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**Probable Cause For Arrest Will Ordinarily  
Defeat First Amendment Retaliation Claims**

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❖ **Introduction**

*An important new U.S. Supreme Court ruling, [Nieves v. Bartlett](#), #17-1174, 2019 U.S. Lexis 3557 (May 28, 2019), greatly limits the circumstances under which a suspect arrested with probable cause can assert a claim for damages for alleged violation of their First Amendment free speech rights by that arrest.*

This article focuses on that case. It first examines some of the prior caselaw on First Amendment retaliatory prosecution or arrest claims, and then discusses the facts and reasoning of this latest U.S. Supreme Court decision on the topic. At the end of the article, there is a listing of useful and relevant resources and references, including some commentaries on the case.

❖ **Prior Caselaw**

The U.S. Supreme Court has addressed the issue of First Amendment claims in the context of prosecutions and arrests in a number of prior cases.

In [Hartman v. Moore](#), #04-1495, 547 U.S. 250 (2006), inspectors for the U.S. Postal Service investigated a company and its chief executive, believing that they had an improper role in the search for a new Postmaster General, and had been involved in a

consulting-firm kickback scheme. A federal prosecutor, allegedly urged to do so by the postal inspectors, brought criminal charges against the firm and a number of its executives. The federal trial court acquitted the defendants, and concluded that there was no evidence that they engaged in any crimes.

The company's chief executive then filed a federal civil rights lawsuit under [\*Bivens v. Six Unknown Fed. Narcotics Agents\*](#), #301, 403 U.S. 388 (1971), claiming that the prosecution had violated his [First Amendment](#) rights, and had been brought in retaliation for his various lobbying efforts.

Claims against the federal prosecutor were dismissed on the basis of absolute prosecutorial immunity for the decision to proceed with a criminal prosecution. Ultimately, a federal trial court denied a motion for qualified immunity by the defendant postal inspectors, who had argued that they were entitled to such immunity because there had been probable cause for the prosecution, and a federal appeals court upheld this result.

The U.S. Supreme Court, in a 5-2 decision, with two Justices not participating, reversed this denial, holding that the complaint could not assert a claim for violation of the First Amendment through retaliatory criminal prosecution “without alleging an absence of probable cause to support the underlying criminal charge. We hold that want of probable cause must be alleged and proven.”

It was therefore insufficient to merely claim that there were governmental employees who had retaliatory motives for beginning or continuing with the prosecution, if probable cause for the prosecution on the charged criminal offenses existed.

Ordinarily, the Court's majority noted, there is a presumption of “regularity” given to a prosecutor's decision to initiate or proceed with a prosecution. “And this presumption that a prosecutor has legitimate grounds for the action he takes is one we do not lightly discard, given our position that judicial intrusion into executive discretion of such high order should be minimal.”

This presumption can be overcome, allowing a retaliatory prosecution lawsuit to go forward, if there is an absence of probable cause, as well as a retaliatory motive on the part of a government employee or official urging the prosecution.

Subsequently, in [\*Reichle v. Howards\*](#), #11-262, 566 U.S. 658 (2012), the U.S. Supreme Court held that it was not clearly established, at the time of a 2006 arrest, that an arrest supported by probable cause could violate the First Amendment. The plaintiff was arrested by Secret Service agents protecting Vice President Dick Cheney after he was overheard saying on his cell phone that he was going to confront the Vice President and ask him “how many kids he’s killed today.”

He touched the Vice President’s shoulder and made statements critical of the war in Iraq. The arresting agents were entitled to qualified immunity as the U.S. Supreme Court stated that it has never held that there is a First Amendment right to be free of a retaliatory arrest supported by probable cause, and the plaintiff’s action in touching the Vice President provided probable cause for the arrest for assault.

In [\*Lozman v. Riviera Beach\*](#), #17-2,1, 133 S. Ct. 735, 2018 U.S. Lexis 3691, 2018 WL 3013809, the U.S. Supreme Court found a viable First Amendment claim despite the existence of probable cause for an arrest. In this case, after a man towed his floating home into a city-owned marina, he became a critic of the city’s plan to seize waterfront homes for private development. He sued to try to block the plan. He alleged that city officials devised an official plan to intimidate him.

A police officer handcuffed him and carried him out from a city council meeting that he was trying to address. The arrest was allegedly for violating the council’s rules of procedure by discussing issues unrelated to the city and refusing to leave the podium. The prosecutor determined that there was probable cause for his arrest, but dismissed the charges.

In a lawsuit under 42 U.S.C. 1983, the trial court instructed the jury that, for the plaintiff to prevail on his retaliatory arrest claim, he had to prove that the officer was motivated by impermissible animus against his protected speech and lacked probable cause to make the arrest. A federal appeals court upheld a judgment for the city.

The U.S. Supreme Court vacated. The existence of probable cause did not bar the plaintiff’s First Amendment retaliation claim because his case is “far afield from the typical retaliatory arrest claim.” He still must prove the existence and enforcement of an official policy motivated by retaliation which is unlike an on-the-spot decision by an individual officer. The Court noted that the plaintiff alleges that the city

deprived him of the right to petition, “one of the most precious of the liberties safeguarded by the Bill of Rights.”

### ❖ New U.S. Supreme Court Decision

In [\*Nieves v. Bartlett\*](#), #17-1174, 2019 U.S. Lexis 3557 (May 28, 2019), an 8-1 majority of the Court ruled that an arrestee’s claim that two police officers retaliated against him for his protected First Amendment speech by arresting him for disorderly conduct and resisting arrest could not survive summary judgment. The Court noted that this was “a more representative case” than the atypical facts faced in [\*Lozman\*](#).

The incident in [\*Nieves\*](#) occurred during a winter sports festival, “Arctic Man,” a raucous winter sports festival held in a remote part of Alaska. One of the officers was speaking with a group of attendees at the festival when the seemingly intoxicated plaintiff started shouting at them not to talk to the police. The officer was then asking some festival participants to move their beer keg inside their RV, since minors had been making off with some beer. When the officer approached him, the plaintiff began yelling at the officer to leave.

The plaintiff later denied being drunk or acting aggressively, and did not yell at the officer. He asserted that it was the officer who became aggressive when he refused to speak to him.

Rather than escalate the situation, the officer left. Minutes later, the plaintiff approached a second officer in an aggressive manner while he was questioning a minor about alleged drinking, stood between him and the teenager, and yelled with slurred speech that the officer should not speak with the minor.

When the plaintiff stepped toward the officer, close in a combative way, the officer pushed him back. The first officer saw the confrontation and initiated an arrest. The officers took him to the ground and threatened to use a Taser on him. He was charged with disorderly conduct and resisting arrest. Those charges were later dropped.

After he was handcuffed, the arrestee claims that the first officer said “bet you wish you would have talked to me now.”

The only evidence of retaliatory animus identified by the U.S. Court of Appeals for the Ninth Circuit was the plaintiff's affidavit alleging that statement by the first officer. But that allegation said nothing about what motivated the second officer, who had no knowledge of the plaintiff's prior run-in with the first officer.

In any event, the U.S. Supreme Court found that the retaliatory arrest claim against both officers could not succeed because they had probable cause to arrest him. The existence of probable cause to arrest defeated his First Amendment claim as a matter of law.

Under the Court's analysis, the existence of probable cause for an arrest will ordinarily bar a claim that the arrest was made in retaliation for protected First Amendment speech.

The Court's opinion did provide for a small exception to this general rule where officers have probable cause to make arrests, but typically exercise their discretion not to do so, particularly with arrests made for very minor offenses. An unyielding requirement to show the absence of probable cause in such cases could pose "a risk that some police officers may exploit the arrest power as a means of suppressing speech."

The presence of probable cause will not bar a claim that the arrest was made in retaliation for protected First Amendment speech when objective evidence is presented that the plaintiff was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.

Because this is an objective rather than a subjective test, in routine situations, with probable cause for an arrest for a criminal offense, it will be a rare case in which the arrestee will be able to assert a claim for First Amendment retaliation.

The dangers of a subjective test involving the officer's state of mind or motivation for the arrest seemed clear to the Court. "Because a state of mind is 'easy to allege and hard to disprove,' a subjective inquiry would threaten to set off 'broad ranging discovery' in which 'there often is no clear end to the relevant evidence,' As a result, policing certain events like an unruly protest would pose overwhelming litigation risks. Any inartful turn of phrase or perceived slight during a legitimate arrest could land an officer in years of litigation."

“Police officers conduct approximately 29,000 arrests every day,” the Court noted. Making those arrests is “a dangerous task that requires making a quick decision.” That is why the Court “generally review[s] their conduct under objective standards of reasonableness.” The new clear rule announced by the Court should help “to ensure that officers may go about their work without undue apprehension of being sued,” while preserving the possibility of asserting a First Amendment retaliation claim in the most egregious circumstances.

## ❖ Resources

The following are some useful resources related to the subject of this article.

- [False Arrest/Imprisonment: No Warrant](#). AELE Civil Case Summaries.
- [First Amendment](#). Wikipedia article.
- [First Amendment](#). AELE Civil Case Summaries.
- [First Amendment Center](#), Library of Congress.
- [First Amendment Events: Rights of Participants](#). Reference Card for State and Local Law Enforcement Agencies, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance.
- [First Amendment Online Training](#). Bureau of Justice Assistance, National Criminal Intelligence Resource Center.
- [Retaliatory Arrests and Prosecution](#). First Amendment Encyclopedia, Free Speech Center, Middle Tennessee State University.

## ❖ Relevant Monthly Law Journal Articles

- [Contempt of Cop: Verbal Challenges, Disrespect, Arrests, and the First Amendment](#), 2011 (10) AELE Mo. L. J. 101.
- [Funeral Protests and the First Amendment](#), 2011 (6) AELE Mo. L. J. 101.
- [Retaliation Against Prisoners for Protected First Amendment Expression](#), 2010 (3) AELE Mo. L. J. 301.

❖ **References:** (*Chronological*)

1. [U.S. Supreme Court Update: The Existence of Probable Cause to Arrest May Defeat a First Amendment Claim as a Matter of Law](#), by Jack Ryan, Legal & Liability Risk Management Institute (June 3, 2019).
2. [John Roberts Strikes a Blow Against Free Speech](#), by Garrett Epps, The Atlantic (June 3, 2019).
3. [Nieves v. Bartlett and Retaliatory Arrests: Protecting Law Enforcement at the Expense of the First Amendment and Section 1983](#), by Sheldon Nahmod, Nahmod Law (June 2019).
4. [How retaliatory-arrest claims relate to the First and Fourth Amendments](#) by Erwin Chemerinsky, ABA Journal (December 3, 2018).
5. [Can Police Retaliate Against Loudmouths?](#) by Garrett Epps, The Atlantic (Nov. 26, 2018).
6. [U.S. Supreme Court Decides that an Arrest with Probable Cause can still Violate the Arrestee's First Amendment Rights](#), by Jack Ryan, Legal & Liability Risk Management Institute (June 18, 2018).
7. [Retaliatory Arrests and the First Amendment: The Chilling Effects of Hartman v. Moore on the Freedom of Speech in the Age of Civilian Vigilance](#) by Linda Zhang, 64 UCLA Law Review 1328 (2017).
8. [You Have the Right to Free Speech: Retaliatory Arrests and the Pretext of Probable Cause](#), by Katherine Grace Howard, 51 Georgia Law Review Issue 2 (January 01, 2017).
9. [Pickers, Protesters, and Police: The First Amendment and Investigative Activity](#), by Carl A. Benoit, FBI Law Enforcement Bulletin (Aug. 2012).
10. [Recommendations for First Amendment Protected Events for State and Local Law Enforcement Agencies](#), Global Justice Information Sharing Initiative, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance (December 2011).
11. [Criminal Speech](#), by Martin J. King, [FBI Law Enforcement Bulletin](#), Vol. 77, Number 4 (April 2008) pg. 23.

12. [Time, Place, and Manner: Controlling the Right to Protest](#) By Martin J. King,  
76 [FBI Law Enforcement Bulletin](#) No. 5, pgs. 20-32 (May 2007).

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