

IN THE

Supreme Court of the United States

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DAVID SIVELLA,

Petitioner,

—v.—

TOWNSHIP OF LYNDHURST, NEW JERSEY, ET AL.,

Respondent.

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

**BRIEF IN OPPOSITION FOR RESPONDENT
ROBERT GIANGERUSO**

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QUESTION PRESENTED

Respondent objects to Petitioner's overly broad and incorrect framing of the question presented. The relevant issue based on the decision below has never been, and is not now, what activities are barred or prohibited by the First Amendment. The legal issue is whether Qualified Immunity was properly applied and the sole question presented is:

In October 2013, was it clearly established that an elected government official's request for an investigation into perceived wrongdoing, assuming it was requested in retaliation for protected speech, constituted a First Amendment violation?

PARTIES TO THE PROCEEDING

The only remaining parties to the case in this proceeding are David Sivella, Petitioner, and Robert Giangeruso, Respondent.

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CITATION TO OPINIONS BELOW

Respondent is in agreement with Petitioner's statement with the addition of pointing out the Court's Orders dismissed all claims against all Defendants including Robert Giangeruso and the Township of Lyndhurst.

JURISDICTION

Respondent is in agreement with Petitioner's statement on jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS

With the addition of the constitutional legal doctrine of Qualified Immunity as set forth by this Court's longstanding precedent, respondent is in agreement with Petitioner's statement on constitutional and statutory provisions.

Qualified Immunity

Government officials performing discretionary functions are shielded from civil liability for civil damages insofar as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Ashcroft v. al-Kidd*, 563 U.S. 731; *Pearson v. Callahan*, 555 U.S. 223 (2009).

STATEMENT OF RELATED CASES

There are no related cases.

COUNTERSTATEMENT OF THE CASE

Petitioner was properly given the benefit of all favorable inferences as required in a Summary Judgment Motion therefore, Respondent accepts Petitioner's Statement of Facts for purposes of this Petition but with the following notable exceptions.

Petitioner does not make any argument that Qualified Immunity was improperly granted based on questions of fact. Any alleged factual disputes raised by Petitioner are unavailing because they are directed at the substantive First Amendment claims only and do not pertain to the Court's decision on Qualified Immunity. Petitioner does not dispute any factual basis supporting the Court's decision granting Qualified Immunity. Petitioner continues to incorrectly urge this Court, as he did below, to improperly shift the burden of proof to Respondent, to prove the Respondent did not violate Petitioner's First Amendment rights. He then raises issues that are wholly irrelevant to the legal issue of Qualified Immunity. Qualified Immunity is a threshold legal question which was properly decided by the District Court of New Jersey and upheld by the Third Circuit.

Additionally, Petitioner asserts that the request for an investigation into "no show jobs" was *baseless* although he provides this Court with no credible evidence to support this claim. The uncontroverted evidence from Petitioner himself, under oath at deposition, confirms that despite having an obligation pursuant to Township Ordinance to report to Mayor Giangeruso as part of his employment duties as a Township Planner, Petitioner failed to do so (JA117 T59:24 to T61:19). Furthermore, Petitioner did not keep any records of the time he spent working on projects nor did he punch into work as noted by a

subsequent Township-wide audit conducted by the New Jersey State Comptroller's office in 2014. The Township Governing Body was advised that their timekeeping records were deficient and were further advised to keep better records pursuant to administrative requirements. (JA117-197 T127:2-28; T186:12-15). Petitioner testified under oath that he did not keep any time records and based on this failure he understood and agreed with the Comptroller's conclusion. (JA117 T222:3 to 223:7). Furthermore, Petitioner confirmed under oath that he was never questioned by any government or law enforcement agency related to any request for an investigation into "no-show jobs" or in regard to the State Comptroller's audit. (JA82 T82:15 to T83:6; JA117 T127:2-28; T186:12-15).

Moreover, apart from a request for an investigation, Petitioner further admits that as of August 2013, two months before the request for an investigation was even made, he had already advised the Township Manager that he intended to resign because he purchased a home in a different town and planned to move. (See JA98; JA117 T127:2-28; T186:12-15)¹.

The only factually material allegation of retaliation for alleged protected free speech is the **request** for an investigation into no show jobs, which, as a matter of law, was not clearly established at the time of the request for the investigation in October 2013.

Consequently, giving Petitioner the benefit of all favorable inferences, the material facts in the record

¹ At deposition Petitioner testified he thought his reference to "last August" in his October 28, 2013 letter referred to August 2013 not August 2012. He was given the benefit of this as a favorable inference by the Court below.

support the Court's finding that Qualified Immunity was appropriate. As of October 2013, there was no clearly established right that would put any reasonable government official on notice that a request for an investigation, even assuming it was retaliatory, could in any way violate Petitioner's First Amendment Rights.

ARGUMENT SUMMARY

This Petition should be denied for five very important reasons: (1) The Court below properly decided this case and correctly applied the law; (2) There is no true split of the Circuit Courts as claimed because the facts, and legal issues, and question presented in those cases do not squarely address the facts, and issues and question presented in this case; (3) Petitioner did not disclose this Court's prior consideration and rejection of Certiorari in the cases Petitioner claims to establish a split in the Circuit Courts; (4) The facts of this case are unique, complicated and do not present an opportunity for any proper clarification of the question presented; (5) This case does not present a question of national importance requiring this Court's consideration because this Court has already considered these argument in *Breaux v. City of Garland*, 205 F.3d 150, 158 (5th Cir. 2000) and *Dahlia v. Rodriguez*, 735 F.3d 1060, 1078-79 (9th Cir. 2013), and denied Certiorari in both.

REASONS FOR DENYING THE PETITION

I. THE THIRD CIRCUIT APPLIED THE PROPER STANDARD FOR QUALIFIED IMMUNITY.

The Third Circuit Court decision correctly applied Qualified Immunity. The Court found that *Holt v. Pennsylvania*, 683 F. App.'x 151 (3d Cir. 2017) was persuasive in determining that the right was not clearly established. However, other circuits have found that a workplace investigation, especially one without any disciplinary action, is not an adverse employment action. Without any adverse action, there could be no retaliation claim. See, e.g., *Jones v. Fitzgerald*, 285 F.3d 705, 714-15 (8th Cir. 2002). In this case, Petitioner was not fired, demoted or otherwise disciplined. No employment action was taken at all much less adverse action. Based on the body of Appellate Circuit Court law holding that an investigation is not considered an adverse employment action, this Court need not address Petitioner's alleged First Amendment concerns.

II. THE ISSUE PRESENTED BY PETITIONER IS INCORRECT, OVERLY BROAD AND NOT PROPERLY BEFORE THIS COURT.

The Court should deny Certiorari because Petitioner has incorrectly and improperly framed the question presented as a determination of whether the First Amendment bars public employees from initiating *baseless* criminal investigations in retaliation for protected speech. First, this is a completely different issue than that presented and decided by the Court below. The sole question presented is purely legal. The issue in this case was not about what actions are barred pursuant to the First Amendment as Petitioner sets forth, but rather whether it was clearly established that a reasonable government official would know that a request for an investigation, even if assumed in retaliation for protected speech, could constitute a First Amendment violation.

In addition to incorrectly framing the question presented, Petitioner's question presented is the exact overly broad generalized claim that has repeatedly been rejected in the Third Circuit and by this Court. See, *Karns v. Shanahan*, 879 F.3d 504 (3d Cir. 2018); *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam).

The issue as framed by Petitioner ignores the only relevant legal question in this case which is whether at the time of the alleged misconduct (October 2013) it was clearly established that a reasonable government official would know that calling for an investigation, even if it was assumed to be retaliatory, could violate the First Amendment. Petitioner does not, and indeed cannot dispute the Appellate Court's decision finding that there was no such clearly established right at the time of the request for an investigation in this case

based on Third Circuit and U.S. Supreme Court precedent as well as the utter lack of any robust consensus of authority among the other Circuit courts.

III. THE PETITION SHOULD BE DENIED BECAUSE THERE IS NO TRUE SPLIT AMONG CIRCUIT COURTS ON THE RELEVANT LEGAL ISSUES IN THIS CASE.

While there is a difference between the Fifth and Ninth Circuits decisions there is no true Circuit split on the issue given the unique set of facts and different legal questions in those cases. The divergence is merely a majority/minority position. The majority of Circuit courts support Respondents' position that it was not clearly established that as of 2013, an alleged retaliatory request for an investigation into no-show jobs based on alleged protected speech would violate the First Amendment. Second, while it is true that the Third Circuit has not directly addressed this issue in a published decision, it has held in an unpublished decision – relied upon by the appellate court in this case – that as of 2017, four years after the request for an investigation in this case, the right was still not clearly established. See, *Holt, supra*. Petitioner fails to provide any legitimate reason for this Court to overturn the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits, which held that workplace investigations are not deemed to be adverse employment actions. See, *Joseph v. Leavitt*, 465 F.3d 87, 91 (2d Cir. 2006), *cert denied* 127 S. Ct. 1855 (2007) (an employee does not suffer a materially adverse change in the terms and conditions of employment where the employer merely enforces its preexisting disciplinary policies in a reasonable manner); *Gunten v. Maryland*, 243 F.3d 858, 869 (4th Cir. 2001) (terms, conditions, or benefits of a person's employment do not

provide immunity from the employer's policies or disciplinary procedures); *Kuhn v. Washtenaw Cty.*, 709 F.3d 612, 625 (6th Cir. 2013) ("neither an internal investigation into suspected wrongdoing by an employee nor that employee's placement on paid administrative leave pending the outcome of such an investigation constitutes an adverse employment action[.]" citation omitted); *Nichols v. S. Ill. University-Edwardsville*, 510 F.3d 772, 786-87 (7th Cir. 2007) (placement on paid administrative leave pending a fitness for duty evaluation was not a materially adverse action); *Jones v. Fitzgerald*, 285 F.3d 705, 714-15 (8th Cir. 2002) (no material disadvantage in a term or condition of employment from an investigation where the plaintiff was not suspended, nor was she threatened with discipline); *Lincoln v. Maketa*, 880 F.3d 533, 543 (10th Cir. 2018) (workplace investigations generally are not considered adverse employment actions); *Rademakers v. Scott*, 350 Fed App'x 408, 412-13 (11th Cir. 2009) (the employment investigation itself and recommendation of termination were not materially adverse actions).

Additionally, the cases cited by Petitioner from the Fifth and Ninth Circuits alleging a Circuit Court split are not squarely on point with this case and those decisions do not represent a true split in the Circuit Courts for several reasons. See, *Breaux v. City of Garland*, 205 F.3d 150 (5th Cir. 2000); cert. denied 531 U.S. 816 (2000); and *Dahlia v. Rodriguez*, 735 F. 3d 1060; cert. denied sub nom. *City of Burbank v. Dahlia*, 571 U.S. 1198 (2014).

First, these cases are significantly different from this case both factually and legally. Therefore, any difference in those decisions from the Third Circuit Court's decision in this case, is based on the unique facts and the different legal questions presented in

those cases and cannot be said to constitute a true “split” in judicial authority. Secondly, neither case relied upon by Petitioner involved Qualified Immunity, although a companion case to *Dahlia*, which Petitioner failed to cite and completely omitted from his brief, did grant Qualified Immunity in a First Amendment retaliatory investigation/ administrative leave case, specifically finding that the law was not clearly established at the time of the offending conduct. *Dahlia v. Stehr*, 491 Fed. App’x 799, 801 (9th Cir. 2012). Thus, the only time the Ninth Circuit analyzed a retaliatory investigation to determine if Qualified Immunity applied, it actually granted Qualified Immunity which is entirely consistent with the Third Circuit decision in this case finding the law was not clearly established. Consequently, as it relates to Qualified Immunity there is no split in the Circuit courts.

Finally, Petitioner failed to inform this venerable Court that it has already weighed in on *Breaux* and *Dahlia* denying Certiorari in both cases. Therefore, this Court has already had an opportunity to clarify the so called split and in both cases did not see the need for review. This is reason enough to deny this Petition, but there are also substantive reasons requiring denial.

Importantly, neither *Breaux* nor *Dahlia* involved Qualified Immunity which is the sole legal issue in this Petition. This is significant because when analyzing Qualified Immunity, it is important that the facts in the precedential decision are sufficiently similar to the facts of the case before the Court to ensure that a reasonable person in the same or similar circumstances would have sufficiently been on notice that his or her actions would violate clearly established law.

In *Breaux*, the Fifth Circuit did not make any determination on whether Qualified Immunity applied or whether it was clearly established that an internal affairs investigation could constitute a First Amendment violation. Thus, the two main issues in this case were not even addressed by the Fifth Circuit. Nevertheless, the Fifth Circuit considered whether an investigation constituted an adverse action and concluded that their own precedent specifically established that investigations do not constitute adverse employment actions. Therefore, even though the alleged investigation in *Breaux, supra*, was assumed to be based on the Plaintiff's allegations of illegal political investigations by his superiors, the Fifth Circuit holds that an investigation is not an adverse employment action sufficient to sustain any freedom of speech claim. *Breaux, Id.* at 157-158.

The *Breaux* case does not present any contrary decision that would be inconsistent with the Third Circuit's decision in this case. The *Breaux* case did not make any determination regarding Qualified Immunity as it was apparently never raised. That the Fifth Circuit has made a determination that an internal investigation is not a sufficient adverse action to constitute a potential First Amendment violation is not at odds with the Third Circuit's decision in this case. The Third Circuit has not made any pronouncement regarding whether such investigations can constitute adverse action sufficient to trigger a First Amendment violation. *Holt, supra*, 683 F. App.'x at 159. If *Breaux* were followed, Robert Giangeruso would have had all claims dismissed against him in this matter. More importantly however, this Court has considered the facts and legal issues raised in the *Breaux* case denying Certiorari signaling that this Court did not determine any inconsistency or

conflict in the law requiring intervention. *Breaux*, 531 U.S. 816 (2000).

Likewise, in *Dahlia v. Rodriguez*, 735 F. 3d 1060 (9th Cir. 2013) *cert. denied sub nom. City of Burbank v. Dahlia*, 571 U.S. 1198 (2014) neither the facts nor the legal issues raised in that matter are sufficiently square with the facts or legal issues in this case to constitute a split within the Circuit Courts that would require this Court's intervention. *Dahlia* involved a police officer's allegations of retaliation because he reported misconduct to Internal Affairs, his Police Union and the Sheriff's Department. Dahlia claimed he was placed on administrative leave during an investigation in retaliation for informing on his superiors' misdeeds. The *Dahlia* Court did not consider any issues related to Qualified Immunity or whether it was clearly established that being placed on administrative leave can constitute a First Amendment violation and the legal issue in *Dahlia* was completely different from the legal issues before the Court in this case. The issue in *Dahlia* was whether Plaintiff's reporting his superior officer's wrongdoing to authorities was properly deemed within his public duties as a sworn police officer, and therefore not protected by the First Amendment, or made as a private citizen and therefore potentially protected. The issue of public versus private speech was not any part of the Third Circuit Court's decision in this case. Additionally, the *Dahlia* Court relied heavily on interpretation of California State Law which specifically defines the duties of a police officer to include the disclosure of police misconduct by fellow police officers. Finally, the Court's decision in *Dahlia* overturned a motion to dismiss in lieu of an answer and simply concluded that **under some circumstances** placement on an administrative leave

might constitute an adverse employment action, and that *Dahlia* sufficiently alleged additional acts in his Complaint that could constitute potential adverse employment action and the case was remanded for further proceedings. *See, Dahlia*, 735 F.3d. at 1078. There was no definitive finding by the Ninth Circuit that under all circumstances being placed on administrative leave, even if it is based on protected First Amendment speech such as reporting misconduct, constitutes an adverse action sufficient to violate the First Amendment. The Ninth Circuit decision in *Dahlia* did not touch on any of the legal issues that are before this Court thus *Dahlia*, is not at odds with the Third Circuit's decision in this case. Nevertheless, the *Dahlia* case came before this Court on a petition for a Writ of Certiorari which was denied. *City of Burbank California v. Dahlia*, 571 U.S. 1198 (2014). Thus, this Court has had the opportunity already to consider the different opinions from the Fifth and Ninth Circuits that Plaintiff claims create a split and on both occasions the Court declined to hear those cases.

Furthermore, this Petition should also be denied because Petitioner omitted a Ninth Circuit decision that supports the Third Circuit's decision in this case. In a companion case to *Dahlia v. Rodriguez*, the Police Chief, Tim Stehr, who was a Defendant in the *Dahlia* case, filed a Motion for Summary Judgment based on Qualified Immunity which was denied by the District Court and because denial of qualified immunity is directly appealable, the Ninth Circuit accepted Stehr's interlocutory appeal. The Ninth Circuit Court opinion was filed on August 7, 2012, granted Qualified Immunity to Tim Stehr, the individual who placed Dahlia on administrative leave, specifically finding, as the Third Circuit did in this case, that because they

had not previously decided the question of whether being placed on administrative leave constitutes an adverse employment action for protected speech, Dahlia's purported right protecting him from placement on administrative leave pending investigation based on his reports of misconduct was not "clearly established" at the time of the challenged conduct, therefore Qualified Immunity was granted. *Dahlia v. Stehr*, 491 Fed. App'x 799 (9th Cir. 2012).

Petitioner failed to advise this Court of its denial of Certiorari in the cases that Petitioner relies upon to ostensibly support his incorrect claim of an Appellate Circuit Court split and his failure to provide this Court with the only relevant Ninth Circuit opinion in a companion case to *Dahlia*, finding a lack of clearly established law that an investigation could constitute an adverse action in violation of the First Amendment, is fatal to this Petition. The *Breaux*, *Dahlia* and *Stehr* decisions definitively establish there is no inconsistency or split between the Fifth and Ninth Circuit Court decisions and the Third Circuit decision on the relevant legal issues in this case.

Both *Breaux* and *Dahlia* were decided on completely different facts than the matter before this Court, and involved different legal questions and neither addressed whether or not Qualified Immunity was appropriate and whether the right to be free from an investigation, even assuming it was retaliatory based on First Amendment speech, was clearly established at the time of the alleged offending conduct in this case which was October 2013. The stark difference in the facts and legal issues between this case and those presented in *Breaux* and *Dahlia*, explains the different conclusions reached by the courts consistent with the facts and issues unique to each case. Because of the fact sensitive decisions and different legal issues

concerned in each case there is no basis to claim, much less find, a true split in the Circuit Courts. Moreover, the *Dahlia v. Stehr* decision actually confirms harmony between the Ninth and Third Circuit courts on Qualified Immunity rather than any split. In examining Qualified Immunity both the Fifth and Ninth Circuit Court concluded that it was not clearly established that an investigation leading to an administrative leave constituted an adverse action, even assuming it was done in retaliation for protected speech, and both the Ninth Circuit in *Dahlia v. Stehr* and the Third Circuit in this case granted Qualified immunity on that basis. For these reasons there is no split in authority in the Circuit Courts and given this Court's prior denial of Certiorari in both *Breaux* and *Dahlia*, this Petition should be denied as a matter of law.

**IV. THERE IS NO QUESTION OF LAW OR
PUBLIC POLICY REQUIRING THIS
COURT'S INTERVENTION AND THIS CASE
IS A POOR VEHICLE TO DECIDE
WHETHER THE RIGHTS ALLEGED BY
PETITIONER ARE "CLEARLY
ESTABLISHED."**

Petitioner contends that "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." Pet. 6. However, Petitioner's attempt to create an issue of national concern fails. Since 2006, this Court has declined to grant Certiorari on cases involving adverse employment actions brought by public officials. In both *Breaux* and *Dahlia*, the two cases that Petitioner cites regarding the alleged Circuit split, Certiorari was denied. In those cases, the facts were more straightforward.

This case is a poor vehicle for reviewing an alleged retaliatory investigation. The underlying claim in this case is based on a public official's belief that some employees had no-show jobs. But Petitioner's sworn testimony confirms his own failure to report to the Mayor or keep any time records and these admitted failures created the belief that work was not being performed. These uncontested facts in the record are glossed over or ignored by Petitioner. Accordingly, the Court should not take this case as it does not present a clean and clear set of facts upon which to settle any open legal question of whether a request for an investigation, even if assumed retaliatory, can constitute a First Amendment violation.

Furthermore, Petitioner claims the question presented in this case is whether the First Amendment bars Mayor Giangeruso's *baseless* request for an investigation in retaliation for Sivella engaging in protected speech. In order to determine whether an investigation can constitute retaliation for protected First Amendment speech, this Court would have to weigh competing First Amendment rights and legal obligations of elected and public officials to report perceived corruption or wrongdoing versus a public employee's freedom of speech. These competing interests do not present a clear case to settle any open legal questions. If a public or elected official reporting perceived wrongdoing could violate a person's free speech, it could easily cause him or her to second guess or even abandon the important public function and solemn duty to report official wrongdoing or misconduct for fear of being sued. This is the very thing Qualified Immunity is meant to protect against.

Consequently, this petition fails to present any basis to invoke this Court's discretionary review and offers no compelling reason to do so.

CONCLUSION

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

Dated: January 11, 2022

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