No. 23-5133

United States Court of Appeals for the Tenth Circuit

WAYNE BROWN,
Plaintiff-Appellant,

v.

CITY OF TULSA; CHARLES W. JORDAN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHIEF OF POLICE, TULSA POLICE DEPARTMENT,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
HONORABLE WILLIAM P. JOHNSON
Civil Case No. 4:19-cv-00538-WPJ-CDL

APPELLANT'S PRINCIPAL BRIEF
ORAL ARGUMENT REQUESTED

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GLOSSARY OF TERMS

TPD ..... Tulsa Police Department

DJA ..... Declaratory Judgment Act

STATEMENT OF PRIOR OR RELATED APPEALS

There are no prior or related appeals.

STATEMENT OF JURISDICTION

Plaintiff-Appellant Wayne Brown ("Plaintiff") filed his original complaint on October 9, 2019. (R-1, Compl.). On December 27, 2019, Plaintiff filed a First Amended Complaint ("FAC"). (R-6, FAC, App.8-35). This is the operative pleading in this case.

The FAC advanced federal claims arising under the First and Fourteenth Amendments to the U.S. Constitution and 42 U.S.C. § 1983, and a state law claim (*Burk* claim) arising out of the same set of operative facts. The district court had jurisdiction over the federal claims pursuant to 28 U.S.C. §§ 1331 and 1343 and supplemental jurisdiction over the state law claim pursuant to 28 U.S.C. § 1367(a).

On February 3, 2020, Defendant-Appellee City of Tulsa ("City") and Defendant-Appellee Charles W. Jordan ("Defendant Jordan") (collectively referred to as "Defendants") each filed a motion to dismiss. (R-13, City's Mot. to Dismiss; R-14, Def. Jordan's Mot. to Dismiss). Plaintiff opposed the motions. (R-17, Pl.'s Resp. to City's Mot.; R-18, Pl.'s Resp. to Def. Jordan's Mot.).

On November 21, 2023, the district court granted Defendants' motions as to Plaintiff's federal claims and declined supplemental jurisdiction over Plaintiff's state law claim. (R-30, Mem. Op. & Order, App.36-64). That same day, Final Judgment was entered in Defendants' favor. (R-31, J., App.65).

On December 9, 2023, Plaintiff filed a timely notice of appeal. (R-32, Notice of Appeal, App.66-67).

This appeal is from a final order and judgment that disposes of all parties' claims. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

PRELIMINARY STATEMENT

This civil rights action, brought under the First and Fourteenth Amendments and Oklahoma state law, challenges Defendants' termination of Plaintiff on account of the content and viewpoint of his "protected expression," which was made as a private citizen prior to his employment with the City.

On September 4, 2019, Defendants, acting under color of state law, terminated Plaintiff's employment as a police officer with the City of Tulsa Police Department ("TPD") because of the content and viewpoint of certain social media posts he made *several years prior to* the City hiring him as a police officer.

"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.'" *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006) (quoting *Connick v. Myers*, 461 U.S. 138, 142 (1983)); *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."); *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) (same). Moreover, Oklahoma law

recognizes an actionable common-law tort for an at-will employee's discharge in contravention of a clear mandate of public policy that is found in Oklahoma's constitutional, statutory, or decisional law or in a federal constitutional provision (such as the First Amendment) that prescribes a norm of conduct for Oklahoma (a *Burk* claim).

The policy implications associated with permitting the government to terminate a public employee for speech on social media that he made *several years prior to his hiring* are grave. Permitting such actions threatens to chill the free speech rights of anyone who has an interest in pursuing public employment in the future.

In sum, the FAC states claims for relief that are plausible on their face. This Court should promptly reverse the district court and permit the case to proceed on the merits.

STATEMENT OF THE ISSUES FOR REVIEW

I. Whether Defendants' firing of Plaintiff because of the content and viewpoint of social media posts he made several years prior to his hiring as a City police officer violated his rights protected by the First Amendment.

II. Whether Defendants' firing of Plaintiff because of the content and viewpoint of social media posts he made on Facebook, a forum that

Defendants allow, violated the equal protection guarantee of the Fourteenth Amendment.

III. Whether Defendant Jordan, the Chief of Police, enjoys qualified immunity for firing Plaintiff because of the content and viewpoint of Plaintiff's speech.

IV. Whether the district court abused its discretion by not exercising supplemental jurisdiction over Plaintiff's *Burk* claim.

STATEMENT OF THE CASE

A. Procedural History.

This lawsuit was filed on October 9, 2019. (R-1, Compl.). On December 27, 2019, Plaintiff filed an amended complaint (FAC), which advanced federal claims arising under the First and Fourteenth Amendments to the U.S. Constitution and 42 U.S.C. § 1983, and a state law *Burk* claim (wrongful discharge) arising out of the same set of operative facts. (R-6, FAC, App.8-35).

On February 3, 2020, Defendants City and Jordan each filed a motion to dismiss (R-13, City's Mot. to Dismiss; R-14, Def. Jordan's Mot. to Dismiss), which Plaintiff opposed (R-17, Pl.'s Resp. to City's Mot.; R-18, Pl.'s Resp. to Def. Jordan's Mot.).

On November 21, 2023, the district court granted Defendants' motions as to Plaintiff's federal claims and declined supplemental jurisdiction over Plaintiff's

state law claim. (R-30, Mem. Op. & Order, App.36-64). Final Judgment was entered in Defendants' favor that same day. (R-31, J., App.65).

On December 9, 2023, Plaintiff filed a timely notice of appeal. (R-32, Notice of Appeal, App.66-67). This appeal follows.

B. Statement of Facts.

On October 24, 2018, Plaintiff was selected for the Tulsa Police Academy. It was Plaintiff's life-long dream to become a uniformed police officer. (R-6, FAC ¶¶ 17, 18, App.11).

On January 22, 2019, Plaintiff commenced his employment with the TPD. Prior to and during his time at the police academy, Plaintiff was subject to close scrutiny and background investigations to ensure that he had the character, demeanor, and temperament to become a uniformed police officer, which he does. (R-6, FAC ¶¶ 19, 20, App.12).

At no time has Plaintiff ever discriminated against anyone on account of his or her race, religion, or other protected class. At no time has Plaintiff engaged in any conduct that exhibited an unlawful or otherwise discriminatory bias against any race, religion, or other protected class. (R-6, FAC ¶ 21, App.12).

The police academy is twenty-eight weeks long. It is rigorous, and it is designed, in large part, to test the character of the candidates. Plaintiff successfully completed the police academy on August 2, 2019. At no time while he was

attending the police academy did Plaintiff ever discriminate against anyone on account of his or her race, religion, or other protected class nor did he engage in any conduct that exhibited an unlawful or otherwise discriminatory bias against any race, religion, or other protected class. At no time while he was attending the police academy did Plaintiff engage in any conduct unbecoming an officer or police employee. (R-6, FAC ¶¶ 22-25, App.12).

On August 6, 2019, Plaintiff began field training. His shift assignment was Tuesday through Friday, 1400 to 2400 (2 p.m. to midnight). At no time during his field training did Plaintiff ever discriminate against anyone on account of his or her race, religion, or other protected class nor did he engage in any conduct that exhibited an unlawful or otherwise discriminatory bias against any race, religion, or other protected class. At no time during his field training did Plaintiff take any action that was inconsistent with his Oath of Office and Value Oath. At no time during his field training did Plaintiff engage in any conduct unbecoming an officer or police employee. (R-6, FAC ¶¶ 26-30, App.12-13).

During his time at the academy and during his field training, Plaintiff's performance as a candidate and his performance as a police officer were exemplary. Plaintiff's actions demonstrated that he was well qualified to serve as a uniformed police officer with the TPD. (R-6, FAC ¶ 31, App.13).

On September 4, 2019, Defendants terminated Plaintiff's employment as an officer with the TPD based on the content and viewpoint of social media posts he posted on his Facebook page ("Duke Brown") several years prior to his hiring by the TPD. Defendants terminated Plaintiff's employment at the urging of Marq Lewis, a local, radical, left-wing, political activist and agitator who has disdain for white police officers and hatred for President Donald Trump, considering both to be racists. (R-6, FAC ¶¶ 32, 33, App.13).

Marq Lewis, and/or those working in association with him, including the Council on American-Islamic Relations-Oklahoma ("CAIR-OK"), made a complaint about Plaintiff's old Facebook posts to Defendants, who fired Plaintiff shortly thereafter as a result. "Within one hour and fifteen minutes of receiving *the complaint* the officer was terminated," TPD Sergeant Shane Tuell told reporters, referring to the firing of Plaintiff. (R-6, FAC ¶¶ 34, 35, App.13-14) (emphasis added). In other words, Plaintiff was fired *based on a complaint* by political activists and *not* based on any disruptions at the workplace.

In his Facebook post, Marq Lewis complains about *three* "very offensive social media images" that he and/or those associated with him searched out on Plaintiff's Facebook page.[1] (R-6, FAC ¶ 38, App.14). However, during Plaintiff's

[1] It is common knowledge that in order to find a Facebook post that is 3 or 4 years old, the person looking would have to dig deeply and engage in an exhaustive search to find it.

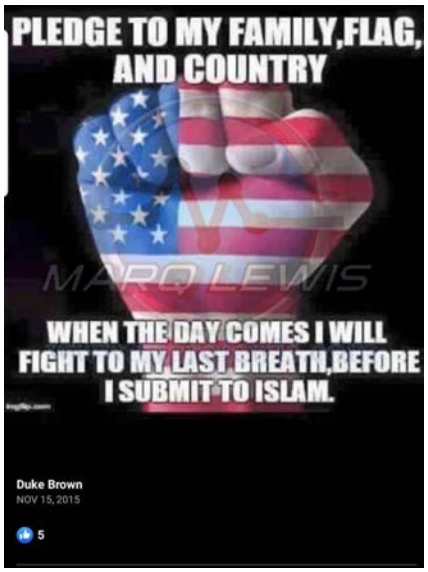
appeal of the denial of unemployment benefits as a result of his termination, Deputy Chief Eric Dalgliesh of the TPD testified for the City and stated that Plaintiff was terminated for posting *two* images on his Facebook page: the Trump Post and the Blue Lives Matter Post, appearing below. (R-6, FAC ¶ 90, App.27).

The Trump Post is an image of the yet-to-be-president Donald Trump, and it was posted on or about *August 6, 2015*:

The Blue Lives Matter post contains an image created by the famous American sniper and decorated war hero Chris Kyle superimposed over the American flag with a thin blue line—the flag image is associated with the "blue lives matter" movement. This image was posted on or about *March 24, 2016*.

(R-6, FAC ¶ 72, App.20-21).

The third post, which was analyzed by the district court but not one of the posts the City's representative claimed served as the basis for Plaintiff's firing, consisted of an image making the point that Americans (particularly Christians, such as Plaintiff, who will not convert or submit to Islam as a matter of religious conviction) will not surrender or submit to sharia-supremacism, which is a tyrannical form of government prevalent in countries such as Iran and a form of governance demanded by terrorist organizations such as ISIS and Al Qaeda. The image (the "Pledge to My Family Post") was posted on or about November 15, 2015, and it appears below:



(R-6, FAC ¶ 72, App.21).

Plaintiff was informed of his termination on September 4, 2019, by TPD Captain Thom Bell, TPD Captain Luke Sherman, and two officers from TPD Internal Affairs. At approximately 2:05 p.m., Plaintiff was told by Captain Bell to come in the meeting room where Captain Sherman and the Internal Affairs officers were waiting. (R-6, FAC ¶¶ 39, 40, App.14).

Upon Plaintiff's entry into the room, the door was closed behind him by Captain Sherman, and Plaintiff was instructed to remove his gun belt by Captain Bell. Plaintiff removed his gun belt as ordered and handed it to the Internal Affairs officer to his immediate left, who then laid it on the table. (R-6, FAC ¶¶ 41, 42, App.14).

Plaintiff was told to sit down. He complied. He was then handed an Interoffice Correspondence from Defendant Jordan dated September 4, 2019, the

subject of which is "Personnel Order #19-257 Termination," and told to read it. Plaintiff read the correspondence, which stated that his employment with the TPD was "hereby terminated effective immediately" because the TPD "was made aware of social media postings made by [Plaintiff] that violate Department Rules & Regulations and Policies and Procedures." (R-6, FAC ¶¶ 43, 44, Ex. A, App.15, App.33-35).

Accordingly, the basis for Plaintiff's termination was the following TPD policy: Policy and Procedure 31-324 (Social Media and Networking) Procedures C.6., which states,

> Department personnel should be mindful that their speech, when using social media, is public and becomes part of the worldwide electronic domain. Therefore, adherence to the department's code of conduct is required in the personal use of social media. In particular, department personnel are prohibited from posting speech containing obscene or sexually explicit language, images, acts, and statements or other forms of speech that ridicule, malign, disparage, or otherwise express bias against any race, religion, or protected class of individuals.

(R-6, FAC ¶ 45, App.15) ("Social Media Policy"). However, the Personnel Policies and Procedures for the City state as follows:

> 402. Prohibition Against Suspension, Removal or Demotion
>
> No person in the classified service shall be suspended, removed or demoted because of race, creed, color, *religious or political beliefs or affiliations*, except when such person advocates or belongs to an organization which advocates the overthrow of the government by force or violence (CSCA).

(R-6, FAC ¶ 46, App.15-26) (emphasis added). Plaintiff does not advocate or belong to an organization which advocates the overthrow of the government by force or violence. (R-6, FAC ¶ 47, App.16).

During this meeting on September 4, 2019, and consistent with the Interoffice Correspondence, Plaintiff was told that his employment was being terminated because he violated the Social Media Policy. Plaintiff was informed that he posted offending social media posts on his private Facebook page, and that these posts were sent by a complaining citizen to either the mayor's office or Defendant Jordan's office, he was unclear which. (R-6, FAC ¶¶ 48, 49, App.16).

Plaintiff asked if they (those responsible for the decision to fire him, including Defendant Jordan) were going to give him a chance to explain "his side of it," and he was told by Captain Bell and the Internal Affairs officer to his immediate left that they were not there to listen to anything Plaintiff had to say and that he needed to sign the termination paper. Plaintiff stated that this was not right and that he had done nothing wrong. (R-6, FAC ¶¶ 50, 51, App.16).

Plaintiff asked if there was any way that he could talk to Defendant Jordan about this decision to terminate his employment. The officers would not say whether Plaintiff would be given a chance to discuss the matter with Defendant Jordan. All they would say was that they would pass the message to him

(Defendant Jordan), but they were not going to discuss anything further about this with Plaintiff. (R-6, FAC ¶¶ 51, 52, App.16).

Plaintiff was then told to strip off his vest and relinquish all of his credentials that were issued to him by the TPD. Plaintiff complied. Plaintiff continued to try and talk with the officers about the matter, but they refused to speak with him. Plaintiff told them that the posts were three to six years old and that this decision to terminate his employment was complete "BS" and they knew it. (R-6, FAC ¶¶ 53, 54, App.16-17).

Earlier that day (at or about 11:11 a.m.) and prior to Plaintiff arriving at work, a friend forwarded to Plaintiff a copy of Marq Lewis' Facebook post which referred to a number of old social media postings on Plaintiff's Facebook page. In the post forwarded by Plaintiff's friend, Marq Lewis falsely claims, *inter alia*, that "Officer Brown has biases towards people who practice Islam and Black Americans." (R-6, FAC ¶ 55, App.17).

Plaintiff did not have any indication that old posts appearing on his Facebook page were an issue until seeing the message sent to him by his friend. Upon seeing Marq Lewis' post, Plaintiff wasn't sure what the forwarded message was all about or why Marq Lewis would be trolling his Facebook page for old posts. However, upon being confronted by Captain Bell and the other officers, Plaintiff understood that something was brewing behind the scenes and that his

Facebook posts referenced by Marq Lewis were the posts that served as the basis for his firing. (R-6, FAC ¶ 56, App.17).

Plaintiff asked the officers to please not make him do a "shame walk" in front of everyone as he left, and they agreed that they would make sure the hallways were clear so he could leave. The officers told Plaintiff that he had to remove his shirt and that he was not allowed to leave with it. Plaintiff was completely devastated at this point. He signed the Interoffice Correspondence as directed, even though he did not want to. He was given a copy for his records. (R-6, FAC ¶¶ 57, 58, App.17).

The officers cleaned out Plaintiff's police vehicle and brought him his personal items. Plaintiff was then led out of the meeting room and out the back door. (R-6, FAC ¶¶ 59, 60, App.18).

Captain Bell instructed Plaintiff to bring whatever he had at his house to the division the next day so they did not have to come get it and embarrass Plaintiff any further. Plaintiff departed the Riverside Division totally dejected, embarrassed, and humiliated. He headed home realizing that his dream of being a police officer was over. (R-6, FAC ¶ 61, App.18).

Plaintiff was understandably angered by the way this all transpired. He had successfully completed background checks, interviews, and other inspections of his character. He completed twenty-eight rigorous weeks of training at the police

academy and nearly a month of field training as a police officer. He had committed himself to being the best police officer possible. Not once during this arduous process did anyone suspect Plaintiff of harboring any bias toward anyone, because he doesn't. Not once during this arduous process did anyone complain to him about posts made three to six years ago on his Facebook page. Indeed, Defendant Jordan didn't have the courage to confront Plaintiff personally or to allow Plaintiff an opportunity to discuss the matter with him. Instead, ***Defendant Jordan allowed a local political activist who was well known in the community, particularly amongst the police officers, as a person who harbors anti-police bias to cause Plaintiff's firing based on the content and viewpoint of Plaintiff's public issue speech made years prior to his hiring by the TPD***. (R-6, FAC ¶ 62, App.18).

The next day, September 5, 2019, around 1:00 p.m., Plaintiff returned to the Riverside Division to return the rest of the TPD property he had in his possession. Plaintiff met with Captain Bell, and he told the officer that his Bluetooth headphones were still in the police vehicle and that he needed to retrieve them. Captain Bell directed Plaintiff to drive his personal vehicle around the back of the building to the parking lot, which he did. There, Captain Bell gave Plaintiff his headphones after retrieving them from the police vehicle. (R-6, FAC ¶ 63, App.18-19).

After giving him his headphones, Captain Bell told Plaintiff, "On a personal note ***I didn't want to do this*** (referring to Plaintiff's termination) and ***I think its BS***, but understand I have a job to do as well and best of luck to you in the future." Captain Bell also told Plaintiff that ***he was a good officer and they (the TPD) needed people like him***. Plaintiff responded by saying, "Thank you," and he shook Captain Bell's hand. Plaintiff then departed the division and headed home for good. (R-6, FAC ¶ 64, App.19) (emphasis added).

Plaintiff was never given an opportunity to discuss the matter with Defendant Jordan. (R-6, FAC ¶ 65, App.19).

Shortly ***after*** Plaintiff's firing, news reports began circulating and social media erupted, condemning Plaintiff and vilifying him as a racist and an Islamophobe.[2] For example, on September 6, 2019, CAIR-OK issued a press release titled, "CAIR-OK Applauds Termination of Tulsa Police Officer for Islamophobic Social Media Posts." CAIR-OK is an affiliate of CAIR-National. CAIR-National was an unindicted co-conspirator/joint-venturer in one of the largest terrorism financing trials prosecuted by the U.S. Government. Persons who oppose or are critical of CAIR's nefarious, Islamists agenda are labeled by CAIR

[2] The City's firing of Plaintiff provided the pretext for the false accusations made against him, thereby fueling the media response. At the end of the day, Defendants sided with a well-known, anti-police activist and betrayed a good police officer. (*See* R-6, FAC ¶ 62, App.18).

as "Islamophobes" in an effort to marginalize and ultimately silence their speech.[3] (R-6, FAC ¶¶ 66, 67, App.19).

In response to a media inquiry, Sgt. Shane Tuell, TPD's Public Information Officer, wrote: "Early yesterday morning the police department was notified of some questionable social media posts by one of our officers. The Chief [Defendant Jordan] immediately ordered internal affairs to open an investigation, and *within one hour and 15 minutes* of receiving the complaint the officer was terminated." (R-6, FAC ¶ 68 [emphasis added], App.19-20). This is not disruption in the workplace; it is the cancel culture at work to suppress speech.

The social media posts that served as Defendants' basis for firing Plaintiff were posted or shared on Plaintiff's Facebook page three to six years prior to the start of his employment with the TPD. (R-6, FAC ¶ 74, App.24).

Each of the offending Facebook posts constitutes speech made by Plaintiff as a private citizen commenting on matters of public concern. Each of the subjects represented in the offending Facebook posts constitutes public issue speech. None

[3] As set forth in the FAC: "It is false to equate the rejection of sharia-supremacism—a principle that guided and motivated the terrorists to kill innocent Americans on 9/11, as just one example—with bias against Islam in general. Because someone rejects Nazism, for example, does not mean that the person is biased against all Germans . . . Our nation's fight against ISIS, Al Qaeda, and the Taliban is, at its core, a fight against sharia-supremacism—a reason why it was so important to destroy the caliphate that ISIS claimed it was creating. Islamists overseas have mercilessly persecuted and murdered Christians. Many Chaldean Christians, as just one example, have fled Iraq because of this persecution." (R-6, FAC ¶¶ 75-77, App.25).

of the offending speech contains obscene or sexually explicit language, images, or acts, and none of the offending speech ridicules, maligns, disparages or otherwise expresses bias against any race, religion, or protected class of individuals. Each of the offending Facebook posts conveys a personal political or religious viewpoint. None of the offending Facebook posts provide a scintilla of evidence that Plaintiff would unlawfully discriminate against anyone while he was serving as a police officer with the TPD. Indeed, Plaintiff has demonstrated through his actions that he possesses the ability, character, motivation, and skill to be an exceptional police officer. (R-6, FAC ¶¶ 79-83, App.25-26).

Defendants terminated Plaintiff's employment because a local political activist and his followers disagree with Plaintiff's political and religious views. (R-6, FAC ¶ 84, App.26).

Defendants' firing of Plaintiff caused Plaintiff public humiliation, embarrassment, anger, and stress. At times, Plaintiff would avoid going out in public, particularly with family and friends, because of this humiliation and embarrassment and his desire not to subject his family and friends to similar humiliation, harassment, or embarrassment on his account. (R-6, FAC ¶ 85, App.26).

Defendants' *firing* of Plaintiff has *undermined the trust and confidence that the TPD police officers have in their leadership*. *Plaintiff's firing demonstrates to*

the rank and file of the TPD that their leadership, in particular Defendant Jordan, will "throw them under the bus" to promote political correctness and to appease political activists like Marq Lewis and CAIR-OK. Defendants' firing of Plaintiff erodes the esprit de corps of the TPD. Defendants' *firing* of Plaintiff did not advance any legitimate government interest and, in fact, was contrary to the government's legitimate interests *by undermining the confidence and trust that TPD officers have in their leadership*. (R-6, FAC ¶¶ 86, 87, App.26).

In sum, Defendants' *firing* of Plaintiff is contrary to any legitimate government interest in that *it has impaired discipline by superiors and harmony among coworkers, it has had a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, and it has thus impeded the performance of other officers and interfered with the regular operation of the TPD*. (R-6, FAC ¶ 88, App.26). In other words, it is the precise opposite of what the district court concluded. Here, it was the *firing* of Plaintiff on account of his speech that disrupted and undermined the efficiency of the public service and *not* Plaintiff's speech, which consisted solely of social media posts made years prior to his government employment.

As a result of his termination, Plaintiff sought unemployment benefits. His request was denied by the Oklahoma Employment Security Commission, which concluded that Plaintiff was not entitled to unemployment benefits under Section

2-406 of the Oklahoma Employment Security Act because he was discharged for misconduct connected to his work. Plaintiff appealed. The issue confronted by the Appeal Tribunal was whether Plaintiff "was discharged for a reason amounting to misconduct connected with the work." The Appeal Tribunal reversed the Commission's determination, concluding that Plaintiff was qualified for benefits. The Appeal Tribunal ruled, in relevant part, that "it cannot be found that [Plaintiff's] conduct [the posting of the two images at issue], years before being hired, is connected to the work in this matter. It would seem illogical to find the [Plaintiff's] conduct violated a policy before he was even aware of the policy. . . . Benefits are allowed." (R-6, FAC ¶¶ 89-91, App.26-27). Similarly, it was "illogical" and wrong as a matter of law for the district court to dismiss Plaintiff's claims.

C. Decision Below.

1. First Amendment Claim.

The district court dismissed Plaintiff's First Amendment claim for failure to state a plausible claim for relief. (R-30, Mem. Op. & Order at 8-19, App.43-54). The district court commenced its analysis by concluding that "[b]ased upon the facts of this case, [it] considers *Flanagan*'s protected expression test to be the more appropriate test to apply. Plaintiff clearly did not speak as an employee, his speech did not concern work, and his speech did not occur at work." (R-30, Mem. Op. &

Order at 14 [citing *Flanagan v. Munger*, 890 F.2d 1557, 1564 (10th Cir. 1989)], App.49). Accordingly, the district court found that all of the social media posts at issue are "protected expression." (R-30, Mem. Op. & Order at 14-16, App.49-51). Per the court, "[t]he August 6, 2015, post of Donald Trump is a protected expression of political speech." (*Id*. at 14, App.49). The court found that the March 24, 2016, Blue Lives Matter Post is protected expression, stating, "Just as speech concerning the Black Lives Matter movement is protected social speech, so is speech promoting the Blue Lives Matter movement." (*Id*. at 15, App.50). And the court found that the November 15, 2015 post ("Pledge to my family, flag and country when the day comes, I will fight to my last breath, before I submit to Islam") "is protected expression." (*Id*. at 15-16, App.50-51).

"Having concluded that the Facebook posts at issue are protected expression, [the district court] proceed[ed] to the third element of the *Garcetti/Pickering* test." (*Id*. at 16, App.51). This element required the district court to determine "whether the government's interests, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interests." (*Id*. at 10 [quoting *Duda v. Elder,* 7 F.4th 899, 910 (10th Cir. 2021)], App.45). This element is an "issue[] of law for the court to decide." (R-30, Mem. Op. & Order at 10 [quoting *Knopf v. Williams*, 884 F.3d 939, 945 (10th Cir. 2018)], App.45). And it is the central "issue of law" on appeal.

The district court concluded that "[b]ased on facts taken from Plaintiff's Complaint, Plaintiff's speech itself did create actual disruption," further concluding that "the Defendant City's interest in maintaining a police force that instills public confidence and prohibits partisanship in law enforcement outweighs Plaintiff's interest in having his expression protected." (R-30, Mem. Op. & Order at 16-18, App.51-53). Because the district court found that "the Defendant City's interest outweighs Plaintiff's interest in his protected speech, as a matter of law," the court concluded that "Plaintiff's First Amendment claim against the City must be dismissed." (*Id*. at 18, App.53).

2. Equal Protection Claim.

The district court dismissed Plaintiff's equal protection claim for failing to plausibly state a claim for relief. (R-30, Mem. Op. & Order at 19-20, App.54-55). The district court concluded that

> Plaintiff's complaint fails to plausibly plead sufficient facts of an equal protection violation. Plaintiff has not identified any individual or group who were granted the use of a forum to which he was denied.[4] Nor has Plaintiff alleged he was discriminated against on the basis of membership in some class or group. In effect, Plaintiff argues

[4] This is demonstrably false. In addition to the fact that the City and the TPD have social media policies (thus permitting the use of social media as a forum for speech) (*see supra*), as Plaintiff noted in his responses to Defendants' motions to dismiss, the City (https://www.facebook.com/cityoftulsa/) and Defendant Jordan (https://www.facebook.com/chuck.jordan1) maintain Facebook pages, as does the City's police department (https://www.facebook.com/tulsapolice/). (*See* R-17, Pl.'s Resp. to City's Mot. at 21 n.13; R-18, Pl.'s Resp. to Def. Jordan's Mot. at 23 n.14).

> that he was arbitrarily treated differently from others, without any assertion that the different treatment was based on his membership in any particular class. This type of 'class of one' theory of equal protection was foreclosed by the Supreme Court . . .

(R-30, Mem. Op. & Order at 20, App.55). As argued further below, the district court misapprehended the factual and legal bases for Plaintiff's equal protection claim. To be clear, Plaintiff's claim is *not* based on a "class of one" theory.

3. Official Capacity Claims.

The district court next addressed Plaintiff's official capacity claims against Defendant Jordan, the Chief of Police and decision maker for the TPD. (R-30, Mem. Op. & Order at 20-22, App.55-57). The court concluded that "suing Chief Jordan in his official capacity under section 1983, is the same as suing the City. This is not a finding of non-liability but rather of redundancy because of the fact that the City is already a defendant in this lawsuit. In other words, the Chief in his official capacity is the City." (*Id*. at 21 [internal brackets, quotations, and citations omitted], App.56). The district court further concluded that "[t]he official capacity claims against Defendant Jordan would fail for the same reason as the claims against the Defendant City of Tulsa and are redundant." (*Id*.).

4. Individual Capacity Claims.

Although the district court dismissed Plaintiff's First Amendment and Equal Protection claims for failure to state plausible claims for relief as a matter of law, the court nonetheless proceeded to address the "individual capacity claims" against

Defendant Jordan. (R-30, Mem. Op. & Order at 22-25, App.57-60). In doing so, the court addressed whether Defendant Jordan enjoyed qualified immunity for his actions in this case. (*Id*.).

The district court concluded that Defendant Jordan did not violate clearly established law under the First (freedom of speech) and Fourteenth (equal protection) Amendments when he fired Plaintiff because of the content and viewpoint of social media posts he made several years prior to his hiring by the TPD. As a result, Defendant Jordan was entitled to qualified immunity. (R-30, Mem. Op. & Order at 22-25, App.57-60).

5. Declaratory and Injunctive Relief.

The district court separately addressed Plaintiff's requests for prospective relief. The court concluded that "[t]o the extent Plaintiff is seeking declaratory and injunctive relief against Defendant Jordan in his official capacity, those claims are dismissed for the above stated reasons." (R-30, Mem. Op. & Order at 22-25, App.57-60). Upon reviewing the Declaratory Judgment ACT ("DJA"), the district court concluded that "there is an 'actual controversy," but [it] decline[d] to exercise its jurisdiction under the DJA," noting that "[t]he Court has concluded as a matter of law that Defendant Jordan is entitled to qualified immunity with respect to Plaintiff's constitutional claims and dismissed all federal claims against Defendant City." (*Id*. at 26, App.61). The court stated that if it "were to exercise

its jurisdiction, it would not settle the controversy or serve a useful purpose"; therefore, "Plaintiff's claim for declaratory relief against Defendant Jordan in his individual capacity and against Defendant City is dismissed." (*Id*.).

The district court similarly denied Plaintiff's request for injunctive relief against Defendant Jordan as he is no longer the Chief of Police, and as against the City "because the Court dismissed all constitutional claims." (*Id*. at 27, App.62).

6. *Burk* State Law Claim.

Because the district court dismissed all of the federal claims, it declined to exercise supplemental jurisdiction over the remaining *Burk* state law claim, dismissing the claim without prejudice. (R-30, Mem. Op. & Order at 27-28, App.62-63).

SUMMARY OF THE ARGUMENT

It is well established that Plaintiff does not surrender his constitutional rights upon accepting employment with the City. By firing Plaintiff for social media posts he made several years prior to his hiring based on complaints made by political activists, Defendants violated Plaintiff's right to freedom of speech protected by the First Amendment. Plaintiff's speech, which was made as a private citizen commenting on matters of public concern, is "protected expression." The district court erred by concluding that the City's interests as an employer in promoting the efficiency of the public services it performs through its employees

(police officers) outweighs Plaintiff's interest in engaging in the protected expression. Here, the record is devoid of evidence of actual or potential *internal* disruption caused by Plaintiff's speech. Rather, the district court relied on *potential and speculative external* problems which might be caused by the *public's reaction* to Plaintiff's speech. Indeed, "within one hour and 15 minutes of receiving the complaint" about the social media posts, Defendants fired Plaintiff. The district court's ruling is contrary to this Circuit's precedent.

The district court's equal protection ruling is also contrary to the law. Plaintiff has not advanced a "class of one" claim. Rather, Plaintiff relies upon clearly established law that under the Equal Protection Clause, the government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. Here, Defendants permit public employees to use social media (in fact, Defendants themselves maintained Facebook pages), an acceptable forum, but punished Plaintiff for using this very same forum (Facebook) based on the content and viewpoint of his expression, in violation of the Fourteenth Amendment.

The district court also erred by concluding that Defendant Jordan enjoys qualified immunity for firing Plaintiff based on the content and viewpoint of social media posts he made several years prior to his hiring by the TPD. Here, Defendant Jordan violated clearly established constitutional rights of which a reasonable

person would have known. That is, the contours of Plaintiff's rights under the First and Fourteenth Amendments were sufficiently clear that a reasonable official would understand that what he is doing violates those rights. Accordingly, in light of pre-existing law, the unlawfulness of Defendant Jordan's actions was apparent.

Finally, because the district court erred by dismissing Plaintiff's federal law claims, and the dismissal of these claims served as the rationale for declining to exercise supplemental jurisdiction over Plaintiff's state law *Burk* claim (wrongful discharge), the lower court's decision to decline jurisdiction should be reversed, and the state law claim remanded for further consideration.

ARGUMENT

I. Standard of Review.

This Court "review[s] *de novo* a district court's decision on a Rule 12(b)(6) motion for dismissal for failure to state a claim." *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007). And it "review[s] a denial of supplemental jurisdiction for abuse of discretion." *Nielander v. Bd. of Cty. Comm'rs*, 582 F.3d 1155, 1172 (10th Cir. 2009).

A claim survives a Rule 12(b)(6) motion to dismiss if its "[f]actual allegations [are] enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true (even if doubtful in fact)." *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations

omitted). Accordingly, to survive Defendants' motions, Plaintiff's FAC "must contain sufficient factual matter, *accepted as true*, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570) (emphasis added). Moreover, "when a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder." *Twombly*, 550 U.S. at 563 n.8.

Neither *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), nor *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), individually or in combination, creates a "heightened" pleading standard under the Federal Rules since that "can only be accomplished by the process of amending the Federal Rules, and not by judicial interpretation." *Twombly*, 550 U.S. at 569, n.14 (internal quotations omitted). As the Court stated in *Twombly*, "[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Id*. at 570. For example, in *Erickson v. Pardus*, 551 U.S. 89 (2007), a case decided shortly after *Twombly*, the Supreme Court reversed a dismissal granted under Rule 12(b)(6). In doing so, the Court reemphasized the liberal Rule 8 pleading standard, which "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Id*. at 93. Furthermore, the Court stated, "Specific facts are not

necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Id.* (quoting *Twombly*, 550 U.S. at 555). Upon application of this standard, the Supreme Court held that it was error for the Court of Appeals to conclude that the allegations were "too conclusory" for pleading purposes. *Id*. at 94.

As discussed further below, the FAC states claims to relief that are plausible on their face. This Court should reverse the district court.

II. Defendants Violated Plaintiff's Clearly Established Right to Freedom of Speech.

This Circuit applies a five-step approach for analyzing claims where a public employee has been disciplined/terminated based on his speech. These steps include the following: (1) whether the speech was made pursuant to an employee's official duties; (2) whether the speech was on a matter of public concern; (3) whether the government's interests, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interests; (4) whether the protected speech was a motivating factor in the adverse employment action; and (5) whether the defendant would have reached the same employment decision in the absence of the protected conduct. *Helget v. City of Hays*, 844 F.3d 1216, 1221 (10th Cir. 2017); *Duda,* 7 F.4th at 910. "The first three elements are issues of law for the court to decide, while the last two are factual issues typically

decided by the jury." *Knopf*, 884 F.3d at 945 (internal quotations and citation omitted).

To summarize, all five factors favor Plaintiff. First, the speech at issue was not made pursuant to Plaintiff's official duties. Plaintiff made the posts on his private social media account years prior to his hiring by the City. This factor is not in dispute. Second, Plaintiff's speech is "protected expression" by the First Amendment as it was on matters of public concern. The district court agreed. Third, the district court erred and misapplied controlling Circuit law by concluding that the government's interests outweighed Plaintiff's free speech interests. Fourth, the protected speech was the *only* basis (and thus the only motivating factor) for the adverse employment action. This factor is not in dispute. And finally, Defendants would *not* have reached the same employment decision in the absence of Plaintiff's speech. This factor is also not in dispute.

In sum, the primary issue in this appeal with regard to the First Amendment claim is whether the balance of interests in this case favors punishing Plaintiff for his protected expression. We begin by setting forth the basis for concluding that Plaintiff's speech is "protected expression" that rests "on the highest rung of the hierarchy of First Amendment values."

A. Plaintiff's Speech Is Protected Expression.

Pursuant to clearly established law, Defendants may not fire Plaintiff on a basis that infringes his constitutionally protected interest in freedom of speech. *Rankin*, 483 U.S. at 383 ("[A] State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech."). Plaintiff's speech addressed political and social issues and thus involved matters of public concern. *See Considine v. Bd. of Cnty. Comm'rs*, 910 F.2d 695, 699 (10th Cir. 1990) (defining speech on a matter of public concern as speech "fairly considered as relating to any matter of political, social, or other concern to the community") (quoting *Connick*, 461 U.S. at 146). Under controlling Circuit precedent, Plaintiff's Facebook posts, which are a form of expression that *did not occur at work and which are not about his work with the TPD as he was not so employed at the time the posts were made*, are best considered "protected expression" for this Court's analysis. As stated by this Circuit, "We hold that the public concern prong of the *Pickering/Connick* test cannot be applied to a case of nonverbal expression that does not occur at work or is not about work. The alternative test should be whether the speech involved is 'protected expression.'"[5] *Flanagan*, 890 F.2d at 1564-65 ("Applying the above

[5] The Trump Post is simply an image, the Blue Lives Matter Post is a logo superimposed over an image, and the Pledge to My Family Post is a captioned image. All of the Facebook posts at issue involve the sharing of previously created

test to this case, it is clear that plaintiffs' speech is protected expression. Sexually explicit films and the distribution of sexually explicit films have consistently been upheld as protected under the first amendment, whether under the free speech or free press clauses."); *see also id.* at 1564 (finding that the public-concern test "implies that the test is not intended to apply to areas in which the employee does not speak at work or about work," because the test "is intended to weed out speech by an employee speaking as an employee upon matters only of personal interest").

Additionally, the Supreme Court "has recognized that expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (internal quotations and citations omitted). And the Supreme Court affirmed that the First Amendment protects expression made via social media:

> While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the "vast democratic forums of the Internet" in general, and social media in particular. . . . In short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics "as diverse as human thought."

Packingham v. N.C., 137 S. Ct. 1730, 1735-36 (2017) (citations omitted). In sum, there can be no serious dispute that the speech at issue is protected by the First

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images/posts, much like *Flanagan* involved the distribution of previously created videos.

Amendment—either as speech addressing a "matter of public concern" or as "protected expression."

Additionally, it is without dispute that Plaintiff's protected expression was made *years prior* to his hiring by the City and thus well before he was a public employee and subject to any social media policy. (*See* R-6, FAC ¶ 91 [reversing the denial of unemployment benefits and concluding that "[i]t would seem illogical to find the [Plaintiff's] conduct violated a policy before he was even aware of the policy. . . . Benefits are allowed"], App.27). Consequently, the balancing test set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968), is not a good fit. Nonetheless, consistent with *Flanagan*, we now turn to the balancing portion of the *Pickering* test. *Flanagan*, 890 F.2d at 1565 ("Since this speech is off the job and not related to the internal functioning of the department and is clearly protected expression under the first amendment, we then proceed to the balancing portion of the *Pickering* test.").

B. The Balance Weighs Heavily in Favor of Protecting Plaintiff's Speech.

"Under *Pickering*, [a court] must balance plaintiffs' interest in engaging in [] protected expression against the state's interest as an employer in 'promoting the efficiency of the public services it performs through its employees.'" *Flanagan*, 890 F.2d at 1565 (quoting *Pickering*, 391 U.S. at 568). When balancing these interests, the court must consider "the content, context, manner, time, and place of

the employee's expression." *Id*. (citing *Connick*, 461 U.S. at 152-53). "[T]he balance must tip in favor of protection [of free speech rights] unless the employer shows that some restriction is necessary to prevent the disruption of official functions or to insure effective performance by the employee." *Id*. (internal quotation marks and citation omitted). Indeed, "[w]hile it is framed as a 'balancing test,' [the *Pickering* test] actually places a substantial threshold burden *on the employer* before balancing is even considered." *Trant v. Okla.*, 426 F. App'x 653, 661 (10th Cir. 2011) (emphasis added). Thus, "the *employer* bears the burden of justifying its regulation of the employee's speech." *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1207 (10th Cir. 2007). This "burden" "is a true burden of *demonstration*, not a mere matter of hypothetical articulation." *Trant*, 426 F. App'x at 661. Consequently, an "employer cannot rely on purely speculative allegations that certain statements caused or will cause disruption." *Id*. (quoting *Dixon v. Kirkpatrick*, 553 F.3d 1294, 1304 (10th Cir. 2009)).

The analysis in *Flanagan* compels this Court to reverse the district court. In *Flanagan*, police officers were given official reprimands for operating while off-duty a video rental store that contained sexually explicit films. *Flanagan,* 890 F.2d at 1561. The court held that the plaintiffs' interest in their free speech rights outweighed the "attenuated" interest of defendants in avoiding "negative public feelings about the distribution of sexually explicit films [that] would erode the

public's respect and confidence in the police department . . . [and] discourage citizens from cooperating with the department, thereby inhibiting the efficiency and effectiveness of it in the community." *Id*. at 1566. More importantly, the court held that the "reaction by offended members of the public [that] adversely impact [a police department's] ***external*** relationships and operations" cannot justify suppressing the free speech rights of off-duty officers, *id*. (emphasis added); rather "the only public employer interest that can outweigh a public employee's recognized speech rights is the interest in avoiding direct disruption, ***by the speech itself***, of the public employer's ***internal operations*** and employment relationships," *id*. (emphasis added). Thus, absent "evidence of actual, or potential, disruption of the department's ***internal operations***" such as "discipline problems," "disharmony," "impact on close working relationships," and "performance problems by plaintiffs," the employer police department ***cannot*** penalize an off-duty officer for exercising his first amendment rights. *Id*. (emphasis added). Inexplicably, the district court completely ignored the controlling law of this Circuit, permitting "public disruption" and "public outrage" to trump free speech.

Furthermore, in *Flanagan*, this Circuit made an additional finding that is relevant (and dispositive) here. Per the Court:

> ***The department cannot justify disciplinary action against plaintiffs simply because some members of the public find plaintiffs' speech offensive and for that reason may not cooperate with law enforcement officers in the future***. The Supreme Court has squarely

> rejected what it refers to as the "heckler's veto" as a justification for curtailing "offensive" speech in order to prevent public disorder. *See, e.g., Edwards v. South Carolina*, 372 U.S. 229 (1963); *Terminiello v. Chicago*, 337 U.S. 1 (1949). *See also Berger v. Battaglia*, 779 F.2d [992, 1001 (4th Cir. 1985)]. The record is devoid of evidence of actual or potential ***internal*** disruption caused by plaintiffs' speech. Defendants' evidence pointed only to potential problems which might be caused by the ***public's reaction to plaintiffs' speech***. "Apprehension of disturbance is not enough to overcome the right to freedom of expression." *Battle v. Mulholland*, 439 F.2d 321, 324 (5th Cir. 1971) (quoting *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506-07 (1969)). The Supreme Court's rejection of the heckler's veto lends support to our holding that the defendants have only an attenuated interest in preventing plaintiffs' speech.

Flanagan, 890 F.2d at 1566-67 (emphasis added). The district court's failure to apply the controlling law of this Circuit is reversible error.

As the factual record demonstrates, the balance weighs *heavily* in favor of protecting Plaintiff's right to freedom of speech. Indeed, the record demonstrates that Defendants had no legitimate interest in punishing Plaintiff for his speech. In fact, *firing* Plaintiff for his speech was contrary to Defendants' interests because it undermined the confidence and trust that TPD officers have in their leadership. As set forth in the FAC, Defendant Jordan allowed a local political activist who was well known in the community, *particularly amongst the police officers*, as a person who harbors anti-police bias to cause Plaintiff's firing based on the content and viewpoint of Plaintiff's public issue speech made years prior to his hiring by the TPD. Defendants' *firing* of Plaintiff has undermined the trust and confidence that

the TPD police officers have in their leadership. Plaintiff's *firing* demonstrates to the rank and file of the TPD that their leadership, in particular Defendant Jordan, will "throw them under the bus" to promote political correctness and to appease political activists like Marq Lewis and CAIR-OK. Defendants' *firing* of Plaintiff erodes the *esprit de corps* of the TPD. And this was confirmed by Captain Bell, who told Plaintiff that he "didn't want to do this" (referring to Plaintiff's firing) and that he (Captain Bell) thought it was "BS," adding that he thought Plaintiff was a good officer and they (the TPD) needed people like him. (R-6, FAC ¶¶ 64, 86-88, App.19, App.26). In other words, the ***firing*** of Plaintiff on account of his speech is what caused "internal disruption."

As the clearly established law of this Circuit holds, Defendants ***"cannot justify disciplinary action against plaintiff[] simply because some members of the public find [his] speech offensive and for that reason may not cooperate with law enforcement officers in the future***." *Flanagan*, 890 F.2d at 1566. The district court erred by concluding the very opposite.

In sum, Defendants' *firing* of Plaintiff is contrary to any legitimate government interest in that it has impaired discipline by superiors and harmony among coworkers, it has had a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, and it has thus impeded the performance of other officers and interfered with the regular operation of the

TPD. Indeed, there was no legitimate "disruption" to justify the firing of Plaintiff. The disruption necessary to overcome Plaintiff's right to freedom of speech was not even possible in this case as Defendants fired Plaintiff "[w]ithin one hour and fifteen minutes of receiving the complaint" about the social media posts. (R-6, FAC ¶¶ 34, 35, App.13-14). The district court's decision was egregiously wrong and must be reversed.

III. Defendants Violated Plaintiff's Right to Equal Protection.

Plaintiff's equal protection claim is not a "class of one" claim. The district court's decision dismissing this claim was based on an erroneous and faulty analysis and must be reversed.

The principle of law at issue here was articulated by the Supreme Court as follows: "[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the *use of a forum* to people whose views it finds acceptable, but *deny use to those wishing to express less favored or more controversial views*." *Police Dep't of the City of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) (emphasis added); *see also Carey v. Brown*, 447 U.S. 455, 461-62 (1980) (discriminating among speech-related activities in a forum violates the Equal Protection Clause). This does not require any particular "class" analysis. The district court was wrong to conclude that it does.

As noted above, social media is an exceedingly important *forum* for free speech. *See Packingham v. N.C.*, 137 S. Ct. at 1735-36 ("[S]ocial media users employ these websites to engage in a wide array of protected First Amendment activity on topics 'as diverse as human thought.'") (citation omitted). By punishing Plaintiff for engaging in speech in this forum because Defendants considered the speech offensive, Defendants engaged in viewpoint discrimination. *See Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) ("Giving offense is a viewpoint."); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is . . . an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.").

The Equal Protection Clause prohibits the government from permitting the use of a forum (social media) to people whose views it finds acceptable,[6] but punishing those wishing to express less favored or more controversial views in the forum. This is precisely what Defendants have done here in violation of Plaintiff's right to equal protection guaranteed by the Fourteenth Amendment.

[6] As noted previously, the City (https://www.facebook.com/cityoftulsa/), Defendant Jordan (https://www.facebook.com/chuck.jordan1), and the TPD (https://www.facebook.com/tulsapolice/) maintain Facebook pages.

The district court's order dismissing Plaintiff's equal protection claim was wrong as a matter of law and must be reversed.

IV. Defendant Jordan Does Not Enjoy Qualified Immunity.

To begin, qualified immunity does not protect a defendant against claims for declaratory and injunctive relief, it does not apply to claims against a municipality, nor does it apply to claims against a defendant in his official capacity.[7] *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841, n.5 (1998) (noting that qualified immunity is unavailable "in a suit to enjoin future conduct [or] in an action against a municipality"); *Cannon v. City & Cnty. of Denver*, 998 F.2d 867, 876 (10th Cir. 1993) ("[T]here is no qualified immunity to shield the defendants from claims [for declaratory and injunctive relief]"); *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 527 (9th Cir. 1989) (same); *Hall v. Tollett*, 128 F.3d 418, 430 (6th

[7] As argued in the district court, per the Interoffice Correspondence, Plaintiff was fired based on a TPD social media policy, which may or may not be a City policy. However, as alleged in the FAC, Defendant Jordan, in his official capacity as Chief of Police, was the decisionmaker for the City (which is why Plaintiff sued both the City and Defendant Jordan in his official capacity—Defendant Jordan would be the person against whom declaratory and injunctive relief would be appropriate). Plaintiff contends that the TPD policy at issue should be considered a City policy, thus making the City liable under *Monell v. New York Department of Social Services*, 436 U.S. 658, 694-95 (1978). As Plaintiff noted in the district court, if the City concedes the municipal liability issue, then Plaintiff would agree that there is no need to also name Defendant Jordan in his official capacity. But the City has not conceded this issue. Also as noted in the district court, Plaintiff named Defendant Jordan to make it clear that the City would be liable for *his* official actions on a theory of *respondeat superior* for the *Burk* state law claim. The district court did not address this last issue.

Cir. 1997) ("Qualified immunity . . . does not shield [the defendant] from the claims brought against him in his official capacity."). Consequently, Defendant Jordan (or his replacement) cannot use qualified immunity to thwart Plaintiff's request for declaratory and injunctive relief, which includes, *inter alia*, a declaration that the firing was unlawful and an "injunction expunging all paperwork or references from Plaintiff's personnel file related to the incident giving rise to Defendants' violation of his rights . . . and prohibiting the use of any such paperwork or references in any future employment matter . . . ." (R-6, FAC ¶ 6 & Prayer for Relief, App.9, App.31).

Further, the defense of qualified immunity does not shield Defendant Jordan from liability for violating Plaintiff's clearly established rights. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court stated the applicable standard as follows: government officials are protected from personal liability and thus enjoy qualified immunity only "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

The Court employs a two-part test to analyze a qualified immunity defense. "In resolving a motion to dismiss based on qualified immunity, a court must consider whether the facts that a plaintiff has alleged make out a violation of a constitutional right, and *whether the right at issue* was clearly established at the

time of defendant's alleged misconduct." *Leverington v. City of Colo. Springs*, 643 F.3d 719, 732 (10th Cir. 2011) (quotations and ellipses omitted) (emphasis added); *see also Saucier v. Katz*, 533 U.S. 194, 201 (2001) (mandating a two-step sequence for resolving qualified immunity claims); *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (stating that courts have discretion to "decid[e] which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand").

Whether a right is "clearly established" is an objective test: "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Stearns v. Clarkson*, 615 F.3d 1278, 1282 (10th Cir. 2010) (citation omitted).

"The law is clearly established when a Supreme Court or Tenth Circuit decision is on point, or if the clearly established weight of authority from other courts shows that the *right* must be as plaintiff maintains." *Harman v. Pollock*, 586 F.3d 1254, 1261 (10th Cir. 2009) (internal quotations omitted) (emphasis added). The Tenth Circuit has explained that "clearly established" means "'[t]he *contours of the right* must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question

has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.'" *Id*. (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (emphasis added). Indeed, the Supreme Court noted in *Hope v. Pelzer*, 536 U.S. 730, 741 (2002), that "officials can still be on notice that their conduct violates established law even in novel factual circumstances."

As this Circuit emphasized in *Dodds v. Richardson*, 614 F.3d 1185 (10th Cir. 2010), "[T]he 'clearly established' prong of the qualified immunity inquiry asks whether the '[t]he contours of the *right*' the plaintiff claims the defendant violated are 'sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id*. at 1207 (internal quotations and citations omitted).

In *Dodds*, for example, the Court concluded that "Plaintiff has demonstrated at this stage in the litigation that the contours of the right he claims Defendant violated were sufficiently clear that a reasonable official in Defendant's position would know his maintenance of policies that prevent arrestees with preset bail from posting bail for no legitimate reason violates the Fourteenth Amendment right to due process." *Id*. The court described the "clearly established" right as "Plaintiff's right to be free from unjustified detention after his bail was set." *Id*. at 1206-07.

As set forth above and below, the Court should have little difficulty rejecting Defendant Jordan's qualified immunity defense.

A. Defendant Jordan Violated Plaintiff's Clearly Established Right to Free Speech.

Defendant Jordan does not enjoy qualified immunity for firing Plaintiff based on the content and viewpoint of his speech made years prior to his hiring by the TPD. "The law has been clearly established since 1968 that public employees may not be discharged in retaliation for speaking on matters of public concern, absent a showing that the government employer's interest in the efficiency of its operations outweighs the employee's interest in the speech." *Andersen v. McCotter*, 100 F.3d 723, 729 (10th Cir. 1996); *see also McFall v. Bednar*, 407 F.3d 1081, 1090 (10th Cir. 2005) (finding that it was clearly established that a government employee cannot be terminated for speaking out on matters of public concern); *Hulen v. Yates*, 322 F.3d 1229, 1239-40 (10th Cir. 2003) (finding it well-established that retaliation in the form of an involuntary transfer for protected speech is prohibited); *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.'") (quoting *Connick*, 461 U.S. at 142); *Rankin*, 483 U.S. at 383 ("[A] State may not discharge an employee on a basis that infringes that employee's constitutionally protected

interest in freedom of speech.") (citation omitted); *City of San Diego*, 543 U.S. at 80 (same). In short, Plaintiff's right at issue here was clearly established.

Moreover, in the specific context of this case, the Court should conclude that established Circuit law was sufficient to put Defendant Jordan on notice that Plaintiff's speech touched on a matter of public concern or was "protected expression." *See Flanagan*, 890 F.2d at 1564-65. Speech on a matter of public concern is generally defined as "speech fairly considered as relating to any matter of political, social, or other concern to the community." *Considine*, 910 F.2d at 699 (quoting *Connick*, 461 U.S. at 146) (internal quotations omitted); *see also Claiborne Hardware Co.*, 458 U.S. at 913 (stating that "expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values") (internal quotations and citations omitted). And the First Amendment protects expression posted on social media. *Packingham*, 137 S. Ct. at 1735-36 (citations omitted) (describing the Internet, and more specifically, social media, as one of "the most important places (in a spatial sense) for the exchange of views"). In sum, prior to Plaintiff's firing for his speech, it was clearly established that his speech was protected by the First Amendment. We turn now to the balancing test. *Flanagan*, 890 F.2d at 1565 ("Since this speech is off the job and not related to the internal functioning of the department and is clearly protected expression under the first amendment, we then proceed to the balancing portion of the *Pickering* test.").

As noted, "[u]nder *Pickering*, [a court] must balance plaintiffs' interest in engaging in [] protected expression against the state's interest as an employer in 'promoting the efficiency of the public services it performs through its employees.'" *Flanagan*, 890 F.2d at 1565 (quoting *Pickering*, 391 U.S. at 568). This balance favors protecting Plaintiff's free speech rights "unless the employer shows that some restriction is *necessary* to prevent the disruption of official functions or to insure effective performance by the employee." *Id*. (internal quotation marks omitted) (emphasis added). This "balancing test" "places a *substantial* threshold burden *on the employer* before balancing is even considered." *Trant*, 426 F. App'x at 661 (emphasis added). Thus, Defendant Jordan "bears the burden of justifying" his firing of Plaintiff based on Plaintiff's speech. *Brammer-Hoelter*, 492 F.3d at 1207 (emphasis added). This "burden" "is a true burden of *demonstration*, not a mere matter of hypothetical articulation." *Trant*, 426 F. App'x at 661. Consequently, as a matter of clearly established law, an "employer cannot rely on purely speculative allegations that certain statements caused or will cause disruption," *id*. (quoting *Dixon*, 553 F.3d at 1304), which is precisely what the district court did in defense of Defendant Jordan in this case.

The analysis in *Flanagan* compels this Court to reverse the district court. As discussed previously, in *Flanagan*, *police officers* were given official reprimands for operating while off-duty a video rental store that contained sexually explicit

films. *Flanagan,* 890 F.2d at 1561. The court held that the plaintiffs' interest in their free speech rights outweighed the "attenuated" interest of the defendants. *Id*. at 1566. In fact, this Court held that the "*reaction* by offended members of the public [that] adversely impact [a police department's] *external* relationships and operations" cannot justify suppressing the free speech rights of off-duty officers. *Id*. (emphasis added). Rather, and it is worth repeating and emphasizing here, "the *only* public employer interest that can outweigh a public employee's recognized speech rights is the interest in avoiding direct disruption, *by the speech itself* [and *not* the *firing on account of the speech*], of the public employer's *internal* operations and employment relationships." *Id*. Thus, absent "evidence of actual, or potential, disruption of the department's *internal* operations" such as "discipline problems," "disharmony," "impact on close working relationships," and "performance problems by plaintiffs" *caused by the speech*, the employer police department cannot penalize an off-duty officer for exercising his First Amendment rights. *Id*. *Period*. Indeed, as the facts demonstrate here, the *firing* of Plaintiff on account of his speech (and not the speech itself) caused disruption of the TPD's "internal operations."

Flanagan, which is controlling and dispositive here, compels reversal of the district court. As noted above and repeated here, this Court in *Flanagan* held as follows:

> The department cannot justify disciplinary action against plaintiffs simply *because some members of the public find plaintiffs' speech offensive and for that reason may not cooperate with law enforcement officers in the future*. The Supreme Court has squarely rejected what it refers to as the "heckler's veto" as a justification for curtailing "offensive" speech in order to prevent public disorder. . . . The record is devoid of evidence of actual or potential *internal* disruption caused by plaintiffs' speech. Defendants' evidence pointed only to potential problems which might be caused by the *public's reaction to plaintiffs' speech*. Apprehension of disturbance is not enough to overcome the right to freedom of expression. The Supreme Court's rejection of the heckler's veto lends support to our holding that the defendants have only an attenuated interest in preventing plaintiffs' speech.

Flanagan, 890 F.2d at 1566-67 (internal citations and quotations omitted) (emphasis added); (*see, e.g.,* R-6, FAC ¶ 84 ["Defendants terminated Plaintiff's employment because a local political activist and his followers disagree with Plaintiff's political and religious views"], App.26; *see also id*. ¶ 62, App.18).

Here, *firing* Plaintiff on account of his speech actually undermined the government's interests in that it undermined the confidence and trust that TPD officers have in their leadership. Defendant Jordan allowed a local political activist who was well known in the community, *particularly amongst the police officers*, as a person who harbors anti-police bias to cause Plaintiff's firing based on the content and viewpoint of Plaintiff's public issue speech made years prior to his hiring by the TPD. Defendant Jordan's *firing* of Plaintiff undermined the trust and confidence that the TPD police officers have in their leadership. The *firing* demonstrated to the rank and file of the TPD that their leadership, in particular

Defendant Jordan, will "throw them under the bus" to promote political correctness and to appease political activists. The *firing* of Plaintiff eroded the *esprit de corps* of the TPD. And this was *confirmed* by Captain Bell, who told Plaintiff that he "didn't want to do this" (referring to Plaintiff's firing) and that he (Captain Bell) thought it was "BS," adding that he thought Plaintiff was a good officer and they (the TPD) needed people like him. (R-6, FAC ¶¶ 64, 86-88, App.19, App.26). As noted, the disruption necessary to overcome Plaintiff's right to freedom of speech was not even possible in this case as Defendants fired Plaintiff "[w]ithin one hour and fifteen minutes of receiving the complaint" about the social media posts. (R-6, FAC ¶¶ 34, 35, App.13-14).

In sum, Defendant Jordan does not enjoy qualified immunity for firing Plaintiff on account of his speech. It is not a close call. The district court's decision is egregiously wrong and must be reversed.[8]

B. Defendant Jordan Violated Plaintiff's Clearly Established Right to Equal Protection.

As noted previously, the district court's bases for dismissing Plaintiff's equal protection claim were erroneous as a matter of fact and law. As a result, the

[8] *Fields v. City of Tulsa*, 753 F.3d 1000, 1015 (10th Cir. 2014), does not undermine Plaintiff's position. In *Fields*, the court's primary concern was with the *internal* operations of the TPD, including the confidence and trust that TPD officers will have in their leadership. *See, e.g., id*. at 1015 ("We have long recognized that law-enforcement agencies have a 'heightened interest . . . in maintaining discipline . . . among employees.'") (internal citation omitted).

court's qualified immunity analysis on this claim is wrong as well. It is clearly established that "under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Police Dep't of the City of Chi.*, 408 U.S. at 96; *see also Carey*, 447 U.S. at 461-62 (discriminating among speech-related activities in a forum violates the Equal Protection Clause). Social media is an exceedingly important forum for free speech. *See Packingham v. N.C.*, 137 S. Ct. at 1736 ("[S]ocial media users employ these websites to engage in a wide array of protected First Amendment activity on topics 'as diverse as human thought.'") (citation omitted). And it is a forum that is open to the City, TPD, Defendant Jordan, and other City employees.[9] By punishing Plaintiff for engaging in speech in this forum (social media) because Defendant Jordan considered the speech offensive, Defendant Jordan engaged in viewpoint discrimination. *See Matal*, 137 S. Ct. at 1763 ("Giving offense is a viewpoint."); *Rosenberger*, 515 U.S. at 829 ("Viewpoint discrimination is . . . an egregious form of content discrimination."). It is clearly established that the Equal Protection Clause prohibits government officials from permitting the use of a forum (social media) to people whose views

[9] As noted, in addition to policies that directly acknowledge the permitted use of social media by City employees, the City, Defendant Jordan, and TPD also maintain Facebook pages. (*See supra* n.4).

they find acceptable, but denying use to those wishing to express less favored or more controversial views by punishing them for doing so. This is precisely what Defendant Jordan has done here. He is *not* entitled to qualified immunity.

V. The City Is Liable for Plaintiff's Wrongful Discharge under State Law.

Because the district court erroneously dismissed Plaintiff's federal claims, this Court should reverse the lower court's decision to decline supplemental jurisdiction over the state law claim. *See Baca v. Sklar*, 398 F.3d 1210, 1222 n.4 (10th Cir. 2005) ("Because we remand Baca's First Amendment retaliation claim, the district court should reconsider its decision to decline supplemental jurisdiction over Baca's state law claims."); *Blair v. Raemisch*, 804 F. App'x 909, 921 (10th Cir. 2020) ("[O]ur decision to reverse and remand the dismissal of Blair's federal religious diet claims regarding the vegan patty meals at CSP undermines the district court's rationale for declining to exercise supplemental jurisdiction over Blair's state-law claim. Accordingly, we reverse that decision and remand this claim to the district court for further consideration.").

Under the Oklahoma Constitution, "Every person may freely speak, write, or publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." Okla. Const. Art. II, § 22. City policy ("Prohibition Against Suspension,

Removal or Demotion"), cited previously, generally protects the right to free speech. And Plaintiff has a right to freedom of speech under the First Amendment.

A viable *Burk* (wrongful discharge) claim[10] must allege (1) an actual or constructive discharge (2) of an at-will employee (3) in significant part for a reason that violates an Oklahoma public policy goal (4) that is found in Oklahoma's constitutional, statutory, or decisional law or in a federal constitutional provision that prescribes a norm of conduct for Oklahoma and (5) no statutory remedy exists that is adequate to protect the *Oklahoma policy goal*. *Vasek v. Bd. of Cty. Comm'rs*, 186 P.3d 928, 932 (Okla. 2008).

As demonstrated in the FAC: (1) Plaintiff was actually discharged from his employment; (2) for purposes of a *Burk* wrongful discharge claim, Plaintiff was an at-will employee; (3) the reason for Plaintiff's discharge violates an Oklahoma public policy goal; (4) that policy is found in Oklahoma's Constitution, the First Amendment to the U.S. Constitution, and the City's policy noted above; and (5) no statutory remedy exists that is adequate to protect the Oklahoma policy goal.

While Plaintiff has advanced a *federal* claim under 42 U.S.C. § 1983, this federal statute, standing alone, is not sufficient to adequately protect Plaintiff's interests and the *Oklahoma* policy goals described above. To begin, § 1983 cannot be used to protect the policy goals set forth in the Oklahoma Constitution and in

[10] *Burk v. K-Mart Corp.,*1989 OK 22, 770 P. 2d 24 (Okla. 1989).

state law, such as the City's Prohibition Against Suspension, Removal or Demotion policy. In other words, § 1983 only protects rights granted *by federal law*, not rights or policies protected *by state law*. *See Stanley v. Gallegos*, 852 F.3d 1210, 1211 (10th Cir. 2017) ("The federal civil-rights statute, 42 U.S.C. § 1983, authorizes suits against persons acting under color of state law for violations of rights granted by federal law."). Second, the *Burk* claim protects at-will employees. Third, the City is only liable under § 1983 if it is found that a municipal policy was the moving force behind the constitutional violation. *See Monell*, 436 U.S. at 694-95. Fourth, and related, the City may be liable under Plaintiff's *Burk* claim on a theory of *respondeat superior*. *See Speight v. Presley*, 2008 OK 99, ¶ 13, 203 P.3d 173, 176 (Okla. 2008) ("Oklahoma law recognizes the application of the doctrine of *respondeat superior* to the Governmental Tort Claims Act."). *Respondeat superior* liability is not available under § 1983. *See Monell*, 436 U.S. at 691 ("[A] municipality cannot be held liable under § 1983 on a *respondeat superior* theory."). Consequently, if there is no municipal liability under *Monell* and Defendant Jordan has qualified immunity from suit under § 1983, as he claimed he did (and as the district court so found), then Plaintiff will have no federal remedy for his unlawful termination. Thus, § 1983 does not adequately protect *Oklahoma's* policy goals. And finally, the claim is timely

brought pursuant to 51 O.S. § 157 ("Governmental Tort Claims Act"). (R-6, FAC ¶¶ 92, 93, App.27).

The Court should reverse the district court and direct it to exercise supplemental jurisdiction over Plaintiff's state law claim.

CONCLUSION

Plaintiff respectfully requests that the Court reverse the district court and remand the case to proceed on the merits.

ORAL ARGUMENT STATEMENT

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and 10th Cir. R. 28.2(C)(4), Plaintiff respectfully requests that this Court hear oral argument. This case presents for review important questions of law arising under the First and Fourteenth Amendments to the United States Constitution.

Oral argument will assist this Court in reaching a full understanding of the issues presented and the underlying facts. Moreover, oral argument will allow the attorneys for both sides to address any outstanding legal or factual issues that this Court deems relevant.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7), the foregoing brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 12,508 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that pursuant to 10th Cir. R. 25.5, all required privacy redactions have been made.

I further certify that the hard copies of this brief to be submitted to the Court are exact copies of the version submitted electronically.

I further certify that the electronic submission of this brief was scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise (P62849)

ADDENDUM

Record No.	Description
R-30	Memorandum Opinion & Order Granting Motions to Dismiss
R-31	Final Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WAYNE BROWN,

Plaintiff,

v. No. 19-cv-00538-WPJ-FHM

(1) CITY OF TULSA; and

(2) CHARLES W. JORDAN,
individually and in his official capacity as
Chief of Police, Tulsa Police Department;

Defendants.

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT CITY OF TULSA'S MOTION TO DISMISS AND GRANTING DEFENDANT JORDAN'S MOTION TO DISMISS

THIS MATTER comes before the Court[1] upon Defendants City of Tulsa's ("Defendant City") and Defendant Charles W. Jordan's ("Defendant Jordan") Motions to Dismiss (Docs. 13, 14), each filed February 3, 2020. Plaintiff Wayne Brown ("Plaintiff") timely responded to each (Docs. 17, 18), to which Defendants replied (Docs. 20, 21). Having reviewed the relevant pleadings and the applicable law, the Court finds Defendants' Motions are well-taken and, therefore, **GRANTS** the Motions.

BACKGROUND[2]

Five years ago, on October 24, 2018, Plaintiff received news from the Tulsa Police Department ("TPD") that he was selected for the Tulsa Police Academy ("Academy"). Doc. 6 at

[1] Chief United States District Court Judge William P. Johnson of the District of New Mexico was assigned this case as a result of the Tenth Circuit Order designating Judge Johnson to hear and preside over cases in the Northern District of Oklahoma.

[2] The following recitation of facts derive from Plaintiff's First Amended Complaint (Doc. 6), which the Court, as it must on a motion to dismiss, accepts as true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2008).

¶ 17. The Academy commenced on January 22, 2019 (at which time Plaintiff began his employment with TPD) and lasted a rigorous twenty-eight weeks. *Id.* at ¶¶ 19, 22. Prior to and during the Academy, Plaintiff was subject to close scrutiny and background investigations to ensure he had the demeanor, character, and temperament to become a uniformed police officer. *Id.* at ¶¶ 20, 22. Twenty-eight weeks later, Plaintiff successfully completed the Academy. *Id.* at ¶ 23. Shortly thereafter, on August 6, 2019, Plaintiff began his field training with TPD Officer Jim Tornberg, which progressed without issue. *Id.* at ¶¶ 26, 28–31. Defendant Charles W. Jordan was the Chief of Police for the TPD during the relevant timeline of this case. *Id.* at ¶16.

Plaintiff's employment as an officer was short-lived and less than one month later, on September 4, 2019, he was terminated from TPD. *Id.* at ¶ 32. On the morning of his termination, Plaintiff knew something was brewing behind the scenes. *Id.* at ¶ 56. This is because around 11:11 a.m., a friend forwarded to Plaintiff a copy of a local political activist's Facebook posts which referred to a number of old posts made by Plaintiff. *Id.* at ¶ 55. Marq Lewis, "a local, radical, left-wing, political activist and agitator" posted on his Facebook that Plaintiff "has biases towards people who practice Islam and Black Americans." *Id.* at ¶¶ 33, 37. Lewis reached this conclusion by referencing "very offensive social media" posts made by Plaintiff, under his Facebook name, "Duke Brown." *Id.* at ¶¶ 38. The posts complained of by Lewis are described by him as follows (typographical errors in original):

> Image of The president riding a lion with the Confederate flag.
> Image of the a first, acknowledging a fight against the religious faith, Islam.
> Image of the punisher with crosshairs. The image originated from the American sniper Chris Kyle who was very controversial with killing Iraqi citizens along with killing American citizens during Katrina."

Id. at ¶¶ 38, 72.A, 72.B., 72.C. *See infra* Table 1.

Marq Lewis then made a complaint to Defendants regarding these old Facebook posts. *Id.* at ¶ 34. With a hunch that something was brewing, at approximately 2:05 p.m., Plaintiff was told by Captain Thom Bell to come in the meeting room where Captain Luke Sherman and Internal Affairs officers were waiting. *Id.* at ¶ 40. Plaintiff entered the room, the door was closed behind him, and he was instructed to remove his gun belt. *Id.* at ¶ 41. Plaintiff complied and handed his gun belt to the Internal Affairs officer to his immediate left, who then laid it on the table. *Id.* at ¶ 42. Plaintiff was told to sit down, which he did. *Id.* at ¶ 43. He was then handed an Interoffice Correspondence from Defendant Jordan dated September 4, 2019, with the subject line, "Personnel Order #19-257 Termination," and was told to read it. *Id.*[3] The Interoffice Correspondence stated Plaintiff's employment was "hereby terminated effective immediately," because the TPD "was made aware of social media postings made by [Plaintiff] that violate Department Rules & Regulations and Policies and Procedures." *Id.*

The relevant TPD policy is "Policy and Procedure 31-324 (Social Media and Networking) Procedures C.6.," which states,

> Department personnel should be mindful that their speech, when using social media, is public and becomes part of the worldwide electronic domain, Therefore, adherence to the department's code of conduct is required in the personal use of social media. In particular, department personnel are prohibited from posting speech containing obscene or sexually explicit language, images, acts, and statements or other forms of speech that ridicule, malign, disparage, or otherwise express bias against any race, religion, or protected class of individuals.

Id. at ¶ 45 (*hereinafter* "TPD Social Media Policy").

During the meeting on September 4, and consistent with the Interoffice Correspondence, Plaintiff was told that his employment was being terminated because he violated the TPD Social

[3] The Interoffice Correspondence, referenced in the First Amended Complaint, was also attached to the Complaint as Exhibit A. *See Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002) ("[T]he district court may consider documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity.").

Media Policy via his Facebook posts complained of by a citizen. *Id.* at ⁋⁋ 48–49. "Within one hour and fifteen minutes of receiving the complaint the officer was terminated," TPD Sergeant Shan Tuell told reporters. *Id.* at ⁋ 35. After receiving his termination, Plaintiff asked if they were going to give him a chance to explain "his side of it," to which Captain Bell and an Internal Affairs officer said they were not there to listen to anything Plaintiff had to say and that he needed to sign the termination paper. *Id.* at ⁋ 50. Plaintiff stated that this was not right and that he had done nothing wrong. *Id.* at ⁋ 51. Plaintiff told them that the posts were three to six years-old and that termination was complete "BS." *Id.* at ⁋ 54. Nevertheless, Plaintiff asked if there was any way that he could talk to Chief Jordan about this termination decision. *Id.* at ⁋ 52. The officers would not say exactly but did say they would relay his message to Chief Jordan. *Id.*

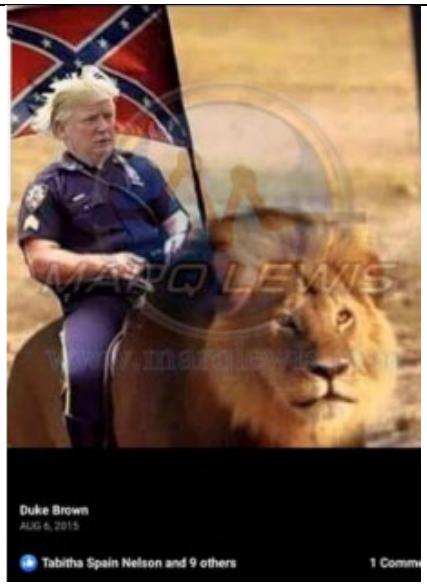
To avoid further embarrassment, Plaintiff asked the officers to please not make him do a "shame walk" in front of everyone as he left, and they agreed. *Id.* at ⁋ 57. Plaintiff signed the Interoffice Correspondence, though he did not want to. *Id.* at ⁋ 58. His patrol car was cleaned out and Plaintiff was then led out of the meeting room and out the back door. *Id.* at ⁋⁋ 59–60. At this point, Plaintiff was "totally dejected, embarrassed, and humiliated." *Id.* at ⁋ 61.

The next day, September 5, 2019, at around 1:00 p.m., Plaintiff returned to TPD to bring the rest of his TPD property he still had and to retrieve personal headphones he had left. *Id.* at ⁋ 63. Upon giving him his personal headphones, Captain Bell told Plaintiff, "On a personal note I didn't want to do this . . . and I think [it's] BS, but understand I have a job to do as well and best of luck to you in the future," or words to that effect. *Id.* at ⁋ 64.

Then the media got a hold of the story. Shortly after the firing, news reports began circulating and social media erupted, condemning Plaintiff and labeling him as a racist and an Islamophobe. *Id.* at ⁋ 66. In response to a media inquiry, Sgt. Tuell, TPD's Public Information

Officer, wrote: "Early yesterday morning the police department was notified of some questionable social media posts by one of our officers. The Chief . . . immediately ordered internal affairs to open an investigation, and within one hour and 15 minutes of receiving the complaint the officer was terminated." *Id.* at ⁋ 68. Defendants confirmed with the media that Plaintiff was terminated because Defendants believed that Plaintiff violated the TPD Social Media Policy prohibiting personnel "from posting forms of speech that express bias against any race, religion, or protected class of individuals." *Id.* at ⁋ 69. Below is a table of three social media posts that Plaintiff alleges "served as Defendants' basis for terminating Plaintiff," along with Plaintiff's description of the posts. *Id.* at ⁋ 72.[4] All of the posts that potentially served as the basis for terminating Plaintiff were made years before Plaintiff's employment with TPD. *Id.* at ⁋ 74.

Table 1

⁋	**Facebook Post**	**Plaintiff's Description**
72.A.		"An image of yet-to-be-president Donald Trump ('Trump Post'), which was posted on or about August 6, 2015:"

[4] In total, there were nine Facebook posts that Marq Lewis complained of on social media. Doc. 6, at ⁋⁋72–73. However, Plaintiff alleges that it is three posts (⁋⁋ 72.A., 72.B., 72.C.) that likely prompted his termination. *Id.* at ⁋72. Also, at a hearing, Deputy Chief Eric Dalgliesh stated Plaintiff was terminated for posting only two images: the Trump Post and the Blue Lives Matter Post. *Id.* at ⁋ 90. Therefore, the Court will confine its analysis to the three posts in Table 1.

72.B.		"An image making the point that Americans (particularly Christians, such as Plaintiff, who will not convert or submit to Islam as a matter of religious conviction) will not surrender or submit to sharia-supremacism, which is a tyrannical form of government prevalent in countries such as Iran and a form of governance demanded by terrorist organizations such as ISIS and Al Qaeda. The image was posted on or about November 15, 2015:"
72.C.		"An image created by the famous American sniper and decorated war hero Chris Kyle superimposed over the American flag with a thin blue line—the flag image is associated with the 'blue lives matter' movement. This image ('Blue Lives Matter Post') was posted on or about March 24, 2016."

Plaintiff alleges that the termination has caused him public humiliation, embarrassment, anger, and stress. *Id.* at ⁋ 85. He alleges that this termination has undermined the trust and confidence that the TPD police officers have in their leadership, in that Defendants' will "throw them under the bus" to promote political correctness and appease political activists. *Id.* at ⁋ 86.

Because of his termination, Plaintiff requested unemployment benefits, which were initially denied. *Id.* at ⁋ 89. Deputy Chief Eric Dalgliesh, who was testifying for the City, stated

that Plaintiff was terminated for posting only two images on his Facebook page: the Trump Post and the Blue Lives Matter Post. *Id.* at ⁋ 90. On September 26, 2019, Plaintiff submitted to the City Clerk a Notice of Tort Claim, seeking recovery for wrongful termination under state law. *Id.* at ⁋ 92.

Plaintiff filed this action in federal court on October 9, 2019, against Defendant City of Tulsa and Defendant Charles W. Jordan, in his official and individual capacities. *See* Docs. 2, 6. In his First Amended Complaint, Plaintiff alleges that the Defendants violated his First Amendment rights by retaliating against his speech, Defendants violated his rights under the Equal Protection Clause of the Fourteenth Amendment, and Defendants wrongfully discharged Plaintiff under Oklahoma common law (*Burk* claim). Doc. 6 at ⁋⁋ 94–110. Plaintiff seeks declaratory relief, injunctive relief, and damages. *Id.* at Prayer for Relief. Defendants then filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Docs. 13, 14.

STANDARD

The federal rules require a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To "survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although a court must accept all the complaint's factual allegations as true, the same is not true of legal conclusions. *See id.* Mere "labels and conclusions" or "formulaic recitation[s] of a cause of action" will not suffice. *Twombly*, 550 U.S. at 555. "Thus, in ruling on a motion to dismiss, a court should disregard all conclusory statements of law and consider whether the remaining specific factual allegations, if assumed to be true,

plausibly suggest the defendant is liable." *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011).

Overall, the "plausibility" standard refers to "the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'" *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570). "'The *Twombly* standard may have greater bite' in the context of a § 1983 claim against individual government actors, because 'they typically include complex claims against multiple defendants.'" *Kan. Penn Gaming, LLC*, 656 F.3d at 1215 (quoting *Robbins*, 519 F.3d at 1249). It is "particularly important in such circumstances that the complaint make clear exactly *who* is alleged to have done *what* to *whom*, to provide each individual with fair notice as to the basis of the claims against him or her, as distinguished from collective allegations against the state." *Kan. Penn Gaming, LLC*, 656 F.3d at 1215 (internal quotation marks omitted).

DISCUSSION

The Court will first discuss Defendant City of Tulsa's Motion to Dismiss (Doc. 13), including the First Amendment claim and the equal protection claim. Second, the Court will discuss Defendant Jordan's Motion to Dismiss (Doc. 14), including the official capacity claims, and the claims in his individual capacity (First Amendment and equal protection claims). Third, the Court will move on to discuss the declaratory and injunctive relief requested by Plaintiff. Finally, the Court will discuss Plaintiff's state law *Burk* claim against both Defendants.

I. City of Tulsa

A. First Amendment Claim

Plaintiff argues that Defendant City punished and retaliated against him because of the expression of his political and religious viewpoints, in violation of Plaintiff's First Amendment free speech rights. Doc. 6, at ⁋⁋ 95–100; Doc. 17. Defendant City disagrees and concludes its interest, as employer, outweighed Plaintiff's free speech interest. Doc. 13. For reasons detailed below, the Court finds Defendant City's Motion is well-taken.

Sitting on the Supreme Judicial Court of Massachusetts in 1892, Justice Holmes observed: A policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. City of New Bedford*, 29 N.E. 517, 517 (Mass. 1892). This was the unchallenged dogma for many years, that "a public employee had no right to object to conditions placed upon terms of employment—including those which restricted the exercise of constitutional rights." *Connick v. Myers*, 461 U.S. 138, 143 (1983). However, that "dogma has been qualified in important respects." *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006).

Now, the Supreme Court "has made clear that public employees do not surrender all their First Amendment rights by reasons of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Garcetti v. Ceballos*, 547 U.S. at 417. This First Amendment protection exists even if the public employee is probationary and even if the public employee can be discharged for any reason or no reason at all. *Rankin v. McPherson*, 483 U.S. 378, 383–84 (1987). The challenge, however, is to "arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Ed. of Tp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968); *see also Garcetti*, 547 U.S. at 420 ("The Court's decisions, then, have sought to promote the individual and societal interests that are

served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions.").

The *Pickering* Court sought to achieve this balance through the adoption of a four-part test to be implemented in public-employee, free-speech cases. *See, e.g., Kent v. Martin*, 252 F.3d 1141, 1143 (10th Cir. 2001) (describing *Pickering* test). The Court in *Garcetti* "expanded on the *Pickering* test by adding a fifth, threshold inquiry that seeks to determine whether the speech at issue was made pursuant to the public employee's official duties." *Leverington v. City of Colorado Springs*, 643 F.3d 719, 724 (10th Cir. 2011). "Thus, after *Garcetti*, 'it is apparent that the "*Pickering*" analysis of freedom of speech retaliation claims is a five-step inquiry which we now refer to as the "*Garcetti/Pickering*" analysis.'" *Id.* (quoting *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1202 (10th Cir. 2007)).

The familiar *Garcetti/Pickering* test includes the following inquiries:

> (1) Whether the speech was made pursuant to an employee's official duties; (2) whether the speech was on a matter of public concern; (3) whether the government's interests, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interests; (4) whether the protected speech was a motivating factor in the adverse employment action; and (5) whether the defendant would have reached the same employment decision in the absence of the protected conduct.

Duda v. Elder, 7 F.4th 899, 910 (10th Cir. 2021). "'The first three elements are issues of law for the court to decide, while the last two are factual issues typically decided by the jury.'" *Knopf v. Williams*, 884 F.3d 939, 945 (10th Cir. 2018) (quoting *Trant v. Oklahoma*, 754 F.3d 1158, 1165 (10th Cir. 2014)).

i. Employee's Official Duties

Defendant City states, "there is no dispute that Plaintiff spoke as a private citizen rather than as a public employee and the first element of the *Garcetti/Picke[r]ing* analysis is satisfied."

Doc. 13, at 11. Plaintiff states, "it is without dispute that Plaintiff's protected expression was made *years prior* to his hiring by the City as a police officer and thus well before he was a public employee . . . ." Doc. 17, at 17 (emphasis in original). The First Amended Complaint alleges Plaintiff commenced his employment with TPD on January 22, 2019, and the Facebook posts at-issue were published in 2015 and 2016. Doc. 6, at ⁋⁋ 19, 72. Therefore, it is undisputed by the parties and there are no allegations in the First Amended Complaint to indicate Plaintiff's exercise of his right to free speech was made pursuant to his official duties. Therefore, this element weighs in Plaintiff's favor. *See Cramer v. Okla. Cnty. Bd. Of Cnty. Comm'rs*, 2018 WL 8966815, at *4 (W.D. Okla. May 30, 2018).

ii. Matter of Public Concern / Protected Expression

A "public employee's speech is entitled to *Pickering* balancing only when the employee speaks 'as a citizen upon matters of public concern' rather than 'as an employee upon matters only of personal interest.'" *City of San Diego v. Roe*, 543 U.S. 77, 83 (2004) (quoting *Connick v. Myers*, 461 U.S. 138, 147 (1983)). Whether speech addresses a matter of public concern is determined by "the content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. at 147–48. Public concern relates "to any matter of political, social, or other concern to the community . . . ." *Id.* at 146. Additionally,

> public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication. The Court has also recognized that certain private remarks, such as negative comments about the President of the United States, touch on matters of public concern and should thus be subject to *Pickering* balancing.

City of San Diego v. Rose, 543 U.S. at 83–84.

If an employee's speech does not touch on a matter of public concern, "the employee has no First Amendment cause of action based on his or her employer's reaction to the speech."

Garcetti v. Ceballos, 547 U.S. 410, 418 (2006); *see also Connick*, 461 U.S. at 146 (If the speech does not relate to any matter of public concern, then "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.").

However, the Tenth Circuit has recognized the threshold public concern test is not applicable to all situations. In *Flanagan v. Munger*, police officers were reprimanded for violating off-duty employment regulations for conduct unbecoming of an officer by owning and operating a video rental store that sold and rented out sexually explicit videos. 890 F.2d 1557, 1560–61 (10th Cir. 1989). The officers sued the Chief of Police and the City, alleging the defendants violated their First Amendment rights. *Id.* at 1561. The Tenth Circuit stated that the *Pickering/Connick* public concern test does not apply "when public employee nonverbal protected expression does not occur at work and is not about work." *Id.* at 1564. The Court identified that simply owning a store is "not debate or explicit verbal speech" and if "plaintiffs had made off-duty statements supporting sexually explicit films, those comments would almost surely relate to a matter of public concern." *Id.* at 1563. The *Flanagan* Court explained:

> When a statement is made at or about work, use of the public concern test, indeed a narrow definition of public concern, makes sense. . . . However, in a case like this of nonverbal protected expression not at or about the workplace, the "speech" already takes place outside of the workplace and thus the purpose behind using the public concern is simply irrelevant.
>
> The formulation of the public concern test in *Connick* and its progeny also implies that the test is not intended to apply to areas in which the employee does not speak at work or about work. . . . Thus, the *Connick* public concern test is intended to weed out speech by an employee speaking *as* an employee upon matters only of personal interest. The speech of the plaintiffs in this case is clearly not speech as an employee, and thus does not fulfill the purpose of the public concern test. . . . Clearly, plaintiffs are not speaking as employees and thus do not fit the narrow spectrum which the public concern test is meant to identify.

> Thus, we conclude that the public concern test does not apply when public employee nonverbal protected expression does not occur at work and is not about work.

Id. at 1564.

The Tenth Circuit announced, "[t]he alternative test should be whether the speech involved is 'protected expression.' If the speech involved is protected expression, then the second half of the existing *Pickering* test . . . should be applied." *Id.* at 1564–65. Other courts have applied the *Flanagan* test to public employee speech which occurs out of work and is unrelated to work. *See, e.g.*, *Rothschild v. Bd. Of Educ. of City of Buffalo*, 778 F. Supp. 642, 654–55 (W.D.N.Y. Dec. 5, 1991) (Teachers were disciplined for their participation in the production of a videotape filmed at a public school outside of work hours. The *Rothschild* Court applied the Tenth Circuit's approach in *Flanagan* and held the speech was protected); *Hawkins v. Dep't of Pub. Safety and Corr. Services*, 602 A.2d 712, 719–20 (Md. 1992) (considering *Flanagan* while analyzing a prison guard's abusive words and conduct towards a private citizen while guard was off duty, away from the prison and out of uniform); *Melzer v. Bd. of Educ. of City Sch. Dist. of City of New York*, 196 F. Supp. 2d 229, 250 (E.D. N.Y. Feb. 26, 2002) ("there is no province in trying to discern if a protected expression or association is in regard to a matter of public concern if it is not about work or related to work").

The Court recognizes that *Flanagan's* holding relates to nonverbal expression and the Tenth Circuit has declined to extend *Flanagan* to an employee's out of work verbal expression. *See Leverington v. City of Colorado Springs*, 643 F.3d 719 (10th Cir. 2011). In *Leverington*, a nurse was terminated after she told a police officer who issued her a speeding ticket that she "hoped she never had him as a patient." *Id.* at 722. The Tenth Circuit declined to apply *Flanagan* stating, the nurse's "statement was clearly verbal expression, it related to her work, and it potentially had

an impact upon her employer. Unlike the difficulty in *Flanagan* in determining what 'comment' was being made . . ., here we have no difficulty in evaluating Ms. Leverington's statement. *Id.* at 725. Based upon the facts of this case, the Court considers *Flanagan's* protected expression test to be the more appropriate test to apply.[5] Plaintiff clearly did not speak as an employee, his speech did not concern work, and his speech did not occur at work. *Flanagan*, 890 F.2d at 1564.

Plaintiff alleges that two, but possibly three, Facebook posts formed the basis of his termination: the "Trump Post," the "Blue Lives Matter Post," and the November 15, 2015, post. *See* Doc. 6, at ⁋⁋ 72, 90. Therefore, the Court will only analyze whether these three Facebook posts are protected expression. *Virginia v. Black*, 538 U.S. 343, 358 (2003) ("The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech.").

1. August 6, 2015, Trump Post

The first post at issue is an image of then-presidential candidate Donald Trump riding a lion with a confederate flag in the background, posted August 6, 2015. *See* Doc. 6, at ⁋ 72.A.; Table 1. "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotation marks omitted). Political speech is "at the core of protected speech." *Bass v. Richards*, 308 F.3d 1081, 1089 (10th Cir. 2002). The August 6, 2015, post of Donald Trump is a protected expression of political speech.

2. March 24, 2016, Blue Lives Matter Post

The next post is an image allegedly created by American veteran Chris Kyle superimposed over the American Flag with a thin blue line—the image associated with the "Blue Lives Matter"

[5] The Court acknowledges the Defendant City contends the public concern test is the appropriate test to apply. *See* Doc. 13, at 11; Doc. 20, at 3. Regardless, both parties concede either test is met (for the three posts at issue) and both proceed to *Pickering* balancing. *See* Doc. 13, at 11; Doc. 17, at 16.

movement. Doc. 6, at ¶ 72.C.; Table 1. The post contains the words, "despite what your momma told you . . . violence does solve problems." *Id.* Recently, the Honorable J. Nicholas Ranjan of the District Court of the Western District of Pennsylvania acknowledged that political or social-protest speech—such as employees wearing facemasks that displayed the slogan "Black Lives Matter"—was social speech which struck "at the heart of the most valuable speech protected by the First Amendment." *Amalgamated Transit Union Local 85 v. Port Auth. of Alleghany Cnty.*, 513 F. Supp. 3d 593, 612 (W.D. Pa. Jan. 19, 2021). Just as speech concerning the Black Lives Matter movement is protected social speech, so is speech promoting the Blue Lives Matter movement.

3. November 15, 2015, Post

Lastly, Plaintiff posted an image with the text, "Pledge to my family, flag and country when the day comes I will fight to my last breath, before I submit to Islam." Doc. 6, at ¶ 72.B.; Table 1. "The hallmark of the protection of free speech is to allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting." *Virginia v. Black*, 538 U.S. 343, 358 (2003) (citing *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). There are certain well-defined and narrowly limited classes of speech which are not afforded Constitutional protection. *See id.* Speech which incites imminent lawless action, true threats and fighting words are not protected. *Id.* at 359. Speech cannot be curtailed "simply because the speaker's message may be offensive to his audience." *Hill v. Colorado*, 530 U.S. 703, 716 (2000). The Court does not consider this post to be one of the exceptions to Constitutional protection. Fighting words are those "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Virginia v. Black*, 538 U.S. at 359. While this post contemplates fighting, the Court does not find it was inherently likely to provoke a violent reaction. Nor does the Court consider the post

to incite imminent lawless action or constitute a true threat. For these reasons, the November 15, 2015, post is protected expression.

iii. Balancing the Parties' Interests

Having concluded that the Facebook posts at issue are protected expression, the Court must now proceed to the third element of the *Garcetti/Pickering* test. The Defendant City contends it have a superior interest in maintaining the public's confidence, Plaintiff's Facebook posts did cause a "significant actual disruption," and Plaintiff's Facebook posts "harmed the public's trust in Plaintiff as a Tulsa Police Officer in that he would treat all members of the community fairly." Doc. 13, at 17 (emphasis in original). Conversely, Plaintiff argues the City did not have a legitimate interest in limiting his speech, his speech did not cause an *internal* disruption, and the City's termination of his employment amounts to an impermissible heckler's veto. *See* Doc. 17, at 19–20.

The balance of Plaintiff's right to free speech and the employer's right to curtail activity which interferes with the efficient operation of the office does not occur in a vacuum. *Flanagan v. Munger*, 890 F.2d 1557, 1564–65 (10th Cir. 1989). "The manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). Pertinent considerations include "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Id.* Essentially, the balance must tip in favor of protection "unless the employer shows that some restriction is necessary to prevent the disruption of official functions or to insure effective performance by the employee." *Flanagan v. Munger*, 890 F.2d at 1565 (internal quotation marks omitted).

The Tenth Circuit has said "the only public employer interest that outweighs the employee's free speech interest is avoiding direct disruption, *by the speech itself*, of the public employer's internal operations and employment relationships." *Duda v. Elder*, 7 F.4th 899, 912 (10th Cir. 2021) (emphasis in original). This circuit requires "the employer to prove 'actual disruption' when the adverse employment action took place 'long after' the employee spoke on a matter of public concern." *Id.* at 912–13 (citing *Bailey v. Indep. Sch. Dist. No. 69*, 896 F.3d 1176, 1183 (10th Cir. 2018) (quotations omitted)). A showing of actual disruption is not required if the adverse action occurred soon after the employee's protected speech, but a showing of potential disruption is required. *Id.*[6]

In the context of law enforcement, "a police department's determination that an officer's speech warrants discipline is afforded considerable deference . . . and police departments may permissibly consider the special status officers occupy in the community when deciding what limitations to place on officers' off-duty speech." *Hernandez v. City of Phoenix*, 43 F.4th 966, 979 (9th Cir. 2022) (citation omitted); *see also Fields v. City of Tulsa*, 753 F.3d 1000, 1015 (10th Cir. 2014) ("We have long recognized that law-enforcement agencies have a heightened interest in maintaining discipline among employees."); *Connick v. Myers*, 461 U.S. 138, 151–152 (1983) ("When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate.").

"Efficient law enforcement requires mutual respect, trust and support." *McMullen v. Carson*, 754 F.2d 936, 939 (11th Cir. 1985). This is difficult for the City to achieve if its employees are permitted to publicly broadcast images that causes actual disruption, which the city is required to establish. *Duda*, 7 F.4th at 912–913; *see supra* note 6. Based on facts taken from Plaintiff's

[6] Although the Tenth Circuit has never fixed temporal boundaries for the actual disruption test, it has found that "six months falls on the 'long after' side of the line." *Duda v. Elder*, 7 F.4th 899, 913 n. 10 (10th Cir. 2021).

Complaint, Plaintiff's speech itself did create actual disruption. A complaint about the Facebook posts was made by a local activist to TPD; "news reports began circulating and social media erupted," Vilifying Plaintiff as a racist and Islamophobe; TPD administration had to respond to media inquiries; and the termination (because of the Facebook posts) "undermined the trust and confidence that TPD police officers have in their leadership." Doc. 6, at ⁋⁋ 6, 66–69, 86. The Defendant City contends—uncontroverted by Plaintiff—that the posts "created such a public disruption that Chief Jordan and the Tulsa Police Department received numerous inquiries from concerned citizens," and the posts "caused public outrage and disruption[,] harmed the public's trust in Plaintiff as a Tulsa Police Officer" and set back the efforts to build trust between TPD and the community. Doc. 13, at 16–17; *see* Doc. 17, at 2–4 (Plaintiff's response to Defendant City, objecting to some of Defendant City's facts).

Here, the Defendant City's interest in maintaining a police force that instills public confidence and prohibits partisanship in law enforcement outweighs Plaintiff's interest in having his expressions protected. *McMullen v. Carson*, 745 F.2d at 939 (affirming district court's application of the *Pickering* balancing test and holding the Sheriff's interest in carrying out the sheriff department's duties to the public outweighed terminated clerk's interest in right to participate in an organization committed to violent, criminal and racist conduct); *Grutzmacher v. Howard County*, 851 F.3d 332, 345 (4th Cir. 2017) (fire department's interest in efficiency and preventing disruption outweighed plaintiff's interest in speaking in manner he did and posting on social media). Since the Court has found for Defendant City on the *Garcetti/Pickering* balancing (a question of law), the Court need not reach the last two elements, which are "factual issues typically decided by the jury." *Knopf v. Williams*, 884 F.3d 939, 945 (10th Cir. 2018) (internal

quotation marks omitted); *see also Duda v. Elder*, 7 F.4th 899, 910–11 (10th Cir. 2021) ("To prevail, a plaintiff must show all five elements.").

Because the Defendant City's interest outweighs Plaintiff's interest in his protected speech, as a matter of law, Plaintiff's First Amendment claim against the City must be dismissed.

B. Equal Protection Claim

Plaintiff alleges Defendant City violated his rights under the Equal Protection Clause of the Fourteenth Amendment by selectively targeting the content and viewpoint of Plaintiff's speech and beliefs, and selectively enforcing policies against Plaintiff. Doc. 6, at ⁋⁋ 101–107. Defendant City argues Plaintiff's "very vague and ill-defined claim" is a "class of one" theory of equal protection, foreclosed by the Supreme Court in *Engquist v. Oregon Dept. of Agric.*, 553 U.S. 591 (2008). Doc. 13, at 19–21. In response, and in an attempt to clarify, Plaintiff relies on *Police Dp't of the City of Chicago v. Mosley* for the conclusion that the law was clearly established: "[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." 408 U.S. 92, 96 (1972).

"The Equal Protection Clause is concerned with governmental classifications that 'affect some groups of citizens differently than others,' especially those in 'an identifiable group.'" *Pignanelli v. Pueblo Sch. Dist. No. 60*, 540 F.3d 1213, 1221 (10th Cir. 2008) (quoting *Engquist v. Oregon Dep't of Agric.*, 553 U.S. at 600–01. "a public employee-turned-plaintiff must be a member of an identifiable class to bring an equal protection claim, *Pignanelli*, 540 F.3d at 1220, and must allege that "the challenged state action intentionally discriminates between groups of persons." *SECSYS, LLC v. Vigil*, 666 F.3d 678, 685 (10th Cir. 2012).

Here, Plaintiff's complaint fails to plausibly plead sufficient facts of an equal protection violation. Plaintiff has not identified any individual or group who were granted the use of a forum to which he was denied. Nor has Plaintiff alleged he was discriminated against on the basis of membership in some class or group. In effect, Plaintiff argues that he was arbitrarily treated differently from others, without any assertion that the different treatment was based on his membership in any particular class. This type of "class of one" theory of equal protection was foreclosed by the Supreme Court in *Engquist*. *See Engquist*, 553 U.S. at 594 (rejecting in the public employment context a "class of one" theory whereby the plaintiff alleges "she was arbitrarily treated differently from other similarly situated employees, with no assertion that the different treatment was based on membership in any particular class").

For these reasons, Plaintiff has not plausibly pleaded Defendant City violated his right to equal protection. Therefore, the Court dismisses Plaintiff's equal protection claim against Defendant City.

II. Defendant Jordan

A. Official Capacity Claims

At the outset, the Court will discuss Plaintiff's Section 1983 official capacity claims against Defendant Jordan. "Defendant Jordan is sued individually and in his official capacity as the Chief of Police." Doc. 6, ¶ 16. Defendant Jordan argues that all claims against him in his official capacity are redundant of those against the City and therefore, should be dismissed. Doc. 14, at 4–5. Plaintiff argues—in a footnote—that since Plaintiff was fired based on a TPD social media policy (which may or may not be a City policy), and since Defendant Jordan is a decisionmaker for the City, then Defendant Jordan is the person against whom declaratory and injunctive relief would be appropriate. Doc. 18, at 14 n. 10. Plaintiff, however, *would* agree that naming Defendant Jordan

in his official capacity would not be needed *if* the Defendant City concedes the municipal liability issue. *Id.*

Plaintiff conflates the individual and official capacity claims. If Plaintiff concludes that "Defendant Jordan *would be the person* against whom declaratory and injunctive relief would be appropriate," then an official capacity suit is the wrong vehicle to achieve Plaintiff's relief. "[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally, for the real party in interest is the entity." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (citation omitted). In other words, suing Chief Jordan in his official capacity under section 1983, *is the same* as suing the City. This is not a "finding of non-liability but rather of redundancy because of the fact that the City is *already* a defendant in this lawsuit. In other words, [the Chief] in his official capacity *is* the City." *Lopez v. Bd. of Cnty. Comm'rs for Lea Cnty.*, 2016 WL 10588126, at *2 (D.N.M. March 4, 2016); *see also Romero v. Storey*, 2010 WL 11619180, at *2 (D.N.M. Sept. 17, 2010) ("Consequently, § 1983 claims against individual defendants in their official capacities are redundant when those same claims are also brought against the municipal entity that employs the individual defendants."). Overall, "[t]here is no longer a need to bring official-capacity actions against local government officials, for under *Monell* . . . local government units can be sued directly for damages and injunctive or declaratory relief." *Kentucky v. Graham*, 473 U.S. at 167 n. 14.

The official capacity claims against Defendant Jordan would fail for the same reason as the claims against the Defendant City of Tulsa and are redundant. Since the section 1983 official capacity claims against Defendant Jordan are redundant, the Court dismisses with prejudice the official capacity claims against Defendant Jordan for failure to state plausible section 1983 claims. *See Romero v. Storey*, 2010 WL at *2 ("[T]he majority of cases which have dealt with the issue of

redundancy in § 1983 lawsuits have held that the appropriate remedy is, in fact, dismissal of the official capacity claim.") (compiling cases).

B. Individual Capacity Claims

Defendant Jordan argues that all claims against him in his individual capacity should be dismissed because he is entitled to qualified immunity. *See* Doc. 14. Plaintiff, conversely, argues that Defendant Jordan violated Plaintiff's clearly established rights and therefore, is not entitled to qualified immunity. *See* Doc. 18.

Qualified immunity "protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Although typically at the summary judgment stage, a district court may grant a motion to dismiss based on qualified immunity "but asserting a qualified immunity defense via a Rule 12(b)(6) motion . . . subjects the defendant to a more challenging standard of review than would apply on summary judgment." *Truman v. Orem City*, 1 F.4th 1227, 1235 (10th Cir. 2021) (internal quotation marks omitted). "Specifically, the court analyzes the defendant's conduct *as alleged in the complaint*." *Id.* (emphasis in original) (internal quotation marks omitted). The Tenth Circuit employs a strict two-part test that the plaintiff must meet: First, the plaintiff must establish "that the defendant violated a constitutional or statutory right," and second, "that this right was clearly established at the time of the defendant's conduct . . . ." *McBeth v. Himes*, 598 F.3d 708, 716 (10th Cir. 2010) (internal quotation marks omitted). The Court has discretion to decide which prong to address first. *Id.* A case is clearly established "when a Supreme Court or Tenth Circuit decision is on point," and the "clearly established law should not be defined at a high level of generality." *Redmond v. Crowther*, 882 F.3d 927, 935 (10th Cir.

2018) (internal quotation marks omitted). Although a prior case need not have identical facts, "the clearly established law must be particularized to the facts of the case." *White v. Pauly*, 580 U.S. 73, 79 (2017).

i. First Amendment Retaliation

Plaintiff argues that by terminating him, Defendant Jordan violated his clearly established right to free speech. Doc. 18, at 17. Plaintiff principally relies on *Flanagan v. Munger*, 890 F.2d 1557 (10th Cir. 1989), arguing it "compels the Court to deny Defendant Jordan's motion." Doc. 18, at 19.

In *Flanagan*, police officers were reprimanded for violating off-duty employment regulations for conduct unbecoming of an officer by owning and operating a video rental store that sold and rented out sexually explicit videos. 890 F.2d at 1560–61. The officers sued the Chief of Police and the City, alleging the defendants violated their First Amendment rights. *Id.* at 1561. The Tenth Circuit stated that the *Pickering/Connick* public concern test does not apply "when public employee nonverbal protected expression does not occur at work and is not about work." *Id.* at 1564. Importantly, the Court identified that simply owning a store is "not debate or explicit verbal speech" and if "plaintiffs had made off-duty statements supporting sexually explicit films, those comments would almost surely relate to a matter of public concern." *Id.* at 1563. Instead of the public concern test, the Tenth Circuit crafted the "protected expression" test: "If the speech involved is protected expression, then the second half of the existing *Pickering* test—the balancing between the employee's right to free speech and the employer's right to curtail activity which interferes with the efficient operation of the office—should be applied. *Id.* at 1564–65. Once the Court moved on to *Pickering* balancing, it found in favor of the officers, because any disruption from the speech itself was too attenuated. *Id.* at 1566.

The Court disagrees that *Flanagan* compels the Court—in this qualified immunity context—to deny Defendant Jordan's motion because the facts in *Flanagan* are inapposite here. The issue here is not whether Defendants violated Plaintiff's free speech rights by regulating his unbecoming, outside-of-work business dealings. Dealings which, as the Tenth Circuit identified, had no indicia of verbal speech, statements, nor debate. *Flanagan*, 890 F.2d at 1563. Rather, the issue is whether Plaintiff's termination by Defendants due to his social media posts violated his free speech rights. Thus, *Flanagan* is not particularized to the facts of this case. *See Knopf v. Williams*, 884 F.3d 939, 944 (10th Cir. 2018) ("the clearly established law must be particularized to the facts of the case" and the "dispositive question is whether the violative nature of *particular* conduct is clearly established") (internal quotation marks omitted). Plaintiff does not cite or analyze any other Tenth Circuit or Supreme Court cases that are particularized to the facts here which establish that Defendant Jordan's actions violated clearly established law.[7] The second prong of the qualified immunity analysis is not satisfied, and Defendant Jordan is entitled to qualified immunity. Therefore, as a matter of law, Plaintiff's First Amendment claim against Defendant Jordan in his individual capacity must be dismissed.

ii. Equal Protection Claim

Plaintiff also alleges Defendant Jordan violated his rights under the Equal Protection Clause of the Fourteenth Amendment by selectively targeting the content and viewpoint of Plaintiff's speech and beliefs, and selectively enforcing policies against Plaintiff. Doc. 6, at ⁋⁋ 101–107. Defendant Jordan argues Plaintiff's "very vague and ill-defined claim" is a "class of

[7] Plaintiff does cite many cases that stand for the proposition that "public employees may not be discharged in retaliation for speaking on matters of public concern," etc. *See* Doc. 18, at 17. However, such broad statements of law that merely repeat the generic *Garcetti/Pickering* standard are insufficient for the clearly established prong. *See Knopf v. Williams*, 884 F.3d 939, 946–47 (10th Cir. 2018) (concluding that repeating the generic *Garcetti/Pickering* standard is not particularized and fails the second prong of the qualified immunity analysis).

one" theory of equal protection, foreclosed by the Supreme Court in *Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591 (2008). Doc. 14, at 10–11.

For the same reasons in the Court's discussion of the equal protection claim against Defendant City, Plaintiff's complaint fails to plausibly plead sufficient facts of an equal protection violation. Plaintiff has not identified any individual or group who were granted the use of a forum to which he was denied. Nor has Plaintiff alleged he was discriminated against on the basis of membership in some class or group. Plaintiff has not plausibly pleaded Defendant Jordan violated his right to equal protection and Plaintiff cannot overcome Defendant Jordan's qualified immunity. Therefore, the Court dismisses Plaintiff's equal protection claim against Defendant Jordan in his individual capacity.

III. Declaratory and Injunctive Relief

Plaintiff seeks declaratory and injunctive relief against the Defendants, requesting:

> [A] declaration that Defendants violated his clearly established rights as set forth in this First Amended Complaint; a declaration that the termination of Plaintiff's employment as a police officer with the TPD was unlawful; an injunction enjoining the enforcement of Defendant's unconstitutional acts, policies, practices, procedures, and/or customs that were the moving force behind the violation of Plaintiff's rights as set forth in this First Amended Complaint; an injunction expunging all paperwork or references from Plaintiff's personnel file related to the incident giving rise to Defendants' violation of his rights as set forth in this First Amended Complaint and prohibiting the use of any such paperwork or references in any future employment matter . . . .

Doc. 6, at ⁋ 6. Plaintiff grounds this relief under 28 U.S.C. §§ 2201 and 2202, and Rules 57 and 65 of the Federal Rules of Civil Procedure. *Id.* at ⁋ 8.

To the extent Plaintiff is seeking declaratory and injunctive relief against Defendant Jordan in his official capacity, those claims are dismissed for the above stated reasons. Regarding Plaintiff's request for declaratory judgment against Defendant Jordan in his individual capacity and against Defendant City, the Declaratory Judgment Act ("DJA") provides:

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a). Whether subject matter jurisdiction exists, there are "two separate hurdles for parties seeking a declaratory judgment to overcome," a Constitutional one and a discretionary one. *Surefoot LC v. Sure Foot Corp.*, 531 F.3d 1236, 1240 (10th Cir. 2008). First, there must be an "actual controversy," which is "equated to the Constitution's case-or-controversy requirement." *Id.* (citing *Aetna Life Ins. Co. v. Hayworth*, 300 U.S. 227, 239–40 (1937)). Second, since the DJA is discretionary ("may," not "must"), a plaintiff must persuade the court to make a declaration on the merits based on a number of case specific factors. *Id.* Relevant factors include whether a declaratory judgment: (1) would settle the controversy; (2) would serve a useful purpose in clarifying the legal relations at issue; (3) is being used merely for the purpose of procedural fencing or to win the "race to res judicata"; (4) would increase friction between federal and state courts and improperly encroach upon state jurisdiction; and (5) is in addition to an alternative remedy which is better or more effective. *State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 983 (10th Cir. 1994).

Here, there is an "actual controversy," but the Court declines to exercise its jurisdiction under the DJA. The Court has concluded as a matter of law that Defendant Jordan is entitled to qualified immunity with respect to Plaintiff's constitutional claims and dismissed all federal claims against Defendant City. Therefore, if the Court were to exercise its jurisdiction, it would not settle the controversy or serve a useful purpose. Plaintiff's claim for declaratory relief against Defendant Jordan in his individual capacity and against Defendant City is dismissed.

Concerning Plaintiff's request for injunctive relief (Doc. 6, at ⁋ 6), the Court notes that Defendant Jordan is no longer the Chief of Police of TPD. *See* Doc. 21, at 6. Therefore, Defendant Jordan, individually, cannot provide Plaintiff with any of the relief he seeks. Concerning Defendant City, because the Court dismissed all the constitutional claims, an injunction in the manner requested by Plaintiff is likewise denied.

IV. *Burk* State Law Claim

Plaintiff lastly asserts a state law, wrongful discharge claim—a *Burk* claim[8]—against Defendants. Doc. 6, at ⁋⁋ 109–110. Plaintiff alleges the Defendants impermissibly infringed upon his freedom of speech or expression in violation of the First Amendment, the Oklahoma Constitution, and the City's policy. Doc, 6, at ⁋ 109. Defendant City argues the claim must be dismissed because it is impermissibly vague, and Plaintiff is not entitled to double recovery. Doc. 13, at 22–24. Defendant Jordan argues this claim should be dismissed. Doc. 14, at 12–15. Plaintiff did not respond to Defendant Jordan's arguments. *See* Doc. 18. Therefore, the Court considers Plaintiff's *Burk* claim against Defendant Jordan abandoned and dismisses the claim without prejudice.

Regarding the *Burk* claim against Defendant City, since the Court has dismissed Plaintiff's federal claims, it is necessary to consider whether it is appropriate to decide the remaining state

[8] In *Burk v. K-Mart Corp.*, 770 P.2d 24, the Oklahoma Supreme Court created an exception to its general rule of at-will employment by recognizing a cause of action for wrongful discharge in violation of public policy. *Wilburn v. Mid-S. Health Dev., Inc.*, 343 F.3d 1274, 1277 n.2 (10th Cir. 2003). Generally, "employers are free to discharge at-will employees in good or bad faith, with or without cause," but the *Burk* tort allows an at-will employee to sue for wrongful discharge in violation of public policy. *Darrow v. Integris Health, Inc.*, 176 P.3d 1204, 1210 (Okla. 2008). To state a claim for wrongful discharge under the public policy exception to at-will employment, a plaintiff must allege:

> (1) An actual or constructive discharge (2) of an at-will employee (3) in significant part for a reason that violates an Oklahoma public policy goal (4) that is found in Oklahoma's constitutional, statutory, or decisional law or in a federal constitutional provision that prescribes a norm of conduct for Oklahoma and (5) no statutory remedy exists that is adequate to protect the Oklahoma policy goal.

Vasek v. Bd. Of Cnty. Comm'rs of Noble Cnty., 186 P.3d 928, 932 (Okla. 2008).

law claim. Supplemental jurisdiction "is a doctrine of discretion, not of plaintiff's right." *City of Chicago v. Int'l. Coll. of Surgeons*, 522 U.S. 156, 172 (1997) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966)). Under 28 U.S.C. § 1367(c)(3), a district court may decline to exercise supplemental jurisdiction if the district court has dismissed all claims over which it has original jurisdiction. *See Estate of Harshman v. Jackson Hole Mountain Resort Corp.*, 379 F.3d 1161, 1165 (10th Cir. 2004) ("Even where a 'common nucleus of operative fact' exists, federal jurisdiction is not mandatory over pendant claims or parties."). When deciding whether to exercise supplemental jurisdiction, a federal court should consider and weigh in each case, and at every stage in the litigation, the values of "judicial economy, convenience, fairness, and comity." *Gibbs*, 383 U.S. at 726. If federal claims are dismissed before trial, leaving only issues of state law, "the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice." *Bauchman for Bauchman v. West High Sch.*, 132 F.3d 542, 549 (10th Cir. 1997) (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988); *Gibbs*, 383 U.S. at 726).

Here, the Court has dismissed Plaintiff's federal claims. The case is still in its initial stages: a Scheduling Order has not been entered and the litigation has not progressed past the motion to dismiss stage. Therefore, it will not be unduly inconvenient for the parties to transfer to state court to try the *Burk* claim at this juncture. The *Burk* claim implicates Oklahoma public policy, and this Court finds it is more appropriate for an Oklahoma state court to adjudicate such a claim. For these reasons, the Court dismisses the *Burk* claim against Defendant City without prejudice.

CONCLUSION

IT IS THEREFORE ORDERED that Defendant City of Tulsa's Motion to Dismiss Plaintiff's First Amended Complaint (Doc. 13) is **GRANTED**. Plaintiff Wayne Brown's section

1983 claims (First Amendment and equal protection claims) against Defendant City of Tulsa are **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that Defendant Charles W. Jordan's Motion to Dismiss Plaintiff's First Amended Complaint (Doc. 14) is **GRANTED**. Plaintiff Wayne Brown's section 1983 claims (First Amendment and equal protection claims), in his official and individual capacities, are **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that Plaintiff Wayne Brown's state law *Burk* claim against Defendant City of Tulsa and Defendant Charles W. Jordan is **DISMISSED WITHOUT PREJUDICE**.

IT IS SO ORDERED.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WAYNE BROWN,

Plaintiff,

v. No. 19-cv-00538-WPJ-FHM

(1) CITY OF TULSA; and

(2) CHARLES W. JORDAN,
individually and in his official capacity as
Chief of Police, Tulsa Police Department;

Defendants.

FINAL JUDGMENT

THIS MATTER came before the Court[1] upon Defendant City of Tulsa's Motion to Dismiss (Doc. 13) and Defendant Charles W. Jordan's Motion to Dismiss (Doc. 14), each filed February 3, 2020. Pursuant to the findings and conclusions set forth in the Court's Memorandum Opinion and Order granting Defendants' Motions (Doc. 30), the Court found that Defendants' arguments were well-taken and therefore dismissed with prejudice the federal claims and dismissed without prejudice the state law claims.

IT IS THEREFORE ORDERED and **ADJUDGED** that all federal claims in this action are hereby DISMISSED WITH PREJUDICE and all state claims are hereby DISMISSED WITHOUT PREJUDICE, thus disposing of this case in its entirety.

UNITED STATES DISTRICT JUDGE

[1] Chief United States District Court Judge William P. Johnson of the District of New Mexico was assigned this case as a result of the Tenth Circuit Order designating Judge Johnson to hear and preside over cases in the Northern District of Oklahoma.