No. 22-1025

In the
Supreme Court of the United States

SYLVIA GONZALEZ,

Petitioner,

v.

EDWARD TREVINO, II, MAYOR OF CASTLE HILLS, SUED IN HIS INDIVIDUAL CAPACITY, ET AL.,

Respondents.

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

BRIEF OF *AMICI CURIAE* ALASKA, FLORIDA, MISSISSIPPI, MONTANA, NEBRASKA, NORTH DAKOTA, OHIO, SOUTH CAROLINA, SOUTH DAKOTA, AND UTAH IN SUPPORT OF RESPONDENTS

TREG TAYLOR
Attorney General of Alaska

KIMBERLY D. RODGERS
Assistant Attorney General
Counsel of Record
ALASKA DEPARTMENT OF LAW
1031 W. Fourth Ave., Suite 200
Anchorage, AK 99501
(907) 269-6612
kimber.rodgers@alaska.gov

Counsel for Amici Curiae

Additional Counsel

Ashley Moody
Attorney General
State of Florida

Dave Yost
Attorney General
State of Ohio

Lynn Fitch
Attorney General
State of Mississippi

Alan Wilson
Attorney General
State of South Carolina

Austin Knudsen
Attorney General
State of Montana

Marty Jackley
Attorney General
State of South Dakota

Michael T. Hilgers
Attorney General
State of Nebraska

Sean D. Reyes
Attorney General
State of Utah

Drew H. Wrigley
Attorney General
State of North Dakota

QUESTIONS PRESENTED

Nieves v. Bartlett held that probable cause bars a retaliatory arrest claim except for "circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so." 139 S. Ct. 1715, 1727 (2019). To meet the "narrow" exception, a plaintiff must show "that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Id.*

The questions presented are:

1. Whether the *Nieves* probable cause exception can be satisfied by objective evidence other than specific examples of arrests that never happened.

2. Whether the *Nieves* probable cause rule is limited to individual claims against arresting officers for split-second arrests.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Rules

Regulations

Other Authorities

INTEREST OF AMICI CURIAE

States have a substantial interest in the elements governing First Amendment retaliatory arrest claims under 42 U.S.C. § 1983 because these claims implicate their vital interest in public safety and maintaining order. Public safety depends on law enforcement officers being willing and able to make arrests authorized by law and supported by probable cause. And the overwhelmingly majority of crimes fall under state, not federal, jurisdiction, so enforcing the law is an essential function for state and local governments. Officers should not be deterred from making arrests by fears of personal liability and unfounded litigation requiring them to defend their state of mind against subjective perceptions of retaliatory motive.

In addition to the states' crucial interest in law enforcement, states that indemnify their employees for unfavorable judgments based on actions within the scope of their employment have concrete financial interests in minimizing their officers' exposure to liability.

INTRODUCTION

This case presents a First Amendment claim of retaliatory arrest brought under 42 U.S.C. § 1983 seeking damages against three city officials—the mayor, police chief, and a detective. Pet. App. 101a. A councilwoman, Sylvia Gonzalez, alleges that they engineered her arrest for tampering with a government record in retaliation for her activities organizing a citizen petition seeking the removal of the city manager. *Id.* at 99a. But the court of appeals properly dismissed Gonzalez's claim under *Nieves v.*

Bartlett, 139 S. Ct. 1715 (2019), which requires that she show either the absence of probable cause for her arrest or that she was arrested for a very minor, commonplace offense when similarly situated individuals not engaging in protected First Amendment activities were not. Gonzalez showed neither. She admits that probable cause supported her arrest. Pet. App. 26a. Indeed, an independent magistrate issued the arrest warrant finding probable cause that she had intentionally taken and concealed the submitted petition after legal questions were raised about how she obtained residents' signatures. J.A. 49, 52, 54-57. And Gonzalez's allegations about other record-tampering prosecutions, Pet. App. 117a, do not show that city officials have ignored the record tampering of others not engaged in protected activities.

The Amici States urge this Court to affirm the dismissal and reject Gonzalez's answers to both questions presented, which address the elements and proof necessary for First Amendment retaliatory arrest claims under § 1983.

The absence of probable cause is ordinarily an essential element of all such claims, even when the arrest was not on the spot, because of the inherent causation complexities particular to these claims and the risk of chilling legitimate law enforcement activities with unfounded claims that are "easy to allege and hard to disprove." *Nieves v. Bartlett*, 139 S. Ct. at 1723-25 (quoting *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998)). Thus, the existence of probable cause for Gonzalez's arrest defeats her First Amendment claim unless she satisfies an exception.

Gonzalez fails to satisfy the "narrow" exception discussed in *Nieves*, which permits claims to proceed only "where officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Id.* at 1727. The exception is crafted to avoid swallowing the general rule, applying only in cases of warrantless arrest for "very minor," commonplace criminal offenses that rarely result in arrest, like jaywalking. *Id.* Gonzalez's attempt to satisfy this exception fails because the record-tampering offense is not a petty, commonplace offense rarely resulting in arrest, she was arrested under a warrant, and her evidence does not compare her situation to others similarly situated.

While in many cases a plaintiff may not be able to maintain a § 1983 claim for damages against individual defendants, that does not mean law enforcement has unfettered discretion to exploit the arrest power. Numerous protections exist at the federal, state, and local level to prevent abuse. States and municipalities provide for citizen complaints and administrative review of police conduct to prevent retaliatory arrests. State statutes place limitations on the arrest power. And the United States points out federal and state remedies against law enforcement officials who willfully violate individuals' constitutional rights and against agencies with a pattern or practice of retaliatory arrests. U.S. Amicus Br. 13.

SUMMARY OF ARGUMENT

I. Under *Nieves v. Bartlett*, probable cause bars a retaliatory arrest claim unless the plaintiff satisfies an exception for petty, commonplace offenses. 139 S.

Ct 1715, 1727 (2019). This strikes the right balance between providing a damages remedy for unconstitutional retaliation and avoiding excessive interference with law enforcement. Speech—even highly valued political speech—should not immunize speakers who commit crimes from arrest. The probable-cause bar and its narrow exception prevent dubious claims from advancing to discovery and trial, avoid peering into officers' minds when their conduct is (and should be) judged by an objective standard, and give space for officers to do their jobs protecting public safety. *Id.* at 1723-25.

II. The logic of *Nieves*, 139 S. Ct. at 1723-24, and *Hartman v. Moore*, 547 U.S. 250, 262-63 (2006), supports applying the probable-cause bar to claims like Gonzalez's, rather than limiting it as she asks. Determining the true motives for an arrest presents the same causal complexities whether the arrest is made after deliberations or on the spot. *Nieves*, 139 S. Ct. at 1723-24. Causation is complicated for deliberative arrests because the protected activity is often a "wholly legitimate consideration" in the arrest, *id.*, and, if a warrant is issued, the independent decisionmaker, a magistrate, is not the § 1983 defendant with the purported retaliatory motive, *Hartman*, 547 U.S. at 262-63. Gonzalez's proposed cabining of the probable-cause bar to on-the-spot arrests would perversely disincentivize reflection and obtaining warrants. And discerning the line between on-the-spot and deliberative arrests would be difficult for courts in many cases.

III. The *Nieves* exception permits retaliatory arrest claims to advance in a narrow set of cases where

retaliation is more likely to be the but-for cause of an arrest, despite the existence of probable cause. These cases are warrantless arrests for "very minor" commonplace offenses that "rarely result[] in arrest," like jaywalking. *Nieves*, 139 S. Ct. at 1727. Plaintiffs arrested for these types of crimes must produce "objective evidence" that they were arrested when similarly situated individuals not engaging in protected speech were not. *Id.* Gonzalez's case—her arrest under warrant for the serious criminal offense of record-tampering—does not fit the exception. And her evidence does not address individuals engaging in criminal conduct like hers without being arrested.

IV. Section 1983 claims against individual defendants are not the only solution to combat retaliatory arrests. Other processes and remedies exist to prevent retaliatory arrests and provide correction or discipline if violations occur. These include criminal and civil remedies, disciplinary proceedings, and limits on the arrest power.

ARGUMENT

I. The *Nieves* probable-cause bar and its narrow exception allow meritorious claims to proceed while efficiently screening out unfounded claims.

Nieves strikes the right balance by permitting recovery for the arrests most likely caused by retaliatory animus while filtering out those that are not. The First Amendment prohibits "the government from retaliating against a person for having exercised the right to free speech." *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1948 (2018). Yet speech—

even highly valued political speech—should not immunize speakers who commit crimes from arrest. And police officers need room to act to protect public safety without fear of facing difficult-to-defend dubious lawsuits. *Nieves v. Bartlett*, 139 S. Ct. 1715, 1725 (2019). Because "probable cause speaks to the objective reasonableness of an arrest," its presence offers weighty evidence of a non-retaliatory reason for the arrest. *Id.* at 1724. This is why a plaintiff must show the absence of probable cause to bring a retaliatory arrest claim or satisfy a "narrow" exception that applies only when "officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Id.* at 1725, 1727.

Gonzalez asks the Court to limit the *Nieves* probable-cause bar only to "on-the-spot" arrests or to stretch the narrow exception wide open so that any "objective evidence that speech was the reason for the arrest" satisfies it. Pet Br. 18, 20. Both these proposals would fatally undermine a manageable rule helpful to sorting out meritorious claims and to leaving space for legitimate law enforcement.

A. As Gonzalez acknowledges, *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), established that "while the government may not retaliate against its critics, critics do not get special rights." Pet. Br. 18. That case, in which a public schoolteacher alleged that he was not rehired in retaliation for his speech criticizing his employer, required but-for causation to prove such a claim. 429 U.S. at 282-83, 287. It was not enough that the teacher showed that his protected conduct played "a substantial part" in the decision not to rehire him

because a "candidate ought not to be able, by engaging in [protected] conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision." *Id.* at 285-86. Instead, the teacher's showing shifted the burden to the school board to establish by a preponderance of the evidence that it would have reached the same decision without the protected conduct. *Id.* at 287.

B. For claims of retaliatory arrest and prosecution, the Court still required but-for causation but limited the application of the *Mt. Healthy* framework. *Hartman v. Moore*, 547 U.S. 250, 259, 265-66 (2006); *Nieves*, 139 S. Ct. at 1723. Observing that "a state of mind is 'easy to allege and hard to disprove,'" the Court refused to do a subjective inquiry into intent without a threshold showing that probable cause for the arrest or prosecution was absent. *Nieves*, 139 S. Ct. at 1725 (quoting *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998)). A case proceeds to the *Mt. Healthy* burden-shifting framework only if probable cause was absent or if the plaintiff provides evidence that she was arrested without a warrant for a very minor offense when similarly situated individuals not engaging in protected First Amendment activities were not. *Id.* at 1725, 1727.

The Court adopted the probable-cause bar for several reasons.

Judging an arrest at the outset by its objective reasonableness was consistent with the Court's longstanding rejection of invitations to probe

subjective intent in the Fourth Amendment search-and-seizure context. *Id.* at 1724. An objective standard did not "compromise evenhanded application of the law by making the constitutionality of an arrest 'vary from place to place and from time to time' depending on the personal motives of individual officers." *Id.* at 1725 (quoting *Devenpeck v. Alford*, 543 U.S. 146, 154 (2004)).

In addition, "common-law principles that were well settled at the time of [§ 1983's] enactment" supported the probable-cause bar because the common-law torts most like a retaliatory arrest based on protected speech (false imprisonment and malicious prosecution) barred suits if probable cause was present. *Id.* at 1726 (quoting *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997)).

The probable-cause bar also avoided stifling legitimate law enforcement, "dampen[ing] the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Id.* at 1725 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)). If officers fear difficult-to-defend litigation where they face personal liability, they may arrest less often, resulting in fewer arrests and some of the guilty going free. *Atwater v. City of Lago Vista*, 532 U.S. 318, 351 (2001). Where unlawful conduct coincides with speech critical of government, police might hesitate to arrest in time to prevent the conduct from escalating and endangering the lives of the government officials or the public. "Multiplied many times over, the costs to society of such underenforcement could easily outweigh the costs to defendants of being needlessly arrested and booked." *Id.* Furthermore, "policing

certain events like an unruly protest would pose overwhelming litigation risks. Any inartful turn of phrase or perceived slight during a legitimate arrest could land an officer in years of litigation." *Nieves*, 139 S. Ct. at 1725.

Lastly, probable cause was a ready-made, objective answer to sorting out motives. It carries "powerful evidentiary significance" in determining whether an arrest or prosecution was due to an official's purported animus or a plaintiff's potentially criminal conduct. *Hartman*, 547 U.S. at 261; *see Nieves*, 139 S. Ct. at 1724. In almost all cases, the existence of probable cause for a potential crime provides compelling non-retaliatory grounds sufficient to result in arrest, even if an officer also has retaliation in mind. *Nieves*, 139 S. Ct. at 1724.

Of course, the existence of probable cause is "not necessarily dispositive" of causation, *Hartman*, 547 U.S. at 265, and the probable-cause bar occasionally screens out meritorious claims. In fact, the *Hartman* case had strong evidence of retaliatory motive against speech of the highest order—the court of appeals observed that it came "close to the proverbial smoking gun," *Moore v. Hartman*, 388 F.3d 871, 884 (D.C. Cir. 2004). Yet the Court still concluded that probable cause barred the claim. *Hartman*, 547 U.S. at 265-66. The Court recognized that strong evidence of retaliatory causation would occasionally coexist with probable cause to bring charges. *Id.* at 264. But rather than fashioning a rule based on the most egregious circumstances—which "are likely to be rare and consequently poor guides in structuring a cause of action"—the Court defined the elements of a

retaliatory prosecution claim, just as it did for retaliatory arrest, with an eye to the typical case. *Id.*; *see Nieves*, 139 S. Ct. at 1723. For retaliatory prosecutions, probable cause is an absolute bar to suit. *Hartman*, 547 U.S. at 265-66. For retaliatory arrests, it bars a claim against individuals unless the criminal offense is one for which officers typically exercise their discretion not to arrest. *Nieves*, 139 S. Ct. at 1727.

This narrow exception is designed to avoid screening out meritorious retaliatory arrest claims in a subset of cases where "probable cause does little to prove or disprove the causal connection between animus and injury." *Id.* The exception allows retaliation claims to proceed in a case of a warrantless arrest for a "very minor," commonplace crime that "rarely results in arrest." *Id.* The fact that probable cause so rarely inspires an arrest for these petty, commonplace offenses suggests that, if protected speech coincided with the arrest, the arrest was chiefly motivated by animus for that speech, not probable cause. Yet at the same time, the exception has guardrails to avoid swallowing the general rule. A plaintiff's claim proceeds only if the inference of retaliation is strengthened by a showing of "objective evidence" that the plaintiff "was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Id.*

C. The Court should reject Gonzalez's invitation to decide this case in a way that restricts the probable-cause bar or expands the narrow exception to swallow the general rule. Doing so would mark a return to officers routinely facing trial on insubstantial retaliatory arrest claims.

The pre-*Nieves* experience in the Ninth and Tenth circuits is telling. Before *Nieves*, these circuits allowed retaliatory arrest suits to proceed even when probable cause supported the arrest. *Skoog v. County of Clackamas*, 469 F.3d 1221, 1235 (9th Cir. 2006); *Howards v. McLaughlin*, 634 F.3d 1131, 1148-49 (10th Cir. 2011). But despite officers enduring years of litigation, apparently not a single plaintiff convinced a jury that retaliation was the but-for cause of an arrest supported by probable cause. U.S. Amicus Br. 24, *Nieves*, 139 S. Ct. at 1715 (No. 17-1174), 2018 WL 4105539 at *24.

* * *

Nieves provides a workable rule. Modifying it to permit Gonzalez's retaliatory arrest claim against the individual defendants would lead to unnecessary litigation chilling law enforcement without a meaningful increase in the protection of First Amendment rights.

II. The *Nieves* probable-cause bar applies to § 1983 claims for retaliatory arrest, regardless of whether the arrest is made on the spot or after deliberation.

Gonzalez asks the Court to limit *Nieves* to claims against police officers for on-the-spot arrests, *see* Pet. Br. 30-34, but her request finds no purchase in the language or logic of that decision or the Court's other retaliatory arrest and prosecution cases. Gonzalez's proposed rule is unworkable and undesirable. Fortunately, "nothing" in *Nieves* "cabins its holding to actions of officers in the line of duty." Pet. App. 30a n.6. Requiring Gonzalez—and others arrested after

investigatory periods—to show an absence of probable cause makes sense because these claims raise the same causation difficulties discussed in *Nieves*, 139 S. Ct. at 1723-25 and *Hartman v. Moore*, 547 U.S. 250, 262-64 (2006). And applying the probable-cause bar to all types of retaliatory arrest claims avoids perversely disincentivizing officers from deliberating and obtaining warrants.

A. Gonzalez's claim presents the same layered causation difficulties as explained in *Nieves*, 139 S. Ct. 1723-25, and *Hartman*, 547 U.S. at 262-64. Her case is a prime example of why this Court should not categorically except arrests that are not "on the spot" from the probable-cause bar.

The first causal complexity is one that Gonzalez's case shares with *Nieves*: As is often true, the protected speech or activity was a "wholly legitimate consideration" in the decision to arrest. 139 S. Ct. at 1724. In *Nieves*, a trooper concluded that an intoxicated man at a raucous and remote winter festival was a safety threat and arrested him after he accosted troopers investigating underage drinking. *Id.* at 1720-21. In part, the content of the man's speech—berating a trooper questioning a minor and belligerently yelling at others not to talk to the police—supported the reasonableness of the arrest. *Id.* at 1720, 1724.

So too here. Gonzalez's protected advocacy legitimately factored into the investigating detective's decision to seek an arrest warrant for record-tampering because it revealed a motive for her actions. J.A. 52. At the meeting that ended with Gonzalez concealing the public petition submitted to the city, a

resident accused her of making misrepresentations while lobbying for petition signatures. J.A. 45-47, 49-50. And the subsequent investigation revealed that Gonzalez had told a different resident to forge his parents' signatures on the petition. J.A. 56-57. Thus—based on Gonzalez's protected activities—the detective believed that she may have tried to take the petition to avoid scrutiny of her signature-gathering efforts. J.A. 52. Because the record-tampering offense requires the *intentional* destruction, concealment, or removal of a governmental record, Tex. Penal Code Ann. § 37.10(c)(1) (West 2018), Gonzalez's possible motive for concealing the petition—inextricably tied to her protected activity—supported the finding of probable cause. And even though Gonzalez did not sue the arresting officer, she sued officials involved in the decision—the mayor who initiated the investigation, the police chief who assigned the work, and the detective who sought an arrest warrant. Pet. App. 101a-102a; J.A. 6, 42-43. Requiring her to show an absence of probable cause helps disentangle the detective's and other officials' purported animus from proper consideration of her protected activity.

On top of this, Gonzalez's case is causally complex for another reason. Unlike the *Nieves* suspect, who was arrested due to the defendant troopers' on-the-spot decision, 139 S. Ct. at 1720-21, Gonzalez was arrested pursuant to a warrant issued by an independent third party with absolute immunity from suit (a magistrate). Pet. App. 114a-15a. This makes Gonzalez's case analogous to a *Hartman* claim for retaliatory prosecution. 547 U.S. at 261-63. In both cases, plaintiffs cannot sue the ultimate decisionmakers—the prosecutor or judge—because

they are shielded from § 1983 damages liability. *Id.* at 262 (prosecutorial immunity); *Sup. Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 734-35 (1980) (judicial immunity). In both cases, therefore, plaintiffs may prevail only by proving that a government official acting for retaliatory reasons induced an immune decisionmaker to reach a conclusion he or she would not have otherwise made based on the facts or evidence alone. *Hartman*, 547 U.S. at 261-63. That is a difficult causal chain to link up.

But there's more. A prosecutor's decision to pursue charges is accorded a presumption of regularity, *id.* at 263, and judges, too, are presumed fair and neutral, *United States v. Morgan*, 313 U.S. 409, 421 (1941) (calling judges "men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances"). To outweigh these presumptions, plaintiffs would need ample evidence of a retaliatory government official's inducement.

All these causal complexities heighten the evidentiary value of the probable-cause determination. Establishing the absence of probable cause eliminates a legitimate reason for making the decision, allowing for an inference that the official's purported retaliatory motive tainted the presumedly fair decisionmaker's action. *Hartman*, 547 U.S. at 263. Given the causation hurdles, *Hartman* held that the existence of probable cause is reason enough to conclude that a prosecution would have occurred despite the purported retaliation and to bar a retaliatory prosecution claim—without exception—

when there is probable cause. *Id.* 265-66. *Nieves* extended this rule to retaliatory arrest, subject to a "narrow qualification" for warrantless arrests for very minor offenses, discussed further in Section III below. 139 S. Ct. at 1727. The same logic applies to Gonzalez's claim: Her concession of probable cause should defeat her claim unless she satisfies the limited *Nieves* exception.

B. *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945 (2018), is too far afield to be of any use to Gonzalez. She frames that case as an example of a "deliberative, premediated retaliatory arrest" that was not defeated by probable cause and that is consequently analogous to hers. Pet. Br. 30-31, 34. But the *Lozman* plaintiff's retaliatory arrest claim did not survive dismissal because his arrest was "deliberative," rather than "on the spot." 138 S. Ct. at 1954. (In any event, his arrest *was* on the spot after he refused to end his public comments at a council meeting. *Id.* at 1949-50.)

What separated the *Lozman* plaintiff's claim from the usual retaliatory arrest claim was that he sued the city under § 1983 and a necessary element of a claim against a city is "the existence and enforcement of an official policy motivated by retaliation." *Id.* at 1954. The requirement to prove an official policy was indispensable to alleviating the Court's concerns about retaliatory arrest suits. *Id.* First, the Court required "objective evidence" of such a policy, satisfying the preference for objective standards consistent with the Fourth Amendment. *Id.*; *see Nieves*, 139 S. Ct. at 1724. Second, elevating retaliation against protected speech to the level of

official policy is presumably rather uncommon, presenting "little risk of a flood of retaliatory arrest suits." *Lozman*, 138 S. Ct. at 1954. Plus, the need for objective evidence of the official policy would screen out meritless claims. *See id.* Third and finally, causation was "not of the same difficulty" when the official policy is retaliation for prior, protected speech, not for speech legitimately factoring into the arrest decision. *Id.*

Gonzalez does not contend that her claim against the individual defendants survives because her arrest was due to an official policy of retaliation,[1] Pet. Br. 30-31, so her reliance on *Lozman* is misplaced.

C. Gonzalez also argues that only time-pressured arrests require the probable-cause bar because more objective evidence of retaliatory motive may emerge with more time. Pet. Br. 19, 33-34. But the passage of

---

[1] To the extent that Gonzalez or her amici suggest this argument, that issue is not on review and should not be considered. *E.g.*, *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.6 (1996) (declining to reach an issue "outside of the scope of the question on which we granted certiorari"). The court of appeals decided that *Lozman*'s holding, 138 S. Ct at 1955, was limited to claims against a municipality brought under *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978) and thus did not apply to Gonzalez's claim against the individual defendants. Pet. App. 30a-32a (agreeing with sister circuits that *Lozman* is so limited (citing *Novak v. City of Parma*, 932 F.3d 421, 429-30 (6th Cir. 2019) and *DeMartini v. Town of Gulf Stream*, 942 F.3d 1277, 1294 (11th Cir. 2019))). Gonzalez did not include this issue in her questions presented, Pet. i, thus abandoning any claim of error. She did, however, bring a *Monell* claim against the city, which was permitted to proceed under *Lozman* and is currently stayed pending this appeal. Pet. Br. 16 n.3; Pet. App. 32a, 73a-78a, 89a-96a.

time allows for more deliberation—strengthening the finding of probable cause—so the bar is just as useful as a tool for accurately and quickly resolving claims involving after-the-fact arrests. The passage of time in Gonzalez's case allowed for an investigation, including reviewing the meeting video and interviewing petition signers. J.A. 43-57. This produced the necessary facts, establishing an intentional taking of a government document and Gonzalez's potential motive, to support the finding of probable cause. J.A. 49, 52, 56-57.

Or take Gonzalez's example of *Ballentine v. Tucker*, in which activists who chalked messages critical of law enforcement were arrested after the fact, rather than on the spot. 28 F.4th 54 (9th Cir. 2022). There, although the passage of time between the illegal acts and the arrests produced some objective evidence of a retaliatory motive, it also strengthened the finding of probable cause. *Id.* at 59-60. The officers observed the protesters chalking statements on the sidewalk, which was expensive to clean up, on three different occasions. *Id.* at 59-60. The first time, the officers asked the activists to clean up the chalk and they would not be cited, encouraged them to protest with signs instead, and ultimately cited them when they did not stop chalking. *Id.* at 59. But the activists violated the anti-graffiti statute two more times. *Id.* at 59-60. During the third incident, the investigating detective, whom the activists later sued, disagreed with a chalked statement, stating that it was false that no city officer had ever been prosecuted for murder. *Id.* at 60. He did not take any action against them that day. *Id.* Three weeks later, the activists were arrested under warrants. *Id.* The repeat offenses *and* the neutral magistrate's issuance of the arrest

warrants strengthened the presumption underlying the probable-cause bar—that the arrest would have occurred anyway due to probable cause, despite the detective's allegedly retaliatory motive.[2]

Thus, rather than supporting Gonzalez's point, the facts of *Ballentine* illustrate that the probable-cause bar is a useful tool for any type of arrest.

D. Worse, Gonzalez's proposed distinction between on-the-spot and deliberative arrests is unworkable.

Her dividing line would encourage officers to make snap judgments and not seek warrants. Abolishing the probable-cause bar for deliberative arrests would make it easier for plaintiffs' claims to proceed to discovery and trial, resulting in less protection for officers if they obtain a warrant or take time for consultation or reflection before making an arrest than if they do not. This is nonsensical. Warrants are a safeguard for liberty that was "one of the driving forces behind the [American] Revolution," *Riley v. California*, 573 U.S. 373, 403 (2014), and the preferred method for conducting arrests, *United States v. Watson*, 423 U.S. 411, 423 (1976).

Even if Gonzalez's proposed dividing line made sense, she does not explain how to draw it. She defines an "on the spot arrest" as "probable cause and the arrest arise in a single event based on the officer's observations." Pet. Br. 28. But as the United States explains, what constitutes a "single event" is unclear.

---

[2] The Ninth Circuit ultimately allowed the activists' retaliatory arrest claim to advance because they produced evidence meeting the *Nieves* exception, not because the probable-cause bar was inapplicable to after-the-fact arrests. *Ballentine,* 28 F.4th at 62.

See U.S. Amicus Br. 32. Gonzalez's conception of a "single event" seems to exclude anytime an officer has a few minutes to reflect or consult with others, perhaps while returning to his patrol car with a driver's license to check for outstanding warrants.

The arrest in *Nieves*—an archetypical warrantless arrest—does not even neatly fall onto one side or the other of Gonzalez's proposed dividing line. Rather than a single event based on the observations and judgment of one trooper, *Nieves* involved two troopers and two separate encounters several minutes apart, ending in the suspect's arrest when one trooper rushed to the other's aid. 139 S. Ct. at 1720-21. Yet Gonzalez acknowledges that *Nieves* exemplifies the "mine run of arrests" to which the probable-cause bar does and should apply. Pet. Br. 31 (quoting *Lozman*, 138 S. Ct. at 1954).

E. Lastly, as the United States explains, history undermines Gonzalez's proposed dividing line. U.S. Amicus Br. 28-31. Such a distinction is "absent from the two common-law claims that *Nieves* identified as most analogous to retaliatory arrest—malicious prosecution and false imprisonment—each of which imposed a [probable-cause bar], regardless of whether a claim arose in the context of a split-second arrest." *Id.* at 9. Gonzalez argues that abuse of process, which does not have a probable-cause bar, is the closest parallel. Pet. Br. 45-47. But that ignores the *Nieves* determination, 139 S. Ct. at 1726, as well as the *Hartman v. Moore* decision to adopt the probable-cause bar for retaliatory prosecutions despite "debate" over whether malicious prosecution or abuse of process is the closer parallel, 547 U.S. 250, 258 (2006).

* * *

Regardless of the timing of the arrest, probable cause efficiently and ordinarily rules out retaliation as the but-for cause of an arrest. This Court should reject Gonzalez's proposal to abandon the requirement that plaintiffs establish the absence of probable cause for deliberative arrests whatever that may mean.

III. The *Nieves* exception to the probable-cause bar applies only to warrantless arrests for petty, commonplace crimes that rarely result in arrest.

Probable cause defeats a retaliatory arrest claim unless the criminal offense is one for which officers "typically exercise their discretion" not to arrest even when they have probable cause. *Nieves*, 139 S. Ct. at 1727. This "narrow" exception applies to warrantless arrests for "very minor" commonplace offenses that "rarely result[] in arrest," like jaywalking. *Id.* If applicable, the exception allows a plaintiff to proceed with a retaliatory arrest claim by presenting "objective evidence" that he or she "was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Id.* Gonzalez's claim does not satisfy this exception because her crime was not very minor, her arrest was not warrantless, and her evidence did not show comparators.

A. The *Nieves* exception is carefully crafted to limit it to warrantless arrests for petty, commonplace criminal offenses, not for *any* type of arrest for *any* crime. 139 S. Ct. at 1727.

The Court created the exception to account for the modern expansion of the arrest power and the

weakness of probable cause as a tool for ruling out retaliation in a subset of cases. *Id.* In holding that probable cause bars retaliatory arrest suits, the Court relied on "common-law principles that were well-settled at the time of [§ 1983's] enactment." *Id.* at 1726 (quoting *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997)). But in the 150 years since § 1983's enactment, statutes in every state "'permit warrantless misdemeanor arrests' in a much wider range of situations—often whenever officers have probable cause for 'even a very minor criminal offense.'" *Id.* at 1727 (quoting *Atwater v. City of Lago Vista*, 532 U.S. 318, 344, 354 (2001)). Although officers now have the power to arrest without a warrant for even very minor offenses, in practice they generally do not. Thus, for this subset of crimes, probable cause is less likely to provide a sufficient explanation for a warrantless arrest that rules out retaliatory animus as a but-for cause. *Id.* Even if probable cause is present, animus might explain why a very minor offense that ordinarily results in a citation or no adverse action leads to a warrantless arrest of a violator hurling insults at an officer. In *Nieves*, the Court concluded that this circumstance merited an exception to the general rule that probable cause defeats retaliatory arrest claims. *Id.*

This exception is categorically unavailable to Gonzalez because of the nature of her crime and arrest.

1. Record-tampering is a serious offense that does not fall within the exception. Contrary to Gonzalez's characterizations, she was not arrested for a very minor offense of "temporarily misplacing a

[government] document," Pet. Br. 3, but rather she concedes that probable cause supported her arrest for the offense of intentionally destroying, concealing, removing or otherwise impairing the availability of a government record.[3] Pet. App. 26a; Tex. Penal Code. Ann. 37.10(c)(1) (West 2018). Albeit not murder, this offense is nothing like the petty, widespread offenses that rarely result in arrest—like jaywalking at many intersections, *Nieves*, 139 S. Ct. at 1727, or drinking water while commuting on public transit.[4] And when discovered, record-tampering is enforced, including against government officials like Gonzalez. *E.g., Fernandez v. State*, 619 S.W.3d 779 (Tex. Ct. App. 2020) (affirming the conviction of a sheriff's deputy for falsifying an incident report at the jail); *Mills v. State*, 941 S.W.2d 204 (Tex. Ct. App. 1996) (affirming the conviction of a county sheriff who destroyed a jail commissary ledger).

2. The valid arrest warrant from a magistrate also bars Gonzalez's claim. Pet. App. 114a-115a. The *Nieves* exception applies only to arrests without a warrant—to address the expansion of police officers' discretion since § 1983's enactment. 139 S. Ct. at 1727.

---

[3] In addition to the elements of the criminal offense for which Gonzalez was arrested, the facts belie her minimization of her conduct. Pet. Br. 3, 6, 42. The petition was only missing "temporarily" because the mayor noticed it was missing, and a police officer specifically asked Gonzalez if she had it and watched her find it. J.A. 46-47, 50-51.

[4] *See* Md. Code Ann., Transp. § 7-705(b)(3), (e) (making eating or drinking on the Metro a misdemeanor); Md. Code Ann., Crim. Proc. § 2-202 (authorizing warrantless arrests for misdemeanors committed in the presence of an officer).

A magistrate's independent scrutiny dispels the concern underlying the *Nieves* exception that an officer on the beat relied on probable cause for a petty offense to cover up her true motive of making an arrest in retaliation for the suspect's speech. *See id.* In several states, including Gonzalez's state of Texas, a magistrate may deny a warrant, even when there is probable cause.[5] In a majority of states, again including Texas, the magistrate may choose between issuing an arrest warrant or a summons,[6] or may be

---

[5] *E.g.*, Tex. Code Crim. Proc. Ann. art. 15.03 (West) (providing that a magistrate "may," rather than "shall," issue a warrant or summons); Ga. Code § 17-4-40(a) (magistrate "may issue" arrest warrant); Me. R. Unified Crim. P. 4(c)(2) (similar); N.H. R. Crim. 3(b) (similar).

[6] Tex. Code Crim. Proc. Ann. art. 15.03 (providing that a "magistrate may issue a warrant of arrest or a summons"); Ala. R. Crim. P. 3.1 ("If the defendant is not in custody, if the offense charged is bailable as a matter of right, and if there is no reason to believe that the defendant will not respond to the summons, a summons may be issued, at the sole discretion of the issuing judge or magistrate."); Ark. R. Crim. P. 6.1 (permitting a judicial officer to issue a summons for non-violent offenses when the person is not a flight risk); Colo. R. Crim. P. 9 (except for specified felonies, preferring a summons over an arrest warrant unless there is a "significant risk" of flight or to public safety); Conn. R. Super. Ct. Crim. Sec. 36-4 (allowing judicial authority to issue summons subject to exceptions primarily addressing safety and flight risks); Del. Super. Ct. Crim. R. P. 4(a) ("A summons instead of a warrant may issue in the discretion of the committing magistrate."); 725 Ill. Comp. Stat. 5/107-9(c) (allowing court to issue either); Ind. Code Ann. § 35-33-4-1 (West) (same for misdemeanors); Iowa Code Ann. § 804.1 (West); (same for "public offenses"); Kan. Stat. Ann. § 22-2302 (West) (same for misdemeanors); Minn. R. Crim. P. 19.01 ("[T]he court may issue a summons instead of a warrant when the prosecutor requests or the court directs."); Neb. Rev. Stat. Ann. § 29-425 (allowing for

required to issue a summons, unless an arrest is necessary to ensure the defendant's presence in court or for public safety or other compelling reasons.[7]

---

issuance of summons "when the court is convinced that a [summons] would serve all of the purposes of the arrest warrant procedure"); Okla. Stat. Ann. tit. 22, § 209(C) (West) (permitting judicial officer to choose between warrant or summons); Or. Rev. Stat. Ann. §§ 133.110, 133.055 (West) (permitting issuance of summons—a "criminal citation"—for misdemeanors and some felonies); Wis. Stat. Ann. § 968.04(1), (2)(b) (West) (leaving it to judge's discretion whether to issue summons or warrant for felonies and more serious misdemeanors); W. Va. R. Crim. P. 4 ("Within the discretion of the magistrate a summons instead of a warrant may issue."); W. Va. Mag. Ct. R. Crim. P. 4 (same).

[7] Alaska R. Crim. P. 4 (requiring court to issue a summons, not a warrant, unless "an arrest is necessary to ensure the defendant's presence in court" or "because the defendant poses a danger"); Fla. Stat. Ann. § 901.09 (West) (requiring trial court judge to issue a summons instead of a warrant for misdemeanors if judge "reasonably believes" the defendant "will appear upon a summons"); Idaho Crim. R. 4 (requiring magistrate to "give preference to the issuance of a summons" instead of a warrant and providing mandatory factors to guide the decision); Ky. Rev. Stat. Ann. § 431.410 (West) (requiring issuance of summons, except for designated offenses, unless there is a flight risk, an arrest is necessary to prevent "imminent bodily harm" or "other good and compelling reason as determined by the judicial officer"); La. Code Crim. Proc. Ann. art. 28 (requiring a summons unless "imminent and serious harm is threatened"); Mass. Gen. Laws Ann. ch. 276, § 24 (West) (requiring a summons, not a warrant, unless "in the judgment of the court or justice, there is reason to believe that the defendant will not appear"); Mo. Sup. Ct. R. 21.03 (requiring a summons for misdemeanors unless "there are reasonable grounds to believe" the defendant will not appear or poses a danger to others); Mich. Comp. Laws Ann. § 764.1a (West) (requiring a summons, not a warrant, unless the crime is "assaultive" or involves "domestic violence," the defendant may not appear or is a public safety risk, or the

Limiting the exception to warrantless arrests avoids reintroducing causal complexity the probable-cause bar eliminated. The involvement of an independent decisionmaker requires a plaintiff to establish that a defendant with a retaliatory motive induced a magistrate to reach a decision furthering the retaliation that the magistrate would not have made otherwise. *See Hartman v. Moore*, 547 U.S. 250, 261-63 (2006). Probable cause absolutely bars retaliatory prosecution claims because of the causal complexity posed by an independent prosecutor's involvement. *Id.* at 265-66. The same applies here—probable cause should always bar retaliatory arrests made under a lawfully executed and valid warrant.

This rule draws a clear line for law enforcement while bolstering the judicial preference for warrants, *United States v. Watson*, 423 U.S. 411, 423 (1976). Obtaining a valid warrant insulates officers from suit, encouraging them to slow down and reflect on arrest decisions when possible. And speech should never immunize wrongdoers from accountability by deterring arrests. In *Ballentine v. Tucker*, the anti-police activists chalking messages, rather than communicating with signs or other ways that were not

---

prosecutor asks for a warrant); Ohio Crim. R. 4(A)(1) (requiring a summons, not a warrant, "upon the request of the prosecuting attorney, or when issuance of a summons appears reasonably calculated to ensure the defendant's appearance."); Utah R. Crim. P. 6(c) (requiring a summons unless defendant will not appear or "there is substantial danger of a breach of the peace, injury to persons or property, or danger to the community"); Wis. Stat. Ann. § 968.04(1), (2)(b) (West) (requiring a summons for certain misdemeanors "unless the judge believes that the defendant will not appear").

expensive to clean up, were not deterred by a citation. 28 F.4th 54, 59-60 (9th Cir. 2022). But rather than reacting by arresting them on the spot, the detective investigated and gave all the evidence, including the content of the speech—which helped with the evaluation of First Amendment concerns—to a magistrate for review and issuance of arrest warrants. *Id.* at 62-63. Yet the detective still had to defend his motives in a civil retaliatory arrest suit. *Id.* This cannot be the right result. The *Nieves* exception applies only to warrantless arrests.

B. Even if the *Nieves* exception could apply to Gonzalez's arrest under warrant for record-tampering, her evidence would not satisfy it. Gonzalez's evidence did not show that she "was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Nieves*, 139 S. Ct. at 1727. *Nieves* mandated this comparison to provide essential objective evidence linking the purported retaliation to the arrest—to show that the "non-retaliatory grounds," the alleged crime, were "in fact insufficient to provoke the adverse consequences," the arrest. *Id.* at 1722 (quoting *Hartman,* 547 U.S. at 256. Only by identifying similarly situated individuals who were not arrested does a plaintiff demonstrate that retaliation caused her arrest. The lack of this evidence dooms Gonzalez's claim.

Unlike a person arrested for jaywalking—who could likely point to many other violators left alone by police—Gonzalez has pointed to no one else who intentionally destroyed, removed, or concealed a government document, yet was not arrested. *See* Tex.

Penal Code. Ann. 37.10(c)(1) (West 2018). Gonzalez's evidence of other people who were prosecuted for other conduct, mostly instances of falsifying government documents, does not help address whether her arrest for her conduct was caused by retaliatory animus. *See* Pet. App. 117a. Only evidence of others not arrested for similar conduct could inform this inquiry. Gonzalez's evidence may suggest that arrests for conduct like hers are rare, but that does not suggest retaliation any more than it suggests that the conduct itself—or getting caught for it—is rare.

Nothing else that Gonzalez points to is evidence of differential treatment of similarly situated individuals, which is essential to satisfying the *Nieves* exception. Plus, the detective's description of her protected activities in the arrest affidavit, as discussed above, was legitimately included to support her alleged motive for the record tampering, as well as to allow the magistrate to evaluate any First Amendment concerns with issuing the arrest warrant. J.A. 52.

Nieves's comparative evidence standard is not impossible for plaintiffs to meet. In *Ballentine v. Tucker*, the activists chalking anti-police messages satisfied it. 28 F.4th 54, 62 (9th Cir. 2022). They presented evidence that they were arrested while others who chalked without engaging in anti-police speech were not—they simply pointed to other individuals chalking at the same time in the same location who were not arrested. *Id.* If a plaintiff's arrest is truly based on commonplace conduct that rarely leads to arrest—the kind of offense that

motivated the Court to create the *Nieves* exception—such examples should not be hard to come by.

The Court should keep the *Nieves* exception narrow. It was carefully crafted to allow claims to advance for a specific subset of cases where the existence of probable cause does not sufficiently explain an arrest, leaving retaliation a likely but-for cause. So contained, the *Nieves* exception does not undermine the useful general probable-cause bar. If expanded to cover situations like Gonzalez's—warrant-supported arrests for serious offenses absent evidence of comparators who were not arrested—the exception would swallow the rule.

IV. Other mechanisms and remedies exist to deter retaliatory arrests or correct abuses of the arrest power.

Section 1983 claims for damages against individual state and municipality defendants are not the only check on the risk that the arrest power will be used to suppress speech.[8] Even when probable cause bars the occasional meritorious retaliatory arrest claim, other remedies, including disciplinary procedures against individual officers, may correct or prevent the harm. And states have statutes and court rules that limit warrantless arrests, curbing officers'

[8] Federal officers in their individual capacity are not subject to First Amendment claims of retaliatory arrest. *Egbert v. Boule*, 596 U.S. 482, 498-501 (2022) (declining to imply this constitutional cause of action under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)). For federal officers, the Court has left it to Congress to create a damages remedy should that be necessary to curb arrests in retaliation for the exercise of free speech. *Id.*

discretion to make arrests, including for retaliatory reasons.

A. Litigation. A plaintiff may bring a § 1983 claim against a municipality for an official policy motivated by retaliation under *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945 (2018), just like Gonzalez did here, Pet. App. 73a-78a, 89a-96a; Pet Br. 16 n.3. And a plaintiff may seek injunctive relief under § 1983 against state officials who act unconstitutionally, even if damages are unavailable. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 & n.10 (1989). The United States points out other criminal and civil remedies, including the federal government's enforcement mechanisms to remedy patterns or practices of retaliatory arrests, and federal and state prosecutions of officers who willfully violate individuals' constitutional rights. U.S. Amicus Br. 13.

B. Disciplinary proceedings. Regardless of the potential for civil liability, officers who arrest or take other actions for improper reasons are subject to disciplinary action. Both internal and external administrative processes respond to complaints against officers who violate the law or local policies. This provides a valuable check against retaliatory arrests.

Law enforcement agencies receive and resolve citizen complaints as an important part of their law enforcement functions. Nationwide, police departments recognize that holding officers accountable for their actions is essential to maintaining the public legitimacy that police need to be effective. Int'l Ass'n of Chiefs of Police, *Building Trust Between the Police and the Citizens They Serve*

5-7 (2009), https://portal.cops.usdoj.gov/resource center/RIC/Publications/cops-w0724-pub.pdf; *see also* Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help Police Fight Crime in Their Communities?,* 6 Ohio St. J. Crim. L. 231, 233-39 (2008) (citing procedural fairness as a source of police legitimacy, and legitimacy as a major factor in the success of law enforcement). Citizen complaints assist a police department not only in identifying officers who should be monitored more closely, disciplined, or removed for misconduct, but also by revealing areas where better training or enhanced supervision is needed.

Citizen review boards, or other types of external review, are another mechanism to address citizen complaints. In cities and counties across the country, "civilian oversight has been increasingly institutionalized as a regular feature of policing," with more than 140 civilian oversight agencies, including in almost all large cities. Joseph De Angelis et al., *Civilian Oversight of Law Enforcement: Assessing the Evidence* 49 (2016), https://tinyurl.com/y94aelhc. Localities have a wide range of civilian oversight—from entities with limited authority to review and make recommendations to boards that have investigative and subpoena powers—and each community may tailor its civilian oversight to meet its needs. *Id.* at 22-32; *The President's Task Force on 21st Century Policing Implementation Guide: Moving from Recommendations to Action* 7 (2015), https:// portal.cops.usdoj.gov/resourcecenter/content.ashx/cops-p341-pub.pdf.

Alaska, for example, has a state certification council, composed of law enforcement officials and members of the public, that may revoke a certificate required for employment as an officer if evidence demonstrates that the officer is "not of good moral character," which could include violating a citizen's constitutional rights. Alaska Stat. §§ 18.65.150, 18.65.240, 18.65.242(a), 18.65.245(2); Alaska Admin Code tit. 13, § 85.900(7); *see Alaska Police Standards Council v. Parcell*, 348 P.3d 882 (Alaska 2015) (affirming council's decision to revoke certificate of officer who abused alcohol, made sexually offensive remarks, and lied during the subsequent investigation).

Another example is the District of Columbia's Office of Police Complaints, which receives and investigates complaints from citizens. D.C. Code § 5-1107. The office is independent from the police department, overseen by a publicly appointed board. *Id.* at §§ 5-1104, 5-1105. If the office sustains a complaint, it refers the matter to the police department to recommend and the police chief to decide on discipline. *Id.* § 5-1112. The police chief generally may not reject the office's merits determination. *Id.* § 5-1112(e), (g).

C. Limitations on warrantless arrests. To ensure that the arrest power is used appropriately, states may also limit officers' authority to conduct warrantless arrests. "[I]t is in the interest of the police to limit petty-offense arrests, which carry costs that are simply too great to incur without good reason." *Atwater v. City of Lago Vista*, 532 U.S. 318, 352 (2001).

States generally preclude arrest without a warrant for misdemeanors committed outside an officer's presence. *See Atwater*, 532 U.S. at 355-60 (listing statutes).

Many states have also chosen "more restrictive safeguards through statutes limiting warrantless arrest for minor offenses." *Id.* at 352. Such safeguards include providing for release on a citation or summons, with a requirement to appear later to answer the charge, in lieu of a full custodial arrest. Nat'l Conference of State Legislatures, *Citation in Lieu of Arrest* (updated March 18, 2019), https://tinyurl.com/yd9wsf9d. By statute or court rule, all states provide for citation release for misdemeanor or petty offenses, and occasionally even felonies. *Id.* (providing summary chart of state laws). And twenty-four states have a presumption of issuing citations—rather than making an arrest—for certain crimes or under certain circumstances. *Id*. For example, an Alaska statute usually requires officers to issue citations, rather than arrest, for minor infractions or violations. Alaska Stat. § 12.25.180(b). A Virginia statute directs officers to issue a summons to appear for most misdemeanors that are not punishable by a jail sentence, rather than arresting the person. Va. Code § 19.2-74. These and other similar state statutes typically have exceptions permitting a custodial arrest when there are reasonable grounds to believe that the person will not appear or poses a danger to persons or property, or the person has outstanding warrants or requires physical or behavioral health care, such as needing to become sober. *Citation in Lieu of Arrest, supra.*

* * *

Thus, § 1983 is not the only answer. Other processes, including disciplinary proceedings to investigate complaints of retaliatory arrest, and limitations on the arrest power make a damages remedy for retaliatory arrests unnecessary for deterrence and correction.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

TREG TAYLOR
Attorney General of Alaska

KIMBERLY D. RODGERS
Assistant Attorney General
Counsel of Record
ALASKA DEPARTMENT OF LAW
1031 West Fourth Avenue
Anchorage, Alaska 99501
(907) 269-6612
kimber.rodgers@alaska.gov

Counsel for Amici Curiae