APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS BROWNSVILLE DIVISION

BLANCA ARIZMENDI,
Plaintiff,

VS

BROWNSVILLE INDEPENDENT SCHOOL DISTRICT, et al
Defendants

CIVIL ACTION NO.1:16-CV-00063

MEMORANDUM OPINION AND ORDER

Before the Court is Defendants' Motion for Summary Judgment [Doc. No. 25]. The Plaintiff brought suit under 42 U.S.C. §§ 1983, 1985(2) against Brownsville Independent School District ("BISD"), BISD Police Department, and Sergeant Patrick Gabbert ("Sgt. Gabbert") in his individual capacity. The Court granted BISD Police Department's Motion for Summary Judgment in its March 2nd, 2017 Order. [Doc. No. 39]. The remaining claims in this suit are 42 U.S.C. § 1983 Fourth Amendment false arrest and malicious prosecution claims against Sgt. Gabbert, a 42 U.S.C. § 1985(2) conspiracy claim against Sgt. Gabbert and BISD, and 42 U.S.C. § 1983 First Amendment retaliation claims against Sgt. Gabbert and BISD.

During the hearing on this Motion, the Court requested briefing on three topics related to the core issues pertaining to possible material issues of fact. The Court will address the parties' briefing on those issues in addition to resolving any remaining issues presented in the earlier filings in this case.

I. Background

High school class rank can be a determinative factor for prestigious college admissions and scholarships. Given its importance in today's society, students aiming for coveted top spots often find themselves locked in intense competition with their classmates. A fair grading system

ultimately leads even the most ambitious students to accept their academic outcomes, wherever the chips may fall. Naturally, a particular student's unfair advantage allowing him or her to game the system sparks controversy and peer resentment.

The Plaintiff is a French teacher employed by BISD, assigned to Simon Rivera High School ("Rivera High School"). The Plaintiff received a note from Ms. Dora Martinez concerning Ms. Martinez's daughter's grade point average ("GPA"). Ms. Martinez is related to Rivera High School Principal Hector Hernandez ("Principal Hernandez"), and her daughter is Principal Hernandez's niece. Ms. Martinez w was apparently upset that her daughter received a 90 average on her assignments in Plaintiffs class in the third six weeks of the fall semester of 2012. Allegedly, Principal Hernandez began to

express his concern about his niece's grade to Plaintiff, and also recruited Assistant Principal Rose Ortiz ("Assistant Principal Ortiz") to further convey his dissatisfaction about his niece's grade to Plaintiff. According to Plaintiff, Principal Hernandez escalated his coercive tactics at a May 21, 2013 meeting. At that meeting, Principal Hernandez allegedly tried to pressure, intimidate, and coerce Plaintiff into raising his niece's GPA.

A later review of Principal Hernandez's niece's grades revealed an apparent discrepancy. A grade change form allegedly signed and submitted by Plaintiff boosted Principal Hernandez's niece's grade considerably, resulting in a GPA that tied her for the second highest GPA in her class. [See Defs.' Ex. A, Doc. No. 25-1 at 32]. An unknown source leaked information about the grade change, and the controversy became a popular topic on local news stations. The Plaintiff denies that she made the change and alleges that Principal Hernandez or Assistant Principal Ortiz orchestrated the grade change. The Defendants instead contend that Plaintiff was responsible for submitting the grade change form.

The Plaintiff filed a grievance against Principal Hernandez on June 14, 2013, accusing him of forging Plaintiffs signature to change his niece's grade and of creating a hostile work environment for Plaintiff. [Pl.'s Ex. 9, Doc. No. 27-10 at 3]. After the grade change controversy became a topic for local media, Sgt. Gabbert, a detective with the

BISD Police Department, initiated an investigation on July 17, 2013 at the behest of Dr. Tony Juarez, BISD's then director of human resources, into the possible offense of tampering with a government record under Tex. Pen. Code § 37.10. [Defs.' Ex. A, Doc. No. 25-1 at 5]. Soon thereafter, Plaintiff was questioned by Sgt. Gabbert as to whether Plaintiff actually signed the grade change form. [Id. at 6].

The Plaintiff claims that at the time of her interview with Sgt. Gabbert, she believed that she was simply a cooperative witness in Sgt. Gabbert's investigation. The Plaintiff was also interviewed by the Cameron County District Attorney's office along with other employees from BISD. According to Sgt. Gabbert's case files, on September 24, 2013, Plaintiff told Sgt. Gabbert that the signature on the grade change form was a forgery. [Defs.' Ex. A, Doc. No. 25-1 at 6]. On September 28, 2013, Plaintiff submitted a sworn statement to Sgt. Gabbert averring to the same. [Id. at 24, 26].

Sgt. Gabbert's case files indicate that on December 13, 2013, Sgt. Gabbert asked Plaintiff for samples of her handwriting. [Id. at 13]. Sgt. Gabbert sent the samples to the Texas Department of Public Safety Crime Lab ("DPS"). On July 16, 2014, DPS issued a report indicating that there was a strong possibility that Plaintiff wrote her signature on the grade change form, but that a more definite determination might be possible if Sgt. Gabbert submitted additional signature samples. [Id. at 40]. In September of 2014, Sgt. Gabbert obtained

additional samples from Plaintiff. [id. at 14]. On December 8, 2014, DPS issued a lab report in which the analyst concluded that Plaintiff signed the grade change form. [Id. at 29].

On January 5, 2015, Sgt. Gabbert arrested Plaintiff under authority of an arrest warrant obtained from a City of Brownsville Municipal Magistrate Judge ("magistrate"). [Id. at 30]. In the warrant affidavit he provided to the magistrate, Sgt. Gabbert listed Texas Penal Code § 42.06, Texas' "false alarm" statute, as the statute the Plaintiff had violated. [Gabbert Aff., Doc. No. 25-1 at 27, Dec. 31, 2014]. Under§ 42.06:

> A person commits an offense if he knowingly initiates, communicates or circulates a report of a present, past, or future bombing, fire, offense, or other emergency that he knows is false or baseless and that would ordinarily:
> (1) cause action by an official or volunteer agency organized to deal with emergencies;
> (2) place a person in fear of imminent serious bodily injury; or(
> 3) event or interrupt the occupation of a building, room, place of assembly, place to which the public has access, or aircraft, automobile, or other mode of conveyance.

Tex. Pen. Code § 42.06. The offense is a Class A misdemeanor, and a state jail felony if the report is related to an emergency involving a public or private institution of higher learning, or a public primary or secondary

school. Id. According to Plaintiff, she was processed into the city jail and released the same day without seeing a magistrate judge. The Plaintiffs criminal charge was dismissed on June 30, 2015 because the two-year statute of limitations on the offense had expired. [Pl.'s Ex. 10, Doc. No. 27-11 at 2]. Sgt. Gabbert's warrant affidavit listed the offense date as February 11, 2013. [Gabbert Aff., Doc. No. 25-1 at 27].

The Plaintiff subsequently brought this suit alleging violations of her First and Fourth Amendment rights under 42 U.S.C. § 1983 and a conspiracy claim under 42 U.S.C. § 1985(2). The Plaintiff claims that Sgt. Gabbert knowingly and deliberately, or with a reckless disregard

for the truth, made false statements to secure the warrant, and that those false statements were material to the finding of probable cause for Plaintiff's arrest (Fourth Amend-ment false arrest/malicious prosecution claim). The Plaintiff also alleges that BISD and Sgt. Gabbert conspired against Plaintiff to deprive Plaintiff of her constitutional and statutory rights (conspiracy claim). Finally, Plaintiff claims that BISD and Sgt. Gabbert retaliated against Plaintiff's expression of protected speech (First Amendment retaliation claim).

II. Legal Standard

Summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The movant bears

the burden of identifying those portions of the record it believes demonstrate the absence of a genuine issue of material fact." *Triple Tee Golf, Inc. v. Nike, Inc.*, 485 F.3d 253, 261 (5th Cir. 2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986)). Once a movant submits a properly supported motion, the burden shifts to the non- movant to show that the Court should not grant the motion. *Celotex Corp.*, 477 U.S. at 321-25.

The non-movant then must provide specific facts showing that there is a genuine dispute. Id. at 324; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Court must draw all reasonable inferences in the light most favorable to the nonmoving party in deciding a summary judgment motion. Id. at 255. The key question on summary judgment is whether a hypothetical, reasonable factfinder could find in favor of the nonmoving party. Id. at 248.

III. Analysis

(A) 42 U.S.C. § 1983 False Arrest Claim Against Sgt. Gabbert

1. Has Plaintiff Raised a Fact Issue as to whether Sgt. Gabbert Knowingly or Recklessly Misrepresented a Material Fact in the Warrant Affidavit?

The claim of false arrest is a constitutional tort which implicates the guarantees of the Fourth and Fourteenth Amendments. *Martinez v. Klevenhagen*, 52 F.3d 1068 (5th Cir. 1995). To establish that Sgt. Gabbert violated the Plaintiffs constitutional rights by the arrest, Plaintiff must show that Sgt. Gabbert lacked probable cause to arrest her. See *Haggerty v. Tex. S. Univ.*, 391 F.3d 653, 655 (5th Cir. 2004). "If there was probable cause for any of the charges made ... then the arrest was supported by probable cause, and the claim for false arrest fails." Wells v. Bonner, 45 F.3d 90, 95 (5th Cir. 1995). The court may make its own legal determination of probable cause in a§ 1983 claim. *Garris v. Rowland*, 678 F.2d 1264, 1270 (5th Cir. 1982). Nevertheless, where facts relied upon to show probable cause in a § 1983 action are controverted, they must be resolved by the jury before any such legal determination can be made. *Id.*

Pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), a Fourth Amendment violation may be established where an officer intentionally, or with reckless disregard for the truth, includes a false statement in a warrant application. *Kohler v. Englade*, 470 F.3d 1104, 1113 (5th Cir. 2006). In the context of a§ 1983 false arrest claim, an officer is liable for swearing to false information in an affidavit in support of a search warrant provided that: (1) that the officer knowingly, or with reckless disregard for the truth, provided false information to secure the arrest warrant and (2) the warrant application would not have been sufficient to establish probable cause without the false

statements. *Freeman v. County of Bexar,* 210 F.3d 550, 553

(5th Cir. 2000) (citing *Franks*, 438 U.S. at 171). Whether an officer knowingly, or with reckless disregard for the truth, provided false statements to secure a warrant affidavit is a question of fact for the jury. *Johnson v. Norcross*, 565 Fed. Appx. 287,289 (5th Cir. 2014)

The Plaintiff alleges that Sgt. Gabbert[1] misrepresented a key fact in the warrant he submitted to the magistrate-specifically-that Plaintiff circulated a report which was false and baseless. [Doc. No. 2 at 6; Doc. No. 44 at 18]. To secure a warrant for Plaintiff's arrest, Sgt. Gabbert averred that Plaintiff "initiat[ed] and communicat[ed] a report that [he] knew was 'false and baseless'" which caused Sgt. Gabbert to "initiate an investigation" into the grade change allegations. [Gabbert Aff., Doc. No. 25-1 at 27]. Sgt. Gabbert further averred that Plaintiff "circulated a report that was false and baseless which in tum caused BISD Police investigators to seize several public school computers and documents for forensic reviews." [Id.] The Plaintiff identifies deposition testimony in which Sgt. Gabbert admits that Plaintiff never filed any report with law enforcement which subsequently caused Sgt. Gabbert to initiate an investigation into a potential

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[1] There is no evidence that was provided to the Court suggesting that anyone else but Sgt. Gabbert drafted or assisted in drafting the affidavit submitted to the magistrate.

forgery related to the grade change. [See Gabbert Dep., 61:5-12, Oct. 6, 2016].

The Plaintiff's grievance filed with BISD was not the catalyst for the "false report" investigation. Sgt. Gabbert testified that he was told to initiate the investigation by BISD's director of human resources after a local news station broke the grade change story with the help of the anonymous source. [Id. at 10:14-25, 11:1-3]. Sgt. Gabbert does not even reference the grievance in his warrant affidavit. [Gabbert Aff., Doc. No. 25-1 at 27]. The Plaintiff has provided competent summary judgment to raise a fact issue as to whether Sgt. Gabbert knowingly submitted false statements in his warrant affidavit.

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The Defendants argue that despite these deficiencies, their Motion should still be granted because Sgt. Gabbert did have probable cause for at least one crime to arrest Plaintiff. Sgt. Gabbert does refer to the alleged crime committed by Plaintiff as an offense of "False Report" twice in the warrant affidavit. [*Id.*] Under Texas' "false report" statute, a person who, with intent to deceive, knowingly makes a false statement that is material to a criminal investigation to a peace officer may be guilty of a Class B misdemeanor. Tex. Pen. Code § 37.08. Sgt. Gabbert averred that Plaintiff told him that her signature on the grade change form was forged, an allegation that was contradicted by DPS's handwriting analysis report. [Gabbert Aff., Doc. No. 25-1 at 27]. Thus, Sgt. Gabbert arguably had probable cause to arrest Plaintiff under § 37.08.

Nevertheless, Sgt. Gabbert averred that Plaintiff allegedly communicated a false report on February 11, 2013. [Gabbert Aff., Doc. No. 25-1 at 27]. The Plaintiff transmitted the alleged false statement to Sgt. Gabbert on September 24, 2013. [Id.]. Clearly Sgt. Gabbert was not referring to Plaintiffs statement to him as the "False Report" he referenced in his warrant affidavit. Sgt. Gabbert was instead referring to the date the grade change form was submitted. [See Defs.' Ex. A, Doc. No. 25-1 at 32].

Moreover, Sgt. Gabbert arrested Plaintiff for a more severe offense than one punishable under § 37.08. Sgt. Gabbert averred in his warrant affidavit that the offense Plaintiff allegedly committed under Tex. Pen. Code§ 42.06 carried a penalty of a Class A misdemeanor. [Gabbert Aff., Doc. No. 25-1 at 27]. Punishment for a Class A misdemeanor may include jail time for up to one year. Tex. Pen. Code § 12.21. Texas' false report crime under § 37.08 is a Class B misdemeanor, Id. § 37.08, and is punishable for confinement in jail for a maximum of 180 days. Id. § 12.22.

Even if the false statements in the warrant affidavit were not made knowingly, Sgt. Gabbert may have provided them recklessly. The false alarm statute was an obviously cumbersome fit on its face for the particulars of Plaintiff's arrest. Setting aside the fact that the statute applies only to emergent situations, which did not exist, Sgt. Gabbert could not pinpoint any report Plaintiff filed with law enforcement or a volunteer agency

which satisfies the statute because Plaintiff never made one. [See Gabbert Dep., 61:5-12]. The Court is convinced that Plaintiff has adequately raised a fact issue as to whether Sgt. Gabbert recklessly included a material misrepresentation in the warrant affidavit he submitted to the magistrate. See United States v. Alvarez, 127 F.3d 372, 374-75 (5th Cir. 1997) (finding that an officer acted with reckless disregard when the officer submitted a warrant affidavit under a Texas statute that criminalized "sexual conduct" with a minor where the evidence of the crime was limited to a one-second video clip of a minor female exposing her breast).

The Plaintiff has raised a triable issue of fact as to the first prong of the *Franks* analysis. Sgt. Gabbert may have simply been mistaken when he submitted the warrant affidavit to the magistrate judge, but the mix-up may have been purposeful, or a product of reckless disregard. This question is significant, and its resolution is tasked to the factfinder. As to the second part of the Franks analysis, the Court must decide whether, absent the misleading statements, the warrant application would have been sufficient to establish probable cause. Under the test established by Franks, even if Sgt. Gabbert included false or misleading statements in his affidavit, such statements would not be of issue unless those statements were material, or necessary, to a finding of probable cause.

Sgt. Gabbert's averment that Plaintiff was responsible for "initiating and communicating a report that was 'false and baseless'" is

the crux of false alarm crime. [Gabbert Aff., Doc. No.

25-1 at 27]. Sgt. Gabbert averred that it was Plaintiff's "report" that caused BISD Police investigators to "initiate an investigation" into the crime of tampering with governmental records. [Id.] It is difficult to postulate how Sgt. Gabbert could have probable cause to arrest someone under the false alarm statute without including the very statement which transforms Plaintiffs action into the crime of false alarm. If the offending statements were removed, there would be no false alarm crime to charge, and a magistrate could not make a determination that Plaintiff had committed the false alarm offense.

As noted earlier in the opinion, Sgt. Gabbert may have had probable cause to arrest Plaintiff under Texas' false report statute (Tex. Pen. Code § 37.08), and he did include facts in his warrant affidavit suggesting that Plaintiff submitted a false statement which was material to Sgt. Gabbert's investigation. [Gabbert Aff., Doc. No. 25-1 at 27]. Relying primarily on *Devenpeck v. Alford*, 543 U.S. 146 (2004), Defendants argue that as a matter of law, as long as Sgt. Gabbert included sufficient facts in the warrant affidavit to arrest Plaintiff for any crime, the warrant affidavit Sgt. Gabbert submitted was constitutionally sufficient even if it referenced the wrong crime (the false alarm offense under Tex. Pen. Code § 42.06). In a somewhat related argument, one that is closely intertwined with the issue of

qualified immunity addressed later in the opinion, Defendants also argue that because Sgt. Gabbert had probable cause for Plaintiffs warrantless arrest pursuant to the false report offense, Sgt. Gabbert's arrest of Plaintiff is constitutionally sufficient notwithstanding the warrant affidavit he submitted to the magistrate.

In *Devenpeck*, a police officer, one of the petitioners, arrested the respondent for surreptitiously videotaping the officer at a traffic stop-an act that the officer erroneously believed was a crime under Washington's Privacy Act. See *Devenpeck,* 543 U.S. at 150-151. There were alternate grounds to establish probable cause for respondent's arrest under a statute

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criminalizing the impersonation of a police officer. See *id*. at 150. The officer knew that respondent's car had flashing headlights, that the respondent's radio was tuned to the county police band, and that the respondent had handcuffs and a hand-held police scanner in his car. Id. at 149. Nevertheless, the officer informed the respondent he was under arrest for a violation of the Privacy Act only. See *id*. at 156.

The respondent subsequently asserted a § 1983 claim for false arrest in federal district court, arguing that the officer did not have probable cause to arrest him for conduct that was not considered a crime in the state. See *id.* at 151. The jury found that there was probable cause motivating respondent's arrest, and reached a verdict for the officer. *Id* The Ninth Circuit reversed, finding that no

evidence supported the jury's verdict. *Id* at 152. The circuit court reasoned that the officer could not have had probable cause for the arrest because the officer informed the respondent that he was under arrest for a violation of the Privacy Act only, an offense that did not actually criminalize the videotaping of an officer. See *id*

The Supreme Court rejected the Ninth Circuit's restriction that limited the probable cause inquiry to the stated reason for the arrest. The Court explained that "an arresting officer's state of mind (except for the fact that he knows) is irrelevant to the existence of probable cause." Id at 153. The Court ruled that an arresting officer's "subjective reason[s] for making the arrest need not be the criminal offense as to which the known facts provide probable cause." Id Thus, per Devenpeck, as long as an arresting officer has sufficient probable cause to arrest a suspect for any crime, the stated reason for the arrest has no bearing on its constitutionality.

The Supreme Court pointed out what it perceived as a clear absurdity if the constitutionality of an arrest were to hinge on the stated reason for the detention: a knowledgeable officer's arrest would be valid while an arrest made by a rookie in precisely the

same circumstances would not. *Id.* at 154. The Court noted that while it was certainly good practice to inform a person of the reason of their arrest at the time they are taken in custody, there was no constitutional requirement to do so. *Id.* at 155.

Devenpeck, however, addressed only a warrantless arrest. The Defendants do not identify any authority extending *Devenpeck* to a situation where a police officer secures a warrant for an arrest through false statements. The Fifth Circuit has, post-*Devenpeck*, faced the question of whether probable cause is required as to the exact crime charged in the warrant, but has yet to provide an answer. See *Johnson v. Norcross*, 565 Fed. Appx. 287, 290 n.1 (5th Cir. 2014) (declining to rule on whether *Devenpeck* applied to arrests made pursuant to a warrant). The Fifth Circuit has further opined that the *Devenpeck* standard may be different when a magistrate is deceived in order to obtain a warrant. See *Cole v. Carson*, 802 F.3d 752, 764 (5th Cir. 2015), cert. granted, Judgment vacated sub nom. *Hunter v. Cole*, 137 S. Ct. 497, 196 L. Ed. 2d 397 (2016). In a non-precedential opinion, the Circuit has characterized as "dubious" the argument "that an officer can give a knowingly false affidavit and avoid liability by the fortuity that, after the fact, he may be able to argue some other basis for the arrest." *Deleon v. City of Dallas*, 345 Fed. Appx. 21, 23 n.2 (5th Cir. 2009)

The Supreme Court in *Devenpeck* did not fundamentally change its longstanding precedent as outlined in Franks. Under the first prong of the *Franks* test, a defendant must show that a false statement was knowingly, or with reckless disregard for the truth, included in a warrant affidavit. In contrast to the bedrock principle clarified for warrantless arrests by *Devenpeck*, the mindset of an officer is clearly relevant in a

Franks challenge to a warrant affidavit. As to the second part of the *Franks* test, a misrepresentation in an affidavit may be excused where there is sufficient probable cause for the crime charged without the

misrepresentation. The Defendants have alerted the court to no binding precedent under Franks that allows for a warrant to be saved if the probable cause exists for any other crime the suspect may have committed.

"Warrants inevitably take some time for police officers or prosecutors to complete and for magistrate judges to review." *Missouri v. McNeely*, 133 S. Ct. 1552, 1562 (2013). Warrant affidavits are "normally drafted by nonlawyers in the midst or haste of a criminal investigation," and courts rightfully should give a pass on "[t]echnical requirements of elaborate specificity." *United States v. Ventresca*, 380 U.S. 102, 108 (1965). A false statement submitted to secure a warrant affidavit is by no means a technical requirement and deserves no comparable leniency. This is especially true for the facts at bar where there is no evidence of any exigent circumstances which demanded that Sgt. Gabbert rush to arrest Plaintiff. In fact, Plaintiff was not arrested for almost two years after the date pinpointed by Sgt. Gabbert.

The Defendant would have this Court read Devenpeck to hold that the conduct of an arresting officer who knowingly or recklessly submits a false statement a magistrate judge should be excused if the officer's warrant affidavit fortuitously supports another

unidentified crime, or if the arresting officer could have arrested the suspect without a warrant. The Court, like the Fifth Circuit, finds Defendants' argument "dubious." Such a constitutional bail-out renders the Fourth Amendment's requirement that a warrant not issue but "upon probable cause, supported by Oath or affirmation" a mere nullity. This Court does not read the ruling in *Devenpeck* to fundamentally alter the precedent set in *Franks* as far as that opinion applies to arrests made under the authority of a warrant secured through knowing or reckless false averments.

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The Court concludes that without the alleged misrepresentation that Plaintiff circulated or initiated a report, the warrant application would not have been sufficient to show probable cause. The Plaintiff has raised an issue of triable fact as to whether Sgt. Gabbert knowingly, or with reckless disregard, misrepresented material facts in the affidavit he submitted to secure a warrant for Plaintiffs arrest.

2. Does the Independent Intermediary Doctrine Insulate Sgt. Gabbert from Liability?

Under the independent intermediary doctrine, "even an officer who acted with malice ... will not be liable if the facts supporting the warrant or indictment are put before an impartial intermediary such as a magistrate or grand jury, for that intermediary's 'independent' decision 'breaks the causal chain' and insulates the initialing party." *Hand v. Gary*, 838 F.2d 1420, 1427

(5th Cir. 1988) (quoting *Smith v. Gonzales*, 670 F.2d 522, 526 (5th Cir. 1982)). Nevertheless, the chain of causation is broken only where all the facts are presented to the independent intermediary and the law enforcement official does not to withhold or misrepresent any pertinent information to the independent intermediary. *Id.* at 1428. "Any misdirection of the magistrate or the grand jury by omission or commission perpetuates the taint of the original official behavior." *Id.*

"[M]ere allegations of 'taint,' without more, are insufficient to overcome summary judgment." *Cuadra v. Houston Indep. Sch. Dist.*, 626 F.3d 808, 813 (5th Cir. 2010). The plaintiff must show that the officer knowingly submitted a false statement, or did so in reckless disregard for the truth. *Anderson v. City of McComb, Miss.*, 539 Fed. Appx. 385, 387 (5th Cir. 2013). Whether an independent intermediary's findings were tainted by a false or misleading statement by an officer is a question of fact for the jury. See *Buehler v. City of Austin/Austin Police Dep't,* 824 F.3d 548, 554 (5th Cir. 2016), cert. denied sub nom. *Buehler v. Austin Police*

Dept., 16-729, 2017 WL 1366734 (U.S. Apr. 17, 2017) (clarifying that a determination as to whether the "taint" exception to independent intermediary doctrine applies is a triable question of fact).

As noted above, there is a fact question as to whether Sgt. Gabbert knowingly or recklessly misrepresented material statements in the warrant affidavit he submitted

to the magistrate judge. Thus, the independent intermediary doctrine does not bar Plaintiffs false arrest claim at this stage in the proceedings.

3. Is Sgt. Gabbert Entitled to the Defense of Qualified Immunity?

Qualified immunity shields government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Determining whether a government official may be clothed in the defense of qualified immunity involves a two-step process. "First, a court must decide whether a plaintiffs allegation[s], if true, establishes a violation of a clearly-established right." *Hernandez ex rel. Hernandez v. Tex. Dep't of Protective & Regulatory Servs.,* 380 F.3d 872, 879 (5th Cir. 2004). Second, "a court must decide whether the conduct was objectively reasonable in light of clearly established law at the time of the incident." *E.A.F.F. v. Gonzalez*, 600 Fed. Appx. 205, 209 (5th Cir. 2015), cert. denied, 135 S. Ct. 2364 (2015). A defendant's assertion of qualified immunity "alters the usual ... burden of proof." *Trent v. Wade*, 776 F.3d 368, 376 (quoting *Brown v. Callahan*, 623 F.3d 249,253) (5th Cir. 2010)). The plaintiff thus bears the burden of proof to show "a genuine and material dispute as to whether the official is entitled to qualified immunity." *Id.*

Immunity ordinarily should be decided by the court long before trial. *Hunter v. Bryant*,

502 U.S. 224, 228 (1991). Qualified immunity is "an immunity from suit rather than a mere

defense to liability ... it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis deleted). Where there remain disputed issues of material fact related to immunity, the jury, if properly instructed, may decide the question. *Snyder v. Trepagnier,* 142 F.3d 791,800 (5th Cir. 1998) (quoting *Presley v. City of Benbrook,* 4 F.3d 405, 410 (5th Cir. 1993)) (internal quotation marks omitted). The denial of a motion for summary judgment based on qualified immunity is immediately appealable under the collateral order doctrine to the extent that it turns on an issue of law. *Flores v. City of Palacios,* 381 F.3d 391, 393 (5th Cir. 2004) (quoting *Mitchell,* 472 U.S. at 530) (internal quotation marks omitted).

The right to be free from arrest without probable cause is a clearly established constitutional right. *Mangieri v. Clifton,* 29 F.3d 1012, 1016 (5th Cir. 1994). Thus, the Court must decide whether Sgt. Gabbert's conduct was "objectively unreasonable" in light of clearly established law. *Crostley v. Lamar County, Texas*, 717 F.3d 410, 422 (5th Cir. 2013). The court determines whether an officer's conduct was objectively unreasonable after taking into account the totality of the circumstances at the time the arrest were made. *Id.*

Knowingly or recklessly submitting a warrant affidavit which contains false statements is not objectively reasonable

conduct in light of clearly established law. See *Hart v. O'Brien*, 127 F.3d 424, 448-49 (5th Cir. 1997), abrogated on other grounds by *Kalina v. Fletcher*, 522 U.S. 118 (1997). "In the context of Fourth Amendment false arrest claims and the issue of probable cause, [e]ven law enforcement officials who reasonably, but mistakenly, conclude that probable cause is present are entitled to immunity." Id. (quoting *Gibson v. Rich*, 44 F.3d 274, 277 (5th Cir. 1995))(internal quotation marks omitted). In considering the totality of the circumstances, the court must disregard any false statements in the affidavit supporting the warrant that are

made knowingly or intentionally, or with reckless disregard for the truth. *Hale v. Fish*, 899 F.2d 390,400 & n. 3 (5th Cir. 1990) (citing *Franks* , 438 U.S. at 154).

Obviously, the possibility remains that Sgt. Gabbert simply made a mistake. If the eventual factfinder were to decide as such, Sgt. Gabbert would undoubtedly be shielded by qualified immunity. See *Garris*, 678 F.2d 1273 (finding that a police officer was entitled to qualified immunity where the jury found that the officer's material omission in a warrant affidavit was the product of negligence or innocent mistake). As it stands, there remains an issue of triable fact as to whether Sgt. Gabbert knowingly, or with reckless disregard, misrepresented material facts in the warrant affidavit. The Defendants' Motion is denied with respect to immunity as to Plaintiffs false arrest claim against Sgt. Gabbert.

B. 42 U.S.C. § 1983 Malicious Prosecution Claim Against Sgt. Gabbert

The Fifth Circuit has ruled that there is "no such freestanding constitutional right to be free from malicious prosecution exists." *Castellano v. Fragozo*, 352 F.3d 939, 945 (5th Cir. 2003). The pertinent part of Castellano reads:

> The initiation of criminal charges without probable cause may set in force events that run afoul of explicit constitutional protect-tions-the Fourth Amendment if the accused is seized and arrested, for example, or other constitutionally secured rights if a case is further pursued. Such claims of lost constitutional rights are for violation of rights locatable in constitutional text, and some such claims may be made under 42 U.S.C. § 1983. Regardless, they are not claims for malicious prosecution and labeling them as such only invites confusion.

352 F.3d at 954. *In Deville v. Marcantel*, the Fifth Circuit further explained that a malicious prosecution claim is not "independently cognizable:"

> Instead, it must be shown that the officials violated specific constitutional rights in connection with a "malicious prosecution." For example , "the initiation of criminal charges without probable cause may set in force events that run afoul of the ... Fourth Amendment if the accused is seized and arrested ... or other constitutionally secured rights if a case is further pursued." However , these " are not

> claims for malicious prosecution." Accordingly, plaintiffs' claim under§ 1983 for " malicious prosecution" in
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> respect to the May 2006 arrest is not independentlycognizable, and defendants are entitled to summary judgment on that claim."

567 F.3d 156, 169 (5th Cir. 2009) (emphasis added). Per *Castellano*, Defendants are entitled to summary judgment for Plaintiffs malicious prosecution claim.

C. 42 U.S.C. § 1983 Retaliation Claims Against Sgt. Gabbert and BISD

"[T]he First Amendment prohibits not only direct limitations on speech but also adverse government action against an individual because of her exercise of First Amendment freedoms." Colson v. Grohman, 174 F.3d 498, 508 (5th Cir. 1999). The Plaintiff claims that she was retaliated against for filing a grievance and engaging in protected speech by BISD administrators. Liability under§ 1983 may not be predicated on *respondeat superior* liability. A local government entity may be sued "if it is alleged to have caused a constitutional tort through a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers:' *City of St. Louis v. Praprotnik,* 485 U.S. 112, 121 (1988) (citing *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 690 (1978)). The Plaintiff has identified no such policy statement, ordinance, regulation, or decision to impose §1983 liability on BISD for Plaintiffs First Amendment retaliation claim.

The Plaintiff also asserts a First Amendment retaliatory arrest claim against Sgt. Gabbert.[2]2 The Defendants repeat the same arguments as to Plaintiffs false arrest claim against Sgt. Gabbert: (1) that Sgt. Gabbert is shielded by the independent intermediary doctrine, and (2) that Sgt. Gabbert is entitled to the defense of qualified immunity.

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As discussed earlier in the opinion, a fact issue remains as to whether Sgt. Gabbert knowingly or recklessly provided a false statement to a magistrate judge and accordingly, there is a fact question as to whether the independent intermediary's findings were based on a tainted affidavit. Consequently, the independent intermediary doctrine therefore does not shield Plaintiffs First Amendment retaliation claim at this juncture.

Moving to Defendants' assertion of the qualified immunity defense, the Plaintiff bears the burden of proof to show "a genuine and material dispute as to whether the official is entitled to qualified immunity."

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[2] Courts apply a slightly different test when a plaintiff-employee suffers an adverse employment action in response to protected speech. An employee must show (I) that his or her speech was a matter of public concern, (2) that the employee suffered an adverse employment action for exercising his or her First Amendment rights, and (3) that the employee's exercise of free speech was a substantial or motivating factor in the adverse employment action. *Benningfield v. City of Houston,* 157 F.3d 369, 375 (5th Cir. 1998). The Plaintiff has provided no competent summary judgment evidence of any adverse employment action she may have suffered or evidence to suggest that Sgt. Gabbert had anything to do with any adverse employment action.

Trent, 776 F.3d at 376. To establish that Plaintiff was subjected to retaliation in violation of her First Amendment rights, Plaintiff must show: (1) that she was engaged in constitutionally protected activity, (2) that Sgt. Gabbert's actions caused her to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity , and (3) that Sgt. Gabbert's actions were substantially motivated against Plaintiffs exercise of constitutionally protected conduct. *Brooks v. City of W Point, Miss.*, 639 Fed. Appx. 986, 999 (5th Cir. 2016) (citing *Keenan v. Tejeda*, 290 F.3d 252,258 (5th Cir. 2002)).

The first issue is whether Plaintiffs internal employment grievance was constitutionally protected activity. To warrant constitutional protection, a private employment grievance must be a matter of public concern. See *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 399 (2011). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record ." *Connick v. Myers*, 461 U.S. 138, 147-48 (1983). "When a public employee speaks in his capacity as an employee and addresses personal matters such as personnel and employment disputes, rather than in his capacity as a citizen on a matter of public interest, his speech falls outside the

protection of the First Amendment." *Salge v. Edna /ndep. Sch. Dist.*, 411 F.3d 178, 186 (5th Cir. 2005).

When the speech in question merely touches on an element of private concern in a broader context of a matter of public concern, a court may conclude that the employee's speech as a whole qualifies as a matter of public concern. Id. Private speech made in the backdrop of public debate may relate to the public concern. *Kennedy v. Tangipahoa Par. Library Bd. of Control*, 224 F.3d 359, 372 (5th Cir. 2000), abrogated on other grounds by *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 562-63 (2007). Furthermore, if releasing the private speech to the public would inform the populace of more than the fact of an employee's employment grievance, the content of the speech may be public in nature. Id.

Looking to Plaintiffs grievance, part of Plaintiffs "speech" certainly reflected a matter of private concern. The Plaintiff raised a complaint about a workplace controversy which she claimed affected both her work environment and health. [Pl.'s Ex. 9, Doc. No. 27-10 at 4]. Nevertheless, the controversy she raised involved the unethical conduct of administrators at Rivera High School, a matter, if made public, would obviously be of import to the community at large.

Moreover, the Plaintiffs speech was made in the backdrop of significant public discussion. The Plaintiff filed a grievance on May 29, 2013 and a grievance hearing was held on August 6, 2013. On July 7, 2013, Channel 4 News, a local network affiliate, published a news story covering the alleged grade change controversy which featured statements by outraged parents of children at

Rivera High School. [Pl.'s Ex. 3, Doc. No. 27-4]. Given that the grievance hearing was conducted in the backdrop of significant public debate, the Court is convinced that speech should not be subsumed to the category of speech covering internal

personnel disputes and working conditions. The Plaintiffs speech was a matter of public concern, and thus qualifies as constitutionally protected speech.

The Plaintiff, however, fails to satisfy the second prong of the First Amendment retaliation test. 42 U.S.C. § 1983 is a tort statute, and "[a] tort to be to be actionable requires injury." *Ammons v. Baldwin*, 705 F.2d 1445, 1448 (5th Cir. 1983). Obviously, Plaintiff was arrested. Legally, a false arrest may chill further speech by a person of ordinary sensibilities. See *Lacey v. Maricopa County*, 693 F.3d 896, 917 (9th Cir. 2012) (citing *Beck v. City of Upland*. 527 F.3d 853, 871 (9th Cir. 2008)) ("[A]rresting someone in retaliation for their exercise of free speech rights is sufficient to chill speech is an understatement.") (internal quotation marks omitted).

Nevertheless, whether a person of ordinary sensibility would be chilled by the alleged retaliation is a mixed question of fact and law. See *Keenan*, 290 F.3d at 260 (finding that the district court erroneously ruled no fact issue precluded summary judgment where the plaintiffs included uncontroverted affidavits averring that they curtailed their protected speech activities in response to their retaliatory prosecutions). To that effect,

Plaintiff does not provide summary judgment evidence indicating that her protected speech activities were chilled in any manner in response to her arrest. Counsel's statements are not competent summary judgment evidence. See Fed. R. Civ. P. 56(c)(l)(A). A simple affidavit from Plaintiff would have sufficed. The Plaintiff has not created a fact issue as to a chilling effect on her post-arrest speech.

The Plaintiff has not bet her burden on the third prong of the First Amendment retaliation test. In all likelihood, there is no smoking gun in Sgt. Gabbert's case files that would definitively establish the grievance as a substantially motivating factor for the arrest. Certainly, Sgt. Gabbert initiated the grade change investigation after the grievance was filed, and Sgt. Gabbert's case

files indicate that he knew of Plaintiffs grievance. [See Defs.' Ex. A, Doc. No. 25-1 at 6]. Nevertheless, the Plaintiff has not provided any competent summary judgment to suggest that Sgt. Gabbert's actions were in any way motivated against Plaintiffs exercise of protected speech. In fact, all of the evidence supports the opposite conclusion. Sgt. Gabbert did not take any action until DPS informed him that in its opinion, the grade change form was executed by Plaintiff. This was over a year-and-a-half after Sgt. Gabbert learned about the grievance.

The Court asked the parties in an in-court hearing to brief the question of whether the Plaintiffs Fourth Amendment false arrest claim and Plaintiffs First Amendment retal-

iatory arrest claim are factually mutually exclusive [Summ. J. Hr'g Tr. 39, Mar. 2, 2017]. According to the summary judgment evidence, Sgt. Gabbert began investigating Plaintiff after being requested to do so by BISD's director of human resources-not because of Plaintiffs grievance. [Defs.' Ex. A, Doc. No. 25-1 at 5]. Obviously, this is the very basis of Plaintiffs claim that Sgt. Gabbert's warrant affidavit contains false statements. Had the evidence shown that the arrest was motivated by Plaintiffs grievance, Defendants would have had a better argument that the warrant affidavit does not include false statements, but merely contains mistakes.

The briefing submitted by both parties did not adequately address the Court's question. Notwithstanding the fact that Plaintiffs claims are potentially incompatible, the Plaintiff has not provided competent summary judgment to create an issue of triable fact as to whether Sgt. Gabbert's conduct caused Plaintiff to suffer an injury that would chill constitutionally protected speech or as to whether Sgt. Gabbert's actions were substantially motivated against Plaintiffs exercise of constitutionally protected speech. As Plaintiff has not met her burden to bring forth competent summary judgment evidence that Sgt. Gabbert's conduct violated her First Amendment constitutional rights, a discussion of whether Sgt. Gabbert acted in an objectively

unreasonable manner is unnecessary. Sgt. Gabbert is entitled to the defense of qualified immunity against Plaintiffs retaliation claim.

The Defendants' Motion is granted as to Plaintiffs First Amendment retaliation claim against both Sgt. Gabbert and BISD.

D. 42 U.S.C. § 1985(2) Conspiracy Claim against Sgt. Gabbert and BISD

The Plaintiff claims that Sgt. Gabbert and BISD conspired against Plaintiff to deprive Plaintiff of her constitutional rights. The Defendants argue that the longstanding rule in the Fifth Circuit that a corporation (or single legal entity) can not conspire with its own agents or employees-known as the intra-corporate conspiracy doctrine-bars Plaintiffs claim. *Hilliard v. Ferguson*, 30 F.3d 649, 651 (5th Cir. 1994). Citing to *Reich v. Lopez*, 38 F. Supp. 3d 436, 465 (S.D.N.Y. 2014), the Plaintiff asserts that because there were members of the conspiracy who were not agents or employees of BISD, the intracorporate conspiracy doctrine does not apply.

As the Court noted in the hearing on these issues, for purposes of summary judgment, the Plaintiff must provide some evidence that there were in fact other members of the conspiracy who were not agents or employees of BISD. [See Summ. J. Hr'g Tr. 42]. In the briefing Plaintiff submitted to the Court after the hearing, Plaintiff simply pointed out that she pleaded that another party outside the organization was involved in the conspiracy. [Doc. No. 44 at 20]. Assuming that Reich actually stands for the exception to the intracorporate conspiracy doctrine Plaintiff asserts and that such an exception is even recognized by the Fifth Circuit, the Plaintiff

provides no competent summary judgment evidence pertaining to the involvement of any persons in the alleged conspiracy aside from BISD agents or employees.

Moreover, Plaintiff has not even properly pleaded a § 1985(2) case. The first clause of § 1985(2) prohibits conspiracies that interfere with the administration of justice in federal court. *Daigle v. Gulf State Utilities Co., Local Union No. 2286*, 794 F.2d 974, 979 (5th Cir. 1986). The

Plaintiff does not so argue-nor is there any summary judgment evidence to indicate-that this clause is applicable to Plaintiff's claim. Id. The second clause prohibits conspiracies that interfere with the administration of justice in state court. Id. The second clause of§ 1985(2) contains equal protection language paralleled in § 1985(3). Id. The Fifth Circuit is clear that § 1985(2), like § 1985(3), requires a showing of class-based animus. *Daigle*, 794 F.2d at 979. The Plaintiff has not pleaded nor has she presented any facts pointing to the existence of a class-based conspiracy. The Defendants' Motion is granted as to Plaintiffs § 1985(2) conspiracy claim against Sgt. Gabbert and BISD.

IV. Conclusion

The Defendants' Motion for Summary Judgment [Doc. No. 25) is hereby granted as to the 42 U.S.C. § 1983 malicious prosecution claim, the 42 U.S.C. § 1985(2) conspiracy claim, and the 42 U.S.C. § 1983 retaliation

claims. As to Plaintiffs sole remaining 42 U.S.C. § I983 false arrest claim against Sgt. Gabbert, the Court hereby denies Defendants' Motion. There remains an issue of triable fact as to whether Sgt. Gabbert knowingly, or in reckless disregard of the truth, submitted a false statement in the warrant affidavit he used to secure Plaintiffs arrest.

Signed this 26th day of May, 2017.

s/
Andrew S. Hanen
United States District Judge

APPENDIX B

Case: 17-40597 Document: 00514888033
Page: 1 Date Filed: 03/26/2019
United States Court of Appeals, Fifth Circuit
FILED March 26, 2019, Lyle W. Cayce, Clerk

IN THE UNITED STATES COURT OF APPEALSFOR THE FIFTH CIRCUIT

No. 17-40597

BLANCA ARIZMENDI,
Plaintiff - Appellee

v.

PATRICK GABBERT, Individually and in his official capacity as Criminal Investigator,
Defendant - Appellant

Appeal from the United States District Court for the Southern District of Texas

Before HIGGINBOTHAM, SOUTHWICK, and COSTA, Circuit Judges. PATRICK E. HIGGINBOTHAM, Circuit Judge:

Blanca Arizmendi teaches high school French in Brownsville, Texas. Patrick Gabbert, the school district's criminal investigator, swore out an affidavit in support of a warrant for the arrest of Arizmendi for allegedly communicating a false report. Arizmendi now sues Gabbert for false arrest under 42 U.S.C. § 1983, contending that Gabbert know-ingly or recklessly misstated material facts in the affidavit. Gabbert argues that he is entitled to

Summary judgment because even if he made mater-ial false allegations in his affidavit, the allegations also established probable cause to arrest Arizmendi for a different offense than the one for which he sought a warrant. We conclude

that the validity of the arrest could not be saved by facts stated in the warrant sufficient to establish probable cause for a different charge from that sought in the warrant, but Gabbert is entitled to qualified immunity because this was not clearly established at the time of his conduct. We will therefore reverse the district court's denial of Gabbert's motion for summary judgment.

I

The arrest stemmed from a multi-year investigation into a high school "grade change form." Arizmendi taught the school principal's niece. She alleges that beginning in January 2013, the principal and the student's mother began pressuring her to raise the student's grade. A later review of the student's grades found that a grade change form—appearing to have been completed and signed by Arizmendi—had been submitted to raise the student's grade considerably in Arizmendi's class, tying her for the second-highest GPA in her year. Arizmendi maintains that she "never authorized, accepted, [ ]adopted . . . . [or] signed any grade change form."

On June 14, 2013, Arizmendi filed an administrative grievance form alleging that the school principal forged Arizmendi's

signature, falsified records, and illegally changed his niece's grade. An unknown source leaked this information to the local media, which covered the issue and the resulting controversy.

On request by the school district's director of human resources in July 2013, Gabbert began investigating whether someone had illegally tampered with government records, as prohibited by Texas Penal Code § 37.10. As part of his investigation, he seized documents and computers from the school. He also interviewed Arizmendi on September 24, 2013. According to his case notes, when he showed Arizmendi the original grade change form, Arizmendi stated that she had never signed the form and her signature had been forged. A few

days later, Arizmendi submitted a sworn statement to Gabbert reiterating these statements.

In December 2013, Gabbert sent the grade change form and samples of Arizmendi's handwriting to the Texas Department of Public Safety Crime Lab. The lab requested additional handwriting samples and ultimately issued a report stating that Arizmendi's signature on the form was legitimate. Upon receiving this information, Gabbert "reclassified" his investigation to one involving whether Arizmendi had filed a false report in violation of Texas Penal Code § 42.06. Section 42.06, titled "False Alarm or Report," states that "[a] person commits an offense if he knowingly initiates, communicates or circulates a report of a present, past, or future bombing, fire, offense, or other

emergency that he knows is false or baseless and that would ordinarily . . .cause action by an official or volunteer agency organized to deal with emergencies; . . . place a person in fear of imminent serious bodily injury; or . . . prevent or interrupt the occupation of a building, room, place of assembly, place to which the public has access, or aircraft, automobile, or other mode of conveyance." "False alarm or report" is a Class A misdemeanor punishable by up to a year in jail.

Gabbert submitted an affidavit seeking an arrest warrant for Arizmendi "for the offense of False Report, a Class A misdemeanor." He stated that "on or about" February 11, 2013, Arizmendi "intentionally and knowingly [c]omitt[ed] the offense of False Report . . . by initiating and communicating a report that [she] knew was 'false and baseless' and causing the reaction of Law Enforcement to initiate an investigation into the allegation of [ ]Tampering with Governmental Records (school records)." He also stated in the affidavit that on September 24, 2013, Arizmendi told him that her signature had been forged on the grade change form, and the Public Safety Crime Lab had later "determin[ed] that Blanca Arizmendi signed [her own] signature" on the form.

In sum, Gabbert swore that Arizmendi had "circulated a report that was false and baseless which in turn caused [school district police investigators] to seize several public school computers and documents for forensic reviews."

Upon approval of the warrant for Arizmendi's arrest for the crime of "false report" committed on February 11, 2013,[1] Gabbert arrested Arizmendi. She was processed into jail and released the same day. Six months later, the District Attorney's Office dismissed the charges as barred by the applicable two-year statute of limitations. Arizmendi then sued Gabbert for false arrest, alleging that he "knowingly and intentionally submitted an affidavit for an arrest warrant that contained false and misleading information in order to manipulate the Magistrate Judge" into issuing the warrant.[2] Gabbert moved for summary judgment, invoking qualified immunity. The district court found a triable issue of material fact as to whether Gabbert submitted a false statement in his warrant affidavit with knowing or reckless disregard for the truth; it therefore denied him qualified immunity on Arizmendi's false arrest claim. Gabbert appeals.

II

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[1] The warrant authorized Arizmendi's arrest for committing the offense of "false report" on February 11, 2013. It did not identify the specific section number under which
Arizmendi was to be arrested.

[2] Arizmendi initially sued the school district in addition to Gabbert and included claims for several other constitutional violations. The district court granted summary judgment to the defendants on every claim except the § 1983 false arrest claim against Gabbert, including Arizmendi's claims for malicious prosecution, First Amendment retaliation, and conspiracy. Arizmendi does not cross-appeal the denial of summary judgment on those claims.

"Summary judgment is required if the movant establishes that there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law."[3] When a public official pleads a qualified immunity defense,

"[t]he plaintiff bears the burden of negating qualified immunity, but all inferences are drawn in [the plaintiff's] favor."[4]

"The doctrine of qualified immunity protects government officials from civil damages liability when their actions could reasonably have been believed to be legal."[5] It "protects all but the plainly incompetent or those who knowingly violate the law," and applies "unless existing precedent . . . placed the statutory or constitutional question *beyond debate*."[6] "To overcome an official's qualified immunity defense, a plaintiff must show that the evidence, viewed in the light most favorable to him, is sufficient to establish a genuine dispute '(1) that the official violated a statutory or constitutional right, and (2) that the right was clearly

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[3] Brown v. Callahan, 623 F.3d 249, 253 (5th Cir. 2010) (citing Fed. R. Civ. P. 56(c)).

[4] Id. (citations omitted).

[5] Morgan v. Swanson, 659 F.3d 359, 370 (5th Cir. 2011) (en banc).

[6] Id. at 371 (internal quotation marks omitted) (emphasis in original).

established at the time of the challenged conduct.'"[7]

"Although a denial of summary judgment is typically unappealable, defendants have a limited ability to appeal a denial of qualified immunity under the collateral order doctrine."[8] We have jurisdiction over such appeals only "to the extent that the district court's order turns on an issue of law."[9] In other words, we may "decide whether the factual disputes are material . . . [and review] the district court's legal analysis as it pertains to qualified immunity," but may not "review the genuineness of any factual disputes."[10] "An officer challenges materiality [by contending] that taking all the plaintiff's factual allegations as true[,] no violation of a clearly established right was shown."[11]

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III

Arizmendi argues that she has raised a triable factual dispute over whether Gabbert violated her Fourth Amendment rights. She contends that once false statements are excised from Gabbert's warrant affidavit, it did not support probable cause for the offense for which she was arrested.

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[7] *Cutler v. Stephen F. Austin State Univ.*, 767 F.3d 462, 469 (5th Cir. 2014) (quoting *Ashcroft v. al-Kidd,* 563 U.S. 731, 735 (2011)) (internal quotation marks omitted).

[8] Id. at 467 (emphasis in original).

[9] Id. at 467–68 (quoting *Kovacic v. Villareal*, 628 F.3d 209, 211 (5th Cir. 2010)).

[10] Id. at 468 (quoting *Wyatt v. Fletcher*, 718 F.3d 496, 502 (5th Cir. 2013), and *Kovacic,* 628 F.3d at 211 n.1).

[11] *Winfrey v. Pikett*, 872 F.3d 640, 643–44 (5th Cir. 2017) (internal quotation marks omitted) (emphasis in original).

A

The Fourth Amendment guarantees "the right of the people to be secure in their persons . . . against unreasonable searches and seizures . . . and [that] no warrants shall issue, but upon probable cause."[12] A constitutional claim for false arrest, which Arizmendi brings through the vehicle of § 1983, "requires a showing of no probable cause."[13] Probable cause is established by "facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense."[14]

In general, "[i]t is well settled that if facts supporting an arrest are placed before an independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation for false arrest, insulating the initiating party."[15] There is a qualification: the initiating party may still be liable for false arrest "if the plaintiff shows that the 'deliberations of the intermediary were in some way tainted by the actions of the defendant.'"[16] Chiefly relevant here, thirty-five years before

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[12] U.S. Const. amend. IV

[13] *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 204 (5th Cir. 2009).

[14] Id. (quoting *Piazza v. Mayne*, 217 F.3d 239, 245–46 (5th Cir. 2000)).

[15] *McLin v. Ard*, 866 F.3d 682, 689 (5th Cir. 2017).

[16] Id. (quoting *Deville v. Marcantel*, 567 F.3d 156, 170 (5th Cir. 2009)).

Gabbert obtained his warrant, *Franks v. Delaware* established that even if an independent magistrate approves a warrant application,"a defendant's Fourth Amendment

rights are violated if (1) the affiant, in support of the warrant, includes 'a false statement knowingly and intentionally, or with reckless disregard for the truth,' and (2) the allegedly false statement is necessary to the finding of probable cause."[17]

B

Arizmendi contends that even though an independent magistrate approved the arrest warrant, Gabbert is liable for false arrest because he made intentional or reckless misrepresentations in his warrant affidavit. Specifically, she contests two statements Gabbert swore to in his affidavit: that Arizmendi "initat[ed] and communicat[ed] a report that [she] knew was 'false and baseless'" on February 11, 2013, causing law enforcement to "initiate an investigation" into the grade change form, and that Arizmendi "circulated a report that was false and baseless which in turn caused [school district] police investigators to seize several public school computers and documents for forensic reviews."

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[17] *Winfrey v. Rogers*, 901 F.3d 483, 494 (5th Cir. 2018), on petition for rehearing (quoting *Franks v. Delaware*, 438 U.S. 154, 155–56, 165 (1978)); see Hale v. Fish, 899 F.2d 390, 400–02 (5th Cir. 1990) (applying *Franks* to a § 1983 claim for arrest without probable cause).

The district court found a genuine factual dispute over whether Gabbert intentionally or recklessly submitted false statements in his affidavit. It observed that while Arizmendi filed an internal grievance form on June 14, 2013, Gabbert instead alleged that Arizmendi initiated and communicated a "report" on February 11, 2013, that caused law enforcement action including the confiscation of files and computers. The district court ultimately found that media attention spurred Gabbert's investigation, not any action taken by Arizmendi. As for Gabbert's mental state, the court observed that "Gabbert may have simply been mistaken when he submitted the warrant affidavit to

the magistrate judge, but the mix-up may have been purposeful, or a product of reckless disregard." Limited as we are in our jurisdiction to review the district court's denial of summary judgment, we accept its identification of a genuine dispute over whether Gabbert knowingly or recklessly included false statements in his warrant affidavit.

But *Franks* also requires the allegedly false statements to have been material to the finding of probable cause. We must "consider the faulty affidavit as if [the] errors [or] omissions were removed[,] . . . [and then] examine the 'corrected affidavit' and determine whether the probable cause for the issuance of the warrant survives the deleted false statements and material omissions."[18] After correcting the affidavit to exclude the

[18] Winfrey, 901 F.3d at 495

challenged statements, the affidavit alleges that (1) on September 24, 2013, Gabbert met with Arizmendi, who stated that her signature had been forged on the grade change form and that she had previously filed a grievance against a school administrator for falsifying her signature; and (2) a Department of Public Safety handwriting analysis later determined that Arizmendi had signed her own name on the form.

It is unclear whether Gabbert argues on this appeal that once the contested allegations are excised from his warrant affidavit, the affidavit supports probable cause for the "false alarm or report" offense for which Arizmendi was arrested.[19] To the extent that he does, we disagree. As relevant here, a critical element of the "false alarm or report" offense is that the defendant have initiated or circulated a false report of an "offense" or

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"emergency" that would ordinarily cause official action.[20] Excising the statements that Arizmendi "initiat[ed] and communi-cat[ed] a report that [she] knew was 'false and baseless'" and that the report "caused BISD Police Investigators to seize several public

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[19] In oral argument, for example, Gabbert's counsel conceded that it was "obvious" that Gabbert should not have sought to arrest Arizmendi for "false alarm or report" under Texas Penal Code § 42.06 rather than "false report" under § 37.08. Gabbert also appears to admit in his briefing that at least some of the challenged statements were "misleading" and that he should have sought a warrant under § 37.08.

[20] See Tex. Pen. Code § 42.06.

school computers and documents for forensic reviews," it is difficult to see how the remaining allegations established probable cause for the specific offense of "false alarm or report."[21]

IV

Gabbert's primary defense is that even if the corrected warrant affidavit did not establish probable cause for the "false alarm or report" offense, he had probable cause to arrest Arizmendi without a warrant for a different offense. He suggests that there was probable cause that Arizmendi had committed the lesser offense of "false report" under Texas Penal Code § 37.08, which states that "[a] person commits an offense if, with intent to deceive, he knowingly makes a false statement that is material to a criminal investigation and makes the statement to . . . a peace officer." As we have explained, Gabbert also alleged in his affidavit that Arizmendi told him in September 2013 that she had not signed the grade change form, and later handwriting analysis refuted

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[21] The offense of "false alarm or report" does not require a showing that the report actually caused official action. But the only suggestion in Gabbert's affidavit that Arizmendi had circulated a report that "would ordinarily" cause official action comes from the false statements that Arizmendi's report caused the BISD police investigation. Without those allegations, the affidavit could not establish probable cause for the offense, even though it alluded to a grievance Arizmendi had filed and her later statement to Gabbert that she had not signed the grade change form.

her claim.[22] We agree that this was sufficient to generate probable cause that

Arizmendi violated § 37.08's "false report" offense when she met with Gabbert.[23]

The critical question is therefore whether an officer who knowingly or recklessly included false statements on a warrant

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[22] Arizmendi does not contest these statements.

Gabbert argues that the extent of his misconduct, if any, was that he inadvertently cited the incorrect section number—in other words, he meant to cite section 37.08, and instead cited section 42.06. As we have explained, the district court determined that Gabbert made other false statements. It also suggested that Arizmendi had raised a genuine factual dispute over whether Gabbert's accusation that Arizmendi violated the "false alarm or report" offense in section 42.06 was knowing or reckless. The court observed that "false alarm or report" is a more serious offense punishable by a longer prison sentence, and that Gabbert's affidavit closely tracked the elements of the "false alarm or report" offense. Here too, we lack jurisdiction to review the district court's identification of a genuine factual dispute

[23] The Supreme Court has established that in general, a claim for false arrest cannot lie in the failure to obtain a warrant for the arrest, at least for offenses committed in the arresting officer's presence. See *Virginia v. Moore*, 553 U.S. 164, 176 (2008) ("We conclude that warrantless arrests for crimes committed in the presence of an arresting office are reasonable under the Constitution, and that while States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment's protections."). To be clear, the issue here is not whether Gabbert could have arrested Arizmendi without a warrant. It is whether once he obtained a warrant, potentially in violation of Franks, he could retroactively justify a warrant-based arrest by claiming that he could have instead conducted a warrantless arrest based on facts stated in the affidavit.

affidavit can be held liable for false arrest despite having had probable cause to arrest the plaintiff without a warrant for a different offense not identified in the affidavit, an argument with great force. This said, the principle was not clearly established at the time of Gabbert's alleged conduct, so Gabbert is entitled to qualified immunity.

A

In *Vance v. Nunnery*,[24] we suggested that an officer could not evade liability in such circumstances. While investigating Vance for the April 5, 1995 burglary of a storage facility, Nunnery, a police detective, also received information suggesting that Vance had burglarized the same facility on March 10 of that year.[25] Although Nunnery learned shortly after obtaining a warrant to arrest Vance for the April 5 burglary that Vance could not have committed that crime, he arrested Vance regardless.[26] When Vance sued under § 1983 for

violation of his Fourth Amendment rights, Nunnery offered a defense strikingly similar to the one Gabbert presents in this case: he "argued that he was entitled to qualified immunity, not because he met the constitutional requirements for arresting Vance for the April 5th burglary [for which Vance was actually arrested], but because he had arguable probable cause to arrest Vance for a

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[24] 137 F.3d 270 (5th Cir. 1998).
[25] Id. at 271–73.
[26] Id.

'related offense'—a burglary that he believed occurred . . . on March 10th."[27]

Nunnery's defense relied on the "related offense" doctrine, which established that while a police officer could generally not obtain qualified immunity for a warrantless arrest by claiming that he could have validly arrested the plaintiff for a different offense, he was entitled to immunity where the charged and uncharged offenses were "related" and the officer demonstrated "arguable probable cause" to arrest the plaintiff for the uncharged related offense.[28] We had relied on the related offense doctrine for decades prior to Vance.[29] In doing so, we made clear that we would not "indulge in ex post facto extrapolations of all crimes that might have been charged on a given set of facts at the moment of arrest[, since] . . . [s]uch an exercise might permit an arrest that was a sham or fraud at the outset, really unrelated to the crime for which probable cause was actually present[,] to be retroactively validated"—hence the requirement that where the charged and uncharged offenses did not match, they at least be related.[30]

We concluded that Nunnery was not entitled to claim the protection for related offenses because "[u]nlike every police officer who has successfully invoked the related offense doctrine, Nunnery did not make a warrantless

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[27] Id. at 273.

[28] Id. at 274

[29] See *United States v. Atkinson*, 450 F.2d 835, 838–39 (5th Cir 1971) (citing *Mills v. Wainwright*, 415 F.2d 787 (5th Cir. 1969)).

[30] Id. at 838.

arrest[, but instead] arrested Vance on the basis of an arrest warrant that he knew was no longer supported by probable or arguable probable cause."[31] In short, we declined in Vance to extend the related-offense defense to warrant based arrests. This approach recognized that the primary role of the related offense doctrine was to strike a "compromise" between forcing officers making warrantless arrests to routinely charge arrestees with every possible offense "to increase the chances that at least one charge would survive the test for probable cause,"[32] at one extreme, and allowing officers to justify "sham or fraudulent arrests on the basis of ex post facto justifications that turn out to be valid,"[33] at the other. In contrast, allowing an officer to invoke the related offense doctrine when justifying a warrant-based arrest "would unjustifiably tilt this balance in favor of qualified immunity" because "[a] police officer who obtains an arrest warrant and then intentionally arrests someone he knows to be innocent should not benefit from a doctrine designed to protect

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[31] Id. Though we held in the alternative that Nunnery lacked probable cause even to arrest Vance for the alleged March 10 burglary, *Vance*, 137 F.3d at 276–77, this does not diminish the force of our holding that the related offense doctrine did not extent to warrantbased arrests. See, e.g., *Perez v. Stephens*, 784 F.3d 276, 281 (5th Cir. 2015) (per curiam) (discussing the binding force of alternative holdings).

[32] *Vance*, 137 F.3d at 275 (quoting *Trejo v. Perez*, 693 F.2d 482, 485 (5th Cir. 1982)).

[33] Id. (quoting *Gassner v. City of Garland,* 864 F.2d 394, 398 (5th Cir. 1989)).

police officers from civil liability for reasonable mistakes in judgment made when they effect warrantless arrests for conduct they believe is criminal based on their observations or 'first-hand knowledge.'"[34]

While Vance is not the only relevant authority on this issue, it is the clearest voice in our circuit on the relationship between an invalid warrant and a warrantless arrest for a different offense. In a series of pre-Vance and pre-*Franks* cases, we had suggested that a warrant-based arrest was lawful if the officer had probable cause to make a warrantless arrest, even if the warrant

itself was invalid.[35] These cases did not implicate the same principles as Vance and this case. Some involved arrests based on faulty warrant affidavits that could later be justified by pointing to probable cause for the same offense identified in the warrant;[36]

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[34] Id.

[35] 35 See United States v. Francis, 487 F.2d 968, 971–72 (5th Cir. 1973) (holding that the sufficiency of a warrant affidavit was "immaterial" where the arrest would have been valid without a warrant); United States v. Morris, 477 F.2d 657, 662–63 (5th Cir. 1973) ("[I]t does not necessarily follow from the fact that the arrest warrants were defective that the officers' entry into the apartment was unlawful . . . . A warrantless arrest is nevertheless valid if the arresting officer has probable cause to believe that the person arrested has committed or is in the act of committing a crime."); United States v. Wilson, 451 F.2d 209, 214–15 (5th Cir. 1971) ("A search incident to an arrest valid on one ground is not an illegal search merely because the arrest would be invalid if supported only by the faulty warrant.").

[36] 36 See *Francis,* 487 F.2d at 971–72; *Morris,* 477 F.2d at 662–64. 37 See *Wilson*, 451 F.2d at 214–15.

another addressed an apparent clerical error that led a warrant to cite the wrong section of the United States code.[37] In contrast, *Vance* dealt directly with the question of whether an officer could make an arrest based on a warrant that he should have known was invalid, then claim the protection shed by the related offense doctrine. We do not take *Vance* to be in tension with this line of cases, but rather to be an interpretation of the related offense doctrine that predated them.

In sum, *Vance* rejected the possibility that an officer could arrest someone based on a warrant and then, on its challenge, retroactively justify his conduct by arguing that he had probable cause to arrest the person without a warrant for a different offense. Taking the disputed facts in the light most favorable to Arizmendi, that is exactly what Gabbert has done. To be sure, Vance differs from this case in certain ways. It did not involve a Franks violation, but rather a violation of the separate principle that an officer cannot arrest someone for an offense of which the officer knows the person to be innocent. Further, Gabbert include facts in his warrant affidavit that would arguably support probable cause for the other offense, while no such

facts were included in the warrant affidavit in *Vance*. Neither of these differences, however, disturb the applicability of *Vance's* underlying recognition that an officer who made an unconstitutional warrant-based

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arrest could not be spared from liability by the possibility that he could conduct a separate, warrantless arrest of the same arrestee—precisely what Gabbert argues here.

B

Neither party addresses *Vance* or its parallels to this case. Rather, Gabbert relies upon *Devenpeck v. Alford*,[38] where police believed that a suspect had committed several offenses—including impersonating a police officer, lying to officers, and violating the State Privacy Act—but only arrested and charged him with an offense that was later established to be wholly unsupported by the facts.[39] The Court rejected the resulting § 1983 challenge, concluding that the warrantless arrest was valid so long as the officers had probable cause to arrest him for any crime based on the facts within their knowledge.[40] It did not matter whether the crime for which someone was arrested was "closely related" to other crimes for which there was probable cause to arrest—in other words, the related offense doctrine was too restrictive—because "[s]ubjective intent of the arresting officer . . . is simply no basis for invalidating an arrest."[41] Gabbert argues that

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[38] 543 U.S. 146 (2004).

[39] Id. at 149 .

[40] Id. at 153-56

[41] Id. at 154–55; see also id. at 153 ("Our cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. That is to say, his subjective reason for making the arrest need not be the criminal

Devenpeck squarely applies here: he arrested Arizmendi for one crime, but since he had probable

cause to arrest her for a different crime, it does not matter whether he committed Franks violations in the course of obtaining the arrest warrant.

The parties dispute whether *Devenpeck* applies solely to warrantless arrests, or also reaches warrant-based arrests. We, like other courts, have not explicitly addressed the reach of *Devenpeck* in circumstances like these.[42] After *Devenpeck,* but without

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offense as to which the known facts provide probable cause." (citations omitted)).

[42] Relying on *Devenpeck,* the Eleventh Circuit has suggested that probable cause for a warrant-based arrest is an absolute bar to a false arrest claim even when the arresting officer lacked probable cause for "all announced charges." See *Elmore v. Fulton Cty. Sch. Dist.*, 605 F. App'x 906, 914–17 (11th Cir. 2015) (per curiam) (ultimately affirming the dismissal of a false arrest claim on grounds that did not implicate this principle). Conversely, after *Devenpeck* was decided but without mentioning the case, the Sixth Circuit drew a line between warrant-based and warrantless arrests similar to the one we drew in Vance: where "an officer is confronted with a rapidly developing situation and makes the on-the-scene determination to arrest someone in the reasonable-but-mistaken belief that the arrestee committed a crime whose elements, it turns out later, were unmet though the arrestee's conduct did satisfy the elements of a different crime," the error is "in no small part technical: [the officer] is correct in believing the arrestee susceptible to arrest, and mistaken only as to which crime the arrestee committed." See *Kuslick v. Roszczewski*, 419 F. App'x 589, 594 (6th Cir. 2011). Such an officer, the Sixth Circuit held, "is in a thoroughly different position than . . . [one] who, from a

addressing it explicitly, we characterized as "dubious" the argument that "an officer can give a knowingly false affidavit and avoid liability by the fortuity that, after the fact, he may be able to argue some other basis for the arrest."[43] We have since acknowledged the possibility that Devenpeck may be limited to warrantless arrests, though we have not offered

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further analysis.[44] There are two reasons,

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position of safety and retrospective deliberation, decides to falsify details of the arrestee's conduct in a sworn statement made to a magistrate in order to obtain authorization for a retaliatory arrest." Id.

Several circuits have also held that an officer who relies on a facially invalid warrant is exempt from false arrest liability as long as there was probable cause to arrest the person for the offense identified in the warrant. See *Graves v. Mahoning County*, 821 F.3d 772, 775–77 (6th Cir. 2016); accord *Noviho v. Lancaster County*, 683 F. App'x 160, 164–65 (3d Cir. 2017); *Robinson v. City of South Charleston*, 662 F. App'x 216, 221 (4th Cir. 2016). But these cases did not decide whether the offense identified in the warrant must match the offense for which there was probable cause to make an arrest. Cf. *Goad v. Town of Meeker,* 654 F. App'x 916, 922–23 (10th Cir. 2016) (citing Graves for the proposition that the court could look to facts outside the warrant to establish probable cause, but also explaining that the plaintiff "would have to show that the Defendants lacked probable cause to support the charged crime against him" (emphasis added)).

[43] *DeLeon v. City of Dallas*, 345 F. App'x 21, 23 n.2 (5th Cir. 2009) (per curiam).

[44] See, e.g., Johnson v. Norcross, 565 F. App'x 287, 289–90 (5th Cir. 2014) (per curiam).

however, to doubt that *Devenpeck* applies here.

First, *Devenpeck* applies with significantly more force in the warrantless arrest context. The Court expressed concern over ways in which probing an officer's mental state could lead to "haphazard" results—an arrest's validity might hinge on whether it was made by a rookie or a veteran officer knowledgeable about the law; perhaps more troublingly, the arresting officer may have an incentive not to provide grounds for a warrantless arrest to avoid the risk that the stated grounds would fail to withstand scrutiny even though other potential grounds might have succeeded.[45] These concerns have little force with arrests based on warrants, where officers are called upon to identify both the offense and the facts that ground probable cause. Nor do warrant based arrests involve the snap judgments attending warrantless arrests—so similar leniency may be undue an officer arresting with an unconstitutionally invalid warrant.[46]

Indeed, the Court's identification of the related offense doctrine's potential drawbacks meshes with the distinction we drew in *Vance* between warrantless and warrant-based arrests. As we have explained, Vance held that an officer was not entitled to the limited protection of the related offense doctrine when conducting a warrant-based arrest; the related offense doctrine was crafted to provide protection only for officers

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[45] *Devenpeck,* 543 U.S. at 155–56.

[46] See *Vance*, 137 F.3d at 275–76 (explaining the practical differences between warrantless and warrant-based arrests); *Kuslick*, 419 F. App'x at 594 (same).

conducting warrantless arrests, lest they be forced to proactively identify every possible offense the arrestee may have committed. While *Devenpeck* held that the validity of a warrantless arrest should not be limited by an insistence that the officer have

probable cause for the charged offense or related offenses, it did not disturb our previous recognition that allowing an officer conducting an improper warrant-based arrest to point to another offense for which there was probable cause would "unjustifiably tilt [the balance of protection] in favor of qualified immunity."[47]

Second, and relatedly, *Devenpeck* hinged on the requirement that we distance ourselves from an arresting officer's subjective state of mind, focusing solely on the objective facts known to the officer at the time. Yet Franks explicitly requires inquiry into officers' states of mind to assess the validity of arrest warrants. Only deliberate or reckless misstatements or omissions are Franks violations; mere negligence will not suffice.[48] This stands in stark contrast to the Supreme Court's emphasis on objectivity surrounding warrantless arrests.

C

Today we cannot conclude that an officer can deliberately or recklessly misstate or omit facts in a warrant affidavit to procure a

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[47] Vance, 137 F.3d at 275.

[48] See Franks, 438 U.S. at 171.

warrant to arrest someone for a specific crime, then escape liability by retroactively constructing a justification for a warrantless arrest based on a different crime. That said, overarching and reconciling principles bring clarity.

Franks and *Devenpeck* operate in tandem by protecting the validity of an arrest in circumstances where the arrest does not deny a person the protections of the Fourth Amendment—in these circumstances, the mental state of the officer aside, the arrest is lawful. In warrantless arrests, there is no threat to a citizen's Fourth Amendment rights where the officer had probable cause to arrest, albeit not for the offense he chose to charge. With a warrant, even where

there was ultimately no probable cause for the arrest, an officer instead gains the protection of Franks—invalidating the warrant only for misstatements willfully or recklessly made, and then only for misstatements necessary to the finding of probable cause for the charged offense.

As of Gabbert's conduct, we had not yet explained this common ground between warrantless and warrant-based arrests—let alone established that these principles do not mandate further protection for an officer who arrests someone based on a Franks-violating warrant, then later points to probable cause to have effected a warrantless arrest for another offense. A reasonable officer in Gabbert's position may not have recognized that by proceeding with an arrest based on a warrant, the validity of the arrest would not

be judged by standards applicable to warrantless arrests, standards he could have met. In short, one could have reasonably taken *Devenpeck* to protect the validity of Arizmendi's arrest, even if—based on the facts in the light most favorable to Arizmendi—Gabbert should have known that the warrant itself was invalid under Franks.

Knowing or reckless false statements in a warrant affidavit are not to be condoned. But Arizmendi has not persuaded us that Gabbert's actions were then illicit by clearly established law. Gabbert is therefore entitled to qualified immunity.

V

The judgment of the district court is reversed.

APPENDIX C

Case: 17-40597 Document: 00514976806
Page: 1 Date Filed: 05/30/2019

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-40597

BLANCA ARIZMENDI,
Plaintiff – Appellee

v.

PATRICK GABBERT,
Individually and in his official capacity as Criminal Investigator,
Defendant – Appellant

Appeal from the United States District Court for the Southern District of Texas

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion March 26, 2019, 5 Cir., _____, _____ F.3d _____)

Before HIGGINBOTHAM, SOUTHWICK, and COSTA, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on

Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT JUDGE

APPENDIX D

Case: 17-40597 Document: 00514976832
Page: 1 Date Filed: 05/30/2019

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-40597

BLANCA ARIZMENDI,
Plaintiff – Appellee

v.

PATRICK GABBERT,
Individually and in his official capacity as Criminal Investigator,
Defendant – Appellant

Appeal from the United States District Court for the Southern District of Texas

Before HIGGINBOTHAM, SOUTHWICK, and COSTA, Circuit Judges.

PER CURIAM:
IT IS ORDERED that Appellee's motion to dismiss the appeal for lack of jurisdiction is DENIED.

APPENDIX E

Case 1:16-cv-00063 Document 56 Filed on 06/07/19 in TXSD Page 1 of 2

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-40597

BLANCA ARIZMENDI,
Plaintiff - Appellee

v.

PATRICK GABBERT,
Individually and in his official capacity as Criminal Investigator,
Defendant – Appellant

Appeal from the United States District Court for the Southern District of Texas

Before HIGGINBOTHAM, SOUTHWICK, and COSTA, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is reversed.