No. 15-480

IN THE

Supreme Court of the United States

TOWN OF MOCKSVILLE ET AL.,

Petitioners,

v.

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

Respondents.

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

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioners present this case as raising the question whether police officers speak as citizens under the First Amendment when they follow a general duty to report "all crime" to "a law enforcement agency." Pet. 7, 11. But in truth, respondents here complained primarily about *noncriminal* behavior. And, as will be explained below, the office to which respondents complained, the North Carolina Governor's Office, is not a "law enforcement agency."

A. Factual Background

Respondents Kenneth Hunter, Rick Donathan, and Jerry Medlin are decorated former members of the Mocksville, North Carolina Police Department ("MPD"). Pet. App. 4a. While employed at the MPD, the officers became "concerned about [petitioner Robert] Cook's behavior and leadership" as the "administrative chief" of the MPD. *Id.* They believed that Cook's inappropriate behavior was bringing the MPD into disrepute in the community. Cook drank alcohol "publicly, excessively, and while in uniform," which the officers feared "reflected poorly" on the MPD. *Id.* They also suspected that Cook had "'fixed' tickets for his friends." *Id.* 5a. Respondents further believed that Cook treated the two African-American officers on the force differently because of their race, in part because Cook had demoted Hunter and simultaneously promoted a fellow officer in the same position who had less experience but was white. *Id.*; 1 CA4 Joint Appendix ("CA4 JA") 150, 154.

Respondents also believed that Cook violated North Carolina laws. Although Cook was not a

"certified law enforcement officer," he engaged in the felonious behavior of driving a police car and using its "blue flashing lights" and sirens. Pet. App. 4a. Respondents also suspected that Cook and others were "mismanaging" department funds, "even using [them] for personal gain." *Id.* 5a. They brought all these issues to the attention of petitioner Christine Bralley, the town manager who had hired Cook, but she was unresponsive. *Id.*

By early December 2011, Cook's conduct had become so egregious that the three officers decided to speak out. Pet. App. 5a. They felt "that Mocksville deserved an effective police force that served everyone equally." *Id.* 41a. Respondents "met privately" – in their free time and away from their MPD offices – to discuss their options. *Id.* 5a. They then contacted the local chapter of the NAACP, which "advised them to contact a state agency." *Id.* 6a.

Before acting on this advice, Hunter asked his daughter to purchase a prepaid cell phone so the officers could report their complaints "separately from [their] affiliation with the MPD." Pet. App. 6a. Using this phone and "away from the Mocksville PD," respondents called the state Attorney General's Office. *Id.* 16a. That office, however, referred them to "local authorities," whom the officers felt they could not trust. *Id.* 6a.

Respondents instead called the office of North Carolina's highest elected official, the Governor. Pet. App. 6a. Before this call, the three officers had never had any contact with the Governor's Office. *Id.* 15a-16a. Indeed, because the Governor is "completely outside normal law enforcement channels," *id.* 36a,

the officers had to look online for a publicly available number, 7 CA4 JA 197-98. They called that number on the prepaid phone and away from MPD premises. Pet. App. 6a, 16a.

Without identifying themselves, Cook, or the Town of Mocksville, respondents briefly explained that they had information about misconduct in a local police department, including a chief's "drinking problem," misappropriation of funds, "perceived racial discrimination," and "masquerad[ing] as a certified officer." Pet. App. 6a, 53a; *see also id.* 42a. When asked for a number at which they could be called back, the officers gave the number for the prepaid phone. *Id.* 6a.

Later that day, a representative from the Governor's Office called respondents' phone to follow up on the initial conversation. Pet. App. 7a. That representative suggested that the Governor's Office might be able to request an inquiry by the State Bureau of Investigation ("SBI"). *Id.* Only then did respondents "name the Mocksville PD as the subject of their concerns." *Id.* 16a.

Unfortunately for respondents, the SBI assigned the matter to a local investigator who had a "close relationship" with Cook. Pet. App. 7a. Shortly after he began his investigation, the MPD obtained the number of the prepaid phone. *Id.* Town Manager Bralley then contacted Sprint, the service provider for the prepaid phone, and discovered that both Donathan and Medlin had used their MPD-issued phones to call the prepaid phone. *Id.* 8a. Though Cook had never before fired an officer – even in the face of "illegal drug use" and other "criminal activity" – he fired all three respondents two days later. *Id.*

B. Procedural History

1. Respondents sued petitioners in the U.S. District Court for the Middle District of North Carolina. They brought a First Amendment retaliation claim under 42 U.S.C. § 1983, alleging that Chief Cook fired them for speaking to the Governor's Office. Pet. App. 3a, 45a. They also alleged that petitioners violated article I, section 14 of the North Carolina Constitution – the state's free-speech guarantee – and that petitioners wrongfully discharged them in violation of state public policy. *Id.* 9a, 58a-59a. Respondents sought both damages and injunctive relief in the form of reinstatement. *See* Pet. 4; 1 CA4 JA 68-69.

Petitioners moved for summary judgment, arguing that they did not violate federal or state law. The individual petitioners also argued that, even if they had violated the First Amendment, they were immune from damages liability. The district court denied the motion in part and granted it in part.

To determine whether respondents' calls to the Governor's Office constituted speech protected by the First Amendment, the district court applied the test laid out in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). Pet. App. 49a. Under that test, speech that public employees make as "citizens" is protected, while speech made "'pursuant to their official duties'" is not. *Id.* 49a-51a (quoting *Garcetti*, 547 U.S. at 421). The district court concluded that – viewing the facts in the light most favorable to respondents – respondents spoke as "private citizens" when they called the Governor's Office, and that petitioners had violated the First Amendment by firing respondents. *Id.* 51a, 55a.

The district court also held that petitioners Cook and Bralley were not entitled to qualified immunity. Pet. App. 36a-37a. It explained that the Fourth Circuit's elucidation of *Garcetti*'s framework in *Andrew v. Clark*, 561 F.3d 261 (4th Cir. 2009), "clearly established" that respondents' calls to the Governor's Office were protected speech. *Id.* 34a-35a.

Turning to respondents' ability to secure relief from the Town, the district court held that the Town was not subject to Section 1983 liability because respondents' firings were not carried out pursuant to any municipal "policy or custom." Pet. App. 57a-58a. However, the district court held that respondents could pursue their state-law claims against the Town. North Carolina law does not require a policy or custom showing, and respondents "presented evidence from which a jury could find that the Town fired them for a reason violating public policy." *Id.* 59a (wrongful-discharge claim); *see also id.* 60a-61a (state constitutional claim).

2. The individual petitioners filed an interlocutory appeal challenging the district court's denial of qualified immunity, and the Fourth Circuit affirmed.[1] Applying *Garcetti*, the court of appeals first held that respondents had "reached out as concerned citizens" when they contacted the Governor's Office. Pet. App. 3a. The Fourth Circuit found no evidence that respondents' "day-to-day

[1] The Town named itself an appellant in the Fourth Circuit and is a petitioner here. But the district court's qualified immunity ruling – the only one subject to appeal right now – does not apply to the Town.

duties . . . included reaching out to the Governor's Office about anything at all." *Id.* 16a. The court of appeals also emphasized that respondents' calls were anonymous and made away from MPD premises using a prepaid phone. *Id.*

Furthermore, the Fourth Circuit rejected petitioners' argument that a general duty to report crimes "morph[ed]" calling the Governor's Office "into part of [respondents'] daily duties." Pet. App. 17a. "[T]he Supreme Court," the Fourth Circuit explained, "has expressly rejected focusing on 'formal job descriptions.'" *Id.* (quoting *Garcetti*, 547 U.S. at 424). At any rate, the court of appeals noted that respondents' complaints about Cook included descriptions of noncriminal activity. *Id.* 16a-17a.

The court of appeals then turned to petitioners' argument that the relevant case law did not clearly establish that respondents spoke as citizens when they called the Governor's Office. The Fourth Circuit agreed with the district court that its 2009 decision in *Andrew*, 561 F.3d 261, clearly established that officers speak as citizens when contacting an outside agency about "serious governmental misconduct." Pet. App. 21a-23a. Thus, the court of appeals held that any reasonable official would have known at the time of the firings that respondents had engaged in protected speech when they detailed Cook's misconduct to the Governor's Office. *Id.* 22a-23a.

Judge Niemeyer dissented. Pet. App. 25a-33a. He contended that *Andrew* had not clearly established that respondents acted as citizens when they contacted the Governor's Office because that opinion focused on when an officer's speech involves a matter of public concern, not "when a police officer

speaks as a citizen rather than an employee." *Id.* 31a.

3. Petitioners sought rehearing en banc. The Fourth Circuit denied the petition without any judge requesting a vote. Pet. App. 64a.

REASONS FOR DENYING THE WRIT

The Fourth Circuit faithfully applied the test laid out in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), to hold that respondents spoke as private citizens when expressing their concerns about Cook to the North Carolina Governor's Office. Pet. App. 16a. That holding does not conflict with any decision from any other court of appeals. And, for several reasons, this case would be a poor vehicle for expounding more generally upon when the First Amendment shields police officers from retaliation for their speech.

Petitioners' qualified immunity argument is also unworthy of review. The Fourth Circuit's holding that its prior precedent clearly established that respondents spoke as citizens is correct. And because the holding applies only to cases involving retaliation for police officers' speech arising in the Fourth Circuit before 2013, this may be the only case to which that holding applies.

I. The First Amendment Question Presented Is Not Worthy Of Review.

A. The Fourth Circuit's Decision Is Correct.

1. The First Amendment generally protects a public employee's speech when he speaks "as a citizen . . . upon matters of public concern." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). By

contrast, when a public employee speaks "pursuant to [his] official duties," he is "not speaking as [a] citizen[] for First Amendment purposes, and the Constitution does not insulate [his] communications from employer discipline." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

To determine whether a public employee speaks as a citizen or an employee, courts must undertake a "practical" inquiry. *Garcetti*, 547 U.S. at 424. Speech "outside of the scope of [an employee's] ordinary job responsibilities" is citizen speech, *Lane v. Franks*, 134 S. Ct. 2369, 2378 (2014), whereas communication "in the course of official business" is employee speech, *Garcetti*, 547 U.S. at 423.

In *Garcetti*, the Court held that the plaintiff prosecutor spoke as an employee when "writing a memo" to his supervisor regarding "the proper disposition of a pending criminal case." 547 U.S. at 422. The speech (that is, his "work product") was simply "part of what he, as a [prosecutor], was employed to do" and "paid to perform"; it did not "b[ear] similarities" to everyday citizen speech. *Id.* at 421-22. By contrast, in *Lane*, the Court held that a college program director spoke as a citizen when he testified about corruption in his program. 134 S. Ct. at 2378-80. Even though he "learned of the subject matter of his testimony in the course of his employment," that did "not transform [his] speech into employee – rather than citizen – speech" because the testimony was "outside the scope of his ordinary job responsibilities." *Id.* at 2378-79; *see also Pickering*, 391 U.S. at 568, 572-73 (teacher spoke as a citizen when he wrote a letter to a newspaper about his school board's funding policies).

Respondents are easily entitled to proceed to trial under this jurisprudence. Viewing the facts in the light most favorable to respondents because they are opposing summary judgment, the Fourth Circuit explained that "[n]othing suggests that [respondents'] request that the Governor's Office look into suspected corruption and misconduct at the Mocksville PD was 'ordinarily within the scope of [their] duties.'" Pet. App. 16a (quoting *Lane*, 134 S. Ct. at 2379). Respondents' "'daily professional activities'" did not "include[] calling the Governor's Office for any purpose, much less to express concerns about the Mocksville PD." *Id.* 15a-16a (quoting *Garcetti*, 547 U.S. at 422). Nor was complaining to the Governor's Office part of any general "policy, practice, or protocol" in the department. *Id.* 50a.

Indeed, respondents' speech was in no way an "[o]fficial communication[] . . . in the course of official business." *Garcetti*, 547 U.S. at 422-23. They called the Governor's Office while "away from the Mocksville PD." Pet. App. 16a. They used a personal phone, not a department-issued phone. *Id.* And they never provided their names and did not provide their departmental affiliation until the Governor's Office specifically requested it. *Id.*

Finally, respondents' speech "bore similarities" to speech engaged in "by numerous citizens every day." *Garcetti*, 547 U.S. at 422. The three officers brought their concerns to the Governor's Office using the same channels available to any North Carolina citizen. They obtained the office's number from its publicly available website, 7 CA4 JA 197-98, which asked "citizens throughout North Carolina" to call with concerns, *Contact Your State Government:*

Governor's Office, Office of Governor Bev Perdue, http://www.governor.nc.gov/contact/Contact.aspx [http://bit.ly/1QQpNql] (archived Oct. 29, 2011).

The "mere fact" that respondents' complaints "concern[ed] information acquired by virtue of [their] public employment does not transform that speech" – made through normal citizen channels – into employee speech. *Lane*, 134 S. Ct. at 2379. Respondents were "uniquely qualified to comment" on mismanagement and corruption in their local police department – a topic that is "of interest to the public at large." *Id.* at 2380 (quoting *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) (per curiam)). If the First Amendment did not protect the officers' complaints under these circumstances, those most likely to know of such misconduct could never report it without risking their jobs. This Court has recognized that such a result is "antithetical to [its] jurisprudence." *Id.*

2. Notwithstanding all of this, petitioners argue that respondents spoke as employees because they necessarily acted pursuant to a "general duty of all law enforcement officers" to report crimes to a law enforcement agency. Pet. 17; *see id.* i, 18. But the purported duty of all law enforcement officers to report crimes is, at best, a "[f]ormal job description[]." *Garcetti*, 547 U.S. at 424. Such a formal duty is just one factor in *Garcetti*'s practical inquiry; it is "neither necessary nor sufficient" to render officers' complaints employee speech. *Id.* at 425.

In response, petitioners argue that "*Garcetti*'s admonition about job descriptions" is limited to cases where employers "adopt overly broad job descriptions in an attempt to evade First Amendment liability."

Pet. 17. This argument misinterprets *Garcetti*. The opinion in that case explains that formal job descriptions are not dispositive because they "often bear little resemblance to the duties an employee actually is expected to perform." 547 U.S. at 424-25. That reasoning holds true regardless of an employer's intent in drafting the description. "The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties." *Lane*, 134 S. Ct. at 2379. Asking that exact question, the Fourth Circuit concluded that respondents spoke as citizens. Pet. App. 12a.

In any event, petitioners' argument relies on two factual premises that are incorrect. First, the MPD manual did not impose a *general* duty to report fellow MPD officers' crimes – that is, a duty to report such crimes to any law enforcement agency. Instead, the MPD manual – on which petitioners base this argument, *see* Pet. 4 – set forth a *specific* duty of officers to report fellow officers' violations of laws to the "Chief of Police." Pet. App. 17a (quoting the manual). Indeed, given that respondents contacted the Governor's Office, not Cook, they cannot be said to have acted pursuant even to any specific directive to report crimes in their ranks. To the extent it might be thought odd that the only duty MPD officers had if their chief broke the law was to report this to the chief himself, that is the way the manual was written. And petitioners have never pointed to any other duty in the MPD manual or elsewhere that "tells an officer what to do when the Police Chief himself is violating the law and department policy." *Id.* 53a n.2.

Second, even if MPD officers had a general duty to report fellow officers' criminal misconduct to any law enforcement agency, the only speech at issue here is respondents' complaints to the Governor's Office. The North Carolina Governor's Office is not a law enforcement agency. In North Carolina, the Attorney General, not the Governor, is "the chief law enforcement officer of the state." 12 N.C. Admin. Code 2A.0201. And the Governor has no control over the Attorney General; they are "constitutional[ly] independen[t]." *Tice v. Dep't of Transp.*, 312 S.E.2d 241, 245 (N.C. 1984) (citing N.C. Const. art. III, § 7). Furthermore, neither the North Carolina Constitution nor state statutes provide the Governor a supervisory role over police departments or officers in the state. *See* N.C. Const. art. III, § 5; N.C. Gen. Stat. § 147-12.

Petitioners argue to the contrary based on a single regulatory provision stating that the State Bureau of Investigation ("SBI") "shall have charge of the investigation of crimes and criminal procedure as the Governor or Attorney General may direct." Pet. 3 (quoting 12 N.C. Admin. Code 3B.0104(d)). That provision is beside the point. The Attorney General, not the Governor, is the head of the SBI and appoints the SBI Director, who "serves at [the] will of the Attorney General." 12 N.C. Admin. Code 3B.0103; *see id.* 3B.0101. The Governor thus has no supervisory responsibility over the SBI.

That Section 3B.01014(d) nevertheless enables the Governor to direct the SBI to investigate a crime does not turn the Governor's Office into a law enforcement agency. The Governor's Office has no power to carry out any investigation directly – or to

charge or prosecute crimes. The Governor's Office, therefore, is "completely outside normal law enforcement channels." Pet. App. 36a.

B. The Fourth Circuit's Holding Does Not Conflict With The Law Of Any Court Of Appeals.

Petitioners contend that the circuit courts have adopted "different approaches" to how *Garcetti*'s framework applies when police officers "report[] departmental misconduct to law enforcement agencies for investigation." Pet. 8. This is incorrect. All of the courts to which petitioners refer use the same fact-intensive approach to determine whether an employee spoke pursuant to his ordinary job duties. Accordingly, no circuit court would have held that respondents spoke as employees when they anonymously recounted Chief Cook's misconduct to the Governor's Office.

1. Relying only on *Wilson v. Tregre*, 787 F.3d 322 (5th Cir. 2015), petitioners assert that the Fifth Circuit would have resolved this case in their favor because it supposedly treats an officer's duty to report crimes as "dispositive" under *Garcetti*. Pet. 9-11. Not so.

In *Wilson*, a chief deputy sheriff reported concerns about his department's interrogation practices to his supervisor (the sheriff), his department's internal affairs unit, and his parish's district attorney. 787 F.3d at 324. With respect to the report to the district attorney, the Fifth Circuit held that the chief deputy spoke as an employee in part because "[a]s a law enforcement officer, [he] was required to report any action he believed violated the law." *Id.* at 325.

This sentence in *Wilson* does not dictate that the Fifth Circuit would have held that respondents spoke as employees when they contacted the Governor's Office. In *Wilson*, the chief deputy contacted an office unquestionably engaged in law enforcement and with which his department regularly worked. 787 F.3d at 324. Indeed, Louisiana law requires each sheriff's office "to report every crime within [its] knowledge to the district attorney within twenty-four hours." *Louisiana v. Didier*, 254 So. 2d 262, 267 (La. 1971). Thus, the chief deputy sheriff was "acting in his official duties as the Chief Deputy at all the relevant times." *Wilson*, 787 F.3d at 325.

Unlike Wilson's close working relationship with the local district attorney, respondents' "'daily professional activities'" did not "includ[e] calling the Governor's Office for any purpose, much less to express concerns about the Mocksville PD." Pet. App. 15a-16a (quoting *Garcetti*, 547 U.S. at 422). And, unlike the chief deputy in *Wilson*, who first reported within "the chain of command" to his supervisor and department internal affairs unit, 787 F.3d at 324-25, here respondents initially contacted the NAACP, demonstrating they were not trying to carry out any job duty.

Other Fifth Circuit precedent confirms that the law of that circuit does not hold that a police officer's general duty to report crimes categorically renders any such communication to any governmental office employee speech. Only five months before *Wilson*, the Fifth Circuit expressly recognized that while formal job duties "can be instructive," courts "cannot, and do not, rely on official job descriptions, even statutory ones, in applying *Garcetti*'s rule." *Gibson v.*

Kilpatrick, 773 F.3d 661, 671 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 2318 (2015). Thus, in assessing whether a police chief spoke as an employee when reporting a mayor's misconduct, the Fifth Circuit made clear that that there is "no heuristic for *Garcetti*'s applicability." *Id.* at 670. "[N]o single fact or factor is dispositive." *Id.*; *see also Hardesty v. Cochran*, No. 14-31114, 2015 WL 4237656, at *5 (5th Cir. July 14, 2015) (looking beyond official job description); *Williams v. Riley*, 275 Fed. Appx. 385, 389 (5th Cir. 2008) (same).

2. The Seventh Circuit similarly would have concluded that respondents spoke as citizens. In *Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007), *cert. denied*, 552 U.S. 1099 (2008), the Seventh Circuit held that a police officer spoke as an employee when he reported his chief's obstruction of investigations and manipulation of arrest reports to an assistant district attorney. *Id.* at 597. The Seventh Circuit noted that, when reporting to the assistant district attorney, the officer was performing his duty as a member of the Milwaukee Police Department "to report all potential crimes." *Id.* at 598.

But, as petitioners acknowledge, the existence of this duty was not "dispositive." Pet. 20. The Seventh Circuit also recognized that (i) the officer spoke about a case he was assigned to investigate and (ii) the officer's regular job duties included meeting with the district attorney to discuss arrest reports. *Morales*, 494 F.3d at 597-98.

These additional facts distinguish *Morales* from this case, where respondents were not acting in the course of their ordinary duties. Respondents were in no way responsible for investigating Cook's

misconduct. And neither respondents nor anyone else in their office regularly met with the Governor.

3. Petitioners correctly recognize that the Ninth Circuit would have resolved this appeal in the same way as the Fourth Circuit. Pet. 7, 13-15.

At the same time, petitioners mischaracterize Ninth Circuit case law. They assert that the Ninth Circuit's decision in *Dahlia v. Rodriguez*, 735 F.3d 1060 (9th Cir. 2013) (en banc), *cert. denied*, 134 S. Ct. 1283 (2014), holds that law enforcement officers' general duty to report crimes is "irrelevant" under *Garcetti*. Pet. 11. But *Dahlia* contains no such declaration. All the Ninth Circuit said there is that "'[t]he 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.'" 735 F.3d at 1070-71 (quoting *Garcetti*, 547 U.S. at 425). And in *Hagen v. City of Eugene*, 736 F.3d 1251, 1258-59 (9th Cir. 2013), decided after *Dahlia*, the Ninth Circuit looked in part to a duty in a department policy manual to determine whether an officer spoke as an employee.

Petitioners also discuss the Ninth Circuit's decision in *Huppert v. City of Pittsburg*, 574 F.3d 696 (9th Cir. 2009). *See* Pet. 11-13. But that case cannot establish any circuit conflict because it was abrogated by the en banc decision in *Dahlia*, 735 F.3d at 1063.[2]

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[2] At any rate, the Ninth Circuit's analysis in *Huppert* is not inconsistent with the Fourth Circuit's holding here. *Huppert* held that officers acted as employees when they spoke – unlike respondents here – at the direction of their superiors or in

C. This Case Would Be A Poor Vehicle To Consider Whether A Police Officer Speaks As An Employee When He Reports Crimes To A Law Enforcement Agency.

Even if the First Amendment question petitioners pose were certworthy, this case would not be an appropriate vehicle to address it.

1. Petitioners ask this Court to address whether the First Amendment protects police officers who report misconduct in their ranks to a "law enforcement agency" pursuant to a "general duty" to enforce criminal laws. Pet. 7, 11. But, as explained above, the Court would not be able to address that issue here because it requires two factual predicates that are not present in this case. *See supra* 11-13.

First, petitioners posit that respondents communicated with the Governor's Office pursuant to a "general duty" imposed by their department to report crimes to any law enforcement agency, as was true in cases such as *Morales*, 494 F.3d at 598. But the only duty in the MPD manual concerning misdeeds by fellow officers was the specific duty to report fellow officers' violations of laws to the chief of

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connection with active law enforcement investigations. 574 F.3d at 703-10. And *Huppert* noted that the First Amendment may protect officers who deliver complaints – as respondents did here – "to an elected official." *Id.* at 709-10; *see also Freitag v. Ayers*, 468 F.3d 528, 545 (9th Cir. 2006) ("[The] right to complain both to an elected public official and to an independent state agency is guaranteed to any citizen in a democratic society regardless of his status as a public employee." (citing *Pickering*, 391 U.S. at 568)).

police. *See supra* 11. If this Court wishes to decide how a "general duty" of the sort petitioners describe figures into the *Garcetti* calculus, this Court should wait for a case where such a directive actually exists.

Second, the Governor's Office is not a "law enforcement agency." *See supra* 12-13. So even if respondents had a duty to report other officers' crimes to any law enforcement agency – not just the chief – contacting the Governor's Office would not have fulfilled that duty.

2. The argument petitioners press – that respondents spoke as employees when reporting violations of "criminal laws," Pet. 17 – could not affect whether this case goes to trial or the relief to which respondents are entitled.

Respondents seek reinstatement and damages on the ground that Cook fired them in violation of the First Amendment. To prevail, respondents need only show that *some* of their complaints to the Governor's Office were constitutionally protected and that those complaints were "a motivating factor" in Cook's decision to fire them. Pet. App. 18a. Respondents need not prove that *all* of their speech to the Governor's Office was protected. *See, e.g.*, *Davis v. McKinney*, 518 F.3d 304, 314-17 (5th Cir. 2008) (public employee spoke variously as a citizen and as an employee depending on the topic and recipient of "each aspect of a communication"); *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1204-05 (10th Cir. 2007) (same); *see also Connick v. Myers*, 461 U.S. 138, 148-49 (1983) (some questions in an inter-office survey were matters of public concern while another was not).

That being so, even if their complaints regarding *criminal* conduct were not protected speech, respondents would still be entitled to prevail because "many" of their complaints of malfeasance "did not rise to the level of criminal conduct." Pet. App. 53a; *see also id.* 16a-17a. In particular, respondents told the Governor's Office that Cook was mismanaging the MPD and "had a drinking problem," *id.* 5a-6a, and "alerted the Governor's Office to perceived racial discrimination in the MPD," *id.* 53a.

Petitioners offer no argument that respondents had any obligation to transmit these noncriminal complaints.[3] The most petitioners assert is that it is "undisputed" that respondents sought to open a "criminal investigation." Pet. 2. But even this is not true. As respondents' noncriminal complaints demonstrate, respondents were primarily concerned that petitioners' mismanagement of the Mocksville PD "lower[ed] the MPD's reputation in the community." Pet. App. 53a; *see also id.* 6a. These complaints were pure citizen speech.

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[3] Petitioners use the word "misconduct" instead of "crimes" in their question presented and occasionally in their petition to describe the conduct respondents supposedly had a duty to report. But petitioners never *argue* that MPD officers had a duty to report noncriminal misconduct. They rest entirely on the officers' supposed duty to report "crime." Pet. 4; *see also id.* 7 (officers' "duties include enforcing all *criminal laws*" (emphasis added)). Petitioners limited their arguments below in this respect as well. *See* Pet. App. 15a (reciting petitioners' arguments that "[w]hen a police officer reports a *crime*, he is literally just doing his job" (emphasis added)).

II. The Qualified Immunity Question Presented Is Not Worthy Of Review.

Petitioners argue that "[t]he applicability of qualified immunity" here is "a question of exceptional importance" and that the Fourth Circuit erred in holding that *Andrew v. Clark*, 561 F.3d 261 (4th Cir. 2009), clearly established that respondents spoke as citizens when complaining about Cook's misconduct to the North Carolina Governor's Office. Pet. 21. Neither argument is persuasive.

A. This Issue Does Not Warrant This Court's Attention.

1. The Fourth Circuit's qualified immunity holding here is extremely narrow, applying to only a small – and vanishing – set of cases.

Petitioners do not contest that circuit precedent can clearly establish that their conduct was unlawful. *See, e.g.*, *Lane v. Franks*, 134 S. Ct. 2369, 2382 (2014) (noting that "controlling" circuit precedent can clearly establish law for qualified immunity purposes). Instead, petitioners contend that the Fourth Circuit erroneously concluded that its prior decision in *Andrew* made it clear that respondents spoke here as citizens. Pet. 21-23.

Because this argument turns on the meaning of *Andrew*, it is pertinent only to public-employee speech cases within the Fourth Circuit.

Moreover, petitioners' argument is relevant only to cases where the underlying conduct took place before 2013. In that year, the Fourth Circuit again addressed the First Amendment rights of police officers, holding that an officer engaged in protected speech when he contacted several outside

organizations – including multiple state agencies – about a falsified police report created within his department. *Durham v. Jones*, 737 F.3d 291, 294 (4th Cir. 2013). Any First Amendment retaliation case involving police officers arising after *Durham* would need to account for that decision in any qualified immunity analysis.

Petitioners do not point to any other cases involving retaliation for police-officer speech in the Fourth Circuit arising before 2013 that further review here could affect. Nor are any new cases concerning such firings likely to be brought. The limitations period for bringing any such action has already run in Virginia and West Virginia, and it will expire in 2016 in the other states in the circuit. *See* Martin A. Schwartz, *Section 1983 Litigation Claims and Defenses* § 12.02 (4th ed. 2015); *see also Wiggins v. Edwards*, 442 S.E.2d 169, 170 (S.C. 1994).

2. Furthermore, for two reasons, the Fourth Circuit's holding will likely have a limited impact even on the two individual petitioners.

First, even if the individual petitioners were entitled to immunity from damages, petitioner Bralley would still have to stand trial because respondents seek injunctive relief in the form of reinstatement. A grant of qualified immunity shields defendants only from having to pay monetary damages. *See Wood v. Strickland*, 420 U.S. 308, 314 n.6 (1975); Wesley Kobylak, *Immunity of Public Officials from Personal Liability in Civil Rights Actions Brought by Public Employees Under 42 U.S.C.A. § 1983*, 63 A.L.R. Fed. 744, §§ 5-7 (2015). Bralley still holds her position as town manager, *see Elected Officials*, Town of Mocksville, NC,

http://bit.ly/1IBlnvE (last visited Dec. 7, 2015), and has the final authority to hire MPD officers, Pet. App. 58a; 1 CA4 JA 94. So she appears to be a proper defendant for respondents' reinstatement claim. *See Paxman v. Campbell*, 612 F.2d 848, 852, 861 (4th Cir. 1980) (en banc) (requiring public officials to reinstate plaintiffs despite being entitled to qualified immunity), *disapproved on other grounds by Owen v. City of Independence*, 445 U.S. 622 (1980).

Second, neither individual petitioner will likely have to pay any damages. The district court ruled that respondents' state-law claims against the Town of Mocksville may proceed. *See* Pet. App. 39a, 59a-60a. If respondents prevail against the Town on these claims – which parallel their federal claims, *see* 1 CA4 JA 65-68 – they will presumably seek and receive full relief from the Town, rendering the individual petitioners' liability immaterial.

3. Petitioners nonetheless quote *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015), to assert that any qualified immunity issue – no matter how particularized or inconsequential – "is important not just to individual litigants but to 'society as a whole.'" Pet. 21. The Court, however, granted certiorari in that case to consider not just a qualified immunity issue but also a more important legal issue that had divided the circuits. Having taken both questions, a majority of the Court chose to answer the qualified immunity question. But as Justice Scalia noted, there was "little chance" that this Court would have granted certiorari on the "fact-bound" and "uncertworthy" qualified immunity issue alone. *Id.* at 1779 (Scalia, J., concurring in part and dissenting in part). And as noted in Part I above,

there is no reason here to grant certiorari to consider petitioners' First Amendment argument.

B. The Fourth Circuit Correctly Rejected Petitioners' Qualified Immunity Argument.

A public official is not immune from suit under 42 U.S.C. § 1983 when a "reasonable official in [his] shoes would have understood that he was violating" the Constitution. *Sheehan*, 135 S. Ct. at 1774 (alteration in original) (quoting *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014)). The Fourth Circuit correctly held that *Andrew* provided clear notice to reasonable officials in petitioners' position that respondents spoke as citizens.

1. In *Andrew*, a police officer wrote an internal memorandum questioning whether his department's tactical unit was justified in using deadly force during an operation. 561 F.3d at 263. The officer later showed the memorandum to a local newspaper. *Id.* Police commissioners then fired the officer. *Id.*

The Fourth Circuit held that, taking the officer's allegations as true, he spoke as a citizen when releasing the memorandum because he was "not under a duty to write the memorandum as part of his official responsibilities." *Andrew*, 561 F.3d at 264, 266-68. The officer "had not previously written similar memoranda," and "would not have been derelict in his duties . . . had he not written the memorandum." *Id.* at 264. It was also not the officer's job to investigate shootings or to communicate with outside organizations regarding such matters. *Id.* at 264-65. Instead, the officer disclosed the memorandum outside of his department "because of his concern for public safety." *Id.* at 265;

see also Durham, 737 F.3d at 303-04 (explaining that *Andrew* held that "an employee's speech about serious governmental misconduct, and certainly not least of all serious misconduct in a law enforcement agency, is protected" (citation omitted)).

2. The Fourth Circuit correctly held that *Andrew* clearly established that respondents spoke as citizens when they reported Cook's misconduct to the Governor's Office. As in *Andrew*, respondents had no regular interaction or professional relationship with the agency they contacted. Nor, as in *Andrew*, would they have been derelict in their duties had they failed to make the complaints at issue. 561 F.3d at 264. The MPD manual instructed the officers to report misconduct within their ranks to the Chief of Police, not to any outside office. Pet. App. 17a. Finally, respondents contacted the Governor's Office anonymously on a private cell phone and away from their office, leaving no doubt that they were acting outside of their official capacity as Mocksville police officers. *Id.* 16a-17a, 51a, 54a.

Petitioners protest that *Andrew* addressed only whether the officer's speech conveyed a matter of public concern, leaving aside the issue "whether the officer[] spoke as [a] citizen[] when reporting departmental corruption." Pet. 21. Not so. Taking the officer's allegations as true, *Andrew* held that the officer's claim that he had no duty to speak about the misconduct demonstrated that "the dissemination of

his memorandum *was citizen speech*." *Andrew*, 561 F.3d at 268 (emphasis added).[4]

Petitioners also note that the officer in *Andrew* released his memorandum to the press. But as the Fourth Circuit below explained, nothing in *Andrew*'s "broadly-worded" holding "suggests that fact was somehow dispositive." Pet. App. 22a; *see also Hope v. Pelzer*, 536 U.S. 730, 743 (2002) (the "reasoning, though not the holding" in a case decided by the same circuit "gave fair warning" that defendants acted unlawfully). Indeed, it would make no sense to protect public employees' speech only when shared with the press. The First Amendment protects the right to report misconduct to elected officials, either in the form of pure speech or as a petition for a redress of grievances, just as surely as it protects the right to make such allegations to the press. *Cf. Garcetti v. Ceballos*, 547 U.S. 410, 420 (2006) (expressing views "inside [the] office, rather than publicly, is not dispositive").

Concurring in *Andrew*, Judge Wilkinson similarly stressed that it would be "inimical to First

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[4] Contrary to Judge Niemeyer's dissenting assertion, the fact that *Andrew* rendered this holding "in the context of [a] factual dispute" regarding the officer's official duties did not deprive the holding of its ability to give "guidance" to petitioners. Pet. App. 31a. When a court rejects a motion to dismiss while assuming factual allegations to be true, the court establishes that the law prohibits the alleged conduct. *See* 5B Charles Alan Wright et al., Federal Practice and Procedure § 1356 (3d ed. 2015) ("The function of a motion to dismiss for failure to state a claim . . . is to test the law governing the claim and not the facts that support the claim.").

Amendment principles" to foreclose protection for police officers' speech that "bring[s], often at some personal risk, [governmental] operations into public view." 561 F.3d at 273; *see also Lane*, 134 S. Ct. at 2379-80 ("[O]ur precedents dating back to *Pickering* have recognized 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."). Judge Wilkinson's observation applies with full force here. Respondents reported misconduct and corruption occurring at their department's highest level. Spurred by concern that Mocksville's citizens were being deprived of "an effective police force that served everyone equally," they complained to their state's highest elected official through a channel available to all constituents. Pet. App. 6a. Courts have long regarded this type of speech as quintessential First Amendment activity.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 9, 2015