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Reply Brief. Crouse v. Caldwell, 138 S.Ct. 470 (2017) (No. 17-242), 2017 U.S. S. Ct. Briefs LEXIS 4102, 2017 WL 4918297

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No. 17-242

In The
Supreme Court of the United States

RICHARD CROUSE and GEORGE T. WINNINGHAM,

Petitioners,

v.

JAMES CHAD CALDWELL,
Chief of Police, Town of Moncks Corner,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF

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I. This Case Presents The Circuit Conflicts Described In The Petition

A. The first conflict described in the petition, regarding the respective roles of courts and juries in free speech cases, is not limited to whether the court or a jury is to decide subsidiary factual disputes related to *Pickering* balancing. *See Pickering v. Board of Education*, 391 U.S. 563, 567 (1968). The courts of appeals disagree as well about whether a court or jury should decide subsidiary factual disputes related to whether an employee spoke "as a citizen." *See Connick v. Myers*, 461 U.S. 138, 142 (1983). Both aspects of that conflict matter here, because there were disputed facts related to both constitutional issues.

There is no disagreement about the nature of the Fourth Circuit standard. The court below held that "whether the speech was made as a citizen," as well as *Pickering* balancing, are "questions of law." App. 9a-10a; *see id.* 12a ("*courts* [are] to engage in a practical inquiry into the employee's daily professional activities" (emphasis added; internal quotation marks omitted)); 13a ("*courts* must look beyond formal job descriptions" (emphasis added)). Under the decision below, the only "factual inquiry" is about whether the speech at issue "caused the disciplinary action." *Id.* 10a. Respondent defends the Fourth Circuit standard, arguing that courts, not juries, should decide any subsidiary factual questions related to whether speech was constitutionally protected. Br.Opp. 5.

Conversely, as the petition explained, other circuits treat as jury issues subsidiary factual disputes related to whether an employee spoke as a citizen, as well as those related to *Pickering* balancing. In the Eighth Circuit "*any* underlying factual disputes concerning whether the plaintiff's speech is protected ... should be submitted to the jury." *Shands v. City of Kennett*, 993 F.3d 1337, 1342 (8th Cir. 1993) (emphasis added; quoted at Pet. 19-20). The Tenth Circuit precedent requires that juries decide questions of historical fact in First Amendment cases generally, and is not limited to claims regarding speech by government employees. *Weaver v. Chavez*, 458 F.3d 1096, 1101-02 (10th Cir. 2006) (quoted at Pet. 20). In *Posey v. Lake Pend Oreille School Dist.*, 526 F.3d 1121 (9th Cir. 2008) (quoted at Pet. 20), the Ninth Circuit addressed specifically the role of a jury in determining subsidiary questions of fact related to whether an employee spoke as a citizen. "[W]e agree with the Third, Seventh, and Eighth Circuits and hold that the determination whether speech ... was spoken as a public employee or a private citizen presents a mixed question of fact and law.... [T]he scope and content of a plaintiff's job responsibilities can and should be found by a trier of fact...." 526 F.3d at 1129. The Ninth Circuit acknowledged that the Fifth, Tenth and District of Columbia Circuits, like the Fourth Circuit in this case, apply the contrary rule. 526 F.3d at 1127-28. In *Fox v. Traverse City Area Public Schools Bd. of Educ.*, 605 F.3d 345, 350 (6th Cir. 2010), the Sixth Circuit noted the existence of this specific conflict.

Respondent argues that any circuit split regarding whether courts or juries should decide such subsidiary factual issues does not matter here, because in this case there were no "instances of conflicting or disputed evidence." Br.Opp. 10 n.3. That is clearly incorrect. The petition describes in considerable detail the conflicting evidence in this case. Pet. 11-14. Respondent does not in any way disagree with that summary of the evidentiary disputes, or refer to it at all. Even if there were factual disputes, respondent contends, the petition did not "identif[y]" any instance in which the Fourth Circuit failed to "view the material facts in a light most favorable to the Petitioners." Br.Opp. 10. To the contrary, the petition specifically spells out key factual disputes resolved by the Fourth Circuit in favor of respondent. Pet. 21-22.

Respondent argues that the Fourth Circuit rule is not "germane" to this case because this appeal involves a summary judgment motion regarding qualified immunity. Br.Opp. 11. But the Fourth Circuit itself certainly believed that standard was germane to this appeal; that is the standard which the court of appeals announced and applied. The decision cited by the court below as establishing that standard, *Brooks v. Arthur*, 685 F.3d 367, 371 (4th Cir. 2012), was itself a summary judgment case. The panel's actual reasoning, repeatedly relying on Chief Caldwell's disputed account of the facts, removes any doubt that the court below was actually applying the very standard which respondent objects was not germane. Respondent may believe that the authority of courts to decide subsidiary factual

issues in free speech cases should be exercised only at a trial on the merits (Br.Opp. 8), but it does not contend that the Fourth Circuit, in this case or any other, has ever imposed that limitation.

B. There is no disagreement about the constitutional standard that the Fourth Circuit used regarding *Pickering* balancing. At the time of the violation at issue, Fourth Circuit law did not recognize the three types of lessened protection announced in the decision below; a decision by this Court rejecting those new limitations on free speech would thus defeat the defendant's claim of qualified immunity.

The brief in opposition includes a one-sentence pro forma denial of the existence of a circuit conflict about those issues. "Petitioners are attempting to create a circuit conflict where none really exists." Br.Opp. 12. But the brief in opposition says nothing at all about the multi-faceted conflict detailed in the petition. Pet. 23-33.

Respondent contends that in *Connick* this Court directed lower courts to rate the value of an employee's speech, when it held that the "manner, time and place" of speech are "relevant" to *Pickering* balancing. Br.Opp. 13 (quoting 461 U.S. at 152). But the passage in *Connick* quoted by respondent states only that the time, place and manner of the employee's speech are relevant to magnitude of the employer's interest, noting that those circumstances may affect the level of "threat[]" the speech poses to "the employing agency's institutional efficiency." 461 U.S. at 152.

Respondent argues that "a decision based entirely on a ... qualified immunity analysis does not decide the merits of the underlying constitutional dispute and, hence, does not establish any precedent that warrants the issuance of a writ of certiorari." Br.Opp. 7. But a court ruling on a qualified immunity defense necessarily sets out the substantive legal standard to be used in determining whether the action of the defendant was clearly unconstitutional. That is precisely what occurred in this case. The panel held that the defendant could reasonably have believed the plaintiffs' speech was unprotected because as a legal matter speech enjoys lesser constitutional protection if it is private, if it is engaged in for personal reasons, or if it is not well informed. App. 14a. The legal standard regarding *Pickering* balancing announced by the panel in this officially reported case is now controlling precedent in the Fourth Circuit; the precedential significance of the court of appeals decision is the same regardless of whether those standards were established and applied in a qualified immunity case or in a decision about the merits.

The decision below dramatically expands the circumstances in which defendants in the Fourth Circuit can in the future establish qualified immunity. In light of the decision in this case, a defendant may now argue that a reasonable official in that circuit could believe that speech on a matter of public concern is less protected (and thus likely to fail *Pickering* balancing) under any of the reduced-protection standards spelled out in the opinion below. Conversely, an employee who

seeks legal counsel before speaking will be advised that his or her speech is far more likely to be protected if disseminated to a very large public group rather than being raised internally.

The court of appeals' decision rested on two independent grounds (and related constitutional standards), one applying the Fourth Circuit's standard regarding *Pickering* balancing, and the other applying the court of appeals' standard regarding when an employee speaks as a citizen. When a lower court decision rests on two independent grounds, this Court regularly grants review of both. *E.g.*, *County of Los Angeles v. Mendez*, 137 S.Ct. 1539 (2017). That is what the Court should do in this case. The circuit conflict regarding whether a court or jury should decide subsidiary fact issues is in this case inextricably intertwined with both of the issues of substantive constitutional law.

C. Respondent argues that the Fourth Circuit held that a government employee is unprotected under *Garcetti* only when the employee engages in the speech that is one of his or her job duties. *See Garcetti v. Ceballos*, 547 U.S. 410 (2006). That is not a plausible interpretation of the decision below.

When the Fourth Circuit referred to the "duties" of the plaintiffs, it did not require that handing out complaint forms have *been* one of their actual job duties, or hold that it was. Instead, the court of appeals held that *Garcetti* applied because handing out such a form was merely "connect[ed]" to or "resemble[d]" the plaintiffs'

duties. App. 14a. But most employee speech that gives rise to First Amendment claims is "connected" to the speaker's job, in the sense that it has something to do with the agency for which the employee works. *Garcetti* removes speech from constitutional protection only when it is made "pursuant to" an employee's duties. 547 U.S. at 421. In *Givhan v. Western Line School Dist.*, 439 U.S. 410, 413 (1979), all the plaintiff's speech concerned "policies and practices at [the] school" where she taught. This Court nonetheless held that her speech was protected, explaining that "[t]he First Amendment protects some expression related to the speaker's job." *Givhan*, 439 U.S. at 421. Similarly, to say, without more, that a task merely "resembles" a job duty is implicitly to acknowledge that the task is not in fact an actual duty at all. The difference between the rule announced in *Garcetti* (and applied in other circuits), that an employee's speech is unprotected only if that speech is part of his or her actual job duties, and the Fourth Circuit rule that speech is unprotected whenever it merely is "connected to" or "resembles" those duties, is not a semantic distinction. The Fourth Circuit's sweeping rule would largely eviscerate the First Amendment rights of public employees.

The "facts" cited by the Fourth Circuit as indicating the plaintiffs "sp[o]ke ... as employees" make clear that the court of appeals' standard does not require an actual job duty. The three critical facts were that Berkeley knew that Crouse and Winningham were police officers, that the plaintiffs were "on call" (although at lunch) when they engaged in the speech, and that

they gave Berkeley a "town form." App. 14a. The fact that the person who witnesses speech knows the speaker is a public employee has nothing to do with whether that speech is a job duty; a government employee's families and friends, for example, always know where he or she works. Marvin Pickering mentioned in his letter to the editor that he was a public school teacher. *Pickering*, 391 U.S. at 576. The fact that the plaintiffs were "on call" while at lunch is equally unrelated to whether the content of their speech was a job duty; that would have been true if the plaintiffs had dropped by Mr. Berkeley's home to discuss the Carolina Panthers draft selections. Bessie Givhan was at the school where she worked when she complained about racial discrimination. *Givhan*, 439 U.S. at 415. The fact that the plaintiffs gave out a town form would be relevant under *Garcetti* only if giving out that particular form was part of their job. But all the witnesses agreed that this was not one of the job responsibilities of a Moncks Corner police officer. Pet. 13-14.

Respondent asserts that the Fourth Circuit "concluded that the information available to Chief Caldwell would lead a reasonable police chief to believe that the Petitioners were acting within the scope of their official duties when they delivered a copy of the police department's citizen complaint form to James Berkeley." Br.Opp. 15-16. That clearly inaccurate assertion confirms the actual nature of the Fourth Circuit standard. First, there is no such finding in the court of appeals opinion; this assertion is not accompanied by any citation to the decision below. Second, there is nothing

at all in the record about "the information available to Chief Caldwell" concerning the plaintiffs' duties. Third, there has never been a claim in this case, nor could there be, that Caldwell might have misunderstood what the plaintiffs' job duties were. The Moncks Corner Police Department had fewer than 25 officers, and the Chief would obviously have known what the officers' duties were; all the officers who testified knew what those duties were, and were not.

The decision below dramatically expands the circumstances in which defendants in the Fourth Circuit can assert qualified immunity. In light of the decision in this case, a defendant in that circuit may now argue that a reasonable official could believe that under *Garcetti* public employees have no First Amendment protection when their speech, although not a job duty, merely is "connected to" or "resembles" their work. At the time of the violation at issue, Fourth Circuit law did not yet hold that speech loses protection under *Garcetti* if it merely is connected to or resembles a worker's actual duties; a decision by this Court rejecting that new limitation on free speech would thus defeat the defendant's claim of qualified immunity.

II. This Case Is of Exceptional Importance

The issues in this case reflect a problem of unique and increasingly urgent national importance. The use of excessive force by law enforcement officers, once a matter primarily of concern in the Black and Hispanic communities, has with the advent of widely-viewed

video recordings garnered the attention of the entire country. A series of investigations by the United States Department of Justice has documented in several major police departments both systematic abuse and a lack of internal controls. Although the circumstances of particular cases are understandably matters of dispute, even the staunchest supporters of law enforcement recognize that this problem is sufficiently widespread, and visible, to undermine public confidence in and cooperation with the police.

A key cause of the persistence of this intractable problem has been the unwillingness of individual police officers to speak out when they witness or learn about the use of excessive force. Their failure to do so is of particular consequence, because police officers are often the key witnesses, sometimes the only surviving witnesses, when force is used, and they may have a unique understanding of the events, based on their years of law enforcement experience or their knowledge of the fellow officers involved. Police officers who raise these issues within their own departments may permit, or indeed compel, those departments to address internal problems before they result in litigation, or further injuries. But the vital role that law enforcement officials themselves could and should play in preventing and correcting the use of excessive force has too often been stifled by what the Department of Justice has accurately characterized as a "code of silence."[1] The President of the Chicago police officer's

[1] United States Department of Justice, Investigation of the Chicago Police Department ("Chicago Report"), 8, 75 (January 13,

union "admitted to ... a code of silence within [Chicago Police Department], saying 'there's a code of silence everywhere, everybody has it.'"[2] That widespread and deeply engrained code of silence has been enforced by reprisals, both by fellow officers and by higher police officials, against police officers with the courage and candor to speak up.

The First Amendment guarantee of free speech ought to provide at least some protection from such retaliation. But the Fourth Circuit decision in the instant case effectively constitutionalizes the use of reprisals to enforce a code of silence. In virtually every case, if a police officer says anything about the use of excessive force, his or her statement will be "connect[ed]" to the officer's job, a connection that under the decision below is likely to be fatal to any First Amendment claim. An officer who takes the entirely responsible step of trying to deal with a problem internally, rather than publically denouncing his or her department or fellow officers, is likely to forfeit any First Amendment protection because the speech involved will be directed to only one or two individuals.

As Justice Sotomayor noted in her dissent in *Salazar-Limon v. City of Houston*, 137 S.Ct. 1277 (2017), this Court has repeatedly granted review at the behest of officers charged with having used excessive

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2017); United States Department of Justice, Investigation of the Baltimore City Police Department, 151-53 (August 10, 2016); *see* https://www.themarshallproject.org/record/605-blue-wall-of-silence.

[2] Chicago Report, 75.

force, even though the application of qualified immunity may well leave without remedy the victims of constitutional violations, or their bereaved families. It is equally important that this Court's discretion be exercised to protect officers who attempt to prevent, or correct, such constitutional violations. In his concurring opinion in *Salazar-Limon*, Justice Alito observed that this Court's decisions to grant review of petitions filed by defendants in excessive force cases reflect no indifference to the constitutional violations alleged, but rather the application of "uniform standards [of] review." 137 S.Ct. at 1278. The Court stood ready to apply those same standards of review, he suggested, to a petition on behalf of plaintiffs who opposed the use of excessive force, if a "lower court conspicuously failed to apply a governing legal rule." *Id.* This is that case.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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