No. 22-1025

IN THE

Supreme Court of the United States

SYLVIA GONZALEZ,

Petitioner,

v.

EDWARD TREVINO, II, et al.,

Respondents.

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

BRIEF OF INSTITUTE FOR FREE SPEECH AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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The Institute for Free Speech is a nonpartisan, nonprofit organization dedicated to the protection of the First Amendment rights of speech, assembly, press, and petition. In addition to scholarly and educational work, the Institute represents individuals and civil society organizations in litigation securing their First Amendment liberties. Helping ensure that people are free to express their political views without fear of being arrested for doing so advances the Institute's core mission.

INTRODUCTION AND SUMMARY OF ARGUMENT

This amicus brief addresses the second Question Presented by petitioners: Which First Amendment retaliatory arrest cases are governed by *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977), this Court's default rule in First Amendment retaliation cases, and which are governed by *Nieves v. Bartlett*, 139 S. Ct. 1715, 1727 (2019), which imposes a higher standard on plaintiffs in some retaliatory arrest cases.

Petitioner reads *Nieves* to apply where the defendant is an arresting officer who made an "on the spot" arrest. Petr. Br. 30-34. That reading has much to recommend it. Amicus proposes an alternative approach: *Nieves* applies where the protected activity is a "wholly legitimate consideration" in the arrest decision—that is, when the protected activity

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus, its members, or counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

"provides evidence of a crime or suggests a potential threat." *Nieves*, 139 S. Ct. at 1724; *Reichle v. Howards*, 66 U.S. 658, 668 (2011).

Such cases present unique "causal complexities" that justify a heightened burden on plaintiffs. *Nieves*, 139 S. Ct. at 1724. As Judge Thapar put the point, in such cases, the standard *Mt. Healthy* inquiry—designed to suss out if "the same decision would have been reached absent plaintiff's protected speech"—"gets us nowhere": Both the plaintiff and the officer *agree* that the protected speech was the reason for the arrest. *See Novak v. Parma*, 932 F.3d 421, 431 (6th Cir. 2019). The plaintiff claims the officer made the arrest out of animus to the protected activity; the officer claims he was simply enforcing the law. *Nieves*'s additional requirements help tease out which party is correct.

Moreover, in many cases where protected activity is a "wholly legitimate consideration," the bigger First Amendment problem may lie with the statute itself. Where the statute itself criminalizes vulgarity, parody, or criticism of the police, for instance, it's difficult to say that the officer's motive is retaliatory rather than a desire to enforce a "duly enacted law." *See Leonard v. Robinson*, 477 F.3d 347, 367 (6th Cir. 2007) (Sutton, C.J., concurring in part).

Limiting *Nieves* to cases where protected speech is a "wholly legitimate consideration" in the arrest decision better accords with First Amendment values than petitioner's approach, which would apply *Nieves* to all arrests that take place in close proximity to the crime. For instance, imagine an officer with a vendetta against his critic who waits for her to slip up and violate some traffic law, then makes an "on the spot"

arrest. Under petitioner's approach, that officer still gets the benefit of *Nieves*. Under amicus's approach, he would not—there's no legitimate reason for her protected activity to influence an arrest for a traffic violation. Moreover, amicus's approach properly cabins *Nieves* to cases truly presenting the "causal complexities" animating that decision. By contrast, the Fifth Circuit's decision below, which applies *Nieves* virtually across the board in retaliatory arrest cases, undermines the careful balance *Nieves* struck.

Whether by adopting amicus's approach or petitioner's, this Court should reverse the decision below. A 72-year-old city councilwoman was jailed for organizing a petition critical of the government. Any approach that entirely forecloses her retaliatory arrest claim cannot be correct.

ARGUMENT

I. *Mt. Healthy* provides the default rule for analyzing First Amendment retaliation claims.

The rule this Court announced in *Mt. Healthy*, which is the default in First Amendment retaliation cases, provides a workable framework in the majority of retaliatory arrest claims.

1. In First Amendment jurisprudence, motives matter. Indeed, "First Amendment law is best understood and most readily explained as a kind of motive-hunting." Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 414 (1996).

Consistent with this principle, this Court has long recognized that "the First Amendment bars retaliation for protected speech." *Crawford-El v. Britton*, 523 U.S.

574, 592 (1998). "Retaliation" describes an adverse action taken as a result of an improper motive. *Heffernan v. City of Patterson*, 578 U.S. 266, 273 (2016).

A plaintiff asserting a First Amendment retaliation claim cannot recover merely because a government official acts with an improper motive. It may be "dishonorable to act with an unconstitutional motive, but action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway." *Hartman v. Moore*, 547 U.S. 250, 260 (2006). In other words, the motive must be the but-for cause of the retaliatory action.

2. This Court operationalized that inquiry decades ago through its foundational opinion in *Mt. Healthy*. There, the Court established a two-step framework that serves as a "test of causation." *Id.* at 286. A plaintiff alleging retaliation must first show that the First Amendment protected activity was a "motivating factor" in the adverse action. *Id.* at 287 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 & n.21 (1977)). "[C]ircumstantial" or "direct evidence" can both be used to satisfy the plaintiff's burden. *Arlington Heights*, 429 U.S. at 266.

If the plaintiff carries that burden, the defendant then has the opportunity to show he would have taken the same adverse action "even in the absence of the protected conduct." *Mt. Healthy*, 429 U.S. at 287.

3. The *Mt. Healthy* framework has governed a wide range of First Amendment retaliation cases, including where government actors invoke safety or security concerns. *See, e.g.*, *Ashley v. Boayue*, 2023 WL 2910533, at *6 (6th Cir. 2023) ("shakedown" of

incarcerated plaintiff's cell, leading to confiscation of prescribed medical supplies); *Williams v. Radford*, 64 F.4th 1185, 1193 (11th Cir. 2023) (segregated confinement and search of incarcerated plaintiff's cell); *Bello-Reyes v. Gaynor*, 985 F.3d 696, 698 (9th Cir. 2021) (immigration detention); *Smith v. Cnty. of Suffolk*, 776 F.3d 114, 122-25 (2d Cir. 2015) (police department disciplinary actions against an officer); *Roberts v. Winder*, 16 F.4th 1367, 1381-84 (10th Cir. 2021) (police officer's reassignment).

4. *Mt. Healthy* has also proven to be a reliable framework in retaliatory arrest claims. *See, e.g.*, *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1954-55 (2018). In particular, *Mt. Healthy* provides courts with tools to weed out meritless retaliatory arrest claims that could undermine law enforcement interests.

To proceed under *Mt. Healthy*, a plaintiff can't just allege protected activity and an arrest; she must show a causal connection between the two. *See, e.g.*, *Hill v. City of Fountain Valley*, 70 F.4th 507, 519 (9th Cir. 2023) (asking officers "what was really going on" before being arrested insufficient to reach a jury, even where officers lacked probable cause for arrest). Indeed, a case may be dismissed even at the complaint stage where there is an "'obvious alternative explanation'" to retaliation—for example, that "officers were simply trying to maintain law and order." *Mitchell v. Kirchmeier*, 28 F.4th 888, 896-97 (8th Cir. 2022) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009)); *cf. Moss v. U.S. Secret Serv.*, 572 F.3d 962, 970 (9th Cir. 2009) (a "bald allegation of impermissible motive" does not plausibly state a claim for relief).

Plaintiffs have a particularly difficult time showing retaliation where arrests are made for serious crimes. In such cases, courts reasonably infer a nonretaliatory basis for the arrest. *See, e.g.*, *Abrams v. Walker*, 307 F.3d 650, 652, 657 (7th Cir. 2002) (disobeying the officer, attempting to flee, and grabbing a knife); *Thames v. City of Westland*, 796 Fed. Appx. 251, 265 (6th Cir. 2019) (making bomb threat).

Even where the crime of arrest is less serious, an officer isn't liable simply because he made a bad judgment call. Instead, an officer will be held liable only if he was motivated by animus against the protected activity. For instance, in one case, officers arrested protesters dressed as zombies for disorderly conduct. *Baribeau v. City of Minneapolis*, 596 F.3d 465, 470-71 (8th Cir. 2010). The court sided with officers on the First Amendment retaliation claim. *Id.* at 481. Even though officers lacked probable cause for the arrest, one officer said he "observed a young girl become frightened," and that was enough for the court to conclude that the protesters' protected activity was not a "motivating factor" in the arrest. *Id.* at 480-81.

The qualified immunity doctrine layers on still more protection. Precedent may not clearly establish a plaintiff's activity as protected. *See, e.g.*, *Molina v. City of St. Louis, Mo.*, 59 F.4th 334, 338-40 (8th Cir. 2023) (observing and recording police). It protects an officer where the adverse action is not clearly established as capable of chilling protected activity. *See, e.g.*, *Frey v. Town of Jackson, Wyo.*, 41 F.4th 1223, 1235 (10th Cir. 2022) (wristlock after arrest). And the officer may be enforcing a law yet be entitled to qualified immunity because he reasonably relies on

the law's legality. *See, e.g.*, *Acosta v. City of Costa Mesa*, 718 F.3d 800, 823-26 (9th Cir. 2013) (disorderly behavior statute).

5. While assessing causation under *Mt. Healthy*, courts can consider a wide variety of evidence.

For instance, courts can consider what an officer said or did while effectuating an arrest. *See, e.g.*, *Ford v. City of Yakima*, 706 F.3d 1188, 1191 (9th Cir. 2013) (officer's statement to plaintiff, recorded on video, that, "You talked yourself—your mouth and your attitude talked you into jail." (emphases removed)). Courts can also weigh previous interactions between the plaintiff and the police officer. *See, e.g.*, *Beck v. City of Upland*, 527 F.3d 853, 868-69 (9th Cir. 2008) (previous "heated confrontation" between plaintiff and police in which officer told plaintiff, "[W]e should have taken care of you a long time ago."). And courts can consider a police officer's longstanding animus against a group with which plaintiff is associated. *See, e.g.*, *Sloman v. Tadlock*, 21 F.3d 1462, 1469-70 (9th Cir. 1994) (officer was "almost always" present at association's picketing events and pulled over a fellow association member to criticize a bumper sticker supporting association's political activities).

Mt. Healthy also allows courts to take into account the presence or absence of probable cause and the treatment of comparable individuals who have not engaged in protected activity. Under *Mt. Healthy*, "if an officer had probable cause for making an arrest, that tends to undermine an allegation that the arrest was fabricated." *See Gullick v. Ott*, 517 F. Supp. 2d 1063, 1072, 1074-76 (W.D. Wis. 2007). And courts applying *Mt. Healthy* routinely consider how officers responded to the same or similar crimes. *See, e.g.*,

Ballentine v. Tucker, 28 F.4th 54, 62-63 (9th Cir. 2022) (no evidence that anyone had ever been arrested for chalking on the sidewalk supported claim that arrest was in retaliation for chalking messages critical of police).

II. The *Mt. Healthy* framework should apply to retaliatory arrest cases except for where First Amendment protected activity was a "wholly legitimate consideration" for the arrest.

1. Though *Mt. Healthy* is the default rule in First Amendment retaliation cases, this Court departed from that default in *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), for certain retaliatory arrest claims: those where the plaintiff's First Amendment protected activity was a "'wholly legitimate consideration' for officers when deciding whether to make an arrest." *Id.* at 1724 (quoting *Reichle v. Howards*, 566 U.S. 658, 668 (2011)).

Protected activity is a "wholly legitimate consideration" in an arrest decision when it "provides evidence of a crime or suggests a potential threat." *Reichle*, 566 U.S. at 668. For example, a suspect's "untruthful and evasive answers" might lead an officer to believe the suspect had previously committed an offense. *Nieves*, 139 S. Ct. at 1724 (citation omitted). The suspect's protected activity may be part of an offense currently being committed: In *Nieves* itself, the suspect's "content and tone of speech" was part of the way he committed the offense of disorderly conduct. *Id.* Or a suspect's statements might make clear he "presents a continuing threat," such that an officer worries an offense is about to be committed. *Id.* (citation omitted).

2. Cases where protected activity is a "wholly legitimate consideration" present causal complexities absent from the mine run of retaliatory arrest cases.

In most cases, the plaintiff and the officer have different stories about the reason for the arrest: The plaintiff says the officer made the arrest because she criticized the police, the officer said he made the arrest for a reason unrelated to the protected activity (for instance, the plaintiff was driving erratically). *Mt. Healthy* helps us untangle who is telling the truth.

But in cases where speech is a "wholly legitimate consideration," *both* officer and plaintiff agree that the protected activity is the reason for the arrest. Both might agree that an arrest for, say, obstructing a police investigation was made because the plaintiff was encouraging others not to speak with the police. *See Nieves*, 139 S. Ct. at 1724. The plaintiff claims the arrest was retaliatory: The officer is hostile to the plaintiff's message critical of the police. The officer claims the arrest was made because the plaintiff's speech was interfering with police activity: The officer was simply enforced the obstruction law. The "causal complexit[ies]," *Nieves*, 139 S. Ct. at 1724, of such cases—the fact that both sides agree that the protected activity was the but-for cause of the arrest—mean that the *Mt. Healthy* framework is insufficient to identify true retaliatory arrest cases.

3. To address that "causal complexity," this Court has imposed additional requirements on plaintiffs in cases where protected activity is a "wholly legitimate consideration" in the arrest decision. In such cases, in addition to showing that the protected conduct was a "motivating factor" in the arrest (*Mt. Healthy*'s first step), a plaintiff must also either (1) prove that the

officer lacked probable cause to arrest or (2) supply comparator evidence (for instance, that in other cases, officers have exercised their discretion not to arrest for that offense).[2] *See Nieves*, 139 S. Ct. at 1725, 1727.

Nieves thus imposes a higher bar for plaintiffs in certain retaliatory arrest cases. In cases where a plaintiff can meet her burden under *Mt. Healthy*, but cannot make one of *Nieves*'s additional showings, *Nieves* may foreclose a retaliatory arrest claim altogether. For instance, when the plaintiff's strongest evidence is an officer's own statements, *see supra*, 7-8, the *Nieves* requirements may bar a plaintiff's claim.

4. Understanding *Nieves* to cover cases where speech is a "wholly legitimate consideration" in the arrest decision harmonizes this Court's case law.

To start, imposing a higher standard than *Mt. Healthy* in cases featuring heightened "causal complexities" accords with *Nieves*'s predecessor cases. *See, e.g.*, *Reichle*, 566 U.S. at 668 (describing the "tenuous causal connection between the defendant's alleged animus and the plaintiff's injury"); *Hartman*, 547 U.S. at 259 ("[T]he need to prove a chain of causation from animus to injury . . . provides the strongest justification for the no-probable-cause requirement . . . .").

Understanding *Nieves* to be confined to cases where speech is a "wholly legitimate consideration" in the arrest decision also makes sense of this Court's decisions in *Nieves* and *Lozman*.

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[2] What exactly qualifies under (2) is the subject of the first Question Presented by the petitioner. This amicus brief does not address that question.

In *Nieves*, the protected activities were Bartlett's refusal to speak with Nieves and his yelling at a fellow partygoer not to speak with the police. *See* 139 S. Ct. at 1721. But those same activities were "wholly legitimate considerations" in the arrest decision—Bartlett was guilty of committing disorderly conduct, the crime of arrest, in part *because* he had yelled at other partygoers not to speak with police. *Nieves*, 139 S. Ct. at 1721. This Court thus required Bartlett not only to prove that his protected activities were "motivating factor[s]" in the arrest but also to make one of the two additional showings. *Id.* at 1723, 1727

In *Lozman v. City of Riviera Beach*, by contrast, the animus-generating protected activity was *not* a "wholly legitimate consideration" in the arrest decision. Lozman had previously criticized the city and was later arrested for violating rules of procedure at a public hearing. *See Lozman*, 138 S. Ct. at 1949-51. The Court held the arrest was "retaliation for prior, protected speech." *Id.* at 1954. The protected activities (Lozman's prior criticisms of the city) "b[ore] little relation to the criminal offense for which the arrest [wa]s made" (violating procedural rules at the hearing). *Id.* Because Lozman's previous criticisms of the city were not "wholly legitimate consideration[s]" in the arrest decision, he did not have to make either of the *Nieves* showings.

5. Moreover, when a criminal statute makes First Amendment activity a "wholly legitimate consideration" for an arrest, a plaintiff's quarrel may be with the statute itself. In *Leonard v. Robinson*, for example, an officer faced a retaliatory arrest claim for enforcing vulgarity statutes against a plaintiff who uttered the phrase, "God damn." 477 F.3d 347, 351

(6th Cir. 2007). Writing separately, Judge Sutton opined that the real First Amendment problem was with the vulgarity statute itself. *Id.* at 363 (Sutton, J., concurring in part and dissenting in part).

Amicus's approach accords with Judge Sutton's intuition: It may be harder to prove retaliation when an officer considers protected activity in the course of enforcing "duly enacted laws." *See id.* at 367. But precisely where it is most difficult to prove retaliation—when the activity criminalized by the statute overlaps with the protected activity that purportedly generated animus—the plaintiff will have another recourse: challenging the law itself as violative of the First Amendment. *Id.* at 363. Indeed, if the plaintiff's challenge to the statute is successful, she can receive money damages and attorneys' fees. *See City of Houston, Tex. v. Hill*, 482 U.S. 451 (1987).

6. Under a correct reading of *Nieves*, this Court should vacate the Fifth Circuit's judgment in this case. Here, Ms. Gonzalez's protected, animus-generating activity consisted of spearheading a petition critical of the city manager. Pet. App. 21a; 34a (Oldham, J., dissenting). At a city council meeting, Ms. Gonzalez inadvertently placed the petition in her binder (then returned it before leaving). Two months later, she was arrested for "destroy[ing], conceal[ing], remov[ing], or otherwise impair[ing] the . . . availability of a governmental record"—despite never having left the council meeting with the petition. *Id.* 22a (majority) (quoting Tex. Pen. Code § 37.10(a)(3)). Ms. Gonzalez's protected activity was not a "wholly legitimate consideration" in deciding to arrest her for tampering with a governmental record. *Id.* 55a (Oldham, J., dissenting); *cf. Lozman*, 138 S. Ct. at 1954. The Fifth

Circuit thus erred in requiring Ms. Gonzalez to prove one of *Nieves*'s additional requirements.

6. Admittedly, that's not the only way to read *Nieves*. Petitioner in this case reads *Nieves* to apply where (1) the arrest was "on the spot," and (2) the named defendant is an arresting officer. Petr. Br. 30-34. That proposal has much to recommend it, and Ms. Gonzalez's retaliation claim would proceed under either petitioner's approach or amicus's. However, amicus's approach reaches more intuitive outcomes than petitioner's in other retaliatory arrest situations.

Imagine, for instance, a slight variant on the facts of this case: A monthslong vendetta against Ms. Gonzalez, but by an arresting officer; and the same arrest for tampering with a government document, but made "on the spot" instead of two months later. Under petitioner's rule, *Nieves* would apply and potentially foreclose Ms. Gonzalez's claim, vendetta notwithstanding. By contrast, as explained *supra*, 8-10, amicus's approach doesn't turn on whether the arrest is made immediately after the crime or on whether the arresting officer or someone else was sued.

Conversely, imagine that, instead of arresting her two months after the city council meeting for tampering with government property, defendants instead arrest Ms. Gonzalez two months later for violating a statute that prohibits impairing police department operations (let's say her petitioning activity led citizens to stop cooperating with police). Under petitioner's rule, *Mt. Healthy* would govern, since Ms. Gonzalez was arrested well after her purported crime, not "on the spot." But it would be difficult to disentangle the protected petitioning

activity from the offense, and it's quite possible that Ms. Gonzalez's actual quarrel is with the statute purportedly criminalizing her advocacy. It would make more sense to apply *Nieves.* Amicus's approach would do so, because the petitioning activity was a "wholly legitimate consideration" in determining whether Ms. Gonzalez had impaired police operations.

III. Amicus's approach better calibrates First Amendment analysis across a wide range of cases than the Fifth Circuit's rule.

The Fifth Circuit held that plaintiffs in virtually all retaliatory arrest cases are required to make *Nieves*'s additional showings. That holding blocks meritorious cases and prevents courts from reaching important First Amendment questions. Amicus's approach remedies those problems by requiring courts to ask the right questions in each case.

1. Under the broad interpretation of *Nieves*, potentially meritorious First Amendment retaliatory arrest cases have failed. In *Galarnyk v. Fraser*, for example, a bridge safety consultant went on "Geraldo at Large," a FOX News TV show, to criticize government agencies in the aftermath of a bridge collapse. 687 F.3d 1070, 1071 (8th Cir. 2012). About a week later, Galarnyk visited the collapse site. *Id.* at 1072. He was asked to leave a restricted area. He complied but was nevertheless arrested for trespassing. The arresting officer stated to a colleague: "Do you know who that guy is? He was on Geraldo. We've got to keep him locked up in a deep, dark room so he doesn't get any more information as long as we can." *Id.* at 1073.

The Eighth Circuit assumed that every retaliatory arrest plaintiff must prove a lack of probable cause. *Id.*

at 1076. Because Galarnyk could not, the Eighth Circuit granted summary judgment to officers. *Id.*

But plaintiff should not have been required to satisfy either of the two additional *Nieves* requirements. The protected activity (criticizing government agencies on FOX News) was not a "wholly legitimate consideration" in the arrest decision because appearing on TV has nothing to do with trespassing. Instead, a court should only have applied only *Mt. Healthy* and considered whether the evidence—and, in particular, the officer's statement about locking the plaintiff "in a deep, dark room" for appearing on television—was sufficient to show that the protected activity was a "motivating factor" in the arrest. And even then, under *Mt. Healthy*, the arresting officer could still avoid liability by proving he would still have made the arrest regardless of Galarynk's public criticism.

2. Even where protected activity happens simultaneously with allegedly unlawful activity, the protected activity may not be a "wholly legitimate consideration" in the arrest decision. Amicus's approach identifies those situations and applies the correct test—*Mt. Healthy*.

For instance, in *Boykin v. City of New York*, a freelance reporter followed a protest on a highway and published photographs of the protest online. 2022 WL 4585299, at *1 (S.D.N.Y. Sept. 29, 2022), *aff'd*, 2023 WL 7383147 (2d Cir. Nov. 8, 2023). Police arrested Boykin for "walking on a highway," even though the road was already closed to traffic. *Id.* The next day, the New York City Mayor's press secretary apologized to Boykin, acknowledging that the arrest "never should have happened." *Id.* Boykin sued for retaliatory arrest.

The Second Circuit held that Boykin had to make one of the *Nieves* additional showings. 2023 WL 7383147, at *3. Because he could show neither a lack of probable cause nor comparator evidence, the court dismissed Boykin's case at the pleading stage. *Id.*

By contrast, if *Nieves* were applied only where protected activity was a "wholly legitimate consideration" in the arrest decision, Boykin would have only needed to carry his burden under *Mt. Healthy*—showing that his protected activity was a "motivating factor" in his arrest. Boykin's protected activity—documenting a protest—was *not* a "wholly legitimate consideration" in deciding whether to arrest him for walking on a highway.

That wouldn't mean Boykin's claim would prevail. If the only evidence of retaliation was the fact of protected activity and the fact of arrest, he would lose at *Mt. Healthy*'s first step. And even if Boykin could carry his burden under the first step of *Mt. Healthy*, the officer may well be able to win under the second step.

3. In some cases, broadly applying *Nieves* prevents courts from detecting core First Amendment harms, such as unlawful prior restraint. In *Lund v. City of Rockford*, for example, a reporter claimed he was arrested in retaliation for photographing a police sting operation. 956 F.3d 938, 943 (7th Cir. 2020). Police were determined to prevent him from publishing the photographs, so they followed him and arrested him when he committed a traffic violation: driving his motorized bicycle the wrong way down a one-way road. *Id.* at 941-42. He was also charged with other crimes, including, as relevant here, obstructing a police investigation. *Id.* at 942.

Because the Seventh Circuit (like the Fifth) applies *Nieves* to all First Amendment retaliatory arrest cases against officers, it rejected plaintiff's claim: The officers had probable cause for the traffic violation, and the plaintiff produced insufficient comparator evidence. *Id.* at 944-46. That resolved the case.

As a result, the Seventh Circuit did not analyze the obstruction offense. According to the officers, Lund was about to commit the obstruction offense by publishing his photos on social media while the sting was ongoing, potentially "creat[ing] a danger for the undercover officers who were unarmed in a high crime area." *Id.* at 942. But making an arrest to prevent a journalist from publishing photos is, in effect, a prior restraint on speech. Such a prior restraint comes with a "heavy presumption against its constitutional validity." *See Carroll v. Princess Anne*, 393 U. S. 175, 181 (1968) (citation omitted). To be sure, this particular prior restraint may have been valid given the serious concerns about officer safety. The Seventh Circuit's broad application of *Nieves*, however, pretermitted that important constitutional question when officers managed to arrest speakers on a makeweight charge.

Amicus's approach, by contrast, would have teed up the relevant First Amendment questions. First, the court would have looked at the obstruction offense. Because protected activity (attempting to publish photos) was a "wholly legitimate consideration" in the arrest decision, *Nieves* would apply. Lund would have had two options. Either he would have needed to show that the officer lacked probable cause—that is, that the obstruction statute didn't contemplate this sort of

prior restraint. Or he would have needed to produce comparator evidence. *See supra*, 9-10. And remember, Lund would have had the opportunity to argue that the obstruction statute itself was unconstitutional as applied to him.

If Lund had succeeded as to the obstruction charge, the court would have gone on to analyze the charge of biking the wrong way down a one-way street. *Mt. Healthy* would have applied to that charge because Lund's photography was not a "wholly legitimate consideration" in assessing whether he had traveled the wrong way down a one-way street. Lund would have had the opportunity to show that his photography was nevertheless a "motivating factor" in the arrest decision. And officers would have had the chance to prove they would have arrested Lund even absent the photography.

The key point is this: The court wouldn't end its analysis simply by finding Lund biked the wrong way down a one-way street. Instead, it would tackle the important First Amendment questions raised by the obstruction statute and the possibly pretextual biking arrest.

4. Finally, limiting *Nieves* to cases where protected activity is a "wholly legitimate consideration" in the arrest decision properly handles cases where the officer faithfully applies the law, but the law itself potentially violates the First Amendment. In *Sexton v. City of Colorado Springs, Colo.*, a plaintiff observed a traffic stop then yelled at the officers: "Feel good about that? Harassing and taxing? These are innocent civilians." 2022 WL 168714, at *1 (D. Colo. Jan. 19, 2022). He began filming and yelling expletives. *Id.* After an officer

warned Sexton that he could "yell his opinions of the police, but that using the word 'fuck' was against the law," Sexton was arrested for offenses including disorderly conduct. *See id.* at *2-3. He sued.

Under amicus's approach, *Nieves* would apply to Sexton's retaliation claim because Sexton's protected activity was a "wholly legitimate consideration" in his arrest. That is, the basis for the arrest *was* Sexton's protected activity—his use of expletives. The district court therefore properly rejected Sexton's retaliation claim because he could not make the additional *Nieves* showings. *See Sexton*, 2022 WL 168714, at *8-10.

But *because* the law made Sexton's protected activity a "wholly legitimate consideration" in the arrest decision, *see Nieves*, 139 S. Ct. at 1724 (citation omitted), the district court correctly allowed Sexton's as-applied challenge to the disorderly conduct statute to proceed, *see Sexton*, 2022 WL 168714, at *10-12. As Judge Thapar has observed, statutes that make protected activity a legitimate consideration for arrests give police "cover to retaliate against all kinds of speech under the banner of probable cause." *See Novak v. City of Parma*, 932 F.3d 421, 432 (6th Cir. 2019). And under amicus's approach, the circumstances where suing the arresting officer himself will be the most difficult are precisely those where a challenge to the statute itself is most appropriate.

IV. The Fifth Circuit's rule undermines traditional First Amendment values.

Amicus's approach is preferable to the Fifth Circuit's because it accords with this Court's First Amendment doctrine, aligns with the history of the

First Amendment, and vindicates constitutional rights in an important context.

1. *Aligns With Doctrine*. Scrutiny of governmental motive is at the core of a retaliation claim. *Supra*, 3-4. Retaliation "threatens to inhibit exercise of the protected right," *Crawford-El*, 523 U.S. at 588 n.10, not only by the person against whom adverse action is taken but also by all others watching. After all, to punish one "tells the others that they engage in protected activity at their peril." *Heffernan*, 578 U.S. at 273.

Applying *Nieves* broadly is at odds with those First Amendment principles. *Nieves* uses a Fourth Amendment concept—probable cause—that is purely objective; the officer's motive is "irrelevant." *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004). But the First Amendment retaliation inquiry "serves a different purpose" and "does not depend on the presence or absence of probable cause." *Nieves*, 139 S. Ct. at 1732 (Gorsuch, J., concurring in part and dissenting in part).

Because of the doctrinal tension between the Fourth Amendment probable cause concept and the First Amendment retaliation analysis, probable cause should rarely play a dispositive role in First Amendment cases. The exception, as explained *supra*, 8-10, is where protected activity is a "wholly legitimate consideration" in the decision to arrest.

2. *Aligns With Founding-Era History*. Founding-Era history confirms a long tradition—far predating *Mt. Healthy*—of prohibiting punishment because of protected expression.

That tradition came to the Founders by way of British constitutional law. In the *Seven Bishops' Case*

of 1688[3]—"one of the most notable attempts to crush" liberty in British constitutional history—seven bishops who petitioned against the king's Declaration of Indulgences were prosecuted for seditious libel.[4] That prosecution spawned an enduring commitment not only to the right to petition but also to protecting that right against governmental retaliation. The English Bill of Rights declared both a "Right of the Subjects to petition the King" and outlawed "all Commitments and Prosecutions for such Petitioning."[5] From there came the First Amendment's Petition Clause.[6]

Moreover, the Founders specifically feared retaliation against dissenters. They warned that officials would often be motivated to suppress criticism and would take retaliatory action based on that intent. As an influential colonial-era essayist put it, free expression is "the great Bulwark of Liberty" and "the Terror of Traytors and Oppressors."[7] As such,

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[3] 12 How. St. Tr. 183 (K.B. 1688).

[4] *See* Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union 349 (2d ed. 1871).

[5] 1 Will. & Mar. Sess. 2, c. 2 (1689).

[6] *See* Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights 227-28 (Richard L. Perry & John C. Cooper eds. 1959).

[7] Thomas Gordon & John Trenchard, *No. 15: Of Freedom of Speech: That the Same is Inseparable from Publick Liberty* (Feb. 4, 1720), *reprinted in* 1 Cato's Letters, or Essays on Liberty, Civil and Religious, and Other Important Subjects 96, 100 (4th ed. 1737) [Cato's Letters]. *Cato's Letters* were "the most popular, quotable, esteemed source of political ideas in the colonial period." Clinton Rossiter, Seedtime of the Republic: The Origin of the American Tradition of Political Liberty 141 (1953).

governmental officials are prone to "endeavour[ing] to restrain" critical views.[8] One prominent voice during the ratification debates argued that government officials in a republic were just like "any King in Europe" in that they were "liable to personal prejudice, and to passion."[9] The Founders were thus wary that an official, motivated by animus, "might prosecute a bold writer, or any other person, who had become obnoxious to their resentment."[10] *Mt. Healthy*'s proscription on adverse governmental action taken because of protected activity is the modern response to the Founders' concerns.

3. *Preserves First Amendment Protections.* For at least three reasons, the Court's sensitivity for First Amendment activity should be at its apex in cases like this one.

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[8] Cato's Letters No. 15, *supra* note 7, at 101.

[9] A Native of Virginia, Observations upon the Proposed Plan of Federal Government (Apr. 2, 1788), *reprinted in* 9 The Documentary History of the Ratification of the Constitution Digital Edition 655, 686 (John P. Kaminski et al. eds. 2009).

[10] *Id.* Indeed, the very probable cause requirement that *Nieves* relied on was historically used to protect the right of petitioners to dissent. The probable cause requirement was developed to protect government critics from libel suits brought by government officials. *See Thorn v. Blanchard*, 5 Johns. 508, 528, 530 (N.Y. Ct. for Corr. of Errors 1809) (urging protection for government critics in suits where only evidence of malice is petition itself); *Gray v. Pentland*, 2 Serg. & Rawle 23, 30 (Pa. 1815) (relying on *Thorn* to develop probable cause requirement); *Howard v. Thompson*, 21 Wend. 319, 330-31 (N.Y. Sup. Ct. of Judicature 1839) (same); *Bodwell v. Osgood*, 20 Mass. 379, 379, 383-84 (1825) (same); *see generally* Cooley, *supra* note 4, at 432-34.

First, speech critical of government conduct is "at the very center of the constitutionally protected area of free discussion." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1965). The First Amendment reflects "a profound national commitment to the 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." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Second, in the context of an arrest, an officer wields immense coercive authority that, when misused, can go far to chill the exercise of First Amendment rights. Arrests, even without convictions, impose serious harms: An officer may "frisk" an arrestee and search her belongings with few constraints; he may strip search her before booking and jailing her, subjecting her to the indignity of incarceration while creating a permanent arrest record that will follow her throughout her life. *See Utah v. Strieff*, 579 U.S. 232, 252-54 (2016) (Sotomayor, J., dissenting).

And third, *Nieves*'s focus on probable cause poses acute challenges for plaintiffs. Probable cause is "not a high bar." *See D.C. v. Wesby*, 138 S. Ct. 577, 586 (2018) (citation omitted). Because of the sheer breadth of criminal law today, "almost anyone can be arrested for something." *Nieves*, 139 S. Ct. at 1730 (Gorsuch, J., concurring in part and dissenting in part). This Court has thus acknowledged that "police officers may exploit the arrest power as a means of suppressing speech." *Lozman*, 138 S. Ct. at 1953. Indeed, as Judge Ho has highlighted, the risk of public officials "weaponiz[ing] the criminal justice system against

their political adversaries has never been greater." Pet. App. 5a (Ho, J., dissenting from denial of rehearing en banc).

This case illustrates the threat that retaliatory arrests can pose to First Amendment rights. A seventy-two-year-old councilwoman helped organize a petition criticizing the performance of the city manager. For her troubles, she spent "a day in jail—handcuffed, on a cold metal bench, wearing an orange jail shirt, and avoiding using the restroom, which had no doors and no toilet-paper holders." Pet. App. 39a (Oldham, J., dissenting). Even though the charges against Ms. Gonzalez were dropped, she was "so traumatized by the experience that she will never again help organize a petition or participate in any other public expression of her political speech[.]" *Id.* 40a. As Judge Oldham aptly summarized, the city ultimately succeeded in silencing Ms. Gonzalez in an "underhanded and permanent way." *Id.* Any reading of *Nieves* that fails to hold defendants accountable would betray the values that lie at the core of the First Amendment.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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