No. _____

In The
Supreme Court of the United States

MICHAEL BILLIONI, *Petitioner,*
v.
SHERIFF BRUCE BRYANT,
INDIVIDUALLY AND IN HIS OFFICIAL
CAPACITY AS YORK COUNTY SHERIFF,
and YORK COUNTY DETENTION CENTER;
YORK COUNTY SHERIFF'S OFFICE;
YORK COUNTY, *Respondent*s

WCNC-TV INC, *Respondent,*

CONNIE McMILLAN; CHRISTOPHER PENLAND;
JAMES MOORE; LINDSEY HENSON;
CAROL SUTTON; FRANCINE WEYERS;
JAMES BRACKETT, *Intervenors.*

Oon Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether a public employee's speech about serious law enforcement misconduct involving an in-custody death has limited weight in the *Pickering* First Amendment balancing analysis because the employee spoke out while an internal investigation was allegedly ongoing and did not first submit concerns through the chain of command.

2) Whether a public employees' speech about serious law enforcement misconduct has limited weight in the *Pickering* First Amendment balancing analysis because the employee viewed the misconduct on the surveillance video and did not personally witness the misconduct.

LIST OF PARTIES

Michael Billioni, *Petitioner,* and York County Sheriff Bruce Bryant, *Respondent.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Miscellaneous authorities:

PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Billioni respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The first opinion of the United States Court of Appeals for the Fourth Circuit can be found at 759 F. App'x 144 (4th Cir. 2019). The second opinion of the United States Court of Appeals for the Fourth Circuit can be found at 998 F.3d 572 (4th Cir. 2021); The first opinion of the United States District Court for South Carolina is unreported but can be found at *Billioni v. York Cty*., Civil Action No. 0:14-cv-03060-JMC, 2017 U.S. Dist. LEXIS 94677 (D.S.C. June 20, 2017) The second opinion of the United States District Court for South Carolina is unreported but it can be found a *Billioni v. York Cty*., Civil Action No. 0:14-cv-03060-JMC, 2019 U.S. Dist. LEXIS 176257 (D.S.C. Oct. 10, 2019).

JURISDICTION

The judgment of the U.S. Court of Appeals for the Fourth Circuit issued Judgement denying the petition for rehearing *en banc* on July 2, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law … abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

Joshua Grose, a mentally ill prisoner, died, beaten, bleeding, tasered, naked and strapped to a restraint chair (often cited as an instrument of torture and refered to as "the devils chair")[1] in the early morning hours of Sunday, October 20, 2013, in the York County Detention Center ("YCDC") in York, South Carolina. His death was recorded by surveillance systems at the Detention Center.[2] Shortly before his death and while already restrained and being placed in the restraint chair, detention officer James Moore repeatedly punched Grose with a closed fist.

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[1] Emma Ockerman, *Prisons and Jails Still Use the 'Devil's Chair.' It's Been Used for Torture,* Vice News August 9, 2021,https://www.vice.com/en/article/wx5kgx/restraint
-chairs-devils-chair-prisons-jails-torture.
Radley Balko, *The Watch Opinion: Death by the devil's chai*r, The Washington Post,
August 25, 2017 https://www.washingtonpost.com/news/the-watch/wp/2017/08/25/
death-by-the-devils-chair/

[2] The surveillance video is part of the record. It was submitted to both the district court and the Fourth Circuit under seal. (0:14-cv-3060-JMC:ECF No 63-1, ECF No. 234-1) (USCA4 Appeal: 20-1420 Doc: 20)

Although other officers were present, they did not intervene to stop Officer Moore. To the contrary, the detention officers also tased Grose multiple times in "drive stun" mode, which is used for pain compliance, to the point where Mr. Grose became unconscious and had to be revived with smelling salts. When he regained consciousness, the detention officers also put a spit mask and football helmet on his head, which they secured with flex cuffs. Mr. Grose, in addition to experiencing what appeared to be a mental health crisis, had a visible bleeding head wound. Although Emergency Medical Services (EMS) was called, EMS did not take his vitals or transport Grose from the YCDC to the hospital, nor did they render medical assistance. Grose, who was obviously mentally impaired, was then placed, still naked and restrained in the chair, along with shackles and cuffs, and a helmet, alone in a cell, where he died.

Later that same day, York County Sheriff Bruce Bryant ("Sheriff") held a press conference about Grose's in-custody death. At the press conference, the Sheriff's Public Information Officer, Trent Faris ("Faris") alleged in his formal statement of behalf of Bryant that:

Grose had been booked the prior evening, "was very uncooperative with Detention Center officers and staff," "attempted to drown[] himself in his cell toilet," and "hit his head on his cell wall several times." According to Faris, Grose was restrained "for his safety," but "was still very, very combative and kept hitting his head on the back of the . . .

restraint chair. Faris stated when officers tried to put Grose in a football helmet—again, "for his safety"—they noticed a laceration on the back of his head, which led them to contact emergency medical services between approximately 1:20 A.M. and 1:46 A.M. According to the EMS, the lacerations did not require stitches, so the decision was made not to transport to the hospital. At 2:20 a.m. during normal rounds, Detention Officers found Mr. Grose unresponsive. Mr. Grose was unstrapped from the chair and CPR was performed at 2:20 a.m. to 2:29 a.m. EMS was called back to the Detention Center. According to EMS, Mr. Grose was in cardiac arrest when they arrived the second time. Mr. Grose was pronounced dead at the emergency room at 3:05 a.m.

When asked by a reporter whether officers would face disciplinary action for Grose's death, Faris answered "[*a]ll our officers, did exactly what they were supposed to do last night*." Faris indicated that there was an internal investigation being conducted and the matter was being investigated by the South Carolina Law Enforcement Division ("SLED") [3] ; however, it appeared that everyone involved acted properly and did everything possible to save Grose's.

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[3] SLED is a statewide investigative law enforcement agency in South Carolina that provides manpower and technical assistance to other law enforcement agencies and conducts investigations on behalf of the state as directed by the Governor and Attorney General. Sheriffs and other members of law enforcement often work for SLED at some point in their career resulting in a tight knit and interconnected law enforcement community.

Michael Billioni, the Petitioner, worked at YCDC as a Master Control Specialist, he was not at work when Grose died. However, he watched the news coverage, including the Sheriff's press conference. On Monday evening, October 21, 2013, Billioni reported to work for his regularly scheduled shift. He along, with his partner Paul Aube ("Aube"), as well as other detention officers watched the surveillance video of Grose's death. It was common for employees to review events on the surveillance video. Billioni watch the video several times because he was disturbed and concerned by what he saw. Contrary to the Sheriff's claims, "[*a]ll our officers, did exactly what they were supposed to do*." Billioni believed the officers' treatment of Grose contributed to and possibly caused Grose's death. [4] Billioni believed Faris's public statement that "everyone acted appropriately," was not accurate, and should be corrected. Moreover, it appeared to Billioni the Sheriff was attempting to cover-up serious misconduct within YCDC. Mr. Grose was not the first prisoner to die strapped to a restraint chair inside the YCDC. Moreover, it was well known that Officer Moore had a long history of use of excessive force complaints against him. In fact, it is undisputed that Officer Moore had recently returned to work after serving a 6-month suspension for attempting to assault another prisoner in a restraint chair. Officer Moore was required to undergo a

[4] According to the coroner's report the manner of death was sucuide, however the cause of death was closed head injury including subdural, subarachnoid and intraparenchymal hemorrhage due blunt force trauma to the head.

psychological evaluation, where it was determined Moore was "out of control" and unfit for duty. Yet, after being sent to anger management training and placed on medication, the Sheriff allowed Officer Moore to return to work. He was on probationary status at the time of Grose's death.

After his shift, Billioni shared his concerns about what he had seen on the video with his wife, who worked in a non-reporter capacity at a local television station. He told his wife that Grose was "struck approximately 12 times in the course of the incident that led to his death" and "that other officers were there and did nothing" while Moore repeatedly struck Grose. Billioni's wife was disturbed by what by what her husband reported. Thus, when she got to work that day she shared the information with the news director who shared it with investigative reporter Stuart Watson. ("Watson"). Later that same day, Watson contacted the Sheriff's Office with a Freedom of Information Act ("FOIA") request for the surveillance footage. According to the Sheriff, Watson allegedly inquired of the former employee responding to the FOIA whether the video depicted an officer striking Grose multiple times, a detail which had not been included in the public statement. The Sheriff refused to release the video to Watson and directed Chief Administrator James Arwood ("Chief Arwood") and Assistant Administrator Richard Martin ("Martin") to investigate who had "leaked" the alleged "confidential" information about the circumstances surrounding Grose's death to the media. The jail administrators knew Billioni's wife worked at a new

station, so they immediately brought him in for questioning at approximately 5:00 p.m. on Tuesday, October 22, 2013. Because Billioni was afraid of losing his job, he initially denied speaking to anyone about the video. The following morning, Billioni requested to speak with the administrators and at 8:00 a.m. in a telephone call with Chief Arwood, Billioni admitted he discussed the matter with his wife. The Sheriff terminated Billioni on October 25, 2013, for Violations of York County Rules, Regulations and Policies, 300.16 Code of Ethic; VIII Employment Rules of Conduct 16 VII Confidential Information. According to the Sheriff, Billioni violated policy by discussing confidential information about an ongoing investigation with his wife. Notwithstanding, the Sheriff, Chief Arwood and Aube all admitted to discussing details of Grose's death with their wives. Even though the Sheriff now claims Billioni was fired because he initially lied and discussed confidential details with his wife, the paperwork submitted by the Sheriff to the South Carolina Department of Workforce and Employment [5] stated Billioni was denied unemployment benefits because he "hurt the credibility of the Sheriff's Office."

Following Billioni's termination, the Sheriff held a second press conference where he showed (but did not allow photographs or copies of) the video of Mr. Grose's in custody death. The Sheriff told reporters that the officers who were involved in Mr. Grose's

[5] The agency that handles unemployment claims for the state of South Carolina.

death were "heroic", and they did everything that they could to save him. Moreover, he said that he had not found any fault by any officer concerning Grose's death or the other death of another inmate who previously died in a restraint chair.[6] At the press conference, Mr. Watson asked the question, "then why did you fire Mike Billioni"? The Sheriff became very, very agitated and said, "that man was terminated, and I believe you know the answer". And he started to yell at Watson and point his finger at him saying, "out of all the people in this room, you know the answer to that question" and then he refused to let Watson ask any further questions for the duration of the press conference. SLED subsequently cleared the Sheriff and Officers involved of criminal conduct. When the SLED investigation was complete, Watson again attempted to obtain a copy of the video by sending a FOIA request for the video to SLED. Watson drove to Columbia from Rockhill to pick it-up the video. When he gets there, he is told SLED will no longer release the video to him. The Sheriff, who was a former SLED agent, admitted during his deposition he contacted the Chief of SLED and told him not to release the video to Watson. To date the Sheriff has refused to release the video to the public. It has been presented to the court under seal and was also released to counsel for the Grose family/estate in the

[6] Contrary to the Sheriff's claims at his press conference, denying wrongdoing in Grose's death as well as the death of another detainee who died in custody in the restraint chair, the Sheriff paid substantial monetary settlements to the families of both men.

litigation against the Sheriff relating to the wrongful in custody death of Mr. Grose.

Procedural History

Billioni filed this lawsuit on July 31, 2014, alleging that his termination constituted retaliation for his public speech about serious law enforcement misconduct in violation of the First Amendment. He sought damages and equitable relief, including reinstatement. The Sheriff moved for summary judgement. Initially the District Court denied the Sheriff qualified immunity. Holding, "[u]pon review, the court observes that Sheriff Bryant did not make any showing of disruption within the YCSO due to the statements made by Plaintiff to his wife. However, even if the court takes into consideration any disruption caused by the internal investigation that was conducted by the YCSO, such disruption is clearly outweighed by the public's interest in the disclosure of misconduct or malfeasance."(citation omitted) *Billioni v. York Cty.*, Civil Action No. 0:14-cv-03060-JMC, 2017 U.S. Dist. LEXIS 94677, at *36 (D.S.C. June 20, 2017)." *Billioni v. York Cnty., No.* 0:14-cv-3060-JMC, 2017 WL 2645737, at *11 (D.S.C. June 20, 2017). The Sheriff appealed the ruling pursuant to the collateral order exception to the final order requirement.

The Court of Appeals determined the district court used the incorrect "actual disruption" standard instead of the "reasonable apprehension of disruption standard" when assessing whether Petitioner's speech caused a disruption. *Billioni v.*

Bryant, 759 F. App'x 144, 149-50 (4th Cir. 2019). Consequently, the court remanded the case to district court to apply the correct legal standard as well as to make any further factual findings that may be warranted under that standard. *Id*. On remand, the district court made a 180 degree change and reversed its earlier decision and held, "the weight of the value of Plaintiff's speech is negligible at worst, significantly diminished at best, and does not surpass the weight of Sheriff Bryant's reasonable apprehension of a disruption." *Billioni v. York Cty*., Civil Action No. 0:14-cv-03060-JMC, 2020 U.S. Dist. LEXIS 43166, at *20 (D.S.C. Mar. 12, 2020). Billioni filed a timely appeal.

The second time the case was before the Court of Appeals, the majority affirmed the district court. The Court's analysis focused on the second prong of the *Pickering* balancing test. The majority held Billioni's interest in conveying the speech in question should be afforded diminished weight. *Billioni v. Bryant*, 998 F.3d 572, 578 (4th Cir. 2021). The majority concluded:

Billioni acted on limited and unconfirmed information when disclosing confidential details. He did so knowing that an investigation into the incident was underway and made no effort whatsoever to proceed through the chain of command or any law enforcement channel. We must therefore assign limited weight to Billioni's speech interest." *Id. at* 578-79.

In the dissenting opinion, Judge Floyd found otherwise stating, "I am persuaded that Billioni had sufficient knowledge to support his speech….Billioni watched a public press conference during which an officer affirmatively stated there was no misconduct surrounding Grose's death. Billioni then compared the substance of the officer's remarks with *actual recorded footage* of the incident." *Id*. at 580-81. Accordingly, Judge Floyd wrote, "I would hold that Billioni's interest in warning of potential police misconduct and corruption surpasses [the Sheriff's] interest in efficiency." *Id*. at 581. A request for *en banc* hearing was denied. Because he was unsuccessful, the district court assessed $4,802.20 in costs against Billioni.[7]

REASONS FOR GRANTING THE WRIT

This petition for a writ of certiorari should be granted for two key reasons. First, there is a split in the circuits regarding the weight given to public employees' speech about serious law enforcement misconduct when balancing the employee's interest, as a private citizen in the exercise of his First Amendment rights, against the government's interest, as an employer, to promote efficiency of government service. The lower court gave Billioni's speech limited weight, while other circuits afford greater weight to speech exposing misconduct, including when the employee speaks prior to the conclusion of an internal investigation. Initially, the *Pickering* balancing test required a showing of

[7] 0:14-cv-03060-JMC (ECF No. 215)

actual disruption. Since *Pickering*, however, decisions offer conflicting dicta on the necessity of showing actual or anticipatory disruption and who should be the arbiter of facts in determining if the articulation of the disruption (real or feared) is sufficient. Second, this petition should be granted because the past 24 months have demonstrated the damage that serious law enforcement misconduct can have, not only on individuals, but on our communities. Currently speech about the most serious incidents of misconduct in law enforcement - by those most able to see it and stop it - is given varying and inconsistent degrees of protection. Clear direction on the Constitutional rights of public employees is needed from the Court.

I. Circuit Court Split in the Application of Pickering to Government Employees Engaging in First Amendment Expression

A. Development of the Schism

The test for determining whether the government, as an employer, can take disciplinary action against employees for expressing their First Amendment rights is the 1968 *Pickering* balancing test. Applying this test, the court balances the employee's interest, as a private citizen in the exercise of his First Amendment rights, against the government's interest, as an employer, to promote efficiency of government service. This test has become more complex over time. In *Connick v. Myers,* 461 U.S. 138, 146 (1983), the court established the requirement that a public employee's speech must

touch on a matter of public concern in order to trigger *Pickering* balancing and potentially qualify for First Amendment protection. Once the fact that the speech was of public concern was established those concerns could be weighted against the employers concerns about efficiency and disruption of the public entity.

In the period after *Connick, current* Supreme Court Justice Sotomayor voiced concerns over preservation of the Constitutional right of employees who speak out and the difficulty in applying the present standard. She advocated requiring the employer to show actual disruption to the operation of the employer in her dissenting opinion in *Pappas v. Giuliani* 290 F.3d 143, 144-145 (2d Cir. 2002). Pappas was employed by the New York City Police Department in the Management Information Systems Division, responsible for maintenance of computer systems. Pappas received letters soliciting charitable contributions, he responded anonymously, enclosing offensive and racially bigoted materials in the reply envelopes. *Id*. After an investigation, Papas was brought in for questioning and he admitted to sending the materials. Papas claimed, "I was protesting, and I was tired of being shaken down for money by these so-called charitable organizations. And it was a form of protest, just put stuff back in an envelope and send stuff back as a form of protest." *Id.* at 145. The majority upheld the grant of summary judgment for the employer finding a "reasonable perception of serious likely impairment of its performance of its mission outweighed

Pappas's interest in free speech." *Id*. at 151. In her dissent, Justice Sotomayor wrote:

Today the Court enters uncharted territory in our First Amendment jurisprudence. The Court holds that the government does not violate the First Amendment when it fires a police department employee for racially inflammatory speech -- where the speech consists of mailings in which the employee did not identify himself, let alone connect himself to the police department; where the speech occurred away from the office and on the employee's own time; where the employee's position involved no policymaking authority or public contact; where there is virtually no evidence of workplace disruption resulting directly from the speech; and where it ultimately required the investigatory resources of two police departments to bring the speech to the attention of the community. Precedent requires us to consider these factors as we apply the *Pickering* balancing test, and each counsels against granting summary judgment in favor of the police department employer. Id. at 159 (Sotomayor, J., dissenting).

Subsequently, *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) further limited the scope of the *Pickering* balancing test for public employees by holding that an employee's actions pursuant to his official duties were not constitutionally protected. In *Garcetti* the Ninth Circuit determined that an employee, Ceballos', memo concerning lack of veracity by law enforcement officials constituted speech on a matter of public concern within the meaning of *Pickering*

and that Ceballos's free speech rights outweigh the district attorney's efficiency interests. The public employer appealed to the Supreme Court, which reversed in a 5-4 vote. Stevens, Souter, and Breyer each wrote dissenting opinions. Stevens criticized the majority's decision as "misguided" and stated that "the notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment is quite wrong." Souter's dissent, joined by Stevens and Ginsburg stated not only that a public employee retains his First Amendment rights in his official workplace speech when he "speaks on a matter of unusual importance" he also, like Sotamayor, stated there is a "need actually to disrupt government if its officials are corrupt or dangerously incompetent."

The *Garcetti* decision resulted in further inconsistency and division over the degree of Constitutional protection that public employees are afforded when they seek to report and expose serious misconduct, including in law enforcement.

B. Actual Disruption vs. Potential Disruption

A review of the application of the *Pickering* test in the various circuits reveals that the Tenth Circuit is in the minority; in that it affords public employees the greatest protection for speech regarding serious misconduct. Conversely, as result of the lower court's decision in this case, the Fourth Circuit affords the least protection of First Amendment rights to its public servants. The Tenth Circuit traditionally relies on the actual disruption standard, resting on

its belief that actual disruption is an "obvious requirement" of the *Pickering* Balancing Test. Madyson Hopkins, *Click at Your Own Risk-Free Speech for Public Employees in the Social Media Age.,* The George Washington University Law Review, vol. 89:1, 12 (March 2021). The Tenth Circuit's decisions have repeatedly maintained that in order for the government to prevail under the *Pickering* balancing test, it must show evidence that the employee's speech impacted the actual operation of the government. *See, e.g. Melton v. City of Okla. City, 879 F.2d 706, (10th Cir. 1989), vacated and remanded on other grounds, 928 F.2d 920 (10th Cir. 1991) (en banc)), Schalk v. Gallemore*, 906 F.2d 491, 496 (10th Cir. 1990), *Barker v. City of Del City,* 215 F.3d 1134 (10th Cir. 2000), *Casey v. West Las Vegas Independent School District*, 473 F.3d 1323 (10th Cir. 2007).

In *Schalk v. Gallemore*, 906 F.2d 491 (10th Cir. 1990) an employee of a municipally-owned hospital, was terminated after she submitted a letter to the hospital board regarding her concerns of inefficiency and unfairness under the leadership of the chief administrator. *Id.* at 492. Because the employer asserted that *Schalk*'s comments created hostility but did not submit evidence of "disruptive confrontations," or any evidence showing that *Schalk*'s work suffered, the Tenth Circuit held the employer failed to show that *Schalk'*s speech caused an actual disruption. *Id*. at 496–97. Schalk's speech was thus protected under the First Amendment because without evidence that it caused an actual disruption, Schalk's interest in free speech was

deemed to outweigh the employer's interest in regulating it. *Id.* at 497. The Tenth Circuit is alone in holding that the *Pickering* Balancing Test requires proof of an actual disruption. *Hopkins, supra* at 11. Most recently applying it in *Duda v. Elder*, No. 20-1416, 2021 U.S. App. LEXIS 22439, at *18 (10th Cir. July 27, 2021), the court held that firing a patrol sergeant for supporting a candidate who challenged the sheriff's reelection bid, and for giving an interview to a local newspaper about sexual harassment violated the First Amendment because there was no evidence that [the patrol sergeant's] political speech "threatened any of the work" of the sheriff or compromised morale. Id. at *21.

Looking at the other circuits' positions on the disruption issue, lower courts require the employer to articulate inconsistent and varying degrees of real or potential disruption, or prediction of disruption. *See.* J*effries v. Harleston*, 52 F.3d 9, 13 (2d Cir. 1995), *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 472 (3d Cir. 2015), *Durham v. Jones*, 737 F.3d 291 (4th Cir. 2013), *Wallace v. Benware*, 67 F.3d 655 (7th Cir. 1995), *Shahar v. Bowers,* 114 F.3d 1097, 1108 (11th Cir. 1997). 26 U.S. App. D.C. 297, 306, 841 F.3d 485, 494 (2016). In *Gillis v. Miller,* 845 F.3d 677, (6th Cir. 2017) the Sixth Circuit stated, "we have never squarely addressed whether employers must show evidence of actual disruption in order to prevail under the Pickering test. Our sister circuits appear to be split on this issue. The Second, Third, Seventh, Eighth, Ninth, and Eleventh Circuits have each held that evidence of actual disruption is not

required". *Id*. at 685. The Second Circuit requires that "the government must demonstrate by a preponderance of the evidence that that the public employee's speech was likely to disrupt the government's activities and that the likely disruption was sufficient to outweigh the First Amendment value of the public employee's speech." *Gusler v. City of Long Beach*, 715 F. App'x 68, 68 (2d Cir. 2018). The Third Circuit similarly looks to see if disruption is "likely" because of the employee's speech. *Kimmett v. Corbett,* 554 F. App'x 106, 113 (3d Cir. 2014). Under Fifth Circuit case law, courts look to see if disruption is beginning due to the employee's speech, "[t]he indispensable predicate to balancing, however, is evidence from the public employer of actual or incipient disruption to the provision of public services". *Grogan v. Lange*, 617 F. App'x 288, 292 (5th Cir. 2015).

Unlike the circuits that only require a prediction of disruption, the Eighth holds that in some cases employers need to offer evidence of actual disruption. *Hemminghaus v. Missouri*, 756 F.3d 1100, 1112 (8th Cir. 2014). One line of decisions in the Eighth Circuit requires the government to make a showing of actual disruption in the workplace, *see, e.g., Lindsey v. City of Orrick*, 491 F.3d 892, 900 (8th Cir. 2007); *Shockency v. Ramsey County*, 493 F.3d 941, 949 (8th Cir. 2007), while another line of decisions requires a lesser showing than actual disruption. *See, e.g., Bailey v. Dep't of Elementary & Secondary Educ.*, 451 F.3d 514, 521 (8th Cir. 2006) ("[e]vidence of actual disruption … is not required in all cases."); *Tindle v. Caudell*, 56 F.3d 966, 972-973

(8th Cir. 1995) ("a reasonable prediction of disruption is entitled to substantial weight" in the balancing process). The most recent Eighth Circuit opinion addressing this issue is *Morgan v. Robinson,* 920 F.3d 521, 525 (8th Cir. 2019) which the court found there was evidence that a former employee's campaign statements made while running for sheriff actually disrupted the office. The court also found that the employee violated the administration's and other employees' trust and created office disharmony, which further proved that actual disruption occurred.

In the circuits that only require an employer to show a potential for disruption, the employer's claims that the employee's speech has a potential to cause disruption must be supported by some evidence, "not rank speculation or bald allegation". *See Gustafson v. Jones,* 290 F.3d 895, 909 (7th Cir. 2002). "Pickering balancing is not an exercise in judicial speculation." *Kinney v. Weaver*, 367 F.3d 337, 363 (5th Cir. 2004). The mere existence of a workplace disruption may not be sufficient to overcome the employee's interest. Instead, a public employer must tolerate a workplace disruption so long as it is directly proportional to the importance of the disputed speech to the public. *Kimmett v. Corbett*, 554 F. App'x 106, 107 (3d Cir. 2014). An employer must provide some evidence by which a court can measure whether its claims of disruption are reasonable. *Nichols v. Dancer*, 657 F.3d 929, 934 (9th Cir. 2011),*Shockency v. Ramsey Cnty.*, 493 F.3d 941, 949-50 (8th Cir. 2007).

When apply the Pickering test "'to determine [whether] the employee's free speech interests outweigh the efficiency interests of the government as employer.'" *Gillis,* 845 F.3d at 684 (quoting *Scarbrough v. Morgan Cnty. Bd. of Educ.,* 470 F.3d 250, 255 (6th Cir. 2006)). The test considers "the manner, time, and place of the employee's expression." *Rankin v. McPherson*, 483 U.S. 378, 388, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987).[8] The "pertinent considerations" for the balancing test are "whether the statement [(a)] impairs discipline by superiors or harmony among co-workers, [(b)] has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, [(c)] impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise," id., or (d) undermines the mission of the employer. *Rodgers v. Banks*, 344 F.3d 587, 602 (6th Cir. 2003).

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[8] *Rankin v. McPherson*, 483 U.S. 378 (1987), discusses that the Court can consider if the speech: (1) affects discipline; (2) impairs coworker harmony; (3) has a negative impact on close working relationships for which personal loyalty and confidence are necessary; (4) impedes performance; (5) interferes with the operation of the employer; (6) undermines the employer's mission ; (7) is communicated in private; (8) conflicts with the responsibilities of the employee; and (9) abuses the employees authority. *Rankin* ultimately held that the employer failed to produce evidence of disruption and that a constable violated the rights of a clerical employee when he terminated her for a remark she made about President Reagan during a personal conversation in the workplace.

Yet there also is little consensus on what factors to consider in weighing the employer's evidence of alleged feared disruption, again leading to inconsistency, and each circuit using its own set of factors. *Hopkins, supra*, at 10. For example, the Fourth Circuit utilizes nine different factors in applying the *Pickering* balancing test. *McVey v. Stacy*, 157 F.3d 271, 278 (4th Cir. 1998). The rest of the circuit courts have adopted similar sets of factors which are weighted differently. *Gillis*, 845 F.3d at 685; *Munroe v. Cent. Bucks Sch. Dist*., 805 F.3d 454, 472 (3d Cir. 2015); *Lewis v. Cowen,* 165 F.3d 154, 163 (2d Cir. 1999); *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 979–81 (9th Cir. 1998); *Shahar v. Bowers,* 114 F.3d 1097, 1108 (11th Cir. 1997); *Wallace v. Benware*, 67 F.3d 655, 661 n.8 (7th Cir. 1995); *Tindle v. Caudell,* 56 F.3d 966, 971–73 (8th Cir. 1995).

Given the uncertainty in the amount and type of proof required as it relates to alleged disruption, whistleblowers face radically different outcomes depending on the jurisdiction. Compare the Ninth Circuit's decision in *Moser v. Las Vegas Metro.* Police Dep't, 984 F.3d 900 (9th Cir. 2021) with the Fourth Circuit's decision here. Billioni's speech regarding serious government misconduct involving the in-custody death of a retrained mentally ill detainee was not afforded protection while Moser's facebook comment implying law enforcement should have put "holes" in a criminal suspect is protected. Even though both circuits use the same disruption standard and neither employer provided any evidence of disruption. Moser was a Las Vegas

SWAT sniper, who commented on Facebook that "it was a shame that a suspect who had shot a police officer did not have any holes in him". *Id*. 902. After the police department dismissed him from the SWAT team, Moser sued, alleging violation of his First Amendment right. *Id*. Moser contended that his comment suggested only that the police officer should have fired defensive shots. The district court construed Moser's statement as advocating unlawful violence, and ruled that the government's interest in employee discipline outweighs Moser's First Amendment right under the Pickering balancing test for speech by government employees. *Id*. The Ninth Circuit reversed holding that "there is a factual dispute about the objective meaning of Moser's comment: was it a hyperbolic political statement lamenting police officers being struck down in the line of duty — or a call for unlawful violence against suspects? Another factual dispute exists over whether Moser's comment would have likely caused disruption in the police department. These factual disputes had to be resolved before the court could weigh the competing considerations under the Pickering balancing test." *Id*. at 902. As the outcomes in *Moser* and *Billioni* demonstrate, circuits are also split on how they handle issues of factual disputes. In *Moser,* the Seventh Circuit ruled in the employees favor because of the factual dispute. However, in *Munroe v. Cent. Bucks Sch. Dist*., 805 F.3d 454 (3d Cir. 2015), *Grutzmacher v. Howard Cty*., 851 F.3d 332 (4th Cir. 2017), and *Gillis v. Miller,* 845 F.3d 677, (6th Cir. 2017), the courts accepted the employers' claims that a reasonable belief of disruption existed; notwithstanding that

there were factual disputes and ruled in favor of the public employers.

The result of these varying, inconsistent and eroding standards is less protection of citizen's First Amendment rights than appears to have been intended by *Pickering,* especially for public employees. Less protection for public employees grants more power to governments who seek to cover up potential wrongdoing. Employers can easily manufacture allegations of anticipated disruption and fears of bad outcomes. Law enforcement officers, like Billioni, who had a good record and was generally well liked and whose conduct per the finding of the court did not affect the workplace, already face dire consequences when they speak out about "bad apples" or failures to follow policy and procedure. Is less protection for these officers (and our citizenry) what we as a society want? Is that what the goal of the First Amendment really is? To allow law enforcement to hide behind a blue blanket based on idealistic necessity for absolute loyalty to the hierarchy rather than a duty to protect and serve, all based on conjecture of lost camaraderie?

II. The Fourth Circuit's Decision to afford Billioni's speech diminished weigh conflicts with the Principle of Affording Protection to Whistleblower Speech

As stated above, in this case, Billioni's speech exposed serious questions regarding the treatment of a mentally impaired detainee, use of restraints, use of force, and cover-up of the full circumstances of an

in custody death in York County, SC. Nevertheless the Fourth Circuit performed a legal contortion act in order to assign Billioni's concerned speech diminished weight when "balanced" against the interests of the employer and created new law requiring exhaustion of internal chains of command and completion of all investigations (including those that remain open for years) before an employee can speak out about concerns over the death of a restrained and mentally disabled detainee.

Much has been written on, and the Supreme Court has acknowledged, the critical role whistleblowers play in American self-governance. Whistleblower speech is critically important because it helps ensure a well-functioning democracy. See, *Connick v. Myers,* 461 U.S. 138, 145 (1983) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." When government officials misappropriate resources or engage in misconduct, they undercut the public interest. Since "[g]overnment employees are often in the best position to know what ails the agencies for which they work," *Waters v. Churchill*, 511 U.S. 661, 674 (1994), speech by such employees that exposes misconduct or abuse by public officials has been considered to have "occup[ied] 'the highest rung in the hierarchy of First Amendment values" and entitled to the most protection. See e.g. *Hall v. Mo. Highway & Transp. Comm'n,* 235 F.3d 1065, 1068 (8th Cir. 2000)) (internal quotation marks omitted)); *Swinefold v. Snyder Cnty., Pa.*, 15 F.3d 1258, 1274 (3d Cir. 1994) ("Speech involving government impropriety occupies the highest rung of First

Amendment protection."). The First Amendment's protections become even more salient when they implicate particularly valuable and sensitive speech. This includes speech revealing potential unlawful conduct, corruption, discrimination, misconduct, wastefulness, inefficiency, or wrongdoing by government agencies or employees, which is inherently of public concern. See, e.g., A*lpha Energy Savers, Inc. v. Hansen*, 381 F.3d 917, 925–26 (9th Cir. 2004). Decisions dealing with public employee speech further emphasize that "[t]he public has a significant interest in encouraging legitimate whistleblowing so that it may receive and evaluate information concerning the alleged abuses of . . . public officials." *O'Donnell v. Yanchulis,* 875 F.2d 1959, 1062 (3rd Cir. 1989); see also *Baldassare v. New Jersey,* 250 F.3d 188, 198 (3d Cir. 2001).

On this background, in *Billioni*, the Fourth Circuit assigns diminished weight as a matter of law to public employees whose speech exposes serious government misconduct during an alleged period of internal investigation. The lower court opinion seems to gloss over the principle that investigation of the actions of law enforcement, like any other governmental agency, will cause disruption to those who seek to hide their actions. The Third, Fifth, Sixth, Ninth, and Tenth Circuits have held that disruption is weighed differently in the context of whistleblowing because disruption is an unavoidable consequence of exposing corruption and misconduct. See *Kimmett v. Corbett,* 554 F. App'x 106, 107 (3d Cir. 2014) ("Courts must also bear in mind that an employee who accurately exposes rampant

corruption will no doubt cause a workplace disruption. In such a case, given the public's strong interest in legitimate whistleblowing, it would be absurd to hold that the First Amendment generally authorizes corrupt officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office. Thus, the mere existence of a workplace disruption may not be sufficient to overcome the employee's interest. Instead, a public employer must tolerate a workplace disruption so long as it is directly proportional to the importance of the disputed speech to the public."); see also *Devlin v. Kalm*, 531 F. App'x 697, 705-06 (6th Cir. 2013) (All whistleblowers create disruption and to hold that the First Amendment permits corrupt officials to punish employee whistleblowers because they somewhat disrupted the office is absurd); see also *Rivero v. City & County of San Francisco*, 316 F.3d 857, 866 (9th Cir. 2002) (noting that a state's interest in preventing workplace disruption "does not weigh as heavily against whistleblowing speech as against other speech on matters of public concern"); see also *Porter v. Califano,* 592 F.2d 770, 773-74 (5th Cir. 1979) which opined that "an employee who accurately exposes rampant corruption in her office no doubt may disrupt and demoralize much of the office. The First Amendment generally authorizes corrupt officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office. Of course, as Pickering indicates, the chilling of even accurate speech may be justified in certain extreme situations, for example, in which the employee unduly breached confidentiality or disrupted

intimate working relationships. The point is simply that the balancing test articulated in *Pickering* is truly a balancing test, with office disruption or breached confidences being only weights on the scales;" and *Conaway v. Smith*, 853 F.2d 789, 798 (10th Cir. 1988).

Effective police work will be hopelessly compromised if the courts allow supervisors to retaliate against law enforcement officers for communicating factual details that bear on police departments' ability to conduct objective investigations. *Delgado*, 282 F.3d at 519. "The fact that a police officer's job responsibilities may in some measure overlap with motivations of a well-meaning citizen does not change this analysis." Id. "Speech that accurately exposes official impropriety or corruption may certainly be described as highly critical of the officials it targets, yet it has generally been accorded the greatest level of First Amendment protection." *Jefferson*, 90 F.3d at 1298 (Rovner, J., concurring). See also *Glass,* 2 F.3d at 741 (matters of public concern include speech aimed at uncovering wrongdoing or breaches of the public trust). The interest of the employee in speaking out to uncover government malfeasance has often been held to outweigh the interest of the employer in maintaining harmony in the workplace. *Jefferson*, 90 F.3d at 1298 (collecting cases).

Consistent with Fifth, Sixth, Ninth, and Tenth Circuits the, Third Circuit also affords greater weight to speech exposing misconduct, including when the employee speaks prior to the conclusion of

an internal investigation. *Dougherty v. Sch. Dist.*, 772 F.3d 979, 991 (3d Cir. 2014). Because Bennett's speech does not occupy "the highest rung" of public concern, less of a showing of disruption is required. *Bennett v. Metro. Gov't of Nashville & Davidson Cty.*, 977 F.3d 530, 545 (6th Cir. 2020). The facts of *Dougherty* are similar to the facts presented here. Dougherty, was an employee with the School District of Philadelphia, who met with reporters from *The Philadelphia Inquirer* to discuss the alleged misconduct of the School District's Superintendent in steering a prime contract to a minority-owned business. *Id.* at 982. Once the story ran in the newspaper, the School District initiated an investigation into the leak. Consequently, a third party agency was brought in to investigate, employees were suspended and Dougherty was ultimately terminated. In that case the Court of Appeals, applying the *Pickering* balancing test, agreed with the district court that a reasonable jury could conclude that Dougherty's speech would have made only a minimal disruption had the School District not subsequently engaged a third party investigator, suspended six administrators, and fired Dougherty. "It is against this Court's precedent to find against an employee where the disruption 'was primarily the result, not of the plaintiff's exercise of speech, but of his superiors' attempts to suppress it.'" Id. (citing, *Czurlanis v. Albanese*, 721 F.2d 98, 107 (3d Cir. 1983). The parties in *Dougherty* did not dispute that there was some actual disruption, but the Court clarified that, "it would be absurd to hold that the First Amendment generally authorizes corrupt officials to punish subordinates who blow the

whistle simply because the speech somewhat disrupted the office." *Dougherty v. Sch. Dist.*, 772 F.3d 979, 992-93 (3d Cir. 2014).

In *Devlin v. Kalm*, 531 F. App'x 697, 706 (6th Cir. 2013) the Court discussed that a "core concern" of the First Amendment is the protection of whistleblowers who report government wrongdoing. The Sixth Circuit, in balancing, looked at the case from the perspective of government efficiency stating that preventing Plaintiff's speech would not seem to aid the government's interest in efficiency, since the speech would bring the alleged wrongful practices to light and lead to more efficient provision of public services.

III. The Court of Appeals Erred by Requiring Public Employees to Proceed Through their Chain of Command and Allow All Investigations to Conclude before Speaking about Serious Misconduct in Law Enforcement.

The lower court held 2-1 that Billioni's speech was not protected because he did not attempt to go through his chain of command. *Billioni v. Bryant*, 998 F.3d 572, 579 (4th Cir. 2021). This ruling creates a condition precedent-that public employees must proceed through the chain of command before speaking about serious misconduct, otherwise their employer can terminate them. This requirement begets cover-ups, retaliation, oppression, corruption, and puts public employees further at risk. It also prevents the public from learning about corruption

and misconduct that their public officials are engaged in from the employees who are in the best position to observe it. Forcing public employees to first proceed through their chain of command before exposing misconduct and corruption places them at great risk. Moreover, if public employees adhere to the Fourth Circuit's requirement it will likely deprive their speech of any chance of First Amendment protection. Several circuits hold that public employees' reports of misconduct and corruption made through the chain of command, are not protected by the First Amendment because they fall within the scope of the employee's duties pursuant to *Garcetti*. *See e.g. Davis v. McKinney,* 518 F.3d 304, 313 n.3 (5th Cir. 2008), *Pearson v. District of Columbia*, 644 F. Supp. 2d 23, 39 (D.D.C. 2009), *Bivens v. Trent*, 591 F.3d 555, 560 (7th Cir. 2010). The D.C. Circuit and Sixth Circuit are considerably quick to characterize employee reports of misconduct, made to the chain of command, as being part of the employee's official duties and thus are unprotected by the First Amendment. In fact, when determining if the public employee's speech is protected, the Seventh Circuit has focused on whether the employee directed his or her speech to a person within his or her "chain of command." See, *Bivens v. Trent*, *infra.* Similarly, the Fifth Circuit's "chain of command" analysis holds that if the employee communicates about their employment to a supervisor, it is considered speech pursuant to the employee's official duties, therefore it is not protected. *Davis v. McKinney,* 518 F.3d 304, 313 (5th Cir. 2008).

The lower court's decision that employers can terminate public employees because the employee did not proceed through the chain of command directly conflicts with the holdings of other circuits. The Ninth Circuit holds, when an employee's communication includes speech protected by the First Amendment, the employee cannot be disciplined for ignoring the chain of command in presenting the communications, even if they also embrace matters of personal interest. *Anderson v. Central Point School District No. 6*, 746 F. 2d 505 (9th Cir. 1984). Ninth and Tenth Circuits look at whether the speech at issue is "external," meaning whether the speech was made outside of the workplace. *Freitag v. Ayers*, 468 F.3d 528, 545 (9thCir. 2006) *Thomas v. City of Blanchard*, 548 F.3d 1317, 1325 (10th Cir. 2008). Under this external speech analysis, if an employee speaks outside of the workplace and the speech is not required by the employee's job, the employee is speaking as a private citizen, not pursuant to their official duties.

The Fourth Circuit held Billioni's speech was of limited value because he made no effort to proceed up the chain of command. Notwithstanding that the Sheriff through his public information officer publicly denied wrongdoing by declaring at a press conference "[*a]ll our officers, did exactly what they were supposed to do*." Moreover the public information officer indicated that there was an internal investigation being conducted and the matter was being investigated by the South Carolina

Law Enforcement Division ("SLED")[9]; however, it appeared that everyone involved acted properly and did everything possible to save Grose. Billioni did not report up the chain of command because of fear of termination (and crossing the blue line) and because the press conference not only exonerated the department, and also sought to misrepresent what happened to Mr. Grose while he was in custody. If the majority view prevails, public employees can say adios to any First Amendment rights. To allow the decision to stand rewards public officials who seek to cover-up misconduct and corruption.

The majority of the panel below, without legal precedent, further imposed a second condition precedent to speaking out about serious police misconduct, specifically, that the speaker (in this case a law enforcement officer) must first allow any and all investigations of the matter to be completed. This is a departure from precedent and presents an important and unique matter of law and for that reason, this Court should grant the relief requested. The Fourth Circuit did not specifically identify any court that had adopted this view. Moreover, the requirement that one seeking to expose serious police misconduct must first allow the completion of an internal investigation is impractical, and in most circumstances would be impossible. The analysis

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[9] SLED is a statewide investigative law enforcement agency in South Carolina that provides manpower and technical assistance to other law enforcement agencies and conducts investigations on behalf of the state as directed by the Governor and Attorney General. Sheriffs and other members of law enforcement often work for SLED at some point in their career resulting in a tight knit and interconnected law enforcement community.

seems to presuppose that the speaker would know that there was investigation, independent or internal, and that it had concluded. That presupposition is unfair and chills speech of the highest value – that pertaining to serious, police misconduct. *See Durham v. Jones*, 737 F.3d 291, 303-04 (4th Cir. 2013) ("an employee's speech about serious governmental misconduct, and certainly not least of all serious misconduct in a law enforcement agency is protected."). Specifically, imagine how this requirement would be met. Would a subordinate officer go to his supervisor, in this case the very subject of the investigation, and ask:

> OFFICER: "Hey, I understand there's an investigation going on."
> SUPERVISOR: "Who told you that?"
> OFFICER: "Never mind that. Has it wrapped up?"
> SUPERVISOR: "Why do you want to know?"
> OFFICER: "Just curious."
> SUPERVISOR: "Not that it's any of your business, but no. It hasn't."
> OFFICER: "Okay, I'll check back with you tomorrow."

Imagine then that this colloquy repeats itself every day thereafter, until the investigation is completed, or is never completed (to avoid scrutiny). To require as much is not supported by the law in this area and for good reason –- compliance would be impractical, if not impossible, and would likely result in further disruption of the sort the law in this area seeks to eliminate.

IV. The Question Presented is Important.

Tragically, Mr. Grose is not alone, mentally inmates are subject to despicable treatment in South Carolina's jail. Glenn Smith, Jennifer Berry Hawes and Mary Katherine Wildeman, *Jamal Sutherland's death in Charleston jail latest tragedy in 'America's new asylums.* The Post and Courier May 14, 2021. https://www.postandcourier.com/news/jamal-sutherlands-death-in-charleston-jail-latest-tragedy-in-americas-new-asylums/article_1189a36e-b4e8-11eb-a60d-33d9c7435ab1.html. Jamal Sutherland's death in the Detention Center in North Charleston, South Carolina on January 5, 2021, received national attention. Id. Unlike Sheriff Bryant, the Charleston County Sheriff released the surveillance video showing deputies pepper spraying and tasing Sutherland. Dakin Andone, Chris Boyette and Amanda Watts, CNN *South Carolina sheriff's office releases footage showing the in-custody death of a mentally ill Black man* https://www.cnn.com/2021/05/14/us/jamal-sutherland-charleston-jail-footage/index.html. The public has a right to know what is occurring in their jails and public servants, like Mr. Billioni, are in the best position to inform them. The value of their speech is reflected in the corruption and misconduct that has been uncovered. South Carolina's sheriffs have a long history of corruption and misconduct. In the past decade, no fewer than 11 of South Carolina's 46 counties have seen their sheriffs accused of breaking laws. Tony Bartelme and Joseph Cranney, *SC sheriffs fly first class, bully employees and line their pockets with taxpayer money, The Post and Courier,* Mar 16, 2019 Updated Jun 30, 2021. https://www.postandcourier.com/news/sc-sheriffs-fly-

first-class-bully-employees-and-line-their/article_bed9eb48-2983-11e9-9a4c-9f34f02f8378.html. South Carolina's Sheriff's have embezzled, bribed, leveraged their power to sexually assault female employees, driven drunk, and bullied other public officials. *Id.*

The lower court's decision fosters this corruption and allows wrongdoing to fester. These abuses will only be prevented if this Court protects the civil rights of public employees who have the courage and fortitude to speak out against serious misconduct in law enforcement.

CONCLUSION

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

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