No. 24-

IN THE

Supreme Court of the United States

FREDERICK LEWIS WASHINGTON,

Petitioner,

v.

SUNFLOWER COUNTY, MISSISSIPPI,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

JIM WAIDE
Counsel of Record
WAIDE & ASSOCIATES, P.A.
Post Office Box 1357
Tupelo, MS 38802
(662) 842-7324
waide@waidelaw.com

Counsel for Petitioner

120126

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Should this Court summarily reverse when a court of appeals defies clear, unmistakable decisions of this Court?

2. Should a judge or a jury decide whether a public employee's speech is pursuant to his ordinary job duties, such that the speech is not protected by the First Amendment?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States:

1. Frederick Lewis Washington, Petitioner; and

2. Sunflower County, Mississippi, Respondent.

STATEMENT OF RELATED PROCEEDINGS

Washington v. Sunflower County, Miss., No. 4:22-CV-54-DMB-DAS, United States District Court for the Northern District of Mississippi. Judgment entered January 24, 2023.

Washington v. Sunflower County, Miss., United States Court of Appeals for the Fifth Circuit. Judgment entered July 23, 2024.

Washington v. Sunflower County, Miss., United States Court of Appeals for the Fifth Circuit. Order denying rehearing September 4, 2024).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

STATEMENT OF RELATED PROCEEDINGS iii

TABLE OF CONTENTS..... iv

TABLE OF APPENDICES vi

TABLE OF CITED AUTHORITIES vii

OPINIONS BELOW.....1

JURISDICTION.....1

CONSTITUTIONAL AMENDMENTS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

I. THIS COURT SHOULD GRANT CERTIORARI AND SUMMARILY REVERSE BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DISREGARDED THIS COURT'S UNAMBIGUOUS PRECEDENTS.....4

Table of Contents

Page

II. THIS COURT SHOULD GRANT THE WRIT IN ORDER TO RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE STATUS OF SPEECH IS A QUESTION OF LAW OR IS A MIXED QUESTION OF FACT AND LAW, REQUIRING A JURY'S DETERMINATION 7

CONCLUSION 16

TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JULY 23, 2024 .....1a

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JULY 23, 2024 .....11a

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT, N.D., MISSISSIPPI, GREENVILLE DIVISION, FILED JANUARY 24, 2023.....13a

APPENDIX D — ORDER DENYING PETITION FOR REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED SEPTEMBER 4, 2024 .....27a

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES:

Ashcroft v. Iqbal,
556 U.S. 662 (2009). 6, 7

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 6

Blakely v. Washington,
542 U.S. 296 (2004) 15

Boeing Co. v. Shipman,
411 F.2d 365 (5th Cir. 1969). 15

Charles v. Grief,
522 F.3d 508 (5th Cir. 2008) 10

Connick v. Myers,
461 U.S. 138 (1983). 7, 8, 10-12

Curtis v. Loether,
415 U.S. 189 (1974) 14

Dahlia v. Rodriguez,
735 F.3d 1060 (9th Cir. 2013). 12, 13

Dougherty v. Sch. Dist. of Phila.,
772 F.3d 979 (3d Cir. 2014) 12

Ellins v. City of Sierra Madre,
710 F.3d 1049 (9th Cir. 2013). 12

Cited Authorities

Page

Flora v. Cnty. of Luzerne,
776 F.3d 169 (3d Cir. 2015) 12

Fox v. Traverse City Area Pub. Sch. Bd. of Educ.,
605 F.3d 345 (6th Cir. 2010). 11

Garcetti v. Ceballos,
547 U.S. 410 (2006). 5-11, 13

Gautreaux v. Scurlock Marine, Inc.,
107 F.3d 331 (5th Cir. 1997). 15

Kennedy v. Bremerton Sch. Dist.,
597 U.S. 507 (2022). 6-8

Lane v. Franks,
573 U.S. 228 (2014) 6, 8

Markman v. Westview Instruments, Inc.,
517 U.S. 370 (1996) 9

Mayhew v. Town of Smyrna, Tennessee,
856 F.3d 456 (6th Cir. 2017). 11, 12

Nunez v. Superior Oil Co.,
572 F.2d 1119 (5th Cir. 1978) 10

Parker v. Hulme,
18 F. Cas. 1138 (No. 10,740) (C.C.E.D. Pa. 1849). 9

Page

Pickering v. Board of Education,
391 U.S. 563 (1968) 8

Posey v. Lake Pend Oreille Sch. Dist. No. 84,
546 F.3d 1121 (9th Cir. 2008) 11, 13

Powers v. Ohio,
499 U.S. 400 (1991) 15

Ramos v. Louisiana,
590 U.S. 83 (2020). 7

Robinson v. York,
566 F.3d 817 (9th Cir. 2009). 13

Sec. & Exch. Comm'n v. Jarkesy,
___ U.S. ___, 144 S. Ct. 2117 (2024) 14

Sioux City & P. R. Co. v. Stout,
84 U.S. 657 (1873) 9

Washington v. Sunflower Cnty., Mississippi,
No. 2360072,
2024 WL 3510116 (5th Cir. July 23, 2024) 2-4

Washington v. Sunflower Cnty., Mississippi,
No. 4:22CV54DMBDAS,
2023 WL 372645 (N.D. Miss. Jan. 24, 2023) 2, 3

Williams v. Riley,
275 F. App'x 385 (5th Cir. 2008) ("*Williams I*") 10

Page

CONSTITUTIONAL AMENDMENTS:

U.S. Const. amend. I 1, 5, 8, 11-15

U.S. Const. amend. VII. 2, 14, 16

STATUTES:

28 U.S.C. § 1254(1). 1

28 U.S.C. § 1983. 13

Fed. R. Civ. P. 12(c) 3-5

Miss. Code Ann. § 9-5-137 2

Miss. Code Ann. § 1941. 3

Miss. Code Ann. § 1974(o). 3

Miss. Code Ann. § 19-4-1 5

Miss. Code Ann. § 19-4-7 . . . . . .2, 5

MISCELLANEOUS:

15 Papers of Thomas Jefferson 282 (J. Boyd ed. 1958). 15

Page

Stone T. Hendrickson, *Salvaging* Garcetti*: How A Procedural Change Could Save PublicEmployee Speech*, 71 Ala. L. Rev. 291 (2019) 8, 9, 14

OPINIONS BELOW

The unpublished opinion of the United States District Court for the Northern District of Mississippi is found at No. 4:22CV54DMBDAS, 2023 WL 372645 (N.D. Miss., Jan. 24, 2023), and is attached as Pet. App. 13a-26a. The unreported opinion of the United States Court of Appeals for the Fifth Circuit affirming the district court is found at 2024 WL 3510116 (5th Cir., July 23, 2024), and is attached as Pet. App. 1a-10a. The unpublished order of the United States Court of Appeals for the Fifth Circuit denying petition for rehearing, U.S.C.A. No. 23-60072 (5th Cir., September 4, 2024), is attached as Pet. App. 27a-28a.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit decided on July 23, 2024, petition for rehearing denied on September 4, 2024, by Writ of *Certiorari*, under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AMENDMENTS INVOLVED

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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.

The Seventh Amendment of the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

Respondent Sunflower County, Mississippi employed Petitioner Frederick Lewis Washington as its county administrator. As county administrator, Petitioner had statutorily defined, specific administrative and supervisory duties, as well as such other "duties and responsibilities" as the Respondent's governing body, the board of supervisors, "may determine." MISS. CODE ANN. § 19-4-7.

A Mississippi chancery clerk is an elected county official, who serves as the court clerk, as custodian of the county's records, and as the board of supervisors' clerk. MISS. CODE ANN. § 9-5-137.

On September 18, 2021, Petitioner informed Respondent's chancery clerk that the county board of supervisors had engaged in bid rigging when buying a truck, including the use of a phantom bidder who did not even manufacture trucks. At its next meeting, the board of supervisors fired Petitioner. *Washington v. Sunflower Cnty., Mississippi*, No. 4:22CV54DMBDAS, 2023 WL 372645, *1-2 (N.D. Miss. Jan. 24, 2023), aff'd, No. 2360072, 2024 WL 3510116 (5th Cir. July 23, 2024); Pet. App. 17a.

Petitioner filed suit in the United States District Court for the Northern District of Mississippi alleging a violation of his free speech rights. The district court granted Respondent's Rule 12(c) motion for judgment on the pleadings. The district court held that Petitioner's "reporting what he believed to be illegal conduct to 'the Clerk of the Board' was done pursuant to his official duties." *Washington*, 2023 WL 372645, at *4; Pet. App. 23a.

On appeal, the Fifth Circuit Court of Appeals upheld the district court's Rule 12(c) dismissal based upon Petitioner's formal statutory job duties. The Fifth Circuit wrote:

> Here, [Petitioner's] complaint belies any contention that his speech was outside the scope of his ordinary job duties. As noted above, Washington pleads his job description as outlined in two provisions of the Mississippi Code. ROA.6 (citing MISS. CODE ANN. §§ 1941 & 7). Those provisions include duties like "carry[ing] out the general policies of the board," MISS. CODE ANN. § 1941, . . . and "[k]eep[ing] the board of supervisors informed as to federal and state laws and regulations which affect the board of supervisors and the county," *id.* § 1947(o). Thus, reporting potentially illegal misconduct to the Board's own clerk was clearly "in the course of " Washington's job duties.

Washington, 2024 WL 3510116, at *3; Pet. App. 7a-8a.

In finding that "reporting potentially illegal misconduct to the Board's own clerk was clearly 'in the course of' Washington's job duties . . . ," *Washington*, 2024 WL 3510116, at *3; Pet. App. 8a, the Fifth Circuit ignored Petitioner's complaint, which alleged that Petitioner's "ordinary job duties did not include reporting illegal or criminal activity, and especially did not include reporting illegal or criminal activity by the members of the Board of Supervisors."

After the Fifth Circuit upheld the Rule 12(c) dismissal, Petitioner filed a petition for rehearing en banc, which was denied on September 4, 2024. Pet. App. 27a-28a.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI AND SUMMARILY REVERSE BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DISREGARDED THIS COURT'S UNAMBIGUOUS PRECEDENTS.

The Fifth Circuit upheld the grant of the Rule 12(c) dismissal based upon formal statutory job duties. The Fifth Circuit wrote that "[Petitioner] pleads his job description as outlined in two provisions of the Mississippi Code." *Washington*, 2024 WL 3510116, at *3; Pet. App. 8a.

In this regard, the complaint's exact pleading follows:

> As County Administrator, [Petitioner] had administrative duties with respect to carrying out the directions of the County Board of Supervisors as to the administration of County

> affairs. [Petitioner's] duties are described in MISS. CODE ANN. § 19-4-1 and MISS. CODE ANN. § 19-4-7 . . . [Petitioner's] ordinary job duties did not include reporting illegal or criminal activity, and especially did not include reporting illegal or criminal activity by the members of the Board of Supervisors.

(Emphasis added).

The Fifth Circuit's upholding dismissal of this case under FED. R. CIV. P. 12(c), based upon formal statutory job duties, disregards this Court's leading decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). *Garcetti* held: "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti*, 547 U.S. at 421.

In determining the role of formal job descriptions, *Garcetti* held:

> Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.

Garcetti, 547 U.S. at 424-25.

Garcetti was followed in *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022). *Kennedy* quoted *Lane v. Franks*, 573 U.S. 228, 240 (2014), as holding the "critical question . . . is whether the speech at issue is itself ordinarily within the scope of an employee's duties." *Kennedy*, 597 U.S. at 529. *Kennedy* held that this issue must be "undertaken 'practical[ly],' rather than with a blinkered focus on the terms of some formal and capacious written job description." *Kennedy*, 597 U.S. at 529 (emphasis added).

By dismissing the case at bar based solely upon Petitioner's formal job duties, the Fifth Circuit Court of Appeals disregarded both *Garcetti* and *Kennedy*.

Additionally, the Fifth Circuit disregarded a fundamental pleading rule. To "survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (emphasis added).

The Fifth Circuit declined to accept as true the facts in the complaint. The complaint pled that Petitioner's job duties were described by statute, but that his ordinary job duties "did not include reporting illegal or criminal activity, and especially did not include reporting illegal or criminal activity by the members of the Board of Supervisors."

By disregarding the factual allegations in the complaint and, instead, relying upon a formal job description (which never mentions whether or not Petitioner's duties include reporting illegal activity), the Fifth Circuit ignored the

long-settled rule, restated in *Iqbal*, that on a motion to dismiss, the complaint's allegations must be "accepted as true." *Iqbal*, 556 U.S. at 678.

If the lower courts need not follow this Court's opinions, the thought, expense, and effort expended in writing those opinions is wasted. "[F]ederal courts have a constitutional obligation to follow a precedent of this Court unless and until it is overruled by this Court." *Ramos v. Louisiana*, 590 U.S. 83, 124, n. 5 (2020). This Court's precedents in *Garcetti*, *Kennedy*, and *Iqbal* have not been overruled. Therefore, the lower courts "have a constitutional obligation" to follow those precedents. This Court should grant *certiorari*, summarily reverse, and direct the Fifth Circuit to follow *Garcetti*, 547 U.S. at 424-25, *Kennedy*, 597 U.S. at 529-30, and *Iqbal*, 556 U.S. at 678.

II. THIS COURT SHOULD GRANT THE WRIT IN ORDER TO RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE STATUS OF SPEECH IS A QUESTION OF LAW OR IS A MIXED QUESTION OF FACT AND LAW, REQUIRING A JURY'S DETERMINATION.

The Fifth Circuit decided, as a matter of law, that Petitioner's speech was made pursuant to his official job duties. Treating the status of speech as a legal issue is consistent with a footnote in *Connick v. Myers*, 461 U.S. 138, 148, n. 7 (1983), which stated that the "inquiry into the protected status of speech is one of law, not fact."

However, *Connick* was adjudicating a different issue than the issue presented here. The issue adjudicated in

Connick was striking "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Connick*, 461 U.S. at 142, quoting *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

The balancing test which this Court has mandated in deciding First Amendment free speech rights of public employees is not at issue here. The issue here is the threshold issue of whether speech qualifies for First Amendment protection because it is not "ordinarily within the scope of an employee's duties. . . ." *Lane*, 573 U.S. at 240; *accord, Kennedy*, 597 U.S. at 529-30; *Garcetti*, 547 U.S. at 421.

Connick's statement, that the "inquiry into the protected status of speech is one of law, not fact," *Connick*, 461 U.S. at 148, n. 7, was not followed in *Garcetti* when determining the threshold issue of whether speech is made as a citizen or is made as an employee. *Garcetti* explained that the issue of whether speech is pursuant to an employee's official job duties is a "practical one," *Garcetti*, 547 U.S. at 425, and requires inquiry into the "duties an employee actually is expected to perform. . . ." *Garcetti*, 547 U.S. at 424-25.

Stone T. Hendrickson, *Salvaging Garcetti: How A Procedural Change Could Save PublicEmployee Speech*, 71 Ala. L. Rev. 291, 306 (2019), explains the logic of treating the issue of whether speech is part of an employee's ordinary job duties as a mixed question of law and fact requiring a jury's input. Hendrickson writes:

> In particular, juries would be functionally wellsuited to perform the *Garcetti* analysis. Juries will necessarily contribute a much broader range of vocational experience to the evaluation of the parties' claims. . . . Having a broad range of firsthand experience with a variety of job responsibilities and descriptions, a jury would likely be in a better position to evaluate the actual scope of an employee's job responsibilities than a single judge who has generally been in the same line of work for his or her entire career.

Salvaging Garcetti*: How A Procedural Change Could Save PublicEmployee Speech*, 71 Ala. L. Rev. at 306 (footnote omitted).

"It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge." *Sioux City & P. R. Co. v. Stout*, 84 U.S. 657, 664 (1873).

Deciding which judicial actor (judge or jury) is "in a better position" to evaluate the issue follows this Court's methodology. For example, *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), held that a "judge, from his training and discipline, is more likely to give a proper interpretation to such [patents] than a jury; and he is, therefore, more likely to be right, in performing such a duty, than a jury can be expected to be." *Markman*, 517 U.S. at 388-89, quoting *Parker v. Hulme*, 18 F. Cas. 1138 (No. 10,740) (C.C.E.D. Pa. 1849).

On the other hand, applying the same methodology, *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1126 (5th Cir. 1978), held those questions dealing with the "mainsprings of human conduct. . . ." present issues of fact for a jury. According to *Nunez:* "[L]itigants are entitled to have the jury draw those inferences or conclusions that are appropriate grist for juries." *Nunez*, 572 F.2d at 1124. In this case, disregarding its own precedent in *Nunez*, the Fifth Circuit did not pause to consider which judicial actor (judge or jury) was in a "better position" to decide the issue of the scope of an employee's job duties. Instead, the Fifth Circuit assumed this was an issue of law, following its own holding in *Charles v. Grief*, 522 F.3d 508, 512 (5th Cir. 2008), which held: "Whether [Petitioner] engaged in protected speech is a purely legal question. . . ."

Nevertheless, there is disagreement, even within Fifth Circuit, on this issue. In *Williams v. Riley*, 275 F. App'x 385 (5th Cir. 2008) ("*Williams I*"), correctional officers were fired because they carried out their written job responsibilities to report misconduct when they reported that deputy sheriffs had beaten a defenseless inmate. The Fifth Circuit reversed the district court's *Garcetti*-based grant of summary judgment, stating that "whether the speech was: pursuant to . . . official duties Plaintiff actually [were] expected to perform, i.e., made in the course of performing their official duties under *Garcetti*, 547 U.S. at 421-25 [is an issue of fact]. Accordingly, dismissal was improper." *Williams I*, 275 F. App'x at 389 (inner quotations omitted).

The Fifth Circuit's internal disagreement is reflected in the decisions by other Courts of Appeals. The Courts of Appeals are divided as to whether *Connick* or *Garcetti* applies the correct methodology.

For example, *Mayhew v. Town of Smyrna, Tennessee*, 856 F.3d 456 (6th Cir. 2017), upheld the dismissal of a First Amendment suit brought by a city employee who had reported co-employees for violating wastewater-treatment regulations. In the course of holding the issue of whether the speech was employee speech or citizen speech, *Mayhew* noted a circuit court split arising from *Garcetti* and *Connick*:

> In *Connick*, the Supreme Court unequivocally stated that "[t]he inquiry into the protected status of speech is one of law, not fact." [*Connick*] 461 U.S. at 148 n.7 . . . However, the Supreme Court's holding in *Garcetti* "that the question of whether a statement was spoken as a public employee or as a private citizen for First Amendment purposes was 'a practical one,' requiring a factspecific inquiry into the 'duties an employee actually is expected to perform,'" resulted in a circuit split as to "whether the inquiry into the protected status of speech remains one purely of law as stated in *Connick*, or if instead *Garcetti* has transformed it into a mixed question of fact and law." *Fox*, 605 F.3d at 350[1] (quoting *Garcetti*, 547 U.S. at 424-25 . . . and *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1127 (9th Cir. 2008)).
>
> As we summarized in *Fox*, the Third, Seventh, Eighth, and Ninth Circuits have concluded that "whether the speech in question was spoken as

1. *Fox v. Traverse City Area Pub. Sch. Bd. of Educ.*, 605 F.3d 345 (6th Cir. 2010).

> a public employee or a private citizen presents a mixed question of fact and law," while the D.C., Fifth, and Tenth Circuits have stayed true to *Connick*'s holding. *Id.* (citations omitted).

Mayhew, 856 F.3d at 462.

A contrary result was reached in *Flora v. Cnty. of Luzerne*, 776 F.3d 169 (3d Cir. 2015). In *Flora*, a public defender was fired when he criticized the inadequacies and unfairness of a local public defender system. The district court granted summary judgment in favor of the defendant, finding, as a matter of law, that the public defender spoke in his capacity as an employee. The Third Circuit reversed, stating:

> "'Whether a particular incident of speech is made within a particular plaintiff 's job duties is a mixed question of fact and law.'" *Dougherty v. Sch. Dist. of Phila.*, 772 F.3d 979, 988 (3d Cir. 2014) (brackets omitted) . . . Specifically, the scope and content of a plaintiff 's job responsibilities is a question of fact, but the ultimate constitutional significance of those facts is a question of law. *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1058 (9th Cir. 2013).

Flora, 776 F.3d at 175.

The Ninth Circuit agrees with the Third Circuit. *Dahlia v. Rodriguez*, 735 F.3d 1060 (9th Cir. 2013), was a suit for a First Amendment violation by a police detective who was fired because he reported abusive interrogation tactics by a subordinate officer. The district court granted summary judgment for the defendant, holding, as a matter

of law, that the plaintiff's First Amendment claim was barred by the fact that the plaintiff was acting pursuant to his professional duties. The Ninth Circuit reversed, finding that *Garcetti* makes the issue of the status of speech, in part, a factual issue. *Dahlia* held:

> Our case law since *Garcetti* provides further guidance. In *Posey*, we analyzed a § 1983 First Amendment retaliation claim brought by a high school security guard against the school district that was dismissed on summary judgment. *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1123 (9th Cir. 2008). Considering the divergent views of other circuits, we concluded that "after Garcetti the inquiry into the protected status of speech presents a mixed question of fact and law, and specifically that the question of the scope and content of a plaintiff's job responsibilities is a question of fact." *Id.* at 1130. Therefore we held that, "when there are genuine and material disputes as to the scope and content of the plaintiff's job responsibilities, the court must reserve judgment on [whether the plaintiff's speech was pursuant to his official duties] . . . until after the factfinding process." *Id.* at 1131; *see also Robinson v. York*, 566 F.3d 817, 823-24 (9th Cir. 2009) (holding that the "scope of [the plaintiff's] job duties is a question of fact. . . .").

Dahlia, 735 F.3d at 1072-73.

Stone T. Hendrickson agrees that there is a circuit split on the issue, writing: "The Fifth, Sixth, Seventh,

Eighth, Tenth, and D.C. Circuits have ruled that the inquiry remains solely one of law. But the Third and Ninth Circuits have read the *Garcetti* 'practical' language to shift the inquiry to a mixed question." Hendrickson, *Salvaging Garcetti: How A Procedural Change Could Save PublicEmployee Speech*, 71 Ala. L. Rev. at 299-300 (footnote omitted).

This Court has recently cautioned against utilization of procedures which deny litigants a jury trial. This Court, just this year, held that suits brought by the Securities and Exchange Commission to recover penalties implicate the Seventh Amendment and require jury trials in *Sec. & Exch. Comm'n v. Jarkesy*, ___ U.S. ___, 144 S. Ct. 2117 (2024). This Court wrote: "The right to trial by jury is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right has always been and should be scrutinized with the utmost care." *Jarkesy*, 144 S. Ct. at 2120 (internal quotations omitted).

Of course, no one has questioned the common law right to a jury trial in a First Amendment retaliation case seeking damages. According to *Curtis v. Loether*, 415 U.S. 189, 194 (1974): "The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law."

However, if a jury is empaneled, but is not allowed to decide such threshold, mundane issues as the scope of an employee's ordinary job duties, the jury has become a powerless figurehead.

Dissenting from a decision which restricted the jury's role in *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969), overruled by *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997), Judge Rives lamented the then-emerging trend to diminish matters which a jury may decide since this trend denies "citizen[s] a proud and rightful place in the administration of justice. . . ." *Boeing*, 411 F.2d at 378 (Rives, J., dissenting).

Such a diminishment of the role of juries was not the intention of the constitutional framers. "Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative." *Blakely v. Washington*, 542 U.S. 296, 306 (2004), quoting 15 Papers of Thomas Jefferson 282, 283 (J. Boyd ed. 1958). "[W]ith the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." *Powers v. Ohio*, 499 U.S. 400, 407 (1991).

The summary disposition of this case, by a court's determining, without any role for a jury and based on a formal job description, that Petitioner had no First Amendment rights because he was carrying out his "ordinary job duties" denies citizens their "proud and rightful place in the administration of justice."

The significance of this curtailment of the authority of juries warrants review by this Court.

CONCLUSION

This Court should summarily reverse this case because the Fifth Circuit declined to follow clear and basic principles established beyond doubt by this Court. Alternatively, this Court should grant the Writ in order to decide whether the status of speech is a question of law to be determined by only judges or whether it is mixed question of law and fact for which there is a Seventh Amendment right to trial by jury.

Respectfully submitted,

JIM WAIDE
Counsel of Record
WAIDE & ASSOCIATES, P.A.
Post Office Box 1357
Tupelo, MS 38802
(662) 842-7324
waide@waidelaw.com

Counsel for Petitioner

APPENDIX

TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JULY 23, 2024 . . . . . 1a

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JULY 23, 2024 . . . . . 11a

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT, N.D., MISSISSIPPI, GREENVILLE DIVISION, FILED JANUARY 24, 2023 . . . . . 13a

APPENDIX D — ORDER DENYING PETITION FOR REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED SEPTEMBER 4, 2024 . . . . . 27a

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JULY 23, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-60072

FREDERICK LEWIS WASHINGTON,

Plaintiff-Appellant,

v.

SUNFLOWER COUNTY, MISSISSIPPI,

Defendant-Appellee.

Filed July 23, 2024

Appeal from the United States District Court for the Northern District of Mississippi, USDC No. 4:22-CV-54

OPINION

Before King, Jones, and Oldham, Circuit Judges.

Per Curiam:*

The Sunflower County Board of Supervisors fired County Administrator Frederick Lewis Washington. Washington sued under federal and state law, alleging

* This opinion is not designated for publication. See 5th Cir. R. 47.5.

that he was wrongfully discharged for disclosing a bid-rigging scheme. The district court entered judgment for the County. We affirm.

I.

This case arises from a motion for judgment on the pleadings, so we "accept the well-pleaded facts as true." *Q Clothier New Orleans, LLC v. Twin City Fire Ins. Co.*, 29 F.4th 252, 256 (5th Cir. 2022).

Frederick Lewis Washington served as County Administrator for Sunflower County, Mississippi until September 20, 2021. As County Administrator, Washington's duties generally "concern[ed] administrative duties of carrying out the policies and directions of the Board of Supervisors in performing such tasks as making estimates of expenditures for the annual budget, hiring, directing and controlling the work of County employees, and managing administrative and accounting functions." ROA.6. And Washington's complaint specifies that his "duties are described in Miss. Code Ann. § 19-4-1 and Miss. Code Ann. § 19-4-7." *Ibid.* Those statutes provide, in relevant part:

> Such administrator, under the policies determined by the board of supervisors and subject to said board's general supervision and control, shall administer all county affairs falling under the control of the board and carry out the general policies of the board in conformity with the estimates of expenditures

> fixed in the annual budget as finally adopted by the board or as thereafter revised by appropriate action of the board.

Miss. Code Ann. § 19-4-1. And:

> The board of supervisors may delegate and assign to the county administrator [the following duties]:
>
> . . .
>
> (m) See that all orders, resolutions and regulations of the board of supervisors are faithfully executed;
>
> (n) Make reports to the board from time to time concerning the affairs of the county and keep the board fully advised as to the financial condition of the county and future financial needs;
>
> (o) Keep the board of supervisors informed as to federal and state laws and regulations which affect the board of supervisors and the county. . . .

Id. § 19-4-7.

On or about September 17, 2021, Washington learned members of the Board of Supervisors had engaged in what Washington believed to be an illegal bid-rigging scheme.

Washington "informed the Chancery Clerk (the Clerk of the Board of Supervisors) that the Board had made an illegal purchase of a garbage truck." ROA.6. In doing so, he "reported to the Board" the potential legal problems with their own actions. *Ibid.* At the next Board meeting, the Board "went into executive session . . . and discharged [Washington] from his employment." ROA.8.

In November 2021, Washington filed a Notice of Claim before the Board, seeking re-employment and damages for his purportedly unlawful termination. Washington then filed this action in district court, alleging violations of the First Amendment and Mississippi law. Sunflower County moved for judgment on the pleadings under Rule 12(c). The district court granted that motion as to Washington's First Amendment claim. It denied the motion as to the state law claim, instead declining to exercise supplementary jurisdiction under 28 U.S.C. § 1367(c) and dismissing the state claim without prejudice.

II.

We review a district court's ruling on a Rule 12(c) motion for judgment on the pleadings *de novo*, applying the same standard used for deciding Rule 12(b)(6) motions to dismiss. *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007). We therefore "accept the well-pleaded facts as true and view them in the light most favorable to the plaintiff." *Q Clothier*, 29 F.4th at 256. Like under Rule 12(b)(6), to survive the Rule 12(c) stage, a complaint must plead "sufficient factual matter . . . that allows the court to draw the reasonable inference that the

defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). But we need not accept the complaint's legal conclusions or "mere conclusory statements." *Ibid.*

Local governments, including counties, are amenable to suit under 42 U.S.C. § 1983 for policies that violate the Constitution. *Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658, 690, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). To state a § 1983 claim against Sunflower County, Washington must show (1) a constitutional violation (2) for which the "moving force" was (3) an official policy or "governmental custom." *Id.* at 690-91, 694 (quotation omitted). It is well settled that "without a predicate constitutional violation, there can be no *Monell* liability." *Loftin v. City of Prentiss*, 33 F.4th 774, 783 (5th Cir. 2022) (citing *Garza v. Escobar*, 972 F.3d 721, 734 (5th Cir. 2020)).

The predicate constitutional violation alleged in this case is a violation of the public employee speech doctrine. "To determine whether the public employee's speech is entitled to protection, courts must engage in a two-step inquiry." *Graziosi v. City of Greenville*, 775 F.3d 731, 736 (5th Cir. 2015) (citing *Lane v. Franks*, 573 U.S. 228, 237, 134 S. Ct. 2369, 189 L. Ed. 2d 312 (2014)); *see also Powers v. Northside Indep. Sch. Dist.*, 951 F.3d 298, 307 (5th Cir. 2020) (same); *Gibson v. Kilpatrick*, 773 F.3d 661, 666 (5th Cir. 2014) (same). First, courts determine whether the plaintiff "spoke as a citizen on a matter of public concern." *Gibson*, 773 F.3d at 666. If the answer is no, that ends the inquiry. *Powers*, 951 F.3d at 307. If the answer is yes, the court will also consider the justification for the adverse

employment action "by balancing the interest in allowing the speech against the interest in penalizing it." *Gibson*, 773 F.3d at 666-67.

As to the first step, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti v. Ceballos*, 547 U.S. 410, 421, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006). To determine whether speech is "pursuant to [an employee's] official duties," we engage in a "practical" inquiry, *id.* at 421, 424, asking whether the speech was "ordinarily within the scope of [the] employee's duties." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 529, 142 S. Ct. 2407, 213 L. Ed. 2d 755 (2022) (quoting *Lane*, 573 U.S. at 240).

Two cases merit discussion to explain the contours of the public employee speech doctrine. First, the Supreme Court's holding in *Kennedy* demonstrates when speech is not within a public employee's ordinary job responsibilities. *See id.* at 529-30. In *Kennedy*, the plaintiff, a football coach, engaged in brief, personal prayers at midfield after football games. 597 U.S. at 518-19 (describing the activity that ultimately led to the adverse employment action). The Supreme Court held those prayers were not "ordinarily within the scope of his duties as a coach" because the speech reflected no government policy, was not conveying a government message, was not directed at the players he was paid to coach, and took place during a time when other faculty members engaged in other private conduct.

Id. at 513, 529-31. Only by crediting "an 'excessively broad job description'" could the Court have found the coach's speech was made pursuant to his ordinary duties. *Id.* at 530-31 (alteration adopted) (quoting *Garcetti*, 547 U.S. at 424). The Supreme Court declined to read the coach's job description in that way, and so found the coach spoke as a citizen, not a public employee. *Id.* at 531.

Second, our court's decision in *Powers* clarifies when speech *is* within the scope of an employee's ordinary job duties. There, a principal and assistant principal of an elementary school made a series of calls to the Texas Education Agency to "validate that [they] were on the right approach for [testing] accommodations" and to report that the school district had "violated the law" by backtracking on that approach. *Powers*, 951 F.3d at 303 (quotations omitted). Although the plaintiffs admitted their "job duties included implementing [the testing accommodations] for students," they nonetheless "contend[ed] that their job duties did not include *reporting* [the district's] alleged misconduct to a higher level authority." *Id.* at 308 (emphasis in original). But the plaintiffs served on "the school's committee that was tasked with implementing and ensuring compliance" with the accommodations and "participated in . . . meeting[s]" to determine student eligibility for the accommodations. *Ibid.* Our court found, given the scope of the plaintiffs' ordinary duties, that reporting the alleged misconduct was speech "in the course of performing . . . Plaintiffs' official duties" and therefore unprotected. *Ibid.* (quotation omitted).

Here, Washington's complaint belies any contention that his speech was outside the scope of his ordinary

job duties. As noted above, Washington pleads his job description as outlined in two provisions of the Mississippi Code. ROA.6 (citing Miss. Code Ann. §§ 19-4-1 & 7). Those provisions include duties like "carry[ing] out the general policies of the board," Miss. Code Ann. § 19-4-1, executing all "orders, resolutions and regulations of the board," *id.* § 19-4-7(m), "[m]ak[ing] reports to the board . . . concerning the affairs of the county," *id.* § 19-4-7(n), and "[k]eep[ing] the board of supervisors informed as to federal and state laws and regulations which affect the board of supervisors and the county," *id.* § 19-4-7(o). Thus, reporting potentially illegal misconduct to the Board's own clerk was clearly "in the course of" Washington's job duties.

Even if we ignored Washington's formal job description, his own words establish a similar scope for his duties. He pleads his "duties concern[ed] administrative duties of carrying out the policies and directions of the Board of Supervisors. . . ." ROA.6. Reporting a potentially illegal decision to the Board's clerk is clearly within the scope of "carrying out the . . . directions of the Board," even if it was an unusual circumstance. In the same way that reporting misconduct was "in the course of" implementing the school program in *Powers*, 951 F.3d at 308, reporting bid-rigging was "in the course of" conducting the County's administrative business.

And unlike *Kennedy*, Washington pleads no facts that could raise a plausible inference that his report was outside his ordinary job duties. His speech was related to the County business he oversaw. He reported directly

to the Chancery Clerk, who served as the Board's clerk. And although the speech possibly undermined the Board's interests, his speech was still government-directed, as reporting on state law affairs fell within his job description. Washington's complaint therefore offers none of the markers of private speech the Supreme Court emphasized in *Kennedy*. *See* 597 U.S. at 529-30.

Finally, Washington's argument that "talking to the elected chancery clerk [was not] a part of the job duties of the County Administrator" is also unavailing. Blue Br. at 9. His own complaint suggests reporting to the Clerk amounted to reporting to the Board. The report was therefore analogous to the reports in *Powers*. And Washington points to no precedent that would undermine that conclusion. *See Graziosi*, 775 F.3d at 737 (finding a police officer spoke as a citizen in Facebook posts because "making public statements was not ordinarily within the scope of Graziosi's employment"); *Bevill v. Fletcher*, 26 F.4th 270, 276-78 (5th Cir. 2022) (finding a police officer's affidavit supporting venue transfer was not "pursuant to an official duty" because the affidavit was submitted as a friend of the defendant and Bevill "did not speak for QPD's benefit when he submitted [the] affidavit"); *Howell v. Town of Ball*, 827 F.3d 515, 524 (5th Cir. 2016) (finding a police officer spoke as a citizen in cooperating with an FBI investigation).

Washington therefore fails to raise a plausible inference that he spoke as a private citizen. Without that showing, he cannot support a First Amendment claim against Sunflower County, and we need not reach the other elements of his claim.

III.

The district court declined to exercise supplemental jurisdiction over Washington's state law claim. *See* 28 U.S.C. § 1367(c). "A district court's decision whether to exercise that jurisdiction after dismissing every claim over which it had original jurisdiction is purely discretionary." *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639, 129 S. Ct. 1862, 173 L. Ed. 2d 843 (2009). We therefore review for abuse of discretion. *Id.* at 640; *see also Hicks v. Austin Indep. Sch. Dist.*, 564 F. App'x 747, 748 (5th Cir. 2014) (per curiam). In this case, Washington brought one federal claim over which the district court had original jurisdiction. After the district court dismissed that federal claim, it had discretion under § 1367(c) to decline supplemental jurisdiction over the state law claim. Washington points to nothing to suggest the district court abused that discretion.

AFFIRMED.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JULY 23, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-60072

FREDERICK LEWIS WASHINGTON,

Plaintiff-Appellant,

versus

SUNFLOWER COUNTY, MISSISSIPPI,

Defendant-Appellee.

Filed: July 23, 2024

Appeal from the United States District Court
for the Northern District of Mississippi
USDC No. 4:22-CV-54

Before KING, JONES, and OLDHAM, *Circuit Judges.*

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

Appendix B

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that Appellant pay to Appellee the costs on appeal to be taxed by the Clerk of this Court.

The judgment or mandate of this court shall issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. See Fed. R. App. P. 41(b). The court may shorten or extend the time by order. See 5th Cir. R. 41 I.O.P.

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT, N.D., MISSISSIPPI, GREENVILLE DIVISION, FILED JANUARY 24, 2023

UNITED STATES DISTRICT COURT, N.D., MISSISSIPPI, GREENVILLE DIVISION

No. 4:22-CV-54-DMB-DAS

FREDERICK LEWIS WASHINGTON,

Plaintiff,

v.

SUNFLOWER COUNTY, MISSISSIPPI,

Defendant.

Filed January 24, 2023

OPINION AND ORDER

Sunflower County, Mississippi, moves for judgment on the pleadings on Frederick Lewis Washington's § 1983 First Amendment claim and his state law wrongful termination claim. Because Washington did not allege he spoke as a citizen and because he failed to plead the necessary elements to establish municipal liability, the motion will be granted with respect to the First Amendment claim. And because the Court declines to exercise supplemental jurisdiction over the state law claim, that claim will be dismissed without prejudice.

Appendix C

I

PROCEDURAL HISTORY

On April 7, 2022, Frederick Lewis Washington filed a complaint in the United States District Court for the Northern District of Mississippi against his former employer, Sunflower County, Mississippi. Doc. #1. In his complaint, Washington alleges he was terminated for reporting illegal activity by the County's Board of Supervisors in violation of his constitutional First Amendment right to free speech and "in violation of the Mississippi common law exception to employment at will, which prohibits an employer from discharging an employee because the employee reported illegal activity." *Id.* at 4-5.

The County filed an answer on June 6, 2022. Doc. #7. The same day, it filed a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). Doc. #8. The motion is fully briefed. Docs. #9, #18, #22.

II

STANDARD

The standard for deciding a Rule 12(c) motion for judgment on the pleadings is the same standard used for deciding a motion to dismiss pursuant to Rule 12(b)(6). *Q Clothier New Orleans, L.L.C. v. Twin City Fire Ins. Co.*, 29 F.4th 252, 256 (5th Cir. 2022). To survive dismissal

under this standard, "a complaint must present enough facts to state a plausible claim to relief. A plaintiff need not provide exhaustive detail to avoid dismissal, but the pleaded facts must allow a reasonable inference that the plaintiff should prevail." *Mandawala v. Ne. Baptist Hosp., Counts 1, 2, & 11*, 16 F.4th 1144, 1150 (5th Cir. 2021) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). The Court must "accept all well-pleaded facts as true and construe the complaint in the light most favorable to the plaintiff." *Heinze v. Tesco Corp.*, 971 F.3d 475, 479 (5th Cir. 2020). However, the Court does not accept as true "conclusory allegations, unwarranted factual inferences, or legal conclusions." *Id.*

> The court's review is limited to the complaint, any documents attached to the complaint, and any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint. The Court may also consider matters of public record, and any other matters of which it may take judicial notice.

Tilman v. Clarke Cnty., 514 F. Supp. 3d 884, 889 (S.D. Miss. 2021) (cleaned up) (collecting cases).

III

FACTUAL ALLEGATIONS

Sunflower County employed Frederick Washington as its County Administrator. Doc. #1 at 2. His duties, which are outlined in Mississippi Code §§ 19-4-1 and 19-4-7,

"concern administrative duties of carrying out the policies and directions of the Board of Supervisors in performing such tasks as making estimates of expenditures for the annual budget, hiring, directing and controlling the work of County employees, and managing administrative and accounting functions." *Id.*

"On or about September 17, 2021, [Washington] informed the Chancery Clerk (the Clerk of the Board of Supervisors) that the Board had made an illegal purchase of a garbage truck." *Id.* Washington "learned and reported to the Board that before bids were taken for a County garbage truck, qualified bidders, who had complied with all the specifications required by State law, had been informed that they were not eligible in [sic] participate in the bidding process" because they "did not have a truck already on the ground." *Id.* at 2-3. "Having a truck already on the ground was not a requirement of the bids, and State law prohibited taking bids which were not contained in a written description or an appropriate amendment to the written description." *Id.* at 3.

"As a result of the . . . bid rigging, qualified bidders were eliminated, which left as the only bidders Burroughs Truck Company and Sansom Equipment Company." *Id.* Because Sansom "was a phantom bidder since it does not manufacture or sell trucks," Burroughs "obtained the right to sell the garbage truck to the County." *Id.* Burroughs "could not have gotten the bid unless there was an agreement among several persons to carry out the scam. This agreement was made either by various members of the Board of Supervisors and a representative

of Burroughs . . . or was made [by] three (3) members of the Board of Supervisors." *Id.* at 4.

After Washington informed the Clerk about the "scam being carried out by the Board, at the next Board meeting, on September 20, 2021, [the County] . . . went into executive session . . . and discharged [Washington] from his employment." *Id.*

IV

ANALYSIS

Washington alleges that his discharge "was in violation of the free speech rights guaranteed him by United States Constitution Amendment One, since reporting illegal and criminal activity was not a part of [his] ordinary job duties, and . . . was a proximate cause of his discharge." *Id.* He also alleges he "was discharged in violation of Mississippi common law exception to employment at will, which prohibits an employer from discharging an employee because the employee reported illegal activity." *Id.* at 5.

In seeking judgment on the pleadings in its favor, the County submits that Washington's claims, as pled, fail for multiple reasons. Doc. #9 at 1. It argues that "the Board never did anything illegal" because "the Mississippi Governor and the Sunflower County Board of Supervisors both declared a state of emergency" due to COVID, under which "Mississippi statutory law conferred on [the County] additional emergency powers including the power to purchase needed commodities without following the

normal procedure laid out in Mississippi's bid statutes." *Id.* As to the First Amendment claim, the County argues Washington "cannot show that he spoke as a citizen on a matter of public concern" and "has not pled the necessary facts to establish municipal liability." *Id.* at 10. According to the County, Washington's "state law claim is barred because he failed to appeal his termination" as required by Mississippi Code § 11-51-75 and, even if it is not barred, the claim "fails because it cannot meet either of the two limited public policy exceptions to Mississippi's at-will employment." *Id.* at 16.

A. First Amendment Claim

> To establish a First Amendment retaliatory-discharge claim, [a plaintiff] must prove that (1) he suffered an adverse employment decision, (2) he spoke as a citizen on a matter of public concern, (3) his interest in the speech outweighs the government's interest in the efficient provision of public services, and (4) the protected speech motivated the adverse employment action.

Bevill v. Fletcher, 26 F.4th 270, 275-76 (5th Cir. 2022). The County challenges the second and fourth elements, arguing Washington "cannot show that he was speaking as a citizen on a matter of public concern, and he cannot show that his speech was a substantial or motivating factor of his termination." Doc. #9 at 10.

As to the second element, the County contends Washington spoke as an employee rather than a citizen

because "[a]ctivities undertaken in the course of performing one's job are activities pursuant to official duties, even if the employee is not required to undertake the activity," and Washington's duties required him to inform the Board if he thought it had "issued an illegal order . . . which he believed violated state and federal law." *Id.* at 11-12. Additionally, the County argues that Washington's reporting "internally, to the Clerk of the Board of Supervisors" further demonstrates he did not speak as a citizen because his speech which "took place almost entirely inside the workplace strongly favors the conclusion that his speech occurred in the course of his ordinary job duties." *Id.* at 13 (quoting *Marchman v. Crawford*, 237 F. Supp. 3d 408, 426 (W.D. La. 2017)).

Washington responds that "speech alleging illegal acts, which are outlawed by state and federal criminal law, is a matter of public concern" and "telling the Chancery Clerk that the Board is acting illegally, is not ordinarily within the scope of a County Administrator's duties." Doc. #18 at 9, 12 (cleaned up). He argues that "[i]f a county administrator can be retaliated against because he reports illegal activity to a public official, the likelihood of preventing public corruption is diminished." *Id.* at 12.

The County replies that while Washington "spends a large section of his response arguing to this Court about what constitutes issues of public concern[, t]hat is not what [it] has argued here." Doc. #22 at 5. Rather, it argues that he "was acting as an employee-not as a citizen."[1] *Id.*

1. The County further argues that "what Washington alleges he reported was not illegal, thus, it was not a matter of public

> The as a citizen requirement draws a distinction between when public employees speak in their private capacities and when they speak pursuant to their official duties. When public employees speak pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and their speech is not protected. Although the Supreme Court articulated no comprehensive framework for determining whether speech is within the scope of an employee's official duties, it did state that neither job descriptions nor the fact that the speech concerns the subject matter of the employment are dispositive. The Court further advised that the proper inquiry should be practical and focused on the scope of the employee's professional duties.

Powers v. Northside Indep. Sch. Dist., 951 F.3d 298, 307-08 (5th Cir. 2020) (cleaned up).

Powers is instructive. In *Powers*, the plaintiffs were a principal and assistant principal whose job duties "included implementing Section 504 for students" at their school. *Id.* at 308. After the defendant school district realized the plaintiffs incorrectly determined a student qualified for an accommodation, it conducted an investigation and alerted the plaintiffs of Section 504 violations at the school. *Id.* at 303. The plaintiffs each

---

concern." Doc. #22 at 5. Given the basis for the ruling below, the Court need not reach the issue of public concern.

contacted the Texas Education Agency ("TEA") on several occasions "to validate their Section 504 procedures and to report [the school district's] allegedly unlawful conduct." *Id.* at 303. The plaintiffs were suspended pending the outcome of the investigation, which ultimately concluded that the plaintiffs "intentionally authorized inappropriate student testing accommodations based on a misapplication of Section 504 eligibility requirements." *Id.* at 303-04. Subsequently, the school district terminated both plaintiffs' employment. *Id.* at 304. The plaintiffs sued the school district alleging, of relevance here, a violation of their First Amendment free speech rights under § 1983. *Id.* The district court granted summary judgment based on its conclusion that "Plaintiffs' complaints to the TEA regarding [the school district's] application of Section 504 accommodations were activities performed pursuant to [their] official duties." *Id.* at 307.

On appeal, the *Powers* plaintiffs "contend[ed] that their job duties did not include *reporting* [the school district's] alleged misconduct to a higher level authority." *Id.* at 308. The Fifth Circuit found this argument "unconvincing." *Id.* It concluded that because the plaintiffs were "tasked with implementing and ensuring compliance with Section 504," "[i]t then follows that [their] calls to TEA regarding Section 504 construction and application at [the school] were clearly . . . undertaken in the course of performing their jobs, such that they were pursuant to [their] official duties" and thus their speech was "not protected by the First Amendment." *Id.*

Here, Washington alleges that his duties as County Administrator "are described in MISS. CODE ANN.

§ 19-4-1 and MISS. CODE ANN. § 19-4-7." Doc. #1 at 2. Mississippi Code § 19-4-7 provides:

> The board of supervisors may delegate and assign to the county administrator the duties and responsibilities enumerated below, in whole or in part, and such other duties and responsibilities as said board may determine, not contrary to the laws of the State of Mississippi or the Constitution thereof and not assigned by law to other officers:
>
> . . .
>
> (m) See that all orders, resolutions and regulations of the board of supervisors are faithfully executed;
>
> . . .
>
> (o) Keep the board of supervisors informed as to federal and state laws and regulations which affect the board of supervisors and the county . . .
>
> . . .
>
> (q) Receive inquiries and complaints from citizens of the county as to the operation of county government, investigate such inquiries and complaints and shall report his finding to the board and the individual

> supervisor of the district from which such inquiry or complaint arises.

Miss. Code Ann. § 19-4-7(m), (o), (q).

Similar to how the *Powers* plaintiffs were tasked with implementing Section 504, Washington was tasked with ensuring that all Board orders were faithfully executed, informing the Board in relation to state and federal law, and reporting his findings on complaints to the Board. As in *Powers*, it follows that his reporting what he believed to be illegal conduct to "the Clerk of the Board" was done pursuant to his official duties. Thus, he was not speaking as a private citizen and his speech is not protected. *Powers*, 951 F.3d at 308. And because his speech is not protected, he fails to state a First Amendment claim.[2]

B. Municipal Liability

The County also argues that "Washington's First Amendment claim must be pled through municipal liability" and he "has not alleged that there was an official policy that was promulgated by the Board of Supervisors and that this policy was the moving force behind the violation of his constitutional right." Doc. #9 at 15-16. Washington responds that municipal liability is adequately pled because all that is required "is a short and plain statement that [the County] violated his First Amendment

2. Given this conclusion, the Court declines to address whether the speech was a motivating factor in the termination decision.

rights." Doc. #18 at 14 (internal quotation marks omitted). The County replies that "Washington has not identified an official policy which was the moving force behind his alleged violation of his constitutional right." Doc. #22 at 10.

"To state a § 1983 claim against a municipality, a plaintiff must show that (1) an official policy (2) promulgated by the municipal policymaker (3) was the moving force behind the violation of a constitutional right." *Jackson v. City of Hearne*, 959 F.3d 194, 204 (5th Cir. 2020) (internal quotation marks omitted). Here, Washington's failure to allege a First Amendment claim, as detailed above, "forecloses his claim" against the County. *Id.* Regardless, he "fails to identify any municipal policy or custom, much less one that violated a constitutional right." *Id.* Accordingly, Washington has failed to state a municipal liability claim.

C. State Law Claim

The County argues the "state law claim is barred because [Washington] failed to appeal his termination" as required by Mississippi Code § 11-51-75 and, even if it is not barred, the claim "fails because it cannot meet either of the two limited public policy exceptions to Mississippi's at-will employment" because the reported activity was not illegal. Doc. #9 at 16.

Because the County's motion for judgment on the pleadings has been granted on Washington's federal claim, no federal question remains. Since the parties' lack

of diversity[3] precludes diversity jurisdiction, the Court must use its discretion to decide whether to exercise supplemental jurisdiction over the state law claim. *See Heggemeir v. Caldwell Cnty.*, 826 F.3d 861, 872 (5th Cir. 2016). The supplemental jurisdiction statute, 28 U.S.C. § 1367, provides:

> The district courts may decline to exercise supplemental jurisdiction . . . [if] (1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c). Courts in the Fifth Circuit treat the four circumstances enumerated in § 1367 as "statutory factors" to consider when evaluating supplemental jurisdiction. *Enochs v. Lampasas Cnty.*, 641 F.3d 155, 159 (5th Cir. 2011). "The general rule is that a court should decline to exercise jurisdiction over remaining state-law claims when all federal-law claims are eliminated before trial." *Watson v. City of Allen*, 821 F.3d 634, 642 (5th Cir. 2016).

Whether the Board's actions violated Mississippi law such that Washington's reporting them would fall under

3. *See* Doc. #1 at 1; *see also id.* at 2 (asserting federal question jurisdiction).

an exception to the at-will employment doctrine is better addressed by the state courts. This Court therefore declines to exercise supplemental jurisdiction over the state law claim.

V

CONCLUSION

The County's motion for judgment on the pleadings [8] is **GRANTED in Part and DENIED** in Part without prejudice. It is GRANTED as to Washington's First Amendment § 1983 claim. It is DENIED without prejudice in all other respects. Washington's state law claim is **DISMISSED without prejudice**.

SO ORDERED, this 24th day of January, 2023.

APPENDIX D — ORDER DENYING PETITION FOR REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED SEPTEMBER 4, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-60072

FREDERICK LEWIS WASHINGTON,

Plaintiff-Appellant,

versus

SUNFLOWER COUNTY, MISSISSIPPI,

Defendant-Appellee.

Filed: September 4, 2024

Appeal from the United States District Court
for the Northern District of Mississippi
USDC No. 4:22-CV-54

ON PETITION FOR REHEARING EN BANC

Before KING, JONES, and OLDHAM, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the

petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.