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

REPLY BRIEF FOR PETITIONERS

Dorsey R. Carson, Jr.
Counsel of Record
Kathryn P. Goff
Carson Law Group, PLLC
125 S. Congress St., Ste 1336
Jackson, Mississippi 39201
(601) 351-9831
dcarson@thecarsonlawgroup.com

Steve C. Thornton
Post Office Box 16465
Jackson, Mississippi 39236
Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

ARGUMENT

I. There is no preservation issue. This Court has the authority and the discretion to review the questions presented.

Petitioners' retaliatory arrest case is based upon their belief that, in searching and arresting Mark Mayfield under two defective warrants, Respondents failed to accord Mark Mayfield the rights they were obliged to provide by the First Amendment. The First Amendment issues have been raised by the Mayfields at every step of this case. *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), is front and center.

The first question for this Court is whether *Lozman* and *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), require a plaintiff to identify other individuals who engaged in similar conduct yet were not arrested, and the second, whether the *Mt. Healthy* burden-shifting standard adopted in *Lozman* applies equally to warrant-based retaliatory arrest claims.

Instead of addressing the merits of these questions, Respondents spend most of their briefs spinning alleged facts, most of which are disputed if not directly contradicted by other evidence not before this Court. By the time Respondents get to their crux argument, they have rightly disclosed that Petitioners cited *Nieves* in *Mayfield II* (addressing retaliation under the First Amendment). The Fifth Circuit cited *Nieves* in both *Mayfield II* and *Mayfield I* (addressing qualified immunity under the Fourth Amendment).[1]

[1] Respondents cite to *Mayfield I* for their First Amendment arguments, but *Mayfield I* addressed only Fourth Amendment issues under *Malley v. Briggs*, 475 U.S. 335 (1986).

Respondents nevertheless urge this Court to forgo the opportunity to address important First Amendment issues because the Mayfields did not adequately preserve their First and Fourth Amendment arguments. City 19-21.

Even setting Petitioners' "waiver of waiver" defense aside,[2] Respondents miss the boat on the purpose and legal requirements for waiver. Waiver is a defense based upon a failure to raise an issue or defense in the courts below. That does not equate into a question of whether a party adequately argued a single case, or even multiple cases, as Respondents contend. *Nieves* is not a new argument; and even if it could somehow be construed to be one, it is not a new claim.

Indeed, whether *Nieves* applies to warrant-based arrests is the very question presented here. The rationale for protecting officers making split-second decisions in the field simply does not exist in warrant-based cases. The Mayfields believe *Nieves* should not be expanded to shield cities, mayors, and charging

---

Mayfield II addressed First Amendment issues under *Lozman* and *Nieves*, as well as a Fourth Amendment "probable cause" exception under *Franks v. Delaware*, 438 U.S. 154 (1978). *Mayfield I* was an interlocutory appeal by Officer Currie on whether she was entitled to qualified immunity under the Fourth Amendment. *Mayfield I* is not a First Amendment case that falls under *Lozman* or *Nieves*. *Mayfield II* is. There is a clear, important distinction.

[2] Respondents did not raise their newfound waiver argument before the Fifth Circuit and, ironically, may have forfeited or waived the defense under the same authorities they cite.

officers in warrant-based arrest cases, as the Fifth Circuit has done in this case.

This issue has not been waived. "A waived claim or defense is one that a party has knowingly and intelligently relinquished; a forfeited plea is one that a party has merely failed to preserve." *Wood v. Milyard*, 566 U.S. 463, 470 n.4 (2012). "Although jurists often use the words interchangeably, forfeiture is the failure to make the timely assertion of a right[;] waiver is the intentional relinquishment or abandonment of a known right." *Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004). Neither a forfeiture nor a waiver is present in this case.

"Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido, Cal.,* 503 U.S. 519, 534 (1992). "A litigant seeking review in this Court of a claim properly raised in the lower courts thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below." *Id.* at 535.

In *Lebron v. National R.R. Passenger Corp*., this Court not only considered a "new" argument but agreed with the petitioner. 513 U.S. 374 (1995). In both the district court and the appellate court, Lebron argued that, although Amtrak was a private entity, its actions were subject to constitutional requirements because it was so closely connected with federal entities. *Id.* at 378-79. Then, after certiorari was granted, Lebron "first explicitly presented" the alternative argument that Amtrak was itself a federal entity. *Id.* at 379. This contrasted with Lebron's

position below "expressly disavow[ing]" the contention that Amtrak was a governmental entity. *Id.* at 378.

Delivering the opinion, Justice Scalia wrote, "Lebron's contention that Amtrak is part of the Government is in our view not a new claim within the meaning of that rule, but a new argument to support what has been his consistent claim: that Amtrak did not accord him the rights it was obliged to provide by the First Amendment." *Id.* at 379. Justice Scalia further noted that even if "this *were* a claim not raised by petitioner below, we would ordinarily feel free to address it, since it was addressed by the court below. Our practice permit[s] review of an issue not pressed so long as it has been passed upon...." *Id.*

The Mayfields presented their First Amendment objections throughout the district and appellate courts. Under *Yee* and *Lebron*, the Mayfields are not prevented from challenging the relevant legal standard here. Petitioners' underlying legal claim throughout this litigation has been consistent—that Respondents violated Mark Mayfield's First and Fourth Amendment rights when they conspired and acted to arrest Mayfield without probable cause to criminally (and politically) prosecute Mayfield for constitutionally protected political speech and actions they knew were not criminal. This Court may properly reach and decide the issue.

Respondents cite no cases in which this Court has found a waiver or forfeiture under these circumstances. *See* City 28 (citing *United States v. Jones*, 565 U.S. 400, 413 (2012) (government's alternative argument that, even if a GPS device attachment and use was a search, it was reasonable and thus lawful, was forfeited, where litigant did not

raise it below, the D.C. Circuit did not address it, and the new argument was raised for the first time after certiorari was granted); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (on review of a state court judgment, where the respondent asserted that federal maritime law governed the case, the Court concluded that because the issue was not raised below, it was forfeited); *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 413 (2017) (upon a distinct argument made by the United States in an amicus brief, the Court concluded: "We generally do not entertain arguments that were not raised below and that are not advanced in this Court by any party"); *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419, 435 (2016) (declining to decide the preclusion issue, holding "[t]he Commission's failure to articulate its preclusion theory before the eleventh hour has resulted in inadequate briefing on the issue," after the Commission changed its argument between the certiorari and merits stages). None of these cases fit the procedural history here.

The government violates the First Amendment whenever it retaliates against someone for criticizing public officials and/or public policies. Petitioners pursued Mayfield's First Amendment objections early and consistently throughout the proceedings. Accordingly, the first and second questions presented by the petition are properly before this Court.

This Court has now granted review in another case that presents identical issues. There is no good reason to deprive Mayfield of the opportunity to benefit from this Court's forthcoming clarification. This Court is not procedurally barred from granting certiorari.

II. This Court's resolution in *Gonzalez v. Trevino* will impact this case.

Respondents next assert that this case will not be affected by the resolution of *Gonzalez* because the district court held that the Mayfields lacked evidence of retaliatory intent. City 21-24. Respondents again miss the point.

Indeed, in granting the City and Mayor's motion for summary judgment, the district court discussed the difficulty of applying *Nieves* and stated: "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." Pet. App. 37a. The district court clearly considered the absence of comparator evidence.

The Fifth Circuit reviewed the district court's ruling under the standard it set in *Gonzalez*, which requires comparator evidence. Judge Ho expressly stated that he voted with the panel in *Mayfield II* because they were bound by the precedent established in *Gonzalez* and *Mayfield I*. Pet. App. 5a, n.1. Respondents are merely speculating that the result would have been the same if the Fifth Circuit did not require comparator evidence. It did. And the district court did.

Respondents ignore the standard of review for summary judgment under *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and its progeny. At the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. *Id.* at 249. The evidence of the

non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. *Id.* at 255.

Despite spending over fifteen pages walking through the procedural history and heavily disputed facts,[3] many of which are controverted by other testimony and evidence, Respondents fall short of showing that the Mayfields could not avoid summary judgment (much less a motion to dismiss for Respondents Butler Snow and Clark, where the district court inferred criminal intent from a single sentence in the complaint).

Judge Ho's dissent notes some of the evidence showing that the arrests were retaliatory against those opposing the Cochran campaign, including damning testimony from prosecutors, before concluding: "These allegations should've been sufficient to state a First Amendment retaliation claim." Pet. App. 6a.

According to Judge Ho, *Gonzalez* "requires us to deny relief [to the Mayfields]—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." Pet. App. 7a. 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." Pet. App. 4a. Judge Ho recognized the irrationality of the Fifth Circuit comparative evidence rule: "Exactly how is Mayfield's family supposed to track down other

---

[3] The vigor and length by which Respondents argue disputed facts is indicative of why Judge Ho notes that "this case should've gone to trial." Pet. App. 7a. There is sufficient evidence upon which a jury can properly proceed to find a verdict.

scenarios where a citizen provided similar information to another person, but was not arrested—as *Gonzalez* requires?" Pet. App. 7a.

This Court should establish the correct standard and afford the Mayfields the opportunity to make their case under the applicable law.

III. The Fifth Circuit severally departed from the Rule 12(b)(6) plausibility standard by improperly inferring criminal intent and originating possible crimes not included in the Amended Complaint or any warrants or affidavits.

Respondents Butler Snow and Donald Clark, Jr. incorrectly assert that the questions presented do not pertain to them. BS 10-11. Likewise, the City and other Respondents similarly claim that "the Mayfields aren't challenging" "the district court consider[ing] crimes other than those cited in the warrant." City 26, n.9. But the Mayfields clearly are.

The district court expressly read criminal intent into the Amended Complaint when it dismissed the claims alleged against Butler Snow and Clark. Pet. App. 66a-69a. The district court further relied on four *possible* crimes, none of which were crimes cited by the officers in their warrants and affidavits against Mayfield: "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." Pet. App. 67a.

Then, in granting summary judgment to the City and Mayor, the district court expressly relied on trespass, a crime neither Mayfield nor any alleged "co-

conspirator" was charged with: "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." Pet. App. 36a.

Then the *Mayfield II* panel held: "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." Pet. App. 14a-15a. The *Mayfield II* panel altogether ignored the district court's inference of criminal intent, but instead relied on other possible crimes.[4] Pet. App. 15a. Despite this, Respondents curiously state that "the court of appeals did not base its rulings on crimes not cited in the warrant applications." City 26.

Yet, both the district court and Fifth Circuit relied upon the crimes of "trespass" and "breaking and entering," neither of which were alleged or charged against Mayfield. Neither crime was included in any contemporaneous warrant or affidavit against any "co-conspirator." As it relates to Butler Snow and Clark,

---

[4] Mark Mayfield was never charged with any of the "possible" crimes "suggest[ed]" by the courts below, including trespass or breaking and entering. Nor could he be, legally. As contained in the Amended Complaint, Mayfield's mother lived in the same long-term care facility as Rose Cochran. As also stated therein, Mayfield had a right to be at the facility. No evidence suggests that Mayfield committed these crimes, or that anybody even alleged those crimes. Only the courts below have improperly raised other "possible" crimes that Mayfield could have been charged with (but wasn't) as a post-facto justification.

the district court also noted "invasion of privacy" as another possible crime even though there is no such crime separate from the voyeurism statute that Mayfield was wrongly charged with violating. Pet. App. 67a. Neither court held that Mayfield committed any crime—only that he *could* have *possibly* been charged with some crime other than the ones cited in the defective warrants.

These rulings directly contradict this Court's plausibility standard where, at the 12(b)(6) stage, all inferences are to be drawn in the favor of the plaintiff. Moreover, as it relates to warrant-based charges resulting in the discovery of "other crimes," in *Arizmendi v. Gabbert*, 919 F.3d 891 (5th Cir. 2019),[5] the Fifth Circuit held that *Devenpeck v. Alford*, 543 U.S. 146 (2004) does not apply to warrant-based arrests and, therefore, evidence of other crimes cannot cure a defective warrant.

The *Mayfield II* panel departed far from *Arizmendi* and the Rule 12(b)(6) plausibility standard. Accordingly, the Mayfields have requested that, in addition to the questions presented, this Court also exercise its supervisory power. Pet. 23-25. This Court can and should exercise this authority to rectify the Fifth Circuit's severe departure from both Supreme Court and Fifth Circuit precedent.

The Mayfields properly appealed the dismissal of Butler Snow and Clark, arguing the improper inference of intent to the Fifth Circuit. Petitioners'

---

[5] The Eleventh Circuit has reached the opposite result. The Mayfield's petition seeks review of this circuit split under the Fourth Amendment over whether *Devenpeck v. Alford*, 543 U.S. 146 (2004) applies to warrant-based arrests.

brief states: "the District Court necessarily relied upon improper inferences in determining that probable cause existed. The District Court's dismissal of Plaintiffs' claims against those parties was improper and should be reversed." Respondents now contend that the Mayfields have waived any argument under *Twombly/Iqbal* regarding the sufficiency of the Amended Complaint. BS 9-10. That argument fails for the same reasons as the *Nieves* waiver argument fails. *Twombly* and *Iqbal* are U.S. Supreme Court cases interpreting the Rule 12(b)(6) standard. Respondents do not cite any authority for their position that a party can waive a legal standard established by the Court.

The Fifth Circuit stretched the Rule 12(b)(6) plausibility test well beyond its limits in dismissing Butler Snow and Clark. In so holding, the courts below conducted a post-facto justification for Mayfield's search and arrest by relying solely on possible other crimes not alleged in the Amended Complaint, not alleged in any warrant or affidavit, and wholly devoid of any factual basis—both alleged and discovered.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dorsey R. Carson, Jr.
Counsel of Record
Kathryn P. Goff
CARSON LAW GROUP, PLLC
125 S. Congress St., Ste 1336
Jackson, Mississippi 39201
(601) 351-9831
dcarson@thecarsonlawgroup.com

Steve C. Thornton
Attorney at Law
Post Office Box 16465
Jackson, Mississippi 39236

Counsel for Petitioners

January 18, 2024