

In the Supreme Court of the United States

No. _____

MARTIN E. O'BOYLE, JONATHAN O'BOYLE AND WILLIAM RING, *APPLICANTS*

v.

TOWN OF GULF STREAM.

**APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION
FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE ELEVENTH CIRCUIT**

To the Honorable Clarence Thomas
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the Eleventh Circuit

Eleventh Circuit Case No. 22-10865

Pursuant to Rules 13.5 and 30.2 of this Court, counsel for Martin O'Boyle, Jonathan O'Boyle, and William Ring ("Plaintiffs" or "Applicants") respectfully requests a 30-day extension of time, to and including July 19, 2023, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

The court of appeals denied panel rehearing, App.2a, entered a substitute opinion, App.1a–14a, and entered a judgment, App.15a–16a, all on March 21, 2023. Unless extended, the time for filing a petition for a writ of certiorari will expire on June 19, 2023. Undersigned counsel was retained on or about April 28, 2023, after the

Eleventh Circuit denied the panel rehearing petition. Counsel seeks an extension of time to file a petition for a writ of certiorari on important questions pertaining to the standard for First Amendment retaliation claims under 42 U.S.C. § 1983 and states the following in support:

1. This case stems from public-record requests that Plaintiffs filed with the Town of Gulf Stream, as well as other speech criticizing local government, all of which constitutes First Amendment protected activity. Acting on an expressly stated policy of retribution against Plaintiffs, the Town filed (ultimately unsuccessful) counter-claims in the record-request proceedings, a civil lawsuit based on the RICO statute, bar complaints, and a criminal prosecution. Plaintiffs then sued the Town under Section 1983 for retaliation. The district court granted summary judgment to the Town based on its conclusion that Plaintiffs failed to show that the Town lacked “probable cause” for filing the civil actions, bar complaints, and criminal prosecution, App.7a–8a, and the Eleventh Circuit affirmed, App.14a.

2. With respect to the Town’s unsuccessful civil actions and bar complaints, the Eleventh Circuit ruled that, under *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), plaintiffs who base retaliation claims on the filing of civil actions must show an absence of probable cause for those actions. App.9a–10a; *see also DeMartini v. Town of Gulf Stream*, 942 F.3d 1277, 1304 (11th Cir. 2019) (same). *Nieves*, however, involved the distinct and narrow question of whether the absence-of-probable-cause requirement for “retaliatory prosecution” claims (*see Hartman v. Moore*, 547 U.S. 250 (2006)) should be extended to “retaliatory arrest” claims. *Nieves*, 139 S. Ct. at 1720.

3. Outside of the context of retaliatory criminal prosecutions and arrests, this Court has never held that a plaintiff asserting a Section 1983 retaliation claim must prove that the government acted without probable cause. Instead, the Court has long adhered to the standard burden-shifting rule for Section 1983 retaliation claims: the plaintiff bears the burden of demonstrating that unconstitutional animus was a motivating factor for an adverse action; the burden then shifts to the defendant to demonstrate that, even without any impetus to retaliate, the defendant would have taken the action complained of. *See Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977).

4. Yet, the Eleventh Circuit has extended the *Nieves* absence-of-probable-cause requirement beyond retaliatory prosecutions and arrests, *see DeMartini*, 942 F.3d at 1304, and applied that requirement here to dispose of Plaintiffs' claims based on retaliatory civil actions, *see App.9a–13a*. In contrast to the Eleventh Circuit, other federal courts have not extended *Hartman* and *Nieves* beyond retaliatory prosecutions and arrests. *See, e.g., Bello-Reyes v. Gaynor*, 985 F.3d 696, 701 (9th Cir. 2021) (“*Nieves* does not apply here because it arose out of the criminal arrest context”). Still other courts have recognized that an open question exists due to the Eleventh Circuit's extension of *Hartman* and *Nieves* beyond retaliatory prosecutions and arrests. *See, e.g., Rudd v. City of Norton Shores*, 977 F.3d 503, 516 (6th Cir. 2020) (recognizing the open question of “whether a probable-cause element extends to civil suits”).

5. The absence-of-probable-cause requirement is not well suited for retaliation claims outside the context of retaliatory prosecution and arrest. In contrast to

retaliatory prosecutions (*Hartman*), where the public prosecutor serves as an independent check on government actors seeking to retaliate against a citizen, lawyers filing civil lawsuits on behalf of the government are not bound by the same constraints, nor are they disinterested. Also, in contrast to retaliatory arrests (*Nieves*), where officers frequently must make split-second judgments, civil litigation does not involve the same immediacy. Here, for example, the Town's retaliatory action followed an expressly stated policy of retribution and months of deliberation. Additionally, where (as here) the government acts pursuant to an express policy of retribution, probable cause does little to disentangle retaliatory motives from legitimate ones.

6. The Eleventh Circuit's ruling in this case—among other things—furthers a dangerous circuit precedent under which only entirely baseless civil retaliatory actions by government officials have a remedy in federal law—and that is true no matter whether government officials are acting to further a motive to suppress speech. Further still, the Eleventh Circuit's opinion creates a roadmap for those in power to retaliate with impunity, even if the retaliation is done pursuant to a stated and known government policy. This case potentially presents other important questions relating to the standards for claims alleging that the government has retaliated against, and chilled the exercise of, a plaintiff's First Amendment rights.

7. Counsel for Plaintiffs respectfully requests a 30-day extension of time to and including July 19, 2023, within which to file a petition for a writ of certiorari. Undersigned counsel was retained on or about April 28, 2023, only after the Eleventh

Circuit denied Plaintiffs' petition for panel rehearing. For the period between retention and the current due date, the undersigned, Kim Watterson, has had (and currently has) significant prior court commitments, including the preparation of petition for a writ of certiorari to be filed in another case, briefing relating to a civil and criminal forfeiture proceeding in the Southern District of Florida, appellate briefing in the California Court of Appeal, oral argument in a Pennsylvania appellate court, and substantial pre-trial briefing in a matter pending in Alabama state court. Co-counsel, Patrick Yingling, also has had (and currently has) significant prior court commitments, including amicus briefs in this Court and the U.S. Court of Appeals for the Federal Circuit, as well as a reply brief in the Tennessee Court of Appeals. Additional time is needed so that new counsel may review the record and perform the legal research necessary to present Plaintiffs' case and questions properly in this Court.

Respectfully submitted,

/s/ Kim M. Watterson

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