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 REPLY BRIEF
ORAL ARGUMENT REQUESTED

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GLOSSARY OF TERMS

TPD .... Tulsa Police Department

STATEMENT OF PRIOR OR RELATED APPEALS

There are no prior or related appeals.

INTRODUCTION

The "*cancel culture*" is real, and it is a grave and serious threat to the First Amendment. This case illustrates the point. A well-known, anti-police activist was able to change the life of a young police officer by complaining about the *viewpoint* of certain posts appearing on the officer's Facebook page—posts the officer made several years *prior* to when he was hired by the Tulsa Police Department ("TPD"). "[*W*]*ithin one hour and 15 minutes of receiving the complaint*," the City of Tulsa, through its Chief of Police, Defendant Chuck Jordan, fired the officer, Plaintiff Wayne Brown. (R-6, First Amended Compl. ["FAC"] ¶¶ 35, 68, App.14, 19-20).

Defendant Jordan had neither the courage nor professional courtesy to discuss the matter with Plaintiff before firing him, despite Plaintiff's pleas to do so. (R-6, FAC ¶¶ 50, 51, 65, App.16, 19). Defendant Jordan didn't give Plaintiff an opportunity to address or explain the matter (or the option of taking down the posts or making them private).[1] (*Id.* ¶ 65, App.19). Nothing. Defendant Jordan and the City cowered under the pressure of this activist and his social media bullies, throwing a good officer under the bus to appease the cancel culture.

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[1] Defendants assert that Plaintiff "did not take any steps to comply with TPD policy by removing the previously posted offensive content from his page or by making his content private so that it was not publicly available." (Defs.' Br. at 3). Yet, Defendants never explained to Plaintiff why these posts were problematic (in fact, they refused to discuss the matter with him), let alone afford him the opportunity to remove the posts or make them private.

In a further display of cowardice, Defendant Jordan sent Captain Bell to do his dirty work. As acknowledged by Captain Bell, who was sent by Defendant Jordan to fire Plaintiff, the firing was "*BS*" (R-6, FAC ¶¶ 64, 86-88, App.19, App.26), and so too are Defendants' legal arguments in defense of the firing.

This is not a hard case. Controlling law compels the reversal of the district court's patently wrong decision. Defendants' firing of Plaintiff violated his "constitutionally protected interest in freedom of expression." *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006) ("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 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). It's not a close call.

As set forth more fully in Plaintiff's opening brief and reaffirmed here, the district court erred by dismissing Plaintiff's free speech and equal protection claims, it erred by granting Defendant Jordan qualified immunity, and it abused its discretion by dismissing Plaintiff's state law claim.

ARGUMENT IN REPLY

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

Plaintiff's speech (his social media posts) was made as a private citizen commenting on matters of public concern. Plaintiff's public issue speech "rest[s] on the highest rung of the hierarchy of First Amendment values." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (stating that the Court "has recognized that expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values") (internal quotations and citations omitted). This is undisputed. (Defs.' Br. at 11 ["[T]he District Court properly determined that Brown's subject posts were protected expression."]). Accordingly, the principal issue on appeal is whether Defendants can justify this suppression of Plaintiff's speech under existing law. They cannot.

"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 v. Munger*, 890 F.2d 1557, 1565 (10th Cir. 1989) (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)). 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).

Plaintiff's private expression addressed public issues (content), it was made several years (3 to 6 years) prior to his hiring by the TPD (time), it consisted of several posts on a private Facebook page (manner and place), and it did not address the TPD, TPD policies or practices, or anyone associated with the TPD (content and context).

In short, Plaintiff's social media posts were 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).

And to make the matter worse for Defendants, *City* policy provides 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). In other words, Plaintiff's firing violated the City's own policy.

Additionally, the reasonable inference drawn from the fact that the Facebook posts at issue remained for many years (3 to 6) on the social media platform—a platform which maintains strict community standards prohibiting offensive content, *see* https://www.facebook.com/communitystandards/introduction—is that the posts do not contain "racist, anti-Islam, pro-violence, and other offensive content." Indeed, no reasonable juror in Oklahoma would consider these posts offensive nor would the juror conclude that Plaintiff's sharing of these posts years prior to being hired as a police officer disqualifies him from currently serving on the TPD, particularly when there is no evidence that Plaintiff has ever engaged in any racists or discriminatory behavior. (*See* R-6, FAC ¶¶ 21-31, 79-83, App.12, 24, 25).

"[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) (emphasis added). "While 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).

Based on this Court's precedent, TPD "cannot justify disciplinary action against [Plaintiff] simply because some members of the public find [Plaintiff's] speech offensive and for that reason may not cooperate with law enforcement officers in the future."[2] *Flanagan*, 890 F.2d at 1566. Yet, this is precisely what Defendants did here. Defendants fired Plaintiff due to the reaction of a certain segment of the public (an anti-police activist and his followers) to Plaintiff's speech. The only evidence of impact on the TPD's "enterprise" is that Plaintiff's *firing* (and not his "expression") undermined the officers' confidence in the TPD leadership. This is established, without contradiction, by the reaction of Captain Bell. As set forth in the First Amended Complaint, Captain Bell told Plaintiff, "On

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[2] In a footnote, this Court stated in *Flanagan* the following:

> The Fourth Circuit has held that even the disruption of the police department's external relationships and operations to the extent of picketing and potential altercations between blacks and whites did not justify disciplinary action in faithfulness to first amendment principles.
>
> Here not only was the perceived threat of disruption only to external operations and relationships, it was caused not by the speech itself but by threatened reaction to it by offended segments of the public. Short of direct incitements to violence by the very content of public employee speech . . ., we think this sort of threatened disruption by others reacting to public employee speech simply may not be allowed to serve as justification for public employer disciplinary action directed at that speech.

Flanagan, 890 F.2d at 1566 n.8 (quoting *Berger v. Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985)).

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 [emphasis added], App.19).

Defendants' contrary arguments regarding the "potential" disruptive effects of Plaintiffs' speech (*see* Defs.' Br. at 15-16) are entirely speculative and contrary to the allegations of the First Amended Complaint.[3] *Trant*, 426 F. App'x at 661 (stating that the employer's "burden" "is a true burden of demonstration, not a mere matter of hypothetical articulation" and that an "employer cannot rely on

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[3] As set forth in the First Amended Complaint, it was Defendants' *firing* of Plaintiff that ignited the media response as the firing was perceived as confirming the false claims that Plaintiff was a racist and an "Islamophobe." (FAC ¶¶ 66-69, App.19-20). Moreover, it is improper for this Court to consider the additional documents/exhibits submitted in Defendants' "supplemental appendix," including the screenshot of Lewis' Facebook post that the City attached to its motion to dismiss as Exhibit A. Plaintiff objected to Defendants' insertion of additional facts below, (R-17, Pl.'s Resp. to City Mot. to Dismiss at 2-4; R-18, Pl.'s Resp. to Jordan Mot. to Dismiss at 2-3), and he continues to do so here. Lewis' Facebook page is not a "document" central to Plaintiff's claims. *See Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002) ("In addition to the complaint, the 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."). Nonetheless, contrary to Defendants' assertion, "hundreds of comments and shares" of Lewis's post (Defs.' Br. at 3) is indicative of nothing: you don't have to be from Tulsa to "comment" on or "share" the post—just a "follower" who apparently agrees with Lewis' anti-police agenda.

purely speculative allegations that certain statements caused or will cause disruption." *Id*. (citing *Dixon v. Kirkpatrick*, 553 F.3d 1294, 1304 (10th Cir. 2009)).

Indeed, the City essentially bragged that it fired Plaintiff "within one hour and 15 minutes" of receiving the activist's complaint about the posts as if to demonstrate its "wokeness" *bona fides*. As Defendants admit, they knew nothing about the posts prior to this complaint from the public. (*See* Defs.' Br. at 4 [admitting that they had no idea these old Facebook posts existed until they were brought to their attention by the anti-police activist]). Defendants also note that Plaintiff "was subject to dismissal *without cause*," which further indicates the lack of "cause" for the firing.

In sum, where is the evidence of disruption to the "operation of the enterprise" sufficient to warrant the punishing of Plaintiff's speech? There is none. In fact, the anti-police activist had to search back *3 to 6 years* on Plaintiff's Facebook page to find anything to complain about. In other words, at a minimum, there were no offending posts within the *3 years prior* to Plaintiff's hiring. It defies reason to conclude that Plaintiff was a "racist" or an "Islamophobe" or any other cancel culture label in light of the facts of this case.

In the final analysis, the Court should not allow this frontal attack on police officers (and the First Amendment) by activists who employ social media as a

weapon to promote their anti-police political agenda. Permitting the district court's decision to stand will only incentivize such actions, to the detriment of the First Amendment. As Plaintiff noted in his opening brief, 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. The balance weighs heavily in favor of protecting Plaintiff's right to freedom speech, particularly in the context of this case. The district court must be reversed.

II. Defendants Violated Plaintiff's Clearly Established Right to the Equal Protection of the Law.

Defendants misapprehend Plaintiff's equal protection argument and simply repeat the error of the district court's ruling. Plaintiff has not advanced a "class of one" claim, and this is not a case involving discrimination against a "suspect class" *per se*. (*See* Defs.' Br. at 17-19). Rather, Plaintiff relies upon clearly established law that under the Equal Protection Clause, the government may not grant the use of a forum (social media in this case)[4] to people whose views it finds acceptable,

[4] Social media is an important forum for expressing viewpoints on public issues. Per the U.S. Supreme Court:

> 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

but deny use to those wishing to express less favored or more controversial views. Moreover, whether Defendants' decision to fire Plaintiff was based on its written social media policy or not, the decision still violates the Equal Protection Clause of the Fourteenth Amendment (as well as the Free Speech Clause of the First Amendment). (*See* Defs.' Br. at 19 [stating that "[a]ll officers were permitted to use Facebook and all officers had to comply with TPD's social media and networking policy."]). The fact that a policy was the moving force behind the constitutional violation does not negate the violation. It simply affirms that the City is liable. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

In *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972), the U.S. Supreme Court articulated the following principle of law that is applicable here: "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." At issue in *Mosley* was a Chicago disorderly conduct ordinance condemning picketing near schools, except "the peaceful picketing of any school involved in a labor dispute." *Mosley*, 408 U.S. 92.

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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).

Mosley did not involve discrimination against a suspect class (including a "class of one"). It involved *discrimination* based on viewpoints, which is similar to this case. As the Court noted, "[t]here is an '*equality of status in the field of ideas*,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to . . . speaking by some groups, government may not prohibit others from . . . speaking on the basis of what they intend to say." *Id.* at 96 (emphasis added).

In *Carey v. Brown*, 447 U.S. 455, 461-62 (1980), the U.S. Supreme Court echoed the principle of law expressed in *Mosely*, concluding that discriminating among speech-related activities in a forum violates the Equal Protection Clause. At issue was an Illinois statute that generally prohibited picketing of residences or dwellings, but exempted from its prohibition peaceful picketing of a place of employment involved in a labor dispute. The case did not involve a particular "class" of persons nor simply a "class of one." It was a case involving *discrimination* based on the content and viewpoint of the speaker, as in this case.

Simply put: this is not a "class of one" or "suspect class" case. It is a case involving *discrimination based on viewpoint* in a forum (social media) that Defendants admittedly allow "all officers" to use.

As noted by the U.S. Supreme Court, "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." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). The "restriction" in this case is the firing of Plaintiff. And viewpoint discrimination by the government is unlawful regardless of the nature of the forum. In fact, it is unlawful even when a forum is not at issue. For example, in *Matal v. Tam*, 137 S. Ct. 1744 (2017), the U.S. Supreme Court held that the Patent and Trademark Office violated the free speech rights of the lead singer of the rock group, "The Slants," when it found that the mark could not be registered on the principal register because it was used as a derogatory term for Asian persons. The Court found that the restriction on the petitioner's commercial speech was viewpoint based and thus offended the First Amendment. *See id*. As the Court concluded, "Giving offense is a viewpoint." *Id*. at 1763.

There is no question that Defendants punished Plaintiff because of the viewpoint of the speech he expressed via social media posts he made several years prior to his hiring by the TPD. And worse yet, Defendants fired Plaintiff because certain members of the public were offended by the viewpoints expressed by Plaintiff's speech. It is important to note here that Plaintiff disagrees with Defendants' assertion that his social media posts were racist or "Islamophobic" or conveyed any such message of bias. Herein lies one of the main problems of

viewpoint discrimination and why it is so abhorrent to the First Amendment—viewpoints are subjective. For example, some view the Confederate flag as nothing more than a symbol of racism, while others may view it more in its historical context, representing Southern heritage or civil war battles and sacrifices. Some may consider all supporters of Donald Trump to be white supremacists, while many most certainly do not. Some reject the violent actions of Islamists, like ISIS, which persecuted Christians in Iraq (*see* R-6, FAC ¶¶ 75-77, App.25), and vow never to submit to this Sharia-driven jihad, while some view such expressions as "Islamophobic" and an affront to all Muslims. Some oppose the Black Lives Matter movement by supporting the Blue Lives Matter movement. Some do the opposite. (*See generally* R-30, Mem. Op. & Order at 15 ["Just as speech concerning the Black Lives Matter movement is protected social speech, so is speech promoting the Blue Lives Matter movement."], App.50).[5] It is also important to note that nothing in the TPD social media and networking policy prohibits an officer from using Facebook to discuss politics or religion or other public issues or related subjects. Accordingly, by punishing Plaintiff for the social media posts at issue here, Defendants (the government) are taking sides on certain public issues and engaging in improper viewpoint discrimination.

[5] As noted previously, the fact that Facebook did not remove these "offending" posts based on its strict "community standards" undermines any claim that these posts were objectively "racist" or "Islamophobic."

As noted, "[a]ll officers are permitted to use Facebook." (Defs.' Br. at 19). In fact, Defendants themselves maintain Facebook pages.[6] Yet, Defendants prohibited Plaintiff from using this same forum (*i.e.*, they fired him for doing so) based on the viewpoint of his speech in violation of the First Amendment *and* the equal protection guarantee of the Fourteenth Amendment. The district court erred by dismissing this claim.

III. Defendant Jordan Does Not Enjoy Qualified Immunity.

"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); *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

[6] (*See* https://www.facebook.com/cityoftulsa/ [City of Tulsa Facebook page]; https://www.facebook.com/chuck.jordan1 [Defendant Jordan's Facebook page]; https://www.facebook.com/tulsapolice/ [TPD Facebook page]).

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). Consequently, it is clearly established that Defendant Jordan does not enjoy qualified immunity for firing Plaintiff because of his expression on public issues.

Defendants argue (echoing and repeating the district court's error) that *Flanagan v. Munger*, 890 F.2d 1557 (10th Cir. 1989), is insufficient to put Defendant Jordan on reasonable notice that firing Plaintiff because some members of the public find his speech offensive violates the First Amendment. (Defs.' Br. at 22-23 [arguing that *Flanagan* is not sufficiently "particularized"]). The argument is frivolous. *Flanagan*, which involves the off-duty speech of police officers, is controlling and on point.

Defendants and the district court attempt to distinguish *Flanagan* by suggesting that it was not really about the freedom of speech but only a case involving "unbecoming, outside-of-work business dealings." (*See* Defs.' Br. at 23 [quoting the district court]). This argument is belied by *Flanagan* itself. *See, e.g., Flanagan*, 890 F.2d at 1564-65 ("[I]t 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.") (emphasis added).

Indeed, this section of *Flanagan* effectively defeats Defendant Jordan's claim of qualified immunity as it clearly placed him on reasonable notice that his actions were unlawful:

> *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 at 1001. 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);

To claim that *Flanagan* is not "particularized" enough because it involved "non-verbal" speech is nonsense. The Trump Post at issue 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. None of the offending speech was "verbal" speech expressed by Plaintiff. No word was uttered from Plaintiff's mouth. And

all of the Facebook posts at issue involve the sharing of previously created images/posts, much like *Flanagan* involved the distribution of previously created videos.

As noted above, Defendants' claim that Plaintiff's speech "caused actual disruption" (Defs.' Br. at 22 [claiming that "Brown's offensive posts caused actual disruption" without pointing to any actual evidence of disruption, because none exists]) is likewise frivolous as it is entirely speculative and contrary to the facts.

"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). *Flanagan* provides the necessary clarity. It is a free speech case involving off-duty First Amendment activity of police officers. It is hard to imagine a more particularized case. *See also Harman v. Pollock*, 586 F.3d 1254, 1261 (10th Cir. 2009) (explaining 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.'") (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)); *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)

(stating that "officials can still be on notice that their conduct violates established law even in novel factual circumstances").

In their opposition, Defendants reference *Sabatini* and *Grutzmacher* as support for Defendant Jordan's qualified immunity defense. (Defs.' Br. at 22). However, *Sabatini v. Las Vegas Metropolitan Police Department*, 369 F. Supp. 3d 1066 (D. Nev. 2019), a district court case from Nevada, is not controlling, and it is factually different from the case at bar such that it undermines Defendants' argument. Plaintiff Sabatini, a corrections officer, made over two dozen posts on his Facebook page that were overtly racists and directed toward inmates, and Plaintiff Moser made an offending post that commented directly on the actions of fellow police officers. *See id*. Thus, unlike the present case, the speech at issue in *Sabatini* was made while the officers were employed by the police department, and the speech related directly to the internal operations and functioning of the department.

Defendants' reliance on *Grutzmacher v. Howard County*, 851 F.3d 332 (4th Cir. 2017), a Fourth Circuit case, is similarly misplaced insofar as its legal analysis is inconsistent with *Flanagan*. *Grutzmacher* is also distinguishable on its facts. *Grutzmacher* involved the termination of a "battalion chief" with the Howard County, Maryland Department of Fire and Rescue Services based on social media posts the plaintiff made over a "several-week period" while employed by the

Department. As noted by the court, a battalion chief is "the most critical leadership position in the organization." *Id*. at 337. After setting forth the *numerous* ways in which the expression *actually* disrupted the internal operations of the Department, the Court concluded that

> the Department's interest in workplace efficiency and preventing disruption outweighed the public interest commentary contained in Plaintiff's Facebook activity. In reaching this conclusion, we emphasize that this balancing test is a "particularized" inquiry. . . . Therefore, although we resolve the balancing test in favor of the Department, we expressly caution that a fire department's interest in maintaining efficiency will not always outweigh the interests of an employee in speaking on matters of public concern. [Here,] the Department's interest in managing its *internal* affairs outweighs the public interest in Plaintiff's speech . . . .

Id. at 348 (internal citations omitted) (emphasis added).

Because *Flanagan*, a Tenth Circuit case, demonstrates that Defendant Jordan violated clearly established rights of which a reasonable government official would have known, it would be improper to go outside of the circuit to look for any contrary cases.

Fields v. City of Tulsa, 753 F.3d 1000, 1015 (10th Cir. 2014), similarly fails to support Defendants' argument. 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. *Fields* involved a situation where a senior officer objected to a directive from the Chief of Police on religious grounds. The concern of the Court was the impact of this objection on maintaining discipline

within the ranks. *Id*. at 1015 ("Fields was a commanding officer. His challenge to a superior's order, by disobedience or by litigation, sets a powerful example. It would likely undermine not just his superiors' confidence in his loyalty and willingness to implement orders, but also his own authority as a commander."). The First Amendment activity at issue in *Fields* was the filing of litigation related to the challenged order and not Facebook posts made years prior to the officer's hiring. Moreover, in the case at bar, it was the *firing* of Plaintiff (and not his speech) that eroded the confidence and trust of the TPD leadership.

Finally, *Helget v. City of Hays*, 844 F.3d 1216 (10th Cir. 2017) (*see* Defs.' Br. at 22), is also factually dissimilar. As stated by the Court,

> [W]e conclude the City's operational interests outweigh Helget's speech interest *in submitting an affidavit in ongoing civil litigation*. Because Helget's role required her to work closely with her superiors and maintain confidential information, her disclosure of those confidences caused her superiors to lose trust in her, directly undermining the Department's operations.

Id. at 1219 (emphasis added). This case is not *Helget*.

In sum, clearly established law demonstrates that Defendant Jordan does not enjoy qualified immunity.

IV. The District Court Abused Its Discretion by Dismissing Plaintiff's State Law Claim.

The district court never addressed the merits of Plaintiff's state law claim, including whether § 1983 provides an adequate remedy for the harm caused by

Defendants in this case. (*See* Defs.' Br. at 24-27 [arguing the merits of the state law claim]). Rather, the lower court declined supplemental jurisdiction over the state law claim because it had previously dismissed the federal claims. Accordingly, the issue on appeal is whether the district court abused its discretion by doing so (particularly if this Court reinstates the federal claims, as it should). (R-30, Mem. Op. & Order at 27-28, App.62-63).

Because the district court erred by dismissing Plaintiff's federal claims, the Court should remand for the lower court to reconsider its decision with regard to Plaintiff's *Burk* claim.[7] *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) (holding that the Court's decision to reverse and remand the dismissal of the federal claim "undermines the district court's rationale for declining to exercise supplemental jurisdiction over [the plaintiff's] state-law claim," thus reversing that decision and remanding the claim to the district court for further consideration).

CONCLUSION

Plaintiff respectfully requests that the Court reverse the district court and remand the case for further proceedings.

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

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 5,250 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.

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