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First Amendment Retaliation Claims in the Law Enforcement Context

First Amendment Retaliation Claims Involving Law Enforcement Officers and the Impact of Nieves v. Bartlett

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In 2019 in Nieves v. Bartlett, the Supreme Court resolved a circuit split by holding that a plaintiff bringing a First Amendment retaliatory arrest claim must show the absence of probable cause under most circumstances. 139 S.Ct. 1715, 1725–27 (2019). Put differently, probable cause can defeat a retaliatory arrest claim, subject to the allegedly narrow exception where a plaintiff presents objective, comparison-based evidence of different treatment by those similarly situated. Id. at 1727. This paper, intended to complement a presentation at the International Municipal Lawyers Association 2020 Mid-Year Seminar, presents an overview of the First Amendment retaliation claim in the law enforcement context, discusses the Supreme Court cases leading up to Nieves, and explains the Nieves opinions. As is indicated throughout the paper (and as particularly applicable to the Nieves rule), not all principles applicable to First Amendment retaliation claims are equally applicable to other contexts, particularly the treatment of public employees, and vice versa.

I. OVERVIEW OF FIRST AMENDMENT RETALIATION PRINCIPLES

"Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. Generally, "the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out." Hartman v. Moore, 547 U.S. 250, 256 (2006).

Although law enforcement is the focus of this paper and the accompanying presentation, "the bulk of First Amendment retaliation claims arise in the public employment setting," and groundwork of First Amendment retaliation caselaw has been laid in employment cases. See Thaddeus-X v. Blatter, 175 F.3d 378, 388 (6th Cir. 1999) (per curiam). As will be discussed, in Mount Healthy City School District Board of Education v. Doyle, an employment case, the Supreme Court established the rule of causation for First Amendment retaliation claims. 429 U.S. 274, 285 (1977). The Mt. Healthy case, and the distinction between a First Amendment claim arising from an employment context and one arising from certain law enforcement contexts, will be relevant when addressing causation and the Supreme Court's recent decision in Nieves v. Bartlett, 139 S.Ct. 1715 (2019).

Before reaching those topics, however, it is clearly worth stating how the Circuits have adapted the Supreme Court case law into a practical tool. Although the precise description of the elements vary both among circuits and depending on the factual setting, to prove a First Amendment retaliation claim, a plaintiff must typically show at least,

> (1) that the speech or conduct at issue was protected,
>
> (2) that the defendant took adverse action against the plaintiff, and
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> (3) that there was a causal connection between the protected speech and the adverse action."

Espinal v. Goord, 558 F.3d 119, 128 & n.7 (2d Cir. 2009); see also Lauren W. ex. rel. Jean W. v. DeFlaminis, 480 F.4d 259, 267 (3d Cir. 2007); Thaddeus-X, 175 F.3d at 394.

A. The First Element – Protected Conduct

Protected speech is exceedingly broad. "As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." United States v. Stevens, 559 U.S. 460, 468 (2010) (overbreadth of statute criminalizing depictions of animal cruelty violated First Amendment). "The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits." Id. at 470. The First Amendment provides essentially identical protection to an individual's right to petition. See Borough of Duryea v. Guarnieri, 564 U.S. 379, 382–83 (2011); McDonald v. Smith, 472 U.S. 479, 485 (1985) ("These First Amendment rights are inseparable").[1]

This paper does not attempt to explore the contours of protected conduct in any depth nor the restrictions that may be placed on them based on time, manner, and place. See, e.g., McCullen v. Coakley, 573 U.S. 464, 477 (2014). In most typical law enforcement cases—particularly police encounters—a plaintiff will usually be in a position offer up some conduct that satisfies the first element, since "[i]t is well-settled that the freedom to criticize public officials and expose their wrongdoing is a fundamental First Amendment value, indeed, '[c]riticism of the government is at the very center of the constitutionally protected area of free discussion.'" Arnett v. Myers, 281 F.3d 552, 560 (6th Cir. 2002) (quoting Rosenblatt v. Baer, 383 U.S. 75, 85 (1966)). It is easy to imagine the typical arrestee criticizing the public official arresting him.

B. The Second Element – Adverse Action

At least outside the employment context, the tendency of the action to deter a person of "ordinary firmness" typically defines "adverse action." See Keenan v. Tejeda, 290 F.3d 252 (5th Cir. 2002) (lengthy traffic stop with guns drawn and questionable misdemeanor charge sufficiently adverse) (citing Carroll v. Pfeffer, 262 F.3d 847, 850 (8th Cir. 2001); Smith v. Plati, 258 F.3d 1167, 1176 (10th Cir. 2001)).

One question the Circuits disagree on, however, is whether there must be some showing that the action caused some degree of actual, though not completely deterrent, effect on the plaintiff's exercise of his First Amendment rights. "The second element requires some showing that the plaintiff's exercise of free speech has been curtailed." McLin v. Ard, 866 F.3d 682, 696–97 (5th Cir. 2017) (citing Suarez Corp. Indus. v. McGraw, 202 F.3d 676, 686 (4th Cir. 2000); Sullivan v. Carrick, 888 F.2d 1, 4 (1st Cir. 1989)). The majority of Circuits, however, go the opposite direction. The Sixth Circuit, for example, has defined adverse action as "one that is *capable* of deterring a person of ordinary firmness from exercising the constitutional right in

[1] In at least two contexts, whether the speech is on a matter of "public concern" limits whether First Amendment protection will apply. First, under proper circumstances, a public employee's speech can be regulated if it not on a matter of public concern. See Lane v. Franks, 573 U.S. 228, 236–37 (2014) (citing Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cty., 391 U.S. 563 (1968)). Second, the First Amendment can be a defense to tort liability based on speech if it is on a matter of public concern. See Snyder, 562 U.S. at 452.

question. *Actual* deterrence need not be shown." Hill v. Lappin, 630 F.3d 468, 472 (6th Cir. 2010) (threat to transfer or segregate inmate sufficiently adverse) (citations and internal quotation marks omitted; emphases in original); see Mendocino Env't Ctr. v. Mendocino Cnty., 192 F.3d 1283, 1300 (9th Cir. 1999) (citing Crawford-El v. Britton, 93 F.3d 813, 826 (D.C. Cir. 1996), vacated on other grounds, 520 U.S.1273 (1997)); Bennett v. Hendrix, 423 F.3d 1247, 1351–54 (11th Cir. 2005) (collecting cases).[2]

While the possibility of litigating the second element should of course be considered—particularly in a jurisdiction imposing an actual injury/curtailment requirement—in the run-of-the-mill police case, and, to a slightly lesser extent, prison case, adverse action will likely be sufficiently established. In the experience of the authors, at least, these claims accompany detentions, arrests, and shows or uses of force—conduct certainly capable of deterring persons of ordinary firmness from exercising rights. Moreover, courts have stressed the low bar for establishing an adverse action, noting, for example, that the plaintiff's burden "is merely to establish the factual basis . . . that the retaliatory acts amounted to more than a de minimis injury." Hill, 630 F.3d at 473 (citations and internal quotation marks omitted).

C. The Third Element – Causation and the Mt. Healthy Framework

In Mount Healthy City School Board of Education v. Doyle, the Supreme Court established the typical rule of causation for First Amendment retaliation claims. 429 U.S. 274, 285 (1977). In Mt. Healthy, plaintiff Frank Doyle, an untenured school teacher and president of the teacher's association, alleged the defendant school board refused to renew his contract in retaliation for him calling a radio station concerning school policy. 429 U.S. at 276, 281–82. Doyle had engaged in other activities not purported to be protected by the First Amendment. Id. The District Court took the view that the school board was motivated in "substantial part" by retaliation for Doyle's exercise for First Amendment rights, and therefore a violation had occurred, regardless of whether the school board was also motivated by other, unprotected reasons. Id. at 284–85. The Supreme Court stated this did not go far enough; instead, the initial burden should be on the plaintiff to show the constitutionally protected "conduct was a 'substantial factor' or, in other words, . . . a 'motivating factor'" for the adverse action. Id. at 287. Once the plaintiff carries the burden, the defendant can defeat the claim by showing "by a preponderance of the evidence that it would have reached the [same adverse action] even in the absence of the protected conduct." Id. Some courts have referred to this rebuttal as the "same decision defense," e.g. Watson v. Rozum, 834 F.3d 417, 422 (3d Cir. 2016), although this should not confused with the similarly-applied Title VII affirmative defense that carries different implications. See, e.g., Quigg v. Thomas Cnty. Sch. Dist., 814 F.3d 1227, 1242–1243 (11th Cir.2016).

[2] Most jurisdictions impose an additional burden on the plaintiff where the adverse action is a defendant government official's speech, which also is protected by the First Amendment. See Echols v. Lawton, 913 F.3d 1313, 1320 (11th Cir. 2019) (collecting cases). In such cases, courts require a showing that the "official's retaliatory speech amount[ed] to a threat, coercion, or intimidation," so as to "reconcile" the plaintiff and defendant's competing First Amendment rights. Id. (without deciding whether to adopt such a rule).

In Mt. Healthy, the Court also made clear something implicit in its new rule: an otherwise legitimate government act can become unconstitutional if undertaken in retaliation for an exercise of First Amendment speech. Id. at 283. That is, it did not matter that Doyle was untenured and "could have been discharged for no reason whatsoever, he may nonetheless establish a claim if the decision not to rehire him" was in retaliation of the exercise of First Amendment rights. Id. This concept taken alone would suggest that probable cause—which makes an arrest or prosecution a legitimate government act—is not sufficient to defeat a First Amendment retaliation where the arrest or prosecution is the adverse action. But the Supreme Court held differently in Hartman and Nieves.

II. SUPREME COURT CASES LEADING UP TO NIEVES

In Hartman v. Moore, the Supreme Court resolved a circuit split over whether a First Amendment retaliation claim premised on an allegedly retaliatory prosecution requires the plaintiff to show an absence of probable cause for the prosecution. 547 U.S. 250, 255–56 (2006). It held that yes, "want of probable cause must be alleged and proven" in a retaliatory prosecution case. Id. at 252. In the Court's view, "the need to prove a chain of causation from animus to injury, with details specific to retaliatory-prosecution cases, provides the strongest justification for the no-probable-cause requirement." Id. at 260. The Court pointed to two unique aspects of retaliatory prosecution cases setting them apart. Id. First, there will always be "a distinct body of highly valuable circumstantial evidence" of retaliatory causation, namely, evidence of probable cause. Id. at 261. Second, these cases involve more complex causation than usual because of the relationship between the investigating officers and the charging prosecutor. Id. at 261–62. Since prosecutors will be immune, and the defendant will typically be the investigating officers, the Court points out that the claim is more correctly characterized as "successful retaliatory inducement to prosecute." Id. at 262. That is, the investigating officer, because of retaliatory animus, induces the prosecutor to bring charges. See id. The question then, under Mt. Healthy, is whether the prosecutor would have charged anyway. See id. at 264. Complicating this further, courts afford prosecutors a "presumption of regularity." Id. The presence or absence of probable cause streamlines these complexities, in particular because the evidence is so significantly probative of retaliatory causation. See id. at 265.

In Reichle v. Howards, the Supreme Court had its first opportunity to address whether the no-probable-cause requirement extended to retaliatory arrests. 566 U.S. 658, 663 (2012). It passed, deciding instead that the agents in question were entitled to qualified immunity. Id. The Court determined that after Hartman, the right to be free from a retaliatory arrest supported by probable cause was not clearly established. Id. at 665–666. This was in part because retaliatory arrest and retaliatory prosecution claims were often raised at the same time and Courts of Appeals, before and after Hartman, had applied a no-probable-cause requirement uniformly to both claims. Id. at 667, 669. The Court did lay the groundwork for Nieves, though, by identifying that, like retaliatory prosecution cases, evidence of probable cause will be readily available, and "such evidence can be thought similarly fatal to a plaintiff's claim, given that retaliatory arrest cases also present a tenuous causal connection between the defendant's alleged animus and the plaintiff's injury." Id. at 668. The tenuous connection, in the case of a retaliatory arrest, was not the officer-prosecutor relationship, but apparently the fact that the suspect's "speech provides evidence of a crime or suggests a potential threat." Id. For probable cause purposes, then, an officer may legitimately

consider the content and manner of speech, which muddles the causation question. Id. The Court acknowledged, though, that certain factors were present in the prosecution context that were not in the arrest context. Id. at 668–69.

In light of her position in Hartman and Nieves, it is interesting that Justice Ginsburg, with Justice Breyer joining, concurred in the judgment. She wrote, "[w]ere defendants ordinary law enforcement officers, I would hold that Hartman . . . does not support their entitlement to qualified immunity." Id. at 670. However, the defendants were Secret Service agents investigating an individual who made physical contact with the vice president in a public space. Id. at 660–61.

> 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. . . . they rightly take into account words spoken to, or in the proximity of [that person]. . . . Retaliatory animus cannot be inferred from the assessment they made in that regard. If rational, that assessment should not expose them to claims for civil damages."

Id. at 670. From this, it's not entirely clear on what grounds Justice Ginsburg would reverse the district court's denial of summary judgment, or how "if rational" ought to be determined. See id. at 662. It is possible she defines the right at issue as freedom from retaliatory arrest by close protection officers, supported by probable cause; and feels that right has not been clearly established.

In Lozman v. City of Riviera Beach, the Supreme Court held that the no-probable-cause requirement was not applicable to a retaliatory arrest, but only under specific circumstances applicable to the case. 138 S.Ct. 1945, 1955. Fane Lozman was an outspoken critic of city policies, having spoken at numerous meetings, criticized a number of officials and filed a lawsuit concerning development plans. Id. at 1949. In a closed door meeting, a city councilmember, Elizabeth Wade, suggested city resources be used to intimidate Lozman, which received the consensus of the council. Id. Five months later, Lozman was speaking at a public meeting, allegedly discussing issues unrelated to the City. Id. at 1949–50. When he refused to stop, Wade instructed an officer to intervene and eventually "carry him out." Id. Lozman's first amendment retaliation suit was against the city only, requiring him, under generally-applicable § 1983 law, to establish that official municipal policy caused the constitutional violation. Id. at 1951 (citing Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658 (1978)).

The Court did not add much to the analysis of the no-probable-cause requirement to retaliatory arrests generally. Essentially, it followed Reichle's analysis of the question, noting that "[t]here is undoubted force in the City's position" that the no-probable-cause requirement should apply, but, "there are substantial arguments that Hartman's framework is inapt in retaliatory arrest cases." Id. at 1953. It does add that, absent the no-probable-cause requirement, the causal issues discussed in Reichle "create[] a risk that the courts will be flooded with dubious retaliatory arrest suits." Id.

This case, the Court determined, was "far afield" from the "mine run" of retaliatory arrest cases. Id. at 1954. The causation problem, premised on the potential relevance of protected statements in forming probable cause, was not present when the protected statements were made months earlier, "bearing little relation to the criminal offense for which the arrest is made." Id.

Further, the requisite "objective evidence of a policy motived by retaliation" replaces the evidentiary value of probable cause in other retaliatory arrest cases. See id. The Court also found that official retaliatory policy is much more troubling than an "ad hoc, on-the-spot decision by an individual officer." Id. Finally, since Lozman's protected conduct was both his lawsuit and his criticism of public officials, his protected speech, including his right to petition, was "high in the hierarchy of First Amendment values." Id. at 1954–55. Under those facts, the Court did not require the absence of probable cause to be proven. Id. at 1955.

Conceivably, Lozman could be read as analogous, and applicable, to claims raising only some, but not all, of its facts. That is, there is no clear boundary between what makes a case a Lozman case and what makes it a typical retaliatory arrest case subject to the Nieves rule. But, read strictly, Justice Thomas, dissenting, identifies the many factors that appear required:

> By my count, the Court has identified five conditions that are necessary to trigger its new rule. First, there must be an official municipal policy of intimidation. Second, the policy must be premeditated and formed well before the arrest—here, for example, the policy was formed months earlier. Third, there must be objective evidence of such a policy. Fourth, there must be little relation between the protected speech that prompted the retaliatory policy and the criminal offense for which the arrest is made. Finally, the protected speech that provoked the retaliatory policy must be high in the hierarchy of First Amendment values. Where all these features are present, the Court explains, there is not the same causation problem that exists for other retaliatory-arrest claims.

Id. at 1956 (Thomas, J., dissenting) (citations and internal quotation marks omitted).

III. NIEVES V. BARTLETT – PROBABLE CAUSE GENERALLY BARS RETALIATORY ARREST

In Nieves v. Bartlett, the Supreme Court resolved whether the no-probable-cause requirement applied to retaliatory arrests. 139 S.Ct. 1715, 1721 (2019). The answer is a qualified yes. It held that, absent a showing that no probable cause existed for the arrest, a First Amendment retaliatory arrest claim will fail, id. at 1725, except in the "narrow" exception where "the plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been," id. at 1727. If the plaintiff survives by making one of these two showings, the analysis proceeds to the Mt. Healthy test, requiring the plaintiff to "show that the retaliation was a substantial or motivating factor behind the arrest, and, if that showing is made, the defendant can prevail only by showing that the arrest would have been initiated without respect to retaliation." Id. at 1721 (quoting Lozman 138 S.Ct. at 1952–53) (internal quotation marks and alterations omitted).

Russell Bartlett was an attendee at Arctic Man, a raucous, days-long sporting event in Alaska. Id. at 1720. He intervened when Sgt. Luis Nieves was speaking with other partygoers. Id. Nieves contended an intoxicated Bartlett yelled at the others to not speak to police and yelled at Nieves to leave. Id. Nieves left to avoid escalating the situation. Id. Bartlett testified he was sober, did not yell, and that Nieves got aggressive because Bartlett wouldn't speak to him. Id. A few minutes later, Trooper Bryce Weight was investigating minors for underage drinking when Bartlett intervened again, yelled at Weight, then "stepped very close to him in a combative way." Id.

Weight pushed him back and Nieves rushed over. Id. at 1720–21. Bartlett was slow to comply and officers forced him to the ground. Id. at 1721. Bartlett claims he was close to Weight only because the music was loud and he was slow to comply with commands because he did not want to aggravate a back injury. Id. Bartlett claims after Nieves handcuffed him, Nieves said, "[B]et you wish you would have talked to me now." Id. (alteration in original).

In Bartlett's subsequent § 1983 suit, he claimed the arrest was retaliation for his protected speech: refusing to speak with Nieves and intervening with the discussion between Weight and the potential underage drinkers. Below, the district court determined probable cause to arrest was present, and this precluded Bartlett's First Amendment retaliation claim. Id. The Ninth Circuit reversed because it had previously established a retaliatory arrest claim could survive in the presence of probable cause. Id. (citing Ford v. Yakima, 706 F3d 1188 (9th Cir. 2013)).

The Supreme Court found numerous grounds for imposing the no-probable-cause requirement. See id. at 1723. Primary among these was the Court's determination that retaliatory arrest claims create a complex causal inquiry, similar to those arising in retaliatory prosecution claims, which the Court identified in Hartman. Id. at 1723–24. One component of this complexity is that the content and manner of a suspect's speech can form a legitimate basis for probable cause, "convey[ing] vital information—for example, if he is 'ready to cooperate' or rather 'present[s] a continuing threat.'" Id. at 1724 (quoting Lozman, 138 S.Ct. at 1953). In Bartlett's case, for example, the officers perceived him to be a threat based on the tone and content of his speech, among other things. Id. While the Court conceded that retaliatory arrests do not carry all of the complexities of retaliatory prosecutions—e.g., "the presumption of prosecutorial regularity" or the involvement of multiple government actors—it concludes that for both claims "it is particularly difficult to determine whether the adverse government action was caused by the officer's malice or the plaintiff's potentially criminal conduct." Id. The fact that most cases will have ample available evidence of probable cause, and that the absence or presence of probable cause will be so weighty as to make the causation question nearly binary, appealed to the Court as a solution to this complexity. See id.

Second to "causal complexity," the Court apparently considered Fourth Amendment caselaw precedential—or at least persuasive—because in Fourth Amendment cases officers' subjective intent is not relevant, including when assessing the legitimacy of an arrest. See id. at 1724–25 ("Bartlett's subjective approach would undermine that precedent by allowing even doubtful retaliatory arrest suits to proceed based solely on allegations about an arresting officer's mental state."). From this Fourth Amendment comparison, the Court draws out policy concerns regarding the burdens of litigation posed by a purely subjective approach, concluding, that, because state of mind is easy to allege, "a subjective inquiry would threaten to set off "'broad-ranging discovery' in which 'there often is no clear end to the relevant evidence.'" Id. at 1725 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 817 (1982). Policing, the Court is concerned, "would pose overwhelming litigation risks," and officers might even limit their communications during policing." Id.

Finally, the Court relied on the premise that common law principles "settled at the time § 1983 was enacted guide its definition of § 1983 claims." Id. at 1726. In its view, no retaliatory arrest tort existed at common law, so the closest analogies were false imprisonment or malicious

prosecution claims. Id. Since probable cause is a complete defense to both of these claims at common law, it should likewise defeat a First Amendment retaliatory arrest claim. Id.

The Court seems to ignore that in Hartman it was dismissive, if passingly, of these last two arguments: the potential deluge of litigation and the common law analogy. 547 U.S. at 258. The Hartman Court had not identified a large volume of retaliatory prosecution cases nor any disproportion between circuits applying a no-probable-cause requirement to suggest the requirement increased litigation. Id. at 258–59. Likewise, it stated, "we are certainly ready to look at the elements of common-law torts when we think about elements of actions for constitutional violations, but the common law is best understood here more as a source of inspired examples than of prefabricated components of Bivens torts." Id. at 258 (citing Albright v. Oliver, 510 U.S. 266, 277 n.1 (1994) (discussing § 1983 claims)).

Returning, though, to Nieves, and as stated, a plaintiff is excepted from the Court's no-probable-cause requirement 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. In crafting this exception, the Court was mindful of "circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to." Id. Even the Court, it seems, would take issue with a retaliatory-motivated arrest for jaywalking. Id. "In such a case, because probable cause does little to prove or disprove the causal connection between animus an injury, applying Hartman's rule would come at the expense of Hartman's logic." Id. Because the exception's "inquiry is objective," it avoids "the significant problems that would arise from reviewing police conduct under a purely subjective standard." Id.

A. *Concurrences, Dissents*

Justices Breyer, Alito, Kagan, and Kavanaugh joined in Chief Justice Roberts' opinion. Id. at 1716.

Justice Thomas concurred in part and dissented in part, joining in all of the majority opinion except the establishment of the exception to the no-probable cause rule. Id. at 1716, 1728 (Thomas, J., concurring in part, dissenting in part). In his view, there is no basis for crafting an exception in the common law torts of false arrest and malicious prosecution. Id. at 1729 (Thomas, J., concurring in part, dissenting in part). The Court, he feels, also impermissibly imported a Fourteenth Amendment selective prosecution "similarly-situated" standard into First Amendment jurisprudence, where it otherwise has no precedent. Id. (Thomas, J., concurring in part, dissenting in part). (He fails, however, to comment on the majority's use of Fourth Amendment "precedent" in fashioning its First Amendment rule). In his view, if the Court is "discomfort[ed] with the number of warrantless arrests that are privileged today [that] is an issue for state legislatures, not a license for this Court to fashion an exception to a previously 'consistent rule.'" Id. (Thomas, J., concurring in part, dissenting in part). Put differently, Hartman should be controlling and dispositive. See id. (Thomas, J., concurring in part, dissenting in part). Finally, Justice Thomas is concerned the exception is overbroad—it could be applied, for example, to felony arrests. Id. (Thomas, J., concurring in part, dissenting in part). Accordingly, it encourages protracted litigation, and risks chilling arrests. Id. (Thomas, J., concurring in part, dissenting in part).

Justice Ginsburg essentially dissents, though her opinion is a concurrence in part. Id. at 1734–35 (Ginsburg, J., concurring in part, dissenting in part). Noting the "array of laws," such as disorderly conduct and failure to comply, that could justify an arrest, she states concisely her concern with arrest authority being abused at the expense of free speech and press rights. Id. at 1734 (Ginsburg, J., concurring in part, dissenting in part). "If failure to show lack of probable cause defeats an action under 42 U.S.C. § 1983, only entirely baseless arrests will be checked." Id. (Ginsburg, J., concurring in part, dissenting in part). In her view, the Mt. Healthy standard suffices to balance the interests at stake in a retaliatory arrest claim. Id. at 1725 (Ginsburg, J., concurring in part, dissenting in part). She concurs in part because she would reverse as to Weight only, who, unlike Nieves, made no statement to Bartlett evidencing retaliatory animus.[3] Id. (Ginsburg, J., concurring in part, dissenting in part).

Justice Gorsuch, for better or worse, may offer the most interesting opinion. It appears best interpreted, primarily, as a dissent, since he criticizes almost every analytical step the majority takes. Id. at 1730–34 (Gorsuch, J., concurring in part, dissenting in part). It is labeled a concurrence in part, presumably because he

> would hold, as the majority does, that the absence of probable cause is not an absolute requirement of such a claim and its presence is not an absolute defense. At the same time, I would also acknowledge that this does not mean the presence of probable cause is categorically irrelevant: It may bear on causation, and it may play a role under Armstrong.[4] But rather than attempt to sort out precisely when and how probable cause plays a role in First Amendment claims, I would reserve decision on those questions until they are properly presented to this Court and we can address them with the benefit of full adversarial testing.

Id. at 1734 (Gorsuch, J., concurring in part, dissenting in part). So it does not appear that Justice Gorsuch approves of a no-probable-cause requirement, or at least not a strictly-construed one. See id. at 1734 (Gorsuch, J., concurring in part, dissenting in part). In regard to probable cause "bearing on causation," he suggests probable cause would be dispositive under existing standards, functionally in the same manner the majority's rule would apply:

> [I]f the officer had probable cause [to support] a serious crime *of the sort that would nearly always trigger an arrest* . . . it's hard to see how a reasonable jury might find that the plaintiff's speech caused the arrest. . . . In cases like that, it would seem that officers often will be entitled to dismissal on the pleadings or summary judgment.

Id. at 1732 (Gorsuch, J., concurring in part, dissenting in part) (emphasis added).

Justice Gorsuch also believes that United States v. Armstrong, 517 U.S. 456 (1996), may be applicable to a First Amendment retaliatory arrest case, and suggests this should be tested in a future case. Nieves, 139 S.Ct. at 1733–34 (Gorsuch, J., concurring in part, dissenting in part). In

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[3] Justice Sotomayor does not concur in this result on procedural grounds: the petitioners did not seek reconsideration of how the Ninth Circuit applied the Mt. Healthy standard. Id. at 1742.

[4] U.S. v. Armstrong, 517 U.S. 456 (1996). See infra.

Armstrong, the Court held that in a Fourteenth Amendment selective prosecution claim, a plaintiff must present clear evidence of discrimination where probable cause supports the prosecution. Id. at 1733 (Gorsuch, J., concurring in part, dissenting in part) (citing Armstrong, 517 U.S. at 465). The Armstrong Court imposed that burden because federalism and separation of powers commanded deference in prosecution decisions "to state and federal executive officials, not judges." Id. (Gorsuch, J., concurring in part, dissenting in part).

Confusingly, Justice Gorsuch suggests his opinion can be harmonized with the majority's rule and invites lower courts to proceed on cases that would not seem to satisfy it:

> But I do not understand the majority as going that far. The only citation the majority offers in support of its new standard is Armstrong, which expressly left open the possibility that other kinds of evidence, such as admissions, might be enough to allow a claim to proceed. Given that, I retain hope that lower courts will apply today's decision "commonsensically", and with sensitivity to the competing arguments about whether and how Armstrong might apply in the arrest setting.

Id. at 1734 (citations omitted) (Gorsuch, J., concurring in part, dissenting in part).

Justice Sotomayor, dissenting, is not convinced by Justice Gorsuch's suggestion that the Armstrong rule may be applicable, but otherwise Justice Sotomayor and Justice Gorsuch's critiques of the majority opinion follow a similar pattern. Id. at 1735, 1741–42 (Sotomayor, J., dissenting). Both start with the apparently uncontested premise that probable cause does not undo the constitutional violation that occurs when a legitimate arrest is made to retaliate for the exercise of First Amendment liberties. Id. at 1730, 1735 (Gorsuch, J., concurring part, dissenting in part; Sotomayor, J., dissenting). Therefore, § 1983 permits a civil claim and does not authorize an exception based on probable cause. Id. (Gorsuch, J., concurring part, dissenting in part; Sotomayor, J., dissenting). Neither believe drawing on the common law tort of false arrest is appropriate. Id. at 1731, 1737 (Gorsuch, J., concurring part, dissenting in part; Sotomayor, J., dissenting) ("[T]he point of the common law tort of false arrest or false imprisonment was to remedy arrests and imprisonments effected *without lawful authority*. . . . The point of [First Amendment retaliatory arrest claims] isn't to guard against officers who *lack* lawful authority to make an arrest. Rather, it's to guard against officers who *abuse* their authority by making an otherwise lawful arrest for an unconstitutional *reason*." (Gorsuch, J., concurring in part, dissenting in part)). As such, Justice Gorsuch reasons, common law false arrest translates to a Fourth Amendment claim, from which the First Amendment operates independently. Id. at 1731 (Gorsuch, J., concurring in part, dissenting in part). And just as Fourteenth Amendment selective arrest claims do not consider probable cause, regardless of its role in a Fourth Amendment analysis, there is no reason courts are compelled by the Fourth Amendment to import probable cause into a First Amendment analysis. Id. at 1732, 1738 (Gorsuch, J., concurring part, dissenting in part; Sotomayor, J., dissenting).

Both Justice Gorsuch and Justice Sotomayor also attack the majority's use of Hartman as precedent. First, says Justice Gorsuch, Hartman was justified because the causal connection in a retaliatory prosecution case involved connecting the officer's intent with the prosecutor's charging decision, which was subject to a "presumption of regularity." Id. at 1732–33 (Gorsuch, J., concurring in part, dissenting in part). "Hartman made equally clear that its reason did *not* extend

to 'ordinary retaliation claims, where the government agent allegedly harboring the animus is also the individual allegedly taking the adverse action.' And *that* describes a retaliatory arrest claim like Mr. Bartlett's to a tee." Id. at 1733 (Gorusch, J., concurring in part, dissenting in part) (quoting Hartman, 547 U.S. at 259–60). This point is arguably overstated. In Hartman, the "ordinary retaliation claim" the Court referred to was immediately followed by examples from the employment context. 547 U.S. at 259. In addition, the Court cited the causal connection in retaliatory prosecution cases as the "strongest justification" for the no-probable-cause requirement, but this encompassed not just the officer-prosecutor relationship, id. at 260, but also the ready availability of evidence of probable cause, id. at 261, and the significant weight of probable cause as evidence of retaliatory causation, id. at 264. If Hartman should not be extended to retaliatory arrests, that is not, at least, because Hartman explicitly said so.

Justice Sotomayor also takes issue with some of the Court's practical concerns, noting that, "[a]s for the risk of litigating dubious claims, the Court pays too high a price to avoid what may well be marginal inconvenience. . . . the burden of a (presumably indemnified) officer facing trial pales in comparison to the importance of guarding core First Amendment activity against the clear potential for abuse that accompanies the arrest power." Id. at 1737–38 (Sotomayor, J., dissenting). Justice Sotomayor notes that the Mt. Healthy standard "is by no means easily satisfied" already. Id. at 1736 (Sotomayor, J., dissenting). When it comes to the presence of complex questions about causation, Justice Sotomayor critiques that, "[t]hat is true of most unconstitutional motive claims, yet we generally trust the courts are up to the task of managing them." Id. at 1737 (Sotomayor, J., dissenting).

But Justice Sotomayor spends much of her opinion criticizing the Court's comparison-based evidence exception to its no-probable-cause requirement. After criticizing the majority's overall logic, she makes the transition by unexpectedly stating "[w]ere it simply an unorthodox solution to an illusory problem, the standard announced today would be benign." Id. at 1738–1739 (Sotomayor, J., dissenting). In her view, the fact that the exception "arbitrarily fetishizes" comparison-based evidence and "ration[s] First Amendment protection in an illogical manner" appears to be the greater evil. See id. at 1739 (Sotomayor, J., dissenting). Justice Sotomayor considers that, in most contexts, intent is best proven by looking at a decisionmaker's own statements, especially since the modern world affords more audiovisual means than ever to collect this evidence. Id. (Sotomayor, J., dissenting). Therefore, her concern is that gross abuses will be fenced out of the exception, and those that could be easily identified by common sense—as in the jaywalking example—will now require the collection of additional evidence. Id. at 1740–41 (Sotomayor, J., dissenting).

Justice Sotomayor also aptly points out that the exception may create more questions than it answers. "I do not mean to overstate the clarity of today's holding. What exactly the Court means by 'objective evidence,' 'otherwise similarly situated,' and 'the same sort of protected speech' is far from clear. I hope that courts approach this new standard commonsensically." Id. at 1741 (Sotomayor, J., dissenting) (citations omitted). Like Justice Gorsuch, she assumes the standard will be read broadly:

> Given the significant evidentiary challenges plaintiffs face, the best assumption is that the Court intends to afford some latitude, especially at the outset of a case. That could mean relying on common experience to assess the most self-evidently minor

> infractions . . . ; allowing plaintiffs to rely on rough comparisons or inexact statistical evidence where laboratory-like controls cannot realistically be expected; and permitting discovery into potential comparator evidence where a complaint raises a strong inference of unconstitutional motive. For similar reasons, I assume the Court intends to permit plaintiffs to draw from a broad universe of potential comparators. And because the test is 'objective,' plaintiffs presumably can look beyond the practices of the specific officer or officers who arrested them, to see how other officers handle comparable infractions.

Id. at 1741 n.8 (Sotomayor, J., dissenting).

One final point should be made about what the dissenters do not address. None squarely challenge the majority's point that the tone and content of a suspect's speech may form the basis for probable cause, see id. at 1724–25, the primary source of "causal complexity" put forth in Reichle. Presumably, even where the speech is the motivating factor for an arrest, Justice Sotomayor and Justice Ginsburg would take the position that the Mt. Healthy standard allows a court to assess whether it is a *retaliatory* cause or a law-enforcement cause of the arrest.

IV. CONCLUSION

Nieves cannot be ignored as affording law enforcement officers additional protection not previously available in all circuits, and providing a boon to attorneys defending these municipal actors. Nonetheless, as Justice Sotomayor points out, it opens at least as many questions as it answers concerning its supposedly narrow exception. The invitation to lower courts to apply this in a common sense manner and the suggestion that it is ill-defined are likely to lead many courts reach decisions they would have previously: finding allegations of comparison-based evidence plausible, and relatively thin evidence sufficient for a reasonable jury where they sense egregious First Amendment violations by those with police power. The status of Lozman creates another route around the no-probable-cause requirement, in cases involving municipal liability and where courts are inclined to interpret the Lozman opinion broadly. Nieves does not end the discussion on retaliatory arrests, it is likely to create additional circuit splits on the nature of its exception in the future.