

CASE NO. 21-50276

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In the  
**United States Court of Appeals**  
for the **Fifth Circuit**

**SYLVIA GONZALEZ,**

*Plaintiff–Appellee,*

*v.*

**EDWARD TREVINO, II, Mayor of Castle Hills, sued in his individual capacity; JOHN SIEMENS, Chief of the Castle Hills Police Department, sued in his individual capacity; ALEXANDER WRIGHT, sued in his individual capacity,**

*Defendants–Appellants.*

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On Appeal from the United States District Court for the Western District of Texas, San Antonio Division, No.5:20-cv-01151, Honorable David Alan Ezra, Presiding

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**AMICUS CURIAE BRIEF OF FANE LOZMAN IN SUPPORT OF APPELLEE’S PETITION FOR REHEARING EN BANC**

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## **SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS**

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that the following persons have an interest in the outcome of this case. This statement is made to assist this Court in evaluating possible disqualification or recusal.

### **Plaintiff-Appellee Sylvia Gonzalez**

Represented by Anya Bidwell, Patrick Jaicomo, and William Aronin (Institute for Justice)

### **Defendants-Appellants Edward Trevino II, John Siemens, and Alexander Wright**

Represented by Scott M. Tschirhart and Lowell F. Denton (Denton Navarro Rocha Bernal & Zech P.C.)

### ***Amicus Curiae* Fane Lozman**

Represented by Cory R. Liu (Ashcroft Law Firm LLC) and Courtney Elgart (Sullivan & Triggs LLP)

### ***Amici Curiae* Roderick & Solange MacArthur Justice Center, American Civil Liberties Union, National Police Accountability Project, and ACLU of Texas**

Represented by Devi M. Rao (MacArthur Justice Center); Vera Eidelman, Esha Bhandari, and Brian Hauss (ACLU); Lauren Bonds (National Police Accountability Project); and Savannah Kumar, Brian Klosterboer, and Adriana Piñon (ACLU of Texas).

### ***Amicus Curiae* Constitutional Accountability Center**

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Dated: September 30, 2022

/s/ Cory R. Liu

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## INTEREST OF *AMICUS CURIAE*\*

*Amicus curiae* Fane Lozman was the petitioner who prevailed in *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), the interpretation of which is central to the disagreement between the Panel majority and dissent in this case.

After experiencing retaliation from the city council members of Riviera Beach for his protected First Amendment activities, Mr. Lozman filed a lawsuit under 42 U.S.C. § 1983. At great personal sacrifice, he helped establish the precedent that a plaintiff alleging a premeditated plan to make a retaliatory arrest is not required to negate the existence of probable cause to prevail. Under that precedent, a defendant's retaliatory arrest is not automatically insulated from judicial scrutiny merely because the defendant invoked pretextual grounds for the arrest. Mr. Lozman is concerned that the Panel majority misreads and fails to apply *Lozman*, undermining the First Amendment's guarantees of freedom of speech and the right to petition the government for a redress of grievances.

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\* No party's counsel authored any portion of this brief. No person other than *amicus* and his counsel contributed money to fund this brief. Appellants have consented to the filing of this brief. Appellees are opposed.

## ARGUMENT

The facts of this case are eerily similar to those of *Lozman v. City of Riviera Beach*, [138 S. Ct. 1945](#) (2018). In that case, city council members hatched a conspiracy to silence Fane Lozman from criticizing government officials by arresting him while he was speaking during the public comment period of a city council meeting. Lozman sued the City of Riviera Beach for unconstitutionally arresting him in retaliation for exercising his First Amendment rights. The Supreme Court held that Lozman did not have to negate the existence of probable cause to maintain his claim of retaliatory arrest, emphasizing that premeditated retaliatory arrests threaten the “right to petition,” “one of the most precious of the liberties safeguarded by the Bill of Rights.” *Lozman*, [138 S. Ct. at 1954](#) (quoting *BE & K Constr. Co. v. NLRB*, [536 U.S. 516, 524](#) (2002)).

In this case, Sylvia Gonzalez, a duly elected member of the city council of Castle Hills, collected signatures for a non-binding petition calling for the city manager to be replaced. The mayor, police chief, and a private lawyer devised a conspiracy to have her arrested and force her to spend a night in jail based on the pretext that she allegedly stole the

very petition she helped to organize in the first place. Despite the clear similarities between this case and *Lozman*, the Panel majority held that if Gonzalez did not dispute probable cause, then she could not establish a claim of retaliatory arrest. The Panel majority distinguished *Lozman* on the ground that it involved a claim against a municipality, stating: “*Lozman*’s holding was clearly limited to *Monell* claims.” Op.10.

But *Lozman* contained no such limitation. In deciding *Lozman*, the Supreme Court considered the tension between the principle that arrests are permitted when supported by probable cause and the principle that the “First Amendment prohibits government officials from retaliating against individuals for engaging in protected speech.” 138 S. Ct. at 1948–49. Bound up in resolving this tension were thorny issues of causation. These issues of causation, and not the difference between an individual-liability suit and a *Monell* claim, constituted the focus of the parties’ briefs, the oral argument, and ultimately the Court’s opinion in *Lozman*.

A plaintiff bringing a claim for a “constitutional tort” under 42 U.S.C. § 1983 must establish “causation.” *Hartman v. Moore*, 547 U.S. 250, 259–60 (2006). In *Hartman*, the Court held that in a retaliatory-



prosecution claim, the plaintiff had to prove the absence of probable cause because of the inherently attenuated causation between the defendant official's animus and the injury alleged: the decision to prosecute. *Lozman*, 138 S. Ct. at 1952–53. The prosecutor is the ultimate decisionmaker as to whether to prosecute but is absolutely immune from suit, so the defendant in such a case is some other official charged with causing the prosecution based on retaliatory animus. *Id.* Requiring the absence of probable cause ensures that the defendant official's retaliatory animus, and not simply the presence of probable cause, actually caused the prosecution.

The *Lozman* Court expressed similar concerns about causation in run-of-the-mill claims of retaliatory arrest involving the “split-second judgments” of officers because the content of speech might be a valid consideration in making arrest decisions. *Id.* at 1953. In such cases involving “split-second judgments,” there are concerns about whether retaliatory animus actually caused the arrest. *Id.* This concern was later reflected in the Court's subsequent decision in *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019). In *Nieves*, the Court distinguished premediated plans to violate the First Amendment like the one in *Lozman* from the

“typical retaliatory arrest claim” in which probable cause is “generally” sufficient to defeat the claim. 139 S. Ct. at 1722, 1726. Nothing in *Nieves* supports the Panel majority’s limitation of *Lozman* to claims against municipalities. Rather, *Nieves* focused again on “the problem of causation.” *Id.* at 1723.

With this context in mind, the *Lozman* Court’s observation that the case involved a municipal-liability claim in which city council members “formed a premeditated plan to intimidate him in retaliation” was not a limitation of the Court’s holding to claims against municipal defendants. *Lozman*, 138 S. Ct. at 1954. Rather, the Court was explaining that *Lozman*’s claim went well beyond challenging the simple fact of his arrest and involved a premeditated plan to retaliate against a citizen for exercising his First Amendment rights. *Id.*

The Panel majority ignores the nuanced discussions of causation in *Lozman* and *Nieves* and instead makes the categorical pronouncement that *Lozman* is limited to only *Monell* claims, *i.e.*, claims against municipalities. Op.10. That holding creates a constitutional anomaly in which the substantive scope of the First Amendment’s protections differs depending on whether the defendant is

a city or an individual officer. Nothing in the First Amendment’s text or the Supreme Court’s opinions in *Lozman* or *Nieves* supports the Panel majority’s conclusion that the test for a First Amendment violation changes depending on the identity of the defendant. Indeed, the *Lozman* Court’s only discussion of an individual officer’s liability—its statement that the arresting officer likely was not liable because he “appears to have acted in good faith” and lacked other indicia of retaliatory motive, *Lozman*, [138 S. Ct. at 1954](#)—would have been an entirely superfluous and pointless observation if the existence of probable cause alone was dispositive of individual-capacity suits.

The more sensible and faithful reading of the Supreme Court’s precedents is that in cases involving a police officer’s on-the-spot, split-second decision to arrest someone (*Nieves*), the existence of probable cause is typically, though not always, sufficient to defeat the plaintiff’s claim of retaliation. In the “unusual circumstances” of a premeditated plan to retaliate against someone for exercising his or her right to petition the government (*Lozman*), the plaintiff need not negate the existence of probable cause because the pretextual invocation of

probable cause does not automatically immunize the defendant from liability.

This case presents one of the “unusual circumstances” of a premeditated plan of retaliation warranting the application of *Lozman*. Indeed, its facts are equally if not more disturbing than those of *Lozman*. Sylvia Gonzalez was a duly elected member of the city council of Castle Hills. In an effort to faithfully represent the voters who elected her, she organized a petition that garnered hundreds of signatures, which was presented to the city council for discussion. For her efforts to question the status quo and improve the lives of her constituents, Defendants had her arrested and jailed based on patently frivolous, pretextual grounds, hoping to eventually oust her from her seat on the city council. Defendants’ horrifying abuse of government power was an attack on representative democracy itself.

The “right to petition” is “one of the most precious of the liberties safeguarded by the Bill of Rights.” *Lozman*, 138 S. Ct. at 1954 (quoting *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524 (2002)). It is of “ancient significance” and traces back to Magna Carta, as Judge Oldham noted in dissent. Op.19. Because “the government itself orchestrate[d] the

retaliation” against Gonzalez, she has “little practical recourse” through petitioning her government and has “a compelling need for adequate avenues of redress” in the courts. *Lozman*, 138 S. Ct. at 1954. *Lozman* applies in this case, and the Panel majority erred in holding that Gonzalez was required to negate the existence of probable cause to prevail on her claim.

### CONCLUSION

The Court should grant the petition for rehearing en banc.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

On September 30, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Sophos Endpoint Protection and is free of viruses.

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## CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of FED. R. APP. P. 29(b)(4), because excluding the parts of the document exempted by FED. R. APP. P. 32(f), this document contains 1,434 words.

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