APPENDIX

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-50276

SYLVIA GONZALEZ,

Plaintiff-Appellee,

versus

EDWARD TREVINO, II, MAYOR OF CASTLE HILLS, SUED IN HIS INDIVIDUAL CAPACITY; JOHN SIEMENS, CHIEF OF THE CASTLE HILLS POLICE DEPARTMENT, SUED IN HIS INDIVIDUAL CAPACITY; ALEXANDER WRIGHT, SUED IN HIS INDIVIDUAL CAPACITY,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:20-CV-1511

ON PETITION FOR REHEARING EN BANC

Before BARKSDALE, ENGELHARDT, and OLDHAM, *Circuit Judges*.

PER CURIAM:

Appendix A

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. The petition for rehearing en banc is DENIED because, at the request of one of its members, the court was polled, and a majority did not vote in favor of rehearing (FED. R. APP. P. 35 and 5TH CIR. R. 35).

In the en banc poll, six judges voted in favor of rehearing (Smith, Higginson, Ho, Duncan, Oldham and Douglas), and ten voted against rehearing (Richman, Jones, Stewart, Elrod, Southwick, Haynes, Graves, Willett, Engelhardt and Wilson).

Appendix A

JAMES C. HO, *Circuit Judge*, dissenting from denial of rehearing en banc:

"[T]he most heinous act in which a democratic government can engage is to use its law enforcement machinery for political ends." Laurence H. Silberman, *Hoover's Institution*, WALL ST. J., July 20, 2005. And not just heinous—it's also unconstitutional.

The First Amendment is supposed to stop public officials from punishing citizens for expressing unpopular views. In America, we don't allow the police to arrest and jail our citizens for having the temerity to criticize or question the government. If the freedom of speech meant anything to our nation's Founders, it meant that "it was beyond the power of the government to punish speech that criticized the government in good faith." Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 309 (2017). "Criticism of government is at the very center of the constitutionally protected area of free discussion." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

But it falls on the judiciary to ensure that the First Amendment is not reduced to a parchment promise.[1]

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[1] *See*, *e.g.*, The Federalist No. 48, at 313 (James Madison) (Clinton Rossiter ed., 1961) ("a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against . . . encroachments"); *Considering the Role of Judges Under the Constitution of the United States: Hearing Before the S. Comm. on the Judiciary*, S. Hrg. 112–137, at 6–7 (2011) (statement of Justice Scalia) ("Every banana republic has a bill of rights. . . . The bill of rights of the former [Soviet Union] was much better than ours. . . . Of course, they were just

Few officials will admit that they abuse the coercive powers of government to punish and silence their critics. They're often able to invent some reason to justify their actions. So courts must be vigilant in preventing officers from concocting legal theories to arrest citizens for stating unpopular viewpoints.

That's why the Supreme Court has made clear that a citizen "need not prove the absence of probable cause to maintain a claim of retaliatory arrest" under the First Amendment. *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1955 (2018). There's no "unyielding requirement to show the absence of probable cause" to state a claim of First Amendment retaliation. *Nieves v. Bartlett*, 139 S. Ct. 1715, 1727 (2019).

And for good reason. There are countless situations in which "officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Id.* As a result, there's a meaningful "'risk that some police officers may exploit the arrest power as a means of suppressing speech.'" *Id.* (quoting *Lozman*, 138 S. Ct. at 1953).

What's more, this risk has never been more prevalent than today. "[C]riminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something." *Id.* at 1730 (Gorsuch, J., concurring in part and dissenting in part). "[T]he average busy professional in this country wakes up in the morning,

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words on paper, what our Framers would have called 'a parchment guarantee.'").

goes to work, comes home, takes care of personal and family obligations, and then goes to sleep, unaware than he or she likely committed several crimes that day." Harvey A. Silverglate, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT XXX (2009). "[P]rosecutors can find some arguable federal crime to apply to just about any one of us, even for the most seemingly innocuous conduct." *Id. See also* Paul Larkin & Michael Mukasey, *The Perils of Overcriminalization*, HERITAGE FOUNDATION, Feb. 12, 2015.

In other words, the opportunity for public officials to weaponize the criminal justice system against their political adversaries has never been greater.

So it's up to the judiciary to make sure that those who hold positions of power stay in their lane. Courts must make certain that law enforcement officials exercise their significant coercive powers to combat crime—not to police political discourse.

That's what the Supreme Court recently reminded us in *Lozman* and *Nieves*. Unfortunately, the panel majority failed to uphold these principles and instead granted qualified immunity to the defendants in this case. I respectfully dissent from the denial of rehearing en banc.

Appendix A

I.

At this stage of the proceedings, we accept as true the following allegations as stated in the complaint:

Sylvia Gonzalez is an elderly retiree from Castle Hills, Texas. Like many of her fellow citizens, she was unhappy about some aspect of her local government. But unlike most, she decided to do something about it. She ran for city council against a well-connected incumbent. And she won.

During the campaign, Gonzalez heard numerous complaints about the city manager, whom the mayor had appointed to handle the day-to-day business of running the city.

After taking office, Gonzalez organized a petition that called for the reinstatement of the previous city manager—and thus, implicitly, the dismissal of the incumbent city manager. The petition noted that the current city manager "talked about [fixing] the streets," but had not "fixed a single street." By contrast, the previous city manager "oversaw, from start to finish, over a dozen street projects."

More than three hundred Castle Hills residents signed Gonzalez's petition calling for the city council to "FIX OUR STREETS" by removing the current city manager.

At Gonzalez's first city council meeting as an elected member, a resident of Castle Hill submitted Gonzalez's petition to the mayor. This triggered a

contentious debate about the current city manager. The debate spilled over to the next day.

At the end of the next day's meeting, Gonzalez picked up various papers off the table and placed them in her binder. While Gonzalez was chatting after the meeting, the police captain tapped her on the shoulder and explained that the mayor (who had sat next to her during the meeting) wanted to have a word. The police captain escorted Gonzalez to the mayor. The mayor then asked Gonzalez where the petition was. She answered: "Don't you have it? It was turned into you yesterday." At the mayor's prompting, Gonzalez looked for the petition in her binder and found it among other papers that had been beside her on the table. As Gonzalez handed the petition back to him, the mayor said: "You probably picked it up by mistake."

The mayor, the police chief, and a special detective then hatched a plan to charge Sylvia with a crime in order to remove her from office. The police chief deputized his close friend, a private attorney, as a special detective to investigate Gonzalez. Following the investigation, the special detective filed an arrest affidavit alleging that Gonzalez had committed the crime of "intentionally destroy[ing], conceal[ing], remov[ing], or otherwise impair[ing] the verity, legibility, or availability of a governmental record." TEX. PEN. CODE ANN. § 37.10(a)(3).

"The plan then entered its next phase: the arrest. [The] 'Special Detective' . . . lived up to his title. He did three special things to ensure that Sylvia would

be arrested and jailed rather than simply asked to appear before a judge." *Gonzalez v. Trevino*, 42 F.4th 487, 496 (5th Cir. 2022) (Oldham, J., dissenting). First, the special detective got a warrant rather than a summons. (A summons is standard for nonviolent offenses—only a warrant can result in jailtime.) Second, the special detective circumvented the district attorney by using a procedure normally reserved for emergencies or violent felonies: He walked the warrant directly to a magistrate. Third, the special detective prevented Gonzalez from using the satellite booking function, which facilitates booking, processing, and releasing nonviolent offenders without jailtime. Gonzalez's warrant did not go through any of the traditional channels, so it wasn't in the satellite booking system.

Gonzalez turned herself in as soon as she learned about the warrant for her arrest. She then spent a day in jail, handcuffed to a cold metal bench and wearing an orange jail shirt.

During her jailtime, she was forced to forgo use of a restroom—as a modest 72-year-old retiree, she was not comfortable using a restroom that had no doors and no toilet paper. In addition, her jailers refused to let her stand up and stretch her legs.

The district attorney ultimately dropped the charges. But only after Gonzelez's name and photo were splashed across local media for days.

The arrest left Gonzalez so traumatized that she resolved never to organize a petition or to run for

office ever again—precisely what her tormenters-in-office conspired to achieve.

II.

A retaliatory arrest can give rise to a First Amendment claim even if the arrest was supported by probable cause. *See*, *e.g.*, *Lozman*, 138 S. Ct. at 1955 ("Lozman need not prove the absence of probable cause to maintain a claim of retaliatory arrest"); *Nieves*, 139 S. Ct. at 1727 (same).

To illustrate why respect for the First Amendment demands that probable cause pose no impenetrable barrier to a retaliation claim, the Supreme Court has offered the following simple example: "[A]t many intersections, jaywalking is endemic but rarely results in arrest." *Nieves*, 139 S. Ct. at 1727. So "[i]f an individual who has been vocally complaining about police conduct is arrested for jaywalking at such an intersection, it 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." *Id.*

Accordingly, a plaintiff may proceed on a First Amendment retaliatory arrest claim so long as he "presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Id.*

It's not difficult to imagine different forms of evidence that might be used to prove this point.

To take one example, a plaintiff might identify particular individuals who had engaged in the same acts, but not the same speech, and yet were not arrested—what the panel majority called "comparative evidence." 42 F.4th at 492.

But alternatively, a plaintiff might present evidence that the underlying statute had *never* been used under analogous circumstances, despite the fact that such conduct is commonplace—what the panel dissent called "negative evidence." *Id.* at 506 (Oldham, J., dissenting).

The latter is what Gonzales presented here. As the panel dissent noted, "government employees routinely—with intent and without it—take stacks of papers before, during, and after meetings." *Id.* Gonzalez made clear in her complaint that she would present objective evidence that no one has ever been arrested for doing what she did. She reviewed all of the charges brought in the county during the last decade and concluded that "neither the misdemeanor tampering statute, nor its felony counterpart, has ever been used to criminally charge someone for allegedly trying to steal a nonbinding or expressive document, such as the petition at issue in this case." As she explained in her complaint:

> Of 215 grand jury felony indictments obtained under the tampering statute at issue in this case, not one had an allegation even closely resembling the one mounted against [Gonzalez]. By far the largest chunk of the indictments

> involved accusations of either using or making fake government identification documents: altered driver's licenses, another person's ID, temporary identification cards, public safety permits, green cards, or social security numbers. A few others concerned the misuse of financial information, like writing of fake checks or stealing banking information. The rest are outliers, but all very different from Sylvia's situation. They concern hiding evidence of murder, cheating on a government-issued exam, and using a fake certificate of title, among others.

So as the panel dissent concluded, "common sense dictates that [Gonzalez's] negative assertion amounts to direct evidence that similarly situated individuals not engaged in the same sort of protected activity had not been arrested." *Id.* Gonzalez showed that county officials decided to arrest her, even though they usually exercise their discretion not to make such arrests. And that's all *Nieves* requires.

Yet the panel majority dismissed Gonzalez's claim on the ground that she "does not offer evidence of other similarly situated individuals who mishandled a government petition but were not prosecuted under Texas Penal Code § 37.10(a)(3)." *Id.* at 492. According to the majority, *Nieves* "requires some comparative evidence." *Id.* at 493.

But that misreads *Nieves*. Recall the jaywalking example: "an individual who has been vocally

complaining about police conduct is arrested for jaywalking." 139 S. Ct. at 1727. As the panel dissent explains, "[i]t's not clear that there will always (or ever) be available comparative evidence of jaywalkers [who] weren't arrested. Rather, the retaliatory-arrest-jaywalking plaintiff always (or almost always) must appeal to the commonsense proposition that jaywalking happens all the time, and jaywalking arrests happen virtually never (or never)." *Gonzalez*, 42 F.4th at 503 (Oldham, J., dissenting). I agree that it makes little sense to read *Nieves* to require comparative evidence.

III.

The panel majority's reading of *Nieves* is not just mistaken—it also creates an admitted split with the Seventh Circuit. *See* 42 F.4th at 492–93 ("We recognize that one of our sister circuits has taken a broader view of [*Nieves*] . . . . We do not adopt this more lax reading.").

As the Seventh Circuit has observed, *Nieves* does not "adopt[] a rigid rule that requires, in all cases, a particular form of comparison-based evidence." *Lund v. City of Rockford*, 956 F.3d 938, 945 (7th Cir. 2020). Rather, *Nieves* requires "objective evidence"—and in determining what counts, "common sense must prevail." *Id.*

Under *Nieves*, comparator evidence is certainly sufficient, but it's not necessary for a retaliation claim to proceed. All *Nieves* requires is "objective evidence that [the plaintiff] was arrested when otherwise

similarly situated individuals . . . had not been." 139 S. Ct. at 1727. A plaintiff can point to specific individuals who engaged in the same prohibited conduct yet were not arrested. But a plaintiff can alternatively point to other evidence that the conduct, though common, rarely results in arrest. This latter type of evidence works because "[e]vidence that an arrest has never happened before (i.e., a negative assertion) can support the proposition that there are instances where similarly situated individuals . . . hadn't been arrested." *Gonzalez*, 42 F.4th 487 at 505 (Oldham, J., dissenting).

IV.

"[T]he First Amendment's guarantee of free speech is not just a legal doctrine. It represents the most fundamental value in American democracy. A national commitment to uninhibited political speech is a crucial aspect of our country's culture." Laurence H. Silberman, *Free Speech Is the Most Fundamental American Value*, WALL ST. J., Sep. 30, 2022. So "[u]nless all American institutions are committed to free political speech, I fear the strain on the First Amendment's guarantees will become unbearable." *Id.*

We should've championed these principles and granted rehearing en banc in this matter. Instead, we have chosen to leave the decision of the panel majority intact.

But that decision not only misreads *Nieves* and thereby creates an admitted circuit split. It also

under-protects the American people against violations of their First Amendment rights. As a result, citizens in our circuit are now vulnerable to public officials who choose to weaponize criminal statutes against citizens whose political views they disfavor.

Moreover, I fear that this latest en banc denial continues to take our court down the wrong path. Our circuit's en banc decisions continue to get the First Amendment not only wrong, but backwards.

We deny First Amendment protection when it comes to sincere acts of political advocacy—but we invoke First Amendment protection when it comes to demonstrated acts of political corruption. *Compare*, *e.g.*, *Zimmerman v. City of Austin*, 881 F.3d 378 (5th Cir. 2018), *with United States v. Hamilton*, 46 F.4th 389, 398 n.3 (5th Cir. 2022). We presume corruption where we should presume innocence—but we excuse corruption where the evidence is extravagant. *See id. But see United States v. Hamilton*, __ F.4th __, __ (5th Cir. 2023) (Ho, J., dissenting from denial of rehearing en banc) ("[O]ur circuit is getting the First Amendment backwards in case after case. The freedom of speech guaranteed to every citizen protects political advocacy—not corruption."); *Zimmerman v. City of Austin*, 888 F.3d 163, 164 (5th Cir. 2018) (Ho, J., dissenting from denial of rehearing en banc).

We reject our citizens when they claim a First Amendment right to criticize their government—but we embrace public officials who claim a First Amendment right not to be criticized by others. *Compare*, *e.g.*, *Gonzalez*, 42 F.4th 487, *with Wilson v. Houston*

Community College System, 955 F.3d 490 (5th Cir. 2020), *rev'd*, 142 S. Ct. 1253 (2022). *But see Wilson v. Houston Community College System*, 966 F.3d 341, 345 (5th Cir. 2020) (Ho, J., dissenting from denial of rehearing en banc) ("The First Amendment guarantees freedom *of* speech, not freedom *from* speech. It secures the right to criticize, not the right *not* to be criticized.").

We worry about preserving the rights of violent protesters—but not the rights of people of faith. *Compare*, *e.g.*, *Doe v. Mckesson*, 947 F.3d 874 (5th Cir. 2020) (eight votes to revive First Amendment defense of violent protest), *with East Texas Baptist University v. Burwell*, 807 F.3d 630 (5th Cir. 2015) (only four votes to revive religious liberty challenge to the Affordable Care Act). *See also Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011) (en banc) (denying relief to evangelical Christian students who were prohibited from expressing their faith to other students at any time while at school).[2]

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[2] Compare our en banc decision in *Morgan* with our en banc rehearing denial in *Oliver v. Arnold*, 19 F.4th 843 (5th Cir. 2021). In both cases, public school students expressed religious views that school officials sought to ostracize. In *Morgan*, we sided with the school. In *Oliver*, we sided with the student. Religious liberty experts have described *Oliver* as "the Fifth Circuit's redemption for its mistake in *Morgan*." Hiram Sasser, *Fifth Circuit Gets It Right in* Arnold *Decision*, Federalist Soc'y, Dec. 20, 2021, https://fedsoc.org/commentary/fedsoc-blog/fifth-circuit-gets-it-right-in-arnold-decision. But our decision in *Oliver* triggered sharp rebuke and opposition from seven members of the court. *See*, *e.g.*, 19 F.4th at 859, 862 (Duncan, J., dissenting from denial

V.

Even worse, we're not just getting the First Amendment backwards. We're also getting qualified immunity backwards. Just compare the denial of en banc rehearing here with some of our other recent en banc decisions.

We grant qualified immunity to officials who trample on basic First Amendment rights—but deny qualified immunity to officers who act in good faith to stop mass shooters and other violent criminals. *Compare*, *e.g.*, *Gonzalez*, 42 F.4th 487; *Morgan*, 659 F.3d 359 (granting qualified immunity to principal who prohibited students from expressing their faith while at school), *with Cole v. Carson*, 935 F.3d 444 (5th Cir. 2019) (en banc) (denying qualified immunity to police officers who took lethal action against a student who was about to shoot up his high school); *Winzer v. Kaufman County*, 940 F.3d 900 (5th Cir. 2019) (denying rehearing en banc in case against police department

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of rehearing en banc) (disparaging decision as a "dumpster fire" and urging federal judges to defer to school boards).

Similarly, in *Sambrano v. United Airlines, Inc.*, 2022 WL 486610 (5th Cir. 2022), the panel majority allowed people of faith to seek preliminary injunctive relief to vindicate their religious objections to a COVID-19 vaccine mandate. We denied en banc rehearing. But as in *Oliver*, our decision in *Sambrano* triggered sharp rebuke and opposition from four members of the court. *See Sambrano*, 2022 WL 486610, at *28 (Smith, J., dissenting) (disparaging decision as an "orgy of jurisprudential violence"); *Sambrano v. United Airlines, Inc.*, 45 F.4th 877 (5th Cir. 2022).

for lethal actions taken during active shooting incident).

Accordingly, officers who punish innocent citizens are immune—but officers who protect innocent citizens are forced to stand trial. Officers who deliberately target citizens who hold disfavored political views face no accountability—but officers who make split-second, life-and-death decisions to stop violent criminals must put their careers on the line for their heroism. *But see Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., respecting denial of cert.) ("But why should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting?").

Put simply, "we grant immunity when we should deny—and we deny immunity when we should grant." *Horvath v. City of Leander*, 946 F.3d 787, 795 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part). Indeed, ours is the rare circuit that has been summarily reversed by the Supreme Court for both wrongly granting *and* wrongly denying qualified immunity. *See Tolan v. Cotton*, 572 U.S. 650 (2014), *summarily rev'g* 713 F.3d 299 (5th Cir. 2013); *Mullenix v. Luna*, 577 U.S. 7 (2015), *summarily rev'g* 773 F.3d 712 (5th Cir. 2014); *Taylor v. Riojas*, 141 S.

Ct. 52 (2020), *summarily rev'g* 946 F.3d 211 (5th Cir. 2020).[3]

This pattern is not just disconcerting to me. It's also disconcerting to a broad coalition of civil rights organizations—including organizations that disagree with one another over countless issues, but agree that there's something amiss about our court's approach to qualified immunity and the First Amendment. In *Morgan*, for example, the amicus coalition led by the First Liberty Institute included the American Center for Law and Justice, the American Civil Liberties Union, the Becket Fund for Religious Liberty, the Cato Institute, Christian Legal Society, the Claremont Institute, the National Association of Evangelicals, and Wallbuilders.[4]

These respected public interest organizations no doubt have limited resources that they must deploy wisely. Yet they all took the time and effort to make

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[3] The Tenth Circuit appears to be the only other circuit that the Supreme Court has summarily reversed in recent years for both wrongly granting and wrongly denying qualified immunity. *See White v. Pauly*, 580 U.S. 73 (2017), *summarily rev'g* 814 F.3d 1060 (10th Cir. 2016); *Sause v. Bauer*, 138 S. Ct. 2561 (2018), *summarily rev'g* 859 F.3d 1270 (10th Cir. 2017); *City of Tahlequah v. Bond*, 142 S. Ct. 9 (2021), *summarily rev'g* 981 F.3d 808 (10th Cir. 2020).

[4] A similarly diverse group of amici appears in *Villarreal v. City of Laredo*, 52 F.4th 265 (5th Cir. 2022), including such nationally respected civil rights organizations and public interest groups as Alliance Defending Freedom, Americans for Prosperity Foundation, the Cato Institute, the Constitutional Accountability Center, the Electronic Freedom Foundation, the First Liberty Institute, and the Institute for Justice.

their views known to our court in *Morgan*. "It is no accident that several religiously affiliated organizations have filed amicus briefs in support of [the First Amendment] claim" and "uniformly decry the potential for misuse" of government power to "harass" and "uniquely burden religious organizations." *Whole Woman's Health v. Smith*, 896 F.3d 362, 370, 373–74 (5th Cir. 2018).

* * *

It's heartwarming that, in these divisive times, an ideologically diverse group of leading organizations can still unite behind the cause of freedom of speech and tolerance for conflicting viewpoints. It's unfortunate that our court was unable to unite behind that same cause today. I respectfully dissent from the denial of rehearing en banc.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-50276

SYLVIA GONZALEZ,

Plaintiff-Appellee,

versus

EDWARD TREVINO, II, MAYOR OF CASTLE HILLS, SUED IN HIS INDIVIDUAL CAPACITY; JOHN SIEMENS, CHIEF OF THE CASTLE HILLS POLICE DEPARTMENT, SUED IN HIS INDIVIDUAL CAPACITY; ALEXANDER WRIGHT, SUED IN HIS INDIVIDUAL CAPACITY,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:20-CV-1511

Before BARKSDALE, ENGELHARDT, and OLDHAM, *Circuit Judges*.

KURT D. ENGELHARDT, *Circuit Judge*:

Appendix B

In this case, we are confronted with a dilemma that the Supreme Court has wrestled with recently: how are we to treat a plaintiff's claims when she asserts retaliatory arrest for engaging in conduct protected by the First Amendment, but concedes that there exists probable cause for the arrest? As we are bound by the Court's precedent, we hold that Gonzalez fails to establish a violation of her constitutional rights.

I

Sylvia Gonzalez is a resident of Castle Hills, Texas. Castle Hills, a city of fewer than 5000 residents, is governed by a five-member city council that appoints a city manager to handle the day-to-day business of the city. In 2019, Gonzalez was elected to a seat on the city council. During her campaign, Gonzalez learned that many residents of Castle Hills were unhappy with the performance of the contemporary city manager. As her first act in office, Gonzalez participated in organizing a nonbinding petition that called for the removal of the city manager from office. On May 21, Gonzalez attended her first city council meeting as a council member, at which a resident submitted the petition to the council. The council meeting grew contentious and was extended through the next day.

After the meeting ended, Gonzalez left her belongings on the dais and went to speak with a constituent. At one point during this conversation, a police officer approached Gonzalez and informed her that Mayor Edward Trevino wished to speak with her. Gonzalez

returned to the dais, and Trevino inquired where the petition was located. Trevino asked Gonzalez to look for the petition in her binder, and, to her alleged surprise, she found the petition there.

Two days later, Castle Hills chief-of-police John Siemens informed Sergeant Paul Turner that Trevino would contact Turner. Trevino wanted to file a criminal complaint alleging that Gonzalez took the petition without consent. Turner began an investigation, which yielded no returns. Siemens then asked special detective Alex Wright to take over the investigation. Wright interviewed two witnesses, including Trevino, and requested an interview of Gonzalez, which she refused. Wright determined that Gonzalez committed a violation of Texas Penal Code §§ 37.10(a)(3) and (c)(1), which provide that "[a] person commits an offense if he . . . intentionally destroys, conceals, removes, or otherwise impairs the verity, legibility, or availability of a governmental record."

Wright then obtained a warrant against Gonzalez from a magistrate. The process that Wright used was lawful but atypical, as he: (1) chose to secure a warrant, rather than a summons, for a nonviolent crime, and (2) circumvented the district attorney by walking the warrant directly to the magistrate. According to Gonzalez, the use of this process prevented her from using the satellite booking function of the Bexar County jail system, making her unable to avoid spending time in jail when arrested. Wright's affidavit in support of the warrant included statements about the speech in her petition, noting that "[f]rom

her very first [council] meeting in May of 2019 [Gonzalez] (along with another alderwoman) has been openly antagonistic to the city manager, Ryan Rapelye, wanting desperately to get him fired." The petition also described, in significant detail, the result of Wright's investigation. Wright narrates a video of the meeting which he characterizes as "clearly show[ing] Defendant Gonzalez intentionally concealing and removing the Petition[] from city custody." According to Wright, the video also shows that Gonzalez was reluctant to return the petition from her binder. And the affidavit speculates on a possible motive for Gonzalez taking the petition: a resident claimed that Gonzalez got her to sign the petition under false pretenses.

Gonzalez alleges that the action against her under Texas Penal Code § 37.10(a)(3) for her conduct is unprecedented. She asserts that "a review of [the] misdemeanor and felony data from Bexar County over the past decade makes it clear that the misdemeanor tampering statute has never been used in Bexar County to criminally charge someone for trying to steal a nonbinding *or* expressive document." She continues, "[o]f 215 grand jury felony indictments obtained under the tampering statute at issue in this case, not one had an allegation even closely resembling the one mounted against [Gonzalez]." Gonzalez notes that most indictments under the statute involved fake government IDs, such as driver's licenses, and that misdemeanor data is similar.

When Gonzalez learned of the warrant for her arrest, she turned herself in. She was booked on July 18 and spent the evening in jail. She is no longer on the city council, and she alleges that she "will never again help organize a petition or participate in any other public expression of her political speech," nor will she ever "again run for any political office." Gonzalez also asserts that Trevino and others engaged in other activities to attempt to remove her from the council, including having her removed from office based on a "made-up technicality," and filing a civil lawsuit against her alleging incompetence and official misconduct.

Gonzalez sued Trevino, Siemens, Wright, and the City of Castle Hills, asserting two claims under 42 U.S.C. § 1983 for violation of her First and Fourteenth Amendment rights. The Defendants moved to dismiss based on the independent-intermediary doctrine and on qualified immunity grounds. The district court denied Defendants' motion, finding that Gonzalez's claims could proceed notwithstanding the existence of probable case. The individual Defendants appealed.

II

"[A] district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). Accordingly, under the collateral order doctrine, we have jurisdiction to review this interlocutory appeal of the district court's denial of qualified

immunity. *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012).

This court reviews denial of a motion to dismiss based on qualified immunity de novo. *Kelson v. Clark*, 1 F.4th 411, 416 (5th Cir. 2021). "In doing so, 'we must accept all well-pleaded facts as true and draw all reasonable inferences in favor of the nonmoving party.'" *Id.* (quoting *Morgan v. Swanson*, 659 F.3d 359, 370 (5th Cir. 2011) (en banc)). The complaint must contain sufficient facts to "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). But a complaint's "'naked assertion[s]' devoid of 'further factual enhancement'" will not suffice, *see id.* (quotation omitted), and courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *see also Iqbal*, 556 U.S. at 678 (holding that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions"). "[A] plaintiff seeking to overcome qualified immunity must plead specific facts that both allow the court to draw the reasonable inference that the defendant is liable for the harm he has alleged and that defeat a qualified immunity defense with equal specificity." *Backe*, 691 F.3d at 648.

III

Gonzalez brings claims under 42 U.S.C. § 1983 against Trevino, Siemens, and Wright on the grounds that she was arrested in retaliation for her protected speech. "To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988). Appellants assert a defense of qualified immunity. "There are two aspects to qualified immunity: whether the plaintiff has alleged a violation of a [statutory or] constitutional right and whether the right at issue was 'clearly established' at the time of the alleged violation." *Cope v. Cogdill*, 3 F.4th 198, 204 (5th Cir. 2021) (citing *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)).

The question before us is whether Gonzalez has alleged a violation of her constitutional rights when probable cause existed for her allegedly retaliatory arrest. Appellants argue the existence of probable cause dooms Gonzalez's claims. Gonzalez does not dispute that probable cause existed to arrest her but argues that it does not bar her suit.[5]

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[5] Appellants frame their arguments in terms of our independent-intermediary doctrine, which dictates that "if an independent intermediary, such as a justice of the peace, authorizes an arrest, then the initiating party cannot be liable for false arrest." *Shaw v. Villanueva*, 918 F.3d 414, 417 (5th Cir. 2019). Because Gonzalez does not contest the existence of probable cause, this case may be resolved without resorting to this doctrine. *See*

Appendix B

The Supreme Court addressed the importance of probable cause to retaliatory arrest cases in *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019). *Nieves* dealt with an allegedly retaliatory arrest at an extreme sporting event in Alaska. *Id.* at 1720. Russell Bartlett quarreled with two police officers and claimed that he was arrested partly for refusing to speak with one of the officers. *Id.* 1720–21. The Court held that the existence of probable cause to arrest Bartlett necessarily defeated his retaliatory arrest claim. *Id.* at 1724. It reiterated the general rule it announced in *Hartman v. Moore*, 547 U.S. 250 (2006), that in retaliatory prosecution cases a plaintiff must plead and prove the absence of probable cause for the underlying criminal charge. *Id.* It then held that rule applied to retaliatory arrest claims both because "[o]fficers frequently must make 'split-second judgments' when deciding whether to arrest, and the content and manner of a suspect's speech may convey vital information," and because "evidence of the presence or absence of probable cause for the arrest will be available in virtually every retaliatory arrest case." *Id.* at 1724 (citations omitted).

However, the Supreme Court carved out a narrow exception to the general rule that the existence of probable cause will defeat a retaliatory arrest claim. Under this exception, plaintiff need not plead lack of

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Buehler v. City of Austin/Austin Police Dep't, 824 F.3d 548, 553 (5th Cir. 2016) (holding that the independent-intermediary doctrine only "becomes relevant when . . . a plaintiff's claims depend on a lack of probable cause to arrest him"). The finding of the independent magistrate further demonstrates that probable cause existed for Gonzalez's arrest here.

probable cause "where officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Id.* at 1727. This is because "[i]n such cases, an unyielding requirement to show the absence of probable cause could pose 'a risk that some police officers may exploit the arrest power as a means of suppressing speech.'" *Id.* (quoting *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1953–54) (2018)). The Court provided the example of jaywalking, which it noted "is endemic but rarely results in arrest." *Id.* It continued, "[i]f an individual who has been vocally complaining about police conduct is arrested for jaywalking," the claim should not be dismissed despite the existence of probable cause because "[i]n such a case, . . . probable cause does little to prove or disprove the causal connection between animus and injury." *Id.* The Court "conclude[d] 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." *Id.* All parties agree that *Nieves* governs this case; they differ, however, on whether this "case squeezes through the crack of an opening that *Nieves* left ajar." *Lund v. City of Rockford*, 956 F.3d 938, 944 (7th Cir. 2020).

Gonzalez cannot take advantage of the *Nieves* exception because she has failed to "present[] objective evidence that [s]he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." 139 S. Ct. at 1727. Gonzalez does not offer evidence of other

similarly situated individuals who mishandled a government petition but were not prosecuted under Texas Penal Code § 37.10(a)(3). Rather, the evidence she offers is that virtually everyone prosecuted under § 37.10(a)(3) was prosecuted for conduct different from hers. The inference she asks us to draw is that because no one else has been prosecuted for similar conduct, her arrest must have been motivated by her speech. But the plain language of *Nieves* requires comparative evidence, because it required "objective evidence" of "otherwise similarly situated individuals" who engaged in the "same" criminal conduct but were not arrested. *Id.* The evidence Gonzalez provides here comes up short.

We recognize that one of our sister circuits has taken a broader view of the *Nieves* exception and held that "the [*Nieves*] majority does not appear to be adopting a rigid rule that requires, in all cases, a particular form of comparison-based evidence." *Lund*, 956 F.3d at 945. The Seventh Circuit came to this conclusion primarily in reliance on Justice Gorsuch's concurrence in part and Justice Sotomayor's dissent in *Nieves*. *Id.* at 944–45. We do not adopt this more lax reading of the exception. Instead, the best reading of the majority's opinion compels the opposite approach. The Court's language was careful and explicit: it required "objective evidence" of "otherwise similarly situated individuals" who engaged in the same criminal conduct but were not arrested. *Nieves*, 139 S. Ct. at 1727. The most reasonable reading of this language is that some comparative evidence is required to invoke this "narrow" exception. *Id.* And importantly, the

majority had the benefit of Justice Gorsuch's concurrence in part and dissent in part as well as and Justice Sotomayor's dissent when crafting the exception. Had the majority wished to soften or broaden the language of the exception in response to those criticisms, it could have done so. Indeed, the driving reason for Justice Sotomayor's dissent seems to be that she read the majority opinion the same way we do: as requiring that a plaintiff produce some comparative-based evidence. *See id.* at 1739 (Sotomayor, J., dissenting).[6]

In sum, the plain language of the *Nieves* exception requires evidence that Gonzalez has not provided. Lacking such evidence, *Nieves* tells us that Gonzalez's claims fail because probable cause existed to arrest her.

Gonzalez also relies on another Supreme Court case to argue that her claim may proceed notwithstanding probable cause. In *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), the Supreme Court dealt with a case involving Fane Lozman, a citizen of Riviera Beach. Like Gonzalez, Lozman was an outspoken critic of local city officials. According to Lozman, the city council hatched a plan to intimidate him

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[6] The dissent offers a thoughtful but different reading of *Nieves*. But the dissent's reading invokes the same concerns expressed in Justice Sotomayor's dissent and Justice Gorsuch's separate opinion. The dissent also contends that *Nieves* may not be applicable here because this case did not involve a split-second decision by a police officer. Putting aside that the district court and the parties emphasized the relevance of *Nieves*, nothing in that case cabins its holding to actions of officers in the line of duty.

in order to curtail his speech. *Id.* at 1949. At a public meeting before the council, Lozman started making remarks, and refused to leave the podium when asked. He was arrested for violating the city counsel's rules of procedure. *Id.* at 1949–50. He alleged that the arrest was in retaliation for his speech but conceded that probable cause existed to arrest him. Lozman sued the City of Rivera Beach, asserting a claim under *Monell v. New York City Dep't. of Soc. Servs.*, 436 U.S. 658 (1978). *Id.* at 1950–51. The jury found for the City, and on appeal the Eleventh Circuit affirmed, holding that the existence of probable cause for the arrest necessarily defeated Lozman's claims. *Id.* at 1950. The Supreme Court reversed, holding that Lozman's claim could proceed.

Gonzalez's argument is that *Lozman* is applicable here because, as in that case, her "claim is far afield from the typical retaliatory arrest claim" because she was not arrested by an officer making a "split-second" decision and because there is additional evidence of retaliatory intent, including certain statements in the affidavit. *Id.* at 1954. But the Supreme Court allowed Lozman's claims to proceed not because of the unusual facts of the case, but because he was asserting a *Monell* claim against the municipality itself, rather than individuals. It held that "[t]he fact that Lozman must prove the existence and enforcement of an official policy motivated by retaliation separates Lozman's claim from the typical retaliatory arrest claim." *Id.* This was so because "[a]n official retaliatory policy is a particularly troubling and potent form of retaliation, for a policy can be long term and pervasive,

unlike an ad hoc, on-the-spot decision by an individual officer." *Id.* Moreover, "[a]n official policy can be difficult to dislodge." *Id.*

Lozman's holding was clearly limited to *Monell* claims.[7] Our sister circuits have recognized as much. *See Novak v. City of Parma*, 932 F.3d 421, 429–30 (6th Cir. 2019) (holding that "*Lozman* does not apply where, as here, the plaintiff sues individual officers"); *DeMartini v. Town of Gulf Stream*, 942 F.3d 1277, 1294 (11th Cir. 2019) (noting that *Lozman* applies only to cases involving official policies). Gonzalez did bring a *Monell* claim against the City of Castle of Hills, but that claim is irrelevant to this appeal.

Finally, in her Rule 28(j) materials, Gonzalez asserts that a recent case from this circuit, *Villarreal v. City of Laredo*, 17 F.4th 532 (5th Cir. 2021), holds that a claim under § 1983 may proceed on similar facts. In *Villarreal*, the plaintiff was a citizen-reporter who was arrested for violating a Texas statute that prohibited citizens from soliciting governmental information from public officials that had not yet been made public. We reasonably pointed out that "it should be obvious to any reasonable police officer that locking up a journalist for asking a question violates the First Amendment" and therefore qualified immunity did not bar the plaintiff's suit. *Id.* at 541. The panel also recognized that its opinion called the constitutionality of the Texas statute into question. *Id.* at 546–47.

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[7] The dissent acknowledges as much. *See post* at 30–31.

Villarreal was different in kind and did not address the issue we face here. In *Villarreal*, the conduct the plaintiff was arrested for—asking questions of police officers—was plainly constitutional. Here, the conduct Gonzalez was arrested for—allegedly stealing a government document—is not plainly constitutional. The heart of our holding in *Villarreal* is that a citizen cannot be arrested under a statute that outlaws plainly constitutional behavior, an issue not raised on these facts. Indeed, *Villarreal* did not address—nor did it even cite—*Nieves* or *Lozman*, the cases both parties recognize govern this case. We therefore find that our opinion in *Villarreal* does not control here.

In his dissent, Judge Oldham makes a forceful case for why the Constitution ought to provide a claim here, particularly given that Gonzalez's arrest was allegedly in response to her exercise of her right to petition. Were we writing on a blank slate, we may well agree with our distinguished colleague. But we remain bound by what we consider the better readings of the relevant Supreme Court precedent.

IV

For the reasons stated herein, we REVERSE the district court's order denying Appellants' motion to dismiss, and REMAND with instructions that Gonzalez's claims against Appellants be dismissed.

Appendix B

ANDREW S. OLDHAM, *Circuit Judge*, dissenting:

This case involves an alleged conspiracy of city officials to punish Sylvia Gonzalez—a 72-year-old councilwoman—for spearheading a nonbinding petition criticizing the city manager. The district court concluded that Sylvia's claim survives qualified immunity at the motion-to-dismiss phase. My esteemed colleagues don't reach the clearly-established-law question because they conclude that under the best reading of Supreme Court precedent, Sylvia failed to adequately state a claim. With the deepest respect and admiration for my learned and distinguished friends in the majority, I disagree.

I.

A.

We are reviewing a motion-to-dismiss decision, so we must take the facts as Sylvia Gonzalez plausibly alleges them, drawing every reasonable inference in her favor. *See Heinze v. Tesco Corp.*, 971 F.3d 475, 479 (5th Cir. 2020). At this stage, here's what we must accept as true:

Castle Hills is a city in Texas with fewer than 5,000 residents. It's governed by a city council of one mayor and five aldermen (called "councilmembers"). The mayor and the councilmembers are elected positions. The council appoints a city manager for an indefinite period to handle the City's day-to-day decisionmaking. The city manager nominates the chief of police and needs approval from the city council.

Appendix B

In Spring 2019, Sylvia Gonzalez was a retired 72-year-old woman living in Castle Hills. Because she wanted to give back to her community, Sylvia ran for a seat on the council. She faced an incumbent. And she won.

During her campaign, Sylvia repeatedly heard complaints about the city manager. After her successful election, Sylvia sought to express her constituents' discontent to the entire city council. So she spearheaded a nonbinding citizens' petition urging the removal of the city manager Ryan Rapelye. The petition complained that for years, "various city managers [have] talked about [fixing] street[s]" but "[n]one have fixed a single" one. To "restor[e] effective management," the petition proposed that Rapelye be replaced with a former city manager who had followed through on promises. Hundreds of Castle Hills residents signed the petition.

At Sylvia's first council meeting, on May 21, 2019, a resident submitted the petition to the council, specifically to Mayor Edward Trevino. The meeting was contentious, to put it mildly. In fact, the petition spurred so much discussion that it led to another council meeting the next day. Given the apparent significance of the petition, one would think that between this meeting and the one the following day, Trevino would've made copies of the document. But he did not.

The next day did not go more smoothly. The city council continued to debate Rapelye's job performance. When the meeting finally finished, Sylvia got

ready to leave, picked up her documents, and placed them in her binder. Before she left, a constituent asked Sylvia some questions. During their conversation, a police officer in charge of safety at the meeting (Captain Steve Zuniga) interrupted and told Sylvia that Trevino wanted to talk to her.

Sylvia went to Trevino who was still at his seat next to Sylvia's. Trevino asked Sylvia, "Where's the petition?" Sylvia responded, "Don't you have it? It was turned in to you yesterday." Trevino said that he didn't and then asked Sylvia to check her materials for it. And to Sylvia's surprise, the petition was in her binder. So she handed Trevino the petition, who said that she "probably picked it up by mistake." After all, they sat right next to each other at the meeting. You might think that was the end of the matter.

But you'd be wrong. Soon after, Trevino hatched a plan with other city officials to retaliate against Sylvia for spearheading the petition. Before describing the plan, I'll introduce you to the schemers: Mayor Trevino, Police Chief John Siemens, and "Special Detective" Alex Wright.[1] Trevino appointed Rapelye as city manager, Rapelye appointed Siemens as police chief, and Siemens commissioned his trusted friend Wright as a "special detective." Together, I call them "the Conspirators."

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[1] The scheme is even more elaborate than that set out here. But because all the claims aren't before us on appeal, I omit these other troubling allegations.

Appendix B

The Conspirators' plan had three parts: (1) investigate Sylvia for purporting to intentionally conceal the very petition she championed; (2) drum up charges against Sylvia and arrest her in a way that makes sure she spends the night in jail; and (3) remove her from office. Part three follows from part two because "if a councilmember is convicted of a felony or a misdemeanor involving official misconduct, it would operate as an immediate removal from office."

Start with the investigation. On May 24, Siemens—who again was appointed by City Manager Rapelye—told another police officer (Sergeant Paul Turner) that Trevino would be contacting him "in reference to the filing of a criminal complaint" against Sylvia. What crime did she conceivably commit? The Conspirators' theory was that Sylvia "concealed" a government document by picking up her own petition at the end of the second council meeting and then immediately handing it back to Trevino. Trevino asked Sergeant Turner to investigate this purported "crime." Turner started his investigation and (unsurprisingly) got nowhere.

But this did not stop Trevino and Siemens. On June 18, 2019, Siemens deputized Wright to take over Turner's investigation. Wright is a trusted friend of Siemens and a private attorney; he's not a peace officer. Wright then spent another month investigating Sylvia. During the investigation, Wright interviewed Trevino, Captain Zuniga, and Rapelye.

On June 24, 2019, "Special Detective" Wright interviewed Trevino. According to Wright, Trevino

stressed that Sylvia was "openly antagonistic to the city manager" and "desperately [wanted] to get him fired." Wright also interviewed Captain Zuniga. According to Wright, Zuniga provided facts that Wright "found to be consistent with Mayor Trevino's." One fact was that Sylvia stated that she thought the petition in her possession were "extras" because they were "copies." But recall that even though Trevino now thought that the petition was significant, he never had copies made between the first and second meeting.

"Special Detective" Wright then filed an arrest affidavit asserting that Sylvia committed a Class A misdemeanor for "intentionally destroy[ing], conceal[ing], remov[ing], or otherwise impair[ing] the verity, legibility, or availability of a governmental record." TEX. PENAL CODE § 37.10(a)(3). Never mind that Sylvia would have no reason to conceal her own petition. Never mind that Sylvia did not in fact conceal her own petition. And never mind that Sergeant Turner, an actual officer, investigated this purported "crime" for over a month and (obviously) got nowhere.

The plan then entered its next phase: the arrest. "Special Detective" Wright lived up to his title. He did three special things to ensure that Sylvia would be arrested and jailed rather than simply asked to appear before a judge.

First, Wright chose to get a warrant rather than a summons. Summonses are normally reserved for people suspected of nonviolent crimes, and they don't require a trip to jail. Obviously, Sylvia's purported

"crime" was nonviolent. Still, Wright chose to get a bench warrant for her arrest.

Second, Wright didn't get a warrant through the district attorney ("DA")—even though that's the normal procedure. Instead, Wright circumvented the DA. By using a procedure typically reserved for violent felonies or emergency situations, Wright walked the warrant directly to a magistrate judge. This side-step ensured that the DA couldn't stop the retaliatory arrest. And there can be little doubt that the DA would've stopped it if given the chance: After all, when the DA's office finally learned of the charges and reviewed them, it immediately dismissed them.

Third, by using the procedure that skirted the DA, Wright ensured that Sylvia couldn't avoid jail through the satellite-booking function. This function allows individuals with outstanding warrants for nonviolent offenses to be booked, processed, and released without being jailed. But because Sylvia's warrant wasn't obtained through the traditional channels, it wasn't discoverable through the satellite office's computer system. This left Sylvia with only one option: jail.

So off to jail she went. When Sylvia learned of the arrest warrant, she decided to turn herself in. On July 18, 2019, Sylvia—a 72-year-old councilwoman—was booked. She spent a day in jail—handcuffed, on a cold metal bench, wearing an orange jail shirt, and avoiding using the restroom, which had no doors and no toilet-paper holders. The entire time she wasn't allowed to stand up and stretch her legs.

The next part of the plan was removing her from office. This time the Conspirators only somewhat succeeded. It's true that the DA dismissed the charges, so Sylvia wasn't "convicted" of the misdemeanor, and in turn, she wasn't "immediately remov[ed] from office." But it's also true that Sylvia is "so traumatized by the experience that she will never again help organize a petition or participate in any other public expression of her political speech [and] will . . . never again run for any political office." Although the plan didn't go as intended, the Conspirators ended up succeeding in a more underhanded and permanent way.

B.

Sylvia sued the Conspirators in their individual capacities and the City of Castle Hills under 42 U.S.C. § 1983 for violating her First Amendment right as incorporated by the Fourteenth Amendment. The Conspirators moved to dismiss Sylvia's claim based on qualified immunity, while the City moved to dismiss her claim because she didn't sufficiently allege a claim under *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978).

The district court denied both motions to dismiss. Only the denial of the Conspirators' motion is relevant here on interlocutory appeal. The court first rejected the Conspirators' principal argument that Sylvia had to prove the absence of probable cause to plead a First Amendment retaliatory-arrest claim. The court did so because under clearly established law, Sylvia alleged "the existence of objective evidence that she was arrested when otherwise similarly

situated individuals not engaged in the same sort of protected speech had not been." Because the Conspirators didn't meaningfully contest whether Sylvia plausibly alleged a violation of her First Amendment rights, the court concluded that Sylvia's claim passed motion-to-dismiss muster.

The Conspirators timely appealed. We have jurisdiction under 28 U.S.C. § 1291. *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). Review is *de novo*. *Morrow v. Meachum*, 917 F.3d 870, 874 (5th Cir. 2019).

II.

Qualified immunity includes two inquiries. The first question is whether the officials violated a constitutional right. *Jackson v. Gautreaux*, 3 F.4th 182, 186 (5th Cir. 2021). I say yes. The second question is whether the right at issue was clearly established at the time of the alleged misconduct. *Ibid.* On this question, I am not so sure. But my esteemed colleagues in the majority do not address it, so I do not offer a reason to disturb the district court's judgment.

A.

To allege a First Amendment retaliation claim, Sylvia must show that: (1) she engaged in a constitutionally protected activity, (2) the officials took a material adverse action that caused her to suffer an injury, and (3) there's a causal connection between the officials' retaliatory animus and her subsequent injury. *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019); *see also Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir.

2002); *Novak v. City of Parma*, 932 F.3d 421, 427 (6th Cir. 2019) (Thapar, J.). I address each in turn. I then (4) address (a) the Conspirators' remaining counter-arguments and (b) my esteemed colleagues' approach.

1.

Sylvia engaged in activity that was protected by the First Amendment as incorporated by the Fourteenth Amendment. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances." U.S. CONST. amend. I; *see also United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 n.4 (1967) (incorporating the relevant clauses). As the Conspirators' counsel rightly admitted at oral argument, Sylvia alleged a violation of her right to petition the government.

The right to petition has a rich historical pedigree that "long antedate[s] the Constitution." *McDonald v. Smith*, 472 U.S. 479, 482 (1985); *see also Borough of Duryea v. Guarnieri*, 564 U.S. 379, 395 (2011) (The right "is of ancient significance in the English law and the Anglo–American legal tradition."). In fact, its roots "run[] from [the] Magna Carta in 1215 through royal commitments in the Petition of Right of 1628 and the Bill of Right of 1689 to seventeenth- and eighteenth-century parliamentary guarantees of a general right to petition." Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739, 741 (1999) (quotation omitted).

Appendix B

In 1215, the Magna Carta "confirmed the right of barons to petition the King." *Borough of Duryea*, 564 U.S. at 395. In 1689, the English Declaration of Rights provided that "[i]t is the Right of the Subjects to petition the King, and all Commitments and Prosecutions for such Petitioning are Illegal." 1 Wm. & Mary, ch. 2, 6 Statutes of the Realm 143; *see also McDonald*, 472 U.S. at 482; *Borough of Duryea*, 564 U.S. at 395–96; 1 WILLIAM BLACKSTONE, COMMENTARIES *139 ("[A]ll commitments and prosecutions for such petitioning [were] illegal.").

Early American Colonies also provided a right to petition. *See Borough of Duryea*, 564 U.S. at 394; Lawson & Seidman, *supra*, at 748–50; Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 144–55 (1986). For example, the Stamp Act Congress of 1765 "included a right to petition the King and Parliament in its Declaration of Rights and Grievances." *McDonald*, 472 U.S. at 482. And the "first Continental Congress in 1774 recognized the right to petition." Lawson & Seidman, *supra*, at 750. The "Declarations of Rights enacted by many state conventions" also had "a right to petition for redress of grievances." *McDonald*, 472 U.S. at 482–83. And during the ratification debates, Anti-Federalists "circulated petitions urging delegates not to adopt the Constitution absent modification by a bill of rights." *Borough of Duryea*, 564 U.S. at 396.[2] The significance

[2] The Anti-Federalists pointed, in particular, to the Constitution's omission of a right to petition. *See, e.g.*, Centinel No. 2, *in* 2 THE COMPLETE ANTI-FEDERALIST 143, 153 (Herbert J.

of petitioning continued after the ratification of the Constitution and the First Amendment. *See id.* at 396–97.

Given this tradition, it's unsurprising that the Supreme Court has put the right on a pedestal. The Court has stressed that the right to petition is "one of the most precious of the liberties safeguarded by the Bill of Rights." *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524 (2002) (quotation omitted). It has also said that the right is "an essential safeguard of freedom." *Borough of Duryea*, 564 U.S. at 395. It even went so far to say that "[t]he very idea of a government, republican in form, implies a right . . . to petition for a redress of grievances." *United States v. Cruikshank*, 92 U.S. 542, 552 (1875).[3] And for good reason: "The

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Storing ed., 1981) (arguing that "petitioning or remonstrating to the federal legislature ought not to be prevented"); Centinel No. 4, *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 164 ("Of what avail will be a prosperous state of commerce, when the produce of it will be at the absolute disposal of an arbitrary and unchecked government, who may levy at pleasure the most oppressive taxes; who may destroy every principle of freedom; who may even destroy the privilege of complaining."); Philadelphiensis No. 5, *in* 3 THE COMPLETE ANTI-FEDERALIST, *supra*, at 116–18; Essay by Samuel, *in* 4 THE COMPLETE ANTI-FEDERALIST, *supra*, at 193 (objecting that there is no "provision made for the people or States, to petition or remonstrate"). In 1788, the American people ratified the Constitution without an express protection for the right to petition; but soon thereafter, they "recognized the power of the Anti-Federalists' criticisms and ratified the [First] Amendment in 1791." *United States v. ERR, LLC*, 35 F.4th 405, 410 (5th Cir. 2022).

[3] *See also* Lawson & Seidman, *supra*, at 742 ("The constitutional guarantee of the right to petition is a guarantee against legislative interference with a preexisting, predefined right

right to petition is in some sense the source of other fundamental rights, for petitions have provided a vital means for citizens to request recognition of new rights and to assert existing rights against the sovereign." *Borough of Duryea*, 564 U.S. at 397.[4]

It's thus safe to say that Sylvia engaged in speech and conduct "high in the hierarchy of First Amendment values." *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1955 (2018).

2.

The Conspirators took a material adverse action against Sylvia. Retaliation by government officials for exercising one's right to petition violates the First Amendment. *See Nieves*, 139 S. Ct. at 1722 ("As a general matter the First Amendment prohibits government officials from subjecting an individual to

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whose contours are assumed rather than created by the Constitution."); *Borough of Duryea*, 564 U.S. at 403 (Scalia, J., concurring in the judgment in part and dissenting in part) ("The reference to 'the right of the people' indicates that the Petition Clause was intended to codify a pre-existing individual right, which means that we must look to historical practice to determine its scope.").

[4] The right to petition also gave rise to the celebrated *Case of the Seven Bishops*, 12 How. St. Tr. 183 (K.B. 1688), where the jury famously acquitted bishops charged with libel for petitioning the government. This led to the Constitution's Take Care Clause, which "ruled out the [executive's] suspending and dispensing powers." *See Texas v. Biden*, 20 F.4th 928, 979–82 (5th Cir. 2021); *see also* MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 115–19 (2020).

retaliatory actions for engaging in protected speech." (quotation omitted)); *Hous. Cmty. Coll. Sys. v. Wilson*, 142 S. Ct. 1253, 1259 (2022) ("[A]s a general matter, the First Amendment prohibits government officials from subjecting individuals to retaliatory actions after the fact for having engaged in protected speech." (quotation omitted)).

The adverse action here is "easy to identify": It's the "arrest." *Id.* at 1260. And that action is a "material" violation of Sylvia's rights. *Id.* at 1261. Although "we expect elected representatives to shoulder a degree of criticism about their public service from their constituents and their peers," we don't expect them to shoulder an arrest and a night in jail for a misdemeanor as retaliation for exercising their First Amendment right to petition. *Ibid.*

3.

Next, the causal connection. Sylvia alleged numerous facts to show that the Conspirators arrested her for petitioning the government. This is not a case where we must guess about the Conspirators' motives. It's also not a case where we must rely on the allegations in the complaint standing alone. Rather, *the face of the arrest affidavit itself* lists Sylvia's viewpoints as relevant facts warranting her arrest. For example:

- "From her very first [council] meeting in May of 2019, [Sylvia] has been openly antagonistic to the city manager, Ryan Rapelye, wanting desperately to get him fired."

- "Part of her plan to oust Mr. Rapelye involved collecting signatures on several petitions to that effect."

- "Gonzalez had personally gone to [a resident's] house on May 13, 2019, to get her signature on one of the petitions under false pretenses, by misleading her, and by telling her several fabrications regarding Ryan Rapelye . . . ."

There is no way to understand "Special Detective" Wright's affidavit except that he—as a private attorney deputized to act by his fellow Conspirators—wanted to arrest Sylvia because of her petition.

If there were any doubt on that score, "Special Detective" Wright eliminated it with the highly irregular procedure he used to get Sylvia's warrant. *See supra*, at 15–16. This procedure ensured that the DA couldn't stop the arrest and that Sylvia spent the night in jail for a nonviolent misdemeanor rather than merely appearing before a judge at a particular date and time. And the moment the actual prosecutors found out about the shenanigans, they dismissed the case.

Thus, the Conspirators' animus plainly caused Sylvia's arrest. Sylvia has met her burden of showing the requisite causal connection.

4.

Now, the Conspirators' and my esteemed colleagues' objections. I first (a) reject the Conspirators' contention that Sylvia relies on vicarious liability to establish her claim. I then (b) address my colleagues' conclusion that the presence of probable cause dooms Sylvia's claim.

a.

The Conspirators complain that the district court didn't consider each of them separately. That is, they think the court allowed Sylvia to rely on vicarious liability to establish her claim. They're wrong.

It's true that Sylvia "must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). But she did just that: She sufficiently connected each defendant to her claim through her allegations of a conspiracy.

A "conspiracy allegation offers 'the conceptual spring' for holding [one] defendant liable for the actions of another defendant." *Rudd v. City of Norton Shores*, 977 F.3d 503, 513 (6th Cir. 2020) (quoting *Farrar v. Cain*, 756 F.2d 1148, 1151 (5th Cir. 1985)). "A plaintiff must prove that a single plan existed, that each alleged coconspirator shared in the general conspiratorial objective, and that an overt act was committed in furtherance of the conspiracy." *Id.* at 517 (quotation omitted). "An express agreement need not exist, and each conspirator need not have known all

of the details of the illegal plan or all of the participants involved." *Ibid.* (quotation omitted).

Sylvia sufficiently alleged a conspiracy between Trevino, Siemens, and Wright. First, Sylvia adequately alleged that there was one plan: retaliate against Sylvia for exercising her right to petition with the goal of removing her from the city council.

Second, Sylvia adequately alleged that each coconspirator shared in the general conspiratorial objective. Mayor Trevino nominated Rapelye to be city manager. Siemens was appointed to his position as the chief of police by Rapelye. Siemens hired his trusted friend Wright as a "special detective" to take over the investigation from Sergeant Turner, even though Siemens's own sergeant had no success in his investigation. Trevino's interview with Wright made clear that it was Sylvia's petition efforts that motivated his filing of the complaint. And Wright's inclusion of these seemingly irrelevant facts in the warrant affidavit underscores that Wright shared in the conspiratorial objective to retaliate against Sylvia for spearheading the petition.

Last, Sylvia adequately alleged that one of the Conspirators took an overt act in furtherance of the general conspiratorial objective. Obviously, at least Wright took an affirmative act when he secured an arrest warrant and ensured that Sylvia spent the night in jail. But Trevino and Siemens did too. Trevino took an overt act because he filed the criminal complaint that started it all and participated in his

coconspirator's investigation by giving an interview. And Siemens deputized Wright in the first place.

In short, Sylvia sufficiently connected each individual defendant to this claim through her conspiracy allegations.

b.

Next, my esteemed colleagues don't dispute that Sylvia engaged in protective activity, that the Conspirators took a material adverse action, or that retaliatory animus caused the arrest. Instead, they conclude that because the parties agree that there was probable cause for the arrest, Sylvia's claim fails under the Supreme Court's decision in *Nieves*.

With deepest respect, I am obligated to disagree. I first (i) explain *Nieves*. I then (ii) explain the more relevant precedent, *Lozman*. I last (iii) explain that under *Nieves* or *Lozman* or both, Sylvia has met her burden.

i.

It's well-established that "the language of an opinion is not always to be parsed as though we were dealing with the language of a statute." *Brown v. Davenport*, 142 S. Ct. 1510, 1528 (2022) (quotation omitted); *see also Borden v. United States*, 141 S. Ct. 1817, 1833 n.9 (2021). Instead, we must read precedent, including *Nieves*, "fairly and holistically." *Mitchell Law Firm, LP v. Bessie Jeanne Worthy Revocable Tr.*, 8 F.4th 417, 421 (5th Cir. 2021); *see also United States*

v. Vargas-Soto, 35 F.4th 979, 991 (5th Cir. 2022) (explaining that "it's never a fair reading of precedent to take . . . sentences out of context").

In *Nieves,* the Supreme Court announced a two-part rule. The first part is a general rule: "The presence of probable cause should *generally* defeat a First Amendment retaliatory arrest claim." 139 S. Ct. at 1726 (emphasis added). The second part is a "narrow qualification": Probable cause will *not* defeat a retaliatory-arrest claim in "circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Id.* at 1727. To avail herself of the second part of this rule, the plaintiff can "present[] objective evidence that [s]he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Ibid.* This is an "objective inquiry." *Ibid.*

My learned colleagues hold that the "most reasonable reading of this language is that some comparative evidence is required to invoke" the second part of *Nieves*'s rule. *Ante*, at 8. That is, my colleagues hold that probable cause will defeat a retaliatory-arrest claim (*Nieves* part one) unless the retaliatory-arrest plaintiff can produce *comparative* evidence showing that officers generally do not arrest people for the underlying crime (*Nieves* part two).

In my view, and again with deepest respect, such *comparative* evidence is not required. *Nieves* simply requires objective evidence. And evidence is "[s]omething (including testimony, documents, and tangible

objects) that tends to prove or disprove the existence of an alleged fact." *Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019). So the retaliatory-arrest plaintiff need only provide (objective) evidence that *supports* the required proposition by tending to connect the officers' animus to the plaintiff's arrest. Such evidence could be comparative. But as far as I can tell, nothing in *Nieves* requires it to be so.

Context confirms that straightforward reading. The second part of the *Nieves* rule identifies circumstances "where officers have probable cause to make arrests, but typically exercise their discretion not to do so." 139 S. Ct. at 1727. In those circumstances, "probable cause does little to prove or disprove the causal connection between animus and injury." *Ibid.* The *Nieves* majority gave a prototypical example of a circumstance that should meet the second part: jaywalking. As the Court explained:

> For example, at many intersections, jaywalking is endemic but rarely results in arrest. If an individual who has been vocally complaining about police conduct is arrested for jaywalking at such an intersection, it 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. In such a case, . . . probable cause does little to prove or disprove the causal connection between animus and injury . . . .

Ibid. It's not clear that there will always (or ever) be available comparative evidence of jaywalkers that weren't arrested. Rather, the retaliatory-arrest- jaywalking plaintiff always (or almost always) must appeal to the commonsense proposition that jaywalking happens all the time, and jaywalking arrests happen virtually never (or never). Yet under today's opinion, I am afraid the very jaywalking plaintiff invoked by the Supreme Court to illustrate part two of the *Nieves* rule would lose for lack of nonexistent comparative evidence.

I'm also not sure what to make of the separate writings in *Nieves*. *Contra ante*, at 8–9. The *Nieves* Court gave us five different opinions to explain its holding. It's true that Justice Sotomayor (writing only for herself) said the *Nieves* majority "arbitrarily fetishizes one specific type of motive evidence—treatment of comparators—at the expense of other modes of proof." 139 S. Ct. at 1739 (dissenting op.). But Justice Gorsuch (also writing only for himself) concurred by emphasizing that "I do not understand the majority as going that far." *Id.* at 1734 (concurring op.). And the *Nieves* majority said nary a word about either assertion. Nor did any of this actually matter in *Nieves* because the case did not implicate comparative evidence in any event. So I think the absolute most that can be said about the Court's holding is that (1) the presence of probable cause is not a bar to retaliatory-arrest claims, so long as (2) the plaintiff produces objective evidence of retaliatory animus.

But the more fundamental problem is that it's not even clear to me *Nieves* is the most relevant precedent here. Recall that *Nieves* creates a two- part rule: a general rule that probable cause defeats retaliatory-arrest claims (part one), and an exception for circumstances where officers generally exercise discretion not to arrest (part two). The *Nieves* Court framed the *entirety* of that two-part rule to accommodate the necessities of split-second decisions to arrest. *See id.* at 1724 (pointing to the need for "split-second judgments" (quotation omitted)); *see also id.* at 1725 ("Police officers conduct approximately 29,000 arrests every day—a dangerous task that requires making quick decisions in circumstances that are tense, uncertain, and rapidly evolving." (quotation omitted)). And *Nieves* itself involved precisely such a split-second warrantless arrest. *See id.* at 1720–21 (describing the incident, which involved a drunk and combative partygoer who did not immediately comply with police orders and almost got tased). It's unclear to me why we should apply a rule designed for split-second warrantless arrests to a deliberative, premediated, weeks-long conspiracy.[5]

[5] It's true that *Nieves* expressly framed only the first part of its rule—that probable cause generally defeats retaliatory-arrest claims—to accommodate split-second decisions. But it's also irrelevant. That's because if the general rule does not apply to deliberative, intentional, and premediated conspiracies to punish people for protected First Amendment activity, then surely the exception to that general rule (*Nieves* part two) also does not apply to such deliberative, intentional, and premeditated conspiracies.

In short, *Nieves* designed a rule to reflect "the fact that protected speech [or conduct] is often a legitimate consideration when deciding whether to make an arrest" and the fact that "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." *Id.* at 1724. In this case, it's plainly impossible that Sylvia's speech and petitioning activity was a "legitimate consideration" in the Conspirators' efforts to jail her. And there's zero difficulty or complexity in figuring out whether it was animus or her purportedly criminal conduct that caused her arrest. It was plainly the former; if it were even conceivably the latter, the Conspirators would not have needed a faux detective, would not have needed to circumvent the DA's office, and would not have had their charges dismissed the moment a real law-enforcement official found out about them. It's therefore unclear to me what purchase *Nieves* has here.

ii.

Rather, the more relevant rule appears to come from *Lozman*. That case involved materially identical facts to ours. There, Fane Lozman was "an outspoken critic" of the City of Riviera Beach, who "often spoke during the public-comment period at city council meetings," "criticized" public officials, and even sued the City. 138 S. Ct. at 1949. During "a closed-door session," the City's council "formed an official plan to intimidate him" and executed the plan at the next public meeting. During the public-comment period,

Lozman "stepped up to the podium to give remarks," but early into his remarks, a councilmember "interrupted Lozman" and "direct[ed] him to stop" talking. *Ibid.* Lozman, however, continued, so the councilmember "called for the assistance of the police officer in attendance." *Ibid.* After Lozman refused to leave the podium, the councilmember ordered the officer to arrest him. *Id.* at 1949–50. And the officer did. *Id.* at 1950.

Lozman sued the City under § 1983 for violating his First Amendment rights. Although Lozman "concede[d] that there was probable cause for the arrest," the Supreme Court concluded that the existence of probable cause itself didn't doom his claim. *Id.* at 1951. In reaching that conclusion, the Court highlighted four characteristics. First, the Court noted that Lozman didn't "sue the officer who made the arrest." *Id.* at 1954. Second, the Court highlighted that Lozman alleged "more governmental action than simply an arrest" because there was "a premeditated plan to intimate him." *Ibid.* This mattered because an "official retaliatory policy is a particularly troubling and potent form of retaliation, for a policy can be long term and pervasive, unlike an ad hoc, on-the-spot decision by an individual officer." *Ibid.* Third, the Court emphasized that the "retaliation [was] for prior, protected speech bearing little relation to the criminal offense for which the arrest is made." *Ibid.* Finally, the Court stressed that the retaliation was for Lozman exercising his right to petition, which is "high in the hierarchy of First Amendment values." *Id.* at 1954–55. Because of these four characteristics, the Court

determined that "Lozman's claim [wa]s far afield from the typical retaliatory arrest claim" and "the [causation] difficulties that might arise [in] the mine run of arrests made by police officers" weren't present. *Id.* at 1954.

Each of those characteristics is present (at least in part) here. First, Sylvia didn't sue an officer who made the arrest. To be sure, Wright obtained the arrest warrant. But he didn't find Sylvia and arrest her; that is, he didn't actually execute the warrant. Rather, another official executed the warrant when Sylvia turned herself in. And Sylvia didn't sue that official. Second, the Conspirators "formed a premeditated plan" to retaliate against Sylvia for engaging in protected activity. *Ibid.* Third, the protected activity wasn't a legitimate consideration for the arrest. Indeed, the arrest bore "little [relevant] relation to the criminal offense for which the arrest is made." *Ibid.*; *cf. Nieves*, 139 S. Ct. at 1723–24 ("The causal inquiry is complex because protected speech is often a *wholly legitimate consideration* for officers when deciding whether to make an arrest." (emphasis added) (quotation omitted)). Sylvia's spearheading of the petition was irrelevant to the elements of the criminal offense and the reasons provided in the affidavit to get the arrest warrant. In fact, her involvement cut directly against it. After all, why would Sylvia intentionally conceal the very petition she championed? Last, the right violated here is also the right to petition. *See Lozman*, 138 S. Ct. at 1954–55.

In the end, the only relevant difference between *Lozman* and this case is that Sylvia's claim is against *the Conspirators*, while Lozman brought a *Monell* claim against *the City itself*. My esteemed colleagues find this difference dispositive. *See ante*, at 10 ("*Lozman*'s holding was clearly limited to *Monell* claims.").[6] It's true that *Lozman* involves a *Monell* claim and that *Nieves* wrote that the *Lozman* Court "limited [its] holding to arrests that result from official policies of retaliation." 139 S. Ct. at 1722. But as the *Nieves* Court acknowledged, the *Monell* claim mattered because it showed that *Lozman* involved "facts [that] were far afield from the typical retaliatory arrest claim," while *Nieves* involved a "more representative case." *Ibid.* (quotation omitted). So even though *Lozman*'s holding is limited, the opinion's teachings are still instructive—especially when understanding *Nieves*.

iii.

Under *Nieves* or *Lozman* or both, Sylvia has met her burden. She alleges that "a review of the misdemeanor and felony data from Bexar County over the past decade makes it clear that the misdemeanor tampering statute has never been used in Bexar County to criminally charge someone for trying to

[6] They also cite two of our sister circuits. But neither *Novak v. City of Parma*, 932 F.3d 421 (6th Cir. 2019), nor *DeMartini v. Town of Gulf Stream*, 942 F.3d 1277 (11th Cir. 2019), involved a conspiracy. So they had no occasion to consider whether *Lozman* is instructive for claims against individual defendants based on conspiracy.

steal a nonbinding or expressive document." More specifically, she alleges that most indictments under the statute involved fake government IDs, such as driver's licenses, social security numbers, and green cards. As my esteemed colleagues recognize, "the evidence [Sylvia] offers is that virtually everyone prosecuted under [the Texas statute] was prosecuted for conduct different from hers." *Ante*, at 8. In these circumstances, that is enough to satisfy the second part of the *Nieves* rule and to hold that probable cause does nothing to defeat Sylvia's retaliatory-arrest claim.

First, Sylvia's evidence is obviously objective. She did a comprehensive "review of misdemeanor and felony data from Bexar County over the past decade." And she doesn't rely on "the statements and motivations of the particular [officials]." *Nieves*, 139 S. Ct. at 1727.

Second, Sylvia's evidence supports the proposition that *Nieves* requires: She "was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech [or conduct] had not been." *Ibid.* Evidence that an arrest has never happened before (*i.e.*, a negative assertion) can support the proposition that there are instances where similarly situated individuals not engaged in the same protected activity hadn't been arrested (*i.e.*, a positive inference). *See Negative Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Evidence suggesting that an alleged fact does not exist, such as a witness's testifying that he or she did not see an event occur. . . ."). Context determines whether a negative assertion

amounts to positive evidence. *See ibid.* (explaining that "a negative assertion will sometimes be considered positive evidence").[7]

Here, common sense dictates that Sylvia's negative assertion amounts to direct evidence that similarly situated individuals not engaged in the same sort of protected activity had not been arrested. *See Lund v. City of Rockford*, 956 F.3d 938, 945 (7th Cir. 2020) ("We must consider each set of facts as it comes to us, and in assessing whether the facts supply objective proof of retaliatory treatment, . . . common sense must prevail."). After all, government employees routinely—with intent and without it—take stacks of papers before, during, and after meetings. Under the Conspirators' interpretation of Texas Penal Code § 37.10(a)(3), there should be dozens if not hundreds of arrests of officeholders and staffers during every single legislative biennium—to say nothing of the hundreds if not thousands of arrests during the more-frequent local-government meetings across the State.

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[7] It's of course true that comparative evidence can be *better* evidence than the negative assertions Sylvia provides because it more directly supports the point. *See Negative Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Negative evidence is generally regarded as weaker than positive evidence because a positive assertion that a witness saw an event is a stronger statement than an assertion that a witness did not see it."). But this doesn't mean that Sylvia's evidence doesn't support the required proposition that other similarly situated individuals not engaged in the same sort of protected activity hadn't been arrested. Simply put, just because Sylvia's evidence requires an inference doesn't mean it isn't evidence sufficient to meet *Nieves*. Our system accepts circumstantial evidence all the time.

On the record before us, however, there has been only one: Sylvia's.

In short, Sylvia properly alleged that the Conspirators jailed her for petitioning the government. *Nieves* is no barrier to her retaliatory-arrest claim. She has therefore pleaded a constitutional violation and satisfied the first prong of the qualified-immunity inquiry.

B.

The second prong is whether the Conspirators violated Sylvia's clearly established rights. This question is admittedly harder. You might reasonably think that if the First Amendment clearly establishes anything, it's that the government cannot arrest a citizen for her petition. That's obviously been true since at least the English Declaration of Rights in 1689. *See* 1 Wm. & Mary, ch. 2, 6 Statutes of the Realm 143 ("It is the Right of the Subjects to petition the King, and all Commitments and Prosecutions for such Petitioning are Illegal."); *see also* Declaration and Resolves of the First Continental Congress Resolution 8 (Oct. 14, 1774) ("That they have a right peaceably to assemble, consider of their grievances, and petition the king; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal.").

On the other hand, in *Reichle v. Howards*, 566 U.S. 658 (2012), the Court held that we cannot define the right against retaliatory arrests "as a broad general proposition." *Id.* at 665 (quotation omitted). Rather,

"the right in question is not the general right to be free from retaliation for one's speech, but the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause. This Court has never held that there is such a right." *Ibid.* So *Reichle* might lead you to think that Sylvia cannot surmount the clearly-established-law prong.

On yet another hand, however, *Reichle* (like *Nieves*) involved a split-second decision to arrest an unruly person in a public place. *See id.* at 661 (describing the incident, in which Howards assaulted the Vice President, lied about it, and was arrested). Neither *Reichle* nor *Nieves* involved secret, deliberative, and intentional conspiracies to jail an elderly woman for petitioning the government. And it's not at all clear that we should apply the same qualified-immunity inquiries for First Amendment cases, Fourth Amendment cases, split-second-decisionmaking cases, and deliberative-conspiracy cases. *See, e.g.*, *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2421 (2021) (statement of Thomas, J., respecting the denial of certiorari) (criticizing the "one-size-fits-all doctrine"). As Justice Thomas has observed, "why should [speech-suppressing] officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting? We have never offered a satisfactory explanation to this question." *Id.* at 2422; *see also* Andrew S. Oldham, *Official Immunity at the Founding*, 46 HARV. J.L. & PUB. POL'Y --- (forthcoming) (manuscript at 26–27),

https://ssrn.com/abstract=3824983. That further suggests that the Conspirators here should not get the same qualified-immunity benefits that cops on the beat might get.

And in any event, *Reichle* was not the Court's last word on the topic. In *Lozman*, the Court supplied the holding that *Reichle* said was theretofore missing—namely, it held that retaliatory-arrest plaintiffs *can* prevail even when their arrests are supported by probable cause. 138 S. Ct at 1955. Moreover, as noted above, *Lozman* and our case involve materially identical facts. And the Supreme Court decided *Lozman* in 2018—the year before the Conspirators jailed Sylvia for petitioning the government. So that might lead you to think that the Conspirators were given every conceivable form of fair notice—in a string of authority from 1689 to 2018—that their conduct was flagrantly violative of the First Amendment. *See Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam) (Qualified immunity's "focus is on whether the officer had fair notice that her conduct was unlawful.").[8] Whatever the right answer to this

[8] The timing of *Nieves* does nothing to help the Conspirators. The Court decided that case before Sylvia's arrest, and hence the Conspirators were on notice that probable cause would not necessarily defeat a retaliatory-arrest claim. *See* 139 S. Ct. at 1727–28 (so holding); *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) ("[T]he court must decide whether the right at issue was 'clearly established' *at the time of defendant's alleged misconduct*." (emphasis added)). It's no answer to say, as the Conspirators do, that they *started* conspiring to retaliate against Sylvia before *Nieves* was decided. Only the "plainly incompetent" would hatch a retaliatory plan before that decision and stick to it

question might be, my distinguished colleagues in the majority have no occasion to reach it. *See ante*, at 5–11 (resolving the case on prong one of the qualified-immunity inquiry). So I see little use in saying more about it.

With deepest respect, I dissent.

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afterwards. *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (quotation omitted).

Appendix C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SYLVIA GONZALEZ,	§	No. 5:20–CV–1151–DAE
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
CITY OF CASTLE HILLS, TEXAS; EDWARD TREVINO, II, Mayor of Castle Hills; JOHN SIEMENS, Chief of the Castle Hills Police Department; and ALEXANDER WRIGHT;	§	
	§	
Defendants.	§	

ORDER DENYING MOTION TO DISMISS

Before the Court is Defendants' Motion to Dismiss Pursuant to Rule (12)(b)(6) that was filed on October 12, 2020. (Dkt. # 13.) Sylvia Gonzalez ("Plaintiff") filed a response on October 26, 2020. (Dkt. # 17.) Defendants then filed a reply on October 28, 2020. (Dkt. # 18.) Pursuant to Local Rule CV-7(h), the Court finds this matter suitable for disposition without a hearing. After careful consideration of the memoranda filed in

support of and against the motion, the Court—for the reasons that follow—**DENIES** the motion.

FACTUAL BACKGROUND

This case concerns the alleged retaliatory arrest of Sylvia Gonzalez, a former councilmember of the City of Castle Hills. The City of Castle Hills ("City") is located in Bexar County, Texas and its governing body consists of a mayor and five aldermen, commonly referred to as councilmembers. (Dkt. # 1.) The City has adopted the city-manager form of government and delegated extensive authority to its city manager. (Id.)

On May 4, 2019, Plaintiff was elected as the first Hispanic councilwoman in Castle Hills history. (Id.) Ten days later, she was sworn in as a councilmember by Bexar County Sheriff Javier Salazar. (Id.) City Attorney Schnall was allegedly present at the ceremony and did not object to any part of the swearing-in. (Id.)

Plaintiff organized a nonbinding citizens' petition advocating for the removal of city manager Ryan Rapelye. (Dkt. # 17.) According to Plaintiff, the petition had no legal force—it was designed to merely express citizens' discontent with Rapelye's performance. (Dkt. # 1.) The petition proposed that the city council replace Rapelye with Diane Pfeil, who previously served as city manager. (Id.) On May 21, 2019, the day of Plaintiff's first council meeting, a resident submitted the petition to the city council. (Id.) The council argued over Rapelye's job performance for two days, and during the two-day meeting, Plaintiff sat next to

Mayor Trevino. (Id.) Plaintiff claims that when the meeting ended, she stood up and walked away from her seat to speak with other councilmembers. (Id.) When she returned to gather her belongings, Mayor Trevino asked about the location of the petition. (Id.) Plaintiff allegedly found the petition in her binder and handed it to him. (Id.) Plaintiff argues that she did not intentionally place the petition in her binder and the petition never left the council table. (Id.)

Plaintiff argues that in retaliation for the nonbinding petition and her criticism of certain city officials, Defendants planned a scheme to retaliate against her. According to Plaintiff, Mayor Trevino tasked Police Chief Siemens with investigating and charging her for a criminal offense. (Id.) Siemens assigned a full-time police officer to investigate Plaintiff and her petition. (Id.) According to Plaintiff, when the officer did not find anything, Siemens then hired Special Detective Wright ("Wright"). (Id.) Plaintiff states that Wright is not a police officer but is rather a full-time attorney in private practice with a police commission maintained by the City of Castle Hills. (Id.) After a month-long investigation, Wright brought one misdemeanor charge against Plaintiff for tampering with a government record for allegedly attempting to steal the petition. (Dkt. # 1); see Tex. Penal Code § 37.10(a)(3), (c)(1). Plaintiff contends that this charge "has never been brought against someone for even remotely similar conduct, and certainly not against someone for stealing their own petition." (Dkt. # 17.)

Instead of issuing a summons for the nonviolent misdemeanor, Wright obtained a warrant to arrest the 72-year-old, which ensured that she would spend time in jail rather than remaining free and appearing before a judge.[1] (Id.) Defendants also bypassed the Bexar County District Attorney's Office, who upon later review, dismissed the charges. (Id.)

According to Plaintiff, this was not the first time that Defendants had attempted to retaliate against her. Plaintiff claims that on July 9, 2019, before her arrest, Defendants used a made-up technicality related to the manner in which she was sworn in to attempt to strip her of her council seat. (Id.) Plaintiff was sworn in by a sheriff, but Defendants alleged that because he was not "engaged in the performance of his duties," she was sworn in improperly.[2] (Id.) City Attorney Schnall told her that she could not be re-sworn in because more than 30 days had elapsed since Plaintiff's election. (Dkt. # 1.) For that reason, she would be replaced by Amy McLin, who Plaintiff beat in her election. (Id.)

After the city attorney prevented the council from voting on Plaintiff's removal, Plaintiff filed suit and a judge issued a temporary restraining order on July 17, 2019 enjoining Defendants from moving forward with her removal. (Id.) Having failed to remove

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[1] When Plaintiff heard about the warrant, she turned herself in on July 18, 2019. (Dkt. # 1.)

[2] Plaintiff points out that this same technicality could have been used against Mayor Trevino, who was sworn in on the same day as Plaintiff. (Dkt. # 17); see Tex. Gov't Code § 602.002(17).

Gonzalez, six Castle Hills residents—allegedly all closely allied with Mayor Trevino—filed a lawsuit in the name of the state of Texas to remove Gonzalez from office for incompetence and official misconduct. (Id.) After the District Attorney moved to dismiss the action, the district court judge dismissed the case and denied the motion for a new trial. (Dkt. # 1.) The six residents appealed the ruling and as of the date that Plaintiff filed her complaint in this case, the appeal was still pending. (Id.) According to Plaintiff, her attorneys reached out to opposing counsel to release her from the lawsuit. (Id.) However, opposing counsel conditioned release on Plaintiff signing an affidavit stating that she would never run for city council again. (Id.)

Plaintiff filed her complaint on September 29, 2020, bringing a § 1983 claim against Defendants Mayor Trevino, Police Chief Siemens, and Detective Wright (collectively, "Individual Defendants") for violating her First and Fourteenth Amendment rights. (Id.) She also brings a municipal liability claim pursuant to § 1983 against Defendant City of Castle Hills for violating her First and Fourteenth Amendment rights. (Id.); see Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978). The matter before the Court is Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6). (Dkt. # 13.)

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted." To survive a

Rule 12(b)(6) motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). In analyzing whether to grant a 12(b)(6) motion, a court accepts as true "all well pleaded facts" and views those facts "in the light most favorable to the plaintiff." United States ex rel. Vavra v. Kellogg Brown & Root, Inc., 727 F.3d 343, 346 (5th Cir. 2013) (citation omitted). A court need not "accept as true a legal conclusion couched as a factual allegation." Iqbal, 556 U.S. at 678.

DISCUSSION

In their motion to dismiss, Defendants request that the Court take judicial notice of the warrant that was issued for Plaintiff's arrest. (See Dkt. # 13.) Because Plaintiff alleges that Defendants violated her constitutional rights by arresting her in retaliation for the nonbinding petition that she organized, the existence or nonexistence of probable cause is crucial when analyzing Plaintiff's claims. Federal Rule of Evidence 201 permits a district court to take judicial notice of a "fact that is not subject to reasonable dispute because it (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). A district court may take judicial notice of a

fact at the motion to dismiss stage. Basic Cap. Mgmt., Inc. v. Dynex Cap., Inc., 976 F.3d 585, 589 (5th Cir. 2020). In fact, "it is clearly proper in deciding a 12(b)(6) motion to take judicial notice of matters of public record." Norris v. Hearst Trust, 500 F.3d 454, 461 n.9 (5th Cir. 2007). Because the warrant is a public record and bears the signature of the state court judge, the Court takes judicial notice of the warrant in considering the motion. See Dent v. Methodist Health Sys., No. 3:20-CV-00124-S, 2021 WL 75768, at *2 (N.D. Tex. Jan. 8, 2021) (taking judicial notice of a warrant attached to defendant's motion to dismiss plaintiff's § 1983 claim alleging false arrest).

Defendants raise several arguments in support of their motion to dismiss Plaintiff's claims. The Court will address their arguments in turn.

I. Independent Intermediary Doctrine and Probable Cause

Defendants maintain that Plaintiff's claims should be dismissed under the independent intermediary doctrine. (Dkt. # 13.) The warrant for Plaintiff's arrest was approved by a state court judge, who determined that there was probable cause for Plaintiff's arrest. (Id.) Because Plaintiff has not pled or proved the absence of probable cause, Defendants insist that Plaintiff's claims are barred. (Id.)

In response, Plaintiff argues that the independent intermediary doctrine does not apply because she did not bring her claims under the Fourth Amendment. (Dkt. # 17.) With respect to her municipal liability

claim, she also contends that under Lozman v. City of Riviera Beach, 138 S. Ct. 1945 (2018), Monell liability can exist when its leadership punishes an individual in retaliation for her speech, even if the city can find probable cause for an infraction. (Dkt. # 17.) With respect to her claim against the Individual Defendants, Plaintiff argues that Nieves v. Bartlett, 139 S. Ct. 1715 (2019) does not apply. (Id.) Instead, she contends that she only needs to meet the standard announced in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), and she has done so here. (Id.) In their reply, Defendants maintain that the independent intermediary doctrine applies in First Amendment cases. (Dkt. # 18.) They also contend that neither Lozman nor Mount Healthy supports Plaintiff's arguments. (Id.)

"It 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." Deville v. Marcantel, 567 F.3d 156, 170 (5th Cir. 2009) (quoting Taylor v. Gregg, 36 F.3d 453, 456 (5th Cir. 1994)). "[T]he initiating party may be liable for false arrest if the plaintiff shows that 'the deliberations of that intermediary were in some way tainted by the actions of the defendant.'" Id. (quoting Hand v. Gary, 838 F.2d 1420, 1428 (5th Cir. 1988)). But, "because the intermediary's deliberations protect even officers with malicious intent," a plaintiff must show that the official's malicious motive led the official to withhold relevant information or otherwise misdirect the independent

intermediary by omission or commission. Buehler v. City of Austin/Austin Police Dep't., 824 F.3d 548, 555 (5th Cir. 2016); Buehler v. Dear, No. 1:17-CV-724-DAE, 2020 WL 5793008, at *6 (W.D. Tex. Mar. 27, 2020).

Although Defendants have correctly pointed out that the Fifth Circuit has held that the independent intermediary doctrine applies in First Amendment cases,[3] those cases predate two leading Supreme Court cases, Lozman and Nieves, which are particularly instructive here because they both concern when plaintiffs must make a no-probable-cause showing in support of a First Amendment retaliatory arrest claim. The Court will first consider Plaintiff's municipal liability claim before addressing her claim against the Individual Defendants.

A. Municipal liability claim

The U.S. Supreme Court has held that the existence of probable cause does not bar all First Amendment retaliatory arrest claims brought against a

[3] See Curtis v. Sowell, 761 F. App'x 302, 205 (5th Cir. 2019) (holding that the district court did not err in dismissing the plaintiff's First Amendment claim because "probable cause was independently established by [a] grand jury"); Buehler v. City of Austin/Austin Police Dep't, 824 F.3d 548, 554 (5th Cir. 2016); Russell v. Altom, 546 F. App'x 432, 436–37 (5th Cir. 2013). Although Curtis does not predate Lozman, the Fifth Circuit noted in a footnote that Lozman did not apply because the plaintiff did not allege that the defendant prosecuted him as part of an "official retaliatory policy" to silence him. Curtis, 761 F. App'x at 305 n.1.

municipality. In Lozman, the plaintiff frequently criticized a municipal development project and opposed what he perceived as improper conduct by various city officials. 138 S. Ct. at 1950. The plaintiff, Lozman, participated in the public-comment session of the city council meetings more than 200 times and he filed a lawsuit alleging that the city council violated Florida's open-meetings laws. Id. At one council meeting, he stood at the podium and began speaking about arrests of former officials. Id. One councilmember told him to stop talking, and a police officer approached Lozman and asked him to leave the podium. Id. When he refused, Lozman was arrested and charged with disorderly conduct and resisting arrest without violence. Id. at 1949–50. The State's attorney later determined that there was probable cause to arrest Lozman for the offenses but decided to dismiss the charges. Id. at 1950. Lozman filed a lawsuit against the City for its alleged retaliatory actions, and after a 19-day trial, the jury returned a verdict for the City on all claims. Id. When the case reached the U.S. Supreme Court, the plaintiff challenged only the City's alleged retaliatory arrest. Id.

The Supreme Court held that the existence of probable cause does not bar all First Amendment retaliatory arrest claims brought against a municipality. Id. at 1955. The fact that the plaintiff had to prove the existence and enforcement of an official policy motivated by retaliation separated his claim from the typical retaliatory arrest claim. Id. at 1954. The Court explained,

> An official retaliatory policy is a particularly troubling and potent form of retaliation, for a policy can be long term and pervasive, unlike an ad hoc, on-the-spot decision by an individual officer. An official policy also can be difficult to dislodge. A citizen who suffers retaliation by an individual officer can seek to have the officer disciplined or removed from service, but there may be little practical recourse when the government itself orchestrates the retaliation.

Id. Further, the causation problem in retaliatory arrest cases "is not of the same difficulty where, as is alleged here, the official policy is retaliation for prior, protected speech bearing little relation to the criminal offense for which the arrest is made." Id. Finally, the Supreme Court noted that the "right to petition '[i]s one of the most precious of the liberties safeguarded by the Bill of Rights.'" Id. (quoting BE & K. Constr. Co. v. NLRB, 536 U.S. 516, 524 (2002)). Because Lozman alleged that the City deprived him of the right to petition by retaliating against him for his lawsuit and criticisms of public officials, Lozman's speech was "high in the hierarchy of First Amendment values." Id.

The Court finds that Lozman controls here. First, Plaintiff alleges the existence of a retaliatory policy,[4]

[4] For example, Plaintiff alleges "Castle Hills adopted and enforced an official policy or custom to retaliate against Sylvia for her First Amendment activities, namely the expression of her political thought through a nonbinding citizens' petition urging

just as the plaintiff alleged in Lozman. (See Dkt. # 1.) Second, like Lozman, this is not an ordinary retaliatory arrest claim—here, Plaintiff alleges that Defendants tried many times to strip her of her council seat. (See id.) For example, according to Plaintiff, Defendants attempted to strip her of her council seat pursuant to a swearing-in technicality, a lawsuit brought by residents who are allegedly closely allied with Defendants, and an arrest. (See id.) And even then, the nonviolent misdemeanor offense was brought because she allegedly stole her *own* petition. (See id.) Thus, the connection between the alleged animus and injury will not be "weakened . . . by [an official's] legitimate consideration of speech." Lozman, 138 S. Ct. at 1954 (quoting Reichle v. Howards, 566 U.S. 658, 668 (2012)). Finally, because the "right to petition [i]s one of the most precious of the liberties safeguarded by the Bill of Rights," Plaintiff's speech is "high in the hierarchy of First Amendment values." Id. "For these reasons, [Gonzalez] need not prove the absence of probable cause to maintain a claim of retaliatory arrest against the City."[5] Id. at 1955.

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the firing of city manager Rapelye." (Dkt. # 1.) Plaintiff further alleges "[t]his scheme was a part of an official policy or custom that was deliberate, long-term, and pervasive, unlike on-the-spot decisions to arrest, sometimes made by individual officers in split-second situations." (Id.)

[5] Although the Supreme Court noted that cases like Lozman "will require objective evidence of a policy motivated by retaliation to survive summary judgment," this is a motion to dismiss and Plaintiff has satisfied her pleading requirements under Rule 8. Lozman v. City of Riviera Beach, 138 S. Ct. 1945, 1954 (2018).

The Court recognizes that Lozman involved an atypical retaliatory arrest claim. Id. at 1954 (characterizing claims such as the one in Lozman as a "unique class of retaliatory arrest claims" and stating that "Lozman's claim is far afield from the typical retaliatory arrest claim"). The Supreme Court stated that "[o]n facts like these, Mt. Healthy provides the correct standard for assessing a retaliatory arrest claim" and "[t]he Court need not, and does not, address the elements required to prove a retaliatory arrest claim in other contexts." Id. at 1955. However, as the Court discusses above, Lozman and this case share many crucial facts. Further, Defendants, who did not even cite Lozman in their motion to dismiss, have failed to distinguish Lozman from this case. First, in their reply, Defendants assert that Lozman is different because it was not decided at the pleading stage—it was an appeal from an adverse jury verdict after a 19-day trial. (See Dkt. # 18.) However, Defendants do not explain why or how these distinct stages of litigation necessarily require a different outcome. At this stage of the litigation, Plaintiff need only plead "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570. Second, Defendants state that Lozman's claim was "far afield from the typical retaliatory arrest claim." (Dkt. # 18.) However, as described above, the characteristics of Lozman that distinguish that case from typical retaliatory arrest cases are present in this case as well. Third, Defendants state that Lozman's arrest was only part of the City's retaliatory conduct. (Id.) But, as described above, Plaintiff alleges that other retaliatory actions were taken in this case too. The Court

discussed above why causation is not weakened in this case by not requiring Plaintiff to prove the absence of probable cause. Therefore, the Court will not dismiss Plaintiff's claims against the City merely because probable cause may have existed for the misdemeanor offense.

B. Claim Against Individual Defendants

Nieves involved a retaliatory arrest claim against two police officers. 139 S. Ct. at 1724, 1726. The plaintiff, Bartlett, was arrested at a winter sports festival in a remote part of Alaska. Id. at 1720. While a law enforcement officer was speaking with a group of attendees, Bartlett shouted at them to stop talking to the police. Id. When the officer approached him, Bartlett yelled at the officer to leave. Id. Bartlett then confronted another law enforcement officer who was questioning a minor. Id. He stepped towards the officer in an allegedly combative manner, who pushed him back. Id. Bartlett was arrested for disorderly conduct and resisting arrest. Id. at 1721. He brought a § 1983 claim against the officers, alleging that they violated his First Amendment rights by arresting him in retaliation for his speech (i.e., his initial refusal to speak with the first officer and his intervention in the second officer's discussion with the minor). Id.

The U.S. Supreme Court held that in most retaliatory arrest cases, the plaintiff must plead and prove the absence of probable cause for the arrest.[6] Id. at

[6] The Court noted that Lozman did not apply here because that case "involved unusual circumstances in which the plaintiff

1724, 1726. In reaching this decision, the Court explained the complex causal inquiry in these cases, particularly given that "[o]fficers frequently make 'split-second judgments' when deciding whether to arrest, and the content and manner of a suspect's speech may convey vital information—for example, if he is 'ready to cooperate' or rather 'present[s] a continuing threat.'" Id. at 1724 (quoting Lozman, 138 S. Ct. at 1953).

However, the Supreme Court also carved out an exception to this general rule.[7] The Court stated 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."[8] Id. at 1727. The Court

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was arrested pursuant to an alleged 'official municipal policy' of retaliation." Nieves v. Bartlett, 139 S. Ct. 1715, 1722 (2019).

[7] This is not to be confused with Plaintiff's characterization of Nieves as an exception to Mt. Healthy. (Dkt. # 17.) The Supreme Court states in Nieves that the Mt. Healthy test applies only if the plaintiff establishes the absence of probable cause. Nieves, 139 S. Ct. at 1725; see DeMartini v. Town of Gulf Stream, 942 F.3d 1277, 1296 (11th Cir. 2019). Absent such a showing, the retaliatory arrest claim fails unless it falls within the Nieves exception. 139 S. Ct. at 1725, 1727. In Plaintiff's response to Defendants' motion to dismiss, she does not argue that there was no probable cause for her arrest. Thus, in deciding Defendants' motion to dismiss, the Court will evaluate Plaintiff's claim under Nieves rather than Mt. Healthy.

[8] The Supreme Court provided the following example of a case that would fall under the exception:

reasoned that such a showing addresses the causal concern by helping to establish that "non-retaliatory grounds [we]re in fact insufficient to provoke the adverse consequences." Id. (quoting Hartman v. Moore, 547 U.S. 250, 256 (2006)). Because this inquiry is objective, it avoids the problems that would be created by reviewing the officers' subjective intent. Id. Further, "[a]fter making the required showing, the plaintiff's claim may proceed in the same manner as claims where the plaintiff has met the threshold showing of the absence of probable cause." Id.

The Court finds that the Nieves exception applies in this case and Plaintiff need not plead or prove the absence of probable cause. Plaintiff alleges that the misdemeanor offense for which she was charged has "never been used in Bexar County to criminally charge someone for trying to steal a nonbinding or expressive document." (See Dkt. # 1.) In support of her argument, Plaintiff states that misdemeanor and felony data from Bexar County over the past decade shows that of "215 grand jury felony indictments obtained under the tampering statute at issue in this case, not one had an allegation even closely

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> [A]t many intersections, jaywalking is endemic but rarely results in arrest. If an individual who has been vocally complaining about police conduct is arrested for jaywalking at such an intersection, it 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.

Nieves, 139 S. Ct. at 1727.

resembling the one mounted against Sylvia." (Id.) According to Plaintiff, most of the indictments involved accusations of either "using or making fake government identification documents: altered driver's licenses, another person's ID, temporary identification cards, public safety permits, green cards, or social security numbers" and some indictments involved misuse of financial information. (Id.) The "outlier" indictments allegedly involve "hiding evidence of murder, cheating on a government-issued exam, and using a fake certificate of title, among others." (Id.) In the misdemeanor cases, Plaintiff claims that the alleged tampering typically involved the use of fake social security numbers, driver's licenses, and green cards. (Id.) Plaintiff further argues that according to the data, people accused of such nonviolent offenses typically do not go to jail. (Id.) At the motion to dismiss stage, the Court accepts as true Plaintiff's well pleaded facts and views those facts "in the light most favorable to the plaintiff." Kellogg Brown, 727 F.3d at 346. Because Plaintiff alleges the existence of objective evidence that she was arrested when "otherwise similarly situated individuals not engaged in the same sort of protected speech had not been," the Court will not dismiss Plaintiff's § 1983 claim against the Individual Defendants for failing to plead and prove the absence of probable cause. Nieves, 139 S. Ct. at 1727.

Appendix C

II. Qualified Immunity

The parties seem to disagree on Plaintiff's burden to defeat the qualified immunity defense on a motion to dismiss. Defendants contend that once a qualified immunity defense is raised, the Fifth Circuit requires a plaintiff to meet a heightened pleading standard "to show with factual detail and particularity why the defendant official cannot maintain the qualified immunity defense." (Dkt. # 13) (citing Elliot v. Perez, 751 F.2d 1472, 1473 (5th Cir. 1985), Schultea v. Wood, 47 F.3d 1427, 1429–34 (5th Cir. 1995), and Morgan v. Hubert, 335 F. App'x 466, 472–73 (5th Cir. 2009)).

In response, Plaintiff maintains that the district court must merely determine whether the plaintiff has "file[d] a short and plain statement [in] his complaint, a statement that rests on more than conclusions alone." Anderson v. Valdez, 845 F.3d 580, 589–90 (5th Cir. 2016) (quoting Schultea, 47 F.3d at 1433); (Dkt. # 17.) In other words, "a plaintiff must plead qualified-immunity facts with the minimal specificity that would satisfy Twombly and Iqbal." (Dkt. # 17) (quoting Arnold v. Williams, 976 F.3d 535, 540 (5th Cir. 2020)).

In the Fifth Circuit,

> [s]ection 1983 claims implicating qualified immunity are subject to the same Rule 8 pleading standard set forth in Twombly and Iqbal as all other claims; an assertion of qualified immunity in a defendant's answer or motion to dismiss

> does not subject the complaint to a heightened pleadings standard.

Arnold v. Williams, 979 F.3d 262, 267 (5th Cir. 2020). Defendants' reliance on Schultea is mistaken. Schultea states that "[w]hen a public official pleads the affirmative defense of qualified immunity in his answer, the district court may, on the official's motion or on its own, require the plaintiff to reply to that defense in detail." 47 F.3d at 1433. However, the Court did not do so in this case and Plaintiff is not required "to anticipate a defendant's qualified immunity defense by providing greater specificity in their initial complaint." DeGroff v. Bost, No. 6:20-CV-00067-ADA-JCM, 2020 WL 6528078, at *4 (W.D. Tex. Nov. 5, 2020) (citing Crawford-El v. Britton, 523 U.S. 574, 595 (1998)). In the context of a Rule 12(b)(6) motion to dismiss, the Court must determine whether "the plaintiff's pleadings assert facts which, if true, would overcome the defense of qualified immunity." Backe v. LeBlanc, 691 F.3d 645, 648 (5th Cir. 2012) (quoting Wicks v. Miss. State Emp. Servs., 41 F.3d 991, 994–95 (5th Cir. 1995)); see Saenz v. G4S Secure Solutions (USA), Inc., 224 F. Supp. 3d 477, 481 (W.D. Tex. 2016); Rojero v. El Paso County, 226 F. Supp. 3d 768, 776–77 (W.D. Tex. 2016). Thus, the Court agrees with Plaintiff concerning her burden of overcoming the qualified immunity defense at the motion to dismiss stage.

"[A] plaintiff seeking to overcome qualified immunity must plead specific facts that both allow the court to draw the reasonable inference that the

defendant is liable for the harm he has alleged and that defeat a qualified immunity defense with equal specificity." Backe, 691 F.3d at 648. Once the district court finds that the plaintiff has so pled, if the court remains "unable to rule on the immunity defense without further clarification of the facts," it may issue a discovery order "narrowly tailored to uncover only those facts needed to rule on the immunity claim." Id. (quoting Lion Boulos v. Wilson, 834 F.2d 504, 507–08 (5th Cir. 1987)).

Qualified immunity shields government officials from liability when performing discretionary functions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Kinney v. Weaver, 367 F.3d 337, 349 (5th Cir. 2004). Courts evaluate qualified immunity defenses in two steps. First, a court must determine whether the "facts alleged show the officer's conduct violated a constitutional right." Brown v. Miller, 519 F.3d 231, 236 (5th Cir. 2008) (quoting Scott v. Harris, 550 U.S. 372, 377 (2007)). Second, if the court finds a violation, it must determine whether "the right was clearly established . . . in light of the specific context of the case." Id. (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)). To be "clearly established" for purposes of qualified immunity, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id. (quoting Atteberry v. Nocona Gen. Hosp., 430 F.3d 245, 256 (5th Cir. 2005)). There need not be "commanding precedent" that holds that the "very action

in question" is unlawful; the unlawfulness need only be "readily apparent from relevant precedent in sufficiently similar situations." Id. at 237 (quoting Atteberry, 430 F.3d at 257).

The right allegedly violated must be established not as a broad general proposition, but in a "particularized" sense "so that the 'contours' of the right are clear to a reasonable official." Reichle v. Howards, 566 U.S. 658, 665 (2012). "Here, the right in question is not the general right to be free from retaliation for one's speech, but the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause." Id. "[T]he First Amendment prohibits government officials from subjecting an individual to retaliatory actions" for engaging in protected speech. Hartman v. Moore, 547 U.S. 250, 256 (2006). If an official takes actions against someone based on the forbidden motive and "non-retaliatory grounds are in fact insufficient to provoke the adverse consequences," the injured person may seek relief by bringing a First Amendment claim. Id.; see Nieves, 139 S. Ct. at 1722. To prevail on this claim, "a plaintiff must establish a 'causal connection' between the government defendant's 'retaliatory animus' and the plaintiff's 'subsequent injury.'" Nieves, 139 S. Ct. at 1722 (quoting Hartman, 547 U.S. at 259). The motive must be a "but-for" cause of the injury, such that the adverse action would not have been taken absent the retaliatory motive. Id. As described above, the plaintiff typically must plead and prove the absence of probable cause for the arrest unless "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." Id. at 1727.

The Court finds that, viewing the facts in the light most favorable to Plaintiff, the Individual Defendants violated Plaintiff's constitutional rights. Plaintiff alleges that she was arrested because she organized a nonbinding citizens' petition, not because she attempted to steal her own petition. (Dkt. # 1.) She claims that the Individual Defendants acted with a retaliatory motive by alleging that they took several actions to attempt to take away her council seat. (Id.) She further alleges that "[t]he retaliatory arrest manufactured by the City and the Individual Defendants directly and proximately caused severe harms" including harm to Plaintiff's reputation, future opportunities, finances, faith in the criminal justice system, and physical health. (Id.) These allegations support the existence of a retaliatory motive and causation. As described above, even if there were probable cause to arrest Plaintiff for the misdemeanor, the exception in Nieves applies here because she has pled the existence of objective evidence that she was arrested when "otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." 139 S. Ct. at 1727. Therefore, Plaintiff has alleged the existence of a constitutional violation.

To show that a right was "clearly established," a plaintiff must identify either "controlling authority" or a "consensus of cases of persuasive authority" sufficient to clearly signal to a reasonable official that

certain conduct falls short of the constitutional norm. Wilson v. Layne, 526 U.S. 603, 617 (1999). The Court finds that when Plaintiff was arrested, this right was clearly established. Before Nieves, the U.S. Supreme Court held that the First Amendment right to be free from a retaliatory arrest that is supported by probable cause was not clearly established. See Reichle, 566 U.S. at 664–65 ("This Court has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause . . . [the arresting officers] are thus not entitled to qualified immunity."); Lozman, 138 S. Ct. at 1954 ("[W]hether in a retaliatory arrest case [a suit should be barred] where probable cause exists . . . must await a different case."). Other courts have found that this was not a clearly established right before Nieves. See Lund v. City of Rockford, 956 F.3d 938, 948–49 (7th Cir. 2020) (holding that the officers were entitled to qualified immunity because the incident occurred before Nieves was decided); Phillips v. Blair, 786 F. App'x 519, 529 (6th Cir. 2019) (holding that there was no First Amendment right to be free from a retaliatory arrest otherwise supported by probable cause that was clearly established in 2014); Turner v. Williams, No. 3:19-CV-641-J-32PDB, 2020 WL 1904016, at *9 (M.D. Fla. Apr. 17, 2020) ("[I]t was not clearly established until Nieves, that an officer could be liable for an alleged retaliatory arrest" even where probable cause is present); Woolum v. City of Dallas, No. 3:18-cv-2453-B-BN, 2020 WL 687614, at *11 (N.D. Tex. Jan. 22, 2020) (holding that Nieves did not make the right clearly established in the case because the alleged

retaliatory arrest occurred in 2017)[9]; Cano v. Vickery, Civ. A. No. H-16-392, 2018 WL 4567169, at *6 (S.D. Tex. Sept. 24, 2018) (holding that qualified immunity did not apply before Nieves). The Supreme Court has stated that "in [some] instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" United States v. Lanier, 520 U.S. 259, 271 (1997) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

Nieves was decided on May 28, 2019. The warrant for Plaintiff's arrest was issued on July 17, 2019 and Plaintiff turned herself in on July 18, 2019. (See Dkts. ## 1, 13.) Because Nieves was decided two months before the alleged retaliatory arrest, the Court finds that the right was clearly established. See Turner v. Lieutenant Driver, 848 F.3d 678, 685 (5th Cir. 2017) ("The right must be clearly established 'at the time of the challenged conduct.'"). Plaintiff further alleges that "[e]very reasonable government official would have had a fair warning that [retaliating against individuals in violation of the First Amendment] and participating in a scheme to do so is unconstitutional." (Dkt. # 1.) The Court finds that Defendants have not shown that they are entitled to qualified immunity and thus the Court will not

[9] The district court judge for this case adopted the recommendation of the magistrate judge in Woolum v. City of Dallas, No. 3:18-CV-2453-B-BN, 2020 WL 636903, at *1 (N.D. Tex. Feb. 11, 2020).

dismiss Plaintiff's claims against the Individual Defendants.

III. Municipal liability

Defendants argue that Plaintiff fails to properly allege its municipal liability claim. (Dkt. # 13.) According to Defendants, Plaintiff failed to allege facts supporting "single incident" liability or that Mayor Trevino, Police Chief Siemens, or Special Detective Wright are final policymakers. (Id.) Defendants further maintain that Plaintiff did not allege the existence of a written policy or custom, or that any policy or custom caused the alleged constitutional violation. (Id.) Finally, Defendants insist that Plaintiff has not alleged the existence of a pattern of similar incidents that can be used to show deliberate indifference. (Id.)

In response, Plaintiff states that she has adequately pled that her arrest was "a constitutional violation whose moving force [was] that policy (or custom)" by stating "had Castle Hills lacked animus toward Sylvia's speech, it would have never devised, adopted or implemented its policy of retaliation." (Dkt. # 17 (citing Dkt. # 1.)) Plaintiff maintains that Defendants' causation argument is foreclosed by Lozman and urges the Court to find that she has adequately pled that the Individual Defendants were policymakers and participated in the retaliatory policy. (Id.)

Municipal liability under § 1983 requires proof of three elements: (1) a policymaker; (2) an official

policy; and (3) a violation of constitutional rights whose "moving force" is the policy or custom. Piotrowski v. City of Houston, 237 F.3d 567, 578 (5th Cir. 2001).

A. Policy Maker

To impose municipal liability, there must be an official policymaker "with actual or constructive knowledge of the constitutional violation" that acted on behalf of the municipality. Zarnow v. City of Wichita Falls, 614 F.3d 161, 167 (5th Cir. 2010). "The policymaker must have final policymaking authority." Rivera v. Hous. Indep. Sch. Dist., 349 F.3d 244, 247 (5th Cir. 2003). Whether a specific official has final policymaking authority is a question of state law. Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737 (1989). In the Fifth Circuit, "the specific identity of the policymaker is a legal question that need not be pled; the complaint need only allege facts that show an official policy, promulgated or ratified by the policymaker, under which the municipality is said to be liable." Groden v. City of Dallas, 826 F.3d 280, 284 (5th Cir. 2016).

Plaintiff has provided two pages of allegations in support of her claim that City Manager Rapelye, City Attorney Schnall, councilmember McCormick, and the Individual Defendants in this case are policymakers with policymaking authority. (See Dkt. # 1.) For example, Plaintiff alleges that "[a]s mayor—president of the city council—defendant Trevino is a municipal policymaker, and his decisions and actions described in this complaint represent official Castle Hills

Policy." (Id.) With respect to Police Chief Siemens, Plaintiff states that "[a]s police chief—executive head of the police department—defendant Siemens is a municipal policymaker, and his decisions and actions described in this complaint represent official Castle Hills policy." (Id.) With respect to Wright, Plaintiff states that

> [a]s special detective—charged directly by defendant Siemens and defendant Trevino with assigning [a] criminal charge to Sylvia—defendant Wright's decisions and actions described in this complaint represent official Castle Hills policy. Alternatively, as policymakers supervising and directing defendant Wright, defendant Siemens, defendant Trevino, city manager Rapelye, and councilmember McCormick ratified defendant Wright's actions as municipal policy.

(Dkt. #1.)

Upon analyzing the Code of Ordinances for the City of Castle Hills, it appears that none of Plaintiff's suggested policymakers have "final policymaking authority." Given that Plaintiff challenges the alleged retaliatory arrest, the Court will first determine whether Police Chief Siemens has policymaking authority given that in Castle Hills, he "is the executive head of the police department." Code of Ordinances, City of Castle Hills, Texas § 24-21. Although the code states that the duties of the police chief are "to

supervise, regulate, and manage the department and have control of all its activities," the code also states that the police chief "is directly responsible to the city manager for the proper and efficient operation of the department." Id. Thus, because he directly reports to the city manager, Police Chief Siemens does not have final policymaking authority here.

City manager Rapelye also does not have final policymaking authority. In the City of Castle Hills, the city manager is appointed by the city council and serves as "the administrative head of the municipal government under the direction and supervision of the council." Id. § 2-134. Again, given that the city manager is merely the administrative head "under the direction and supervision of" the council, City Manager Rapelye also does not have final policymaking authority.[10]

Mayor Trevino also does not have policymaking authority. Although the mayor serves as the president of the city council and presides at the meetings, he does not have a vote at the meetings unless the city council is divided. Id. § 2-108. Practically speaking, it

[10] Where local law does not delegate authority from the council to the city manager, the city manager does not have final policymaking authority here. The Fifth Circuit has held that Texas "state law alone does not give to city managers 'the responsibility for making law or setting policy in any given area of a local government's business.'" Bolton v. City of Dallas, 541 F.3d 545, 550 (5th Cir. 2008); see Tex. Local Gov't Code Ann. § 25.029. "State law instead reserves that role for the 'governing body.'" Bolton, 541 F.3d at 550.

appears that this should not happen often given that *five* alderman serve on the city council. See id. § 2-23.

"A city's governing body may delegate policymaking authority (1) by express statement or formal action or (2) 'it may, by its conduct or practice, encourage or acknowledge the agent in a policymaking role.'" Zarnow, 614 F.3d at 167 (quoting Bennett v. City of Slidell, 728 F.2d 762, 769 (5th Cir. 1984)). The Court finds that the city council has the final policymaking authority in this case, and to the Court's knowledge, there has been no delegation of this authority. Further, while the council is comprised of the mayor and five aldermen, it cannot be said that an individual member of the council has final policymaking authority when it has been vested in the entire council. However, the fact that individual council members were aware of the incidents described in this lawsuit leads the Court to conclude that is premature to determine that the council did not have "actual or constructive knowledge of the constitutional violation" while acting on behalf of the municipality. Id.

Even though Plaintiff failed to specifically identify the city council as a policymaker in the complaint, this is not a proper basis for dismissal. "[T]he complaint need only allege facts that show an official policy, promulgated or ratified by the policymaker, under which the municipality is said to be liable." Groden, 826 F.3d at 284. The Court will thus need to determine whether the city council promulgated or ratified the custom or policy alleged by Plaintiff.

B. Custom or Policy

A plaintiff may establish the existence of an official policy by showing "(1) a formally adopted municipal policy; (2) an informal custom or practice; (3) a custom or policy of inadequate training, supervision, discipline, screening, or hiring; or (4) a single act by an official with final policymaking authority." Snow v. City of El Paso, 501 F. Supp. 2d 826, 831 (W.D. Tex. 2006); see Monell, 436 U.S. at 694 (establishing that § 1983 municipal liability claims may be based on an officially adopted and promulgated policy); Johnson v. Moore, III, 958 F.2d 92, 94 (5th Cir. 1992) (explaining that municipal liability may be based on "persistent and widespread practice" of which actual or constructive knowledge is attributable to the policymaking authority); City of Canton v. Harris, 489 U.S. 378, 385–88 (1989) (explaining that § 1983 municipal liability claims may be based on inadequacy of training where the failure to train amounts to deliberate indifference to the rights of persons); Pembaur v. City of Cincinnati, 475 U.S. 469, 480–81 (1986) (explaining that "municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances").

Plaintiff cannot establish "single incident" liability because she has not alleged that the retaliatory arrest was orchestrated by the city council, the final policymaker. However, the Court finds that Plaintiff has met her burden of pleading the existence of "a persistent, widespread practice of city officials or

employees, which, although not authorized by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy." Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984). Showing a pattern of conduct is necessary "only where the municipal actors are *not* policymakers." Zarnow, 614 F.3d at 169. Plaintiff asserts that "Castle Hills has a history of cracking down on disfavored speech" and has "retaliate[ed] against city residents who voice criticism of the City or its officials or who petition the City for redress of grievances." (Dkt. # 1.) Plaintiff provides two examples. According to Plaintiff, in 2017 or 2018, a local resident was threatened by "the former police chief, the former mayor, and the former city manager" at his home after he organized a petition to advocate for the closing of an impound lot in his neighborhood. (Id.) Plaintiff also claims that in 2018, the former mayor threatened another city resident with an easement violation after the resident put up opposition campaign signs on private front yards with owner permission. (Id.) Defendants take issue with these examples because they did not lead to false arrests, but the Court finds that because they concern citizens' First Amendment rights, these incidents are sufficient to show a "persistent, widespread practice" at the pleading stage.[11] Thus, Plaintiff has met her burden of pleading the existence of a policy or custom at the motion to dismiss stage.

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[11] This does not mean that Plaintiff will ultimately prevail on this issue—the Court finds merely that Plaintiff has met her burden at the pleading stage.

Appendix C

C. "Moving Force"

Plaintiff has also adequately pled a violation of constitutional rights whose "moving force" is the policy or custom. For purposes of a Rule 12(b)(6) motion, when it comes to alleging causation or "moving force," it is enough that the plaintiff pleads that the policy was the reason for the arrest. See Groden, 826 F.3d at 286–87. Plaintiff has alleged that the "actions undertaken or ratified by the City constitute the moving force behind the retaliatory arrest aimed at Sylvia's exercise of her First Amendment rights, which caused harm to Sylvia, including, but not limited to damage to her reputation, her health, her financial circumstances, and other adverse effects." (Dkt. # 1.) She further alleges that "[h]ad it not been for the retaliatory animus, the City would have never caused, permitted, or approved Sylvia's arrest for championing a nonbinding citizens' petition that did nothing other than express public discontent with the city government." (Id.) Further, Defendants' argument that Plaintiff cannot plead causation because there was probable cause for the arrest is foreclosed by Lozman, as described above. Because Plaintiff has adequately pled all of the requirements for her Monell claim, the Court denies Defendants' motion to dismiss Plaintiff's municipal liability claim.

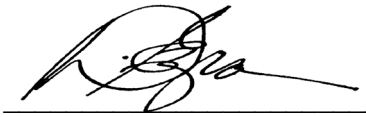
CONCLUSION

For the reasons stated above, Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6) (Dkt. # 13) is **DENIED.**

Appendix C

IT IS SO ORDERED.

DATE: San Antonio, Texas, March 12, 2021.



David Alan Ezra
Senior United States District Judge

Appendix D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DISIVION

SYLVIA GONZALEZ, *Plaintiff*, v. CITY OF CASTLE HILLS, TEXAS; EDWARD "JR" TREVINO, II, Mayor of Castle Hills, sued in his individual capacity; JOHN SIEMENS, Chief of the Castle Hills Police Department, sued in his individual capacity; and ALEXANDER WRIGHT, sued in his individual capacity, *Defendants*.	Civil Action No. 5:20-cv-1151 **Complaint and Jury Demand**

COMPLAINT FOR RETROSPECTIVE RELIEF

Appendix D

Plaintiff Sylvia Gonzalez hereby sues the City of Castle Hills, Texas ("Castle Hills" or "City"); and Edward "JR" Trevino, II, John Siemens, and Alexander Wright (collectively, "Individual Defendants") for their deprivation of her rights under the First and Fourteenth Amendments to the United States Constitution.

Introduction

1. After being elected to the Castle Hills city council, Sylvia Gonzalez participated in organizing a nonbinding citizens' petition to urge the removal of Ryan Rapelye from his position as the Castle Hills city manager.

2. Getting wind of Sylvia's efforts and assuming she was the driving force behind the petition, Defendant Castle Hills and the Individual Defendants (collectively, "Defendants") adopted a plan to retaliate against Sylvia for her protected speech, resulting in Sylvia's arrest on manufactured misdemeanor charges of tampering with a government record.

3. This lawsuit seeks redress for that unconstitutional arrest.

4. Defendants charged Sylvia under a statute that has never before or since been used to arrest individuals similarly situated to Sylvia.

5. Sylvia's arrest was unlawful because it was engineered and executed as part of a high-level policy

to retaliate against Sylvia's exercise of political speech.

6. This was a long-term and pervasive policy and involved significant deliberations—outside of split-second decision making—by high-level officials.

7. Defendants succeeded in their attempts to punish and intimidate Sylvia, who, at the age of 72, made history as the City's first Hispanic councilwoman.

8. Sylvia, with her reputation ruined and her pocketbook significantly diminished, has been so traumatized by the experience that she will never again help organize a petition or participate in any other public expression of her political speech. She will also never again run for any political office.

9. There is nothing more fundamental to our system of government than its founding principle that the First Amendment protects political speech. This principle means little if local governments and their officials can—without consequence—punish and intimidate those who engage in political speech. This suit is filed in defense of this principle and to ensure the constitutional accountability of all government officials.

Jurisdiction and Venue

10. This is a civil rights case brought under 42 U.S.C. § 1983, and the First and Fourteenth Amendments to the United States Constitution.

11. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1343, 2201, and 2202.

12. Venue is proper in this Court under 28 U.S.C. § 1391.

The Parties

13. Plaintiff Sylvia Gonzalez is a citizen of the United States and long-time resident of Castle Hills, Texas.

14. Defendant City of Castle Hills, Texas, is a Type A general-law municipality located in Bexar County, Texas. The City's governing body consists of a mayor and five aldermen, commonly referred to as councilmembers. The City has adopted the city-manager form of government and delegated extensive authority to its city manager.

15. Defendant Edward "JR" Trevino, II, is the mayor of Castle Hills.

16. Defendant John ("Johnny") Siemens is the chief of the Castle Hills police department and was appointed to that position by a city manager.

17. Defendant Alexander ("Alex") Wright is a practicing attorney who, although not a police officer by trade, acted as a special detective with the police department. On June 18, 2019, he was assigned by defendant police chief Siemens to investigate a complaint against Sylvia made by defendant mayor Trevino. The City has carried Wright's law enforcement commission

for many years, even though Wright is not an active duty officer and is not employed by the City.

Statement of Facts

Sylvia

18. Sylvia Gonzalez is 74 years old.

19. She comes from a law-enforcement family dedicated to public service.

20. Sylvia's father was a police officer.

21. Sylvia's daughter is a police officer.

22. Sylvia's niece and cousins are police officers.

23. Other than the charge at issue in this case, Sylvia has no criminal record.

24. After a fulfilling career in communications, Sylvia successfully ran for a seat on the Castle Hills city council and spoke out against the politically powerful in her small hometown by criticizing city manager Ryan Rapelye and participating in an effort to organize a non-binding citizens' petition to remove him from office.

25. After Defendants learned about Sylvia's criticisms of Rapelye and assumed she was the driving force behind the petition advocating for his removal, they developed a plan to punish and intimidate Sylvia in retaliation for her political speech. The plan culminated in Sylvia's arrest under a misdemeanor statute for purportedly trying to steal the petition she herself

championed. The statute has never been used to arrest a person in an analogous situation

26. Defendants intended for Sylvia—a harmless and peaceful woman in her seventies, who presented no threat to anyone and was no risk of flight— to spend the day in jail. That's why they obtained a warrant, instead of a summons, and also bypassed the Bexar County district attorney's office—the default practice for those accused of nonviolent crimes, which would have afforded Sylvia an opportunity to be processed through a satellite booking, rather than going to jail. As it happens, the district attorney's office, upon later review, dismissed the charges against Sylvia.

Castle Hills

27. Defendant Castle Hills is a city with fewer than 5,000 residents.

28. The City's government is controlled by a small group of politically powerful people (including the mayor, chief of police, and city manager).

29. The mayor of Castle Hills is an elected position. The mayor serves as the presiding officer of the city council. The mayor casts a tie-breaking vote on the city council and has the power to call special council meetings.

30. The chief of police of Castle Hills is appointed by the city manager and reports to the city manager. The appointment is subject to approval by the city

council. The chief of police is in charge of the police department and oversees its operations and budget. Among other duties, the chief of police oversees criminal investigations.

31. The Castle Hills city council is the five-member executive body of the City. The members are elected for two-year terms. They vote to set policy, adopt the City's budget, approve purchases and contracts, and review laws. They also appoint executive officials, such as the city manager and city attorney.

32. The city manager of Castle Hills is appointed for an indefinite period by the city council and is in charge of most day-to-day decision-making. The city manager's powers include ensuring enforcement of all city laws; receiving and accounting for all city moneys; managing city contracts; appointing and removing department heads and subordinate city employees; preparing the city budget; and acting as the editor of the city newsletter, *The Reporter*.

33. The city attorney for Castle Hills is appointed by the city council. The city attorney serves as a legal adviser to the council, the city manager, and all other officers, boards, and departments of the City. Among other duties, the city attorney reviews articles published in the city newsletter, *The Reporter*.

Sylvia Runs for Office

34. When Sylvia decided to run for office, she was prepared for a grueling campaign to unseat her

opponent, who was a well-connected incumbent supported by the City and the Individual Defendants.

35. Sylvia campaigned house-to-house, knocking on countless doors and personally meeting with more than 500 Castle Hills families.

36. Sylvia was not prepared, however, for the degree of negative feedback she would receive about the City during her campaigning.

37. Castle Hills residents complained to Sylvia about corruption and other problems with the City and the Individual Defendants.

38. Although she did not know him personally, Sylvia was deeply disturbed by stories about city manager Ryan Rapelye.

39. As one example, Sylvia heard that Rapelye had falsely accused his secretary of stealing city documents, having her detained by Castle Hills police, and forcing her to take a lie detector test before firing her.

40. While campaigning, Sylvia also heard allegations that the City and the Individual Defendants were steering city policy and resources away from resident services and toward enriching city employees.

41. Beyond the stories, many residents conveyed frustration with Castle Hills government and with city manager Rapelye. One resident suggested Sylvia

organize a petition to express discontent with Rapelye's performance.

Sylvia Wins the Election

42. On May 4, 2019, Sylvia was elected as the first Hispanic councilwoman in Castle Hills history.

43. On May 14, 2019, Sylvia was sworn in as a member of the council by Bexar County sheriff Javier Salazar.

44. City attorney Schnall was present at Sylvia's swearing-in ceremony.

45. Schnall did not object to any part of the swearing-in, and even applauded at the completion of the ceremony.

Sylvia Takes Office and Takes on the City and the Individual Defendants.

46. As her first act in office, Sylvia participated in organizing a citizen- signed, nonbinding petition calling for the removal of city manager Rapelye from office. *See* Exhibit A, the Petition.

47. The petition was a pure expression of political speech. It had no legal force. It was designed to simply express the discontent of Sylvia's constituents with Rapelye's performance as city manager and was signed by more than 300 Castle Hills residents.

48. The petition had six concise bullet points and was titled "FIX OUR STREETS Reinstate former City Manager Diane Pfeil." *Id.*

49. The petition proposed that city council replace Rapelye with Diane Pfeil, a previous city manager who had been removed from office after repeatedly clashing with defendant Siemens (deputy police chief at the time) and defendant Trevino (then a councilmember), including over the use of civil forfeiture funds. *Id.*

50. In addition, one of the bullet points in the petition criticized "various city managers" who came after Diane Pfeil for "ma[king] up priority lists and pa[ying] for expensive engineering studies." "None," the petition continued, "have fixed a single street." *Id.* Rapelye is one of the various city managers who came after Diane Pfeil.

51. Defendants mistakenly believed that Sylvia collected all of the 300-plus signatures, even though she personally obtained just a fraction of this total number.

52. Not everyone who heard from Sylvia signed her petition. Chalene Martinez, a resident with connections to the City and the Individual Defendants, declined to sign.

53. On May 21, 2019—Sylvia's first council meeting—a resident submitted the petition to the city council

54. To Sylvia's surprise, the City and the Individual Defendants expected its submission.

55. Citizens with connections to the City and the Individual Defendants, including Mike Flinn, Bonnie Hopke, and Robbie Casey, attended the council meeting and testified against the petition.

56. Chalene Martinez—a citizen who had refused to sign the petition when asked by Sylvia—also testified in opposition to the petition.

57. According to Martinez, Sylvia asked her to sign the petition "under false pretenses."

58. Martinez did not elaborate further.

59. Due to its contentiousness, the meeting was ultimately carried over to the next day, May 22, 2019.

60. The May 22 meeting remained tense, while the city council argued over city manager Rapelye's job performance.

61. Importantly, Sylvia and defendant mayor Trevino sat next to each other at the council table during council meetings.

62. When the meeting was finally over, Sylvia got ready to go, picking up all of the hand-outs on her side of the dais and placing them in her binder.

63. Before she could leave, the city council secretary walked up to Sylvia and told her that Amy McLin— the incumbent unseated by Sylvia—had an

immediate open records request for Sylvia and was waiting to give it to her.

64. Sylvia left her belongings—including her document binder—on the dais, and went to talk to McLin, who asked Sylvia for all the notes Sylvia took during the May 21 meeting related to the questions Sylvia asked of Rapelye.

65. Sylvia responded that she threw away the post-its but that if McLin wanted to hear the questions, they were available on the Castle Hills' YouTube channel.

66. Sylvia's fellow councilmember, Clyde "Skip" McCormick, who was standing next to McLin, threatened to have Sylvia arrested and "sent to federal prison" if she didn't hand over a copy of her meeting notes.

67. During this entire conversation, Sylvia was standing with her back to the dais.

68. At some point during the conversation, a police officer in charge of the safety—Captain Steve E. Zuniga—tapped on Sylvia's shoulder and told her that defendant mayor Trevino wanted to talk to her. Exhibit B, Castle Hills Police Department Offense/Incident Report, at 5.

69. Sylvia turned around and, escorted by Zuniga (which she found rather strange), went back to the dais, where defendant Trevino and she had been sitting next to each other during the meeting.

70. With Captain Zuniga by his side, defendant Trevino asked Sylvia: "Where's the petition?"

71. Sylvia replied: "Don't you have it? It was turned in to you yesterday."

72. Responding in the negative, defendant Trevino then asked Sylvia to look for the petition in her binder.

73. Sylvia did and, much to her surprise, found the petition there.

74. When Sylvia handed the petition to defendant Trevino, he stated: "You probably picked it up by mistake."

75. The two parted ways, with Sylvia not thinking much of the encounter.

76. Sylvia did not intentionally put the petition in her binder.

77. Sylvia never left the council room with the petition. Indeed, she never even left the council table with the petition.

78. Sylvia had worked hard to help organize the petition and ensure its submission to city council. The petition gave more force to Sylvia's own judgment that the city manager was not doing a good job. It would have been entirely illogical for Sylvia to try to take back the petition.

Appendix D

Castle Hills and the Individual Defendants Retaliate Against Sylvia, Ultimately Securing Her Arrest.

79. The City and the Individual Defendants learned about Sylvia's petition from supporters like Chalene Martinez, whom Sylvia approached for her signature.

80. The City and the Individual Defendants, acting under color of Texas law and cloaked in authority from Castle Hills, then developed a comprehensive plan to punish and deter Sylvia based on her political expression. The plan was to give Sylvia a taste of her own medicine by removing her from the city council.

81. Castle Hills councilmember McCormick wrote about the Defendants' plan in the City's newsletter, distributed to residents on July 17, 2019, but written weeks ahead of time. To remove a council member, he said, residents could sue them for official misconduct or incompetency. Alternatively, if a councilmember is convicted of a felony or a misdemeanor involving official misconduct, it would operate as an immediate removal from office. Exhibit C, The Castle Hills Reporter, at 5-6 (July/August 2019).

82. As the editor of the City's newsletter, city manager Rapelye saw the article well in advance of its publication.

83. As a reviewer of the City's newsletter, city attorney Schnall also saw the article well in advance of its publication.

84. In addition to the two options provided by councilmember McCormick, the City and the Individual Defendants developed a third: retaliate against Sylvia's speech by directly removing her from office through a manufactured technical failure in her swearing-in.

85. The City and the Individual Defendants were motivated to punish Sylvia for her speech—and deter future speech—based on the content of that speech.

86. Had the City and the Individual Defendants not harbored retaliatory animus toward Sylvia's speech, they would have never acted on any one of the three options in their plan.

Option 1: Charge Sylvia with a crime and arrest her.

87. As described in councilmember McCormick's article, the surest way to remove a council member is by obtaining a criminal conviction against her.

88. To punish Sylvia for championing the petition and to deter her from the future exercise of her First Amendment rights, the City and the Individual Defendants developed and executed a plan to manufacture criminal charges against Sylvia and have her thrown in jail.

89. On May 24, 2019—two days after defendant mayor Trevino, with Captain Zuniga by his side, confronted Sylvia about purportedly stealing the petition that she supported—defendant police chief Siemens

told another police officer— Sergeant Paul Turner— that defendant Trevino would be contacting the officer "in reference to the filing of a criminal complaint" against Sylvia, which defendant Trevino subsequently did. Exhibit B, at 4.

90. After the complaint was filed, Sergeant Turner began his investigation by going to the homes of people who signed the petition and questioning them about this act of civil expression.

91. Many of these individuals whom Sergeant Turner approached said they felt threatened by his actions and questions, as it was difficult to understand why a police officer would be knocking on their doors and challenging their signatures on a nonbinding petition, with no force other than an expression of political thought.

92. On June 18, 2019—with Sergeant Turner's investigation going nowhere—the City and the Individual Defendants changed strategy. Defendant Siemens turned to a trusted friend, defendant special detective Alex Wright, to take over Sergeant Turner's investigation.

93. Defendant Wright is a private attorney, not a professional police officer, although he is a commissioned police officer in Texas and the Castle Hills Police Department has paid to carry defendant Wright's commission for years.

94. While it is often true that in sensitive political cases local district attorneys employ private lawyers

to act as special prosecutors, these lawyers are not deputized as police officers, cannot be affiants for warrants, and cannot walk warrants (bypassing local district attorneys in doing so).

95. Defendant Wright—with the authorization provided to him by defendant Siemens—did all three. And defendant Wright did not act as a special prosecutor, he was tasked with investigating Sylvia as a detective.

96. As part of his month-long investigation into Sylvia, defendant Wright interviewed defendant Trevino, Captain Zuniga, and city manager Rapelye.

97. Following his investigation, the only charge defendant Wright could come up with was a Class A misdemeanor for tampering with a government record, for supposedly attempting to steal a petition that Sylvia herself championed. Tex. Penal Code § 37.10(a)(3), (c)(1).

98. Defendants made the most of this charge, however, by doing three distinct things to ensure that Sylvia would be jailed based on it, rather than simply asked to appear before a judge.

99. First, Defendants chose to obtain a warrant, rather than a summons— the procedure normally reserved for people suspected of nonviolent crime. Unlike warrants, summonses do not require a trip to jail.

100. Second, Defendants didn't just obtain a warrant through normal channels, by going through the

district attorney (the "DA"). Instead, they circumvented the DA by using a procedure typically reserved for violent felonies or emergency situations and walked the warrant directly to a magistrate. When the DA's office finally learned of the charges and reviewed them, it dismissed them.

101. Third, by using the procedure that circumvented the DA, Defendants also ensured that Sylvia would not be able to avoid jail by taking advantage of the satellite booking function, provided by the Bexar County jail system to weed out nonviolent offenses. This function allows individuals with outstanding warrants to be booked, processed, and released without being jailed. Because Sylvia's warrant was not acquired through the traditional channels, it was not discoverable through the satellite office's computer system, leaving Sylvia no option other than jail.

102. It was bad enough that Sylvia was jailed for a nonviolent offense. Even worse, the charge itself was a sham, since the statute it utilized was never before used to charge people on facts even remotely similar to Sylvia's.

103. According to defendant Wright's affidavit, Sylvia violated the misdemeanor statute because she tried to steal the petition she herself championed. As evidence of the attempt, the affidavit, provided by Defendant Wright to a magistrate, used the brief, inconclusive statements made by Chalene Martinez during the meeting on May 21, as well as the allegations made by defendant Trevino in his complaint. The affidavit also accused Sylvia of being openly

antagonistic toward city manager Rapelye. The affidavit did not dispute that Sylvia was expressing political speech. The issue was that this speech was intended to oust defendant Rapelye from his job. Indeed, the affidavit shows that Sylvia's speech was the motivation behind defendant Wright's investigation:

> a. "From her very first [council] meeting in May of 2019, [Sylvia] (along with another alderwoman) has been openly antagonistic to the city manager, Ryan Rapelye, wanting desperately to get him fired."
>
> b. "Part of her plan to oust Mr. Rapelye involved collecting signatures on several petitions to that effect."
>
> c. "Gonzalez had personally gone to [a resident's] house on May 13, 2019, to get her signature on one of the petitions under false pretenses, by misleading her, and by telling her several fabrications regarding Ryan Rapelye . . . ."

Exhibit D, Defendant Wright's Complaint/Affidavit for Warrant of Arrest, at 2, 5 (citing defendant Wright's interviews with defendant Trevino and Ms. Martinez).

104. Importantly, there was no need to examine Sylvia's speech in order to determine whether there was probable cause to arrest her for theft.

105. Furthermore, a review of misdemeanor and felony data from Bexar County over the past decade makes it clear that the misdemeanor tampering statute has never been used in Bexar County to criminally charge someone for trying to steal a nonbinding *or* expressive document.

106. Of 215 grand jury felony indictments obtained under the tampering statute at issue in this case, not one had an allegation even closely resembling the one mounted against Sylvia. By far the largest chunk of the indictments involved accusations of either using or making fake government identification documents: altered driver's licenses, another person's ID, temporary identification cards, public safety permits, green cards, or social security numbers. A few others concerned the misuse of financial information, like writing of fake checks or stealing banking information. The rest are outliers, but all very different from Sylvia's situation. They concern hiding evidence of murder, cheating on a government-issued exam, and using a fake certificate of title, among others.

107. Misdemeanor data is even more unremarkable. In each case available for review, the alleged tampering involved the use of fake social security numbers, driver's licenses, and green cards.

108. The data, as well as the availability of procedures designed to allow people suspected of nonviolent offenses avoid going to jail, are clear: Defendants only had Sylvia arrested because they were harboring retaliatory animus toward her and wanted to punish

her for speaking out against city manager Rapelye and the entrenched interests of the City and the Individual Defendants he represented.

109. Had the City and the Individual Defendants lacked retaliatory animus, the Defendants would not have devised, adopted, or implemented their plan, which resulted in Sylvia's arrest.

110. Sylvia learned about a warrant for her arrest when she was in a doctor's office, waiting for her appointment.

111. As the receptionist called her name, a neighbor called Sylvia on her cellphone and told her that she should turn herself in.

112. Explaining to the receptionist that she had an emergency and had to leave, Sylvia went downstairs and waited for her husband to pick her up.

113. The two septuagenarians then drove to the county jail.

114. The 72-year-old councilwoman was booked on July 18, 2019, spending a terrifying day in jail, sitting, handcuffed, on a cold metal bench, wearing an orange jail shirt, and avoiding using the restroom, which had no doors and no toilet-paper holders. The entire time there, she was not allowed to stand up and stretch her legs.

115. For someone who doesn't even have a speeding ticket on her record, this was quite an experience.

116. Sylvia's name and mugshot were splashed across local media for days, and they are still on the internet.

Option 2: Remove Sylvia from office for a made-up technicality.

117. While defendant Wright was buying time during his month-long investigation of Sylvia, the City and the Individual Defendants were considering alternative options to retaliate against Sylvia for her political speech. After all, their ultimate retaliatory goal was to intimidate, punish, and silence Sylvia by removing her from office. One way of achieving it was by arresting her and throwing her in jail. Another was by trying to remove Sylvia directly.

118. On July 9, 2019, right before Sylvia approached her seat at the council table, city attorney Schnall pulled Sylvia into a room with one of his law partners, as well as defendant mayor Trevino and a non-resident friend of the mayor, where Schnall told Sylvia that she was not qualified to be a member of city council because she had been sworn in by a sheriff. To support his statement, Schnall invoked the Texas Government Code, according to which "[a]n oath . . . may be administered" by a sheriff, provided it is done when the sheriff "is engaged in the performance of the [sheriff's] duties" and "the administration of the oath relates to the [sheriff's] duties." Tex. Gov't Code § 602.002(17). Schnall argued that when sheriff Salazar swore in Sylvia, he was doing neither.

119. Remarkably, Schnall—the city attorney, present at council meetings to ensure that necessary legal requirements are followed—had attended Sylvia's swearing-in by sheriff Salazar and raised no concerns at the time. Instead, he watched approvingly from mere feet away as Sylvia took her oath of office, applauding when she concluded.

120. But now, motivated by retaliatory animus toward Sylvia, city attorney Schnall with the support of defendant Trevino declared that Sylvia had been improperly sworn in and was not qualified to remain in her seat on the council. Further, because more than 30 days had elapsed since Sylvia's election, Schnall stated that Sylvia could not be resworn. Instead, she had to be replaced by the Defendant's ally Amy McLin, whom Sylvia had beaten in the election.

121. Sylvia's de facto removal by Schnall and defendant Trevino was not ratified by a vote of the city council as would have been required under Texas law. Instead, when the issue was raised at a council meeting, Schnall said it was not properly before the council and could not be taken up.

122. Evidencing the retaliatory purpose of Sylvia's removal, Defendants had not attempted to take similar actions against council members who had been sworn in by sheriffs in the past, including two who were sworn in by a sheriff in 2014 and served out their terms without incident.

123. More to the point, Defendants also did not question the legitimacy of defendant mayor Trevino's

seat, even though he was sworn in by the Bexar County Precinct 3 commissioner Kevin A. Wolff. Just like with the sheriffs, the Texas Government Code qualifies the purpose for which commissioners can administer oaths of office, limiting it to "a matter pertaining to a duty of the . . . commission." Tex. Gov't Code § 602.002(6). If it is questionable whether a *sheriff's* administration of the oath relates to the sheriff's duties and falls within their scope, it is also questionable whether a *commissioner's* administration of the oath is a matter pertaining to a duty of the commission. Yet, city attorney Schnall did not question the mayor's legitimacy, even though he and Sylvia were sworn in on the same day.

124. Determined to address the concern and move on, Sylvia got resworn by a notary at a bank. She and her friend then went to the city manager's office to turn in the certificate, proving that she did so. As she was walking out the door, Sylvia overheard city manager Rapelye complain to someone: "You know what she did? She campaigned against me!"

125. Sylvia also contested Defendants' decision to order her removal by securing a special council meeting to take up the issue on July 17, 2019. That's when the City and the Individual Defendants knew that the simple route of direct removal was not going to be so simple.

126. So, on this same day, July 17, 2019, defendant Wright circumvented the Bexar County DA and walked the warrant for Sylvia's arrest to a judge. The following day Sylvia was arrested.

127. After she was released from jail on bond, Sylvia sought a temporary restraining order against Castle Hills and Schnall enjoining her removal. A court granted the order the day after her filing, on July 23, 2019.

Option 3: File a civil lawsuit against Sylvia to keep her off city council.

128. After a judge temporarily enjoined Defendants' attempt to unilaterally remove Sylvia from council on July 23, 2019, six Castle Hills residents, including Mike Flinn, Robbie Casey, and Bonnie Hopke—the three residents who, along with Chalene Martinez, testified against Sylvia's petition—filed a lawsuit in the name of the State of Texas to remove Sylvia for incompetence and official misconduct.

129. Ironically, and further evidencing the existence of a high-level plan, criminal charges filed against Sylvia in retaliation for her political speech were cited as the main reason warranting Sylvia's removal.

130. As with the Defendants' use of the criminal process, the residents' use of the civil process circumvented the district attorney's office.

131. And as with the Defendants' use of the criminal process, when the district attorney learned of the residents' use of the civil process, he filed a motion to dismiss the action, stating that "removal may only proceed with the intervention of the District Attorney to represent the interest of the state" and that "the

Bexar County Criminal District Attorney declines to further prosecute this removal."

132. When the six residents filed their objections to the motion of nonsuit, the district attorney further elaborated that "after a careful and independent investigation [it determined that] neither the criminal charges against Defendants not this Chapter 21 removal action should proceed."

133. After a district court judge dismissed the case and denied the motion for new trial, the six residents appealed this determination. As of the date of this complaint, their appeal is still pending.

134. When Sylvia's attorneys—and later a trusted friend—reached out to Mike Flinn's counsel on her behalf, asking for Sylvia to be released from the lawsuit— since she was no longer on the city council and had already spent around $70,000 in attorney's fees—the counsel refused. During one of these conversations, Flinn's counsel conditioned the release from the lawsuit on Sylvia signing an affidavit stating that she would never again run for the city council.

135. Despite being initially unsuccessful in (1) obtaining a criminal indictment against Sylvia, (2) removing her from office based on the claim of being improperly sworn in, and (3) having a civil lawsuit filed to remove Sylvia, Defendants succeeded in their ultimate goal of intimidating and punishing Sylvia in retaliation for her political speech. Sylvia is no longer on the city council—since she could not afford neverending attorney's fees caused by her arrest and by

Schnall's and citizens' attempts to remove her— and will never again help organize a petition or participate in any other public expression of her political speech. She will also never again run for any political office.

Injury to Plaintiff

Defendants Have Severely Harmed Sylvia.

136. The retaliatory arrest manufactured by the City and the Individual Defendants directly and proximately caused severe harms to Sylvia, including but not limited to:

a. The harm to Sylvia's reputation. Sylvia's mugshot was displayed repeatedly in the media, both in her community and beyond. She was the subject of repeated news articles about her wrongful arrest. To this day, harmful and embarrassing news articles with Sylvia's mugshot appear when one searches for her on the internet. This harm continues to this day and is likely to continue in the future.

b. The harm to her future opportunities. Sylvia's arrest is a matter of public record. If she were to ever apply for a job (which is increasingly likely even for senior citizens, in times of economic uncertainly) or for public benefits, her chances of succeeding would be significantly diminished due to her criminal record. *See* Elisha Jain, *Arrests as Regulation,* 67 Stan. L. Rev. 809, 810 (2015); *see*

also Gary Fields & John R. Emshwiller, Opinion, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime,* Wall St. J. (Aug. 18, 2014), https://www.wsj.com/articles/as-arrest-records-rise-americans-find- consequences-can-last-a-lifetime-1408415402?st=cj2xuywlkthsmji.

c. The harm to her pocketbook. Sylvia had to pay a fee to be released from jail, a bondsman to secure her bond, and tens of thousands of dollars to lawyers to defend against the criminal charges.

d. The harm to her faith in the criminal justice system. Defendants' actions caused Sylvia to lose faith in the criminal justice system and law enforcement in Castle Hills, a place where she lives and where her family has worked in law enforcement.

e. The harm to her physical health. Stress brought on by the worry about her criminal prosecution led to many sleepless nights as well as anxiety-filled days, resulting in the overall deterioration of Sylvia's physical health.

Appendix D

Causes of Action

Count I
42 U.S.C. § 1983—First and Fourteenth Amendments
(Retaliatory Arrest Claim Against Individual Defendants Trevino, Siemens, and Wright)

137. Sylvia realleges and incorporates by reference the allegations in Paragraphs 1 through 136 of this complaint, as if fully stated herein.

138. Sylvia's actions in championing the creation, signature, and submission of a nonbinding citizens' petition and urging the removal of city manager Rapelye from his job are safeguarded by the First Amendment to the United States Constitution.

139. Using their respective authorities under color of state law, the Individual Defendants subjected Sylvia to the deprivation of her rights under the First Amendment by retaliating against her for exercising those rights.

140. Motivated to punish and intimidate Sylvia for her exercise of free speech, the Individual Defendants engaged in various harmful acts against Sylvia in violation of clearly established First Amendment law, resulting in her arrest. These acts include:

a. Defendant Trevino lodging a baseless theft complaint against Sylvia and participating in and encouraging a criminal investigation and the institution of criminal charges

against Sylvia for her involvement with the petition.

b. Defendant Siemens instigating and overseeing a full criminal investigation and institution of criminal charges against Sylvia for an ostensible crime related to defendant Trevino's theft complaint.

c. Defendants Siemens and Trevino bringing in defendant Wright and tasking him with investigating Sylvia and manufacturing criminal charges against her.

d. Defendant Wright conducting a full criminal investigation of Sylvia under a "Tampering with Governmental Record" statute that is never used against individuals similarly situated to Sylvia; swearing out a misleading criminal complaint against Sylvia; and proceeding with a criminal arrest process meant to intentionally exclude the district attorney's involvement and foreclose any avenue for Sylvia to appear before a court—either by way of a summons or through the satellite office—rather than be jailed.

141. The foregoing are actions independently unconstitutional but also were intended to send a warning to anyone else in Castle Hills bold enough to challenge the Individual Defendants' grip on power by exercising their First Amendment rights.

142. It is clearly established that retaliating against individuals by arresting them under a law that is generally not used to arrest similarly-situated individuals is a violation of the First Amendment. Every reasonable government official would have had a fair warning that doing so and participating in a scheme to do so is unconstitutional.

143. It is furthermore clearly established that retaliating against individuals by engaging in the various harmful acts described in Paragraph 140 is a violation of the First Amendment. Every reasonable government official would have had a fair warning that doing so and participating in a scheme to do so is unconstitutional.

144. The facts also demonstrate that the criminal charge the Individual Defendants assigned to Sylvia was a sham charge, regardless of attempts to fabricate probable cause or convince a judge to sign an arrest warrant. Thus, even if probable cause existed, the application of an unenforced law to Sylvia is insufficient to outweigh the retaliatory animus illustrated by the surrounding circumstances. The facts, including the exclusion of the district attorney and his later dismissal of defendant Wright's charges against Sylvia, cannot objectively justify Sylvia's arrest.

145. No other similarly situated individuals have ever been charged or arrested as Sylvia was.

146. Moreover, the Individual Defendants were not acting under time constraint and made no split-second decisions regarding Sylvia's arrest.

147. Furthermore, Sylvia's protected speech is not a legitimate consideration in determining whether to make an arrest based on the claim that she tried to steal the petition.

148. The Individual Defendants' unconstitutional acts, motivated by retaliatory animus, directly harmed Sylvia by chilling her ability to exercise her First Amendment rights and by causing her pecuniary loss and the deterioration of her health.

149. Had it not been for the retaliatory animus, the Individual Defendants would have never arrested Sylvia for her actions related to supporting a nonbinding citizens' petition that did nothing other than express public discontent with the city government.

Count II

42 U.S.C. § 1983 – First and Fourteenth Amendments
(Retaliatory Arrest Claim against the City of Castle Hills)

150. Sylvia realleges and incorporates by reference the allegations in Paragraphs 1 through 136 of this complaint, as if fully stated herein.

151. Through the Individual Defendants, as well as through city manager Rapelye, city attorney Schnall, and councilmember McCormick, Castle Hills adopted and enforced an official policy or custom to retaliate against Sylvia for her First Amendment activities, namely the expression of her political thought

through a nonbinding citizens' petition urging the firing of city manager Rapelye.

152. As noted in Count I and elsewhere in the complaint, the City retaliated against Sylvia in violation of the First Amendment by concocting a scheme to arrest Sylvia on manufactured misdemeanor charges.

153. This scheme was a part of an official policy or custom that was deliberate, long-term, and pervasive, unlike on-the-spot decisions to arrest, sometimes made by individual officers in split-second situations.

154. The decision to arrest Sylvia can also be easily disentangled from her speech: unlike in some situations when an officer has to take speech into account when determining whether an arrest is warranted (for example content of speech could indicate whether a suspect is ready to cooperate or presents a continuing threat), here, there was no need to consider the substance of the petition to determine whether the tampering statute was violated. Afterall, the basis for Sylvia's arrest was the allegation that she tried to steal her petition. The substance of the petition has nothing to do with evaluating whether the theft took place.

155. The actions of the Individual Defendants, as well as city manager Rapelye, attorney Schnall, and councilmember McCormick are attributable to the City. As final policy-makers with final authority, or who were delegated final authority, these individuals made a deliberate choice to adopt a course of action

that retaliated against Sylvia and resulted in her arrest. They also ratified these retaliatory acts.

156. As city manager—imbued with the authority to appoint and supervise all city employees and departments—Rapelye is a municipal policymaker, and his decisions and actions described in this complaint represent official Castle Hills policy.

157. As mayor—president of the city council—defendant Trevino is a municipal policymaker, and his decisions and actions described in this complaint represent official Castle Hills policy.

158. As a council member, McCormick was a municipal policymaker, and his decisions and actions described in this complaint represent official Castle Hills policy.

159. As police chief—executive head of the police department—defendant Siemens is a municipal policymaker, and his decisions and actions described in this complaint represent official Castle Hills policy. Alternatively, as policymakers supervising and directing defendant Siemens, city manager Rapelye, councilmember McCormick, and defendant Trevino ratified defendant Siemens's actions as municipal policy.

160. As special detective—charged directly by defendant Siemens and defendant Trevino with assigning criminal charge to Sylvia—defendant Wright's decisions and actions described in this complaint represent official Castle Hills policy. Alternatively, as

policymakers supervising and directing defendant Wright, defendant Siemens, defendant Trevino, city manager Rapelye, and councilmember McCormick ratified defendant Wright's actions as municipal policy.

161. As city attorney, who serves as a legal adviser to the council, the city manager, and all other departments of the City, Marc Schnall acted in a way that represented official Castle Hills policy. Alternatively, as policymakers supervising and directing Schnall, defendants Siemens and Trevino, city manager Rapelye, and councilmember McCormick ratified Schnall's actions as municipal policy.

162. The actions undertaken or ratified by the City constitute the moving force behind the retaliatory arrest aimed at Sylvia's exercise of her First Amendment rights, which caused harm to Sylvia, including, but not limited to damage to her reputation, her health, her financial circumstances, and other adverse effects.

163. Had it not been for the retaliatory animus, the City would have never caused, permitted, or approved Sylvia's arrest for championing a nonbinding citizens' petition that did nothing other than express public discontent with the city government.

164. Alternatively, in recent years, there has been a persistent and widespread practice by Castle Hills of retaliating against city residents who voice criticism of the City or its officials or who petition the City for redress of grievances.

165. In addition to what happened to Sylvia, Castle Hills has a history of cracking down on disfavored speech.

166. For example, in 2017 or 2018, a local resident organized a petition to advocate for the closing of an impound lot in his neighborhood. To intimidate the resident and discourage him from submitting the petition, defendant Trevino—then a council member—along with the former police chief, the former mayor, and the former city manager showed up at the resident's home and threatened him.

167. Similarly, in 2018, when another city resident put up opposition campaign signs on private front yards with owner permission, defendant Trevino's predecessor called and threatened him with an easement violation. "If this is the way y'all want to play the game," said the mayor in a voicemail message, "then I can order the police to just go ahead and write citations to everybody that has them in the easement and kinda, maybe report it that you were the one that started this."

168. In 2016 and 2018, mayor Trevino, police chief Siemens, special detective Wright, and councilmember McCormick were in positions of power in Castle Hills. As such, they—as current policymakers—had actual or constructive knowledge of this unconstitutional policy or custom of retaliating against city residents who criticize Castle Hills or its officials or who petition the City for redress of grievances.

169. But for the City's policy or custom of retaliation in response to criticism of those in power, Sylvia would not have been arrested, had her reputation dragged through the mud, subjected to abuse of process, and suffered various other harms that further serve to chill her First Amendment activities.

Prayer for Relief

WHEREFORE, Sylvia Gonzalez seeks a judgment (1) declaring that the City and the Individual Defendants violated her rights under the First and Fourteenth Amendments to the United States Constitution, and (2) awarding her compensatory and punitive money damages against the City of Castle Hills, Texas; Edward "JR" Trevino, II; John Siemens; and Alexander Wright. Sylvia also seeks her attorney's fees and costs under 42 U.S.C. § 1988 as well as all other and further relief as the Court may deem just and proper.

Jury Demand

Sylvia Gonzalez demands a trial by jury on all issues triable under Rule 38 of the Federal Rules of Civil Procedure.

Dated: September 29, 2020 Respectfully submitted,

/s/ Anya Bidwell
Anya Bidwell (TX Bar No. 24101516)
Will Aronin*
Patrick Jaicomo*

Appendix D

INSTITUTE FOR JUSTICE
901 North Glebe Road,
Suite 900
Arlington, VA 22203
(703) 682-9320
abidwell@ij.org
waronin@ij.org
pjaicomo@ij.org
* *Pro Hac Vice* motions
to be filed

CERTIFICATE OF SERVICE

I hereby certify that, on this 29th day of September, 2020, I electronically filed the Complaint with the Clerk of Court using the CM/ECF system.

I further certify that I caused a copy of the foregoing Complaint to be served via process server upon the following:

City of Castle Hills
209 Lemonwood Drive
Castle Hills, TX 78213

John Siemens
209 Lemonwood Drive
Castle Hills, TX 78213

Edward "JR" Trevino, II
209 Lemonwood Drive
Castle Hills, TX 78213

Alexander Wright
5707 W I-10
San Antonio, TX 78201

/s/ Anya Bidwell

Appendix D

EXHIBIT A

PETITION

A Petition to Castle Hills City Council

FIX OUR STREETS

Reinstate former City Manager Diane Pfeil

- Due to our size and selected form of government, our city has always relied on the city manager to oversee construction projects.
- From 2014-2016, City Manager Diane Pfeil oversaw, from start to finish, over a dozen street projects including Herweck, Honeysuckle, Twinleaf, Gladiola, Zornia, Krameria, Tamworth and Castle Lane (which had a drainage component).
- All were completed on time and on budget.
- After Diana Pfeil's departure only one street project remained—Danube. Construction projected to last 90 days took 13 months to complete and taxpayers paid an extra $260,000 in cost overruns.
- During the next three years, various city managers talked about streets, made up priority lists and paid for expensive engineering studies. None have fixed a single street.
- Diane Pfeil proved that she could both administer the city's mandated services of public safety, code enforcement, finance, municipal court and public information and still supervise and complete all of the projects undertaken during her tenure.

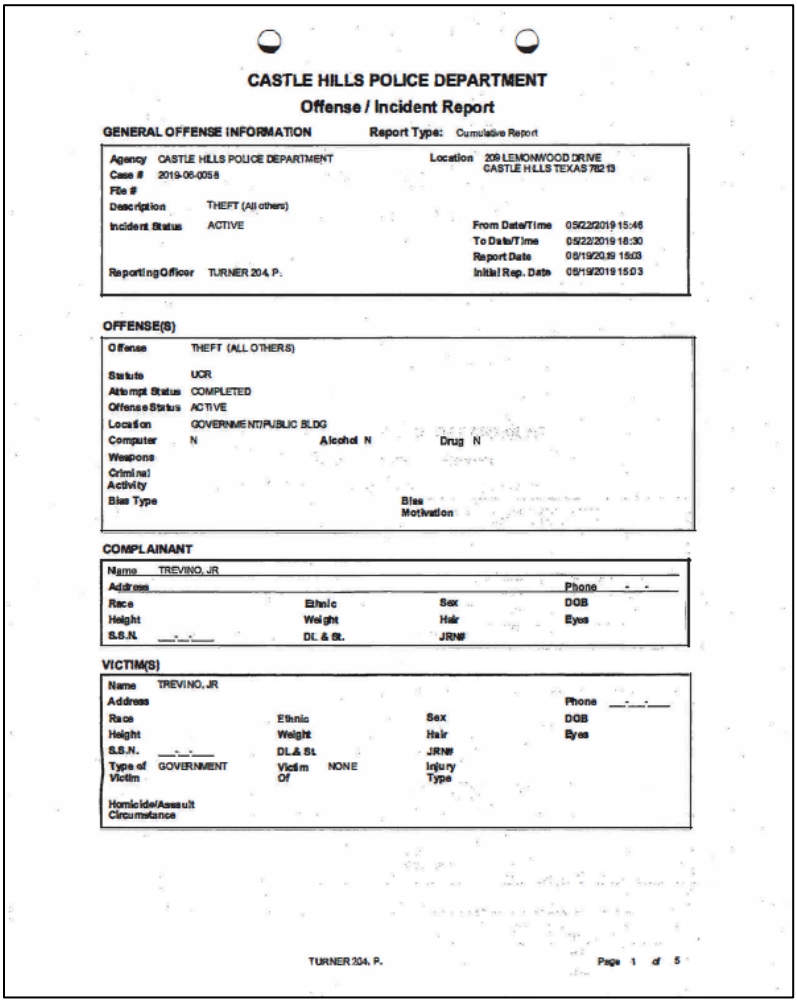
In the interest of restoring effective management, we the undersigned petition for the reinstatement of Diane Pfeil as City Manager of Castle Hills:

Print Name	Signature	Street Address

Appendix D

EXHIBIT B

CASTLE HILLS POLICE DEPARTMENT
OFFENSE/INCIDENT REPORT



CASTLE HILLS POLICE DEPARTMENT

Offense / Incident Report

GENERAL OFFENSE INFORMATION **Report Type:** Cumulative Report

Agency	CASTLE HILLS POLICE DEPARTMENT	Location	209 LEMONWOOD DRIVE CASTLE HILLS TEXAS 78213
Case #	2019-06-0058		
File #			
Description	THEFT (All others)		
Incident Status	ACTIVE	From Date/Time	05/22/2019 15:46
		To Date/Time	05/22/2019 16:30
		Report Date	05/19/2019 15:03
Reporting Officer	TURNER 204, P.	Initial Rep. Date	05/19/2019 15:03

OFFENSE(S)

Offense	THEFT (ALL OTHERS)				
Statute	UCR				
Attempt Status	COMPLETED				
Offense Status	ACTIVE				
Location	GOVERNMENT/PUBLIC BLDG				
Computer	N	Alcohol	N	Drug	N
Weapons					
Criminal Activity					
Bias Type		Bias Motivation			

COMPLAINANT

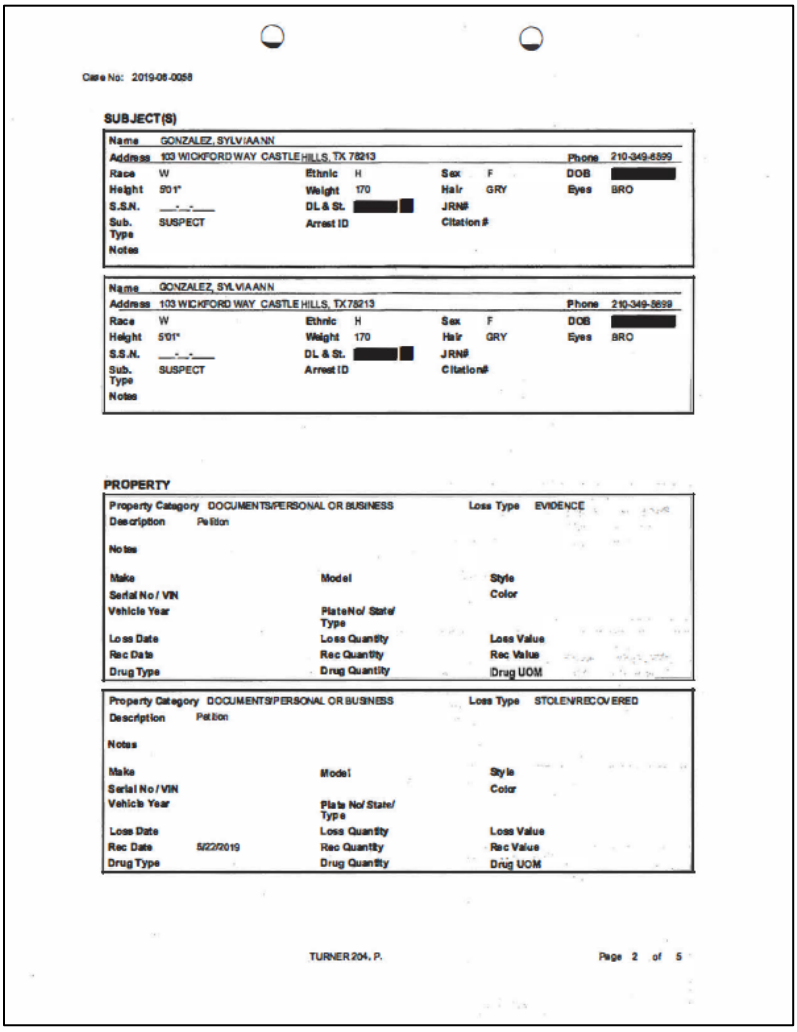
Name	TREVINO, JR				
Address				Phone	- -
Race		Ethnic		Sex	DOB
Height		Weight		Hair	Eyes
S.S.N.	___-__-____	DL & St.		JRN#	

VICTIM(S)

Name	TREVINO, JR				
Address				Phone	___-___-____
Race		Ethnic		Sex	DOB
Height		Weight		Hair	Eyes
S.S.N.	___-__-____	DL & St.		JRN#	
Type of Victim	GOVERNMENT	Victim Of	NONE	Injury Type	
Homicide/Assault Circumstance					

TURNER 204, P. Page 1 of 5

Appendix D



Case No: 2019-06-0058

SUBJECT(S)

Name	GONZALEZ, SYLVIA ANN						
Address	103 WICKFORD WAY CASTLE HILLS, TX 78213					Phone	210-349-8899
Race	W	Ethnic	H	Sex	F	DOB	[redacted]
Height	5'01"	Weight	170	Hair	GRY	Eyes	BRO
S.S.N.	___-__-____	DL & St.	[redacted]	JRN#			
Sub. Type	SUSPECT	Arrest ID		Citation #			
Notes							

Name	GONZALEZ, SYLVIA ANN						
Address	103 WICKFORD WAY CASTLE HILLS, TX 78213					Phone	210-349-8899
Race	W	Ethnic	H	Sex	F	DOB	[redacted]
Height	5'01"	Weight	170	Hair	GRY	Eyes	BRO
S.S.N.	___-__-____	DL & St.	[redacted]	JRN#			
Sub. Type	SUSPECT	Arrest ID		Citation#			
Notes							

PROPERTY

Property Category	DOCUMENTS/PERSONAL OR BUSINESS			Loss Type	EVIDENCE
Description	Petition				
Notes					
Make		Model		Style	
Serial No / VIN				Color	
Vehicle Year		Plate No/ State/ Type			
Loss Date		Loss Quantity		Loss Value	
Rec Date		Rec Quantity		Rec Value	
Drug Type		Drug Quantity		Drug UOM	

Property Category	DOCUMENTS/PERSONAL OR BUSINESS			Loss Type	STOLEN/RECOVERED
Description	Petition				
Notes					
Make		Model		Style	
Serial No / VIN				Color	
Vehicle Year		Plate No/ State/ Type			
Loss Date		Loss Quantity		Loss Value	
Rec Date	5/22/2019	Rec Quantity		Rec Value	
Drug Type		Drug Quantity		Drug UOM	

TURNER 204, P.

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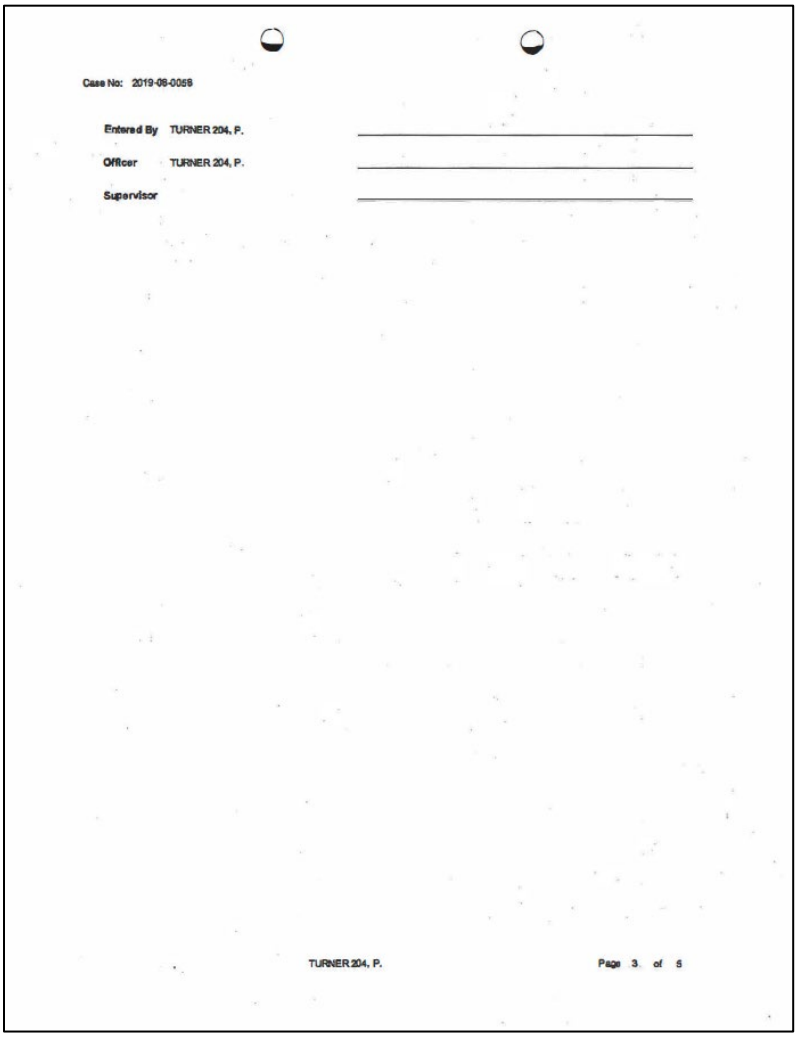


Case No: 2019-08-0058

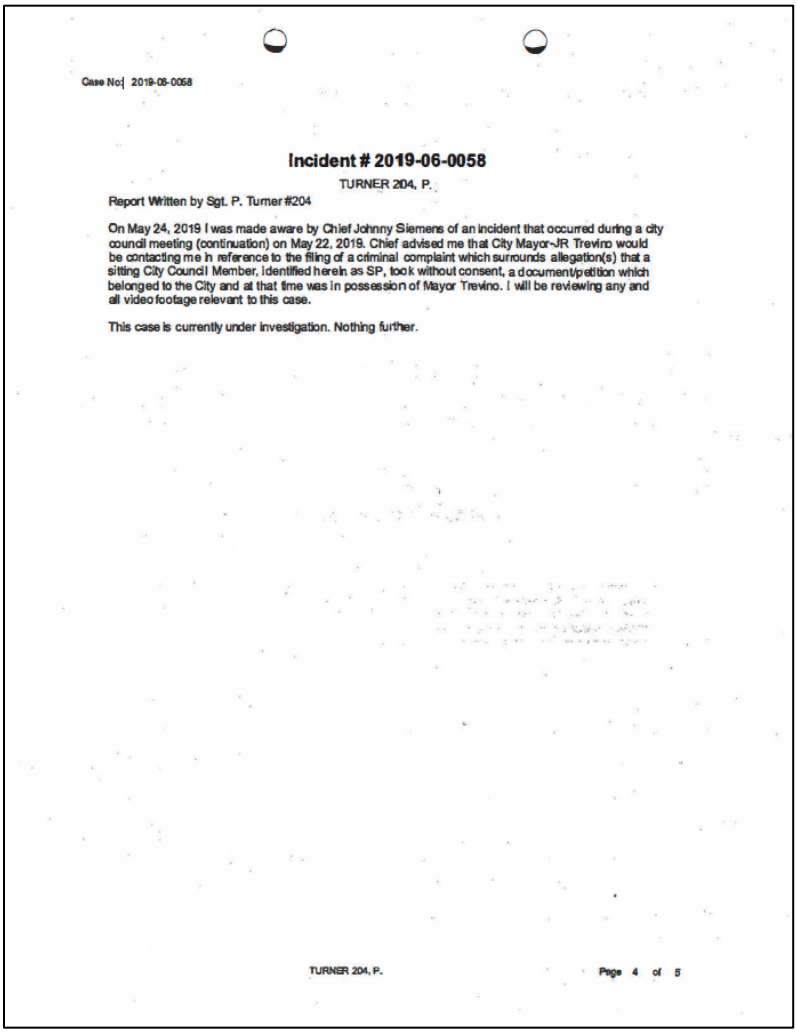
Entered By TURNER 204, P.

Officer TURNER 204, P.

Supervisor

TURNER 204, P. Page 3 of 5

Appendix D



Case No: 2019-06-0058

Incident # 2019-06-0058

TURNER 204, P.

Report Written by Sgt. P. Turner #204

On May 24, 2019 I was made aware by Chief Johnny Siemens of an incident that occurred during a city council meeting (continuation) on May 22, 2019. Chief advised me that City Mayor-JR Trevino would be contacting me in reference to the filing of a criminal complaint which surrounds allegation(s) that a sitting City Council Member, identified herein as SP, took without consent, a document/petition which belonged to the City and at that time was in possession of Mayor Trevino. I will be reviewing any and all video footage relevant to this case.

This case is currently under investigation. Nothing further.

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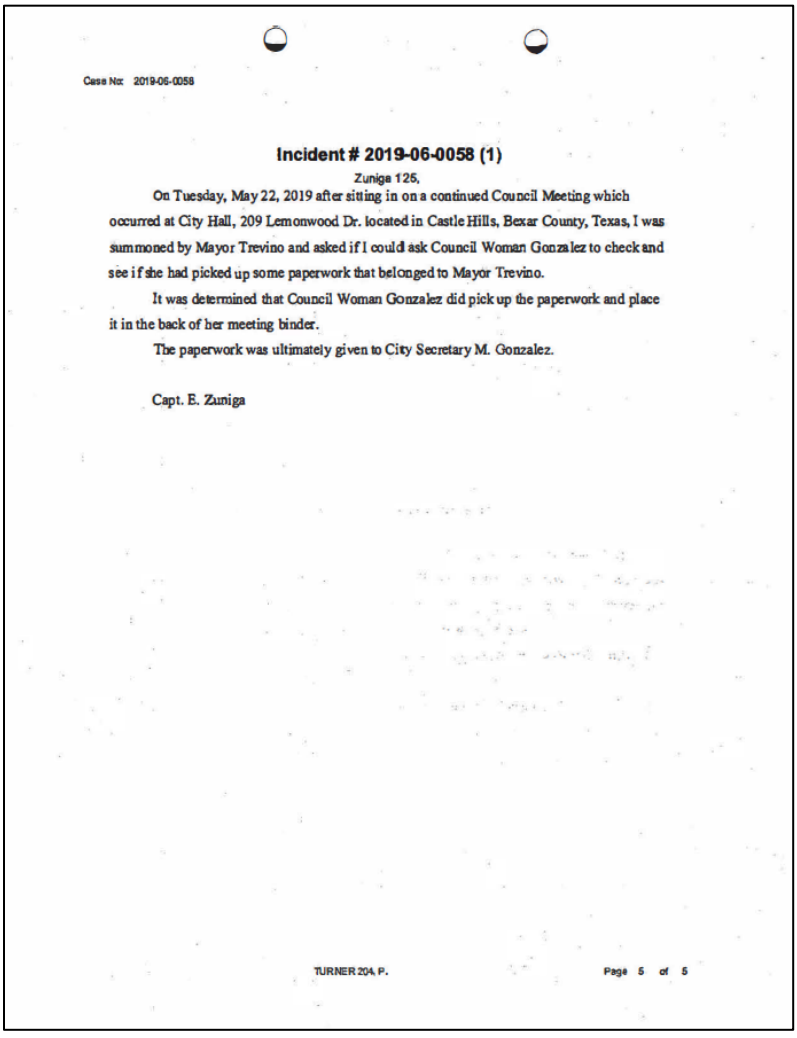

Case No: 2019-06-0058

Incident # 2019-06-0058 (1)

Zuniga 125,

On Tuesday, May 22, 2019 after sitting in on a continued Council Meeting which occurred at City Hall, 209 Lemonwood Dr. located in Castle Hills, Bexar County, Texas, I was summoned by Mayor Trevino and asked if I could ask Council Woman Gonzalez to check and see if she had picked up some paperwork that belonged to Mayor Trevino.

It was determined that Council Woman Gonzalez did pick up the paperwork and place it in the back of her meeting binder.

The paperwork was ultimately given to City Secretary M. Gonzalez.

Capt. E. Zuniga

TURNER 204, P.

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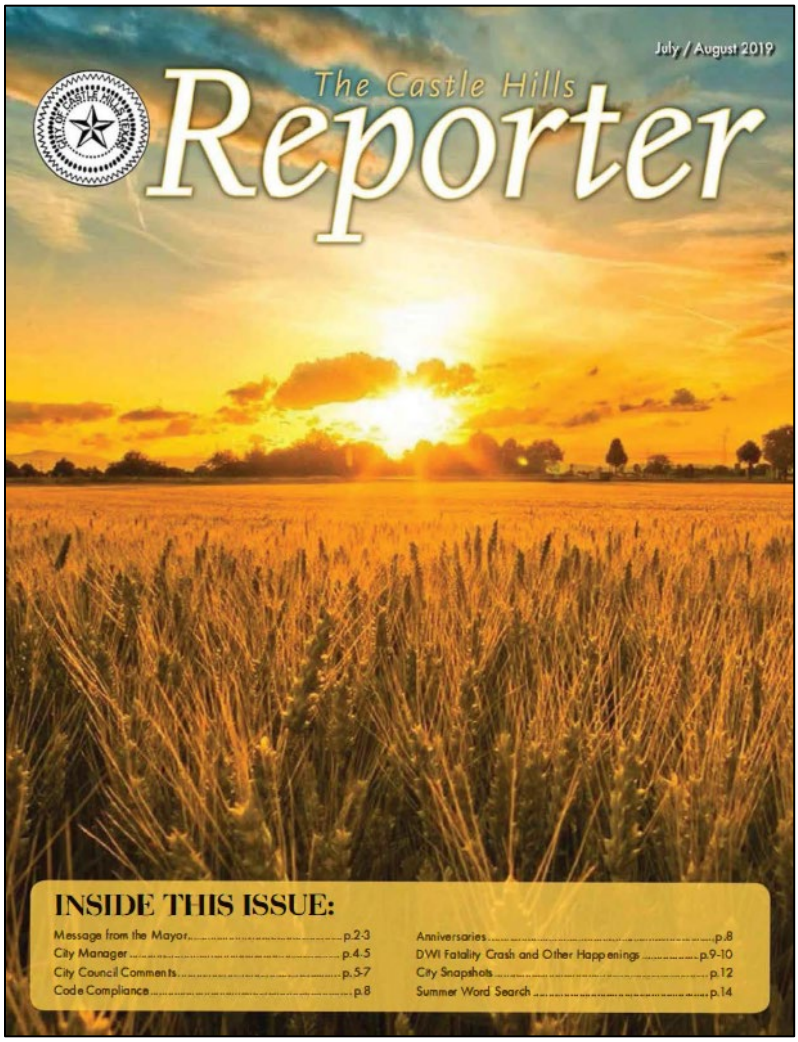
Appendix D

EXHIBIT C

CASTLE HILLS REPORTER NEWSLETTER



Appendix D

MESSAGE FROM THE MAYOR

Friends,

Words cannot express how honored and proud I am to be back serving our City. At the City Council Candidate Forum in April someone asked the question, if I would do anything differently this time on council. My initial reaction was that I would work equally as hard, but I remember what I did wrong on council. I wasn't able to tell enough residents about my struggles, failures, or successes. I will be working to share as much information as possible, so you know about my efforts to make our City better.

As most of you all know I sought out to buy my home in Castle Hills after growing up just down the street from our City. I long admired the small-town atmosphere, the perception of the tight knit community, and the idea that leaders could be accessible. We have great neighbors but the biggest value in Castle Hills is the people that work to give us the best possible services. I've said before that our employees are the lifeblood of our City and I strongly believe it. If it weren't for our outstanding services, Castle Hills would still be a great neighborhood, but it wouldn't be a City.

I have several goals and priorities as your Mayor. First and foremost is to ensure an open and transparent government which welcomes an array of perspectives. As the saying goes, I know what I know but I don't know what I don't know. This is where we need the citizens, the subject matter experts, to come forward to share your knowledge and independent thoughts. During my campaign as I was knocking on doors, I was amazed at the diversity of our residents. I assure you that no matter what your vocation is, you can make an impact in Castle Hills. While we might not always agree, I truly believe that the best decisions land in the middle of differing opinions. If you aren't sure if you have the time to commit or you aren't sure what you want to do, please reach out to me. The City has numerous boards and commissions with varying level of commitment needs, if you would like, let's have a cup of coffee and find the right one for you!

My next goal is to support our City staff. In walking the streets, I heard the residents loud and clear you love our City services which I vehemently agree. Every aspect of the Castle Hills's services is top notch; of course, we can always be better and working to make that happen is one of my priorities. Below are my thoughts and perspective as it relates to each of our City departments:

Continued on page 3

"The statements and facts contained in newsletter articles from the Mayor and City Council Members are their own personal views and should not be considered official city sponsored statements or facts and should not be relied upon as such."

CITY COUNCIL

JR Trevino
Mayor
Clyde R. McCormick
Place 1
Mark F. Sanderson
Place 2
Sylvia Gonzalez
Place 3
Lesley Wenger,
Mayor Pro-Tem, Place 4
Douglas Gregory
Place 5

CITY STAFF

Ryan Rapelye
City Manager, (210) 293-9673
Melissa L. Gonzalez
City Secretary, (210) 293-9681
Vacant
Finance, (210) 293-9674
James "Jim" Ladewig
Fire Department Chief
(210) 342-2341, ext. 217
Johnny Siemens
Police Department Chief
(210) 342-2341
Rick Harada
Public Works & Animal Control
Department Director
(210) 293-9676

ALL EMERGENCIES, EMT, FIRE & POLICE CALL 911
Non-emergency (210) 342-2341

Monthly Meetings

All meetings are held at City Hall unless otherwise posted.

City Council
2nd Tuesdays, 6:30 p.m.
Architectural Review Committee
1st Wednesday, 7:00pm
Upon Request
Board of Adjustment
4th Monday, 5:30 p.m.
Upon Request
Zoning Commission
1st Tuesday, 7:00pm
Upon Request
Crime Control & Prevention District
3rd Monday, 5:30pm
As Needed

Appendix D

Administration

While our office has seen turn over the years, our City Manager, Ryan Rapelye, has held the highest standards for all employees. In my opinion our administration could use some additional support. We regularly have residents come in and volunteer to help with permits. While the volunteers are always welcomed and much appreciated, I believe we find ourselves in a precarious situation when we are relying on volunteers to sustain day to day operations. Permits are essential to Castle Hills for a variety of reasons. Permits ensure that the City maintains a certain level of safety, adheres to building standards, and provides a uniform look to our community; as determined by our ordinances. More importantly, permitting which encompass plan review and inspections generates revenue for the City to support these services. Home renovation and growth in our business community generate additional revenue in our ad valorem and sales tax which not only help to sustain City services but provide additional funding for projects like streets, drainage, or special projects.

Fire

Thanks to a good friend of mine that works for the Southwest Texas Regional Advisory Council, I have been brushing up on my emergency response knowledge. In my education of the first responder world I have come to learn about some of the most important factors that affect life safety is, "minutes" in correlation to response time. When lives are on the line minutes are precious, which is why it is extremely valuable to have our Fire Department that is literally 3 minutes away from anywhere in our City. When the minutes count, you can count on Castle Hills Fire to be on scene quickly. If the recent events in our area have shown anything is that while we feel safe in Castle Hills, we are not immune to catastrophic events.

Police

Following up from that last line, it is important to drive home the point that mass casualties don't discriminate where they happen. Being able to have our Police department is another example of having the first responders when it matters. In walking the streets, many people think that we have a safe City. While I would agree that we do have a safe City, I have seen firsthand how hard our officers work to keep our City safe, I am a regular on the police ride-along. In my ride-along, I have seen arrests for illicit drugs, people driving under the influence, stolen vehicles, and felons in possession of firearms. In all of the arrests, there is one common variable, we have the best possible and most courteous officers working to keep our streets safe. Aside from the officers on the street, we have a great team of investigators that produce results at all levels. Whether it stolen items being recovered or are a business that had an employee that embezzled over $100,000.

Public Works

Last but certainly not least, the public works team; which is my personal favorite. Rick and his team work nonstop to keep our City clean, maintained, and safe potential hazards; with a shoestring budget. Most notably, the team are incredibly modest, humble, and work in the shadows. Rick has been with the City for nearly 20 years and has done all the jobs and continues to do all the jobs as necessary. Unfortunately, Public Works experiences a great deal of turn over, Rick takes responsibility of training all new hires on how to maintain safety, repair and operate equipment.

At the end of the day, I know we have some of best services around and some of the best department heads as well. My goal is to optimize service and ultimately provide the best value for our tax dollars. I'm confident with Mr. Rapelye's knowledge and experienced coupled with our relationships in the area, Castle Hills is poised for great things. I have had the good fortune of having numerous friends reach out to me so that their organizations can partner with Castle Hills to make our lives a little better. I look forward to sharing those individual details with you all in the upcoming months. Until then, if I can be of service please do not hesitate to contact me.

Yours in service,

JR Trevino
Mayor
JTrevino@CastleHills-TX.gov
210-559-5940

Appendix D

MESSAGE FROM
THE CITY MANAGER

By Ryan D. Rapelye, City Manager

Development of the FY 2020 Budget!

The annual operating budget serves as a policy document, a financial plan, an operations guide, and a communications device for the City. It is the foundation for the City's allocation of resources toward service delivery plans to provide quality services and investments, and continued improvements. It also reflects incremental changes addressing service requirements and builds upon initiatives funded in prior years, while establishing new direction for programs. The budget document is also used to evaluate the effectiveness of City programs and services while providing extensive information on municipal operations.

As City Manager, I am tasked with the day to day operations of the city while carrying out the policies established by the council. As City Manager, it is my duty to prepare and submit to the council, prior to the beginning of each fiscal year, a budget of proposed expenditures for the ensuing year, showing in as much detail as practicable the estimated amounts required for the efficient operation of each department of the city and the reasons for such estimated expenditures. The FY 2019 Proposed Budget which was eventually presented last August delivered a balanced budget with surplus for infrastructures and other capital expenses. The budget maintained the tax rate and afforded the opportunity to maintain current services levels for the residents of Castle Hills. The budget was defined and transparent and had recommended to maintain all positions to ensure City services and continue to improve all customer services to our residents.

During the development of the FY 2020 Proposed Budget process, we must ensure we continue to maintain and provide excellent municipal services to citizens, businesses, and visitors while ensuring appropriate funding and tracking of all financial resources. The City operates in a fiscal year that begins January 1 through December 31; developing the budget comprehensively relies on the City Council's efforts to provide input and direction as well as City departments. The process should always include our residents in having the ability and opportunity to speak on the budget during two public hearings before final adoption. Council as well as the public input is necessary to capture this information related to services and projects in the community but there must be a hierarchy of function. The budget must fund basic city services first and then plan effectively in order to address the long-range projects.

As is the case with most municipalities, personnel/ payroll costs encompass the largest single expense in a budget. Public safety requires round the clock staffing and specialized equipment which endures extensive wear and tear. The FY 2019 Adopted Budget covered core services such as Public Safety (Fire, Police and Dispatch), sanitation/streets within our Public Works, Municipal Court and Administration. The General Fund is the largest fund for the City and accounts for the general service and operations.

Last year in crafting the FY 2019 Proposed Budget, the focus was to maintain the City's core service and balance this with an emphasis on customer service; maintain the City's reserve at an adequate levels, which should protect the City from future uncertainties; project revenues which was established at reasonable levels, utilizing historical data; and ensure department and program costs will be budget at a reasonable level, which parallel the cost of providing services. All of these factors will still be key in developing the FY 2020 Proposed Budget.

As a part of the development of the FY 2020 Proposed Budget, one of the focuses will be the need to review current capital projects for streets and drainage underway and utilize the 5-year CIP to program the necessary dollars for initiating new capital projects next year. In reference to minor projects, the Public Works Department has a budgeted line item for $50,000 for minor street/drainage projects around the community and part of the development of the FY 2020 budget is to review the need to increase and utilize "on demand" contractors similar to what we did recently on South Winston and Lemonwood.

The City of Castle Hills currently has $3.2 million in associated street/drainage funds for infrastructure projects, these funds are infused by revenue from sales tax, digital billboards and stormwater billing/fees. Consequently, the City will eventually need to find an alternate funding for future infrastructure projects. The City in the future may need to issue certificates of obligation to borrow, possibly leverage partnerships and/or attempt to obtain grant funding to offset future costs of projects. Recently, the City entered into a new long-term contract with a digital billboard company which will provide additional revenue for drainage and streets. Revenue from digital billboards is dedicated to drainage and streets and 80 percent of total revenue which equates to roughly $3.9 Million for drainage over the lifespan of the contract. This revenue will be committed to future drainage projects and the new digital billboard will be erected in a commercial area near Loop 410.

The City of Castle Hills largest operating expense is the landfill fees in sanitation since we transport and dispose residential waste at a landfill outside of San Antonio. Over the years, the expenditure related to landfill fees has escalated in our sanitation department in association with the operating costs charged by the landfill. This may be different from other suburban cities around San Antonio which might contract these services for residential collection. In preparation of the FY 2020 Proposed Budget, staff has monitored this line-item expense and will review any necessary modifications which may need to be adjusted for this service.

As I have mentioned previously in articles, the City of Castle Hills has very good employees who are knowledgeable, talented and dedicated to their respected positions within the organization. As part of the development of the FY 2020 Proposed Budget, another focus should involve the need to recruit and retain personnel to the City of Castle Hills. As part of the development of the budget we should factor the need to have competitive salary and benefits.

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"City Manager's" article continued from page 4

The City of Castle Hills is fortunate and unique to a have a dedicated public safety team which encompasses fire, police and dispatch. Another area in the development of the FY 2020 Proposed Budget is to ensure we are addressing first responders needs in our organization and community.

Moving forward, the City will have a number of workshops on the development of the FY 2020 Proposed Budget. This will be an opportunity for citizens to provide input and comment. The FY 2020 Budget Calendar is available on the City's website. Every budget is an attempt to balance current and future needs within the framework of limited resources. Council and staff will work cooperatively in constructing the proposed budget based on these those guidelines.

As always, I would like to provide an update on our capital projects in the pipeline:

- **Phase III Antler Drive Roadway Improvements** – Construction commenced in early May, currently the installation of utility work is underway and next will involve the reconstruction of the roadway. Project is expected to take nine months.
- **Street Maintenance Program – Seal Coat Bids** – The City has identified street candidates and developed a list of street segments to include in the 2019 SMP. The 2019 SMP for Seal Coat Projects will include, but not limited to approximately 29 different streets segments and 4 alleys for an approximate total length of 9.28 miles. The City did not receive any bids so our City Engineers will be reviewing and modifying the language in order to advertise again for bids.
- **Banyan/Glentower** – Engineering services and/or design is underway on the reconstruction of Banyan and Watershed III Drainage Improvement Phase I (Banyan Drive and Glentower Drive). Design is at 60% and the City will advertise for bids in September. Construction is expected to take nine months on these two projects.
- **Mimosa/Krameria to West Avenue** – Engineering services and/or design is underway for Watershed II Drainage Improvement Phase I (Mimosa/Krameria to West Avenue). Design is at 60% and City will advertise for bids in September.

Please contact me at rrapelye@castlehills-tx.gov or at the office at 210.293.9673 if you have any questions on projects or need assistance with services from the City of Castle Hills.

COUNCIL COMMENTS

CLYDE R. McCORMICK
PLACE 1

A. In my article last issue, I wrote about the City Manager-Council form of government. I had found the first ordinance (Ordinance 182, passed by our City Council in 1963) which I believed adopted the City Manager form of government for Castle Hills. In subsequent research, I believe I have discovered that our city has been operating in violation of state law ever since 1963. It appears that the original ordinance 182 was invalid and the use of the City Manager form was done illegally because there was no election as required by statute. I believe our city had and has no authority to hire a City Manager as described in Local Government Code Chapter 25. Here is why:

The original state law statute, sections 1164a-1 through 1164a-10, were enacted in 1943 and remained substantially unchanged until codified as Chapter 25 of the Local Government Code in 1987. An ordinance passed by city council is preempted by a conflicting state law and is not effective to alter Texas statutes. The relevant provision is 1164a-3 (now Ch25 sections 25.022 thru 25.025), which provides in part: "Before the provisions of this Act shall apply to and become operative in any city of this State, it shall be submitted for vote to the legally qualified electors of such city for adoption, and shall receive a majority of all votes cast thereon at such election." and requiring the election be brought upon a petition of at least 20 percent of the total number of votes cast for Mayor in the last election, etc... There was no petition and no election or vote. Therefore, the City Manager form of government described in Chapter 25 cannot legally be used in Castle hills and the provisions of Chapter 22 apply to our city government.

This view was confirmed by Attorney General Opinion letter JC-0544, Aug. 14, 2002, summarized in part as follows: "General law cities are creatures of statute and have only those powers expressly granted by statute or necessarily implied therefrom. The legislature has expressly designated the Mayor of a general law city as the budget officer of a municipality and has assigned specific duties to the Mayor. The City Council has no authority to reassign the Mayor's statutory duties to another. The Mayor is expressly authorized to require other city officers to provide necessary information to him and may also delegate to city employees non-discretionary ministerial and administrative tasks necessary to carry out his statutory duties."

However, Section 25.051 was amended by the legislature in 2003 adding 25.051(b) which provides in pertinent part, as follows: "This chapter does not limit the authority of the governing body of a general-law municipality to appoint and prescribe the duties of a municipal officer or employee under Chapter 22, 23 or 24." This appears to mean that the Governing body might appoint a "City Administrator" (or "City Manager"), under the provisions of Sections 22.071 and 22.072, to assist the Mayor, under the Mayor's direction and supervision, in carrying out day to day administrative functions and ministerial duties assigned to the Mayor by section 22.042 and Chapter 102 Local Government Code (LGC), and the Mayor retains his assigned

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responsibilities. Looks to me like Chapter 22 now applies.

B. A question was raised last month regarding removal of General-law City Mayors and City Councilmembers. Let me clear up -- there is NO Recall Election procedure available to the citizens of Castle Hills.

This is a very abbreviated summary of the relevant portion of Chapter 21 of the Texas Local Government Code (LGC). The general grounds for removal are incompetency, official misconduct and intoxication on or off duty (unless alcohol is prescribed). (LGC Section 21.025). A sworn pleading for removal may be filed with the district court in the officer's county of residence by any six-month resident of the municipality who is not under indictment in the county. (LGC 21.026). The court will require a bond to be posted by the complainant. (LGC 21.028). The petition must set out the specifics of the grounds for removal complained of in clear terms including the date, time and place. (LGC Section 21.026) The grounds for removal must have occurred since the last election of the officer, unless facts were unknown to voters at the time of the election, (LGC 21.024). The complainant must obtain citation and service on the officer sought to be removed. If the Judge denies citation, the matter is dismissed and costs shall be assessed against the complainant. (LGC 21.027) The officer shall have the right of trial by jury or may choose to be tried by the judge of the court. The case will be prosecuted by the district attorney assisted by the complainant. These matters have precedence over other court business. If the removal is not affirmed the officer remains in office and the court may assess damages and costs against the persons filing the removal action. Alternatively, the court may affirm the removal action. Either party may appeal the court's decision (LGC 211.027, 21.029-21.030). I don't know of any reported cases of removal under this statute.

In addition, per Section 21.031 LGC-any conviction of an elected officer of a felony, or of a misdemeanor involving official misconduct, operates as an immediate removal from office. The court rendering judgement shall include a removal order in the judgement. Further, in the event of an appeal, the court rendering the judgment may suspend the officer, if in the public interest, pending final judgment on appeal.

Once final, a judgment of removal makes the officer ineligible for re-election to the same office before the second anniversary of the date of removal. (LGC 21.032)

C. We need interested volunteers for a variety of city committees including zoning. Expressions of interest in any committee may be forward to the City Manager. Or, in the case of the Zoning Commission, to me, Clyde R "Skip" McCormick, 210-383-8941, cmccor5683@aol.com.

I attended a Grant Management program this week (at my own expense). Someone asked how things were, politically, in Castle Hills. My Response was "In our beautiful little community we enjoy all the benefits of the National Political Dysfunction!"

Someone came up to me last month and actually apologized for comments made during a council meeting. Nicest thing that has happened to me recently. Been a tough year so far. Are you interested in good government? Want to be an active participant? Please contact me Clyde R "Skip" McCormick, 210-383-8941, cmccor5683@aol.com.

MARK F. SANDERSON
PLACE 2

Greetings!

As your new Alderman, I though I'd introduce myself and give you bit on my family and me. Currently, I work as a software engineer in a remote capacity for a DC based engineering company specializing in highly complex software systems. It is a job that is quite demanding, requiring that I keep up to date on the latest and greatest technology.

Visitors to my house will notice that I enjoy technology, and have many 'Smart Home' toys that help us enjoy our home. My hobbies include Computers and Technology (of course), High-Powered Amateur Rocketry (NAR Level One Certified), Ham Radio (General/ KE5BAY), racing RC Trucks and flying RC Airplanes and projects around the house. Although I'm not current, I am also a private pilot as well (SEL/VFR). You might see me tooling around the neighborhood on my Red Harley-Davidson Ultra Ltd on which I do my own repair work.

My wife Rassel is from the Philippines and earned her US Citizenship nearly two years ago in a very emotional Austin, Texas ceremony. She is a woman of many talents, as evidenced by her amazingly artistic Easter celebration that she has put on for friends and neighbors past 3+ years here in Castle Hills. Fluent in no less than five languages (Visayan, Capiznon, Tagalog, Hiligaynon/Ilonggo and English) as well as a working knowledge of Chinese and Japanese her language skills surpass just about anyone I know.

As a political newcomer, I am quite lucky to have a wife who is also an experienced political worker in her native Philippines. As teacher and mother she is unsurpassed in my eyes. She is mother to our only child, Charles Frederick, the focus of our lives. I have certainly married up. Charles, our son, is five years old, and is a 'graduate' of the Christian School of Castle Hills Pre-School and is now on his way to starting Kindergarten class in Castle Hills Elementary. His hobbies include running his RC truck in the back yard, learning to read and write, and playing with his monster trucks in the sand and dirt. Thankfully he has his mother's looks and great attitude!

It will take a little while for me to settle into my new role as your representative. I am both humbled and awed at the responsibility that you as citizens have entrusted in me. Please be patient and keep in mind that I'm not, and never will be, a politician. My habit of 'shooting from the hip' will be distressing to some, and I apologize in advance to those who might be offended. It is my hope that we will all learn how to accept each other's differences while feeling free to openly criticize policy matters that are important to us all. Public debate should be passionate, open and honest with no fear of humiliation or embarrassment.

My goals are for us to have a civil environment during council meetings that will not be intimidating or disrespectful. I hope to help pass into law new zoning restrictions that will help protect our residential quality of life. We have much work to do on eliminating illegal residential businesses. A lot of work still remains on streets, flooding and making Castle Hills as more family-friendly environment to raise our children in.

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Feel free to call me at any time 210 848 0661. Leave a voice mail if I don't answer; I will return your call as soon as possible. Feel free to email me, but I don't believe that email is the best medium to air grievances and solve problems. I appreciate the in-person approach. I have reserved Sunday afternoons for discussing constituent issues. I look forward to being your advocate!

Mark F. Sanderson
(210) 828-0661
msanderson@castlehills-nc.gov

SYLVIA GONZALEZ
PLACE 3

New Zoning Commission Members

One of the first actions of the new City Council was the nomination and approval by Council of Zoning Commission members to serve two year terms. The process this year was for each Councilmember to nominate a candidate, and Council then voted to approve (or not) each nomination.

I nominated Joe Rodriguez to serve as Chairman of the Zoning Commission, and he was approved. Lesley Wenger nominated Jana Baker, Douglas Gregory nominated Margo Pena and Mark Sanderson nominated Todd Herman—all were approved.

The Zoning Commission is composed of five members and two alternates. Since Skip McCormick's nominations were not approved, there is an open seat on Zoning until Mr. McCormick provides a nomination that the majority of Council approves.

In order for the Zoning Commission to be complete in the interim, two alternate members were nominated and approved: John Herndon and George Booth who can fill in for the 5th seat or for a regular member who is unable to attend a Zoning Meeting.

The Zoning Commission is required by State Law if a city has zoning regulations. It is an advisory board and makes recommendations to Council on all matters related to our zoning codes and individual requests from property owners for the proper use of their property according to city policy.

We have a number of important issues coming up that were not finalized by the prior Zoning Commission:

- A policy on short-term rentals if we decide to begin allowing such uses as Airbnb's.
- Prohibition of impound lots within the City of Castle Hills limits.
- Acceptance or rejection of changes proposed by the Zoning Review Committee—a process also required by State Law—most of which have been waiting for a recommendation for over two years.

The new members of the Zoning Commission are all long-term homeowners who have opposed unwanted development in their neighborhoods and believe in protecting the special residential qualities desired by the majority of their neighbors.

Sylvia Gonzalez
(210) 912-6664
sylvia.gonzalez1@yahoo.com

LESLEY WENGER
Mayor Pro-Tem, PLACE 4

What Purpose do Fees Serve?

Some of the most common complaints from residents of Castle Hills have to do with fees the city imposes, particularly the fees imposed by Public Works for pickup of tree limbs and extraordinary items—many of which homeowners consider to be arbitrary. Part of the problem is that the fees that have been approved by Council are no longer posted on the website, so there is no easy way for a homeowner to determine if these fees are appropriate or accurate. But then there are all the other fees the city imposes which, in many cases, serve no purpose other than to collect money. I raised this issue at the January 8, 2019 Council Meeting, to consider eliminating tree trimming and roofing permit fees for starters. However, Council wanted to know what the impact would be on the Budget.

The opportunity to re-consider all permit fees, and how they benefit residents, will come up in our Budget Workshops this year, which begin in July. Usually most citizens do not attend these workshops, but this is when Council determines how we spend your tax money for the coming year. The two permits I brought up in January, along with many others, do not protect residents. In the case of roof permits, Council voted, in 2016, to reduce the fee from a percentage of the proposed cost to a flat fee of $100 plus $50 for reinspection which is cursory at best. In the event that you have a problem with a new roof, the city takes no responsibility—that is a matter between you and the roofing company. San Antonio does not issue or charge for roofing permits. Tree permits, which are viewed as a way to prevent oak wilt and other tree damage, also do not serve that purpose. They are issued for one month, to allow for tree trimmers' availability and scheduling changes. That means that the city has no idea what day the trimming is taking place and no one will be checking to make sure the tools used for cutting are clean or that the cuts are painted—that, again, is between you and the tree company you hire. The only function the city plays is to not issue permits for companies that may have been found disreputable—something that can be determined, if such a list exists, by a phone call to City Hall or a posting on the city website. On the other hand, some permits, for new construction, are useful to maintain structural and safety compliance: electrical wiring and new plumbing, if not done correctly, can cause fires and flooding which could impact adjoining properties. Your experience with city fees will be useful in determining which fees should be maintained and which should be eliminated.

Lesley Wenger | (210) 377-3636 | wengerrx@satx.rr.com

Appendix D

Code Compliance

Happy 4th of July. I would to acknowledge all of our veterans and active duty service members and their families. Thank You for service and sacrifice to our Great Nation!

This month's topic will be trees. When a tree falls from one private property onto another private property, the duty to remove the fallen debris is with the property owner upon which the debris has fallen onto. That the debris originates from a neighboring property is not relevant for the purposes of a code violation as there is no language in the code that addresses this sort of civil issue. The City cannot and will not get involved in a matter of civil damages not caused by public property and therefore cannot advocate for one side or the other in these disputes.

As for tree removal in emergency circumstances, the code states that "Trees in need of emergency pruning or removal that threatens lives or property due to damage beyond the control of the owner, may be trimmed or removed without a permit. …All wounds on oak trees shall be painted immediately or as soon as weather and/or daylight allows (see section 48-104), and debris must be removed within 48 hours." Section 48-77 (e) and Sec. 48-56 states that "In the event of a dead, dying or diseased tree with an infestation threatening other trees, or the tree(s) pose a hazard to life or property which cannot be mitigated without its removal, the city manager may authorize the immediate removal of the tree(s) without the need for involvement by the architectural review committee."

If you plan a construction project that involves the removal of trees, please note that such a project will need to come before the Architectural Review Committee as referenced in Sec. 8-48 "(c) If the project requires removal of trees, this request must be clearly documented in the architectural review committee application, and payment for the tree removal as provided in the city fee schedule shall accompany the application, and supporting documentation per Chapter 48 Article II shall be provided."

Any other tree removal request is addressed in Sec. 48-55 which states that "The city architectural review committee shall review and hold a hearing on all tree removal requests when required by this Code. The architectural review committee shall make a recommendation to the city council for approval, approval with modifications, or disapproval of every request for protected or heritage tree removal.

Though not all-inclusive, the following are examples of tree removal requests that may be approved by the architectural review committee:

1. Trees so located as to prevent access to the property or as to preclude reasonable and lawful use of the property;
2. Dead, dying or diseased such that recovery is not practicable.

Thank you for your time and as always, you can always file against your neighbor in Municipal Court if you feel that the City Code does not represent your personal interests.

CH
Castle Hills, TX

ANNIVERSARIES:

Police Department Anniversaries

Dispatcher Travis Lowe, 6/6/1996 – 23 years

Sgt. Paul Turner, 6/1/2005 – 14 years

Sgt. Ronald Singleton, 6/12/2012 – 7 years

Chief Johnny Siemens, 6/17/2013 – 6 years

Officer Daniel Cossu, 6/15/2015 – 4 years

Cpl. Tony Crawford, 6/26/2015 – 4 years

Officer Nathaniel Peck, 6/26/2015 – 4 years

Appendix D

Passports

The City of Castle Hills is now officially able to accept paperwork for U.S. passport applications at city hall. The passport application services are available on a walk-in basis:

- Monday: 8:30 am to 2 pm;
- Wednesday: 8:30 am to 4 pm;
- Friday: 10 a.m to 2 pm

Appointments are available for Saturdays from 8:30 a.m. to 1:30 p.m.

To schedule an appointment call (210) 293-9674 or (210) 342-2341.

For more information regarding how to apply for or renew your passport, please visit the U.S. Department of State website at: https://travel.state.gov/content/travel/en/passports.html

DWI Fatality Crash and Other Happenings

On June 9th police officers responded to the 1700 blk NW Loop 410 for a rollover accident. When the officers arrived, they began to assist the injured driver and began the crash investigation. At that point tragedy struck. A driver of another truck lost control and struck two patrol vehicles. The out of control vehicle continued towards an officer walking on the shoulder of the highway, causing him to have to jump over the concrete barrier, falling 20 feet to the frontage road below to save his life. The vehicle continued towards our other officers as well as a group of good Samaritans tending to the driver of the original crash. This caused another officer and two civilians to jump from the highway, falling 20 feet as well, to the frontage road below. The vehicle struck two other civilians, causing the death of one and seriously injuring the other. The investigation of the second crash led officers to believe that the driver was intoxicated at the time of the accident. Both officers that jumped from the highway to the frontage road below sustained injuries and were transported to the hospital. Both officers have been released from the hospital and are recovering.

One person's decision to drink and drive contributed to a tragedy that effected so many families. This poor choice impacted the good Samaritans, who were trying to provide help to an injured crash victim, along with their families; it effected the police officers that were injured and their loved ones who must help them in their recovery. Further, the police department was impacted having their colleagues injured. Lastly, it has affected our community, especially those who have always stood strong in support of their police officers and department.

The outpouring of support for the injured officers and the police department has definitely assisted putting this event behind us. This

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Hope out of Tragedy

incident has brought the Castle Hills Community together in support for all the victims of this senseless tragedy to a level I have personally never seen in my nineteen years of employment with the city. Many members of the community offered their support for the officers by making monetary donations, sending cards, or bringing food to the officers. Thank you all so much. The 100 Club of San Antonio also provided substantial support from there agency to the officers and their families. This outpouring of support to the injured officers and the police department has definitely assisted putting this event behind us.

Officers and Dispatchers coming together on a Saturday to help with the lawn work for the injured officer at his home.

This tragedy has strengthened the resolve of the members of the police department to continue to arrest drivers, who are intoxicated, in an effort to keep the community safe. Remember to plan while you can and have arrangements made if you are going to consume alcoholic beverages and need a means to get home. Please do not Drink and Drive.

Three officers were recognized by the Mothers Against Drunk Driving (MADD) for their commitment to DWI Enforcement during 2018 and the police department was also recognized as an outstanding agency for their collective efforts as well. The department, as well as its members, have been recognized for several consecutive years for consistency in DWI enforcement.

Officer Alcala, Officer Earlywine, and Sergeant Davila were recognized by MADD in the picture below.

POLICE DEPARTMENT ANNIVERSARIES

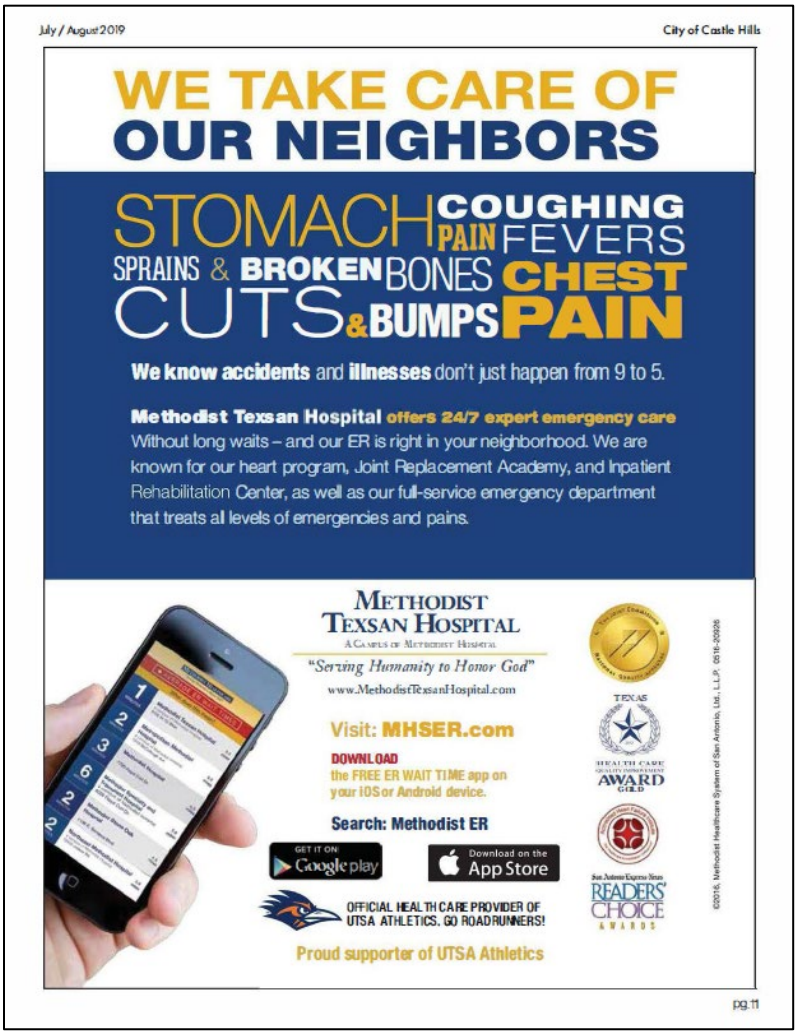
Dispatcher Travis Lowe, 6/6/1996 – 23 years
Sgt. Paul Turner, 6/1/2005 – 14 years
Sgt. Ronald Singleton, 6/12/2012 – 7 years
Chief Johnny Siemens, 6/17/2013 – 6 years
Officer Daniel Cossu, 6/15/2015 – 4 years
Cpl. Tony Crawford, 6/26/2015 – 4 years
Officer Nathaniel Peck, 6/26/2015 – 4 years

Congratulations Sgt Spears with your retirement after 20 years of service and thank you.

Officer Peck and Corporal Tomblin taking a pit stop for some ice-cold lemonade.

The Door Church graciously provided lunch for First Responders.

Appendix D


July / August 2019
City of Castle Hills
WE TAKE CARE OF
OUR NEIGHBORS
STOMACH COUGHING
PAIN FEVERS
SPRAINS & BROKEN BONES CHEST
CUTS & BUMPS PAIN
We know accidents and illnesses don't just happen from 9 to 5.
Methodist Texsan Hospital offers 24/7 expert emergency care
Without long waits – and our ER is right in your neighborhood. We are known for our heart program, Joint Replacement Academy, and Inpatient Rehabilitation Center, as well as our full-service emergency department that treats all levels of emergencies and pains.
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City of Castle Hills

July / August 2019

CITY SNAPSHOTS

Appendix D

CPS ENERGY

Gas Leaks: Recognize, React, Report

1. **RECOGNIZE THE SIGNS OF A GAS LEAK:**
   - **Smell** – A distinctive, sulfur-like odor. Not all gas is odorized, so do not rely on your nose alone to detect a leak.
   - **Sight** – Continual bubbling in water outdoors, dirt spraying or blowing into the air, or dead/dying vegetation in an otherwise moist area.
   - **Sound** – Hissing, roaring or whistling noises coming from the ground or gas equipment.
2. **REACT IMMEDIATELY IF YOU SUSPECT A LEAK.** Assume there's a danger. Warn others and leave the area quickly. **Do NOT** light a match or use electrical appliances including light switches, garage door openers, doorbells, radios, TVs or any phone. These items can ignite natural gas.
3. **REPORT THE LEAK.** From a safe location, call CPS Energy at 210-353-HELP (4357) and dial 911. **Do NOT** assume someone else will report the leak. **Do NOT** go back to the leak area until our personnel say it is safe to return.

2019 National Night Out

National Night Out is a nationwide event sponsored by the National Association of Town Watch (NATW). Registration is free and is now open. National Night Out will take place **Tuesday, October 1, 2019.** Most events start around 6:00 PM and are scheduled to last until 10:00 PM.

Registration is required if your community is planning on hosting its own events or activities. From gatherings to block-parties to snacks and visits by police officers, neighbors are encouraged to come outside and meet one another and learn about happenings in their neighborhood. This is a great opportunity to exchange information that can heighten crime and drug prevention awareness while letting criminals know that neighborhoods are organized and fighting back.

National Night Out, an annual community-building campaign, promotes partnerships between citizens and police and encourages the creation and participation in neighborhood watch groups.

Online registration is now open at https://natw.org/registration. Get registered today and give yourself plenty of time to plan a successful event!

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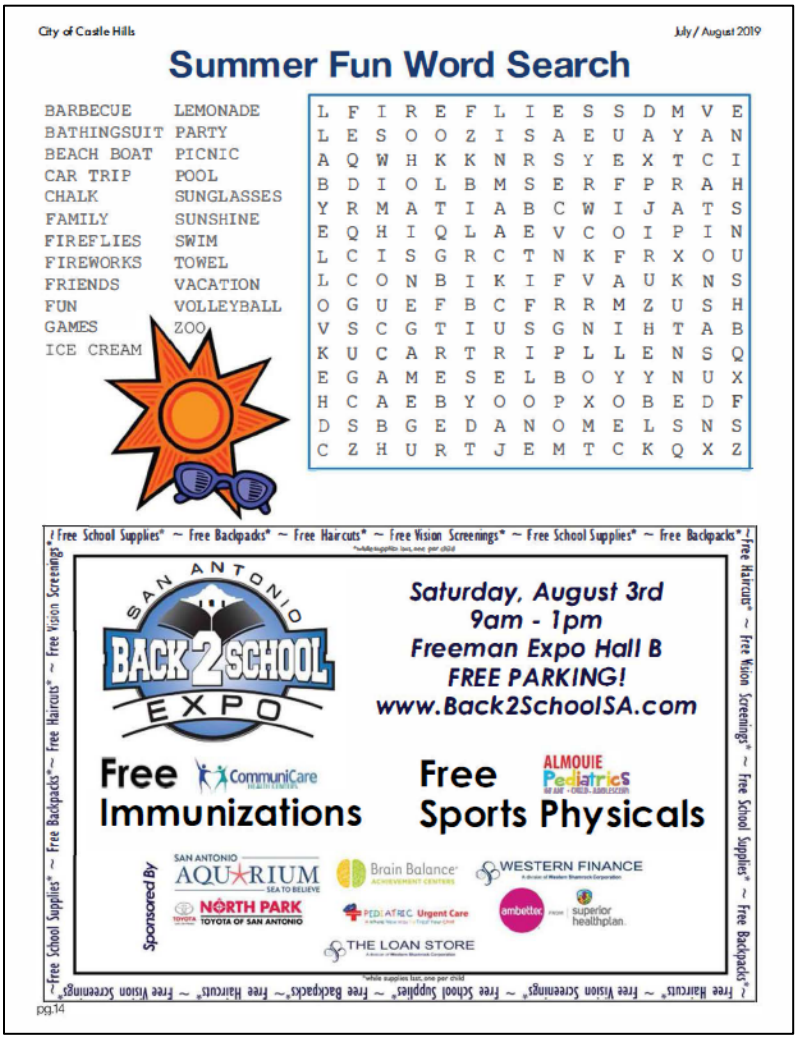

City of Castle Hills

July / August 2019

Summer Fun Word Search

BARBECUE
BATHINGSUIT
BEACH BOAT
CAR TRIP
CHALK
FAMILY
FIREFLIES
FIREWORKS
FRIENDS
FUN
GAMES
ICE CREAM
LEMONADE
PARTY
PICNIC
POOL
SUNGLASSES
SUNSHINE
SWIM
TOWEL
VACATION
VOLLEYBALL
ZOO

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V	S	C	G	T	I	U	S	G	N	I	H	T	A	B
K	U	C	A	R	T	R	I	P	L	L	E	N	S	Q
E	G	A	M	E	S	E	L	B	O	Y	Y	N	U	X
H	C	A	E	B	Y	O	O	P	X	O	B	E	D	F
D	S	B	G	E	D	A	N	O	M	E	L	S	N	S
C	Z	H	U	R	T	J	E	M	T	C	K	Q	X	Z

Appendix D

How does Smartlipo work?

Literally melting fat, laser-assisted lipolysis is performed at Radiance with a local anesthetic and occasionally a mild sedative if desired. Smartlipo uses a laser and a cannula (1 mm tube) to apply heat directly to the problem fat. Once the fat cells have been destroyed, they don't come back unless there is a large weight gain. Therefore, a typical treatment is a one-time procedure.

Smartlipo provides surgeons with:

- Greater control
- Reduced side effects
- Faster healing and recovery
- Improved Skin tightening

Treatment Areas:

Smartlipo can treat fat virtually anywhere including:

- Knees & thighs
- Hips & waist
- Abdomen, torso & back
- Chest
- Arms, neck

Recovery:

One of the greatest benefits of Smartlipo is its short recovery period. This period is often as short as 24 hours. There may be bruising and swelling lasting longer. The incisions used are incredibly small and the laser reduces damage to surrounding tissue. There is no hospital stay and the treatment can vary from one hour to 6 hours.

Results can be seen as quick as one week with continued improvement over 6-12 months.

radiance medspa
laura bennack, m.d.

Call us at (210) 804-0772 to make an appointment for a free consult.

April 1 – August 31, 2019 enjoy 20% off.

Appendix D

City of Castle Hills
209 Lemonwood Drive
San Antonio, TX 78213

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Time Dated

Neighborhood News

Published and distributed by
Neighborhood News Inc.
5740 Colony Drive Suite LL100
San Antonio, TX 78230
(210) 558-3160 * (210) 558-3163 fax

Info@NeighborhoodNews.com • ***www.NeighborhoodNews.com***
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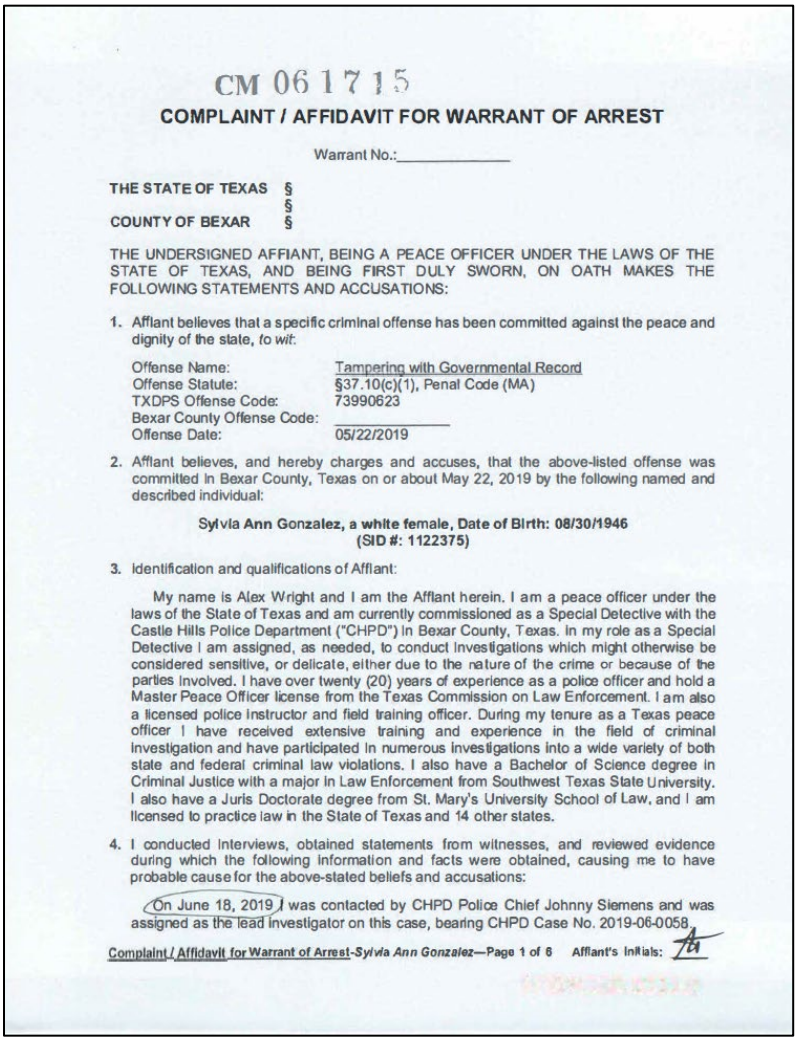
Appendix D

EXHIBIT D

COMPLAINT/AFFIDAVIT FOR WARRANT OF ARREST



CM 06 1 7 1 5

COMPLAINT / AFFIDAVIT FOR WARRANT OF ARREST

Warrant No.:_____

THE STATE OF TEXAS §
§
COUNTY OF BEXAR §

THE UNDERSIGNED AFFIANT, BEING A PEACE OFFICER UNDER THE LAWS OF THE STATE OF TEXAS, AND BEING FIRST DULY SWORN, ON OATH MAKES THE FOLLOWING STATEMENTS AND ACCUSATIONS:

1. Affiant believes that a specific criminal offense has been committed against the peace and dignity of the state, *to wit*:

Offense Name:	Tampering with Governmental Record
Offense Statute:	§37.10(c)(1), Penal Code (MA)
TXDPS Offense Code:	73990623
Bexar County Offense Code:	_____
Offense Date:	05/22/2019

2. Affiant believes, and hereby charges and accuses, that the above-listed offense was committed in Bexar County, Texas on or about May 22, 2019 by the following named and described individual:

Sylvia Ann Gonzalez, a white female, Date of Birth: 08/30/1946
(SID #: 1122375)

3. Identification and qualifications of Affiant:

My name is Alex Wright and I am the Affiant herein. I am a peace officer under the laws of the State of Texas and am currently commissioned as a Special Detective with the Castle Hills Police Department ("CHPD") in Bexar County, Texas. In my role as a Special Detective I am assigned, as needed, to conduct investigations which might otherwise be considered sensitive, or delicate, either due to the nature of the crime or because of the parties involved. I have over twenty (20) years of experience as a police officer and hold a Master Peace Officer license from the Texas Commission on Law Enforcement. I am also a licensed police instructor and field training officer. During my tenure as a Texas peace officer I have received extensive training and experience in the field of criminal investigation and have participated in numerous investigations into a wide variety of both state and federal criminal law violations. I also have a Bachelor of Science degree in Criminal Justice with a major in Law Enforcement from Southwest Texas State University. I also have a Juris Doctorate degree from St. Mary's University School of Law, and I am licensed to practice law in the State of Texas and 14 other states.

4. I conducted interviews, obtained statements from witnesses, and reviewed evidence during which the following information and facts were obtained, causing me to have probable cause for the above-stated beliefs and accusations:

On June 18, 2019 I was contacted by CHPD Police Chief Johnny Siemens and was assigned as the lead investigator on this case, bearing CHPD Case No. 2019-06-0058.

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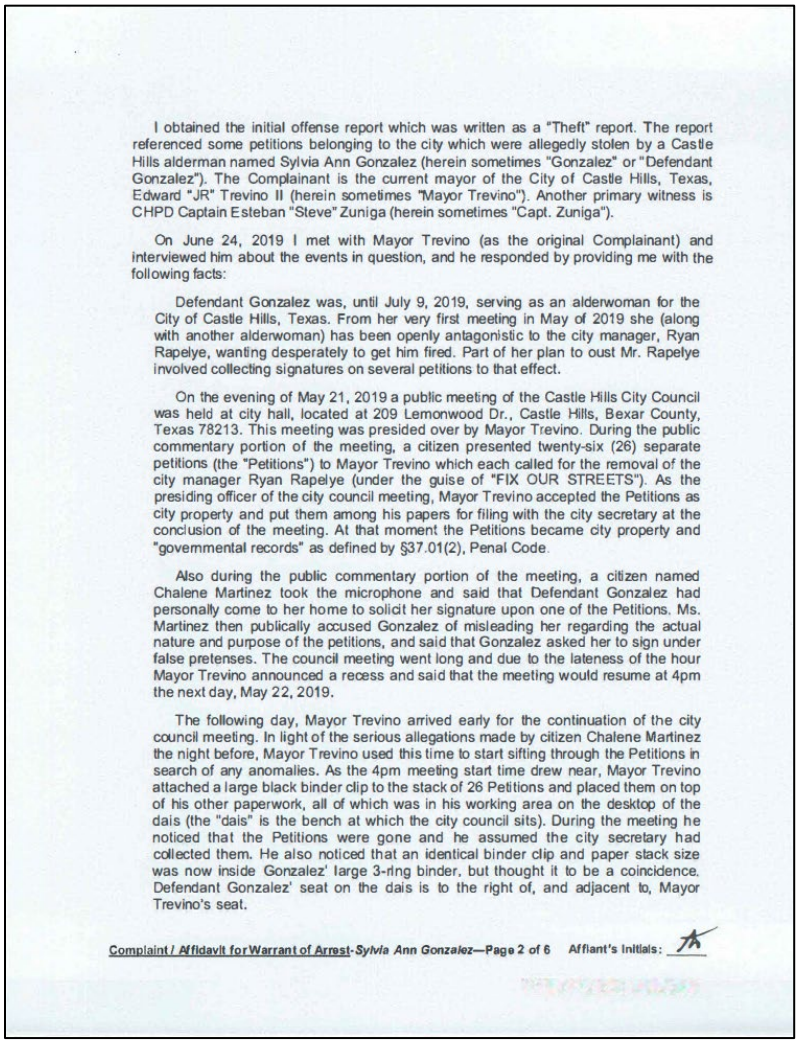

I obtained the initial offense report which was written as a "Theft" report. The report referenced some petitions belonging to the city which were allegedly stolen by a Castle Hills alderman named Sylvia Ann Gonzalez (herein sometimes "Gonzalez" or "Defendant Gonzalez"). The Complainant is the current mayor of the City of Castle Hills, Texas, Edward "JR" Trevino II (herein sometimes "Mayor Trevino"). Another primary witness is CHPD Captain Esteban "Steve" Zuniga (herein sometimes "Capt. Zuniga").

On June 24, 2019 I met with Mayor Trevino (as the original Complainant) and interviewed him about the events in question, and he responded by providing me with the following facts:

Defendant Gonzalez was, until July 9, 2019, serving as an alderwoman for the City of Castle Hills, Texas. From her very first meeting in May of 2019 she (along with another alderwoman) has been openly antagonistic to the city manager, Ryan Rapelye, wanting desperately to get him fired. Part of her plan to oust Mr. Rapelye involved collecting signatures on several petitions to that effect.

On the evening of May 21, 2019 a public meeting of the Castle Hills City Council was held at city hall, located at 209 Lemonwood Dr., Castle Hills, Bexar County, Texas 78213. This meeting was presided over by Mayor Trevino. During the public commentary portion of the meeting, a citizen presented twenty-six (26) separate petitions (the "Petitions") to Mayor Trevino which each called for the removal of the city manager Ryan Rapelye (under the guise of "FIX OUR STREETS"). As the presiding officer of the city council meeting, Mayor Trevino accepted the Petitions as city property and put them among his papers for filing with the city secretary at the conclusion of the meeting. At that moment the Petitions became city property and "governmental records" as defined by §37.01(2), Penal Code.

Also during the public commentary portion of the meeting, a citizen named Chalene Martinez took the microphone and said that Defendant Gonzalez had personally come to her home to solicit her signature upon one of the Petitions. Ms. Martinez then publically accused Gonzalez of misleading her regarding the actual nature and purpose of the petitions, and said that Gonzalez asked her to sign under false pretenses. The council meeting went long and due to the lateness of the hour Mayor Trevino announced a recess and said that the meeting would resume at 4pm the next day, May 22, 2019.

The following day, Mayor Trevino arrived early for the continuation of the city council meeting. In light of the serious allegations made by citizen Chalene Martinez the night before, Mayor Trevino used this time to start sifting through the Petitions in search of any anomalies. As the 4pm meeting start time drew near, Mayor Trevino attached a large black binder clip to the stack of 26 Petitions and placed them on top of his other paperwork, all of which was in his working area on the desktop of the dais (the "dais" is the bench at which the city council sits). During the meeting he noticed that the Petitions were gone and he assumed the city secretary had collected them. He also noticed that an identical binder clip and paper stack size was now inside Gonzalez' large 3-ring binder, but thought it to be a coincidence. Defendant Gonzalez' seat on the dais is to the right of, and adjacent to, Mayor Trevino's seat.

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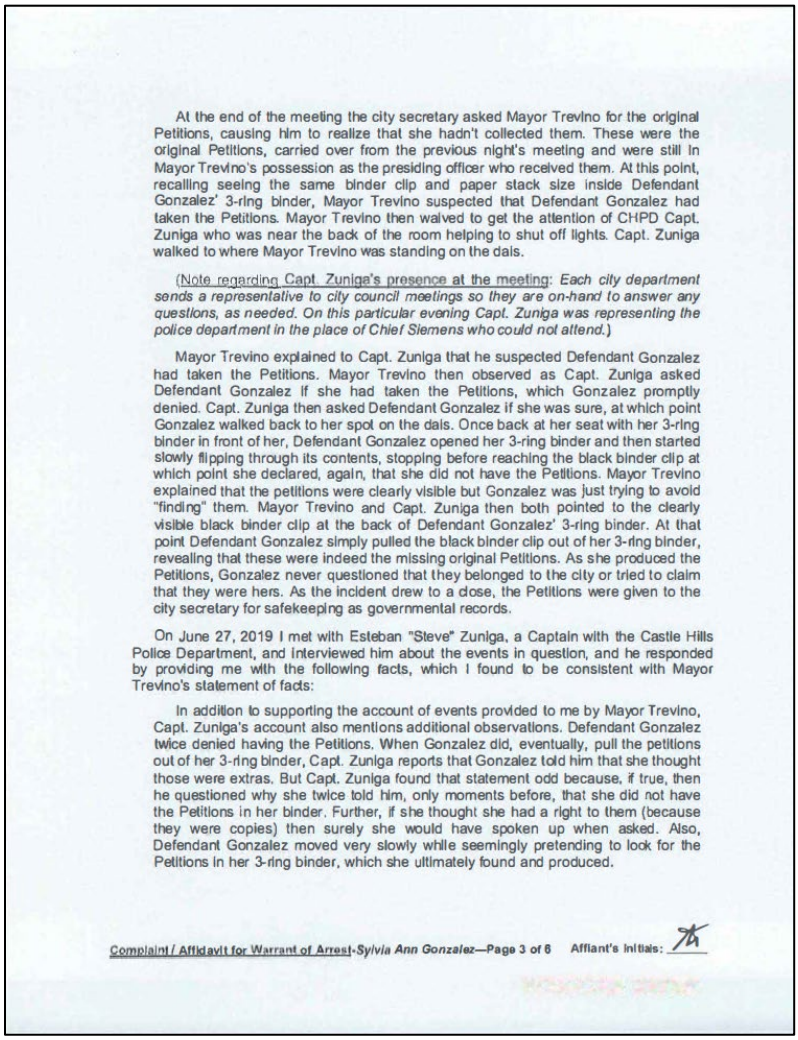


At the end of the meeting the city secretary asked Mayor Trevino for the original Petitions, causing him to realize that she hadn't collected them. These were the original Petitions, carried over from the previous night's meeting and were still in Mayor Trevino's possession as the presiding officer who received them. At this point, recalling seeing the same binder clip and paper stack size inside Defendant Gonzalez' 3-ring binder, Mayor Trevino suspected that Defendant Gonzalez had taken the Petitions. Mayor Trevino then waived to get the attention of CHPD Capt. Zuniga who was near the back of the room helping to shut off lights. Capt. Zuniga walked to where Mayor Trevino was standing on the dais.

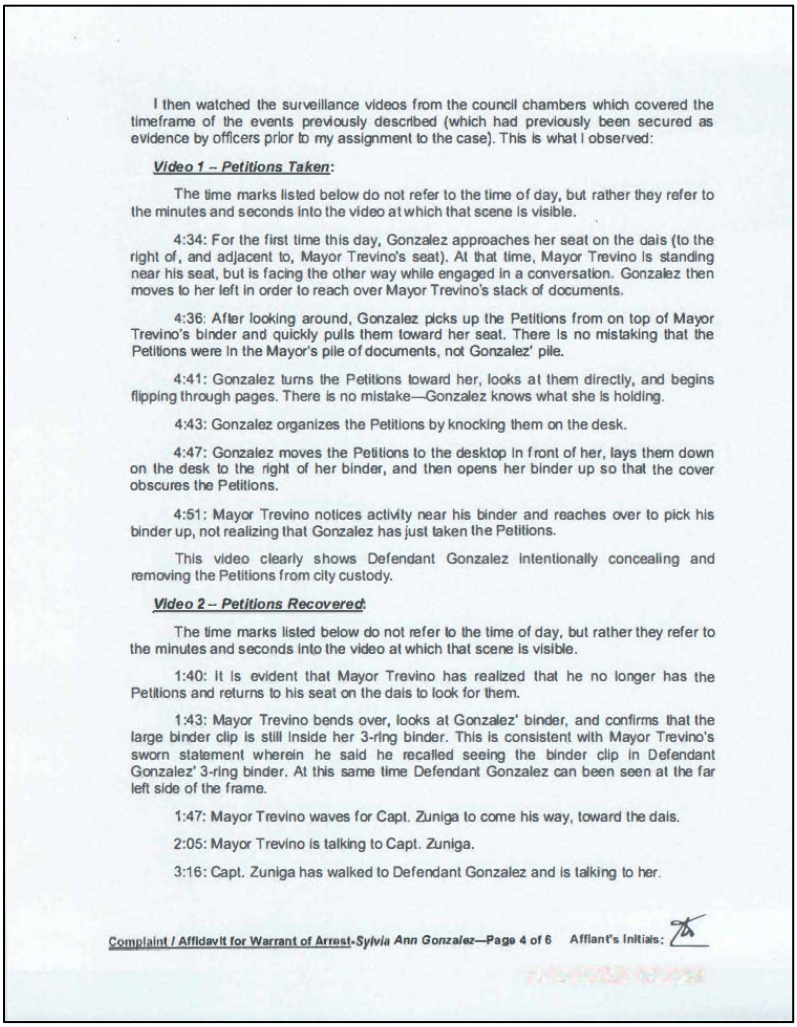
(Note regarding Capt. Zuniga's presence at the meeting: *Each city department sends a representative to city council meetings so they are on-hand to answer any questions, as needed. On this particular evening Capt. Zuniga was representing the police department in the place of Chief Siemens who could not attend.*)

Mayor Trevino explained to Capt. Zuniga that he suspected Defendant Gonzalez had taken the Petitions. Mayor Trevino then observed as Capt. Zuniga asked Defendant Gonzalez if she had taken the Petitions, which Gonzalez promptly denied. Capt. Zuniga then asked Defendant Gonzalez if she was sure, at which point Gonzalez walked back to her spot on the dais. Once back at her seat with her 3-ring binder in front of her, Defendant Gonzalez opened her 3-ring binder and then started slowly flipping through its contents, stopping before reaching the black binder clip at which point she declared, again, that she did not have the Petitions. Mayor Trevino explained that the petitions were clearly visible but Gonzalez was just trying to avoid "finding" them. Mayor Trevino and Capt. Zuniga then both pointed to the clearly visible black binder clip at the back of Defendant Gonzalez' 3-ring binder. At that point Defendant Gonzalez simply pulled the black binder clip out of her 3-ring binder, revealing that these were indeed the missing original Petitions. As she produced the Petitions, Gonzalez never questioned that they belonged to the city or tried to claim that they were hers. As the incident drew to a close, the Petitions were given to the city secretary for safekeeping as governmental records.

On June 27, 2019 I met with Esteban "Steve" Zuniga, a Captain with the Castle Hills Police Department, and interviewed him about the events in question, and he responded by providing me with the following facts, which I found to be consistent with Mayor Trevino's statement of facts:

In addition to supporting the account of events provided to me by Mayor Trevino, Capt. Zuniga's account also mentions additional observations. Defendant Gonzalez twice denied having the Petitions. When Gonzalez did, eventually, pull the petitions out of her 3-ring binder, Capt. Zuniga reports that Gonzalez told him that she thought those were extras. But Capt. Zuniga found that statement odd because, if true, then he questioned why she twice told him, only moments before, that she did not have the Petitions in her binder. Further, if she thought she had a right to them (because they were copies) then surely she would have spoken up when asked. Also, Defendant Gonzalez moved very slowly while seemingly pretending to look for the Petitions in her 3-ring binder, which she ultimately found and produced.

Appendix D



I then watched the surveillance videos from the council chambers which covered the timeframe of the events previously described (which had previously been secured as evidence by officers prior to my assignment to the case). This is what I observed:

Video 1 -- Petitions Taken:

The time marks listed below do not refer to the time of day, but rather they refer to the minutes and seconds into the video at which that scene is visible.

4:34: For the first time this day, Gonzalez approaches her seat on the dais (to the right of, and adjacent to, Mayor Trevino's seat). At that time, Mayor Trevino is standing near his seat, but is facing the other way while engaged in a conversation. Gonzalez then moves to her left in order to reach over Mayor Trevino's stack of documents.

4:36: After looking around, Gonzalez picks up the Petitions from on top of Mayor Trevino's binder and quickly pulls them toward her seat. There is no mistaking that the Petitions were in the Mayor's pile of documents, not Gonzalez' pile.

4:41: Gonzalez turns the Petitions toward her, looks at them directly, and begins flipping through pages. There is no mistake—Gonzalez knows what she is holding.

4:43: Gonzalez organizes the Petitions by knocking them on the desk.

4:47: Gonzalez moves the Petitions to the desktop in front of her, lays them down on the desk to the right of her binder, and then opens her binder up so that the cover obscures the Petitions.

4:51: Mayor Trevino notices activity near his binder and reaches over to pick his binder up, not realizing that Gonzalez has just taken the Petitions.

This video clearly shows Defendant Gonzalez intentionally concealing and removing the Petitions from city custody.

Video 2 -- Petitions Recovered:

The time marks listed below do not refer to the time of day, but rather they refer to the minutes and seconds into the video at which that scene is visible.

1:40: It is evident that Mayor Trevino has realized that he no longer has the Petitions and returns to his seat on the dais to look for them.

1:43: Mayor Trevino bends over, looks at Gonzalez' binder, and confirms that the large binder clip is still inside her 3-ring binder. This is consistent with Mayor Trevino's sworn statement wherein he said he recalled seeing the binder clip in Defendant Gonzalez' 3-ring binder. At this same time Defendant Gonzalez can been seen at the far left side of the frame.

1:47: Mayor Trevino waves for Capt. Zuniga to come his way, toward the dais.

2:05: Mayor Trevino is talking to Capt. Zuniga.

3:16: Capt. Zuniga has walked to Defendant Gonzalez and is talking to her.

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4:00: Defendant Gonzalez has returned to her seat position at the dais and has pulled her 3-ring binder toward her.

4:06: Defendant Gonzalez slowly flips through the contents of her binder, stopping before reaching the black binder clip. It appears as though Defendant Gonzalez was trying to avoid "finding" the Petitions which she has already affirmatively stated that she does not have.

4:20: Defendant Gonzalez appears to be running out of papers to slowly flip through and will soon reach the Petitions.

4:24: Mayor Trevino and Capt. Zuniga finally just point to the obvious binder clip containing the Petitions. It appears to me that Defendant Gonzalez realized that she could pretend no longer, so she simply pulled the Petitions out of her binder without further hesitation.

4:46: The Petitions are given to the custody of the city secretary for safekeeping as governmental records.

After watching these videos I was able to confirm the accounts of the events as they were given to me by Mayor Trevino and Capt. Zuniga.

Of particular note to me was that these videos show several furtive movements by Defendant Gonzalez. Gonzalez appeared to be purposefully avoiding "finding" the Petitions by feigning her failure to notice the obvious binder clip which those around her could clearly see. Also, she moved extremely slowly while looking through her 3-ring binder, only thumbing through a few pages at a time, much more slowly than someone would do if they were trying to prove that they didn't have the Petitions. It seemed as if she was wasting time hoping for some form of rescue.

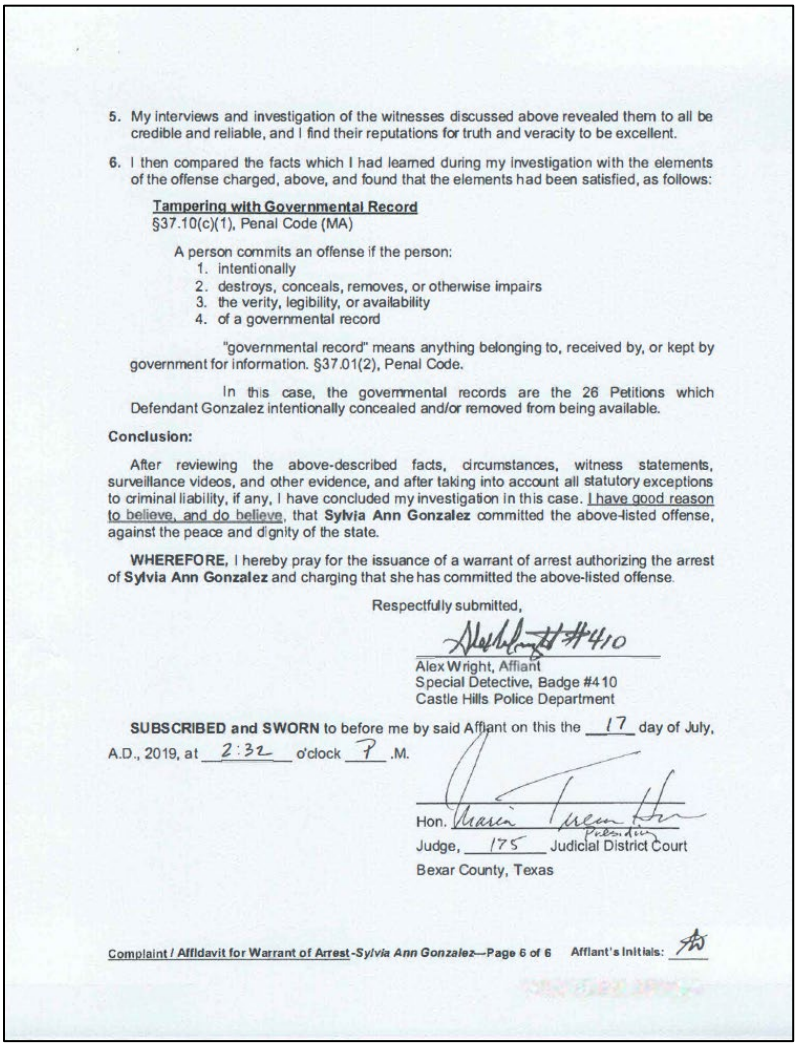
On July 2, 2019 I met with Capt. Zuniga and obtained his sworn statement of the events, which was wholly consistent with the facts he provided to me during our previous interview.

On July 7, 2019 I met with Chalene Martinez, the citizen who spoke out against Gonzalez at the May 21, 2019 city council meeting. I interviewed her and obtained her sworn statement regarding the following events: Gonzalez had personally gone to Ms. Martinez' house on May 13, 2019 to get her signature on one of the petitions under false pretenses, by misleading her, and by telling her several fabrications regarding Ryan Rapelye which Ms. Martinez felt was damaging to his reputation. Although Defendant Gonzalez' interaction with Ms. Martinez does not have a direct bearing on the offense charged herein, it is relevant as it supports a motive for Defendant Gonzalez' desire to steal the petitions—before further scrutiny could be brought to bear upon Chalene Martinez' signature thereon.

On July 8, 2019 I met with Mayor Trevino and obtained his sworn statement of the events, which was wholly consistent with the facts he provided to me during our previous interview.

I also contacted Gonzalez several times during the course of my investigation, offering her the opportunity to give me her version of events; however she refused to talk to me.

Appendix D



5. My interviews and investigation of the witnesses discussed above revealed them to all be credible and reliable, and I find their reputations for truth and veracity to be excellent.

6. I then compared the facts which I had learned during my investigation with the elements of the offense charged, above, and found that the elements had been satisfied, as follows:

Tampering with Governmental Record
§37.10(c)(1), Penal Code (MA)

A person commits an offense if the person:
1. intentionally
2. destroys, conceals, removes, or otherwise impairs
3. the verity, legibility, or availability
4. of a governmental record

"governmental record" means anything belonging to, received by, or kept by government for information. §37.01(2), Penal Code.

In this case, the governmental records are the 26 Petitions which Defendant Gonzalez intentionally concealed and/or removed from being available.

Conclusion:

After reviewing the above-described facts, circumstances, witness statements, surveillance videos, and other evidence, and after taking into account all statutory exceptions to criminal liability, if any, I have concluded my investigation in this case. I have good reason to believe, and do believe, that **Sylvia Ann Gonzalez** committed the above-listed offense, against the peace and dignity of the state.

WHEREFORE, I hereby pray for the issuance of a warrant of arrest authorizing the arrest of **Sylvia Ann Gonzalez** and charging that she has committed the above-listed offense.

Respectfully submitted,

#410

Alex Wright, Affiant
Special Detective, Badge #410
Castle Hills Police Department

SUBSCRIBED and SWORN to before me by said Affiant on this the 17 day of July, A.D., 2019, at 2:32 o'clock P .M.

Hon. Presiding
Judge, 175 Judicial District Court
Bexar County, Texas

Complaint / Affidavit for Warrant of Arrest-*Sylvia Ann Gonzalez*—Page 6 of 6 Affiant's Initials: