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MUNICIPAL BULWARKS: THE BATTLE FOR CORPORATE ACCOUNTABILITY

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AMICUS

By: AMANDA KARRAS,
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Retaliatory Arrests are Back at the Supreme Court

When the Supreme Court decided *Nieves v. Bartlett* more than four years ago, it was the third time the Court had attempted to resolve the vexing question of whether probable cause defeats a First Amendment retaliatory arrest claim as a matter of law. The Court first grappled with the question in *Reichle v. Howards,* but punted after granting the Secret Service officer qualified immunity, concluding if a right existed, it was not clearly established.[1] Next up, the Court contended with the issue in *Lozman v. City of Riviera Beach,* a case involving a quintessential gadfly who was arrested at the city council meeting.[2] But again, the Court concluded the question "must await a different case" because the facts were "far afield from the typical retaliatory arrest claim."[3] In this case, Lozman had brought the claim against the City itself, rather than the officer, alleging an "'official municipal policy' of intimidation."[4] The Court concluded that if a plaintiff can prove, with objective evidence, "the existence and enforcement of an official policy motivated by retaliation," then the claim may move forward under *Monell* even if the officer had probable cause to arrest.[5]

The *Nieves* Exception

Finally, a year after the Court decided *Lozman,* the Court granted certiorari in a case involving a more "typical" arrest situation in *Nieves v. Bartlett. Nieves* centered on events that transpired during the "Arctic Man" festival, which occurs in a remote portion of Alaska, home to a small community.[6] But "once a year, upwards of 10,000 people descend on the area for Arctic Man, an event known for both extreme sports and extreme alcohol consumption."[7] Between the remote location, alcohol consumption, reckless behavior, snowmobiling, fighting, and extreme temperatures, what could go wrong?

As a refresher, in 2014, Troopers Nieves and Weight were working the festival and they encountered Bartlett at a large outdoor party where it appeared minors were drinking alcohol.[8] When they first approached Bartlett, he refused to speak to Trooper Nieves.[9] Meanwhile, Trooper Weight spotted a minor drinking alcohol and began to speak with him. Bartlett, who was intoxicated and weighs 240 lbs., then rushed over to Trooper Weight and the minor and stepped between them, getting very close to Trooper Weight.[10] Trooper Weight pushed Bartlett to create space for himself and Trooper Nieves arrested Bartlett for disorderly conduct and resisting arrest.[11] Bartlett alleges that after the arrest, Trooper Nieves said: "bet you wish you would have talked to me now."[12] After the prosecutor dismissed charges, Bartlett sued under §1983 claiming, among other things, that the arrest violated the First Amendment.

The Supreme Court held that *generally* speaking, a plaintiff must plead and prove the absence of probable cause to move forward with a retaliatory arrest claim under the First Amendment.[13] The Court explained that retaliatory arrest claims suffer the same challenges as retaliatory prosecution claims, like the ones at issue in *Hartman v. Moore,* because both can present "a tenuous causal connection between the defendant's alleged animus and the plaintiff's injury."[14] Further, the Court noted that speech can inform an officer's (often split second) decision to arrest by "convey[ing] vital information – for example, if [the arrestee] is ready to cooperate or rather presents a continuing threat," making the causal connection in these cases complex.[15] (internal quotations omitted).

That would have been the end of the issue, but the Court explained that the rule it announced contains a "narrow qualification" for the situation where an officer has probable cause to arrest but where officers "typically exercise their discretion not to do so."[16] The Court provides an example of someone who is complaining about the police and then jaywalks.[17] Because so few people are actually arrested for jaywalking, if a plaintiff can present "objective evidence that he was arrested when otherwise

similarly situated individuals not engaged in the same sort of protected speech had not been," then the plaintiff can proceed with the retaliation claim, even if the officer had probable cause to arrest.[18] The Court stressed that the inquiry is objective in such a case and statements and motivations of the officer are irrelevant at this initial inquiry stage.[19]

The decision sparked several concurring and dissenting opinions, and two of the nine Justices came to different conclusions over the majority's meaning of the exception. Justice Sotomayor's dissent read the majority's exception as not requiring direct evidence of improper retaliation and instead, accepting a plaintiff's showing of more generalized comparator evidence, whereas Justice Gorsuch in his concurrence noted that admissions and other types of evidence might be enough to proceed (though the majority eschewed a test inquiring into the subjective motivations of the officer).[20] Justice Sotomayor, while objecting to the narrow type of evidence required to fall within the majority's exception, also highlighted the lack of clarity in the exception, noting that "[w]hat exactly the Court means by 'objective evidence,' 'otherwise similarly situated,' and 'the same sort of protected speech' is far from clear."[21]

Gonzalez v. Trevino

Given Justice Sotomayor's dissent noting the lack of clarity in *Nieves*, it is unsurprising that the lower courts split over what the majority meant regarding the type of evidence necessary to satisfy the *Neives* exception. The Fifth Circuit requires specific examples of non-arrests as comparators while the Seventh and Ninth Circuits require "objective proof of retaliatory treatment" to satisfy the exception.[22] The Supreme Court granted certiorari in *Gonzalez v. Trevino* to provide clarity and answer two questions: (1) Whether the probable-cause exception in *Nieves* can be satisfied by objective evidence other than specific examples of arrests that never happened; and (2) whether *Nieves* is limited to individual claims against arresting officers for split-second arrests.

In this case, Sylvia Gonzalez was elected to a seat on the city council for Castle Hills, Texas, a town with fewer than 5,000 residents. As her first act in office, she called for the removal of the city manager by organizing a nonbinding petition. During Gonzalez's first city council meeting, a resident submitted the petition to remove the city manager. The petition was then presented to the Mayor, who put the petition with his papers. During the meeting, a citizen accused Gonzalez of misleading her regarding the nature of the petition and indicated that Gonzalez asked her to sign the petition under false pretenses.[23] The meeting grew contentious, and was adjourned to continue the following day.

The next day, the Mayor placed the petitions on top of his paperwork, attaching them with a large black binder clip.[24] During the meeting, the Mayor noticed that the petitions were gone and he noticed a similar stack of papers clipped together with a black binder with Gonzalez's things, but he initially assumed the city secretary had collected the petitions.[25] However, after the meeting, the secretary asked for the petitions, which made the Mayor realize they were now missing.[26] At this point, he asked the police officer presiding over the meeting to find out if Gonzalez had taken the petitions.[27] Gonzalez denied having the petitions and opened her binder and started flipping through the papers to show the officer.[28] She continued to state she did not have the petitions and stopped before reaching the stack of papers with the black binder clip. The Mayor and the officer pointed to the stack of papers with the black binder at which point, she pulled them out and gave them back.[29] Gonzalez contends that she did not intentionally place the petition in her binder.

The police officer investigating the allegation ultimately determined that Gonzalez violated Texas Penal Code §§37.10(a)(3) and (c)(1), which provide that "[a] person commits an offense if he ... intentionally destroys, conceals, removes, or otherwise impairs the verity, legibility, or availability of a governmental record." The investigation took over a month because the officer interviewed witnesses, including the citizen who accused Gonzalez of obtaining her signature for the petition under false pretenses, which he believed provided a motive for her taking the petitions.[30] He also reviewed the videos from the city council meeting which showed Gonzalez reaching to take the petitions from the Mayor's belongings while he was occupied speaking with another person .[33] The officer secured a warrant for Gonzalez's arrest, and she spent the day in jail.[32]

Gonzalez sued under Section 1983, claiming that she was arrested in retaliation for her protected speech. She claims that this particular criminal statute has not been used in the county to criminally charge someone trying to steal a nonbinding or expressive document in the last decade. While there were 215 grand jury indictments under the statute, she claims none remotely resembled the facts of this case.

The Fifth Circuit held that Gonzalez' claim does not fall within the *Nieves* exception because she did not present "objective evidence

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Amicus *cont'd from page 23*

that she was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been."[35] The court reasoned that *Nieves* required Gonzalez to provide evidence of others "who engaged in the 'same' criminal conduct but were not arrested, and she was unable to do so, failing to identify others who had mishandled a government petition and were not prosecuted.[36] Instead, she provided evidence of who was prosecuted under the statute and argued their offenses were different than hers.[37] The Fifth Circuit declined to construe the absence of arrests for her specific acts as indicative of officers exercising discretion and rejected her invitation to infer that "because no one else was prosecuted for similar conduct, her arrest must have been motivated by her speech."[38]

Conclusion

Four years after announcing what it purported to be a "narrow exception," the Supreme Court has the opportunity in this case to clarify what exactly it meant in *Nieves*. The Court will answer what type of evidence a plaintiff must proffer to support a claim for retaliatory arrest even where probable cause to arrest exists. *Nieves* emphasized that the exception was narrow, and the way to prove the exception will help inform whether it is truly narrow or not. If the Court allows an expansion in the type of evidence a plaintiff may provide including, as Justice Sotomayor and Justice Gorsuch argued for in their separate writings in *Nieves*, a "commonsensical" approach to the exception, then local government liability in this area is likely to increase. As the Fifth Circuit observed, the Seventh Circuit has already adopted the expansive reading of *Nieves* proposed by Justices Sotomayor and Gorsuch.

In *Nieves*, IMLA had argued for a bright-line approach - i.e., where probable cause exists to arrest, there can be no retaliatory arrest claim under the First Amendment.[39] That approach was rejected, but IMLA believes the Court should stand by what it said in *Nieves* and that the exception should be truly narrow. While the Institute for Justice, who is representing Gonzalez, has done a good job spinning the facts in the plaintiff's favor (emphasizing that she was 72 years old and put in jail over a minor offense), the concern is that the Court could broaden the exception to the point where local governments will be subjected to significantly more retaliatory arrest claims, thereby increasing liability for local governments. The Fifth Circuit's approach to the evidentiary question provides the narrowest way to view the exception, which would limit liability for local governments.

Moreover, retaliatory arrest claims are easy to allege and challenging to defend in most contexts involving police officers making on-the-spot arrests. As the Court explained in *Nieves* when it rejected a subjective component to the exception:

> policing certain events like an unruly protest would pose overwhelming litigation risks. Any inartful turn of phrase or perceived slight during a legitimate arrest could land an officer in years of litigation. Bartlett's standard would thus "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."[40]

With a broad exception, as advocated by the petitioner, police officers could be hamstrung in their abilities to make split-second arrest decisions. Given the number of arrests each year, which are estimated to be about 27,630 per day, a broad exception could provide crippling liability for local governments.[41]

Another wrinkle for the Court to address is this was not a split-second decision case. This case involved a warrant and a month-long investigation. And the Court is sure to grapple with those facts. On the one hand, the Institute for Justice frames the lengthy investigation as a reason the Court should not need to worry about the general rule that probable cause bars these types of claims because there was no heat of the moment decision-making and thus no need to protect officers from these types of claims. On the other hand, the warrant could also cut in favor of the City due to the fact that a neutral decision-maker found probable cause existed, thus supporting the idea that the ultimate arrest, even if removed in time from the protected speech, was not motivated by any alleged retaliatory animus. Ultimately, this case will provide clarity for local governments and hopefully stay within *Nieves'* framing of a "narrow" exception. ML

Notes

1. Service agent arrested someone who approached Vice President Cheney and touched him after the agent heard him say "I'm going to ask [him] how many kids he's killed today." Id. at 660-61.
2. Lozman v. City of Riviera Beach, 138 S.Ct. 1945, 1949 (2018).
3. *Id.* at 1954.
4. *Id.*
5. *Id.*
6. Nieves v. Bartlett, 139 S. Ct. 1715, 1720 (2019).
7. *Id.*
8. *Id.*

9. *Id.*
10. *Id.*
11. *Id.* at 1720-21.
12. *Id.* at 1721.
13. *Id.* at 1723-24.
14. *Id.* at 1723.
15. *Id.* at 1724.
16. *Id.* at 1727.
17. *Id.*
18. *Id.*
19. *Id.*
20. Compare Nieves v. Bartlett, 139 S. Ct. 1715, 1740 (2019) (Sotomayor, J. dissenting) with *Id.* at 1734 (Gorsuch, J. concurring).
21. *Nieves*, 139 S. Ct. 1715, 1741 (2019) (Sotomayor, J. dissenting).
22. *See* Petition for Cert., No. 22-1025, available at: https://www.supreme-court.gov/Docket PDF/22/22-1025/264005/20230420105239077_Petition%20for%20a%20Writ%20of%20Certiorari.pdf.
23. *See* Pet. App., p. 159a, available at: https://www.supreme-court.gov/Docket PDF/22/22-1025/264005/20230420105307703_Appendix.pdf.
24. *Id.*
25. *Id.*
26. *Id.* at 160a.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 158a-163a.
31. *Id.*
32. Gonzalez v. Trevino, 42 F.4th 487, 489–90 (5th Cir. 2022).
33. *Id.* at 490.
34. *Id.*
35. *Id.* at 492.
36. *Id.*
37. *Id.*
38. *Id.*
39. *See* IMLA Amicus Brief, available at: https://www.supreme-court.gov/Docket PDF/17/17-1174/60763/20180827132011284_SLLC%20amicus%20brief%20in%20Nieves%20v.%20Bartlett%208-27-2018.pdf
40. *Nieves*, 139 S. Ct. at 1725.
41. *See* Department of Justice, *2019 Crime in the United States,* available at: https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/persons-arrested.

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