No. _____

In The
Supreme Court of the United States

RICHARD CROUSE and GEORGE T. WINNINGHAM,

Petitioners,

v.

JAMES CHAD CALDWELL,
Chief of Police, Town of Moncks Corner,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) When disputes of fact arise regarding whether speech by a public employee is protected by the First Amendment, should those factual issues be resolved by a trier of fact (the rule in the Second, Third, Sixth, Eighth and Tenth Circuits), or by the court as a matter of constitutional law (the rule in the Fourth Circuit)?

(2) When a government employee engages in speech on a subject of public concern, and a court applying *Pickering* balances the First Amendment interest against any contrary interests of the employer, should the extent of that First Amendment interest be "lessened" –as the Fourth Circuit holds – if the speaker directed his or her statements to one person rather than the "larger public," was motivated by some "personal concern" in speaking about that subject, or was "not providing a particularly informed opinion"?

(3) Can a defendant establish qualified immunity under *Garcetti v. Ceballos*, by showing that he or she could reasonably have believed that the action of the plaintiff was in his "capacity" as an employee (the rule in the Fourth Circuit), or only by showing he or she could reasonably have believed that the plaintiff spoke "pursuant to his professional responsibilities" (the rule in the First, Fifth and Ninth Circuits)?

PARTIES

The parties to this proceeding are set forth in the caption.

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STATUTES

28 U.S.C. § 1254(1).....1

Petitioners Richard Crouse and George T. Winningham respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on February 17, 2017.

OPINIONS BELOW

The February 17, 2017 opinion of the court of appeals, which is reported at 848 F.3d 576 (4th Cir. 2017), is set out at pp. 1a-26a of the Appendix. The March 14, 2017 order of the court of appeals denying rehearing and rehearing en banc, which is not reported, is set out at pp. 29a of the Appendix. The December 22, 2015 order of the district court is set out at pp. 27a-28a. The transcript of the district court motion hearing of October 28, 2015 is set out at pp. 30a-31a of the Appendix.

JURISDICTION

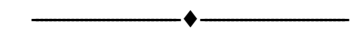
The decision of the court of appeals was entered on February 17, 2017. A timely petition for rehearing was denied by the court of appeals on March 14, 2017. On June 5, 2017, the Chief Justice extended the time for filing the petition until August 11, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment provides in pertinent part: "Congress shall make no law ... abridging the freedom of speech...."

Section one of the Fourteenth Amendment provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.



INTRODUCTION

On October 4, 2013, police and medical personnel were called to the parking lot of a Wal-Mart in Moncks Corner, South Carolina, to assist James Berkeley, who had fallen asleep in his car after taking the wrong medication. When Mr. Berkeley had revived, police learned that he was the subject of an outstanding warrant. Mr. Berkeley submitted to arrest, his hands were handcuffed behind his back, and he got into the back of a police car. Thereafter, under circumstances that remain in dispute, and while still handcuffed, Mr. Berkeley sustained injuries at the hands of the Moncks Corner police. The nurse at the Moncks Corner jail refused to admit him to the jail until he had first been examined at a hospital emergency room.

Several days later, two officers who had been present at the Wal-Mart parking lot incident indicated to their supervisor that excessive force had been used. The supervisor passed this information on to two Moncks Corner detectives, who read the incident report and looked at photographs of Mr. Berkeley's injuries. The two detectives during their lunch hour brought to Mr. Berkeley at his home a copy of the town's civilian complaint form. Mr. Berkeley subsequently called one of the officers who had witnessed the Wal-Mart incident, and his call led to an investigation. After receiving an oral report from the investigator, the Chief of Police concluded that what had occurred was "just absolutely horrible." The Police Captain labeled the conduct at issue "despicable." The Chief summarily forced two officers to resign, without awaiting completion of the investigator's report.

This is not a case about excessive force, and Mr. Berkeley is not a party. The Chief of Police did not discipline any of the officers who were involved in the incident at the Wal-Mart parking lot. Rather, the Chief of Police forced out the two detectives who had given Mr. Berkeley the complaint form. This is a case about freedom of speech. The Fourth Circuit, deepening conflicts on two major First Amendment issues, and creating another conflict on yet a third, has imposed novel and unpredictable limitations on the constitutional rights of millions of public employees in that circuit.

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STATEMENT

Legal Background

This case arises under the principles established by *Pickering v. Board of Education*, 391 U.S. 563 (1968), and its progeny for evaluating free speech claims by government employees. The plaintiff in such a case must establish that he or she spoke about a matter of public concern. If the plaintiff does so, "[t]he question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). The lower courts often refer to that analysis as *Pickering* balancing. *See Pickering*, 391 U.S. at 568, 572-73; *Connick v. Myers*, 461 U.S. 138, 150 (1983); *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

Where the nature of the plaintiff's speech is in dispute, the government may seek to justify its actions on the basis of what it actually (but perhaps mistakenly) believed the plaintiff had said, provided that the government before taking the disputed employment action had through an investigation or otherwise acquired sufficient information to render its conclusion reasonable. *Waters v. Churchill*, 511 U.S. 661, 677-78 (1994) (plurality opinion). Where there is a dispute about the employer's actual motivation, *e.g.*, about whether the employee was fired because of speech that would be unprotected or because of different speech that would be constitutionally protected, a trier of fact

must ascertain what the motive of the employer actually was, in order to determine *which* speech was the reason for the dismissal. *Id.*, 511 U.S. at 682 (plurality opinion), 683-85 (Souter, J., concurring).

The First Amendment does not protect a government employee for discipline based on speech made pursuant to the employee's official duties. *Garcetti*, 547 U.S. at 413, 424. The critical question under *Garcetti* is whether the speech at issue was within the scope of the employee's "ordinary job duties." *Lane v. Franks*, 134 S.Ct. 2369, 2378-79 (2014).

Factual Background

Petitioners Richard Crouse and George Winningham were detectives in the Moncks Corner Police Department until they were forced to resign in October 2013. Winningham was a corporal, and he reported to Crouse, a sergeant. Crouse, in turn, reported to Lieutenant Michael Roach. Roach's supervisors were Captain Mark Murray and, in charge of the entire department, Chief Chad Caldwell, the respondent. The department employed about 25 officers. App. 3a.

The sequence of events leading to Crouse's and Winningham's forced resignations began on October 4, 2013, with a call for assistance for James Berkeley. He had fallen asleep in his car in a Wal-Mart parking lot after taking the wrong medication. His three young children could not wake him and they alerted Wal-Mart security, which called the police. Roach was the first to arrive on the scene. Berkeley claims that Roach

pulled him from the car and threw him on the ground, while Roach says that he pulled Berkeley out of the car to wake him up. App. 4a. Officer Shawnda Winder arrived shortly after this occurred. Roach and Winder learned that Berkeley had an outstanding arrest warrant, and placed him under arrest. Berkeley permitted the officers to handcuff his hands behind his back, and got into the back of a police car.

Although Berkeley was seated in the police car, one of his legs was still outside the car; Mr. Berkeley is well over six feet tall, and could not fit easily into the back seat. According to Winder, Roach slammed the door on Berkeley's leg, which caused Berkeley to yell.[1] Roach then used a "knee strike" to try to get Berkeley to move his leg into the car. Roach claimed the knee strike hit the outside of Berkeley's leg; Berkeley claimed that Roach kneed him in his testicles. App. 4a. After the knee strike, Berkeley got out of the car, loudly complaining that Roach had kneed him "in the balls."[2] Although Berkeley still had his hands cuffed behind his back, a scuffle ensued, at the end of which Berkeley (according to Winder) was lying face down in the parking lot with Roach kneeing him in the back. Winder persuaded Roach to desist, pointing out that Berkeley was calm and not resisting.[3] Roach then threatened to fire his Taser at Berkeley, but again Winder was able

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[1] JA 1227.

[2] JA 1214.

[3] JA 1269, 1274, 1283-84.

to convince him that further force was not necessary.[4] Winder and another officer, Ronitto Dozier, assisted Berkeley to stand up, and he got into the police car without further incident.

Winder thought she should take Berkeley to the emergency room, but Roach ordered her to take him to the jail. JA 1215. At the jail, the nurse refused to admit Berkeley because of his visible injuries, unless he first went to the local hospital emergency room. At the emergency room, a nurse checked Berkeley's vital signs and concluded he was not in danger. Berkeley declined further treatment, and was returned to the jail, from which he was within a day or two released on bail.[5] Berkeley was charged with resisting arrest and assaulting a police officer; as of 2015 those charges were still pending.

Winder and Dozier reported to their own supervisor, Corporal Frankie Thompson, that they believed Roach had used unwarranted force and had been verbally abusive to Berkeley.[6] Thompson in turn gave that information to Crouse and Winningham, and indicated that if Berkeley filed a complaint Winder and Dozier would support him.[7] At about this time, Roach came into the police headquarters and, according to Winningham and Crouse, "bragged about how he beat up a

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[4] App. 4a-5a; JA 1215.

[5] JA 1232, 1240.

[6] JA 1245-46, 1252, 1318.

[7] JA 1002-03, 1116, 1121, 1132.

six-foot man...." JA 1118.[8] Winningham and Crouse read the incident report and looked at photographs that Winder had taken of Berkeley after the incident, concluding from the photographs that "it did look like excessive force was used." JA 1003, 1120.

Crouse and Winningham decided to bring Mr. Berkeley a copy of the form the department prepared for citizens to submit complaints about police officers. They did so during their lunch hour; both were out of uniform, but were identifiable as police officers because of their badges. App. 5a. In addition to giving Berkeley the form, Crouse and Winningham asked if he was going to file a complaint, and told him that if he did officers who had witnessed the incident at the Wal-Mart parking lot would support him. *Id.* Winningham also suggested that Berkeley get an attorney if he had in fact been assaulted. Apparently concerned about possible reprisals for having spoken to Berkeley, Crouse and Winningham asked that Berkeley not openly recognize them if they met at the police station. Crouse used a separate piece of paper to hold the citizen complaint form, ensuring that his fingers did not touch the form. App. 5a.[9]

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[8] *See* JA 996 "He said he kneed somebody in the balls or inner thigh or something. And the guy was handcuffed, and he was all happy about doing it 'cause the guy was like six foot, over six foot"), 1001, 1058, 1119 ("he bragged about assaulting a male, James Berkeley"), 1123.

[9] When a police investigator later interviewed Berkeley, he specifically asked that Berkeley turn over the form the officers

The next day Berkeley's wife called the police department and asked to speak with Winder. Winder called back and spoke with Mr. Berkeley, who told Winder that he had been visited by two police officers.[10] Winder reported the call to Chief Caldwell, who then directed Lieutenant Mark Fields to conduct an investigation. App. 6a. Fields interviewed Berkeley; based on Berkeley's description of the two officers who had given him the complaint form, Fields suspected that they were Crouse and Winningham. Fields reported his suspicions to Chief Caldwell. Fields then interviewed Crouse and Winningham, both of whom admitted speaking to Berkeley and giving him the complaint form. *Id.* Fields reported this to Chief Caldwell, who was "absolutely outraged"; what Crouse and Winningham had done, Caldwell later commented, was "one of the most disloyal acts in my 40 year career."[11] At Caldwell's direction, Captain Murray told Crouse and Winningham that they would be fired if they did not resign; both officers then resigned. App. 7a.

Corporal Thompson was suspended without pay for three days for having "initiated [his] own investigation" into the Wal-Mart incident "which did not involve [him]," and for having discussed with Crouse and Winningham "previous incidents involving [Roach] which

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had given him. JA 500-01. The record does not reveal whether the investigator actually dusted the form for fingerprints.

[10] What else Berkeley may have said to Winder, and what Winder then told the Chief, are discussed *infra*.

[11] JA 687.

... did not involve [him]."[12] Lieutenant Fields' report concluded (after all three had already been punished) that Crouse, Winningham and Thompson had acted improperly.[13] The Fields report reached no conclusions regarding whether Roach was guilty of any misconduct, and did not include any description of the written statement which Winder had provided that was sharply critical of Roach's actions.[14] Winder resigned from the police department shortly after the Wal-Mart incident, and told state investigators that she had left because of that incident, and that she "d[id] not believe that serious complaints [were] taken serious[ly] within the department."[15]

Following an investigation of Roach's actions by state police, the local prosecutor decided not to press charges again him.[16] The Moncks Corner Police Department revised its complaint form to include a lengthy summary of a local ordinance and state law criminalizing any false report, and to require a complainant to acknowledge that any "false or misleading statement ... may subject me to civil liability or criminal prosecution." The form states that if the accused officer disagrees with the allegation, the complainant might be asked to take a polygraph test, although the officer would not be ordered to submit to a polygraph

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[12] JA 338.

[13] JA 250-51.

[14] JA 245-51.

[15] JA 1295.

[16] JA 274-75.

test unless the complainant had first taken and passed such a test.[17]

Proceedings Below

Crouse and Winningham brought this action in federal court, asserting that their forced resignations violated the First Amendment. Specifically, the amended complaint alleged that "[t]he Defendants retaliated against the Plaintiffs by constructively discharging them in violation of their First Amendment right to free speech for providing the victim of a police assault with the appropriate form to file a civilian complaint against the assaulting officer." JA 53. In the course of discovery, a number of significant fact-bound disputes emerged, the nature of which framed the litigation that followed.

First, it was unclear what Winder told Chief Caldwell about the call from Berkeley. According to Caldwell, Berkeley said that the two officers had been "trying to get him to file a complaint and to sue the police department."[18] Captain Murray, who was present when Winder spoke with Caldwell, recounted instead that Berkeley "was wanting to know who all the officers were at the time of his incident at WalMart."[19] Winder said that Berkeley had told her the two officers advised him to sue both the department and Roach, did not mention encouragement to file a complaint, and

[17] JA 360.

[18] JA 581-82.

[19] JA 839; *see id.* 855-56.

did not testify about what she told the chief about the call.[20]

Second, there was conflicting evidence regarding what Fields told Caldwell about what he learned at his interviews with Berkeley, Crouse and Winningham. There are six contemporaneous records of what occurred at those interviews: a transcript of the interview with Berkeley, written statements by Crouse and Winningham, audio recordings of portions of the Crouse and Winningham interviews, and Fields' November 2013 report. Those records consistently describe the same events; Crouse and Winningham gave Berkeley the complaint form, asked him if he was going to complain, and told him that two officers believed Roach had acted improperly. But at his deposition fifteen months later, Caldwell testified that Fields had told him a number of other things that were not contained in those contemporaneous records. According to Caldwell, Fields stated that "[Berkeley] said that [Crouse and Winningham] had went to Berkeley and told Mr. Berkeley to come file a complaint and try and get Roach fired and sue the Moncks Corner Police Department."[21] Those descriptions of what Crouse and Winningham said are not in the transcript of the Berkeley interview. Caldwell also asserted that Fields told him Crouse and Winningham "admitted ... [g]oing to Berkeley and telling him that – file a complaint

[20] JA 215-16.

[21] JA 620.

against Roach and sue the police department."[22] But those admissions are not in the statements of Crouse and Winningham or the recordings of the Crouse and Winningham interviews.

Third, the discovery raised questions about what the Chief's motive was in forcing Crouse and Winningham to resign. The complaint alleged they were forced out because they gave the complaint form to Berkeley, and that might be what Caldwell meant when he said the two detectives were "disloyal." But, *if* Caldwell was also told that Berkeley stated, or the detectives admitted, that they had urged Berkeley to sue the department, to sue Roach, to try to get Roach fired, or to file a complaint, it was possible that Caldwell decided to terminate Crouse and Winningham because one of those (supposed) actions.

Fourth, in light of *Garcetti*, the parties developed evidence regarding the duties of Crouse and Winningham, albeit in different ways. The plaintiffs adduced substantial evidence that their actual job responsibilities did not include giving out complaint forms. Winningham specifically insisted that was not one of his responsibilities.

> Q. Did you not feel you had any duty as a police officer to go talk to Mr. Berkeley?
>
> A. I would say no. That's not my job.[23]

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[22] JA 691; *see* JA 695.

[23] JA 1128.

Officer Winder stated that she did not "remember ever seeing this form."[24] Captain Murray testified that "to [his] knowledge" officers did not even occasionally distribute the forms "in the field."[25] When asked who was responsible for distributing the forms, Murray identified (only) a particular civilian employee who worked at the front window of the police department.[26] Distribution of the forms was not restricted to police department employees; anyone could come to the department, pick up the forms, and pass them out as they pleased. App. 5a; JA 723. The defendants did not offer direct evidence of the ordinary job duties of police officers, either in the form of job descriptions or sworn statements. Instead, they sought to prove through examination of Crouse and Winningham that the detectives were motivated to distribute the forms by a sense of responsibility to the department, not just as good citizens.

At the hearing on Caldwell's motion for summary judgment, counsel for respondent argued that uncertainty as to the motives of Crouse and Winningham was sufficient to establish qualified immunity. "[I]t's not clear whether it was done out of duty or whether it was done out of public spiritedness; and therefore, it can't be clearly established because we don't know what it was."[27] The district court concluded that there were "issues of fact" regarding whether "what they

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[24] JA 1290.

[25] JA 857-58.

[26] JA 841.

[27] JA 1619.

said" was "part of their official duties." App. 30a. Those same disputes, he reasoned, entitled Caldwell to dismissal on grounds of qualified immunity. *Id.* 31a.

The court of appeals affirmed the dismissal of the claims against Caldwell, but on different grounds. The court's analysis began with a central tenet of Fourth Circuit caselaw regarding speech claims by government employees. In that circuit, the *Pickering* balancing test and the application of *Garcetti* are entirely matters of constitutional law. App. 9a-10a. That precedent permitted the court of appeals to resolve a number of key disputes. The majority concluded that Caldwell had indeed talked with both Fields and Winder about a statement by Berkeley that Crouse and Winningham had urged him to sue Roach as well as the department. App. 18a. The majority resolved the question about the actual motivation for the dismissal, holding that Chief Caldwell "viewed" what (he thought) Crouse and Winningham had done, "seeking to foment litigation against their own boss," "as a threat to his ability to manage the police department." App. 17a-18a.

The majority also reasoned that in the application of *Pickering*, there is "lessened public interest" in certain types of speech, even though the content of that speech concerns a matter of public concern. Speech involves a lessened public interest, and thus is less likely to outweigh any government interests, the Fourth Circuit held, if the speech was not directed at the public at large (the plaintiffs had spoken only to Berkeley), if the speaker did not have "a particularly informed

opinion" (the plaintiffs "did not witness the alleged use of excessive force"), or to the extent that the speech was "in furtherance of matters of personal concern." App. 16a. Based on these premises, the majority concluded that Caldwell was entitled to qualified immunity with regard to *Pickering* balancing.

With regard to *Garcetti*, the majority did not decide whether handing out complaint forms was among the professional responsibilities of the plaintiffs, and did not suggest that the Chief of Police would not have known what those duties were. Instead, it reasoned that Chief Caldwell was entitled to qualified immunity because he could reasonably have believed the plaintiffs "were speaking in their capacity as employees of the police department." App. 14a.

Judge Motz disagreed with the panel's finding of qualified immunity regarding *Garcetti.* Under the majority standard, she noted, whether *Garcetti* applies depends largely on whether the audience can identify the speaker as a government employee; "that is not the law." App. 22a. There was, she pointed out, no evidence that handing out citizen complaint forms was among the duties of Moncks Corner officers, and "Chief Caldwell did not believe, and could not have reasonably believed, otherwise." *Id.* Judge Motz concurred with the finding of qualified immunity regarding *Pickering* balancing, albeit on different grounds than the majority. *Id*. 23a-26a. Her analysis rested largely on her belief that Crouse and Winningham were trying to get Roach fired.

REASONS FOR GRANTING THE WRIT

I. THERE IS AN ENTRENCHED WELL-RECOGNIZED CIRCUIT CONFLICT REGARDING WHETHER A COURT OR A TRIER OF FACT SHOULD DECIDE FACTUAL ISSUES THAT AFFECT WHETHER SPEECH BY PUBLIC EMPLOYEES IS CONSTITUTIONALLY PROTECTED

The Fourth Circuit decision turns on a well-recognized circuit conflict regarding the resolution of *Pickering* claims. The resolution of that issue is of fundamental importance to the First Amendment rights of more than 28 million federal, state, and local government employees.

In many cases involving the application of *Pickering* balancing, as is true in the instant case, there are subsidiary questions of fact. The Fourth Circuit has long held that the determination of *all* issues related to *Pickering* balancing is for the court, regardless of whether the underlying facts are in dispute.

> The weighing of th[e] [*Pickering*] balance is a question of law for the court.... [T]his court has held that the entire balancing process is an inquiry of law for the court.... Joyner contends that it is the providence of a jury or fact finder to determine the underlying facts to which the court then applies the legal standard. The clear implication of *Connick*, however, is to the contrary.... In *Dodson*, this court

> held that such questions "were not factual issues for the jury," but "involved questions of constitutional law for the court."

Joyner v. Lancaster, 815 F.2d 20, 23 (4th Cir. 1987) (quoting *Jones v. Dodson*, 727 F.3d 1329, 1337 n.11 (4th Cir. 1984)).

Four circuits hold, to the contrary, that such subsidiary factual disputes are to be resolved by the trier of fact. In *Gorman-Bakos v. Cornell Coop. Extension*, 252 F.3d 545, 557-58 (2d Cir. 2001) (opinion joined by Sotomayor, J.), the Second Circuit explained that

> [a]s a general rule, the application of the balancing test is a question of law which is properly performed by the district court.... In the present case, however, the facts relevant to that determination are contested.... It would be improper at this stage for the district court – or this court on appeal – to resolve the factual disputes between the parties, or to decide the proper balance between the parties' interests.... [A]fter these underlying factual disputes are decided by a factfinder, the district court should consider the factual findings to come to its own legal conclusions about [*Pickering* balancing].

The Second Circuit reiterated that rule in *Johnson v. Ganim*, 342 F.3d 10, 114-15 (2d Cir. 2003). One of the factual issues in both *Gorman-Bakos* and *Johnson*, as in the instant case, was whether the employer was motivated by actual concern with disruption of its activities, or instead by disagreement with the content

of the employee's speech. *Johnson*, 342 F.3d at 115 ("disputes pertaining to ... defendants' motivations in ... terminating plaintiff preclude summary judgment"); *Gorman-Bakos*, 252 F.3d at 558 ("the parties disagree as to ... whether ... plaintiffs were in fact not dismissed because of the disruption, but because of the content of their speech"). The Second Circuit admonished in *Johnson* that

> [t]hough the qualified immunity inquiry is generally an objective one, a defendant's subjective intent is indeed relevant in motive-based constitutional torts such as [this].... Otherwise, defendants in such cases would always be immunized from liability "'so long as they could point to objective evidence showing that a reasonable official could have acted on legitimate grounds.'"

342 F.3d at 116 (quoting *Lucarto v. Safir*, 264 F.3d 154, 169 (2d Cir. 2001)).

In the Third Circuit "[o]nly after the jury ha[s] determined the nature and substance of the plaintiff's alleged activity c[an] the court decide its status as protected or unprotected." *Bennis v. Gable*, 823 F.2d 723, 729 (3d Cir. 1987). In the Eighth Circuit, "[a]ny underlying factual disputes concerning whether the plaintiff's speech is protected, ... should be submitted to the jury.... For example, the jury should decide factual questions such as the nature and substance of the plaintiff's speech activity, ... and whether the speech created disharmony in the work place." *Shands v. City*

of Kennett, 993 F.2d 1337, 1342 (8th Cir. 1993).[28] In the Tenth Circuit, "courts are ... required to separate fact from law to undertake their role in assessing the effect on rights of free expression.... The district court ... [should] assess whether the inquiry involves an underlying question of historical fact.... Those facts as determined by the jury can then be employed in the ultimate constitutional inquiry conducted by the court." *Weaver v. Chavez*, 458 F.3d 1096, 1101-02 (10th Cir. 2006). The Sixth Circuit accords the trier of fact an even greater role, holding that "[w]hen a *Pickering* claim is adjudicated on its merits, it is for the fact-finder, be it jury or court, to determine the relative weight of these potentially antithetical interests." *Guercio v. Brody*, 911 F.2d 1179, 1183 (6th Cir. 1990).

The conflict is well recognized. In *Posey v. Lake Pend Oreille School Dist.*, 546 F.3d 1121 (9th Cir. 2008), the Ninth Circuit noted that "[t]he circuits are ... split on the question whether the balancing inquiry is an issue of law or fact." 546 F.3d at 1128 n.3 (contrasting decisions in the Second and Eighth Circuits with the Fourth Circuit decision in *Joyner*). The Tenth Circuit

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[28] *See Belk v. City of Eldon*, 228 F.3d 872, 878 (8th Cir. 2000) ("[b]oth [*Connick*] issues are questions of law for the court to decide.... Any underlying factual disputes, however, are properly submitted to the jury...."); *McGee v. South Pemiscot School Dist. R-V*, 712 F.2d 339, 342 (8th Cir. 1983) ("It was for the jury to decide whether the letter created disharmony between McGee and his immediate supervisors."); *Roberts v. Van Buren Public Schools*, 743 F.2d 949, 954 (8th Cir. 1985) ("proper resolution of [whether the plaintiff engaged in protected activity], particularly as to the balancing, may involve determination by the jury of certain underlying facts....").

has acknowledged the circuit conflict as well. *Weaver v. Chavez*, 458 F.3d at 1011 (10th Cir. 2006) ("The circuits are split ... as to whether the jury has *any* role in the *Pickering* balancing, especially where the application of the balancing might turn on disputed questions of fact.") (emphasis in original; contrasting decisions in the Second and Eighth Circuits with decision in the Fourth Circuit).

The majority rule is clearly correct. "An issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question." *Miller v. Fenton*, 474 U.S. 104, 113 (1985). The plurality opinion in *Waters v. Churchill* reasoned that where there is a dispute regarding whether an employer dismissed an employee because of an unprotected disruptive statement, or in retaliation for a protected nondisruptive statement, that question must be resolved by the factfinder. 511 U.S. at 682. That is precisely the dispute in this case. Plaintiffs contend that they were forced to resign for giving Mr. Berkeley a complaint form; the defendant has not yet argued that doing that would be disruptive. The Fourth Circuit, on the other hand, believed that Caldwell got rid of the plaintiffs because he thought they were fomenting litigation against their boss, and "viewed [that] as a threat to his ability to manage the police department." App. 17a. Caldwell's "view[]" – as found by the court of appeals – was the "[m]ost critical[]" aspect of its analysis. *Id*. There was also a dispute of fact in this case about what Caldwell was told about the results of the Fields' investigation. The Fourth Circuit held that it

was reasonable for Caldwell to rely on his conversation with Fields about Berkeley's statements; but what Fields said in that conversation is very much in dispute, because Caldwell's account[29] is inconsistent with the contemporaneous records. That dispute is central to the disagreement about Caldwell's motive. If none of those present at the conversation among Crouse, Winningham and Berkeley stated to Fields that the detectives urged Berkeley to sue Roach or the police department, and Caldwell knew that, he could not reasonably have concluded that Crouse or Winningham had done so.

This case illustrates the insolvable practical problems created by the Fourth Circuit rule. The contemporaneous 2013 accounts and recordings of what Berkeley, Crouse and Winningham said and wrote, including Fields' own report, cannot easily be reconciled with Caldwell's later account of what he had been told by Fields. The appropriate method for sorting that out is at an evidentiary hearing, where each witness can be cross-examined about these differences, and the trier of fact can assess the credibility of everyone involved. Perhaps Fields will testify that Berkeley, Crouse and Winningham all made key statements when his recording device happened to be off, and that he just forgot to mention those pivotal statements in his 2013 report. A motion for summary judgment can be an effective tool for identifying genuine issues of

[29] The panel cites to JA 620, the passage in which Caldwell recounts Fields' supposed summary of Berkeley's statements to him. App. 18a.

material fact; it was never intended to be a method of resolving such factual issues. Faced with conflicting accounts and possible inferences, an appellate court which treated all aspects of the issues as "questions of constitutional law for the court" could do little more than resort to conjecture and surmise.

II. THERE IS AN IMPORTANT AND EXPANDING CIRCUIT CONFLICT REGARDING WHETHER CERTAIN SPEECH BY PUBLIC EMPLOYEES IS ACCORDED ONLY "LESSENED" PROTECTION

The second conflict implicated by the decision below is a longstanding disagreement among the courts of appeals about the nature of balancing under *Pickering* and its progeny. When a public employee speaks on a matter of public concern, whether that speech enjoys constitutional protection depends on balancing the interest of the speaker and public in freedom of expression against the interest of the employer in the effective functioning of the employing agency. Most circuits understand this to mean that the existence of an interest in free expression is a given, and that the relevant inquiry concerns only whether the employer has adduced sufficient grounds to limit that expression. Three circuits, on the other hand, believe that federal judges are also to evaluate, by yet evolving standards, the value of the particular speech at issue. The Fourth Circuit decision in the instant case establishes an especially expansive version of the grounds on which the

value of an employee's speech can be downgraded in value by a federal judge.

This conflict derives in part from differences in the language of this Court's opinions. *Pickering* and *Connick* spoke in general terms about striking "a balance between the interest of the [employee] as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568; *Connick*, 461 U.S. at 142. That language could have been understood to authorize courts to evaluate not only the nature of any legitimate government interests affected, but also the nature and magnitude of the interest of the speaker (or the public). Subsequently, in applying the balancing test in *Rankin v. McPherson*, 483 U.S. 378, 389-91 (1987), the Court discussed only the various possible injuries that the plaintiff's speech might have caused to the employer. Then in *Garcetti*, the Court limited the inquiry to an assessment of the government's proffered justification for limiting the speech in question. When an employee has spoken as a citizen on a matter of public concern, it held, "[*t*]*he* question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." 547 U.S. at 418 (emphasis added). *Lane v. Franks*, 134 S.Ct. 2369 (2014), reiterated that formulation. 134 S.Ct. at 2378.

Eight circuits apply the standard in *Garcetti*, and limit the so-called balancing inquiry to whether the

employer has established a sufficient legitimate justification for restricting the employee's speech. For example, the Second Circuit in *Ruotolo v. City of New York*, 514 F.3d 184, 189 (2d Cir. 2008) (opinion joined by Sotomayor, J.), explained that "[w]hether public employee speech is protected from retaliation under the First Amendment entails two inquiries: (1) 'whether the employee spoke as a citizen on a matter of public concern' and, if so, (2) 'whether the relevant governmental entity had an adequate justification....' " (Quoting *Garcetti*). The Third, Fifth, Sixth, Ninth, Tenth, Eleventh, and District of Columbia Circuits apply the same standard, quoting this same passage from *Garcetti*.[30] They break down application of *Pickering* and its progeny into a series of "steps," one of which is assessing the adequacy of the government's proffered justification. There is no "step" in which those circuits would undertake to adjust the "weight" of the interest of the speaker and the public in free expression. As the Tenth Circuit explained in *Dixon v. Kirkpatrick*, 553 F.3d 1294 (10th Cir. 2009), if the plaintiff spoke as a citizen about a matter of public concern,

> [w]e go on ... to decide "whether the employee's interest in commenting on the issue

[30] *Hill v. Borough of Kutztown*, 455 F.3d 225, 241-42 (3d Cir. 2006); *Anderson v. Valdez*, 845 F.3d 580, 592-93 (5th Cir. 2016) ("two inquiries"); *Holbrook v. Dumas*, 658 Fed.Appx. 280, 284 (6th Cir. 2016) ("two-step inquiry"); *Oyama v. University of Hawaii*, 813 F.3d 850, 864 (9th Cir. 2015) ("five-step inquiry"); *Helget v. City of Hays, Kansas*, 844 F.2d 1216, 1222 (10th Cir. 2017); *Carollo v. Boria*, 833 F.3d 1322, 1329 (11th Cir. 2016) ("two inquiries"); *Mpoy v. Rhee*, 758 F.3d 285, 289-90 (D.C. Cir. 2014) ("two-step inquiry").

> outweighs the interest of the state as employer." ... Although this element is framed as a "balancing test", this Court has held that First Amendment rights "are protected 'unless the employer shows that some restriction is necessary to prevent the disruption of official functions or to ensure effective performance by the employee.'"

553 F.3d 1304 (quoting *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192, 1203 (10th Cir. 2007)).

On the other hand, with the decision below, there are now three circuits that construe *Pickering* balancing to authorize federal judges to assign a particular level of value to the speech at issue in each case. Decisions in the First and Eighth Circuits permit such evaluation in only limited circumstances; judges are to assign less weight to the speech of a public employee if he or she was motivated in whole or part by self-interest, rather than by an entirely altruistic desire to contribute to public discussion. *O'Connor v. Steeves*, 994 F.2d 905, 915 (1st Cir. 1993) ("O'Connor's motives for speaking out are properly weighed in the balance under *Pickering*.... Thus, insofar as self-interest is found to have motivated public-employee speech, the employee's expression is entitled to less weight in the *Pickering* balance than speech on matter of public concern intended to serve the public interest."); *Barnard v. Jackson County, Missouri*, 43 F.3d 1218, 1226 (8th Cir. 1995) ("Upon remand, the district court is free in conducting the *Pickering* test to determine whether Barnard's motives for speaking with the FBI were less

than altruistic and therefore accord this expression less weight than speech purely intended to serve the public's interest.") (footnote omitted); *Porter v. Dawson Educational Service Co-op.*, 150 F.3d 887, 894 (8th Cir. 1998).

The Fourth Circuit decision in the instant case dramatically expands the scope of judicial evaluation of the value of public-employee speech. Under the decision below, there is a "lessened public interest in speech" (App. 16a), and a concomitant lessened degree of constitutional protection, in three circumstances, only one of which is recognized in the First and Eighth Circuits. First, there is a lessened interest if the speech was "not an effort to participate in a larger public dialogue." App. 15a. Here the plaintiffs spoke to only one person, not, for example, "at a public meeting." *Id.* 16a. Second, there is a lessened interest where the speaker is "not providing a particularly well informed opinion." *Id*. Third, a lessened interest exists "to the extent that a public employee's expression is in furtherance of matters of personal concern." *Id.*

The contrary majority rule is clearly the correct one. The First Amendment itself reflects a judgment by the American people that freedom of expression has inherent value. *See U.S. v. Stevens*, 559 U.S. 460, 470 (2010). There are certain narrow "historical and traditional categories" of expression, such as obscenity, that have been deemed to have relatively little value. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in judgment). But judges have no roving

commission to create new categories of less valued speech, or to decide that speakers, or the public, have a "lessened interest" in certain other types of speech or under particular types of circumstances.

The particular "lessen[ing]" doctrines promulgated by the Fourth Circuit illustrate the unsoundness of this entire approach. The court of appeals reasoned that the plaintiffs' speech involved a lessened interest, and thus deserved lessened protection, because they were not trying to "participate in a larger public dialogue." App. 15a. Instead of writing a letter to a newspaper, or speaking at a public meeting, Crouse and Winningham had talked privately only with a single individual. App. 16a. Five circuits have expressly rejected this very distinction, correctly holding that speech is not less deserving of protection because it occurs in private.[31] *Givhan v. Western Line Consol. Sch.*

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[31] *Fox v. District of Columbia*, 83 F.3d 1491, 1494 (D.C. Cir. 1996) ("The absence of media coverage is of no consequence. Circuit law is clear that 'the fact that [an employee's] statement was not made public does not affect the analysis.' *Tao v. Freeh*, 27 F.3d at 640.... An employee is not constitutionally penalized for making a sensitive report discreetly and without fanfare, or for failing to elicit the media's interest. Editors are not gatekeepers for employees' First Amendment rights."); *Marquez v. Turnock*, 967 F.2d 1175, 1178 (7th Cir. 1992) ("Nor should it make any difference that most of Marquez's statements were made to other persons within the Department, rather than to the general public."); *Speigla v. Hull*, 371 F.3d 928, 937-38 (7th Cir. 2004) ("an employee who attempts to follow internal mechanisms to resolve important issues should not automatically be treated less favorably than the individual who immediately turns to the press or public forum."); *Hafley v. Lohman*, 90 F.3d 264, 267 (8th Cir. 1996) ("Whether the

Dist., 439 U.S. 410 (1979), insisted that the First Amendment requires "the *same* sort of *Pickering* balancing for the private expression of a public employee as it does for public expression." 439 U.S. at 415 (emphasis added; footnote omitted). *Rankin v. McPherson*, 483 U.S. 378, 388 n.13 (1987), held that "a purely private statement on a matter of public concern will rarely, if ever, justify discharge of a public employee." In many circumstances, private speech to the proper single individual will be more effective at correcting a problem of public concern than a general public appeal.[32] In some contexts, " 'one-on-one communication'

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protected speech is actually communicated to the public is irrelevant."); *Starrett v. Wadley*, 876 F.2d 808, 816 n.11 (10th Cir. 1989) ("when the First Amendment otherwise would protect an employee's statements, the fact that the employee makes the statements privately to the employer rather than publicly does not eliminate the Constitution's protections"); *Ferrara v. Mills*, 781 F.2d 1508, 1516 n.11 (11th Cir. 1986) ("speech is no less protected because it was made in private."). The Third Circuit once applied this lessening standard. *Roseman v. Indiana University of Pennsylvania*, 520 F.2d 1364, 1368 (3d Cir. 1975) ("Roseman's expressions were essentially private communications.... As Roseman's communications were made in forums not open to the general public ... , the First Amendment interest in their protection is correspondingly reduced.") (footnote omitted). The Third Circuit has held that *Roseman* is no longer good law after *Givhan*. *Trotman v. Bd. of Trustees of Lincoln University*, 635 F.2d 216, 230 n.10 (3d Cir. 1980); *see McGill v. Bd. of Ed. of Pekin Elementary Sch. Dist.*, 602 F.2d 774, 777 n.4 (7th Cir. 1979).

[32] *Azzaro v. County of Allegheny*, 110 F.3d 968, 978 (3d Cir. 1997) (en banc) ("Private dissemination of information and ideas can be as important to effective self-governance as public speeches."); *Gardetto v. Mason*, 100 F.3d 803, 815 (10th Cir. 1996) ("Private communications are often the most effective way to

is 'the most effective, fundamental, and perhaps economical avenue of political discourse.'" *McCullen v. Coakley*, 134 S.Ct. 2518, 2536 (2014) (quoting *Meyer v. Grant*, 486 U.S. 414, 424 (1988)). The Fourth Circuit decision has the peculiar effect of providing an incentive for government employees to contact the press or broadcast their objections to a wide audience, the type of speech that is often more likely to be disruptive to an employer than a private conversation.[33] *See Garcetti*

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bring about policy changes and the least disruptive to the delivery of government services.").

[33] *O'Connor v. Steeves*, 994 F.2d 905, 917 n.10 (1st Cir. 1993) ("[A] public employee, whose disclosure have the potential to disrupt the employing agency or department, may act responsibly by taking steps to minimize disruption by limiting dissemination to the public authorities most directly concerned."); *Pappas v. Giuliani*, 290 F.3d 143, 158 (2d Cir. 2002) (Sotomayor, J.) ("the fact that speech takes place in private ... reduces the likelihood of disruption.);.... Second, it enhances the free speech interests at stake because the employee is speaking in his capacity 'as the member of the general public he seeks to be.'" (quoting *Pickering*, 391 U.S. at 574); *Hulbert v. Wilhelm*, 120 F.3d 648, 654 (7th Cir. 1997) ("We find it hard ... to believe that the county would have preferred [the plaintiff] going immediately to the local newspapers and television stations with his information."); *Atcherson v. Siebmann*, 605 F.3d 1058, 1063 n.6 (8th Cir. 1979) ("Atcherson's use of a private letter would ordinarily cause less disruption than making such charges publicly."); *Lee v. Nicholl*, 197 F.3d 1291, 1296 n.1 (10th Cir. 1999) ("[O]verly emphasizing the forum of speech used by the employee threatens to upset the *Pickering* balance. Requiring employees to speak publicly to have their speech qualify as a matter of public concern may jeopardize the same speech in the second step of the *Pickering* balance, where the employee's interest in the speech is weighed against the government's interest in preventing undue disruption in the workplace. In several cases this court has found employee speech to be unnecessarily disruptive because

v. Ceballos, 547 U.S. at 427 (Stevens, J., dissenting) ("It seems perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors."). Under this standard Crouse and Winningham would have been accorded a greater degree of protection if, instead of meeting privately with Berkeley, they had taken out a full-page ad in the local newspaper, reprinting the complaint form and in a bold headline calling it to the attention of Mr. Berkeley. For a public employee in the Fourth Circuit, the parameters of this standard are intolerably vague. An audience of one is so small as to trigger lessened protection; on the other hand, a speech to a national meeting of ACLU members would be fully protected. But how many people have to be present to avoid lessened protection – 10? 50? 100? – is simply unclear.

Equally untenable is the rule in the First, Fourth, and Eighth Circuits that there is less public interest in, and thus less protection for, speech "to the extent that a public employee's expression is in furtherance of matters of personal concern." App. 16a. This Court has repeatedly indicated that activity that would otherwise be protected by the First Amendment does not lose that protection solely because of what would otherwise be an impermissible purpose. *B E & K Construction Co. v. NLRB*, 536 U.S. 516 (2002). A fortiori, the degree of constitutional protection accorded speech cannot be reduced because the speaker had a

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the employee opted to "go public" before utilizing internal lines of communication.").

"personal," but entirely lawful, motive. As several lower courts have correctly noted, the individuals who are personally affected by a matter of public concern are the most likely to speak up about it; if there is any danger of employer retaliation, they may be the only ones who will do so.[34] Under the standard in the First, Fourth, and Eighth Circuits, the greater the number of people adversely affected by a current or proposed government policy, the smaller the number of people who could safely discuss it. Under this standard, most public employees would probably have a lessened level of protection if they said anything about repeal of the Affordable Care Act or withdrawal from the Paris climate change agreement, but all would be fully protected if they took a position on whether Congress should repeal the law designating October 9 as Lief Erickson

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[34] *Rode v. Dellarciprete*, 845 F.2d 1195, 1202 (3d Cir. 1988) ("Dismissing ... speech as unprotected merely because [the speaker] had a personal stake in the controversy fetters public debate on an important issue because it muzzles an affected public employee from speaking out."); *Zamboni v. Stamler*, 847 F.2d 73, 78 (3d Cir. 1988) ("[I]t is unlikely that an employee who lacks a person interest in the subject that gives rise to the speech in question would file a lawsuit to vindicate his or her personal rights."); *O'Donnell v. Barry*, 148 F.3d 1126, 1134 (D.C. Cir. 1998) ("Indeed, it may be that those employees who are dissatisfied with their workplaces are precisely those who are likeliest to notice malfeasance, and be willing to speak up about it."); *Kristofek v. Village of Orland Hills*, 712 F.3d 979, 985 (7th Cir. 2013) ("The marketplace of ideas would become quite impoverished indeed if anyone (including public employees) motivated solely by his or her own self-interest were precluded from participating in it."); *Breuer v. Hart*, 909 F.2d 1035, 1039 (7th Cir. 1990) ("Wrongdoing may often be revealed to the proper authorities only by those who have some personal stake in exposing wrongdoing").

Day. The Fourth Circuit version of this rule is a vaguely described sliding scale; the "extent" to which an employee has a personal stake in some subject reduces proportionately his or her constitutional protection. *See* App. 17a (plaintiffs "more concerned with getting Roach in trouble than ensuring an appropriate response"). The greater the harm caused by an employer's misconduct, the lesser the constitutional protection accorded to the victim; thus among victims of sexual harassment, a rape victim who complained would have lesser First Amendment rights than a woman who was the target of uncouth remarks. Even the most astute government employee could not anticipate what that would mean in practice. And the vagueness of this rule, like the size of audience rule, might guarantee the availability of a qualified immunity defense in all but the most unusual of cases.

The Fourth Circuit rule that speech by public employees is less protected if the speakers do not offer "a particularly informed opinion" (App. 16a) is "startling and dangerous." *U.S. v. Stevens*, 559 U.S. at 470. Entrance into the free market place of ideas is not limited to those who are "particularly informed." Public employees who lack the slightest scientific training have the same constitutional right to discuss climate change or Ebola as an engineer at NASA or a physician at the Centers for Disease Control. Federal judges have no commission to rate the comparative informativeness of speakers who discuss matters of public concern as if they were scoring Olympic ice dancers.

III. THE FOURTH CIRCUIT'S QUALIFIED IMMUNITY STANDARD REGARDING *GARCETTI* IS INCONSISTENT WITH THE DECISIONS OF THIS COURT AND NUMEROUS COURTS OF APPEALS

The Fourth Circuit's holding that Caldwell was entitled to qualified immunity with regard to *Garcetti* is palpably inconsistent with the decisions of this Court, and with decisions in the other circuits in which this question has arisen.

Qualified immunity may be available if at the time of the asserted constitutional violation either the legal standard was unclear, or the relevant facts were unclear to the defendant. The court of appeals did not suggest that either of those circumstances was present here. Under *Garcetti*, speech by a public employee is outside the protection of the First Amendment if the employee speaks "pursuant to his or her official responsibilities." 547 U.S. at 424. The court of appeals did not contend that in the context of this case there was any uncertainty about what that standard meant. There was arguably a dispute about whether the official responsibilities of a Moncks Corner detective included distributing citizen complaint forms, but the Fourth Circuit did not suggest that the Chief of Police himself would not have known the answer. In a small department with only 25 officers, the Chief of Police obviously would know the responsibilities of his subordinates.

Rather than apply the *Garcetti* standard, and inquire whether Chief Caldwell could reasonably have believed that distributing the complaint forms was among the "official responsibilities" of police detectives, the Fourth Circuit held that Caldwell was entitled to qualified immunity because he could reasonably have believed that Crouse and Winningham, in giving Berkeley the complaint form, "were speaking in their capacity as employees of the police department." App. 14a. But whether an individual "speak[s] in [his or her] capacity as [an] employee" is not the governing legal standard, particularly in the wake of the 2006 decision in *Garcetti*. In *Connick* the Court distinguished between speech "as a citizen upon matters of public concern" and speech "as an employee upon matters only of personal interest." 461 U.S. at 147. That early formula combined two distinct questions, the "matter" about which an employee spoke, and whether he spoke "as a citizen." *Garcetti* clearly separated the two issues, and clearly announced that a public employee speaks as a citizen unless he or she is speaking "pursuant to [his or her] official duties." 547 U.S. at 421. This Court has not used the phrase "speaks as an employee" since the 2004 decision in *City of San Diego v. Roe*, 543 U.S. 77, 83 (2004). In this context, the Court has never used the phrase speaking "in their capacity as employees" or "in his or her capacity as an employee." At the time of the events giving rise to this action, no reasonable person could have believed that under *Garcetti* an employee who was *not* speaking "pursuant to [his or her] official duties" was nonetheless outside the protection of the First Amendment if he or she were in some sense

"speaking in his or her capacity as [an] employee[ ]." As of 2013 there clearly was no such constitutional rule under *Garcetti*.

Other circuits, in evaluating qualified immunity claims since *Garcetti*, consistently apply only the "pursuant to ... official duties" standard. *E.g., Anderson v. Valdez*, 845 F.3d 580, 596-601 (5th Cir. 2016); *Demers v. Austin*, 746 F.3d 402, 410-18 (9th Cir. 2014); *Decotiis v. Whittemore*, 635 F.3d 22, 36-38 (1st Cir. 2011).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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848 F.3d 576
United States Court of Appeals,
Fourth Circuit.

Richard **CROUSE**; George T. Winningham,
Plaintiffs-Appellants,

v.

TOWN OF MONCKS CORNER; James Chad Caldwell, Chief of Police, Moncks Corner Police Department, Defendants-Appellees.

No. 16-1039
|
Argued: December 7, 2016
|
Decided: February 15, 2017

Affirmed.

Diana Gribbon Motz, J., filed opinion concurring in judgment.

Appeal from the United States District Court for the District of South Carolina, at Charleston. C. Weston Houck, Senior District Judge. (2:14-cv-00438-CWH)

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Before WILKINSON, MOTZ, and FLOYD, Circuit Judges.

Opinion

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Floyd joined. Judge Motz wrote a separate opinion concurring in the judgment.

WILKINSON, Circuit Judge:

Appellants are two police officers who appeal their dismissal from the force, claiming that it was in retaliation for the exercise of their First Amendment rights. The district court granted qualified immunity to the police chief on the ground that it was unclear whether the officers had acted as private citizens or government employees. For the reasons that follow, we affirm the judgment.

I.

Plaintiffs Richard Crouse and George Winningham were detectives in the Moncks Corner Police Department until they were forced to resign in October 2013. Winningham was a corporal, and he reported directly to Crouse, a sergeant. Crouse, in turn, reported to Lieutenant Michael Roach. Roach's supervisors were Captain Mark Murray and, in charge of the entire department, Chief Chad Caldwell.

Crouse and Winningham had "good" relationships with Roach when they began to work for him, but those relationships deteriorated over time. J.A. 980, 1091. Crouse and Winningham complained about Roach's management style, his treatment of criminal suspects, and his showing the officers inappropriate pictures. Chief Caldwell agreed that Roach could be "argumentative" and "abrasive." J.A. 608. Another officer described Roach as "aggressive," but she felt that his approach as a detective "tend[ed] to work." J.A. 1323. Crouse discussed his complaints about Roach with both Captain Murray and Chief Caldwell, but until October 2013, these complaints did not include accusations of excessive use of force.[1]

[1] The plaintiffs also point to an incident at a high school reunion, an argument Roach and Winningham had over a duty assignment, and an altercation between Roach and his brother. It is not clear that Chief Caldwell even knew of the first two alleged incidents, and Roach's behavior, while allegedly rude and truculent, speaks more to an argumentative personality than to any harm remotely relevant to this case.

The sequence of events leading to Crouse's and Winningham's resignations began with the arrest of James Berkeley on October 4, 2013. Berkeley had fallen asleep in his car in a Wal-Mart parking lot after taking the wrong medication. His three sons in the car could not wake him and alerted Wal-Mart security, who called the police. Roach was the first to arrive on the scene. Berkeley claims that Roach pulled him from the car and threw him to the ground, while Roach says that he pulled Berkeley out of the car to wake him up. A second Moncks Corner police officer, Shawnda Winder, arrived to find Berkeley standing outside of his car arguing with Roach. While she did not see the initial encounter, Winder felt that Roach was being rude to Berkeley and making the situation more difficult.

Roach and Winder learned that Berkeley had an outstanding arrest warrant and placed him under arrest in the back of Winder's patrol car. While Berkeley was in the patrol car, he and Roach began to argue again. Roach tried to shut the car door, but Berkeley's leg prevented it from closing. Roach tried to shut the door again and then used a knee strike to try to force Berkeley's leg into the car. Berkeley claims the knee strike hit his groin, while Roach claims the strike was to Berkeley's outer thigh. After the knee strike, Berkeley jumped out of the patrol car. Roach and Winder tried to push Berkeley back into the patrol car. Another officer on the scene, Officer Dozier, was able to force Berkeley onto the ground. Roach and Dozier held Berkeley down, and Roach threatened to use his Taser

if Berkeley resisted further. Berkeley calmed down, and Dozier and Winder helped him back into the patrol car.

Crouse and Winningham learned about this incident the following Monday, October 7, 2013. That morning, another officer told Crouse and Winningham that he had heard that Roach had "kneed Mr. Berkeley in the" groin. J.A. 1116. Crouse and Winningham read the incident report and viewed pictures of Berkeley's injuries. Crouse discussed his concerns about the incident with Captain Murray.

The next day, Crouse and Winningham decided to talk to Berkeley. During their lunch, Crouse and Winningham drove to Berkeley's house. They were in plainclothes and driving an unmarked car, but their guns and badges were visible. After a few minutes sitting outside the house, they saw Berkeley and initiated a conversation with him. Crouse and Winningham encouraged him to file a complaint about Roach. They told him that other officers supported his version of the story, and Winningham suggested that Berkeley get an attorney. Crouse also handed Berkeley a form that the police department prepared for citizens to submit complaints about police officers. These forms were freely available in the police station and were distributed by clerical staff and police officers.

Crouse and Winningham made several efforts to conceal their visit to Berkeley. Crouse used a separate piece of paper to hold the citizen complaint form, ensuring that his fingers never touched the form that he

gave to Berkeley. Crouse told Berkeley to pretend not to recognize the officers if they saw each other in the police station. After they left, the two officers initially agreed to say that Berkeley had flagged them down but ultimately decided to tell the truth if they were questioned.

Despite the officers' entreaties to Berkeley not to discuss their visit, he spoke with Officer Winder that day. He told her that a Moncks Corner police officer had encouraged him to sue Roach and the Moncks Corner Police Department. Winder informed Chief Caldwell, who assigned Lieutenant Mark Fields to investigate the entire incident – both Berkeley's claim of excessive use of force and the visit by the mysterious officers.

Fields began his investigation by reviewing the incident report and interviewing some of the officers who were present at Berkeley's arrest. On October 15, 2013, Fields interviewed Berkeley about both his arrest and the officers who had come by his house. Based on Berkeley's physical description of the two officers, Fields suspected that they were Crouse and Winningham.

After reporting his suspicions to Chief Caldwell, Fields interviewed Crouse and Winningham separately. Both admitted to speaking with Berkeley and gave written statements describing what they had done. Fields told Chief Caldwell, who "was absolutely outraged." J.A. 687. Caldwell instructed Captain Murray to give Crouse and Winningham the opportunity to

resign. Murray told Crouse and Winningham that if they did not resign, they would be terminated, and both officers resigned.

Fields's investigation into Berkeley's accusation of excessive force continued. After Fields finished his investigation, Chief Caldwell requested that the South Carolina Law Enforcement Division investigate the incident. That investigation ended in March 2014, when the local prosecutor determined that the evidence did not support seeking criminal charges against Roach for excessive use of force.

On February 19, 2014, Crouse and Winningham filed suit against Chief Caldwell and the Town of Moncks Corner. Relevant here, they raised a claim under 42 U.S.C. § 1983, arguing that their forced resignations had been an unconstitutional retaliation for the exercise of their First Amendment rights. At a hearing, the district court held that Chief Caldwell was entitled to qualified immunity on the First Amendment claim. The court reasoned that it was not clearly established law that Crouse and Winningham were acting as private citizens when they spoke to Berkeley and that, under *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006), acting as a private citizen was a necessary element of a First Amendment retaliation claim. The parties agreed to dismiss without prejudice two remaining claims.[2] Crouse and Winningham now

[2] The district court initially declined to dismiss these two claims, which dealt with Crouse and Winningham's wages, noting that they were factually distinct from the other issues the court

appeal the grant of summary judgment on their First Amendment claim.

II.

It is well established that government workers do "not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of [their] employment." *City of San Diego v. Roe*, 543 U.S. 77, 80, 125 S.Ct. 521, 160 L.Ed.2d 410 (2004) (per curiam). Underlying this rule is both the government employee's interest, "as a citizen, in commenting upon matters of public concern," *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), and the community's interest in hearing those employees' "informed opinions on important public issues." *Roe*, 543 U.S. at 82, 125 S.Ct. 521. Nonetheless, "a governmental employer may impose certain restraints on the speech of its employees . . . that would be unconstitutional if applied to the general public." *Id.* at 80, 125 S.Ct. 521. A public agency has an interest "in promoting the efficiency of the public services it performs through its employees," *Pickering*, 391 U.S. at 568, 88 S.Ct. 1731, and

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was considering. In its final order, however, the district court dismissed the two wage claims without prejudice pursuant to an agreement of the parties, and Crouse and Winningham have refiled the claims as a new and separate action. The dismissal without prejudice was the functional equivalent of severing the claims, creating "two discrete, independent actions, which then proceed as separate suits for the purpose of finality and appealability." *Gaffney v. Riverboat Servs. Of Ind., Inc.*, 451 F.3d 424, 441 (7th Cir. 2006). This court thus has jurisdiction to hear the appeal.

allowing all employment decisions to be subject to "intrusive oversight by the judiciary in the name of the First Amendment" would compromise an agency's operations. *Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

When a government employee claims that he was disciplined because of his speech, we use a three-prong test to determine if the employee's rights under the First Amendment were violated. *McVey v. Stacy*, 157 F.3d 271, 277 (4th Cir. 1998). The first prong asks whether the employee "was speaking as a citizen upon a matter of public concern or as an employee about a matter of personal interest." *Id*. This prong can in turn be divided into two inquiries: whether the speech was made as a citizen or pursuant to the employee's duties, *Garcetti*, 547 U.S. at 421, 126 S.Ct. 1951, and whether the content of the speech addressed "a matter of interest to the community" rather than "complaints over internal office affairs." *Connick*, 461 U.S. at 149, 103 S.Ct. 1684. If the speech was made as a citizen and addressed a matter of public concern, the second prong of the test requires a court to balance the interest of the employee in speaking freely with the interest of the government in providing efficient services. *Pickering*, 391 U.S. at 568, 88 S.Ct. 1731. The *Pickering* balancing test demands a "particularized" inquiry into the facts of a specific case. *Connick*, 461 U.S. at 150, 103 S.Ct. 1684. If a court determines that the employee's interest outweighed the government employer's interest, the third prong requires a determination that the employee's speech caused the disciplinary action. *McVey*,

157 F.3d at 277-78. The first two prongs of this test are questions of law, while the third is a factual inquiry. *Brooks v. Arthur*, 685 F.3d 367, 371 (4th Cir. 2012).

Because the first two prongs of the test are questions of law, an employer is entitled to qualified immunity if either prong cannot be resolved under clearly established law. "[Q]ualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). To defeat a qualified immunity defense, a plaintiff must show "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011). In order to hold that a right is clearly established, a court does not need to find "a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Id*. at 741, 131 S.Ct. 2074. The qualified immunity inquiry depends on the official's "perceptions at the time of the incident in question." *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994).

We review de novo a district court's grant of summary judgment based on qualified immunity, viewing the facts in the light most favorable to the nonmoving

party. *Smith v. Gilchrist*, 749 F.3d 302, 307 (4th Cir. 2014).

III.

We hold that Chief Caldwell is entitled to qualified immunity on Crouse and Winningham's First Amendment claim.[3] He could reasonably have viewed their conversation with Berkeley as surreptitious conduct designed to foment complaints and litigation against a supervisor with whom they did not get along. Caldwell saw this behavior as a serious threat to the smooth running of the police department and to his own ability to maintain operational control. In fact, it would be difficult for any institution to function when subordinates are engaged in secretive efforts to foment litigation against supervisors with whom they have, for whatever reason, an unfortunate personal chemistry.

We have the "discretion [to] decid[e] which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson*, 555 U.S. at 236, 129 S.Ct. 808. Because we find that the law was not clearly

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[3] Crouse and Winningham also appeal the grant of summary judgment to the Town of Moncks Corner on their First Amendment claim. Moncks Corner would be liable only if a violation occurred pursuant to a municipal policy. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Because Crouse and Winningham protest a single employment decision involving no municipal policy, the town is not liable. *Greensboro Prof'l Fire Fighters Ass'n, Local 3157 v. City of Greensboro*, 64 F.3d 962, 966 (4th Cir. 1995).

established here, we will not reach the other step in the analysis – whether a constitutional violation actually occurred.

A.

The district court granted Caldwell qualified immunity because it was not clear "from the facts in this case whether [Crouse and Winningham] were speaking as citizens or as government employees." J.A. 1658.

The first inquiry in Crouse and Winningham's case is, again, whether they spoke as "citizen[s] upon matters of public concern" rather than as "employee[s] upon matters only of personal interest." *Connick*, 461 U.S. at 147, 103 S.Ct. 1684. The First Amendment does not protect speech made pursuant to a government employee's official duties, even when that speech is upon a matter of public concern. *Garcetti*, 547 U.S. at 421, 126 S.Ct. 1951. This reflects the fact that "[e]mployers have heightened interests in controlling speech made by an employee in his or her professional capacity." *Id*. at 422, 126 S.Ct. 1951. Government employees do not have a constitutional "right to perform their jobs however they see fit." *Id*.

Determining whether speech was made in the course of an employee's job requires courts "to engage in a 'practical' inquiry into the employee's 'daily professional activities.'" *Hunter v. Town of Mocksville*, 789 F.3d 389, 397 (4th Cir. 2015) (quoting *Garcetti*, 547 U.S. at 422, 424, 126 S.Ct. 1951). Whether the employee

spoke at his workplace or away from it is not dispositive. *Garcetti*, 547 U.S. at 420, 126 S.Ct. 1951. Likewise, courts must look beyond formal job descriptions, and "the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties." *Id*. at 424-25, 126 S.Ct. 1951.

We have encountered only a few cases requiring a detailed inquiry into whether a plaintiff's speech was within the scope of his occupational duties. In *Hunter v. Town of Mocksville*, we held that it was clearly established law in 2011 that police officers did not act pursuant to their official duties when they used a disposable cell phone to make anonymous calls to the governor's office reporting suspected wrongdoing in their police department. *Hunter*, 789 F.3d at 396. The defendant argued that, because all "police officers have a duty to enforce criminal laws" and because the department's manual instructed officers to cooperate with other law enforcement agencies, the plaintiff officers were acting in their capacity as employees. *Id*. at 399. We held, however, that these facts were not sufficient to show that the plaintiffs had acted as police officers rather than as citizens. *Id*.

Here, Crouse and Winningham argue that they spoke as citizens because they were in plainclothes and an unmarked car, they went to Berkeley's house during their unpaid lunch hour, and they were never instructed to speak to Berkeley. On the other hand, though, as Chief Caldwell was aware, Berkeley easily

identified Crouse and Winningham as police officers from their guns and badges. In fact, Berkeley so clearly recognized Crouse and Winningham as police officers that he told Winder that very day that Moncks Corner police officers had visited his home. While the lunch hour was unpaid, Crouse and Winningham were expected to be on call at that time and to remain prepared to do their job. And police officers have many interactions with citizens that are not the result of an instruction from their supervisor but are still a part of their official duties. Plaintiffs also gave Berkeley the police department's citizen complaint form. Though these forms were freely available in the police station, Crouse and Winningham's delivery of an official town form lends to their speech an additional connection to their official police duties.

These facts allowed Chief Caldwell to reasonably believe that, as a legal matter, Crouse and Winningham were speaking in their capacity as employees of the police department. Unlike in *Hunter*, Crouse and Winningham were clearly identified as police officers, and their speech more closely resembled their daily duties as police detectives than did the *Hunter* plaintiffs' calls to the governor's office. Chief Caldwell's perception may be debated, but he is not "liable for bad guesses in gray areas." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992). Because it was reasonable for Chief Caldwell to believe that Crouse and Winningham acted in their public roles as police officers, it was reasonable for Caldwell to believe that their speech

was not protected, and he is thus entitled to qualified immunity.

B.

Even were we to assume arguendo that Crouse and Winningham spoke as private citizens on a matter of public concern, Chief Caldwell would still be entitled to qualified immunity because, based on the clearly established law at the time of his decision and the facts he knew at that time, the outcome of the *Pickering* balancing test is not "beyond debate." *al-Kidd*, 563 U.S. at 741, 131 S.Ct. 2074.

As noted, *Pickering* requires courts to balance "the public employee's interest in speaking on matters of public concern against the government's interest in providing effective and efficient government through its employees." *McVey*, 157 F.3d at 278. "The public's interest in hearing the employee's speech also weighs in the balance." *Brickey v. Hall*, 828 F.3d 298, 304 (4th Cir. 2016). For this inquiry, courts "must take into account the context of the employee's speech . . . and the extent to which it disrupts the operation and mission of the agency." *McVey*, 157 F.3d at 278. The Supreme Court has recognized that "such particularized balancing is difficult." *Connick*, 461 U.S. at 150, 103 S.Ct. 1684.

In applying the balance, we first note that Crouse and Winningham's speech was simply not an effort to participate in a larger public dialogue. Their speech

was not, for example, a letter to a newspaper, *Pickering*, 391 U.S. at 566, 88 S.Ct. 1731, or an online posting contributing to a public discussion of an important issue, *Liverman v. City of Petersburg*, 844 F.3d 400, 409 (4th Cir. 2016), or testimony at a public meeting. *Robinson v. Balog*, 160 F.3d 183, 188 (4th Cir. 1998). Instead, the officers sought to conceal their speech by asking Berkeley to pretend that he had never met them. Moreover, Crouse and Winningham were not providing a particularly informed opinion. They did not witness the alleged use of excessive force and had never, in fact, witnessed Roach using excessive force. J.A. 986. To be sure, "[p]ublic employees do not forfeit the protection of the Constitution's Free Speech Clause merely because they decide to express their views privately rather than publicly." *Cromer v. Brown*, 88 F.3d 1315, 1326 (4th Cir. 1996). Nonetheless, Chief Caldwell could reasonably have surmised that the lessened public interest in the speech meant that his freedom of action was correspondingly broader.

Second, Chief Caldwell was entitled to regard Crouse and Winningham's speech as an outgrowth of their private dissatisfactions with Roach. This court has held, in connection with the *Pickering* balance, that "[t]o the extent that a public employee's expression is in furtherance of matters of personal concern, the public employer's burden of showing the predominance of the public's interest in continuing the efficient functioning of a public entity is lessened." *Joyner v. Lancaster*, 815 F.2d 20, 24 (4th Cir. 1987).

Here, Chief Caldwell knew that Crouse and Winningham did not enjoy working under Roach and that their complaints centered on his demeanor and management style. Crouse and Winningham argue that they were concerned more about the police department not responding to Roach's behavior than about their personal issues with him. They point to the three above mentioned incidents prior to Berkeley's arrest for which Roach was not disciplined: Roach's dispute over a duty assignment with Winningham, an incident at Roach's high school reunion, and Roach's altercation with his brother. *See supra* note 1. There is no evidence, however, that Chief Caldwell even knew of the first two incidents until after Crouse and Winningham resigned. And in all events, the alleged incidents lack any claim to materiality: they do not speak to a pattern of excessive force on the job or any failure on the part of Caldwell to discipline serious misconduct. Moreover, Crouse and Winningham went to Berkeley's house the day after learning about his arrest rather than waiting for the police department to investigate the matter, suggesting that they were more concerned with getting Roach in trouble than ensuring an appropriate departmental response. In short, Chief Caldwell was justified in considering any speech here against the backdrop of the ongoing, private dispute between plaintiffs and Roach.

Most critically, Chief Caldwell viewed what happened here as a threat to his ability to manage the police department. We have noted that, as paramilitary

organizations, "greater latitude is afforded to police department officials in dealing with dissension in their ranks." *Maciariello*, 973 F.2d at 300. When Chief Caldwell decided to give Crouse and Winningham the opportunity to resign, he was justified in the perception that they had gone behind his back to foment litigation against their own boss. While plaintiffs deny that they told Berkeley to sue the department, it was reasonable for Chief Caldwell to believe that Crouch and Winningham had encouraged Berkeley to do just that, J.A. 620, based on Winningham's admission in his written statement that he told Berkeley to get an attorney and Caldwell's conversations with Winder and Fields about Berkeley's claim that an officer had encouraged him to sue Roach and the department.

The chain of command would be left in tatters if subordinates tried to stir up litigation against supervisors with whom they, for whatever reason, did not get along. And it isn't just police departments. Most public agencies feature multiple levels of supervision. What happened here would undermine the hierarchical structure that even the most admirably collaborative institutions maintain.

IV.

There is no way to balance the competing *Pickering* interests without looking at the facts of a particular case, and no court has managed to sketch out

completely clear criteria governing claims of retaliation against employees for the exercise of First Amendment rights. In the absence of clear rules, there must remain room for the judgment of those officials to whom responsibility has been entrusted and accompanying accountability has been required. Chief Caldwell could reasonably have believed that Crouse and Winningham were acting as police officers rather than private citizens when they visited Berkeley. Moreover, given Crouse and Winningham's ongoing disputes with Roach, their efforts to conceal their speech, and the challenge their conduct, if not addressed, posed to police department operations, Chief Caldwell could reasonably have viewed the department's interest in maintaining discipline as paramount in the *Pickering* balance. Because his judgments were reasonable ones, Chief Caldwell is entitled to qualified immunity. The district court's grant of summary judgment is therefore

AFFIRMED.

DIANA GRIBBON MOTZ, Circuit Judge, concurring in the judgment:

For the reasons that follow, I agree that qualified immunity shields Chief Caldwell from liability in this case. I write separately because I cannot join the majority's rationale for so holding.

I.

Garcetti v. Ceballos, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006), instructs that the First Amendment does not protect statements that public employees make "pursuant to their official duties." *Id*. at 421, 126 S.Ct. 1951. As the Supreme Court has explained, "[t]he critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Lane v. Franks*, ___ U.S. ___, 134 S.Ct. 2369, 2379, 189 L.Ed.2d 312 (2014). To answer that question, a court engages in a practical inquiry "into the employee's 'daily professional activities' to discern *whether the speech at issue occurred in the normal course of those ordinary duties*." *Hunter v. Town of Mocksville*, 789 F.3d 389, 397 (4th Cir. 2015) (emphasis added) (quoting *Garcetti*, 547 U.S. at 422, 126 S.Ct. 1951). This inquiry focuses on the employees' actual, ordinary job duties. *See, e.g.*, *Andrew v. Clark*, 561 F.3d 261, 267 (4th Cir. 2009) (emphasizing the materiality of whether a police officer "had an official responsibility to submit a memorandum regarding" a police shooting).

In this case, Chief Caldwell forced Detectives Crouse and Winningham to resign because they brought a citizen complaint form to James Berkeley and encouraged him to file a complaint about the treatment he received from Lt. Roach. Thus, the controlling question is whether this speech by Crouse and Winningham "is itself ordinarily within the scope of [their]

duties." *Lane*, 134 S.Ct. at 2379. The majority apparently believes that it was, but the record does not contain a shred of evidence to support that view.

Indeed, it is undisputed that it was not Crouse and Winningham's job to hand out citizen complaint forms or to encourage citizens to take action against a superior officer. There is no evidence that any officers in Moncks Corner have such duties. Moreover, Crouse and Winningham were not assigned to the Berkeley incident in any capacity, and they went to Berkeley's home during their lunch break. They certainly were not authorized to bring a complaint form to Berkeley or to encourage him to complain about Lt. Roach. In fact, they lost their jobs precisely because they did this. As the captain who oversaw the investigation of Crouse and Winningham explained in his deposition, the detectives were forced to resign because they went outside "the chain of command." J.A. 862.

Chief Caldwell's deposition testimony also substantiates that Crouse and Winningham spoke well outside the bounds of their official duties. The Chief was asked to explain why Frankie Thompson, an officer who purportedly conspired with Crouse and Winningham against Lt. Roach, received only a three-day suspension for his role in the plot. J.A. 262. The Chief responded that if Thompson had gone with Crouse and Winningham to talk to Berkeley, he would have forced Thompson to resign too. J.A. 687. The reason why speaks volumes. According to Chief Caldwell, going to Berkeley with a complaint form and encouraging Berkeley to take action against Lt. Roach was "one of

the most disloyal acts in my 40 year career. *I've never had something like that happen*." J.A. 687 (emphasis added).

This evidence compels the conclusion that Crouse and Winningham spoke and acted outside the scope of their ordinary duties. This is doubly so when we view the evidence in the light most favorable to Crouse and Winningham, as we must on summary judgment even when applying the qualified immunity doctrine. *See Tolan v. Cotton*, ___ U.S. ___, 134 S.Ct. 1861, 1863, 188 L.Ed.2d 895 (2014) (per curiam); *Hunter*, 789 F.3d at 393. *Garcetti* teaches that if Crouse and Winningham acted pursuant to their official duties, there must have been some job duty they were supposedly carrying out. But the record in this case, viewed in whatever light you please, shows that there was no such duty. It also shows that Chief Caldwell did not believe, and could not have reasonably believed, otherwise.

The majority engages in no meaningful inquiry into the detectives' official duties. Instead, it relies almost entirely on the fact that Berkeley easily identified Crouse and Winningham as police officers. *See* Maj. Op. at ___-___. In effect, the majority holds that whether public employees speak "pursuant to their official duties" depends on whether their audience can tell what their job is. But that is not the law. Public employees do not lose their First Amendment rights simply because their audience knows, or can guess, where they work. The majority's conclusion to the contrary has no root in *Garcetti* or its progeny.

II.

Even though the record is clear that Detectives Crouse and Winningham spoke as citizens on a matter of clear public concern, namely, police brutality, I agree that Chief Caldwell enjoys qualified immunity from their claims in this lawsuit.

To determine the Chief's entitlement to qualified immunity, we balance the detectives' interest in speaking out against the Chief's interest in maintaining efficient delivery of the police department's public service. *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). When balancing these interests, we must consider "the manner, time, and place of the employee's expression," as well as "the context in which the dispute arose." *Rankin v. McPherson*, 483 U.S. 378, 388, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987). Qualified immunity applies in this case because no precedent clearly established that this balance favored the detectives.

First Amendment protections for public employees promote transparency and accountability by allowing employees to speak out about misconduct and abuses the public might otherwise never uncover. *See Lane*, 134 S.Ct. at 2377; *City of San Diego v. Roe*, 543 U.S. 77, 82, 125 S.Ct. 521, 160 L.Ed.2d 410 (2004) (per curiam). The need for these protections is particularly acute in police departments.

Police misconduct and abuses of power often involve matters of life and death. And police departments are particularly vulnerable to the temptation to

circle the wagons and "wall themselves off from public scrutiny and debate." *Liverman v. City of Petersburg*, 844 F.3d 400, 413 (4th Cir. 2016). In an ideal world, police misconduct and abuses would be discovered and disciplined according to established procedures. Sadly, this is not our world. Serious allegations of misconduct sometimes go unanswered, and officers who abuse their power sometimes go undisciplined. By permitting officers to speak out in these cases, the First Amendment allows the public to hold a police department accountable when the normal process fails.

However, the need for such incentives is far less compelling when a police department is not even given a chance to review or investigate an incident. This is especially true when officers rush to speak out about an incident of which they have no personal knowledge.

Even viewing the evidence in the light most favorable to the detectives, that is what happened here. J.A. 228, 234, 1114-1128. The Berkeley incident occurred late on Friday, October 4, 2013. On Monday morning, Crouse and Winningham learned about the incident third-hand. J.A. 1115-17. They then reviewed the police report and heard Lt. Roach bragging about how he had subdued Berkeley. J.A. 1118-20. Although Crouse and Winningham did not speak to any of the other officers present at the scene and did not conduct any other significant follow-up, they concluded that Lt. Roach's use of force was excessive. J.A. 1120-23. They went to Berkeley's house the very next day, before the police department had any real opportunity to review Lt. Roach's use of force or begin its own investigation.

J.A. 1126-28, 228, 234. Crouse and Winningham did not even wait for Berkeley to complain that he had been mistreated. Instead, they took it upon themselves to begin the process for removing Lt. Roach.

We must weigh these facts against the extent to which Chief Caldwell reasonably apprehended disruption from the detectives' speech. *See Maciariello v. Sumner*, 973 F.2d 295, 300 (4th Cir. 1992). Police departments have good reason to fear disruption in cases like this. Effective policing requires an effective chain of command, and that is undermined when subordinates try to get their superiors fired at the drop of a hat. More importantly, a police department's ability to protect the public depends on the public's trust that the police department will use its powers responsibly and adequately discipline officers who do not. Officers risk eroding that trust when they go to the public with unsubstantiated allegations of abuse or misconduct without allowing internal review and investigations to unfold. No one is well served when officers rush to try their superiors in the court of public opinion.

Under these circumstances, a reasonable officer in Chief Caldwell's position could conclude that the department's interest outweighed that of the detectives. It was not "beyond debate" which way the scales tilted. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011). At best, it was a gray area to which qualified immunity applies.

This is not to say that qualified immunity applies whenever police officers speak out about misconduct

by their superiors. For example, it is clearly established law in this circuit that police officers may speak out about a department's efforts to cover up an incident of excessive force. *Durham v. Jones*, 737 F.3d 291, 303 (4th Cir. 2013). Our case law also establishes that local police officers may report their superiors' alleged corruption to state law enforcement. *Hunter*, 789 F.3d at 393-95, 401-02. Officers may even do these things quietly or anonymously – without going to the press or grabbing the proverbial megaphone. *See id*. at 401-02 (holding that an anonymous phone call to state authorities was protected and rejecting the argument that "only speech to a media organization can qualify for First Amendment protection"); *Cromer v. Brown*, 88 F.3d 1315, 1327-29 (4th Cir. 1996) (holding that the balancing test "clearly" favored officers' circulation of an anonymous letter because they "moved quietly and did not try to provoke a public confrontation").

However, when officers rush to have a superior officer fired for excessive use of force, without giving the department a chance to conduct its own review or investigation, it is not clearly established law that their interest in telling private citizens to take action against their superiors outweighs the department's interest in preventing disruption. Accordingly, I concur with the majority that Chief Caldwell is entitled to qualified immunity.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA CHARLESTON DIVISION

Richard Crouse and George T. Winningham, Plaintiffs, v. Town of Moncks Corner; Town of Moncks Corner Police Department; and James Chad Caldwell, Chief of Police in his *individual and official capacity*; Defendants.	C.A. No. 2:14-cv-00438-CWH

ORDER ENTERING FINAL JUDGEMENT

Upon consideration of the parties Consent Motion for Final Judgment, it is hereby, ORDERED that a Final Judgment is Entered granting Defendants motion for summary judgment and dismissing Plaintiffs causes of action 1 through 5 in accordance with text order (ECF 78) and Transcript of October 28, 2015 hearing. The remaining claims are dismissed without prejudice in accordance with the stipulation of the parties filed in this matter on December 21, 2015.

AND IT IS SO ORDERED.

/s/ C. Weston Houch
C. WESTON HOUCH
UNITED STATES
DISTRICT JUDGE

December 22, 2015
Charleston, South Carolina

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-1039
(2:14-cv-00438-CWH)

RICHARD CROUSE; GEORGE T. WINNINGHAM

Plaintiffs-Appellants

v.

TOWN OF MONCKS CORNER; JAMES CHAD CALDWELL, Chief of Police, Moncks Corner Police Department

Defendants-Appellees

ORDER

FILED: March 14, 2017

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Transcript of Motion Hearing
October 28, 2015
JA 1656-58

* * *

THE COURT: . . . The plaintiffs were unquestionably during the period of time discussed here public employees. The threshold question, therefore, for determining whether or not there is a violation of their First Amendment rights to freedom of speech is to determine whether or not what they said, what they spoke, was done as a citizen on a matter of public concern, or whether it was done as a part of their official duties. If they spoke as citizens in a matter of public concern, then the possibility of a First Amendment claim arises.

On the other hand, when they speak pursuant to their official duties, they are not speaking as citizens for First Amendment purposes and the Constitution does not insulate their communications from employer discipline. It is very difficult for me in this case to determine whether or not their speech was public or private, if I can use those words for brevity. And I would have a difficult task saying that there are no genuine issues of fact on those issues and therefore grant summary judgment based on that conclusion.

I find that there are issues of fact on how – on what basis these plaintiffs spoke when they spoke; and therefore, I turn on that particular cause of action to

the defense of qualified immunity. And I think the confusion as to the first consideration we made pretty well establishes that qualified immunity is available. I can't tell from the facts in this case whether they were speaking as citizens or as government employees; and therefore, it seems only logical to me that I likewise cannot find that the constitutional right allegedly violated was clearly defined.

To the contrary, we can't determine what it is, so how can we say it's clearly defined? I don't think we can. And I think that the defense of qualified immunity entitles the defendant, Caldwell, summary judgment on the first cause of action.