No. _____

In the Supreme Court of the United States

PAUL CAMPBELL FIELDS,
Petitioner,

v.

CITY OF TULSA; CHARLES W. JORDAN, individually and in his official capacity as Chief of Police, Tulsa Police Department; ALVIN DARYL WEBSTER, individually and in his official capacity as Deputy Chief of Police, Tulsa Police Department,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

SCOTT WOOD
Wood, Puhl & Wood, PLLC
2409 E. Skelly Drive
Suite 200
Tulsa, Oklahoma 74105
(918) 742-0808

ERIN MERSINO
Thomas More Law Center
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, Michigan 48106
(734) 827-2001

ROBERT JOSEPH MUISE
Counsel of Record
American Freedom Law Center
P.O. Box 131098
Ann Arbor, Michigan 48113
(734) 635-3756
rmuise@americanfreedomlawcenter.org

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Petitioner Paul Fields, a Tulsa, Oklahoma Police Captain, was punished by his government employer for filing a civil rights lawsuit, which made public the allegations that his employer violated his constitutional rights by suspending him without pay and punitively transferring him for objecting on religious grounds to an order requiring officer attendance at a religious proselytizing event.

More specifically, Petitioner was punished for his "actions and writings that were made public"—"actions and writings" made public by Petitioner's attorneys, and not Petitioner himself, in the course of advancing Petitioner's constitutional claims. The Tenth Circuit's conclusion that Petitioner's retaliation claim arising under the First Amendment would be futile is clearly erroneous, contrary to this Court's precedent, and indeed, establishes harmful precedent that will have a chilling effect on public employees who want to seek redress for the violation of their constitutional rights in a court of law.

Does the First Amendment permit a government employer to retaliate against and punish an employee for statements made by the employee's attorney in a civil rights complaint and during the course of litigating the employee's civil rights claims against his employer?

PARTIES TO THE PROCEEDING

The Petitioner is Paul Campbell Fields ("Petitioner").

The Respondents are the City of Tulsa; Charles W. Jordan, individually and in his official capacity as Chief of Police, Tulsa Police Department; and Daryl Webster, individually and in his official capacity as Deputy Chief of Police, Tulsa Police Department (collectively referred to as "Respondents").

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JURISDICTION

The judgment of the court of appeals was entered on May 22, 2014. App. 1. A Petition for Rehearing was denied on June 16, 2014. App. 60-61. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment provides, in relevant part, "Congress shall make no law . . . 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." U.S. Const. amend. I.

STATEMENT OF THE CASE

Petitioner, a Tulsa police captain, was punished for objecting to an order that conflicted with his "personal religious convictions" and notifying Respondents that he "intend[s] not to follow this directive, nor require any of [his] subordinates to do so if they share similar religious convictions." App. 6-7. For raising this religious objection, Petitioner was immediately stripped of his command, transferred to another division where he was subsequently assigned to the graveyard shift, and subjected to an Internal Affairs (IA) investigation. App. 8-9; *see also* App. 11-12.

During the pendency of the IA investigation, Petitioner filed this lawsuit and the extant First Amended Complaint.

As Respondents acknowledge, Petitioner was punished, in part, for his "refusal to attend and refusal to assign officers from [his] shift, who shared [his] religious beliefs, to attend" the "Appreciation Day" hosted by the Islamic Society of Tulsa. App. 9-10. Petitioner's "Sworn-Employee Performance Evaluation"—an evaluation that was approved and signed by Respondents Jordan and Webster—states that "Captain Fields was disciplined during this rating period for refusing to attend and refusing to direct that officers attend a law enforcement appreciation day at a local mosque." App. 37 n.1.

Petitioner objected on religious grounds to the attendance order because the "appreciation" event was advertised as including—and in fact did include—religious proselytizing, and Petitioner is strictly prohibited from discussing his Christian faith

while on duty, thereby creating for him a conflict and a moral dilemma. *See* App. 35-36 (stating objection based on religious beliefs).

As the panel acknowledged, during the "appreciation" event, the Muslim hosts "discussed Islamic beliefs, Mohammed, Mecca, and why and how Muslims pray; they showed officers a Koran; and they showed the officers Islamic religious books and pamphlets that were for sale and encouraged the officers to buy them." App. 9. Moreover, "[a]fter the event the Islamic Society posted on its website a photograph of officers sitting at a table with members of the mosque with the caption, 'Discover Islam Classes for Non-Muslims.'" App. 9.

Petitioner's punishment for objecting to this order was harsh. In addition to his immediate and punitive transfer and being subjected to an IA investigation, following the investigation, Petitioner was "suspended without pay for 80 hours/10 days," warned that "[a]ny further violations of Rules and Regulations . . . will lead to more severe disciplinary action, including dismissal," and that he would "not be considered for future promotions for a period of . . . at least one (1) year from the effective date of this order." App. 11-12.

Petitioner's official punishment and the bases for this punishment were set forth in a "personnel order" issued on June 9, 2011. This order was issued *after* Petitioner filed his First Amended Complaint.[1] *See* App. 11-12.

[1] The First Amended Complaint was filed on March 23, 2011.

Per the June 9 "personnel order," Petitioner was punished in part because his "actions and writings that were made public brought discredit upon the department." App. 12. These "actions and writings" refer to the filing of this lawsuit, which made public the allegations that Respondents violated Petitioner's constitutional rights. Indeed, Respondent "Jordan testified at a May 2013 grievance hearing that the 'actions and writings' for which [Petitioner] was punished had been statements by [Petitioner's] attorney that accused Jordan of assisting in 'global jihad' and accused [the Tulsa Police Department] of trying to force [Petitioner] to go to a mosque for a religious service and to engage in the faith of Islam." App. 12-13.

Upon learning that he was punished for filing this lawsuit, Petitioner immediately sought leave to file a Second Amended Complaint, seeking to add a First Amendment retaliation claim. *See* App. 51-56. The district court denied the motion, concluding that the claim "would be futile" because the speech did not address "matters of public concern." App. 56. This decision was affirmed on other grounds by the Tenth Circuit, which concluded that Petitioner's "retaliation claim would fail because the interests of Tulsa Police Department (TPD) as an employer outweighed [Petitioner's] *free-speech interests in filing this suit*." App. 4 (emphasis added); *see also* App. 23-28.

In sum, Petitioner's free speech claim is not based on any statement, oral or written, Petitioner made

pursuant to his official duties.[2] *See Garcetti v. Ceballos*, 547 U.S. 410 (2006). In fact, it is not based upon any statement he made personally. Rather, Petitioner's claim is based upon the fact that Respondents punished him for filing this lawsuit, which made public the allegations set forth in his complaint—allegations that address matters of public concern. *See Connick v. Myers*, 461 U.S. 138, 142 (1983).

REASONS FOR GRANTING THE PETITION

"Almost 50 years ago, this Court declared that citizens do not surrender their First Amendment rights by accepting public employment." *Lane v. Franks*, No. 13-483, 2014 U.S. LEXIS 4302, at *6 (U.S. June 19, 2014); *Garcetti*, 547 U.S. at 413 ("It is well settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.") (internal quotations and citation omitted); *Connick*, 461 U.S. at 142 (same); *Rankin v. McPherson*, 483 U.S. 378, 383 (1987) ("[A] State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech."); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605-06 (1967) ("[T]he theory that public employment . . . may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."). Indeed, this past term, the Court affirmed the following:

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[2] As stated by the district court, "The [Respondents] do not argue that filing this lawsuit was within the scope of [Petitioner's] official duties. Therefore, the speech [Petitioner] claims is protected—the filing of this lawsuit—was outside [Petitioner's] official duties." App. 54.

> 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 bringing about of political and social changes desired by the people. . . . This remains true when speech concerns information related to or learned through 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. There is considerable value, moreover, in *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. *The interest at stake is as much the public's interest as it is the employee's own right to disseminate*.

Lane, 2014 U.S. LEXIS 4302, at **13-14 (internal quotations and citations omitted) (emphasis added); *see also id*. at **17 (holding that "the First Amendment protects a public employee who provides truthful sworn testimony, compelled by a subpoena, outside the scope of his ordinary job responsibilities").

Contrary to this well-established precedent, the Tenth Circuit has now permitted a public employer to punish an employee for seeking redress in a court of law for the violation of his constitutional rights—punishment based on the written and oral statements *made by the employee's attorney and not the employee himself*.

Consequently, the Tenth Circuit's rejection of Petitioner's First Amendment retaliation claim has produced a decision on an important federal question in a way that conflicts with relevant decisions of this Court. *See* Sup. Ct. R. 10(c).

The panel framed the issue as follows: whether "the district court should have allowed [Petitioner] to amend his complaint to include a claim that [Respondents] retaliated against him for filing this lawsuit, in violation of the First Amendment right to freedom of speech."[3] App. 23.

And it is important to highlight once again that the speech at issue here was not spoken or written *by Petitioner*—it was spoken and written *by Petitioner's attorneys* in the filing of the complaint and other court papers and during the course of this litigation. *See* App. 12-13. That alone is a sufficient reason for reviewing this case because allowing this decision to stand will chill the filing of civil rights complaints by government employees and intrude upon the attorney-client relationship by permitting the government to retaliate against and thus punish the employee (*i.e.*, the client) for statements *made by his attorney* during the course of litigating claims against his government employer.

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[3] Here, there is no dispute that Respondents punished Petitioner for filing this lawsuit. Therefore, the speech at issue was a substantial or motivating factor in the retaliatory action. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (setting forth the analysis for claims that a plaintiff has suffered job-related sanctions as a result of speech). Thus, the principal question presented is whether the speech at issue is entitled to constitutional protection.

As Petitioner argued below, inherent in the right to freedom of speech is the right to seek redress of one's grievances in a court of law. "It was not by accident or coincidence that the rights to freedom of speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights . . . ." *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *see also United Mine Workers of Am. v. Ill. State Bar Ass'n*, 389 U.S. 217, 221-22 (1967). Indeed, "[t]he right to petition is cut from the same cloth as the other guarantees of [the First] Amendment, and is an assurance of a particular freedom of expression." *McDonald v. Smith*, 472 U.S. 479, 482-83 (1985); *see also id*. at 484 ("Filing a complaint in court is a form of petitioning activity.").[4]

As noted by the panel, the district court rejected Petitioner's retaliation claim by concluding that "the subject matter of his lawsuit was not a matter of public concern." App. 25. The panel, however, stated that it "need not address the public-concern issue. Regardless of whether the lawsuit was on a matter of public concern, [Petitioner's] claim cannot survive the balancing of interests at the third step of the *Garcetti/Pickering* analysis." App. 25.

Here, there is no dispute that Petitioner's speech—the filing of his civil rights lawsuit—was not

[4] In a footnote, the panel stated, "Perhaps Fields could have framed his claim as a violation of his right to petition. . . . But our analysis would be the same." App. 23 n.1 (citing *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2494-95 (2011) (noting that retaliation claims by public employees are subject to the same test regardless of whether they are under the Free Speech or Petition clauses of the First Amendment)).

pursuant to any of his ordinary job responsibilities as a police officer. App. 54 (stating that Respondents "do not argue that filing this lawsuit was within the scope of [Petitioner's] duties" and concluding that "the speech [Petitioner] claims is protected . . . was outside [his] official duties"); *compare Garcetti*, 547 U.S. at 421 ("[W]hen 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."), *with Lane*, 2014 U.S. LEXIS, at **19 ("The sworn testimony in this case is far removed from the speech at issue in *Garcetti*—an internal memorandum prepared by a deputy district attorney for his supervisors recommending dismissal of a particular prosecution."). Thus, there is no dispute that Petitioner was speaking as a private citizen for First Amendment purposes.

Moreover, there can be little dispute that Petitioner's speech was addressing a matter of public concern. As this Court stated, "Speech involves matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Lane*, 2014 U.S. LEXIS, at **22 (internal quotations and citation omitted); *see also Connick*, 461 U.S. at 143 (same). Indeed, when the content of the speech focuses on disclosing wrongdoing or other malfeasance on the part of government officials in the conduct of their official duties, it is a matter of public concern. *See Lane*, 2014 U.S. LEXIS, at **22-23 ("The content of Lane's testimony—corruption in a public

program and misuse of state funds—obviously involves a matter of significant public concern"); *Garcetti*, 547 U.S. at 425 ("Exposing governmental inefficiency and misconduct is a matter of considerable significance.").

In short, Petitioner's speech—the filing of his civil rights lawsuit, which publicly disclosed the violation of his constitutional rights by his government employer—is clearly speech involving a matter of public concern. *See David v. City & Cnty. of Denver*, 101 F.3d 1344, 1356 (10th Cir. 1996) ("[E]ven speech that focuses on internal employment conditions and is made in the context of a personal dispute may be regarded as pertaining to a matter of public concern if it addresses important constitutional rights which society at large has an interest in protecting.") (internal quotations and citation omitted); *see generally G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (noting that "expression on public issues" rests on the "highest rung of the hierarchy of First Amendment values").

The panel concluded, however, that Respondents' interests as a government employer outweighed Petitioner's interests as a private citizen to speak on a matter of public concern. App. 27-28. The panel stated that Petitioner's "challenge to a superior's order, by disobedience *or by litigation*, sets a powerful example," further stating that this "*would likely* undermine not just his superiors' confidence in his loyalty and

willingness to implement orders, but also his own authority as a commander." App. 27 (emphasis added).

The panel is wrong for at least four reasons. First, the panel failed to consider the "special value" of Petitioner's speech. As this Court recently stated,

> It bears emphasis that our precedents dating back to *Pickering* 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. . . .

Lane, 2014 U.S. LEXIS, at **20-21 (stating further that "[t]he importance of public employee speech is especially evident in the context of this case: a public corruption scandal"); *see also Monsanto v. Quinn*, 674 F.2d 990, 1001(3d Cir. 1982) ("We do not underestimate the internal unease or unpleasantness that may follow when a government employee decides to break rank and complain either publicly or to supervisors about a situation which she believes merits review and reform. That is the price the First Amendment exacts in return for an informed citizenry."); *McKinley v. Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983) ("[S]peech that concerns 'issues about which information is needed or appropriate to enable the members of society' to make informed decisions about the operation of their government merits the highest degree of first amendment protection.") (quoting *Thornhill v. Alabama*, 310 U.S. 88, 102 (1946)).

Second, "real, not imagined, disruption is required." *McKinley*, 705 F.2d at 1115; *see also Connick*, 461 U.S.

at 152 ("We caution that a stronger showing [of disruption] may be necessary if the employee's speech more substantially involved matters of public concern."). As the panel implicitly acknowledged, Respondents "'never explain how any of their interests are legitimately advanced by punishing [Petitioner] for filing this civil rights lawsuit.'" App. 28 (quoting Petitioner's reply brief). Indeed, there is no evidence that Petitioner's speech caused any "real," as opposed to "imagined," disruption in the workplace. And this is further supported by the fact that the panel had to qualify its own conclusion by noting that Petitioner's litigation "*would likely*" cause disruption. In short, the panel improperly dismissed the fact that Respondents failed to set forth any legitimate interest advanced by retaliating against Petitioner for filing this lawsuit. App. 28 (acknowledging Petitioner's argument but dismissing it by simply asserting that "[w]e have long said that we may affirm on any basis supported by the record, even if it requires ruling on arguments not reached by the district court or even presented to us on appeal") (internal quotations and citation omitted).

Third, the panel failed to consider the fact that Petitioner was punished (and thus retaliated against) not for *his speech*, but for the speech of his attorneys made during the course of litigating this lawsuit. Consequently, the panel's decision thus also fails to account for the adverse impact it will have on the attorney-client relationship in cases in which an employee is suing his government employer.

And finally, the panel is wrong because its decision was based on the ultimate outcome of the lawsuit, *see* App. 26-27, and will thus have an untold chilling effect

on employees who are considering whether to seek redress in a court of law for alleged violations of their constitutional rights by their government employer. *See, e.g., Czurlanis v. Albanese*, 721 F.2d 98, 106 (3d Cir. 1983) ("A policy which would compel public employees to route complaints about poor departmental practices to the very officials responsible for those practices would impermissibly chill [speech on public issues].").

In short, this type of retaliation should never be permitted. Public employees should not be discouraged and inhibited from resolving in a court of law disputes involving alleged constitutional violations by government officials *See generally NAACP v. Button*, 371 U.S. 415, 437-44 (1963) (recognizing the importance of public interest litigation to enforce constitutional rights). And this is particularly the case when, as here, the government officials involved have a sworn duty to uphold the Constitution.

Indeed, the panel's decision will have an immense chilling effect on public employees who may want to seek redress for the violation of their constitutional rights in a court of law, and it will, at a minimum, inhibit the attorney-client relationship that must develop during the course of that litigation.

In sum, as a direct consequence of the panel's decision, a public employee who is considering whether to vindicate his or her constitutional rights in a court of law is now faced with a very difficult decision because if the employee does not ultimately prevail, the defendant-employer can fire (or take other adverse action against) the plaintiff-employee for the negative publicity the employer may receive as a result of the

lawsuit or the statements made by the employee's attorney during the course of litigating the claims.

A court of law should never allow the government to punish an employee for filing a civil rights lawsuit that seeks to vindicate constitutional rights, as the panel has done here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT JOSEPH MUISE
Counsel of Record
American Freedom Law Center
P.O. Box 131098
Ann Arbor, Michigan 48113
(734) 635-3756
rmuise@americanfreedomlawcenter.org

SCOTT WOOD
Wood, Puhl & Wood, PLLC
2409 E. Skelly Drive, Suite 200
Tulsa, Oklahoma 74105
(918) 742-0808

ERIN MERSINO
Thomas More Law Center
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, Michigan 48106
(734) 827-2001

Counsel for Petitioner