No. 23-597

In the

Supreme Court of the United States

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

Petitioners,

v.

BUTLER SNOW, L.L.P., DONALD CLARK JR., CITY OF MADISON, MISSISSIPPI, MARY HAWKINS BUTLER, GENE WALDROP, CHUCK HARRISON, AND VICKIE CURRIE,

Respondents.

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

BRIEF IN OPPOSITION

ROY A. SMITH, JR.
DANIEL COKER HORTON & BELL, P.A.
4400 OLD CANTON RD., STE 400
JACKSON, MS 39215

KAYTIE M. PICKETT
Counsel of Record
ADAM STONE
JONES WALKER LLP
3100 N. STATE ST., STE 300
JACKSON, MS, 39216
(601) 709-3344
kpickett@joneswalker.com

January 4, 2024

Counsel for Respondents the City of Madison, Mississippi; Mary Hawkins Butler; Gene Waldrop; Chuck Harrison; and Vickie Currie

QUESTIONS PRESENTED

1. Unlike the plaintiff in *Gonzalez v. Trevino*, the Mayfields never challenged the scope of the *Nieves v. Bartlett* exception to the general rule that a plaintiff bringing a retaliatory arrest claim against an officer must prove an absence of probable cause. No court below addressed the *Nieves* exception. Did the Mayfields fail to preserve for review any of the questions presented in *Gonzales v. Trevino*?

2. Also unlike *Gonzalez*, the Mayfields' case proceeded to the summary judgment stage on a retaliatory arrest claim under *Lozman v. City of Riviera Beach*, and the district court found that the Mayfields lacked even indirect, circumstantial evidence of retaliatory intent. Is this therefore an inappropriate case for considering the scope of *Nieves*?

3. The court of appeals held that the totality of warrant applications, presented by the same officers to the same municipal judge as part of the same case, should be considered in evaluating probable cause. The court did not apply the related-offense doctrine. Should the Court find that this case does not fairly present the question of whether the related-offense doctrine of *Devenpeck v. Alford* applies to warrant-based arrests?

4. Should the Court deny review of whether the arresting officer lacked probable cause when the courts below held that the Mayfields failed to show the violation of a clearly established right?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

RELEVANT STATUTORY PROVISIONS

The Mayfields cite the current version of Section 43-47-19(2) of the Mississippi Code (2023), but the statute was amended in 2019. Section 43-47-19, as it existed in 2014 when the relevant arrests took place, provided in relevant 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 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."

STATEMENT OF THE CASE

Factual Background

The Conspiracy

In 2014, Tea Party candidate Chris McDaniel challenged incumbent U.S. Senator Thad Cochran in the Republican Party primary. Pet. App. 60a. Four McDaniel supporters—Clayton Kelly, John Mary, Richard Sager, and Mark Mayfield—plotted for Kelly to sneak into the nursing home of Senator Cochran's wife, Rose, to photograph her in the privacy of her bed. Pet. App. 61a.

These conspirators knew Mrs. Cochran was bedridden with progressive dementia.[1] Pet. App. 12a. They did not seek a "good, clear picture" of Mrs. Cochran in her bed out of idle curiosity. ROA 4002-03, 4607. The conspirators believed Senator Cochran was sleeping with his aide, Kay Webber, and they wanted this picture to use in a video contrasting Mrs. Cochran's deteriorated, bedridden appearance with

[1] Mrs. Cochran was not a "semi-public figure." Pet. at 7. Her marriage fifty years earlier did not make her so. *See Dayton Newspapers, Inc.*, 170 Ohio App. 3d 471, 480, 867 N.E.2d 874, 881 (2007) (holding public official's wife was not a limited purpose public figure solely by virtue of her marriage). And Mrs. Cochran—who had been bedridden and out of the public eye for many years—did not "thrust" herself into a public controversy. *Ferguson v. Watkins*, 448 So.2d 271 (Miss. 1984); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). In fact, no recent public pictures of her existed when the conspirators hatched their plot. ROA 4206, 4366, 4377-78, 4460.

Ms. Webber's attractive, healthy appearance. Pet. App. 12a. As Clayton Kelly put it, they wanted to show Mrs. Cochran's condition "versus the condition [Senator Cochran's] side chick was in." ROA 4206.

The conspirators planned for Kelly, an aspiring blogger, to post the video on YouTube. Pet. App. 24a, 89a. In the script for the video, Kelly wrote, "Shocking right? While [Rose] rots in a bed Thad has been having a very good time with Kay Webber." ROA 4459. The conspirators privately speculated about this "very good time," comparing Ms. Webber to Monica Lewinsky. ROA 4424, 4458-59.

To get the picture the conspirators wanted, John Mary exchanged Facebook messages with Mark Mayfield, whose mother was in the same nursing home as Mrs. Cochran. Pet. App. 24a, 90a. Mary told Mayfield, "Obtaining a GOOD clear picture [of] you know who… would REALLY put teeth into what we are working on." ROA 4607 (ellipses in original). Mayfield responded, "Gonna be a challenge. Security camera right outside the door." ROA 4607; Pet. App. 24a.[2] Mary responded, "[W]ear a cap and glasses…and look down never straight ahead while withing [*sic*] view of cameras." ROA 4607. Mayfield responded, "Can't commit. I can get someone in the building and is [*sic*] the room if you know someone who would do it."

---

[2] The Mayfields state, "Mayfield believed that the photo could be obtained legally," but they cite no allegation or evidence of this belief. Pet. at 7. Mark Mayfield's statement that getting a picture would "be a challenge" because of the security camera suggests otherwise.

ROA 4607. Mary answered, "I HAVE YOUR MAN…Clayton Kelly is his name." ROA 4608.

Through Mayfield, Kelly learned the information he needed to access Rose Cochran's bedroom without detection. The Mayfields admit that "Mayfield provided limited information that ultimately helped to procure the photograph of Rose Cochran." Pet. at 7. That information included where the nursing home guards would be, Mrs. Cochran's room number, what direction to go, even the smell of the right elevator. ROA 4186-88, 4190-91, 4195-96; Pet. App. 25a.

After failed earlier attempts, Kelly succeeded on Easter Sunday. He "coat-tailed" a security guard to gain access to Mrs. Cochran's nursing home bedroom, where he photographed her in her bed. ROA 4214. As agreed, Kelly incorporated the picture into a video that he posted on YouTube. Pet. App. 25a. The Mayfields admit the picture of Rose Cochran in her bed was "appalling." Pet. App. 26a.

The McDaniel campaign disavowed the video and ordered it taken down. Pet. App. 26a. Kelly told Mary the picture of Rose "was shocking and maybe [] went too far," and he later claimed, "The video did not stay up long as the morality of Rose's picture being out there hit me." ROA 4870, 4325. Another McDaniel supporter told Mary that the "[v]ideo is horrible, especially with Rose nursing home photos. You're killing her dignity and makes you look [like an] ass." Pet. App. 26a.

The Investigation

After Senator Cochran's campaign staff saw the video of his wife in bed, Senator Cochran called his lawyers. Pet. App. 26a. One of those lawyers, Don Clark, called Mayor Hawkins Butler. Pet. App. 13a. The Mayor called Chief Waldrop and asked him to meet with Clark. Pet. App. 62a.

Chief Waldrop and Assistant Chief Sanders went to the law firm, Butler Snow, that afternoon. ROA 5005-06. After the meeting, they assigned Officers Harrison and Currie to investigate. Pet. App. 26a. In the following days, the officers met several times with the city attorney and two assistant district attorneys to discuss the investigation and the appropriate charges. Pet. App. 26a. The Mayor was *not* involved in the investigation or the decision to seek any arrests. Pet. App. 18a, 37a; ROA 5003-5; 5052; 5353-54; 5539-40; 8097-98.

The Arrests

The municipal judge issued a warrant for Kelly's arrest. Pet. App. 108a. After his arrest, Kelly gave a voluntary statement and permission to search his Facebook and YouTube accounts. Pet. App. 13a. Kelly's statement and messages showed Mary's involvement, and the municipal judge issued a warrant for Mary's arrest. Pet. App. 112a. After Mary's arrest, he also gave a voluntary statement, which described Richard Sager and Mark Mayfield's involvement in the plan. Pet. App. 112a; ROA 219-226.

Sager was arrested shortly thereafter.[3] Pet. App. 112a.

The same officers—Officers Harrison and Currie—presented the arrest and search warrant applications to the same municipal judge, who issued both warrants. Pet. App. 53a. The applications cited various statutes, including Criminal Conspiracy, Miss. Code § 97-1-1; Photographing a Person in a Place of Expected Privacy, § 97-29-63; and Exploitation of a Vulnerable Adult, § 43-47-19. ROA 166-176, 205-239.

Based on Mary's and Kelly's statements and their Facebook and phone records, Officers Harrison and Currie submitted search and arrest warrant applications for Mayfield. Pet. App. 53a. Harrison's affidavits for the search warrants cite Miss. Code § 43-47-19(3) and contain a detailed statement of facts. Pet. App. 45a, 71a. Currie's affidavit for the arrest warrant cites the conspiracy statue, Miss. Code § 97-1-1, and Miss. Code § 97-29-63 as the underlying offense. Pet. App. 52a; ROA 8048. It contains minimal facts, but it states that Mayfield had been "communicating, planning, and assisting Clayton Kelly with information and resource which aided and assisted Kelly in photographing and filming Rose Cochran inside of her residence, her room at St. Catherine's

[3] The Mayfields suggest all these warrant applications were defective. Pet. at 9. The District Court found this argument was "generally foreclosed by the guilty pleas of two of the conspirators…." Pet. App. 37a.

Village, without her knowledge or permission." Pet. App. 70a.

The municipal judge issued the warrants, and Mark Mayfield was arrested at his office the same day. Pet. App. 113a. He posted bond and was released within hours of his arrest. ROA 5727-37.

The Prosecutions

Following the arrests, an attorney in private practice, Andy Taggart, called the Mayor and the District Attorney to offer to serve as a special prosecutor. ROA 6326-29. The District Attorney declined this offer. ROA 6329-30. According to then-assistant district attorney Dow Yoder, after the arrests, the Mayor told Yoder that Taggart and Butler Snow[4] would prosecute if the District Attorney's office was afraid to do so. Pet. 31a; ROA 6098-99. But Yoder, a McDaniel supporter, was not involved in the cases, and he insisted he had no personal knowledge that the Mayor agreed to target anyone or to encourage anyone to submit a false warrant application. ROA 6055, 6130, 6113.

Kelly pleaded guilty to conspiracy to commit burglary of a dwelling, Miss. Code § 97-17-23, and Mary pleaded guilty to posting injurious messages to

[4] The attorney who offered to prosecute, Andy Taggart, was not with Butler Snow when he made his offer to the Mayor or the District Attorney, and Yoder was likely confused. ROA 6155.

the internet, § 97-45-17. Pet. App. 116a-117a. Sager entered a pre-trial diversion program. Pet. App. 116a.

Three days after McDaniel lost the primary election, Mark Mayfield took his own life.[5] Pet. App. 14a. He did so before a grand jury could consider an indictment. ROA 136, 5748.

Procedural Background

The Bill of Discovery State Court Proceedings

Before filing their federal lawsuit, the Mayfields filed two state-court suits—each a bill for discovery, an archaic, *ex parte* action still allowed in Mississippi chancery courts. *See Butler Snow LLP v. Estate of Mayfield*, 281 So. 3d 1214, 1219 (Miss. Ct. App. 2019). Through one of these cases, which proceeded under seal, the Mayfields obtained "massive amounts of information": "Several thousand pages of documents were received in response to subpoenas duces tecum issued under the bill of

[5] Judge Ho, in his dissent from the denial of rehearing en banc, asked, "[D]id [Mark Mayfield] deserve to be arrested, prosecuted, and imprisoned?" Pet. App. 6a. Mayfield was neither prosecuted nor imprisoned. He also asked, "Did he deserve to be humiliated, even driven to suicide…?" Pet. App. 6a. But the district court found that the Mayfields failed to produce summary judgment evidence that the arrest caused Mark Mayfield to experience an irresistible impulse to commit suicide. Pet. App. 38a.

discovery, and multiple depositions were taken, including those of minors." *Id.* at 1217.

After obtaining this "massive amount of information," the Mayfields brought their federal lawsuit against Butler Snow and Don Clark; Chief Waldrop; Officers Currie and Harrison; Mayor Hawkins Butler; the City of Madison; and Richard Wilbourn. Pet. App. 78a.

The Complaint and Motions to Dismiss

The Mayfields brought claims under Sections 1983 and 1988 for violations of Mark Mayfield's constitutional rights under the First, Fourth, Fifth, Eighth, and Fourteenth Amendments and for state law torts. Pet. App. 79a. In their Amended Complaint, the Mayfields admitted that Mark Mayfield discussed with John Mary and Clayton Kelly how to get "into Mrs. Cochran's nursing home room" to "take photographs of Mrs. Cochran in her bed." Pet. App. 89a, 90a-91a. The Amended Complaint cites the search and arrest warrants issued for Mary, Kelly, and Mayfield and admits that the municipal judge signed Mayfield's arrest warrant "on the basis of the Currie affidavit and the Harrison affidavits[.]" Pet. App. 45a, 86a.

Every defendant moved to dismiss, and the government officials raised qualified immunity. ROA 163-164, 201-203, 274-275, 437-440. While the motions to dismiss were pending, the court allowed the Mayfields to conduct further discovery. ROA 793-798.

In support of the motions to dismiss, the defendants submitted the police incident report, the affidavits supporting Mark Mayfield's, John Mary's, Richard Sager's and Clayton Kelly's search and arrest warrants, Mary's voluntary statement, Kelly's judgment of conviction, and Mary's petition to enter guilty plea. ROA 166-176, 205-239, 563-574.

The district court considered this evidence and the admissions contained within the complaint. *Mayfield v. Butler Snow LLP*, 341 F. Supp. 3d 664, 670 (S.D. Miss. 2018). The district court found that Rose Cochran was "entitled to privacy in her bedroom" under the statute cited in Mayfield's arrest warrant, Miss. Code § 97-29-63(1); that Officer Currie "got the law right" in the arrest warrant application; and that the admissions in the Mayfields' complaint, in hindsight, supported Officer Currie's arrest warrant application. *Id.* at 670, 673.

The court dismissed the Fourth Amendment claims against the City and the Mayor. *Id.* at 674. The court, however, allowed the Mayfields to proceed on their First Amendment retaliatory arrest claim under *Lozman v. City of Riviera* against the City and the Mayor, because *Lozman* does not require the absence of probable cause. *Id.*

After requesting (and receiving) further briefing, the district court denied qualified immunity to Officer Currie under *Malley v. Briggs*, 475 U.S. 355, 341 (1986). The court, looking at the arrest warrant application in isolation, found it too "bare bones" to support probable cause. Pet. App. 58a. The court

granted qualified immunity to Officer Harrison because the search warrant applications contained sufficient facts and the "erroneous legal citation in his application was the kind of negligent 'mistaken judgment' that merits qualified immunity." Pet. App. 58a.

The Qualified Immunity Appeal

Officer Currie immediately appealed the denial of qualified immunity. A three-judge panel of Judges Graves, Dennis, and Willett reversed. *Mayfield v. Currie (Mayfield I)*, 976 F.3d 482, 487 (5th Cir. 2020).

The court of appeals held that the evidence cited in the totality of the warrant applications was "quite detailed" and "clearly was sufficient to establish probable cause to issue a warrant for Mayfield's arrest." *Mayfield I*, 976 F.3d at 487. The court did *not* discuss any crimes not cited in the warrants. So contrary to the Mayfields' description, the court did *not* hold that Officer Currie's affidavit "contained sufficient evidence of probable cause of a crime that (1) was not cited in the warrant and (2) Mayfield was never charged." Pet. at 12.

The court *did* hold that the Mayfields failed to meet their burden under the second prong of qualified immunity. *Id.* at 487-88. In his concurring opinion, Judge Willett observed that "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. They have not done so."

Id. at 492. In their petition, the Mayfields do not mention this additional holding of *Mayfield I*.

The *Mayfield I* panel did not consider the Mayfields' First Amendment claim against Officer Currie separately from their Fourth Amendment claim. *See Mayfield I*, 976 F.3d at 486 n.1. The panel did not do so because the Mayfields never argued they could proceed with a First Amendment claim against Officer Currie despite the existence of probable cause. The Mayfields, in fact, did not even cite *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), in their appellees' brief, though the decision came down almost four months earlier.

The panel ultimately remanded to the district court to consider in the first instance whether the Mayfields could establish a violation under *Franks v. Delaware*, 438 U.S. 154 (1978). Pet. App. 46a.

Remand on the Claims against Officer Currie

On remand, Officer Currie renewed her motion to dismiss. She argued that the Mayfields had not alleged that she withheld or misstated any evidence in any of the warrant applications. ROA 8479-85.

In response, the Mayfields did *not* argue that their First Amendment claim against Officer Currie could survive despite the existence of probable cause. ROA 8500-8525. Again, they did not cite *Nieves*. Instead, the Mayfields argued that Officer Currie withheld facts showing that Mark Mayfield only wanted a "good, clear picture" of Rose Cochran and

had not intended for Clayton Kelly to take the "appalling" picture he took. ROA 8506-08. They further argued that Officer Currie withheld evidence that Clayton Kelly had not trespassed (though he later plead guilty to burglary). ROA 8508-09.

The court held that "from all of the circumstances gained during the investigation, Mark Mayfield's criminal intent can be inferred." *Mayfield v. Butler Snow LLP*, No. 3:17-CV-514-CWR-FKB, 2021 U.S. Dist. LEXIS 154483, at *3 (S.D. Miss. 2021). The court also held that the Mayfields had not met their burden on the second prong of qualified immunity: "They have not produced a single similar case where a court denied qualified immunity based on a difference of opinion about criminal intent." *Id.* at *3-4.

And (unsurprisingly, given that the Mayfields did not raise the issue), the district court did not mention *Nieves* or whether the Mayfields could proceed on a First Amendment claim against Officer Currie despite the existence of probable cause.

The Lozman Claim against the City and the Mayor

While Officer Currie's appeal was pending, the parties conducted extensive discovery. Following the close of discovery, the City and the Mayor moved for summary judgment on the Mayfields' First Amendment retaliatory arrest claim under *Lozman*. The district court granted the motion. *Mayfield v. City of Madison*, 540 F. Supp. 3d 615 (S.D. Miss. 2021).

Contrary to the Mayfield's characterization, the district court's grant of summary judgment did not turn on whether the Mayfields had evidence of an "official plan." Pet. at 12. Rather, the court held that the Mayfields lacked any evidence, whether direct or circumstantial, that "any investigation, arrest, search, or prosecution was carried out *because of political beliefs*." *Mayfield*, 540 F. Supp. 3d at 622 (emphasis in original). Instead, the "City investigators followed the evidence from Kelly to Mary to Mayfield." *Id.* at 624.

In opposition to summary judgment, the Mayfields relied heavily on Dow Yoder's deposition testimony about the way the District Attorney's office handled the prosecution. The district court found the evidence immaterial because the District Attorney's Office is a separate governmental entity: "Evidence of an unusual process from the State actors is not evidence of a pretextual arrest by the City officers." *Id.*

Following entry of final judgment, the Mayfields appealed to the Fifth Circuit. This time, a separate panel comprising Chief Judge Richman, Judge Ho, and Judge Engelhardt heard the appeal.

The Second Appeal

Considering the Fourth Amendment claims, the court held that the district court properly granted the officers qualified immunity. The court did not hold that probable cause existed "for crimes not cited in the warrant". Pet. at 13. Instead, it held, "While it[']s arguable that Mayfield did not meet the intent

element of the specific statute cited, that's not enough to overcome qualified immunity." *Mayfield v. Butler Snow (Mayfield II)*, 75 F.4th 494, 500 (5th Cir. 2023). The court affirmed the district court's holding that the Mayfields had not overcome qualified immunity's second prong. *Id.*

Like the first appellate panel, the second did not consider the Mayfields' First Amendment retaliatory arrest claims against the officers as separate from their Fourth Amendment claims. The Mayfields didn't ask it to do so. Yet the Mayfields claim, "[T]he Fifth Circuit held that probable cause for Mark Mayfield's arrest precluded the retaliation claim because Mayfield did not present particularized, comparator evidence." Pet. at 13.

No, it didn't. The words "particularized, comparator evidence" do not appear anywhere in the opinion. The Mayfields never argued they should be allowed to proceed with their retaliation claim against the officers regardless of probable cause. And because the Mayfields did not make this argument, the Fifth Circuit did not consider it.

The court also did not affirm dismissal of the Mayfields' First Amendment retaliation claim against the City or the Mayor for failure to present "particularized, comparator evidence." The court considered all the evidence the Mayfields offered to oppose summary judgment and held: "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." *Id.* at 501.

Judge Ho's Dissent from the Denial of Rehearing En Banc

Following the second panel's decision, a member of the court asked for an en banc poll. The Fifth Circuit declined to reconsider the case en banc, over Judge Ho's dissent. *Mayfield v. Butler Snow*, 78 F.4th 796 (5th Cir. 2023) (per curiam).

Judge Ho stated that the *Mayfield I* decision "foreclosed the theory adopted in *Gonzalez*—that a plaintiff could win even if there was probable cause." *Id.* at 798 n.2 (Ho, J., dissenting). Judge Ho did not acknowledge that this "theory," which arises from *Nieves*, existed before *Gonzalez* or *Mayfield I*. He also did not address the Mayfields' failure to raise a *Nieves* argument to the *Mayfield I* panel, or the district court on remand, or the *Mayfield II* panel. Instead, he claimed the Mayfields "had no choice but to dispute the existence of probable cause in this appeal." *Id.*

Judge Ho's dissenting opinion did not distinguish between a retaliatory prosecution claim, which is governed by *Hartman v. Moore*, 547 U.S. 250 (2006); a retaliatory arrest against a municipality, which is governed by *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018); or a retaliatory arrest claim against officers, which is governed by *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019). Judge Ho concluded that the Fifth Circuit's interpretation of *Nieves* in *Gonzalez*, rather than *Lozman* or *Hartman*, tied the

court's hands from granting relief for First Amendment retaliation. *Id.* at 800 (Ho, J., dissenting).

In arguing that the Mayfield's allegations "should've been sufficient to state a First Amendment retaliation claim," Judge Ho relied on Dow Yoder's deposition testimony. *Id.* at 798. The district court and second panel found this same evidence inadequate to support a *Lozman* retaliatory arrest claim because Yoder described the District Attorney's prosecutorial actions, rather than the City's or the officers' acts in making arrests. *Compare Mayfield*, 78 F.4th at 798 (Ho, J., dissenting) *with Mayfield*, 540 F. Supp. 3d at 624 *and Mayfield II*, 75 F.4th at 501.

Eleven judges of the Fifth Circuit, including *Mayfield I* and *II* panel members Chief Judge Richman, Judge Graves, Judge Willett, and Judge Engelhardt, voted against rehearing en banc.

SUMMARY OF THE ARGUMENT

This is not a case like *Lozman*, where a man was arrested for refusing to yield the podium at a city council meeting. *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1950 (2018). This is also not a case like *Gonzalez*, where a woman was arrested for briefly possessing a public document. *Gonzalez v. Trevino*, 42 F.4th 487, 489 (5th Cir. 2022). These trivial misdemeanor arrests, made in response to Fane Lozman and Sylvia Gonzalez's criticisms of their local governments, raise serious First Amendment concerns.

This is a case where a group of men, including Mark Mayfield, conspired to rob a bedridden dementia patient of her dignity by sneaking into her nursing home room to photograph her in bed, without her knowledge or consent. The community was outraged, not at the men's political beliefs, but at their appalling act. And two of the conspirators pleaded guilty to felonies.

The City and the officers "aggressively pursue[d] those who committed a potential invasion of the privacy of an incapacitated adult," *Mayfield II*, 75 F.4th 494 at 501. The Mayfields argued that a former assistant district attorney's testimony showed Mark Mayfield's arrest was retaliatory. The district court and the court of appeals disagreed: "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." *Id.* (emphasis in original).

So the Mayfields' evidence did not establish the City's retaliatory intent under *Lozman*. The Mayfields never even argued this evidence was enough to show the officers' retaliatory intent under *Nieves*. The court of appeals, therefore, never considered whether the Mayfields needed comparator evidence, and the outcome of *Gonzalez* can have no effect on this case.

Unlike Sylvia Gonzalez, who conceded the existence of probable cause, the Mayfields have only ever argued the absence of probable cause on their claims against the officers. The court of appeals did not reject the Mayfields' argument based on the

related offense doctrine. Instead, the court of appeals found that the totality of the warrant applications arguably demonstrated probable cause and, regardless, the Mayfields had not shown the violation of a clearly established right. This case does not raise the issue of whether the related-offense doctrine applies to warrant-based arrests, and the Fifth Circuit did not ignore its own precedent. Review is not warranted on any of the Mayfields' three issues presented, and their petition should be denied.

ARGUMENT

I. The Mayfields failed to preserve their first two issues, so they are inappropriate for review.

The Mayfields did not preserve their first two issues presented for review. They never argued that their First Amendment retaliation claims against the officers should proceed despite the presence of probable cause. They never raised whether *Nieves v. Bartlett* requires a plaintiff to identify other individuals who engaged in similar conduct yet were not arrested—*i.e.*, comparators. And the lower courts did not discuss the scope of *Nieves*, because they were not asked to do so.

To make this case appear like *Gonzalez*, the Mayfields base their petition on a mischaracterization of the court of appeals' decision. But the Fifth Circuit did not, as the Mayfields claim, hold that "probable cause for Mark Mayfield's arrest precluded the retaliation claim because Mayfield did not present particularized, comparator evidence." Pet. at 13. And

the *Mayfield I* panel did not, as Judge Ho suggested, "foreclose the theory adopted in *Gonzalez*—that a plaintiff could win even if there was probable cause." *Mayfield*, 78 F.4th at 798 n.2 (Ho, J., dissenting). Instead, the *Mayfield I* panel merely cited *Nieves* for the proposition that a plaintiff must *generally* show the absence of probable cause to bring a retaliatory arrest claim against individual officers. *Mayfield I*, 976 F.3d at 486 n.1. Neither panel addressed whether the Mayfields might satisfy an exception, because the Mayfields never argued that they could.

By contrast, in *Gonzales v. Trevino*, the plaintiff conceded the existence of probable cause and premised her case on the *Nieves* exception. 42 F.4th 487, 489 (5th Cir. 2022) ("[H]ow are we to treat a plaintiff's [retaliatory arrest] claims when she…concedes that there exists probable cause for the arrest?"). The district court in *Gonzalez* found the plaintiff's allegations sufficient under *Nieves*, but a divided panel of the Fifth Circuit reversed. *Id.* at 490, 494. Both the district court and appellate decisions carefully discussed the Supreme Court's majority, concurring, and dissenting opinions in *Nieves*. The issue is well-presented in *Gonzalez*; it is not here.

Judge Ho charitably excused the Mayfields' failure to raise *Nieves*, claiming the Mayfields "had no choice but to dispute the existence of probable cause in this appeal." *Mayfield*, 78 F.4th at 798 n.2 (Ho, J., dissenting). But he did not explain why the Mayfields ignored the *Nieves* exception for the four years between the *Nieves* May 2019 decision and the second

panel's July 2023 decision.[6] Not until their petition for writ of certiorari did the Mayfields argue they state a claim under *Nieves*.

The Court has held that failure to raise an argument below waives or forfeits it. *See United States v. Jones*, 565 U.S. 400, 413 (2012); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002). Accordingly, the Court does not ordinarily "'adjudicate either legal or predicate factual questions in the first instance.'" *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 413 (2017) (quoting *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419, 435 (2016)). Here, the Mayfields base their petition on arguments they failed to raise below, and they offer no reason why the Court should depart from its normal practice of denying review of unpreserved issues. The Court should not do so, and the Mayfields' petition should be denied.

II. This Court's resolution of *Gonzalez* will not affect this case because the Mayfields will still lack evidence of retaliatory intent.

Because the Mayfields lack evidence of retaliatory intent, a writ of certiorari will not affect the outcome of this case. The Mayfields, unlike Sylvia

---

[6] The Mayfields knew *Nieves* existed, because they cited *Nieves* in their brief opposing the City's motion for summary judgment—although *Nieves* applies to claims against individual officers, not municipalities. ROA 6009-12. Yet they did not argue, even in that brief, that they could satisfy any interpretation of the *Nieves* exception on *any* claim.

Gonzalez, had the benefit of discovery in state and federal court. *Gonzalez*, 42 F.4th at 491 (deciding whether Gonzalez stated a claim for retaliatory arrest on the pleadings). Yet even after discovery, the district court held that the Mayfields lacked any evidence that anyone arrested Mark Mayfield because of his political beliefs. *Mayfield v. City of Madison*, 540 F. Supp. 3d 615, 622 (S.D. Miss. 2021).

The district court's analysis did not turn on whether the Mayfields had proven an official municipal policy; it explicitly held that the Mayfields could not establish retaliatory intent. *Id.* at 622. The district court's review was broad: it did not examine only whether the Mayfields presented "objective" evidence similar to the evidence in *Lozman v. City of Riviera*. *Id.* Instead, using its own burden-shifting framework, the court considered any evidence that could conceivably demonstrate retaliatory intent, including "indirect, circumstantial evidence."[7] *Id.* at 623.

The district court's test was more generous than any possible interpretation of *Lozman* or *Nieves*. Yet even under this broad test, the district court found, and appellate court agreed, that the Mayfields lacked

---

[7] Reasoning that *Lozman* "may be incomplete," the court asked (1) whether Mayfield engaged in protected First Amendment activity; (2) whether the City articulated a legitimate, non-retaliatory reason for the arrest; and (3) whether the City's reason was pretextual. *Id.* at 623. The district court held a plaintiff could show pretext either through evidence of disparate treatment or by showing the City's explanation was false. *Id.*

evidence that anyone arrested Mark Mayfield because of his political beliefs. *Id.* at 622. Rather, the officers "followed the evidence" with "free rein to conduct their investigation as they saw fit." *Id.* at 624.

In his dissent from the denial of rehearing en banc, Judge Ho argued that Yoder's deposition testimony was sufficient to "state a First Amendment retaliation claim." *Mayfield*, 78 F.4th at 800 (Ho, J., dissenting). But Judge Ho did not explain why the second panel held this evidence was insufficient to show retaliatory intent under *Lozman*, yet somehow the same evidence should state a claim against the officers under *Nieves*.

Moreover, every statement Judge Ho cited is about the *prosecution* of the Rose Cochran conspirators, not their *arrest*—as the district court recognized and the panel affirmed.[8] *Compare Mayfield*, 78 F.4th at 798 (Ho, J., dissenting) *with Mayfield*, 540 F. Supp. 3d at 624 *and Mayfield II*, 75 F.4th at 501. Retaliatory prosecution, unlike retaliatory arrest, always requires the absence of probable cause. *See Hartman v. Moore*, 547 U.S. 250, 263 (2006). *Nieves* and *Lozman* are retaliatory arrest cases. Judge Ho's blending of two distinct causes of action undermines his argument.

---

[8] In Mississippi, a district attorney's office handles prosecutions. District attorneys are officers of the state (not a city) and are responsive to the set of counties (not cities) that comprise their respective districts. *See* Miss. Code § 25-31-11. Neither Madison County nor the 20th Circuit Court District was named as a defendant in this case.

The statements Judge Ho quoted demonstrate real anger at the conspirators. Judge Ho assumed, without proof, that the conspirators' political beliefs caused this anger. Yet the conspirators' own political party was furious about the appalling photograph of Mrs. Cochran, and their candidate ordered the video taken down. Pet. App. 26a. In fact, McDaniel issued a written statement expressing his "abhorrence" at Clayton Kelly's "reprehensible" and "criminal" act. *See* Geoff Pender, *Man arrested for sneaking into Cochran's wife's nursing home*, THE CLARION-LEDGER (May 17, 2014), https://www.clarionledger.com/story/news/politics/2014/05/17/cochran-wife-nursing-home-arrest/9211639/. Another Tea Party member said the video "robbed [Mrs. Cochran] of her dignity" and made the conspirators "look [like] ass." Pet. App. 26a. No evidence suggests that the conspirators' political ideology caused this outrage, rather than the cruel exploitation of an elderly, bedridden woman with dementia.

The district court considered the same statements Judge Ho quoted, and it found they were not enough to demonstrate retaliatory intent. *Mayfield*, 540 F. Supp. 3d at 624. The second appellate panel affirmed. *Mayfield II*, 75 F.4th at 501. No matter the scope of *Nieves*, the Mayfields cannot prevail on retaliatory arrest given this finding. For this reason, the Court's decision in *Gonzalez* will not change the outcome of this case, and review is not warranted.

III. The Mayfields base their third question presented on mischaracterizations of the opinions below.

A. The Mayfields ignore the second prong of qualified immunity.

The Court should deny review of the Mayfield's final question presented because the Mayfields ignore the second prong of qualified immunity. In their final question presented for review, the Mayfields ask whether it is sufficient for an arresting officer to have probable cause for a crime not listed in a warrant. Pet. at 1. This question goes to the first prong of the qualified immunity test—disproving probable cause. But to succeed on a Fourth Amendment claim against the arresting officer, the Mayfields must show not only a lack of probable cause, but also the violation of a "clearly established" right. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011).

Both appellate panels found that the Mayfields failed to meet their burden of proving the violation of a clearly established right—the second prong of the qualified immunity analysis. On their first appeal, the Mayfields presented no argument and no case holding that probable cause cannot be determined from the totality of warrant applications presented. *Mayfield I*, 976 F.3d at 487. On their second, the Mayfields presented no argument and no case denying qualified immunity based on a difference of opinion on criminal intent. *Mayfield II*, 75 F.4th at 500.

The Mayfields address neither holding on the second prong of qualified immunity. But qualified

immunity requires that the Mayfields overcome *both* prongs. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Review of one alone cannot change the outcome of this case, and therefore, review is unwarranted.

B. No court below relied on the related-offenses doctrine.

By mischaracterizing the court of appeals' decisions, the Mayfields seek to create the illusion of a certiorari-worthy issue on a circuit split. But the court of appeals did not base its rulings on crimes not cited in the warrant applications.[9] It never mentioned the related-offenses doctrine. And this is not surprising, because *Devenpeck v. Alford*, 543 U.S. 146 (2004), and *Arizmendi v. Gabbert*, 919 F.3d 891 (5th Cir. 2019), do not address the situation present here: the same officers presented multiple arrest and search warrant applications based on the same facts to the same municipal judge, who issued each warrant.

The Mayfields' third argument in their petition for certiorari is nothing more than a recasting of the same argument every court below rejected: that Mark Mayfield lacked the necessary intent for the crime for which he was arrested. The warrant applications

---

[9] In considering whether Don Clark or Butler Snow had probable cause to report a crime, the district court considered crimes other than those cited in the warrant. *Mayfield*, 341 F. Supp. 3d at 670. The court of appeals affirmed. *Mayfield II,* 75 F.4th at 499-500. But the Mayfields aren't challenging that decision, and the "closely related offenses" doctrine governs whether an officer has probable cause, not a private citizen. *Devenpeck*, 543 U.S. at 153-54.

showed, and the Mayfields admitted in their complaint, that Mark Mayfield knew that the plan was to photograph Mrs. Cochran *in her bed*, in the privacy of her bedroom, to contrast her physical appearance with her husband's paramour's. Pet. App. 88a, 90a-91a. Mayfield refused to take the picture himself and warned about the security camera because he knew the plan was wrong. ROA 4607-08.

An arresting officer could reasonably infer that secretly photographing a woman in a place of privacy without consent is indecent under Miss. Code § 97-29-63. *See Moore v. State*, No. 2022-KA-00327-COA (Jan. 2, 2024), *available at* https://courts.ms.gov/images/Opinions/CO173006.pdf; *Stuart v. State*, 369 So. 3d 545, 552 (Miss. Aug. 17, 2023). While the Fifth Circuit considered the intent element of the specific statute cited in the arrest warrant "arguable," this evidence was enough to satisfy the low bar of probable cause. *Mayfield v. Butler Snow (Mayfield II)*, 75 F.4th 494, 500 (5th Cir. 2023).[10]

Finally, the evidence also established probable cause for a subsection of a statute cited in the warrant

---

[10] The *Mayfield II* panel may have considered the evidence stronger than "arguable" had the panel had the benefit of two recent Mississippi appellate decisions, *Stuart v. State*, 369 So. 3d 545 (Miss. Aug. 17, 2023), and *Moore v. State*, No. 2022-KA-00327-COA (Jan. 2, 2024), *available at* https://courts.ms.gov/images/Opinions/CO173006.pdf. In both cases, the courts held the jury could infer "indecent" intent under the statute from intentional, secret filming in a protected location without the consent of those filmed, though both defendants argued they lacked sexual desire for the persons filmed.

applications, Miss. Code § 43-47-19. ROA 303. A reasonable municipal judge could infer from the warrant applications that the picture had sufficient monetary value, regardless of whether Clayton Kelly was paid. And the evidence showed that the conspirators, including Mark Mayfield, conspired to purposefully exploit the vulnerable, elderly Rose Cochran—to take advantage of her helpless, bedridden position for their own gain.[11]

As the Mayfields admit, the municipal judge considered the totality of the warrant applications. The statutes cited in those applications are not post-hac rationalizations. The court of appeals did not rely on the related-offense doctrine to affirm the finding of probable cause. So the undeveloped circuit split on whether the related-offense doctrine applies to warrant-based arrests has no bearing on this case, nor did the Fifth Circuit fail to follow its own precedent. Most importantly, the Mayfields failed to meet their burden of overcoming the second prong of qualified immunity, so the third question they pose for review is irrelevant to the outcome of this case.

---

[11] Judge Ho stated, "Defendants acknowledged that the statutes they considered didn't cover the activists' conduct." *Mayfield*, 78 F.4th at 799 (Ho, J., dissenting). But Defendants conceded only that § 43-47-19(3) did not apply, while arguing that the other criminal statutes referenced throughout the police file did apply—including § 43-47-19(2)(b).

CONCLUSION

Sylvia Gonzalez mistakenly placed a public petition in her binder. Mark Mayfield plotted to spread across the internet a secretly taken photograph of an elderly dementia patient in her bed, and his co-conspirator, the photographer, pleaded guilty to a felony. Gonzalez conceded the existence of probable cause and litigated solely on the *Nieves* exception; the Mayfields failed to argue *Nieves* at any point below. On a motion to dismiss, the district court found Gonzalez presented sufficient allegations of retaliatory intent. Here, on summary judgment, the district court found, and the appellate court agreed, that the Mayfields lacked any evidence of retaliatory intent.

The cases are not similar in any way. The grant of a writ of certiorari in *Gonzalez* should have no bearing on this case. The Mayfields fail to present any compelling reason justifying review, and their petition should be denied.

Respectfully submitted,

ROY A. SMITH, JR.
DANIEL COKER HORTON & BELL, P.A.
4400 OLD CANTON RD., STE 400
JACKSON, MS 39215

KAYTIE M. PICKETT
Counsel of Record
ADAM STONE
JONES WALKER LLP
3100 N. STATE ST., STE 300
JACKSON, MS, 39216
(601) 709-3344
kpickett@joneswalker.com

Counsel for Respondents the City of Madison, Mississippi; Mary Hawkins Butler; Gene Waldrop; Chuck Harrison; and Vickie Currie