No. _____

In The
Supreme Court of the United States

PATRICK BOYD,

Petitioner,

v.

MISSISSIPPI DEPARTMENT OF PUBLIC SAFETY; ALBERT SANTA CRUZ, Individually and in his Official Capacity as Commissioner of the Mississippi Department of Public Safety; DONNELL BERRY, Individually and in his Official Capacity as Director of Mississippi Highway Safety Patrol and Assistant Commissioner of the Mississippi Department of Public Safety,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether law enforcement and governmental supervisors, by mere announcement of some collective fear, without any factual basis whatsoever, may override the First Amendment protections of an actively serving officer or employees commenting on matters of public concern.

PARTIES TO THE PROCEEDING

All parties are listed in the caption.

RULE 29.6 STATEMENT

No parties are or entail either parent companies or nonwholly owned subsidiaries.

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2018 U.S. App. LEXIS 27995, ___ F. App'x ___, 2018 WL 4818992.

In the district court:

Boyd v. Miss. Dep't of Pub. Safety, USDC No. 3:16-CV-177.

JURISDICTION

The decision of the Fifth Circuit Court of Appeals was entered on October 3, 2018. There was no petition for rehearing, rehearing en banc, or request for extension of time requested. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I to the Constitution of the United States of America: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people

peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

There is a sharp split in the circuits about whether public employee terminations resulting from alleged internal disruption caused by speech on a matter of public concern can occur without any facts supporting the allegation of disruption caused by the employee. *Gillis v. Miller*, 845 F.3d 677 (6th Cir. 2017). Society and government benefit from First Amendment protection for honest employees. Those forthright employees must not be gagged by supervisors who cannot withstand honest criticism based on the public interest.

In the present case, Petitioner Patrick Boyd had emailed comments on fourteen points of contention within the Mississippi Highway Patrol. One of these points was that the Patrol had been promoting officers who did not meet the Patrol's own internal standards for promotion. As one example, Captain Boyd referenced the promotion of officer Marshall Pack over the more qualified candidate, Gayle McMullin, to head up the training division. Captain Boyd's comments anticipated a decision from the Fifth Circuit Court of Appeals on the exact issue of Marshall Pack's promotion.

Using the Patrol's internal server, Captain Boyd had circulated his email to a small group of fellow officers on March 26, 2015. For almost two weeks afterwards, nothing happened. Silence ensued. Then, on

April 6, 2015, the Fifth Circuit issued its opinion, *McMullin v. Miss. Dep't Pub. Safety*, 782 F.3d 251 (5th Cir. 2015). That opinion paralleled the comments made by Captain Boyd. Captain Boyd had pointed out that the promotion challenged in the *McMullin* decision had been against established procedures, and that the promotion had been made over a candidate with greater qualifications.[1]

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[1] Selected portions of the *McMullin* decision include:

> A jury could infer that Colonel Berry's conduct evinced a connivance to favor Master Sergeant Pack over Lieutenant McMullin based on race. . . .
>
> E. Qualifications Comparison . . .
>
> Master Sergeant Pack, by contrast, had a lower rank, seven fewer years of service with the Department, . . . And, he had been fired twice while working for the Department and assigned to the Mississippi Bureau of Narcotics. Master Sergeant Pack was terminated first in October 1995 for having sex with a confidential informant. He was later reinstated because other officers who engaged in similar activity had not been terminated. He was again terminated in December 2001 for (1) seizing cash from a potential target without accounting for the seizure, (2) participating in sexually explicit behavior during a vacation in Florida, and (3) observing but not reporting illegal drug activity during that vacation. Subsequently, Master Sergeant Pack and the Department entered into a settlement which rescinded his second termination, restored him to the same rank and grade, and gave him full benefits and back pay. . . .
>
> A jury could conclude that the promotion of Master Sergeant Pack, with his dubious record of service and Colonel Berry's stated failure to review the record of Master Sergeant Pack before the promotion, was evidence of discriminatory motive based on race. *McMullin v. Miss.*

A published opinion, in and of itself, is a matter of public concern. *S. Bos. Allied War Veterans Council v. City of Bos.*, 875 F. Supp. 891, 895 (D. Mass. 1995) ("decisions of the court . . . are matters of public concern.").

Only two days after the Fifth Circuit *McMullin* decision came down, on April 8, 2015, Colonel Berry ordered Captain Boyd to appear before him. Colonel Berry was furious. He berated Captain Boyd and told him he had no business raising these issues. There was no mention of disruption within the Patrol, no mention of a "racial ruckus," and no mention of fear.[2] Colonel Berry reacted by removing Boyd from his command and reassigning him to a remote and isolated outpost consigned to salvage. Colonel Berry also removed Captain Boyd from the SWAT team and ordered Boyd to relinquish his team leadership to Marshall Pack, the very same Marshall Pack who had been criticized by the Fifth Circuit for his earlier invalid promotion by Colonel Berry.

By May 29, 2015 Colonel Berry arranged to fire Captain Boyd,[3] using as an excuse an automobile

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Dep't of Pub. Safety, 782 F.3d 251, 255-56 (5th Cir. 2015).

[2] Deposition of Patrick Boyd, Exhibit A, Exhibit 39-2, Case No. 3:16-cv-00177-HTW-LRA (S.D. Miss. 2017).

[3] Also of note is the timing of Berry's action. Berry waited ten days, until on the day that Boyd filed his grievance concerning his transfers, before initiating his termination.

accident, although no other officer had ever been fired for such an accident.[4]

These facts are not reflected in the litigation of this case. The district court and the Fifth Circuit upheld Captain Boyd's termination on a finding that he had caused fear within the SWAT team. No evidence in the record supports this conclusion. The Fifth Circuit made the finding that "the purpose for the transfer to the salvage department was that Boyd caused a 'racial ruckus'[5] and tension within Troop H, and that he was removed from the SWAT team because some of the members 'did not feel safe' working with him." *Boyd v. Miss. Dep't of Pub. Safety*, 2018 U.S. LEXIS 27905, *10 (Oct. 3, 2018). There are no facts in this case that support that finding. There is a vague statement included in Colonel Berry's deposition that "[i]t was just the word out there, they – they didn't feel safe with him."[6]

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[4] Captain Boyd supplied extensive comparative evidence on this issue, but this question never reached the jury.

[5] Boyd's criticism of the promotion policy was not entirely racial, however. His email pointed to white officers as well as black officers who had been promoted in flagrant violation of the Patrol's own written policies. Promotion in accord with established policies, policies established on valid criteria, would have been based on considerations of public safety, while Colonel Berry acted solely to solidify personal allegiance to himself, over public safety concerns.

[6] The Fifth Circuit adopted a rationale from an earlier decision that a police department's interest in preserving loyalty may be satisfied by allegations of a nonspecified "office buzz." *Id.*, at *10. Here, the Defendants offered no proof that any officer actually expressed fear of working with Captain Boyd. Also, that earlier decision, *Graziosi v. City of Greenville Miss.*, 775 F.3d 731, 740 (5th Cir. 2015), had involved criticism expressed in an open forum,

Colonel Berry could give no other information, no specifics whatsoever, even remotely evidencing any discord within the troops.[7]

Captain Boyd's performance record had been flawless before his banishment and subsequent termination. He was a decorated war veteran, had received steady advancement within the patrol, and had won an award from the FBI. Among the recipients of his email were his father and brother, who were also officers within the Highway Patrol, and Gayle McMullin, the officer who had been denied promotion in favor of Marshall Pack. She was also the elected President of the Mississippi State Troopers Association, the informal union of the Highway Patrol.[8]

As to Captain Boyd's fourteen areas of concern, not one was directly denied by the Defendant Patrol.

The one area critical of Colonel Berry's prior promotion of unqualified officers alleges that the invalid promotions were illegal under the Patrol's own regulations and led to unqualified officers being placed in positions of command. Incompetence in law enforcement is potentially endangering to other officers and

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where the general public might learn of dissension within the ranks. Captain Boyd, to the contrary, had sought factual support for his contentions from, at most, sixteen other officers within the Patrol itself and had not yet publicized his contentions.

[7] Deposition of Colonel Donnell Berry, Exhibit B, Exhibit 39-2, pages 8-10, Case No. 3:16-cv-00177-HTW-LRA (S.D. Miss. 2017).

[8] Deposition of Patrick Boyd, Exhibit A, Exhibit 39-2, Case No. 3:16-cv-00177-HTW-LRA (S.D. Miss. 2017).

members of the public at large. It is not disputed that the issues raised by Captain Boyd were matters of public concern.

REASONS FOR GRANTING THE PETITION

A. This Court Should Grant Certiorari to Resolve a Split among the Circuits as to Whether a Governmental Entity must Introduce Evidence of Actual Disruption of its Legitimate Activities Resulting from an Employee's Exercise of Protected First Amendment Rights.

The circuits have not determined whether the articulated rationale from governmental authorities *must* be based on facts. *Sexton v. Martin*, 210 F.3d 905 (8th Cir. 2000). *Sexton* held: "Before the Court commences the *Pickering* balancing test, however, it is critical to determine whether the defendant has produced sufficient evidence that the speech had an adverse effect on the efficiency of the employer's operations. [Citation omitted.] In other words, to put the *Pickering* balancing test at issue, the public employer must proffer sufficient evidence that the speech had an adverse impact on the department." *Sexton*, at 911-12.

Importantly, *Sexton* specifically held: "'a simple assertion by the employer that contested speech affected morale, without supporting evidence,' is not enough . . . ," and "[m]ere allegations of disruption are

insufficient to put the *Pickering* balance at issue." *Id.*, at 912.

Sexton also collected cases from multiple circuit courts that emphasized the need for explicit factual considerations: *See*, *e.g., Williams v. Kentucky*, 24 F.3d 1526, 1537 (6th Cir.), *cert. denied*, 513 U.S. 947 (1994) (where allegations of illegal conduct of public employers have only minimal effect on the efficiency of the office the balance weighs in favor of the speech); *Bieluch v. Sullivan*, 999 F.2d 666, 672-73 (2d Cir. 1993), *cert. denied*, 510 U.S. 1094 (1994) (allegations that speech concerning town budgets, school construction and tax expenditures " 'posed a potential threat' to police operations" insufficient to outweigh protected speech); *Biggs v. Dupo*, 892 F.2d 1298, 1303-04 (7th Cir. 1990) (police officer's interest in critiquing role of politicians in police department policies outweighed allegations of workplace disruption); *Wulf v. Wichita*, 883 F.2d 842, 867 (10th Cir. 1989) (purely speculative allegations of disruption do not outweigh police officer's protected speech); *Rode v. G. Dellarciprete*, 845 F.2d 1195, 1202 (3d Cir. 1988) (Police department employee's allegations of racial animus within department did not affect state's interest in efficiency and performance of department); *Spiegler v. Hull*, 371 F.3d 928 (2004), *cert. denied*, 552 U.S. 975 (2007) (remand in favor of law enforcement officer where the district court was silent on the basic underlying facts) (opinion by Flaum, Wood, Posner).

Recently, the Tenth Circuit has again ruled that governmental employer had "failed to show its

interests outweighed [the employee's] speech. *Knopf v. Williams*, 884 F.3d 939, 945 (10th Cir. 2018). And Justice Sotomayor's dissent in *Pappas v. Giuliani*, 290 F.3d 143, 159 (2d Cir. 2002), *cert. denied*, 539 U.S. 958 (2003) noted that "At some point, such concerns are so removed from the effective functioning of the public employer that they cannot prevail over the free speech rights of the public employee."

Opposing decisions, collected from numerous circuits in *Gillis v. Miller*, 845 F.3d 677, *supra*, held that a mere belief, without more, of disruption caused by the speech defeats First Amendment rights: *Brown v. City of Trenton*, 867 F.2d 318, 322 (6th Cir. 1989); *Cherry v. Pickell*, 188 F. App'x 465, 469-70 (6th Cir. 2006) ("[I]n the context of police departments, we have emphasized that the court should show 'deference to the city's judgment on the matter of discouraging public dissension within its safety forces.'"; *Mosholder v. Barnhardt*, 679 F.3d 443, 451 (6th Cir. 2012) (law enforcement officials often have legitimate and powerful interests in regulating speech by their employees). *Hughes v. Whitmer*, 714 F.2d 1407, 1422 (8th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984) ("[W]here an officer's speech-related activity has the effect of materially disrupting his working environment, such activity is not immunized by constitutional guarantees of freedom of speech."), and *Brown*, *supra*, at 322-23 ("[w]hen employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has

threatened the authority of the employer to run the office.").

The Second, Third, Seventh, Eighth,[9] Ninth, and Eleventh Circuits have each held that evidence of actual disruption is not required. *See, e.g.*, *Tindle v. Caudell*, 56 F.3d 966, 972 (8th Cir. 1995) ("A showing of actual disruption is not always required in the balancing process under Pickering."); *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 472 (3d Cir. 2015) ("The government need not show the existence of actual disruption if it establishes that disruption is likely to occur because of the speech."); *Lewis v. Cohen*, 165 F.3d 154, 163 (2d Cir. 1999), *cert. denied*, 528 U.S. 823 (1999) ("The State need show only a 'likely interference' with its operations, and 'not an actual disruption.' "); *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 979 (9th Cir. 1998), *cert. denied*, 526 U.S. 1018 (1999) ("[P]ublic employers need not allege that an employee's expression actually disrupted the workplace; 'reasonable predictions of disruption' are sufficient." (citation omitted)); *Shahar v. Bowers*, 114 F.3d 1097, 1108 (11th Cir. 1997), *cert. denied*, 522 U.S. 1049 (1998) (en banc) (holding that "a particularized showing of interference with the provision of public services is not required" under *Pickering*); *Wallace v. Benware*, 67 F.3d 655, 661 n.8 (7th Cir. 1995) ("We do not agree, however, that an actual disruption of the affected department

[9] *Sexton*, *supra*, was an Eighth Circuit decision. The precedent within several circuits is inconsistent. *Tindle v. Caudell* contradicts *Sexton.*

need be shown. . . ."); *see also Foster v. City of Southfield*, 106 F.3d 400 (6th Cir. 1996), *cert. denied*, 520 U.S. 1240 (1997) (unpublished table disposition) (A "government employer need not prove actual disruption, but rather merely the likelihood of disruption.") *Gillis v. Miller*, *supra* at 685 (6th Cir. 2017).

B. This Court Should Grant Certiorari to Clarify its Own Precedent from *Pickering* and its progeny as to the Necessity of Actual Proof by the Government of *Some* Ascertainable Damage to its Functioning as a Result of the Challenged Speech.

Recently, the Fourth Circuit noted that, "*Pickering*'s 'particularized balancing . . . is subtle [and] difficult to apply.'" *Cannon v. Vill. of Bald Head Island*, 891 F.3d 489, 498-99 (4th Cir. 2018). This Court's decision in *Rankin v. McPherson*, 483 U.S. 378, 383-84 (1987) quoted both *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968) that "The determination whether a public employer has properly discharged an employee for engaging in speech requires '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'" and *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) that "It is clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech." Both these statements were quoted with approval in

Rankin v. McPherson. While the test evolving from *Pickering v. Board of Education* has included a decision that law enforcement officials are not required to "tolerate an action which [they] reasonably believe [] would disrupt the office, undermine [their] authority and destroy close working relationships," *Connick v. Myers*, 461 U.S. 130, 154 (1983), yet, as we have seen above, various circuit courts have nevertheless ruled that facts must weigh in the balance.[10]

Although the Fifth Circuit opinion in the present case held that Patrick Boyd could be fired under the analysis of *Rankin v. McPherson*, 483 U.S. 378 (1987), the Fifth Circuit omitted reference to *Rankin*'s ruling in favor of the employee there.[11]

The *Gillis v. Miller* decision, *supra*, followed the evolution of the *Pickering* standard in noting the split

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[10] This Court, last term, addressed *Pickering* as a pivotal question in *Janus v. Am. Fed'n of State, Cty. & Mun. Employees, Council 31*, ___ U.S. ___, 138 S. Ct. 248, 201 L. Ed. 2d 924 (2018). An additional view of *Pickering* would move governmental motive into the array of facts to be considered. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413 (1996).

[11] For purposes of this petition Captain Boyd is emphasizing his speech. He also raised First Amendment protections for his gathering of information, his association with members of the Patrol and its Troopers' Association, and his efforts to petition for redress of grievances. No consideration was given to the ruling from *Mt. Healthy School District v. Doyle*, 429 U.S. 274, 278 (1977) that where a party proves that his conduct was legally protected, and this conduct was a "substantial" or "motivating" factor in the decision to take adverse action against him, his adversary must prove that he would have made the same decision even in the absence of the protected conduct.

in the circuits on the precise issue of "whether employers must show evidence of actual disruption in order to prevail under the *Pickering* test." *Id.*, at 685.

The circuits holding that employers are not necessarily required to show an actual disruption stemming from employee speech have generally followed the analysis provided by a plurality of the Supreme Court in *Waters v. Churchill*, 511 U.S. 661, 673-74 (1994) (lead opinion of O'Connor, J.). There, four justices explained that while the Supreme Court has held that "high officials should allow more public dissent by their subordinates," . . . "we have given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern, and even though when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential." This standard allows deference to predictions, but even predictions should be based on facts.

The *Waters v. Churchill* explanation provides that, without a factual underpinning, a court's decision based on this standard would necessarily be arbitrary. The various circuits cite this Court's variously articulated standards to go either way, for or against the First Amendment, where there is no supporting set of facts offered from the government.

CONCLUSION

Here, the Court confronts a manifold split among the circuits, but resolving those divisions – though essential – is not the end in itself. The split must be resolved to reverse the case below, so that no judicial inquiry that threatens either the effective functioning of a public agency or the essential exercise of freedom of speech is determined without allegiance to the truth. The standard the Fifth Circuit imposes here is a dangerous one. Merely announcing a finding, without fact, parallels the error described in *Whitney v. California*, 274 U.S. 357, 376 (1927), that "[m]en feared witches and burned women." Merely claiming a danger does not establish the fact of its existence. And such illusionary dangers cannot be allowed to usurp the protections of the First Amendment.

This Court should grant certiorari to establish that First Amendment issues must be decided on the basis of fact.

Respectfully submitted,

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