# Third Time's the Charm: The Supreme Court's Clarification of the Retaliatory Arrest Standards in *Gonzalez v. Trevino*

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Three times in the last seven years, the Supreme Court has grappled with the role that probable cause plays in First Amendment retaliation claims involving arrests.[1] It's an unenviable job.

On the one hand, if an arrest was made with probable cause, then all the boxes would seem to be checked, making an arrest, at least objectively, justifiable. And if the arrest was justifiable, why allow plaintiffs a collateral challenge through a retaliation lawsuit? On the other hand, allowing probable cause to trump evidence of retaliation would leave a backdoor in the First Amendment. Our current expansive kludge of criminal laws means "almost anyone can be arrested for something,"[2] giving petty tyrants an opportunity to silence their critics with minimal creativity and a pair of handcuffs.

The Court's overall approach has been to adopt a compromise so that no one is fully satisfied but both sides can claim a victory of sorts. Government officials who make arrests supported by probable cause have a presumption of good faith, but plaintiffs can present evidence of retaliation at the threshold stage to overcome that presumption. The question that divided the courts before *Gonzalez v. Trevino* was what kind of evidence of retaliation was allowed. After *Gonzalez*, any evidence will suffice, as long as it is objective and

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[1] Gonzalez v. Trevino, 144 S. Ct. 1663 (2024); Nieves v. Bartlett, 587 U.S. 391 (2019); Lozman v. Riviera Beach, 585 U.S. 87 (2018); *see also* Reichle v. Howards, 566 U.S. 658 (2012).

[2] *Nieves*, 587 U.S. at 412 (Gorsuch, J., concurring in part and dissenting in part).

"makes it more likely that an officer *has* declined to arrest someone for engaging in such conduct in the past."[3]

For two reasons, *Gonzalez* v. *Trevino* is an encouraging development for free speech and bad news for those looking to use the power of arrest to silence their critics. First, the Supreme Court clarified that the only evidence that must be excluded at the threshold stage is state-of-mind evidence. Like the Fifth Circuit in *Gonzalez*, lower courts had interpreted the previous rule to exclude everything but specific examples of individuals who engaged in the same conduct but avoided arrest. They can't do that anymore. Second, the Supreme Court rejected the defendants' request for a sweeping rule that would have rubberstamped all retaliatory arrests supported by warrants.

This article proceeds in four parts. The first part sets up the problem that the Supreme Court faced when grappling with the presence of probable cause in retaliatory arrest claims. The second part examines *Nieves v. Bartlett*, the Supreme Court's first attempt to announce a general rule about retaliatory arrests. The third part discusses the Supreme Court's most recent retaliatory arrest decision, *Gonzalez v. Trevino*, which clarified the rule announced in *Nieves*. The article concludes by looking to the future of these issues.

## I. The Pre-*Nieves* Debates: Considering Whether Probable Cause Is a Barrier to Retaliatory Arrest Lawsuits

Arrests are an important law enforcement tool. They protect the public by removing dangerous individuals from the streets, and they deter future lawbreakers from committing crimes. But arrests are also an incredibly effective tool for silencing political opponents. The barrier to arrests is low—arguable probable cause[4] of some crime[5] is all that's required. And the effects of arrests are particularly chilling—when the choice is "shut up or go to jail," most people

[3] *Gonzalez*, 144 S. Ct. at 1667.

[4] Probable cause is not a high bar. It will "frequently" be based on "innocent behavior." Illinois v. Gates, 462 U.S. 213, 243 n.13 (1983).

[5] *See* Harvey A. Silvergate, Three Felonies a Day: How the Feds Target the Innocent xxxvi (2011); *see also* James R. Copland & Rafael A. Mangual, Manhattan Inst., Overcriminalizing the Sooner State 6 (2016) (explaining that between 2010 and 2015, the South Carolina legislature enacted an average of 60 new crimes annually, followed by Minnesota with 46, Michigan with 45, North Carolina with 34, and Oklahoma with 26).

will choose to forgo their First Amendment rights. No wonder autocrats around the world find arrests to be such an attractive form of "opposition management."[6]

In this country, we've been rightly wary of retaliatory arrests. As the Supreme Court observed 37 years ago, the right to criticize the government, "without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."[7]

At the same time, we've also given law enforcement officials substantial deference, especially when their actions are justified by the presence of probable cause. The Court has repeatedly explained that the subjective intent of the officer is simply "irrelevant" and provides "no basis for invalidating an arrest."[8] "[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer."[9]

So what to do, then, with cases in which a plaintiff admits (or a court decides) that there was probable cause for the arrest but claims that the true cause of the arrest was the plaintiff's political views or speech criticizing the government? Does it make sense to let the suit proceed even though the conduct of the government officials responsible for the arrest was objectively reasonable? Or should such suits be barred even when a complaint presents compelling facts showing that probable cause was merely a laundering mechanism for a First Amendment violation? And are these the only two options?

### *A. Option One: Probable Cause Is No Barrier to Retaliatory Arrest Suits*

The Court has never seriously entertained allowing First Amendment plaintiffs to proceed unencumbered in the face of probable cause.

[6] For example, since the start of the war in Ukraine in February 2022, Russia has arrested more than 20,000 Russians who criticized the invasion. These arrests are often made under laws—such as skipping patriotism classes—that are designed to make it look like the arrest was caused by the defendants' activities rather than the substance of their speech. *See* Ann M. Simmons, *Ordinary Russians Feel Wrath of Putin's Repression*, Wall St. J. (Nov. 11, 2023), https://perma.cc/8MVTLQYV.

[7] City of Houston v. Hill, 482 U.S. 451, 463 (1987).

[8] Devenpeck v. Alford, 543 U.S. 146, 153, 155 (2004).

[9] Kentucky v. King, 563 U.S. 452, 464 (2011) (internal quotation marks and citation omitted).

Even Justices Ruth Bader Ginsburg and Stephen Breyer were leery of this possibility, convinced that probable cause should be dispositive in at least some cases.

Consider Justice Ginsburg's concurrence (joined by Justice Breyer) in *Reichle v. Howards*. In *Reichle*, a secret service officer was sued by a protester after the officer arrested him for lying to a federal official.[10] The situation unfolded when Vice President Dick Cheney visited a shopping mall in Colorado. The protester—Steven Howards—walked up to the Vice President and told him that his "policies in Iraq are disgusting."[11] As the Vice President moved along, Howards touched his shoulder.[12] Following this encounter, one of the agents—Gus Reichle—approached Howards and asked whether he had touched the Vice President. After Howards said no, Reichle arrested him.[13]

Howards sued, arguing that he was arrested not because he had lied about touching the Vice President, but because he had criticized the Iraq War. The Supreme Court ultimately dismissed Howards's claim by granting Reichle qualified immunity. Justice Ginsburg concurred. Going beyond qualified immunity, Ginsburg explained that the presence of probable cause, in her view, meant that Reichle should not be exposed "to claims for civil damages" at all.[14] "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. In performing that protective function, they rightly take into account words spoken to, or in the proximity of, the person whose safety is their charge."[15] Because Secret Service officers are "duty bound to take the content of [the suspect's] statements into account" to determine the level of threat, "[r]etaliatory animus cannot be inferred from the assessment they made in that regard."[16]

[10] *See* 566 U.S. 658, 662 (2012).

[11] *Id*. at 661.

[12] *See id*.

[13] *See id*.

[14] *Id*. at 672 (Ginsburg, J., concurring in the judgment).

[15] *Id*. at 671.

[16] *Id*. at 672.

Thus, even Ginsburg and Breyer—at the time the second and third most pro-plaintiff Justices on the bench[17]—thought that probable cause was an essential variable in solving the equation of retaliatory arrests. In the process, they zeroed in on something—the public-safety need to take speech into account while making arrests—that would eventually drive the entire Court's thinking.[18]

### *B. Option Two: Probable Cause Is a Full Barrier to Retaliatory Arrest Suits*

Similarly, the Court has never seriously considered barring all retaliatory arrest claims in the face of probable cause. Only Justice Clarence Thomas has made this argument, citing two reasons.

#### *1. Common law*

According to Thomas, the three closest analogues to retaliatory arrest claims are false arrest, malicious imprisonment, and malicious prosecution.[19] Because all three required a showing of no probable cause, that's what a retaliatory arrest claim should also require.[20]

#### *2. Thomas's disagreement with* Monroe v. Pape

Thomas "adhere[s] to the view that *no* intent-based constitutional tort would have been actionable under the § 1983 that Congress enacted."[21] On this telling, officers can only be sued if they act pursuant to an unconstitutional state or local law. If they act in a rogue manner—for example, by intending to retaliate against an opponent—then that is not covered by § 1983 and should not be actionable in federal court. *Monroe v. Pape* recognized such intentional

[17] The most pro-plaintiff Justice on the bench was of course Sonia Sotomayor. The absence of her signature on that concurrence is telling and consistent with her subsequent statements on the issue. *See infra* Part II.

[18] *See infra* Part II.

[19] *See* Lozman v. Riviera Beach, 585 U.S. 87, 105 (2018) (Thomas, J., dissenting).

[20] *See id. But see* Nieves v. Bartlett, 587 U.S. 391, 414 (2019) (Gorsuch, J., concurring in part and dissenting in part) (disagreeing with Thomas because "the *First* Amendment . . . seeks not to ensure lawful authority to arrest but to protect the freedom of speech," so the common-law analogues to the Fourth Amendment should not control) (emphasis in original).

[21] *Lozman*, 585 U.S. at 104 n.2 (Thomas, J., dissenting) (cleaned up).

actions,[22] so according to Thomas it was wrongly decided. As a result, Thomas—along with Justice Antonin Scalia in his time—would deny constitutional remedies altogether.[23]

### *C. Option Three: Probable Cause Is a Partial Barrier to Retaliatory Arrest Suits*

Other members of the Court have openly struggled to chart a middle course that filters out insubstantial cases without catching (too many) meritorious ones. At oral argument in *Nieves v. Bartlett*,[24] Justice Samuel Alito explained the difficulty of crafting a rule to govern a range of cases:

> At one end there is a case where you've got the disorderly person situation. A police officer arrives at the scene where two people are shouting at each other, and one of them says something insulting to the officer, and ends up getting arrested. . . . At the other end, you have a case like a journalist has written something critical of the police department and then a week later is given a citation for driving 30 miles an hour in a . . . 25-mile-an-hour zone.[25]

Justice Alito's question illustrates two competing considerations in retaliatory arrest suits. The first is that, in many of these cases, officers must take protected speech into account to determine whether the speaker should be arrested. As Justice Ginsburg explained in *Reichle*, this need presents a causal complexity: Speech can simultaneously be political (telling Dick Cheney you don't like his Iraq policies) and provide a justification for a valid arrest (a potential motive for intent to harm the Vice President). If considering protected speech can be legitimate—indeed, officers are often "duty bound" to take it into account[26]—then exposing officers to liability on that

[22] *See* Monroe v. Pape, 365 U.S. 167, 172 (1961) (concluding that "Congress, in enacting § 19[83], meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position").

[23] *See* Crawford-El v. Britton, 523 U.S. 574, 612 (1998) (Scalia, J., dissenting).

[24] *See infra* Part II.

[25] Transcript of Oral Argument at 9–10, Nieves v. Bartlett, 587 U.S. 391 (2019) (No. 17-1174) (edited for clarity).

[26] Reichle v. Howards, 566 U.S. 658, 672 (2012) (Ginsburg, J., concurring in the judgment).

ground seems not just unfair to the officer, but also detrimental to public safety concerns. Subjecting officers to suits, on this view, would chill legitimate law enforcement and freeze suspect-officer communications at the time when they are most needed.

But the second consideration—which must be weighed against the first—is that pretextual arrests can be easy. Probable cause is a low barrier, and opportunities to find a crime to pin on a critic are increasingly abundant.[27]

At the Institute for Justice, we receive potential case submissions involving retaliatory arrests on a weekly basis. This area has become one of our most frequently litigated. Most fact patterns we hear about do not involve on-the-spot arrests, as in *Reichle*. Instead, they center on premeditation arising from a long-brewed animosity, akin to the second scenario discussed by Justice Alito.

Here are some examples just from the last year:

- In Escambia County, Alabama, a newspaper publisher and reporter were arrested for publishing a story—based on their confidential sources—on a school superintendent's misuse of COVID-19 funds. Media accounts later revealed that the superintendent was very close with the district attorney and the sheriff.[28]
- In Surfside, Florida, a teenage activist spent 27 hours in jail for allegedly pushing the vice mayor during a debate. The original affidavit relied on the vice mayor's account, but later interviews revealed that the confrontation never took place.[29]
- In Trumbull County, Ohio, a local politician spent a day in jail after she refused to apologize for her criticism of the sheriff for abominable jail conditions.[30]

[27] *See Nieves*, 587 U.S. at 412 (Gorsuch, J., concurring in part and dissenting in part).

[28] *See* Paul Farhi, *Local Journalists Arrested in Small Alabama Town for Grand Jury Story*, Wash. Post (Nov. 1, 2023), https://www.washingtonpost.com/style/media/2023/11/01/atmore-alabama-journalists-arrested-grand-jury/.

[29] *See* Martin Vassolo, *Surfside Arrest Further Divides Town Ahead of Election*, Axios (Mar. 15, 2024), https://www.axios.com/local/miami/2024/03/15/surfside-arrest-divides-town-election.

[30] *See* Amanda Holpuch, *Arrest Violated County Official's Free Speech Rights, Judge Rules*, N.Y. Times (Jan. 18, 2024), https://www.nytimes.com/2024/01/18/us/ohio-niki-frenchko-arrest.html.

In all of these cases, charges were quickly dismissed. But by then, the powers-that-be had already forced their critics behind bars—however temporarily—sending chills down their spines and across their communities. Preventing these types of bogus criminal cases from proceeding is insufficiently protective of the First Amendment.

## II. *Nieves*: The Court Makes Probable Cause a Partial Barrier to Retaliatory Arrest Lawsuits

After sidestepping this dilemma in *Reichle* and then *Lozman*,[31] the Supreme Court took a direct shot at it in *Nieves*. Balancing these two considerations, the Court held that probable cause is a barrier to a retaliation suit but not an insurmountable one. The Court explained that a plaintiff must plead and prove the absence of probable cause, unless he alleges "objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been."[32] The Court did not flesh out the definition of the term "objective" other than to say that evidence must go beyond allegations of state of mind.[33] Nor did the Court address the meaning of the phrase "similarly situated" other than to cite *United States v. Armstrong*.[34] That case had held that to properly state a defense against a racially biased criminal prosecution, criminal defendants must point to specific comparators—that is, individuals who were not Black and who could have been prosecuted, but were not.[35]

[31] *Lozman v. Riviera Beach* came out one Term before *Nieves v. Bartlett*. Riviera Beach had had enough of Fane Lozman's opposition to its policies, so one of its councilmembers "suggested that the City use its resources to 'intimidate' Lozman." Lozman v. Riviera Beach, 585 U.S. 87, 91 (2018). As a result of this "premeditated plan," Lozman was arrested. *Id*. at 100. When he sued, the Court set out to answer generally "whether the existence of probable cause defeats the First Amendment claim for retaliatory arrest." *Id*. at 102 (Thomas, J., dissenting) (internal quotation marks and citation omitted). But just as the Court did in *Reichle*, it ended up punting on this question. *See id*. at 99 (majority opinion) The Court instead announced that its rule, which allowed Lozman's suit to move forward, was limited to an official municipal policy of retaliation. *See id*. at 101.

[32] *Nieves,* 587 U.S. at 407 (citing United States v. Armstrong, 517 U.S. 456, 465 (1996)).

[33] *Id*. at 403.

[34] *Id.* at 407.

[35] *See Armstrong*, 517 U.S. at 465.

*Nieves* arose out of Alaska's Arctic Man festival, "known for both extreme sports and extreme alcohol consumption."[36] When Russell Bartlett crossed paths with officers Bryce Weight and Luis Nieves, it was "around" 1:30 a.m.[37] The two encounters at issue in the case involved the officers explaining to Arctic Man attendees that they should move their beer kegs inside their RVs and also asking those who were underage whether they'd been drinking.[38] Bartlett intervened in both of those encounters, yelling at the officers and commanding his fellow Arctic Man aficionados not to talk to them. When the latter encounter escalated into what appeared to be a confrontation between Bartlett and Weight, Nieves arrested Bartlett for disorderly conduct. After Nieves handcuffed Bartlett, he reportedly said: "[B]et you wished you would have talked to me now."[39]

Bartlett sued both officers, claiming that he was arrested not because of his belligerent behavior but because the officers did not like the content of his speech. Although the district court found that Bartlett's arrest was supported by probable cause,[40] Bartlett pointed to Nieves's comments during the arrest as evidence of retaliation.[41]

There was no question that Bartlett's speech criticizing the officers was protected. By the time the case reached the Supreme Court, there was also no question that Bartlett was arrested at least in part because of his speech. The question before the Court was whether the officers' consideration of Bartlett's speech permitted Bartlett to bring a First Amendment claim, given the existence of probable cause.

### *A. General Rule: Probable Cause Bars Retaliatory Arrests*

Channeling Justice Ginsburg's discussion of causal complexity in *Reichle*,[42] the Supreme Court held that "probable cause should generally defeat a retaliatory arrest claim."[43] This holding was based

[36] *Nieves*, 587 U.S. at 395.

[37] *Id.*

[38] *See id.* at 395–96.

[39] *Id.* at 397.

[40] *See id.*

[41] *See id.*

[42] *See supra* Part I; *see also* Reichle v. Howards, 566 U.S. 658, 671 (2012) (Ginsburg, J., concurring in the judgment).

[43] *Nieves*, 587 U.S. at 406.

on the Court's concern that "retaliatory arrest cases . . . present a tenuous causal connection between the defendant's alleged animus and the plaintiff's injury."[44] The causal connection is tenuous because "protected speech is often a wholly legitimate consideration for officers when deciding whether to make an arrest."[45] "Officers frequently must make split-second judgments when deciding whether to arrest, and the content and manner of a suspect's speech may convey vital information—for example, if he is ready to cooperate or rather presents a continuing threat."[46] "Indeed, that kind of assessment happened in this case. The officers testified that they perceived Bartlett to be a threat based on a combination of the content and tone of his speech, his combative posture, and his apparent intoxication."[47]

### *B. Exception: Objective Evidence That Nonretaliatory Grounds Are Insufficient to Explain the Arrest Can Overcome Probable Cause*

But the Court's reliance on causal complexity could go only so far. In the second part of *Nieves*, the Court announced that a plaintiff may show that "non-retaliatory grounds were in fact insufficient to provoke the adverse consequences" through an "objective inquiry that avoids the significant problems that would arise from reviewing police conduct under a purely subjective standard."[48] If a plaintiff can make such a showing, then the plaintiff's retaliation claims should be allowed to proceed "in the same manner as claims where the plaintiff has met the threshold showing of the absence of probable cause."[49]

For some retaliatory arrests, "probable cause does little to prove or disprove the causal connection between animus and injury."[50] For example, "if an individual who has been vocally complaining about police conduct is arrested for jaywalking" at a busy intersection where such arrests are rare, it's a safe bet that the arrest was

[44] *Id*. at 401 (internal quotation marks and citation omitted).

[45] *Id.* (cleaned up).

[46] *Id*. (cleaned up).

[47] *Id*.

[48] *Id.* at 407 (cleaned up).

[49] *Id*. at 407–8.

[50] *Id*. at 407.

motivated by the jaywalker's complaints, not his crime.[51] If a plaintiff can make a similar showing, a retaliatory arrest claim should be able to proceed regardless of probable cause.

Still, the Court announced the jaywalking exception in mystifying terms: "[T]he no-probable-cause requirement should not apply," it said, "when a 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."[52] The Court did not define the term "objective" other than to explain that purely subjective evidence, such as allegations of the officer's state of mind, do not come in.[53] Nor did the Court explain the meaning of "similarly situated."[54] Instead, it cited to a selective prosecution case, *United States v. Armstrong*, as an example of what it had in mind.[55]

In *Armstrong*, Black individuals were indicted on charges of conspiring to possess and distribute crack cocaine.[56] In their attempt to throw out the indictments, these individuals raised a defense of selective prosecution. As evidence, they presented a study showing that the defendants were Black in all of the 24 relevant closed cases in the previous year.[57] That fact, they claimed, tended to show that they were prosecuted only because of their race, entitling them to further discovery on the defense of selective prosecution.[58] But what they didn't have was evidence that white people were accused of similar crimes without being indicted. That, in the Court's view, was a death blow to this argument. Because the criminal defendants could not point to "individuals who were not black and could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted," the district attorney could proceed with the indictments.[59]

[51] *Id*.

[52] *Id*.

[53] *Id*. at 403–04 (rejecting "Bartlett's purely subjective approach").

[54] *Id.* at 407.

[55] *See id*.

[56] *See* United States v. Armstrong, 517 U.S. 456, 458 (1996).

[57] *See id*. at 459.

[58] *See id*.

[59] *Id*. at 470.

As Justice Sonia Sotomayor pointed out in her *Nieves* dissent, there might as well have been no jaywalking exception at all if this standard applied. In selective prosecution cases, statistical evidence of nonprosecutions is available through a comparison of those who were arrested for a crime against those who were subsequently prosecuted for that crime.[60] But such comparative statistics do not exist in retaliatory arrest cases.[61] "And unlike race, gender, or other protected characteristics, speech is not typically sorted into statistical buckets that are susceptible of ready categorization and comparison."[62] If *Armstrong* applies, then "comparison-based evidence is the sole gateway" through which plaintiffs can avoid the general no-probable-cause rule.[63] But such "fetishiz[ation of] one specific type of motive evidence . . . at the expense of other modes of proof" is "arbitrar[y]" and "ration[s] First Amendment protection in an illogical manner."[64]

Unlike Justice Sotomayor, Justice Neil Gorsuch did not see the *Nieves* majority as taking the *Armstrong* argument that far. "[E]nough questions remain about *Armstrong*'s potential application," he explained, "that I hesitate to speak definitively about it today."[65] Moreover, "[s]ome courts of appeals have argued that *Armstrong* should not extend, at least without qualification, beyond prosecutorial decisions to arrests by police."[66] Justice Gorsuch explained that in his view *Nieves* did not "adopt[] a rigid rule . . . that First Amendment retaliatory arrest plaintiffs who can't prove the absence of probable cause must produce 'comparison-based evidence' in every case."[67] He "retain[ed] hope that lower courts" would apply *Nieves* "'commonsensically,' and with sensitivity to the competing arguments about whether and how *Armstrong* might apply in the arrest setting."[68]

[60] *See Nieves*, 587 U.S. at 429 (Sotomayor, J., dissenting).

[61] *See id.* ("[W]hile records of arrests and prosecutions can be hard to obtain, it will be harder still to identify arrests that never happened.").

[62] *Id.*

[63] *Id.*

[64] *Id.* at 427–28.

[65] *Id.* at 418 (Gorsuch, J., concurring in part and dissenting in part).

[66] *Id.*

[67] *Id.* at 419.

[68] *Id.* (internal citation omitted).

## III. *Gonzalez*: The Court Clarifies That Probable Cause Can Be Overcome with Any Objective Evidence of Retaliation

It did not take long for circuit courts to split over the meaning of *Nieves*'s "similarly situated" standard.[69] According to the Seventh Circuit, *Nieves* "does not appear to be adopting a rigid rule that requires, in all cases, a particular form of comparison-based evidence."[70] Instead, courts "must consider each set of facts as it comes to [them], and in assessing whether the facts supply objective proof of retaliatory treatment," the Seventh Circuit "surmise[d] that Justices Gorsuch and Sotomayor are correct—common sense must prevail."[71]

According to the Fifth Circuit, on the other hand, "the plain language of *Nieves* requires comparative evidence, because it require[s] 'objective evidence' of 'otherwise similarly situated individuals' who engaged in the 'same' criminal conduct but were not arrested."[72] The Fifth Circuit acknowledged that "one of [its] sister circuits ha[d] taken a broader view" but stated that it did "not adopt this more lax reading of the exception."[73]

### *A. Proceedings Below*

Consistent with its narrow view of comparative evidence, the Fifth Circuit rejected a First Amendment retaliation claim by a 72-year-old city councilwoman, Sylvia Gonzalez, who was arrested weeks after she championed a petition calling for the resignation of the city manager in her hometown of Castle Hills, Texas. Gonzalez was arrested under a statute criminalizing tampering with a government record. Two months earlier, during a city council meeting when the petition was introduced, she had taken what she thought was a copy of the petition and placed it in her binder at the dais. As soon as the

[69] *Id.* at 407 (majority opinion).

[70] Lund v. City of Rockford, 956 F.3d 938, 945 (7th Cir. 2020) ("agree[ing] with Justice Gorsuch's interpretation of the majority opinion in *Nieves*").

[71] *Id*.

[72] Gonzalez v. Trevino, 42 F.4th 487, 492 (5th Cir. 2022), *vacated and remanded*, 144 S. Ct. 1663 (2024).

[73] *Id*. at 492–93.

mayor pointed out that this was the actual petition and not a copy, Gonzalez had given it back.[74]

The question in the case, like in *Nieves*, was whether Gonzalez could sue the mayor and other allies of the city manager for retaliation. Gonzalez claimed that the defendants had organized her arrest to punish her oppositional speech. But because a magistrate had signed a warrant for her arrest—making the existence of probable cause virtually unassailable—the defendants argued that she should be prevented from asserting a retaliation claim.[75]

Because this case was filed on the heels of *Nieves*, Gonzalez knew that she needed to plead objective evidence in her complaint showing that government officials normally use their discretion not to arrest in these types of situations. To do this, she reviewed 10 years' worth of felony and misdemeanor data in Bexar County (where Castle Hills is located), showing that the anti-tampering statute "had never been used in the county 'to criminally charge someone for trying to steal a nonbinding or expressive document.'"[76] "[T]he typical indictment" involved "'accusations of either using or making fake government identification documents.'"[77] And "[e]very misdemeanor case, according to Gonzalez, involved 'fake social security numbers, driver's licenses, [or] green cards.'"[78]

In addition to this survey, Gonzalez presented "*other* types of objective evidence" to show that in cases like hers government officials "typically exercise their discretion not to [arrest]."[79] For example, Gonzalez "pointed to . . . details about the anomalous procedures used for her arrest," like the fact that 72-year-old councilmembers wanted for nonviolent misdemeanors are typically issued summonses and not arrest warrants.[80] Moreover, the warrant affidavit itself contained "statements . . . suggesting a retaliatory motive,"[81]

[74] *See* Gonzalez v. Trevino, 144 S. Ct. 1663, 1666 (2024).

[75] *See id*. at 1667.

[76] *Id*. at 1666 (quoting the complaint).

[77] *Id*. at 1667 (quoting the complaint).

[78] *Id*. (quoting the complaint).

[79] *Id*. at 1677 (Jackson, J., concurring) (emphasis in original).

[80] *Id*. at 1678. *See also id*. at 1666 (majority opinion) ("[A] local Magistrate granted a warrant for Gonzalez's arrest.").

[81] *Id.* at 1678 (Jackson, J., concurring).

such as observations that Gonzalez was "openly antagonistic to the city manager" and "desperately [wanted] to get him fired."[82]

For the Fifth Circuit, none of this objective evidence mattered. The Fifth Circuit did not even engage with the nonsurvey evidence, such as the unusual procedures employed by the defendants to ensure an arrest or their statements in the affidavit. With respect to the survey evidence, the Fifth Circuit simply stated that "Gonzalez does not offer evidence of other similarly situated individuals who mishandled a government petition but were not prosecuted under Texas Penal Code § 37.10(a)(3). Rather, the evidence she offers is that virtually everyone prosecuted under § 37.10(a)(3) was prosecuted for conduct different from hers."[83] The Court thus threw out Gonzalez's claim because she couldn't find another councilmember who similarly put a nonbinding petition in her binder and was *not* arrested for it.

Judge Andrew Oldham dissented from the Fifth Circuit's decision. According to his opinion, "such *comparative* evidence is not required. *Nieves* simply requires objective evidence. And evidence is '[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact.'"[84] Judge Oldham stated that as long as a plaintiff provides objective evidence that "tend[s] to connect the officers' animus to the plaintiff's arrest," the plaintiff should be able to proceed with her claims.[85] "Such evidence could be comparative. But as far as [Judge Oldham could] tell, nothing in *Nieves* requires it to be so."[86]

### *B. The Supreme Court Ruling*

The Supreme Court full-throatedly agreed with Judge Oldham's view. In reversing the Fifth Circuit, it stated that (1) the Fifth Circuit's interpretation of the *Nieves* exception was "overly cramped"; (2) "specific comparator evidence" is not required; and (3) "the demand for virtually identical and identifiable comparators goes

[82] *Gonzalez*, 42 F.4th at 490 (internal quotation marks omitted).

[83] *Id.* at 492.

[84] *Id*. at 502 (Oldham, J., dissenting) (quoting *Evidence*, Black's Law Dictionary (11th ed. 2019)).

[85] *Id.*

[86] *Id*.

too far."[87] Instead, "[t]he only express limit [the Court] placed on the sort of evidence a plaintiff may present . . . is that it must be objective in order to avoid the significant problems that would arise from reviewing police conduct under a purely subjective standard."[88]

This reference to "objective" evidence echoed the Court's *Nieves* decision, where it emphasized the importance of evaluating an officer's conduct under the objective standard of reasonableness.[89] So long as the plaintiff provides objective evidence that "makes it more likely that an officer *has* declined to arrest someone for engaging in such conduct in the past," this requirement is met.[90]

The Supreme Court further clarified that when it asked for evidence of similarly situated individuals in *Nieves*, it did not limit that evidence to specific comparator evidence as it had in *Armstrong*. Any objective evidence that officers have in the past used their discretion not to arrest would do.[91] In other words, the Seventh Circuit was right: Courts must commonsensically assess whether the facts supply objective proof of retaliatory treatment, without tying themselves in statistical knots to figure out what does and does not constitute a direct comparator.[92] As Justice Alito explained in his concurrence:

> Our jaywalking example in *Nieves* plainly proves this point. We did not suggest that a vocal critic of the police charged with jaywalking had to produce evidence that police officers knowingly refused to arrest other specific jaywalkers. And we certainly did not suggest that this jaywalker had to find others who committed the offense under the same conditions as those in his case—for example, on a street with the same amount of traffic traveling at the same speed within a certain distance from a crosswalk at the same time of day.[93]

Crucially, the Court did not give any credence to the defendants' argument that a warrant short-circuits the analysis, barring a claim of retaliation. While having a warrant is a defense in cases where the existence

[87] *Gonzalez*, 144 S. Ct. at 1667.

[88] *Id*. (internal quotation marks omitted).

[89] *See supra* Part II.

[90] *Gonzalez*, 144 S. Ct. at 1667.

[91] *See id*.

[92] *See* Lund, 956 F.3d at 945.

[93] *Gonzalez*, 144 S. Ct. at 1673 (Alito, J., concurring).

of probable cause is at issue,[94] once probable cause is not disputed, the fact that defendants obtained a warrant is immaterial. The Court's unwillingness to entertain arguments about the protective power of warrants is consistent with its general deference to those officers who are pressed to make warrantless arrests in dangerous settings.[95]

Justice Alito's concurrence provides additional guidance. For example, he explained that objective evidence means anything other than evidence regarding an officer's state of mind—"*e.g.*, evidence of bad blood between the officer and the plaintiff."[96] Valid objective evidence also includes Gonzalez's evidence that elderly councilmembers with no criminal records typically aren't arrested for nonviolent misdemeanors. Alito further clarified that the threshold question "asks whether the plaintiff engaged in the type of conduct that is unlikely to result in arrest or prosecution," which is different from the merits question of "whether the defendant's adverse decision was influenced by the plaintiff's constitutionally protected speech."[97] By this definition, objective evidence of the defendant surveying the plaintiff's house for several weeks does not come in, because that evidence is still dealing with that particular defendant's motivations.[98] But objective evidence of "an affidavit from an officer testifying that no one has been prosecuted in the jurisdiction for engaging in similar conduct" does come in.[99] Such evidence shows not the state of mind of the defendant, but rather the overall practice of not arresting these types of individuals. This is consistent with Justice Ketanji Brown Jackson's concurrence (joined by Justice Sotomayor), which emphasized that objective evidence also includes statements in the arrest affidavit suggesting a retaliatory motive.[100] Even an objective

[94] Franks v. Delaware, 438 U.S. 154, 171 (1978) (discussing the presumption of validity for government action supported by a warrant).

[95] *E.g.*, Kisela v. Hughes, 584 U.S. 100, 103 (2018) (extending extra deference to "police officers" because they are "often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation") (internal quotation marks omitted).

[96] *Gonzalez*, 144 S. Ct. at 1672 (Alito, J., concurring).

[97] *Id*.

[98] *See id*. ("[E]vidence regarding an officer's state of mind . . . does not qualify [as objective evidence].").

[99] *Id*.

[100] *See id.* at 1677–78 (Jackson, J., concurring).

inquiry can take the defendants' statements into account, as long as they go to show not the defendants' state of mind but rather the objective fact that a reasonable official in their shoes could have declined to arrest under similar circumstances in the past.[101]

Justice Thomas wrote the sole dissent.[102] Thomas was concerned that the Court in *Gonzalez* had expanded the *Nieves* exception, which now applies "if a plaintiff presents evidence of *any* objective fact that makes it more likely that an officer has declined to arrest someone for engaging in such conduct in the past."[103] Consistent with Thomas's previous statements on this issue,[104] he emphasized that he would erect a full barrier to suit when there is probable cause because "[t]here is no basis in either the common law or our First Amendment precedents for the exception created in *Nieves* and expanded upon [in *Gonzalez*]."[105]

## IV. The Future of Retaliatory Arrest Claims

In her *Nieves* dissent, Justice Sotomayor wrote that "[w]hat exactly the Court means by 'objective evidence,' 'otherwise similarly situated,' and 'the same sort of protected speech' is far from clear."[106] *Gonzalez* mostly clarified these terms. We now know that *Nieves*, unlike *Armstrong*, does not require specific comparator evidence to overcome the presence of probable cause. We now know that all the plaintiff must present is objective evidence, which is anything other than evidence regarding an officer's state of mind. And we now know that the evidence need only show that a person taking similar action *without* the speech would have avoided arrest.

This type of objective evidence of meaningfully differential treatment can take many forms, including unusual timing or procedures, statistical evidence, anecdotal evidence, and even statements by

[101] *See id*.

[102] Justice Brett Kavanaugh wrote separately to opine that the grant of certiorari was "ill-advised," but he concurred in full because in his view the opinion "does not seem to say anything that is harmful to the law." *Id*. at 1677 (Kavanaugh, J., concurring).

[103] *Id*. at 1679 (Thomas, J., dissenting) (internal quotation marks omitted) (emphasis in original).

[104] *See supra* Part I.B.

[105] *Gonzalez*, 144 S. Ct. at 1679 (Thomas, J., dissenting) (internal quotation marks omitted).

[106] *Nieves*, 587 U.S. at 432 (Sotomayor, J., dissenting).

government officials. That means police reports and arrest affidavits can come in. It also means that statements by police officers *after* the arrest can come in too. So, for example, bodycam footage of a police officer's statement to a colleague that "we usually don't arrest people for this minor offense" or "I see people do this all the time, but this is the only time I arrested someone" must be allowed in. Such statements show differential treatment and therefore are sufficient to overcome the presence of probable cause.

The upshot: Retaliatory arrest claims—extremely difficult to bring before *Gonzalez*—now stand a chance. In this age of increased polarization, this outcome is most welcome. It means that government officials cannot count on arrests as a retaliatory weapon of choice to silence their opponents. Even when an arrest is supported by probable cause, a plaintiff can now bring a retaliation lawsuit. And the plaintiff does not have to point to a specific individual who engaged in the same conduct, did not criticize the government, and was not arrested. In *Gonzalez*, common sense prevailed. Let's hope it prevails in the future choices made by our government officials, too.