

The First Crackdown Is Free: *Nieves* Is Insufficient to Protect Free Speech from the Incoming Cycle of Government Repression

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Free speech in the United States is under threat in a manner unparalleled in modern history. The current administration nakedly uses government to suppress the press, disappears legal immigrants based on their viewpoint, and gleefully deploys the military against protestors in states controlled by the opposition party. The repression of political speech is necessary to establish managed democracy and other forms of authoritarian rule. Retaliatory arrest or prosecution are a classic means of enacting viewpoint repression.

*This Note posits that *Nieves v. Bartlett* wrongly codified a long-mutated doctrine of First Amendment law that practically permits naked viewpoint discrimination through baseless arrest and censure. Under this doctrine, the courts are impotent to hold government officials liable under § 1983 for enacting classic repression because they have rendered the Ku Klux Klan Act nullis juris. In this Note, I critically analyze the *Nieves* doctrine in light of ongoing civil rights lawsuits by plaintiffs involved in the 2024 Israel–Palestine protests in Texas. These cases demonstrate that the *Nieves* doctrine is forced to accept the implausible, has unjustified requirements, excludes relevant evidence, and is insufficient to protect First Amendment rights. Practically speaking, under *Nieves*, at least the first crackdown is always free, and every time the court adjusts the doctrine, the next crackdown becomes a “first.” While many scholars have suggested adjustments to the doctrine, the most stable solution is to return First Amendment retaliation questions to the *Mt. Healthy* standard.*

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INTRODUCTION

The right to criticize the government without risking arrest is “one of the principal characteristics by which we distinguish a free nation from a police state.”¹ Yet a YouGov poll of 3,010 U.S. adults conducted on September 19, 2025, found that a plurality of those surveyed—forty-four percent—believed the government was the biggest threat to free speech.² This Note analyzes the Court’s disfigurement of § 1983 claims for speech repression via police action. Part I summarizes the First Amendment doctrine which balances qualified immunity against § 1983 claims for official retaliation against protected speech, the *Nieves* doctrine. Part II critically analyzes the doctrine’s flaws. Part III reveals those flaws in current civil rights lawsuits by protestors after the spring 2024 Palestine–Israel demonstrations. It ultimately concludes that the *Nieves* doctrine absurdly requires officials be presumed immune for conduct that is facially unconstitutional. This renders § 1983 nullis juris and prevents official conduct from being adjudicated so as to clearly establish constitutional violations. The rule is so extreme that logically, every tweak to the doctrine provides a fresh wave of immunity. While many scholars have suggested tweaks, the best solution is to return to the original standards established in *Mt. Healthy* and *Harlow*.

1. HOW THE COURTS HANDLE FIRST AMENDMENT RETALIATION CLAIMS

Congress passed 42 U.S.C. § 1983 to provide compensation to people when the government violates their civil rights and to deter officials from doing so in the future.³ The modern conception of the First Amendment holds government neutrality sacred and, “at its absolute zenith,” protects the right to engage in political speech in traditional public forums without fear of retaliation.⁴ In the United States, we eschew a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”⁵ When government action discriminates against protected speech based on its content or

¹ *City of Houston v. Hill*, 482 U.S. 451, 463 (1987).

² *Which of the Following Do You Think Is Currently the Biggest Threat to Free Speech?*, YOUGov (Sep. 19, 2025), <https://today.yougov.com/topics/society/survey-results/daily/2025/09/19/674e6/3> [<https://perma.cc/EJS8-7CPF>].

³ See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 427 (1971) (Black, J., dissenting).

⁴ G. Alex Sinha, *Policing’s Free-Speech Problem*, 2025 UTAH L. REV. 453, 454 (2025).

⁵ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

viewpoint, it is presumptively unconstitutional.⁶ This discrimination may be de jure—discriminatory on its face—or de facto—through biased exercise of official judgment.⁷ Viewpoint discrimination is often enforced through retaliatory prosecution or arrest, but under the *Nieves* doctrine, the officials who do so are presumed to be immune even when their acts are facially unconstitutional.⁸

A. The Mt. Healthy Standard: Retaliatory Action in the First Amendment Context

The Court held that § 1983 conflicts directly with the common law principle of qualified immunity in *Pierson v. Ray*.⁹ There, the Court established that government agents are shielded from liability for official actions they “reasonably believe[]” to be constitutional.¹⁰ This balance has mutated several times in the First Amendment context.

The Court first applied *Pierson* to a § 1983 First Amendment retaliation claim in *Mt. Healthy City School District Board of Education v. Doyle*.¹¹ There, a teacher was not rehired by the school board explicitly for, among other reasons, expressing his views about the board on a radio station.¹² Justice Rehnquist wrote for a unanimous court and created the *Mt. Healthy* standard based on past Fourteenth, Fourth, and Fifth Amendment cases where the Court “found it necessary to formulate a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused.”¹³ *Mt. Healthy* established that plaintiffs must (1) allege and prove that they engaged in protected conduct which (2) was a substantial or motivating (but-for) factor in the government agent’s action, after which the burden shifts to the defendant to (3) demonstrate by a preponderance of the evidence that they would

⁶ See *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 101–02 (1972) (holding the Fourteenth Amendment requires strict scrutiny of speech restrictions based on content); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 120–21 (1991) (applying the same scrutiny under the First Amendment).

⁷ *Sinha*, *supra* note 4, at 465–66.

⁸ See *id.* at 466–67 (discussing the Supreme Court’s dilution of First Amendment protections through its differential treatment of de jure and de facto discrimination claims).

⁹ 386 U.S. 547, 555 (1967).

¹⁰ See *id.* (excusing liability for an agent acting under a statute he reasonably believed to be valid but was later held unconstitutional).

¹¹ 429 U.S. 274 (1977).

¹² *Id.* at 282–83.

¹³ *Id.* at 286–87 (citing *Lyons v. Oklahoma*, 322 U.S. 596 (1944); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Nardone v. United States*, 308 U.S. 338 (1939); *Parker v. North Carolina*, 397 U.S. 790 (1970)).

have taken the same action regardless of the protected conduct.¹⁴ These factors would ultimately be weighed by a jury.

Five years later, in *Harlow v. Fitzgerald*,¹⁵ the Court the court changed the *Pierson* test and made qualified immunity significantly harder to overcome. *Harlow* established the infamous holding that officials are immune for discretionary actions that “[do] not violate clearly established statutory or constitutional rights of which a reasonable person would have known,” with that reasonableness being an objective analysis.¹⁶ It also held that subjective evidence of retaliatory motive was wholly incompatible with qualified immunity determinations because to allow subjective analysis would unfairly burden officials with meritless trials.¹⁷ Under the doctrine at this stage, the objective existence of probable cause generally defeated retaliation claims. However, circuits split on whether a plaintiff must plead and prove that probable cause *objectively did not exist* to succeed.¹⁸

B. Hartman Chooses the No-Probable-Cause Rule

The Court adopted the no-probable-cause rule in *Hartman v. Moore*,¹⁹ a retaliatory prosecution claim. In *Hartman*, a lobbyist advocating for a disfavored technology at the Postal Service was investigated and ultimately prosecuted by postal inspectors for kickbacks and undue influence over the selection of the Postmaster General.²⁰ The Court upheld the prosecution and held (5-2) that to reach the *Mt. Healthy* test, § 1983 and *Bivens* plaintiffs must first plead and show an objective absence of probable cause as a threshold issue.²¹

Justice Souter’s majority opinion justified this change because criminal prosecutions are different from civil retaliation in two important ways: (1) in the criminal context “there will always be a distinct body of highly valuable circumstantial evidence available . . . showing whether there was or was not probable cause to bring the criminal charge”; and (2) the “requisite causation between the defendant’s retaliatory animus and the plaintiff’s injury is usually more complex than it is in other retaliation cases,” because a prosecutor (who has absolute immunity under common

¹⁴ *Id.* at 287.

¹⁵ 457 U.S. 800 (1982).

¹⁶ *Id.* at 818.

¹⁷ *Id.* at 816–18.

¹⁸ *Hartman v. Moore*, 547 U.S. 250, 255 (2006).

¹⁹ 547 U.S. 250 (2006).

²⁰ *Id.* at 253–54.

²¹ *Id.* at 265–66.

law and § 1983) signed off on the arrest.²² Because the cost of adding this requirement seemed very low, Justice Souter, joined by Justices Stevens, Scalia, Kennedy, and Thomas, saw no harm in requiring the plaintiff to plead and prove an objective lack of probable cause to then reach the *Mt. Healthy/Harlow* analysis.²³

Justices Ginsburg and Breyer dissented, pointing out that the retaliatory evidence in the case was close to a proverbial “smoking gun”: the defendants “strenuously urg[ed]” the U.S. Attorney to press charges.²⁴ In Justice Ginsburg’s eyes, this ruling would only check “*entirely* ‘baseless prosecutions’ So long as the retaliators present evidence barely sufficient to establish probable cause” to cover for their improper motive, the victim would bear the cost of their defense and damage to reputation with no chance of compensation.²⁵ Justice Ginsburg expressed preference for the D.C. Circuit’s formulation, which held that “recovery remains possible . . . in those rare cases where strong motive evidence combines with weak probable cause to support a finding that the [investigation and ensuing] prosecution would not have occurred but for the [defending] officials’ retaliatory animus.”²⁶

C. Nieves Applies Hartman to Retaliatory Arrest Claims

After demurring in other cases,²⁷ Chief Justice Roberts, writing for a 6-3 Court, applied *Hartman*’s no-probable-cause rule to retaliatory arrest in *Nieves v. Bartlett*,²⁸ but—recognizing its extremity—also created the *Nieves* exception.²⁹ Bartlett was arrested at a winter sports festival called “Arctic Man” for disorderly conduct and resisting arrest after allegedly yelling at attendees not to speak to police and intervening in an officer’s conversation with a minor.³⁰ Officers claimed Bartlett was aggressive and

²² *Id.* at 261–63.

²³ *Id.* at 265–66.

²⁴ *Id.* at 266 (Ginsburg, J., dissenting) (quoting *Moore v. Hartman*, 388 F.3d 871, 884 (D.C. Cir. 2004)).

²⁵ *Id.* at 266–67 (Ginsburg, J., dissenting).

²⁶ *Id.* at 267 (Ginsburg, J., dissenting) (alteration in original) (quoting *Moore*, 388 F.3d at 881).

²⁷ *Reichle v. Howards*, 566 U.S. 658, 665 (2012) (rejecting the plaintiff’s argument that *Hartman* controlled and upholding qualified immunity for an alleged retaliatory arrest because it was not clearly established at the time that an arrest supported by probable cause could violate the First Amendment); *Lozman v. City of Riviera Beach*, 585 U.S. 87, 99 (2018) (applying the *Mt. Healthy* standard instead of *Hartman* to a case where the plaintiff alleged an official policy of retaliation by the city but did not sue his arresting officer).

²⁸ 587 U.S. 391 (2019).

²⁹ *Id.* at 401–04, 406.

³⁰ *Id.* at 395–96.

combative, though he disputed this and claimed he was only loud due to music, slow to comply because of a back injury, and that an officer stated, “[B]et you wish you would have talked to me now,” during his arrest.³¹

The *Nieves* Court supported the application of *Hartman* to retaliatory arrest because, like retaliatory prosecution, “it is particularly difficult to determine whether the adverse government action was caused by the officer’s malice or the plaintiff’s potentially criminal conduct.”³² The Court agreed that objective probable cause “should generally defeat a retaliatory arrest claim” but created a narrow qualification “for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so.”³³ It affirmed that “the statements and motivations of the particular arresting officer are ‘irrelevant’ at this stage.”³⁴ The Court then upheld Bartlett’s arrest because probable cause objectively existed, instead of remanding under the new standard.³⁵

To illustrate, Chief Justice Roberts gave the example of being arrested for jaywalking after publicly criticizing police conduct.³⁶ “[I]t would seem insufficiently protective of First Amendment rights to dismiss the individual’s retaliatory arrest claim on the ground that there was undoubted probable cause for the arrest.”³⁷ The *Nieves* exception, therefore, is “that the no-probable-cause requirement should not apply 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.”³⁸ Once this showing has been made, the case may proceed as if the no-probable-cause threshold requirement had been met.³⁹

Dissents in *Nieves* by Justices Sotomayor and Ginsburg generally echo Justice Ginsburg in *Hartman*, reiterating their preference for the *Mt. Healthy* standard.⁴⁰ While Justice Gorsuch did not quite agree, he dissented in part to argue that “nothing in our precedent (let alone logic) suggests that causation is always unprovable just because the officer had

³¹ *Id.* at 396 (alteration in original).

³² *Id.* at 402 (citing *Lozman*, 585 U.S. at 98).

³³ *Id.* at 406.

³⁴ *Id.* at 407 (quoting *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004)).

³⁵ *Id.* at 408.

³⁶ *Id.* at 407.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 408.

⁴⁰ *Id.* at 420 (Ginsburg, J., dissenting); *id.* at 422 (Sotomayor, J., dissenting).

probable cause to arrest.”⁴¹ Justice Gorsuch pointed out that *Hartman* justified the requirement of no-probable-cause proof because of the complex causal connection between protected conduct and a *prosecutor’s* absolute immunity for official actions, something that was simply absent in *Nieves*.⁴² *Hartman* also explicitly held its logic did not extend to claims where the “agent allegedly harboring the animus is also the individual allegedly taking the adverse action,” which the *Nieves* court ignored.⁴³ Presciently, Justice Gorsuch also noted problems with the objective evidence standard—that “comparative data about similarly situated individuals may be less readily available for arrests than for prosecutorial decisions, and that other kinds of evidence—such as an officer’s questions and comments to the defendant—may be equally if not more probative in the arrest context.”⁴⁴ He concluded that we should reform the rule but did not precisely say how.⁴⁵

D. Gonzalez v. Trevino Clarifies Nieves

The Court was forced to clarify the objective evidence standard in *Gonzalez v. Trevino*⁴⁶ after the circuits, predictably, split on how to apply it.⁴⁷ In *Trevino*, the Fifth Circuit refused to apply the *Nieves* exception to a city councilwoman (Gonzalez) arrested under a statute prohibiting intentional removal of a government record because they rejected evidence that nobody had been arrested under the statute in the past ten years for similar conduct.⁴⁸ The Court explicitly rejected the Fifth Circuit’s “slim” conception of the standard and held that the “only express limit we placed on the sort of evidence a plaintiff may present for that purpose is that it must be objective” to avoid relying on a purely subjective analysis.⁴⁹ Notably, Justice Jackson concurred to argue that anomalous procedures and officer statements under the current standard were considered irrelevant but are in fact objective evidence of discriminatory treatment

⁴¹ *Id.* at 417 (Gorsuch, J., dissenting).

⁴² *Id.* at 417 (Gorsuch, J., dissenting).

⁴³ *Id.* (Gorsuch, J., dissenting) (quoting *Hartman v. Moore*, 547 U.S. 250, 259–60 (2006)).

⁴⁴ *Id.* at 418–19 (Gorsuch, J., dissenting).

⁴⁵ *Id.* at 419–20 (Gorsuch, J., dissenting).

⁴⁶ 144 S. Ct. 1663 (2024).

⁴⁷ See *id.* at 1667; see also *First Amendment—Freedom of Speech—Retaliatory Arrest—Nieves v. Bartlett*, 133 HARV. L. REV. 272, 280 (2019) (pointing out the ambiguity of the evidentiary standard in *Nieves*).

⁴⁸ *Trevino*, 144 S. Ct. at 1666–67.

⁴⁹ *Id.* at 1667.

under *Trevino*'s broadened standard, echoing Justice Gorsuch's partial dissent in *Nieves*.⁵⁰

II. THE *NIEVES* DOCTRINE AND ITS FOUNDATIONS HAVE BEEN HEAVILY CRITICIZED

Many have argued that the *Nieves* doctrine and its foundations are completely unjustified. They point out that qualified immunity has become a major barrier to using § 1983 as intended by Congress because it has grown far beyond its common law roots and the data on its use does not support the logistical rationale for its creation. As it has been applied in the free speech context, the *Nieves* doctrine amplifies these problems. The doctrine lacks a textual basis, confuses Fourth and First Amendment violations, and its evidence standards are both unclear and illogical.

This mutated doctrine has failed to deter First Amendment violations by police. As Sinha points out in *Policing's Free Speech Problem*, police have unique means, motive, and opportunity to repress core political speech in traditional public forums.⁵¹ The data show that retaliatory arrests continue to occur and the police regularly engage in viewpoint discrimination even in sacred traditional fora.⁵² Multiple studies have found that police intervene forcefully more often against Black Lives Matter, racial justice, and police brutality protests.⁵³ There is also evidence that police discriminate against left-wing protests.⁵⁴ Another form of retaliation is arrest for "contempt-of-cop," where police use excessive force, false arrest, and malicious prosecution in retaliation for First

⁵⁰ *Id.* at 1677–78 (Jackson, J., concurring).

⁵¹ Sinha, *supra* note 4, at 472–76.

⁵² *See id.* at 484.

⁵³ *See* ROUDABEH KISHI & SAM JONES, DEMONSTRATIONS & POLITICAL VIOLENCE IN AMERICA 7 (2020), https://acleddata.com/sites/default/files/wp-contentarchive/uploads/2020/09/ACLED_USDataReview_Sum2020_SeptWebPDF_HiRes.pdf [<https://perma.cc/ED7W-7EWT>] (finding that authorities intervened in Black Lives Matter protests nine percent of the time as compared to three percent of the time for all other types of protests); Mihir J. Chaudhary & Joseph Richardson, Jr., *Violence Against Black Lives Matter Protestors: A Review*, 8 CURRENT TRAUMA REPS. 96, 98 (2022) (providing more information on the group that gathered and analyzed the data from the Kishi and Jones study); Heidi Reynolds-Stenson, *Protesting the Police: Anti-Police Brutality Claims as a Predictor of Police Repression of Protest*, 17 SOC. MOVEMENT STUD. 48, 59 (2018). *See generally* Kim Barker, Mike Baker & Ali Watkins, *In City After City, Police Mishandled Black Lives Matter Protests*, N.Y. TIMES (June 28, 2021), <https://www.nytimes.com/2021/03/20/us/protests-policing--george-floyd.html> [<https://perma.cc/2JJR-2TGV>]; Tobi Thomas, Adam Gabbatt & Caelainn Barr, *Nearly 1,000 Instances of Police Brutality Recorded in US Anti-Racism Protests*, GUARDIAN (Oct. 29, 2020), <https://www.theguardian.com/us-news/2020/oct/29/us-police-brutality-protest> [<https://perma.cc/7SN6-65SG>].

⁵⁴ Lesley Wood, *Policing Counter-Protest*, SOCIO. COMPASS, Sep. 2022, at 1, 2.

Amendment protected activities perceived as disrespect.⁵⁵ Right now, foreign students are—without warning—losing their visas and being forcefully detained because of their speech that the Trump administration dislikes.⁵⁶ While some describe the cost of police misconduct lawsuits as staggering, serious analysis tends to show the amount won in such lawsuits currently has no real effect on police behavior.⁵⁷

A. Unqualified Immunity

Qualified immunity is not popular and has been heavily criticized. Most obviously, qualified immunity is nowhere in the text of § 1983: the statute explicitly grants judicial immunity but is otherwise written broadly.⁵⁸ Lacking textual support, the Supreme Court has generally justified its decisions on qualified immunity as derived from traditional common law torts, general principles of fairness comparable to lenity, and as necessary to protect officials from wasting resources on bad claims.⁵⁹ These justifications do not hold up under scrutiny. This Note will proceed, in short, to argue that modern qualified immunity is so different from its common law roots that even defenders admit it no longer resembles its roots, is radically different from principles of lenity, and available data proves it does not subject officials to trial burdens but does discourage adjudication of meritorious cases.

B. Modern Qualified Immunity Doctrine Does Not Reflect Common Law

Section 1983 was originally passed as the Ku Klux Klan Act in 1871, alongside what would become 18 U.S.C. § 242 and the Reconstruction Amendments, to provide a direct cause of action against

⁵⁵ Christopher J. Perras, *Prosecuting First Amendment Retaliation*, DEP'T OF JUST. J. FED. L. & PRAC., Mar. 2022, at 95, 96, 105; see also SANDHYA KAJEEPETA & DANIEL K.N. JOHNSON, POLICE AND PROTESTS: THE INEQUITY OF POLICE RESPONSES TO RACIAL JUSTICE DEMONSTRATIONS 5–8 (2023), https://tminstitutelfd.org/wp-content/uploads/2023/10/Police-and-Protests_PDF-3.pdf [<https://perma.cc/79YE-E3SY>].

⁵⁶ Benjamin Wittes, *The Situation: About Those Disappearing Students*, LAWFARE (Mar. 31, 2025), <https://www.lawfaremedia.org/article/the-situation-about-those-disappearing-students> [<https://perma.cc/J3CB-4RRJ>].

⁵⁷ See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 417 (2000); see also Cristina Carmody Tilley, *A New Private Law of Policing*, 89 BROOKLYN L. REV. 367, 414 (2024) (“[T]he initial hypothesis that municipalities would undertake reform to avoid financial liability has been thoroughly refuted.”).

⁵⁸ 42 U.S.C. § 1983.

⁵⁹ See William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 53–54, 69–70 (2018); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 8 (2017).

federal agents for the violation of civil rights “under color of” law, authority, custom, etc.⁶⁰ Section 242 applies criminal penalties for similar actions violating civil rights “under color of” law, authority, etc., though it requires the violation be willful.⁶¹ Baude, in 2018, completely deconstructed the historical justification for modern qualified immunity because there was no “well-established, good-faith defense in suits about constitutional violations” before or after § 1983 was passed.⁶² He wrote that while a good-faith defense did exist in some common law suits, it was unique to those torts, and even that immunity was far narrower than modern generalized qualified immunity doctrine.⁶³

Before § 1983, citizens typically sued officials for constitutional violations under common law torts such as trespass or malicious prosecution, which entailed their own unique elements and defenses. Baude argues the most common true defense which granted immunity was not good-faith, but legality: for example, in a trespass case for a questionable seizure of property, the official could not be liable if their actions were constitutionally vindicated.⁶⁴ Justice Marshall held there that an official’s good-faith reliance on presidential instruction did not vindicate his unlawful seizure of a Dutch boat.⁶⁵ Baude’s review of scholarship found that Marshall’s perhaps harsh logic “was a fixture of the founding era”; good faith simply could not excuse illegal actions.⁶⁶ This was mediated by individual petitions to Congress for indemnification which were granted around sixty percent of the time.⁶⁷ This is a far cry from the modern standard, which “protects officers who have outrageously abused their power simply because no prior decision has declared that conduct unlawful.”⁶⁸ This standard is so extreme that some scholars state

⁶⁰ Ku Klux Klan Act, ch. 22, 17 Stat. 13 (1871).

⁶¹ 18 U.S.C. § 242.

⁶² Baude, *supra* note 59, at 55.

⁶³ *Id.*

⁶⁴ *Id.* at 55–56 (citing *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 176–79 (1804)).

⁶⁵ *Little*, 6 U.S. at 179.

⁶⁶ Baude, *supra* note 59, at 56.

⁶⁷ *Id.* at 56–57.

⁶⁸ Joanna C. Schwartz, *Qualified Immunity’s Boldest Lie*, 88 U. CHI. L. REV. 605, 608 (2021) (citing Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 TOURO L. REV. 633, 653–56 (2013) (describing shifting standards for clearly established law)); *see also* Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937, 1948–51 (2018) (describing confusion about how factually analogous prior court decisions must be to clearly establish the law); John C. Jeffries, Jr., *What’s Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 854–59 (2010) (describing confusion about which sources can clearly establish the law and how factually analogous prior cases must be to clearly establish the law).

it is “as if the one-bite rule for bad dogs started over with every change in weather conditions.”⁶⁹ One way this extremity can be demonstrated is in comparison to lenity in criminal law. Criminal lenity analysis does not consider judicial disagreement to weigh in favor of granting lenity, but in contrast considers it a strong point in favor of granting qualified immunity when there is a circuit split.⁷⁰ Schwartz also points out that the “clearly established” test ignores the reality that police are not trained on specific facts as unconstitutional, they are taught general principles.⁷¹

In 2021, Keller publicly disagreed with Baude and found that there was a generalized qualified immunity for discretionary duties.⁷² However, Keller still concluded that many important features of modern immunity doctrine diverge significantly from the common law around 1871; most importantly, “qualified immunity at common law could be overridden by showing an officer’s subjective improper purpose, while today the clearly-established-law test applies.”⁷³

The common law basis for modern qualified immunity is thus unjustified. However, while such investigations are important, these discussions tend to miss that Congress wanted to *change* the status quo when it passed § 1983. It was aware of the state of the common law and certainly expected the Court to apply common law principles, but a plain text reading of § 1983 shows a direct path to justice instead of relying on the complicated and ineffective common law on the topic. Congress passed § 1983 against the backdrop of anti-Reconstruction lawfare to ensure that scofflaw creativity could no longer shield officials from their abuse.

C. The Logistical Concerns are Unjustified

The argument that qualified immunity saves officials from the costs of adjudication also falls apart under scrutiny. Joanna Schwartz analyzed 1,183 cases in five federal district courts and found that qualified immunity does not relieve official defendants of their discovery and trial burdens.⁷⁴ The data show that qualified immunity is rarely the formal reason that § 1983 cases are dismissed because “the doctrine is not well

⁶⁹ John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 256 (2013).

⁷⁰ Baude, *supra* note 59, at 74–75.

⁷¹ Schwartz, *supra* note 68, at 609.

⁷² See Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1344 (2021).

⁷³ *Id.* at 1346.

⁷⁴ See Schwartz *supra* note 59, at 9.

suited to dismiss many claims before trial, and qualified immunity is often unnecessary to serve its intended role.”⁷⁵ Schwartz found that qualified immunity does not prevent costs associated with litigation because only 0.6% of cases were dismissed on qualified immunity grounds before discovery and only 3.2% were dismissed before trial.⁷⁶ Yet it is raised as a defense at these stages more than 37% of the time, increasing costs.⁷⁷ She also points out that courts regularly apply qualified immunity without deciding the harder questions like the broadness of the right in question.⁷⁸ Schwartz illustrates her point with a Ninth Circuit Case where qualified immunity was granted to the officers two weeks before trial but, due to other claims, no one was spared an arduous trial.⁷⁹ She concludes these costs to overcome qualified immunity may discourage the filing of meritorious claims.⁸⁰

A 2018 study on qualified immunity in trial buttresses Schwartz’s conclusions. There, Reinert analyzed 287 cases where qualified immunity was raised; 211 went to trial, and defendants won in about 70% of cases, comparable to other civil rights case data.⁸¹ Of those that went to trial, only 15% received jury instructions on qualified immunity.⁸² Those instructions tended to reduce plaintiff success rate by two thirds and where courts gave the plaintiff the burden to *rebut* qualified immunity they always lost.⁸³ The data is different for First Amendment claims and suggests qualified immunity does serve the Court’s logistical goal in public protest cases. In a 2024 analysis of First Amendment cases where it was considered, Zick found 33% of claims are dismissed on qualified immunity grounds at the motion to dismiss stage and 60% were dismissed at the summary judgment stage.⁸⁴ This shows that qualified immunity is a more significant barrier to First Amendment claims.

⁷⁵ *Id.* at 52.

⁷⁶ *Id.* at 60.

⁷⁷ *Id.*

⁷⁸ *Id.* at 65–66.

⁷⁹ *Id.* at 68–69.

⁸⁰ *Id.* at 62.

⁸¹ Alexander A. Reinert, *Qualified Immunity at Trial*, 93 NOTRE DAME L. REV. 2065, 2081–82 (2018).

⁸² *Id.* at 2083–84.

⁸³ *Id.* at 2087–88.

⁸⁴ Timothy Zick, *Public Protest and Governmental Immunities*, 97 S. CAL. L. REV. 1583, 1610 (2024).

D. The Nieves Doctrine Is Deeply Flawed

First, and perhaps most obviously, *Nieves* has no textual basis in § 1983. The law does not distinguish between types of government retaliation, does not require plaintiffs to plead or prove that probable cause did not objectively exist, and only explicitly provides immunity to judicial officers. *Nieves* practically redefines § 1983 from covering acts “under color of any statute, [etc.]” which cause “the deprivation of any rights, privileges, or immunities secured by the Constitution and laws” to only specific acts which have been previously established to violate constitutional rights.⁸⁵ The primary textual mistake the Court has made is holding that “under color of” can *only* mean outside actual lawful authority, with a narrow exception exemplified by jaywalking after a police protest. This is unsupported by textual analysis; “under color of” includes *abuse* of power, which is the exercise of otherwise lawful authority in an improper way. Baude elaborates on the history of the phrase; it is a legal term of art going back 500 years that “seems to perfectly include police officers and other officials who abuse or exceed their state-granted authority.”⁸⁶ It also seems the framers of § 1983 understood the phrase this way because it replaced “under pretense of” with “under color of” during the final drafting phase of the law, which also generally broadened the statute in other ways.⁸⁷

Nieves’s definition of “under color of,” drawn from *Hartman*, also differs significantly from the phrase’s definition in parallel criminal law. The Department of Justice’s website for 18 U.S.C. § 242, the criminal version of § 1983, states:

acts under “color of law” include acts not only done by federal, state, or local officials within their lawful authority, but also acts done beyond the bounds of that official’s lawful authority, if the acts are done while the official is purporting to or pretending to act in the performance of his/her official duties.⁸⁸

There are other significant differences to criminal law: a 2022 paper by the Department of Justice noted that *no* § 242 First Amendment violations had been charged since *Nieves*, even though whether *Nieves* applied to criminal law was undecided.⁸⁹ It argued the largest obstacle to

⁸⁵ 42 USC § 1983.

⁸⁶ Baude, *supra* note 59, at 64–65.

⁸⁷ *Id.* at 65.

⁸⁸ *Deprivation of Rights Under Color of Law*, DEP’T OF JUST. (May 31, 2021), <https://www.justice.gov/crt/deprivation-rights-under-color-law> [<https://perma.cc/BTN9-ZK7S>].

⁸⁹ Perras, *supra* note 55, at 98.

prosecution is causation: the “high standard of proof” requires proving a negative motive and disproving the officer’s good faith.⁹⁰ To prove the former, it recommends using officer statements before and after the event.⁹¹ To prove the latter, it recommends using officer statements to prove retaliatory motive, training materials which contradict their action, and/or the testimony of a fellow officer that the defendant was wrong.⁹² *Nieves*, perversely, excludes most of this evidence from consideration in the civil context. This problem is reflected across § 1983 claims of all types, leading to results like those shown in a 2016 study where only about one fourth of officers arrested for a crime were sued in some form under § 1983.⁹³

Second, *Hartman*’s no-probable-cause rule should not have been applied to retaliatory arrest in *Nieves*. Retaliatory arrests simply lack the complex causation problems connected with prosecutorial misconduct stated in *Hartman* to justify the no-probable-cause requirement. The Court has held that immunity in retaliatory prosecution claims is not analogous to immunity in warrantless retaliatory arrest claims.⁹⁴ As Justice Gorsuch pointed out in his *Nieves* concurrence, the existence of probable cause only answers whether an arrest violates the Fourth Amendment, not the First.⁹⁵ As *Nieves* admits, it would seem insufficiently protective of the First Amendment to kill all claims on that basis alone.⁹⁶ The application of *Hartman* to retaliatory arrest is therefore unjustified.

Third, the “similarly situated” evidentiary standard in *Nieves* was unclear and immediately lead to a circuit split. Although *Trevino* is an “encouraging development,” the standard remains overly burdensome.⁹⁷ *Trevino* held that any objective evidence may be used by plaintiffs to fit the *Nieves* exception, but CATO researchers Bidwell and Jaicomo point out that “statistical evidence of nonprosecutions is available through a comparison of those who were arrested for a crime against those who were

⁹⁰ *Id.* 105–06.

⁹¹ *Id.* at 106.

⁹² *Id.* at 106–07.

⁹³ Philip Matthew Stinson, Sr. & Steven L. Brewer, Jr., *Federal Civil Rights Litigation Pursuant to 42 U.S.C. § 1983 as a Correlate of Police Crime*, 30 CRIM. JUST. POL’Y REV. 223, 248 (2016).

⁹⁴ See *Van de Kamp v. Goldstein*, 555 U.S. 335, 342 (2009) (distinguishing absolute prosecutorial immunity for decisions close to the judicial process from non-absolute general qualified immunity).

⁹⁵ See *Nieves v. Bartlett*, 587 U.S. 391, 415 (2019) (Gorsuch, J., dissenting).

⁹⁶ *Id.* at 407.

⁹⁷ Anya Bidwell & Patrick Jaicomo, *Third Time’s the Charm: The Supreme Court’s Clarification of the Retaliatory Arrest Standards in Gonzalez v. Trevino*, 2023–2024 CATO SUP. CT. REV. 181, 182 (2023–2024).

subsequently prosecuted for that crime. But such comparative statistics do not exist in retaliatory arrest cases.”⁹⁸ Further, the Court did not offer guidance on when officers typically make arrests or at what scale to conduct the statistical analysis.⁹⁹ In a world where discriminatory policing and retaliatory arrest for protest are common, it may be impossible for real victims to get clean data sufficient to access the exception.¹⁰⁰

Fourth, it defies logic to say that an arresting officer’s statements or state of mind can *never* be relevant to a retaliatory arrest claim. *Trevino*’s any-objective-evidence holding seems to conflict with the Court’s previous holding in *Nieves* that such evidence is irrelevant to the *Nieves* exception.¹⁰¹ Justice Jackson pointed out as much in her *Trevino* concurrence: anomalous arrest procedures and officer statements can be objective evidence fitting the *Nieves* exception.¹⁰² Consider a statement by an officer arresting a protest attendee that they were instructed to fill a quota of arrests at the protests, or a statement that the officer believed their department did not normally make arrests in similar situations. These statements are not state-of-mind evidence but objective proof of atypical arrest; they evidence the officer’s practices, reflective of their department’s policy and its past actions. This question lingers despite the Court’s attempts to clean it up in *Trevino*. In the interest of reform, Bidwell and Jaicomo echo Justice Jackson’s *Trevino* concurrence to argue that *Trevino* actually permits, among other evidence, the evaluation of officer statements for the purpose of objectively determining discriminatory treatment, such as statements indicating the officers would not arrest similarly situated people.¹⁰³ If Bidwell, Jaicomo, and Justice Jackson are correct, then the Court has practically come full circle. Under Justice Jackson’s formulation, a plaintiff may apply the *Nieves* exception by offering an officer’s statement that they would not typically arrest similarly situated individuals as objective evidence. If those statements are now, again, relevant to the threshold *Nieves* exception, the Court has pointlessly remade the wheel by shuffling the previous standard around. Considering the gamification problem of the qualified immunity doctrine, the Court’s full circle adjustments have the effect of consistently obscuring what First Amendment rights are “clearly established.”

⁹⁸ *Id.* at 192 (footnote omitted) (citing *Nieves*, 587 U.S. at 422 (Sotomayor, J., dissenting)).

⁹⁹ See *First Amendment—Freedom of Speech—Retaliatory Arrest—Nieves v. Bartlett*, *supra* note 47, at 279–80.

¹⁰⁰ *Id.* at 278–80.

¹⁰¹ *Nieves*, 587 U.S. at 407 (quoting *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004)).

¹⁰² *Gonzalez v. Trevino*, 144 S. Ct. 1663, 1677–78 (2024) (Jackson, J., concurring).

¹⁰³ Bidwell & Jaicomo, *supra* note 97, at 197–98.

Last, *Nieves* fails on policy grounds by failing to properly balance the interests at stake. Remedies for violation of fundamental rights must be sufficient to reduce future violations and fairly compensate the existing victims—deterrence and restitution. “Deterrence has many faces.”¹⁰⁴ In its simplest form, deterrence theory posits that people make decisions by balancing advantages and disadvantages of their actions with minimal information—the “market model.”¹⁰⁵ They balance certainty, severity, and delay of punishment against the benefits of their action.¹⁰⁶ Crucially, evidence has demonstrated that “punishment certainty is far more consistently found to deter crime than is punishment severity,” meaning that the actor must believe there is a real chance they will be punished for that punishment to be effective at deterring behavior.¹⁰⁷ However, these effects are filtered through impulsivity and situational stress.¹⁰⁸ There are also theories of systemic deterrence—where the general character of those in charge of a punishment system is balanced against the benefits, regardless of certainty, severity, or delay of punishment.¹⁰⁹ Punishment may be formal or extralegal.¹¹⁰

Police are almost always totally indemnified from financial penalties as a result of civil rights violations even when they get to trial.¹¹¹ But public condemnation, even without financial penalty, seems to have a powerful effect on individual behavior. Public adjudication fulfills important sociological purposes, such as the enforcement of morality (usually through a jury), the vindication of the victim, the labeling of bad actors to enhance community safety, or to initiate rehabilitation. Crump thus argues that condemnation is unlike other extralegal deterrents (such as job loss or divorce) because it ultimately forces the internalization of collective norms by all, even if they are not the target of condemnation.¹¹² This condemnation through labeling ripples out to those who Émile Durkheim called “upright people,” causing them to internalize the

¹⁰⁴ David Crump, *Deterrence*, 49 ST. MARY’S L.J. 317, 318 (2018).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Daniel S. Nagin & Greg Pogarsky, *Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence*, 39 CRIMINOLOGY 865, 865 (2001).

¹⁰⁸ Greg Pogarsky & Alex R. Piquero, *Studying the Reach of Deterrence: Can Deterrence Theory Help Explain Police Misconduct?*, 32 J. CRIM. JUST. 371, 374 (2004).

¹⁰⁹ Crump, *supra* note 104, at 319.

¹¹⁰ *Id.* at 318.

¹¹¹ Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 936–37 (2014).

¹¹² Crump, *supra* note 104, at 338.

community's norms and fear condemning themselves.¹¹³ This fear is a potent deterrent which is already in the actor's mind during contemplation of deviance.¹¹⁴ That self-disapproval has been shown to be the strongest possible deterrent of misconduct.¹¹⁵ Thus, § 1983's deterrence is most effective at reducing police misconduct when it has the opportunity to publicly adjudicate as many meritorious cases as possible. This will provide both opportunities to condemn or vindicate certain actions and rights, which in turn will have a strong effect on individual behavior.

Insidiously, every time the Court tinkers with or reconstitutes First Amendment doctrine, the Court creates a "new" wave of plausible legal questions which could require the application of qualified immunity because classic retaliatory conduct must now be analyzed under the new rules. This has produced an absurd posture which, as seen below, presumes immunity for officials who engage in facially unconstitutional viewpoint discrimination—the hallmark of a police state. The first crackdown is free, but the regular application of "new" standards means there are lots of "firsts"!

III. THE FLAWS OF THE NIEVES DOCTRINE ILLUSTRATED BY THE 2024 UNIVERSITY OF TEXAS PROTESTS

In spring 2024, protests against Israel's war in Gaza provoked forceful response by police across the country.¹¹⁶ In March, Texas Governor Greg Abbott issued executive order GA-44.¹¹⁷ GA-44 labeled certain phrases used at recent protests as antisemitic in violation of Texas law, ordered an update of school speech policy, and ordered that student groups "such as the Palestine Solidarity Committee and Students for Justice in Palestine are disciplined for violating these policies."¹¹⁸ The referenced law, section 448.001 of the Texas Government Code, defines antisemitism and incorporates an international organization's definition that includes calling the state of Israel racist and comparing "contemporary

¹¹³ *Id.* (quoting ÉMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (George Simpson trans., 2d ed. 2013))

¹¹⁴ *See id.* at 339.

¹¹⁵ Pogarsky & Piquero, *supra* note 108, at 381.

¹¹⁶ Sinha, *supra* note 4, at 489.

¹¹⁷ Exec. Order No. GA-44 (Mar. 27, 2024), <https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2024/GA-44.pdf> [<https://perma.cc/LG7E-F84Y>].

¹¹⁸ *Id.*

Israeli policy to that of the Nazis.”¹¹⁹ The universities impacted by GA-44 dutifully complied with the order.¹²⁰

In April, protests organized by the proscribed groups on college campuses were forcefully ended by police action.¹²¹ Governor Abbott tweeted, “These protesters belong in jail. . . . Students joining in hate-filled, antisemitic protests at any public college or university in Texas should be expelled.”¹²² At the University of Texas at Austin (UT-Austin), the Palestine Solidarity Committee planned to march from Speedway to the South Lawn, which were both protected by state law as sacred public fora.¹²³ A combined force of Texas Department of Public Safety (TDPS) Troopers, University of Texas Police (UTPD), and Austin Police (APD) made dozens of arrests for trespassing on the first day of protests and as the protests continued.¹²⁴ All charges against protestors were eventually dropped for lack of probable cause or evidence.¹²⁵ To illustrate, a former faculty member was charged with assault and criminal mischief (which was also the basis of his removal from the University of Texas faculty) after allegedly cursing at an officer and breaking the officer’s bike bell.¹²⁶

¹¹⁹ Tex. Gov’t Code Ann § 448.001; INT’L HOLOCAUST REMEMBRANCE ALL., IHRA NON-LEGALLY BINDING WORKING DEFINITION OF ANTI-SEMITISM 2 (2016), <https://holocaustremembrance.com/wp-content/uploads/2024/01/IHRA-non-legally-binding-working-definition-of-antisemitism-1.pdf> [<https://perma.cc/23WG-BCYU>].

¹²⁰ *Students for Just. in Pal., at Univ. of Hou. v. Abbott*, 756 F. Supp. 3d 410, 415 (W.D. Tex. 2024).

¹²¹ E.g., Complaint ¶¶ 32–34, 74–75, *Heilrayne v. Univ. of Tex. at Austin*, No. 1:25-cv-640-DAE, 2026 LX 185631 (W.D. Tex. Jan. 27, 2026).

¹²² *At Least 30 Protestors Arrested at UT Austin: “These Protesters Belong in Jail,” Abbott Says*, CBS NEWS (Apr. 24, 2024), <https://www.cbsnews.com/texas/news/several-protesters-arrested-at-ut-austin-these-protesters-belong-in-jail-abbott-says/> [<https://perma.cc/C5G2-HGB3>].

¹²³ Complaint, *supra* note 121, ¶¶ 32–34, 91.

¹²⁴ See Ren Leija, Naina Srivastava & Maryam Ahmed, *Students, Faculty, Law Enforcement Clash at Pro-Palestine Protest*, DAILY TEXAN (Apr. 24, 2024), <https://thedailytexan.com/2024/04/24/students-faculty-law-enforcement-clash-at-pro-palestine-protest/> [<https://perma.cc/63KR-UEQQ>]; Maryam Ahmed, *UT Austin Pro-Palestine Encampment Dismantled by Law Enforcement, Over 100 Protestors Arrested: Timeline*, DAILY TEXAN (Apr. 29, 2024), <https://thedailytexan.com/2024/04/29/ut-austin-pro-palestine-encampment-dismantled-by-law-enforcement-over-100-protesters-arrested/> [<https://perma.cc/26QG-462P>].

¹²⁵ Carlone McConnico, *Travis County Prosecutors Drop 79 Trespassing Charges from On Campus Protest*, DAILY TEXAN (June 26, 2024), <https://thedailytexan.com/2024/06/26/travis-county-prosecutors-drop-79-trespassing-charges-from-on-campus-protest/> [<https://perma.cc/5HY2-QVB5>].

¹²⁶ Andrew Weber, *Former UT Lecturer’s Lingering Charges from Pro-Palestinian Protest Dismissed*, KUT NEWS (Oct. 8, 2025), <https://www.kut.org/crime-justice/2025-10-08/austin-ut-charges-pro-palestinian-protest-university-of-texas-rich-heyman> [<https://perma.cc/8NR4-FRRS>].

The case was dismissed after the TDPS “failed to submit evidence.”¹²⁷ Students involved in the protests and the organizations proscribed in Governor Abbott’s executive order were subsequently disciplined and suspended.¹²⁸

It is difficult to see this series of events as anything but archetypal repression of protected speech. The government enforced a certain viewpoint of antisemitism by both punishing students involved in proscribed organizations and declaring peaceful protest in a sacred public forum illegal through trespassing charges. But as we will see, due to this Frankenstein doctrine, all officials involved have immunity for their actions. This has been the case so far in the lawsuits filed by student protestors. Despite a ruling that Governor Abbott’s executive order is facially viewpoint discrimination, all officials involved in the crackdown have been and will likely be granted immunity.

A. Treatment of First Amendment Claims by Protestors at UT-Austin

1. *Students for Justice in Palestine v. Abbott*¹²⁹

In May of 2024, student groups including those proscribed by GA-44 sued Governor Abbott in his official capacity, along with public universities, their respective boards and members, and presidents in their official and individual capacities.¹³⁰ The plaintiffs asserted First Amendment claims under § 1983: that executive order GA-44 was facially viewpoint discrimination and that university application of the order constituted de facto viewpoint discrimination.¹³¹ In an order issued on October 24, 2024, the Texas Western District essentially agreed with plaintiffs’ interpretation of GA-44, but ultimately dismissed claims against most defendants on sovereign immunity grounds, leaving plaintiffs only the chance at declaratory relief against the remaining regents and presidents of the universities.¹³²

Judge Pitman held that sovereign immunity dismissed all defendants except the regents and presidents in their official capacity, who fit within

¹²⁷ *Id.*

¹²⁸ *E.g.*, Verified Second Amended Complaint ¶ 39, Qaddumi v. Univ. of Tex. at Austin, No. 1:24-cv-1002-DII (W.D. Tex. Dec. 18, 2024).

¹²⁹ *Students for Just. in Pal., at Univ. of Hou. v. Abbott*, 756 F. Supp. 3d 410 (W.D. Tex. 2024).

¹³⁰ *Id.* at 416. Members of the UT-Austin Board of Regents were only sued in their official capacity. *Id.*

¹³¹ *Id.*

¹³² *Id.* at 419–20.

the *Ex parte Young* exception.¹³³ Second, per *Ex parte Young*, the court limited the plaintiffs' relief against the remaining defendants to solely prospective declaratory and injunctive relief.¹³⁴ This logically dismissed the claims against the remaining defendants in their individual capacities, sidestepping the qualified immunity question.¹³⁵ Then, following *Ex parte Young* precedent, Judge Pitman analyzed the plaintiffs' claims and found they were likely to succeed on the merits, because GA-44 discriminates on its face by closing the definition of antisemitism to constitutional interpretation, chilling the plaintiffs' speech.¹³⁶ But the requested relief was overbroad, so the court could not grant the plaintiffs' injunction enjoining GA-44's enforcement.¹³⁷ In determining the plaintiff's likelihood of success, Judge Pitman considered the effect *Tinker v. Des Moines*¹³⁸ could have on the case; *Tinker* held that schools may sometimes engage in viewpoint restriction of student speech rights, but it has not yet been applied to public universities by the Supreme Court or the Fifth Circuit.¹³⁹ Judge Pitman ruled the plaintiffs were likely to succeed even if *Tinker* were applied, because universities do not act *in loco parentis* and "[t]he revised university policies chill a kind of expression that is a hallmark of university activity"—"passionate political debate."¹⁴⁰ Thus, the proscribed activity in GA-44 is unlikely to be considered substantially disruptive under *Tinker*.

2. *Qaddumi v. Hartzell*¹⁴¹

Qaddumi, a member of the Palestine Solidarity Committee at UT-Austin, was an organizer of the April 24, 2024, protests on campus.¹⁴² The events were planned for Speedway (a pedestrian walkway through campus) and the South Lawn, and were to terminate later that evening.¹⁴³ The university communicated multiple times beforehand that the planned event was barred because it violated university rules.¹⁴⁴ This was later

¹³³ *Id.*

¹³⁴ *Id.* at 420.

¹³⁵ *Id.* at 423.

¹³⁶ *Id.* at 424–25.

¹³⁷ *Id.* at 428.

¹³⁸ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

¹³⁹ *Students for Just. in Pal.*, 756 F. Supp. 3d at 424–25.

¹⁴⁰ *Id.* at 426.

¹⁴¹ No. 1:24-cv-1002-RP, 2025 LX 144004 (W.D. Tex. June 13, 2025).

¹⁴² Verified Second Amended Complaint, *supra* note 128, ¶¶ 6–7.

¹⁴³ *Id.* ¶¶ 9, 15.

¹⁴⁴ *Id.* ¶¶ 10, 16.

found by the Committee of Counsel on Academic Freedom and Responsibility (CCAFR), a University of Texas organ, to be false.¹⁴⁵ The CCAFR also concluded that the defendants were attempting to comply with Executive Order GA-44.¹⁴⁶ On April 24, as protestors gathered on Speedway near Gregory Gym, they were corralled by police while police ordered dispersal.¹⁴⁷ Qaddumi volunteered to mediate; he relayed the dispersal order to the gathered crowd and continued to do so as the crowd reconvened further south due to kettling.¹⁴⁸ As he mediated, he was suddenly arrested by UTPD for criminal trespass.¹⁴⁹ The charges were dropped for lack of probable cause, but Qaddumi was ultimately suspended by the university and banned from campus for failure to comply.¹⁵⁰

Qaddumi sued UT-Austin, then-president Jay Hartzell and then-provost Sharon Wood in their individual and official capacities under § 1983 for viewpoint discrimination and retaliation against protected speech.¹⁵¹ Qaddumi alleges defendants acted pretextually to bar protected speech, effectuate his baseless arrest, and maintain his suspension all based on the content of his speech.¹⁵² He plead that GA-44 and its compliant policies are facially viewpoint discriminatory, that counter-protestors on April 24 were not arrested, that past protests that actually broke university rules were not treated similarly, and Jay Hartzell's statements show retaliatory motive.¹⁵³

A partial dismissal order by Judge Pitman of June 13, 2025, followed the same sovereign immunity conclusions as *Students for Justice in Palestine (SJP)* but actually reached the qualified immunity question.¹⁵⁴ Here, Judge Pitman held that Hartzell and Wood were immune in their individual capacity, reasoning that the outstanding *Tinker* question makes

¹⁴⁵ *Id.* ¶ 8 n.1, ¶ 34. Per SB 37, which was passed during the 89th Legislative Session in Texas, the CCAFR was dissolved September 1, 2025. Tex. S.B. 37, 89th Leg., R.S. (2025).

¹⁴⁶ Verified Second Amended Complaint, *supra* note 128, ¶ 16.

¹⁴⁷ *Id.* ¶¶ 28–29.

¹⁴⁸ *Id.* ¶¶ 29–32.

¹⁴⁹ *Id.* ¶ 32. The author of this Note also personally witnessed this arrest.

¹⁵⁰ *Id.* ¶¶ 33, 37.

¹⁵¹ *Id.* ¶¶ 41–56.

¹⁵² *Id.*

¹⁵³ *Id.* ¶¶ 17, 20–24, 26–27.

¹⁵⁴ Qaddumi v. Hartzell, No. 1:24-cv-1002-RP, 2025 LX 144004, at *8–12, *21 (W.D. Tex. June 13, 2025).

it impossible to satisfy the *Harlow* “clearly established” standard.¹⁵⁵ Similar to *SJP*, this also limited Qaddumi to solely prospective injunctive and declaratory relief against all three defendants in their official capacities on the issue of Qaddumi’s suspension because it was an ongoing injury plausibly caused by the facial viewpoint discrimination in GA-44.¹⁵⁶ Judge Pitman pointed to precedent “that a state university cannot expel a student in retaliation for engaging in an activity protected by the First Amendment.”¹⁵⁷ Judge Pitman then determined that Qaddumi fit the *Nieves* exception because Qaddumi had plead both retaliatory motive and provided objective evidence of atypical arrest.¹⁵⁸ That evidence was that neither the counter-protestors at the April 24 protest nor past rule-breaking protests had been met with force.¹⁵⁹ Past that threshold, the Court held that Qaddumi sufficiently plead the remaining elements derived from *Mt. Healthy*.¹⁶⁰

3. *Heilrayne v. University of Texas at Austin*¹⁶¹

Arwyn Heilrayne, Citlalli Soto-Ferate, Iliana Medrano, and Mia Cisco were UT-Austin students and recent graduates active in pro-Palestine campus organizing.¹⁶² They participated in the April 24, 2024, protest at UT-Austin and were arrested—those charges were dropped for lack of probable cause—and those who were students later took agreements for deferred suspension they allege violate their rights.¹⁶³ On

¹⁵⁵ *Id.* at *10–12 (“[N]either the Fifth Circuit or Supreme Court has squarely held whether *Tinker* governs at the university level.” (quoting *Students for Just. in Pal.*, at Univ. of Hou. v. Abbott, 756 F. Supp. 3d 410, 425 (W.D. Tex. 2024))).

¹⁵⁶ *Id.* at *12, *19 (citing *Students for Just. in Pal.*, 756 F. Supp. 3d at 427).

¹⁵⁷ *Id.* at *15

¹⁵⁸ *Id.* at *16–18.

¹⁵⁹ *Id.* at *17–18.

¹⁶⁰ *Id.* at *15 (citing *Doe v. Harrell*, 841 F. App’x 663, 669 (5th Cir. 2021) (citing *Kelleher v. Flawn*, 761 F.2d 1079, 1083 (5th Cir. 1985) (applying the *Mt. Healthy* test to a First Amendment claim by a university employee forced to be reassigned)) (applying the *Mt. Healthy* factors to PhD candidate’s claim that his views on vaccine safety motivated the University of Texas to dismiss him from the program in retaliation)).

¹⁶¹ *Heilrayne v. Univ. of Tex. at Austin*, No. 1:25-cv-640-DAE, 2026 LX 185631 (W.D. Tex. Jan. 27, 2026).

¹⁶² Complaint, *supra* note 121, ¶¶ 10–13.

¹⁶³ *Id.* ¶¶ 1–4, 83–85. Heilrayne alleges she was standing on the grass beside Speedway when four or five troopers pushed her to the ground, brought her behind the police line, and zip-tied her wrists tightly. *Id.* ¶¶ 55–56. Soto-Ferate alleges she was arrested while walking to a friend and suffered arm and shoulder pain for a week after the officers’ rough handling. *Id.* ¶ 59. Medrano alleges that while she was being detained, her dress rode up, exposing her undergarments; officers allegedly ignored her when she asked them to pull her dress down. *Id.* ¶ 65. Cisco alleges a counter-protestor shouted in her face while she was detained and the

April 30, 2025, they sued UT-Austin, the Board of Regents and its members in their individual and official capacities, former president Jay Hartzell in his individual, current president Jim Davis in his official capacity (substituted for Hartzell's official capacity claim), Greg Abbott in his individual capacity, UTPD officers in their individual capacities, and TDPS officers in their individual capacities.¹⁶⁴ Their claims against individual capacity defendants under § 1983 are for viewpoint discrimination and retaliation against protected speech.¹⁶⁵

Heilrayne is distinct from *Qaddumi* and *SJP* because it makes claims against Governor Abbott and the arresting officers in their individual capacities; it also presents officer statements which may have objective value that could fit the *Nieves* exception.¹⁶⁶

The *Heilrayne* plaintiffs presented substantial evidence that they experienced an unconstitutional crackdown against their viewpoint. They were charged for criminal trespass despite being in a public forum, the probable cause affidavits submitted for arrests on April 24 seem to have been filled out *en masse* with identical bases, and the cases were dismissed within two days by Travis County for lack of probable cause.¹⁶⁷ Plaintiffs have also offered substantial objective evidence to fit the *Nieves* exception. First, the *Heilrayne* plaintiffs compared the case to a past protest also used by *Qaddumi*: a 2018 Young Conservatives of Texas demonstration in support of Brett Kavanaugh's confirmation to the Supreme Court.¹⁶⁸ A clash with counter protestors led to no arrests or discipline.¹⁶⁹ Second, they offered evidence of discriminatory treatment on April 24: when the police kettled protestors, plaintiffs witnessed police selectively blocking access to the UT-Austin Tower entrance, only barring access to a male student wearing a keffiyeh and a Muslim student wearing a hijab.¹⁷⁰ When Heilrayne (who was also wearing a keffiyeh) stepped away from the chaos into the grass around Speedway after the police formed their phalanx, she stood and observed for a time with many others until she was rushed by

officers did nothing. *Id.* ¶ 70. Plaintiffs claim all of them were restrained by painful measures, with several reporting loss of feeling and other injuries as a result of excessively tight zip ties. *Id.* ¶¶ 56, 59, 66, 71.

¹⁶⁴ *Id.* ¶¶ 14–21.

¹⁶⁵ *Id.* ¶¶ 128–146. Plaintiffs also made a § 1983 Fourth Amendment claim against the officers and a racial discrimination claim under 42 U.S. § 2000(d). *Id.* ¶¶ 147–165.

¹⁶⁶ *See id.* ¶¶ 54, 57.

¹⁶⁷ *See* Complaint, *supra* note 121, ¶¶ 76, 91, 120–122.

¹⁶⁸ *Id.* ¶¶ 94–100.

¹⁶⁹ *Id.* ¶¶ 95, 100.

¹⁷⁰ *Id.* ¶ 47.

several officers, knocked to the ground, and arrested.¹⁷¹ While Cisco was detained after being arrested, a pro-Israel counter-protester approached and yelled within inches of the detained protestor's face in plain view of officers, who did not react.¹⁷²

Last, the plaintiffs also offer two statements by officers which seem to have objective relevance under *Nieves* and *Trevino*. The first is that, after being arrested, Heilrayne overheard officers speaking to each other about a fifty-person arrest quota.¹⁷³ The second is close to the proverbial smoking gun from Ginsburg's *Hartman* dissent:

Notably, moments before Ms. Heilrayne's arrest, a DPS trooper, gathered with other troopers close to where Ms. Heilrayne would be arrested, asked his colleagues, "What are [the students] doing that's illegal? We've been asking this question, but what are they doing that's illegal?" He went on to ask, "What if this was after a game or something? That many people is out . . . after a basketball game. We do this after the Aggie games?" His colleague replied, "No."¹⁷⁴

These statements, along with the irregularities of the probable cause affidavit, are exactly the type of objective evidence that Justice Jackson considered in her *Trevino* concurrence. The Western District had an opportunity to grapple with whether *Nieves* permits the use of these statements as objective evidence or whether to strictly hold that "the statements and motivations of the particular arresting officer are 'irrelevant' at this stage."¹⁷⁵ Disappointingly, it did not take that opportunity.¹⁷⁶

¹⁷¹ *Id.* ¶¶ 55.

¹⁷² *Id.* ¶ 70.

¹⁷³ *Id.* ¶ 57. Police arrested fifty-seven individuals on April 24, 2024, in relation to the protests. *Id.* ¶ 56.

¹⁷⁴ *Id.* ¶ 54 (alteration in original).

¹⁷⁵ *Nieves v. Bartlett*, 587 U.S. 391, 407 (2019) (quoting *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004)).

¹⁷⁶ An order was given in the Heilrayne case on January 27, 2026, after the original submission of this Note. As a result, the following section initially contained a prediction about how the court would rule. I predicted that Abbott would retain sovereign immunity and Hartzell would be granted qualified immunity in their individual capacities. I predicted that (1) only official capacity claims against UT-Austin, the University of Texas System Board of Regents and its members, and Hartzell would survive the *Ex parte Young* exception; (2) the police involved would likely be granted qualified immunity because of the outstanding *Tinker* question; (3) the only remedy that would be left to plaintiffs would be prospective relief through the removal of the students' suspension; and (4) the evidence plaintiffs presented could be sufficient to satisfy the *Nieves* standard for the claims which survive immunity, even without using the officers' statements.

In an order issued on January 27, 2026, the Western District decided immunity and analyzed the *Nieves* exception in the First Amendment context. Of the official-capacity defendants, it found sovereign immunity barred plaintiffs' claims against UT-Austin and the University of Texas System Board of Regents as entities, but that sovereign immunity did not bar claims against Jim Davis (substituted for Jay Hartzell) and the *members* of the Board of Regents as state officials.¹⁷⁷ The court relied on the *SJP* case mentioned above and recent Fifth Circuit precedent to hold that the interim president of UT-Austin and the members of the board of regents have sufficient governing authority to meet the "scintilla of enforcement" requirement over the Dean of Students and Student Affairs which actually administer disciplinary actions.¹⁷⁸ Further, the expunction of their disciplinary records does count as prospective relief.¹⁷⁹

Next, the court analyzed the individual-capacity defendants for sufficient personal involvement in the alleged constitutional violation under § 1983. The court permitted the suits to continue against UTPD arresting officers, their supervising lieutenant, the chair of the University of Texas System Board of Regents, Hartzell, and Governor Abbott.¹⁸⁰ Under the same analysis for official-capacity defendants, it permitted the suits to continue against Jim Davis and the chair of the Board of Regents, but dismissed the other members.¹⁸¹ The court directly addressed whether plaintiffs met the *Nieves* exception for retaliation, and found that they pled sufficient evidence.¹⁸² They "have alleged that similarly situated counter-protestors were not subject to arrest or student discipline, and that past protests by similarly situated student organizations were not treated in the same manner."¹⁸³ The court did not rely on the officers' statements discussed above for the *Nieves* analysis, nor did it mention this question of objective evidence.

Finally, the Court turned to qualified immunity. Because plaintiffs sufficiently alleged a First Amendment violation, the only issue was whether the right at issue was clearly established at the time of the defendants' alleged conduct.¹⁸⁴ The court held that "it appears unsettled

¹⁷⁷ *Heilrayne v. Univ. of Tex.*, No. 1:25-cv-640-DAE, 2026 LX 185631, at *14–15 (W.D. Tex. Jan. 27, 2026).

¹⁷⁸ *Id.* at *18–19 (quoting *Jackson v. Wright*, 82 F.4th 362, 367 (5th Cir. 2023)).

¹⁷⁹ *Id.* at *19–20.

¹⁸⁰ *Id.* at *22, 26–28.

¹⁸¹ *Id.* at *28–30.

¹⁸² *Id.* at *38–39.

¹⁸³ *Id.* at *39.

¹⁸⁴ *Id.* at *41.

whether the rights Plaintiff claims are violated are ‘clearly established.’”¹⁸⁵ The court framed its role as determining “whether the principle that *Tinker* is *inapplicable* to college campuses was ‘clearly established’ such that a reasonable official could not have relied on that case in cancelling the April 24th protest and arresting and disciplining students involved.”¹⁸⁶ Because there was, at minimum, uncertainty on the issue, Defendants’ decisions were not “plainly incompetent.”¹⁸⁷ Thus, all individual capacity claims for First Amendment causes of action were barred by qualified immunity.¹⁸⁸ The only First Amendment claims permitted to proceed were against current UT-Austin president Jim Davis and the chair of the Board of Regents in their official capacities.¹⁸⁹

B. Implausible Deniability: Nieves Has Mutated First Amendment Protections Such that Officials Are Presumed Immune for Acts Presumed to be Unconstitutional

The orders in *SJP*, *Qaddumi*, and *Heilrayne* faithfully apply *Nieves* and demonstrate how it produces absurd outcomes: a facially viewpoint discriminatory order is presumed unconstitutional but the officials who enacted it with force are presumed immune. Somehow, § 1983 cannot be applied even to *blatant* viewpoint discrimination and *baseless* arrests, meaning it has mutated even past Justice Ginsburg’s view in her *Hartman* dissent. The consideration of *Tinker* in the Western District implies immunity will apply to these same officials for future crackdowns so long as how (not whether) the First Amendment applies to students is “unclear.”¹⁹⁰ The courts are required to implausibly hold that state officials could *never* reasonably know that narrowly defining a complicated political concept by law, then declaring by *fiat* that certain student organizations have violated that law by virtue of their speech could be unconstitutional.

This is a classic crackdown, but *Nieves* demands that courts take even implausible deniability by defendants as fact because of outstanding factors like *Tinker*. In *SJP*, the Western District determined the plaintiffs

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at *42–43.

¹⁸⁷ *Id.* at *43 (quoting *Taylor v. Barkes*, 575 U.S. 822, 825 (2015)).

¹⁸⁸ *Id.* at *44.

¹⁸⁹ *Id.* Plaintiffs’ surviving Fourth Amendment claims were also barred by qualified immunity *Id.* at *34–35.

¹⁹⁰ See *Qaddumi v. Hartzell*, No. 1:24-cv-1002-RP, 2025 LX 144004, at *10 (W.D. Tex. June 13, 2025) (“[N]either the Fifth Circuit or Supreme Court has squarely held whether *Tinker* governs at the university level.” (quoting *Students for Just. in Pal., at Univ. of Hou. v. Abbott*, 756 F. Supp. 3d 410, 425 (W.D. Tex. 2024))).

would likely succeed even if *Tinker* were applied, but the *Nieves* Frankenstein doctrine prevents the actual adjudication of the question. These Western District orders demonstrate the extremity of the *Harlow* standard in First Amendment cases: state officials have no individual accountability for ordering or carrying out blatant viewpoint discrimination because the Fifth Circuit and Supreme Court have yet to decide how—not whether—the First Amendment applies to students. Somehow, that unrealized future ruling overrules the plain text of § 1983. This mutated immunity renders the text of the Ku Klux Klan Act *nullius in juris*.

C. Heilrayne Provides an Opportunity to Hold that Atypical Arrest Procedures and Officer Statements Have Objective Relevance to the *Nieves* Exception

Second, the *Heilrayne* case demonstrates that the court’s affirmation in *Nieves* that officer statements are irrelevant for purposes of the *Nieves* exception is plainly wrong. The Western District declined to adopt, or even mention, Justice Jackson’s formulation that some atypical arrest practices or officer statements have objective value. *Trevino* explained that the only limit on the relevant evidence is that it must be objective, to avoid a “purely subjective” standard.¹⁹¹ The *Heilrayne* statements have objective and subjective relevance. They are evidence that the Texas Department of Public Safety had a policy of exercising their discretion not to arrest similarly situated people in the same area after sports events and that officers knew this but proceeded anyway. The Western District declined to include these statements for their relevance to the *Nieves* exception because it found sufficient evidence to proceed without broadening *Nieves* and *Trevino*.¹⁹² Perhaps it will be addressed on appeal. Ironically, if the courts were to adopt this conception of evidence relevant to the *Nieves* exception, the standard would be so broad as to almost practically return to the *Mt. Healthy* plus *Harlow* evidence standards, where everything but the officer’s subjective state of mind was relevant to whether the case could proceed.

CONCLUSION

The entire *Nieves* doctrine has unjustifiably created arbitrary barriers which deny plaintiffs their day in court in clear conflict with both the plain text of § 1983 and the originating common law. Every time the

¹⁹¹ *Gonzalez v. Trevino*, 144 S. Ct. 1663, 1667 (2024) (quoting *Nieves*, 587 U.S. at 407) (emphasis added).

¹⁹² *Heilrayne*, 2026 LX 185631, at *38–39.

Court tinkers with this mutated doctrine, it generates a new wave of legal cover for blatant repression. The Texas cases show how the doctrine of qualified immunity requires the courts to prioritize the hypothetical future application of precedent over the First Amendment rights of those who suffered baseless arrest under a blatantly unconstitutional order.

As this doctrine and qualified immunity have grown out of control, scholars have taken notice and offered multiple solutions. Schwartz has argued that we should either end qualified immunity as it exists altogether or redefine “clearly established” to incorporate evidence for whether the official in question acted in accordance with governing laws and training, akin to returning to the legality defense.¹⁹³ Krotoszynski and Roberts argue for a framework which increases overall speech by broadening equitable remedies available to courts.¹⁹⁴ That framework would explicitly consider the harms done to both the speaker and the audience, incentivize private attorneys to receive bounties for valid free speech claims, and approve of creative equitable orders.¹⁹⁵ Hor suggests a modified version of the *Mt. Healthy* standard which de-emphasizes the existence of probable cause by requiring plaintiffs to plead and prove the officer’s retaliatory motive was the actual and proximate cause of the injury.¹⁹⁶ Thus, “the key inquiry is whether the retaliation caused the plaintiff’s injury (arrest), not whether the arrest was valid.”¹⁹⁷

In the First Amendment context, I agree with Justices Ginsburg and Sotomayor, and CATO scholars like Bidwell and Jaicomo that these cases should simply return to the *Mt. Healthy* and *Harlow* requirements. For qualified immunity, this would return *Harlow*’s “reasonable person” objective analysis to juries, allowing courts to clearly establish constitutional violations (or vindications) and hopefully preventing qualified immunity for blatantly unconstitutional action that happens to be novel. This would better secure the parties’ right to a day in court and would satisfy the democratic function of the jury in § 1983, especially because they define what is reasonable. For First Amendment claims, deciding retaliatory arrests under the *Mt. Healthy* standard (overturning *Hartman* and *Nieves*) would provide clarity and predictability to all parties, not least because there are now decades of case law which courts could once more rely on. That includes pre-*Hartman* precedent and those

¹⁹³ Schwartz, *supra* note 68, at 678–82.

¹⁹⁴ Ronald J. Krotoszynski, Jr. & Caprice L. Roberts, *Reimagining First Amendment Remedies*, 109 IOWA L. REV. 911, 949–51 (2024).

¹⁹⁵ *Id.* at 948–49.

¹⁹⁶ Ryan Hor, *Choose Your Words Carefully: Reimagining Retaliatory Arrest After Nieves v. Bartlett*, 90 FORDHAM L. REV. 873, 901 (2021).

¹⁹⁷ *Id.*

cases post-*Hartman* which met the no-probable-cause rule. The standard also has a strong textual basis and most accurately reflects the definition of “under color of law” by incorporating the officer’s subjective intent as a but-for cause of the violation but allowing the existence of probable cause to remain highly relevant to the officer’s defense.

If the Texas cases were considered under this standard, they largely would have reached the same results in the *Qaddumi* and *SJP* orders. It would not have affected the sovereign immunity dismissals. However, under *Harlow*’s reasonable person requirement, the *Qaddumi* and *Heilrayne* plaintiffs might have had an opportunity to present Hartzell and Wood’s implausible deniability to a jury. This outcome is still not predetermined; while there is substantial evidence of unconstitutional or retaliatory motive, their positions are closer to a prosecutor than an arresting officer, so the complex causal nexus contemplated in *Hartman* may make it difficult to prove their actions were a but-for cause of plaintiffs’ suspensions and arrests. That nexus may also still require the *Tinker* considerations seen in the Western District because *Tinker* considers the complex rulemaking required of state university officials to balance free speech with a safe learning environment. It is also likely that they could provide some evidence to show they would have taken the same actions without GA-44, under some nominal time, place and manner restrictions.

The police in *Heilrayne* may also be a different matter under *Mt. Healthy/Harlow*. The *Heilrayne* plaintiffs provided evidence that police openly engaged in viewpoint discrimination, made baseless atypical arrests, and made statements which rebut the defense that they would have behaved similarly without unconstitutional motive. Baseless arrest in these circumstances is more likely to be considered a clearly established constitutional violation under *Harlow*, so it could be that the Western District would not have applied qualified immunity to all police involved. The *Tinker* considerations are also less relevant to the police than school administrators because police are not involved in complex rulemaking. Thus, under this standard, police are less likely to be granted immunity for baseless arrest to enforce facially obvious viewpoint discrimination, especially where their statements show they are aware their orders are atypical.

The *Mt. Healthy* standard would return power to the people to rule on government conduct via jury by eliminating the court-promulgated mutated threshold question known as *Nieves*. As it stands, each time the court tinkers, they provide a fresh wave of broad immunity for actions that are somehow distinguishable from blatant repression of protected speech. Returning to the stable *Mt. Healthy* standard inhibits that gamification in the First Amendment context. In the Texas protest cases, the courts have

an opportunity for minor reform to include evidence of atypical arrest and officer statements as objectively valuable, which they should take. But so long as the Court allows qualified immunity to stand and makes its little adjustments, it has nullified § 1983 and practically abdicated its duty to provide sufficient remedies to people whose speech has been baselessly criminalized. Without major changes, this doctrine will define that impotence in the coming era of crackdowns.