

IN THE
Supreme Court of the United States

ROYCE DENTON MCLIN,
Petitioner,

v.

JASON GERALD ARD, INDIVIDUALLY AND
IN HIS OFFICIAL CAPACITY AS SHERIFF OF
LIVINGSTON PARISH, LOUISIANA, *et al.*,
Respondents.

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

**BRIEF IN OPPOSITION FOR RESPONDENTS
JASON GERALD ARD, BENJAMIN THOMAS
BALLARD, JACK R. ALFORD, JR., STAN
CARPENTER, BRIAN P. SMITH, BONITA G.
SAGER, AND WILLIAM DORSEY**

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INTRODUCTION

This case presents nothing more than the application of well-settled principles of qualified immunity on Respondents' Motion to Dismiss. The lower courts properly applied principles that have been enunciated by this Court numerous times and concluded that the rights at issue were not "clearly established." Petitioner has presented no compelling reasons why this Court should grant his Petition for Writ of Certiorari. Petitioner fails to demonstrate that the Fifth Circuit's opinion is in conflict with a decision of this Court or another court of appeals, and similarly fails to show that there is a split among the courts of appeals which requires resolution by this Court. Moreover, Petitioner cannot even show that the District Court erred in dismissing his claims or that the Fifth Circuit erred in affirming that dismissal.

Petitioner first contends that this Court has provided contradictory guidance to lower courts as to how the "clearly established" standard should be applied. Specifically, Petitioner contends that this Court's opinions in *Hope v. Pelzer*, 536 U.S. 730 (2002), *Brouseau v. Haugen*, 543 U.S. 194 (2004), *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011), and *White v. Pauly*, 580 U.S. ____, 137 S.Ct. 548 (2017), have "plagued" the lower courts with "doctrinal uncertainty" regarding the appropriate standards by which to determine whether a right is "clearly established" for the purposes of qualified immunity. However, the irrefutable truth is that the Court's precedent provides a clear and consistent standard for which there is no need for clarification.

Petitioner also attempts to manufacture a discrepancy regarding how the "clearly established" standard is applied by the courts of appeals. Again, Petitioner

has not shown, and cannot show, that the circuit courts are employing materially different standards that require resolution by this Court.

Finally, Petitioner urges that this case is the ideal vehicle for the Court to provide guidance on this issue. Yet, not only is no such guidance necessary, but the thrust of Petitioner's primary argument to overturn the Fifth Circuit ruling is based upon an incorrect reading of his own complaint. Moreover, Petitioner's claims rest upon a poorly pled and incomplete complaint, and any ruling rendered on that complaint would not be capable of providing the broad guidance suggested by Petitioner.

Petitioner has failed to demonstrate that there are compelling reasons for this Court to grant the Petition. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

I. The Facts.

Because this case addresses the dismissal of claims pursuant to Fed.R.Civ.P. 12(b)(6), the Court is constrained to consider only those facts pled in Petitioner's complaint. Fed.R.Civ.P. 12(d). Here, McLin's complaint alleges that the council member defendants, James Norred, Jr., Cynthia Wale, and Chance Parent, swore out affidavits contending they were each subjected to defamation as a result of anonymous comments and statements posted to the social media site Facebook. The actual content of the Facebook posting is not pled in the complaint.¹

¹ Although Petitioner includes a general summary of the statements in his Petition, he notably cites to his Fifth Circuit

Nevertheless, McLin's complaint goes on to allege that, based on council member Chance Parent's insistence, Detective Ben Ballard obtained a subpoena *duces tecum* directed to Facebook, and once he received the response, he requested another subpoena be issued to Charter Communications, to determine the identity of the person who posted the comments. McLin alleges that, based on the productions made by Facebook and Charter, which linked McLin's home address to the account used to make the comments on Facebook, Detective Ballard obtained a search warrant for McLin's home. The complaint alleges that, during the course of the search, defendants confiscated various electronic equipment and devices, which were then delivered to the Louisiana State Police for forensic analysis.

According to the complaint, the forensic analysis revealed that the user account used to post the comments to Facebook had been accessed by one of the laptop computers seized from McLin's home. McLin alleges that, based on this information, Detectives Ballard and Carpenter advised the council member defendants that criminal defamation charges were warranted against McLin. McLin further alleges that the council member defendants swore out criminal complaints with incorporated arrest warrants as to McLin for violation of La.R.S. §14:47. The complaint alleges that arrest warrants were issued and, on the same day, McLin voluntarily surrendered to the Livingston Parish Sheriff's Office and Detective Ballard, at which time McLin was issued a misdemeanor summons. Nothing else is pled regarding McLin's encounter with the sheriff's office defendants, any communications he had with the sheriff's office defendants, his

brief for that issue. It is undisputed that the actual content of McLin's comments was not pled in the complaint.

appearances in court (if any), or any other aspect of the issuance of the summons. As the district court pointed out, notably “absent from the complaint is any allegation that the Plaintiff was restrained, hand cuffed, jailed or even made to defend the charges.” Pet.App. 33a.

II. Summary of Proceedings.

Petitioner filed suit against Sheriff of Livingston Parish Jason Ard, Deputies Benjamin Thomas Ballard, Jack R. Alford, Jr., Stan Carpenter, Brian P. Smith, Bonita G. Sager, and William Dorsey, and three members of the Livingston Parish Council, James Norred, Jr., Cynthia Wale, and Chance Parent, alleging a violation of his rights pursuant to the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, violation of his right to freedom of speech, and violation of his right to be free from unlawful arrest. McLin sought monetary damages pursuant to 42 U.S.C. §1983.

The council member defendants filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). The district court granted the motion and dismissed all claims against the council member defendants. With respect to McLin’s Fourth Amendment false arrest claim, the district court held McLin had not stated a claim for violation of his Fourth Amendment rights since he was only issued a misdemeanor summons and was never handcuffed, jailed, or even made to defend the charges; therefore, his “liberty was not meaningfully impaired,” and thus, he “was not seized for the purposes of the Fourth Amendment.”²

² Pet.App. 31a-34a. The district court dismissed McLin’s Fourth Amendment unlawful search claims against the council

Shortly after the district court's ruling, the sheriff's office defendants waived service of the complaint and filed their own Rule 12(b)(6) motion to dismiss, which the district court granted in part and denied in part. The court dismissed Petitioner's Fourth Amendment false arrest claims and First Amendment retaliation claims, citing the same reasoning employed for its dismissal of the claims against the council member defendants. The district court denied the sheriff's office defendants' motion to dismiss Petitioner's Fourth Amendment claim for an alleged unlawful search of his home. The sheriff's office defendants appealed the district court's partial denial of their motion to dismiss to the United States Court of Appeal for the Fifth Circuit, exercising their right to an immediate appeal of their denial of qualified immunity pursuant to 28 U.S.C. §1291. Due to the insufficient allegations pled in the complaint, the Fifth Circuit reversed the district court's partial denial of the sheriff's office defendant's motion to dismiss, and remanded the case back to the district court to give McLin the opportunity to amend his complaint. *McLin v. Ard*, 611 F. App'x 806 (5th Cir. 2015).

Upon remand, McLin amended his complaint and the sheriff's office defendants re-urged their motion to dismiss. The district court granted the motion to dismiss, and dismissed McLin's only remaining federal law claim, ruling the complaint still failed to state a claim upon which relief could be granted.

member defendants because Petitioner did not attribute the search to them and the First Amendment claim because McLin had not pled the essential elements of a First Amendment retaliation claim. Pet.App. 35a-39a.

McLin sought review of the district court's judgment in the United States Court of Appeals for the Fifth Circuit in regards to his claims against all defendants. The only issues that were appealed were the Fourth Amendment claim for false arrest and the First Amendment retaliation claim. With respect to McLin's false arrest claim, the court held (1) McLin adequately pled the defendants submitted false affidavits for the purpose of obtaining arrest warrants; thus, the issuance of the warrants did not shield defendants from liability; (2) McLin adequately pled he had been seized for Fourth Amendment purposes when McLin surrendered to the arrest warrants and defendants exercised authority consistent with the warrants—even if McLin thereafter only signed his summons and was allowed to leave; and (3) McLin's complaint adequately alleged an unreasonable seizure because the defendants could not have believed they had probable cause to arrest him for the conduct alleged in the complaint. Pet.App. 8a-21a.

Having found that McLin adequately pled a Fourth Amendment violation, the court turned to the second prong of the qualified immunity test, which required it to determine whether the rights at issue were “clearly established” at the time of the defendants' conduct. The court recognized that neither this Court nor the Fifth Circuit had previously held that accepting a person's surrender to an arrest warrant, without imposing further pre-trial restrictions, constituted a seizure.³ The court further noted that there was also no “robust consensus of persuasive authority” establishing that a seizure occurs under the scenario before

³ Pet.App. 22a.

it.⁴ Accordingly, McLin failed to plead a violation of a “clearly established” constitutional right, and the Fifth Circuit, therefore, affirmed the dismissal of his claims.⁵

Petitioner has now filed a Petition for Writ of Certiorari, seeking this Court’s review of the Fifth Circuit’s decision with respect to his Fourth Amendment claim for false arrest.⁶

The Fifth Circuit properly affirmed the district court’s granting of the motions to dismiss, finding that defendants were entitled to qualified immunity. In so doing, the Fifth Circuit correctly applied the “clearly established” standard as it has been elucidated by this Court. The Fifth Circuit’s application of the standard is also consistent with the application of the qualified immunity principles by the other courts of appeals.

Petitioner has failed to demonstrate that there are compelling reasons for this Court to grant the Petition. Accordingly, the Petition should be denied

III. McLin did not suffer a violation of his Fourth Amendment rights.

In order to overcome the invocation of qualified immunity, Petitioner must allege facts demonstrating both that the defendants violated a statutory or constitutional right, and that the right was “clearly established” at the time of the challenged conduct. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). As set

⁴ *Id.*

⁵ *Id.* The Fifth Circuit also affirmed the dismissal of McLin’s First Amendment retaliation claim, holding that McLin failed to plead that the defendants’ retaliatory conduct actually curtailed his speech, an essential element of his claim. Pet.App. 23a-26a.

⁶ Petitioner does not raise the dismissal of his First Amendment claim as a basis for review.

forth above, the Fifth Circuit found that Petitioner's allegations were sufficient to allege that defendants violated McLin's Fourth Amendment rights, but were insufficient to show that the right which was allegedly violated was "clearly established" at the time of the alleged conduct. In other words, the law did not so clearly and unambiguously prohibit the alleged conduct such that every reasonable officer would know it violated the law.

As an initial matter, Respondents disagree that the complaint sufficiently pleads a claim for violation of McLin's Fourth Amendment rights. Since this is a hurdle that McLin must overcome for his claims to survive, it is imperative that his allegations in this regard be examined in accordance with this Court's standard, as pronounced in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

In *Iqbal*, the Court, citing to *Twombly*, recognized that a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (citations omitted). This plausibility standard is not akin to a "probability requirement," but it asks for more than a mere possibility that a defendant has acted unlawfully. *Id.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.*

The Court's opinion in *Iqbal* was very clear that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* at 678. Thus, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice." *Id.*

With these considerations in mind, an examination of the facts pled in McLin's complaint demonstrate that he has not pled sufficient facts to establish a claim for violation of his Fourth Amendment rights. For this reason alone, no intervention or review by this Court is warranted.

A. McLin has not pled facts establishing that the arrest warrants do not provide a shield of immunity to his Fourth Amendment claims.

McLin specifically pled in his complaint that arrest warrants were obtained from a neutral magistrate prior to the alleged seizure of McLin. It is well settled that the issuance of an arrest warrant will typically shield an official from liability for an alleged unconstitutional arrest, and only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable, will the shield of immunity be lost. *Malley v. Briggs*, 475 U.S. 335, 344–45 (1986).

Here, McLin did not plead sufficient facts to establish that this shield of immunity should not be provided to the sheriff's office defendants. Indeed, McLin did not actually plead any facts showing that these defendants tainted the deliberations of the judge who issued the warrants, nor did he plead facts demonstrating that the warrants were so lacking in

indicia of probable cause that they should not have issued.

Nevertheless, the Fifth Circuit determined that the officers were not entitled to the shield of immunity in light of McLin's allegation that the "arrest warrant affidavits" were "materially false," and that, according to McLin, the "false and misleading statements" contained in the affidavits "originated, at least in part, from a self-serving and unreliable 'review' of illegally [] obtained evidence" by certain officers."⁷ The Fifth Circuit held these allegations were sufficient to strip the officers of the immunity provided by the arrest warrants.⁸ However, under the standards enunciated by this Court in *Iqbal* and *Twombly*, these allegations are far from sufficient to establish the invalidity of the warrants.

First, while it is true that McLin did, in fact, plead that the arrest warrants were premised on "false statements," **he never specifies what those false statements were.** The complaint contains no facts whatsoever regarding the specifics or even the nature of any false statements or how those statements tainted the judge's deliberations.

Without pleading the content of the allegedly false statements, it is impossible for a court to determine whether the magistrate judge's deliberations were tainted. Simply making the conclusory claim that the warrants contained false statements is not sufficient, and is precisely the type of pleading that this Court has rejected because it is, at best, a "formulaic recitation of the elements of a cause of action." *Iqbal*,

⁷ Pet.App. 4a.

⁸ Pet.App. 10a-11a.

556 U.S. at 678. The Fifth Circuit was far too generous in its “inferences” derived from Petitioner’s poorly worded complaint. McLin has not pled specific facts to demonstrate that the judge’s deliberations were actually tainted, and, therefore, the sheriff’s office defendants should not lose the “shield of immunity.”

McLin’s claim also fails because his complaint does not attribute the allegedly “false statements” to any of the sheriff’s office defendants. Rather, he clearly pleads that the arrest warrants were issued after “Defendants Norred, Wale, and Parent thereafter swore out criminal complaints with incorporated arrest warrants as to Mr. McLin.” He further alleges that, the “false and misleading statements contained within the affidavits [were] confected by [the council member] Defendants Norred, Wale, and Parent.”

Finally, the warrant applications were not so lacking in indicia of probable cause that it rendered belief in its existence unreasonable simply because they were based upon a violation of Louisiana’s criminal defamation statute, La.R.S. §14:47. It was argued below that the arrest warrants were *per se* invalid because they were premised upon a violation of this statute. That is, McLin argued that, because the criminal statute for which the summons were issued had been ruled unconstitutional, it cannot provide any indication of probable cause that would be objectively reasonable to rely upon.

While La.R.S. §14:47 was ruled unconstitutional by this Court in *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964), the Court only ruled it unconstitutional in part. Indeed, a review of the history of La.R.S. §14:47 demonstrates that the determination of which applications of the statute pass constitutional muster can be a complicated analysis. The United States District

Court for the Western District of Louisiana has twice correctly noted that Louisiana courts have recognized the unconstitutionality of the statute in only certain circumstances. See *Simmons v. City of Mamou*, 2012 WL 912858, at *5 (W.D. La. Mar 15, 2012), citing *State v. Defley*, 395 So.2d 759 (La. 1981) and *State v. Snyder*, 277 So.2d 660 (La. 1973); *Snyder v. Ware*, 314 F. Supp. 335, 336 (W.D. La. 1970) *aff'd*, 397 U.S. 589 (1970) (“We find that the Louisiana statutory provisions in question are not unconstitutional per se, but that they may be susceptible of a limiting construction.”). In fact, the Court in *Snyder* left open the question of whether the statute “provides a vehicle under which the state may constitutionally proscribe defamatory utterances made against those in public life . . .” *Snyder*, 314 F.Supp. at 336.

In *Simmons* and *Snyder*, two federal district court judges recognized the ambiguous and complicated status of the validity of La.R.S. §14:47. On this basis alone, it is clear that not every reasonable officer should be required to interpret La.R.S. §14:47 and the cases interpreting it and determine on their own in which factual scenarios it is constitutional or unconstitutional. This is particularly true when, as here, the facts of suspected criminal activity are presented to a neutral magistrate for a probable cause determination. This is the very type of situation where law enforcement officers should go to a neutral magistrate for a warrant and why this Court cloaks those officers with the shield of immunity.

Indeed, in the ordinary case, 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

comporting in form with the requirements of the Fourth Amendment. *United States v. Leon*, 468 U.S. 897, 921 (1984); *see also Malley*, 474 U.S. at 346, n. 9, (1986). “It is a sound presumption that the magistrate is more qualified than the police officer to make a probable cause determination, and it goes without saying that where a magistrate acts mistakenly in issuing a warrant but within the range of professional competence of a magistrate, the officer who requested the warrant cannot be held liable.” *Malley*, 474 U.S. at 346.

Even so, **based upon the allegations in the complaint, no determination can even be made whether the application of La.R.S. §14:47 in this case was unconstitutional. McLin has not pled the actual content of the comments at issue.** While McLin alleged generally that the council member defendants’ criminal complaints were in response to “certain” comments which were “critical” and “disparaging,” and has alleged generally the topics of the comments, **he has not pled the actual speech at issue.** Without facts pled specifically alleging the actual substance of the comments, it cannot be determined whether the comments were, or were not, protected from prosecution under La.R.S. §14:47. The Fifth Circuit overlooked this critical pleading deficiency and relied upon the conclusory allegations regarding the speech rather than requiring Petitioner to plead the actual statements at issue.

In summary, since McLin has not pled with specificity what “false statements” were included in the applications for the arrest warrant and because he attributes the “false statements” in the arrest warrant affidavits to the council member defendants, he has no basis for arguing that the warrants do not shield the sheriff’s office defendants from liability. Moreover,

because McLin has not pled the actual speech at issue, it is impossible to determine whether the application of La.R.S. §14:47 was unconstitutional. In light of these deficiencies in the complaint, McLin cannot clear the first hurdle of establishing a violation of his Fourth Amendment rights. For this reason, review by this Court is unwarranted.

B. McLin has not pled facts establishing that he was seized within the meaning of the Fourth Amendment.

Even if McLin has adequately pled that the sheriff's office defendants lacked probable cause and that the arrest warrants did not shield them from liability, he still can only prevail on a claim for violation of his Fourth Amendment rights if he has sufficiently pled that he was "seized" within the meaning of the Fourth Amendment.

It is well settled that an individual has been seized for Fourth Amendment purposes "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). Importantly, this "reasonable person" standard is objective, and is concerned not with the citizen's subjective perception or the officers' subjective intent, but only with what the officers' words and actions would have conveyed to a reasonable and innocent person. *Id.*, citing *Michigan v. Chesternut*, 486 U.S. 567, 574, 576, n. 7 (1988). Accordingly, "the subjective intent of the officers is relevant to an assessment of the Fourth Amendment implications of police conduct only to the extent that that intent has been conveyed to the person confronted." *Id.* "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons."

Florida v. Bostick, 501 U.S. 429, 434 (1991). “Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may [the Court] conclude that a ‘seizure’ has occurred.” *Id.*

Here, McLin’s complaint made only conclusory allegations of false arrest and unlawful detention. The only factual allegations pertaining to the false arrest claim are as follows: that the council member defendants swore out criminal complaints with incorporated warrants as to McLin; that “[t]he three (3) arrest warrants were issued in due course,” and later that same day, McLin “voluntarily surrendered unto the Livingston Parish Sheriff’s Office . . . and Defendant Ballard” and signed a Misdemeanor Summons which included the three (3) purported violations; and, that the summons remained extant for more than four months before being rejected by the Assistant District Attorney on December 19, 2012. This is the extent of the facts pled by McLin regarding the alleged seizure. Nothing is pled regarding the details of his encounter with the sheriff’s office defendants, who was present (other than Detective Ballard), any communications he had with the sheriff’s office defendants, his appearances in court (if any), or any other aspect of the issuance of the summonses. As the district court pointed out, notably “absent from the Complaint is any allegation that the Plaintiff was restrained, hand cuffed, jailed or even made to defend the charges.”⁹

Given the complete absence of any facts that would support a finding that McLin had been seized under the Fourth Amendment, he has not sufficiently pled a claim for violation of his rights. Indeed, there are no

⁹ Pet.App. 33a.

facts pled to suggest that there was ever any physical force or show of authority that would cause an objectively reasonable person to believe they were not free to leave. There are no facts pled to suggest that any words or actions by the sheriff's office defendants conveyed an intent to restrain McLin.

This Court has given examples of the type of police conduct that typically accompanies a seizure: (1) the threatening presence of several officers; (2) the display of a weapon by an officer; (3) physical touching of the person of the citizen; and (4) the use of language or tone of voice indicating that compliance with an officer's request might be compelled. *Mendenhall*, 446 U.S. at 554. McLin has not pled any facts that would suggest that any of these factors were met.

Without such facts pled in the complaint, McLin has again failed to establish an essential element of his claim; namely, that he was seized within the meaning of the Fourth Amendment. McLin is required to plead more than broad conclusions. Because he has not done so, McLin has not shown that he can overcome the first prong of the qualified immunity analysis, which requires him to establish a violation of his constitutional rights. In light of this failure, there is no need to examine the Fifth Circuit's analysis of the second prong of qualified immunity, thus rendering any intervention by this Court unnecessary.

REASONS FOR DENYING THE PETITION

I. The “clearly established” standard has been well-defined by this Court and is consistently applied by the circuit courts.

The primary focus of McLin's Petition is the second prong of the qualified immunity test, i.e., whether the rights at issue were “clearly established” at the

time of the defendants' conduct. Petitioner attempts to manufacture a split among the courts of appeals, suggesting that intervention by this Court is necessary for a uniform application of the "clearly established" standard. However, not only does Petitioner fail to show that such a material discrepancy exists, he also ignores the fact that, under any standard, the rights at issue here were not "clearly established" and qualified immunity still applies. Moreover, this Court has re-iterated the "clearly established" standard time and time again, including as recently as last term. There is absolutely no need for the Court to grant McLin's Petition to simply reiterate that standard and affirm the application of qualified immunity to this case.

A. There is no "doctrinal uncertainty" caused by any "contradictory guidance" from this Court.

In an attempt to persuade the Court that its intervention is necessary in this case, McLin claims that there is "doctrinal uncertainty" caused by "contradictory guidance" from this Court's precedent. Pet. 9. However, a plain reading of this Court's opinions demonstrates that no such "conflict" or "doctrinal uncertainty" exists.

The touchstone of qualified immunity is "fair notice." *Mullenix v. Luna*, 577 U.S. ___, 136 S. Ct. 305, 314 (2015). This Court has explained that "the contours of a right [must be] sufficiently clear that every reasonable official would have understood that what he is doing violates that right," *al-Kidd*, 563 U.S. at 741, as "the unlawfulness must be apparent" "in light of the pre-existing law." *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987). This Court's recent opinions have confirmed that the Court "does not require a case directly on point . . . but existing precedent must

have placed the statutory or constitutional question beyond debate.” *White*, 137 S. Ct. at 551 (quoting *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (brackets omitted)). This Court has also reiterated that “clearly established law should not be defined at a high level of generality.” *Id.* at 552. Yet, “[o]f course, general statements of the law are not inherently incapable of giving fair and clear warning to officers.” *Id.* (quoting *United States v. Lanier*, 520 U.S. 259, 271(1997)).

While Petitioner clearly recognizes these well-established principles, it is argued that this Court’s opinions in *Anderson*, *Hope*, *Brosseau*, *al-Kidd*, and *White*, have provided “contradictory guidance” that has led to “doctrinal uncertainty” regarding the proper application of the “clearly established standard.” But Petitioner’s argument is premised upon a selective reading of those decisions, and cherry-picked quotations from each. Indeed, Petitioner argues that *Hope* departed from *Anderson*, in that it permits a right to be defined “generally” rather than “specifically.” Pet. 2. But *Hope* contains no such proclamation. In fact, *Hope* reiterated the Court’s statements in *Anderson* that, “[i]n some circumstances . . . a very high degree of prior factual particularity may be necessary. But general statements of the law are not inherently incapable of giving fair and clear warning.” *Hope*, 536 U.S. at 740–41 (quoting *Anderson*, 483 U.S. at 640).

Petitioner then argues that the Court shifted back to requiring rights to be more specifically defined in *Brosseau*, where the Court held that qualified immunity applied when the plaintiff cited to no precedent that “squarely governed” the factual scenario at issue. Pet. 2. Again, Petitioner’s argument is misplaced. The Court’s comment that plaintiff had not cited a case that “squarely governed” the case before it was simply

made in response to the plaintiff's citation to three cases that the Court examined but considered inapplicable to its analysis; thus, the Court stated that "[n]one of them squarely governs the case here; they do suggest that Brosseau's actions fell in the 'hazy border between excessive and acceptable force.'" *Brosseau*, 543 U.S. at 201. Nowhere in the opinion did the Court suggest that plaintiff was required to come forward with a materially similar case; in fact, the Court reiterated that, "in an obvious case, these standards can 'clearly establish' the answer, even without a body of relevant case law." *Id.* at 200.

Next, Petitioner argues "[t]he Court in *al-Kidd* further held that a right is clearly established only when 'existing precedent place[s] . . . the statutory or constitutional question beyond debate.'" Pet. 2. Petitioner implies that, in *al-Kidd*, the Court moved further toward requiring a factually analogous case in order to overcome qualified immunity. However, Petitioner's quote from *al-Kidd* omits an essential element of its holding. In full, the Court stated, "**[w]e do not require a case directly on point**, but existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741. The Court's statement is directly in line with its prior holdings that qualified immunity can be overcome by pointing to a factually analogous case which previously found the conduct to be unlawful, **or** to a body of constitutional law that renders the unlawfulness obvious.

Petitioner then argues that the Court's recent decision in *White* observed that a right could be "generally defined" when it stated that "general statements of the law [can give] fair and clear warning to officers." Pet. 2. But again, Petitioner's argument

fails to consider the entirety of the Court's statements. The Court in *White* expressly admonished the lower courts that "it is again necessary to reiterate the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.'" *White*, 137 S.Ct. at 552. But the Court recognized, as it had countless times in the past, that "general statements of the law are not inherently incapable of giving fair and clear warning" to officers, but only when, in the light of pre-existing law, the unlawfulness is apparent. *Id.* Again, the Court's opinion is in line with its prior holdings that general statements of law are only sufficient when the unlawfulness of the conduct is apparent.

When the Court's opinions are fairly examined, it is clear that the Court has been consistent in its application of the "clearly established" standard. Petitioner's attempt to create "doctrinal uncertainty" is a product of a selective and incomplete reading of the Court's opinions. No further clarification by the Court is necessary.

B. There is no conflict among the circuits that must be resolved by this Court.

After manufacturing this "doctrinal uncertainty," Petitioner then argues that the Court's opinions have led to "conflict among the circuits regarding the level of specificity at which a right must be defined." Petitioner argues that the tension between requiring "existing precedent" to place the "question beyond debate" and having "general statements of the law" give a "fair and clear warning" has produced vast differences in the courts of appeals' application of the

“clearly established” standard.¹⁰ Upon a careful reading of the cases, Petitioner’s argument that there is conflict among the circuits in regards to the “clearly established” standard falls as easily as did his argument that this Court has created doctrinal uncertainty.

Under the “clearly established” standard articulated by this Court, one must show that the defendants were given fair notice that their conduct was unlawful **either** by citing a factually similar case holding that the conduct is unlawful (i.e., settles the constitutional question “beyond debate”) **or** by citing principles of law showing that the conduct was so patently or obviously unlawful that no guidance from a court would be necessary to put all reasonable officers on notice that the conduct was unlawful.

Turning to the circuit opinions cited by Petitioner, each of the decisions articulated and applied this standard consistently. Each of the opinions recognized that one can prove that a right is “clearly established” by citing factually similar controlling precedent that held the conduct to be unlawful **or** by pointing to principles of law which would sufficiently put all officers on notice that the conduct was unlawful. While the cases may use slightly different verbiage, the standards applied are all consistent and in line with this Court’s pronouncements.

For example, although Petitioner claims that the Sixth, Ninth, and Fourth Circuits adopt the broadest standards, a review of the cited opinions shows that they have all adopted standards directly in line with this Court’s precedent. *See Martin v. City of Broadview Heights*, 712 F.3d 951, 961 (6th Cir. 2013) (“An action’s unlawfulness may be plain “from direct holdings, from

¹⁰ Pet. 10.

specific examples described as prohibited, or from the general reasoning that a court employs.” So while the contours of a right must be “sufficiently clear,” a “fundamentally similar” or “materially similar” case is not required to show it is clearly established.”); *Chappell v. Mandeville*, 706 F.3d 1052, 1056–57 (9th Cir. 2013) (To determine whether the law was clearly established, we first look to our own binding precedent. If none is on point, we may consider other decisional law. We need not find that the “very action in question has previously been held unlawful,” but, rather, we consider whether “a reasonable officer would have had fair notice that [the action] was unlawful, and that any mistake to the contrary would have been unreasonable.”); *Meyers v. Baltimore Cty., Md.*, 713 F.3d 723, 734 (4th Cir. 2013) (“[I]t is not required that a right violated already have been recognized by a court in a specific context before such right may be held “clearly established” for purposes of qualified immunity. Thus, the absence of a judicial decision holding that it is unlawful to use a taser repeatedly and unnecessarily under similar circumstances does not prevent a court from denying a qualified immunity defense. As the Supreme Court has emphasized, “officials can still be on notice that their conduct violates established law even in novel factual circumstances.”); *Wall v. Wade*, 741 F.3d 492, 502–03 (4th Cir. 2014) (“[C]learly established “includes not only already specifically adjudicated rights, but those manifestly included within more general applications of the core constitutional principle invoked.”). (Citations omitted in all.)

These circuits’ applications of the “clearly established” standard are no broader than that of any other circuit. Nor are they broader than the standard established by this Court’s precedent. The courts look

first to cases with materially similar facts, but in the absence of such a case, permit a plaintiff to overcome qualified immunity by establishing that general constitutional principles sufficiently put the officer on notice that his conduct was unlawful.

The same is true with the First, Second, Seventh, Eighth, and Eleventh Circuits, which Petitioner argues focus on a narrow notice-based analysis. However, an examination of those cases show that the standard employed is no different than any other circuit. *See Belsito Commc'ns, Inc. v. Decker*, 845 F.3d 13, 23–24 (1st Cir. 2016) (“So ‘the relevant legal rights and obligations must be particularized enough that a reasonable official can be expected to extrapolate from them and conclude that a certain course of conduct will violate the law.’ The bottom line, then, is that while [the plaintiff] need not show that the complained-about conduct is the spitting image of conduct previously deemed unlawful, he must show that the conduct's unlawfulness was “apparent,” given preexisting law.”); *Jennings v. Jones*, 499 F.3d 2, 16 (1st Cir. 2007) (“The law is clearly established either if courts have previously ruled that materially similar conduct was unconstitutional, or if ‘a general constitutional rule already identified in the decisional law [applies] with obvious clarity to the specific conduct’ at issue.”); *McGowan v. United States*, 825 F.3d 118, 124 (2d Cir. 2016) (The “‘absence of a decision by this Court or the Supreme Court directly addressing the right at issue will not preclude a finding that the law was clearly established’ so long as preexisting law ‘clearly foreshadow[s] a particular ruling on the issue.’”); *Howell v. Smith*, 853 F.3d 892, 897 (7th Cir. 2017) (“[A] plaintiff must ‘show either a reasonably analogous case that has both articulated the right at issue and applied it to a factual circumstance similar to the

one at hand or that the violation was so obvious that a reasonable person necessarily would have recognized it as a violation of the law.” This requirement does not mean that a plaintiff must be able to point to a case “on all fours” with the defendant officer's misconduct. But there must be settled authority that would cause him to understand the illegality of the action.”); *Atkinson v. City of Mountain View, Mo.*, 709 F.3d 1201, 1212 (8th Cir. 2013) (“[t]here is no requirement that ‘the very action in question [be] previously . . . held unlawful.’ It is enough that ‘earlier cases . . . g[a]ve’ [the defendant] ‘fair warning that [his] alleged treatment of’ [the plaintiff] ‘was unconstitutional.’”);¹¹ *Harper v. Lawrence Cty., Ala.*, 592 F.3d 1227, 1233 (11th Cir. 2010) (“We recognize three sources of law that would put a government official on notice of statutory or constitutional rights: specific statutory or constitutional provisions; principles of law enunciated in relevant decisions; and factually similar cases already decided by state and federal courts in the relevant jurisdiction.”); *Gray ex rel. Alexander v. Bostic*, 458 F.3d 1295, 1306 (11th Cir. 2006) (“Even in the absence of factually similar case law, an official can have fair warning that his conduct is unconstitutional when the constitutional violation is obvious,

¹¹ McLin’s Petition demonstrates an obvious misunderstanding of these cases where, when discussing *Atkinson*, it is argued that “[t]he Eighth Circuit’s approach is more fact-specific . . .” Pet. 13. The Eighth Circuit’s reference to a fact-specific analysis clearly refers to the necessity of applying the “clearly established” standards to the specific facts before the court. (“We conduct a ‘fact-intensive inquiry . . . in light of the specific context of the case . . .’”). Nowhere in the opinion did the court suggest that it requires a factually identical case for a plaintiff to overcome qualified immunity.

sometimes referred to as ‘obvious clarity’ cases.”)
(Citations omitted in all.)¹²

Petitioner next argues that the Third and Tenth Circuits place a higher emphasis on facts. Yet, again, the standards enunciated in the cited cases do not support his argument. *See Schneyder v. Smith*, 653 F.3d 313, 330 (3d Cir. 2011) (“To determine whether a new scenario is sufficiently analogous to previously established law to warn an official that his/her conduct is unconstitutional, we ‘inquir[e] into the general legal principles governing analogous factual situations . . . and . . . determin[e] whether the official should have related this established law to the instant situation.’” In extraordinary cases, a broad principle of law can clearly establish the rules governing a new set of circumstances if the wrongfulness of an official's action is so obvious that ‘every objectively reasonable government official facing the circumstances would know that the official's conduct did violate federal law when the official acted.’ A plaintiff ‘can demonstrate that the right was clearly established by presenting a closely analogous case that establishes that the Defendants’ conduct was unconstitutional or by presenting evidence that the Defendant's conduct was so patently violative of the constitutional right that

¹² Petitioner also cites *Saylor v. Nebraska*, 812 F.3d 637, 643 (8th Cir. 2016), where the court stated that “[i]f a plaintiff can show relevant case law in the jurisdiction at the time of the incident that should have put the government employee on notice, qualified immunity is improper.” While the court clearly recognized the possibility of overcoming qualified immunity with a relevant case, the court did not discuss, and surely did not foreclose, the possibility of overcoming the immunity by pointing to general constitutional principles that could fairly put the official on notice that his conduct was unlawful, even absent a factually analogous case.

reasonable officials would know without guidance from a court.”); *Estate of Reat v. Rodriguez*, 824 F.3d 960, 964–65 (10th Cir. 2016) (“[W]e consider ‘either if courts have previously ruled that materially similar conduct was unconstitutional, or if a general constitutional rule already identified in the decisional law [applies] with obvious clarity to the specific conduct at issue.’ Usually, this requires either ‘a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.’”) (Citations omitted in all.)

Despite Petitioner’s attempt to demonstrate some discrepancy among the circuits with respect to how each applies the “clearly established” standard, there is no discernable difference between the standards employed. Again, while each of the courts may use slightly different language, each permits a plaintiff to prove that a right is clearly established by either pointing to a materially similar case that previously held the conduct in question to be unlawful or to point to broader constitutional principles that would sufficiently put every reasonable officer on notice that the conduct was unlawful. None of the courts permitted qualified immunity to be overcome with rights defined at a high level of generality, nor do any require a case directly on point. There is no split among the circuits, and no further clarification by this Court is necessary.

II. The Fifth Circuit correctly employed the “clearly established” standard in this case.

Petitioner next turns to the Fifth Circuit’s analysis in this case, claiming that the court of appeals went further than other circuit courts by considering events outside the defendants’ knowledge or control when it considered whether the rights at issue in this case are

“clearly established.” Pet. 15. Specifically, McLin’s Petition claims that the Fifth Circuit’s grant of qualified immunity to defendants was based on the conduct of officers other than defendants, arguing that “the Defendants did not seize McLin at the Sheriff’s Office; they were not even present when McLin surrendered.” Pet. 16-17.

However, as has become commonplace since the inception of this litigation, McLin’s arguments are premised upon facts that are not contained in the complaint. **Nowhere in the complaint does McLin allege that the sheriff’s office defendants were not present when he appeared at the sheriff’s office.** In fact, McLin has actually pled in paragraph 25 of his First Amended Complaint to the contrary as it relates to Detective Ballard, specifically alleging that **McLin “voluntarily surrendered unto the Livingston Parish Sheriff’s Office . . . and Defendant Ballard at 3:29 PM CST on August 16, 2012”** (cited in the court of appeal’s opinion, Pet.App. 16a). Petitioner’s argument to this Court that defendants were not present when he surrendered to the sheriff’s office is not supported by any factual allegations in the complaint.

Contrary to Petitioner’s argument, the Fifth Circuit’s opinion does not represent any “novel expansion of the qualified immunity doctrine.” Nor does it create any new standard for applying qualified immunity. After the Fifth Circuit held that McLin had adequately pled a violation of his Fourth Amendment rights, it correctly recognized that its inquiry could not stop there, and that it must also look to whether the rights alleged to have been violated were “clearly established” at the time of the officer’s conduct. The Fifth Circuit began its analysis in this regard by

correctly citing this Court’s precedent (similar to the standard employed by every other circuit) that, “[w]hen considering a defendant’s entitlement to qualified immunity, [the court] must ask whether the law so clearly and unambiguously prohibited his conduct that ‘every reasonable official would understand that what he is doing violates [the law].’” Pet. App. 21a–22a, citing *Morgan v. Swanson*, 659 F.3d 359, 370 (5th Cir. 2011) (quoting *Ashcroft v. al-Kidd*, 563 U.S. at 741) and *Lane v. Franks*, 573 U.S. ___, 134 S. Ct. 2369, 2381 (2014). The Fifth Circuit further recognized, “[t]o answer that question in the affirmative, we must be able to point to controlling authority—or a robust consensus of persuasive authority—that defines the contours of the right in question with a high degree of particularity.” Pet. App. 22a, citing *Morgan*, 659 F.3d at 371–72 (internal quotation marks omitted) (quoting *al-Kidd*, 563 U.S. at 742) and *Mullenix*, 136 S. Ct. at 308.

Having cited and explained the correct standard, the Fifth Circuit correctly applied that standard, recognizing a lack of controlling authority or robust consensus of persuasive authority, that *every* reasonable officer would understand that McLin was seized for the purposes of the Fourth Amendment. Pet. App. 22a. Indeed, the Court noted that, as of its decision, “neither the Supreme Court nor the Fifth Circuit has decided that an officer’s acceptance of a voluntary surrender to an arrest warrant constitutes a Fourth Amendment seizure.” Pet.App. 22a. Continuing, the court noted that there was no “robust consensus of persuasive authority,” given that only one circuit—the Eleventh—has found a seizure in these circumstances

in a published opinion, and a majority of circuit courts have not yet weighed in. Pet.App. 22a.¹³

Although McLin now takes issue with this conclusion, he was unable to cite to any analogous case—or robust consensus of persuasive authority—that would show that the rights at issue here were “clearly established.” McLin even fails to make such a showing in his Petition to this Court. The fact remains that there are no materially similar cases or constitutional rules identified in decisional law that have established that a Fourth Amendment seizure occurs when an individual voluntarily appears in response to the issuance of an arrest warrant with nothing more.

Indeed, the lack of any detention of McLin is what distinguishes nearly every case cited by McLin in his brief to the Fifth Circuit. Nearly every case McLin relied upon involved a plaintiff who was actually arrested or detained following their surrender to an arrest warrant. *See Albright v. Oliver*, 510 U.S. 266 (1991) (finding a Fourth Amendment seizure where the plaintiff surrendered to the arrest warrant, after which he was taken into custody, forced to post a bond, and was subject to the condition that he not leave the state without permission of the Court); *Whiting*, 85 F.3d 581 (finding a Fourth Amendment seizure where the plaintiff was taken into custody and detained overnight after he surrendered to the arrest warrant); *Cummisky v. Mines*, 248 Fed. App’x 962 (10th Cir.

¹³ It is worth noting that even the Eleventh Circuit case cited, *Whiting v. Traylor*, 85 F.3d 581 (11th Cir 1996), involves facts which are highly distinguishable from the facts of this case. In *Whiting*, after the plaintiff voluntarily surrendered, he was detained overnight and then released on bond. *Id.* at 583. There are absolutely no facts pled in the complaint that would suggest McLin was subject to any similar detention.

2007) (finding a Fourth Amendment seizure where the plaintiff surrendered, was photographed and fingerprinted, and had to post bond before he was released); *Groom v. Fickes*, 966 F.Supp 1466 (S.D. Tex. 1997) (finding a Fourth Amendment seizure where the plaintiff was booked, photographed, handcuffed, and taken before a magistrate). *Garrett v. Stanton*, 2009 WL 4258135 (S.D. Ala. Nov. 19, 2009) (finding a Fourth Amendment seizure where the plaintiff was held until he posted bond). Each of these cases involved detention by physical force or show of authority that is simply not present in this case.

On the other hand, the sheriff's office defendants pointed to cases that consistently rejected Fourth Amendment claims where there was no physical detention of the plaintiff. *See Vicknair v. La. Dept. of Wildlife and Fisheries*, 2013 WL 1180834 (W.D. La. Jan 29, 2013) (finding no Fourth Amendment seizure where the plaintiffs were read their *Miranda* rights, advised that they were going to be cited for trespassing, provided written statements and were issued misdemeanor citations and summonses for trespassing, and then left the sheriff's office); *Matherne v. Larpenner*, 54 F.Supp.2d 684 (E.D. La. June 2, 2009), (finding no Fourth Amendment seizure where the plaintiff did not allege that she was detained, arrested, arraigned, incarcerated, tried, or convicted in connection with the issuance of a misdemeanor summons); *DiBella v. Borough of Beachwood*, 407 F.3d 599 (3d Cir. 2005) (finding no Fourth Amendment seizure where the plaintiffs were issued summonses but never arrested, never posted bail, and were free to travel); *Bielanski v. County of Kane*, 550 F.3d 632 (7th Cir. 2008) (finding that a summons alone does not equal a seizure for Fourth Amendment purposes and no court has ever held as much); *Britton v. Maloney*, 196 F.3d

24 (1st Cir. 1999) *cert. denied*, 530 U.S. 1204 (2000) (finding that issuance of a summons requiring plaintiff to appear in court is insufficient to establish a Fourth Amendment seizure); *Gonzalez v. Brazeley*, 2009 WL 2411800 (E.D. La. 2009) (finding that there is no cognizable §1983 claim for false arrest when a criminal defendant is not arrested and detained, but instead is merely summoned to appear in court to answer charges without additional restriction).

Admittedly, none of the cases cited by McLin or defendants were materially analogous to this case. However, neither did any of those cases (or all of the cases, taken as a whole) clearly establish a constitutional rule that a Fourth Amendment seizure occurs when an individual voluntarily appears in response to the issuance of an arrest warrant with nothing more. It is precisely this lack of controlling authority or clear consensus among the courts that rendered qualified immunity applicable in this case.

The Fifth Circuit correctly applied the qualified immunity standard. Petitioner cannot fairly argue that either a closely analogous case or a constitutional rule identified in decisional law put defendants on notice that their conduct constituted a seizure under the Fourth Amendment. Petitioner has not shown that the Fifth Circuit incorrectly applied the “clearly established” standard as enunciated by this Court. Accordingly, no review or intervention by this Court is warranted.

III. There is no need for further clarification from this Court.

Petitioner argues that additional clarification is needed from this Court regarding the application of the “clearly established” standard. However, the Court

has already opined on this subject numerous times in the past few years in *White*, *Mullenix*, *Ashcroft v. al-Kidd*, *Brousseau*, and *Hope*. Just last term, the Court essentially provided the exact guidance that McLin now seeks. In *White*, the Court reiterated the applicable standard as it had previously elucidated in both *al-Kidd* and *Mullinex*:

Qualified immunity attaches when an official's conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix v. Luna*, 577 U.S., at ————, 136 S.Ct., at 308. While this Court's case law "do[es] not require a case directly on point" for a right to be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.*, at ————, 136 S.Ct., at 308. In other words, immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Ibid.*

White, 137 S.Ct. at 551. This Court did not change the "clearly established" standard in *White*, but simply reiterated that standard. Although the opinion in *White* was rendered after the Fifth Circuit opinion in the present case, the Fifth Circuit applied the standard reiterated by this Court, and did so correctly.

It is unclear what additional clarification McLin is seeking, given the consistency among the Court's recent opinions and the opinions of the various circuit courts. What is clear is that the Court cannot dictate future specific outcomes in specific cases in the district and circuit courts—it can only articulate standards for the courts to apply when adjudicating what can, at times, be somewhat difficult and unique factual

circumstances. This Court has explained the standard to be applied to those factual circumstances several times within the last few years and has done so consistently. There is simply no need for the Court to intervene in this case to do so yet again, particularly given the deficiencies contained throughout Petitioner's complaint.

CONCLUSION

The District Court correctly held that defendants, Jason Gerald Ard, Benjamin Thomas Ballard, Jack R. Alford, Jr., Stan Carpenter, Brian P. Smith, Bonita G. Sager, and William Dorsey, were entitled to qualified immunity and correctly granted their motion to dismiss. The Fifth Circuit correctly affirmed. Contrary to Petitioner's assertion, the Fifth Circuit's opinion is not in conflict with either this Court's opinions or any circuit opinions. This case presents nothing more than the application of well settled principles of qualified immunity to a particular set of facts as set forth in Petitioner's complaint. This case does not present any compelling reasons for this Court to grant the Petition for Writ of Certiorari and therefore, the Petition should be denied.

Respectfully submitted,

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