No. 21-792

In The
Supreme Court of the United States

MICHAEL BILLIONI,

Petitioner,

v.

BRUCE BRYANT, SHERIFF, YORK COUNTY, SOUTH CAROLINA, *et al.*,

Respondents.

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

RESPONDENT SHERIFF BRUCE BRYANT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISION

STATUTE

STATEMENT OF THE CASE

Petitioner Michael Billioni brought this action under 42 U.S.C. § 1983 alleging a First Amendment claim of retaliatory discharge arising from the termination of his employment with the York County (SC) Sheriff's Office. Respondent Bruce Bryant was the duly elected Sheriff of York County at the time.

Sheriff Bryant moved for and was granted summary judgment by the district court. The district court granted Sheriff Bryant's motion on the grounds that Petitioner's interest in speaking upon a matter of public concern was outweighed by Sheriff Bryant's interest in providing effective and efficient services to the public and, therefore, Petitioner's speech was not protected. Petitioner appealed to the Fourth Circuit Court of Appeals which affirmed the grant of summary judgment, holding that Petitioner's speech was not protected by the First Amendment. *Billioni v. Bryant*, 998 F.3d 572, 579 (4th Cir. 2021). Judge Henry Floyd issued a dissenting opinion. Petitioner filed a petition for rehearing and rehearing en banc which was denied.

REASONS FOR DENYING THE PETITION

I. Introduction

In his Petition for Writ of Certiorari, Petitioner first focuses on purported circuit conflicts that he asks this Court to resolve. Respondent Sheriff Bryant submits, however, that no such conflicts exist, and to the contrary, the circuits have uniformly applied this Court's well-established precedent. Thus, there is no split of authority for this Court to resolve. Petitioner also asserts that the Fourth Circuit Court of Appeals created new law requiring exhaustion of internal chains of command and the completion of investigations before an employee's external speech is protected. Petitioner misstates the Fourth Circuit's holding. In balancing the parties' rights under *Pickering v. Bd. of Educ.*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968), the Fourth Circuit merely gave greater weight to Respondent's interests based on the particular and peculiar facts of this case. Finally, even if this Court found a sufficient basis to grant certiorari in this action, Respondent would be entitled to qualified immunity which the Fourth Circuit did not address. Therefore, this is not a case worthy of a grant of certiorari.

II. Overview of Circuit Court Decision

Following the death of an inmate at the detention center where Petitioner worked, Petitioner watched a video of the detention center employees attempting to restrain the inmate prior to his death. *Billioni* at 574. Petitioner felt that what he saw on the video did not align with information Respondent released to the public concerning the inmate's death. *Id*. Knowing that the entire matter had already been

turned over to the South Carolina Law Enforcement Division for an independent investigation and that Respondent had also opened an internal affairs investigation into the incident, Petitioner told his wife about his concerns. *Id.* at 574-75. Petitioner's wife was employed by a local news agency, which commenced an investigation of its own. *Id.*

At the outset it is important to note that the Fourth Circuit decided this case on the second prong of a *Pickering* analysis which requires a court to balance the interests of an employee in speaking freely with the interest of the government in providing efficient services. In undertaking that analysis, the court did not simply consider Petitioner's speech and its impact on the conduct of business in Respondent's office. It also considered Petitioner's admitted misconduct in both the course of uttering that speech and afterwards. *Id.* at 573. Specifically, Petitioner's speech involved the disclosure of confidential information in violation of Respondent's policies. *Id.* Petitioner knew prior to his speech that the information was already the basis of both internal and external investigations, the latter by the State of South Carolina's highest law enforcement agency. *Id.* at 574. Moreover, following that speech, Petitioner admittedly and repeatedly lied to Respondent during the course of Respondent's own internal investigation. *Id.* at 573. The Fourth Circuit found Petitioner's behavior particularly concerning in light of the fact that he was employed by a paramilitary organization which is entitled to greater deference in employment decisions than other governmental entities. *Id.* at 577.

The Fourth Circuit, in applying the second prong of *Pickering*, considered relevant the fact that Petitioner had no first-hand knowledge of the incident and spoke to no one involved in it before violating Respondent's policies and disclosing confidential information, *Billioni* at 578, rendering his opinions less than the "informed opinions on important public issues" contemplated by *City of San Diego v. Roe*, 543 U.S. 77, 82, 125 S. Ct. 521, 160 L. Ed. 2d 410 (2004) (per curiam). Most importantly, in holding that Petitioner's speech was not protected the Fourth Circuit considered relevant the facts that he failed to utilize his chain of command about his concerns and he knew Respondent had already ordered both internal and external law enforcement investigations. *Billioni* at 578-79. In other words, rather than allowing the two separate investigations to play out, Petitioner elected to ignore his chain of command and Respondent's policies in injecting his own secondhand thoughts into the matter. The Fourth Circuit determined that while Petitioner's actions did not doom his claim *ab initio,* it certainly diminished the weight of his interest in speaking. *Id.* Had the matter been swept under the proverbial rug, Petitioner's interest would undoubtedly have been accorded more weight. But the Fourth Circuit found that in a paramilitary organization, Petitioner should have let the investigations play out or at least spoken with his superiors who already had the matter under review, both within and without the organization.

Turning to the disruption element of *Pickering*, the Fourth Circuit pointed to the "frenzy of media attention about unconfirmed facts related to" the incident which was part of "an active investigation"; that "information was being disseminated to the news outlet that had not . . . been confirmed" including that the inmate had been struck in the head numerous times which did not occur; that "someone apparently was divulging information during a death investigation that was ongoing"; and that "this disruption ballooned into a separate internal investigation into the unauthorized disclosure, undercutting manpower and resources to continue the ongoing investigation into the incident." *Billioni* at 579. The Fourth Circuit found that this evidence was "the type and level of reasonably apprehended disruption [which] sufficiently outweighs Billioni's diminished speech interest as a matter of law." *Id.*

Accordingly, the Fourth Circuit correctly conducted the *Pickering* balancing test and found that Petitioner's speech was not protected by the First Amendment as his interests in speaking were outweighed by Respondent's interests.

III. There is no split among the circuits as to whether actual or predicted disruption must be shown under *Pickering's* balancing test.

Appellant asks this court to resolve an alleged split among the circuits as to whether an employer must show actual or predicted disruption of the workplace in conducting the balancing test under *Pickering*. There is no such split. This Court has repeatedly said that potential disruption is the

appropriate standard: there is no "necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Garcetti v. Ceballos*, 547 U.S. 410, 418, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006) ("A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some *potential* to affect the entity's operations.") (emphasis added); *Waters v. Churchill*, 511 U.S. 661, 673, 114 S. Ct. 1878, 128 L. Ed. 2d 686 (1994) ("[W]e have consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large. *Few of the examples we have discussed involve tangible, present interference with the agency's operation.* The danger in them is mostly speculative . . . But we have given substantial weight to government employers' *reasonable predictions of disruption*, even when the speech involved is on a matter of public concern.") (emphasis added); *Connick v. Myers*, 461 U.S. 138, 152, 154, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983) (holding that Myer's First Amendment interest did "not require that Connick tolerate action which he *reasonably believed* would disrupt the office, undermine his authority, and destroy close working relationships") (emphasis added).

Pickering itself acknowledges that the standard could be either actual or predicted disruption depending on the circumstances of the case. *Id.*, 391 U.S. at 572-73, 88 S. Ct. at 1737. ("What we do have before us is a case in which a teacher has

made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are *neither shown nor can be presumed* to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally.")

Petitioner leans hard into the notion that "[t]he Tenth Circuit is alone in holding that the Pickering Balancing Test requires proof of an actual disruption," Pet. at 17, and thus has split from the other federal circuits on the issue. Indeed, one of the cases cited by Petitioner – *Gillis v. Miller*, 845 F.3d 677 (6th Cir. 2017) – notes the alleged split among the Tenth Circuit and the other circuits before ultimately agreeing with the latter that predicted disruption may suffice. Both Petitioner and the *Gillis* court are wrong in believing a split exists or even existed.

By the time *Gillis* was decided in 2017, the Tenth Circuit had been allowing predicted disruption as a basis for termination of an employee for more than twenty years. *See Moore v. City of Wynnewood*, 57 F.3d 924, 934-935 (10th Cir. 1995) (government employer need not "wait for speech actually to disrupt core operations before taking action"; "Defendants need not justify their predictions of department disruption with a formal evidentiary showing") (citing *Waters*). One of the Tenth Circuit's most recent decisions on this issue – a case cited by Petitioner – says the exact opposite of what Petitioner claims and explains the existence of two standards depending on the temporal proximity between speech and adverse action. In *Duda v. Elder*, 7 F.4th 899 (10th Cir. 2021), the court of appeals states:

> [W]hen the adverse action occurred "soon after" the employee's protected speech, we do not require a showing of actual disruption. *See Kent v. Martin*, 252 F.3d 1141, 1146 (10th Cir. 2001). Instead, when the employer's intent in taking an adverse action is "to avoid actual disruption," *id.*, we will "generally defer to a public employer's reasonable predictions of disruption, as long as the predictions are supported by specific evidence," *Deschenie v. Bd. of Educ. of Cent. Consol. Sch. Dist. No. 22*, 473 F.3d 1271, 1279 (10th Cir. 2007) (quotations omitted). This potential-disruption standard reflects that "neither . . . the government, [n]or a police department in particular, have to wait for speech actually to disrupt core operations before taking action."

Duda at 913 (quoting *Moore*, *supra*). The minority opinion in *Jackson v. Besecker*, 700 F. App'x 792 (10th Cir. 2017), explains precisely why there are two different standards, both of which are correct:

> Sheriff Besecker's argument requires proof of actual disruption, rather than the mere potential for disruption, because the firing took place four months after the election. If the firing had taken place during the campaign, the sheriff might have been able to rely on the mere potential for disruption . . . We have approached the issue differently when the incumbent waited

> until after the election to fire the unsuccessful opponent. . . .[I]n my view, potential disruption would be irrelevant when the firing occurred over four months after an election."

Id. at 799-800 (concurring and dissenting in part; internal citations omitted).

Thus, pursuant to the direction this Court gave in *Pickering, Waters*, *Connick,* and *Garcetti,* an employer may rely on predicted disruption where the termination occurs close in time after the speech at issue. Actual disruption is the standard where there is a significant delay between the speech and the adverse action because there is no longer a need to predict the impact of that speech upon the workplace, as the employer can rely on the historical record. The Tenth Circuit is in complete accord with every other circuit on this issue. Having refuted Petitioner's claim that a split of authority exists on this issue, this Court should reject the petition as to this ground for certiorari.

IV. The Fourth Circuit properly determined that, under the peculiar and specific facts of this case, Petitioner's interest in speaking was entitled to less weight because he lacked an informed opinion, could have reported his concerns to his chain of command; and before his speech his employer had already set in motion internal and external investigations of the incident about which Petitioner sought to speak.

The facts of this case are particularly unusual. An employee with no firsthand knowledge of a work-related incident, knowing that his employer was actively pursuing an internal investigation of that incident while also requesting the scrutiny of the highest law enforcement agency in the state, chose to speak to no one at his place of work about the incident and instead disclosed confidential information to his wife and encouraged her to pursue a third investigation through her media employer. When asked by Respondent if he had disclosed that information Petitioner repeatedly lied. Only after numerous inquiries did he admit: (1) that he had violated his employer's policies on public disclosure of confidential information; (2) that he had done so knowing the incident in question was already the subject of two separate law enforcement investigations; and (3) that he had lied numerous times in response to direct questions about his conduct. The likelihood of repetition of the facts of this case is virtually nil, making this matter unworthy of a grant of certiorari.

Petitioner's mistaken belief that the Fourth Circuit created a new standard requiring exhaustion of all chains of command and the conclusion of all investigations before speaking is unsupported. In fact, if that were the case, the Fourth Circuit would have ceased its analysis once Petitioner admitted he failed to utilize his chain of command or spoke in advance of the conclusion of the relevant investigations. According to Petitioner, the existence of either of those facts now bars a First Amendment claim in the Fourth Circuit. That is is not the case. Instead, the Fourth Circuit conducted the *Pickering* balancing test with those facts, as well as Petitioner's limited, uninformed opinions of the actual facts surrounding the incident and his misconduct, in mind. Petitioner did not speak out of urgency or necessity because two investigations were already underway. He nonetheless chose to speak in the most disruptive manner in violation of his employer's policies. And then he chose to repeatedly lie about his actions. The Fourth Circuit merely considered those facts in conducting its *Pickering* analysis and reaching its conclusion that Petitioner's speech was unprotected because his interests were entitled to less weight than Respondent's.

The Fourth Circuit did not make new law in this case. And even if it did, the likelihood of repetition of facts comparable to the facts in this action is virtually nonexistent. Accordingly, the Court should deny Petitioner's petition for certiorari as to this ground.

V. As an additional sustaining ground, if Petitioner is correct that a split of authority exists as to whether *Pickering* requires actual or predicted disruption, Respondent would be entitled to qualified immunity.

"The doctrine of qualified 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.'" *Stanton v. Sims*, 571 U.S. 3, 5-6, 134 S. Ct. 3, 4–5, 187 L. Ed. 2d 341 (2013) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)). "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments," and "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id*. (quoting *Ashcroft v. al–Kidd*, 563 U.S. 731, 744, 131 S. Ct. 2074, 2085, 179 L. Ed. 2d 1149 (2011)). Courts " 'do not require a case directly on point' before concluding that the law is clearly established, 'but existing precedent must have placed the statutory or constitutional question beyond debate.' " *Id.*

Where a split of authority exists on a question of law, a finding of qualified immunity is appropriate. *See Stanton,* 571 U.S. at 10-11 (finding qualified immunity appropriate where "federal and state courts of last resort around the Nation were sharply divided" such that the issue "was not beyond debate") (quoting *al–Kidd, supra*). Accordingly, to the extent a circuit split exists as to whether an employer must wait for actual disruption to occur before terminating an

employee, Respondent is entitled to qualified immunity, rendering this issue moot.

CONCLUSION

For the foregoing reasons, the Respondent submits that the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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