APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-60733

ROBIN MAYFIELD; OWEN MAYFIELD; WILLIAM MAYFIELD; ESTATE OF MARK STEVENS MAYFIELD,

Plaintiffs—Appellants,

versus

BUTLER SNOW, L.L.P.; DONALD CLARK, JR.; CITY OF MADISON, MISSISSIPPI; MARY HAWKINS-BUTLER, *Individually and in her Official Capacity*; POLICE CHIEF GENE WALDROP, *Individually and in his Official Capacity*; CHUCK HARRISON, *Individually and in his Official Capacity*; VICKIE CURRIE, *Individually and in her Official Capacity*; JOHN AND JANE DOES 1-10; RICHARD WILBOURN, III,

Defendants—Appellees,

DALE DANKS, JR.; JANET DANKS; JORDAN RUSSELL; QUINTON DICKERSON,

Movants—Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:17-CV-514

ON PETITION FOR REHEARING EN BANC

Before RICHMAN, *Chief Judge,* and HO and ENGELHARDT, *Circuit Judges*.[*]

PER CURIAM:

The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. 35 and 5TH CIR. R. 35), on the Court's own motion, rehearing en banc is DENIED.

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

[*] Judges Southwick and Wilson did not participate in the consideration of the rehearing en banc.

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

At first blush, Mark Mayfield, Priscilla Villarreal, and Sylvia Gonzalez don't appear to have a lot in common.

Mayfield was a Tea Party activist who supported a primary challenger to a U.S. Senator. *See Mayfield v. Butler Snow*, _ F.4th _, _ (5th Cir. 2023). Villarreal writes stories on Facebook "in profanity-laced Spanglish" criticizing local police and prosecutors in a sprawling border city. Simon Romero, *La Gordiloca: The Swearing Muckraker Upending Border Journalism*, N.Y. TIMES (Mar. 10, 2019). *See also Villarreal v. City of Laredo*, 44 F.4th 363, 368 (5th Cir. 2022), *vacated on reh'g en banc*, 52 F.4th 265 (5th Cir. 2022). Gonzalez is a retiree who wanted to give back to her small bedroom community by running for local office. *See Gonzalez v. Trevino*, 42 F.4th 487, 489 (5th Cir. 2022), *reh'g en banc den.*, 60 F.4th 906 (5th Cir. 2022).

If they'd ever met, they likely would've disagreed on countless issues.

But they share at least one thing in common: They all disagreed with those in power. And they all believe that they were punished for it—that they were charged, arrested, jailed, and humiliated for the crime of criticizing those in office. They all assert that it's wrong for officials to jail their opponents as an intimidation tactic. They all allege that that's exactly what happened to them. And they all ask this court for the opportunity to tell their stories to a jury and prove their case in a court of law.

The First Amendment doesn't mean much if you're only allowed to express views favored by the government. There's not much left to freedom of speech if you

have to worry about being jailed for disagreeing with public officials. Indeed, it's hard to imagine anything more inimical to our Founding principles. *See*, *e.g.*, Laurence H. Silberman, *Hoover's Institution*, WALL ST. J., July 20, 2005 ("[T]he most heinous act in which a democratic government can engage is to use its law enforcement machinery for political ends."). "Nothing is more corrosive to public confidence in our criminal justice system than the perception that there are two different legal standards—one for the powerful, the popular, and the well-connected, and another for everyone else." *United States v. Taffaro*, 919 F.3d 947, 949 (5th Cir. 2019) (Ho, J., concurring in the judgment).

But I fear that that's what we're allowing. In case after case, citizens present compelling allegations that officials are abusing government power to reward allies and punish adversaries. And we stand by and let it happen.

So I'm concerned about the state of freedom of speech in our circuit. I'm heartened that a diverse amicus coalition of respected public interest groups have asked us to hold officials accountable in cases like these. *See Gonzalez*, 60 F.4th at 913 & n. 4 (Ho, J., dissenting from denial of rehearing en banc). These organizations no doubt disagree with one another on virtually every major issue under the sun. Yet they've joined forces to support the basic right of every American to criticize their government.

I regret that we remain unable to muster that same unity in these cases. I worry that, 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." *Id.* at 911. I dissent from the denial of rehearing en banc.[1]

I.

This case is not just the latest example of officials abusing our criminal justice system to punish political adversaries. It's also the most tragic.

Plaintiffs present serious allegations that Defendants abused the criminal justice system to destroy the livelihood and life of a citizen for opposing an incumbent U.S. Senator in a contested primary election—and that their misuse of government power drove him to suicide.

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[1] To be clear, I have no quarrel with how my distinguished colleagues on the per curiam panel decided this case. After all, we were bound by circuit precedent. That's why I concurred in the judgment. _ F.4th at _ n.*. It's not just that we were bound by *Gonzalez* (which was issued prior to our decision but after briefing and oral argument in this case). We were also bound by our court's previous ruling in *this* case. *See Mayfield v. Currie*, 976 F.3d 482 (5th Cir. 2020). As the per curiam correctly observes:

> As this court has previously noted, Plaintiffs brought claims under multiple provisions of the Constitution, including but not limited to the First and Fourth Amendments. *See Mayfield*, 976 F.3d at 486 n.1. But this court concluded that "Plaintiff-Appellees' claims against Officer Currie . . . fall under the Fourth Amendment." *Id.* As that opinion explained, "*in 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." *Id*. (citing *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019)).

_ F.4th at _ (emphasis added). In other words, our earlier decision in *Mayfield* foreclosed the theory adopted in *Gonzalez*—that a plaintiff could win even if there was probable cause. So Plaintiffs had no choice but to dispute the existence of probable cause in this appeal.

A group of political activists asked a local attorney, Mark Mayfield, to help them take a photograph of the Senator's wife. (They chose Mayfield because his mother lived in the same nursing home.)

Mayfield declined to take the photo. But he did tell them where in the nursing home the Senator's wife lived.

Perhaps he shouldn't have provided the information he was asked. But did he deserve to be arrested, prosecuted, and imprisoned? Did he deserve to be humiliated, even driven to suicide—and his family destroyed?

It's unfathomable that law enforcement officials would've devoted scarce police resources to pursuing Mayfield, but for one thing: The people in power disliked his political views.

Substantial record evidence supports that commonsense inference. To begin with, a former prosecutor, Dow Yoder, testified that he personally witnessed a number of public officials—including the mayor, prosecutors, and police officers—boast about their efforts to persecute political opponents of the incumbent Senator, including Mayfield. He also reported these statements to public corruption investigators at the FBI.

For example, according to Yoder, a prosecutor told him that he "hate[s] those [activist] sons of bitches" and that "it kills [him] so bad to have to say there's no evidence of any felonies in th[e] case." The prosecutor added that "proving the crime . . . is not the point."

In addition, Yoder testified that the mayor told him that, "[i]f the DA's office is scared to . . . prosecute these [challenger's] supporters," she had other attorneys "just drooling, ready to get prosecuting."

There's more. Another former prosecutor admitted during his own deposition that he had contacted the mayor and informed her that he was "furious" about the incident and wanted to be appointed special prosecutor in the matter. And Defendants acknowledged that the statutes they considered didn't cover the activists' conduct.

II.

These allegations should've been sufficient to state a First Amendment retaliation claim. Deploying the criminal justice system to target one's political opponents violates the First Amendment. And that is so even if the arrest was supported by probable cause. *See*, *e.g.*, *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1955 (2018) ("Lozman need not prove the absence of probable cause to maintain a claim of retaliatory arrest."); *Nieves v. Bartlett*, 139 S. Ct. 1715, 1727 (2019) (same).

After all, there are countless situations in which "officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Nieves*, 139 S. Ct. at 1727. So there's a real "'risk that some police officers may exploit the arrest power as a means of suppressing speech.'" *Id*. (quoting *Lozman*, 138 S. Ct. at 1953–54). But just as we would never accept probable cause as a defense to a racially motivated prosecution, we shouldn't accept probable cause as a defense to a politically motivated one, either.

So this case should've gone to trial. Yet our court's precedents foreclose that result. In *Gonzalez*, we held that a plaintiff may not proceed on a First Amendment retaliation claim unless he presents objective "comparator" evidence that identifies other individuals who

engaged in similar conduct yet were not arrested. *See* 42 F.4th at 492.

Our decision in *Gonzalez* significantly under-protects freedom of speech. Just look at this case: There's powerful testimony that public officials used the criminal justice system to punish the political opponents of an incumbent U.S. Senator. But they did so by using obscure theories of law that made it effectively impossible to assemble evidence of comparable scenarios. (Exactly how is Mayfield's family supposed to track down other scenarios where a citizen provided similar information to another person, but was *not* arrested—as *Gonzalez* requires?)

As a result, *Gonzalez* ties our hands and requires us to deny relief—no matter how obvious it is that these actions would never have been taken against a citizen who held views favored by those in power.

Like other forms of discrimination, political viewpoint discrimination can come in all sorts of shapes and sizes. It makes little sense to protect only certain people, depending on the particular size and shape of the abuse. In a country that claims to be free, *any* politically-motivated prosecution should be well out of bounds.

* * *

Justice Scalia warned us about the dangers of unchecked prosecutorial power—especially for those who hold views disfavored by public officials.

As he put it, "the most dangerous power of the prosecutor" is "that he will pick people that he thinks he should get, rather than cases that need to be prosecuted." *Morrison v. Olson*, 487 U.S. 654, 728 (1988) (Scalia, J., dissenting) (quoting Robert Jackson,

The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys, Apr. 1, 1940). And he further explained why the risk is so real:

> With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. *It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.*

Id. (quoting Attorney General Robert Jackson) (emphasis added). I respectfully dissent from the denial of rehearing en banc.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-60733

ROBIN MAYFIELD; OWEN MAYFIELD; WILLIAM MAYFIELD; ESTATE OF MARK STEVENS MAYFIELD,

Plaintiffs—Appellants,

versus

BUTLER SNOW, L.L.P.; DONALD CLARK, JR.; CITY OF MADISON, MISSISSIPPI; MARY HAWKINS-BUTLER, *individually and in her Official Capacity*; POLICE CHIEF GENE WALDROP, *Individually and in his Official Capacity*; CHUCK HARRISON, *Individually and in his Official Capacity*; VICKIE CURRIE, *Individually and in her Official Capacity*; JOHN AND JANE DOES 1-10; RICHARD WILBOURN, III,

Defendants—Appellees,

DALE DANKS, JR.; JANET DANKS; JORDAN RUSSELL; QUINTON DICKERSON,

Movants—Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:17-CV-514

Before RICHMAN, *Chief Judge*, and HO and ENGELHARDT, *Circuit Judges*.

PER CURIAM:[*]

Mark Mayfield was arrested for being part of a scheme to take a picture of Senator Thad Cochran's late wife, Rose Cochran, in the privacy of her nursing room home. One month later, Mayfield was found dead in his home, seemingly from suicide.[1] His widow, sons, and estate filed a complaint alleging 42 U.S.C. § 1983 claims as well as various tort claims against state and private actors involved in his arrest and prosecution. The complaint alleges that Mayfield was subject to a politically motivated prosecution that deprived him of his constitutional rights, shut down his law practice, and humiliated him and his family, causing severe emotional distress—all of which directly led to his suicide.

Defendants filed a motion to dismiss all claims. Excluding one—a *Lozman* claim against the City of Madison and Mayor Hawkins-Butler—the district court dismissed all of Plaintiffs' claims.[2] After discovery, the district court granted summary judgment for the City of Madison and Mayor Hawkins-Butler, finding that Plaintiffs could not prove the required elements of their *Lozman* claim. Plaintiffs appeal the dismissal of their claims, the summary judgment on their

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[*] Judge Ho concurs in the judgment only, in light of *Mayfield v. Currie*, 976 F.3d 482 (5th Cir. 2020), and *Gonzalez v. Trevino*, 42 F.4th 487 (5th Cir. 2022). *See also Gonzalez v. Trevino*, 60 F.4th 906, 907 (5th Cir. 2023) (Ho, J., dissenting from denial of rehearing en banc) (disagreeing with *Mayfield* and *Gonzalez*).

[1] The death was ruled a suicide, but "Plaintiffs find it difficult to concede a suicide" even though they assume it for the purposes of this appeal.

[2] *See Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945 (2018).

Lozman claim, and several orders regarding expert testimony and discovery. We affirm.

I.

This is the second time this case has come before us on appeal. *See Mayfield v. Currie*, 976 F.3d 482 (5th Cir. 2020). The facts of this case were well stated by our court's previous opinion, and we summarize them here.

In 2014, Tea Party candidate Chris McDaniel challenged Senator Thad Cochran in the tightly contested Mississippi Senate Republican Primary. McDaniel supporters believed that Senator Cochran was having an extramarital affair with his assistant, Kay Webber, and sought to make it a campaign issue. At the time, Senator Cochran's wife, Rose Cochran, was suffering from progressive dementia and was bedridden in a Mississippi nursing home.

John Mary along with other McDaniel supporters hatched a plan to sneak into Rose Cochran's nursing home room to take a photo of her. The goal was to juxtapose a photo of her with Kay Webber, to support allegations of Senator Cochran's infidelity.

These individuals reached out to a fellow McDaniel supporter, Mark Mayfield. Mayfield frequently visited the nursing home because his mother was also a resident there.

Mayfield refused to take the photo of Rose Cochran himself. But he explained where her room was to the other McDaniel supporters because he believed guests routinely visited the residents.

Relying on Mayfield's directions, Clayton Kelly snuck into the nursing home and took a photo of Rose Cochran in her room. Kelly incorporated the photo into

a public YouTube video. Kelly removed the video a few hours later due to negative reactions, including from other McDaniel supporters.

Senator Cochran's team saw the YouTube video and contacted Butler Snow, the law firm that served as counsel to Senator Cochran's campaign and his family. A lawyer at Butler Snow, Don Clark, brought the video to the attention of the Mayor of Madison and the Madison Chief of Police.

Officers Chuck Harrison and Vickie Currie were assigned to the case. They prepared and submitted warrant applications for the search and arrest of Clayton Kelly for violating a subsection of Mississippi's Abuse, Neglect, and Exploitation statute that makes the willful infliction of physical pain or injury on a vulnerable person a felony. *See* MISS. CODE ANN. § 43-47-19(3). There's no evidence Kelly physically injured Rose Cochran, but the citation to that specific subsection may have been a typographical error—subsection (2)(b) criminalizes the willful exploitation of a vulnerable person when the exploitation has monetary value. Kelly gave officers permission to search his Facebook and YouTube accounts, which implicated other McDaniel supporters involved in the scheme. Further investigation revealed Facebook messages that implicated Mayfield's participation. Based on these messages, Harrison and Currie submitted search and arrest warrant affidavits for Mayfield, each of which cited either MISS. CODE ANN. § 43-47-19(3) or MISS. CODE ANN. § 97-29-63, a statute prohibiting the posting of messages through electronic media for the purpose of causing injury to any person with lewd intent. *See Gilmer v. State*, 955 So.2d 829, 840 (Miss. 2007) (holding that lewd intent is a necessary element of an offense under Miss. Code Ann. § 97-29-63). A magistrate

judge issued the warrants on May 22, 2014. Mayfield was arrested at his office the same day.

Mayfield was subject to significant news coverage and lost his largest client. He was also forced to stop his political activities for the Tea Party and the McDaniel campaign. On June 24, 2014, Senator Cochran won his runoff race.

Three days later, Mayfield committed suicide.

A year later, the Madison County Circuit Court entered a judgment of conviction against Clayton Kelly for conspiring to commit burglary of a dwelling. Additionally, John Mary entered a guilty plea of conspiracy to violate MISS. CODE ANN. § 97-45-17.

After Mayfield's death, his widow, sons, and estate filed their complaint against Defendants. Their claims included a § 1983 claim, a *Bivens* claim, and various state tort claims against private parties, the local municipality, and government and law enforcement officials involved in Mayfield's arrest.[3] All were dismissed except a *Lozman* claim against the City of Madison and Mayor Hawkins-Butler.

II.

A.

This court reviews de novo a district court's dismissal for failure to state a claim under Rule 12(b)(6). *Ghedi v. Mayorkas*, 16 F.4th 456, 463 (5th Cir. 2021).

Plaintiffs claim that Butler Snow and Don Clark, by initiating a police report, participated in a retaliatory prosecution against Mayfield for the exercise of his First Amendment rights. All parties agree that this

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[3] *See Bivens v. Six Unknown Named Agents Fed. Narcotics Agents*, 403 U.S. 388 (1971).

claim turns on whether Butler Snow and Clark had probable cause to initiate a police report. The district court found that probable cause was evident from the amended complaint. The amended complaint states that a photo of Rose Cochran was taken without permission, which could suggest trespass or breaking and entering. The district court did not err in dismissing the claims against Butler Snow and Don Clark.

Plaintiffs additionally brought § 1983 claims against Officer Vickie Currie and Officer Chuck Harrison.[4] Officer Currie got a warrant for Mayfield's arrest, and Officer Harrison got a warrant to search his home and workplace.

As this court has previously noted, Plaintiffs brought claims under multiple provisions of the Constitution, including but not limited to the First and Fourth Amendments. *See Mayfield*, 976 F.3d at 486 n.1. But this court concluded that "Plaintiff-Appellees' claims against Officer Currie . . . fall under the Fourth Amendment." *Id.* As that opinion explained, "in 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." *Id.* (citing *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019)).

So Plaintiffs need to allege that Mayfield was arrested and searched without probable cause. "Probable cause exists when the totality of facts and circumstances within a police officer's knowledge at the moment of arrest are sufficient for a reasonable person

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[4] The district court dismissed the 42 U.S.C. § 1983 claim against Police Chief Gene Waldrop because the amended complaint did not specify any claim against him. Plaintiffs do not contest this dismissal in their appellate briefing.

to conclude that the suspect had committed or was committing an offense." *Ramirez v. Martinez*, 716 F.3d 369, 375 (5th Cir. 2013) (emphasis and quotation marks omitted). In this case, Plaintiffs claim they can defeat probable cause and overcome qualified immunity by showing a harm under either *Malley v. Briggs*, 475 U.S. 335 (1986), or *Franks v. Delaware*, 438 U.S. 154 (1978).

Under *Malley*, "an officer can be held liable for a search authorized by a warrant when the affidavit presented to the magistrate was 'so lacking in indicia of probable cause as to render official belief in its existence unreasonable.'" *Mayfield*, 976 F.3d at 487–88 (quoting *Malley*, 475 U.S. at 344-45). This court's previous decision in this case held that there is no *Malley* harm here because there were other affidavits that supported the arrest warrant. 976 F.3d at 487–88. But that decision remanded to the district court to address the *Franks* claim.

Under *Franks*, an officer who "deliberately or recklessly provide[s] false, material information for use in an affidavit" in support of a warrant or who "who makes knowing and intentional omissions that result in a warrant being issued without probable cause" is liable. *Melton v. Phillips*, 875 F.3d 256, 264 (5th Cir. 2017). On remand, the district court found there was no *Franks* harm, a finding we now affirm.

Plaintiffs argue there was a *Franks* violation because the Officers withheld evidence that Mayfield didn't have the requisite intent to trespass or invade Rose Cochran's privacy. While its arguable that Mayfield did not meet the intent element of the specific statute cited, that's not enough to overcome qualified immunity. The allegations establishing the conspirators wanted a "good, clear picture" admit an intent to enter

into Rose Cochran's room and take her picture. And, as the district court noted, Plaintiffs "have not produced a single similar case where a court denied qualified immunity based on a difference of opinion about criminal intent." *Mayfield v. Butler Snow, LLP*, 2021 WL 3642038, at *2 (S.D. Miss. Aug. 17, 2021). The district court did not err in dismissing the claims under § 1983.

Finally, Plaintiffs brought numerous state tort actions against Officer Currie and Harrison, which were all dismissed by the district court. On appeal, Plaintiffs only challenge the district court's dismissal of their civil conspiracy claim. The district court was correct in dismissing Plaintiffs' claim for civil conspiracy because it was not timely. Moreover, civil conspiracy is a derivative claim that depends on some underlying wrong. *See Wells v. Shelter Gen. Ins. Co.,* 217 F.Supp.2d 744, 755 (S.D. Miss. 2002) (applying Mississippi law; collecting cases). To the extent that Plaintiffs do not appeal the dismissal of the state law tort claims, their civil conspiracy claim cannot proceed. To the extent that Plaintiff's civil conspiracy claim relies on their federal § 1983 claim, their civil conspiracy claim cannot proceed because the § 1983 claim was correctly dismissed.

The district court did not err in dismissing Plaintiffs' claims against the Defendants in this case.

B.

A district court's ruling on a summary judgment motion is reviewed de novo. *Correa v. Fischer*, 982 F.2d 931, 932 (5th Cir. 1993). Summary judgment is appropriate only when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a).

Plaintiffs' only claim to survive the motion to dismiss stage was their *Lozman* claim against the City of Madison and Mayor Hawkins-Butler. After discovery, the district court granted summary judgment for the City of Madison and its Mayor. Plaintiffs' theory was that the City of Madison pursued Mayfield in retaliation for his political activities at the direction of the Mayor.

The Supreme Court held in *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945 (2018), that a First Amendment retaliatory arrest claim against a municipality may survive despite the presence of probable cause under certain circumstances. In such cases, there's a difficult evidentiary burden that Plaintiffs do not meet. In *Lozman*, there was extensive evidence the city council used city resources to intimidate the plaintiff because of his speech, including a meeting transcript enshrining that plan as official municipal policy and a video of a city council member directing the plaintiff's arrest. *Id.* at 1949–50. Not so here.

Here, Plaintiffs' best evidence merely establishes that the City of Madison was aggressively pursuing those who committed a potential invasion of the privacy of an incapacitated adult. The evidence doesn't show that the City carried out the investigation, arrest, search, or prosecution *because of* Mayfield's political views, which the Plaintiffs needed to show to succeed. The same is true of the Mayor: Although some evidence in the record suggests she knew the conspirators were McDaniel supporters, other evidence clarifies that she was not responsible for the prosecutorial decisions of the District Attorney's Office. The district court properly granted summary judgment for the City of Madison and its Mayor.

C.

Plaintiffs also appeal the district court's ruling regarding an expert witness as well as various discovery orders issued by a magistrate judge.

Regarding the expert witness, the district court barred Plaintiffs from bringing Michael Lyman to give expert testimony on the absence of probable clause. Lyman's testimony is an inadmissible legal opinion. The district court did not err in striking Plaintiffs' expert witness.

Plaintiffs also appeal the magistrate judge's discovery orders. Plaintiffs must show that the court abused its discretion in denying a discovery motion. *Atkinson v. Denton Pub. Co.*, 84 F. 3d 144, 147 (5th Cir. 1996). However, this court need not conduct that analysis. Plaintiffs challenge discovery orders made by a magistrate judge. At no point did the district court judge ever consider the discovery issues raised by the Plaintiffs. "The law is settled that appellate courts are without jurisdiction to hear appeals directly from federal magistrates." *United States v. Renfro*, 620 F.2d 497, 500 (5th Cir. 1980). *See* FED. R. CIV. P. 72(a).

* * *

We affirm.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

CAUSE NO. 3:17-CV-514-CWR-FKB

ROBIN MAYFIELD, *et al.*

Plaintiffs

v.

BUTLER SNOW LLP, *et al.*

Defendants

ORDER

Before the Court is Officer Vickie Currie's motion to dismiss based on qualified immunity. Docket No. 445. On review, the motion will be granted.

The facts and applicable legal standards are well-known by now. *See Mayfield v. Currie*, 976 F.3d 482, 486 (5th Cir. 2020), *as revised* (Sept. 23, 2020); *see also Terwilliger v. Reyna*, 4 F.4th 270, at *3 (5th Cir. 2021).

The substantive question is whether Officer Currie violated the Fourth Amendment, as interpreted by *Franks v. Delaware*, by "deliberately or recklessly provid[ing] false, material information for use in an affidavit or [making] knowing and intentional omissions that result[ed] in a warrant being issued without probable cause." *Mayfield*, 976 F.3d at 487 (quotation marks and citation omitted). The Mayfields specifically believe that Officer Currie knowingly withheld from

the Municipal Judge evidence that: (1) Mark Mayfield lacked intent to trespass because he believed anyone could enter St. Catherine's Village, and (2) Mark Mayfield lacked intent to invade Rose Cochran's privacy as he merely wanted a good, clear picture of her.

To defeat Officer Currie's entitlement to qualified immunity, the Mayfields "must show (1) that [she] violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." *Id.* at 486 (citations omitted).

The Mayfields run into problems on both elements.

First, on the merits, it is difficult to accept the proposition that Mark Mayfield lacked the requisite criminal intent. The allegations of the complaint set forth that Mayfield voluntarily helped the co-conspirators take a photo of Rose Cochran in a place where she was entitled to privacy. That place, St. Catherine's Village, is open for family members to visit their loved ones, not to the general public. Mayfield knew that because his mother was a resident. Entry to the premises was gained by a co-conspirator pretending to be a family member visiting on a holiday. And that the ensuing picture was not to anyone's liking does not mean Mayfield did not help them capture it in a private place. From all of the circumstances gained during the investigation, Mark Mayfield's criminal intent can be inferred.[1]

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[1] The Mayfields say that Mark Mayfield was engaged in constitutionally protected speech by supporting his preferred candidate, and argue that the conversations between him and his co-conspirators about obtaining the photographic evidence was all about gathering information to help inform the public. We need not be sidetracked on that point, for the Supreme Court held long ago that the constitutional guarantee of freedom of speech

As for the second prong of the qualified immunity analysis, "it is the plaintiff's burden to establish that an allegedly violated right was clearly established." *Id.* at 487. That too is difficult for the plaintiffs to meet. They have not produced a single similar case where a court denied qualified immunity based on a difference of opinion about criminal intent. In *Winfrey v. Rogers*, 901 F.3d 483, 489 (5th Cir. 2018), for example, the officer was denied qualified immunity after he failed to mention in his affidavit hard exculpatory evidence like a lab report showing that the suspect's blood was not at the scene. Officer Currie's affidavit left much to be desired, but it did not omit exculpatory evidence.

The motion is granted. A separate Final Judgment shall issue.

SO ORDERED, this the 17th day of August, 2021.

s/ Carlton W. Reeves
UNITED STATES DISTRICT JUDGE

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does not immunize "speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949); *see also United States v. Varani*, 435 F.2d 758, 762 (6th Cir. 1970) ("[S]peech is not protected by the First Amendment when it is the very vehicle of the crime itself.").

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI NORTHERN DIVISION

CAUSE NO. 3:17-CV-514-CWR-FKB

ROBIN MAYFIELD; OWEN MAYFIELD; WILLIAM MAYFIELD; THE ESTATE OF MARK STEVENS MAYFIELD

Plaintiffs

v.

THE CITY OF MADISON, MISSISSIPPI, *et al.*

Defendants

ORDER

Mark Mayfield was an attorney in Madison County, Mississippi. He practiced real estate law, was active in the Baptist Church, and was a founder of the Mississippi Tea Party.

In 2014, Mayfield supported State Senator Chris McDaniel's effort to unseat U.S. Senator Thad Cochran in the Republican Party primary. Mayfield's actions during that campaign would lead to his tragic and untimely death by suicide. Mayfield's family later commenced litigation against those persons and entities they believed to be responsible for his passing.

The Court initially denied the City of Madison's motion to dismiss. Now, with discovery complete, the City files this motion for summary judgment. It seeks to be released from any liability for Mayfield's death.

For the reasons that follow, the City's motion is granted.

I. Factual and Procedural History

The plaintiffs' allegations were discussed in the Court's Order granting in part and denying in part the defendants' motions to dismiss. *See Mayfield v. Butler Snow LLP*, 341 F. Supp. 3d 664 (S.D. Miss. 2018). Three years later, the facts presented below will focus on the evidence relevant to Mayfield and the City of Madison.

It was March 2014. The Republican Party primary was in full swing, and Mark Mayfield was an active supporter of Senator McDaniel. Through his advocacy, Mayfield was drawn into communications with fellow McDaniel supporters John Mary, Richard Sager, and Clayton Kelly, who were pursuing a new way to bolster McDaniel's chances.

Mary, Sager, and Kelly had a plan to claim that Senator Cochran was an adulterer. They wanted to make a video showcasing how Cochran spent time with his longtime aide in Washington, D.C., instead of with his wife, Rose, a resident of the St. Catherine's Village assisted living facility in Madison, Mississippi. Mary and his associates wanted the video to feature a photo of the real Mrs. Cochran.

Mayfield was useful to Mary, Sager, and Kelly because his mother was a resident of St. Catherine's Village. Mayfield knew how to navigate the premises and knew the location of Rose Cochran's room. When contacted about the plan, he wrote Mary to confirm that he could "get someone in the building and is [sic] the room." Mayfield knew, for example, that there was a security camera next to Mrs. Cochran's room.

On March 19, Kelly spoke with someone—he believed it was Mayfield—about accessing St. Catherine's Village. As Kelly recalled the conversation, the person explained how "he went and visited his mother frequently and he passed by Rose Cochran every single day. . . . I remember him telling me he was very sad for her. And I remember him telling me verbatim like I -- like I described earlier how to get there."

On March 30, Kelly got another call with "details on the layout of the place." We do not know who made this call. The Mayfields, however, claim that Kelly spoke with Richard Wilbourn, an attorney in Madison County.[1]

Kelly went to St. Catherine's Village on Easter Sunday,[2] which that year fell on April 20. He wore his "Easter Sunday outfit" to blend in with the many persons visiting their family members. He then followed the instructions for how to get to Rose Cochran's room. Kelly later explained that "she was displayed with her door open so everyone in the community center could also see." He snapped a photo of a bedridden Mrs. Cochran, then left.

The ensuing YouTube video that Kelly made was, to put it mildly, not a successful piece of political advocacy. McDaniel supporters and Cochran supporters alike thought it an "appalling" portrayal of a bedridden

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[1] Wilbourn was initially a defendant in this case, but the claims against him were dismissed in a prior order.

[2] For Christians, we know this to be the holiest day on the calendar. *See, e.g.*, Dr. Martin Luther King, Jr., *Questions That Easter Answers*, April 21, 1957, https://kinginstitute.stanford.edu/king-papers/documents/questions-easteranswers-sermon-delivered-dexter-avenue-baptist-church ("Easter is a day above all days.").

elderly woman.[3] Under pressure, Kelly pulled the video down within hours of its posting.

The Cochran campaign contacted its outside law firm, Butler Snow, to understand its options. The head of the Butler Snow firm then contacted the Mayor of Madison, Mary Hawkins-Butler, to encourage criminal prosecutions of the persons who invaded Mrs. Cochran's privacy. Senator Cochran's campaign manager also contacted the Mayor asking that she turn over the prosecution to Butler Snow. The Mayor directed both of them to the police department.

The police department's top officials met with the head of Butler Snow to hear the allegations. The police department then commenced its investigation. The matter was assigned to Investigators Chuck Harrison and Vickie Currie. Because it was a high-profile case, the City Attorney and local Assistant District Attorneys were brought in regularly to consult on the proper charges. They met daily to discuss what charges to bring and how to proceed.

On May 16, the Madison Police Department arrested Kelly and charged him with exploitation of a vulnerable adult. Kelly gave a voluntary statement and access to his social media accounts. The social media accounts contained messages showing Mary's involvement in the scheme. Additional charges would later be brought against Kelly. He eventually pled guilty to burglary.

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[3] "Appalling" is the word the plaintiffs' brief uses to describe the reaction of McDaniel supporters. Docket No. 408 at 9. Their brief also recounts that one of the purported co-conspirators said the "[v]ideo is horrible, especially with Rose nursing home photos. You're killing her dignity and makes you look [like an] ass." *Id*. at 10.

On May 20, Madison police arrested Mary. Mary gave a statement explaining Mayfield's role in the events. Mary eventually pled guilty to a conspiracy count.

On May 22, Madison police arrested Mayfield. The basis for Mayfield's arrest warrant was Officer Currie's affidavit stating that Mayfield had assisted the other conspirators in photographing Mrs. Cochran. The police also executed search warrants on Mayfield's home and office. The basis for those warrants was Officer Harrison's affidavits indicating that Mayfield's office would have evidence that he inflicted pain on a vulnerable person.[4] Mayfield's bond was set at $250,000.

Mayfield became depressed, sought professional help, and was prescribed medication for sleep, depression, and anxiety. His wife Robin experienced similar symptoms and was also prescribed medication.

On June 27, 2014, Robin found her husband in their basement. He took his own life. This suit followed.

Claims against Butler Snow and several other defendants have already been resolved. This Order addresses only the Mayfields' claim against the City of Madison: that the Cochran supporters who ran the City arrested Mayfield in retaliation for his involvement with the McDaniel campaign. The Mayfields invoke *Lozman v. City of Riviera Beach*, a Supreme Court case holding that in certain circumstances, a person arrested for their political activities can sue a municipality for First Amendment retaliation despite the existence of probable cause for the arrest. 138 S. Ct. 1945 (2018).

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[4] Depositions revealed that the defendants lacked any knowledge or belief that anyone in this case inflicted pain upon Rose Cochran.

The City argues that it cannot be held liable because there is no direct evidence of a "premeditated, official policy to arrest" McDaniel supporters. The Mayfields respond that the evidence shows "a policy-making decision to retaliate against Mark Mayfield for his pro-McDaniel political activities, and to do so in a manner helpful to Thad Cochran's re-election campaign."

Two prior rulings in this case have some bearing on today's Order. First, when read together, this Court's earlier opinion and the Fifth Circuit's opinion in Officer Currie's interlocutory appeal indicate that there was probable cause to arrest Mark Mayfield and search his residence and office. *See Mayfield*, 341 F. Supp. 3d at 670; *Mayfield v. Currie*, 976 F.3d 482, 487 (5th Cir. 2020); *see also United States v. Froman*, 355 F.3d 882, 889 (5th Cir. 2004) (defining probable cause).

Second, the persons who conspired to enter, and then did enter, St. Catherine's Village to photograph Rose Cochran were not engaging in First Amendment-protected activity. "The First Amendment does not guarantee the right to engage in a criminal conspiracy," this Court previously reasoned. *Mayfield*, 341 F. Supp. 3d at 670 (citing *United States v. El-Mezain*, 664 F.3d 467, 537 (5th Cir. 2011)).

With those principles in mind, we turn to the legal standard.

II. Legal Standard

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party seeking to avoid summary judgment must identify admissible evidence in the record showing a fact dispute. *Id.* at 56(c)(1). "Once a summary judgment

motion is made and properly supported, the nonmovant must go beyond the pleadings and designate specific facts in the record showing that there is a genuine issue for trial. Neither 'conclusory allegations' nor 'unsubstantiated assertions' will satisfy the nonmovant's burden." *Wallace v. Tex. Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996) (quotation marks and citations omitted).

The Court views the evidence and draws reasonable inferences in the light most favorable to the nonmovant. *Maddox v. Townsend and Sons, Inc.*, 639 F.3d 214, 216 (5th Cir. 2011). But the Court will not, "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts." *McCallum Highlands, Ltd. v. Wash. Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir. 1995), *as revised on denial of reh'g*, 70 F.3d 26 (5th Cir. 1995).

III. Discussion

A. The Statute of Limitations

In its earlier opinion, this Court held that this matter most closely resembled a malicious prosecution case, rather than a false imprisonment case. *Mayfield*, 341 F. Supp. 3d at 672. Accordingly, the three-year statute of limitations began to run on the date that the prosecution ended. The suit was timely.

The conclusion still rings true as to the case as a whole. But it is perhaps difficult to reconcile that reasoning with the fact that *right now*, the sole claim before the Court is one of retaliatory arrest, not retaliatory prosecution. And if the three-year statute of limitations for this cause of action began to run on the date of Mark Mayfield's retaliatory arrest, then the City of Madison has a strong argument that, at least

as to this claim, the Mayfields' assertion of their rights was untimely.

The issue is arguably moot because the Court has found in the City's favor on the merits, *see infra*, but the Court mentions it here because of the likelihood that the Fifth Circuit will hear the case next, and may wish to clarify the proper accrual of a *Lozman* claim.

B. Retaliatory Arrest

For many years, the law was clear that governments could retaliate against persons who expressed irksome ideas and opinions—gadflies and the like—by arresting them, as long as law enforcement officers had probable cause to arrest. *E.g.*, *McLin v. Ard*, 866 F.3d 682, 694 (5th Cir. 2017). *Lozman* changed that. It represents a new way to seek First Amendment protection.

The case arose out of Fane Lozman's "contentious relationship" with the City of Riviera Beach. 138 S. Ct. at 1949. As the Court explained,

> Soon after his arrival Lozman became an outspoken critic of the City's plan to use its eminent domain power to seize homes along the waterfront for private development. Lozman often spoke during the public-comment period at city council meetings and criticized councilmembers, the mayor, and other public employees. He also filed a lawsuit alleging that the Council's approval of an agreement with developers violated Florida's open-meetings laws.

Id.

The City Councilmembers were unhappy with Lozman's criticism. During one closed-door meeting, a Councilmember said the City should "intimidate" him.

Id. Others agreed. *Id.* And five months later, the City acted on that threat. While he was (again) making public comments at a City Council meeting, a Councilmember ordered a municipal officer to arrest Lozman. *Id.* at 1950. He was charged with disorderly conduct. *Id.* The State later dismissed the charges. *Id.*

The Supreme Court agreed that these facts set forth a plausible claim of First Amendment retaliation. "An official retaliatory policy is a particularly troubling and potent form of retaliation," it reasoned, "for a policy can be long term and pervasive, unlike an ad hoc, on-the-spot decision by an individual officer." *Id.* at 1954. It added,

> This unique class of retaliatory arrest claims . . . will require objective evidence of a policy motivated by retaliation to survive summary judgment. Lozman, for instance, cites a transcript of a closed-door city council meeting and a video recording of his arrest. There is thus little risk of a flood of retaliatory arrest suits against high-level policymakers.

Id. The Court then remanded the matter for further proceedings.

In this case, the Mayfields' best evidence of wrongdoing comes from the deposition testimony of former Madison County ADA Dow Yoder. He said that after the arrests, Mayor Hawkins-Butler told him, "[i]f the DA's office is scared to -- going to be scared to prosecute these McDaniel supporters, I've got Butler Snow and Andy Taggart, they are just drooling, ready to get started prosecuting. If y'all can't do your job, we'll be glad to get Butler Snow . . . ."

Yoder claimed that Officer Currie told him similar things, including "[a]re you going to play ball and do

what's expected or are you going to let somebody else carry the water?" (It should be noted here that Yoder was known to be a McDaniel supporter, so "are you going to play ball" could have multiple meanings.) At one point Officer Currie told Yoder, "[w]e've just got to figure out what to charge them with."

Yoder then testified about what was happening within the District Attorney's Office. He said that District Attorney Michael Guest—now a member of Congress—"admitted" that "there would not have been probable cause to arrest Clayton Kelly." The ADAs were openly discussing that they could not prove all of the elements of the crimes, especially the intent element, Yoder recalled. On the day Mark Mayfield died, Guest apparently told Yoder:

> Dow, you know, we were just trying to get these folks in the pretrial diversion or just get them to admit that there was something morally or, you know, something - you know, we're not trying to put any of these guys in jail, you know. Maybe Clayton Kelly, we'll see about him, but, you know, we've got to get there. And you can't get there unless you've got people who were cooperating.

Yoder was so concerned that he called the FBI. He was later terminated from the DA's Office.

The legal standard requires the Court to view this evidence in the light most favorable to the Mayfields. It suggests that the City of Madison and the District Attorney's Office were aggressively pursuing those persons they felt had committed voyeurism or trespassed into Rose Cochran's room at St. Catherine's Village. Those persons were McDaniel supporters.

What the evidence does not show, however, is that any investigation, arrest, search, or prosecution was carried out *because of political beliefs*. That a handful of McDaniel supporters conspired to enter, and in one case did enter, St. Catherine's Village is undisputed. But there is no evidence that they were targeted for prosecution because they were McDaniel supporters. In *Lozman* terms, the Mayfields have no evidence that the City made an official plan to retaliate against McDaniel supporters on the basis of their First Amendment-protected activity.

This is where the law turns interesting.

First, *Lozman* may be incomplete. In a case handed-down one year later, the Supreme Court considered a retaliatory arrest claim brought against individual officers, rather than a municipality. It held that one relevant factor in these claims is whether "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." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1727 (2019). That seems a valuable addition to the law. Mr. Lozman's case gets stronger if he can point to other people who weren't arrested for similar conduct.

Second, *Lozman* is a "unique" case because the facts are (a) known and (b) so plainly objectionable. 138 S. Ct. at 1954. The opinion explicitly noted that the presence of "a transcript of a closed-door city council meeting and a video recording of [plaintiff's] arrest" were rare. *Id.* This Court agrees. It is unusual for a defendant to place this kind of direct evidence of unlawful intent into a written, contemporaneous record. Most parties are more sophisticated than the City of Riviera Beach.

The question then becomes, what is to be done about indirect, circumstantial situations of First Amendment retaliation? The Supreme Court persuasively explained why judicial remedies must be available, reasoning that "when retaliation against protected speech is elevated to the level of official policy, there is a compelling need for adequate avenues of redress." *Id.* But the remedy *Lozman* offers is limited to only the most blatant examples of municipal retaliation. In addition, with probable cause no longer serving as a clear gatekeeper to these claims, it will be difficult to discern exactly when to allow a *Lozman* claim proceed into discovery or trial.

After living with this case for some time, the Court has wondered whether a more familiar burden-shifting framework could be used. Just as in employment discrimination cases, in these situations we are trying to look past a given reason for an adverse event—look beyond a firing for poor performance, or an arrest for something as broad as "disorderly conduct"—and determine if the given reason is a mere pretext for unlawful activity. In other words, courts are trying to use the burden-shifting framework to get at the truth of a given situation.

Adopting another judicial framework is not a perfect solution. In their book *Unequal*, Sandra F. Sperino and Suja A. Thomas observe that the *McDonnell Douglas* test is "quite complex." SPERINO AND THOMAS, UNEQUAL 115 (2017). They also argue that the framework itself "can distract judges from the main question of whether a person was treated differently because of a trait, such as sex or age." *Id.* at 119. On the other hand, it at least is a familiar starting point. How many *Lozman* claims will the judiciary unknowingly turn a blind eye toward, simply because there is no transcript showing

an official policy of premeditated retaliation? If a framework can provide some direction toward truth, then it is worth considering.

In what follows, then, the Court will consider whether the indirect evidence of First Amendment retaliation can support the Mayfields' claim beyond the summary judgment stage.

To make out a prima facie *Lozman* claim, at the summary judgment stage the plaintiff must put forward evidence that he was (a) arrested by municipal officers, after (b) engaging in First Amendment-protected activity, for which (c) the charges were later dismissed. The municipality must then come forward with its legitimate, non-discriminatory reasons for the arrest. *See, e.g.*, *Goudeau v. Nat'l Oilwell Varco, L.P.*, 793 F.3d 470, 474 (5th Cir. 2015). Finally, the plaintiff "must prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for" First Amendment retaliation. *Id.* (quotation marks and citation omitted). "A plaintiff may show pretext either through evidence of disparate treatment or by showing that the employer's proffered explanation is false or unworthy of credence." *Jackson v. Cal-W. Packaging Corp.*, 602 F.3d 374, 378–79 (5th Cir. 2010) (quotation marks and citation omitted).

Applied here, for present purposes the Mayfields have stated a prima facie case, as they claim that the retaliatory arrest was for Mark Mayfield's protected speech in being a vocal McDaniel supporter.[5] Because

[5] The City "does not dispute that Plaintiffs have evidence of Mayfield's exercise of his First Amendment rights." Docket No. 401 at 16.

the prima facie test is not supposed to be overly burdensome, that is enough.

The City, in turn, has articulated a legitimate, non-retaliatory reason for Mayfield's arrest. Based on the evidence gathered during its investigation, the City had probable cause that Mayfield conspired with others to trespass onto St. Catherine's Village property.

At the third and final step, the Mayfields must come forward with evidence that a jury could use to conclude that the City's probable cause was, for lack of a better term, bullshit. *See generally* HARRY G. FRANKFURT, ON BULLSHIT (2005) (attempting to define the term). The questions at step three are supposed to be tailored to the particular circumstances of the case. In age discrimination cases, for example, "[a] plaintiff can show pretext and discriminatory motive by pointing to age-related comments made by a person in charge of firing"; "by pointing out that the employer replaced the plaintiff with a younger, 'clearly less qualified' employee"; or "by showing a departure from standard procedure." *McMichael v. Transocean Offshore Deepwater Drilling, Inc.*, 934 F.3d 447, 457, 459 (5th Cir. 2019) (citations omitted).

In this case, the framework suggests that we should ask a series of questions. Did the investigation follow the evidence to its targets, or did the police "round up the usual suspects?" Was there anything unusual about the timing or the manner of the City's investigation? Is there any other case where the City Attorney met with the District Attorney and the investigators every day to discuss charges and be involved in how those charges would proceed? Were persons who engaged in similar conduct also arrested, or were they let off the hook because of more agreeable political beliefs? *See Nieves*, 139 S. Ct. at 1727.

An examination of the evidence adduced in this case satisfactorily answers these questions. Instead of rounding up the most vocal McDaniel supporters, City investigators followed the evidence from Kelly to Mary to Mayfield. The police were given free rein to conduct their investigation as they saw fit, without direction from the Mayor, a Cochran supporter. There is no evidence that before the Rose Cochran incident, the City of Madison was itching for an excuse to go after McDaniel supporters. And there is no evidence of differential treatment of McDaniel and Cochran supporters. As an example, there is no evidence that Cochran supporters entered a McDaniel relative's home in Madison, after which the City refused to prosecute them.

To this, the Mayfields would no doubt press the testimony of Yoder. Perhaps of most concern is Yoder's testimony that "this case was handled unlike any other case that ever came through the DA's office." The problem with this evidence, though, is that the City of Madison is not responsible for the prosecutorial decisions of the District Attorney's Office. One is a municipal entity; the other is a State entity. Evidence of an unusual process from the State actors is not evidence of a pretextual arrest by the City officers.

The Mayfields have also pressed that, in their minds, the City brought a series of cases against McDaniel supporters that lacked probable cause. Those arguments, however, are generally foreclosed by the guilty pleas of two of the conspirators, as well as the fact that it is the law of the case that the City had probable cause to arrest Mayfield.

For these reasons, the Court grants the City's motion for summary judgment on the merits of the Mayfields' *Lozman* claim.

C. Damages

Finally, the City argues that the Mayfields are not entitled to wrongful death damages because they have no evidence or expert that Mark Mayfield was under an irresistible impulse.

In suicide cases, Mississippi law permits recovery "only if the suicide was proximately caused by the intentional act of the defendant, creating an irresistible impulse in the decedent to take his or her own life." *Truddle v. Baptist Mem'l Hosp.-DeSoto, Inc.*, 150 So. 3d 692, 695 (Miss. 2014) (citations omitted). A colleague on this Court has interpreted that to require evidence "that the decedent must have been in a state of mental disturbance"; "must not be in control of his faculties"; must act "without conscious volition"; and "the impulse must in fact be proximately caused by the wrongful conduct of the defendant." *Shamburger v. Grand Casino of Mississippi, Inc./Biloxi*, 84 F. Supp. 2d 794, 799 (S.D. Miss. 1998) (quotation marks omitted).

Here, the Mayfields have no evidence, expert or otherwise, that Mark Mayfield acted under an irresistible impulse. The motion on this issue of wrongful death damages is therefore granted.

IV. Conclusion

The City's motion for summary judgment is granted. SO ORDERED, this the 19th day of May, 2021.

s/ Carlton W. Reeves
UNITED STATES DISTRICT JUDGE

APPENDIX E

REVISED 9/23/2020

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-60331

ROBIN MAYFIELD; OWEN MAYFIELD; WILLIAM MAYFIELD; THE ESTATE OF MARK STEVENS MAYFIELD,

Plaintiffs—Appellees,

versus

VICKIE CURRIE*, Individually and in her Official Capacity*,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:17-CV-514

Before DENNIS, GRAVES, and WILLETT, *Circuit Judges*.
JAMES E. GRAVES, JR., *Circuit Judge*:

This is a qualified immunity suit in which Defendant-Appellant challenges the district court's denial of her motion to dismiss. We REVERSE and REMAND.

I

Mark Mayfield ("Mr. Mayfield"), a lawyer, was a founder of the Mississippi Tea Party. In 2014, he supported State Senator Chris McDaniel's primary challenge to then-sitting U.S. Senator Thad Cochran.

The facts underlying this case involve four other supporters of Mr. McDaniel: John Mary; Rick Sager; Clayton Kelly; and Richard Wilbourn III (collectively, "the conspirators").

As the district court describes it, the conspirators "thought [Senator] Cochran was a hypocrite and an adulterer who lived with his longtime aide in Washington, D.C.[,] while his aging wife, Rose, was left alone in a Madison, Mississippi assisted living facility called St. Catherine's Village." They therefore planned to take a photo of Mrs. Cochran in her room at St. Catherine's and use it in an attack ad against her husband. The conspirators sought the assistance of Mr. Mayfield, whose mother lived in the same facility. Mr. Mayfield refused to photograph Mrs. Cochran himself but agreed to show the conspirators the location of her room. In late March or early April of 2014, Mr. Mayfield met one of the conspirators at St. Catherine's and pointed "down the hall" to the location of Mrs. Cochran's room. On April 20, 2014, one of the conspirators went to Mrs. Cochran's room and took a video of her lying in bed. He posted an attack ad on YouTube six days later. The ad, which contained a still photo of Mrs. Cochran in her bed, went viral before being taken down in a matter of hours.

About one month later, the Madison Police Department arrested Mr. Mayfield and two of the conspirators. The basis for Mr. Mayfield's arrest warrant was the affidavit of Officer Vickie Currie, who stated that Mr. Mayfield had communicated with the conspirators and assisted them in their effort to photograph Mrs. Cochran. The police, based on an affidavit from Officer Chuck Harrison ("Mr. Harrison"), also executed search warrants at Mr. Mayfield's home and office. Mr. Mayfield's largest client left him the next day, causing

the "complete collapse of his law practice." Mr. Mayfield became depressed and was prescribed medication for sleep, depression, and anxiety. On June 27, 2014, Robin Mayfield ("Mrs. Mayfield") found her husband dead of a gunshot wound to the head. The coroner ruled the death a suicide.

Mrs. Mayfield, her sons, and Mr. Mayfield's estate (together, "Plaintiff-Appellees") filed suit against several parties, including Officer Currie, based on 42 U.S.C. § 1983 and § 1988. Officer Currie and Officer Harrison filed a motion to dismiss. The district court found that Plaintiff- Appellees' claims were timely, but "require[d] additional briefing to determine whether the plaintiffs have stated a claim sufficient to overcome Officer Currie and Harrison's qualified immunity defense." It therefore granted the officers' motion in part and denied the motion in part, without prejudice to refiling. Shortly thereafter, Officer Currie filed a renewed motion to dismiss. The district court denied that motion, finding only that "[i]t was not objectively reasonable for her to present to the judge such a bare-bones warrant application lacking any underlying facts and circumstances showing [Mr. Mayfield's] unlawful conduct." This appeal followed.

II

"On interlocutory appeal, we review a district court's denial of a qualified-immunity-based motion to dismiss de novo." *Benfield v. Magee*, 945 F.3d 333, 336 (5th Cir. 2019) (citing *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 194 (5th Cir. 2009)). "We accept all well-pleaded facts as true, drawing all reasonable inferences in the nonmoving party's favor." *Id.* "We do not, however, accept as true legal conclusions, conclusory statements, or "'naked assertion[s]" devoid of "further factual enhancement."'" *Id.* at 336–37 (quoting *Ashcroft v.*

Iqbal, 556 U.S. 662, 678 (2009)). To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead factual allegations that, if true, "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "That is, the well-pleaded facts must make relief plausible, not merely possible." *Benfield*, 945 F.3d at 337 (citing *Iqbal*, 556 U.S. at 678).

"The doctrine of qualified immunity protects government officials from civil damages liability when their actions could reasonably have been believed to be legal." *Morgan v. Swanson*, 659 F.3d 359, 370 (5th Cir. 2011) (en banc). "To defeat a claim of qualified-immunity, the plaintiff has the burden to demonstrate the inapplicability of the defense." *McLin v. Ard*, 866 F.3d 682, 689 (5th Cir. 2017) (citing *Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 253 (5th Cir. 2005)). The plaintiff must show "(1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." *Whitley v. Hanna*, 726 F.3d 631, 638 (5th Cir. 2013) (internal quotation marks omitted) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)). We "have discretion to decide which prong of the qualified-immunity analysis to address first." *Morgan*, 659 F.3d at 371 (citing *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)).

III

Plaintiff-Appellees' Section 1983 claim against Officer Currie is rooted in the Fourth Amendment.[1]

[1] Plaintiff-Appellees' Amended Complaint invokes the First, Fourth, Fifth, Eighth, and Fourteenth Amendments. But Plaintiff-Appellees' claims against Officer Currie, whether characterized as claims for false arrest or for malicious prosecution, fall under the Fourth Amendment. *See, e.g.*, *Nieves v. Bartlett*, 139 S. Ct. 1715, 1723 (2019) (holding that, in order to bring a First Amendment claim for retaliatory arrest, a plaintiff generally

They allege that Officer Currie violated Mr. Mayfield's constitutional rights when she "submitted to a municipal judge a warrant-application affidavit that (a) was completely devoid of facts showing the elements of any crime, much less the crime cited in the warrant, and (b) withheld known facts that would have shown no crime was committed . . . and that the intent of the accused target was political speech protected by the First Amendment." Based on that allegedly defective affidavit, the municipal court judge issued a warrant for Mr. Mayfield's arrest. Officer Currie responds that there was no constitutional violation because the issuance of the arrest warrant broke the causal chain, immunizing her from liability.

"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) (citing *Taylor v. Gregg*, 36 F.3d 453, 456 (5th Cir. 1994*), overruled on other grounds by Castellano*, 352 F.3d at 949 (en banc)) (quotation marks omitted).

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must first show the absence of probable cause for the arrest, *i.e.*, a Fourth Amendment violation); *Castellano v. Fragozo*, 352 F.3d 939, 945, 953 (5th Cir. 2003) (en banc) ("The initiation of criminal charges without probable cause may set in force events that run afoul of explicit constitutional protection—the Fourth Amendment if the accused is seized and arrested, for example."); *see also Blackwell v. Barton*, 34 F.3d 298, 302 (5th Cir. 1994) ("We hold that Blackwell's section 1983 claim against Barton for illegal arrest and detention is properly considered under the Fourth Amendment, the more specific constitutional right implicated by her allegations.").

But that shield against liability, known in this circuit as the independent-intermediary doctrine, is not absolute. There are two ways to overcome the doctrine relevant here. First, in *Malley v. Briggs*, the Supreme Court held that an officer can be held liable for a search authorized by a warrant when the affidavit presented to the magistrate was "so lacking in indicia of probable cause as to render official belief in its existence unreasonable." 475 U.S. 335, 344–45 (1986). "The *Malley* wrong is not the presentment of false evidence, but the obvious failure of accurately presented evidence to support the probable cause required for the issuance of a warrant." *Melton v. Phillips*, 875 F.3d 256, 264 (5th Cir. 2017) (en banc) (citing *Michalik v. Hermann*, 422 F.3d 252, 261 (5th Cir. 2005)). And second, under *Franks v. Delaware*, 438 U.S. 154 (1978), and its progeny, officers who "deliberately or recklessly provide[ ] false, material information for use in an affidavit" or who "make[] knowing and intentional omissions that result in a warrant being issued without probable cause" may still be held liable. *Melton*, 875 F.3d at 264 (citing *Hart v. O'Brien*, 127 F.3d 424, 448 (5th Cir. 1997), and *Michalik*, 422 F.3d at 258 n.5). Officer Currie invoked both *Malley* and *Franks* in her motion to dismiss. The district court denied that motion but cabined its analysis to *Malley*. So that's where we begin.

"The question to be asked, under *Malley*, is whether a reasonably well-trained officer in [Officer Currie's] position would have known that his affidavit failed to establish probable cause and that he should not have applied for a warrant." *Jennings v. Joshua Indep. Sch. Dist.*, 877 F.2d 313, 317 (5th Cir. 1989) (internal quotation marks and citation omitted). Officer Currie argues that "the information [she] and other investigators provided to [the magistrate] throughout the course of

their investigation clearly was sufficient to establish probable cause to issue a warrant for Mayfield's arrest." We agree.

The affidavit submitted by Officer Currie in support of the arrest warrant application for Mr. Mayfield was indeed sparse. If it were the only document before the court, the analysis would quickly resolve in Plaintiff-Appellees' favor. But it is not. In the week preceding Mr. Mayfield's arrest, Officer Currie and her colleagues presented a series of affidavits and warrant applications in connection with the Cochran case. Those materials were all reviewed and signed by the same municipal judge. And they were significantly more in-depth than the affidavit challenged by Plaintiff-Appellees. Indeed, the affidavits submitted by Officer Currie's colleague in support of an application to search Mr. Mayfield's residence and office—which were submitted alongside the arrest warrant application—are quite detailed.

Officer Currie does not cite any cases holding that, in determining whether an officer would have known that her affidavit failed to establish probable cause, it is appropriate to consider other affidavits and applications submitted to the same judge regarding the same case. But in the context of qualified immunity, it is the plaintiff's burden to establish that an allegedly violated right was clearly established. *See, e.g., Wigginton v. Jones*, 964 F.3d 329, 338 (5th Cir. 2020). Plaintiff-Appellees have not met that burden. Indeed, their own Amended Complaint acknowledges that the municipal judge signed the arrest warrant in question "on the basis of the Currie affidavit and the Harrison affidavits," and references the other warrants submitted by Officer Currie and her colleagues. The district court's

conclusion that Plaintiff-Appellees adequately alleged a *Malley* wrong was therefore error.

As noted above, however, the independent-intermediary doctrine does not begin and end with *Malley*. The parties also raised *Franks* before the district court and on appeal. But the district court did not analyze that issue, perhaps out of reliance on the principle that "a plaintiff cannot hold an officer liable under *Franks* for intentionally omitting important exculpatory information from a warrant affidavit when the officer has also committed a *Malley* violation by presenting a facially deficient warrant affidavit to the issuing judge." *See Kohler v. Englade*, 470 F.3d 1104, 1113–14 (5th Cir. 2006).

"[I]t is the settled law of our circuit that the district court should have the first opportunity to address all of the issues contained in the appeal." *F.D.I.C. v. Lee*, 130 F.3d 1139, 1141 (5th Cir. 1997). We therefore conclude that remand for further consideration of *Franks* is appropriate.

IV

The portion of the district court order denying Officer Currie's motion to dismiss pertaining to *Malley* is REVERSED, and this case is REMANDED for further proceedings consistent with this opinion.

DON R. WILLETT, *Circuit Judge*, concurring:

Stating the correct outcome is easy in this case; untangling a knotty constitutional inquiry to arrive at that outcome, less so. Today's bottom-line disposition is certainly correct: Reversing the denial of Officer Currie's *Malley*-based motion to dismiss, and remanding the *Franks* issue. I write separately only to point out that the Mayfields have not shown *any* constitutional violation, much less a clearly established one.

* * *

The court begins (and ends) its immunity analysis on "clearly established law" grounds, declining to address—let alone determine—whether Officer Currie violated the Fourth Amendment in the first place. True, the Supreme Court has blessed our "sound discretion" to pivot solely on prong two of the qualified-immunity analysis.[1] And "clearly established law" is often outcome-determinative. But just because we *can* jump straight to prong two without undertaking the nettlesome task of determining if anyone's rights were violated doesn't mean we *should*. Leapfrogging the constitutional merits does make for easier sledding.[2] But such skipping, jurists and scholars lament, leads

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[1] *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009) ("The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."). *See also Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) ("address[ing] only the qualified immunity question, not whether there was a Fourth Amendment violation in the first place").

[2] *Zadeh v. Robinson*, 928 F.3d 457, 479–80 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part).

to "'constitutional stagnation'—fewer courts establishing law at all, much less *clearly* doing so."[3]

The modern immunity regime, as with many judge-invented doctrines, could use greater precision. And one way to advance constitutional clarity is to give courts and public officials more matter-of-fact guidance as to what the law prescribes and proscribes. Yes, scrutinizing the alleged constitutional offense requires more work. More time. More resources. Overworked federal courts already resemble Lucy and Ethel in the chocolate factory.[4]

But since we require plaintiffs to prove a violation of clearly established law, it seems only fair that we do our part in establishing what that law is. How can a plaintiff produce precedent if fewer courts are producing precedent? How can a plaintiff show a violation if fewer courts are showing what constitutes a violation? The result:

> Section 1983 meets Catch-22. . . . Important constitutional questions go unanswered precisely because no one's answered them before. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads government wins, tails plaintiff loses.[5]

Ordinary citizens are told that ignorance of the law is no excuse. The judge-created rules of qualified

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[3] *Id.* at 479 (quoting Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 12 (2015)).

[4] *I Love Lucy: Job Switching* (CBS television broadcast Sept. 15, 1952).

[5] *Zadeh*, 928 F.3d at 479–80.

immunity are, well, different. Accordingly, judges should, whenever possible, shrink the universe of uncertainty and "clearly establish" which alleged misdeeds violate the law, and which do not, thus narrowing the presumed knowledge gap between those who enforce our laws and those who live under them.

I

Officer Currie is shielded from civil liability "insofar as [her] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[6] Specifically, the Mayfields must show: "(1) that [Officer Currie] violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct."[7]

As explained below, the Mayfields fall doubly short: There is no Fourth Amendment violation at all, clearly established or otherwise.

A

The Mayfields argue that Officer Currie violated Mr. Mayfield's Fourth Amendment right[8] because her

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[6] *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (citations omitted).

[7] *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (quoting *Harlow*, 457 U.S. at 818).

[8] The Fourth Amendment protects the right to be free from "unreasonable searches and seizures." U.S. CONST. amend. IV. Because an arrest qualifies as a "seizure" of a "person," it "must be reasonable under the circumstances." *Ashcroft*, 563 U.S. at 735–36 (citation omitted). "Fourth Amendment reasonableness is predominantly an objective inquiry" that asks "whether the circumstances, viewed objectively, justify [the challenged] action." *Id.* at 736. (internal quotation marks and citations omitted).

warrant-application affidavit for his arrest unreasonably lacked probable cause under *Malley v. Briggs*.[9] Officer Currie argues there is no constitutional violation because the municipal court judge issued the warrant for Mr. Mayfield's arrest and, under the independent-intermediary doctrine, the judge's decision breaks the chain of causation and insulates her from liability.[10]

To start, the *Malley* analysis does not answer the constitutional question. In *Malley*, the Supreme Court clarified that, in the context of an arrest warrant, qualified immunity shields officers from liability

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[9] 475 U.S. 335 (1986). The Mayfields also argue that Officer Currie violated the Fourth Amendment on the theory that she maliciously concealed information that would have, if included, deprived the warrant of probable cause. *See Franks v. Delaware*, 438 U.S. 154 (1978). But because the district court did not address the alleged omissions or their impact on probable cause, if any, we properly remand the case with respect to the *Franks* analysis. Therefore, we limit our discussion to the *Malley* analysis.

However, it is worth explicitly clarifying that *Malley* and *Franks* involve distinct applications of qualified immunity to Fourth Amendment violations: *Malley* centers on the officer's lack of facts to support the probable cause for a warrant, while *Franks* focuses on the officer's malicious motive in providing—or withholding—material information for use in the affidavit. Some of our prior cases synthesized *Franks* and *Malley*, but, as we recently made clear en banc, malice has no place in the *Malley* analysis. *Melton v. Phillips*, 875 F.3d 256, 264 (5th Cir. 2017) (en banc) (correctly viewing *Franks* and *Malley* as distinct applications of qualified immunity to Fourth Amendment violations).

[10] *Deville v. Marcantel*, 567 F.3d 156, 170 (5th Cir. 2009). But the independent- intermediary doctrine is not impervious: *Malley* recognized that an officer is not immune, *even if* the judge issues an arrest warrant based on that officer's affidavit, where the warrant application lacks probable cause. *See Malley*, 475 U.S. at 344–45.

unless the "warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable."[11] This merely restates the ordinary qualified-immunity standard: that officers are only liable when "every 'reasonable official would [have understood] that what he is doing violates'" the constitutional right at issue.[12]

So, setting aside the clearly established law issue, I would address head-on the constitutional merits: Did Mr. Mayfield suffer a Fourth Amendment violation on the grounds that the warrant relied on too few facts to support probable cause? "Because probable cause deals with probabilities and depends on the totality of the circumstances, it is a fluid concept that is not readily, or even usefully, reduced to a neat set of legal rules."[13] Our arrest-warrant affidavit cases, like *Blake v. Lambert*, instruct that probable cause exists when facts are stated in the arrest-warrant affidavit from which a judge could independently determine a crime was likely committed.[14]

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[11] *Malley*, 475 U.S. at 344–45 (citation omitted).

[12] *Ashcroft*, 563 U.S. at 741 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

[13] *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018) (internal quotation marks and citations omitted).

[14] 921 F.3d 215, 220–21 (5th Cir. 2019).

In the context of a warrantless arrest, "probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 243 n.13 (1983). This "is not a high bar." *Kaley v. United States*, 571 U.S. 320, 338 (2014).

In the analogous context of a search warrant, "[p]robable cause exists when there are reasonably trustworthy facts which, given the totality of the circumstances, are sufficient to lead a prudent person to believe that the items sought constitute fruits,

On its own, Officer Currie's affidavit is rather lean, identifying Mr. Mayfield, reciting the charged offense, and citing the corresponding statutes. But her affidavit has facts (unlike the constitutionally deficient one in *Blake*, which did not). Officer Currie's affidavit states that Mr. Mayfield assisted his co-conspirators and provided them with information that enabled them to photograph and film Mrs. Cochran in her room at St. Catherine's.[15] And importantly, even if Officer Currie's affidavit is bare bones, an affidavit can be rehabilitated.[16] Here, Officer Currie did not submit the contested affidavit in a vacuum. There were additional

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instrumentalities, or evidence of a crime." *Kohler v. Englade*, 470 F.3d 1104, 1109 (5th Cir. 2006) (citing *Gates*, 462 U.S. at 238–39).

[15] The warrant affidavit provides that Mr. Mayfield "did willfully, unlawfully, and feloniously conspire with John Mary and Clayton Kelly to commit the crime of Photographing taping, or filming a person in violation of expectation of privacy (97-29-63) by communicating, planning, and assisting Clayton Kelly with information and resources which aided and assisted Kelly in photographing and filming Rose Cochran inside of her residence, her room at St. Catherine's Village, without her knowledge or permission."

[16] "Because the Fourth Amendment does not require written warrants, an otherwise invalid warrant can be rehabilitated by sworn oral testimony before a judicial officer given contemporaneously upon presentation of the warrant application." *Spencer v. Staton*, 489 F.3d 658, 662 (5th Cir.), *modified on other grounds on reh'g*, 489 F.3d 466 (5th Cir. 2017) (citing *United States v. Hill*, 500 F.2d 315, 320 (5th Cir. 1974), for the proposition that a court may consider an affiant's sworn oral testimony, extrinsic to the written affidavit, in determining whether a warrant was founded on probable cause). Here, the issuing municipal court judge had before him Officer Currie's three *sworn* arrest-warrant affidavits for Mr. Mayfield's co-conspirators as well as Officer Harrison's *sworn* search-warrant affidavit for Mr. Mayfield's home and office. Such evidence, though extrinsic to the contested affidavit, rehabilitated the contested affidavit, assuming it needed rehabilitation.

supporting facts from which the municipal court judge could independently determine probable cause. Specifically, Officer Currie submitted the contested affidavit on the same day, and to the same judge, that Officer Harrison submitted his search- warrant affidavit for Mr. Mayfield's house and office. And Officer Harrison's affidavit was far meatier, stating that Mr. Mayfield agreed to assist Mr. Mary and Mr. Sager in creating their video of Mrs. Cochran and that Mr. Mayfield provided Mr. Kelly with "detailed information" on how to get into St. Catherine's and locate Mrs. Cochran's room.[17] Plus, in the days immediately prior to her submission of the contested affidavit, Officer Currie submitted sworn arrest-warrant affidavits for three of Mr. Mayfield's co-conspirators, one of which explicitly refers to Mr. Mayfield's involvement in the conspiracy; all of these arrest-warrant affidavits were submitted to the very same judge who received the affidavit at issue here.[18] And finally, the Mayfields

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[17] Officer Harrison's search-warrant affidavit provides factual support for Officer Currie's affidavit: "John Mary stated that he and Richard Sager eventually made contact with Mark Mayfield who agreed to assist them in creating th[e] video." The affidavit later notes, "Clayton Kelly was provided with detailed information on how to get into St. Catherine's Village and also how to locate and get into the area where her room was located through the assistance of Mark Mayfield."

[18] Officer Currie submitted arrest-warrant affidavits for Mr. Sager, for Mr. Mary, and for Mr. Kelly. In the arrest-warrant affidavit for Mr. Mary, Officer Currie noted that Mr. Mary "stated in some of the messages that an individual named `Mark' w*uld b e making the arrangements to have an individual . . . call Clayton Kelly with detailed instructions on where to locate Rose Cochran's room within St. Catherine's Village." "Mark" is referring to Mr. Mayfield.

The judge also had before him search-warrant affidavits for Mr. Mayfield's co-conspirators: Officer Harrison submitted search-

admit that the municipal court judge signed Mr. Mayfield's arrest warrant on the basis of the Currie affidavit *and* the Harrison affidavit.[19]

In sum, the record evidence establishes that the municipal court judge was presented with an arrest-warrant affidavit containing facts that were corroborated and supplemented by other arrest and search-warrant affidavits, which, considered together, establish probable cause and justify the warrant for Mr. Mayfield's arrest.[20] Because the warrant was supported by probable cause, the Mayfields have not shown a constitutional violation.

B

Turning to the second issue—"clearly established law"—the court rightly concludes that the Mayfields fail to establish that the alleged Fourth Amendment violation was "clearly established" at the time of the challenged conduct.[21] To be clearly established, a right must be sufficiently clear "that every 'reasonable official would [have understood] that what he is doing violates that right.'"[22] An officer is not eligible for qualified immunity under *Malley* when there is an "obvious failure of accurately presented evidence to support the probable cause required for the issuance

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warrant affidavits for Mr. Kelly's residence and car and for Mr. Mary's residence, and Officer Brown submitted a search-warrant affidavit for Mr. Sager's residence.

[19] The Mayfields allege this fact in their Amended Complaint.

[20] *Compare Spencer*, 489 F.3d at 662–63 (finding that the record was insufficient to demonstrate that the officer's testimony was sufficient to support probable cause and noting that the officer did not allege that his oral statements were made under oath).

[21] *Ashcroft*, 563 U.S. at 735 (quoting *Harlow*, 457 U.S. at 818).

[22] *Id.* at 741 (quoting *Anderson*, 483 U.S. at 640).

of a warrant."[23] Officer Currie is entitled "to qualified immunity from suit unless, 'on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue.'"[24]

We have held the standard in *Malley* is not satisfied when an officer proffers a facially invalid warrant affidavit—one devoid of any facts—one that "states nothing more than the charged offense, accompanied by a conclusory statement" that the individual committed the offense.[25] That was *Blake*, where the officer's arrest-warrant affidavit "simply identifie[d] [the named individual], recite[d] the charged offense, and cite[d] the corresponding . . . statutes."[26] Such a bare-bones affidavit fell short of *Malley* because "[i]t d[id] not provide any supporting facts from which a [judge] could independently determine probable cause."[27]

And, while we have held that an officer is not entitled to qualified immunity under *Malley* when the warrant was based solely on a skimpy affidavit, the burden is on the Mayfields to cite a case holding that the Fourth Amendment required the affidavit to establish probable cause on its own, without consideration of other supporting documents.[28] They have not done so.

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[23] *Melton*, 875 F.3d at 264.

[24] *Spencer*, 489 F.3d at 661 (quoting *Malley*, 475 U.S. at 341).

[25] *Id.* at 662.

[26] *Blake*, 921 F.3d at 220.

[27] *Id. See also Spencer*, 489 F.3d at 662 (citations omitted) (describing a bare-bones affidavit as one that "does not supply the factual basis for probable cause necessary for issuance of an arrest warrant").

[28] *Blake*, 921 F.3d at 221.

II

The Supreme Court has explicitly recognized our discretion to address the qualified-immunity prongs in whatever order we choose. In my judgment, the development of the law is best served by undertaking, wherever possible, the threshold constitutional analysis. Respectfully, courts should attempt to provide greater judicial guidance at the outset, explaining whether a right was in fact violated, not merely whether a rights violation was clearly established.

In any event, because the Mayfields have failed to show a constitutional violation, let alone a clearly established one, Officer Currie cannot be liable under *Malley*. And the court is right to remand the *Franks* issue so that the district court can tackle it in the first instance.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI NORTHERN DIVISION

CAUSE NO. 3:17-CV-514-CWR-FKB

ROBIN MAYFIELD, *et al.*

Plaintiffs

v.

BUTLER SNOW LLP, *et al.*

Defendants

ORDER

A variety of motions are before the Court. We begin with the City of Madison's motion for reconsideration.

Because no judgment has issued, this Court "is free to reconsider and reverse its decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law." *Austin v. Kroger Texas, L.P.*, 864 F.3d 326, 336 (5th Cir. 2017) (quotation marks and citations omitted).

The City argues that the plaintiffs' retaliation claim fails because causation is lacking and because *Lozman v. City of Riviera Beach* is distinguishable. We are all working to understand and apply *Lozman* since it was handed-down last year. In this case, fidelity to *Lozman* weighs in favor of taking up these fact-specific arguments at the summary judgment stage. Of course,

"it bears repeating that sufficiently stating a claim says nothing about a plaintiff's ability to succeed at summary judgment or at trial." *Acadia Ins. Co. v. Hinds Cnty. Sch. Dist.*, No. 3:12-CV-188-CWR-LRA, 2013 WL 2182799 at *7 (S.D. Miss. May 20, 2013) (citation omitted).

The City then presses that the plaintiffs' claims are time-barred, but this Court sees no reason to deviate from its earlier, contrary ruling. The motion is denied.

Next up is Mayor Hawkins-Butler's renewed motion to dismiss. As suggested in the earlier Order, the Mayor is entitled to qualified immunity because the most analogous First Amendment retaliation law was not clearly established until 2018. The individual-capacity claims brought against her are dismissed.

Finally, Officers Currie and Harrison have renewed their motions to dismiss. Officer Currie's motion is due to be denied. It was not objectively reasonable for her to present to the judge such a bare-bones warrant application lacking any underlying facts and circumstances showing Mayfield's unlawful conduct. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986). On the other hand, Officer Harrison has shown that the erroneous legal citation in his application was the kind of negligent "mistaken judgment[]" that merits qualified immunity. *Id.* at 343. The motion is, therefore, granted as to Officer Harrison and denied as to Officer Currie.

SO ORDERED, this the 30th day of April, 2019.

s/ Carlton W. Reeves
UNITED STATES DISTRICT JUDGE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI NORTHERN DIVISION

CAUSE NO. 3:17-CV-514-CWR-FKB

ROBIN MAYFIELD; OWEN MAYFIELD; WILLIAM MAYFIELD; THE ESTATE OF MARK STEVENS MAYFIELD

Plaintiffs

v.

BUTLER SNOW LLP; DONALD CLARK, JR.; THE CITY OF MADISON, MISSISSIPPI; MARY HAWKINS-BUTLER, *Individually and in her Official Capacity*; POLICE CHIEF GENE WALDROP, *Individually and in his Official Capacity*; CHUCK HARRISON, *Individually and in his Official Capacity*; VICKIE CURRIE, *Individually and in her Official Capacity*; RICHARD WILBOURN, III; JOHN AND JANE DOES 1-10

Defendants

and

THAD COCHRAN

Movant

ORDER

Mark Mayfield lived in Madison County, Mississippi. He and his wife, Robin, were proud parents of two sons, Owen and William. He practiced real estate law, was active in the Baptist Church, and was a founder of the Mississippi Tea Party.

In 2014, Mayfield's activism led him to volunteer for a political campaign. He enthusiastically supported State Senator Chris McDaniel's effort to unseat U.S. Senator Thad Cochran. Sadly, Mayfield's actions during that campaign would ultimately lead to his death.

Now before the Court are a variety of motions in which the defendants seek to be relieved of liability for Mayfield's passing. All will be discussed below.

I. Factual and Procedural History

The following allegations and quotes are drawn from the amended complaint. They are taken as true for present purposes.

In 2014, Mississippi was due to elect someone to the United States Senate. A contentious Republican Party primary was underway. Many members of the Mississippi Tea Party supported State Senator Chris McDaniel's attempt to oust incumbent U.S. Senator Thad Cochran. Mark Mayfield was among those Tea Partiers. He got involved with the McDaniel campaign.

McDaniel supporters perceived themselves to be up against a politically and financially powerful "Republican Establishment." Cochran had been a U.S. Senator since 1978. His reelection campaign had the backing of many powerful Mississippians and institutions, including Mississippi's "most politically connected and powerful law firm"—Butler Snow LLP. The firm, based in Ridgeland, has offices throughout the southeastern United States and other parts of the country, including Washington, D.C., Boston, and Denver, and even as far away as London and Singapore. The firm's members include former Republican National Committee Chairman and Mississippi Governor Haley Barbour, former U.S. Senator David Vitter, and other ex-politicians.

Cochran's reelection campaign also drew support from many other state and local politicians.

The McDaniel camp thought the Republican Establishment was playing dirty. According to the amended complaint, Butler Snow was providing legal and financial support to Cochran's campaign *and* an "independent" Super PAC supporting Cochran's reelection effort. If true, that coordination would violate federal election law. The amended complaint alleges that the Super PAC, called "Mississippi Conservatives," was organized and operated by Haley Barbour and his family. It further claims that Barbour was secretly and illegally providing financial guarantees to Trustmark National Bank so that the Super PAC could get a bank loan. When the secret loan was finally unearthed, the Federal Election Commission fined the Super PAC $19,000.

McDaniel supporters John Mary, Rick Sager, Clayton Kelly, and Richard Wilbourn III ("the conspirators") decided to fight back. They thought Cochran was a hypocrite and an adulterer who lived with his longtime aide in Washington, D.C. while his aging wife, Rose, was left alone in a Madison, Mississippi assisted living facility called St. Catherine's Village.[1] The conspirators planned to take a photo of the bedridden Mrs. Cochran and use it in an attack ad against Cochran.

The conspirators sought Mayfield's assistance, knowing that his mother also lived in St. Catherine's Village. Mayfield refused to photograph Mrs. Cochran but agreed to "show where the room was." So in late March or early April 2014, Mayfield met Wilbourn at St.

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[1] The aide is now Cochran's wife. Chris Cillizza, *Thad Cochran's new marriage — and why our politics stink*, WASH. POST, May 26, 2015.

Catherine's Village. Mayfield "pointed Wilbourn down the hall . . . to where Rose Cochran's room was located."

Easter Sunday fell on April 20. That day, Kelly went to Mrs. Cochran's room and took a video of her lying in her bed. He posted an attack ad on YouTube six days later. The ad contained a still photo of Mrs. Cochran in her bed. The video went viral and was taken down in a matter of hours.

Cochran and his campaign retained Don Clark, the chairman of Butler Snow, to represent them in the Rose Cochran "incident." In mid-May, Clark told the Mayor of the City of Madison, Mary Hawkins-Butler, that the incident should be treated criminally, as it was a possible case of exploitation of a vulnerable adult. The Mayor referred him to Madison Police Chief Gene Waldrop. Clark then pitched various criminal charges to Chief Waldrop and his officers. The Police Department decided to pursue the matter.

On May 16, the Madison Police Department arrested Kelly and charged him with exploitation of a vulnerable adult. At that moment Mayfield and Wilbourn were campaigning for McDaniel at the Ross Barnett Reservoir. Additional charges would later be brought against Kelly. He eventually pled guilty to burglary.

On May 22, the Madison Police Department arrested Mayfield, Mary, and Sager for conspiracy. The basis for Mayfield's arrest warrant was Officer Vickie Currie's affidavit stating that Mayfield had communicated with the other conspirators to photograph Mrs. Cochran. The police also executed search warrants on Mayfield's home and office. The basis for those warrants was Officer Chuck Harrison's affidavits indicating that Mayfield's office would have evidence that he inflicted

pain on a vulnerable person. Mayfield's bond was set at $250,000.[2]

Mayfield's largest client, Trustmark National Bank, abandoned him the next day. That caused the "complete collapse of his law practice."[3] Mayfield became depressed, sought professional help, and was prescribed medication for sleep, depression, and anxiety. His wife experienced similar symptoms and was also prescribed medication.

On June 27, 2014, Robin Mayfield found her husband in their basement, dead of a gunshot wound to the head. He was 57. The coroner ruled it a suicide.

Robin, her sons, and the Mayfield estate filed this suit three years later. They assert wrongful death, civil

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[2] Dale Danks, Jr. was the municipal court judge who signed the warrants and set Mayfield's bond. Interestingly, Danks has now entered his appearance in this case as co-counsel for Mayor Hawkins-Butler. That inadvertently lends credence to the plaintiffs' beliefs about the Republican Establishment.

[3] In one of several ironies in this sad case, the allegations suggest that Mayfield's biggest client was part of the swamp Tea Partiers like Mayfield claimed they wanted to drain:

> Unbeknownst to Mark at the time, Trustmark National Bank was solidly in the Cochran camp. Trustmark National Bank was the single largest contributor to a Cochran-related Super PAC, having contributed in excess of $250,000.00 to Mississippi Conservatives, among other contributions. Also unbeknownst to Mark, Trustmark National Bank had financed the million dollar D.C. home of [Cochran aide] Kay Webber, where Thad Cochran also lived. . . . Upon information and belief, when Webber purchased the house, she had a co-signor on the home who was a donor to Cochran and rumored to be the wife of a Member of the Board of Directors for Trustmark National Bank.

Docket No. 6 at 23-24.

conspiracy, negligent infliction of emotional distress, § 1983, and related causes of action against Butler Snow, Clark, the City of Madison, Mayor Hawkins-Butler, Chief Waldrop, Officer Harrison, Officer Currie, and Wilbourn. The plaintiffs claim that the defendants violated rights guaranteed by the First, Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

The plaintiffs have a variety of grievances. They say the Cochran campaign and Butler Snow pressed charges for political advantage so that they could smear the McDaniel campaign for associating with criminals. They say Mayor Hawkins-Butler and members of her City's police department were longtime Cochran supporters who arrested Mayfield in retaliation for his political views. They say the police were wrong to charge Mayfield at all because his speech— disclosing Mrs. Cochran's room number to Wilbourn—was protected by the First Amendment, and that the police further erred by charging him with a felony, since the value of any exploitation did not exceed $250. They say the District Attorney's Office falsely and recklessly blamed Mayfield for giving Kelly the location of Mrs. Cochran's room, when in fact Mayfield told Wilbourn, who *then* told Kelly. They say Butler Snow and the City of Madison were in cahoots because Butler Snow has represented the City in bond issuances and lobbying for years. They express anger and heartbreak at Wilbourn's betrayal of Mayfield, his purported friend, and disbelief that the authorities never charged Wilbourn with conspiracy.

The defendants have all responded with motions to dismiss. They contend that Mayfield's arrest was supported by probable cause, that his claims are

untimely, and that his death was his responsibility alone.

II. Legal Standards

A. Motions to Dismiss

When considering a motion to dismiss under Rule 12(b)(6), the Court accepts the plaintiff's factual allegations as true and makes reasonable inferences in the plaintiff's favor. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A satisfactory complaint will "contain a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.* at 677-78 (quotation marks and citation omitted). This requires "more than an unadorned, the defendant-unlawfully-harmed-me accusation," but the complaint need not have "detailed factual allegations." *Id.* at 678 (quotation marks and citation omitted). The plaintiff's claims must also be plausible on their face, which means there is "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted).

B. Qualified Immunity

Four defendants have invoked the defense of qualified immunity.

"Qualified immunity shields government officials from civil damages liability insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pasco ex rel. Pasco v. Knoblauch*, 566 F.3d 572, 578 (5th Cir. 2009) (quotation marks and citation omitted). "More precisely, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right . . . in the light of pre-existing law

the unlawfulness must be apparent." *Id.* (quotation marks, citation, and brackets omitted).

At the motion to dismiss stage, a qualified immunity analysis requires the Court to decide "(1) whether facts alleged or shown by plaintiff make out the violation of a constitutional right, and (2) if so, whether that right was clearly established at the time of the defendant's alleged misconduct." *Id.* at 579 (citations omitted).

III. Discussion

A. Butler Snow and Don Clark

In their motion to dismiss, Butler Snow and Don Clark argue that the entirety of the case fails because they had probable cause to report a crime to the Madison Police Department. The plaintiffs agree that their claims, at least as to these defendants, turn on whether there was probable cause.[4]

Probable cause is "a showing of the probability of criminal activity." *United States v. Froman*, 355 F.3d 882, 889 (5th Cir. 2004) (quotation marks and citations omitted). The standard "requires the existence of facts sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed and the person to be arrested (or searched) committed it." *Id.* A proper showing of probable cause requires "more than mere suspicion" but less than "proof beyond a reasonable doubt." *Id.*

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[4] Per the parties' framework, the Court assumes that Butler Snow and Don Clark are state actors subject to § 1983 liability. The Court does not endorse this dubious assumption. *See Daniel v. Ferguson*, 839 F.2d 1124, 1130 (5th Cir. 1988) ("Police reliance in making an arrest on information given by a private party does not make the private party a state actor.").

The parties further agree that the Court may resolve this motion by considering the incident reports and affidavits referenced in the amended complaint. The Court has reviewed those documents.

The incident reports and affidavits do not show what exactly Don Clark told the Madison Police Department on May 16. A summary of the call was memorialized by someone else, Officer Currie, and three days later at that. The summary said that Clark, representing the Cochran campaign, had called to report a "possible case of exploitation of a vulnerable adult" based on the video Kelly posted on YouTube.

The plaintiffs' amended complaint alleges that Butler Snow and Clark were engaged in "a political prosecution." Their brief adds that the incident report and affidavits "demonstrate . . . that the Butler Snow defendants knew the search and arrest warrants issued for the Rose Cochran Incident lacked probable cause." But the documents show no such thing. They confirm only that Clark reported a "possible" crime against Mrs. Cochran. What else Clark said, suggested, or knew cannot be discerned from the four corners of the document.

On review, the Court finds that Clark's report was supported by probable cause. The YouTube video showed that someone invaded Mrs. Cochran's privacy, took a photo, and broadcast it for political advantage. At a minimum, the perpetrators of such a crime could be subject to prosecution for trespass, breaking and entering, invasion of privacy, and conspiracy to commit those substantive offenses. Clark was well within his rights—anyone would have been— to tell the police that a "possible" crime had been committed.

Nothing suggests that Clark made a false report. Nothing suggests that Clark's report referenced Mayfield. And nothing suggests that Clark or his firm dictated how law enforcement went about its investigation.

To all this, the plaintiffs insist that Clark was in the wrong because no crime was committed. Invasion of privacy requires proof that the victim was "in a state of undress," they say—and Rose Cochran was dressed. But that is a gross misread of the statute. The law required proof that the victim was in a place where she "*would intend to be*" undressed, "including, but not limited to" a "bedroom." Miss. Code Ann. § 97-29-63(1) (2014) (emphasis added). It is therefore irrelevant that Mrs. Cochran was dressed. She was entitled to privacy in her bedroom.

The plaintiffs then contend that Mayfield had a constitutional right to tell Wilbourn where Mrs. Cochran's room was located. No, he did not. The First Amendment does not guarantee the right to engage in a criminal conspiracy. *See United States v. El-Mezain*, 664 F.3d 467, 537 (5th Cir. 2011) ("It is well established under First Amendment principles that there is no prohibition on the evidentiary use of speech to establish the elements of a crime or to prove motive or intent. In addition, speech itself may be criminal under certain circumstances.").

The plaintiffs next criticize Clark and Butler Snow for failing to report Kelly's trespass to the State Department of Health.[5] The grievance has no merit. The statute they cite says that persons who suspect abuse or exploitation "may" report it to the Depart-

[5] It's an odd complaint: if Clark and Butler Snow really *were* on a witch hunt, would Mayfield truly want them to lodge false complaints with additional government agencies?

ment. Miss. Code Ann. § 43-47-37(4). By the terms of this statute, Clark and Butler Snow had no duty to report the exploitation of Mrs. Cochran to the State Department of Health.

The bottom line is that Clark and Butler Snow had probable cause to believe that a crime had been committed. They are not liable for their report to the Madison Police Department.[6]

B. Chief Waldrop, Officer Currie, and Officer Harrison[7]

The law enforcement defendants contend that the plaintiffs' claims are time-barred, that they had probable cause to arrest Mayfield and search his properties, and that they are entitled to qualified immunity.

The amended complaint does not explain how Chief Waldrop violated the plaintiffs' rights, so he is entitled to dismissal. What follows will focus on Officers Currie and Harrison. We pick up where we left off—after Clark's May 16 report to the Madison Police Department.

On May 19, someone at the Madison Police Department completed a supplemental repor describing the course of the investigation from May 16 to May 19. It said that a consensual search of Kelly's Facebook account had unearthed messages between Kelly and Mary about their plans to enter Mrs. Cochran's room,

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[6] Given this outcome, Clark and Butler Snow's motion to file under seal a state-court deposition of Mayor Hawkins-Butler [106] and motion to convert to summary judgment [107] are denied as moot. Their motion for leave to file a supplemental brief [104] is granted; the documents need not be refiled. Their motion for an extension of time to file a reply brief [111] is granted nunc pro tunc.

[7] In this section, the Court will address only the individual-capacity claims brought against these defendants.

take a photo, and use it in a political video. In those messages, Mary told Kelly that "Mark" would arrange for an unknown person to tell Kelly how to locate Mrs. Cochran's room.

The Facebook messages must have led to Mark Mayfield. On May 22, Officer Currie presented to a municipal judge a general affidavit alleging that Mayfield had conspired with Kelly and Mary. It specifically said that "by communicating, planning, and assisting Clayton Kelly with information and resources which aided and assisted Kelly in photographing and filming Rose Cochran inside of her residence, . . . without her knowledge or permission," Mayfield had helped his co-conspirators violate Mississippi Code § 97-29-63. That statute, as it read at that time, provided that:

> Any person who with lewd, licentious or indecent intent secretly photographs, films, videotapes, records or otherwise reproduces the image of another person without the permission of such person when such a person is located in a place where a person would intend to be in a state of undress and have a reasonable expectation of privacy, including, but not limited to, private dwellings or any facility, public or private, used as a restroom, bathroom, shower room, tanning booth, locker room, fitting room, dressing room or bedroom shall be guilty of a felony . . . .

Miss. Code Ann. § 97-29-63(1) (2014).[8]

Also on May 22, Officer Harrison applied for search warrants for Mayfield's home and business. After

[8] This statute was amended as of July 1, 2015.

describing the course of the investigation, the affidavits explained how, according to Mary, Mayfield agreed to help the conspirators by telling Kelly how to access St. Catherine's Village. The affidavits further stated that Mayfield's home and office would have information (mainly electronically stored information) regarding the exploitation of Mrs. Cochran.

Officer Harrison's affidavits cited a violation of Mississippi Code § 43-47-19(3). Under that statute, "[a]ny person who willfully inflicts physical pain or injury upon a vulnerable person shall be guilty of felonious abuse or battery, or both, of a vulnerable person and, upon conviction thereof, may be punished by imprisonment in the State Penitentiary for not more than twenty (20) years." Miss. Code Ann. § 43-47-19(3).

1. The Constitutional Violations (§ 1983)

The threshold question is whether the plaintiffs' § 1983 claims are timely. The Court concludes that they are. As the Fifth Circuit recently explained in *Winfrey v. Rogers*, when a plaintiff's claim "more closely resembles" a malicious prosecution case than a false imprisonment case, the statute of limitations begins to run when "the prosecution ends in the plaintiff's favor." No. 16-20702, 2018 WL 3976939, at *5 (5th Cir. Aug. 20, 2018). Here, as in *Winfrey*, the plaintiffs' "claim is more like the tort of malicious prosecution, because [the plaintiff] was arrested through the wrongful institution of legal process: an arrest pursuant to a warrant, issued through the normal legal process, that is alleged to contain numerous material omissions and misstatements." *Id.* For this reason, the plaintiffs' § 1983 claims accrued on the date the prosecution ended—which is the date Mayfield died. The plaintiffs' commencement of this

lawsuit within three years of that date made it timely. The Court will move on to the merits.

Police officers who apply for warrants are typically entitled to qualified immunity for their on-the-job mistakes. *See Malley v. Briggs*, 475 U.S. 335, 343 (1986). In layman's terms, that means police officers are given "ample room for mistaken judgments."[9] *Id.* Relevant to this case, however, there are "two different situations in which" qualified immunity can be lost and "an officer can be held liable for an unlawful search even when a warrant was obtained." *Melton v. Phillips*, 875 F.3d 256, 266 (5th Cir. 2017) (en banc) (Costa, J., concurring).

The first situation occurs when the attesting officer's "warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Malley*, 475 U.S. at 344-45. "The *Malley* wrong is not the presentment of false evidence, but the obvious failure of accurately presented evidence to support the probable cause required for the issuance of a warrant." *Melton*, 875 F.3d at 266 (Costa, J., concurring).

The second situation comes into play when the attesting officer, or an officer who provides information for the warrant application, makes false statements.

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[9] Despite the existence of qualified immunity, the Supreme Court has found it "desirable" that an officer first pauses to consider "whether he has a reasonable basis for believing that his affidavit establishes probable cause." *Malley*, 475 U.S. at 343. "Premature requests for warrants are at best a waste of judicial resources; at worst, they lead to premature arrests, which may injure the innocent or, by giving the basis for a suppression motion, benefit the guilty." *Id.* at 344-45.

> The Supreme Court held in *Franks v. Delaware* that an officer may be liable when he makes a false statement knowingly and intentionally, or with reckless disregard for the truth that results in a warrant being issued without probable cause . . . . The Fifth Circuit has interpreted *Franks* liability to also include liability for an officer who makes knowing and intentional *omissions* that result in a warrant being issued without probable cause.

Michalik v. Hermann, 422 F.3d 252, 258 n.5 (5th Cir. 2005) (quotation marks and citations omitted).

In our case, the most glaring problem is that Officer Currie's affidavit is conclusory. It contains no facts tending to show that Mayfield committed a crime. With the benefit of hindsight—*i.e.*, the admissions in the plaintiffs' complaint—we know that she was correct; Mayfield *did* conspire with others to photograph Mrs. Cochran in her bedroom. But Officer Currie's affidavit may run afoul of *Malley* and its progeny because it provides no factual basis on which a judge could evaluate her application.

Officer Harrison's affidavits have the opposite problem. They contain factual matter "sufficient to provide the magistrate with a substantial basis for determining the existence of probable cause" that *a* crime had been committed. *Kohler v. Englade*, 470 F.3d 1104, 1109 (5th Cir. 2006) (quotation marks and citation omitted). But Officer Harrison got the crime wrong. The facts he presented do not lead to the conclusion that Mayfield could have violated Mississippi Code § 43-47-19(3). No one acted or conspired to inflict physical pain upon Mrs. Cochran. Given the criminal statute invoked, it is not obvious whether there was "some nexus between the items to be seized and the

criminal activity being investigated." *Id.* (citation omitted).

In short, Officer Currie got the law right but not the facts, while Officer Harrison had the facts correct but not the law. The municipal court judge nevertheless issued all of the arrest and search warrants the officers desired. That issuance does not necessary relieve the officers from liability. Even the Supreme Court has acknowledged that "ours is not an ideal system, and it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should." *Malley*, 475 U.S. at 345–46; *see also Kohler*, 470 F.3d at 1109.

The Court requires additional briefing to determine whether the plaintiffs have stated a claim sufficient to overcome Officer Currie and Harrison's qualified immunity defense. Within 30 days, therefore, the Officers may renew their motion to dismiss the § 1983 claims. They shall have a total of 25 pages for their opening and reply briefs. The plaintiffs' response shall be limited to the § 1983 claims against these defendants only. The plaintiff's response shall also be limited to 25 pages. The parties are encouraged to provide a detailed discussion of the relevant federal case law. Oral argument may be scheduled for later in the fall.

2. The State Law Claims

The plaintiffs' state tort claims against Officers Currie and Harrison may not proceed. The plaintiffs missed the one-year filing deadline for intentional torts. *See* Miss. Code Ann. § 15-1-35. Their negligence claims, meanwhile, fail because Mississippi law permits negligence claims arising from suicide only when the decedent was in the custody or control of a facility, such as a mental health facility or hospital. *Truddle v.*

Baptist Ment'l Hosp.-DeSoto, Inc., 150 So. 3d 692, 697–98 (Miss. 2014). That was not the case here.[10] The plaintiffs' effort to distinguish *Truddle* is unavailing; the case they rely upon is grounded in intentional tort, not negligence. *See State for Use & Benefit of Richardson v. Edgeworth*, 214 So. 2d 579, 586 (Miss. 1968).

As a result, these claims are dismissed.

C. The City of Madison and Mayor Hawkins-Butler

Next up are the plaintiffs' (official-capacity) claims against the City as well as their individual-capacity claims against Mayor Hawkins-Butler. Only the § 1983 claims will be considered further, as the plaintiffs' state-law tort claims fail for the statute of limitations reasons already discussed.

After reviewing the complaint, the Court is unable to see how the City of Madison or its Mayor violated Mayfield's constitutional rights, with one possible exception. Earlier this summer—when the briefing on these motions had already closed—the Supreme Court held that in certain situations, a person who was arrested because of political payback *can* sue a municipality for First Amendment retaliation *despite* the existence of probable cause. *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945 (2018).

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[10] Recognizing this hurdle, the plaintiffs' briefs refuse to concede that Mayfield committed suicide. We are left in a liminal state: the plaintiffs do not admit the suicide, but do not present any alternate theory of death. Whether that is uncertainty or a tactical decision, it cannot save their state-law claims today. Obviously, though, if the plaintiffs discover evidence of murder, the statute of limitations on a resulting civil suit may have been tolled.

The new decision has obvious resonance to our case. Even if there is probable cause to believe that Mayfield committed a crime, the plaintiffs contend that the City of Madison pursued him in retaliation for his political activities during the 2014 Republican Party primary. The plaintiffs may proceed to litigate this claim, and only this claim, against the City.

Questions remain about whether the plaintiffs can proceed against the Mayor. Mr. Lozman secured the Supreme Court's permission to pursue a *Monell* claim against the City, which cuts against our plaintiffs pursuing the Mayor in her individual capacity. At the same time, however, our plaintiffs' *Lozman* claim appears to be based on a single unconstitutional act of the City's final policymaker—the Mayor. If the claims merge, the plaintiffs may be entitled to proceed against her officially and individually. The Court will then have to address whether she is entitled to qualified immunity because this anti-retaliation principle was (arguably) not clearly established in spring 2014.

Additional briefing would be helpful. Within 30 days, the Mayor may renew her motion to dismiss the *Lozman* claim brought against her in her individual-capacity. The same briefing limits placed on the Officers' motion and response will apply to the Mayor's motion and response.

For these reasons, this motion is granted in part and denied in part.

D. Richard Wilbourn, III

The plaintiffs' claims against Wilbourn also cannot proceed. For one, the amended complaint does not contain any allegations describing what Wilbourn did to harm Mayfield or the plaintiffs. The fact that Wilbourn was listed as a prosecution witness for the

Kelly case does not make him part of a conspiracy to violate Mayfield's civil rights or cause emotional distress.

In addition, the only cause of action specifically mentioning Wilbourn, the wrongful death cause of action, says that Wilbourn's "intentional actions" led to Mayfield's suicide. That means the claim is subject to the one-year statute of limitations for intentional torts. *Lee v. Thompson*, 859 So. 2d 981, 991 (Miss. 2003). The plaintiffs missed that deadline and have provided no reason to toll the statute of limitations.

Wilbourn's motion to dismiss is granted in its entirety.

IV. Conclusion

Butler Snow and Clark's motion to dismiss is granted. The Officers' motion is granted in part and denied in part without prejudice to refiling as stated above. The City's motion is granted except that the plaintiffs may proceed with their *Lozman* claim. The Mayor's motion is granted in part and denied in part without prejudice to refiling as stated above. Wilbourn's motion to dismiss is granted. Renewed motions to dismiss are due within 30 days.

SO ORDERED, this the 18th day of September, 2018.

s/ Carlton W. Reeves
UNITED STATES DISTRICT JUDGE

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI NORTHERN DIVISION

CAUSE NO.: 3:17-cv-00514-CWR-FKB

ROBIN MAYFIELD, OWEN MAYFIELD, WILLIAM MAYFIELD, and The ESTATE OF MARK STEVENS MAYFIELD

Plaintiffs,

v.

BUTLER SNOW LLP, DONALD CLARK, JR., THE CITY OF MADISON, MISSISSIPPI, MARY HAWKINS-BUTLER, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY, POLICE CHIEF GENE WALDROP, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, CHUCK HARRISON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, VICKIE CURRIE, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY, RICHARD WILBOURN, III, and JOHN AND JANE DOES 1-10,

Defendants.

AMENDED COMPLAINT

JURY TRIAL DEMANDED

COME NOW Robin Mayfield, Owen Mayfield, William Mayfield, and the Estate of Mark Stevens Mayfield (the "Mayfield Estate"), and file this, their Amended Complaint against Butler Snow LLP; Donald Clark, Jr.; the City of Madison, Mississippi; Mary Hawkins-Butler, individually and in her official capacity as Mayor of the City of Madison; Gene Waldrop, individually and in his official capacity as City of Madison Police

Chief; Chuck Harrison, individually and in his official capacity; Vickie Currie, individually and in her official capacity; Richard Wilbourn, III; and John and Jane Does 1-10.

1. This is an action under 42 U.S.C. § 1983 and § 1988 for deprivation of civil rights, false arrest, false imprisonment, kidnapping, failing to intervene, violation of the equal protection and substantive due process clauses of Fourteenth Amendment to the U.S. Constitution, and for violation of free speech and associational rights guaranteed by the First Amendment to the U.S. Constitution; violation of rights under color of federal law ("*Bivens* action") arising under the First, Fourth, Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution; abuse of process; negligent infliction of emotional distress; wrongful death; and civil conspiracy.

2. The Defendants engaged in unconstitutional, negligent and/or tortious actions that harmed Mark Mayfield, Robin Mayfield, Owen Mayfield, William Mayfield; and deprived Mark Mayfield and Plaintiffs of their constitutional rights; effectively shut down Mark Mayfield's law practice; embarrassed and humiliated the Plaintiffs; and caused severe emotional distress to Mark Mayfield and his family, all of which directly led to Mark Mayfield's untimely death.

JURISDICTION AND VENUE

3. This Court has original jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. §§ 1331 and 1343. The Court has jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367.

4. This Court is the proper venue for the instant dispute pursuant to 28 U.S.C. § 1391(b), as the actions

alleged herein occurred in the Southern District of Mississippi.

PARTIES

5. Plaintiff Robin Mayfield is an adult resident of Madison County, Mississippi.

6. Plaintiff Owen Mayfield is an adult resident of Hinds County, Mississippi.

7. Plaintiff William Mayfield is an adult resident of Hinds County, Mississippi.

8. At the time of his death, Mark Stevens Mayfield was a citizen of the United States of America and the State of Mississippi wherein he resided in Madison County, Mississippi. On behalf of Plaintiff Estate of Mark Stevens Mayfield, Deceased (the "Mayfield Estate"), the suit is brought by Owen Mayfield and William Mayfield, the sons of Mark Mayfield and the duly appointed Co-Executors of the Mayfield Estate.

9. Defendant Butler Snow LLP is a Delaware limited liability partnership headquartered in Ridgeland, Madison County, Mississippi. Butler Snow LLP may be served through its Registered Agent, Thomas E. Williams, Butler Snow LLP, 1020 Highland Colony Parkway, Suite 1400, Ridgeland, Mississippi 39157-2139.

10. Defendant Donald Clark, Jr., is an adult resident of Hinds County, Mississippi. Mr. Clark may be served with process at 2046 Brecon Drive, Jackson, Mississippi 39211.

11. Defendant City of Madison (hereafter "City") is a municipal corporation organized and existing under the laws of the State of Mississippi having authority, duties, and powers as provided under the laws of the State of Mississippi, and existing and operating within the judicial district of the Southern District of Mississippi.

12. Defendant Mary Grace Hawkins-Butler is an individual resident of Madison County, Mississippi, who may be served at City Hall, 1004 Madison Avenue, Madison, MS 39110, or at her residence at 238 N. Castle Drive, Madison, MS 39110. Defendant Mary Grace Hawkins-Butler is being sued in her individual capacity and in her official capacity as Mayor of the City of Madison, Mississippi.

13. Defendant Gene Waldrop is an individual resident of Madison County, Mississippi, who may be served at 2001 Main Street, Madison, MS 39110. Defendant Gene Waldrop is being sued in his individual capacity and in his official capacity as Police Chief of the City of Madison, Mississippi.

14. Defendant Chuck Harrison is an adult Mississippi resident who may be served at 2001 Main Street, Madison, MS 39110. Defendant Chuck Harrison is being sued in his individual capacity and in his official capacity as a law enforcement officer for the City of Madison, Mississippi.

15. Defendant Vickie Currie is an adult Mississippi resident who may be served at 2001 Main Street, Madison, MS 39110. Defendant Vickie Currie is being sued in her individual capacity and in her official capacity as a law enforcement officer for the City of Madison, Mississippi.

16. Defendant Richard Wilbourn, III, is an adult resident of Madison County, Mississippi. Mr. Wilbourn may be served with process at 206 Jefferson Ridge, Ridgeland, Mississippi 39157.

17. Defendants John and Jane Does 1-10 are unknown individuals and/or entities liable to Plaintiffs for the acts and omissions as alleged herein. The names and capacities of Defendants John and Jane

Does 1-10 inclusive, whether individual, corporate or otherwise, are presently unknown to Plaintiffs, who therefore sue said Defendants by fictitious names and will further seek leave of Court to amend this Complaint to show their true names and capacities when the same are ascertained. Plaintiffs allege upon information and belief each of the Defendants designated herein as a Doe is responsible in some manner and liable herein to Plaintiffs in some manner whether alleged herein in this Amended Complaint or not, and by such wrongful conduct, said Defendants, each of them, proximately caused the injury and damage occasioned herein.

BACKGROUND OF THE PARTIES

MARK MAYFIELD AND HIS FAMILY

18. Mark Stevens Mayfield ("Mark") passed away on June 27, 2014. Mark was 57 years old at the time of his death.

19. Mark Mayfield was a loving father and husband, and a gentle human being.

20. Mark was born in 1956 in Laurel, Mississippi; he was the first of his parents' three children.

21. Mark spent his early years growing up in Bay Springs, Mississippi, and in 1962 his family moved to Jackson, Mississippi.

22. Mark graduated from Jackson Preparatory School and later attended the University of Mississippi and the University of Mississippi School of Law where he earned his Juris Doctorate degree.

23. Mark Mayfield was a well-respected, Mississippi-licensed attorney.

24. Upon receiving his law degree in 1981, Mark returned to Jackson and practiced real estate law for 33 years, including 19 years with his father until his father's death in 2002. He was a member of the Mississippi and American Bar Associations.

25. Mark met the love of his life, Robin Reeves ("Robin" or "Robin Mayfield"), at the Mississippi Bar Convention, and they were married on August 21, 1982.

26. Mark was an active and respected member of First Baptist Church Jackson.

27. Mark Mayfield was an influential figure in Jackson business and many social and political organizations.

28. Mark put the interests of others first and had a pure, authentic interest in others he met. Mark loved connecting people and bringing them together. Always thinking of others, Mark exhibited a genuine servant's spirit in all of his relationships.

29. Mark loved life, people, and his family. He was a mentor, an outdoor enthusiast, very involved in his sons' upbringing, and an important role model for many in his life.

30. Mark had a great love for the State of Mississippi and the United States of America.

31. Robin Mayfield is the widow of Mark Mayfield. Mark and Robin were married on August 21, 1982, and remained husband and wife for 31 years, until Mark's tragic death.

32. Mark and Robin were blessed with two sons, Owen Mayfield ("Owen") and William Mayfield ("William").

33. Owen is the older son of Mark and Robin. William is Mark and Robin's younger son. Both Owen and William graduated from St. Andrew's Episcopal School and the University of Mississippi. Mark was an engaged member of the St. Andrew's Episcopal School community.

34. Mark Mayfield greatly loved his family, Plaintiffs herein, and his family greatly loved him.

35. Mark's text messages and emails reveal a kind and loving father and husband who communicated most often with his two sons Owen and William, and his wife Robin. They constantly encouraged each other, checked in with each other, and shared supportive messages such as Bible verses and personally-written motivational messages. His family was close and showed genuine caring towards each other.

36. Mark was involved in his church and various charities and civic activities but, until the events described herein, was not previously materially involved in political activity.

37. Mark Mayfield became politically involved in founding the Mississippi Tea Party.

38. Ultimately, through his Tea Party activities, Mark became involved in the campaign of State Senator Chris McDaniel, Republican candidate for United States Senate.

39. In addition to communication with family and friends, Mark communicated via text, email, and voice with others who worked on the campaign for Chris McDaniel (the "McDaniel Campaign").

40. Mark showed an eagerness and willingness to help the McDaniel Campaign through encouraging others to attend events, analyzing items from a legal

perspective, and offering his political insight as to strategy.

41. Even when communications may have shown some negative tendencies towards McDaniel's opponent, Senator Thad Cochran, or towards others who they considered to be the "Republican Establishment", Mark did not engage in public insults.

42. Nevertheless, Mark's support of the McDaniel Campaign put him at odds with many local and statewide elected officials in Mississippi who were supportive of incumbent United States Senator Thad Cochran.

43. Many of Cochran's corporate supporters were powerful, and benefited directly, financially, from Cochran's position of power. They had a lot to lose if McDaniel defeated Cochran.

44. On or about May 22, 2014, Defendant Currie signed an affidavit in support of the issuance of an arrest warrant for Mark Mayfield (the "Currie affidavit")[1].

45. The Currie affidavit avers Mark Mayfield had engaged in "communicating" and that said "communicating" was part of a conspiracy to violate Mississippi Code Ann. § 97-29-63 (photographing with lewd, licentious, or indecent intent). The Currie affidavit presented no evidence that Mark Mayfield (or any other person charged in connection with the Rose

[1] Clayton Kelly had been arrested on May 16, 2014, by the Madison Police Department following a complaint of exploitation of a vulnerable adult in connection with his taking of video and/or photographs of Senator Thad Cochran's bedridden wife in the St. Catherine's Village nursing home, as further described herein. John Mary and Richard ("Rick") Sager were also arrested and charged with conspiracy.

Cochran Incident) had photographed Rose Cochran with lewd, licentious, or indecent intent.

46. On that same date, Defendant Harrison signed two affidavits (the "Harrison affidavits") in support of the issuance of search warrants for Mark's office and home.

47. The Harrison affidavits state that Mark Mayfield engaged in providing "detailed information" and that Mark's office contained evidence of a violation of Mississippi Code Ann. § 43-47-19(3) (infliction of physical pain upon a vulnerable person). Defendants had no evidence whatsoever that Mark (or any other person) had inflicted physical pain on Rose Cochran.

48. On the basis of the Currie affidavit and the Harrison affidavits, on May 22, 2014, Madison Municipal Court Judge Dale Danks signed a warrant for Mark Mayfield's arrest and search warrants for his office and home.

49. Based upon the actions of the Madison Police Department through Defendants Waldrop, Harrison, and Currie, Mark Mayfield was arrested at his law office shortly after the warrants were issued.

50. Also based upon the actions of the Madison Police Department through Defendants Waldrop, Harrison, and Currie, Mark Mayfield's office and Mark and Robin's home were searched and items belonging to Mark and Robin were seized.

51. Mark was well-established and well-respected, had no prior criminal history, and posed no threat of flight. Nevertheless, the City of Madison Municipal Court imposed excessive bail in the amount of $250,000 on the charge of conspiracy to violate Miss. Code Ann. § 97-29-63.

52. Mark became the subject of intense national media scrutiny, news stories, and internet blog posts.

53. The day following his arrest, Mark's largest client, Trustmark National Bank, moved all of its business away from Mark, resulting in a complete collapse of his law practice.

54. Mark began to lose sleep and became depressed. After his arrest, Mark's doctor prescribed a number of medications for sleep, depression, and anti-anxiety assistance.

55. Robin experienced similar symptoms, and was also prescribed medication for her anxiety.

56. Mark expressed concern for Robin throughout the stressful ordeal of his arrest.

57. During the days following his arrest, Mark had a group of supportive male friends who often met for breakfast, lunch, or for leisure activities such as riding bicycles. Mark and his friends communicated often, and the range of supportive friends who were communicating via text messages and emails with him grew throughout the time frame of his arrest. Despite his dire situation, Mark continued with his positive and uplifting communication to others, even up until and on the date of his sudden death.

58. Mark communicated via text message with his son Owen on the eve of his death, showing enthusiasm and interest in his son's photographs of Washington, D.C.

59. On June 27, 2014, Robin awoke and could not find Mark in the house.

60. Robin continued searching and then found her husband of 31 years dead in a storage room, with a bullet hole through his head.

61. Robin had to call her sons Owen and William to inform them that their father was dead.

62. Mark Mayfield's death was ruled a suicide.

THE 2014 U.S. SENATE RACE

63. In 2014, Mississippi State Senator Chris McDaniel decided to challenge United States Senator Thad Cochran in the Republican primary. Senator Cochran had held that office since 1978.

64. The Republican establishment lined up behind Cochran, including Butler Snow LLP, Clark, and Haley Barbour, as well as his nephews Austin Barbour and Henry Barbour.

65. McDaniel, a younger upstart, quickly gained some notoriety in social and other media.

66. In contrast to the Republican establishment and powerhouse money behind the Cochran campaign, McDaniel's base was the Mississippi Tea Party and other anti-establishment Republicans.

67. McDaniel gained a lead in the polls against Cochran.

68. McDaniel quickly found himself attacked by a barrage of ads from the Thad Cochran Campaign and the Barbour-run Thad Cochran Super PAC.

69. Beginning in January or February 2014, some Tea Party activists and McDaniel supporters, including John Mary, decided to hatch a plan to do some digging and make an anti-Cochran attack ad on their own.

70. Knowing of rumors that, while his wife lay in bed in the Sienna nursing home building of St. Catherine's Village, Senator Cochran traveled about

with a female companion on his staff, Mary decided to further investigate and look for proof.

71. Mary was introduced to Richard Sager, another Mississippi Tea Party conservative, and the two decided that, if they could get into Mrs. Cochran's nursing home room and get a photograph of her, they could expose Senator Cochran.

72. Mary and Sager enlisted conservative blogger Clayton Kelly, who also saw an opportunity to build the audience for his "Constitutional Clayton" blog and YouTube channel, in the plan to post the information they found.

RICHARD WILBOURN, AND THE ARREST OF MARK MAYFIELD

73. Richard Wilbourn, III ("Wilbourn") is a wealthy attorney who has both deep pockets and deep political connections.

74. Wilbourn was involved with the Tea Party and befriended Mark Mayfield after they became acquainted through Tea Party activities. Mark, always kind and generous, invited Wilbourn and his daughters to join Mark and his family for dinners, tailgating at Ole Miss ball games, and spending time at the Mayfields' Oxford condo, and to join the Mayfields for Thanksgiving dinner in 2013.

75. Wilbourn knew that Senator Cochran's wife lived at St. Catherine's Village, where Mark Mayfield's mother also resided.

76. Wilbourn, like others, thought that exposing Senator Cochran's rumored affair would help McDaniel in his campaign.

77. On information and belief, in early spring 2014, Wilbourn approached Roy Nicholson, chairman of the

Mississippi Tea Party, with the idea that someone should try to obtain a photograph of Rose Cochran at St. Catherine's Village, but Nicholson responded that McDaniel would not approve.

78. On information and belief, Wilbourn told John Mary that he should contact Mark Mayfield. John Mary contacted Mark via Facebook message and the two began discussing politics. Ultimately, the topic of getting a photograph of Rose Cochran was discussed. Mary said he knew that Mrs. Cochran lived in the same facility as Mark's mother, but Mark was unwilling to take a photograph.

79. On information and belief, Wilbourn asked for Mark's help in learning where Mrs. Cochran's room was located.

80. After Mark's mother passed away on March 16, 2014, Wilbourn capitalized on the opportunity, asking Mark to meet him at St. Catherine's Village when Mark went to clean out his mother's room.[2]

81. On information and belief, Mark and Wilbourn were at St. Catherine's Village on a Sunday afternoon in late March or early April 2014, and Mark pointed Wilbourn down the hall on the second floor to where Rose Cochran's room was located.

82. Mark, having done all he agreed to (show where the room was), said he would do nothing further; Wilbourn assured Mark he would take everything from there.

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[2] Despite Plaintiffs' best efforts to obtain them, the St. Catherine's videos from this date have gone missing.

83. John Mary or Wilbourn told Mark that he knew of a guy (later discovered to be Clayton Kelly) who would take photographs of Mrs. Cochran in her bed.

84. On or about March 27, John Mary told Clayton Kelly that he should be getting a call with information about Rose Cochran. Kelly contacted Mary to tell him he was receiving calls from a blocked number and that the caller, who was not Mark, left a voicemail claiming to have information on Mrs. Cochran. Kelly, however, said he was expecting a call from Mark and would not answer the blocked number.

85. Mary let Kelly know that he did not know who the caller with information was, but instructed Kelly to answer all calls, including those from blocked numbers.

86. Using a blocked phone number, Wilbourn gave the information on the layout of the nursing home to Clayton Kelly[3].

87. After two failed attempts, Kelly was able to gain access to Mrs. Cochran's room on Easter Sunday and take cell phone video of her in her bed.

88. Shortly thereafter, in the early morning hours of April 26, 2014, Kelly posted a video on YouTube that included a still photo from the cell phone video. The post quickly gained attention, but was taken down later that same day.

89. On May 14, 2014, Wilbourn sent Mark an email message referencing Senator Cochran having a

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[3] On information and belief, in the voluntary statement Kelly gave to Officers Currie and Harrison the day of his arrest, he told them that a man who did not identify himself and who called from a blocked number gave him instructions on where to locate Mrs. Cochran's room.

mistress and referring to Rose Cochran's room number at St. Catherine's Village.

90. Madison Police Department Incident Report Number 2014050539 (the "Rose Cochran Incident") was opened on May 16, 2014, after Don Clark, giving his business address at Butler Snow and representing Senator Thad Cochran, contacted the Madison Police Department on May 15, 2014, about a possible case of exploitation of a vulnerable adult. Clark reported that a video including a photo of Rose Cochran in her bed at St. Catherine's Village had been posted to Clayton Kelly's YouTube account.

91. Mississippi Code Annotated §43-47-37 mandates the reporting of abuse or exploitation of patients and residents of care facilities like St. Catherine's Village. The statute provides, in pertinent part:

> (4) Any other individual who has knowledge of or reasonable cause to believe that any patient or resident of a care facility has been the victim of abuse, exploitation or any other criminal offense may make a report to the State Department of Health and the Medicaid Fraud Control Unit.

92. On information and belief, neither Don Clark nor any other individual reported the Rose Cochran Incident to the State Department of Health and/or the Medicaid Fraud Control Unit.

93. The Mississippi Vulnerable Persons Act, Miss. Code Ann. § 43-47-19, requires that exploitation of a vulnerable person have a value exceeding $250.00 to be considered a felony.

94. On May 16, 2014, Kelly was arrested and charged with felony exploitation of a vulnerable adult.

95. In the voluntary statement he gave the day of his arrest, Kelly told Officers Currie and Harrison that he had not been paid for his involvement in the Rose Cochran Incident, nor had anyone ever even offered to pay him for obtaining the photo, making and posting the video, or any other participation in the Rose Cochran Incident.

96. The same day that Kelly was arrested, Wilbourn and Mark had planned to do some campaigning for McDaniel during skull races at the Ross Barnett Reservoir.

97. After they finished, Mark got a call from Wilbourn. Wilbourn said Mark had left something at his house and needed to come pick it up.

98. Once there, Wilbourn told Mark that they could no longer have contact with each other and cut ties. Seeing arrests being made and the players start to be revealed, Wilbourn clearly wanted to avoid any implication in the Rose Cochran Incident and started hiding his tracks.

99. On May 22, 2014, John Mary, Richard Sager, and Mark Mayfield were also arrested for conspiracy to commit a felony, exploitation of a vulnerable adult.

100. On information and belief, Wilbourn retained an attorney that same day.

101. Having abandoned Mark in his time of need, after Mark's arrest, Wilbourn left a handwritten note on the Mayfields' front door saying he was sorry this had happened. Mark kept the note for a while, but weeks later, asked Robin to shred it.

102. Richard Wilbourn was listed as a potential witness for the prosecution in Clayton Kelly's trial. When the Clarion-Ledger newspaper attempted to

speak to him for a story it ran on June 4, 2015, he could not be reached for comment. Nor has he ever made one.

103. Nonetheless, both at Kelly's arraignment and when he pled guilty and received his sentence, Wilbourn was observed in the courtroom.

104. Despite their knowledge of Wilbourn and his involvement in spearheading the attempts to obtain Rose Cochran photographs, on June 18, 2015, the Madison County District Attorney's Office made published statements to the Clarion-Ledger that there were no other persons involved.

105. The Clarion-Ledger was told by the Madison County District Attorney's Office that prosecutors were confident they prosecuted all conspirators in the Cochran nursing home photo case "based on all available evidence."

106. Instead of identifying Richard Wilbourn as the person who instructed Kelly on where Rose Cochran's room was and how to get into the facility, authorities expressly said it was Mayfield. These were false and reckless statements.

107. Instead, an Assistant District Attorney went even further and told the press, "We have no evidence that Mark Mayfield came into St. Catherine's with anyone else from the time of his mother's death until the video was taken on April 20th (2014). We have thoroughly been through all the surveillance videos." Quite simply, both statements are untrue.

FEDERAL ACTORS:

BUTLER SNOW, CLARK, AND THAD COCHRAN

108. Butler Snow LLP ("Butler Snow") is a 330-lawyer international firm with offices in 24 locations,

including Washington, D.C. Butler Snow is Mississippi's largest law firm.

109. Donald Clark ("Clark") has served as the Chairman of Butler Snow since 2006.

110. At all times relevant to this lawsuit, Clark was the Managing Member of Butler Snow. Clark is the primary policy-maker for the firm.

111. Clark also serves as the Managing Member of Butler Snow Holdings, LLC.

112. Butler Snow's public clients consist of numerous state governments, state and federal agencies, county governments, municipal governments, and other federal, state, and local governmental bodies.

113. Butler Snow has a strong government, lobbying, and government relations practice.

114. Butler Snow has several subsidiaries and/or related companies, including VisionFirst Advisors, led by former Mississippi Governor Haley Barbour; Butler Snow Advisory Services, LLC; MRC X, LLC; and Butler Global, LLC.

115. Butler Snow attorney Haley Barbour served as Governor of Mississippi from 2004 to 2012, and as Chairman of the Republican National Committee from 1993 to 1997. Barbour also worked for years as a lobbyist, and co-founded the Washington lobbying firm BGR Group.

116. Many of Butler Snow's employees and 330 attorneys have previously served as elected officials, including Barbour, former Republican United States Senator David Vitter, former Republican United States Congressman John Tanner, and former Speaker of the Colorado House of Representatives Terrance Carroll.

117. Many others belong to Butler Snow's long list of formerly and presently appointed officials and high ranking executive employees, particularly in Mississippi. Butler Snow is the most politically connected and powerful law firm in the State of Mississippi.

118. With its strong political connections to state and local governments, Butler Snow and Don Clark were natural choices for Republican United States Senator Thad Cochran to hire as his attorneys, and for that of his federal election campaign.

119. Thad Cochran has served in Congress since 1972.

120. Senator Cochran serves as the ranking Republican member of the powerful Senate Committee on Appropriations ("Senate Appropriations Committee").

121. During the 109th Congress (2005-2006), 114th Congress (2015-2016), and the current 115th Congress, Senator Cochran served, and continues to serve, as Chairman of that powerful Senate Appropriations Committee.

122. At all times relevant hereto, Butler Snow and Clark were legal counsel for Thad Cochran, and operated under color of federal law.

123. In addition to representing Thad Cochran personally, at all times relevant hereto, Butler Snow and Clark were the legal counsel for the federal election campaign of United States Senator Thad Cochran (the "Thad Cochran Campaign").

124. The Thad Cochran Campaign was an extension of Thad Cochran, and its employees, vendors, and attorneys were authorized to act on his behalf.

125. In addition to having a pro-active legal team with Butler Snow and Clark, the Thad Cochran

Campaign was run by individuals close to Butler Snow and Clark.

126. Though federal election law prohibits coordination between a candidate's campaign and any Super PACs, Butler Snow and Clark provided funding and legal, governmental, and/or political advice to Mississippi Conservatives, a Barbour-run Super PAC supporting Thad Cochran (the "Thad Cochran Super PAC").

127. Mississippi Conservatives was organized, formed and/or operated by Henry Barbour, the brother of Austin Barbour and the nephew of Butler Snow attorney Haley Barbour.

128. Through attorney Haley Barbour and others, Butler Snow and Henry Barbour raised millions of dollars for Mississippi Conservatives.[4]

129. Additionally, Butler Snow attorney Haley Barbour secretly, and illegally, provided the collateral to secure the Thad Cochran Super PAC's $250,150 bank loan from Trustmark National Bank.[5]

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[4] Upon information and belief, Butler Snow's Haley Barbour was the largest fundraiser for Mississippi Conservatives. Mississippi Conservatives was a Super PAC during the 2014 election. In 2014, the committee raised a total of $3.36M and spent a total of $3.32M, all in support of Thad Cochran's campaign.

[5] Barbour's role in securing the Trustmark National Bank loan for the Thad Cochran Super PAC, Mississippi Conservatives, was not revealed until documents were released by the Federal Election Commission on November 15, 2016. Previously, the Thad Cochran Super PAC had concealed Barbour's identity as the guarantor of the loan, although it reported a direct contribution of $25,000 from Barbour in 2014. The FEC fined the Thad Cochran Super PAC $19,000 for violating campaign finance disclosure rules by keeping secret for more than two years Barbour's involvement in securing the bank loan.

130. Butler Snow and Clark directly and indirectly contributed and raised millions of dollars for the Thad Cochran Campaign, the Thad Cochran Super PAC, and other political action committees supporting Thad Cochran's reelection campaign to the United States Senate.

131. Specifically, Butler Snow and Clark directly and indirectly raised funds for and made extraordinary financial contributions:

a. to the Thad Cochran Campaign;

b. to Cochran's Political Action Committees, including Citizens for Cochran[6];

c. to Cochran-related Super PACs, including Mississippi Conservatives (directly and indirectly through fundraising efforts of former Mississippi Governor Haley Barbour, an attorney at Butler Snow and a member of the powerful lobbying firm BGR Group); and,

d. to the Senate Victory Fund PAC ("Senate Victory Fund").

132. At all times relevant hereto, Butler Snow and Clark acted on behalf of United States Senator Thad Cochran.

133. At all times relevant hereto, Butler Snow and Clark were delegated the authority and had the full power of the office of United States Senator Thad Cochran.

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[6] Citizens for Cochran was a Senate campaign committee during the 2014 election based in Mississippi. In 2014, the committee raised a total of $7.09M and spent a total of $7.55M, all in support of Thad Cochran's campaign.

134. In filing the Rose Cochran Incident complaint with the Madison Police Department, Clark gave his Butler Snow address and represented to the Madison Police Department that he and Butler Snow were filing the complaint in their capacity of representing Senator Thad Cochran.

STATE ACTORS:

BUTLER SNOW, CLARK, CITY OF MADISON, HAWKINS-BUTLER, WALDROP HARRISON, AND CURRIE

135. The City of Madison is a municipality incorporated under the laws of the State of Mississippi. The City operates under a Mayor and Board of Aldermen form of government, with a Governing Body comprised of the Mayor and a seven-member Board of Aldermen.

136. Mary Hawkins-Butler ("Hawkins-Butler") is the Mayor of the City of Madison.

137. Hawkins-Butler is a member of the Republican Party and has served as Mayor since 1981.

138. The Madison Police Department is a division of the City of Madison. It is made up of several divisions, including a Criminal Investigations Section, which handles investigation of criminal activity. The Criminal Investigations Section employs full-time Investigators who work on cases along with the District Attorney's office in prosecuting crimes.

139. Vickie Currie ("Currie") is a law enforcement officer for the City of Madison. Currie enjoys a close relationship with Mayor Hawkins-Butler.

140. Butler Snow and Clark were well-aware of the campaign contributions made and favors owed to them. In addition to serving as counsel for the City of Madison and Madison County, Mississippi, Butler

Snow and Clark had previously raised funds for and made significant financial contributions to election campaigns for many local officials in City of Madison and Madison County, Mississippi, including but not limited to:

a. City of Madison Mayor Mary Hawkins-Butler;

b. Members of the Board of Aldermen for the City of Madison;

c. Madison County District Attorney Michael Guest;

d. Members of the Madison County Board of Supervisors; and

e. Madison County judicial officers, and candidates for judicial office.

141. Thad Cochran and Hawkins-Butler have been friends since at least 1981, when Hawkins-Butler was elected Mayor.

142. Hawkins-Butler was friends with Rose Cochran, the wife of Thad Cochran.

143. Hawkins-Butler was friends with Thad Cochran's parents, when they were living.

144. Whenever Hawkins-Butler has approached Thad Cochran requesting that the City of Madison receive federal funding, Cochran has helped, including but not limited to funding for City of Madison water and sewer systems, and for Madison schools.

145. Hawkins-Butler and Thad Cochran are political allies.

146. Hawkins-Butler has been a strong supporter of Thad Cochran for decades, and was a strong supporter during the 2014 U.S. Senate Campaign.

147. Likewise, Don Clark and Hawkins-Butler have been friends for decades.

148. Hawkins-Butler and Clark are also political allies.

149. Butler Snow and Clark regularly send campaign contributions to Hawkins-Butler during her campaigns, including during her unsuccessful statewide race for State Auditor.

150. When Clark brought the Rose Cochran Incident "crimes" to Madison Mayor Mary Hawkins-Butler, Butler Snow and Clark knew that she was a longtime friend of Thad Cochran.

151. Butler Snow and Clark knew that Madison Mayor Hawkins-Butler would be more than willing to do anything they asked to help Thad Cochran and the Thad Cochran Campaign, including directly enlisting the assistance of her Chief of Police and law enforcement, including Waldrop, Harrison, and Currie.

152. Butler Snow and Clark knew that City of Madison government officials and actors would assist them in their plans to prosecute Clayton Kelly and any co-conspirators.

153. At all times relevant herein, Butler Snow acted in joint activity with the City of Madison to such a degree that the actions of Butler Snow can be attributed to the City of Madison, and vice-versa.

154. In addition to Clark's friendship with Mayor Hawkins-Butler, for at least for several decades, Butler Snow and Clark have served as outside legal counsel for the City of Madison.

155. For example, upon information and belief, Butler Snow and Clark have been the City of Madison's legal counsel on each and every City of Madison bond

issuance for at least 20 years, and for bond issues totaling well into tens of millions of dollars.[7]

156. Currie is a supporter of Thad Cochran, and was during the 2014 U.S. Senate Campaign.

157. At all times relevant to this case, Currie was an Investigator with the Madison Police Department.

158. Bryan Buckley ("Buckley") is a Madison County Assistant District Attorney. Buckley was hired after Michael Guest was elected as Madison County District Attorney.

159. Buckley is a supporter of Thad Cochran, and was during the 2014 U.S. Senate Campaign.

160. Buckley worked closely with Butler Snow, Clark, Harrison, and Currie on the investigation of the Rose Cochran Incident, including planning the resulting arrests and prosecutions.

161. Butler Snow and Clark worked both independently and jointly with the City of Madison, Mayor Mary Hawkins-Butler, Waldrop, Harrison, and Currie to develop their criminal legal theories to pursue Clayton Kelly and others, including Mark Mayfield, and to cause harm to the McDaniel Campaign.

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[7] In addition to serving as legal counsel for the City of Madison, Butler Snow and Clark have served as outside legal counsel for Madison County, Mississippi, at least for several decades. Butler Snow is the lobbying firm for Madison County, Mississippi. For at least the last fifteen years, Butler Snow and Clark have served as bond counsel for Madison County on over 36.8 million dollars in bond-related financing. Upon information and belief, Butler Snow and Clark have been Madison County's legal counsel on each and every Madison County bond issuance for at least 20 years, and for bond issues totaling well into tens of millions of dollars.

162. Butler Snow's joint activity included, but was not limited to, actions with the City of Madison Office of Mayor, Madison Police Department, and Madison prosecutor's office in their filing of charges, investigation, and prosecution against Mark Mayfield and others.

163. At all times relevant herein, Butler Snow was acting in joint activity with the Madison County District Attorney's Office to such a degree that the actions of Butler Snow can be attributed to the Madison County District Attorney's Office, and vice-versa.

164. Butler Snow's joint activity included, but was not limited to, actions with the Madison County District Attorney's Office in their filing of charges, investigation, and prosecution of Mark Mayfield.

165. Upon information and belief, prior to the Rose Cochran Incident, Buckley had never been assigned to prosecute any vulnerable adult abuse or exploitation cases in the Madison County District Attorney's office.

166. However, Buckley was assigned to the case because, like Currie, he was a known supporter of Thad Cochran. He was given the matter rather than it being assigned to another prosecutor who was a supporter of McDaniel, Cochran's opponent in the Republican Primary.

167. In 2014, Frontier Strategies, LLC, worked on advertising strategy for Cochran's campaign. Frontier Strategies[8] is a politically-connected and powerful

[8] In 2014, Quinton Dickerson III was a key campaign strategist for the Cochran campaign. Dickerson is closely affiliated with Butler Snow and its attorney Haley Barbour. Dickerson served as campaign spokesman during Haley Barbour's successful 2003 Mississippi gubernatorial bid. Following Governor Barbour's

lobbying and advertising agency for government, political, nonprofit, and corporate clients.

168. Following Mark's arrest, Frontier Strategies produced a negative campaign ad featuring Mark and his arrest.

169. Trustmark National Bank was Mark Mayfield's longest-standing and largest client, prior to his arrest. Mark and his father had performed legal services for Trustmark National Bank for over 30 years.

170. Unbeknownst to Mark at the time, Trustmark National Bank was solidly in the Cochran camp. Trustmark National Bank was the single largest contributor to a Cochran-related Super PAC, having contributed in excess of $250,000.00 to Mississippi Conservatives, among other contributions.

171. Also unbeknownst to Mark, Trustmark National Bank had financed the million dollar D.C. home of Kay Webber[9], where Thad Cochran also lived.

HOW MARK MAYFIELD AND OTHERS CAME TO BE CHARGED

172. The prosecution of Mark Mayfield was a political prosecution, plain and simple. The prosecution was a use of the color of state law as a tool to exact political retaliation and intentional injury upon Mark Mayfield for his exercise of his rights of free speech and free association under the First Amendment. A primary

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campaign, Dickerson and fellow political staffer Josh Gregory formed Frontier Strategies, LLC.

[9] Webber is now Thad Cochran's wife. Upon information and belief, when Webber purchased the house, she had a co-signor on the home who was a donor to Cochran and rumored to be the wife of a Member of the Board of Directors for Trustmark National Bank.

purpose of this prosecution was to hurt Thad Cochran's political opponent.

173. Prior to the Republican Primary election runoff, Thad Cochran and the Thad Cochran Campaign became aware of the video produced by Clayton Kelly and posted to his YouTube page on April 26, 2014, which contained an image of Mrs. Rose Cochran.

174. They seized the opportunity to make a political issue against Chris McDaniel due to Clayton Kelly's poor decisions.

175. Few people actually saw the video before Kelly took it down the same day it was posted at the request of persons affiliated with the McDaniel Campaign.

176. However, the Thad Cochran Campaign had downloaded or otherwise obtained a copy of the video before it was taken down on April 26. Quinton Dickerson of Frontier Strategies maintained a copy of the video.

177. Clark and Butler Snow were made aware of the video by Thad Cochran and the Thad Cochran Campaign.

178. One of the ideas suggested within the Thad Cochran Campaign and their attorneys at Butler Snow was to press criminal charges, which would politically be advantageous for the Thad Cochran Campaign by associating the McDaniel Campaign with "criminals."

179. Rather than immediately reporting any alleged "crime" to authorities as required by the Mississippi Vulnerable Persons Act, Clark and Butler Snow waited until May 15, 2016— three weeks later— to contact authorities at the City of Madison (instead of the statutorily-mandated authorities). Their contact

was made just weeks before the Republican Primary Runoff Election.

180. Though they had the information the entire time since the video's posting on April 26, Butler Snow and Clark apparently spent these roughly three weeks concocting a plan and formulating criminal causes of action that could possibly be pursued by prosecutors.

181. Among the criminal legal theories floated by Butler Snow and Clark were (1) disturbing the peace under Miss. Code Ann. § 97-5-15; (2) stalking; (3) voyeurism under Miss. Code Ann. § 97-29-61; (4) photographing with lewd, licentious or indecent intent under Miss. Code Ann. § 97-29-63; (5) vulnerable person abuse or exploitation under § 43-47-19; and/or (6) trespass.

182. Clark's first phone call to the City of Madison was not to law enforcement, or a criminal investigator. Nor was it to the authorities mandated by statute for reporting exploitation of a vulnerable adult.

183. Rather, Clark first called his friend Madison Mayor Mary Hawkins-Butler to discuss Butler Snow's legal theories and proposed criminal charges.

184. Clark told Hawkins-Butler that a crime had been committed in the City of Madison. Clark invited Hawkins-Butler and the Chief of Police to come to Butler Snow's office to look at the video.

185. The Thad Cochran Campaign also contacted Hawkins-Butler and wanted to run the investigation.

186. Hawkins-Butler directed Clark to her Police Chief in order to begin the criminal prosecution.

187. After speaking with Hawkins-Butler, Clark spoke with the City of Madison Police Chief.

188. Clark then met with City of Madison law enforcement officers, including Currie and/or Harrison.

189. Clark presented City of Madison law enforcement officers with the various legal theories advanced by Butler Snow.

190. Brian Buckley was a supporter of Senator Cochran and, upon information and belief, was in contact with members of Senator Cochran's staff prior to the arrests in the Rose Cochran Incident. Mr. Buckley's support of Senator Cochran led to Currie being directed to work with him, rather than other employees of the District Attorney's office, in investigating and prosecuting the Rose Cochran Incident.

191. The City of Madison, Hawkins-Butler, Waldrop, Harrison, Currie, Brian Buckley, Butler Snow, and Clark worked together to target certain individuals, including Mark Mayfield, for arrest and prosecution based on those individuals' support of Chris McDaniel, Senator Cochran's opponent.

192. Clark and the City of Madison ultimately settled on filing a criminal complaint against Clayton Kelly for felony exploitation of a vulnerable adult under Miss. Code Ann. § 43- 47-19.

193. On May 15, 2014, Clark contacted Vickie Currie to discuss filing a criminal complaint with the felony exploitation of a vulnerable adult theory that he and Butler Snow had developed.

194. On May 16, 2014, Don Clark filed an Incident Report, Incident Number 2014050539, against Clayton Thomas Kelly. The offense alleged in the report was violation of Miss. Code Ann. § 43-47-19(3), and Vickie Currie was the assigned detective. This same Incident Report Number is the one used for the arrests and

prosecutions of all of the individuals arrested in connection with the Rose Cochran Incident, including Mark Mayfield.

195. Currie signed an affidavit in support of the arrest warrant for Kelly on May 16, 2014, for exploitation of a vulnerable person. Her affidavit states that "information was received from the Butler Snow Law Firm, whom (sic) provides legal assistance to the Thad Cochran U.S. Senate..." That same day, Harrison signed an affidavit in support of a search warrant for Kelly's home. Both warrants issued on May 16.

196. On May 22, 2014, another arrest warrant for Kelly was issued, this one listing a charge of conspiracy to commit a felony crime and for violation of § 97-29-63 (photographing or filming without permission with lewd, licentious, or indecent intent). This statute was not in the previous arrest or search warrants.

197. Butler Snow, Clark, the City of Madison, Hawkins-Butler, Waldrop, Harrison, and Currie knew that Thad Cochran is a public official and public figure, and that the election of the United States Senator from Mississippi is a matter of political importance about which the state's citizens have a constitutional right to speak. Consequently, the facts surrounding Thad Cochran's relationship with Kay Weber, his living arrangements, and Rose Cochran's condition and living arrangements were facts of political importance about which Mississippians had a right to speak.

198. At the time Mark Mayfield was charged, the State Actor Defendants knew they lacked evidence to show that Mark had conspired with anyone to commit a crime.

199. At all pertinent times, Mark Mayfield was legally upon the premises of St. Catherine's Village.

200. Whether on St. Catherine's Village property or elsewhere, Mark Mayfield had the First Amendment right to associate with persons of his choosing and to exercise his rights to speak about subjects of interest, specifically, but not limited to, his knowledge that Rose Cochran resided at St. Catherine's Village at the time when Thad Cochran was rumored to be in a relationship with Kay Weber.

201. Mark Mayfield was exercising his constitutionally protected right to free speech and freedom of association when he told Richard Wilbourn, truthfully and accurately, that Rose Cochran was residing in St. Catherine's Village and where her room was.

202. Defendant Currie reviewed St. Catherine's Village security surveillance tapes and records of Mark Mayfield's access card use and determined that Mark had not returned to St. Catherine's Village after he removed his mother's belongings.

203. The Currie affidavit's statement that Mark's conduct amounted to "communicating" shows the Defendants knew that Mark's actions were the exercise of his right to free speech and, therefore, amounted to a pretense for charging him with a crime. Accordingly, the arrest warrant issued on the basis of the Currie affidavit lacked probable cause.

204. Similarly, the Harrison affidavits' statements that Mark Mayfield provided "detailed information" show Defendants knew that Mark's actions constituted exercise of his right to free speech. The search warrants issued on the basis of the Harrison affidavits lacked probable cause.

205. Notwithstanding the absence of evidence of criminal conduct, and the ample evidence that Mark Mayfield's conduct was the exercise of his

Constitutionally-protected rights, the Defendants nonetheless decided to target Mark with trumped-up charges, for political expediency[10].

206. The above-named State Actor Defendants, acting jointly, knew or should have known that none of the individuals charged with committing or conspiring to commit violation of Miss. Code Ann. § 43-47-19, and arrested on May 22, 2014--including Mark Mayfield--could be proven to have committed that crime because Kelly stated on May 16, 2014, that he received no payment for taking, using, or distributing the photograph of Rose Cochran. The essential element that makes an exploitation a felony—value of the exploitation exceeding $250.00—was missing.

207. Miss. Code Ann. § 43-47-19 provides, in pertinent part:

> (1) It shall be unlawful for any person to abuse, neglect or exploit any vulnerable person.
>
> . . .
>
> (2)(b) Any person who willfully exploits a vulnerable person, where the value of the exploitation is less than Two Hundred Fifty Dollars ($250.00), shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not to exceed Five Thousand Dollars ($5,000.00) or by imprisonment not to exceed one (1) year in the county jail, or by both such fine and imprisonment; where the value of the exploitation is Two Hundred Fifty Dollars ($250.00) or more, the

[10] At least one other individual was investigated, but not charged.

> person who exploits a vulnerable person shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment in the custody of the Department of Corrections for not more than ten (10) years.
>
> (3) Any person who willfully inflicts physical pain or injury upon a vulnerable person shall be guilty of felonious abuse or battery, or both, of a vulnerable person and, upon conviction thereof, may be punished by imprisonment in the State Penitentiary for not more than twenty (20) years.

§ 43-47-19.

208. Clayton Kelly did not receive any payment for taking the video of Rose Cochran. As such, there was no basis for bringing an exploitation charge against him, as the value requirement was not satisfied[11].

209. Additionally, there was no evidence or assertion that Clayton Kelly or Mark Mayfield willfully inflicted pain or injury upon Rose Cochran. As such, there was no basis for the Harrison affidavit's assertion that anything contained in Mark Mayfield's home or office contained evidence of violation of § 43-47-19(3).

210. Nevertheless, due to Butler Snow and Clark's joint efforts with the City of Madison, Madison Mayor Mary Hawkins-Butler, Waldrop, Harrison, and Currie, a wholly unsupportable charge was made against

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[11] Indeed, the charge that Kelly ultimately pled guilty to, burglary, required that he "break and enter" the nursing home. Mark Mayfield had permission to be in St. Catherine's Village to remove items from his mother's room; therefore, no burglary charge could lie against him. Miss. Code Ann. 97-17-23(1).

Mark Mayfield for felony conspiracy to commit exploitation.

211. Despite the investigation, and despite his involvement in scouting and mapping St. Catherine's Village and conveying the information on location and access to Kelly, Richard Wilbourn was never arrested or charged with any crime.

212. On May 19, 2014, Currie signed an affidavit in support of John Mary's arrest warrant on a charge of conspiracy to commit a felony, citing §§ 97-29-63 and 43-47-19 as the underlying crimes. The warrant issued and was served the next day.

213. On May 20, 2014, Officer Mike Brown drove to Hattiesburg, Mississippi, to serve search and arrest warrants on John Mary. Mary gave a voluntary statement to Officer Brown.

214. On May 21, 2014, Officer Brown served a search warrant on Richard ("Rick") Sager. Brown gave the affidavit in support of the search warrant. Currie signed an affidavit in support of an arrest warrant for Sager for conspiracy to commit a felony (§ 97-29-63).

215. Sager gave a voluntary statement. At his initial appearance on May 22, 2014, the charges against him include tampering with evidence and conspiracy, with a $250,000 bond per charge for a total of $500,000.

216. On May 22, 2014, Harrison gave affidavits in support of search warrants for Mark Mayfield's home and business addresses, listing the Vulnerable Adult Statute (§ 43-47-19) as their basis. Some of the property seized during execution of these search warrants was held until August 4, 2014.

217. Additionally, on information and belief, some of the property was turned over to the Federal Bureau of

Investigation, though no action was ever taken by the FBI against any of the alleged co-conspirators.

218. On May 22, 2014, Mark Mayfield was arrested at his office, and charged with felony conspiracy to commit exploitation of a vulnerable adult. His bond was set at an inexplicably and unjustifiably high $250,000[12].

219. For a well-known figure in the community, an attorney, and a family man who posed no flight risk, the unwarranted felony criminal charge and disproportionately high bond relieved any doubt that his arrest and prosecution were for show and that Mark was a pawn in a political game. This was not about justice, but, rather, about the Cochran political machine and its Madison branches exacting revenge for supporting Cochran's opponent.

220. The Cochran campaign's agents, including Butler Snow and City of Madison, continued to act jointly and independently to flex their muscles in punishing Mark by going after his business.

221. On or about May 23, the day after his arrest, Trustmark National Bank—a large contributor to the Cochran campaign—informed Mark that it was pulling business away from him because of the arrest.

222. The Thad Cochran Campaign released a video featuring Mark and referring to him as a "criminal."

223. Cochran's communication director, Jordan Russell, who was long-time friend of Mark and grew

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[12] Richard Sager, who also lacked a prior criminal record, had bond set at $500,000 on charges of conspiracy and tampering with evidence—based on assisting John Mary in conducting research on Cochran's alleged affair.

up with his son, Owen, referred to him in public as a "criminal" and a "felon" before Mark was even indicted.

224. The McDaniel Campaign distanced itself from Mark. He stopped participating in Tea Party activities, even though he had helped found the Mississippi Tea Party, as a result of the public humiliation, embarrassment, and quick onset of anxiety and depression following his arrest.

225. Mark, Robin, Owen, and William saw Mark's face over and over on local, regional, national, and international news stories about the Rose Cochran Incident. He became the face of the Rose Cochran Incident in print, digital, and televised media.

226. The toll this public humiliation and persecution began to take on Mark, Robin, Owen, and William was hard and swift.

227. The arrest, loss of his long-term largest client, loss of the ability to engage in campaign activity, and continued public shaming caused Mark to grow anxious and depressed. Though he had never before been prescribed antidepressant or anxiety medications, the week after his arrest, his family physician wrote him prescriptions to help him sleep, ease his anxiety, and help with the sudden onset of depression.

228. The day after his arrest, Trustmark National Bank informed Mark that he could no longer have his name or letterhead on any Trustmark National Bank documents.

229. Mark transferred all active Trustmark National Bank files to another lawyer.

230. Thereafter, with a void of work, Mark would call Robin to come sit with him at his office because he was sitting at his office by himself—the law practice

that his father started in the mid-1950s. Over 60 years of the Mayfield law practice vanished overnight.

231. Mark reached out to his friend Richard Wilbourn, who he thought would provide support, particularly since he had been the one who fed Clayton Kelly the information on accessing St. Catherine's Village. Wilbourn and Mark met up a few times at a community swimming pool in Bridgewater to talk. To Mark's obviously distressed state, Wilbourn proffered reassurance and platitudes, all the while covering his own tracks and leaving Mark to take the fall.

232. With no work or ability to participate in Tea Party or McDaniel Campaign activities as the result of his arrest, Mark was forced into isolation. He lost interest in and the ability to participate in the things he formerly loved in life, lost weight, and was unable to sleep.

233. On June 24, 2014, after a runoff campaign that turned ugly, Senator Cochran won a runoff.

234. On June 27, 2014, three days later, Robin Mayfield woke up to find Mark's side of the bed empty. She found him on the floor of the storage room, a gun in his hand and a bullet hole in his head. She then had to call her two sons and tell them that their father was dead.

235. That same day, at least three City of Madison police officers—Currie, Harrison, and Scott Dean—came to the Mayfields' home, entering the property without Robin's permission and without basis (having already searched and seized property for their investigation). Madison police officers were observed in the Mayfields' garage shortly after Robin called 911.

236. The Mayfields' home was in Ridgeland, and the Ridgeland Police Department attended the scene to investigate the death. Robin subsequently filed complaints for trespassing against the Madison police officers.

237. Though Mark and Robin had planned to retire in the house that they lived in for nine years, Robin was not able to relive that horror on a daily basis. Robin sold the home. Robin suffers from post-traumatic stress disorder and has to take prescriptions for anxiety, and to prevent the panic attacks that she began suffering after the death.

238. John Mary a/k/a John Bert is an adult resident of Hattiesburg, Mississippi. He is a former radio talk show host and conservative who supported the Chris McDaniel campaign. After his arrest in connection with the Rose Cochran Incident, he cooperated with law enforcement and the District Attorney's office in the prosecution of others, including Mark Mayfield.

239. John Mary pled guilty on August 6, 2014, to Conspiracy to Commit the Crime of Posting Electronic Media for the purpose of harming another. He was sentenced to five years of supervised probation and agreed to cooperate in the investigation and prosecution of his alleged co-conspirators.

240. Richard "Rick" Sager is an adult resident of Laurel, Mississippi. Following his arrest in connection with the Rose Cochran Incident for conspiracy and tampering with evidence, he completed a pre-trial diversion program and was not prosecuted.

241. Clayton Kelly initially pled guilty to a charge of conspiracy to commit burglary (not violation of the Vulnerable Persons Act, which prosecutors knew would not be able to be proven), but the burglary

charges were later dropped. Kelly—whose initial burglary charges could have sentenced him to 50 years—was ultimately sentenced to two and a half years in prison, with another two and a half years' probation that are still being served.

242. In short, those who were deemed the most easily expendable—by the Cochran Campaign and those acting on its behalf, its State Actor Defendant supporters, and Richard Wilbourn—took the fall; Wilbourn was able to use his money and connections to avoid being charged. Investigator Vickie Currie, having served her purpose in the political game, was transferred to the animal control division of the Madison Police Department.

CAUSES OF ACTION

COUNT I: VIOLATION OF STATUTE 42 U.S.C. § 1983 (BUTLER SNOW, CLARK, CITY OF MADISON, HAWKINS-BUTLER, WALDROP, HARRISON, CURRIE, AND JOHN DOES AND JANE DOES 1-10)

243. Plaintiffs incorporate and reallege each of the foregoing paragraphs as if fully set forth herein.

244. Butler Snow, Clark, City of Madison, Hawkins-Butler, Waldrop, Harrison, and Currie ("State Actor Defendants") violated 42 U.S.C. § 1983.

245. These State Actor Defendants' conduct, made under color of state law, operated to deprive Plaintiffs of their clearly-established rights guaranteed by the United States Constitution and federal statutes, specifically including:

(a) The right to free speech protected by the First Amendment of the United States Constitution;

(b) The right to freedom of association protected by the First Amendment of the United States Constitution;

(c) The right to be free from unreasonable searches and seizures protected by the Fourth Amendment of the United States Constitution;

(d) The right to be free from excessive bail protected by the Eighth Amendment of the United States Constitution; and,

(e) The right of due process protected by the Fourteenth Amendment of the United States Constitution.

246. The above-described actions by Defendants Butler Snow and Don Clark in conspiring and acting jointly with the other State Actor Defendants and other local and state officials to formulate the charges brought against Mark Mayfield and others are sufficient to deem them to be acting under color of state law for purposes of 42 U.S.C. § 1983 inasmuch as the officials Butler Snow and Don Clark represented and/or took part in the conspiracy in a manner stemming from their state functions.

247. Moreover, Defendants Butler Snow and Clark's representation of these local and state officials and entities constitutes a close nexus such that the actions of Butler Snow and Clark could be reasonably interpreted to be attributed to its client, the City of Madison.

248. That is, when Butler Snow and Clark provided the other State Actor Defendants and the District Attorney's office with their legal theories and potential charges, it was with the authority of the City of Madison and Mayor Hawkins-Butler.

249. The legal theories and charges were further provided with the intent (a) that they be pursued and (b) be pursued to benefit Thad Cochran and the Thad Cochran Campaign.

250. Further, the legal theories and charges were provided with the knowledge that one or more of them would, in fact, (a) be pursued and (b) be pursued to benefit of Thad Cochran and the Thad Cochran Campaign.

251. At all times relevant here, Butler Snow was acting in joint activity with the City of Madison and other State Actor Defendants to such a degree that the actions of Butler Snow and Clark can be attributed to the City of Madison, and vice-versa.

252. Butler Snow's joint activity included but was not limited to actions with the City of Madison Office of Mayor, City of Madison Police Department, and City of Madison Prosecutor's Office in their filing of charges, investigation, and prosecution against Mark Mayfield and others.

253. As such, Defendant Butler Snow and Clark can be considered state actors for purposes of 42 U.S.C. § 1983.

254. The above-described actions were taken by the State Actor Defendants while acting under the color of state law, and caused Mark Mayfield to be deprived of his clearly-established rights secured by the United States Constitution under the First, Fourth, Fifth, Eighth, and Fourteenth Amendments, which resulted in injuries to Mark Mayfield and, ultimately, his death. The deprivations complained of herein were a direct and proximate result of the custom, policy and practice of the State Actor Defendants, and their officers and

agents named herein, and/or as enacted by final policy-making authorities.

255. The State Actor Defendants were aware of the deprivations complained of herein, and condoned or were deliberately indifferent to such conduct.

256. As a direct and proximate result of the foregoing, the State Actor Defendants deprived Mark Mayfield and Plaintiffs of their rights and privileges as citizens of the United States, and Defendants caused Plaintiffs to suffer financial injury, significant indignities, and to be hurt and injured in their health, strength, and activity, and which have caused, and will continue to cause, Plaintiffs physical, mental, and emotional pain and suffering, all to their general damage in a sum which will be proven at trial.

257. Pursuant to 42 U.S.C. § 1983, Plaintiffs pray for judgment against Defendants and each of them, jointly and severally, for damages in such amount as the court or finder of fact deems proper, in a sum which will be proven at trial, plus costs and attorney fees.

COUNT II: VIOLATION OF CONSTITUTIONAL RIGHTS UNDER COLOR OF FEDERAL LAW
(BIVENS ACTION)
(BUTLER SNOW, CLARK, AND JOHN DOES AND JANE DOES 1-10)

258. Plaintiffs incorporate and reallege each of the foregoing paragraphs as if fully set forth herein.

259. Thad Cochran is a United States Senator and, therefore, a federal actor.

260. Senator Cochran authorized Don Clark to act on his behalf, thus delegating authority to him. As such, Don Clark and his firm Butler Snow are

considered to be federal actors when acting on their client Thad Cochran's behalf.

261. Don Clark did, in fact, act on Thad Cochran's behalf in connection with the Rose Cochran Incident.

262. Defendants Butler Snow and Clark conspired with Senator Cochran and/or his agents and representatives, and/or acted with their delegated authority, in formulating the charges brought against Mark Mayfield.

263. Defendants Butler Snow and Clark acted on behalf of Senator Cochran in filing the Incident Report against Clayton Kelly for the Rose Cochran Incident for exploitation of a vulnerable person under Miss. Code Ann. § 43-47-19.

264. Defendants Butler Snow and Clark are, therefore, deemed to be acting under color of federal law for purposes of a Bivens action.

265. Moreover, Defendants Butler Snow and Clark's representation of Senator Cochran and his campaign constitutes a close nexus such that the actions of Butler Snow and Clark could be reasonably interpreted to be attributed to its client, a federal actor.

266. As such, Defendants Butler Snow and Clark can be considered federal actors for purposes of *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999 (1971).

267. The above-described actions were taken by Butler Snow and Clark while acting under the color of federal law, and caused Mark Mayfield to be deprived of his clearly-established rights secured by the United States Constitution under the First, Fourth, Fifth, and Eighth Amendments, and constitute abuse of process,

which resulted in injuries to Mark and, ultimately, his death.

268. Butler Snow and Clark were aware of the deprivations complained of herein, and condoned or were deliberately indifferent to such conduct.

269. As a result, Plaintiffs have been damaged and in an amount to be fully proven at the trial of this matter.

COUNT III: NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS
(ALL DEFENDANTS)

270. Plaintiffs incorporate and reallege each of the foregoing paragraphs as if fully set forth herein.

271. The Defendants could reasonably foresee that their intentional and/or negligent acts would result in emotional harm and distress to any "co-conspirators," including Mark Mayfield and his family.

272. Mark Mayfield did, in fact, suffer mental and emotional distress as the result of the Defendants' acts. Mark Mayfield's mental and emotional distress manifested itself via demonstrable harm during the period preceding his death.

273. Robin Mayfield also suffered mental and emotional distress as the result of the Defendants' acts, both after Mark's arrest and after his death continuing to the present day.

274. As a result, Plaintiffs have been damaged and in an amount to be fully proven at the trial of this matter.

COUNT IV: WRONGFUL DEATH (ALL DEFENDANTS)

275. Plaintiffs incorporate and reallege each of the foregoing paragraphs as if fully set forth herein.

276. The wrongful and negligent acts and omissions of Defendants were a direct, substantial, and proximate cause of the emotional distress and death of Mark Mayfield.

277. Alternatively and/or additionally, Richard Wilbourn's intentional actions caused Mark Mayfield to experience an irresistible impulse to commit suicide.

278. As federal actors, Defendants Butler Snow and Don Clark are also subject to liability.

279. As state actors, Defendants Butler Snow and Don Clark are also subject to liability.

280. Plaintiffs are entitled to damages under Mississippi Code Annotated § 11-7-13, and for non-economic damages for loss of consortium.

COUNT V: CIVIL CONSPIRACY (ALL DEFENDANTS)

281. Plaintiffs incorporate and reallege each of the foregoing paragraphs as if fully set forth herein.

282. Defendants conspired and colluded together to wrongfully arrest and prosecute Mark Mayfield for a crime he did not commit, thereby depriving him of his state and federal constitutionally protected rights.

283. As a result, Plaintiffs were damaged in an amount to be fully proven at the trial of this matter.

COUNT VI: KIDNAPPING AND FALSE IMPRISONMENT

284. Plaintiffs incorporate and reallege each of the foregoing paragraphs as if fully set forth herein.

285. The State Actor Defendants unreasonably and unlawfully seized Mark's person without probable cause to believe a crime occurred.

286. The State Actor Defendants throughout Mark's false imprisonment, remained deliberately indifferent.

287. The State Actor Defendants held Mark Mayfield in confinement, and required Mark to pay tens of thousands of dollars to obtain his release.

288. The State Actor Defendants lacked lawful authority to seize, detain, confine, imprison, and deprive Mark Mayfield of his liberty. The State Actor Defendants were grossly negligent in unreasonably and unlawfully seizing and confining Mark Mayfield.

289. As a direct and legal result of the foregoing, Plaintiffs were hurt and injured in their health, strength, and activity, which have caused, and will continue to cause, Plaintiffs physical, mental, and emotional pain and suffering, all to their general damage in a sum which will be proven at trial.

WHEREFORE, PREMISES CONSIDERED, the Plaintiffs pray:

a. That process issue to the Defendants and that they be required to answer in the time allowed by law,

b. That compensatory damages of, from and against the Defendants, each and severally, be awarded to the Plaintiffs,

c. That Plaintiffs be awarded punitive damages against the Defendants,

d. That Plaintiffs be awarded reasonable expenses incurred in this litigation, including reasonable attorney and expert fees, pursuant to 42 U.S.C. §1988 (b) and (c),

e. For actual, compensatory, economic, and non-economic damages; and

f. That the Plaintiffs receive any other further and general relief to which it may appear they are entitled.

s/*Dorsey R. Carson, Jr.*

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