

Amicus Corner

Alaska's Spring Break Ends Up at the High Court

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This time last year, many of us (myself included) speculated that the 2017 Term could be Justice Kennedy's last before retiring. It turns out we were right, and he penned his last majority decision in June 2018 in *South Dakota v. Wayfair*. In the meantime, Judge Kavanaugh, a former Kennedy clerk, is poised to join the Supreme Court bench, possibly by the time the October 2018 Term starts.

Although the 2017 Term looked like it was going to be chock-full of blockbusters, many of the issues in the biggest cases were sidestepped, such as the issue of partisan gerrymandering in *Gill v. Whitford* and *Benisek v. Lamone* and the clash of anti-discrimination laws and the First Amendment in *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*. These issues are sure to make their way back to the Court at some point in the near future. In fact, the Justices have already decided they want a do-over on one of the cases they punted on last Term.

The issue in *Nieves v. Bartlett* is whether probable cause defeats a First Amendment retaliatory-arrest claim under 42 U.S.C. § 1983. This was precisely the issue presented in *Lozman v. City of Riviera Beach*. However, instead of deciding that issue, the Supreme Court held 8-1 in *Lozman* that under the particular facts of the case involving evidence that a City Council allegedly used its powers to intimidate him, *Lozman* could pursue his claim against the City for an "official municipal policy" of intimidation / retaliation under the First Amendment, even though probable cause existed for his arrest. The *Lozman* case was remanded to the Eleventh Circuit with instructions to apply *Mt. Healthy's* framework to his claim. Under *Mt. Healthy*, a plaintiff establishes speech-based retaliation by demonstrating that the defendants would not have taken the challenged action "but for" their retaliatory motive.

The *Lozman* decision is significant for local governments, but its holding is inapplicable to the torrent of cases involving a police officer's on-the-spot arrest in circumstances that implicate the First Amendment. The Court emphasized that this was a unique case and that there was "little risk of a flood of retaliatory arrest suits against high level policymakers" as a result of its ruling. That will not be the case, however, if the Court decides, when it hears *Nieves* this fall, that probable cause does not defeat a retaliatory arrest claim as a matter of law in most arrest cases.

Lozman actually wasn't the first time the Court had heard argument on this precise issue. The question was also presented in *Reichle v. Howards*, 566 U.S. 658 (2012), but the Court ultimately skipped over the First Amendment question in that case too and instead found in favor of the Secret Service agent on the basis of qualified immunity. Now we are hoping that the third time is the charm, and the Supreme Court will finally decide the issue (hopefully in the officers' favor).

Nieves involves an incident at the "Artic Man" festival, which is a multi-day event centered around high-speed ski and snowmobile races that attracts thousands of people to a remote portion of Alaska every year. Picture "spring break meets extreme skiing in negative ten degrees." To set the scene a bit more, here's Matt White with SB Nation:

> Arctic Man is a weeklong, booze and fossil-fueled Sledneck Revival bookended around the world's craziest ski race... Over the course of a week, something like 10,000 partiers and their snowmachines disgorge onto Camp Isabel's 300-acre pad to drink, grill, fight, drink and, at least while the sun is out, blast their sleds through the ear-deep powder in the surrounding hills one last time before it all melts away. Then on Friday morning, anyone not hopelessly hungover or already drunk by noon swarms up the valley south of camp to watch the damnedest ski race on earth.[1]

What could possibly go wrong, you ask?

Russell Bartlett was attending Arctic Man in 2014. Trooper Nieves encountered him at a large outdoor party where it appeared that minors were drinking, but Bartlett refused to converse with Nieves. Meanwhile, Trooper Weight spotted an underage attendee drinking alcohol and began to speak with the minor. Bartlett, who was intoxicated and weighs 240 lbs, then moved over to Trooper Weight and the minor. The video footage shows that all three individuals were standing very closely together exchanging words and that Bartlett's right hand was roughly at shoulder height and within inches of Trooper Weight.

Trooper Weight, who interpreted Bartlett's actions as hostile and aggressive, "created space for himself" by pushing Bartlett back. Trooper Nieves saw all this and ran over. The troopers subdued Bartlett and he was arrested for disorderly conduct and resisting arrest. Bartlett alleges that after the arrest, Trooper Nieves said: "bet you wish you would have talked to me now."

The prosecutor determined there was probable cause for the arrest, but dismissed the charges against Bartlett for budgetary reasons. Bartlett then brought suit under §1983 claiming excessive force, malicious prosecution, false imprisonment, and retaliatory arrest. The district court found in favor of the officers on all the charges on summary judgment, but the Ninth Circuit reversed on the retaliatory arrest charge.

The Circuit reiterated that within its jurisdiction, a plaintiff can prevail on a retaliatory arrest claim even if the officers

had probable cause to arrest. In this case, because Bartlett alleged that Nieves said: "bet you wish you would have talked to me now," a reasonable jury could have found that the arrest was in retaliation for his refusal to answer questions earlier in the evening and summary judgment was therefore inappropriate.

IMLA filed an amicus brief in the *Lozman* case and will file another one in *Nieves*. We believe a bright line rule is appropriate in this context or else police officers will be paralyzed in making arrests anytime someone exercises any First Amendment rights. It is not hard to think of examples of how challenging arrests would become for police officers if they have to worry about personal liability for First Amendment violations even where probable cause exists to arrest. Protesters who become violent and people at a political rally who violate the law could claim their arrests were in violation of their First Amendment rights. Even making an arrest at a bar fight (or the Arctic Man festival) could become problematic for police officers depending on what is said in the heat of the moment. It's not hard to imagine a situation getting out of hand at the festival in this case if the police officers had hesitated to make an arrest based on worries of personal liability under the First Amendment.

And then there is the example of how easy it would be to manufacture these claims that Chief Justice Roberts gave during the *Reichle* oral argument:

> So, what you have, under your theory, a person should put on his car a bumper sticker that says "I hate the police" and then every time they're pulled over, they will have – certainly a plausible case is you violated my First Amendment rights. It's not because I was going 60 miles an hour; it's because of my bumper sticker...And the police officer – at that point, he says, you know, I can't give a ticket to this guy without being hauled into court on personal liability because he's got a credible case that it was for First Amendment grounds... And then all of a sudden – I don't know why everybody doesn't have a bumper sticker.[2]

IMLA believes a police officer in these situations should not have to balance a potentially amorphous First Amendment test when that officer is making the determination of whether probable cause exists to make an arrest. Further as the *Nieves* case demonstrates, one bare allegation made by a plaintiff in this context is enough to defeat summary judgment, all but ensuring that these claims will always be tried by a jury. If the Court finds in favor of Bartlett in this case, virtually any arrestee will be able to manufacture a First Amendment retaliatory arrest claim.

Even though the Court in *Lozman* and *Reichle* skirted the issue presented in *Nieves,* we have some information to try to forecast the outcome in *Nieves* based on these decisions and how the oral arguments went. Although trying to count Supreme Court votes is always a challenging (and sometimes fruitless) endeavor, we can at the very least count on Justice Thomas' vote as he made it clear in his dissent in *Lozman* that he would have answered the question presented and concluded that the lack of probable cause is a necessary element to pursue a First Amendment retaliatory arrest claim. So, going into *Nieves,* local governments know we have at least one vote.

From there it becomes more of a guessing game. Based on the oral arguments in both cases, it seems likely that Chief Justice Roberts and Justice Alito would both likely agree with Justice Thomas. Each of them had concerns that there were not adequate protections in place to prevent law enforcement officers from being dragged into court on frivolous claims. One could surmise that Justice Gorsuch might agree as would perhaps Judge Kavanaugh, assuming he is confirmed in time to hear the case. Those guesses are based purely on inferences about the Justices' ideology and pro-law enforcement / qualified immunity decisions they have authored.[3]

During the *Lozman* oral argument, Justice Kennedy and Justice Breyer were both concerned about the impact of retaliatory arrest liability on law enforcement during protests or bar fights. Specifically, Justice Breyer stated during the *Lozman* oral argument:

> Of course, your case is quite different from what's worrying me and what's worrying me and I think Justice Kennedy perhaps, and that is imagine a serious riot situation. They exist. And in that riot situation, where the police have a problem because there's a sub-gang and the sub-gang is going around breaking windows and setting fire to things, they can't arrest everybody in the sub-gang. There are too many of them. Okay? So it's not going to be true that the Mt. Healthy 'it would have happened anyway,' works because it doesn't work... There are six members of the gang and four policemen with affidavits saying we could only arrest four people. Then we have seven more affidavits which say, I saw the look on that policeman's face as soon as we called him a pig. All right? And I am certain that he would never have arrested this person for – who after all was just lighting a match. He might have had a cigarette. And – and I'm certain he wouldn't have arrested him had it not been for the words that he heard. And the policeman had to make a split-second decision, and I don't know. Now that's a – that's the subset that he means, I think, by a bar. Okay? So is there some words in this opinion that would favor you hypothetically that would wall off that case from decision now?[4]

Based on the foregoing, it might seem Justice Breyer will be on the police officers' side. However, we cannot fully count on his vote (and Justice Kennedy will no longer be on the bench), because in *Reichel,* Justice Breyer seemed more concerned about the fact that police officers can easily manufacture probable cause to arrest for any number of things (like jaywalking or speeding) even if the real motivation was retaliatory animus. In fact, in *Reichel,* Justice Breyer joined Justice Ginsburg's concurrence, noting that in her view a "no-probable cause requirement would be inapplicable." *See Reichel,* 566 U.S. at 671 (Ginsburg, J. concurring). Said another way, Justices Ginsburg and Breyer believe that even where probable cause exists, a First Amendment retaliation claim is not necessarily precluded. In *Reichel,* Justice Ginsburg went on to say that that she nevertheless concurred in the judgment because "officers assigned to protect public officials must make singularly swift, on the spot, decisions whether the safety of the person they are guarding is in jeopardy." *Id.*

Based on his comments at oral argument and his concurrence in *Reichel,* it seems likely that Justice Breyer and perhaps some of the other more liberal Justices would like to find a middle ground. Where in "serious" situations

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> analyzing whether or not a constitutional violation had occurred, but solely on the finding that the right at issue was not "clearly established." If the law is not "clearly established," an officer's actions, the Court assumes, can only be reasonable. This approach has led to decisions like *Mullenix*, where the Court declined to address the question of whether a plaintiff's constitutional rights were violated, but decided only if the right was "clearly established."

He references with respect the standard originally expressed in *Hope v. Pelzer*, 536 U.S. 730 (2002), which called for defining "clearly established law" at a "high level of generality;" the key inquiry being whether officers are on "notice their conduct is lawful." In *Hope*, the Court overruled the Eleventh Circuit, finding that officers had fair warning that shackling a prisoner to a post for seven hours in a standing position with only two water breaks and no opportunity to use the facilities violated his constitutional rights. Butr the "high level of generality" standard was short-lived: in *Ashcroft v. al-Kidd*, Justice Scalia inserted the word "every" in the operative sentence, so that the new rule of law became that a right is clearly established only when "[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right." (emphasis added).

As Weinstein sees it, the failure to address whether an act is constitutional prevents the creation of "clearly established" law needed to guide law enforcement and courts on narrow issues not yet decided by the Supreme Court, as indicated in this cite from a Michigan Law Review article: "At a time in which it is vital for constitutional law to keep pace with changes in technology, social norms, and political practices, this trend toward granting immunity while failing to articulate constitutional rights will surely have far-reaching, negative repercussions. (Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity,* 113 Mich. L. Rev. 1219, 1250 (2015).

The Supreme Court's policy justifications for qualified immunity, says Weinstein, have evolved over time, but always in the background is the threat of financial cost to government officials. While individuals appear to be at risk, in reality, individual police officers are virtually always indemnified by governmental treasuries. If the immunity springs from a more generalized desire to avoid "unnecessary litigation," that too is suspect: Weinstein cites sources positing that qualified immunity actually may *increase* the costs and delays associated with Section 1983 litigation—he points to a report which found that although only 3.9% of 979 cases studied presented facts in which qualified immunity could be raised, the defense was in fact raised by defendants in more than 37% of these cases–and was sometimes raised multiple times, at the motion to dismiss stage, at summary judgment, and through interlocutory appeals.

He also cites empirical evidence refuting the theory that the time and expense of litigating qualified immunity cases is worthwhile because it protects defendants from discovery and trial:

> But in the five districts in my study, just 8.6% of qualified immunity motions brought by defendants in my docket dataset resulted in case dismissals. The remaining 91.4% of qualified immunity motions brought by defendants required the parties and judges to dedicate time and resources to briefing, arguing, and deciding the motions without shielding defendants from discovery and trial. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 60–61 (2017).

That study found that, even in cases when immunity was granted, it was most often done at summary judgment stage, failing to avoid litigation due to the extensive fact discovery required to litigate a motion for summary judgment.

This is an unacceptable situation for Weinstein. "The Supreme Court's recent emphasis on shielding public officials and federal and local law enforcement means many individuals who suffer a constitutional deprivation will have no redress; state governments are protected by sovereign immunity and municipalities are not liable under *Monell* unless individual liability can be first proven. See, e.g., *Cordero v. City of New York*, 282 F. Supp. 3d 549, 557 (E.D.N.Y. 2017). His solution? "Courts should, when reasonable, follow Saucier's guidance to first analyze whether a constitutional violation occurred, instead of skipping to whether the right at issue was "'clearly established.'"

Applying the law to the facts before him, Weinstein declined to find grounds for qualified immunity, allowing six of the seven counts to go to trial. That proceeding began on September 4, 2018, and will no doubt be followed with interest. ML

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(in *Lozman* Justice Kagan asked whether the rule should apply to "serious" crimes or felonies) there would be a rule that says probable cause bars a First Amendment retaliation claim; however in less serious cases, perhaps these Justices would allow the suit to go forward even if the officer had probable cause to arrest if there was evidence of retaliatory animus.

Based on all of this, the best case scenario is that there are five votes that would conclude that the probable cause precludes retaliatory arrest claims as a matter of law. However, if the Court is looking for a compromise, it may find in favor of the officers, but fashion a rule that does not totally preclude these cases from going forward in a situation where probable cause to arrest exists. Specifically, the Justices could try to carve out the bar fight or riot / protest examples from less serious arrests. Of course, we won't know for sure until the Court issues its decision, which will be sometime before June 2019.

1. Matt White, Arctic Man: Wild Rides and Crazed Nights at America's Most Extreme Ski Race, SB Nation, July 23, 2014, available at: https://www.sbnation.com/longform/2014/7/23/5923357/arctic-man-alaska-ski-race-profile. The race itself involves a skier barreling down a mountain and linking up with a snowmobiler by grabbing a tow rope (think water skiing) and then speeding behind the snowmobile at 90 mph. To watch a short 2-minute video about the festival, click here: https://www.youtube.com/watch?v=xA8RxM31OzU

2. *See Reichle v. Howards* 566 U.S. 658 (2012), oral argument transcript, available at: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2011/11-262.pdf

3. Judge Kavanaugh authored a dissent from the denial of rehearing en banc in *District of Columbia v. Wesby.* In his dissent from denial, he argued the officers should have been granted qualified immunity, making some of the same types of arguments the Chief Justice seems concerned about in terms of personal liability for officers for civil rights claims.

4. *See Lozman v. City of Riviera Beach,* oral argument transcript, available at: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-21_67ip.pdf ML