Case No. 18-15232

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH RYAN,

Plaintiff and Appellee,

vs.

ROBERT FABELA,

Defendant and Appellant.

On Appeal From The United States District Court
For The Northern District of California
The Honorable Lucy H. Koh, Presiding Judge
Case No. 5:16-CV-04032-LHK

[PROPOSED] AMICI CURIAE BRIEF IN SUPPORT OF APPELLANT ROBERT FABELA BY LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, and INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION

[Rule 29, Federal Rules of Appellate Procedure; Circuit Rule 29-3]

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INTRODUCTION AND SUMMARY OF ARGUMENT

The League of California Cities, the California State Association of Counties, and the International Municipal Lawyers Association submit this brief in support of defendant and appellant Robert Fabela who challenges the district court's adverse ruling on the issue of qualified immunity. Fabela, General Counsel for the Santa Clara Valley Transportation Agency, fired then Senior Assistant Counsel Joseph Ryan. Ryan had created a website with negative postings about another employee, David Terrazas, who was running for office. Fabela contends, among other things, that if the termination violated Ryan's First Amendment rights, the law was not clearly established under the circumstances Fabela faced, and he is entitled to qualified immunity.

This brief will offer a broader perspective on the concern raised by the denial of qualified immunity in this case. The judgment call required of management personnel where a public employee's speech rights may be involved turns on assessing multiple factors and weighing the respective interests of employee and employer. Except in rare cases, how a court will rule down the line on disciplinary decisions is inherently uncertain. It was uncertain here. To deny qualified immunity for a reasonable, if mistaken, judgment call is not only inconsistent with Supreme Court authority, but has the potential for adversely affecting the operation of the public entity by creating a conflict of interest for management personnel who must decide whether to play it safe to protect against the burden of litigation and potential personal liability or to undertake disciplinary actions that serve the best interest of the employer.

The League of California Cities is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health,

safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The California State Association of Counties ("CSAC") is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California, and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this is a matter with the potential to affect all California counties.

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts. IMLA and its members monitor litigation of concern to local governments and identify those cases that have nationwide significance. IMLA has identified this case as having

such significance, particularly given the importance of the doctrine of qualified immunity to IMLA's members.

This brief was not authored by counsel for any of the parties in this action, nor did any party contribute money intended to fund the preparation or submission of this brief, nor has any other person contributed money intended to fund the preparation or submission of the brief.

ARGUMENT

DENIAL OF QUALIFIED IMMUNITY IN THIS CASE POTENTIALLY COMPROMISES EFFECTIVE MANAGEMENT BY PERSONNEL WHO CONFRONT THE RISK OF BURDENSOME LITIGATION AND LIABILITY SHOULD THEY REACH THE WRONG CONCLUSION AS TO WHETHER A PUBLIC EMPLOYEE'S SPEECH IS PROTECTED BY THE FIRST AMENDMENT.

A. Courts, Including This One, Have Recognized The Difficulty Of Determining Whether Public Employee Speech Is Protected. If It Is Difficult For Courts, It Is Much More So For A Supervisor Attempting To Discharge His Duties.

The doctrine of qualified immunity shields government officials from liability for conduct that "'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)); *see Mullenix v. Luna*, __ U.S. __, 136 S. Ct. 305, 308 (2015) ("A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right'") (quoting *Reichle v. Howards*, 566 U.S. __, 132 S. Ct. 2088, 2093 (2012)).

In the context of the Fourth Amendment, the Supreme Court has noted how qualified immunity functions with respect to abstract rights. "By its plain terms, the Amendment forbids unreasonable searches and seizures, yet it may be difficult for an officer to know whether a search or seizure will be deemed reasonable given

the precise situation encountered." *Ziglar v. Abbasi*, __ U.S. __, 137 S. Ct. 1843, 1866 (2017).

So it is with the First Amendment. It forbids a government's infringing free speech rights of citizens. Yet, in the public employment context, it may be difficult for an official to know whether a court will deem such infringement to have occurred. As a general proposition, a public employee has a right to be free of retaliation based on his constitutionally protected speech. The difficulty, however, lies in determining whether the speech is protected in the first instance, because the relevant right "is not a general constitutional guarantee . . . but its application in a particular context." *Brewster v. Board of Education*, 149 F.3d 971, 977 (9th Cir. 1998) (internal quotations and citation omitted).

Thus, when determining whether conduct violates clearly established law, precluding qualified immunity, the Supreme Court has "'repeatedly told courts . . . not to define clearly established law at a high level of generality.'" *Mullenix v. Luna*, 136 S. Ct. at 308 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)). The inquiry "must be undertaken in light of the *specific context* of the case, not as a broad general proposition." *Mullenix*, 136 S. Ct. at 308 (internal quotations and citations omitted, emphasis added). "The dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" *Id*. (quoting *al-Kidd*, 563 U.S. at 742) (italics in *Mullenix*). While a case directly on point is not required, "'existing precedent must have placed the statutory or constitutional question beyond debate.'" *Id*. (quoting *al-Kidd*, 563 U.S. at 741). Indeed, in its most recent iteration of the qualified immunity standard, the Supreme Court emphasized that public employees "are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." *Kisela v.*

Hughes, __ U.S. __, 138 S. Ct. 1148, 1153 (2018) (quoting *Mullenix*, 136 S. Ct. at 309).

In the specific context of public employee speech rights, to assess whether the speech is protected, courts are required "to seek 'a balance between the interests of the 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.'" *Connick v. Myers*, 461 U.S. 138, 142 (1983) (quoting *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968)).

This Court has recognized the difficulty of this task, explaining that the *Connick* court "emphasized the subtlety of the balancing process, writing that 'the State's burden in justifying a particular [discipline] varies depending upon the nature of the employee's expression. Although such particularized balancing is difficult, the courts must reach the most appropriate possible balance of the competing interests.'" *Demers v. Austin*, 746 F.3d 402, 413 (9th Cir. 2014) (quoting *Connick*, 461 U.S. at 150).

If striking an appropriate balance of competing interests is a subtle and difficult task for a court, it is no less so for the public entity supervisor who is trying to decide whether or not he or she may discipline an employee. This Court has recognized that fact in discussing the availability and necessity of qualified immunity.

> Because *Pickering*'s analysis as to whether a public employee's expression is constitutionally protected requires a fact-sensitive, context-specific balancing of competing interests, "the law regarding such claims will rarely, if ever, be sufficiently 'clearly established' to

> preclude qualified immunity under *Harlow* [*v. Fitzgerald*, 457 U.S. 800 (1982)] and its progeny."

Lytle v. Wondrash, 182 F.3d 1083, 1088 (9th Cir. 1999) (quoting *Moran v. State of Washington*, 147 F.3d 839, 847 (9th Cir. 1998)). The *Lytle* court found that the outcome of the balancing test did not so clearly favor the plaintiff that it would have been *patently unreasonable* for the defendants to conclude that their actions were lawful. *Id*. at 1085, 1088-89 (emphasis added).

B. This Case Illustrates Circumstances When Qualified Immunity Should Apply: The Analysis Of Whether Ryan's Speech Was Protected Presents Variables At Every Point Which Require A Judgment Call.

1. Public concern.

In determining whether particular speech is protected, the first step is to determine whether it involved a matter of public concern by analyzing its content, form, and context. *Lytle*, 182 F.3d at 1087. This Court has acknowledged that the public concern inquiry "is not an exact science," and "courts have had some difficulty deciding when speech deals with an issue of 'public concern.'" *Desrochers v. City of San Bernardino*, 572 F.3d 703, 709 (9th Cir. 2009) (internal quotations and citations omitted). Even judges may disagree on the issue: In *Desrochers*, while the majority found police officer grievances did not address a matter of public concern, the dissent found that they did. *Id*. at 717-18.

If judges can disagree on this difficult issue, surely there is room for a reasonable supervisor to make the wrong call under certain circumstances. That is certainly so in this case where the result of the public concern analysis was not clear-cut. The website was a Facebook page entitled "Anyone but Terrazas for city

council," and the first post said "telling the truth about Santa Cruz politics." 1 Excerpts of Record ("ER") 5-6. Subsequent posts provided information to the effect that Terrazas was hired to a position for which Ryan believed subordinate women were more qualified, Ryan commuted to work in his car despite being an employee of a public transit agency, and Ryan may have misstated his exact title at the agency. 1 ER 6.

The district court here found that the content and form factors weighed in favor of Ryan: The website was about an election and was shared with the public. 1 ER 13-14. As to context, however, the court stated "the context factor weighs against the finding of public concern" in light of the difficult working relationship between Ryan and Terrazas, Ryan's "low opinion of Terrazas" such that he "consistently acted on his dislike of Terrazas" and his actions were "consistent with a caustic tone of the posts," and also in light of the fact that his claim that the website was motivated by is "sense of civic duty [was] undermined by [his] failure to point to evidence of [his] political involvement outside of Terrazas's campaign, and by the fact that [he] lives in San Francisco and not Santa Cruz," where Terrazas was seeking election. 1 ER 15-16.

And yet, the district court went on to conclude that content, not context or motive, was controlling, and so found that Ryan had established his speech was a matter of public concern. 1 ER 16. For qualified immunity purposes, even assuming the district court came to the right conclusion as to public concern, the conclusion is not "beyond debate," nor would it be "patently unreasonable" to conclude otherwise. *Mullenix*, 136 S. Ct. at 308; *Lytle*, 182 F.3d at 1085.

> In a close case, when the subject matter of a statement is only marginally related to issues of public concern, the fact that it was made because of a grudge or other private interest . . . may lead the

> court to conclude that the statement does not substantially involve a matter of public concern.

Desrochers, 572 F.3d at 710 (quoting *Johnson v. Multnomah County*, 48 F.3d 420, 425 (9th Cir. 1995)).

Here, a supervisor, with first-hand knowledge of the acrimony in the workplace, might also be led to conclude that a subordinate's statements did not substantially involve a matter of public concern, particularly given content that appears to be so minimally intended to provide a voter with what the voter might need to make an informed decision. As one court has noted, "An employee's speech will rarely be entirely private or entirely public." *Morgan v. Ford*, 6 F.3d 750, 755 (11th Cir. 1993). In making the call here, there was plenty of room for reasonable mistake.

2. Balancing test.

"[T]he fact that an employee's expression touches on an issue of public concern does not automatically entitle him to recovery. The 'public concern' prong is a necessary, but not a sufficient, condition of constitutional protection." *Brewster*, 149 F.3d at 979. Thus, assuming an employee's speech touches on a matter of public concern, the next step is to determine if that speech interest outweighs the interest of the employer "in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. As discussed above, courts have recognized the subtlety and difficulty of this balancing process such that the right "will rarely, if ever" be clearly established so as to preclude qualified immunity. *Lytle*, 182 F.3d at 1088.

Yet the district court found Ryan's speech interest outweighed any interest by the employer because "'political speech' lies 'at the core of First Amendment

protection' and . . . 'the more tightly the First Amendment embraces a speech' the stronger the showing of workplace disruption must be.'" 1 ER 23.

Aside from the title of the website, given its substance and tone, an official could reasonably, if mistakenly, conclude the First Amendment did *not* "tightly embrace" the speech at issue here, which, in the context of all that had gone on before between Terrazas and Ryan, could appear more an ad hominem attack reflecting dysfunctional office relationships than the speech of a citizen concerned about an election he could not, in any event, vote in or be affected by. The very brevity of the website's stay on the internet ("around a day"), *see* 1 ER 22, arguably undercuts any claim it was designed to influence voters rather than to annoy an enemy.

Or at least raises a question to that effect—the significant point for qualified immunity purposes.

As to the employer's interest, the district court gave it little, if any, weight because the website was up on the internet for only about a day and so, in the court's view, it could have had little impact on SCVTA's operation—its existence was not even discovered for eight months—and it did not disrupt co-worker relationships because Terrazas was the only target, and the strain there predated the website.[1/] 1 ER 22-23.

[1/] The district court relied on *Hyland v. Wonder*, 972 F.2d 1129, 1140 (9th Cir. 1992) for the proposition that the employer must demonstrate "actual, material and substantial disruption." 1 ER 22. But courts within the Circuit disagree even on this point. *See Lytle*, 182 F.3d at 1089 ("proof of actual disruption is not required: an employer need only show that the public employee's expression causes 'reasonable predictions of disruption'") (quoting *Waters v. Churchill*, 511 U.S. 661, 673 (1994)). In other words, there exists here another layer of uncertainty providing yet another opportunity for a supervisor to make a reasonable mistake in determining whether an employee's speech is protected.

But a reasonable supervisor could have seen things otherwise. Here, the nature of Ryan's job was significant: Ryan was a lawyer and, as Senior Assistant Counsel, he provided legal services to Terrazas and his department. 1 ER 2. Thus, whatever other purpose they served, the anonymous website posts could reasonably be seen as those of a lawyer finding another opportunity to attack and humiliate his client. Moreover, the content of the website in part implicated confidential personnel information (the relative qualifications of Terrazas and his subordinates), raising questions about Ryan's ethics and trustworthiness, and so calling into question his qualifications for the job of Senior Assistant Counsel. 1 ER 6. The website itself, once discovered, negatively impacted the relationship between Fabela and the Board of SCVTA. 1 ER 7 ("I told Joe . . . that I'm going to have to answer to the Board about Joe's actions and my management of him"). Fabela had repeatedly admonished Ryan for a confrontational style that got in the way of his working relationships. 1 ER 4. The criticism was to little effect, apparently, because Ryan went ahead and posted on the website.

The most significant fact about the discovery of the website is not how long it took but how it occurred—in a demand letter from Terrazas's attorney preliminary to a potential lawsuit alleging harassment and retaliation: The letter cited the website as evidence of retaliatory harassment. 1 ER 6, 18. A supervisor realizing that counseling a subordinate on his relations with clients had no effect whatsoever, except a potential lawsuit, could reasonably conclude that the balance of interests tipped in the employer's favor, and here, that Ryan's website was not protected speech that precluded firing him. Qualified immunity is intended to protect such a discretionary decision.

C. A Reversal In This Case On Qualified Immunity Grounds Would Serve The Policy Underlying The Doctrine And Assure That Personal Liability Of Management Personnel Is Reserved For Only Obvious Violations Of Public Employee Speech Rights.

In denying qualified immunity, the district court did what the Supreme Court has repeatedly warned courts not to do: it defined "clearly established law" at a high level of generality and did not "undertake[] [the inquiry] in light of the specific context of the case." *Mullenix*, 136 S. Ct. at 308 (internal quotations and citations omitted). Specifically, it denied qualified immunity because "[t]he Ninth Circuit has long held that public employees cannot be retaliated against for engaging in political activity." 1 ER 26. It gave specific context—which the Supreme Court has made plain is all important in qualified immunity analysis—no weight, although it found the specific context of the case favored Fabela. 1 ER 15.

The doctrine of qualified immunity is designed to serve the public interest by shielding public employees from personal liability for reasonable mistakes made in the process of doing their jobs. For that reason, the protection afforded is broad, its purpose to "give[] officials 'breathing room to make reasonable but mistaken judgments'" and to "protect[] 'all but the plainly incompetent or those who knowingly violate the law.'" *Ziglar*, 137 S. Ct. at 1866-67 (quoting *al-Kidd*, 563 U.S. at 743 and *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

The availability of qualified immunity in the proper case is to prevent recognized social costs such as "the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (referring to social cost in "the diversion of official

energy from pressing public issues, and the deterrence of able citizens from acceptance of public office").

The denial of qualified immunity in a case such as this—where a determination of the speech rights of a public employee/lawyer depends on a nuanced balancing of his interests against those of his employer—triggers concerns about exactly those risks.

That this case involves a lawyer and his treatment of a client, and purported political speech bound up with long-standing personal animosity affecting job performance, takes it out of the category of rare cases where First Amendment protection is obvious, requiring little if any analysis or exercise of judgment. *See, e.g.*, *Hunt v. County of Orange*, 672 F.3d 606 (9th Cir. 2012) (deputy's campaign against sheriff and culture of corruption in department); *Gilbrook v. City of Westminster*, 177 F.3d 839 (9th Cir. 1999) (press release regarding lack of preparedness of fire department); *Alpha Energy Savers, Inc. v. Hansen*, 381 F.3d 917, 926 (9th Cir. 2004) (testimony about race and age discrimination by government). None of these cases, including *Hunt* upon which the district court relied in denying qualified immunity (1 ER 26), would have put Fabela on notice that termination of Ryan under the circumstances of *this* case would expose him to liability and damages.

Rather, if the denial of qualified immunity is upheld, management personnel will be put on notice that tough calls requiring consideration of multiple factors carry too much personal risk. One obvious consequence of great concern to the public entity employer will be the reluctance of supervisors to make the tough calls that need to be made, particularly in grey areas, for fear of burdensome litigation and personal liability for damages. Additionally, supervisory personnel may well

find themselves in a direct conflict of interest with employers—whether to make the best decision for the employer or to make the protective decision least likely to expose them to litigation and damages. And an individual contemplating employment in the public sector will have reason to think twice.

Moreover, if the shield of qualified immunity is denied for discretionary decisions in cases like this one where it is far from clear how a court will strike the balance of competing interests, then the whole purpose of qualified immunity as envisioned by the Supreme Court will have been defeated. Personal liability of management personnel should be reserved for obvious, patently unreasonable violations of public employee speech rights.

CONCLUSION

For the foregoing reasons, the League of California Cities, the California State Association of Counties, and the International Municipal Lawyers Association respectfully urge this Court to hold that Robert Fabela is at least entitled to qualified immunity.

Respectfully submitted,

DATED: July 26, 2018

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this **[PROPOSED] AMICI CURIAE BRIEF IN SUPPORT OF APPELLANT ROBERT FABELA BY LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, and INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION** is proportionately spaced, has a typeface of 14 points or more, and contains 3,669 words.

DATED: July 26, 2018

s/ Alison M. Turner
Alison M. Turner

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 26, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Pauletta L. Herndon
Pauletta L. Herndon