

In The
Supreme Court of the United States

SYLVIA GONZALEZ,
Petitioner,

v.

EDWARD TREVINO, II, MAYOR OF CASTLE HILLS,
SUED IN HIS INDIVIDUAL CAPACITY, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

SUPPLEMENTAL BRIEF OF RESPONDENTS

Scott M. Tschirhart
Counsel of Record
Lowell F. Denton
DENTON NAVARRO ROCHA BERNAL & ZECH, P.C.
A Professional Corporation
2500 W. William Cannon Drive, Suite 609
Austin, Texas 78745
512/279-6431
512/279-6438 (Facsimile)
smtschirhart@rampagelaw.com
lfdenton@rampagelaw.com
Counsel for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIESii

SUPPLEMENTAL BRIEF FOR RESPONDENTS.... 1

CONCLUSION..... 3

TABLE OF AUTHORITIES

Cases

<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009)	1
<i>Gonzalez v. Trevino</i> , 42 F.4th 487 (5th Cir. 2022)	2
<i>Mayfield v. Butler Snow</i> , 78 F.4th 796 (5th Cir. 2023).....	1
<i>Mayfield v. Butler Snow, L.L.P.</i> , 75 F.4th 494 (5th Cir. 2023)	2, 3
<i>Mayfield v. Currie</i> , 976 F.3d 482 (5th Cir. 2020)	2
<i>Murphy v. Schmitt</i> , No. 22-1726, 2023 WL 5748752 (8th Cir. Sept. 6, 2023)	1, 2
<i>Nieves v. Bartlett</i> , — U.S. —, 139 S. Ct. 1715, 204 L.Ed.2d 1 (2019)	2, 3
<i>United States v. Romain</i> , 393 F.3d 63 (1st Cir. 2004)	1

Statutes

Texas Penal Code § 37.10	2
--------------------------------	---

SUPPLEMENTAL BRIEF FOR RESPONDENTS

On September 21, 2023, Petitioner filed a Supplemental Brief for Petitioner, citing a dissent by the Honorable Judge James C. Ho in an unrelated case, *Mayfield v. Butler Snow*, 78 F.4th 796, 796 (5th Cir. 2023) (per curiam) (Mayfield 2) (Ho, J., dissenting). Interestingly, Judge Ho concurred in the judgment, but dissented from the denial of rehearing en banc. *See Mayfield v. Butler Snow, L.L.P.*, 78 F.4th 796, 798 (5th Cir. 2023).

Judge Ho's dissent is not a new matter and a dissenting opinion is not binding precedent, the majority opinion is controlling. *See United States v. Romain*, 393 F.3d 63, 74 (1st Cir. 2004).

New matters would include new cases such as:

Murphy v. Schmitt, No. 22-1726, 2023 WL 5748752, at *2 (8th Cir. Sept. 6, 2023)(affirming a motion to dismiss when the plaintiff has not pleaded facts sufficient to demonstrate a "facial plausibility" that police commonly see violations of a particular statute and fail to make arrests.)(citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

The Supreme Court has been clear that "[a] particular officer's state of mind is simply 'irrelevant,' and it provides 'no basis for invalidating an arrest.'" *Nieves*, 139 S. Ct. at 1725 (citations omitted). Such a position is necessary as "[p]rotected speech is often a legitimate consideration when deciding

whether to make an arrest.” *Id.* at 1724. “To ensure that officers may go about their work without undue apprehension of being sued, we generally review their conduct under objective standards of reasonableness.” *Id.* at 1725.

Murphy v. Schmitt, No. 22-1726, 2023 WL 5748752, at *2 (8th Cir. Sept. 6, 2023).

In the present case, Petitioner also failed to plead facts sufficient to demonstrate a “facial plausibility” that the City’s police commonly see people stealing or concealing governmental documents in violation of state law, and fail to make arrests. The Court of Appeals correctly concluded that Petitioner did 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). *See Gonzalez v. Trevino*, 42 F.4th 487, 492 (5th Cir. 2022)

Mayfield v. Butler Snow, L.L.P., 75 F.4th 494, 500 (5th Cir. 2023)(“[I]n order to bring a First Amendment claim for retaliatory arrest, a plaintiff generally must first show the absence of probable cause for the arrest, i.e., a Fourth Amendment violation.”)(quoting *Mayfield v. Currie*, 976 F.3d 482, 486, fn.1 (5th Cir. 2020), as revised (Sept. 23, 2020)(citing *Nieves v. Bartlett*, — U.S. —, 139 S. Ct. 1715, 204 L.Ed.2d 1 (2019)).

Mayfield also involved a warrant, but the plaintiffs argued that there was a *Franks* violation because the Officers withheld evidence. *See id.* at 500.

However, that allegation was insufficient to overcome qualified immunity because the plaintiffs could not produce authority denying qualified immunity where there was a difference of opinion about criminal intent. *See id.* at 500-501.

In the present case, there is not even a *Franks* allegation and the Court of Appeals correctly concluded that Respondents Trevino, Siemens, and Wright are entitled to qualified immunity.

These Opinions are all new law and are relevant to the matters being considered in connection with this Petition. In each case, the Courts correctly applied this Court's decision in *Nieves* and reached the correct and consistent outcome.

CONCLUSION

For all the aforementioned reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

Denton Navarro Rocha Bernal & Zech, P.C.

attorneys & counselors at law • rampagelaw.com

A Professional Corporation

2500 W. William Cannon Drive, Suite 609

Austin, Texas 78745

512/279-6431

512/279-6438 (Facsimile)

smtschirhart@rampagelaw.com

lfdenton@rampagelaw.com

By: /s/SCOTT M. TSCHIRHART

SCOTT M. TSCHIRHART

State Bar No. 24013655

LOWELL F. DENTON

State Bar No. 05764700

Attorneys for Respondents

Edward "JR" Trevino, II; John Siemens;

And Alexander Wright