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Supreme Court: Probable Cause Defeats a First Amendment Retaliation Claim . . . Except When It Doesn't

In *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), the Supreme Court of the United States concluded that probable cause defeats a First Amendment retaliatory-arrest claim—unless the crime in question is the sort for which "objective evidence" shows "similarly situated" individuals are not arrested. *Nieves*, 139 S. Ct. at 1727. As a general matter, the First Amendment prohibits state actors from punishing an individual based on the content of his or her speech. The Fourth Amendment, on the other hand, does not focus on the subjective intent of an arresting officer so long as the arrest is supported by probable cause.

The question we ask is then: What happens when a police officer has probable cause to arrest someone engaging in First Amendment speech? Stated differently: Is a First Amendment "retaliatory-arrest claim" against an arresting officer categorically defeated by the existence of probable cause? According to the Supreme Court, "yes —so long as the crime in question is the sort for which "objective evidence" shows "similarly situated" persons *not* engaged in protected speech are *also* arrested. *Id*. at 1727.

Thirteen years ago, the Supreme Court recognized the settled law that "as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions" for engaging in protected speech" in *Hartman v. Moore*, 547 U.S. 250 (2006). However, the Court then twice sidestepped ruling on the issue of whether probable cause to make an arrest defeats a claim that the arrest was in retaliation for protected speech. *See Reichle v. Howards*, 566 U.S. 658 (2012) (ruling on the alternative ground of qualified immunity); *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018) (ruling narrowly on unusual circumstances involving an alleged "official municipal policy" of retaliation). The Supreme Court finally articulated a clear rule in a "more representative case" brought about by, of all things, shenanigans springing forth from the notoriously free-spirited "Arctic Man" festival in Alaska's Hoodoo Mountains.

Preceding his arrest, respondent Russell Bartlett may (or may not) have been intoxicated when he loudly refused to answer an officer's questions. Bartlett also may (or may not) have aggressively approached the same officer later, when the officer was asking some minors if they had been consuming alcohol. *Nieves*, 139 S. Ct. at 1720. What Bartlett unequivocally *did* do, however, was insert himself between the minors and the police, and informed (or slurred to) the officers that the minors were not obligated to speak to them. *Id.* Bartlett—now between the officer and the target of the officer's investigation—then stepped very close to the police officer, prompting the officer to physically push Bartlett away. A fellow officer then arrested Bartlett for disorderly conduct. *Id.* at 1721. While Bartlett was being arrested, the original officer told Bartlett "[b]et you wish you would have talked to me now." *Id.*

Bartlett sued the arresting officers under 42 U.S.C. § 1983 claiming his arrest was motivated by a desire to punish him for exercising his First Amendment right to speak out against the police. *Id.* The defendant-officers responded asserting that they had probable cause to arrest Bartlett for interfering with a police investigation and disorderly conduct,

and therefore the arrest was reasonable under the Fourth Amendment. *Id.* The officers won summary judgment at the trial level; however, the United States Court of Appeals for the Ninth Circuit reversed, concluding that probable cause did not categorically defeat a First Amendment retaliation claim. *Id.*

Thereafter, the Supreme Court reversed the Ninth Circuit's decision, holding that probable cause under the Fourth Amendment defeats a First Amendment retaliation claim (subject to an exception, discussed below). *Id.* at 1724. Since probable cause is viewed objectively, the subjective intent of the arresting officer (and theoretically any statements he or she makes during the arrest) is immaterial to the analysis, "avoid[ing] the significant problems that would arise from reviewing police conduct under a purely subjective standard." *Id.* at 1724-25, 1727. However, the Court's ruling does not provide definitive and unqualified clarity.

Writing for a majority of the Court, Chief Justice Roberts created "a narrow qualification . . . for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Id.* at 1727. As an example, Justice Roberts offered jaywalking, which "is endemic but rarely results in an arrest." *Id.* If probable cause generally defeats a First Amendment retaliation claim because there would have been an arrest even absent any protected speech, then the Court's "narrow qualification" is meant to ensure the First Amendment does not evaporate when it is less clear that an officer would have actually made an arrest absent speech. *Id.* This "narrow exception" did not apply to Mr. Bartlett's case, however, seemingly because "disorderly conduct" is the type of crime that is regularly the basis for an arrest (unlike jaywalking). *Id.* at 1728. The Court therefore affirmed summary judgment for the officers and Bartlett was unsuccessful in his effort to be compensated for his arrest. *Id.*

Although *Nieves v. Bartlett* resolves one issue—does a First Amendment retaliation claim *require* there be an absence of probable cause?—it creates another: what type of "objective-comparative evidence" is sufficient to escape the definitive impact of the presence of probable cause on a First Amendment retaliation claim? The *Nieves* majority offers no guidance beyond suggesting that "very minor criminal offenses" (such as jaywalking) might be offenses that do not typically result in arrest. But what makes something a "very minor criminal offense?"

The obvious criteria for assessing whether a crime is "minor" would be to look at (a) the conduct involved and (b) resulting penalties for the conduct—but would such evidence truly defeat a showing that such "minor" offenses are, nonetheless, routinely the basis for arrest? It is also unclear from the Court's jaywalking example if some offenses are so "minor" that *any* arrest is suspicious under the First Amendment if speech is present. And if some crimes are so "minor" that common sense indicates they are non-arrestable, are some crimes so "major" that they are *never* suspicious even if the arrestee is engaged in protected speech? And how are jurisdictional variances in defining a given crime (be it a "major" or "minor" crime) accounted for? *Nieves* does not speak to these concerns.

What if "common sense" cannot provide the necessary "objective-comparative evidence" for a given fact pattern? Justice Sotomayor suggested some possible options in her dissenting opinion. *Id.* at 1741 (Sotomayor, J., dissenting); *see also id.* at 1734 (Gorsuch, J., concurring in part and dissenting in part) (which opinion Justice Sotomayor's dissent discusses). To Justice Sotomayor, the necessary "objective-comparative evidence" could include admissions by the arresting officers, statistical evidence of the arrest rates for the offense in question for the defendant-officer and/or others, or other "direct" evidence. *Id.* at 1741-42 nn.8-9 (Sotomayor, J., dissenting). To date, however, there is no federal authority demonstrating what quantum of evidence is sufficient.

The case law either sidesteps or ignores the exception entirely, *see Hartman v. Thompson*, 931 F.3d 471, 483-85 (6th Cir. 2019), or simply states such evidence is not present in the record, without discussion. *See, e.g.*, *McKenzie v. City of New York*, No. 17 Civ. 4899 (PAE), 2019 U.S. Dist. LEXIS 121937, at *22-24 (S.D.N.Y. July 22, 2019). For Illinois-

based practitioners, the United States Court of Appeals for the Seventh Circuit has not yet addressed a First Amendment retaliatory-arrest claim since *Nieves* was decided. Thus, practitioners in the Seventh Circuit have no greater insight as to how these issues will be resolved in practice at this time.

The following example illustrates the new conundrum: A protestor is sitting on a park bench, eating a sandwich wrapped in wax paper. Next to the protestor is a handmade "Marijuana for All" sign. Sandwich now gone, the protestor chucks the wrapper into a nearby planting bed, grabs his sign and begins trudging back to the protest—but not before a police officer arrests the protestor for littering. Annoyed, the officer tells the protestor "If you don't want to get arrested, don't carry a sign like that in my neighborhood."

The protestor then sues the officer under Section 1983, claiming the littering charge was a ruse: the officer *really* wanted to punish the protestor for engaging in speech protected by the First Amendment. The officer's attorney retorts any reasonable officer had probable cause to arrest for littering, and therefore the arrest was valid under the Fourth Amendment (and the officer's subjective animus is thus immaterial). Assuming probable cause exists for the criminal offense of littering, how would the plaintiff "objectively" prove that "similarly situated" litterers are not arrested, thereby triggering the *Nieves* exception?

In sum, the Supreme Court has established that a First Amendment retaliatory-arrest claim is defeated when probable cause is established *unless* there is "objective evidence" showing that "similarly situated people" engaging in similar speech were *not* arrested. The current trend in the post-*Nieves* case law is to end the inquiry at the presence or absence of probable cause. Practitioners will have to continue to wait for examples of sufficient "objective-comparative evidence" to satisfy *Nieves*' exception. However, the practitioner defending an arresting officer is advised to investigate (if available) the defendant-officer's arresting history for the crime in question to better understand the potential for satisfying the *Nieves* exception through the officer's own testimony and/or practices.

About the Authors

Keith E. Fruehling, a partner with *Heyl, Royster, Voelker & Allen, P.C.*, is a highly successful litigator in many civil practice areas, including the defense of tort litigation, complex civil rights, medical malpractice, employment, construction, product liability, and toxic tort/asbestos claims in federal and state courts. He has taught, lectured and published on federal and state civil practice issues. He currently serves on the Illinois State Bar Association's (ISBA) Board of Governors, is the immediate past chair of the ISBA's Task Force on the Unauthorized Practice of Law and has recently been appointed by the President of the ISBA to the Future of the Courts Special Committee. Prior to joining *HeylRoyster* in 1997, Mr. Fruehling served as a Senior Assistant State's Attorney with Champaign County from 1994–1997.

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