No. 15-480

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

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

This case presents an opportunity to clarify post-*Garcetti v. Ceballos*, 547 U.S. 410 (2006) jurisprudence described by the district court as "ambiguous" (Pet. App. 56a) and by the dissenting circuit court judge as "murky at best." Pet. App. 26a. It implicates not only the special trust and confidence our communities place in law enforcement officers, but also the courts' conflicting approaches to defining the official duties of public employees generally.

The denial of qualified immunity in this case is plain error. It rests on an appellate decision that came out two years after the respondents' employment was terminated. The district court reversed itself on this issue. There is a compelling dissent to the circuit court opinion. The circuit panel majority's conclusion that respondents' rights were clearly established in December 2011 must not be allowed to stand.

Petitioners request this Court take up this case to clarify important constitutional principles and prevent manifest injustice. The petition for writ of certiorari should be granted.

RESPONDENTS CALLED THE GOVERNOR'S OFFICE TO REQUEST A CRIMINAL INVESTIGATION

Respondents argue the North Carolina Governor's Office is completely outside normal law enforcement channels and that they contacted it merely as concerned citizens. Respondents emphasize that they complained about civil as well as criminal matters. Respondents' argument is silent

about what they sought to accomplish by calling the Governor's Office, but the record is clear. Respondents called the Governor's Office to request it exercise its authority to direct a criminal investigation of the Mocksville Police Department, and that is exactly what the Governor's Office did.

Hunter and Donathan testified that they "decided to seek an investigation by state officials concerning the corruption of the [Mocksville Police Department]." CA4 JA 137, 162. Donathan suggested calling the Governor's Office "to request an investigation." CA4 JA 163. All three respondents testified they reported to the Governor's Office the following crimes:

- Unauthorized stopping of motorists with blue lights (a felony under N.C.G.S. § 14-277(d1)(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).

CA4 JA 138-9, 163, 188.

According to Medlin, "We ***obviously intended***, and assumed, that we would be having an in-depth interview with some ***law enforcement official from the Governor's office*** or some other state agency." CA4 JA 188.

Vickie Jones, the employee of the Governor's Office who took the plaintiffs' call, made handwritten notes indicating they were "attempting to take out arrest warrants." CA4 JA 216. In her

typewritten notes, Jones indicated, "If our office cannot help, the officers plan to take out warrants on the chief." CA4 JA 219.

Respondents argue the Governor's Office is not a law enforcement agency, which raises the question why they, as law enforcement officers themselves, called it to request a criminal investigation. In fact it is clear the Governor's Office was an appropriate agency for such a request. Respondents acknowledge the Governor's Office is expressly authorized to direct the State Bureau of Investigation (SBI) to undertake an investigation of corruption within a police department. *See*, 12 North Carolina Administrative Code 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 Governor and Attorney General have long shared authority to direct investigations of the SBI. Since 2014, the SBI has reported directly to the Governor's Office. The Governor appoints the SBI's Director (North Carolina General Statutes § 143B-926) and has statutory authority to direct its investigations. See e.g. N.C.G.S. § 143B-917. Respondents' argument that the Governor's Office is completely outside normal law enforcement channels is unfounded and belied by their own testimony about the reason for their call.

RESPONDENTS SPOKE PURSUANT TO THEIR OFFICIAL DUTY

Respondents argue the fundamental duty of law enforcement officers to report misconduct in the ranks is analogous to a job description, therefore it is neither necessary nor sufficient to establish the

scope of their official duties. Resp. Opp. 10. Simultaneously, however, respondents suggest their call to the Governor's Office was outside the scope of their duties because the Mocksville Police Manual contains no express directive to call the Governor's Office to report departmental corruption. Resp. Opp. 17-18.

Respondents overlook the oath taken by all sworn police officers in North Carolina, which includes the obligation to "be alert and vigilant to enforce the criminal laws of this State[.]" N.C.G.S. § 11-11. They ignore the requirement of local enforcement officers to cooperate with the SBI in the "arrest and apprehension of criminals[.]" N.C.G.S. § 143B-923.

More basically, respondents' argument contradicts a common sense understanding of what police officers do for a living: identify criminal behavior and report it to the appropriate agency for investigation. Respondents' own retained expert, Melvin Tucker, issued a report confirming the respondents had an affirmative duty to report misconduct on the part of Chief Cook. Tucker testified:

> Q. In your opinion number two, which begins on page seven, again paraphrasing, you indicate that the plaintiffs had an affirmative duty to report in good faith what they believed to be misconduct on the part of Cook.
>
> A. That's correct.
>
> CA4 JA 3117-3118.

Although in this case respondents had an affirmative obligation to report what they believed to

be criminal misconduct that is not the essential question. The question is whether, in calling the Governor's Office (whether this function was mandatory or discretionary) they did what police officers are employed to do.

In addition to these important considerations regarding law enforcement officers, who are among the most trusted and powerful of public employees, this case presents the opportunity to clarify the standard for defining the scope of other employees' public duties. As shown in the petition for writ of certiorari and the cases cited therein, the circuits have taken a variety of approaches, focusing on such things as:

- whether the speech at issue was affirmatively mandated;
- whether it was expressly forbidden;
- whether the speech was made within the chain of command;
- whether it was a regular or rare occurrence for the employee to engage in similar speech.

The Court should take this opportunity to provide much-needed guidance to public employers and lower courts on these important questions.

COOK AND BRALLEY ARE ENTITLED TO QUALIFIED IMMUNITY

Whether or not the Court deems it appropriate to address the merits under *Garcetti,* it should reverse the circuit court's denial of qualified immunity for the reasons stated in Judge Niemeyer's dissent. Even if the circuit court's majority decision was correct, as judge Niemeyer noted, it was the first of its kind. The applicable law could not have been

clearly established when the respondents' employment was terminated.

Respondents argue that qualified immunity was properly denied under *Andrew v. Clark*, 561 F.3d 261 (4th Cir. 2009). However, even with the benefit of *Andrew*, the district court initially granted qualified immunity to Cook and Bralley, noting that analogous cases were "ambiguous" and accordingly, "This ambiguity precludes finding that the plaintiffs' rights were clearly established." Pet. App. 56a. Chief Cook and Town Manager Bralley should not be individually liable for guessing wrong in 2011 on a constitutional question that a federal judge recognized was still unsettled nearly two years later.

The district court reversed itself and denied qualified immunity only after the Fourth Circuit's decision in *Durham v. Jones*, 737 F.3d 291 (4th Cir. 2013), stating, "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." Pet. App. 36a.

Judge Niemeyer aptly explained in his dissenting opinion why neither *Andrew* nor *Durham* clearly established respondents' First Amendment rights. Pet. App. 25a. However, even if *Durham* definitively settled the question in 2013, as the district court concluded, Chief Cook and Town Manager Bralley could not have predicted it in December 2011. The applicable law in this case is difficult and unsettled. It is a classic case in which qualified immunity should apply.

CONCLUSION

Petitioners respectfully request this petition for writ of certiorari be granted, or in the alternative, that the denial of qualified immunity to Chief Cook and Town Manager Bralley be summarily reversed.

Respectfully submitted,

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