

No. 17-1374

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

**KENNETH L. HUNTER; RICK A. DONATHAN;  
AND JERRY D. MEDLIN,**  
Plaintiffs-Appellants,

v.

**TOWN OF MOCKSVILLE, NORTH CAROLINA; ROBERT W.  
COOK, in his official capacity as Administrative Chief of Police of  
the Mocksville Police Department and in his individual capacity;  
and CHRISTINE W. BRALLEY, in her official capacity as Town  
Manager of the Town of Mocksville and in her individual capacity,**  
Defendants-Appellees,

**INTERLOCAL RISK FINANCING  
FUND OF NORTH CAROLINA,**  
Intervenor-Appellee.

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On Appeal from the United States District Court  
For the Middle District of North Carolina at Greensboro

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BRIEF OF NORTH CAROLINA ADVOCATES FOR JUSTICE AND NATIONAL  
ASSOCIATION OF POLICE ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF  
PLAINTIFFS-APPELLANTS

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4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))?  YES  NO  
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question)  YES  NO  
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding?  YES  NO  
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ J. Michael McGuinness

Date: 9/18/2017

Counsel for: NAPO

### CERTIFICATE OF SERVICE

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I certify that on 9/18/2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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(signature)

9/18/2017  
(date)



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6. Does this case arise out of a bankruptcy proceeding?  YES  NO  
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Narendra K. Ghosh

Date: 9/18/2017

Counsel for: NCAJ

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I certify that on 9/18/2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
INTEREST OF <i>AMICI</i> .....	1
SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	3
I.    THE DISTRICT COURT ERRED IN GRANTING THE TOWN OF MOCKSVILLE’S MOTION FOR SUMMARY JUDGMENT .....	3
A.    North Carolina City and Town Managers Often Act As Final Policymakers .....	3
B.    The Mocksville Town Manager Was Formally Delegated Final Policymaking Authority Over Personnel .....	6
C.    The Facts Demonstrate that the Mocksville Town Manager Has Final Policymaking Authority Even Absent Evidence of Formal Delegation .....	7
D.    The District Court Erred By Failing to Consider Relevant State and Local Law and By Overstating the Necessity of Positive Law .....	13
E.    A Ruling in the Town’s Favor Would Undermine the Remedies Created by Section 1983 .....	15
CONCLUSION .....	17
CERTIFICATE OF COMPLIANCE .....	18
CERTIFICATE OF SERVICE .....	19

## TABLE OF AUTHORITIES

### Cases

<i>Andrew v. Clark</i> , 561 F.3d 261 (4th Cir. 2009).....	15, 16
<i>Arendale v. City of Memphis</i> , 519 F.3d 587 (6th Cir. 2008) .....	12
<i>Austin v. Paramount Parks, Inc.</i> , 195 F.3d 715 (4th Cir. 1999).....	3, 4, 7, 14
<i>Barnett v. Karpinos</i> , 119 N.C. App. 719, 460 S.E.2d 208 (1995).....	5, 14
<i>City of St. Louis v. Praprotnik</i> , 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988).....	6, 8, 13, 14
<i>Dill v. City of Edmond, Oklahoma</i> , 155 F.3d 1193 (10th Cir. 1998) .....	11, 12
<i>Durham v. Jones</i> , 737 F.3d 291 (4th Cir. 2013) .....	15
<i>Edwards v. City of Goldsboro</i> , 178 F.3d 231 (4th Cir. 1999) .....	5, 15
<i>Garrity v. New Jersey</i> , 385 U.S. 493, 87 S. Ct. 616, 17 L.Ed.2d 562 (1967) .....	15
<i>Greensboro Prof'l Fire Fighters Ass'n, Local 3157 v. City of Greensboro</i> , 64 F.3d 962 (4th Cir. 1995) .....	6, 7, 14
<i>Hyland v. Wonder</i> , 117 F.3d 405 (9th Cir. 1997) .....	12
<i>Jett v. Dallas Indep. Sch. Dist.</i> , 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989).....	4, 14
<i>Liverman v. City of Petersburg</i> , 844 F.3d 400 (4th Cir. 2016) .....	9
<i>Pembaur v. City of Cincinnati</i> , 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986).....	3, 4, 7
<i>Randle v. City of Aurora</i> , 69 F.3d 441 (10th Cir. 1995).....	8
<i>Robertson v. Wegmann</i> , 436 U.S. 584, 98 S. Ct. 1991, 56 L. Ed. 2d 554 (1978) ...	15
<i>Spell v. McDaniel</i> , 824 F.2d 1380 (4th Cir. 1987).....	7, 10
<i>Valentino v. Vill. of S. Chicago Heights</i> , 575 F.3d 664 (7th Cir. 2009).....	8, 11, 12

**Statutes**

Mocksville, N.C., Town Code § 2-4.1 .....7  
N.C. Gen. Stat. § 160A-147 .....4  
N.C. Gen. Stat. § 160A-148..... 4, 8, 13  
N.C. Gen. Stat. § 160A-164.....13



## **INTEREST OF *AMICI***

*Amici Curiae*, the North Carolina Advocates for Justice (“NCAJ”) and the National Association of Police Organizations, Inc. (“NAPO”), submit this brief in support of Plaintiffs-Appellants and respectfully urge this Court to reverse the district court’s decision granting summary judgment in favor of Defendant Town of Mocksville.<sup>1</sup>

NCAJ is a volunteer professional organization of 2,500 North Carolina lawyers devoted to advocating and protecting the rights of the accused in criminal cases and the injured in civil litigation, and ensuring the integrity of the judicial system. Members of NCAJ regularly represent law enforcement officers in state and federal employment disputes, and regularly seek to hold municipal governments accountable for violations of the United States Constitution.

NAPO and its affiliate, the National Law Enforcement Officers’ Rights Center of the Police Research and Education Project, is a national non-profit organization that represents law enforcement officers throughout the United States. NAPO is a coalition of police associations that serve to advance the interests and rights of law enforcement officers through legal advocacy, education and

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<sup>1</sup> Pursuant to Rule 29, counsel for *Amici* state that no counsel for a party authored this brief in a whole or in part, and no person or entity other than *Amici* or its counsel made a monetary contribution to the preparation or submission of this brief. *Amici* have filed a motion seeking leave to file this amicus brief; the parties either consent or take no position on the motion.

legislation. NAPO represents over 1,000 law enforcement organizations, with over 238,000 sworn law enforcement officers. NAPO often appears as amicus curiae in appellate cases of special importance to the law enforcement community.

*Amici* have a strong interest in the issues of law before this Court. The district court refused to hold a municipality responsible for unconstitutional retaliation committed by officials at the apex of the municipality's personnel system. If adopted by this Court, this holding will often make it impossible for police officers victimized by officially sanctioned retaliation to obtain any meaningful recovery. It will create a fiction in which those with absolute authority over the careers of law enforcement officers are permitted when they enter a courtroom to pretend that authority does not exist. And it will encourage municipal councils to ignore the possibility that their officials are violating the Constitution while denying the victims any meaningful recourse.

### **SUMMARY OF ARGUMENT**

Plaintiffs were police officers employed by the Town of Mocksville, North Carolina. In 2011, they were unconstitutionally terminated by the Mocksville Town Manager and Administrative Chief of Police.

On summary judgment, the district court concluded that Mocksville was not liable for the plaintiffs' termination, concluding that neither the Town Manager nor the Administrative Chief of Police had final policymaking authority over

municipal personnel. This ruling was in error. The Mocksville Town Board formally delegated final policymaking authority to the Town Manager. The Town Board explicitly established that all town personnel were the Town Manager's employees, enacted no policies limiting her discretion, and provided no avenue through which aggrieved personnel could appeal her decisions.

Because the Town Manager and Administrative Chief of Police were the municipality's final policymakers over personnel, the Town of Mocksville can be held directly liable for their unconstitutional employment practices. A contrary ruling would conflict with opinions of this Court, the United States Supreme Court, and the North Carolina Court of Appeals. It would also undermine the purpose behind Section 1983.

The district court's ruling on summary judgment should be reversed.

## **ARGUMENT**

### **I. THE DISTRICT COURT ERRED IN GRANTING THE TOWN OF MOCKSVILLE'S MOTION FOR SUMMARY JUDGMENT.**

#### **A. North Carolina City and Town Managers Often Act As Final Policymakers.**

"[A] municipality may incur § 1983 liability for a single decision of a policymaking official." *Austin v. Paramount Parks, Inc.*, 195 F.3d 715, 728 (4th Cir. 1999) (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986)). An individual is a final policymaker under § 1983

when they speak “with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue.” *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989). “Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority[.]” *Id.*

“[M]unicipalities often spread policymaking authority among various officers and official bodies.” *Pembaur*, 475 U.S. at 483, 106 S. Ct. at 1300. The question of who constitutes a municipal “final policymaker” is “dependent upon an analysis of state law, requiring review of the relevant legal materials, including state and local positive law, as well as custom or usage having the force of law.” *Austin*, 195 F.3d at 729.

North Carolina permits certain municipalities to operate under a “council-manager” form of government, in which an elected council works together with an appointed manager to handle municipal affairs. *See* N.C. Gen. Stat. § 160A-147 *et seq.* State statutes afford municipal managers a list of enumerated powers and duties. *See* N.C. Gen. Stat. § 160A-148. Those powers and duties include the power to “appoint and suspend or remove all city officers and employees not elected by the people.” *Id.* § 160A-148(1). Although the statute requires this authority be exercised “in accordance with such general . . . personnel policies[] or

ordinances as the council may adopt[,]” *id.*, it also affords managers wide-ranging authority “for administering all municipal affairs placed in [their] charge” by their municipal council, and for “perform[ing] any other duties that may be required or authorized by the council.” *Id.* § 160A-148; -148(8).

Given this broad authority, North Carolina unsurprisingly recognizes that town managers and other department heads often act with final policymaking authority. For example, in *Barnett v. Karpinos*, 119 N.C. App. 719, 724, 460 S.E.2d 208, 211 (1995), the North Carolina Court of Appeals recognized that the Chapel Hill Town Manager and Chief of Police together acted as final policymakers where the Chief of Police “determine[d] practices to be used by department personnel in consultation with the Town Manager.” *Id.*

This Court has also recognized that North Carolina municipalities can expand a manager’s authority to encompass not only the power to make employment decisions, but also the authority to set employment policy. *See Edwards v. City of Goldsboro*, 178 F.3d 231 (4th Cir. 1999) (denying a motion to dismiss where the complaint alleged that the Goldsboro Town Manager and Chief of Police had been afforded final policymaking authority over personnel). If a municipal council places its manager in charge of all matters regarding government personnel, the manager acts with final policymaking authority. *See Greensboro Prof'l Fire Fighters Ass'n, Local 3157 v. City of Greensboro*, 64 F.3d 962, 965

(4th Cir. 1995) (holding that the Greensboro City Manager was a final policymaker over personnel matters).

As discussed below, the Mocksville Town Board formally delegated final employment policymaking authority to the Town Manager. Even absent that formal delegation, the facts show that the Town Manager and Administrative Chief of Police together acted with final policymaking authority over personnel.

**B. The Mocksville Town Manager Was Formally Delegated Final Policymaking Authority Over Personnel.**

The Mocksville Town Board made its Town Manager the municipality's final policymaker over personnel matters by direct, formal delegation.

“[V]alid local ordinances and regulations” inform whether a municipal actor constitutes a final policymaking official. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 125, 108 S.Ct. 915, 925, 99 L.Ed.2d 107 (1988). When a North Carolina municipality designates its town manager the “chief personnel officer” at the top of a “centralized personnel system” with authority to set personnel rules and administer “all matters relating to personnel,” the manager acts as a final policymaker over personnel matters. *Greensboro*, 64 F.3d at 965.

Here, the Mocksville Town Board enacted an ordinance establishing that “Town personnel shall be employed by the Town Manager . . . the terms of the positions shall be at the will of the Town Manager.” Mocksville, N.C., Town Code

§ 2-4.1. In the late 1980's, the Board repealed all personnel policies that could have limited the Town Manager's authority. *See* JA 665-666. In the early 2000's, the Board allowed department managers to make termination decisions, but still subjected those decisions to review by the Town Manager. JA 699-701.

By making all town personnel "employed by the Town Manager" and by affording the Town Manager complete discretion over the terms of those positions, the Town Board formally delegated final policymaking authority over personnel matters to the Town Manager. *See Greensboro*, 64 F.3d at 965. The Town of Mocksville is therefore directly liable for the Town Manager's unconstitutional personnel decisions. *See Austin*, 195 F.3d at 728; *Pembaur*, 475 U.S. at 480.

**C. The Facts Demonstrate that the Mocksville Town Manager Has Final Policymaking Authority Even Absent Evidence of Formal Delegation.**

"Delegation may be express . . . or implied from a continued course of knowing acquiescence by the governing body in the exercise of policymaking authority by an agency or official[.]" *Spell v. McDaniel*, 824 F.2d 1380, 1387 (4th Cir. 1987); *see also Austin*, 195 F.3d at 729 (recognizing that policymaking authority may be shown by "custom or usage having the force of law"). Even absent the Town Board's formal delegation, the facts demonstrate that the Town Manager and the Chief of Police together acted as final policymakers over personnel decisions.

Three questions are particularly important when evaluating whether an official acted with final policymaking authority: (1) whether the official acted within his official grant of authority; (2) whether the official's decisions were "constrained by policies not of that official's making"; and (3) whether the official's decision was "subject to review by the municipality's authorized policymakers[.]" *Praprotnik*, 485 U.S. at 127, 108 S. Ct. at 926; *see also Randle v. City of Aurora*, 69 F.3d 441, 448 (10th Cir. 1995) (identifying these three inquiries as helpful when evaluating whether an official acted as a final policymaker); *Valentino v. Vill. of S. Chicago Heights*, 575 F.3d 664, 676 (7th Cir. 2009) (same).

Each of these three inquiries demonstrates that the Mocksville Town Manager and Administrative Chief of Police had policymaking authority over employment matters. First, they plainly had the authority to terminate town employees. *See* N.C. Gen. Stat. § 160A-148(1); JA 699-701. Second, their termination decisions were not "constrained by policies" not of their own making because the Town of Mocksville has not had personnel policies since the late 1980's. JA 93 ¶ 4; *see also* JA 112, ¶ 12 ("The Town of Mocksville does not have a written personnel policy[.]"). Third, the Town Manager's personnel decisions were not "subject to review" by the Town Board; "since about 1987 or 1988, the Town has had no ordinance or grievance procedure by which employees who are disciplined or discharged from employment could challenge adverse employment



actions imposed on them.” JA 112, ¶ 12. When one of the Plaintiffs nevertheless attempted an appeal to the Board, a Board Member simply referred him to the Town Manager. JA 162, ¶ 45.

Instead, the evidence shows a longstanding practice perfectly consistent with the express delegation discussed above. *See* Section I.2, *supra*. The Town Manager and the Chief of Police made personnel decisions without consulting or seeking guidance from the Town Board, JA 111-112, ¶¶ 8-9, and there is no evidence the Town Board ever interfered in a personnel matter or reversed a personnel decision. The Administrative Chief of Police unilaterally issued policies, JA 239, and did so without approval from the Town Manager or Town Board, JA 669, demonstrating his own final policymaking authority. *Cf. Liverman v. City of Petersburg*, 844 F.3d 400, 413 (4th Cir. 2016) (“An entity has ‘final’ authority to set this sort of [employee speech] policy when no further action is needed for the policy to take effect.”). These policies limited officers’ speech in ways directly relevant to the First Amendment claims at issue, *see, e.g.*, JA 270, while restricting officers’ ability to contact any “member of the City Council, Mayor, [or] City Manager” without “permission of the chief.” JA 266.

This evidence confirms the direct delegation provided by municipal ordinances. The Mocksville Town Board is entirely uninvolved in setting personnel policies and making personnel decisions. It offers its employees no

recourse when the Town Manager seeks to act unconstitutionally; it neither purports to limit the Town Manager's ability to set her own personnel standards and policies, nor allows aggrieved employees to challenge the Manager's actions to the Board. The Mocksville Town Manager and Administrative Chief of Police act as final policymakers when they terminate police officers.

In *Spell*, the Fayetteville City Council and City Manager technically retained exclusive authority over police administration. 824 F.2d at 1396. However, that authority "was only a paper, formal authority, never effectively exercised . . . to curb or countermand the authority in fact being exercised by [the Chief] and his subordinates in the police department." *Id.* at 1397. This Court held that the Chief was therefore a final policymaker, and that Fayetteville could not avoid municipal liability "by such purely formal reservations of 'final' authority." *Id.*

Here, the facts are stronger than in *Spell*. The jury found that the Mocksville Town Manager, a named defendant, worked in concert with the Chief of Police to violate the plaintiffs' First Amendment rights. The Mocksville Town Board did not even retain a "paper, formal authority" to review the Police Chief and Town Manager's personnel decisions. If the Fayetteville Chief of Police was a final policymaker in *Spell*, the Mocksville Chief of Police and Town Manager must be final policymakers, even in the absence of a formal delegation.

Other circuits follow the same approach. For example, in *Dill v. City of Edmond, Oklahoma*, 155 F.3d 1193 (10th Cir. 1998), the Tenth Circuit addressed a comparable First Amendment retaliation case. The *Dill* plaintiff alleged she was unlawfully transferred from detective to patrol officer by the police chief, and that the police chief was a final policymaking official. *Id.* at 1210. The defendants argued that “the city council, and to a limited extent, the city manager,” were the only officials with policymaking authority. *Id.*

The Tenth Circuit agreed with the plaintiff. *Id.* at 1211. The court acknowledged that municipal ordinances were silent as to who had the authority to determine policy regarding employee transfers and discipline. *Id.* It nevertheless recognized that the decision to transfer the plaintiff fell within the police chief’s authority, that the chief’s decision was guided only by his own policies, and that the city manager would not review his transfer decisions. *Id.* The Tenth Circuit thus found the chief had final policymaking authority over employee transfers. *Id.*

In *Valentino v. Village of South Chicago Heights*, 575 F.3d 664 (7th Cir. 2009), the Seventh Circuit held that an official was a final policymaker over personnel decisions when he had the authority to terminate his staff, the municipal board did not “govern the manner in which [he made] his hiring or firing decisions,” and there was no evidence the board provided “any meaningful oversight” of his process or “meaningful[] review[]” of his decisions. *Id.* at 678.

In *Hyland v. Wonder*, 117 F.3d 405 (9th Cir. 1997), the Ninth Circuit held that a city could be liable for acts of a department where those originally vested with final policymaking authority “left the internal management” of the department to the department head and “attempted not to interfere[.]” *Id.* at 415. In *Arendale v. City of Memphis*, 519 F.3d 587 (6th Cir. 2008), the Sixth Circuit held that a city could be liable for unconstitutional discipline ratified by a police chief where the municipality provided no procedures for further appeal of the chief’s decision. *Id.* at 602.

Here, the Town Manager’s final policymaking authority, conferred by formal designation, is even clearer than in *Dill*, *Valentino*, *Hyland*, and *Arendale*. The Mocksville Town Board formally disavowed any role in personnel matters, expressly making all municipal personnel “employed by the Town Manager.” The Mocksville Town Manager was actively involved in terminating Plaintiffs under authority granted to her by both state statute and municipal ordinance.

But even absent those facts, Plaintiffs would still prevail. The Town Manager and Police Chief’s termination decision fell within their authority, was not governed by any policy issued by the Town Board, and was not subject to the Board’s review. The termination decisions therefore fell within the Defendants’ final policymaking authority even absent formal delegation.

**D. The District Court Erred By Failing to Consider Relevant State and Local Law and By Overstating the Necessity of Positive Law.**

The district court found that the Town Manager and Administrative Chief of Police were not final policymakers. JA 1137-1138. It relied in large part on N.C. Gen. Stat. § 160A-164, which provides that municipal councils “may adopt” employment policies, and its conclusion that *Praprotnik* would not permit a court to “assum[e] that municipal policymaking authority lies somewhere other than where the applicable law purports to put it.” *Id.* This approach has at least four problems.

First, by focusing solely on N.C. Gen. Stat. § 160A-164, the court did not recognize that town managers are also afforded powers and duties by statute, including the power to make termination decisions, the duty to see that laws “are faithfully executed within the City,” and the obligation to “perform any other duties that may be required or authorized by the council.” N.C. Gen. Stat. § 160A-148. North Carolina statutes recognize that town managers are intimately involved in employment matters, and that the scope of their authority is in the discretion of the town board. The Court is not required to “assume that municipal policymaking authority lies somewhere other than where the applicable law purports to put it” because applicable statutes contemplated a town manager having the relevant policymaking authority.

Second, the district court failed to recognize that relevant legal materials include both “state and local positive law[.]” *Austin v. Paramount Parks, Inc.*, 195 F.3d 715, 729 (4th Cir. 1999) (emphasis added); *see also Praprotnik*, 485 U.S. at 125 (recognizing that relevant legal materials include “valid local ordinances and regulations”). By limiting its inquiry to state statutes, the court improperly discounted the relevance of the Mocksville Town Board’s official actions giving final policymaking authority to the Town Manager.

Third, the district court failed to recognize that it must inquire not only into written law, but also “‘custom or usage’ having the force of law.” *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737, 109 S. Ct. 2702, 2724, 105 L. Ed. 2d 598 (1989); *accord, Austin*, 195 F.3d at 729-730. The district court therefore impermissibly discredited the possibility that even absent formal delegation, the Town Manager and Administrative Chief of Police would possess final policymaking authority if, in practical effect, their decisions as to personnel policies had the force of law.

Fourth, the district court failed to acknowledge that both this Court and the North Carolina Court of Appeals have recognized that North Carolina town managers can act as final policymakers. *See Barnett v. Karpinos*, 119 N.C. App. 719, 725, 460 S.E.2d 208, 211 (1995); *Greensboro Prof’l Fire Fighters Ass’n*,

*Local 3157 v. City of Greensboro*, 64 F.3d 962, 965 (4th Cir. 1995); *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999).

**E. A Ruling in the Town’s Favor Would Undermine the Remedies Created by Section 1983.**

Adopting the reasoning below would not only be inconsistent with prior rulings of this Court, the North Carolina Court of Appeals, and circuit courts around the nation, but would also undermine the purpose of Section 1983.

“Section 1983’s critical concerns are compensation of the victims of unconstitutional action, and deterrence of like misconduct in the future.”

*Robertson v. Wegmann*, 436 U.S. 584, 599, 98 S. Ct. 1991, 2000, 56 L. Ed. 2d 554 (1978). Upholding the district court’s ruling would frustrate the goals of deterrence and compensation.

Section 1983 exists in part to deter state actors from engaging in or sanctioning constitutional violations. As law enforcement officers, Plaintiffs “are not relegated to a watered down version of constitutional rights.” *Garrity v. New Jersey*, 385 U.S. 493, 500, 87 S. Ct. 616, 17 L.Ed.2d 562 (1967). As this case and others demonstrate, retaliatory employment practices impede police operations and destroy esprit de corps. *See Durham v. Jones*, 737 F.3d 291 (4th Cir. 2013); *Andrew v. Clark*, 561 F.3d 261 (4th Cir. 2009). Adopting the lower court’s decision will encourage municipalities to ignore the possibility that officials are

engaging in unconstitutional employment practices. By ostensibly holding authority to intervene in all matters, but granting other officials the unlimited ability to exercise that authority however the officials see fit, a municipality's elected officials could both abdicate their responsibility to ensure that the Constitution is upheld while insulating the municipality from liability.

Section 1983 also exists to compensate the victims of constitutional violations. As demonstrated by this case, adopting the lower court's ruling will seriously compromise that objective. Ending a law enforcement officer's career can have devastating financial consequences. When officers cannot bring claims against the municipality, their ability to obtain adequate compensation for their injuries will depend not only on overcoming qualified immunity, but also on the personal resources of the individual defendant and the existence and vagaries of any applicable insurance policies.

“[T]he First Amendment should never countenance the gamble that informed scrutiny of the workings of government will be left to wither on the vine.” *Andrew*, 561 F.3d at 273 (Wilkinson, J. concurring). When the official at the apex of a municipality's employment system ends a law enforcement officer's career to punish him for reporting on possible governmental misconduct, the municipality should be held responsible for that decision.



## CONCLUSION

For the foregoing reasons, and for the reasons set forth in Plaintiffs' brief, this Court should reverse the district court's order granting the Town of Mocksville summary judgment.

Respectfully submitted this the 18th day of September, 2017.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT  
Effective 12/01/2016

No. 17-1374      Caption: Hunter et al. v. Town of Mocksville et al.

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**Type-Volume Limit for Briefs:** Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 13,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 15,300 words or 1,500 lines. A Reply or Amicus Brief may not exceed 6,500 words or 650 lines. Amicus Brief in support of an Opening/Response Brief may not exceed 7,650 words. Amicus Brief filed during consideration of petition for rehearing may not exceed 2,600 words. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include headings, footnotes, and quotes in the count. Line count is used only with monospaced type. See Fed. R. App. P. 28.1(e), 29(a)(5), 32(a)(7)(B) & 32(f).

**Type-Volume Limit for Other Documents if Produced Using a Computer:** Petition for permission to appeal and a motion or response thereto may not exceed 5,200 words. Reply to a motion may not exceed 2,600 words. Petition for writ of mandamus or prohibition or other extraordinary writ may not exceed 7,800 words. Petition for rehearing or rehearing en banc may not exceed 3,900 words. Fed. R. App. P. 5(c)(1), 21(d), 27(d)(2), 35(b)(2) & 40(b)(1).

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(s) /s/ Narendra K. Ghosh

Party Name NCAJ and NAPO (amici curiae)

Dated: 9/18/2017

## **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing documents with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on September 18, 2017.

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

Date: September 18, 2017.

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