No. 22-1025

IN THE

Supreme Court of the United States

SYLVIA GONZALEZ,

Petitioner,

v.

EDWARD TREVINO, II, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AND INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES – cont'd

Page(s)

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 in the proper interpretation of 42 U.S.C. § 1983, a landmark law enacted to vindicate the rights guaranteed by the Constitution. Accordingly, they have an interest in this case.

SUMMARY OF ARGUMENT

In *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), this Court limited when individuals can pursue First Amendment retaliation claims brought under Section 1983 that are based on a police officer's decision to make a warrantless arrest. In doing so, this Court struck a careful balance between two competing imperatives—protecting "[p]olice officers" from "doubtful retaliatory arrest suits . . . based solely on allegations about an arresting officer's mental state," *id.* at 1725, and preventing "police officers" from "exploit[ing] the arrest power as a means of suppressing speech," *id.* at 1727 (quoting *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1953-54 (2018)).

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[1] 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 its preparation or submission. Under Supreme Court Rule 37.2, because this brief has been filed more than ten days before the due date, the brief serves as notice to the parties.

This 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 Fifth Circuit's decision undoes this Court's careful handiwork, applying *Nieves* where it is inapplicable and then compounding that error by reading its exception out of existence. Contrary to the decision below, the *Nieves* rule applies only in suits that challenge "an arresting officer's mental state," *id.* at 1725, because it is based on considerations unique to warrantless arrests by law enforcement officers. And even where that rule applies, its exception does not require any specific type of "comparative" data. Pet. App. 29a. By getting both points wrong, the Fifth Circuit has created an impunity for viewpoint discrimination that *Nieves* tried to avoid. This Court should grant the petition for *certiorari* and reverse that flawed and dangerous ruling.

ARGUMENT

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

According to Petitioner Sylvia Gonzalez, Respondents 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 were targeting citizens with disfavored viewpoints across the South.

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 an 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 the Klan's impunity); *Mitchum v. Foster*, 407 U.S. 225, 240 (1972) ("state courts were being used to harass and injure").

To address these acts of retaliation 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."). And Congress did so in categorical, unqualified terms, making "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, this Court has limited Section 1983's broad 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 importantly, 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); *see also Reed v. Goertz*, 143 S. Ct. 955, 961 (2023) (courts must focus "on the specific constitutional right alleged to have been infringed" when developing rules under Section 1983).

For the reasons discussed below, it is inconsistent with the values and purposes of the First Amendment right against viewpoint retaliation—secured against state and local action by the Fourteenth Amendment—to apply *Nieves* beyond the context of law enforcement officers' warrantless arrests. The harm of doing so is further heightened when the *Nieves* exception is given the indefensibly narrow scope reflected in the decision below.

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*, this Court addressed First Amendment claims brought under Section 1983 that were based on "an arresting officer's mental state" when making a warrantless arrest. 139 S. Ct. at 1725. *Nieves*'s probable cause rule and its exception were both 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. *See* Pet. App. 24a (Gonzalez "turned herself in"). The Fifth Circuit was therefore wrong to apply *Nieves* here.

When a police officer who made a warrantless arrest is later 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 reasons this Court gave for that rule all relate exclusively to warrantless arrests.

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 situations in which police officers are sued for their discretionary, on-the-spot decisions to make warrantless arrests.

In addition to those practical considerations, *Nieves* also relied on "the common law approach to similar tort claims." *Id.* at 1726. More specifically, it relied on the common law's approach to liability for discretionary, warrantless arrests by law enforcement officers. *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 police officers' discretionary, 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). *Nieves*'s exception, designed to avoid that risk, focuses on police officers' use of their warrantless arrest authority: it encompasses circumstances where officers typically "exercise their discretion," *id.,* not to arrest despite probable cause. *See also id.* (citing traditional limits on police officers' common law privilege "to make warrantless arrests").

The *Nieves* 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). "Because this inquiry is objective, the statements and motivations *of the particular arresting officer* are irrelevant." *Id.* (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 demonstrated by *Lozman*, which permitted 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)). Although Gonzalez's claims are not based on an official municipal policy, as in *Lozman*, neither are they based on an officer's warrantless arrest, as in *Nieves*. It is clear from *Lozman* that not all First Amendment claims for retaliatory arrest require an absence of probable cause. *Nieves* is the only decision imposing such a requirement, and it

did so in a case involving a police officer's warrantless arrest, citing justifications relevant only to that context.

The facts here, like those in *Lozman*, are "far afield" from the type of retaliatory arrest claim addressed in *Nieves*. 139 S. Ct. at 1722 (quoting *Lozman*, 138 S. Ct. at 1954). Unsurprisingly, therefore, none of the factors that *Nieves* discussed to explain its rule 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 amid rapidly unfolding events.
- Her claims are not based on stray remarks allegedly made during a single encounter but rather on a long series of documented actions taken to silence and disempower her.
- 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), avoiding any need to disentangle permissible and impermissible consideration of speech.

In short, this case does not implicate the difficulties that arise from claims that target "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 allowing Gonzalez's claim to proceed would not

threaten the protection that *Nieves* gives to police officers for their warrantless arrests.

Moreover, the type of conduct alleged by Gonzalez represents a uniquely serious incursion on the First Amendment, beyond the harms stemming from arrests 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:

> 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.

Lozman, 138 S. Ct. at 1954. In those circumstances, "there is a compelling need for adequate avenues of redress." *Id.* So too here, for the same reasons. While the concerns underlying *Nieves* do not apply here, those underlying *Lozman* unquestionably do.

In sum, *Nieves*'s probable cause rule is limited to warrantless arrests by law enforcement officers. In a case like this one, it 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. This Court therefore carved out an exception, allowing plaintiffs to furnish "objective evidence" that they were arrested while "otherwise similarly situated individuals" were not. *Id.* By failing to consider the point of this carveout, the Fifth Circuit misconstrued its scope—all but winnowing the exception out of existence.

The *Nieves* exception serves a specific purpose: along with the probable cause rule, it mitigates the causal difficulties in retaliation suits against arresting officers by enabling plaintiffs to show objectively "that 'non-retaliatory grounds [we]re in fact insufficient'" to cause their arrest. *Id.* at 1722 (quoting *Hartman v. Moore*, 547 U.S. 250, 256 (2006)). Its availability helps prevent 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 court below treated the exception like an arbitrary hurdle: fixating on the phrasing of one sentence in *Nieves*, it ignored the opinion's explanation for why it created the exception in the first place.

Had the Fifth Circuit 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* Pet. App. 29a, 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* Pet. App. 22a (describing the "atypical" process used by

Respondents "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, without arrest. 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 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 Fifth Circuit's contrary ruling 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 any records will exist of people engaging in the same conduct without arrest, 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* Pet. App. 67a ("the petition never left the council table"), there is unlikely to be any documented record of people engaging in such actions.

Were that enough to foreclose a retaliation claim, the *Nieves* exception would be drained of all force—upending the careful balance this Court attempted to strike, empowering government 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, *amici* urge this Court to grant the petition for a writ of *certiorari*.

Respectfully submitted,

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