SUPREME COURT OF THE UNITED STATES

No. 22–1025

SYLVIA GONZALEZ, PETITIONER v. EDWARD TREVINO, II, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 20, 2024]

JUSTICE ALITO

The surveillance videos, moreover, confirmed Trevino and Zuniga's account of Gonzalez's evasiveness. From this evidence, Wright concluded that Gonzalez had likely violated Texas's anti-tampering statute, which makes it a crime for someone to "remov[e]" a government document intentionally, Tex. Penal Code Ann. §37.10(a)(3) (West Cum. Supp. 2023), and he sought an arrest warrant from the local Magistrate. Wright's warrant affidavit included details from his interviews with the witnesses and his review of the surveillance videos. The Magistrate agreed that probable cause supported Gonzalez's arrest, and he granted Wright's request.

The Court's opinion completes the story. After the warrant was issued, Gonzalez spent an evening in jail. A month later, the district attorney dropped all charges against her. But Gonzalez's suit against Trevino, Wright, and the police chief is still ongoing five years later. And Gonzalez has never disputed—at any point of the litigation—that probable cause supported her arrest.

II

Gonzalez attacks the Fifth Circuit's judgment on two fronts. First, she contends that the Fifth Circuit took an unduly restrictive view of the *Nieves* exception. Second, she asks us to cabin the no-probable-cause requirement to on-the-spot arrests. The Court briskly dispatches this case on the first question, but I think lower courts and litigants deserve additional guidance. I therefore divide my analysis into three parts. First, I provide the relevant legal background for retaliatory-arrest and retaliatory-prosecution claims. Second, I elaborate on the scope of the *Nieves* exception. Third, I explain why *Nieves* is not limited to split-second arrests.

A

"[T]he law is settled that as a general matter the First

Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." Hartman v. Moore, 547 U. S. 250, 256 (2006). We ordinarily analyze First Amendment retaliation claims under the two-step framework set out in Mt. Healthy City Bd. of Ed. v. Doyle, 429 U. S. 274, 287 (1977). At the first step, the plaintiff must demonstrate that he engaged in protected speech and that his speech was a "'substantial'" or "'motivating'" factor in the defend-

U. S. 731, 737 (2011); see also Kentucky v. King, 563 U. S. 452, 464 (2011); Whren v. United States, 517 U. S. 806, 812 (1996).

Second, protected speech is often a "wholly legitimate consideration" for officers when deciding whether to file charges or to make an arrest. Reichle v. Howards, 566 U. S. 658, 668 (2012). An "officer may decide to arrest [a] suspect because his speech provides evidence of a crime or suggests a potential threat." Ibid. The facts of Nieves itself illustrate this point. In that case, the police officers decided to arrest the plaintiff for disorderly conduct and resisting arrest because "they perceived [the plaintiff] to be a threat" based in part on the combative tone and content of his speech. 587 U. S., at 401. And no one suggested that an individual's speech is off-limits in this respect. Ibid. (explaining that "the content and manner of a suspect's speech" may provide important information for law enforcement).

Third, the machinery of criminal justice often works through multiple government officers. An officer who makes an arrest may do so based on his own judgment, orders from a superior, or as in this case, a warrant issued by a magistrate. Thus, it is often challenging to draw a straight line between the plaintiff's protected speech and the defendant from whom he seeks recovery. In such circumstances, it may be difficult to discern whether the officer acted improperly. Cf. Messerschmidt v. Millender, 565 U. S. 535, 546 (2012) (noting that "the fact that a neutral magistrate has issued a warrant is the clearest indication that the [arresting] officers acted in an objectively reasonable manner"); Bilida v. McCleod, 211 F. 3d 166, 174–175 (CA1 2000) (Boudin, J.) ("Plausible instructions from a superior or fellow officer support qualified immunity where, viewed objectively in light of the surrounding circumstances, they could lead a reasonable officer to conclude that the necessary legal justification for his actions exists").

For these reasons, we have required plaintiffs pressing

First, courts must remember that the exception is just that—an exception, and a narrow one at that. Judges should not conflate the question whether certain evidence can be considered under the Nieves exception with the entirely distinct question whether the evidence suffices to satisfy this threshold inquiry. We have long recognized "[t]he deep-rooted nature of law-enforcement discretion," Castle Rock v. Gonzales, 545 U. S. 748, 761 (2005), and a plaintiff therefore must surmount a very high bar when the official can point to the existence of probable cause underpinning an arrest. The example in Nieves of a police officer arresting a vocal critic for jaywalking serves as a helpful benchmark for courts and litigants. A plaintiff may satisfy the Nieves exception only by providing comparably powerful evidence.

Second, evidence that tends to show only that the plaintiff's constitutionally protected speech was a "substantial or motivating factor" behind the adverse action should not be considered unless and until the plaintiff can provide other evidence to satisfy the Nieves exception. Lozman, 585 U. S., at 97. This requirement flows from the recognition that the Nieves exception serves only as a gateway to the Mt. Healthy framework. The Nieves exception asks whether the plaintiff engaged in the type of conduct that is unlikely to result in arrest or prosecution. By contrast, the Mt. Healthy inquiry is keyed toward whether the defendant's adverse decision was influenced by the plaintiff's constitutionally protected speech.

To see how these principles operate in practice, consider the following hypothetical. Suppose a plaintiff charged with a particular crime brings three pieces of evidence. First, he proffers an affidavit from an officer testifying that no one has been prosecuted in the jurisdiction for engaging in similar conduct. Second, he produces a statistical study corroborating the affidavit. And third, the plaintiff testifies

that a police officer has been surveilling his house for several weeks. The first two pieces of evidence count toward the Nieves exception, but the third piece of evidence does not. Instead, the third piece of evidence can be considered only after his claim advances to the Mt. Healthy framework. Any other approach would render the Mt. Healthy framework redundant in most, if not all, cases.

In Nieves, three Justices dissented at least in part and would have permitted plaintiffs in cases with probable cause to proceed to trial if they were able to survive summary judgment under Mt. Healthy. They argued their positions forcefully and well, but it is not faithful to our precedent to use the "narrow" Nieves exception as a crowbar for overturning the core of that decision's holding, supported by six Justices—namely, that the existence of probable cause either always or nearly always precludes a suit like this one.

I now turn to the facts of Gonzalez's case. Here, her evidence is of the type that plaintiffs can use in making out their case under the Nieves exception. I agree with the Court that a plaintiff does not need to identify another person who was not arrested under the same law for engaging in a carbon-copy course of conduct. Our jaywalking example in Nieves plainly proves this point. We did not suggest that a vocal critic of the police charged with jaywalking had to produce evidence that police officers knowingly refused to arrest other specific jaywalkers. And we certainly did not suggest that this jaywalker had to find others who committed the offense under the same conditions as those in his case—for example, on a street with the same amount of traffic traveling at the same speed within a certain distance

Gonzalez argues that we should limit Nieves to split-second cases because, in her view, a retaliatory-arrest claim is analogous to the common-law tort of abuse of process, which lacks a no-probable-cause requirement. Tr. of Oral Arg. 5–6. She urges us to rely on the abuse-of-process analogy to draw a line between split-second arrests with no process and arrests pursuant to process that can be likened to the common-law tort. Ibid.

Gonzalez's appeal to the common law is wrong twice over. To start, she is wrong to suggest that the abuse-of-process tort was somehow not before us when we decided Nieves. Our prior decision in Hartman gave full consideration to whether abuse of process was the appropriate analog for a retaliatory-prosecution claim. See 547 U. S., at 258 (noting that "we could debate whether the closer common-law analog to retaliatory prosecution is malicious prosecution (with its no-probable-cause element) or abuse of process (without it)"). By holding that such a claim requires a plaintiff to prove there was no probable cause for the charge, Hartman necessarily rejected the force of anan .87e common-la ow n 1.92C (t)1.9 4.5 (e)h6se r6 (B I

defendants urged us to analogize retaliatory-prosecution claims to the malicious-prosecution tort, while the plaintiff suggested that abuse of process might be the more apt analog. Brief for Petitioners 25–30 and Brief for Respondent 41–42 in Hartman v. Moore, O. T. 2005, No. 04–1495. But neither party asked us to adopt the malicious-prosecution analogy for some §1983 retaliatory-prosecution claims while relying on the abuse-of-process analogy for others.

Gonzalez, by contrast, invites us to slice and dice every complaint alleging a retaliatory-arrest claim based on a quick skim of the facts at the motion-to-dismiss stage. Under her view, the elements of a plaintiff's meritorious §1983 claim may evolve throughout the lawsuit as more facts are discovered and verified. I see little value in endorsing this awkward and predictably inefficient innovation.

Gonzalez's proposed limit on Nieves would also be un-

the defendants would have been better off if they had arrested her immediately. I see no good reason to switch out Nieves for a novel doctrinal dichotomy that generates such counterintuitive results.

In sum, Nieves applies to all retaliatory-arrest claims brought under §1983. And that decision means what it says. "[P]robable cause should generally defeat a retaliatory arrest claim," and a plaintiff bringing such a claim "must plead and prove the absence of probable cause for the arrest" unless he can fit within its narrow exception. 587 U. S., at 402, 406. Nothing in the Court's decision today should be understood as casting doubt on this holding.

III

With these observations, I join the Court's opinion.

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people in Texas who steal things (or more precisely here, who steal government records) do not get arrested. Instead,

as Amicus Curiae 20.* Similarly, "if officers falsely document the arrest or include other indicia of retaliatory motive in arrest-related documents, that too might suggest meaningfully differential treatment." Id., at 21.

Here, in addition to her survey, Gonzalez presented this other kind of evidence as well. Before the District Court, Gonzalez pointed to, among other things, details about the anomalous procedures used for her arrest and statements in the arresting officer's warrant affidavit suggesting a retaliatory motive. See Brief for Petitioner 43–44. Those categories of evidence, too, can support the conclusion that Gonzalez "was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." Nieves, 587 U. S., at 407. On remand, the lower courts may consider the full scope of objective evidence that Gonzalez has offered to establish differential treatment. See ante, at 4.

With this understanding, I join the Court's per curiam opinion.

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*JUSTICE ALITO suggests that evidence of this sort—such as the fact that "a police officer has been surveilling [a plaintiff's] house for several weeks"—would not "count towards the Nieves exception." Ante, at 10 (concurring opinion). He does not explain, however, why such evidence would not be objective, or why such evidence would not be relevant to proving that a plaintiff "was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." Nieves, 587 U. S., at 407.

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JUSTICE THOMAS, dissenting.

I continue to believe that "plaintiffs bringing a First Amendment retaliatory-arrest claim under §1983 should have to plead and prove a lack of probable cause." Lozman v. Riviera Beach, 585 U. S. 87, 107 (2018) (THOMAS, J., dissenting).* Under the Court's precedents, §1983 is "construed in light of common-law principles that were well settled at the time of its enactment." Kalina v. Fletcher, 522 U. S. 118, 123 (1997). "Because no common-law tort for retaliatory arrest in violation of the freedom of speech existed when §1983 was enacted, we look to the common-law torts that provide the closest analogy to this claim." Nieves v. Bartlett, 587 U. S. 391, 409 (2019) (THOMAS, J., concurring in part and concurring in judgment) (internal quotation marks and alteration omitted). As I have previously explained, the common-law torts most analogous to retaliatory-arrest claims are false imprisonment, malicious arrest, and malicious prosecution—all of which required a 0 9 327.*.4eslhu

to prove "the absence of probable cause." Id., at 409–410.

declined to arrest someone for engaging in such conduct in the past." Ante, at 5 (emphasis deleted). Accordingly, even though Gonzalez's proffered evidence does not point to a single "similarly situated individua[l]," the Court nonetheless concludes she may satisfy the Nieves exception. Nieves, 587 U. S., at 407.

There is "no basis in either the common law or our First Amendment precedents" for the exception created in Nieves and expanded upon today. Id., at 409 (opinion of THOMAS, J.). And, the Court should not craft §1983 rules "as a matter of policy." Id., at 411. I would adhere to the only rule grounded in history: Probable cause defeats a retaliatory-arrest claim. I respectfully dissent.