No. _____

In the
Supreme Court of the United States

TOWN OF MOCKSVILLE, NORTH CAROLINA; ROBERT W. COOK, in his official capacity as Administrative Chief of Police of the Mocksville Police Department and in his individual capacity; CHRISTINE W. BRALLEY, in her official capacity as Town Manager of the Town of Mocksville and in her individual capacity,

Petitioners,

v.

KENNETH L. HUNTER; RICK A. DONATHAN; JERRY D. MEDLIN,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

Patrick H. Flanagan
Application for Admission Pending
CRANFILL, SUMNER & HARTZOG, LLP
P.O. Box 30787
Charlotte, NC 28230
(704) 940-3419 (Telephone)
(704) 332-9994 (Facsimile)
phf@cshlaw.com

Counsel for Petitioners

Philip M. Van Hoy
Counsel of Record
Stephen J. Dunn
VAN HOY, REUTLINGER, ADAMS & DUNN
737 East Boulevard
Charlotte, NC 28203
(704) 375-6022 (Telephone)
(704) 375-6024 (Facsimile)
phil.vanhoy@vradlaw.com
steve.dunn@vradlaw.com

Counsel for Petitioners

*Gibson*Moore Appellate Services, LLC
206 East Cary Street ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

QUESTIONS PRESENTED

I. Whether the First Amendment protects police officers who report misconduct in their ranks to a law enforcement agency for investigation.

II. Whether Chief Cook and Town Manager Bralley are entitled to qualified immunity.

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list represents all of the parties before the United States Court of Appeals for the Fourth Circuit:

The petitioners are the Town of Mocksville, North Carolina, Robert Cook, former Chief of Police, and Christine Bralley, Town Manager. The respondents are three former officers of the Mocksville Police Department: Kenneth L. Hunter, Rick A. Donathan, and Jerry D. Medlin.

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The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 789 F.3d 389 (4th Cir. 2015) and is reprinted at Appendix 1a. The district court's unreported order on petitioners' motion for summary judgment (granting qualified immunity to petitioners Cook and Bralley) is reprinted at Appendix 38a. The district court's order denying respondents' motion to alter or amend judgment and motion for relief from judgment (affirming qualified immunity) is reprinted at Appendix 62a. The district court's order granting respondents' supplemental motion to alter or amend judgment and motion for relief from judgment (denying qualified immunity) is reprinted at Appendix 34a.

JURISDICTION

The court of appeals issued its judgment on June 15, 2015. (App. 1a). The court of appeals denied petitioners' petition for rehearing or rehearing *en banc* on July 13, 2015. (App. 63a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). This petition is timely filed pursuant to U.S. Supreme Court Rule 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory and constitutional provisions relevant to this petition are as follows:

42 U.S.C. § 1983 provides in pertinent part:

> 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…

The First Amendment to 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.

STATEMENT OF THE CASE

This is a First Amendment retaliation case. The respondents are former sworn officers of the Mocksville Police Department ("MPD") who allege they were fired for contacting the North Carolina Governor's Office to request an investigation of alleged misconduct and corruption by Chief Cook and others within the department.

In December 2011, Police Officers Kenneth L. Hunter, Rick A. Donathan, and Jerry D. Medlin of the MPD contacted the North Carolina Attorney General's Office to request an investigation of perceived corruption and misconduct within the Police Department, including corruption by Chief Cook. It is undisputed that the purpose of the respondents' report was to initiate a criminal investigation.

The Attorney General's office suggested the officers contact local authorities, but the respondents decided against it because they perceived the local authorities as having close relationships with Chief Cook. Officer Donathan suggested calling the Governor's Office to request an investigation. The Governor's Office is expressly authorized to direct the State Bureau of Investigation to commence such an investigation. *See*, 12 North Carolina Administrative Code Sec. 03B.0104(d) (*The SBI shall have charge of the investigation of crimes and criminal procedure as the Governor or Attorney General may direct*).

The officers reported to the Governor's Office the following alleged crimes:

- Unauthorized stopping of motorists with blue lights (a felony under N.C.G.S. § 14-277(dl)(4));
- Embezzlement (a felony under N.C.G.S. § 14-90 *et seq.*);
- Driving under the influence of alcohol (a misdemeanor under N.C.G.S. § 20-138.1);
- Breaking and entering into a car (a felony under N.C.G.S. § 14-56).

The only allegation plaintiffs claim to have reported to the Governor's Office that is not a crime consists of unspecified racially discriminatory practices.

As sworn officers of the MPD, respondents were bound by an oath of office and the provisions of the Mocksville Police Manual. The oath of a sworn officer provides among other things that he will be alert and vigilant to enforce the criminal laws of this

State. The Manual includes several provisions requiring officers to report crime, including misconduct within their ranks, and to cooperate with other law enforcement agencies.

In response to the officers' call, the Governor's Office directed the North Carolina State Bureau of Investigation to commence an investigation. Two weeks later, Chief Cook allegedly learned of the call, and, after consulting with Town Manager Bralley, terminated the officers' employment.

The officers filed this action asserting claims under 42 U.S.C. § 1983 against Chief Cook, Town Manager Bralley, and the Town of Mocksville, alleging that the defendants violated their First Amendment rights by terminating their employment in retaliation for their exercise of free speech rights in calling the Governor's Office. They sought compensatory and punitive damages, reinstatement, and injunctive relief against future violations of their rights.

Following discovery, petitioners' moved for summary judgment, arguing that because the officers spoke pursuant to their official duties in calling the Governor's Office, their speech was not protected under *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006). Cook and Bralley also argued they were immune from suit in their individual capacities under the doctrine of qualified immunity.

On October 21, 2013, the district court issued an order denying petitioners' motion on the *Garcetti* issue, stating, "There is no evidence before the Court that the Governor's office had any regular

interaction with MPD police officers for purposes of investigating and enforcing criminal laws and no evidence of any MPD policy, practice, or protocol suggesting MPD officers should or could request the Governor to investigate crimes in Mocksville generally or under specific circumstances. The [petitioners] have not pointed to anything in the Mocksville Police Manual or elsewhere which imposes such a specific duty on its officers or says anything about contacting the Governor if the police chief was engaged in improper conduct." (App. 50a-51a). The district court acknowledged, "Obviously police officers have a duty to enforce North Carolina criminal law, but that does not mean they have a duty to call the Governor and report criminal offenses or other misconduct by the police chief." (App. 52a).

Accordingly, the district court found the respondents spoke as citizens, not employees, and thus their speech was protected under the First Amendment. However, the court granted qualified immunity to Cook and Bralley, finding that the officers' rights were not clearly established because, "analogous cases are ambiguous." (App. 56a).

Respondents filed a motion to alter or amend the district court's judgment, which was denied on October 9, 2013. (App. 62a). Respondents then filed a second motion to alter or amend the judgment, arguing that the district court's grant of qualified immunity should be revisited in light of a new Fourth Circuit decision: *Durham v. Jones*, 737 F.3d 291 (4th Cir. 2013).

Petitioners argued that *Durham* represented no change in the law because it does not address the *Garcetti* issue of whether the officers spoke as citizens or employees. In fact, the analysis in *Durham* is limited to whether the speech at issue involved matters of public concern. The decision in *Durham* neither analyzes nor even mentions *Garcetti.*

The district court disagreed, however, and in an order dated January 22, 2014, amended its earlier judgment and entered an order denying qualified immunity. (App. 34a). The court pointed out that MPD officers do not routinely work with the Governor and noted (incorrectly) that the Governor is "completely outside normal law enforcement channels." (App. 36a).

Chief Cook and Town Manager Bralley filed an interlocutory appeal, challenging the district court's denial of qualified immunity. Petitioners argued there had been no constitutional deprivation in the first place since, under *Garcetti*, respondents' speech was unprotected, and, even if respondents' speech was protected, this was not clearly established in December 2011.

On June 15, 2015, the Fourth Circuit panel ruled that respondents spoke as citizens, not employees, because calling the Governor's Office was not among the plaintiffs' "daily professional activities." (App. 17a). The panel majority also affirmed the district court's denial of qualified immunity to Cook and Bralley over a dissenting opinion by Judge Niemeyer, who concluded the law was not clearly established in December 2011, stating, "The question of whether police officers speak *as employees* or *as*

*citizen*s when complaining to the Governor's Office about departmental corruption and misconduct was undecided in this circuit—and has remained so before today—and the proper application of relevant principles is murky at best." (App. 26a) (emphasis in original).

Petitioners' petition for rehearing or rehearing en banc in the Fourth Circuit was denied on July 13, 2015. Petitioners now file this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

The circuit courts are divided on how *Garcetti* applies where police officers, whose duties include enforcing all criminal laws, report misconduct within their ranks to a law enforcement agency. The Fifth Circuit has held categorically that such speech is unprotected. At the other end of the spectrum, the Fourth Circuit (in this case) and the Ninth Circuit each has adopted its own analytical framework, neither of which gives any weight to the fundamental duty of police officers to enforce the law. Somewhat in between, the Seventh Circuit cites the basic law enforcement responsibility of police officers among the factors considered in the practical inquiry required under *Garcetti.*

In the midst of this uncertainty, where precious little is clearly established, Chief Cook and Town Manager Bralley face the prospect of standing trial on claims from which they should be immune. This Court should grant the writ to clarify the scope of police officers' official duties and grant immunity to Bralley and Cook.

I. The Circuits are Split on the Significance of Police Officers' Fundamental Duty to Enforce the Law.

This Court in *Garcetti* expressly declined to articulate a comprehensive framework for defining the scope of public employees' duties. The circuit courts have adopted three distinctly different approaches to police officers' reporting departmental misconduct to law enforcement agencies for investigation.

A. Defining the scope of official duties under *Garcetti* and *Lane*.

This Court held in *Garcetti v. Ceballos*, 547 U.S. 410, 421, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006) that when public employees speak "pursuant to their official duties" they do not speak as citizens and "the Constitution does not insulate their communications from employer discipline." Because there was no dispute in *Garcetti* that the contested speech was made pursuant to the employee's official duties, the Court declined to articulate a comprehensive framework for defining the scope of such duties where there is room for serious debate.

The Court held simply that the employee acted as a government employee "[w]hen he went to work and performed the tasks he was paid to perform[.]" 547 U.S. at 422, 126 S. Ct. 1951. Rejecting the suggestion that employers could restrict employees' rights by creating excessively broad job descriptions, however, the Court instructed, "The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee is actually 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." 547 U.S. at 424, 126 S. Ct. 1960.

In *Lane*, the Court held that truthful testimony under oath by a public employee outside the scope of his "ordinary job duties" is speech as a citizen for First Amendment purposes. ___ U.S. ___, 134 S. Ct. at 2378. "The critical question under *Garcetti*," the Court instructed, "is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." ___ U.S. ___, 134 S. Ct. at 2379.

B. The Fifth Circuit has held that in reporting potentially unlawful activity, a sheriff's deputy spoke pursuant to a basic duty of all law enforcement officers.

In *Wilson v. Tregre*, 787 F.3d 322 (5th Cir. 2015), the Fifth Circuit Court of Appeals held that the general duty of law enforcement officers to report crime was dispositive of a sheriff's deputy's First Amendment claim. Wilson, while employed as Chief Deputy in the Sheriff's office of St. John the Baptist Parish, Louisiana, became concerned about potentially unlawful audio and video monitoring of interrogation rooms. He discussed his concern with Sheriff Tregre, who ordered an internal investigation. Wilson also reported his concerns to Internal Affairs and the District Attorney, who requested that the State Police conduct an investigation.

Wilson was subsequently fired. He sued, asserting claims under 42 U.S.C. § 1983, the Louisiana Constitution, and the Louisiana whistleblower statutes. The district court granted summary judgment on all claims and Wilson appealed.

The Fifth Circuit held as follows:

> In this case, Wilson was acting in his official duties as the Chief Deputy at all the relevant times. When Wilson relayed his concerns to Sheriff Tregre and to Internal Affairs, he was simply reporting potential criminal activity up the chain of command. *See Davis v. McKinney*, 518 F.3d 304, 313 & n. 3 (5th Cir. 2008). Wilson's disclosures to the District Attorney and then to the State Police also fell within the scope of his employment. As a law enforcement officer, Wilson was required to report any action that he believed violated the law. *See* La. Att'y Gen. Op. No. 94–105 (Apr. 13, 1994), *available at* 1994 WL 330222 (explaining that the Parish Sheriff has a duty to "enforce[e] all state, parish, local laws and ordinances" "even in situations where others are charged with the duty of enforcing ordinances"); *see also Charles v. Grief*, 522 F.3d 508, 514 (5th Cir. 2008) (recognizing that a sheriff's deputy holds a "professional position of trust and confidence"); *Williams v. Dall. Indep. Sch. Dist.*, 480 F.3d 689, 693 (5th Cir. 2007) (per curiam) (recognizing that speech required by one's position as an employee is not protected by the First Amendment). In short, because we agree with the district court that Wilson's complaints

> about the recordings were made within the scope of his employment, his speech was not protected by the First Amendment.

Wilson, 787 F.3d at 325.

Significantly, the Fifth Circuit drew no meaningful distinction between Wilson's reporting internally up the chain of command and his external report to the District Attorney. Both communications, the court reasoned, were pursuant to Wilson's fundamental duty as a law enforcement officer to report violations of the law. As shown herein, this approach is starkly different from those taken in other circuits.

C. The Ninth and Fourth Circuits regard law enforcement officers' general duty to report all crime as irrelevant in defining the scope of their official duties.

1. The Ninth Circuit initially held the general law enforcement duty was dispositive, then later declared it was irrelevant.

The Ninth Circuit initially took an approach similar to the Fifth Circuit's in *Wilson.* In *Huppert v. City of Pittsburg*, 574 F.3d 696 (9th Cir. 2009), a panel majority affirmed summary judgment for the defendant in a First Amendment retaliation case, holding that California police officers acted pursuant to their official duties when they investigated and reported on corruption within the police department. The *Huppert* panel relied on the following language from California court of appeal decision, *Christal v. Police Comm'n of City of San Francisco*, 33 Cal. App. 2d 564, 92 P.2d 416 (1939), for the general duty of California police officers to report crime:

> "The duties of police officers are many and varied. Such officers are the guardians of the peace and security of the community, and the efficiency of our whole system, designed for the purpose of maintaining law and order, depends upon the extent to which such officers perform their duties and are faithful to the trust reposed in them. Among the duties of police officers are those of preventing the commission of crime, of assisting in its detection, and of disclosing all information known to them which may lead to the apprehension and punishment of those who have transgressed our laws. When police officers acquire knowledge of facts which will tend to incriminate any person, it is their duty to disclose such facts to their superiors and to testify freely concerning such facts when called upon to do so before any duly constituted court or grand jury. It is for the performance of these duties that police officers are commissioned and paid by the community."

Huppert, 574 F.3d at 707 (quoting *Christal*, 92 P.2d at 419).

The *Huppert* panel majority held that officers spoke pursuant to this basic law enforcement duty in (1) assisting the District Attorney as ordered, (2) defying the police chief's orders and continuing an investigation at the behest of an immediate supervisor, (3) cooperating with the FBI, and (4) testifying before a grand jury. 574 F.3d at 698-700, 703, 706-08.

However, the Ninth Circuit sitting en banc in *Dahlia v. Rodriguez*, 735 F.3d 1060 (9th Cir. 2013) overruled *Huppert*, rejecting the conclusion that police officers necessarily speak pursuant to their official duties in reporting misconduct. Angelo Dahlia, a detective in the Burbank Police Department, brought a First Amendment suit alleging he was retaliated against for reporting misconduct within the department up the chain of command as well as to Internal Affairs, the police union, and the Los Angeles Sheriff's Department. The district court dismissed the complaint for failure to state a claim, reasoning that under *Huppert*, Dahlia spoke pursuant to his official duty, and a circuit panel affirmed.

The Ninth Circuit, sitting en banc, reversed the panel and overruled *Huppert.* The majority likened *Christal's* "sweeping description of a California police officer's professional duties" to an excessively broad job description of the sort rejected in *Garcetti.* 735 F.3d at 1070. In its place, the court in *Dahlia* mandated a "fact intensive" inquiry into the scope of a plaintiff's job duties and articulated three "guiding principles" for conducting it. *Dahlia*, 735 F.3d at 1074.

First, the court deemed it "relevant, if not necessarily dispositive" whether the employee confined his communications to his chain of command. "If… a public employee takes his job concerns to persons outside the work place in addition to raising them up the chain of command at his workplace, then those external communications are ordinarily not made as an employee, but as a

citizen." *Dahlia*, 735 F.3d at 1074, quoting, *Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008).

Second, according to *Dahlia*, the subject matter of the communication is "highly relevant to the ultimate determination whether the speech is protected by the First Amendment." 735 F.3d at 1074-5. The court distinguished between the preparation of a routine report such as that at issue in *Garcetti* with the raising of broad concerns about corruption or systemic abuse, saying of the latter, "it is unlikely that such complaints can reasonably be classified as being within the job duties of an average public employee, except when the employee's regular job duties involve investigating such conduct, e.g., when the employee works for Internal Affairs or another such watchdog unit." 735 F.3d at 1075.

Finally, the court concluded that "when a public employee speaks in direct contravention to his supervisor's orders, that speech may often fall outside the speaker's professional duties." 735 F.3d at 1075. The fact that a public employee is threatened or harassed by his supervisors for engaging in a particular type of speech provides, according to the court, "strong evidence that the act of speech was not, as a 'practical' matter, within the employee's job duties notwithstanding any suggestions to the contrary in the employee's formal job description." *Id.*

Emphasizing the unsettled state of post-*Garcetti* First Amendment law, the court in *Dahlia* noted the existence of circuit splits on two issues. The first is whether the protected nature of speech is a question of law or a mixed question of fact and law. 735 F.3d

at 1072-73 (quoting *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1123 (9th Cir. 2008) for the proposition that the scope and content of an employee's duties is a question of fact, but noting the "divergent views of other circuits[.]"). Second, the court noted a split in the circuits as to whether it is appropriate to consider, as *Dahlia* does, whether a public employee speaks in direct contravention of his supervisor's orders. 735 F.3d at 1075 (comparing *Jackler v. Byrne*, 658 F.3d 225 (2d Cir. 2011) with *Bowie v. Maddox*, 653 F.3d 45 (D.C. Cir. 2011).

Ultimately, the Ninth Circuit held that Dahlia spoke pursuant to his official duties in reporting misconduct up the chain of command, but that he adequately alleged a retaliation claim based on his communications to Internal Affairs, the police union, and the Los Angeles Sheriff's Department. The importance of the basic duty of law enforcement officers to report potential violations of law, held to be dispositive in *Wilson*, was flatly rejected in *Dahlia*.

2. The Fourth Circuit decision in this case incorrectly limited the inquiry to an employee's "daily duties."

Like the Ninth Circuit in *Dahlia*, the Fourth Circuit panel in this case gave no weight to the fundamental duty of all law enforcement officers to report violations of law. Instead, the court stated, "In determining whether the employee spoke as a citizen—the question at the heart of this appeal—the Supreme Court has instructed us to engage in a 'practical' inquiry into the employee's 'daily professional activities' to discern whether the speech at issue occurred in the normal course of those

ordinary duties." *Hunter v. Town of Mocksville*, 789 F.3d 389, 397 (4th Cir. 2015). By limiting its inquiry to activities occurring "daily," the Fourth Circuit panel distorted *Garcetti's* holding.

The controlling factor under *Garcetti* is whether speech is made "pursuant to" an employee's duties, not whether it is part of a task the employee performs every day. The "daily professional activities" passage quoted by the Fourth Circuit, in context, shows that the panel's reliance on the phrase is misplaced:

> "Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance."

547 U.S. at 422.

The Court's reference to "daily professional activities" merely refers to categories of tasks that clearly do not constitute citizen speech. It does mean duties must be performed daily in order to be official. Indeed the Court referred to the fact Ceballos' duties merely "sometimes" required him to speak or write, yet still held such speech was unprotected.

Under *Lane*, the critical question is "whether the speech at issue it itself ordinarily within the scope of an employee's duties[.]" *Lane*, 134 S. Ct. 2379. Neither *Garcetti* nor *Lane* requires such duties be performed frequently, much less daily, as held by the Fourth Circuit in this case.

The Fourth Circuit's misapplication of a "daily professional activities" standard pervades its analysis of this case. The court emphasized that the respondent's "daily professional activities" and "day-to-day duties" did not include calling the Governor's Office to report misconduct or for any other reason. *Hunter*, 789 F.3d at 399. The court dismissed the general duty of all law enforcement officers to enforce criminal laws, stating, "[A] general duty to enforce criminal laws in the community does not morph calling the Governor's Office because the chief of police is himself engaging in misconduct into part of an officer's daily duties." *Id.*

Like the Ninth Circuit in *Dahlia*, the Fourth Circuit compared the general law enforcement duty to an overly broad job description. *Hunter,* 789 F.3d at 399. *Garcetti's* admonition about job descriptions, however, was responsive to Justice Souter's concern in a dissenting opinion that, after *Garcetti,* public employers would adopt overly broad job descriptions in an attempt to evade First Amendment liability. *Cf. Garcetti*, 547 U.S. at 431 n. 2, 126 S. Ct. 1951 (Souter, J., dissenting) ("I am pessimistic enough to expect that one response to the Court's holding will be moves by government employers to expand stated job descriptions…"). That concern is not implicated here. The general duty of law enforcement officers to report violations of the law existed long before *Garcetti*.

Rather, the courts in *Hunter* and *Dahlia* urge abandonment of a common sense understanding of what police officers do for a living. They stand, in effect, for the proposition that law enforcement officers' professional duties do *not* include reporting misconduct in their ranks to an appropriate agency for investigation. This is contrary to the understanding of society as a whole—and of officers themselves—and has potentially grave consequences for the efficient operation of agencies that depend on rigid discipline and public trust.

D. The Seventh Circuit has held the general law enforcement duty is one factor among others considered in determining the scope of a police officer's official duties.

In *Morales v. Jones*, 494 F.3d 590 (2007), the Seventh Circuit listed the general law enforcement duty of police officers among the factors it considered in making the "practical inquiry" required under *Garcetti*. Alfonso Morales and David Kolatski were police officers in the Milwaukee Police Department who were reassigned to street patrol duties after Morales informed an Assistant District Attorney about allegations that the Police Chief and Deputy Chief had harbored the Deputy Chief's brother, who was wanted on felony warrants. The officers sued under the First Amendment and were awarded compensatory and punitive damages at trial. Defendants moved for judgment as a matter of law, which the district court denied. Defendants appealed and the Seventh Circuit panel majority reversed in part and remanded for a new trial. *Morales*, 494 F.3d at 592.

The court found Kolatski's speech unprotected because it was information pertinent to an ongoing investigation which Kolatski had a duty to disclose. *Morales*, 494 F.3d at 597. As to Morales, however, the court distinguished between Morales' report to the Assistant District Attorney, which was unprotected, and his testimony about the same facts in a civil deposition, which was protected. The critical difference is that the former speech was pursuant to Morales' official duties while the latter was not. *Id.*, at 597-98.

The court found that Morales' conversation with the Assistant District Attorney was pursuant to his official duties because he met with the A.D.A. "in his capacity as a [Vice Control Division] Officer." It deemed significant that, "Morales did not meet with [the A.D.A.] on his own time to report information that was unconnected to anything he was working on. Indeed, Morales' speech concerned a case that he was assigned to investigate." *Id.*

"Furthermore," the court noted, "the Milwaukee Police Department requires officers to report all potential crimes. By informing [the A.D.A.] of the allegations against Chief Jones and Deputy Chief Ray, Morales was performing that duty as well." *Morales*, 494 F.3d at 598. The court acknowledged that Morales had considerable discretion whether or not to investigate the misconduct at issue, however, in exercising that discretion, he acted as a law enforcement officer and not as a citizen. *Morales,* 494 F.3d n. 3. On this basis, the court held Morales' report to the A.D.A. unprotected.

In contrast, the court held Morales' testimony in a civil deposition was protected even though it addressed the same subject matter as his report to the A.D.A. "Being deposed in a civil suit pursuant to a subpoena," the court reasoned, "was unquestionably not one of Morales' job duties because it was not part of what he was employed to do." *Morales*, 494 F.3d at 598. The court recognized the "oddity" of a constitutional ruling in which speech said to one individual may be protected under the First Amendment, which precisely the same speech said to another individual is not protected. Nevertheless, the court stated, "*Garcetti* established just such a framework, and we are obliged to apply it." *Id.*

In *Morales*, the Seventh Circuit treated the general duty of law enforcement officers to report violations of the law neither as dispositive, as in *Wilson*, nor as irrelevant, as in *Dahlia* and *Hunter*. *Morales* sets forth a distinctly different approach, treating the fundamental law enforcement duty as one factor among others to consider in determining the scope of police officers' official duties. This Court should grant the writ and resolve this conflict among the circuits.

II. Cook and Bralley Are Entitled to Qualified Immunity Because the Applicable Law was not Clearly Established in December 2011.

A. Qualified immunity is a matter of exceptional importance.

The purpose of qualified and public official immunity is to protect individual defendants, where applicable, from having to participate in protracted

litigation. In *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), this Court stated that the defense of qualified immunity is designed not only to protect government officials from liability for money damages, but also to allow officials to avoid the burdens attendant to a lawsuit. In other words, qualified immunity "is an immunity from suit rather than a mere defense to liability." *Id.*

The applicability of qualified immunity is therefore a question of exceptional importance. As noted by this Court in *City and County of San Francisco v. Sheehan*, 575 U.S. ___, 135 S. Ct. 1765, 1774 n. 3 (2015), qualified immunity is important not just to individual litigants but to "society as a whole."

B. The circuit panel majority's denial of qualified immunity was clearly erroneous.

Judge Niemeyer's dissenting opinion in the Fourth Circuit clearly sets forth the panel majority's error in denying qualified immunity to Cook and Bralley. In holding that respondents' rights were clearly established in December 2011, the circuit panel majority relied on two Fourth Circuit cases: *Durham v. Jones*, 737 F.3d 291 (4th Cir. 2013), and *Andrew v. Clark*, 561 F.3d 261 (4th Cir. 2009). However, those cases only go so far as to conclude that exposing corruption within a police department is a matter of public concern. Neither of them addressed the separate threshold issue of whether the officers spoke as citizens when reporting departmental corruption to a law enforcement agency for investigation.

In *Andrew*, a police officer wrote a memorandum about an officer-involved shooting, expressing concerns about whether the shooting was justified and whether its investigation was handled properly. The officer sent his memorandum to a reporter from the Baltimore Sun, which ran an article raising the same questions about the shooting. In reversing the district court's grant of qualified immunity, the Fourth Circuit concluded that "the question whether the Andrew Memorandum was written as part of his official duties was a disputed issue of material fact that [could not] be decided on a motion to dismiss pursuant to Rule 12(b)(6)." *Andrew*, 561 F.3d at 267. In the context of that factual dispute, *Andrew* provides no guidance regarding when a police officer speaks as a citizen rather than as an employee.

In this case, even in light of *Andrew,* the district court initially granted qualified immunity to Bralley and Cook. It was only after the Fourth Circuit's decision in *Durham* that the district court reversed itself upon the officers' second motion to amend the judgment. Even if *Durham* were dispositive, it was not decided until two years after the officers' termination. A law cannot be clearly established prior to its being established in the first place. It is fundamentally unfair to hold Cook and Bralley personally liable for guessing wrong on a close question as to which the district court itself, in its own estimation, made the same mistake. More to the point, the district court and the Fourth Circuit simply erred in holding that *Durham* made a critical difference in this analysis.

The court in *Durham* focused on whether the plaintiff spoke on a matter of public concern and on whether his interest in speaking outweighed his

employer's interest in maintaining an effective work environment. *Id.* at 298-304. *Durham* says nothing whatsoever about the issue in this case—whether the officers spoke as citizens or employees. *Durham's* holding merely addresses the well-established proposition that public corruption is a matter of public concern, stating, "it was clearly established in the law of this Circuit in September 2009 that an employee's speech about serious governmental misconduct, and certainly not least of all serious misconduct in a law enforcement agency, is protected." *Durham*, 737 F.3d at 303-04.

Both *Durham* and *Andrew* also are readily distinguishable from this case on their facts. In neither case was the plaintiff's speech directed exclusively to a government agency for investigation. In *Andrew,* the speech was directed exclusively to a newspaper. In *Durham*, the speech was directed to media organizations and a broad spectrum of elected officials. In light of this factual distinction, it can hardly be said that existing precedent "placed the… constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S. Ct. 2074, 2083, 179 L. Ed. 2d 1149 (2011).

In December 2011, the Fourth Circuit had not spoken definitively on the issue presented in this case. The other federal circuits have taken varying approaches, many of which support the petitioners' argument that respondents' speech was unprotected. Under these circumstances the operative law cannot have been clearly established. The individual defendants are entitled to qualified immunity.

CONCLUSION

For the reasons stated herein, this petition for writ of certiorari should be granted.

Respectfully submitted,

/s/ Philip M. Van Hoy
Philip M. Van Hoy
Counsel of Record
Stephen J. Dunn
VAN HOY, REUTLINGER,
ADAMS & DUNN
737 East Boulevard
Charlotte, NC 28203
(704) 375-6022
phil.vanhoy@vradlaw.com
steve.dunn@vradlaw.com

/s/ Patrick H. Flanagan
Patrick H. Flanagan
Application for Admission Pending
CRANFILL SUMNER
& HARTZOG, LLP
P.O. Box 30787
Charlotte, NC 28230
(704) 940-3419
phf@cshlaw.com

Counsel for Petitioners

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FILED: June 15, 2015

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-1081

KENNETH L. HUNTER; RICK A. DONATHAN; JERRY D. MEDLIN,

Plaintiffs – Appellees,

v.

TOWN OF MOCKSVILLE, NORTH CAROLINA; ROBERT W. COOK, in his official capacity as Administrative Chief of Police of the Mocksville Police Department and in his individual capacity; CHRISTINE W. BRALLEY, in her official capacity as Town Manager of the Town of Mocksville and in her individual capacity,

Defendants – Appellants.

NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS,

Amicus Supporting Appellees.

No. 14-1125

KENNETH L. HUNTER; RICK A. DONATHAN; JERRY D. MEDLIN,

Plaintiffs – Appellants,

v.

TOWN OF MOCKSVILLE, NORTH CAROLINA; ROBERT W. COOK, in his official capacity as Administrative Chief of Police of the Mocksville Police Department and in his individual capacity; CHRISTINE W. BRALLEY, in her official capacity as Town Manager of the Town of Mocksville and in her individual capacity,

Defendants - Appellees.

NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS,

Amicus Supporting Appellants.

Appeals from the United States District Court for the Middle District of North Carolina, at Greensboro. Catherine C. Eagles, District Judge. (1:12-cv-00333-CCE-JEP)

Argued: December 9, 2014 Decided: June 15, 2015

Before NIEMEYER, WYNN, and DIAZ, Circuit Judges.

Affirmed by published opinion. Judge Wynn wrote the majority opinion, in which Judge Diaz joined. Judge Niemeyer wrote a dissenting opinion.

ARGUED: Stephen John Dunn, VAN HOY, REUTLINGER, ADAMS & DUNN, Charlotte, North

Carolina, for Appellants/Cross-Appellees. Robert Mauldin Elliot, Helen Parsonage, ELLIOT MORGAN PARSONAGE, PLLC, Winston-Salem, North Carolina, for Appellees/Cross-Appellants. **ON BRIEF**: Jaye E. Bingham-Hinch, Raleigh, North Carolina, Patrick H. Flanagan, CRANFILL, SUMNER & HARTZOG, LLP, Charlotte, North Carolina; Philip M. Van Hoy, VAN HOY, REUTLINGER, ADAMS & DUNN, Charlotte, North Carolina, for Appellants/Cross-Appellees. J. Michael McGuinness, THE MCGUINNESS LAW FIRM, Elizabethtown, North Carolina; William J. Johnson, NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, Alexandria, Virginia, for Amicus Curiae.

WYNN, Circuit Judge:

"Almost 50 years ago, th[e Supreme] Court declared that citizens do not surrender their First Amendment rights by accepting public employment." Lane v. Franks, 134 S. Ct. 2369, 2374 (2014). A threshold question for determining "whether a public employee's speech is entitled to protection" is whether the employee "spoke as a citizen on a matter of public concern." Id. at 2378 (quotation marks and citation omitted).

In this Section 1983 case alleging First Amendment rights violations, viewing the evidence in their favor—as we must at summary judgment, Plaintiffs—officers of the Mocksville Police Department ("Mocksville PD") in Mocksville, North Carolina—reached out as concerned citizens to the North Carolina Governor's Office about corruption and misconduct at the Mocksville PD. The district

court therefore rightly rejected Defendants' argument that Plaintiffs' outreach enjoyed no First Amendment protection. For this and other reasons explained below, we affirm the district court's denial of summary judgment to Defendants Robert W. Cook and Christine W. Bralley.

I.

Viewing the evidence in the light most favorable to Plaintiffs, the non-movants, as we must at the summary judgment stage, the evidence shows that Plaintiffs Kenneth L. Hunter ("Hunter"), Rick A. Donathan ("Donathan"), and Jerry D. Medlin ("Medlin"), served as police officers with the Mocksville PD. Hunter, an assistant chief, had worked for the Mocksville PD since 1985; Donathan, a lieutenant, had been with the Mocksville PD since 1998; and Medlin had served as an officer since 2006. All three Plaintiffs had distinguished careers with the Mocksville PD, receiving honors and promotions throughout their tenures.

Defendant Robert W. Cook ("Cook") joined the Mocksville PD as police chief in 2005.[1] Over time, Plaintiffs became concerned about Cook's behavior and leadership. For example, Plaintiffs saw Cook drink alcohol publicly, excessively, and while in uniform and feared that it reflected poorly on the Mocksville PD. Plaintiffs also believed that Cook violated the law by driving a police car with blue flashing lights and behaving as if he were a certified law enforcement officer when, in reality, he had never been certified and was only an "administrative" chief. Plaintiffs suspected that Cook

[1] Cook no longer serves as the Mocksville PD chief

and his ally and deputy chief, Daniel Matthews, were together mismanaging Mocksville PD and other public funds and even using those funds for personal gain. Plaintiffs perceived racial discrimination at the Mocksville PD. And Plaintiffs believed that Cook "fixed" tickets for his friends.

Plaintiffs independently raised such concerns about Cook with Mocksville Town Manager, Defendant Christine W. Bralley ("Bralley"). Yet they noticed no improvement after reporting their concerns to Bralley and instead perceived reasons to worry about retaliation. Donathan, for example, raised his concerns with Bralley and was soon thereafter criticized by Matthews about a concern he had raised with Bralley. And a month after Medlin sent Bralley a sealed letter detailing concerns about the Mocksville PD, Cook demoted him. (That demotion was ultimately reversed.)

In November 2011, the situation at the Mocksville PD escalated. Cook reorganized the department, elevating Matthews to second-in-command and stripping Hunter, one of only two African-Americans at the Mocksville PD, of his supervisory responsibilities. Hunter filed a grievance about his demotion, but his grievance, and concerns, were dismissed. Donathan, on the other hand, was invited to Cook's home, instructed to "adhere to the 'politics' of the MPD," and promoted to lieutenant. J.A. 161.

In early December 2011, five Mocksville PD officers, including all three Plaintiffs, met privately to discuss their concerns about Cook and his ally Matthews. At that meeting, Plaintiffs decided to seek an investigation by an outside agency into

corruption at the Mocksville PD. According to Hunter, Plaintiffs made this decision because they felt, "as citizens of the community, that Mocksville deserved an effective police force that served everyone equally" and not because they felt it was "part of our job duties." J.A. 137.

Plaintiffs set up a meeting with local representatives of the National Association for the Advancement of Colored People ("NAACP"), who, after hearing Plaintiffs' concerns, advised them to contact a state agency. Accordingly, Plaintiffs decided to contact the North Carolina Attorney General. Hunter had his "daughter purchase a disposable phone at Wal-Mart that could be used to report our citizen complaints separately from our affiliation with the MPD." Id.

On December 14, 2011, Plaintiffs got together and used the disposable phone to call the Attorney General's Office. The Attorney General, however, referred Plaintiffs to local authorities who were closely aligned with Cook and whom Plaintiffs therefore felt they could not contact. Plaintiffs then called the North Carolina Governor's Office, again using the disposable phone. Without identifying either themselves or the Mocksville PD, Plaintiffs conveyed some of their concerns, including their suspicions that Cook embezzled funds, had a drinking problem, and masqueraded as a certified officer with powers to, for example, use blue lights and pull people over even though he was only an administrative chief without the authority to do so. The Governor's Office representative asked for a telephone number at which someone could return the call, and Plaintiffs gave the number for the disposable phone.

Later that day, someone else from the Governor's Office called the disposable phone. Donathan answered the call, spoke to the representative, and identified the Mocksville PD to the representative. The Governor's Office representative offered to request that the State Bureau of Investigation ("SBI") investigate the Mocksville PD.

The next week, Medlin saw the local SBI Agent, D.J. Smith, at the Mocksville PD offices. Plaintiffs knew that Smith had a close relationship with both Cook and Matthews. Medlin saw Smith show Matthews a piece of paper and saw the two men look for Cook. On December 22, 2011, Plaintiffs received a message from Smith, who called the disposable phone. Smith left a message identifying himself and stating that he was following up on the request for an investigation. Plaintiffs did not return the call because "we did not trust any local authorities in investigating our concerns because of Chief Cook's influence" and thus "disposed of the phone for fear that Chief Cook may search the police department and find it." J.A. 140.

As it turned out, the phone was nevertheless "found." Smith contacted the Davie County Sheriff's Office, the county in which Mocksville is located, and asked an officer there to check whether the phone number used to make that complaint belonged to anyone at the Sheriff's Office. The Sheriff's Department officer contacted the Mocksville PD and asked an officer there to run the number through Mocksville PD records. The officer also called the disposable phone himself—though Plaintiffs did not pick up.

On December 27, 2011, Bralley contacted Sprint customer service to set up an online account, explaining that she wanted to check call records for a specific telephone number. The Sprint invoice issued that same day for the billing period ending December 23, 2011 included phone calls to the disposable phone's number. Both Donathan and Medlin had placed calls to and received calls from the disposable phone using their Mocksville PD-issued mobile phones.

On December 29, 2011, Chief Cook fired all three Plaintiffs. This was the first time Cook had fired anyone during his tenure as the Mocksville PD chief. Officer misbehavior—including illegal drug use and even criminal activity—had previously occurred. But the officers in those cases received lesser punishments or were allowed to voluntarily resign rather than be fired.

All three Plaintiffs received similar termination letters that gave performance justifications such as "[i]nsubordinat[ion]," "[a]ttitude," "[r]umored [f]alse [d]eter mental [sic] [i]nformation," and "other conduct unbecoming a Officer." J.A. 153, 178. Plaintiffs had been given no notice of these performance issues before they were fired. In an after-the-fact memo to the town attorney, Cook expressly mentioned Plaintiffs' telephone call to the Governor and SBI, claiming Plaintiffs "conspire[d]" to discredit him, Bralley, and others in calls to "SBI and Governor with false information"—information Cook claimed "[t]he SBI and DA have determined . . . to be slanderous and false." J.A. 543. And around the time Cook fired Plaintiffs, Cook called the local district attorney and told him that "you can't have

people in-house that are continually undercutting you and causing trouble." J.A. 2009.

In April 2012, Plaintiffs brought suit against Cook, Bralley, and the Town of Mocksville, alleging, among other things, that their First Amendment rights were violated when they were fired for speaking out about corruption and misconduct at the Mocksville PD. Defendants answered, and discovery ensued. Defendants then moved for summary judgment, which Plaintiffs opposed. Initially, in October 2013, the district court granted summary judgment to all Defendants on the Section 1983 claims but denied summary judgment as to the state law wrongful discharge and constitutional claims. In January 2014, however, the district court granted a motion for reconsideration and reversed course as to Cook and Bralley, holding that neither was entitled to qualified immunity.

The parties challenge aspects of both orders in this appeal. We review these summary judgment rulings de novo, viewing the evidence in the light most favorable to the non-moving party—here, Plaintiffs—and drawing all reasonable inferences in their favor. Miller v. Leathers, 913 F.2d 1085, 1087 (4th Cir. 1990) (en banc).

II.

Defendants argue that they are entitled to qualified immunity, which shields government officials "who commit constitutional violations but who, in light of clearly established law, could reasonably believe that their actions were lawful." Henry v. Purnell, 652 F.3d 524, 531 (4th Cir. 2011) (en banc). To successfully avail themselves of qualified immunity, Defendants must show either

that no constitutional violation occurred or that the right violated was not clearly established at the time it was violated. Id. Defendants argue primarily that no violation occurred.

A.

With their first argument, Defendants contend that the district court erred in ruling that Plaintiffs spoke as citizens and not as employees when they reached out to the Governor's Office. Accordingly, per Defendants, the First Amendment does not protect Plaintiffs from retaliation. We disagree.

1.

"Speech by citizens on matters of public concern lies at the heart of the First Amendment, which 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" Lane, 134 S. Ct. at 2377 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)). This remains true when speech concerns information related to public employment. "After all, public employees do not renounce their citizenship when they accept employment, and this Court has cautioned time and again that public employers may not condition employment on the relinquishment of constitutional rights." Id. (citing, inter alia, Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., Ill., 391 U.S. 563, 568 (1968)).

In its most recent statement on public employee speech, a unanimous Supreme Court underscored the "considerable value" of "encouraging, rather than inhibiting, speech by public employees. For government employees are often in the best position to know what ails the agencies for which they work."

Lane, 134 S. Ct. at 2377 (quotation marks, alterations, and citation omitted). Were public employees not able to speak on matters of public concern, "the community would be deprived of informed opinions on important public issues." San Diego v. Roe, 543 U.S. 77, 82 (2004) (per curiam). Indeed, "[t]he interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." Id. The Supreme Court thus underscored last year in Lane that "[i]t bears emphasis that our precedents . . . have recognized that speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment." 134 S. Ct. at 2379.

Further, as the Supreme Court has recognized, "[t]he importance of public employee speech is especially evident in the context of . . . a public corruption scandal." Id. at 2380. Indeed "[i]t would be antithetical to our jurisprudence to conclude that the very kind of speech necessary to prosecute corruption by public officials—speech by public employees regarding information learned through their employment—may never form the basis for a First Amendment retaliation claim." Id.

That being said, precedent makes clear that courts must also consider "the government's countervailing interest in controlling the operation of its workplaces." Id. at 2377. "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).

Accordingly, courts must "balance between the interests of the [public 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." Pickering, 391 U.S. at 568. As the Supreme Court explained in Garcetti, this balancing test boils down to a two-step inquiry: The first question is "whether the employee spoke as a citizen on a matter of public concern. If the answer is no," First Amendment protections are not implicated. 547 U.S. at 418. If, however, the answer is yes, then we must ask whether the employee's interest in speaking out about the matter of public concern outweighed the government's interest in providing effective service to the public. Id.

In determining whether the employee spoke as an employee or as a citizen—the question at the heart of this appeal—the Supreme Court has instructed us to engage in a "practical" inquiry into the employee's "daily professional activities" to discern whether the speech at issue occurred in the normal course of those ordinary duties. Garcetti, 547 U.S. at 422, 424. The Supreme Court expressly rejected a focus on "formal job descriptions," eschewing "the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions." Id. at 424. And just last year in Lane, the Supreme Court unanimously admonished lower courts for "read[ing] Garcetti" and its employee speech implications "far too broadly." 134 S. Ct. at 2379. The Court emphasized that "[t]he critical question . . . is whether the speech at issue is itself ordinarily within the scope of an employee's

duties, not whether it merely concerns those duties." Id.

In Garcetti, the speech at issue was an internal memorandum a deputy district attorney had prepared for his supervisors recommending a particular disposition in a specific case. 547 U.S. at 410. The Supreme Court noted that the deputy "did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case." Id. at 422. Accordingly, the internal memorandum, which fell within the scope of the deputy's ordinary duties, did not constitute protected speech. Id. at 421-22.

By contrast, in Lane, the Supreme Court held that a public employee's sworn testimony in a judicial proceeding was "quintessential" citizen speech—"even when the testimony relates to . . . public employment or concerns information learned during that employment." 134 S. Ct. at 2378-79. The Court recognized that a testifying public employee "may bear separate obligations to his employer—for example, an obligation not to show up to court dressed in an unprofessional manner." Id. at 2379. But any such obligation is distinct from "the obligation, as a citizen, to speak the truth." Id. Further, the Supreme Court left no doubt that the subject matter of the speech at issue in Lane—"corruption in a public program and misuse of state funds—obviously involves a matter of significant public concern." Id. at 2380. And the defendants in Lane had failed to demonstrate a governmental

interest that could nevertheless tip the balance in their favor. Id. at 2381.

Similarly, in Pickering, a teacher was fired after he wrote a letter to the editor of a local newspaper critical of how the superintendent of schools had handled proposals to raise school revenue. Pickering, 391 U.S. at 564. The Supreme Court held that the letter, which neither "impeded the teacher's proper performance of his daily duties in the classroom" nor "interfered with the regular operation of the schools generally," constituted protected speech. Id. at 572-73. The Supreme Court underscored that "whether a school system requires additional funds is a matter of legitimate public concern." Id. at 571. On such matters, "free and open debate is vital," and teachers are "most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." Id. at 571-72.

Even in our own Circuit, we have made clear that the "core First Amendment concern" is "the actual workings—not just the speeches and reports and handouts—of our public bodies." Andrew v. Clark, 561 F.3d 261, 273 (4th Cir. 2009) (Wilkinson, J., concurring). Therefore, in Andrew, we reversed the dismissal of a Section 1983 complaint in which a former police commander alleged retaliation for disclosing to the news media an internal report he had authored questioning both a police shooting and the police investigation into the shooting. It would have been "inimical to First Amendment principles to treat too summarily those who bring, often at

some personal risk, [the government's] operations into public view." Id.

Likewise, in Durham v. Jones, we upheld a jury verdict for a plaintiff police officer terminated in retaliation for speaking out about law enforcement misconduct. 737 F.3d 291 (4th Cir. 2013). In Durham, the plaintiff prepared a report about an incident that had involved the use of force. Id. at 294. Other officers and detectives aggressively interrogated the plaintiff and ordered him to revise his incident report. He refused. Id. Ultimately, the plaintiff decided to "bring to light actual or potential wrongdoing on the part of his superiors, calling for an external investigation and media coverage." Id. at 300 (quotation marks and citation omitted). He sent a letter and written materials to, among others, the State's Attorney and the Governor of Maryland. Id. We made it clear that this situation was "no ordinary workplace dispute," and that "where public employees are speaking out on government misconduct, their speech warrants protection." Id. at 303 (quotation marks and citation omitted).

2.

Turning to the facts of this case, Defendants contend that "Plaintiffs' speech was not protected because they spoke as employees, not as citizens." Appellants' Br. at 23. Defendants argue that Plaintiffs' "calling the Governor's Office was pursuant to their official duties . . . . When a police officer reports a crime, he is literally just doing his job." Id. at 30. With this characterization of Plaintiffs' speech, we cannot agree.

Nothing before us suggests that Plaintiffs' "daily professional activities," Garcetti, 547 U.S. at 422,

included calling the Governor's Office for any purpose, much less to express concerns about the Mocksville PD. Nothing suggests that Plaintiffs' request that the Governor's Office look into suspected corruption and misconduct at the Mocksville PD was "ordinarily within the scope of [Plaintiffs'] duties." Lane, 134 S. Ct. at 2379. Indeed, a "practical" inquiry into Plaintiffs' day-to-day duties, Garcetti, 547 U.S. at 424, manifestly does not lead to the conclusion that those included reaching out to the Governor's Office about anything at all.

Instead, the evidence viewed in the light most favorable to Plaintiffs illustrates that Plaintiffs acted as private citizens. It is undisputed that Plaintiffs first met, in their free time and away from their Mocksville PD offices, with a non-governmental organization—the NAACP—about perceived misconduct and corruption at the Mocksville PD. The NAACP suggested reaching out to a state agency. Accordingly, using a private disposable phone away from the Mocksville PD, Plaintiffs first contacted the North Carolina Attorney General's Office and ultimately the North Carolina Governor's Office. Initially, Plaintiffs identified neither themselves nor the Mocksville PD. Only after a Governor's Office representative offered to request an SBI investigation did Plaintiffs name the Mocksville PD as the subject of their concerns.

Defendants counter that Plaintiffs acted pursuant to their official duties because all sworn police officers have a duty to enforce criminal laws, and Plaintiffs, police officers, suspected criminal conduct. While some of the suspected corruption and misconduct at issue here, such as misusing public funds for personal gain, might qualify as criminal,

other misconduct, such as racial discrimination within the Mocksville PD, might not. Moreover, and more importantly, a general duty to enforce criminal laws in the community does not morph calling the Governor's Office because the chief of police himself is engaging in misconduct into part of an officer's daily duties.

Defendants further argue that the Mocksville Police Manual broadly obligated Plaintiffs to, among other things: "cooperate with all Law Enforcement agencies, other City Departments, and Public service organizations and . . . give aid and information as such organizations may be entitled to receive," J.A. 3306; report in writing other "employees violating laws" (though Defendants conveniently omit from their brief to whom such written reports of employee malfeasance are to be submitted: "to the Chief of Police"), J.A. 3318; and generally "enforce all Federal, State, and City laws and ordinances coming within departmental jurisdiction," J.A. 3305. But the Supreme Court has expressly rejected focusing on "formal job descriptions," as well as any "suggestion that employers can restrict employees' rights by creating excessively broad job descriptions." Garcetti, 547 U.S. at 424. 20

In sum, privately reaching out to the Governor's Office about suspected corruption and misconduct at the Mocksville PD, at the hands of the chief of police, cannot fairly or accurately be portrayed as simply part of Plaintiffs' "daily professional activities." Garcetti, 547 U.S. at 422. In reaching out to the Governor's Office, Plaintiffs were not "just doing [their] job." Appellants' Br. at 30. Rather, Plaintiffs spoke as citizens, on a matter of undisputedly public

concern,[2] and no countervailing government interest has even been suggested. Accordingly, the district court rightly rejected Defendants' motion for summary judgment on this basis.

B.

With their next argument, Defendants contend that Plaintiffs' speech was not a motivating factor in their being fired. Defendants contend that Plaintiffs therefore cannot succeed with their First Amendment retaliatory discharge claims. See, e.g., Wagner v. Wheeler, 13 F.3d 86, 90 (4th Cir. 1993) (holding that a plaintiff claiming retaliatory discharge in violation of his First Amendment rights "must show that his protected expression was a 'substantial' or 'motivating' factor in the employer's decision to terminate him" (citation omitted)). This issue is, however, not properly before us.

The Supreme Court has made clear that "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." Johnson v. Jones, 515 U.S. 304, 319-20 (1995).[3] Stated differently, "[i]f

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[2] Defendants do not even attempt to argue on appeal that public corruption does not constitute a matter of public concern.

[3] By contrast, the Supreme Court has left no doubt that "a district court's order denying a defendant's motion for summary judgment [is] an immediately appealable 'collateral order' (i.e., a 'final decision') . . . where (1) the defendant was a public official asserting a defense of 'qualified immunity,' and (2) the issue appealed concerned, not which facts the parties might be able to prove, but, rather, whether or not certain given facts showed a violation of 'clearly established' law." Johnson, 515

summary judgment was denied as to a particular claim solely because there is a genuine issue of material fact, that claim is not immediately appealable and we lack jurisdiction to consider it." Iko v. Shreve, 535 F.3d 225, 235 (4th Cir. 2008).

Fatally for Defendants' argument here, the district court denied summary judgment because a material dispute of fact existed on the causation issue:

> The plaintiffs have offered sufficient evidence to support a jury finding that the Town fired them for reporting to the Governor's office that the Mocksville Police Department was experiencing corruption and other issues. While the Town has offered evidence that the plaintiffs were fired for performance issues, that evidence does not entitle them to summary judgment. It merely creates a disputed question of material fact which a jury must decide. The defendants are not entitled to summary judgment on this basis.

Hunter v. Town of Mocksville, N.C., No. 1:12-CV-333, 2013 WL 5726316, at *4 (M.D.N.C. Oct. 21, 2013), vacated in part, 2014 WL 881136 (M.D.N.C. Jan. 22, 2014). Because the district court rejected Defendants' causation argument due to a dispute of

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U.S. at 311 (citations omitted). Indeed, this kind of summary judgment is otherwise "'effectively unreviewable,' for review after trial would come too late to vindicate one important purpose of 'qualified immunity'—namely, protecting public officials, not simply from liability, but also from standing trial." Id. at 312 (citation omitted).

material fact, we must refrain from considering it. See Iko, 535 F.3d at 234-35.

C.

With their final argument on appeal, Defendants contend that even if Plaintiffs' First Amendment rights were violated, those rights were not clearly established at the time, i.e., in December 2011. Accordingly, Cook and Bralley argue that they are entitled to qualified immunity protecting them from suit.

Qualified immunity shields government officials "who commit constitutional violations but who, in light of clearly established law, could reasonably believe that their actions were lawful." Henry, 652 F.3d at 531. Regarding whether a right was clearly established, "[t]he relevant, dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Id. at 534 (quoting Saucier v. Katz, 533 U.S. 194, 202 (2001), overruled in part on other grounds, Pearson v. Callahan, 555 U.S. 223 (2009)).

To ring the "clearly established" bell, there need not exist a case on all fours with the facts at hand. In other words, "the nonexistence of a case holding the defendant's identical conduct to be unlawful does not prevent the denial of qualified immunity." Edwards v. City of Goldsboro, 178 F.3d 231, 251 (4th Cir. 1999) (holding that First Amendment rights of an off-duty officer communicating about concealed weapons were sufficiently established by precedent regarding off-duty officer's entertainment performances). "Rather, the unlawfulness must be apparent in light of pre-existing law." Trulock v. Freeh, 275 F.3d 391, 400 (4th Cir. 2001).

Turning to the right at issue here—namely First Amendment expressive rights of public employees—we have expressly held that "it was clearly established in the law of this Circuit in September 2009 that an employee's speech about serious governmental misconduct, and certainly not least of all serious misconduct in a law enforcement agency, is protected." Durham, 737 F.3d at 303–04 (citation omitted). As discussed in greater detail above, in Durham, a police officer claimed he was terminated in retaliation for speaking out about law enforcement misconduct. The plaintiff officer wrote a report about an incident involving the use of force and refused to bow to pressure to revise the report. After the plaintiff officer sent written materials including the report to, among others, the Governor of Maryland, he was fired. We called this situation "no ordinary workplace dispute" and made clear that "where public employees are speaking out on government misconduct, their speech warrants protection." Id. at 303 (quotation marks and citation omitted).

In holding that "it was clearly established in the law of this Circuit" in 2009 that "an employee's speech about serious governmental misconduct," and especially "serious misconduct in a law enforcement agency, is protected," Durham, 737 F.3d at 303–04, we relied on Andrew, 561 F.3d at 266–68. In Andrew, we concluded that an officer had stated a claim under the First Amendment where he alleged retaliation for releasing to the media an internal report he had authored questioning a police shooting and the investigation into the shooting. Id. at 261-62. As Judge Wilkinson noted in his concurring opinion, it would be "inimical to First Amendment

principles to treat too summarily those who bring, often at some personal risk, [the government's] operations into public view." Id. at 273 (Wilkinson, J., concurring). In Judge Wilkinson's lyrical words, "[i]t is vital to the health of our polity that the functioning of the ever more complex and powerful machinery of government not become democracy's dark lagoon." Id.

Andrew and Durham clearly established that, long before the December 2011 speech and retaliation at issue here, "speech about serious governmental misconduct, and certainly not least of all serious misconduct in a law enforcement agency, is protected." Durham, 737 F.3d at 303–04 (citation omitted). Defendants attempt to make much of the fact that, in both Andrew and Durham, the plaintiffs had reached out to the news media (though in Durham, the plaintiff also reached out to others, including the Governor's Office). That may be. But nothing in this Court's reasoning or broadly-worded holdings in either Andrew or Durham suggests that that fact was somehow dispositive. Nothing in either Andrew or Durham stands for the proposition that only speech to a media organization can qualify for First Amendment protection. And we agree with Justice Stevens that it would be "perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly," Garcetti, 547 U.S. at 427 (Stevens, J., dissenting)—which is precisely what we would be doing, were we to adopt Defendants' position that exposing serious government misconduct to the news media is protected, but exposing that same misconduct to the Governor's Office, as in this case, by definition is not.

In sum, "it was clearly established in the law of this Circuit" in December 2011 that speech about "serious misconduct in a law enforcement agency[] is protected." Durham, 737 F.3d at 303–04. The district court therefore did not err in denying qualified immunity to Cook and Bralley on this basis.

III.

In their lone argument on appeal, Plaintiffs contend that "Bralley was the final decisionmaker with respect to the employment of the plaintiffs, and that Cook was the final policymaker of the MPD." Appellees' Br. at 47. Accordingly, per Plaintiffs, the Town of Mocksville is liable for Cook's and Bralley's unconstitutional retaliatory actions, and the district court erred in holding otherwise and dismissing their claims against the town. This issue is, however, not properly before us.

"With a few exceptions not relevant here, this court has jurisdiction of appeal from 'final decisions' only." Cram v. Sun Ins. Office, Ltd., 375 F.2d 670, 673 (4th Cir. 1967). Generally, "a district court order is not 'final' until it has resolved all claims as to all parties." Am. Petroleum Inst. v. Cooper, 718 F.3d 347, 353-54 n.7 (4th Cir. 2013) (quoting Fox v. Baltimore City Police Dep't, 201 F.3d 526, 530 (4th Cir. 2000)).

The district court's disposal only of Plaintiffs' claims against the Town of Mocksville does not constitute a final judgment. It is, therefore, not generally reviewable. See Cram, 375 F.2d at 673 (noting that "a summary judgment as to one of the parties is no exception to the rule" of finality and an appeal thereof "must therefore be dismissed").

A potential avenue for appealability nevertheless exists: Civil Procedure Rule 54(b) "provides a vehicle by which a district court can certify for immediate appeal a judgment that disposes of fewer than all of the claims or resolves the controversy as to fewer than all of the parties." Fox, 201 F.3d at 530. Under Rule 54, the district court "may direct entry of a final judgment as to one or more, but fewer than all, claims or parties"—but "only if the court expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b).

Here, however, the record does not reflect that the district court entered judgment for the Town of Mocksville under Rule 54. On the contrary, the district court made plain in its January 2014 order that "final judgment has not been entered as to any party . . . pursuant to Rule 54." Hunter, 2014 WL 881136, at *2. Accordingly, we must refrain from considering this issue.[4]

IV.

For the reasons explained above, the judgments of the district court, to the extent they are reviewable at this juncture, are

AFFIRMED.

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[4] Had the district court come down the other way on the issue, moreover, it still would have been unreviewable. See Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 43 (1995) (holding that a county commission's assertion that the sheriff was not the county policymaker was a defense to liability, not an immunity from suit, and that denial of summary judgment for the county commission was thus not immediately appealable).

NIEMEYER, Circuit Judge, dissenting:

I would grant qualified immunity to Police Chief Robert Cook and Town Manager Christine Bralley because it was not clearly established at the time that Chief Cook fired the plaintiff-officers that the officers had complained to the North Carolina Governor's Office as citizens, rather than as employees. If the officers had complained as employees, "the Constitution does not insulate their communications from employer discipline." Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

In December 2011, Police Officers Kenneth L. Hunter, Rick A. Donathan, and Jerry D. Medlin of the Mocksville Police Department in Mocksville, North Carolina, used a disposable telephone to call the Governor's Office to anonymously report perceived corruption and misconduct within the Police Department, including corruption by Chief Cook, and to request that an investigation be initiated. Two weeks later, after Chief Cook allegedly learned of the call and consulted with Town Manager Bralley, he terminated the three officers' employment.

The officers commenced this action under 42 U.S.C. § 1983 against Chief Cook, Town Manager Bralley, and the Town of Mocksville, alleging that the defendants violated their First Amendment rights by terminating their employment in retaliation for their exercise of free speech rights in calling the Governor's Office. They sought compensatory and punitive damages, reinstatement, and injunctive relief against future violations of their rights.

On the defendants' motion for summary judgment, the district court denied Chief Cook and Town Manager Bralley's claim of qualified immunity and granted judgment to the Town of Mocksville, concluding that the officers failed to state a claim for municipal liability. Chief Cook and Town Manager Bralley filed this interlocutory appeal, challenging the district court's denial of their qualified immunity, and the officers cross-appealed the dismissal of their municipal liability claim.

The majority affirms the qualified immunity ruling, concluding that the officers' complaint to the Governor's Office about departmental misconduct was protected by the First Amendment because it was clearly established that the officers were not simply carrying on their "daily professional activities" but rather were speaking as citizens on a matter of public concern. But in reaching this conclusion, the majority fails to identify any controlling precedent that would have informed Chief Cook and Town Manager Bralley that they were acting unlawfully in firing the officers for going over their heads to the Governor's Office to complain about departmental misconduct. The question of whether police officers speak as employees or as citizens when complaining to the Governor's Office about departmental corruption and misconduct was undecided in this circuit -- and has remained so before today -- and the proper application of relevant principles is murky at best. Therefore, the relevant case law was not clearly established at the time of the defendants' conduct. In such circumstances, Chief Cook and Town Manager Bralley are entitled to qualified immunity, which shields government officials from suits for damages when acting in their

personal capacity unless (1) they violate a statutory or constitutional right (2) that was "clearly established at the time of the challenged conduct." Lane v. Franks, 134 S. Ct. 2369, 2381 (2014) (quoting Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080 (2011)) (internal quotation marks omitted). Accordingly, I would reverse and remand with instructions to grant Chief Cook and Town Manager Bralley qualified immunity.*

In considering whether a right was clearly established at the time of the challenged conduct, courts are guided by three principles. First, "as long as [an official's] actions could reasonably have been thought consistent with the rights [he is] alleged to have violated," he is entitled to qualified immunity. Anderson v. Creighton, 483 U.S. 635, 638 (1987). Second, while an official may be denied qualified immunity without "the very action in question ha[ving] previously been held unlawful," id. at 640, "existing precedent must have placed the statutory or constitutional question beyond debate," al-Kidd, 131 S. Ct. at 2083 (emphasis added). Third, existing precedent is limited to "the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose." Edwards v. City of Goldsboro, 178 F.3d 231, 251 (4th Cir. 1999) (quoting Jean v. Collins, 155 F.3d 701, 709 (4th Cir. 1998) (en banc)).

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* I agree with the majority that we do not have subject matter jurisdiction to address the officers' cross-appeal of the dismissal of their municipal liability claim for failure to demonstrate that either Chief Cook or Town Manager Bralley was the final policymaker for the Town.

The test for evaluating a First Amendment retaliation claim is well-established and inquires:

> (1) whether the public employee was speaking as a citizen upon a matter of public concern or as an employee about a matter of personal interest; (2) whether the employee's interest in speaking upon the matter of public concern outweighed the government's interest in providing effective and efficient services to the public; and (3) whether the employee's speech was a substantial factor in the employee's termination decision.

McVey v. Stacy, 157 F.3d 271, 277-78 (4th Cir. 1998). In Garcetti, the Supreme Court refined the test, making clear that "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." 547 U.S. at 421 (emphasis added). Thus, in the wake of Garcetti, the inquiry whether an employee was speaking as a citizen is logically independent from the inquiry whether the employee was speaking on a matter of public concern. See Lane, 134 S. Ct. at 2378–81 (determining first that the employee's speech was "speech as a citizen," id. at 2378, before turning to whether his speech was "speech on a matter of public concern," id. at 2380).

Chief Cook and Town Manager Bralley concede that the law was clearly established by December 2011 that the officers, when complaining about criminal misconduct in their department, were speaking on a matter of public concern and that their interest in so speaking outweighed the Police

Department's interest in providing effective and efficient services to the public. They contend, however, that the officers' "duties and obligations as law enforcement officers included the reporting and investigation of misconduct," and therefore that the officers "were speaking as employees rather than citizens" when they complained to the Governor's Office about such misconduct in the Police Department. Recognizing the officers' argument to the contrary, Chief Cook and Town Manager Bralley maintain that, "[a]t a minimum," the state of the law in this circuit was unsettled as to whether officers, complaining as these officers did, speak as employees or as citizens.

I agree with the defendants that, as of December 2011, the law was not clearly established -- nor, indeed, has it been at any time before now -- that a police officer complaining to the Governor's Office of departmental corruption involving his police chief speaks as a citizen. Given the lack of relevant authority, it was entirely reasonable for Chief Cook and Town Manager Bralley to have concluded that the officers were complaining as employees in the course of their official duties when making their complaints.

In deciding otherwise, the majority relies on two decisions -- Andrew v. Clark, 561 F.3d 261 (4th Cir. 2009), and Durham v. Jones, 737 F.3d 291 (4th Cir. 2013). But those cases only go so far as to conclude unremarkably that exposing corruption within a police department is a matter of public concern -- a proposition with which Chief Cook and Town Manager Bralley agree. Neither case addresses the independent inquiry of whether the officers were

speaking as citizens when reporting departmental corruption for investigation.

In Andrew, a police officer alleged that his First Amendment rights were violated when he was fired for leaking to the press an internal memorandum that he had written regarding whether the police department properly handled an investigation of an officer-involved shooting. Andrew, 561 F.3d at 263. In an apparent effort to insulate his claim from the argument that he spoke as an employee, Andrew alleged in his complaint (1) that he "was not under a duty to write the memorandum as part of his official responsibilities"; (2) that "[h]e had not previously written similar memoranda after other officer-involved shootings"; (3) that he "would not have been derelict in his duties . . . , nor would he have suffered any employment consequences, had he not written the memorandum"; (4) that the police commissioner characterized the memorandum as "unauthorized" and ignored it; and (5) that he was not responsible for investigating officer-involved shootings and did not work with or have control over the units that bore that responsibility. Id. at 264. The defendants replied that because Andrew was the district commander, he was required to write reports for all shootings within his district. Id. at 266-67 & n.1. In reversing the district court's grant of qualified immunity, we concluded that "the question whether the Andrew Memorandum was written as part of his official duties was a disputed issue of material fact that [could not] be decided on a motion to dismiss pursuant to Rule 12(b)(6)." Id. at 267 (emphasis added); see also id. ("At this stage of the proceedings in this matter, we must conclude that there is 'room for serious debate' regarding whether Andrew had

an official responsibility to submit a memorandum . . ."). Thus, in the context of that factual dispute, Andrew provides no guidance regarding when a police officer speaks as a citizen rather than as an employee.

Durham is no different. There, we affirmed the district court's denial of qualified immunity to a sheriff who fired his deputy for sending a packet of materials describing corruption within the sheriff's office to the media and various state officials. Durham, 737 F.3d at 294. In doing so, we focused on whether the deputy sheriff spoke on a matter of public concern and on whether his interest in speaking outweighed his employer's interest in maintaining an effective work environment. Id. at 298-304. We said nothing about whether the deputy sheriff had been speaking as a citizen, an issue that the sheriff never raised in his brief. See Br. of Appellant, Durham, 737 F.3d 291 (No. 12-2303), 2013 WL 551533 (arguing exclusively that the materials did not pertain to a matter of public concern and that the interest of the sheriff's office in maintaining an efficient and effective law enforcement agency outweighed any interest that the deputy sheriff claimed in disseminating the materials).

Not only did Andrew and Durham not address whether police officers speak as citizens when reporting corruption to a state agency, but the facts of those cases also render them decidedly distinguishable from the case before us. Whereas the terminated officers in those cases had leaked information to members of the media, either exclusively (Andrew) or in tandem with a distribution to a broad spectrum of public officials

(Durham), the terminated officers in this case reported the corruption exclusively to a single governmental agency that could have been thought to have supervisory or investigatory responsibility over the Police Chief and the Town Manager. In light of this factual distinction, it can hardly be said that existing precedent "placed the . . . constitutional question beyond debate," al-Kidd, 131 S. Ct. at 2083 (emphasis added).

The majority maintains that it would be "perverse" to hold that employee speech regarding serious governmental misconduct is protected when made publicly but not when made to the Governor's Office. Ante, at 25 (quoting Garcetti, 547 U.S. at 427 (Stevens, J., dissenting)) (internal quotation marks omitted). Maybe so, but that is not the proper inquiry. Rather, the question is whether Durham and Andrew made it such that a reasonable official would have understood that the individual defendants' conduct violated the plaintiffs' First Amendment rights. See Owens v. Balt. City State's Attorney's Office, 767 F.3d 379, 398 (4th Cir. 2014), cert. denied, No. 14-887, 2015 WL 275612 (U.S. Apr. 27, 2015). To the extent that our prior case law suggested that a law-enforcement officer speaks as a citizen when reporting corruption and misconduct to the media for publication, it would not necessarily have been apparent to a reasonable official that such an officer speaks as a citizen when making such a report to a governmental agency for investigation.

"Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." Maciariello v. Sumner, 973 F.2d 295, 298 (4th Cir. 1992). Here, not only was there no authority in this circuit holding that the defendants' conduct was

unlawful, but also there was no precedent regarding when a police officer speaks as a citizen rather than as an employee. Thus, Chief Cook and Town Manager Bralley were left to speculate about and guess whether terminating the employment of Officers Hunter, Donathan, and Medlin would violate their First Amendment rights. Because those public officials are not liable for incorrect guesses, I would grant them qualified immunity and reverse the district court's ruling denying that immunity.

FILED: January 22, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

KENNETH L. HUNTER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	1:12-CV-333
	)	
TOWN OF MOCKSVILLE, NORTH CAROLINA, et al.,	)	
	)	
Defendants.	)	

ORDER

This matter is before the Court on Plaintiffs' Supplemental Motion to Alter or Amend Judgment and Motion for Relief from Judgment. (Doc. 103.) The plaintiffs contend that this Court's previous decision granting qualified immunity to defendants Town Manager Christine Bralley and Chief Robert Cook should be revisited and revised in light of the Fourth Circuit's decision in *Durham v. Jones*, 737 F.3d 291 (4th Cir. 2013).

The Court previously held that the cases addressing whether an employer can or cannot discharge law enforcement officers for anonymous off-duty reporting of apparent corruption were ambiguous and gave the defendants the benefit of qualified immunity. *Hunter v. Town of Mocksville*, No. 12-CV-333, 2013 WL 5726316, at *9 (M.D.N.C. Oct. 21, 2013); (Doc. 95 at 15-16.) The Fourth Circuit has now explicitly held that "it was clearly

established in the law of this Circuit in September 2009 that an employee's speech about serious governmental misconduct, and certainly not least of all serious misconduct in a law enforcement agency, is protected."[1] *Durham*, 737 F.3d at 303-04 (internal citation omitted). The Fourth Circuit expressly relied on *Andrew v. Clark*, 561 F.3d 261, 269 (4th Cir. 2009), which this Court, in its previous opinion, acknowledged was in plaintiffs' favor. *Hunter*, 2013 WL 5726316, at *9; (Doc. 95 at 16.)

Ms. Bralley and Chief Cook note that *Durham* did not address the *Garcetti* issue of whether the plaintiffs were speaking as citizens or as employees and contend that *Durham* is not relevant to whether the law on the *Garcetti* issue in this case was "clearly established."[2] But that argument assumes too much. There are now two reported Fourth Circuit cases that weigh in favor of the plaintiffs' position and none that weigh in favor of immunity for Chief Cook and Ms. Bralley. That there are cases in other circuits which might give rise to some uncertainty does not help the defendants; the issue is whether the law is clearly established in this circuit. *See Wilson v. Layne*, 141 F.3d 111, 114 (4th Cir. 1998) (en banc).

Moreover, there are significant factual differences between this case and the out-of-circuit cases the Court earlier viewed as establishing a lack of clarity about the law. Those cases, *Anemone v. Metro.*

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[1] The plaintiffs here were terminated in December 2011.

[2] Defendants also contend that they "never even argued" at summary judgment that the "plaintiffs' speech would cause disruption within the MPD." (Doc. 106 at 5.) This is inaccurate. (*See* Doc. 38 at 16-17.)

Transp. Auth., 629 F.3d 97, 115-17 (2d Cir. 2011), and *Morales v. Jones*, 494 F.3d 590, 597-98 (7th Cir. 2007), involved reports to a prosecutor's office with whom the plaintiff law enforcement officers had regular contact. Here, plaintiffs communicated their concerns to the NAACP and to the Governor. Mocksville law enforcement officers do not routinely work with the Governor, who is completely outside normal law enforcement channels. Indeed, there is no evidence that at the time of the events in question, Ms. Bralley, Chief Cook, or anyone associated with them said or did anything which would even indirectly indicate that they considered the phone calls to the Governor's office to have been part of the plaintiffs' jobs.

The Court concludes that its earlier determination that the plaintiffs' First Amendment rights were not clearly established must be revisited and, in light of the clear language in *Durham*, set aside. Since final judgment has not been entered as to any party, much less all parties, the Court may revise its decision "at any time," pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

For the reasons stated above, it is **ORDERED** that:

1. Plaintiffs' Supplemental Motion to Alter or Amend Judgment and Motion for Relief from Judgment, (Doc. 103), is **GRANTED**;

2. This Court's order entered October 21, 2013, (Doc. 95), is **VACATED** to the extent it granted Defendants' Motion for Summary Judgment as to defendants Christine Bralley and Robert Cook; and

3. Defendants' Motion for Summary Judgment, (Doc. 37), is **DENIED** as to Christine Bralley and Robert Cook and plaintiffs' § 1983 and punitive damages claims against Christine Bralley and Robert Cook may proceed to trial.

This the 22nd day of January, 2014.

FILED: October 21, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

KENNETH L. HUNTER, RICK A. DONATHAN, and JERRY D. MEDLIN	)	
Plaintiffs,	)	
v.	)	1:12-CV-333
TOWN OF MOCKSVILLE, NORTH CAROLINA, ROBERT W. COOK, in his official capacity as Administrative Chief of the Mocksville Police Department and in his individual capacity; CHRISTINE W. BRALLEY, in her official capacity as Town Manager of the Town of Mocksville and in her individual capacity,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Catherine C. Eagles, District Judge.

The Court previously entered Orders, (Docs. 71, 88), ruling on Defendants‟ Motion for Summary Judgment, (Doc. 37), and Plaintiffs‟ Motion to Alter or Amend Judgment and for Relief from Judgment. (Doc. 80.) In those Orders, the Court indicated it

would file an opinion explaining its rulings as time permitted. For the reasons stated herein, the plaintiffs have presented evidence sufficient to raise a disputed question of material fact as to whether their First Amendment rights were violated. Despite this, the individual defendants are entitled to qualified immunity on the 42 U.S.C. § 1983 claims, and there is no evidence the Town had a policy of retaliation, so all § 1983 claims will be dismissed. The related state law claims survive and may proceed to trial.

FACTS

Viewed in the light most favorable to the plaintiffs, the evidence shows the following: The plaintiffs, Kenneth Hunter, Rick Donathan, and Jerry Medlin, were police officers with the Mocksville Police Department. Assistant Chief Hunter had worked for the MPD since 1985, Lieutenant Donathan since 1998, and Detective Medlin since 2006. (Doc. 43-1 at ¶¶ 4-5; Doc. 43-2 at ¶¶ 3-4; Doc. 43-3 at ¶¶ 3, 5.) Over the years, the plaintiffs developed a range of concerns about defendant Police Chief Robert Cook and his leadership of the MPD. Specifically, the plaintiffs observed Chief Cook drinking alcohol publicly, excessively, and while in uniform, and they feared that this was jeopardizing the MPD"s credibility in the community, (Doc. 43-1 at ¶¶ 12-16; Doc. 43-2 at ¶¶ 9-10; Doc. 43-3 at ¶¶ 10-13); believed that Chief Cook was violating the law by driving a police car with blue lights flashing and otherwise engaging in activity that indicated he was a certified law enforcement officer, even though he had never been certified, (Doc. 43-1 at ¶ 17; Doc. 43-2 at ¶¶ 11-12; Doc. 43-3 at ¶¶ 14-15); suspected that Chief Cook

and Assistant Chief Daniel Matthews were mismanaging MPD and Davie County Law Enforcement Association funds and in some cases improperly using those funds for personal uses, (Doc. 43-1 at ¶¶ 18-19; Doc. 43-3 at ¶¶ 16-18); felt that Chief Cook's failure to discipline other officers' serious misconduct undermined morale within the MPD and posed a threat to public safety, (Doc. 43-1 at ¶ 49; Doc. 43-2 at ¶¶ 14-16; Doc. 43-3 at ¶¶ 20-23); and perceived racial discrimination in the MPD. (Doc. 43-1 at ¶¶ 9, 15; Doc. 45-2 at 10-11).

Over the years, each of the three plaintiffs raised their concerns about Chief Cook and Assistant Chief Matthews with the Mocksville Town Manager, defendant Christine Bralley. (Doc. 37-2 at ¶¶ 8-9; Doc. 43-1 at ¶¶ 22, 28; Doc. 43-2 at ¶ 17; Doc. 43-3 at ¶ 24.) Assistant Chief Hunter did not notice any improvement on the part of Chief Cook or Assistant Chief Matthews, and he worried about potential retaliation based on how Chief Cook had reacted to other individuals who questioned his policies or management. (Doc. 43-1 at ¶¶ 22, 28.) Lieutenant Donathan raised his concerns with Town Manager Bralley but was soon after criticized by Assistant Chief Matthews about one of the concerns he had raised. (Doc. 43-2 at ¶ 18.) A month after Detective Medlin sent Town Manager Bralley a letter detailing his concerns about the MPD, Chief Cook demoted him to the position of patrol officer. (Doc. 43-3 at ¶ 24.) Although Town Manager Bralley later overruled Chief Cook"s decision, Detective Medlin came to believe that raising issues internally or with Town Manager Bralley could result in retaliation. (*Id.*) Lieutenant Donathan concluded that raising concerns about the MPD with Town Manager

Bralley might result in retaliation from his supervisors. (Doc. 43-2 at ¶ 18.)

In December 2011, five MPD officers, including the three plaintiffs, met privately and discussed their shared concern that Chief Cook and Deputy Assistant Chief Matthews were putting their personal interests ahead of the department. (Doc. 43-1 at ¶ 29; Doc. 43-2 at ¶ 31; Doc. 43-3 at ¶ 28.) At the meeting, the plaintiffs decided to seek an investigation by state officials of corruption within the MPD. (Doc. 43-1 at ¶ 30; Doc. 43-2 at ¶ 32; Doc. 43-3 at ¶ 28.) According to Assistant Chief Hunter, the plaintiffs made this decision because they "were ashamed of what the MPD had become in the community, and truly felt, as citizens of the community, that Mocksville deserved an effective police force that served everyone equally." (Doc. 43-1 at ¶ 31.)

The plaintiffs set up a meeting with local NAACP representatives, who, after hearing the plaintiffs" concerns about the MPD, advised them to contact a state agency. (*Id.* at ¶ 32; Doc. 43-2 at ¶ 33; Doc. 43-3 at ¶ 29; Doc. 43-6 at ¶¶ 3, 6; Doc. 43-7 at ¶¶ 3, 6.) Assistant Chief Hunter had his daughter buy a disposable cell phone ("Tracfone") for him. (Doc. 43-1 at ¶ 33.) On December 14, 2011, the plaintiffs used the Tracfone to call the North Carolina Attorney General's Office but were told to refer their complaints to local authorities. (*Id.* at ¶¶ 35-36; Doc. 43-2 at ¶ 35; Doc. 43-3 at ¶ 32; *see also* Doc. 43-12 at ¶ 4(c) (stating Tracfone made contact with Attorney General's Office on December 15, 2011).) Because Chief Cook had close relationships with local authorities, the plaintiffs chose instead to contact the North Carolina Governor's Office, and again they

used the Tracfone. (Doc. 43-1 at ¶¶ 36-37; Doc. 43-2 at ¶¶ 35-36; Doc. 43-3 at ¶¶ 32-33; Doc. 43-12 at ¶ 4(c).) The plaintiffs briefly conveyed many of their concerns to someone at the Governor's Office without revealing their identities or indicating which police chief, police department, or town was involved. (Doc. 43-1 at ¶ 37; Doc. 43-2 at ¶ 37; Doc. 43-3 at ¶ 33.) They provided their Tracfone number and were told that someone would call them back. (Doc. 43-1 at ¶ 38; Doc. 43-2 at ¶ 38; Doc. 43-3 at ¶ 34.) Later that day, a different person from the Governor's Office called the Tracfone, which Lieutenant Donathan answered, and the Governor"s representative offered to request an investigation by the State Bureau of Investigation on the plaintiffs" behalf. (Doc. 43-2 at ¶ 39.) Lieutenant Donathan gave him permission to do so and identified the MPD as the police department in question. (*Id.*)

The following week, Detective Medlin observed SBI Agent D.J. Smith in the MPD offices. (Doc. 43-3 at ¶ 35.) Agent Smith was the local SBI representative in the Mocksville area. (Doc. 43-1 at ¶ 41; Doc. 48-3 at 3.) The plaintiffs had worked with Agent Smith and knew he was close to Chief Cook and Deputy Assistant Chief Matthews. (Doc. 43-1 at ¶ 41.) Detective Medlin observed Agent Smith show Deputy Assistant Chief Matthews a piece of paper and perceived that the two men were looking for Chief Cook. (Doc. 43-3 at ¶ 35.) Soon thereafter, the plaintiffs received a message on the Tracfone from Agent Smith, who stated he was following up on their request for an investigation. (Doc. 43-1 at ¶ 40; Doc. 43-2 at ¶ 42; Doc. 43-3 at ¶ 37; Doc. 43-12 at ¶ 4(d).)

On or about December 20, 2011, Agent Smith contacted Captain Christopher Shuskey of the Davie County Sheriff's Office[1] and told him that an anonymous complaint about Chief Cook had been made to the Governor"s Office. (Doc. 49-1 at 3-7.) Agent Smith asked Captain Shuskey to check whether the phone number used to make that complaint belonged to anyone listed in the Sheriff's Office's records. (*Id.* at 5-7; Doc. 48-3 at 16-17.) Captain Shuskey found only an old listing of questionable value associating the number with a Hispanic female. (Doc. 48-3 at 16; Doc. 49-1 at 6-7.) Captain Shuskey contacted Officer Nelson Turrentine of the MPD and asked Officer Turrentine to run the number through the MPD"s records. (Doc. 49-1 at 7.) Officer Turrentine said he did not recognize the number but thought the name listed on the old record might be that of a Hispanic female who had recently been with a relative of Assistant Chief Hunter when the relative was arrested. (Doc. 49-1 at 4; Doc. 48-5 at 40.)

Both Lieutenant Donathan and Detective Medlin had placed calls to and received calls from the Tracfone using their MPD-issued cell phones, (Doc. 43-2 at ¶ 43), and this was reflected on the MPD"s Sprint billing records. (Doc. 43-12 at ¶ 7.) On December 27, 2011, Town Manager Bralley contacted Sprint customer service for help in setting up an online account; she mentioned that she wanted to check the call records for a phone number that she did not identify. (Doc. 43-14 at 10.) Around this time, before any of the plaintiffs were terminated, Town Manager Bralley notified Chief

[1] Mocksville is in Davie County.

Cook that Lieutenant Donathan had used his MPD-issued cell phone for thirty-seven hours in a month. (Doc. 48 at 43.) The Sprint invoice for the billing period ending on December 23, which was issued on December 27 and included the phone calls between the plaintiffs and the Tracfone, listed Lieutenant Donathan as having used his cell phone for thirty-six hours and fifty-two minutes. (Doc. 43-12 at ¶ 6.)

On December 29, 2011, Chief Cook fired each of the plaintiffs. (Doc. 43-1 at ¶ 4 & p. 26; Doc. 43-2 at ¶ 3 & p. 25; Doc. 43-3 at ¶ 3 & p. 20; Doc. 48-1 at 20-21.) Termination letters handed to each plaintiff indicate the reasons were related to performance. (Doc. 43-1 at 26; Doc. 43-2 at 25; Doc. 43-3 at 20.) The plaintiffs have presented evidence that the performance-related reasons given were false and that none had been given any notice of any performance issues before they were fired. (Doc. 43-1 at ¶¶ 44-51; Doc. 43-2 at ¶¶ 48-50; Doc. 43-3 at ¶¶ 40-42.) Lieutenant Donathan discussed his termination with Town Manager Bralley, who indicated to him that she approved of Chief Cook's decision. (Doc. 43-2 at ¶ 46.) In an after-the-fact memo outlining all the performance issues with the plaintiffs, Chief Cook expressly mentioned the plaintiffs‟ telephone call to the Governor. (Doc. 51-6 at 3.)

The firings were the first by Chief Cook since Town Manager Christine Bralley hired him in 2005 and delegated to him the authority to hire and fire MPD employees. (*See* Doc. 37-2 at ¶ 4; Doc. 44 at 2; Doc. 48-1 at 36, 40.) In other cases involving egregious officer misbehavior, including cases of illegal drug use and criminal activity, the officers

received lesser punishments or were allowed to voluntarily resign. (Doc. 48-1 at 36.)

ANALYSIS

I. The First Amendment Claim

The plaintiffs contend that Chief Cook, Town Manager Bralley, and the Town of Mocksville violated their First Amendment rights by retaliating against them for contacting the Governor's office about corruption and misconduct by the police chief and others in the department. (Doc. 1 at 24-25.) The defendants first contend that their evidence shows the plaintiffs were terminated for competence issues and that the plaintiffs have not offered sufficient proof that they were fired in retaliation for their speech.

The plaintiffs have offered evidence that before they contacted the Governor's office, there was no indication that any of their long careers with the MPD were in jeopardy. (*See* Doc. 43-1 at ¶¶ 23-24; Doc. 43-2 at ¶¶ 4, 28; Doc. 43-3 at ¶¶ 3, 5-6.) The plaintiffs‟ evidence also shows that Chief Cook never before fired an officer, even in cases of egregious misbehavior, (Doc. 48-1 at 36), but that Chief Cook once tried to retaliate against Detective Medlin for filing a complaint with Town Manager Bralley. (Doc. 43-3 at ¶ 24.) The evidence about Agent Smith's investigation into the anonymous call to the Governor's office would allow a jury to infer that the call and the Tracfone number had come to the attention of Town Manager Bralley and Chief Cook; that Town Manager Bralley had been reviewing the Town‟s cell phone records as a result; and that she had discovered the connection between Detective Medlin and Lieutenant Donathan to the Tracfone

number. On December 29, 2011, all three plaintiffs were fired in succession for performance-related reasons which had never been mentioned to them before and which are either false or unfounded. (Doc. 43-1 at ¶ 42; Doc. 43-2 at ¶ 44; Doc. 43-3 at ¶ 38.) The plaintiffs were terminated approximately two weeks after their call to the Governor, and Chief Cook mentioned the call to the Governor's office in an after-the-fact memo about the plaintiffs. (Doc. 51-6 at 3.)

The defendants have denied that the plaintiffs were fired in retaliation for calling the Governor's office, and they contend that the plaintiffs need more direct evidence of retaliation. This argument is misplaced. The fact that the plaintiffs' evidence is circumstantial does not mean it is insufficient. The law gives no greater weight to direct evidence over circumstantial evidence, and circumstantial evidence is frequently relied on in employment retaliation or discrimination cases because often only the defendants know the true motivation for their conduct. *See, e.g.*, *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1459 & n. 12 (7th Cir. 1994) (holding timing of discharge decision in relation to protected expression supported inference of retaliation; defendants' self-serving denials not conclusive).

The plaintiffs have offered sufficient evidence to support a jury finding that the Town fired them for reporting to the Governor's office that the Mocksville Police Department was experiencing corruption and other issues. While the Town has offered evidence that the plaintiffs were fired for performance issues, that evidence does not entitle them to summary judgment. It merely creates a disputed question of material fact which a jury must decide. The

defendants are not entitled to summary judgment on this basis.

The defendants next contend that the plaintiffs are not entitled to First Amendment protection for their communications to the Governor's office. They contend they could restrict the plaintiffs' speech under the circumstances of this case and specifically rely on cases that allow public employers to restrict speech "that owes its existence to a public employee's professional responsibilities." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

"The First Amendment protects not only the affirmative right to speak, but also the 'right to be free from retaliation by a public official for the exercise of that right.'" *Adams v. Univ. of N.C.-Wilmington*, 640 F.3d 550, 560 (4th Cir. 2011) (quoting *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 685 (4th Cir. 2000)). On the one hand, "public employees do not surrender all their First Amendment rights by reason of their employment," *Garcetti*, 547 U.S. at 417, but on the other hand, the government "as an employer, undoubtedly possesses greater authority to restrict the speech of its employees than it has as sovereign to restrict the speech of the citizenry as a whole." *Urofsky v. Gilmore*, 216 F.3d 401, 406 (4th Cir. 2000).

Thus, courts must balance the interests of a public employee, "'as a citizen, in commenting upon matters of public concern'" against those of the government, "'as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Adams*, 640 F.3d at 560 (quoting *Connick v. Myers*, 461 U.S. 138, 142 (1983)). To

balance those interests in the context of a retaliation claim, courts undertake a three-step inquiry:

> (1) whether the public employee was speaking as a citizen upon a matter of public concern or as an employee about a matter of personal interest; (2) whether the employee's interest in speaking upon the matter of public concern outweighed the government's interest in providing effective and efficient services to the public; and (3) whether the employee's speech was a substantial factor in the employee's adverse employment decision.

Adams, 640 F.3d at 560-61 (quoting *McVey v. Stacy*, 157 F.3d 271, 277-78 (4th Cir. 1998)) (internal alteration omitted). In the first step of this inquiry, there are essentially two questions to ask: whether the employee was speaking as a citizen, and whether the speech was a matter of public concern. *Garcetti*, 547 U.S. at 419-21.

Corruption and malfeasance in a police department are, without question, matters of public concern. *Jurgensen v. Fairfax Cnty.*, 745 F.2d 868, 879 (4th Cir.1984) (stating that speech that attempts to bring to light actual or potential wrongdoing or breach of public trust generally implicates matters of public concern); *see also Garcetti*, 547 U.S. at 425 ("Exposing governmental inefficiency and misconduct is a matter of considerable significance."). The defendants do not contend otherwise. Therefore, the Court concludes that the plaintiffs spoke on matters of public concern when they contacted the Governor's office. As noted *supra*, the plaintiffs have also offered sufficient evidence to establish that the speech was a substantial factor in

their termination. The Court will turn to the remaining two aspects of the inquiry: whether the speech was "pursuant to official duties" and whether the Town's interest in regulating its employees' speech outweighs the employees" interests.

Even when speech is about a topic of public concern, public employees who make statements "pursuant to their official duties" are not speaking as citizens for First Amendment purposes and their speech does not warrant constitutional protection. *Garcetti*, 547 U.S. at 421; *see Mils v. City of Evansville*, 452 F.3d 646, 647-48 (7th Cir. 2006) ("*Garcetti* . . . holds that before asking whether the subject-matter of particular speech is a topic of public concern, the court must decide whether the plaintiff was speaking 'as a citizen' or as part of her public job.") Because the parties in *Garcetti* agreed that the speech at issue was made pursuant to the plaintiff's official duties, the Court had "no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." *Garcetti*, 547 U.S. at 424. The Court did note that "[t]he proper inquiry is a practical one" that should focus on "the duties an employee actually is expected to perform," not on formal job descriptions. *Id.* at 424-25.

Before *Garcetti*, the Fourth Circuit held, in reliance on *Connick*, 461 U.S. at 148 n.7, that "whether speech is that of a private citizen addressing a matter of public concern is a question of law for the court." *Urofsky*, 216 F.3d at 406. Since *Garcetti*, courts have uniformly continued to treat the "public concern" question as one of law, but the circuits have split over whether the determination of

whether a public employee's speech was made as a citizen or as an employee pursuant to official duties is a question of law or a mixed question of law and fact. *See* Sarah L. Fabian, *Garcetti v. Ceballos: Whether an Employee Speaks as a Citizen or as a Public Employee – Who Decides?*, 43 U.C. Davis L. Rev. 1675, 1692 (2010). The Fourth Circuit has not yet taken an authoritative position on this issue.

In *Andrew v. Clark*, 561 F.3d 261 (4th Cir. 2009), decided at the Rule 12(b)(6) stage, the Fourth Circuit noted the factual nature of this kind of question, but did not address who would ultimately resolve the question. *Id.* at 267-68. However, in *Bevis v. Bethune*, 232 F. App"x 212, 215-16 (4th Cir. 2007), and *Shenoy v. Charlotte-Mecklenburg Hosp. Auth.*, 521 F. App'x 168, 172-73 (4th Cir. 2013), the Fourth Circuit appears to have treated it as a question of law appropriate for resolution at summary judgment, and several district courts have taken the same approach. *See, e.g.*, *Miller v. Hamm*, Civil No. CCB-10-243, 2011 WL 9185, at *4 (D. Md. Jan. 3, 2011); *Jackson v. Alleghany Cnty.*, No. 7:07CV0417, 2008 WL 3992351, at *9-10 (W.D. Va. Aug. 28, 2008). In this case, the answer is the same regardless of whether it is viewed as a question of law or as a mixed question of law and fact.

There is no evidence before the Court that the Governor's office had any regular interaction with MPD police officers for purposes of investigating and enforcing criminal laws and no evidence of any MPD policy, practice, or protocol suggesting MPD officers should or could request the Governor to investigate crimes in Mocksville generally or under specific circumstances. The defendants have not pointed to anything in the Mocksville Police Manual or

elsewhere which imposes such a specific duty on its officers or says anything about contacting the Governor if the police chief was engaged in improper conduct.

Rather, all of the evidence indicates the plaintiffs intended to act and did act as private citizens. The plaintiffs first met in private about perceived misconduct and corruption in the MPD. (Doc. 43-1 at ¶ 29.) They then met with local NAACP representatives, a private, nongovernmental entity with no law enforcement responsibilities, for guidance on addressing the issue. (*Id.* at ¶ 32.) To avoid retaliation and to keep their complaints separate from their affiliation with the MPD, the plaintiffs used a disposable phone to contact the Governor's office. (*Id.* at ¶¶ 33, 37.) In their first call with the Governor's office, the plaintiffs did not identify themselves or the MPD. (*Id.* at ¶ 37.) Only after someone in the Governor's office offered to request an SBI investigation did the plaintiffs say that their concerns were about the MPD. (Doc.43-2 at ¶ 39.) The plaintiffs then awaited SBI action. (Doc. 43-1at ¶ 38.) The plaintiffs thus acted in private and took numerous steps to dissociate themselves from the MPD and maintain their anonymity.

This is not a case like those cited by the defendants where police officers were retaliated against for reporting issues to outside agencies with which they had regular working relationships. *See, e.g., Anemone v. Metro. Transp. Auth.*, 629 F.3d 97, 116 (2d Cir. 2011) (plaintiff had regular contacts with district attorney's office). Nor is this case like *Cheek v. City of Edwardsville*, 514 F. Supp. 2d 1220 (D. Kan. 2007), where the plaintiffs had experience

and protocols for addressing internal corruption and misconduct, and considered it part of their official duties. *See id.* at 1225-26, 1231 (plaintiffs testified that they had investigated internal police misconduct in the past in cooperation with outside agencies, knew which agencies to work with, and that such work was part of their official duties).

The defendants' contention that the plaintiffs acted pursuant to their official duties because all sworn police officers have a duty to enforce North Carolina's criminal law, (Doc. 38 at 12), is inconsistent with *Garcetti*'s command that courts determine this issue by engaging in a practical inquiry. Obviously police officers have a duty to enforce the law, but that does not mean they have a duty to call the Governor and report criminal offenses or other misconduct by the police chief. The Police Manual's general directives to "take appropriate action on the occasion of a crime," (Doc. 57-7 at p. 17, ¶ 117), to "cooperate with all Law Enforcement agencies," (*id.* at p. 27, ¶ 307), to "detect and arrest violators of the law," (*id.* at 26, ¶ 303), and to "enforce all Federal, State, and City laws," (*id.*), do not impose a duty on police officers to contact the Governor about criminal conduct in Mocksville. Moreover, these general obligations are not dispositive.

> 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. As noted *supra*, Defendants have offered no evidence to suggest the plaintiffs were actually expected to contact the Governor's office to seek assistance with apparent misconduct and corruption at high levels in the MPD.[2]

Finally, the plaintiffs were not exclusively reporting criminal activity. (Doc. 43-1 at ¶¶ 31, 37.) Although some of their concerns involved potentially criminal activity, many involved only malfeasance which did not rise to the level of criminal conduct or were otherwise related to the plaintiffs‟ concern that Chief Cook's and Assistant Chief Matthew's activities were lowering the MPD's reputation in the community. (*Id.*) For example, the plaintiffs alerted the Governor's office to perceived racial discrimination in the MPD. (Doc. 43-1 at ¶ 37; Doc. 43-2 at ¶ 37; Doc. 43-3 at ¶ 33.) While the alleged discrimination may violate certain laws, reporting it to the NAACP and the Governor's office cannot be construed as criminal law enforcement.

The plaintiffs‟ evidence establishes without contradiction that they were acting as concerned citizens, not police officers enforcing the criminal

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[2] The Manual directs officers who know of other "members or employees violating laws, ordinances, rules of the department or disobeying orders shall report same in writing to the Chief of Police via official channes [sic]." (Doc. 57-7 at 39, ¶ 363.) The defendants have not directed the Court's attention to anything in the Manual, which is over 75 pages long, which tells an officer what to do when the Police Chief himself is violating the law and department policy.

law. The Court therefore concludes that the plaintiffs acted as citizens, not as employees pursuant to official duties, when they contacted the Governor's office.

The Court must next consider whether the plaintiffs" "interest in speaking upon the matter of public concern outweighed the government's interest in providing effective and efficient services to the public." *Adams*, 640 F.3d at 560-61 (quotation marks omitted). There are numerous factors relevant to this analysis, but the core consideration is "the extent to which [the plaintiff's speech] disrupts the operation and mission of the agency." *McVey*, 157 F.3d at 278. Although police departments receive "greater latitude" in this analysis, the balance does not tip automatically in their favor. *Maciariello v. Sumner*, 973 F.2d 295, 300 (4th Cir. 1992). The defendants have not presented any evidence that the plaintiffs" private report to state authorities caused or was likely to cause disruption in the MPD.[3] The defendants rely on *Maciariello*, but the facts of that case are distinguishable. In *Maciariello*, the plaintiffs conducted their own "devious" and unauthorized internal investigation into the police department, and the Fourth Circuit found that in such cases "the potential for disruption is self-evident." *Id.* at 297, 300. In contrast, the plaintiffs here placed a single anonymous call to the Governor's office, awaited a response, then accepted the Governor's office's offer to initiate an SBI investigation. (Doc. 43-1 at ¶¶ 37-38.)

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[3] Indeed, such an argument is inconsistent with the defendants" contention that the plaintiffs had a duty to report the Chief's criminal conduct to the Governor.

If the plaintiffs‟ conduct in this case is sufficient to find the balance favors the MPD, it is difficult to imagine any situation where police officers who report internal misconduct and corruption to someone outside the department would receive any First Amendment protection. Given the limited nature of the plaintiffs‟ conduct and the defendants‟ lack of evidence on this issue, the Court concludes that plaintiffs‟ interest in rooting-out corruption and misconduct in the MPD outweighs the MPD‟s interest in avoiding the limited risk of any associated disruption. The public interest in exposing corruption and malfeasance in law enforcement also supports First Amendment protection.

Because the plaintiffs have offered substantial evidence that their speech on a matter of public concern was a substantial factor leading to their discharge, there is no evidence they were acting in their official capacities, and the Town has not established that its interests outweigh the plaintiffs' interests, the defendants are not entitled to summary judgment on the § 1983 First Amendment claims.

II. Qualified Immunity for § 1983 Claims

Chief Cook and Town Manager Bralley contend they are entitled to qualified immunity under § 1983 because their discretionary conduct did not violate "[c]learly established . . . constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To be clearly established, "the contours of the right must have been so conclusively drawn as to leave no doubt that the challenged action was unconstitutional."

Edwards v. City of Goldsboro, 178 F.3d 231, 251 (4th Cir. 1999) (quotation marks omitted). In the First Amendment context, rights will "only infrequently" be clearly established. *McVey*, 157 F.3d at 277.

The plaintiffs contend it is clear that an employer cannot discharge law enforcement officers for anonymous off-duty reporting of apparent corruption in their police department to outside agencies, or for seeking an investigation of such malfeasance, where such reporting does not cause any disruption. (Doc. 81 at 5-6.) Based on this Court's review, however, analogous cases are ambiguous. *Compare Anemone*, 629 F.3d at 115 (holding MTA officer's report of suspected corruption to district attorney was not protected speech because contacts were made pursuant to official duties), *and Morales v. Jones*, 494 F.3d 590, 597-98 (7th Cir. 2007) (holding officers' report of supervisors' possible criminal conduct to district attorney was not protected speech because officers had duty to report all potential crimes and thus speech was pursuant to official duties), *with Andrew*, 561 F.3d at 266-68 (concluding officer stated claim under First Amendment where he alleged retaliation for releasing memo to press and threatening to sue department), *and Walters v. Cnty. of Maricopa*, No. CV 04-1920-PHX-NVW, 2006 WL 2456173, at *14 (D. Ariz. Aug. 22, 2006) (holding officer's speech was entitled to First Amendment protection because whistleblowing was not within officer's official duties).

This ambiguity in authorities precludes finding that the plaintiffs‟ rights were clearly established. Therefore, Chief Cook and Town Manager Bralley are entitled to qualified immunity, and the plaintiffs‟ § 1983 claims against them are dismissed.

III. Municipal Liability

The plaintiffs seek to hold the Town liable for Chief Cook's and Town Manager Bralley's retaliatory actions in this case. The Town may be held liable under § 1983 only if the plaintiffs can demonstrate that their injury stems from a policy or custom of the Town. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). "To hold a municipality liable for a single decision (or violation), the decisionmaker must possess „final authority to establish municipal policy with respect to the action ordered.'" *Love-Lane v. Martin*, 355 F.3d 766, 782 (4th Cir. 2004) (citing *Pembaur v. Cincinnati*, 475 U.S. 469, 481 (1986)).

Whether an individual has final policymaking authority is a question of state law to be resolved by the trial judge. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989). North Carolina vests the city or town council with the power to make personnel policies, N.C. Gen. Stat. 160A-164, and the Supreme Court has held that "a federal court would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 126 (1988). Further, the Fourth Circuit has held, in a case similar to this, that even where a police chief has been delegated final decision-making authority for personnel decisions, that does not make the police chief the final policymaker for purposes of imputing municipal liability. *Crowley v. Prince George's Cnty.*, 890 F.2d 683, 686-87 (4th Cir. 1989).

The plaintiffs contend that despite the statute vesting personnel policymaking authority in the

Town Council, in fact Town Manager Bralley and/or Chief Cook were the final policymakers relevant to this case. (Doc. 81 at 12-13.) The plaintiffs have offered evidence that Town Manager Bralley and Chief Cook never sought the Town Council's approval for their personnel decisions. (*See id.* at 13.) Further, when plaintiff Donathan attempted to speak to a Town Council member about his discharge, that member referred him back to Town Manager Bralley. (*Id.*) At best, the plaintiffs" evidence suggests that Town Manager Bralley and/or Chief Cook were the final decision-makers for personnel matters. Under *Crowley*, this is not enough to demonstrate that Town Manager Bralley and/or Chief Cook were the final policymakers for the Town. Therefore, the plaintiffs" § 1983 claims against the Town will be dismissed because there is no basis to infer that their discharge stemmed from a policy or custom of the Town.

IV. State Wrongful Discharge Claims

At-will employees in North Carolina may not be terminated "for an unlawful reason or purpose that contravenes public policy." *Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 175, 381 S.E.2d 445, 447 (1989) (quoting *Sides v. Duke Univ.*, 74 N.C. App. 331, 342, 328 S.E.2d 818, 826 (1985)). The North Carolina Supreme Court has found public policy to include the "express policy declarations contained in the North Carolina General Statutes." *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 353, 416 S.E.2d 166, 169 (1992). North Carolina appellate courts have found public policy to include the State Constitution, in particular its guarantee of free speech in Article I, Section 14. *See Lenzer v. Flaherty*, 106 N.C. App. 496, 515, 418 S.E.2d 276, 287 (1992). Plaintiffs

contend they were wrongfully discharged in violation of public policy when they were terminated for exercising their free speech.

"Under North Carolina law, a plaintiff may only bring a wrongful-discharge action against the plaintiff's employer, not against the employer's agents." *Iglesias v. Wolford*, 667 F. Supp. 2d 573, 590 (E.D.N.C. 2009), *aff'd*, 400 F. App'x 793 (4th Cir. 2010); *see Sides*, 74 N.C. App. at 343, 328 S.E.2d at 826-27, *overruled on other grounds by Kurtzman v. Applied Analytical Indus., Inc.*, 347 N.C. 329, 333, 493 S.E.2d 420, 423 (1997). The plaintiffs were employed by the Mocksville Police Department, and so the Town of Mocksville was their employer, not Chief Cook or Town Manager Bralley. *See Houpe v. City of Statesville*, 128 N.C. App. 334, 344-45, 497 S.E.2d 82, 89 (1998) (finding police officer‟s wrongful discharge claim only available against the city, not the City Manager or Chief of Police). Therefore, the plaintiffs‟ wrongful discharge claims against Chief Cook and Town Manager Bralley are dismissed.

The plaintiffs have presented evidence from which a jury could find that the Town fired them for a reason violating public policy. While the Town has asserted immunity defenses against the plaintiffs‟ wrongful discharge claims, it has not made any arguments on that basis in connection with the motion. Therefore, summary judgment on this claim will be denied.

V. State Constitutional Claims

The North Carolina Constitution provides a direct cause of action against the state and state officials acting in their official capacity for violations of Article I, Section 14‟s guarantee of free speech.

Corum v. Univ. of N. Carolina, 330 N.C. 761, 785-88, 413 S.E.2d 276, 291-93 (1992). The plaintiffs have sued the Town, as well as Chief Cook and Town Manager Bralley in their official capacity under this provision. (Doc. 1 at 26.) However, "where the governmental entity may be held liable for damages resulting from its official policy, a suit naming public officers in their official capacity is redundant." *Moore v. City of Creedmoor*, 345 N.C. 356, 367, 481 S.E.2d 14, 21 (1997). Therefore, these claims against Chief Cook and Town Manager Bralley will be dismissed.

The plaintiffs also assert free speech claims under the North Carolina Constitution against the Town. "The standards for free speech retaliation claims under the state constitution are the same as those for free speech claims under the federal constitution." *Sheaffer v. Cnty. of Chatham*, 337 F. Supp. 2d 709, 729 (M.D.N.C. 2004); *see also Evans v. Cowan*, 132 N.C. App. 1, 9, 510 S.E.2d 170, 175-76 (1999) (applying First Amendment standard delineated in *Connick*, 461 U.S. at 147-48, to Section 14 claim); *Lenzer v. Flaherty*, 106 N.C. App. 496, 515, 418 S.E.2d 276, 287-88 (1992) (evaluating Section 14 claim under First Amendment standard). Both parties appear to concede this point. (Doc. 38 at 24-25; Doc. 52 at 26.) As noted earlier in Section I, the plaintiffs have produced sufficient evidence for a jury to find that they were fired for exercising their free speech rights under the North Carolina Constitution.

The defendants contend that this claim should be dismissed because the plaintiffs otherwise have an adequate state remedy by virtue of their public policy wrongful discharge claim. *See Corum*, 330 N.C. at 782, 413 S.E.2d at 289; *Phillips v. Gray*, 163

N.C. App. 52, 58, 592 S.E. 229, 233 (2004). However, it is not yet clear whether the plaintiffs‟ wrongful discharge claim will provide an adequate state remedy against the Town. Because the record is inadequate to decide this question as a matter of law, the motion for summary judgment should be denied.

VI. Punitive Damages

The plaintiffs seek punitive damages for their claims against Chief Cook and Town Manager Bralley. Because the plaintiffs‟ § 1983 claims and state law claims against Chief Cook and Town Manager Bralley are being dismissed, their claims for punitive damages must also be dismissed.

CONCLUSION

For the reasons set forth above, the plaintiffs‟ § 1983 and punitive damages claims against all defendants are dismissed. The plaintiffs' state law claims against Chief Cook and Town Manager Bralley are also dismissed. The plaintiffs‟ state law claims against the Town may proceed to trial.

This the 21st day of October, 2013.

UNITED STATES DISTRICT JUDGE

FILED: October 10, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA

KENNETH L. HUNTER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	1:12-CV-333
	)	
TOWN OF MOCKSVILLE,	)	
NORTH CAROLINA, et al.,	)	
	)	
Defendants.	)	

ORDER

This matter is before the Court on Plaintiffs' Motion to Alter or Amend Judgment and Motion for Relief from Judgment. (Doc. 80.) In view of the extensive briefing on these topics, the Court does not find it necessary to await a reply brief before ruling.

For reasons that will be stated in a written opinion entered as time permits, it is **ORDERED** that Plaintiffs' Motion to Alter or Amend Judgment and Motion for Relief from Judgment, (Doc. 80), is **DENIED**.

This the 9th day of October, 2013.

UNITED STATES DISTRICT JUDGE

FILED: July 13, 2015

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-1081 (L)
(1:12-cv-00333-CCE-JEP)

KENNETH L. HUNTER; RICK A. DONATHAN; JERRY D. MEDLIN

Plaintiffs - Appellees

v.

TOWN OF MOCKSVILLE, NORTH CAROLINA; ROBERT W. COOK, in his official capacity as Administrative Chief of Police of the Mocksville Police Department and in his individual capacity; CHRISTINE W. BRALLEY, in her official capacity as Town Manager of the Town of Mocksville and in her individual capacity

Defendants - Appellants

NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS

Amicus Supporting Appellee

No. 14-1125
(1:12-cv-00333-CCE-JEP)

KENNETH L. HUNTER; RICK A. DONATHAN; JERRY D. MEDLIN

Plaintiffs – Appellants

v.

TOWN OF MOCKSVILLE, NORTH CAROLINA; ROBERT W. COOK, in his official capacity as Administrative Chief of Police of the Mocksville Police Department and in his individual capacity; CHRISTINE W. BRALLEY, in her official capacity as Town Manager of the Town of Mocksville and in her individual capacity

Defendants - Appellees

NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS

Amicus Supporting Appellant

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer, Judge Wynn, and Judge Diaz.

For the Court

/s/ Patricia S. Connor, Clerk