No. 19-726

IN THE

Supreme Court of the United States

MALLORY JONES, *et al.*,

Petitioners,

v.

RAMONE LAMKIN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS MARSHAL OF THE CIVIL AND MAGISTRATE COURT OF RICHMOND COUNTY, GEORGIA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

JODY MAE SMITHERMAN
AUGUSTA LAW DEPARTMENT
535 Telfair Street
Building 3000
Augusta, GA 30901
(706) 842-5550
jsmitherman@augustaga.gov

Counsel of Record for Respondent Augusta, Georgia

EDWARD J. TARVER
Counsel of Record
ENOCH TARVER, P.C.
3540 Wheeler Road, Suite 312
Augusta, GA 30909
(706) 738-4141
etarver@enochtarver.com

Counsel of Record for Respondent Ramone Lamkin

294851

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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, can the lower courts rely on enabling legislation for the positions in question to establish that party affiliation is an appropriate requirement for the effective performance of the position or must the lower courts rely solely on the actual duties performed by the individual in the position to make such a determination?

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

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

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The Eleventh Circuit decision is printed at 2019 WL 3183635 and is reprinted in Appendix 1 to the Petition for a Writ of Certiorari. The District Court opinion granting summary judgment to Lamkin and Augusta is printed at 2018 WL 9538939 and reprinted in Appendix 15 to the Petition for a Writ of Certiorari.

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 Jones and Moses. Pursuant to Rule 13.1 of the Rules of this Court, the Petition for a Writ of Certiorari was filed within ninety (90) day of September 5, 2019.

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I:

Congress shall make no law respecting as 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.

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 Unities States or other personal 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 all, suit in equity, or other proper proceeding for redress, except in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

1974 Ga. Laws 2410, §§ 10-12:

Section 10. The sheriff and the clerk of the Civil Court of Richmond County, Georgia, shall be appointed by the chief judge of said court for a term of office to run concurrently with his own. The sheriff and the clerk of said court shall have authority, with the approval of the chief judge of said court, to name their deputies who shall hold said office at the pleasure of the said sheriff or clerk as the case may be, subject to approval of the chief judge of said court. It is hereby further provided that the chief judge, and associate judge and all of the other officers of the Civil Court of Richmond County, Georgia, now serving their present term of office are hereby confirmed as the

chief judge, and associate judge and other officers of said court, to name their deputies who shall hold said office at the pleasure of said sheriff or clerk as the case may be subject to approval of the chief judge of said court. It is hereby further provided that the judge and all of the other officers of the Civil Court of Richmond County, Georgia, now serving their present term of office are hereby confirmed as the judge and other officers of said court.

Section 11. Be it further enacted by the authority aforesaid, that all of the requirements and duties, powers and authority imposed by law upon and conferred upon the clerk of Richmond County Superior Court and the sheriff of Richmond County shall be obligatory upon and shall be vested in the clerk and sheriff of said Civil Court, and the several deputies, respectively and shall be concurrent and coexistent with said clerk of Superior Court and sheriff of Richmond County. Provided, however, that the amount of the bond of the clerk of said Civil Court shall be ten thousand ($10,000.00) dollars, and the amount of the bond of the sheriff of said Civil Court shall be ten thousand ($10,000.00) dollars, and the amount of the bond of deputy clerks of said Civil Court shall be one thousand ($1,000.00) dollars, and the amount of the bond of deputy sheriffs of said Civil Court shall be one thousand ($1,000.00) dollars; and all such bonds have as surety thereon a surety company doing business in this State and having an office and authorized to do business in Georgia, and premium of such bonds to be paid out of the county treasury of Richmond County, Georgia.

Section 12. The clerk and deputy clerks of said Civil Court shall have complete power and authority, co-existent and coordinate with the power of the judges of said court,

under the provisions of this Act, to issue any and all warrants, civil and criminal, suits, and garnishments, writs of attachment, distress warrants, dispossessory warrants, warrants against intruders, warrants against tenant holding over, possessory warrants, bail trover, and summary processes and writs which are issuable as a matter of right, to accept and approve bonds and to discharge any and all other functions, which under the laws of this State are performable by a justice of the peace. And all deputy clerks, and deputy sheriffs, if and when appointed under the terms of this Act, shall exercise all the functions and be subject to all the responsibilities and requirements of the clerk and sheriff of said court.

1978 Ga. Laws 3341, § 1:

An Act creating the Civil Court of Richmond County, Georgia, approved August 28, 1931 (Ga. Laws 1931, p. 270), as amended, particularly by an Act approved March 31, 1971 (Ga. Laws 1971, p. 2745), is hereby amended by striking, wherever the same shall appear, the word "Sheriff" as it pertains to the Sheriff of the Civil Court of Richmond County, Georgia, and inserting in lieu thereof the word "Marshal", so that after the effective date of this Section the hereinbefore sheriff of said court shall be known as and referred to as the "Marshal of the Civil Court of Richmond County, Georgia.

1999 Ga. Laws 3508, § 10A:

The provisions of Section 10 of this Act or any other provision of law notwithstanding, the person serving as marshal of the Civil Court of Richmond County on January 1, 1999, shall continue to serve as such for the

remainder of a term expiring January 1, 2002; except in case of vacancy created by death, resignation, or disqualification, in which event a special election to fill such vacancy for the remainder of such term may be called and held as provided by general law. The marshal of the Civil Court of Richmond County shall be elected at the general municipal election held in November, 2001, and quadrennially thereafter by the qualified voters of Richmond County for a term of office of four years beginning January 1 following such election and until the election and qualification of a successor. All elections under this section shall be conducted on a nonpartisan basis, without a primary, and as provided by Chapter 2 of Title 21 of the O.C.G.A. All persons elected to the office of marshal of the Civil Court of Richmond County under the provisions of this section shall be elected by plurality vote as defined by Code Section 21-2-2 of the O.C.G.A. Any other provision of law notwithstanding, all persons serving as marshal of said court under the provisions of this section shall have the authority to manage the affairs of said office and to name their deputies who shall hold said office at the pleasure of the marshal.

STATEMENT OF THE CASE

Augusta, Georgia is a political subdivision of the State of Georgia. The governing authority of Augusta, Georgia is the Commission consisting of ten (10) Commissioners and the Mayor (the "Commission"). 1995 Ga. Laws p. 3648, 3650. Under the authority and control of the Commission is the Administrator, the General Counsel, the Clerk of Commission, and the Director of Compliance. There are no elected officials under the authority and control of the Augusta, Georgia Commission.

Each of the various elected officials have budgets that are part of the Augusta, Georgia budget because Augusta, Georgia is legally required to provide them with sufficient funds to effectively operate their offices. Augusta, Georgia's control over elected officials' budgets, including the Sheriff and the Marshal, is only to set the annual dollar amount for their budget. Once an elected official's budget is approved by Commission, the elected official has the right to spend the money as he or she deems appropriate except that they cannot make changes to salary and wage accounts (i.e. increase their overall spending on wages and benefits) without Commission approval. (Id., ¶ 10).

The position of Marshal of Civil Court of Richmond County was created by the Georgia Legislature through local law in 1974.[1] Ga. Laws 1974, p. 2410. Even in its inception, the position of Marshal was part of the Civil Court system appointed by and reporting to the elected position of Chief Judge, not the County government. Id. In providing the Marshal with jurisdiction, the law states "that all of the requirements and duties, powers and authority imposed by law upon and conferred upon … the sheriff of Richmond County shall be obligatory upon and shall be vested in the … [Marshal], and the several deputies, respectively and shall be concurrent and coexisting with said … Sheriff of Richmond County." Id. Importantly, the Legislature stated that deputy marshals "shall exercise all the functions and be subject to all the

1. In 1974, the original position was named the "Sheriff of the Civil Court of Richmond County," but was later amended, in 1978, to the "Marshal of the Civil Court of Richmond County." Ga. Laws 1978, p. 3341.

responsibilities and requirements of the … [marshal]…" Ga. Laws 1974, p. 2417.

Effective the election of 2001, the Office of the Marshal became an elected office voted in by the residents of Richmond County. Ga. Laws 1999, p. 3508. The law making the Office of the Marshal an elected office specifically states "[a]ny other provision of law notwithstanding, all persons serving as marshal of said court under the provisions of this section shall have the authority to manage the affairs of said office and to name their deputies who shall hold said office at the pleasure of the marshal." Id. The deputies of the Marshal's Office work at the direction and the pleasure of the duly-elected Marshal.

The Marshal's Office is a law enforcement organization and the Marshal performs the powers and duties vested in him through deputies. Marshal's deputies play a special role in implementing the Marshal's policies and goals. Marshal's deputies on patrol exercise significant discretion and make decisions that create policy. The Marshal relies on his deputies to foster public confidence in law enforcement and to provide the Marshal with truthful and accurate information to perform his elected position.

Petitioner Jones was initially employed with the Richmond County Marshal's Office from 1993 to 1996, returned to the Marshal's Office in 2001 before resigning again and returning in 2003 where Jones stayed until December 31, 2016 at which time Jones was one of only two employees holding the position of Captain in the Marshall's Office. Steve Smith was the Marshal throughout Jones' employment with the Richmond County Marshal's Office. Petitioner Jones publicly supported Steve Smith in the

election and made a Facebook post describing the "things that Steve Smith had done for [him] over the years," but without "bashing" Lamkin.

Petitioner Moses was initially hired into the Marshal's Office in 2009 under Steve Smith and represented the Marshall's Department as its Community Relations Sergeant as of December 31, 2016. Petitioner Moses also publicly supported Steve Smith in the election "to the fullest." Petitioner Moses wore campaign shirts, posted pictures on Facebook with Steve Smith, and "asked family and friends to support him." Additionally, Moses also informed Lamkin of his intention to run to become Marshall in the next election. By letters dated December 6, 2016, Appellee Lamkin informed Petitioners that "[d]ue to the change in administration and leadership," both would be terminated effective January 1, 2017.

The District Court granted Augusta's and Lamkin's motions for summary judgment on September 24, 2018. The District Court found that because the Georgia Legislature expressly gave deputy marshals' duties "which are identical to" those of the Marshal by granting deputy marshal the authority to "exercise all the functions" of the Marshal the deputy marshals are alter egos of the Marshal and that party affiliation is an appropriate requirement for the effective performance of the position. The Eleventh Circuit Court of Appeal affirmed this decision on July 16, 2019.

ARGUMENT

This Court has created two frameworks for analyzing political expression employment cases depending on

whether the case involves political patronage or employee expression. Terry v. Cook, 866 F.2d 373, 375 (11th Cir. 1989). Political patronage is involved when the employees' public employment "was absolutely conditioned upon political allegiance and not upon the content of expressions of political beliefs." Id. at 277. Employee expression is involved when the employees' public employment is terminated for the substance of the political speech and campaigning activities. Stough v. Gallagher, 967 F.2d 1523, 1527-28 (11th Cir. 1992).

In this matter, the District Court properly found that this matter involves political patronage and not employee expression. This finding was not challenged by Petitioners at the Appellate Court and they do not appear to be attempting to challenge that here. Rather, Petitioners' focus is on the District and Appellate Courts' finding that Petitioners were the alter ego of Respondent Lamkin and the use of the categorical approach based on that finding.

Political patronage cases are analyzed under the *Elrod-Branti* standard. Under this standard, the general rule is that political patronage dismissals infringe upon First Amendment principles. Elrod v. Burns, 427 U.S. 347, 360 (1976). However, as with any general rule, there are exceptions to this protection. Id. Specifically, if it can be demonstrated that political affiliation is an appropriate requirement for the effective performance for the position involved, then First Amendment protection is not appropriate. Branti v. Finkel, 44 U.S. 507, 519 (1980). This analysis is generally a fact-intensive inquiry, except when the subordinate has the authority to act as the "alter-ego" of the elected official. Cutcliffe v. Cochran, 117 F.3d 1353, 1555 (11th Cir. 1997); Underwood v. Harkins,

698 F.3d 1335, 1344 (11th Cir. 2012); Ezell v. Wynn, 802 F.3d 1217, 1225 (11th Cir. 2015). The Eleventh Circuit has specifically held that "[a]n elected official may dismiss an immediate subordinate for opposing her in an election without violating the First Amendment if the subordinate, under state or local law, has the same duties and powers as the elected official." Underwood, 698 F.3d at 1343.

Petitioners urge this Court to find that the *Elrod-Branti* standard be limited "to a true 'policymaker,' such as those who are second or third in the chain of command …". Pet. For Cert., p. 13. However, this Court has already specifically held that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public officer involved." Branti, 445 U.S. at 518. Thus, the true question is whether the statutory framework that creates the position, if applicable, can be relied upon by the lower courts in determining whether party affiliation is an appropriate requirement for the effective performance of the public officer involved and the undisputed answer is 'yes.'

Contrary to Petitioners' assertion, the Eleventh Circuit has not entered a decision which is in conflict with decisions of various other United States Courts of Appeal on this same issue and, thus, there is not a division in the circuits as to how the lower courts are to handle partisan employee dismissals. There is not a single case cited by Petitioners that stands for the proposition that a public officer that has duties and functions identical to that of the elected official is not a position that appropriately requires party affiliation.

In Diruzza v. County of Tehama, et al, 206 F.3d 1304 (9th Cir. 1304), the court assumed arguendo that the holdings in the Fourth, Seventh, and Eleventh Circuit were correct on this issue, but found that they were inapplicable to the case before it due to interpretation and application of California Law regarding the responsibilities and duties of a sheriff's deputy. Id. at 1309. Therefore, this case is not in conflict with the Eleventh Circuit Court of Appeals cases, but rather completely in line with them, because it appropriately looked to the applicable state statutory framework that created the position and established it was not sufficient to determine whether party affiliation is an appropriate requirement for the effective performance of the public officer involved and only then called to look at the actual duties of the position involved. Id. In that case, the only alleged policymaking authority the plaintiff had was that "she gave open political support to the incumbent sheriff," which the court accurately determined was insufficient and is not even remotely applicable to the case before this Court. Id. at 1310.

The Tenth Circuit in Jantzen v. Hawkins stated that it "must focus on the inherent powers of the position and the actual duties performed" in order to determine whether party affiliation is an appropriate requirement for the effective performance of the public officer involved. Jantzen, et al v. Hawkins, et al, 188 F.3d 1247, 1253 (10th Cir. 1999). The court did not discuss where these inherent powers of the position came from but it would make sense that, at a minimum, these inherent powers came from any applicable state statutory framework that created the position. Just like the Tenth Circuit did in Jantzen, the Eleventh Circuit has also held, using the exact same framework applied in the case before this Court, that political affiliation in the position of jailers was not "an

appropriate requirement for effective job performance." Terry, 866 F. 2d at 377-78. Therefore, there is not a conflict between the Eleventh Circuit and the Tenth Circuit.

Horton, et al v. Taylor, 767 F.2d 471 (6th Cir. 1985), is also unhelpful to Petitioners. In Horton, there is no allegation that a county road-grader operator had the same duties and powers as a county judge. Rather, in that case, the district court held that the county road-grader was the alter ego of the county judge because in small, rural county politics residents equate employees with their employers. Id. at 475. The Sixth Circuit appropriately found that "[t]he size of the office alone in this case cannot justify" applying the *Elrod-Branti* standard and overturned the district court. Id. at 476. This was not a rejection of the alter ego concept but rather the application of the alter ego concept based on office size alone. This is congruent with the findings of the Eleventh Circuit and does not create a conflict between the circuits.

Assaf v. Fields, 178 F.3d 170 (3rd Cir. 1999), is inapplicable to the case before this Court. The district court in Assaf found that the plaintiff was entitled to First Amendment protection from political discharge but granted summary judgment based on qualified immunity. The Third Circuit stated that "the only issue before us on appeal is the propriety of the [d]istrict [c]ourt's ruling that [defendants] were entitle to qualified immunity." Id. at 174. Therefore, there is nothing in this decision that is applicable to the case before this Court and which could be used to create a conflict between the circuits on the issue presently before the Court.

As shown above, Petitioners have failed to establish either that the Eleventh Circuit's decision in this case is contrary to any precedence of this Court or that it creates a division between the decisions of various other United States Courts of Appeal on this same issue.

CONCLUSION

For the foregoing reasons, this Court should deny Petitioners' Petition for Writ of Certiorari because the Eleventh Circuits decision is in accord with the *Elrod-Branti* standard.

This 2nd day of March, 2020.

JODY MAE SMITHERMAN
AUGUSTA LAW DEPARTMENT
535 Telfair Street
Building 3000
Augusta, GA 30901
(706) 842-5550
jsmitherman@augustaga.gov

Counsel of Record for Respondent Augusta, Georgia

EDWARD J. TARVER
Counsel of Record
ENOCH TARVER, P.C.
3540 Wheeler Road, Suite 312
Augusta, GA 30909
(706) 738-4141
etarver@enochtarver.com

Counsel of Record for Respondent Ramone Lamkin