IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO. 21-50276

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
NO. 5:20-CV-01151-DEA, HON. DAVID ALAN EZRA

BRIEF OF *AMICI CURIAE* THE RODERICK & SOLANGE MACARTHUR JUSTICE CENTER, THE AMERICAN CIVIL LIBERTIES UNION, THE NATIONAL POLICE ACCOUNTABILITY PROJECT, AND THE ACLU OF TEXAS IN SUPPORT OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

In addition to the persons and entities previously identified by the parties, undersigned counsel certifies that the following persons and entities have an interest in the outcome of this case:

Name of Interested Party	**Connection and Interest**
Roderick & Solange MacArthur Justice Center	Amicus Curiae
Devi M. Rao	Counsel for the Roderick & Solange MacArthur Justice Center
The American Civil Liberties Union Foundation	Amicus Curiae
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INTEREST OF *AMICI CURIAE*[1]

The Roderick and Solange MacArthur Justice Center (MJC) is a not-for-profit organization founded by the family of J. Roderick MacArthur to advocate for civil rights and a fair and humane criminal justice system. MJC has represented clients facing myriad civil rights injustices, including issues concerning police misconduct, the rights of protestors, compensation for those whose constitutional rights have been violated, and the treatment of incarcerated people. MJC has an interest in the sound and fair administration of the criminal justice system, and in ensuring those who have been treated unfairly by that system are able to bring suit to vindicate their rights.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The ACLU of Texas is a state affiliate of the ACLU. Both organizations have been at the forefront of efforts nationwide to protect the full array of civil

[1] Pursuant to Federal Rule of Appellate Procedure 29, *amici* affirm that no counsel for either party authored this brief in whole or in part. No one other than *amici* made monetary contributions to its preparation or submission.

rights and liberties, including the right to free speech. The ACLU and ACLU of Texas have frequently appeared before courts throughout the country in First Amendment cases, both as direct counsel and as *amici curiae*. 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 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 the principle of viewpoint neutrality is therefore of immense concern to the ACLU, its civil rights clients seeking justice, and its members and donors.

The National Police Accountability Project (NPAP) was founded in 1999 by members of the National Lawyers Guild to address allegations of misconduct by law enforcement officials through coordinating and assisting civil rights lawyers representing their victims. NPAP has approximately six hundred attorney members practicing in every region of the United States. Every year, NPAP members litigate the thousands egregious cases of law enforcement abuse that do not make news

headlines or capture national attention. NPAP members regularly represent protesters who advocate on behalf of controversial issues. NPAP provides training and support for these attorneys and other legal workers, public education and information on issues related to law enforcement and detention misconduct and accountability, and resources for non-profit organizations and community groups involved with victims of such misconduct. NPAP supports legislative efforts aimed at increasing accountability for law enforcement and appears regularly as *amicus curiae* in cases such as this one presenting issues of particular importance for its member lawyers and their clients.

Amici file this brief to provide the Court with the broader context of retaliatory police action, and to situate this case within that context.

SUMMARY OF THE ARGUMENT

Sylvia Gonzalez brought this suit alleging she was the subject of retaliation by the mayor of Castle Hills, Texas and members of the Castle Hills Police Department after she was arrested and jailed simply for preparing a petition to remove the city manager and presenting the petition at a city council meeting. It is critical to situate Ms. Gonzalez's experience in the broader context of retaliatory law enforcement actions against individuals for their speech.

Unfortunately, it is relatively common for officers to retaliate with arrests against protestors demonstrating against police misconduct, those filing complaints against police, or those vocally critical of police action. Those, like Ms. Gonzalez, who are active in local politics are another frequent target of retaliatory law enforcement action—like retaliatory arrests—that infringe on those individuals' right to petition, "one of 'the most precious of the liberties safeguarded by the Bill of Rights.'" *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524 (2002). These arrests often occur for technical infractions that would normally result in citation and release, or no citation at all, and disproportionately fall on people of color.

The Supreme Court recognized in *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), another case involving a retaliatory arrest stemming from events at a city council meeting, that the existence of probable cause does not immunize government actors against First Amendment claims for retaliatory arrest in all circumstances. And in *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), the Court explained that "where officers have probable cause to make arrests, but typically exercise their discretion not to do so," the existence of probable cause does not defeat a retaliatory arrest claim. *Id.* at 1727.

This exception is critical. If a person can be arrested for speech so long as there happens to be probable cause to arrest for something else, police have wide latitude to arrest people because of speech they disfavor. It is easy to find a pretext for arrest because statutes and ordinances forbid a wide range of unremarkable human activity—like wearing saggy pants, crossing the street while reading a text message, and barbecuing in a front yard. In particular, statutes and municipal ordinances that prohibit blocking sidewalks, amplifying sound, unlawful assembly, and disorderly conduct can—and often are—used to retaliate against protestors for their speech. The *Nieves* exception is critical in protecting

First Amendment rights, and to stop retaliatory arrest of protestors and the civically-engaged like Ms. Gonzalez.

ARGUMENT

I. Illegal Arrests for Disfavored Speech Is a Serious and Systemic Problem That Disproportionately Impacts Communities of Color.

A. Retaliatory Arrests for Perceived "Anti-Police" Speech.

Retaliatory arrests against individuals on the basis of their speech is, unfortunately, an all-too-common problem. In particular, and notwithstanding the First Amendment, a number of police departments systematically arrest people in retaliation for their perceived "anti-police" speech. For example, in a 2015 report, the Department of Justice (DOJ) found that "suppression of speech" by the Ferguson, Missouri Police Department (FPD) "reflects a police culture that relies on the exercise of police power—however unlawful—to stifle unwelcome criticism." U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 28 (2015) (hereinafter "Ferguson DOJ Report").[2] The report noted that despite a settlement agreement and

[2] Available at https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

a consent decree in two separate cases regarding protest activities, "it appears that FPD continues to interfere with individuals' rights to protest and record police activities." *Id.* at 27. For example, on February 15, 2015, the six-month anniversary of the shooting death of Michael Brown, "protesters stood peacefully in the police department's parking lot, on the sidewalks in front of it, and across the street." *Id.* The police responded with retaliatory arrests:

> Video shows that as one man recorded the police arresting others, he was arrested for interfering with police action. Officers pushed him to the ground, began handcuffing him, and announced, "stop resisting or you're going to get tased." It appears from the video, however, that the man was neither interfering nor resisting. A protester in a wheelchair who was live streaming the protest was also arrested. . . . Six people were arrested during this incident. It appears that officers' escalation of this incident was unnecessary and in response to derogatory comments written in chalk on the FPD parking lot asphalt and on a police vehicle.

Id. at 27-28.[3]

[3] FPD also responded to protected First Amendment activity with excessive force, including tear gas and rubber bullets. Justin Hansford & Meena Jagannath, *Ferguson to Geneva: Using the Human Rights Framework to Push Forward a Vision for Racial Justice in the United States After Ferguson*, 12 HASTINGS RACE & POVERTY L. J. 121, 131 (2015).

The DOJ made similar findings regarding the Baltimore Police Department (BPD) in 2016: "BPD violates the First Amendment by retaliating against individuals engaged in constitutionally protected activities. Officers frequently detain and arrest members of the public for engaging in speech the officers perceive to be critical or disrespectful." U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 9 (2016) (hereinafter "Baltimore DOJ Report").[4] In addition, the report detailed BPD police officers using unreasonable force against individuals who engage in speech critical of law enforcement and improperly interfering with individuals' rights to videotape arrests and other police activity. *See id.* at 118-20.

Likewise, a preliminary injunction decision issued by the United States District Court for the Eastern District of Missouri analyzed the St. Louis Police Department's response to protests triggered by the acquittal of Officer Jason Stockley for the fatal shooting of Anthony Lamar Smith. *Ahmad v. City of St. Louis*, No. 17-cv-2455, 2017 WL 5478410, at *1 (E.D. Mo. Nov. 15, 2017), *modified on other grounds*, *Ahmad v. City of St. Louis*, 995 F.3d 635 (8th Cir. 2021). These protests

[4] Available at https://www.justice.gov/crt/file/883296/download.

were directed at both the verdict and "broader issues, including racism and the use of force by police officers." *Id.* Notably, "[t]he participants often express[ed] views critical of police." *Id.* And, as one lieutenant testified, there were no policies or guidelines in St. Louis defining when it is appropriate to declare an assembly unlawful. *Id.* at *6. As such, when St. Louis police encountered protestors, officers simply declared an "unlawful assembly" and carried out mass arrests—an almost textbook illustration of how broad laws empower the police to retaliate against those engaged in protected speech.

B. "Contempt of Cop" Arrests.

One particularly common form of retaliation is known as the "contempt of cop" arrest. In these cases, a police officer has probable cause to believe an offense has occurred, but the suspect's speech, perceived as disrespectful, is the real reason for the arrest or citation. Matthew Heins, *Contempt of Cop is Not a Legal Charge and Neither is Trumping Up Other Charges to Support an Arrest!*, LAW ENFORCEMENT ACTION FORUM (Michigan Municipal League), Mar. 2018 at 1.[5]

[5] Available at http://www.mml.org/insurance/risk_resources/publications/leaf_newsletter/2018_06.pdf.

A 1999 review of the New Jersey State Police by then-New Jersey Attorney General John J. Farmer identified "contempt of cop" citations as a "problem" in "law enforcement nationwide." JOHN J. FARMER, JR. & PAUL H. ZOUBEK, FINAL REPORT OF THE STATE POLICE INTERVIEW TEAM 93-94 (1999).[6] "Simply put," the report explained, "it is the tendency for certain police officers to approach the public with an attitude that they, the officer, are in no way to be challenged or questioned." *Id.* at 94.

More recently, the DOJ found that Newark Police Department officers often arrest people for contempt of cop: "The [Newark Police Department's] arrest reports and [internal affairs] investigations . . . reflect numerous instances of the [department's] inappropriate responses to individuals who engage in constitutionally protected First Amendment activity, such as questioning or criticizing police actions." U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 13 (2014).[7] In one instance, for example, "an individual was arrested after he questioned officers' decision to arrest his neighbor." *Id.*

[6] Available at https://www.state.nj.us/lps/Rpt_ii.pdf.

[7] Available at https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf.

Similarly, in the Ferguson Report, the DOJ found that police not only retaliated against demonstrators, but also that officers routinely made "contempt of cop" arrests:

> [O]fficers frequently make enforcement decisions based on what subjects say, or how they say it. Just as officers reflexively resort to arrest immediately upon noncompliance with their orders, whether lawful or not, they are quick to overreact to challenges and verbal slights. These incidents—sometimes called "contempt of cop" cases—are propelled by officers' belief that arrest is an appropriate response to disrespect.

Ferguson DOJ Report at 25. Notably, the breadth of offenses contained in Ferguson's municipal code made it easy to come up with charges: "These arrests are typically charged as a Failure to Comply, Disorderly Conduct, Interference with Officer, or Resisting Arrest." *Id.*

Likewise, the DOJ report about the Baltimore Police Department recounted an incident where a young African-American man was ordered to leave an area because he "'had no respect for law enforcement.'" Baltimore DOJ Report at 116. The police spotted the young man and his friend in the same area fifteen minutes later and placed them both under arrest for failure to obey. *Id.*

C. Retaliatory Arrests for Political Opposition to Local Government Leaders.

A common tactic employed by public officials, notably members of city councils, is to target citizens who use their First Amendment rights to criticize and hold accountable their government leaders. Fane Lozman, the plaintiff who alleged retaliatory arrest against the city of Riviera Beach, Florida, for example, was "an outspoken critic" of his local city council. *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1949 (2018). In 2006, Lozman attended a city council meeting and—"[a]s he had done on earlier occasions and would do more than 200 times over the coming years"—"stepped up to the podium to give remarks" about government corruption. *Id.* Councilmember Elizabeth Wade interrupted Lozman, and told him to stop speaking. *Id.* Lozman continued. *Id.* A police officer then asked Lozman to leave the podium, but Lozman refused and kept speaking. *Id.* Councilmember Wade directed the officer to "carry him out," and "[t]he officer handcuffed Lozman and ushered him out of the meeting." *Id.* at 1949-50. At oral argument Chief Justice Roberts

described the video of the arrest as "chilling." Transcript of Oral Argument at 34, *Lozman*, 138 S. Ct. 1945 (No. 17-21).[8]

Another instance of city-council retaliation occurred in *Holley v. Town of Carp Hill*, 351 F. Supp. 3d 1359 (M.D. Ala. 2018). Frank Holley, the former mayor of Carp Hill, was a frequent critic of then-mayor Danny Evans. *Id.* at 1361-62. Holley would frequently criticize Evans's leadership at city council meetings and Evans would limit Holley's speaking time. *Id.* In 2014, witnesses testified that Evans told officers to target Holley. *Id.* at 1362. Indeed, Roosevelt Finley, who was the police chief in 2014, testified that Evans told him to "set [Holley] up" and to do "anything you can do to arrest that b----ard, put his old a-- in jail." *Id.* Holley was eventually arrested for a traffic violation and subsequently sued the town, alleging his arrest was in retaliation for his speech. *Id.* at 1363.

Other examples from the caselaw abound. *See, e.g.*, *Acosta v. City of Costa Mesa*, 718 F.3d 800, 809 (9th Cir. 2013) (speaker at city council

[8] Available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-21_ljgm.pdf. The video of the encounter is also available on the Supreme Court's website: https://www.supremecourt.gov/media/video/mp4files/Lozman_v_RivieraBeach.mp4.

arrested following his refusal to comply with councilmember's order to stop talking); *Henneberg v. City of Newark*, No. 13-cv-05238, 2017 WL 1493006, at *2-3 (N.D. Cal. Apr. 26, 2017) (frequent critic of Newark city council arrested at a luncheon); *Fernandes v. City of Jersey City*, No. 2:16-cv-7789, 2017 WL 2799698, at *3 (D.N.J. June 27, 2017) (citizen, whose construction project was halted by the city, criticized government officials at city council meetings and was forcibly removed from the podium).

The Department of Justice is attentive to this problem. In a 2011 report, the DOJ determined that the Maricopa County, Arizona Sheriff's Office "sought to silence individuals who have publicly spoken out and participated in protected demonstrations against the [Office's] policies and practices" regarding immigration. Letter from Thomas E. Perez, Assistant Attorney General, to William R. Jones, Counsel, Maricopa County Sheriff's Office, at 13 (Dec. 15, 2011).[9] Relevant here, during two separate meetings of the County Board of Supervisors, deputies arrested several individuals who expressed criticism of the Maricopa County Sheriff's Office (MSCO). *Id.* at 14. None of the protesters were convicted.

[9] Available at https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf.

Id. The DOJ concluded: "The arrests and harassment undertaken by MCSO have been authorized at the highest levels of the agency and constitute a pattern of retaliatory actions intended to silence MCSO's critics." *Id.*

D. Communities of Color Are Disproportionately Impacted by Retaliatory Police Action.

Retaliatory actions by police officers have historically disproportionately affected people of color, especially Black Americans. Beginning during Reconstruction and continuing until today, Black Americans have long been retaliated against for speaking out against abusive state and police practices. This retaliation has often taken the form of brutal violence; if the government is willing to silence a message or group through the application of such force, there is little reason to doubt that it is also engaging in retaliatory arrests targeting the same messages and groups. In effect, this retaliatory action means that the First Amendment does not protect everyone's speech equally. *See* Justin Hansford, *The First Amendment Freedom of Assembly as a Racial Project*, 127 YALE L.J. FORUM 685, 688 (2018).

For example, following the end of the Civil War, a group of African Americans attempted to convene a conference to amend the state

constitution to extend voting rights to Black men and repeal the racially discriminatory "Black Codes"—a prototypical political activity. Bryan Stevenson, *A Presumption of Guilt: The Legacy of America's History of Racial Injustice*, *in* POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT 10 (Angela J. Davis ed., 2017). When the delegates convened, a "white mob, backed by police, many of them Confederate veterans," responded with unyielding violence. Ron Chernow, GRANT 574-75 (2017). Following the attack, 37 people were killed and at least 160 were wounded. *Id.*

Police retaliation against Black protestors continued into the Civil Rights Era. Although the examples of police retaliation are countless, the tragic events at Selma highlight police animus towards Black political speech. Hundreds of protestors crossed the Edmond Pettus Bridge in order to protest the murder of Jimmie Lee Jackson by state police. Sara Bullard, FREE AT LAST: A HISTORY OF THE CIVIL RIGHTS MOVEMENT AND THOSE WHO DIED IN THE STRUGGLE 430 (1993). On the opposite end of the bridge, a wall of Alabama state troopers, billy clubs in hand, waited for the protestors. Christopher Klein, *How Selma's 'Bloody Sunday' Became*

a Turning Point in the Civil Rights Movement, HISTORY (July 18, 2020).[10] Alabama governor George Wallace commanded his state troopers to "use whatever measures [were] necessary to prevent a march." *Id.* The police attacked the peaceful protestors, firing tear gas, trampling protestors with horses, and beating them with their clubs. Taylor Branch, AT CANAAN'S EDGE: AMERICA IN THE KING YEARS 1965-68, at 51 (2006).

Native American protest has historically drawn a similar level of police resentment. In 1890, federal troops and the national guard were sent to the Northern Plains to dismantle the Ghost Dance movement. Nick Estes, OUR HISTORY IS THE FUTURE: STANDING ROCK VERSUS THE DAKOTA ACCESS PIPELINE, AND THE LONG TRADITION OF INDIGENOUS RESISTANCE 127-28 (2019). The Ghost Dance was an inter-tribal resistance movement that protested the Dawes Act, which allowed the Federal government to seize and break-up tribal lands. *Id.* at 120. In order to stifle the movement, the federal government's Seventh Cavalry massacred between 270 to 300 native people, most of whom were women and children. *Id.* at 128.

[10] Available at https://www.history.com/news/selma-bloody-sunday-attack-civil-rights-movement.

Government retaliation against Native American protest continues into the modern day. Take, for instance, the abuse sustained by Indigenous rights activist Vanessa Dundon. Ms. Dundon, a member of the Navajo tribe, went to North Dakota to protest the Dakota Access Pipeline's destruction of sacred indigenous land. Sandy Tolan, *Wounded on the Front Line of Standing Rock, a Protestor Refuses to Give Up Her Fight*, L.A. TIMES (Dec. 22, 2016).[11] During a protest, Ms. Dundon heard the sound of a weapon, and looked up and "saw a tear gas canister coming straight for her face," which ultimately struck her right eye. Complaint at *17, *Dundon v. Kirchmeier*, No. 1:16-cv-406 DLH-CSM (D.N.D. Nov. 28, 2016). Ms. Dundon eventually required three surgeries to re-attach her retina and she suffers from permanent vision loss. *Id.* at *18. She is now the lead plaintiff in a class action lawsuit against various Morton County and other municipal law enforcement officials alleging the use of excessive force deprived her and her fellow plaintiffs their First Amendment right to speech and assembly. *Id.* at *5-6.

[11] Available at https://www.latimes.com/nation/la-na-standing-rock-wounded-20161222-story.html.

In short, police officers across jurisdictions have historically abused—and continue to abuse—their ability to arrest individuals, particularly people of color, who dare question the police or others in positions of authority.

Indeed, the case before this Court showcases the serious risks faced by people of color for criticizing and opposing their political leaders. Sylvia Gonzalez was a community organizer who ran for city council on a promise that she would create a non-binding citizens' petition demanding the removal of city manager Ryan Rapelye. ROA.169. She then became the first Hispanic councilwoman elected in the history of Castle Hills. *Id.* The retaliatory action she experienced is consistent with the historical evidence: people of color who dare speak out against those in power are frequently subject to unlawful punishment for their speech.

II. The *Nieves* Exception Is Critical Because Broad Regulations Make It All Too Easy to Find Probable Cause to Arrest People for Disfavored Speech.

A. The *Nieves* Exception Provides Critical First Amendment Protection.

The *Nieves* exception is a bulwark against police using their discretion to punish dissent by arresting people for expressing ideas with which they disagree. In *Nieves v. Bartlett*, the Supreme Court explained

that "probable cause should generally defeat a retaliatory arrest claim," because "[o]fficers frequently must make 'split-second judgments' when deciding whether to arrest, and the content and manner of a suspect's speech may convey vital information." 139 S. Ct. 1715, 1724, 1727 (2019) (quoting *Lozman*, 138 S. Ct. at 1953). But it carved out an important exception, "warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Id.* In such a circumstance, "the no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Id.*

The *Nieves* exception is critically important. The Court noted that broadly-written "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." *Id.* (internal quotation marks omitted). As a result of these capacious statutes, "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 1953-54). The Court provided a concrete example:

> [A]t many intersections, jaywalking is endemic but rarely results in arrest. If an individual who has been vocally complaining about police conduct is arrested for jaywalking at such an intersection, it would seem 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. In such a case, . . . probable cause does little to prove or disprove the causal connection between animus and injury.

Id.; *see also Reichle v. Howards*, 566 U.S. 658, 671 (2012) (Ginsburg J., concurring) (stating the "causation problem will not arise in the typical retaliatory-arrest case").

This case falls squarely within the *Nieves* exception, and illustrates why the exception is so important. Ms. Gonzales was retaliated against after engaging in political speech critical of the city manager. ROA.169-171. Specifically, Ms. Gonzalez organized a nonbinding citizens' petition advocating for the removal of the city manager, and after a resident submitted that petition to the city council, and Ms. Gonzalez accidentally placed the petition in her binder, Appellants planned a scheme to retaliate against her. ROA.169-170. Ultimately, Ms. Gonzalez was arrested and charged under Texas Penal Code § 37.10(a)(3) which states

"[a] person commits an offense if he [...] intentionally destroys, conceals, removes, or otherwise impairs the verity, legibility, or availability of a governmental record." But, as the District Court noted, this broad tampering statute had *never* been used in even remotely similar situations. ROA.184-185. Indeed, most of the indictments under the provision involved accusations of using fake government identification—fake social security numbers, driver's licenses, and green cards—or involved misuse of financial information. ROA.184-185. And, unlike Ms. Gonzalez, most people accused of such nonviolent offenses do not go to jail. ROA.185. The district court concluded that because Ms. Gonzalez was arrested and charged "'when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been,'" the *Nieves* exception applies and the existence of probable cause does not defeat her retaliatory arrest suit. ROA.183-184 (quoting *Nieves*, 139 S. Ct. at 1727).

This Texas statute is not an outlier. Elsewhere in the country, many laws are so broadly written and prohibit so much activity that it is very easy for police to arrest people in retaliation for their speech. In various

municipalities across the United States, it is illegal to wear saggy pants,[12] to cross a street while viewing a cell phone,[13] and to have a barbecue in one's front yard.[14] Without the *Nieves* exception, such broad statutes would allow for government officials, with impunity, to retaliate against individuals with whom they disagree.

B. Laws Affecting Protest Provide Probable Cause for Arrest in a Wide Range of Circumstances.

To see why the *Nieves* exception is critical in protecting free speech, it is important to understand that protesters often violate broad statutes and ordinances that prohibit a wide range of activity, such as blocking sidewalks, unlawful assembly, violating noise ordinances, and disorderly

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[12] *See, e.g.*, Abbeville, Louisiana Code of Ordinances § 13-25 ("It shall be unlawful for any person in a public place or in view of the public to wear pants or a skirt in such a manner as to expose their underlying garments."); *see also* 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 similar saggy pants ordinances across the country).

[13] *See, e.g.*, Revised Ordinances of Honolulu § 15-24.23, https://www.honolulu.gov/rep/site/ocs/Chapter_15.pdf ("No pedestrian shall cross a street or highway while viewing a mobile electronic device.").

[14] *See, e.g.*, Berkeley, Missouri Code of Ordinances § 210.2250 ("Subject to certain exceptions mentioned hereinbelow, no person shall be permitted to barbecue or conduct outdoor cooking in front of the building line of any single-family dwelling, multi-family dwelling or commercial structure."), https://ecode360.com/31778191.

conduct.[15] Because these laws encompass so much conduct, the police have probable cause to arrest large numbers of protesters. For example, in *Ahmad*, the court noted that, in St. Louis, "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. 17-cv-2455, 2017 WL 5478410, at *6 (E.D. Mo. Nov. 15, 2017), *modified on other grounds*, *Ahmad v. City of St. Louis*, 995 F.3d 635 (8th Cir. 2021).

Even putting aside the constitutional validity of laws affecting protests, selective enforcement of such laws can provide a cover for viewpoint discrimination by police. That is why the *Nieves* exception is so critical: Where there is evidence that police have chosen to enforce particular laws only against critics they disagree with, or to punish certain viewpoints, the existence of probable cause does not categorically bar a retaliation claim. If the rule were otherwise, the police would be

[15] Of course, protestors (or others) may be arrested where police lack probable cause to begin with, and probable cause may be lacking where the purported crime is based entirely on protected speech. However, the *Nieves* exception is important to help curb—and deter—police abuses.

able to wield the power to arrest protesters for the very purpose of silencing disfavored messages.

i. Unlawful Assembly and Failure to Disperse.

Under typical "unlawful assembly" ordinances, "[o]fficials can disperse a protest 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). For example, the California Penal Code defines the misdemeanor of "unlawful assembly" to include two or more people gathering for the purpose of committing an act that is unlawful, but non-violent: "Whenever two or more persons assemble together to do an unlawful act, or do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an unlawful assembly." Cal. Penal Code § 407.[16]

Police have used their discretion under unlawful assembly laws to "target citizens across the political spectrum, including civil rights

[16] *See also* Idaho Code §§ 18-6404, 18-6405 (stating that the misdemeanor of unlawful assembly occurs "[w]henever 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 . . ."); Iowa Code § 723.2 ("An unlawful assembly is three or more persons assembled together, with them or any of them acting in a violent manner, and with intent that they or any of them will commit a public offense.").

workers, antiabortion demonstrators, labor organizers, environmental groups, Tea Party activists, Occupy protesters, and antiwar protesters." Inazu, *supra*, at 5.

ii. Blocking Roads and Sidewalks.

State and local governments often prohibit blocking roads, highways, and sidewalks. For example, the Texas Penal Code makes it a crime to "intentionally, knowingly, or recklessly . . . [o]bstruct" a laundry list of locations: "a highway, street, sidewalk, railway, waterway, elevator, aisle, hallway, entrance, or exit to which the public or a substantial group of the public has access," not to mention "any other place used for the passage of persons, vehicles, or conveyances," all "regardless of the means of creating the obstruction and whether the obstruction arises from his acts alone or from his acts and the acts of others." Tex. Penal Code Ann. § 42.03(a).[17]

[17] *See also* Ga. Stat. § 16-11-43 ("A person who, without authority of law, purposely or recklessly obstructs any highway, street, sidewalk, or other public passage in such a way as to render it impassable . . . is guilty of a misdemeanor."); La. Rev. Stat. § 14:97 ("Simple obstruction of a highway of commerce is the intentional or criminally negligent placing of anything or performance of any act on any railway, railroad, navigable waterway, road, highway, thoroughfare, or runway of an airport, which will render movement thereon more difficult."); D.C. Code § 22-1307(a) ("It is

The police use these laws to arrest protesters. In the fall of 2020, three activists were arrested and charged under the Texas obstruction law after attending a peaceful protest demanding the removal of a Confederate statue that stands in front of their town's courthouse. Simone Carter, *What, No Firehoses? Gainesville Police Try to Silence Protestors with Arrest Warrants*, DALLAS OBSERVER (Sept. 4, 2020).[18] Similarly, following the police shooting of Alton Sterling, police arrested numerous protesters in Baton Rouge under Louisiana's obstruction-of-a-highway law. Fifth Amended Complaint at 2-5, *Tennart v. City of Baton Rouge*, No. 3:17-cv-00179-JWD-EWD (M.D. La. Jan. 5, 2021), ECF 310.[19]

iii. Disorderly Conduct Ordinances.

Police also arrest protesters under disorderly conduct ordinances. In *Lewis v. City of Tulsa*, "prolife activists were picketing an abortion clinic." 775 P.2d 821, 822 (Okla. Crim. App. 1989). Clayton Lewis and other activists stood 50-60 feet away from the entrance to the clinic and

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unlawful . . . [t]o crowd, obstruct, or incommode . . . [t]he use of any street, avenue, [or] alley.").

[18] Available at https://www.dallasobserver.com/news/pro-gainesville-organizers-released-on-bond-11940316.

[19] Roderick & Solange MacArthur Justice Center attorneys are among the counsel for the *Tennart* plaintiffs.

yelled at people entering that "it was murder. You should feel guilty about what you are doing." *Id.* For these lawful activities, Mr. Lewis was arrested and convicted under Tulsa's disorderly conduct ordinance. *Id.* at 823. The Oklahoma Court of Criminal Appeals ultimately reversed his conviction. *Id*.

iv. Noise Ordinances and Curfew Orders

Following the murder of George Floyd, municipalities across the country used various legal mechanisms, to limit the hours protestors were allowed to protest. For example, the City of Los Angeles implemented "curfew orders," and the police used these orders to arrest and fine numerous protestors. Compl. at 1-3, *Black Lives Matter-Los Angeles v. Garcetti*, No. 2:20-cv-04940 (C.D. Cal. June 3, 2020).

Like curfew orders, noise ordinances are another tool used by law enforcement officers to limit core First Amendment activity. For instance, a Tampa Bay Times report found that officers had issued "thousands of dollars in noise ordinance fines to protesters" where there had been "no megaphone noise complaints initiated by citizens—all were started by police officers." Kavitha Surana, *New Port Richey Protesters*

Slapped with Megaphone Fines, TAMPA BAY TIMES (Nov. 22, 2020).[20] In addition, this past January, the Connecticut House of Representatives passed an ordinance which prohibits protestors from "making unreasonable noise" within or outside the presence of the Connecticut General Assembly. 2021 Conn. H.B. 6455, Gen Assemb., Reg. Sess.[21] Broad noise ordinances like this can be abused by law enforcement officers who will use them to silence speech perceived to be critical of the police.

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[20] Available at https://www.tampabay.com/news/2020/11/22/new-port-richey-protesters-slapped-with-megaphone-fines/.

[21] Matthew Delmont, a history professor at Dartmouth College condemned these measures, explaining that "the anti-protest bills we're seeing right now are an attempt to maintain the status quo and prevent more significant change that would lead to more equitable systems." Char Adams, *Experts Call 'Anti-Protest' Bills a Backlash to 2020s Racial Reckoning*, NBC NEWS (May 18, 2021), https://www.nbcnews.com/news/nbcblk/experts-call-anti-protest-bills-backlash-2020-s-racial-reckoning-n1267781. In another instance, following criticism from local activists, the Santa Monica city council quashed a targeted noise ordinance bill after it "morphed into an overarching anti-protest ordinance revision that affects the entire city." Brennon Dixson, *Council pulls noise protest over 'miscommunication',* SANTA MONICA DAILY PRESS (Mar. 15, 2021), https://www.smdp.com/council-pulls-noise-protest-over-miscommunication/202845.

C. Police Officers Exploit the Discretion Created by Broad Laws to Arrest Protestors with Whom They Disagree.

These are not just hypothetical concerns. Police officers have used the discretion provided by broad statutes and ordinances to retaliate against speakers and demonstrators with whom they disagree. For example, in September of 2015, Michael Picard was protesting legally near a DUI checkpoint with a sign that read "Cops Ahead. Keep Calm and Remain Silent." Amy B. Wang, *Cops Accidentally Record Themselves Fabricating Charges Against Protester, Lawsuit Says*, WASH. POST (Sept. 20, 2016). The officers' discussion of charging Picard was inadvertently captured on video, and the transcript of that recording provides a rare glimpse into how police officers (in this case, Master Sergeant Patrick Torneo, Sergeant John Jacobi, and Trooper John Barone) sometimes fabricate charges to retaliate against a protester. Torneo is heard saying: "Have that Hartford lieutenant call me, I want to see if he's got any grudges."[22] Barone asks: "You want me to punch a number [slang for opening an investigation] on this either way? Gotta cover our ass."

[22] The full video is available here: https://www.washingtonpost.com/news/post-nation/wp/2016/09/20/cops-accidentally-record-themselves-fabricating-charges-against-protester-lawsuit-says. The dialogue in this section was transcribed from that video.

The officers proceed to debate how to charge Picard, illustrating how broad statutes and ordinances often grant the police vast discretion to effectuate retaliatory arrests:

> Jacobi: So, we can hit him with reckless use of the highway by a pedestrian and creating a public disturbance, and whatever he said.
>
> Barone: That's a ticket?
>
> Jacobi: Two tickets.
>
> Barone: Yeah.
>
> Jacobi: That's a ticket with two terms, yeah. It's 53a-53-181, something like that for—
>
> Barone: I'll hit him with that, I'll give him a ticket for that.
>
> Jacobi: Crap! I mean, we can hit him with creating a public disturbance.
>
> . . .
>
> Jacobi: All three are tickets—
>
> Torneo: Yep.
>
> Jacobi: We'll throw all charges three on the ticket.
>
> Torneo: And then we claim that, um, in backup, we had multiple people, um, they didn't want to stay and give us a statement, so we took our own course of action.

The DOJ Ferguson Report also illustrates the phenomenon of police creatively charging people in order to retaliate against them for protected

speech. In one case, "a police officer arrested a business owner on charges of Interfering in Police Business and Misuse of 911 because she objected to the officer's detention of her employee." Ferguson DOJ Report at 25. Indeed, the officer made the arrest after the business owner attempted to call the police chief, which "suggests that [the officer] may have been retaliating against her for reporting his conduct." *Id.* In another instance, an officer arrested a man for violating broad "Manner of Walking in Roadway" ordinance because the man cursed at the officer. *Id.*

Particularly relevant to this Court, given the geography, are two examples from Texas. In *Allee v. Medrano*, the Supreme Court found 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. 416 U.S. 802, 815 (1974). And in Gainesville, Texas, a man was prosecuted for "online impersonation" when he donated $10 to a fundraising page for racial justice organizers and displayed his donation under the name of the Gainesville Police Chief Kevin Phillips in an effort to parody him.[23]

[23] Press Release, ACLU of Texas, Gainesville Man Prosecuted in Violation of His Right to Free Speech, ACLU of Texas Says, Mar. 6, 2021,

In *Ford v. City of Yakima*, 706 F.3d 1188, 1191 (9th Cir. 2013), *abrogated by Nieves*, 139 S. Ct. 1715, an officer arrested and jailed a motorcyclist under a noise ordinance. The officer decided to make the arrest because he became irritated with the motorist for (lawfully) talking back. *Id.* at 1190-91. Prior to the arrest, the officer made a series of statements that included, "[i]f you run your mouth, I will book you in jail for it. Yes, I will, and I will tow your car," and "[i]f you have diarrhea of the mouth, you will go to jail." *Id.* The officer also said: "A lot of times we tend to cite and release people for [noise ordinance violations] or we give warnings. However . . . you acted a fool . . . and we have discretion whether we can book or release you. You talked yourself—your mouth and your attitude talked you into jail." *Id.*

* * *

In protests against the police or local governments, some see courage and dissent, while others see insult, exaggeration, and ingratitude. Freedom of expression lives and breathes in that clash of ideologies, a reflection of our "profound national commitment to the

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available at https://www.aclutx.org/en/press-releases/gainesville-man-prosecuted-violation-his-right-free-speech-aclu-texas-says.

principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The First Amendment commands that conflicts of ideas must be resolved through public discourse—not through retaliatory arrests intended to silence one side of the conversation.

CONCLUSION

For the reasons stated above, and those in Appellee's brief, the Court should affirm the district court's denial of the motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

All counsel of record are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Date: July 14, 2021

/s/ Devi M. Rao
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a) and 5th Cir. R. 32.3, I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 6,489 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. R. 32.1 and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Century Schoolhouse typeface.

Date: July 14, 2021

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