No. 18-329

In the Supreme Court of the United States

LANDRY ROUNTREE,
Petitioner,

v.

TROY DYSON; CITY OF BEAUMONT,
Respondents.

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

BRIEF IN OPPOSITION

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RELEVANT QUESTIONS PRESENTED

1. Whether the Fifth Circuit creates a circuit split by granting a motion to dismiss after an amended complaint has been filed.

2. Whether the Fifth Circuit creates a circuit split with regards to the standards for *sua sponte* dismissals.

3. Whether the enforcement of the Equal Protection Clause as it applies to licenses is inconsistent between the Circuit Courts.

4. Whether the Fifth Circuit failed to follow longstanding Supreme Court precedent on wrongful arrest.

PARTIES TO THE PROCEEDINGS

Petitioner Landry Rountree was the Appellant below; and

Respondents Troy Dyson and the City of Beaumont were the Appellees.

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INTRODUCTION

In the Petition for Certiorari, Petitioner Landry Rountree ("Rountree") has raised four questions for consideration by this Court. Two of the four questions allege the decision of the Fifth Circuit creates a circuit split, which is not true. The Fifth Circuit has routinely held that "defendants should not be required to file a new motion to dismiss simply because an amended pleading was introduced while their motion was pending." Pet. App. 2a. Rountree's equal protection failed, because it was insufficiently pled and did not show that Rountree was "treated differently from others similarly situated." Pet. App. 2a. In regards to question four, Rountree is simply misrepresenting this Court's rulings as relates to lawful arrest.

Rountree's issues were fully briefed and outlined before the lower courts. He has not presented any reason to suggest a need for further review by this Court; as such, the Petition for Certiorari should be denied.

STATEMENT OF CASE

A. Factual Background

On November 4, 2013, the Beaumont Police Department, Traffic Division, received a complaint by Gregory Stanley, d/b/a Spanky's Wrecker, that Landry's Towing's state licenses had expired, which is a violation of the City's towing ordinances. The complaint specifically alleged Rountree's insurance certificate and towing license for the company had lapsed. Officers Don Bracker and Darleen Wisby attempted to inspect the records of Landry's Towing and such request was denied by Rountree, which is also

a violation of the ordinance. Several municipal court citations were issued to Rountree for violations pursuant to the City's Code of Ordinances.

Rountree was informed in a letter dated November 7, 2013, that the wrecker permit for Landry's Towing was revoked for two (2) years. The revocation letter also informed Rountree of his right to appeal the decision to the City Council or a hearings officer. Rountree elected to have his appeal heard by the City Council. A hearing was held on December 3, 2013. Rountree's appeal was unsuccessful and the City Council upheld the Chief of Police's decision to suspend Rountree's towing permit. The suspension period was from December 3, 2013 to December 2, 2015. During the suspension period, Rountree was removed from the Wrecker Rotation List and prohibited from participating in non-consent tows.[1]

On March 26, 2014, Sergeant Troy Dyson (hereinafter "Sergeant Dyson") was dispatched to the scene of an accident at the request of Officer Jerry Jackson.[2] Sergeant Dyson informed Rountree that his tow truck was parked within one thousand feet (1,000')

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[1] The Wrecker Rotation List is a list maintained by Police Dispatch of all the permitted wreckers in the City. The list is used when police officers request wrecker services for a non-consent tow. A non-consent tow is when an officer determines, usually after an accident, that a vehicle is no longer safe to operate and orders it to be towed.

[2] Rountree does not mention the investigating officer, Officer Jackson. Prior to the arrival of Rountree, Officer Jackson determined that the vehicles involved in the accident were no longer safe to operate on the roadway.

of an accident, which is a violation of the City's towing ordinance, and asked Rountree to move his truck outside of the one thousand foot (1,000') radius. Rountree refused to comply with the request made by Sergeant Dyson and was subsequently arrested.

On November 13, 2014, Rountree entered into a plea agreement with the city prosecutor to resolve his outstanding Municipal Court violations. In exchange for a plea of no contest to four (4) violations, the remainder of Rountree's violations were dismissed. Rountree's charges from his March 26, 2014, arrest were among those that were dismissed in the plea agreement.

B. Procedural History

Rountree sued the City of Beaumont (hereinafter the "City") and Sergeant Dyson asserting violations of his federal civil rights (equal protection, due process, procedural due process and false arrest/false imprisonment). Rountree also asserted state law causes of action for false arrest, false imprisonment, intentional infliction of emotional distress, and violation of due process and procedural due process. The lawsuit was against Sergeant Dyson in both his individual and official capacities. The case was removed to federal court and the City filed a Motion to Dismiss Sergeant Dyson pursuant to §101.106(e). The Court granted the Motion and dismissed Sergeant Dyson in his individual capacity only.

The City and Sergeant Dyson filed a Rule 12(b)(1) & (6) Motion to Dismiss on May 4, 2016. Rountree filed a response and amended his pleadings on August 17, 2016, and August 29, 2016, respectively. Sergeant

Dyson obtained outside counsel on December 1, 2016. Sergeant Dyson filed a Motion to Dismiss Rountree's First Amended Complaint. Rountree responded and Sergeant Dyson responded to Rountree's reply motion. On March 27, 2017, after considering all motions, the Court granted the City's and Sergeant Dyson's Rule 12(b)(1) & (6) Motion and Sergeant Dyson's Motion to Dismiss. Rountree appealed and the Fifth Circuit affirmed the district court ruling on June 11, 2018.

REASONS FOR DENYING THE PETITION

A. The Fifth Circuit did not create a circuit split by granting a motion to dismiss after an amended complaint had been filed.

The Fifth Circuit's dismissal of Rountree's case did not cause a circuit split. As they outlined in their opinion, "several district courts in this circuit [have held that] defendants should not be required to file a new motion to dismiss simply because an amended pleading was introduced while their motion was pending." This is especially true when "the defects raised in the original motion remain in the new pleading, the court simply may consider the motion being addressed to the amended pleading." *Rountree v. Dyson*, 892 F.3d 681, 683 (5th Cir. 2018) citing 6 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. CIV. §1476 (3d ed. updated Apr.2018).

Rountree disagrees, citing to the Ninth Circuit's ruling in *Ferdik v. Bonzelet*, 963 F.2d 1258 (9th Cir. 2015). However, Rountree fails to accurately detail for the Court the facts of this case. Ferdik filed an original petition which the court reviewed and found it failed to

state a claim for which relief may be granted. *Id.* at 1260. Ferdik was given leave to amend his pleadings. *Id.* After failing to timely amend his pleadings at the direction of the court, his case was dismissed. *Id.* The Ninth Court's decision to dismiss Ferdik's case was not based on a pending motion to dismiss, but on the Court's discretion, because Ferdik failed to comply with the Court's order to amend his complaint. *Id.* at 1263.

Rountree also looks to the Eleventh Circuit for additional support, citing to *Pintando v. Miami-Dade Housing Agency*, 501 F.3d 1241 (11th Cir. 2007). However, Rountree has again mischaracterized the nature of the court's dismissal, which is based on supplemental jurisdiction. In *Pintando*, the Eleventh Circuit ruled that once Pintando amended his complaint and eliminated the federal question for which supplemental jurisdiction was contingent, the court no longer retained jurisdiction. *Id.* at 1242. The ruling was not predicated on a pending motion to dismiss.

Lastly, Rountree asserts that his argument is also supported by previous rulings in the Seventh Circuit, citing *Massey v. Helman*, 196 F.3d 727 (7th Cir. 1999). In this case, the court's dismissal was based on a pending motion to dismiss, but said motion was filed *after* the amended complaint. The ruling from *Massey* did not center on moot pleadings; rather, its focus was on when affirmative defenses are raised timely. Dr. Otten was terminated from his position as a prison physician. *Id.* at 731. Upon termination, he joined the existing lawsuit of Michael Massey, a former patient who was suing for the wrongful denial of a surgery. *Id.* Dr. Otten's appearance in the lawsuit cited new claims

of retaliation and wrongful termination. *Id.* Prison officials amended their motion to include new defenses for failure to exhaust administrative remedies and lack of standing, and the motion were granted. *Id.* at 732. Dr. Otten appealed, stating those defenses were not originally asserted and should not be considered. *Id.* at 734-735. The Seventh Circuit held since Dr. Otten's claims were not raised until the third and fourth amended complaints, the defenses were timely and properly raised, and affirmed the decision. *Id.* at 735. Rountree has failed to show a circuit split on this issue; thus, his Petition for Writ should be denied.

B. The Fifth Circuit did not create a circuit split with regards to the standards for *sua sponte* dismissals.

Rountree states that his case against the City was dismissed *sua sponte* because he amended his pleadings and the City did not file a new motion. As previously stated, the Fifth Circuit and several other circuits have consistently held "defendants should not be required to file a new motion to dismiss simply because an amended pleading was introduced while their motion was pending." *Rountree*, 892 F.3d at 683; citing 6 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. CIV. §1476 (3d ed. updated Apr.2018).

As previously stated, Rountree has failed to show that the City's motion was moot; thus, he is unable to show that the lower court abused its discretion when relying on the City's motion. Rountree's Petition for Writ should be denied.

C. The enforcement of the Equal Protection Clause as it applies to licenses is not inconsistent between the Circuit Courts.

Rountree also asserts that the enforcement of the Equal Protection Clause as it relates to licenses is inconsistent between the Circuit Courts. Rountree bases this claim on his personal interpretation of the Second Circuit's opinion in *Progressive Credit Union v. City of New York*, 889 F.3d 40 (2d Cir. 2018).

In *Progressive*, the plaintiffs argued that recent regulations created a disparate treatment between ride share companies and taxicabs, those changes were imposed without due process, and resulted in a taking without just compensation. *Id.* at 48. The court dismissed the plaintiffs' case on the grounds that the plaintiffs failed to adequately plead claims under the Equal Protection Clause, they did not properly avail themselves to due process procedures, and their claims for a taking were not ripe. *Id.* at 55.

For the first time, Rountree alleges that he was not granted the necessary due process before his towing permit was suspended. Pet. 13. This assertion is, however, completely different from his earlier statements before the lower courts, as well as a contradiction of the facts before this Court in which Rountree states he appealed the revocation of his permit. Pet. 5. The Supreme Court has held that "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Bowlby v. City of Aberdeen*, 681 F.3d 215, 220 (5th Cir. 2012); *citing Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (quotation marks and citation omitted). In

most cases, "a meaningful time" means prior to the deprivation of the liberty or property right at issue. *Zinermon v. Burch*, 494 U.S. 113, 127, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990); *see also Caine v. Hardy*, 943 F.2d 1406, 1411-12 (5th Cir. 1991) ("Ordinarily, government may effect a deprivation only after it has accorded due process . . . ."). Rountree availed himself to the appeal process prior to the enforcement of his suspension period. Rountree's claim that he was denied due process is false.

Rountree's claims under the Equal Protection Clause were dismissed because he failed to show that he was treated "differently for others similar situated." *Rountree*, F.3d at 685. Rountree presumptuously assumes that had his case been heard in the Second Circuit, he would have been successful. Pet. 15. However, his faith in the Second Circuit is misplaced. Although, the court agreed that the plaintiffs suffered a decrease in the value of their medallions, they held that said decrease did not violate due process. *Progressive*, 889 F.3d at 53.

Rountree's suspension was essentially a contractual termination with the City. The class-of-one theory of equal protection does not apply in the public employment context. *Rountree*, 892 F.3d at 684; *citing Engquist v. Ore. Dep't of Agric.*, 553 U.S. 591, 604, 128 S.Ct. 2146, 170 L.Ed.2d 975 (2008). There is a crucial difference, with respect to constitutional analysis, between the government exercising "the power to regulate or license, as lawmaker," and the government acting "as proprietor, to manage [its] internal operation." *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 896, 81 S.Ct. 1743, 6 L.Ed.2d 1230

(1961). This distinction has been particularly clear in our review of state action in the context of public employment. The Fifth Circuit relied on *Integrity Collision Ctr. v. City of Fulshear*, 837 F.3d 581 (5th Cir. 2016), stating class-of-one claims are inapposite "to local government's discretionary decisions to include or not include a company on a non-consent tow list," thus rendering the opinion that the City had equal rights to retain and terminate contractual relationships for private services. *Rountree*, 892 F.3d at 685.

Rountree's suspension only prohibited him from towing on behalf of the City and he was not restricted from private tows. Thus, no property interest taking existed. Rountree has failed to show an inconsistent application of the Equal Protection Clause among the circuits and his Petition for Writ should be denied.

D. The Fifth Circuit did not fail to follow longstanding Supreme Court precedent on wrongful arrest.

Rountree first cites *Siegert v. Gilley*, 500 U.S. 226, 231, 11 S.Ct. 1789, 114 L.Ed.2d 277 (1991), generally stating that to overcome qualified immunity, a plaintiff must allege the violation of a clearly established right. However, this statement oversimplifies the qualified immunity analysis.

While a plaintiff must indeed allege a violation of a clearly established right, he must do more to overcome qualified immunity. In that regard, a plaintiff must plead facts establishing a violation of "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73

L.Ed.2d 396 (1982). This includes an analysis of "not only the currently applicable law, but whether that law was clearly established at the time an action occurred" and whether the officer's actions were "objective[ly] reasonable[] … as measured by reference to clearly established law." *Harlow*, 457 U.S. at 818-19; *Siegert*, 500 U.S. at 231-33.

Next, Rountree cites *Gerstein v. Pugh*, 420 U.S. 103, 11-12, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) and *Michigan v. DeFillippo*, 443 U.S. 31, 37, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979), and asserts the general proposition that officers are precluded from arresting a subject without probable cause, and then identifies the general definition of probable cause. While this is perhaps helpful with respect to one prong of the qualified immunity analysis (i.e., what the general current law is with respect to arrests), it effectively ignores the other qualified immunity prong (the objective reasonableness of the officer's actions based upon then existing clearly established law). Rountree appears to recognize this as he follows with two Fifth Circuit cases – *Gibson v. Rich*, 44 F.3d 274, 277 (5th Cir. 1995) and *Babb v. Dorman*, 33 F.3d 472, 477 (5th Cir. 1994) – generally setting out the reasonableness analysis based upon clearly established law.

Although Rountree next claims misapplication of Supreme Court qualified immunity precedent by the Fifth Circuit, Rountree fails to cite, or discuss, any Supreme Court case law addressing the objective legal reasonableness prong of the qualified immunity analysis. This prong of the qualified immunity analysis has been the focus of numerous Supreme

Court decisions and, as set forth below, several of the concepts important to same.

First, the Supreme Court has stated even law enforcement officials who "reasonably, but mistakenly, conclude that probable cause is present" are entitled to qualified immunity and "should not be held personally liable." *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Stated another way, the qualified immunity defense "'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryant*, 502 U.S. 224, 229 112 S.Ct. 534, 116 L.Ed.2d 589 (1991)(quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271, (1986)); *see also Kisela v. Hughes*, ___ U.S. ___, 138 S.Ct. 1148, 1152, 200 L.Ed.2d 449 (2018).

Second, regarding the "'clearly established' law analysis, [plaintiff must] identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment." *White v. Pauly*, 580 U.S. at __, 137 S.Ct. 548, 552, 196 L.Ed.2d 463 (2017). "Because the focus is on whether the officer had fair notice that [his] conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct." *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004)(per curiam). While the Supreme "Court's case law does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question *beyond debate*." *White*, 137 S.Ct. at 551(internal quotations marks omitted and emphasis added). Although "'general statements of the law are not inherently

incapable of giving fair and clear warning' to officers, … [] 'in the light of pre-existing law the unlawfulness must be apparent.'" *White*, 137 S.Ct. at 552 (quoted citations omitted). With this in mind, the Supreme Court has instructed courts "'not to define clearly established law at a high level of generality.'" *Kisela*, 138 S.Ct. 1152 (quoted citations omitted).

Third, "'specificity is especially important in the Fourth Amendment context where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here [alleged wrongful arrest], will apply to the factual situation the officer confronts.'" *Kisela*, 138 S.Ct. at 1152 (quoting *Mullenix v. Luna*, 577 U.S. __, 136 S.Ct. 305, 308, 193 L.Ed.2d 255 (2015)(per curiam)). Like Fourth Amendment excessive force, Fourth Amendment arrests are "an area of the law 'in which the result depends very much on the facts of each case,' and thus police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." *Kisela*, 138 S.Ct. at 1153 (quoting *Mullenix*, 136 S.Ct. at 309)(internal quotation marks omitted and emphasis deleted)). "An officer 'cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.'" *Kisela*, 138 S.Ct. at 1153 (quoting *Plumhoff v. Rickard*, 572 U.S. __ at __, 134 S.Ct. 2012, 188 L.Ed.2d 1056 (2014)). Thus, if officers of reasonable competence could disagree on whether or not there was probable cause to arrest a defendant, immunity should be recognized. *Babb*, 33 F.3d at 477.

Finally, because the qualified immunity defense involves an objective analysis, "probable cause may be for any crime and is not limited to the crime that the officers subjectively considered at the time they perform an arrest." *Davidson v. City of Stafford*, 848 F.3d 384, 392 (5th Cir. 2017)(citing *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 204 (5th Cir. 2009)(citing *Davenpeck v. Alford*, 543 U.S. 146, 153-54, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004)("… [the officer's] subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause")).

Rountree, although focusing upon and quoting the City Ordinance he was arrested under (Section 6.08.002), completely fails to address, in any way, the City Ordinance (Section 6.08.006(a)(1)) upon which the Fifth Circuit's probable cause/qualified immunity analysis and decision was based. Rountree also fails to identify any factually specific similar case that would have put Sergeant Dyson on notice that he was violating the Fourth Amendment. Again, as stated above, the qualified immunity analysis can be applied to any City Ordinance violation, not just the one charged, and the Fifth Circuit found Rountree failed to make any argument that Dyson's actions would have been objectively unreasonable in believing his order to be lawful in light of City Ordinance Section 6.08.006(a)(1). The Fifth Circuit also held Rountree's pled acts demonstrated that Dyson was not objectively unreasonable in believing he had probable cause to arrest Rountree.

The applicable City Ordinance relating to the probable cause/qualified immunity analysis by the

Fifth Circuit (City Ordinance Section 6.08.006(a)(1)) is posted on the City of Beaumont, Texas' website and is as follows:

> "(a) Tow truck operator. ***All tow truck operators shall***:
>
> (1) ***Obey all lawful orders given by any police officer and not in any manner interfere*** with any police officer in the performance of his/her duty." (emphasis added).

Considering the City Ordinance above, Rountree admitted in his complaint that Dyson ordered him "to move his tow truck and leave the scene," but Rountree "declined to follow the sergeant's direction to leave the scene." As can be seen, under City Ordinance 6.08.006(a)(1), Sergeant Dyson had probable cause to, and it would have been objectively reasonable for Sergeant Dyson to, arrest Rountree for his failure to obey Dyson's apparently lawful order.

Accordingly, as a matter of law, the Fifth Circuit has not misapplied any probable cause or qualified immunity Supreme Court precedent, nor the relevant ordinance at issue. In fact, it appears Rountree, in his Petition for Writ here and at the Fifth Circuit level, failed to analyze, for purposes of probable cause and/or qualified immunity, the facts pled with respect to all potential City Ordinance violations asserted by Sergeant Dyson, including the one analyzed by the Fifth Circuit (Section 6.08.006(a)(1)). In the end, there is no indication the pleadings reflected Sergeant Dyson was plainly incompetent, or knowingly violated the

law. Accordingly, Rountree's Petition for Writ should be denied.

CONCLUSION

For the above and foregoing reasons, Rountree's Petition for a Writ of Certiorari should be denied.

Respectfully submitted this 15th day of October, 2018.

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