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

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AND INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION AS *AMICI CURIAE* IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING *EN BANC*

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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: October 3, 2022

/s/ Brianne J. Gorod
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CORPORATE DISCLOSURE STATEMENT

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

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INTEREST OF *AMICI CURIAE*[1]

Constitutional Accountability Center is a think tank and public-interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. The Institute for Constitutional Advocacy and Protection is a public-interest law group housed at Georgetown University Law Center, whose mission is to use the power of the courts to defend American constitutional rights and values. *Amici* have a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text and history, and therefore have an interest in this case.

INTRODUCTION

In *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), the Supreme Court limited the ability to pursue claims brought under the First Amendment and 42 U.S.C. § 1983 that are based on police officers' discretionary decisions to make warrantless arrests. In doing so, the Court struck a careful balance between two competing imperatives—a desire to protect police officers from "doubtful retaliatory arrest suits . . . based solely on allegations about an arresting officer's mental state," *id.* at 1725, and the need to prevent "police officers [from] exploit[ing] the arrest power

[1] *Amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their 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.

as a means of suppressing speech," *id.* at 1727 (quoting *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1953-54 (2018)). The Court reconciled those dual imperatives by combining a general rule with an important exception: when plaintiffs allege that police officers violated the First Amendment by arresting them, "probable cause should generally defeat a retaliatory arrest claim," but not in "circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Id.* at 1727.

The panel decision undoes the Supreme Court's careful handiwork, applying *Nieves* where it is inapplicable and compounding that error by reading the *Nieves* exception out of existence. The probable cause rule of *Nieves* applies only in suits that challenge "an arresting officer's mental state," *id.* at 1725, and it arises from considerations unique to warrantless arrests. And even where the probable cause rule applies, the exception to that rule does not require any specific type of "comparative" data. Slip Op. at 8. By getting both points wrong, the panel has created an impunity for viewpoint discrimination that the Supreme Court tried to avoid. This Court should reconsider that flawed and dangerous ruling.

ARGUMENT

I. Section 1983 Was Enacted to Address Politically Motivated Retaliation Like the Conduct Alleged Here.

According to Sylvia Gonzalez, Appellants secured a warrant for her arrest on a pretextual misdemeanor charge to try to silence her political advocacy. She

sued under 42 U.S.C. § 1983, alleging a violation of the First Amendment. That statute was passed to provide redress in precisely this type of scenario.

Enacted after the Civil War, Section 1983 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). It was passed, in part, to curb politically motivated retaliation by state and local officials, who, across the South, were targeting citizens with disfavored viewpoints.

This problem took two forms. First, Southern officials were selectively withholding the law's protection from individuals with unpopular views, particularly Black citizens and Union supporters. While crimes of the Ku Klux Klan went unpunished, one Senator observed, "[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 (1871). As one Congressman protested, "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.

Second, state and local officials were retaliating against unpopular viewpoints directly, by instigating "baseless civil and criminal prosecutions to punish and intimidate." David Achtenberg, *With Malice Toward Some: United*

States v. Kirby, Malicious Prosecution, and the Fourteenth Amendment, 26 Rutgers L.J. 273, 275 (1995); *see* Cong. Globe, 42d Cong., 1st Sess. 321 (1871) (describing incident in which "warrants were issued for the arrest of peaceable and well-disposed negroes upon the charge of 'using seditious language'" after they protested Klan impunity); *Mitchum v. Foster*, 407 U.S. 225, 240 (1972) ("state courts were being used to harass and injure"). To address these retaliatory arrests and other constitutional violations, Congress empowered victims to seek redress in federal court. *See* Cong. Globe, 42d Cong., 1st Sess. 333 (1871) ("Suppose that . . . every person who dared to lift his voice in opposition . . . found his life and his property insecure. . . . In that case I claim that the power of Congress to intervene is complete and ample.").

The text Congress chose is categorical, with "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 "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). Nevertheless, the Supreme Court has limited Section 1983's language, explaining that 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 these judicially devised limits must be "consistent with the values and

purposes of the constitutional right at issue." *Thompson v. Clark*, 142 S. Ct. 1332, 1337 (2022) (quotation marks omitted).

II. *Nieves* Shields Police Officers from Litigation over Warrantless Arrests, but Does Not Extend to Other Types of Arrests Orchestrated by Other Types of Officials.

In *Nieves*, the Supreme Court addressed claims based on "an arresting officer's mental state" when making a warrantless arrest. 139 S. Ct. at 1725. *Nieves*'s rules were crafted to address that scenario, and they make sense only in that context. But Gonzalez does not challenge any officer's decision to make a warrantless arrest, Slip Op. 4 (Gonzalez "turned herself in"), and the panel was wrong to assume that *Nieves* applies here.

When police officers who make warrantless arrests are sued for retaliation, it generates "complex causal inquiries" that risk exposing officers to frivolous litigation. *Nieves*, 139 S. Ct. at 1724. To "ensure that officers may go about their work without undue apprehension of being sued," *Nieves* imposes 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." *Id.* at 1725, 1727.

The "causal inquiry is complex" in retaliation suits arising from warrantless arrests "because protected speech is often a wholly legitimate consideration for

officers when deciding whether to make an arrest." *Id.* at 1723-24 (quotation marks omitted). Exacerbating that problem, warrantless arrests often require "split-second judgments," *Lozman*, 138 S. Ct. at 1953, "in circumstances that are tense, uncertain, and rapidly evolving," *Nieves*, 139 S. Ct. at 1725 (quotation marks omitted).

Moreover, it is "easy to allege" but "hard to disprove" that an arresting officer had retaliatory motives. *Id.* (quotation marks omitted). Even when such allegations are based on nothing but an "inartful turn of phrase or perceived slight," they can "land an officer in years of litigation." *Id.* Thus, "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.

Finally, retaliation suits involving warrantless arrests threaten to diminish the Fourth Amendment standards that shield police officers from scrutiny of their motives. The Fourth Amendment asks only "whether the circumstances, viewed objectively," justify a seizure, "*whatever* the subjective intent motivating the relevant officials." *Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011) (quotation marks omitted). But permitting retaliatory arrest suits "based solely on allegations about an arresting officer's mental state" would "undermine" these standards. *Nieves*, 139 S. Ct. at 1725.

These practical considerations all relate exclusively to police officers' warrantless arrests. In addition to those considerations, *Nieves* also cited "the common law approach to similar tort claims," *id.* at 1726, and here too focused entirely on discretionary arrests by law enforcement. *See id.* ("At common law, peace officers were privileged to make warrantless arrests based on probable cause . . . ."); *id.* at 1727 ("the consistent rule was that officers were not liable for arrests they were privileged to make based on probable cause").

The exception to *Nieves*'s probable cause rule likewise focuses exclusively on warrantless arrests. As *Nieves* explains, "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 (emphasis added) (quoting *Lozman*, 138 S. Ct. at 1953-54). To avoid that risk, *Nieves* fashioned an exception for circumstances where officers typically "exercise their discretion" not to arrest despite probable cause. *Id.* (citing traditional limits on police officers' common law privilege "to make warrantless arrests"). This exception "provides an objective inquiry that avoids the significant problems that would arise *from reviewing police conduct* under a purely subjective standard." *Id.* (emphasis added); *see id.* ("Because this inquiry is objective, the statements and motivations *of the particular arresting officer* are irrelevant." (emphasis added and quotation marks omitted)).

Plainly, *Nieves* is concerned exclusively with warrantless arrests by law enforcement officers. That it does not apply to all retaliatory arrest claims is evidenced by *Lozman*, in which the Court addressed claims based on an "official municipal policy" of retaliation. 138 S. Ct. at 1951 (quoting *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978)). And the Court has never said that the facts of *Lozman* represent the only kind of "unusual circumstances," *Nieves*, 139 S. Ct. at 1722, that distinguish a case from *Nieves*.

While Gonzalez's claims are not based on an official municipal policy as in *Lozman*, they are just as far afield from the typical retaliatory arrest claim addressed in *Nieves*. Unsurprisingly, therefore, none of the factors *Nieves* discussed to explain its holding are implicated here. Gonzalez is not suing a police officer who arrested her. Her arrest did not result from a police officer's judgment, much less a spur-of-the-moment decision concerning rapidly unfolding events. Her claims are not based on stray remarks made during a single encounter but rather on a long series of actions allegedly taken to silence and disempower her. And the speech for which she 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, this case does not implicate the difficulties that arise from "the typical retaliatory arrest claim," *Nieves*, 139 S. Ct. at 1722 (quoting *Lozman*, 138 S. Ct. at 1953-54), which involves "an ad hoc, on-the-spot decision by an individual officer," *Lozman*, 138 S. Ct. at 1954. Instead, just as in *Lozman*, "probable cause does little to prove or disprove the causal connection between animus and injury." *Nieves*, 139 S. Ct. at 1727. And Gonzalez's claim does not threaten the protection that *Nieves* gives to police officers for their warrantless arrests. Indeed, everything that *Lozman* said about why official retaliation policies create "a compelling need for adequate avenues of redress," 138 S. Ct. at 1954, has equal force here. *Nieves* simply does not apply.

III. The *Nieves* Exception Requires Objective Evidence of Retaliatory Intent, Not Any Specific Kind of Comparative Data.

Even in the context of warrantless arrests, "an unyielding requirement to show the absence of probable cause" would be "insufficiently protective of First Amendment rights." *Nieves*, 139 S. Ct. at 1727. *Nieves* therefore created an exception to this requirement where plaintiffs furnish "objective evidence" that they were arrested while "otherwise similarly situated individuals" were not. *Id.* By failing to consider the point of this exception, the panel misconstrued its scope—winnowing the exception out of existence.

The *Nieves* exception serves a specific purpose. Along with the probable cause rule, it mitigates the "causal concern" in retaliation suits against arresting

officers by enabling plaintiffs to show objectively "that 'non-retaliatory grounds [we]re in fact insufficient'" to cause the arrest. *Id.* at 1722 (quoting *Hartman v. Moore*, 547 U.S. 250, 256 (2006)). Its availability prevents law enforcement officers from "exploit[ing] the arrest power as a means of suppressing speech." *Id.* at 1727 (quoting *Lozman*, 138 S. Ct. at 1953-54).

Faithfulness to *Nieves* requires interpreting that exception sensibly in light of its function. But the panel treated the exception like an arbitrary hurdle. Fixating on the phrasing of one sentence, the panel ignored the Supreme Court's explanation for why it created the exception in the first place.

Had the panel properly read *Nieves* as a whole, it would have recognized that Gonzalez's allegations easily fit within the *Nieves* exception. Evidence that the misdemeanor for which she was charged has never been used against anyone for conduct like hers, *see* Slip Op. 8, is precisely the type of "objective evidence" regarding "similarly situated individuals" that *Nieves* calls for, 139 S. Ct. at 1727. And evidence that people who are accused of this misdemeanor are not typically arrested or jailed, *see* Slip Op. 3 (describing the "atypical" process Appellants used "to secure a warrant, rather than a summons"), further indicates that this is a scenario "where officers have probable cause to make arrests, but typically exercise their discretion not to do so," *Nieves*, 139 S. Ct. at 1727.

Nieves does not say that its exception can be satisfied only by documentation that other people have engaged in the exact same conduct as the plaintiff. The point of the exception, after all, is simply to "establish that non-retaliatory grounds" were "insufficient" to provoke the arrest, through "an objective inquiry that avoids the significant problems that would arise from reviewing" the "statements and motivations of the particular arresting officer." *Id.* (quotation marks omitted).

The data cited by Gonzalez, if accurate, is objective evidence that she would not have been arrested but for the retaliatory motive she alleges, and that people who have not criticized the city government have never been charged in circumstances like hers. That is all *Nieves* requires.

The panel's contrary interpretation is a license for government officials to use creative criminal accusations as a pretext for speech-based arrests. The more unprecedented the accusation, the less likely that records will exist of people engaging in the same conduct, because no one will have previously imagined it could amount to a crime. For instance, if city council members have never been 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"), there is unlikely to be any documented record of people taking such actions.

Were that enough to foreclose a retaliation claim, the *Nieves* exception would be drained of all force—upending the careful balance struck by the Supreme Court, empowering political officials to suppress dissent, and subverting the text and purpose of Section 1983. *Nieves* does not require that result, even assuming it applies here at all.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted.

Respectfully submitted,

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Dated: October 3, 2022

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 October 3, 2022.

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 3rd day of October, 2022.

/s/ Brianne J. Gorod
Brianne J. Gorod

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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(b)(4) because it contains 2,597 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that this 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.

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