No. 22-1025

IN THE

Supreme Court of the United States

SYLVIA GONZALEZ,

Petitioner,

—v.—

EDWARD TREVINO, II, MAYOR OF CASTLE HILLS, SUED IN HIS INDIVIDUAL CAPACITY; JOHN SIEMENS, CHIEF OF THE CASTLE HILLS POLICE DEPARTMENT, SUED IN HIS INDIVIDUAL CAPACITY; ALEXANDER WRIGHT, SUED IN HIS INDIVIDUAL CAPACITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF TEXAS, CATO INSTITUTE, AND FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes & Regulations

Other Authorities

INTEREST OF AMICI CURIAE[1]

The **American Civil Liberties Union (ACLU)** is a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The **ACLU of Texas** is a state affiliate of the national ACLU. The ACLU and its affiliates have frequently appeared before this Court in First Amendment cases, both as direct counsel and as amici curiae. *See, e.g.*, *United States v. Hansen*, No. 22-179 (U.S. argued Mar. 27, 2023) (counsel); *Mahanoy Area Sch. Dist. v. B. L. ex rel. Levy*, 141 S. Ct. 2038 (2021) (counsel); *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019) (amicus); *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018) (amicus). Many landmark civil rights decisions of the 1950s and 1960s arose out of free speech controversies and involved the government's attempted use of its arrest powers to silence ideas and movements critical of the government. *See, e.g.*, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). History demonstrates that governmental efforts to retaliate against particular viewpoints are often aimed at those who challenge and criticize the status quo. The preservation of retaliatory arrest claims is therefore of immense concern to the ACLU, its civil rights clients seeking justice, and its members and donors.

The **Cato Institute** is a nonpartisan public-policy research foundation founded in 1977 and

[1] The parties have been notified of amici's intent to file this brief. No party has authored this brief in whole or in part, and no one other than amici, their members, and their counsel have paid for the preparation or submission of this brief.

dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice, founded in 1999, focuses on the scope of substantive criminal liability, the proper role of police in their communities, the protection of constitutional safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

The **Foundation for Individual Rights and Expression (FIRE)** is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended expressive rights nationwide through public advocacy, targeted litigation, and amicus curiae participation. Brief of FIRE as Amicus Curiae in Support of Respondents, *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038 (2021); Brief of FIRE as Amicus Curiae in Support of Petitioner, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022); Brief of FIRE as Amicus Curiae in Support of Respondent, *Frese v. Formella*, No. 22-939 (petition for cert. filed Apr. 27, 2023). As part of its mission, FIRE directly represents individuals in Section 1983 lawsuits who were arrested because of their protected speech. Because of that experience, FIRE is keenly aware of the need for a robust remedy for retaliatory arrests. That need is especially great today, as public officials continue to selectively enforce criminal statutes against critics and dissenters, often employing obscure criminal statutes in obviously unconstitutional ways.

SUMMARY OF ARGUMENT

Where police arrest their critics or others expressing disfavored views, the existence of probable cause does not automatically bar retaliatory arrest claims. Instead, in order to preserve First Amendment freedoms, this Court determined in *Lozman v. City of Riviera Beach* that retaliatory arrest claims may proceed where government actors form a "premeditated plan to intimidate a [speaker] in retaliation for his criticisms of [the government]." 138 S. Ct. 1945, 1954 (2018). For the same reason, in *Nieves v. Bartlett*, this Court determined that retaliatory arrest claims may also proceed where officers have probable cause to arrest but "typically exercise their discretion not to do so." 139 S. Ct. 1715, 1727 (2019). The *Nieves* exception guards against law enforcement officers abusing their discretion to censor those with whom they disagree.

Here, the Fifth Circuit took an unduly restrictive view of the *Nieves* exception. It held that an arrestee can invoke the exception only if comparative evidence shows that others who were engaged in identical conduct, but not the same expression, were not arrested. That rule is at odds with this Court's logic and test in *Nieves*. According to the Fifth Circuit, a plaintiff like Ms. Gonzalez, who was arrested for entirely commonplace conduct under a broadly worded statute that had *never* before been used to target conduct like hers, cannot bring suit.

If left in place, the Fifth Circuit's decision will have devastating consequences for critics of the government for two reasons. First, individuals will rarely be able to meet the Fifth Circuit's high evidentiary bar with respect to rarely used or

creatively applied criminal provisions, because they typically do not have access to evidence of other individuals engaged in conduct identical to theirs. Yet where, as here, the plaintiff's conduct is commonplace and has never before been charged, there should be no need for such evidence. The absence of other arrests for commonplace conduct should suffice to establish that police typically exercise their discretion not to arrest for such conduct. Requiring direct comparative evidence would render the *Nieves* exception unusable in such circumstances, even by those this Court expressly sought to protect.

Second, the *Nieves* exception was grounded in the recognition that the First Amendment requires protection against the risk that law enforcement officers might exploit their necessarily broad discretion to censor disfavored speech. The Fifth Circuit's conclusion—that a government critic arrested under a stretched reading of a criminal law that has never before been applied to any similar conduct has no remedy—runs directly counter to this principle. Leaving its rule in place would open the door to officers censoring their critics through novel applications of broad or vague criminal laws.

This Court has recognized that the *Nieves* exception is crucial because broad and open-ended laws provide police with ready probable cause to arrest almost anyone for almost anything. An officer seeking to retaliate against an individual for protected speech will have an easy time finding a pretext to arrest. And unfortunately, some police do exploit their vast discretion to arrest for expressing disfavored views. Where, as here, broadly worded laws are used in novel ways against individuals critical of the

government, retaliatory arrest claims should not automatically fail for want of direct comparative evidence.

This Court should grant certiorari to ensure that the *Nieves* exception provides meaningful First Amendment protection to critics of the government like Ms. Gonzalez, and that courts do not unnecessarily blind themselves to objective evidence of retaliation.

ARGUMENT

I. The Decision Below Denies Important First Amendment Protections that the *Nieves* Decision Was Designed to Preserve.

The existence of probable cause generally defeats a retaliatory arrest claim. *Nieves*, 139 S. Ct. at 1727. But "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.* (quoting *Lozman*, 138 S. Ct. at 1953). In order to guard against that risk, the Court held that the existence of probable cause should not defeat a retaliatory arrest claim "where officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Id.* Holding otherwise would be "insufficiently protective of First Amendment rights," for it would require dismissal of claims initiated by plaintiffs arrested for commonplace activity that typically goes unpunished—for example, a claim by a vocal critic of the police who is arrested for jaywalking at an intersection where "jaywalking is endemic but rarely results in arrest." *Id.*

This case raises the same First Amendment concerns. Ms. Gonzalez, a 72-year-old first-time city council member, spoke out against the City Manager, and organized a nonbinding citizen's petition to remove him. After mistakenly placing the petition in her binder, she was arrested and charged under a broad tampering law that had *never* before been used to target such conduct. The law under which Ms. Gonzalez was arrested makes it a crime to "intentionally destroy, conceal, remove, or otherwise impair the verity, legibility, or availability of a governmental record." Tex. Penal Code § 37.10(a)(3). It is typically invoked to arrest for the use of fake government identification, such as fake social security numbers or driver's licenses, or for misuse of financial information. App. 23a.

In order to show that her arrest was retaliatory, Ms. Gonzalez alleged that the law had never before been used to charge someone for purportedly attempting to steal (or misplacing) a nonbinding expressive document, much less a petition they themselves had prepared in order to criticize the government. App. 23a (citing allegation that, "[o]f 215 grand jury felony indictments obtained under the tampering statute . . . not one had an allegation even closely resembling the one mounted against [Gonzalez]").

This allegation should have been enough. As Judge Oldham noted in dissent below, "[h]ere, common sense dictates that [Ms. Gonzalez's] negative assertion amounts to direct evidence that similarly situated individuals not engaged in the same sort of protected activity had not been arrested." App. 60a. "[G]overnment employees routinely—with intent and

without it—take stacks of papers before, during, and after meetings." App. 60a. Thus, "there should be dozens if not hundreds of arrests of officeholders and staffers during every single legislative biennium—to say nothing of the hundreds if not thousands of arrests during the more-frequent local-government meetings across the State." App. 60a. Instead, there was only one: Ms. Gonzalez's.

The Fifth Circuit held that Ms. Gonzalez could not invoke the *Nieves* exception because she "d[id] not offer evidence of other similarly situated individuals who mishandled a government petition but were not prosecuted under Texas Penal Code § 37.10(a)(3)." App. 28a–29a. According to the Fifth Circuit, the *Nieves* exception is limited to situations where a plaintiff presents "comparative evidence" of individuals "who engaged in the same criminal conduct but were not arrested." App. 29a.

This unduly narrow interpretation of the *Nieves* exception drastically diminishes the very First Amendment protections the Court sought to preserve. Retaliatory arrest plaintiffs will often be unable to prove that other people engaged in the exact same conduct that they did, because that evidence is often unavailable. How is Ms. Gonzalez supposed to show that other people placed petitions in binders and were not prosecuted? In a situation where the statute has *never* been applied to prosecute similar commonplace behavior, it logically follows that the government has not sought to prosecute others for similar acts.

Even with respect to the jaywalking example that this Court used to illustrate why the *Nieves* exception was necessary, "[i]t's not clear that there will always (or ever) be available comparative

evidence of jaywalkers that weren't arrested." App. 53a (Oldham, J., dissenting). Such a rule could require plaintiffs to gather, for example, video of other jaywalkers at the same crosswalk in similar traffic conditions who were not arrested, or testimony from officers demonstrating the number of instances in which they let jaywalkers pass by. Rather than rely on such evidence, "the retaliatory-arrest-jaywalking plaintiff always (or almost always) must appeal to the commonsense proposition that jaywalking happens all the time, and jaywalking arrests happen virtually never (or never)." App. 53a. Moreover, where, as here, the Fifth Circuit's rule is applied to conduct that is not easily visible to others, but is nonetheless commonplace, the rule acts as a complete bar to relief.

The Fifth Circuit's rule, requiring direct comparative evidence even where a statute has *never* before been enforced against commonly engaged-in conduct, would exclude some of the most troubling examples of retaliatory arrest—cases like this one, where officers rely on a novel reading of a criminal law for the first time to arrest a critic for trivial, commonplace conduct. It would incentivize officers to stretch the bounds of vague and broad laws to skirt liability for such arrests. And it could even encourage the introduction of new laws to be used against critics. Such a restrictive version of the *Nieves* exception would leave individuals like Ms. Gonzalez "vulnerable to public officials who choose to weaponize criminal statutes against citizens whose political views they disfavor." App. 14a (Ho, J., dissenting from denial of rehearing en banc).

II. A Robust *Nieves* Exception Is Crucial Because Officers Have Probable Cause for Arrest in a Wide Range of Circumstances.

Allowing retaliatory arrest claims to proceed under these circumstances is critically important because "'statutes in all 50 States and the District of Columbia permit warrantless misdemeanor arrests' in a . . . wide[] range of situations—often whenever officers have probable cause for 'even a very minor criminal offense.'" *Nieves*, 139 S. Ct. at 1727 (quoting *Atwater v. City of Lago Vista*, 532 U.S. 318, 344–45 (2001)). Indeed, "criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something." *Id.* at 1730 (Gorsuch, J., concurring in part and dissenting in part).[2] For example, laws across the United States make it illegal to wear saggy pants,[3] spit in a public park,[4] or barbecue in one's front yard.[5] *See generally* Arielle W. Tolman & David

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[2] *See also* Paul Larkin & Michael Mukasey, *The Perils of Overcriminalization*, The Heritage Foundation (Feb. 12, 2015), https://www.heritage.org/report/the-perils-overcriminalization ("[T]here are more criminal laws than anyone could know").

[3] *See, e.g.*, Abbeville, La. Code of Ordinances § 13-25; William C. Vandivort, Note, *I See London, I See France: The Constitutional Challenge to "Saggy" Pants Laws*, 75 Brook. L. Rev. 667, 673 (2009) (cataloging saggy pants ordinances across the country).

[4] *See, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 21, § 9003.21 ("It shall be unlawful for any person to spit or expectorate in any park."); Goodyear, Al. Code of Ordinances § 11-1-15 ("It is unlawful for any person to spit upon any of the public sidewalks or crosswalks in the City . . . or any park in the City.").

[5] *See, e.g.*, Berkeley, Mo. Code of Ordinances § 210.225, https://ecode360.com/31778191.

M. Shapiro, *From City Council to the Streets: Protesting Police Misconduct After* Lozman v. City of Riviera Beach, 13 Charleston L. Rev. 49, 60–61 (2018).

Under the Fifth Circuit's rule, this breadth would afford officers wide latitude to arrest critics using novel applications of broadly worded laws, and plaintiffs would face a nearly insurmountable burden to unearth examples of identical, unremarkable, but purportedly illegal conduct that went unpunished. In other words, "the state could use these laws not for their intended purposes but to silence those who voice unpopular ideas," which, as Justice Gorsuch recognized, would leave "little . . . of our First Amendment liberties." *Nieves*, 139 S. Ct. at 1730 (Gorsuch, J., concurring in part and dissenting in part).

For example, traffic laws provide officers with "essentially unfettered" discretion to arrest. *See* Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 Vand. L. Rev. 1497, 1503 (2007). Conduct and conversations that occur during traffic stops are typically not publicly observable, so it would be exceedingly difficult, if not impossible, for an individual arrested during a traffic stop to obtain evidence that others who were pulled over for the same traffic infraction but spoke more politely to the officer were not arrested.

The laws that often govern mass assemblies—ordinances regarding noise, unlawful assembly, and disorderly conduct—are also capacious, placing protesters at particular risk. The Fifth Circuit's rule would require them to jump through unnecessary and potentially insurmountable evidentiary obstacles just

to prove that other people engaged in commonplace activity and did not get arrested.

For example, noise ordinances are meant to keep noise levels manageable for residents—but they have also been used by officers to issue "thousands of dollars in . . . fines to protesters" where there had been no "noise complaints by citizens."[6] One individual, James Webb, was cited for violating a Pontiac noise ordinance[7] while parked at a gas station playing a song titled "Fuck the Police" at a high volume. *Webb v. Slosson*, No. 19-CV-12528, 2020 WL 4201178, at *1 (E.D. Mich. July 22, 2020). Yet to pursue a retaliatory arrest claim under the Fifth Circuit's rule, he would have had to obtain evidence of others playing purportedly less offensive songs from parked cars at the same volume without getting arrested.

Typical "unlawful assembly" ordinances are similarly capacious.[8] "Officials can disperse a protest

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[6] Kavitha Surana, *New Port Richey Protesters Slapped with Megaphone Fines*, Tampa Bay Times (Nov. 22, 2020), https://www.tampabay.com/news/2020/11/22/new-port-richey-protesters-slapped-with-megaphone-fines/.

[7] The ordinance makes it "unlawful for any person to create, assist in creating, permit, continue or permit the continuance of any unreasonably loud, disturbing, unusual or unnecessary noise which annoys, disturbs, injures, or endangers the comfort, repose, health, peace, or safety of others within the limits of the City of Pontiac." Pontiac, Mich. Mun. Code § 58-203.

[8] *See, e.g.*, Idaho Code § 18-6404 ("Whenever two or more persons assemble together to do an unlawful act, and separate without doing or advancing toward it, or do a lawful act in a violent, boisterous or tumultuous manner, such assembly is an unlawful assembly"); Minn. Stat. § 609.705 ("When three or more persons assemble, each participant is guilty of unlawful assembly . . . if

as long as they conclude that participants are at some point planning to engage in forceful or violent lawbreaking." John Inazu, *Unlawful Assembly as Social Control*, 64 U.C.L.A. L. Rev. 2, 7 (2017). Such ordinances allow police to use their discretion to arrest upon an inference of "*possible* future illegal activity." Olalekan N. Sumonu, *Shot in the Streets, Buried in Courts: An Assault on Protester Rights*, 52 Seton Hall L. Rev. 1569, 1577 (2022). In St. Louis, for example, "an individual officer can decide, in his or her discretion, to declare an unlawful assembly, and there are no guidelines, rules, or written policies with respect to when an unlawful assembly should be declared." *Ahmad v. City of St. Louis*, No. 4:17-cv-2455, 2017 WL 5478410, at *6 (E.D. Mo. Nov. 15, 2017), *modified on other grounds*, 995 F.3d 635 (8th Cir. 2021).

Police can—and have—used their discretion under unlawful assembly ordinances to target "civil rights workers, antiabortion demonstrators, labor organizers, environmental groups, Tea Party activists, Occupy protesters, and antiwar protesters." Inazu, *supra*, at 5; *see also* Civ. Rts. Div., U.S. Dep't of Just., *Investigation of the Ferguson Police Department* 27 (Mar. 4, 2015) (reporting that in 2014, the City of Ferguson "settled a[] suit alleging that it had abused

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the assembly is: (1) with intent to commit any unlawful act by force; or (2) with intent to carry out any purpose in such manner as will disturb or threaten the public peace; or (3) without unlawful purpose, but the participants so conduct themselves in a disorderly manner as to disturb or threaten the public peace.").

its loitering ordinance . . . to arrest people who were protesting peacefully on public sidewalks").[9]

The same is true of disorderly conduct ordinances. For example, police arrested an antiabortion protester under Oklahoma's disorderly conduct ordinance for picketing outside an abortion clinic and saying "abortion is murder." *Lewis v. City of Tulsa*, 775 P.2d 821, 823 (Okla. Crim. App. 1989). The morning of the trial, the City amended the charge to Disturbing the Peace by Abusive or Violent Language, and at the end of trial, the City amended the charge back to Disorderly Conduct. *Id.* The Oklahoma Court of Criminal Appeals ultimately reversed the protester's conviction, reaffirming that "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* (quoting *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972)).

Under the Fifth Circuit's rule, these protesters would have to establish that arrests of others similarly assembling but expressing different views did not happen. Even with respect to public conduct, it may be surprisingly difficult to prove a negative; at bottom, such claims must often rely on the commonsense proposition that the Fifth Circuit rejected.

Where the conduct in question is obviously commonplace but not easy to observe in public—for example, misplacing a government document, or getting pulled over for a minor traffic infraction—the Fifth Circuit rule will be an impenetrable barrier. And

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[9] Available at https://s3.documentcloud.org/documents/1681202/ferguson-police-department-report.pdf.

where, as here, the conduct is trivial and commonplace, and the application of a broad law is entirely novel, the absence of evidence of similarly situated others ought not be a license for retaliation, nor a barrier to suit.

III. The Decision Below Risks Freeing Police to Exploit Their Vast Discretion to Arrest Those with Whom they Disagree.

The risk that police might exploit their vast discretion to arrest people with whom they disagree is not hypothetical. *See, e.g.*, *Allee v. Medrano*, 416 U.S. 802, 815 (1974) (finding a "persistent pattern of police misconduct" in the enforcement of Texas statutes, including an unlawful assembly law, against activists seeking to organize a farmworkers union).

In 2014, George Alston was pulled over for driving with tinted windows—but ultimately arrested because an officer disliked how he criticized the traffic stop. *Alston v. City of Darien*, 750 F. App'x 825, 830 (11th Cir. 2018).[10]

In *Ford v. City of Yakima*, an officer arrested and jailed a motorist under a noise ordinance because he was irritated that the motorist talked back. 706 F.3d 1188, 1190–91 (9th Cir. 2013), *abrogated by Nieves*, 139 S. Ct. 1715. Before the arrest, the officer stated, "[i]f you run your mouth, I will book you in jail for it,"

[10] When Alston was pulled over, he was talking to his wife over the phone, and said "[t]his is the reason I don't come to McIntosh County because it's fucked up over here." *Id.* at 829. The police officer ordered Alston out of the car, handcuffed him, and took him to jail. *Id.* at 829–30. There, the officer told another officer that he was "getting [Alston] because of how he acted in the car with his wife, and he was cussing" at the officer. *Id.* at 830.

and "you acted a fool . . . and we have discretion whether we can book or release you . . . *your mouth and your attitude talked you into jail*." *Id.*

In 2015, Michael Picard was protesting legally near a DUI checkpoint with a sign reading "Cops Ahead: Keep Calm and Remain Silent."[11] Officers brainstormed how they might charge Picard, with one directing another to "have that Hartford lieutenant call me . . . to see if he's got any grudges" against Picard.[12] Another officer suggested, "we can hit him with reckless use of the highway by a pedestrian and creating a public disturbance."[13] After settling on those charges, they resolved to "claim that . . . in backup, we had multiple people . . . they didn't want to stay and give us a statement, so we took our own course of action."[14] Prosecutors indeed charged Mr. Picard with reckless use of a highway by a pedestrian[15] and creating a public disturbance,[16] but

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[11] Amy B. Wang, *Cops Accidentally Record Themselves Fabricating Charges Against Protester, Lawsuit Says*, Wash. Post (Sept. 20, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/09/20/cops-accidentally-record-themselves-fabricating-charges-against-protester-lawsuit-says/.

[12] *Id.* (video at 00:00:50).

[13] *Id.* (video at 00:01:09).

[14] *Id.* (video at 00:01:50).

[15] Connecticut General Statutes § 53-182 provides that "[a]ny pedestrian who uses any street or highway negligently or recklessly . . . or recklessly disregards his own safety or the safety of any person by the manner of his use of any street or highway shall be deemed to have committed an infraction."

[16] Connecticut General Statutes § 53a-181a provides that "A person is guilty of creating a public disturbance when, with

eventually dropped the charges. Mem. of Decision on Cross Mots. for Summ. J., *Picard v. Toreno*, No. 3:16-cv-01564-WWE, at 7–8 (D. Conn. Sept. 16, 2019), ECF 92.[17]

These cases highlight how easy it is for law enforcement officers to abuse their discretion to arrest those with whom they disagree. The Fifth Circuit's rigid rule requiring direct comparative evidence, even where police have invoked a broad statute in a wholly novel manner to reach commonplace conduct, only exacerbates the problem by denying relief to anyone who lacks evidence that others engaged in identical conduct and were not arrested.

The U.S. Department of Justice (DOJ) has often found evidence of routine retaliatory arrests in certain departments. The DOJ's 2015 report on the Ferguson Police Department (FPD), for example, revealed that

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intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he (1) engages in fighting or in violent, tumultuous or threatening behavior; or (2) annoys or interferes with another person by offensive conduct; or (3) makes unreasonable noise."

[17] Mr. Picard brought a retaliatory arrest claim against the officers, arguing (in part) that police charged him in retaliation for protesting. Mem. of Decision on Cross Mots. for Summ. J., *Toreno*, No. 3:16-cv-01564-WWE, at 1 (D. Conn. Sept. 16, 2019). On defendants' motion for summary judgment, the court found that "disputed issues of fact preclude[d] a determination that probable cause existed as a matter of law," and "Plaintiff ha[d] adduced evidence from which a reasonable jury could determine that defendants charged plaintiff with an improper retaliatory intent." *Id.* at 23–24. The parties settled in 2020, with the State of Connecticut Agreeing to pay Picard $50,000. *See Picard v. Torneo, Jacobi, Barone*, ACLU of Connecticut, https://www.acluct.org/en/cases/picard-v-torneo-jacobi-barone.

"FPD arrests people for a variety of protected conduct: people are punished for talking back to officers, recording public police activities, and unlawfully protesting perceived injustices."[18] The DOJ reported that "FPD's suppression of speech reflects a police culture that relies on the exercise of police power—however unlawful—to stifle unwelcome criticism."[19] The DOJ similarly found that officers of the Baltimore Police Department "routinely infringe upon the First Amendment rights of the people of Baltimore City," for example by "unlawfully stop[ping] and arrest[ing] individuals for speech they perceive to be disrespectful or insolent."[20] And employees of the Maricopa County Sheriff's Office (MCSO) in Arizona were found to have "engaged in a pattern or practice of retaliating against individuals for exercising their First Amendment right to free speech,"[21] including arresting members of "an organization highly critical of what they called MCSO's discriminatory treatment of Latinos" during a public meeting.[22] None of the charges resulted in

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[18] Civ. Rts. Div., U.S. Dep't of Just., *Investigation of the Ferguson Police Department* 24 (Mar. 4, 2015), https://s3.documentcloud.org/documents/1681202/ferguson-police-department-report.pdf.

[19] *Id.* at 28.

[20] Civ. Rts. Div., U.S. Dep't of Just., *Investigation of the Baltimore City Police Department* 116 (Aug. 10, 2016), https://www.justice.gov/opa/file/883366/download.

[21] Letter from Thomas E. Perez, Assistant Attorney General, to William R. Jones, Counsel, Maricopa Sheriff's Office, at 13 (Dec. 15, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf.

[22] *Id.* at 14.

convictions.[23] But charges alone are enough to chill future First Amendment activities. *See Thurairajah v. City of Fort Smith*, 925 F.3d 979, 985 (8th Cir. 2019) ("[T]here can be little doubt that being arrested for exercising the right to free speech would chill a person of ordinary firmness from exercising that right in the future." (internal quotation marks and citation omitted)).

A recent investigation of the Louisville Metro Police Department (LMPD) similarly revealed that "LMPD officers engage in . . . retaliatory practices against lawful, verbal challenges to police action in different settings against different kinds of people."[24] For example, during the 2020 protests in response to the killings of Breonna Taylor and George Floyd, "LMPD arrested some protesters . . . for vague subjective reasons, like causing 'annoyance,' 'alarm,' or 'inconvenience.'"[25] And in 2021, nine LMPD officers arrested a Black man "for obstructing a roadway" after he had stood in a crosswalk with a cross protesting police violence earlier that day.[26]

The Fifth Circuit's rule would leave many victims of retaliatory arrests with no remedy because they will be unable to show that people who engaged in identical conduct but expressed different views were not arrested—even where, as here, the conduct

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[23] *Id.*

[24] Civ. Rts. Div., U.S. Dep't of Just., *Investigation of the Louisville Metro Police Department and Louisville Metro Government* 57 (Mar. 8, 2023), https://www.justice.gov/opa/press-release/file/1573011/download.

[25] *Id.* at 55.

[26] *Id.* at 57.

charged is commonplace and has *never* before been the subject of an arrest. The man arrested by nine LMPD officers would have to identify others who stood in the crosswalk but did not oppose police violence who were not arrested. Similarly, under the Fifth Circuit's rule, a man arrested in Ferguson for violating a broad "Manner of Walking in Roadway" ordinance because he used profanities with the officer[27] would have to identify individuals who similarly violated the ordinance but used cleaner language when stopped by an officer. And "a business owner [arrested] on charges of Interfering in Police Business and Misuse of 911 because she objected to the officer's detention of her employee"[28] could not pursue a First Amendment claim unless she could show that similarly situated business owners who did not seek to report police misconduct were not arrested—an impossible bar.

In order for the *Nieves* exception to serve its intended purpose, this Court should grant certiorari and clarify that the existence of probable cause does not bar a retaliatory arrest claim where police enforce a law against a critic for commonplace conduct that has never before been the subject of arrest under the law.

CONCLUSION

For the foregoing reasons, Ms. Gonzalez's petition for a writ of certiorari should be granted.

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[27] Civ. Rts. Div., U.S. Dep't of Just., *Investigation of the Ferguson Police Department* 4 (Mar. 4, 2015), https://s3.documentcloud.org/documents/1681202/ferguson-police-department-report.pdf.

[28] *Id.* at 25.

DATED: May 2, 2023

Respectfully submitted,

/s/ Vera Eidelman

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