No. 24-507

IN THE

Supreme Court of the United States

JAMES DALY,

Petitioner,

v.

CITY OF DE SOTO, MISSOURI, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE PETITION

The Court should deny Petitioner James Daly's Petition because Daly presents no compelling reason for the Court to grant certiorari. Daly contends, in his Question Presented, that the City of Desoto[1] violated his First Amendment right to Free Speech because the City did not discharge him until over one year after the alleged speech occurred. However, his Question Presented, standing alone, presents no proper basis for the Court's consideration for certiorari review. Absent is any claim that the decision of the United States Court of Appeals for the Eighth Circuit, an unpublished *per curiam* decision, conflicts with any decision of this Court or another United States court of appeals on the same question; decided an important federal question in a way that conflicts with a decision by a state court of last resort; so far departed from the accepted and usual course of judicial proceedings as to call for this Court's supervisory power; or decided an important question of federal law that has not been, but should be, settled by this Court. Sup. Ct. R. 10(a) and (c).

Indeed, Daly acknowledges that the district court correctly cited the Court's balancing test in *Pickering v. Board of Education*, 391 U.S. 563 (1968), in addressing the merits of his First Amendment claim on the City's summary judgment motion, but argues the district court misapplied the relevant *Pickering* factors to be balanced. (Pet., p. 11-14.) He further contends the district court

1. While Daly identifies Jeff McCreary, the City's Chief of Police, as a Respondent, he did not challenge the district court's dismissal of his claim against Chief McCreary before the Eighth Circuit. Nor does he challenge Chief McCreary's dismissal before this Court.

omitted key facts from its summary judgment order for the City. (Pet., p. 8-11.) However, these grounds do not present a compelling basis for certiorari review under Sup. Ct. R. 10. For, when such claims of error are presented, Rule 10 makes plain that certiorari is "rarely granted." Further, Daly's claims are also without merit.

Therefore, in the absence of a meritorious basis for certiorari under Sup. Ct. R. 10, the City of Desoto respectfully requests the Court to deny Daly's Petition for a Writ of Certiorari.

I. THE QUESTION PRESENTED DOES NOT PRESENT AN ISSUE OF LAW REQUIRING RESOLUTION BY THIS COURT.

A. The Court's *Pickering* Balancing Test is Well-Settled.

Daly, in his Petition, does not advance a question meeting the threshold requirements of Sup. Ct. R. 10. His claim that he was terminated by the City for engaging in protected speech is a dubious one. The district court, in addressing his First Amendment claim, found that "[t]he evidence establishes that Daly was terminated for misconduct and dishonesty, not for engaging in protected speech." (Pet. App., p. A13). The district court only addressed the *Pickering* factors as a secondary and alternative basis for its decision, after assuming, for sake of argument, that Daly was terminated due to the Halloween display. (*Id.*)

Regardless, Daly's claim that his First Amendment rights were violated does not merit certiorari review.

He merely argues that the City's termination of his employment was "belated," impacting one of the six factors in the Court's *Pickering* balancing test as delineated by the Eighth Circuit. (Pet., pp. 11-12.) His citation to the Eighth Circuit's decision in *Anzaldua v. Ne. Ambulance & Fire Prot. Dist.*, 793 F.3d 822, 835 (8th Cir. 2015), does not support a contrary conclusion and certainly does not advance his quest for certiorari.

Daly does not contend that the Eighth Circuit's enumeration of the *Pickering* factors in *Anzaldua* conflicts with any other federal court of appeals. Indeed, Daly cannot do so because there is no such conflict.

In the end, Daly does nothing more than invite the Court to decide the relative weight to be given one factor of the *Pickering* balancing test when compared to other factors. (Pet., pp. 11-13.) Daly, in so doing, inaccurately frames the factual record to suggest that a higher importance should be ascribed to the "time, manner, and place of speech" factor. However, his argument is contrary to precedent. He ignores that the *Pickering* test is a flexible one, and that "the weight to be given to any factor varies depending on the circumstances of the case." *Anzaldua*, 793 F.3d at 835 (quoting *Germann v. City of Kan. City*, 776 F.2d 761, 764 (8th Cir. 1985)). In this case, as found by the district court, and affirmed by the Eighth Circuit, the City offered sufficient evidence that Daly's termination was justified under the *Pickering* test because the evidence demonstrated that Daly's speech disrupted the City's operations. (Pet. App., pp. A3, A14.)

Under these circumstances, Daly cannot claim entitlement to certiorari review. Absent is any conflict in

the law. The gravamen of his Petition concerns exclusively the weight given by the district court in applying the *Pickering* factors and not in deciding an unsettled question of federal law or deciding a question of federal law in a manner contrary to a decision of this Court or any other circuit court of appeals. The rule in *Pickering*, a decision decided over one-half century ago and applied by its numerous progeny, cannot be considered to be an unsettled one. Therefore, Daly's Petition should be denied.

B. Any Dispute Raised by Daly in his Question Presented Pertains to the Application of the Law to the Facts of this Case.

The import of the timing of the "speech" factor compared to the other factors in *Pickering* test concerns the application of well-settled law. Even if this Court were to evaluate the district court's analysis of the time of the speech as a component of the *Pickering* balancing test, the Court would find no basis to reverse the district court's judgment for the City, which the Eighth Circuit affirmed.

The City's termination decision was not belated. The City made its decision one month after the City learned of the speech at issue. (Pet. App., pp. A7-A8.) The "speech" was a Halloween display in Daly's yard, a grave marker in the shape of a Cross inscribed with the epithet, "Here lies Michael Brown, a Fat Ghetto Clown." (Pet. App., p. A7.) Michael Brown was killed during a police encounter in 2014 in the St. Louis metropolitan area, which incident resulted in unrest, violence, and notoriety across the United States.

Daly's neighbor took a picture of the display in October 2019. In July 2020, the picture was shared on Facebook.

The picture was re-posted in early October 2020. The latter post included a picture of Daly and identified him as a City police officer. (Pet. App., p. A7.) The City only learned of the speech when Daly told the City's Police Chief about the October Facebook post.

This information prompted the City to investigate the post. The investigation addressed Daly's knowledge of the display and his interactions with his neighbors. Ultimately, City officials concluded Daly lied to the City's investigators about the display's existence and his knowledge of it. (Pet. App., p. A7.) The investigation also revealed that Daly engaged in Conduct Unbecoming in altercations with his neighbors. (*Id.*) The City's termination decision was based on Daly's Conduct Unbecoming and untruthfulness, the latter of which made him unfit to serve as a police officer. (Pet. App., pp. A8, A13.)

The City made its decision within a week of the conclusion of the investigation. Thus, when considered in conjunction with the City's first notice of the speech at issue, the termination decision was not delayed. Under the circumstances, and as affirmed by the Eighth Circuit, the district court properly considered the timing factor in applying the *Pickering* test. (Pet. App., p. A14.)

Important to the district court's analysis of the factual record, as dictated by *Pickering* and its progeny, is the context in which the termination decision is made. The Facebook post (not the speech itself) was made amid the national turmoil over the death of George Floyd in 2020. The post garnered national media attention, and not only prompted a protest, but also prompted significant concern for the safety of the City's employees and also occupied a

significant percentage of the City Manager's time. (Pet. App., pp. A14-A15.)

Daly, in his Petition, ignores these critical aspects of the district court's analysis, which the Eighth Circuit affirmed in an unpublished *per curiam* opinion. Restated, Daly focuses solely on the extent of the disruption caused by the October 2020 protest in De Soto while ignoring the balance of the evidence regarding the impact that the Facebook post had on the City's operations.

Thus, Daly, in his Petition, mischaracterizes the district court's application of the *Pickering* factors. The district court's judgment did not turn on the timing of Daly's speech, but on the effect that the publicity of the speech had on the City. (Pet. App., pp. A14-A15.) This is not a novel situation in First Amendment Free Speech jurisprudence pertaining to public employees. As explained by this Court in *Garcetti v. Ceballos*, a government entity has broader discretion to restrict speech when acting as an employer if those restrictions are directed at speech that can affect the entity's operations. 547 U.S. 410, 418 (2006).

This principle of First Amendment jurisprudence is well settled. Here, Daly simply takes issue with the weight given to the "disruption" factor over the "time, place, and manner of speech" factor. His contention in no way warrants certiorari review. As made plain in Sup. Ct. R. 10, "a petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."

II. TO THE EXTENT DALY ASKS THE COURT TO WEIGH THE EVIDENCE, HIS PETITION SHOULD BE DENIED.

Daly also contends the district court, and by extension, the Eighth Circuit, disregarded evidence favorable to him. (Pet., p. 8, Section A.) He begins his argument with a recitation of factual evidence allegedly overlooked by the district court. The crux of his argument is that this additional factual evidence created a triable issue of fact, and, therefore, the district court's summary judgment was improper. Rather than presenting a legal issue of significance that requires resolution by this Court, Daly impermissibly requests the Court to correct what he believes to be inaccurate factual findings by the district court. The Eighth Circuit properly determined, after careful review of the entire record, that those findings should not be disturbed. (Pet. App., pp. A2-A3.)

Plainly, this ground raised in Daly's Petition does not warrant certiorari review. Under Sup. Ct. R. 10, certiorari is "rarely granted" when the asserted error is predicated on "erroneous factual findings." Given the entirety of the district court's analysis in this case, including the fact that the district court predicated its decision on its finding that the City terminated Daly for misconduct and dishonesty, and not for engaging in protected speech, Daly's Petition does not present a sufficient basis for the Court to depart from its usual practice to reject certiorari in this context. (Pet. App., p. A13.)

Moreover, a review of Daly's evidence only confirms the propriety of the district court's decision. Daly asserts that evidence regarding the ultimate course of a protest regarding his "speech" and an affidavit from one of

several witnesses were not given the proper weight at the summary judgment stage. He argues the district court did not follow Eighth Circuit precedent articulated in *Allard v. Baldwin*, 779 F.3d 768, 771 (8th Cir. 2015), which requires the district court to view the facts in a light most favorable to the non-moving party. (Pet., p. 10.)

His argument is without merit. Contrary to Daly's argument, the district court viewed the summary judgment record in the light most favorable to Daly. (Pet. App., p. A9, A15.) The district court so stated in its Memorandum and Order. (*Id.*)

Moreover, Daly ignores that the Eighth Circuit reviews the grant of a motion for summary judgment *de novo*, and that on a *de novo* review, the Eighth Circuit must also review all of the evidence and reasonable inferences in the light most favorable to the non-moving party. As shown by the Eighth Circuit's decision, this is precisely what the Eighth Circuit did in this case. (Pet. App., p. A3, citing *Henry v. Johnson*, 950 F.3d 1005, 1010 (8th Cir. 2020)). The Eighth Circuit's standard of review, as drawn from *Henry v. Johnson*, is identical to the standard of review stated in *Allard v. Baldwin*.

Plainly, there is no conflict between the standard of review applied by the Eighth Circuit in this case and the standard of review in *Allard*. Nor could there be. The standard is not a novel one. Indeed, the standard of review stated by the Eighth Circuit in *Allard* and *Henry* is consistent with the standard articulated by this Court. *See*, *e.g.*, *White v. Pauly*, 580 U.S. 73, 76 (2017).

In the end, Daly simply contends the district court misapplied this properly-stated rule, which is not a proper

basis for certiorari under Supreme Court Rule 10. Further, Daly omits facts critical to the district court's analysis. For example, he ignores the district court's conclusion, as affirmed by the Eighth Circuit, that the City presented ample evidence that Daly was terminated for misconduct and dishonesty, and not for engaging in protected speech. (Pet. App., pp. A13.) Applying the *McDonnell Douglas* burden-shifting framework, the district court concluded the City's termination decision was legitimate and not pretextual. *Id.*

The district court then applied the *Pickering* balancing test to conclude that, even if for sake of argument that protected speech motivated the City's termination decision, the City acted within its authority. (Pet. App., p. A13.) Applying the principles stated in *Garcetti*, 547 U.S. at 418, and in light of the even more significant interest the City has in regulating speech of a public safety employee as explained in *Anzaldua*, 793 F.3d at 834, the district court correctly concluded that there was no genuine issue of fact that required resolution by a jury. (Pet. App., pp. A13-A14.)

Here, Daly simply disagrees with the district court's findings and conclusions, which were upheld by the Eighth Circuit under the appropriate standard of review. He does not contend the district court applied an improper standard. Indeed, Daly even acknowledges the district court correctly incorporated the *Pickering* analysis in rendering its decision. (Pet., p. 11.) He merely disagrees with the district court's findings. This, however, is not a meritorious basis for certiorari review.

Under these circumstances, Daly's Petition should be denied. Application of Sup. Ct. R. 10 to Daly's Petition

permits no other conclusion. Absent is a significant federal question. And certainly this is not the exceptional case that merits certiorari review predicated on a claim based on erroneous factual findings or the misapplication of a settled and properly stated rule of law.

CONCLUSION

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

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