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Choose Your Words Carefully: Reimagining Retaliatory Arrest After *Nieves v. Bartlett*

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CHOOSE YOUR WORDS CAREFULLY: REIMAGINING RETALIATORY ARREST AFTER *NIEVES V. BARTLETT*

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In the summer of 2020, the United States experienced potentially its largest ever social movement in the protests against racial inequality. Predictably, protestors clashed with law enforcement officers, often leading to arrests. Arrested individuals could bring § 1983 retaliatory arrest claims alleging that the officers deprived them of their First Amendment right to free speech. Such claims underline the tension between two vital interests: free speech and law enforcement effectiveness.

In 2019, the U.S. Supreme Court decided Nieves v. Bartlett*, which crafted a new framework for retaliatory arrest claims that consequently diminished a plaintiff's chance to prevail and recover damages. The Court held that, aside from a narrow exception, the presence of probable cause would extinguish the plaintiff's claim. Rather than striking a balance between the two interests, the Court heavily tipped the scale in favor of law enforcement.*

Challenging the Court's current position, this Note examines prior § 1983 retaliation decisions and concludes that a more appropriate framework would eradicate the probable cause standard and instead permit introduction of evidence of an officer's subjective mindset. Further, to overcome the causal complexity inherent in retaliatory arrest claims, this Note advocates for the addition of a proximate cause requirement, such that the interests of both parties can be adequately balanced. Ultimately, this new framework provides the opportunity for both the plaintiff and the law enforcement officer to litigate about the officer's subjective motivation surrounding the arrest.

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INTRODUCTION

One of the most revered constitutional rights is the freedom of speech and expression, the exercise of which should not be prohibited by government

officials or law enforcement officers.[1] But when an individual is arrested for exercising that right, there may be grounds for a subsequent retaliatory arrest action under 42 U.S.C. § 1983.[2] In defending against such a suit, the arresting officers often argue that the arrest was justified, principally due to the presence of probable cause.[3] Accordingly, two competing interests directly conflict in cases involving retaliatory arrest: the freedom of speech and the efficacy of law enforcement. As it currently stands, retaliatory arrest jurisprudence staunchly favors the interests of law enforcement.[4]

The legal doctrine of retaliatory arrest has a greater practical effect and import in times of social and political unrest. Though the United States's history is mired with protest, the summer and fall of 2020 saw perhaps the largest protest movement in the nation's history with an estimated twenty-six million people who demonstrated in response to racial inequality nationwide.[5] Given the contentious interactions between law enforcement officers and protestors in the current social climate, courts' construal of retaliatory arrest is especially consequential to balancing free speech and the power of law enforcement.[6]

Consider two examples from the summer of 2020 illustrating the kind of interactions where individuals believed they were arrested for engaging in free speech. On May 29, 2020, CNN, like many other media networks, deployed a television crew to cover the ongoing protests in the wake of George Floyd's death.[7] At approximately 5:00 AM in Minnesota, CNN correspondent Omar Jimenez and his crew were arrested on live television, despite informing law enforcement of their role as journalists.[8] CNN and Jimenez maintain that the television crew's arrest violated clearly established First Amendment rights.[9]

Similarly, on June 2, 2020, a protester in Charleston, South Carolina, knelt before law enforcement officers at the end of a tense day of civilian and

1. David L. Hudson Jr., *Retaliatory Arrests*, THE FIRST AMENDMENT ENCYCLOPEDIA (2019), https://www.mtsu.edu/first-amendment/article/1647/retaliatory-arrests [https://perma.cc/TM2Q-HX6K].

2. 42 U.S.C. § 1983; *see infra* Part I.A.

3. *See generally* Nieves v. Bartlett, 139 S. Ct. 1715 (2019).

4. *See infra* Part II.

5. Larry Buchanan, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/ZE7Z-B39V].

6. *See* 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/57B2-BYLN] ("[H]undreds of thousands of people joined largely peaceful demonstrations throughout the country, but cities reported hundreds of arrests as protesters clashed with the police . . . .").

7. Jason Hanna & Amir Vera, *CNN Crew Released from Police Custody After They Were Arrested Live on Air in Minneapolis*, CNN (May 29, 2020, 8:19 PM), https://www.cnn.com/2020/05/29/us/minneapolis-cnn-crew-arrested/index.html [https://perma.cc/27CU-WEME].

8. *See id.*

9. *See id.*

police conflict.[10] The protester, Givionne Jordan Jr., can be seen on video attempting to deliver a long and unifying speech, ending with: "Do you want to make a stand? Do you want to make a change? Because if we charge you and you charge us, what is that really doing?"[11] Immediately thereafter, law enforcement moved forward and arrested Jordan, seemingly singling him out from the many protestors.[12]

These incidents did not occur in isolation. Variations of alleged law enforcement retaliation in response to the exercise of protected speech, both inside and outside the context of protest, have been well-documented.[13] Though retaliation happens in many contexts, the current resurgence of protests warrants the renewed urgency of this discussion.[14]

This Note analyzes and critiques how courts have construed the doctrine of retaliatory arrest—a unique intersection of multiple legal fields. A typical retaliatory arrest claim implicates the constitutional right of free expression, Fourth Amendment procedural requirements placed on law enforcement, and the general principle that where there is a legal wrong, the law provides a remedy.[15] As mentioned above, citizens have the constitutional right to freely express their ideas without government infringement under the First Amendment.[16] To redress and deter such situations, wronged individuals may file a § 1983 claim alleging that their constitutional rights under the First

10. Li Cohen, *A Protestor Knelt Down to Tell Police He Loves and Respects Them. They Threw Him in Jail.*, CBS NEWS (June 2, 2020, 4:04 PM), https://www.cbsnews.com/news/protester-knelt-down-to-tell-police-he-loves-and-respects-them-they-threw-him-in-jail-charleston-south-carolina/ [https://perma.cc/ZAC7-W4BD].

11. Rob Way (@RobWayTV), TWITTER (June 2, 2020, 2:07 PM), https://twitter.com/RobWayTV/status/1267880521872412672 [https://perma.cc/Y3WM-C73G].

12. *See id.*

13. *See, e.g.*, Thayer v. Chiczweski, 705 F.3d 237, 250 (7th Cir. 2012) (holding that police likely had probable cause to arrest an antiwar protestor for disorderly conduct when he engaged in blocking traffic); Snoeyenbos v. Curtis, 439 F. Supp. 3d 719, 732 (E.D. Va. 2020) (holding that a police officer who offered lunch to another deputy to arrest a motorist who was critical of police on social media was not liable under § 1983 due to the presence of probable cause); Collins v. City of New York, 295 F. Supp. 3d 350, 369 (S.D.N.Y. 2018) (holding that officers had probable cause to arrest plaintiffs who failed to disperse at an Occupy Wall Street protest).

14. *See, e.g.*, Thomas J. Sugrue, *2020 Is Not 1968: To Understand Today's Protests, You Must Look Further Back*, NAT'L GEOGRAPHIC (June 11, 2020), https://www.nationalgeographic.com/history/2020/06/2020-not-1968/ [https://perma.cc/9LMS-LHFS]. As of fall 2020, nationwide police brutality protests have arisen in the wake of the death of George Floyd. Indeed, this wave of protests is the latest in a long line of civil unrest dating to the nation's origin. *Id.* For the purposes of this Note, specific protests are not mentioned, but it is important to understand that protests, especially those charged with political rhetoric, are common circumstances in which allegations of retaliatory arrest may arise.

15. *See generally* Howard M. Wasserman, *Argument Preview: Probable Cause, Retaliatory Arrests, and the First Amendment*, SCOTUSBLOG (Nov. 19, 2018, 2:59 PM), https://www.scotusblog.com/2018/11/argument-preview-probable-cause-retaliatory-arrests-and-the-first-amendment/ [https://perma.cc/DRW8-DG8E].

16. U.S. CONST. amend. I. While the First Amendment also extends to other fundamental rights, the scope of this Note is limited to individuals who exercise their freedom of speech and allege retaliation on behalf of law enforcement for the exercise thereof.

Amendment had been violated, and consequently, they may seek monetary damages.[17]

The courts, however, have struggled to apply a consistent framework to retaliatory arrest claims that adequately balances the competing interests of free speech and law enforcement.[18] Some courts have been inconsistent in determining what role, if any, probable cause plays in a retaliatory arrest case.[19] Further, in deciding a framework for retaliatory arrest, some circuit courts have analogized retaliatory arrests to retaliatory prosecutions, which require a plaintiff to prove an absence of probable cause to prevail.[20] Alternatively, other circuit courts have distinguished retaliatory arrest from retaliatory prosecution by demonstrating that circumstances surrounding prosecution were fundamentally different from a typical arrest.[21] In particular, this latter group of circuit courts has found the existence of prosecutorial immunity and the tenuous causal chain of retaliatory animus from plaintiff to prosecutor to be too unique to import into simpler retaliatory arrest cases.[22] Therefore, to this second group of courts, the important distinction between retaliatory arrest and retaliatory prosecution is that retaliatory arrest claims do not require proving an absence of probable cause.[23]

The U.S. Supreme Court addressed this circuit split twice,[24] culminating in its decision in *Nieves v. Bartlett*.[25] There, the Court offered two pathways for a plaintiff to prevail on a § 1983 claim for retaliatory arrest: (1) by proving an absence of probable cause or (2) by showing that, despite the existence of probable cause, the officer arrested the plaintiff under circumstances in which the officer would normally exercise discretion not to do so and "similarly situated" individuals were not arrested.[26] Courts tend to give law enforcement the benefit of the doubt in retrospective examinations of probable cause,[27] and the *Nieves* Court itself was unclear as to how to interpret or apply the second path it provided to the plaintiff.[28] As a result, *Nieves* has had the functional impact of greatly diminishing a plaintiff's chances of recovery under a § 1983 claim for retaliatory arrest.

Lawsuits alleging retaliatory arrest squarely pit the freedom of speech against the efficacy of law enforcement officers in carrying out their duties

17. *See infra* Part I.A.

18. *Compare* Hartman v. Moore, 547 U.S. 250 (2006) (discussing retaliatory prosecution), *with* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (discussing retaliatory termination from a teaching position).

19. *See infra* Part I.C.1.

20. *See infra* Part I.C.2.

21. *See, e.g.*, Greene v. Barber, 310 F.3d 889, 895–96 (6th Cir. 2002) (stating that it is unclear whether the presence of probable cause could extinguish the constitutional question).

22. *See, e.g.*, Howards v. McLaughlin, 634 F.3d 1131, 1148 (10th Cir. 2011), *rev'd*, 566 U.S. 658 (2012).

23. *See id.*

24. *See infra* Part I.C.3.

25. 139 S. Ct. 1715 (2019).

26. *See id.* at 1723–27; *infra* Part I.C.4.

27. *See infra* Part II.A.

28. *See infra* Part I.C.4.

without fear of liability. The subsequent application of the retaliatory arrest doctrine influences not only the power of law enforcement but also the civil rights of the citizens who interact with them.[29] As such, this Note recognizes the validity of each of the competing interests of protected speech and effective law enforcement and seeks to advocate for a solution that adequately balances both interests.

Part I analyzes the legal background, namely the history of § 1983 tort claims and the way the Supreme Court has construed § 1983 as it pertains to First Amendment retaliatory arrests.[30] Part II analyzes the decision in *Nieves v. Bartlett* and the burdensome requirements that § 1983 plaintiffs must overcome as a result.[31] Finally, Part III advocates for a reconsideration of the retaliatory arrest doctrine where evidence of subjective intent is permissible and probable cause does not carry controlling weight in the analysis.[32]

I. THE EVOLUTION OF MODERN RETALIATORY ARREST DOCTRINE

This part provides background on the areas of law implicated by the complex doctrine of retaliatory arrest. First, this part discusses the history of § 1983 claims and examines how individuals who believe that their constitutional rights were violated by law enforcement officers use this statute as a mechanism for redress.[33] Next, this part analyzes the two principal questions that divided circuit courts on retaliatory arrest: (1) whether to employ the *Mt. Healthy City School District Board of Education v. Doyle*[34] burden-shifting framework, which allows evidence of the officer's subjective mindset; and (2) whether the absence-of-probable-cause standard from *Hartman v. Moore*[35] for retaliatory prosecution should apply to retaliatory arrest cases.[36] Finally, this part addresses the *Nieves* binary that leaves plaintiffs with the burden to demonstrate that no probable cause existed, or more likely—given the probability that this burden cannot be satisfied—how plaintiffs must then demonstrate similarly situated individuals were not arrested.[37]

29. 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, 54–55 (2018).
30. *See infra* Part I.
31. *See infra* Part II.
32. *See infra* Part III.
33. *See infra* Part I.A.
34. 429 U.S. 274 (1977).
35. 547 U.S. 250 (2006).
36. *See infra* Part I.B.
37. *See infra* Part I.C.

A. History of § 1983 Constitutional Torts

Constitutional torts are civil actions that an individual may bring to seek monetary damages for the violation of a constitutional right.[38] Section 1983, the principal vehicle for such suits, provides a cause of action against a state or municipal officer who commits a constitutional violation.[39] If an individual is arrested for what may be a deprivation of federal or constitutional rights,[40] that individual may bring a civil suit against the law enforcement officer for monetary damages.[41] The applicable law, 42 U.S.C. § 1983, states that "[e]very person who, under color of any statute, ordinance, regulation, custom . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured."[42] Accordingly, law enforcement officers who arrest individuals for engaging in constitutionally protected speech face the prospect of civil liability.[43] Understanding the history of § 1983 and its subsequent expansion in the modern era provides crucial context for retaliation jurisprudence; the cause of action arises not simply because a law enforcement officer retaliated against an individual but because, in doing so, the officer deprived the individual of the ability to engage in constitutionally protected conduct.[44]

Section 1983 emerged from the Ku Klux Klan Act of 1871,[45] originating as a means for Congress to enforce the newly enacted Fourteenth Amendment.[46] In particular, Congress worried that without this legislation, state law would not always redress infringements of the Fourteenth Amendment, either explicitly or in practice.[47] Considering the extreme racial

38. Eric Williamson, *Jeffries Makes Case for Reforming Constitutional Torts*, UNIV. OF VA. SCH. OF L. (Oct. 10, 2012), https://www.law.virginia.edu/news/2012_fall/jeffries_qa.htm [https://perma.cc/EUV2-NB54].

39. While this Note focuses exclusively on plaintiffs who bring § 1983 claims for retaliatory arrest claims, see Alex Langsam, Note, *Breaking* Bivens*?: Falsification Claims After* Ziglar v. Abbasi *and Reframing The Modern* Bivens *Doctrine*, 88 FORDHAM L. REV. 1395 (2020), for a thorough discussion of an alternative means of seeking monetary damages against federal government officials who have inflicted constitutional wrongs.

40. Section 1983 also provides monetary remedies for violations of federal statutory right. *See, e.g.*, Maine v. Thiboutot, 448 U.S. 1, 9 (1980) ("The statute states that fees are available in *any* § 1983 action."). This Note, however, will only consider constitutional violations.

41. 42 U.S.C. § 1983. Importantly, the text of § 1983 would include law enforcement officers as individuals who could deprive citizens of their constitutional rights. In the context of § 1983 liability for retaliatory arrest, this Note makes no distinction between law enforcement officers and police officers.

42. *Id.*

43. *See, e.g.*, Crawford-El v. Britton, 523 U.S. 574, 592 (noting that there is a long-standing rule that the First Amendment prohibits retaliation for protected speech).

44. Randolph A. Robinson II, *Policing the Police: Protecting Civil Remedies in Cases of Retaliatory Arrest*, 89 DENV. U. L. REV. 499, 501 (2012).

45. Pub. L. No. 42-22, 17 Stat. 13 (codified as amended in scattered sections of 42 U.S.C.); *see* Robinson, *supra* note 44, at 499 n.1.

46. *See* Michael T. Burke & Patricia A. Burton, *Defining the Contours of Municipal Liability Under 42 U.S.C. § 1983:* Monell *Through* City of Canton v. Harris, 18 STETSON L. REV. 511, 513 (1989) (citing CONG. GLOBE, 42d Cong., 1st Sess., app. 68, 80, 83–85 (1871)).

47. Monroe v. Pape, 365 U.S. 167, 171–74 (1961).

tensions of the time period, the legislation was considered vital to ensuring that government officials did not violate the legal rights of Black citizens and to giving these citizens a means of legal recourse.[48]

Originally, a § 1983 claim arose only when an official engaged in some action taken under an authority *expressly* enumerated by state law or custom; however, after *Monroe v. Pape*,[49] the Court held that § 1983 also provides a remedy when officers acting in their official capacity violated an individual's constitutional or federally guaranteed rights.[50] Though the impact of this distinction may not be readily apparent, it greatly expanded the scope of § 1983 to those seeking damages.[51] Under earlier interpretations of § 1983, individuals could not recover if the officer engaged in unauthorized conduct.[52] Instead, liability under § 1983 would only apply when the unlawful action was "taken either in strict pursuance of some specific command of state law or within the scope of executive discretion in the administration of state laws."[53] Following *Monroe*, the resulting expansion of what is now known as constitutional tort law allows prospective plaintiffs to use § 1983 to seek redress when public officials engage in unauthorized conduct and commit a wide variety of constitutional wrongs.[54] Consequently, § 1983 is the statute of choice for plaintiffs in retaliation cases that implicate and deprive potential plaintiffs of federal or constitutional rights.[55]

B. The Elements of a Retaliation Claim

While retaliation claims could arise in a variety of contexts, this Note focuses on plaintiffs who allege that law enforcement officers arrested them, thereby depriving them of their constitutionally protected freedom of speech. In essence, an individual who is arrested or otherwise retaliated against for engaging in protected speech has the right, under the current interpretation of § 1983, to seek damages in a civil suit.[56]

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48. Burke & Burton, *supra* note 46, at 513; Robinson, *supra* note 44, at 501.

49. 365 U.S. 167 (1961).

50. *Id.* at 173–75; *see also* Robinson, *supra* note 44, at 501.

51. *See* Robinson, *supra* note 44, at 501. After the *Monroe* decision, any officer who subverted an individual's constitutional or federal rights could be sued in a civil capacity. In contrast, prior to this case, individuals could only sue officers if the deprivation of their legal rights originated from actions that officers enforced under express state law. *See id.*

52. *See* Burke & Burton, *supra* note 46, at 516 (citing Barney v. City of New York, 193 U.S. 430 (1904)).

53. *See* Burke & Burton, *supra* note 46, at 516 (quoting *Monroe*, 365 U.S. at 213 (Harlan, J., dissenting)).

54. *See* Burke & Burton, *supra* note 46, at 514.

55. *See id.* at 514; *cf.* Gilmere v. City of Atlanta, 774 F.2d 1495, 1504 (11th Cir. 1985) (holding that a plaintiff subjected to excessive force by a law enforcement officer was entitled to use § 1983 as a means of seeking a civil remedy), *cert. denied*, 476 U.S. 1115 (1986); Fann v. City of Cleveland, 616 F. Supp. 305, 314–15 (N.D. Ohio 1985) (holding that § 1983 permits a remedy for invasion of the Fourth Amendment right to privacy when a plaintiff was strip-searched).

56. 42 U.S.C. § 1983.

Therefore, to prevail in a retaliation claim under § 1983, a plaintiff must prove that: (1) the plaintiff engaged in constitutionally protected speech; (2) the government official or arresting officer caused the plaintiff to suffer an injury, such as being the subject of arrest; and (3) the defendant's actions were motivated by the plaintiff's engagement in constitutionally protected conduct.[57] Traditionally, if plaintiffs could prove each of these elements, defendants then had the burden to prove that they would have taken the same action absent the protected conduct.[58]

Addressing the first element, constitutionally protected speech in a retaliation claim is generally inclusive of almost all conceivable speech.[59] As John Koerner points out, while defendants may argue that the plaintiff's speech is not protected, for example, because it fits a narrow exception such as "fighting words,"[60] courts are generally reluctant to find that an individual's speech is not considered "protected."[61] As a result, most cases do not turn on whether the speech itself was actually worthy of First Amendment protection, and this prong is relatively simple for a plaintiff to satisfy.[62]

The plaintiff must then prove the existence of an injury.[63] Though this Note focuses primarily on injuries sustained as a result of alleged retaliatory arrest, where the arrest itself is the injury, injuries in the retaliatory context may also arise in situations of employment and prosecution.[64] Further, the magnitude of the injury in retaliation claims is immaterial to the lawsuit's legitimacy and, therefore, the injury prong of a retaliatory arrest claim is not typically the controlling factor in the case.[65]

In light of the ease with which the first two elements of retaliation claims may be satisfied, liability often turns on whether the defendant's action was

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57. John Koerner, Note, *Between* Healthy *and* Hartman*: Probable Cause in Retaliatory Arrest Cases*, 109 COLUM. L. REV. 755, 759–60 (2009).

58. *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

59. *See* Koerner, *supra* note 57, at 760–61.

60. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (holding that fighting words are those that are threatening or would cause an ordinary man to understand that a fight was about to occur).

61. Koerner, *supra* note 57, at 760–61; *see, e.g.*, City of Houston v. Hill, 482 U.S. 451, 461–62 (1987) (finding that the "fighting words doctrine" is a very narrow exception to protected speech with limited applicability); Greene v. Barber, 310 F.3d 889, 896 (6th Cir. 2002) (holding that an individual who called a law enforcement officer a lewd name was "not egregious enough" to meet the standard of "fighting words"); Posr v. Court Officer Shield No. 207, 180 F.3d 409, 416 (2d Cir. 1999) (holding that vague, nonspecific statements without more cannot satisfy the "fighting words standard"). *But see* Davis v. Twp. of Paulsboro, 421 F. Supp. 2d 835, 849–50 (D.N.J. 2006) (holding that an explicit threat to harm a law enforcement officer satisfies the "fighting words" exception to protected speech).

62. Koerner, *supra* note 57, at 760–61.

63. *Id.* at 761.

64. *See infra* Part I.C.

65. *See* Koerner, *supra* note 57, at 761–62 (citing Rutan v. Republican Party of Ill., 497 U.S. 62, 75 n.8 (1990) (finding that even minor injuries, such as an injury sustained by an employer not throwing a birthday party for an employee, would satisfy the injury prong in a retaliation claim if the action was performed with an animus to punish or retaliate against the employee)).

the cause of the plaintiff's injury.[66] Like other § 1983 claims, First Amendment retaliation claims include a causation element.[67] Accordingly, a plaintiff alleging a violation of a constitutional right must prove that the protected conduct was a "substantial factor" in motivating the defendant to take the action ultimately culminating in the plaintiff's injury.[68] The complexity of proving causation in retaliation claims led to two circuit splits, which, after multiple attempts at clarifying the doctrine, culminated in *Nieves*.

C. Nieves*: The Supreme Court Crafts a Framework to Resolve Prior Circuit Splits*

This section examines how the circuit courts and the Supreme Court struggled to apply retaliatory arrest claims before *Nieves*. Typical retaliation claims under § 1983 adhered to the burden-shifting framework from *Mt. Healthy City School District Board of Education v. Doyle*.[69] However, circuit courts split on whether both retaliatory arrest and retaliatory prosecution claims should be analyzed under that framework.[70] Soon thereafter, in *Hartman v. Moore*,[71] the Supreme Court held that in retaliatory prosecution cases, the *Mt. Healthy* framework did not apply, and the plaintiff had to prove an absence of probable cause.[72] Again, the circuits split—this time on whether the absence-of-probable-cause requirement was limited to retaliatory prosecution claims or should extend to retaliatory arrests, as well.[73] After multiple attempts at resolving the circuit split, the Court created a definitive framework in *Nieves v. Bartlett*.[74]

1. Should the *Mt. Healthy* Burden-Shifting Framework Apply to Retaliatory Arrest?

The Supreme Court first faced a retaliation claim in the context of a § 1983 lawsuit in *Mt. Healthy*, which ultimately set the framework for future retaliation cases.[75] The case revolved around Fred Doyle, a teacher employed by the Mt. Healthy Board of Education from 1966 to 1971.[76] In his capacity as a teacher, he was elected president of the Teacher's

66. Koerner, *supra* note 57, at 761–62.

67. *See, e.g.*, Parker v. North Carolina, 397 U.S. 790, 796 (1970) (holding that the relationship between the alleged coercive interrogation and the plaintiff's confession was too attenuated and not the actual cause of the injury); Wong Sun v. United States, 371 U.S. 471, 491 (1963) (holding that a Fourteenth Amendment dispute arising from an involuntary confession was too attenuated to satisfy the causal element).

68. *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977); *infra* Part I.C.

69. Koerner, *supra* note 57, at 756.

70. *See id.* at 766–67.

71. 547 U.S. 250 (2006).

72. *See id.* at 261.

73. Koerner, *supra* note 57, at 775.

74. *See generally* Nieves v. Bartlett, 139 S. Ct. 1715 (2019); *infra* Part I.C.3.

75. Koerner, *supra* note 57, at 761–62.

76. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 281 (1977).

Association, where his work negotiating general contractual terms between the teachers and the Board of Education led to tensions between the two parties.[77] In early 1970, Doyle was involved in multiple incidents that the school deemed problematic.[78] Specifically, he argued with school employees in the cafeteria, referred to students in a derogatory manner within a disciplinary complaint, and made obscene gestures to two female students.[79]

One final incident pushed the Board of Education to terminate Doyle's employment altogether.[80] In 1971, the principal of the school in which Doyle worked circulated a memorandum specifying standards for "teacher dress and appearance."[81] Shortly thereafter, Doyle called into a local radio show detailing and critiquing this internal memorandum.[82] One month later, the superintendent of the Board of Education recommended that Doyle not be rehired due to, in the superintendent's opinion, Doyle's unprofessional handling of the matter.[83]

The Supreme Court held that Doyle was engaging in constitutionally protected speech and that his subsequent termination constituted an injury.[84] Regarding the causation element, the Court articulated that "[t]he constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct."[85] Accordingly, the Court stated that Doyle had the burden to prove that the Board of Education considered his protected speech a substantial factor in the decision not to rehire him.[86] Notably, the Court expanded the typical § 1983 causation analysis. The Court established not only that a plaintiff must prove that the defendant's retaliatory action was an actual cause of the injury but that, if this burden is satisfied, the defendant must have ample opportunity to rebut the assertion by showing it would have taken the same action absent any retaliatory motivation.[87] Thus, once the plaintiff proved causation, the burden shifted to the defendant to prove that the action was not motivated by retaliatory animus.[88]

After *Mt. Healthy*, courts reviewing retaliation claims, even outside the retaliatory arrest context, almost uniformly applied this burden-shifting

77. *Id.*
78. *See id.* at 281–82.
79. *Id.*
80. *See id.* at 282.
81. *Id.*
82. *Id.*
83. *Id.*
84. *See id.* at 284.
85. *Id.* at 285–86.
86. *See id.* at 287.
87. *Id.*
88. Koerner, *supra* note 57, at 763. When a plaintiff attempts to prove causation, the standard is "substantial factor" because the imposition of but-for causation would "merge the plaintiff's prima facie case and the defendant's rebuttal." *Id.* The defendant's burden on rebuttal is to demonstrate by a preponderance of the evidence that the officer would have taken the same action absent the protected conduct. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

framework.[89] However, circuit courts eventually split on how *Mt. Healthy* should apply in retaliatory arrests and retaliatory prosecutions, disagreeing specifically about the role that probable cause should play in the burden-shifting framework.[90]

On one side, the Second,[91] Fifth,[92] Eighth,[93] and Eleventh[94] Circuits did not apply the *Mt. Healthy* burden-shifting framework and dismissed retaliatory arrest and retaliatory prosecution cases without further inquiry when the officer could demonstrate probable cause, effectively satisfying the defendant's rebuttal to the causation element.[95] In contrast, the Tenth[96] and Sixth[97] Circuits did not consider probable cause dispositive, instead treating it as one of multiple types of evidence of the officer's retaliatory animus and continuing to apply the typical burden-shifting inquiry.[98] Consequently, the Supreme Court addressed the circuit split in *Hartman v. Moore*[99] to determine whether the *Mt. Healthy* burden-shifting framework should apply to all retaliation cases, including retaliatory arrest and retaliatory prosecution.[100]

2. *Hartman*: The Absence-of-Probable-Cause Standard in the Context of Retaliatory Prosecution

In *Hartman*, a retaliatory prosecution case, the Court directly addressed the question of whether a First Amendment retaliation claim could succeed if the plaintiff failed to plead an absence of probable cause.[101] There, William Moore—the CEO of Recognition Equipment Inc., a multiline optical scanning technology company—successfully lobbied the United States Postal Service (USPS) to adopt the company's technology for sorting mail.[102] Despite Moore's initially successful efforts, USPS ultimately did not extend the contract to Recognition Equipment Inc. and awarded the contract to one of the company's competitors.[103] Soon thereafter, Moore was investigated by USPS inspectors and was subsequently indicted by a grand

89. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that the plaintiff bears the burden of proving an employment decision was based on an impermissible criterion constituting a substantial factor in the employment decision, upon which the burden shifts to the defendant to prove the decision would have nevertheless been reached absent the retaliatory motives).
90. *See infra* Part I.B.
91. Singer v. Fulton Cnty. Sheriff, 63 F.3d 110, 119–20 (2d Cir. 1995).
92. Keenan v. Tejeda, 290 F.3d 252, 261–62 (5th Cir. 2002).
93. Benigni v. Smith, 121 F. App'x 164, 165–66 (8th Cir. 2005).
94. Redd v. City of Enterprise, 140 F.3d 1378, 1383 (11th Cir. 1998).
95. Koerner, *supra* note 57, at 769.
96. Greene v. Barber, 310 F.3d 889, 895 (6th Cir. 2002).
97. DeLoach v. Bevers, 922 F.2d 618, 620 (10th Cir. 1990).
98. Koerner, *supra* note 57, at 774.
99. 547 U.S. 250 (2006).
100. *Id.* at 252.
101. *See id.*
102. *See id.* at 252–53.
103. *See id.* at 253.

jury for his potential role in influencing the person who was elected Postmaster General.[104]

After a six-week trial, the court acquitted Moore, suggesting there was a "complete lack of direct evidence."[105] Empowered by the court's finding, Moore brought his own § 1983 action against the prosecutor and the USPS inspectors involved in his initial investigation.[106] Among the causes of action, Moore alleged retaliatory prosecution, claiming that USPS conspired with the prosecutor to initiate his prosecution because of his prior criticism of USPS.[107] The retaliatory prosecution claim was eventually heard by a federal district court in the District of Columbia against only the USPS inspectors, and the court dismissed the claim.[108] However, after an appeal to the D.C. Circuit, the Supreme Court granted certiorari to resolve a growing circuit split in retaliation jurisprudence.[109] Ultimately, the Supreme Court, finding Moore's claim objectively unreasonable, held that a plaintiff who brings a § 1983 retaliatory prosecution claim must allege and prove the absence of probable cause to prevail.[110]

Importantly, while the decision did not entirely eradicate the *Mt. Healthy* burden-shifting framework, it marked a shift in how the Court treated subsets of retaliation claims.[111] Going forward, the plaintiff in a retaliatory prosecution case would have the burden of proving an *absence* of probable cause.[112] The Court diverged from *Mt. Healthy* for three main reasons: (1) the complex causation unique to retaliatory prosecution claims, (2) the evidentiary concerns, and (3) the presumption of prosecutorial regularity.[113] However, the Court did not address whether this holding extended to retaliatory arrests or was limited solely to retaliatory prosecution.[114]

Part of the reason that the *Hartman* Court diverged from the *Mt. Healthy* standard was because, in the case of retaliatory prosecution, the causation analysis is more complex than it is in a typical retaliation case.[115] Specifically, the Court reasoned that "a plaintiff . . . must show that the nonprosecuting official acted in retaliation, and must also show that [the

104. *Id.* at 253–54.

105. United States v. Recognition Equip. Inc., 725 F. Supp. 587, 596 (D.D.C. 1989).

106. *Hartman*, 547 U.S. at 252 (citing *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 391 (1971) as Moore's justification for bringing suit).

107. *See id.*

108. *Id.* at 255.

109. *Id.* at 255–56.

110. *See id.* at 257–59 (holding that the *Mt. Healthy* framework does not apply to retaliatory prosecution).

111. Koerner, *supra* note 57, at 770–71.

112. *See id.* (emphasis added).

113. *Id.* at 771.

114. *See id.* at 771–72. The Court abandoned the *Mt. Healthy* standard in retaliatory prosecution claims partially because of the inherent causal complexities regarding the role of prosecutors. *See* Hartman v. Moore, 547 U.S. 250, 261 (2006). The Court did not decide whether this distinction stands to muster in factually distinct retaliatory arrest cases and, instead, focused on the specific features of retaliatory prosecution. *See* Koerner, *supra* note 57, at 772.

115. *Hartman*, 547 U.S. at 259–61.

official] induced the prosecutor to bring charges that would not have been initiated without his urging."[116] Further, prosecutors are typically immune to suit, so the plaintiff must also sue those other individuals who induced the prosecutor to bring charges, thereby adding another step to the causation analysis.[117] These factors complicate and lengthen the causal analysis, meaning a plaintiff in a retaliatory prosecution would have to prove not only that the plaintiff was arrested in retaliation for engaging in protected conduct but also that the arresting officer caused him to be prosecuted for it.[118]

Taken together, the *Hartman* Court found that causation and probable cause were inextricably linked, and to overcome the presumption of a prosecutor's regularity in decision-making, a plaintiff must affirmatively show an absence of probable cause.[119] The Court reasoned that probable cause would likely arise in most retaliatory prosecution cases regardless, and as such, its absence should be included as an element of the plaintiff's prima facie case.[120]

While it is clear that *Hartman* diverged from the burden-shifting framework of *Mt. Healthy*, the ensuing requirement that plaintiffs must prove an absence of probable cause was based largely on facts specific to retaliatory prosecution, leaving it unclear whether the *Hartman* holding would extend to retaliatory arrest cases.[121] Once more, the circuit courts split—this time specifically on *Hartman*'s applicability to retaliatory arrest cases.[122] The Second,[123] Eighth,[124] and Eleventh[125] Circuits all embraced *Hartman*'s heightened standard of proving an absence of probable cause.[126] The Sixth

116. *Id.* at 262.
117. *See id.* at 261–62.
118. *See id.*
119. Koerner, *supra* note 57, at 771–72; Tolman & Shapiro, *supra* note 29, at 73–74.
120. *Hartman*, 547 U.S. at 265.
121. Linda Zhang, *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, 1346 (2017). As Professor Zhang notes, the Court frequently mentioned the need to prove a chain of causation "from animus to injury" regarding facts specific to retaliatory prosecution cases. *Id.* (citing *Hartman*, 547 U.S. at 259).
122. *See* Zhang, *supra* note 121, at 1346.
123. *See* Curley v. Vill. of Suffern, 268 F.3d 65, 73 (2d Cir. 2001) (applying the *Mt. Healthy* standard when Curley was allegedly arrested in connection with his campaign statements criticizing the village police chief).
124. *See* Williams v. City of Carl Junction, 480 F.3d 871, 876–77 (8th Cir. 2007) (holding that plaintiff had to plead and prove an absence of probable cause when alleging that twenty-six municipal citations were written in retaliation for his comments criticizing city officials).
125. Phillips v. Irvin, 222 F. App'x 928, 929 (11th Cir. 2007) (finding that law enforcement officers had probable cause based on dash camera footage showing Officer Irwin's eight repeated requests to plaintiff to back off so that law enforcement officers could complete his federal traffic stop).
126. Zhang, *supra* note 121, at 1343.

Circuit did not commit to either standard.[127] In contrast, the Ninth[128] and Tenth[129] Circuits held that *Hartman* was a narrow case limited to retaliatory prosecution and, instead, applied the typical *Mt. Healthy* burden-shifting framework to retaliatory arrest cases where probable cause was one of multiple types of relevant evidence.[130]

3. *Reichle* and *Lozman*: Foreshadowing the Future Framework

The Supreme Court granted certiorari to resolve the circuit split regarding which standard should apply to retaliatory arrest cases in *Reichle v. Howards*.[131] There, the plaintiff was arrested for assault after verbally accosting Vice President Dick Cheney and allegedly making physical contact with him.[132] After being arrested, plaintiff Steven Howards denied ever assaulting the vice president and alleged he was arrested as retaliation for his verbal criticism.[133] Rather than definitively solving the circuit split, the Court ruled against Howards on qualified immunity grounds.[134] Importantly, however, the Court left open the idea, in dicta, that retaliatory prosecution was sufficiently similar to retaliatory arrest and that it would be open to such an extension of *Hartman* in the future.[135]

Once more, the Supreme Court addressed *Hartman*'s applicability to retaliatory arrests in *Lozman v. City of Riviera Beach*.[136] However, the Court did not resolve the *Mt. Healthy-Hartman* circuit split due to the specific facts of the case.[137] In *Lozman*, the plaintiff owned a floating home in a marina

127. *See* Kennedy v. City of Villa Hills, 635 F.3d 210, 217 n.4 (6th Cir. 2011) (holding that a plaintiff bringing an ordinary retaliation claim may not need to demonstrate a lack of probable cause); Leonard v. Robinson, 477 F.3d 347, 355 (6th Cir. 2006) (holding that *Hartman* was about a retaliatory prosecution, which involves more complex causal chains); Barnes v. Wright, 449 F.3d 709, 720 (6th Cir. 2006) (holding that *Hartman* applies to all retaliation claims, not just claims of retaliatory prosecution).

128. Skoog v. Cnty. of Clackamas, 469 F.3d 1221, 1232 (9th Cir. 2006) (holding that a plaintiff does not need to plead the absence of probable cause to prevail).

129. Howards v. McLaughlin, 634 F.3d 1131, 1148 (10th Cir. 2011) (holding that *Hartman* is limited only to retaliatory prosecution cases), *rev'd*, 566 U.S. 658 (2012).

130. Zhang, *supra* note 121, at 1347.

131. 565 U.S. 1078 (2011).

132. Reichle v. Howards, 566 U.S. 658, 661 (2012).

133. *See id.* at 662–63.

134. *See id.* at 670. Qualified immunity insulates government officials from civil liability so long as their actions did not violate a clearly established statutory or constitutional right. *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982). To be clearly established, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). In *Reichle*, the Court held that it was unclear whether Hartman applied to retaliatory arrests, and thus, there was not a clearly established right. *See Reichle*, 566 U.S. at 668–69. Therefore, the law enforcement officers were entitled to qualified immunity. *See id.* at 670.

135. *See id.* at 667–68. Though not essential to the qualified immunity principle, the Court laid out the basis for future decisions by explicitly comparing retaliatory prosecution with retaliatory arrest, namely the typical presence of probable cause in both. *Id.*

136. 138 S. Ct. 1945 (2018).

137. *See* Michael G. Mills, Note, *The Death of Retaliatory Arrest Claims: The Supreme Court's Attempt to Kill Retaliatory Arrest Claims in* Nieves v. Bartlett, 105 CORNELL L. REV. 2059, 2072–73 (2020). In discussing a case that was decided after *Lozman*, Mills described

owned by the city of Riviera Beach.[138] At the time, the plaintiff had harshly criticized the city's plan to use eminent domain to seize homes in the marina for the eventual use of private development.[139] According to Lozman's allegations, the city council held a closed-door meeting, and the transcript purportedly showed an official city plan to intimidate Lozman.[140] Five months later, Lozman was arrested at a public meeting while voicing his complaints about city policy.[141]

Lozman acknowledged that there was probable cause for the arrest, but he nonetheless claimed that the presence of probable cause should not defeat his First Amendment claim.[142] The Court acknowledged that either *Mt. Healthy* or *Hartman* could feasibly control the outcome of the case given the lack of clarity surrounding the Court's retaliatory arrest jurisprudence.[143] While giving credence to both opposing arguments, the Court held that the factual irregularity of the case—a coordinated city policy meant to intimidate Lozman—made it an improper vehicle to resolve the circuit split.[144] The Court stated that the question of "whether in a retaliatory arrest case the *Hartman* approach should apply, thus barring a suit where probable cause exists, or, on the other hand, the inquiry should be governed only by *Mt. Healthy* is a determination that must await a different case."[145] Deciding the case narrowly, the Court held that Lozman "need not prove the absence of probable cause to maintain a claim of retaliatory arrest against the City."[146] The Court's decision to not definitively outline the framework for retaliatory arrest cases thus left the door open for future deliberation.[147]

4. *Nieves*: The Supreme Court Responds

After two prior attempts, the Court resolved the question regarding the absence-of-probable-cause standard in *Nieves v. Bartlett*.[148] Bartlett was an Alaskan resident who attended a winter sports festival when he encountered

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Lozman's holding as "incredibly fact specific" and stated that it "has little applicability." *See id.* at 2095 n.227.

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

139. *See id.*

140. *Id.*

141. *Id.* at 1949–50.

142. *Id.* at 1951.

143. *See id.* at 1951–54.

144. *See id.* at 1954.

145. *Id.*

146. *Id.* at 1955 ("On facts like these, *Mt. Healthy* provides the correct standard for assessing a retaliatory arrest claim. The Court need not, and does not, address the elements required to prove a retaliatory arrest claim in other contexts.").

147. *See id.* at 1955–56 (Thomas, J., dissenting). Justice Thomas expressed his concern that the majority seemed to fashion a narrow ruling that did not address the circuit split, saying, "The petition for certiorari asked us to resolve whether 'the existence of probable cause defeat[s] a First Amendment retaliatory arrest claim as a matter of law' . . . . Yet the Court chooses not to resolve that question." *Id.* He also expressed his discontent with the narrow scope of the ruling, stating, "I find it hard to believe there will be many cases where this rule will even arguably apply . . . . Not even Lozman's case is a good fit." *Id.* at 1956.

148. *See generally* Nieves v. Bartlett, 139 S. Ct. 1715 (2019).

Sergeant Nieves, who had been talking to a few attendees whom he believed may have been underage and intoxicated.[149] Bartlett then admonished the attendees not to talk to the police.[150] A few minutes later, a different police officer asked underage drinkers where they had obtained alcohol.[151] Bartlett angrily confronted the trooper, and Sergeant Nieves intervened, arresting Bartlett.[152] Importantly—and disputed by the parties—Nieves told Bartlett while arresting him, "[B]et you wish you would have talked to me now."[153] This statement provided justification for Bartlett to allege that he was arrested in retaliation for engaging in protected speech.[154]

Resolving the circuit split, the Court created a framework with a narrow exception: like retaliatory prosecution claims in *Hartman*, a showing of probable cause defeats any claim of retaliatory arrest, except where probable cause exists but an officer would not typically arrest another individual in similar circumstances or where otherwise similarly situated individuals were not arrested.[155] In so holding, the Court noted the similarities in the causal complexities between retaliatory prosecutions and retaliatory arrests.[156] Further, the Court emphasized the need for an objective test to prevent a flood of cases alleging subjective biases from entering the lower courts.[157] In sum, the Court applied *Hartman* standards to retaliatory arrest claims with a minor exception, thereby establishing the framework under which future § 1983 retaliatory arrest claims for First Amendment deprivations would be analyzed.[158]

II. THE IMPACT OF PROBABLE CAUSE ON RETALIATORY ARREST JURISPRUDENCE

Following the Court's decision in *Nieves*, a retaliatory arrest plaintiff must make an affirmative showing of probable cause—a doctrine fundamentally rooted in the Fourth Amendment that determines whether an arrest was valid—to prevail on the claim.[159] First, this part will explain how courts have conventionally applied probable cause, often resulting in greater protection for the interest of effective law enforcement.[160] Second, this part will examine how, due to the flexibility and breadth of probable cause, lower courts applying the *Nieves* framework typically have not found plaintiffs to

149. *Id.* at 1717–18.
150. *Id.*
151. *See id.* at 1720–21.
152. *Id.* at 1721.
153. *Id.*
154. *See id.* ("The protected speech, according to Bartlett, was his refusal to speak with Nieves earlier in the evening and his intervention in Weight's discussion with the underage partygoer.").
155. *See id.* at 1727.
156. *See id.* at 1723–24.
157. *See id.* at 1725.
158. *See infra* Part II.
159. *See, e.g.*, *Nieves*, 139 S. Ct. at 173–-32; *infra* Part III.B.
160. *See infra* Part II.A.

be successful in their § 1983 retaliatory arrest claims.[161] Finally, this part identifies multiple cases in which, following *Nieves*, the absence of a probable cause requirement and a narrow exception have actually precluded individuals from recovering on First Amendment retaliatory arrest claims.[162]

A. The Probable Cause Standard: Deference to Law Enforcement Expertise

Following the Court's decision in *Nieves*, a plaintiff alleging a § 1983 claim for retaliatory arrest must affirmatively prove an absence of probable cause to prevail, unless the arrest occurred in a context in which law enforcement typically exercises discretion not to make an arrest.[163] By instituting this framework, *Nieves* had the practical effect of leaving § 1983 plaintiffs alleging retaliatory arrest with two narrow paths to success.[164]

Accordingly, a plaintiff's prospects of success in a § 1983 claim rest largely on whether there was an absence of probable cause, meaning that the probable cause analysis is crucial to retaliatory arrest claims. However, the Supreme Court has deliberately chosen not to give a clear, technical definition to probable cause.[165] Instead, the Court has opted for a more flexible approach in which probable cause is determined "based on the totality of the circumstances."[166] In doing so, the Court has established a probable cause framework that is readily adaptable to the incredible variety of criminal contexts in which questions of probable cause arise.[167] Furthermore, this flexible, nontechnical approach allows law enforcement officers "to rely on their expertise, intuition, and observational skills to decide whether suspicious behavior warrants further action, without the constraints of an otherwise rigid test."[168]

Probable cause is itself a vast area of law, and while probable cause inquiries vary widely,[169] this Note only considers instances where law enforcement officers acted with probable cause when allegedly arresting an individual for protected speech. Courts confronted with this type of probable cause inquiry consider whether the circumstances and particular facts of a case would warrant law enforcement's reasonable belief that an offense has

161. *See infra* Part II.B.

162. *See infra* Part II.C.

163. *See Nieves*, 139 S. Ct. at 1727.

164. *See, e.g.*, Mills, *supra* note 137, at 2075.

165. Illinois v. Gates, 462 U.S. 213, 231 (1983) ("[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts.").

166. Erica Goldberg, *Getting Beyond Intuition in the Probable Cause Inquiry*, 17 LEWIS & CLARK L. REV. 789, 790 (2013).

167. *Id.* at 790–91.

168. *Id.*

169. *Compare* Illinois v. Gates, 462 U.S. 213, 231 (1983) (holding that a magistrate judge had probable cause to issue a search warrant based on an informant's anonymous tip), *with* Riley v. California, 573 U.S. 373, 384 (2014) (holding that a reasonable suspicion requirement is more appropriate than probable cause in the search incident to the arrest of the petitioner's cellphone). For a more exhaustive analysis of probable cause, see WILLIAM E. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS § 4:4 (2d ed. 2021).

been or is being committed.[170] Moreover, the existence of probable cause depends on the reasonable conclusion that can be drawn from the facts known to the arresting officer at the time of the arrest.[171]

Consider, however, probable cause as a probability standard.[172] It is unclear how certain a reasonable law enforcement officer must be in believing a crime either "has been or is being committed."[173] Rather than attempting to quantify a level of certainty, courts have relied on yet another flexible term: "fair probability."[174] In doing so, the Supreme Court pragmatically refused to create a technical framework for defining probable cause and, instead, stated that "probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."[175] Accordingly, the Court acknowledged the need for a flexible and commonsense application, like the fair-probability standard that could readily be understood by law enforcement.[176]

Keeping in mind the flexible probable cause standard, the Court in *Nieves* also relied on the conventional distinction between objective and subjective justifications for probable cause.[177] Specifically, the Court based its reasoning on its decision in *Devenpeck v. Alford*.[178] There, the Court had articulated the fundamental idea that an arresting officer's state of mind is "irrelevant to the existence of probable cause."[179] In fact, this case marked a culmination of decisions suggesting similar sentiments, particularly that "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent."[180] Ultimately, the Court has stressed that effective evaluation of law enforcement is best achieved through objective examination rather than by questioning an officer's subjective state of mind.[181] As applied in the context of retaliatory arrest, probable cause does not permit an examination of the officer's subjective state of mind, though that could be helpful in determining the motive for the arrest.[182]

But just as importantly, by not requiring law enforcement officers to divulge any subjective reasoning to explain their actions, the Court has impliedly authorized law enforcement to justify an arrest after its

170. Brinegar v. United States, 338 U.S. 160, 175 (1949).
171. Maryland v. Pringle, 540 U.S. 366, 371 (2003).
172. *See* Goldberg, *supra* note 166, at 792.
173. *Id.*
174. *Gates*, 462 U.S. at 238.
175. *See id.* at 232.
176. United States v. Cortez, 449 U.S. 411, 418 (1981).
177. Nieves v. Bartlett, 139 S. Ct. 1715, 1724–25 (2019).
178. 543 U.S. 146 (2004).
179. *Id.* at 153.
180. Whren v. United States, 517 U.S. 806, 814 (1996).
181. *See, e.g.*, Horton v. California, 496 U.S. 128, 138 (1990).
182. *See Nieves*, 139 U.S. at 1737–41 (Sotomayor, J., dissenting).

occurrence.[183] As stated in *Devenpeck*, the probable cause need not be for an "offense actually invoked at the time of arrest."[184] Plainly, an officer could arrest an individual for engaging in protected speech and later "check the statute books" to justify the action.[185] Thus, law enforcement officers are able to retrospectively point out any criminal law that could provide the basis for the flexible probable cause standard, regardless of whether the arrest was motivated by probable cause for that specific crime, all while escaping any inquiry into subjective motives law enforcement officers may have had.[186]

In sum, while it is very difficult for plaintiffs to prove the absence of probable cause in a retaliatory arrest context, it is easy for law enforcement officers to demonstrate its presence. While plaintiffs in a retaliatory arrest claim may allege that the officer acted with retaliatory animus, the court's inability to peer into the subjective mindset of an officer when determining probable cause all but eliminates any other potential causes of the arrest, namely retaliation for protected conduct.[187] Further, the probable cause doctrine deliberately obfuscates any technical or legal definition, instead relying on law enforcement's intuition and professional expertise when making an arrest, so long as officers demonstrate that there is a fair probability that a crime has been or is being committed.[188]

Finally, when courts' construal of probable cause also permits officers to identify ex post reasoning for the arrest, especially when trivial crimes such as traffic stops remain enforceable, scholars such as Professor Wayne Logan have suggested that the requirement of probable cause as a precursor to arrest loses much of its meaning.[189] As Justice Ruth Bader Ginsburg pointed out in her dissent in *Nieves*, "given the array of laws proscribing, e.g., breach of the peace, disorderly conduct, obstructing public ways, failure to comply with a peace officer's instruction, and loitering, police may justify an arrest as based on probable cause when the arrest was in fact prompted by a retaliatory motive."[190] Therefore, as explained by Justice Ginsburg, requiring a plaintiff in a retaliatory arrest claim to prove an absence of probable cause creates a nearly insurmountable burden for the plaintiff. By

183. *See Devenpeck*, 543 U.S. at 153 (holding that even though an officer's state of mind may not provide the legal justification for probable cause, the objective factual circumstances can give rise to probable cause when challenged later).

184. *Id.*

185. *Nieves*, 139 U.S. at 1741 (Sotomayor, J., dissenting) (noting that this application of probable cause places too high of a burden on retaliatory arrest plaintiffs).

186. *See* Mills, *supra* note 137, at 2076–77.

187. *See id.*

188. 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, 137–38 (2009) ("So long as probable cause exists that *some* offense occurred, an arrest is constitutionally reasonable, even if the legal basis is not specified, or indeed, if the basis initially specified turns out to lack legal justification.").

189. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 7 (1997) (discussing the ways that outdated or trivial laws, such as minor traffic crimes, allow officers to search for ex post support for reasonable suspicion or probable cause, essentially undercutting the reason that probable cause exists).

190. *Nieves*, 139 S. Ct. at 1734 (Ginsburg, J., concurring).

foreclosing the plaintiff from delving into the arresting officer's subjective mindset, the framework ultimately frustrates the entire purpose of retaliatory arrest claims.

B. Nieves *Binary: Showing an Absence of Probable Cause or Proving the Exception*

Given the Supreme Court's expansive interpretation of probable cause, legitimate questions arise regarding whether a plaintiff alleging a § 1983 retaliatory arrest claim can succeed under any circumstances. This part describes the burden a retaliatory arrest plaintiff must sustain in attempting to prove probable cause. Furthermore, this part demonstrates that even in the unlikely event that some semblance of probable cause cannot be demonstrated by the defendant officer, a plaintiff's second path to success under the *Nieves* exception is generally unclear, as well.

In *Nieves*, the Court held that plaintiffs cannot prevail unless they can prove an absence of probable cause, *except* where an officer has probable cause to make an arrest but normally would exercise discretion *not* to do so.[191] Therefore, the *Nieves* Court crafted a binary for retaliatory arrest plaintiffs: either prove an absence of probable cause or demonstrate that law enforcement officers typically do not arrest similarly situated persons.[192]

When the Court created this exception, it avoided creating the bright-line rule that an absence of probable cause will *always* defeat a retaliatory arrest claim.[193] While this narrow exception means that probable cause will not always defeat a retaliatory arrest claim, the imprecision of the exception's methodology nonetheless imposes a similar burden on the plaintiff.[194] Specifically addressing the exception laid out by the majority, Justice Sotomayor identified the exception's lack of clarity.[195] In particular, she noted that it "is far from clear" what the majority meant by "objective evidence," "otherwise similarly situated," and "same sort of protected speech."[196] Seemingly, the majority's approach indicates that an individual claiming retaliatory arrest would have to, under the *Nieves* exception: (1) concede that probable cause existed, (2) identify other individuals who faced similar circumstances regarding the protected speech and the arrest, and (3) show that the same individuals were not arrested.[197] In practice, the narrow exception seems to hinder retaliatory arrest plaintiffs who, if they

191. *See id.* at 1726 (majority opinion).
192. *See id.*
193. *See id.* at 1727 ("[A]n unyielding requirement to show the absence of probable cause could pose 'a risk that some police officers may exploit the arrest power as a means of suppressing speech.'" (quoting Lozman v. City of Riviera Beach, 138 S. Ct. 1945, 1953–54 (2018))).
194. *See id.* at 1735 (Sotomayor, J., dissenting) (questioning how the exception was formulated, namely, identifying the lack of precedent and statutory background that warranted the creation of the narrow exception).
195. *See id.* at 1741.
196. *See id.*
197. *See id.* at 1740.

cannot prove an absence of probable cause, must identify with particularity a similar fact pattern that yielded different results, without clear direction as to how that showing can be made.[198]

Considering both ways in which a retaliatory arrest plaintiff can prevail in a § 1983 lawsuit, neither alternative presents an effective means for recovery. First, the plaintiff must demonstrate that the arresting officer, despite the vast number of state and federal criminal statutes, did not reasonably believe that there was a fair probability of past or current criminal activity.[199] Since such a requirement is difficult to prove, especially given the fact that evidence regarding the arresting officer's subjective mindset is prohibited, the plaintiff is left to hope that the narrow exception can be satisfied.[200] But to satisfy the exception, the plaintiff must present objective evidence showing that similarly situated individuals were not arrested for conducting the same actions—an especially difficult burden given the lack of clear guidance from the Court on how a plaintiff may do so.[201] Either option then—in practice, if not in theory—is prohibitively difficult for plaintiffs to prove. The *Nieves* Court may have increased the burden on § 1983 retaliatory arrest plaintiffs.

C. The Practical Consequences of Nieves *on Retaliation Jurisprudence*

Though the above discussion about probable cause suggests the *Nieves* framework would prevent relief for plaintiffs, a survey of circuit decisions demonstrates that the concern is not purely hypothetical. Of these cases, most did not proceed past the probable cause inquiry, and none of the plaintiffs ultimately recovered.

1. No Recovery Under *Nieves*

One way to identify whether Justice Sotomayor's fears have been vindicated is to analyze how *Nieves* has been interpreted by lower courts. Some circuit courts have directly considered a First Amendment claim following *Nieves*, leading to one plaintiff surviving a summary judgment motion but leaving most to lose on the merits at trial.[202] Other circuits—the

198. *See id.* (explaining that, in the case of a retaliatory arrest when an individual is arrested for recording a police officer, according to the majority's exception, the individual would have the burden of looking to other bystanders who were also recording the police officer but were not arrested).

199. *See supra* Part II.A.

200. *See supra* Part II.A.

201. *See Nieves*, 139 S. Ct. at 1739–42 (Sotomayor, J., dissenting) ("The basic error of the Court's new rule is that it arbitrarily fetishizes one specific type of motive evidence—treatment of comparators—at the expense of other modes of proof.").

202. Capp v. Cnty. of San Diego, 940 F.3d 1046, 1057–58 (9th Cir. 2019) (emphasizing that "this is likely to be a very close case," but since plaintiffs pled that the defendants were motivated purely by retaliation and this was a summary judgment motion and the plaintiffs were pro se, the ultimate decision on the merits would be left to the factfinder). Importantly, this Note acknowledges that a plaintiff may settle the case after surviving summary judgment—or at any other stage in the lawsuit. However, the focus of this Note is that, generally, the *Nieves* framework has had the practical impact of diminishing a plaintiff's chance at winning the case on the merits not on potential settlement. Though settlement is

Sixth,[203] Tenth,[204] and Eleventh[205] Circuits—each emphasize the probable cause standard from *Nieves* in denying retaliatory arrest claims and did not find evidence to satisfy the narrow exception, despite ancillary claims of additional retaliatory motives.[206] Though admittedly a small sample size, an analysis of the courts' holdings demonstrates the overwhelming burden a § 1983 plaintiff has in order to prevail in a retaliatory arrest claim.

a. Hinkle v. Beckham Board of County Commissioners

In *Hinkle v. Beckham Board of County Commissioners*,[207] Laramie Hinkle, a former police officer, was arrested for what he alleged was supporting the sheriff's election opponent.[208] However, the deputy who arrested Hinkle claimed that Hinkle owned a stolen trailer, based on evidence that was obtained from the trailer's former owner and that was corroborated by the insurance company.[209] After the arrest, the arresting officer learned that the former owner, a pastor, actually had two trailers and that the insurance company supposedly committed a clerical error when corroborating the pastor's original story.[210] Once the exculpatory evidence was eventually brought to light, Hinkle sued the county, alleging, among other claims, retaliatory arrest.[211] Addressing this claim, the Tenth Circuit cited *Nieves* to emphasize that a retaliatory arrest claim should not include inquiry into the subjective mindset of the arresting officer.[212] Indeed, the court engaged in a lengthy analysis of probable cause, once more making it clear that probable cause is "not a high bar" for arresting officers to meet.[213] Finding that probable cause existed, despite the clerical error, and finding no evidence existed to satisfy the narrow *Nieves* exception, the court dismissed the retaliatory arrest claim.[214]

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clearly possible, the circuit court cases below demonstrate a lack of strong retaliatory arrest precedent that would yield favorable results for plaintiffs.

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

204. Hinkle v. Beckham Cnty. Bd. of Cnty. Comm'rs, 962 F.3d 1204 (10th Cir. 2020).

205. Demartini v. Town of Gulf Stream, 942 F.3d 1277 (11th Cir. 2019).

206. *See, e.g.*, Novak v. City of Parma, 932 F.3d 421 (6th Cir. 2019). Though Sixth Circuit jurisprudence on this issue is discussed later in this Note, dicta in this case points out a different flaw in applying *Nieves*. *See id.* at 431. The court notes that in some instances, as here where the plaintiff operated a parody police department Facebook account, separating speech and conduct is impossible. *Id.* Finally, the court went on to note that this type of arrest was precisely the kind that the Supreme Court was worried about in *Nieves*, namely, a situation in which an individual is arrested and the only potential criminal conduct was engaging in protected speech. *See id.*

207. 962 F.3d 1204 (10th Cir. 2020).

208. *Id.* at 1214.

209. *See id.* at 1211.

210. *See id.* at 1215–17.

211. *See id.* at 1217.

212. *Id.* at 1227 ("The *Nieves* Court adopted this objective test of probable cause to avoid an unwelcome result of using an officer's subjective state of mind . . . .").

213. *Id.* at 1220 (quoting Kaley v. United States, 571 U.S. 320, 338 (2014)).

214. *See id.* at 1228.

b. Hartman v. Thompson

Similarly, the Sixth Circuit held that law enforcement officers had probable cause to arrest plaintiffs for causing a disruption while the plaintiffs protested outside a delegated "protest zone."[215] The plaintiffs were arrested because their failure to disperse from the specific area in a timely manner meant "a reasonable officer would have probable cause."[216] Even in this summary judgment motion, the Court found that probable cause warranted immediate dismissal of the retaliatory arrest claim.[217]

c. Demartini v. Town of Gulf Stream

The Eleventh Circuit also emphasized the role that probable cause plays in retaliatory arrest claims without even considering the *Nieves* exception in *Demartini v. Town of Gulf Stream*.[218] There, the plaintiff alleged that the town's suit filed against her, under the Racketeer Influenced and Corrupt Organizations Act (RICO),[219] was retaliatory in that it was brought against her after she exercised her First Amendment speech rights in filing nearly 2000 public records requests.[220] After a lengthy analysis, the court extended the *Nieves* requirement of proving an absence of probable cause to retaliation in this non-arrest context of a civil suit initiated by the town.[221] In doing so, the court went so far as to say that "[j]ust as a citizen may have the right to sue the government, the government likewise has the right, and duty, to engage in legitimate responsive litigation to defend itself against such challenges."[222] Ultimately, the court held that since the town had probable cause to initiate a RICO lawsuit, as a matter of law, no retaliation claim could prevail.[223]

d. Lund v. City of Rockford

Despite each of these cases finding that probable cause existed, only one circuit case included in this survey has actually analyzed and discussed the *Nieves* exception. In this outlier case, the Seventh Circuit, in *Lund v. City of Rockford*,[224] championed the "common sense" approach outlined by Justice Gorsuch in *Nieves*.[225] Accordingly, the plaintiff was not required to produce

215. Hartman v. Thompson, 931 F.3d 471, 481–83 (6th Cir. 2019).
216. *Id.* at 482 (citing KY. REV. STAT. ANN. § 525.160 (West 1980)).
217. *See id.* 484–85.
218. 942 F.3d 1277 (11th Cir. 2019), *cert. denied sub nom.* DeMartini v. Town of Gulf Stream, 141 S. Ct. 660 (2020).
219. 18 U.S.C. § 1962.
220. *See id.* at 1282–87.
221. *See id.* at 1304 ("Based on the factors discussed in the Supreme Court's *Hartman* and *Nieves* decisions, we conclude that . . . the presence of probable cause will generally defeat a § 1983 First Amendment retaliation claim based on a civil lawsuit as a matter of law.").
222. *Id.*
223. *See id.* at 1303–04.
224. Lund v. City of Rockford, 956 F.3d 938, 943–45 (7th Cir. 2020).
225. *Id.* at 945 (quoting Nieves v. Bartlett, 139 S. Ct. 1715, 1727 (2019)).

comparison-based evidence demonstrating that other people at the scene of the crime were not arrested but rather some sort of "objective evidence that he was arrested when otherwise similarly situated individuals [would not be]."[226] Interestingly, while the *Lund* court adhered to this "commonsensical[]" approach to the *Nieves* exception, it did not articulate what the "objective evidence" would actually constitute or, alternatively, how an individual could prove it.[227] There, the plaintiff alleged he was arrested for filming a police "sting" operation, and the officers contended he was arrested for riding an electric bike incorrectly down a one-way street.[228] The Court noted that the arresting officers doubtlessly had probable cause and that the plaintiff's claim was defeated.[229] The plaintiff did not provide any evidence that could satisfy the *Nieves* exception, even under the "commonsensical[]" approach.[230] However, the court stressed that "comparison-based evidence" demonstrating that other individuals present at the scene of the crime were not arrested—which Justice Sotomayor was concerned was mandated by the *Nieves* exception—was not necessary.[231]

Given the application of *Nieves* by lower court cases, two things are clear. First, the probable cause standard is not only easy to meet but also has predictably existed in each case.[232] Second, the closest a plaintiff has come to satisfying the *Nieves* limited exception was in *Lund*, but the court still failed to describe what would constitute objective comparison-based evidence that would allow a plaintiff to prevail.[233] Practically, the *Nieves* decision may have caused retaliatory arrest plaintiffs to have no legitimate chance at recourse.

III. NO MORE *NIEVES*: A RESOLUTION FOCUSED ON RETALIATION

Before addressing this Note's proposed solution to the nearly insurmountable burden *Nieves* has placed on prospective retaliatory arrest plaintiffs, it is important to briefly acknowledge that three other student notes have sought to address this problem.[234] While each note provides a marked improvement on the current state of retaliatory arrest jurisprudence, this Note advocates for more expansive change in a unique capacity.[235]

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226. *See id.*
227. *See id.*
228. *See id.* at 941–42.
229. *See id.* at 945–46.
230. *See id.* at 946.
231. *Id.* at 945–46.
232. *See supra* Parts II.A–B.
233. *See Lund*, 956 F.3d at 945.
234. *See generally* John S. Clayton, Note, *Policing the Press: Retaliatory Arrests of Newsgatherers After* Nieves v. Bartlett, 120 COLUM. L. REV. 2275 (2020); Brenna Darling, Note, *A (Very) Unlikely Hero: How* United States v. Armstrong *Can Save Retaliatory Arrest Claims After* Nieves v. Bartlett, 87 U. CHI. L. REV. 2221 (2020); Mills, *supra* note 137.
235. For an interesting discussion on the commonsensical approach to the *Nieves* exception, see Mills, *supra* note 137, at 2094–101. In particular, Mills suggests that the "similarly situated individuals" analysis could be informed using a commonsensical reading of *United States v. Armstrong*, 517 U.S. 456 (1996). In addition, Mills employs a burden-shifting analysis borrowed from employment discrimination cases. *See id.* at 2098.

As this Note has shown, a mechanical application of the *Nieves* test, especially the absence-of-probable-cause standard, would unduly burden the rights of First Amendment retaliatory arrest plaintiffs seeking relief. Therefore, this part addresses three important considerations in turn. First, Part III.A tracks the respective opinions of Justices Gorsuch and Sotomayor in holding that probable cause is, at best, one of multiple relevant considerations in a retaliatory arrest claim.[236] Part III.B proposes a solution that expands and adapts the prior *Mt. Healthy* standard to adequately consider the competing interests in a typical retaliatory arrest case; Part III.B also attempts to account for the inherent causal complexities while affording probable cause an appropriate weight in the analysis.[237] Finally, Part III.C demonstrates how the proposed solution would be practically implemented and addresses big-picture concerns regarding the balancing of law enforcement and First Amendment rights.[238]

A. Probable Cause: A Fourth Amendment Concept?

Given the expansive construction and highly discretionary nature of probable cause,[239] this Note focuses on a methodology in which probable cause is not afforded disproportionate weight in retaliatory arrest claims. Ultimately, in a case in which an individual alleges retaliation that violates First Amendment speech rights, the Fourth Amendment doctrine of probable cause should not provide such a high bar to recovery. This part advocates for a framework that recognizes that probable cause may have some influence but should not categorically bar recovery when probable cause is present.

Particularly insightful are the respective analyses in Justice Gorsuch's concurrence and Justice Sotomayor's dissent. Starting first with a textual analysis of § 1983, Justice Gorsuch states that nowhere in the text of the statute does the term "probable cause" appear.[240] However, noting that "[c]ourts often assume that Congress adopts statutes against the backdrop of the common law," Justice Gorsuch states that this statute should be read in

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Mills focuses his advocacy on expanding and more clearly articulating the process involved in the *Nieves* exception. *See id.* at 2094–101. Similarly, Darling also uses *Armstrong* in crafting a framework that would, analogizing to retaliatory prosecution, create another exception to *Nieves* that would permit the court to examine the officer's unconstitutional intent. *See* Darling, *supra* note 234. This Note takes the stance, as do the aforementioned notes, that the Supreme Court has used *Armstrong* sparingly, rarely finding unconstitutional intent on behalf of government officials, and thus, this Note proceeds differently. *See id.* at 2224.

236. *Infra* Part III.A.

237. *See infra* Part III.B.

238. *See infra* Part III.C.

239. *See supra* Part II.A.

240. Nieves v. Bartlett, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring) ("But look at [§ 1983] as long as you like and you will find no reference to the presence or absence of probable cause as a precondition or defense to any suit."). Though not immediately relevant to the above argument, Justice Gorsuch also insists that by creating a requirement that a plaintiff must show probable cause, the Court effectively enacts new law—an activity which is the province of the legislature. *See id.*

harmony with general principles of tort immunities.[241] Here, the relevant common-law backdrop are the torts of false arrest and false imprisonment, neither of which is directly applicable and thus should not influence retaliatory arrest claims.[242]

Importantly, the torts of false arrest and false imprisonment are intended to provide a remedy for individuals who are arrested or detained without lawful authority, thereby making probable cause a central inquiry.[243] Justice Gorsuch states that these two torts doctrines are, when deeply considered, Fourth Amendment claims.[244] As he explains, false arrest precedent considers warrantless arrest unsupported by probable cause to be an unreasonable seizure in violation of the Fourth Amendment.[245] Accordingly, the majority wrongfully accepted the argument that "[b]ecause those two torts . . . required plaintiffs to plead and prove an absence of probable cause for their detention or prosecution, a Section 1983 plaintiff alleging retaliatory arrest must do the same."[246]

In contrast, the First Amendment operates separately from the Fourth Amendment and protects fundamentally different interests; the right from unlawful search and seizure is different from the right to engage in protected speech.[247] Furthermore, § 1983 was intended to "vindicate violations of 'rights, privileges, or immunities secured by the Constitution . . . .'"[248] State tort rules should only serve to fill in gaps in § 1983 when those rules are compatible with the statute's purpose.[249] As such, the majority's reliance on probable cause afforded disproportionate weight to a doctrine more appropriate in the Fourth Amendment context than in the First Amendment context in which retaliatory arrest resides.

Perhaps most illustrative of the argument that probable cause should not be controlling in First Amendment retaliation is Justice Gorsuch's analogue to the Court's equal protection jurisprudence in similar contexts.[250] Referencing *Yick Wo v. Hopkins*,[251] Justice Gorsuch articulated that it is universally accepted that an otherwise legal detention, had it been based on

241. *Id.* at 1730–31.

242. *Id.* 1731 (explaining that the common-law doctrines of false arrest or false imprisonment are to provide remedies to those arrested without warrants or probable cause).

243. *See id.*

244. *See id.* (citing Manuel v. Joliet, 137 S. Ct. 911, 919 (2017)).

245. *Id.* at 1731–32.

246. *See* Brief of Constitutional Accountability Center as Amicus Curiae in Support of Respondent at 4, Nieves v. Bartlett, 139 S. Ct. 1715 (2019) (No. 17-1174).

247. *Nieves*, 139 S. Ct. at 1732 (Gorsuch, J., concurring) ("[A] First Amendment retaliatory arrest claim serves a different purpose than a Fourth Amendment unreasonable arrest claim, and that purpose does not depend on the presence or absence of probable cause.").

248. *See* Rehberg v. Paulk, 566 U.S. 356, 361 (2012) (citing 42 U.S.C. § 1983); *see also supra* Part I.A.

249. *See* Brief of Constitutional Accountability Center as Amicus Curiae in Support of Respondent at 10–19, Nieves v. Bartlett, 139 S. Ct. 1715 (2019) (No. 17-1174) (explaining that Justices should not be empowered to make freewheeling policy choices in interpreting § 1983 claims).

250. *See id.* at 1731–32.

251. 118 U.S. 356 (1886).

racially discriminatory factors, violates the detainee's Fourteenth Amendment protections.[252] In *Yick Wo*, Chinese immigrants were arrested for illegally operating laundries without permits even though law enforcement officers took no action against white laundry operators engaged in the same activity.[253] Though probable cause doubtlessly existed and a violation of the law occurred, the enforcement of that action nonetheless violated the Fourteenth Amendment.[254] Importantly, while probable cause may have been relevant to whether the detainment was constitutional, the ultimate question before the Court was whether the detainment violated equal protection principles—a question on which probable cause had little to no bearing.[255]

Thus, the question remains: what role should probable cause play in retaliatory arrest when the protected conduct is constitutionally protected speech? If First Amendment interests can be analogized to equal protection jurisprudence, whether an arrest is valid and whether the protected speech caused retaliation are two separate questions.[256] Conversely, the argument that probable cause is *completely* irrelevant to a retaliatory arrest claim also seems illogical.[257] The unique challenge of retaliation cases is to recognize that two things may simultaneously be true: (1) the arrest was valid and based on a flexible probable cause standard, and (2) the arrest was in retaliation for constitutionally protected speech or conduct.

This Note advocates for a framework that reconciles these two truths and attempts to create a better mechanism for balancing the interests of plaintiffs and law enforcement officers. First, despite the Court's unequivocal rejection of subjective evidence of the officer's mindset, an effective framework must permit such evidence to demonstrate retaliatory motive.[258]

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252. *Nieves*, 139 S. Ct. at 1731 (Gorsuch, J., concurring).

253. *Yick Wo*, 118 U.S. at 373–74.

254. *See id.*; *see also* Gibson v. Superintendent of N.J. Dep't of L. and Pub. Safety–Div. of State Police, 411 F.3d 427, 440 (3d Cir. 2005); Hedgepeth *ex rel.* Hedgepeth v. Wash. Metro. Area Transit Auth., 386 F.3d 1148, 1156 (D.C. Cir. 2004); Marshall v. Columbia Lea Reg'l Hosp., 345 F.3d 1157, 1166 (10th Cir. 2003); Vakilian v. Shaw, 335 F.3d 509, 521 (6th Cir. 2003); Johnson v. Crooks, 326 F.3d 995, 999–1000 (8th Cir. 2003); Holland v. Portland, 102 F.3d 6, 11 (1st Cir. 1996). Each of these cases decided by courts within the Ninth Circuit reflects the courts' opinion that when the plaintiffs' arrests were based on racial animus, the plaintiffs did not need to show a lack of probable cause. The general idea is that a successful equal protection claim had considerations fully independent from Fourth Amendment probable cause inquiries.

255. *See Yick Wo*, 118 U.S. at 373–74.

256. *See Hedgepeth*, 386 F.3d 1148, 1156 (D.C. Cir. 2018) ("[S]imply because a practice passes muster under the Fourth Amendment (arrest based on probable cause) does not mean that unequal treatment with respect to that practice is consistent with equal protection.").

257. *See Nieves*, 139 S. Ct at 1732 (Gorsuch, J., concurring) ("But while it would be a mistake to think the absence of probable cause is an essential element of a First Amendment retaliatory arrest claim . . . I acknowledge that it may also be a mistake to assume that probable cause is entirely irrelevant. . . .").

258. *Contra* Devenpeck v. Alford, 543 U.S. 146, 153 (2004) (holding that an officer's state of mind is "irrelevant"). As mentioned above, the Court's reasoning in grafting this no-probable-cause requirement, and therefore establishing a reliance on objective evidence, was based on the idea that the plaintiff in a retaliatory arrest case was essentially questioning the validity of the arrest. *Nieves*, 139 S. Ct. at 1724–25. However, the Court was not asked to

Second, any framework must overcome the causal complexities inherent in retaliatory arrest cases. Finally, probable cause must not itself categorically defeat a retaliation claim, but evidence thereof should be one of many factors considered among other evidence. The framework presented in Part III.C considers each of these issues and attempts to dispel some of the majority's concerns about retaliatory arrest in *Nieves*.

B. Balancing Subjective Intent and Probable Cause: A New Framework

To address these concerns, this Note advocates for a solution generally reminiscent of the *Mt. Healthy* standards but with a variety of key changes. Though both this Note's framework and *Mt. Healthy*'s standards require the officer to show the arrest did not occur in retaliation, how the officer can prove that is different. Rather than focusing on whether the officer had probable cause or whether the officer would have normally undertaken such action, this Note's framework focuses on evidence of the officer's subjective mindset and retaliatory animus.

To prevail under this proposed, modified framework, the plaintiff must show through the evidence of the officer's intent (1) that the plaintiff engaged in constitutionally protected speech, (2) that the plaintiff suffered an injury (typically through arrest), (3) and that the protected speech was the actual and (4) proximate cause of the officer retaliating and initiating an arrest. Should the plaintiff meet this burden, the law enforcement officer could still rebut the claim by providing evidence to dispute the retaliatory motive. The officer's burden would therefore not necessarily require demonstrating that there was probable cause for the arrest and that the officer would have taken the same action anyway but, instead, that the arrest did not occur in retaliation for protected speech. Under this Note's framework, the key inquiry is whether the retaliation caused the plaintiff's injury (arrest), not whether the arrest was valid. While the officer would not be foreclosed from using evidence of probable cause, whether the existence of probable cause could overcome the evidence of retaliation would be a question for the factfinder.[259]

Before addressing the implications of this framework, it is worth mentioning that, though it is similar to *Mt. Healthy*'s framework, this framework differs in the reoriented burden-shifting analysis that takes place.[260] Like circuit courts that applied *Mt. Healthy* to retaliatory arrest, evidence about subjective intent is permitted under this Note's suggested framework. However, under *Mt. Healthy*, once the plaintiff successfully makes this showing, the burden shifts to the defendant to prove that the arrest

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invalidate an arrest but rather was asked whether the arrest was motivated by retaliatory animus. *See id.* at 1722. Thus, subjective intent of the officer, including the officer's statements, should be considered. *See id.* at 1740 (Sotomayor, J., dissenting) (explaining that an objective no-probable-cause standard that does not permit evidence of an officer's intent would make evidence such as video recordings irrelevant).

259. *See* Crawford-El v. Britton, 523 U.S. 574, 594 (1998) (rejecting a clear and convincing standard for constitutional claims that require proof of improper intent, such as retaliation).

260. *See generally* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

would have occurred regardless of the alleged retaliatory motive, often prompting the production of evidence that the arrest was based on probable cause.[261] In contrast to this Note's proposal, then, the *Mt. Healthy* framework inevitably focuses on the validity of the arrest, not the retaliation that is the foundation of the lawsuit. This Note's framework rejects that particular element of the burden-shifting framework to avoid unduly emphasizing the role of probable cause in retaliatory arrest.[262] Instead, the defendant's burden would be to demonstrate the lack of a retaliatory motive, not simply that the arrest would have occurred regardless.

Finally, this Note's framework also adds a proximate cause requirement to ensure that the link between the protected conduct and the arrest was not overly attenuated. This new element to the retaliatory arrest framework ensures that, where too many steps separate the injury from the alleged retaliatory conduct, the law enforcement officer will not be liable.

To illustrate an application of this framework, this Note considers the incident involving the CNN reporter mentioned in the Introduction and discusses how the application of this Note's framework to a hypothetical case arising from that incident would differ from the application of the *Nieves* framework. In doing so, this Note addresses the concerns from *Nieves* while simultaneously demonstrating how this Note's framework functions.

Recall that Jimenez, a CNN reporter covering protests in Minnesota, was arrested for, in his opinion, engaging in constitutionally protected speech.[263] If Jimenez brought a § 1983 claim under *Nieves*, he would need to prove an absence of probable cause. Presuming that the arresting officer could point to any possible criminal statute and demonstrate a reasonable belief that an offense had been committed, Jimenez could not satisfy the *Nieves* absence-of-probable-cause standard.[264] Accordingly, he would then have to show that despite the presence of probable cause, similarly situated individuals were not arrested.

Depending on how the court would interpret the *Nieves* exception, Jimenez's claim could succeed. For example, the court could determine that "similarly situated individuals" comprised other journalists who have doubtlessly covered protests while engaging in the same conduct who were not arrested. In contrast, the court could adopt Justice Sotomayor's approach

261. *See id.* at 283–87; *see also* notes 95–97 and accompanying text.

262. *See* Greene v. Barber, 310 F.3d 889, 898 (6th Cir. 2002) (holding that, had there been probable cause and insufficient evidence of retaliation, the *Mt. Healthy* standard would be satisfied).

263. *See* notes 7–9 and accompanying text.

264. *See, e.g.*, MINN. STAT. § 609.50(2) (2021). Here, the text states that an individual will be guilty of obstructing legal process if the individual "obstructs, resists, or interferes with a peace officer while the officer is engaged in the performance of official duties." *Id.* Sparing the reader a statutory analysis of whether this statute's text would warrant convicting Jimenez, it is worth remembering that the officer's subjective intent is irrelevant in determining probable cause. *See generally* Whren v. United States, 517 U.S. 806, 814 (1996). Therefore, any number of potential crimes that a reasonable officer could have believed that Jimenez committed would constitute probable cause, even if the officer articulated his suspicion ex post. Nieves v. Bartlett, 139 S. Ct. 1715, 1741 (2019) (Sotomayor, J., dissenting).

and require Jimenez to point to other individuals at the scene of the alleged misconduct who were not arrested when he was.[265] Ultimately, given the high bar of the *Nieves* absence-of-probable-cause standard and the lack of clarity in how courts construe the exception, there is a substantial likelihood that Jimenez may not recover on his retaliatory arrest claim.

Under this Note's proposed framework, a different likely result emerges. First, as a news reporter who was live on air, Jimenez was engaging in protected conduct.[266] Secondly, he was arrested, which would constitute the requisite injury needed. It is under the causation prongs, however, that this Note's framework differs drastically from *Nieves* and even *Mt. Healthy*.

1. Actual Causation

Starting with the actual causation requirement, Jimenez would have to submit evidence that his constitutionally protected conduct was a substantial factor in his arrest. As articulated in *Mt. Healthy*, he must show that the arresting officer's conduct was substantially motivated by Jimenez's exercise of First Amendment rights.[267] Given that the question before the court would be whether the arrest was in retaliation for protected conduct, not whether the arrest itself was valid, Jimenez would not be foreclosed from introducing evidence regarding the officer's intentions or mindset as he would be under *Nieves*. At this point, Jimenez could offer evidence to support the alleged retaliatory motive;[268] he would not have to prove an absence of probable cause. Since Jimenez identified himself as a CNN reporter and spoke with police, since other journalists nearby were not arrested, and, most importantly, since he was reporting about the police in the context of a protest sparked by police brutality, there is a decent likelihood that Jimenez could prove that retaliation was a substantial factor in his arrest.[269] That said, actual causation is not the end of a plaintiff's burden.

265. *Nieves*, 139 S. Ct. at 1741 (Sotomayor, J., dissenting) ("It is hard to see what point is served by requiring a journalist arrested for jaywalking to point to specific other jaywalkers who got a free pass . . . .").

266. *See* Clayton, *supra* note 234, at 2284–85 ("[C]ircuit courts have unanimously held that open video recording of police and government officials in public constitutes protected First Amendment activity, subject to reasonable time, manner, and place restrictions."). The First Amendment rights as they pertain to the press are well established. N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring) ("The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government.").

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

268. According to CNN's live on-air coverage, the arresting officer told Jimenez that he was being arrested and they were just following orders, implying that there was more to the arrest than a legal infraction. Hanna & Vera, *supra* note 7.

269. *See id.*

2. Overcoming the *Nieves* Causal Complexity with a Proximate Cause Analysis

Presuming that Jimenez can prove that his protected conduct was a substantial factor in his arrest, unlike *Nieves* or *Mt. Healthy*, this framework imposes a proximate cause requirement, as well. In doing so, this framework borrows a concept from other tort actions and attempts to ensure that there is an essential link between the protected conduct and the retaliatory arrest. The touchstone of proximate cause is the directness of the relationship between the conduct in question and the injury.[270] Thus, the plaintiff would have to show that the arrest was a direct result of the protected conduct.[271] Moreover, a proximate cause requirement would require Jimenez to show that there were no intervening factors between the protected conduct and his arrest.[272] For example, an individual who engages in protected speech, then engages in multiple other activities later in the day, any one of which could have led to the arrest, would have broken the causal chain and would therefore fail the proximate cause element under this Note's framework.

In this instance, Jimenez could likely demonstrate that there was proximate cause linking his protected speech to his arrest. There were no intervening factors; he was arrested while live on air. Furthermore, Jimenez could, under the new framework, put forth evidence demonstrating that his protected speech was directly linked to his arrest. For example, should the factfinder believe that the law enforcement officers arrested Jimenez during his ongoing coverage of the protest, meaning no time had elapsed between Jimenez engaging in the protected conduct and his arrest, the proximate cause prong of this Note's framework would likely be satisfied.

3. The Limited Role of Probable Cause

This scenario, unlike the scenario in *Mt. Healthy*, presents a different burden-shifting framework. Rather than permitting the law enforcement officer to demonstrate the validity of the arrest through a probable cause standard, a successful defense would require breaking—or at least casting doubt on—the causal chain from the protected conduct to the arrest or demonstrating a lack of retaliatory motive. Accordingly, the question before the court would not be whether the arrest should be invalidated but whether the retaliatory animus violated the plaintiff's First Amendment rights.

It is worth noting, however, that while the validity of the arrest invokes the Fourth Amendment and the question of protected speech invokes the First Amendment, even Justices Gorsuch and Sotomayor cast doubt on whether probable cause was wholly irrelevant.[273] Though the threshold question is

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270. *See* W. KEETON ET AL., PROSSER AND KEETON ON LAW OF TORTS § 41, at 264 (5th ed. 1984).

271. *See id.*

272. *See id.*

273. Nieves v. Bartlett, 139 S. Ct. 1715, 1732 (2019) (Gorsuch, J., concurring); *id.* at 1736 (Sotomayor, J., dissenting).

whether the arrest was in retaliation for protected conduct, law enforcement officers would likely argue that probable cause existed for the arrest, even under this framework. But, the presence or absence of probable cause should not have controlling influence on the claim. Instead, it should be one factor that may be persuasive when considered alongside the other evidence.

To illustrate this point, the officers who arrested Jimenez could argue that his allegations of retaliatory animus did not cause his arrest. Rather, the officer may point to probable cause for violation of Minnesota's obstruction of the peace statute.[274] However, Jimenez would likely introduce evidence of what the arresting officer said to him, that other news reporters were not arrested, and anything else that may indicate retaliation for his news coverage. Therefore, even if probable cause existed, a neutral factfinder may still conclude that Jimenez engaged in protected conduct that gave rise to the officer's retaliatory animus that was both the actual and proximate cause of his arrest. Thus, probable cause should be treated as just one of many other types of evidence that the factfinder considers in determining whether there was a retaliatory arrest. Instead, the officer would have a better chance at rebutting the alleged retaliatory animus through the production of evidence that indicated no retaliatory motive was present, perhaps using eyewitness testimony or body camera footage of the arrest.

In sum, this new framework permits both the plaintiff and the law enforcement officer to litigate the officer's motivation for the arrest. Unlike in *Nieves*, a plaintiff can—and must—provide evidence of subjective retaliatory animus to prevail. Probable cause may be considered, but it should not be disproportionately weighted in comparison to other evidence.

C. The Comparative Advantage of a New Framework

This Note's framework provides a more balanced mechanism to preserve the First Amendment rights of retaliatory arrest plaintiffs while still considering the practical concerns of law enforcement officers, as articulated by the *Nieves* Court. There, the Court was concerned about these interests but also was weary of permitting evidence of subjective intent, the potential floodgates of litigation, and the causal complexity of retaliation cases that would accompany a different retaliatory arrest framework.[275] Yet, this new framework overcomes each concern.

The *Nieves* Court ultimately rejected the idea that the officers' subjective intent was relevant when it mistakenly classified the retaliatory arrest as a Fourth Amendment question.[276] In contrast, this Note's framework adopts the positions of Justices Gorsuch and Sotomayor, both of whom correctly

274. MINN. STAT. § 609.50(2) (2021); *cf.* Stuntz, *supra* note 189, at 7 (discussing the breadth of criminal statutes permitting law enforcement officers to point to any statute where there may have been probable cause).

275. *See Nieves*, 139 S. Ct. at 1723–28.

276. *See id.* at 1724–26 ("In the Fourth Amendment context, however, 'we have almost uniformly rejected invitations to probe subjective intent.'" (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 736 (2011))).

identify that the plaintiff is not seeking redress for a Fourth Amendment violation but a First Amendment one.[277] By recognizing this key distinction, the majority's reliance on Fourth Amendment precedent to foreclose evidence of subjective intent no longer makes logical sense.[278] Realistically, what sense would it make—in a retaliatory arrest suit in which the inquiry hinges on an officer's motivation—to foreclose any inquiry into that officer's subjective intent?

The *Nieves* Court argued that evidence proceeding solely on allegations regarding an arresting officer's mental state would chill law enforcement's efficacy.[279] The Court went on to suggest that allegations pertaining to a police officer's subjective mindset would be "easy to allege and hard to disprove."[280] Furthermore, policing certain events, such as an unruly protest, "would pose overwhelming litigation risks."[281] Essentially, this argument amounts to the fear that law enforcement officers would be unable to effectively carry out their duties for constant fear that they could be subject to retaliatory arrest lawsuits where a plaintiff could baselessly allege retaliatory animus. While perhaps legitimate concerns, these practical considerations are not supported by the reasoning of courts that have employed the similar *Mt. Healthy* standard, which like this Note's framework, allowed for evidence of subjective intent.

Recall that, prior to *Nieves*, there was a circuit split as to whether *Hartman*'s absence-of-probable-cause standard should extend from retaliatory prosecution to retaliatory arrest.[282] As such, some circuits continued to follow the *Mt. Healthy* standard and permitted retaliatory arrest plaintiffs to allege evidence of the arresting officer's subjective motivations; yet none of the circuits faced overwhelming amounts of retaliatory arrest litigation.[283] For example, in the Ninth Circuit, the Northern District of California registered only three cases related to retaliatory arrest in 2018.[284] In the Central District of California, five retaliatory arrest cases occurred in 2018.[285] Moreover, in the District of Alaska, the *Nieves* case was the only one involving retaliatory arrest.[286] Similarly low numbers appear in the Southern District of California, the District of Hawaii, the District of Nevada,

277. *See supra* Part III.B.

278. *Nieves*, 139 S. Ct. at 1732 (Gorsuch, J., concurring) ("[A] First Amendment retaliatory arrest claim serves a different purpose than a Fourth Amendment unreasonable arrest claim, and that purpose does not depend on the presence or absence of probable cause."); *id.* at 1735 (Sotomayor, J., dissenting) (explaining that "the issue here is not whether an arrest motivated by protected speech may violate the First Amendment despite probable cause for the arrest; the question is under what circumstances § 1983 permits a remedy").

279. *See id.* at 1725 (majority opinion).

280. *Id.* (quoting Crawford-El v. Britton, 523 U.S. 574 (1998)).

281. *Id.*

282. *See supra* Part I.C.1.

283. *See supra* Part I.C.1.

284. *See* Brief of Three Individual Activists as Amici Curiae in Support of Respondent at 6–7, Nieves v. Bartlett, 139 S. Ct. 1715 (2019) (No. 17-1174).

285. *Id.* at 7.

286. *Id.* at 8–10.

the District of Oregon, and the Western District of Washington.[287] Of cases brought in all the district courts in the Ninth Circuit, only fifty-seven cases involving retaliatory arrest occurred from January 2013 to December 2018.[288] Any fear of the *Nieves* Court that pleading evidence of an officer's subjective mindset would unduly expose law enforcement to excessive litigation has proven wholly unfounded.

Therefore, the litigation history does not support the majority's concern that a framework permitting evidence of the officer's mindset would open the floodgates of retaliatory arrest claims. Furthermore, as underscored by the lack of cases listed above, there is little evidence to suggest that the circuits adopting a *Mt. Healthy* framework experienced a chilling effect on law enforcement officers, such that they could no longer effectively perform their duties.[289] By failing to acknowledge the practical consequences in circuits that permitted evidence of subjective intent, the majority's concerns proved merely hypothetical. To the extent that this Note's framework adopts *Mt. Healthy*'s inclusion of evidence of the officer's subjective mindset, it follows that this framework would yield similar results.

Another major concern of the *Nieves* Court was the causal complexity inherent in retaliation cases.[290] Essentially, the Court reasoned that in retaliatory arrest claims it is "particularly difficult to determine whether the adverse government action was caused by the officer's malice or the plaintiff's potentially criminal conduct."[291] This Note's framework better addresses this concern. Specifically, the reason that retaliatory arrest cases have causal complexities is threefold. First, it can be difficult to determine—as an evidentiary matter—whether an arrest was motivated by animus or the need to make an arrest.[292] Second, protected speech is often a legitimate consideration for the officer when deciding whether to make an arrest.[293] Finally, in some instances the speech itself can be the source of probable cause prompting the arrest.[294] Since the *Nieves* Court, despite adopting a *Hartman* standard, acknowledged that retaliatory arrest and prosecution has a more attenuated causal connection than instances where the speech itself is the source of probable cause, this Note need not address the third point.[295]

With this Note's framework, both the first and second concerns are addressed through the admission of evidence indicating the arresting officer's subjective mindset. Whether this evidence can ultimately demonstrate that the officer's motivation was rooted in animus is a question

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287. *See id.* at 9.
288. *See id.* at 7–10.
289. *See supra* Part II.C.1.
290. *See* Nieves v. Bartlett, 139 U.S. 1715, 1723–24 (2019).
291. *Id.* at 1724.
292. *See id.* at 1723 (holding that "even when an officer's animus is clear, it does not necessarily show that the officer 'induced the action of a prosecutor who would not have pressed charges otherwise'" (quoting Hartman v. Moore, 547 U.S. 250, 263 (2006))).
293. Reichle v. Howards, 566 U.S. 658, 668 (2012) (holding that protected speech is often a "wholly legitimate consideration" for officers when deciding whether to make an arrest).
294. *See* Clayton, *supra* note 234, at 29.
295. *See Nieves*, 139 S. Ct. at 1721–23.

for the jury, but both parties have the opportunity to plead their case. This would ensure that a plaintiff would only recover in the instance that there was proof that the retaliatory animus was both the actual and proximate cause of the arrest. Whether the officer considered the protected speech when making the arrest would surely be relevant. Likewise, when an individual's conduct is the *only* reason for his arrest, evidence of subjective motivation is of even greater importance. Accordingly, a plaintiff would have the burden of proof, which the officer may attempt to contradict. The factfinder can be entrusted to determine the cause of the arrest, thereby dispelling the first and second concerns.[296]

As a result, this Note's solution would ensure that plaintiffs have a framework in which their protected speech is better guarded by permitting evidence of subjective motivation. Such an approach would neither lead to a flood of litigation (evidenced by the Ninth Circuit's very limited litigation history) nor chill the actions of law enforcement. Furthermore, this Note rejects the burden-shifting framework in *Mt. Healthy* that would unduly emphasize probable cause. Instead, this Note permits officers to refute plaintiffs' evidence and demonstrate that their conduct was not rooted in retaliatory animus. The added proximate cause element also ensures that where the relationship between the protected conduct and the arrest is too attenuated, the officer will not be liable. This approach not only better addresses the *Nieves* Court's concerns but also better balances the constitutional rights of plaintiffs without sacrificing the efficacy of law enforcement.

CONCLUSION

The *Nieves* framework is untenable, both in its protection of First Amendment rights and in its functional impact on retaliatory arrest plaintiffs. An approach that deliberately casts aside the officer's subjective motivations in favor of an extremely deferential probable cause standard cannot adequately balance the interests at hand.

In contrast, this Note's framework recognizes the inherent differences in First Amendment and Fourth Amendment interests, underlining the relevance of evidence showing an officer's motivations while not completely divorcing probable cause from the inquiry. Moreover, to address the causal complexity, this framework's actual and proximate cause elements ensure that the litigation is focused on whether the protected speech itself caused the retaliatory arrest—not whether the arrest was valid because of the presence of probable cause. In a nation where free speech is revered, this new framework provides plaintiffs with a greater chance to recover when their free speech right is unjustly taken from them.

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296. *See id.* at 1737 (Sotomayor, J., dissenting) ("With regard to the majority's concern that establishing a causal link to retaliatory animus will be complex: That is true of most unconstitutional claims, yet we generally trust that courts are up to the task of managing them.").