No. _____

In The

Supreme Court of the United States

JAMES DALY,
Petitioner,
v.
CITY OF DE SOTO, MISSOURI,
and JEFF MCCREARY,
Respondents.

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a public official and his Municipality have the right to discharge from employment a subordinate public employee, due to the nature of that employee's speech as to a matter of admitted public concern, more than a year after such alleged speech took place. The City of De Soto, Missouri's belated decision to terminate James Daly's employment violates the Free Speech Clause of the First Amendment.

PARTIES TO THE PROCEEDING

Petitioner (appellant in the court of appeals) is James Daly.

Respondents (appellees in the court of appeals) are the City of De Soto, Missouri, and its Police Chief Jeff McCreary.

RELATED PROCEEDINGS

United States District Court (E.D. Missouri):

Daly. v. *City of De Soto*, *et al*, No. 4:22-CV-00259 (September 8, 2023)

United States Court of Appeals (8th Cir.):

Daly. v. *City of De Soto*, *et al*, No. 23-3223 (June 27, 2024)

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IN THE SUPREME COURT OF THE UNITED STATES

No.
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v.
CITY OF DE SOTO, MISSOURI, AND JEFF MCCREARY, RESPONDENTS

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

PETITION FOR A WRIT OF CERTIORARI

James Daly respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-2) is reported as No. 4:22-CV-00259. The opinion of the district court (Pet. App. A-5) is not yet published in the Federal Supplement but is listed as No. 23-3223.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 2024. The jurisdiction of this Court is

invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Jurisdiction of the court arises out of the first and fourteenth amendments, 42 U.S.C. 1983 and 28 U.S.C. 1254 (1).

STATEMENT

James Daly ("Daly") filed his initial Complaint for damages in the United States District Court for the Eastern District of Missouri. The Complaint alleged claims of retaliation in violation of Missouri state law, R.S.MO 213.070, as well as a violation of Daly's right to free speech in his public employment pursuant to the First and Fourteenth Amendments, and 42 U.S.C. 1983. Mr. Daly, a De Soto, Missouri police sergeant, pursued a retaliation claim after aiding a female officer under his supervision who complained about harassment within the workplace. Mr. Daly asserted his freedom of speech claim after a Facebook post by a third party was made regarding Halloween decorations in his yard from the prior year (i.e. fall of 2019), prompting an investigation and his termination. After the close of discovery, the defendants filed a Motion, and accompanying Memorandum, seeking Summary Judgment on all claims.

The District Court granted respondents' motion for Summary Judgment, and an appeal followed. The Eighth Circuit affirmed. The panel majority did not disturb the district court's factual findings and made no attempt to assess fully the material facts of the

case. Instead, the panel held that despite the cited factual and legal issues related to the proffered reason for termination, no sufficient issue of fact existed relative to the discharge decision at issue under the First and Fourteenth Amendment.

In his summary judgment briefing, Petitioner presented undisputed evidence that the subject speech, as encompassed by a Halloween decoration, related directly to a matter of public concern. And, in fact, the Respondents did not contest that the speech itself related directly to a matter of public concern, to wit the question of race relations and related policing.

The speech in question was publicly expressed via the placement of a decoration upon Daly's yard during the prior Halloween season of 2019. In his discharge determination letter over one year later, Respondent McCreary openly acknowledged that the subject speech drove his decision to terminate Daly. This Court's intervention is urgently needed because if a public employer can terminate an employee for unverified but speech-based accusations, months if not years later, the right to free speech is circumscribed substantively.

A. The petitioner's free speech claim:

This appeal arises out of a violation of petitioner's constitutional right to free speech asserted against respondents De Soto and McCreary. Mr. Daly was employed by the De Soto Police Department, with his latest position as a Sergeant, from March 18, 2019, to November 4, 2020. He was hired as a police officer and remained as such through his employment with De Soto.

Mr. Daly's duties included observance of a code of

conduct policy stating that De Soto employees shall conduct themselves "in a manner as to reflect most favorably on the department" and as to not bring "disrepute" as a police officer. At all times relevant hereto, Mr. Daly maintains that he successfully performed the essential functions of his job responsibilities with the De Soto Police department, including De Soto's policy on proper conduct.

Respondent De Soto is a municipality operating under a Council-Manager form of government, with Todd Melkus serving as City Manager and incorporating an elected board to oversee the police department. De Soto maintains policies which allow public employees the right to speak on matters of public concern while being free from retaliation. Such policy, at least on its surface, tracks with the free speech rights of De Soto employees such as Mr. Daly.

Mr. Daly was a police officer with several decades of experience in the profession. Before commencing his employment with De Soto, Mr. Daly served as a St. Louis police officer for over 20 years. After retiring from the St. Louis Police Department, Mr. Daly's prior experience and exceptional performance earned him a position, as well as a later promotion, to that of a sergeant with De Soto after only nine months of employment by the city.

In summer 2020, one of Mr. Daly's neighbors posted a photo on Facebook of the Daly family's 2019 Halloween decorations. While these decorations were on actual display in October of 2019, the photo was reposted on Facebook in October 2020, along with a photo of Mr. Daly. The post identified Mr. Daly as a De Soto police officer, and targeted Mr. Daly's property and speech, relating back to the October

2019 Halloween decoration. The post was made concurrent with the national outrage over the death of George Floyd and the national conversation about police brutality. While Mr. Daly had engaged in prior dialogue with his neighbors, he did not have any prior relationship with the individuals who created these social media posts.

Thereafter, Mr. Daly experienced openly adverse treatment within the workplace. He was used by activists/protestors as a justification for them to hold a second protest in front of De Soto City Hall in the fall of 2020. An initial protest was held prior to the Daly social media situation arising. In response to the planned second 'protest' event, De Soto City Manager Todd Melkus, and police department leadership inclusive of Chief McCreary, perpetuated the notion that a contentious protest against Mr. Daly would take place in front of City Hall. Mr. Melkus and Chief McCreary further promoted the idea that a counterprotest would take place to confront the activists and heightened this preemptive tension by setting up barricades and telling police officers to "keep an eye on each other."

These asserted fears proved to be unfounded. Official reports, as well as testimonies of multiple officers, show that the protest caused a truly de minimis degree of actual disruption. The subject event was unquestionably "peaceful" in nature and did not cause any issues for the police department or De Soto City Hall. Less than 20 individuals showed up for the protest. Almost all protestors left after approximately two hours. Officer Andrew Noreen, Mr. Daly's coworker, likened the gathering to a small parade or fireworks display, much less a protest.

After the low turnout for the asserted protest, it became plain that the general De Soto populace was not adversely affected by Mr. Daly's Halloween display from over a year prior. In turn, city employees were also not affected by these Facebook posts in any way. Yet, De Soto supervision used these social media posts, and the coverage in any meaningful manner. Nonetheless, McCreary placed Mr. Daly on administrative leave and opened an internal investigation.

The internal investigation did not reveal any improper conduct by Mr. Daly while on duty. Instead, Mr. Daly was subsequently terminated after De Soto police supervision spoke with his neighbors, many of whom disapproved of the 2019 Halloween display. While Mr. Daly's work for the De Soto police department was untarnished, he was fired nonetheless. As noted, Chief McCreary cited specifically the fact of the prior year's speech as the main factor driving the termination decision.

Mr. Daly thereafter pursued his claims of unlawful retaliation and violation of his right to freedom of speech. In its decision denying Daly's free speech claim, the District Court largely overlooked Officer Noreen's Declaration. Within the same, Officer Noreen explicitly confirmed that the two demonstrations which took part in De Soto were "minor" and were not "burdensome or disruptive" for De Soto employees and/or the police department. These demonstrations were "completely peaceful" and only required police officers to work some overtime.

City Manager Todd Melkus also confirmed in his deposition that these protests were not disruptive to the city. Mr. Melkus admitted that the final protest in

October 2020 – which was the only protest directly relating to Mr. Daly – was "small" and only took place at one intersection "catty corner" to city hall. Mr. Melkus further testified that he believed it to be "correct" that the protestors simply wrote on the sidewalk with chalk and left less than two hours after arriving. Nor did De Soto incur any substantial "monetary costs" and/or damages as a direct result of the subject protest.

Chief McCreary also confirmed the significant lack of disruption from the protest against Mr. Daly. Chief McCreary agreed that at most 20 people showed up at the gathering. These protesters were generally from a Facebook group called "Expect Us" and were not in direct affiliation for, or against, Mr. Daly. Chief McCreary could recall the duration for which these protestors gathered, but ultimately confirmed that any alleged disruption was not a factor in his decision to recommend termination for Mr. Daly. Instead, Chief McCreary cited Mr. Daly's decorations as the first basis for discharge in the "Summary of Offense(s)" contained in his termination letter issued to Daly. He did not cite specifically any alleged "disruption" as part of his decision to terminate Mr. Daly's employment.

Mr. Daly has at all times maintained that he did not put up, promote, and/or advertise these displays to neighbors, coworkers, or anyone else in the DeSoto community. Further, he has also stated that these decorations were put up by his father-in-law, a fact which was confirmed in De Soto's internal investigation.

REASONS FOR GRANTING THE PETITION

The District Court in its Summary Judgment Order gave minimal deference to the evidence supplied by Mr. Daly. Despite the ample body of evidence provided the Court by Daly – thereby creating one or more issues of genuine material fact - summary judgment was entered in favor of Respondents. The District Court's ruling was error, for the following reasons.

A. Evidence Omitted from the Order

While the District Court acknowledged that Daly had experienced adverse treatment after the 2019 Halloween decoration was placed unto social media a year later, it erred in omitting certain related facts from its decision to grant summary judgment. The Court incorrectly held, effectively, that Mr. Daly presented "insufficient evidence" to create genuine issues of material fact.

Chief McCreary officially discharged Mr. Daly from employment with a letter of termination. The letter specifically cited the 2019 Daly family Halloween decorations as the first and primary example of behavior constituting conduct unbecoming. The District Court neglected to acknowledge this direct evidence of unlawful motive. Given these facts, it is indisputable that the decision maker relied upon Mr. Daly's protected speech – his 2019 decorations - as a reason for termination.

The District Court improperly declined to find that Mr. Daly took no action in promoting or encouraging the Halloween display. Mr. Daly did not take the photo of the yard, and he did not create the 2020

Facebook post about the display. Mr. Daly has also maintained that he did not place the Halloween decorations on display. His father-in-law, Mark Ikemeier, put them on display in 2019 while Mr. Daly was on duty.

As part of his investigation into the matter, Chief McCreary drafted a report in which he described having spoken to Mr. Ikemeier over the phone. Mr. Ikemeier confirmed to Chief McCreary that he put the decorations on display, stating that he "put them up in 2019" and that "Jim doesn't even like Halloween" or putting up decorations.

In his report, Chief McCreary further stated that the information provided by Mr. Ikemeier directly contradicted the "metadata information" found on a phone during the internal investigation. The report outlines a specific contradiction found within Mr. Daly's internal investigation. While De Soto allegedly decided to use these asserted facts as a reason to terminate, the District Court improperly opted to use them as proof that no genuine issue of fact existed. Such issues were plainly in dispute and as such were for the jury.

Additionally, the District Court's decision to grant summary judgment relied heavily on the alleged "disruption" caused by the Halloween decorations. The District Court concluded that Daly's decorations caused a "massive" disruption, but neglects to acknowledge the totality of facts and evidence relevant to this factual finding. At no point did the Court acknowledge City Manager Todd Melkus' confirmation that the Expect Us protest was "small" and lasted less than two hours. Mr. Melkus even confirmed that, instead of chaos and massive disruption, the protestors wrote on sidewalks with

chalk. Mr. Melkus further admitted that there were no "monetary costs" associated with handling the two protests in town.

Chief McCreary also confirmed that there was no "massive" disruption to De Soto as a result of the decorations. Chief McCreary testified that no more than 20 people showed up. Importantly, these were "Expect Us" protestors that were not from the De Soto community and were not neighbors of Mr. Daly.

Finally, while the District Court noted the alleged disruption was a factor in its decision to grant summary judgment, Chief McCreary claimed that the same "disruption" was **NOT** part of his decision to recommend the termination of Mr. Daly. Thus, two differing conclusions have been drawn from the same evidence, producing genuine questions of fact. At a minimum, the disruption issue was a factual matter for the jury's assessment.

Further, the District Court refused to acknowledge any aspect of Officer Andrew Noreen's declaration. This approach is in direct contrast to the Court's obligation to view the facts in a light most favorable to the appellant as the non-moving party. *Allard v. Baldwin*, 779 F.3d 768, 771 (8th Cir. 2015) Mr. Noreen's declaration states plainly that the City of De Soto did not experience any significant disruption during the gathering which allegedly occurred as a result of Mr. Daly's Halloween decorations. Only two protests took place in De Soto (only the second of which involved Daly), and both were deemed "minor" and not "burdensome or disruptive" for the city, as well as for its employees. Mr. Noreen found the protests to be "completely peaceful" and did not require anything of the officers, other than to work overtime.

Simply put, the District Court did not take petitioner's proffered (and/or controverted) facts into account when granting summary judgment. Specifically, it was never acknowledged that Mr. Melkus was the final decision maker in Mr. Daly's termination, and that he "never concluded" whether or not Mr. Daly put up the decorations in his yard. Mr. Melkus also admitted that everyone "has the right to put things in their yard" and to "say things when they are not on duty" for the police department. Rather than provide clarification, these statements only produce more questions without answers. Given this, summary judgment was simply improper.

B. *Pickering* Requires that, to be protected, the subject speech must be as to a Matter of Public Concern, Which Existed in this Instance.

Here, the District Court correctly incorporated the balancing test found in *Pickering v. Bd. Of Education*, 391 U.S. 563 (1968) to identify whether Mr. Daly's free expression affected his employer's interests. The Court incorrectly concluded, though, that Mr. Daly's termination was "justified" without considering all relevant factors. Instead, the Court ignored, improperly, the age of the speech in question.

Pickering identifies a multitude of factors when a court weighs the circumstances of a given public work-related speech scenario. The court considers the following: (1) the need for harmony in the workplace; (2) whether the government's responsibilities require a close working relationship; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech impeded the

employee's ability to perform his duties. *Anzaldua v. Ne. Ambulance & Fire Prot. Dist.,* 793 F.3d 822, 835 (8th Cir. 2015)(referring to *Pickering v. Bd. Of Education*, 391 U.S. 563, 568 (1968)). While the test is recognized as flexible, it is not so malleable as to neglect to review for summary judgment purposes whether the evidence, when taken in a light most favorable to the appellant as the non-moving party, creates a genuine issue of material fact.

The courts below neglected to recognize the timing of the subject display and the later publication of the display by others. These decorations were not put up at the time of the alleged 2020 protest at issue. Instead, they were on display one year prior, at Halloween in 2019. The asserted disruption for the City arose from a third-party social media post made almost one year after the speech itself, in the fall of 2020. The timing of the alleged disruption incurred by De Soto is thus not consistent with the timing of the physical display. Other individuals – not the plaintiff - resurfaced the display photo at a moment that was unrelated to Mr. Daly's Halloween decorations. This inconsistency cannot go unnoted – yet it was given no relevance by the District Court.

Instead, the District Court focused on the context in which the dispute arose, and the degree of asserted public interest when deciding to grant summary judgment. These considerations were meritless. Evidence adduced by Daly established that very few individuals participated in the gathering arising from Mr. Daly's display. The group's main activity was the creation of chalk drawings across the street from the De Soto city hall. The 2019 display proved only to be disruptive when it was convenient for Mr. Daly's disgruntled neighbors a year after the fact.

Mr. Daly's actions here were retrofitted by defendants to fit a narrative that affects all police officers. The protesters that arrived were not associated with Mr. Daly, nor his local community. These individuals used Mr. Daly as an excuse to gather, regardless of the circumstances. The context of Mr. Daly's scrutiny was co-opted to fit a larger, national conversation. There would be no issue with Mr. Daly's decorations if there was not a larger sense of social unrest, as was the case in 2019. Nonetheless, these issues did not keep Mr. Daly from performing the duties of his job. Moreover, the actual protest at issue was minimal in the extreme. As such, the *Pickering* test fails to support Respondents' discharge decision on account of circumstantial inconsistencies.

Ultimately, the resolution of this dispute in favor of Respondents was predicated upon a gross mistake by the courts below. That mistake was simple in nature, yet broad-based in its implications. If a public speaking public servant may be penalized for his speech made months, if not years, earlier – then the First Amendment loses its relevance. Stated otherwise, the timing of the subject public speech is always of plain relevance as relates to the penalty applied to the speaker for that same speech. To deny a jury the right to consider this aspect altogether was a mistake.

Both Mr. Melkus and Chief McCreary admit that Daly's display was a motivating factor when it came to terminating Mr. Daly's employment. The termination letter confirms this with its opening sentence. Because of this, a violation of Mr. Daly's right to freedom of expression occurred in this instance. At a bare minimum, the issue cannot be decided at the summary judgment stage. Daly's

evidence properly was deserving of consideration by the ultimate trier of fact, the jury. This Court's intervention is warranted now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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