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Cameras Down, Hands Up: How the Supreme Court Chilled the Development of the First Amendment Right to Record the Police

I. INTRODUCTION

You may not realize this, but the Supreme Court of the United States has possibly jeopardized one of your First Amendment rights: the right to record the police. While this right may mean little to you now, it could serve as a means of protecting your other rights and in keeping law enforcement accountable. Because of the right to record the police, we have documented footage of police brutality from Missouri to Louisiana. These recordings have sparked outrage and fueled a conversation around policing, race, and our country's values.

This Comment will track the development of the right to record the police through the circuit courts, to include the existence of an "artificial circuit split." Then, it will address the recent Supreme Court decision, *Nieves v. Bartlett*,¹ in which the court required a plaintiff in a retaliatory arrest claim to plead and prove that the police lacked probable cause.² Finally, it will combine these two topics to show that when the Court prioritized policing above protesting, and probable cause above constitutional rights, it thrust an icepick in the development of the right to record; and that instead, to protect this

*Mercer University (B.B.A. 2016); Mercer University School of Law (J.D., 2020). Member, Mercer Law Review (2018–2020). Special thanks to my parents, Dan and Sabine; to Tyler, an outspoken supporter of the First Amendment; and to Professor Fleissner, a Constitutional Connoisseur. Without my parents, I would not have had the opportunity to go to law school; without Tyler, I would not have survived it; and without Professor Fleissner, I would not be as successful as I am today.

1. *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019).

2. *Id.* at 1723.

right and others, it should have adopted a framework practiced in several circuits, the *Mt. Healthy* Framework.³

II. THE CIRCUIT COURTS—THE SPLIT

A. Circuits with a Recognized Right

Of the nation's thirteen federal circuit appellate courts, only six have unequivocally recognized a citizen's First Amendment right to record the police as they conduct their public duties.⁴

The first of these courts was the United States Court of Appeals for the Eleventh Circuit.⁵ In *Smith v. City of Cumming*,⁶ a decision handed down in the year 2000, the court did not even hesitate when it announced that the right existed.⁷ By synthesizing numerous cases from its own circuit and beyond, the court held that the First Amendment protects the right to gather information about public officials, especially when that information relates to a matter of public interest.⁸ The only caveat the court placed on this rule, which many

3. This framework is adapted from *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). In this burden-shifting framework, first, the plaintiff has the burden to prove that the protected speech or act was the but-for cause of the arrest, then the onus is on the government defendant to prove the arrest would have been made without the protected behavior, including a showing of probable cause. *Nieves*, 139 S. Ct. at 1735.

4. The United States Courts of Appeals for the Eleventh, First, Seventh, Third, Fifth, and Ninth Circuits, in that order.

5. See *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000).

6. 212 F.3d 1332 (11th Cir. 2000). This opinion does not contain many facts of the case. Subsequent opinions based on the plaintiff's other claims detail that Plaintiff James Smith was convicted of first-degree arson, and his § 1983 claim, as it related to the First Amendment, stemmed from an officer preventing him from video recording the arson arrest. See *Smith v. United States*, 51 Fed. Cl. 36 (2001). As this incident occurred in the early 1990s, I assume it is safe to say that this case did not deal with cell phone recordings, like the further cases will.

7. *Smith*, 212 F.3d at 1333.

8. *Id.* (synthesizing *Blackston v. Alabama*, 30 F.3d 117, 120 (11th Cir. 1994) (finding that plaintiffs' interest in filming public meetings is protected by the First Amendment); *Forde v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing a First Amendment right to film matters of public interest); *Iacobucci v. Boulter*, No. 94-10531-PBS, 1997 U.S. Dist. LEXIS 7010, at *18 (D. Mass., Mar. 26, 1997) (unpublished opinion) (finding that an independent reporter has a protected right under the First Amendment and state law to videotape public meetings); see also *United States v. Hastings*, 695 F.2d 1278, 1281 (11th Cir. 1983) (finding that the press generally has no right to information superior to that of the general public) (citing *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 609 (1978); *Lambert v. Polk Cty.*, 723 F. Supp. 128, 133 (S.D. Iowa 1989) ("It is not just news organizations . . . who have First Amendment rights to make and display videotapes of events . . ."); *Thompson v. City of Clio*, 765 F. Supp. 1066, 1070-71 (M.D. Ala. 1991) (finding that city council's ban on member's attempt to

later courts have followed, is that the right is limited to reasonable time, place, and manner restrictions.⁹

Of note is the fact that the Eleventh Circuit so readily recognized the right with seemingly little deliberation, a feat, as we will see, that is not as simple for other courts. Yet, although this court recognized that the right existed, the plaintiffs did not prevail on their 42 U.S.C. § 1983¹⁰ claim.¹¹ Instead, the court held that the defendant officers had not actually violated their right to record.¹²

While these plaintiffs lost because the court found their right was not violated, many other plaintiffs have lost on the ground of qualified immunity. Qualified immunity is the principle that shields public officials from personal liability stemming from discretionary acts¹³ taken during the exercise of their position.¹⁴ When determining whether qualified immunity is appropriate, the court uses two prongs: (1) whether a constitutional right existed and (2) whether the right was clearly established at the time of the violation.¹⁵

The "clearly established" doctrine is, in essence, where the circuit split lies. Just like defendants cannot be charged with a vague law,

record proceedings regulated conduct protected by the First Amendment); *cf.* *Williamson v. Mills*, 65 F.3d 155 (11th Cir. 1995) (reversing district court's grant of qualified immunity to a law enforcement officer who seized the film of and arrested a participant in a demonstration for photographing undercover officers)).

9. *Smith*, 212 F.3d at 1333.

10. 42 U.S.C. § 1983 (2019). Most cases that discuss the issue of the First Amendment right to record come to the courts through a § 1983 claim. This federal statute, originally called the "Ku Klux Klan Act," was passed to protect the rights laid out in the newly adopted Fourteenth Amendment. The act states that "[e]very person who, under color of any [law] . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . ." 42 U.S.C. § 1983. In essence, it acts as a tort action for any person whose fundamental rights have been violated. *See* 42 U.S.C. § 1983; *Monroe v. Pape*, 365 U.S. 167, 171 (1961).

11. *Smith*, 212 F.3d at 1333.

12. *Id.* (citing *Nail v. Cmty. Action Agency of Calhoun Cty.*, 805 F.2d 1500, 1501 (11th Cir. 1986)) (holding that the Smiths failed to "prove that the conduct complained of deprived them of 'a right, privilege or immunity secured by the constitution or laws of the United States,'" as required under § 1983).

13. Discretionary acts are those that require the official to exercise personal discretion or thought, as opposed to ministerial acts which merely require following a set rule or standard.

14. *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). The basis of this principle is the balance between holding "officials accountable when they exercise power irresponsibly" and the need to protect officials from harassing or distracting litigation. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

15. *See Saucier v. Katz*, 533 U.S. 194 (2001) (overruled by *Pearson v. Callahan*, 555 U.S. 223, maintaining the two prongs but allowing them to be decided in any order).

officers cannot be held liable under a civil rights violation unless they have fair warning that their actions violated a particular constitutional right.¹⁶ Many courts use this prong to discuss that while, yes, the right exists, it was not apparent enough that an officer would know. Below, the importance of the clearly established determination is illustrated.

In *Glik v. Cunniffe*,¹⁷ the United States Court of Appeals for the First Circuit dealt with the issue of qualified immunity. In *Glik*, the plaintiff was walking in the Boston Commons, when he saw several police officers arrest a young man. The plaintiff, Glik, and other bystanders began to worry about the amount of force the officers were using, so Glik pulled out his cell phone and began recording the arrest. When officers noticed what Glik was doing, they confronted him, asked whether he was using audio recording,¹⁸ and arrested him for violations to the Massachusetts wiretap statute and two other state offenses. All charges were dismissed, and Glik filed a § 1983 claim against the officers for violations of his First and Fourth Amendment rights.¹⁹ The district court denied the defendants' claim of qualified immunity, for which the defendants appealed.²⁰

When determining whether the First Amendment right existed, the United States Court of Appeals for the First Circuit stated that cases within their circuit and throughout the others "answer that question unambiguously in the affirmative."²¹ Much like *Smith*, which was cited here, the First Circuit analogized a private citizen's right to record to that provided to news reporters.²² As the court stated, the right of access given to the press is equal to that provided to private citizens.²³ Additionally, the First Circuit placed the same time, place, and manner restrictions on the issue as did the Eleventh Circuit, but, here, the plaintiff prevailed. The court held that because Glik recorded the police from one of the oldest parks in the country at a distance away from the arrest, he was well within his rights to record, and by deterring him from recording, the officers violated his rights.²⁴ The First Circuit

16. *Glik v. Cunniffe*, 655 F.3d 78, 81 (1st Cir. 2011).

17. *Id.* at 78.

18. The use of audio recording is what supposedly put Glik in violation of the Massachusetts wiretap statutes.

19. *Glik*, 655 F.3d at 79–80.

20. *Id.* at 80–81.

21. *Id.* at 82.

22. *Id.* at 83–84.

23. *Id.*

24. *Id.* at 84.

affirmed this ruling several years later in *Gericke v. Begin*,²⁵ where it used *Glik* to show that the right to record was clearly established.²⁶

Next, the United States Court of Appeals for the Seventh Circuit joined the discussion with *ACLU of Illinois v. Alvarez*,²⁷ decided in 2012. In *Alvarez*, the ACLU challenged the state's wiretapping statute²⁸ which established a class one felony for any audio recording of law enforcement officers.²⁹ This statute in no way restricted the visual recording of officers, but as soon as audio was initiated, a felony was committed.³⁰ The ACLU challenged the law as it applied to their upcoming police accountability program.³¹

The Illinois ACLU's police accountability program sought to record police officers as they performed their duties at expressive events. These events would include protests or demonstrations involving members of either the ACLU or other groups. The ACLU would then display these recordings online and through other electronic media forms. None of the audio received during these recordings would be with the officers' consent, but the ACLU intended to only record speech which was audible to a regular bystander.³²

Concerned with the potential backlash, before it initiated the program, the ACLU sought declaratory judgement and a preliminary injunction under § 1983 to bar the Cook County State Attorney, Anita Alvarez, from prosecuting its members under the state's wiretapping laws.³³

The wiretapping laws not only made it a felony to audio record police officers performing their duties, but outlawed the recording of all audio during any oral communication.³⁴ The district court, failing to recognize a First Amendment right to audio record and seeing this statute as

25. 753 F.3d 1 (1st Cir. 2014). *Gericke* involved a woman and her friends driving in a two-car caravan. An officer pulled over her friend's car and asked Gericke to leave. Instead she drove over to a nearby parking lot and held up her phone (unbeknownst to the officer, it was not actually recording). The officers arrested Gericke for violations to the state's wiretapping laws. Her arrest was overturned, and she later succeeded on her § 1983 claim. *Id.* at 2–5.

26. *Id.* at 4–5.

27. 679 F.3d 583 (7th Cir. 2012).

28. 720 Ill. Comp. Stat. 5/14-1, 2, 4 (2019).

29. *Alvarez*, 679 F.3d at 586. Under the statute, recording private citizens without their consent only constituted a class four felony, and nothing in the statute prevented recording silent video of officers. *Id.*

30. *Id.* at 586.

31. *Id.*

32. *Id.*

33. *Id.* at 586–88.

34. *Id.* at 595.

constitutional, dismissed the ACLU's complaint for failure to state a cognizable First Amendment injury.³⁵ The circuit court vehemently disagreed with the district court.³⁶

The circuit court determined that despite the conclusions of the district court, there was, in fact, a First Amendment right to audio record.³⁷ The court held that, first, the First Amendment protects not only direct speech, but the processes that results in that speech.³⁸ The court likened the process of recording to that of painting or taking notes at events, activities which found protections in prior Seventh Circuit precedent.³⁹ Second, the court stated that First Amendment Freedom of Speech includes the right to receive the speech of others. Because the officers would be speaking in a way for others to hear, the ACLU had just as much right to receive that speech as anyone else.⁴⁰ And third, the court highlighted that the First and Eleventh Circuits agree that the right exists.⁴¹

Given that the right was established, the circuit court then looked to whether the wiretap statute could survive First Amendment scrutiny.⁴² The court determined that it could not, because by banning all recordings, even those not intended as private, it failed to serve the end goal of privacy.⁴³ The court held that while this statute was a violation of First Amendment rights, it was even more so because it prevented the ACLU from recording public officials.⁴⁴ The court emphasized the "practically universal agreement that a major purpose of the First Amendment 'was to protect the free discussion of governmental affairs.'"⁴⁵ By failing to recognize that the ACLU had a cognizable First Amendment claim, the district court and State Attorney committed a flagrant injustice.⁴⁶ For this, the circuit court reversed and remanded, instructing the district court to enter the preliminary injunction.⁴⁷

35. *Id.* at 586.

36. *Id.*

37. *Id.* at 600–01.

38. *Id.* at 595–96.

39. *Id.*

40. *Id.* at 592.

41. *Id.* at 601 n.10.

42. *Id.* at 595.

43. *Id.* at 606.

44. *Id.* at 608.

45. *Id.* at 597 (quoting *Ariz. Free Enter. Club's Freedom Fund PAC v. Bennett*, 131 S. Ct. 2806, 2828 (2011)).

46. *Id.* at 608.

47. *Id.* at 586.

Thereafter, it took five more years for another circuit court to jump into the ring. Finally, in 2017 the United States Court of Appeals for the Fifth Circuit held that the right to record was not clearly established at the time of the incident but preserved the right for future decisions.⁴⁸ In *Turner v. Driver*,⁴⁹ Phillip Turner was taking photographs of the Fort Worth, Texas police station from the sidewalk across the street. Two officers saw him with his phone and asked for identification. When he refused to offer it, he was placed in the back of a patrol car with the windows rolled up and the air conditioning turned off in the hot Texas sun, while the officers waited outside. Lieutenant Driver arrived and spoke to Turner and the officers. He determined they did not have anything to charge Turner with and released him. Turner subsequently filed a § 1983 claim against the officers and the city.⁵⁰

The district court found that the First Amendment right to record was not clearly established, and the circuit court agreed.⁵¹ The circuit court held that due to a lack of precedent, either mandatory or persuasive, which could place the question beyond debate, the court could not find a clearly established right.⁵² However, the court did not stop at qualified immunity in this case, it instead went on to recognize the First Amendment right for the future. The court agreed with several of the courts mentioned above and reiterated the facts that the First Amendment protects the gathering of information, that it protects film,⁵³ and that it can help citizens and the police force, itself.⁵⁴

The United States Courts of Appeals for the Third Circuit came to a very similar conclusion that same year holding, in *Fields v. City of Philadelphia*,⁵⁵ that while not clearly established at the time, a First Amendment right to record the police certainly existed.⁵⁶ *Fields* involved two separate instances of citizens recording officers. First, Amanda Geraci was prevented from recording police as they arrested a protestor during an anti-fracking event. She was neither arrested nor

48. *Turner v. Driver*, 848 F. 3d 678, 687–88 (5th Cir. 2017).

49. 848 F. 3d 678.

50. *Id.* at 683–84.

51. *Id.* at 687.

52. *Id.*

53. *Kingsley Int'l Pictures Corp. v. Regents of Univ. of State of N.Y.*, 360 U.S. 684, 688 (1959).

54. *Turner*, 848 F.3d at 689. The court in *Turner* discussed that recordings not only keep officers accountable to citizens but can also help the officers by corroborating the officer's story in order to exonerate him or her from charged wrongdoing. *Id.*

55. 862 F.3d 353 (3d Cir. 2017).

56. *Id.* at 358.

cited, but she was pushed against a pillar so she could no longer have a vantage point from which to record the arrest.⁵⁷ Second, Richard Fields happened upon police breaking up a party while he was walking home. He stopped to photograph the incident with his phone. When officers demanded he leave the scene, he refused. He was arrested, and his phone was searched.⁵⁸

Although the Philadelphia Police had a policy that explicitly said not to intrude on a private citizen's right to record officers, the district court granted summary judgement in their favor, finding that the plaintiffs' actions were not protected under the First Amendment because their acts were not sufficiently expressive.⁵⁹ The district court refused to create a First Amendment protection when the act of recording officers had no expressive purpose.⁶⁰

The circuit court did not agree with the limitations placed by the lower court.⁶¹ The court instead held that the matter should not rest on the expressive nature of the content, but on the information gathering purpose, which the First Amendment also stands to protect.⁶² The court went on to highlight just why this protection is so important.⁶³ The court detailed that bystander recordings of the police offer so much more than a police-dashcam. It stated that bystander videos show the scene from a new perspective and fill in gaps of areas where the officers did not film or where they are withholding footage. The court also explained how these recordings can be disseminated even faster than traditional media outlets.⁶⁴ Not only does bystander filming serve the public, but it can serve the police force as well. The court highlighted that the films help departments identify problem officers, aid in the Department of Justice's work with local police departments, and that the knowledge of being recorded encourages better policing.⁶⁵

Although the court recognized recording police was a vital right, subject only to reasonable time, place, and manner restrictions, it did not find that it was violated in this case.⁶⁶ The court held that despite the police policy and the recognition of the right in other opinions

57. *Id.* at 356.

58. *Id.*

59. *Id.* Neither Geraci nor Fields planned to share their videos or photographs.

60. *Id.* at 356–57.

61. *Id.* at 358.

62. *Id.* at 359.

63. *Id.* at 359–60.

64. *Id.*

65. *Id.* at 360.

66. *Id.*

within the circuit, the right was not clearly established at the time of the incident because it was unclear whether an officer should have known that there was a First Amendment right absent expressive intent.⁶⁷ For this reason, the officers were entitled to qualified immunity and not liable to the plaintiffs, a blow to this case, but a boost for future First Amendment claims.

By the time the United States Court of Appeals for the Ninth Circuit was faced with a First Amendment recording case, the decision was an easy one to make. In *Askins v. United States Department of Homeland Security*,⁶⁸ the Ninth Circuit, when questioned whether First Amendment protection to record government officials performing their duties in public existed, simply cited to *Alvarez*, *Glik*, and *Smith*. What this court had to decide differently was whether the rule applied to United States port of entries.

The facts here involved two separate incidents. First, Ray Askins was stopped from taking photographs at the Calexico West border entry from a nearby park. He took the photos out of concern for the environmental impact of the emissions coming from the idling cars waiting for inspection. As he was photographing, Customs and Border Protection (CBP) officers told him to stop, took his camera, and deleted his pictures.⁶⁹ Second, Christian Ramirez was taking pictures from the San Ysidro port. He noticed that the CBP officers were only stopping female travelers and wanted to ensure they were not doing anything inappropriate. He was also asked to stop, and his photos were deleted.⁷⁰ Both men challenged the policies of the CBP that required members of the news media, even though they were both civilians, to receive advance permission before collecting information at the ports of entry. They argued these bans were overly broad and violated their First Amendment rights.⁷¹

This case differed from some of the previously decided ones because it wasn't about whether the right existed, but whether it existed in the area of the ports. The government argued that the area around the ports was private property, owned by the CBP.⁷² The district court tended to agree, not finding this area private property, but finding the restrictions reasonable for protecting the compelling government

67. *Id.* at 362.

68. 899 F.3d 1035 (9th Cir. 2018).

69. *Id.* at 1038–39.

70. *Id.* at 1039–40.

71. *Id.* at 1043.

72. *Id.* at 1046.

interest of "territorial integrity."⁷³ The circuit court struck down both arguments, holding that the government failed to prove the rule's purpose beyond a general assertion of national security, and finding that the public streets and walkways used by the plaintiffs were typical public fora.⁷⁴ While the case was remanded for further proceedings regarding whether the plaintiffs' actions met any other restrictions, it nonetheless stands as a recognition in this circuit of the importance of the First Amendment right to record.

From the above cases, it is clear that the right to record police officers has many implications for both individuals and groups. Although not all the courts found in favor of the plaintiffs, the courts nonetheless ensured that the right is demonstrated in the books, so that future courts may find that the First Amendment right to record police is clearly established.

B. Circuits that have not Recognized a Right

The main reason a circuit split exists is not because the courts disagree that the First Amendment right exists, but because some courts have avoided that determination altogether. For this reason, this split has been coined an "artificial circuit split."⁷⁵ Instead of determining issues of First Amendment protections, the next courts have dismissed the claims on grounds such as qualified immunity. Nonetheless, this artificial circuit split has ramifications for lower courts within the circuits.

In *McCormick v. City of Lawrence*,⁷⁶ the United States Court of Appeals for the Tenth Circuit affirmed the lower court's dismissal of the plaintiffs' First Amendment claims.⁷⁷ There, the plaintiffs, who identified themselves as, "constitutional rights activists and vocal critics of the Lawrence, KS police department," filed claims under § 1983 against the Lawrence Police Department for alleged retaliation against them for verbal protests—two of which were recorded. The

73. *Id.* at 1045.

74. *Id.* at 1045–46.

75. See Tyler Finn, Note, *Qualified Immunity Formalism: "Clearly Established Law" and The Right to Record Police Activity*, 119 COLUM. L. REV. 445, 446 (2019); Gregory T. Frohman, Comment, *What is and What Should Never Be: Examining The Artificial Circuit "Split" on Citizens Recording Official Police Action*, 64 CASE W. RES. 1897, 1899 (2014); Aracely Rodman, Comment, *Filming The Police: An Interference Or A Public Service*, 48 ST. MARY'S L. J. 145, 146 (2016); Kayleigh E. Butterfield, Comment, *Beyond The First Amendment: Broader Protections For a Citizen's Right to Record*, 51 WAKE FOREST L. REV. 1203, 1203 (2016).

76. 130 F. App'x. 987 (10th Cir. 2005).

77. *Id.* at 989.

plaintiffs argued that because of these protests and recordings, the officers threatened them with arrest and criminal charges and searched and destroyed their audio and video recording devices.⁷⁸

Instead of finding that the plaintiffs had a right to record the officers, the circuit court affirmed the lower court in finding that the plaintiffs were not entitled to First Amendment protections because of their use of "fighting words"⁷⁹ and that the destruction of videos was not a clearly established First Amendment violation.⁸⁰

The Tenth Circuit, later, furthered this rule. In *Mocek v. City of Albuquerque*,⁸¹ it cited to its opinion in *McCormick*—and other cases where no clearly established rule was found—to hold that the plaintiff's rights were not violated when he was arrested while recording within an airport—a nonpublic forum.⁸² The court, in *Mocek*, did not consider whether a First Amendment right to record enforcement officers in public existed, because the plaintiffs' arrest, while possibly influenced by retaliation, was supported by other probable cause.⁸³

The United States Court of Appeals for the Fourth Circuit has probably dismissed the issue faster than any other court. In *Szymecki v. Houck*,⁸⁴ in a *per curiam* two-page unpublished decision, the court affirmed the district court's decision that the "First Amendment right to record police activities" was not clearly established and that the defendants were entitled to qualified immunity.⁸⁵ The court did not even bother with the facts of the case and dispensed with oral

78. *Id.* at 988.

79. *Id.* In the first recorded incident, a traffic stop, it was alleged Plaintiff McCormick shouted, "Hey f *** er! Leave her the f*** alone! Leave the out-of-towners alone! Way to welcome them to Lawrence!" and later "Mother F *** ers," "F*** heads," "F *** ing pigs," "Why don't you run around the track, chubby?," "Hey chubby, what's your name?," "Hey fatty," "Hey fat a**," and "Leave her the f*** alone." *McCormick v. City of Lawrence*, 325 F. Supp. 2d 1191, 1196–97 (D. Kan. 2004). And in the second incident, a sobriety check, it was alleged Plaintiff McCormick shouted, "F*** you! How's that? That's protected expression. First Amendment. I can quote a case to you if you'd like." *Id.* at 1198. In fact, it was the district court that had several cases for McCormick, ones which said his use of such expletives is not protected speech. *Id.* at 1200–01; see *Pringle v. Court of Common Pleas*, 604 F. Supp. 623, 626 (M.D. Pa. 1985); *Woodward v. Gray*, 241 Ga. App. 847, 527 S.E.2d 595, 599–600 (Ga. Ct. App. 2000); *Commonwealth v. Mastrangelo*, 489 Pa. 254, 414 A.2d 54, 55–56, 58 (Pa. 1980); *City of Springdale v. Hubbard*, 52 Ohio App. 2d 255, 369 N.E.2d 808, 810–12 (1977).

80. *McCormick*, 130 F. App'x. at 988.

81. 813 F.3d 912 (10th Cir. 2015).

82. *Id.* at 930–32.

83. *Id.* at 931.

84. 353 F. App'x. 852 (4th Cir. 2009).

85. *Id.* at 853.

arguments⁸⁶. The Fourth Circuit has not published an opinion on this matter, even though the district courts are clearly eager for guidance.⁸⁷

These are the only circuit courts that have wrestled with the issue, but district courts around the country need their guidance when handling it themselves. This issue becomes even more challenging with the new developments in the highest court, explained below.

III. THE SUPREME COURT—THE ICE PICK

In its latest Term, the Supreme Court of the United States added new case law in the area of the First Amendment.⁸⁸ While this case does not deal directly with the First Amendment right to record the police, it may nonetheless have ramifications in this area of the law.⁸⁹

A. *The Recent Opinion*

In *Nieves v. Bartlett*,⁹⁰ the Court ruled that in suits for retaliatory arrest, the plaintiff must claim and prove that the officers did not have probable cause for making the arrest and instead conducted the arrest in retaliation for some constitutionally protected action.⁹¹ In this case, Bartlett was arrested for disorderly conduct and resisting arrest during the Artic Man⁹² festival in Paxson, Alaska. While Bartlett disagreed with the officers' stories, Officer Nieves and Trooper Weight claimed they arrested Bartlett after he yelled at them while they spoke to other festival goers, and that Bartlett shoved Weight when asked to leave. The officers also claimed that Bartlett resisted arrest by moving slowly when they attempted to handcuff him.⁹³

At the district court level, the court sided with the officers, granting summary judgment in their favor, and finding that the existence of probable cause for making the arrest precluded Bartlett's First Amendment retaliatory arrest claim.⁹⁴ The Ninth Circuit reversed,

86. *Id.*

87. *See Garcia v. Montgomery Cty.*, 145 F. Supp. 3d 492 (D. Md. 2015); *J.A. v. Miranda*, No. PX 16-3953, 2017 U.S. Dist. LEXIS 141643 (D. Md. Sept. 1, 2017).

88. *Nieves*, 139 S. Ct. 1715.

89. Brian Frazelle, *The Supreme Court Just Made It Easier for Police to Arrest You for Filming Them*, SLATE (May 31, 2019, 3:13 PM) <https://slate.com/news-and-politics/2019/05/supreme-court-nieves-police-abuse-case.html>.

90. 139 S. Ct. 1715.

91. *Id.* at 1724.

92. Artic Man is a weeklong winter sports festival in a small town in Alaska, known for extreme sports, loud parties, and excessive drinking. *Id.* at 1720.

93. *Id.* at 1720–21.

94. *Id.* at 1721.

holding that probable cause was not the basis of the claim, and instead that the plaintiff must simply show "(1) that the officer's conduct would 'chill a person of ordinary firmness from [their] First Amendment' actions and (2) the officers desire to chill these actions was the but-for cause of the arrest.⁹⁵ The officers filed a petition of writ of certiorari with the Supreme Court, which was granted.⁹⁶

In the Supreme Court opinion, authored by Chief Justice Roberts, the Court reversed the Ninth Circuit's decision and instead agreed with the district court, holding that when a plaintiff claims retaliatory arrest in violation of a constitutionally protected right, the plaintiff must "plead and prove" a lack of probable cause to make the arrest.⁹⁷ Because this burden may be a high bar to surpass, given the numerous arrestable offenses in this country, the Court placed a qualifier upon it.⁹⁸ The Court stated that plaintiffs can overcome the existence of probable cause by showing that the officers did not arrest other similarly situated citizens.⁹⁹ As in those times when officers have the authority to make an arrest, but usually use their discretion to abstain.¹⁰⁰ The example provided by the Court was jaywalking, a violation of the law for which very few people are arrested.¹⁰¹

While this decision does not directly affect the right to record the police, it does place a new caveat on this action. Bystanders and protesters who are participating in their First Amendment right can be thwarted through arrest. An arrest would halt them from further recording, and as long as there is some probable cause to make the arrest, the injured party has no recourse against the officers. These implications will be further discussed in the Analysis section of this Comment.¹⁰²

B. Prior Precedent

This new decision came at the dismay of many friends of the court.¹⁰³ Just last term, the court decided *Lozman v. City of Rivera Beach*.¹⁰⁴ In

95. *Id.*

96. *Id.*

97. *Id.* at 1723.

98. *Id.* at 1727.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Infra* Part III.

103. See Brief of the First Amendment Foundation and Fane Lozman as Amici Curiae in Support of Respondent, *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019) (No. 17-1174); Brief of Three Individual Activists as Amici Curiae in Support of Respondent, *Nieves v. Bartlett*,

Lozman, the issue was identical to the one here: whether probable cause can bar a retaliatory arrest claim.¹⁰⁵ There, *Lozman* was arrested during a city council meeting. Over the years, he had attended many of these meetings to speak out against the city's use of eminent domain to seize homes along the waterfront for private development. The city council claimed *Lozman* was arrested for violating its rules regarding meetings; *Lozman* claimed he was arrested in retaliation of his public criticism of the officials.¹⁰⁶

Lozman filed a § 1983 claim against the city, citing multiple incidents of harassment. The jury found for the city on all such claims. The Eleventh Circuit affirmed, holding that probable cause defeated a First Amendment claim for retaliatory arrest.¹⁰⁷

The two sides in this case argued for two different Supreme Court precedents. *Lozman* argued *Mt. Healthy City Board of Education v. Doyle*¹⁰⁸ controlled, while the city went with *Hartman v. Moore*.¹⁰⁹ Under the *Mt. Healthy* Framework, the court finds government defendants liable for violating the First Amendment if it concludes that the defendants would not have taken action against the plaintiff "but for" their intent to punish or suppress protected expression.¹¹⁰ Although *Mt. Healthy* involved a civil, wrongful termination claim, it has since been adopted for criminal matters.¹¹¹ *Hartman*, on the other hand, arose in a criminal setting.¹¹² There, the Court held that a plaintiff arguing a retaliatory prosecution must first show a lack of probable cause.¹¹³ If the court finds there was probable cause, the plaintiff

139 S. Ct. 1715 (2019) (No. 17-1174); Brief of the Institute for Free Speech as Amici Curiae in Support of Respondent, *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019) (No. 17-1174); Brief of the National Press Photographers Association et al. as Amici Curiae in Support of Respondent, *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019) (No. 17-1174).

104. 138 S. Ct. 1945 (2018).

105. *Id.* at 1949.

106. *Id.* at 1950.

107. *Id.*

108. 429 U.S. 274 (1977).

109. 547 U.S. 250 (2006).

110. *See Mt. Healthy*, 429 U.S. at 287; Brief of the First Amendment Foundation, *supra* note 103, at 3.

111. *See Ford v. City of Yakima*, 706 F.3d 1188, 1194–95 (9th Cir. 2013); *Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 821 (6th Cir. 2007); *Gullick v. Ott*, 517 F. Supp. 2d 1063, 1069 (W.D. Wis. 2007).

112. *Lozman*, 138 S. Ct. at 1952.

113. *Id.* (citing *Hartman*, 547 U.S. at 265–66).

loses.¹¹⁴ If the court finds there was no probable cause, then the court applies the *Mt. Healthy* framework.¹¹⁵

Faced with these two options, the Court chose . . . neither. The Court stated that Lozman's claim did not represent the typical retaliatory arrest claim because he wasn't suing the officers, but the city.¹¹⁶ For this reason, the court was not tasked with determining which framework best fits in retaliatory arrest claims. The Court remanded the case and instructed the Court of Appeals to apply *Mt. Healthy*, but only in the context of determining whether it applied to a city's retaliatory policy, not a retaliatory arrest.¹¹⁷

Given the opportunity to address retaliatory arrests in the *Nieves* case, many amici curiae urged the court to extend the *Mt. Healthy* framework.¹¹⁸ The amici noted that the Ninth Circuit follows this rule and has not experienced an influx of frivolous retaliation claims.¹¹⁹ Additionally, they urged that the framework better protects constitutional rights by not tipping the scales in favor of the government.¹²⁰ Instead of listening to these pleas, the Court, in *Nieves*, went with the *Hartman* camp, applying the retaliatory prosecution rule to retaliatory arrests and forcing plaintiffs to make a threshold showing of no probable cause to further their claim.¹²¹

C. Disagreement in the Court

The disapproval of the new opinion came not only from the outside but from inside the court as well. The majority opinion in *Nieves* was joined, in full, by Justices Breyer, Alito, Kagan, and Kavanaugh and in all but one part by Justice Thomas.¹²² Other Justices added their own opinions, to include, Justice Gorsuch, who concurred in part and dissented in part, Justice Ginsburg, who did the same, and Justice Sotomayor, who dissented.¹²³

114. *Id.*

115. *Id.*

116. *Id.* at 1954.

117. *Id.* at 1955.

118. *Supra* note 103.

119. See Brief of Three Individual Activists, *supra* note 103, at 4 (citing briefs of petitioners and their *Amici Curiae*).

120. Brief of National Press Photographers, *supra* note 103, at 24.

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

122. *Id.* at 1719.

123. See *id.* at 1730–42.

Justice Thomas's concurrence actually creates a harsher rule than that proposed by the majority.¹²⁴ In his opinion, which found most of its citations from earlier opinions authored by Thomas, himself, he sought to do away with the defense of similarly situated people.¹²⁵ Instead, he believed that retaliatory arrests of this kind should be treated just like their common law torts of false imprisonment, malicious arrest, and malicious prosecution, which each require a mere showing of probable cause to deflect.¹²⁶ He found the majority's allowance of a similarly situated exception, as an "untethered" approach not rooted in the common-law or First Amendment precedents.¹²⁷ While some of the other Justices worried that the majority opinion would increase retaliatory arrests and the suppression of the First Amendment, Justice Thomas felt this ruling "derail[s] our retaliation jurisprudence in several ways," and will "chill[] law enforcement," as opposed to citizens.¹²⁸

Justice Gorsuch found optimism in the majority's opinion, hoping that the lower courts would apply common sense and understanding when faced with a similar issue.¹²⁹ He found, as he believed the majority hinted at, that probable cause is not an absolute requirement, nor an absolute defense in defeating a retaliatory arrest claim. He pointed to the reference of *United States v. Armstrong*¹³⁰ in the majority's opinion. In *Armstrong*, the Court held that to prove retaliatory prosecution, the plaintiff, in a racially powered claim, is required to show clear evidence of discrimination, through "similarly situated individuals of a different race" who were not equally prosecuted¹³¹ or admissions by the prosecutors regarding a discriminatory purpose.¹³² Although Gorsuch agreed that questions still surround *Armstrong* and its application, he believed that the majority's nod to this precedent showed its willingness to admit evidence beyond similarly situated peoples to defeat the existence of probable cause.¹³³

Despite this optimism, Justice Gorsuch still voiced one of the greatest concerns within this new ruling:

124. *Id.* at 1728 (Thomas, J., concurring).

125. *Id.*

126. *Id.* at 1728–29.

127. *Id.* at 1729.

128. *Id.* at 1730.

129. *Id.* at 1733 (Gorsuch, J., concurring in part and dissenting in part).

130. 517 U.S. 456 (1996).

131. *Id.* at 465.

132. *Id.*, but see *id.* at 469 n.3.

133. *Nieves*, 139 S. Ct. at 1733.

In our own time and place, criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something. If the state could use these laws not for their intended purposes but to silence those who voice unpopular ideas, little would be left of our First Amendment liberties, and little would separate us from the tyrannies of the past or the malignant fiefdoms of our own age.¹³⁴

If the lower courts do not heed his advice and instead refuse to admit evidence beyond the thin requirement of similarly situated, this doomsday view of tyrannies and fiefdoms may very well become a reality.

While Justice Ginsburg concurred with the ruling as to Sergeant Nieves, she dissented in that towards Trooper Weight, and presented an idea that directly coincided with the amici: the *Mt. Healthy* Framework should command.¹³⁵ The burden shifting structure of *Mt. Healthy*, Justice Ginsburg iterated, would better protect journalists, protestors, and citizens from baseless, retaliatory arrests; better protect them than "this thin case [that] state[s] a rule that will leave press members and others exercising First Amendment rights with little protection against police suppression of their speech."¹³⁶

Justice Sotomayor, the only fullhearted dissenter, was also the only Justice who mentioned the topic at issue in this Comment—the First Amendment right to record the police. Justice Sotomayor fervently protested the "similarly situated" rule established by the majority as it had no grounding in American law.¹³⁷ To illustrate this rule's shortcomings, she painted a story of a passerby who sees police arresting a man in front of a home and pulls out a camera to record the officers.¹³⁸ If the officers arrest this citizen journalist, is she required to show proof that other similarly situated onlookers were not arrested? How will she accomplish this if she was alone in her actions? And will the court make the captured recording irrelevant in its decision? Justice Sotomayor seemed deeply troubled by the conclusion this kind of case would come to, and like Gorsuch, urged the lower courts to use common sense when applying this rule.¹³⁹

134. *Id.* at 1730.

135. *Id.* at 1735 (Ginsburg, J., concurring in the judgment in part and dissenting in part).

136. *Id.*

137. *Id.* (Sotomayor, J., dissenting).

138. *Id.* at 1740.

139. *Id.* at 1741.

Furthermore, Justice Sotomayor takes the same position as Justice Ginsburg and the *amici*, that the *Mt. Healthy* framework is the most appropriate rule for First Amendment retaliation claims.¹⁴⁰ She described the majority rule as one that "constrain[s] a person's liberty" for a "marginal convenience" and denies the wisdom of our forefathers who created the protections of the First Amendment.¹⁴¹

IV. IMPLICATIONS & ANALYSIS—THE BETTER OUTCOME

This Comment does not seek to take sides on the current artificial circuit split because, in the opinion of this Author, the Supreme Court's opinion in *Nieves* has completely chilled any further development towards the split. Courts, which have not yet made a determination on whether the right exists, will never get the opportunity, because the plaintiffs will not be able to overcome the stringent probable-cause-similarly-situated rule (such a result was already demonstrated above in the Tenth Circuit case, *McCormick*). As Justice Gorsuch said, "criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something."¹⁴² Therefore, whenever someone is arrested for filming the police, there will surely be some attenuable probable cause. The ruling in *Nieves*, without ever mentioning the right to record or this circuit split, has put an end to the discussion and possibly to the use of this paramount right.

A. *Why Do We Need Citizen Recordings?*

The Guardian¹⁴³ maintains a record of American citizens who have been killed by the police. For 2016, that number was 1,093.¹⁴⁴ We've heard a few of these names, Philando Castile, Alton Sterling, but what about the 1,091 others? Most likely, those others did not have bystander recordings like Castile or Sterling. Without those recordings, the decision on who was at fault for the killing comes down to the officer's story or his body camera. While these videos may at the time be enough, for example in the recent killing of Atatiana Jefferson, overwhelmingly, that is not the case. Without an alternative, citizen-driven option, the full truth in all its angles may never be revealed.

140. *Id.* at 1742.

141. *Id.*

142. *Id.* at 1730 (Gorsuch, J., concurring in part and dissenting in part).

143. *The Counted: People Killed by Police in the US*, THE GUARDIAN, <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database> (last visited Sep. 28, 2019).

144. *Id.*

While citizen videos are not always perfect, and while their ability to go "viral" has numerous implications (good and bad), they are nonetheless vital in ensuring accountability and integrity in the police force.

1. Use of Body Cameras

While our modern times have seen a proliferation in the use of cell phones with built-in recording capabilities, there has been an increase in another recording device: police body cameras. In some instances, these cameras are all that are needed to ensure justice is served. For example, the body cam footage from the recent shooting of Atatiana Jefferson in Fort Worth, Texas.¹⁴⁵ On the evening of October 12, 2019, Ms. Jefferson was playing a video game with her nephew, when she was shot and killed by Officer Dean who was responding to a nonemergency safety check for an open door. In the officer's body cam footage, he and a fellow officer can be seen walking around Ms. Jefferson's home. They do not knock on any doors; they do not announce themselves. The officers circle to the back of the home, where Officer Dean responds to something in the back window. He yells out "[p]ut your hands up" and within milliseconds shoots at the figure in the window. The availability of this body cam video left no doubt in anyone's mind that Officer Dean acted erratically, irresponsibly, and illegally. He promptly resigned from the force and was charged with murder.¹⁴⁶

With police equipped with their own recording devices, why is it so important that we protect a citizen's right to record? Well, first, only five states require that law enforcement officers wear body cameras: South Carolina, Nevada, California, Florida, and Connecticut.¹⁴⁷ And even in these states, there are limits to who is required to wear them¹⁴⁸ and when the officers can get them.¹⁴⁹ Secondly, citizens can't always get access to the body camera recordings. While Connecticut, Nevada, North Dakota, Oklahoma, and Texas treat the recordings like public records, they each have their own exclusions and standards that allow

145. Karen Grigsby Bates, *Former Fort Worth Officer Charged With Murder In Fatal Shooting Of Woman In Her Home*, NPR (Oct. 14, 2019), <https://www.npr.org/2019/10/14/770179241/former-ft-worth-officer-charged-with-murder-in-fatal-shooting-of-woman-in-her-ho>.

146. *Id.*

147. BODY WORN CAMERA LAWS DATABASE, NCSL [hereinafter NCSL DATABASE], [http://www.ncsl.org/research/civil-and-criminal-justice/body-worn-cameras-interactive-graphic.aspx#/_](http://www.ncsl.org/research/civil-and-criminal-justice/body-worn-cameras-interactive-graphic.aspx#/) (last visited Sep. 28, 2019).

148. Typically, only officers who routinely interact with the public.

149. Contingencies are based on state funding and federal grants.

them to withhold, redact, or obscure some kinds of videos.¹⁵⁰ Florida, Georgia, Oregon, and South Carolina do not provide body camera footage in open records requests, but they may provide it if you appear in the recording or if it would serve the public interest.¹⁵¹

Clearly, there are not enough body cameras being worn and operated to make them a legitimate substitute for cell phone recordings. And, if a citizen can't even access the recordings, they are of little use at all.

2. Improving Policing

While evidence of the effects of body cameras on police behavior is still inconclusive,¹⁵² there are numerous reasons to believe that having an eye pointed right back on big brother is beneficial. Civility, lower incidences of brutality, and accountability are all potential benefits of citizens recording officers. If officers are aware that a camera is on them and that all their actions can be shared with their superiors and the public, it's certain they'll behave better.

Nevertheless, there are also possible drawbacks of citizens recording the police. First, it may encroach on the officer's privacy, and the right to privacy is one which people have been fighting to gain and protect for hundreds of years.¹⁵³ Yet, this concern is addressed by the fact that the right to record only extends to officers conducting their duties in public. If they can do it for anyone's eyes to see, they can do it for anyone's lens to see as well. A second concern may be that recording can lead to distractions. If an officer is worried about the camera in his face and not the assailant he's trying to arrest, it may cause problems. However, most bystanders who record the police, as seen in the fact patterns above, do so away from the action. And third, no one likes someone looking over their shoulder as they do their job. However, video cameras are so ubiquitous now,¹⁵⁴ is anyone ever not under surveillance? With all the possible complaints officers could bring, there is always a counterattack. Overall, the right to record benefits us all, citizen and officer, and it is a right that must be protected.

150. NCSL DATABASE, *supra* note 147.

151. NCSL DATABASE, *supra* note 147.

152. Brett Chapman, *Body-Worn Camera: What the Evidence Tells Us*, NATIONAL INSTITUTE OF JUSTICE (Nov. 14, 2018), <https://nij.ojp.gov/topics/articles/body-worn-cameras-what-evidence-tells-us>.

153. See *Mapp v. Ohio*, 367 U.S. 643 (1961); *Katz v. United States*, 389 U.S. 347 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); just to name a few.

154. *What's Wrong with Public Video Surveillance*, ACLU, <https://www.aclu.org/other/whats-wrong-public-video-surveillance> (last visited Sept. 30, 2019).

3. Power of the Viral Video

One reason that citizen recordings spark so much interest and outrage is due to their ability to go viral. Recordings can be shared on a multitude of social media sites and for an infinite amount of times. This shareability can lead to further exposure, but it is not without its faults.

As an example, in early August of 2019, a video of an arrest made on a Saturday night in Tybee Island, GA went viral.¹⁵⁵ The video depicts a large male officer pressing a small blond woman against the ground and attempting to handcuff her. Another man approaches and attempts to pull the officer off, and the two have an altercation. While the citizen cameraman's view is blocked by a truck, the woman lets out a loud screech. Thereafter, the officer's backup arrives, and the woman is subdued enough to be handcuffed. The backup officer engages the man who tried to pull the first officer away. The officer aggressively drags the man to the ground, but the man refuses to go down easily. The man is tased and then agrees to be handcuffed. During the entire altercation, bystanders are loudly screaming at the officers.¹⁵⁶

The video, posted on Facebook by a bystander not familiar with the arrestees, was shared over a thousand times, making its true reach unknowable.¹⁵⁷ Once the Tybee Island city and police leaders learned of the video, they were quick to speak out. The mayor stated that the video was taken out of context, and the use of force by the officers was appropriate. For this reason, he and the police department posted the police body camera footage and the police report on Facebook, so everyone could learn the full story. The full footage alleges to show the two suspects being aggressive with the officers: the man violently pulling at the officer's vest and the woman attempting to scratch at the officer's face. Additionally, the police report goes into the facts that led to the original arrest: the incident began with the woman fleeing after attempting to use a fake I.D. to enter a bar.¹⁵⁸

This story illustrates the point that citizen recordings are only one angle, but so are police body cameras. The more angles that can be obtained, the more complete the picture will be. While the city decried

155. Lance Bazemore, FACEBOOK (Aug. 24, 2019, 1:39 AM), <https://www.facebook.com/lance.bazemore.3/videos/10157506995859104/>.

156. *Id.*

157. *Id.* When a Facebook video is shared, it is viewable by all the Facebook Friends of that profile holder. Those friends can in turn share it on their own profile, making it available to their Friends. While the original video claims to have 1,700 shares, there is no telling how many eyes that really reached.

158. Sean Evans, *Tybee Island Mayor Responds to Viral Arrest Video*, WTOC, (Aug. 6, 2019, 3:52 AM) <https://www.wtoc.com/2019/08/05/tybee-island-mayor-comments-viral-arrest-video/>.

the video, here, they quickly remedied the issue with a few Facebook posts and news stories. The remedy for if this had been actual police brutality with no citizen recording could have been a long legal battle (if the officer denies excessive force) or an unsolved murder (if the accused perpetrator is mortally injured). I'd take a post over either option any day.

B. Ramifications of Nieves v. Bartlett

As mentioned above, the result of the rule from *Nieves* may be an ever-unresolved circuit split. When plaintiffs bring a § 1983 claim praying for the court to recognize a First Amendment right to record the police, they may swiftly be struck down by the existence of probable cause. Although not all right to record cases stem from a retaliatory arrest actions, which was the issue in *Nieves*, it is not a far stretch that this rule may apply otherwise. *Mt. Healthy* began as wrongful termination.¹⁵⁹ *Hartman* was a retaliatory prosecution.¹⁶⁰ Clearly, the courts are not afraid to adapt these rules to new realms.

This impediment may not yet be the end. First, the divergent views provided by the various Justices in the *Nieves* opinion may greatly affect how it applies in the future. Justice Gorsuch said the majority may have left open space for lower courts to use multiple forms of evidence when finding probable cause.¹⁶¹ Yet, Justice Sotomayor was not as hopeful in her interpretation.¹⁶² And then, Justice Thomas thought the majority was too lenient and would implement an even stricter rule.¹⁶³ Second, the Ninth Circuit currently uses the *Mt. Healthy* framework for retaliatory arrests. Meaning, the courts that lie in the largest circuit may push back on this new holding and find greater room for interpretation. It is too soon to know what the courts will do.

1. The Correct Framework

When plaintiffs bring forward retaliatory arrest claims for violations to their First Amendment rights, there is one clear rule the court should apply, the *Mt. Healthy* framework. Although this rule came from a civil and not a criminal issue, the Ninth Circuit has shown that the rule can seamlessly fit into either domain. The *Mt. Healthy* framework

159. *Mt. Healthy*, 429 U.S. 274.

160. *Nieves*, 139 S. Ct. at 1733 (Gorsuch, J. concurring opinion) (discussing *Hartman*, 547 U.S. 250).

161. *Nieves*, 139 S. Ct. at 1734.

162. *Id.* at 1740–41.

163. *Id.* at 1728–29.

affords the greatest deference to the plaintiff and the police. Under the *Mt. Healthy* framework, the plaintiff has the burden of showing that the protected speech or action was the but-for cause of the arrest.¹⁶⁴ If the plaintiff does so, then the burden is on the government defendant to show the arrest would have been made without the protected behavior, which includes a showing of probable cause. The plaintiff benefits from not being immediately defeated by the defense of probable cause; the police benefit because as long as they can show they would have made the arrest even without the protected behavior (so the officer was doing his job instead of retaliating), they win. The framework would lead to the most honest results and do a far better job at protecting the truth and justice, than does the *Nieves* rule.

2. The Changing Court

As we proceed into the future, these cop-friendly opinions may be more and more likely. As the federal courts lean further right, as the current administration is assuring happens,¹⁶⁵ it also leans more in favor of law enforcement. Although conservatives and the right wing tend to favor smaller government and personal rights, they also are more likely to "back the blue."¹⁶⁶ Perhaps this is in response to the increase in more liberal led protests, like Black Lives Matter or the Women's March; or perhaps this is because of the political affiliations of most officers. While this is unclear, what is clear is that while numerous Justices urge the lower courts to use "common sense" when applying the *Nieves* rule, that common sense may be more partisan than some people would like.

V. CONCLUSION

In conclusion, the Supreme Court of the United States got it wrong when it decided *Nieves*. This opinion makes it exponentially easier for the police to arrest someone for exercising their constitutional rights, simply by claiming probable cause. This opinion threatens to put an end to any further development in the right to record the police. By creating such a stringent rule, fewer courts will have the opportunity to address

164. *Mt. Healthy*, 429 U.S. at 287.

165. Sam Berger, *Conservative Court Packing*, CENTER FOR AMERICAN PROGRESS (Apr. 3, 2019, 9:01 AM), <https://www.americanprogress.org/issues/democracy/news/2019/04/03/468234/conservative-court>.

166. Randy Petersen, *The Conservative Case for Policing Reforms*, RIGHT ON CRIME (Feb. 23, 2018) <http://rightoncrime.com/2018/02/the-conservative-case-for-policing-reforms/> ("Support for our police officers is a proud characteristic of the conservative movement . . .").

the right, because plaintiff's will be halted at the probable cause step. Because the right to record is such a necessary protection, we can hope lower courts will prudently apply this *Nieves* rule, but because the Supreme Court and lower federal appellate courts have made a hard swing right, we can predict that more opinions like this are on the way.

Christina Murray