UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SYLVIA GONZALEZ, Plaintiff, v. CITY OF CASTLE HILLS, TEXAS; EDWARD TREVINO, II, Mayor of Castle Hills; JOHN SIEMENS, Chief of the Castle Hills Police Department; and ALEXANDER WRIGHT; Defendants.	§ § § § § § § § § § § § §	No. 5:20–CV–1151–DAE

ORDER DENYING MOTION TO DISMISS

Before the Court is Defendants' Motion to Dismiss Pursuant to Rule (12)(b)(6) that was filed on October 12, 2020. (Dkt. # 13.) Sylvia Gonzalez ("Plaintiff") filed a response on October 26, 2020. (Dkt. # 17.) Defendants then filed a reply on October 28, 2020. (Dkt. # 18.) Pursuant to Local Rule CV-7(h), the Court finds this matter suitable for disposition without a hearing. After careful consideration of the memoranda filed in support of and against the motion, the Court—for the reasons that follow—**DENIES** the motion.

FACTUAL BACKGROUND

This case concerns the alleged retaliatory arrest of Sylvia Gonzalez, a former councilmember of the City of Castle Hills. The City of Castle Hills ("City") is located in Bexar County, Texas and its governing body consists of a mayor and five aldermen, commonly referred to as councilmembers. (Dkt. # 1.) The City has adopted the city-manager form of government and delegated extensive authority to its city manager. (Id.)

On May 4, 2019, Plaintiff was elected as the first Hispanic councilwoman in Castle Hills history. (Id.) Ten days later, she was sworn in as a councilmember by Bexar County Sheriff Javier Salazar. (Id.) City Attorney Schnall was allegedly present at the ceremony and did not object to any part of the swearing-in. (Id.)

Plaintiff organized a nonbinding citizens' petition advocating for the removal of city manager Ryan Rapelye. (Dkt. # 17.) According to Plaintiff, the petition had no legal force—it was designed to merely express citizens' discontent with Rapelye's performance. (Dkt. # 1.) The petition proposed that the city council replace Rapelye with Diane Pfeil, who previously served as city manager. (Id.) On May 21, 2019, the day of Plaintiff's first council meeting, a resident submitted the petition to the city council. (Id.) The council argued over Rapelye's

job performance for two days, and during the two-day meeting, Plaintiff sat next to Mayor Trevino. (Id.) Plaintiff claims that when the meeting ended, she stood up and walked away from her seat to speak with other councilmembers. (Id.) When she returned to gather her belongings, Mayor Trevino asked about the location of the petition. (Id.) Plaintiff allegedly found the petition in her binder and handed it to him. (Id.) Plaintiff argues that she did not intentionally place the petition in her binder and the petition never left the council table. (Id.)

Plaintiff argues that in retaliation for the nonbinding petition and her criticism of certain city officials, Defendants planned a scheme to retaliate against her. According to Plaintiff, Mayor Trevino tasked Police Chief Siemens with investigating and charging her for a criminal offense. (Id.) Siemens assigned a full-time police officer to investigate Plaintiff and her petition. (Id.) According to Plaintiff, when the officer did not find anything, Siemens then hired Special Detective Wright ("Wright"). (Id.) Plaintiff states that Wright is not a police officer but is rather a full-time attorney in private practice with a police commission maintained by the City of Castle Hills. (Id.) After a month-long investigation, Wright brought one misdemeanor charge against Plaintiff for tampering with a government record for allegedly attempting to steal the petition.

(Dkt. # 1); see Tex. Penal Code § 37.10(a)(3), (c)(1). Plaintiff contends that this charge "has never been brought against someone for even remotely similar conduct, and certainly not against someone for stealing their own petition." (Dkt. # 17.)

Instead of issuing a summons for the nonviolent misdemeanor, Wright obtained a warrant to arrest the 72-year-old, which ensured that she would spend time in jail rather than remaining free and appearing before a judge.[1] (Id.) Defendants also bypassed the Bexar County District Attorney's Office, who upon later review, dismissed the charges. (Id.)

According to Plaintiff, this was not the first time that Defendants had attempted to retaliate against her. Plaintiff claims that on July 9, 2019, before her arrest, Defendants used a made-up technicality related to the manner in which she was sworn in to attempt to strip her of her council seat. (Id.) Plaintiff was sworn in by a sheriff, but Defendants alleged that because he was not "engaged in the performance of his duties," she was sworn in improperly.[2] (Id.) City Attorney

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[1] When Plaintiff heard about the warrant, she turned herself in on July 18, 2019. (Dkt. # 1.)

[2] Plaintiff points out that this same technicality could have been used against Mayor Trevino, who was sworn in on the same day as Plaintiff. (Dkt. # 17); see Tex. Gov't Code § 602.002(17).

Schnall told her that she could not be re-sworn in because more than 30 days had elapsed since Plaintiff's election. (Dkt. # 1.) For that reason, she would be replaced by Amy McLin, who Plaintiff beat in her election. (Id.)

After the city attorney prevented the council from voting on Plaintiff's removal, Plaintiff filed suit and a judge issued a temporary restraining order on July 17, 2019 enjoining Defendants from moving forward with her removal. (Id.) Having failed to remove Gonzalez, six Castle Hills residents—allegedly all closely allied with Mayor Trevino—filed a lawsuit in the name of the state of Texas to remove Gonzalez from office for incompetence and official misconduct. (Id.) After the District Attorney moved to dismiss the action, the district court judge dismissed the case and denied the motion for a new trial. (Dkt. # 1.) The six residents appealed the ruling and as of the date that Plaintiff filed her complaint in this case, the appeal was still pending. (Id.) According to Plaintiff, her attorneys reached out to opposing counsel to release her from the lawsuit. (Id.) However, opposing counsel conditioned release on Plaintiff signing an affidavit stating that she would never run for city council again. (Id.)

Plaintiff filed her complaint on September 29, 2020, bringing a § 1983 claim against Defendants Mayor Trevino, Police Chief Siemens, and Detective Wright (collectively, "Individual Defendants") for violating her First and Fourteenth Amendment rights. (Id.) She also brings a municipal liability claim

pursuant to § 1983 against Defendant City of Castle Hills for violating her First and Fourteenth Amendment rights. (Id.); see Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978). The matter before the Court is Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6). (Dkt. # 13.)

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted." To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). In analyzing whether to grant a 12(b)(6) motion, a court accepts as true "all well pleaded facts" and views those facts "in the light most favorable to the plaintiff." United States ex rel. Vavra v. Kellogg Brown & Root, Inc., 727 F.3d 343, 346 (5th Cir. 2013) (citation omitted). A court need not "accept as true a legal conclusion couched as a factual allegation." Iqbal, 556 U.S. at 678.

DISCUSSION

In their motion to dismiss, Defendants request that the Court take judicial notice of the warrant that was issued for Plaintiff's arrest. (See Dkt. # 13.) Because Plaintiff alleges that Defendants violated her constitutional rights by arresting her in retaliation for the nonbinding petition that she organized, the existence or nonexistence of probable cause is crucial when analyzing Plaintiff's claims. Federal Rule of Evidence 201 permits a district court to take judicial notice of a "fact that is not subject to reasonable dispute because it (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). A district court may take judicial notice of a fact at the motion to dismiss stage. Basic Cap. Mgmt., Inc. v. Dynex Cap., Inc., 976 F.3d 585, 589 (5th Cir. 2020). In fact, "it is clearly proper in deciding a 12(b)(6) motion to take judicial notice of matters of public record." Norris v. Hearst Trust, 500 F.3d 454, 461 n.9 (5th Cir. 2007). Because the warrant is a public record and bears the signature of the state court judge, the Court takes judicial notice of the warrant in considering the motion. See Dent v. Methodist Health Sys., No. 3:20-CV-00124-S, 2021 WL 75768, at *2 (N.D. Tex. Jan. 8, 2021) (taking judicial notice of a warrant attached to defendant's motion to dismiss plaintiff's § 1983 claim alleging false arrest).

Defendants raise several arguments in support of their motion to dismiss Plaintiff's claims. The Court will address their arguments in turn.

I. Independent Intermediary Doctrine and Probable Cause

Defendants maintain that Plaintiff's claims should be dismissed under the independent intermediary doctrine. (Dkt. # 13.) The warrant for Plaintiff's arrest was approved by a state court judge, who determined that there was probable cause for Plaintiff's arrest. (Id.) Because Plaintiff has not pled or proved the absence of probable cause, Defendants insist that Plaintiff's claims are barred. (Id.)

In response, Plaintiff argues that the independent intermediary doctrine does not apply because she did not bring her claims under the Fourth Amendment. (Dkt. # 17.) With respect to her municipal liability claim, she also contends that under Lozman v. City of Riviera Beach, 138 S. Ct. 1945 (2018), Monell liability can exist when its leadership punishes an individual in retaliation for her speech, even if the city can find probable cause for an infraction. (Dkt. # 17.) With respect to her claim against the Individual Defendants, Plaintiff argues that Nieves v. Bartlett, 139 S. Ct. 1715 (2019) does not apply. (Id.) Instead, she contends that she only needs to meet the standard announced in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), and she has

done so here. (Id.) In their reply, Defendants maintain that the independent intermediary doctrine applies in First Amendment cases. (Dkt. # 18.) They also contend that neither Lozman nor Mount Healthy supports Plaintiff's arguments. (Id.)

"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." Deville v. Marcantel, 567 F.3d 156, 170 (5th Cir. 2009) (quoting Taylor v. Gregg, 36 F.3d 453, 456 (5th Cir. 1994)). "[T]he initiating party may be liable for false arrest if the plaintiff shows that 'the deliberations of that intermediary were in some way tainted by the actions of the defendant.'" Id. (quoting Hand v. Gary, 838 F.2d 1420, 1428 (5th Cir. 1988)). But, "because the intermediary's deliberations protect even officers with malicious intent," a plaintiff must show that the official's malicious motive led the official to withhold relevant information or otherwise misdirect the independent intermediary by omission or commission. Buehler v. City of Austin/Austin Police Dep't., 824 F.3d 548, 555 (5th Cir. 2016); Buehler v. Dear, No. 1:17-CV-724-DAE, 2020 WL 5793008, at *6 (W.D. Tex. Mar. 27, 2020).

Although Defendants have correctly pointed out that the Fifth Circuit has held that the independent intermediary doctrine applies in First Amendment cases,[3] those cases predate two leading Supreme Court cases, Lozman and Nieves, which are particularly instructive here because they both concern when plaintiffs must make a no-probable-cause showing in support of a First Amendment retaliatory arrest claim. The Court will first consider Plaintiff's municipal liability claim before addressing her claim against the Individual Defendants.

A. Municipal liability claim

The U.S. Supreme Court has held that the existence of probable cause does not bar all First Amendment retaliatory arrest claims brought against a municipality. In Lozman, the plaintiff frequently criticized a municipal development project and opposed what he perceived as improper conduct by various city officials. 138 S. Ct. at 1950. The plaintiff, Lozman, participated in the public-comment session of the city council meetings more than 200 times and he filed a lawsuit alleging that the city council violated Florida's open-meetings

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[3] See Curtis v. Sowell, 761 F. App'x 302, 205 (5th Cir. 2019) (holding that the district court did not err in dismissing the plaintiff's First Amendment claim because "probable cause was independently established by [a] grand jury"); Buehler v. City of Austin/Austin Police Dep't, 824 F.3d 548, 554 (5th Cir. 2016); Russell v. Altom, 546 F. App'x 432, 436–37 (5th Cir. 2013). Although Curtis does not predate Lozman, the Fifth Circuit noted in a footnote that Lozman did not apply because the plaintiff did not allege that the defendant prosecuted him as part of an "official retaliatory policy" to silence him. Curtis, 761 F. App'x at 305 n.1.

laws. Id. At one council meeting, he stood at the podium and began speaking about arrests of former officials. Id. One councilmember told him to stop talking, and a police officer approached Lozman and asked him to leave the podium. Id. When he refused, Lozman was arrested and charged with disorderly conduct and resisting arrest without violence. Id. at 1949–50. The State's attorney later determined that there was probable cause to arrest Lozman for the offenses but decided to dismiss the charges. Id. at 1950. Lozman filed a lawsuit against the City for its alleged retaliatory actions, and after a 19-day trial, the jury returned a verdict for the City on all claims. Id. When the case reached the U.S. Supreme Court, the plaintiff challenged only the City's alleged retaliatory arrest. Id.

The Supreme Court held that the existence of probable cause does not bar all First Amendment retaliatory arrest claims brought against a municipality. Id. at 1955. The fact that the plaintiff had to prove the existence and enforcement of an official policy motivated by retaliation separated his claim from the typical retaliatory arrest claim. Id. at 1954. The Court explained,

> An official retaliatory policy is a particularly troubling and potent form of retaliation, for a policy can be long term and pervasive, unlike an ad hoc, on-the-spot decision by an individual officer. An official policy also can be difficult to dislodge. A citizen who suffers retaliation by an individual officer can seek to have the officer disciplined or removed from service, but there may be little practical recourse when the government itself orchestrates the retaliation.

Id. Further, the causation problem in retaliatory arrest cases "is not of the same difficulty where, as is alleged here, the official policy is retaliation for prior, protected speech bearing little relation to the criminal offense for which the arrest is made." Id. Finally, the Supreme Court noted that the "right to petition '[i]s one of the most precious of the liberties safeguarded by the Bill of Rights.'" Id. (quoting BE & K. Constr. Co. v. NLRB, 536 U.S. 516, 524 (2002)). Because Lozman alleged that the City deprived him of the right to petition by retaliating against him for his lawsuit and criticisms of public officials, Lozman's speech was "high in the hierarchy of First Amendment values." Id.

The Court finds that Lozman controls here. First, Plaintiff alleges the existence of a retaliatory policy,[4] just as the plaintiff alleged in Lozman. (See Dkt. # 1.) Second, like Lozman, this is not an ordinary retaliatory arrest claim—here, Plaintiff alleges that Defendants tried many times to strip her of her council seat. (See id.) For example, according to Plaintiff, Defendants attempted to strip her of her council seat pursuant to a swearing-in technicality, a lawsuit brought by residents who are allegedly closely allied with Defendants, and an arrest. (See id.)

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[4] For example, Plaintiff alleges "Castle Hills adopted and enforced an official policy or custom to retaliate against Sylvia for her First Amendment activities, namely the expression of her political thought through a nonbinding citizens' petition urging the firing of city manager Rapelye." (Dkt. # 1.) Plaintiff further alleges "[t]his scheme was a part of an official policy or custom that was deliberate, long-term, and pervasive, unlike on-the-spot decisions to arrest, sometimes made by individual officers in split-second situations." (Id.)

And even then, the nonviolent misdemeanor offense was brought because she allegedly stole her *own* petition. (See id.) Thus, the connection between the alleged animus and injury will not be "weakened . . . by [an official's] legitimate consideration of speech." Lozman, 138 S. Ct. at 1954 (quoting Reichle v. Howards, 566 U.S. 658, 668 (2012)). Finally, because the "right to petition [i]s one of the most precious of the liberties safeguarded by the Bill of Rights," Plaintiff's speech is "high in the hierarchy of First Amendment values." Id. "For these reasons, [Gonzalez] need not prove the absence of probable cause to maintain a claim of retaliatory arrest against the City."[5] Id. at 1955.

The Court recognizes that Lozman involved an atypical retaliatory arrest claim. Id. at 1954 (characterizing claims such as the one in Lozman as a "unique class of retaliatory arrest claims" and stating that "Lozman's claim is far afield from the typical retaliatory arrest claim"). The Supreme Court stated that "[o]n facts like these, Mt. Healthy provides the correct standard for assessing a retaliatory arrest claim" and "[t]he Court need not, and does not, address the elements required to prove a retaliatory arrest claim in other contexts." Id. at 1955. However, as the Court discusses above, Lozman and this case share many crucial

[5] Although the Supreme Court noted that cases like Lozman "will require objective evidence of a policy motivated by retaliation to survive summary judgment," this is a motion to dismiss and Plaintiff has satisfied her pleading requirements under Rule 8. Lozman v. City of Riviera Beach, 138 S. Ct. 1945, 1954 (2018).

facts. Further, Defendants, who did not even cite Lozman in their motion to dismiss, have failed to distinguish Lozman from this case. First, in their reply, Defendants assert that Lozman is different because it was not decided at the pleading stage—it was an appeal from an adverse jury verdict after a 19-day trial. (See Dkt. # 18.) However, Defendants do not explain why or how these distinct stages of litigation necessarily require a different outcome. At this stage of the litigation, Plaintiff need only plead "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570. Second, Defendants state that Lozman's claim was "far afield from the typical retaliatory arrest claim." (Dkt. # 18.) However, as described above, the characteristics of Lozman that distinguish that case from typical retaliatory arrest cases are present in this case as well. Third, Defendants state that Lozman's arrest was only part of the City's retaliatory conduct. (Id.) But, as described above, Plaintiff alleges that other retaliatory actions were taken in this case too. The Court discussed above why causation is not weakened in this case by not requiring Plaintiff to prove the absence of probable cause. Therefore, the Court will not dismiss Plaintiff's claims against the City merely because probable cause may have existed for the misdemeanor offense.

B. Claim Against Individual Defendants

Nieves involved a retaliatory arrest claim against two police officers. 139 S. Ct. at 1724, 1726. The plaintiff, Bartlett, was arrested at a winter sports festival in a remote part of Alaska. Id. at 1720. While a law enforcement officer was speaking with a group of attendees, Bartlett shouted at them to stop talking to the police. Id. When the officer approached him, Bartlett yelled at the officer to leave. Id. Bartlett then confronted another law enforcement officer who was questioning a minor. Id. He stepped towards the officer in an allegedly combative manner, who pushed him back. Id. Bartlett was arrested for disorderly conduct and resisting arrest. Id. at 1721. He brought a § 1983 claim against the officers, alleging that they violated his First Amendment rights by arresting him in retaliation for his speech (i.e., his initial refusal to speak with the first officer and his intervention in the second officer's discussion with the minor). Id.

The U.S. Supreme Court held that in most retaliatory arrest cases, the plaintiff must plead and prove the absence of probable cause for the arrest.[6] Id. at 1724, 1726. In reaching this decision, the Court explained the complex causal inquiry in these cases, particularly given that "[o]fficers frequently make 'split-

[6] The Court noted that Lozman did not apply here because that case "involved unusual circumstances in which the plaintiff was arrested pursuant to an alleged 'official municipal policy' of retaliation." Nieves v. Bartlett, 139 S. Ct. 1715, 1722 (2019).

second judgments' when deciding whether to arrest, and the content and manner of a suspect's speech may convey vital information—for example, if he is 'ready to cooperate' or rather 'present[s] a continuing threat.'" Id. at 1724 (quoting Lozman, 138 S. Ct. at 1953).

However, the Supreme Court also carved out an exception to this general rule.[7] The Court stated 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."[8] Id. at 1727. The Court reasoned that such a showing

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[7] This is not to be confused with Plaintiff's characterization of Nieves as an exception to Mt. Healthy. (Dkt. # 17.) The Supreme Court states in Nieves that the Mt. Healthy test applies only if the plaintiff establishes the absence of probable cause. Nieves, 139 S. Ct. at 1725; see DeMartini v. Town of Gulf Stream, 942 F.3d 1277, 1296 (11th Cir. 2019). Absent such a showing, the retaliatory arrest claim fails unless it falls within the Nieves exception. 139 S. Ct. at 1725, 1727. In Plaintiff's response to Defendants' motion to dismiss, she does not argue that there was no probable cause for her arrest. Thus, in deciding Defendants' motion to dismiss, the Court will evaluate Plaintiff's claim under Nieves rather than Mt. Healthy.

[8] The Supreme Court provided the following example of a case that would fall under the exception:

> [A]t many intersections, jaywalking is endemic but rarely results in arrest. If an individual who has been vocally complaining about police conduct is arrested for jaywalking at such an intersection, it would seem insufficiently protective of First Amendment rights to dismiss the individual's retaliatory arrest claim on the ground that there was undoubted probable cause for the arrest.

Nieves, 139 S. Ct. at 1727.

addresses the causal concern by helping to establish that "non-retaliatory grounds [we]re in fact insufficient to provoke the adverse consequences." Id. (quoting Hartman v. Moore, 547 U.S. 250, 256 (2006)). Because this inquiry is objective, it avoids the problems that would be created by reviewing the officers' subjective intent. Id. Further, "[a]fter making the required showing, the plaintiff's claim may proceed in the same manner as claims where the plaintiff has met the threshold showing of the absence of probable cause." Id.

The Court finds that the Nieves exception applies in this case and Plaintiff need not plead or prove the absence of probable cause. Plaintiff alleges that the misdemeanor offense for which she was charged has "never been used in Bexar County to criminally charge someone for trying to steal a nonbinding or expressive document." (See Dkt. # 1.) In support of her argument, Plaintiff states that misdemeanor and felony data from Bexar County over the past decade shows that of "215 grand jury felony indictments obtained under the tampering statute at issue in this case, not one had an allegation even closely resembling the one mounted against Sylvia." (Id.) According to Plaintiff, most of the indictments involved accusations of either "using or making fake government identification documents: altered driver's licenses, another person's ID, temporary identification cards, public safety permits, green cards, or social security numbers" and some indictments involved misuse of financial information. (Id.) The "outlier"

indictments allegedly involve "hiding evidence of murder, cheating on a government-issued exam, and using a fake certificate of title, among others." (Id.) In the misdemeanor cases, Plaintiff claims that the alleged tampering typically involved the use of fake social security numbers, driver's licenses, and green cards. (Id.) Plaintiff further argues that according to the data, people accused of such nonviolent offenses typically do not go to jail. (Id.) At the motion to dismiss stage, the Court accepts as true Plaintiff's well pleaded facts and views those facts "in the light most favorable to the plaintiff." Kellogg Brown, 727 F.3d at 346. Because Plaintiff alleges the existence of objective evidence that she was arrested when "otherwise similarly situated individuals not engaged in the same sort of protected speech had not been," the Court will not dismiss Plaintiff's § 1983 claim against the Individual Defendants for failing to plead and prove the absence of probable cause. Nieves, 139 S. Ct. at 1727.

II. Qualified Immunity

The parties seem to disagree on Plaintiff's burden to defeat the qualified immunity defense on a motion to dismiss. Defendants contend that once a qualified immunity defense is raised, the Fifth Circuit requires a plaintiff to meet a heightened pleading standard "to show with factual detail and particularity why the

defendant official cannot maintain the qualified immunity defense." (Dkt. # 13) (citing Elliot v. Perez, 751 F.2d 1472, 1473 (5th Cir. 1985), Schultea v. Wood, 47 F.3d 1427, 1429–34 (5th Cir. 1995), and Morgan v. Hubert, 335 F. App'x 466, 472–73 (5th Cir. 2009)).

In response, Plaintiff maintains that the district court must merely determine whether the plaintiff has "file[d] a short and plain statement [in] his complaint, a statement that rests on more than conclusions alone." Anderson v. Valdez, 845 F.3d 580, 589–90 (5th Cir. 2016) (quoting Schultea, 47 F.3d at 1433); (Dkt. # 17.) In other words, "a plaintiff must plead qualified-immunity facts with the minimal specificity that would satisfy Twombly and Iqbal." (Dkt. # 17) (quoting Arnold v. Williams, 976 F.3d 535, 540 (5th Cir. 2020)).

In the Fifth Circuit,

> [s]ection 1983 claims implicating qualified immunity are subject to the same Rule 8 pleading standard set forth in Twombly and Iqbal as all other claims; an assertion of qualified immunity in a defendant's answer or motion to dismiss does not subject the complaint to a heightened pleadings standard.

Arnold v. Williams, 979 F.3d 262, 267 (5th Cir. 2020). Defendants' reliance on Schultea is mistaken. Schultea states that "[w]hen a public official pleads the affirmative defense of qualified immunity in his answer, the district court may, on the official's motion or on its own, require the plaintiff to reply to that defense in

detail." 47 F.3d at 1433. However, the Court did not do so in this case and Plaintiff is not required "to anticipate a defendant's qualified immunity defense by providing greater specificity in their initial complaint." DeGroff v. Bost, No. 6:20-CV-00067-ADA-JCM, 2020 WL 6528078, at *4 (W.D. Tex. Nov. 5, 2020) (citing Crawford-El v. Britton, 523 U.S. 574, 595 (1998)). In the context of a Rule 12(b)(6) motion to dismiss, the Court must determine whether "the plaintiff's pleadings assert facts which, if true, would overcome the defense of qualified immunity." Backe v. LeBlanc, 691 F.3d 645, 648 (5th Cir. 2012) (quoting Wicks v. Miss. State Emp. Servs., 41 F.3d 991, 994–95 (5th Cir. 1995)); see Saenz v. G4S Secure Solutions (USA), Inc., 224 F. Supp. 3d 477, 481 (W.D. Tex. 2016); Rojero v. El Paso County, 226 F. Supp. 3d 768, 776–77 (W.D. Tex. 2016). Thus, the Court agrees with Plaintiff concerning her burden of overcoming the qualified immunity defense at the motion to dismiss stage.

"[A] plaintiff seeking to overcome qualified immunity must plead specific facts that both allow the court to draw the reasonable inference that the defendant is liable for the harm he has alleged and that defeat a qualified immunity defense with equal specificity." Backe, 691 F.3d at 648. Once the district court finds that the plaintiff has so pled, if the court remains "unable to rule on the immunity defense without further clarification of the facts," it may issue a

discovery order "narrowly tailored to uncover only those facts needed to rule on the immunity claim." Id. (quoting Lion Boulos v. Wilson, 834 F.2d 504, 507–08 (5th Cir. 1987)).

Qualified immunity shields government officials from liability when performing discretionary functions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Kinney v. Weaver, 367 F.3d 337, 349 (5th Cir. 2004). Courts evaluate qualified immunity defenses in two steps. First, a court must determine whether the "facts alleged show the officer's conduct violated a constitutional right." Brown v. Miller, 519 F.3d 231, 236 (5th Cir. 2008) (quoting Scott v. Harris, 550 U.S. 372, 377 (2007)). Second, if the court finds a violation, it must determine whether "the right was clearly established . . . in light of the specific context of the case." Id. (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)). To be "clearly established" for purposes of qualified immunity, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id. (quoting Atteberry v. Nocona Gen. Hosp., 430 F.3d 245, 256 (5th Cir. 2005)). There need not be "commanding precedent" that holds that the "very action in question" is unlawful; the unlawfulness need only be "readily apparent from relevant precedent in sufficiently similar situations." Id. at 237 (quoting Atteberry, 430 F.3d at 257).

The right allegedly violated must be established not as a broad general proposition, but in a "particularized" sense "so that the 'contours' of the right are clear to a reasonable official." Reichle v. Howards, 566 U.S. 658, 665 (2012). "Here, the right in question is not the general right to be free from retaliation for one's speech, but the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause." Id. "[T]he First Amendment prohibits government officials from subjecting an individual to retaliatory actions" for engaging in protected speech. Hartman v. Moore, 547 U.S. 250, 256 (2006). If an official takes actions against someone based on the forbidden motive and "non-retaliatory grounds are in fact insufficient to provoke the adverse consequences," the injured person may seek relief by bringing a First Amendment claim. Id.; see Nieves, 139 S. Ct. at 1722. To prevail on this claim, "a plaintiff must establish a 'causal connection' between the government defendant's 'retaliatory animus' and the plaintiff's 'subsequent injury.'" Nieves, 139 S. Ct. at 1722 (quoting Hartman, 547 U.S. at 259). The motive must be a "but-for" cause of the injury, such that the adverse action would not have been taken absent the retaliatory motive. Id. As described above, the plaintiff typically must plead and prove the absence of probable cause for the arrest unless "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.

The Court finds that, viewing the facts in the light most favorable to Plaintiff, the Individual Defendants violated Plaintiff's constitutional rights. Plaintiff alleges that she was arrested because she organized a nonbinding citizens' petition, not because she attempted to steal her own petition. (Dkt. # 1.) She claims that the Individual Defendants acted with a retaliatory motive by alleging that they took several actions to attempt to take away her council seat. (Id.) She further alleges that "[t]he retaliatory arrest manufactured by the City and the Individual Defendants directly and proximately caused severe harms" including harm to Plaintiff's reputation, future opportunities, finances, faith in the criminal justice system, and physical health. (Id.) These allegations support the existence of a retaliatory motive and causation. As described above, even if there were probable cause to arrest Plaintiff for the misdemeanor, the exception in Nieves applies here because she has pled the existence of objective evidence that she was arrested when "otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." 139 S. Ct. at 1727. Therefore, Plaintiff has alleged the existence of a constitutional violation.

To show that a right was "clearly established," a plaintiff must identify either "controlling authority" or a "consensus of cases of persuasive authority" sufficient to clearly signal to a reasonable official that certain conduct falls short of the constitutional norm. Wilson v. Layne, 526 U.S. 603, 617 (1999). The Court

finds that when Plaintiff was arrested, this right was clearly established. Before Nieves, the U.S. Supreme Court held that the First Amendment right to be free from a retaliatory arrest that is supported by probable cause was not clearly established. See Reichle, 566 U.S. at 664–65 ("This Court has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause . . . [the arresting officers] are thus not entitled to qualified immunity."); Lozman, 138 S. Ct. at 1954 ("[W]hether in a retaliatory arrest case [a suit should be barred] where probable cause exists . . . must await a different case."). Other courts have found that this was not a clearly established right before Nieves. See Lund v. City of Rockford, 956 F.3d 938, 948–49 (7th Cir. 2020) (holding that the officers were entitled to qualified immunity because the incident occurred before Nieves was decided); Phillips v. Blair, 786 F. App'x 519, 529 (6th Cir. 2019) (holding that there was no First Amendment right to be free from a retaliatory arrest otherwise supported by probable cause that was clearly established in 2014); Turner v. Williams, No. 3:19-CV-641-J-32PDB, 2020 WL 1904016, at *9 (M.D. Fla. Apr. 17, 2020) ("[I]t was not clearly established until Nieves, that an officer could be liable for an alleged retaliatory arrest" even where probable cause is present); Woolum v. City of Dallas, No. 3:18-cv-2453-B-BN, 2020 WL 687614, at *11 (N.D. Tex. Jan. 22, 2020) (holding that Nieves did not

make the right clearly established in the case because the alleged retaliatory arrest occurred in 2017)[9]; Cano v. Vickery, Civ. A. No. H-16-392, 2018 WL 4567169, at *6 (S.D. Tex. Sept. 24, 2018) (holding that qualified immunity did not apply before Nieves). The Supreme Court has stated that "in [some] instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" United States v. Lanier, 520 U.S. 259, 271 (1997) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

Nieves was decided on May 28, 2019. The warrant for Plaintiff's arrest was issued on July 17, 2019 and Plaintiff turned herself in on July 18, 2019. (See Dkts. ## 1, 13.) Because Nieves was decided two months before the alleged retaliatory arrest, the Court finds that the right was clearly established. See Turner v. Lieutenant Driver, 848 F.3d 678, 685 (5th Cir. 2017) ("The right must be clearly established 'at the time of the challenged conduct.'"). Plaintiff further alleges that "[e]very reasonable government official would have had a fair warning that [retaliating against individuals in violation of the First Amendment] and

[9] The district court judge for this case adopted the recommendation of the magistrate judge in Woolum v. City of Dallas, No. 3:18-CV-2453-B-BN, 2020 WL 636903, at *1 (N.D. Tex. Feb. 11, 2020).

participating in a scheme to do so is unconstitutional." (Dkt. # 1.) The Court finds that Defendants have not shown that they are entitled to qualified immunity and thus the Court will not dismiss Plaintiff's claims against the Individual Defendants.

III. Municipal liability

Defendants argue that Plaintiff fails to properly allege its municipal liability claim. (Dkt. # 13.) According to Defendants, Plaintiff failed to allege facts supporting "single incident" liability or that Mayor Trevino, Police Chief Siemens, or Special Detective Wright are final policymakers. (Id.) Defendants further maintain that Plaintiff did not allege the existence of a written policy or custom, or that any policy or custom caused the alleged constitutional violation. (Id.) Finally, Defendants insist that Plaintiff has not alleged the existence of a pattern of similar incidents that can be used to show deliberate indifference. (Id.)

In response, Plaintiff states that she has adequately pled that her arrest was "a constitutional violation whose moving force [was] that policy (or custom)" by stating "had Castle Hills lacked animus toward Sylvia's speech, it would have never devised, adopted or implemented its policy of retaliation." (Dkt. # 17 (citing Dkt. # 1.)) Plaintiff maintains that Defendants' causation argument is foreclosed by Lozman and urges the Court to find that she has adequately pled that the Individual Defendants were policymakers and participated in the retaliatory policy. (Id.)

Municipal liability under § 1983 requires proof of three elements: (1) a policymaker; (2) an official policy; and (3) a violation of constitutional rights whose "moving force" is the policy or custom. Piotrowski v. City of Houston, 237 F.3d 567, 578 (5th Cir. 2001).

A. Policymaker

To impose municipal liability, there must be an official policymaker "with actual or constructive knowledge of the constitutional violation" that acted on behalf of the municipality. Zarnow v. City of Wichita Falls, 614 F.3d 161, 167 (5th Cir. 2010). "The policymaker must have final policymaking authority." Rivera v. Hous. Indep. Sch. Dist., 349 F.3d 244, 247 (5th Cir. 2003). Whether a specific official has final policymaking authority is a question of state law. Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737 (1989). In the Fifth Circuit, "the specific identity of the policymaker is a legal question that need not be pled; the complaint need only allege facts that show an official policy, promulgated or ratified by the policymaker, under which the municipality is said to be liable." Groden v. City of Dallas, 826 F.3d 280, 284 (5th Cir. 2016).

Plaintiff has provided two pages of allegations in support of her claim that City Manager Rapelye, City Attorney Schnall, councilmember McCormick, and the Individual Defendants in this case are policymakers with policymaking authority. (See Dkt. # 1.) For example, Plaintiff alleges that "[a]s mayor—

president of the city council—defendant Trevino is a municipal policymaker, and his decisions and actions described in this complaint represent official Castle Hills Policy." (Id.) With respect to Police Chief Siemens, Plaintiff states that "[a]s police chief—executive head of the police department—defendant Siemens is a municipal policymaker, and his decisions and actions described in this complaint represent official Castle Hills policy." (Id.) With respect to Wright, Plaintiff states that

> [a]s special detective—charged directly by defendant Siemens and defendant Trevino with assigning [a] criminal charge to Sylvia—defendant Wright's decisions and actions described in this complaint represent official Castle Hills policy. Alternatively, as policymakers supervising and directing defendant Wright, defendant Siemens, defendant Trevino, city manager Rapelye, and councilmember McCormick ratified defendant Wright's actions as municipal policy.

(Dkt. # 1.)

Upon analyzing the Code of Ordinances for the City of Castle Hills, it appears that none of Plaintiff's suggested policymakers have "final policymaking authority." Given that Plaintiff challenges the alleged retaliatory arrest, the Court will first determine whether Police Chief Siemens has policymaking authority given that in Castle Hills, he "is the executive head of the police department." Code of Ordinances, City of Castle Hills, Texas § 24-21. Although the code states that the duties of the police chief are "to supervise, regulate, and manage the department and have control of all its activities," the code also states that the police

chief "is directly responsible to the city manager for the proper and efficient operation of the department." Id. Thus, because he directly reports to the city manager, Police Chief Siemens does not have final policymaking authority here.

City manager Rapelye also does not have final policymaking authority. In the City of Castle Hills, the city manager is appointed by the city council and serves as "the administrative head of the municipal government under the direction and supervision of the council." Id. § 2-134. Again, given that the city manager is merely the administrative head "under the direction and supervision of" the council, City Manager Rapelye also does not have final policymaking authority.[10]

Mayor Trevino also does not have policymaking authority. Although the mayor serves as the president of the city council and presides at the meetings, he does not have a vote at the meetings unless the city council is divided. Id. § 2-108. Practically speaking, it appears that this should not happen often given that *five* alderman serve on the city council. See id. § 2-23.

[10] Where local law does not delegate authority from the council to the city manager, the city manager does not have final policymaking authority here. The Fifth Circuit has held that Texas "state law alone does not give to city managers 'the responsibility for making law or setting policy in any given area of a local government's business.'" Bolton v. City of Dallas, 541 F.3d 545, 550 (5th Cir. 2008); see Tex. Local Gov't Code Ann. § 25.029. "State law instead reserves that role for the 'governing body.'" Bolton, 541 F.3d at 550.

"A city's governing body may delegate policymaking authority (1) by express statement or formal action or (2) 'it may, by its conduct or practice, encourage or acknowledge the agent in a policymaking role.'" Zarnow, 614 F.3d at 167 (quoting Bennett v. City of Slidell, 728 F.2d 762, 769 (5th Cir. 1984)). The Court finds that the city council has the final policymaking authority in this case, and to the Court's knowledge, there has been no delegation of this authority. Further, while the council is comprised of the mayor and five aldermen, it cannot be said that an individual member of the council has final policymaking authority when it has been vested in the entire council. However, the fact that individual council members were aware of the incidents described in this lawsuit leads the Court to conclude that is premature to determine that the council did not have "actual or constructive knowledge of the constitutional violation" while acting on behalf of the municipality. Id.

Even though Plaintiff failed to specifically identify the city council as a policymaker in the complaint, this is not a proper basis for dismissal. "[T]he complaint need only allege facts that show an official policy, promulgated or ratified by the policymaker, under which the municipality is said to be liable." Groden, 826 F.3d at 284. The Court will thus need to determine whether the city council promulgated or ratified the custom or policy alleged by Plaintiff.

B. Custom or Policy

A plaintiff may establish the existence of an official policy by showing "(1) a formally adopted municipal policy; (2) an informal custom or practice; (3) a custom or policy of inadequate training, supervision, discipline, screening, or hiring; or (4) a single act by an official with final policymaking authority." Snow v. City of El Paso, 501 F. Supp. 2d 826, 831 (W.D. Tex. 2006); see Monell, 436 U.S. at 694 (establishing that § 1983 municipal liability claims may be based on an officially adopted and promulgated policy); Johnson v. Moore, III, 958 F.2d 92, 94 (5th Cir. 1992) (explaining that municipal liability may be based on "persistent and widespread practice" of which actual or constructive knowledge is attributable to the policymaking authority); City of Canton v. Harris, 489 U.S. 378, 385–88 (1989) (explaining that § 1983 municipal liability claims may be based on inadequacy of training where the failure to train amounts to deliberate indifference to the rights of persons); Pembaur v. City of Cincinnati, 475 U.S. 469, 480–81 (1986) (explaining that "municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances").

Plaintiff cannot establish "single incident" liability because she has not alleged that the retaliatory arrest was orchestrated by the city council, the final policymaker. However, the Court finds that Plaintiff has met her burden of

pleading the existence of "a persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy." Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984). Showing a pattern of conduct is necessary "only where the municipal actors are *not* policymakers." Zarnow, 614 F.3d at 169. Plaintiff asserts that "Castle Hills has a history of cracking down on disfavored speech" and has "retaliate[ed] against city residents who voice criticism of the City or its officials or who petition the City for redress of grievances." (Dkt. # 1.) Plaintiff provides two examples. According to Plaintiff, in 2017 or 2018, a local resident was threatened by "the former police chief, the former mayor, and the former city manager" at his home after he organized a petition to advocate for the closing of an impound lot in his neighborhood. (Id.) Plaintiff also claims that in 2018, the former mayor threatened another city resident with an easement violation after the resident put up opposition campaign signs on private front yards with owner permission. (Id.) Defendants take issue with these examples because they did not lead to false arrests, but the Court finds that because they concern citizens' First

Amendment rights, these incidents are sufficient to show a "persistent, widespread practice" at the pleading stage.[11] Thus, Plaintiff has met her burden of pleading the existence of a policy or custom at the motion to dismiss stage.

C. "Moving Force"

Plaintiff has also adequately pled a violation of constitutional rights whose "moving force" is the policy or custom. For purposes of a Rule 12(b)(6) motion, when it comes to alleging causation or "moving force," it is enough that the plaintiff pleads that the policy was the reason for the arrest. See Groden, 826 F.3d at 286–87. Plaintiff has alleged that the "actions undertaken or ratified by the City constitute the moving force behind the retaliatory arrest aimed at Sylvia's exercise of her First Amendment rights, which caused harm to Sylvia, including, but not limited to damage to her reputation, her health, her financial circumstances, and other adverse effects." (Dkt. # 1.) She further alleges that "[h]ad it not been for the retaliatory animus, the City would have never caused, permitted, or approved Sylvia's arrest for championing a nonbinding citizens' petition that did nothing other than express public discontent with the city government." (Id.) Further, Defendants' argument that Plaintiff cannot plead causation because there

[11] This does not mean that Plaintiff will ultimately prevail on this issue—the Court finds merely that Plaintiff has met her burden at the pleading stage.

was probable cause for the arrest is foreclosed by Lozman, as described above. Because Plaintiff has adequately pled all of the requirements for her Monell claim, the Court denies Defendants' motion to dismiss Plaintiff's municipal liability claim.

CONCLUSION

For the reasons stated above, Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6) (Dkt. # 13) is **DENIED**.

IT IS SO ORDERED.

DATE: San Antonio, Texas, March 12, 2021.

David Alan Ezra
Senior United States District Judge