No. 22-370

In the Supreme Court of the United States

PERCY UTLEY,

Petitioner,

versus

CITY OF HOUSTON, TEXAS; ART ACEVEDO; JOHN DOE OFFICERS,

Respondents.

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

SUPPLEMENTAL BRIEF

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The Court of Appeals entered judgment on June 17th, 2022. 5a. It then denied a timely petition for rehearing *en banc* on July 18th, 2022. 6a. The original petition was timely filed on October 17th, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1). This Supplement is filed pursuant to Supreme Court Rule 15.8 because it "call[s] attention to new cases, new legislation, or other intervening matter not available at the time of the party's last fling."

SUPPLEMENTAL REASONS FOR GRANTING THE PETITION

In the period between filing the Petition for Writ of Certiorari and filing this Supplement, the exact harm Petitioner cited by allowing the Fifth Circuit's decision to stand uncorrected has already been realized.

Although the original panel opinion is unpublished, its effect is nonetheless the same as if it was binding precedent. Ostensibly, the Fifth Circuit's rule is that (current) unpublished opinions are not binding and should not be treated as such. 5th Cir. R. 47.5.1. Despite this rule, as one Fifth Circuit judge has noted, panels have used the practice to justify a "one-and-done" approach to some decisions. *Sambrano v. United Airlines, Inc.*, 45 F.4th 877, 886–89 (5th Cir. 2022) (Smith, J., dissenting). This approach allows panels to effectively play fast and loose with precedent and *stare decisis* on the basis that the decision is unpublished, so it should, these panels tell themselves, only bind the parties before them. *Id.* But the reality is that practitioners and district courts do not treat them as such, especially when an "unpublished" opinion contains on-point substantive analysis, whether or not that analysis is reflective of *actual* binding precedent. *Id.* This trend is not unique to the Fifth Circuit, as demonstrated by the Eleventh Circuit's recent admonishment of a district court for treating an unpublished opinion as binding. *McNamara v. Gov't Employees Ins. Co.*, 30 F.4th 1055, 1060–61 (11th Cir. 2022) ("While our unpublished

opinions 'may be cited as persuasive authority,' they 'are not considered binding precedent.' We have said so again and again, but it bears repeating. Accordingly, a district court shouldn't simply cite to one of our unpublished opinions as the basis for its decision without separately determining that it is persuasive.") (internal citations omitted).

Here, the district court dismissed a nearly identical claim, and stated explicitly that "The Court agrees with the defendants that *Utley* is binding and dispositive."[1] In doing so, it determined that it could not apply the reasoning in another nearly identical Southern District of Texas case that denied the same defendants' motion to dismiss because of *Utley*.[2] Continuing the tradition of the district court and appellate court in *Utley*, the district court in *Wade* determined that the alleged facts that should have been used to conduct the probable cause analysis were "conclusory," without bothering to explain *why* or *how* they are conclusory, nor what non-conclusory facts would have sufficed to overcome this new presumption that an arrest at a protest was lawful. The plaintiff in *Wade* even made the extra pleading contemplated by the original Petition—that neither vehicle traffic nor pedestrian traffic on the sidewalk were obstructed, and that people could pass freely through the crowd—but to no avail.

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[1] The case at issue is *Wade v. City of Houston*, No. 4:22-cv-1357 (Dkt. # 23) (S.D. Tex. Oct. 20, 2022).

[2] The other case is *Herrera v. City of Houston*, No. 4:20-cv-2083 (Minute Entry 08/18/2021) (S.D. Tex. Aug. 18, 2021).

The harm in allowing this case to stand is clear: police in the 5th Circuit now have *carte blanche* to arrest protestors *en masse* so long as they might have a pretextual justification to do so. On the standard set forth here, there are no facts that would-be plaintiffs could possibly plead to demonstrate that the arrest was pretextual because those pleadings would, under this standard, be considered "conclusory." Instead, they would need to plead some undefined level of facts to affirmatively prove the absence of probable cause. Put differently, a district court may now, on a *motion to dismiss*, use an appeal to ignorance as the standard of review. Such fallacy cannot be allowed if these rights are to have any meaning.

Whether the peaceful protest is a pro-life protest of a pro-choice law or a women's rights march in the National Mall, under the 5th Circuit's rule here, the police could conduct a mass arrest for any potential technical violation of any minor statute and face no repercussions, even if the motivation of such an arrest is the suppression of speech due to its viewpoint.

In this case, *Wade*, and *Herrera*, the peaceful protests all happened to be in response to the death of Houston native George Floyd. Although protests in some cities escalated beyond peaceful, the same cannot be said for the protests in Houston. Even then-chief Acevedo acknowledged that there were "no significant damages or injuries" as a result of the peaceful protests in Houston. Even within the last month, courts across the country

have reached different results in similar cases based on the *context* of the specific plaintiff and protest in question. *See, e.g., Welch v. Dempsey*, No. 21-3504, _ F.4th _ (8th Cir. Oct. 20, 2022) (affirming the denial of qualified immunity to officers that arrested someone live-streaming the protest, in part because the police reasoning that a courthouse window had been broken by protestors was considered irrelevant because it happened thirteen minutes and at a different, but nearby, location could not justify the arrest); *Baca v. Anderson*, No. 22-cv-02461-WHO (N.D. Cal. Oct. 12, 2022) (denying qualified immunity to an officer who arrested a protestor that shouted at him that he was a "racist cop" and was filming the protest, contrasting it to *Johnson v. City of San Jose*, another N.D. Cal. case where dismissal was granted to an officer on a First Amendment claim arising out of a George Floyd protest); *Monacelli v. City of Dallas*, No. 3:21-cv-2649-L (N.D. Tex. Sept. 30, 2022) (dismissing a reporter's claim against the City of Dallas because the use of a "kinetic impact projectile" in that case, one other George Floyd case, and one other protest in 2018 was not sufficient to establish a pattern or practice).

Whether or not HPD agreed with the content of the protests, the law is clear that they cannot arrest hundreds protestors *en masse* across the several days' worth of protests pursuant to a clear policy based solely on pretext.

As this case makes clear, it is imperative that this Court reaffirm its long-standing precedent

with respect to the pleading standard and the First and Fourth Amendments. With the amount and variety of passionate public debates in this county, our fundamental right to peacefully assemble and communicate a collective message has rarely been so crucial. The content of the message cannot determine the validity of an arrest; only the objective presence of probable cause can do that. This Court must step in and shepherd this country back to a place where its citizens' constitutional rights are robust and meaningfully protected.

CONCLUSION

For the foregoing reasons and for the reasons stated in the original Petition, this Court should grant a writ of certiorari.

Respectfully submitted,

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