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; JOHN SIEMENS, CHIEF OF THE CASTLE HILLS POLICE DEPARTMENT, SUED IN HIS INDIVIDUAL CAPACITY; ALEXANDER WRIGHT, SUED IN HIS INDIVIDUAL CAPACITY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE LAW ENFORCEMENT ACTION PARTNERSHIP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

The Law Enforcement Action Partnership ("LEAP") is a nonprofit organization whose members include police, prosecutors, judges, corrections officials, and other law enforcement officials advocating for criminal justice and drug policy reforms that will make our communities safer and more just. Founded by five police officers in 2002 with a sole focus on drug policy, today LEAP's speakers bureau numbers more than 300 criminal justice professionals advising on police-community relations, incarceration, harm reduction, drug policy, and global issues. Through speaking engagements, media appearances, testimony, and support of allied efforts, LEAP reaches audiences across a wide spectrum of affiliations and beliefs, calling for more practical and ethical policies from a public safety perspective.

This case presents an important opportunity to ensure that those who abuse their official power to orchestrate premeditated retaliatory arrests are held accountable. That accountability is essential to maintaining the integrity of law enforcement, building trust in the police, and ultimately keeping the public safe. LEAP and its members thus have an interest in ensuring that the courts leave open avenues to provide relief to victims of official misconduct and that courts protect such victims against retaliation for exercising their constitutional rights.

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus* or its counsel made a monetary contribution to this brief 's preparation.

INTRODUCTION AND SUMMARY OF ARGUMENT

Sylvia Gonzalez was a dedicated city councilwoman who made the wrong enemies: her city's mayor and its police chief. She tried to root out government corruption and cronyism; they tried to punish her for it. Together, the mayor and police chief devised a plan to arrest her and send her to jail on a ginned-up misdemeanor charge of tampering with records. Even though the retaliatory intent behind their actions was apparent, the Fifth Circuit held that Gonzalez could not establish a First Amendment retaliation claim because there was probable cause to arrest her. Nothing in this Court's precedents compels that erroneous result, which would allow corrupt officials to use the power of arrest to punish constitutionally protected speech and conduct with impunity.

In *Nieves v. Bartlett*, this Court held that a First Amendment retaliatory-arrest claim may not lie against a police officer who has probable cause to make an arrest under circumstances that require "split-second judgments." 139 S. Ct. 1715, 1724 (2019) (citation omitted). Under those limited circumstances, "the content and manner of a suspect's speech may convey vital information—for example, if he is 'ready to cooperate' or rather 'present[s] a continuing threat,'" and an officer's reliance on that information can confound a court's ability to determine whether the arrest was made in retaliation against First Amendment activity.[2] *Ibid.* (citation omitted).

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[2] *Nieves* recognized a "narrow qualification" to its requirement that a retaliatory-arrest plaintiff show the absence of probable cause "for circumstances where officers have probable cause to

But this Court has never held that probable cause defeats a First Amendment retaliation claim when, far from making split-second judgments, government officials act under a plainly "premeditated plan to intimidate [a plaintiff] in retaliation for [her] criticisms of city officials." *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1954 (2018). To the contrary, this Court made clear in *Lozman* that such "retaliatory-arrest plaintiffs *can* prevail even when their arrests are supported by probable cause." Pet. App. 63a (Oldham, J., dissenting).

Here, despite a months-long campaign by respondents to gin up an excuse to arrest Gonzalez and send her to jail in response to her efforts to remove a poorly performing city manager, the Fifth Circuit held that Gonzalez's First Amendment retaliation claim could not proceed because she could not show the absence of probable cause for her arrest. *See* Pet. App. 21a. That conclusion is supported neither by this Court's precedents nor by the doctrinal and practical considerations underpinning the *Nieves* no-probable-cause rule. Outside of the context of split-second arrests made by police officers in the face of potential danger, the ordinary rule applies: "[I]f the First Amendment clearly establishes anything, it's that the government cannot arrest a citizen for her petition"—or for any other activity protected by the First Amendment. *Id.* at 61a (Oldham, J., dissenting). Here, at

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make arrests, but typically exercise their discretion not to do so." 139 S. Ct. at 1727. *Amicus* agrees with Gonzalez that a plaintiff may meet this exception by adducing any relevant objective evidence, not merely comparator evidence of other similarly situated individuals who were not arrested while engaging in similar conduct but not the same sort of protected speech. But *amicus* focuses on the second, equally important question presented here: whether *Nieves* applies to this case at all.

every step of the way, respondents flouted norms and abused legal loopholes to ensure that Gonzalez would pay the price for exercising her First Amendment rights. Because this case presents none of the "thorny causation issue[s]" that justify the *Nieves* rule, "probable cause alone" should not have barred Gonzalez's claim. *Novak v. City of Parma*, 932 F.3d 421, 431 (6th Cir. 2019) (Thapar, J.).

First principles confirm that the Fifth Circuit improperly extended the *Nieves* rule. This Court has construed 42 U.S.C. § 1983, which supplies Gonzalez's cause of action, in light of prevailing common law principles at the time of § 1983's enactment in 1871. The closest common-law analogy to Gonzalez's retaliatory arrest claim is abuse of process. And at common law, the presence of probable cause was no defense to the tort of abuse of process. The same result follows from § 1983's plain text, which contains "no reference to the presence or absence of probable cause as a precondition or defense to any suit." *Nieves*, 139 S. Ct. at 1730 (Gorsuch, J., concurring in part and dissenting in part).

Finally, the implications of the Fifth Circuit's decision are stark. An ever-growing list of local, state, and federal offenses gives officials a sizeable menu of pretextual options for ordering the arrest of a person engaged in speech, petition, or worship whom they dislike. That arresting discretion can be particularly dangerous to disfavored speakers and members of minority communities, who are especially likely to face official retaliation. Many victims of such retaliation will lack a civil remedy if they are forced to prove the absence of probable cause, depriving them of a valuable tool to hold bad actors accountable. That, in turn,

will fray public trust in law enforcement, undercutting police-community relationships and harming public safety in the process. And it will chill First Amendment activity, as individuals will hesitate to freely exercise their rights out of fear that they will be hauled off to jail.

These dangers make it all the more important to be "vigilant" in making sure that government officials and employees cannot "concoc[t] legal theories to arrest citizens" for First Amendment activity. Pet. App. 4a (Ho, J., dissenting from denial of rehearing en banc). This Court should reverse.

ARGUMENT

I. PROBABLE CAUSE DOES NOT BAR FIRST AMENDMENT CHALLENGES TO PREMEDITATED RETALIATORY ARRESTS.

Viewing itself as constrained by "Supreme Court precedent," the Fifth Circuit held that probable cause defeats a First Amendment retaliatory-arrest claim even when the claim is based on a calculated, premeditated decision to arrest the plaintiff for constitutionally protected behavior. Pet. App. 33a. But nothing in this Court's precedents compels that result. The *Nieves* rule—requiring a showing of no probable cause for an allegedly retaliatory arrest—applies only to cases involving split-second arrests made by police officers on the spot, which present uniquely challenging questions regarding causation. Outside of that context, *Nieves* did not disturb the Supreme Court's "longstanding recognition that the Government may not retaliate for exercising First Amendment speech rights." *Wilkie v. Robbins*, 551 U.S. 537, 555 (2007).

What Gonzalez experienced here was no split-second decision, and certainly no response to imminent

danger. Respondents are not on-the-ground police officers. They are the city's mayor, its police chief, and a private attorney deputized as a "Special Detective," who collectively engaged—far removed from the scene of Gonzalez's alleged offense—in a months-long campaign to concoct grounds that would justify arresting her and sending her to jail as punishment for challenging cronyism and potential corruption. They ultimately succeeded—and so humiliated her that she gave up public office altogether. Given respondents' clearly retaliatory design, Gonzalez's § 1983 claim should proceed, notwithstanding her persecutors' successful effort to conjure probable cause to arrest her under a rarely enforced statute.

A. The First Amendment Prohibits Deliberate, Calculated Retaliatory Arrests Regardless Of Probable Cause.

As Judge Oldham correctly explained, Pet. App. 54a, *Nieves* recognized a limited exception to the normal rule that the First Amendment prohibits government actors from retaliating against individuals for engaging in protected speech and activity. *Nieves* reasoned that officers may legitimately rely on protected speech to determine whether to make an on-the-spot arrest in the face of danger, blurring the causal connection between animus and arrest. But neither precedent nor principle justifies the Fifth Circuit's extension of *Nieves* to deliberate and premeditated retaliatory arrests.

"[T]he law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions" for "engaging in protected" speech or activity. *Nieves*, 139 S. Ct. at 1722; *Hartman v. Moore*, 547 U.S. 250, 256

(2006). That foundational protection against "[o]fficial reprisal for protected speech" reflects the principle that retaliation "'offends the Constitution [because] it threatens to inhibit exercise of the protected right.'" *Hartman*, 547 U.S. at 256 (quoting *Crawford-El v. Britton*, 523 U.S. 574, 588 n.10 (1998)) (second alteration in original).

Determining whether government action is retaliatory turns on whether the official acted "based on . . . a retaliatory motive"—whether "retaliatory animus" "cause[d] the injury." *Nieves*, 139 S. Ct. at 1722 (citation and emphasis omitted). That analysis typically requires a standard but-for causation inquiry. *Ibid.*

In the context of certain allegedly retaliatory arrests, however, this Court has recognized that the causal chain can be hard to untangle, because an arrest could be motivated either by "animus toward the content of a suspect's speech" or by "wholly legitimate consideration of speech"—like when the speech "suggests a potential threat." *Reichle v. Howards*, 566 U.S. 658, 668 (2012). In such cases, the Court has adopted a proxy for a causal link to retaliatory animus: the absence of probable cause for the arrest. If an officer had probable cause, the arrest was likely legitimate, but if he did not, that is "weighty evidence that [his] animus caused the arrest." *Nieves*, 139 S. Ct. at 1723–24.

The Court's holding in *Nieves* marked only a narrow departure from the usual rule that retaliation against First Amendment-protected activity is categorically unlawful. In particular, the requirement that a plaintiff show the absence of probable cause was crafted "to accommodate the necessities of split-second decisions to arrest." Pet. App. 54a (Oldham,

J., dissenting). Because officers "frequently must make split-second judgments when deciding whether to arrest," the Court observed, it can be difficult to determine if an arrest was made to punish protected speech, or because the speech showed that the suspect "present[ed] a continuing threat." *Nieves*, 139 S. Ct. at 1724 (cleaned up); *see also id.* at 1725 (noting that the task of conducting an arrest "requires making quick decisions" and so should be reviewed objectively).

Those same concerns do not arise, however, outside the context of split-second decisions made quickly by officers on the ground to respond to threats to life or limb. This Court has thus underscored that a claim based on a "premeditated plan to intimidate [the plaintiff] in retaliation for his criticisms of city officials" is "far afield from the typical retaliatory arrest claim." *Lozman*, 138 S. Ct. at 1954. In such circumstances, the causal "difficulties that might arise" in "the mine run of arrests"—which involve "ad hoc, on-the-spot decision[s] by . . . individual officer[s]"—"are not present." *Ibid.*

This distinction between spur-of-the-moment and planned-out arrests makes sense. Determining the cause of an arrest that is made as part of a deliberate premeditated effort to interfere with constitutionally protected activity—such as speech, petition, worship, or newsgathering—is a far more straightforward task than untangling the motivations behind an officer's instantaneous reaction to potential or actual danger. After all, "[w]hen public officials are forced to make split-second, life-and-death decisions in a good-faith effort to save innocent lives, they deserve some measure of deference." *Wearry v. Foster*, 52 F.4th 258, 259

(5th Cir. 2022) (Ho, J., concurring in denial of rehearing en banc). Because they must make those "split-second judgments" in "circumstances that are tense, uncertain, and rapidly evolving," it is inappropriate to scrutinize their motivations "with the 20/20 vision of hindsight." *Plumhoff v. Rickard*, 572 U.S. 765, 774–75 (2014) (citation omitted).

By contrast, "when public officials make the deliberate and considered decision to trample on a citizen's constitutional rights," the causal link between animus and injury is often clear. *Wearry*, 52 F.4th at 259 (Ho, J., concurring in denial of rehearing en banc); *see also Cole v. Carson*, 935 F.3d 444, 472 (5th Cir. 2019) (Willett, J., dissenting) (similar). Officials who "have time to make calculated choices" about infringing on constitutional rights should not "receive the same protection as a police officer who makes a split-second decision" to initiate an arrest to forestall danger. *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., respecting denial of certiorari).

The Fifth Circuit failed to recognize this vital distinction, instead holding that *Nieves* applies across the board regardless of whether an arrest occurred in the heat of the moment or as part of a premeditated scheme. Pet. App. 27a–29a. But "[t]he *Nieves* Court framed the *entirety* of [its] rule" around the causal challenges presented by split-second arresting decisions. *Id.* at 54a (Oldham, J., dissenting) (citing 139 S. Ct. at 1724–25). There is thus no reason to apply its absence-of-probable-cause requirement—which the Court "designed for split-second warrantless arrests"—to a "deliberative, premedi[t]ated, weeks-long conspiracy." *Ibid.*

Instead, the governing rule in cases involving calculated retaliatory arrests is dictated by *Lozman*'s

recognition that "premeditated plan[s]" to arrest individuals for their constitutionally protected activity do not present the same challenges in determining whether retaliatory animus caused an arrest. 138 S. Ct. at 1954. For planned-out arrests, there is no probable-cause exception to the First Amendment's prohibition on government officials "retaliating against individuals for engaging in protected speech." *Id.* at 1949.

The Fifth Circuit recognized the "forceful case" for that conclusion, which Judge Oldham persuasively laid out in dissent. Pet. App. 33a. But the majority believed itself "bound" by its misguided reading of *Nieves*. *Ibid.* This Court should correct that error.

B. Applying *Nieves* To Calculated Retaliatory Arrests Leads To Startling And Unjustified Consequences.

This lawsuit exemplifies how determining whether an arrest was caused by retaliatory animus is far more "straightforward" outside the context of split-second arrests. *Nieves*, 139 S. Ct. at 1722. And the startling result in this case only underscores the Fifth Circuit's erroneous understanding of *Nieves*.

Gonzalez's arrest for exercising her First Amendment rights to free speech and petition presents none of the "causal complexities" that may hinder the resolution of retaliation claims in the context of split-second arrest decisions. *Nieves*, 139 S. Ct. at 1723. From start to end, respondents planned out ways to evade protocol and common practice to retaliate against Gonzalez for her First Amendment activity. Pet. App. 102a–103a. Respondents' extensive misconduct made clear that, regardless of the existence of probable

cause, the arrest was purely retaliatory and had no legitimate law enforcement basis.

After Gonzalez was elected to the Castle Hills city council, she helped organize a petition calling for the removal of the city manager. Pet. App. 106a–107a. In response, the city manager's supporters—Mayor Edward Trevino, II, and Police Chief John Siemens—put in motion a criminal investigation to find an excuse to charge Gonzalez with a crime, all so that they could remove her from office. *Id.* at 99a–100a.

The improper and retaliatory nature of the investigation is obvious through and through. The officer initially assigned to the matter came up with nothing after a month investigating Gonzalez. *See* Pet. App. 112a–114a. Chief Siemens refused to let a proper investigation get in his way, though. Instead, he brought in a trusted friend to investigate anew: Alexander Wright, a private attorney whom he named Special Detective. *Id.* at 113a.

Whatever the merits in other contexts of recruiting outside help to investigate, the decision here was driven by a desire to retaliate. Police departments will turn to special detectives with expertise in areas such as interviewing, maintaining relationships with witnesses and suspects, and identifying sources of intelligence. *See* Anthony A. Braga et al., Nat'l Inst. of Just., *Moving the Work of Criminal Investigators Towards Crime Control* 3 (2011), bit.ly/3NmwP9w. "With their special knowledge and skill set, investigators can advise uniformed patrol officers on the nature of local crime problems and supplement their crime-control efforts with their expertise." *Ibid.*

Here, however, Chief Siemens did not select Wright for any special expertise; there was nothing uniquely challenging about the investigation that

warranted a call for outside help. Rather, he brought on Wright precisely because of their close personal relationship. Pet. App. 113a–114a.

The move produced its intended result: Wright recommended a misdemeanor charge for tampering with a government record, based on Gonzalez's supposed attempt to steal the very petition she participated in creating and organizing. Pet. App. 107a–110a, 114a. Wright's affidavit to support the warrant application left no doubt about the role of Gonzalez's constitutionally protected activity in the decision to arrest her: It explicitly cited Gonzalez's public criticism of the city manager—*i.e.*, her speech and petition—to justify it. *Id.* at 115a–116a.

The conspirators needed a criminal act with which to charge Gonzalez. Mayor Trevino and Chief Siemens therefore sought to ensure that Gonzalez would be caught with the petition in her possession, so they could accuse her of unlawfully taking it from government offices. Pet. App. 107a–110a.

That close-knit scheming between the mayor and the police department raised additional red flags. The Texas Administrative Code emphasizes that a law enforcement officer "is never the arm of any political party or clique" and should not act under the influence of any special favors or allegiances. 37 Tex. Admin. Code § 1.113(1), (9) (2023). A mayor likewise has a number of law enforcement responsibilities—including an obligation to "actively ensure that the laws and ordinances of the city are properly carried out." Tex. Mun. League, *2022 Handbook for Mayors and Councilmembers* 18 (2022), bit.ly/3Lbnmzv.

Rather than heed their duties, Mayor Trevino and his collaborators weaponized the police department to advance their crusade against Gonzalez. The mayor

coordinated with a police captain to question Gonzalez about her petition and catch her with the document in her possession. Pet. App. 108a–112a. And Chief Siemens abused his authority by acting as an extension of the mayor and giving the mayor special consideration at Gonzalez's expense.

The conspirators also took multiple unorthodox steps to ensure that they could arrest Gonzalez and send her to jail to punish her for her anti-corruption campaign. For instance, Wright opted to secure a bench warrant for Gonzalez's arrest to ensure that she would go to jail. Pet. App. 114a–116a. In Texas, warrants are usually reserved for apprehending violent offenders. *See*, *e.g.*, *Rodriguez v. State*, 2018 WL 4225018, at *3 (Tex. Ct. App. Sept. 6, 2018) (arrest warrant issued for suspected capital murder). People suspected of nonviolent crimes, meanwhile, typically receive a summons instead, which "serve[s] the same purpose" as an arrest warrant but "spar[es] the defendant embarrassment" by allowing her to avoid a jail trip and "save[s] the State time, effort, and expense." *Gallegos v. State*, 971 S.W.2d 626, 628 (Tex. Ct. App. 1998). Gonzalez's alleged crime was obviously nonviolent, but Wright flouted law enforcement norms to guarantee that she would spend time in a jail cell.

To ensure they would get a bench warrant and not a summons, Wright and his collaborators left the district attorney's office out of the loop when seeking the warrant—"even though [involving prosecutors is] the normal procedure." Pet. App. 39a (Oldham, J., dissenting); *cf.*, *e.g.*, *State v. Drummond*, 501 S.W.3d 78, 80 (Tex. Crim. App. 2016) (assistant district attorney presenting probable cause affidavit to magistrate to

obtain an arrest warrant for the offense of official oppression). They instead relied on a procedure "typically reserved for violent felonies or emergency situations" and went straight to a magistrate judge with their warrant application. Pet. App. 39a (Oldham, J., dissenting). *But see*, *e.g.*, *Flores v. State*, 367 S.W.3d 697, 698 (Tex. Ct. App. 2012) (even in murder case, assistant district attorney involved in arrest warrant process).

This maneuver allowed the police chief and his conspirators to evade the independent-minded scrutiny of a prosecutor and pull off the arrest and incarceration without interference. "[T]here can be little doubt that the DA [district attorney] would've stopped [the scheme] if given the chance: After all, when the DA's office finally learned of the charges and reviewed them, it immediately dismissed them." Pet. App. 39a (Oldham, J., dissenting).

The conspirators' failure to consult with the district attorney's office was highly unorthodox and further evidence of improper motives. District attorneys play a key part in the investigatory process; because the decision to charge is the prosecutor's, national guidelines recommend that they be intimately involved with investigations even before charges are filed. *See* Nat'l Dist. Att'ys Ass'n, *National Prosecution Standards* § 2-5.6 (3d ed. 2009), bit.ly/3AsBgIv (prosecutors "should serve in . . . an advisory capacity" during "the investigation of criminal cases" "to promote lawful investigatory methods that will withstand later judicial inquiry"). And even when officers can initiate criminal proceedings directly, they "should be required to present the complaint for prior review by the prosecutor." Am. Bar Ass'n, *Criminal Justice Standards: Prosecution Function* § 3-4.2 (4th

ed. 2017), bit.ly/3oE0UqZ. All those norms went out the window here.

Bypassing the district attorney advanced respondents' scheme to put Gonzalez in jail in more ways than one. It also prevented Gonzalez from invoking the satellite booking function, which enables those with outstanding warrants for nonviolent offenses to be processed without going to jail. Pet. App. 39a (Oldham, J., dissenting); *id.* at 115a.

This carefully devised scheme guaranteed that the 72-year-old Gonzalez would spend time behind bars. Even though all charges were eventually dropped, Gonzalez came away humiliated, and her physical and mental health suffered. *See* Pet. App. 125a, 129a. She then withdrew from public participation, giving up her council seat—and dropping her engagement in her community's civic life. *Id.* at 123a–125a. Just as respondents hoped all along.

The allegations here leave no doubt that this arrest was indeed retaliatory. Respondents collaborated to ensure that Gonzalez would be caught with the petition in her possession; they relied on a "special detective" who was a friend of the police chief to manufacture a sham criminal charge; and they circumvented the district attorney and ordinary rules of the road to maintain their plot and ensure Gonzalez landed in a jail cell. On the pleadings, it is difficult to imagine a stronger claim of retaliatory animus. Yet the Fifth Circuit's strained reading of *Nieves* rendered that claim a nonstarter on the ground that the arrest was supported by probable cause. Reversing the Fifth Circuit's decision is essential to preventing future arrests like this one from suppressing First Amendment activity.

C. First Principles Confirm That The *Nieves* Rule Does Not Apply To Premeditated Arrests.

The common-law backdrop that prevailed at the time of § 1983's enactment and § 1983's plain text also confirm that the *Nieves* rule has only a narrow ambit.

1. *Common law.* "When defining the contours of a claim under § 1983," this Court "look[s] to common-law principles that were well settled at the time of its enactment." *Nieves*, 139 S. Ct. at 1726 (internal quotation marks omitted). Because there was no common-law tort for retaliatory arrest when § 1983 was enacted in 1871, the Court "turn[s] to the common law torts that provide the closest analogy to retaliatory arrest claims." *Ibid.* (internal quotation marks omitted). Here, that tort is abuse of process.

At common law, a person was liable for damages to another if he abused legal process to force another to do something which he could not lawfully be compelled to do. William Benjamin Hale, *Handbook on the Law of Torts* 361 (1896); *see Phoenix Mut. Life Ins. Co. v. Arbuckle*, 52 Ill. App. 33, 38 (1893) (a plaintiff must show that "process was *willfully* abused to accomplish some unlawful purpose"); Thomas M. Cooley, *A Treatise on the Law of Torts* 189–90 (1879) (similar). As one treatise explained, "[p]rocess, when in due form . . . will protect the officer in the due and legal execution thereof, but it does not protect the officer in any abuse of the person . . . against whom such process is issued." Martin L. Newell, *A Treatise on the Law of Malicious Prosecution, False Imprisonment, and the Abuse of Legal Process* 68 (1892). A plaintiff could bring a claim for abuse of process "even if such process has been issued for a just cause, and is valid in form, and the proceeding thereon was justified and

proper in its inception." Hale, *Handbook*, *supra*, at 361. The tort, in other words, was not about "maliciously putting the process in force, but [about] maliciously abusing it." *Ibid.*

Abuse of process is the closest common law analogy here. Respondents orchestrated a premeditated warrant-based arrest to retaliate against Gonzalez. Execution of an arrest warrant is legal process for purposes of the tort. *See*, *e.g.*, *Grainger v. Hill*, 4 Bing. N.C. 212 (1838) (holding that sheriff abused legal process in executing an arrest warrant); *see also Wolf v. Colorado*, 338 U.S. 25, 30–31 n.1 (1949) (explaining that at common law there was action for damages against abuse of search warrants), *overruled on other grounds by Mapp v. Ohio*, 367 U.S. 643 (1961); Hale, *Handbook*, *supra*, at 361 ("[a] warrant valid on its face is no defense"). And respondents abused that process by effectuating the arrest for the purpose of "leading the person arrested to do some collateral thing, which [s]he could not lawfully be compelled to do"—to compel Gonzalez to stop engaging in protected petitioning activity. Hale, *Handbook*, *supra*, at 361.[3]

Importantly, to show abuse of process, "[i]t is not necessary to prove that the action in which the process issued has been determined or to aver that it was sued out without probable cause." Newell, *Treatise*, *supra*,

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[3] Although the Court in *Nieves* suggested that the closest common-law analogues to the retaliatory arrest claim there were false imprisonment and malicious prosecution, that view stemmed solely from the way the case was litigated. *See* 139 S. Ct. at 1726 (noting that "[t]he parties dispute whether the better analog is false imprisonment or malicious prosecution," but sidestepping the dispute as academic). This case materially differs from *Nieves* because Gonzalez's arrest was premeditated and made pursuant to an arrest warrant, which constitutes "legal process" for abuse-of-process purposes.

at 68; *see Mayer v. Walter*, 64 Pa. 283, 286 (1870). "It is evident that when such a wrong has been perpetrated, it is entirely immaterial whether the proceeding itself was baseless or otherwise." *Mayer*, 64 Pa. at 286. Indeed, the defining feature that distinguishes abuse of process from malicious prosecution is that "want of probable cause is not an essential element." Hale, *Handbook*, *supra*, at 361.

In one leading case, for instance, the Supreme Court of New York held that a sheriff had maliciously abused legal process where he "executed [a] warrant in an unreasonable and oppressive manner, and with the avowed and malicious design to vex and oppress the plaintiff." *Rogers v. Brewster*, 5 Johns. 125, 126 (N.Y. Sup. Ct. 1809) (per curiam); *see Docter v. Riedel*, 71 N.W. 119, 121 (Wis. 1897) (Marshall, J., dissenting) (explaining that *Rogers* "will be found cited by all standard text writers" on the abuse of process tort). In *Rogers*, the sheriff had ample opportunity to execute a warrant by taking property that would not interfere with the debtor's business. 5 Johns. at 127. Instead, he seized and sold the debtor's horse without "any just cause" for doing so. *Ibid.* Even though the writ he was enforcing was proper, his actions were "causeless and malicious . . . [and] against the duty of his office." *Ibid.* As a result, the court held, the plaintiff could recover damages. *Ibid.*

Thus, at common law, government officials could be held liable for damages where, as here, they abuse legal process to an unlawful end—regardless of the existence of probable cause.

2. *Alternative to the common law approach.* In the alternative, the Court could focus on the plain text of § 1983, which does not contain a no-probable-cause defense.

Section 1983's text is silent when it comes to defenses—"look at that statute as long as you like and you will find no reference to the presence or absence of probable cause as a precondition or defense to any suit." *Nieves*, 139 S. Ct. at 1730 (Gorsuch, J., concurring in part and dissenting in part). Instead, the statute grants plaintiffs broad relief, imposing "liability on anyone who, under color of state law, subjects another person 'to the deprivation of any rights, privileges, or immunities secured by the Constitution.'" *Ibid.*

In crafting exceptions to this broadly worded statute, the Court has relied primarily on the "Derogation Canon." *See* Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. 201, 216–17 (2023). The Derogation Canon provides that "statutes in derogation of the common law are to be strictly construed." Antonin Scalia & Bryan A. Garner, *Reading Law* 318 (2012). The Court first relied on this canon in interpreting § 1983 in *Tenney v. Brandhove*, which held that state legislators were immune from suit under § 1983 because Congress would not "impinge on a [common law] tradition" of legislative immunity through "the general language" in § 1983. 341 U.S. 367, 376 (1951). The Court then extended this principle to judicial immunity and qualified immunity. *See Pierson v. Ray*, 386 U.S. 547, 554 (1967).

But the Derogation Canon has always stood on shaky footing. It is "a relic of the courts' historical hostility to the emergence of statutory law." Scalia & Garner, *supra*, at 318. As far back as 1874, Theodore Sedgwick stated that the canon was a creature of the judicial belief that common law was "the perfection of human wisdom" to be guarded against legislative intrusion. Theodore Sedgwick, *A Treatise on the Rules*

Which Govern the Interpretation and Construction of Statutory and Constitutional Law 270 (2d ed. 1874). Other commentators have similarly criticized the canon. *See* Reinert, *Qualified Immunity*, *supra*, at 218–21 (collecting sources).

As a general matter, this Court has understood the canon to apply only where a statute "clearly covers a field formerly governed by the common law." *Samantar v. Yousuf*, 560 U.S. 305, 320 (2010). Thus, "the Derogation Canon has rarely worked to limit the reach of statutory causes of action, other than in the context of Section 1983." Reinert, *Qualified Immunity*, *supra*, at 228. During the early part of the nineteenth century, "the Court never even hinted, let alone held, that common law defenses are incorporated into statutory causes of action absent express legislative direction to the contrary." *Id.* at 224. The Court's refusal to read a statute as abrogating the common law extended only to *claims* or *rights* that existed at common law, not *defenses*. *Id.* at 225 (citing *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 692 (1834)).

Later in the nineteenth century, during and after Reconstruction, the Court generally construed statutes creating remedies and rights of action liberally. Reinert, *Qualified Immunity*, *supra*, at 225–28; *see White v. Cotzhausen*, 129 U.S. 329, 341–42 (1889) (explaining the "rule [that] though it may be in derogation of the common law . . . everything is to be done in advancement of the remedy that can be done consistently with any fair construction that can be put upon it" (citation omitted)). This understanding of the Derogation Canon has survived through the twentieth century and into the present, with § 1983 being the principal exception. Reinert, *Qualified Immunity*, *supra*, at 228–34 (collecting cases); *see also St. Louis,*

Iron Mountain & S. Ry. Co. v. Taylor, 210 U.S. 281, 294 (1908) (refusing to entertain defenses based on "the common-law duty of the employer to use reasonable care" because the statute makes no mention of these limitations).

The Congress that passed the Civil Rights Act of 1871, which included § 1983, would not have understood it to incorporate common law defenses in its broad remedial statute. And that Congress would not have understood the Derogation Canon to apply to such a statute. *See supra* 19–20. Because canons of interpretation should be applied in light of the "likely intent of the enacting legislature," Caleb Nelson, *What Is Textualism?*, 91 Va. L. Rev. 347, 386 (2005), the Derogation Canon does not apply to § 1983. The upshot is straightforward: The Court should not incorporate atextual common law defenses into § 1983, so it should not extend the *Nieves* rule any further.

In any event, the Derogation Canon's caution against abrogation of the common law must yield when the legislature's command is explicit. And there *was* an explicit command by the Reconstruction Congress to displace common law defenses. As it was passed, the Civil Rights Act of 1871 included a clause—the Notwithstanding Clause—which provided that "any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding." Ch. 22, § 1, 17 Stat. 13, 13. Because that text apparently did not make its way into the United States Code, it was largely lost to history, and the Court has never grappled with this text in its

§ 1983 jurisprudence.[4] But the "implications are unambiguous": background common law defenses have "no place in Section 1983." Reinert, *Qualified Immunity*, *supra*, at 236 (noting this point about state law immunities).

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Whether this Court understands *Nieves* in light of the common-law principles that prevailed at the time of § 1983's enactment or in light of § 1983's plain text alone, the result is the same: The existence of probable cause is no defense to a premeditated, retaliatory arrest made pursuant to an arrest warrant.

II. THE FIFTH CIRCUIT'S RULE WOULD HAVE SIGNIFICANT NEGATIVE RAMIFICATIONS FOR LAW ENFORCEMENT AND THE PUBLIC.

The dramatic expansion of criminal codes across the country has made it easier than ever for government actors who wish to punish a person for engaging in protected First Amendment activity to find probable cause for *some* criminal violation on which to base an arrest. Civil lawsuits against those engaged in premeditated, retaliatory arrests serve as a critical check on this kind of misconduct.

The Fifth Circuit's decision insulates government actors from accountability in many cases of deliberate

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[4] The legally effective language is the language contained in the Act and not the United States Code. The discrepancy is not a result of positive law but a decision of the first Revisers of Federal Statutes in 1874. *See U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993) ("Though the appearance of a provision in the current edition of the United States Code is 'prima facie' evidence that the provision has the force of law, it is the Statutes at Large that provides the legal evidence of laws" (cleaned up)).

retaliation. Allowing that shield to stand would in turn undermine public trust in law enforcement, making it harder for the vast majority of honest officers to do their job and keep their communities safe. It would also chill First Amendment-protected speech and activity, especially among those who hold views disfavored by government actors. These dangers confirm that *Nieves* does not apply outside the context of split-second arrest decisions.

A. Civil Liability For Plainly Premeditated Arrests Is A Key Deterrent Against The Growing Threat Of Retaliatory Arrests.

Retaliatory arrests have "never been more prevalent than today." Pet. App. 4a (Ho, J., dissenting from denial of rehearing en banc); *see* Amanda D'Souza et al., *Federal Investigations of Police Misconduct: A Multi-City Comparison*, 71 Crime, L., & Soc. Change 461, 474 (2019) ("[a] troublesome finding in all [federal investigations over the past two decades] was officers' retaliatory actions against citizens"). This trend is a byproduct of the ever-growing size of modern criminal codes. *See* GianCarlo Canaparo et al., Heritage Found., *Count the Code: Quantifying Federalization of Criminal Statutes* 3 (2022), bit.ly/3Lcpve2 (showing that the number of statutory provisions creating a federal crime increased by 36% between 1994 and 2019); James R. Copland & Rafael A. Mangual, Manhattan Inst., *Overcriminalizing America* 4 (2018), bit.ly/41CLNfT ("common problems in state criminal law" include "[t]oo many crimes on the books"). Coupled with the growth of the administrative state—which has made crimes out of all manner of regulatory infractions—the number of crimes on the books that a person might commit has steadily risen for decades.

See Susan E. Dudley, *Milestones in the Evolution of the Administrative State*, 150 Daedalus 33, 45 (2021) ("The modern administrative state, as measured by the number of agencies . . . and the number of regulations they issue, has grown significantly over the last hundred years.").

A government actor who may be inclined to punish a disfavored speaker—or journalist, or petitioner, or worshipper—can therefore readily find a minor offense they committed and use that to justify an arrest. This Court has observed, for instance, that jaywalking is "endemic but rarely results in arrest." *Nieves*, 139 S. Ct. at 1727. But an officer seeking to punish "an individual who has been vocally complaining about police conduct" can exercise discretion and arrest that person if she jaywalks. *Ibid.*

Broad arresting powers can be abused to burden disfavored groups. As here, public officials acting in bad faith can use law enforcement discretion "to arrest citizens for stating unpopular viewpoints"—even though the expression of dissenting perspectives "is essential to our form of self-government." Pet. App. 4a (Ho, J., dissenting from denial of rehearing en banc); *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038, 2049 (2021) (Alito, J., concurring). And the ill effects of retaliatory arrests are especially likely to fall on individuals in minority communities. *See* Ellen S. Podgor, *The Dichotomy Between Overcriminalization and Underregulation*, 70 Am. Univ. L. Rev. 1061, 1065 (2021) (observing that overcriminalization "provides increased choices to prosecutors," which "can result in disparities, especially to poor and minority members of society").

Civil lawsuits are a vital check against premeditated, retaliatory arrests. Indeed, this Court has repeatedly recognized that civil suits help "to hold public officials accountable when they exercise power irresponsibly." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *accord Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (acknowledging "the importance of a damages remedy to protect the rights of citizens"). This element of accountability ensures that the "government will respond to the will of the people." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 301 (1964) (Goldberg, J., concurring in the result); *cf. Harris v. Pittman*, 927 F.3d 266, 282–83 (4th Cir. 2019) (Wilkinson, J., dissenting) ("Police officers do overreach. And when they do, the law must hold them to account.").

This Court should not close the courthouse doors on the many deserving plaintiffs who are deliberately punished for exercising their First Amendment rights by actors who—despite finding probable cause for an arrest—clearly acted on retaliatory animus. That outcome would only further contribute "to the deep deficit in police accountability throughout our country." Joanna C. Schwartz, *After Qualified Immunity*, 120 Colum. L. Rev. 309, 312 n.8, 313 (2020) (citation omitted). And the lack of accountability would harm police departments, too: Exposure to civil liability provides incentives to improve police performance and reduce constitutional violations; allows them to gather information about misconduct and illegal uses of force; and helps gather data that fills gaps in internal reporting systems, such as unearthing more conclusive evidence in excessive-force lawsuits. Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 Cardozo L. Rev. 841, 845–46 (2012).

Other consequences for rogue officers—such as internal discipline—are inadequate alone to stamp out bad-faith, unconstitutional behavior. *See* Schwartz, *What Police Learn*, at 862–74; *Crouse v. Town of Moncks Corner*, 848 F.3d 576, 589 (4th Cir. 2017) (Motz, J., concurring in the judgment) ("Serious allegations of misconduct sometimes go unanswered, and officers who abuse their power sometimes go undisciplined."). And those consequences are absent altogether when the offending party is a government official rather than a police officer. Failing to limit *Nieves* to on-the-spot officer arrests would deprive many individuals of a crucial way to hold accountable government actors who retaliate against them for engaging in constitutionally protected behavior.

B. Permitting Probable Cause To Bar Liability For Plainly Retaliatory And Premeditated Arrests Would Undermine Trust In The Police And Interfere With Public Safety.

Allowing those who carry out deliberate, premeditated retaliatory arrests to avoid liability would diminish the public's trust in and cooperation with good-faith law enforcement efforts. Trust in the police has already been on the decline over the past two decades, especially in minority communities. *See* Jeffrey M. Jones, Gallup, *In U.S., Black Confidence in Police Recovers from 2020 Low* (July 14, 2021), bit.ly/3V9qb8H. But police officers are supposed to "occupy positions of great public trust and high public visibility." *Gilbert v. Homar*, 520 U.S. 924, 932 (1997). If those who violate that trust are not held responsible—a likely consequence of applying *Nieves* in this case—that will only exacerbate existing tensions between law-abiding police officers and their communities. That, in

turn, would undermine law enforcement's ability to maintain public safety.

"Effective police work, including the detection and apprehension of criminals, requires that the police have the trust of [their] community" and that the public believe that police departments "will use [their] powers responsibly and adequately discipline officers who do not." *Reynolds v. City of Chicago*, 296 F.3d 524, 530 (7th Cir. 2002); *Crouse*, 848 F.3d at 589 (Motz, J., concurring in the judgment). Members of the public need to believe in the good faith of officers so they feel comfortable calling on law enforcement to help in emergencies and aiding police investigations. *See Duncan v. Becerra*, 970 F.3d 1133, 1161 (9th Cir. 2020) (noting that "some people, especially in communities of color, do not trust law enforcement and are less likely . . . to call 911 even during emergencies"), *overruled on other grounds*, 142 S. Ct. 2895 (2022). And police officers need to feel trusted by the people they serve to do their jobs effectively. *See Harris*, 927 F.3d at 286–87 (Wilkinson, J., dissenting).

Those police-community relations fray, however—and the public's trust is diminished—when government actors misuse the arrest power without consequence. Even the bad acts of a few will hinder community trust in the police, the vast majority of whom carry out their jobs with dignity and honor. U.S. Dep't of Just., *Building Trust Between the Police and the Citizens They Serve* 17 (2009), bit.ly/3LwqCGS. The Fifth Circuit's rule, by shielding from liability those who "exploit the arrest power as a means of suppressing speech," *Lozman*, 138 S. Ct. at 1953, would further undermine trust in the police and officers' ability to fulfill their duties to the public. That consequence is all the more unwarranted when the few bad actors are

government officials, like a mayor or police chief, directing police officers to do their dirty work for them.

This loss of trust would have major downstream effects. If people do not feel comfortable calling on the police in a crisis, that will threaten public safety. Andrew Goldsmith, *Police Reform and the Problem of Trust*, 9 Theoretical Criminology 443, 443 (2005) ("Without public trust in police, 'policing by consent' is difficult or impossible and public safety suffers."). And if community members are less likely to cooperate in police investigations, police officers will find it harder to conduct their duties in the future. *See, e.g.*, David S. Kirk et al., *The Paradox of Law Enforcement in Immigrant Communities: Does Tough Immigration Enforcement Undermine Public Safety?*, 641 Annals of Am. Acad. of Pol. & Soc. Sci. 79, 79 (2012) (lawless actions by officers "undermine[] individuals' willingness to cooperate with the police and engage in the collective actions necessary to socially control crime"). These costs are likely to be significant: A lack of trust in the police is correlated with an increase in gun violence in communities, which in turn fuels a cycle of over-enforcement of minor misdemeanors, further eroding trust in the police and fueling violence in communities. Abene Clayton, Guardian, *Distrust of Police Is Major Driver of U.S. Gun Violence, Report Warns* (Jan. 21, 2020), bit.ly/41CFwAV. A rule that promotes accountability for the minority of bad-faith actors, by contrast, promotes public confidence in the integrity of the criminal justice system.

C. Failing To Prohibit Premeditated Retaliatory Arrests Would Chill First Amendment-Protected Activity.

The Fifth Circuit's holding is also likely to chill First Amendment activity. Individuals may choose to

abstain from speaking—or petitioning the government, or conducting newsgathering activities, or engaging in religious exercise—if they fear the government can punish them with impunity for exercising their constitutional rights.

When the government takes adverse action based on an individual's First Amendment activity, their "exercise of [protected] freedoms" is "in effect . . . penalized and inhibited." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). And "to state that arresting someone in retaliation for their exercise of free speech rights is sufficient to chill speech is an understatement." *Lacey v. Maricopa County*, 693 F.3d 896, 917 (9th Cir. 2012) (en banc) (cleaned up). This case exemplifies those effects: For Gonzalez, the experience of being arrested for lawful speech and petitioning was so harrowing that she abandoned her legislative efforts entirely and withdrew from public service. Pet. App. 124a.

The free exchange of ideas will also be hampered unless individuals know they can exercise their First Amendment rights free from government penalty—and that if they are punished, they will have legal recourse against it. Open and active discussion of matters of public import is "a fundamental principle of our constitutional system," *Stromberg v. California*, 283 U.S. 359, 369 (1931), but it cannot flourish if government actors can stomp out disfavored voices.

It therefore "falls on the judiciary" to "make certain that law enforcement officials exercise their significant coercive powers to combat crime—not to police political discourse." Pet. App. 3a, 5a (Ho, J., dissenting from denial of rehearing en banc). The First Amendment demands nothing less.

CONCLUSION

The Fifth Circuit's decision should be reversed.

Respectfully submitted.

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