No. 23-597

In The
Supreme Court of the United States

ROBIN MAYFIELD, et al.,

Petitioners,

v.

BUTLER SNOW, L.L.P., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Butler Snow L.L.P. is a Delaware limited liability partnership that has no parent company, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

Butler Snow, L.L.P. and Donald Clark, Jr., a lawyer at that firm (collectively "Butler Snow"), have no interest in the questions presented by the petitioners for review by this Court. The petition makes factual and legal misstatements to shoehorn Butler Snow into those questions.

All questions presented in the petition address the claimed liability of defendants other than Butler Snow. Butler Snow was dismissed from the case by the District Court, and that holding was affirmed by the Fifth Circuit, for one simple reason: the firm had probable cause or good grounds to make an initial report to the authorities of possible criminal activity. That reason is as sound today as ever.

STATEMENT OF THE CASE

A. Factual background.[1]

Several men devised a scheme during the 2014 Republican Senate Primary in Mississippi to photograph Rose Cochran, the infirm and bedridden wife of

[1] Because Butler Snow was dismissed under Federal Rule of Civil Procedure 12(b)(6), this factual recitation is based on the well pleaded factual allegations in the Amended Complaint and on the publicly available police records. The District Court considered the police records based on the parties' agreement that the records were integral to the pleading. ROA 346. ("ROA" refers to the electronic record on appeal in the United States Court of Appeals for the Fifth Circuit.)

Senator Thad Cochran. Pet. App. 89a–91a. Their idea was to juxtapose Mrs. Cochran's photograph with that of the Senator's longtime aide, for use in an attack ad that they hoped would benefit their preferred candidate, Chris McDaniel. The ad would insinuate that Senator Cochran was having an affair with his aide. *Id*. at 88a–89a.

Mark Mayfield's role was to inform the others on the location of Mrs. Cochran's private room at a nursing home located in Madison, Mississippi. Mayfield possessed that knowledge because his mother was also a resident at the nursing home. *Id*. at 89a–91a.

Mayfield understood that the purpose of the scheme was to obtain a photograph of Mrs. Cochran in her bed. *Id*. at 90a–91a. Using an access card he possessed to gain entry to the building to visit his mother, Mayfield took one of the other participants in the scheme, Richard Wilbourn, to the nursing home on a Sunday afternoon and showed him the location of Mrs. Cochran's room. *Id*. The Amended Complaint described this activity as "scouting and mapping" the facility. *Id*. at 112a.

Wilbourn then passed the "information on the layout of the nursing home" along to a blogger, Clayton Kelly. *Id*. at 89a–92a. Armed with this information, Kelly gained access to the nursing home on his third try, having failed on his first two attempts to enter. *Id*. at 91a. He "was able to gain access to Mrs. Cochran's room" and took a "cell phone video of her in her bed." *Id*. Kelly incorporated this into a video that

he produced and posted online to his YouTube channel. *Id.*; ROA 169–170.

Kelly removed the video from YouTube soon after posting it because viewers found it "appalling." C.A. 5 Appellants' Br. at 7. But the video "quickly gained attention" and was preserved by a Cochran campaign staffer. Pet. App. 91a, 105a.

When Senator Cochran learned of the video, he engaged Butler Snow to represent his family. Butler Snow inquired with the Mayor of Madison whom it should contact regarding this incident, specifically to arrange viewing the video. Butler Snow then participated in a meeting with the Madison police to report the incident and provided the police the video.

The general substance of Butler Snow's oral report to the police (made by Donald Clark) was incorporated at some point into pages 4 and 5 of a more extensive document (ROA 166–171) prepared by police officers during their investigation. As shown on page 4 of the document, Butler Snow's oral report referenced Clayton Kelly, identified as the person who had posted the video. ROA 169. Butler Snow had no knowledge when it made the report that Mayfield played a role in obtaining the photograph, and the oral report made no mention of Mayfield.

Soon after Butler Snow's report, Madison police officers arrested Clayton Kelly. Based on their interview of Kelly and their review of his electronic communications, the police made arrests of three additional persons, including Mark Mayfield. Mayfield's arrest

warrant cited Mississippi Code § 97-1-1 (Conspiracy). ROA 331.

In the end, Kelly, along with two others involved in this scheme, pleaded guilty to various crimes. ROA 137–138, 564–574. Mayfield committed suicide one month after his arrest, before a grand jury considered any possible indictment. Pet. App. 115a.

B. Proceedings below.

Roughly three years after Mark Mayfield's death, the Mayfields filed this lawsuit. Butler Snow moved to dismiss the Amended Complaint. ROA 163–192, 546–574.

The District Court granted Butler Snow's motion. Pet. App. 59a–77a. The Court reasoned that Butler Snow's report to the Madison authorities was supported by probable cause:

> 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.
>
> . . .

> 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].

Pet. App. 67a–69a.

Other defendants remained in the case for years and were dismissed on other bases following discovery and dispositive motions.

The Mayfields appealed the final judgment to the Fifth Circuit, which affirmed Butler Snow's dismissal on essentially the same basis as the District Court's opinion:

> 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 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.

Pet. App. 14a–15a.

The rest of the Fifth Circuit's opinion addressed the other defendants and the legal issues relevant to them. The Mayfields now seek certiorari review.

REASONS FOR DENYING THE PETITION AS TO BUTLER SNOW

I. The petition contains factual and legal misstatements.

As required by this Court's Rules, Butler Snow files this response to correct misstatements in the petition, to avoid waiving objection and so that the misstatements do not wrongly frame what is before the Court. *See* Sup. Ct. R. 15. This opposition addresses those misstatements first, before turning to other reasons to deny certiorari.

A. Butler Snow did not ask the City of Madison's Mayor to pursue criminal charges against Mark Mayfield.

The petition creates the impression that Butler Snow, in a phone call, asked the City of Madison's Mayor to pursue criminal charges against Mark Mayfield. Pet. at 8. That allegation is not in the Amended Complaint and is therefore irrelevant as to Butler Snow.

The impression is also false. The only two participants in the referenced phone call—Mayor Mary Hawkins-Butler and Donald Clark—testified that

Clark called Hawkins-Butler to report a potential crime and to arrange a viewing of the video. ROA. 6376, 6378–6379.[2] Neither witness testified that Clark asked for criminal charges to be pursued. Importantly, both witnesses testified that Mark Mayfield's name was never mentioned in this phone conversation because at the time of that call neither Clark nor Hawkins-Butler knew of Mayfield's involvement.

For the same reason, Butler Snow's official report to the police, made soon after the police viewed the video, did not mention Mayfield's name. ROA 169–170. Only later did the police discover Mayfield's involvement.

B. Anyone wanting to take a photograph of Rose Cochran knew that he had to invade the privacy of Mrs. Cochran's bedroom.

The petition says that Mayfield "believed" that Clayton Kelly could obtain a photo of Mrs. Cochran "legally." Pet. at 7. The Mayfields cite no support for that claim, and Butler Snow is not aware of any. Mayfield committed suicide, and therefore made no statement elaborating his beliefs. This is nothing more than a

[2] Clark was deposed after Butler Snow's dismissal. So unimportant was his role in the Mayfields' case, his deposition transcript was not relied upon in the other parties' summary judgment briefing and does not appear to be part of the record on appeal.

self-serving guess as to Mayfield's understanding of the legality of the proposed photograph.

In any event, the Amended Complaint says that the conspirators discussed that Clayton Kelly "would take photographs of Mrs. Cochran *in her bed*." Pet. App. 91a. Richard Wilbourn "asked for [Mayfield's] help in learning where Mrs. Cochran's *room* was located," *id*. at 90a, because the conspirators wanted to get "*into* Mrs. Cochran's nursing home *room*" to "get a photograph of her," *id*. at 89a. Mrs. Cochran was "*bedridden*," *id.* at 85a, and the conspirators knew she "*lay in bed*," *id*. at 88a, so her private bedroom was the only place where she could be photographed.[3] Anyone, including Mayfield, knew that taking a photograph of Mrs. Cochran meant invading the privacy of her bedroom.

Nursing home residents pay for and are entitled to protection from complete strangers entering their private bedrooms and taking unauthorized photographs. The Amended Complaint alludes to those expectations of privacy and some of the protections in place: the property is under video surveillance, Pet. App. 90a, 94a; regular visitors must possess security access cards, *id*. at 109a; and Clayton Kelly was twice thwarted in gaining access to the property, *id.* at 91a.

Accordingly, there is no factual basis to assert that Mayfield believed that it was perfectly legal to sneak into a secure nursing home, go the bedroom of a bedridden patient, take an appalling photograph of that

[3] Emphasis is supplied throughout this paragraph.

patient in her bed, and then publish that photograph to the world. Any reasonable person would rightly assume—or at least have serious concerns—that such conduct violated some law.

A number of reasonable Mississippi lawyers concluded just that. The municipal judge found the conduct sufficient to issue arrest warrants for the various conspirators. And the other conspirators pleaded guilty to various crimes, suggesting that their counsel, too, had concerns that their clients' conduct violated Mississippi criminal statutes.

C. The contours of the *Twombly/Iqbal* standard are not before the Court.

At the end of their petition the Mayfields drift into asking this Court to compel the Fifth Circuit to adhere to the *Twombly/Iqbal* pleading standard. Pet. at 23–25. This issue is not listed in the questions presented. And the argument is made in such vague terms, it is unclear what the Mayfields mean.

To the extent this vague argument is directed at Butler Snow, the Mayfields have waived it. Their Fifth Circuit briefs do not cite *Twombly* or *Iqbal*. C.A. 5 Appellants' Br. at ix–xi; C.A. 5 Appellants' Reply Br. at iii–vii. The Mayfields did not make this a case about the sufficiency of their pleading, as such.

Rather, as to Butler Snow the parties agreed on the dispositive issue: whether Butler Snow had probable cause or good grounds to make an initial report to

the authorities. Pet. App. 14a–15a, 66a. Though the Mayfields' Amended Complaint contains many conclusory statements that do not satisfy the *Twombly/Iqbal* pleading standard, no one made an issue of that in the courts below because what the Mayfields *did* adequately plead was sufficient to absolve Butler Snow by establishing good grounds to make a report to the authorities.

II. The questions presented in the petition do not pertain to Butler Snow.

Having addressed the broad categories of legal and factual misstatements in the petition, Butler Snow now turns to the specific questions presented.

The three questions the Mayfields say are certworthy are unrelated to Butler Snow's dismissal. Butler Snow should be dismissed as a respondent.

The first question concerns the necessity of comparative evidence to defeat a retaliatory arrest claim. Butler Snow was not dismissed because the Mayfields lacked comparative evidence, Pet. App. 67a–69a, and the Fifth Circuit did not affirm Butler Snow's dismissal on that basis, *id*. at 14a–15a. Instead, the Mayfields *agreed* in both courts below that if Butler Snow had probable cause or good grounds to report possible criminal activity, then that was a complete defense to their claims against Butler Snow. *Id*. at 14a–15a, 66a. So, the non-existence of comparative evidence makes no difference to the Mayfields' case against Butler Snow. Even if the Court were to vacate the Fifth Circuit's judgment

because of this first question, Butler Snow would remain dismissed.

The second and third questions concern the applicability of standards from the warrantless arrest context to the warrant-based arrest context. These questions do not address Butler Snow's dismissal either. Butler Snow made an initial report to the authorities before there were any warrants and before anyone was arrested or even searched. The Mayfields conceded below that the City of Madison and its officers controlled the subsequent process of obtaining warrants and the features of those warrants. C.A. 5 Appellants' Br. at 10–11, 14–15, 17–18, 20; C.A. 5 Appellants' Reply Br. at 6. Therefore, even if the Court were to vacate the Fifth Circuit's judgment because of the second or third questions, Butler Snow would remain dismissed.

The Mayfields should not have included Butler Snow among the respondents to this petition. The Court should not grant a petition that wrongly drags Butler Snow through a case in which it lacks any remaining interest.

III. Butler Snow acted reasonably in reporting Clayton Kelly's unusual conduct to the authorities.

When it made its report to the authorities, Butler Snow knew that someone had entered the nursing home, gone to Mrs. Cochran's room, taken an unauthorized photograph of her lying in bed, and that Clayton Kelly had posted that photograph to his YouTube

channel. The law firm reported what it knew to the authorities and discussed several criminal statutes that might be implicated.

From there, the police chose whom to investigate and arrest and what statutes to include in the affidavits and warrants that make up the police file.[4] Whether those statutes fit the conduct is not Butler Snow's fight. The only question as to Butler Snow—as the Mayfields *agreed* in the courts below—has always been whether Butler Snow had probable cause or good grounds to make an initial report of possible criminal activity. Pet. App. 14a–15a, 66a.

The law firm had probable cause or good grounds. The unusual conduct might have satisfied any number of criminal statutes, just as the District Court reasoned. *Id*. at 67a–69a.

One factual detail is worth clarifying, given that the Mayfields say this is a retaliatory arrest case. Mark Mayfield's arrest warrant charged him with participation in a conspiracy, without specifying an underlying crime. ROA 331. The judge who issued that warrant had multiple affidavits in front of him referencing multiple potential crimes. One affidavit referenced the exploitation of a vulnerable adult statute, Miss. Code

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[4] Although the Mayfields initially suggested that Butler Snow might have played some role in controlling the statutes cited in police affidavits and warrants, they abandoned that theory during the litigation. C.A. 5 Appellants' Br. at 10–11, 14–15, 17–18, 20; C.A. 5 Appellants' Reply Br. at 6.

§ 43-47-19, without specifying a subsection of that statute. ROA 332.[5]

There can be no serious debate that Clayton Kelly willfully exploited a vulnerable adult and that his exploitation had some monetary value[6]—thereby fulfilling the statute's subsection "(2)(b)." Anyone who helped facilitate Kelly's conduct could be guilty of a conspiracy to exploit a vulnerable adult. Again, at least one affidavit in the police file cited that statute without mistakenly citing some other, incorrect subsection.

Therefore, the Mayfields' preoccupation with what other warrants and affidavits say or don't say appears to be much ado about nothing and does not map onto the issues in *Gonzalez v. Trevino*.

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[5] The circuits appear to be in accord that a judge issuing a warrant can consider information spread across multiple affidavits available at the time the warrant is issued. *See*, *e.g.*, *Kaiser v. Lief*, 874 F.2d 732, 735 (10th Cir. 1989); *Sovereign News Co. v. United States*, 690 F.2d 569, 575 (6th Cir. 1982); *United States v. Fogarty*, 663 F.2d 928, 930 (9th Cir. 1981); *United States v. Todisco*, 667 F.2d 255, 258 (2d Cir. 1981). Not only did one affidavit for Mayfield cite Section 43-47-19, generally, so too did one affidavit for Clayton Kelly. ROA. 303. These affidavits were available to the judge who issued Mayfield's arrest warrant.

[6] The video's monetary value was obvious in several ways: (1) Campaigns pay substantial money for opposition research; (2) A YouTube channel like Kelly's gains value from increased traffic likely to result from unique, scintillating content; (3) Kelly viewed himself as an up-and-coming blogger; his future career stood to benefit, financially and otherwise, from "scooping" a major story. There is no requirement in the statute that the accused receive actual payment in money, only that the exploitation have monetary value.

Regardless, those arguments have nothing to do with Butler Snow, which did not prepare the affidavits or warrants. A private citizen making an initial report of possible criminal activity need not cite the correct title, chapter, and section of the code book. Butler Snow did not attempt such specificity and was not required to do so.

CONCLUSION

The Court should deny the petition for writ of certiorari.

Respectfully submitted,

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