No. 21-50276

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SYLVIA GONZALEZ,

Plaintiff – Appellee,

v.

EDWARD TREVINO, II, Mayor of Castle Hills, sued in his individual capacity; JOHN SIEMENS, Chief of the Castle Hills Police Department, sued in his individual capacity; ALEXANDER WRIGHT, sued in his individual capacity,

Defendants – Appellants.

On Appeal from the United States District Court
for the Western District of Texas, San Antonio Division
Case No. 5:20-CV-01151

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF – APPELLEE

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, I hereby certify that I am aware of no persons or entities, besides those listed in the party briefs, that have a financial interest in the outcome of this litigation. In addition, I hereby certify that I am aware of no persons with any interest in the outcome of this litigation other than the signatories to this brief and their counsel, and those identified in the party and *amicus* briefs filed in this case.

Dated: July 14, 2021

<u>/s/ Dayna J. Zolle</u>
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text and history, and therefore has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Sylvia Gonzalez claims that in an effort to silence her political advocacy, Appellants orchestrated a scheme to punish and intimidate her, abusing their official positions to secure her arrest on a pretextual misdemeanor charge. Seeking to have her lawsuit under 42 U.S.C. § 1983 dismissed, Appellants argue that her claim of retaliatory arrest in violation of the First Amendment is foreclosed by *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), which generally requires plaintiffs bringing such claims to show an absence of probable cause for their arrest. Appellants are wrong:

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. Plaintiff–Appellee has consented to the filing of this brief. Defendants–Appellants have not consented.

Nieves does not preclude this suit, and Gonzalez should have the opportunity to substantiate her claims.

A landmark statute dating to the Reconstruction era, Section 1983 was enacted to combat, among other abuses, political retaliation by state and local officials, who were refusing to protect citizens with disfavored viewpoints from private violence and were instead targeting such individuals for baseless prosecutions and arrests. Although Section 1983's broad and categorical text makes no reference to the lack of probable cause as a precondition to any suit, the Supreme Court in *Nieves* imposed a threshold requirement on such claims to prevent burdensome litigation against police officers arising from spur-of-the-moment arrest decisions made in rapidly unfolding situations—litigation sometimes based only on stray remarks allegedly made during the course of an arrest. Under this threshold requirement, plaintiffs must show a lack of probable cause for their arrest or provide "objective evidence" that they were arrested "when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Nieves*, 139 S. Ct. at 1727.

Importantly, these standards were designed to ensure that meritorious Section 1983 suits alleging retaliatory arrest could continue to go forward. The Court recognized that "an unyielding requirement to show the absence of probable cause" might allow government officers to "exploit the arrest power as a means of suppressing speech." *Id.* (quotation marks omitted). By fashioning an exception to

that requirement, the Court sought to achieve a compromise between competing imperatives—ensuring freedom from speech-based retaliation while shielding police officers from spurious lawsuits. The standards set forth in *Nieves* must be applied sensibly in light of the competing values they seek to reconcile and the careful balance the Court sought to attain. Any other approach would be "insufficiently protective of First Amendment rights." *Id.*

Under those standards, claims like Gonzalez's must be allowed to proceed. None of the considerations that motivated *Nieves*'s probable cause requirement are implicated by her suit, and she has provided the type of objective evidence that *Nieves* calls for to show that she was targeted in a manner unlike similarly situated individuals. Those detailed allegations place her claim of retaliatory arrest firmly within the exception to *Nieves*'s probable cause requirement. Indeed, if allegations supported by the wealth of objective evidence that Gonzalez has provided are dismissed under *Nieves*, then the exception to the probable cause requirement will have lost all force—empowering government officials to use the arrest power as a means of suppressing dissent. That result would subvert the balance the Supreme Court attempted to strike in *Nieves*, as well as the work of the Congress that enacted Section 1983. The district court should be affirmed.

ARGUMENT

I. Section 1983 Is Meant to Deter State and Local Officials from Violating the Constitution by Retaliating Against Disfavored Viewpoints.

Deriving from the Civil Rights Act of 1871, Section 1983 is a key part of the "extraordinary legislation," Cong. Globe, 42d Cong., 1st Sess. 322 (1871), enacted during Reconstruction to "alter[] the relationship between the States and the Nation with respect to the protection of federally created rights," *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). Its aim was to confer new "safeguards to life, liberty, and property," Cong. Globe, 42d Cong., 1st Sess. 374, by enabling individuals to seek judicial relief for deprivations of rights "secured by the Constitution of the United States." An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, § 1, 17 Stat. 13, 13 (Apr. 20, 1871). By "interpos[ing] the federal courts between the States and the people, as guardians of the people's federal rights," this statute, "along with the Fourteenth Amendment it was enacted to enforce," was one of the "crucial ingredients in the basic alteration of our federal system accomplished during the Reconstruction Era." *Patsy v. Bd. of Regents*, 457 U.S. 496, 503 (1982) (quotation marks omitted).

The catalyst for this legislation was Southern government officials' tacit support of the reign of terror being carried out by the Ku Klux Klan, *see Wilson v. Garcia*, 471 U.S. 261, 276 (1985), which sought to suppress the speech and association rights of former slaves and their Unionist allies, retaliating against those

who advocated equality or supported federal policies. Congress learned, for example, that after a citizens' meeting was called "to protest against the outrages" being committed in Mississippi, Klan members sought revenge, and "[a]t their instigation warrants were issued for the arrest of peaceable and well-disposed negroes upon the charge of 'using seditious language.'" Cong. Globe, 42d Cong., 1st Sess. 321; *see also id.* at 155 (testimony describing attack in which the Klan "made all the colored men promise they would never vote the Radical ticket again"); *id*. at 157 (testimony that Blacks "were killed because they were summoned as witnesses in the Federal courts"); *id*. at 321 (testimony that the Klan "wanted to run them off because the principal part of them voted the Radical ticket" and that "[t]hey have been trying to get us to vote" the other way).

As one Congressman put it, "our fellow-citizens are being deprived of the enjoyment of the fundamental rights of citizens" because of "their opinions on questions of public interest." *Id*. at 332.

Section 1983, however, "was not a remedy against the Klan" but against "those who represent[ed] a State in some capacity" and "were unable or unwilling" to enforce the law with an even hand. *District of Columbia v. Carter*, 409 U.S. 418, 426 (1973) (quoting *Monroe v. Pape*, 365 U.S. 167, 175-76 (1961) (brackets omitted)). Congress recognized that laws were being applied selectively across the South to target disfavored groups and viewpoints. While "outrages committed upon

loyal people through the agency of this Ku Klux organization" went unpunished, one Senator noted, "[v]igorously enough are the laws enforced against Union people. They only fail in efficiency when a man of known Union sentiments, white or black, invokes their aid." Cong. Globe, 42d Cong., 1st Sess. 505. The fundamental problem was that biased state officials, by systematically tolerating or condoning attacks on people with unpopular viewpoints, were "denying decent citizens their civil and political rights." *Wilson*, 471 U.S. at 276.

Apart from selectively refusing to protect citizens from private violence, states were also retaliating against disfavored political views more directly. A significant problem during Reconstruction was the instigation of "baseless civil and criminal prosecutions to punish and intimidate those who had been loyal to the Union during the Civil War or who tried to enforce national policy." David Achtenberg, *With Malice Toward Some:* United States v. Kirby*, Malicious Prosecution, and the Fourteenth Amendment*, 26 Rutgers L.J. 273, 275 (1995); *see* Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess., at xviii (1866) ("prosecutions have been instituted in State courts against Union officers for acts done in the line of official duty, and similar prosecutions are threatened elsewhere"); *Mitchum*, 407 U.S. at 240 ("state courts were being used to harass and injure"). These groundless suits "had proved potent instruments of harassment" because of the arrests they triggered, and by 1871 Congress had enacted multiple new laws responding to the

problem by expanding habeas corpus and the ability to remove state prosecutions to federal court. Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. Pa. L. Rev. 793, 829 (1965).

Abuses continued, however. To address them and other violations of fundamental liberties, Congress enacted Section 1983, allowing victims to go to federal court to vindicate their federal constitutional rights. *See* Cong. Globe, 42d Cong., 1st Sess. 333 ("Suppose that . . . every person who dared to lift his voice in opposition to the sentiment of this conspiracy found his life and his property insecure. . . . In that case I claim that the power of Congress to intervene is complete and ample.").

In light of this urgent purpose, it is no surprise that Section 1983's text is broad and categorical. The statute "ma[kes] no mention of defenses or immunities," *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and concurring in the judgment), and contains "no reference to the presence or absence of probable cause as a precondition or defense to any suit," *Nieves*, 139 S. Ct. at 1730 (Gorsuch, J., concurring in part and dissenting in part). "Instead, the statute imposes liability on anyone who, under color of state law, subjects another person 'to the deprivation of any rights, privileges, or immunities secured by the Constitution.'" *Id.* (quoting 42 U.S.C. § 1983).

Nevertheless, the Supreme Court has found it necessary to fashion limits on the scope of Section 1983, explaining that to effectuate the statute's tort-like remedy, courts "must determine the elements of, and rules associated with, an action seeking damages for its violation." *Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017). But that endeavor, the Court has stressed, must be pursued with caution: judicially devised rules should never override "the values and purposes of the constitutional right at issue," *id.* at 921 (quotation marks omitted), but rather "should be tailored to the interests protected by the particular right in question," *Carey v. Piphus*, 435 U.S. 247, 258-59 (1978); *cf. Wyatt v. Cole*, 504 U.S. 158, 164 (1992) ("we will not recognize an immunity available at common law if § 1983's history or purpose counsel against applying it in § 1983 actions").

As the next section explains, the Court attempted to follow that approach in *Nieves v. Bartlett*, reconciling the importance of First Amendment freedoms with the causation difficulties that arise when retaliation suits are brought against police officers for on-the-spot arrests. Faithfully applying *Nieves* requires a similar attention to the constitutional values at stake, and to the critical role that Section 1983 suits play in "deterring officials' unconstitutional behavior." *Hardin v. Straub*, 490 U.S. 536, 542 (1989).

II. *Nieves* Strikes a Balance Between Competing Imperatives, and Its Rules Must Be Applied Sensibly in Light of that Purpose.

The Supreme Court has acknowledged that "criticisms of public officials"

rank "high in the hierarchy of First Amendment values," *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1954 (2018) (citing *Connick v. Myers*, 461 U.S. 138, 145 (1983)), and indeed "has recognized the right to petition as one of the most precious of the liberties safeguarded by the Bill of Rights," *id.* (quoting *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524 (2002) (quotation marks omitted)). The First Amendment thus prohibits public officials from "subjecting an individual to retaliatory actions" for voicing his or her criticisms, *Nieves*, 139 S. Ct. at 1722 (quoting *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (quotation marks omitted)), including by causing his or her arrest, which "deprives a person of essential liberties," *Lozman*, 138 S. Ct. at 1948.

In *Nieves*, however, the Court confronted a causation problem that, if left unaddressed, threatened to leave police officers exposed to frivolous lawsuits over remarks they make during spur-of-the-moment arrests in volatile situations. To address that problem and "ensure that officers may go about their work without undue apprehension of being sued," the Court imposed a threshold requirement that plaintiffs must demonstrate either a lack of probable cause for their arrest or "objective evidence" that they were arrested "when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Nieves*, 139 S. Ct. at 1725, 1727. These standards must be applied sensibly in light of their purpose, with an eye toward preserving the careful balance struck by the Court.

As *Nieves* explains, claims of First Amendment retaliation always involve a "problem of causation." *Id.* at 1723 (quotation marks omitted). "It is not enough to show that an official acted with a retaliatory motive and that the plaintiff was injured—the motive must *cause* the injury. Specifically, it must be a 'but-for' cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive." *Id.* at 1722.

That test can raise difficult questions when a police officer makes a discretionary arrest decision, because "protected speech is often a legitimate consideration when deciding whether to make an arrest." *Id.* at 1724. As the Court had previously noted: "The content of the suspect's speech might be a consideration in circumstances where the officer must decide whether the suspect is ready to cooperate, or, on the other hand, whether he may present a continuing threat to interests that the law must protect." *Lozman*, 138 S. Ct. at 1953. "That means it can be difficult to discern whether an arrest was caused by the officer's legitimate or illegitimate consideration of speech." *Id.*; *see Nieves*, 139 S. Ct. at 1723-24 ("The causal inquiry is complex because protected speech is often a wholly legitimate consideration for officers when deciding whether to make an arrest." (quotation marks omitted)).

Compounding that problem, arrest decisions often involve "split-second judgments," *Lozman*, 138 S. Ct. at 1953, by police officers dealing with potentially

volatile situations. As the Court noted in *Nieves*, "Police officers conduct approximately 29,000 arrests every day—a dangerous task that requires making quick decisions in 'circumstances that are tense, uncertain, and rapidly evolving.'" *Nieves*, 139 S. Ct. at 1725 (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)). In that context, "the content and manner of a suspect's speech may convey vital information—for example, if he is 'ready to cooperate' or rather 'present[s] a continuing threat.'" *Id.* at 1724 (quoting *Lozman*, 138 S. Ct. at 1953). In *Nieves*, for example, police officers "testified that they perceived [the plaintiff] to be a threat based on a combination of the content and tone of his speech, his combative posture, and his apparent intoxication." *Id.*

Further heightening the risk of unfounded suits against police officers, it is easy for arrestees to make spurious but difficult-to-disprove claims that officers acted in ways revealing a retaliatory motive during these encounters. Such allegations can rest on nothing more than a stray remark made—or alleged to have been made—during the course of the arrest. "Because a state of mind is 'easy to allege and hard to disprove,'" *id.* at 1725 (quoting *Crawford–El v. Britton*, 523 U.S. 574, 585 (1998)), permitting such claims to go forward without an objective threshold hurdle "would threaten to set off 'broad-ranging discovery' in which 'there often is no clear end to the relevant evidence,'" *id.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982)). "Any inartful turn of phrase or perceived slight during

a legitimate arrest could land an officer in years of litigation," dampening the ardor of police officers as they discharge their duties. *Id.* "And the complexity of proving (or disproving) causation in these cases creates a risk that the courts will be flooded with dubious retaliatory arrest suits." *Lozman*, 138 S. Ct. at 1953. Another "predictable consequence" is that "officers would simply minimize their communication during arrests to avoid having their words scrutinized for hints of improper motive—a result that would leave everyone worse off." *Nieves*, 139 S. Ct. at 1725.

Finally, the Supreme Court reasoned that permitting retaliatory arrest suits without any objective threshold showing would diminish Fourth Amendment standards that shield police officers from scrutiny of their motives. Because the Fourth Amendment "regulates conduct rather than thoughts," it asks only "whether the circumstances, viewed objectively," justify that conduct, "*whatever* the subjective intent motivating the relevant officials." *Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011) (quotation marks omitted). "A particular officer's state of mind," therefore, "provides 'no basis for invalidating an arrest.'" *Nieves*, 139 S. Ct. at 1725 (quoting *Devenpeck v. Alford*, 543 U.S. 146, 155 (2004)). This rule is meant "[t]o ensure that officers may go about their work without undue apprehension of being sued." *Id.* But allowing retaliatory arrest suits to proceed "based solely on allegations about an arresting officer's mental state," the Court decided, would

“undermine” those basic Fourth Amendment standards. *Id.*

These considerations all focus on the context of discretionary arrests made in the heat of the moment by police officers—who often may legitimately take speech into account when deciding to make an arrest. Police officers, the Supreme Court determined, should not be deterred from vigorously performing their duties by the threat of retaliation suits that, even when frivolous, may require extensive litigation and discovery before dismissal.

Crucially, however, the Court recognized that “an unyielding requirement to show the absence of probable cause could pose ‘a risk that some police officers may exploit the arrest power as a means of suppressing speech.’” *Id.* at 1727 (quoting *Lozman*, 138 S. Ct. at 1953-54). And so the Court fashioned a compromise between competing imperatives: while probable cause “generally” defeats a retaliatory arrest claim, it does not do so in “circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so.” *Id.* As the Court explained, if someone who has been “vocally complaining” about a matter of public interest is arrested on facts that would not normally lead to an arrest, it would be “insufficiently protective of First Amendment rights to dismiss the individual’s retaliatory arrest claim on the ground that there was undoubted probable cause for the arrest.” *Id.*

The rules set forth in *Nieves* must be applied sensibly in light of the competing

values they seek to reconcile and the careful balance the Court sought to achieve. The requirement of "objective evidence" that a plaintiff was arrested "when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been," *id.*, is not an arbitrary hurdle. That requirement has a specific purpose: it addresses the "causal concern" described above "by helping to establish that 'non-retaliatory grounds [we]re in fact insufficient to provoke the adverse consequences.'" *Id.* (quoting *Hartman*, 547 U.S. at 256). And the exception to this requirement likewise serves a vital purpose—preventing government officials from "exploit[ing] the arrest power as a means of suppressing speech." *Id.* (quoting *Lozman*, 138 S. Ct. at 1953-54). Unless courts interpret that exception fairly, keeping in mind its ultimate function, government officials will end up enjoying the impunity that *Nieves* sought to avoid.

III. Gonzalez Has Made the Threshold Showing Required by *Nieves*.

As the district court held, "the *Nieves* exception applies in this case," and Gonzalez "need not plead or prove the absence of probable cause" for her arrest. ROA.184. Significantly, none of the considerations that motivated *Nieves*'s probable cause requirement are implicated here. And Gonzalez has provided the type of objective evidence that *Nieves* calls for to show that she was targeted in a manner that similarly situated individuals were not. That showing, combined with her detailed allegations of a multifaceted scheme to punish her for her political

advocacy, places her claim of retaliatory arrest firmly within the exception to *Nieves*'s probable cause requirement. While the burden will remain on her to substantiate her allegations under the framework of *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), the threshold *Nieves* test does not foreclose her claims at this initial stage.

None of the factors discussed by the Supreme Court to explain its ruling in *Nieves* are implicated by Gonzalez's suit. Her arrest did not result from a police officer's spur-of-the-moment judgment about rapidly unfolding events, but rather, she alleges, from orchestrated decisions by high-level city officials over a period of months. *See* Appellee Br. 3-6. Her allegation of retaliatory motive is not based on stray remarks claimed to have been made by an arresting officer with whom she never previously interacted; rather, she cites a series of events allegedly demonstrating that city officials pursued a long campaign to silence and disempower her—including repeated attempts to strip her of her council seat, remove her from office, and coerce her into pledging that she would not seek office again, as well as efforts to ensure that she would serve jail time on the misdemeanor charge brought against her. *Id.* at 7-8. And the speech for which Gonzalez claims she was targeted (advocating replacement of the city manager) was not intertwined with the conduct for which she was arrested (allegedly stealing a government record), thus avoiding any need to disentangle permissible and impermissible consideration of speech.

In short, the causation problems that motivated *Nieves* simply do not arise here. In these circumstances, "probable cause does little to prove or disprove the causal connection between animus and injury." *Nieves*, 139 S. Ct. at 1727. Requiring Gonzalez to show a lack of probable cause, therefore, "would come at the expense of [that rule's] logic." *Id.*

Indeed, virtually everything the Supreme Court said in *Lozman* about official municipal policies targeting disfavored speakers—another context in which retaliatory arrest suits may proceed despite probable cause—has equal force here:

> The causation problem in arrest cases is not of the same difficulty where, as is alleged here, the official policy is retaliation for prior, protected speech bearing little relation to the criminal offense for which the arrest is made. In determining whether there was probable cause to arrest Lozman for disrupting a public assembly, it 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 in a case like this one it is unlikely that the connection between the alleged animus and injury will be "weakened . . . by [an official's] legitimate consideration of speech."

Lozman, 138 S. Ct. at 1954 (quoting *Reichle v. Howards*, 566 U.S. 658, 668 (2012)). Here too, the "causation problem" that motivated the *Nieves* rule "is not of the same difficulty," because Appellants allegedly retaliated against Gonzalez for "prior, protected speech bearing little relation to the criminal offense for which" her arrest was sought, and because it is "difficult to see why a city official could have legitimately considered" that Gonzalez had, "earlier, criticized city officials." *Id.*

Importantly, too, claims like Gonzalez's pose no risk of weakening the

protections that police officers receive under the Fourth Amendment's standard of objective reasonableness. Her case, even if ultimately successful, will have no effect on police officers' liability for on-the-spot arrest decisions. *Cf. Nieves*, 139 S. Ct. at 1727 (the "objective inquiry" provided by the probable cause requirement "avoids the significant problems that would arise from reviewing *police conduct* under a purely subjective standard" (emphasis added)).

For all these reasons, Gonzalez's suit does not implicate the causation difficulties or the risks to police officers that arise from "the typical retaliatory arrest claim." *Id.* at 1722 (quoting *Lozman*, 138 S. Ct. at 1953-54).

Moreover, the type of conduct alleged by Gonzalez represents a uniquely serious incursion on the First Amendment, beyond the harms stemming from a typical arrest made by police officers acting on their own initiative. When influential government officials embark on a scheme to intimidate and silence those who disagree with their policies—as Gonzalez alleges—the harms to free speech are akin to those arising under an official municipal policy of retaliation, as the Supreme Court has described them:

> An official retaliatory policy is a particularly troubling and potent form of retaliation, for a policy can be long term and pervasive, unlike an ad hoc, on-the-spot decision by an individual officer. An official policy also can be difficult to dislodge. A citizen who suffers retaliation by an individual officer can seek to have the officer disciplined or removed from service, but there may be little practical recourse when the government itself orchestrates the retaliation. For these reasons, when

> retaliation against protected speech is elevated to the level of official policy, there is a compelling need for adequate avenues of redress.

Lozman, 138 S. Ct. at 1954.

In sum, the concerns underlying *Nieves*'s probable cause rule do not apply to this case.

Furthermore, Gonzalez's allegations easily satisfy the requirements for *Nieves*'s exception to that rule. *See* Appellee Br. 21-24. Under *Nieves*, Gonzalez needed to provide objective evidence that she was arrested "when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." 139 S. Ct. at 1727. As the district court summarized, Gonzalez provided extensive "misdemeanor and felony data from Bexar County over the past decade" to show that no felony indictment for the offense she was charged with was ever brought for conduct resembling hers, and that misdemeanor charges have similarly been reserved for vastly different situations, such as "the use of fake social security numbers, driver's licenses, and green cards." ROA.184-85. Empirical evidence that "the misdemeanor offense for which she was charged has 'never been used in Bexar County to criminally charge someone for trying to steal a nonbinding or expressive document'" like a citizen petition, ROA.184 (quoting complaint), is precisely the type of "objective evidence" regarding "similarly situated individuals" that *Nieves* calls for. 139 S. Ct. at 1727.

Gonzalez's data also allegedly shows that individuals accused of the

misdemeanor with which she was charged are not typically arrested or jailed. ROA.184. Evidence that people are not normally arrested for this offense further indicates, as required by *Nieves*, that this is a "circumstance[] where officers [may] have probable cause to make arrests, but typically exercise their discretion not to do so." *Nieves*, 139 S. Ct. at 1727.

Appellants argue that there is no evidence of Gonzalez being treated differently from similarly situated individuals because she "does not allege that there have been any other persons" who engaged in conduct like hers but "were not charged." Appellants Br. 10. As they see it, Gonzalez must demonstrate that other people took the same action that she is alleged to have taken (attempting "to steal or hide a petition that has been presented to a city council") without being criminally charged for it. *Id.* at 12; *see id.* (Gonzalez "has not alleged that the steal[ing of] a nonbinding or expressive document is endemic" (quotation marks omitted)).

That is not what *Nieves* requires. *Nieves* calls for evidence that a plaintiff 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. It does not say that this requirement can be satisfied only by records of other people committing the same conduct without being charged. Appellants point to an example the Court discussed about the selective enforcement of jaywalking laws, but the Court never suggested that the meaning of "otherwise similarly situated individuals," *id.*, is

limited to that fact pattern. The point of this requirement, after all, is simply to help "establish that non-retaliatory grounds" were "insufficient to provoke the adverse consequences," and to do so through "an objective inquiry that avoids the significant problems that would arise from reviewing . . . . the statements and motivations of [a] particular arresting officer." *Id.* (quotation marks omitted).

If the data cited by Gonzalez shows what she claims it does, then it provides objective evidence that she would not have been arrested but for the retaliatory motives she alleges, and that people who have not criticized the city government as she did have never had this type of criminal charge brought against them. That is all *Nieves* requires.

Appellants' interpretation of *Nieves* would allow government officials to lodge all sorts of creative and exotic criminal accusations as a pretext to arrest people whose speech they want to suppress. The more unprecedented the accusation, the less likely that any documented record will exist of people having engaged in the conduct in question, because no one will have previously thought that such conduct could amount to a crime. For example, if city council members have never been criminally charged for anything like moving a citizen petition from one part of the council table to another part, *see* ROA.170 ("the petition never left the council table"), while leaving it still visible to observers, *see* Appellants Br. 4 (stating that Appellant Trevino "noted a binder clip in Appellee's meeting binder that looked like

the one he used to clip the 26 pages of the petition together"), then there is unlikely to be any documented record of people taking such actions. And if that were enough to foreclose a retaliation claim, as Appellants argue, the *Nieves* exception would be drained of all force, upending the careful balance struck by the Supreme Court.

Appellants also argue that allowing this case to go forward "would cause a chilling effect on public officials who report criminal activity" because they "could not report a crime for fear that they would be haled into court for doing their civic duty." Appellants Br. 12. But Gonzalez alleges much more than the simple act of reporting a crime: she claims that Appellants worked in concert to secure her arrest based on a pretextual charge, circumventing the local district attorney's office and taking special measures to ensure she would be jailed. Appellee Br. 4-7. She also alleges a series of attempts to remove her from the city council in support of her claims of retaliatory motive. *Id.* at 7-8. Whether or not she can substantiate these claims, allowing them to proceed poses no risk of deterring the good-faith reporting of crimes. The circumstances alleged here are a far cry from what worried the Supreme Court in *Nieves*—the dilemma police officers would face if any "inartful turn of phrase or perceived slight during a legitimate arrest could land an officer in years of litigation." *Nieves*, 139 S. Ct. at 1725.

Indeed, if allegations of retaliatory arrest supported by the level of detail and the wealth of objective evidence that Gonzalez has provided are dismissed under

Nieves, then the exception to its probable cause requirement will have lost all meaning—empowering government officials to use the arrest power as a means of suppressing dissent with impunity. That result would subvert the careful balance *Nieves* attempts to strike between ensuring freedom from speech-based retaliation and shielding police officers from spurious lawsuits. It would also subvert the intent of the Congress that enacted Section 1983. *Nieves* does not preclude this suit, and Gonzalez should have the opportunity to substantiate her claims.

CONCLUSION

For the foregoing reasons, the district court's ruling should be affirmed.

Respectfully submitted,

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Dated: July 14, 2021

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on July 14, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 14th day of July, 2021.

/s/ Dayna J. Zolle
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 5,271 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached *amicus* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 14th day of July, 2021.

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