

IN THE SUPREME COURT OF THE UNITED STATES

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No. 22-1025

SYLVIA GONZALEZ, PETITIONER

v.

EDWARD TREVINO, II, ET AL.

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

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MOTION OF THE UNITED STATES FOR LEAVE TO  
PARTICIPATE IN ORAL ARGUMENT AS AMICUS CURIAE  
AND FOR DIVIDED ARGUMENT

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Pursuant to Rule 28 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully moves for leave to participate in the oral argument in this case and requests that the United States be allowed ten minutes of argument time. The United States has filed a brief as amicus curiae in support of neither party. Petitioner and respondents have each agreed to cede five minutes of argument time to the United States, and therefore consent to this motion.

1. This case presents two questions about the application of Nieves v. Bartlett, 139 S. Ct. 1715 (2019), to a First Amendment retaliatory-arrest claim for damages under 42 U.S.C. 1983. Nieves held that, as a general matter, a plaintiff alleging a retaliatory-

arrest claim under Section 1983 is required to plead and prove the absence of probable cause. 139 S. Ct. at 1723-1727. But the Court described an exception to that general rule: a "narrow qualification," applicable in circumstances "where officers have probable cause to make arrests, but typically exercise their discretion not to do so," such as "jaywalking at \* \* \* an intersection." Id. at 1727.

The brief for the United States suggests, as a threshold matter, that the Court clarify that Nieves's general no-probable-cause requirement is an element of a constitutional tort, not a limit on the scope of the First Amendment. It also suggests that vacatur and remand is warranted on the first question presented, which concerns whether Nieves's exception can only be satisfied by evidence that law-enforcement authorities were aware of, but declined to arrest, other individuals who engaged in the same general behavior as the plaintiff but did not engage in the same First Amendment activities. The brief for the United States takes the position that although the exception is limited to cases where "a plaintiff presents objective evidence that [she] was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been," 139 S. Ct. at 1727, it does not limit the form of that evidence, as the court of appeals' decision appears to have done. And on the second question presented -- whether Nieves's general no-probable-cause

requirement applies outside the context of split-second arrests -- the brief for the United States takes the position that no legal or logical distinction meaningfully differentiates deliberative arrests from on-the-spot ones.

2. The United States has a strong interest in the resolution of the questions presented. Although federal officers are not subject in their individual capacity to First Amendment claims of retaliatory arrest, see Egbert v. Boule, 596 U.S. 482, 498-501 (2022), the United States has a substantial interest in ensuring that Section 1983's private-enforcement mechanism is carefully calibrated to respect individuals' First Amendment rights without overly chilling the federal government's state and local law-enforcement partners. The United States also has a substantial interest in ensuring that Nieves's general no-probable-cause rule is understood as a limitation on Section 1983 claims -- not the First Amendment itself -- and therefore does not impede the federal government's own ability to safeguard First Amendment rights through criminal and civil enforcement authorities, e.g., 18 U.S.C. 241, 242; 34 U.S.C. 12601.

The United States has previously participated as amicus curiae in the oral argument in multiple cases raising questions about the scope of First Amendment retaliatory-arrest claims, including in Nieves itself. See Nieves, supra; Lozman v. City of Riviera Beach, 138 S. Ct. 1945 (2018); Reichle v. Howards, 566

U.S. 658 (2012). It also participated in oral argument as a party in Hartman v. Moore, 547 U.S. 250 (2006), which addressed the related question of whether a damages claim for retaliatory prosecution requires a plaintiff to establish the absence of probable cause.

In light of the government's substantial interests, the United States' participation at oral argument would materially assist the Court in its consideration of this case.

Respectfully submitted.

ELIZABETH B. PRELOGAR  
Solicitor General

JANUARY 2024