No. _____

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 Petition for a Writ of Certiorari to the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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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. 2022), 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—the 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 Alexander Wright were individual defendants in the district court and the appellants in the Fifth Circuit.

Defendant City of Castle Hills was a city defendant in the district court and is not a party to respondents' interlocutory appeal.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Gonzalez* v. *Trevino*, *et al.*, No. 21-50276, 5th Cir. (February 22, 2023) (denying rehearing en banc);

- *Gonzalez* v. *Trevino*, *et al.*, No. 21-50276, 5th Cir. (July 29, 2022) (reversing denial of individual defendants' motion to dismiss); and

- *Gonzalez* v. *City of Castle Hills, Texas, et al.*, No. 5:20-CV-1151, W.D. Tex. (March 12, 2021) (denying individual and city defendants' motion to dismiss).

Defendant City of Castle Hills could not appeal the denial of the motion to dismiss due to the interlocutory nature of the proceedings.

There are no other proceedings in state or federal trial or appellate courts, or in this Court, related to this case under Supreme Court Rule 14.1(b)(iii).

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Nieves v. *Bartlett*, which governs First Amendment claims for retaliatory arrests, was decided by this Court only four terms ago. Yet the circuits are already in an admitted split over the reach of one of its most important holdings: that probable cause does not bar First Amendment claims against police officers when a plaintiff "presents objective evidence 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 Seventh and Ninth Circuits have interpreted this rule to allow plaintiffs flexibility in the types of "objective evidence" that can make that showing. Unlike the Fifth Circuit, they do not limit plaintiffs to a narrow category of evidence consisting only of specific cases of non-arrests where people committed the same violation but did not engage in protected speech. *Lund* v. *City of Rockford*, 956 F.3d 938, 945 (7th Cir. 2020); see also *Ballentine* v. *Tucker*, 28 F.4th 54, 60 (9th Cir. 2022). Rather, a plaintiff can prevail by pointing to "statements from arresting officers or other police officials" and "a wide range of other objective evidence of retaliation." *Lyberger* v. *Snider*, 42 F.4th 807, 813-814 (7th Cir. 2022) (cleaned up).

While recognizing that at least "one of [its] sister circuits has taken a broader view of the *Nieves* exception,"[1] the court below held that a specific example of

[1] Courts refer to the similarly-situated rule in *Nieves* as "the *Nieves* exception" or "the jaywalking exception," as will Gonzalez in this petition. The general rule that probable cause defeats retaliatory arrest claims will be referred to as "the *Nieves* rule."

non-arrests "is required to invoke [it]." Pet. App. 29a. As a result, the court "d[id] not adopt [the other circuits'] more lax reading of the exception," *ibid.*, and denied petitioner Sylvia Gonzalez her claim for retaliatory arrest, over dissents by Judge Andrew Oldham, *id.* at 3a, and later Judge James Ho, *id.* at 34a.

By breaking with the Seventh and Ninth Circuits, the court below blinded itself to clear and objective evidence of retaliatory motive presented by Gonzalez in her complaint. For example, Gonzalez was arrested for the routine and common mistake of misplacing a document—a petition she organized—by inadvertently putting it in her binder. But in the last ten years, the statute used for her arrest was never once used to jail someone engaged in a remotely similar conduct. Gonzalez's arrest was also inconsistent with the regular practice in Bexar County, where jails are overcrowded and nonviolent misdemeanants with no criminal records are processed without being jailed. Finally, the arrest affidavit listed Gonzalez's viewpoints as relevant facts warranting her arrest.

The court below acknowledged that Gonzalez's complaint revealed "that virtually everyone prosecuted under [the relevant statute] was prosecuted for conduct different from hers." *Id.* at 29a. But it held that because "the plain language of *Nieves* requires comparative evidence" of non-arrests, Gonzalez's failure to point to records of people who misplaced government papers without criticizing the government and were not arrested for it meant that she did not satisfy the *Nieves* exception. *Ibid.*

Tellingly the court stated that "[w]ere we writing on a blank slate, we may well agree with" Judge Oldham's dissenting view of the exception, especially because "Gonzalez's arrest was allegedly in response to her exercise of her right to petition." *Id.* at 33a. But the majority felt bound by "the better reading of the relevant Supreme Court precedent." *Ibid.*

While Judge Oldham would have held that Gonzalez presented enough objective evidence to satisfy the *Nieves* exception, his broader point is that the *Nieves* rule, which was designed for "split-second warrantless arrests," should not apply in the first place: "*Nieves* designed a rule to reflect 'the fact that protected speech [or conduct] is often a legitimate consideration when deciding whether to make an arrest' and the fact 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 54a-55a (Oldham, J., dissenting) (citation omitted). "In this case, it's plainly impossible that [Gonzalez's] speech and petitioning activity were 'a legitimate consideration' in the [respondents'] efforts to jail her." *Id.* at 55a. And "there's zero difficulty or complexity in figuring out whether it was animus or her purportedly criminal conduct that caused her arrest." *Ibid.* A rule governing warrantless arrests should not apply to "deliberative, premeditated, weeks-long" conduct. *Id.* at 54a.

The Sixth Circuit has also articulated a similar point of view, stating in 2019 that "based on the Supreme Court's reasoning" in *Nieves*, "the general rule of requiring plaintiffs to prove the absence of probable cause should not apply" when no "thorny causation

issue[s]" are present. *Novak* v. *City of Parma*, 932 F.3d 421, 431-432 (6th Cir. 2019) (Thapar, J., writing for the unanimous panel).[2]

Only this court can resolve the disagreement between the circuits. At bottom, the question is whether *Nieves* designed a rule that requires courts to blind themselves to clear evidence of retaliatory motive as long as probable cause is present to arrest, even for the most mundane of offenses. If it is true, then America's "exuberantly" growing criminal laws can be used "not for their intended purposes but to silence those who voice unpopular ideas" and "little [is] left" of the fundamental right "to speak without risking arrest." *Nieves*, 139 S. Ct. at 1730 (Gorsuch, J., concurring in part and dissenting in part); see also Pet. App. 3a-4a (Ho, J., dissenting from denial of rehearing en banc).

The Court should grant this petition and reverse.

OPINIONS BELOW

The original 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.

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[2] This decision preceded *Novak* v. *City of Parma*, 33 F.4th 296 (6th Cir. 2022), cert. denied 143 S. Ct. 773 (2023), which was decided on separate grounds.

JURISDICTION

The original opinion of the court of appeals was filed on July 29, 2022. Pet. App. 20a. On February 22, 2023, the court, in a ten-to-six vote, denied rehearing en banc. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution prohibits any law "abridging the freedom of speech, or of the press;" or the right of the people to petition the Government for a redress of grievances."

* * *

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

STATEMENT

A. Factual background

Four years ago, petitioner Sylvia Gonzalez, a 72-year-old retiree from Castle Hills, Texas, ran for city council to give back to her community. *Id*. at 102a. Gonzalez's opponent was a well-connected incumbent, allied with the town's city manager. *Id*. at 104a-105a. To the surprise of many, including herself, Gonzalez won, becoming the first Hispanic woman to be elected to the Castle Hills city council. *Id*. at 106a.

One big part of Gonzalez's success was the promise she made to organize a petition to unseat the city manager who was deeply unpopular due to his bare-knuckle tactics and city corruption. *Id.* at 105a. Having to deal with this petition was an undesirable task for respondents, the city manager's allies. They helped him run the city by steering city policy and resources away from resident services and toward enriching city employees. *Ibid.*; *id.* at 107a-108a.

On day one of Gonzalez's tenure, she got to work. *Id.* at 106a. Along with her fellow residents, Gonzalez canvassed neighborhoods collecting hundreds of signatures in support of a petition to "FIX OUR STREETS" by reinstating a previous city manager. *Id.* at 107a; 136a. At Gonzalez's first council meeting as an elected member, a resident submitted the petition to the mayor (respondent Trevino). *Ibid.*

The council meeting grew contentious during debate on the city manager's job performance and was extended to the next day. *Id.* at 108a. At the meeting's conclusion, Gonzalez, who sat next to the mayor at the dais, picked up the papers strewn around her sitting area and put them in her binder. *Ibid.*

Then, leaving her binder behind, Gonzalez went to the other side of the room to talk to a constituent. *Id.* at 108a-109a. A few minutes later, a police officer in charge of safety at the meeting tapped Gonzalez on her shoulder and explained that the mayor wanted to talk to her. *Id.* at 109a. The police officer escorted Gonzalez to the mayor who was still at his seat next to Gonzalez's. *Ibid.* The mayor then asked Gonzalez, "Where's the petition?" Gonzalez responded, "Don't

you have it? It was turned in to you yesterday." *Id.* at 110a. At the mayor's prompting, Gonzalez looked for the petition in her binder and to her surprise found it there. *Ibid.* Gonzalez then handed the petition to the mayor who volunteered to Gonzalez that she "probably picked it up by mistake." *Ibid.*

To punish Gonzalez for organizing the petition that criticized their ally, the city manager, respondents then engineered a plan to arrest her and remove her from office. *Id.* at 111a-112a. The plan had three parts, which included investigating Gonzalez for intentionally concealing the very petition she spearheaded; jailing Gonzalez based on this investigation; and removing Gonzalez from office based on the arrest and subsequent conviction. *Id.* at 111a; see Tex. Local Gov't Code § 21.031 (if a councilmember is convicted of a misdemeanor involving official misconduct, she is immediately removable from office).

Part 1: Investigation

The "investigation" of a briefly misplaced document lasted almost two months. *Id.* at 112a, 118a. At first, it was a rank-and-file police officer who was tasked by the mayor and police chief (respondent Siemens) to investigate Gonzalez. *Id.* at 113a. Three weeks into the unfruitful investigation, the police chief deputized an attorney and his friend (respondent Wright) to take over as a "special detective." *Ibid.*

After a month of additional work, the special detective filed an arrest affidavit asserting 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 government record." *Id*. at 118a; Tex. Penal Code § 37.10(a)(3). Despite speech being completely irrelevant to the elements of the criminal offense, the affidavit listed Gonzalez's viewpoints to justify her arrest, including that:

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

- "Part of her plan to oust [the city manager] involved collecting signatures on several petitions to that effect";

- "Gonzalez had personally gone to [a resident'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 [the city manager]."

Id. at 116a, 158a-163a.

Part 2: Arrest and Jailing

To secure Gonzalez's arrest and ensure she spent time in jail, the special detective performed three unusual maneuvers. First, instead of obtaining a summons—a standard procedure for nonviolent misdemeanors, especially those involving elected officials—he chose to obtain a warrant. *Id*. at 114a. Second, instead of involving the district attorney, he walked this warrant directly to a judge—again, a procedure reserved for emergencies or violent felonies. *Id*. at 114a-115a. Third, because he walked the warrant to a

judge, the warrant wasn't in the satellite booking system, so Gonzalez could not be booked, processed, and released without jailtime. *Id*. at 115a.

Gonzalez's booking photo, which appeared on local news

Gonzalez turned herself in as soon as she learned about the warrant *Id*. at 118a. Thanks to respondents' maneuvering, she spent a day in jail, handcuffed, on a cold metal bench, wearing an orange jail shirt, and avoiding the restroom, which had no doors. *Ibid*.

Part 3: Removal from Office

Because the district attorney dropped the charges as soon as he learned about them, *id*. at 115a, Gonzalez was not convicted of the misdemeanor and as a result was not "immediate[ly] remov[ed] from office," Tex. Local Gov't Code § 21.031, as respondents had

planned. They still succeeded in their goal. Gonzalez was so hurt by the experience and so embarrassed by the media coverage of her arrest, that she gave up her council seat and swore off organizing petitions or criticizing her government. *Id.* at 123a-124a.

B. Procedural history

1. Gonzalez sued respondents in the U.S. District Court for the Western District of Texas. She asserted two counts of retaliation, alleging that respondents and the City of Castle Hills violated her right to petition the government and criticize it. *Id.* at 126a, 129a.

In her complaint, Gonzalez alleged that a review of the felony and misdemeanor data from Bexar County over the past decade made it clear that the tampering statute had never been used to charge someone for a common and uneventful offense of putting a piece of paper in the wrong pile. *Id.* at 117a. Out of 215 grand jury felony indictments obtained under the tampering statute, not one had an allegation even remotely resembling the one mounted against Gonzalez. *Ibid.* By far the largest portion of the indictments involved accusations of either using or making fake government identification documents: altered driver's licenses, another person's ID, temporary identification cards, public safety permits, green cards, or social security numbers. *Ibid.* A few others concerned the misuse of financial information, like the writing of fake checks or stealing of banking information. *Ibid.* The outlier examples included hiding evidence of murder, cheating on a government-issued exam, and using a fake certificate of title. *Ibid.* Gonzalez further alleged that the misdemeanor data was

even less notable. *Ibid.* In each reviewed case, the alleged tampering involved the use of fake social security numbers, driver's licenses, and green cards. *Ibid.*

Respondents and the city filed a motion to dismiss for failure to state a claim. *Id.* at 65a. The district court denied the motion on both counts. With regard to respondents, the court held that "the *Nieves* exception applies * * * and Plaintiff need not plead or prove the absence of probable cause." *Id.* at 80a. Gonzalez sufficiently alleged "the existence of objective evidence" showing that over the last ten years no one in Bexar County was charged under the tampering statute for conduct remotely like hers. *Id.* at 81a.

With regard to the city, the district court held that Gonzalez adequately pled that the city council, as a final policy maker, engaged in a persistent and widespread practice that was the moving force behind the denial of the constitutional rights. *Id.* at 90a-96a.

Because the motion to dismiss was in a qualified immunity posture, respondents filed an interlocutory appeal. *Id.* at 20a. The claim against the city was stayed pending the resolution of this petition.

2. The Fifth Circuit, over a dissent by Judge Oldham, reversed the district court's judgment, holding that *Nieves*'s probable cause rule barred Gonzalez's retaliation claim. *Id.* at 21a.

The panel majority determined that Gonzalez failed to present sufficient objective evidence to satisfy the jaywalking exception. In its view, "*Nieves* requires comparative evidence, because it required 'objective evidence' of 'otherwise similarly situated

individuals' who engaged in the 'same' criminal conduct but were not arrested." Pet. App. 29a (quoting *Nieves*, 139 S. Ct. at 1727). Since Gonzalez did not point to a specific individual who 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*. In other words, Gonzalez's reliance on a decade-worth of charges under the same statute, respondents' explicit reference to Gonzalez's protected activity in the arrest affidavit, and a drastic departure from regular procedures in Bexar County for jailing people was not enough. Gonzalez was obligated to point to a specific individual who also misplaced papers at a government meeting, but without criticizing the government, and was not arrested for it.

By ruling against Gonzalez, the Fifth Circuit admitted that it split from its sister courts: "We recognize that one of our sister circuits has taken a broader view of the *Nieves* exception" that doesn't require "'a particular form of comparison-based evidence.'" *Ibid*. (quoting *Lund*, 956 F.3d at 945). "We do not adopt this more lax reading of the exception." *Ibid*.

The panel admitted that "[w]ere we writing on a blank slate, we may well agree with our distinguished colleague," Judge Oldham, and recognize Gonzalez's claim. *Ibid*. Nonetheless, "we remain bound by what we consider the better reading of the relevant Supreme Court precedent." *Ibid*.

3. Judge Oldham disagreed with the panel majority. In his view, Gonzalez met her burden of supplying objective evidence to show differential treatment under *Nieves*. "First, [Gonzalez]'s evidence is obviously

objective. She did a comprehensive 'review of misdemeanor and felony data from Bexar County * * * [a]nd she doesn't rely on 'statements and motivations of the particular [officials].'" *Id.* at 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 expressed skepticism that the *Nieves* rule should even apply to situations outside of warrantless, on-the-spot arrests. *Ibid.* "*Nieves* designed a rule to reflect" two realities that complicate the job of arresting officers when they make warrantless arrests: 1. "that protected speech [or conduct] 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 (citing *Nieves*, 139 S. Ct. at 1724). But "it's plainly impossible that [Gonzalez]'s speech and petitioning activity was a 'legitimate consideration'" in respondents' efforts to arrest her. *Ibid.* "And there's zero difficulty or complexity in figuring out whether it was animus or [Gonzalez's] purportedly criminal conduct that" caused respondents to engineer her arrest. *Ibid.*

"[T]he more relevant rule," in Judge Oldham's view, "appears to come from *Lozman*," which involved "materially identical facts." *Ibid.* (citing *Lozman* v. *City of Riviera Beach*, 138 S. Ct. 1945 (2018)). First,

Gonzalez "didn't sue an officer who made the arrest." *Id.* at 57a. Second, she was a victim of "'a premeditated plan' to retaliate against [her] for engaging in protected activity." *Ibid.* Third, "the protected activity wasn't a legitimate consideration for the arrest." *Ibid.* And fourth, "the right violated here is * * * the right to petition," *ibid.*, which this Court said was "one of the most precious of the liberties safeguarded by the Bill of Rights." *Lozman*, 138 S. Ct. at 1954.

In response, the majority dismissed the distinction between split-second arrests and premeditated plans to arrest: "the Supreme Court allowed Lozman's claims to proceed not because of the unusual facts of the case, but because he was asserting a *Monell* claim against the municipality." Pet. App. 31a.

4. The Fifth Circuit denied rehearing en banc in a ten-to-six vote, with Judges Smith, Higginson, Ho, Duncan, Oldham, and Douglas voting in favor. *Id.* at 2a. Judge Ho wrote a dissent from the denial for many of the same reasons advanced in Judge Oldham's panel dissent.

According to Judge Ho, "The First Amendment is supposed to stop public officials from punishing citizens for expressing unpopular views." *Id.* at 3a (Ho, J., dissenting from denial of rehearing en banc). But officials are "often able to invent some reason to justify their actions," which requires courts to "be vigilant in preventing officers from concocting legal theories to arrest citizens for stating unpopular" views. *Id.* at 4a. Thus, "probable cause [must] pose no impenetrable barrier to a retaliation claim." *Id.* at 9a.

Judge Ho would have held that by presenting evidence in her complaint that "no one has ever been arrested for doing what she did," Gonzalez met her burden to show "that [respondents] decided to arrest her, even though they usually exercise their discretion not to make such arrests." *Id.* at 10a-11a. According to Ho, "that's all that *Nieves* requires." *Id.* at 11a. It "makes little sense to read *Nieves* to require comparative evidence" of non-arrests. *Id.* at 12a. *Nieves*'s own example for the exception—jaywalking—leaves plaintiffs with no choice but to "appeal to the commonsense proposition that jaywalking happens all the time, and jaywalking arrests happen virtually never (or ever)." *Ibid.* (citing *id.* at 53a (Oldham, J., dissenting)).

REASONS FOR GRANTING THE PETITION

In the last two years, three circuit courts reached an admitted split over the interpretation of the *Nieves* probable cause exception. Some circuit court judges, including Judge Oldham below and a unanimous Sixth Circuit panel, question whether *Nieves* even applies in situations where probable cause is irrelevant to assessing the objective reasonableness of an arrest. Only this Court can resolve the conflict. It should grant review and reverse.

I. The circuits are split on the scope of the *Nieves* probable cause exception.

1. *Nieves* is this Court's most recent statement on "whether probable cause to make an arrest defeats a claim that the arrest was in retaliation for speech protected by the First Amendment." 139 S. Ct. at 1721. It was made in the context of split-second warrantless

arrests, which pose "special challenges to law enforcement"—two police officers arrested a man during an Arctic Man festival after he told festival attendees to not cooperate with them. *Id*. at 1720.

According to *Nieves*, "[t]he presence of probable cause should generally defeat a First Amendment retaliatory arrest claim" except in "circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Id*. at 1726–1727. The former part of the rule comes from *Hartman* v. *Moore*, 547 U.S. 250, 261, 265 (2006)—the Court's earlier decision on retaliatory prosecutions, where the Court held that because proving the link between the police officer's retaliatory animus and the plaintiff's injury of being prosecuted is generally complex, "plaintiffs must * * * prove as a threshold matter that the decision to press charges was objectively unreasonable because it was not supported by probable cause." *Nieves*, 139 S. Ct. at 1723. The latter part of the rule is what's commonly referred to as the jaywalking exception. It addresses the "'risk that some police officers may exploit the arrest power as a means of suppressing speech'" and waives the probable cause requirement when "probable cause does little to prove or disprove the causal connection between animus and injury." *Id*. at 1727.

Thus in *Nieves*, the Court did not adopt *Hartman*'s "unyielding requirement to show the absence of probable cause," lest "Hartman's rule would come at the expense of Hartman's logic." *Ibid*.

A prototypical example of the jaywalking exception is jaywalking itself. It happens all the time, but

rarely results in arrests. "If an individual who has been vocally complaining about police conduct is arrested for jaywalking," it is not at all clear that probable cause and not animus was the reason for the arrest. *Ibid.* Dismissing a claim like that "would seem insufficiently protective of First Amendment rights." *Ibid.* As a result, if 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," that will "address[] *Hartman*'s causal concern by helping establish that non-retaliatory grounds were in fact insufficient to provoke the adverse consequences." *Ibid.* (cleaned up) (emphasis added). Provided the plaintiff makes that objective showing, she can maintain her retaliation claim despite the existence of probable cause. *Ibid.*

2. The Court described what constitutes objective evidence from the perspective of what it is not, rather than what it is. It is not "a purely subjective standard," *id.* at 1727, and does not permit allegations of "the personal motives of individual officers," "the subjective state of mind of the officer," or "the subjective intent motivating the relevant officials." *Id.* at 1725. So statements like "bet you wish you would have talked to me now," which officer Nieves made when arresting Bartlett, are not sufficient to overcome the existence of probable cause. *Id.* at 1721, 1724.

The Court also cited *United States* v. *Armstrong* to provide examples of the types of objective evidence that would be sufficient. *Id.* at 1727. Comparative evidence identifying particular individuals who had engaged in the same acts, but not the same speech, and yet were not arrested would certainly be sufficient.

But that doesn't mean that data not based on these types of comparators wouldn't. For example, a negative assertion that an arrest hasn't happened before for that type of conduct can support the proposition that there are instances where similarly situated individuals not engaged in the same protected activity hadn't been arrested. See Evidence, Black's Law Dictionary (11th ed. 2019) (explaining that "a negative assertion will sometimes be considered positive evidence"). *Armstrong* too "expressly left open the possibility that other kinds of evidence, such as admissions, might be enough to allow a claim to proceed." *Nieves*, 139 S. Ct. at 1734 (Gorsuch, J., concurring in part and dissenting in part).

Despite the Court announcing the jaywalking exception just four terms ago, the circuits already disagree on its scope, with the Fifth Circuit departing from the Seventh and Ninth on whether only particular comparative evidence of non-arrests could overcome the existence of probable cause.

A. The Ninth and Seventh Circuits permit any objective evidence of disparate treatment for purposes of the *Nieves* exception.

1. In the Ninth and Seventh Circuits, First Amendment plaintiffs are not limited in the type of objective evidence they can marshal to overcome the existence of probable cause. In other words, courts in these jurisdictions don't have to blind themselves to evidence of retaliatory motive simply because the evidence of non-arrests is unavailable. Instead, they look to "whether the facts supply objective proof of

retaliatory treatment," declining to "predict in advance every factual scenario which might meet the [Supreme] Court's 'objective evidence' standard." *Lund*, 956 F.3d at 945.

In *Ballentine* v. *Tucker*, the Ninth Circuit allowed a retaliation claim against police officers where plaintiffs failed to point to a specific example of someone who didn't criticize the police, did violate the statute, and didn't get arrested for it. The case involved activists chalking anti-police messages on Las Vegas sidewalks. *Ballentine*, 28 F.4th at 60. They were arrested under Nevada's graffiti statute. *Ibid*. In discovery, government records showed that there were "only two instances in which chalkers were suspected of or charged with violating [the] statute," neither one resulting in arrest. *Id*. at 62. These two instances, however, involved the very same plaintiffs, who were not arrested earlier despite engaging in the exact same chalking activity criticizing the police. *Ballentine* v. *Las Vegas Metropolitan Police Dep't*, 480 F. Supp. 3d 1110, 1116 (D. Nev. 2020). In addition, police could point to no example of the police department ever arresting anyone besides the plaintiffs for chalking on the sidewalk. *Ballentine*, 28 F.4th at 62. In other words, no evidence presented by the plaintiffs could point to instances of people 1. chalking on sidewalks; 2. not criticizing police; and 3. not being arrested under the graffiti statute. Nonetheless, the Ninth Circuit still held that the evidence plaintiffs provided was "the kind of 'objective evidence' required by the

Nieves exception," and recognized their retaliatory arrest claim despite probable cause. *Ibid.*[3]

In *Lund* v. *City of Rockford*, the Seventh Circuit also rejected defendants' attempts to cabin the *Nieves* exception to only evidence of non-arrests. Plaintiff—a local reporter—argued that his arrest for driving a motorized bike "the wrong way down a one-way street was, in fact, retaliation for his protected First Amendment journalistic activity." *Lund*, 956 F.3d at 945. To overcome probable cause, the reporter presented "what he [mischaracterized] as an 'admission'" by arresting officers that they arrested him based on his newsgathering activities and a statement he made earlier during their encounter. *Ibid.* The court held that probable cause barred the reporter's claim. In the process, the court announced a broad reading of the *Nieves* exception. Had the plaintiff "made [an] attempt to present objective evidence showing that the police rarely make arrests for driving the wrong way on a one-way street, or that other similarly situated persons were not arrested," he would have satisfied the standard. *Id.* at 945-946. Similarly, had the plaintiff "demonstrated retaliation in some other way," he could have still overcome having to make the threshold showing of no probable cause. *Id.* at 945. Per *Armstrong*, the court would have even been satisfied with the officers' admission of retaliatory intent, had it been an actual admission and not the reporter's misrepresentation of it. *Ibid.* The Seventh Circuit has

[3] *Ballentine* is also interesting because the data was only collected in discovery. This speaks in favor of allowing "discovery into potential comparator evidence where a complaint raises a strong inference of unconstitutional motive." *Nieves*, 139 S. Ct. at 1741 n.8 (Sotomayor, J., dissenting).

since confirmed its reading of the *Nieves* exception: "a plaintiff might prevail by pointing to similarly-situated comparators, statements from arresting officers or other police officials, or a wide range of other objective evidence of retaliation." *Lyberger*, 42 F.4th at 813-814 (cleaned up).

2. By "surmis[ing] that Justices Gorsuch and Justice Sotomayor are correct," the Seventh Circuit, like the Ninth, adopted a "commonsensical[]" approach to the *Nieves* "standard." *Lund*, 956 F.3d at 945. This approach includes relying "on common experience to assess the most self-evidently minor infractions," such as jaywalking, or, here, putting papers in the wrong pile during a meeting. *Nieves*, 139 S. Ct. at 1741 n.8 (Sotomayor, J., dissenting). In addition, courts can "permit plaintiffs to draw from a broad universe of potential comparators," allow limited discovery, and consider "objectively probative statements describing events in the world" as opposed to "the officer's internal thought processes." *Id.* at 1741 n.7, n.8.

Importantly, courts can allow "rough comparisons or inexact statistical evidence where laboratory-like controls cannot realistically be expected." *Id*. at 1741 n.8. For example, in the case below, as in *Ballentine*, evidence that a statute has never before been used to punish a similar conduct could support a proposition that people misplaced papers before, or chalked on a sidewalk before, but were not arrested for it.

3. Had the Ninth and Seventh Circuits' "commonsensical[]" interpretation of the *Nieves* exception been applied to the facts below, probable cause would not have barred Gonzalez's retaliatory arrest claim.

In her complaint, Gonzalez alleged sufficient objective evidence to satisfy this standard, including:

- A ten-year data analysis of the charges filed under the tampering statute;
- Respondents admitting in the arrest affidavit that Gonzalez's speech informed the decision to charge her, even though speech is irrelevant to the elements of the criminal offense; and
- A list of three actions taken by respondents that departed from normal county procedures and ensured that an elderly person with no criminal record would be arrested and jailed for a nonviolent misdemeanor.[4]

See Statement, *supra*, at 8-11.

[4] The extent of departures from normal procedures here is glaring. It helps to show that while the respondents' actions were technically authorized by law, they were clearly motivated by malice. As this Court held in *Arlington Heights* v. *Metropolitan Housing Development Corporation*, "[d]epartures from the normal procedural sequence * * * might afford evidence that improper purposes are playing a role." 429 U.S. 252, 267 (1977). It is simply "commonsens[e]" for courts to consider this evidence when untangling probable cause from improper motive. *Nieves*, 139 S. Ct. at 1734 (Gorsuch, J. concurring in part and dissenting in part). Such evidence, unlike state of mind allegations, is not easy to come by and is extremely probative. Yet the Fifth Circuit ignored it. The Seventh and Ninth Circuit would not.

B. The Fifth Circuit permits only specific examples of non-arrests.

1. In the Fifth Circuit, however, Gonzalez's objective evidence was not sufficient to show disparate treatment. That's because in the Fifth Circuit, probable cause bars retaliatory arrest claims unless a plaintiff can produce comparison-based evidence of specific individuals who engaged in the same conduct but not in the same speech and were not arrested. Since Gonzalez did not "offer evidence of other similarly situated individuals who mishandled a government petition but were not prosecuted" under the tampering statute, no other objective evidence she presented, no matter how overwhelming, satisfied its "better reading" of the *Nieves* exception. Pet. App. 28a-29a, 34a.

2. The problem with this "better reading" of the exception is that courts are blinded to other objective evidence of retaliatory intent, even if it helps to isolate the improper motive. And that's *Nieves*'s rule coming at the expense of *Nieves*'s logic.

Nieves's probable cause requirement for retaliatory arrest claims was born out of necessity. In situations where arresting officers make an on-the-spot decision to arrest and the arrestee also happens to be a speaker, it's usually impossible to tell whether it was the officer's malice or a wholly legitimate consideration of speech that drove the decision. *Nieves*, 139 S. Ct. at 1727. Officer Nieves made an arrest "based on a combination of the content and tone of [Bartlett's] speech," for example. *Id.* at 1724. But it was far from clear that he did so because he didn't appreciate

Bartlett's criticism rather than because the content of Bartlett's speech was part of his disorderly conduct.

The logic of *Nieves*, therefore, is that in cases involving thorny causation issues, police officers cannot be put in a position where subjective state of mind allegations—which are "easy to allege and hard to disprove"—would expose them to litigation. *Id.* at 1725 (cleaned up). In such cases, readily available evidence of probable cause, which "speaks to the objective reasonableness of an arrest," can serve as a threshold requirement to help sort out illegitimate claims. *Id.* at 1724. If there was probable cause to arrest the speaker, chances are the speaker would have been arrested even if he didn't speak. *Id.* at 1727. If there was no probable cause to arrest the speaker, that's "weighty evidence" of speech and not actual crime motivating the arrest. *Id.* at 1724, 1727.

In cases without thorny causation issues, however, probable cause need not serve as a blindfold.

That's what the jaywalking exception is all about. Just because a rabble-rousing jaywalker arrested for complaining about police conduct cannot point to specific other jaywalkers who got a free pass, doesn't mean that courts must ignore evidence that jaywalking is common; that people normally don't get arrested for it; and that the one jaywalker that police officers chose to arrest happens to be a rabble-rouser. Under the Fifth Circuit precedent, however, that's exactly what they must do.

That's "insufficiently protective of First Amendment rights." *Id.* at 1727. Where "probable cause does

little to prove or disprove causal connection between animus and injury," courts mustn't ignore other objective evidence, lest the probable cause requirement "could pose a risk that some police officers may exploit arrest power as means of suppressing speech." *Ibid.*

II. Some circuit judges question the applicability of *Nieves* outside of split-second decisions to arrest.

A distinct question presented by this case is whether *Nieves*'s rule applies at all outside of split-second decisions to arrest. The Sixth Circuit and Judge Oldham's dissent think not because in cases where arresting officers are not sued for an on-the-ground execution of warrantless arrests, there simply aren't the thorny causation issues that are the backbone of *Nieves*. In such cases, *Lozman*—where premeditation obviates causal concerns—seems to provide a better rule.

1. According to *Nieves*, there are two reasons why probable cause is most useful in situations involving split-second arrests. First, it is useful where protected speech is a legitimate consideration for deciding whether to make an arrest—for example, in *Nieves*, it was legitimate for the officers to take into account Bartlett's loudly discouraging people from cooperating with the police in their decision to arrest him for disorderly conduct. 139 S. Ct. at 1724; see also Pet. App. 55a (Oldham, J., dissenting). Second, probable cause is useful where "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." *Nieves*, 139 S. Ct. at 1724; see

also *Novak*, 932 F.3d at 432. Again, in *Nieves*, as well as other warrantless arrest cases, a short period of time spent on deciding whether to arrest makes it impossible to collect enough evidence to determine whether an improper consideration of protected speech actually took place. Probable cause, on the other hand, will be easily available to stand in for objective reasonableness. *Nieves*, 139 S. Ct. at 1724.

Where these two considerations are not present—*i.e.*, in any case that involves premeditated and deliberate decision-making—probable cause is not a useful proxy for determining the legitimacy of an arrest.

Consider *Lozman* v. *City of Riviera Beach*, which "involved materially identical facts" to the case below. Pet. App. 55a (Oldham, J., dissenting). There, "an outspoken critic" of the city, who "often spoke during the public-comment period at city council meetings," openly criticized the city, and even sued it, was arrested during a council meeting on a councilmember's orders. *Lozman*, 138 S. Ct. at 1949. The arrest happened as Lozman was giving his remarks, over a direction by councilmember Wade to stop talking. *Ibid.* There was an earlier, closed-door meeting, where the councilmember suggested, and others agreed, that "the City use its resources to 'intimidate' Lozman and others who had filed lawsuits against the City." *Ibid.* (quoting from the meeting's transcript).

When Lozman sued for retaliation, he argued that this was no ordinary split-second decision to arrest. The city council "formed an official plan to intimidate him," and executed it by ordering the arrest. *Ibid.*

In *Lozman*, neither of the special considerations inherent to warrantless arrests was present. First, the "retaliation [was] for prior, protected speech bearing little relation" to the arresting offense of talking without authorization at the council meeting. See *id.* at 1954 ("[I]t is difficult to see why a city official could have legitimately considered that Lozman had, months earlier, criticized city officials or filed a lawsuit against the city."). So there was no need for Lozman's speech to be taken into account when deciding whether to make the arrest. And second, there was plenty of clear evidence of retaliatory motive, drowning out the existence of probable cause. For example, there was a transcript from a closed-door council-meeting, where council members "formed an official plan to intimidate" Lozman for filing a lawsuit against the city. *Id.* at 1949. In addition, there were "a number of disputes with city officials and employees over the ensuing years, many of which Lozman says were part of the City's plan of retaliation." *Ibid.*

Importantly, the arresting officer was not a defendant in Lozman's suit. The officer acted in the moment, with no opportunity to do anything other than execute the orders. The officer's behavior, however, is in stark contrast to that of councilmember Wade, whose deliberate actions are categorically different.

2. The Sixth Circuit and the Fifth Circuit's Judge Oldham agree that when "probable cause does little to disentangle retaliatory motives from legitimate ones * * * the general rule of requiring plaintiffs to prove the absence of probable cause should not apply." *Novak*, 932 F.3d at 432; see also Pet. App. 55a (Oldham, J., dissenting).

In the case below, Judge Oldham identified *Lozman* as supplying "the more relevant rule." Pet. App. 55a (Oldham, J., dissenting). After all, there was plenty of evidence—without even looking to the Bexar County data—disentangling proper and improper motives, and because "[i]n this case, it's plainly impossible that [Gonzalez]'s speech and petitioning activity were a legitimate consideration in the [respondents]' efforts to jail her." *Ibid.* (cleaned up). In fact, all the evidence points to malice and not crime being the reason for arrest:

- The officer first assigned to investigate Gonzalez spent almost a month looking into the allegations and "got nowhere," *id.* at 37a;

- Following that investigation, respondents Trevino and Siemens engaged a friendly "Special Detective" (respondent Wright) who did "three special [and irregular] things" to ensure that Gonzalez, who has no criminal record, would be arrested for a nonviolent misdemeanor, *id.* at 38a;

- Once the district attorney learned about the charges against Gonzalez, he promptly dismissed them, *id.* at 55a;

- The affidavit for Gonzalez's arrest listed her viewpoints as relevant to her arrest, even though Gonzalez's "spearheading of the petition was irrelevant to the elements of the criminal offense" of tampering with a government record, *id.* at 57a;

- Gonzalez was arrested for supposedly trying to intentionally conceal the very petition she organized, *ibid*;

- Gonzalez, like Lozman, did not sue the officer who made the arrest, *ibid*.

This evidence, in Judge Oldham's view, made Gonzalez's claim different from anything discussed in *Nieves*, since "the causation difficulties that might arise in the mine run of arrests made by police officers" simply weren't present. *Ibid*. (cleaned up).

3. Three years earlier, writing for a unanimous panel in *Novak* v. *City of Parma*, Judge Thapar also stated that where "probable cause does little to disentangle retaliatory motives from legitimate ones * * * [i]t may be that, based on the Supreme Court's reasoning in [the *Nieves*] case and others, the general rule of requiring plaintiffs to prove the absence of probable cause should not apply." 932 F.3d at 432. The case involved two officers who obtained a warrant to arrest Anthony Novak for "unlawfully impair[ing] the [police] department's functions." *Id*. at 425. Novak alleged that the arrest was in retaliation for his mocking the Parma Police Department by styling a Facebook page to look like the department's official Facebook page and posting messages like an announcement of a "Pedophile Reform event," where pedophiles would receive honorary police commissions. *Id*. at 424-426. While the Sixth Circuit remanded the case after affirming the denial of qualified immunity, it provided a list of "future issues" that it said were "most interesting," though they did not bear on the

outcome of the case, since the events at issue took place before *Nieves* was decided. *Id.* at 430.

One of those future issues was whether "probable cause alone may not protect the officers." *Ibid.* After all, "in *Nieves* and its predecessors, the Court based its reasoning on the thorny causation issue that comes up" when "the factfinder" can't "disentangle whether the officer arrested him" because of his protected speech or purportedly criminal conduct. *Ibid.* In *Novak*, the presence of probable cause "gets us nowhere" because "absent Novak's protected speech, there would be no basis for probable cause." *Ibid.* (cleaned up). In addition, being blinded to anything other than probable cause here would make "Novak's case [into] prime ground for" police officers "'exploit[ing] the arrest power as a means of suppressing speech.'" *Ibid.* (citing *Lozman*, 138 S. Ct. at 1953).

In *Novak*, as in this case, probable cause would have offered no help in disentangling proper and improper motives for the arrest. In contrast, there was a greater risk that the arrest power could have been weaponized as means of punishing criticism. In these types of cases, with claims that don't fit the mold of "the typical retaliatory arrest claim," *Lozman*, 138 S. Ct. at 1954, the purchase that *Nieves* has is at best "unclear." Pet. App. 55a (Oldham, J., dissenting).

4. Limiting *Nieves* to warrantless arrests is also in line with the Court's framing of the probable cause issue. *Nieves* is concerned with shielding a busy, on-the-beat "[p]olice officer[]," 139 S. Ct. at 1725, who is torn between his respect for the right to speak on the one hand, and the need to enforce the laws on the

other. This officer must act fast, making decisions "in circumstances that are tense, uncertain, and rapidly evolving." *Ibid.* (cleaned up). The last thing he needs is being dragged through the courts simply because a plaintiff made an allegation based on this officer's mental state. *Ibid.* Accepting these allegations without requiring some showing of the lack of objective reasonableness "would pose overwhelming litigation risks," especially when "policing certain events like an unruly protest." *Ibid.* That's when probable cause comes to the rescue. It "speaks to the objective reasonableness of an arrest." *Id.* at 1724. Since its presence generally means that the arrest would have happened even without speech, and "its absence will * * * generally provide weighty evidence that the officer's animus caused the arrest," it gets our officer out of a tight spot and lets him get on with his job. *Ibid.*

This case is different. Instead of brave police officers making warrantless arrests in situations that are dangerous and chaotic, it involves desk-bound bureaucrats scheming for months to find an excuse to obtain a warrant and cause their critic to be jailed. See *Lozman*, 138 S. Ct. at 1954. *Nieves* was not written to deal with such facts. The tool it supplied, therefore, is, at best, not very useful for handling premeditated and intentional conduct and, at worst, makes the right to criticize the government into "a parchment promise." Pet. App. 3a (Ho, J., dissenting from denial of rehearing en banc). One way to ensure this doesn't happen is by having a robust enforcement of the *Nieves* exception, in line with the Seventh and Ninth Circuits' approach. Another way is by holding, in line with the Sixth Circuit's dicta and with Judge Oldham's dissent, that *Nieves* does not apply in cases

with no time pressures and where the facts provide a straightforward account of whether it was malice or criminal conduct that caused the arrest.

III. The questions presented are exceptionally important and squarely presented.

1. One-hundred-and-forty-seven years ago this Court anxiously observed that "[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *United States* v. *Reese*, 92 U.S. 214, 221 (1876).

Today this anxiety is a reality. Thousands of federal and state laws criminalize every manner of activity. "[I]t is only a slight exaggeration to say that the average busy practitioner in this country wakes up in the morning, goes to work, comes home, takes care of personal and family obligations, and then goes to sleep, unaware that he or she likely committed several crimes that day." Harvey A. Silvergate, Three Felonies a Day: How the Feds Target the Innocent xxxvi (2011). The federal government accounts for at least 4,000 of such laws, while Texas alone has more than 1,700 crimes on the books, including the very broad tampering statute at issue in this case. *Overcriminalization*, Right on Crime.[5]

Other Texas criminal offenses—all of which carry the risk of incarceration—include a broadly defined "[f]raud in fishing tournaments," which is a Class A

[5] Available at https://rightoncrime.com/initiatives/overcriminalization/ (last viewed Apr. 18, 2023).

misdemeanor, punishable by up to a year in jail, Tex. Parks & Wild. Code § 66.023; "[m]islabel[ing] a container of citrus fruit," a Class B misdemeanor, which can land a person in jail for 180 days, Tex. Agr. Code § 93.061(4), 93.062; and "[c]ausing pecans to fall from a pecan tree by any means, including by thrashing," a Class C misdemeanor that comes with a nice side of three months in jail, Tex. Gov't Code § 3101.010.

Each of these laws, often broad or outdated, supplies government officials with discretion to use the arrest power to punish their critics. The mere existence of these excuses to arrest makes it more likely that "officers [would] *abuse* their authority by making an otherwise lawful arrest for an unconstitutional *reason*." *Nieves*, 139 S. Ct. at 1731 (Gorsuch, J., concurring in part and dissenting in part). Under the decision below, in other words, government critics should stay away from pecan trees.

Consider these examples of premeditated and deliberate conduct, where evidence of malice is quite obvious but there is also, technically, probable cause sufficient to justify an arrest:

- In Texas, a reporter who criticized her local police department through posting videos on her social media websites was arrested for "solicit[ing] * * * from a public servant information that: (1) the public servant had access to by means of his office or employment; and (2) has not been made public." Tex. Penal Code § 39.06(c). The arrest happened six months after the relevant incident; "local officials have never brought a

> prosecution" under that statute "in the nearly three-decade history of that provision;" and the police department on several previous occasions tried to intimidate the reporter into stopping her coverage.

Villarreal v. *City of Laredo*, 44 F.4th 363, 368 (5th Cir. 2022) (vacated, pending en banc review).[6]

- In Ohio, a local man who posted a parody of a police department on Facebook was arrested under a statute that prohibited people from "knowingly us[ing] any computer * * * or the internet so as to disrupt, interrupt, or impair the functions of any police * * * operations." Ohio Rev. Code § 2909.04. The arrest occurred a month after the parody account had been deleted; and there was no disturbance of the police department activities, other than several citizens calling on the non-emergency line "to alert the city"

[6] In *Villarreal*, the Fifth Circuit did not engage with the question of whether *Nieves* barred the journalist's retaliatory arrest claim because it dismissed the claim on the ground that the journalist's speech wasn't chilled. 44 F.4th at 374; see also Pet. App. 33a ("*Villarreal* was different in kind and did not address the issue we face here. * * * Indeed, *Villarreal* did not address—nor did it even cite—*Nieves* or *Lozman*, the cases both parties recognize govern this case."). The case was recently reheard en banc on the question of whether qualified immunity shields police officers given that they acted under a statute when they infringed on a journalist's right to ask questions of public officials. The en banc case will not address the correct interpretation of *Nieves* or the split with the Seventh and Ninth Circuits.

> to the existence of the parody page and "to verify" that it was not the official page.

Novak v. *City of Parma*, 33 F.4th 296, 303 (6th Cir. 2022), cert. denied 143 S. Ct. 773 (2023).

- In Minnesota, a bridge safety consultant who went on national news channels and discussed the failure of Minnesota Department of Transportation's inspections of the I-35W bridge before its 2007 collapse, was arrested under a statute making it illegal to "intentionally * * * trespass[] on the premises of another," Minn. Stat. § 609.605 subdiv. 1(b)(3), for entering government property without authorization, even though he left as soon as he was ordered and even though one of the officers commented that the consultant needed to be "locked up" for talking to news channels.

Galarnyk v. *Fraser*, 687 F.3d 1070, 1073 (8th Cir. 2012).

2. The case below fits this pattern to a T. Gonzalez was a prominent government critic who petitioned her government to remove a city manager. Two months after she unwittingly put the petition into her binder, there was a warrant issued for her arrest. Gonzalez was charged with "intentionally destroy[ing], conceal[ing], remov[ing], or otherwise impair[ing] the verity, legibility, or availability of a government record." Tex. Penal Code § 37.10(a)(3). As Judge Oldham pointed out in his dissent, "government employees routinely—with intent and without

it—take stacks of papers before, during, and after meetings." Pet. App. 60a (Oldham, J., dissenting). If this statute were used to punish this type of a conduct, "there should be dozens if not hundreds of arrests of officeholders and staffers during every single legislative biennium." *Id.* at 60a. Instead, there are none. What there is plenty of, however, is evidence that respondents used the statute as a pretext to punish Gonzalez for criticizing them.

3. This case is a great vehicle for resolving the questions presented, which were outcome-determinative below. The district court denied respondents' motion to dismiss and held that probable cause did not preclude Gonzalez's claim for retaliatory arrest. The Fifth Circuit reversed solely because it *reluctantly* determined that probable cause did preclude such a claim. Pet. App. 33a ("Were we writing on a blank slate, we may well agree with our distinguished colleague."). The Fifth Circuit produced three separate opinions, including two different dissents, with Judge Ho arguing that Gonzalez met her burden under the *Nieves* exception and Judge Oldham, while agreeing with that, also stating that "the more relevant rule appears to come from *Lozman*." Pet. App. 55a (Oldham, J., dissenting). If this Court resolves Gonzalez's case in line with the Seventh and Ninth Circuits, then she prevails and her case goes back to the district court. If this Court resolves Gonzalez's claim by holding that the *Nieves* rule does not apply in the first place, in line with the Sixth Circuit's discussion and Judge Oldham's dissent, then she again prevails and her case goes back to the district court.

This Court should intervene now to resolve disagreements between the circuits and assure that government officials who maliciously scour the law books for a crime to silence a critic do not get off scot-free in the face of objective evidence of retaliation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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