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

REPLY BRIEF FOR PETITIONER

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ARGUMENT IN REPLY

Respondents' dramatically different rendition of facts might lead one to think this case is poised for trial or here on summary judgment. But this case is here on a motion to dismiss. The two questions before this Court boil down to whether a court can consider Gonzalez's alleged evidence of retaliation at all. The Fifth Circuit panel majority believed it could not. This Court should reverse. Adopting respondents' novel position would upset *Nieves* by leaving in-the-field police officers most vulnerable to retaliatory-arrest claims. It would also conflict with the common law, which treated claims like those in *Nieves* differently from claims like Gonzalez's. And it would invite government officials to retaliate against their rivals with arrests, by giving them a blueprint for avoiding liability.

Because respondents take such liberties with the complaint, we begin by pointing out examples of their misleading statements and mischaracterizations of Gonzalez's position. Then, in Part II, we address the *Nieves* probable-cause rule. We first explain how Gonzalez's reading makes the rule easy to administer, honors *Nieves*'s reasoning, and tracks the common-law history of Section 1983. We then analyze respondents' alternate position, which conflicts with the reasoning of *Hartman* and *Nieves*, departs from the common law, and would leave the First Amendment wildly under-protected. Finally, in Part III, we discuss the *Nieves* carve-out.

I. Respondents and their amici misconstrue the complaint and misrepresent Gonzalez's position.

Respondents and their amici repeatedly fail to accept the complaint's factual allegations as true and in the light most favorable to Gonzalez. See *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170, 175-176 (2017). But this Court need not find facts at this motion-to-dismiss stage. So we clarify here only four points about the facts and Gonzalez's position.

1. To start, respondents suggest that Gonzalez conceded she was guilty of "stealing" (or "theft" of) a government document. Resp.Br. 2-5, 10-12, 15, 17, 23, 26, 30, 36-38, 45-47, 50-51. Not so. She has conceded only that there was probable cause to believe she "concealed and/or removed from being available" a government document (a nonbinding petition she championed). JA-53; Tex. Penal Code § 37.10(c)(1). The criminal statute requires only general intent—that is, intent to "place out of sight" or "change the location, position, station, or residence of" the document. O'Connor's Texas Criminal Offenses & Defenses, ch. 30C, § 2. It does not require knowledge of wrongdoing or specific intent to deprive anyone of the document. *Ibid.* So probable cause existed upon "a reasonable ground for belief" that Gonzalez meant to place the papers where she did, in her binder on the dais. *Maryland* v. *Pringle*, 540 U.S. 366, 371 (2003) (citation omitted).

As respondents' own amici acknowledge, probable cause is "not a high bar." Nat'l.Sheriffs'.Assn.Br. 12.

"[I]nnocent behavior frequently will provide the basis for" it. *Illinois* v. *Gates*, 462 U.S. 213, 243 n.13 (1983). Gonzalez maintains she is innocent, and the law presumes she is. The statute is broad enough for her innocent conduct to have supplied probable cause, which a judge found. Indeed, probable cause also existed to believe the mayor violated the same statute by taking the petition and keeping it in his personal possession overnight, between meetings. Pet.App. 108a ¶¶61-62, 110a ¶71; JA-45-46. See also Pet. App.53a, 60a (Oldham, J., dissenting) (observing that "government employees routinely—with intent and without it—take stacks of papers before, during, and after meetings," which would justify "dozens if not hundreds of arrests of officeholders and staffers during every single legislative biennium").

2. Next, respondents ignore Wright's late arrival to the investigation, implying that he was assigned from the get-go. Resp.Br. 5, 30. He wasn't. He was tapped in only after two active-duty officers—the on-scene officer and the officer originally assigned to investigate—declined to arrest Gonzalez. Pet.App.109a-113a. Wright's investigation uncovered no information the two active-duty officers lacked. See JA-43-53. Contra Ak.Br. 13.

3. Respondents also contend that Gonzalez "inexplicably did not use Bexar County's satellite booking process." Resp.Br. 12. But Gonzalez explained in her complaint that—by breaking normal practice, circumventing the district attorney—respondents kept the warrant out of the satellite-booking system, so she could not avoid jail. Pet.App.115a at ¶101 ("Because [Gonzalez's] warrant was not acquired through the

traditional channels, it was not discoverable through the satellite office's computer system, leaving Sylvia no option other than jail."); see also Pet.App.103a.[1]

4. Finally, Respondents misstate Gonzalez's position as "probable cause *never* bars retaliatory-arrest claims involving investigations or warrants." Resp.Br. 2, 23. This is wrong. As we explain below, under Gonzalez's reading of *Nieves*, probable cause will often bar retaliatory-arrest claims involving investigations and warrants. *Infra* Part II.A.1.

II. *Nieves*'s reasoning and the common law confirm that *Nieves* does not extend to Gonzalez's case.

Gonzalez maintains that *Nieves* neither considered nor imposed a universal probable-cause rule for all retaliatory uses of the arrest power; it considered the difficulties police officers confront when making on-the-spot arrests. See *Nieves* v. *Bartlett*, 139 S. Ct. 1715, 1724-1725 (2019) (observing that police officers "frequently must make 'split-second judgments' when

[1] Respondents also incorrectly state that Gonzalez "agreed" Wright's warrant application "was accurate." Resp.Br. 5. Gonzalez's counsel agreed only that Wright's application lacked material misrepresentations on which the magistrate relied in finding probable cause. C.A. Oral Arg. 27:56-28:22. And her complaint clearly disputes statements in the affidavit. See *Saunders* v. *Duke*, 766 F.3d 1262, 1270-1271 (11th Cir. 2014) (observing that when a plaintiff disputes the contents of a document attached to the complaint, the contents are not taken as true); *e.g.*, Pet.App.108a ¶56 (stating, contrary to the affidavit, that a certain resident did not sign the petition).

deciding whether to arrest," "in 'circumstances that are tense, uncertain, and rapidly evolving'").[2]

Respondents argue that Gonzalez's view makes *Nieves* inadministrable. Resp.Br. 27. They would instead expand the probable-cause rule to all retaliatory-arrest claims—against police officers, city secretaries, and conniving politicians alike, involving arrests in hasty circumstances or arrests contrived months after an alleged crime. Resp.Br. 19, 33. Respondents also argue, for the first time, that the probable-cause rule is absolute—not qualified—for all arrests made with a warrant. Resp.Br. 20.

As explained below, Gonzalez's view is easy to implement. It adheres to *Nieves*'s reasoning and common-law principles.

Respondents' position, by contrast, conflicts with the reasoning of *Hartman* and *Nieves*, departs from the common law, and would leave the First Amendment sorely under-protected.

A. Petitioner's view makes *Nieves* easily administrable, honors *Nieves*'s reasoning, and tracks the common law.

1. Gonzalez's reading of *Nieves* is easy to execute:

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[2] The realities of in-the-field policing also drove this Court's decisions in, for example, *New York* v. *Quarles*, 467 U.S. 649, 655-656 (1984) (creating an exception to the *Miranda*-warning requirement), and *County of Sacramento* v. *Lewis*, 523 U.S. 833, 853 (1998) (recognizing a more forgiving standard for in-the-field police officers in the Fourteenth Amendment context).

> *Nieves* applies when the defendant is a police officer who arrested the plaintiff on the spot—that is, within the first lawful encounter during which, or right after, the officer develops probable cause.

Two elaborations. First, well-settled Fourth Amendment standards mark the bounds of a lawful encounter. Cf. *Nieves*, 139 S. Ct. at 1724-1725, 1727. Police officers are familiar with and bound by these standards already: the encounter may be lawful because it is consensual or because it is a permissible investigatory detention. *Florida* v. *Royer*, 460 U.S. 491, 497 (1983); *Terry* v. *Ohio*, 392 U.S. 1 (1968). During this lawful encounter, an officer may obtain a warrant, call supervisors or others, consult fellow officers, or investigate the suspected crime. So long as the officer arrests the plaintiff before the lawful encounter ends, *Nieves* applies.

Second, a lawful encounter is "right after" the officer develops probable cause if the officer pursues a suspect without delay. This line is nothing new. For centuries the common law required officers conducting warrantless arrests for misdemeanors to do so on the spot after witnessing criminal activity. See Melville Bigelow, *Elements of the Law of Torts for the Use of Students* 160 (1891) ("At common law, no valid arrest without a warrant can be made for a misdemeanor, except on the spot."); 3 Francis Wharton, *Treatise on the Criminal Law of the United States* 4-5

(1874).[3] Modern state statutes impose a similar requirement. See *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 355-360 (2001) (Appendix) (citing statutes from all 50 states and D.C. permitting arrests for misdemeanors committed in an officer's presence). These rules, like *Nieves*'s probable-cause rule, give police officers leeway when conducting on-the-spot arrests.

Nieves illustrates its scope. Sergeant Nieves had two encounters with Russell Bartlett: one at 1:30 a.m., and another several minutes later. 139 S. Ct. at 1720. After the 1:30 interaction ended, Nieves saw Bartlett harassing another officer, supplying probable cause for a new crime of disorderly conduct. Nieves arrested Bartlett without delay. *Id.* at 1720-1721. So the arrest was on-the-spot.

With familiar standards defining on-the-spot arrests, respondents' questions are easy to answer:

- "What if officers call or text colleagues or lawyers for advice?" Resp.Br. 27.

  Nieves *applies if the arrest occurred before the lawful encounter ended.*

- Referring to Gonzalez's juxtaposition of police officers reacting to a crime and officers who go

[3] See also, *e.g.*, *Regina* v. *Walker*, 169 Eng. Rep. 759, 760 (1854) (holding apprehension unlawful where "the assault for which the prisoner might have been apprehended was committed at another time," two hours earlier, "and at another place" and "there was no continued pursuit"); *Wahl* v. *Walton*, 16 N.W. 397, 397 (Minn. 1883) (recognizing that the defendant officer "had no authority to arrest in the evening for a violation at noon").

back to the office and deliberate, "Is a Zoom call more office-like?" *Ibid.*

> *No, because a Zoom call can be made from the scene during a lawful encounter.*

- "What if officers deliberate in the car or at a coffee shop?" *Ibid.*

> Nieves *applies if the suspect remains lawfully detained or chooses not to leave and the arrest occurs before the encounter ends.*

- "What if tag-teaming officers each see only part of the crime?" *Ibid.*

> Nieves *applies if any officer arrested the plaintiff during a lawful encounter during which, or right after, the officer develops probable cause.*

Respondents thus incorrectly state Gonzalez's position as "probable cause *never* bars retaliatory-arrest claims involving investigations or warrants." Resp.Br. 2, 23. To the contrary, in Gonzalez's view, *Nieves*'s probable-cause rule applies to claims involving investigations, consultations, and warrants—so long as the investigation, consultation, warrant, and arrest occurred by the end of a lawful encounter. After all, phone-in and electronic warrant applications are now commonplace.[4]

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[4] See, *e.g.*, *Missouri* v. *McNeely*, 569 U.S. 141, 172-173 (2013) (Roberts, C.J., concurring in part) (observing that warrants can be issued quickly: "[j]udges have been known to issue warrants

As a result, Gonzalez's reading of *Nieves* does not "bizarrely incentivize" officers not to investigate, deliberate, and obtain a warrant before making an arrest.[5] Resp.Br. 16. No matter the scope of *Nieves*'s probable-cause rule, officers like Sergeant Nieves cannot escape the question, "Should I let this person go free or arrest them now?" In fact, in fast-developing, dangerous situations that police officers face—domestic-violence disputes, reckless driving, bar fights, rowdy parties—we often want officers to make on-the-spot arrests. And Gonzalez's position leaves in place powerful incentives to obtain a warrant when circumstances allow it: Warrants are presumptively valid and give rise to a presumption of probable cause, effectively shielding against Fourth Amendment claims. See, *e.g.*, *Johnson* v. *Myers*, 53 F.4th 1063, 1068 (7th Cir. 2022). And for retaliation claims, warrants both guard against initial disputes about whether the officer had probable cause and supply evidence of nonretaliatory motive.

2. Gonzalez's position honors *Nieves*'s reasoning. *Nieves* arose from a crowded, raucous event and a warrantless arrest—that is, an arrest without legal

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in as little as five minutes" while others "e-mail[] them back to officers in less than 15 minutes"); CloudGavel, *Electronic Warrant Service Advertisement*, https://perma.cc/T3A6-KB6H; Justin H. Smith, *Press One for Warrant: Reinventing the Fourth Amendment's Search Warrant Requirement Through Electronic Procedures*, 55 Vand. L. Rev. 1591, 1616 (2002).

[5] The Court rejected a similar "perverse incentives" argument in *Thompson* v. *Clark*, 596 U.S. 36 (2022), where prosecutors argued that without an "indications of innocence" requirement prosecutors would be incentivized to prosecute cases they otherwise would have dismissed. N.Y.Dist.Atty.Assn.Br. 25-26, No. 20-659.

process—by a patrolling officer. 139 S. Ct. at 1720. The Court was explicitly concerned with officers who "frequently must make 'split-second judgments' when deciding whether to arrest."[6] *Id.* at 1724. In those situations, officers' motives are often complicated, opaque, and difficult to discern—making probable cause especially salient in evaluating whether the officer retaliated for protected speech. See *New York* v. *Quarles*, 467 U.S. 649, 656 (1984) (observing that in-the-field officers "act out of a host of different, instinctive, and largely unverifiable motives—their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence"). This concern does not apply to all government officials, much less those who (like respondents) do not arrest people but have people arrested. See Pet.App.54a (Oldham, J., dissenting).

If the facts and reasoning of *Nieves* weren't enough to confirm its limits, the Court's articulation of the carve-out does. Crafting a carve-out only for "arresting officer[s]" whose conduct is generally reviewed "under objective standards of reasonableness" makes little sense if the rule applies to all government officials, as respondents contend. *Nieves*, 139 S. Ct. at 1725. That would leave arresting officers—whom the

[6] See also *Nieves* v. *Bartlett*, Opinion Announcement (May 28, 2019), https://apps.oyez.org/player/#/roberts10/opinion_announcement_audio/24865 (stating that the Court "agreed to hear th[e] case to decide whether a person can sue *a police officer* for a First Amendment retaliatory arrest when *the arresting officer* had probable cause to believe the person *was committing* a crime" (emphasis added)).

probable-cause rule was designed to protect—more exposed to liability than all other government officers.

3. Gonzalez's position also tracks the common-law history of Section 1983. The common law treated claims arising from on-the-spot arrests (like those in *Nieves*) differently from claims arising from the use of a warrant to arrest a person for an unlawful purpose (like Gonzalez's claims). The first category was false imprisonment. The second category was abuse of process.

Respondents and their amici disregard the arrest-focused origins of the abuse-of-process tort and contend that Gonzalez's position would wreak havoc on governments, law enforcement, elected officials, and the public. See, *e.g.*, Tex.Cntys.Br. 6-8, 10. But abuse of process emerged in large part from courts' concern with "abuse[s] made of the power to arrest."[7] *Savage* v. *Brewer*, 16 Pick. 453, 456 (Mass. 1835). And since the tort emerged by the early nineteenth century, there is no evidence it wreaked havoc on any segment of society.

Respondents and their amici get it backwards when they assert that "[a]buse of process is a poor fit for retaliatory-arrest claims, which target the initial arrest, not ensuing process." Resp.Br. 32; Tex.Cntys.Br. 8. To be sure, the claims in *Nieves* targeted an arrest preceding legal process. But the

[7] In recent decades, the danger that the arrest power will be abused has risen with the proliferation of criminal laws. *Nieves*, 139 S. Ct. at 1730 (Gorsuch, J., concurring).

opposite is true here; legal process (a warrant) preceded Gonzalez's arrest.

We agree with respondents and the United States to the extent they assert that false imprisonment is the most analogous common-law tort to the claims in *Nieves*. That is because the warrantless arrest in *Nieves* was a "detention without legal process," not alleged "*wrongful institution* of legal process" (malicious prosecution), 139 S. Ct. at 1726, or some "perversion of lawfully initiated process to illegitimate ends" (abuse of process), *Heck* v. *Humphrey*, 512 U.S. 477, 486 n.5 (1994). Again, no legal process had begun when the officer arrested Bartlett. See *Wallace* v. *Kato*, 549 U.S. 384, 389-390 (2007) (a magistrate's finding of probable cause or arraignment on charges is the start of legal process); *Manuel* v. *Joliet*, 580 U.S. 357, 359 (2017).

At common law, abuse of process was unavailable to plaintiffs like Bartlett, who sued based on their on-the-spot arrests. As the tort's name suggests, abuse of process required legal process and its abuse. Officers conducting arrests on-the-spot—that is, by "spontaneous" and "prompt action"—had to do so without legal process. Thomas M. Cooley, *Law of Torts* 174-176 (1879); *Carroll* v. *United States*, 267 U.S. 132, 157 (1925). Today's fast-issuing warrants were unheard of then.

While abuse of process is an improper analogy for Bartlett's claims, it is the proper analogy for Gonzalez's. As one treatise explained: "[w]hoever makes use of the process of the court for some private purpose of his own, not warranted by the exigency of the writ or

the order of the court, is amenable to an action for damages for an abuse of the process of the court." C.G. Addison, 1 *Wrongs and their Remedies, Being a Treatise on the Law of Torts* 601 (3d ed. 1870). Put another way, abuse of process lay in lawful process "willfully abused to accomplish some unlawful purpose." Cooley, at 190. The key was that lawful process was intentionally and actually put to an improper use. See Martin L. Newell, *A Treatise on the Law of Malicious Prosecution, False Imprisonment, and the Abuse of Legal Process* 7 (1892) ("An abuse of legal process is where the party employs it for some unlawful object, not for the purpose which it is intended by law to effect; in other words, it is a perversion of it.").

This fits Gonzalez's claim perfectly. She alleges that respondents willfully and actually used legal process for improper purposes—to punish Gonzalez for petitioning against the city manager, to coerce or force her out of her seat on the city council, and to silence her.[8] Addison, at 601. The resemblance to common-law abuse-of-process cases is easy to see and hard to miss.

For example, in *Smith* v. *Weeks*, 18 N.W. 778 (Wis. 1884), an officer willfully executed a writ of attachment in a way that subjected a locomotive engineer to

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[8] This is also why malicious prosecution is not the best analogy for Gonzalez's claims. Malicious prosecution is the "*wrongful institution* of legal process," *Nieves*, 139 S. Ct. at 1726. Gonzalez concedes that the legal process was proper because the warrant was supported by probable cause. But that concession accepts today's version of probable cause; Gonzalez may have had a claim under the more rigorous common-law probable-cause standard. See Nat'l.Pol.Accountability.Proj.Br. 14-16.

oppressive jail time. The officer saw the engineer twice during the day but did not execute the writ either time. He instead waited until 9 p.m., when the engineer's locomotive was dangerous and it was too late in the day to seek bail. So the engineer spent a frigid night in an unsanitary, cold cell. He sued, and the court concluded that even if the writ had been valid, the engineer presented a strong case of abuse of process, the officer having fixed upon the very time that was "most dangerous to the public and most oppressive to the plaintiff" to arrest him. *Id.* at 784. Cf. *Rogers* v. *Brewster*, 5 Johns. 125 (N.Y. 1809).

In another case, a crew chief oversaw a team putting up telephone poles. *Jackson* v. *American Tel. & Tel. Co.*, 51 S.E. 1015 (N.C. 1905). He wanted to place poles on the plaintiff's property, but the plaintiff denied his permission. To get the plaintiff out of the way, the crew chief "caused a warrant to be issued by a magistrate for his arrest" for an alleged assault with a weapon. *Id.* at 1016. The crew chief persuaded a police officer to execute the warrant that day, so the team could set up poles while the plaintiff was in jail that night, which they did. The landowner sued, and the court held that he advanced a valid abuse-of-process claim even if probable cause supported the warrant. *Id.* at 1018. That is because the crew chief willfully used the warrant to do something the warrant wasn't meant for—removing the plaintiff as an obstacle to placing poles on his property.

And in the seminal case of *Grainger* v. *Hill*, 132 Eng. Rep. 769 (1838), the captain of a ship mortgaged it for a loan. The creditors worried that the ship was insufficient security for the loan and wanted the

ship's register but had no right to it. The creditors applied for and received a writ based on the captain's debt, accompanied officers to execute the writ, and told the officers their true goal. An officer told the captain that he would be detained unless he handed over the register or procured bail. The captain gave up the register and later sued the creditors. The court held that the plaintiff presented a valid abuse-of-process claim without alleging the lack of probable cause, reasoning that "the declaration and proof must be according to the particular circumstances" of the case. *Id.* at 773 (Park, J.); *id.* at 774 (Bosanquet, J.).

As these cases illustrate, when legal process was intentionally used to subject a person to unordinary oppression or vexation (*Smith*), or to remove them as an obstacle (*Jackson*), or to coerce them to do something outside the proceeding (*Grainger*), the "ulterior motive" and "improper use" requirements of abuse of process were met.

That is the case here. As in *Smith*, respondents used the legal process at their disposal in a particularly oppressive, vexing way. Normally, a person accused of a nonviolent crime would have been issued a summons or processed through the satellite-booking system, not spend time in jail. Pet.App.103a, ¶26. But respondents sought a warrant instead of a summons. And after the warrant was issued, respondents kept it out of the satellite-booking computer system, guaranteeing that Gonzalez would go to jail. *Ibid.* As in *Jackson*, they used a warrant, after it was issued, to remove Gonzalez from the place where she impeded their personal goals—her council seat. Pet.App.111a-119a. And as in *Grainger*, they leveraged legal

process, after it was issued, to coerce or force Gonzalez to do things outside the process: leave her seat and shut her mouth. Pet.App.123a-124a ¶135.

B. Respondents' novel rule conflicts with *Hartman*, flips *Nieves* on its head, departs from the common law, and leaves First Amendment rights under-protected.

Respondents assert a novel rule adopted by exactly zero circuits, including the Fifth Circuit below. Respondents urge that a warrant imposes an absolute probable-cause bar on every retaliatory-arrest claim. Resp.Br. 20. They suggest that because warrants involve multiple actors, *Hartman*'s absolute probable-cause bar should apply whenever a warrant is issued. Resp.Br. 22-23. This argument conflicts with *Hartman*, *Nieves*, and the common law. And it leaves the First Amendment under-protected.

1. *Hartman* reiterated the simple test for but-for causation: "[C]hange one thing at a time and see if the outcome changes." *Bostock* v. *Clayton County*, 590 U.S. 644, 656 (2020); see *Hartman* v. *Moore*, 547 U.S. 250, 262 (2006). Applying this rule to a prosecutorial-inducement claim, the question is whether the prosecutor "br[ought] charges that would not have been initiated without [the defendant's] urging." *Hartman*, 547 U.S. at 262. We assume the answer is "no" when probable cause supports the charges. That is because prosecutors may initiate charges on their own, and courts do not inquire into prosecutors' "high order" executive decisions to bring charges; those decisions

instead carry a presumption of regularity when supported by probable cause. *Id.* at 263.[9]

The same but-for test applies here: "Without respondents' retaliatory motive, would Gonzalez still have been arrested?" The answer is a clear "no." Without respondents' retaliatory motive,

- Wright would not have been assigned to investigate after two officers declined to arrest Gonzalez. So nobody would have applied for an arrest warrant, and the judge would not have issued a warrant on her own.[10] Pet.App.113a-114a.

- Wright would not have applied for an arrest warrant instead of a summons (summonses being the usual practice for nonviolent crimes). Pet.App.114a.

- Wright would not have circumvented the district attorney, walking the warrant application to the judge. Going through the district attorney is the usual practice and would have made the warrant discoverable in Bexar County's

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[9] See also *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996); *Wayte* v. *United States*, 470 U.S. 598, 607-608 (1985); *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999).

[10] Magistrates in Texas may issue warrants in only three circumstances: (1) when an offender commits a felony or breach of the peace within the magistrate's view; (2) when another person makes an oath, before the magistrate, that a person has committed a crime; and (3) when a state statute otherwise specifies. Tex. Code Crim. Proc. art. 14.02, 15.03.

satellite-booking system, allowing Gonzalez to avoid arrest and jail. Pet.App.114a-115a.

- After the warrant was issued, Wright would not have kept it out of the satellite-booking system. Pet.App.115a.

Because Gonzalez's claims pass the but-for causation test that *Hartman* applied, respondents urge this court to "apply[] *Hartman*'s rule * * * at the expense of *Hartman*'s logic." *Nieves*, 139 S. Ct. at 1727.

2. Respondents' rule also conflicts with *Nieves*, which gave special protection to in-the-field police officers making "quick decisions in 'circumstances that are tense, uncertain, and rapidly evolving.'" 139 S. Ct. at 1725 (quoting *Graham* v. *Connor*, 490 U.S. 386, 397 (1989)). Perversely, respondents' rule would leave those police officers, alone, vulnerable to retaliation claims involving arrests. All other officials causing a person's arrest would be absolutely shielded by a warrant. But police officers arresting people without a warrant may be sued through the *Nieves* carve-out.

3. Respondents' rule departs from the common law. Respondents would use a one-size-fits-all approach to common-law analogies. They reason that because this Court observed false imprisonment and malicious prosecution as potential analogies in *Nieves*, those two torts are the only viable analogs for all retaliatory-arrest claims. But this Court looks to common-law principles that were well-established by 1871. *Imbler* v. *Pachtman*, 424 U.S. 409, 418 (1976). And by 1871, it was well-established that the torts of false imprisonment, malicious prosecution, and abuse

of process were distinct. The common law did not treat all claims arising from an arrest the same. Nor did it impose an absolute probable-cause bar on claims arising from arrests under a warrant. See *supra* Part II.A.3. Respondents and the United States ignore these common-law distinctions, which track the differences between the claims in *Nieves* and those here. See Resp.Br. 31-33; U.S.Br. 28-31. But see U.S.Br. 25, *Chiaverini* v. *City of Napoleon*, No. 23-50 (arguing against an assumption that the same common-law analogy applies to all the petitioner's distinct Fourth Amendment claims under Section 1983).

4. Finally, respondents' position leaves the First Amendment woefully under-protected. Returning to first principles, state government officials violate the First Amendment when they arrest a person in retaliation for protected expression. *Nieves*, 139 S. Ct. at 1722. Probable cause neither prevents nor purifies the violation. *Ibid.*; *id.* at 1730 (Gorsuch, J., concurring). Not even an arrestee's guilt of a crime cleanses a retaliatory arrest of unconstitutionality. See *id.* at 1727. Nor does the text of Section 1983 make liability turn on the presence or absence of probable cause, much less guilt of some crime. See 42 U.S.C. 1983. Indeed, Section 1983 says nothing about probable cause or defenses to liability. And the only way to read Section 1983 "in harmony" with general common-law principles that existed in 1871 is to treat claims like Bartlett's (false imprisonment) differently from claims like Gonzalez's (abuse of process). *Imbler*, 424 U.S. at 418.

If a warrant bars all retaliatory-arrest claims, as respondents contend, then government officers with

an ounce of strategy may easily arrange their opponents' arrests and avoid liability. After all, the law books are filled with crimes for which "noncriminal acts, taken altogether" supply probable cause. *United States* v. *Rees*, 957 F.3d 761, 769 (7th Cir. 2020); see Pet.Br. 47-51.[11]

III. The *Nieves* carve-out may be satisfied with various forms of objective evidence.

Like with their factual contentions, respondents vigorously argue that Gonzalez's alleged objective evidence of retaliation is unpersuasive. Resp.Br. 43-49. But this Court need not decide the strength of that evidence. Judge Oldham found it compelling below, Pet.App.59a-61a, and the panel majority stated that they "may well agree with [him]" if they didn't feel "bound" to hold Gonzalez's evidence legally irrelevant. Pet.App.33a. But the circuit split is over

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[11] Respondents and some amici argue that other safeguards protect First Amendment rights, making a remedy under Section 1983 unnecessary. See Resp.Br. 51; Ak.Br. 28-33; LocalGov't.L.Ctr.Br. 19-24. This Court rejected similar arguments in *Lozman* v. *City of Riviera Beach*, 585 U.S. 87 (2018). See, *e.g.*, U.S.Br. 26-30, *Nieves*, 139 S. Ct. 1715. And for good reason. In *Monroe* v. *Pape*, 365 U.S. 167 (1961), this Court "rejected the view" that Section 1983 "does not reach abuses of state authority that are forbidden by the State's statute or Constitution or are torts under the State's common law." *Zinermon* v. *Burch*, 494 U.S. 113, 124 (1990). See generally *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 523 (1989) (Scalia, J., concurring in judgment) (observing the danger of oppression from political factions in small, rather than large, political units). So although alternate remedies affect the availability of recovery when no statutory cause of action exists, see, *e.g.*, *Egbert* v. *Boule*, 596 U.S. 482, 497 (2022), Section 1983's text and history insist on the opposite here.

whether objective evidence of retaliation other than examples of non-arrests may be evaluated at all. Compare *Lund* v. *City of Rockford*, 956 F.3d 938, 945 (7th Cir. 2020), with Pet.App.29a.

Like Judge Oldham, Gonzalez maintains that the lower courts should not be categorically forbidden from considering her objective evidence, which includes:

- Data showing that Gonzalez is the only person in Bexar County in the past decade to be arrested for allegedly concealing a government document for a few minutes. Pet.App.117a, 128a ¶145.

- Wright departed from normal practice, bypassing the district attorney and walking a warrant application straight to a judge, ensuring the warrant would not be entered into the satellite-booking system and that Gonzalez would be jailed—unlike similarly situated individuals. Pet.App.114a-115a ¶¶100-101, Pet.App.128a ¶145.

- Two police officers declined to arrest Gonzalez—the on-the-scene officer and the officer originally assigned to investigate. Pet.App.109a-110a, 112a-113a. Gonzalez was jailed only after Wright was called in to fashion her arrest, without any new evidence. Pet.App.103a ¶26, 113a-114a; JA-43-53.

- Respondents' ulterior goal to remove Gonzalez from the council was outlined in the local

newsletter by respondents' ally, which makes sense only if respondents plotted her removal. Pet.App.111a; JA-27-28.

- Respondents' admission in Wright's affidavit that Gonzalez's speech was a reason they sought a warrant, even though her speech was not part of the alleged criminal conduct. Pet.App.115a-116a; JA-44, -52.

This evidence easily rebuts any probable-cause-based presumption that Gonzalez would have been arrested without respondents' retaliatory motive.

The panel majority's narrow view of acceptable objective evidence of retaliation is practically unworkable. It requires plaintiffs to identify someone who violated the same statute in the same way and was not arrested. Pet.App.28a-30a. This standard bars claims by jaywalkers that *Nieves* anticipated passing through the carve-out. Pet.App.12a (Ho, J., dissenting from denial of reh'g en banc); Pet.App.53a (Oldham, J., dissenting). After all, if a jaywalker cannot identify someone who jaywalked at the same place, under the same weather and traffic conditions, and in front of a police officer from the same police department, he would fail under the Fifth Circuit's rule.

Respondents argue for a similarly narrow view—that only comparator evidence can satisfy the carve-out and only people who "committed analogous conduct" are proper comparators. Resp.Br. 39.[12] But

[12] At the same time, though, respondents contend that Gonzalez's conduct was akin to all other conduct resulting in arrests under the same statute for the past decade. Resp.Br. 44-45. That

respondents would narrow the carve-out even further, limiting it to "endemic," "minor crimes." Resp.Br. 35-36. This limit is needed, they say, to prevent discovery and trials on claims arising from arrests for murder, rape, and the like. *Ibid.* But respondents solve a non-existent problem. The objective-evidence requirement already weeds out claims arising from arrests for murder, rape, and similar crimes. The more serious the crime, the harder it is for a plaintiff to show that officers decline to arrest for the same or similar conduct without protected speech. *Nieves*, 139 S. Ct. at 1727. Limiting the carve-out to minor, endemic crimes also disfavors on-the-beat officers—who alone make warrantless arrests for minor, endemic crimes.

The endemic-minor-crime line that respondents would draw is also manipulable and hard to pin down—because it depends on a freewheeling characterization of a crime's seriousness. One man's "jaywalking" is another man's "intentionally impeding a public roadway with disregard for death or serious bodily injury." Respondents demonstrate this, (mis)characterizing Gonzalez's conduct as "stealing

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cannot be right. The statute covers a wide range of conduct. See *Alfaro-Jimenez* v. *State*, 577 S.W.3d 240, 244 (Tex. Crim. App. 2019) (acknowledging that the statute is "complicated, covering a multitude of potential harms," creating "offenses ranging from a Class A misdemeanor to a second-degree felony"). And if respondents were right, then whether Gonzalez's evidence is relevant turns arbitrarily on how many subsections the criminal statute is divided into. Had Texas defined as separate crimes (in separate statutes) falsifying a government ID, misuse of financial information, hiding evidence of murder, cheating on a government-issued exam, and concealing a government document, Gonzalez's data would show that nobody in the past decade was arrested under the same statute as her.

government records," while apparently finding no theft in the mayor keeping the same documents overnight. Resp.Br. 4; see *supra* Part I.1.

Another problem with the Fifth Circuit's and respondents' positions is that they disregard the differences between the Equal Protection Clause and the First Amendment. The Equal Protection Clause directs that "all persons similarly situated should be treated alike." *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The First Amendment, by contrast, prohibits retaliatory arrests—regardless of probable cause, guilt, or how other people are treated.[13] *Nieves*, 139 S. Ct. at 1722. In the First Amendment context, examples of "similarly situated individuals" are helpful proxies for whether a plaintiff would have been treated more favorably absent the protected expression. *Id.* at 1727. But other objective evidence can be powerful, too. Take the city councilmember's statements in *Lozman* v. *City of Riviera Beach*, 585 U.S. 87, 91, 101 (2018). Or recorded statements of a bureaucrat admitting how he plotted and ensured his rival's arrest. Indeed, not even *United States* v. *Armstrong*, which this Court cited when crafting the *Nieves* carve-out, precludes use of "direct admissions" in the Equal Protection context. 517 U.S. 456, 469 n.3 (1996). And the analogy to *Armstong* goes

[13] Stated differently, the Equal Protection Clause asks whether similarly situated people have been treated differently; the First Amendment asks whether the hypothetical former self—who was not only similarly but identically situated to the plaintiff—would have been treated differently without the defendants' retaliatory motive.

only so far, given its different legal and procedural context. See U.S.Br. 24-26.

This Court should reverse the Fifth Circuit's decision that it could not consider Gonzalez's alleged objective evidence of retaliation. On remand, the court may consider in the first instance whether, with those allegations, Gonzalez has plausibly alleged that retaliation was the but-for cause of her arrest.

This Court should also reject respondents' proposed rules, which would serve as an instruction manual for officials to retaliate against individuals by causing their arrests and avoiding liability under Section 1983.

CONCLUSION

For these reasons, and those in Gonzalez's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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