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

BRIEF FOR PETITIONER

ANYA BIDWELL
Counsel of Record
PATRICK JAICOMO
WILL ARONIN
MARIE MILLER
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Ste. 900
Arlington, VA 22203
(703) 682-9320
abidwell@ij.org

Counsel for Petitioner

QUESTIONS PRESENTED

In *Nieves* v. *Bartlett*, this Court held that probable cause does not bar a retaliatory arrest claim against a "police officer" when a plaintiff shows "that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." 139 S. Ct. 1715, 1727 (2019).

The circuits admittedly disagree on whether only specific examples of non-arrests, Pet. App. 28-29 (5th Cir. 2023), or any "objective proof of retaliatory treatment" can satisfy this standard, *Lund* v. *City of Rockford*, 956 F.3d 938, 945 (7th Cir. 2020); see also *Ballentine* v. *Tucker*, 28 F.4th 54, 62 (9th Cir. 2022).

Here, a 72-year-old councilwoman organized a petition criticizing a city manager, and unwittingly placed it in her binder during a council meeting. Two months later, respondents—city manager's allies—engineered her arrest for tampering with a government record. That charge has no precedent involving similar conduct, was supported by an affidavit based on the councilwoman's viewpoints, and skirted ordinary procedures to ensure her jailing. The councilwoman sued respondents but no arresting officer.

The questions presented are:

1. Whether the *Nieves* probable cause exception can be satisfied by objective evidence other than specific examples of arrests that never happened.

2. Whether the *Nieves* probable cause rule is limited to individual claims against arresting officers for split-second arrests.

PARTIES TO THE PROCEEDING

Petitioner Sylvia Gonzalez was the plaintiff in the district court and appellee in the Fifth Circuit.

Respondents Edward Trevino, John Siemens, and Alex Wright were individual defendants in the district court and appellants in the Fifth Circuit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CODES AND STATUTES

OTHER AUTHORITIES

BRIEF FOR PETITIONER

Petitioner Sylvia Gonzalez respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals and the dissenting opinion are reported and available at 42 F.4th 487. Pet. App. 20a-64a. The denial of rehearing en banc and the dissenting opinion are reported and available at 60 F.4th 906. Pet. App. 1a-19a. The opinion of the United States District Court for the Western District of Texas denying respondents' motion to dismiss is unreported but available at 2021 WL 4046758. Pet. App. 65a-97a.

JURISDICTION

The original opinion of the court of appeals was filed on July 29, 2022. Pet. App. 20a. On February 22, 2023, the court denied rehearing en banc. Pet. App. 1a. This Court granted the petition for writ of certiorari on October 13, 2023 and has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging

> the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. * * *

Section 37.10(a)(3) of the Texas Penal Code in effect at the time of the arrest provided: "A person commits an offense if he intentionally destroys, conceals, removes, or otherwise impairs the verity, legibility, or availability of a government record."

STATEMENT

On May 21, 2019, Petitioner Sylvia Gonzalez—a 72-year-old retiree and prominent critic of the government of Castle Hills, Texas, who had recently been elected to the city council—spoke at a city council meeting in favor of a petition that she had spearheaded to remove the city manager. Near the end of that two-day meeting, while gathering up her papers,

Gonzalez accidentally gathered up the petition along with them, an error that was discovered and corrected within minutes.

Two months later, for having temporarily mislaid the petition, Gonzalez was arrested, accused of "destroy[ing], conceal[ing], remov[ing], or otherwise impair[ing] the verity, legibility, or availability of a governmental record." Tex. Penal Code § 37.10(a)(3) (effective Sept. 1, 2015 to Aug. 31, 2019). Though Gonzalez had no criminal record and was not a flight risk, she was booked and spent a day in jail, wearing an orange jail shirt, and forced to sit tightly handcuffed on a metal bench.

In her complaint for First Amendment retaliation, Gonzalez detailed a months-long scheme by respondents—a mayor, police chief, and, later, lawyer appointed by the police chief as a special detective—to punish her for spearheading the very petition she was accused of stealing. For example, respondents undertook a series of highly unusual maneuvers to circumvent the district attorney's office, ensuring that the 72-year-old would be arrested and jailed, rather than simply issued a summons. And her complaint described how, in the ten years preceding her arrest, no one had ever been charged under the Texas government records law for temporarily misplacing a document. Instead, the overwhelming majority of the 215 grand jury felony indictments obtained under the statute involved accusations of using or making fake government identification.

The charges against Gonzalez were so flimsy that the district attorney refused to prosecute. But by then

the damage had already been done. Gonzalez had already suffered the trauma of an arrest. Her mug shot had already been widely shared in the news media. And the government officials who sought to hound her out of public office eventually succeeded—Gonzalez was so hurt by the experience that she gave up her council seat and swore off organizing petitions or criticizing her government.

The retaliation Gonzalez suffered because of her political advocacy was not just shocking; it was unconstitutional. After all, the First Amendment doesn't only bar direct prohibition of unwelcome political speech. *Laird* v. *Tatum*, 408 U.S. 1, 11 (1972). It also bars retaliation for this speech. *Lozman* v. *City of Riviera Beach*, 138 S. Ct. 1945, 1948 (2018).

Of course, government critics are not entitled to special rights compared to non-critics. To help untangle harmful retaliation for speech from more benign considerations of speech, the Court in *Mt. Healthy City School District Board of Education* v. *Doyle* adopted a burden-shifting framework. Under that framework, after a plaintiff establishes that her protected speech substantially motivated the government's action against her, the burden shifts to the defendants, who can defeat the claim by showing that the adverse action would have been taken "even in the absence of protected conduct." 429 U.S. 274, 287 (1977).

In the more-than-four decades since *Mt. Healthy*, this Court has departed from that rule only twice: in *Hartman* v. *Moore*, 547 U.S. 250 (2006), involving retaliatory prosecutions, and in *Nieves* v. *Bartlett*, 139 S. Ct. 1715 (2019), involving on-the-spot police

arrests. For both situations, the Court created a presumption that, if a plaintiff can't show the absence of probable cause, the adverse action would have happened even without a retaliatory motive.

With retaliatory prosecution claims, this presumption is irrebuttable because of the deference accorded to prosecutorial decisionmaking and the fact that, in addition to animus, the plaintiff would have to prove that the defendant induced a prosecutor to act. *Hartman*, 547 U.S. at 265-266.

With on-the-spot police arrests—where probable cause and arrest arise within a single event—the presumption is rebuttable and justified for two reasons. First, similar to retaliatory prosecutions, the adverse action is undertaken by an officer who is generally evaluated under a deferential standard of objective reasonableness. Second, in time-pressured situations, the universe of available evidence, other than state-of-mind evidence, is often severely limited. *Nieves*, 139 S. Ct. at 1724.

Nieves allowed plaintiffs to overcome this presumption by "present[ing] objective evidence" that similarly situated non-critics are not subjected to arrests. 139 S. Ct. at 1727. Citing the example of jaywalking—a crime that "is endemic but rarely results in arrest"—the Court explained that the mere existence of probable cause will not shield officers from First Amendment retaliation claims "where officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Ibid*.

The facts alleged here, involving a months-long conspiracy to manufacture charges against a government critic, could not be further from the on-the-spot arrest that justified deference in *Nieves*. Yet, rather than analyzing the case under *Mt. Healthy*, the Fifth Circuit held that *Nieves* barred Gonzalez's claims because there was probable cause to believe she had violated Texas's government records law, Pet. App. 27a, at least under respondents' extraordinary and unprecedented interpretation of that law. To boot, the Fifth Circuit held that Gonzalez could not avail herself of *Nieves*'s carve-out to the no-probable-cause rule unless she could point to specific individuals who were not critics of the Castle Hills government and who had not been arrested after "mishandl[ing] a government petition." *Id.* at 28a-29a. Of course, because no one had ever been charged under even remotely similar circumstances, and because it is impossible to know which of countless non-critics of the Castle Hills government may have temporarily mislaid a government document they intended to turn in to the city council, this was a fatal burden.

If affirmed, the Fifth Circuit's decision will give government officials a green light to arrest their critics under the most tenuous showings of probable cause and after deliberate calculation, all but inviting government officials to "pick[] the man and then search[] the lawbooks." Robert H. Jackson, *The Federal Prosecutor*, 24 J. Am. Judicature Soc'y 18, 19 (1940). Arrests will become the retaliation weapon of choice, and the more outlandish the legal interpretation leading to these arrests, the more insulated they will be from scrutiny. Under the First Amendment, that result must not stand.

A. Factual Background

1. Petitioner Sylvia Gonzalez is a 77-year-old retiree. Four-and-a-half years ago, Gonzalez ran an outsider campaign for a seat on the Castle Hills city council. After promising the voters to organize a campaign to fire the incumbent city manager who was diverting resources from resident services like street repair, Gonzalez won, becoming the first Hispanic woman elected to the council. Gonzalez was especially proud to win because, after a career in the private sector, she finally became a public servant, honoring the memory of her father—a well-respected, long-time police officer. Pet. App. 102a-106a.

Respondents are the mayor of Castle Hills, Edward Trevino; then-police-chief of Castle Hills, John Siemens; and a private attorney, Alex Wright who, at the time of events in question, was a Siemens-appointed special detective. Pet. App. 102a-103a. All three were closely allied with Castle Hills city manager, Ryan Rapelye, the very man Gonzalez's voters wanted fired. *Id*. at 103a.

Castle Hills is a small city in Bexar County, Texas. It has a population of less than 5,000 and is governed by a city council composed of one mayor and five councilmembers. The mayor and councilmembers are elected, while the council appoints a city manager to handle day-to-day city business and decisionmaking. The city manager, in turn, nominates the chief of police. Pet. App. 103a-104a.

2. After being sworn in by the Bexar County sheriff on May 14, 2019, Gonzalez got right to work. As

promised during her campaign, Gonzalez organized a nonbinding citizens' petition urging the city manager's removal. Pet. App. 106a-107a. Along with her fellow residents, Gonzalez canvassed neighborhoods in support of a petition to "FIX OUR STREETS" by replacing Rapelye. *Id*. at 107a; JA 2-3. More than 300 Castle Hills residents ultimately added their names to the petition. Pet. App. 106a-107a.

At Gonzalez's first council meeting on May 21, 2019, a resident submitted the petition to Mayor Trevino, sparking a prolonged and tense discussion of the city manager's job performance that continued the next day. Pet. App. 107a-108a.

When the meeting concluded on May 22, Gonzalez gathered her papers and handouts, placing them in her binder, as Mayor Trevino, who sat next to Gonzalez, glanced over.[1] Pet. App. 108a. Before she could leave, the council secretary told Gonzalez that a former councilmember—the woman Gonzalez unseated in the election—was waiting to speak with her. Gonzalez left her binder on the council table and stepped away for a contentious conversation with her defeated opponent who demanded that Gonzalez provide the notes she took during the previous day's portion of the meeting. Fellow councilmember (and Rapelye

[1] "*Video 1 – Petitions Taken*," https://youtu.be/xKmz9zGIHY0 (beginning around 4:23); JA 49; see also note 2, *infra*. Gonzalez offers the videos for the Court's convenience but cautions that she has not yet been permitted discovery in this case and, therefore, has not had the opportunity to view the longer unedited video in its original format, investigate why the provided videos begin and end when they do, why there is a gap of time between the videos, or why they lack source audio.

supporter) Skip McCormick watched the discussion. When Gonzalez explained that she had thrown away the relevant Post-its, McCormick broke in and threatened to have Gonzalez arrested. *Id*. at 108a-109a.

Meanwhile, Mayor Trevino had hustled back to the council table, where he peeked at Gonzalez's binder and waved over Castle Hills Police Captain Steve Zuniga, who was on duty for the meeting.[2] Trevino directed Zuniga to summon Gonzalez back to the council table. Trevino then asked Gonzalez, "Where's the petition?" Gonzalez responded, "Don't you have it? It was turned in to you yesterday." Pet. App. 109a. Trevino said that he did not have the petition and asked Gonzalez to look for it in her binder. *Ibid*. To her surprise—but not Trevino's—the petition was in Gonzalez's binder, which still sat on the council table. *Ibid*. Gonzalez handed Trevino the petition. Trevino then remarked that Gonzalez had "probably picked it up by mistake." *Id*. at 109a-110a.

3. To punish Gonzalez for organizing the petition that criticized their ally, the city manager, respondents engineered a plan to remove Gonzalez from office by any means, including arrest. In the months that followed, Gonzalez suffered an investigation for supposedly stealing the petition she spearheaded; a jailing based on this investigation; and two additional attempts to remove her from office. Pet. App. 111a-112a.

Councilmember McCormick sketched out respondents' plan and the relationship between an arrest and

---

[2] "*Video 2 – Petitions Recovered*," https://www.youtube.com/watch?v=oMsBYVPyIW0 beginning around 1:25); JA 50-51; see also note 1, *supra*.

removal in the city newsletter, *The Castle Hills Reporter*—a publication edited by City Manager Rapelye and reviewed by the city attorney. Pet. App. 104a, 111a-112a; JA 27-28. In an article published a day before Gonzalez's arrest, but written weeks ahead of time, *id.* at 111a, McCormick explained that a city councilmember could be removed in one of two ways: either she could be sued for official misconduct, or she could be convicted of a crime, which would make her immediately removable from office. JA 27-28; see Tex. Local Gov't Code § 21.031. "[A]ny conviction of an elected officer of a felony, or of a misdemeanor involving official misconduct," McCormick wrote, "operates as an immediate removal from office." JA 28.

a. *Investigation*. The investigation for briefly misplacing the petition lasted almost two months. Two days after the meeting, Police Chief Siemens assigned rank-and-file officer Sergeant Paul Turner to investigate Gonzalez. Pet. App. 112a-113a, 140a. Three weeks later, when Turner's investigation was not yielding the results Chief Siemens wanted, he appointed a trusted friend and local attorney Alex Wright as a "special detective" and assigned him to take over the investigation. *Id.* at 113a-114a. Wright spent another month "investigating" Gonzalez, ultimately bringing an arrest affidavit to a magistrate judge, which asserted that Gonzalez committed a Class A misdemeanor by "intentionally destroy[ing], conceal[ing], remov[ing], or otherwise impair[ing] the verity, legibility, or availability of a governmental record." *Id.* at 114a, 118a; Tex. Penal Code § 37.10(a)(3) (effective Sept. 1, 2015 to Aug. 31, 2019). Although speech is irrelevant to the elements of the criminal

offense, Wright's affidavit listed Gonzalez's viewpoints to justify her arrest, including that:

- "From her very first meeting in May of 2019 [Sylvia] has been openly antagonistic to the city manager, Ryan Rapelye, wanting desperately to get him fired."

- "Part of her plan to oust Mr. Rapelye involved collecting signatures on several petitions to that effect."

- "Gonzalez had personally gone to [Chalene] Martinez's house on May 13, 2019 to get her signature on one of the petitions under false pretenses, by misleading her, and by telling her several fabrications regarding Ryan Rapelye * * * damaging to his reputation."

JA 44-52. Wright hypothesized that Gonzalez was motivated to "steal the petitions—before further scrutiny could be brought to bear upon Chalene Martinez's signature thereon." *Id.* at 52. But, as any reasonably diligent investigation would have determined, Martinez never signed the petition. Pet. App. 107a. And even if she had, her signature would have shed no light on the propriety of the signature-gathering process.

This tampering charge against Gonzalez was highly unusual. A review of Bexar County data showed that in the ten years preceding Gonzalez's charge, no one had ever been charged for misplacing a government document—presumably a not-unprecedented occurrence. Pet. App. 117a. Specifically, out of 215 grand jury felony indictments obtained under the

statute, by far the largest portion involved accusations of using or making fake government identification, such as green cards, or social security numbers. A few others concerned the misuse of financial information, like writing fake checks or stealing banking information. Outlier examples included hiding evidence of murder, cheating on a government-issued exam, and using a fake certificate of title. Misdemeanor data was even less remarkable. In every reviewed case, the alleged tampering involved the use of fake social security numbers, driver's licenses, or green cards. *Ibid.*

b. *Jailing*. To secure Gonzalez's arrest and ensure she spent time in jail, Special Detective Wright performed three unusual maneuvers.

First, instead of issuing a summons, which would normally be used for people—like Gonzalez—who are known residents of the community suspected of low-level, non-violent offenses and which would not entail a trip to jail, Wright sought an arrest warrant. Pet. App. 114a.

Second, instead of following the normal warrant process by coordinating with the district attorney's office, which would have given the district attorney the opportunity to prevent unlawful or problematic arrests, Wright "walked the warrant" directly to a magistrate judge, circumventing normal processes with a procedure typically reserved for emergency situations (for example, a fleeing suspect). And there is no doubt the district attorney would have refused to approve Gonzalez's arrest if given the chance: when the district attorney's office finally learned of the charges

against Gonzalez, it immediately dismissed them. Pet. App. 114a-115a.

Third, instead of following the normal procedures that would have allowed Gonzalez to be booked, processed, and released at Bexar County's satellite-booking facility, the unconventional manner in which Wright obtained the warrant ensured that Gonzalez would be jailed. Wright's approach guaranteed that the warrant would not be discoverable through the satellite office's computer system. Pet. App. 115a.

When Gonzalez learned of the arrest warrant, she turned herself in. On July 18, 2019, Gonzalez—an elderly grandmother without even a speeding ticket on her record—was booked. She spent the day in jail, tightly handcuffed, on a cold metal bench, wearing an orange jail shirt, and avoiding the bathroom which was open to a room full of people. Pet. App. 118a-119a. Local media extensively covered the arrest and splashed Gonzalez's mug shot across newspapers and broadcasts, repeating respondents' accusations:

July 18, 2019, Booking Photo

Id. at 117a-119a.

c. *Removal from Office*. Respondents did two more things, above and beyond engineering her arrest, to remove Gonzalez from office.

The first preceded the arrest. A month after Gonzalez's election, as she was taking her seat for a council meeting, the city attorney pulled her into a room with Mayor Trevino and told Gonzalez that she had not been properly sworn in, she could not appeal that decision, and she would be replaced by the woman whom Gonzalez had defeated in her election. Pet. App. 119a-120a. Although the county sheriff had administered Gonzalez's oath, the attorney argued that a sheriff can administer an oath only if he "is engaged in the performance of [his] duties" and "the administration of the oath relates to [his] duties." Tex. Gov't

Code § 602.002(18). The attorney asserted the sheriff was doing neither when he swore in Gonzalez. Pet. App. 119a.

Tellingly, the city attorney did not question Mayor Trevino's swearing in, even though Trevino was sworn by a county commissioner, subject to similar pertaining-to-duties limitations in the Texas Code. Tex. Gov't Code § 602.002(6). Pet. App. 120a-121a.

Second, two-and-a-half months after Gonzalez's election, respondents engineered a civil lawsuit against Gonzalez, acting on the alternative theory for removal provided by McCormick. See JA 27-28. On July 23, 2019, six Castle Hills residents aligned with respondents sued Gonzalez for official misconduct. The removal suit relied primarily on the criminal charges against Gonzalez as the justification for her removal. Pet. App. 122a.

Both of these attempts initially failed. A state court enjoined Gonzalez from being removed based on the swearing in technicality, and the civil case was rejected when the district attorney—like with the criminal charges—refused to move forward with it. Pet. App. 122a-123a. But respondents still succeeded in their goal. Gonzalez was so exhausted, burdened, and embarrassed by the experience that she ultimately gave up her council seat and swore off organizing petitions or criticizing her government. *Id.* at 123a-124a.

Mayor Trevino and City Manager Rapelye still run Castle Hills today.

B. Proceedings Below

1. In September 2020, Gonzalez sued respondents and the City of Castle Hills in the Western District of Texas for violating her First Amendment rights to petition and criticize her government.[3] Pet. App. 126a, 129a. The district court denied respondents' motion to dismiss on qualified-immunity grounds, holding that under this Court's carve-out to *Nieves*'s no-probable-cause rule, "Plaintiff need not plead or prove the absence of probable cause." *Id*. at 80a. The court explained that by including allegations of Bexar County criminal data, Gonzalez had alleged sufficient "objective evidence that she was arrested when 'otherwise similarly situated individuals not engaged in the same sort of protected speech had not been[.]'" *Id*. at 81a (quoting *Nieves*, 139 S. Ct. at 1727). In addition, the right to be free from a retaliatory arrest, even if otherwise supported by probable cause, the court explained, was clearly established no later than May 28, 2019, when *Nieves* was decided. *Id*. at 88a.

2. a. The Fifth Circuit reversed, holding that *Nieves*'s no-probable-cause rule barred Gonzalez's retaliation claim. Pet. App. 21a. Although Gonzalez had alleged substantial objective evidence that she would not have been arrested had she not been a critic of the government, the panel concluded the evidence was of the wrong kind. In its view, "*Nieves* requires comparative evidence, because it required 'objective evidence' of 'otherwise similarly situated individuals' who

[3] Gonzalez's claims against the city have been stayed pending the resolution of her claims against the individual respondents on appeal. Accordingly, she does not discuss the city's asserted defenses here.

engaged in the 'same' criminal conduct but were not arrested." *Id.* at 29a (quoting *Nieves*, 139 S. Ct. at 1727). Given that Gonzalez had not pointed to another specific individual who had both misplaced a document without engaging in protected speech and was not arrested under the statute, "[t]he evidence Gonzalez provides here comes up short." *Ibid.*

2. b. Judge Oldham dissented. In his view, Gonzalez alleged sufficient objective evidence of retaliation under *Nieves*. "First, [Gonzalez's] evidence is obviously objective. She did a comprehensive 'review of misdemeanor and felony data from Bexar County over the past decade.'" Pet. App. 59a (Oldham, J., dissenting). And "[s]econd, [Gonzalez's] evidence supports the proposition that *Nieves* requires." *Ibid.* "Evidence that an arrest has never happened before (*i.e.*, a negative assertion) can support the proposition that there are instances where similarly situated individuals not engaged in the same protected activity hadn't been arrested (*i.e.*, a positive inference)." *Ibid.*

In addition, Judge Oldham cast doubt on *Nieves*'s application outside of on-the-spot police arrests. Pet. App 59a. "*Nieves* designed a rule to reflect" two realities that complicate the job of arresting officers when they make time-pressured arrests: (1) "that protected speech * * * is often a legitimate consideration when deciding whether to make an arrest" and (2) "that 'it is particularly difficult to determine whether the adverse government action was caused by the officer's malice or the plaintiff's potentially criminal conduct.'" *Id.* at 55a (quoting *Nieves*, 139 S. Ct. at 1724). "[T]he more relevant rule" for cases like Gonzalez's, according

to Judge Oldham, "appears to come from *Lozman*." *Ibid.* (citing *Lozman*, 138 S. Ct. at 1949).

In response to Judge Oldham's dissent, the majority asserted that *Lozman* was inapposite because its holding was limited to *Monell* claims. Pet. App. 32a.

3. The Fifth Circuit denied rehearing en banc in a ten-to-six vote, with Judges Smith, Higginson, Ho, Duncan, Oldham, and Douglas voting to rehear Gonzalez's case. Pet. App. 2a. Judge Ho wrote a dissent from the denial expressing many of the same concerns advanced in Judge Oldham's panel dissent and stating that "probable cause [must] pose no impenetrable barrier to a retaliation claim." *Id.* at 9a (Ho, J., dissenting from denial of en banc review).

SUMMARY OF ARGUMENT

I. The Fifth Circuit erred in applying *Nieves* and not *Mt. Healthy* to "deliberative, intentional, and premeditated conspiracies to punish people for protected First Amendment activity," Pet. App. 54a (Oldham, J., dissenting), because the *Nieves* no-probable-cause rule shields only arresting officers reacting to potential crimes unfolding before them and making on-the-spot decisions to arrest.

A. In *Mt. Healthy*, the Court recognized that while the government may not retaliate against its critics, critics do not get special rights. 429 U.S. at 285. To balance these two considerations, *Mt. Healthy* adopted the general burden-shifting framework, which—if the plaintiff carries her initial burden—requires the government to show that it would have taken the adverse action even without protected

speech. *Id.* at 287. This framework is the general rule for resolving retaliation cases, and the Court has applied it in a variety of contexts—including retaliatory arrests. See *Lozman*, 138 S. Ct. at 1955.

B. The Court has departed from *Mt. Healthy* only twice. The first time, in *Hartman* v. *Moore*, the Court held that the presence of probable cause in a retaliatory prosecution case would doom the plaintiff's ability to carry her *Mt. Healthy* burden. In that setting, even probative evidence of a defendant's animus is unlikely to show that the defendant induced the action of a prosecutor whose decisions enjoy the presumption of regularity. As a result, the Court created an irrebuttable presumption that, so long as probable cause supported the underlying charge, the prosecution would have occurred even without retaliatory motive. 547 U.S. at 261.

The second time, in *Nieves* v. *Bartlett*, the Court held that the presence of probable cause in a case involving an on-the-spot police arrest would similarly undermine the plaintiff's ability to carry her *Mt. Healthy* burden. Such arrests are often executed under time pressure. This leaves little evidence of retaliatory motive other than allegations of the officer's state of mind. And while the officer is making a time-pressured decision to arrest, speech may be a "wholly legitimate" consideration. *Nieves,* 139 S. Ct. at 1724. Such arrests are also executed by police officers, whose decisions are generally evaluated under an objective standard of reasonableness. *Id.* at 1725. In these special circumstances, the Court held, defendants also enjoy a presumption—though a rebuttable one—that the arrest would have occurred even without retaliatory motive. *Id.* at 1723.

C. But not every arrest supported by probable cause is the same. In cases like *Lozman* and this case, where defendants are not arresting officers, none of the special circumstances that justified *Nieves*'s departure from *Mt. Healthy* are present. Nor are those special circumstances present in *all* cases where defendants are police officers. Relevant here, they are not present when officers are not responding to unfolding crimes but instead have the opportunity to go back to the office, consult colleagues and legal advisors, or engage in more thorough investigations. In these cases, while probable cause maintains some evidentiary significance, it is not any more apt to disprove causation than other probative evidence of the sort courts routinely consider under *Mt. Healthy*. Thus, *Mt. Healthy*'s general rule should govern.

II. The Fifth Circuit further erred by rigidly limiting the universe of "objective evidence" upon which plaintiffs may rely in order to take advantage of *Nieves*'s carve-out to the no-probable-cause rule. Under the Fifth Circuit's view, the only objective evidence plaintiffs may point to is evidence of non-arrests of non-critics engaging in similar allegedly arrestable behavior. Thus, the Fifth Circuit held that the objective evidence alleged here—showing that respondents adopted an extraordinary and unprecedented interpretation of the law and applied it for the first and only time to a prominent critic—was irrelevant. But nothing in *Nieves* commands that result. Instead, the plaintiff should only have to produce objective evidence that speech was the reason for the arrest, which Gonzalez did.

III. The practical effect of the Fifth Circuit's ruling would be to all but preclude First Amendment claims for retaliatory arrest. That result can be squared with neither Section 1983 nor the common-law tort of abuse of process, which allowed plaintiffs to proceed on their claims without showing that probable cause was lacking.

IV. Affirming the Fifth Circuit's ruling would do violence to this country's foundational principles by incentivizing government officials to use inventive, pretextual arrests as their preferred means of suppressing criticism. Given the ever-expanding criminal laws, which are often so broad as to include perfectly innocent conduct, there are endless opportunities for government officials to use the criminal justice system to bludgeon dissenters into submission. America's defining characteristic is that, unlike Russia, Iran, and China, it doesn't jail its critics. This Court should not allow that to change.

ARGUMENT

I. This Court should not extend *Nieves* beyond First Amendment retaliation claims made against police officers for conducting on-the-spot arrests.

The First Amendment protects critics like Sylvia Gonzalez from official retaliation. *Nieves*, 139 S. Ct. at 1722. Yet the Fifth Circuit's ruling all but eliminates that protection when retaliation takes the form of an arrest.

As explained below, the burden-shifting framework this Court adopted in *Mt. Healthy* has long supplied the general rule for resolving First Amendment

retaliation cases, and this Court has successfully employed that framework even in cases of retaliatory arrest. This Court has departed from that framework only twice, in *Hartman* and *Nieves*, which turned on the unique facts present in claims for retaliatory prosecution and claims against police officers for on-the-spot arrests. Although the facts of this case—involving a months-long conspiracy to arrest a political critic—could not be further from the on-the-spot arrest at issue in *Nieves*, the Fifth Circuit held that *Nieves* controlled. That ruling cannot be squared with this Court's precedent and should be reversed.

A. *Mt. Healthy* provides the general rule for First Amendment retaliation cases.

1. First Amendment retaliation claims require courts to untangle the causes of adverse government action: Was it undertaken in illegitimate retaliation for protected speech, or was it undertaken for some other, legitimate reason, even if the government considered that speech? *Mt. Healthy*, 429 U.S. at 285. Recognizing the need to protect speakers' First Amendment rights while also ensuring that speakers are not better off than non-speakers "as a result of the exercise of the constitutionally protected conduct," the Court adopted a burden-shifting framework. *Ibid.* Under that framework, plaintiffs must make a threshold showing that protected speech "was a 'motivating factor'" behind the decision to take an adverse action. The burden then shifts to defendants, who can end the case by demonstrating that they "would have reached the same decision * * * even in the absence of the protected conduct." *Id.* at 287.

In *Mt. Healthy*, for example, a teacher alleged that he was not rehired by the school board because he spoke to a radio station about the school's memorandum on teacher dress and appearance. 429 U.S. at 282. To support his claim, the teacher supplied a letter he had received from one of the board members, stating in unambiguous terms that his radio interview was a part of the decision to not renew his contract. *Id.* at 282-283. The district court held that the teacher's allegations and evidence showed that the decision not to rehire him was substantially motivated by animus. *Id.* at 284-285, 287.

While the Court agreed, it stated that "even if * * * the protected conduct played a 'substantial part' in the actual decision not to [rehire]," that would not "necessarily amount to a constitutional violation justifying remedial action." *Mt. Healthy*, 429 U.S. at 285. A vivid incident, like disclosing private deliberations on a radio program, was "inevitably on the minds of those responsible for the decision to rehire," but it did not mean that the same decision would not have been reached had the incident not occurred. *Id.* at 285. To ensure that a critic is not placed "in a better position" than "he would have occupied had he done nothing," the Court held that merely proving that the protected conduct played a substantial part in the adverse decision could only get the teacher so far. *Ibid.* If the board showed that it would have reached the same decision in the absence of protected conduct, that would defeat the case. *Id.* at 287.

2. The *Mt. Healthy* framework has proven effective for sifting through harmful and unharmful considerations of speech. In the more-than-forty years since

Mt. Healthy was decided, this Court has countenanced its burden-shifting framework in an array of alleged government retaliation scenarios, including terminating a trash hauler's contract, *Bd. of Cnty. Comm'rs* v. *Umbehr*, 518 U.S. 668, 671 (1996), denying public employment, *Rankin* v. *McPherson*, 483 U.S. 378, 383 (1987), and subjecting a critic to arrest, *Lozman*, 138 S. Ct. at 1955.

Indeed, this Court's application of *Mt. Healthy* in *Lozman* is particularly instructive because *Lozman* "involved materially identical facts" to this case. Pet. App. 55a (Oldham, J., dissenting). Although *Lozman* concerned municipal liability, "the opinion's teachings are still instructive." *Id.* at 58a

Like this case, *Lozman* involved an outspoken critic who had become a thorn in the side of local government. The plaintiff, Fane Lozman, sued the City of Riviera Beach after city officials ordered his arrest in the middle of his unauthorized statements during a public-comment period. *Lozman*, 138 S. Ct. at 1949-1950. According to Lozman, his arrest had nothing to do with his breaking council meeting rules and everything to do with his long-term relationship with the city, which was openly antagonistic and litigious. *Ibid.* But because probable cause supported Lozman's arrest, the Eleventh Circuit held that *Mt. Healthy* did not apply. *Id.* at 1950.

This Court reversed, holding that *Mt. Healthy* applied. In the process, the Court highlighted a number of facts regarding *Lozman*'s arrest that made it suitable for review under *Mt. Healthy* despite the existence of probable cause and placed it outside of the "mine

run of arrests." 138 S. Ct. at 1954. In part, this was because Lozman sued city officials, rather than the arresting officer. *Ibid*. This was important because when looking at the behavior of a councilmember, courts don't need to deal with the difficulty of superimposing subjective motivations on a general objective reasonableness standard, which is used for evaluating officer conduct. *Ibid*. Equally significant was that, as here, Lozman "allege[d] more governmental action than simply an arrest," claiming that defendants "formed a premeditated plan to intimidate him in retaliation for his criticisms of city officials." *Ibid*.

This Court recognized that evidence in such premeditated arrests involving retaliation for "prior, protected speech bearing little relation to the criminal offense for which the arrest is made" can more than outmatch the existence of probable cause, *Lozman*, 138 S. Ct. at 1954—something that would not be true with time-pressured police arrests that the Court later considered in *Nieves*, see Part II.B, *infra*. Lozman, for example, alleged a long history of animosity between himself and the government officials who ordered his arrest—an allegation he supported by pointing to a variety of actions the government had taken against him that were unrelated to his breaking council rules. *Lozman,* 138 S. Ct. at 1949-1950.

This Court remanded Lozman's case with the instruction that *Mt. Healthy* applies notwithstanding the existence of probable cause. *Lozman,* 138 S. Ct. at 1955. *Lozman* thus confirms that *Mt. Healthy* supplies the general rule for resolving First Amendment retaliation cases, and there is no per se exception to *Mt. Healthy* for cases involving arrests supported by probable cause.

B. This Court has departed from the *Mt. Healthy* rule in two discrete contexts: retaliatory prosecutions and on-the-spot police arrests.

This Court has departed from *Mt. Healthy*'s burden-shifting framework in only two contexts: retaliatory prosecutions and claims against police officers for on-the-spot arrests. It justified those departures as necessary to account for the unique role probable cause plays in each situation.

1. For retaliatory prosecutions claims, the Court in *Hartman* v. *Moore* held that the existence of probable cause creates an irrebuttable presumption that the prosecution would have occurred even without retaliatory motive. 547 U.S. at 263-266. As this Court made clear, that presumption was justified on two grounds unique to retaliatory prosecution cases. First, prosecutors' decisions enjoy a "presumption of regularity," *id*. at 263, which attaches "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute," *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996). Second, the defendant in these cases is not the prosecutor, but rather a nonprosecuting official who, the plaintiff must show, induced the prosecutor to act. *Hartman*, 547 U.S. at 261-262 (describing retaliatory prosecution cases as "successful retaliatory inducement to prosecute" cases). Taken together, these factors make retaliatory prosecution cases unsuited to the *Mt. Healthy* framework. Even if the plaintiff could present evidence of inducement in her prima facie case, that would not dispense with the presumption of

regularity afforded to prosecutors' decisions to bring charges supported by probable cause. *Id.* at 265.

The facts of *Hartman* illustrate these points. In *Hartman*, the chief executive of a company that manufactured multiline barcode readers alleged that postal inspectors successfully induced a prosecutor to bring criminal charges against him and his company. 547 U.S. at 252-253. According to the plaintiff, the inspectors wanted him prosecuted in retaliation for his lobbying campaign to pressure the Postal Service to adopt the technology behind his product. *Ibid.*

Ultimately, the plaintiff was prosecuted and, following his acquittal, he sued the postal inspectors for retaliation. In the course of that suit, the plaintiff provided extensive evidence of the inspectors' forbidden motive. For example, the postmaster general specifically asked the plaintiff to cease his public pressure campaign to adopt the multiline reader, and when plaintiff refused, postal service inspectors launched two investigations against him. *Hartman*, 547 U.S. at 252-253. Moreover, when the postal service finally acquiesced and adopted the multiline technology, the plaintiff's company did not get that contract. *Ibid.*

The Court did not dispute that this evidence was persuasive as to the *investigators'* intent. But the Court held that the prosecutor's independent decision to prosecute broke the "chain of causation from animus to injury," at least when that decision was supported by probable cause. *Hartman*, 547 U.S. at 259. In other words, all of the plaintiff's evidence could not prove that the prosecutor would not have brought charges anyway. *Id.* at 262.

Because the prosecutor's decision to prosecute was entitled to a presumption of regularity, this Court felt that the only practical way to "bridge the gap between the nonprosecuting government agent's motive and the prosecutor's action" was through evidence of the presence or absence of probable cause. *Hartman*, 547 U.S. at 263. Thus, in the context of retaliatory prosecution cases, the unique role of the prosecutor justified departure from the *Mt. Healthy* framework.

2. In *Nieves* v. *Bartlett*, this Court held that similar special considerations justified departing from *Mt. Healthy* when police officers are sued for making on-the-spot arrests—on-the-spot meaning probable cause and the arrest arise in a single event based on the officer's observations. First, just as with prosecutors, police officers operate under special rules. When they perform their duties, such as executing arrests, their conduct is generally evaluated under the standard of objective reasonableness, which makes state-of-mind allegations inherently less persuasive. *Nieves*, 139 S. Ct. at 1724-1725 (citing *Devenpeck* v. *Alford,* 543 U.S. 146, 155 (2004)). Second, just as with prosecutions, on-the-spot arrests—due to their compressed timeline—pose unique evidentiary problems. These special features justified creating a rebuttable presumption that if a police officer had probable cause to arrest, he would have made the decision to arrest even without retaliatory motive. *Id*. at 1725.

The facts of *Nieves* exemplified this reasoning. *Nieves* was set against the backdrop of an "Arctic Man" festival, with "upwards of 10,000 people descend[ing] on [Alaska] for * * * an event known for

both extreme sports and extreme alcohol consumption." 139 S. Ct. at 1720. The plaintiff sued, claiming that two officers patrolling a crowded festival retaliated against him when—reacting to his speech, apparent intoxication, and aggressive posture—they arrested him for disorderly conduct. *Id.* at 1721. The plaintiff, on the one hand, alleged that the officers did not like his speech because one of the officers stated during the arrest: "[B]et you wish you would have talked to me now." *Ibid.* The officers, on the other hand, had probable cause to arrest the plaintiff for disorderly conduct. *Ibid.*

In the Court's view, under these circumstances, probable cause was dispositive. First, defendants were police officers, whose conduct courts "generally review * * * under objective standards of reasonableness." *Nieves*, 139 S. Ct. at 1725. Second, in on-the-spot arrests—which occur under "circumstances that are tense, uncertain, and rapidly evolving," *id.* (quoting *Graham* v. *Connor*, 490 U.S. 386, 397 (1989))—the only evidence of retaliatory motive will typically go to the arresting officer's subjective state of mind, see *id.* at 1724-1725. But a state of mind "is 'easy to allege and hard to disprove'"—a problem magnified by the fact that police officers may have entirely proper reasons to take speech into account when making an on-the-spot arrest, such as in determining whether a suspect presents a threat or is ready to cooperate. *Id.* at 1725 (quoting *Crawford-El* v. *Britton*, 523 U.S. 574, 585 (1998)). Indeed, the officers in *Nieves* testified that they had determined the plaintiff presented a threat. *Id.* at 1724.

Thus, this Court observed that claims arising out of on-the-spot police arrests provide a "closely related context" to *Hartman* and are ill-suited to the *Mt. Healthy* framework. *Nieves*, 139 S. Ct. at 1725. In the Court's view, the existence of probable cause in such cases precludes retaliation claims against arresting officers unless a plaintiff can point to objective evidence that non-critics would not have been arrested for a similar conduct. *Id.* at 1728; see Part II, *infra*.

C. *Mt. Healthy*, not *Nieves*, governs retaliatory arrest claims that involve investigatory periods instead of on-the-spot police arrests.

The Fifth Circuit erred in deciding this case under *Nieves* and not *Mt. Healthy*. As the alleged facts show, none of the concerns that justified this Court's previous departures from the *Mt. Healthy* framework are present here. The arrest of Sylvia Gonzalez—far from reflecting the "tense, uncertain, and rapidly evolving" nature of *Nieves*'s on-the-spot arrest, 139 S. Ct. at 1725—did not occur until two months after the event supplying probable cause. Moreover, unlike in *Nieves*, Gonzalez did not sue the officers who arrested her.

Simply put, Gonzalez's claim is still an "ordinary retaliation claim[]," even though her arrest was supported by probable cause. *Hartman*, 547 U.S. at 259. Examples from this Court and lower courts confirm that *Mt. Healthy* supplies the fitting framework here.

1. First and most notable is this Court's ruling in *Lozman*. See Part I.A., *supra*. "Each of [the] characteristics" that convinced the Court not to extend *Hartman* to

Lozman is "present (at least in part) here." Pet. App. 57a (Oldham, J., dissenting).

Just like *Lozman*, this case does not involve a claim against an arresting officer, which all by itself means that this case falls outside of the "mine run of arrests made by police officers" at issue in *Nieves*. *Lozman*, 138 S. Ct. at 1854.

Just like *Lozman*, this case points to more actions than an arrest and does not rely on mere allegations of state of mind. For example, there is evidence of the respondents' attempt to strip Gonzalez of the council seat based on a technicality involving a swearing-in procedure, and respondents' allies' baseless lawsuit against Gonzalez, using the tampering charge as part of an argument for why a state court should have ordered her removal from office.

Just like in *Lozman*, the protected speech here bore little relation to the criminal offense for which Gonzalez was arrested. "[Gonzalez's] spearheading of the petition was irrelevant to the elements of the criminal offense and the reasons provided in the affidavit to get the arrest warrant." Pet. App. 57a (Oldham, J., dissenting).

2. *Mt. Healthy* also supplies the appropriate standard for claims against arresting officers who are *not* making on-the-spot arrests. Unlike the "mine run of arrests" exemplified by *Nieves*, police officers in these cases are not reacting to a crime unfolding before them, without an opportunity to go back to the office and deliberate. Instead of operating under "circumstances that are tense, uncertain, and rapidly

evolving," 139 S. Ct. at 1725, these police officers are operating entirely under conditions within their control, with plenty of time to not only carefully consider their actions, but also to consult with legal advisors.

Put differently, deliberative, premeditated arrests that follow an investigatory period do not involve patrol work or responses to citizen calls, which take up most of police time. Barry Friedman & Elizabeth G. Jánszky, *Policing's Information Problem*, 99 Tex. L. Rev. 1, 8-9 & n.33 (2020) (describing patrol officers as "the 'backbone' of policing" and citing studies).[4] As a result, they do not warrant the same protections as those accorded to on-the-spot law-enforcement decisions. Cf. *County of Sacramento* v. *Lewis*, 523 U.S. 833, 853 (1998) (applying a more deferential due process standard to police when "unforeseen circumstances demand an officer's instant judgment" but not when "the luxury enjoyed" by an official provided more "time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations").[5]

---

[4] Cf. Egon Bittner, *Florence Nightingale in Pursuit of Willie Sutton: A Theory of the Police in* The Potential for Reform of Criminal Justice 31, 33 (Jacob Herbert ed., 1974) (characterizing the "unique competence" of the police as responding to events involving "something-that-ought-not-to-be-happening-and-about-which-somebody-had-better-do-something-now" and recognizing the societal expectation that "the policemen will handle the problem 'then-and-there.'")

[5] See also *Regina* v. *Walker*, 169 Eng. Rep. 759, 760 (1854) (Pollock, C. B.) (declaring a warrantless arrest unlawful when "[t]he assault for which the prisoner might have been apprehended was committed at another time and at another place; there was no continued pursuit of the prisoner, and the

One such case is *Ballentine* v. *Tucker*, where a police officer was sued for arresting plaintiffs three weeks after they chalked statements criticizing the police on the sidewalks of Las Vegas. 28 F.4th 54, 60 (9th Cir. 2022). The Ninth Circuit decided that, as a retaliatory arrest case, *Ballentine* should be first analyzed under *Nieves*. *Id*. at 62. But the Ninth Circuit went on to discuss how *Mt. Healthy* would apply if the plaintiff showed on remand that he was entitled to *Nieves*'s carve-out to the no-probable-cause rule. That discussion vividly shows how, in cases involving premeditated and deliberative police arrests, *Mt. Healthy* supplies appropriate tools for differentiating between benign considerations of speech and retaliation, even when such arrests are supported by probable cause.

Particularly relevant here, *Ballentine* illustrates how, in cases not involving time-pressured decisionmaking, both plaintiffs *and* defendants have access to a bevy of objective evidence with which to satisfy their respective burdens. The plaintiffs in *Ballentine*, for example, alleged that, during the weeks between probable cause and arrest, the officer tracked the protesters on social media, engaged with them about the content of their speech, and ignored chalkers who were not drawing anti-police messages. *Ballentine,* 28 F.4th at 59-60. Like this case, the plaintiffs also pointed to deviations from normal procedures that secured harsher treatment for the government critics, specifically, the arresting officer's decision to seek an arrest warrant rather than simply issuing a

---

interference of the prosecutor was not for the purpose of preventing an affray, nor of arresting a person whom he had seen committing an assault").

citation. *Id*. at 62. But the officer too could have defended himself by presenting evidence that he would have made an arrest even without taking speech into account. For example, the officer testified that the reason he pursued an arrest warrant was because previous citations had not deterred the plaintiffs from violating the anti-graffiti ordinance. *Id*. at 60. In addition, the protesters were given opportunities to express the same speech by using signs, instead of chalking on sidewalks. *Id*. at 59. Thus, as in *Lozman* and this case, the longer time frame allowed for a more comprehensive review of evidence under *Mt. Healthy*, benefiting the judicial process without inherently disadvantaging either party.

* * *

The Fifth Circuit's departure from *Mt. Healthy* was neither required by *Nieves* nor justified by any of the special considerations present in *Nieves*. Cases of deliberative, premeditated retaliatory arrest like this one and like *Lozman* are appropriately decided under *Mt. Healthy*, regardless of whether the arrest is supported by probable cause.

II. Even if *Nieves* controlled all retaliatory arrest claims, Gonzalez alleged sufficient objective evidence to overcome probable cause.

Even if *Nieves* governs this case, Gonzalez meets its criteria for overcoming the existence of probable cause. *Nieves* requires only that plaintiffs point to "objective evidence" that they were treated differently from non-critics, *Nieves*, 139 S. Ct. at 1727, which is

exactly what Gonzalez did here. Limiting the objective evidence to specific instances of non-arrests under the same statute, as the Fifth Circuit's ruling does, imposes artificial rigidity to this very important carve-out, making it impossible to satisfy. See Pet. App. 9a (stating that *Nieves* imposed "no impenetrable barrier to a retaliation claim") (Ho, J., dissenting from denial of en banc review).

A. The *Nieves* carve-out from the no-probable-cause rule requires only that evidence be objective.

The rule announced in *Nieves* is not based on the naïve assumption that on-the-spot police arrests supported by probable cause are never driven by retaliatory animus—it is a pragmatic rule for dealing with the evidentiary difficulties that arise in situations where speech may be relevant to the decision to arrest and there will often be little evidence of retaliation beyond ephemeral evidence of an arresting officer's subjective motivations. But, as this Court recognized in *Nieves*, not all on-the-spot arrests supported by probable cause suffer these evidentiary difficulties. For this reason, *Nieves* created a carve-out from its no-probable-cause rule, to address "circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Nieves*, 139 S. Ct. at 1727.

A plaintiff can access this carve-out by alleging "objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Nieves*, 139 S. Ct. at 1727. "After making the required

showing, the plaintiff's claim may proceed in the same manner as claims where the plaintiff has met the threshold showing of the absence of probable cause." *Ibid*. If an officer arrests a critic for jaywalking, for example, probable cause will not bar a lawsuit if this critic can show that jaywalking at that intersection "rarely results in arrest." *Ibid*. "[T]o dismiss [this] claim on the ground that there was undoubted probable cause for the arrest" would be "insufficiently protective of First Amendment rights." *Ibid*.

Nieves imposed only one limitation on the evidence that may be presented to satisfy the carve-out: The evidence must be objective, meaning that "statements and motivations of the particular arresting officer[6] are 'irrelevant' at this stage." *Nieves*, 139 S. Ct. at 1727 (quoting *Devenpeck*, 543 U.S. 146 at 153); see also Pet. App. 53a (Oldham, J., dissenting) ("[T]he absolute most that can be said about the Court's holding is that (1) the presence of probable cause is not a bar to retaliatory arrest claims, so long as (2) the plaintiff produces objective evidence of retaliatory animus.")

---

[6] If there were any doubt that *Nieves* is limited to time-pressured decisionmaking by arresting officers, the phrasing of the exception in terms of arresting officers should dispel it. It would make no sense for the Court to create a probable-cause bar for *all* retaliatory arrest claims but allow plaintiffs to circumvent this bar only when they sue on-the-beat law-enforcement. Cf. *Hoggard* v. *Rhoades*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., dissenting from the denial of certiorari) (questioning why officials "who have time to make calculated choices" should receive the same protection as "a police officer who makes a split-second decision to use force in a dangerous setting").

B. The Fifth Circuit's interpretation of the *Nieves* carve-out writes it out of existence.

The Fifth Circuit interpreted *Nieves*'s "objective evidence" limitation as requiring plaintiffs to identify specific individuals who engaged in a similar unlawful conduct, did not criticize the government, and were not arrested. Pet. App. 28a-29a; but see *Nieves*, 139 S. Ct. at 1734 (Gorsuch, J., concurring in part and dissenting in part) ("I do not understand the majority as going that far."). This rigid interpretation turns the carve-out into a nullity. Moreover, it excludes lot of probative objective evidence for no good reason.

1. This Court did not intend for the *Nieves* no-probable cause rule to be insurmountable. If it had, it would have extended *Hartman* and created another irrebuttable presumption. Instead, concerned with protecting speakers from officers who "'exploit the arrest power as a means of suppressing speech,'" this Court did not impose an "unyielding requirement to show the absence of probable cause." *Nieves*, 139 S. Ct. at 1727 (quoting *Lozman*, 138 S. Ct. at 1953).

Yet the Fifth Circuit's rule—treating evidence of non-arrests as the only objective evidence plaintiffs may rely upon to satisfy the *Nieves* carve-out—would do exactly that. Such an interpretation makes *Nieves*'s no-probable-cause rule effectively irrebuttable for three reasons.

First, the information the Fifth Circuit rule requires is unlikely to exist because police generally keep no records of instances where they could have

performed an arrest but didn't. Alison Siegler & William Admussen, *Discovering Racial Discrimination by the Police*, 115 Nw. U. L. Rev. 987, 1023-1024 (2021); see *Nieves*, 139 S. Ct. at 1740 (Sotomayor, J., dissenting) (stating that "while records of arrests and prosecutions can be hard to obtain, it will be harder still to identify arrests that never happened"); *id.* at 1733 (Gorsuch, J., concurring in part and dissenting in part) (observing that "[s]ome courts of appeals have * * * reasoned * * * that comparative data about similarly situated individuals may be less readily available for arrests than for prosecutorial decisions").

Second, even if such evidence existed, it would be within police officers' knowledge and control, and outside of plaintiffs' reach pre-discovery. Siegler & Admussen, *supra*, at 1023-1024; cf. *Thompson* v. *Clark*, 596 U.S. 36, 48 (2022) (explaining that "the individual's ability to seek redress for a wrongful prosecution cannot reasonably turn on the fortuity of whether the prosecutor or court happened to explain why the charges were dismissed"). That contrasts with prosecutions, where plaintiffs can "compar[e] who was arrested with who was prosecuted." *United States* v. *Sellers*, 906 F.3d 848, 853 (9th Cir. 2018).

Third, finding statistical evidence with respect to non-critics is especially difficult. "[U]nlike race, gender, or other protected characteristics, speech is not typically sorted into statistical buckets that are susceptible of ready categorization and comparison." *Nieves*, 139 S. Ct. at 1740 (Sotomayor, J., dissenting).

2. An insuperable burden for plaintiffs aside, there are also no sound reasons for the Fifth Circuit's rule

restricting the acceptable evidence to specific instances of non-arrest of people engaged in near-identical conduct. There are many types of equally probative, objective evidence that can show a critic being treated differently from similarly situated non-critics. One such type is statistical evidence. Pet. App. 52a (Oldham, J., dissenting). Another type is non-statistical evidence, such as a record of previous behavior by the defendant, departures from the normal procedural sequence, and official transcripts. See, *e.g.*, *Lozman*, 138 S. Ct. at 1949-1950.

a. "It's not difficult to imagine different forms of [statistical] evidence that might be used to prove" that a person was singled out when a non-critic would not have been. Pet. App. 9a (Ho, J., dissenting from denial of en banc review). For example, like here, "a plaintiff might present evidence that the underlying statute had never been used under analogous circumstances." *Id*. at 10a; see also *Ballentine*, 28 F.4th at 62 (observing that records of a statute not being used to arrest chalkers is a kind of "objective evidence" that may be used for purposes of the *Nieves* carve-out). Or, as with jaywalking, a plaintiff can point to statistics to show that while the unlawful activity is commonplace, at the intersection in question, jaywalking arrests are exceptionally rare. *Nieves*, 139 S. Ct. at 1727; see also *Lund* v. *City of Rockford*, 956 F.3d 938, 945-946 (7th Cir. 2020) (stating that evidence of rare enforcement could satisfy the threshold requirement to overcome the existence of probable cause). Similarly, to infer existence of non-arrests, courts could "permit plaintiffs to draw from a broad universe of potential comparators" and "allow[] * * * rough comparisons or inexact statistical evidence where laboratory-like controls cannot realistically be expected." *Nieves*, 139 S. Ct. at

1741 n.8 (Sotomayor, J., dissenting). "Simply put, just because * * * evidence requires an inference doesn't mean it isn't evidence sufficient to meet *Nieves*." Pet. App. 60a (Oldham, J., dissenting).

District courts—because of their broad authority to "tailor discovery narrowly and * * * dictate the sequence of discovery," *Crawford-El*, 523 U.S. at 598—are well-equipped to handle this evidence. If necessary, they can order further discovery into statistical evidence based on the reliability and strength of the plaintiff's showing. See, *e.g.*, *Sellers*, 906 F.3d at 855 (discussing comparative evidence in the context of selective enforcement claims under the Equal Protection Clause); *United States* v. *Davis*, 793 F.3d 712, 720-721 (7th Cir. 2015) (en banc) (same).

b. The Fifth Circuit's rule also improperly excludes a wide variety of objective, non-statistical evidence that courts have found relevant to establishing improper government motive in analogous circumstances. In *Lozman*, for example, the Court found it noteworthy that, prior to his arrest, the city systematically singled out Lozman for treatment not accorded to non-critics, such as forcing him to muzzle his dog and filing an admiralty lawsuit against his floating home. *Lozman*, 138 S. Ct. at 1950, 1954.

In addition, this Court relied on a transcript of a closed-door session during which one of the councilmembers "suggested that the City use its resources to 'intimidate' Lozman and others who had filed lawsuits against the city" and the rest of the councilmembers "responded in the affirmative" to the suggestion. *Lozman*, 138 S. Ct. at 1949. This transcript, in the

Court's view, was "objective evidence" tending to show that those who filed lawsuits against the city would be targeted, while those who did not file lawsuits against the city would not be targeted through police powers available to the municipality. *Id.* at 1954. While the Court in *Nieves* explained that "statements * * * of the *particular arresting officer* are 'irrelevant' at this stage," *Nieves,* 139 S. Ct. at 1727 (emphasis added), *Lozman* counsels against excluding official documents showing a calculated decision by other government actors who use the police to retaliate against critics. *Lozman*, 138 S. Ct. at 1954. This distinction, like the distinction between the primary holdings of *Nieves* and *Lozman*, is justified by the special circumstances of on-the-spot arrests. After all, it is one thing when an arresting officer voices frustration or irritation with a vocally critical suspect in the chaotic and often dangerous circumstances surrounding an arrest; it is another when a government official describes a long-term plan to use the machinery of the government in furtherance of retaliation.

Lower courts, too, have found non-statistical objective evidence helpful when inquiring into improper government motive. For example, in *Marshall* v. *Columbia Lea Regional Hospital*, a case involving allegations of a racially discriminatory arrest by a New Mexico police officer, Judge McConnell wrote for the unanimous Tenth Circuit panel to hold that, independent of statistical comparators, the officer's disciplinary record, his arrest reports in similar cases, and newspaper articles describing racial tensions in the community could "provide evidence that similarly situated individuals of a different race received

differential treatment." 345 F.3d 1157, 1163, 1167-1168, 1171 (10th Cir. 2003) (citing *Armstrong*, 517 U.S. at 465).

As *Lozman* and *Marshall* show, there is no basis for excluding these or any other type of objective evidence from consideration when applying *Nieves*'s carve-out to the no-probable-cause rule. The Fifth Circuit's exclusion of evidence other than direct comparators does little to deter government officials from exploiting the arrest power as a means of suppressing speech.

C. Gonzalez alleged sufficient objective evidence to fit within the *Nieves* carve-out to the no-probable-cause rule.

In her complaint, Gonzalez alleged ample objective evidence—both statistical and non-statistical—showing that she was targeted for her speech.

First, Gonzalez described a decade's worth of misdemeanor and felony data from Bexar County, where she was arrested. According to that data, no one in that county of two million people had ever been charged for misplacing a government document during a public meeting. This "negative assertion amounts to direct evidence" that Gonzalez was singled out based on her speech. Pet. App. 60a (Oldham, J., dissenting). True, Gonzalez could not point to "evidence of other similarly situated individuals who mishandled a government petition but were not prosecuted." *Id*. at 28a-29a. But it is also implausible that Gonzalez was the first person in the history of Bexar County to temporarily mislay a government document. Thus, "evidence that the underlying statute

had *never* been used under analogous circumstances, despite the fact that such conduct is commonplace" tends to show that "county officials decided to arrest [Gonzalez], even though they usually exercise their discretion not to make such arrests." *Id.* at 10a-11a (Ho, J., dissenting from denial of en banc review) (emphasis in the original). "[T]hat's all *Nieves* requires." *Id.* at 11a.

Second, Gonzalez alleged other objective, non-statistical evidence showing that a non-critic in her shoes would not have been arrested. Indeed the very affidavit respondents submitted to support the warrant for Gonzalez's arrest is replete with references to her petitioning activities and criticism of the city manager. See pp. 11, *supra*. The affidavit objectively evidences respondents' calculated choice to charge Gonzalez because of her protected conduct.

Gonzalez also, like the plaintiff in *Marshall*, provided a newsletter describing two ways to remove a councilmember from her seat: convict her of a crime or sue her for official misconduct. Not only was the newsletter published contemporaneously with the incidents at issue here, it describes exactly the methods that respondents and their allies used to retaliate against Gonzalez. This too is objective evidence of a plan to remove Gonzalez for being a critic.

In addition, like the plaintiffs in *Marshall* and *Lozman*, Gonzalez pointed to the record of respondents' previous behavior targeting Gonzalez for her speech. Before throwing Gonzalez in jail, respondents tried to remove her from the city council based on a technicality that could have applied with equal force

to the mayor. Yet, the mayor, obviously not a critic, was spared, while Gonzalez, a critic, was not. And, after that failed and the district attorney dismissed the criminal charges against her, respondents continued their campaign for Gonzalez's removal via a civil suit advanced through their allies.

Finally, Gonzalez also presented evidence of "[d]epartures from the normal procedural sequence," which "might afford evidence that improper purposes are playing a role." *Village of Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977). She showed that "Special Detective Wright lived up to his title" and "did three special things to ensure that [Gonzalez] would be arrested and jailed rather than simply asked to appear before a judge." Pet. App. 38a (Oldham, J., dissenting); see pp. 12-13, *supra*. Each was reserved for violent or fleeing felons, a laughable idea when applied to Gonzalez, an elderly grandmother with no criminal record of any kind accused of low-level, non-violent infraction.

* * *

Gonzalez has alleged objective, highly probative evidence that only government critics get thrown in jail in Castle Hills for putting documents in the wrong pile. The Fifth Circuit wrongly excluded Gonzalez's evidence from consideration.

III. Section 1983 and the common law support Gonzalez's retaliation claim.

The practical effect of the Fifth Circuit's ruling would be to greenlight public officials' "use [of the] law enforcement machinery for political ends," so long as

they can launder it through probable cause. Pet. App. 3a (Ho, J., dissenting from denial of en banc review) (citation omitted). Neither Section 1983, nor common law, which the Court looks to "[w]hen defining the contours of a claim under § 1983," *Nieves*, 587 U.S. at 1726, countenances such an outcome.

1. The text of Section 1983 counsels against applying *Nieves* to Gonzalez's claim. First, as a remedial statute, Section 1983 should be given "the largest latitude consistent with the words employed" by Congress. *Lake Country Ests., Inc.* v. *Tahoe Reg'l Plan. Agency*, 440 U.S. 391, 399-400 & n.17 (1979) (quoting Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871) (Rep. Shellabarger)). And the words Congress employed are categorical: "Every person" "shall be liable" for "subjecting or causing to be subjected" another person to the "deprivation of any rights secured by the Constitution" under color of state law. 42 U.S.C. 1983. "[L]ook 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).

2. The common law also confirms that probable cause should not bar Gonzalez's retaliation claim. The closest common-law analog to this claim is abuse of process, and it allowed the plaintiff to proceed with the lawsuit without showing the absence of probable cause. See C. G. Addison, *Wrongs and their Remedies, being a Treatise on the Law of Torts* at 601-602 (1870) (3d ed.); see also *Heck* v. *Humphrey*, 512 U.S. 477, 486 n.5 (1994) ("The gravamen of [abuse-of-process] is not the wrongfulness of the prosecution, but some

extortionate perversion of lawfully initiated process to illegitimate ends."); *Hartman*, 547 U.S. at 258.

Abuse of process emerged from an observation that sometimes defendants, while acting with lawful authority, were nonetheless inflicting injury on plaintiffs by perverting the use of judicial process. *Grainger* v. *Hill*, 132 Eng. Rep. 769, 773 (1838) (Park, J.). Under this tort, defendants were liable for exploiting the legal tools at their disposal for ulterior purposes—for example, to extort property, to vex plaintiffs with harsh treatment, and to remove plaintiffs as obstacles. See, e.g. *id.* at 221 (Tindal, C.J.), 222 (Park, J.), 223 (Vaughan, J.), 224 (Bosanquet, J.) (plaintiff didn't need to overcome probable cause where defendants used an arrest to pressure plaintiff into giving them property to which they had no right); *Smith* v. *Weeks*, 18 N.W. 778, 783-784 (Wis. 1884) (plaintiff wouldn't need to overcome probable cause where defendant, faced with a number of options for a train engineer's arrest, chose the time most oppressive to the engineer, subjecting him to a night of frigid temperatures and unsanitary conditions in jail); *Jackson* v. *American Tel. & Tel. Co.*, 51 S.E. 1015, 1016, 1018 (N.C. 1905) (plaintiff didn't need to overcome probable cause where a telephone-company crew chief caused a land-owner's arrest to remove him as an obstacle to setting up telephone poles on the land).

Though the forms of abuse varied, the principle was well-settled by 1871 when Congress enacted Section 1983: An abuse-of-process claim did not require plaintiffs to plead and prove the absence of probable cause. Instead, plaintiffs generally had to show oppression in the defendant's perverted use of legal

process "for some unlawful object." *Mayer* v. *Walter*, 64 Pa. 283, 285-286 (1870) (differentiating between abuse of process and malicious prosecution and observing that in cases of abuse of process, "it is entirely immaterial whether the proceeding itself was baseless or otherwise. We know that the law is good, but only if a man use it lawfully."); see also *Sommer* v. *Wilt*, 4 Serg. & Rawle 19, 23 (Pa. 1818) ("The injury consists in the oppression and the malice.").

Gonzalez's suit lines up with this tradition: government officials "working upon the fears of the person under arrest" to compel her to do some act in accordance with the wishes of those in control. *Wood* v. *Bailey*, 11 N.E. 567, 576 (Mass. 1887). "[F]or every such wrong there is a remedy, not only against the officer whose duty it is to protect the person under arrest, but also against all others who may unite with him in inflicting the injury." *Ibid.* In line with Section 1983 and common law, probable cause should not be a barrier to Gonzalez's suit.

IV. The Fifth Circuit's ruling, if affirmed, will dramatically expand the government's power to arrest political opponents.

The Fifth Circuit's ruling provides a loophole for unaccountable retaliation: As long as an official can find a crime to fit a critic, he can avoid accountability. This is problematic, to say the least. Arrests based on probable cause are easy to engineer, while being arrested tends to linger in the critic's and society's psyche longer than perhaps any other form of retaliation. More fundamentally, arresting critics is corrosive to the very foundation of a free society.

A. Arrests are a particularly pernicious form of punishment and must not be allowed to become a retaliation weapon of choice.

Arrests are more pernicious than other forms of government retaliation for two primary reasons. First, opportunities for arrests are abundant. Second, the effects of arrests are especially harmful and, therefore, particularly chilling.

1. Because the number of criminal laws in the United States has exploded, "almost anyone can be arrested for something." *Nieves*, 139 S. Ct. at 1730 (Gorsuch, J., concurring in part and dissenting in part). Between 1994 and 2019, for instance, the number of statutory provisions creating a federal crime increased by 36 percent. GianCarlo Canaparo et al., Heritage Found., Count the Code: Quantifying Federalization of Criminal Statutes 3 (2022). The situation is just as bad at the state level. Between 2010 and 2015, for example, the South Carolina legislature enacted an average of 60 new crimes annually, followed by Minnesota with 46, Michigan with 45, North Carolina with 34, and Oklahoma with 26. James R. Copland & Rafael A. Mangual, Manhattan Inst., Overcriminalizing the Sooner State 6, Issue Brief 56 (2016). Because arrests are allowed as long as there is probable cause to believe a person committed "even a very minor criminal offense," *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 354 (2001), the risk of retaliatory arrests "has never been more prevalent than today." Pet. App. 4a (Ho, J., dissenting from denial of en banc review); see also Tex. Code Crim. Proc. art. 14.01-

14.03, 14.04, 15.03 (showing that an individual can be arrested for any felony or misdemeanor offense).

Minor offenses are not hard to find. In Texas, a person can get arrested for obstructing a sidewalk. Tex. Penal Code § 42.03. In Louisiana, it's a crime to use turn signals improperly. La. Stat. §§ 32:104; 32:391. And in Alabama, it's illegal to ride a bicycle on a sidewalk. Ala. Stat. §§ 32-1-1.1(87); 32-5A-52.

Many crimes, moreover, are so open-ended that their text can be understood to cover perfectly innocent conduct. In this case, Gonzalez was arrested for tampering with a government record because misplacing a paper in a binder can technically be an intentional act that "removes * * * availability of a governmental record." Tex. Penal Code § 37.10(a)(3). In Kansas, a newspaper was raided because one of its journalists downloaded driver's license information from a publicly accessible government website.[7] This technically constituted "knowingly and without authorization, access[ing] [a] computer," which is a crime. Kan. Stat. Ann. § 21-5839. And in Ohio, a jokester on Facebook was jailed for parodying his local police department. *Novak* v. *City of Parma*, 33 F.4th 296 (6th Cir. 2022) cert. denied, 143 S. Ct. 773 (2023). That counted as "knowingly us[ing] any computer * * * or the internet so as to disrupt, interrupt, or impair the functions of any police * * * operations." *Id.* at 303 (citing Ohio Rev. Code § 2909.04).

---

[7] Shannon Najmabadi, *Police Raid Small Kansas Paper, Seizing Phones, Computers*, Wall St. J. (Aug. 13, 2023), https://perma.cc/GZM8-6Q5Q.

2. Arrests are often more chilling than other modes of retaliation, such as a denial of a government benefit or a failure to renew a contract. There are psychological effects to arrests. Being handcuffed, searched, fingerprinted, booked, potentially strip searched, and jailed is something that any ordinary person—let alone an elderly one—would place high up on the list of experiences she hopes to never encounter.

There are also material effects. Arrests are a matter of public record and there are all kinds of consequences to that. See *Utah* v. *Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) (observing that an arrest record alone leads to "the 'civil death' of discrimination by employers, landlords, and whoever else conducts a background check"). For example, it is often impossible to get a job in a chosen field. See, *e.g.*, 15 U.S.C. 1681c(a)(2) (providing that records of arrest can be maintained on background checks and credit reports for at least seven years). Even if the arrest itself is not a formal legal barrier, it may raise red flags for employers or licensing bodies.[8] It is also harder to qualify for public benefits, such as food stamps and public housing. Eisha Jain, Arrests as Regulation, 67 Stan. L. Rev. 809, 810-812 (2015). For an elected official, like Gonzalez, being arrested and enduring all the subsequent negative publicity is

[8] Letter from Mike Greenberg, Inst. for Just., to Kulani Moti et al., Minn. Dep't of Hum. Servs. (July 12, 2023) (challenging a state human services department determining, based on a person's arrest record, that the alleged act leading to her arrest met "the definition of Aggravated Robbery" even though the person was never charged, let alone convicted), https://perma.cc/5EHQ-D2AD.

often a career-ending event. Indeed, Gonzalez stepped down after her arrest and has not run for office since.

These chilling effects also reverberate much farther than the individual. By arresting Gonzalez, respondents sent an unmistakable message that Castle Hills is their territory and anyone who challenges them does so at their peril.

Ironically, if the Fifth Circuit's decision is allowed to stand, arrests will become a weapon of choice for government officials who seek to punish their critics. If arrests (not made on the spot of a suspected crime scene) are treated with less scrutiny than other adverse actions, it is hard to imagine why, in a situation where an arrest is an option, a bad actor would reach for anything else. See, *e.g.*, *Baldauf* v. *Davidson*, No. 1:04-cv-1571, 2006 WL 3743819, at *19-20 (S.D. Ind. Dec. 18, 2006) (under the Fifth Circuit's interpretation of *Nieves*, the plaintiff would not have been able to sue the officer for arrest but would have been able to sue the officer for ordering her to leave the convenience store).

B. Arresting political critics, though common in dictatorships, is fundamentally un-American.

Thirty-six years ago, this Court observed that the right to criticize the government, "without thereby risking arrest" is a "principal characteristic by which we distinguish a free nation from a police state." *City of Houston* v. *Hill*, 482 U.S. 451, 462-463 (1987). One need only to read the headlines to see that no truer words have been spoken.

Since the start of the war in Ukraine in February 2022, Russia has arrested more than 20,000 Russians who criticized the invasion.[9] Artyom Sakharov, for example, held an antiwar sign in front of a cathedral in St. Petersburg. Thirty minutes later, police officers detained Sakharov for an administrative offense of discrediting the Russian military.[10] Varya Galkina, a ten-year-old child, posted a pro-Ukraine symbol as her profile picture on WhatsApp. Days later, she was arrested for skipping patriotism lessons and interrogated for four hours, having to answer such questions as, "What does your mum tell you about Ukraine?"[11] Russia is not a free nation but a police state.

In 2022 alone, Iran arrested "130 human rights defenders, 38 women rights defenders, 36 political activists, 19 lawyers, and 38 journalists."[12] Among them are two film directors, Mohammad Rasoulof and Mostafa Al-Ahmad, who collected signatures for a petition calling on the government to stop a violent crackdown of protests following a building collapse in the city of Abadan.[13, 14] Rasoulof and Al-Ahmed were

---

[9] Ann M. Simmons, *Ordinary Russians Feel Wrath of Putin's Repression*, Wall St. J. (Nov. 11, 2023), https://perma.cc/8MVT-LQYV.

[10] *Ibid.*

[11] *'Total Distrust': Rise of the Russian Informers*, Polina Ivanova, Fin. Times (Mar. 30, 2023), https://perma.cc/2BCV-RQNW.

[12] *Iran: Thousands of Detained Protesters and Activists in Peril*, Hum. Rights Watch (Nov. 3, 2022), https://perma.cc/8VMX-FD7L.

[13] *Iran: Arrest of High-Profile Critics*, Hum. Rights Watch (July 12, 2022), https://perma.cc/T64Y-KXHK.

[14] *Iran Arrests 2 Filmmakers Over Posting on Social Media*, Associated Press (July 8, 2022), https://perma.cc/4476-MG4N.

charged with plotting to undermine Iran's state security.[15] Iran is not a free nation but a police state.

And in China, just this April, Shanghai security officers arrested Li Yanhe, a book publisher, for "endangering national security."[16] In addition, until at least 2021, the Chinese government forcefully incarcerated hundreds of thousands Uyghurs and other Muslims on sweeping charges like separatism, as part of a "people's war on terror."[17] China is not a free nation but a police state.

To be sure, the city of Castle Hills has not descended into a police state. But in targeting critic Sylvia Gonzalez for arrest on trumped-up charges unlike those ever brought against any other citizen of Bexar County, Castle Hills did succumb to a temptation common to those regimes, a temptation that then-Attorney General Robert Jackson identified as "the greatest danger of abuse" available to law enforcement. Jackson, *The Federal Prosecutor* at 19. "With the law books filled with a great assortment of crimes," Jackson warned, there is a "fair chance of finding at least a technical violation of some act on the part of almost everyone," enabling law enforcement to "pick[] the man and then search[] the lawbooks." *Ibid.*

---

[15] *Ibid.*

[16] Liam Scott, *China Reveals It Arrested Taiwan-Based Book Publisher on National Security Charge*, Voice of Am. (Apr. 27, 2023), https://perma.cc/EV5K-MJ2G.

[17] See Chris Buckley & Austin Ramzy, *Night Images Reveal Many New Detention Sites in China's Xinjiang Region*, N.Y. Times (Sept. 24, 2020) (discussing incarcerations specifically, not internment camps), https://perma.cc/7FDS-AUSW.

What makes Gonzalez's case different is not why it happened, but where it happened. Because unlike the law of Russia, or Iran, or China, this Court's First Amendment precedent stands as a bulwark against that sort of tyranny—whether it be the gross tyranny visited upon the subjects of autocratic regimes or the petty tyranny visited upon an elderly woman who had the temerity to criticize her local government. This Court should reaffirm that precedent here.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

ANYA BIDWELL
Counsel of Record
PATRICK JAICOMO
WILL ARONIN
MARIE MILLER
INSTITUTE FOR JUSTICE
901 N. Glebe Rd.
Ste. 900
Arlington, VA 22203
(703) 682-9320
abidwell@ij.org

Counsel for Petitioner

DECEMBER 11, 2023