In the Supreme Court of the United States

No. 21-7019

RUNNIE MYLES

Petitioners

-against-

JAY JACOBS individually and in his official capacity as Chairman of the Nassau County Democratic Committee, NASSAU COUNTY BOARD OF ELECTIONS, DAVE GUGERTY in his official capacity as Democratic Commissioner of the Nassau County Board of Elections, JOHN DOE AND JANE DOE #1-10 and THE COUNTY OF NASSAU,

Respondents.

PETITION FOR WRITE OF CERTIORARI

Runnie Myles
Pro Se Petitioner
C/O Clarke & Fellows, P.C.
136 Gazza Blvd.
Farmingdale, NY 11735

Question Presented

Whether the circuit court committed reversable error when it dismissed Petitioner's case on an issue of fact that was never noticed or briefed and that none of the parties raised at any point in the litigation.

Parties to the Proceeding

All names appear on the caption

Related Cases

Myles v. Jacobs et al
19-3373
2nd Circuit Court of Appeals
Judgment entered
October 25, 2021

Myles v. Jacobs et al
2:17-cv-06424
Judgment entered
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OPINIONS BELOW

The October 25, 2021 opinion of the court of appeals, which is not reported at No. 19-3373, 2021 WL 4944885 (2d Cir. Oct. 25, 2021) is reproduced in Appendix A. The September 17, 2019 order of the district court which is not reported at No. CV176424JMAARL, 2019 WL 4467743 (E.D.N.Y. Sept. 17, 2019).

JURISDICTION

The circuit court entered its order *sua sponte* dismissing this matter. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case raises at least three issues in which there are a circuit split or the Supreme Court has yet to definitively rule. First, the circuit court dismissed this matter without notice *sua sponte* on an issue that was unbriefed. There is currently a circuit split as to whether a *sua sponte* dismissal without notice is reversable error. This case is the perfect vehicle to resolve this split.[1] Second, it is unsettled law as to what elements must be shown when a plaintiff is the subject of a retaliatory civil lawsuit. Third, the Supreme Court has yet to clarify the person of "ordinary firmness" standard.

The primary reversable error the circuit court committed was *sua sponte* dismissal without notice, yet the circuit court also committed other reversable errors. Primarily, it applied the wrong standard of causation in its standing analysis.

Causation standards are different at different stages of litigation. In determining Standing at the outset, causation is a very lenient standard where there only needs to be a "causal nexus" between the alleged conduct and the injury. This is most evident in First Amendment cases where all courts have found a "causal nexus" to be a very low burden.

Proximate and "but for" cause are concepts in later stages of litigation in which the injury has to be foreseeable and to have occurred "but for' the alleged conduct. Proximate cause and "but for" cause are part of the "cause of action" itself. These causation issues usually are decided at summary judgment or trial and certainly not without notice and *sua sponte* at the appeals level.

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[1] Unfortunately, the United States Supreme Court has failed to resolve the question of whether it is reversible error for a court to fail to give a litigant notice and an opportunity to respond before it dismisses the case on grounds it has raised *sua sponte*.
Blake R. Hills, Sua Sponte Dismissals: Is Efficiency More Important Than Procedural Fairness?, 89 UMKC L. Rev. 243 (2020).

In other words, causation in standing is a threshold issue to get into the doors of court. The causation element in the actual cause of action determines whether you stay in court after getting beyond standing and is fact based.

The circuit court below has unprecedentedly reversed this burden. The circuit court essentially found Petitioner's injuries are self-inflicted in that he succumbed to immense state pressure to drop out of a political race. The circuit court made this decision *sua sponte* without the matter being briefed in the district court or the circuit court itself.[2]

Worse still, the circuit court did not realize the issues it was raising were issues that go to the elements of a cause of action and not standing. To further drive this point home, "ordinary firmness" is an element in a First Amendment retalion claim. Ordinary firmness is an issue of fact. Ordinary firmness cannot be decided *sua sponte* and certainly not in terms of standing.

The circuit court's theory of causation is especially difficult to surmount when it comes to First Amendment cases. Under this theory, at some point, almost everyone stops speaking or gives in to State pressure. Unmitigated resolve to fight on no matter how futile should not be the standard for getting in the court room door to have your First Amendment case heard.

This decision is especially dangerous in today's world. It will mean a peaceful protestor will have been considered to have forfeited their Free speech rights unless they fight every order of a police officer controlling a

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[2] "The Supreme Court has recognized that appellate courts have the power to raise issues not identified by the parties. However, saying that appellate courts have the discretion to *raise* issues *sua sponte* is a far cry from saying that appellate courts have the discretion to *decide* such issues without requesting briefs from the parties. Indeed, a close reading of the Supreme Court's opinion in *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc* .suggests that sua sponte decision making is an abuse of judicial discretion." Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts, 69 Tenn. L. Rev. 245, 287 (2002)

protest. The circuit court's decision will put the lives of protestors and police officers at risk.

Furthermore, it will force every government whistleblower to think twice because they are unwilling to suffer the most severe adverse employment actions. The circuit court's decision is illogical; it is unjust; it is unprecedented; and it is dangerous.

The court of appeals in a cursory decision held, "Although Myles alleges that Jacobs, through Gugerty, ordered the employees of the Nassau County Board of Elections to go to the homes of the signatories of Myles's petition to "harass[ ]" them and "attempt[ ] to coerce them into admitting that their signatures were forged," Compl., E.D.N.Y. Doc. No. 1, at ¶ 28, Myles does not allege these actions had *any effect* on him or his placement on the ballot. Rather, Myles alleges that the reason he withdrew his petition is because his attorney John Ciampoli – who is not a defendant – "convinc[ed] [Myles] that he would be indicted for fraud unless he withdrew his Designating Petition." *Id.* at ¶ 32. To the extent that Myles's candidacy was "suppress[ed]," *id.* at ¶ 33, that was due to the actions of his counsel, not any of the named defendants." *See* Appendix B.

The circuit court's decision fails to grasp that Petitioner Myles First Amendment rights were burdened the very moment that Respondent Jacobs coordinated with a government agency to file a lawsuit to remove him from the ballot. In this case, the burden on Petitioner's First Amendment rights is having to defend a lawsuit. For the purposes of Standing, Petitioners withdrawal from the race after the lawsuit was filed has absolutely no bearing on Standing.

At best, the fact that Petitioner withdrew from the race goes to proximate cause issues related to the elements of the actual cause of action which are not the same as causation in Standing which are decided under the "fairly traceable" standard and not proximate cause.

In other words, the proximate cause of Petitioners injury is an inquiry to be decided after discovery not *sua sponte* at the pleading stage.

This Court should take this matter because it is of the most urgent national importance because the circuit court has created an unprecedented burden on all First Amendment litigants. If the decision is left to stand, it will chill the speech of an untold amounts of citizens. Worse still the circuit court has come to this unjust decision *sua sponte* without giving Petitioner any chance to clarify the issue which is violative of his due process rights to have notice and opportunity to be heard.

REASON FOR GRANTING THE WRIT

I. A sua sponte dismissal based on an unbriefed issue concerning an element of the cause of action is *per se* reversable error

It must be noted at the outset that the circuit court raised the issue of causation *sua sponte*. This case had not moved beyond the pleading stage. There were absolutely no facts other than the pleadings upon which the circuit court *sue sponte* based its decision on causation.

The circuit court did this without notice. The matter was not briefed. The matter was brought up for the first time by the circuit court and never mentioned by any of the parties.

It is the general rule, that a federal appellate court does not consider an issue not passed upon below. *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868, 2877, 49 L. Ed. 2d 826 (1976).

Still further, there is currently a circuit split concerning *sua sponte* dismissal without notice. In the absence of direction from the Supreme Court, the circuit courts have developed three (3) different approaches to *sua sponte* dismissals. One group of circuits considers a trial court's failure to give notice and opportunity to respond to be *per se* reversible error. The second group considers

failure to give notice and opportunity to respond to be erroneous but not necessarily reversible error. The third group does not consider failure to give notice and opportunity to respond to be error if the plaintiff could not possibly prevail based on the facts of the complaint. *See,* Blake R. Hills, Sua Sponte Dismissals: Is Efficiency More Important Than Procedural Fairness?, 89 UMKC L. Rev. 243, 248 (2020).

Currently, the First, Second, Sixth and Eleventh Circuits find it is reversable error to act *sua sponte* without notice. See *Street v. Fair*, 918 F.2d 269 (1st Cir. 1990); United States v. Perez, 849 F.2d 793 (2d Cir. 1988); *Tingler v. Marshall*, 716 F.2d 1109 (6th Cir. 1983), superseded by statute on other grounds, 28 U.S.C. § 1915(e)(2) (1996).

The Fifth, Seventh and Eighth Circuits find that it is improper bunt not *per se* reversable error. See, *Lozano v. Ocwen Fed. Bank*, FSB, 489 F.3d 636 (5th Cir. 2007); Joyce v. Joyce, 975 F.2d 379 (7th Cir. 1992); *Smith v. Boyd*, 945 F.2d 1041 (8th Cir. 1991).

The Third, Ninth, Tenth and D.C. Circuits hold that it is not an error if Plaintiff could possibly prevail. See *Goodwin v. Castille*, 465 F.App'x 157 (3d Cir. 2012); *Omar v. Sea-Land Serv.*, Inc., 813 F.2d 986 (9th Cir. 1987); *McKinney v. Okla. Dep't of Human Servs.*, 925 F.2d 363, 365 (10th Cir. 1991); *Baker v. U.S. Parole Comm'n*, 916 F.2d 725 (D.C. Cir. 1990).

Furthermore, this Court has noted that it is a clear abuse of the circuit court's discretion to consider fundamental elements of a case *sua sponte*. *U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 444, 113 S. Ct. 2173, 2177, 124 L. Ed. 2d 402 (1993). See also, Adam Milani and Micheal Smith, Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts, 69 Tenn. L. Rev. 245, 287 (2002) in which the author notes

The Supreme Court has recognized that appellate courts have the power to raise issues not identified by the parties. However, saying that appellate courts have the discretion to *raise* issues *sua sponte* is a far cry from saying that appellate courts have the discretion to *decide* such

issues without requesting briefs from the parties. Indeed, a close reading of *United States National Bank* suggests that *sua sponte* decision making is an abuse of judicial discretion. *Id.*

No matter what deference this Court decides to give to the circuit court's decision, it is clear the circuit court raised causation *sua sponte* which constitutes *per se* error. Therefore, this case provides a perfect vehicle to resolve a long standing circuit split as to the proper standard to review court action done without notice *sua sponte.*

II. The "fairly traceable" requirement is a clearly established standard for determining standing and the second circuit's causation analysis is a dangerous and substantial deviation from established case law

What makes the *sua sponte* matter more glaring is how completely wrong the circuit court got the law on standing. The "fairly traceable" causation requirement is a long and clearly established standard for determining Standing. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796, 209 L. Ed. 2d 94 (2021). The circuit court used proximate cause analysis in the instant matter which is an unprecedented and substantial deviation from well-established case law.

In fact, as Judge Posner has famously pointed out, such causal inquiries in a First Amendment case are an **issue of fact** in the elements of the cause of action and not a threshold Standing issue.

> The effect on freedom of speech may be small, but since there is no justification for harassing people for exercising their constitutional rights it need not be great in order to be actionable. Yet even in the field of constitutional torts *de minimis* non curat lex. Section 1983 is a tort statute. A tort to be actionable requires injury. It would

> trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise...However, more is alleged here-an entire campaign of harassment which though trivial in detail may have been substantial in gross. **It is a question of fact** whether the campaign reached the threshold of actionability under section 1983. *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982)(Emphasis mine).

As Judge Posner has made clear, whether harassment can deter a person from exercising a First Amendment right is an issue of fact. This is not a Standing issue to be decided *sua sponte* without any discovery and certainly not to be decided without notice and without being briefed.

Furthermore, First Amendment cases "present unique standing considerations" such that "the inquiry tilts dramatically toward a finding of standing." *Libertarian Party of Los Angeles Cty. v. Bowen*, 709 F.3d 867, 870 (9th Cir. 2013).

Therefore, causation considerations in standing are different from proximate cause and require a lower showing. In proving standing, a plaintiff need not establish that the challenged conduct was the proximate cause of the injury.

Instead, "the injury must be *fairly traceable* to the challenged action of the defendant." *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014) ("Proximate causation is not a requirement of Article III standing, which requires only that the plaintiff's injury be fairly traceable to the defendant's conduct.").

The circuit court argues that Petitioner's injuries are self-inflicted and/or due to some third party not before the court. This amounts to either contributory negligence or an intervening cause. These are proximate cause concepts and

are not part of a "fairly traceable" analysis to determine standing.

Petitioner Myles was injured the very moment that Respondent Jacobs coordinated with Respondent Nassau County Board of Elections to file a lawsuit to remove Petitioner from the ballot. The Respondent Nassau County Board of elections is an agency without prosecutorial power. Aiding in and filing of a civil lawsuit is beyond the purview of that organization. Therefore, the mere fact that the agency aided Respondent Jacobs in the preparation and prosecution of the lawsuit is an injury.

Still further, when Respondent Nassau County Board of elections sent its employees to harass and intimidate Petitioner's supporters from attending a hearing, this too was an injury. All of these actions were prior to Petitioner Myles withdrawing and constituted an actionable burden on his First Amendment rights.

Not obtaining ballot access was only one among many injuries. It was the last injury in a string of injuries. The first injury was the coordination between a governmental agency and a party chair to remove Petitioner from the ballot.

Even if proximate cause was the standard to obtain standing, which it clearly is not, Petitioner would have met that burden too. Petitioner Myles not achieving ballot access is necessarily a foreseeable result of Respondents' actions. After all, blocking Petitioner Myles access to the ballot was the Respondents' entire objective.

To be clear, the chief allegation against the Respondents is that they interfered with a state court proceeding through intimidating witnesses. It should be obvious there is a casual nexus between preventing necessary witnesses from testifying and the outcome of a case. It does not matter if the result was achieved through a decision to withdraw or an actual ruling from a court invalidating the petition. Either way, the Respondents achieved their intended result.

It is absurd to claim Petitioner Myles is the cause of his own injury. Petitioner Myles did everything within his

power to appear on the ballot. He gathered the requisite number of valid signatures. We know that the signatures were valid because after a thorough agency review process, a bipartisan committee verified every signature and found the petition to contain the requisite number of valid signatures.

After the bipartisan commission approved the petition, Respondent Jacobs coordinated with the County Respondents and filed a state court proceeding challenging this finding. And still Petitioner Myles fought on. Petitioner Myles retained an election law attorney. There was a state court proceeding where the Nassau County Democratic Committee attorneys alleged pervasive fraud against Petitioner Myles despite the fact that, paradoxically, Petitioner Myles was still the Nassau County Democratic Committee's chosen candidate.

Despite all of these obstacles, Petitioner Myles persisted with the defense of his petition. Petitioner Myles would have continued to fight but for the fact that the witnesses he needed to call were intimidated from testifying by Democratic patronage employees under the direction of the Respondents. This is a clear causal nexus between Respondents purposeful activity and the burden on Petitioner's First Amendment Rights.

At most, the causal inquiry should be: "Would a "person of ordinary" firmness withdrew from the race?"

However, "ordinary firmness" is an element of the cause of action and not a standing issue as Judge Posner and other courts have pointed out.

Ordinary firmness is based on facts which cannot be decided without being briefed and *sua sponte* on the pleadings by an appeals court. See *Bennie v. Munn*, 822 F.3d 392 (8th Cir. 2016), Cert. Denied, 137 S. Ct. 814 (2017). *See also*, Abigail E. Williams, It's Dispositive: Considering Constitutional Review for First Amendment Retaliation Claims; *Bennie v. Munn, 822 F.3d 392 (8th Cir. 2016), Cert. Denied, 137 S. Ct. 814 (2017)*, 82 Mo. L. Rev. 1235, 1240 (2017).

This Court has yet to give a definitive standard for Ordinary firmness. *Id.* Nevertheless as every court to deal with this before has pointed out, it is not a standing issue but an issue of fact within the elements of the cause of action.

III. The Supreme Court has yet to clarify what standard of causation is required in First Amendment retaliation cases where the retaliatory action the government takes is the filing of a civil lawsuit

First Amendment Retaliation claims usually arise in the context of a government employee speaking out or during an arrest while a plaintiff is exercising a First Amendment right. When the government uses the legal system to arrest or prosecute a plaintiff, courts require a plaintiff to "prove an absence of probable cause as to the challenged retaliatory arrest or prosecution in order to establish the causation link between the defendant's retaliatory animus and the plaintiff's injury. *DeMartini v. Town of Gulf Stream*, 942 F.3d 1277, 1289 (11th Cir. 2019) citing *Nieves*, 587 U.S. at ——, 139 S. Ct. at 1726; *Hartman*, 547 U.S. at 260–61, 265–66, 126 S. Ct. at 1704, 1706–07 (2006)

The circuit court in *DeMartini* which appears to be the only court that has weighed in substantially on this issue of retaliatory civil lawsuits went on to note "We have located only three circuit decisions involving § 1983 First Amendment retaliation claims predicated on a retaliatory civil lawsuit or counterclaim. See *Greenwich Citizens Comm., Inc. v. Ctys. of Warren & Wash. Indus. Dev. Agency*, 77 F.3d 26 (2d Cir. 1996) (counterclaim); *Harrison v. Springdale Water & Sewer Comm'n*, 780 F.2d 1422 (8th Cir. 1986) (counterclaim); *Bell v. Sch. Bd. of Norfolk*, 734 F.2d 155 (4th Cir. 1984) (civil declaratory judgment action). Although Mt. Healthy was decided in 1977 well before these decisions, two of them, *Harrison* and *Bell*, do not

cite *Mt. Healthy*. And, of course, all three cases were decided long before the probable cause decisions in *Hartman*, *Lozman*, and *Nieves*. Nonetheless, each of the three circuits gave some consideration to whether the underlying civil action was frivolous in deciding whether the § 1983 plaintiff had shown the requisite causation between the defendant's retaliatory animus and the plaintiff's injury." *DeMartini* at 1298.

This discussion is relevant in the instant matter because this further emphasizes all courts that have dealt with this issue are unclear of what the standard of causation is with regard to the elements of the cause of action of First Amendment Retaliation in a civil context.

Nevertheless, courts are clear that causation is an element of the cause of action and not an amplification or modification of the "traceable" test for the Standing requirement. It should go without saying that the legal concept of "Standing" is a necessary precursor to bring a lawsuit and not an actual element in the cause of action.

In other words, to plead any cause of action standing is required. This standing analysis is separate from the elements of the cause of action. In the cause of action for First Amendment retaliation, the causal link between the retaliatory civil lawsuit and the exercise of the First Amendment activity are the relevant factor.

Therefore, Petitioner Myles necessarily had Standing. Standing was conferred on Petitioner Myles the moment Respondents filed a lawsuit against him. The lower court pushes the point of injury to when Petitioner Myles withdrew from the race.

Nevertheless, that has nothing to do with the issue of Standing. The inquiry of whether Petitioner Myles withdrew from the race goes to proximate cause of his injuries and does not defeat the contention that his injuries are fairly traceable to Respondents conduct.

Every court that has dealt with this issue, does not frame the issue in the form of Standing but as an element in a First Amendment retaliation claim. Since this Court has yet to determine the standard of causation on

retaliatory civil actions in First Amendment claims, this case would serve as the perfect vehicle to give much needed clarification.

CONCLUSION

Wherefore, the undersigned asks this Court to reverse and remand this matter to the Second Circuit to make further findings as to the merits on the matter and for such and further relief this Court finds just.

Runnie Myles

Sworn to before me on the
23rd day of January 2022

Annette Pennell
Notary Public

[redacted]