**In The**

# Supreme Court of the United States

**No.**

DAVID SIVELLA,
*Petitioner*

*v.*

TOWNSHIP OF LYNDHURST, ET AL,
*Respondent*

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

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTION(S) PRESENTED

From 2005 through 2013, Petitioner David Sivella ("Sivella") was the Township of Lyndhurst, New Jersey's ("Lyndhurst") part-time Associate Planner under the direct supervision of Respondent Mayor Robert Giangeruso ("Mayor Giangeruso"). From 2009 through 2011, Sivella was also the Bergen County Housing Department Director. In 2011, Sivella was questioned by law enforcement about Mayor Giangeruso receiving improper Section 8 benefits by listing his mother who lived with him as a tenant. In 2013, Mayor Giangeruso learned about the investigation when agents visited his home. Mayor Giangeruso blamed Sivella for the investigation and launched a criminal investigation falsely claiming that Sivella had a 'no show' job in retaliation for Sivella's perceived cooperation with the authorities.

The question presented is:

Does the First Amendment bar a public employer from initiating a baseless criminal investigation in retaliation for a public employee engaging in protected speech?

## PARTIES TO THE PROCEEDING

All the parties in this proceeding are listed in the caption.

## STATEMENT OF RELATED CASES

None

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## TABLE OF AUTHORITIES

## PETITION FOR A WRIT OF CERTIORARI

Petitioner David Sivella respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

## OPINIONS BELOW

The District Court for the District of New Jersey's Order denying Summary Judgment and subsequent Letter Order granting Qualified Immunity are unpublished and reproduced at App.10a-20a; 24a-32a.

The Third Circuit's Judgement and Opinion are unpublished and reproduced at App.1a-9a.

## JURISDICTION

The Third Circuit Court of Appeals entered judgment on August 3, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides:

> "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."

42 U.S.C. §1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

## STATEMENT OF THE CASE

This case serves to settle a long-standing circuit split and ensure that going forward America's public employees are Constitutionally guaranteed to be free from retaliatory frivolous criminal investigations for engaging in protected speech that their public employer dislikes. This case will further ensure that public employers will not be able to shield their illicit retaliatory conduct under the doctrine of qualified immunity.

**A. Factual Background**

Petitioner was a public employee who served as the Bergen County Housing Department Director ("BCHD Director") from 2009 through 2011 and as a part-time Associate Planner for Lyndhurst from 2005 through 2013. As the BCHD Director, Petitioner was responsible for overseeing the Section 8 housing program in Bergen County, New Jersey. As a part-time Associate Planner, Petitioner was responsible for reporting directly to Mayor Giangeruso regarding Lyndhurst's planning issues. Petitioner held both positions simultaneously from 2009 through April 2011.

In 2011, Petitioner's roles as BCHD Director and Associate Planner for Lyndhurst unexpectedly intersected. While being questioned by law enforcement, Petitioner came to learn that Mayor Giangeruso was being investigated for Section 8 benefits he was receiving by listing his mother who lived with him as his tenant when such arrangements were strictly prohibited.

When Mayor Giangeruso was visited by Federal agents in 2013 at his home, he immediately called Petitioner. Ginageruso was irate. Mayor Giangeruso believed that Petitioner was responsible for the investigation into his conduct because Petitioner was the BCHD Director and was directly responsible for overseeing Section 8 benefits in Bergen County. Mayor Giangeruso was determined to retaliate against Petitioner. Shortly thereafter, Mayor Giangeruso ordered the Lyndhurst Police Department, from which he was retired and served as Commissioner, to conduct a criminal investigation into whether Petitioner was

treating his position as Lyndhurst's Associate Planner as a "no show" job. Mayor Giangeruso further ordered that the investigation be conducted "in a confidential and timely manner, with reports solely to [him]." The Bergen County Prosecutor chastised Mayor Giangeruso's request and informed him that it would be inappropriate for the Lyndhurst Police Department to provide him reports concerning the investigation or to even advise whether the investigation was active.

**B. The District Court**

The District Court for the District of New Jersey ("District Court") initially denied Summary Judgment finding that issues of material fact existed with respect to Petitioner's First Amendment claims. The District Court held that a reasonable fact-finder could infer a "pattern of antagonism" between Petitioner and Mayor Giangeruso and a "temporal proximity" between Mayor Giangeruso's Section 8 subsidy being investigated and discontinued in 2013, Mayor Giangeruso blaming Petitioner for the investigation, and Mayor Giangeruso opening an investigation into Petitioner's job. App.29a-30a.

On reconsideration the District Court reversed finding that, despite the existence of issues of material fact, Mayor Giangeruso was entitled to qualified immunity because it was not clearly established that an investigatory request could constitute a retaliatory act under the First Amendment. App.16a. In arriving at this conclusion, the District Court cited Hartman v. Moore, 547 U.S. 250, 262 (2006) in which this Court noted in dicta, "[n]o one here claims that simply conducting a retaliatory investigation with a view to

promote a prosecution is a constitutional tort... Whether the expense or other adverse consequences of a retaliatory investigation would ever justify recognizing such an investigation as a distinct constitutional tort is not before us." App.16a. The District Court further found that this Court never revisited the issue which supported a finding that the right is not clearly established. App.16a.

**C. The 3rd Circuit**

On appeal, the Third Circuit affirmed, finding that Mayor Giangeruso was entitled to qualified immunity because it was not clearly established that the initiation of an investigation into a no-show municipal job could amount to First Amendment retaliation. App.5a. The Third Circuit, like the District Court, held that Hartman, supra, 547 U.S. at 262 did not address or establish that that a retaliatory investigation was a "constitutional violation." App.7a. In the absence of any precedent from this Court, the Third Circuit too found that the right was not clearly established.

What is more, the Third Circuit found that a circuit split on the relevant issue continues to exist today. App.7a. In the Fifth Circuit, "investigating alleged violations of departmental policies... [is] not [an] adverse employment action." Breaux v. City of Garland, 205 F.3d 150, 158 (5th Cir. 2000). Conversely, in the Ninth Circuit, the placement on administrative leave pending discipline can constitute an adverse employment action for a First Amendment retaliation claim. Dahlia v. Rodriguez, 735 F.3d 1060, 1078-79 (9th Cir. 2013).

## REASONS FOR GRANTING THE INSTANT PETITION

As the Third Circuit and District Court acknowledged, there is a longstanding Circuit split on the relevant issue in this case; the Third Circuit, from which this case emanates, has no binding authority; and this Court has yet to address the issue. This Court's intervention is imperative. It is of grave concern that our nation's twenty million public employees can currently be subjected to retaliatory investigations for exercising their First Amendment rights with impunity. Public employees' right to be free from First Amendment retaliation is of profound public importance. The instant matter provides this Court with an issue of first impression which it forshadowed in Hartman, supra, and which will serve to provide clarity, guidance, and protection among all our Circuits.

Uniformity among our Circuits on issues related to the protection of public employees is fundamentally important. Public servants should not only be free from First Amendment retaliation but should also be afforded the same fundamental protections regardless of what State they live in. It is unfortunate and unjust that some of the country's public employees can lawfully be subjected to retaliatory investigations while other public employees are shielded from such reprehensible conduct. Our public employees deserve to be treated with the same dignity and respect in all our courts.

## CONCLUSION

The petition for a writ of certiorari should be granted for the foregoing reasons.

Respectfully submitted,

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# APPENDIX

United States Court of Appeals, Third Circuit.

David SIVELLA, Appellant

v.

TOWNSHIP OF LYNDHURST, Robert Giangeruso, Lyndhurst Commissioner

No. 20-2342

Submitted Under Third Circuit L.A.R. 34.1(a) May 25, 2021(Opinion Filed: August 3, 2021)

Appeal from the United States District Court for the District of New Jersey (D.C. Civil No. 2:15-cv-07038), District Judge: Honorable Madeline Cox Arleo

Attorneys and Law Firms

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Ian C. Doris, Esq., Keenan & Doris, Rutherford, NJ, Anthony P. Seijas, Esq., Cleary Giacobbe Alfieri & Jacobs, Oakland, NJ, for Defendant-Appellee Robert Giangeruso.

Before: GREENAWAY, JR., and KRAUSE, Circuit Judges, and KANE, District Judge.*

OPINION**

KANE, District Judge.

David Sivella appeals from the District Court's June 16, 2020 order granting summary judgment for Appellee Robert Giangeruso, the Mayor of the Township of Lyndhurst (the "Township"), based on qualified immunity.[1] We will affirm.

## I. Background

After working on Giangeruso's political campaigns in 2005 and 2009, Sivella held two different municipal jobs: part-time Associate Planner for the Township from approximately 2005 through 2013, and Bergen County Housing Department Director ("BCHD Director") from approximately 2009 through 2011, holding both jobs simultaneously from 2009 to 2011. One of Sivella's responsibilities as BCHD Director was overseeing the Section 8 housing program. See 42 U.S.C. § 1437f. Sivella voluntarily resigned from his position as BCHD Director in April 2011, continuing to work as an Associate Planner for the Township until 2013.

In approximately June 2011, after he resigned as BCHD Director, Sivella was interviewed by the Bergen County Prosecutor and Housing and Urban Development ("HUD") investigators regarding Section 8 housing benefits received by Giangeruso's mother. Her Section 8 housing benefits were ultimately discontinued after HUD investigators determined that the

configuration of the house in which she resided with Giangeruso did not meet the requirements for the Section 8 program.

On September 10, 2013, at a Township public meeting, Township Commissioner Thomas DiMaggio expressed a concern that there were "no-show jobs" for several Township employees. While no names were mentioned at the meeting, Sivella was one of three individuals thought to have had a no-show municipal job.

Thereafter, on October 15, 2013, Giangeruso and Township Commissioner DiMaggio sent a letter to the Township Chief of Police requesting that he confidentially investigate the no-show municipal job allegations raised at the September public meeting. The letter did not disclose any names. The record reflects that any investigation, to the extent one was conducted,[2] "receiv[ed] no result anywhere." App. 355. Sivella ultimately resigned from his position as an Associate Planner with the Township on October 28, 2013.

Sivella filed a complaint against the Township and Giangeruso, alleging that Giangeruso and the Township (collectively, "Appellees") retaliated against him for exercising his First Amendment right to freedom of speech.[3] On November 6, 2019, the District Court entered an order denying Appellees' motion for summary judgment as to Sivella's First Amendment retaliation claims for the following reasons: (1) "there is a genuine factual dispute as to whether a person of ordinary firmness would be deterred from speaking out because of [Appellees'] retaliatory acts, including Giangeruso and Litterio's threatening statements and Giangeruso's investigation into [Sivella's] job";[4] (2) "there is a genuine [dispute] of material fact with respect to the causation element [of a First Amendment

retaliation claim], because a reasonable fact-finder could infer a 'pattern of antagonism' between [Sivella] and Giangeruso and a 'temporal proximity' between Giangeruso's Section 8 subsidy being discontinued in 2013, Giangeruso blaming Sivella for the investigation into that subsidy, and Giangeruso subsequently opening an investigation into [Sivella's] job after the September 10, 2013 Commissioners' meeting"; and (3) Giangeruso was not entitled to qualified immunity because he failed to show that "he did not violate clearly established constitutional rights." App. 416-17.

In granting Appellees' motion for reconsideration of its November 6, 2019 order, the District Court found that, in requesting an investigation into no-show municipal jobs in October 2013, Giangeruso had not violated any clearly established right, and was therefore entitled to qualified immunity and summary judgment as to Sivella's First Amendment retaliation claims.

## II. Discussion

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291. We exercise plenary review over the District Court's order granting summary judgment and we apply the same standard as the District Court. Goldenstein v. Repossessors Inc., 815 F.3d 142, 146 (3d Cir. 2016); Beers-Capitol v. Whetzel, 256 F.3d 120, 130 n.6 (3d Cir. 2001). We review de novo the legal grounds underpinning a claim of qualified immunity. Halsey v. Pfeiffer, 750 F.3d 273, 287 (3d Cir. 2014).

Before us, Sivella contends that the District Court erred in granting Appellees' motion for

reconsideration and reversing its prior ruling that Giangeruso was not entitled to qualified immunity on Sivella's First Amendment retaliation claims. Further, Sivella maintains that genuine disputes of material fact exist with respect to his First Amendment retaliation claims. In connection with his first argument, Sivella asserts that the District Court erroneously relied on dicta from Hartman v. Moore, 547 U.S. 250, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006), and a non-precedential decision of a panel of this Court in Holt v. Pennsylvania, 683 F. App'x 151 (3d Cir. 2017), in finding that Sivella's "right to be free from a retaliatory investigation based on his engaging in protected speech" was not clearly established at the time Giangeruso sent a letter to the Township Police Chief requesting the initiation of an investigation into no-show municipal jobs in October 2013.

We find that the District Court properly concluded that Giangeruso was entitled to qualified immunity because, at the time he requested the initiation of an investigation into no-show municipal jobs in 2013, it was not clearly established that, assuming the investigation was requested in retaliation for protected speech, such an adverse action amounted to a First Amendment violation.

"[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.' " Bayer v. Monroe Cnty. Children & Youth Servs., 577 F.3d 186, 191 (3d Cir. 2009) (quoting Pearson v. Callahan, 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009)). "Clearly established" means that "there must be sufficient precedent at the time of action, factually similar to the plaintiff's allegations, to put

defendant on notice that his or her conduct is constitutionally prohibited." Mammaro v. N.J. Div. of Child Prot. & Permanency, 814 F.3d 164, 169 (3d Cir. 2016) (quoting McLaughlin v. Watson, 271 F.3d 566, 572 (3d Cir. 2001)). We first look to applicable Supreme Court precedent, but if none exists, "a 'robust consensus of cases of persuasive authority' in the Court[s] of Appeals could clearly establish a right for purposes of qualified immunity." Id. (quoting Taylor v. Barkes, 575 U.S. 822, 826, 135 S.Ct. 2042, 192 L.Ed.2d 78 (2015) (per curiam)).

The right that **Sivella** alleges Giangeruso violated is his right to be free from a request for an investigation into his employment in retaliation for the exercise of his First Amendment rights. A claim for First Amendment retaliation requires: "(1) constitutionally protected conduct, (2) retaliatory action sufficient to deter a person of ordinary firmness from exercising his constitutional rights, and (3) a causal link between the constitutionally protected conduct and the retaliatory action." Thomas v. Indep. Tp., 463 F.3d 285, 296 (3d Cir. 2006). As noted above, **Sivella** alleges that Giangeruso retaliated against him for his statements to HUD investigators in 2011 by requesting the initiation of an investigation into whether he held a no-show municipal job in October 2013. Accordingly, Giangeruso's entitlement to qualified immunity turns on whether, in October 2013, it was clearly established that a request for an investigation could constitute a retaliatory act for purposes of the First Amendment.

In Hartman, the Supreme Court held that a plaintiff alleging a speech-based retaliatory prosecution claim must plead and prove an absence of probable cause to support the criminal charge underlying the retaliation claim. 547 U.S. at 252, 126 S.Ct. 1695. In dicta, the

Supreme Court stated that it had not established that a retaliatory investigation was a "constitutional violation." Id. at 262 n.9, 126 S.Ct. 1695. Since Hartman, no Supreme Court case has addressed the issue of whether the initiation of a retaliatory investigation can constitute a First Amendment violation. As this Court has previously stated, an absence of relevant Supreme Court precedent strongly supports a finding that a particular right is not clearly established. Spady v. Bethlehem Area Sch. Dist., 800 F.3d 633, 639 (3d Cir. 2015) (stating that "[i]n order for a right to be clearly established there must be applicable precedent from the Supreme Court").

Moreover, in 2013, there existed no "robust consensus of cases of persuasive authority" clearly establishing a right to be free from a retaliatory investigation. Mammaro, 814 F.3d at 169 (citation and internal quotation marks omitted). **Sivella** argues that the District Court erroneously relied on Holt, wherein a panel of this Court observed that we had "not considered whether the initiation of an internal investigation can constitute an adverse action for purposes of a First Amendment retaliation claim, and our sister circuits are split on the issue." 683 F. App'x at 154. We recognize that Holt was a non-precedential opinion, which does not constitute binding precedent. See 3d Cir. I.O.P. 5.7 (2018). What is significant, however, is that there was and remains a circuit split on the relevant issue. Compare, e.g., Breaux v. City of Garland, 205 F.3d 150, 158 (5th Cir. 2000) (finding that "[i]nvestigating alleged violations of departmental policies ... [is] not [an] adverse employment action"), with Dahlia v. Rodriguez, 735 F.3d 1060, 1078-79 (9th Cir. 2013) (holding that placement on administrative leave pending discipline

can constitute an adverse action for purposes of a First Amendment retaliation claim).

In view of the above authority (or lack thereof), we easily conclude that, in October 2013, when Giangeruso sent a letter requesting the initiation of an investigation of no-show municipal jobs by the Township Chief of Police, allegedly in retaliation for Sivella's protected speech, it was not clearly established that such an adverse action amounted to a First Amendment violation. Accordingly, the District Court correctly concluded that Giangeruso was entitled to qualified immunity and summary judgment as to Sivella's First Amendment retaliation claims. In light of the Court's conclusion regarding Giangeruso's entitlement to qualified immunity, we need not reach Sivella's argument regarding the existence of material factual disputes as to certain elements of his First Amendment retaliation claims.

## III. Conclusion

For the foregoing reasons, we will affirm the District Court's order granting Appellees' motion for reconsideration and summary judgment in favor of Giangeruso.

## Footnotes

*The Honorable Yvette Kane, United States District Judge for the Middle District of Pennsylvania, sitting by designation.

**This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

1Not relevant to this appeal is the District Court's dismissal of Sivella's remaining claims against the Township upon his consent.

2Sivella was never contacted or questioned by any law enforcement agency related to any investigation into no-show municipal jobs.

3His complaint also asserted a claim under the New Jersey Civil Rights Act, N.J. Stat. Ann. § 10:6-1, et seq., for violation of his First Amendment rights, and common law claims of negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress. Upon Sivella's concession that his common law claims failed as a matter of law, the District Court granted Appellees' motion for summary judgment as to those claims.

4Carmen Litterio was the Deputy Police Chief of the Township.

CLOSING

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
MADELINE COX ARLEO
UNITED STATES DISTRICT JUDGE

MARTIN LUTHER KING COURTHOUSE
50 WALNUT ST. ROOM 4066
NEWARK, NJ 07101
973-297-4903

June 16, 2020

VIA ECF

LETTER ORDER

**Re: Sivella v. Township of Lyndhurst, et al.**
**Civil Action No. 15-7038**

Dear Litigants:

This matter comes before the Court by way of Defendants Township of Lyndhurst's (the "Township") and Robert Giangeruso's ("Giangeruso" and, together with the Township, "Defendants") Motion for Reconsideration, ECF No. 50, of the Court's November 6, 2019 Order, ECF No. 49 (the "Summary Judgment Order"), pursuant to Local Civil Rule 7.1. For the reasons that follow, the Motion is **GRANTED.**

## I. BACKGROUND

Because the parties are familiar with this litigation, the Court briefly summarizes the key facts from the Summary Judgment Order.

This matter arises out of claims that Defendants improperly retaliated against Plaintiff David Sivella ("Plaintiff" or "Sivella") for exercising his First Amendment freedom of speech rights. Summary Judgment Order at 1; see also Compl. ¶¶ 21-26, 40-44 (alleging First Amendment claims under 42 U.S.C. § 1983 ("Section 1983") and the New Jersey Civil Rights Act ("CRA"), N.J.S.A. § 10:6-1 et seq.), ECF No. 1.1.

Plaintiff was an Associate Planner for the Township from 2005 through October 2013 and Executive Director of the Bergen County Housing Department (the "BCHD") from 2010-2011. Summary Judgment Order at 2. In his role at the BCHD, Plaintiff was responsible for overseeing Bergen County's participation in the United States Department of Housing and Urban Development's ("HUD") Section 8 Housing Subsidy program, 42 U.S.C. § 1437f ("Section 8"). Summary Judgment Order at 2.

Giangeruso served as the Township's Public Safety Commissioner from 2005 until mid-2012, when he became the Township's Mayor. Id. He remained Mayor at all times relevant to this action. Id.

Between May and July 2011, officers from the Bergen County Prosecutor's Office and an investigator from HUD interviewed Plaintiff regarding a Section 8 subsidy that Giangeruso received in connection with his mother residing with him. Id.; see also November 5, 2019 Oral Argument Tr. at 11:24-12:8, ECF No. 57. Giangeruso did not learn that Plaintiff gave this interview until the summer of 2013, when FBI investigators questioned Giangeruso about the propriety of the Section 8 subsidy. Summary Judgment

Order at 2-3. Plaintiff alleges that Giangeruso blames him for this investigation, which resulted in the Section 8 subsidy being discontinued. Id.

At a public meeting of the Township's Commissioners on September 10, 2013, Giangeruso and others discussed opening an investigation into "no-show" municipal jobs. Id. at 3. While they did not mention specific names, the Commissioners planned to investigate Plaintiff's Associate Planner job. Id.; see also Giangeruso Dep. Tr. at 71:2-13 (testifying that Plaintiff's job would be investigated), ECF No. 33.7. On October 15, 2013, Giangeruso sent a letter asking Lyndhurst Police Chief James O'Connor ("Chief O'Connor") to investigate two unnamed Lyndhurst employees for no-show jobs "in a confidential and timely manner, with reports solely to me." See Ex. A, ECF No. 41.1 (the "October 15 Letter") (emphasis in original).

On November 1, 2013, Bergen County Prosecutor John Molinelli replied to the October 15 Letter, stating that "it would be inappropriate for Chief O'Connor to commit to provide . . . you with reports concerning such an investigation or to even advise you of whether or not such an investigation exists." Ex. B, ECF No. 41.1 (the "November 1 Letter").

On October 28, 2013, Plaintiff resigned from his Associate Planner role, effective December 31, 2013. Summary Judgment Order at 4. Plaintiff characterizes his resignation as a constructive discharge, alleging that Defendants violated his First Amendment speech rights because they investigated his job in retaliation for his interview with Bergen County and HUD investigators. Id. at 2 n.4, 4.fn1

On March 27, 2019, Defendants moved for summary judgment. ECF No. 33. Following oral argument, the Court denied summary judgment as to

Plaintiff's First Amendment claims, reasoning that genuine disputes of material fact precluded entry of judgment as a matter of law. See Summary Judgment Order at 5-7. The Court also found that Giangeruso was not entitled to qualified immunity because he did "not demonstrate[] that he did not violate clearly established constitutional rights." Id. at 7.

Defendants filed the instant Motion for Reconsideration on November 19, 2019, see ECF No. 50, which Plaintiff opposed, see ECF No. 56.

## I II. LEGAL STANDARD

A party seeking reconsideration must show "(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion . . . or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." Max's Seafood Cafe v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999). The standard is high; reconsideration is not an opportunity for a party to "relitigate the case." OR v. Hunter, 576 F. App'x 106, 110 (3d Cir. 2014). A motion for reconsideration is not an alternative to the appellate process, and one that merely raises "a difference of opinion with the court's decision" must be denied. Ownbey v. Aker Kvaerner Pharm. Inc., No. 07-2190, 2015 WL 7295892, at *1 (D.N.J. Nov. 17, 2015).

## III. ANALYSIS A. Qualified Immunity for Giangeruso

Giangeruso argues that reconsideration of the Summary Judgment Order is warranted because the Court overlooked relevant Supreme Court and Third

Circuit precedent in its qualified immunity analysis. Def. Br. at 4-13, ECF No. 50.2. The Court agrees that Giangeruso is entitled to qualified immunity.fn2

Under the doctrine of qualified immunity, government officials "are shielded 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." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The qualified immunity analysis has two components: (1) whether the plaintiff has demonstrated "a violation of a constitutional right," and (2) "whether the right at issue was clearly established at the time of the defendant's alleged misconduct." Pearson v.Callahan, 555 U.S. 223, 232 (2009). The Court may address these two prongs in either order, and "[q]ualified immunity is applicable unless the official's conduct violated a clearly established constitutional right." Id. at 232, 236.

Here, Defendants only argue that Plaintiff's rights were not clearly established as of the time of Giangeruso's alleged misconduct. See Def. Br. at 4-15. Accordingly, the Court first considers the "clearly established" prong of the qualified immunity analysis.

For a constitutional right to be clearly established, its "contours . . . must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). That is, "in light of pre-existing law the unlawfulness must be apparent." Id. Importantly, "[t]his inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition," and the Court must not "define clearly established law at a high level of generality." Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (internal quotation marks and citations omitted).

In order to appropriately define the right, the Court looks to Plaintiff's underlying claim. To establish a claim for retaliation under the First Amendment, a plaintiff must prove: (1) he was engaged in "constitutionally protected conduct," (2) the defendant took "retaliatory action sufficient to deter a person of ordinary firmness from exercising his constitutional rights," and (3) there is "a causal link between the constitutionally protected conduct and the retaliatory action." Thomas v. Independence Twp., 463 F.3d 285, 296 (3d Cir. 2006). Here, Plaintiff asserts that Giangeruso initiating a confidential, allegedly baseless investigation into Plaintiff's job because of Plaintiff's interview with Bergen County and HUD investigators amounts to a First Amendment violation. See Summary Judgment Order at 5-6. The Court therefore considers whether Plaintiff's right to be free from a retaliatory investigation based on his engaging in protected speech was clearly established when Giangeruso sent the October 15 Letter. See Karns v. Shanahan, 879 F.3d 504, 522 (3d Cir. 2018) (noting that plaintiff's argument that "the law was clearly established that the First Amendment prohibits government officials from subjecting individuals to retaliation for their protected speech," while true, framed the right "at much too high a level of abstraction") (internal quotation marks and citation omitted); Reichle v. Howards, 566 U.S. 658, 664-65 (2012) (explaining that while "the First Amendment prohibits government officials from subjecting an individual to retaliatory actions for his speech," the appropriate inquiry for qualified immunity was whether "the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause" was clearly established).

Plaintiff's claim turns on finding that Giangeruso asking Chief O'Connor to initiate a "confidential" investigation into Plaintiff's job, see October 15 Letter, constitutes a retaliatory act for purposes of the First Amendment. This request came roughly a month after a public Township Commissioner's meeting, wherein Giangeruso and others discussed investigating "no-show" municipal jobs.fn3 The Court concludes it was not clearly established that such a vague investigatory request could constitute a retaliatory act under the First Amendment as of October 2013.

In Hartman v. Moore, the Supreme Court held that in an "action against criminal investigators for inducing prosecution in retaliation for speech," a plaintiff must "allege[] and prove[]" an "absence of probable cause to support the underlying criminal charge." 547 U.S. 250, 252 (2006). The Supreme Court noted, in dicta, "[n]o one here claims that simply conducting a retaliatory investigation with a view to promote a prosecution is a constitutional tort . . . . Whether the expense or other adverse consequences of a retaliatory investigation would ever justify recognizing such an investigation as a distinct constitutional violation is not before us." Id. at 262 n.9. No subsequent Supreme Court case has addressed this issue of whether initiating a retaliatory investigation—standing alone—can constitute a First Amendment violation. An absence of relevant Supreme Court precedent strongly supports finding that the right is not clearly established. See Spady v. Bethlehem Area Sch. Dist., 800 F.3d 633, 639 (3d Cir. 2015) ("In order for a right to be clearly established there must be applicable precedent from the Supreme Court[.]"); see also Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) (noting that to defeat qualified immunity "existing precedent must have placed the

statutory or constitutional question beyond debate") (citation omitted).fn4

B. Claims Against the Township

Beyond Supreme Court precedent, a "robust consensus of cases of persuasive authority" from the Courts of Appeals "could itself clearly establish [a] federal right." City and Cty. of San Francisco, Cal. v. Sheehan, 135 S. Ct. 1765, 1778 (2015). No such consensus exists here.

As of 2017—more than four years after the relevant conduct here—the Third Circuit still "ha[d] not considered whether the initiation of an internal investigation can constitute an 'adverse action' for purposes of a First Amendment retaliation claim." Holt v. Pennsylvania, 683 F. App'x 151, 159 (3d Cir. 2017).5 In granting qualified immunity, the panel described a disagreement among sister circuits on this issue. See id. (summarizing conflicting precedent from the Fifth and Ninth Circuits). Based on that disagreement, the panel found the plaintiff's First Amendment rights were not clearly established, reasoning that when "'judges . . . disagree on a constitutional question, it is unfair to subject [a public official] to money damages for picking the losing side of the controversy.'" Id. (quoting Wayne v. Layne, 526 U.S. 603, 618 (1999)) (alteration in original). Holt demonstrates that, when Giangeruso sent the October 15 Letter, there was not a "robust consensus," Sheehan, 135 S. Ct. at 1778, among courts that initiating an investigation into an employee in retaliation for protected speech constituted a First Amendment violation. Given this lack of Supreme Court and Third Circuit precedent, the Court cannot find that Giangeruso was on notice that asking for an investigation into

Plaintiff's job could amount to unconstitutional retaliation. As such, Giangeruso is entitled to qualified immunity. Id.

Defendants argue that the Court should dismiss Plaintiff's claims against the Township. See Def. Br. at 3-4, 15. On January 27, 2020, the Court ordered Plaintiff to show cause why his remaining claims against the Township should not be dismissed for failing to establish any municipal "policy or custom" for which the Township could be held liable under Section 1983 pursuant to the Supreme Court's decision in Monell v. Department of Social Services, 436 U.S. 658, 693 (1978). See ECF No. 59. In response to that Order, Plaintiff filed a letter consenting to dismissal of the remaining claims against the Township. See ECF No. 60. Accordingly, the Court dismisses the remaining claims against the Township.

## IV. CONCLUSION

For the reasons stated above, Defendants' Motion for Reconsideration, ECF No. 50, is **GRANTED**. Giangeruso is entitled to summary judgment based on qualified immunity, and the remaining claims against the Township of Lyndhurst are **DISMISSED**. This matter is now **CLOSED**.

**SO ORDERED.**

SO ORDERED.
*/s Madeline Cox Arleo*
MADELINE COX ARLEO
UNITED STATES
DISTRICT JUDGE
Footnotes

1 Plaintiff also claims that he and Giangeruso had a history of antagonism. For example, Plaintiff testified that shortly after Giangeruso became Mayor, he met with Plaintiff and told him, "You work for me now; you do what I tell you to do." Summary Judgment Order at 2. Around the same time, Carmine Litterio ("Litterio"), the Township's Deputy Police Chief and Giangeruso's close friend, publicly approached Plaintiff, shook his hand very aggressively, and told him, "I'm old school, Dave, I stick with my friends. Do you understand me?" Id. at 2-3. There is no evidence in the record, however, that any action was taken with respect to the investigation into Plaintiff's job prior to Plaintiff's October 28, 2013 resignation, other than Giangeruso sending the October 15 Letter.

2 It is worth nothing that Defendants devoted a scant two pages to the issue of qualified immunity in their summary judgment motion, citing no cases which suggest that Plaintiff's right to be free from a retaliatory investigation was not clearly established under the First Amendment. See Def. Summary Judgment Br. at 29-31, ECF No. 32.2. There is, therefore, no caselaw that the Court overlooked and, on that basis alone, the Motion for Reconsideration could be denied. Nonetheless, given the importance of this issue and the fact that qualified immunity may be raised at any time, see Sharp v. Johnson, 669 F.3d 144, 158 (3d Cir. 2012), the Court addresses the qualified immunity arguments raised in the instant Motion.

3 There is no record evidence that Plaintiff was ever mentioned by name at the Commissioners' meeting or in the October 15 Letter. While Giangeruso later testified that Plaintiff's job was one to be investigated, see

Giangeruso Dep. Tr. at 71:2-13, there is no indication that Plaintiff was aware of the October 15 Letter, nor is there evidence that any action was taken in the investigation, see supra n. 1. Plaintiff resigned two weeks after the October 15 Letter. See Summary Judgment Order at 4.

4 Moreover, Hartman's context of a retaliatory arrest or criminal investigation—implicating one's liberty—is fundamentally distinct from the retaliatory employment investigation at issue here, particularly given the fact that the record contains no proof that the investigation was actually initiated. See, e.g., November 1 Letter (Bergen County Prosecutor Molinelli noting "that it would be inappropriate for Chief O'Connor to commit to provide . . . reports concerning such an investigation or even to advise . . . whether or not such an investigation exists or its progress until such time as it is proper and lawful for law enforcement to advise local government officials on such matters").

5 Holt involved an internal investigation initiated by a Pennsylvania State Police Captain into one of his troopers. See 683 F. App'x at 153-54, 159.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
MADELINE COX ARLEO
UNITED STATES DISTRICT JUDGE

MARTIN LUTHER KING COURTHOUSE
50 WALNUT ST. ROOM 4066
NEWARK, NJ 07101
973-297-4903

January 27, 2020

VIA ECF

LETTER ORDER

Re: Sivella v. Township of Lyndhurst, et al.
Civil Action No. 15-7038

Dear Litigants:

You are hereby ordered to show cause why Plaintiff's remaining claims against the Township of Lyndhurst should not be dismissed for failing to establish any municipal "policy or custom" for which the Township could be held liable under 42 U.S.C. § 1983 and its New Jersey analog, N.J.S.A. § 10:6-1 et seq. See Monell v. Dep't of Soc. Servs., 436 U.S. 658, 693 (1978); Estate of Roman v. City of Newark, 914 F.3d 789, 798 (3d Cir. 2019).

Both sides should file briefs by February 4, 2020, with any reply in opposition due by February 11, 2020.

SO ORDERED.
*/s Madeline Cox Arleo*
MADELINE COX ARLEO
UNITED STATES DISTRICT JUDGE

Hon. Madeline Cox Arleo
United States District Judge
District of New Jersey
Martin Luther King Bldg & U.S. Courthouse
50 Walnut Street, Courtroom 4A
Newark, New Jersey 07101

February 3, 2020

Re: Sivella v. Township of Lyndhurst, et. al.
Docket No. 2:15-cv-07038 (MCA)(MAH)

Dear Judge Arleo,

I represent the Plaintiff in the above matter and write this letter in response to the Court's Order to Show Cause regarding Monell liability. See, Dkt. No. 59.

After carefully reviewing the record in this matter I do not believe that it establishes Monell liability. As such, Plaintiff does not wish to use judicial resources determining the issue. Plaintiff does not oppose the Township of Lyndhurst from being dismissed from this matter on those grounds. I conferred with adversary last week to inform him of same. I do not anticipate any further filings related to this discrete issue.

Thank you for your attention to this matter.

Respectfully yours,

s/ Joel Silberman
Joel Silberman, Esq.

Cc: All counsel via ECF only

Filed 11/06/19
UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DAVID SIVELLA
Plaintiff,
v.
TOWNSHIP OF LYNDHURST, and LYNDHURST COMMISSIONER ROBERT GIANGERUSO,
Defendants.

Civil Action No. 15-07038
ORDER

**THIS MATTER** comes before the Court on Defendants Township of Lyndhurst's ("Lyndhurst") and Lyndhurst Commissioner Robert Giangeruso ("Giangeruso" or, collectively, "Defendants") Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56, ECF No. 33;

and it appearing that Plaintiff David Sivella ("Plaintiff") opposes the Motion, ECF No. 40;

and it appearing that this matter arises out of Plaintiff's claims under both the U.S. Constitution, enforced through 42 U.S.C. § 1983, and the New Jersey Civil Rights Act ("CRA"), N.J.S.A. § 10:6-1 et seq., alleging that Defendants retaliated against Plaintiff for exercising his First Amendment freedom of speech rights (Counts 1, 2, 6),1 as well as common law claims of negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress arising out of the same retaliatory acts (Counts 3-5),2 Compl. ¶¶ 21-44, ECF No. 1.1;

and it appearing that Giangeruso served as Lyndhurst's Public Safety Commissioner from 2005 until

becoming its Mayor in mid-2012, Plaintiff's Statement of Material Facts ("SOMF") ¶ 7, ECF No. 39;

and it appearing that Plaintiff was Associate Planner for Lyndhurst from 2005 through 2013, id. ¶ 9;

and it appearing that in 2010, Plaintiff became Executive Director of the Bergen County Housing Department ("BCHD") and was responsible for Section 8 housing, id. ¶¶ 11-13;

and it appearing that during Plaintiff's tenure as Executive Director, BCHD inspectors visited Giangeruso's home to discuss a Section 8 subsidy for his mother who was living with him,3 and Giangeruso later called Plaintiff to complain about this inspection, id. ¶¶ 14-17;

and it appearing that in approximately June 2011, shortly after Plaintiff had left his role as BCHD Executive Director, officers from the Bergen County Prosecutor's Office and an investigator from the federal Department of Housing and Urban Development ("HUD") interviewed him regarding Giangeruso's Section 8 subsidy,4 Pl. Dep. at 90:4-96:23, ECF No. 33.6;

and it appearing that, shortly after Giangeruso became Mayor, he met with Plaintiff and told Plaintiff, "You work for me now; you do what I tell you to do," id. at 104:3-17;

and it appearing that, at some point in late 2012 or 2013, Litterio approached Plaintiff, shook his hand very aggressively, and told Plaintiff, "I'm old school, Dave, I stick with my friends. Do you understand me?" Id. at 109:6-14;

and it appearing that Litterio and Giangeruso had a close relationship and that Litterio was known as Giangeruso's "enforcer," SOMF ¶¶ 21-26;

and it appearing that in 2013, Giangeruso's Section 8 subsidy was discontinued, and that FBI

investigators later interviewed Giangeruso about the subsidy,5 Giangeruso Dep. at 95:21-97:14, 106:1-19, ECF No. 33.7;

and it appearing that Plaintiff alleges Giangeruso blamed him for the Bergen County and HUD investigations into Giangeruso's Section 8 subsidy, Pl. Dep. at 106:7-107:17;

and it appearing that Giangeruso attended a September 10, 2013 meeting of the Lyndhurst Commissioners where there was a discussion of investigating "no-show" government jobs, Giangeruso Dep. at 69:5-72:25;

and it appearing that, while no names were specifically mentioned at this meeting, Giangeruso testified that Plaintiff's job was one of the roles to be investigated, id. at 71:2-13;

and it appearing that Plaintiff testified that Litterio was at the September 10 meeting and "went on a tirade about this one person writing things on a message board that were . . . defamatory," Pl. Dep. at 115:14-23;

and it appearing that, while Plaintiff did not write those online posts, members of the Lyndhurst government often assumed Plaintiff was the author, Pl. Dep. at 255:18-265:14;6

and it appearing that on October 15, 2013, Giangeruso sent a letter to Lyndhurst Police Chief James O'Connor ("O'Connor"), asking him to investigate two unnamed Lyndhurst employees for no-show jobs "in a confidential and timely manner, with reports solely to me," Pl. Ex. A, ECF No. 41.1 (emphasis in original);

and it appearing that on November 1, 2013, Bergen County Prosecutor John Molinelli ("Molinelli") sent a letter to Giangeruso in response to Giangeruso's October 15 letter, stating that "it would be inappropriate for Chief O'Connor to commit to provide . . . you with

reports concerning such an investigation or to even advise you of whether or not such an investigation exists," Pl. Ex. B, ECF No. 41.1;

and it appearing that Plaintiff resigned from his role as Lyndhurst Associate Planner on October 28, 2013, effective December 31, 2013, allegedly owing in part to Defendants' intimidating and retaliatory actions, Plaintiff's Response to Defendant's L. Civ. R. 56.1 Statement of Undisputed Material Facts ¶ 44, ECF No. 39;

and it appearing that, on August 14, 2014, Litterio instructed Lieutenant Michael Carrino ("Carrino") to investigate a car parked on a lawn near Plaintiff's home, Litterio Dep. at 62:6-63:22, ECF No. 41.2;

and it appearing that officers then arrived at Plaintiff's home, spoke to roofers who were performing work on Plaintiff's house at the time, and left without documenting any part of this incident, SOMF ¶¶ 32-42;7

and it appearing that Carrino was "chastised" by O'Connor for failing to document this incident, id. ¶ 43; O'Connor Dep. at 25:7-13, ECF No. 41.2;

and it appearing that Defendants now seek summary judgment on Plaintiff's claims, ECF No. 33; and it appearing that in considering a motion for summary judgment, the Court views all evidence in the light most favorable to the non-moving party, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986);

and it appearing that summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law," Fed.R.Civ.P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986);

and it appearing that to establish a claim for retaliation under the First Amendment, Plaintiff must

prove: (1) he was engaged in "constitutionally protected conduct," (2) Defendant took "retaliatory action sufficient to deter a person of ordinary firmness from exercising his constitutional rights, and (3) a causal link between the constitutionally protected conduct and the retaliatory action," Thomas v. Independence Twp., 463 F.3d 285, 296 (3d Cir. 2006) (citations omitted);

and it appearing that the parties do not dispute that Plaintiff was engaged in constitutionally protected conduct,8 Pl. Mem. at 6; Defs. Br. at 16, ECF No. 33.3 (only arguing Plaintiff failed to satisfy the second and third elements of the Thomas test);

and it appearing that Defendants argue Plaintiff has not adduced evidence of any adverse or retaliatory action that would deter a person of ordinary firmness from exercising his First Amendment rights, Defs. Br. at 8-16;

and it appearing that whether retaliatory action is sufficient to deter a person of ordinary firmness from exercising his constitutional rights is an objective test, such that whether or not a plaintiff was actually deterred is not dispositive to the inquiry, see Martin v. Gearhart, 712 F. App'x 179, 188 (3d Cir. 2017) ("The test for adverse action . . . is not whether this plaintiff would be deterred, but rather whether a [plaintiff] of ordinary firmness would be deterred.") (citing Bistrian v. Levi, 696 F,3d 352, 376 (3d Cir. 2012));

and it appearing that "whether a retaliatory campaign of harassment has reached the threshold of actionability under [the First Amendment and] § 1983" is "generally a question of fact," Suppan v. Dadonna, 203 F.3d 228, 233 (3d Cir. 2000);

and it appearing that there is a genuine factual dispute as to whether a person of ordinary firmness would be deterred from speaking out because of

Defendants' retaliatory acts, including Giangeruso and Litterio's threatening statements and Giangeruso's investigation into Plaintiff's job, compare, e.g., Brennan v. Norton, 350 F.3d 399, 419 (3d Cir. 2003) (finding that allegations that the plaintiff "was taken off the payroll" and given several suspensions would rise to actionable retaliation, while a supervisor failing to use plaintiff's title or capitalize his name would not); Thomas, 463 F.3d at 290, 296 (holding that "campaign of harassment and intimidation," which included wrongfully accusing the plaintiff of breaking the law, subjecting him to unreasonable searches and seizures, and causing unwarranted investigations of him was actionable retaliation); with Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006) (noting that "petty slights, minor annoyances, and simple lack of good manners" are not actionable); Revell v. City of Jersey City, 394 F. App'x 903, 906 (3d Cir. 2010) (holding that the plaintiff's "allegations, which were equivalent to a few criticisms, admonishments, or verbal reprimands, do not rise to the level of a campaign of retaliatory harassment" as a matter of law);

and it appearing that Defendants argue Plaintiff has failed to proffer evidence of a causal link between his constitutionally protected conduct and the alleged retaliation, Defs. Mem. 8, 15-16, 20-23;

and it appearing that to establish causation in a First Amendment retaliation action, a plaintiff "usually must prove either (1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or (2) a pattern of antagonism coupled with timing to establish a causal link," Lauren W. ex rel. Jean W. v. DeFlaminis, 480 F.3d 259, 267 (3d Cir. 2007);

and it appearing that there is a genuine issue of

material fact with respect to the causation element, because a reasonable fact-finder could infer a "pattern of antagonism" between Plaintiff and Giangeruso and a "temporal proximity" between Giangeruso's Section 8 subsidy being discontinued in 2013, Giangeruso blaming Plaintiff for the investigation into that subsidy, and Giangeruso subsequently opening an investigation into Plaintiff's job after the September 10, 2013 Commissioners' meeting;

and it appearing that summary judgment is inappropriate on Counts 1 and 2 because of the material fact disputes discussed above;

and it appearing that Giangeruso argues he is entitled to qualified immunity, Defs. Mem. at 29-31;

and it appearing that government officials performing their "discretionary" official duties are generally entitled to qualified immunity if their actions "do[] not violate clearly established statutory or constitutional rights of which a reasonable person would have known," Harlow v. Fitzgerald, 457 U.S. 800, 818(1982);

and it appearing that summary judgment for Giangeruso based on qualified immunity is inappropriate at this stage because he has not demonstrated that he did not violate clearly established constitutional rights; and it appearing that summary judgment is inappropriate on Plaintiff's claim under the CRA (Count 6) for the reasons discussed in connection with Counts 1 and 2 supra, because the analysis of a First Amendment claim under the CRA mirrors the analysis under federal law, see Trafton v. Woodbury, 799 F. Supp. 2d 471, 443-44 (collecting cases and noting that courts in this District have "repeatedly interpreted [CRA] analogously to [42 U.S.C.] § 1983");

IT IS on this 6th day of November, 2019;
ORDERED that Defendant's Motion for Summary Judgment, ECF No. 33, is GRANTED as to the negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress claims (Counts 3-5) and DENIED as to the First Amendment claims under 42 U.S.C. § 1983 and the NJ CRA (Counts 1, 2, and 6).

*/s Madeline Cox Arleo*_____
HON. MADELINE COX ARLEO
UNITED STATES DISTRICT JUDGE

Footnotes
1 At oral argument, Plaintiff's counsel clarified that this claim is limited to Plaintiff's speech to investigators regarding Giangeruso's Section 8 Housing subsidy and the allegedly retaliatory investigation into Plaintiff's job that followed.
2 Plaintiff concedes that these common law claims fail as a matter of law. Pl. Mem. at 12, ECF No. 40. As such, the Court will dismiss Counts 3-5.
3 Throughout this Order, the Court will refer to the subsidy as "Giangeruso's Section 8 subsidy."
4 This is the "speech" upon which Plaintiff's First Amendment claim is premised. Although this speech occurred sometime in 2011, Plaintiff claims that it was not until 2012-2013, when Giangeruso's Section 8 subsidy was discontinued and when federal investigators spoke to Giangeruso after its discontinuance, that Giangeruso learned that Plaintiff had previously spoken to investigators on this issue. Although there is not direct evidence that Giangeruso knew that Plaintiff had spoken with investigators, there is circumstantial evidence, discussed infra, that includes comments from

Giangeruso and Lyndhurst Deputy Police Chief Carmine Litterio ("Litterio") which support an inference that Giangeruso knew Plaintiff had spoken to investigators by 2013.

5 The record is not clear on the precise timing of when the subsidy was discontinued and when FBI investigators interviewed Giangeruso. Giangeruso testified that he was "not sure" if he was interviewed by the FBI in "2014 or '15." Giangeruso Dep. at 96:10-11. At oral argument, counsel for both Plaintiff and Defendants indicated that the FBI interview occurred in 2013.

6 Plaintiff stated that he "absolutely was not the person posting things on the website or on a message board" that Litterio raised at the September 2013 meeting, but he "assume[s] they think I'm doing everything anyway." Pl. Dep. at 261:21-262:3.

7 Plaintiff was not home when officers arrived. SOMF ¶ 40.

8 As previously noted, Plaintiff's counsel focused on Plaintiff's conversations with Bergen County and HUD investigators as the relevant protected speech in this case. See supra notes 1, 4.

**CERTIFICATE OF COMPLIANCE**

DAVID SIVELLA,

*Petitioner*

v.

TOWNSHIP OF LYNDHURST, ET AL

*Respondent*

As required by Supreme Court Rule 33.1(h), I certify that the Petition for Writ of Certiorari contains 1,309 words, excluding the parts of the Petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 29, 2021

/s/ Frederick W. Wright

FREDERICK W. WRIGHT
Wright Appellate Services, LLC
1015 Chestnut Street, 517 Jefferson Building
Philadelphia, PA 19107
(215) 733-9870*FAX (215) 733-9872*(800) 507-9020

# AFFIDAVIT OF SERVICE

SUPREME COURT OF THE UNITED STATES

DAVID SIVELLA,
Petitioner

v.

TOWNSHIP OF LYNDHURST, ET AL
Respondent

I, Frederick W. Wright, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by:

Joel S. Silberman, Esq.
Suite 300
26 Journal Square
Jersey City, NJ 07306
(201) 420-1913
*Attorney for Petitioner*

On this 29th day of October 2021 I deposited copies of the Petition for Writ of Certiorari, with the United States Post Office to mail priority to the following, in addition to Electronic Filing:

Ian C. Doris, Esq.
Keenan & Doris
71 Union Avenue, Suite 105
Rutherford, NJ 07070

Scott Sears, Esq.
Cleary Giacobbe Alfieri & Jacobs
169 Ramapo Valley Road
Upper Level 105
Oakland, NJ 07436

Filing to the Court has been perfected on the same date as above.

/s/ Frederick W. Wright
FREDERICK W. WRIGHT
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1015 Chestnut Street, 517 Jefferson Building
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