No. 18-1042

In The
Supreme Court of the United States

FRANK GONZALEZ,

Petitioner,

v.

CITY OF HIALEAH, FLORIDA,

Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the panel of the Eleventh Circuit Court of Appeals committed reversible error in affirming the District Court's final order dismissing Frank Gonzalez's procedural due process claim asserting a deprivation of property interest based on the City of Hialeah's termination of his probationary employment for failure to state a claim for relief under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

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INTRODUCTION

Frank Gonzalez seeks review of an unpublished panel opinion of the Eleventh Circuit, which affirmed the dismissal of his claim that the City of Hialeah deprived him of an alleged property interest in his employment as a probationary police officer in violation of his right to procedural due process. Based on the provisions of the City Charter, Civil Service Rules and Regulations ("CSRR"), and the applicable collective bargaining agreement ("CBA"), the Eleventh Circuit concluded Gonzalez did not have a property interest in his employment. (Pet. App. 1a-7a.)

In his petition for a writ of certiorari, Gonzalez asserts that the Eleventh Circuit departed from the established legal framework for procedural due process claims based on property interest deprivations. Specifically, he claims the Eleventh Circuit erred by applying a "federal common law" rule and ignoring state law in determining whether he had a legitimate claim of entitlement in his employment so as to give him a property interest. He claims the alleged federal common law rule the Eleventh Circuit established created a requirement that, in order for an employee to have a property interest in employment, the employee must have a right to an internal appeal from the termination decision.

Gonzalez contends the Eleventh Circuit's alleged departure from the established legal framework creates a conflict with decisions of other circuits, the Florida Supreme Court, and this Court.

There is no compelling reason to grant review. Gonzalez's assertion of error rests on a mischaracterization or misunderstanding of the Eleventh Circuit's opinion. The Eleventh Circuit did not create or apply a federal common law rule, ignore state law, or conclude a right to internal appeal is required for a property interest to exist. For this reason, there is no error presented for review. Because Gonzalez's claim that the Eleventh Circuit's opinion conflicts with decisions of other courts rests on the same mischaracterization or misunderstanding of the opinion, there is no conflict that would warrant review.

STATEMENT OF THE CASE

I. Procedural History

Gonzalez, a former employee of the City of Hialeah, filed a civil action asserting state and federal law employment-related claims against the City in Florida state court; the City removed it to federal court. (DE 1.)[1]

After removal, Gonzalez filed a Fourth Amended Complaint asserting two federal procedural due process claims (counts 1 and 2) and three state law claims (counts 3-5). (DE 24.) The City filed a motion to dismiss all counts with prejudice for failure to state a cause of action under Rule 12(b)(6). (DE 31.)

[1] Citations to the record are identified by the district court docket entry number ("DE"), followed by the page number.

The district court entered a final order dismissing both federal due process claims with prejudice. (DE 102 at 3-8.) Having disposed of the federal claims, the court remanded the state law claims to state court. (*Id.* at 7-8.)

Gonzalez appealed the district court's final order to the Eleventh Circuit. The panel issued an unpublished opinion affirming the final order in its entirety. (Pet. App. 1a-7a.) Gonzalez filed a motion for rehearing as to the panel's affirmance of the procedural due process claim based on termination of his employment (count 1), which was denied. (Pet. App. 22a.)

Gonzalez filed a timely petition for certiorari. The petition is limited to the Eleventh Circuit's decision affirming dismissal of the procedural due process claim based on the termination of his employment (count 1). The facts and proceedings relevant to the petition are discussed below.

II. Gonzalez's Employment with the City

Gonzalez was a police officer for the City from 2000 until 2007, at which point he resigned. (DE 24 at p. 2, ¶¶ 11-15.) In May 2008, the City rehired him from a certified reemployment list, subject to a probationary period under Rule VIII, § 6(c) of the Civil Service Rules and Regulations ("CSRR") adopted by the City's Personnel Board. (*Id.* at p. 3, ¶¶ 19-20; *see also* Pet. App. 31a-32a.)

The City Charter directs the City's Personnel Board to establish a probationary period for new employees and promoted employees. (Pet. App. 27a (Charter, art. IV, § 4.07(b)(3)f).) For new employees, the probationary period must be "not more than 12 months . . . or as otherwise provided in the collective bargaining agreements." (*Id.*)

Under the Collective Bargaining Agreement ("CBA") between the City and the union that represents its police officers, "probationary period" is defined as "a period of one (1) year from the date of swearing in by the Mayor, if the employee is previously certified by the State of Florida, as a Police Officer, or one (1) year from the date of State certification and swearing in by the Mayor, if not previously State certified." (Pet. App. 34a.)

The CBA provides that officers serving an "initial probationary period . . . may be terminated as provided by the Civil Service Rules and Regulations, *with or without cause*, by the City." (Pet. App. 36a (CBA art. 25, § 3d (emphasis added)).) CSRR Rule VIII, § 4 states that "a probationary employee may be discharged . . . *at any time with or without cause* and in compliance with the provisions of the applicable CBA." (*Id.* at 31a.) CSRR Rule X, § 1 provides that a probationary employee "has no civil service rights . . . and may be discharged . . . at any time without appeal." (*Id.* at 32a-33a.)

From August to November 2008, the City conducted an internal investigation into an incident

involving Gonzalez. (DE 24 at p. 5, ¶¶ 34-36.) The investigation resulted in a finding that Gonzalez violated departmental rules. (*Id.* at pp. 5, 150.) The Chief of Police notified Gonzalez by letter on November 4, 2008. (*Id.*) On January 6, 2009, the Chief of Police held a pre-disciplinary meeting with Gonzalez, recommended to the mayor that Gonzalez be terminated, and placed Gonzalez on paid leave pending a final decision by the mayor. (DE 24 at pp. 135-36.) When Gonzalez requested a pre-disciplinary meeting with the mayor, the City advised him that he did not have a right to a pre-disciplinary hearing with the mayor because he was a probationary employee. (*Id.*; DE 24 at p. 5, ¶ 36.)

By letter dated Monday, January 12, 2009, the mayor notified Gonzalez that his employment with the City was terminated effective Friday, January 9, 2009. (DE 24 at p. 6, ¶ 37; *id.* at p. 139.) In the letter, the mayor stated that the City had the right to terminate a probationary employee at any time without providing an explanation. (*Id.*) However, as a courtesy, the mayor stated that his decision was based in part on Gonzalez's lapse of judgment in the incident that was the subject of the internal investigation. (*Id.*)

III. Settlement Agreement between Gonzalez and the City

Three years after his employment terminated, in 2012, Gonzalez allegedly learned that Article IV, § 4.07(b)(4)a.2 of the City Charter states that employees in classified service serving a probationary period

may be removed by the mayor "for cause" with written notice. (DE 24 at p. 7, ¶¶ 47-48; *id.* at p. 41.) At that time, Gonzalez threatened to sue the City, claiming it violated his constitutional rights in connection with his employment. (DE 24 at p. 7, ¶¶ 47-48.)

The parties entered into a written settlement agreement a few months later. (DE 24 at ¶ 7-8, ¶¶ 50-53; *id.* at p. 141.) In exchange for a settlement payment and other consideration, Gonzalez released the City from any and all claims he may have had as of the date of the agreement. (*Id.* at p. 142, ¶ 6.)

In December 2016—over four years after entering into the settlement agreement and seven years after his City employment ended—Gonzalez brought this action against the City to undo the settlement agreement and assert employment-related claims. (DE 1 at pp. 1-2; *see also* DE 24.)

IV. Fourth Amended Complaint

Gonzalez's Fourth Amended Complaint contained five counts—two federal claims (counts 1-2) and three state law claims (counts 3-5). (DE 24.)

Counts 1 and 2 were 42 U.S.C. § 1983 claims alleging violations of Gonzalez's procedural due process rights under the Fourteenth Amendment of the United States Constitution. (DE 24 at pp. 11-15.) Count 2 is not relevant to the matter before the Court.

In count 1, Gonzalez alleged that "for cause" language in Article IV, § 4.07(b)(4)a.2 of the City Charter

gave him a property interest in his employment and the City violated his right to procedural due process by terminating him without providing him pre- or post-termination hearings. (DE 24 at p. 12, ¶¶ 84-85.)

The only state law claim relevant to the petition is count 3, which was a claim for rescission and cancellation of the 2012 settlement agreement, pursuant to which Gonzalez released any and all claims he may have had against the City. (DE 24 at pp. 15-18.)

V. Motion to Dismiss Fourth Amended Complaint

The City moved to dismiss all claims in the Fourth Amended Complaint with prejudice for failure to state a claim for relief under Rule 12(b)(6). (DE 31.) As to count 1, the City argued that Gonzalez did not have a property interest in his employment as a probationary employee.

VI. District Court Order on Motion to Dismiss

The district court's order on the motion dismissed with prejudice both federal claims (counts 1 and 2). (Pet. App. 8a-21a.) As to count 1, the district court concluded that, under the CBA, CSRR, and Charter, Gonzalez was a probationary employee and did not have a property interest in his employment. (*Id.* at 12a-16a.) The court also concluded that, even if he did have a property interest as a probationary employee, the City

gave him all the process he was due by giving him written notice of termination. (*Id.* at 16a.)

Having dismissed the only federal claims, the district court remanded the state law claims to state court.[2] (*Id.* at 20a-21a.)

VII. Eleventh Circuit's Opinion

The Eleventh Circuit issued an opinion affirming the district court. (Pet. App. 1a-7a.) As to the procedural due process claim based on the termination of Gonzalez's employment, the court affirmed dismissal on the basis that Gonzalez lacked a property interest in his employment. (*Id.* at 4a-6a.) In doing so, the court discussed and analyzed the relevant provisions of the Charter, the CBA, and the CSRR. (*Id.* at 5a-6a.) The court concluded that none of the relevant provisions limited the City's power to terminate probationary police officers in any way. (*Id.*) Because there was no

[2] In the proceedings that followed in state court, the Florida Third District Court of Appeal issued an opinion affirming the state trial court's dismissal of Gonzalez's state law claims with prejudice, including his claim for rescission of the 2012 settlement agreement pursuant to which he released the City from any and all claims he may have had through date of the settlement agreement (including any claims based on his 2009 termination). *Gonzalez v. City of Hialeah*, No. 3D18-1158, 2019 WL 211518 (Fla. 3d DCA Jan. 16, 2019) (*per curiam*). The district court of appeal denied Gonzalez's motion for issuance of a written opinion on February 22, 2019, there are no motions pending, and the time period for filing post-decision motions has expired. Fla. R. App. P. 9.330(a)(1). However, the mandate has not yet issued. *See* Fla. R. App. P. 9.340(b) (mandate shall be issued after expiration of 15 days from the date of order denying post-decision motion).

limitation on the City's power to terminate his employment, he had no legitimate claim of entitlement to continued employment, and, thus, no property interest. (*Id.*)

Gonzalez filed a motion for rehearing as to count 1, which was denied. (Pet. App. 22a.) The motion for rehearing did not raise any of the issues Gonzalez has raised in his petition for certiorari.

REASONS FOR DENYING THE PETITION

I. The petition rests on a mischaracterization of the Eleventh Circuit's opinion in this case

The petition should be denied because it rests squarely on a mischaracterization of the Eleventh Circuit's opinion. Since his claim of error is based solely on a mischaracterization, the asserted error does not exist and there is no error presented for review. The petition should be denied on this basis alone.

Gonzalez incorrectly represents that the Eleventh Circuit's opinion created "a new federal standard of ignoring state law and requiring a right to appeal to determine the existence of a property interest in continued employment[.]" (Pet. 14.) More specifically, he claims the Eleventh Circuit's opinion "established the following federal common law standard in this instant case: an expressed for cause employment removal limitation prescribed by local law is irrelevant

to determine whether a protectable property interest in continued employment exists regardless of state law because such property interest only exists when there is a right to appeal such decision." (Pet. 14.) He further contends that, "without applying Florida law, the lower court [the Eleventh Circuit panel] held that the Charter's employment removal for cause requirement was irrelevant to its finding because Gonzalez did not have a right to appeal the cause of the termination—the court did not apply the charter provisions requiring the Personnel Board to have an appeal process for all Classified Service employees, which by definition included probationary employees." (Pet. 12.)

Based on these mischaracterizations of the Eleventh Circuit's opinion, Gonzalez frames his first question presented for review as "whether there is a federal common law standard to determine the existence of a property interest in city employment, without applying state laws, requiring that such interest exists only when there is a procedural right to appeal for a cause removal decision, in contradiction of *Board of Regents v. Roth*, 408 U.S. 564 [(1972)], and *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985)." (Pet. i.) Because the Eleventh Circuit's opinion did not apply a "federal common law standard" rather than state law in determining whether a property interest existed, and it did conclude that a property interest only exists if there is a right to appeal a removal decision, Gonzalez's first question presented is simply not implicated by the opinion in this case.

Gonzalez's assertion that the Eleventh Circuit ignored state law and instead applied a federal common law standard in determining whether Gonzalez had a property interest has no basis in the opinion whatsoever. (Pet. App. 1a-7a.)

First, the opinion correctly articulated the legal framework applicable to procedural due process claims based on property deprivations in the public employee context. The opinion stated that the first step in the procedural due process analysis is to determine whether the plaintiff has a property interest. (Pet. App. 4a (citing *Ross v. Clayton County*, 173 F.3d 1305, 1307 (11th Cir. 1999).) The opinion further stated that, "[g]enerally speaking, 'a public employee has a property interest in continued employment if *state law or local ordinance* in any way limits the power of the appointing body to dismiss an employee.'" (*Id.* at 4a-5a (emphasis added).) The court acknowledged that, "[p]robationary employees typically 'lack property interests in their employment because they are "at will" employees without a legitimate claim of entitlement to continued employment.'" (*Id.* at 5a.) However, the court stated that, in determining whether an employee serving a probationary period has a property interest in his employment, the court "must look behind the 'probationary' label 'to the controlling principles of *state law and the substance of the [employee's] status*.'" (*Id.* (emphasis added).)

The case the Eleventh Circuit's opinion cited for this framework, *Ross v. Clayton County*, further shows that the court correctly identified and articulated the

legal standard, including the role of state law. (Pet. App. 4a.) Quoting this Court's decision in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), *Ross* stated that, "[a] public employee has a property interest in employment if 'existing rules or understandings that stem from an independent source such as state law create a legitimate claim of entitlement.'" *Ross*, 173 F.3d at 1307. Citing this Court's decision in *Bishop v. Wood*, 426 U.S. 341 (1976), the court further explained that "[t]his determination requires examination of relevant state law." *Ross*, 173 F.3d at 1307. *Ross* also stated that, "[g]enerally, a public employee has a property interest in continued employment if state law or local ordinance in any way 'limits the power of the appointing body to dismiss an employee.'" *Id.* (quoting *Barnett v. Housing Auth. of City of Atlanta*, 707 F.2d 1571, 1577 (11th Cir. 1983), *overruled on other grounds by McKinney v. Pate*, 20 F.3d 1550, 1558 (11th Cir. 1994)). *Ross* also acknowledged that, an employee's classification as "probationary" is not determinative, and an employee labeled as "probationary" may have a property interest in employment under applicable state law. *Id.* (citing *Stapp v. Avoyelles Parish Sch. Bd.*, 545 F.2d 527, 532 (5th Cir. 1977)).

The Eleventh Circuit's opinion correctly articulated the applicable legal framework. Gonzalez does not, in fact, contend that any portion of the court's statement of the legal framework is incorrect. Under the Court's guidelines, "misapplication of a properly stated rule of law" is rarely a basis for granting a petition for certiorari. Sup. Ct. R. 10. Therefore, even if the

Eleventh Circuit had incorrectly applied the correctly-stated law (which it did not), the error in applying the law would not itself warrant review.

There is not a single statement in the Eleventh Circuit's opinion to which Gonzalez can point as reflecting that the court did what he claims it did. The Eleventh Circuit's opinion did not state that the court was applying a new or different rule; or that it was applying federal common law rather than state law in determining whether Gonzalez had a legitimate claim of entitlement to continued employment; or that a property interest cannot exist without a right to internally appeal a termination; or that it was otherwise departing from the framework it articulated. (Pet. App. 4a-6a.) The complete lack of any such statement makes the fact that the opinion expressly articulated the correct law all the more important.

The Eleventh Circuit's analysis identified and described the relevant provisions of the CBA, Charter, and CSRR as the external sources controlling the substance of Gonzalez's employment status. (Pet. App. 5a-6a.) The court analyzed these documents to determine whether the City's power to discharge Gonzalez was in any way limited, so as to give him a property interest in continued employment. (Pet. App. 6a.) The court stated that both the CBA and CSRR provided that probationary employees could be discharged with or without cause. (*Id.* at 5a-6a.)

The court next analyzed the Charter provision stating that probationary employees may be " 'removed

for cause at any time during the working test (probationary) period by the mayor subject to civil service regulations, by providing written notice of the action taken to the employee, together with the reasons for the . . . removal.'" (Pet. App. 6a.) The court concluded that the "for cause" language in this provision did not place a limitation on the City's power to discharge a probationary employee. (*Id.*) The court explained that the language of this Charter provision "grants the mayor sole discretion to determine whether cause for removal exists"; the court also stated that none of the documents grants a probationary employee a right to appeal the mayor's determination. (*Id.*) Because the Court determined that the power to remove probationary employees was unlimited under the relevant documents, it concluded Gonzalez had no protected property interest in continued employment. (*Id.*)

Gonzalez cannot point to any actual language in the opinion to support his position. He paraphrases the Eleventh Circuit's decision, and does so in a way that is misleading. For example, he claims the court "held that the Charter's for cause removal requirement was irrelevant to its finding because Gonzalez did not have a right to appeal the cause of the termination." (Pet. 12.) However, the court did not hold that the "for cause" language in the Charter was irrelevant, nor did it hold that the lack of a right to appeal negated the "for cause" language. Rather, the court's analysis clearly explained that the presence of the "for cause" language did not limit the mayor's power to remove probationary employees because what constituted cause was left to

the mayor's sole discretion. In addition to the language of the Charter provision itself, the court stated that none of the governing documents gave probationary employees a right to challenge the mayor's determination.[3] Gonzalez also incorrectly states that the Eleventh Circuit "created a balancing test of the Charter, the CBA, and the CSRR." (Pet. 12.) The court did not state that it was applying a balancing test, nor did it weigh the various documents against each other. Rather, it identified and described the relevant provisions of each document, and then analyzed those provisions. (Pet. App. 4a-6a.)

Gonzalez's position that the court applied a federal common law standard, rather than state law, in determining whether he had a property interest appears to be based solely on the fact that the court's

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[3] In his petition, Gonzalez asserts that the Charter required the Personnel Board to "establish procedures for reviewing removals of classified service employees for misconduct, efficiency or other good reasons; and hearing appeals . . . from removals." (Pet. 7; *id.* Pet. i ("The charter also required a process to hear appeals from all discharged classified service employees.").) His petition claims that this requirement applies to all classified service employees, including probationary employees, and argues that the Personnel Board failed to provide procedures for review and appeal of removals of all classified service employees since the provision for review and appeal in the CSRR did not apply to probationary employees. (*Id.* at 7.) Although Gonzalez did not make any argument based on this idea below, his petition faults the Eleventh Circuit for "not apply[ing] the Charter provisions requiring the Personnel Board to have an appeal process for all Classified Service employees, which by definition included probationary employees." (Pet. 12.) Any argument he is now attempting to make based on this provision has not been preserved for review.

analysis of this issue did not cite any state court decision. However, the absence of a citation does not give rise to an inference that the court ignored state law or applied a federal common law rule. Furthermore, his petition does not identify any state court decision holding that the same or materially similar provisions give rise to a property interest under Florida law.

Because the Eleventh Circuit's opinion neither applied a federal common law standard in lieu of state law nor concluded a property right cannot exist unless there is a right to appeal a removal decision, the "error" on which Gonzalez's petition rests does not exist. As discussed below, because his assertions of conflict with other court decisions likewise rest on this non-existent "error," he cannot establish any conflict as a basis for review.

II. The Eleventh Circuit's opinion does not conflict with the decisions of other circuits cited in the petition

Gonzalez argues the "Eleventh Circuit's new federal standard of ignoring state law and requiring a right to appeal to determine the existence of a property interest in continued employment is in direct contradiction with the federal circuits." (Pet. 14.) He cites various decisions of other circuits for the well-established rule that property interests are created by state law, including local regulations and contracts. (*Id.* at 14-15.) He then asserts that, "[t]he Eleventh Circuit's holding in this instant case, as it relates to public

employees in a probationary period, is in direct contradiction with the Third, Fifth, and Sixth Circuits." (*Id.* at 15.)

The simple response to Gonzalez's assertion of conflict with other circuits—both as to the circuit court cases he cites for the general proposition that property interests are determined by state law, and those he cites for that proposition in the context of probationary employees—is the same. For the reasons explained above, the Eleventh Circuit did not apply a federal common law standard or ignore state law in determining the existence of a property interest. The Eleventh Circuit articulated the correct legal standard for determining whether a property interest exists. It also correctly applied that legal standard by analyzing the regulations and contract provisions governing Gonzalez's employment under state law. There is no conflict with any of the circuit court decisions Gonzalez cites.

Because the petition only provides discussion of the "probationary period" cases of the Third, Fifth, and Sixth Circuits, only those cases will be addressed further. Beyond the reason stated above, these "probationary period" cases are distinguishable on other grounds which show that they are not in conflict with the decision in this case.

Gonzalez first asserts a conflict with *Samuel v. Holmes*, 138 F.3d 173 (5th Cir. 1998). (Pet. 15.) However, he misquotes the *Samuel* opinion (and the employer's policy quoted in the opinion) when he states: "*Samuel* applied Louisiana law to hold that the

employer's local policy stating it 'shall not discharged [sic] any non-tenured employee . . . without cause' entitled plaintiff to a protected property interest in continued employment." *Id.* First, the school board's policy required "just cause" to discharge non-tenured employees. Second, the court's conclusion that the employee in that case had a protected property interest was not based on the school board's "just cause" requirement alone. Rather, it was based on two specific state statutes, which state appellate courts had specifically held to grant specific rights to non-tenured employees, and additional provisions of the policy the school board adopted pursuant to the requirements of one of those statutes.

The *Samuel* court explained that a state statute (LSA-R.S. 17:522) required termination of probationary (non-tenured) school board employees to be based on a "valid reason." *Id.* (citing LSA-R.S. 17:522). The court further explained that a state appellate court had specifically held that this statute required school boards to have a "valid reason" to terminate non-tenured employees, and that the statute provided non-tenured employees with a cause of action against the school board for termination without a "valid reason." *Id.* (citing *Quina v. Orleans Par. Sch. Bd.*, 224 So. 2d 835, 840 (La. Ct. App. 1969)). Another provision of the same statute provided that, "in absence of written notification of unsatisfactory performance, a probationary employee automatically becomes a permanent

employee at the end of his or her probationary period." *Id.* at 177.[4]

Another state statute required that each school district "shall develop and adopt rules and policies which it shall use in dismissing school employees who have not attained tenure." *Id.* (citing LSA-R.S. 17:81.5). Pursuant to this statutory requirement, the school district in *Samuel* adopted policies governing termination of non-tenured employees: the provision requiring "just cause" to terminate non-tenured employees, and a provision entitling non-tenured employees to "three levels of hearings before dismissal" (including "a six-step hearing which includes opening and closing statements and the presentation of

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[4] As to the significance of this statutory provision, the court provided the following footnote:

> *See also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39, 105 S.Ct. 1487, 1491, 84 L.Ed.2d 494 (1985) (holding that a state statute which stated that employees were "entitled to retain their positions 'during good behavior and efficient service,' who could not be dismissed 'except . . . for . . . misfeasance, malfeasance, or nonfeasance in office,' " created property interests protectable by the Due Process clause). This contrasts sharply with the employment provision in *Board of Regents v. Roth*, where the Supreme Court held that an employee did not have a property interest because the terms of employment "did not provide for contract renewal absent 'sufficient cause.' Indeed, they made no provision for renewal whatsoever." *Roth*, 408 U.S. at 578, 92 S. Ct. at 2709.

Id. at 177 n. 21.

witnesses and evidence from both sides") to challenge the basis for removal. *Id.*

The *Samuel* court also discussed a state appellate court decision which specifically concluded that the statute requiring school boards to adopt policies governing removal of non-tenured employees (LSA-R.S. 17:81.5) granted non-tenured employees property interests of which they could not be deprived without due process. *Id.* at 178 (citing *Cowart v. Lee*, 626 So. 2d 93 (La. Ct. App. 1993)). In *Cowart*, the state appellate court rejected the argument that a school board's failure to adopt policies governing termination of non-tenured employees, in violation of the statute, prevented a terminated non-tenured employee from stating a procedural due process claim. 626 So. 2d at 95-96. In discussing the legislative history and purpose of the statute, the state appellate court stated that, "[i]n enacting LSA-R.S. 17:81.5, the people of this state, represented by the Legislature, purposefully sought to remove non-tenured school employees from the category of 'at will' employees, and in doing so, limited the authority of school boards and their superintendents to hire and fire non-tenured, nonteaching personnel without regard to the rights of employees so affected." *Id.* at 95. The state appellate court thus rejected the school board's assertion that non-tenured employees "cannot avail themselves of the rights they, and through them, the taxpayer, were given by express statute, solely as a consequence of the school board's apparent disregard for the legislation." Therefore, the state appellate court held that, "[i]n the absence of

some properly perfected rules and policies, and by 'properly' we mean promulgated in accordance with LSA-R.S. 17:81.5, the supervisor and school board exceeded their authority when they terminated the employment of a nontenured employee in the absence of some demonstrable compelling need." *Id.* at 96.

Samuel's conclusion that the non-tenured school district employee had a property interest in her employment was based on these two specific statutes, the two state appellate court decisions specifically holding that these specific statutes granted non-tenured employees property interests, and the school board's policies (adopted pursuant to a statutory mandate) providing removal for "just cause" and ample hearing rights to challenge a "just cause" determination.

In contrast to *Samuel*, here there is no state law (or even a local law or contract provision) requiring non-tenured municipal employees to be terminated based on a "valid reason" and providing non-tenured employees a cause of action against the employer to test the validity of the reason for termination. Nor has the Florida legislature enacted any statute for the specific purpose of removing all probationary city police officers from "at will" employment status. Finally, there is no Florida appellate decision concluding that the City's local provisions (or any materially similar provisions) create property rights for probationary police officers or other employees. Thus, *Samuel* is distinguishable on numerous grounds and does not conflict with the Eleventh Circuit's decision in this case.

Gonzalez also claims the Eleventh Circuit's decision in this case conflicts with *Bueno v. City of Donna*, 714 F.2d 484 (5th Cir. 1983). (Pet. 16.) There, the city's personnel policies required "just cause" to terminate "any employee," including probationary employees. *Id*. The personnel policies further stated that a probationary employee could be dismissed when "in the judgment of the department head or supervisor, his work record is not of a quality to merit continuation in the city's employment." *Id.* Under these policies, a probationary employee was "entitled to continued employment until there arose 'just cause' for his dismissal," and, therefore, had a constitutionally protected property interest in his employment. *Id.*

Gonzalez contends that "*Bueno* applied the employer's local regulation under Texas law requiring 'just cause' to dismiss the plaintiff even when working in a probationary period." (Pet. 16.) Therefore, he appears to cite it as creating a conflict with the Eleventh Circuit's opinion (which he incorrectly claims did not apply state law to determine the existence of a property interest) by stating that the *Bueno* opinion applied state law. But the *Bueno* court did not cite a state law case to support its analysis of whether the plaintiffs had an expectation of continued employment, so as to give them a protected property. It is difficult to see how Gonzalez could claim the Eleventh Circuit's failure to cite a state law decision to support its analysis shows that it did not apply state law, while at the same time contend that *Bueno* applied state law to the property interest analysis, when *Bueno* likewise did

not cite a state law case. The case in no way creates the conflict Gonzalez claims.

In any event, Gonzalez's discussion of *Bueno* incorrectly relies on the court's rejection of the city's argument about what process was constitutionally due to the plaintiffs. After concluding the plaintiffs had a property interest, the *Bueno* court rejected the city's alternative argument that, "if the plaintiffs are deemed to possess a legitimate property right in the retention of their employment, and if the employees who resigned did not waive these rights, their property interest exists only to the extent that it is protected by the procedural safeguards provided in the city's ordinances and rules." *Id.* at 493. The city's ordinances and rules did not provide any procedural safeguards whatsoever—not even notice of the reasons for discharge or an opportunity to respond. *Id.* Thus, the city's alternative argument was that, even though the employees had property interests of which they could not be deprived without due process of the law, zero process was due to them. Thus, this argument and the court's analysis of this argument solely went to the issue of the type or degree of process that was constitutionally due—not the issue of whether the plaintiffs had a property interest. In rejecting the city's argument, the *Bueno* court cited *Arnett v. Kennedy*, 416 U.S. 134, 135 (1974), for the proposition that, "[w]hile the [s]tate may define what is and is not property, once having defined those rights, the Constitution defines due process." *Bueno*, 714 F.2d at 493.

Gonzalez's discussion of this portion of *Bueno* does not acknowledge that the *Arnett* rule only applies *after* it is determined that a property interest exists. By failing to do so, his discussion suggests that a court cannot consider whether the employer's regulations provide an avenue to challenge the grounds for termination as a factor in determining the existence of a limitation on the employer's power to terminate the employee, so as to give the employee a legitimate entitlement of continued employment. *Bueno* made no such holding. Therefore, the Eleventh Circuit's observation that the relevant documents did not give reemployed officers serving a probationary period a right to appeal the mayor's termination decision does not conflict with *Bueno*.

Gonzalez also claims the Eleventh Circuit's opinion conflicts with *Lee v. W. Reserve Psychiatric Habilitation Ctr.*, 747 F.2d 1062, 1067 (6th Cir. 1984). (Pet. 16.) The only analysis Gonzalez supplies is in a parenthetical following the citation to the case. (*Id.*) His parenthetical incorrectly indicates that *Lee* held that a probationary employee had a property interest in his employment. (*Id.*) In *Lee*, the court specifically stated that the defendants conceded the plaintiff had a property interest, and, because the existence of a property interest was not in dispute and had no effect on the outcome of the case due to the court's ruling for the plaintiff on his claim based on a deprivation of a liberty interest, the court need not decide the issue. *Lee*, 747 F.2d at 1067. Because *Lee* did not even decide whether

a property interest existed, it cannot be a basis for a circuit conflict on the issue.

Similarly, Gonzalez contends there is also a conflict with *Perri v. Aytch*, 724 F.2d 362, 366 (3d Cir. 1983), but only analyzes the case in a parenthetical following the case citation. (Pet. 17.) *Perri*, like *Bueno* and the Eleventh Circuit's opinion in this case, decided whether a property interest existed after discussing the relevant policies established by the employer, without citing state case law. Gonzalez argues the Eleventh Circuit's failure provide a citation to a state law case supporting its conclusion that the City's local policies did not give him a legitimate expectation of continued employment means the panel must have applied a federal common law standard to determine that no property interest existed. He takes the opposite tack in *Perri* where that court likewise fails to cite a state law case to support its conclusion that a property interest *does* exist. It makes no sense to take opposite positions on cases that did the same thing (i.e., not cite a state law case). There is no conflict with *Perri*.

Gonzalez next discusses the Tenth Circuit's opinion in *Lentsch v. Marshall*, 741 F.2d 301, 305 (10th Cir. 1984), although it is not clear whether he contends it is in conflict with the Eleventh Circuit's decision. In any event, *Lentsch* concluded an employee had a legitimate expectation of continued employment where the local ordinance provided that employees may be dismissed for "misconduct, inefficiency or other just cause." *Id.* However, the ordinance did not expressly state that these were the "only" grounds for

termination. *Id.* The regulation did not specify procedures for terminations. *Id.* The court noted that there was no state law decision interpreting the ordinance or any similar ordinance language. Without citing any state law decision, the court concluded that, "when, as here, an ordinance merely specifies reasons for which an employee may be discharged, we think that the most reasonable construction of that ordinance is that an employee may be discharged only for those reasons." *Id.*

Gonzalez's petition states that "*Lentsch* recognized that state laws and state court cases govern the determination whether a protected interest in employment exists regardless of the absence of procedures to follow." (Pet. 17.) However, *Lentsch* did not need to (and therefore did not) consider whether an avenue for challenging the basis for termination existed in determining whether the ordinance placed any limitations on the decisionmaker's ability to terminate employees. The ordinance specifically provided the grounds for termination ("misconduct, inefficiency or other just cause"); the court interpreted the enumeration of specific grounds for termination to mean that the stated grounds were the only grounds for termination. 741 F.2d at 305. Unlike the ordinance in *Lentsch*, the City's regulations in this case did not provide any grounds for termination of a probationary officer. *Lentsch* is distinguishable and it does not conclude that a court may not consider whether there is an avenue to challenge the basis for termination in determining whether

regulations restrict the grounds on which an employee may be terminated. There is no conflict.

Finally, Gonzalez appears to assert a conflict with the Ninth Circuit's recent decision in *Palm v. Los Angeles Dep't of Water & Power*, 889 F.3d 1081, 1087 (9th Cir. 2018), and a prior case cited in that decision, *Fleisher v. City of Signal Hill*, 829 F.2d 1491, 1494-95 (9th Cir. 1987). (Pet. 18.) In both cases, the Ninth Circuit considered the absence of a procedure allowing probationary employees to challenge the basis for termination as part of the analysis of whether probationary employees had a legitimate expectation of continued employment. In *Palm*, the court explained that "[s]tate law establishes a property interest in employment if it restricts the grounds on which an employee may be discharged." 889 F.3d at 1085 (quoting *Dorr v. Cnty. of Butte*, 795 F.2d 875, 878 (9th Cir. 1986) (internal quotation marks omitted)). "If discharge can only be for 'just cause,' an employee has a right to continued employment until there is just cause to dismiss him." *Id.* (internal quotation marks and alteration omitted). Thus, whether the employer's regulations provide an employee with a right to challenge the basis for a termination decision is relevant to the issue of whether there is any restriction on the permissible grounds for termination. *Id.*

The language of the regulations in *Palm* is similar to the City's regulations in this case. In *Palm*, one of the regulations provided that "[n]o person in the classified civil service shall be discharged . . . except for cause. . . ." *Id.* Another provision stated that, "[a]t or

before the expiration of the probationary period, the appointing authority may terminate the probationary employee by delivering written notice of termination to the employee assigning in writing the reasons for the termination." *Id.* The provision defining the term probationary period included a statement that during the probationary period, the employee "may be terminated without right of appeal to the Board of Civil Service Commissioners." *Id.* Reviewing all of these provisions together, the court concluded the probationary employee lacked a property interest.

Gonzalez claims that, unlike the Eleventh Circuit's decision in this case, the Ninth Circuit applied state law in determining whether a property interest existed. For the same reasons previously explained, Gonzalez's contention that the Eleventh Circuit failed to apply state law is incorrect. The conflict he asserts thus does not exist

Accordingly, the Eleventh Circuit's decision in this case is not in conflict with any of the circuit court opinions Gonzalez cites.

III. The Eleventh Circuit's opinion does not conflict with any decision of the Florida Supreme Court cited in the petition

The next section of Gonzalez's argument, according to the heading, purports to argue that the Eleventh Circuit's decision in this case conflicts with one or more Florida Supreme Court decisions. (Pet. 19.) However, a

reading of this section leaves it unclear what Gonzalez is actually arguing.

Gonzalez cites four Florida Supreme Court decisions in this section, but discusses them only minimally. (Pet. 19, 24.) It is unclear whether he is attempting to assert that all four cases conflict with the decision in this case. Regardless, there is no conflict with any of them.

The first case, *City of Miami Beach v. Fleetwood Hotel, Inc*., 261 So. 2d 801, 803 (Fla. 1972), is cited for the proposition that a city charter is the supreme law of a municipality. (Pet. 19.) The second case, *Baynard v. Windom*, 63 So. 2d 773, 777 (Fla. 1952), is cited for the proposition that a city regulation cannot abolish the city charter. (*Id.*) Without any further discussion or explanation, Gonzalez states: "As such, the lower court was required to determine whether the Charter, the CBA, or the CSRR governed Gonzalez's property right in continued employment." (*Id.*) However, neither *Fleetwood Hotel* nor *Baynard* expressly or even implicitly articulate a requirement to determine that one of these documents controls the property interest inquiry. The Eleventh Circuit's decision does not conflict with the propositions for which these cases are cited (that a city charter is the city's supreme law and that a city regulation cannot abolish its charter).

The third Florida Supreme Court case Gonzalez cites, *Moser v. Barron Chase Sec., Inc*., 783 So. 2d 231, 236 (Fla. 2001), is cited for the general proposition that "[a] property interest may be created by statute,

ordinance or contract, as well as policies and practices of an institution which support claims of entitlement." (Pet. 19.) He provides no further discussion of the case. However, there is nothing in the Eleventh Circuit's decision that conflicts with this proposition.

The fourth and final Florida Supreme Court case Gonzalez cites is *Laney v. Holbrook*, 8 So. 2d 465 (Fla. 1942). Gonzalez cites *Laney* and two decisions of Florida district courts of appeal in support of the following statement: "Where a statute or ordinance lists specific grounds for discharge of a public employee or states that a public employee can only be terminated for just cause, Florida courts hold the employee has a property right of which he or she cannot be deprived without due process of the law." (Pet. 19.) Gonzalez does not argue that the Eleventh Circuit's decision conflicts with this proposition. Indeed, none of the relevant documents listed any specific grounds for terminating probationary employees; nor did they provide that a probationary employee could only be terminated for "just cause."

The only other Florida cases Gonzalez cites in this section are decisions of district courts of appeal, not the Florida Supreme Court. Any conflict with these intermediate appellate court decisions (assuming any conflicts exist), does not warrant review by this Court. Sup. Ct. R. 10(a). In any event, Gonzalez only cites these cases for general propositions and does not assert any conflict with the decision in this case. (Pet. 19-20, 24.)

Interestingly, the bulk of this section does not address Florida case law. Rather, it focuses on *Ross v. Clayton County*, 173 F.3d 1305 (11th Cir. 1999), which the Eleventh Circuit cited in its opinion in this case for the applicable legal framework. (Pet. 20-24.) Gonzalez's lengthy discussion of *Ross* and the cases it cites has nothing to do with his claim of a conflict between the decision in this case and a decision of the Florida Supreme Court.

Gonzalez attempts to link the irrelevant discussion of *Ross* and the cases it cites to Florida law by simply stating that, unlike in those cases, "in this instant case the lower court needed to conduct an analysis under Florida law to restore the conflict amongst the Charter, the CSRR, and the BA." (Pet. 24.) No citation to Florida law or other explanation is provided.[5] However, if this is intended to mean that, if any of the provisions were deemed to be in conflict, a court could not determine whether a property interest existed without first determining which of the three documents prevails, the City disagrees. Gonzalez provides no authority for his position that such a determination would be required. Further, none of the three documents (the CBA, the CSRR, or the Charter) would give rise to a property interest individually. Because the result would be the same regardless of which document

[5] Note that Gonzalez's petition incorrectly represents that the City agreed with him that the Charter was in direct conflict with the CBA and the CSRR. (Pet. 8-10, 12.)

were held to prevail, such a determination would be unnecessary.

Gonzalez next states—without any citation to authority or further discussion—that "Florida courts do not require an appeal right as [sic] condition precedent to having a property interest." (Pet. 24.) This statement has no relevance here, as the Eleventh Circuit did not conclude that the right to appeal is necessary to establish a property interest. In any event, Gonzalez cites no Florida Supreme Court decision and thus cannot claim a conflict.

Gonzalez concludes this section by arguing that Florida courts apply an "objective for cause standard" "regardless [sic] the existence of an internal appeal right under local law." In support of this statement, he cites the Florida Supreme Court's decision in *Laney*, 8 So. 2d at 468, and a district court of appeal decision. (Pet. 24.) However, unlike this case, *Laney* did not involve a provision vesting a particular decisionmaker with authority to terminate employees "for cause," without enumerating the grounds that constitute cause or otherwise providing standards governing the determination of cause or through which validity of the cause determination could be measured or challenged. Quite the opposite, *Laney* dealt with a state law providing robust protections for tenured public school employees. *Id.* at 465-69. The state law enumerated the specific grounds on which a tenured employee could be disciplined, provided for independent administrative review which included a full evidentiary hearing, provided detailed standards and requirements for

governing proof and issuance of an administrative determination, and the administrative determination was subject to judicial review. *Id.* There is nothing in *Laney* suggesting that the words "for cause" alone give rise to a measurable, objective standard for what constitutes cause, so as to give rise to a legitimate expectation of continued employment absent that objective standing being met.

For these reasons, Gonzalez has failed to show any conflict between the Eleventh Circuit's opinion and any Florida Supreme Court decision.

IV. The Eleventh Circuit's opinion does not conflict with this Court's decision in *Board of Regents of State Colleges v. Roth*

Gonzalez argues that the Eleventh Circuit's opinion conflicts with this Court's decision in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972). (Pet. 24-25.) However, the only conflict he asserts is that the Eleventh Circuit's opinion "eradicates this Court's precedent set in *Roth* because it repudiates the application of state law in a matter outside the purview of federal statutes and the federal constitution, that is, the legitimate interest to continued public employment at the state, county, or municipal level." (*Id.*)

For the reasons explained above, the Eleventh Circuit did not apply a federal common law standard or ignore state law in determining whether Gonzalez had a property interest. Certainly, nothing in the Eleventh Circuit's opinion "eradicates this Court's precedent set

in *Roth*" or "repudiates the application of state law." Gonzalez has not shown a conflict with this Court.

V. Gonzalez's second question presented for review is not properly before the Court

Gonzalez framed his second question presented for review as "whether a classified service probationary employee appointed from a certified reemployment list states a claim upon removal without any hearings with a decision maker, without proper notice, when the employer created a public record stigmatizing such disputed removal and concealed the charter rights." (Pet. i.) Gonzalez has not presented any argument addressing this question in his petition. Because this question was not briefed in the petition, it has not been properly presented to the Court for review.

In any event, this question is not properly before this Court because it was not passed upon by the Eleventh Circuit. The Eleventh Circuit concluded that Gonzalez did not have a property interest in his employment, and affirmed the district court on this basis. The court did not address any other aspect of the claim. Gonzalez's second question presented does not go to the existence of a property interest; rather, it goes to the issue of what process is due, which was not addressed by the Eleventh Circuit's opinion.

Additionally, together with other statements in the petition, the second question presented's reference to "stigmatizing" public records raises questions of whether Gonzalez is attempting to raise any issue

relating to a deprivation of a liberty interest. In addition to the reference to "stigma[]" in the second question presented, Gonzalez's petition asserts that, before the Eleventh Circuit, he "claimed that Hialeah deprived [him] of his liberty interest without procedural due process of law by permitting the publication of the Internal Investigation Report in conjunction with the Termination Letter," which "stigmatized" him. (Pet. 12.) However, Gonzalez's complaint did not assert a due process claim based on deprivation of a liberty interest. (*See* DE 24.) While Gonzalez filed a motion for leave to amend his complaint before the district court ruled on the City's motion to dismiss, his motion did not seek leave to add a claim or amend an existing count to assert a due process violation based on deprivation of a liberty interest. Indeed, his motion for leave to amend did not seek to add or amend any federal claims whatsoever. The Eleventh Circuit's opinion affirmed the district court's denial of his motion for leave to amend on the basis that it did not identify or attach a copy of his proposed amendment. (Pet. App. 7a.)

In his petition, Gonzalez appears to fault the Eleventh Circuit because it "did not address [his] liberty interest claim." (Pet. 13.) As explained above, there was no liberty interest claim to address.

While it is unclear whether Gonzalez is attempting to imply that he had pled a liberty interest procedural due process claim, or otherwise inject liberty interest issues into the matters for which he seeks review before this Court, in an abundance of caution, the City clarifies that he never asserted a liberty interest claim before the district court and he never filed any

motion for leave to amend for the purpose of including a liberty interest claim. His first reference to a liberty interest was in his brief before the Eleventh Circuit, where he argued that the district court erred in dismissing his federal claims with prejudice because he could have alleged facts in an attempt to state a liberty interest claim.

To the extent that Gonzalez's reference to "stigmatizing" documents in the second question presented attempts to raise an issue relating to a liberty interest (Pet. i), the issue is not properly before the Court.

Therefore, the second question presented does not provide a basis warranting review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted on March 11, 2019.

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