No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented to this Court are:

1. Whether, in the case of an alleged retaliatory arrest in violation of the First Amendment, *Nieves v. Bartlett* requires a plaintiff to identify other individuals who engaged in similar conduct yet were not arrested. This is the same question that will be decided in *Gonzalez v. Trevino*.

2. Whether the *Mt. Healthy* burden-shifting standard adopted in *Lozman v. City of Riviera*, 138 S. Ct. 1945 (2018) applies equally to warrant-based retaliatory arrest claims. Though phrased differently, this is much like the second question that will be decided in *Gonzalez*.

3. In the case of an arrest made with a warrant, whether the Fourth Amendment requires the arresting officer to have probable cause specifically for the crime cited in the warrant or is it constitutionally sufficient for the officer to have probable cause for a separate crime not mentioned in the warrant.

Last month, this Court granted certiorari in *Gonzalez v. Trevino*, No. 22-1025, *certiorari granted* (October 13, 2023) with two questions presented: (1) whether the *Nieves* probable cause exception can be satisfied by objective evidence other than specific examples of arrests that never happened, and (2) whether the *Nieves* probable cause exception is limited to individual claims against arresting officers for split-second arrests. This petition seeks review of these same questions presented in *Gonzalez*.

This petition further seeks review of a circuit split under the Fourth Amendment over whether *Devenpeck v. Alford*, 543 U.S. 146 (2004) applies to

warrant-based arrests or is limited to warrantless arrests. *Devenpeck* holds that, based on objective facts then known to the arresting officer, the officer needs probable cause to arrest the plaintiff for some crime, even if different from the offense cited. The Fifth Circuit held *Devenpeck* does not apply to warrant-based arrests. The Eleventh Circuit has reached the opposite conclusion. Notably, the Fifth Circuit in this case did not follow its own authoritative precedents, but upheld the warrants, finding probable cause for a crime not cited in the warrants.

Here, Mark Mayfield supported a Republican party candidate challenging the sitting U.S. Senator in the primary. To discredit the incumbent Senator, another supporter took a photo of the Senator's wife and posted it in a political video. City officers used alleged co-conspirator crimes (voyeurism and vulnerable adult statutes) to obtain search and arrest warrants for Mayfield, even though they knew the elements of the statutes were not met. The warrants and supporting affidavits were prepared in coordination with municipal policy makers who were making statements indicating their intent to use the arrest as retaliation against the political activity. The Fifth Circuit held that (1) probable cause existed, though for a crime not cited in the warrants, and (2) Mayfield was required to present comparator evidence. Tragically, after his public arrest and humiliation, Mayfield died from an apparent self-inflicted gunshot.

PARTIES TO THE PROCEEDING

Petitioners are Robin Mayfield, Owen Mayfield, William Mayfield, and the Estate of Mark Stevens Mayfield, the plaintiffs and appellants below.

Respondents are Butler Snow, L.L.P., Donald Clark, Jr., City of Madison, Mississippi, Mary Hawkins-Butler, Gene Waldrop, Chuck Harrison, and Vickie Currie, the defendants and appellees below.[1]

[1] Dale Danks, Jr., Janet Danks, Jordan Russell, and Quinton Dickerson also appear as movants and appellees in the official caption in the court of appeals; their claims involved discovery matters and they are no longer participating in these proceedings. Richard Wilbourn, III was dismissed on state statute of limitation grounds and is no longer participating in these proceedings.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Robin Mayfield et al. v. Butler Snow, LLP, et al.*, No. 3:17-cv-514, U.S. District Court for the Southern District of Mississippi. Decisions entered September 18, 2018, April 30, 2019, May 19, 2021, and August 17, 2021;
- *Robin Mayfield et al. v. Vickie Currie,* No. 19-60331, U. S. Court of Appeals for the Fifth Circuit. Judgment entered September 23, 2020[2]; and
- *Robin Mayfield et al. v. Butler Snow, LLP, et al.*, No. 21-60733, U. S. Court of Appeals for the Fifth Circuit. Judgments entered July 27, 2023.[3] Rehearing denied August 23, 2023.

There are no other proceedings in state or federal trial or appellate courts, or in this Court, related to this case under Supreme Court Rule 14.1(b)(iii).

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[2] *Mayfield v. Butler Snow, LLP*, 341 F. Supp. 3d 664 (S.D. Miss. Sept. 18, 2018), *rev'd and remanded sub nom*. *Mayfield v. Currie*, 976 F.3d 482 (5th Cir. 2020), *as revised* (Sept. 23, 2020). Petitioners will refer to this Fifth Circuit Opinion as "*Mayfield I*".

[3] *Mayfield v. Butler Snow, L.L.P.*, 75 F.4th 494 (5th Cir. 2023). Petitioners will refer to this Fifth Circuit Opinion as "*Mayfield II*".

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING iii
RELATED PROCEEDINGS iv
TABLE OF AUTHORITIES viii
PETITION FOR WRIT OF CERTIORARI 1
DECISIONS BELOW 3
STATEMENT OF JURISDICTION 4
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 4
STATEMENT OF THE CASE 7
Factual Background 7
Procedural Background 10
REASONS FOR GRANTING PETITION 14
I. The Court should grant certiorari in accordance with its pending review of *Gonzalez v. Trevino*, to decide (1) whether the *Nieves* probable cause exception can be satisfied by objective evidence other than specific examples of arrests that never happened, and (2) whether *Nieves* is limited to individual claims against arresting officers for split-second arrest 14
II. The Court should grant certiorari and clarify that, in the case of a warrant-based arrest, the arresting officer must have probable cause specifically for the crime cited in the warrant ... 17
III. The Court should grant certiorari to exercise its supervisory power to rectify the Fifth Circuit's severe departure from precedent. 23
CONCLUSION 26

APPENDICES

Appendix A 1a

Order and Dissenting Opinion of the Fifth Circuit on *sua sponte* petition for rehearing *en banc* (August 23, 2023)

Appendix B 10a

Opinion of the Fifth Circuit (per curiam) (Ho, J. concurring, in judgment only) (July 27, 2023) ("*Mayfield II*")

Appendix C 20a

Order of the United States District Court for the Southern District of Mississippi (August 17, 2021)

Appendix D 23a

Order of the United States District Court for the Southern District of Mississippi (May 19, 2021)

Appendix E 39a

Majority Opinion and Concurring Opinion of the Fifth Circuit (October 14, 2020) ("*Mayfield I*")

Appendix F 57a

Order of the United States District Court for the Southern District of Mississippi (April 30, 2019)

Appendix G 59a

Order of the United States District Court for the Southern District of Mississippi (September 18, 2018)

Appendix H..... 78a

Amended Complaint in Cause No. 3:17-cv-514 in the United States District Court for the Southern District of Mississippi (July 21, 2017)

TABLE OF AUTHORITIES

Cases

Arizmendi v. Gabbert,
919 F.3d 891 (5th Cir. 2019)..... 20, 21, 23, 24

Ashcroft v. Iqbal,
556 U.S. 662 (2009)..... 23, 24

Ballentine v. *Tucker*,
28 F.4th 54 (9th Cir. 2022) 2

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007)..... 23, 24

Burge v. Parish of St. Tammany,
187 F.3d 452 (5th Cir. 1999)..... 23

DeLeon v. City of Dallas,
345 F. App'x 21 (5th Cir. 2009) 19

Dempsey v. Bucknell Univ.,
834 F.3d 457 (3d Cir 2016) 22

Devenpeck v. Alford,
543 U.S. 146 (2004)..... i, 18, 19, 20, 21

Elmore v. Fulton County School District,
605 F. App'x 906 (11th Cir. 2015) 21, 22

Franks v. Delaware,
438 U.S. 154 (1978)..... 12, 16

Gassner v. City of Garland,
864 F.2d 394 (5th Cir. 1989)..... 19

Goad v. Town of Meeker,
654 F. App'x 916 (10th Cir. 2016) 22

Gonzalez v. Trevino,
42 F.4th 487 (5th Cir. 2022),
reh'g en banc denied, 60 F.4th 906
(5th Cir. 2022) ..... i, 2, 14, 16, 26

Graves v. Mahoning County,
821 F.3d 772 (6th Cir. 2016) 22

Johnson v. Norcross,
565 F. App'x 287 (5th Cir. 2014) 19

Kuslick v. Roszczewski,
419 F. App'x 589 (6th Cir. 2011) 21

Lozman v. City of Riviera,
138 S. Ct. 1945 (2018) ..... i, 1

Lund v. *City of Rockford*,
956 F.3d 938 (7th Cir. 2020) 1, 2

Lyberger v. Snider,
42 F.4th 807 (7th Cir. 2022) 2

Malley v. Briggs,
475 U.S. 335 (1986) 11, 16

Mt. Healthy City School Dist. Bd. of Educ. v. Doyle,
429 U.S. 274 (1977) 1

Nieves v. Bartlett,
139 S. Ct. 1715 (2019) 1

Noviho v. Lancaster County,
683 F. App'x 160 (3d Cir. 2017)..... 22

Pfannstiel v. City of Marion,
918 F.2d 1178 (5th Cir. 1990)..... 18

Robinson v. City of South Charleston,
662 F. App'x 216 (4th Cir. 2016) 22

Trejo v. Perez,
693 F.2d 482 (5th Cir. 1982)..... 18

United States v. Atkinson,
450 F.2d 835 (5th Cir. 1971)..... 18

Vance v. Nunnery,
137 F.3d 270 (5th Cir. 1998)..... 18-20, 22-24

Villarreal v. City of Laredo,
44 F.4th 363 (5th Cir. 2022), *reh'g en banc granted, opinion vacated*, 52 F.4th 265 (5th Cir. 2022)..... 15

Constitutional Provisions

U.S. Const., amend. I 4

U.S. Const., amend. IV..... 4

U.S. Const., amend. XIV 4

Statutes

28 U.S.C. § 1254(1)..... 4

28 U.S.C. § 1291 4

28 U.S.C. § 1331 4
28 U.S.C. § 1343(a)(3)..... 4
42 U.S.C. § 1983 5
Miss. Code Ann. § 43-47-19..... 6, 9, 11
Miss. Code Ann. § 97-1-1..... 6, 9
Miss. Code Ann. § 97-29-63..... 5, 9

PETITION FOR A WRIT OF CERTIORARI

The government violates the First Amendment whenever it retaliates against someone because they criticize public officials or public policies. In *Lozman v. City of Riviera*, this Court granted certiorari to determine whether the existence of probable cause is an absolute bar to a First Amendment retaliatory arrest claim. 138 S. Ct. at 1949. This Court held that, on facts of retaliatory intent such as those presented in *Lozman*, probable cause did not bar a First Amendment claim for retaliatory arrest. *Id.* at 1955. The Court further held that the Court's burden shifting framework established by *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) would apply to such retaliatory arrest claims. *Lozman*, at 1955. The *Lozman* plaintiff's claims were made against the municipality, not against the arresting officer. *Id.* at 1947.

A year later, the Court addressed a First Amendment retaliatory arrest claim against arresting officers based upon a warrantless arrest where probable cause was admittedly present. *Nieves v. Bartlett*, 139 S. Ct. 1715, 1720 (2019). This Court held that in such setting the claim may proceed only when the 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 1728.

Now, less than four court terms later, the circuit courts are split on the application of the *Nieves* objective evidence requirement. The Seventh and Ninth Circuits have interpreted the rule to allow different types of objective evidence to satisfy the *Nieves* rule. *See Lund v. City of Rockford*, 956 F.3d

938, 945 (7th Cir. 2020); *Ballentine v. Tucker*, 28 F.4th 54, 61-62 (9th Cir. 2022). Under this interpretation of *Nieves*, a plaintiff may prevail by pointing to a wide range of objective evidence of retaliation, including statements of the arresting officers or other officials. *Lyberger v. Snider*, 42 F.4th 807, 813-814 (7th Cir. 2022).

This Court recently granted certiorari in *Gonzalez v. Trevino*, No. 22-1025, to decide (1) whether the *Nieves* probable cause exception can be satisfied by objective evidence other than specific examples of arrests that never happened, and (2) whether the *Nieves* probable cause exception is limited to individual claims against arresting officers for split-second arrests. Because this petition seeks review of these same two questions presented in *Gonzalez*, the Court should grant this petition and hold it for disposition in accordance with the Court's decision in the *Gonzalez* case.

Further, this case presents two additional reasons for the Court to grant certiorari. First, in the case of a warrant-based arrest, the question is whether the Fourth Amendment requires the government to have evidence supporting probable cause for the crime stated in the arrest or search warrant, rather than some other crime not charged. Second, whether the Fifth Circuit's severe departure from its own precedent and the accepted and usual course of judicial proceedings compels this Court to exercise its supervisory power to rectify.

DECISIONS BELOW

1. The district court's order dismissing Don Clark and Butler Snow under Rule 12(b)(6); dismissing claims alleged against Mayor Hawkins-Butler and the City of Madison, excluding the *Lozman* claim, under Rule 12(b)(6); dismissing Chief Waldrop based upon qualified immunity; and dismissing the state law claims alleged against Officers Harrison and Currie, and Richard Wilbourn based upon state statutes of limitations. *Mayfield v. Butler Snow, LLP*, 341 F. Supp. 3d 664 (S.D. Miss. Sept. 18, 2018).

2. The district court's order dismissing Officer Harrison based on qualified immunity. This order is not reported but is attached as Petitioners' Appendix F, pp. 57a-58a.

3. The Fifth Circuit's opinion reversing the district court's denial of Officer Currie's motion to dismiss. *Mayfield v. Vickie Currie*, 976 F.3d 482 (5th Cir. 2020).

4. The district court's decision granting summary judgment on every remaining claim and party, excluding Officer Currie. *Mayfield v. City of Madison*, 540 F. Supp. 3d 615 (S.D. Miss. May 19, 2021).

5. The district court's order dismissing Officer Currie. This order is not reported but is attached as Petitioners' Appendix C, pp. 20a-22a.

6. The Fifth Circuit's opinion affirming the district court. *Mayfield v. Butler Snow, L.L.P.*, 75 F.4th 494 (5th Cir. 2023).

7. The Fifth Circuit's denial of a *sua sponte* petition for *en banc* review. This opinion is not

reported but is attached as Petitioners' Appendix A, pp. 1a-9a.

STATEMENT OF JURISDICTION

On July 27, 2023, the Fifth Circuit issued its opinion affirming the district court's grant of summary judgment to City of Madison, and on August 23, 2023, the Fifth Circuit denied rehearing *en banc*. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3), and the Fifth Circuit under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves United States Constitution Amendments I, IV, and XIV, 42 U.S.C. § 1983, Miss. Code Ann. § 97-29-63(1), Miss. Code Ann. § 43-47-19(2), and Miss. Code Ann. § 97-1-1(1).

* * *

The First Amendment to the United States Constitution prohibits any law "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

* * *

The Fourth Amendment to the United States Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause,

supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

* * *

42 U.S.C. § 1983 provides, in pertinent part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

* * *

Section 97-29-63(1) of the Mississippi Code provides:

"(1) Any person who with lewd, licentious or indecent intent secretly photographs, films, videotapes, records or otherwise reproduces the image of another person without the permission of such person when such a person is located in a place where a person would intend to be in a state of undress and have a reasonable expectation of privacy, including, but not limited to, private dwellings or any facility, public or private, used as a restroom, bathroom, shower room, tanning booth, locker room, fitting room, dressing room or bedroom shall be guilty of a felony and upon conviction shall be punished by a fine of Five Thousand Dollars ($ 5,000.00) or by imprisonment of not more than five (5) years in the custody of the Department of Corrections, or both."

* * *

Section 43-47-19(2) of the Mississippi Code provides:

"Any person who willfully commits an act or willfully omits the performance of any duty, which act or omission contributes to, tends to contribute to, or results in neglect, physical pain, injury, mental anguish, unreasonable confinement or deprivation of services which are necessary to maintain the mental or physical health of a vulnerable person, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not to exceed One Thousand Dollars ($1,000.00) or by imprisonment not to exceed one (1) year in the county jail, or by both such fine and imprisonment. Any accepted medical procedure performed in the usual scope of practice shall not be a violation of this subsection."

* * *

Section 97-1-1(1) of the Mississippi Code provides, in relevant part:

"If two (2) or more persons conspire either:

a. To commit a crime; or

. . .

h. To accomplish any unlawful purpose, or a lawful purpose by any unlawful means; such persons, and each of them, shall be guilty of a felony and upon conviction may be punished by a fine of not more than Five Thousand Dollars ($5,000.00) or by imprisonment for not more than five (5) years, or by both."

STATEMENT OF THE CASE

Factual Background

In 2014, Mississippi State Senator Chris McDaniel challenged incumbent U.S. Senator Thad Cochran in the Republican Primary. Mark Mayfield was a founder of the Mississippi Tea Party and an active supporter of McDaniel. The Mississippi Tea Party endorsed and supported McDaniel. Sen. Cochran was supported by "the Republican Establishment." Pet. App. 23a-24a.

Sen. Cochran was rumored to have been having an extra-marital affair while his wife was bedridden in a nursing home. Two Tea Party members, John Mary and Clayton Kelly, wanted to help the McDaniel campaign by exposing Cochran. Rose Cochran resided at St. Catherine's Village, a retirement home in Madison, Mississippi. Mayfield's mother was also a resident of St. Catherine's. Pet. App. 24a.

Mary messaged Mayfield via Facebook in March 2014 and explained his interest in obtaining a "good, clear picture" of Mrs. Cochran. Mayfield declined to take the photo, but told Mary that, like most retirement homes, "anyone could just go in and visit." Mayfield believed that the photo could be obtained legally. As such, Mayfield provided limited information that ultimately helped to procure the photograph of Rose Cochran. Pet. App. 3a.

Mary also believed the photo could be obtained legally. Mary believed that taking a good, clear photo of Rose Cochran, a semi-public figure, was activity protected by the First Amendment.

Neither Mayfield nor Mary contemplated a "lewd, licentious, or indecent" photo that would violate Mississippi law. The envisioned photo of Rose Cochran

was not sexual in nature. There were no conversations about taking any pornographic photos of Rose Cochran. When Mary spoke with Mayfield about taking a photo of Rose Cochran, they had no lewd, licentious, lascivious, or indecent intent.

In April 2014, Clayton Kelly photographed Rose Cochran. He then produced and posted a political video online that included the picture of Mrs. Cochran as well as the wall plaque displaying her name and room number. Shortly thereafter, due to objections from other McDaniel supporters, Kelly removed the online video. Pet. App. 25a.

Almost one month later (just weeks before the primary run-off between Cochran and McDaniel), on May 15, 2014, Don Clark, Cochran's attorney and the chair of the Butler Snow law firm, called longtime Cochran personal and political friend Madison Mayor Mary Hawkins-Butler and asked her to pursue criminal charges. Pet. App. 25a.

Mayor Hawkins-Butler instructed Madison Police Department ("MPD") Chief Gene Waldrop to meet with Clark. Pet. App. 4a. That same afternoon, Waldrop, MPD Assistant Chief Robert Sanders, and Madison City Attorney John Hedglin met Clark and others at Butler Snow's offices, where they discussed the photo and several statutory crimes that could be used to charge those involved. Pet. App. 25a.

Chief Waldrop directed MPD Officers Vicki Currie[4] and Chuck Harrison to investigate the producers of the political video. Then, in close coordination with Chief Waldrop, the city attorney, and deputy district

[4] Notably, Officer Currie is also a close, personal friend of Mayor Hawkins-Butler. Pet. App. 99a.

attorneys, Officers Currie and Harrison signed defective warrant-application affidavits that (a) did not aver any facts constituting any crime, (b) misrepresented Mayfield's intent, and (c) withheld facts the officers knew about Mayfield's intent. Madison Municipal Court Judge Dale Danks approved the arrest warrant.[5] Pet. App. p. 63a, fn2.

In this setting, Mayor Hawkins-Butler made statements to others, including statements to an assistant district attorney evidencing her intent to retaliate against those accused of making the political video against her friend.

In the affidavits and warrants, Mayfield was accused of conspiring (violating § 97-1-1) to commit the crime of photographing "with lewd, licentious or indecent intent" (violating § 97-29-63) and "willfully inflict[ing] physical pain or injury upon a vulnerable person" (violating § 43-47-19(3)). Even though MPD lacked sufficient evidence to establish probable cause for the warrants, with defective search warrants in hand, a slew of officers searched Mayfield's home and office. His computers, cell phone, and other devices were seized. Even though MPD had evidence of Mayfield's political intent and, importantly, his lack of

[5] Early in this case, Dale Danks, who continued to practice law while serving as a municipal judge, entered his appearance as co-counsel for Mayor Hawkins-Butler. The district court noted that Danks' appearance "inadvertently lends credence to the plaintiffs' beliefs about the Republican Establishment." Pet. App. 63a, fn2. Danks would later assert that his communications with Mayor Hawkins-Butler were attorney-client privileged.

criminal intent, Mayfield was arrested with the defective warrants.[6] Pet. App. 13a.

Immediately following Mayfield's arrest, the City of Madison issued a press release to the media containing Mayfield's mugshot. Mayfield's arrest quickly made national news. Mayfield was escorted shackled into a media-packed courtroom where he received a $250,000 bond. Mayfield's mugshot was then incorporated into an effective statewide television campaign advertisement for Sen. Cochran. Pet. App. 86a.

After his arrest, Mayfield began to lose sleep and became depressed. He sought professional help and was prescribed a number of medications for sleep, depression, and anxiety. Mayfield's wife experienced similar symptoms and was also prescribed medication. Pet. App. 87a.

Mark Mayfield was found dead from an apparent self-inflicted gun wound a few days after the primary election. Pet. App. 14a.

Procedural Background

Petitioners filed suit in the U.S. District Court of the Southern District of Mississippi, alleging, *inter alia*, that Respondents violated the First and Fourth Amendments when they conspired and acted to arrest Mayfield without probable cause to criminally (and politically) prosecute Mayfield for actions they knew

[6] The district court noted, "Depositions revealed that the defendants lacked any knowledge or belief that anyone in this case inflicted pain upon Rose Cochran." Pet. App. 27a, fn.4.

were not criminal and constituted constitutionally protected political speech. Pet. App. 78a.

Respondents all moved to dismiss the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). MPD Chief Waldrop and Officers Currie and Harrison also sought dismissal on qualified immunity grounds. The district court dismissed (a) Clark and his law firm Butler Snow under Rule 12(b)(6) finding they had probable cause to report that a crime may have been committed, (b) Chief Waldrop based upon qualified immunity, (c) all claims except the *Lozman* claim alleged against Mayor Hawkins-Butler and the City under Rule 12(b)(6) finding probable cause existed for a crime not cited in the warrants issued for Mayfield's search and arrest, and (d) the state law claims against Officer Harrison, Officer Currie, and Richard Wilbourn based upon state statutes of limitations. Pet. App. 59a-77a.

After requesting supplemental briefing, the district court issued a second Order. Despite finding that the sworn facts in Officer Harrison's affidavit did not amount to a violation of Mississippi Code § 43-47-19(3), which applies to a person who willfully inflicts physical pain or injury upon a vulnerable person, the district court dismissed Officer Harrison. The district court deduced, without any evidence, that Officer Harrison had erroneously cited the wrong statute.

The district court found that Officer Currie's warrant-application affidavit was not sufficient to pass muster under *Malley v. Briggs*. 475 U.S. 335 (1986). Pet. App. 57a-58a.

Officer Currie appealed the denial to the Fifth Circuit. *Mayfield I*. Pet. App. 41a. The *Mayfield I* court acknowledged that Officer Currie's warrant-

application-affidavit was deficient standing alone. However, the court deemed it appropriate to look at all the affidavits submitted to the magistrate in the related criminal investigations. Pet. App. 39a-46a.

When those affidavits were considered, the *Mayfield I* court held, Officer Currie's affidavit was not defective under *Malley* because it contained sufficient evidence of probable cause of a crime that (1) was not cited in the warrant and (2) Mayfield was never charged. Thereby, the district court's ruling was reversed, and the matter was remanded back to the lower court for an evaluation of Currie's affidavit under the standard established in *Franks v. Delaware*, 438 U.S. 154 (1978). Pet. App. 39a.

Next, the district court granted summary judgment to Mayor Hawkins-Butler and the City of Madison on the remaining *Lozman* claim. Pet. App. 38a. The district court held Petitioners lacked evidence that the City made an official plan to retaliate.

On remand, the district court ruled that Officer Currie's warrant-application-affidavit was not defective under *Franks*, and therefore, was sufficient to support probable cause (again, for a crime not cited in the warrant). Pet. App. 22a. The dismissal of Officer Currie left no remaining claims or defendants, and a Final Judgment was entered.

Petitioners appealed to the Fifth Circuit. In *Mayfield II*, the Fifth Circuit affirmed (a) the lower court's Rule 12(b)(6) dismissal of all of Petitioners' claims alleged in the Amended Complaint[7], except the *Lozman* claim against Mayor Hawkins-Butler and the City, based upon its findings that ***other*** affidavits

[7] *See* Pet. App. 78a.

supported the officers' probable cause under *Malley* (for crimes not cited in the warrant), and that the officers did not deliberately or recklessly provide false information or make intentional omissions under *Franks*; (b) summary judgment on Petitioners' *Lozman* claim against the City and Mayor after finding Petitioners did not meet the evidentiary burden (in the summary judgment context) to show that Mark Mayfield was arrested in retaliation for his political activities; and (c) several orders regarding discovery and Petitioners' excluded expert testimony. Pet. App. 10a-19a.

Petitioners now respectfully seek this Court's review and reversal of the Fifth Circuit's holdings in *Mayfield I* and *Mayfield II*.

REASONS FOR GRANTING PETITION

I. The Court should grant certiorari in accordance with its pending review of *Gonzalez v. Trevino*, to decide (1) whether the *Nieves* probable cause exception can be satisfied by objective evidence other than specific examples of arrests that never happened, and (2) whether *Nieves* is limited to individual claims against arresting officers for split-second arrests.

In this case, the Fifth Circuit held that probable cause for Mark Mayfield's arrest precluded the retaliation claim because Mayfield did not present particularized, comparator evidence.

This was the Fifth Circuit panel's holding despite witness testimonies evidencing that the arrests were

retaliatory against those opposing the Cochran campaign. Some of the evidence of retaliatory intent included testimony from a former prosecutor who was working in the City District Attorney's office at the time of Mayfield's arrest. The facts of this case should place this case outside the scope of *Nieves* because there is no question that government actors targeted Mark Mayfield in retaliation for his First Amendment activity.

A few short months before *Mayfield II* was decided, however, the Fifth Circuit established a new, higher "comparator" standard in *Gonzalez v. Trevino*, 42 F.4th at 493. In reversing the denial of a motion to dismiss filed by individual defendants, the Fifth Circuit in *Gonzalez* held that a plaintiff may not proceed on a First Amendment retaliation claim unless he presents "comparator" evidence that identifies other individuals who engaged in similar conduct yet were not arrested. *Id*. at 492-93. Thus, the *Gonzalez* court determined that a plaintiff must show specific examples of non-arrests to prove retaliatory treatment. *Id.* at 492.

In his dissent from the denial of *en banc* review of *Gonzalez*, Fifth Circuit Judge James C. Ho recognized that the majority's interpretation of *Nieves* creates a split with the Seventh Circuit. 60 F.4th at 910. *Gonzalez* is now pending review by this Court. *See* No. 22-1025.

As in *Gonzalez*, in *Mayfield II*, Judge Ho also dissented from the denial of *en banc* review. Pet. App. 1a-9a. In his dissent, Judge Ho first recognized the heartbreaking loss of Mark Mayfield's life, and the resulting depth of pain to Mayfield's wife and two sons: "This case is not just the latest example of officials

abusing our criminal justice system to punish political adversaries. It's also the most tragic." Pet. App. 5a.

Then, Judge Ho expressed "concern[] about the state of freedom of speech in [the Fifth Circuit]." Pet. App. 4a. Judge Ho notes that Mark Mayfield, Sylvia Gonzalez, and Patricia Villarreal[8] initially appear very different but "share at least one thing in common: They all disagreed with those in power. And they all believe that they were punished for it—that they were charged, arrested, jailed, and humiliated for the crime of criticizing those in office. They all assert that it's wrong for officials to jail their opponents as an intimidation tactic. They all allege that that's exactly what happened to them. And they all ask this court for the opportunity to tell their stories to a jury and prove their case in a court of law." Pet. App. 3a.

In *Mayfield II*, Judge Ho concurred in judgment only because the panel was "bound by circuit precedent" in *Gonzalez* (as to *Nieves*) and *Mayfield I* (as to *Malley*). Pet. App. 5a, fn.1. Judge Ho, however, reiterated his serious concern that "*Gonzalez* significantly under-protects freedom of speech." Pet. App. 8a.

According to Judge Ho, *Gonzalez* "requires us to deny relief—no matter how obvious it is that these actions would never have been taken against a citizen who held views favored by those in power." As a result, "citizens in our circuit are now vulnerable to public officials who choose to weaponize criminal statutes

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[8] *Villarreal v. City of Laredo*, 44 F.4th 363 (5th Cir. 2022), *reh'g en banc granted, opinion vacated*, 52 F.4th 265 (5th Cir. 2022).

against citizens whose political views they disfavor." Pet. App. 8a.

Judge Ho recognized the irrationality of the Fifth Circuit comparative evidence rule: "Exactly how is Mayfield's family supposed to track down other scenarios where a citizen provided similar information to another person, but was not arrested—as *Gonzalez* requires?" Pet. App. 8a.

This Court has now granted certiorari in *Gonzalez v. Trevino*, No. 22-1025. This Court's holding from that upcoming review is likely to be determinative on this same issue in this case.

II. The Court should grant certiorari and clarify that, in the case of a warrant-based arrest, the arresting officer must have probable cause specifically for the crime cited in the warrant.

The arresting officers used Mississippi's voyeurism and vulnerable person statutes to obtain search and arrest warrants for Mark Mayfield, even though they knew the elements of the statutes were not met. Petitioners can overcome the independent-intermediary doctrine by showing that the affidavit was "so lacking in indicia of probable cause" (*Malley v. Briggs*) or that the officer intentionally omitted or misrepresented material facts (*Franks v. Delaware*). Here, Officers Currie and Harrison submitted search and arrest warrant applications that lacked evidence of probable cause for the crimes alleged therein.

Indeed, the district court found that the sworn facts in Officer Harrison's affidavit did not constitute a violation of Mississippi Code § 43-47-19(3), which applies to a person who willfully inflicts physical pain

or injury upon a vulnerable person. Pet. App. 71a. Officer Harrison's motion to dismiss was granted, however, after the court surmised, without evidence, that the officer mistakenly cited the wrong statute: "Officer Harrison has shown that the erroneous legal citation in his application was the kind of negligent 'mistaken judgment' that merits qualified immunity." Pet. App. 58a. Officer Currie's motion to dismiss was denied by the district court because "[i]t was not objectively reasonable for her to present to the judge such a bare-bones warrant application lacking any underlying facts and circumstances showing Mayfield's unlawful conduct." *Id.*

In Officer Currie's appeal, the Fifth Circuit panel in *Mayfield I* agreed that Officer Currie's affidavit was sparse but found that she and her colleagues had submitted a series of affidavits and warrant applications in connection with other alleged co-conspirators, which were all reviewed and signed by the same city judge. Pet. App. 44a. The Fifth Circuit concluded that the district court erred in finding that the plaintiffs adequately alleged a *Malley* wrong. Pet. App. 41a.

Neither the Fifth Circuit nor the district court held probable cause existed to search and arrest Mayfield under the statutes cited in the warrants and the arresting officers' warrant affidavits—the state voyeurism and vulnerable person statutes. And the Fifth Circuit in *Mayfield I* did not identify what other crime "probable cause" existed for Mayfield's arrest.[9]

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[9] On remand after *Mayfield I*, the district court denied the *Franks* challenge and for the first time identified "trespass" and "intent to invade privacy" as possible conspiracy crimes. Yet,

This Court in *Devenpeck v. Alford* held that a warrantless arrest by the arresting officer is reasonable under the Fourth Amendment if, given the facts known to the officer, probable cause exists to believe that a crime has been or is being committed. 543 U.S. at 152. The extent of *Devenpeck* remains unclear, and, as such, the circuits are split.

Prior to *Devenpeck*, the Fifth Circuit applied the "related offense" doctrine to warrantless arrests, meaning "a police officer could not obtain qualified immunity for an unconstitutional warrantless arrest by claiming that he could have arrested the plaintiff for another offense unless (1) the charged and uncharged offenses were "related" and (2) the arresting officer could demonstrate arguable probable cause for the uncharged "related" offense. *See Vance v. Nunnery*, 137 F.3d 270, 274 (5th Cir. 1998)(*citing Pfannstiel v. City of Marion*, 918 F.2d 1178 (5th Cir. 1990); *Gassner v. City of Garland*, 864 F.2d 394 (5th Cir. 1989); *Trejo v. Perez*, 693 F.2d 482 (5th Cir. 1982); *cf. United States v. Atkinson*, 450 F.2d 835 (5th Cir. 1971)(applying the related offense doctrine to salvage the legality of an arrest in a criminal proceeding)).

In *Vance*, the Fifth Circuit declined to extend the "related offense" doctrine to warrant-based arrests. 137 F.3d at 274. The officer in *Vance* arrested the accused based on a warrant that the officer knew was

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until the district court made its *ex post facto* justification, those crimes were never alleged or charged against Mayfield or any purported co-conspirator. Nor would they have been—Mayfield was a regular at the nursing home where his mother resided and could invite others. Further, except for the Mississippi voyeurism statute cited in the warrant, invasion of privacy is not an independent crime. Pet. App. 21a.

not supported by probable cause. *Id*. at 275. The primary role of the related offense doctrine, the *Vance* court reasoned, was to strike a compromise between, at one extreme, forcing officers making warrantless arrests to routinely charge arrestees with every possible offense to increase the chances that at least one charge would survive the probable cause test, and, at the other extreme, allowing officers to justify sham or fraudulent arrests based on valid ex post facto justifications. *Id*.

Allowing an officer to invoke the related-offense doctrine, in this case, when the arrest made was based on a warrant would unjustifiably tilt this balance in favor of qualified immunity. *Id*. "A police officer who obtains an arrest warrant and then intentionally arrests someone he knows to be innocent should not benefit from a doctrine designed to protect police officers from civil liability for reasonable mistakes in judgment made when they effect warrantless arrests for conduct they believe is criminal based on their observations or "first-hand knowledge." *Id*. at 276.

The Fifth Circuit did not directly address whether the ruling in *Devenpeck* pertaining to warrantless arrests extended to warrant-based arrests until 2019[10]. *See Arizmendi v. Gabbert*, 919 F.3d 891 (5th Cir. 2019). The *Arizmendi* court noted that in

[10] After *Devenpeck*, the Fifth Circuit declined to address the "dubious argument that an officer can give a knowingly false affidavit and avoid liability by the fortuity that, after the fact, he may be able to argue some other basis for the arrest." *See DeLeon v. City of Dallas*, 345 F. App'x 21, 23 n.2 (5th Cir. 2009) (per curiam). Then, in *Johnson v. Norcross*, 565 F. App'x 287 (5th Cir. 2014) (per curiam), the Fifth Circuit acknowledged the possibility (without further analysis) that *Devenpeck* may be limited to warrantless arrests. *Id*. at 289–90.

Devenpeck, where the arrest was made without a warrant, the ruling hinged on the requirement that courts distance themselves from an arresting officer's subjective state of mind, focusing solely on the objective facts known to the officer at the time. *Id*. at 903.

Franks, however, explicitly requires courts to inquire into an officer's state of mind to assess the validity of arrest warrants. *Id*. "Only deliberate or reckless misstatements or omissions are *Franks* violations; mere negligence will not suffice. This stands in stark contrast to this Court's emphasis on objectivity surrounding warrantless arrests." *Id*.

Viewing these principles together with its analysis in *Vance*, the *Arizmendi* court held that *Devenpeck* does not apply to warrant-based arrest:

> *Franks* and *Devenpeck* operate in tandem by protecting the validity of an arrest in circumstances where the arrest does not deny a person the protections of the Fourth Amendment—in these circumstances, the mental state of the officer aside, the arrest is lawful. In warrantless arrests, there is no threat to a citizen's Fourth Amendment rights where the officer had probable cause to arrest, albeit not for the offense he chose to charge. With a warrant, even where there was ultimately no probable cause for the arrest, an officer instead gains the protection of *Franks*—invalidating the warrant only for misstatements willfully or recklessly made, and then only for

> misstatements necessary to the finding of probable cause for the charged offense.

Id. at 903-04.

The Eleventh Circuit has reached the opposite conclusion. Relying too on *Devenpeck*, the Eleventh Circuit has suggested that probable cause for a warrant-based arrest is an absolute bar to a false arrest claim even when the arresting officer lacked probable cause for "all announced charges." *See Elmore v. Fulton County School District*, 605 F. App'x 906, 914–17 (11th Cir. 2015) (per curiam) (ultimately affirming the dismissal of a false arrest claim on grounds that did not implicate this principle).

The Sixth Circuit, after *Devenpeck* but without mentioning the case, drew a line between warrant-based and warrantless arrests, like the Fifth Circuit did in *Vance*. *See Kuslick v. Roszczewski*, 419 F. App'x 589 (6th Cir. 2011). In *Kuslick*, the court held: "where an officer is confronted with a rapidly developing situation and makes an on-the-scene determination to arrest someone in the reasonable-but-mistaken belief that the arrestee committed a crime whose elements, it turns out later, were unmet though the arrestee's conduct did satisfy the elements of a different crime, the error is 'in no small part technical: [the officer] is correct in believing the arrestee susceptible to arrest, and mistaken only as to which crime the arrestee committed.'" *Id.* at 594. Such an officer "is in a thoroughly different position than ... [one] who, from a position of safety and retrospective deliberation, decides to falsify details of the arrestee's conduct in a sworn statement made to a magistrate in order to obtain authorization for a retaliatory arrest." *Id.*

Several circuits have also held that an officer who relies on a facially invalid warrant is exempt from false arrest liability if there was still probable cause to arrest the person identified in the warrant. *Noviho v. Lancaster County*, 683 F. App'x 160, 165 n.21 (3d Cir. 2017)("Further, we recently reaffirmed that 'false arrest or imprisonment claims will necessarily fail if probable cause existed for any one of the crimes charged against the arrestee.'"[11]); *Robinson v. City of South Charleston*, 662 F. App'x 216, 221 (4th Cir. 2016). But these cases did not decide whether the offense identified in the warrant must match the offense for which there was probable cause to make an arrest. *See also Goad v. Town of Meeker*, 654 F. App'x 916, 922–23 (10th Cir. 2016) (*citing Graves v. Mahoning County*, 821 F.3d 772, 775–77 (6th Cir. 2016) for the proposition that the court could look to facts outside the warrant to establish probable cause, but also explaining that the plaintiff "would have to show that the defendants lacked probable cause to support the *charged crime* against him" (emphasis added)).

Thus, on this important federal issue, the Eleventh Circuit conflicts with Fifth Circuit's cases holding that probable cause must be found for the crime cited in the arrest warrant.

Significantly, the Fifth Circuit's decisions in *Mayfield I* and *Mayfield II* are directly contrary to the Fifth Circuit's own authoritative precedents in *Vance v. Nunnery* and *Arizmendi v. Gabbert*.

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[11] *Dempsey v. Bucknell Univ.*, 834 F.3d 457, 477 (3d Cir. 2016).

III. The Court should grant certiorari to exercise its supervisory power to rectify the Fifth Circuit's severe departure from precedent.

In principle, Fifth Circuit decisions are binding precedents on subsequent panels of the circuit court. *Burge v. Parish of St. Tammany*, 187 F.3d 452, 466 (5th Cir. 1999). In the *Mayfield* decisions, the district court and both Fifth Circuit panels failed to follow the authoritative precedents of *Vance v. Nunnery* and *Arizmendi v. Gabbert*.

The *Vance* and *Arizmendi* precedential decisions of the Fifth Circuit held that the Fourth Amendment requires probable cause to support the crime stated in the warrant, not some other crime that could be supported by post hoc review of the evidence. *Vance*, 137 F.3d at 275-276 and *Arizmendi*, 919 F.3d at 900. Directly contrary to these (and without mentioning them), the district court and both Fifth Circuit panels in *Mayfield* ruled that a warrant-based arrest could be supported by probable cause of a crime other than the one cited in the arrest warrant. As such, the *Mayfield* panels departed from the Fifth Circuit's rules of orderliness. In doing so, the *Mayfield* panels so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the district court, as to call for an exercise of this Court's supervisory power.

Further, the Fifth Circuit panels did not follow this Court's precedents in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). This Court's decisions are binding on circuit courts. Under this Court's familiar *Twombly/Iqbal* plausibility standard, a complaint must contain sufficient facts accepted as true that state a claim for

relief that is plausible on its face. *Iqbal*, at 678 (*quoting Twombly*, at 570). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* The court must view the facts in the light most favorable to the plaintiff and questions of fact and any ambiguities in the controlling substantive law must be resolved in the plaintiff's favor. *Id*.

Petitioners' Amended Complaint leaves little room to doubt whether it contains sufficient facts. The Amended Complaint consists of 289 paragraphs and twelve (12) footnotes over the course of forty-two (42) pages. These paragraphs contain detailed, specific factual allegations against each of the defendants. Most of the factual allegations were ultimately shown through discovery to be true.

But snippets of the 289 paragraphs in the amended complaint were used as the sole basis for the district court to hold that Petitioners admitted probable cause existed (for a crime not cited in the warrant) and, therefore, their claims were dismissed. More specifically, the district court relied on one or two select paragraphs in the pleading to infer criminal intent on the part of Mark Mayfield, and thus support probable cause for a crime not cited in the warrant. Pet. App. 20a-21a. This ruling runs directly contrary to this Court's *Twombly/Iqbal* plausibility standard that, at the 12(b)(6) stage, all inferences are to be drawn in the favor of the plaintiff.

By affirming the district court, the Fifth Circuit has not only failed to properly apply the plausibility standard to require sufficient facts, but it has also upheld the district court's violation of this Court's

Twombly/Iqbal holdings that inferences from the complaint are drawn in the plaintiff's favor at the 12(b)(6) stage. The *Mayfield* panels so far departed from the *Twombly/Iqbal* standard as to call for an exercise of this Court's supervisory power.

CONCLUSION

This petition for a writ of certiorari should be granted in accordance with this Court's pending review of *Gonzalez v. Trevino*, No. 22-1025, to decide (1) whether the *Nieves* probable cause exception can be satisfied by objective evidence other than specific examples of arrests that never happened, and (2) whether *Nieves* is limited to individual claims against arresting officers for split-second arrests. The *Nieves* questions to be decided by this Court in *Gonzalez* should be dispositive of those same questions presented in this case.

Additionally, this petition for a writ of certiorari should be granted since there is a circuit split as to whether, in cases of arrests and searches that are warrant-based, the Fourth Amendment requires probable cause to support the crime stated in the warrant, and not some other crime.

Lastly, this petition for a writ of certiorari should be granted since the Fifth Circuit failed to follow its own precedential decisions in *Vance* and *Arizmendi* which hold that the Fourth Amendment requires probable cause to support the crime stated in the warrant, not some other crime, and since the Fifth Circuit failed to follow the *Twombly/Iqbal* "plausibility" standard under Rule 12(bb)(6) by inferring criminal intent in Mayfield rather than the expressly stated political intent, and for the other foregoing reasons.

Respectfully submitted,

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