

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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SYLVIA GONZALEZ, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) No. 22-1025  
 )  
EDWARD TREVINO, II, ET AL., )  
 )  
 ) Respondents. )  
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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 plaintiff  
16 could bring a claim even if there was a warrant.  
17 For example, in Jackson versus American  
18 Telephone Company, there was a warrant for a  
19 serious offense. It was a warrant for assault  
20 with a deadly weapon, and it was properly  
21 issued. But a plaintiff still had a cause of  
22 action because that warrant was used as a  
23 pretext for private purposes, inconsistent with  
24 the exigencies of the writ in the words of  
25 common law.

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

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

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

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

16 MS. BIDWELL: Yes, Your Honor.

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

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

23 JUSTICE SOTOMAYOR: Right.

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



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

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

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

21 JUSTICE JACKSON: Well --

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

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

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

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

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

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

23 (Laughter.)

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

1 to emphasize the narrowness of the exception.

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

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

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

1           So it's a very particular causal  
2 complexity that's present in a lot of cases, but  
3 it is not present in a case like this one, where  
4 you have two months to issue a warrant based on  
5 no new information. All information that was  
6 developed developed at the time when  
7 Ms. Gonzalez took this piece of paper 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 is  
8 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 with -- of course, with prosecutors, you have  
5 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 you making  
17 this argument because you have bigger fish to  
18 fry or because you think this is the argument  
19 that's most likely to succeed in this case and  
20 serve the interests of your client?

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

1 case, you said that Mt. Healthy rules should  
2 apply.

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

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

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

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



1 to that.

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

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

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

8                   JUSTICE SOTOMAYOR: To that --

9                   JUSTICE BARRETT: Counsel -- go ahead.

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

12                  MS. BIDWELL: Yes.

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

21                  MS. BIDWELL: Your Honor -- sorry.

22                  JUSTICE SOTOMAYOR: Where was that  
23                  from?

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

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

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

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

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

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

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

23 MS. BIDWELL: Yes, Your Honor, but the  
24 way that the Fifth Circuit is describing that  
25 rule, just the fact that Ms. Gonzalez is a

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

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

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

11 CHIEF JUSTICE ROBERTS: Why not --

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

14 JUSTICE BARRETT: Finish.

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

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

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

22 CHIEF JUSTICE ROBERTS: Well, I mean,  
23 in Nieves, the whole point is -- we were talking  
24 about jaywalking, and the point is nobody's ever  
25 arrested for jaywalking unless there's something

1 fishy going on on. And to sort of pick one  
2 person and say, well, that's an adequate  
3 comparator, I think, really misses the whole  
4 point of Nieves.

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

16 So it is important --

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

24 MS. BIDWELL: Yes. And you normally  
25 don't allow this kind of inquiry because police

1 officers have to make decisions where they have  
2 to take speech into account very quickly, so --  
3 but I understand that now I'm talking about  
4 Question Presented 2 again.

5 CHIEF JUSTICE ROBERTS: Yeah.

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

21 JUSTICE KAVANAUGH: Well, is it --

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

23 JUSTICE BARRETT: Counsel -- oh,  
24 sorry. Go ahead.

25 JUSTICE KAVANAUGH: You go ahead.

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

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

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

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

1 supported his opponent, that kind of evidence of  
2 motive under Nieves is not going to qualify as  
3 objective evidence.

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

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

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

25 JUSTICE BARRETT: Yeah, I'm -- I'm



1       positing -- everything else that you have --

2                   MS. BIDWELL:  Yes.

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

7                   MS. BIDWELL:  Right.

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

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

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

24                  JUSTICE BARRETT:  So reckless driving,  
25      they follow her on her way home and she's going

1 -- you know, what is the standard -- 15 miles  
2 over the speed limit, she's -- she's speeding  
3 late at night on a country road where there's no  
4 one there. Same -- same rule? The crime  
5 doesn't matter?

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

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 Justice Thomas, anything further?

16 Justice Alito?

17 Justice Sotomayor?

18 Justice Kagan?

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

22 MS. BIDWELL: Yes, Your Honor.

23 JUSTICE KAVANAUGH: And I guess, on  
24 the fact pattern here, how are you going to have  
25 evidence that goes one way or the other? I

1 mean, the fact that no one's been prosecuted who  
2 stole a doc -- allegedly stole a document from  
3 the next person at the city council meetings, so  
4 I'm just curious what you think -- how this is  
5 going to proceed? I mean, you look at the  
6 video, which I have, and, you know, you could  
7 come to one conclusion about this.

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

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

1 I guess --

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

8 But even if --

9 JUSTICE KAVANAUGH: But I -- keep  
10 going. I'm sorry.

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

18 The problem with the Fifth Circuit's  
19 rule --

20 JUSTICE KAVANAUGH: I guess --

21 MS. BIDWELL: Yeah.

22 JUSTICE KAVANAUGH: I guess the  
23 concern I have here is the crime is a -- the  
24 offense is a serious offense, the offense  
25 itself. The question's really whether the --

1 the facts of this case meet it.

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

9 MS. BIDWELL: Your Honor --

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

13 MS. BIDWELL: Justice Kavanaugh, we --

14 JUSTICE KAVANAUGH: -- that's not --  
15 that's not nothing.

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

19 JUSTICE KAVANAUGH: I -- I understand  
20 that.

21 MS. BIDWELL: Yes.

22 JUSTICE KAVANAUGH: That's the -- but,  
23 in terms of concluding that it's retaliatory, I  
24 think you have to show some evidence that she  
25 was singled out for -- under Nieves, singled

1 out. I mean, Nieves is very specific about  
2 saying you need to identify similarly situated  
3 individuals not engaged in the same sort of  
4 protected speech had not been -- had not been  
5 arrested.

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

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

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

23 MS. BIDWELL: There is probable cause  
24 to say that she concealed a government record  
25 because she took a -- a piece of paper from one

1 side of the dais and moved it to another side of  
2 the dais. As Judge Oldham explains in his  
3 dissent, this kind of a crime is akin to my  
4 letting my kid ride a bicycle around the  
5 neighborhood but being charged under or being  
6 arrested for child endangerment.

7 JUSTICE KAVANAUGH: Okay. Thank you.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Barrett?

10 Justice Jackson?

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

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

1 cetera, et cetera.

2 So are you asking for sort of an  
3 extension of the Nieves exception to cover that  
4 kind of evidence as well?

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

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

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



1 of vexatious litigation. So maybe you can  
2 explain why that wouldn't be the case.

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

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

19 JUSTICE JACKSON: Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel.

22 MS. BIDWELL: Thank you.

23 CHIEF JUSTICE ROBERTS: Ms. Reaves.  
24  
25

1                   ORAL ARGUMENT OF NICOLE F. REAVES  
2                   FOR THE UNITED STATES, AS AMICUS CURIAE,  
3                   SUPPORTING NEITHER PARTY

4                   MS. REAVES: Mr. Chief Justice, and  
5 may it please the Court:

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

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

22                  The Fifth Circuit, therefore, applied  
23 the wrong legal standard by effectively  
24 requiring Petitioner to show direct evidence of  
25 comparators or empirical statistics.

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

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

13           I welcome the Court's questions.

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

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

18           JUSTICE THOMAS: Yeah.

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

23           JUSTICE THOMAS: What is that?

24           MS. REAVES: So I think it can be a  
25           variety of different types of evidence in

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

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

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

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

25 That being said, some types of

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

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

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

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

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

23 MS. REAVES: I respectfully disagree  
24 because I think that evidence still has to  
25 ultimately go to show that a similarly situated

1 person wouldn't have been arrested.

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

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

11           MS. REAVES: -- crafted the general no  
12 probable cause rule.

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

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

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

25           CHIEF JUSTICE ROBERTS: Like, what

1 sort of stuff would not be admissible as  
2 evidence if you think the probable cause  
3 requirement should be defeated?

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

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

21 MS. REAVES: So I think some of the  
22 evidence Petitioner has relied on here, so  
23 evidence about other council members who aren't  
24 defendants here and using that evidence when  
25 it's not part of a Monell pattern or practice

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

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

16 So I understand in Nieves that that  
17 may not have been relevant, in part because it  
18 was a warrantless arrest, so there was no  
19 process involved, and also in part because,  
20 frankly, Mr. Nieves's complaint didn't allege an  
21 ulterior motive that might satisfy an abuse of  
22 process claim, right? It didn't -- it didn't  
23 have an allegation that he was being extorted in  
24 the way that we have that kind of allegation  
25 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 three points on that,  
6                   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, 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 doesn't -- it wasn't limited to  
23 property and money. Often it was, you're right.  
24 But I've actually litigated abuse of process  
25 claims, and the -- the point is the process,

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

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

11 JUSTICE GORSUCH: Well --

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

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

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

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

6 And, second, I think it would be odd  
7 for the Court --

8 JUSTICE GORSUCH: Well, if I read it  
9 differently, then what?

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

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

21 In the middle, the Court would look to  
22 a different analogy, and I don't think that  
23 analogy is justified by the rationales this  
24 Court has articulated for the no probable cause  
25 rule, which are that probable cause will always

1 be relevant and readily available and evidence  
2 of it or lack thereof, and, second, that there  
3 may be causal difficulties caused by multiple  
4 actors or the propriety of considering speech in  
5 certain situations.

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

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel.

14 Justice Thomas?

15 Justice Alito?

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

25 MS. REAVES: So that evidence,

1 standing alone, is not going to be enough to  
2 demonstrate that there were similarly situated  
3 people who engaged in the same sort of activity  
4 who were not arrested.

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

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

19 CHIEF JUSTICE ROBERTS: Justice  
20 Sotomayor?

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

1 correct?

2 MS. REAVES: That's correct. We think  
3 the Fifth Circuit applied too strict a form of  
4 evidence requirement.

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

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

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

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

22 JUSTICE SOTOMAYOR: Have you seen an  
23 explosion of litigation with retaliatory --  
24 Lozman-type retaliatory arrest exceptions?

25 MS. REAVES: We haven't done a

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

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

15 JUSTICE SOTOMAYOR: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice Kagan?

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



1 MS. REAVES: That's correct.

2 JUSTICE KAGAN: That's -- that's --  
3 that's an obvious implication of -- I mean not  
4 just an implication. Nieves makes that quite  
5 clear.

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

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

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

1 comparative in nature.

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

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

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

24           MS. REAVES: Well, I think there are  
25 four of -- it makes sense to put them in the

1 bucket of things that courts can consider, first  
2 of all, because courts generally aren't limited  
3 in the form of evidence they can rely on to  
4 consider inferences. And I think, in particular  
5 here, any objective evidence is going to go to  
6 addressing Hartman's causal concerns by helping  
7 to establish that non-retaliatory grounds were,  
8 in fact, insufficient to provoke adverse  
9 consequences.

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

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

25           JUSTICE KAGAN: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Gorsuch?

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

9 MS. REAVES: That's correct. We read  
10 Nieves and Hartman to be elements of the causes  
11 of action, not elements of the First Amendment  
12 itself.

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

18 MS. REAVES: That's absolutely  
19 correct, and that's why we argued in our brief  
20 that the Court should actually make that clear  
21 at some point in one of these cases.

22 JUSTICE GORSUCH: And causation,  
23 normally, a plaintiff can point to any evidence  
24 to -- to support an inference of causation,  
25 right?

1 MS. REAVES: That's correct. Any  
2 relevant evidence that's otherwise admissible,  
3 yes.

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

12 MS. REAVES: That's correct.  
13 Obviously, qualified immunity isn't directly at  
14 issue in this case before this Court. That --

15 JUSTICE GORSUCH: No, we haven't -- we  
16 haven't gotten to that yet, right?

17 MS. REAVES: Right.

18 JUSTICE GORSUCH: You have to jump  
19 through this hoop before you get to that hoop,  
20 right?

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

23 JUSTICE GORSUCH: Okay.

24 MS. REAVES: -- Justice Gorsuch. If  
25 this requirement is a part of the cause of

1 action, not a part of the First Amendment  
2 requirement, as a general matter, an official is  
3 not going to be entitled to qualified immunity  
4 based on a mistake about the scope of the cause  
5 of action.

6 JUSTICE GORSUCH: Well, you've got  
7 clearly established law, though, you know, and  
8 you've got to be able to point to something,  
9 right?

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

12 JUSTICE GORSUCH: We've got the second  
13 part --

14 MS. REAVES: -- the Court should  
15 potentially clarify this.

16 JUSTICE GORSUCH: -- of qualified  
17 immunity still to deal with.

18 MS. REAVES: Yes, Justice Gorsuch.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Kavanaugh?

21 JUSTICE KAVANAUGH: I think what  
22 you're looking for, right, is evidence that  
23 suggests that other people who did what this  
24 person is alleged to have done wouldn't have  
25 been arrested and that this person was arrested

1 because of her political viewpoint or particular  
2 speech or political expressive activities.

3 Does that sound right so far?

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

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

20 But just thinking about inferences --  
21 you used the word "inferences" a lot -- if you  
22 have probable cause -- and I'm not saying it  
23 exists here or not -- if you have probable cause  
24 that someone intentionally stole government  
25 documents, intentionally, knowingly,

1 intentionally, to impair a government  
2 investigation or proceeding, I mean, that's  
3 going to be prosecuted all the time, right?

4 MS. REAVES: I agree with that,  
5 Justice Kavanaugh. I think --

6 JUSTICE KAVANAUGH: Exactly.

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

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

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



1 falls in the misdemeanor bucket.

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

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

16 I mean, I don't know that you wouldn't  
17 be -- the inference would be you would be  
18 prosecuted under some statute, even if it is "a  
19 general intent" statute, isn't that right?

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

1 JUSTICE KAVANAUGH: Who engaged in  
2 those facts?

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

9 JUSTICE KAVANAUGH: Right. And the  
10 whole case here -- yeah. Okay. Thank you.

11 JUSTICE BARRETT: I'd like to pick up  
12 there. So how important is the seriousness of  
13 the crime?

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

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

25 Does it matter at all? I mean, do we

1 look at the facts? Do we look at the crime?  
2 And before we even get into the Nieves exception  
3 and looking at the kind of evidence that you're  
4 proposing, do we do some sort of threshold  
5 analysis about whether the facts or the crime or  
6 both are actually serious?

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

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

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

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

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

19                   MS. REAVES: So, as far as the  
20 seriousness of the crime goes, even if you don't  
21 --

22                   JUSTICE BARRETT: Felony versus --

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

24                   JUSTICE BARRETT: -- misdemeanor or  
25 whatever.

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

11                   JUSTICE BARRETT: Thank you.

12                   CHIEF JUSTICE ROBERTS: Justice  
13 Jackson?

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

24                   But then you seem to accept numbers or  
25 different kinds of forms of evidence that don't

1 in my view necessarily go directly to  
2 determining that a similarly situated person was  
3 treated differently.

4 So how -- I guess Justice Kagan put it  
5 that there are sort of several inferences to get  
6 you from certain kinds of evidence to a  
7 similarly situated person.

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

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

23 MS. REAVES: So I think you're either  
24 going to need to have evidence or you're going  
25 to need to have an inference that similarly

1 situated people engaged in the same sort of  
2 activity and were not arrested. We just don't  
3 think there needs to be direct evidence of that.

4 And I think, for example --

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

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

19 And I think maybe the jaywalking  
20 example is helpful. There might be a situation  
21 in which you have evidence no one's ever been  
22 arrested for jaywalking before. You don't have  
23 direct evidence that anyone has jaywalked out  
24 this corner in front of the -- a police officer,  
25 but that might be something that there could be

1 an inference for in these sort of low-level  
2 endemic crimes.

3 JUSTICE JACKSON: All right. Thank  
4 you.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 Ms. Blatt.

8 ORAL ARGUMENT OF LISA S. BLATT  
9 ON BEHALF OF THE RESPONDENTS

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

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

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



1 exception.

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

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

19           But then every arrest invites a  
20 lawsuit. Every case gets past a motion to  
21 dismiss and on to discovery and before a jury.  
22 Plaintiffs will always contest the police  
23 version of events and then point to the -- the  
24 lack of arrest records for their reframed  
25 conduct. Take this case: The complaint alleges

1 Petitioner accidentally misplaced papers and  
2 denies that Petitioner acted intentionally, but  
3 the warrant application recounts a case of  
4 serious intentional theft.

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

13 I welcome questions.

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

21 What would be some of your responses  
22 to some of the arguments that you have heard for  
23 the type of evidence? For -- what I'm  
24 concerned -- interested in, for example, is --  
25 and there are rare cases where crimes are rarely

1 punished and that you could have the exact same  
2 argument. What kind of evidence would you use  
3 in a case like that to counter the probable  
4 cause?

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

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

24 JUSTICE THOMAS: Well, I think the --  
25 I -- well, I'm not going to say I have agreed

1 with you again, but that's not where we are now,  
2 and what I'm trying to get you to engage with is  
3 some of the back and forth we've had so far.

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

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

25 JUSTICE SOTOMAYOR: Counselor, you're

1 characterizing this as a theft, as -- and the  
2 assumption of Justice Kavanaugh was the same.  
3 But the government's pointing out, and I think  
4 rightly, that this wasn't charged as a theft  
5 because theft would have a defense of there was  
6 no intention to permanently deprive someone.  
7 There's a whole series of things.

8           The crime that was charged here was a  
9 crime of moving a document, and all it required  
10 was a general intent to move it. The defense  
11 was, I didn't -- I did it accidentally. She may  
12 have been defeated in that or not.

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

18           MS. BLATT: So --

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

1 intentionally or not.

2 I'd go a step further having been a  
3 former prosecutor. Even if it was intentional,  
4 we probably wouldn't have brought the charges  
5 because no harm, no foul, no harm.

6 MS. BLATT: Mm-hmm.

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

13 MS. BLATT: Mm-hmm.

14 JUSTICE SOTOMAYOR: -- with -- when  
15 there's a dispute about things like this, people  
16 are not arrested in this way.

17 MS. BLATT: So --

18 JUSTICE SOTOMAYOR: That's exactly  
19 what I think their claim is.

20 MS. BLATT: Mm-hmm.

21 JUSTICE SOTOMAYOR: You're -- you're  
22 characterizing it differently, but that's the  
23 bottom line of this claim.

24 MS. BLATT: So -- so at least four  
25 responses. One, there was no charge here.

1 There was an arrest, and the arrest warrant  
2 three times says the opposite of what you just  
3 said. It said the video clearly shows Gonzalez  
4 intentionally concealing and removing a petition  
5 from custody. Page 49, there's no mistake  
6 Gonzalez knows what she's holding. She's  
7 holding the petition. At warrant page 53, I'm  
8 charging her for meeting the elements of the  
9 statute because she had a desire to  
10 intentionally remove and impair the availability  
11 of this document from city custody.

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

22 If you look at all six provisions of  
23 that statute, it's wrongdoing, all of it. It is  
24 inconceivable that a statute called tampering  
25 and that has all bad acts, this one little act

1 was, oh, here, I just committed theft because I  
2 just moved something for the other, it's just  
3 not credible.

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

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

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

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

25 Now, when you get it to that level of



1 specificity that no one took, you know, the  
2 feathers from the Smithsonian, then the Fifth  
3 Circuit said naturally, well, who steals  
4 feathers from the Smithsonian? And the -- the  
5 Fifth Circuit said on pages 29 and 30, you have  
6 to have some comparative evidence.

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

14 JUSTICE JACKSON: But isn't --

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

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

24 MS. BLATT: So -- so the plaintiff has  
25 two choices, and she could have had two choices

1 here. She could have at least said I'll allege  
2 a comparator. This statute -- I'm not going to  
3 challenge probable cause or this statute, but it  
4 covers completely innocent conduct. And I'm  
5 going to allege people always engage in innocent  
6 conduct and don't get arrested.

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

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

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

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

25 MS. BLATT: Mm-hmm.

1 JUSTICE GORSUCH: -- because of my  
2 First Amendment expression is not enough to  
3 state a claim?

4 MS. BLATT: Absolutely not. And the  
5 reason is why the government says this on page  
6 20 of their brief.

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

11 MS. BLATT: Mm-hmm.

12 JUSTICE GORSUCH: -- counting statutes  
13 and regulations. I can't imagine how many there  
14 are at the state and local level.

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

21 MS. BLATT: Well, I'm going to -- if  
22 -- if -- I'm going to try to convince you  
23 otherwise, but I have to try to do that.

24 JUSTICE GORSUCH: Yeah. I'd like --  
25 I'd like -- good luck.

1 (Laughter.)

2 MS. BLATT: Okay. So it's -- well,  
3 let me just try this, Justice Gorsuch. If it's  
4 never been enforced, then just say, people do  
5 it. If there's a statute that makes it illegal  
6 to commit adultery, it's not that hard to say I  
7 -- I've committed adultery or my neighbors  
8 committed adultery.

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

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

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

1                   But you're saying that -- that a court  
2                   can't even look at that evidence, the fact that  
3                   a crime has never been prosecuted, ever, except  
4                   for against a person who alleges a First  
5                   Amendment violation, I have to turn a blind eye  
6                   to that.

7                   MS. BLATT: No, you --

8                   JUSTICE GORSUCH: I can't even look at  
9                   it is your --

10                  MS. BLATT: You --

11                  JUSTICE GORSUCH: That's your  
12                  argument.

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

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

18                  MS. BLATT: If -- if you have a simple  
19                  allegation that there is a person on the planet  
20                  who has done that conduct.

21                  JUSTICE KAGAN: A named person on the  
22                  planet?

23                  MS. BLATT: No.

24                  JUSTICE KAGAN: Just a -- a person on  
25                  the planet?

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

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

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

24           MS. BLATT: And -- and, again, we're  
25 going to get into a dispute about, if you accept

1 the warrant -- if you accept the plaintiff  
2 complaint, the -- the -- the -- the officer will  
3 always lose and the officer can never arrest and  
4 the officer doesn't -- literally can never  
5 arrest without worrying about getting sued and  
6 --

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

14 MS. BLATT: It was denied here. It  
15 was already denied because the court said, the  
16 district court said, Nieves created an exception  
17 and you adequately pled the exception. So it  
18 was actually denied. And Judge Oldham said --  
19 the -- the Fifth Circuit reversed on the First  
20 Amendment issue. Judge Oldham said he's not so  
21 sure how he would rule on qualified immunity.

22 But we're happy to win on qualified  
23 immunity, but we actually lost it here. And the  
24 Court in Nieves could have done the same thing.  
25 Generally, you want to keep it so officers

1 aren't afraid of being sued.

2 JUSTICE SOTOMAYOR: All we do is  
3 vacate and remand and let them -- and let them  
4 --

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

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

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

23 MS. BLATT: Well --

24 JUSTICE BARRETT: And that will knock  
25 out cases, right?



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

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

16 JUSTICE KAVANAUGH: Can I -- can I ask  
17 about --

18 MS. BLATT: -- already.

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

1 removing government documents, et cetera.

2 MS. BLATT: Yes.

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

9 MS. BLATT: We agree.

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

17 MS. BLATT: Well, you wanted --

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

22 MS. BLATT: So the in the weeds is  
23 that's why you need comparators, but at a higher  
24 level, it is why we're making the argument that  
25 this will happen in every case if you extend it

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

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

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

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

1 MS. BLATT: Have at it.

2 JUSTICE BARRETT: -- hey, you  
3 intentional -- you intentionally do it, you  
4 intentionally gathered, you intentionally  
5 blocked a street.

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

15 JUSTICE KAVANAUGH: The, like, protest  
16 cases?

17 MS. BLATT: Protest cases.

18 JUSTICE KAVANAUGH: Yeah. Or --

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

24 (Laughter.)

25 JUSTICE KAGAN: I guess I was -- I

1 thought that the part -- I thought that the  
2 point of Nieves was, if you have solid objective  
3 evidence that you're in a world in which you  
4 were arrested for something that somebody who  
5 hadn't engaged in your speech activities would  
6 not be arrested for, that you should be able to  
7 present that evidence to get over the probable  
8 cause bar.

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

11 MS. BLATT: Two videos.

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

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

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

25 JUSTICE KAGAN: Well, it's not a

1 Lozman claim against the city. It's the same  
2 defendants here.

3 MS. BLATT: Oh, it's just -- just  
4 officers agreeing?

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

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

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

19 MS. BLATT: This -- this --

20 JUSTICE KAGAN: I mean, I guess what  
21 I'm suggesting is that the point -- look, the  
22 point of this probable cause bar is we don't  
23 want every old allegation of, like, you know,  
24 they had a bad intent and they were trying to  
25 look at -- but, if you have solid objective

1 evidence that you were being treated differently  
2 from another person in your situation, that that  
3 solid objective evidence should -- and part of  
4 that might be comparative in the way that you're  
5 suggesting, but -- but there might be other  
6 things too.

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

13 JUSTICE GORSUCH: You're -- you're  
14 fighting the facts and -- and -- and -- and --

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

17 JUSTICE GORSUCH: Justice Kagan's  
18 asking you a hypothetical question. I'd be  
19 grateful if you'd answer it.

20 MS. BLATT: Sure. The problem with  
21 this anything goes --

22 JUSTICE KAGAN: It's good I have an  
23 enforcer.

24 MS. BLATT: Yes.

25 (Laughter.)

1 JUSTICE GORSUCH: Anytime.

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

4 MS. BLATT: And -- and your  
5 question --

6 JUSTICE KAGAN: But I had a  
7 hypothetical --

8 MS. BLATT: -- was excellent.

9 JUSTICE KAGAN: -- and it was a good  
10 one.

11 JUSTICE GORSUCH: It was.

12 (Laughter.)

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

20 JUSTICE KAGAN: No, now you're still  
21 fighting it because --

22 JUSTICE GORSUCH: Yeah.

23 JUSTICE KAGAN: -- because --

24 MS. BLATT: Sorry. Okay. On -- on  
25 your other hypo --



1 JUSTICE GORSUCH: You don't need an  
2 enforcer.

3 (Laughter.)

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

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

20 MS. BLATT: Right.

21 JUSTICE KAGAN: It's obvious on its  
22 face that this is treating Ms. Gonzalez  
23 differently.

24 MS. BLATT: And what I'm concerned  
25 about is the next hypothetical, where the

1 plaintiff, like in Nieves, says that officer  
2 said to me: You know, I was out to get you, or  
3 I'm so glad -- you know, it's time to arrest  
4 you. I've been waiting.

5 I mean, the -- the -- we all know that  
6 the government --

7 JUSTICE KAGAN: I mean, now you're  
8 just -- you're going to the statements that  
9 obviously are not coming in under Nieves because  
10 they're just statements that the officer made --

11 MS. BLATT: But you have them on  
12 videotape, right?

13 JUSTICE KAGAN: -- reflecting his  
14 state of mind at that time. So --

15 MS. BLATT: Isn't the only -- I'm  
16 sorry. Maybe I misunderstood your hypo. Isn't  
17 it only because there's a videotape of the  
18 officer's statements?

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

24 MS. BLATT: I worry that if you write  
25 an opinion that says only that evidence is okay

1 if you've got the officer on videotape, that's  
2 fine. I worry where you're going is anything  
3 that I as a judge think is pretty relevant that  
4 she was picked on. That's what scares me, and  
5 that's what scares me representing police  
6 officers, who literally, you know, are trying to  
7 work to get the community to trust them and do  
8 their job and don't, you know, have smear  
9 campaigns every time they're sued. It's -- it's  
10 --

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

1 MS. BLATT: Now you're my enforcer, I  
2 think.

3 (Laughter.)

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

6 MS. BLATT: But it sounds like a very  
7 helpful question.

8 JUSTICE ALITO: You don't need one by  
9 any means.

10 (Laughter.)

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

20 JUSTICE ALITO: Now what about these  
21 two situations? So there's a protest and one of  
22 the protesters is 6 foot 5 and weighs 250 pounds  
23 and used to be a -- a linebacker in college and  
24 gets into an argument with a police officer  
25 about something and pushes the police officer.

1 The police officer arrests him, charges him with  
2 assault, which is a felony, all right? That's  
3 -- well, I'll continue --

4 CHIEF JUSTICE ROBERTS: No, go ahead.

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

12 Is -- what would be the comparator in  
13 that situation? You have to find another  
14 situation where there's a -- a person of similar  
15 statute --

16 MS. BLATT: No.

17 JUSTICE ALITO: -- stature who --

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

24 So, in your -- again, I would never  
25 put this on assault because every case will be:

1 I just elbowed, everyone else was punching, and  
2 I was the only one arrested. But assuming it's  
3 going to do assault, it's easy to allege a  
4 comparator: Everyone at the bar was throwing  
5 punches, and I was the only one wearing my  
6 T-shirt that said "I hate the police." You meet  
7 the comparator requirement easily.

8 JUSTICE ALITO: All right. Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you.

10 Justice Thomas?

11 Anything further, Justice Alito?

12 Anything, Justice Gorsuch?

13 Justice Kavanaugh?

14 Oh, I'm sorry. Justice Barrett?

15 Justice Jackson?

16 MS. BLATT: Oh, thank goodness.

17 (Laughter.)

18 MS. BLATT: Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,

20 counsel.

21 Rebuttal, Ms. Bidwell?

22 REBUTTAL ARGUMENT OF ANYA A. BIDWELL

23 ON BEHALF OF THE PETITIONER

24 MS. BIDWELL: I have four points to

25 make.

1           So first point is I think it's very  
2           important to look at the two questions presented  
3           in context of each other. So, if you are saying  
4           that Nieves covers the vast bulk of cases, which  
5           are the cases where police officers are making  
6           on-the-spot arrests, for example, during  
7           protests, during art event festivals, when they  
8           are responding to domestic violence calls,  
9           that's the vast bulk of police cases.

10           If you say that Nieves only covers  
11           that, then when you talk about objective  
12           evidence carveout, the -- the exact example of a  
13           comparator might actually make sense because  
14           then you can have a comparator, for example, on  
15           -- during a protest.

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

1 protesting events under the endemic crime  
2 similarly situated exception.

3 So it's important to keep those two  
4 perspectives in terms of Question Presented 1  
5 and Question Presented 2.

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

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

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 counsel.

25 The case is submitted.



1                   (Whereupon, at 11:30 a.m., the case  
2 was submitted.)  
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