

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

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P R O C E E D I N G S

(10:04 a.m.)

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

Ms. Bidwell.

ORAL ARGUMENT OF ANYA A. BIDWELL

ON BEHALF OF THE PETITIONER

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

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

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

Second, Respondents parse Nieves like a statute to say that it limits plaintiffs to a particular type of comparative example. To be 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 -- a
16 plaintiff could bring a claim even if there was
17 a warrant. For example, in Jackson versus
18 American Telephone Company, there was a warrant
19 for a serious offense. It was a warrant for
20 assault with a deadly weapon, and it was
21 properly issued. But a plaintiff still had a
22 cause of action because that warrant was used as
23 a pretext for private purposes, inconsistent
24 with 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 -- when -- we're -- we were talking here
22 about not a 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 SOTOMAYOR: 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, Nieves, we're
9 talking about the holding not extending beyond
10 its reasoning. And the reasoning in Nieves is
11 colored by this representative case, which,
12 as -- as the government argued in Nieves, is the
13 vast bulk of cases which are an 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 from one
8 --

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

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

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

1 class of cases that Nieves was talking about.

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

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

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

24 And that very example also appears in
25 Reichle. That very example also appears in

1 Lozman. This is the causal complexity that is
2 particularly difficult to untangle.

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

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

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

17 JUSTICE JACKSON: I think --

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

24 MS. BIDWELL: Your Honor, we would be
25 happy with the objective evidence carveout as

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

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

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

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

22 MS. BIDWELL: This -- we're making
23 this argument because Ms. Gonzalez's case
24 clearly is not the kind of case that the Court
25 was concerned with in Nieves. This case is much

1 more similar to Lozman on the facts, and in that
2 case, you said that Mt. Healthy rules should
3 apply.

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

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

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

24 And it seems hard to me to draw that
25 line in a way that would prove administrable,

1 predictable, so I was wondering -- yeah, respond
2 to that.

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

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

1 trained on.

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

9 JUSTICE SOTOMAYOR: To that --

10 JUSTICE BARRETT: Counsel -- go ahead.

11 JUSTICE SOTOMAYOR: To that second
12 question or to the first question presented --

13 MS. BIDWELL: Yes.

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

22 MS. BIDWELL: Your Honor -- sorry.

23 JUSTICE SOTOMAYOR: Where was that
24 from?

25 MS. BIDWELL: Yeah, it is in the

1 complaint. It's on page 110A of the complaint.

2 JUSTICE SOTOMAYOR: I was reading the
3 complaint too fast. So thank you.

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

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

16 JUSTICE KAVANAUGH: Why is that? I
17 don't understand that.

18 MS. BIDWELL: Under the Fifth Circuit
19 --

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

24 MS. BIDWELL: Yes, Your Honor, but the
25 way that the Fifth Circuit is describing that

1 rule, just the fact that Ms. Gonzalez is a
2 council member and Mayor Trevino is a mayor and
3 they're serving different functions makes the
4 Mayor not similarly situated to Ms. Gonzalez.

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

10 JUSTICE BARRETT: Counsel, can I ask
11 --

12 CHIEF JUSTICE ROBERTS: Why not --

13 JUSTICE KAVANAUGH: This is a very --
14 go ahead.

15 JUSTICE BARRETT: Finish.

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

18 You -- when you refer to it as a
19 comparator, are you referring to it in the terms
20 of the Nieves exception?

21 MS. BIDWELL: Yes, we're talking about
22 Nieves exception.

23 CHIEF JUSTICE ROBERTS: Well, I mean,
24 in Nieves, the whole point is -- we were talking
25 about jaywalking, and the -- the point is

1 nobody's ever arrested for jaywalking unless
2 there's something fishy going on. And to sort
3 of pick one person and say, well, that's an
4 adequate comparator, I think, really misses the
5 whole point of Nieves.

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

17 So it is important --

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

25 MS. BIDWELL: Yes. And you normally

1 don't allow this kind of inquiry because police
2 officers have to make decisions where they have
3 to take speech into account very quickly, so --
4 but I understand that now I'm talking about
5 Question Presented 2 again.

6 CHIEF JUSTICE ROBERTS: Yeah.

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

22 JUSTICE KAVANAUGH: Well, the -- is it
23 --

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

25 JUSTICE BARRETT: Counsel -- oh,

1 sorry. Go ahead.

2 JUSTICE KAVANAUGH: No. You go ahead.

3 JUSTICE BARRETT: I was just going to
4 ask you whether, on that point of looking at
5 other evidence, would it be consistent with the
6 Nieves exception to look at things other than
7 comparators? Let's -- let's say that I agree
8 with you that the Fifth Circuit required too
9 much of the comparator, too much specificity,
10 maybe too much, you know, statistical evidence.

11 But isn't the other kinds of evidence
12 that you're looking at -- aren't those -- isn't
13 that the kind of Mt. Healthy evidence that
14 doesn't necessarily go to the probable cause
15 inquiry?

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

22 And in cases like Nieves, motive alone
23 is not going to get you an inference of
24 causation. It has to be something beyond
25 subjective motive. So, for example, here, if we

1 were just to allege in our complaint that Mayor
2 Trevino disliked Ms. Gonzalez because she
3 supported his opponent, that kind of evidence of
4 motive under Nieves is not going to qualify as
5 objective evidence.

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

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

23 MS. BIDWELL: It doesn't, Your Honor,
24 because you -- it has to be evidence beyond
25 subjective motive, so like the government

1 argues, for example, the evidence of irregular
2 procedure, walking the warrant -- yes.

3 JUSTICE BARRETT: Yeah, I'm -- I'm
4 positing -- everything else that you have --

5 MS. BIDWELL: Yes.

6 JUSTICE BARRETT: -- is there except
7 the crime changes and it's not kind of this
8 random crime, you know, in random circumstances,
9 but --

10 MS. BIDWELL: Right.

11 JUSTICE BARRETT: -- she has the same
12 long-running disputes, the same kind of other
13 evidence, but the crime is more substantial.
14 Your position is the same?

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

21 Our position is that the court should
22 be allowed to look at it and then say, okay,
23 maybe that's enough or maybe that's not enough.
24 But the problem with the Fifth Circuit's rule is
25 that it says you can't even look at any of that

1 evidence and weigh it. And --

2 JUSTICE BARRETT: So reckless driving,
3 they follow her on her way home and she's going
4 -- you know, what is the standard -- 15 miles
5 over the speed limit, she's -- she's speeding
6 late at night on a -- country road where there's
7 no one there. Same -- same rule? The crime
8 doesn't matter?

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

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Justice Thomas, anything further?

19 Justice Alito?

20 Justice Sotomayor?

21 Justice Kagan?

22 JUSTICE KAVANAUGH: The -- the crime's
23 prosecuted on occasion, correct? It's just the
24 fact pattern here that is unusual, is that --

25 MS. BIDWELL: Yes, Your Honor.

1 JUSTICE KAVANAUGH: And I guess, on
2 the fact pattern here, how are you going to have
3 evidence that goes one way or the other? I
4 mean, the fact that no one's been prosecuted who
5 stole a -- allegedly stole a document from the
6 next person at the city council meetings, so I'm
7 just curious what you think -- how this is going
8 to proceed? I mean, you look at the video,
9 which I have, and, you know, you could come to
10 one conclusion about this.

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

19 JUSTICE KAVANAUGH: But, if -- if --
20 if the conclusion is that someone intentionally
21 -- the evidence suggests probable cause that
22 someone intentionally stole a document that's a
23 government document and did it with a motive
24 because concerns have been raised about her role
25 in getting the signatures on the petition the

1 day before, so she had motive, and you have the
2 video, and we know that stealing a government
3 document is, in fact, a crime that's prosecuted,
4 I guess --

5 MS. BIDWELL: Yes, Your Honor, two
6 things for that. Number one is that the statute
7 is a general intent statute, so you don't need
8 to be looking at her motives, why would she take
9 a piece of paper from one side of the dais and
10 put it on the other side of the dais.

11 But even if --

12 JUSTICE KAVANAUGH: But I -- keep
13 going. I'm sorry.

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

21 The problem with the Fifth Circuit's
22 rule --

23 JUSTICE KAVANAUGH: I guess --

24 MS. BIDWELL: Yeah.

25 JUSTICE KAVANAUGH: I guess -- I guess

1 the concern I have here is the crime is a -- the
2 offense is a serious offense, the offense
3 itself. The question's really whether the --
4 the facts of this case meet it.

5 But, if you concluded that it met it,
6 other people would be prosecuted for that too.
7 The fact that there hasn't been someone else
8 prosecuted just shows that, I suppose, you know,
9 no one else in these circumstances has been
10 accused of that or -- or they haven't found
11 anyone.

12 MS. BIDWELL: Your Honor --

13 JUSTICE KAVANAUGH: But, if you -- if
14 you intentionally stole a government document at
15 a government proceeding, you know, that's --

16 MS. BIDWELL: Justice Kavanaugh, we --

17 JUSTICE KAVANAUGH: -- that's not --
18 that's not nothing.

19 MS. BIDWELL: We -- we disagree with
20 that characterization. Our position in the
21 complaint --

22 JUSTICE KAVANAUGH: I -- I understand
23 that.

24 MS. BIDWELL: Yes.

25 JUSTICE KAVANAUGH: That's the -- but,

1 in terms of concluding that it's retaliatory, I
2 -- I think you have to show some evidence that
3 she was singled out for -- under Nieves, singled
4 out. I mean, Nieves is very specific about
5 saying you need to identify similarly situated
6 individuals not engaged in the same sort of
7 protected speech had not been -- had not been
8 arrested.

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

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

23 JUSTICE KAVANAUGH: Right. But
24 stealing something intentionally, if that's what
25 happened, that's -- you know.

1 MS. BIDWELL: There is probable cause
2 to say that she concealed a government record
3 because she took a -- a piece of paper from one
4 side of the dais and moved it to another side of
5 the dais. As Judge Oldham explains in his
6 dissent, this kind of a crime is akin to my
7 letting my kid ride a bicycle around the
8 neighborhood but being charged under or being
9 arrested for child endangerment.

10 JUSTICE KAVANAUGH: Okay. Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Barrett?

13 Justice Jackson?

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

25 I'm not sure that applying that in the

1 way that it seems to be articulated here would
2 capture the evidence of the two other
3 prosecutors deciding not to prosecute, et
4 cetera, et cetera.

5 So are you asking for sort of an
6 extension of the Nieves exception to cover that
7 kind of evidence as well?

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

15 And in that sense, objective
16 evidence -- as the government argues, objective
17 evidence of causation, irrespective of its form,
18 should be allowed to come in. And that's also
19 the Seventh Circuit's point.

20 JUSTICE JACKSON: View of it, all
21 right. So, if we -- if we take your view of it
22 that we don't limit it to just that language,
23 but we're looking at what was Nieves really
24 about with respect to the exception and,
25 therefore, allow all the kinds of evidence

1 you're talking about, many -- many of the
2 Respondents' arguments suggest that this is
3 going to be opening the floodgates to all sorts
4 of vexatious litigation. So maybe you can
5 explain why that wouldn't be the case.

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

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

22 JUSTICE JACKSON: Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 MS. BIDWELL: Thank you.

1 CHIEF JUSTICE ROBERTS: Ms. Reaves.
2 ORAL ARGUMENT OF NICOLE F. REAVES
3 FOR THE UNITED STATES, AS AMICUS CURIAE,
4 SUPPORTING NEITHER PARTY
5 MS. REAVES: Mr. Chief Justice, and
6 may it please the Court:

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

17 Regardless of its form, evidence that
18 supports that inference does what Nieves
19 requires. It addresses Hartman's causal concern
20 by helping to establish that non-retaliatory
21 grounds were, in fact, insufficient to provoke
22 the adverse consequences.

23 The Fifth Circuit, therefore, applied
24 the wrong legal standard by effectively
25 requiring Petitioner to show direct evidence of

1 comparators or empirical statistics.

2 Respondents would eliminate the Nieves
3 exception altogether for arrests involving
4 warrants. That unpreserved argument does not
5 appear to have been accepted by any court of
6 appeals and would draw unwarranted distinctions.

7 On the flip side, Petitioner's
8 approach to both questions presented would
9 require the Court to essentially overrule Nieves
10 and would draw lines between different
11 categories of arrests that have no basis in the
12 concerns that motivated the general cause -- no
13 probable cause rule.

14 I welcome the Court's questions.

15 JUSTICE THOMAS: What would that
16 evidence look like?

17 MS. REAVES: The evidence that we
18 think should come in?

19 JUSTICE THOMAS: Yeah.

20 MS. REAVES: So we think that it's any
21 objective evidence that supports the ultimate
22 inference that the Court required to satisfy the
23 Nieves exception.

24 JUSTICE THOMAS: What is that?

25 MS. REAVES: So I think it can be a

1 variety of different types of evidence in
2 different situations. So, for example, it could
3 be a pattern of arrests for a behavior far
4 afield of a plaintiff's. It could be
5 common-sense propositions or inferences, like
6 jaywalking never happens. It could be officers'
7 employment of an unusual, irregular, or
8 unnecessarily onerous arrest procedure, timing
9 and events leading up to arrest and that an
10 arrest was falsely documented.

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

17 JUSTICE THOMAS: What would that look
18 like in this case?

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

1 That being said, some types of
2 evidence that are relevant in this case I do
3 think are Petitioner's evidence that arrests for
4 her -- for behavior -- her behavior -- for
5 behavior under the statute were for behavior far
6 afield of hers.

7 The nature of the crime itself, it's a
8 low-level misdemeanor crime that can be
9 satisfied just by the general intent of moving
10 the document.

11 I think the irregular arrest
12 procedures here are relevant as well.

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

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

24 MS. REAVES: I respectfully disagree
25 because I think that evidence still has to

1 ultimately go to show that a similarly situated
2 person wouldn't have been arrested.

3 And I don't think the form of
4 evidence, as long as it's objective, whether
5 that's direct statistical comparators or other
6 evidence that supports an inference that others
7 wouldn't have been arrested, changes kind of the
8 concerns that this Court identified in Nieves
9 when it --

10 CHIEF JUSTICE ROBERTS: Yeah, but, I
11 mean, the -- the --

12 MS. REAVES: -- adopted the general no
13 probable cause rule.

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

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

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

1 CHIEF JUSTICE ROBERTS: Like, what
2 sort of stuff would not be admissible as
3 evidence if you think the probable cause
4 requirement should be defeated?

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

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

22 MS. REAVES: So I think some of the
23 evidence Petitioner has relied on here, so
24 evidence about other council members who aren't
25 defendants here and using that evidence when

1 it's not part of a Monell pattern or practice
2 claim doesn't either support the similarly
3 situated inference and it -- you know, it -- but
4 it might be able to come in if you were just
5 doing some sort of Mt. Healthy analysis like
6 Petitioner is requesting as part of the second
7 question presented.

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

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

1 Why should the Court turn a blind eye
2 to abuse of process as a common law tort
3 analogue, which we usually look to common law
4 tort analogues when interpreting 1983?

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

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

15 MS. REAVES: Well, I think that Nieves
16 largely foreclosed that because --

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

25 MS. REAVES: So --

1 JUSTICE GORSUCH: But here we are.

2 MS. REAVES: -- let me start with
3 Nieves and then kind of turn to the merits of
4 that question.

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

11 JUSTICE GORSUCH: Again, I agree with
12 you, it wasn't relevant in Hartman and wasn't
13 relevant in Nieves. But why isn't it relevant
14 here?

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

20 JUSTICE GORSUCH: Or -- or any other
21 kind of favor or -- or thing. And -- and -- and
22 why -- why -- it -- it doesn't -- it wasn't
23 limited to property and money. Often it was,
24 you're right. But I've actually litigated abuse
25 of process claims, and the -- the point is the

1 process, yes, it was supported and it -- it was
2 properly done. The magistrate here signed off
3 on it, but it was being done for an ulterior
4 purpose. And I think that's the allegation
5 here.

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

12 JUSTICE GORSUCH: Well --

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

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

20 Here, she's saying, yeah, the arrest
21 could be lawfully made, but it wasn't being made
22 for the right -- it wasn't being made for the
23 true reasons that the writ was designed for --

24 MS. REAVES: Right.

25 JUSTICE GORSUCH: -- or what the law

1 was designed for. It was being done for an
2 ulterior purpose, to push me out of the
3 political process and silence me.

4 MS. REAVES: To be fair, she pleaded a
5 retaliatory arrest claim, so that's arrest and
6 retaliation for her prior conduct. She's
7 brought in allegations that there was also
8 future intent, but that's not part of the claim
9 itself.

10 And, second, I think it would be odd
11 for the Court --

12 JUSTICE GORSUCH: Well, if I read it
13 differently, then what?

14 MS. REAVES: So I think, just stepping
15 back a little bit, I think it would be
16 irregular, in light of the rationales this Court
17 has identified, to carve off the three sets of
18 claims in different ways that I think are at
19 issue here.

20 So, first, there's retaliatory
21 prosecution. The general no probable cause bar
22 applies. There's also a split-second arrest.
23 Petitioner agrees the general no probable cause
24 rule applies there.

25 In the middle, the Court would look to

1 a different analogy, and I don't think that
2 analogy is justified by the rationales this
3 Court has articulated for the no probable cause
4 rule, which are that probable cause will always
5 be relevant and readily available and evidence
6 of it or lack thereof, and, second, that there
7 may be causal difficulties caused by multiple
8 actors or the propriety of considering speech in
9 certain situations.

10 And this category of more deliberative
11 arrests that Petitioner is carving out isn't
12 different on those kind of key issues that
13 motivated the exception. So that's why I think
14 the Court should continue to look to malicious
15 prosecution and false arrest.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Justice Thomas?

19 Justice Alito?

20 JUSTICE ALITO: What would you say in
21 response to the questions that Justice Kavanaugh
22 was asking about the situation where there are
23 plenty of arrests under a particular provision,
24 but in the case at hand, the factual
25 circumstances are quite unusual and there is no

1 evidence that anybody has been arrested for
2 committing the crime in that particular way?
3 How do you think a court should deal with that?

4 MS. REAVES: So that evidence,
5 standing alone, is not going to be enough to
6 demonstrate that there were similarly situated
7 people who engaged in the same sort of activity
8 who were not arrested.

9 So I think that evidence could
10 potentially be relevant if there are other
11 reasons to infer that there were, in fact,
12 similarly situated people and they were not
13 arrested, but the novelty of a crime alone is
14 not enough to make the similarly situated
15 showing.

16 I think there are a lot of good
17 reasons for that. We articulate some in our
18 brief, but that includes the fact that just
19 because someone figures out a new way to engage
20 in criminal activity doesn't suggest there's
21 anything nefarious by a government prosecuting
22 that.

23 CHIEF JUSTICE ROBERTS: Justice
24 Sotomayor?

25 JUSTICE SOTOMAYOR: If I'm

1 understanding you right, on the first question
2 presented, your position is that the Fifth
3 Circuit is the only circuit that's demanding a
4 specific kind of comparison-based evidence,
5 correct?

6 MS. REAVES: That's correct. We think
7 the Fifth Circuit applied too strict a form of
8 evidence requirement.

9 JUSTICE SOTOMAYOR: And if I remember
10 correctly, the Fifth Circuit blamed it on the
11 language in Nieves and said that Nieves
12 compelled this conclusion but that they were
13 sympathetic, that Judge Oldham's view of it
14 being a little wide -- wider than they're
15 applying it is consistent with the Ninth and
16 Seventh Circuit, correct?

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

21 JUSTICE SOTOMAYOR: Exactly. But --
22 but Ninth and Fifth -- the Ninth and -- and
23 Seventh Circuit view it consistently with your
24 view today, correct?

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

1 JUSTICE SOTOMAYOR: Have you seen an
2 explosion of litigation with retaliatory --
3 Lozman-type retaliatory arrest exceptions?

4 MS. REAVES: We haven't done a
5 statistical analysis on that. Obviously, Nieves
6 did not -- was not decided very long ago. You
7 know, that being said, I think, if you look at
8 the decisions in the Seventh and Ninth Circuits,
9 such as the Ballentine decision in the Ninth
10 Circuit, they very carefully looked at the types
11 of evidence we've discussed but ultimately
12 looked at that inference of whether that
13 suggests that similarly situated persons would
14 not have been arrested.

15 So I do think that they struck the
16 balance between applying the Nieves rule but
17 just allowing a broader range of evidence to
18 satisfy it than the Fifth Circuit did below.

19 JUSTICE SOTOMAYOR: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice Kagan?

21 JUSTICE KAGAN: So if I could talk
22 about this question of what kind of evidence
23 should come in under the Nieves exception, and
24 let's sort of think about three sets of
25 evidence. So, one, I think nobody would say,

1 right, that an allegation of a subjective state
2 of mind on the police officer is going to get
3 you past the probable cause bar. Is that
4 correct?

5 MS. REAVES: That's correct.

6 JUSTICE KAGAN: That's -- that's --
7 that's an obvious implication of -- I mean not
8 just an implication. Nieves makes that quite
9 clear.

10 Now, on the other side of the
11 spectrum, you have this quite obviously
12 comparative evidence. The Fifth Circuit seemed
13 to have a very narrow view of what that was,
14 like you have to point to a particular person
15 who wasn't arrested.

16 But let's expand that a little bit
17 more and say, well, that would be a little bit
18 nutty. I mean, if you come in and you say
19 nobody's ever been arrested for that, I can't
20 point to a particular person, but, look,
21 nobody's ever been arrested for that, that
22 should count too, right? So -- so -- so, you
23 know, that's all, like, very comparative stuff,
24 right?

25 So in the middle -- and I guess this

1 is where I thought your brief was interesting --
2 is objective evidence that you might take to
3 support an inference as to comparisons with
4 other people but that is not on its face very
5 comparative in nature.

6 And I'll just read you some of what
7 you said in your brief. The timing of and
8 events leading up to a plaintiff's arrest, the
9 history of the defendant's interactions with the
10 plaintiffs, the fact that officers falsely
11 documented the arrest. Maybe the most
12 comparative of these is the employment of an
13 unusual, irregular, or unnecessarily onerous
14 arrest procedure.

15 So all of these, you can understand
16 how somebody could argue from them to a
17 comparative statement that another person who
18 didn't make these kinds -- who didn't engage in
19 this kind of speech activity wouldn't have been
20 treated the same way, but it is a little bit of
21 an inferential jump.

22 And so I guess my long-winded question
23 is, why do you put those sorts of statements in
24 the bucket that should be able to come in to get
25 past the probable cause bar rather than lump

1 them with allegations of subjective intent on
2 the part of the police officer?

3 MS. REAVES: Well, I think there are
4 four of -- it makes sense to put them in the
5 bucket of things that courts can consider, first
6 of all, because courts generally aren't limited
7 in the form of evidence they can rely on to
8 consider inferences. And I think, in particular
9 here, any objective evidence is going to go to
10 addressing Hartman's causal concerns by helping
11 to establish that non-retaliatory grounds were,
12 in fact, insufficient to provoke adverse
13 consequences.

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

24 Now, again, that evidence alone isn't
25 enough, but it can help tell the whole story of

1 a particular arrest and help support the
2 conclusion that the Nieves exception is
3 satisfied.

4 JUSTICE KAGAN: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Gorsuch?

7 JUSTICE GORSUCH: Just to be clear,
8 we're not talking about the causation standard
9 under the First Amendment itself, right? We're
10 talking about this Court's gloss on what the
11 causation requirement is statutorily under 1983,
12 right?

13 MS. REAVES: That's correct. We read
14 Nieves and Hartman to be elements of the causes
15 of action, not elements of the First Amendment
16 itself.

17 JUSTICE GORSUCH: So the First
18 Amendment may well be broader than this. It's
19 just that this Court has said, for purposes of a
20 statute, we're going to require more specific
21 kinds of evidence, right?

22 MS. REAVES: That's absolutely
23 correct, and that's why we argued in our brief
24 that the Court should actually make that clear
25 at some point in one of these cases.

1 JUSTICE GORSUCH: And causation,
2 normally, a plaintiff can prove -- point to any
3 evidence to -- to support an inference of
4 causation, right?

5 MS. REAVES: That's correct. Any
6 relevant evidence that's otherwise admissible,
7 yes.

8 JUSTICE GORSUCH: Yeah. And so it's
9 this gloss that we're dealing with that we
10 created. And then, at the end of the day, in
11 terms of the parade of horrors, there's always
12 qualified immunity, which we haven't even
13 addressed, that -- that's layered on top of all
14 of this, that a -- that a government official
15 could invoke?

16 MS. REAVES: That's correct.
17 Obviously, qualified immunity isn't directly at
18 issue in this case before this Court. That --

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

21 MS. REAVES: Right.

22 JUSTICE GORSUCH: You -- you have to
23 jump through this hoop before you get to that
24 hoop, right?

25 MS. REAVES: That's correct, but I

1 actually have an asterisk on that --

2 JUSTICE GORSUCH: Okay.

3 MS. REAVES: -- Justice Gorsuch. If
4 this requirement is a part of the cause of
5 action, not a part of the First Amendment
6 requirement, as a general matter, an official is
7 not going to be entitled to qualified immunity
8 based on a mistake about the scope of the cause
9 of action.

10 JUSTICE GORSUCH: Well, you've got
11 clearly established law, though, you know, and
12 you've got to be able to point to something,
13 right?

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

16 JUSTICE GORSUCH: We've got the second
17 part --

18 MS. REAVES: -- the Court should
19 potentially clarify this.

20 JUSTICE GORSUCH: -- of qualified
21 immunity still to deal with.

22 MS. REAVES: Yes, Justice Gorsuch.

23 CHIEF JUSTICE ROBERTS: Justice
24 Kavanaugh?

25 JUSTICE KAVANAUGH: I think what

1 you're looking for, right, is evidence that
2 suggests that other people who did what this
3 person is alleged to have done wouldn't have
4 been arrested and that this person was arrested
5 because of her political viewpoint or particular
6 speech or political expressive activities.

7 Does that sound right so far?

8 MS. REAVES: That's correct. I think
9 the second part would come in more under the Mt.
10 Healthy inquiry after you get through the
11 similarly situated inquiry, but yes, that's
12 correct, Justice.

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

24 But just thinking about inferences --
25 you used the word "inferences" a lot -- if you

1 have probable cause -- and I'm not saying it
2 exists here or not -- if you have probable cause
3 that someone intentionally stole government
4 documents, intentionally, knowingly,
5 intentionally, to impair a government
6 investigation or proceeding, I mean, that's
7 going to be prosecuted all the time, right?

8 MS. REAVES: I agree with that,
9 Justice Kavanaugh. I think --

10 JUSTICE KAVANAUGH: Exactly.

11 MS. REAVES: -- the distinction here,
12 though, is we agree with Petitioner that the
13 only intent required is general intent. So the
14 only intent she -- the government had to prove
15 here was that she picked up the document and
16 intentionally moved it.

17 So I think, because of that, that's
18 why this was prosecuted as a misdemeanor. And
19 if you want evidence for why it is just general
20 intent, you can look at Texas Penal Code 6.03.
21 You can look at the treatise that Petitioner
22 cites in her reply. And so I do think that's
23 why this particular case does fit within the
24 heartland of the Nieves exception.

25 That being said, the government isn't

1 opposed if the Court were to draw a
2 serious/non-serious crime distinction which
3 probably would be along a misdemeanor/felony
4 line. It just seems that this case clearly
5 falls in the misdemeanor bucket.

6 JUSTICE KAVANAUGH: And are you
7 looking at the -- I mean, now we're going back
8 to the law in question rather than the facts,
9 but I think the idea was someone who committed
10 these facts -- who engaged in these activities
11 would not be prosecuted but for their speech.

12 And if they could -- they're
13 prosecuted under the general intent, but if
14 their activities, if the police officer believes
15 this was done to prevent inquiries into which
16 names were on the petition because there were
17 allegations the day before that she had coerced
18 or misled people into signing the petition --
19 again, I'm not taking a position on any of that.

20 I mean, I don't know that you wouldn't
21 be -- the inference would be you would be
22 prosecuted under some statute, even if it is "a
23 general intent" statute, isn't that right?

24 MS. REAVES: So I think -- and, again,
25 I think this is counterfactual here potentially,

1 but I agree that if the facts are more serious
2 than the potential charge, the relevant
3 comparator would be other similarly situated
4 persons and whether there was probable cause.

5 JUSTICE KAVANAUGH: Who engaged in
6 those facts?

7 MS. REAVES: Who engaged in the same
8 activity, yes. I do think that's the relevant
9 inquiry. Just because someone is charged with a
10 lower crime or arrested for a lower crime, you
11 know, doesn't kind of change the analysis as far
12 as similarly situated goes.

13 JUSTICE KAVANAUGH: Right. And the
14 whole case here -- yeah. Okay. Thank you.

15 JUSTICE BARRETT: I'd like to pick up
16 there. So how important is the seriousness of
17 the crime?

18 I -- I said before, and I think
19 Justice Kavanaugh is right to be more precise
20 about this, so this is kind of a random prime --
21 crime, but it's random because of the facts of
22 the case and it was a misdemeanor.

23 So, you know, jaywalking, the example
24 in Nieves for the exception, I mean, jaywalking,
25 I think everybody agrees that absent some

1 circumstance, you know, where you endangered
2 someone or darted in front of a car, jaywalking
3 is not serious.

4 Does it matter at all? I mean, do we
5 look at the facts? Do we look at the crime?
6 And before we even get into the Nieves exception
7 and looking at the kind of evidence that you're
8 proposing, do we do some sort of threshold
9 analysis about whether the facts or the crime or
10 both are actually serious?

11 MS. REAVES: So I think, under the
12 Nieves exception, I do think it's similarly
13 situated persons would have been arrested. I
14 don't think it necessarily matters what crime or
15 what level of seriousness of crime was listed on
16 the warrant or was listed on, you know, the
17 officer's notes. So I do think it's a
18 conduct-based comparison.

19 I don't think the Court needs to
20 address the seriousness question here
21 necessarily because this is a misdemeanor crime,
22 but we would have no objection to the Court
23 drawing a felony/misdemeanor distinction and
24 just saying that Nieves doesn't apply outside of
25 that, and I think that's because -- and that

1 could be appropriate because Nieves did seem to
2 be concerned about endemic crimes that are
3 infrequently prosecuted, where there's a large
4 amount of discretion.

5 And from the federal government's
6 perspective, where we see the most types of
7 problematic and potentially retaliatory arrests
8 are in situations like unlawful assembly,
9 blocking a sidewalk, disorderly conduct,
10 trespassing on government property, and those
11 things tend to be low-level endemic offenses
12 where there's a lot of discretion.

13 JUSTICE BARRETT: That's true,
14 although the line between misdemeanor and felony
15 is drawn in different places in different
16 jurisdictions, and it would be pretty hard, I
17 think, to -- to hold that as a consistent line.

18 So, when you say similarly situated,
19 you're saying that you look both at conduct and
20 at crime, but the federal government doesn't
21 have a position about whether we look at the
22 seriousness of the crime?

23 MS. REAVES: So, as far as the
24 seriousness of the crime goes, even if you don't
25 --

1 JUSTICE BARRETT: Felony versus --

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

3 JUSTICE BARRETT: -- misdemeanor or
4 whatever.

5 MS. REAVES: Yeah, I don't -- I think,
6 if you decide not to draw some sort of strong
7 line between those two, I think how that would
8 generally play out is, when you have a felony or
9 a more serious crime, there's just going to be a
10 presumption that people are regularly prosecuted
11 for that, and it's going to be very easy to find
12 examples of people who engaged in the same
13 conduct and were, in fact, prosecuted but didn't
14 have the same speech.

15 JUSTICE BARRETT: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Jackson?

18 JUSTICE JACKSON: So I guess I'm going
19 back to Justice Kagan's helpful dynamic in terms
20 of figuring out the types of evidence, and I'm
21 still a little bit confused about the
22 government's position that, really, what is at
23 issue here is a determination of the treatment
24 of similarly situated persons, that that
25 provides, I think you say in your brief, the

1 compelling objective basis for inferring that
2 the arrest was retaliatory.

3 But then you seem to accept numbers or
4 different kinds of forms of evidence that don't
5 in my view necessarily go directly to
6 determining that a similarly situated person was
7 treated differently.

8 So how -- I guess Justice Kagan put it
9 that there are sort of several inferences to get
10 you from certain kinds of evidence to a
11 similarly situated person.

12 So can you say more about why, for
13 example, the government was -- wouldn't be
14 insisting that the plaintiff in this case at
15 least say something about this having happened
16 before, that there are similarly situated
17 people?

18 I mean, I find it difficult -- and I'm
19 not saying you're wrong. I'm just trying to
20 puzzle it out. You say, you know, evidence that
21 an arrest has never happened before. I mean,
22 surely that's common sense. But I guess I'm
23 trying to understand how, unless we have
24 evidence that this same kind of thing happened
25 before, we can take that evidence and say that's

1 an inference that -- of the kind that you're
2 trying to draw.

3 MS. REAVES: So I think you're either
4 going to need to have evidence or you're going
5 to need to have an inference that similarly
6 situated people engaged in the same sort of
7 activity and were not arrested. We just don't
8 think there needs to be direct evidence of that.

9 And I think, for example --

10 JUSTICE JACKSON: If your only
11 evidence was that this never happened before,
12 would you also require a plaintiff to show -- I
13 mean, the arrest, excuse me, never happened
14 before, no one was arrested for this conduct,
15 would you also require the plaintiff to show
16 that other people had engaged in this conduct?

17 MS. REAVES: So the plaintiff would
18 either need to show that or would need to
19 show -- you know, not directly show that, not
20 direct -- have direct evidence of that, but a
21 plaintiff could have evidence that supports that
22 inference or there could be a common-sense
23 inference.

24 And I think maybe the jaywalking
25 example is helpful. There might be a situation

1 in which you have evidence no one's ever been
2 arrested for jaywalking before. You don't have
3 direct evidence that anyone has jaywalked at
4 this corner in front of the -- a police officer,
5 but that might be something that there could be
6 an inference for in these sort of low-level
7 endemic crimes.

8 JUSTICE JACKSON: All right. Thank
9 you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Ms. Blatt.

13 ORAL ARGUMENT OF LISA S. BLATT
14 ON BEHALF OF THE RESPONDENTS

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

17 Throughout history, probable cause has
18 foreclosed retaliatory arrest suits. Nieves
19 created one narrow exception for warrantless
20 arrests, where officers typically look away or
21 give warnings or tickets. This Court should not
22 blow up that exception.

23 First, this case involves a warrant.
24 Warrants do not entail the boundless officer
25 discretion that justified the Nieves exception

1 in the first place. Warrants also deter abuse
2 by inviting judicial scrutiny, and warrants add
3 intervening actors that make it even less likely
4 that animus caused the arrest. At a minimum,
5 warrants are the last place to widen the Nieves
6 exception.

7 Second, this case involves theft. For
8 crimes such as theft, where officers typically
9 arrest, the justification for the Nieves
10 exception just doesn't exist. It is only where
11 officers rarely arrest that probable cause loses
12 its probative force. Extending the exception to
13 everything from theft to terrorism just invites
14 questions about why police arrested some people
15 and not others.

16 Third, Petitioner never alleged
17 comparators, i.e., others who engaged in similar
18 conduct but were not arrested. Only comparators
19 rule out the probative value of probable cause.
20 Petitioner and the government would allow anyone
21 to sue with objective evidence of animus or
22 using so-called negative evidence, the absence
23 of arrest for similar conduct.

24 But then every arrest invites a
25 lawsuit. Every case gets past a motion to

1 dismiss and on to discovery and before a jury.
2 Plaintiffs will always contest the police
3 version of events and then point to the -- the
4 lack of arrest records for their reframed
5 conduct. Take this case: The complaint alleges
6 Petitioner accidentally misplaced papers and
7 denies that Petitioner acted intentionally, but
8 the warrant application recounts a case of
9 serious intentional theft.

10 Now Petitioner was free to challenge
11 probable cause, but, instead, she admitted it.
12 And if you accept Petitioner's gamesmanship,
13 those arrested for domestic violence will claim
14 the victim just slipped, those arrested for
15 threats will claim they were just joking, and
16 those arrested for embezzlement will claim they
17 just accidentally misplaced the funds.

18 I welcome questions.

19 JUSTICE THOMAS: I, of course, agreed
20 with you in Nieves, with what you just said, but
21 we've crossed that bridge. And you've heard a
22 discussion of what kind of evidence would be
23 necessary to counter the causal connection or to
24 -- to -- to change it, to overcome probable
25 cause determination or the warrant.

1 What would be some of your responses
2 to some of the arguments that you have heard for
3 the type of evidence? For -- what I'm
4 concerned -- interested in, for example, is --
5 and there are rare cases where crimes are rarely
6 punished and that you could have the exact same
7 argument. What kind of evidence would you use
8 in a case like that to counter the probable
9 cause?

10 MS. BLATT: Yeah, I think if -- the
11 way I read Nieves, as the narrow exception that
12 the Court said it was, it should be easy to
13 plead the exception because it's talking about
14 cases where people actually engage in the
15 conduct but officers give a ticket or a citation
16 or a warning or they look away.

17 And you just don't have that kind of
18 case. The Court was talking about jaywalking,
19 dog off a leash, eating on the subway, not
20 wearing a seatbelt, not cases where the
21 assumption is, when there is probable cause if
22 officers typically arrest, and I just think that
23 that is per se true with theft, and it's the
24 opposite presumption is true with crimes where
25 you can get a ticket. No one gets a ticket for

1 murder. No one gets a ticket for assault. No
2 one gets a ticket or a citation for theft.
3 That's not a thing.

4 JUSTICE THOMAS: Well, I think the --
5 I -- well, I'm not going to say I have agreed
6 with you again, but that's not what -- where we
7 are now, and what I'm trying to get you to
8 engage with is some of the back and forth we've
9 had so far.

10 MS. BLATT: Okay. So, if we're going
11 to take it to any crime goes and misdemeanors in
12 Texas are punishable but -- by up to a year in
13 jail, you will have every case where the
14 plaintiff, like in this case, says you have to
15 accept my allegations as true, which I did
16 nothing wrong.

17 And then the officers -- thank God we
18 here had a warrant, but if there wasn't a
19 warrant, you will not hear the officers' version
20 of events. The only reason you heard the
21 officers' side of the story, as in Nieves, was
22 you had a summary judgment record. That
23 complaint alleges a bone-chilling case of police
24 brutality that made me not want to ever step
25 foot in Alaska. You never even heard the

1 officer's side until he was deposed, you had
2 massive discovery, you had sensitive police
3 documents. And every case -- very few people
4 get arrested and think, oh, well, yeah, I was
5 caught and I still think there was retaliation.
6 Every drug case, wasn't my drugs. Every --

7 JUSTICE SOTOMAYOR: Counselor, you're
8 characterizing this as a theft, as -- and the
9 assumption of Justice Kavanaugh was the same.
10 But the government's pointing out, and I think
11 rightly, that this wasn't charged as a theft
12 because theft would have a defense of there was
13 no intention to permanently deprive someone.
14 There's a whole series of things.

15 The crime that was charged here was a
16 crime of moving a document, and -- and all it
17 required was a general intent to move it. The
18 defense was, I didn't -- I did it accidentally.
19 She may have been defeated in that or not.

20 But the point is that there are
21 charges brought for stealing government
22 documents and there are charges that are brought
23 for moving government documents. And that's
24 never happened in a situation like this.

25 MS. BLATT: So --

1 JUSTICE SOTOMAYOR: So my point is
2 you're building it up on the facts of the case
3 to characterize it as something that wasn't the
4 charge. And I think what the government is
5 saying is, for this kind of misdemeanor that was
6 charged, it doesn't happen when there's a
7 dispute about whether something was moved
8 intentionally or not.

9 I'd go a step further having been a
10 former prosecutor. Even if it was intentional,
11 we probably wouldn't have brought the charges
12 because no harm, no foul, no harm.

13 MS. BLATT: Mm-hmm.

14 JUSTICE SOTOMAYOR: And, in fact, two
15 police officers wouldn't charge it, one public
16 prosecutor didn't charge it. In the end, even
17 with a warrant, the charges were dropped. This
18 is just not the kind of situation like in the
19 jaywalking example --

20 MS. BLATT: Mm-hmm.

21 JUSTICE SOTOMAYOR: -- with -- when
22 there's a dispute about things like this, people
23 are not arrested in this way.

24 MS. BLATT: So --

25 JUSTICE SOTOMAYOR: That's exactly

1 what I think their claim is.

2 MS. BLATT: Mm-hmm.

3 JUSTICE SOTOMAYOR: You're -- you're
4 characterizing it differently, but that's the
5 bottom line of this claim.

6 MS. BLATT: So -- so at least four
7 responses. One, there was no charge here.
8 There was an arrest, and the arrest warrant
9 three times says the opposite of what you just
10 said. It said the video clearly shows Gonzalez
11 intentionally concealing and removing a petition
12 from custody. Page 49, "There is no mistake
13 Gonzalez knows what she is holding." She's
14 holding the petition. At warrant page 53, I'm
15 charging her for meeting the elements of the
16 statute because she had a desire to
17 intentionally remove and impair the availability
18 of this document from city custody.

19 Now, on the statute, I'm shocked by
20 the government because the government has its
21 own parallel, 18 U.S.C. 2071, that is the same
22 tampering statute. All states have a tampering
23 statute, and they all read the same way with
24 intent. Now they cite the treatise, but the
25 treatise she didn't cite was the section on

1 intent and it said you have to have a conscious
2 desire to remove the documents from the
3 government.

4 If you look at all six provisions of
5 that statute, it's wrongdoing, all of it. It is
6 inconceivable that a statute called tampering
7 and that has all bad acts, this one little act
8 was, oh, here, I just committed theft because I
9 just moved something for the other, it's just
10 not credible.

11 But, if you're -- if you agree with
12 her and the government that I am wrong, then
13 this should have been an easy case for her to
14 allege a comparator, but she didn't even allege
15 Mayor Trevino was a comparator because she
16 alleged no comparators.

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

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

22 MS. BLATT: She gave you a page cite
23 that mentioned the Mayor had the document
24 between one night and the next. There's no --
25 the comparator allegation is at 117 and it's an

1 absence of one. And that's what the district
2 court relied on. It's what the Fifth Circuit
3 reversed. That her complaint alleges -- again,
4 it's 117A -- that no one has been ever arrested
5 for trying to take a non-binding and expressive
6 document.

7 Now, when you get it to that level of
8 specificity that no one took, you know, the
9 feathers from the Smithsonian, then the Fifth
10 Circuit said naturally, well, who steals
11 feathers from the Smithsonian? And the -- the
12 Fifth Circuit said on pages 29 and 30, you have
13 to have some comparative evidence.

14 But she could have, but we know why
15 she didn't. We know why she didn't allege
16 comparators, because it would have been
17 preposterous to say, yeah, public officials
18 secret away government documents to avoid, you
19 know, checking on things like forgery and lying,
20 but no one ever gets arrested.

21 JUSTICE JACKSON: But isn't --

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

23 JUSTICE JACKSON: -- isn't -- isn't
24 our goal here to try to assess whether or not
25 she should have had to allege that? So I see

1 you talking about this at a certain level of
2 specificity, and I'm trying to understand what
3 your view is of what she should have said in
4 order to satisfy the rule and whether the rule
5 should be as the Fifth Circuit lays it out.

6 MS. BLATT: So -- so the plaintiff has
7 two choices, and she could have had two choices
8 here. She could have at least said I'll allege
9 a comparator. This statute -- I'm not going to
10 challenge probable cause or this statute, but it
11 covers completely innocent conduct. And I'm
12 going to allege people always engage in innocent
13 conduct and don't get arrested.

14 And then you and I or we would have
15 been having a fight with, well, can you look at
16 the comparators from the complaint or shouldn't
17 you look at the comparators?

18 JUSTICE JACKSON: So, for you, it's
19 not enough to say no one has ever been arrested
20 the for this kind -- doing this kind of thing
21 before?

22 MS. BLATT: No, because it's that --
23 it's so much easier to say, and people do it.
24 Here are the reasons why the government said
25 this, but they forgot what they said on page 20

1 of their brief, which --

2 JUSTICE GORSUCH: Well, hold on. I --
3 I hold on. I -- I -- I'm just want to pin --
4 put a pin in that if I might. So you're saying
5 that an allegation that the statute's never been
6 enforced against anyone but it was against me --

7 MS. BLATT: Mm-hmm.

8 JUSTICE GORSUCH: -- because of my
9 First Amendment expression is not enough to
10 state a claim?

11 MS. BLATT: Absolutely not. And the
12 reason is why the government says this on page
13 20 of their brief.

14 JUSTICE GORSUCH: How many -- how many
15 statutes are there on the books these days, many
16 of which are hardly ever enforced? Last I read,
17 there were over 300,000 federal crimes --

18 MS. BLATT: Mm-hmm.

19 JUSTICE GORSUCH: -- counting statutes
20 and regulations. I can't imagine how many there
21 are at the state and local level.

22 And you're saying they can all sit
23 there unused, except for in a -- one person who
24 alleges that I was the only person in America
25 who's ever been prosecuted for this because I --

1 I dared express a view protected by the First
2 Amendment and that's not actionable?

3 MS. BLATT: Well, I'm going to -- if
4 -- if -- I'm going to try to convince you
5 otherwise, but I have to try to do that.

6 JUSTICE GORSUCH: Yeah. I'd like --
7 I'd like -- good luck.

8 (Laughter.)

9 MS. BLATT: Okay. So it's -- well,
10 let me just try this, Justice Gorsuch. If it's
11 never been enforced, then just say, people do
12 it. If there's a statute that makes it illegal
13 to commit adultery, it's not that hard to say I
14 -- I've committed adultery or my neighbors
15 committed adultery.

16 If the statute -- if -- let's just put
17 it -- and, again, the government tells you on
18 page 20 of its brief the fact that the statute
19 has never been enforced could prove little or
20 nothing.

21 And here are four reasons why. Maybe
22 no one commits the crime. Maybe you don't see
23 carjacking in Amish country. Maybe you don't
24 see people stealing boats in Death Valley.
25 Maybe people commit -- the crime itself is

1 unusual. Maybe it's incest or cannibalism.

2 Maybe it's something like government --

3 JUSTICE GORSUCH: All of which the
4 Court could take into consideration in doing a
5 but-for causation analysis. If -- if -- if you
6 really think that there's a case in Amish
7 country and there's no carjacking, the Court can
8 say that evidence is not enough.

9 But you're saying that -- that a court
10 can't even look at that evidence, the fact that
11 it's -- a crime has never been prosecuted, ever,
12 except for against a person who alleges a First
13 Amendment violation, I have to turn a blind eye
14 to that.

15 MS. BLATT: No, you --

16 JUSTICE GORSUCH: I can't even look at
17 it is your --

18 MS. BLATT: You -- you --

19 JUSTICE GORSUCH: That's your
20 argument.

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

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

1 MS. BLATT: If -- if you have a simple
2 allegation that there is a person on the planet
3 who has done that conduct.

4 JUSTICE GORSUCH: Well --

5 JUSTICE KAGAN: A named person on the
6 planet?

7 MS. BLATT: No.

8 JUSTICE KAGAN: Just a -- a person on
9 the planet?

10 MS. BLATT: I think you can have news
11 articles that people jaywalk, you can have news
12 articles that people eat on the subway, you can
13 have -- I mean, generally, I thought -- again, I
14 didn't write Nieves, but I thought Nieves was
15 talking about crimes where people were not
16 embarrassed to admit that they did them and it
17 wouldn't be that hard to say I can't believe I
18 was arrested for, you know, crossing an
19 intersection. And, no, you do not have to say
20 the same intersection.

21 JUSTICE KAGAN: The -- the Fifth
22 Circuit understood this rule to say you have to
23 show a person within this jurisdiction who has
24 engaged in this conduct before and was not
25 arrested.

1 And I think what Justice Gorsuch is
2 saying is that that has got to be wrong.
3 Whatever else you want to put into this bucket,
4 you should be able to say they've never charged
5 somebody with this kind of crime before and I
6 don't have to go find a person who has engaged
7 in the same conduct.

8 MS. BLATT: And -- and, again, we're
9 going to get into a dispute about, if you accept
10 the warrant -- if you accept the plaintiff
11 complaint, the -- the -- the -- the officer will
12 always lose and the officer can never arrest and
13 the officer doesn't -- it -- literally can never
14 arrest without worrying about getting sued and
15 --

16 JUSTICE JACKSON: Except I thought
17 that was the point of qualified immunity. This
18 was the other characterization that I was going
19 to ask you about, which is you say every case
20 goes forward, we never hear the officer's side
21 of the story. But, I mean, isn't that what
22 qualified immunity does?

23 MS. BLATT: It was denied here. It
24 was already denied because the court said, the
25 district court said, Nieves created an exception

1 and you adequately pled the exception. So it
2 was actually denied. And Judge Oldham said --
3 the -- the Fifth Circuit reversed on the First
4 Amendment issue. Judge Oldham said he's not so
5 sure how he would rule on qualified immunity.

6 But we're happy to win on qualified
7 immunity, but we actually lost it here. And the
8 Court in Nieves could have done the same thing.
9 Generally, you want to keep it so officers
10 aren't afraid of being sued.

11 JUSTICE BARRETT: But, Ms. --

12 JUSTICE SOTOMAYOR: All we do is
13 vacate and remand and let them -- and let them
14 --

15 MS. BLATT: Well, I hope you vote for
16 some qualified immunity. That would be nutty
17 just to vacate and remand because you just want
18 us to lose? I mean --

19 JUSTICE BARRETT: But you -- but you
20 still have to satisfy -- kind of to go to
21 Justice Jackson's point, you know, it's -- I
22 don't think it would be the case that anybody
23 who was arrested could make this charge and then
24 get on to discovery because then you'd still
25 have to survive a motion to dismiss on the Mt.

1 Healthy inferences, right?

2 I mean, she has -- if you put aside
3 the probable cause, the no probable cause
4 requirement, if you put that aside, I mean, she
5 has all of this evidence for retaliation. Not
6 everybody who's arrested is going to have the
7 kind of evidence she has on that score.

8 MS. BLATT: Well --

9 JUSTICE BARRETT: And that will knock
10 out cases, right?

11 MS. BLATT: -- I disagree, especially
12 given the type of evidence she alleges. I mean,
13 the stuff she's alleging doesn't have any
14 citation. It just says she showed up and she --
15 somehow the DA would have entered a warrant into
16 a satellite booking process. I have no idea
17 what she's talking about, that you had to get a
18 -- the -- the Fifth Circuit asked her
19 specifically was there any requirement that the
20 police officer have to go to a DA and she says
21 no, but she says, well, it's the normal
22 procedure, without a citation in the record.

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

1 JUSTICE KAVANAUGH: Can I -- can I ask
2 about --

3 MS. BLATT: -- already.

4 JUSTICE KAVANAUGH: -- Justice
5 Gorsuch's question because I think that's
6 important. And maybe I'm looking at it the
7 wrong way, but I assume people who intentionally
8 engage in this conduct are prosecuted all the
9 time, generally speaking, namely, intentionally
10 stealing government documents, intentionally
11 removing government documents, et cetera.

12 MS. BLATT: Yes.

13 JUSTICE KAVANAUGH: Intentionally
14 obstructing government proceedings. People who
15 accidentally take a document are -- are never
16 prosecuted presumably, put aside what crimes.
17 For example -- I think the government said look
18 at the conduct, not the crime.

19 MS. BLATT: We agree.

20 JUSTICE KAVANAUGH: So how do we
21 assess that at this stage when they're alleging
22 they did it unintentionally and they would have
23 a good case if that were, in fact, true, but the
24 police officer said there's probable cause that
25 she did it intentionally. She intentionally

1 stole. How do we assess that?

2 MS. BLATT: Well, you wanted --

3 JUSTICE KAVANAUGH: Because I think
4 Justice Gorsuch's question goes -- is correct if
5 it's unintentional, but I'm -- I don't think
6 it's correct if it's intentional.

7 MS. BLATT: So the in the weeds is
8 that's why you need comparators, but at a higher
9 level, it is why we're making the argument that
10 this will happen in every case if you extend it
11 beyond cases where police don't typically arrest
12 because every assault case will be I was -- you
13 know, every looting case will be I didn't -- I
14 took a toothbrush or I -- you know, I don't know
15 how that -- that ring got in my bag, or I left
16 the party as soon as the cocaine came, and the
17 officer will say, you know, no, I saw you with
18 it.

19 And we'll be debating, I -- I don't
20 know, I think half of you will say that should
21 go to a jury and half of you think this is not a
22 good idea for officers. How can they kind of
23 enforce the law in this type of environment?

24 I would say, if you're going to do
25 comparators, you have to look at the comparators

1 that's alleged in the warrant application. The
2 problem is you might not have a warrant
3 application in all kinds of cases. If it's a
4 warrantless arrest, all you're going to have is
5 the complaint, and the complaint says, I'm
6 innocent.

7 JUSTICE BARRETT: What about the kind
8 of crimes the government was talking about, like
9 unlawful assembly and those kinds of crimes,
10 where, you know --

11 MS. BLATT: Have at it.

12 JUSTICE BARRETT: -- hey, you
13 intentional -- you intentionally do it, you
14 intentionally gathered, you intentionally
15 blocked a street.

16 MS. BLATT: Yeah. Have at it. That
17 is Nieves. That is the hard core of that should
18 be easy to allege, and we agree with a lot of
19 the government's examples about comparators.
20 You can use yourself as a comparator on a
21 previous occasion. If you're the only
22 journalist arrested for assembly, that kind of
23 stuff, I thought that was the point of Nieves.
24 That should -- should go.

25 JUSTICE KAVANAUGH: The, like -- like,

1 protest cases?

2 MS. BLATT: Protest cases.

3 JUSTICE KAVANAUGH: Yeah. Or --

4 MS. BLATT: Not theft cases, not
5 assault cases, not insider trading or tax fraud
6 or political corruption. I mean, I really would
7 advise every criminal to put a, you know,
8 political bumper sticker on their car and --

9 (Laughter.)

10 JUSTICE KAGAN: I guess I was -- I
11 thought that the part -- I thought that the
12 point of Nieves was, if you have solid objective
13 evidence that you're in a world in which you
14 were arrested for something that somebody who
15 hadn't engaged in your speech activities would
16 not be arrested for, that you should be able to
17 present that evidence to get over the probable
18 cause bar.

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

21 MS. BLATT: Two videos.

22 JUSTICE KAGAN: The -- the second
23 video is of a meeting with all the relevant
24 officials and they're all talking about how they
25 can get back at Ms. Gonzalez, and they say:

1 Hey, why don't we do this investigation, we'll
2 go arrest her, we'll go, you know, because she
3 moved this piece of paper, and -- and that's --
4 and they all agree to that.

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

7 MS. BLATT: No, that -- that's a
8 Lozman claim, and there is a Lozman claim
9 pending against the city.

10 JUSTICE KAGAN: Well, it's not a
11 Lozman claim against the city. It's the same
12 defendants here.

13 MS. BLATT: Oh, it's just -- just
14 officers agreeing?

15 JUSTICE KAGAN: It's just -- yeah,
16 it's the same defendants, but there they all are
17 on videotape agreeing how they're going to
18 retaliate against Ms. Gonzalez.

19 MS. BLATT: That was the Nieves
20 complaint is Officers Weight and Bartlett -- I
21 hope I have their names right -- or Nieves and
22 -- and Weight were conspiring to get this
23 person, and so you just didn't have them on
24 videotape.

25 JUSTICE KAGAN: Yeah. Well, now you

1 have them on videotape. That seems like pretty
2 good objective evidence to get you over the
3 probable cause bar.

4 MS. BLATT: This -- this --

5 JUSTICE KAGAN: I mean, I guess what
6 I'm suggesting is that the point -- look, the
7 point of this probable cause bar is we don't
8 want every old allegation of, like, you know,
9 they had a bad intent and they were trying to
10 look at -- but, if you have solid objective
11 evidence that you were being treated differently
12 from another person in your situation, that that
13 solid objective evidence should -- and part of
14 that might be comparative in the way that you're
15 suggesting, but -- but there might be other
16 things too.

17 MS. BLATT: I -- I mean, the problem
18 is this is a poster child. There is absolutely
19 nothing in the complaint that suggests that
20 either the chief of police or this police
21 officer had any reason to even know who this
22 woman was or her speech.

23 JUSTICE GORSUCH: You're -- you're
24 fighting the facts and -- and -- and -- and --

25 MS. BLATT: Well, but that's what this

1 case is going to govern.

2 JUSTICE GORSUCH: Justice Kagan's
3 asking you a hypothetical question. I'd be
4 grateful if you'd answer it.

5 MS. BLATT: Sure. The problem with
6 this anything goes --

7 JUSTICE KAGAN: It's good I have an
8 enforcer.

9 MS. BLATT: Yes.

10 (Laughter.)

11 JUSTICE GORSUCH: Anytime.

12 JUSTICE KAGAN: Because I can let you
13 get carried away doing all this other stuff.

14 MS. BLATT: And your question --

15 JUSTICE KAGAN: But I had a
16 hypothetical --

17 MS. BLATT: -- was excellent.

18 JUSTICE KAGAN: -- and it was a good
19 one.

20 JUSTICE GORSUCH: It was.

21 (Laughter.)

22 MS. BLATT: Because you're a good
23 advocate, and every advocate is going to hire
24 you or somebody like you who's going to say my
25 evidence is really good, look how these people

1 were out to get me, I'm an unpopular figure,
2 this is a small town, I didn't like the road
3 construction.

4 JUSTICE KAGAN: No, now you're still
5 fighting it because --

6 JUSTICE GORSUCH: Yeah.

7 JUSTICE KAGAN: -- because --

8 MS. BLATT: Sorry. Okay. On -- on
9 your other hypo --

10 JUSTICE GORSUCH: You don't need an
11 enforcer.

12 (Laughter.)

13 MS. BLATT: Any hypothetical, it is
14 going to be: I was picked on, and I'm going to
15 be able to cite any evidence that's anything
16 but, I guess, an officer's subjective statement.
17 Yeah, because that's the only thing you
18 specifically ruled out. And the Court, I think,
19 said very clearly only comparator evidence.
20 Once you have a similarly situated person who's
21 not engaged in speech --

22 JUSTICE KAGAN: Well, look, you don't
23 have to -- from my videotape, you do not have to
24 make a very long leap of inference to say: Oh,
25 that's comparative. You know, this videotape is

1 like let's go get Ms. Gonzalez. You don't have
2 to say: And we wouldn't have gotten everybody
3 else.

4 MS. BLATT: Right.

5 JUSTICE KAGAN: It's obvious on its
6 face that this is treating Ms. Gonzalez
7 differently.

8 MS. BLATT: And what I'm concerned
9 about is the next hypothetical, where the
10 plaintiff, like in Nieves, says that officer
11 said to me: You know, I was out to get you, or
12 I -- I'm -- I'm so glad -- you know, it's --
13 it's time to arrest you. I've been waiting.

14 I mean, the -- the -- we all know that
15 the government --

16 JUSTICE KAGAN: I mean, now you're
17 just -- you're -- you're going to the statements
18 that obviously are not coming in under Nieves
19 because they're just statements that the officer
20 made --

21 MS. BLATT: But you have them on
22 videotape, right?

23 JUSTICE KAGAN: -- reflecting his
24 state of mind at that time. So --

25 MS. BLATT: Isn't the only -- I'm

1 sorry. Maybe I misunderstood your hypo. Isn't
2 it only because there's a videotape of the
3 officer's statements?

4 JUSTICE KAGAN: Well, it's -- it's --
5 it's -- it's -- it's pretty clear, objective
6 evidence that a judge can look at, which makes
7 it clear that Ms. Gonzalez was picked on because
8 she was doing what the First Amendment allows
9 her to do.

10 MS. BLATT: I worry that if you write
11 an opinion that says only that evidence is okay
12 if you've got the officer on videotape, that's
13 fine. I worry where you're going is anything
14 that I as a judge think is pretty relevant that
15 she was picked on. That's what scares me, and
16 that's what scares me representing police
17 officers, who literally, you know, are trying to
18 work to get the community to trust them and do
19 their job and don't, you know, have smear
20 campaigns every time they're sued. It's -- it's
21 --

22 JUSTICE ALITO: The presence or
23 absence of the videotape would be important if
24 the case actually goes to trial, but prior to
25 that, I really don't see why that changes the

1 situation. So, whether you have a videotape
2 that shows that they really were conspiring to
3 get a particular person or all you have is an
4 allegation by the person who was arrested that
5 the arresting officer said the only reason why
6 I'm arresting you is because the mayor told me
7 to do it, that's -- for purposes of a motion to
8 dismiss or summary judgment, it seems to me they
9 count -- it counts just as much as the
10 videotape. It's just not as persuasive perhaps
11 in the end. Am I not --

12 MS. BLATT: Now you're my enforcer, I
13 think.

14 (Laughter.)

15 JUSTICE ALITO: No, I'm not being --
16 I'm not trying to be your enforcer by any means.

17 MS. BLATT: But it sounds like a very
18 helpful question.

19 JUSTICE ALITO: You don't need one by
20 any means.

21 (Laughter.)

22 MS. BLATT: I -- I think you're saying
23 that's helpful, that every complaint can allege,
24 you know, the officer said something or, you
25 know -- I mean, I hate to -- but Mayor Barry

1 said -- you know, he showed up at that Vista
2 Hotel to meet his girlfriend for sex, not the
3 drugs, and the FBI was clearly out to get him,
4 and you didn't know that he did anything wrong
5 until you watched the videotape.

6 JUSTICE ALITO: Now what about these
7 two situations? So there's a protest and one of
8 the protesters is 6 foot 5 and weighs 250 pounds
9 and used to be a -- a linebacker in college and
10 gets into an argument with a police officer
11 about something and pushes the police officer.
12 The police officer arrests him, charges him with
13 assault, which is a felony, all right? That's
14 -- well, I'll continue --

15 CHIEF JUSTICE ROBERTS: No -- no, go
16 ahead.

17 JUSTICE ALITO: All right. Then the
18 -- at -- at another protest, the protester is a
19 frail, elderly person who weighs 90 pounds and
20 is arrested for assaulting the officer because
21 this person pushed the officer with whatever
22 strength that arrestee has, I mean, in -- in the
23 latter situation and is charged with assault.

24 Is -- what would be the comparator in
25 that situation? You have to find another

1 situation where there's a -- a person of similar
2 statute --

3 MS. BLATT: No.

4 JUSTICE ALITO: -- stature who --

5 MS. BLATT: No, I would loosen --
6 literally, our comparator in this case, had she
7 pled it, could have been anyone who
8 intentionally takes government documents.
9 Didn't have to be even a city official, didn't
10 have to be what kind of document.

11 So, in your -- again, I would never
12 set -- put this on assault because every case
13 will be: I just elbowed, everyone else was
14 punching, and I was the only one arrested. But
15 assuming it's going to do assault, it's easy to
16 allege a comparator: Everyone at the bar was
17 throwing punches, and I was the only one wearing
18 my T-shirt that said "I hate the police." You
19 meet the comparator requirement easily.

20 JUSTICE ALITO: All right. Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you.

22 Justice Thomas?

23 Anything further, Justice Alito?

24 Anything, Justice Gorsuch?

25 Justice Kavanaugh?

1 Oh, I'm sorry. Justice Barrett?

2 Justice Jackson?

3 MS. BLATT: Oh, thank goodness.

4 (Laughter.)

5 MS. BLATT: Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,

7 counsel.

8 Rebuttal, Ms. Bidwell?

9 REBUTTAL ARGUMENT OF ANYA A. BIDWELL

10 ON BEHALF OF THE PETITIONER

11 MS. BIDWELL: I have four points to

12 make.

13 So first point is I think it's very
14 important to look at the two questions presented
15 in context of each other. So, if you are saying
16 that Nieves covers the vast bulk of cases, which
17 are the cases where police officers are making
18 on-the-spot arrests, for example, during
19 protests, during art event festivals, when they
20 are responding to domestic violence calls,
21 that's the vast bulk of police cases.

22 If you say that Nieves only covers
23 that, then when you talk about objective
24 evidence carveout, the -- the exact example of a
25 comparator might actually make sense because

1 then you can have a comparator, for example, on
2 -- during a protest.

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

15 So it's important to keep those two
16 perspectives in terms of Question Presented 1
17 and Question Presented 2.

18 And, Justice Sotomayor, on the -- your
19 question about data, National Police
20 Accountability Project, on page 24 of their
21 amicus, talk about how there is no floodgates
22 after the Seventh Circuit and the Ninth
23 Circuit's interpretation of the carveout. They
24 say that there were only 178 cases overall
25 analyzed, and only 17 cases out of those 178

1 proceeded to -- passed motion to dismiss or
2 motion for summary judgment.

3 And, finally, I'd just like to mention
4 that political retaliation is dangerous. First
5 Amendment has to mean something. Mayors should
6 not be allowed to launder animus through
7 warrants. Common law understood that. And we
8 respectfully ask that this Court understand that
9 too. Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 The case is submitted.

13 (Whereupon, at 11:30 a.m., the case
14 was submitted.)

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1	abstract ^[1] 54:16 abuse ^[12] 5:12 6:5 39:10, 11, 14, 22 40:2 41:7, 9, 17, 24 64:1 accept ^[5] 61:3 65:12 67:15 78:9, 10 accepted ^[1] 34:5 accepting ^[1] 18:20 accident ^[1] 54:20 accidentally ^[4] 65:6, 17 68:18 81:15 According ^[2] 3:20 7:10 account ^[5] 5:20 9:18 12:22 21:3 37:21 Accountability ^[1] 95:20 accused ^[1] 28:10 across ^[1] 50:23 act ^[1] 71:7 acted ^[1] 65:7 action ^[5] 4:3 6:22 51:15 53:5, 9 actionable ^[1] 75:2 activities ^[4] 54:6 56:10, 14 84:15 activity ^[6] 33:15 45:7, 20 49:19 57:8 62:7 actors ^[2] 44:8 64:3 acts ^[1] 71:7 actually ^[12] 6:13 13:6 38:8 41:24 51:24 53:1 58:10 66:14 79:2, 7 90:24 94:25 add ^[1] 64:2 address ^[2] 33:10 58:20 addressed ^[1] 52:13 addresses ^[1] 33:19 addressing ^[1] 50:10 adequate ^[1] 20:4 adequately ^[1] 79:1 administrable ^[1] 15:25 admissible ^[2] 38:2 52:6 admit ^[1] 77:16 admitted ^[1] 65:11 adopted ^[1] 37:12 adoption ^[1] 39:15 adultery ^[3] 75:13, 14, 15 adverse ^[3] 4:3 33:22 50:12 advise ^[1] 84:7 advocate ^[2] 87:23, 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