No. 22-1025

# Supreme Court of the United States

*Petitioner,*

*Respondents.*

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

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## 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 , including in cases involving the government's use of its arrest powers to silence speech . See, e.g., Nieves v. Bartlett, 139 S. Ct. 1715 (2019) (amicus); Lozman v. City of Riviera Beach , 138 S. Ct. 1945 (2018) (amicus). H(a B c)-(s)-2 (e -2 (f)-1 r a)2 (dct como)2 (dme)1(e -2

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

professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

## SUMMARY OF ARGUMENT

"The freedom of individuals verbally to oppose or challenge [government] action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." City of Houston v. Hill, 482 U.S. 451, 462–63 (1987). That freedom requires not only striking down unconstitutional laws, but also, as in this case, protecting critics from retaliatory arrests.

Arrest is a particularly potent form of retaliation. It deprives critics of their physical liberty, and can trigger a host of negative long-term consequences beyond the period of custody, from hurting job and salary prospects to limiting access to public housing. At the same time, as this Court has recognized, broad and open-ended criminal laws make it possible for government actors to identify probable cause to arrest almost anyone for almost anything. As a result, though criticizing government action and challenging public officials lies at the zenith of First Amendment protection, a public official seeking to retaliate against critics will have an easy time finding something for which to arrest them. And that arrest is likely to have its intended effect, chilling the arrested individuals and other would-be speakers from speaking up again.

The First Amendment prohibits the government from retaliating against individuals for protected speech, including through arrests. To challenge retaliation, plaintiffs must typically plead that they engaged in protected speech and that the government subjected them to an adverse action as a result. Different kinds of evidence may be relevant to drawing the causal link between protected speech and adverse action, from timing to a lack of plausible

alternative explanations, to the full history of the relationship between the plaintiffs and defendants — but there is generally no presumption that the adverse action was proper.

When police undertake on-the-spot, warrantless arrests, however, it can be unusually hard to tell whether their reliance on speech was retaliatory or legitimate. The interaction between the officer and the suspect is limited, and what a suspect says in the encounter may be relevant in assessing the neeche

plan to intimidate [

procedures, also present in this case,

that the causation problems present in the former scenario did not present "the same difficulty" in the latter . Id .

Many types of arrests involving speech also lack those causation problems : those in which the allegedly

of the city manager and her role in organizing the petition against him.

### B. Where an arrest is allegedly motivated by prior, unrelated protected speech, the causal inquiry is not unusually complex.

Causation can be difficult to establish in retaliation cases where the relevant speech "is made in connection with, or contemporaneously to [the relevant] criminal activity." Lozman, 138 S. Ct. at 1953–54. It may be difficult to disentangle, for example, whether a protester arrested for violating a noise ordinance after chanting into a megaphone was in fact arrested because of the decibel level or the message of the chant.

"The content of the suspect's speech might [also] be a consideration in circumstances where the officer must decide whether the suspect is ready to cooperate, or, on the other hand, whether he may present a continuing threat to interests that the law must protect." Id. at 1953. The same is true for the "manner of a suspect's speech" Nieves, 139 S. Ct. at 1724. "[U]ntruthful and evasive answers to police questioning," for example, "could support probable cause." Id. (citing District of Columbia v. Wesby, 583 U.S. 48, 60 (2018)); see also Reichle v. Howards, 566 U.S. 658, 661 (2012). In Nieves, for example, "[t]he officers testified that they perceived [the plaintiff] to be a threat based on a combination of the content and tone of his speech, his combative posture, and his apparent intoxication." 139 S. Ct. at 1724. In all these situations, the arresting officer makes a probable cause determination based on the facts in the moment.

But no comparable difficulty exists where the protected speech that allegedly motivated the arrest is removed—in substance or time—from on-the-spot conduct giving rise to an arrest. In Lozman, for example, this Court found it "difficult to see why a city official could have legitimately considered that Lozman had, months earlier, criticized city officials or filed a lawsuit against the City," when he was arrested for refusing to leave the podium at a public meeting. 138 S. Ct. at 1954. This case offers another example: The content of Petitioner's speech—her criticism of the city manager and her support for his ouster—could not have legitimately served as a basis to arrest her. If anything, it makes the idea that she intended to tamper with the petition, which she supported, implausible.

Where the relevant speech is not contemporaneous with the conduct for which the plaintiff is arrested, "it is unlikely that the connection between the alleged animus and injury will be 'weakened by an official's legitimate consideration of speech,'" for it is unlikely that any consideration of the protected speech will be legitimate. Id. (quoting Reichle, 566 U.S. at 668 (cleaned up)).

### C. Where an arrest is not the result of an ad hoc, on-the-spot decision by an officer, the causal inquiry is not unusually complex.

The same is true for arrests that are not the result of "an ad hoc, on-the-spot decision by an individual officer." Lozman, 138 S. Ct. at 1954. Ad hoc arrests are often "dangerous" and "require [] making quick decisions in 'circumstances that are tense,

uncertain, and rapidly evolving .'" Nieves, 139 S. Ct. at 1725 (quoting Graham v. Connor, 490 U.S. 386, 397 (1989)). Their exigent nature makes them a special case. As noted above, if an officer "must make 'split-second judgments' when deciding whether to arrest, . . . a suspect's speech may convey vital information." Id. at 1724 (citation omitted). At the same time, because "[a]ny inartful turn of phrase or perceived slight during a legitimate arrest could land an officer in years of litigation," allowing retaliatory arrest claims to proceed where probable cause supported the arrest and no objective evidence supports a retaliatory motive "would simply minimize [officers'] communication during arrests to avoid having their

Allowing such claims to proceed does not dissuade officers from communicating with suspects or other members of the public. Because the claim arises from more than that single interaction, the words uttered by an officer during the arrest will typically carry less weight. In addition, the claim may not implicate the arresting officer at all; in Lozman, for example, the petitioner "d[id] not sue the officer who made the arrest" or even allege that the officer acted in bad faith. 138 S. Ct. at 1954. Here, too, the allegations detail a premeditated plan between a group of government officials, not including any arresting officer.

D. Prohibiting retaliatory arrest claims in such cases would deny important First Amendment protections.

On the other hand, if this Court were to presumptively prohibit such claims from proceeding, it could prevent plaintiffs from bringing claims even in cases where disentangling proper and improper reliance on speech for the arrest is not difficult, including where multiple government actors together

For example, where an arrest results from a plan by multiple government officials, "there may be little practical recourse." *Lozman*, 138 S. Ct. at 1954. "A citizen who suffers retaliation by an individual officer can seek to have the officer disciplined or removed from service," but the options are less obvious when more orchestrated retaliation is afoot. *Id.*

The risks are also stark where there is a gap in time between the arrest and the relevant speech, or after the events that purportedly gave rise to the probable cause occurred. The fact that "criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something" can make it too easy to arrest a critic on the spot. *Nieves*, 139 S. Ct. at 1730 (Gorsuch, J., concurring in part and dissenting in part). And the risk becomes even greater as time passes. Though "there are more criminal laws than anyone could know," Paul Larkin & Michael Mukasey, *The Perils of Overcriminalization*, The Heritage Foundation 2 (Feb. 12, 2015), https://thf_media.s3.amazonaws.com/2015/pdf/LM146.pdf, a suitably motivated government official can come to know more and more of them with enough time.

This includes laws targeting everyday, innocuous activity. For example, laws across the United States make it illegal to wear saggy pants,[2] spit in a public

[2] See, e.g., Abbeville, La. Code of Ordinances § 13-25; William C. Vandivort, The Constitutional Challenge to "Saggy" Pants Laws,

park,[3] or barbecue in one's front yard.[4] See generally Arielle W. Tolman & David 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). Traffic laws, too, 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).

The laws that often govern mass assemblies are also capacious, placing protesters at particular risk. Typical "unlawful assembly" ordinances, for example, require only a conclusion that the "participants are at some point planning to engage in forceful or violent lawbreaking." John Inazu, Unlawful Assembly as Social Control, 64 UCLA L. Rev. 2, 7 (2017).[5] 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

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75 Brook. L. Rev. 667, 673 (2009) (cataloging saggy pants ordinances across the country).

[3] 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.").

[4] See, e.g., Berkeley, Mo. Code of Ordinances § 210.2250, https://ecode360.com/31778191.

[5] See, e.g., Idaho Code § 18-6404 ("Whenever two or more persons assemble together to do an unlawful act, and separate without

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 have used their discretion under unlawful assembly ordinances to target "civil rights workers, antiabortion demonstrators, labor organizers,

and at the end of trial, the City amended it 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)).

Thus, government actors seeking to chill speech or retaliate against dissidents will have little difficulty finding probable cause to arrest protestors for something—particularly if given enough time.

## II. Even if Nieves applies beyond ad hoc arrests, the objective evidence necessary to overcome the probable-cause bar is not limited to direct comparative evidence.

Even if this Court were to expand the Nieves exception to apply beyond on-the-spot, warrantless arrests, Petitioner's claim should be allowed to proceed because, even though she does not allege a lack of probable cause for her arrest, she has alleged objective evidence of retaliatory treatment.

Mindful of imposing "unyielding requirement [s]" that would be "insufficiently protective of First Amendment rights," this Court held in Nieves that retaliation claims arising from ad hoc arrests can proceed even where plaintiffs allege that "officers have probable cause to make arrests," as long as they also allege that officers "typically exercise their discretion not to do so." Nieves, 139 S. Ct. at 1727. The Court specifically called for allegations of "objective" evidence, resisting inquiries that would look at the arresting officer's subjective intent. Id. (using the

word "objective" three times). But, unlike the court below, it did not limit that universe only to "comparative evidence" of individuals "who engaged in the 'same' criminal conduct but were not arrested." Pet. App. 29a.

In order to show that the arrest at issue in this case was retaliatory, Ms. Gonzalez alleged that the documents-tampering law had never before been used to charge anyone for purportedly attempting to steal (or misplacing) a nonbinding expressive document, much less a petition they themselves had prepared. Id. at 23a. She also alleged that the defendants skirted ordinary procedures to ensure that, rather than go through typical processing and booking processes, she would have to spend time in jail. Id. at 114a–115a.

These allegations should have been enough. But under the Fifth Circuit's view they were not, because

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)." Id .

Besides creating a functionally insurmountable barrier for many plaintiffs , diminishing Nieves' requirement of objective evidence to only direct comparators would force courts to ignor e glaring objective indicators of differential treatment— including , as here, significant procedural irregularities with punitive effects . That defies logic , and, if adopted, would drastically diminish the very First Amendment protections the Nieves Court sought to preserve.

Retaliatory -arrest plaintiffs will often g (it)-1 (h)6 (Pl oedb)2 (j)5 (e 7 >>8r0.2m5

protesting perceived injustices. "[7] DOJ similarly found that officers of the Baltimore Police Department routinely "unlawfully stop [] and arrest[] individuals for speech they perceive to be disrespectful or insolent."[8] 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,"[9] including arresting members of "an organization highly critical" of them.[10]

A recent investigation of the Louisville Metro Police Department (LMPD) similarly revealed that "LMPD officers engage in . . . retalia

subjective reasons, like causing ‘ annoyance,’ ‘alarm, ’ or ‘inconvenience. ’”[12] 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. [13]

These findings highlight how easy it is for public officials to arrest critics —and illustrate the need for this Court to decline Respondents’ invitation to extend Nieves’ exception to ordinary First Amendment pleading rules beyond ad hoc arrests.

Specific cases reveal similar dangers. For example, in 2015, Michael Picard was protesting

own course of action."[17] Prosecutors indeed charged Mr. Picard with reckless use of a highway by a pedestrian and creating a public disturbance, but eventually dropped the charges. Mem. of Decision on Cross Mots. for Summ. J., Picard v. Toreno, No. 3:16-cv-01564-WIG, at 7–8 (D. Conn. Sept. 16, 2019), ECF 92.[18]

Similar abuses also arise in Nieves-like situations. Specifi

similarly violated the ordinance but used cleaner language when stopped by an officer or were silent.

Similarly, a man cited for violating a Pontiac noise ordinance 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), and another motorist arrested and jailed under a noise ordinance for talking back to an officer, Ford v. City of Yakima, 706 F.3d 1188, 1190–91 (9th Cir. 2013),[20] abrogated by Nieves, 139 S. Ct., would have to find examples of others making equally loud noise while communicating different messages who were not arrested.

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"[21] 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 First Amendment to protect individuals from one of the most potent forms of government retaliation, this Court should reverse the Fifth Circuit and hold that the existence of probable cause does not bar a retaliatory arrest claim where an

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[20] Before the arrest, the officer stated, "[i]f you run your mouth, I will book you in jail for it," 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.

[21] Civ. Rts. Div., U.S. Dep't of Just., Investigation of the Ferguson Police Department 25 (Mar. 4, 2015), https://s3.documentcloud.org/documents/1681202/ferguson-police-department-report.pdf

arrest is allegedly motivated by prior or unrelated speech, where an arrest is not the result of an ad hoc, on-the-spot decision by an officer, and where objective evidence shows retaliatory treatment .

## CONCLUSION

For the foregoing reasons, the decision below should be reversed.

December 18, 2023

Respectfully submitted,

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