No. 22-1025

In The
Supreme Court of the United States

SYLVIA GONZALEZ,

Petitioner,

v.

EDWARD TREVINO, II, MAYOR OF CASTLE HILLS, SUED IN HIS INDIVIDUAL CAPACITY, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

Scott M. Tschirhart
Counsel of Record
Lowell F. Denton
DENTON NAVARRO ROCHA BERNAL & ZECH, P.C.
A Professional Corporation
2500 W. William Cannon Drive, Suite 609
Austin, Texas 78745
512/279-6431
512/279-6438 (Facsimile)
smtschirhart@rampagelaw.com
lfdenton@rampagelaw.com
Counsel for Respondents

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Nieves v. Bartlett involves a warrantless arrest by officers allegedly in violation of Mr. Bartlett's protected speech rights under the First Amendment. *Nieves v. Bartlett*, 204 L. Ed. 2d 1, 139 S. Ct. 1715, 1720-21 (2019).

This Court discussed a "narrow qualification" to the longstanding principal that the existence of probable cause defeats a retaliatory arrest claim where individuals are not ordinarily arrested for a particular crime. *Id* at 1727. Ultimately, the Court determined that Bartlett's claims could not proceed against the officers because the officers had probable cause to arrest him. *Id.* at 1728.

Petitioner invites the Court to apply this "narrow qualification" to arrests pursuant to a warrant issued by a Texas State District Judge. Petitioner's argument would virtually eliminate qualified immunity for arrests pursuant to warrants when a plaintiff pleads unsupported allegations of retaliation. Petitioner's argument would nullify the independent intermediary doctrine which encourages officers to seek a warrant. That doctrine states:

"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." *McLin v. Ard*, 866 F.3d 682, 689 (5th Cir. 2017). "Under this

doctrine, 'even an officer who acted with malice ... will not be liable if the facts supporting the warrant or indictment are put before an impartial intermediary such as a magistrate or a grand jury, for that intermediary's 'independent' decision 'breaks the causal chain' and insulates the initiating party.'" *Buehler v. City of Austin/Austin Police Dep't*, 824 F.3d 548, 554 (5th Cir. 2016).

Therefore, the questions presented are:

> Does the "similarly situated" provision mentioned in *Nieves* refer to persons who committed the same criminal conduct?
>
> Does the "narrow qualification" mentioned in *Nieves* abrogate qualified immunity where a Judge makes an independent determination of probable cause and issues a warrant prior to an arrest and in the absence of allegations of "taint" or *Franks* or *Malley* exception to the independent intermediary doctrine.?

And a related question:

> Can *Nieves* serve as notice to Respondents that their actions violated the law where a Judge makes an independent determination of probable cause and issues a warrant prior to the arrest?

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INTRODUCTION

Petitioner's characterization of the questions presented does not capture the issues posed, argued, and decided in the proceedings below. Petitioner requests this Court to virtually eliminate qualified immunity in the context of an officer disclosing all facts to a Judge and the Judge issues a warrant upon an independent finding that there is probable cause to support the warrant. A plaintiff need only make an unsupported allegation that his or her arrest was prompted by retaliatory intent. This is contrary to this Court's longstanding consistent direction to officers to present all facts to an independent magistrate or grand jury for an independent determination of probable cause.

The counterstatement of questions presented captures the issues of this case which has been correctly decided by the Fifth Circuit consistently with this Court's precedent and the holdings of other courts of appeals.

Specifically, the issue in the proceedings below cannot be framed in high generality and without consideration of the totality of the circumstances as alleged by Petitioner's Complaint, which include allegations regarding other persons who did not commit the same criminal act and the Petitioner's arrest was as a result of a valid warrant issued by a State District Judge.

Additionally, this Court has repeatedly held that qualified immunity should be analyzed for each individual defendant. Qualified immunity for a particular defendant is not abrogated unless that Defendant has notice that what he is doing is illegal. Petitioner's Complaint pleads certain actions of

Respondents in the present matter that happened prior to the release of this Court's Opinion in *Nieves* and therefore *Nieves* does not provide notice to those Respondents that their actions could be illegal.

STATEMENT OF THE CASE

Respondents disagree with how Petitioner chose to describe the factual background of the matter. Taking all reasonable inferences of fact (and not the legal conclusions) in a light most favorable to Petitioner (see *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)), the following allegations from *Plaintiff's Complaint for Retrospective Relief* and the Exhibits attached thereto tell the story. See ECF 1, 1-2, 1-3, 1-5.

Petitioner engaged in gathering signatures for a petition. *See* ECF 1, ¶46.

The petition was presented to the City at a City Council Meeting on May 21, 2019. *See* ECF 1, ¶

The petition became a "government document" as when it was presented to the City. *See* Complaint/Affidavit for Warrant of Arrest, ECF 1-5, pp.3, 7.

The City Council Meeting continued onto the next day, May 22, 2019. *See* ECF 1, ¶59.

Mayor Trevino examined the petition prior to the meeting and used a black binder clip to bind the 26 pages of the petition. *See* ECF 1-5, pg.3.

Videotape of the Council Meeting shows that Petitioner took the petition and placed it into her three-ring binder. *See* ECF 1-5, pg. 5.

During the meeting, Mayor Trevino noticed that the petition was missing, but thought that the City Secretary had collected them. *See* ECF 1-5, pg.3.

Mayor Trevino noticed that there was a black binder clip in Petitioner's three-ring binder, but he dismissed this as coincidence. *See* ECF 1-5, pg.3.

At the conclusion of the meeting, the City Secretary asked Mayor Trevino for the petition. *See* ECF 1-5, pg.4.

Mayor Trevino suspected that Petitioner had the petition and enlisted the aid of Captain Zuniga in recovering the petition from Petitioner. *See* ECF 1, ¶68-73; ECF 1-3, pg.6; ECF 1-5, pp.4,5,6.

On May 24, 2019 Mayor Trevino made a police report regarding the theft of the petition. *See* ECF 1, ¶89; ECF 1-3, pg.5.

This Court decided *Nieves v. Bartlett* on May 28, 2019.

On June 18, 2019 Police Chief Siemens assigned the investigation to Special Detective Wright. *See* ECF 1, ¶92; ECF 1-5, pg.2.

Detective Wright interviewed Mayor Trevino on June 24, 2019 and took a sworn statement from Mayor Trevino on July 8, 2019. *See* ECF 1-5, pp.3-4,6.

Detective Wright interviewed Captain Zuniga on June 27, 2019 and took a sworn statement from him on July 2, 2019. *See* ECF 1-5, pp.4,6.

Detective Wright reviewed the videos of the May 22, 2019 City Council meeting that showed Petitioner taking and Captain Zuniga recovering the petition from Petitioner's possession. *See* ECF 1-5, pp.5-6. The video was consistent with Mayor Trevino and Captain Zuniga's statements. *See ECF* 1-5, pg.6.

Detective Wright attempted to interview Petitioner, but she refused to be interviewed. *See* ECF 1-5, pg.6.

Detective Wright presented the findings from his investigation to a Bexar County District Judge. *See* ECF 1-5.

Detective Wright included all exculpatory and background information in the warrant application to comply with this Court's decision in *Franks* and its progeny. *See* ECF 1, ¶103; ECF 1-5, pg.3; *Franks v. Delaware*, 438 U.S. 154, 171–72, 98 S. Ct. 2674, 2684–85, 57 L. Ed. 2d 667 (1978); *Terwilliger v. Reyna*, 4 F.4th 270, 281 (5th Cir. 2021)("Liability under *Franks* can arise from either material misstatements or material omissions in warrant affidavits.").

On July 17, 2019, the Bexar County District Judge issued a Warrant of Arrest for Tampering with Governmental Record in violation of the Texas Penal Code §37.10(c)(1). *See* ECF 1, ¶¶26, 99; ECF 13, pg.13.

Petitioner filed suit against Respondents on September 29, 2020. *See* ECF 1.

Respondents moved, based on Plaintiff's separate allegations against them, for dismissal pursuant to Rule 12(b)(6). *See* ECF 13, ¶¶23-34.

The District Court denied qualified immunity to Respondents at the pleading stage, finding that the *Nieves* exception applied and that Plaintiff need not plead or prove the absence of probable cause. *See Gonzalez v. City of Castle Hills, Texas*, No. 5:20-CV-1151-DAE, 2021 WL 4046758, at *6 (W.D. Tex. Mar. 12, 2021). The District Court also found that Nieves, decided two months before the alleged retaliatory arrest, was clearly established. See id. at *8.

A divided panel of the Fifth Circuit reversed and rendered the denial of qualified immunity argued in Respondents' Motion to Dismiss. The majority noted

that there was no dispute among the parties that probable cause existed. *See Gonzalez v. Trevino*, 42 F.4th 487, 491, & fn.1 (5th Cir. 2022). The majority also noted that this Court held in *Nieves* that the existence of probable cause necessarily defeated Bartlett's retaliatory arrest claim. *See id.* at 492 (citing *Nieves* 139 S.Ct.at 1724). Because Petitioner had not provided objective evidence of others who engaged in the same criminal conduct but were not arrested, Petitioner's allegations did not fit within the *Nieves* exception. *See id.* at 493.

The dissent relied on facts that were not in the record. For example, the dissent represented that Detective Wright was a not a peace officer. *See id.* at 496 (Oldham, A Dissenting). However, the warrant application demonstrates that Respondent Wright was not only a Texas Peace Officer but a highly experienced and trained Peace Officer:

> I am a peace officer under the laws of the State of Texas and am currently commissioned as a Special Detective with the Castle Hills Police Department ("CHPD") In Bexar County, Texas. In my role as a Special Detective I am assigned, as needed, to conduct Investigations which might otherwise be considered sensitive, or delicate, either due to the nature of the crime or because of the parties Involved. I have over twenty (20) years of experience as a police officer and hold a Master Peace Officer license from the Texas Commission on Law Enforcement. I am also a licensed police Instructor and field training officer. During my tenure as a Texas peace officer I have

> received extensive training and experience in the field of criminal Investigation and have participated In numerous investigations into a wide variety of both state and federal criminal law violations. I also have a Bachelor of Science degree in Criminal Justice with a major In Law Enforcement from Southwest Texas State University.

ECF 1-5, pg.2, ¶3. Many more examples of the dissent's misinterpretation of the facts in the record are detailed in *Appellants' Response to Appellee's Petition for Rehearing En Banc.* ECF Case: 21-50276 Document: 00516511309. The dissent concluded that Nieves holds only that the existence of probable cause does not bar retaliatory arrest claims, "so long as the plaintiff produces objective evidence of retaliatory animus." *Gonzalez,* 42 F.4th at 503 (Oldham, A dissenting).

The Fifth Circuit denied Petitioner's motion for en-banc rehearing.

REASONS FOR DENYING CERTIORARI

I. THE FACTS OF THIS CASE DO NOT PRESENT THE ISSUES RAISED BY PETITIONER.

The facts presented in this case do not present the same issues raised by Petitioner and the Court should deny certiorari because the facts do not lend themselves to revisiting *Nieves*.

For example, it is undisputed that Petitioner's Complaint does not provide objective evidence that any other person who "intentionally destroys,

conceals, removes, or otherwise impairs the verity, legibility, or availability of a government record" (*See Petition for Cert*, pg.5) in violation of Texas law was not arrested or prosecuted for that crime.

Common sense dictates the contrary. Texas requires local governmental entities to maintain and produce governmental records pursuant to the Texas Public Information Act.[1] Texas law provides penalties for failing to maintain governmental records and for private entities to possess certain governmental records.[2] It strains credulity to represent that any Texas city would fail to prosecute persons who conceal or steal governmental records.

Absent "objective evidence that [she] was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been" Petitioner must show that her arrest lacked probable cause. *Nieves v. Bartlett*, 204 L. Ed. 2d 1, 139 S. Ct. 1715, 1727 (2019). The courts have consistently considered the "similarly situated" persons to be those persons who committed or were suspected of committing the same crime. *See Gonzalez v. Trevino*, 42 F.4th 487, 492–93 (5th Cir. 2022); *Lyberger v. Snider*, 42 F.4th 807, 814 (7th Cir. 2022); *Ballentine v. Tucker*, 28 F.4th 54 (9th Cir.

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[1] Texas Government Code, Chapter 552.

[2] Tex. Penal Code § 37.10; Tex. Loc. Gov't Code § 201.005 (Declaration of Records as Public Property; Access); Tex. Loc. Gov't Code Ann. § 202.008 (Penalty: Destruction or Alienation of Record); Tex. Loc. Gov't Code § 202.009 (Penalty: Possession of Record by Private Entity); Tex. Gov't Code Ann. § 441.158 (Local Government Records Retention Schedules).

2022); *Lund v. City of Rockford, Illinois*, 956 F.3d 938, 947 (7th Cir. 2020).

Additionally, the facts in this case involve the independent intermediary doctrine. It is undisputed that Respondent Wright presented the facts supporting Petitioner's arrest to a Bexar County Texas District Judge. The Judge made an independent determination that there was probable cause and issued an arrest warrant.

"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." *Wilson v. Stroman*, 33 F.4th 202, 208 (5th Cir.), *cert. denied sub nom. Reyna v. Wilson*, 214 L. Ed. 2d 234, 143 S. Ct. 425 (2022), and *cert. denied*, 214 L. Ed. 2d 234, 143 S. Ct. 426 (2022). "Under this doctrine, 'even an officer who acted with malice ... will not be liable if the facts supporting the warrant or indictment are put before an impartial intermediary such as a magistrate or a grand jury, for that intermediary's 'independent' decision 'breaks the causal chain' and insulates the initiating party.'" *Buehler v. City of Austin/Austin Police Dep't,* 824 F.3d 548, 554 (5th Cir. 2016)(quoting *Hand v. Gary*, 838 F.2d 1420, 1427 (5th Cir. 1988)), *see also. Russell v. Altom*, 546 Fed.Appx. 432, 436–37 (5th Cir. 2013) (applying the doctrine to First Amendment claims).

This doctrine is not absolute. To overcome the independent-intermediary doctrine at the motion-to-dismiss stage, a plaintiff must bring specific, nonspeculative allegations that the defendant deliberately or recklessly provided false information to the independent intermediary. *See Anokwuru v.*

City of Houston, 990 F.3d 956, 964 (5th Cir. 2021)(citing *Melton v. Phillips*, 875 F.3d 256, 264 (5th Cir. 2017) (en banc)(discussing *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978)). In other words, a plaintiff must show that deliberations of that intermediary were in some way tainted by the officers "[T]he chain of causation is broken only where all the facts are presented to the grand jury, or other independent intermediary where the malicious motive of the law enforcement officials does not lead them to withhold any relevant information from the independent intermediary." *Hand v. Gary*, 838 F.2d 1420, 1428 (5th Cir.1988).

However, Petitioner's Complaint does not state facts to show a "taint" or any *Franks* or *Malley* exception to the independent intermediary doctrine. *See Wilson*, 33 F.4th at 208 ("Regardless of label, this court has recognized *Franks* and *Malley* as functional exceptions to the independent intermediary doctrine."). It is undisputed that probable cause existed to arrest Petitioner. *See Gonzalez*, 42 F.4th at 491, & fn.1. It is undisputed that Respondent Wright complied with the dictates of *Franks* and *Malley* by including information from his interview with Mayor Trevino that Petitioner construes as demonstrating motive. ECF 1, ¶103; ECF 1-5, pg.3.

Petitioner's requested relief would discourage officers who determined that there was probable cause to believe that a crime was committed from bringing the facts to a judge for an independent evaluation of whether probable cause exists. Such a ruling would conflict with this Court's longstanding policy articulated in *Franks* and *Malley* that an

officer must not mislead or withhold any relevant information from the magistrate.

The facts of this case do not justify revisiting *Nieves*, *Franks* or *Malley* and the Court should deny certiorari.

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISIONS OR DECISIONS OF OTHER CIRCUITS.

The Fifth Circuit's Opinion does not conflict with this Court's Opinion in *Nieves* and none of the cases cited by Petitioner demonstrate a conflict among the Circuit courts. In fact, the cases cited by Petitioner are consistent with *Nieves*.

Petitioner failed to produce evidence that persons who steal or conceal governmental records are not arrested. As the Fifth Circuit majority correctly stated:

> Gonzalez does not offer evidence of other similarly situated individuals who mishandled a government petition but were not prosecuted under Texas Penal Code § 37.10(a)(3). Rather, the evidence she offers is that virtually everyone prosecuted under § 37.10(a)(3) was prosecuted for conduct different from hers. The inference she asks us to draw is that because no one else has been prosecuted for similar conduct, her arrest must have been motivated by her speech. But the plain language of *Nieves* requires comparative evidence, because it required "objective evidence" of "otherwise

> similarly situated individuals" who engaged in the "same" criminal conduct but were not arrested. *Id*. The evidence Gonzalez provides here comes up short.
>
> . . . . The Court's language was careful and explicit: it required "objective evidence" of "otherwise similarly situated individuals" who engaged in the same criminal conduct but were not arrested. *Nieves*, 139 S. Ct. at 1727.

Gonzalez v. Trevino, 42 F.4th 487, 492–93 (5th Cir. 2022). Petitioner failed to show objective evidence that other people who secreted or stole governmental documents were treated differently than she was.

The Fifth Circuit's opinion in *Gonzalez* is exactly consistent with this Court's decision in *Nieves*. "For those reasons, we conclude that the no-probable-cause requirement should not apply when 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,* 139 S. Ct. at 1727. Petitioner simply has not identified anyone who is "similarly situated" by having engaged in the same criminal conduct.

Petitioner's cited cases illustrate that "similarly situated" means "engaged in the same criminal conduct."

Petitioner claims that the Ninth Circuit opinion in *Ballentine v. Tucker*, 28 F.4th 54 (9th Cir. 2022) shows a split in the Circuits. *Ballentine* involves "chalking" on sidewalks which violates Nevada's graffiti statute, which prohibits conduct that "places graffiti on or otherwise defaces the public or private property, real or personal, of another, without the

permission of the owner." *Id.* at 59 (citing Nev. Rev. Stat. § 206.330). The Court noted that "the Plaintiffs presented objective evidence showing that they were arrested while others who chalked and did not engage in anti-police speech were not arrested." *Id* at 62. In other words, the court examined disparate treatment of individuals who chalked and engaged in anti-police speech and those who chalked but did not engage in anti-police speech. In either case, the conduct by the chalkers was the same. *Ballentine* does not conflict with *Gonzalez* or *Nieves* and does not represent a split in the Circuits.

Petitioner then points to the Seventh Circuit decision in *Lund v. City of Rockford, Illinois*, 956 F.3d 938 (7th Cir. 2020). The Court found that "Lund has not supplied any 'objective evidence' that 'similarly situated individuals not engaged in the same sort of protected speech 'have not been and would not be arrested for driving the wrong way down a one-way street.'" *Id*. at 947 (citing *Nieves*, 139 S. Ct. at 1727. In Lund, the court required the plaintiff to show that other persons who also drove the wrong way on a one-way street were treated differently. *Lund* does not conflict with *Gonzalez* or *Nieves* and does not represent a split in the Circuits.

Petitioner cites *Lyberger v. Snider*, 42 F.4th 807(7th Cir. 2022). However, *Lyberger* is also consistent in requiring a plaintiff to show that he or she was arrested when others who committed the same crime were not. "Without evidence to the contrary, we have no reason to believe that Centralia and Wamac's police officers would routinely give a pass to someone who followed a stranger home and refused to leave her property." *Id.* at 814. *Lyberger*

does not conflict with *Gonzalez* or *Nieves* and does not represent a split in the Circuits.

Petitioner also cites *Novak v. City of Parma, Ohio*, 33 F.4th 296, 304 (6th Cir. 2022), *cert. denied*, 215 L. Ed. 2d 45, 143 S. Ct. 773 (2023). *Novak* deals with an alleged parody facebook account protected under the First Amendment. *See id.* at 304. Novak alleged that his arrest was in retaliation for the contents of the facebook page. The court pointed out that "there's no recognized right to be free from a retaliatory arrest that is supported by probable cause." *Id.* (citing *Reichle v. Howards,* 566 U.S. 658, 663, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012)). Novak argued that the officers provided false information to the judge when they sought the warrant (a claim that is not in Petitioner's Complaint) but the court determined that none of the allegedly false information was material and that exception to the warrant defense did not apply. *See id.* at 306.

The court reasoned that if there was probable cause for Novak's arrest, or if the officers reasonably believed that there was probable cause, they were entitled to qualified immunity:

> [T]he officers had good reason to believe they had probable cause. Both the City's Law Director and the judges who issued the warrants agreed with them. Reassurance from no fewer than three other officials further supports finding that the officers "reasonably," even if "mistakenly," concluded that probable cause existed. *Wesby*, 138 S. Ct. at 591 (cleaned up). That's enough to shield Riley and Connor from liability.

> Thus, the officers are entitled to qualified immunity on Novak's retaliation claims.

Id. at 305.

Likewise, in the present case, an independent Texas District Court Judge agreed that there was probable cause to issue an arrest warrant for Petitioner. Respondent Wright was reasonable in his determination that there was probable cause to support the arrest warrant, and the District Judge confirmed that belief. Respondents are therefore entitled to qualified immunity on Petitioner's First Amendment retaliation claim.

There is no conflict between *Gonzalez*, *Ballentine, Lund, Lyberger,* or *Novak* and none of these cases conflict with *Nieves.* Absent any conflict, the Court and the Court should deny certiorari.

III. *NIEVES* DOES NOT PROVIDE NOTICE TO RESPONDENTS THAT THEIR ACTIONS WERE CLEARLY ILLEGAL.

This Court's decisions on qualified immunity have consistently focused on notice. "[Q]ualified immunity operates "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 2515, 153 L. Ed. 2d 666 (2002)(quoting *Saucier v. Katz*, 533 U.S. 194, 206, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001).

This Court Opinion in *Nieves* gave guidance to evaluate when and how to consider the existence of probable cause.

> Adopting *Hartman's* no-probable-cause rule in this closely related context addresses those familiar concerns. Absent such a showing, a retaliatory arrest claim fails. But if the plaintiff establishes the absence of probable cause, "then the *Mt. Healthy* test governs: The plaintiff must show that the retaliation was a substantial or motivating factor behind the [arrest], and, if that showing is made, the defendant can prevail only by showing that the [arrest] would have been initiated without respect to retaliation." *Lozman*, 585 U.S., at ——, 138 S.Ct., at 1952–1953 (citing *Hartman*, 547 U.S. at 265–266, 126 S.Ct. 1695).

Nieves, 139 S. Ct. at 1725. This means that a plaintiff must show an absence of probable cause before he or she reaches the *Mt. Healthy* test.

This Court discussed a hypothetical narrow exception where the "no-probable-cause requirement should not apply when 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." *Id*. at 1727. "Because this inquiry is objective, the

statements and motivations of the particular arresting officer are "irrelevant" at this stage." *Id.*

Bartlett was unable to make such a showing. "Because there was probable cause to arrest Bartlett, his retaliatory arrest claim fails as a matter of law." *Id.* at 1728.

Likewise, Petitioner's Complaint fails to allege facts to show that people could go about secreting or stealing government records in Castle Hills, Texas and the police would ignore such a crime.

There is nothing in *Nieves* that would give Respondents fair notice that reporting a crime[3] (Respondent Trevino), assigning an investigation (Respondent Siemens), or conducting a thorough investigation, and presenting the facts to a Judge for an independent determination that there was probable cause to issue a warrant (Respondent Wright) would be unlawful. Therefore, the Fifth Circuit decided *Gonzalez* correctly.

The facts of this case do not justify revisiting *Nieves*, *Franks* or *Malley* and the Court should deny certiorari.

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[3] The report occurred prior to this Court's decision in *Nieves*.

CONCLUSION

For all the aforementioned reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

Denton Navarro Rocha Bernal & Zech, P.C.
attorneys & counselors at law • rampagelaw.com
A Professional Corporation
2500 W. William Cannon Drive, Suite 609
Austin, Texas 78745
512/279-6431
512/279-6438 (Facsimile)
smtschirhart@rampagelaw.com
lfdenton@rampagelaw.com

By: */s/SCOTT M. TSCHIRHART*
SCOTT M. TSCHIRHART
State Bar No. 24013655
LOWELL F. DENTON
State Bar No. 05764700
Attorneys for Respondents
Edward "JR" Trevino, II; John Siemens;
and Alexander Wright