32 U. Balt. L. Rev. 1, 5-6 (2002) (explaining that the "long-established tort of abuse of process" encompasses "manipulat[ing] the tools of litigation" like threatening to "endlessly delay" an already proceeding lawsuit).

A. This Court has already rejected Gonzalez's abuse of process analogy.

This Court looks to the common law "[w]hen defining the contours of a claim under § 1983." *Nieves*, 139 S. Ct. at 1726. When Congress enacted section 1983, "there was no common law tort for retaliatory arrest based on protected speech." *Id.* Thus the Court turns to "the common law torts that provide the 'closest analogy' to the retaliatory arrest claim." *Id.*

Gonzalez contends the "closest" common law tort to her claim is "abuse of process." Pet. Br. 45. At com-

mon law, she argues, an abuse of process claim "allowed the plaintiff to proceed with the lawsuit without showing the absence of probable cause." *Id.*

This Court has already rejected that argument. In *Nieves*, the Court identified the two common law torts most analogous to a First Amendment retaliatory arrest claim as "false imprisonment or malicious prosecution." *Nieves*, 139 S. Ct. at 1726. In briefing, the United States expressly argued that abuse of process was not a potential analog to retaliatory arrests. *Nieves*, U.S. Br., 2018 WL 4105539, 10 n.2 ("A retaliatory-arrest claim is not analogous to the tort of abuse of process, which 'is concerned with the wrongful use of process after it has been issued,' whereas malicious prosecution concerns the wrongful initiation of criminal proceedings in the first instance."). And the Court did not even consider that comparison worth mentioning in its decision. Similarly, in *Hartman*, the Court considered the abuse of process analogy, but it imposed a no-probable-cause requirement in the retaliatory prosecution context. *Hartman v. Moore*, 547 U.S. 250, 258 (2006).

Gonzalez doesn't even attempt to square her analogy with these cases.

B. Even if this Court were writing on a blank slate, abuse of process is not the right common law analogue.

Sidestepping these cases, Gonzalez instead relies on a handful of state cases to argue abuse of process is analogous to her retaliatory arrest claim. Pet. Br. at 45-47. Yet she mischaracterizes and over-generalizes the nature of common law abuse of process. She asserts that abuse of process requires plaintiffs to show

only "oppression in the defendant's perverted use of legal process 'for some unlawful object.'" Pet. Br. 46-47 (quoting *Mayer v. Walter*, 64 Pa. 283, 285-286 (1870)). And she argues her claim fits this definition because officers sought to arrest her to "chill[] her ability to exercise her First Amendment rights." Pet. Br. 47; Pet App. 129a. But the common law does not support Gonzalez's argument.

At common law, abuse of process had two "necessary" elements: (1) "the existence of an ulterior purpose"; and (2) "an act in the use of the process not proper in the regular prosecution of the proceeding." *Priest v. Union Agency*, 125 S.W.2d 142, 144 (Tenn. 1939) (quoting Thomas M. Cooley, A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contracts at 355 (Chicago, Callaghan & Co. eds., 3d ed. 1906). But animus on its own was not enough. "Regular and legitimate use of process" even "with a bad intention," did not suffice. *Id.* "[M]ere arrest and detention under a lawful warrant, without any act amounting to misuse or oppression," did not qualify, because "[r]egular use of process cannot constitute abuse, even though the user was actuated by a wrongful motive, purpose, or intent." *Id.*

Instead, abuse of process occurred "when an adversary, through the malicious and unfounded use of some regular legal proceeding obtain[ed] some advantage over his opponents." Black's Law Dictionary 4th ed., at 25 (1968). This did not cover *any* allegedly malicious action but only "improper use or perversion of process *after it has been issued*." *Id.* (quoting *Publix Drug Co. v. Breyer Ice Cream Co.*, 32 A.2d 413, 415 (Pa. 1943)) (emphasis added). Put another way, abuse of process referred to "abuse in subsequent proceedings"

that perverted the process. *Jackson v. AT&T Co.*, 51 S.E. 1015, 1018 (N.C. 1905) (citation omitted); *see Heck v. Humphrey*, 512 U.S. 477, 486 n.5 (1994) (abuse of process is "some extortionate perversion of lawfully initiated process to illegitimate ends").

Based on this understanding, two primary types of abuse of process claims were permitted at common law. First were claims a party was prosecuted mainly "to extort payment of a debt." W. Page Keeton et al., Prosser and Keeton on the Law of Torts §121 (5th ed. 1984). Indeed, the paradigm abuse of process claim at common law involved extortion. *See e.g.*, *Grainger v. Hill*, 132 Eng. Rep. 769, 772 (1838). Second, abuse of process included claims "[w]hen litigants flagrantly misuse[d] the tools of litigation (e.g., motions, subpoenas, or discovery) for ulterior purposes." Utermohle, *supra*, at 1. Critical to liability in these cases was "an act after filing suit using legal process empowered by that suit to accomplish an end not within the purview of the suit." *Batten v. Abrams*, 626 P.2d 984, 990-91 (Wash. App. 1981). Because the critical component was an act *after* suing, "the bringing of a baseless lawsuit will not establish the act that is the essential element of abuse of process." *Id.*

That common law abuse of process allowed plaintiffs to proceed with their claims without showing the absence of probable cause makes sense. Because "abuse of process does not pertain to the filing of a groundless suit," but the misuse of litigation tools after the suit was initiated, there is limited probative value in knowing whether the suit itself was justified. Utermohle, *supra*, at 11. Yet while here the claim is that the arrest itself was wrongful, the existence of probable cause is always highly probative because it

"speaks to the objective reasonableness of an arrest." *Nieves*, 139 S. Ct. at 1724. In such a case, abuse of process is not an appropriate analog.

Here, Gonzalez claims that her arrest itself was an effort to "chill" her free speech. Pet. App. 129a; Pet. Br. 7-15. She does not claim that an officer or anyone else attempted to extort, coerce, or enact revenge on her once she was arrested. Nor does Gonzalez present any evidence that Respondents misused any "tools of litigation" after her arrest for improper ends. As such, Gonzalez would not have been able to bring an abuse of process claim at common law. Instead, she would be limited to wrongful arrest torts such as malicious prosecution where the admitted existence of probable cause would defeat her claim. *Nieves*, 139 S. Ct. at 1724-27.

Nor is this conclusion altered by the fact the investigation into Gonzalez's conduct took a "lawful but atypical" path. Pet. App. 22a. A complaint about a wrongful investigation is unlike abuse of process because it does not concern the wrongful use of powers or tools arising from a valid suit. Utermohle, *supra*, at 8-11. On its own, "[a]n allegation that a complaint was filed with an ulterior purpose" does not "plead a claim for abuse of process." Philip L. Gordon, *Defeating Abusive Claims and Counterclaims for Abuse of Process*, 30 Colo. L. 47, 48 (Mar. 2001). Yet that is all Gonzalez alleges. She does not allege that the investigators did anything illegal during their investigation or that the investigation itself was cover for an attempt to extort her. Instead, Gonzalez points to the use of a warrant and the lack of involvement by the district attorney. This simply does not amount to abuse of process under the common law.

Gonzalez's abuse of process analogy would also eviscerate the probable-cause bar. Plaintiffs in every retaliatory arrest case allege that government officials wanted to "compel" them "to do some act," Pet. Br. 47, *i.e.*, stop speaking. Those plaintiffs can always allege they have suffered reputational injuries or have lost faith in the criminal justice system. But if plaintiffs can hurdle the probable-cause bar by pleading bad intent, retaliatory arrest actions would be the rule, not the exception.

Finally, Gonzalez and her *amici* argue that upholding the decision below will result in officers freely engaging in retaliatory arrests to stifle protected First Amendment speech. If, as they contend, those undesirable consequences prove to be a real problem, then it is Congress's role to address it. *See, e.g., Hensen v. Santander Consumer USA Inc.*, 582 U.S. 79, 90 (2017) ("[T]hese are matters for Congress, not this Court, to resolve."). Congress can either change the cause of action or condition any future funding to local law enforcement programs on criteria that could include reporting requirements or restrictions designed to address any problems with retaliatory arrests. Congress has frequently "used its spending power to enact legislation to influence the activities of state and local law enforcement." Whitney Novak, *Congress and Law Enforcement Reform: Constitutional Authority*, Cong. Research Serv. (Feb. 15, 2023). And it has often made that funding "subject to various conditions that may further federal interests in regulating law enforcement activities." *Id.*

But this Court's limited role is to "look to 'common-law principles that were well settled at the time of [section 1983's] enactment.'" *Nieves*, 139 S. Ct. at

1726 (quoting *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997). And the common law does not support allowing Gonzalez to proceed with her retaliatory arrest claim here.

II. Gonzalez's proposed rule will harm law enforcement departments and the city and county governments that indemnify them.

A. The scheme Gonzalez asks this Court to adopt will harm law enforcement departments and divert important resources from already under-resourced local governments. As Respondents explain (at 24-25), Gonzalez maintains that probable cause "should defeat retaliatory-arrest claims only for 'on-the-spot' warrantless arrests." That distinction is contrived, since "nothing in [*Nieves*] cabins its holding to actions of officers in the line of duty." Pet. App. 30a n.6. Yet under Gonzalez's view, the probable-cause bar would not apply—even for on-the-spot arrests—if the plaintiff offers some "objective evidence" of retaliation. *See* Pet. Br. 30, 35-36. Thus retaliatory-arrest claims "where magistrates approved warrants, or for split-second arrests" where plaintiffs muster one iota of "objective evidence," "probable cause would become just another part of the evidentiary mix." Resp. Br. at 25. "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." *Id.*; *see* Pet. Br. 18-19, 23.

That new world would have significant consequences for law enforcement officers. Officers are "both symbols and outriders of our ordered society, and they literally risk their lives in an effort to preserve it." *Roberts v. Louisiana*, 431 U.S. 633, 647

(1977) (Blackmun, J., dissenting). They "conduct approximately 29,000 arrests every day—a dangerous task" that often "requires making quick decisions in 'circumstances that are tense, uncertain, and rapidly evolving.'" *Nieves*, 139 S. Ct. at 1725. Thus at common law and up to the present, the "consistent rule" has been that officers are generally "not liable" for arrests they "make based on probable cause." *Id.* at 1727. Upending that rule and subjecting law enforcement officers to liability despite the presence of probable cause or when a plaintiff offers a microcosm of "objective evidence" suggesting retaliation will over-deter and distract them from efficiently carrying out their duties.

This Court has long recognized that threats of personal liability against government officials performing job-related duties threaten the public good. From the start, the common law "recognized the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability." *Scheuer v. Rhodes*, 416 U.S. 232, 239 (1974). That immunity rested on two principles: "(1) the injustice … of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; [and] (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." *Id.* at 239-40. As Judge Learned Hand put it: "[T]o submit all officials ... to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Barr v. Mateo*, 360 U.S. 564, 571 (1959) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)). Police officers "should be free to exercise their

duties unembarrassed by the fear of" lawsuits "which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." *Id.*

Expanding liability for law enforcement—as Gonzalez proposes—threatens effective and efficient policing. Law enforcement interacts with civilians tens of millions of times each year. In 2020 alone, police interacted with 53.8 million U.S. residents. *See* Susannah N. Tapp & Elizabeth J. Davis, *Contact Between Police and the Public, 2020*, U.S. Dep't of Justice (Nov. 2022), perma.cc/RJW7-UTXC. Tens of thousands of those interactions involve arrests. *See Nieves*, 139 S. Ct. at 1725. In these interactions, officers must often make difficult decisions. Fearing the potential for liability, officers may "refrain from acting, may delay their actions, may become formalistic by seeking to 'build a record' with which subsequently to defend their actions, or may substitute 'safe' actions for riskier, but socially more desirable, actions." Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641, 652 (1987) (citation omitted); *see also* Jacob Foster, et al., *An Empirical Analysis of Depolicing Behavior,* Police Practice & Research, Vol. 25, No.1, at 55 (noting that "increasing litigation" is a "growing concern" for law enforcement). This kind of overthinking will both slow down policing, decrease officer safety, and harm those who need help.

B. Gonzalez's approach will also increase costs to already under-resourced city and county govern-

ments. Those costs, in turn, will divert important public resources away from governance and toward frivolous litigation.

Since most municipalities indemnify their officers for job-related actions, section 1983 suits can "absorb undue shares of public budgets." Eisenberg & Schwab, *supra*, at 650. These policies are often "needed to allay employees' 'fear of personal liability' for actions they may take in the line of duty [which may] 'tend to intimidate all employees, impede creativity and stifle initiative and decisive action.'" *Id.* at 652 n.59 (quoting Attorney General Ed Meese III). Those suits drain local government resources in three primary ways: (1) "cities spend inordinate amounts of money to satisfy judgments," (2) "cities must pay the prevailing plaintiff's legal fees," and (3) liability insurance premiums skyrocket. *Id.* at 650-51. Opening yet another avenue of liability—as Gonzalez's approach would do—will increase the already overwhelming costs that municipalities bear for section 1983 suits.

"Many" section 1983 suits are already "frivolous." *Newton v. Rumery*, 480 U.S. 386, 395 (1987). Retaliatory claims are no exception. Cases involved retaliatory motives are "'easy to allege and hard to disprove.'" *Nieves*, 139 S. Ct. at 1725. And because they involve a "subjective inquiry," *id.*, a plaintiff "can turn practically any adverse action into grounds for a retaliation claim." *Egbert v. Boule*, 142 S. Ct. 1793, 1807 (2022). Indeed, even "frivolous retaliation claim[s] 'threaten 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). As Respondents explain, 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." Resp. Br. at 28.

Yet "even when the risk of ultimate liability is negligible, the burden of defending such lawsuits is substantial." *Newton*, 480 U.S. at 395. Not only must officers and their departments each retain counsel, but "[p]reparation for trial, and the trial itself, [] require[s] the time and attention of the defendant officials, to the detriment of their public duties." *Id.* at 395-96. Litigation can last for years, even when it is ultimately meritless. "This diversion of officials from their normal duties and the inevitable expense of defending even unjust claims is distinctly not in the public interest." *Id.* at 396. Indeed, "protect[ing] public officials from the burdens of defending such unjust claims," "further[s] th[e] ... public interest." *Id.*

Current data on police-related lawsuits across the country confirms these likely adverse impacts. Section 1983 lawsuits have "exploded over the past 40 years." Philip M. Stinson Sr. & Steven L. Brewer Jr., *Federal Civil Rights Litigation Pursuant to 42 U.S.C. §1983 as a Correlate of Police Crime*, 30 Crim. Just. Pol'y Rev. 223, 227 (2019); *see also* United States Courts, *Over Two Decades, Civil Rights Cases Rise 27 Percent* (June 9, 2014), bit.ly/3CigWc9. They inundate the federal courts every year. *Id.* Although it is difficult to "accurately determine the extent of litigation against the police" due to lack of official statistics, "[r]ecent estimates suggest that approximately 30,000 police misconduct lawsuits are filed each year in state and federal courts against police officers, their employing agencies, and municipalities." Stinson & Brewer, *supra*, at 226.

And the cost to litigate or settle those suits is astonishing. Over the past ten years, Los Angeles alone has spent close to $330 million on police settlements. Amelia Thomson-DeVeaux, Laura Bronner & Damini Sharma, *Cities Spend Millions on Police Misconduct Every Year. Here's Why It's So Difficult to Hold Departments Accountable*, FiveThirtyEight (Feb. 22, 2021), 53eig.ht/3BcHni5. Legal fees alone can pose massive costs even when the officer prevails. Between 2004 and 2019, private police misconduct lawyers cost Chicago $213 million. Dan Hinkel, *A Hidden Cost of Chicago Police Misconduct: $213 Million to Private Lawyers Since 2004*, Chicago Tribune (Sep. 12, 2019), bit.ly/35nbnhe. Liability insurance, too, costs municipalities dearly. And they have faced skyrocketing premiums and decreased availability as section 1983 has expanded over time. Kenneth S. Abraham, *Police Liability Insurance After Repeal of Qualified Immunity, and Before*, Tort Trial & Ins. Prac. L.J. 31, 52 (2021). Thus, as new roads of civil liability open, law enforcement departments have access to fewer and fewer resources from the overburdened city and county governments that fund them.

CONCLUSION

For these reasons, the Court should affirm the decision below.

Respectfully submitted,

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