A (Very) Unlikely Hero: How *United States v Armstrong* Can Save Retaliatory Arrest Claims After *Nieves v Bartlett*

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In Nieves v Bartlett*, the Supreme Court holds that plaintiffs alleging retaliatory arrests are generally required to prove a lack of probable cause to arrest; there is one small exception for plaintiffs who can demonstrate by "objective evidence" that similarly situated individuals would not have been arrested but for the protected speech at issue. Unfortunately, neither the general rule nor the exception in this recent ruling will help many victims of retaliation. The expansion of the criminal code to cover petty indiscretions means police officers will not have any difficulty identifying probable cause to arrest for* something*. As to the* Nieves *exception, obtaining records of arrests that did* not *occur requires proving a negative—never an easy task. Importantly, the opinion requires courts to disregard even credible evidence of retaliatory intent at the threshold level, unless the plaintiff can show lack of probable cause or provide evidence regarding similarly situated individuals.*

As Justice Neil Gorsuch tentatively suggests in his Nieves *opinion, the rule from* United States v Armstrong*, which governs the discovery bar for selective prosecution claims, is a much better fit than the* Nieves *majority's rigid rule. Although the* Armstrong *Court crafted an analogous similarly-situated-individuals requirement, the opinion left open whether direct evidence of intent could allow litigants to sidestep that requirement. Given the centrality of intent to both selective prosecution and retaliatory arrest claims, courts should follow* Armstrong *in the retaliatory arrest context and consider evidence of intent at the start of litigation. While evidence of prosecutorial intent rarely comes to light, retaliatory arrest plaintiffs will have significantly more access to evidence of police intent, making the* Armstrong *rule more useful in this context—especially in the age of cellphone videos and civilian vigilance.*

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INTRODUCTION

In May 2019, the Supreme Court attempted to clarify the long-disputed standard for First Amendment retaliatory arrest claims. *Nieves v Bartlett*[1] holds that, as a threshold matter,[2] a plaintiff must prove a lack of probable cause for their arrest, but that a "*narrow* qualification"—an exception to the probable cause burden—"is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so."[3] However, to show this exception applies, plaintiffs must present "objective" evidence that similarly situated offenders who were not exercising their free speech rights were not arrested.[4] Importantly, under the "narrow qualification," a plaintiff must present evidence regarding similarly situated individuals at the threshold level, even if they have direct evidence

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1 139 S Ct 1715 (2019).

2 As a case deciding the threshold requirements for retaliatory arrest claims, *Nieves*'s holding governs what showings a plaintiff is required to make before a court will consider other elements of their claim. See id at 1727.

3 Id (emphasis added). While the majority uses the term "narrow qualification," it is framed as an exception to the no-probable-cause requirement throughout the majority opinion, and the other *Nieves* opinions frame it as an exception rather than a qualification.

4 Id.

of retaliatory animus.[5] Under *Nieves*, evidence of a police officer's intent, such as the officer's statements prior to or during an arrest, is ignored at the threshold level.[6]

Concurring in part and dissenting in part, Justice Neil Gorsuch notes that the narrow qualification rule appears similar to the standard for discovery in selective prosecution claims.[7] This standard was established in *United States v Armstrong*,[8] which requires defendants to show that "similarly situated individuals of a different race were not prosecuted" before proceeding to discovery.[9] However, *Armstrong* left open the possibility that plaintiffs could use direct evidence of unconstitutional intent, in lieu of comparison-based evidence regarding similarly situated suspects, to meet the burden.[10] Analogizing to *Armstrong*, Justice Gorsuch reads *Nieves* to similarly allow direct evidence of intent to be considered at the threshold level in certain circumstances.[11] In his opinion, he advocates for lower courts to apply *Nieves* "commonsensically" by giving plaintiffs some evidentiary flexibility.[12] However, the majority's requirement that threshold evidence be "objective" makes it unlikely that courts will consider even credible evidence of intent at the threshold level.

If comparison-based evidence regarding similarly situated individuals is required in every retaliatory arrest case that fails the no-probable-cause test, many victims will be left without redress. Because police officers are permitted to arrest for minor offenses and criminal laws cover many petty violations, officers can often justify a retaliatory arrest with probable cause (for *something*). Thus, many potential plaintiffs must rely on the narrow qualification. Unfortunately, the *Nieves* majority requires plaintiffs to prove a negative—that similarly situated offenders were not arrested—and evidence of non-arrests will be difficult or impossible to find in most circumstances. Thus, victims of police retaliation will have little recourse in the wake of *Nieves*.

Nieves also muddles the Court's rulings in cases involving unconstitutional intent. The majority improperly transplants

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5 *Nieves*, 139 S Ct at 1727 (noting that "[b]ecause this inquiry is objective, the statements and motivations of the particular arresting officer are 'irrelevant' at this stage").

6 See id.

7 See id 1733 (Gorsuch concurring in part and dissenting in part).

8 517 US 456 (1996).

9 Id at 465.

10 See id at 469 n 3.

11 See *Nieves*, 139 S Ct at 1734 (Gorsuch concurring in part and dissenting in part).

12 Id, quoting id at 1741 (Sotomayor dissenting).

Fourth Amendment reasonableness doctrine and applies it to a category of claims that depend on the defendant's intent, not on whether their actions were objectively reasonable.[13] In contrast, the *Armstrong* standard governs selective prosecution claims, which hinge on discriminatory intent, not whether a prosecution was otherwise reasonable.[14] Because the question of intent is at the heart of both selective prosecution and retaliation claims, *Armstrong* offers a more appropriate framework than the Fourth Amendment doctrine cited by the majority.

This Comment argues that applying *Armstrong* to retaliatory arrest claims would open up more opportunities for victims to seek recourse than the existing *Nieves* framework provides, while avoiding *Nieves*'s doctrinal problems. Applying *Armstrong* to retaliatory arrest suits would create a threshold requirement that plaintiffs could meet if they could show that (1) the defendant officer lacked probable cause, (2) similarly situated individuals were not or would not have been arrested, or (3) credible evidence of the defendant officer's unconstitutional *intent* exists. This would give plaintiffs a crucial third way to meet the threshold requirement for their claims' survival and better reflect the fact that retaliation claims depend on evidence of intent, which should not be disregarded at any stage of litigation.

Still, the *Armstrong* standard is a demanding one, and criminal defendants have largely been unsuccessful in using direct evidence of unconstitutional intent in the selective prosecution arena. Although *Armstrong* does not *require* defendants to come up with comparison-based evidence if they have direct evidence of intent, the *Armstrong* Court likely did not expect many criminal defendants to have direct evidence of a prosecutor's malintent, presumably because prosecutors are unlikely to air such discriminatory intent in public. Regardless of the *Armstrong* Court's expectations, nothing in the opinion can be read to bar direct evidence of intent in disputes that hinge on such a factor.[15] The same reasoning applies in the retaliatory arrest context. Fortunately, in those cases, allowing litigants to use evidence of

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[13] See id at 1724–25 (majority).

[14] See *Wayte v United States*, 470 US 598, 608 (1985) ("[T]he decision to prosecute may not be deliberately based upon an unjustifiable standard.") (quotation marks omitted). See also Part III.B.2.

[15] See *Armstrong*, 517 US at 469 n 3 (reserving the question whether direct evidence of intent can be considered in lieu of the similarly-situated-individuals showing). See also *United States v Al Jibori*, 90 F3d 22, 25 (2d Cir 1996) (interpreting *Armstrong* and noting that "admissions [of intent] should sometimes justify further inquiry").

intent is much more likely to make a difference. In retaliatory arrest cases, the defendants are police officers, not prosecutors. Police officers conduct much of their business on the street, and the rise of cellphone videos and "copwatching" efforts have greatly increased the likelihood that direct evidence of retaliatory intent on the part of police officers will be at least witnessed, if not captured on video. Because direct evidence of intent will be significantly easier to obtain in retaliatory arrest scenarios than in selective prosecution, the application of *Armstrong* here is even more appropriate. Though the case has proven to be a hindrance for criminal defendants in its original context, this Comment proposes using *Armstrong* in a new, more positive way: to help victims of police misconduct.

Part I briefly explains First Amendment retaliation doctrine, the 42 USC § 1983 remedy, and how they interact in retaliation claims. Section 1983 serves as a vehicle for enforcing constitutional rights, but subsequent case law has constrained when plaintiffs can get recourse for violations. In *Nieves*, *Armstrong*, and other cases, the Court has restricted civil rights claims, attempting to strike a balance between the need to give victims a remedy and concerns about judicial overreach into government functions. Shifting to *Nieves* itself, Part II lays out the majority opinion and Justice Gorsuch's attempt to reconcile it with *Armstrong*. Part III formulates the rule that results from the application of *Armstrong* to retaliatory arrest cases and explains its practical and doctrinal advantages over the more rigid *Nieves* rule. Finally, Part IV argues that, despite the infamous difficulty of meeting the *Armstrong* standard, using *Armstrong* in retaliatory arrest suits will actually open up opportunities for plaintiffs. While *Armstrong* is a high bar, it provides a crucial third way for victims to meet the threshold requirement. Because evidence of police intent is more readily available than evidence of prosecutorial discrimination, especially with the increasing cellphone surveillance of officers, retaliatory arrest victims will be able to actually make use of this third path.

I. BACKGROUND: REDRESS FOR FIRST AMENDMENT VIOLATIONS

A. The First Amendment Prohibits Retaliatory Actions for Protected Speech

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech."[16] As Justice Thurgood Marshall explained, freedom from state censorship is integral to the development of society; it "permit[s] the continued building of our politics and culture, and [ ] assure[s] self-fulfillment for each individual."[17] In particular, the right to criticize the government reflects "the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[18]

Beyond direct restrictions on speech, the First Amendment prohibits government officials from taking adverse actions against individuals to penalize them for their speech or beliefs.[19] The Court has stated that punishing individuals for engaging in protected speech essentially amounts to restricting that speech directly.[20] Specifically, denying public benefits to those who engage in certain types of speech is prohibited because it "necessarily will have the effect of coercing [them] to refrain from the proscribed speech."[21] Importantly, the government cannot deprive someone of a benefit because of their protected expression, even when there is no legal right to that benefit in the first place.[22] For

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16 US Const Amend I.

17 *Police Department of the City of Chicago v Mosley*, 408 US 92, 95–96 (1972).

18 *New York Times Co v Sullivan*, 376 US 254, 270 (1964). In that case, the Court protected newspapers against liability for publishing false defamatory statements about public officials unless the statements were made with "actual malice." See id at 279–80 (quotation marks omitted). See also, for example, *De Jonge v Oregon*, 299 US 353, 364–66 (1937) (holding that the First and Fourteenth Amendments barred Oregon from prosecuting the defendant for participating in a Communist Party meeting, even though the Party advocated overthrowing the government).

19 See *Crawford-El v Britton*, 523 US 574, 592 (1998) (stating that "the First Amendment bars retaliation for protected speech").

20 See *Speiser v Randall*, 357 US 513, 518 (1958) ("It cannot be gainsaid that a discriminatory [action taken in retaliation] for engaging in speech is a limitation on free speech.").

21 Id at 519.

22 See *Perry v Sindermann*, 408 US 593, 597 (1972) (stating that "even though a person has no 'right' to a valuable governmental benefit . . . there are some reasons upon which the government may not rely [in denying that person access to said benefit]"); *Sherbert v Verner*, 374 US 398, 404 (1963) (observing that "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of

example, in *Pickering v Board of Education of Township High School District 205*,[23] the Court found that a public school board violated a teacher's freedom of speech by firing him after he criticized the superintendent in a letter to a local newspaper,[24] even though there is no right to public employment. Similar claims can be brought for the denial of a variety of benefits, including tax exemptions[25] and unemployment benefits,[26] when such denial was carried out to penalize someone for exercising their First Amendment rights or to suppress expression. Across these different contexts, the operative question is *why* someone was denied a benefit, not whether they were otherwise legally entitled to it. Actions intended to penalize speech may violate the First Amendment, regardless of whether they would have been permissible if taken for other reasons.[27]

Strategic use of criminal law enforcement to penalize civilians for speaking out also runs afoul of the First Amendment. "[T]he law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out."[28] Arrests intended to punish someone for speaking out can also violate the First Amendment,[29] and the Court has acknowledged "that some police officers may exploit the arrest power as a means of suppressing speech."[30] In *City of Houston v Hill*,[31] the Court struck down a city ordinance that made it a crime

conditions upon a benefit or privilege"); *Speiser*, 357 US at 518 (explaining that "appellees are plainly mistaken in their argument that, because a [government benefit] is a 'privilege' or 'bounty,' its denial may not infringe speech").

23 391 US 563 (1968).

24 Id at 564–65.

25 See *Speiser*, 357 US at 528–29.

26 See *Sherbert*, 374 US at 404–06 (finding that when "appellant's declared ineligibility for benefits derives solely from the practice of her religion," such denial of unemployment benefits violates the First Amendment).

27 See, for example, *Mt. Healthy City School District Board of Education v Doyle*, 429 US 274, 283–84 (1977) ("Even though [the teacher-plaintiff] could have been discharged for no reason whatever . . . he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made *by reason* of his exercise of constitutionally protected First Amendment freedoms.") (emphasis added).

28 *Hartman v Moore*, 547 US 250, 256 (2006).

29 See, for example, *Lozman v City of Riviera Beach*, 138 S Ct 1945, 1955 (2018) (finding that the plaintiff's First Amendment rights could have been violated when the city allegedly formed an official policy to order his arrest in order to retaliate against him for criticizing public officials).

30 Id at 1953.

31 482 US 451 (1987).

to "oppose, molest, abuse or interrupt any policeman"[32] because it afforded officers substantial discretion to arrest people as punishment for protected speech, in violation of the First Amendment.[33] In *Hill*, the Court noted that freedom from arrest for challenging police action "is one of the principal characteristics by which we distinguish a free nation from a police state."[34] Since the First Amendment prevents government officials from taking adverse actions against individuals because of their speech or beliefs, using criminal law enforcement to punish speakers is unconstitutional. Important to this Comment's analysis of *Nieves*, whether official action is proper under the First Amendment often hinges on the official's *intent*, specifically whether the action was taken with the motive to penalize protected speech.[35]

B. Constitutional Torts Under § 1983

To redress unconstitutional retaliation by government officials, individuals can bring lawsuits for so-called constitutional torts. While the Constitution guarantees the rights in question, a statute establishes the means to remedy violations. In 1871, Congress established 42 USC § 1983, a private right of action allowing individuals to enforce constitutional protections against state actors and obtain civil remedies.[36] It was not until *Monroe v Pape*[37] in 1961, when the Court confirmed that individuals could sue

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[32] Id at 455, quoting Code of Ordinances, City of Houston § 34-11(a) (1984).

[33] *Hill*, 482 US at 466–67.

[34] Id at 462–63.

[35] See *Mt. Healthy*, 429 US at 287 (holding that a plaintiff alleging retaliatory dismissal must show that his protected speech was a "*motivating* factor" in his dismissal) (emphasis added); *Skoog v County of Clackamas*, 469 F3d 1221, 1232 (9th Cir 2006) (requiring retaliatory arrest plaintiffs to "ultimately prove that [the officer's] desire to cause the chilling effect was a but-for cause of the defendant's action"). See also *Hartman*, 547 US at 256 ("Some [unconstitutional] official actions adverse to [ ] a speaker might well be unexceptionable if taken on other [nonretaliatory] grounds.").

[36] Civil Rights Act of 1871, 17 Stat 13, codified as amended at 42 USC § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.

In *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 US 388 (1971), the Court held that plaintiffs may also bring constitutional claims against federal officers in certain contexts. See id at 397. However, in recent years "the Court has made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity." *Ziglar v Abbasi*, 137 S Ct 1843, 1857 (2017), quoting *Ashcroft v Iqbal*, 556 US 662, 675 (2009).

[37] 365 US 167 (1961).

state officials under § 1983, that plaintiffs began regularly using the statute.[38]

The Supreme Court has explained that courts use common law tort principles to circumscribe the contours of § 1983 claims, identifying the tort closest to a particular constitutional claim and starting with the elements of that tort.[39] Common law tort rules can constrain civil rights remedies independent of whether a constitutional violation actually occurred, meaning that not every right entails a remedy. For example, in *Heck v Humphrey*,[40] the Court held that to recover under § 1983 for an unconstitutional conviction, the plaintiff must prove that the conviction was reversed, expunged, or declared invalid.[41] This rule, borrowed from the tort of malicious prosecution, prevents litigants from challenging convictions in parallel litigation.[42] Perhaps more importantly, it makes proving the injury was *caused* by the violation more efficient and avoids protracted factual disputes, a common concern in civil rights litigation.[43]

The affirmative defense of immunity also shields officials from § 1983 liability in many cases, even if they violated a plaintiff's rights. Immunity doctrines are rooted in the related ideas that excessive litigation disrupts government functions,[44] and that the public interest is better served when certain officials can act with some independence from judicial scrutiny.[45] Qualified immunity protects officials, often police officers, from civil damages liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable

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[38] See id at 187. For a discussion of *Monroe*'s implications for § 1983 litigation, see Sheldon Nahmod, *Section 1983 Is Born: The Interlocking Supreme Court Stories of* Tenney *and* Monroe, 17 Lewis & Clark L Rev 1019, 1036–60 (2013).

[39] See *Carey v Piphus*, 435 US 247, 257–58 (1978). In *Smith v Wade*, 461 US 30 (1983), the Court also recognized that judges can adjust the elements of § 1983 over time to align them with the evolving common law. Id at 34 ("In the absence of more specific guidance, we looked first to the common law of torts (both modern and as of 1871), with such modification or adaptation as might be necessary to carry out the purpose and policy of the statute.").

[40] 512 US 477 (1994).

[41] See id at 486–87.

[42] See id at 484–85.

[43] See, for example, *Nieves*, 139 S Ct at 1724 ("[I]t is particularly difficult to determine whether the adverse government action was caused by the officer's malice.").

[44] See *Harlow v Fitzgerald*, 457 US 800, 818 (1982) (stating that qualified immunity doctrine helps to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment").

[45] See *Pierson v Ray*, 386 US 547, 554 (1967) (explaining that judicial immunity is "for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences").

person would have known."[46] Further, certain officials—including judges[47] and prosecutors[48]—are absolutely immune from § 1983 liability when they act within the scope of their positions. Immunity defenses, especially qualified immunity, are one of the most significant constraints on victims' ability to get redress for violations of their rights.[49]

Because not every constitutional violation entails a remedy, it is important to distinguish between the rights established by the Bill of Rights and the remedies established by § 1983. For example, in *Nieves*, the outcome did not turn on whether the plaintiff's speech rights were infringed, but whether he could bring a lawsuit.[50] At the same time, the Court cannot completely ignore the "settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress."[51] Victims take little comfort in the acknowledgement that their rights were violated if they are unable to obtain relief, and misconduct may not be adequately deterred without enforcement mechanisms.[52] In civil rights cases, courts consistently struggle with balancing the "obvious concerns with the social costs of subjecting public officials to discovery and trial"[53] with the fact that, "[i]n situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees."[54] Thus, in crafting rules to govern § 1983, courts must carefully balance the interests in administrability and avoiding

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46 See *Harlow*, 457 US at 818. Despite the referenced policy justifications for qualified immunity doctrine, some scholars have argued it lacks basis in the text and history of § 1983. See, for example, William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal L Rev 45, 51–77 (2018).

47 See *Pierson*, 386 US at 553–54.

48 See *Imbler v Pachtman*, 424 US 409, 431 (1976).

49 See David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U Ill L Rev 1199, 1217 ("Th[e] [qualified immunity] defense has become a primary means of denying damages to individuals who have suffered a violation of their constitutional rights.").

50 See *Nieves*, 139 S Ct at 1721.

51 *Marbury v Madison*, 5 US (1 Cranch) 137, 147 (1803).

52 See Rudovsky, 2005 U Ill L Rev at 1202 (cited in note 49). Professor David Rudovsky argues that when the Court limits remedies for constitutional violations, it limits the rights' scope because officials "risk little in acting in accordance with the sub-constitutional standards that are a byproduct of remedial restrictions." Id at 1255. See also Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 Colum L Rev 857, 911 (1999) ("[O]ne might doubt the extent to which governmental officials whose behavior is governed by constitutional law care much about constitutional rights except as predictors of legal risk, which is a function of remedies.").

53 *Crawford-El*, 523 US at 585.

54 Id at 591 (quotation marks omitted), quoting *Harlow*, 457 US at 814.

excessive interference with law enforcement with the need to give victims redress.[55]

C. Competing Rules for Retaliation Lawsuits: *Mt. Healthy* and *Hartman*

The Court created the baseline test for First Amendment retaliation claims in *Mt. Healthy City School District Board of Education v Doyle*,[56] requiring that a plaintiff prove that his protected speech was a "motivating factor" in the decision to take adverse action against him.[57] The plaintiff in *Mt. Healthy* was a public school teacher who was fired after engaging in protected speech, including complaining about the school's dress code policy to a local radio station,[58] as well as unprotected activity, including making obscene gestures at students.[59] The Supreme Court rejected the district court's test, which required only that the plaintiff's protected speech "played a substantial part in the decision" to terminate him.[60] The Court reasoned that this "substantial part" test could be met by pointing to some protected speech that the firing could be attributed to, even if the plaintiff would have been fired anyway.[61] Instead, the Court adopted a "burden-shifting framework."[62] First, the plaintiff must show that her protected speech was a "motivating factor" in the government's action against her.[63] If the plaintiff meets this burden, the government is liable unless it can show that it would have taken the action "even in the absence of the protected conduct" to escape liability.[64] The Court reasoned that this test screens out most frivolous claims and streamlines the difficult inquiry into whether an adverse action was solely, partially, or in small part motivated by retaliatory animus.[65]

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55 See *Mt. Healthy*, 429 US at 287 ("[T]he proper test to apply . . . is one which likewise protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights.").

56 429 US 274 (1977).

57 Id at 287.

58 Id at 281–83.

59 Id at 281–82.

60 *Mt. Healthy*, 429 US at 284–86.

61 See id at 285–86.

62 Arielle W. Tolman and David M. Shapiro, *From City Council to the Streets: Protesting Police Misconduct After* Lozman v. City of Riviera Beach, 13 Charleston L Rev 49, 72 (2018).

63 *Mt. Healthy*, 429 US at 287.

64 Id.

65 See id.

Hartman v Moore[66] added a threshold burden for retaliatory *prosecution* claims, requiring plaintiffs to show that the prosecutor lacked probable cause.[67] The Court reasoned that some retaliatory prosecution cases involve complex causal chains, and "the need to show this more complex connection supports a [threshold no-probable-cause] requirement."[68] In a retaliatory prosecution action, a plaintiff may not sue the absolutely immune prosecutor,[69] so they sue police officers or other officials for unlawfully inducing prosecution instead.[70] To prevail, a plaintiff must show that the official, "bent on retaliation,"[71] induced the prosecutor to bring charges which she otherwise would not have brought.[72] Because a *police officer's* malintent "does not necessarily show that the [officer] induced the action *of a prosecutor* who would not have pressed charges otherwise," the plaintiff must show that the prosecutor did not base her own charging decision on probable cause, independent of any police misconduct.[73] Further, courts afford prosecutors a presumption of regularity and assume that they only press charges for lawful reasons.[74] Finally, information regarding probable cause (or lack thereof) is always available in retaliatory prosecution cases and is usually highly evidentiary—if not dispositive—of causation.[75] Thus, the Court decided that a strict no-probable-cause rule should apply without exception.[76] This resolved the circuit split that developed following *Mt. Healthy*, with some circuits requiring plaintiffs alleging retaliatory prosecutions to demonstrate a lack of probable cause[77] and others choosing not to impose this requirement.[78]

Because the *Hartman* Court confined its ruling to retaliatory prosecution claims, the circuits subsequently split on whether the no-probable-cause rule applied to retaliatory arrests as well. After

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66 547 US 250 (2006).

67 See id at 265–66.

68 Id at 261.

69 See *Imbler*, 424 US at 424.

70 See *Hartman*, 547 US at 262.

71 Id at 265.

72 Id at 261–62.

73 Id at 263 (emphasis added).

74 See *Hartman*, 547 US at 263.

75 See id at 261.

76 Id at 265–66 ("[S]howing an absence of probable cause will have high probative force, and can be made mandatory with little or no added cost.").

77 See *Wood v Kesler*, 323 F3d 872, 883 (11th Cir 2003); *Keenan v Tejeda*, 290 F3d 252, 260–61 (5th Cir 2002); *Mozzochi v Borden*, 959 F2d 1174, 1179–80 (2d Cir 1992).

78 See *Poole v County of Otero*, 271 F3d 955, 961 (10th Cir 2001); *Haynesworth v Miller*, 820 F2d 1245, 1256–57 (DC Cir 1987).

Hartman, the Eighth[79] and Eleventh[80] Circuits extended the rule to retaliatory arrest claims, requiring plaintiffs to demonstrate, as an initial matter, that there was no probable cause to arrest them, before addressing questions of retaliatory motivation. In these jurisdictions, the presence of arguable probable cause, even for minor offenses, would defeat retaliatory arrest claims just as it was held to defeat retaliatory prosecution claims in *Hartman*.[81] At the same time, the Sixth,[82] Ninth,[83] and Tenth Circuits[84] declined to require plaintiffs to plead the absence of probable cause. In *Howards v McLaughlin*,[85] the Tenth Circuit explained that, in its view, the causation issues and presumption of regularity that heavily influenced *Hartman* do not apply in the arrest context, declining to extend *Hartman* and denying the officers qualified immunity.[86] The Supreme Court then reversed the Tenth Circuit's denial of qualified immunity but did not address whether *Hartman*'s no-probable-cause rule in fact applies to arrests.[87]

In *Lozman v City of Riviera Beach*,[88] the Court again declined to squarely answer the no-probable-cause question, ruling narrowly that lack of probable cause is not required when the plaintiff can establish an official policy of retaliation by objective evidence.[89] Fane Lozman alleged that municipal leaders created a plan to retaliate against him for speaking out against the use of eminent domain to seize waterfront where his boat was located, and ordered his arrest when he attempted to speak at a city council meeting.[90] Lozman's claim survived, despite the existence of probable cause to arrest him.[91] However, the Court separated Lozman's case from the "typical" retaliatory arrest case because he claimed "that the City itself retaliated against him pursuant to an 'official municipal policy' of intimidation."[92] The Court

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79 See *McCabe v Parker*, 608 F3d 1068, 1075, 1079 (8th Cir 2010).

80 See *Phillips v Irvin*, 222 F Appx 928, 929 (11th Cir 2007).

81 See *McCabe*, 608 F3d at 1079; *Phillips*, 222 F Appx at 929.

82 See *Barnes v Wright*, 449 F3d 709, 718–19 (6th Cir 2006).

83 See *Skoog*, 469 F3d at 1232.

84 See *Howards v McLaughlin*, 634 F3d 1131, 1148 (10th Cir 2011).

85 634 F3d 1131 (10th Cir 2011).

86 See id at 1148.

87 See *Reichle v Howards*, 566 US 658, 668–69 (2012).

88 138 S Ct 1945 (2018).

89 Id at 1954–55.

90 See id at 1949–50.

91 See id at 1949, 1955.

92 *Lozman*, 138 S Ct at 1954, quoting *Monell v New York City Department of Social Services*, 436 US 658, 691 (1978). To prevail on a constitutional claim against a

specified that this "unique class" of claims required "objective" evidence to survive summary judgment.[93] Lozman offered a transcript of the meeting in which officials planned his arrest and a video recording of the arrest itself.[94] The *Lozman* case carved out an exception for a subset of arrests pursuant to official policy of retaliation, leaving undefined the rules governing the "mine run of arrests."[95] That more consequential ruling would be handed down in *Nieves*.

II. *NIEVES V BARTLETT*: THE "NARROW QUALIFICATION" AND THE *ARMSTRONG* APPROACH

In May 2019, the Court finally spoke on the application of *Hartman* to typical retaliatory arrest claims. *Nieves* involves the arrest of a winter sports festival attendee after some less-than-cordial conversations between the attendee and his arresting officers. In 2014, Russell Bartlett attended the "Arctic Man" festival in the Hoodoo Mountains near Paxson, Alaska.[96] At around 1:30 am on the last night of the festival, Sergeant Luis Nieves instructed a group of partygoers to move their beer keg inside their RV to prevent minors from stealing the beer.[97] Nieves testified that an intoxicated Bartlett told the RV owners not to speak with the officers and shouted at Nieves, while Bartlett denied acting belligerently and countered that Nieves in fact acted aggressively.[98] Shortly afterward, Bartlett intervened with another officer who was questioning a teenager about possible underage drinking.[99] The officer, Trooper Bryce Weight, claimed that Bartlett continued behaving aggressively and leaned into him combatively, requiring Weight to push back against Bartlett.[100] Bartlett claimed that he stood close to Weight to speak over the loud background music.[101] Either way, Nieves immediately came to the scene and arrested Bartlett.[102] "[W]hen Bartlett was slow to

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municipality, plaintiffs must show the existence of an official policy that caused the violation to occur. See *Monell*, 436 US at 691.

93 *Lozman*, 138 S Ct at 1954.

94 See id.

95 Id.

96 See *Nieves*, 139 S Ct at 1720.

97 See id.

98 See id.

99 See id.

100 See *Nieves*, 139 S Ct at 1720–21.

101 See id at 1721.

102 See id at 1720–21.

comply with his orders, the officers forced him to the ground and threatened to tase him."[103] According to Bartlett, Nieves said, "[B]et you wish you would have talked to me now," an apparent reference to Bartlett's earlier refusal to cooperate with the officers' management of the beer keg scene.[104] Bartlett was charged with disorderly conduct and resisting arrest, and the charges were eventually dismissed.[105]

Bartlett brought suit against the officers under § 1983, claiming that they arrested him in retaliation for both his refusal to cooperate with the party investigation and his intervention with the officers' questioning of the underage partygoer, in violation of the First Amendment.[106] The district court dismissed the suit on the grounds that the officers had probable cause to arrest Bartlett.[107] However, the Ninth Circuit reversed, applying its prior decision in *Ford v Yakima*.[108] The Ninth Circuit required that Bartlett show that the officers' conduct would "chill a person of ordinary firmness from future First Amendment activity" and present evidence that would "enable him ultimately to prove that the officers' desire to chill his speech was a but-for cause of the arrest," eschewing *Hartman*'s rigid threshold requirement.[109] Bartlett presented only his affidavit alleging that Nieves said, "[B]et you wish you would have talked to me now," but the Ninth Circuit determined that it was enough to proceed.[110]

The Supreme Court granted certiorari to address whether, as a threshold matter, plaintiffs must prove lack of probable cause for typical retaliatory arrest claims.[111] Writing for the Court, Chief Justice John Roberts holds that *Hartman* generally extends to retaliatory arrests, requiring plaintiffs to demonstrate lack of probable cause before litigating other elements of their claim.[112] The majority's reasoning hinges on its conclusion that the causal complexity of retaliatory prosecution cases also applies to arrests, so the same rule should apply as well.[113] The source of the

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103 Id at 1721.
104 *Nieves*, 139 S Ct at 1721.
105 See id.
106 See id.
107 See id.
108 706 F3d 1188 (9th Cir 2013), abrogated by *Nieves*, 139 S Ct 1715 (2019).
109 *Nieves*, 139 S Ct at 1721 (quotation marks omitted).
110 See id.
111 See id.
112 See id at 1723–24.
113 See *Nieves*, 139 S Ct at 1723–24.

complexity differs, as there is not usually a chain of multiple actors in arrest cases.[114] However, the majority notes that protected speech is often a "wholly *legitimate* consideration"[115] in deciding whether to arrest, making it difficult to separate instances of retaliation.[116] Proving lack of probable cause eliminates the possibility that the officer would have lawfully arrested the plaintiff anyway. In addition, the Court identifies false imprisonment and malicious prosecution as common law tort analogues to retaliatory arrest and came to the same result, as both torts are defeated by the existence of probable cause.[117]

The threshold requirement prevents courts from "moving directly to consideration of the subjective intent of the officers," and Fourth Amendment doctrine prohibits these sorts of probes into officer motivations.[118] Citing *Devenpeck v Alford*[119] and other Fourth Amendment cases, the majority explains that a police officer's intent is "irrelevant" at the threshold stage.[120] The Court also cites the practical need to screen out clearly unmeritorious claims, noting that the subjective approach would allow dubious claims to be litigated based on bare allegations about a police officer's state of mind, which could lead to fishing expeditions and other discovery abuses.[121]

However, the opinion carves out a "narrow qualification" for situations in which "officers have probable cause to make arrests, but typically exercise their discretion not to do so."[122] The Court notes that police officers today can make warrantless arrests whenever they have probable cause for even trivial offenses, which was not contemplated when § 1983 was passed.[123] If the no-probable-cause rule applied without exception, officers might unconstitutionally exploit the criminal code to make arrests for

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114 See id at 1724 (noting that retaliatory prosecution and retaliatory arrest claims "give rise to complex causal inquiries for somewhat different reasons").

115 Id (emphasis added) (quotation marks omitted), quoting *Reichle*, 566 US at 668.

116 See *Nieves*, 139 S Ct at 1723–24. For example, a police officer might lawfully consider a suspect's utterances in his decision to arrest if those utterances give the officer reason to believe the suspect is dangerous. See id at 1724. This situation is distinct from an unlawful arrest based on the desire to punish the suspect for his speech. In both cases, the arrest is caused by the speech in some sense.

117 See id at 1726–27.

118 Id at 1724.

119 543 US 146 (2004).

120 *Nieves*, 139 S Ct at 1725 (quotation marks omitted), quoting *Devenpeck*, 543 US at 153.

121 See *Nieves*, 139 S Ct at 1725.

122 Id at 1727.

123 See id.

offenses that they would otherwise overlook. For example, while jaywalking is illegal, officers generally do not make jaywalking arrests, so "probable cause does little to prove or disprove the causal connection between animus and injury."[124] However, the exception applies only "when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been."[125] According to the Court, the objectivity requirement "avoids the significant problems that would arise from reviewing police conduct under a purely subjective standard," returning to *Devenpeck*.[126]

Concurring in part and dissenting in part, Justice Gorsuch suggests that courts should determine the contours of retaliatory arrest actions by analogy to racially selective law enforcement, rather than false imprisonment, which he believes would slightly liberalize the rule.[127] He emphasizes that the question addressed in *Nieves* is not the scope of First Amendment rights, but rather the scope of redress under § 1983, which is shaped by common-law torts.[128] Justice Gorsuch disagrees with the majority's conclusion that false imprisonment was the appropriate tort analogue in this case.[129] He argues that false imprisonment correlates to the Fourth Amendment because warrantless arrests made without probable cause give rise to both common law false arrest torts and unreasonable seizures under the Fourth Amendment.[130] In both contexts, the question is whether the arrest was made without legal authority.[131] In contrast, the First Amendment prohibits officers from "*abus[ing]* their authority by making an *otherwise lawful* arrest for an unconstitutional *reason*," namely, to silence speech.[132] The fact that probable cause defeats false imprisonment claims, essentially Fourth Amendment claims, should not control First Amendment cases like *Nieves*.[133] Justice Gorsuch identifies claims for racially selective detention as a better analogy because

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124 Id.

125 *Nieves*, 139 S Ct at 1727.

126 Id.

127 See id at 1731, 1733 (Gorsuch concurring in part and dissenting in part).

128 See id at 1730–31.

129 See *Nieves*, 139 S Ct at 1731 (Gorsuch concurring in part and dissenting in part).

130 See id.

131 See id.

132 Id (second emphasis added).

133 See *Nieves*, 139 S Ct at 1732 (Gorsuch concurring in part and dissenting in part) ("We thus have no legitimate basis for engrafting a no-probable-cause requirement onto a First Amendment retaliatory arrest claim.").

it prohibits otherwise lawful actions taken for unlawful reasons; he notes that "[e]veryone accepts that a detention based on race, *even one otherwise authorized by law*, violates the Fourteenth Amendment's Equal Protection Clause."[134]

Justice Gorsuch continues the comparison to equal protection jurisprudence by likening the majority's exception to the threshold to obtain discovery on the defense of racially selective prosecution established in *Armstrong*.[135] Under *Armstrong*, when probable cause exists to prosecute, defendants must show that the government "declined to prosecute similarly situated suspects of other races" to obtain discovery related to selective prosecution.[136] However, according to *Armstrong*'s footnote three, if a defendant can present direct evidence of discriminatory intent in the form of admissions, comparison-based evidence might not be required.[137] Since the *Nieves* majority cites only to *Armstrong* in explaining its own similarly-situated-individuals standard,[138] Justice Gorsuch concludes that the Court did not adopt a rigid rule requiring comparison-based evidence in every case and expresses hope that lower courts will apply the exception "commonsensically" by considering direct evidence of unconstitutional motive in certain circumstances.[139]

In dissent, Justice Sonia Sotomayor shares Justice Gorsuch's concerns but disagrees with his conclusion that the majority's narrow qualification can be read to encompass the flexibility for which Justice Gorsuch advocates. She interprets the rule as requiring comparison-based evidence in every case, although she notes that the standard is "far from clear."[140] In her view, the new rule prevents plaintiffs from using even "unassailable proof of an

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134 Id at 1731 (emphasis in original).

135 See id at 1733. See also *Armstrong*, 517 US at 458.

136 *Armstrong*, 517 US at 458.

137 See *Nieves*, 139 S Ct at 1733 (Gorsuch concurring in part and dissenting in part), citing *Armstrong*, 517 US at 469 n 3.

138 See *Nieves*, 139 S Ct at 1727 (identifying *Armstrong* as a point of comparison in its discussion of the similarly-situated-individuals standard). Justice Gorsuch also noted that the separation of powers concern that influenced *Armstrong*—that courts should not meddle in the decision-making of executive branch officials—are relevant to retaliatory arrest claims. Id at 1733 (Gorsuch concurring in part and dissenting in part). See also *Armstrong*, 517 US at 464 ("[S]elective-prosecution claim[s] ask[ ] a court to exercise judicial power over a 'special province' of the Executive. . . . '[T]he presumption of regularity supports' their prosecutorial decisions and, 'in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'").

139 *Nieves*, 139 S Ct at 1734 (Gorsuch concurring in part and dissenting in part), quoting id at 1741 (Sotomayor dissenting).

140 Id at 1736, 1740–41 (Sotomayor dissenting).

officer's unconstitutional statements and motivations,"[141] in contrast to Justice Gorsuch's view that *Nieves* can be read to allow plaintiffs to use this type of evidence at the threshold level.[142] Despite their disagreements, both Justices warn that an ultrastrict reading of *Nieves* will underdeter police misconduct and prevent redress of legitimate grievances.[143]

Although *Nieves* concluded years of uncertainty about whether the no-probable-cause rule applies to retaliatory arrest claims, the majority's rule seems both overly rigid and somewhat ambiguous, as Justices Gorsuch and Sotomayor make clear in their opinions. The holding requires plaintiffs to provide some sort of objective evidence at the threshold level: they must show either that they were arrested without probable cause or that similarly situated individuals were not arrested.[144] Recognizing that a straightforward application of *Hartman*'s no-probable-cause rule would block many valid claims, the majority creates an alternative route: a plaintiff could meet the threshold by providing evidence that similarly situated individuals were not arrested. However, *Nieves* prohibits courts from considering direct evidence of intent at this stage in litigation, despite the fact that unconstitutional motives are at the core of retaliatory arrest claims. In his opinion, Justice Gorsuch draws comparisons to selective prosecution, tentatively suggesting that *Armstrong*'s discovery requirements, which are demanding but more flexible than the *Nieves* majority's, are a better doctrinal fit for retaliatory arrest cases.[145]

While Justice Gorsuch does not elaborate on *Armstrong*'s application in this context,[146] I argue that *Armstrong* could rescue many retaliatory arrest cases from dismissal by giving victims a chance to use potentially probative evidence of intent at the beginning of litigation.

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141 Id at 1736 (quotation marks omitted).

142 See id at 1734 (Gorsuch concurring in part and dissenting in part).

143 See *Nieves*, 139 S Ct at 1732 (Gorsuch concurring in part and dissenting in part) ("But [an] absolute rule doesn't wash with common experience. . . . [T]he presence of probable cause does not necessarily negate the possibility that an arrest was caused by unlawful First Amendment retaliation."); id at 1740 (Sotomayor dissenting) ("[T]he majority's approach will yield arbitrary results and shield willful misconduct from accountability.").

144 See id at 1727 (majority).

145 See id at 1733–34 (Gorsuch concurring in part and dissenting in part).

146 See id.

III. *ARMSTRONG* AND THE "NARROW QUALIFICATION": A "COMMONSENSICAL" APPROACH

In the aftermath of *Nieves*, a retaliatory arrest victim's primary route to obtain redress is to prove a lack of probable cause. There are good reasons to think that this rule will practically eliminate the damages remedy for retaliation by police officers, effectively giving them a pass for First Amendment violations.[147] Police officers have discretion to make arrests for very minor offenses.[148] Combined with the fact that "criminal laws have grown [ ] exuberantly and come to cover so much previously innocent conduct," today's officers have expansive power to arrest. [149] As Justice Gorsuch notes, "almost anyone can be arrested for something."[150] If the presence of probable cause for *any* offense is enough to immunize officers from liability, they may abuse their arrest power without consequences.

The *Nieves* majority acknowledges this reality by carving out the "narrow qualification."[151] However, because providing comparison-based evidence is the only method to reach the threshold burden,[152] many victims will still be out of luck because this type of evidence is extremely difficult to obtain, if it exists at

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147 See Garrett Epps, *John Roberts Strikes a Blow Against Free Speech* (The Atlantic, June 3, 2019), archived at https://perma.cc/X4T8-NU8E (arguing that *Nieves* "will make it harder to hold officers to account when they . . . arrest citizens in retaliation for speech they don't like"); Brian Frazelle, *The Supreme Court Just Made It Easier for Police to Arrest You for Filming Them* (Slate, May 31, 2019), archived at https://perma.cc/S5YM-J9TL (arguing that, "[b]y enabling police officers to target viewpoints they dislike with near impunity, [*Nieves*] could be catastrophic for protesters and the press").

148 See *Atwater v City of Lago Vista*, 532 US 318, 344–45 (2001).

149 *Nieves*, 139 S Ct at 1730 (Gorsuch concurring in part and dissenting in part). See also Marc A. Levin, *At the State Level, So-Called Crimes Are Here, There, Everywhere*, 28 Crim Just 4, 6 (2013) (highlighting how "the deluge of overly broad and vague criminal laws gives police and prosecutors virtually untrammeled authority to arrest and indict anyone").

150 *Nieves*, 139 S Ct at 1730 (Gorsuch concurring in part and dissenting in part).

151 See id at 1727 (majority) ("[A]n unyielding requirement to show the absence of probable cause could pose 'a risk that some police officers may exploit the arrest power as a means of suppressing speech.'"), quoting *Lozman*, 138 S Ct at 1953–54.

152 See *Nieves*, 139 S Ct at 1727. The majority does not clearly indicate whether, for the exception to apply, the crime of arrest must be in a particular category of minor crimes, or if the primary inquiry is whether similarly situated people were not (or possibly would not have been) arrested. For example, if a plaintiff were arrested for jaywalking, would they have to provide any evidence that people are generally not arrested for jaywalking? The majority indicates that this situation self-evidently falls into the exception. Id. As Justice Sotomayor points out, "[i]t is hard to see what point is served by requiring a journalist arrested for jaywalking to point to specific other jaywalkers who got a free pass." Id at 1741 (Sotomayor dissenting).

all. *Nieves* requires plaintiffs to provide evidence of arrests that were *not* made. Unless police officers take notice of and document each circumstance in which they have probable cause to make an arrest but choose not to—an unlikely situation—it is hard to see how plaintiffs would be able to make this showing.[153] As Justice Sotomayor explains, "while records of arrests and prosecutions can be hard to obtain, it will be harder still to identify arrests that never happened."[154] Thus, for many victims with legitimate grievances, proving lack of probable cause will not be viable, and the majority's exception will not save them.

Nieves's requirement that the threshold inquiry be "objective"[155] is not just unduly limiting to victims, it muddles the Court's unconstitutional-intent jurisprudence. Objective evidence rules make sense in the Fourth Amendment context, but retaliation claims do not depend on Fourth Amendment reasonableness. Retaliation hinges on the defendant's intent to suppress or punish speech, not whether his actions were otherwise lawful.[156] So while the majority is correct that intent is irrelevant to Fourth Amendment claims against police officers, in claims based on unconstitutional intent—like retaliation and discrimination—evidence of intent is always relevant. In cases like *Nieves*, courts should consider evidence of intent at the threshold level when it is available.

Although *Armstrong* crafted a comparison-based evidence requirement similar to the *Nieves* majority's rule, it does not preclude litigants from using direct evidence of motive to meet the

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153 See Alison Siegler and William Admussen, *Discovering Racial Discrimination by the Police*, 115 Nw U L Rev *36–37 (forthcoming 2020), online at http://ssrn.com/abstract=3548829 (Perma archive unavailable) (noting that in selective enforcement cases, "it is impossible to identify a particular [ ] individual whom the police did *not* target or investigate, because it is impossible to prove a negative") (emphasis in original). See also Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of* Armstrong, 73 Chi Kent L Rev 605, 617–18 (1998) (discussing that in the selective prosecution context, "[w]hen [ ] the defendants complain that similarly situated Whites are not arrested or prosecuted *at all*, there will be no records to find to meet the similarly situated requirement") (emphasis in original).

154 *Nieves*, 139 S Ct at 1740 (Sotomayor dissenting). In contrast, clear evidence of malintent is becoming more available in the form of recordings from cellphones and security cameras, as is elaborated in Part IV. See also id at 1739 (describing the increasing availability of "audiovisual record[s] of key events" in police-citizen interactions).

155 Id at 1727 (majority) ("[L]ike a probable cause analysis, [the narrow qualification] provides an objective inquiry.").

156 See *Crawford-El v Britton*, 523 US 574, 584 (1998) (referring to retaliation as a claim for which "entitlement to relief *depends* on proof of an improper motive") (emphasis added). See also note 35 and accompanying text.

threshold burden.[157] While *Armstrong* set out to create "a significant barrier to the litigation of insubstantial claims,"[158] the opinion did not go as far as requiring courts to disregard evidence of prosecutorial intent at the threshold level.[159] Because the claim in *Armstrong*, like the claim in *Nieves*, is one that hinges on official intent, not Fourth Amendment reasonableness, the opinion leaves the door open for defendants to present evidence of intent right away if they have it. The *Armstrong* Court established a preliminary requirement against the background that defendants will almost never be able to present direct evidence of prosecutorial motive. Indeed, post-*Armstrong*, few criminal defendants have been able to obtain discovery on selective prosecution claims with evidence of prosecutorial intent alone.[160] Instances in which a prosecutor admits their unconstitutional intent in choosing to prosecute are few and far between.[161]

Clear evidence of a police officer's intent, on the other hand, is much easier to obtain,[162] so retaliatory arrest plaintiffs will have more luck with *Armstrong* than criminal defendants alleging selective prosecution. This Part argues that *Nieves*'s objective evidence requirement contradicts precedent and that the *Armstrong* standard should govern the exception to the no-probable-cause rule. *Armstrong* more accurately represents the Court's unconstitutional-intent jurisprudence and avoids (at least some of) *Nieves*'s harsh results for plaintiffs.[163] I then explain that litigants are empowered to use evidence of motive at the threshold level pursuant to *Armstrong*'s footnote three, despite the scarcity of case law.

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157 See McAdams, 73 Chi Kent L Rev at 612 n 37 (cited in note 153) (discussing *Armstrong*'s footnote three, in which "[t]he Court notes there is one possible exception to its holding").

158 *Armstrong*, 517 US at 464.

159 See id at 469 n 3.

160 For an example of a court allowing discovery on a selective prosecution claim by virtue of evidence of intent alone under footnote three, see *United States v Al Jibori*, 90 F3d 22, 25 (2d Cir 1996) ("The Supreme Court in *Armstrong* reserved the question whether a defendant must satisfy the similarly situated requirement in those circumstances [when evidence of prosecutorial intent exists]. We believe this case demonstrates why admissions should sometimes justify further inquiry.") (citation omitted). *Al Jibori* is discussed further in Part III.C.3.

161 See McAdams, 73 Chi Kent L Rev at 623 (cited in note 153) (noting that in *Al Jibori*, in which the prosecutor admitted that the decision to prosecute was partially based on ethnicity or nationality, "the government made a tactical error . . . that it is not likely to repeat").

162 See Part IV.

163 Though *Armstrong* was written to govern a distinct area of law, Part III.C.1 explains that the rule is workable in the retaliatory arrest context.

A. Rejecting *Nieves* to Avoid a "Constitutional Frankenstein"

While *Nieves* purports to clear up the retaliatory arrest standard, the narrow qualification's comparison-based evidence requirement contradicts precedent. Specifically, applying an objective evidence rule in this context is inconsistent with the Court's unconstitutional-motive jurisprudence. While the Fourth Amendment is solely concerned with objective evidence, requiring it in First Amendment retaliation cases results in, as Justice Sotomayor puts it, "a Frankenstein-like constitutional tort that may do more harm than good."[164]

Under a straightforward reading of *Nieves*, plaintiffs are prohibited from using direct evidence of retaliatory intent in lieu of "objective," comparison-based evidence.[165] In particular, the Court notes that, "[b]ecause this inquiry is objective, the statements and motivations of the particular arresting officer are 'irrelevant' at this stage."[166] The Court rejects the Ninth Circuit's approach, which considered Bartlett's affidavit of Officer Nieves's statement to be sufficient.[167]

To craft this rule, the Court improperly applies Fourth Amendment doctrine, in which an official's subjective intent has no bearing on liability, to First Amendment retaliation claims, which ultimately *depend* on subjective intent and thus require consideration of intent throughout. The text of the Fourth Amendment prohibits only unreasonable conduct,[168] so an officer's

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164 *Nieves*, 139 S Ct at 1738 (Sotomayor dissenting).

165 Id at 1727 (majority).

166 Id, quoting *Devenpeck*, 543 US at 153.

167 See *Nieves*, 139 S Ct at 1727–28. However, as Justice Sotomayor points out, it is not clear whether the majority actually prohibits consideration of *any* officer statements:

> It is also unclear what the majority means when it says that because its threshold "inquiry is objective, the statements and motivations of the particular arresting officer are 'irrelevant.'" That could conceivably be read to mean that all statements are irrelevant, even objectively probative statements describing events in the world—*e.g.*, "I am arresting the libertarians, but not the nonlibertarian protesters who were also trespassing." The facts asserted therein—that libertarians were arrested, nonlibertarians were not, and all were similarly trespassing—are precisely the kind of objective evidence the Court seeks. . . . More likely, [ ] the majority means only that statements describing the officer's internal thought processes are irrelevant (*e.g.*, "I hate libertarians"). But many statements will fall somewhere in between (*e.g.*, "I'm only arresting you because I hate libertarians").

Id at 1741 n 7 (Sotomayor dissenting) (citation omitted).

168 See US Const Amend IV ("The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated.").

state of mind does not bear on the analysis.[169] In contrast, the First Amendment does not mention reasonableness,[170] and motivation matters. As noted in Part I.A, depriving someone of a benefit in order to punish or suppress their speech, even when there is no right to the benefit in the first place, violates the First Amendment.[171] In these instances, the relevant question is not whether the sanction was objectively lawful, but whether it was imposed for an unconstitutional reason.

More specifically, the case law the majority cites to justify the "objective inquiry" rule does not support importing the rule to First Amendment retaliatory arrest litigation. In particular, the majority cites *Devenpeck*,[172] in which the Court held that a police officer's state of mind is "irrelevant" to whether a Fourth Amendment violation occurred, the analysis of which is based on objective reasonableness.[173] In support, the *Devenpeck* Court cited to *Whren v United States*,[174] decided eight years earlier, in which the majority explained that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[175] In *Whren*, the Court considered whether a police officer violates the Fourth Amendment by stopping a motorist when there is probable cause to believe the driver committed a traffic violation, but the stop may have been motivated by the driver's race, not the traffic violation.[176] Because the plaintiffs challenged the stop on Fourth Amendment grounds, they were unsuccessful,[177] but *Whren* explicitly distinguished between Fourth Amendment analysis and other constitutional claims, like equal protection violations, to which the "actual motivations" of the officers are relevant.[178] Since

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169 See *Devenpeck*, 543 US at 153.

170 See US Const Amend I ("Congress shall make no law . . . abridging the freedom of speech, or of the press.").

171 See Part I.A.

172 See *Nieves*, 139 S Ct at 1727.

173 See *Devenpeck*, 543 US at 153, citing *Whren v United States*, 517 US 806, 812–13 (1996).

174 517 US 806 (1996).

175 Id at 813.

176 See id at 808–10.

177 See id at 819.

178 *Whren*, 517 US at 813 ("We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."). See also *United States v Avery*, 137 F3d 343, 352 (6th Cir 1997) ("The Equal Protection Clause of the Fourteenth Amendment provides citizens a degree of protection independent of the Fourth Amendment protection against unreasonable searches and seizures.").

retaliatory arrest claims necessarily involve the motivation of the defendant officer, *Whren* prevents courts from importing a full-throated Fourth Amendment rule to First Amendment retaliation claims and disregarding evidence of intent, even at an early stage of litigation.

The *Nieves* majority cites several other Fourth Amendment cases addressing how the Court generally analyzes police conduct,[179] seeming to say that Fourth Amendment rules apply here merely because retaliatory arrests involve police officers. For example, the majority notes that "[p]olice officers conduct approximately 29,000 arrests every day—a dangerous task that requires making quick decisions. . . . To ensure that officers may go about their work without undue apprehension of being sued, we generally review their conduct under objective standards of reasonableness."[180] While perhaps it is intuitive that similar rules should apply to police liability across the board, the Court disregards the fact that retaliation allegations are not judged according to reasonableness and makes no attempt to explain why the cited Fourth Amendment case law applies in police suits not involving the Fourth Amendment.[181]

Finally, Chief Justice Roberts's concern that considering intent at the outset would "compromise evenhanded application of the law by making the constitutionality of an arrest 'vary from place to place and from time to time' depending on the personal motives of individual officers" is irrelevant for purposes of the First Amendment.[182] Again, since First Amendment violations do not rise and fall with Fourth Amendment reasonableness and instead actually depend on "personal motives of individual officers,"[183] this sort of variation is appropriate—or even required—in the retaliatory arrest context. The retaliatory arrest action loses all meaning if two otherwise similar arrests, one motivated by retaliatory malice, the other not, have the same result under the First Amendment. As noted in *Hartman*, "[s]ome official

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179 See *Nieves*, 139 S Ct at 1724 ("[W]e have almost uniformly rejected invitations to probe subjective intent.") (quotation marks omitted), quoting *Ashcroft v al-Kidd*, 563 US 731, 737 (2011); *Nieves*, 139 S Ct at 1724–25 ("Legal tests based on reasonableness are generally objective, and this Court has long taken the view that evenhanded law enforcement is best achieved by the application of objective standards of conduct.") (quotation marks omitted), quoting *Kentucky v King*, 563 US 452, 464 (2011).

180 *Nieves*, 139 S Ct at 1725.

181 See text accompanying notes 242–43.

182 *Nieves*, 139 S Ct at 1725, quoting *Devenpeck*, 543 US at 154.

183 *Nieves*, 139 S Ct at 1725.

[retaliatory] actions adverse to such a speaker might well be unexceptionable if taken on other grounds."[184] The Court has previously rejected the notion that "conduct [that] is objectively valid, regardless of improper intent" should be immune from challenge,[185] even though doing so would create more consistent standards for official conduct. By ruling that statements of intent are irrelevant as a threshold matter, the majority commits "mix-and-match"[186] constitutional reasoning, using rules tailored to Fourth Amendment reasonableness inquiries and applying them to cases in which intent is the most important element.

B. Applying *Armstrong* to *Nieves*-Style Claims

In his *Nieves* opinion, Justice Gorsuch tentatively proposes applying *Armstrong*'s selective prosecution framework to First Amendment retaliatory arrests.[187] He points out that *Armstrong* does not preclude litigants from using direct evidence of unconstitutional motivation, in lieu of comparison-based evidence, to meet the threshold.[188] According to Justice Gorsuch, the *Nieves* majority "seems to indicate that something like *Armstrong*'s standard might govern a retaliatory arrest claim when probable cause exists to support an arrest"[189] and he advocates for lower courts to apply *Nieves* "commonsensically," consistent with *Armstrong*.[190] However, this hopeful vision is contradicted by the majority's rigid assertion that "statements and motivations of the particular arresting officer are 'irrelevant' at this stage."[191] Unlike *Armstrong*, the *Nieves* majority opinion contains no reservation for cases "involving direct admissions"[192] of intent. Although Justice Gorsuch's assessment is inconsistent with the language of the *Nieves* majority, his suggestion to use *Armstrong* in the retaliatory arrest context represents a marked doctrinal improvement

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184 *Hartman*, 547 US at 256.

185 *Crawford-El*, 523 US at 593–94 (quotation marks omitted).

186 *Nieves*, 139 S Ct at 1738 (Sotomayor dissenting).

187 See id at 1733–34 (Gorsuch concurring in part and dissenting in part).

188 See id at 1733 ("[A] plaintiff generally must produce evidence that the prosecutor failed to charge other similarly situated persons. . . . [H]owever, the Court also suggested that equally clear evidence in the form of 'direct admissions by prosecutors of discriminatory purpose' might be enough to allow a claim to proceed."), quoting *Armstrong*, 517 US at 469 n 3.

189 *Nieves*, 139 S Ct at 1733 (Gorsuch concurring in part and dissenting in part).

190 Id at 1734, quoting id at 1741 (Sotomayor dissenting).

191 Id at 1727 (majority), quoting *Devenpeck*, 543 US at 153. See also Part III.A.

192 *Armstrong*, 517 US at 469 n 3.

from *Nieves* and sensibly allows plaintiffs to use relevant and probative evidence of intent at the onset of litigation.

1. The *Armstrong* discovery burden.

In *Armstrong*, the Court established the standard to proceed to discovery on claims of racially selective prosecution in a criminal matter.[193] The *Armstrong* defendants, who were Black, were indicted on various charges related to crack cocaine distribution, as well as federal firearm offenses; in defense, they argued that the prosecution against them was racially discriminatory and moved for discovery related to that defense.[194] First, the Court identified the elements of selective prosecution claims, noting that they are difficult to prove. The Court explained that, when a prosecutor has probable cause, "the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [their] discretion."[195] To rebut the presumption that the prosecutor acted appropriately within their discretion, "a criminal defendant must present 'clear evidence to the contrary.'"[196] Since prosecutors are afforded a presumption of regularity in their duties as agents of the executive, courts should not overstep by questioning prosecutors' decisions without clear evidence of misconduct.[197]

The Court then turned to the discovery standard: defendants must present "'some evidence tending to show the existence of the essential elements of the defense,' discriminatory effect and discriminatory intent."[198] Describing the standard as "rigorous,"[199] the Court clarified that to demonstrate discriminatory effect, defendants must show that "similarly situated defendants of other races" were not prosecuted.[200] However, *Armstrong* left open whether comparison-based evidence of discriminatory effect

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193 See id at 468.

194 See id at 458–59.

195 Id at 464, quoting *Bordenkircher v Hayes*, 434 US 357, 364 (1978).

196 *Armstrong*, 517 US at 465 (quotation marks omitted), quoting *United States v Chemical Foundation, Inc*, 272 US 1, 14–15 (1926).

197 See *Armstrong*, 517 US at 464. See also *Wayte v United States*, 470 US 598, 607 (1985) ("Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.").

198 *Armstrong*, 517 US at 468, quoting *United States v Berrios*, 501 F2d 1207, 1211 (2d Cir 1974).

199 *Armstrong*, 517 US at 468.

200 Id at 469.

would be required in every case. As Justice Gorsuch notes in his *Nieves* opinion, in *Armstrong*'s footnote three, the Court expressly reserved the question of "whether a defendant must satisfy the similarly situated requirement in a case involving direct admissions by [prosecutors] of discriminatory purpose."[201] While the Court did not explicitly address the standard for demonstrating a prosecutor's discriminatory intent, it acknowledged that, if a prosecutor admits unconstitutional purpose, additional threshold showings may be unnecessary.

To attempt to meet the discovery burden,[202] the defendants in *Armstrong* offered the affidavit of a public defense paralegal alleging that, in 1991, all twenty-four defendants prosecuted for dealing crack cocaine in the jurisdiction were Black.[203] The Court held that this evidence did not meet the discovery threshold requirement because the defendants could not identify any similarly situated, non-Black individuals who "*could have been prosecuted* . . . but were not."[204] The defendants offered no evidence of discriminatory purpose, so the Court did not address how that evidence would have impacted the outcome.

2. How *Armstrong* would change retaliatory arrest litigation (for the better).

If courts applied an *Armstrong*-like rule to retaliatory arrest cases, plaintiffs could meet the threshold requirement by showing (1) a lack of probable cause for their arrests, (2) that similarly situated individuals not engaging in protected speech were not arrested, *or* (3) the police officer's unconstitutional intent in the form of admissions. The addition of this important third path diverges from *Nieves*'s holding, which more severely constrains plaintiffs and requires courts to disregard probative evidence of misconduct at the threshold level.[205]

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[201] Id at 469 n 3 (quotation marks omitted) (alteration in original).

[202] *Armstrong* identified a discovery burden, which is a threshold rule, so defendants must meet the standard before proceeding to discovery. Similarly, the rule in *Nieves* requires plaintiffs to meet the standard upon a motion for summary judgment. If the government moves for summary judgment in a retaliatory arrest case, the plaintiff must show they have met the threshold requirements to avoid having his case dismissed.

[203] See *Armstrong*, 517 US at 459.

[204] Id at 470 (emphasis added).

[205] See *Nieves*, 139 S Ct at 1739–40 (Sotomayor dissenting) ("The majority appears ready to forsake this body of probative evidence, even though it has the potential to narrow factual disputes and avert trials.").

In addition to providing more opportunities for plaintiffs, *Armstrong* more accurately captures the Court's rulings in unconstitutional-intent cases against law enforcement officers. It is helpful to separate constitutional claims based on whether the defendant's conduct was reasonable and those based on the defendant's intent or motive. In contrast to Fourth Amendment claims,[206] cases involving both racial discrimination and retaliation explicitly presume that a plaintiff can have a valid claim even when the action taken against them was objectively reasonable if it was taken for an unconstitutional reason.[207] In cases of racially biased law enforcement, the issue is "*intentionally* discriminatory application of laws" based on race.[208] For retaliatory enforcement, the court asks whether the decision to arrest was based on a "forbidden motive"—to punish protected speech.[209] As Justice Sotomayor notes in her *Nieves* dissent, "First Amendment retaliation claims and equal protection claims are indistinguishable" in the sense that they "both inherently require inquiry into 'an official's motive.'"[210] As the Court has noted, constitutional claims based on motive—like discrimination and retaliation—are considered to be in the same "category."[211]

Because both selective prosecution and retaliation claims depend on intent, *Armstrong*'s approach is a better doctrinal fit for retaliatory arrest litigation than *Nieves*'s rule. The *Armstrong* approach may allow litigants to use evidence of intent to make a threshold showing: in footnote three, the opinion recognizes that if a litigant can provide direct evidence of intent, the similarly-situated-individuals showing may not be necessary. In this scenario, the litigant would have already demonstrated that the

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206 See Part III.A.

207 See *Nieves*, 139 S Ct at 1727 (noting that violations may occur in "circumstances where officers *have probable cause* to make arrests, but typically exercise their discretion not to do so") (emphasis added); *Armstrong*, 517 US at 464 (acknowledging that an otherwise reasonable decision to prosecute is unconstitutional if it is based on "an unjustifiable standard") (quotation marks omitted), quoting *Oyler v Boles*, 368 US 448, 456 (1962).

208 *Whren*, 517 US at 813 (emphasis added).

209 *Nieves*, 139 S Ct at 1722.

210 Id at 1738 (Sotomayor dissenting), quoting *Crawford-El*, 523 US at 585.

211 *Crawford-El*, 523 US at 585 (considering claims based on unconstitutional motive to be a "category of claims"). In fact, selective prosecution jurisprudence encompasses claims based on First Amendment retaliation, in addition to racial and other forms of discrimination prohibited by the Equal Protection Clause. See, for example, *Wayte*, 470 US at 604 ("Petitioner moved to dismiss the indictment on the ground of selective prosecution. He contended that he . . . had been impermissibly targeted . . . for prosecution on the basis of [his] exercise of First Amendment rights."). For further discussion of this point, see Part III.C.1.

government official acted for unconstitutional reasons, which is the essence of the motive-based claim. The *Armstrong* standard reflects the importance of intent to the claim at issue by acknowledging that, while some significant threshold showing may be necessary to weed out frivolous claims, that showing may be based on direct evidence of intent. As explained in Part I.A, retaliation claims similarly depend on unconstitutional intent, not objective reasonableness. Thus, a standard which allows litigants to make a showing of intent at the threshold level should be applied in retaliatory arrest cases, and *Nieves*'s mandate to ignore evidence of intent unless the plaintiff can produce comparison-based evidence must be rejected.

At the same time, the Court's unconstitutional-motive cases involving law enforcement, including *Armstrong*, are sensitive to the countervailing interest in screening out frivolous claims.[212] As articulated by Judge Learned Hand, to devise rules for constitutional torts involving intent, the Court attempts to strike a "balance between the evils inevitable in either alternative," which means taking care not to "submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome."[213] In *Armstrong*, the Court specified that the threshold must be a "significant barrier to the litigation of insubstantial claims."[214]

To be consistent with this language, retaliatory arrest plaintiffs seeking to use evidence of motive at the threshold level should be required to provide credible evidence that is unlikely to lead to protracted factual disputes. For example, plaintiffs might offer video or audio recordings of their arrests or interactions with their arresting officer or corroborating witness affidavits alleging the officer's statements. The Court has been willing to consider this type of evidence even in circumstances when it is particularly concerned about screening out frivolous claims. For example, in *Lozman*, the Court considered a transcript of the meeting in which officials planned his arrest and a video recording of the arrest itself to be "objective evidence of a policy motivated by retaliation."[215] Thus, the Court allowed Lozman to maintain his

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[212] As some have argued, too sensitive, as discussed in Part IV. See *Armstrong*, 517 US at 464 ("[T]he showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims.").

[213] *Gregoire v Biddle*, 177 F2d 579, 581 (2d Cir 1949).

[214] *Armstrong*, 517 US at 464.

[215] *Lozman*, 138 S Ct at 1954.

retaliatory arrest claim against the city despite the existence of probable cause to arrest.[216] In *United States v Al Jibori*,[217] a rare instance in which a court ordered discovery on a selective prosecution defense upon a showing of "direct admissions by [prosecutors] of discriminatory purpose"[218] under *Armstrong* footnote three, the evidence came in the form of the prosecutor's affidavit.[219]

Presumably, if the defendant had merely alleged the prosecutor said something to indicate his racial bias, discovery would not have been ordered. While drawing the line between credible and noncredible evidence is not a simple task, judges are equipped to determine when a plaintiff has met their burden just as they are in other areas of litigation. This rule would set the bar high enough to allay the majority's concerns about screening out "doubtful" suits based on bare allegations about an officer's state of mind,[220] while giving plaintiffs more opportunity to use the evidence available to them and avoiding the doctrinal problems of the *Nieves* majority's more limiting rule.[221]

3. How *Nieves* and similar cases come out under *Armstrong*.

This proposed rule will significantly impact the many claims for which the underlying crime of arrest is neither a crime that police officers never make arrests for, like jaywalking, nor one that officers consistently make arrests for, like violent crimes. In those two situations, the parties are unlikely to dispute whether the narrow qualification applies. However, between these extremes are many offenses, such as disorderly conduct, for which officers exercise a significant amount of discretion as to whether to arrest the offender. In these cases, comparison-based evidence regarding arrest rates of similarly situated individuals may be extremely hard to come by—and may not always be indicative of retaliation—while strong evidence of unconstitutional intent may be more readily available. There is also reason to think that retaliatory arrests for these sorts of violations are not uncommon.

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216 See id at 1955.

217 90 F3d 22 (2d Cir 1996).

218 Id at 25 (alteration in original) (quotation marks omitted), quoting *Armstrong*, 517 US at 469 n 3.

219 See *Al Jibori*, 90 F3d at 24–25. *Al Jibori* is discussed further in Part III.C.3.

220 *Nieves*, 139 S Ct at 1725.

221 As discussed in Part IV, although *Armstrong* is generally regarded as a high bar, its application in the retaliatory arrest context will yield less harsh results, since plaintiffs will have more access to direct evidence of intent.

In 2015, the Department of Justice published a report regarding conduct of police officers in Ferguson, Missouri and found that:

> [O]fficers frequently make enforcement decisions based on what subjects say, or how they say it. Just as officers reflexively resort to arrest immediately upon noncompliance with their orders, whether lawful or not, they are quick to overreact to challenges and verbal slights. These incidents—sometimes called "contempt of cop" cases—are propelled by officers' belief that arrest is an appropriate response to disrespect. These arrests are typically charged as a Failure to Comply, Disorderly Conduct, Interference with Officer, or Resisting Arrest.[222]

Thus, a rule that would provide opportunities for plaintiffs to prove their claims in these scenarios is particularly important.

Under *Armstrong*, Bartlett's single personal affidavit alleging Officer Nieves's statement would still not have been enough to proceed with his case. Without evidence regarding similarly situated individuals, Bartlett would have been required to make a more credible showing of intent to meet the threshold requirement. Bartlett only offered his own affidavit recounting the facts of his arrest, and Nieves's statement would not have constituted "credible" evidence of intent. Though *Armstrong* will be helpful to many litigants who cannot obtain comparison-based evidence, it will only make a difference if they can proffer showings of intent that are more robust than Bartlett's single affidavit.

However, if Bartlett were able to provide a video of the officer's statement or corroborating witness statements, he would have been able to proceed under *Armstrong*, even without comparison-based evidence. This is important for two reasons. First, if easily and quickly verifiable evidence of Nieves's animus existed, it would be a waste for a court to disregard it. If Bartlett already possessed evidence of Officer Nieves's intent, asking the court to consider that evidence at the threshold level would not "threaten to set off 'broad-ranging discovery' in which 'there often is no clear end to the relevant evidence,'" about which the majority is concerned.[223] Allowing Bartlett to present a cell phone video of the

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[222] US Department of Justice, Civil Rights Division, *Investigation of the Ferguson Police Department* *25 (Mar 4, 2015), archived at https://perma.cc/K9R6-BXGK.

[223] *Nieves*, 139 S Ct at 1725, quoting *Harlow v Fitzgerald*, 457 US 800, 817 (1982).

scene could potentially be very helpful to his case, at almost no cost to efficiency.

Second, direct evidence of intent probably would have been Bartlett's only hope, as the comparison-based showing does not track easily onto this case. The facts of *Nieves* illuminate how difficult it can be to determine whether the exception should apply using only comparison-based evidence. On one hand, disorderly conduct, which sometimes poses a threat to others, is a serious enough offense that Bartlett's arrest may not count as a "circumstance[ ] where officers . . . typically exercise their discretion not to [arrest]."[224] At the same time, from Chief Justice Roberts's description of the campgrounds as "raucous" and the festival as "an event known for both extreme sports and extreme alcohol consumption,"[225] it seems likely that other partygoers were committing similar acts of disorderly behavior but were not arrested, so perhaps Bartlett was singled out. It is not clear from the majority's language which version of the rule is appropriate here.

Should courts ask whether the typical disorderly conduct offender is arrested, or whether other disorderly partygoers were arrested in the Hoodoo Mountains?[226] The latter comparison is probably more relevant to the ultimate question of retaliation. However, proving that other partygoers could have been arrested for committing disorderly conduct at Arctic Man would require legal judgments about their behavior. Thus, it is not clear how a plaintiff like Bartlett could possibly get relief under the majority's rule. The facts of *Nieves* itself tend to confirm Justice Sotomayor's prediction that "there will be little daylight between the comparison-based standard the Court adopts and the absolute bar it ostensibly rejects."[227]

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[224] *Nieves*, 139 S Ct at 1727. See also note 152 (explaining that *Nieves* is not clear about whether, for the exception to apply, the crime of arrest must be a minor crime or if the primary inquiry is whether similarly situated people were not arrested).

[225] *Nieves*, 139 S Ct at 1720.

[226] Courts have consistently struggled to define the similarly-situated-individuals analysis in many circumstances. See *United States v Mumphrey*, 193 F Supp 3d 1040, 1061 (ND Cal 2016) ('[T]here is no magic formula for determining who is similarly situated."). As one scholar noted, "[a]lthough frequently invoked in the equal protection context, the 'similarly situated' concept is not uniformly employed in the case law. Many important equal protection opinions contain no substantive 'similarly situated' analysis." Giovanna Shay, *Similarly Situated*, 18 Geo Mason L Rev 581, 586 (2011), citing *Grutter v Bollinger*, 539 US 306, 375 (2003) (Thomas concurring in part and dissenting in part), *United States v Virginia*, 518 US 515 (1996), *Romer v Evans*, 517 US 620 (1996), and *Craig v Boren*, 429 US 190, 192 n 2 (1976).

[227] *Nieves*, 139 S Ct at 1741 (Sotomayor dissenting).

It may be the case that Bartlett would be similarly out of luck under the *Armstrong* standard, assuming he lacked any video evidence or witness statements regarding Officer Nieves's statement. *Armstrong* will not provide a remedy for all victims (if Bartlett was indeed victimized). However, applying *Armstrong* to retaliatory arrest claims in the manner this Comment advocates would give more plaintiffs a chance. This solution would also reflect that retaliation is an intent-based claim, like racial discrimination, not a claim based on reasonableness. While still rigorous, the more flexible *Armstrong* rule better reflects the doctrine and the facts of many arrest scenarios, like Bartlett's, for which comparison-based evidence may not be particularly helpful in determining whether retaliation occurred and would be difficult to obtain in any event.

C. Challenges to the *Armstrong* Approach

1. Justice Sotomayor's concerns.

Even if the *Armstrong* approach to retaliatory arrest litigation is consistent with precedent and helpful to plaintiffs, one may be concerned that *Armstrong* governs a distinct area of law and may be difficult to apply to retaliatory arrest lawsuits. The *Armstrong* framework applies a different constitutional provision to a different type of proceeding concerning a different subject matter. As Justice Sotomayor notes, applying *Armstrong* here would "take a doctrine applying (1) equal protection principles (2) in a criminal proceeding to (3) charging decisions by prosecutors, and ask it also to govern the application of (1) First Amendment principles (2) in a suit for civil damages challenging (3) arrests by police officers."[228] This creates additional doctrinal thorns in an already thorny method of analysis, but each issue that Justice Sotomayor points out can be overcome.

First, *Armstrong* concerned an equal protection challenge, whereas *Nieves* addresses the proper standard for First Amendment retaliation claims. Although these two doctrines protect different rights, Justice Sotomayor herself notes that they are "indistinguishable" for these purposes since they "both inherently require inquiry into 'an official's motive.'"[229] In fact, selective prosecution jurisprudence already encompasses claims based on First

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[228] Id at 1742 (citation omitted).

[229] Id at 1738, quoting *Crawford-El*, 523 US at 585.

Amendment retaliation, in addition to racial and other forms of discrimination prohibited by the Equal Protection Clause. Former prosecutor Melissa L. Jampol explains that selective prosecution claims fall in "two subsets: those based on claims of racial discrimination; and those based on other constitutionally impermissible infringements, such as First Amendment violations."[230] Although equal protection is at issue in *Armstrong*, selective prosecution allegations can also be "based on other constitutionally impermissible infringements, such as First Amendment violations."[231] For example, in *Wayte v United States*,[232] the plaintiff alleged that he was selectively prosecuted for failure to register for the Selective Service based on his vocal opposition to the draft, infringing on his First Amendment rights.[233] The Court concluded that, notwithstanding prosecutorial discretion, "the decision to prosecute may not be 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification,' including the exercise of . . . constitutional rights."[234] Thus, the selective prosecution framework articulated in *Armstrong* can be applied to charges of First Amendment retaliation as well.

Second, *Armstrong* was written to govern criminal proceedings in which a defendant raises an affirmative defense, rather than civil litigation. In general, Federal Rule of Criminal Procedure 16 governs discovery in criminal proceedings.[235] However, the standard created in *Armstrong* is premised on the fact that Rule 16 only governs discovery related to defenses "against the Government's case in chief, but not to the preparation of selective-prosecution claims."[236] Because selective prosecution is an affirmative defense, its discovery standard functions similar to a

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230 Melissa L. Jampol, *Goodbye to the Defense of Selective Prosecution*, 87 J Crim L & Crimin 932, 933 (1997).

231 Id.

232 470 US 598 (1985).

233 Id at 603–04.

234 Id at 608 (citations omitted), quoting *Bordenkircher*, 434 US at 364 and citing *United States v Goodwin*, 457 US 368, 372 (1982). See also *United States v Furman*, 31 F3d 1034, 1037 (10th Cir 1994) (stating that proving the discriminatory intent element of selective prosecution requires showing that "the government's selection of [the defendant] for prosecution 'was invidious or in bad faith and was based on impermissible considerations such as . . . the desire to prevent the exercise of constitutional rights"), quoting *United States v Salazar*, 720 F2d 1482, 1487 (10th Cir 1983).

235 See FRCrP 16(a)(1)(E). In *Armstrong*, the Court references Rule 16(a)(1)(C). However, the 2002 Amendments to the Federal Rules of Criminal Procedure redesignated the materials covered in Rule 16(a)(1)(C) to Rule 16(a)(1)(e). See Amendments to the Federal Rules of Criminal Procedure 11–12 (May 15, 2013).

236 *Armstrong*, 517 US at 463.

threshold standard like the one *Nieves* establishes.[237] For example, in *Marshall v Columbia Lea Regional Hospital*,[238] the Tenth Circuit directly analogized to *Armstrong* when it established a summary judgment standard for § 1983 selective enforcement claims, noting that "[i]n *analogous contexts*[ ] the Court has 'taken great pains to explain that the standard is a demanding one.'"[239] Indeed, other courts have made use of *Armstrong* in § 1983 selective enforcement claims alleging denial of equal protection.[240]

Third, defendants make selective prosecution challenges to prosecutors' charging decisions rather than a police officer's arresting decision.[241] This is important because courts afford prosecutors a presumption of regularity in their official decisions,[242] whereas courts generally show less deference to police officers.[243] In light of this, some circuits have applied a lower evidentiary standard to selective enforcement claims.[244] However, this does not preclude applying *Armstrong* in the arrest context. At least two courts of appeals have determined that deference to the decisions of police officers, as agents of the state and federal executives, requires that the "demanding" standard established in *Armstrong* applies to selective enforcement.[245] As the Tenth Circuit explained, "[b]road discretion has been vested in executive branch officials to determine when to prosecute," citing to *Armstrong*, "and by analogy, when to conduct a traffic stop or initiate an arrest."[246] Further, courts "[o]rdinarily [ ] presume that public

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237 *Nieves*, 139 S Ct at 1725 (aiming to avoid "set[ting] off 'broad-ranging discovery' in which 'there often is no clear end to the relevant evidence'"), quoting *Harlow*, 457 US at 817.

238 345 F3d 1157 (10th Cir 2003).

239 Id at 1167 (emphasis added), quoting *Armstrong*, 517 US at 463.

240 See, for example, *Richards v Gelsomino*, 2019 WL 1535466, *8 (DDC), quoting *Armstrong*, 517 US at 465.

241 See *Nieves*, 139 S Ct at 1742 (Sotomayor dissenting).

242 See, for example, *Armstrong*, 517 US at 464 ("In the ordinary case . . . 'the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor's] discretion.'"), quoting *Bordenkircher*, 434 US at 364.

243 See Siegler and Admussen, 115 Nw U L Rev at *35 (cited in note 153).

244 See, for example, *United States v Sellers*, 906 F3d 848, 856 (9th Cir 2018); *United States v Washington*, 869 F3d 193, 219–20 (3d Cir 2017); *United States v Davis*, 793 F3d 712, 720–21 (7th Cir 2015).

245 See *United States v Alcaraz-Arellano*, 441 F3d 1252, 1264 (10th Cir 2006), quoting *Armstrong*, 517 US at 463. See also *United States v Mason*, 774 F3d 824, 830 (4th Cir 2014) ("In light of 'the great danger of unnecessarily impairing the performance of a core executive constitutional function,' petitioners must demonstrate 'clear evidence' of racially animated selective law enforcement."), quoting *United States v Olvis*, 97 F3d 739, 743 (4th Cir 1996).

246 *Marshall*, 345 F3d at 1167, citing *Armstrong*, 517 US at 464.

officials have 'properly discharged their official duties,'"[247] so all government actors, including police officers, are afforded some level of deference. *Nieves* points out that police officers exercise discretion in who they arrest; the narrow qualification specifically deals with the instances in which officers clearly abuse that discretion.[248] Thus, the presumption of regularity afforded to prosecutors does not foreclose application of *Armstrong* in the arrest context.

While the selective-prosecution-defense framework does not track perfectly onto retaliatory arrest litigation, each of the three apparent difficulties can be overcome. At the same time, applying the *Armstrong* standard here avoids the doctrinal thorns that the *Nieves* rule creates.[249] Although *Armstrong* and *Nieves* address different types of litigation, both retaliatory arrest and selective prosecution claims hinge on the unconstitutional motivations of government officials, and the applicable rules in both areas attempt to balance the need to consider intent with the interest in screening out frivolous claims.

2. Squaring *Armstrong* with *Crawford-El v Britton*.

As this Comment argues, *Armstrong* is an improvement upon *Nieves*, but it is worth examining whether any heightened standard is appropriate for retaliatory arrest litigation. Justice Sotomayor questions applying an *Armstrong*-like standard in the retaliatory arrest context because it could be inconsistent with *Crawford-El v Britton*.[250] As Justice Sotomayor notes,[251] the Court in *Crawford-El* rejected a similar "clear and convincing" standard for "constitutional claims that require proof of improper intent."[252] In *Crawford-El*, a prison inmate filed a retaliation claim against a correctional officer, contending that the officer deliberately misdirected his personal property upon his transfer to another facility by giving his belongings to his brother-in-law rather than shipping them to his next destination.[253] Specifically, the plaintiff

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[247] *Bracy v Gramley*, 520 US 899, 909 (1997), quoting *Armstrong*, 517 US at 464. See also *Alcaraz-Arellano*, 441 F3d at 1264 ("Executive-branch officials possess broad discretion in determining when to make a traffic stop or an arrest.").

[248] See *Nieves*, 139 S Ct at 1727.

[249] See Part III.A.

[250] 523 US 574 (1998).

[251] See *Nieves*, 139 S Ct at 1742 (Sotomayor dissenting) ("[W]e rejected a very similar rule in *Crawford-El*.").

[252] *Crawford-El*, 523 US at 594.

[253] Id at 577–78.

alleged that the officer acted in retaliation for a 1986 incident in which he invited a *Washington Post* journalist to visit the prison facility, resulting in a front-page article detailing the overcrowding crisis at the prison; a 1988 incident in which he complained to the prison administration about invasions of his privacy rights; and another 1988 incident in which he was quoted in the *Washington Post* as "saying that litigious prisoners had been 'handpicked' for transfer."[254]

The District of Columbia Circuit held that, to defeat a motion for summary judgment on an unconstitutional-motive claim, the plaintiff must provide "clear and convincing" evidence of improper state of mind.[255] The Court of Appeals derived this heightened standard from *Harlow v Fitzgerald*.[256] *Harlow* held that to defeat the qualified immunity defense, plaintiffs must provide objective evidence of unreasonable conduct, and "bare allegations of malice" are insufficient to subject government officials to the burdens of trial.[257] In *Crawford-El*, the DC Circuit applied this rule to an affirmative claim of constitutional violation as well and was reversed by the Supreme Court.[258] Justice John Paul Stevens explained that the objective standard from *Harlow* applies only when a plaintiff attempts to overcome qualified immunity, and it does not change the standard for the constitutional claim itself.[259] Thus, courts should not require plaintiffs to adduce "clear and convincing" evidence to defeat a motion for summary judgment on constitutional claims involving improper motives.[260]

Although *Crawford-El* rejected a "special rule"[261] that imposed a blanket heightened burden of proof on all plaintiffs alleging unconstitutional-motive claims,[262] it did not preclude using threshold standards in certain cases when additional showings

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254 Id at 578–79 & n 1.

255 Id at 582–83.

256 457 US 800 (1982).

257 *Harlow*, 457 US at 817–18.

258 See *Crawford-El*, 523 US at 583 (discussing the DC Circuit's reasoning); id at 589 (holding that *Harlow* did not require this result).

259 See id.

260 Id at 594.

261 Id.

262 See *Crawford-El*, 523 US at 585–86. In *Crawford-El*, Justice Stevens worried that the DC Circuit's heightened standard was "not limited to suits by prisoners against local officials, but [would] appl[y] to all classes of plaintiffs bringing damages actions against any government official . . . [and] to the wide array of different federal law claims for which an official's motive is a necessary element." Id at 585.

are necessary to prove causality.[263] Indeed, the Court has been willing to put constraints on certain types of improper-motive claims. For example, in *Hartman*, the Court created the no-probable-cause threshold for retaliatory prosecution claims due to concerns about proving causality and the presumption of regularity afforded to prosecutors.[264] Justifying this rule, the *Hartman* Court cited to *Crawford-El* itself in explaining that "necessary details about proof of a connection between the retaliatory animus and the discharge [ ] will depend on the circumstances,"[265] so putting additional burdens on plaintiffs can be appropriate in some circumstances. Given subsequent cases like *Hartman*, *Crawford-El* cannot stand for the proposition that the Court is *never* permitted to impose additional constraints on § 1983 plaintiffs, so it should not preclude applying something like the *Armstrong* standard here.

What's more, *Crawford-El* suggests that *Armstrong* is a better standard than the majority's narrower carveout, since the *Crawford-El* Court specifically wanted to give plaintiffs a fair chance to prove their claims and avoid rules that place "a thumb on the defendant's side of the scales."[266] While *Crawford-El* does not preclude applying threshold standards in all circumstances, the opinion clearly rejects rules that "undermine[ ] the very purpose of § 1983—to provide a remedy for the violation of federal rights."[267] *Nieves*'s rigid rule will provide a remedy for few plaintiffs, since officers can find probable cause to arrest for even trivial misconduct and comparison-based evidence will be impossible to find in most situations. Although *Armstrong* is burdensome, it avoids completely undermining § 1983 by at least allowing litigants to use the evidence available to them, including direct evidence of intent. *Armstrong* may still prevent some victims from obtaining redress. However, given the Court's concern that too many "doubtful" suits will get through,[268] *Armstrong* is the most viable alternative.

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[263] See id at 593 ("[A]t least with certain types of claims, proof of an improper motive is not sufficient to establish a constitutional violation—there must also be evidence of causation.").

[264] See *Hartman*, 547 US at 261–63.

[265] Id at 260, citing *Crawford-El*, 523 US at 593.

[266] *Crawford-El*, 523 US at 593.

[267] Id at 594–95.

[268] *Nieves*, 139 S Ct at 1725.

3. Using *Armstrong*'s footnote three despite a lack of case law.

Finally, while *Armstrong*'s footnote three "expressly left open the possibility that . . . admissions[of intent] might be enough to allow a claim to proceed,"[269] it is worth examining if and when litigants use this footnote. Indeed, scholars criticize *Armstrong* on the basis that it requires defendants to provide comparison-based evidence "as an absolute condition of discovery."[270] Although criminal defendants have had little success using *Armstrong*'s footnote three, the Court has not precluded it.[271] Rather, criminal defendants are rarely able to use evidence of discriminatory intent because "direct evidence of motive or intent is rarely available."[272] "In general, the absence of . . . direct evidence of police motivation results in most claims being based on [ ] comparisons."[273] As Part IV.A discusses, because statements by prosecutors regarding motivations behind their charging decisions are made primarily behind closed doors, discriminatory effect is generally easier for defendants to prove than discriminatory intent.[274] Thus, the *Armstrong* case law lacks many instances in which defendants circumvent the similarly-situated-individuals threshold by providing direct evidence of intent.

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269 Id at 1734 (Gorsuch concurring in part and dissenting in part).

270 McAdams, 73 Chi Kent L Rev at 606 (cited in note 153). See also Jampol, 87 J Crim L & Crimin at 960–63 (cited in note 230).

271 It should be noted that some courts have taken *Armstrong* to require showing of *both* discriminatory effect *and* intent to obtain discovery. See, for example, *United States v Deberry*, 430 F3d 1294, 1301 (10th Cir 2005) ("As Defendants have failed to present evidence satisfying *Armstrong*'s discriminatory-effect prong, we need not address whether the evidence they presented satisfied the discriminatory-intent prong."). However, the text of *Armstrong* does not compel this conclusion, as the Court did not hold that evidence of effect would be required when the defendant has evidence of unconstitutional intent. Indeed, some courts have noted that the extent to which *Armstrong* requires evidence of both effect and intent at different stages in litigation is unclear. See, for example, *United States v Tuitt*, 68 F Supp 2d 4, 10 (D Mass 1999) ("[T]he Supreme Court's actual analysis of the evidence offered in *Armstrong* . . . in some ways appears to conflate the elements of effect and intent.").

272 *Branch Ministries, Inc v Richardson*, 970 F Supp 11, 17 (DDC 1997) ("[E]vidence concerning the unequal application of the law, statistical disparities and other indirect evidence of intent may be used to show bias or discriminatory motive."). Although direct evidence of prosecutorial intent is extremely difficult to obtain, evidence of a police officer's intent may be more available to retaliatory arrest plaintiffs, as Part IV explains.

273 *Marshall*, 345 F3d at 1168.

274 See Kristin E. Kruse, Comment, *Proving Discriminatory Intent in Selective Prosecution Challenges—An Alternative Approach to* United States v. Armstrong, 58 SMU L Rev 1523, 1535 (2005) ("[T]here is rarely any direct evidence of discrimination, leaving only circumstantial evidence at best.").

I was only able to identify one significant criminal case[275] in which a court used *Armstrong*'s footnote three to allow a claim to move to discovery by virtue of direct evidence of prosecutorial intent. In *Al Jibori*, the Second Circuit noted that *Armstrong* did not strictly require defendants to satisfy the similarly situated requirement when evidence of prosecutorial intent in the form of admissions exists, finding that the "case demonstrate[d] why admissions should sometimes justify further inquiry."[276] The facts of *Al Jibori* are not typical. In the case, the defendant was arrested in John F. Kennedy International Airport and eventually charged with using a false passport under a somewhat rarely used federal statute.[277] He moved to dismiss on the theory that he was selectively prosecuted due to his religion, political affiliation, and request for asylum.[278] Because the defendant offered no evidence that similarly situated individuals were not prosecuted, "[p]ursuant to *Armstrong*, the government could have refused to comply [with discovery] without causing jeopardy to its prosecution."[279]

However, the trial court proceedings occurred before *Armstrong* was handed down.[280] Rather than simply moving to dismiss, the government volunteered an affidavit of the prosecutor, who stated that "the decision to prosecute was based on the similarity between [Chafat] Al Jibori's case and that of the terrorist convicted in the World Trade Center bombing, *both being middle easterners* traveling on altered Swedish passports."[281] The court concluded that the only commonality between the defendant and the convicted terrorist was their regional origin, "a consideration which standing alone is an unconstitutional basis for selecting prosecution," and remanded the case for further discovery.[282]

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[275] To identify cases in which defendants attempted to use evidence of intent to meet the discovery bar on claims of selective prosecution, I conducted several searches of cases referencing *Armstrong*: I searched for cases that included terms like "evidence of intent" and "showing of [the officer's] intent" as well as cases including the word "footnote" or the specific language from *Armstrong*'s footnote three. I then reviewed the cases for references to the defendant trying to either (1) make a threshold showing of the officer's unconstitutional intent or (2) otherwise sidestep the similarly-situated-individuals showing requirement.

[276] *Al Jibori*, 90 F3d at 25.

[277] See id at 23.

[278] See id at 24–25.

[279] Id at 25.

[280] See *Al Jibori*, 90 F3d at 23 (noting that the district court entered judgment against defendant on September 15, 1995).

[281] Id at 24 (emphasis added).

[282] Id at 26.

While *Al Jibori* is clearly an outlier,[283] it shows that *Armstrong* can be interpreted to allow courts to consider direct evidence of intent in lieu of comparison-based evidence at the discovery threshold level.

The Tenth Circuit considered another case in which the litigant sought to provide direct evidence of intent in *Marshall v Columbia Lea Regional Hospital*.[284] Analogizing to *Armstrong*, the court considered the government's motion for summary judgment on a § 1983 selective enforcement claim.[285] The plaintiff did not proffer any evidence regarding similarly situated individuals, and instead he sought "to prove the racially selective nature of his stop and arrest not by means of statistical inference but by direct evidence of [the officer's] behavior."[286] The Tenth Circuit determined that the similarly-situated-individual requirement was not appropriate in Marshall's case, since the claim was grounded in the evidenced intent of the particular officer.[287]

At the same time, most attempts by criminal defendants to sidestep the similarly-situated-individuals showing with direct evidence of intent have not been successful. However, this lack of success can be attributed to problems with the evidence offered, not because evidence of discriminatory intent can *never* allow defendants to obtain discovery. For example, in *United States v Mitchell*,[288] the Northern District of Texas considered whether defendant's allegation that his arresting officer said "I'm tired of you black guys from South Dallas thinking you can abuse white girls and get away with it. You're going to the Feds" would allow him to proceed to discovery on his selective prosecution claim.[289] The court rejected the defendant's argument because he failed to cite prior cases in which defendants used direct evidence of intent to sidestep the comparison-based evidence requirement, and "even if he did, the evidence he has presented . . . does not show the *prosecution's* discriminatory purpose," only the police officer's.[290]

What's more, the defendant's sworn statement, on its own, would probably not be enough to meet *Armstrong*'s "clear"

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[283] See McAdams, 73 Chi Kent L Rev at 623 (cited in note 153) (noting that the government's mistake in *Al Jibori*, submitting the affidavit, is unlikely to be repeated).

[284] *Marshall*, 345 F3d at 1168.

[285] See id at 1167.

[286] Id at 1168.

[287] See id.

[288] 2015 WL 367087 (ND Tex).

[289] Id at *1.

[290] Id at *2.

evidence requirement, even if it did refer to the prosecutor rather than the police officer. As noted in Part III.B.2, *Armstrong* would probably require evidence of intent that is more credible than the defendant's affidavit.

Because the defendant in *Mitchell* did not produce any case law based on footnote three, the trial court was reluctant to apply it. However, other problems with the evidence proffered would have defeated the defendant's claim regardless.[291] Thus, while the district court in *Mitchell* was not obviously convinced that *Armstrong* allowed the defendant to use discriminatory intent to meet the discovery threshold, there were several other problems with the defendant's proffered evidence that also stood in the way of his success. Despite the scarcity of useful case law interpreting footnote three, there is no reason for courts to disregard the possibility that *Armstrong* allows for at least certain forms of evidence of discriminatory intent to allow claims to proceed. Rather, footnote three has been of little use in selective prosecution claims due to practical problems—many of which do not apply in the retaliatory arrest context.

IV. RETALIATORY ARRESTS: A BETTER CONTEXT FOR *ARMSTRONG* THAN SELECTIVE PROSECUTION

Armstrong is a notably difficult standard to meet, so courts should be cautious in extending it. Almost since it was decided, scholars and practitioners have criticized *Armstrong* as a prohibitively high standard.[292] Even if defendants can use either comparison-based evidence or prosecutorial admissions to meet its requirements, neither are feasible in most cases. Evidence regarding the *non*prosecution of similarly situated individuals rarely exists, and if it does, it is likely kept by the prosecutor.[293] At the same time, direct evidence of prosecutorial intent is even

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[291] See, for example, id (explaining that evidence of the *police officer*'s intent was not relevant to the defendant's claim because it did not show the *prosecutor*'s intent).

[292] See, for example, Jampol, 87 J Crim L & Crimin at 932, 954 (cited in note 230) (noting that *Armstrong* "imposes a barrier that is too high for almost any defendant alleging selective prosecution to obtain discovery," such that the requirements for obtaining discovery and the requirements for proving selective prosecution on the merits have "practically merge[d]"); Kruse, Comment, 58 SMU L Rev at 1534 (cited in note 274) ("[R]equiring prima facie evidence before allowing discovery to obtain evidence appears to be a 'Catch 22.'").

[293] See Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U Pa L Rev 1365, 1373–74 (1987) (explaining that a defendant "cannot obtain discovery unless she first makes a threshold showing," which in turn "may be impossible without some discovery").

harder to obtain. Fortunately, since retaliatory arrest plaintiffs are significantly more likely to have access to evidence of a police officer's intent, the *Armstrong* threshold will be easier to meet here than in its original context. Compared with *Nieves*'s rigid rule, *Armstrong* would actually open up opportunities for retaliatory arrest plaintiffs, despite its unhelpfulness in selective prosecution cases.

A. Accessible Evidence of Intent in Retaliatory Arrest Cases

Meeting the threshold described in *Armstrong* is not an easy task. Although the Court asserted that, if selective prosecution truly occurred, meeting the discovery burden should not be "an insuperable task,"[294] it pointed to only one case in which the defendant was able to meet its discovery burden.[295] Very few criminal defendants have been able to use *Armstrong*'s similarly-situated-individual rule to their advantage, and many scholars have asserted that the rule essentially forecloses selective prosecution claims altogether. Professor Richard H. McAdams first noted that "for many crimes, *Armstrong* makes discovery impossible even where the defendant is a victim of selective prosecution."[296] For example, when the crime is so minor that it is generally not prosecuted but for selective prosecution, a litigant would have to detect and provide evidence of others who committed the violation but were not prosecuted.[297] This proof problem may be even worse when the crime at issue is one usually committed in private.[298] Meeting *Armstrong*'s similarly-situated-individuals requirement often involves proving a negative, which makes it extremely difficult to meet.[299]

As explained in Part III.C.3, defendants raising selective prosecution claims have not been able to make use of *Armstrong* footnote three arguments either, because direct evidence of discriminatory intent on the part of a prosecutor is rarely, if ever,

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294 *Armstrong*, 517 US at 470.

295 See id at 466, citing *Yick Wo v Hopkins*, 118 US 356, 374 (1886).

296 McAdams, 73 Chi Kent L Rev at 623 (cited in note 153).

297 See id at 618.

298 See id at 620–21.

299 See Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 Cornell L Rev 1211, 1279 (2018) ("[S]ince such [similarly situated] defendants were not prosecuted . . . it will rarely be the case that documentary evidence of their existence will be available.").

available.[300] In general, prosecutors do not need to explain their charging decisions.[301] If a prosecutor does make a statement evincing racial discrimination in their charging practices or revealing that they pressed charges against a particular defendant in retaliation, they likely made that statement in the privacy of their office, producing no evidence that a criminal defendant could access. Evidence of statements made behind closed doors is not going to be available in most cases, though there are exceptions.[302] It is hard to imagine criminal defendants reliably being able to produce this kind of smoking gun evidence of prosecutorial intent. For the most part, acquiring evidence of prosecutorial intent would require the prosecutor affirmatively choosing to express their racially motivated intentions directly to the court, as the prosecutor did in *Al Jibori*.[303] This situation is exceedingly rare.[304]

In general, the Court's equal protection cases recognize that direct evidence of unconstitutional intent in the form of statements or admissions is often impossible to obtain, and instead allow litigants to use objective, comparison-based evidence.[305] In *Washington v Davis*,[306] the Court held that statutes must have a discriminatory purpose, not merely a disparate impact, to violate the Equal Protection Clause,[307] but acknowledged that evidence of purpose will often be necessarily indirect, and "invidious discriminatory purpose may often be inferred from the totality of the relevant facts."[308] Direct evidence of purpose is rare. It is reasonable to assume that the *Armstrong* Court did not expect any criminal defendants to be able to produce direct evidence of the prosecutor's discriminatory intent, and instead created the (still very demanding) similarly-situated-individual showing requirement

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300 See Jampol, 87 J Crim L & Crimin at 960 (cited in note 230) ("One potential way in which a defendant could meet the . . . threshold is an outright declaration of racial bias by a prosecutor, which is unlikely in almost all instances.").

301 See Reiss, 135 U Pa L Rev at 1373 (cited in note 293).

302 Fane Lozman and his private city council meeting transcript come to mind, and the Court understood that it should not ignore Lozman's proffered evidence of intent. See *Lozman*, 138 S Ct at 1954.

303 See *Al Jibori*, 90 F3d at 25.

304 See McAdams, 73 Chi Kent L Rev at 623 (cited in note 153) (noting "the government made a tactical error" in *Al Jibori* "that it is not likely to repeat").

305 See *Batson v Kentucky*, 476 US 79, 93 (1986) (explaining that in equal protection cases, courts must consider "circumstantial and direct evidence of intent" and that "[c]ircumstantial evidence of invidious intent may include proof of disproportionate impact").

306 426 US 229 (1976).

307 Id at 239.

308 Id at 242.

as an alternative mechanism to show discrimination. As commentators have pointed out, however, the mechanism created by the *Armstrong* Court has essentially failed to help defendants, and criminal defendants have had little success in claiming selective prosecution.[309]

While discriminatory purpose is often hidden from defendants asserting selective prosecution, the retaliatory arrest context is different because police officers do their jobs in public, and thus are much more likely to be caught if they make statements evidencing unconstitutional purpose. If a police officer yells at a civilian to cease his protest activities and then promptly arrests him, the interaction probably occurred in public and might have been heard by witnesses. Or, imagine a tougher scenario. Someone is smoking marijuana outside of a bar (in a state where using marijuana is criminalized), and a police officer sees him but passes him by until hearing him say to his friend, "God, I hate cops." The officer then turns around, retorts, "You really shouldn't have said that," throws him in the squad car, and charges him for marijuana possession. The retaliatory nature of the arrest seems fairly clear—the officer disregarded the crime until he made the protected but inflammatory remark. If the bar's security camera captured the exchange or the arrestee's friend took a cell phone video, he has direct evidence of discriminatory purpose to bring to court. Since retaliatory arrest plaintiffs directly interact with police officers, and those interactions take place in public, they are more likely to be able to present evidence of discriminatory purpose than are defendants alleging selective prosecution.

One might argue that direct evidence of intent to retaliate rarely exists because police officers are careful not to make comments that evidence bad motives. As discussed, in the context of racially discriminatory prosecutions, courts note that "direct evidence of motive or intent is rarely available."[310] However, in situations of retaliation, what triggers the police officer's action is the plaintiff's speech itself, so the officer is arguably more likely to respond with speech of his own. Comments evincing retaliatory intent aren't made out of the blue, but rather in response to something someone else said. Considering this, a police officer saying out loud "you really shouldn't have said that" in response to

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[309] See, for example, Jampol, 87 J Crim L & Crimin at 963 (cited in note 230) (stating that "the Supreme Court has set up a threshold that is too difficult for most defendants to meet, even those with potentially meritorious claims").

[310] *Branch Ministries, Inc v Richardson*, 970 F Supp 11, 17 (DDC 1997).

someone else's offensive remarks seems plausible. Since victims and bystanders will be likely to witness (at least some of) these sorts of comments made by police officers in arrest scenarios, evidence of intent could be available to many potential plaintiffs. Thus, an *Armstrong*-like rule would actually be useful to litigants in this context, giving plaintiffs a chance to use the evidence they have available to them.

B. Cellphone Videos and Police Accountability

That at least some victims of retaliatory arrest will be able to produce evidence of police intent is particularly true given the increase in video surveillance of police-civilian interactions and corresponding availability of clear evidence of officer intent and misconduct. As Justice Sotomayor points out, "more than ever before, an audiovisual record of key events is now often obtainable," so courts should accommodate evidentiary standards as to not "forsake this body of probative evidence."[311] It is difficult to overstate the impact of technology on the public's ability to document and share images of their experiences. Professor Seth F. Kreimer has termed this phenomenon "pervasive image capture," noting how increased cell phone ownership, the decreased cost of shooting photos and videos, and the proliferation of distribution channels like YouTube have combined to create a nearly all-seeing public.[312] In particular, the rise of cell phones with video-recording capabilities has facilitated widespread efforts by passersby to document interactions between police officers and civilians.[313] "Recording technology now is smaller, cheaper, easier to operate, easier to hide, and more pervasive, expanding personal opportunities to record events," including "individual encounters with police and political rallies in which the recorder is a participant."[314]

Third-party recordings of police interactions gone wrong are commonplace. Bystander videos of stops and arrests gone bad have sparked significant public discourse about policing practices and been used in civil and criminal proceedings against police

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311 *Nieves*, 139 S Ct at 1739–40 (Sotomayor dissenting).

312 Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U Pa L Rev 335, 339–41 (2011).

313 See Mary D. Fan, *Democratizing Proof: Pooling Public and Police Body-Camera Videos*, 96 NC L Rev 1639, 1647–52 (2018); Linda Zhang, *Retaliatory Arrests and the First Amendment: The Chilling Effects of* Hartman v. Moore *on the Freedom of Speech in the Age of Civilian Vigilance*, 64 UCLA L Rev 1328, 1360 (2017).

314 Howard M. Wasserman, *Orwell's Vision: Video and the Future of Civil Rights Enforcement*, 68 Md L Rev 600, 616 (2009).

officers involved in those incidents.[315] Particularly striking examples are the recordings of the tragic deaths of Eric Garner in July 2014, Michael Brown in August 2014, and George Floyd in May 2020, which were captured by bystanders.[316] The *New York Times* compiled thirty-two instances of police abuse of people of color since 2014 that were captured on video, and of those many were filmed by third parties.[317] This is a marked change from the circumstances surrounding the beating of Rodney King, "in which a bystander happened upon [the scene] and videotaped the incident for public consumption, arguably [ ] an outlier in 1991, [and] dependent on the then-rare fortuity of an individual having a video camera and on the mainstream media running with the video and the story."[318]

While instances of police brutality raise different issues than a typical retaliatory or otherwise discriminatory arrest, all civil rights plaintiffs are aided by the rise of bystander videos. At a basic level, bringing any kind of civil rights claim against a police officer entails convincing the court that the officer did something wrong while the officer (usually) claims that they did not. The plaintiff needs to give the court a reason to believe that the officer really did tell them to "shut up" just before arresting them at a protest. A bystander video could be just what she needs. If a bystander had caught Officer Nieves's alleged statement as he was arresting Bartlett, Bartlett would have had a shot at proving his claims.

Professor Jocelyn Simonson has also documented the growth of organized police-watching groups, who may be able to provide powerful witness testimony and video evidence.[319] While these groups have existed since at least the 1960s, they have proliferated in the last twenty years, and since 2014, "patrols have

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315 See Zhang, 64 UCLA L Rev at 1361–63 (cited in note 313).

316 See id at 1361–62; Joseph Goldstein and Nate Schweber, *Man's Death After Chokehold Raises Old Issue for the Police* (NY Times, July 18, 2014), archived at https://perma.cc/RK9R-WULD (reporting on Eric Garner's death); Julie Bosman and Joseph Goldstein, *Timeline for a Body: 4 Hours in the Middle of a Ferguson Street* (NY Times, Aug 23, 2014), archived at https://perma.cc/5375-G4NB (reporting on Michael Brown's death); Audra D.S. Burch and John Eligon, *Bystander Videos of George Floyd and Others Are Policing the Police* (NY Times, May 26, 2020), archived at https://perma.cc/LY9N-PELA (reporting on George Floyd's death).

317 See Sarah Almukhtar, et al, *Black Lives Upended by Policing: The Raw Videos Sparking Outrage* (NY Times, Apr 19, 2018), archived at https://perma.cc/RH6N-LK4H.

318 Wasserman, 68 Md L Rev at 617 (cited in note 314) (citation omitted).

319 See Jocelyn Simonson, *Copwatching*, 104 Cal L Rev 391, 407–27 (2016) (describing "the practice of organized copwatching and its rise over the last two decades").

sprung up in Ferguson, St. Louis, Chicago, New York City, Baltimore, and Boston, and copwatching continues to expand to new regions of the country."[320] While the primary goal of these groups is deterring misconduct, not documenting it, Simonson notes that copwatchers often film police-civilian interactions and assist civil rights litigants by providing documentation in court.[321] Though copwatching is not a new phenomenon, cell phone technology has almost certainly increased the potency of these activities, especially in their power to aid civil rights litigants in court.

The ubiquity of cell phone videos taken by bystanders as well as security cameras in public places means that video depictions of many police-citizen interactions are becoming more easily available than ever before.[322] Increasingly, plaintiffs alleging retaliatory, or otherwise discriminatory, arrests will be able to provide evidence of a police officer's unconstitutional intent in the form of video depictions of statements evincing retaliatory animus. This type of evidence is probative and illuminating, and it has the potential to quickly dispel factual questions early in the litigation process. Allowing plaintiffs to present this evidence at the threshold level gives them a chance to show the court that their case might really have merit, even if they cannot provide proof that others were not arrested in a similar circumstance. Such comparison-based evidence might be impossible to obtain, if it even exists. Further, since the heart of retaliatory arrest claims is the question whether the officer made the arrest with the intent to punish or suppress speech, it makes little sense to ignore evidence of intent at any stage of litigation. While the *Nieves* majority's rule requires courts to ignore this probative evidence at the threshold level, applying *Armstrong* to retaliatory arrest cases, and using its footnote three to consider direct evidence at the start of litigation, is more consistent with precedent. Perhaps as importantly, this rule will give retaliatory arrest victims a better chance to use the evidence available to them to hold law enforcement officers accountable for their actions, protecting civil rights from erosion.

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320 Id at 408–09 (citation omitted).

321 See id at 416–19.

322 See, Zhang, 64 UCLA L Rev at 1361–63 (cited in note 313) (compiling examples of police misconduct captured in audio and/or video recordings). For an example of security camera footage capturing a high-profile incident of police brutality, see id at 1362 ("[I]n November 2014, a security camera at a park in Cleveland captured the fatal police shooting of Tamir Rice, a young boy who was playing with an airsoft gun.").

CONCLUSION

Under *Nieves*, plaintiffs must prove lack of probable cause, except in "circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so."[323] Running contrary to the Court's unconstitutional-motive cases, *Nieves* exempts plaintiffs from the no-probable-cause rule only if they can provide objective evidence that similarly situated individuals, not exercising their free speech rights, would not have been arrested.[324] This rule is similar to *Armstrong*'s discovery burden, but importantly, *Armstrong* does not bar litigants from using direct evidence of unconstitutional purpose in the form of admissions to proceed to discovery.[325] Retaliatory arrest, like selective prosecution, is contingent on unconstitutional intent, not Fourth Amendment reasonableness. In *Armstrong*, the Court created a mechanism for defendants to demonstrate discrimination. Because unconstitutional intent is better demonstrated by statements of intent than by comparison-based evidence, *Armstrong* provides a sounder framework for retaliatory arrest claims than the majority's rule.

Perhaps more importantly, using the *Armstrong* framework will create many more opportunities for victims of retaliatory arrest to use the evidence most likely to be available to them—evidence of intent. While defendants alleging selective prosecution have seen little success using *Armstrong*, direct evidence of motive is available more often in the retaliatory arrest context. Police officers operate in public, where witnesses and cameras abound, in contrast to prosecutors who make their (potentially discriminatory) charging decisions in private. Thus, officers' statements of intent are more likely to be witnessed and captured. Given the rise of police-watching efforts, in which passersby film police-civilian encounters, and the widespread use of security cameras in public places, direct evidence of unconstitutional motivations is becoming more available to plaintiffs. They should be permitted to make use of it.

While subjective intent may not bear on Fourth Amendment claims, *Nieves* demonstrates the importance of not shutting out consideration of intent in other contexts. Intent-based claims, like retaliation and racial discrimination, do not rise and fall with the

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[323] *Nieves*, 139 S Ct at 1727.

[324] Id.

[325] See *Armstrong*, 517 US at 469 n 3.

objective reasonableness of behavior. These actions serve to catch unconstitutional behavior that looks reasonable on paper, but that those who were there—those who heard the officer's animus-laced comments—knew was unlawful. If evidence of intent is shut out at the threshold level, Fourth Amendment doctrine threatens to swallow constitutional claims against police officers that depend on intent, despite the different purposes the claims serve. When victims come forward with clear evidence of a police officer's malintent, there is no reason for courts to disregard it.