

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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SYLVIA GONZALEZ, )  
Petitioner, )  
v. ) No. 22-1025  
EDWARD TREVINO, II, ET AL., )  
Respondents. )  
- - - - -

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SYLVIA GONZALEZ, )  
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 Petitioner, )  
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 v. ) No. 22-1025  
 )  
 EDWARD TREVINO, II, ET AL., )  
 )  
 Respondents. )

Wednesday, March 20, 2024

LISA S. BLATT, ESQUIRE, Washington, D.C.; on behalf of  
the Respondents.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument first this morning in Case 22-1025,  
5 Gonzalez versus Trevino.

6 Ms. Bidwell.

7 ORAL ARGUMENT OF ANYA A. BIDWELL

8 ON BEHALF OF THE PETITIONER

9 MS. BIDWELL: Mr. Chief Justice, and  
10 may it please the Court:

11 Respondents try to over-read Nieves in  
12 two ways. They need to win on both attempts.  
13 Each is wrong and would lead to results this  
14 Court could not have intended.

15 First, Respondents say Nieves's rule,  
16 designed for a representative case of  
17 in-the-field law enforcement, now insulates all  
18 government officials. Picture the thin-skinned  
19 bureaucrat scouring for a crime to pin on his  
20 critics. According to Respondents, Section 1983  
21 has nothing to say about that.

22 Second, Respondents parse Nieves like  
23 a statute to say that it limits plaintiffs to a  
24 particular type of comparative example. To be  
25 sure, Nieves did recognize that evidence of

1 subjective motive alone would not get a  
2 plaintiff an inference that this motive caused  
3 the adverse action. But Nieves does not blind  
4 courts to all but one type of objective evidence  
5 of causation.

6 Respondents' position extends Nieves  
7 beyond its moorings. If the mayor in this case  
8 got in front of TV cameras and announced that he  
9 was going to have Ms. Gonzalez arrested because  
10 she challenged his authority, the existence of  
11 probable cause would make this evidence legally  
12 irrelevant.

13 Respondents' position would also toss  
14 out of court a critic arrested for jaywalking on  
15 a remote country road, even if his town had  
16 never arrested anyone for jaywalking before,  
17 simply because he couldn't find a non-critic who  
18 jaywalked on the same spot.

19 Nieves balanced important First  
20 Amendment concerns to protect the on-the-street  
21 first responder making a "now or never" decision  
22 to arrest a suspect in his grasp. It did not so  
23 loosely dispense with the First Amendment  
24 interests as to give government armchair  
25 quarterbacks a free hand at the time of their

1 choosing to punish their critics.

2 I welcome this Court's questions.

3 JUSTICE THOMAS: In Nieves, we dealt  
4 with an arrest, and is it different here because  
5 you have a warrant process, you have an  
6 investigation? Does that break the causal link,  
7 that we would have a case just where a police  
8 officer arrests the plaintiff?

9 MS. BIDWELL: No, Your Honor, it  
10 doesn't. In fact, the fact that warrant exists  
11 here helps us for two reasons. Number one, we  
12 have an analogue at common law, abuse of  
13 process, because warrant is a classic legal  
14 process, but, number two, when it comes to  
15 but-for causation, magistrates are required to  
16 look at the arrest affidavit in order to issue a  
17 warrant. So the arrest affidavit, which we say  
18 would not have been issued had it not been for  
19 retaliatory animus, is something that  
20 magistrates have to take into account, and it is  
21 a but-for causation.

22 And as this Court explained in Bostock  
23 and just this term in Murray, there could be  
24 many but-for causations. Our burden is to show  
25 that, had it not been for animus, that the

1     arrest would not have occurred. That's just one  
2     but -- but-for causation, one but-for cause, and  
3     we meet that requirement here.

4             JUSTICE THOMAS: You say that you use  
5     abuse of process as the analogue. Have we ever  
6     used that in -- in -- in these retaliation  
7     cases?

8             MS. BIDWELL: You didn't, but that was  
9     because there was no process. So, in Lozman,  
10    you had an on-the-spot arrest. In Reichle, you  
11    had an on-the-spot arrest. In Nieves, you had  
12    an on-the-spot arrest. So this is the first  
13    time that this Court actually sees a case with a  
14    warrant coming before it.

15            And just as at common law, a plaintiff  
16    could bring a claim even if there was a warrant.  
17    For example, in Jackson versus American  
18    Telephone Company, there was a warrant for a  
19    serious offense. It was a warrant for assault  
20    with a deadly weapon. And it was properly  
21    issued, but a plaintiff still had a cause of  
22    action because that warrant was used as a  
23    pretext for private purposes, inconsistent with  
24    the exigencies of the writ in the words of  
25    common law.

1 JUSTICE SOTOMAYOR: Your answer is  
2 quite interesting and -- and I think informative  
3 because, as you say, if the warrant never should  
4 have been sought, it's a different kind of  
5 but-for.

6 But also, in many jurisdictions,  
7 Florida and California, judges don't make  
8 probable cause determinations, correct, when  
9 they issue warrants, so --

10 MS. BIDWELL: According to  
11 Respondents, there are some jurisdictions where  
12 there is a discretion to not issue a warrant.

13 JUSTICE SOTOMAYOR: Right. And,  
14 secondly -- and some warrants are false? There  
15 are material falsehoods in a warrant?

16 MS. BIDWELL: Yes, Your Honor.

17 JUSTICE SOTOMAYOR: So you can't say  
18 as a matter of law that that is -- can break the  
19 causation, correct?

20 MS. BIDWELL: Your Honor, yes, but  
21 when we're -- we were talking here about not a  
22 discretion not to issue a warrant.

23 JUSTICE SOTOMAYOR: Right.

24 MS. BIDWELL: The point here is that  
25 magistrates are required under the Fourth



1 Amendment to look at two things, whether there  
2 is probable cause under a warrant and look at  
3 the oath and affirmation. They have no choice  
4 but to look at the oath and affirmation. And we  
5 know that this is oath -- oath and affirmation  
6 here is the affidavit. And magistrate had no  
7 choice but to look at that affidavit. And we're  
8 saying that the affidavit would not have been  
9 obtained had it not been for animus.

10 It's very different from retaliatory  
11 prosecutions and Hartman because, there, a  
12 prosecutor can look at many different things in  
13 order to make a determination of whether to  
14 pursue the prosecution. An affidavit for a  
15 warrant can be one of those things, but it  
16 doesn't have to be that thing.

17 So that was the problem in Hartman,  
18 where you couldn't even get enough evidence of a  
19 but-for cause without looking into the head of  
20 the prosecutor.

21 JUSTICE JACKSON: Well --

22 MS. BIDWELL: Here, you don't have to  
23 look.

24 JUSTICE SOTOMAYOR: You're saying that  
25 Nieves doesn't apply to anything but

1 on-the-spot. I dissented in Nieves, so I  
2 probably on -- on a clean slate would likely  
3 agree with you, but what do I do with the line  
4 in Nieves that says that "plaintiff pressing a  
5 retaliatory arrest claim must plead and prove  
6 the absence of probable cause for the arrest"?  
7 Sort of --

8 MS. BIDWELL: Yes. So, in Nieves,  
9 we're talking about the holding not extending  
10 beyond its reasoning. And the reasoning in  
11 Nieves is colored by this representative case,  
12 which, as -- as the government argued in Nieves,  
13 is the vast bulk of cases which are on-the-spot  
14 arrest cases.

15 And we're talking about in Nieves  
16 having to evaluate police officers under  
17 objective standard of reasonableness at the time  
18 when they have to take speech into account while  
19 making a determination whether to arrest a  
20 suspect or not.

21 CHIEF JUSTICE ROBERTS: I -- I didn't  
22 dissent in Nieves.

23 (Laughter.)

24 CHIEF JUSTICE ROBERTS: And the  
25 Court's opinion in that case went out of its way

1 to emphasize the narrowness of the exception.

2 MS. BIDWELL: Your Honor, that's  
3 because Nieves talks about a vast bulk of  
4 retaliatory arrest cases. The -- the typical  
5 retaliatory arrest case is when a police  
6 officer, like in Nieves, is patrolling the  
7 streets, having to, not on his own time but on a  
8 suspect's time, having to respond to dangerous  
9 situations. The last thing we want is for  
10 police officer worrying about communicating with  
11 a suspect.

12 So that's why, even under the  
13 objective evidence carveout, statements and  
14 motivations of a particular arresting officer  
15 are irrelevant at that point.

16 Nieves covers all these cases that are  
17 important, and there is a very particular  
18 causation complexity in Nieves in that it is  
19 impossible to untangle what a police officer is  
20 thinking at the time. As Justice O'Connor  
21 explained in her -- in Quarles, police officers,  
22 when they're making on-the-spot decisions, have  
23 -- themselves don't have a fully formed  
24 understanding of why they're doing what they're  
25 doing.

1                   So it's a very particular causal  
2     complexity that's present in a lot of cases, but  
3     it is not present in a case like this one, where  
4     you have two months to issue a warrant based on  
5     no new information. All information that was  
6     developed developed at the time when  
7     Ms. Gonzalez took this piece of paper a month --

8                   JUSTICE ALITO: But doesn't the --  
9     doesn't the causal complexity concern -- the  
10    causal complexity that face -- that would face  
11    courts if the rule were otherwise, not causal  
12    complexity that is limited to the situation  
13    where there is what you call an on-the-spot  
14    arrest?

15                  MS. BIDWELL: It concerns courts,  
16    right, because you don't want judges  
17    second-guessing what police officers are doing  
18    when they're making very difficult decisions  
19    whether to arrest a suspect, whether to remove  
20    the suspect from the streets. And they also  
21    have to communicate to the suspect.

22                  JUSTICE ALITO: But that exists  
23    whether or not it's an on-the-spot arrest. The  
24    causal complexity exists in -- in all of the  
25    class of cases that Nieves was talking about.

1           And when the Court was stating what it  
2   held, I don't see a reference to split-second  
3   decisions. The Court says that Nieves and  
4   Wright argue that the same -- that no probable  
5   cause -- that there should be a no probable  
6   cause requirement. Their primary contention is  
7   that retaliatory arrest claims involve causal  
8   complexities akin to those identified in  
9   Hartman. As a general matter, we agree.

10           Then later, when it's stating the  
11   holding, because there was probable cause to  
12   arrest Bartlett, his retaliatory arrest claim  
13   fails as a matter of law. I don't see a  
14   reference to split-second decisions.

15           MS. BIDWELL: Your Honor, on page  
16   1725, you make reference to split-second  
17   decisions when you're explaining a particular  
18   type of causal complexity here where an officer  
19   has to make a decision whether to arrest and in  
20   that moment has to determine -- take speech into  
21   account to determine whether the suspect is  
22   ready to cooperate.

23           And that very example also appears in  
24   Reichle. That very example also appears in  
25   Lozman. This is the causal complexity that is

1 particularly difficult to untangle.

2           Other causal complexities -- and  
3 with -- of course, with prosecutors, you have  
4 your own separate problem where you need to  
5 actually talk to a prosecutor to determine what  
6 the prosecutor was thinking, and that  
7 second-guessing those decisions is also  
8 difficult.

9           But the kind of causal complexity  
10 that's present here is very similar to the  
11 causal complexity in Mt. Healthy. Mt. Healthy  
12 created the burden-shifting framework to ensure  
13 that we can disentangle proper considerations of  
14 speech from improper considerations of speech.

15           JUSTICE ALITO: Well, do you have a --

16           JUSTICE JACKSON: I think --

17           JUSTICE ALITO: -- do you have a -- a  
18 reason -- I assume you do have a reason -- for  
19 stressing this argument rather than your other  
20 argument that the Fifth Circuit understood what  
21 was needed to prove that the case fell within  
22 the exception too narrowly?

23           MS. BIDWELL: Your Honor, we would be  
24 happy with the objective evidence carveout as  
25 well if it were -- if -- if -- if this Court

1 allowed objective evidence of causation to come  
2 in other than what the Fifth Circuit is talking  
3 about, which is a very specific comparator of  
4 non-arrests.

5 But our position is that Nieves  
6 covered the vast bulk of cases, and those cases  
7 involve on-the-spot police officers having to  
8 make very difficult decisions.

9 On the other -- on the one hand, you  
10 only have mere allegations of state of mind. On  
11 the other hand, you have probable cause. And  
12 this Court said that in those types of  
13 situations, we're not going to put police  
14 officers in this very uncomfortable position.

15 JUSTICE ALITO: But are you making  
16 this argument because you have bigger fish to  
17 fry or because you think this is the argument  
18 that's most likely to succeed in this case and  
19 serve the interests of your client?

20 MS. BIDWELL: This -- we're making  
21 this argument because Ms. Gonzalez's case  
22 clearly is not the kind of case that the Court  
23 was concerned with in Nieves. This case is much  
24 more similar to Lozman on the facts, and in that  
25 case, you said that Mt. Healthy rules should

1     apply.

2                   That said, Your Honor, there is a way  
3     to -- we would be happy with the Fifth Circuit  
4     reversal on either one of the questions  
5     presented.

6                   JUSTICE KAGAN:  On -- on the argument  
7     that you have been making, I -- I -- I agree  
8     with you that the split-second arrest seems to  
9     be a key part of the Court's reasoning, maybe  
10    not all of the Court's reasoning but some  
11    critical part of it.

12                  But I -- I guess I wonder whether  
13    dividing the world into split-second arrest  
14    cases versus other cases is going to be a very  
15    difficult thing to do.  I mean, presumably, if  
16    we look at the world of cases in which  
17    retaliatory arrest is charged, they're going to  
18    fall on a spectrum with the most split-second  
19    arrest case over here and something that looks  
20    extremely different over there and a lot of  
21    stuff in the middle.

22                  And it seems hard to me to draw that  
23    line in a way that would prove administrable,  
24    predictable, so I was wondering -- yeah, respond  
25    to that.



1 MS. BIDWELL: Yes, Your Honor. Our  
2 position on Question Presented 2 is that the  
3 line to be drawn is at the well-known Fourth  
4 Amendment standards to the police officers about  
5 initial lawful encounter. As long as probable  
6 cause and arrest within -- arise within that  
7 same initial lawful encounter, it doesn't have  
8 to be split second, Your Honor. It can be -- it  
9 can last for a while. But, as long as it's  
10 within this initial lawful encounter, then  
11 police arrests go under Nieves. But, when that  
12 encounter ends, no.

13 And I'd like to also emphasize that  
14 within that initial lawful encounter, you can  
15 obtain a warrant, an emergency warrant, for  
16 example, or if you encounter a suspect and then  
17 you pulled up information on him and all of a  
18 sudden you see, oh, there is a warrant for  
19 previous arrest, then you could use -- when you  
20 learn of the warrant and as long as you arrest  
21 within the same initial encounter, then you fall  
22 within Nieves. And those are traditional Fourth  
23 Amendment concepts that police officers are  
24 trained on.

25 That said, Your Honor, I understand

1     that another way to go about this, as I  
2     indicated in my opening, is to put all arrests  
3     on the same spectrum, and in that case, we  
4     absolutely agree with the United States  
5     Government that objective evidence of causation  
6     should be allowed irrespective of its form.

7             JUSTICE BARRETT: Counsel -- go ahead.

8             JUSTICE SOTOMAYOR: To that second  
9     question or to the first question presented --

10            MS. BIDWELL: Yes.

11            JUSTICE SOTOMAYOR: -- in your brief,  
12     you mentioned that there was probable cause that  
13     Respondent Mayor Trevino violated the same  
14     statute by taking the petition home and keeping  
15     it overnight. I had no idea where that came  
16     from because you didn't have a cite in the  
17     record to that, and I don't know if it was -- I  
18     don't think it was in the complaint.

19            MS. BIDWELL: Your Honor -- sorry.

20            JUSTICE SOTOMAYOR: Where was that  
21     from?

22            MS. BIDWELL: Yeah, it is in the  
23     complaint. It's on page 110A of the complaint.

24            JUSTICE SOTOMAYOR: I was reading the  
25     complaint too fast. So thank you.

1 All right. Why wouldn't that be  
2 sufficient comparative evidence that someone  
3 else took this by mistake for overnight and kept  
4 it?

5 MS. BIDWELL: That's exactly the  
6 problem with the Fifth Circuit rule, is that it  
7 wouldn't allow this kind of a comparator because  
8 the Fifth Circuit is parsing the rule so  
9 hypertechnically with such a high degree of  
10 specificity that somebody like a mayor would not  
11 be similarly situated to somebody like  
12 Ms. Gonzalez. But --

13 JUSTICE KAVANAUGH: Why is that? I  
14 don't understand that.

15 MS. BIDWELL: Under the Fifth Circuit  
16 --

17 JUSTICE KAVANAUGH: Even accepting  
18 their rule, if some other government official  
19 did the same thing, that would seem to be -- be  
20 useful evidence.

21 MS. BIDWELL: Yes, Your Honor, but the  
22 way that the Fifth Circuit is describing that  
23 rule, just the fact that Ms. Gonzalez is a  
24 council member and Mayor Trevino is a mayor and  
25 they're serving different functions makes the

1 Mayor not similarly situated to Ms. Gonzalez.

2 And it is important to not just limit  
3 the objective evidence to comparators because,  
4 unlike equal protection cases, you could have  
5 situations with First Amendment violations where  
6 you can't point to a direct comparator.

7 JUSTICE BARRETT: Counsel, can I ask  
8 --

9 CHIEF JUSTICE ROBERTS: Why not --

10 JUSTICE KAVANAUGH: This is a very --

11 JUSTICE KAVANAUGH: Go ahead.

12 JUSTICE BARRETT: Finish.

13 CHIEF JUSTICE ROBERTS: I was just  
14 going to say -- I'll -- I'll -- I'll go ahead.

15 You -- when you refer to it as a  
16 comparator, are you referring to it in the terms  
17 of the Nieves exception?

18 MS. BIDWELL: Yes, we're talking about  
19 Nieves exception.

20 CHIEF JUSTICE ROBERTS: Well, I mean,  
21 in Nieves, the whole point is -- we were talking  
22 about jaywalking, and the point is nobody's ever  
23 arrested for jaywalking unless there's something  
24 fishy going on on. And to sort of pick one  
25 person and say, well, that's an adequate

1 comparator, I think, really misses the whole  
2 point of Nieves.

3 MS. BIDWELL: Your Honor, if we are  
4 limiting Nieves only to endemic crimes like  
5 jaywalking, then -- and mayors go on to this  
6 Nieves all-arrests rule, then the only people  
7 who could ever be sued for violations of First  
8 Amendment rights under the objective evidence  
9 carveout would be the police officers who are  
10 making those types of jaywalking decisions, and  
11 mayors and police chiefs who are not making  
12 those kind of difficult decisions on the spot  
13 would be exempt from it.

14 So it is important --

15 CHIEF JUSTICE ROBERTS: Well, but, I  
16 mean, that's expanding the whole inquiry, right?  
17 I mean -- I mean, you're -- the part about the  
18 comparators in Nieves is sort of like a page and  
19 a half at the end. There's a lot more that goes  
20 before us that explains why you do not normally  
21 allow this kind of inquiry.

22 MS. BIDWELL: Yes. And you normally  
23 don't allow this kind of inquiry because police  
24 officers have to make decisions where they have  
25 to take speech into account very quickly, so --

1 but I understand that now I'm talking about  
2 Question Presented 2 again.

3 CHIEF JUSTICE ROBERTS: Yeah.

4 MS. BIDWELL: But, with Question  
5 Presented 1, we agree with the United States  
6 Government that there could be other evidence of  
7 causation that -- that courts shouldn't be  
8 blinding themselves to. Even the Fifth  
9 Circuit's majority opinion said that we  
10 sympathize with Ms. Gonzalez, but we feel like  
11 Nieves obligates us to blind ourselves to  
12 evidence of causation, like the fact that two  
13 police officers looked into Ms. Gonzalez and  
14 thought there was nothing warranting an arrest,  
15 that a prosecutor dismissed the charges, that a  
16 special detective walked a warrant under an  
17 emergency procedure designed for fleeing  
18 suspects to put away a lady --

19 JUSTICE KAVANAUGH: Well, is it --

20 MS. BIDWELL: -- in her 70s.

21 JUSTICE BARRETT: Counsel -- oh,  
22 sorry. Go ahead.

23 JUSTICE KAVANAUGH: You go ahead.

24 JUSTICE BARRETT: I was just going to  
25 ask you whether, on that point of looking at

1 other evidence, would it be consistent with the  
2 Nieves exception to look at things other than  
3 comparators? Let's -- let's say that I agree  
4 with you that the Fifth Circuit required too  
5 much of the comparator, too much specificity and  
6 maybe too much, you know, statistical evidence.

7 But isn't the other kinds of evidence  
8 that you're looking at, aren't those -- isn't  
9 that the kind of Mt. Healthy evidence that  
10 doesn't necessarily go to the probable cause  
11 inquiry?

12 MS. BIDWELL: Your Honor, that goes to  
13 the definition of objective evidence in Nieves,  
14 and what we know from Nieves, on page 1722, the  
15 Court specifically explains that in Mt. Healthy,  
16 often motive alone is going to get you an  
17 inference of causation.

18 And in cases like Nieves, motive alone  
19 is not going to get you an inference of  
20 causation. It has to be something beyond  
21 subjective motive. So, for example, here, if we  
22 were just to allege in our complaint that Mayor  
23 Trevino disliked Ms. Gonzalez because she  
24 supported his opponent, that kind of evidence of  
25 motive under Nieves is not going to qualify as

1 objective evidence.

2 JUSTICE BARRETT: What if she made the  
3 kind of mistake on her state tax forms that  
4 would have been prosecutable, you know, under  
5 the law, but you had all the same objective  
6 evidence, but, you know, this was -- and forget  
7 about the differences between local and county  
8 and state for these purposes -- but the crime is  
9 different? This is kind of a random crime, you  
10 know, that she's charged with here.

11 But you're saying that all of this  
12 evidence of retaliatory conduct can come in,  
13 which is the Mt. Healthy kind of evidence. It's  
14 not so uncommon for people to be prosecuted for  
15 cheating on their taxes. Would we be able to  
16 consider all -- doesn't that swallow the Nieves  
17 exception?

18 MS. BIDWELL: It doesn't, Your Honor,  
19 because you -- it has to be evidence beyond  
20 subjective motive, so like the government  
21 argues, for example, the evidence of irregular  
22 procedure, walking the warrant -- yes.

23 JUSTICE BARRETT: Yeah, I'm -- I'm  
24 positing -- everything else that you have --

25 MS. BIDWELL: Yes.



1 JUSTICE BARRETT: -- is there except  
2 the crime changes and it's not kind of this  
3 random crime, you know, in random circumstances,  
4 but --

5 MS. BIDWELL: Right.

6 JUSTICE BARRETT: -- she has the same  
7 long-running disputes, the same kind of other  
8 evidence, but the crime is more substantial.  
9 Your position is the same?

10 MS. BIDWELL: Yes. Our position is  
11 that the Court must be allowed to look at that  
12 evidence. It doesn't mean that the Court is  
13 going to say, oh, you know what, it neutralizes  
14 probable cause and the plaintiff should be able  
15 to proceed.

16 Our position is that the court should  
17 be allowed to look at it and then say, okay,  
18 maybe that's enough or maybe that's not enough.  
19 But the problem with the Fifth Circuit's rule is  
20 that it says you can't even look at any of that  
21 evidence and weigh it. And --

22 JUSTICE BARRETT: So reckless driving,  
23 they follow her on her way home and she's going  
24 -- you know, what is the standard -- 15 miles  
25 over the speed limit, she's -- she's speeding

1 late at night on a country road where there's no  
2 one there. Same -- same rule? The crime  
3 doesn't matter?

4 MS. BIDWELL: It -- it's not an  
5 offense-by-offense standard. It's a standard of  
6 what did she do and then -- versus what kind of  
7 evidence she can provide and whether probable  
8 cause, given that context, tends to show that  
9 the arrest would not have happened had it not  
10 been for speech.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel.

13 Justice Thomas, anything further?

14 Justice Alito?

15 Justice Sotomayor?

16 Justice Kagan?

17 JUSTICE KAVANAUGH: The -- the crime's  
18 prosecuted on occasion, correct? It's just the  
19 fact pattern here that is unusual, is that --

20 MS. BIDWELL: Yes, Your Honor.

21 JUSTICE KAVANAUGH: And I guess, on  
22 the fact pattern here, how are you going to have  
23 evidence that goes one way or the other? I  
24 mean, the fact that no one's been prosecuted who  
25 stole a doc -- allegedly stole a document from

1 the next person at the city council meetings, so  
2 I'm just curious what you think -- how this is  
3 going to proceed? I mean, you look at the  
4 video, which I have, and, you know, you could  
5 come to one conclusion about this.

6 MS. BIDWELL: It's -- in -- in -- in  
7 -- in that sense, it's similar to other statutes  
8 like child endangerment, for example, where you  
9 do have a serious crime, but you could have  
10 somebody like, I let my 13-year-old kid drive  
11 around the neighborhood on a bicycle, right, and  
12 if somebody is arresting me under the child  
13 endangerment statute, then it raises red flags.

14 JUSTICE KAVANAUGH: But, if -- if --  
15 if the conclusion is that someone intentionally  
16 -- the evidence suggests probable cause that  
17 someone intentionally stole a document that's a  
18 government document and did it with a motive  
19 because concerns have been raised about her role  
20 in getting the signatures on the petition the  
21 day before, so she had motive, and you have the  
22 video, and we know that stealing a government  
23 document is, in fact, a crime that's prosecuted,  
24 I guess --

25 MS. BIDWELL: Yes, Your Honor, two

1 things for that. Number one is that the statute  
2 is a general intent statute, so you don't need  
3 to be looking at her motives, why would she take  
4 a piece of paper from one side of the dais and  
5 put it on the other side of the dais.

6 But even if --

7 JUSTICE KAVANAUGH: Could I -- keep  
8 going. I'm sorry.

9 MS. BIDWELL: But, no, you're right,  
10 Your Honor. Even if you were to say that this  
11 is a crime, you know, on the one hand, you have  
12 probable cause for a serious crime, and on the  
13 other hand, you have evidence of a retaliatory  
14 motive, that courts should be allowed to at  
15 least look at it.

16 The problem with the Fifth Circuit's  
17 rule --

18 JUSTICE KAVANAUGH: I guess --

19 MS. BIDWELL: Yeah.

20 JUSTICE KAVANAUGH: I guess the  
21 concern I have here is the crime is a -- the  
22 offense is a serious offense, the offense  
23 itself. The question's really whether the --  
24 the facts of this case meet it.

25 But, if you concluded that it met it,

1 other people would be prosecuted for that too.  
2 The fact that there hasn't been someone else  
3 prosecuted just shows that, I suppose, you know,  
4 no one else in these circumstances has been  
5 accused of that or -- or they haven't found  
6 anyone.

7 MS. BIDWELL: Your Honor --

8 JUSTICE KAVANAUGH: But, if you -- if  
9 you intentionally stole a government document at  
10 a government proceeding, you know, that's --

11 MS. BIDWELL: Justice Kavanaugh, we --

12 JUSTICE KAVANAUGH: -- that's not --  
13 that's not nothing.

14 MS. BIDWELL: We -- we disagree with  
15 that characterization. Our position in the  
16 complaint --

17 JUSTICE KAVANAUGH: I -- I understand  
18 that.

19 MS. BIDWELL: Yes.

20 JUSTICE KAVANAUGH: That's the -- but,  
21 in terms of concluding that it's retaliatory, I  
22 think you have to show some evidence that she  
23 was singled out for -- under Nieves, singled  
24 out. I mean, Nieves is very specific about  
25 saying you need to identify similarly situated

1 individuals not engaged in the same sort of  
2 protected speech had not been -- had not been  
3 arrested.

4 MS. BIDWELL: And under the Seventh  
5 Circuit's rule, we would be able to point to the  
6 Mayor, and he would be a similarly situated  
7 individual. And also under the Seventh Circuit  
8 rule, we would be able to point to the fact that  
9 two police officers independently looked into  
10 Ms. Gonzalez and decided there was nothing  
11 there, that the prosecutor looked into  
12 Ms. Gonzalez and decided not to pursue charges.

13 And it also gets to this idea of how  
14 many crimes we have on the books today. It  
15 would be one thing if you had 70 crimes. It's  
16 another thing when you have 70 million crimes,  
17 and they are written in a broad manner.

18 JUSTICE KAVANAUGH: Right. But  
19 stealing something intentionally, if that's what  
20 happened, and that's -- you know.

21 MS. BIDWELL: There is probable cause  
22 to say that she concealed a government record  
23 because she took a -- a piece of paper from one  
24 side of the dais and moved it to another side of  
25 the dais. As Judge Oldham explains in his

1 dissent, this kind of a crime is akin to my  
2 letting my kid ride a bicycle around the  
3 neighborhood but being charged under or being  
4 arrested for child endangerment.

5 JUSTICE KAVANAUGH: Okay. Thank you.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Barrett?

8 Justice Jackson?

9 JUSTICE JACKSON: So I guess I'm  
10 wondering whether you're asking for what seems  
11 to be a reasonable extension of the Nieves  
12 exception because, as I read it, I mean, the  
13 Fifth Circuit is not sort of coming out of  
14 nowhere. It does say objective evidence that he  
15 was arrested when otherwise similarly situated  
16 individuals not engaged in the same sort of  
17 protected speech had not been. And I get that  
18 that would capture your mayor scenario, that --  
19 that evidence.

20 I'm not sure that applying that in the  
21 way that it seems to be articulated here would  
22 capture the evidence of the two other  
23 prosecutors deciding not to prosecute, et  
24 cetera, et cetera.

25 So are you asking for sort of an

1 extension of the Nieves exception to cover that  
2 kind of evidence as well?

3 MS. BIDWELL: Your Honor, we don't --  
4 we're not asking for an extension because we  
5 think that Nieves specifically articulates what  
6 the exception is concerned with. And it's a  
7 situation where probable cause will not tend to  
8 show that the arrest would not have happened had  
9 it not been for speech.

10 And in that sense, objective  
11 evidence -- as the government argues, objective  
12 evidence of causation, irrespective of its form,  
13 should be allowed to come in. And that's also  
14 the Seventh Circuit's point.

15 JUSTICE JACKSON: View of it, all  
16 right. So, if we -- if we take your view of it  
17 that we don't limit it to just that language,  
18 but we're looking at what was Nieves really  
19 about with respect to the exception and,  
20 therefore, allow all the kinds of evidence  
21 you're talking about, many -- many of the  
22 Respondents' arguments suggest that this is  
23 going to be opening the floodgates to all sorts  
24 of vexatious litigation. So maybe you can  
25 explain why that wouldn't be the case.



1 MS. BIDWELL: Well, one of the reasons  
2 it wouldn't be the case is because of Chief  
3 Justice Rehnquist's dissent in Crawford-El  
4 where, for him, one way to limit the floodgates  
5 was to introduce this very requirement of  
6 objective, that objective evidence of causation  
7 is something that makes it very difficult for  
8 plaintiff to be able to meet that standard.

9 So, when you have probable cause on  
10 one side of the ledger, when you have warrant on  
11 one side of the ledger, then the kind of  
12 objective evidence of causation that you would  
13 have to present would have to be strong enough  
14 that a court would say that evidence of  
15 causation is a better explainer of what happened  
16 here than evidence of probable cause.

17 JUSTICE JACKSON: Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 MS. BIDWELL: Thank you.

21 CHIEF JUSTICE ROBERTS: Ms. Reaves.

22 ORAL ARGUMENT OF NICOLE F. REAVES

23 FOR THE UNITED STATES, AS AMICUS CURIAE,

24 SUPPORTING NEITHER PARTY

25 MS. REAVES: Mr. Chief Justice, and

1     may it please the Court:

2                 The first question presented is  
3     narrow, asking only what types of evidence can  
4     be used to satisfy the Nieves exception. The  
5     Court need only address that discrete question  
6     and it should hold that the exception can be  
7     satisfied by various types of evidence that  
8     support the ultimate inference Nieves required,  
9     that similarly situated persons who did not  
10    engage in First Amendment activity would not  
11    have been arrested.

12                Regardless of its form, evidence that  
13    supports that inference does what Nieves  
14    requires. It addresses Hartman's causal concern  
15    by helping to establish that non-retaliatory  
16    grounds were, in fact, insufficient to provoke  
17    the adverse consequences.

18                The Fifth Circuit, therefore, applied  
19    the wrong legal standard by effectively  
20    requiring Petitioner to show direct evidence of  
21    comparators or empirical statistics.

22                Respondents would eliminate the Nieves  
23    exception altogether for arrests involving  
24    warrants. That unpreserved argument does not  
25    appear to have been accepted by any court of

1 appeals and would draw unwarranted distinctions.

2 On the flip side, Petitioner's  
3 approach to both questions presented would  
4 require the Court to essentially overrule Nieves  
5 and would draw lines between different  
6 categories of arrests that have no basis in the  
7 concerns that motivated the general no probable  
8 cause rule.

9 I welcome the Court's questions.

10 JUSTICE THOMAS: What would that  
11 evidence look like?

12 MS. REAVES: The evidence that we  
13 think should come in?

14 JUSTICE THOMAS: Yeah.

15 MS. REAVES: So we think that it's any  
16 objective evidence that supports the ultimate  
17 inference that the Court required to satisfy the  
18 Nieves exception.

19 JUSTICE THOMAS: What is that?

20 MS. REAVES: So I think it can be a  
21 variety of different types of evidence in  
22 different situations. So, for example, it could  
23 be a pattern of arrests for a behavior far  
24 afield of a plaintiff's. It could be  
25 common-sense propositions or inferences, like

1 jaywalking never happens.

2 It could be officers' employment of an  
3 unusual, irregular, or unnecessarily onerous  
4 arrest procedure, timing events leading up to  
5 arrest and that an arrest was falsely  
6 documented.

7 But I do think it's important that we  
8 don't think any of that evidence is necessarily  
9 sufficient in any particular case because the  
10 ultimate inference the evidence needs to support  
11 is that there would have been similarly situated  
12 people who were not, in fact, arrested.

13 JUSTICE THOMAS: What would that look  
14 like in this case?

15 MS. REAVES: So we haven't taken a  
16 position on the ultimate question in this case  
17 because we do think the Court just granted a  
18 question -- the question about the form of  
19 evidence, not whether the quantum of evidence  
20 here satisfies that or what the quantum of  
21 evidence is generally.

22 That being said, some types of  
23 evidence that are relevant in this case I do  
24 think are Petitioner's evidence that arrests for  
25 her -- for behavior -- her behavior -- for

1 behavior under the statute were for behavior far  
2 afield of hers.

3 The nature of the crime itself, it's a  
4 low-level misdemeanor crime that can be  
5 satisfied just by the general intent of moving  
6 the document.

7 I think the irregular arrest  
8 procedures here are relevant as well.

9 CHIEF JUSTICE ROBERTS: In Nieves, we  
10 -- the Court went through a long list of reasons  
11 why probable cause should generally, as we put  
12 it, defeat a retaliation claim, and we described  
13 the qualification there as -- as a narrow one.

14 You had a long list of the type of  
15 evidence that should come in to defeat the  
16 retaliation claim. It seems to me to be  
17 inconsistent with the notion of a very strong  
18 general rule that had been well-established and  
19 a very narrow exception.

20 MS. REAVES: I respectfully disagree  
21 because I think that evidence still has to  
22 ultimately go to show that a similarly situated  
23 person wouldn't have been arrested.

24 And I don't think the form of  
25 evidence, as long as it's objective, whether

1     that's direct statistical comparators or other  
2     evidence that supports an inference that others  
3     wouldn't have been arrested, changes kind of the  
4     concerns that this Court identified in Nieves  
5     when it --

6                 CHIEF JUSTICE ROBERTS:  Yeah, but, I  
7     mean, the -- the --

8                 MS. REAVES:  -- dropped the general no  
9     probable cause rule.

10                CHIEF JUSTICE ROBERTS:  It seemed to  
11    me that your -- your -- your list suggests that  
12    this is a normal, typical question.  There's a  
13    debate about it.  We're going to have evidence  
14    on both sides of all sorts of different types  
15    and then figure it out.

16                And that doesn't seem to me to take  
17    into account the reasons that we have the  
18    general rule that probable cause is enough.  It  
19    just seems to take it in the same area as any --  
20    any disputed issue of fact in general.

21                MS. REAVES:  I don't think that --

22                CHIEF JUSTICE ROBERTS:  Like, what  
23    sort of stuff would not be admissible as  
24    evidence if you think that probable cause  
25    requirement should be defeated?

1 MS. REAVES: Well, again, I think,  
2 because the ultimate inference is the similarly  
3 situated inquiry, which is a way I think we  
4 actually differ from Petitioners on the first  
5 question presented, I think that the -- this  
6 sort of evidence, it -- it's going to depend on  
7 the case whether it supports that inference.  
8 Just a standalone allegation that I was arrested  
9 and it --

10 CHIEF JUSTICE ROBERTS: Yeah, yeah,  
11 but I'm trying to get out of it, you seem to say  
12 you're not expanding the exception and you have  
13 -- but give me the type of evidence that would  
14 not -- would be pertinent on the question, but  
15 you would say, oh, that doesn't come in because  
16 we're concerned about maintaining the general  
17 rule.

18 MS. REAVES: So I think some of the  
19 evidence Petitioner has relied on here, so  
20 evidence about other council members who aren't  
21 defendants here and using that evidence when  
22 it's not part of a Monell pattern or practice  
23 claim doesn't either support the similarly  
24 situated inference and it -- you know, it -- but  
25 it might be able to come in if you were just

1 doing some sort of Mt. Healthy analysis like  
2 Petitioner is requesting as part of the second  
3 question presented.

4 JUSTICE GORSUCH: Can I ask you about  
5 the other question presented? You have a  
6 footnote, Footnote 6, about abuse of process.  
7 And I'm struggling to understand why abuse of  
8 process wouldn't relevantly inform our  
9 understanding of Section 1983 if one believes  
10 that abuse of process was a recognized tort at  
11 the time of the statute's adoption, which I  
12 think the evidence tends to support.

13 So I understand in Nieves that that  
14 may not have been relevant, in part because it  
15 was a warrantless arrest, so there was no  
16 process involved, and also in part because,  
17 frankly, Mr. Nieves's complaint didn't allege an  
18 ulterior motive that might satisfy an abuse of  
19 process claim, right? It didn't -- it didn't  
20 have an allegation that he was being extorted in  
21 the way that we have that kind of allegation  
22 here.

23 Why should the Court turn a blind eye  
24 to abuse of process as a common law tort  
25 analogue, which we usually look to common law



1 tort analogues when interpreting 1983?

2 MS. REAVES: So three points on that,  
3 Justice Gorsuch. First is I do think that  
4 Petitioner chose to plead her claim here as a  
5 retaliatory arrest claim, and this Court did  
6 hold in Nieves that --

7 JUSTICE GORSUCH: Yes. But, when we  
8 look at whether it's retaliation in violation of  
9 the First Amendment or any other amendment, we  
10 -- we look to the common law analogues, and here  
11 is an obvious one.

12 MS. REAVES: Well, I think that Nieves  
13 largely foreclosed that because --

14 JUSTICE GORSUCH: Well, that's what  
15 I'm asking you. Do you think it really  
16 foreclosed it? Because it didn't mention it.  
17 And, again, it wasn't pled. And there was no  
18 process. And there wasn't the kind of extortion  
19 that's alleged here. So there are lots of  
20 reasons why Nieves didn't grapple with this  
21 question.

22 MS. REAVES: So --

23 JUSTICE GORSUCH: But here we are.

24 MS. REAVES: -- let me start with  
25 Nieves and then kind of turn to the merits of

1     that question.

2                 The reason why we think the Nieves  
3     Court was aware of this is because the Court in  
4     Hartman discussed abuse of process, declined to  
5     rely on it. The government in its Nieves brief,  
6     page 10, Footnote 2, discussed abuse of process  
7     and explained why it wasn't most relevant.

8                 JUSTICE GORSUCH: Again, agree with  
9     you, it wasn't relevant in Hartman and wasn't  
10    relevant in Nieves. But why isn't it relevant  
11    here?

12                MS. REAVES: So a couple of points on  
13    that. First of all, I think, if you look at an  
14    abuse of process claim, the kind of prototypical  
15    claim was use of process to extort money or  
16    property. Here --

17                JUSTICE GORSUCH: Or -- or any other  
18    kind of favor or -- or thing. And -- and -- and  
19    why -- why -- it doesn't -- it wasn't limited to  
20    property and money. Often it was, you're right,  
21    but I've actually litigated abuse of process  
22    claims, and the -- the point is the process,  
23    yes, it was supported and it was properly done.  
24    The magistrate here signed off on it, but it was  
25    being done for an ulterior purpose. And I think

1       that's the allegation here.

2                   MS. REAVES: I think, though, that  
3       kind of the ordering of the claim doesn't fit on  
4       as well as a malicious prosecution or false  
5       arrest claim. So, here, the retaliation was in  
6       -- the retaliatory arrest was in retaliation for  
7       her prior First Amendment conduct.

8                   JUSTICE GORSUCH: Well --

9                   MS. REAVES: And that's what you have  
10      to plead to plead a retaliatory arrest claim.

11                  JUSTICE GORSUCH: -- a false arrest or  
12      a malicious prosecution claim says there's no  
13      probable cause. That -- that's at the heart of  
14      it, okay, that the arrest couldn't lawfully be  
15      made.

16                  Here, she's saying, yeah, the arrest  
17      could be lawfully made, but it wasn't being made  
18      for the right -- it wasn't being made for the  
19      true reasons that the writ was designed for or  
20      what the law was designed for. It was being  
21      done for an ulterior purpose to push me out of  
22      the political process and silence me.

23                  MS. REAVES: To be fair, she pleaded a  
24      retaliatory arrest claim, so that's arrest and  
25      retaliation for her prior conduct. She brought

1 in allegations that there was also future  
2 intent, but that's not part of the claim itself.

3 And, second, I think it would be odd  
4 for the Court --

5 JUSTICE GORSUCH: Well, if I read it  
6 differently, then what?

7 MS. REAVES: So I think, just stepping  
8 back a little bit, I think it would be irregular  
9 in light of the rationales this Court has  
10 identified to carve off the three sets of claims  
11 in different ways that I think are at issue  
12 here.

13 So, first, there's retaliatory  
14 prosecution. The general no probable cause bar  
15 applies. There's also a split-second arrest.  
16 Petitioner agrees the general no probable cause  
17 rule applies there.

18 In the middle, the Court would look to  
19 a different analogy, and I don't think that  
20 analogy is justified by the rationales this  
21 Court has articulated for the no probable cause  
22 rule, which are that probable cause will always  
23 be relevant and readily available and evidence  
24 of it or lack thereof, and, second, that there  
25 may be causal difficulties caused by multiple

1 actors or the propriety of considering speech in  
2 certain situations.

3 And this category of more deliberative  
4 arrests that Petitioner is carving out isn't  
5 different on those kind of key issues that  
6 motivated the exception, so that's why I think  
7 the Court should continue to look to malicious  
8 prosecution and false arrest.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 Justice Thomas?

12 Justice Alito?

13 JUSTICE ALITO: What would you say in  
14 response to the questions that Justice Kavanaugh  
15 was asking about the situation where there are  
16 plenty of arrests under a particular provision,  
17 but in the case at hand, the factual  
18 circumstances are quite unusual and there is no  
19 evidence that anybody has been arrested for  
20 committing the crime in that particular way?  
21 How do you think a court should deal with that?

22 MS. REAVES: So that evidence,  
23 standing alone, is not going to be enough to  
24 demonstrate that there were similarly situated  
25 people who engaged in the same sort of activity

1     who were not arrested.

2                 So I think that evidence could  
3     potentially be relevant if there are other  
4     reasons to infer that there were, in fact,  
5     similarly situated people and they were not  
6     arrested, but the novelty of a crime alone is  
7     not enough to make the similarly situated  
8     showing.

9                 I think there are a lot of good  
10    reasons for that. We articulate some in our  
11    brief, but that includes the fact that just  
12    because someone figures out a new way to engage  
13    in criminal activity doesn't suggest there's  
14    anything nefarious by a government prosecuting  
15    that.

16                CHIEF JUSTICE ROBERTS: Justice  
17    Sotomayor?

18                JUSTICE SOTOMAYOR: If I'm  
19    understanding you right, on the first question  
20    presented, your position is that the Fifth  
21    Circuit is the only circuit that's demanding a  
22    specific kind of comparison-based evidence,  
23    correct?

24                MS. REAVES: That's correct. We think  
25    the Fifth Circuit applied too strict a form of

1 evidence requirement.

2 JUSTICE SOTOMAYOR: And if I remember  
3 correctly, the Fifth Circuit blamed it on the  
4 language in Nieves and said that Nieves  
5 compelled this conclusion but that they were  
6 sympathetic, that Judge Oldham's view of it  
7 being a little wider than they're applying it is  
8 consistent with the Ninth and Seventh Circuit,  
9 correct?

10 MS. REAVES: That's correct, yes. I  
11 -- I'm not sure that we agree with the Fifth  
12 Circuit. We don't take our position to be any  
13 expansion on Nieves, just --

14 JUSTICE SOTOMAYOR: Exactly. But  
15 --but the Ninth and Fifth -- the Ninth and --  
16 and Seventh Circuit view it consistently with  
17 your view today, correct?

18 MS. REAVES: That's correct, yes.

19 JUSTICE SOTOMAYOR: Have you seen an  
20 explosion of litigation with retaliatory --  
21 Lozman-type retaliatory arrest exceptions?

22 MS. REAVES: We haven't done a  
23 statistical analysis on that. Obviously, Nieves  
24 did not -- was not decided very long ago. You  
25 know, that being said, I think, if you look at

1 the decisions in the Seventh and Ninth Circuits,  
2 such as the Ballentine decision in the Ninth  
3 Circuit, they very carefully looked at the types  
4 of evidence we've discussed but ultimately  
5 looked at that inference of whether that  
6 suggests that similarly situated persons would  
7 not have been arrested.

8 So I do think that they struck the  
9 balance between applying the Nieves rule but  
10 just allowing a broader range of evidence to  
11 satisfy it than the Fifth Circuit did below.

12 JUSTICE SOTOMAYOR: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice Kagan?

14 JUSTICE KAGAN: So if I could talk  
15 about this question of what kind of evidence  
16 should come in under the Nieves exception, and  
17 let's sort of think about three sets of  
18 evidence. So, one, I think nobody would say,  
19 right, that an allegation of a subjective state  
20 of mind on the police officer is going to get  
21 you past the probable cause bar. Is that  
22 correct?

23 MS. REAVES: That's correct.

24 JUSTICE KAGAN: That's -- that's --  
25 that's an obvious implication of -- I mean not



1     just an implication. Nieves makes that quite  
2     clear.

3                 Now, on the other side of the  
4     spectrum, you have this quite obviously  
5     comparative evidence. The Fifth Circuit seemed  
6     to have a very narrow view of what that was,  
7     like you have to point to a particular person  
8     who wasn't arrested.

9                 But let's expand that a little bit  
10    more and say, well, that would be a little bit  
11    nutty. I mean, if you come in and you say  
12    nobody's ever been arrested for that, I can't  
13    point to a particular person, but, look,  
14    nobody's ever been arrested for that, that  
15    should count too, right? So -- so -- so, you  
16    know, that's all, like, very comparative stuff,  
17    right?

18                So in the middle -- and I guess this  
19    is where I thought your brief was interesting --  
20    is objective evidence that you might take to  
21    support an inference as to comparisons with  
22    other people but that is not on its face very  
23    comparative in nature.

24                And I'll just read you some of what  
25    you said in your brief. The timing of and

1 events leading up to a plaintiff's arrest, the  
2 history of the defendant's interactions with the  
3 plaintiffs, the fact that officers falsely  
4 documented the arrest. Maybe the most  
5 comparative of these is the employment of an  
6 unusual, irregular, or unnecessarily onerous  
7 arrest procedure.

8           So all of these, you can understand  
9 how somebody could argue from them to a  
10 comparative statement that another person who  
11 didn't make these kinds -- who didn't engage in  
12 this kind of speech activity wouldn't have been  
13 treated the same way, but it is a little bit of  
14 an inferential jump.

15           And so I guess my long-winded question  
16 is, why do you put those sorts of statements in  
17 the bucket that should be able to come in to get  
18 past the probable cause bar rather than lump  
19 them with allegations of subjective intent on  
20 the part of the police officer?

21           MS. REAVES: Well, I think there are  
22 four of -- it makes sense to put them in the  
23 bucket of things that courts can consider.  
24 First of all, because courts generally aren't  
25 limited in the form of evidence they can rely on

1 to consider inferences. And I think, in  
2 particular here, any objective evidence is going  
3 to go to addressing Hartman's causal concerns by  
4 helping to establish that non-retaliatory  
5 grounds were, in fact, insufficient to provoke  
6 adverse conferences.

7 So, if, for example the method of  
8 arrest is entirely unique, let's say it's the  
9 facts of this case and we also know that no one  
10 has ever been arrested and sat in jail for  
11 having -- for engaging in a misdemeanor, that  
12 does support the inference that not only  
13 similarly situated people were not arrested but  
14 also that this person was really treated  
15 differently from similarly situated persons  
16 across the board.

17 Now, again, that evidence alone isn't  
18 enough, but it can help tell the whole story of  
19 a particular arrest and help support the  
20 conclusion that the Nieves exception is  
21 satisfied.

22 JUSTICE KAGAN: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Gorsuch?

25 JUSTICE GORSUCH: Just to be clear,

1 we're not talking about the causation standard  
2 under the First Amendment itself, right? We're  
3 talking about this Court's gloss on what the  
4 causation requirement is statutorily under 1983,  
5 right?

6 MS. REAVES: That's correct. We read  
7 Nieves and Hartman to be elements of the causes  
8 of action, not elements of the First Amendment.

9 JUSTICE GORSUCH: So the First  
10 Amendment may well be broader than this. It's  
11 just that this Court has said, for purposes of a  
12 statute, we're going to require more specific  
13 kinds of evidence, right?

14 MS. REAVES: That's absolutely  
15 correct, and that's why we argued in our brief  
16 that the Court should actually make that clear  
17 at some point in one of these cases.

18 JUSTICE GORSUCH: And causation,  
19 normally, a plaintiff can point to any evidence  
20 to -- to support an inference of causation,  
21 right?

22 MS. REAVES: That's correct. Any  
23 relevant evidence that's otherwise admissible,  
24 yes.

25 JUSTICE GORSUCH: Yeah. And so it's

1     this gloss that we're dealing with that we  
2     created. And then, at the end of the day, in  
3     terms of the parade of horrors, there's always  
4     qualified immunity, which we haven't even  
5     addressed, that -- that's layered on top of all  
6     of this, that -- that a government official  
7     could invoke?

8                 MS. REAVES: That's correct.  
9     Obviously, qualified immunity isn't directly at  
10    issue in this case before this Court. That --

11                JUSTICE GORSUCH: No, we haven't even  
12    -- we haven't gotten to that yet, right?

13                MS. REAVES: Right.

14                JUSTICE GORSUCH: You have to jump  
15    through this hoop before you get to that hoop,  
16    right?

17                MS. REAVES: That's correct, but I  
18    actually have an asterisk on that --

19                JUSTICE GORSUCH: Okay.

20                MS. REAVES: -- Justice Gorsuch. If  
21    this requirement is a part of the cause of  
22    action, not a part of the First Amendment  
23    requirement, as a general matter, an official is  
24    not going to be entitled to qualified immunity  
25    based on a mistake about the scope of the cause

1 of action.

2 JUSTICE GORSUCH: Well, you've got  
3 clearly established law, though, you know, and  
4 you've got to be able to point to something,  
5 right?

6 MS. REAVES: So I think, if the Court  
7 were to -- that's a reason we think --

8 JUSTICE GORSUCH: We've got the second  
9 part --

10 MS. REAVES: -- the Court should  
11 potentially clarify this.

12 JUSTICE GORSUCH: -- of qualified  
13 immunity still to deal with.

14 MS. REAVES: Yes, Justice Gorsuch.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Kavanaugh?

17 JUSTICE KAVANAUGH: I think what  
18 you're looking for, right, is evidence that  
19 suggests that other people who did what this  
20 person is alleged to have done wouldn't have  
21 been arrested and that this person was arrested  
22 because of her political viewpoint or particular  
23 speech or political expressive activities.

24 Does that sound right so far?

25 MS. REAVES: That's correct. I think

1 the second part would come in more under the Mt.  
2 Healthy inquiry after you get through the  
3 similarly situated inquiry, but yes, that's  
4 correct, Justice.

5 JUSTICE KAVANAUGH: And I guess --  
6 sorry to focus on the facts here, but this is an  
7 unusual case to be analyzing this in the  
8 abstract, it seems to me, because, if someone  
9 unintentionally ended up with documents that  
10 were not theirs and were prosecuted for some --  
11 some crime that was never prosecuted and was  
12 like, yeah, you did it by accident, but we're  
13 going to prosecute you anyway, okay, that sounds  
14 highly unusual and you can't find other people  
15 who would have done that.

16 But just thinking about inferences --  
17 you used the word "inferences" a lot -- if you  
18 have probable cause -- and I'm not saying it  
19 exists here or not -- if you have probable cause  
20 that someone intentionally stole government  
21 documents, intentionally, knowingly,  
22 intentionally to impair a government  
23 investigation or proceeding, I mean, that's  
24 going to be prosecuted all the time, right?

25 MS. REAVES: I agree with that,

1 Justice Kavanaugh. I think --

2 JUSTICE KAVANAUGH: Exactly.

3 MS. REAVES: -- the distinction here,  
4 though, is we agree with Petitioner that the  
5 only intent required is general intent. So the  
6 only intent she -- the government had to prove  
7 here was that she picked up the document and  
8 intentionally moved it.

9 So I think, because of that, that's  
10 why this was prosecuted as a misdemeanor. And  
11 if you want evidence for why it is just general  
12 intent, you can look at Texas Penal Code 6.03,  
13 can look at the treatise that Petitioner cites  
14 in her reply. And so I do think that's why this  
15 particular case does fit within the heartland of  
16 the Nieves exception.

17 That being said, the government isn't  
18 opposed if the Court were to draw a  
19 serious/non-serious crime distinction which  
20 probably would be along a misdemeanor/felony  
21 line. It just seems that this case clearly  
22 falls in the misdemeanor bucket.

23 JUSTICE KAVANAUGH: And are you  
24 looking at the -- I mean, now we're going back  
25 to the law in question rather than the facts,



1 but I think the idea was someone who committed  
2 these facts -- who engaged in these activities  
3 would not be prosecuted but for their speech.

4 And if they could -- they're  
5 prosecuted under the general intent, but if  
6 their activities, if the police officer believes  
7 this was done to prevent inquiries into which  
8 names were on the petition because there were  
9 allegations the day before that she had coerced  
10 or misled people into signing the petition --  
11 again, I'm not taking a position on any of that.

12 I mean, I don't know that you wouldn't  
13 be the -- the inference would be you would be  
14 prosecuted under some statute, even if it is "a  
15 general intent" statute, isn't that right?

16 MS. REAVES: So I think -- and, again,  
17 I think this is counterfactual here potentially,  
18 but I agree that if the facts are more serious  
19 than the potential charge, the relevant  
20 comparator would be other similarly situated  
21 persons and whether there was probable cause.

22 JUSTICE KAVANAUGH: Who engaged in  
23 those facts?

24 MS. REAVES: Who engaged in the same  
25 activity, yes. I do think that's the relevant

1 inquiry. Just because someone is charged with a  
2 lower crime or arrested for a lower crime, you  
3 know, doesn't kind of change the analysis as far  
4 as similarly situated goes.

5 JUSTICE KAVANAUGH: Right. And the  
6 whole case here -- yeah. Okay. Thank you.

7 JUSTICE BARRETT: I'd like to pick up  
8 there. So how important is the seriousness of  
9 the crime?

10 I said before, and I think Justice  
11 Kavanaugh is right to be more precise about  
12 this, so this is kind of a random crime, but  
13 it's random because of the facts of the case and  
14 it was a misdemeanor.

15 So, you know, jaywalking, the example  
16 in Nieves for the exception, I mean, jaywalking,  
17 I think everybody agrees that absent some  
18 circumstance, you know, where you endangered  
19 someone or darted in front of a car, jaywalking  
20 is not serious.

21 Does it matter at all? I mean, do we  
22 look at the facts? Do we look at the crime?  
23 And before we even get into the Nieves exception  
24 and looking at the kind of evidence that you're  
25 proposing, do we do some sort of threshold

1 analysis about whether the facts or the crime or  
2 both are actually serious?

3 MS. REAVES: So I think, under the  
4 Nieves exception, I do think it's similarly  
5 situated persons would have been arrested. I  
6 don't think it necessarily matters what crime or  
7 what level of seriousness of crime was listed on  
8 the warrant or was listed on, you know, the  
9 officer's notes. So I do think it's a  
10 conduct-based comparison.

11 I don't think the Court needs to  
12 address the seriousness question here  
13 necessarily because this is a misdemeanor crime,  
14 but we would have no objection to the Court  
15 drawing a felony/misdemeanor distinction and  
16 just saying that Nieves doesn't apply outside of  
17 that, and I think that's because -- and that  
18 could be appropriate because Nieves did seem to  
19 be concerned about endemic crimes that are  
20 infrequently prosecuted, where there's a large  
21 amount of discretion.

22 And from the federal government's  
23 perspective, where we see the most types of  
24 problematic and potentially retaliatory arrests  
25 are in situations like unlawful assembly,

1 blocking a sidewalk, disorderly conduct,  
2 trespassing on government property, and those  
3 things tend to be low-level endemic offenses  
4 where there's a lot of discretion.

5 JUSTICE BARRETT: That's true,  
6 although the line between misdemeanor and felony  
7 is drawn in different places in different  
8 jurisdictions, and it would be pretty hard, I  
9 think, to -- to hold that as a consistent line.

10 So, when you say similarly situated,  
11 you're saying that you look both at conduct and  
12 at crime, but the federal government doesn't  
13 have a position about whether we look at the  
14 seriousness of the crime?

15 MS. REAVES: So, as far as the  
16 seriousness of the crime goes, even if you don't  
17 --

18 JUSTICE BARRETT: Felony versus --

19 MS. REAVES: So I think, if you --

20 JUSTICE BARRETT: -- misdemeanor or  
21 whatever.

22 MS. REAVES: Yeah, I don't -- I think,  
23 if you decide not to draw some sort of strong  
24 line between those two, I think how that would  
25 generally play out is, when you have a felony or

1 a more serious crime, there's going to be a  
2 presumption that people are regularly prosecuted  
3 for that, and it's going to be very easy to find  
4 examples of people who engaged in the same  
5 conduct and were, in fact, prosecuted but didn't  
6 have the same speech.

7 JUSTICE BARRETT: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Jackson?

10 JUSTICE JACKSON: So I guess I'm going  
11 back to Justice Kagan's helpful dynamic in terms  
12 of figuring out the types of evidence, and I'm  
13 still a little bit confused about the  
14 government's position that, really, what is at  
15 issue here is a determination of the treatment  
16 of similarly situated persons, that that  
17 provides, I think you say in your brief, the  
18 compelling objective basis for inferring that  
19 the arrest was retaliatory.

20 But then you seem to accept numbers or  
21 different kinds of forms of evidence that don't  
22 in my view necessarily go directly to  
23 determining that a similarly situated person was  
24 treated differently.

25 So how -- I guess Justice Kagan put it

1     that there are sort of several inferences to get  
2     you from certain kinds of evidence to a  
3     similarly situated person.

4             So can you say more about why, for  
5     example, the government wouldn't be insisting  
6     that the plaintiff in this case at least say  
7     something about this having happened before,  
8     that there are similarly situated people?

9             I mean, I find it difficult -- and I'm  
10    not saying you're wrong. I'm just trying to  
11    puzzle it out. You say, you know, evidence that  
12    an arrest has never happened before. I mean,  
13    surely that's common sense. But I guess I'm  
14    trying to understand how, unless we have  
15    evidence that this same kind of thing happened  
16    before, we can take that evidence and say that's  
17    an inference that -- of the kind that you're  
18    trying to draw.

19            MS. REAVES: So I think you're either  
20    going to need to have evidence or you're going  
21    to need to have an inference that similarly  
22    situated people engaged in the same sort of  
23    activity and were not arrested. We just don't  
24    think there needs to be direct evidence of that.

25            And I think, for example --

1 JUSTICE JACKSON: If your only  
2 evidence was that this never happened before,  
3 would you also require a plaintiff to show -- I  
4 mean, the arrest, excuse me, never happened  
5 before, no one was arrested for this conduct,  
6 would you also require the plaintiff to show  
7 that other people had engaged in this conduct?

8 MS. REAVES: So the plaintiff would  
9 either need to show that or would need to  
10 show -- you know, not directly show that, not  
11 direct -- have direct evidence of that, but a  
12 plaintiff could have evidence that supports that  
13 inference or there could be a common-sense  
14 inference.

15 And I think maybe the jaywalking  
16 example is helpful. There might be a situation  
17 in which you have evidence no one's ever been  
18 arrested for jaywalking before. You don't have  
19 direct evidence that anyone has jaywalked out  
20 this corner in front of the -- a police officer,  
21 but that might be something that there could be  
22 an inference for in these sort of low-level  
23 endemic crimes.

24 JUSTICE JACKSON: All right. Thank  
25 you.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Ms. Blatt.

4 ORAL ARGUMENT OF LISA S. BLATT  
5 ON BEHALF OF THE RESPONDENTS

6 MS. BLATT: Thank you, Mr. Chief  
7 Justice, and may it please the Court:

8 Throughout history, probable cause has  
9 foreclosed retaliatory arrest suits. Nieves  
10 created one narrow exception for warrantless  
11 arrest where officers typically look away or  
12 give warnings or tickets. This Court should not  
13 blow up that exception.

14 First, this case involves a warrant.  
15 Warrants do not entail the boundless officer  
16 discretion that justified the Nieves exception  
17 in the first place. Warrants also deter abuse  
18 by inviting judicial scrutiny, and warrants add  
19 intervening actors that make it even less likely  
20 that animus caused the arrest. At a minimum,  
21 warrants are the last place to widen the Nieves  
22 exception.

23 Second, this case involves theft. For  
24 crimes such as theft, where officers typically  
25 arrest, the justification for the Nieves



1     exception just doesn't exist. It is only where  
2     officers rarely arrest that probable cause loses  
3     its probative force. Extending the exception to  
4     everything from theft to terrorism just invites  
5     questions about why police arrested some people  
6     and not others.

7             Third, Petitioner never alleged  
8     comparators, i.e., others who engaged in  
9     similarly conduct but were not arrested. Only  
10    comparators rule out the probative value of  
11    probable cause. Petitioner and the government  
12    would allow anyone to sue with objective  
13    evidence of animus or using so-called negative  
14    evidence, the absence of arrest for similar  
15    conduct.

16            But then every arrest invites a  
17    lawsuit. Every case gets past a motion to  
18    dismiss and on to discovery and before a jury.  
19    Plaintiffs will always contest the police  
20    version of events and then point to the -- the  
21    lack of arrest records for their reframed  
22    conduct. Take this case: The complaint alleges  
23    Petitioner accidentally misplaced papers and  
24    denies that Petitioner acted intentionally, but  
25    the warrant application recounts a case of

1 serious intentional theft.

2 Now, Petitioner was free to challenge  
3 probable cause but instead she admitted it. And  
4 if you accept Petitioner's gamesmanship, those  
5 arrested for domestic violence will claim the  
6 victim just slipped, those arrested for threats  
7 will claim they were just joking, and those  
8 arrested for embezzlement will claim they just  
9 accidentally misplaced the funds.

10 I welcome questions.

11 JUSTICE THOMAS: I, of course, agreed  
12 with you in Nieves, with what you just said, but  
13 we've crossed that bridge. And you've heard a  
14 discussion of what kind of evidence would be  
15 necessary to counter the causal connection or to  
16 -- to change it, to overcome probable cause  
17 determination or the warrant.

18 What would be some of your responses  
19 to some of the arguments that you have heard for  
20 the type of evidence? For -- what I'm  
21 concerned -- interested in, for example, is --  
22 and there are rare cases where crimes are rarely  
23 punished, and that you could have the exact same  
24 argument. What kind of evidence would you use  
25 in a case like that to counter the probable

1     cause?

2                   MS. BLATT:  Yeah, I think if -- the  
3     way I read Nieves, as the narrow exception that  
4     the Court said it was, it should be easy to  
5     plead the exception because it's talking about  
6     cases where people actually engage in the  
7     conduct but officers give a ticket or a citation  
8     or a warning or they look away.

9                   And you just don't have that kind of  
10    case.  The Court was talking about jaywalking,  
11    dog off a leash, eating on the subway, not  
12    wearing a seatbelt.  Not cases where the  
13    assumption is when there is probable cause if  
14    officers typically arrest, and I just think that  
15    that is per se true with theft, and it's the  
16    opposite presumption is true with crimes where  
17    you can get a ticket.  No one gets a ticket for  
18    murder.  No one gets a ticket for assault.  No  
19    one gets a ticket or citation for theft.  That's  
20    not a thing.

21                  JUSTICE THOMAS:  Well, I think the --  
22    I -- well, I'm not going to say I have agreed  
23    with you again, but that's not where we are now,  
24    and what I'm trying to get you to engage with is  
25    some of the back and forth we've had so far.

1 MS. BLATT: Okay. So if we're going  
2 to take it to any crime goes and misdemeanors in  
3 Texas are punishable by up to a year in jail,  
4 you will have every case where the plaintiff,  
5 like in this case, says you have to accept my  
6 allegations as true, which I did nothing wrong.

7 And then the officers -- thank God we  
8 here had a warrant, but if there wasn't a  
9 warrant, you will not hear the officers' version  
10 of events. The only reason you heard the  
11 officers' side of the story, as in Nieves, was  
12 you had a summary judgment record. That  
13 complaint alleges a bone-chilling case of police  
14 brutality that made me not want to ever step  
15 foot in Alaska. You never even heard the  
16 officer's side until he was deposed, you had  
17 massive discovery, you had sensitive police  
18 documents. And every case -- very few people  
19 get arrested and think, oh, yeah, I was caught  
20 and I still think there was retaliation. Every  
21 drug case, wasn't my drugs. Every --

22 JUSTICE SOTOMAYOR: Counselor, you're  
23 characterizing this as a theft, as -- and the  
24 assumption of Justice Kavanaugh was the same.  
25 But the government's pointing out, and I think

1     rightly, that this wasn't charged as a theft  
2     because theft would have a defense of there was  
3     no intention to permanently deprive someone.  
4     There's a whole series of things. The crime  
5     that was charged here was a crime of moving a  
6     document, and all it required was a general  
7     intent to move it. The defense was I didn't --  
8     I did it accidentally. She may have been  
9     defeated in that or not.

10            But the point is that there are  
11     charges brought for stealing government  
12     documents, and there are charges that are  
13     brought for moving government documents. And  
14     that's never happened in a situation like this.

15            MS. BLATT: So --

16            JUSTICE SOTOMAYOR: So my point is  
17     you're building it up on the facts of the case  
18     to characterize it as something that wasn't the  
19     charge. And I think that what the government is  
20     saying is, for this kind of misdemeanor that was  
21     charged, it doesn't happen when there's a  
22     dispute about whether something was moved  
23     intentionally or not.

24            I'd go a step further, having been a  
25     former prosecutor. Even if it was intentional,

1 we probably wouldn't have brought the charges  
2 because no harm, no foul, no harm.

3 MS. BLATT: Mm-hmm.

4 JUSTICE SOTOMAYOR: And, in fact, two  
5 police officers wouldn't charge it, one public  
6 prosecutor didn't charge it. In the end, even  
7 with a warrant, the charges were dropped. This  
8 is just not the kind of situation like in the  
9 jaywalking example.

10 MS. BLATT: Mm-hmm.

11 JUSTICE SOTOMAYOR: With -- when  
12 there's a dispute about things like this, people  
13 are not arrested in this way.

14 MS. BLATT: So --

15 JUSTICE SOTOMAYOR: That's exactly  
16 what I think their claim is.

17 MS. BLATT: Mm-hmm.

18 JUSTICE SOTOMAYOR: You're -- you're  
19 characterizing it differently, but that's the  
20 bottom line of this claim.

21 MS. BLATT: So -- so at least four  
22 responses. One, there was no charge here.  
23 There was an arrest. And the arrest warrant,  
24 three times, says the opposite of what you just  
25 said. It said the video clearly shows Gonzalez

1 intentionally concealing and removing a petition  
2 from custody. Page 49, there's no mistake  
3 Gonzalez knows what she's holding. She's  
4 holding the petition. At warrant page 53, I'm  
5 charging her for meeting the elements of the  
6 statute because she had a desire to  
7 intentionally remove and impair the availability  
8 of this document from city custody.

9 Now, on the statute, I'm shocked by  
10 the government because the government has its  
11 own parallel, 18 U.S.C. 2071, that is the same  
12 tampering statute. All states have a tampering  
13 statute, and they all read the same way with  
14 intent. Now, they cite the treatise, but the  
15 treatise she didn't cite was the section on  
16 intent and it said you have to have a conscious  
17 desire to remove the documents from the  
18 government.

19 If you look at all six provisions of  
20 that statute, it's wrongdoing. All of it. It  
21 is inconceivable that a statute called tampering  
22 and that has all bad acts, this one little act  
23 was, oh, here, I just committed theft because I  
24 just moved something for the other, it's just  
25 not credible.

1           But if you -- if you agree with her  
2     and the government that I am wrong, then this  
3     should have been an easy case for her to allege  
4     a comparator, but she didn't even allege Mayor  
5     Trevino was a comparator because she alleged no  
6     comparators.

7           Now, there's been talk about the Fifth  
8     Circuit, and I just want to defend --

9           JUSTICE SOTOMAYOR: What do you do  
10    with the fact that it's in her complaint? She  
11    gave us a page cite.

12          MS. BLATT: She gave you a page cite  
13    that mentioned the mayor had the document  
14    between one night and the next. There's no --  
15    the comparator allegation is at 117 and it's an  
16    absence of one. And that's what the district  
17    court relied on. It's what the Fifth Circuit  
18    reversed. That her complaint alleges -- again,  
19    it's 117a -- that no one has been ever arrested  
20    for trying to take a non-binding and expressive  
21    document.

22          Now, when you get it to that level of  
23    specificity that no one took, you know, the  
24    feathers from the Smithsonian, then the Fifth  
25    Circuit said naturally, well, who steals



1 feathers from the Smithsonian? And the -- the  
2 Fifth Circuit said, on pages 29 and 30, you have  
3 to have some comparative evidence.

4 But she could have, but we know why  
5 she didn't. We know why she didn't allege  
6 comparators, because it would have been  
7 preposterous to say, yeah, public officials,  
8 secret away government documents to avoid, you  
9 know, checking on things like forgery and lying,  
10 but no one ever gets arrested.

11 JUSTICE JACKSON: But isn't --

12 MS. BLATT: She didn't allege that.

13 JUSTICE JACKSON: -- isn't -- isn't  
14 our goal here to try to assess whether or not  
15 she should have had to allege that? So I see  
16 you talking about this at a certain level of  
17 specificity, and I'm trying to understand what  
18 your view is of what she should have said in  
19 order to satisfy the rule and whether the rule  
20 should be as the Fifth Circuit lays it out.

21 MS. BLATT: So -- so a plaintiff has  
22 two choices, and she could have had two choices  
23 here. She could have at least said I'll allege  
24 a comparator. This statute -- I'm not going to  
25 challenge probable cause or this statute, but it

1 covers completely innocent conduct. And I'm  
2 going to allege people always engage in innocent  
3 conduct and don't get arrested.

4 And then you and I or we would have  
5 been having a fight with, well, can you look at  
6 the comparators from the complaint or shouldn't  
7 you look at the comparators?

8 JUSTICE JACKSON: So for you, it's not  
9 enough to say no one has ever been arrested the  
10 for this kind -- doing this kind of thing  
11 before?

12 MS. BLATT: No, because it's that --  
13 it's so much easier to say, and people do it.  
14 Here are the reasons why the government said  
15 this, but they forgot what they said on page 20  
16 of their brief --

17 JUSTICE GORSUCH: Hold on. I -- I --  
18 I just want to pin -- put a pin in that, if I  
19 might. So you're saying that an allegation that  
20 the statute's never been enforced against anyone  
21 but it was against me --

22 MS. BLATT: Mm-hmm.

23 JUSTICE GORSUCH: -- because of my  
24 First Amendment expression is not enough to  
25 state a claim?

1 MS. BLATT: Absolutely not. And the  
2 reason is why the government says this on page  
3 20 of their brief.

4 JUSTICE GORSUCH: How many -- how many  
5 statutes are there on the books these days, many  
6 of which are hardly ever enforced? Last I read,  
7 there were over 300,000 federal crimes --

8 MS. BLATT: Mm-hmm.

9 JUSTICE GORSUCH: -- counting statutes  
10 and regulations. I can't imagine how many there  
11 are at the state and local level.

12 And you're saying they can all sit  
13 there unused, except for one person who alleges  
14 that I was the only person in America who's ever  
15 been prosecuted for this because I -- I dared  
16 express a view protected by the First Amendment  
17 and that's not actionable?

18 MS. BLATT: Well, I'm going to -- if  
19 -- if -- I'm going to try to convince you  
20 otherwise, but I have to try to do that.

21 JUSTICE GORSUCH: Yeah. I'd like --  
22 I'd like -- good luck.

23 (Laughter.)

24 MS. BLATT: Okay. So it's -- well,  
25 let me just try this, Justice Gorsuch. If it's

1 never been enforced, then just say, people do  
2 it. If there's a statute that makes it illegal  
3 to commit adultery, it's not that hard to say I  
4 -- I've committed adultery or my neighbors  
5 committed adultery.

6 If the statute -- let's just put it --  
7 and, again, the government tells you on page 20  
8 of its brief the fact that the statute has never  
9 been enforced could prove little or nothing.

10 And here are four reasons why. Maybe  
11 no one commits the crime. Maybe you don't see  
12 carjacking in Amish country. Maybe you don't  
13 see people stealing boats in Death Valley.  
14 Maybe people -- the crime itself is unusual.  
15 Maybe it's incest or cannibalism. Maybe it's  
16 something like government --

17 JUSTICE GORSUCH: All of which the  
18 Court could take into consideration in doing a  
19 but-for causation analysis. If -- if -- if you  
20 really think that there's a case in Amish  
21 country and there's no carjacking, the Court can  
22 say that evidence is not enough.

23 But you're saying that -- that a court  
24 can't even look at that evidence, the fact that  
25 a crime has never been prosecuted, ever, except

1     for against a person who alleges a First  
2     Amendment violation, I have to turn a blind eye  
3     to that.

4                 MS. BLATT:  No, you --

5                 JUSTICE GORSUCH:  I can't even look at  
6     it is your --

7                 MS. BLATT:  You --

8                 JUSTICE GORSUCH:  That's your  
9     argument.

10                MS. BLATT:  No.  My argument is it's  
11     alone insufficient.  Of course, you can look at  
12     it, and, of course, it's highly relevant.

13                JUSTICE GORSUCH:  Oh, you -- hold on.  
14     You can look at it and it is highly relevant?

15                MS. BLATT:  If -- if you have a simple  
16     allegation that there is a person on the planet  
17     who has done that conduct.

18                JUSTICE KAGAN:  A named person on the  
19     planet?

20                MS. BLATT:  No.

21                JUSTICE KAGAN:  Just a -- a person on  
22     the planet?

23                MS. BLATT:  I think you can have news  
24     articles that people jaywalk, you can have news  
25     articles that people eat on the subway.  You can

1     have -- I mean, generally, I thought -- again, I  
2     didn't write Nieves, but I thought Nieves was  
3     talking about crimes where people were not  
4     embarrassed to admit that they did them and it  
5     wouldn't be that hard to say I can't believe I  
6     was arrested for, you know, crossing an  
7     intersection. And, no, you do not have to say  
8     the same intersection.

9             JUSTICE KAGAN: The -- the Fifth  
10    Circuit understood this rule to say you have to  
11    show a person within this jurisdiction who has  
12    engaged in this conduct before and was not  
13    arrested.

14            And I think what Justice Gorsuch is  
15    saying is that that has got to be wrong.  
16    Whatever else you want to put into this bucket,  
17    you should be able to say they've never charged  
18    somebody with this kind of crime before and I  
19    don't have to go find a person who has engaged  
20    in the same conduct.

21            MS. BLATT: And -- and, again, we're  
22    going to get into a dispute about, if you accept  
23    the warrant -- if you accept the plaintiff  
24    complaint, the -- the -- the -- the officer will  
25    always lose and the officer can never arrest and

1 the officer doesn't -- literally can never  
2 arrest without worrying about getting sued and  
3 --

4 JUSTICE JACKSON: Except I thought  
5 that was the point of qualified immunity. This  
6 was the other characterization that I was going  
7 to ask you about, which is you say every case  
8 goes forward, we never hear the officer's side  
9 of the story. But, I mean, isn't that what  
10 qualified immunity does?

11 MS. BLATT: It was denied here. It  
12 was already denied because the court said, the  
13 district court said, Nieves created an exception  
14 and you adequately pled the exception.

15 So it was actually denied. And Judge  
16 Oldham said -- the -- the Fifth Circuit reversed  
17 on the First Amendment issue. Judge Oldham said  
18 he's not so sure how he would rule on qualified  
19 immunity.

20 But we're happy to win on qualified  
21 immunity, but we actually lost it here. And the  
22 Court in Nieves could have done the same thing.  
23 Generally, you want to keep it so officers  
24 aren't afraid of being sued.

25 JUSTICE SOTOMAYOR: All we do is

1 vacate and remand and let them -- and let them  
2 --

3 MS. BLATT: Well, I hope you vote for  
4 some qualified immunity. That would be nutty  
5 just to vacate and remand because you just want  
6 us to lose? I mean --

7 JUSTICE BARRETT: But you -- but you  
8 still have to satisfy kind of to go to Justice  
9 Jackson's point, you know, it's -- I don't think  
10 it would be the case that anybody who was  
11 arrested could make this charge and then get on  
12 to discovery because then you'd still have to  
13 survive a motion to dismiss on the Mt. Healthy  
14 inferences, right?

15 I mean, she has -- if you put aside  
16 the probable cause, the no probable cause  
17 requirement, if you put that aside, I mean, she  
18 has all of this evidence for retaliation. Not  
19 everybody who's arrested is going to have the  
20 kind of evidence she has on that score.

21 MS. BLATT: Well --

22 JUSTICE BARRETT: And that will knock  
23 out cases, right?

24 MS. BLATT: -- I disagree, especially  
25 given the type of evidence she alleges. I mean,



1 the stuff she's alleging doesn't have any  
2 citation. It just says she showed up and she --  
3 somehow the DA would have entered a warrant into  
4 a satellite booking process. I have no idea  
5 what she's talking about, that you had to get a  
6 -- the Fifth Circuit asked her specifically was  
7 there any requirement that the police officer  
8 have to go to a DA and she says no, but she  
9 says, well, it's the normal procedure, without a  
10 citation in the record.

11 But I think the whole point of Nieves  
12 was we weren't going to go down this road. We  
13 lost on a motion to dismiss --

14 JUSTICE KAVANAUGH: Can I -- can I ask  
15 about --

16 MS. BLATT: -- already.

17 JUSTICE KAVANAUGH: -- Justice  
18 Gorsuch's question because I think that's  
19 important. And maybe I'm looking at it the  
20 wrong way, but I assume people who intentionally  
21 engage in this conduct are prosecuted all the  
22 time, generally speaking, namely intentionally  
23 stealing government documents, intentionally  
24 removing government documents, et cetera.

25 MS. BLATT: Yes.

1 JUSTICE KAVANAUGH: Intentionally  
2 obstructing government proceedings. People who  
3 accidentally take a document are -- are never  
4 prosecuted presumably, put aside what crimes. I  
5 think the government said look at the conduct,  
6 not the crime.

7 MS. BLATT: We agree.

8 JUSTICE KAVANAUGH: So how do we  
9 assess that at this stage when they're alleging  
10 they did it unintentionally and they would have  
11 a good case if that were, in fact, true, but the  
12 police officer said there's probable cause that  
13 she did it intentionally. She intentionally  
14 stole. How do we assess that?

15 MS. BLATT: Well, you wanted --

16 JUSTICE KAVANAUGH: Because I think  
17 Justice Gorsuch's question goes -- is correct if  
18 it's unintentional, but I don't think it's  
19 correct if it's intentional.

20 MS. BLATT: So the in the weeds is  
21 that's why you need comparators, but at a higher  
22 level, it is why we're making the argument that  
23 this will happen in every case if you extend it  
24 beyond cases where police don't typically arrest  
25 because every assault case will be I was -- you

1 know, every looting case will be I didn't -- I  
2 took a toothbrush or I -- you know, I don't know  
3 how that -- that ring got in my bag, or I left  
4 the party as soon as the cocaine came, and the  
5 officer will say, you know, no, I saw you with  
6 it.

7 And we'll be debating, I don't know, I  
8 think half of you will say that should go to a  
9 jury and half of you think this is not a good  
10 idea for officers. How can they kind of enforce  
11 the law in this type of environment?

12 I would say, if you're going to do  
13 comparators, you have to look at the comparators  
14 that's alleged in the warrant application. The  
15 problem is you might not have a warrant  
16 application in all kinds of cases. If it's a  
17 warrantless arrest, all you're going to have is  
18 the complaint, and the complaint says, I'm  
19 innocent.

20 JUSTICE BARRETT: What about the kind  
21 of crimes the government was talking about, like  
22 unlawful assembly and those kinds of crimes,  
23 where, you know --

24 MS. BLATT: Have at it.

25 JUSTICE BARRETT: -- hey, you

1 intentional -- you intentionally do it, you  
2 intentionally gathered, you intentionally  
3 blocked a street.

4 MS. BLATT: Yeah. Have at it. That  
5 is Nieves. That is the hard core of that should  
6 be easy to allege, and we agree with a lot of  
7 the government's examples about comparators.  
8 You can use yourself as a comparator on a  
9 previous occasion. If you're the only  
10 journalist arrested for assembly, that kind of  
11 stuff, I thought that was the point of Nieves.  
12 That should -- should go.

13 JUSTICE KAVANAUGH: The, like, protest  
14 cases?

15 MS. BLATT: Protest cases.

16 JUSTICE KAVANAUGH: Yeah. Or --

17 MS. BLATT: Not theft cases, not  
18 assault cases, not insider trading or tax fraud  
19 or political corruption. I mean, I really would  
20 advise every criminal to put a, you know,  
21 political bumper sticker on their car and --

22 (Laughter.)

23 JUSTICE KAGAN: I guess I was -- I  
24 thought that the part -- I thought that the  
25 point of Nieves was, if you have solid objective

1 evidence that you're in a world in which you  
2 were arrested for something that somebody who  
3 hadn't engaged in your speech activities would  
4 not be arrested for, that you should be able to  
5 present that evidence to get over the probable  
6 cause bar.

7 So here's a -- a -- a hypothetical.  
8 Suppose that there were two videos in this case.

9 MS. BLATT: Two videos.

10 JUSTICE KAGAN: The second video is of  
11 a meeting with all the relevant officials and  
12 they're all talking about how they can get back  
13 at Ms. Gonzalez, and they say: Hey, why don't  
14 we do this investigation, we'll go arrest her,  
15 we'll go, you know, because she moved this piece  
16 of paper, and -- and that's -- and they all  
17 agree to that.

18 Are you saying that that can't come in  
19 to get over the probable cause bar in Nieves?

20 MS. BLATT: No, that -- that's a  
21 Lozman claim, and there is a Lozman claim  
22 pending against the city.

23 JUSTICE KAGAN: Well, it's not a  
24 Lozman claim against the city. It's the same  
25 defendants here.

1 MS. BLATT: Oh, it's just -- just  
2 officers agreeing?

3 JUSTICE KAGAN: It's just -- yeah,  
4 it's the same defendants, but there they all are  
5 on videotape agreeing how they're going to  
6 retaliate against Ms. Gonzalez.

7 MS. BLATT: That was the Nieves  
8 complaint is Officers Wayte and Bartlett -- I  
9 hope I have their names -- or Nieves and -- and  
10 Wayte were conspiring to get this person, and so  
11 you just didn't have them on videotape.

12 JUSTICE KAGAN: Yeah. Well, now you  
13 have them on videotape. That seems like pretty  
14 good objective evidence to get you over the  
15 probable cause bar.

16 MS. BLATT: This -- this --

17 JUSTICE KAGAN: I mean, I guess what  
18 I'm suggesting is that the point -- look, the  
19 point of this probable cause bar is we don't  
20 want every old allegation of, like, you know,  
21 they had a bad intent and they were trying to  
22 look at -- but, if you have solid objective  
23 evidence that you were being treated differently  
24 from another person in your situation, that that  
25 solid objective evidence should -- and part of

1     that might be comparative in the way that you're  
2     suggesting, but -- but there might be other  
3     things too.

4             MS. BLATT: I mean, the problem is  
5     this is a poster child. There is absolutely  
6     nothing in the complaint that suggests that  
7     either the chief of police or this police  
8     officer had any reason to even know who this  
9     woman was or her speech.

10            JUSTICE GORSUCH: You're -- you're  
11     fighting the facts and -- and -- and -- and --

12            MS. BLATT: Well, but that's what this  
13     case is going to govern.

14            JUSTICE GORSUCH: Justice Kagan's  
15     asking you a hypothetical question. I'd be  
16     grateful if you'd answer it.

17            MS. BLATT: Sure. The problem with  
18     this anything goes --

19            JUSTICE KAGAN: It's good I have an  
20     enforcer.

21            MS. BLATT: Yes.

22            (Laughter.)

23            JUSTICE GORSUCH: Anytime.

24            JUSTICE KAGAN: -- you get carried  
25     away doing all this other stuff.

1 MS. BLATT: And your question --

2 JUSTICE KAGAN: But I had a  
3 hypothetical --

4 MS. BLATT: -- was excellent.

5 JUSTICE KAGAN: -- and it was a good  
6 one.

7 JUSTICE GORSUCH: It was.

8 (Laughter.)

9 MS. BLATT: Because you're a good  
10 advocate, and any advocate is going to hire you  
11 or somebody like you who's going to say my  
12 evidence is really good, look how these people  
13 were out to get me, I'm an unpopular figure,  
14 this is a small town, I didn't like the road  
15 construction.

16 JUSTICE KAGAN: No, now you're still  
17 fighting --

18 JUSTICE GORSUCH: Yeah.

19 JUSTICE KAGAN: If -- if --

20 MS. BLATT: Okay. I'm on your other  
21 hypo.

22 JUSTICE GORSUCH: You don't need an  
23 enforcer.

24 (Laughter.)

25 MS. BLATT: Any hypothetical, it is



1     going to be: I was picked on, and I'm going to  
2     be able to cite any evidence that's anything  
3     but, I guess, an officer's subjective statement.  
4     Yeah, because that's the only thing you  
5     specifically ruled out. And the Court, I think,  
6     said very clearly only comparator evidence.  
7     Once you have a similarly situated person who's  
8     not engaged in speech --

9             JUSTICE KAGAN: Well, look, you don't  
10    have to -- from my videotape, you do not have to  
11    make a very long leap of inference to say: Oh,  
12    that's comparative. You know, this videotape is  
13    like let's go get Ms. Gonzalez. You don't have  
14    to say: And we wouldn't have gotten everybody  
15    else.

16            MS. BLATT: Right.

17            JUSTICE KAGAN: It's obvious on its  
18    face that this is treating Ms. Gonzalez  
19    differently.

20            MS. BLATT: And what I'm concerned  
21    about is the next hypothetical where the  
22    plaintiff, like in Nieves, says that officer  
23    said to me: You know, I was out to get you. Or  
24    I'm so glad -- you know, it's time to arrest  
25    you. I've been waiting.

1                   I mean, the -- the -- we all know that  
2     the government --

3                   JUSTICE KAGAN: I mean, now you're  
4     just -- you're going to the statements that  
5     obviously are not coming in under Nieves because  
6     they're just statements that the officer made --

7                   MS. BLATT: But you have them on  
8     videotape, right?

9                   JUSTICE KAGAN: -- reflecting his  
10    state of mind at that time. So --

11                  MS. BLATT: Isn't the only -- I'm  
12    sorry. Maybe I misunderstood your hypo. Isn't  
13    it only because there's a videotape of the  
14    officer's statements?

15                  JUSTICE KAGAN: Well, it's -- it's --  
16    it's -- it's pretty clear, objective evidence  
17    that a judge can look at, which makes it clear  
18    that this, Ms. Gonzalez was picked on because  
19    she was doing what the First Amendment allows  
20    her to do.

21                  MS. BLATT: I worry that if you write  
22    an opinion that says only that evidence is okay;  
23    if you've got the officer on videotape, that's  
24    fine. I worry where you're going is anything  
25    that I as a judge think is pretty relevant that

1 she was picked on. That's what scares me, and  
2 that's what scares me representing police  
3 officers, literally, you know, are trying to  
4 work to get the community to trust them and do  
5 their job, and don't, you know, have the --  
6 smear campaigns every time they're sued.  
7 It's -- it's --

8 JUSTICE ALITO: Presence or absence of  
9 the videotape would be important if the case  
10 actually goes to trial, but prior to that, I  
11 really don't see why that changes the situation.  
12 So whether you have a videotape that shows that  
13 they really were conspiring to get a particular  
14 person, or all you have is an allegation by the  
15 person who was arrested, that the arresting  
16 officer said the only reason why I'm arresting  
17 you is because the mayor told me to do it,  
18 that's -- for purposes of a motion to dismiss or  
19 summary judgment, it seems to me they count --  
20 it counts just as much as the videotape. It's  
21 just not as persuasive perhaps in the end.

22 MS. BLATT: Now you're my enforcer. I  
23 think.

24 (Laughter.)

25 JUSTICE ALITO: No, I'm not being --

1 I'm not trying to be your enforcer by any means.

2 MS. BLATT: But it sounds like a very  
3 helpful question.

4 JUSTICE ALITO: You don't need one, by  
5 any means.

6 (Laughter.)

7 MS. BLATT: I think you're saying  
8 that's helpful, that every complaint can allege,  
9 you know, the officer said something or, you  
10 know -- I mean, I hate to -- but Mayor Barry  
11 said -- you know, he showed up at that Vista  
12 Hotel to meet his girlfriend for sex, not the  
13 drugs, and the FBI was clearly out to get him.  
14 And you didn't know that he did anything wrong  
15 until you watched the videotape.

16 JUSTICE ALITO: Now, what about these  
17 two situations? So there's a protest and one of  
18 the protestors is 6 foot 5 and weighs 250 pounds  
19 and used to be a -- a linebacker in college and  
20 gets into an argument with a police officer  
21 about something and pushes the police officer.  
22 The police officer arrests him, charges him with  
23 assault, which is a felony, all right? That's  
24 -- well, I'll continue --

25 CHIEF JUSTICE ROBERTS: No, go ahead.

1 JUSTICE ALITO: All right. Then the  
2 -- at another protest, the protester is a frail,  
3 elderly person who weighs 90 pounds and is  
4 arrested for assaulting the officer because this  
5 person pushed the officer with whatever strength  
6 that arrestee has, I mean, in -- in the latter  
7 situation, and is charged with assault.

8 Is -- what would be the comparator in  
9 that situation? You have to find another  
10 situation where there's a person of similar  
11 statute --

12 MS. BLATT: No.

13 JUSTICE ALITO: -- stature who --

14 MS. BLATT: No, I would loosen --  
15 literally, our comparator in this case, had she  
16 pled it, could have been anyone who  
17 intentionally takes government documents.  
18 Didn't have to be even a city official, didn't  
19 have to be what kind of document.

20 So in your -- again, I would never put  
21 this on assault because every case will be: I  
22 just elbowed, everyone else was punching, and I  
23 was the only one arrested. But assuming it's  
24 going to do assault, it's easy to allege a  
25 comparator: Everyone at the bar was throwing

1 punches, and I was the only one wearing my  
2 T-shirt that said "I hate the police."  
3 You meet the comparator requirement  
4 easily.  
5 JUSTICE ALITO: All right. Thank you.  
6 CHIEF JUSTICE ROBERTS: Justice  
7 Thomas?  
8 Anything further, Justice Alito?  
9 Anything? Justice Gorsuch?  
10 Justice Kavanaugh?  
11 Oh, I'm sorry. Justice Barrett?  
12 Justice Jackson?  
13 MS. BLATT: Well, thank goodness.  
14 (Laughter.)  
15 MS. BLATT: Thank you.  
16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.  
18 Rebuttal, Ms. Bidwell?  
19 REBUTTAL ARGUMENT OF ANYA A. BIDWELL  
20 ON BEHALF OF THE PETITIONER  
21 MS. BIDWELL: I have four points to  
22 make:  
23 So first point is I think it's very  
24 important to look at the two questions presented  
25 in context of each other. So if you are saying

1     that Nieves covers the vast bulk of cases, which  
2     are the cases where police officers are making  
3     on-the-spot arrests, for example, during  
4     protests, during art and event festivals, when  
5     they are responding to domestic violence calls.  
6     That's the vast bulk of police cases. If you  
7     say that Nieves only covers that, then when you  
8     talk about objective evidence carveout, the --  
9     the exact example of a comparator might actually  
10    make sense because then you can have a  
11    comparator, for example, during a protest.

12                But if you are including mayors into  
13    the general Nieves police arrest framework, that  
14    it is very important that objective evidence  
15    carveout is not just limited to examples of  
16    non-arrest, especially, as Respondent argues,  
17    they say we should have irrebuttable presumption  
18    with warrants. So then mayors get an  
19    irrebuttable presumption with warrants, and the  
20    only people who are going to be sued for First  
21    Amendment retaliation will be police officers  
22    protesting events under the endemic crime  
23    similarly situated exception.

24                So it's important to keep those two  
25    perspectives in terms of question presented 1

1 and question presented 2.

2 And, Justice Sotomayor, on the -- your  
3 question about data, National Police  
4 Accountability Project, on page 24 of their  
5 amicus, talk about how there is no floodgates  
6 after the Seventh Circuit and the Ninth  
7 Circuit's interpretation of the carveout. They  
8 say that they were only 178 cases overall  
9 analyzed, and only 17 cases out of those 178  
10 proceeded to -- past motion to dismiss or motion  
11 for summary judgment.

12 And, finally, I'd just like to mention  
13 that political retaliation is dangerous. The  
14 First Amendment has to mean something. Mayors  
15 should not be allowed to launder animus through  
16 warrants. Common law understood that, and we  
17 respectfully ask that this Court understand that  
18 too. Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 The case is submitted.

22 (Whereupon, at 11:30 a.m., the case  
23 was submitted.)  
24  
25



## Official - Subject to Final Review

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