No. 23-_____

IN THE

Supreme Court of the United States

RANDY SMITH, SHERIFF; DANNY CULPEPER; KEITH CANIZARO,

Petitioners,

v.

JERRY ROGERS, JR.

Respondent.

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

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EMERGENCY RULE 23 APPLICATION FOR STAY

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IDENTITY OF PARTIES

The parties to the proceeding below are as follows:

Petitioners (Defendants/Appellants):

- St. Tammany Parish Sheriff Randy Smith (party);
- Maj. Danny Culpepper (party);
- Capt. Keith Canizaro (party);
- OneBeacon Insurance Group LLC by Atlantic Specialty Insurance Company (Liability Insurer to St. Tammany Parish Sheriff's Office)

Respondent (Plaintiff/Respondent):

- Jerry Rogers, Jr.

RELATED PROCEEDINGS

Jerry Rogers, Jr. v. Randy Smith, Sheriff, Danny Culpeper, Keith Canizaro, No. 2:20-cv-00517, United States District Court, Eastern District of Louisiana. Judgment entered May 13, 2022.

Jerry Rogers, Jr. v. Randy Smith, Sheriff, Danny Culpeper, Keith Canizaro, No. 22-30352, U.S. Court of Appeals for the Fifth Circuit. Judgment entered August 9, 2023.

TABLE OF AUTHORITIES

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STATUTES

LOUISIANA STATUTE

To: Justice Samuel A. Alito, Jr., Associate Justice and Justice for the Fifth Circuit

Applicants and non-prevailing parties below, Randy Smith, Sheriff; Danny Culpepper; and Keith Canizaro (hereinafter "Petitioners") ask that enforcement of the mandate pending the disposition of this case in this Court be stayed. Specifically, this Emergency Application must necessarily be granted because trial in this case is a little more than **three months away** at the time of this filing. Indeed, trial in this case is set for February 20, 2024. Thus, it is imperative that this court grant this Emergency Application for Stay for the reasons set forth more fully below. Respondents have objected to this motion to stay.

STATEMENT OF THE CASE

This case started with the death of Nanette Krentel on July 14, 2017, in St. Tammany Parish. The St. Tammany Parish Sheriff's Office ("STPSO") promptly began investigating Ms. Krentel's death. During that homicide investigation, detectives were made aware of anonymous emails being sent to the murder victim's family – namely, to Nanette Krentel's sister, Kim Watson. In response, Gina Watson, another family member, contacted the lead investigator, Detective Daniel Buckner, and reported the emails. These emails contained information about the ongoing Krentel investigation and included derogatory statements about Detective Buckner and others involved in that case.[1] Though the anonymous emails contained false

[1] The emails claimed that Detective Buckner was "clueless," accused him of being a "stone cold rookie" with no experience and suggested that "anything is better than" Detective Buckner. Detective Buckner was, however, a Louisiana-certified Homicide Investigator, who at the time of the Krentel

information, they succeeded in alarming Ms. Krentel's family, caused them to distrust the Sheriff's Office, and impaired the Detective's ability to investigate Ms. Krentel's homicide. In addition to stating her alarm, Gina Watson began forwarding the emails from the anonymous sender to Detective Bucker and requested that he find the source of the emails.

Thereafter, a subsequent investigation was opened regarding potential obstruction of justice caused by these emails, which were obtained by STPSO under a search warrant citing violation "14:0000." Violation 14:0000 is a common placeholder used by law enforcement officers when a potential crime is not yet associated with a violation of a specific statute. While investigating the emails' source, the Criminal Investigation Division, led by Petitioner, Danny Culpeper, was able to link a Federal Government IP address with Respondent, Jerry Rogers. Rogers was a Federal agent with the U.S. Department of Housing and Urban Development (HUD) and also a former STPSO employee. On August 13, 2019, Lt. Alvin Hotard and Detective Buckner traveled to Rogers' workplace in the Hale Boggs building in New Orleans, Louisiana, to interview him about the emails sent to Ms. Krentel's family. During this interview, Respondent admitted to sending the emails and that he obtained information about the investigation from a then-current STPSO employee.

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investigation, had been a certified law enforcement officer for 19 years and a detective for 8 years. He was a seasoned and successful homicide investigator.

On August 15, 2019, Petitioner, Keith Canizaro, assigned to the Major Crimes Unit of STPSO, was tasked with investigating the possible obstruction of justice related to Nannette Krentel's open homicide investigation. That investigation uncovered insufficient facts to charge Rogers with obstruction of justice, but it did reveal sufficient evidence to charge him with Criminal Defamation under LSA – R.S. § 14:47.[2] Although § 14:47 was later repealed in 2021, at the time of the events giving rise to this matter (2017-2019), the statute remained valid and enforceable. Admittedly, however, there was some debate over the statute's constitutionality in certain contexts. While no court had ever ruled § 14:47 unconstitutional in its entirety, some courts limited its scope.[3]

On September 3, 2019, Petitioner, Canizaro received an email from fellow STPSO officer Grey Thurman containing the McLin case, in which the U.S. Fifth Circuit Court of Appeals held LSA – R.S. § 14:47 to be unconstitutional in some circumstances.[4] Canizaro understood that some unconstitutional circumstances included use of the statute against public officials, but what remained unclear was

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[2] "Defamation is the malicious publication or expression in any manner, to anyone other than the party defamed, of anything which tends: (1) To expose any person to hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence or social intercourse; or (2) to expose the memory of one deceased to hatred, contempt, or ridicule; or (3) to injure any person, corporation, or association of persons in his or their business or occupation." La. R.S. § 14:47 Defamation [Repealed].

[3] While investigating, Petitioner Canizaro utilized the *2018-2019 Edition of the Louisiana Criminal Law and Motor Vehicle Handbook* and found LSA – R.S. § 14:47. The statute was not yet repealed and, as it was written in the very book utilized by Canizaro, contained no exception, limitation, or comments suggesting its unconstitutionality. This statute book, commonly used in law enforcement, was produced in relevant part during discovery.

[4] See *McLin v. Ard*, 866 F.3d 682 (5th Cir. 2017).

whether the facts of McLin applied to the facts of the Rogers investigation, and whether Detective Buckner was considered a public official under the statute.

On September 13, 2019, Petitioners Canizaro and Culpeper met with attorneys from the District Attorney's ("DA") office for the 22nd Judicial District Court regarding the Jerry Rogers investigation. The STPSO officers presented Rogers' emails and discussed the possibility of arresting Rogers for Criminal Defamation. ADA Collin Sims expressed some concerns about the possible unconstitutionality of § 14:47, but he was unsure. The *McLin* case was also discussed, but the same ambiguities remained at the conclusion of that meeting – no definite answers were provided. Sims stated that his office would look into it further and get back to the officers.

Three days later, Petitioner, Culpeper called ADA Sims to follow up regarding the potential arrest of Jerry Rogers, and Sims told Culpeper that the DA's office still had not met to discuss the matter. After still receiving no official position from the DA's office, Petitioner, Culpeper briefed Petitioner, Sheriff Randy Smith, on the status of the Rogers investigation and on the potential Criminal Defamation charge against him. Based on sufficient evidence to support a probable cause determination that Jerry Rogers had violated the law, the Petitioners decided to submit an affidavit for an arrest warrant to the 22nd Judicial District Court.

Later that morning, ADA Sims and Petitioner, Culpeper again discussed the facts of the Rogers investigation and the application of the Criminal Defamation statute. Culpeper informed Sims that the Rogers matter had been effectively

concluded, and that the Petitioners had decided to put the matter before a judge, who could then evaluate the facts in the affidavit to determine if there was sufficient probable cause to issue an arrest warrant. Sims again offered his opinion that the arrest may be unconstitutional, but he did not instruct Petitioners not to make an arrest, nor could he provide any law on point.

Accordingly, on September 16, 2019, Petitioner Canizaro submitted an affidavit for an arrest warrant for Jerry Rogers, Jr. for the charge of Criminal Defamation, LSA – R.S. § 14:47. The affidavit contained entirely factual information supporting probable cause to arrest Rogers, and the warrant was granted and signed by the Honorable Raymond Childress. Rogers was arrested and released on bail that same day.

ARGUMENT

A. Petitioners have satisfied the procedural prerequisites of Supreme Court Rule 23

Jerry Rogers, Jr. filed the instant action on February 13, 2020, alleging violations of his civil rights under Federal and state law and later filed an amended Complaint, more specifically alleging: (1) First Amendment Retaliation; (2) Unlawful Seizure; (3) False Arrest; (4) Violation of the Louisiana Constitution; (5) State Law Malicious Prosecution; and (6) Abuse of Process.

On May 12, 2020, Petitioners filed a Partial Motion to Dismiss and Motion for More Definite Statement pursuant to Rule 12(b)(6) regarding Respondent's malicious prosecution claim and his state law claims. Respondent filed both an Amended

Complaint and an Opposition to Petitioners' Partial Motion to Dismiss, but on July 17, 2020, the district court granted Petitioners' motion, finding that Respondent had failed to state a claim for malicious prosecution.

On January 10, 2022, Respondent filed a Motion for Partial Summary Judgment on his § 1983 false arrest, state law false arrest, and false imprisonment claims. On February 10, 2022, Petitioners filed their own Motion for Summary Judgment on all of Respondent's remaining claims, specifically raising qualified immunity as a defense. The district court heard oral arguments on these motions on March 15, 2022. On May 13, 2022, the court issued its Order and Reasons largely denying Petitioners' Motion for Summary Judgment and granting Respondent's Motion for Partial Summary Judgment.[5] The district court declined to grant Petitioners qualified immunity.

On June 9, 2022, Petitioners filed a Rule 54(b) Motion for Reconsideration of the Court's Order and Reasons. Out of an abundance of caution regarding procedural delays, Petitioner-Appellants also filed a Notice of Appeal of the interlocutory Order denying qualified immunity (and therefore summary judgment). The district court subsequently denied the Motion for Reconsideration as "moot" by the filing of Petitioners' notice of appeal.[6]

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[5] App. 2A

[6] App. 16A.

Thus, the case proceeded to the U.S. Fifth Circuit Court of Appeals, which entered judgement on August 9, 2023, just hours after oral argument, affirming the district court's judgement without addressing any of the legal errors raised on appeal.[7] On September 6, 2023, Petitioners filed a motion to stay or recall the mandate with the Fifth Circuit. However, the Fifth Circuit denied this request on September 11, 2023. As such, Petitioners have satisfied the requirements of Rule 23 as "the relief sought is not available from any other court or judge. Petitioners request stay relief in this court after being denied such relief in both courts below.

B. Petitioners have met the requirements for a stay of enforcement.

"The two 'most critical' factors we must consider in deciding whether to grant a stay are '(1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits' and (2) 'whether the applicant will be irreparably injured absent a stay."[8] However, "when a party seeks stay pending certiorari… the applicant satisfies the first factor only if it can show both 'a reasonable probability that certiorari will be granted' and 'a significant possibility that the judgement below will be reversed.'"[9]

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[7] App. 1A.

[8] *Trump v. Int'l Refugee Assistance Project*, 582 US 571 (2017) (Thomas, J., concurring in part and dissenting in part) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)).

[9] *Trump*, 582 U.S. at 584 (Thomas, J., concurring in part and dissenting in part) (quoting *Barnes v. E-Systems, Inc. Group Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1302 (1991)).

i. Petitioners have satisfied the first factor because there is a reasonable probability that certiorari will be granted and a significant possibility that the judgement below will be reversed.

Before this Court are two assignments of error: (1) the Fifth Circuit's judgement leaves in place an incorrect district court decision that improperly denied summary judgement by denying Petitioners' qualified immunity, and (2) the Fifth Circuit's judgement improperly found that Petitioners lacked probable cause to effectuate an arrest made under the authority of a valid arrest warrant.

a. The Fifth Circuit's judgement incorrectly denied Petitioners qualified immunity

Since 1982, courts have generally and uniformly recognized that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."[10] It exists to ensure that "fear of liability will not unduly inhibit officials in the discharge of their duties."[11] The purpose of qualified immunity is to grant government officials performing discretionary functions immunity from lawsuits unless the official violates clearly established statutory or constitutional rights of which a reasonable person would have known.[12] Thus, when an officer is performing functions in a discretionary manner, they should be granted qualified immunity unless they violate a clearly established statutory or constitutional right. In order to

[10] *Whitney v. Hanna*, 726 F.3d 631, 638 (5th Cir. 2013).

[11] *Camreta v. Greene,* 563 U.S. 692, 705 (2011), quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

[12] 42 U.S.C. § 1983; see also *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

be "clearly established," this court has held that "existing precedent must have placed the statutory or constitutional question beyond debate."[13]

Here, Petitioner was erroneously deprived of qualified immunity by the Fifth Circuit because the "clearly established" requirement has not been met. First, at the time of Respondent's arrest, the non-constitutionality of Louisiana's defamation statute was certainly not "clearly established." Indeed, Respondent was arrested on defamation charges in 2019. At the time of this arrest, Louisiana's defamation statute was still in effect. Respondent was arrested pursuant to this statute. However, in 2021, this statute was repealed as it was unconstitutional in the context of criticism of the official conduct of public officials. Granted, at the time of Respondent's arrest, certain state court judges had limited the scope of La. R. S. § 14:47. However, La. R.S. § 14:47 **was still in effect**. Thus, it is difficult to believe that there was any "clearly established" right as it relates to La. R.S. § 14:47 being unconstitutional at the time of Respondent's arrest in 2019. Indeed, the fact that La. R.S. §14:47 had not been repealed, but had merely been the subject of criticism, does not place this issue "beyond debate."

Furthermore, undergirding the assignment of error as it relates to La. R.S. § 14:47 is this Court's shaky and oft-criticized jurisprudence regarding defamation claims as they relate to public officials. It is well known that Justice Thomas has long been asking this Court to readdress the actual malice standard set forth in *New*

[13] *White v. Pauly*, 137 S. Ct. 548, 551 (2017).

York Times v. Sullivan.[14] In these solicitations, Justice Thomas has pointed to the fact that there is a long line of Justices who agree with him on this issue.[15] Justice Thomas' opinion has been further bolstered by Justice Gorsuch joining him in stating that "the Court would profit from returning its attention" to *New York Times* and its progeny as it may not "serve its intended goals in today's changed world."[16]

While the arguments outlined above are more thoroughly discussed in Petitioner's writ application, it is clear that this issue is ripe for a granting of certiorari. This Court's defamation and actual malice standard has been oft debated, and thus, there is a reasonable probability that certiorari is granted. Furthermore, the Fifth Circuit has clearly misinterpreted jurisprudence regarding what constitutes a "clearly established" right. Given that fact, there is at least a significant possibility of the erroneous judgement denying Petitioner's qualified immunity from the Fifth Circuit being reversed.

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[14] *See Blankenship v. NBCUniversal, LLC*, No. 22-1125, U.S. LEXIS 4139, at *1-3 (Oct. 10, 2023) (Thomas, J., concurring in denial of certiorari); *Counterman v. Colorado*, 143 S. Ct. 2106 (2023) (Thomas, J., dissenting); *Coral Ridge Ministries Media, Inc. v. S. Poverty Law Ctr.*, 142 S. Ct. 2453 (2022) (Thomas, J., dissenting); *Berisha v. Lawson*, 141 S. Ct. 2424 (2021) (Thomas, J., dissenting); *Mckee v. Cosby*, 139 S. Ct. 675 (2019) (Thomas, J., concurring). See also *New York Times v. Sullivan*, 376 U.S. 254 (1964).

[15] *Counterman*, 143 S. Ct., at 2133 (stating that "[m]any Members of this Court have questioned the soundness of *New York Times* and its numerous extensions. *See*, *e.g.*, *Berisha*, 141 S. Ct. 2424 (Gorsuch, J., dissenting from denial of certiorari); *Coughlin v. Westinghouse Broadcasting & Cable, Inc.*, 476 U. S. 1187 (1986) (Burger, C. J., joined by Rehnquist, J., dissenting from denial of certiorari); *Gertz v. Robert Welch*, 418 U. S., 323, 370 (1974) (White, J., dissenting); *Rosenbloom v. Metromedia, Inc.*, 403 U. S. 29 (1971) (Harlan, J., dissenting); *Rosenblatt v. Baer*, 383 U. S. 75 (1966) (Stewart, J., concurring))."

[16] *Berisha*, 141 S. Ct. at 2430 (Gorsuch, J., dissenting from denial of certiorari).

b. The Fifth Circuit's judgement incorrectly found that Petitioners lacked probable cause to effectuate an arrest of Respondent.

As to the second assignment of error, the Fifth Circuit erroneously found that Petitioners lacked probable cause to effectuate an arrest made under the authority of a valid arrest warrant. False arrest is decided on an objective reasonableness standard, and the probable cause determination likewise depends on the viewpoint of an objectively reasonable officer. The U.S. Supreme Court has defined probable cause as the "facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable causation, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense."[17] In addition, and most importantly, the Fifth Circuit has held that, "[t]he constitution does not guarantee that only the guilty will be arrested…Where an arrest is made under authority of a properly issued warrant, the arrest is simply not a false arrest. Such an arrest is not unconstitutional, and a complaint based on such an arrest is subject to dismissal for failure to state a claim."[18]

Here, it is clear that Petitioners were operating under a sufficient arrest warrant. In Fourth Amendment cases that involve a warrant, such as this case, "the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or, as we have sometimes put it, in

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[17] *Piazza v. Mayne*, 217 F.3d 239, 245-46 (5th Cir. 2000) (quoting *Michigan v. DeFillippo*, 99 S.Ct. 2627, 2632 (1979)).

[18] *Smith v. Gonzales*, 670 F.2d 522, 526 (5th Cir. 1982) (emphasis added).

'objective good faith.'"[19] Indeed, the U.S. Supreme Court has held that an officer cannot be expected to question the magistrate's probable cause determination because it is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant.[20] Here, the issue has been Petitioner's failure to include in their affidavit for an arrest warrant information concerning the DA's warning that the arrest might be unconstitutional. Given this fact, the Fifth Circuit affirmed the District Court's finding that no probable cause existed to arrest Respondent. However, this is simply an incorrect holding as this Court has made it clear that a Magistrate's determination that probable cause exists is sufficient to insulate the arresting officer from any liability.

Thus, while Petitioner's argument is laid out more thoroughly in their writ application, it is clear that the Fifth Circuit's holding violated clear precedent as it relates to liability, probable cause, and the issuance of arrest warrants. As such, there is not only a reasonably probability that this writ application is accepted, but also, there is a significant possibility that this result is reversed by this Court.

ii. Petitioners will be irreparably injured absent a stay of enforcement issued by this Court.

"[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers of a form of irreparable injury."[21]

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[19] *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012) (citing *United States v. Leon,* 468 U.S. 897 (1984).

[20] *Messerschmidt*, 565 U.S. 535, 546. (citing *Leon*, 468 U.S. 897, 922).

[21] *Maryland v. King*, 567 U.S. 1301 (2012) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345 (1977).

Furthermore, when law enforcement is involved, there is "an ongoing and concrete harm to… law enforcement and public safety interests" which thus warrants the issuance of a stay.[22] For example, in *Maryland v. King*, this Court found that irreparable injury existed when there was a challenge to a recently enacted statute which allowed for law enforcement officials "to collect DNA samples from individuals charged with but not yet convicted of certain crimes."[23] The Maryland Court of Appeals overturned respondent's conviction because "the collection of his DNA violated the Fourth Amendment."[24] However, Petitioner was able to effectuate a stay of proceedings because they were able to show that the inability to effectuate this enacted statute constituted irreparable harm, and this Court agreed.[25]

Here, the facts are quite similar. As it stands, officers in Louisiana are currently enjoined from and face difficulty executing any arrest warrant due to the holdings set forth in this case. Previously, officers were allowed to rely on a warrant issued by a neutral and detached magistrate. However, the holdings below challenge this commonly held presumption. Indeed, as shown above and in Petitioner's brief, the holdings from the courts below challenge well-established precedent as it relates to the issuance and enforcement of warrants. As it stands, an officer can no longer rely on the fact that it is the magistrate's responsibility to determine whether or not

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[22] *Maryland*, 567 U.S. at 1301.

[23] *Id.*

[24] *Id.*

[25] *Id.*

probable cause exists. Instead, officers may now be prevented from enforcing the statutes enacted by its citizens. And as a result, there is an ongoing and concrete harm to public safety interests. Thus, the irreparable harm element is satisfied as well.

CONCLUSION

For the reasons above, Petitioners ask that the judgement below be stayed.

Respectfully submitted,

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