

No. 17-650

IN THE
Supreme Court of the United States

ROYCE DENTON MCLIN,

Petitioner,

v.

JASON GERALD ARD, ET AL.,

Respondents.

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

REPLY BRIEF OF PETITIONER

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REPLY IN SUPPORT OF PETITION

Rather than focus on the question presented, Respondents seek to relitigate on the merits the issues they lost in the Fifth Circuit. They do not give this Court any reason it should not provide further guidance on the level of specificity at which a right should be defined for the purposes of determining whether the right at issue in the case was clearly established. In 49 pages of briefing in opposition to the petition, Respondents spend a total of three addressing that question, and do not respond at all to the impact of *Hernandez v. Mesa*, which this Court decided just before the Fifth Circuit entered its decision in this case.

The fact remains that the Fifth Circuit held Respondents violated McLin's Fourth Amendment right against unreasonable seizure. The Fifth Circuit held that no reasonable government official would seek an arrest warrant based on McLin's conduct. But the Fifth Circuit took the level of specificity for defining the right at issue a step further, and required McLin to prove that it was clearly established that surrender to an arrest warrant constituted a seizure—something that is pure factual serendipity, and not possibly within a reasonable government official's analysis in deciding whether to pursue an arrest warrant.

McLin should not be penalized for making the police's seizure more convenient by coming to them, rather than forcing police to come to his place of business or his home to arrest him in front of his clients or neighbors. And McLin and thousands and thousands of parties on both sides of Section 1983 actions, as well as the lower courts, would benefit

greatly from guidance on the level of generality at which a right must be defined.

1. The confusion in the lower courts is real and profound. Courts and academics alike have repeatedly expressed frustration with determining the level of generality at which to define a right. Pet. 19-29. As a result, officers have no idea as to the standards on which their conduct will be judged, lower courts are faced with numerous cases that could have never been brought or settled with a better understanding of the likely outcome, and individual litigants on both sides see erroneous decisions based on what standards of generality the district court and then court of appeals choose. *Id.* Providing a standard would make the lower courts more efficient, and it would lead to more consistent and fairer results. *Id.*

The briefs in opposition, ironically, re-define the question presented at too high a level of generality. They set up a straw man by claiming the petition is about the standard of a “clearly established right” in the broadest of terms, and then completely ignore (council defendants) or minimize (sheriff’s office defendants) the true question—the level of specificity at which the right must be defined. The council defendants even go so far as to make character attacks based on unfounded speculation that McLin will not address the question presented on the merits if the petition is granted. Council Defendants’ BIO 5-11. Not so. If the petition is granted, McLin will seek a clarifying standard for determining the level of specificity at which a right must be defined. Pet. 15-19. McLin suggests that courts should define the right at the level of generality at which the facts are relevant to liability for the individual defendant, and this Court should articulate such a standard.

Under the proper standard, however written, the right here would be defined as one against being “arrested for criminal defamation without probable cause under La. R.S. § 14:47 for saying unpleasant things about elected officials.” Pet 15. But the Fifth Circuit defined the right for all defendants at a level of specificity that went into the irrelevant for proving the claim, insofar as it applied information unknowable to a reasonable person in the defendants’ positions—*how* the arrest eventually would occur. The claim is not that the defendants are liable for being arresting officers—it is that they are liable for *causing* the unlawful arrest. McLin does not have to prove that the manner of arrest was unlawful to establish liability for any of the defendants. So the manner of arrest should not be part of the defined right that must be clearly established. With the right properly defined, the Fifth Circuit’s holdings render dismissal of the complaint erroneous because the Fifth Circuit held that McLin adequately pleaded an unreasonable seizure “because the Defendants could not have believed they had probable cause to arrest him.” Pet. App. 21a.

2. With the standard suggested, many cases in myriad contexts could have been decided at least with greater consensus, and perhaps differently. For example:

In *Pauly v. White*, Judge Moritz, in dissent, argued that the majority had defined the right at too high a level of generality. 814 F.3d 1060, 1085 (10th Cir. 2016) (Moritz, J., dissenting), *rev’d sub nom White v. Pauly*, 137 S. Ct. 548 (2017). Judge Moritz chided the majority for applying the “general proposition that an officer may not use deadly force unless he or she faces the immediate threat of physical harm.” *Id.* at

1090. To establish liability, the plaintiff would have had to prove that the officer both failed to warn the suspect who was shot and killed, and that a warning was feasible. *Id.* In light of that, the right at issue should have gone to a level of specificity that included feasibility of giving a warning in light of the surrounding facts. *Id.* at 1091. The majority did not do so, and this Court reversed.

In *Gravelet-Blondin v. Shelton*, Judge Nguyen, in dissent, accused the majority of defining the right at issue at too high a level of generality when it resolved “whether ‘the right to be free from non-trivial force for engaging in mere passive resistance was clearly established prior to 2008.’” 728 F.3d 1086, 1103 (9th Cir. 2013). Judge Nguyen opined that the majority failed to consider the facts at issue. Under a standard articulated based on what must be proven to establish liability, the Court may have reached a different conclusion, but at least would have provided more direct reasoning.

In *Gooden v. Howard Cty.*, Judge Wilkinson dissented because the majority had defined the right at issue too generally. 917 F.2d 1355, 1365 (4th Cir. 1990), *opinion superseded on reh’g*, 954 F.2d 960 (4th Cir. 1992). There, the majority ruled that it was clearly established that the seizure of the mentally ill must be supported by probable cause. *Id.* at 1368. Judge Wilkinson argued that the right should have been defined more specifically to include the issue of danger to oneself or others. *Id.* at 1369.

There are, of course, myriad examples, including this case, where the circuit courts have gone the opposite direction and defined the right at issue too specifically. For instance, in *Perez v. Oakland Cty.*,

Judge Moore dissented, stating that the clearly established right at issue could be described at an appropriate level of specificity as whether there is a clearly established right to continuing medical treatment once a prisoner has been deemed suicidal. 466 F.3d 416, 437 (6th Cir. 2006) (Moore, J., dissenting). But the majority went farther, defining the right in a granular way involving an earlier misdiagnosis that there was no suicide risk, which would not be required to be proven to establish liability. *Id.*

The Fourth Circuit had Judge Wilkinson dissenting that a panel had defined a right to broadly, as noted above. Then the court went too far the other direction, as noted by Judge Gregory in dissent in *Henry v. Purnell*. 619 F.3d 323, 342 (4th Cir. 2010) (Gregory, J., dissenting), *rev'd en banc*, 652 F.3d 524 (4th Cir. 2011). There, the majority excused an officer's unreasonable killing of a fleeing suspect because he confused his firearm for his taser. *Id.* Judge Gregory noted that the right may be defined as a right against an officer using deadly force against a fleeing suspect that does not represent any risk to the officer or others. *Id.* The majority had added a level of specificity, further including a right against the officer intending to use a taser, rather than a firearm. *Id.*

And in *Hernandez v. Mesa*, this Court held that the Fifth Circuit erred when it went beyond the facts that were “knowable to the defendant officers at the time they engaged in the conduct in question.” 137 S. Ct. 2003, 2007 (2017) (*per curiam*). If the Fifth Circuit had guidance to limit the level of generality of defining the clearly established right at issue to facts needed to establish liability, the Fifth Circuit could have applied that standard and avoided awarding qualified

immunity to an officer based on facts outside the officer's knowledge at the time—in *Mesa*, the nationality of the person the officer shot, and here, the manner by which the arrest would be executed. Thus, the case should at least be remanded for reconsideration in light of that decision.

3. The Court should address the question presented because it is not enough that, in the broadest sense, this Court has instructed lower courts to determine whether the official had reasonable notice that his or her actions were unlawful. The reports are full of cases where courts are all over the map as to the level of generality at which they define the right at issue. McLin readily concedes that the categorization of the Circuits in the Petition is inexact, insofar as the Circuits often also are internally inconsistent. Pet. 22-23 (“Doctrinal disuniformity conspicuously manifests itself in two important ways: intra- and inter-circuit conflicts.”). Opinions on this issue are so disparate even within circuits that they defy perfect categorization. That only further underscores the need for guidance from the Court. The lower courts clearly need further guidance on how best to interpret the Court’s instruction not to define the right at issue at too high a level of generality.

In their limited discussion of the question presented, Respondents present no reason to conclude otherwise. They simply state that it is enough that the Court has instructed lower courts not to use too high a level of generality, without addressing the confusion below on what constitutes too high a level of generality that is obvious from the case law and underscored by numerous academics.

Respondents correctly state that the courts recognize that for a right to be “clearly established” a reasonable officer must know his or her conduct is unconstitutional, but they miss the more specific issue of how a court reaches such a conclusion. As it stands, the Court has only given the rather ethereal guidance on defining the right that it must not be placed at “too high of a level of generality.” Beyond that, courts only have a handful of cases, like *White*, that say the circuit court was wrong, but do not state a guideline by which the circuits can evaluate the appropriate level of generality in the future.

Rather than fully address the question presented, Respondents focus on griping about merits arguments that the Fifth Circuit already has rejected. After a five-page block quote about switching questions presented that has no relevance to this case, council defendants throw a different accusation of bad faith by claiming that McLin cannot assert that he engaged in protected speech, and then spend five more pages arguing whether McLin’s speech was protected. Council Defendants’ BIO 11-15. But the Fifth Circuit disagrees—it held that McLin adequately pled speech that was protected. Pet. App. 20a. Similarly, Sheriff’s Office Defendants disagree with the Fifth Circuit as to whether McLin sufficiently pled that the defendants violated his Fourth Amendment rights. Sheriff’s Office Defendants BIO 7-16. Neither set of respondents explains how any of this affects the question presented. The Fifth Circuit’s ruling turned on one consideration—whether McLin had a clearly established right against arrest by surrender to a warrant, rather than arrest by force. And that consideration should have been irrelevant, given that the manner of arrest is not relevant to McLin’s claims.

4. None of this distraction about the merits changes the fact that the Fifth Circuit applied the wrong specificity standard for defining the right here, or that lower courts have trouble defining the appropriate level of generality or specificity, and that has been well-documented. Former Dean of the University of Virginia School of Law, John C. Jeffries, Jr. observed “just how radically the altitude of analysis can affect results,” and how the circuits differ from case to case in the level of generality at which they define relevant rights. John C. Jeffries, Jr., *What’s Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 855-58 (2010).

This is a problem that has vexed the courts for at least two decades. R. George Wright, *Qualified and Civic Immunity in Section 1983 Actions: What do Justice and Efficiency Require*, 49 SYRACUSE L. REV. 1, 16 (1998). (defining the right at issue too specifically makes it “a simple matter to marginalize the principle that officials must apply general, well-established legal principles even if a closely corresponding case has not previously been reported”). Officers, other government officials, and plaintiffs alike would benefit from better guidance. Michael M. Rosen, *A Qualified Defense: In Support of the Doctrine of Qualified Immunity in Excessive Force Cases, With Some Suggestions for Its Improvement*, 35 GOLDEN GATE U. L. REV. 139, 167-73 (2005). By “better defining the scope of clear establishment, our system can better equilibrate” the balance between effective crimefighting and preventing bad conduct “and serve the interests of all.” *Id.* at 174.

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed. In the alternative, the petition should be granted, and the judgment below vacated and remanded.

Respectfully submitted,

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