

# Silenced Speech: The Supreme Court and the Battle Over Retaliatory Arrests

## Description

In a recent case coming out of Capitol Hill, the Supreme Court issued a highly anticipated decision that grapples with retaliatory arrests, First Amendment freedoms, and the scope of the *Nieves v. Bartlett* “probable cause” exception. *Gonzales v. Trevino* reached the High Court after Sylvia Gonzalez, a 72-year-old councilwoman from Castle Hills, Texas, was arrested and charged for violating a state law that prohibits tampering with government records for allegedly withholding a governmental record, specifically, a petition calling for the removal of the city’s manager, that Gonzalez herself spearheaded as part of her campaign efforts.

Before her election to the Castle Hills, Texas, City Council in 2019, Sylvia Gonzalez concentrated her campaign efforts on talking with residents and listening to their concerns. While doing so, she found that several residents shared a widespread discontent with the local city manager. Driven by these issues, she fulfilled her campaign promise and headed a petition advocating for the manager’s removal. After Gonzalez won the election, this petition quickly became the center of attention at a heated city council meeting. At the end of the meeting, Gonzalez was approached by a council officer, requesting that she stay after to speak with the mayor. When the mayor asked Gonzales for the petition, she responded that “he should have the petition, as it was sent to him the day prior.” Despite this, she complied with the mayor’s request to double checked her binder, and ultimately found the petition in a stack of papers and hand handed it to him. The mayor suggested the mix-up might have been accidental because they were sitting next to each other during the meeting.

After this, the mayor instructed the Chief of Police to start an investigation into Gonzalez for allegedly tampering with government record on the basis that she placed the petition in her binder during the city council meeting. After a month of unsuccessful investigations, a special detective, who was also a friend and lawyer for those involved, was appointed to further investigate Gonzalez. The special detective drafted an affidavit to charge and arrest Gonzalez under a Texas anti-tampering statute, citing her outspoken views during the council session as justification. After learning about the warrant, she turned herself in immediately. Although these charges were later dropped, feeling defeated and discouraged, Gonzalez stepped down from her political position.

Gonzales sued the City, the mayor, and the Chief of Police under 42 U.S.C. Â§ 1983, claiming violations of her First and Fourteenth Amendment rights. The district court denied the defendants qualified immunity, finding that Gonzales’s claim fell within the narrow exception to the “no-probable cause requirement” for retaliatory arrest claims, as articulated by the Supreme Court in 2019.<sup>1</sup> When the case reached the Fifth Circuit, the Court took a different view and ultimately reversed, holding that the defendants made a sufficient showing of probable cause for the basis of Gonzales’s arrest. Because the existence of probable cause generally defeats a retaliatory arrest claim, Gonzales was barred from alleging her First Amendment claim.

The Supreme Court granted certiorari to consider whether the Fifth Circuit properly applied the principles established in *Nieves*.

For this case, it is necessary to revisit the backdrop of the probable cause exception as defined by the landmark decision in *Nieves v. Bartlett*. In *Nieves*, the Supreme Court addressed the “no-probable cause requirement,” noting the general rule, that the presence of probable cause for an arrest makes an officer’s retaliatory motive irrelevant for purposes of bringing a First Amendment claim. However, the *Nieves* Court carved out a specific exception to this general rule; often referred to as the “jaywalking exception.” The exception holds that if a plaintiff can demonstrate, with objective evidence, that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been, the *no-probable cause requirement* does NOT apply. When an individual can prove that the *jaywalking exception* applies, probable cause will NOT bar a retaliatory arrest claim brought against an officer.

With this understanding, the questions presented to the Supreme Court were twofold: First, can the probable cause exception established in **Nieves** be satisfied by objective evidence other than specific instances of non-arrests? Second, is the **Nieves** probable cause rule confined only to claims against arresting officers in scenarios involving split-second arrest decisions?

When the case reached Capitol Hill, the Supreme Court agreed with Gonzales’s interpretation of the *Nieves* principles, ultimately vacating the Fifth Circuit’s opinion and remanding the case back to the lower courts to assess whether Gonzalez’s evidence suffices to satisfy the *Nieves* exception. Addressing the Fifth Circuit’s application of *Nieves*, the Justices explained that the Fifth Circuit’s interpretation of *Nieves* was too narrow of a reading. The Fifth Circuit’s narrow interpretation required that for Gonzales to establish a claim under the *Nieves* exception, she needed to identify nearly identical cases involving Plaintiffs who “mishandled a government petition” in the same way Gonzalez did but were not arrested.

The Supreme Court reiterated the scope of the *Nieves* exception, explaining that the purpose for the “jaywalking exception” is to account for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so. The Court clarified that to fall within the exception, a plaintiff must produce evidence to prove that his arrest occurred in such circumstances. The only express limit imposed by the Court regarding the type of evidence a plaintiff must produce, is that it must be objective to avoid “the significant problems that would arise from reviewing police conduct under a purely subjective standard.”

Here, Gonzalez relied on making a comparison between her case with a survey of similar crimes typically charged under the same statute, suggesting she indeed met the criteria needed for this exception. The fact that no one had ever been arrested for engaging in a certain kind of conduct—especially when the criminal prohibition is longstanding and the conduct at issue is not novel—makes it more likely that an officer has declined to arrest someone for engaging in such conduct in the past. Because the Court agreed with Gonzales’s first claim, the Court did not address whether the requirement to demonstrate an absence of probable cause is necessary in cases where the arrest doesn’t involve split-second decisions. This leaves the door open for future legal arguments that this requirement should not apply in more deliberate arrest scenarios.

As we’re reminded by both this case and *Nieves*, while the existence of probable cause generally negates retaliatory arrest claims lodged against officers, it does not fully shield law enforcement actions from scrutiny.

**Gonzalez v. Trevino, 602 US \_ (2024).**

**Date Created**

07/23/2024