

CLIENT NEWS BRIEF

Supreme Court Says Plaintiffs In Law Enforcement First Amendment Retaliation Cases Must Prove No Probable Cause For Arrest

Once a year, deep in the Alaskan wilderness, twelve thousand “snow hippies” exercise their right to party. Law enforcement officers chaperone them at a ratio of ten thousand to seven. At “Arctic Man,” not to be confused with “Burning Man,” there is a blizzard of skiers, snowmobilers, and bonfires. According to the popular sports blogging network SB Nation, “Arctic Man is a weeklong, booze and fossil-fueled Sledneck Revival bookended around the world’s craziest ski race.” From this setting results the latest United States Supreme Court opinion on retaliatory-arrest claims, in which the plaintiff has alleged their arrest was made in retaliation for the exercise of First Amendment free speech rights.

Background

On May 28, 2019, the United States Supreme Court decided *Nieves et al. v. Bartlett*. In the case, Mr. Bartlett, an authentic “Arctic Man Sledneck,” was arrested by police officers for disorderly conduct and resisting arrest. According to the officers, Mr. Bartlett had been inserting himself into conversations between law enforcement and other partygoers. As the facts provide, Mr. Bartlett, with drunken and slurred speech shouted, “Don’t talk to the cops!” to two separate partygoers conferring with two separate law enforcement officers regarding issues the details of which Mr. Bartlett was wholly unaware.

According to the facts in the opinion, the first officer claimed he deescalated Mr. Bartlett’s imposition by walking away. The second officer confronted Mr. Bartlett and claimed Mr. Bartlett then approached him in an aggressive manner, which ultimately resulted in both officers arresting Mr. Bartlett. The officers held Mr. Bartlett in a temporary lockup for a short period of time, eventually releasing him, and the local district attorney’s office did not pursue any charges. Mr. Bartlett later sued the officers, claiming they violated his First Amendment free speech rights by arresting him in retaliation for his speech.

Prior to *Nieves*, there was no clear Supreme Court precedent requiring a plaintiff in a First Amendment retaliatory-arrest case against police officers to show the officers had no probable cause to arrest. The Ninth Circuit, however, in *Ford v. Yakima* (2013) held that a plaintiff can prevail on a First Amendment retaliatory-arrest claim (i.e., arrest in retaliation for exercising of free speech rights) even in the face of probable cause for the arrest. The Ninth Circuit’s holding in *Ford v. Yakima* was designed to avoid official conduct that would “chill a person of ordinary firmness from future First Amendment activity.” In *Nieves*, the Supreme Court did away with the Ninth Circuit’s precedent and rule on point.

The Court’s Opinion and New Rule

Under the new rule established by *Nieves*, as a matter of law, for a First Amendment retaliatory –arrest claim against a law enforcement officer to have a chance to succeed, the plaintiff must establish the absence of probable cause for arrest and then show that retaliation for the exercise of free speech rights

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was a substantial motivating factor behind the arrest. If the plaintiff makes this showing, law enforcement can prevail only by showing that the arrest would have been initiated without respect to retaliation.

The Supreme Court also provided a narrow exception to this general requirement for a plaintiff in such cases. According to the exception, if the plaintiff shows that despite the existence of probable cause to arrest, the officers exercised their discretion not to arrest other similarly situated individuals not engaging in the alleged protected speech, then the plaintiff need not make the required showing of no probable cause. In other words, if Mr. Bartlett had a like-minded wingman engaging in similar behavior, who did not get arrested by the same officers for disorderly conduct and resisting arrest, Mr. Bartlett's First Amendment retaliation claim could have potentially proceeded to trial.

The viability of the exception to the new rule is debatable because the plaintiff bears the burden of producing objective evidence of similarly situated comparators. And it is well-settled that spontaneous statements can justify the reasonable belief of probable cause for a law enforcement officer to affect an arrest.

Takeaways

In *Nieves*, the Supreme Court has taken the position of encouraging proactive law enforcement. Accordingly, the standard for pursuing a citizen First Amendment retaliatory-arrest case has become more difficult to satisfy.

If you would like more information about this case or have any questions related to First Amendment retaliation claims, whether in the context law enforcement arrests, public employment, or otherwise, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcast](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).