No. 17-35552

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIAN ADDISON,
Plaintiff-Appellee,

v.

CITY OF BAKER CITY, a municipal corporation

And

WYN LOHNER, in his individual capacity
Defendants-Appellants.

On Appeal from the United States District Court for the District of Oregon
The Honorable Michael H. Simon, Judge
District Court No. 2:15-cv-2041-SI

AMICUS CURIAE BRIEF FOR AMERICAN CIVIL LIBERTIES UNION OF OREGON IN SUPPORT OF APPELLEE, BRIAN ADDISON SEEKING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Ninth Circuit Rule 26.1, *amicus curiae* American Civil Liberties Union of Oregon hereby states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

Amicus further states that *amicus* counsel authored this brief with only assistance from ACLU staff. No party or party's counsel authored this brief or contributed money to fund the preparation or submission of this brief. No one other than *amicus* contributed money to fund the preparation or submission of this brief.

INTRODUCTION AND INTEREST OF AMICUS

The American Civil Liberties Union of Oregon ("ACLU") is a statewide non-partisan and non-profit organization with over 47,000 members, dedicated to preserving our nation's founding principles of civil rights and civil liberties, including those embodied in the U.S. Constitution. From its inception, the ACLU has been a strong supporter of freedom of the press and expression; it frequently appears before this Court as counsel for parties and as *amicus curiae.*

This case goes to the heart of the First Amendment's protections for freedom of the press and freedom of expression. The public relies on journalists for information that enables public debate and public oversight. But when government officials wield their power to punish and deter criticism by journalists, they suppress both reporting and democratic discourse. In a free and open society, it is paramount that journalists be free to illuminate unconstitutional and abusive government conduct without fear of reprisal.

ARGUMENT

The Court should affirm the district court's denial of summary judgment. The district court properly held that an official may not invoke qualified immunity when he maliciously uses his position and privileges to retaliate for constitutionally-protected speech. In this case, Addison presented evidence that would allow a reasonable factfinder to decide that Lohner used his position as chief of police in a small town to purposefully retaliate against a journalist for a critical editorial by instigating his termination from private employment. The district court used the right test, and came to the right conclusion: denial of summary judgment and a refusal to grant the official qualified immunity.

The First Amendment of the U.S. Constitution prohibits the government from "abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. It therefore "forbids government officials from retaliating against individuals for speaking out." *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 543 (9th Cir. 2010) (citations omitted). A government official unquestionably violates the First Amendment when he maliciously and intentionally sets out to deter and punish the publication of speech he finds objectionable, and his conduct objectively has such a punitive effect.[1] *See Lacey v. Maricopa Cnty.*, 693 F.3d 896, 916-17 (9th Cir. 2012) (citing *Mendocino Envtl. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th

[1] This brief uses the male pronoun because the defendant, Wyn Lohner, is male.

Cir. 1999)); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 58 n.6, 66-68 (1963) (holding a government official violates the First Amendment by using his official position to coerce a private party into denying another's rights). Otherwise permissible government conduct may be unconstitutional when a retaliatory purpose was a "substantial or motivating factor" driving it. *See Mt. Healthy City. Sch. Dist. v. Doyle*, 429 U.S. 274, 283-84 (1977); *Lacey*, 693 F.3d at 916-17 (citing *Mendocino*, 192 F.3d at 1300).

An official may not avoid First Amendment scrutiny by devising indirect ways to inflict the constitutional injury. *See Bantam*, 372 U.S. at 68, 58 n.6. Nor can he conveniently invoke a general interest in "community safety" or his own "free speech" to immunize his conduct. *See Bruce v. Ylst*, 351 F.3d 1283, 1289 (9th Cir. 2003); *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). Rather, the official is liable so long as he successfully set the harm into motion and he reasonably should have known it would occur. *See Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978) (citations omitted).

In this case, Addison wrote an editorial criticizing police conduct. Addison presented evidence that Lohner, the chief of police, wielded his position to maliciously and intentionally punish Addison for the editorial. That evidence included (1) Lohner's open, adamant, and ongoing opposition to the editorial, and (2) Lohner's differential and extreme treatment of Addison after Addison published

the editorial. For example, Addison was subjected to frequent and frivolous traffic stops by Lohner's subordinates, Lohner fabricated an official rap sheet suggesting Addison was a physical threat, and Lohner reached out to Addison's employers to discuss and share the false records he created. *See infra* Part IV. Addison lost his job because of Lohner's actions.

The district court was well within the weight of clearly established authority when it decided to deny Lohner's motion for summary judgment. An official plainly engages in First Amendment retaliation when he punishes his critic by fabricating an official report and supplying it to the critic's private employer, causing the critic to lose his job.

The ACLU respectfully urges the Court to affirm.

I. Constitutional liability attaches when an official maliciously uses his position and privileges to cause a constitutional harm.

A government official unmistakably violates the First Amendment when he intentionally acts to punish the publication of protected speech and his acts have the effect of doing so. *Bantam*, 372 U.S. at 66–67 (government commission that "deliberately set about to achieve the suppression of publications" and whose actions had the effect of intimidating book and magazine distributors from ordering or selling publications violated the First Amendment). An official motivated by retaliatory animus can be liable even when he proffers legitimate justifications. *See Mt. Healthy*, 429 U.S. at 283–84. Similarly, an official whose conduct causes

the constitutional injury can be liable even when he accomplishes it through a private third party or informal means. *See Bantam*, 372 U.S. at 67–69, 58 n.6.

A. Otherwise permissible government conduct is unconstitutional when motivated by a malicious and retaliatory purpose.

Otherwise justifiable official actions are nevertheless unlawful if they are tainted by an invalid motive. An official engages in retaliation when a citizen's protected speech is a "substantial or motivating factor" that motivates the adverse action. *Lacey*, 693 F.3d at 916 (citations omitted). Otherwise permissible government conduct may be unconstitutional when motivated by a retaliatory purpose. *See Mt. Healthy*, 429 U.S. at 283–84 (holding a teacher who lacked tenure and "could have been discharged for no reason whatever" could still bring a retaliation action when the discharge was retaliatory). Even if the official has a legitimate interest, he may not use it "as a cover or a ruse to silence and punish" First Amendment activity. *Bruce*, 351 F.3d at 1289.

This rule plainly applies to police acting in the course of their official duties. For instance, an arrest is unconstitutional if the officer was motivated by retaliatory animus – even if the officer had probable cause. *Ford v. City of Yakima*, 706 F.3d 1188, 1194 n.2 (9th Cir. 2013); *see also Skoog v. Cnty. of Clackamas*, 469 F.3d 1221, 1235 (9th Cir. 2006) (holding probable cause does not preclude a retaliation claim).

Thus, "the possibility that other inferences could be drawn that would provide an alternate explanation for the appellants' actions does not entitle them to summary judgment." *Mendocino*, 192 F.3d at 1303. Rather, to escape liability, officials "must show more than that they *could* have punished the plaintiffs in the absence of the protected speech; instead, the burden is on the defendants to show through evidence that they *would* have punished the plaintiffs under those circumstances." *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 770 (9th Cir. 2006) (citations and internal quotations omitted).[2]

In short, intentions matter when it comes to analyzing First Amendment retaliation claims. *See Mabey v. Reagan*, 537 F.2d 1036, 1045 (9th Cir. 1976) ("Although motivational analyses can be slippery, the only way to erect adequate barriers around First Amendment freedoms is for the trier of the fact to delve into the motives of the [person taking the action]."). The public properly relies on government officials to use their discretion within constitutional bounds. Those limits properly prohibit any actions motivated by the desire to quell constitutionally protected speech.

Here, a reasonable jury could have easily concluded that Lohner acted intentionally for the purpose of punishing Addison for his constitutionally

[2] This burden-shifting standard has most often been applied to cases of adverse employment actions but, as the *Pinard* Court illustrates, it can apply to non-employment contexts.

protected editorial and discouraging him from writing further. The district court properly preserved this inquiry for the jury by denying appellant's motion for summary judgment.

B. An official is liable when he uses his position of authority to cause a private third party to inflict a constitutional injury.

A government official cannot take retaliatory actions that punish speech. This prohibition includes employing informal or unofficial mechanisms, as well as using his position of authority to influence private parties into doing the dirty work of inflicting a constitutional injury indirectly. An official violates the First Amendment when he uses official authority to frighten a private third party into harming a constitutionally protected speaker – regardless of whether the official inflicts the harm personally and directly. *See Bantam*, 372 U.S. at 68, 58 n.6; *Gilbrook v. City of Westminster,* 177 F.3d 839, 854–55 (9th Cir. 1999). Informal, unofficial acts can chill and curtail speech; these are unconstitutional regardless of whether the official had the power to apply formal legal sanctions. *See Bantam*, 372 U.S. at 68, 58, 58 n6.

An official is liable when his actions foreseeably set a retaliatory harm into motion. "Personal participation is not the only predicate for section 1983 liability." *Johnson*, 588 F.2d at 743. Rather, "[a]nyone who 'causes' any citizen to be subjected to a constitutional deprivation is also liable." *Id.* A government actor violates the Constitution when he "set[s] in motion a series of acts by others which

the actor knows or reasonably should know would cause others to inflict the constitutional injury." *Johnson*, 588 F.2d at 743-44 (citations omitted).

The official may be liable even if a private person commits the final act of injury. A government official can be liable when he uses his authority to set a constitutional injury in motion by coercing a *private* actor into inflicting it. *Bantam*, 372 U.S. at 58 n.6. For instance, in *Bantam*, the Supreme Court held the plaintiffs suffered a cognizable constitutional injury when private booksellers and distributors decided to stop ordering and selling their publications due to government intimidation. *Id.* This principle applies with equal force to private employment actions.[3] *Merritt v. Mackey*, 827 F.2d 1368, 1371-72 (9th Cir. 1987) (government officials who "intentionally coerced" a private nonprofit corporation into firing a drug and alcohol counselor supervisor could be held liable under Section 1983 and were not entitled to qualified immunity); *see DiMartini v. Ferrin*, 889 F.2d 922, 928-29 (9th Cir. 1989), *amended by* 906 F.2d 465 (9th Cir. 1990) (agent who allegedly instigated a private employee's discharge not entitled to qualified immunity). An official cannot circumvent the Constitution by simply instigating the injury through a private intermediary.

[3] This issue generally arises in the context of due process claims because of the connection between employment and constitutionally protected property interests. For the purposes of this discussion, these cases illustrate *public* officials can be liable for *private* employment decisions.

Similarly, an official cannot evade liability by employing informal means to retaliate. In fact, an official need not even have power to exact formal legal punishment in order to "directly and designedly" curtail speech. *Bantam*, 372 U.S. at 68. In *Bantam*, the Supreme Court held that the government commission who "simply exhorts booksellers and advises them of their rights" had the effect of intimidating them into refusing to buy or sell publications, thereby violating the Constitution. *Id.* at 68-69. It regarded the commission's notices as "thinly veiled threats . . . serv[ing] as instruments of regulation," even though they were unenforceable and booksellers and distributors were free to ignore them. *Id.* at 69. The Court noted that it must "look through forms to the substance[,]" recognizing that informal measures – including various "means of coercion, persuasion, and intimidation" – may inhibit and punish speech. *Id.* at 67.

Loss of employment is a cognizable injury in this context. An official who lacks authority to make a final employment decision can nonetheless be liable for retaliation when his "improper motive sets in motion the events that lead to termination that would not otherwise occur." *Gilbrook*, 177 F.3d at 854–55 (citation and emphasis omitted). Liability for retaliation extends to adverse employment actions, *see Coszalter*, 320 F.3d 968, 975–76 (9th Cir. 2003), and "termination plainly qualifies as an adverse employment action." *Lakeside-Scott v. Multnomah Cnty.*, 556 F.3d 797, 803 (9th Cir. 2009) (citations omitted). The

question is whether the supervisor "would have considered a dismissal but for the [official's] retaliatory conduct." *Gilbrook*, 177 F.3d at 855. If the official's retaliatory conduct caused the dismissal, and the dismissal was a reasonably foreseeable consequence of the official's conduct, then the dismissal can be imputed to the official. *See Gini v. Las Vegas Metro. Police Dep't*, 40 F.3d 1041, 1044–45 (9th Cir. 1994).

"[I]t is not necessary that the plaintiff demonstrate the loss of a valuable governmental benefit or privilege" in order to make out a claim of retaliation. *Coszalter*, 320 F.3d at 975–76. There is not "an exclusive, category-based limitation on the kind of retaliatory action that is actionable under the First Amendment," and therefore, a variety of harms, including private employment decisions, can underlie an adverse action for a retaliation claim. *Id.*; *see also Fritz v. Charter Twp. Of Comstock*, 592 F.3d 718, 728 (6th Cir. 2010) (official's statements to employer suggesting retention of employee may harm business sufficiently rose to a "a threat to take action tangibly affecting employment status" and supported plaintiff's theory the statements were designed to threaten her economic livelihood). An official can retaliate through means other than denial of a government benefit or privilege.

II. An official cannot take refuge in the First Amendment when he is acting pursuant to official duties and privileges.

The First Amendment is not a refuge for government actors who use their positions to inflict constitutional harm. Of course government officials are permitted to respond to policy disagreements from community critics. *See, e.g.*, *Mulligan v. Nichols*, 835 F.3d 983, 986 (9th Cir. 2016). But what those officials cannot do, consistent with the Constitution, is use their official position to silence critics. Such silencing is not protected speech under the First Amendment. *See, e.g.*, *Lacey*, 693 F.3d 922-23.

Government officials unquestionably retain the First Amendment right to speak as private citizens on matters of public concern. However, where those officials act pursuant to their official duties — such as creating, divulging, and disseminating police records on citizens, *see* ER 7–13 — those statements are not private speech, but government action that may give rise to a constitutional violation, *see Garcetti*, 547 U.S. at 421 ("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications . . . ."); *Dahlia v. Rodriguez*, 735 F.3d 1060, 1075 (9th Cir. 2013) (citations omitted) (noting preparation of a routine report that is a part of normal department procedure is not protected under the First Amendment).

Moreover, an individual speaks as a government official rather than a private citizen when his "speech owe[d] its existence to his position," and he did not speak "as a non-employee citizen could have." *Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813, 824 (9th Cir. 2017) (citing *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 967 (9th Cir. 2011)) (school coach had access to venue and students by virtue of his position, he was acting in manner that could reasonably be viewed as official, and he was fulfilling his job duty to communicate demonstratively). In sum, officials cannot simultaneously exploit their government powers while also invoking their individual rights against government repression.

III. The district court was correct to deny qualified immunity because the law was clearly established when the events transpired.

The district court relied on clearly established and widely recognized legal principles when it determined that Lohner did not have qualified immunity. An official is not entitled to qualified immunity for his constitutional violation if the plaintiff's right was clearly established when the conduct occurred. *Ford*, 706 F.3d at 1195. While the right "must be defined with enough specificity to put a reasonable officer on notice that his conduct is unlawful," it "can be clearly established despite a lack of factually analogous preexisting case law, and officers can be on notice that their conduct is unlawful even in novel factual circumstances." *Id.* (citations omitted). "The relevant inquiry is whether, at the time of the officers' action, the state of the law gave the officers fair warning that

their conduct was unconstitutional." *Id.* (citation omitted).

The rights discussed in the district court's order and this brief were clearly established at the time the events of this case transpired. For fifty-five years, the Supreme Court has recognized that an official violates the First Amendment when he deliberately sets out to curtail speech and his conduct has the effect of doing so. *Bantam*, 372 U.S. at 66–67.

The case law is unambiguous that

- An official who uses his guise of authority to frighten a third party into taking an adverse action must answer to the First Amendment; and he can not circumvent its protections by instigating the injury through a private intermediary. *Id.* at 67, 58, 58 n6; *Gilbrook*, 177 F.3d at 854–55.
- An official is liable if he "set[] in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." *Johnson*, 588 F.2d at 743–44 (citations omitted).
- An official is responsible for causing injuries – including private employment actions – that would otherwise not have occurred. *Gilbrook*, 177 F.3d at 854–55; *Merritt*, 827 F.2d at 1371; *DiMartini*, 889 F.2d at 928–29.

- An official who retaliates against protected speech through informal means violates the First Amendment, regardless of whether he had the authority to apply formal legal sanctions. *Bantam*, 372 U.S. at 67.
- The test for retaliation is whether the conduct would chill an ordinary person from future speech, and that adverse employment actions qualify. *Coszalter*, 320 F.3d at 975–76; *Gilbrook,* 177 F.3d at 854–55. It is unlawful for police to use their authority to retaliate for protected expression. *Ford*, 706 F.3d at 1195–96 (citation omitted).
- "[T]here is a right to be free from retaliation even if a non-retaliation justification exists for the defendants' action." *O'Brien v. Welty*, 818 F.3d 920, 936 (9th Cir. 2016) (citing *Skoog*, 469 F.3d at 1235); *see also Ford*, 706 F.3d at 1195–96.
- Police cannot immunize their unconstitutional conduct by simply calling it "speech." "[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 . . . ." *Garcetti*, 547 U.S. at 421.

In short, the legal precedents articulating Addison's rights were clearly established at the time the events transpired. Lohner should have known his

actions were wrong. Thus, the district court correctly denied him the protection of qualified immunity.

IV. The district correctly decided summary judgment would be improper in the case at hand.

The evidence in the record was more than sufficient to allow a factfinder to conclude that Lohner violated the First Amendment. The district court did not err in denying summary judgment on the merits.

The evidence strongly indicated that Lohner acted purposefully and maliciously to punish Addison's speech, and that his desire to punish drove his conduct. Lohner openly and adamantly opposed Addison's editorial. ER 6, 18. And following its publication, he subjected Addison to differential and extreme treatment. Addison had very little contact with law enforcement before the critical editorial, but after the editorial, he had frequent and numerous encounters, without apparent cause. ER 7–8. Lohner's conduct towards Addison was extraordinary. Lohner told dispatch to "flag" Addison, signifying a potential physical threat, even though people with violent backgrounds rarely received such designations. ER 7, 19. Lohner took it upon himself to contact two employers to tell them Addison posed a threat to public safety, something he had done rarely and in entirely different situations. ER 13. Finally, Addison's employer obtained a file of information about Addison under very odd circumstances, seemingly from the police department rather than the records custodian. ER 11–13. The file did not

contain information that would normally be included, and that casts Addison in a more positive light. ER 11–13. This unusual treatment, and its timing, suggest Lohner acted with a retaliatory motive.

The evidence also indicated that Lohner took advantage of his position of authority to frighten Addison's employer. ER 5–13. This foreseeably caused Addison's dismissal. Lohner developed an inaccurate and misleading "fact file" that "flagged" Addison as a physical threat and that omitted exculpatory information. Lohner contacted Addison's managers to inform them that Addison was a threat to public safety, insinuating Addison should not work there because he could harm the employer's clients. Lohner urged Addison's employer to obtain the biased fact file. And Lohner likely facilitated the provision of said fact file to the employer.

The evidence also showed that Addison's termination would not have occurred but for Lohner's initiative. Two days before Lohner's contact, Addison's employer suggested – expressly through oral communication, as well as by implication in a written work plan – that he would be retained at least thirty days, so long as he complied with the employer's work plan. ER 9. Addison's supervisor did not recall any subsequent work plan noncompliance. ER 10. And nothing suggests the employer had any concerns about Addison's record before Lohner intervened. Indeed, Addison had satisfactorily passed the employer's

background check and been hired as a result. ER 10. Finally, the proximity of Lohner's communications and Addison's termination suggests that the communications caused the termination. Lohner spoke with Addison's boss on November 13; the next day, the employer obtained the records and fired Addison. ER 10–12.

Finally, the evidence shows that Lohner's speech was not entitled to First Amendment protections. First, he engaged in more than mere speech, because he created, divulged, and supplied inaccurate police records. Second, he was not speaking as a private citizen, but rather a government official, as the creation, discussion, and dissemination of police records are a part of a police officer's duties. Indeed, it appears he abused his position as police chief to create inaccurate government records, speak authoritatively on them, and to access and share them. To the extent any of this conduct could be characterized as speech, that speech owed its existence to Lohner's official position, and he was not speaking as a non-employee citizen could have. While Lohner certainly enjoys First Amendment protections in some contexts, this is not one of them.

The district court outlined considerable evidence suggesting Lohner retaliated against Addison for his speech. A jury could easily and quite reasonably reach that conclusion. Therefore, it was correct to deny summary judgment.

CONCLUSION

The ACLU respectfully urges the Court to affirm the district court's denial of Lohner's motion for summary judgment.

Dated: January 19, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2018, I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system. There are no unregistered participants.

/s/ Mathew W. dos Santos
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Dated: January 19, 2018

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,818 words.

I certify that this brief complied with typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally-spaced typeface using Microsoft Office 2011 in 14 point Times New Roman.

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