

No. 25- 1185

IN THE
Supreme Court of the United States

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SUPREME COURT, U.S.

VAN POUNDS,

ORIGINAL
Petitioner,

v.

CAMERON SMITH,
BRIAN LIGHT,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether courts should be allowed to view the facts and inferences in a light more favorable to public officials than to their victims, when ruling upon such officials' qualified immunity-based motions for summary judgment.
2. Whether public officials who make a calculated choice to commit unlawful acts following weeks of deliberation and consultation with legal counsel, and who hide the full extent of their deliberations behind claims of attorney-client privilege, should be afforded the same degree of qualified immunity protection as police officers when compelled to make split-second decisions to use force in dangerous settings.
3. Whether, for purpose of determining qualified immunity, a public employee's constitutional right to speak out as a private citizen on matters of public concern, free of governmental reaction reasonably likely to deter such speech, should be deemed "clearly established" by a body of relevant law.

LIST OF PARTIES TO THE PROCEEDING

Van Pounds, Petitioner, and Cameron Smith and Brian Light, Respondents, were the parties to the proceeding in the Ninth Circuit whose judgment is sought to be reviewed. The Oregon Department of Consumer and Business Services (DCBS) was a party-defendant in this case, but was dismissed as such by the district court (upon motion by defendants) following previous remand from the Ninth Circuit. Respondents and the Ninth Circuit have inexplicably continued to use the caption from the previous appeal, which identified DCBS as a defendant-appellee, in subsequent court filings.

LIST OF RELATED CASES

Pounds v. Smith, No. 6:19-cv-00420-MK, U.S. District Court for the District of Oregon. Judgment entered Sept. 30, 2024.

Pounds v. Smith, No. 24-6649, U.S. Court of Appeals for the Ninth Circuit. Judgment entered Dec. 5, 2025.

TABLE OF CONTENTS

	<i>Page</i>
QUESTIONS PRESENTED	i
LIST OF PARTIES TO THE PROCEEDING	ii
LIST OF RELATED CASES.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF APPENDICES	v
TABLE OF CITED AUTHORITIES	vi
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
INTRODUCTION.....	2
STATEMENT OF THE CASE	3
1. Factual Background	3
2. Procedural History.....	9
REASONS FOR GRANTING THE PETITION.....	11

Table of Contents

	<i>Page</i>
1. Courts should not be allowed to view the facts and inferences in a light more favorable to public officials than to their victims, when ruling upon such officials' qualified immunity-based motions for summary judgment.....	12
2. Public officials who make a calculated choice to commit unlawful acts following weeks of deliberation and consultation with legal counsel, and who hide the full extent of their deliberations behind claims of attorney-client privilege, should not be afforded the same degree of qualified immunity protection as police officers when compelled to make split-second decisions to use force in dangerous settings.....	20
3. For purpose of determining qualified immunity, a public employee's constitutional right to speak out as a private citizen on matters of public concern, free of governmental reaction reasonably likely to deter such speech, should be deemed "clearly established" by a body of relevant law	27
CONCLUSION	34

TABLE OF APPENDICES

	<i>Page</i>
APPENDIX A — Memorandum opinion affirming grant of summary judgment (9th Cir. Dec. 5, 2025).....	1a
APPENDIX B — Order adopting magistrate’s findings and recommendation and granting summary judgment (D. Or. Sept. 30, 2024)	4a
APPENDIX C — Magistrate’s findings and recommendation (D. Or. Apr. 25, 2024)	7a
APPENDIX D — Order denying rehearing (9th Cir. Jan. 28, 2026)	23a

TABLE OF CITED AUTHORITIES

	<i>Page</i>
Cases	
<i>Allen v. Scribner</i> , 812 F.2d 426 (9th Cir. 1987)	31
<i>Anderson v. Central Point School Dist.</i> , 746 F.2d 505 (9th Cir. 1984)	31
<i>Anderson v. Creighton</i> , 483 U.S. 635 (1987)	20, 27
<i>Baxter v. Palmigiano</i> , 425 U.S. 308 (1976)	25
<i>Brosseau v. Haugen</i> , 543 U.S. 194 (2004)	28
<i>Citizens United v. Federal Election Comm.</i> , 558 U.S. 310 (2010)	29, 30
<i>Coszalter v. City of Salem</i> , 320 F.3d 968 (9th Cir. 2003)	30, 31, 32
<i>Desire, LLC v. Manna Textiles, Inc.</i> , 986 F.3d 1253 (9th Cir. 2021)	13
<i>Dodge v. Evergreen School Dist. #114</i> , 56 F.4th 767 (9th Cir. 2022)	29
<i>Eng v. Cooley</i> , 552 F.3d 1062 (9th Cir. 2009)	28, 33

Cited Authorities

	<i>Page</i>
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982).....	20, 27, 31
<i>Hoggard v. Rhodes</i> , 141 S. Ct. 2421 (2021).....	11, 20, 26
<i>Hope v. Pelzer</i> , 536 U.S. 730 (2002).....	28
<i>Kisela v. Hughes</i> , 584 U.S. 100 (2018).....	20, 28
<i>Malley v. Briggs</i> , 475 U.S. 335 (1986).....	20
<i>McKinley v. City of Eloy</i> , 705 F.2d 1110 (9th Cir. 1983).....	30
<i>Mendocino Environmental Center v.</i> <i>Mendocino County</i> , 192 F.3d 1283 (9th Cir. 1999)	31
<i>Mullenix v. Luna</i> , 577 U.S. 7 (2015).....	11
<i>N.S. v. Kansas City Bd. of Police Commissioners</i> , 143 S. Ct. 2422 (2023)	11, 12, 13, 19
<i>Or. State Police Officers Assn. v. State</i> , 783 P.2d 7 (Or. 1989).....	29, 30

Cited Authorities

	<i>Page</i>
<i>Owens v. Local No. 169</i> , 971 F.2d 347 (9th Cir. 1992).....	12
<i>Pickering v. Board of Education</i> , 391 U.S. 563 (1968).....	29, 31
<i>Pounds v. Smith</i> , No. 20-35154, 2021 WL 3667229 (9th Cir. Aug. 18, 2021)	7, 9, 19, 32, 33
<i>Richardson v. McKnight</i> , 521 U.S. 399 (1997).....	11
<i>Rutan v. Republican Party of Illinois</i> , 497 U.S. 62 (1990).....	32
<i>Social Technologies LLC v. Apple Inc.</i> , 4 F.4th 811 (9th Cir. 2021)	13
<i>Thomas v. Carpenter</i> , 881 F.2d 828 (9th Cir. 1989)	31
<i>Tolan v. Cotton</i> , 572 U.S. 650 (2014)	13, 19
<i>Ulrich v. City and County of San Francisco</i> , 308 F.3d 968 (9th Cir. 2002)	29, 32
<i>Weil v. Inv./Indicators, Research Mgmt., Inc.</i> , 647 F.2d 18 (9th Cir. 1981).....	25

Cited Authorities

	<i>Page</i>
<i>White v. Lee</i> , 227 F.3d 1214 (9th Cir. 2000).....	28
<i>Wyatt v. Cole</i> , 504 U.S. 158 (1992).....	12
Constitutional Provisions	
U.S. Const. amend. I	1, 3, 9, 11, 18, 29, 30, 31, 32, 33
U.S. Const. amend. XIV	9
Or. Const. art. I, § 8.	29
Statutory Provisions	
28 U.S.C. § 1254.	1
42 U.S.C. § 1983.	2, 3, 9
Or. Rev. Stat. § 260.432.	24, 29, 30
Regulatory Provision	
Or. Dept. of Admin. Services, <i>Management Service Discipline And Dismissal</i> , State HR Policy No. 70.000.02	7, 15, 22
Other Authority	
Emily Green, <i>Dishonorable: The trouble with Oregon's judicial elections</i> , Street Roots (Nov. 3, 2016) < http://news.streetroots. org/2016/11/03/dishonorable-trouble- oregon-s-judicial-elections >	4

OPINIONS BELOW

The Ninth Circuit's December 5, 2025 opinion is not published in the Federal Reporter, but is reported at 2025 WL 3497989 and is reprinted in the Appendix ("App.") at App. 1a-3a. The district court's September 30, 2024 judgment, and the magistrate's findings and recommendation adopted thereby, are not published in the Federal Supplement, but are reported at 2024 WL 4349123 and 2024 WL 4355169 and are reprinted at App. 4a-6a and 7a-22a respectively. The Ninth Circuit's previous opinion, issued on August 18, 2021, is not published in the Federal Reporter, but is reported at 2021 WL 3667229. The district court's previous judgment, entered on September 18, 2019, and the magistrate's previous findings and recommendation adopted thereby, are not published in the Federal Supplement, but are reported at 2019 WL 4544283 and 2019 WL 4561457.

JURISDICTION

The Ninth Circuit issued its opinion on December 5, 2025. App. 1a-3a. Petitioner's timely petition for panel rehearing or rehearing en banc was denied on January 28, 2026. App. 23a-24a. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution states as follows:

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.

42 U.S.C. § 1983 states, in relevant part, as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

INTRODUCTION

This case results from Respondents' disclosure of a secret governmental file in retaliation for Petitioner's filing as a candidate for judicial office.

Petitioner and Respondents were employed by the Oregon Department of Consumer and Business Services (DCBS). On March 5, 2018, Petitioner filed as a candidate for a seat on the Oregon Supreme Court. Several weeks later, Respondents publicized a secret Report that attacked Petitioner's reputation for honesty and trustworthiness. That Report had been secretly prepared by an untrained DCBS HR analyst, in violation

of State HR policy, some three years previously. Petitioner had never been apprised of the existence of the Report much less afforded an opportunity to contest its contents. Respondents' disclosure of the secret Report resulted in the publication of a newspaper article entitled "Judgment Call: A State Investigation of a Candidate for the Oregon Supreme Court Found Him 'the Least Credible Person in the Unit.'"

Respondents say that their disclosure of the secret Report was merely in response to a public records request. But substantial evidence proves Respondents' explanation to be pretextual and untrue.

Petitioner seeks to hold Respondents accountable for their violation of his right to speak out as a private citizen on a matter of public concern, free of undue governmental interference, under the First Amendment and 42 U.S.C. § 1983.

STATEMENT OF THE CASE

1. Factual Background

At times relevant herein, Petitioner Van Pounds was employed by the Oregon Department of Consumer and Business Services (DCBS) in a managerial service position. 2-ER-22. At times relevant herein, Respondents Cameron Smith and Brian Light were employed as DCBS' director and employee services administrator, respectively.

On March 5, 2018, Pounds exercised his right to speak out as a private citizen on a matter of public concern. On

such date, Pounds filed as a candidate for the Oregon Supreme Court, Position 3. 2-ER-22. Pounds did so to provide voters with a meaningful opportunity to elect a judge as well as to raise awareness regarding the partisan manner in which Oregon's "nonpartisan" judges were being selected.¹ 2-ER-22-23, 27. Position 3 was then occupied by Meagan Flynn, an appointee of Governor Kate Brown. 3-ER-116, 121. *See* 2-ER-27.

Three days later, on March 8, 2018, Nigel Jaquiss, a reporter for Willamette Week newspaper, submitted a public records request to the Oregon Department of Administrative Services. 2-ER-28, 31. Jaquiss stated that it was his understanding that Pounds had been demoted in the past couple of years. 2-ER-31. Jaquiss requested information regarding Pounds' job classifications and salaries. 2-ER-28, 31.

Respondents were aware of Jaquiss' March 8 records request, but kept Pounds in the dark regarding its receipt. 2-ER-30. *See* 2-ER-23, 29; 3-ER-192. In failing to provide notice to Pounds, Respondents violated a well-established, though unwritten, policy of notifying employees of such public records requests. 2-ER-29, 92; 3-ER-192. *See* 3-ER-166-167.

Two weeks later, on March 22, 2018, at 2:11 p.m., Jaquiss submitted a second public records request, this time to DCBS. 2-ER-32. Jaquiss stated that Pounds

1. *See* Emily Green, *Dishonorable: The trouble with Oregon's judicial elections*, Street Roots (Nov. 3, 2016) <<http://news.streetroots.org/2016/11/03/dishonorable-trouble-oregon-s-judicial-elections>>.

was running for a seat on the Oregon Supreme Court, which made his employment with the state a matter of public interest. 2-ER-32. Jaquiss specifically requested disclosure of “written communication, including but not limited to emails, correspondence, investigative reports or other documentation that explains the reasons for Mr. Pounds’ demotion and pay cut.” 2-ER-32.

Respondents oversaw and directed the preparation of DCBS’ response to Jaquiss’ public records request. 4-ER-274; 4-ER-257. *See* 3-ER-197-198. Again, Respondents provided no notice of such request to Pounds. 3-ER-193-197. *See* 2-ER-23. *See also* 2-ER-29, 92.

Within a matter of hours, Light had assembled the records that Respondents intended to disclose to Jaquiss. *See* 2-ER-33-34, 85. The assembled records consisted of (1) a job offer letter dated April 11, 2017 (2-ER-43), (2) a lateral job rotation agreement dated October 14, 2015 (2-ER-44-46) and (3) a report of a personnel investigation conducted in May 2015 (2-ER-47-49; 2-ER-50-65). *See* 2-ER-36. (For purpose of identification, 2-ER-47-65 are referred to herein collectively as the “Report.”). The May 2015 Report attacked Pounds’ reputation for honesty and trustworthiness, and stated that “overwhelmingly, employees do not trust Van” and “Van is generally found to be the least credible person in the unit.” 2-ER-47-48. *See* 3-ER-115, 120. The Report recommended that management consider removing Pounds from his executive service role. 2-ER-49.

Smith “happily” reviewed the assembled records before their planned “launch” (2-ER-33) and then, on March 23, 2018, at 3:45 p.m., e-mailed a copy of the records

to governor's office staff. 2-ER-35; 3-ER-122, 148-149. At deposition, Smith stated that he did so of his own accord, without any express directive. 3-ER-151-154. He knew that Pounds was running for judicial office against a governor's appointee. 3-ER-121. Smith could not explain why the governor's office would legitimately need to possess such records at that point in time. 3-ER-149-150. *See* 2-ER-27. DCBS confirmed that individual personnel records were typically not shared with governor's office staff and that it could not explain why Smith had sent the records to the governor's office on March 23. 3-ER-199, 207-208, 228-230.

Three days later, Respondents finally got around to notifying Pounds of their intent to disclose the records to Jaquiss. On March 26, 2018, at 3:00 p.m., Light called Pounds to his office and handed him a file folder, containing the job offer letter, the lateral job rotation agreement and the May 2015 Report. 2-ER-23; 3-ER-168-172. Light stated that such records were being disclosed to Willamette Week that afternoon in response to a public records request. 2-ER-23; 3-ER-112, 169. Light further stated "That's what you get when you file for public office." 2-ER-23.

Pounds objected to the disclosure of the records, and informed Light that he had never seen or heard of the Report. 2-ER-39, 68; 3-ER-173. Later that evening, by e-mail to Smith, Light confirmed that Pounds' objection was well founded. 2-ER-37.

The records that Light had assembled did not match with Jaquiss' request. 2-ER-37; 3-ER-139. None of the records made any reference to a demotion. 3-ER-138. The job offer letter merely confirmed Pounds' selection as a

senior policy analyst, following a competitive recruitment process. 2-ER-43; 3-ER-226. And the lateral job rotation agreement was similarly not sinister, being the product of divisional reorganization. 2-ER-44-46; 3-ER-164-165, 224. DCBS confirmed that neither were representative of an adverse employment action. 3-ER-224, 226. DCBS also confirmed that neither were causally connected to the May 2015 Report. 3-ER-224-227.

Likewise, the May 2015 Report could not “explain the reasons for” a demotion and pay cut. The Report had been prepared by HR analyst Jay Wayland, who had been hired and who was supervised by Light. 3-ER-238. *See* 3-ER-112. Wayland had never received any training regarding how to conduct personnel investigations (3-ER-23), and had prepared the Report in a manner violative of State HR Policy No. 70.000.02. 2-ER-86-90. Pounds was never interviewed in the course of the investigation and was never given an opportunity to respond to the Report. 2-ER-23. *See* 2-ER-67, 68; 3-ER-112.

Nor was the Report referenced in any manner in Pounds’ official personnel file. 3-ER-115, 221. Pounds had never been apprised of the content or existence of the Report. 2-ER-23. *See* 2-ER-37, 67-68. No action had ever been taken against Pounds as a result of the Report. 2-ER-37; 3-ER-115-116, 162-163.

On appeal, DCBS admitted that Pounds had never been demoted and that no adverse employment action had ever been taken against Pounds as a result of the Report or otherwise. *Pounds v. Smith*, No. 20-35154, 2021 WL 3667229, at *1-2 (9th Cir. Aug. 18, 2021). At deposition, DCBS confirmed that no adverse action had

ever been taken against Pounds as a result of the Report or otherwise, and that Pounds had not been disadvantaged in any manner as a result of the Report. 3-ER-220-223, 233-234. At deposition, Light too admitted that no adverse action had ever been taken, and that Pounds had not been disadvantaged in any manner, as a result of the Report. 3-ER-162-163. *See* 2-ER-37; 3-ER-115-116.

Neither DCBS nor Respondents possess any documentation that explains why Respondents thought that the records were responsive to Jaquiss' request. 2-ER-70-72; 3-ER-200-202. DCBS could not explain why Respondents chose to publicize those records. 3-ER-202, 228. *See* 3-ER-139-140.

Nevertheless, such foregoing facts and circumstances notwithstanding, Respondents proceeded with their disclosure of the assembled records. Respondents e-mailed a copy of the records to Jaquiss on March 28, 2018, at 11:38 a.m. 2-ER-40. *See* 3-ER-112. The transmittal communication falsely conveyed the impression that the records "explained the reasons for" a disciplinary action against Pounds. 2-ER-41; 3-ER-135-136.

On April 11, 2018, Willamette Week published an article, authored by Jaquiss, that drew heavily upon the most negative aspects of the secret Report. 2-ER-42, 69. Nigel Jaquiss, *Judgment Call: A State Investigation of a Candidate for the Oregon Supreme Court Found Him 'the Least Credible Person in the Unit,'* Willamette Week (Apr. 11, 2018) <<https://www.wweek.com/news/2018/04/11/a-state-investigation-of-a-candidate-for-the-oregon-supreme-court-found-him-the-least-credible-person-in-the-unit/>>. Jaquiss' article negatively affected Pounds'

constitutionally protected political speech. 2-ER-23-24. *See* 3-ER-117; 3-ER-123. Jaquiss' article has continued to haunt Pounds' reputation over the world-wide web to date. 2-ER-24. *See* 3-ER-106-110.

2. Procedural History

On March 22, 2019, Pounds filed suit against defendants Cameron Smith, Brian Light and the Oregon Department of Consumer and Business Services (DCBS), in the U.S. District Court for the District of Oregon, asserting violations of his right to free speech under the First Amendment and his right to due process under the Fourteenth Amendment pursuant to 42 U.S.C. § 1983. Dkt. No. 1. Defendants moved to dismiss such suit for failure to state a claim (Dkt. No. 8) and the district court granted such motion, with prejudice. *See* Dkt. Nos. 14, 19. Appeal to the Ninth Circuit ensued.

On appeal DCBS admitted that Pounds had never been demoted and that no adverse employment action had ever been taken against Pounds as a result of the Report or otherwise (i.e., that the disclosure of the secret Report exceeded the ambit of the public records request). *Pounds v. Smith*, 2021 WL 3667229, at *1-2. Accordingly, the Ninth Circuit reversed and remanded the district court's disposition of Pounds' First Amendment retaliation claim. *Id.* at *3.

Pounds filed a first amended complaint on December 22, 2021 (Dkt. No. 49), and defendants again moved for dismissal for failure to state a claim. Dkt. No. 50. The district court granted such motion in part and dismissed DCBS as a party to the case. *See* Dkt. Nos. 62, 67.

Defendants eventually filed an answer to Pounds' first amended complaint on March 9, 2023. Dkt. No. 68.

Discovery in this case commenced in July 2023, and was scheduled to be completed by January 5, 2024. *See* Dkt. No. 88. On September 22, 2023, Pounds moved to compel discovery responses and requested that the court find a waiver of attorney-client privilege due to defendants' purported reliance on the advice of counsel and defendants' failure to properly identify the documents or information to which privilege purportedly applied. Dkt. No. 95. The district court declined to find such a waiver, and extended the privilege to any communications with the "Governor's General Counsel" as well. Dkt. No. 111. The court further ruled that defendants were not required to provide a "privilege log" that identified the documents or information to which privilege purportedly applied. Dkt. No. 111.

Following completion of discovery, defendants filed a qualified immunity-based motion for summary judgment. Dkt. No. 122. The district court granted such motion and entered judgment in favor of defendants on September 30, 2024. App. 4a-6a. In ruling on such motion for summary judgment, the district court found that defendants had acted reasonably, despite substantial evidence to the contrary. *See* App. 19a, 21a.

On October 28, 2024, Pounds again appealed to the Ninth Circuit. Dkt. No. 146. By opinion filed on December 5, 2025, the Ninth Circuit affirmed the district court's grant of qualified immunity. App. 1a-3a. In doing so, the Ninth Circuit failed to address any of the particular facts in this case and erroneously mischaracterized the substance

of Pounds' complaint in a bland, non-controversial and factually deficient manner. App. 3a. Given such a bland mischaracterization, the Ninth Circuit unsurprisingly could not find any "case law or other law establishing" that Smith and Light's acts constituted an adverse employment action under the First Amendment. App. 3a.

REASONS FOR GRANTING THE PETITION

The qualified immunity doctrine has become increasingly controversial. Many critics – including justices on this Court – would say that the qualified immunity doctrine does not properly balance public officials' interest in avoiding unforeseen litigation expense against the public's interest in holding public officials accountable for their misconduct. Many would say that the pendulum of qualified immunity jurisprudence has swung too far in favor of protecting public officials. *See, e.g., N.S. v. Kansas City Bd. of Police Commissioners*, 143 S. Ct. 2422, 2424 (2023) (Sotomayor, J., dissenting) (pointing out that qualified immunity has erroneously become an absolute shield for constitutional violations); *Mullenix v. Luna*, 577 U.S. 7, 26 (2015) (Sotomayor, J., dissenting) (asserting that the Court's application of qualified immunity renders constitutional protections hollow). Many would say that the qualified immunity doctrine needs to be reconsidered. *See, e.g., N.S. v. Kansas City Bd. of Police Commissioners*, 143 S. Ct. at 2424 (Sotomayor, J. dissenting) (arguing that "[i]t is time to restore some reason to a doctrine that is becoming increasingly unreasonable"); *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., statement) (recommending reconsideration of qualified immunity jurisprudence). *See also Richardson v. McKnight*, 521 U.S. 399, 411 (1997) (suggesting that qualified immunity

is unnecessary if employees are shielded from liability by their employers); *Wyatt v. Cole*, 504 U.S. 158, 171 (1992) (Kennedy, J., concurring) (noting that clarifications to summary judgment law have alleviated need for qualified immunity standard).

This case highlights facts and circumstances that give cause for reconsideration of certain aspects of qualified immunity jurisprudence, with an eye toward possibly instilling a greater sense of fairness in the process.

- 1. Courts should not be allowed to view the facts and inferences in a light more favorable to public officials than to their victims, when ruling upon such officials' qualified immunity-based motions for summary judgment.**

This case provides the Court with an opportunity to address an inappropriate and unfair practice that continues to surface within the federal court system. Such practice – i.e., viewing the facts and inferences in favor of a summary judgment movant and then using those facts and inferences to distinguish otherwise governing precedent – is becoming all too common in qualified immunity jurisprudence. *See N.S. v. Kansas City Bd. of Police Commissioners*, 143 S. Ct. at 2424 (Sotomayor, J., dissenting).

When ruling on a motion for summary judgment, a district court is required to view all facts in the light most favorable to the nonmoving party. *Owens v. Local No. 169*, 971 F.2d 347, 355 (9th Cir. 1992). The court is also required to draw all inferences from the evidence in the light most favorable to the nonmoving party. *Id.* Furthermore, in

the event of any factual disputes, the court is required to resolve such disputes in favor of the nonmoving party. *Tolan v. Cotton*, 572 U.S. 650, 656-657 (2014).

This ensures that it is a jury that will hear evidence and determine which story is credible, not a judge reading a paper record. This role of the jury is particularly important in qualified immunity cases, where the stakes are not just about the parties involved, but whether there will be accountability when public officials violate the Constitution.

N.S. v. Kansas City Bd. of Police Commissioners, 143 S. Ct. at 2423 (Sotomayor, J., dissenting).

In a similar vein, on appeal, a court of appeals is supposed to conduct a *de novo* review of a district court's decision to grant summary judgment. *See Desire, LLC v. Manna Textiles, Inc.*, 986 F.3d 1253, 1259 (9th Cir. 2021). And in doing so, the court is supposed to view the facts and inferences in the light most favorable to the nonmoving party. *Tolan v. Cotton*, 572 U.S. at 656-657; *Social Technologies LLC v. Apple Inc.*, 4 F.4th 811, 816 (9th Cir. 2021).

But the courts below did not employ such standards of review. Rather than viewing the evidence in the light most favorable to Pounds, the nonmoving party, both the district court and the Ninth Circuit chose to view the facts and inferences in the manner of an erroneous self-fulfilling prophesy favorable to the Respondents.

One example of such error at the district court level lies in the court's finding that "the 2015 Report played a role in Mr. Pounds' job rotation" and that "even if the word 'demotion' itself was not used, Defendants reasonably understood that these indications of poor management led to Mr. Pounds being reassigned from a supervisory position to a nonsupervisory position." App. 19a. But that cannot be true. If it were true, Light would not have sent his March 26, 2018 e-mail confirming that the Report did not match with the records request, to wit:

The Vamshi Reddy complaint was not found to have merit, therefore it does not explain the reasons for Mr. Pounds [sic] demotion and pay cut. No adverse action was taken on Mr. Pounds as a result of this investigation. The notes of the investigation were not reason for Mr. Pound's [sic] demotion and pay cut, evidenced by the fact that Mr. Pounds had never heard of these notes until today. They obviously were not used for coaching purposes.

2-ER-37. Moreover, if such a "reasonable understanding" were true, Light would have so stated in his March 26, 2018 e-mail rather than confirming that no action had been taken against Pounds as a result of the Report.

Clearly the district court did not fully consider the ramifications of Light's March 26, 2018 e-mail. Nor did the court take into consideration Light's admission, at deposition, that Pounds had not been disadvantaged in any manner as a result of the Report. 3-ER-162-163. *See* 2-ER-37; 3-ER-115-116.

In addition, the district court's finding is refuted by the testimony of DCBS. It is important to note that the

secret Report did not belong to Smith or Light. The Report belonged to DCBS – and DCBS confirmed at deposition that no adverse action was taken against Pounds as a result of the Report, that Pounds was not disadvantaged in any manner as a result of the Report and that there was no causal connection between the Report and Pounds' subsequent job rotation or selection as a senior policy analyst. 3-ER-220-223, 233-234. That testimony alone should have been dispositive regarding the objective absence of any such "reasonable understanding" on the part of Respondents.

In making such finding, it is further obvious that the district court failed to consider, much less give any weight to, the fact that the secret Report was the product of an investigation that had been conducted in violation of State HR Policy No. 70.000.02. *See* 2-ER-88. Pounds was never interviewed in the course of the investigation, and was never apprised of the existence or substance of the Report or given an opportunity to provide a response. 2-ER-23. *See* 2-ER-67, 68; 3-ER-112. Nor did the court consider the fact that Pounds' official personnel file reflected that his work performance had been consistently rated as successful and that the Report was not referenced in any manner in such personnel file. 2-ER-22; 3-ER-115, 221. *See* 2-ER-76-84.

Another example of the district court's error lies in its finding that "there is no genuine dispute that Defendants took reasonable efforts to appropriately respond to" Jaquiss' public records request. App. 19a. In making such finding, the court clearly failed to consider a litany of contradictory facts that demonstrate the "unreasonableness" of Respondents' efforts.

Again, the district court should have considered that the records in issue did not belong to Smith or Light. The records belonged to DCBS – and DCBS confirmed that no adverse action had been taken against Pounds, and Pounds had not been disadvantaged in any manner, as a result of the Report. 3-ER-220-223, 233-234. Furthermore, DCBS could not explain why Respondents chose to disclose those particular records to Jaquiss. 3-ER-202; 3-ER-228. *See* 3-ER-139-140. DCBS' testimony in that regard, in and of itself, should be dispositive on the "unreasonableness" of Respondents' efforts.

Nor did the district court consider Respondents admitted lack of due diligence in researching the existence of any records responsive to Jaquiss' request. Obviously, Respondents did not confer with Pounds. Nor did Respondents confer with Pounds' supervisors.² Respondents did not even look in Pounds' official personnel file. If they had, there would have been no need for Light to send his belated March 26, 2018 "records don't match" e-mail – which illuminated their lack of due diligence. *See* 2-ER-37.

Furthermore, the district court did not give any weight to the fact that Respondents violated a well-established policy of notifying employees of the receipt of such records requests (2-ER-29), and that Respondents deprived Pounds of a meaningful opportunity to intervene by waiting to the "11th hour" to inform him of the request

2. The Magistrate's Findings erroneously state that "Mr. Light was Deputy Administrator of the Division of Finance and Corporate Securities as well as one of Mr. Pounds's supervisors." App. 9a. At times relevant herein, Light was neither.

as well as their intended response. If Respondents had been acting “reasonably,” and in conformity with DCBS policy, they would have notified Pounds of Jaquiss’ requests when the requests came in.

Yet another example of the district court’s error exists in its finding that Smith acted appropriately when he sent the secret Report to the governor’s office because “Mr. Smith reasonably believed that it was part of his job duties to notify his supervisor when potentially negative information may hit the press.” App. 21a. In making such finding, the court obviously chose to ignore the fact that the records did not belong to Smith. The records belonged to DCBS – and DCBS testified at deposition that such confidential personnel-related records were typically not shared with governor’s office staff. DCBS could not explain why Smith sent those records to the governor’s office on March 23, 2018. 3-ER-199, 207-208, 228-230. DCBS’ testimony in that regard should be dispositive regarding the “unreasonableness” of Smith’s conduct.

In addition, the district court should have taken note of the fact that Smith knew that Pounds was running for office against a Governor Brown appointee. 3-ER-121. *See* 2-ER-27. When pressed, Smith could not provide an explanation as to why Brown’s office would legitimately need to possess a copy of the Report at that point in time.³ *See* 3-ER-149-154.

3. Smith could not explain what the governor’s office was expected to do with the Report. Smith had already been assured, by Light, that the negative publicity generated by the disclosure of the Report would be focused solely upon Pounds. According to Light, “All looks fine for DCBS.” *See* 2-ER-33.

Quite simply, the district court ignored key evidence and inferences supporting Pounds' claim and, unsurprisingly, proceeded to find that "because Plaintiff has not provided a compelling argument that Defendants' conduct violated a clearly established First Amendment right – and this Court cannot find case law supporting Plaintiff's position – Defendants are entitled to qualified immunity." App. 20a. As a practical matter, by finding that the Respondents had acted in a "reasonable" manner, the district court effectively foreclosed the possibility of finding any case law clearly establishing the contrary.

In a similar vein, on appeal, the Ninth Circuit chose to create its own form of self-fulfilling prophecy – by overlooking the facts and by inaccurately framing Pounds' complaint in a non-controversial manner. The Ninth Circuit's opinion fails to mention any of the particular facts in this case, and fails to even recognize that Pounds was engaging in protected political speech. Worse yet, such opinion inaccurately downplays the substance of Pounds' complaint by saying "Pounds argues that Smith and Light retaliated against him for exercising his First Amendment rights when they (1) disclosed an investigative report in response to a reporter's public records request, and (2) shared the report with the governor's office." App. 3a. Given such a bland, non-controversial, factually deficient characterization, it is little wonder that the Ninth Circuit could not find any "case law or other law establishing that either act constituted an adverse employment action under the First Amendment" at the time of the events in this case. App. 3a.

Contrary to the Ninth Circuit's slant on this case, however, Pounds' complaint has never been that Respondents disclosed an investigative report "in response" to a reporter's public records request, but rather that Respondents purposefully disclosed a secret Report that exceeded the ambit of the reporter's request. See 4-ER-280; *Pounds v. Smith*, 2021 WL 3667229, *2-3. Furthermore, contrary to the Ninth Circuit's characterization, Pounds' complaint is not just that Respondents "shared" an investigative report with the governor's office, but that Respondents handed over a disparaging, secret Report to Pounds' political rivals. See 4-ER-275.

The courts below were required to view the evidence in the light most favorable to Pounds, the nonmoving party, at both stages of the qualified immunity analysis process – i.e., both in determining whether Respondents had committed a constitutional violation and in determining whether such violation was "clearly established" by preexisting law. *Tolan v. Cotton*, 572 U.S. at 656-657. By failing to do so, the courts erroneously turned a purportedly "qualified" immunity into an absolute shield for a constitutional violation. See *N.S. v. Kansas City Bd. of Police Commissioners*, 143 S. Ct. at 2424 (Sotomayor, J., dissenting). Such practice should not be allowed.

2. **Public officials who make a calculated choice to commit unlawful acts following weeks of deliberation and consultation with legal counsel, and who hide the full extent of their deliberations behind claims of attorney-client privilege, should not be afforded the same degree of qualified immunity protection as police officers when compelled to make split-second decisions to use force in dangerous settings.**

Qualified immunity was only intended to protect “reasonable” public officials – i.e., public officials who act in an objectively reasonable manner. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818-819 (1982); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). It was never intended to protect “the plainly incompetent or those who knowingly violate the law.” *See Malley v. Briggs*, 475 U.S. 335, 341 (1986). Nevertheless, in practice, current qualified immunity analyses seemingly reward both the incompetent and the intentional wrongdoer as well as the whole spectrum in between. *See Kisela v. Hughes*, 584 U.S. 100, 121 (2018) (Sotomayor, J., dissenting) (emphasizing that current qualified immunity practice “tells the public that palpably unreasonable conduct will go unpunished”).

This case provides an opportunity for the Court to reconsider the current “one-size-fits-all” approach to the determination of qualified immunity protection. *See Hoggard v. Rhodes*, 141 S. Ct. at 2422 (Thomas, J., statement) (questioning the Court’s one-size-fits-all approach to qualified immunity jurisprudence).

The facts in this case show that Respondents did not act as would “reasonable” public officials. Unlike police

officers, when compelled to make split-second, life-or-death decisions to use force, Respondents in this case had the luxury of serving their damaging dish deliberately and cold. Respondents had abundant time – literally three weeks – within which to investigate the facts, and to deliberate their course of action, before springing their retaliatory surprise. And, during that time, Respondents had the opportunity to consult with legal counsel – and purportedly did consult with attorneys at the Oregon Department of Justice, as well as the governor’s general counsel, regarding the legal ramifications of their disclosure of the secret Report.

Respondents did not make “reasonable” use of their time. If they had done so, they would have tried to avoid unnecessary conflict with a fellow government team member. However, rather than trying to avoid conflict with Pounds in this case, Respondents employed strategies that seemingly sought to promote it. Respondents’ objective actions speak much louder than Respondents’ subjective words.

If Respondents had been acting reasonably, they would have recognized the importance, and fairness, of keeping a fellow employee informed of a public records request regarding the employee’s work history – especially when department policy dictated the notification of employees affected by such requests. But Respondents did not. Respondents violated department policy by keeping Pounds in the dark regarding the receipt and processing of Jaquiss’ public records requests until the last possible moment. 2-ER-23, 29, 91. *See* 3-ER-192-197.

If Respondents had been acting reasonably, they would have made a good faith effort to determine what records, if any, were responsive to the reporter's public records request. But Respondents did not. They did not check with Pounds. They did not check with Pounds' supervisors. They did not even check Pounds' official personnel file. If they had exercised due diligence, there would have been no need for Light to send his belated "records don't match" e-mail. *See* 2-ER-37.

If Respondents had been acting reasonably, they would not have disclosed a secret, one-sided Report that had been prepared in violation of state policy. As a management service employee, Pounds was covered by State HR Policy No. 70.000.02, *Management Service Discipline and Dismissal*. 2-ER-86-90; 3-ER-215-216. Under such policy, Pounds was entitled to participate in and respond to any investigation that might adversely affect his employment. 2-ER-88. The facts in this case, however, establish that the disparaging Report was secretly prepared⁴ in May 2015 in violation of such HR policy. 2-ER-88; 3-ER-217-219. Pounds was never interviewed in the course of the investigation. 2-ER-23, 67; 3-ER-159. *See* 3-ER-214. Pounds was never afforded an opportunity to provide input or response to the Report.

4. The Report was prepared by HR analyst Jay Wayland, under the supervision of Light. The manner in which Wayland conducted the investigation, however, remains unclear in many respects. 3-ER-240-241. Wayland received no training regarding the conduct of investigations. 3-ER-239. Nor does anyone know what was actually said in the interviews. 3-ER-160. The interviews were not recorded. 3-ER-241-242. And Wayland's handwritten interview notes are sparse and cryptic, at best. 2-ER-73-75; 3-ER-245.

2-ER-23; 3-ER-213-214. *See* 3-ER-162. Nor was Pounds ever apprised of the content or existence of the Report. 2-ER-23. *See* 2-ER-37, 68.

If Respondents had been acting reasonably, they would not have disclosed a secret Report that sullied Pounds' reputation, while allowing purported detractors to avoid the same level of scrutiny. But Respondents did just that. Respondents publicized the secret Report, and publicly dragged Pounds' name through the mud, while allowing purported mudslingers to remain hidden from public view. *See* 2-ER-47-65. Respondents blacked out the names of all persons interviewed or otherwise mentioned in the Report, other than that of Pounds. 3-ER-133, 197-198. Such names were redacted, even though DCBS confirmed that witnesses in such investigations were typically not assured confidentiality.⁵ 3-ER-212-213. *See* 3-ER-134.

If Respondents had been acting reasonably, they would not have gratuitously disclosed disparaging government records to persons opposing Pounds' candidacy for public office. Smith, however, did just that. Smith unilaterally chose to disclose the disparaging Report to governor's office staff, three days before Pounds was even aware of its existence. 2-ER-35; 3-ER-150. *See* 3-ER-199, 207-208, 228-290.

If Respondents had been acting reasonably, they would have paid heed to the fact that, while Pounds' political

5. Pounds has yet to be provided with an unredacted copy of the Report. To date, Pounds still does not know the identity of his purported detractors. 2-ER-23.

speech was clearly permissible and constitutionally protected under federal and Oregon law, their use of work time and work resources in opposition to Pounds' political speech was not. Respondents were statutorily prohibited from using work time or work resources to oppose Pounds' political candidacy. Or. Rev. Stat. § 260.432(2); 2-ER-66. See 3-ER-112.

Finally, if Respondents had been acting as would "reasonable" public officials, they would be willing to demonstrate the "reasonableness" of their actions by divulging the full extent of their deliberations regarding the disclosure of the secret Report. Respondents, however, have opted instead to hide such deliberations behind claims of attorney-client privilege.

Respondents have repeatedly asserted reliance upon legal advice to justify their actions. One example of such purported reliance exists in the form of Smith's March 23, 2018 e-mail to governor's office staff. In that e-mail, Smith stated that:

Our team has assembled the attached public records that will be sent to Nigel. They include the HR investigation and notes from interviews with employees in 2015 (with employee names redacted). *We did consult with DOJ for their advice and guidance on this record request.*

(Emphasis added.) 2-ER-35; 4-ER-250. Another example of Respondents' purported reliance upon legal advice exists in the form of an e-mail sent from Light to Pounds on March 28, 2018. In that e-mail, Light stated that:

. . . I have double-checked with the DOJ and received advice from a second attorney who specializes in public records law. That attorney's advice is consistent with the original advice we received. Therefore . . . we will be providing the information I gave you to the reporter at Willamette Week by the close of business today.

(Emphasis added.) 4-ER-252. Yet Respondents have refused to reveal the actual content of such legal advice as well as the “facts” upon which such advice purportedly was based.

One would think that Respondents – who have professed a dedication to governmental transparency (see 3-ER-149) – would be eager to show their hand, so to speak, by revealing the content of communications that purportedly give credence to their chosen course of conduct. Respondents’ refusal to do so – on the basis of attorney-client privilege – gives cause for a negative inference. In a civil case, a court may draw an adverse inference against parties whose invocation of privilege prevents a full and fair uncovering of the truth. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). *See also Weil v. Inv./Indicators, Research Mgmt., Inc.*, 647 F.2d 18, 24 (9th Cir. 1981) (emphasizing that “because it impedes full and free discovery of the truth, the attorney-client privilege is strictly construed”).

Given ample time and opportunity to investigate and deliberate, and to seek out and obtain legal counsel, Respondents should be charged with knowledge of the facts and law that could have been acquired through the

exercise of due diligence and appropriate legal analysis. For purpose of this case, it is reasonable to infer that Respondents knew that even a minor act of retaliation would be deemed unlawful, if it was “reasonably likely to deter” constitutionally protected speech. And it is reasonable to infer that Respondents knew that their disclosure of a secret, one-sided government Report, that unfairly attacked Pounds’ reputation for honesty and trustworthiness, would impermissibly “chill” protected speech and be unlawful.⁶

Bottom line, Respondents did not make “reasonable” use of their time, and did not act as would “reasonable” public officials, when they coolly, calmly and deliberately – over the course of some three weeks – chose their course of conduct. They made a calculated choice to discredit Pounds’ speech through their disclosure of the secret Report. Public officials, who have ample time to make such “calculated choices,” are not deserving of the same degree of qualified immunity protection as police officers who are compelled to make split-second decisions to use force in dangerous settings. *See Hoggard v. Rhodes*, 141 S. Ct. at 2422 (Thomas, J., statement).

Public officials should be incentivized to “do the right thing.” Qualified immunity in this case does just the opposite. Petitioner respectfully suggests that at a minimum, given such “calculated choice” circumstances,

6. Given the manner in which this case has proceeded, one might also infer that Respondents were assured – by the governor’s general counsel, perhaps – that the state would nonetheless stand behind their disclosure of the secret Report and that, in the event of suit, they would be insulated from any liability or expense.

the burden should shift to such public officials to show that they were acting reasonably and in good faith. Respondents in this case have shown neither.

3. **For purpose of determining qualified immunity, a public employee's constitutional right to speak out as a private citizen on matters of public concern, free of governmental reaction reasonably likely to deter such speech, should be deemed "clearly established" by a body of relevant law.**

For purpose of determining whether an individual's rights are "clearly established" in the context of qualified immunity, this Court has encouraged courts to look for factually analogous cases as evidence of the existence of such rights. This case provides the Court with an opportunity to elaborate on a less frequently used alternative – i.e., an opportunity to explain when a body of relevant, non-fact-specific legal precedent clearly establishes a constitutional right.

Qualified immunity protects public officials from liability for misconduct only when they have no reason to believe that their conduct is unlawful. Said otherwise, public officials are not entitled to qualified immunity if their conduct violates clearly established statutory or constitutional rights of which a reasonable person should have known. *Harlow v. Fitzgerald*, 457 U.S. at 818-819. For qualified immunity purposes, the term "clearly established" means that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. at 640.

But is nearly identical, fact-specific case precedent necessary to clearly establish the contours of a constitutional right in all circumstances? The court below obviously seemed to think so. Such an expectation is common in cases concerning the excessive use of force by police, where “the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue.” *Kisela v. Hughes*, 584 U.S. at 104. Accordingly, in its opinion below, the Ninth Circuit reiterated that a constitutional right is clearly established only when “case law was earlier developed in such a concrete and factually defined context to make it obvious to all reasonable government actors . . . that what [they are] doing violates federal law.” App. 2a-3a.

The court below, however, failed to consider another possibility – i.e., that the constitutional rights implicated herein were clearly established even in the absence of a “concrete and factually defined” precedent. Both this Court and the Ninth Circuit have confirmed that “general statements of the law are not inherently incapable of giving fair and clear warning” and that “closely analogous preexisting case law is not required to show that a right was clearly established.” *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *White v. Lee*, 227 F.3d 1214, 1238 (9th Cir. 2000). “Officials can still be on notice that their conduct violates established law even in novel factual circumstances” if the “case involve[s] ‘mere application of settled law to a new factual permutation.’” *Eng v. Cooley*, 552 F.3d 1062, 1076 (9th Cir. 2009). Furthermore, this Court has indicated that a constitutional right may be “clearly established” by a “body of relevant case law.” *See Brosseau v. Haugen*, 543 U.S. 194, 199 (2004). Likewise,

the Ninth Circuit has held that the precedent that “clearly establishes” a constitutional violation may be derived from a combination of sources. *See Dodge v. Evergreen School Dist. #114*, 56 F.4th 767, 786 (9th Cir. 2022). For purpose of analysis in this case, there are many cases⁷ that, when read together, clearly sound the alarm regarding the unlawfulness of Respondents’ conduct.

First, the courts have provided clear notice of Pounds’ right to speak out as a private citizen on matters of public concern under federal law. *See Pickering v. Board of Education*, 391 U.S. 563, 571-572 (1968). “[P]ublic employees do not lose their rights as citizens to participate in public affairs by virtue of their government employment.” *Ulrich v. City and County of San Francisco*, 308 F.3d 968, 977 (9th Cir. 2002).

Second, the courts have provided clear notice of the heightened sensitivities that surrounded, and protected, Pounds’ speech under federal law. Pounds’ candidacy for judicial office, and his stated reasons for filing for such office, constitute political speech. Political speech is “central to the meaning and purpose of the First Amendment,” and is considered the most protected form of speech.⁸ *See Citizens United v. Federal Election Comm.*,

7. In addition to case law, pertinent statutory provisions point to the wrongfulness of Respondents’ conduct. *See, e.g.*, Or. Rev. Stat. § 260.432(4), which not only recognizes the right of public employees to personally engage in political speech, but prohibits public employees’ use of work time or work resources to oppose a political candidacy.

8. Political speech is protected as an “essential form of expression” under the Oregon Constitution as well. Or. Const. art. I, § 8; *Or. State Police Officers Assn. v. State*, 783 P.2d 7, 9

558 U.S. 310, 329 (2010). Moreover, the Ninth Circuit has instructed that:

Speech that concerns ‘issues about which information is needed or appropriate to enable the members of society’ to make informed decisions about the operation of their government merits the highest degree of first amendment protection.

McKinley v. City of Eloy, 705 F.2d 1110, 1114 (9th Cir. 1983).

Third, and most importantly, the courts have given fair warning to public officials regarding unacceptable retaliatory conduct and the unavailability of qualified immunity in cases such as this. Most significantly, the Ninth Circuit did so in *Coszalter v. City of Salem*, 320 F.3d 968 (9th Cir. 2003). In finding that public officials were not entitled to qualified immunity, the *Coszalter* court explained that government employees have had a clearly established First Amendment right to speak out on matters of “legitimate public concern” since at least 1968, and that a deterrent effect test for First Amendment retaliation cases has been clearly established since at least 1989, to wit:

(Or. 1989). Furthermore, state law clearly recognizes the right of public employees to express their personal political views. *See* Or. Rev. Stat. § 260.432(4); 2-ER-66. “Citizens cannot be forced to sacrifice all political rights simply because they accept public employment.” *Or. State Police Officers Assn. v. State*, 783 P.2d at 11 (Linde, J. concurring).

Government officials are entitled to qualified immunity only “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982). The Supreme Court decided *Pickering v. Board of Education*, establishing that the First Amendment protects employee speech on matters of “legitimate public concern,” in 1968. 391 U.S. at 571, 88 S. Ct. 1731. We decided *Allen v. Scribner*, articulating a deterrent effect test for First Amendment retaliation cases, in 1987. 812 F.2d 426. We decided *Anderson* in 1984 and *Carpenter* in 1989. 746 F.2d 505, 881 F.2d 828. . . . Thus, at the time defendants acted, both the constitutional protection of employee speech and a First Amendment cause of action for retaliation against protected speech were clearly established.

Coszalter v. City of Salem, 320 F.3d at 979.

The Ninth Circuit further explained, and put public officials on notice, that it was unlawful to engage in any conduct that is “reasonably likely to deter” the exercise of protected First Amendment rights, and that the proper inquiry is not whether an employee’s speech was actually inhibited or suppressed, but “whether an official’s acts would chill or silence a person of ordinary firmness from future First Amendment activities.” *Id.* at 975-977; *Mendocino Environmental Center v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999). The court also warned that “[t]o constitute an adverse employment

action, a government act of retaliation need not be severe and it need not be of a certain kind” and that “even minor acts of retaliation can infringe on an employee’s First Amendment rights.” *Coszalter v. City of Salem*, 320 F.3d at 975. On previous appeal, the Ninth Circuit rejected Respondents’ argument that their acts were minor and only involved “mere threats and harsh words.” *Pounds v. Smith*, 2021 WL 3667229, at *2.

In addition, the courts have given fair warning of the types of conduct that are “reasonably likely to deter” protected speech. For example, in *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 75 (1990), this Court noted that the First Amendment “protects state employees not only from patronage dismissals but also from ‘even an act of retaliation as trivial as failing to hold a birthday party for a public employee’ . . . when intended to punish her for exercising her free speech rights.” And, in *Coszalter*, the Ninth Circuit identified various types of conduct that are “reasonably likely to deter” the exercise of First Amendment rights – including, for example, conducting an unwarranted disciplinary investigation or engaging in a campaign of harassment and humiliation. *Coszalter v. City of Salem*, 320 F.3d at 975-977. Furthermore, in a case with a fact pattern arguably similar to that presented herein, the Ninth Circuit has held that an unlawfully adverse employment action exists when a government employer subjects an employee to an investigation regarding purported deficiencies in his professional conduct and then files an adverse report against the employee, thus marring his record of employment. *Ulrich v. City and County of San Francisco*, 308 F.3d at 972-973, 977.

On previous appeal, the Ninth Circuit rejected Respondents' argument that the public disclosure of "a report finding that state employees overwhelmingly viewed their attorney coworker as untrustworthy and not credible" only amounted to bad-mouthing and was so insignificant that it would not deter the exercise of First Amendment rights. *See Pounds v. Smith*, 2021 WL 3667229, at *2. Quite to the contrary, Respondents' disclosure of the secret Report struck at the very heart of Pounds' First Amendment speech.

In sum, this case merely presents a novel factual permutation within an established body of relevant law. *See Eng v. Cooley*, 552 F.3d at 1076. Given such body of law, the Court should find that Pounds' constitutional right to speak out as a private citizen on a matter of public concern, free of undue governmental interference, was "clearly established." The Court should further find that a "reasonable" public official would have been on notice that public disclosure of a secretly prepared, secretly maintained government Report that unfairly attacked Pounds' reputation for honesty and trustworthiness, in reaction to Pounds' protected speech, was "reasonably likely to deter" protected speech and was unlawful. Accordingly, the Court should find that Respondents are not entitled to qualified immunity protection.

CONCLUSION

Wherefore, Petitioner respectfully requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX