No. ----

In The

Supreme Court of the United States

RANDY HENRY,

Petitioner,

v.

J. BRET JOHNSON, *et al.*

Respondents

On Petition for A Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a government employee speaks on a matter of public concern, may the government punish that employee

(1) if the employee's interest in freedom of speech is outweighed by possible adverse effect of the speech on the employer, *regardless of whether* the government's purpose is to retaliate against the speaker because of the content of his or her speech, the rule in the Third and Eighth Circuits, or

(2) only if *both* the employee's interest in freedom of speech is outweighed by the possible adverse effect of the speech on the employer *and* the government's purpose is to address that adverse effect, rather than to retaliate against the employee because of the content of the speech, the rule in the First, Second, Seventh, Ninth and Tenth Circuits?

PARTIES

The petitioner is Randy Henry.

The respondents are J. Bret Johnson, Corey Schoeneberg, Stacey Mosher, Ronald K. Replogle, Luke Vislay, Sarah Eberhard, Gregory D. Kindle, Sandra K. Karsten, Gregory K. Smith, Malik A. Henderson, and Kemp A. Shoun.

DIRECTLY RELATED CASES

Henry v. Johnson, No. 18-3298, United States Court of Appeals for the Eighth Circuit, judgment entered April 9, 2020

Henry v. Johnson, No. 16-4249-CV-C-WJE, United States District Court for the Western District of Missouri, judgment entered September 9, 2018

Ellingson v. Piercy, No: 2:14-CV-04316-NKL, United States District Court, W.D. Mo.

Ellingson v. McCollum, No 14AC-CC00635, 19th Judicial Circuit Court, Cole County, Mo., judgment entered August 31, 2016

State v. Piercy, No. 15MG-CR00724-01, 26th Judicial Circuit Court, Morgan County, judgment entered September 19, 2017

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Statutes

Petitioner Randy Henry respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on February 20, 2020.

OPINIONS BELOW

The February 20, 2020, opinion of the court of appeals, which is reported at 950 F.3d 1005, is set out at pp. 1-13 of the Appendix. The September 26, 2018 order of the district court, which is unofficially reported at 2018 WL 10158806 (W.D. Mo.), is set out at pp. 14-32 of the Appendix. The April 9, 2020 order of the court of appeals denying rehearing is set out at p. 33 of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on February 20, 2020. On April 9, 2020, the court of appeal denied a timely petition for rehearing. On March 19, 2020, the Court extended the time for filing future petitions to 150 days. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 28 U.S.C. § 1331.

CONSTITUTIONAL PROVISIONS INVOLVED

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

STATEMENT OF THE CASE

This case involves the death of an unarmed man in police custody, a recurring problem of exceptional public concern. The plaintiff is a former law enforcement officer, who contends that he was forced out of his job in retaliation for having spoken about that death to the press and others. The Eighth Circuit, in rejecting the plaintiff's First Amendment claim, applied a narrow legal standard. Proof that the plaintiff's speech had (or could have) a significant adverse *effect* on government functions, it held, mandated, without more, dismissal of the plaintiff's First Amendment claim. Other circuits apply a very different standard and would have entertained the plaintiff's contention that the actual *purpose* of the defendants' action was to punish him for the content of his speech.

This Court has held for more than half a century that government employees retain substantial rights under the First Amendment to speak on matters of public concern. *Pickering v. Board of Education of Township High School Dist. 205*, 319 U.S. 563 (1968). This Court's decisions have correctly emphasized that speech by government employees may be particularly important to the public, because those employees will often be uniquely familiar with the activities of the agencies where they work, and thus can bring to public debate valuable information and perspectives.

Pickering and later cases recognize that there are limited circumstances in which the government can restrict the speech of its employees. This case presents a longstanding conflict regarding the circumstances in which the government may do

so. In two circuits this is purely a question of law: so long as a court concludes that the speech caused or credibly threatens an adverse impact on the government functions that outweighs the speaker's interest in free expression, the government may restrict or punish the speech; the purpose of that restriction or sanction is irrelevant. Five circuits apply a broader standard, with both legal and a factual element: government restriction or punishment is permissible only if both the speech actually causes or credibly threatens such disruption (a question of law), *and* the purpose of that restriction or punishment is to address that disruption, rather than to suppress or sanction speech because the government disagrees with its contents (a question of fact). This conflict regarding the *Pickering* standard was central to the litigation below.

Factual Background

The Public Controversy Surrounding the Death of Brandon Ellingson

On May 31, 2014, Brandon Ellingson, a 20 year-old college student, was boating with friends on Lake of the Ozarks in Missouri. A member of the Missouri State Highway Patrol, Trooper Anthony Piercy, on a police boat, directed Ellingson to board the police boat and take a breathalyzer test. When Ellingson failed that test, Piercy arrested him on suspicion of boating while intoxicated. Piercy handcuffed Ellingson's hands behind his back, slipped a life preserver unsecured over Ellingson's head, and headed back to shore at a high rate of speed. Ellingson fell off the bouncing police boat and was unable to swim because he was handcuffed.

Eventually Piercy jumped into the water, but by then, Ellingson had slipped beneath the surface. Ellingson drowned, still handcuffed, in 70 feet of water.

Several high-ranking Highway Patrol officials came to the lake shortly after the drowning. Both the Superintendent and a Major immediately assured Trooper Piercy that "his job was safe."[1] The officials at the scene had a specific discussion about the risk that the Highway Patrol could face financial liability for Ellingson's death.[2] A series of investigations and reports by Highway Patrol officials followed.

Initial Highway Patrol reports indicated that Ellingson was responsible for his own death. Two reports indicated that Ellingson had deliberately jumped off the police boat or had foolishly gotten out of his seat on the bouncing boat and walked to its edge. "[Ellingson] le[ft] vessel voluntarily."[3] "[Ellingson] stood up from the passenger seat . . . turned to the starboard side of the vessel and took a step toward the starboard side of the vessel [and] toppled over the side of the boat, and entered the water."[4] A critical issue was how fast Piercy was driving the police boat at the time of the incident, because Ellingson would have had to do something wrong to fall off a slow-moving boat. The earliest Highway Patrol report recited that the "Oper[ator] Est[imate of] Speed of Vessel" was a modest 10 miles per hour.[5]

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[1] Ex. 11 pp. 52-54; Ex. 13, p. 1.

[2] Ex. 11, pp. 52, 53, 54.

[3]Ex. 10.

[4] Ex. 10.

[5] *Id.*

Another Patrol report stated that "Ellingson was able to free himself from the personal flotation device . . . ,"[6] indicating that Ellingson, despite having his hands handcuffed behind his back, had intentionally removed the life-jacket that was keeping him afloat, and alive. When interviewing one witness, a Highway Patrol investigator commented about Ellingson that "the kid put himself in that position by getting arrested."[7]

The actual cause of Ellingson's death, however, was disclosed by the electronic records of the speed at which Piercy was driving the boat at the time. "[T]he Missouri State Highway Patrol computer . . . data sheet revealed Trooper Piercy was traveling at between 39.1 and 43.7 miles per hour just before this incident."[8] Investigators determined the effect of that speed by driving the police boat at 40 miles per hour through the busy channel where the drowning had occurred, and video-taped the result.[9] The boat gyrated so wildly that the investigator could only remain on board by holding onto the boat with his hands, something that Ellingson could not have done with his hands cuffed behind his back. Later reports, rather than claiming Ellingson had deliberately removed his life preserver once in the water, more accurately stated that the unsecured life jacket floated away from the helpless Ellingson.

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[6] Ex. 7, DFNTS 76034.

[7] Ex. 44, DFNTS 000066.

[8] Ex. 7, DFNTS 076051.

[9] Ex. 23, pp. 65, 83-84.

When one investigator asked Piercy to provide a written statement, he assured Piercy that he would "destroy or not destroy" it later.[10] Piercy was interviewed twice. After one of those interviews, the investigator reported that the recorder had malfunctioned, and there was no recording of Piercy's statements. Rather than re-interview Piercy to obtain his statements verbatim, the investigator summarized what he could recall of those statements.[11] A Highway Patrol official later stated that the investigation was structured with "an intent to limit [the Highway Patrol's] exposure."[12]

The plaintiff, Sergeant Randy Henry, spoke with Trooper Piercy during the night of the drowning, and Piercy made a number of inculpatory statements.[13] Other statements made by Piercy to Henry were inconsistent with statements Piercy later made to investigators.[14] Well aware of the importance of what he had been told by Piercy, Henry offered to provide investigators with a written report. He was told his report "would not be needed."[15] Henry also asked to be interviewed by investigators.[16] The lead investigator was unwilling to interview Henry without getting advance approval from his own supervisor. That supervisor in turn sought

[10] Ex. 9, pp. 205-06.

[11] Ex. 22 p. 129-32.

[12] Ex. 17, p. 61.

[13] Ex. 12, pp. 94, 218; Ex. 13, ¶ 2.

[14] Ex. 13, ¶ 12.

[15] Ex. 13, ¶18.

[16] Ex. 8, p. 68.

prior approval from a major, who sought approval from a different major higher up the chain of command, who in turn asked the Superintendent of the Highway Patrol if it was permissible to interview Henry.[17] The Superintendent finally gave permission, but one of the majors then admonished investigators to keep Henry "on task" during the interview.[18] That admonition meant that Henry should not address whether any of Piercy's conduct violated Highway Patrol policy, or express his evaluation of Piercy's actions.[19] When, during the course of the interview, Henry began to explain why Piercy's conduct violated state law requiring boat operators to operate a motorboat "at a rate of speed so as not to endanger . . . the life or limb of any person" (Rev. Stat. Mo. 306.125), the investigator ordered the employee operating the recording machine to stop recording.[20]

The decision as to whether to prosecute Trooper Piercy would normally have been made by the prosecuting attorney for the county in which Ellingson died. But that prosecutor, Dustin Dunklee, was a long-time friend of Piercy, so he announced that he was recusing himself and asked a state court to appoint a special prosecutor from another county. A special prosecutor, Amanda Grellner, was named in mid-August 2014, and the matter was referred to a coroner's inquest that was held only two weeks after her appointment. Grellner and the coroner agreed to let the

[17] *Id.*, pp. 78-83; Ex. 23, pp. 96-100; Ex. 24, p. 74.

[18] *Id.*. 22, pp. 78-79.

[19] *Id.* 22, pp. 79-80.

[20] Ex. 8, p. 73.

Highway Patrol itself select the witnesses who would testify at the inquest, which occurred on September 4, 2014.[21]

The Highway Patrol decided not to call Sergeant Henry as a witness; a Patrol official explained at the time that Henry's testimony "would only muddy the waters."[22] When an investigator asked special prosecutor Grellner if she was going to show to the inquest jurors the video that demonstrated Piercy would have needed to hold onto the racing patrol boat, Grellner said the video would not be used, because "We're kind of going somewhere else with this."[23] The Patrol investigator who did testify omitted at least three key inculpatory facts known to the Highway Patrol: (1) the actual speed of Piercy's boat, (2) the fact that a passenger would need to hold onto the gyrating boat at that speed, (3) the conflict between Piercy's current account of why he was unable to save Ellingson and what Piercy had told Henry the night of the drowning. The investigator later acknowledged that "[t]he jury wasn't informed of a lot of things."[24]

Trooper Piercy testified, but he was questioned by his own personal attorney.[25] Piercy testified that he was going only 10 miles per hour when the incident occurred.[26] Special prosecutor Grellner asked no questions of Piercy, even

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[21] Ex. 17, p. 68.

[22] Ex. 3, pp. 85-86.

[23] Ex. 8, pp. 97-98.

[24] Ex. 32; Ex. 8, p. 94.

[25] Ex 31, p. 48.

[26] Ex. 44, DFNTS 000064

though she later acknowledged that she realized his testimony at the inquest was inconsistent with his prior statements.[27] The inquest jury deliberated only eight minutes before concluding that Piercy had not committed any offense.[28] On September 8, Grellner advised the Highway Patrol that she was not going to file charges against Piercy.[29]

The Ellingson controversy, however, did not end there. After the Highway Patrol closed its investigation in late July, Sergeant Henry began speaking with the press, and eventually with the Ellingson family. On September 17, only days after Grellner had cleared Piercy, the *Kansas City Star* published the first of a series of articles about the investigation and coroner's inquest. Laura Bauer, "Details in Trooper's account of the drowning of Brandon Ellingson changed, report shows" Ex. 20.

> Some information [in the investigative file] differs from what jurors heard last week in a Morgan County coroner's inquest. . . . The six jurors at the inquest never heard from Henry. Yet according to a two-page summary of his interview with investigators, the longtime water patrol officer offered seemingly crucial information that he said Piercy told him just hours [after Ellingson died].

Id. The news account also disclosed that Piercy was going 39-43 miles per hour when the incident occurred, information that had not been disclosed at the inquest. *Id.* The command staff knew that Sergeant Henry was providing information to

[27] Ex. 24, p. 114; Ex. 31, pp. 51-54.

[28] Ex. 44, DFNTS 000064.

[29] Ex. 34.

news outlets.[30]Also in October, 2014, Sergeant Henry testified twice about Piercy's death and about the Highway Patrol before a committee of the Missouri Assembly.

In November, 2014, a Missouri television station broadcast a story about the controversy, concluding that the "News [station] uncovered . . . a pattern of truth stretching—ranging from spin to distorting the story." Ex. 21. The broadcast story cited discrepancies regarding the speed of Piercy's boat, inconsistencies between what Piercy told Henry and Piercy's later statements, and the fact that investigators shut off their recorder during the Henry interview. *Id.* The station also disclosed a transcript of Patrol officials joking on the radio about Ellingson's death on the night of the drowning, a report that made national news.[31] The story quoted a conversation in which one of the officials on the scene told dispatchers not to put certain things in their report, and to limit who in Highway Patrol saw that report. In addition, "[s]ocial-media commentary ratcheted up . . . in November [2014] when the highway patrol released transcripts of its officers' phone conversations in the aftermath of the drowning. Piercy can be heard referring to

[30] Ex. 8, p. 200

[31] "[Major] Kindle: His Dad is seven (inaudible) of pissed off that we are not going to dive tonight.
Radio: Well.
Kindle: And I understand. I mean I got that. But I'm not gonna get somebody hurt trying to recover someone that's dead.
Radio: Yeah. Exactly. Alright.
Kindle: And I want to just tell him he's not going to be anymore dead in the morning that he is right now.
Radio: "Laughing."
Kindle. But I didn't.
Radio: Ha ha, probably wouldn't have appreciated that very much. Ha ha."

Brandon as a 'little bastard' and suggesting he purposefully jumped off the boat."[32] In December of 2014, the Ellingson family filed suit against the Highway Patrol and a number of its officials.

By early 2015, Henry provided to one or more members of the press, and to the Ellingson family, a list of problems with the investigation and inquest.[33] At about this time Henry joined a closed/private Facebook page, entitled "Justice for Brandon," about the Ellingson controversy.[34] In January 2015, the *Kansas City Star* published another story, explaining that "the Star spent months investigating Ellingson's death. . . . The paper uncovered . . . discrepancies in Piercy's account of events." Ex. 45 Laura Bauer, "Death of Brandon Ellingson, who drowned in handcuffs, gets another look." The story again noted inconsistencies between what Piercy told Henry and Piercy's later statements. It also reported that Senator Grassley, from Ellingson's home state of Iowa, had personally asked Attorney General Holder to look into Ellingson's death. *Id.* The story reported that Grellner announced that she was reopening the Ellingson case.

On February 25, 2015, the *Riverfront Times* published another story about those inconsistencies, and quoted the *Kansas City Star*'s conclusion that "selective . . . information [had been] released at the inquest." Danielle Marie Mackey,

[32] EX 44, DFNTS 000068.

[33] JA 3612-14.

[34] Ex. 44, DFNTS 000039.

"Drowning of Handcuffed Suspect Still Baffles Family, Friends and Witnesses."[35] On February 27, two days after the *Riverfront Times* story, Sergeant Henry's supervisor sent an email to the Superintendent and several other high-ranking Highway Patrol officials about what the supervisor termed "unusual behavior" of Sergeant Henry.

> [I]n October of 2014, Sergeant Henry confided [to another officer] that he had been speaking with the family of Mr. Brandon Ellingson, the Ellingson family's attorney, and various media outlets regarding Mr. Ellingson's custodial drowning in May 2014. . . . Sergeant Henry has continued to speak with those close to Mr. Ellingson and media outlets, even though Mr. Ellingson's family has expressed publicly their displeasure with the Patrol and its employees following his death. In addition, there is pending litigation regarding the custodial death of Mr. Ellingson against the Patrol and many of its employees.

Ex. 47.

Also in early 2015, Sergeant Henry was advised by a colleague in the Highway Patrol that the Patrol had earlier investigated a member of special prosecutor Grellner's family in connection with a serious offense. Although the Patrol had cleared that individual, there was still a related DNA sample that had not been tested, and the colleague told Henry she had been directed to "make this thing go away."[36] The Highway Patrol official whom Henry was told had issued that directive was the lead investigator in the Ellingson case. Sergeant Henry became concerned that there was an appearance of conflict of interest in those circumstances, and expressed that concern to a representative of the Ellingson

[35] Ex. 44 DFNTS 000060-68.

[36] Ex. 5, pp. 417-18.

family, and on the Facebook page,[37] and discussed the problem with Grellner.[38] In March 2015, Grellner recused herself from the Ellingson case, and a new special prosecutor was appointed. Grellner also filed a complaint against Henry with the Highway Patrol.

In May 2015, Henry received a subpoena to be deposed in the civil action that had been brought by the Ellingson family against the Highway Patrol and several of its members. Henry notified his superiors about the deposition, scheduled for June 3-4, 2015, and advised them that his testimony would not be favorable to the Patrol.[39]

The Transfer and Constructive Discharge of Sergeant Henry

(1) Matters came to a head at a June 1, 2015 meeting of the command staff and the Superintendent. The documents provided to meeting participants included the list of problems that Henry had provided the press and the Ellingson family, and a screen shot from the "Justice for Brandon" Facebook page.[40] Henry's contacts with the press and Ellingson family were discussed at the meeting.[41]

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[37] Ex. 44, DFNTS 000026-29.

[38] Ex. 13, ¶ 11.

[39] Ex. 44, DFNTS 000041; Ex. 13.

[40] Ex. 44, DFNTS 000038.

[41] Ex. 15, 175-76; Ex. 18, p. 104.

Th command staff voted to recommend that Henry be transferred to a different Highway Patrol unit and office, "for the good of [the] Patrol."[42] On June 4, Henry's supervisor submitted to the Superintendent the paperwork formally requesting the transfer, and the Superintendent approved the transfer on June 9. Because the transfer was "for the good of [the] Patrol," and under Patrol rules could not be a disciplinary action[43], it was not subject to appeal and took effect immediately. Sergeant Henry was transferred to a Patrol office approximately 90-minute drive from his home.

Sergeant Henry was told that he was required by December 9, 2015, to change his residence to within the part of the state overseen by the Patrol office to which he had been transferred.[44] Henry (as Patrol officials well knew) had a child in school near his existing residence, and he was unwilling to sell his house, move, and him out of school. Rather than do so, Henry retired effective December 1, 2015. Henry contends that the purpose of the transfer was to force him to retire, a tactic which he asserts had successfully been used to punish other members of the Highway Patrol.

(2) At the June 1 meeting, the command staff also took an intermediate step in the Highway Patrol process for *disciplining* a member of the force. That process was still incomplete when Henry retired, and it was ended as moot once he retired.

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[42] Ex. 44, DFNTS 0000078697.

[43] Ex. 18, p. ("This [transfer] is different from the discipline. . . . It requires a non-disciplinary action be done, Betterment of the Patrol Transfer Request.").

[44] Ex. 14, p. 118.

For that reason, although the command staff recommended that Sergeant Henry be demoted to the rank of corporal, he was never demoted. The decisions below contain a number of references to portions of this never-completed disciplinary process, inter-mixed in a somewhat confusing way with discussion of the avowedly non-disciplinary transfer.

Under the Patrol General Order[45] regarding discipline, and under Patrol practice, discipline can be imposed only after a detailed, carefully structured process. (1) A written complaint must be filed with the relevant Patrol office. That office determines whether the allegations would warrant discipline, and whether they appear to have enough substance to warrant a formal investigation. (2) If an investigation is warranted, the office conducts interviews with relevant witnesses, prepares a report summarizing their statements, noting but not resolving any conflicting accounts. (3) The office then decides whether to "classify" the charges as "substantiated."[46] That determination does not involve factual findings as to what occurred, or why it might warrant discipline. (4) The officer who is subject of the complaint is provided with a copy of that report and determination and may submit a written response. (5) The report, determination, and any response are then submitted to the command staff, which decides whether to authorize the issuance of formal charges against the officer involved. (6) If the staff decides to do so, an official drafts the charges, which spell out the specific misconduct with which the

[45] Ex. LL, DFNTS 1430-31.

[46] Ex. 59, DFNTS 078702.

officer is charged. That charging document is not a determination of the merits, but instead states that "reasonable and substantial cause exists to establish" that a violation occurred.[47] (7) The charging document is provided to the officer involved, and the matter is set for consideration by a Personnel Hearing Board. (8) The command staff may make an "offer of discipline," which is like a proposed plea bargain. The officer can accept the proposed disciplinary action and waive his or her right to a hearing by the Board, or can reject the offer and proceed to the hearing. (9) Prior to consideration by the Board, counsel for the officer may engage in discovery. (10) The Board then hears witnesses and arguments, and issues its recommendation regarding whether misconduct occurred and, if so, what sanction should be imposed. (11) The Superintendent makes the actual decision about the merits of the charges, and about what sanction (if any) to impose. The disputed transfer was avowedly non-disciplinary because Henry could not have been transferred for misconduct unless this elaborate disciplinary procedure was followed and completed.

The disciplinary process regarding Sergeant Henry was commenced in the spring of 2015, but only got as far as step 9 before, because of Henry's retirement, it ended as moot in December of that year. Grellner's complaint was investigated, and the statements of the interviewed witnesses were summarized in a May 2015 report by a Captain Schoeneberg. That report classified the complaint as "substantiated," but did not specify what Henry had done wrong. The report was then considered by

[47] Ex. 44, DFNTS 000137.

the command staff at the June 1 meeting. The staff voted to pursue disciplinary action, and those charges—now specifying the nature of the alleged misconduct—were drafted on June 1, and provided to Henry a few days later.[48] The command staff made an "offer of discipline" of demotion to corporal, but Sergeant Henry on June 9 rejected that offer and invoked his right to a hearing. Later that fall, Grellner withdrew her complaint against Henry. That is where things stood in December 2015, when Sergeant Henry retired, and the Board terminated the disciplinary process.

Subsequent Developments in the Ellingson Controversy

In December 2015, the second special prosecutor charged Trooper Piercy with involuntary manslaughter. In June 2017, Piercy pled guilty to a lesser charge; he was sentenced to 180 days in jail, all but 10 days of which were suspended. The Superintendent finally fired Piercy in 2017.

In August 2016, in a state court lawsuit the Ellingson family had brought against the Highway Patrol officials for failing to turn over documents under the Missouri Sunshine Law, a state judge found Patrol officials had intentionally violated state law on repeated occasions.[49] The state judge concluded that the Patrol's explanations for delays in providing requested documents were not

[48] Ex. 44, DFNTS 000137.

[49]Ex. 39.

credible[50], and that it was "unlikely" that, as claimed, the Patrol "simply 'forgot[]'" about a number of the requests.[51] The court held that several of the "documents could all be considered highly damaging to the [Highway Patrol], and the wrongful nondisclosure of these documents is troubling to the Court."[52] The court imposed a $5,0000 fine on the state defendants.

In November 2016, the state settled the Ellingson family federal court civil rights claim for $9 million.

Proceedings Below

District Court

Sergeant Henry commenced this action in federal district court, alleging inter alia that he had been transferred in retaliation for speaking to the press and the Ellingson family, and for posting on the Facebook page. The complaint asserted that the transfer was intended to and foreseeably resulted in his forced retirement. Henry contended that the death of Brandon Ellingson and the ensuing investigations were a matter of public concern.

The defendants moved for summary judgment. They contended that Sergeant Henry's speech to the press and Ellingson family, and on the Facebook page, were not constitutionally protected because it had caused (or was likely to

[50] *Id.* at 14

[51] *Id.* at 23, 25.

[52] *Id.* at 26.

cause) disruption, and that the harm entailed by that disruption outweighed Henry's First Amendment interest in freedom of speech. Such actual or potential disruption, the defendants contended, entitled them without more to summary judgment. The motion papers did not include affidavits or deposition testimony from the defendants setting out what their motives were for the disputed transfer, and the motion did not argue that a reasonable jury would have to find as a matter of fact that the transfer was actually motived by concern about disruption. The motion included a lengthy Statement of Uncontroverted Facts, but none of those assertedly undisputed facts was the motive of any of the defendants. Defendants insisted that the central issue was whether Henry's speech was constitutionally protected, a pure question of law.

Plaintiff opposed that motion on a number of grounds. Of particular relevance here, plaintiff argued the actual motive for his transfer was to retaliate against him for his speech and to force his retirement, not to address any existing or anticipated disruption. He argued that the defendants wanted to retaliate against him because his speech to the press and the Ellingson family, and on social media, had led to an embarrassing series of news accounts, was putting Piercy in jeopardy, and was resulting in revelations that increased the civil legal exposure of the Patrol and several of its members. Plaintiff listed multiple types of evidence supporting his claim that this was the motive for the disputed transfer, as well as detailing

more general evidence showing that the defendants objected to his having provided information to the press and the Ellingson family.[53]

The district judge adopted the legal standard urged by defendants; under that standard, the defendants' purpose in ordering the transfer was not a consideration. The district court concluded that actual or anticipated disruption outweighed Henry's First Amendment interest in speaking with the press and the Ellingson family, and on the Facebook page. App. 21-23. The court held that that speech therefore was constitutionally unprotected, and that Henry's claim based on that speech thus necessarily failed. The defendants acknowledged that Henry's testimony to the state legislature and at his deposition were constitutionally protected, but the district judge held that the testimony was not the cause of Henry's transfer. App. 23-26.

Court of Appeals

The court of appeals acknowledged that Henry's speech concerned a matter of public concern. App. 7. Plaintiff again argued that the defendants had transferred him with the intent of retaliating against him because of the content of his speech, not because of any concern about disruption.[54] The court of appeals, however, applied a legal standard to which that factual contention was irrelevant.

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[53] Memorandum in Opposition to Defendants' Motion for Summary Judgment, pp. 15-18.

[54] Brief for Appellant, pp. 33, 35-37, 42, 56-57; Appellant's Reply Br. Pp. 20, 22-23.

Regarding Henry's speech to the press and Ellingson family, and on his Facebook page (which the court of appeals referred to as his "non-testimonial" speech), the court of appeals held, the dispositive issue was whether the speech was constitutionally protected, a question of law. Under the legal standard set out and applied by the Eighth Circuit, summary judgment turned on three issues only: whether Henry "spoke as a citizen on a matter of public concern," whether there was "evidence [of] an adverse impact on [the employer]," and whether that impact outweighed "the interests of the employee as a citizen commenting on public matters." App. 6. Under that standard, the defendants' purpose in ordering the transfer was not a consideration.

Applying that legal standard, the court of appeals held that Henry's non-testimonial speech was unprotected, and that Henry's First Amendment claim grounded on that speech therefore failed.

> The cumulation of these factors weigh in favor of [the Patrol's] interest in efficiency . . . . As such, we conclude Henry's non-testimonial speech activity was unprotected. *Therefore*, no First Amendment violation occurred.

App. 10 (emphasis added). Under the legal standard applied by the Eighth Circuit, because Henry's non-testimonial speech was not constitutionally protected, it did not matter *why* the defendants had transferred him. See App. 11("[b]ecause Henry's non-testimonial speech was unprotected by the First Amendment, such speech may serve as a legitimate ground for an adverse employment action"). The court of appeals concluded that Henry's testimonial speech, which the defendants

agreed was constitutionally protected, was not the cause of his transfer or any other Highway Patrol actions. App. 11-13.

The court of appeals denied a timely petition for rehearing en banc.

REASONS FOR GRANTING THE WRIT

I. THERE IS AN IMPORTANT CIRCUIT CONFLICT REGARDING WHEN A GOVERNMENT EMPLOYEE CAN BE PUNISHED FOR SPEECH ON A MATTER OF PUBLIC CONCERN

The Eighth Circuit decision deepens a longstanding circuit conflict regarding the meaning of *Pickering*, a difference of central importance to the First Amendment rights of tens of millions of state, local, and federal employees. The Eighth Circuit has now joined the Third Circuit in holding that *Pickering* claims are controlled by a single question of law: whether an employee's free speech interests are outweighed by some actual or potential harm to the government. If it is, the employee can be punished for speech on a matter of public concern. Under that standard, the government's actual motive for the punishment is irrelevant. The Second, Seventh, Ninth and Tenth Circuit, on the other hand, apply the contrary rule: the First Amendment is violated if *either* the employee's free speech interest outweighs the government's interests (a question of law), *or* the government punished the employee because it objected to the content of the employee's speech (a question of fact). Then-Judge Sotomayor joined three of the Second Circuit decisions applying this standard. The First Circuit applies a variant of the majority rule.

The Third Circuit adopted its standard in *Green v. Philadelphia Housing Authority,* 105 F.3d 882, 889 (3d Cir. 1997) (footnote omitted), expressly refusing to consider the purpose of the action complained of.

> Green . . . claims that the Housing Authority Police Department's reasons for his transfer were pretextual, i.e. that the potential for departmental disruption was not the true cause for his transfer. But the test in *Waters* [*v. Churchill,* 511 U.S. 661 (1994)] is an objective one for "potential disruptiveness." . . . Therefore under the facts of this case any pretext is irrelevant.

(Quoting *Waters,* 511 U.S. at 679-81). Under *Green*, the only issue in a *Pickering* case is whether the government's interests outweigh the interests of the employee; where that is the case, the employee's speech is "unprotected," and his or her First Amendment claim "therefore" fails. That is the same standard applied by the Eighth Circuit in the instant case. "Henry's non-testimonial speech activity was unprotected. *Therefore*, no First Amendment violation occurred." App. 10 (emphasis added). In the years since *Green*, the Third Circuit has repeatedly applied this standard, emphasizing that it is a question of law.[55]

The Second Circuit applies a very different standard in *Pickering* cases, requiring not only a showing that actual or potential disruption outweighed the employee's speech interest, but also a determination of whether it was that disruption—rather than disagreement with the content of the speech—that was the motive for the challenged adverse action.

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[55] *Baloga v. Pittston Area School Dist.*, 917 F.3d 742, 756 (3d Cir. 2019); *Falco v. Zimmer*, 767 Fed. Appx. 288 (3d Cir. 2019); *De Ritis v. McGarrigle*, 861 F.3d 444, 452-54 (3d Cir. 2017); *Eggert v. Bethea*, 615 Fed. Appx. 54, 55-56 (3d Cir. 2015).

> Whittled to its core, *Waters* permits a government employer to fire an employee for speaking on a matter of public concern if: (1) the employer's prediction of disruption is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for the speech.

Jeffries v. Harleston, 52 F.3d 9, 13 (2d Cir. 1999). The court of appeals reiterated that three-part standard in *Johnson v. Ganim*, 342 F.3d 105, 114 (2d Cir. 2003); see *Vanderpuye v. Cohen,* 94 Fed. Appx. 3, 4-5 (2d Cir. 2004) (quoting *Johnson* standard) (opinion joined by Sotomayor, J.).

Decisions in the Second Circuit have repeatedly pointed out that under that circuit's standard, a plaintiff will prevail, even if his or her speech did create or threaten a disturbance which outweighed the speech interest, if that disturbance was not the basis for the disputed adverse action.

> [E]ven if the potential disruption to the office outweighs the value of the speech, the employer may fire the employee only *because of* the potential disruption, and *not because of* the speech. That is to say, it matters not that the potential disruption outweighs the value of the speech if the employer subjectively makes the speech the basis of his termination decision; such "retaliatory" discharge is always unconstitutional.

Sheppard v. Beerman, 94 F.3d 823, 828 (2d Cir. 1996) (emphasis in original); see *Gorman-Bakos v. Cornell Co-op Extension of Schenectady County,* 252 F.3d 545, 557 (2d Cir. 2001) (quoting *Sheppard*) (opinion joined by Sotomayor, J.).

> Consequently, although the *Pickering* test presents a question of law, resolution of a First Amendment retaliation claim on a motion for summary judgment may not be possible if the plaintiff introduces sufficient evidence to create a genuine issue of material fact on the question of defendant's improper intent, which is a question of fact.

Locurto v. Safir, 264 F.3d 154, 167 (2d Cir. 2001); see *Reuland v. Hynes*, 460 F.3d 409, 418 (2d Cir. 2006) ("whether [the defendant] was in fact motivated by a desire to avoid disruption, rather than retaliation . . . [is a] factual dispute[] . . . [that] must be submitted to the jury.") (opinion joined by Sotomayor, J.). "If the . . . balance of interests weighs in the government's favor, plaintiff may still succeed by proving that the adverse action was in fact motivated by retaliation rather than by fear of disruption." *Mandell v. County of Suffolk*, 316 F.3d 368, 383 (2d Cir. 2003).

The Second Circuit has repeatedly relied on this test to uphold *Pickering* claims. In *Sheppard* the court of appeals overturned a finding of qualified immunity because there was a dispute of fact as to the employer's motive.

> [T]hese facts may tend to show that [the employer's] motive for firing [the plaintiff] was the content of his speech, not [the employer's] fear that [the plaintiff] would disrupt the office working environment. The district court therefore erred in find that [the employer's] actual intent was "irrelevant" . . . .

94 F.3d at 828-29. In *Johnson* the court of appeals overturned an award of qualified immunity because "[f]actual questions . . . exist as to whether [the plaintiff's] suspension and/or termination was based on the potential for disruption rather than because of his speech." In *Gorman-Bakos* the court of appeals overturned an award of summary judgment to the defendant because

> the parties disagree as to . . . whether even if . . . disruption occurred, plaintiffs were in fact not dismissed because of the disruption, but because of the content of their speech. . . . The[] underlying factual disputes go to the fundamental issue of the rue motivation behind plaintiffs' dismissal. . . . Both sides' arguments rest heavily on the proper characterization of . . . defendants' motives. Making these determinations correctly depends on an evaluation of conflicting testimonial evidence, which a factfinder is in the best position to evaluate.

252 F.3d at 557-58 (opinion joined by Sotomayor, J.).[56]

> Similarly, the Seventh Circuit recognizes that
>
> > a public employer may not "use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech." . . . The First Amendment prohibits such misuse of authority.

Harnishfeger v. United States, 943 F.3d 1105, 1119 (7th Cir. 2019) (quoting *Rankin v. v. McPherson*, 483 U.S. 378, 384 (1987)). Applying that rule, the Seventh Circuit has repeatedly held that summary judgement cannot be granted under *Pickering* where there is a dispute of fact as to whether the defendant was actually motivated by disagreement with the speech in question, rather than by concern about possible disruption. *McGreal v. Ostrov*, 368 F.3d 657, 680 (7th Cir. 2004) ("[evidence] raises a genuine issue as to whether the Department was actually acting out of a fear of potential disruption rather than out of displeasure with the content of McGreal's statements"); *Coady v. Steil*, 187 F.3d 727, 733 (7th Cir. 1999) ("[t]hese facts could appear to undercut defendant's argument that his actions were taken with an eye toward preserving departmental harmony"); *Glass v. Dachel*, 2 F.3d 733, 744 (7th Cir. 1993).

In the Ninth Circuit, "[t]he disruption exception [in *Pickering*] cannot 'serve as a pretext for stifling legitimate speech or penalizing public employees for

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[56] See *Munroe v. Westchester Community College,* 178 Fed. Appx. at 39 (2d Cir. 2006) (reversing summary judgment for defendant under the thee-part *Johnson* test because "factor (3) . . . involves defendants' motives, and this involves unresolved questions of fact"); *Whelan v. Blakeslee,* 1998 WL 382755 at *2 (upholding denial of qualified immunity, even though employer could reasonably believe that plaintiff's interest in speech was outweighed by disruptive effect, because employer was required to "show that the discipline was motivated by" the asserted disruption)

expressing unpopular views.'" *Allen v. Scribner*, 812 F.3d 426, 432 (9th Cir. 1987).

In *Robinson v. York*, 566 F.3d 817 (9th Cir. 2009), the Ninth Circuit relied on this interpretation of *Pickering* in upholding a denial of qualified immunity.

> [A] fact-finder could conclude that Defendants' application of the chain of command policy was pretextual and not based on Defendants' interest in avoiding workplace disruption. If a fact-finder did so conclude, then[the plaintiff]'s speech interests would outweigh Defendants' interest under *Pickering*.

566 F.3d at 825. In *Nunez v. Davis*, 169 F.3d 1222 (9th Cir. 1999), the Ninth Circuit on that ground upheld a jury verdict in favor a dismissed city employee.

> A public employer cannot claim disruption of a close personal relationship [with co-workers or supervisors] to cover up animus toward an employee's speech and a desire to silence the employee. . . . [T]he verdict demonstrates that the jury rejected[the defendant]'s justification for firing Nunez as pretextual.

169 F.3d at 1128-29. In *Burgess v. Pierce County*, 918 F.2d 104 (9th Cir 1989), that court of appeals rejected summary judgment and qualified immunity on this ground.

> [The defendant] argues his interest as a government employer in "promoting the efficiency of the public services [the government] performs through its employees" outweighs [the plaintiff's] first amendment interest, thereby entitling [the defendant] to qualified immunity. . . . However, [the plaintiff] has alleged and offered substantial proof that [the defendant] discharged him in retaliation for speaking out against [a county policy], not for any disruption to the workplace caused by [the plaintiff's] actions. . . . Because [the defendant's] motives are a matter of factual dispute, we need not decide this issue.

918 F.3d at 107 (quoting *Pickering*, 391 U.S. at 568).

The Tenth Circuit has repeatedly insisted that a defendant's belief that an employee's speech would be disruptive must be "formed in good faith." *Andersen v.*

McCotter, 205 F.3d 1214, 1218 (10th Cir. 2000); see *Craven v. University of Colorado Hospital Authority*, 260 F.3d 1218, 1228 (10th Cir. 2001); *Gardetto v. Mason*, 100 F.3d 803, 816 (10th Cir. 1996); *Moore v. City of Wynnewood*, 57 F.3d 924, 934 (10th Cir. 1995). The Tenth Circuit relied on that element in upholding a *Pickering* claim in *Bailey v. Independent School Dist. No. 69 of Canadian County*, 896 F.3d 1176 (10th Cir. 2018). "Defendants contend that Bailey was fired not for his speech but for his misuse of letterhead. But . . . the record fairly supports an inference that Bailey was fired for the views expressed in his letters." *Id.*; see *id.* ("we must conduct our analysis by assuming that Bailey's termination was actually motivated by the letters' content."); *Prager v. LaFaver*, 180 F.3d 1185, 1191 (10th Cir. 1999) ("to the extent that the complaint alleges that Mr. LaFaver hid his true motivation for suspending and terminating Mr. Prager behind the guise of promoting efficiency, we must accept that contention as true.").

The First Circuit applies a variant of the majority rule. Proof that an employer was motivated by disagreement with the content of an employee's speech is part of the *Pickering* balancing, rather than a distinct basis for finding a constitutional violation.

> [I]n the *Pickering* balancing, th[e] [defendant's] motivations for firing [the plaintiff] looms large. . . . [I]f [the defendant] fired [the plaintiff] because she was concerned that the tangible results of his [speech] would negatively affect the efficient functioning of government services, . . . , she would have weighty interest on her side of the *Pickering* scale. On the other hand, if [the defendant] fired [the plaintiff] in a retaliatory fit of pique because she disagreed with his vote and wished to punish him, she would have no legitimate governmental interest on her side of the scale. . . . [The defendant's] motiving for firing [the plaintiff] for his [speech] is a core issue in this case.

Mihos v. Swift, 358 F.3d 91, 103 (1st Cir. 2004) (denying motion to dismiss because complaint alleged defendant's motive was not based on actual concern of harm to governmental interest); see *Davignon v. Hodgson,* 524 F.3d 91, 104-05 (1st Cir. 2008) (applying *Mihos*; upholding jury verdict because "there is ample evidence that [the defendant] suspended the plaintiffs not out of a legitimate concern that their speech compromised safety at the . . . facilities but because of their pro-union activity").

The Connecticut Supreme Court applies the same standard. *DiMartino v. Richens,* 263 Conn. 639, 659 n. 16 (2003) (upholding jury verdict for plaintiff, despite jury finding both the defendants "reasonably believed that the plaintiff's speech was or was likely to be disruptive to the operation of [the facility]," because the jury also found "that the plaintiff's speech, and not the actual or likely disruption, was a substantial motivating factor in the defendant[']s treatment of the plaintiff.").

II. THE THIRD AND EIGHTH CIRCUIT STANDARD IS INCONSISTENT WITH THE DECISIONS OF THIS COURT

The rule in the Third and Eighth Circuits is clearly inconsistent with this Court's decision in *Waters v. Churchill*. In *Waters*, the plurality determined that the employer had reasonably concluded that the employee at issue had engaged in speech that was seriously disruptive. 511 U.S. at 680. But this Court (in several opinions) held—unlike the Eighth Circuit below--that that perceived disruption was

not dispositive; the case was remanded for resolution of the plaintiff's contention that the employer's termination decision was not based on that perceived disruption, but on disagreement with certain content of the plaintiff's speech.

The First Amendment standard, the plurality held, "is to be applied to the speech *for which* [the plaintiff] was fired." 511 U.S. at 681. (emphasis added) The plurality noted that *Connick v. Myers*, 461 U.S. 138, --- (1983), had evaluated the disruptiveness of a particular part of the plaintiff's speech in that case "because that part . . . ' . . . *contributed to [the plaintiff's] discharge*.'" (*Id.*; emphasis in *Waters*).

> Though [the employer] would have been justified in firing [the plaintiff] for the [disruptive] statements . . . , there remains the question whether [the plaintiff] was actually fired because of those statements, or because of something else. .. . [The plaintiff] has produced enough evidence to create a material issue of fact about [the employer's] actual motivation. . . . A reasonable factfinder might . . . conclude that [the employer] actually fired [the plaintiff] not because of the disruptive things she said . . . , but because of nondisruptive statements . . .

511 U.S. at 681-82; see *id.* at 683 ("[a] public employer violates the Free Speech Clause . . . if the employer invokes [a report of disruptive speech] merely as a pretext to shield disciplinary action taken because of protected speech . . . ."). Justice Scalia concurred in the judgment of the Court, which remanded the case for a determination as to the motive of the defendants, reasoning that "[the] availability of a pretext inquiry into the genuineness of a public employer's asserted permissible justification . . . is all that is necessary to avoid the targeting of 'public interest' speech condemned in *Pickering*." 511 U.S. at 690. Under the standard in the Third and Eight Circuits, a pretext inquiry is not available.

This Court warned in *Rankin v. McPherson*, that

> [v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech.

478 U.S. 378, 384 (1987). That admonition would be meaningless if a public employer could punish an employee with whose speech it disagreed merely by pointing to some colorable disruption which was not in fact the motive for the employer's action against that employee.

The motive of the government has always been the touchstone of *Pickering* claims. "The First Amendment's guarantee of freedom of speech protects government employees from termination *because of* their speech." *Board of County Com'rs, Wabaunsee County, Kan v. Umbehr,* 518 US. 668, 675 (1996) (emphasis in original). If an employee proves that he or she was retaliated against because the government objected to the content of his or her speech on a matter of public concern, the government cannot defeat that claim by pointing to some legitimate concern—such as possible disruption—that was *not* the reason for its action. See *Mt. Healthy School Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 287 (1977).

III. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTION PRESENTED

This case is an excellent vehicle for resolving the question presented. In the courts below, Henry contended that he had in fact been transferred because the defendants objected to the content of his speech to the press, to the Ellingson family, and on social media. Both the court of appeals and the district court, in

rejecting Henry's First Amendment claim, relied only a question of law: whether Henry's interest in freedom of speech was outweighed by the Highway Patrol's interest in any possible adverse effect of that speech. Applying that standard, those courts concluded that Henry's speech was "unprotected," and that conclusion mandated dismissal of his constitutional claim. *Why* the defendants decided to transfer Sergeant Henry simply was not relevant under the standard applied below. In the First, Second, Seventh, Ninth and Tenth standard a very different standard would be applied; those circuits would have afforded Sergeant Henry an opportunity to show at trial that the reason for his transfer was actually to punish him because of the content of his speech.

In this case there is substantial evidence—irrelevant under the Eighth Circuit standard—that the defendants indeed transferred Sergeant Henry because they objected to the contents of his speech to the press, the Ellingson family, and on social media. Many of the defendants had been involved in the Ellingson controversy prior to the disputed transfer. One of the defendants had assured Piercy the night of the drowning that his job was safe, one had directed that Henry be kept "on task" when interviewed, two had refused to authorize investigators to interview Henry, and three had gotten the email that reported Henry's "unusual behavior" in speaking to the press and Ellingson family, and that objected to his speech, in part, because the family had been critical of the Patrol.

Plaintiff adduced affidavits from two retired Highway Patrol officials, who described being transferred to posts distant from their homes, and forced to retire,

because they had expressed concern about Patrol practices at Lake of the Ozarks.[57] In one instance, the official who ordered that transfer was the same Superintendent who transferred Sergeant Henry. Another retired officer reported being specifically threatened with a retaliatory transfer if he expressed even in private concern about Patrol practices.[58]

None of the defendants submitted affidavits or declarations attesting to his or her motive for transferring Sergeant Henry. Counsel for the defendants, in their briefs, argued that Sergeant Henry was transferred because two[59] of the prosecutors in the area where Henry worked had advised the Patrol they would not take cases that were based on information from him. But a jury could find that that was not the real reason for the disputed transfer. The record indicates, and the defendants would have known, that as a Sergeant, Henry's primary duties were administrative, and it would be uncommon for him to be the investigating officer in a case.[60] The defendants offered no evidence that Sergeant Henry often did so.[61] The command staff knew of two other instances in which the same prosecutors had indicated they

[57] Ex. 73, Affidavit of Captain Gary Haupt (Retired), pp. 2-3; Ex. 74, Affidavit of Lieutenant John David Wall (Retired), p. 2.

[58] Ex. 72, Affidavit of Eldon Wulf, p. 3.

[59] The prosecutors were the prosecutor who had recused himself from the Ellingson case because he was a long-time friend of Piercy, and the special prosecutor who had handled the coroner's inquest but later recused herself. No similar objection was voiced by the five county prosecutors in the other counties in the region where Sergeant Henry worked.

[60] Ex. 18, p. 80.

[61] Ex.18, pp. 81-82; Ex. 30, pp. 138-39.

would not handle cases from a particular trooper—lower level troopers who were more likely to make arrests—but neither of those troopers was transferred.[62]

In addition, the Superintendent knew that at least one of the prosecutors who refused to work with Sergeant Henry expressly did so because he objected to Henry's having spoken with the press and Ellingson family. That prosecutor's email to the Patrol objected that "S[ergeant] Henry has disclosed information in both an ongoing and closed investigation to multiple non-law enforcement civilians . . . As such, I no longer have confidence in his work and/or his ethics . . . ."[63] But disclosing information about matters of public concern to "non-law enforcement officials"—i.e., to the public--is precisely what the First Amendment ordinarily protects. A trier of fact could conclude that the Superintendent transferred Henry because the Superintendent agreed with that objection to Sergeant Henry's speech to the press and the Ellingson family.

[62] Ex. 18 pp. 78-80, 87; Ex. 22, pp. 156-168; Ex. 24, pp. 88-89, 110-118.

[63] Ex. 87.

CONCLUSION

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

Respectfully submitted,

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