NOTE

THE DEATH OF RETALIATORY ARREST CLAIMS: THE SUPREME COURT'S ATTEMPT TO KILL RETALIATORY ARREST CLAIMS IN *NIEVES V. BARTLETT*

Michael G. Mills†

The Supreme Court's recent decision in Nieves v. Bartlett *threatens to render retaliatory arrest lawsuits superfluous and allows officers to flagrantly chill speech without repercussion. An officer violates the First Amendment when she arrests an individual because of his protected speech. Prior to the Supreme Court's decision in* Nieves*, the individual could bring a lawsuit against the officer under 42 U.S.C. § 1983 for depriving the individual of his First Amendment rights.* Nieves*, however, required the individual to show that the officer lacked probable cause for the arrest. This requirement nearly eliminates retaliatory arrest claims since it is incredibly easy for an officer to show probable cause. Even if the individual could show the officer lacked probable cause, the individual could have already sued the officer for a false arrest. Thus, retaliatory arrest claims are now superfluous and no longer serve any purpose in discouraging officers from chilling free speech. The decision's negative effects will be compounded with the increasing number of retaliatory arrests during protests of recent police killings of Black individuals, including George Floyd and Breonna Taylor.*

The Court did create an exception in Nieves *for when an officer had probable cause but normally would not exercise her discretion to arrest. For example, when an officer arrests an anti-police protester for jaywalking. Nonetheless, the Court suggested such a high standard to govern this exception that very few retaliatory arrest claims will succeed. Instead, lower courts should adopt a less stringent standard. This Note advocates that lower courts adopt a burden-shifting test used in employment discrimination cases. This standard is more realistic for plaintiffs to satisfy, and thus, will allow the* Nieves *exception to deter officers from chilling speech.*

---

† J.D. Candidate, Cornell Law School, 2021; B.A., Siena College, 2018. Special thanks to Professors Nelson Tebbe and Joshua Macey for their invaluable assistance with this Note. Additional thanks to all the *Cornell Law Review* editors who helped polish this Note. Dedicated to my grandmother Delia. To good health.

INTRODUCTION

In Season Three, Episode Two of Stranger Things, Mayor Larry Kline encourages Chief of Police Jim Hopper to break up a protest outside town hall because the protesters do not have a permit.[1] However, Kline tells Hopper that he wants Hopper to break up the protest because they are criticizing Kline—not because the protesters lack a permit. A few scenes later, Hopper is shown leading a protester off in handcuffs, admonishing the protester for not "go[ing] through the proper channels."[2] Surely the First Amendment prevents this kind of retaliation based on the protester's viewpoint?[3] But under the Supreme

---

1 The Duffer Brothers, *Stranger Things 3: Chapter Two: The Mall Rats*, NETFLIX (July 4, 2019), https://www.netflix.com/title/80057281 [https://perma.cc/72WX-6NSZ].

2 *Id.*

3 *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.").

Court's recent decision in *Nieves v. Bartlett*, it seems likely that the protester has no remedy against Hopper or Kline under 42 U.S.C. § 1983. And even if the protester could fit within the *Nieves* exception, the Court implicitly set out such a high standard that success is near impossible.

Forty-two U.S.C. § 1983 holds liable to the injured party any "person who, under color of [law], subjects . . . any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."[4] The First Amendment prevents government officials from retaliating against individuals for their protected speech.[5] Therefore, if an officer arrests an individual because of his or her speech, the individual can seek civil recourse against the officer under § 1983.[6] To make a prima facie showing in a § 1983 retaliatory arrest claim, the plaintiff must prove that (1) the plaintiff's activity was constitutionally protected; (2) the defendant caused an injury that would chill a person of ordinary firmness from engaging in that constitutionally-protected activity; and (3) a causal connection existed between defendant's retaliatory animus and plaintiff's injury.[7] But for decades, lower courts struggled to answer if the plaintiff had to show a lack of probable cause for the arrest.[8]

In recent years, the Supreme Court has considered whether probable cause bars a retaliatory arrest claim three times.[9] In its first attempt, *Reichle v. Howards*, the Court did not reach the retaliatory arrest issue and instead dismissed on qualified immunity grounds.[10] In its second attempt, *Lozman*

---

4 42 U.S.C. § 1983 (2018). The prima facie elements of a § 1983 claim against an individual are: (1) a government official; (2) acting under the color of state law; (3) deprived the plaintiff of a right secured by the Constitution or United States laws. Elizabeth Williams, Annotation, *Cause of Action Under 42 U.S.C.A. § 1983 for Unlawful Arrest or Detention*, 59 CAUSES ACTION 2d 739 (2019). Against a municipality, the elements are: (1) a public official; (2) took actions under the color of law; (3) that deprived the plaintiff of a constitutional or statutory right; (4) that caused the plaintiff injury; and (5) the municipality's official policy caused the constitutional injury. *Id.*

5 *See* Hartman v. Moore, 547 U.S. 250, 256 (2006) (citing Crawford-El v. Britton, 523 U.S. 574, 592 (1998)); 1 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 3:14 (2019).

6 *See* SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983, at 162 (2d ed. 1986).

7 Paige Davidson, Comment, *Retaliatory Arrests: Seeking Compromise in a Constitutional Tug of War*, 50 U. PAC. L. REV. 685, 689 (2019); Williams, *supra* note 4, at 739.

8 *See* Lozman v. City of Riviera Beach, 138 S. Ct. 1945, 1955–56 (2018) (Thomas, J., dissenting).

9 *See* Nieves v. Bartlett, 139 S. Ct. 1715, 1721–22 (2019).

10 Reichle v. Howards, 566 U.S. 658, 663 (2012).

v. City of Riviera Beach, it reached the retaliatory arrest issue, but the Court's holding was narrow and has limited applicability.[11] Finally, in *Nieves*, the Court held that probable cause generally bars a retaliatory arrest claim.[12] The Court was largely concerned that allowing retaliatory arrest lawsuits when the officer had probable cause would prevent officers from making split-second decisions. However, the majority carved out a narrow exception in situations when an ordinary officer had probable cause to make an arrest but typically would not exercise her discretion to do so.[13]

As a practical matter, *Nieves*'s probable cause holding is flawed. Probable cause is an incredibly easy standard for officers to satisfy and can even be satisfied post hoc.[14] Thus, plaintiffs' claims will fail because they will rarely be able to demonstrate that an officer lacked probable cause. Even if the plaintiff does show the officer lacked probable cause, § 1983 false arrest claims already provide a remedy in this scenario, making retaliatory arrest claims duplicative.[15] Such an underinclusive standard, which protects so few speakers, will chill important speech directed against public officials.[16]

This Note proposes an alternative outcome to *Nieves*'s probable cause holding which addresses the Court's concerns about officers being unable to make split-second decisions while still protecting speakers.[17] The test determines if the speaker's environment is a hostile environment where an officer is required to make split-second decisions to preserve public safety. If the environment is hostile, probable cause bars a retaliatory arrest claim. If it is not a hostile environment, plaintiffs must show that their speech was the but-for cause of their arrest.

The Court's second holding, that there is an exception when an ordinary officer has probable cause to make an arrest but typically would not exercise her discretion to do so, is equally as troubling. The exception is the only viable remaining method to prevail on a retaliatory arrest claim, so it needs to be encompassing. But the Court suggested that *United*

---

11 *See Lozman*, 138 S. Ct. at 1954.

12 *Nieves*, 139 S. Ct. at 1723–25.

13 *Id.* at 1727.

14 *See infra* notes 127–135 and accompanying text.

15 *See infra* notes 123–126 and accompanying text.

16 *See infra* notes 156–159 and accompanying text.

17 *See* discussion *infra* subpart III.B.

States v. Armstrong should govern the standard.[18] *Armstrong*, however, is an incredibly difficult standard used in selective prosecutions claims—and arguably has never resulted in a successful claim.[19] Therefore, it is too restrictive to govern the only viable method a plaintiff can use to bring a retaliatory arrest claim.

Instead, I discuss a few alternatives to govern the exception.[20] These include relaxing the *Armstrong* test, lowering the number of similarly situated individuals the plaintiff needs to show, or allowing discovery after the plaintiff makes a nonfrivolous allegation. This Note advocates for a burden-shifting test that requires the plaintiff to make a prima facie showing of retaliation. Then, the defendant must present a content-neutral reason for the arrest. Finally, the burden shifts back to the plaintiff to prove this reason is merely pretextual. This test is not as constrictive as *Armstrong*, thus allowing some retaliatory arrest claims to prevail even with the Court's underinclusive first holding in place.

In this Note, I will address two major issues with *Nieves*: (1) that requiring a plaintiff to show a lack of probable cause is underinclusive, and thus allows for the flagrant chilling of speech; and (2) that *United States v. Armstrong* is too restrictive of a standard to govern the exception and therefore lower courts should seek to adopt a more forgiving standard in future retaliatory arrest cases. These two flaws render § 1983 retaliatory arrest claims practically useless since the plaintiff's claim will either be barred or the plaintiff could have already brought a claim for false arrest. In Part I, I will discuss the Supreme Court's retaliatory arrest cases that led up to *Nieves*. I will also address the circuit split that existed before the decision. In Part II, I will summarize *Nieves* and criticize its logical flaws. In Part III, I will discuss the probable cause holding's underinclusiveness—in that it provides speakers with virtually no protection—along with the effects of this underinclusivity. I will propose an alternative outcome for the case that would have provided speakers with more protection. In Part IV, I will discuss the Court's exception to the rule in situations where an officer otherwise would not have exercised her discretion to arrest. I will criticize the practical implications of using *Arm-*

---

18 *Nieves*, 139 S. Ct. at 1727 (citing United States v. Armstrong, 517 U.S. 456, 465 (1996)).

19 *See infra* notes 199–204 and accompanying text.

20 *See* discussion *infra* subpart IV.B.

strong to govern the standard and propose alternative standards.

I
THE BACKGROUND

Forty-two U.S.C. § 1983 was enacted in 1871 to allow victims of state actions that deprive victims of their constitutional rights to sue the wrongdoer.[21] The law was passed during Reconstruction, largely in response to the Ku Klux Klan's violence against freed slaves and Republicans.[22] Similarly, a victim can bring a *Bivens* action[23] against federal actors for deprivations of constitutional rights.[24] While courts generally borrow between the two actions' doctrines, there are some differences between the two.[25] However, as relevant to this Note, the Supreme Court has never decided if *Bivens* extends to retaliatory arrest claims.[26]

This Part will begin by discussing the prominence of retaliatory arrests in the United States. Then, it will discuss the two cases that contended for the governing standard in retaliatory arrest cases. This Part will lastly discuss the Court's two cases that lead up to *Nieves*.

A. Why Care? Examples of Retaliatory Arrests Throughout the Country

Retaliatory arrest jurisprudence is worthy of the Supreme Court's recent attention due to its prevalence in the United States. Both the news media and the Department of Justice have focused on retaliatory arrests in recent years. Perhaps the most recent, high-profile case involves adult-film star Stormy Daniels who alleged that President Donald Trump engaged in intimate relations with her and then had her sign a

---

21 MICHAEL G. COLLINS, SECTION 1983 LITIGATION: IN A NUTSHELL 1 (4th ed. 2011).

22 MARSHALL S. SHAPO, *Constitutional Tort:* Monroe v. Pape, *and the Frontiers Beyond*, 60 NW. U. L. REV 277 (1965), *in* A SECTION 1983 CIVIL RIGHTS ANTHOLOGY 4, 4 (Sheldon H. Nahmod ed., 1993). For a history on § 1983 and the Court's early § 1983 jurisprudence, see generally COLLINS, *supra* note 21, at 1–14 (describing the origins of § 1983 and how the Court's interpretation of the law changed).

23 Named after the Supreme Court case that pronounced this cause of action: Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

24 *See* COLLINS, *supra* note 21, at 365.

25 STEVEN H. STEINGLASS, 1 SECTION 1983 LITIGATION IN STATE COURTS § 5:4 (2018).

26 Reichle v. Howards, 566 U.S. 658, 663 n.4 (2012) (noting that the Court has never decided if *Bivens* extends to retaliatory arrest claims and declining to decide that question in this case).

"hush agreement."[27] After these allegations, Daniels was arrested for touching three undercover detectives in an Ohio strip club.[28] She was arrested, along with two other women, under an Ohio law which prohibits employees "who regularly appear[ ] nude or seminude at a sexually oriented business" from touching patrons.[29] The charges were later dismissed since Daniels did not regularly appear at the club. Daniels subsequently sued the officers, alleging that they arrested her because of the public statements she made against President Trump.[30] She settled the case for $450,000.[31] In another recent example, off-duty officers arrested Minnesota Vikings defensive tackle Tom Johnson after he filmed the officers.[32] After a jury acquitted him of trespass and disorderly conduct, he sued the officers for, among other things, retaliatory arrest.[33]

The Department of Justice has also noted many instances where police departments used their authority to suppress

---

27 Sarah Fitzpatrick, *Stormy Daniels Sues Trump, Says 'Hush Agreement' Invalid Because He Never Signed*, NBC NEWS (Mar. 7, 2018, 8:09 AM), https://www.nbcnews.com/politics/donald-trump/stormy-daniels-sues-trump-says-hush-agreement-invalid-because-he-n854246 [https://perma.cc/8HR9-NVFC]. Stormy Daniels's real name is Stephanie Clifford. *Id.*

28 Faith Karimi & Amanda Watts, *Charges Against Stormy Daniels Are Dismissed After Ohio Strip Club Arrest*, CNN (July 13, 2018, 7:44 AM), https://www.cnn.com/2018/07/12/politics/stormy-daniels-arrested-in-ohio/index.html [https://perma.cc/J886-PWBM].

29 *Id.*

30 Andrew Blankstein et al., *Stormy Daniels Sues Ohio Cops, Claims She Was Arrested to Protect Trump*, NBC NEWS (Jan. 14, 2019, 2:42 PM), https://www.nbcnews.com/news/crime-courts/stormy-daniels-sues-ohio-cops-claims-she-was-arrested-protect-n958496 [https://perma.cc/M5ZS-7U2C]. Interestingly, Daniels claimed false arrest in violation of her Fourth and Fourteenth Amendment rights and not retaliatory arrest in violation of her First and Fourteenth Amendment rights. *See* Complaint & Demand for Jury Trial at 10–11, Clifford v. Keckley, No. 2:19-cv-00119 (S.D. Ohio Jan. 14, 2019). It is very possible she did not allege retaliatory arrest because of the overlap a probable cause requirement creates between false arrest and retaliatory arrest claims. *See infra* notes 123–126 and accompanying text (noting the overlap *Nieves* created between false arrest and retaliatory arrest claims); *see also* Barnes v. Wright, 449 F.3d 709, 720 (6th Cir. 2006) (requiring retaliatory arrest plaintiffs to show a lack of probable cause).

31 Andrew Blankstein & David K. Li, *Stormy Daniels to Receive $450,000 Settlement over Arrest at Ohio Strip Club*, NBC NEWS (Sept. 27, 2019, 2:26 PM), https://www.nbcnews.com/news/us-news/stormy-daniels-receive-450-000-settlement-over-arrest-ohio-strip-n1059676 [https://perma.cc/L7KJ-63VA].

32 Bernie Pazanowski, *Former NFL Player May Proceed with Claims over Police Tasing*, BLOOMBERG LAW (Nov. 1, 2019, 11:48 AM), https://news.bloomberglaw.com/us-law-week/former-nfl-player-may-proceed-with-claims-over-police-tasing [https://perma.cc/KP7T-K6FP].

33 This Note further discusses Johnson's case *infra* subpart III.A.

speech.[34] For example, in Ferguson, Missouri, the Department of Justice found that the police officers had engaged in arrests designed to suppress anti-police protests. Officers in Ferguson would often arrest those who disrespected them, typically charging them with failure to comply, disorderly conduct, or resisting arrest.[35] The many retaliatory arrest examples the Justice Department found include an officer who arrested a business owner who criticized the officer for detaining the owner's employee, a male who swore at officers after they had told him he was free to go, and multiple individuals who were arrested for recording officers. In one notable incident, Ferguson officers threatened a group protesting the six-month anniversary of Michael Brown's death[36] by announcing "everybody here [i]s going to jail" and subsequently arresting six people.[37] The Department of Justice concluded that Ferguson's officers habitually used police powers to stifle unwelcome criticism.[38]

The Department of Justice also criticized the Maricopa County, Arizona, Sheriff's Office's frequent use of retaliatory arrests.[39] The Department of Justice noted that the Sheriff's Office "engaged in a pattern or practice of retaliating against individuals for exercising their First Amendment right to free

---

34 *See* Arielle W. Tolman & David M. Shapiro, *From City Council to the Streets: Protesting Police Misconduct After* Lozman v. City of Riviera Beach, 13 CHARLESTON L. REV. 49, 56–61 (2018).

35 U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 25–27 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/D25V-3UR7].

36 Michael Brown was an unarmed Black teenager shot and killed by a White police officer in Ferguson. Larry Buchanan et al., *What Happened in Ferguson?*, N.Y. TIMES (last updated Aug. 10, 2015), https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html [https://perma.cc/R73H-F7L2]. After a grand jury decided not to indict the officer, a wave of protests occurred, and police responded in riot gear. *Id.* For a more detailed analysis of the Michael Brown shooting and the subsequent protests, see generally JENNIFER E. COBBINA, HANDS UP DON'T SHOOT 1–2, 27–28, 72–102, 138–42 (2019) (describing the shooting, the aftermath, and the overall impact of Brown's death).

37 U.S. DEP'T OF JUSTICE, *supra* note 35, at 27–28 (internal quotation marks omitted).

38 *Id.* at 28.

39 Tolman & Shapiro, *supra* note 34, at 57. The reader may be familiar with the Maricopa County Sheriff's Office and its former Sheriff, Joe Arpaio. Arpaio was convicted of criminal contempt of court for defying a district court's order to stop racially profiling Latinos based alone on mere suspicion about their immigration status. Julie Hirschfeld Davis & Maggie Haberman, *Trump Pardons Joe Arpaio, Who Became Face of Crackdown on Illegal Immigration*, N.Y. TIMES (Aug. 25, 2017), https://www.nytimes.com/2017/08/25/us/politics/joe-arpaio-trump-pardon-sheriff-arizona.html [https://perma.cc/D7S7-HFX2]. President Trump subsequently pardoned Arpaio. *Id.*

speech."[40] In one instance, officers arrested a man protesting the county's treatment of Latinos for failure to obey a police officer. After he was released, officers arrested the same man as he stood by another protest "with his hands by his side."[41] Officers also arrested individuals during two separate public meetings when the individuals attempted to criticize the county officers' actions.[42]

Finally, the Department of Justice made similar findings about the Baltimore Police Department.[43] Examples of retaliatory arrests by the Baltimore Police Department include ordering a young man to leave an area because he "had no respect for law enforcement" and later arresting him because he did not leave, arresting a man after he yelled "fuck you" at an officer, and arresting a man who questioned a traffic stop's lawfulness.[44]

Most recently, arrests during the George Floyd protests[45] and other recent protests over the killing of unarmed Black individuals illustrate the prevalence of retaliatory arrests—and hence the need for strong protections against them. As of early June 2020, over 10,000 people had been arrested during the George Floyd protests.[46] Among those arrested, there have been many claims—from protesters and journalists alike—of

---

40 Letter from Thomas E. Perez, Assistant Attorney Gen., to Bill Montgomery, Cty. Attorney 13 (Dec. 15, 2011), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf [https://perma.cc/2D4M-QQWC].

41 *Id.*

42 *Id.* at 14.

43 Tolman & Shapiro, *supra* note 34, at 57.

44 U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 116–17 (2016) (internal quotation marks omitted), https://www.justice.gov/crt/file/883296/download [https://perma.cc/2FGA-T5LE]. The report also notes that the police department tended to retaliate with force against individuals for their protected speech. *See id.* at 118–19.

45 George Floyd was an unarmed Black who was murdered when three police officers pinned him to the ground, one of whom kneeled on his neck for eight minutes and forty-six seconds. Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (July 8, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html [https://perma.cc/M6BN-ZD7J]. The officers repeatedly ignored Mr. Floyd's pleas that he could not breathe. Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (July 10, 2020), https://www.nytimes.com/article/george-floyd-protests-timeline.html [https://perma.cc/2QDA-4E57]. National outrage followed when the video went viral, resulting in protests in at least 140 cities. *Id.*

46 Anita Snow, AP Tally: Arrests at Widespread US Protests Hit 10,000, AP NEWS (June 4, 2020), https://apnews.com/bb2404f9b13c8b53b94c73f818f6a0b7 [https://perma.cc/48RJ-HUVK].

arrests in retaliation for protected speech.[47] Thus, retaliatory arrest lawsuits may be more important now than ever. However, in light of the Supreme Court's ruling in *Nieves*, many protesters may be surprised to find out they have little recourse left available against these retaliatory arrests.

B. *Mt. Healthy* Versus *Hartman*: The Two Competing Standards

Having established that retaliatory arrests are pervasive in many cities throughout the United States, it is important to understand the issue the Court resolved in *Nieves*. Two cases are essential to understand the probable cause question: *Mt. Healthy v. Doyle*[48] and *Hartman v. Moore*.[49]

In *Mt. Healthy*, a school board employed Fred Doyle as a teacher.[50] During his employment, Doyle had numerous incidents, such as arguing with a teacher, which resulted in the teacher slapping Doyle; arguing with a cafeteria employee over the amount of spaghetti he was served; and making obscene gestures to students who did not listen to him. Doyle later called into a local radio station about a dress and appearance memorandum which the school circulated, criticized the memorandum, and conveyed the memorandum's content. The district subsequently declined to rehire Doyle. As a reason, the school listed Doyle's "notable lack of tact in handling professional matters," citing Doyle's call to the radio station and his obscene gestures to students.[51] Doyle sued under § 1983, claiming the board violated his First Amendment rights by not rehiring him due to his protected speech.[52] The district court

---

47 *See, e.g.*, Jasmine Aguilera, *Watchdogs Say Assaults on Journalists Covering Protests Is on a 'Scale That We Have Not Seen Before'*, TIME (June 4, 2020, 1:56 PM), https://time.com/5846497/journalists-police-george-floyd-protests/ [https://perma.cc/V92N-9JCT] (noting that law enforcement was targeting journalists with violence or arrests at protests); The Editorial Board, *In America, Protest Is Patriotic*, N.Y. TIMES (June 2, 2020), https://www.nytimes.com/2020/06/02/opinion/george-floyd-protests-first-amendment.html [https://perma.cc/MSY4-JVLB] (collecting various incidents where protesters were arrested in retaliation for their speech); Brian Stelter, *Arresting Reporters at a Protest is an Affront to the First Amendment*, CNN (May 29, 2020, 2:47 PM), https://www.cnn.com/2020/05/29/media/reporters-arrest-minneapolis-first-amendment/index.html [https://perma.cc/Y2M6-DQFG] (criticizing police officers for arresting a CNN reporter live on television).

48 Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

49 547 U.S. 250 (2006).

50 *Mt. Healthy*, 429 U.S. at 281–82.

51 *Id.* at 282–83 (internal quotation marks omitted).

52 *Id.* at 283. Doyle could sue the school board under § 1983 for depriving his constitutional rights since the board was a state actor. *See* JAMES A. KUSHNER, GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION § 2:17 (2019).

found that the statements were clearly protected and that Doyle was entitled to reinstatement and backpay since the protected statements played a "substantial part" in Doyle not being rehired.[53]

A unanimous Supreme Court rejected this substantial-part test. The Court determined that allowing an employee to prevail just because protected conduct was a substantial part of the decision, even though there were otherwise sufficient grounds to take action against the employee, would place the employee in a better position than the employee would have occupied had the violation not occurred.[54] Instead, the Court established a two-step burden-shifting test. The first step was similar to the test the district court used: the plaintiff must show that their conduct was constitutionally protected and that the protected conduct was a substantial factor for the defendant's actions. After the plaintiff makes the showing, the burden shifts to the defendant who must now prove, by a preponderance of the evidence, that the defendant would have taken the same action but-for the plaintiff's constitutionally-protected conduct. In short, *Mt. Healthy* set out the but-for causation showing that a plaintiff must make in a § 1983 retaliation case.[55]

Hartman, however, called into question the *Mt. Healthy* standard as applied in retaliatory arrest cases. In *Hartman*, William Moore was the chief executive of an equipment company.[56] Moore lobbied Congress to convince it to switch the United States Postal Service to multiline optical character readers. The Postmaster General opposed this change, and soon Postal Service inspectors investigated Moore and his company for kickbacks and improperly influencing the selection of a new Postmaster General. Moore was subsequently indicted, but the district court dismissed the case due to a "complete lack of direct evidence" of criminal wrongdoing.[57] Moore brought a *Bivens* action against five postal inspectors, alleging that the postal inspectors had encouraged his prosecution as retaliation for advocating for the multiline readers. The district court refused to grant summary judgment, rejecting the postal in-

53 *Mt. Healthy*, 429 U.S. at 283 (internal quotation marks omitted).

54 *Id.* at 285–87.

55 *See* 2 SMOLLA, *supra* note 5, at § 18:25.

56 Hartman v. Moore, 547 U.S. 250, 252–54 (2006).

57 *Id.* at 254 (internal quotation marks omitted) (quoting United States v. Recognition Equip. Inc., 725 F. Supp. 587, 596 (D.D.C. 1987)).

spectors' argument that the underlying probable cause negated the retaliatory prosecution lawsuit.[58]

The Supreme Court reversed, holding that probable cause bars a retaliatory prosecution claim.[59] It reasoned that retaliatory prosecution claims have a unique causation requirement: since prosecutorial immunity makes prosecutors immune from lawsuits, a plaintiff needs to show a causal connection between the defendant's retaliatory animus and the prosecutor's actions.[60] This causal requirement differs from a normal retaliation claim where the plaintiff only has to show that the defendant harbored animus that was the but-for cause of the defendant's actions. Therefore, since evidence of the defendant's animus did not necessarily show that the prosecutor would not have prosecuted otherwise, the Court heightened the plaintiff's burden.[61] The Court concluded that the defendant's retaliatory motive, combined with a lack of probable cause, would support the belief that the defendant's motive was the but-for cause of the prosecution. Justice Ruth Bader Ginsburg dissented, joined by Justice Stephen Breyer, arguing that the Court's decision would protect against only entirely baseless prosecutions.[62]

Understanding these two cases is essential to understanding the circuit split that existed prior to *Nieves*. Even prior to *Hartman*, some circuits had carved a probable-cause exception into the *Mt. Healthy* standard in retaliatory arrest cases.[63] Other circuits applied the normal *Mt. Healthy* but-for standard even if probable cause existed for the arrest.[64] The circuit split only worsened after *Hartman*, where some circuits reasoned that *Hartman*'s probable cause requirement for retaliatory prosecutions must extend to retaliatory arrests.[65] For example, the Sixth Circuit, which had previously held that the prob-

---

58 *Id.* at 255.

59 *Id.* at 252.

60 *Id.* at 259.

61 *Id.* at 263–65.

62 *Id.* at 266–67 (Ginsburg, J., dissenting).

63 *See, e.g.*, Curley v. Village of Suffern, 268 F.3d 65, 73 (2d Cir. 2001) (holding that the retaliatory arrest inquiry ends when defendant has probable cause to arrest the plaintiff); Redd v. City of Enterprise, 140 F.3d 1378, 1383–84 (11th Cir. 1998) (granting officers qualified immunity since the officer had arguable probable cause to arrest the plaintiff).

64 *See, e.g.*, Skoog v. County of Clackamas, 469 F.3d 1221, 1232 (9th Cir. 2006) (concluding that a plaintiff does not need to plead the absence of probable cause in a retaliatory arrest claim).

65 John Koerner, Note, *Between* Healthy *and* Hartman*: Probable Cause in Retaliatory Arrest Cases*, 109 COLUM. L. REV. 755, 773–75 (2009).

able cause did not prevent a retaliatory arrest claim,[66] held that the *Hartman* rule logically extended to retaliatory arrest claims.[67] In the words of one commentator, "[r]etaliatory arrest case law [was] a mess."[68]

C. *Reichle*: The Supreme Court's First Attempt to Resolve the Probable-Cause Split

The Supreme Court first attempted to resolve this circuit split in *Reichle v. Howards*.[69] In the case, Vice President Richard Cheney was visiting a shopping mall.[70] Secret Service agent Dan Doyle overheard plaintiff Steven Howards say that he was going to ask Cheney how many kids he killed today. Howards approached Cheney and expressed his anger over Cheney's policies in Iraq. Cheney thanked Howards and tried to move along, but Howards touched Cheney's shoulder. Agent Gus Reichle questioned Howards after Doyle briefed him about the incident. Reichle asked Howards if he had assaulted the Vice President, and Howards denied doing so. Nevertheless, Reichle arrested Howards and handed Howards over to the local sheriff's department who charged him with harassment. The charges were later dismissed.

Howards sued Agents Reichle and Doyle under both § 1983 and *Bivens*, claiming, among other things, that they arrested Howards in retaliation for his speech criticizing the Vice President.[71] The agents moved for summary judgment due to qualified immunity,[72] which both the district court and the Tenth Circuit denied for the retaliatory arrest claim.[73] The Tenth Circuit further contributed to the circuit split by holding that *Hartman* does not require retaliatory-arrest plaintiffs to show a lack

---

66 Greene v. Barber, 310 F.3d 889, 896–97 (6th Cir. 2002).

67 Barnes v. Wright, 449 F.3d 709, 720 (6th Cir. 2006). *But see* Leonard v. Robinson, 477 F.3d 347, 355 (6th Cir. 2007) (suggesting it is unclear that *Hartman* changed Sixth Circuit precedent). The Fourth Circuit also established a no-probable-cause requirement after *Hartman*. *See* Pegg v. Herrnberger, 845 F.3d 112, 119–20 (4th Cir. 2017).

68 Koerner, *supra* note 65, at 775.

69 Reichle v. Howards, 566 U.S. 658 (2012).

70 *Id.* at 660–61.

71 *Id.* at 662. For a discussion of *Bivens* in retaliatory arrest claims, see *supra* note 26 and accompanying text.

72 Qualified immunity protects public officials from lawsuits alleging they violated a plaintiff's rights, except in cases where the public official violated a "clearly established" federal law. *See generally* James Buchwalter et al., Annotation, *Raising and Resolving Issue of Qualified Immunity*, 6 FED. PROC. L. ED. § 11:310 (2020) (providing an overview of qualified immunity).

73 *Reichle*, 566 U.S. at 662.

of probable cause.[74] While the Supreme Court granted certiorari to both determine if probable cause bars a retaliatory arrest claim and if the agents were entitled to qualified immunity, the Court decided the case only on qualified immunity grounds.[75]

Nonetheless, the Court laid out important retaliatory arrest principles to describe why a reasonable officer may have believed probable cause barred a retaliatory arrest claim. For example, the Court noted that lower courts often treat retaliatory arrest and prosecution claims similarly.[76] Additionally, just as in retaliatory prosecution cases, probable-cause evidence would be available in almost every retaliatory arrest case. On the other hand, the Court did note that the officers do not have the same "presumption of regularity" as prosecutors do in their decision making.[77] While most of these comments were in dicta,[78] the decision laid out the principles that guided the Court in *Nieves*.

Justice Ginsburg concurred, joined by Justice Breyer, and emphasized how retaliatory arrest cases do not present the same causal-connection issue since officers are not immune from lawsuits like prosecutors.[79] Nonetheless, she concluded that in situations where officers are protecting a public official, they need to be able to "take into account words spoken to . . . the person whose safety" they are charged to protect.[80]

D. *Lozman*: The Supreme Court's Second Take

The Court then laid out its first substantive retaliatory arrest doctrine in *Lozman v. City of Riviera Beach*.[81] However, the case's unique fact pattern resulted in a very narrow rule.[82] Fane Lozman was a Riviera Beach resident who was very critical of the city.[83] He often spoke out against the city during city

---

74 *See* Howards v. McLaughlin, 634 F.3d 1131, 1148 (10th Cir. 2011), *rev'd sub nom.* Reichle v. Howards, 566 U.S. 658 (2012).

75 *Reichle*, 566 U.S. at 663. The Court held that it was not clearly established law that the First Amendment grants citizens the "right to be free from a retaliatory arrest that is supported by probable cause[.]" *Id.* at 664–65.

76 *Id.* at 667–68.

77 *Id.* at 669 (quoting Hartman v. Moore, 547 U.S. 250, 263 (2006)).

78 *See* Patterson v. United States, 999 F.Supp.2d 300, 310 (D.D.C. 2013).

79 *Reichle*, 566 U.S. at 671 (Ginsburg, J., concurring). Oddly enough, Justice Breyer joined the majority's opinion in *Nieves*. Nieves v. Bartlett, 139 S. Ct. 1715, 1719 (2019).

80 *Reichle*, 566 U.S. at 671–72.

81 Lozman v. City of Riviera Beach, 138 S. Ct. 1945 (2018).

82 *See id.* at 1954.

83 *Id.* at 1949.

council meetings and also filed multiple lawsuits against the city.[84] The city council met in a closed-door meeting where it agreed to intimidate Lozman using the city's resources.[85] The council's plan culminated when Lozman spoke at a council meeting and brought up a former county official's arrest. However, a councilmember interrupted him and told Lozman not to discuss that subject. Lozman refused to desist and was asked to leave. When Lozman refused to leave, the councilmember told an officer to arrest Lozman.[86] Lozman was charged with disorderly conduct and resisting arrest; the charges were later dismissed.[87]

Lozman filed suit under § 1983, alleging that the city had engaged in a pattern of retaliation and harassment against him.[88] As to his retaliatory arrest claim, the district court found that there was not probable cause to support the disorderly conduct or resisting arrest charges, but that there may have been probable cause to arrest him for interrupting a public assembly. The district court instructed the jury that Lozman needed to prove a lack of probable cause for the arrest and left the probable cause determination up to the jury. The jury found for the city on all counts. The Eleventh Circuit affirmed, relying on its precedent that barred retaliatory arrest claims when probable cause existed.

During oral arguments, many Justices expressed concern over the fact that Lozman was peacefully speaking during a city council meeting—an environment where there was no threat of violence.[89] Accordingly, the Court opted not to decide the prob-

---

84 As an aside, this was the second case involving Lozman that made its way to the Supreme Court. *See* Lozman v. City of Riviera Beach, 568 U.S. 115, 118–19 (2013) (answering if Lozman's floating home qualified as a "vessel" under the Rules of Construction Act); *see also* Jeffrey Toobin, *Fane Lozman Goes to the Supreme Court, Again*, NEW YORKER (Mar. 2, 2018), https://www.newyorker.com/news/daily-comment/fane-lozman-goes-to-the-supreme-court-again [https://perma.cc/RM9G-X3WD] (noting Lozman's return to the Supreme Court and just how rare this feat is).

85 *Lozman*, 138 S. Ct. at 1949.

86 Lozman's arrest was recorded and can be viewed on the Supreme Court's website. Video: City of Riviera Beach, *Lozman v. Riviera Beach*, SUPREME COURT OF THE UNITED STATES (Nov. 15, 2006), https://www.supremecourt.gov/media/video/mp4files/Lozman_v_RivieraBeach.mp4 [https://perma.cc/3NSN-MWSW].

87 *Lozman*, 138 S. Ct. at 1950.

88 *Id.*

89 *See* Transcript of Oral Argument at 6, Lozman v. City of Riviera Beach, 138 S. Ct. 1945 (2018) (No. 17-21) (Kennedy, J.) ("I'm very concerned about police officers in . . . difficult situations where they have to make quick [decisions] . . . . In this case, there [is] a very serious contention that people in . . . elected office deliberately wanted to intimidate this person, and it seems to me that maybe in this case we should cordon . . . or box off what happened here from the ordinary

able cause issue, finding that Lozman's claim was abnormal because the city was engaging in a coordinated policy of intimidation against Lozman.[90] The Court determined that Lozman, by proving the city's "official retaliatory policy," alleviated the *Hartman* causation problems.[91] The Court also noted that official retaliation policies are especially concerning since they can be long term and pervasive, and that citizens may have little other recourse against the government officials. Thus, only "[o]n facts like these" did the Court find that the *Mt. Healthy* standard applied, leaving open which standard applied in a more ordinary case.[92] The Court remanded the case to the Eleventh Circuit to apply the *Mt. Healthy* standard.[93]

II
NIEVES: THIRD TIME'S A CHARM?

A. *Nieves* Summarized

Finally, the Court resolved this line of cases in *Nieves v. Bartlett*. In the case, Russell Bartlett was attending a festival in Alaska.[94] Sergeant Luis Nieves was talking to a group of intoxicated attendees when Bartlett yelled at the attendees to not

---

conduct of police officers."); *id.* at 8 (Breyer, J.) ("That's not this situation. This situation is someone sitting calmly behind the desk in the middle of the . . . meeting, not somebody out there in a bar or somebody worried about a real riot."); *id.* at 54 (Roberts, C.J.) ("This is not a situation where the police are out in the street and something[ ] happened and they [a]re looking at the, you know, what kind of slogans they have, what they are shouting, a lot [i]s going on. This is, you know, in the city council, during a time specifically set aside for citizens to talk about whatever the council is talking about and comment on it. Is there any basis there for limiting it to the, it seems to me, intensely free speech environment that we [a]re talking about?").

90 *Lozman*, 138 S. Ct. at 1954.

91 *Id.*

92 *Id.* at 1955. Justice Clarence Thomas penned the sole dissent. He enumerated the Court's test into five elements: (1) an official policy of intimidation; (2) that is premeditated well before the arrest; (3) and can be proven by objective evidence; (4) with little relation between the plaintiff's speech and the criminal offense that sparked the arrest; and (5) the speech that provoked the arrest must be of high First Amendment values. *Id.* at 1956 (Thomas, J., dissenting). Thomas criticized that the rule was so narrow and specific that it served almost no use in other cases. Instead, he would have held that probable cause is an absolute bar to retaliatory arrest claims. *Id.* at 1958.

93 The Eleventh Circuit remanded the case to the Southern District of Florida due to the case's unusual facts. Lozman v. City of Riviera Beach, 793 F. App'x 960, 962 (11th Cir. 2019) (per curiam). The city eventually settled with Lozman for $875,000. Jane Musgrave, *Fane Lozman Ends Long Battle with Riviera for $875,000*, PALM BEACH POST (Jan. 14, 2020, 2:34 PM), https://www.palmbeachpost.com/news/20200114/fane-lozman-ends-long-battle-with-riviera-for-875000 [https://perma.cc/7D3S-864H].

94 Nieves v. Bartlett, 139 S. Ct. 1715, 1720–21 (2019).

talk to Nieves. A few minutes later, Trooper Bryce Weight was asking a minor whether he and his friend had been drinking. Bartlett aggressively approached the trooper, stood in between the trooper and the minors, and told the officer to not speak with the minors. After Bartlett stepped toward Weight, Weight pushed him back. Nieves saw this incident, rushed over, and arrested Bartlett. According to Bartlett, Nieves said: "[B]et you wish you would have talked to me now."[95] Bartlett was charged with disorderly conduct and resisting arrest, and these charges were ultimately dismissed. Bartlett then sued the two officers under § 1983, claiming the officers arrested him as retaliation for his speech. The district court granted summary judgment for the officers, determining that they had probable cause to arrest Bartlett. The Ninth Circuit reversed, based on its precedent that probable cause does not automatically defeat a retaliatory arrest claim.

The Supreme Court reversed the Ninth Circuit. Its decision consisted of two major holdings: (1) probable cause generally defeats a retaliatory arrest claim; and (2) there is a narrow exception to this rule when probable cause exists, but an ordinary officer would not typically exercise her discretion to arrest.[96] The Court's first holding largely relied on the similarities between retaliatory prosecutions, where probable cause serves as an absolute defense, and retaliatory arrests.[97] The Court noted that, like retaliatory prosecution cases, the causal inquiry in retaliatory arrest cases is complex. The Court reasoned that speech often conveys vital information to officers that they use to make a "split-second judgment[ ]" on whether they need to arrest an individual.[98] Additionally, the plaintiff would normally present evidence that an officer lacked probable cause because it is probative of the officer's intent.

But these similarities were not the only considerations motivating the Court's opinion. The Court was also concerned about a subjective test's practical results. That is, the Court was concerned that delving into an officer's subjective intent in every case would obstruct an officer's daily work by flooding them with litigation. For example, the Court emphasized that an officer's subjective intent is "easy to allege and hard to disprove," which could result in any routine arrest at a protest

95 *Id.* (alteration in original).

96 *Id.* at 1727.

97 *Id.* at 1723–24.

98 *Id.* at 1724 (internal quotation marks omitted).

causing an officer years of litigation.[99] Instead, the Court found that forbidding cases where the officers had probable cause would prevent these practical concerns.

Moving to the Court's second holding, it determined that there should be a narrow exception for when the officer otherwise would not have exercised her discretion to arrest.[100] The Court gives as an example an officer who arrests an individual for jaywalking after the individual had been complaining about police conduct. Although jaywalking gives probable cause for the arrest, the Court held that it would be "insufficiently protective of First Amendment rights" to dismiss such a chilling abuse of authority.[101] The Court deemed the exception important because warrantless misdemeanor arrests can occur in such a wide range of circumstances and even for incredibly minor offenses.

Justice Neil Gorsuch concurred in part. He argued that probable cause should not be determinative in most cases, but instead should be just one of the various factors courts look at to determine causation.[102] Justice Gorsuch asserted that the Court's probable cause rule does little to protect the First Amendment.[103] He contended that both § 1983's language and the common law do not support the Court's probable cause rule. Instead, he noted that probable cause is usually determinative in false arrest cases, not retaliatory arrest cases. He also pointed out that arrests motivated by race are invalid even if supported by probable cause and argued that the same should follow for arrests motivated by speech.[104]

Justice Sonia Sotomayor dissented.[105] She argued that the lower courts should evaluate retaliatory arrests in the same way they would any other retaliation claim: using a but-for cause standard.[106] She pointed out that, under the Court's

---

99 *Id.* at 1725 (quoting Crawford-El v. Britton, 523 U.S. 574, 585 (1998)). The Court was also concerned that officers would minimize communications during arrests to avoid having their motives scrutinized later. *Id.*

100 *Id.* at 1727.

101 *Id.*

102 *Id.* at 1734 (Gorsuch, J., concurring).

103 *Id.* at 1730–32.

104 *Id.* at 1731–32. Justice Thomas also concurred in part, arguing that the common law did not support any exception to the probable cause rule. *Id.* at 1729 (Thomas, J., concurring); *see also* Lozman v. City of Riviera Beach, 138 S. Ct. 1945, 1958 (2018) (Thomas, J., dissenting) (making the same argument against the *Lozman* exception). Justice Ginsburg also concurred, arguing that a probable cause rule only protects against baseless arrests. *Nieves*, 139 S. Ct. at 1734–35 (Ginsburg, J., concurring).

105 *See Nieves*, 139 S. Ct. at 1735–36 (Sotomayor, J., dissenting).

106 *Id.* at 1736–37.

test, a plaintiff could have unassailable proof of the officer's unconstitutional motives, but would be barred from recourse because the officer had probable cause for the arrest. She criticized the majority for basing its decision on policy goals instead of the statutory language. And even so, she argued that the Court's policy concerns could be addressed through other measures courts have to dismiss frivolous claims.[107] Finally, she pointed out that probable cause allows for post-hoc justification, further condoning flagrant First Amendment violations.[108]

B. *Nieves*'s Logical Flaws

Justices Sotomayor and Gorsuch raise many reasons why *Nieves* is wrongly decided, and to avoid redundancy, this Note will not repeat those reasons in great detail. Instead, this Note will raise a few, unique logical flaws not fully explored in the concurrences or dissent. Then, this Note will discuss the practical harms *Nieves*'s probable cause rule will have on retaliatory arrest claims[109] and what the appropriate standard should be to govern the *Nieves* exception.[110]

One of *Nieves*'s logical flaws is the Court's misguided concern about floodgates opening and officers being inundated with lawsuits over every arrest. This concern can be evaluated because some circuits prior to *Nieves* allowed retaliatory arrest claims even when probable cause existed.[111] And in these circuits, there is no evidence that the courts were flooded with litigation or that officers were unable to function.[112] Therefore, the Court's policy concerns were unfounded.

A second flaw is that *Hartman* did not logically extend to the retaliatory arrest context. First, the causal attenuation in retaliatory prosecution claims is not present in retaliatory ar-

---

107 *Id.* at 1738; *see also* Brief of The Rutherford Institute as Amicus Curiae Supporting Respondent at 21–25, Nieves v. Bartlett, 139 S. Ct. 1715 (2019) (No. 17-1174) [hereinafter Rutherford Amicus] (noting tools courts already have to weed out meritless retaliatory arrest claims).

108 *See Nieves*, 139 S. Ct. at 1741 (Sotomayor, J., dissenting).

109 *See infra* Part III.

110 *See infra* Part IV.

111 *See supra* notes 64, 66, 74 and accompanying text.

112 *See* Brief of Three Individual Activists as Amici Curiae in Support of Respondent at 6–12, Nieves v. Bartlett, 139 S. Ct. at 1715 (2019) (No. 17-1174); Colin P. Watson, Note, *Limiting a Constitutional Tort Without Probable Cause: First Amendment Retaliatory Arrest After* Hartman, 107 MICH. L. REV. 111, 129 (2008); *cf.* Hartman v. Moore, 547 U.S. 250, 258–59 (2006) (rejecting the fear that there would be a flood of litigation without a probable cause bar since other circuits allowed claims when probable cause existed yet had no influx of litigation).

rest claims. The Court in *Hartman* was greatly concerned that retaliatory prosecution suits are not brought against the prosecutor who decided to prosecute but is entitled to prosecutorial immunity, but instead against a nonprosecutor who induced the prosecutor to prosecute.[113] As a result, the Court noted how the nonprosecutor's animus does not necessarily show that the prosecutor was influenced by that animus. But in retaliatory arrest cases, officers do not enjoy the same immunity prosecutors do.[114] Therefore, since most retaliatory arrest cases do not involve an intervening actor, *Hartman* does not logically extend to that context.[115] The Court first tried to reconcile this issue by arguing that the probable cause combined with the officer's malice creates causal attenuation.[116] Yet the same argument could be used for any arrest motivated by an unlawful factor, such as race—yet the Court does not allow probable cause to negate arrests based on race.[117] Second, the Court stressed that prosecutors' decisions are presumptively regular.[118] While officers do enjoy some level of presumable regularity, they do not enjoy the same blanket presumption that prosecutors do.[119] Officers are also not subject to the same expansive legal training prosecutors are.[120] Third, the Court opted in *Lozman* not to extend *Hartman* in a case with an official city policy of retaliation because these policies can be pervasive.[121] Yet this same logic should apply to instances when police officers retaliatorily arrest someone because these arrests can be just as pervasive as official city policies.[122]

But perhaps the most significant logical flaw with *Nieves* is that it renders retaliatory arrest claims nearly superfluous. Normally, when an individual is arrested without probable

---

113 *See Hartman*, 547 U.S. at 261–63.

114 There may be some retaliatory arrest cases where causation is more attenuated, such as when a public official, motivated by the speaker's protected speech, induces an officer to make an arrest. Yet the Supreme Court has oddly looked upon these situations more favorably, allowing in certain circumstances plaintiffs to proceed even when there was probable cause for the arrest. *See* Lozman v. City of Riviera Beach, 138 S. Ct. 1945, 1955 (2018). As a result, the cases where causal connection is the most attenuated are the ones where the plaintiff can proceed even when there was probable cause.

115 Koerner, *supra* note 65, at 779.

116 Nieves v. Bartlett, 139 S. Ct. 1715, 1724 (2019).

117 *Id.* at 1731–32 (Gorsuch, J., concurring).

118 *Hartman*, 547 U.S. at 263.

119 Koerner, *supra* note 65, at 781–82.

120 Randolph A. Robinson II, Note, *Policing the Police: Protecting Civil Remedies in Cases of Retaliatory Arrest*, 89 DENV. U. L. REV. 499, 517 (2012).

121 *See* Lozman v. City of Riviera Beach, 138 S. Ct. 1945, 1954 (2018).

122 *See* examples *supra* subpart I.A.

cause, her civil recourse is a § 1983 claim for false arrest in violation of the Fourth Amendment.[123] But *Nieves* now requires a lack of probable cause to proceed with a retaliatory arrest claim. Therefore, in almost any case where an arrested individual could bring a retaliatory arrest claim, she could have already brought a false arrest claim. This overlap is problematic since the First and Fourth Amendments protect against two distinct harms: chilling speech and governmental intrusion, respectively.[124] The only circumstance remaining where a retaliatory arrest claim could be brought for a depravation of First Amendment rights but not Fourth Amendment rights is in the self-proclaimed "narrow" exception that *Nieves* set out.[125] Therefore, beyond the rare cases that fall into the exception, *Nieves* all but rendered retaliatory arrest claims uselessly duplicative.[126]

III
NIEVES'S UNDERINCLUSIVE PROBABLE CAUSE HOLDING

A. *Nieves*'s Practical Consequences

Beyond being logically dubious, preventing retaliatory arrest claims when the officer had probable cause for the arrest is underinclusive because the rule protects so few speakers. Probable cause is an incredibly easy to satisfy standard, meaning most speakers are left unprotected. The Court has defined probable cause as "whether at th[e] moment [of arrest] the facts and circumstances within [the officer's] knowledge and of which [the officer] had reasonably trustworthy information were sufficient to warrant a prudent [individual] in believing that the [suspect] had committed or was committing an offense."[127] Probable cause is an objective standard, so it can be satisfied using any offense—not just the offense the officer had in mind at the time of arrest.[128] Courts have found probable cause to arrest for failing to wear a seatbelt while driving a

---

123 Michael Coenen, Four Responses to Constitutional Overlap 20 (2019) (unpublished manuscript) (on file with author).

124 Katherine Grace Howard, Note, *You Have the Right to Free Speech: Retaliatory Arrests and the Pretext of Probable Cause*, 51 GA. L. REV. 607, 616 (2017).

125 *See* Nieves v. Bartlett, 139 S. Ct. 1715, 1727 (2019).

126 *See* Watts v. City of Newport Beach, 790 F. App'x 853, 856 n.2 (9th Cir. 2019) (noting that retaliatory arrest damages would be the same as false arrest damages).

127 Beck v. Ohio, 379 U.S. 89, 91 (1964) (citing Brinegar v. United States, 338 U.S. 160, 175–76 (1949); Henry v. United States, 361 U.S. 98, 102 (1959)); *see also* 5 AM. JUR. 2D *Arrest* § 32 (2020) (providing a more detailed definition of probable cause and specific factors courts analyze).

128 Devenpeck v. Alford, 543 U.S. 146, 153–54 (2004).

vehicle,[129] jaywalking,[130] and riding a bicycle the wrong way down a residential street.[131]

Not surprisingly, this low standard is incredibly easy to satisfy.[132] The standard completely ignores that the real world is complex and officers can be motivated by multiple factors—not just probable cause.[133] But under *Nieves*, an officer could escape liability for a retaliatory arrest simply by showing that the defendant was doing as little as violating a seatbelt statute.[134] And protests are ripe with conduct that could provide probable cause for such an arrest, including unlawful assembly, failure to disperse, blocking roads and sidewalks, disorderly conduct, and violating noise ordinances.[135] The illusory protection *Nieves*'s probable cause requirement provides can be easily circumvented so long as an officer can point to one code in the vast statute book that the protester violated. Thus, *Nieves* protects very few speakers from arrest.

But *Nieves*'s underinclusiveness does not stop there. Public officials being sued under § 1983 can invoke a qualified immunity defense if the constitutional right was not clearly established at the time of the violation.[136] In practice, officers frequently invoke this defense in retaliatory arrest actions.[137] And when they do invoke this defense, the officers do not need to show actual probable cause, but only arguable probable cause.[138] Minnesota Vikings defensive tackle Tom Johnson's lawsuit illustrates just one example in the post-*Nieves* world of the arguable-probable-cause rule. In the case, Johnson was in a nightclub when he was told he needed to leave because he

---

129 Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001).

130 United States v. Pratt, 355 F.3d 1119, 1123 (8th Cir. 2004).

131 People v. McKay, 41 P.3d 59, 63–64 (Cal. 2002). For other minor offenses for which courts have found probable cause to sustain an arrest, see Wayne A. Logan, *Reasonableness as a Rule: A Paean to Justice O'Connor's Dissent in* Atwater v. City of Lago Vista, 79 MISS. L.J. 115, 129–31 (2009).

132 Leading Case, *First Amendment—Freedom of Speech—Retaliatory Arrest—* Nieves v. Bartlett, 133 HARV. L. REV. 272, 277 (2019).

133 Robinson, *supra* note 120, at 512.

134 *Cf. Atwater*, 532 U.S. at 354 (finding probable cause for an arrest for violating a seatbelt law which was a fine-only offense). The only argument the arrested could rely on would be the exception set out in *Nieves*. But falling under this exception could be very difficult using the standard the Supreme Court suggested. *See* discussion *infra* Part IV.

135 *See* Tolman & Shapiro, *supra* note 34, at 60–66.

136 Buchwalter et al., *supra* note 72; *see also supra* text accompanying note 72 (defining qualified immunity).

137 *See, e.g.*, Reichle v. Howards, 566 U.S. 658, 662–63 (2012) (invoking, and eventually resolving the case on, qualified immunity grounds).

138 Buchwalter et al., *supra* note 72.

was not in compliance with the club's dress code.[139] Johnson waited in the lobby for his valet parking along with others waiting for their cars. Two off-duty officers, however, approached him and informed him he needed to leave. He questioned why he had to leave when others could wait for their car, at which point the officers shoved him out of the club and pepper sprayed him. Johnson sat outside the club after calling a car and saw the two officers departing. He began recording them, and they came over and asked for Johnson's ID, slapped his phone out of his hand, tased him, and arrested him. He was charged with trespass, disorderly conduct, and obstructing legal process, all of which resulted in acquittal. Johnson then sued the officers for, among other claims, retaliatory arrest. Johnson alleged that the officers arrested him for exercising his free speech right to film the officers. While the district court denied qualified immunity, the Eighth Circuit reversed since the officers had arguable probable cause to believe Johnson trespassed. As the Eighth Circuit defined, arguable probable cause was satisfied if "an officer lacked adequate grounds for an arrest, but made an objectively reasonable mistake about the existence of probable cause."[140] Since the analysis only searched for arguable probable cause, it did not matter if Johnson actually had or reasonably believed he had the right to remain in the lobby.[141] Since it was reasonable for the officers to believe that Johnson did not have permission to remain in the lobby, the officers had arguable probable cause to arrest him for trespassing. It did not matter that the officers did not decide to arrest him until after he started recording—fifteen minutes after the arguable trespass. Since the officers had arguable probable cause to arrest him, the Court's analysis ended. Thus, the court granted the officers qualified immunity on the retaliatory arrest claim.

As if *Nieves* was not already underinclusive enough, the malady is worsened when one factors in post hoc rationalization. Justice Sotomayor noted that, under *Devenpeck v. Alford*, probable cause can exist based on justifications made after the fact.[142] Justice Gorsuch expressed similar concerns.[143] These concerns about post-hoc rationalization were well founded. In fact, the Supreme Court already had seen this possibility in

---

139 Johnson v. McCarver, 942 F.3d 405, 408–09 (8th Cir. 2019).
140 *Id.* at 409.
141 *Id.* at 410.
142 Nieves v. Bartlett, 139 S. Ct. 1715, 1741 (2019) (Sotomayor, J., dissenting) (citing Devenpeck v. Alford, 543 U.S. 146, 153 (2004)).
143 *See id.* at 1732 (Gorsuch, J., concurring).

Lozman, where the district court found that there was no probable cause to arrest Lozman for disorderly conduct or resisting arrest—the charges the officer actually arrested him for—but instead found that there may have been probable cause to arrest Lozman for interrupting a public assembly.[144]

But *Nieves*'s potential underinclusiveness extends to scenarios much more flagrant. Consider the following hypothetical. Officer D is an officer in Mississippi, until she moves to California. She joins the police force in the small town she moved to. Openly carrying a firearm is legal in Mississippi,[145] and Officer D can't imagine a jurisdiction where people are not allowed to openly carry their firearms. But in California, open carry is prohibited.[146]

Officer D is patrolling down the street in the small Californian town when she sees Person P who is openly carrying an AR-15.[147] Being from Mississippi, Officer D sees nothing wrong and keeps on walking. However, P then yells disparaging comments about law enforcement at Officer D. Officer D is incensed, turns back, and confronts P. After more angry words are exchanged, Officer D arrests P. When P says, "What are you arresting me for? I haven't done anything!" Officer D responds, "You made me angry, and that's enough." Officer D takes P's AR-15 and brings P to the police station. When she tells another officer about the situation, the officer says, "Well why don't you just book him for violating open carry laws? That's serious in California, and any officer worth a lick of salt would have arrested him for that alone!"

Afterwards, P files a § 1983 suit against Officer D, alleging retaliatory arrest. Although the officer's actions were explicitly taken because P's anti-police statements "made [Officer D] angry," *Nieves* would bar all § 1983 relief since Officer D had probable cause to arrest P. P committed a serious offense in California, and almost any officer in Officer D's position would have arrested P for open carrying. Therefore, P's claim could not fall under *Nieves*'s exception. The fact that Officer D's rea-

144 Lozman v. City of Riviera Beach, 138 S. Ct. 1945, 1950 (2018).

145 Stephen Parks, *Criminal Law*, *in* 3A ENCYCLOPEDIA OF MISSISSIPPI LAW § 23:291 (Jeffrey Jackson et al. eds., 3d ed. 2020).

146 CAL. PENAL CODE § 26350 (West 2012).

147 The AR-15, short for Armalite rifle, is a semi-automatic rifle which is considered the "most popular rifle in America." Julie Vitkovskaya & Patrick Martin, *4 Basic Questions About the AR-15*, WASH. POST (Feb. 16, 2018, 12:36 PM), https://www.washingtonpost.com/news/checkpoint/wp/2018/02/15/4-basic-questions-about-the-ar-15/ [https://perma.cc/YER7-WQDL]. The rifle is heavily regulated in some states while being subject to almost no regulations in other states. *Id.*

son for the arrest was a post hoc rationalization would play no part in this analysis. Nor would it matter that Officer D's but-for reason for arresting P was because of P's protected speech.

This hypothetical does raise a question: do we even care that P was arrested? After all, he committed a serious offense in California and ultimately there was probable cause for an arrest. It is more just luck (or a lack thereof) that the officer did not realize the lawful reason to arrest P and instead arrested him for his protected speech. Since the outcome was lawful, should courts care about Officer D's motivations?

The Supreme Court answered that question in *Heffernan v. City of Paterson*, where the Court determined that courts should worry about the actor's illicit motive.[148] In the case, an officer was demoted for participating in a mayoral candidate's campaign for office.[149] However, he was only picking up a sign for his mother, who supported the candidate. The officer subsequently sued under § 1983, alleging the city deprived him of his First Amendment rights. But the lower courts found that, since the city was mistaken and the officer was not actually engaged in protected speech, the officer could not recover under § 1983. Nonetheless, the Supreme Court held that the city's reason for demoting the officer was what counted, not its factual mistake. The Court emphasized that the same constitutional harm arises whether or not the city was correct in its factual determinations.

Since courts should care about actors' illicit motives in First Amendment cases, courts should also be concerned that Justices Sotomayor and Gorsuch's fears about post-hoc rationalization are already coming to fruition in the lower courts. The best example comes from the Sixth Circuit in *Hartman v. Thompson*.[150] In the case, protesters were supposed to limit their protest against the Kentucky Farm Bureau's alleged discriminatory policies to a designated area outside of an annual breakfast.[151] Instead, the protesters brought their protest in-

---

148 *See* Heffernan v. City of Paterson, 136 S. Ct. 1412, 1418 (2016). For the argument questioning that *Heffernan* intended to introduce an intent element to Free Speech jurisprudence, see Michael L. Wells, *What Did the Supreme Court Hold in* Heffernan v. City of Paterson, 51 GA. L. REV. ONLINE 1, 12–17 (2016) (noting that unconstitutional motivation would be a new principle in First Amendment law and criticizing that the Court did not clearly articulate the new doctrine); *see also* Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1219 n.32 (2018) (noting that, outside of retaliatory intent, Free Speech doctrine usually does not explicitly flush out motivations).

149 *Heffernan*, 136 S. Ct. at 1416–19.

150 Hartman v. Thompson, 931 F.3d 471 (6th Cir. 2019).

151 *Id.* at 475–77.

side and all stood up in silent protest as a speaker was speaking. There was, however, a factual dispute over what happened. Two protesters claim they were arrested without warning for their actions. However, the officers claim that they asked both protesters to leave or sit down first, and therefore were justified in arresting them for failure to disperse. Thus, there was a factual dispute that would otherwise allow the case to move to trial.[152] But instead, the Sixth Circuit upheld granting summary judgment because the protesters violated a completely different statute than what they were arrested for—disrupting a lawful meeting.[153] Therefore, since the officer had probable cause to arrest them for *something*, the court affirmed dismissing the retaliatory arrest action.[154]

This result is concerning. A trial's goal is to search for the truth.[155] Yet, in a case where there was a clear, material, factual dispute, *Nieves* undermines that goal by allowing for summary judgment based on a statute that had nothing to do with the officer's decision to arrest. By a post-hoc digging through the statute books, the officers were able to escape liability and the underlying factual dispute was left unresolved.

Just what is the harm of this underinclusiveness though? § 1983's goal is to allow private parties to enforce their constitutional rights.[156] But by barring most retaliatory arrest claims when the officer has probable cause—an easy requirement to satisfy—*Nieves* provides virtually no ability for plaintiffs to enforce their rights. The result allows officers to chill speech with no repercussions.[157] The humiliation, property seizures, searches, reputational harms, mental anguish, and detention that follow a retaliatory arrest are more than enough to chill protesters from exercising their free speech rights.[158] So if officers can target protesters whom they disagree with and escape liability by finding infractions as minor as "disrupting a

---

152 *See* FED. R. CIV. P. 56(a) (instructing that the court should only grant summary judgment if there is "no genuine dispute as to any material fact").

153 *Hartman*, 931 F.3d at 482–85.

154 *Id.* at 484–85. Neither the majority nor the dissent applied *Nieves*'s exception to these facts. *See id.* at 496 n.6 (Moore, J., dissenting).

155 *See* Nix v. Whiteside, 475 U.S. 157, 166 (1986).

156 Martin A. Schwartz, *Fundamentals of Section 1983 Litigation*, *in* SWORD AND SHIELD: A PRACTICAL APPROACH TO SECTION 1983 LITIGATION 1, 3 (Mary Massaron Ross & Edwin P. Voss, Jr. eds., 3d ed. 2006); Robinson, *supra* note 120, at 499.

157 Robinson, *supra* note 120, at 521; Linda Zhang, Comment, *Retaliatory Arrests and the First Amendment: The Chilling Effects of* Hartman v. Moore *on the Freedom of Speech in the Age of Civilian Vigilance*, 64 UCLA L. REV. 1328, 1352, 1357 (2017).

158 Tolman & Shapiro, *supra* note 34, at 54–55.

lawful meeting" afterward, protesters very well may just decide to avoid protesting issues that officers may disagree with to avoid such intense scrutiny and harmful consequences. Thus, the speech that is most important to the First Amendment—speech challenging public or police actions[159]—is lost.

B. An Alternative Solution: A More Inclusive Test

Now just because the Court's rationale was heavily flawed does not mean that *Nieves*'s outcome was incorrect. *Nieves* is an example of the classic adage: easy cases make bad law.[160] The Court had little trouble determining that Bartlett's retaliatory arrest claim should have failed—only one Justice dissented.[161] The case highlighted everything that the majority feared: that an officer would not be able to make the split-second decision to arrest an obviously drunk and disorderly individual because the individual had engaged in controversial speech.[162] To boot, one of the troopers didn't even hear Bartlett's previous statements.[163] The majority was clearly concerned that officers would not be able to function if they were unable to make split-second judgments based on the suspect's speech—which often contains important information about whether the suspect presents a threat to public safety.[164]

But as both the pre- and post-*Nieves* cases demonstrate, this concern is not proper in all circumstances. Just as frequently as officers will be in hostile situations where they need to make split-second determinations to keep the peace, they will also be in nonhostile situations where public safety is not at jeopardy.[165] In fact, various Justices had expressed such

---

159 *See* Jesse D. H. Snyder, *What Fane Lozman Can Teach Us About Free Speech*, 19 WYO. L. REV. 419, 446 (2019); Zhang, *supra* note 157, at 1357.

160 *See, e.g.*, United States v. Young, 580 F.3d 373, 381 (6th Cir. 2009) (Sutton, J., concurring) ("[S]ometimes easy cases make bad law."); *cf.* Arthur Corbin, Comment, *Hard Cases Make Good Law*, 33 YALE L.J. 78, 78 (1923) ("[I]t can be said with at least as much truth that hard cases make good law."). *But cf.* N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) ("Great cases[,] like hard cases[,] make bad law.").

161 *See* Nieves v. Bartlett, 139 S. Ct. 1715, 1735 (2019) (Sotomayor, J., dissenting).

162 *See id.* at 1724–25.

163 *Id.* at 1728.

164 *See id.* at 1724.

165 *Compare id.* at 1720 (involving a drunk individual who was yelling and aggressively approached an officer) *with* Hartman v. Thompson, 931 F.3d 471, 476–77 (6th Cir. 2019) (involving protesters peacefully standing in silent unison at a breakfast for sixty seconds), *and* Frank D. LoMonte & Clay Calvert, *The Open Mic, Unplugged: Challenges to Viewpoint-Based Constraints on Public-Comment Periods*, 69 CASE W. RES. L. REV. 19, 23–25 (2018) (noting many examples of speakers at public meetings being arrested).

concerns in the preceding retaliatory arrest cases.[166] The Court should have taken these intuitions about the speaker's environment from *Reichle* and *Lozman* and incorporated them into the *Nieves* decision.

If the Court accounted for these concerns when formulating its test, the concerns about underinclusivity discussed henceforth in this Note would be greatly diminished. I propose my own test below. To put the test succinctly, the ultimate inquiry should have asked if the officer was reasonably, subjectively responding to a hostile environment. If she was, then the *Nieves* probable cause bar applies. If she was not, then the *Mt. Healthy* but-for cause test applies.

To elaborate on this test, the environmental test addresses the Court's concerns that officers will not be able to make heat-of-the-moment decisions. Thus, when officers are responding to hostile environments, where split-second decisions are frequently required to preserve the peace, the officer's decision is protected. Thus, they are free to make decisions without having their words and actions, in the Court's words, "scrutinized for hints of improper motive" afterwards.[167] *Nieves'* exception would still apply for offenses in which an ordinary officer would not have otherwise exercised her discretion to arrest the speaker. But, when the environment is much calmer and more subdued, such as a local brunch or a town meeting, the fear that officers will not be able to make split-second decisions when speech is involved is greatly reduced. Instead, in these situations, the *Mt. Healthy* but-for test should apply.

Additionally, the test is subjective with a reasonableness component. The subjective test is designed to eliminate the post-hoc rationalization problem. For example, using my earlier hypothetical involving P openly carrying an AR-15, Officer D only stopped P because of D's subjective dislike of P's free speech. At best, the environment was only hostile in the officer's mind because of P's free speech. However, had Officer D stopped P because of P's AR-15, the situation would be much more hostile since public safety may be in jeopardy. In that

---

166 *See* Reichle v. Howards, 566 U.S. 658, 671 (2012) (Ginsburg, J., concurring) ("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."); *see also supra* note 89 and accompanying text (noting instances in *Lozman*'s oral arguments when various Justices expressed their concerns that Lozman was arrested while speaking peacefully during a town meeting).

167 *Nieves*, 139 S. Ct. at 1725.

situation, D needs to make a split-second determination if P is dangerous. P's hostile words could reasonably contribute to this analysis. But the officer's subjective beliefs are subject to a reasonableness requirement. Otherwise, if protesters are subject to an officer's unreasonable, easily fabricated, subjective beliefs, their speech may be chilled.[168]

There are two major criticisms to this test that I will address. First, one may argue that the test is too complicated as opposed to the bright-line test.[169] The Court has favored bright-line rules which provide officers clear guidance so officers know in advance if they are complying.[170] But the test is not difficult for officers to satisfy due to its subjective nature. Simple good-faith, common-sense policing will satisfy the test. And even if one still views the test as too complicated, many commentators have called for more complicated tests in retaliatory arrest cases since they are very fact-specific.[171]

On the other hand, one could argue that the test is not protective enough since it does not provide protection for speakers in a hostile environment. For example, what if a protester is peacefully partaking in a protest that features some violence?[172] But this concern would not exist in all situations, since the *Nieves* exception would still apply (assuming that the exception is applied reasonably, as is discussed in Part IV). Thus, protesters would still be protected for minor offenses for which officers usually would not arrest. The only protesters left unprotected are those who commit nontrivial offenses in hostile environments. And while we should still care about officers retaliating against protesters for their protected speech,[173] the section of protesters who would be left unprotected would be

---

168 *See* Zhang, *supra* note 157, at 1357.

169 *Cf.* Davis v. United States, 512 U.S. 452, 461 (1994) (arguing that *Miranda* should be easy-to-apply to avoid forcing officers to make difficult judgement calls with harsh consequences).

170 *See* Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of* Whren v. United States, 83 GEO. WASH. L. REV. 882, 911–12 (2015); Koerner, *supra* note 65, at 757.

171 *See, e.g.*, Davidson, *supra* note 7, at 709 (arguing for a totality-of-the-circumstances test in retaliatory arrest cases); Koerner, *supra* note 65, at 776 (arguing that an all-or-nothing approach fails to fit the facts of individual retaliatory arrest cases); Zhang, *supra* note 157, at 1353 (arguing that the probable cause analysis is too simplified for retaliatory arrest cases).

172 Take, for example, the Ferguson protests. While some protesters were arrested for burglary and property damage, many were arrested for merely failing to disperse. Jason Rosenbaum, *Who Are the Protesters Getting Arrested in Ferguson?*, NPR (Aug. 21, 2014, 5:41 PM), https://www.npr.org/2014/08/21/342207432/who-are-the-protesters-getting-arrested-in-ferguson [https://perma.cc/T5LP-3YG2].

173 *See supra* notes 148–149 and accompanying text.

much smaller than the swath *Nieves* left unprotected—and it seems like the Court would be willing to make that sacrifice to reach a compromise between the officers' needs and the First Amendment.[174]

IV
RETALIATORY ARRESTS' ONLY HOPE: THE *NIEVES* EXCEPTION

A. *United States v. Armstrong*: An Insurmountable Standard

This Note next moves to the Court's exception in *Nieves*. As a reminder, the exception applies when an officer has probable cause to make an arrest but objectively would not normally exercise her discretion to do so.[175]

As a cursory issue, the exception's existence itself is an oddity. The Court heavily relies on the similarities between retaliatory prosecutions and arrests for justifying extending the *Hartman* rule to retaliatory arrests.[176] Yet, in the retaliatory prosecution setting, no such exception exists; probable cause is an absolute defense to retaliatory prosecutions.[177] The majority's stated concern that even minor offenses could result in a retaliatory arrest seems to apply to retaliatory prosecutions, since a prosecution could occur for an equally minor offense. A few more explanations lie in *Reichle*. The Court noted that, in an ordinary retaliatory arrest claim, the animus and the injurious act comes from one source: the officer.[178] Contrast this situation with retaliatory prosecutions, where multiple actors are required.[179] Thus, one rationale for an exception only in retaliatory arrest cases is the Court's fear of one individual possessing the sole means to chill the First Amendment. Alternatively, the Court points to the "presumption of regularity accorded to prosecutorial decisionmaking" as another difference between the two cases.[180] What these inconsistencies show is that *Hartman* did not logically extend to retaliatory arrests.[181] Thus, the issues with the exception further illustrate the flaws in the Court's first holding.

---

174 *See* Nieves v. Bartlett, 139 S. Ct. 1715, 1725 (2019).
175 *Id.* at 1727.
176 *See id.* at 1723–24.
177 Hartman v. Moore, 547 U.S. 250, 265–66 (2006).
178 Reichle v. Howards, 566 U.S. 658, 668–69 (2012).
179 *Hartman*, 547 U.S. at 262.
180 *Reichle*, 566 U.S. at 669 (internal quotation marks omitted) (quoting Hartman v. Moore, 547 U.S. 250, 263 (2006)).
181 *See supra* notes 113–122 and accompanying text.

But despite the logical implications that *Nieves*'s exception raises, it serves an important purpose. The exception provides the only situation where a retaliatory arrest provides protesters an independent cause of action distinct from a false arrest claim.[182] Otherwise, the probable cause standard renders retaliatory arrest suits meaningless and speakers will have no way to redress First Amendment violations.[183] Thus, it is important that this exception serves a substantial function in order to reduce *Nieves*'s chilling effect on protected speech.[184]

Even so, the Supreme Court suggested an incredibly harsh standard to measure this exception, thus threatening to extinguish what little remains of retaliatory arrest claims. In a *cf.* citation, the Court suggests that *United States v. Armstrong* should provide the standard for this exception.[185] But, as Justices Sotomayor and Gorsuch point out, the Court did not require *Armstrong* to govern this test.[186]

In *Armstrong*, the defendant was arrested for conspiring to possess crack with the intent to distribute.[187] The defendant filed a motion for discovery or dismissal, alleging he was selectively prosecuted because he was Black. To support this claim, the defendant presented evidence that every one of the twenty-four cases prosecuted for dealing crack was against a Black defendant, and an affidavit stating that a drug treatment center coordinator told the attorney that there were an equal number of White and minority users and dealers. The Supreme Court denied discovery, laying out both a selective prosecution claim's substantive requirements and what is needed to proceed to discovery.[188] The Court noted how prosecution is a core executive function and their decisions are presumptively regular.[189] Nonetheless, it violated the Equal Protection Clause to selectively prosecute an individual on account of their race, religion, or other arbitrary classifications. But to prove a selective prosecution claim, the defendant needed to present clear evidence that certainly proved the prosecutor's discriminatory intent. The requirements were based on "ordi-

---

182 *See supra* notes 123–126 and accompanying text.

183 *See* Rutherford Amicus, *supra* note 107, at 30.

184 *See supra* notes 156–159 and accompanying text (noting how retaliatory arrests chill speech).

185 Nieves v. Bartlett, 139 S. Ct. 1715, 1727 (2019).

186 *See id.* at 1733 (Gorsuch, J., concurring); *id.* at 1742 (Sotomayor, J., dissenting).

187 United States v. Armstrong, 517 U.S. 456, 458–61 (1996).

188 *See id.* at 465, 468.

189 *Id.* at 464–66.

nary equal protection standards" and required proof of both discriminatory effect and intent.[190] To prove discriminatory effect, the defendant had to show that similarly situated individuals of different races were not prosecuted.

The Court then moved to discovery, asserting that the defendant had to show "'some evidence tending to show the existence' of the discriminatory effect."[191] The Court held Armstrong did not meet that burden because the study failed to identify similarly situated individuals of a different race who could have been prosecuted but were not.[192] The Court rejected the affidavit as hearsay and personal conclusions based on anecdotal evidence.

There is a preliminary question of whether *Armstrong* can even govern retaliatory arrest claims. For example, Justice Gorsuch questioned if data on arrest decisions would be as readily available as data on prosecutorial decisions.[193] Likewise, Justice Sotomayor questioned if an equal protection test from criminal cases could be applied in a civil case to protect First Amendment principles.[194] At the very least, applying an equal protection standard to protect First Amendment interests is in line with the Court's precedent in *United States v. Wayte*.[195] In *Wayte*, the defendant was prosecuted for not registering for selective service and writing letters to government officials informing them he did not intend to do so.[196] In a selective prosecution claim that predated *Armstrong*, defendant claimed he was prosecuted because of his vocal opposition to selective service. Despite the fact that defendant was claiming he was selectively prosecuted on account of exercising his First Amendment rights, the Court judged the claim "according to ordinary equal protection standards."[197] In doing so, the Court looked for similarly situated individuals being treated differently[198]—just as it would years later in *Armstrong*. Since these

190 *Id.* at 465 (internal quotation marks omitted) (quoting Wayte v. United States, 470 U.S. 598, 608 (1985)).

191 *Id.* at 469 (quoting United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974)).

192 *Id.* at 470.

193 Nieves v. Bartlett, 139 S. Ct. 1715, 1733–34 (2019) (Gorsuch, J., concurring).

194 *Id.* at 1742 (Sotomayor, J., dissenting).

195 *See* Wayte v. United States, 470 U.S. 598, 608 (1985).

196 *Id.* at 601–04.

197 *See id.* at 608. While selective prosecution claims are based in the Fourteenth Amendment's Equal Protection Clause, defendant was claiming that he was arbitrarily classified on account of exercising his First Amendment rights. *See id.* at 604, 608 n.9.

198 *See id.* at 610.

equal protection principles have already been applied to a selective prosecution claims designed to protect First Amendment interests, there seems to be little reason to question if these principles could extend to a retaliatory arrest claim designed to protect First Amendment interests.

Accepting that *Armstrong* could be logically imported as a standard for the retaliatory arrest exception, it is such a harsh test that it would dwarf the exception all together. Many commentators have called for reforming *Armstrong* since it is such a difficult standard that selective prosecution claims are almost impossible to prove.[199] In fact, selective prosecution claims are so difficult to prove that, in 1999, Professor David Cole found that there was not a single instance of a successful selective prosecution claim in the United States in over a century.[200] My own research, extended to 2020, only produced

---

199 *See, e.g.*, DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 158–60 (1999) (noting how *Armstrong* makes selective prosecution claims into a mere theoretical, not practical, defense); ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 103 (2007) (arguing that *Armstrong* makes it practically impossible to challenge prosecutorial decisions based on race); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1066 (2010) (asserting that *Armstrong* effectively immunized challenges against racially-based selective prosecution); Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of* Armstrong, 73 CHI.-KENT L. REV. 605, 620 (1998) (criticizing *Armstrong* for setting too expensive of a barrier for indigent defendants); Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After* United States v. Armstrong, 34 AM. CRIM. L. REV. 1071, 1092–94 (1997) (noting that *Armstrong* prevents the "soft enforcement" of equal protection by prohibiting discovery in most cases); Marc Price Wolf, *Proving Race Discrimination in Criminal Cases Using Statistical Evidence*, 4 HASTINGS RACE & POVERTY L.J. 395, 416 (2007) (criticizing the Supreme Court for setting too high of a standard and lower courts for applying it too harshly); Kristin E. Kruse, Comment, *Proving Discriminatory Intent in Selective Prosecution Challenges—An Alternative Approach to* United States v. Armstrong, 58 S.M.U. L. REV. 1523, 1525 (2005) (noting the high burden that *Armstrong* poses); Marc Michael, Note, United States v. Armstrong*: Selective Prosecution—A Futile Defense and its Arduous Standard of Discovery*, 47 CATH. U. L. REV. 675, 718 (1998) (noting that courts' deference to executive agents makes selective prosecution claims nearly impossible).

200 COLE, *supra* note 199, at 160; *see also* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 354 (1997) (same); Wolf, *supra* note 199, at 416 (same). Professor Gabriel Chin notes the dangers of claiming that no defendant has ever prevailed on a selective prosecution claim since successful motions may not have been appealed, have resulted in the prosecution dismissing the charges, or have been resolved through a plea deal. Gabriel J. Chin, *Unexplainable on Grounds of Race: Doubts About* Yick Wo, 2008 U. ILL. L. REV. 1359, 1361 n.11 (2008). Nonetheless, Professor Chin's research produced no successful claims either. My own research produced only one successful case, discussed *infra* notes 201–204 and accompanying text. Like Professor Chin, I caution about claims that no successful selective prosecution claim has ever succeeded and do not claim the one I found to be the first. But for this Note, it will suffice to say a successful selective

one example inconsistent to Professor Cole's 1999 assertion: *State v. Kelly*.[201] In that case, Kelly was convicted and sentenced to death for a double homicide.[202] Seeking postconviction relief, Kelly elicited the following statement from the deputy solicitor: "I felt like the black community would be upset though if we did not seek the death penalty because there were two black victims in this case . . . . [T]he black community would be upset because we are seeking the death penalty in the (Andre) Rosemond case for the murder of two White people."[203] The court found that, based on this statement, the prosecutor impermissibly sought death based on the victim's race.[204] The fact that Kelly's case is one of the only successful selective prosecution claims illustrates an issue with the *Armstrong* standard: unless a party is handed a smoking gun, it is almost impossible to satisfy. In Kelly's case, he was handed a smoking gun in the way of the deputy solicitor's statement. Likewise, if *Armstrong* were applied to retaliatory arrest cases, plaintiffs would only be able to prevail if the officers handed over evidence of their motivations on a silver platter.

Just why is it so difficult for criminal defendants to prevail under *Armstrong*? Scholars have given a multitude of answers. For starters, under this standard it is difficult for the defendant to establish a prima facie showing because courts presume that prosecutors are acting in good faith.[205] Courts fear inquiring into prosecutorial discretion out of respect for separation of powers, thus they grant this presumption.[206] Therefore, the Court requires "clear evidence" contrary to this presumption, which creates an incredibly high bar for defendants to

---

prosecution claim is about as common as no-hitters thrown by New York Mets' pitchers.

201 State v. Kelly, No. 99-CP-42-1174 (S.C. Ct. Com. Pl. Oct. 6, 2003) (order granting relief) (on file with author); John H. Blume et al., *When Lightning Strikes Back: South Carolina's Return to the Unconstitutional, Standardless Capital Sentencing Regime of the Pre-*Furman *Era*, 4 CHARLESTON L. REV. 479, 516 (2010). It should be noted that Kelly's claim was not that the prosecutor selectively prosecuted him, but that the prosecutor selectively sought the death penalty. *See* State v. Kelly at 38 (S.C. Ct. Com. Pl. Oct. 6, 2003). Nonetheless, both claims require the defendant to clear the high burden of showing the prosecutor's discriminatory intent. *See* Omar Saleem, *The Age of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindness on* Terry *"Stop and Frisk"*, 50 OKLA. L. REV. 451, 486–87 (1997).

202 Blume et al., *supra* note 201, at 515.

203 State v. Kelly, at 38 (S.C. Ct. Com. Pl. Oct. 6, 2003).

204 Blume et al., *supra* note 201, at 516.

205 Michael, *supra* note 199, at 718.

206 Poulin, *supra* note 199, at 1077–78.

reach.[207] In practice, this often translates to requiring direct evidence of discriminatory intent since circumstantial evidence is highly scrutinized and hard to verify.[208] In practice, defendants can rarely produce this direct evidence.[209]

In addition, the requirement that the defendant show similarly situated individuals of different races who were not prosecuted is a nearly insurmountable requirement.[210] To make this showing, defendants will often have the difficult task of identifying individuals who were undetected by law enforcement or discovered and not prosecuted. And even if this were possible, the cost of doing so exceeds what most indigent defendants can afford.[211] As if proving that individuals were similarly situated was not hard enough, circuits have been exacting on the kind of statistical showings that can support a selective prosecution claim.[212] For example, the Fourth Circuit required in one case that a study show either the entire number of Black individuals who were committing the offense or a study that showed a greater number of White individuals could have been prosecuted for the same crime.[213] The Supreme Court further added to these requirements by summarily rejecting a study that showed, nationwide, the federal government was twice as likely to charge Black individuals with a death-penalty eligible crime than White individuals.[214] The Court rejected the study since it was merely "raw statistics" instead of statistics that compared the defendant to others who were similarly situated.[215] Defendants cannot even rely on discovery to seek these statistics, since the Court required some evidence tending to show the existence of similarly situated members of other races who were not prosecuted just to proceed to discovery.[216] Thus, defendants are stuck with a catch-

---

207 *See* United States v. Armstrong, 517 U.S. 456, 465 (1996) (internal quotation marks omitted) (quoting United States v. Chem. Found., Inc., 272 U.S. 1, 14 (1926)).

208 *See* Kruse, *supra* note 199, at 1535; *see also supra* notes 201–204 (noting how Kelly was able to prevail since he was handed a smoking gun of the prosecutor's intent).

209 Tobin Romero, Note, *Liberal Discovery on Selective Prosecution Claims: Fulfilling the Promise of Equal Justice*, 84 GEO. L.J. 2043, 2050 (1996).

210 *See* Poulin, *supra* note 199, at 1098–99.

211 McAdams, *supra* note 199, at 620.

212 *See* Wolf, supra note 199, at 416.

213 *Id.* at 417 (citing United States v. Olvis, 97 F.3d 739, 745 (4th Cir. 1996)).

214 United States v. Bass, 536 U.S. 862, 863 (2002) (per curiam).

215 *Id.* at 864.

216 United States v. Armstrong, 517 U.S. 456, 470 (1996).

twenty-two where they need discovery in order to obtain the information that allows them to proceed to discovery.[217]

B. A Commonsensical Application: The Alternative Options

For there to be anything left of retaliatory arrest claims, lower courts need to, as Justice Gorsuch put it, "apply [*Nieves*] 'commonsensically' and with sensitivity to the competing arguments about whether and how *Armstrong* might apply."[218] Fortunately, since *Armstrong* has been subject to so much criticism, commentators have proposed a litany of alternative standards lowers courts could consider. Of course, one solution would just be to apply a relaxed version of *Armstrong*. One way of laxing the standard would be to apply a more flexible definition of "similarly situated individuals."[219] This method would remain most true to the majority's decision in *Nieves* by just applying a different version of the standard they suggested.

Most circuits that have addressed the issue under *Armstrong* have adopted an exacting definition of what makes individuals similarly situated.[220] For example, the Fourth Circuit requires that there be "no distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to" the defendant.[221] Other circuits have adopted similarly harsh definitions.[222] The First Circuit is an exception, in that they define similarly situated individuals as "whether an objective person would see two people similarly situated based upon the incident and context in question."[223] This relaxed standard allows more selective prosecution claims to succeed because a relaxed definition focuses more on the case's facts and less on the prosecutor's

---

217 Melissa L. Jampol, Note, *Goodbye to the Defense of Selective Prosecution*, 87 J. CRIM. L. & CRIMINOLOGY 932, 962 (1997).

218 Nieves v. Bartlett, 139 S. Ct. 1715, 1734 (2019) (Gorsuch, J., concurring) (citations omitted).

219 Thomas P. McCarty, Note, United States v. Khan, *461 F.3d 477 (4th Cir. 2006): Discovering Whether "Similarly Situated" Individuals and the Selective Prosecution Defense Still Exist*, 87 NEB. L. REV. 538, 548 (2008).

220 *Id.* at 547.

221 United States v. Olvis, 97 F.3d 739, 744 (4th Cir. 1996).

222 McCarty, *supra* note 219, at 547 n.88 (collecting sources).

223 Marrero-Gutierrez v. Molina, 491 F.3d 1, 9 (1st Cir. 2007). *But see* United States v. Lewis, 517 F.3d 20, 27 (1st Cir. 2008) (applying a more stringent definition). Regardless of what the current law is in the First Circuit, its definition in *Marrero-Gutierrez* illustrates one potential solution to *Armstrong*'s flaws.

possibly pretextual justifications.[224] Likewise, if a relaxed definition were adopted for the *Nieves* exception, it would make the *Armstrong* standard more tenable in retaliatory arrest claims by focusing on the case's individual facts.

One district court in the Northern District of California already took this approach in *Henneberry v. City of Newark*.[225] In the case, Henneberry was very critical at Newark City Council meetings, leading council members to think he complained too much.[226] When Henneberry attended a private Chamber of Commerce event without a reservation, council members spotted him and confirmed he did not have a reservation. When he incorrectly asserted that he had every right to be at the event, council members informed an officer who arrested Henneberry. While the officer had probable cause to arrest Henneberry for obstructing a business operation, the court allowed the retaliatory arrest suit to continue under the *Nieves* exception.[227] The court looked at other similarly situated individuals and found that the case fit within the *Nieves* exception because no other members of the gallery were asked if they had a reservation.[228]

The court's analysis of similarly situated individuals is far from the "clear evidence" that *Armstrong* required.[229] Remember, *Armstrong* rejected the defendant's study because it "failed to identify individuals who were not black and could have been prosecuted for the offenses for which [the defendant was] charged."[230] The typical definition of similarly situated individuals would have required the arrested individual to show that there were other individuals, who were not engaged in protected speech, who were obstructing a business operation in a similar manner, and who the officer did not exercise discretion to arrest. Instead, the court simply looked to the other individuals in the room, when there was no evidence that they were obstructing a business operation, and concluded that because

---

224 McCarty, *supra* note 219, at 564.

225 Henneberry v. City of Newark, No. 13-cv-05238-TSH, 2019 WL 4194275, at *7 (N.D. Cal. Sept. 4, 2019).

226 *Id.* at *1–2.

227 *Id.* at *6–7. Henneberry did not attempt to claim he fell within the *Lozman* exception, despite the fact a councilmember is the one who encouraged his arrest. *See* Plaintiff's Opposition to Motion for Summary Judgment or, in the Alternative, Motion for Partial Summary Judgment at 11–12, *Henneberry*, 2019 WL 4194275. The likely reason is that *Lozman* is incredibly fact specific and therefore has little applicability. *See supra* notes 89–92 and accompanying text.

228 *Henneberry*, 2019 WL 4194275, at *7.

229 *See* United States v. Armstrong, 517 U.S. 456, 465 (1996) (internal quotation marks omitted) (quoting United States v. Chem. Found., Inc., 272 U.S. 1, 14 (1926)).

230 *Id.* at 470.

they were treated differently, the case fell into the *Nieves* exception.[231] This example should serve as a guide to other lower courts on how to relax the *Armstrong* standard to apply to retaliatory arrest cases—thus avoiding *Armstrong*'s infamously harsh standard.

Another suggested alternative to the *Armstrong* test comes from Justice Thurgood Marshall's dissent in *Wayte*.[232] Justice Marshall argued that, to establish a prima facie case, the defendant must show that (1) she is a member of a "recognizable, distinct class"; (2) a disproportionate number of this class was targeted for investigation or prosecution; and (3) the prosecution selection procedure was "subject to abuse or was otherwise not neutral."[233] The defendant must show sufficient facts as to these elements in order to establish that her claim is nonfrivolous and allow her to proceed to discovery.[234] The nonfrivolous standard allows for easier discovery since the prosecution is often the party with the relevant data to prove a selective prosecution claim.

This test, however, would not fit well in the retaliatory arrest context, even if the plaintiff can make a nonfrivolous claim. The primary issue with the test is that even if the plaintiff can obtain discovery, it may not prove very helpful. In a selective prosecution claim, as Justice Marshall noted, the prosecution is often the one with the information the defendant needs to prove his claim—thus discovery is essential.[235] But obtaining discovery from an officer, sued in her individual capacity, is not going to be as helpful since, as a private citizen, the officer may not have access to the statistics required to prove the plaintiff's claim.[236] And even if the plaintiff manages to obtain third-party discovery from the police department[237] or sues the municipality directly, it may not even have data on individuals the

---

231 *See Henneberry*, 2019 WL 4194275, at *7.

232 Jampol, *supra* note 217, at 932.

233 Wayte v. United States, 470 U.S 598, 626 (1985) (Marshall, J., dissenting).

234 *Id.* at 624–25.

235 *See id.* at 624.

236 *See* FED. R. CIV. P. 34(a) (requiring the items be in the party's possession, custody, or control). It has been suggested that individual officers can more easily produce information about probable cause for an arrest since it is likely contained in their own reports and testimony. *See* Sarah Hughes Newman, Comment, *Proving Probable Cause: Allocating the Burden of Proof in False Arrest Claims Under § 1983*, 73 U. CHI. L. REV. 347, 370 (2006). But the discovery required to show that other individuals are similarly situated would require a broad amount of arrest data, well outside what the officer would have within her control. *Cf. supra* notes 210–217 and accompanying text (explaining the evidentiary burdens defendants face under *Armstrong*).

237 *See* FED. R. CIV. P. 45.

officers could have arrested but did not.[238] Plaintiffs instead will be left to rely on more readily available evidence, such as publicly available arrest records and other individuals who were near the plaintiff but were treated differently.[239] Thus, Justice Marshall's nonfrivolous standard—along with other discovery-related reforms to *Armstrong*—would be much less effective in the retaliatory arrest context.[240]

Another adjustment that could be made to *Armstrong* is changing the number of similarly situated individuals required to satisfy the standard. For example, Professor Yoav Sapir proposed a two-stage test.[241] The first stage would require the arrested individual to show a single similarly situated individual, with the only difference being her race, who was not prosecuted. Upon such a showing, the burden then shifts to the prosecution to compile all data available about similarly situated individuals and whether or not they were prosecuted.[242] This data must dispel the suspicion that an individual was prosecuted on account of his race. Shifting the burden after one showing solves the issue that defendants often have access to only partial data and thus cannot present a comprehensive picture.[243]

Professor Sapir's test is easily modified to the retaliatory arrest context. The plaintiff in the retaliatory arrest action must show one similarly situated individual who was not engaged in similar protected speech and was not arrested. Then,

---

238 *See* Nieves v. Bartlett, 139 S. Ct. 1715, 1733–34 (2019) (Gorsuch, J., concurring) (citing United States v. Sellers, 906 F.3d 848, 856 (9th Cir. 2018); United States v. Washington, 869 F.3d 193, 219 (3d Cir. 2017); United States v. Davis, 793 F.3d 712, 720–21 (7th Cir. 2015); Marshall v. Columbia Lea Reg'l Hosp., 345 F.3d 1157, 1168 (10th Cir. 2003)).

239 *See* Henneberry v. City of Newark, No. 13-cv-05238-TSH, 2019 WL 4194275, at *7 (N.D. Cal. Sept. 4, 2019) (noting the number of arrests for the plaintiff's offense and that nobody else was asked if they had a reservation); *see generally* Kristine Cordier Karnezis, Annotation, *Validity, Construction, and Application of Statutory Provisions Relating to Public Access to Police Records*, 82 A.L.R.3d 19 (1978) (collecting and discussing various state laws and cases on the public accessibility of arrest records).

240 Regardless of its effectiveness, at least one district court has already relaxed the discovery standard by shifting the burden to the defendant to show similarly situated individuals who *were* arrested. *See* Lull v. County of Sacramento, No. 2:17-cv-1211-TLN-EFB PS, 2019 WL 6908046, at *3 (E.D. Cal. Dec. 19, 2019).

241 Yoav Sapir, *Neither Intent nor Impact: A Critique of the Racially Based Selective Prosecution Jurisprudence and a Reform Proposal*, 19 HARV. BLACKLETTER L.J. 127, 147–48 (2003).

242 *Id.* at 153–54.

243 *Id.* at 152; *see also* Wayte v. United States, 470 U.S. 598, 624 (1985) (Marshall, J., dissenting) ("[M]ost of the relevant proof in selective prosecution cases will normally be in the Government's hands.").

the defendant would be required to produce the complete data about similarly situated individuals who were or were not arrested. The burden would be on the defendants to use this data to dispel the suspicion that the individual was arrested on the account of her protected speech. But Professor Sapir's test suffers from some of the same issues Justice Marshall's test would in the retaliatory arrest context: an officer sued in her individual capacity would not have access to the information needed to paint a complete statistical picture.[244] In fact, it would seem unfair to shift the burden to the officer since she is not in much of a better position to compile a complete statistical picture.

The final alternative standard this Note will discuss—and the one it advocates for adopting—is to implement the burden-shifting standard utilized in employment discrimination cases.[245] The Supreme Court developed this standard in *McDonnell Douglas Corp. v. Green*.[246] First, the employee must make a prima facie showing of racial discrimination.[247] Then, the burden shifts to the employer, who must articulate a legitimate, nondiscriminatory reason for rejecting the employee. Finally, the burden shifts back to the employee, who must show that the employer's offered reason was a pretext for racial discrimination.[248] Evidence relevant to proving a pretextual reason can include different treatment of White employees who committed the same acts, employer's reactions to legitimate civil rights activities, and general policies and practices about employing people of color. The Court noted how statistical evidence could be especially helpful in determining the employer's employment policies and practice.

This test can be adapted to *Armstrong*'s framework.[249] First, defendant would have to show that similarly situated individuals of different races were charged with the same crime but treated differently. Then, discriminatory intent would be implied and the burden would shift to the prosecution to pre-

---

244 *See supra* notes 235–240 and accompanying text.

245 Kruse, *supra* note 199, at 1536.

246 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

247 In the employment discrimination context, a prima facie case requires a "showing (i) that [the employee] belongs to a racial minority; (ii) that [the employee] applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite [the employee's] qualifications, [the employee] was rejected; and (iv) that, after [the employee's] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *Id.*

248 *Id.* at 804–05.

249 Kruse, *supra* note 199, at 1539–40.

sent a race-neutral reason for the discrepancies. Finally, the burden would shift back to the defendant to show that the reason was simply a pretext for selective prosecution. Using the *McDonnell Douglas* test to cure *Armstrong*'s defects has many advantages. For example, the Court designed *McDonnell Douglas* to be flexible and thus adaptable to different fact patterns. Thus, defendants would not be hindered by *Armstrong*'s rigid framework. In addition, *McDonnell Douglas* places a strong emphasis on statistics. Defendants are given more leeway to use statistics than they currently are under *Armstrong*.[250] As a result, *McDonnell Douglas* gives defendants more of an opportunity to show that individuals are similarly situated. Finally, burden shifting allows the defendant to succeed even if there was no direct evidence of discrimination.[251] As a result, *McDonnell Douglas* solves the issue that *Armstrong* usually requires a smoking gun.[252]

Just as *McDonnell Douglas* can be imported into selective prosecution cases, it can be imported into retaliatory arrest cases with some tweaking. Defendant would first have to make the typical prima facie showing that would satisfy an ordinary retaliatory arrest claim: (1) the plaintiff's speech was constitutionally protected; (2) the defendant caused an injury that would chill a person of ordinary firmness from engaging in that constitutionally protected activity; and (3) a causal connection existed between defendant's retaliatory animus and plaintiff's injury.[253] Additionally, plaintiff would have to make a fourth showing to fall within the exception: (4) the offense he was arrested for was one for which an ordinary officer would typically not exercise her discretion to arrest an individual. The best and most common way to prove this fourth element would be through statistical evidence.[254] But there could be situations where anecdotal evidence could also be sufficient to prove this element. Consider the following hypothetical: an individual protests on a street corner outside a police station once a week for a year about varying topics, ranging from climate change to how bad Game of Thrones Season Eight was. She

---

250 *See id.* at 1542 (citing United States v. Bass, 536 U.S. 862, 864 (2002) (per curiam)).

251 *Id.* at 1536.

252 *See supra* notes 201–204 and accompanying text.

253 Davidson, *supra* note 7, at 689; Williams, *supra* note 4, at 739.

254 *Cf.* Henneberry v. City of Newark, No. 13-cv-05238-TSH, 2019 WL 4194275, at *7 (N.D. Cal. Sep. 4, 2019) (noting that officers in the area had only issued fourteen arrests or citations for the plaintiff's offense in the past seven years).

never has a permit and, despite needing one, is never arrested. But one day her sign reads "police are racist." She is arrested for not having a permit soon after her weekly protest begins. While this does not paint a complete statistical picture, the fact that the individual was never arrested until she started criticizing the police gives rise to a strong suspicion that she was arrested because of her speech. Thus, the fourth showing would be satisfied.

The second prong is largely the same: once the arrested makes this prima facie showing, the burden then shifts to the officers to offer a reason unrelated to the plaintiff's speech for why the officer exercised his or her discretion to arrest. Lastly, the burden would shift back to the plaintiff to demonstrate that this explanation was merely pretextual. The defendant would be able to demonstrate this pretext with evidence including, but not limited to, statistics,[255] specific instances of other similarly situated individuals who were not arrested, the officer's reaction to the protected speech, and general police policies and practices in the geographic area.[256]

This test seems to be the strongest solution to *Armstrong*'s problems in the retaliatory arrest context. The standard takes *Mt. Healthy*'s burden shifting component and combines it with a more relaxed version of the showing that *Armstrong* requires. Thus, the plaintiff has much more latitude to use indirect evidence instead of being rigidly constrained to direct evidence and highly scrutinized indirect evidence. Burden shifting also allows for the courts to deal with actors' mixed motives.[257] The standard is also incredibly flexible, which is important in retaliatory arrest cases because they are incredibly fact-specific.[258] And finally, it solves the issue that neither party is going to have access, in many cases, to the information required to create a full statistical overview.[259] Since the test scrutinizes statistical studies less and allows for more anecdotal evidence, intensive discovery is not required for the plaintiff to establish

---

255 Courts should not require that these statistics be too exacting, as they currently do with *Armstrong*. *See supra* notes 212–215 and accompanying text. Instead, the courts should gatekeep statistics practically, based on the publicly available information to which the plaintiff would have access. *See supra* notes 235–240 and accompanying text.

256 *Cf.* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804–05 (1973) (allowing an employee to prove pretext using similar types of evidence).

257 Clark M. Neily III, *(Don't) Assume an Honest Government*, 23 TEX. REV. L. & POL. 401, 411 (2019).

258 *See* sources cited *supra* note 171.

259 *See supra* notes 235–240 and accompanying text.

that she was arrested because of her speech if other evidence supports that conclusion.

While this Note advocates that lower courts apply a modification of the *McDonnell Douglas* test (or alternatively a heavily relaxed version of *Armstrong*), there are many viable alternatives out there with which courts can experiment. What is important, though, is that they do not strictly import *Armstrong* into retaliatory arrest cases but instead take the commonsensical approach Justices Sotomayor and Gorsuch advocated for.[260] Because if lower courts strictly apply *Armstrong* to retaliatory arrest claims, the insurmountable standard will eradicate what little the Supreme Court left of retaliatory arrest claims.

CONCLUSION

The Supreme Court's decision in *Nieves v. Bartlett* held that (1) probable cause generally defeats a retaliatory arrest claim; and (2) there is a narrow exception to this rule when probable cause exists, but an ordinary officer would not typically exercise her discretion to arrest.[261] But probable cause is so easily satisfied that the first holding leaves about nothing left of retaliatory arrest claims. And even if the officer lacked probable cause, the plaintiff could have already brought a false arrest claim. Thus, the second holding is the only situation where a plaintiff would need to bring a retaliatory arrest claim while still being able to prevail. Yet the Court threatens to smother that exception by suggesting that *United States v. Armstrong*—an infamously difficult test—governs the standard. Therefore, unless lower courts "approach this new standard commonsensically"[262] and apply a more relaxed standard than *Armstrong*, retaliatory arrest claims are all but dead.

Let us return to where this Note started: with the protesters from Stranger Things Season Three in the small town of Hawkins, Indiana.[263] As a reminder, Chief of Police Jim Hopper broke up a protest because they did not have a permit. But Mayor Larry Kline really was the one who encouraged Hopper to take these actions because the protesters were criticizing Kline. Hopper broke up the protest and arrested a few of the protesters.

---

260 *See* Nieves v. Bartlett, 139 S. Ct. 1715, 1734 (2019) (Gorsuch, J., concurring); *id.* at 1741 (Sotomayor, J., dissenting).
261 *Id.* at 1727.
262 *Id.* at 1741 (Sotomayor, J., dissenting).
263 The Duffer Brothers, *supra* note 1.

The protesters' protected speech clearly was the but-for cause of their arrest. But Hopper likely had probable cause to arrest the protesters if they resisted his order to disperse or continued to be loud.[264] Thus, unless the protesters could fall into the *Nieves* exception, they would be barred from a subsequent § 1983 suit. And, assuming the lower court follows the Supreme Court's lead and applies an unmodified version of *Armstrong*, the protesters would likely not even be able to fall within the exception. In fact, it seems very possible that in a small town the protesters would not be able to locate similarly situated individuals to show a discriminatory effect.[265] And even if the protesters could make such a showing, it would be difficult to show clear evidence of Hopper's intent because of the intense scrutiny courts apply under *Armstrong*. Hopper would have to give the protesters proof of his discriminatory intent on a silver platter for them to succeed. Instead, the protesters are left without recourse. It does not take much imagination to think that these protesters would be chilled from criticizing the mayor again. And while the harm may cease for the protesters in the fictitious Hawkins when the cameras stop rolling, the cameras do not stop rolling for real protesters whose speech will be chilled by *Nieves*' underinclusiveness.

---

264 *See* IND. CODE § 35-45-1-3 (2014) (prohibiting disorderly conduct).

265 *See* Leading Case, *supra* note 132, at 278–79 (noting that the ability to identify similarly situated individuals often depends on where one lives).