NO. ______________________

IN THE SUPREME COURT OF THE UNITED STATES

Charles L. Burgett - Petitioner

vs.

Kansas City Board of Police Commissioners, et al. - Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PRO SE PETITIONER

QUESTIONS PRESENTED

1. Whether the Court of Appeals applied the correct standard in reviewing the district court's grant of summary judgment.

2. Whether the police officer had probable cause to make a warrantless arrest under the Fourth Amendment.

3. Whether the Court of Appeals applied the correct *prima facie* standard for assessing a case of discrimination under 42 U.S.C. § 2000d (Title VI).

LIST OF PARTIES

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioner, Charles L. Burgett was appellant below. Respondents, who were appellees below, are the Kansas City Area Transportation Authority (KCATA), Virgil Lienhard, Shelia Porter, and police officer Brent Cartwright.

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IN THE SUPREME COURT OF THE UNITED STATES

Charles L. Burgett - Petitioner

vs.

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

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Charles L. Burgett, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in Cause No. 16-4105, entered on January 19, 2018. Rehearing en banc and panel rehearing was denied March 14, 2018.

OPINION BELOW

On January 19, 2018 a panel of the Court of Appeals entered its affirmance without opinion the judgment of the United States District Court for the Western District of Missouri. The affirmance without opinion of the Court of Appeals is unpublished.

JURISDICTION

The Court of Appeals entered its judgment on January 19, 2018. On March 14, 2018, the Court of Appeals denied the Petitioner's request for panel rehearing and rehearing en banc, and a copy of the order denying rehearing appears at Appendix 20a. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Kansas City Municipal Ordinance Section 50-102(a)(trespass generally):

(a) A person commits a violation of this section if he knowingly enters unlawfully or *knowingly remains unlawfully in or on a building or inhabitable structure or upon real property*. (Emphasis added).

Missouri Revised Statutes Section 569.140 (defining "enter unlawfully or remain unlawfully")(2009):

(8) "Enter unlawfully or remain unlawfully", a person "enters unlawfully or remains unlawfully" in or upon premises when he is not licensed or privileged to do so. *A person who, regardless of his purpose, enters or remains in or upon premises which are at the time open to the public does so with license and privilege* unless he defies a lawful order not to enter or remain, personally communicated to him by the owner of such premises or by other authorized person. A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of the building which is not open to the public.

42 U.S.C. § 2000d (Title VI of the Civil Rights Act of 1964):

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Rule 56 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

A. Factual Background.

On December 21, 2009, Petitioner, a Black Male boarded a KCATA bus operated by respondent Porter, and paid his fare with his daily-unlimited ride pass. During the route Porter had a conversation with a white male passenger about going to a party with him, in which Porter told him that he could, "ride around" with her. Later, Porter demanded where Petitioner was going, telling him he could not "ride around" and he had to pay or get off the bus. Petitioner told Porter that he had a daily-unlimited ride pass. Porter still shouting stated that Petitioner needed to swipe his pass at the fare box, which he did a second time. When Porter continued to tell Petitioner that he could not ride around, he responded that she was harassing him because he was a Black Male, asserting that she had no problem with the white male riding around. Thereafter, Porter demanded that petitioner get off the bus or she would call the police because he could not "ride around". Porter called her supervisor, respondent Lienhard, white male. Lienhard called the police and shortly thereafter, respondent police officer cartwright, white male, and two fellow white officers came on the bus.

Cartwright threatened Petitioner Burgett to get off the bus or he would be dragged off. Petitioner informed Cartwright that he had no right to assault and batter him and that he had properly paid his fare and done nothing wrong; however, Petitioner exited the bus within a minute of Cartwright's threat. After exiting the bus, Petitioner requested that Cartwright take a report to document the incident. Cartwright initially refused. Petitioner began to walk away but Cartwright called him back and requested his identification. Cartwright then requested Petitioner's Social Security Number. Petitioner told Cartwright that he had his identification and did not need his Social Security Number. After Petitioner's refusal to give Cartwright his Social Security Number, Cartwright turned to Lienhard and asked him if he wanted Petitioner arrested for trespassing. Lienhard told Cartwright that he would "sign". Burgett was arrested by Cartwright without a warrant. See Appellant's Brief at PP. 6-8.

B. District Court Proceedings.

Petitioner brought suit against the named defendants included the respondents KCATA, Porter, Lienhard, and police officer Cartwright; and, defendant Kansas City Board of Police Commissioners (Board) through its members. Petitioner alleged, *inter alia*, violation of the Fourth Amendment under 42 U.S.C. § 1983 based on lack of probable cause; discrimination under 42 U.S.C. § 2000d (Title VI of the Civil Rights Act of 1964); and, state law claims. Due to the granting of numerous motions to dismiss, the district court eventually dismissed all defendants and issues.

Petitioner appealed and the court of appeals reversed and remanded to the district court for consideration of the Fourth Amendment false arrest claim and discrimination claim in regards to the respondents.

The respondents moved for summary judgment. App. 3a, 10a. The district court granted respondents summary judgment, *inter alia*, on the Fourth Amendment false arrest claim and discrimination claim against Petitioner. App. 3a-9a, 10a-19a. It said that, "[t]he totality of these circumstances show that [respondent police officer] had probable cause to believe that [Petitioner] had committed the offense of trespassing. As a result, Petitioner's claim for false arrest fails as a matter of law (App. 7a)". Additionally, it said that, "[Petitioner] has failed to establish a prima facie case of discrimination under Title VI (App. 18a)".

C. The Court of Appeals' Opinion.

The court of appeals entered its affirmance without opinion the judgment of the district court. App. 1a-2a.

D. The Court of Appeals' Denial of Panel Rehearing and Rehearing En Banc.

The court of appeals denied rehearing and rehearing en banc. App. 20a.

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit Court's Affirmance Of The District Court's Summary Judgment Standard; Probable Cause Standard; And, *Prima Facie* Standard Under Title VI Conflicts With This Court's Jurisprudence, Including The Fourth Amendment, And The Standard Employed By Other Courts, Involving Recurring Issues Of Exceptional Important, Which Call For An Exercise Of This Court's Supervisory Power.

A. The court of appeals' summary judgment standard deviates from that employed by This Court and other courts of appeals.

The district court did not review the record as a whole; made its determination in viewing the facts in the light most favorable to the respondents; drew most inferences in the favor of the respondents; and, made credibility determinations in favor of the respondents. See Appellant's Brief at PP. 9-18, 27-28. The court of appeals was supposed to review the district court's grant of summary judgment *de novo*. Murchison v. Rogers, 779 F.3d 882, 886-87 (8th Cir. 2015); yet, the court of appeals erroneously failed to consider much of Petitioner's evidence, failed to view the evidence in the light most favorable to Petitioner and to draw all reasonable inferences in his favor, and substituted its view of the weight of the evidence for the jury's reasonable view.

This Court in applying the summary judgment standard under Rule 56 of the Federal Rules of Civil Procedure have stated that the court must review the record "taken as a whole." *Matsushita Elec. Industrial Co.v. Zenith Radio Corp.*, 475 U.S.574, 587 (1986); *Anderson v. Liberty Lobby, Inc.*,477 U.S.242, 250–251 (1986); *Celotex Corp.v. Catrett*,477 U.S.317, 323 (1986). The district court was required when it reviewed the motions for summary judgment to review all of the evidence in the record; however, it was compelled to draw all reasonable inferences in Petitioner's favor, and prohibited from making credibility determinations or weighing the evidence. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Lytle v. Household Mfg., Inc.*,494 U.S. 545, 554–555 (1990); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-255 (1986); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S.690, 696, n. 6 (1962); *Woodman v. Haemonetics Corp.*, 51 F.3d 1087, 1091(1st Cir. 1995) ("No credibility assessment may be resolved in favor of the party seeking summary judgment.").

B. The court of appeals' probable cause standard is contrary to this Court's established Fourth Amendment jurisprudence.

Respondent officer Cartwright came on the bus and threatened Petitioner Burgett to get off the bus or he would be dragged off without taking the time to further investigate Petitioner's lawful presence on the bus. Notwithstanding, Petitioner's license or privilege to be and he was lawfully on the bus, Petitioner exited the bus within a minute of respondent officer's threat. Appellant's Brief at P. 15. After exiting the bus, Petitioner requested respondent officer to take a report to document the incident. Respondent officer initially refused. While Petitioner was walking away, respondent officer called out to Petitioner and said he needed Petitioner's identification for taking a report. Petitioner handed respondent officer his identification and then respondent officer asked Petitioner for his Social Security Number, which Petitioner refused to provide. Respondent officer turned to respondent Lienhard and asked him if he wanted Petitioner arrested for trespassing. Lienhard said he would "sign".

To determine whether an officer had probable cause for an arrest, "we examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause." Maryland v. Pringle, 540 U. S. 366, 371 (2003). The court of appeals affirmed the district court's disregard of "the events leading up to the arrest" and its erroneous finding of probable cause.

The bus was not a building, inhabitable structure or real property. The court of appeals did not dispute that the bus was not a building or real property; however, it supported the district court's overreached that a reasonable officer could conclude that a bus is an inhabitable structure. Petitioner argued that the bus was not inhabitable structure, which the respondents did not challenge. Appellant's Brief at P. 16. The court of appeals supported the district court's overreaching conclusion that the bus was an inhabitable structure when it relied on a case from another circuit [10th] decided more than six (6) years after the incidents in Petitioner's complaint. Neither the court of appeals nor the district court cited any case in the 8th circuit whatsoever that defined inhabitable structure. Id. Further, the court of appeals sustained the district court's finding that the totality of circumstances would have led a reasonable officer to believe that Petitioner was trespassing. In support, it relied on Thompson v. City of Portland, 620 F. Supp. 482, 486 (D. Me. 1985). The facts in the record regarding Petitioner's incident is distinctly contrasting in that Petitioner did not "subsequent[ly] fail[] to leave [the bus] (App. 6a)" [Because Petitioner did not remain on the bus, respondent officer could not have believed that Petitioner remained unlawfully on the bus]; and, unlike Thompson, Petitioner was not arrested on the bus. Appellant's Brief at PP. 10, 15, 16.

The district court did not consider the evidence from when Petitioner exited the bus until he was arrested while off of the bus by respondent officer. The court of appeals sanctioned the district court's failure to view the facts in the totality of the circumstances. The "totality of the circumstances" requires courts to consider "the whole picture." *United States v. Cortez*, 449 U. S. 411, 417 (1981). Considering the totality of the circumstances, an objectively reasonable officer could not have believed that Petitioner knowingly remains unlawfully in or on a building or inhabitable structure or upon real property. Pringle, *supra*, at 372. Therefore, no objectively reasonable officer could have believed that Petitioner was committing the offense of trespassing; and, no objectively reasonable officer could have believed that there was probable cause to arrest Petitioner. Id. Furthermore, considering the "totality of the circumstances" ("the whole picture"), respondent officer clearly arrested Burgett without a warrant based on retaliation. An retaliatory arrest is unlawful when a police officer does not have probable cause for the arrest. *Reichle v. Howards*, —U.S. ——, 132 S.Ct. 2088, 2096, 182 L.Ed.2d 985 (2012). A police officer is not immune from liability for his wrongful actions. Id. Respondent officer was not entitled to qualified immunity for his intentional and retaliatory motive with no probable cause in arresting Petitioner; and, for his intentional wrongdoing and misconduct in arresting Petitioner. Id.

The district court sanctioned by the court of appeals tilted the scales too heavily in favor of the respondent officer's unaccountability for his actions and to the determent of Petitioner's right to Fourth Amendment Protection.

C. The court of appeals' *prima facie* standard under Title VI departs from that employed by This Court, other courts of appeals, and what it has applied

in its own circuit.

The panel of Shepherd, Bye, and Kelly of the court of appeals, previously found that Petitioner Burgett established a *prima facie* case of discrimination under 42 U.S.C. § 2000d (Title VI). See *Burgett v. Kansas City Board of Police Commissioners*, No. 14-381 (8th Cir. 2015); 613 Fed.Appx. 553 (Mem); 8th Circuit District Court, Case No. 13-00494-CV-W-DW, Doc. #161. The panel of Benton, Bowman and Kelly of the court of appeals disregarded the previous panel's finding and averred that Petitioner failed to establish a *prima facie* case. Regardless, Petitioner established a *prima facie* case of discrimination under Title VI. Additionally, based on the entire record, Petitioner Burgett substantiated his allegations with sufficient probative evidence from which a reasonable jury could infer discriminatory and racial animus by the respondent KCATA through the actions of its employees respondents Porter and Lienhard against Burgett.

Courts have advanced analytical frameworks for assessing Title VI claims. The elements of a Title VI intentional discrimination claim evolved from and are similar to the analysis of cases decided under Title VII of the Civil Rights Act of 1964, as amended. See *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511, 519 (9th Cir. 2011) (looking to Title VII jurisprudence to analyze Title VI claims).

The *McDonnell-Douglas* framework referenced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) is used to establish that a plaintiff was treated differently because of, *inter alia,* his race than a similarly situated individual. Such has been established in Petitioners' case. Under the *McDonnell-Douglas* framework, to prove unlawful discrimination, a plaintiff "must carry the initial burden . . . of establishing a *prima facie* case". See 411 U.S. at 802. For example, here Petitioner established a *prima facie* case with proof that: (1) respondent KCATA was receiving federal funds; (2) Petitioner was discriminated against (forced off of the bus for allegedly "riding around" and arrested); and, (3) Petitioner's race was the motive for discriminatory conduct by respondent KCATA (Petitioner observed respondent Porter tell a similarly situated white male passenger that he could "ride around", and he was not arrested). See Appellant's Brief at PP. 22-26.

The *prima facie* case "creates a presumption that [respondent KCATA] unlawfully discriminated against [Petitioner]," and, if unrebutted, requires "judgment for [Petitioner] because no issue of fact remains in the case." See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). To rebut the presumption of discrimination and raise "a genuine issue of fact as to whether it discriminated" against [Petitioner], [respondent KCATA] "must clearly set forth, through the introduction of admissible evidence, the reasons" for the challenged action. Id. at 254-255. For example, here respondent "Porter had a reasonable belief that Burgett was impermissibly riding around and/or being disruptive [reasons for challenged action]." App. 16a.

Once respondent KCATA has came forth with its explanation for its decision, "[Petitioner] must be afforded a fair opportunity of proving that the [respondent KCATA stated reason was just a pretext for a racially discriminatory decision." McDonnell Douglas, 411 U.S. at 804. Here, Petitioner demonstrated that the accusation [Petitioner allegedly being disruptive] is unworthy of credence because the respondent KCATA produced no evidence to support respondent Porter's accusation especially since it intentionally destroyed the video recording of the incident ("KCATA intentionally destroyed the video recording so that it could hide the fact that Porter exhibited hostility toward Burgett, and initiated the entire incident causing Burgett to be arrested (Appellant's Brief, P. 13)"). See Appellant's Brief at P. 23. Regarding, the allegation that Petitioner was impermissibly riding around, Petitioner violated no policies or procedures internal or otherwise, and he had a daily-unlimited ride pass Day Pass, which entitled him to unlimited rides. Respondent KCATA named no Federal or State Law or Kansas City, Missouri Ordinance that support respondent KCATA's internal and subjective "Permissible Looping" policy, practice and procedures. See Appellant's Brief at PP. 21, 24, 26.

Regardless, the accusation that Petitioner was "impermissible riding around" is contradicted by the finding of fact, to wit: "[respondent] Porter believes that the policy "allows for passengers to ride a route one time in its entirety per payment of the fare or swipe of a bus pass. Upon finishing one full route, passengers are required to exit the bus."". App. 15a. Since the facts in the record shows that Petitoner had a daily-unlimited ride pass and did not ride the route one time in its entirety per swipe of his pass, respondent Porter is not credible. Respondent KCATA did not dispute that the daily-unlimited ride pass entitled passengers to unlimited rides. A genuine fact dispute exists as to whether Petitioner was entitled to unlimited rides; whether there was an interplay between unlimited rides and the so-called looping policy; and, whether Petitioner had ridden one full route. Respondent KCATA'S subjective reason is pretext and should be highly scrutinized. *Warren v. City of Carlsbad, 58 F.3d 439, 443 (9th Cir. 1995), cert. denied, 516 U.S. 1171 (1996)* (subjective practices are particularly susceptible to discriminatory abuse and should be closely scrutinized). The jury not the court is tasked with determining if the so-called "looping policy" was intentionally not followed by respondent Porter. *Quick v. Donaldson, 90 F.3d 1372, 1376-77(8th Cir. 1996).*

The court of appeals affirmation of the district court is erroneous. The district court improperly credited facts favorable to respondents Porter, Lienhard and KCATA; resolved conflicting information in favor of the respondents; and, made credibility determinations in favor of the respondents. The district court cannot conclude, as a matter of law that the evidence establishes whether the defendants' conduct was for nondiscriminatory or pretextual reasons, which require factual determinations of a jury. Id.

In *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554–555 (1990); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-255 (1986); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S.690, 696, n. 6 (1962); *Woodman v. Haemonetics Corp.*, 51 F.3d 1087, 1091(1st Cir. 1995) this Court and the 1st Circuit held,"Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge; and, No credibility assessment may be resolved in favor of the party seeking summary judgment.".

If the evidence is susceptible to two interpretations, the court must reject the interpretation favorable to the respondents and instead accept the interpretation that supports Petitioner. See *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962). The district court must disregard the conflicting testimony favoring the respondents. See *Wilkerson v. McCarthy*, 336 U.S. 53, 57-60 (1949). And, the issues of motive and intent are at play by respondent KCATA through respondents Porter and Lienhard. As the court concluded in *Corneveaux*, a jury should have the opportunity to decide whether to believe either the plaintiff or the defendants. *Corneveaux v. CUNA Mutual Insurance Group*, 76 F.3d 1498 (10th Cir. 1996).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: June 5, 2018

Respectfully Submitted,

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