No. 20-20583

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHARLES E. FOERSTER,
Plaintiff - Appellant

-v-

AUSTIN BLEESS; CITY OF JERSEY VILLAGE,
Defendants - Appellees

Appeal from the United States District Court
for the Southern District of Texas, No. 4:20-CV-1782

INITIAL BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

Charles E. Foerster – Plaintiff-Appellant

Julie L. St. John – Counsel for Plaintiff-Appellant

Robert J. Wiley – Counsel for Plaintiff-Appellant

Wiley Wheeler, P.C. – Counsel for Plaintiff-Appellant

Austin Bleess – Defendant-Appellee

City of Jersey Village – Defendant-Appellee

Ramon G. Viada III – Counsel for Defendants-Appellees

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Texas Municipal League Intergovernmental Risk Pool – Defendant-Appellee

City of Jersey Village's self-insurance fund

/s/ Julie St. John
Julie St. John
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REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellant Charles E. Foerster requests oral argument in this matter. The Fifth Circuit and the Supreme Court have repeatedly held that public employees do not give up their First Amendment rights when speaking as citizens on matters of public concern. A public employee speaks as a citizen when he is not acting within his official duties even if the subject matter of his speech was learned as part of his job. Here, Foerster necessarily spoke out as a citizen when he sent an email to elected officials while he was suspended and without any official duties. However, the District Court erroneously held that Foerster was acting within the scope of his official duties as police chief despite the fact that he was prohibited from carrying out any duties as police chief.

Given the facts of this case and the important considerations related to the protection of citizen speech under the First Amendment, Plaintiff-Appellant believes oral argument would be helpful to the Court in resolving this appeal.

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STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction over this case under 28 U.S.C. § 1331 because Plaintiff alleged Defendants violated 42 U.S.C. § 1983. The District Court also had subject matter over Plaintiff's ancillary Texas law claims under 28 U.S.C. § 1337 because those claims arose out of the same nucleus of operative facts.

This Court has jurisdiction under 28 U.S.C. § 1291, being an appeal from a trial court's final dismissal of all claims against Defendants. Final judgment on the claims was entered on October 16, 2020. ROA.316-26. Notice of Appeal was timely filed on November 6, 2020. ROA.327-28.

ISSUE PRESENTED

ISSUE: Did the District Court err when it held that a public employee who went outside any regular chain of command to contact elected officials about potential blackmail and malfeasance was acting within the scope of his official job duties despite the fact that he was suspended, prohibited from working, and had no official job duties?

STATEMENT OF THE CASE

Plaintiff-Appellant Charles E. Foerster served as the chief of police for the City of Jersey Village for nine years. *See* ROA.9:9. Within the Police Department, the City government, and the community, Foerster was seen as a dedicated leader

who department staff and other department heads looked up to. *See* ROA.9:9-10:15. He understood his job well and did a great job motivating his employees. ROA.10:12-13.

On or about September 13, 2019, Foerster learned that one of his officers, Mark Zatzkin, was likely blackmailing a City of Jersey Village city council member, James Singleton. ROA.11:30-12:33. Zatzkin was facing discipline for a use of force violation and likely blackmailed Singleton to get his discipline reduced.[1] ROA.11:23-12:33. Additionally, Foerster believed Singleton's actions, interfering in a Police Department personnel matter, violated the City Charter. ROA.12:34-35.

Foerster contacted his direct supervisor, city manager Austin Bleess, as soon as he learned Singleton was interfering in Zatzkin's personnel matter, likely as a result of being blackmailed. ROA.12:34. When Bleess failed to take action, Foerster put his concerns in writing and emailed them to Bleess. ROA.12:36. Two days later, Bleess suspended Foerster citing a laundry list of alleged issues dating back to June 2018. ROA.12:37.

While suspended, Foerster informed the mayor of the City of Jersey Village and the four uninvolved council members about the likely blackmail and subsequent

[1] Zatzkin was in possession of a memorandum he had written describing the circumstances surrounding Singleton being forced to resign from the Police Department in 2008, prior to his election to City Council. ROA.10:16-19. Specifically, the memorandum detailed how Singleton had used police computers to watch pornography and masturbated in patrol cars. ROA.10:17, 19.

wrongdoing. ROA.13:38-43. Foerster was under no obligation to report this information to the mayor or the council members as neither were in Foerster's chain of command nor had any authority over Foerster, his employment, or his suspension. *See* ROA.14:48 ("Furthermore, Bleess had the power to hire, fire, and make final personnel policy as it related to Foerster as the Chief of Police"); ROA.66 (Defendants stating in the motions for judgment on the pleadings that "[t]he city manager has the ultimate power to hire and fire employees" (citing City of Jersey Village City Charter § 5.02)).

Moreover, Foerster was under no obligation to report this information to the mayor or the council members because he was suspended and had no official job duties. *See* ROA.13:43; *see also* ROA.77 (Defendants stating in the motions for judgment on the pleadings that "[Foerster] had no choice but to write and send [the email] from home. He was banned from city hall.")

As a result of his communication to the mayor and the uninvolved city council members, Defendants terminated Foerster on October 25, 2019. ROA.13:44-45.

Foerster filed an original petition in Texas state court on May 21, 2020 alleging violations of the First Amendment and the Texas Constitution. ROA.7-17. Defendants removed the case that same day. ROA.4-6. Defendants filed 12(c) motions for judgment on the pleadings on June 17, 2020. ROA.57-218. Foerster filed

his response on July 8, 2020. ROA.219-55. After full briefing, the District Court granted Defendants' motions on October 16, 2020. ROA.316-26.

The District Court made its decision *solely* on the issue of whether Foerster's speech was as a private citizen or a part of his official duties.[2] ROA.316-26. Accordingly, the issue of whether Foerster's speech was as a private citizen is the sole issue on appeal.

SUMMARY OF THE ARGUMENT

Judgment on the pleadings should be reversed on all claims against the City of Jersey Village and Austin Bleess in his individual capacity because the District Court erred when it held that Charles E. Foerster, who had no official duties and was banned from performing any official duties, was acting within his official duties when he went outside of the normal chain of command to report the potential blackmail of and subsequent wrongdoing by a city council member to elected officials.

The District Court failed to conduct the proper "practical inquiry," *Gibson v. Kilpatrick*, 773 F.3d 661, 667 (5th Cir. 2014), or focus on the "critical question" of "whether the speech at issue is itself ordinarily within the scope of an employee's

[2] The District Court also dismissed any claims against Bleess in his official capacity as redundant with the claims against the City. ROA.325. Foerster did not dispute this in his response to the motions and agreed the claims against Bleess in his official capacity should be dismissed. ROA.226 at n.3. Accordingly, this appeal does not dispute the dismissal of any claims against Bleess in his official capacity.

duties, not whether it merely concerns those duties," *Lane v. Franks*, 573 U.S. 228, 240 (2014).

A correct analysis under Supreme Court and Fifth Circuit precedent makes clear Foerster spoke as a private citizen because, at the time Foerster engaged in the speech at issue, he was suspended. It is undisputed that Foerster had no job duties *whatsoever* at the relevant time; he was completely relieved of all duties. Therefore, it is impossible that Foerster could have been acting within the scope of any official job duties. This fact alone should be dispositive. Moreover, Foerster engaged in exactly the type of activity engaged in by citizens who do not work for the government when he went outside of any normal chain of command to contact elected officials about potential corruption and malfeasance. Thus, under binding precedent, Foerster's speech was indeed as a citizen.

Although the District Court acknowledged the crucial facts that Foerster was suspended and went outside any regular chain of command, it failed to give either *any* weight in its analysis. Instead, the District Court summarily concluded Foerster's speech was not protected because he learned about the information because of his employment and the information concerned his job duties. Such an analysis is flawed under existing law.

Accordingly, the District Court erred when it held that Foerster, when he went outside any regular chain of command to contact elected officials about potential

blackmail and malfeasance, was acting within his official job duties despite the fact that he was suspended, prohibited from working, and had no official job duties.

ARGUMENT

I. The standard of review for judgment on the pleadings is de novo.

This Court reviews de novo a district court's grant of a Rule 12(c) motion for judgment on the pleadings. *Machete Prods., L.L.C. v. Page*, 809 F.3d 281, 287 (5th Cir. 2015).

A motion brought pursuant to Rule 12(c) is designed to dispose of cases only when the material facts are not in dispute and a judgment on the merits can be rendered by looking solely at the substance of the pleadings and any judicially noticed facts. *See Hebert Abstract Co. v. Touchstone Props., Ltd.*, 914 F.2d 74, 76 (5th Cir. 1990) (per curium) (citing 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1367, at 509–10 (1990)).

A plaintiff must only provide "a short and plain statement of the claim showing that [he] is entitled to relief . . . in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Plaintiff need only plead "enough facts to state a claim to relief that is plausible on its face." *Id.* At this stage, the court does not evaluate the plaintiff's likelihood of success. *See Doe v. Covington Cnty. Sch. Dist.*, 675 F.3d 849, 854 (5th Cir. 2012). Rather, the court must accept plaintiff's

allegations as true, construe his pleadings in the light most favorable to him, and make all reasonable inferences in his favor. *See Bass v. Stryker*, 669 F.3d 501, 506 (5th Cir. 2012).

"The issue is not whether the plaintiff will ultimately prevail, but whether he is entitled to offer evidence to support his claim. Thus, the court should not dismiss the claim unless the plaintiff would not be entitled to relief ***under any set of facts or any possible theory*** that he could prove consistent with the allegations in the complaint." *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999) (citations omitted) (emphasis added).

II. A public employee does not forfeit all rights to free speech as a result of his employment. Rather, public employees are often protected from retaliation under the First Amendment when speaking out as citizens on matters of public concern.

"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)). "The First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen on matters of public concern." *Davis v. McKinney*, 518 F.3d 304, 311 (5th Cir. 2008).

To prove a First Amendment retaliation claim, a plaintiff must show (1) he suffered an adverse employment action; (2) he spoke as a citizen on a matter of public concern; (3) his interest in commenting on matters of public concern

outweighs the defendants' interest in promoting efficiency; and (4) the plaintiff's speech motivated the adverse action.[3] *See Howell v. Town of Ball*, 827 F.3d 515, 522 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 815 (2017); *see also Beattie v. Madison Cnty. Sch. Dist.*, 254 F.3d 595, 601 (5th Cir. 2001); *Davis*, 518 F.3d at 312.

Determining whether a public employee spoke as a citizen on a matter of public concern requires two separate inquiries – one on citizen speech and one on public concern. *See Davis*, 518 F.3d at 312.

Here, the District Court incorrectly held Foerster did not speak as a citizen when he went outside any regular chain of command, while suspended, to report to the mayor of the City of Jersey Village and the uninvolved city council members that a police officer had likely blackmailed a council member and the council member had likely engaged in subsequent wrongdoing as a result of being blackmailed.

III. Foerster spoke as a citizen when, while suspended, he reported to select elected officials that a police officer was likely blackmailing a city council member and the council member was likely violating the City Charter as a result.

In 2006, the Supreme Court held: "Employees who make public statements outside the course of performing their official job duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by

[3] Defendants only challenged the second element in the motions for judgment on the pleadings. *See* ROA.74.

citizens who do not work for the government." *Garcetti*, 547 U.S. at 423. "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 421. However, it is axiomatic that for a person to make statements "pursuant to their official duties," that person must actually have official duties at the time the speech is made. *See Anderson v. Valdez*, 845 F.3d 580, 597 (5th Cir. 2016) (holding that speech made outside of job duties is "never made pursuant to an employee's official duties.").

In *Gibson v. Kilpatrick*, the Fifth Circuit summarized the guidance from *Garcetti*. *See* 773 F.3d 661, 667 (5th Cir. 2014).

> The Court did state, however, that job descriptions are not dispositive, that the fact that speech concerns the subject matter of employment is not dispositive, and that whether the employee expresses himself in the office is not dispositive. Rather, "the proper inquiry is a practical one," and it focuses solely on whether the speech was performed "within the scope of the employee's professional duties."

Id. (citations omitted).

The Supreme Court reiterated in *Lane v. Franks* that "[t]he critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, *not whether it merely concerns those duties*." 573 U.S. 228, 240 (2014) (emphasis added). In other words, the proper analysis under existing Supreme Court and Fifth Circuit precedent is a practical one regarding whether the

employee was acting within the scope of his official job duties when he engaged in the speech. *See id.*; *Gibson*, 773 F.3d at 667.

A. It was impossible for Foerster to be acting within the scope of any *official duties* because he was suspended, prohibited from working, and thus had no official duties.

When an employee is suspended and has no official duties it is impossible in anyway shape or form for that employee to be acting within the scope of any official duties. To conclude otherwise would be entirely contradictory to this Court's requirement to conduct a practical inquiry regarding citizen speech. *See Lane*, 573 U.S. at 240; *Gibson*, 773 F.3d at 667.

A proper practical analysis as required under *Lane* and its progeny must focus on the critical question of whether Foerster could conceivably act within the scope of any official duties given the fact that he was suspended at the time he spoke. *See id*. He could not because the suspension stripped Foerster of all job duties.

It is uncontested that at the relevant time, Foerster had no job duties *whatsoever* and was, in fact, banned from performing any official duties. *See* ROA.77 (Defendants stating in the motions for judgment on the pleadings that "[Foerster] had no choice but to write and send [the email] from home. He was banned from city hall."). Essentially, Defendants conceded below that Foerster had no other option than to speak as a citizen when he emailed select members of the City's elected leadership about the potential blackmail and subsequent wrongdoing.

See ROA.77. Foerster certainly could not speak as the police chief – he was prohibited from doing so. *See* ROA.77.

Overall, the fact that Foerster was suspended and had no official duties alone should be dispositive of the issue of citizen speech. *See Anderson v. Valdez ("Anderson II")*, 913 F.3d 472, 478 (5th Cir. 2019) (deciding without analyzing that communications made when plaintiff was no longer an employee were protected speech as a citizen.). To hold that an employee who is suspended and has no official job duties was nonetheless acting within his official job duties would fly in the face of the First Amendment protections guaranteed under the law.

Point blank, Foerster was not acting within the scope of any official duties because he had no official duties.

B. Foerster engaged in quintessential free speech when he went outside any regular chain of command on his own time to contact elected officials about potential blackmail and malfeasance.

Emailing elected officials on your own time from your personal email outside of any regular chain of command is exactly the type of activity engaged in by citizens who do not work for the government. *See Charles v. Grief*, 522 F.3d 508, 515 (5th Cir. 2008) (noting that plaintiff's decision to ignore the normal chain of command and communicate directly with elected representatives of the people was significant in its analysis of whether he spoke as a citizen).

Here, as in *Charles*, Foerster went outside of any regular chain of command to select members of the City's elected leadership about potential blackmail and malfeasance among their own ranks. *See* ROA.13:38-43. Foerster was under no obligation to do so and gained nothing personally; neither the mayor nor the city council were in Foerster's chain of command nor had any authority over Foerster, his employment, or his suspension. *See* ROA.14:48 ("Furthermore, Bleess had the power to hire, fire, and make final personnel policy as it related to Foerster as the Chief of Police"); ROA.66 (Defendants stating in the motions for judgment on the pleadings that "[t]he city manager has the ultimate power to hire and fire employees" (citing City of Jersey Village City Charter § 5.02)).

Moreover, any general obligation to detect and prevent wrongdoing Foerster may have had as police chief is inapplicable given the fact that Foerster was suspended. And, regardless of the suspension, any such obligation would fail to qualify as an official duty. *See Anderson II*, 913 F.3d at 477 (quoting *Howell*, 827 F.3d at 523-24) ("Under *Lane*, a general job-imposed obligation to detect and prevent wrongdoing does not qualify as an employee's 'official duty' because 'such broad [obligations] fail to describe with sufficient detail the day-to-day duties of a public employee's job.'").

As it did with Foerster's suspension, the District Court acknowledged the fact that Foerster "diverged from the chain of command" but failed to give this fact *any* weight in its analysis. *See* ROA.323-24.

Overall, "Foerster sent the email to the Mayor and City Council, with the exception of Singleton, because he wanted them to be aware of the potential blackmail and misconduct." ROA.248:38. Foerster's actions were exactly the type of activity engaged in by citizens who do not work for the government and entitled to protection under the law.

Thus, it is clear under binding precedent that Foerster's speech was indeed as a citizen.

IV. Instead of conducting the proper analysis under *Lane* and its progeny, the District Court relied on non-dispositive factors and a flawed premise of law.

Although Foerster's speech may have concerned the duties he had as police chief and he may have learned about the information because of his job as police chief, that is not the relevant inquiry under current law. *See Lane*, 573 U.S. at 240; *Gibson*, 773 F.3d at 667.

An employee who learns about the content of his speech because of his job does not forfeit all protection to free speech under the First Amendment. *See Charles*, 522 F.3d at 513 ("To hold that any employee's speech is not protected merely because it concerns facts that he happened to learn while at work would

severely undercut First Amendment rights."). Additionally, this Court has made clear that whether the speech concerns the subject matter of employment is not dispositive to the analysis of whether an employee spoke within the scope of any official job duties. *Gibson*, 773 F.3d at 667 (summarizing the guidance from *Garcetti* on analyzing whether an employee spoke as a citizen).

Despite these binding Fifth Circuit precedents, the District Court relied on the flawed premise that "speech concerning the fulfillment of a plaintiff's daily operations *or* reflecting special knowledge gained through the course of performing his official duties is indicative of speech as a public employee" to hold Foerster spoke within the scope of his official duties. *See* ROA.323 (citing *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 694 (5th Cir. 2007)) (emphasis added).

In *Williams*, an athletic director wrote a memo about the potential misappropriation of athletic funds to his direct supervisor. 480 F.3d at 690-91. The court held the athletic director wrote the memo in the course of performing his job because its focus was on his daily operations *and* reflected special knowledge he gained through his position. *Id.* at 694. However, neither of these factors alone is dispositive of speech being within a public employee's official job duties. *See Charles*, 522 F.3d at 513; *Gibson*, 773 F.3d at 667. A practical analysis regarding whether the employee was acting within the scope of his official job duties is still required. *See Lane*, 573 U.S. at 240; *Gibson*, 773 F.3d at 667.

Unlike *Williams*, here such an analysis must focus on the crucial fact that Foerster was suspended when he spoke. The non-dispositive factors regarding whether Foerster's speech concerned duties he had as police chief and whether he learned about the information because of his job as police chief are essentially meaningless when viewed in the context of Foerster's suspension. Thus, overall, the District Court failed to conduct the proper practical analysis as required under binding Supreme Court and Fifth Circuit precedent by refusing to factor Foerster's suspension into the equation.

Therefore, the District Court erred when it held that a public employee, who went outside any regular chain of command to report the potential blackmail of and subsequent wrongdoing by a city official, was acting within his official duties despite the fact that he was suspended and had no official job duties.

The proper analysis under existing Supreme Court and Fifth Circuit precedent clearly shows Foerster spoke as a private citizen.

CONCLUSION

For the foregoing reasons, this Court should reverse judgment on the pleadings on all claims against the City of Jersey Village and Bleess in his individual capacity under both the First Amendment and Article 1, § 8 of the Texas Constitution.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Julie St. John, certify that today, December 29, 2020, a copy of the Initial Brief of Appellant was served upon the following individual at the following email address for the Appellees via the Court's ECF system:

Ramon G. Viada III, rayviada@viadastrayer.com

/s/ Julie St. John
Julie St. John

CERTIFICATE OF COMPLIANCE

1. This document complies with Fed. R. App. P. 32(a)(7)(A) because it does not exceed 30 pages.

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/s/ Julie St. John
Julie St. John