No. 17-1374

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.

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

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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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 17-1374 Caption: Hunter et al. v. Town of Mocksville et al.

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(name of party/amicus)

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Signature: /s/ J. Michael McGuinness Date: 9/18/2017

Counsel for: NAPO

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

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North Carolina Advocates for Justice
(name of party/amicus)

who is Amicus Curiae, makes the following disclosure:
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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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/s/ Narendra K. Ghosh
(signature)

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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.[1]

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

[1] 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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(s) /s/ Narendra K. Ghosh

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Dated: 9/18/2017

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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.

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Date: September 18, 2017.

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