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, Hon. David Alan Ezra, Presiding

OPPOSED MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING EN BANC

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OPPOSED MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING EN BANC

Pursuant to the Federal Rules of Appellate Procedure 27, 29(a)(3), and 29(b)(3), proposed *amici curiae* the American Civil Liberties Union, American Civil Liberties Union of Texas, the Foundation for Individual Rights and Expression, and the Cato Institute move for leave to file an *Amici Curiae* Brief in Support of Plaintiff-Appellee's Petition for Rehearing En Banc.

MOVANTS' INTERESTS

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 American Civil Liberties Union of Texas (ACLU of Texas)** is an affiliate of the ACLU. Both organizations have been at the forefront of efforts nationwide to protect the full array of civil 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 Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the rights of all Americans to free speech and free thought—the most essential qualities of liberty. In addition to promoting a culture of respect for these inalienable rights, FIRE engages in strategic litigation and regularly files *amicus* briefs to ensure that the law remains unequivocally on the side of preserving robust First Amendment rights.

The Cato Institute is a non-partisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. The Cato Institute's Project on Criminal Justice was founded in 1999 and focuses

on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

Amici, organizations dedicated to the protection of protestors' rights and the First Amendment right to free speech, have a vital interest in the outcome of this case, and in the proper interpretation of the *Nieves* decision permitting certain First Amendment claims in cases of probable cause to arrest. *See Nieves v. Bartlett*, 139 S. Ct. 1715 (2019).

CONSENT OF THE PARTIES

Amici have obtained the affirmative consent of Appellee to the filing of the proposed *amici curiae* brief. On September 28, 2022, *amici*, through undersigned counsel, sought consent from Appellants for the filing of the proposed *amici* brief, but Appellants declined to consent.

REASONS FOR AND RELEVANCE OF *AMICI CURIAE*

This case raises an issue of exceptional importance: how to interpret the exception articulated by the Supreme Court in *Nieves v. Bartlett*, 139 S. Ct. at 1727, to the requirement that a plaintiff bringing a retaliatory arrest claim must plead and prove the absence of probable cause to arrest. The panel's interpretation of the *Nieves* exception is exceedingly narrow and would diminish crucially important First Amendment protections for protestors and critics of the police and government.

The proposed *amici* brief would serve the critical function of showing how and why the *Nieves* exception preserves First Amendment rights. It also provides examples of broad statutes and ordinances that make it all too easy to find probable cause to arrest people for disfavored speech. Such context is essential in understanding the implications of the panel's overly strict reading of the *Nieves* exception, and *amici* therefore submit that their proposed brief will aid the Court in its consideration of whether to grant en banc rehearing.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court grant leave to file the accompanying *Amici Curiae* Brief in Support of Appellee's Petition for Rehearing En Banc.

Dated: October 3, 2022

/s/ Laura Moraff

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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2022, I electronically filed the foregoing Motion for Leave to File Brief of Amici Curiae with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 27(d), I certify that:

This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because this motion contains 728 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in Century Schoolbook 14-point font using Microsoft Word 2019.

Dated: October 3, 2022

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

(1) Case No. 21-50276: *Gonzalez v. Trevino, et al.*

(2) Pursuant to 5th Cir. R. 28.2.1 and 29.2, the undersigned counsel of record for *amici curiae* certifies that, in addition to the persons and entities previously identified by the parties, the following additional persons and entities have an interest in the outcome of this case:

American Civil Liberties Union (*Amicus Curiae*)

Laura Moraff (Counsel of Record for *Amici Curiae*)

Esha Bhandari (Counsel for ACLU)

Brian Hauss (Counsel for ACLU)

American Civil Liberties Union of Texas (*Amicus Curiae*)

Savannah Kumar (Counsel for ACLU of Texas)

Brian Klosterboer (Counsel for ACLU of Texas)

Adriana Piñon (Counsel for ACLU of Texas)

The Foundation for Individual Rights and Expression (*Amicus Curiae*)

Darpana Sheth (Counsel for the Foundation for Individual Rights and Expression)

The Cato Institute (*Amicus Curiae*)

Clark M. Neily III (Counsel for the Cato Institute)

(3) Pursuant to Fed. R. App. P. 29(a)(4)(A), *amici curiae* further certify that they are nonprofit entities operating under § 501(c)(3) of the Internal Revenue Code. *Amici* are not subsidiaries or affiliates of any publicly-owned corporations and do not issue shares of stock. No publicly held corporation has a direct financial interest in the outcome of this litigation due to *amici*'s participation.

Dated: October 3, 2022

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INTEREST OF *AMICI CURIAE*[1]

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[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.

neutrality is therefore of immense concern to the ACLU, its clients seeking justice, and its members and donors.

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the rights of all Americans to free speech and free thought—the most essential qualities of liberty. In addition to promoting a culture of respect for these inalienable rights, FIRE engages in strategic litigation and regularly files *amicus* briefs to ensure that the law remains unequivocally on the side of preserving robust First Amendment rights.

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SUMMARY OF ARGUMENT

The existence of probable cause does not immunize government actors against First Amendment claims for retaliatory arrest in all circumstances. *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1955 (2018). In *Nieves v. Bartlett*, the Supreme 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. 139 S. Ct. 1715, 1727 (2019). 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.* This *Nieves* exception provides crucial First Amendment protections, and its proper interpretation is therefore of exceptional importance.

The panel determined that an arrestee can only invoke the *Nieves* exception if comparative evidence shows that others who were engaged in identical conduct did not get arrested—it is not enough to show that "virtually everyone" prosecuted under the same statute "was prosecuted for conduct different from hers." Op. 8. This exceedingly narrow reading

of *Nieves* has devastating consequences for critics of police and the government. If one 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 for speech they disfavor. It is easy to find a pretext for arrest because statutes and ordinances forbid a wide range of unremarkable activities, such as obstructing sidewalks and amplifying sound. The Court should grant en banc rehearing to properly interpret the *Nieves* exception and ensure it provides meaningful First Amendment protection to protestors and civically-engaged individuals like Sylvia Gonzalez.

ARGUMENT

I. The Panel's Decision Obliterates Important First Amendment Protections that the *Nieves* Decision Was Designed to Preserve, Raising an Issue of Exceptional Importance Meriting En Banc Review.

Ms. Gonzalez's case illustrates why the *Nieves* exception preserving First Amendment claims in cases of probable cause to arrest is so important. She was retaliated against after engaging in political speech critical of the city manager. ROA.169–71. Specifically, she organized a nonbinding citizens' petition advocating for the removal of the city manager. After a resident submitted that petition to the city council, and

Ms. Gonzalez accidentally placed the petition in her binder,[2] Appellants schemed to retaliate against her. ROA.169–70. 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." This broad tampering statute had never been used in any remotely similar situation. ROA.184–85. Indeed, most indictments under the provision involved accusations of using fake government identification, such as fake social security numbers or driver's licenses, or misuse of financial information. ROA.185. And, unlike Ms. Gonzalez, most people accused of such nonviolent offenses are not jailed. *Id.*

The panel erred in holding that the *Nieves* exception did not apply because "Gonzalez does not offer evidence of other similarly situated individuals who mishandled a government petition but were not prosecuted under Texas Penal Code § 37.10(a)(3)." Op. 7–8. Ms. Gonzalez did offer evidence that, of 215 grand jury felony indictments obtained

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[2] Ms. Gonzalez had been sitting next to Mayor Trevino, to whom the petition was given, and did not know the petition was in her binder until Trevino asked her to look for it there. ROA.14, 16.

under Section 37.10(a)(3), none of them alleged conduct resembling hers. ROA.22. The *Nieves* exception requires no more. Ms. Gonzalez showed that, while Section 37.10(a)(3) could be used to make an arrest for attempting to steal (or misplacing) a nonbinding or expressive document, it was not, in fact, used that way. ROA.22. In other words, this case presents a "circumstance[] where officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Nieves*, 139 S. Ct. at 1727.

The *Nieves* exception is critically important because the Texas statute is not an outlier. "[S]tatutes 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).

In various municipalities across the United States, it is illegal to wear saggy pants,[3] cross a street while viewing a cell phone,[4] or barbecue in one's front yard.[5] Without the *Nieves* exception—or with a version of the exception that cannot be invoked even when an arrest is made pursuant to a statute that has never been used in an analogous situation—such broad statutes would allow for government officials, with impunity, to retaliate against individuals with whom they disagree.

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

The *Nieves* exception offers exceptionally important speech protections, because many laws prohibit a wide range of activity that protestors often engage in, giving police probable cause to arrest them. For example, under typical "unlawful assembly" ordinances,[6] "[o]fficials

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

[4] *See, e.g.*, Revised Ordinances of Honolulu § 15-24.23, http://www4.honolulu.gov/docushare/dsweb/Get/Document-196183/DOC007%20(14).PDF.

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

[6] *See, e.g.,* Cal. Penal Code § 407; Idaho Code §§ 18-6404–05; Iowa Code § 723.2.

can disperse a protest as long as they conclude that participants are at some point planning to engage in forceful or violent lawbreaking."[7] Indeed, 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. 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).

Laws prohibiting obstruction of roads and sidewalks similarly give police broad discretion to arrest.[8] In 2020, three activists were arrested and charged under a Texas obstruction law—which criminalizes "intentionally, knowingly, or recklessly . . . obstruct[ing] . . . any . . . place used for the passage of persons, vehicles, or conveyances, 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 § 42.03(a)—after attending a peaceful protest demanding the

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[7] John Inazu, *Unlawful Assembly as Social Control*, 64 U.C.L.A. L. Rev. 2, 7 (2017).

[8] *See, e.g.*, Ga. Stat. § 16-11-43; La. Rev. Stat. § 14:97; D.C. Code § 22-1307(a).

removal of a Confederate statue that stands in front of their town's courthouse.[9]

Noise ordinances are similarly used to limit core First Amendment activity. The Tampa Bay Times 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."[10]

Selective enforcement of these 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 a particular law not because the conduct at issue is typically punished

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[9] Simone Carter, *What, No Firehoses? Gainesville Police Try to Silence Protestors with Arrest Warrants*, Dallas Observer (Sept. 4, 2020), https://www.dallasobserver.com/news/pro-gainesville-organizers-released-on-bond-11940316; Simone Carter, *Trial Underway for Activists Who Protested for Removal of Confederate Monuments in Gainesville*, Dallas Observer (Aug. 24, 2022), https://www.dallasobserver.com/news/trial-begins-for-protesters-who-called-for-removal-of-gainesville-confederate-monument-14661872. The three protesters are appealing their August 2022 convictions.

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

under that law, but because a critic has expressed a viewpoint with which police disagree, the existence of probable cause does not categorically bar a retaliation claim. A contrary rule would allow police to wield their power to arrest protesters in order to silence disfavored messages.

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

These are not just hypothetical concerns. Police have used the discretion provided by broad statutes and ordinances to retaliate against speakers and demonstrators with whom they disagree. For example, in 2015, Michael Picard was protesting legally near a DUI checkpoint with a sign reading "Cops Ahead: Keep Calm and Remain Silent."[11] Officers' discussion of charging Picard was inadvertently captured on video, providing a rare glimpse into how police officers sometimes fabricate charges to retaliate against a protester.[12] One is heard saying: "Have that Hartford lieutenant call me, I want to see if he's got any grudges."

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

[12] The full video is available, *supra* note 12. The dialogue in this section was transcribed from that video.

Another asks: "You want me to punch a number [slang for opening an investigation] on this either way? Gotta cover our ass."

The officers proceed to debate how to charge Picard:

> 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 three charges 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 U.S. Department of Justice's 2015 report on the Ferguson Police Department 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."[13] 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 a broad "Manner of Walking in Roadway" ordinance because the man cursed at the officer. *Id.*

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

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[13] Civ. Rts. Div., 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.

whether we can book or release you . . . your mouth and your attitude talked you into jail." *Id.*

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.[14]

These examples highlight how crucially important it is that this Court interpret the *Nieves* exception to provide First Amendment protection against officers exploiting broad statutes to suppress speech. In protests against police or local governments, some see courage and dissent, while others see insult and ingratitude. Freedom of expression lives in that clash of ideologies, a reflection of our "profound national

[14] Press Release, ACLU of Tex., *Gainesville Man Prosecuted in Violation of His Right to Free Speech, ACLU of Texas Says* (Mar. 6, 2021), https://www.aclutx.org/en/press-releases/gainesville-man-prosecuted-violation-his-right-free-speech-aclu-texas-says.

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). The First Amendment commands that conflicts of ideas be resolved through public discourse—not retaliatory arrests intended to silence one side of the conversation.

CONCLUSION

For the foregoing reasons, Appellee's petition for rehearing en banc should be granted.

Respectfully submitted,

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I hereby certify that on October 3, 2022, 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.

Dated: October 3, 2022

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G), 32(g)(1), and 5th Cir. R. 32.3, I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(5) because this brief contains 2,591 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.

Dated: October 3, 2022

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