

IN THE SUPREME COURT OF THE UNITED STATES

No. 17-1174

LUIS A. NIEVES, ET AL., PETITIONERS

v.

RUSSELL P. BARTLETT

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

MOTION OF THE UNITED STATES FOR LEAVE TO
PARTICIPATE IN ORAL ARGUMENT AS AMICUS CURIAE
AND FOR DIVIDED ARGUMENT

Pursuant to Rules 28.4 and 28.7 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully moves for leave to participate in the oral argument in this case as amicus curiae supporting petitioners and requests that the United States be allowed ten minutes of argument time. Petitioners have consented to cede ten minutes of argument time to the United States.

This case presents the question whether a claim for damages based on an alleged retaliatory arrest in violation of the First Amendment, brought under 42 U.S.C. 1983, is foreclosed when the

arrest was supported by probable cause and the plaintiff does not allege that he was subjected to an official policy of retaliation against protected speech. The United States has a substantial interest in the circumstances in which federal officers may be held liable for damages in civil actions for alleged violations of constitutional rights. The United States also has an interest in safeguarding constitutional rights, including through the use of federal criminal and civil enforcement authorities.

On August 27, 2018, the United States filed a brief as amicus curiae supporting petitioners. In its brief, the United States argues that the common law, which provides valuable guidance on the requirements of constitutional tort actions, would not permit damages liability for a retaliatory arrest supported by probable cause. U.S. Br. 8-15. Those common law rules are consistent with this Court's reasoning in Hartman v. Moore, 547 U.S. 250 (2006), which held that a plaintiff bringing a constitutional tort claim of retaliatory prosecution in violation of the First Amendment must prove, as an element of the cause of action, the absence of probable cause to charge him with a criminal offense. The Court's reasons in Hartman for adopting a no-probable-cause requirement for retaliatory-prosecution cases support adopting the same requirement for retaliatory-arrest cases. U.S. Br. 15-24. Doing so would not license police officers to engage in retaliation by making arrests for minor offenses supported by probable cause,

including because federal, state, and local governments have enforcement tools to prevent such First Amendment violations. U.S. Br. 24-32.

The United States participated in oral argument as an amicus curiae in a case last Term raising the same question presented here. See Lozman v. City of Riviera Beach, 138 S. Ct. 1945 (2018). The United States also participated in oral argument as an amicus curiae in Reichle v. Howards, 566 U.S. 658 (2012), which presented the same question in the context of a claim against federal officers. As in those cases, division of argument here may materially assist the Court in its consideration of this case.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

OCTOBER 2018