No. 22-1025

In the
Supreme Court of the United States

SYLVIA GONZALEZ,

Petitioner,

v.

EDWARD TREVINO, II, et al.,

Respondents.

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

BRIEF OF *AMICI CURIAE* LOCAL GOVERNMENT LEGAL CENTER, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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STATEMENTS OF INTEREST[1]

The Local Government Legal Center ("LGLC") is a coalition of national local government organizations formed in 2023 to educate local governments regarding the Supreme Court and its impact on local governments and local officials and to advocate for local government positions at the Supreme Court in appropriate cases. The National Association of Counties, the National League of Cities, and the International Municipal Lawyers Association are the founding members of the LGLC.

The National Association of Counties ("NACo") is the only national association that represents county governments in the United States. Founded in 1935, NACo serves as an advocate for the nation's 3,069 county governments and works to ensure that counties have the resources, skills, and support they need to serve and lead their communities.

The National League of Cities ("NLC") is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with forty-nine state municipal leagues, NLC is the voice of over 19,000 American cities, towns, and villages, representing collectively more than 218 million Americans. NLC works to strengthen local leadership, influence federal policy, and drive innovative solutions.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

The International Municipal Lawyers Association ("IMLA") is a non-profit organization of more than 2,500 members dedicated to advancing the interests and education of local government lawyers. It is the only national organization devoted exclusively to local government and law. For nearly 90 years, it has been an educator and advocate for its members, which include cities, towns, villages, townships, counties, water and sewer authorities, transit authorities, attorneys focused on local government law, and others. Its mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

Amici curiae are national organizations representing a majority of America's local governments. Members of these organizations also employ local law enforcement officers who keep the peace and protect public order and safety. Local governments and local law enforcement officers are frequently faced with claims of retaliatory arrest, the vast majority of which are meritless. *Amici* respectfully submit this brief to emphasize the substantial burdens that adopting petitioner's position on either question presented would place on local governments, and the importance for local governments of affirming the decision below.

SUMMARY OF THE ARGUMENT

This Court's pathmarking decision in *Nieves v. Bartlett*, 139 S.Ct. 1715 (2019), laid down a

straightforward rule for retaliatory arrest claims under 42 U.S.C. §1983: Plaintiffs alleging that they were arrested in retaliation for protected speech are generally required to "plead and prove the absence of probable cause for the arrest." *Nieves*, 139 S.Ct. at 1723-24. *Nieves* also identified a single "narrow qualification" to that rule: A plaintiff who has been arrested on probable cause can nevertheless claim retaliation if he can plead and prove "objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Id.* at 1727. In those narrow circumstances, the Court held, a plaintiff can move forward with a retaliatory arrest claim under §1983 even though the arresting officer had probable cause to believe that the plaintiff committed a crime—by showing that officers "typically exercise their discretion" not to make an arrest under comparable circumstances. *Id.*

Those careful limitations on retaliatory arrest claims are critical for local governments and local law enforcement. Police officers in the United States conduct tens of thousands of arrests *every day*, and few if any arrestees are willing to admit that their arrests were primarily based on their suspicious activity rather than on retaliation or some other impermissible motive. Without the strict limits that *Nieves* recognized, local governments will face a torrent of dubious retaliatory arrest suits that will be difficult to dismiss at the pleading stage, and that will accordingly threaten local governments with expansive and broad-ranging discovery and spiraling litigation costs. That will not only impose distracting burdens on local officials and costly legal

expenditures on strained local budgets, but also undermine public safety, discouraging law enforcement personnel from making arrests even on probable cause and exacerbating the difficulties that local governments face in finding qualified officers.

Petitioner's attempts to undo *Nieves* are meritless, and would cause serious difficulties for local governments. First, petitioner tries to expand the *Nieves* exception to allow retaliatory arrest claims whenever a plaintiff can allege any kind of "objective evidence" that the arrest was retaliatory—even when the existence of probable cause for that arrest is undisputed. That not only contravenes the plain language of *Nieves*, but would allow the *Nieves* exception to swallow the rule entirely, as practically any arrestee could allege some kind of purported "objective evidence" to support a claim of retaliation—meaning that practically no retaliatory arrest suit could be dismissed on the pleadings, and local governments would routinely be forced to bear the expensive and distracting burdens of discovery in meritless retaliatory arrest cases.

Second, petitioner asks this Court to limit the general rule of *Nieves*—that plaintiffs bringing retaliatory arrest claims under §1983 typically must plead and prove the absence of probable cause—to "on-the-spot arrests." But nothing in *Nieves* or in any of this Court's other cases is so limited, and petitioner's proposed distinction would create difficult and unnecessary line-drawing problems. Still worse, that approach would create truly perverse incentives for law enforcement, encouraging officers to make immediate arrests rather than (as

here) first obtaining a warrant from a neutral magistrate.

Petitioner's attempts to upend *Nieves* are especially unnecessary because ample alternative mechanisms exist to address allegations of retaliatory arrest. State law is fully capable of providing adequate relief for retaliatory arrest claims, including state causes of action to which *Nieves* would not apply. And local governments have already taken significant measures to ensure that allegations of improper police conduct, including claims of retaliatory arrest, will be investigated and addressed. In extreme cases, moreover, federal law also provides other avenues to ensure sufficient protection against retaliatory arrests, including criminal penalties and federal civil enforcement actions. Taken together, those alternative measures provide more than adequate assurance that genuine allegations of retaliatory arrest will be appropriately addressed, and refute any purported need for this Court to revise *Nieves* to afford additional protection for such claims.

In short, the narrow limitations on retaliatory arrest claims recognized by *Nieves* are essential to protect local governments and local law enforcement against the substantial burdens that a flood of meritless retaliatory arrest suits would otherwise impose. This Court should reject petitioner's attempts to eviscerate those limitations.

ARGUMENT

I. The Narrow And Objective Limitations That *Nieves* Recognized For Retaliatory Arrest Claims Under §1983 Are Critical For Local Governments.

This Court established a clear rule in *Nieves*: "As a general matter," a "plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest." 139 S.Ct. at 1723-24. That rule, the Court held, is subject to only a single "narrow qualification": a plaintiff who has been arrested based on probable cause may nevertheless seek damages under §1983 for retaliatory arrest if he "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.* at 1727. By requiring a plaintiff to present specific evidence that he was arrested when otherwise similarly situated individuals were not, the Court emphasized, this narrow exception "provides an objective inquiry that avoids the significant problems that would arise from reviewing police conduct under a purely subjective standard." *Id.*[2]

That careful balance—a general rule that retaliatory arrest claims require proving the absence of probable cause, tempered by a limited exception for the rare case in which a plaintiff arrested on

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[2] This Court has also held that a plaintiff need not plead and prove the absence of probable cause if he sues a local government for a purported "official municipal policy" of retaliation leading to the allegedly retaliatory arrest. *Lozman v. City of Riviera Beach*, 138 S.Ct. 1945, 1954 (2018). That separate exception is not at issue here.

probable cause can show objective evidence that police officers "typically exercise their discretion not to" arrest others engaged in the same conduct, *id.*—is critical for local governments. As *Nieves* recognized, police officers in the United States "conduct approximately 29,000 arrests every day," or about one every *three seconds*. *Id.* at 1725; *see* FBI, *Crime in the United States 2019: Persons Arrested*, https://shorturl.at/aiU29 (last visited Jan. 31, 2024) (reporting over 10 million arrests in 2019). Without the strict limitations that *Nieves* recognized, courts "will be flooded with dubious retaliatory arrest suits," *Lozman*, 138 S.Ct. at 1953, as plaintiffs arrested on probable cause will routinely claim that they were detained not for their criminal activity but for some other retaliatory reason. By cabining retaliatory arrest suits to only those cases where a plaintiff can show either the absence of probable cause or that others who engaged in the same conduct were not arrested, *Nieves* sets clear and objective boundaries that protect local governments against the deluge of "doubtful retaliatory arrest suits" they would otherwise face. 139 S.Ct. at 1725.

Those boundaries are essential for local governments, their elected officials, the law enforcement officers they employ, and the public they represent. Like all lawsuits brought under §1983, retaliatory arrest suits can impose significant burdens on local governments and on the public at large, saddling local governments with tremendous "expenses of litigation" and the "diversion of official energy from pressing public issues." *Crawford-El v. Britton*, 523 U.S. 574, 590 & n.12 (1998). And because retaliatory motive is "easy to allege and hard

to disprove," *id.* at 584-85, allowing retaliatory arrest claims to proceed without the careful limitations recognized by *Nieves* "would threaten to set off 'broad-ranging discovery' in which 'there often is no clear end to the relevant evidence,'" *Nieves*, 139 S.Ct. at 1725 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982). The "resulting financial loss" from the costs of litigation and distraction of local officials is "borne by all the taxpayers" of the locality, who are themselves entirely innocent of any even arguable wrongdoing. *Owen v. City of Independence*, 445 U.S. 622, 655 (1980). And those costs are all the more severe in an age of strained local government budgets, when additional litigation expenses will either drive up ballooning deficits or force cuts to key services. *See, e.g.*, Daniel Vock, *Cities Stare Down Huge Budget Gaps*, Route Fifty (May 9, 2023), https://shorturl.at/diPV6 (noting that New York City anticipates a $2.9 billion budget shortfall, Oakland has the "largest general fund deficit in the city's history," and Milwaukee faces "cuts to police, firefighters and libraries").

The need for the limitations adopted by *Nieves* is underscored by the structural factors that tend to encourage plaintiffs to file meritless retaliatory arrest suits. Plaintiffs with perceived grievances against their local governments—including plaintiffs who believe they were unfairly arrested—often feel strong personal incentives to bring suit, and may often be encouraged by plaintiffs' lawyers hoping to recover attorneys' fees under §1988 for successful claims. *See* Philip Matthew Stinson Sr. & Steven L. Brewer Jr., *Federal Civil Rights Litigation Pursuant to 42 U.S.C. §1983 as a Correlate of Police Crime*, 30

Crim. Just. Pol'y Rev. 223, 227 (2019) (attributing the "explo[sion]" of §1983 litigation in cases alleging police misconduct in part to the availability of attorneys' fees under §1988); Thomas A. Eaton & Michael Wells, *Attorney's Fees*, *Nominal Damages, and Section 1983 Litigation*, 24 Wm. & Mary Bill Rts. J. 829, 837 (2016) (recognizing the "systemic value [of fees under §1988] in encouraging litigation"). And when cash-strapped local governments are faced with the exorbitant costs of actually defending against a §1983 suit—including extensive litigation expenses, steep increases in insurance premiums, potential multi-million-dollar judgments, and the risk of substantial fee awards—they will often find themselves forced to settle even meritless §1983 actions. *Cf.* Larry K. Gaines & Victor E. Kappeler, *Policing in America* 346-47 (9th ed. 2022) (noting that "more than half" of all cases alleging police misconduct "are settled out of court"); Stinson & Brewer, *supra*, at 226. That in turn "can lead to the filing of frivolous civil suits" intended simply to extract further settlements from the beleaguered town, creating a vicious cycle in which each new settlement only encourages further suits. Gaines & Kappeler, *supra*, at 347.

The boundaries drawn by *Nieves* not only protect local governments against the costs imposed by meritless retaliatory arrest suits, but also serve the basic goal of ensuring public safety. As *Nieves* recognized, allowing plaintiffs to sue for retaliatory arrests outside the narrow circumstances *Nieves* permitted would mean that "policing certain events like an unruly protest would pose overwhelming litigation risks" for individual officers, as "[a]ny

inartful turn of phrase or perceived slight during a legitimate arrest could land an officer in years of litigation." 139 S.Ct. at 1725; *see also* John Breads, *When Police Officers Are Sued*, Local Government Insurance Trust, at 1, https://shorturl.at/ptGS9 (recognizing that suits against "police officers, … their supervisors, agencies, and local governments" can "take years to resolve," "leave officers embittered," and "damage careers"). Those risks will inevitably "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties," *Nieves*, 139 S.Ct. at 1725 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Learned Hand, C.J.)), and encourage officers to "minimize their communication during arrests to avoid having their words scrutinized for hints of improper motive—a result that would leave everyone worse off," *id.*

Allowing retaliatory arrest suits outside the narrow circumstances that *Nieves* permitted would also exacerbate the difficulties that local governments face in seeking to hire and retain qualified law enforcement officers. The prospect of enduring protracted litigation for actions taken in the line of duty only makes it harder for local police departments to fill their ranks—in the midst of a "recruitment crisis," when nearly 80% of local law enforcement agencies across the country already have difficulty recruiting qualified candidates and 25% have been forced to "reduce or eliminate certain agency services, units, or positions" as a result. *A Crisis for Law Enforcement*, International Association of Chiefs of Police, at 3, https://shorturl.at/gtBL2.

Put simply, the clear and objective requirements that *Nieves* places on retaliatory arrest suits are essential to protect local governments against meritless §1983 litigation and to ensure that local law enforcement officers will continue to diligently protect public safety. By requiring plaintiffs claiming retaliatory arrest to plead and prove either that they were arrested without probable cause or that officers have chosen not to arrest others who engaged in comparable conduct, *Nieves* sets a straightforward standard that allows courts to dismiss baseless retaliatory arrest claims early on, without forcing local officials to bear the cost and effort of extensive discovery and subsequent litigation. Any attempt to weaken that standard and expand the circumstances under which plaintiffs are permitted to bring retaliatory arrest claims, by contrast, will only open the floodgates to meritless litigation that will impose substantial costs on local governments, their officials and law enforcement officers, and ultimately the public at large.

II. This Court Should Not Upset The Careful Balance That *Nieves* Recognized.

Petitioner attempts to overturn the delicate balance recognized in *Nieves* in two separate ways. In her first question presented (which she relegates to the second half of her brief), petitioner seeks to dramatically expand the *Nieves* exception, arguing that a person arrested on probable cause should be allowed to bring a retaliatory arrest claim not only by showing "objective evidence that he 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, but by showing *any* "objective evidence" that the arrest was retaliatory. Petr.Br.34-44. In her second question presented, petitioner takes an entirely different tack; she argues that *Nieves* should apply only to "on-the-spot arrests," and that the existence of probable cause should not pose *any* additional barrier to a retaliatory arrest claim outside that context. Petr.Br.21-34. Neither argument is tenable, and accepting either one would pose serious problems for local governments.

A. Petitioner's Dramatic Expansion of the *Nieves* Exception Would Seriously Interfere With Local Government Operations.

Petitioner's first question presented attempts to expand the *Nieves* exception to allow retaliatory arrest claims whenever a plaintiff alleges any kind of "objective evidence" that the arrest was retaliatory—even when it is undisputed that there was probable cause to believe that the plaintiff committed a crime. That attempt runs contrary to both the plain language of *Nieves* and the urgent needs of local government and local law enforcement.

Nieves could not be clearer: the existence of probable cause "should generally defeat a retaliatory arrest claim," and the only "narrow qualification" to that rule is for "circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so." 139 S.Ct. at 1727. In order to fall within that narrow category, *Nieves* explained, a plaintiff must present "objective evidence that he was arrested when otherwise

similarly situated individuals not engaged in the same sort of protected speech had not been." *Id.* That carefully limited exception ensures that plaintiffs arrested on probable cause to believe that they committed a crime are not free to sue their arresting officers (or other local government officials) just by claiming that the arrest was retaliatory—an accusation that is "easy to allege and hard to disprove," *id.* at 1725 (quoting *Crawford-El*, 523 U.S. at 585. Instead, they must show that their conduct is not typically the basis for a criminal arrest, by showing that officers do not generally arrest others whom they observe engaging in similar activity. *Id.* at 1727. Absent that showing, the existence of probable cause is sufficient to bar a retaliatory arrest claim. *Id.* at 1725, 1727.

Petitioner nevertheless argues for a much broader exception, claiming that *any* kind of "objective evidence" of retaliation should be sufficient to allow a retaliatory arrest claim to move forward even when there was probable cause to believe the plaintiff committed a crime. According to petitioner, for instance, a plaintiff arrested on probable cause should still be permitted to bring a retaliatory arrest claim if he can point to "non-statistical evidence" such as "a record of previous behavior by the defendant," "departures from the normal procedural sequence," or "official transcripts," or "statistical evidence" such as "evidence that the underlying statute had never been used under analogous circumstances," to suggest that the arrest was motivated by retaliation rather than by the plaintiff's criminal activity. Petr.Br.39.

As that non-exhaustive list makes clear, petitioner's expansive reading of the *Nieves* exception would swallow the rule entirely, effectively ensuring that *any* plaintiff will be free to bring a retaliatory arrest claim under §1983 even when his arrest was indisputably based on probable cause. It is hard to imagine a plaintiff who could not find something in the arresting officer's "record of previous behavior," or some kind of procedural irregularity, or some stray remark in an "official transcript[]" to suggest a retaliatory motive for his arrest. Petr.Br.39; *cf. City of Chicago v. Morales*, 527 U.S. 41, 62 (1999) (recognizing that "all police officers must use some discretion in deciding when and where to enforce city ordinances"); *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 901 (9th Cir. 2008) (recognizing that "[t]here is almost always a weak inference of retaliation whenever a plaintiff and a defendant have had previous negative interactions"). If all else fails, the plaintiff could always claim that some unique fact in the history of his arrest provided "evidence that the underlying statute had never been used under analogous circumstances," Petr.Br.39, and so showed that the decision to arrest him was driven by purported retaliation rather than the undisputed existence of probable cause to believe that he had committed a crime. And because petitioner's examples of possible "objective evidence" of retaliation are non-exhaustive, that is only a small sample of the kinds of creative theories that plaintiffs might rely on to evade *Nieves* and bring retaliatory arrest claims even when they admit that they were arrested on probable cause.

To be sure, that is not to suggest that those kinds of imaginative retaliatory arrest claims would ultimately prevail at trial (much less that they *should* prevail). But by throwing open the door to any kind of "objective evidence" of retaliatory motive, Petr.Br.34, rather than the narrowly limited comparative evidence that *Nieves* allowed, petitioner's approach would reintroduce all the same "significant problems" that *Nieves* sought to avoid. 139 S.Ct. at 1727. By allowing plaintiffs to sue whenever they can advance any purported "objective evidence" of retaliation, Petr.Br.34, petitioner's approach would make it practically impossible for local governments and law enforcement to defeat retaliatory arrest claims at the pleading stage, and subject local governments once again to "'broad-ranging discovery' in which 'there often is no clear end to the relevant evidence.'" *Nieves*, 139 S.Ct. at 1725 (quoting *Harlow*, 457 U.S. at 817). Petitioner's approach to the *Nieves* exception would accordingly reintroduce all the same burdens on local governments and law enforcement that *Nieves* was designed to prevent, straining local government resources and undermining public safety in all the ways described above. *See supra* pp.7-10.

Petitioner claims that those harms are necessary because plaintiffs cannot easily present the kind of comparative evidence that *Nieves* required. Petr.Br.37-38. But the fact that it is difficult for a plaintiff who is arrested on probable cause to claim retaliatory arrest should hardly come as a surprise, and was hardly an unforeseen consequence when *Nieves* was decided. *See* 139 S.Ct. at 1723-24 (recognizing that "[a]s a general matter," plaintiffs

"pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest"); *id.* at 1727 (allowing only a "narrow qualification" to that rule). In any event, the advent of cellphone videos and the dramatic rise in bystander recordings of police make collecting relevant evidence far easier for plaintiffs today than it was in prior eras. *See* Brenna Darling, *A (Very) Unlikely Hero: How United States v. Armstrong Can Save Retaliatory Arrest Claims After Nieves v. Bartlett*, 87 U. Chi. L. Rev. 2221, 2225 (2020). The increasingly common practice of recording police interactions on video will directly reduce the difficulty of "identify[ing] arrests that never happened," Petr.Br.38 (quoting *Nieves*, 139 S.Ct. at 1740 (Sotomayor, J., dissenting)), making it far easier for retaliatory-arrest plaintiffs to point to other individuals who engaged in same conduct (but not the same speech) and were not arrested. *See, e.g.*, Ann Woolhandler et. al., *Bad Faith Prosecution*, 109 Va. L. Rev. 835, 883, n.82 (2023).

In sum, petitioner's approach seeks to turn the *Nieves* exception from a clear and administrable rule that protects local governments against the burdens of meritless litigation into an open invitation for plaintiffs who were arrested on probable cause to sue under §1983 whenever they can allege any purported "objective evidence" of retaliation. That approach has nothing to recommend it, and would wholly upset the careful balance that *Nieves* set. This Court should reject petitioner's attempt to dramatically lower the showing required for plaintiffs arrested on probable cause to sue for retaliatory arrest.

B. Petitioner's Novel Attempt to Limit *Nieves* to Split-Second Arrests Would Be Equally Disruptive.

Petitioner's second question presented seeks to limit the general rule recognized in *Nieves* that "[a] plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest," *Nieves*, 139 S.Ct. at 1724, by arguing that this general rule should be limited to "on-the-spot arrests," Petr.Br.21. Once again, petitioner's approach has no virtues and substantial vices. Nothing in *Nieves* or anywhere else in this Court's cases holds that the general no-probable-cause requirement for retaliatory arrest claims is limited to "on-the-spot arrests," and adopting that limitation would undermine local law enforcement operations and create bizarre and perverse incentives for local law enforcement officers.

As an initial matter, limiting the general rule of *Nieves* to "on-the-spot arrests" would only guarantee future litigation over what arrests qualify as "on-the-spot"—a problem exacerbated by the differing formulations (each with different implications) that petitioner uses to describe her standard. *See, e.g.*, Petr.Br.i ("split-second"); Petr.Br.21 ("on-the-spot"); Petr.Br.28 ("single event"). If an officer questions suspects at the scene for half an hour before eventually making an arrest, is that "on-the-spot" or "split-second" enough? What if the officer lets the suspect leave the scene, but then has a change of heart, quickly follows the suspect, and makes the arrest five minutes later and a block away? What if the officer consults with his colleagues or a

supervisor first, or makes a phone call first to obtain an emergency warrant? What if the police make no arrest and the case goes cold, but then an officer learns new information and makes the arrest at the first opportunity after that? The possible variations are endless, and petitioner provides neither a workable rule nor any sensible reason for distinguishing among them.

In any event, petitioner's approach would create truly perverse incentives for law enforcement. Adopting petitioner's rule would mean that an officer who takes the necessary time to investigate thoroughly, consult with his colleagues and superiors, and (as here) obtain a warrant would be *more* exposed to claims of retaliatory arrest than an officer who charges ahead and makes an immediate arrest without consulting with others or obtaining a warrant first. That encourages precisely the wrong approach, favoring the officer who arrests first and asks questions later rather than the officer who waits for an independent probable-cause assessment by a neutral magistrate. If anything, the fact that (as here) a neutral magistrate has found the existence of probable cause should weigh strongly *against* allowing a retaliatory-arrest claim to proceed; it certainly should not make that claim *easier* to plead.

Finally, petitioner's attempt to limit *Nieves* to "on-the-spot arrests" would again undermine public safety by discouraging local law enforcement officials from the diligent pursuit of their duties. *See supra* pp.9-10. If any arrest made after more than a few seconds of investigation will potentially expose any officials involved to a retaliatory arrest lawsuit, even

when that arrest is made with a warrant and on probable cause, it will inevitably tend to discourage local officials from doing their duty and seeking the arrest of potentially litigious wrongdoers. The protection provided by generally requiring a plaintiff to prove the absence of probable cause in order to bring a retaliatory arrest claim is thus just as essential to local governments when the arrest is made on a warrant after weeks of investigation as it is when the arrest is made on the spot. *See Nieves*, 139 S.Ct. at 1724-25.

III. The Limitations Recognized By *Nieves* Do Not Affect Other Avenues For Addressing Retaliatory Arrests.

Petitioner's attempts to upset the balance set in *Nieves* are particularly unwarranted because a claim under §1983 is far from the only possible avenue for addressing allegations of retaliatory arrest. In reality, a number of other mechanisms exist to investigate claims of retaliatory arrest, provide remedies for any retaliatory arrests that do occur, and prevent them from occurring in the future.

To begin with, state law is fully capable of providing adequate protections against retaliatory arrest regardless of any federal cause of action under §1983. All 50 state constitutions include provisions that protect the freedom of speech,[3] and nothing in

[3] *See* Ala. Const. art. 1, §4; Alaska Const. art. I, §5; Ariz. Const. art. 2, §6; Ark. Const. art. 2, §6; Cal. Const. art. 1, §2(a); Colo. Const. art. II, §10; Conn. Const. art. I, §4; Del. Const. art. I, §5; Fla. Const. art. I, §4; Ga. Const. art. I, §1, ¶5; Haw. Const. art. I, §4; Idaho Const. art. I, §9; Ill. Const. art. I, §4; Ind. Const. art. 1, §9; Iowa Const. art. I, §7; Kan. Const. Bill of Rights §11;

Nieves prevents any state from setting its own standards for a state-law statutory claim for retaliatory arrest. In fact, some states have already undertaken efforts to enact state statutory causes of action for plaintiffs claiming violations of their state constitutional rights, and have set their own legal standards for recovery under those causes of action. *See, e.g.*, Colo. Rev. Stat. §13-21-131; N.M. Stat. §41-4A-3 (2021); *see also* Alexander Reinert et al., *New Federalism and Civil Rights Enforcement*, 116 Nw. U. L. Rev. 737, 740-41 (2021). And, of course, states are free to impose criminal penalties on those who violate individuals' constitutional rights as well.[4] As those examples show, if a state believes that the cause of action provided by §1983 is insufficient to afford adequate relief for allegations of retaliatory

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Ky. Const. §8; La. Const. art. I, §7; Me. Const. art. I, §4; Md. Const. Declaration of Rights, art. 10; Mass. Const. Pt. 1, art. XXI; Mo. Const. art. I, §8; Mont. Const. art. II, §7; Neb. Const. art. I5; Nev. Const. art. 1, §9; N.H. Const. Pt. I, art. 22; N.J. Const. art. I, §6; N.M. Const. art. II, §17; N.Y. Const. art. I, §8; N.C. Const. art. I, §14; N.D. Const. art. I, §4; Ohio Const. art. I, §11; Okla. Const. §II-22; Or. Const. art. I, §8; Pa. Const. art. I, §7; R.I. Const. art. I, §21; S.C. Const. art. I, §2; S.D. Const. art. VI, §5; Tenn. Const. art. 1, §19; Tex. Const. art. I, §8; Utah Const. art. I, §15; Vt. Const. ch. I, art. 13; Va. Const. art. I, §12; Wash. Const. art. I, §5; W. Va. Const. art. III, §7; Wis. Const. art. I, §3; Wyo. Const. art. I, §20.

[4] *See, e.g.*, Ark. Code §5-52-107; Colo. Rev. Stat. §18-8-403; Del. Code tit. 11, §1211; 720 Ill. Comp. Stat. 5/33-3; Iowa Code §721.2(4); Ky. Rev. Stat. §§522.020, 522.030; Minn. Stat. §609.43; Mont. Code §45-7-401; Neb. Rev. Stat. §28-926; N.H. Rev. Stat. §643:1; N.J. Stat. §2C:30-2; N.Y. Penal Law §195.00; N.D. Cent. Code §12.1-14-05; 18 Pa. Cons. Stat. §5301; Tenn. Code §39-16-403; Tex. Penal Code §39.02; Utah Code §76-8-201; Wash. Rev. Code §9A.80.010.

arrest, it is free to provide additional protections under its own law by authorizing civil or criminal actions where *Nieves* will not control.

Local governments across the country have also taken significant measures to ensure that citizens have adequate opportunities to report improper police conduct, and to ensure thorough investigations of any such allegations. State and local law enforcement officers are required to comply with federal and state laws, local ordinances, and department rules and regulations, including prohibitions on retaliatory arrest. To ensure that officers will follow the law, police departments across the country have established detailed procedures for receiving and processing citizen complaints, and often dedicate entire departments to police oversight and accountability.

The City of Chicago, for example, has established the Civilian Office of Police Accountability ("COPA"), replacing the Independent Police Review Authority as the civilian oversight agency of the Chicago Police Department. COPA works alongside the Chicago Police Department's Bureau of Internal Affairs and investigates all complaints of improper arrest, among other forms of misconduct. Through that process, COPA seeks to identify and address patterns of police misconduct and makes policy recommendations to improve the Chicago Police Department, thereby reducing incidents of misconduct. COPA's website offers citizens multiple ways to file a complaint, explains the investigative process, and tracks individual investigations and outcomes. *See* Civilian

Office of Police Accountability, https://shorturl.at/fg127 (last visited Jan. 31, 2024).

The City of St. Louis's Civilian Oversight Board ("COB") operates in much the same way, "conducting independent, impartial, thorough and timely investigations" into allegations of police misconduct made against the St. Louis City Metropolitan Police Department officers. COB reviews, analyzes, investigates, and makes independent findings and recommendations on these complaints. Its website offers instructions (and a two-part video) on how to file a complaint, says what to expect during the process, and includes a link to the complaint form itself. *See File a Complaint Against a St Louis Metropolitan Police Officer*, Division of Civilian Oversight, https://shorturl.at/eqBC4 (last visited Dec. 19, 2023).

Similar entities also exist at the county level. The County of San Diego, for instance, established its Citizens' Law Enforcement Review Board more than three decades ago to conduct "impartial and independent investigations of citizen complaints" regarding county law enforcement officers. *Citizens' Law Enforcement Review Board*, San Diego County, https://shorturl.at/deghX (last visited Jan. 31, 2024). Its eleven volunteer community members, who are not affiliated with the county sheriff's department or probation department, have jurisdiction to investigate all allegations of police "misconduct," including any "alleged violation of state or federal law." *Id.* More broadly, some states also require police departments statewide to issue written procedures for citizens to follow for making a

complaint, making the process easier for citizens to complete. *See* Cal. Penal Code §832.5(a)(1) ("Each department or agency in this state that employs peace officers shall establish a procedure to investigate complaints by members of the public against the personnel of these departments or agencies, and shall make a written description of the procedure available to the public.").

Those procedures provide significant deterrence against improper police conduct. A complaint that is sustained following an investigation can mar the officer's record, require the officer to receive remedial training, or lead to reassignment, suspension, or even termination. Complaints also can lead to positive systemic changes in policing practices, as civilian oversight boards or departmental internal affairs units can track complaints, recognize problem officers or practices, observe trends in policing, and recommend appropriate changes at the policy-making level.

Finally, in extreme cases, the federal government itself can step in to ensure adequate protection against retaliatory arrests. Congress has made it a federal crime to willfully violate an individual's constitutional rights under color of law, including the right to be free from retaliatory arrests. *See* 18 U.S.C. §§241, 242. It has also authorized federal civil enforcement actions to remedy patterns or practices of civil rights violations, including retaliatory arrests. *See* 34 U.S.C. §12601; *see also, e.g.*, U.S. Dep't of Justice: Civil Rights Division, Investigation of the Ferguson Police Department (Mar. 4, 2015), *available at* https://shorturl.at/fsGQV.

All of those mechanisms provide further assurance that §1983 suits are far from the only avenue available to address allegations of retaliatory arrest, and refute any argument that maintaining the limits recognized by *Nieves* will somehow give local law enforcement free rein to conduct retaliatory arrests.

CONCLUSION

For the foregoing reasons, and for the reasons set forth by respondents, this Court should affirm the judgment below.

Respectfully submitted,

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