No. _____

In The

Supreme Court of the United States

MALLORY JONES and TROY A. MOSES,

Petitioners,

vs.

RAMONE LAMKIN, individually and in his official capacity as Marshal of the Civil and Magistrate Court of Richmond County, Georgia and AUGUSTA, GEORGIA,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In determining whether or not the exception to First Amendment protections for public employees as set forth by this Court in *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980) applies, should the lower courts make their determination based upon the actual work performed by the employee; or should the lower courts make the determination as to whether or not the employee was a policymaker or confidential employee by looking at the written job descriptions set forth in statutes or policies (i.e., the "categorical approach" or "alter ego" theory)?

PARTIES TO THE PROCEEDINGS

Petitioners are Mallory Jones and Troy A. Moses. Respondents are Ramone Lamkin, in his individual and official capacity as Marshal of the Civil Court of Richmond County, Georgia, and Augusta, Georgia.

RELATED CASES

Jones v. Lamkin, CV 117-003, United States District Court for the Southern District of Georgia, 2018 Westlaw 9538939 (S.D. Ga. 2018).

Jones v. Lamkin, 2019 Westlaw 3183635 (11th Cir. 2019).

McCaffrey v. Chapman, 2019 WL 1523044 (4th Cir. 2019) (cert. denied).

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OPINIONS BELOW

The Eleventh Circuit decision is printed at 2019 WL 3183635 and is reprinted in Appendix Pet. 1. The District Court opinion granting summary judgment to Lamkin and Augusta is at 2018 WL 9538939 and reprinted at Appendix Pet. 15.

JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction to review the decision of the Eleventh Circuit Court of Appeals by virtue of 28 U.S.C. § 1254(1). On July 16, 2019, the Eleventh Circuit Court of Appeals affirmed the grant of summary judgment to Respondents. On September 5, 2019, the Eleventh Circuit Court of Appeals denied the petition for rehearing filed by Petitioners. Pursuant to Rule 13.1 of the Rules of this Court, this petition is being filed within ninety (90) days of September 5, 2019.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the

people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

42 U.S.C. § 1983:

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

STATEMENT OF THE CASE

The office of Marshal of the Civil and Magistrate Court of Richmond County was created by Special Act of the Georgia General Assembly. The Civil and Magistrate Court assumed the duties of the justices of the peace and constables. *See* 1974 Ga. Laws § 2410, *et seq.* Originally, Chief Marshal (then called the Sheriff of the Civil Court) was appointed by the Chief Judge of the Civil Court. The Chief Marshal and his deputies served at the pleasure of the Chief Judge of the Civil Court. In 1999, the position of Marshal became an elected position. 1999 Ga. Laws § 3508. The Marshal's Office enforces ordinances, handles dispossessory cases, and serves papers in small claims cases. In Georgia, deputy marshals are certified law enforcement officers and have arrest powers. Petitioners Jones and Moses worked under their elected Marshal (then Marshal Smith). Petitioners' salaries were paid by Respondent Augusta, Georgia.

The Marshal's position is governed by General Law relating to the Magistrate Court, O.C.G.A. § 15-10-100, *et seq.*, as well as the Special Act creating the Magistrate Court. The position of Marshal is therefore akin to a constable of the previous Justice of the Peace courts. Currently, there are more than one hundred (100) deputy marshals who work in the Richmond County Marshal's Office and whose employment is affected by the lower courts' decisions.

Petitioners Jones and Moses were deputy marshals serving under the then-Marshal Steve Smith. In

2016, Smith ran for re-election as Marshal. Lamkin ran as Smith's opponent. Both Jones and Moses openly supported Smith in his bid for re-election. On his own time, Moses supported Smith to the fullest, wore Smith campaign shirts, posted photographs on social media with Smith, and the like. Jones, also on his own time, made social media postings describing things that Smith had done for Jones over the years. Throughout the election campaign, neither Moses nor Jones in any way made derogatory comments or "bashed" Lamkin. Lamkin was elected on May 24, 2016 but did not take office until January 1, 2017. Respondent Augusta, Georgia has a written policy that allows its employees, with the exception of its administrator, to participate in partisan politics on their own time. (Appendix Pet. 51). Despite that policy, the court ruled that Petitioners Jones and Moses could still be terminated for exercising First Amendment rights based on the fact that under the 1974 Special Act they were the alter egos of the Marshal.

In the Summer of 2016, prior to taking office, Lamkin spoke with one of the City of Augusta attorneys about the legality of terminating Jones and Moses. In late October or early November of 2016, Lamkin then had a conversation with his then-supervisor, the Sheriff of Richmond County. Lamkin told the Sheriff that upon assuming the position of Marshal Lamkin could not keep Jones and Moses, because he could not trust them as a result of their loyalty to and support of Smith. The Sheriff, who is both a constitutional officer under the Georgia Constitution and the chief law enforcement officer in Augusta, Richmond County, told

Lamkin that Lamkin could not terminate Jones and Moses because of their political participation. Despite receiving that advice from the Sheriff, on December 6, 2016 Lamkin informed Jones and Moses by letter that they would be terminated effective January 1, 2017. The District Court found that there was no genuine dispute of material fact as to the reason for Lamkin's terminating Jones and Moses finding that Lamkin terminated Jones and Moses because of their support of Smith. *Jones v. Lamkin*, 2018 Westlaw 9538939 (S.D. Ga. 2018).

Respondents Lamkin and Augusta both moved for summary judgment contending that, because the Special Act creating the Office of Marshal made deputy marshals the alter egos of the Marshal, Jones and Moses were not entitled to First Amendment protection. Former Marshal Smith opined that neither Jones nor Moses held any policymaking position. (R67). The District Court held that in the Eleventh Circuit no factual inquiry was required where the subordinate under the law creating the office of Marshal has the same duties and is the alter ego of Lamkin. The District Court concluded that Lamkin did not violate their First Amendment rights when terminating Jones and Moses and granted summary judgment to Lamkin and Augusta.

The District Court and the Eleventh Circuit Court of Appeals have applied what is termed the "categorical" or "alter ego" approach in deciding political patronage dismissal cases where the court decides, as a matter of law, the question of whether or not the dismissed employee was a "policymaker" or was a "confidential

employee." In those cases, these courts look to the statutory or written duties of the dismissed employee, as opposed to the actual duties and position held by the dismissed employee. Using the categorical approach, the District Court granted summary judgment to Respondents. *Jones v. Lamkin*, 2018 Westlaw 9538939 (S.D. Ga. 2018).

The Eleventh Circuit Court of Appeals, in affirming the grant of summary judgment to Respondents, reiterated the fact that in the Eleventh Circuit the "categorical" approach was to be used. *Jones v. Lamkin*, 2019 Westlaw 3183635 (11th Cir. 2019). That methodology of deciding political patronage cases under the *Elrod-Branti* exception to the First Amendment is the methodology generally utilized throughout the Eleventh Circuit, even though there is nothing in this Court's opinion in *Elrod v. Burns*, 427 U.S. 347 (1976) or *Branti v. Finkel*, 445 U.S. 507 (1980) where this Court has held that methodology should be used to decide these types of cases.

REASONS TO GRANT THIS PETITION

Under Rule 10 of the Rules of this Court, the United States Court of Appeals for the Eleventh Circuit has entered a decision which is in conflict with decisions of various other United States Courts of Appeals on this same issue. There is no question but that there is a division in the circuits as to how the lower courts are to handle partisan employee dismissal. This division among the circuits has led to employees' First

Amendment protections being based upon in which part of the country that government employee is employed.

This Court recently had before it a Petition for a Writ of Certiorari in the case of *McCaffrey v. Chapman*, Case No. 19-342. In that case, the Fourth Circuit Court of Appeals applied the alter ego theory and short circuited any *Elrod-Branti* factual analysis required by this Court. *McCaffrey* involved a dispute between a sheriff and a deputy under Virginia law. The facts and law in the case at hand are substantially different. The adoption of the alter ego methodology or the categorical approach, i.e., looking only at the duties of the employee imposed by law or written policy, as opposed to the actual duties performed by that employee to determine whether or not the exceptions to the First Amendment protections created by this Court in *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980), has been criticized by a number of the judges in the Fourth Circuit in *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997) and *McCaffrey v. Chapman*, 921 F.3d 159 (4th Cir. 2019). In the Eleventh Circuit, this approach was criticized in the dissent *Underwood v. Harkins*, 698 F.3d 1335 (11th Cir. 2012) and in a note in the Harvard Law Review at 126 Harvard Law Review 2131 where the author concluded:

> "Courts in the political candidacy context whether under *Elrod-Branti* or *Pickering*, should evaluate critically the government's loyalty interests based on the employee's *actual job* requirement when balancing them

> against the steep costs to the employee and the public's First Amendment interests."

Despite that criticism, the alter ego or categorical approach is being used in a number of circuits, whereas a number of other circuits look at the actual duties being performed by the employee in order to determine if that employee is or is not entitled to First Amendment protection.

In contrast to the Eleventh and Fourth Circuits, the Ninth Circuit, in a case involving a newly elected sheriff who fired a deputy who had supported the losing candidate, held that in order to determine whether or not the exception to First Amendment protections created by the *Elrod-Branti* analysis are applicable, one must look at the duties that the employee actually performs on a day-to-day basis. In that case, California law, just like Georgia law, gives deputy sheriffs the same statutory authority as the Sheriff. In *DiRuzza v. County of Tehama*, 206 F.3d 1304 (9th Cir. 2000), the District Court, relying upon the California statutes, held that a deputy sheriff could be fired without violating his First Amendment rights under the *Elrod-Branti* analysis. However, the Ninth Circuit reversed. In that case, the Court focused on the *actual*, not the *possible* duties of the individual employee to determine whether political loyalty was appropriate for the effective performance of her job. The Ninth Circuit has consistently applied *DiRuzza* subsequent to that date. *See Hunt v. County of Orange*, 672 F.3d 606, 613 (9th Cir. 2012); *Hobler v. Brueher*, 325 F.3d 1145, 1151 (9th Cir. 2003).

In the Tenth Circuit, the courts looked at both the inherent powers of the position and the actual duties performed. *Jantzen v. Hawkins*, 188 F.3d 1247, 1253 (10th Cir. 1999). In that case, deputy sheriffs and other employees claimed a violation of their First Amendment rights after they were fired for supporting a losing candidate. The Tenth Circuit considered the job that the plaintiffs actually performed as evidenced by the record. There, the plaintiffs' duties involved routine police work. The court concluded that there was no compelling political loyalty to arrest a thief, no partisan way to serve a summons, or to stop a speeding motorist. The Tenth Circuit therefore reversed the District Court's grant of summary judgment for the defendants and remanded the case for trial.

In the Eighth Circuit, the courts have likewise focused on the actual duties performed and have rejected the alter ego test. In *Horton v. Taylor*, 767 F.2d 471, 475 (8th Cir. 1985), the District Court upheld the patronage dismissal of five (5) road grade operators by the newly elected county judge. The District Court relied heavily on the perception of political realities of small rural Arkansas counties and on the so-called "alter ego theory" that both the Fourth Circuit and the Eleventh Circuit have adopted. On appeal, the Eighth Circuit reversed and explained that the *Branti* test is a functional test focusing on the actual duties performed by employees. The Eighth Circuit Court of Appeals therefore focused its analysis on the plaintiffs' actual responsibilities which involved the manipulation of

heavy machinery over unpaved rural roads, not a written job description.

The Third Circuit has likewise focused on the actual duties of the employee. In *Assaf v. Fields*, 178 F.3d 170 (3d Cir. 1999), the Third Circuit considered the actual duties which the employee performed, not the written job description. In that case, the Director of the Bureau of Vehicle Management claimed that he was dismissed for political reasons. The court explained that the inquiry into the employee's duties is a "fact specific one" looking at what the employee's job actually entails.

Some Fifth Circuit cases look to the factual issues and do not decide these type cases based upon the alter ego theory. *Assaf v. Fields*, 178 F.3d 170 (3d Cir. 1999). In *Jordan v. Ector County*, 516 F.3d 290 (5th Cir. 2008), the Fifth Circuit pointed out that deputy clerks have the power as clerks, but held that it was a factual issue as to whether or not the *Elrod-Branti* exception was applicable. *See also*, *Vojvodich v. Lopez*, 48 F.3d 879 (5th Cir. 1995).

Even in the Eleventh Circuit, there has been a case in which deputy sheriffs who were fired because of the political support were allowed to recover because they were improperly terminated. *Brett v. Jefferson County, Ga.*, 123 F.3d 1429 (11th Cir. 1997) ultimately resulted in a jury verdict in favor of the dismissed deputies. There are also cases where summary judgment has granted the dismissal of First Amendment claims.

Ezell v. Wynn, 802 F.3d 1217 (11th Cir. 2015); *Stough v. Gallagher*, 967 F.2d 1523 (11th Cir. 1992).

In contrast, the Third, Fifth, Eighth, Ninth and Tenth Circuits looked at the powers of a given office as opposed to the function performed by a particular employee in *Valdizan v. Rivera-Hernandez*, 445 F.3d 63 (1st Cir. 2001). The Second Circuit in *Regan v. Boogertman*, 984 F.2d 577 (2d Cir. 1993) looked at not what the employee actually did, but what the law gave her authority to do to determine if First Amendment protections applied. The Sixth Circuit applied this same test in *Monks v. Marlinga*, 923 F.2d 423 (6th Cir. 1991). The Seventh Circuit also considered the formal job description, not the actual duties in denying First Amendment protections. *Tomczak v. City of Chicago*, 765 F.2d 633 (7th Cir. 1985).

As a result of this divergence in the circuits, Justice Scalia in dissenting in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990) at 111-112 cited cases in his notes which involved similar, if not almost identical factual situations in which cases were decided differently. The dismissal of employees for exercising First Amendment rights should be the exception, not the rule. **The spoils system** has changed from 1828 and the construction of the *Elrod-Branti* exception has made it so that the exception now overrides First Amendment protections in some circuits, but not in others, so that all classifications of employees can be fired for exercising their First Amendment rights and denied relief.

This Court, in its decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), cast doubt on the approach taken by both the Eleventh Circuit and the Fourth Circuit. In *Garcetti*, this Court rejected the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions. Therefore, this Court established that the proper inquiry is a practical one. The reason for that decision is quite obvious in that formal descriptions bear little resemblance to the actual duties an employee can be expected to perform.

In *Pickering v. Bd. of Ed. of Twp. High School Dist. 205, Will County, Illinois*, 391 U.S. 563 (1968), this Court held that public employees may not constitutionally be compelled to relinquish the First Amendment rights that they would otherwise enjoy as citizens. However, in some circuits that rule is not in practice being followed. Under *Pickering* and its prodigy, this Court applied a balancing test to determine whether the First Amendment required a government employer to tolerate actions which he reasonably believes would disrupt the office, undermine his authority or destroy close working relationships. *See Connick v. Myers*, 461 U.S. 138, 154 (1983).

In *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996), this Court recognized the inappropriateness of relying on legislative labels when extending *Elrod-Branti*'s prohibition against politically motivated dismissals of employees to cover independent contractors hired by the government. This Court reasoned that drawing a distinction between employees and independent contractors would invite manipulation by

governments which could avoid constitutional liabilities simply by attaching different labels to particular jobs. In none of the cases decided by this Court has this Court ever approved of an alter ego methodology or categorical approach to support or approve the termination of a government employee because of the exercise of his or her First Amendment rights. This Court should grant this Petition for Certiorari, reject the alter ego or categorical approach adopted by certain circuits, and require that throughout the country an employee's right to exercise his First Amendment rights in a political context is the same, that is, the limitation as to a true "policymaker," such as those who are second or third in the chain of command, not as to all deputy marshals as the Eleventh Circuit has in essence held.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Writ of Certiorari and hold that the limited exception to First Amendment protections is truly limited.

This 4th day of December, 2019.

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