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Case Number 477,2014C

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SHAWN BRITTINGHAM, and CHRISTOPHER STORY Plaintiffs-below Appellants, v. WILLIAM TOPPING, in his capacity as Chief of Police of the Town of Georgetown and individually, RALPH W. HOLM, in his capacity as Captain of the Georgetown Police Department, and individually, and the TOWN OF GEORGETOWN, a municipal Corporation, Defendants-below, Appellees.	:	No.: 477, 2014

APPELLEES, WILLIAM TOPPING, RAPLH W. HOLM AND TOWN OF GEORGETOWN'S, ANSWERING BRIEF

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NATURE OF PROCEEDINGS

In January, 2011, former-Plaintiffs[1] Lester Shaffer and Bradley Cordrey, and current Plaintiffs Shawn Brittingham and Christopher Story—then-current and former Georgetown Police Department (GPD) officers--filed the initial Complaint in the instant matter, against GPD Chief William Topping; Captain Ralph W. Holm, Jr., and the Town of Georgetown. (C.A. No. S11C-01-004, D.I. #1)[2]. In this initial Complaint, the Plaintiffs alleged seven causes of action, stemming from disciplinary action taken against them by the Town for insubordination for violating the chain of command policy.

Plaintiffs had already filed a Petition for a Writ of Mandamus—alleging violations of the Law Enforcement Officers' Bill of Rights (11 *Del.C.* Ch. 92, "LEOBOR") as well as "First Amendment" violations--against the Town, Topping and Holm, in the Superior Court, arising from the identical set of facts. *Brittingham, et.al. v. Town of Georgetown*, S10M-09-023 RFS. The Superior Court granted summary judgment in Defendants favor, and dismissed the petition for mandamus in *Brittingham v. Town of Georgetown, et.al.*, 2011 WL 2650691 (Del. Super. 6/28/11). Plaintiffs appealed that decision to this Court.[3]

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[1] Officer Bradley Cordrey voluntarily dismissed himself from the lawsuit. (D.I. #33); Lester Shaffer's claims were dismissed by Order of the Court dated August 27, 2012. (D.I. #60).

[2] All Docket ("D.I. #) references in this brief refer to the Superior Court record below in the instant case, *Brittingham II*. (Docket appears in Appellants' Amended Appendix at A-1 – A-13).

[3] This Court has consolidated the pending appeal of the mandamus action (No. 464, 2011, *"Brittingham I*") with the instant appeal ("*Brittingham II*").

On July 6, 2011, the Superior Court granted Defendants' Motion to Dismiss 6 of the 7 claims in the initial complaint below, leaving only a "First Amendment Retaliation" count standing, while noting that the maintenance of such a claim "in the realm of public employee speech is not a simple matter." *Shaffer v. Topping*, 2011 WL 2671237 at *2 (Del. Super. July 6, 2011). Defendants answered the Complaint, denying Plaintiffs' claims. On September 2, 2011, Plaintiffs substituted new counsel (Connolly Gallagher, LLP) for their prior counsel (Mr. Rogers, who has returned as counsel of record on this appeal). New counsel filed a First, Second, and ultimately Third Amended Complaint which, while still based upon the underlying factual matters, contained a host of new allegations and legal claims. The final Third Amended Complaint (D.I. #67), consisted of five Counts:

1) First Amendment challenge to GPD Chain of Command policy;
2) §1983 - Retaliation (free speech);
3) §1983 - Retaliation (petition);
4) Violation of Delaware Whistleblowers' Protection Act;
5) Violation of "Implied Covenant of Good Faith and Fair Dealing".

Defendants' Answer, denying all claims, was filed on December 17, 2012 (D.I. #68, B-419*ff*). Extensive discovery was conducted, including Interrogatories, Requests for Production and Admission, and depositions were taken of eight witnesses, including all named parties. At the close of discovery, Defendants moved for Summary Judgment as to all counts on January 31, 2014. The matter was fully briefed and, on July 31, 2014, the Superior Court granted Defendants' Motion in its

entirety. Plaintiffs filed a timely appeal and filed their Opening Brief on October 29, 2014.

This Court issued a brief deficiency notice as to Plaintiffs' Opening Brief on November 5, 2014 noting, *inter alia*, that "[t]he statement of facts does not contain supporting references to appendices or record," in violation of Supr. Ct. R. 14(b)(v). Plaintiffs submitted an "Amended" Opening Brief (AOB) on November 11, 2014, wherein the only amendment to the Statement of Facts was the placement of several references to pages in the Superior Court's opinion granting summary judgment. Plaintiffs have not cited, in the Statement of Facts, or in the body of their Brief, to a single page of the depositions, or evidentiary record, which was before the Court on summary judgment.[4]

This is Defendants' Answering Brief on Appeal.

[4] Defendants respectfully submit that the AOB does not comport with the letter or spirit of Rule 14(b)(v), as the factual "record" is the evidentiary record of the case below, not the dispositive decision of the trial court. Certain references to the Court's decision are inaccurate in that the Court's discussion of facts does not support Plaintiff's partisan characterizations of them. For example, Plaintiffs cite Mem. Op. at 3 (A-17) in support of its assertion of fact in the AOB at 4, that "the silence order was acting as a complete and total gag order…", when the opinion never made such a finding, and never used the term "silence order"; and Mem. Op. at 5 (A-19) where the Court says Defendants "initiated an internal affairs investigation", in support of its assertion of fact in the AOB at 5, that "chief and captain initiated a *retaliatory* . . . investigation." (emphasis added).

SUMMARY OF ARGUMENT

1. ***Denied***. The Superior Court engaged in a thorough review of the voluminous discovery record, applied the correct legal standards as to all claims, and properly granted summary judgment in Defendants' favor on all counts of the Third Amended Complaint. As to the constitutional claims, the Court engaged in a thorough analysis and application of the U.S. Supreme Court's well-settled *Connick/Pickering* tests as to public employee First Amendment claims. Contrary to Plaintiffs/Appellants' claims, the Court considered, but did not rely solely on, Plaintiffs' failure to maintain a First Amendment retaliation claim, in order to dismiss the state law claims in the Complaint. Rather, the Court analyzed each count separately and had ample evidence and independent grounds in the record to dismiss each claim in its own right. Plaintiffs have put forth no facts or argument which would compel this Court to reach a different conclusion upon *de novo* review.

STATEMENT OF FACTS

Background to the Barlow meeting.

William Topping was appointed Chief of Police by Georgetown Town Council in 1998. Topping "completely revamped" the Department. (B-87). Due to his increasing administrative workload, Topping hired Ralph Holm, who eventually became Captain. (B-109). Captain Holm was unpopular with some officers, who felt he did not have sufficient experience, and because of his strict management style. (B-113-14; 182-83; 198-99, 207, 211). In December, 2007, a majority of the officers sent a "Letter of No Confidence" in the Captain to the Mayor and Town Manager, after receiving permission to do so from the Chief. (B-114-15). Captain was put on a performance plan and things improved, but the perceived problems with Captain's personality and management came to a head again prior the Barlow meeting. (B-8, 14, 64, 157, 183).

A Town Councilperson, Eddie Lambden, became hostile toward Chief Topping in 2007, after Lambden tried to interfere in FOP negotiations, and Topping told him to leave the police station, and advised Town Council of his actions. (B-95-96, 105; 141). Lambden later ran for Mayor on a platform of removing Topping. (B-119, 140-41, 53). As Mayor, Lambden continued to try to keep tabs on the Department and subvert Chief Topping's authority, often approaching officers for information in a way that made them uncomfortable. B-53, 69, 140, 202, 375). On

September 18, 2008, the officers, including Plaintiffs, signed a letter to the Town Manager expressing their "100% support" of Chief, and requesting to be kept out of the "feud" between him and Lambden. (B-378-79; B-168, 202). *See also* B-96-97, 102, 168, 185, 202. A few months after the Barlow meeting, in March, 2010, shortly after issuing an official memorandum reminding all GPD employees to follow the Chain of Command, then-Mayor Lambden sent a Facebook message to at least one of the officers, saying that the memo "was just a smokescreen." (B-363; B-139-40).

Georgetown Police Department (GPD) suffered a tragedy on September 1, 2009, when one of its young Patrolmen, Chad Spicer, was shot to death by a criminal whom Spicer and his partner, Shawn Brittingham, were pursuing. Spicer was shot in the face and Brittingham suffered a neck wound. (B-25, 44, 170). Chad Spicer's death fractured what cohesiveness existed in the Department, and morale plummeted to an all-time low. (B-184, 64-65, 199, 102). Chief appointed Captain to be liaison to the Spicer family, which upset some of the other officers who had been close to Chad, and who felt that Chief and Captain did not appreciate Chad during his lifetime. (B-71). Dr. Finegan, a police psychologist who counseled the department after the shooting, identified a group of 7 "disgruntled officers" and warned Topping and Holm that, as part of the aftereffects of this tragedy, these officers might try to undermine management. (B-121, 142-46, 171).

Officers are required by GPD Directive to wear body armor as part of their

official equipment. Body armor carries a manufacturer's warranty that provides a litigation benefit to the agency for 5 years from date of sale. (B-169, 175). This is a warranty period and not an expiration date. *Id*. Months prior to the Barlow meeting, in September 2009, Topping tasked Lt. Shaffer (a former Plaintiff), who was responsible for equipment, with checking each officer's vest and ordering new vests if any were out of warranty. (B-170, 181). A total of 8 new vests were ordered at this time, including one for Shawn Brittingham. (B-5, 122). Story's vest was in warranty at the time of the meeting. (B-60). No officer advised Chief, prior to the meeting, that their vest was out of warranty. (B-170).

The December 23, 2009 meeting at Councilwoman Sue Barlow's house.

A small group of officers, including Shawn Brittingham, formulated a plan to meet with Sue Barlow, a Town Councilwoman (also the mother of two GPD officers), to discuss departmental grievances. (B-197). According to one officer, a meeting of this nature had been planned for months (B-239; B-256-57; *see also* B-182). Mrs. Barlow was contacted by Shawn Brittingham who asked if "he" could stop by, and she was surprised when 5 other officers arrived with him.[5] (B-88). The group met in Mrs. Barlow's dining room and she served the officers refreshments. (B-89).

[5] The 7th officer, Patrolman Jamie Locklear, arrived later, and states that he did not want to go to the meeting, but was pressured to do so by Lt. Shaffer, who said they "needed numbers." (B-239-40; B-250; B-181).

Mrs. Barlow testified that **"[t]he discussion was mostly complaints about the chief and captain."** (B-89). Someone brought up vests, but that did not appear to be a big concern. (B-89-90). They also mentioned cars not being regularly maintained, however, upon checking with the Town Manager, Mrs. Barlow found that this concern, and that of the vests, was unfounded. (B-92, 94). Mrs. Barlow believed that the impetus for the meeting was "all of them [] having an adverse reaction to Chad's death . . . I felt that all of this venting was in relation to that." (B-94). The focus and **"main theme [of the meeting] was how to fire the chief"** and the Captain**.** (B-100). Former plaintiff, Brad Cordrey, agreed with Mrs. Barlow's assessment: **"honestly, it was like a bitch session,"** and a purpose of the meeting was to get the captain fired. (B-181-82). Lawrence Grose testified that they had discussed this before the meeting, and went to the meeting with the hope that Captain would get fired. (B-198, 212). Jamie Locklear also agreed that the focus of the meeting was on trying to get Captain fired. (B-252-54). All of the issues discussed at the meeting concerned internal workplace operations. (B-184, 199). Even Plaintiffs themselves agreed that everyone had complaints about Chief and Captain; they also enumerated their own personal workplace complaints, such as regarding duties and assignments. (B-7-9, 61-63, 67).

Mrs. Barlow met with Town Manager Dvornick on his first day back from vacation to discuss the meeting. (B-93, 216). Mr. Dvornick contacted Shawn

Brittingham that same day, and Brittingham provided feedback for a proposed survey of the officers' concerns. (B-216, 364-65; B-13-15).

Investigation, hearing and discipline for violation of Chain of Command policy.

Upon learning of the secret meeting at Ms. Barlow's house, it became apparent that the Chain of Command policy had been violated, and an internal affairs (IA) investigation was necessary. (B-123-24). Due to the number of GPD officers involved, Chief requested the assistance of a neutral agency, Dover PD, to help conduct the investigation. (B-124). Dover assigned Det. Richardson to do the interviews. (B-124, 201). Captain Holm was in charge of the investigation and, after reviewing the interviews, determined that several potential violations were exonerated, but a violation of insubordination was substantiated. (B-125). Topping offered each officer[6] a letter of reprimand (LOR) as a sanction; Topping discussed this with Town Council as a way to put the issue to rest without having to seriously discipline the officers. (B-125-26).[7] A LOR for this offense was below the minimum sanction for the offense in the disciplinary matrix. (B-127).

Three of the officers, including Plaintiffs, refused the LOR and requested a hearing board to contest the charges. (B-126-27). A hearing board is not an "appeal"

[6] Junior officers Cooper and Locklear were completely exonerated, as it was determined that they may have been influenced by more senior officers. (B-126).

[7] The Superior Court actually erred in its recitation of the facts surrounding the LOR, saying that "Topping was told [by Council] to offer this sanction." (Mem. Op at 6, A-20). The record actually shows that the LOR was suggested by Topping, and Council approved. (B-159).

of the LOR; it is contesting guilt of the charge, so the issue of penalty is off the table unless and until the officer is found guilty. (B-128, 162). There was, therefore, no "increase" in penalties, as Plaintiffs contend. (AOB at 5). A CJC evidentiary hearing was held, before 3 officers unaffiliated with Georgetown, and Plaintiffs were found guilty of insubordination. (B-293-302). The trial board concluded "that [plaintiffs] violated …the Code of Conduct by . . . going outside the chain of command to discuss *internal police matters* with Sue Barlow…." (B-299, emphasis added). Chief then issued sanctions, after consultation with legal counsel, which were within the disciplinary matrix for the class of offense. (B-31, 84, 131, 138). Plaintiffs exercised their right of appeal to Town Council, a hearing was held, and Council upheld the discipline after a hearing. (B-137-39). PFC Story received a 2 week suspension without pay and 7 day reduction in rank, and Cpl. Brittingham, a supervisor, received 4 week suspension without pay and 14 day reduction in rank. Both men were placed on disciplinary probation for one year. (B-387, 395).

Events following the Discipline

Despite their claims of "retaliation" in this litigation, both Plaintiffs worked fairly uneventfully following the disciplinary action. Although Plaintiffs complain of some ordinary management decisions, there is no evidence in the record of any action that could reasonably be considered "retaliation" by defendants. (D.I. #67, ¶24 (B-409-10); B-29-30, 34, 76-78, 190). Starting around August 2010 and

continuing until at least September 2013, Plaintiff Story made in excess of 400 hours of secret audio recordings of himself and others inside and outside the workplace. These recordings were produced in discovery, and some of them were played at depositions, in support of Defendants' case. (B-79-82).

Plaintiff Brittingham voluntarily quit his employment with GPD to accept a job with Milford PD in May, 2011. (B-388). When Chief Topping learned that Brittingham had applied to Milford, Topping cooperated with his application, but actually tried to get Brittingham to stay with GPD, telling him he could still change his mind. (B-36-37, 42-43). Topping allowed Brittingham, a K-9 officer, to keep his dog, Dino (owned by GPD), when he left. (B-38, 176-77). Plaintiff Christopher Story resigned from GPD on January 10, 2014, and took a job with Laurel PD.[8]

[8] Although Plaintiff Brittingham filed a constructive discharge claim (Count V) as part of the litigation below, the parties agree that Plaintiff Story does not assert such a claim, and stipulated that his resignation is not at issue in this litigation.

ARGUMENT

I. THE SUPERIOR COURT PROPERLY GRANTED SUMMARY JUDGMENT IN DEFENDANTS' FAVOR AS TO ALL COUNTS OF PLAINTIFFS' THIRD AMENDED COMPLAINT.

A. Questions Presented.

Whether the Superior Court properly granted summary judgment as to the five counts of the Third Amended Complaint, after 3 ½ years of litigation, where there was no genuine issue as to any material fact and Defendants were entitled to judgment as a matter of law as to each claim. All of Defendants' arguments for summary judgment were preserved before the trial court in Defendants' Opening and Reply Briefs in Support of Motion for Summary Judgment. (D.I. #92, 95).

B. Standard of Review.

On review of a grant of summary judgment, the inquiry is whether there is any genuine issue of material fact, and if not, whether the moving party is entitled to judgment as a matter of law. *Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808, 815 (Del. 2013). In addition, an appellee may defend the judgment with any argument that is supported by the record, even if it questions the trial court's reasoning or relies upon a precedent overlooked or disregarded by the trial court." *Id*.

C. Merits of Argument.

1. The Superior Court properly granted Summary Judgment as to Counts I, II and III, applying the appropriate legal standards to issues of law as to whether Defendants' chain-of-command policy was

constitutional, and whether Plaintiff-employees' actions constituted protected conduct under the federal or Delaware constitutions. No disputes of material fact exist which would preclude these findings on the record.

In response to a motion for summary judgment, the nonmoving party "may not rest upon the mere allegations or denials of [its] pleading, . . . [but] must set forth *specific fact*s that indicate a genuine material issue for trial." Super. Ct. Civ. R. 56(e) (emphasis added). Plaintiffs will "not satisfy [their] burden merely by pointing to self-serving allegations that otherwise are without evidentiary support". *Cliff v. Bd. of Sch. Comm. of City of Indianapolis*, 42 F.3d 403, 408 (7th Cir. 1994)(citation omitted). In the instant case, Plaintiffs point to nothing in the record to demonstrate that any disputes of material fact exist which would preclude summary judgment, particularly as the constitutional questions presented are issues of law for the reviewing Court. *Volkman v. Ryker*, 736 F.3d 1084, 1089 (7th Cir. 2013).

a. Georgetown Police Department's Chain of Command policy is constitutional and well within the wide latitude afforded to paramilitary organizations to regulate employee speech.

Plaintiffs have pointed to no facts or legal authority to support their claim in Count I that the GPD Chain of Command (COC) policy (B-371-74), which requires prior notification of the Chief of Police before discussion of operational matters outside the department, was unconstitutional "on its face." Despite Plaintiffs' creation and use of the term "Silence Order" and unsupported claim that the policy prohibited officers from speaking to "any person," ever, about the department, the

COC policy speaks for itself and, on its face, is limited to communications with Mayor and Council and the Town Manager (B-373), about "operational issues" and employee "concerns" (B-371, 373). The policy does not say that issues *cannot* be elevated,[9] but says that they are to pass through the chain of command *first*, up to and including the Chief ("without FIRST notifying the Chief of Police" B-371).[10] Further, the COC Policy was not an arbitrary or unauthorized act of the Chief, but had been approved by Town Council and the Town Manager as the manner by which employees should raise complaints. (B-165-66; B-377).

Plaintiffs ignore or downplay the fact that a chain of command policy is a routine and necessary mechanism used to maintain order in a paramilitary organization. The trial court correctly recognized the well-settled principle that "because police departments function as paramilitary organizations . . . they are given more latitude in their decisions regarding discipline and personnel regulations. . . ." Mem. Op. at 11 (A-25), *citing Volkman*, *supra*, 736 F.3d at 1092. *See also Kelley v. Johnson*, 425 U.S. 238, 245 (1976); *Ober v. Evanko*, 80 F. Appx. 196 (3d Cir. 2003).

Ober did not hold, as Plaintiffs argue, that a COC Policy "must" provide room

[9] It says "after exhausting the direct chain of command, they can be elevated. . ." (B-373).
[10] Even Plaintiffs' own complaint states that the COC policy was not to raise internal issues outside the Department "without going through [the Chief] first" – not a blanket prohibition. (B-405-06, ¶¶10-12). *See Krauss v. State Farm*, 2004 WL 2830889 (Del. Super. 2004) (discussing judicial admissions).

for "bypass" when the heads of the department are the subject of the speech. (AOB at 9-10). The court merely said that it was "possible" that bypassing a COC "might" be justified in a situation where superiors are reasonably suspected of wrongdoing.[11] 80 F. Appx. 196, 201 (3d Cir. 2003). Here and below, Plaintiffs rely heavily upon *Czurlanis v. Albanese*, 721 F.2d 98 (3d Cir. 1983). However, *Czurlanis* is distinguishable on a multitude of levels. First, the employer was the DMV--not a paramilitary department--and plaintiff (a resident of the county) openly spoke out about wrongdoing in his department during public comment at a County Freeholders meeting. The "chain of command" policy in *Czurlanis* differed from GPD's in that it was not specifically directed to line-employees (it was in a Code provision entitled "Separation of Powers"); was unclear as to scope (as opposed to GPD's clear focus on operational issues) and, while the court recognized that the "public interest" of Mr. Czurlanis' particular speech outweighed the employer's interest in the policy, it did not invalidate the policy on its face. 721 F.2d at 106-07. Finally, Plaintiffs' citation to the *Balas v. Taylor* case, 567 F.Supp.2d 654 (D.Del. 2008), has no bearing on their facial challenge to the COC Policy, as *Balas* did not involve a COC policy, but rather focused on the well-settled proposition that *union activity* is constitutionally protected conduct – a factor not present here.

[11] Notably, in *Ober*, the policy was not deemed unconstitutional even where the plaintiff was reporting alleged corruption. Despite Plaintiffs' dislike of Chief and Captain, at no time did they allege corruption or violations of law by their superiors. (B-106). In any event, the GPD COC Policy effectively has a "bypass" by allowing redress pursuant to the Town's personnel policy after utilizing the internal chain of command. (B-373).

Plaintiffs have failed to set forth any authority which would compel a finding of law that GPD's policy, requiring officers to follow the chain of command prior to speaking outside the department about internal issues, was constitutionally infirm on its face[12] and, moreover, that Defendants would have known that, by enforcing it, they were abridging clearly established rights of the Plaintiffs. *See Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2083 (2011)(discussing qualified immunity). Thus, summary judgment in Defendants' favor was properly granted as to Count I.

b. The extensive record clearly demonstrates that Plaintiffs' speech at the Barlow meeting—addressing various workplace grievances—failed to rise to the level of constitutionally protected "citizen" speech on matters of "public concern." Further, the police employer's strong interest in maintaining discipline and order far outweighed any tangential First Amendment interest Plaintiffs had in the speech.

In Counts II and III of the Third Amended Complaint, Plaintiffs asserted [42 U.S.C.] §1983 claims, alleging that Defendants retaliated against them for engaging in constitutionally protected "free speech" and petition activity.[13] The trial court granted summary judgment to Defendants on each of these Counts. As public employees claiming such violations by their employer, the court properly applied the well-settled body of U.S. Supreme Court case law that applies to such claims.

[12] Defendants do not necessarily agree with the lower court's reliance on the nature of Plaintiffs' speech being dispositive of the constitutionality of the policy on its face (Mem. Op. at 12, (A-26)), but this error—if any—is harmless where, on its face, the COC policy is plainly constitutional under the well-settled caselaw concerning paramilitary organizations, and the court correctly found that Plaintiffs did not engage in constitutionally protected conduct in any event.

[13] Count III, while captioned "1983 Action," also included an allegation of violation of "the Delaware Petition Clause."

Whether an employee's speech or conduct is protected by the First Amendment is a question of law for the Court to decide. *Connick v. Meyers*, 461 U.S. 138, 148, n.7 (1968); *Baldassare v. New Jersey*, 250 F.3d 188, 194 (3d Cir. 2001); *Volkman, supra*, 735 F.3d at 1089. The Court must determine, in the first instance, whether the employee spoke as a citizen on a matter of public concern. *Id.* If so, the Court will go on to consider, again as a matter of law, whether the plaintiff's interest in the speech outweighs the government employer's interests in maintaining efficiency and order, giving particular deference in this regard to paramilitary employers. *Volkman, supra* at 1092, *citing Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). This is commonly called the "*Connick/Pickering*" analysis.

Plaintiffs' Opening Brief states that "[t]he record below, as developed, shows that Plaintiffs engaged in an activity protected under the First Amendment," but cites to not a single fact or page of the record in support of this claim. (AOB at 11). To the contrary, as Defendants demonstrated in moving for summary judgment, the record makes clear that, at the Barlow meeting, the Plaintiffs were speaking, not as "citizens" trying to contribute to the public discourse on issues of "public concern," but as *employees* of the Georgetown Police Department, making complaints about management and internal departmental matters of particular concern to themselves.

The first step in the Court's analysis is to "determine[] whether the public employee spoke as a citizen or an employee." *Wilcoxon v. Red Clay Consol. School*

Dist. Bd. of Educ., 437 F.Supp.2d 235, 243 (2006)(*citing Garcetti v. Ceballos*, 547 U.S. 410 (2006)). To warrant First Amendment protection an employee must speak "as a citizen," not "as an employee upon matters only of personal interest." *Connick*, 461 U.S. at 147. *See also Garcetti* at 420 ("First Amendment . . . does not empower [public employees] to 'constitutionalize the employee grievance.'").

Defendants respectfully submit that the court below erred by concluding that the Plaintiffs here were speaking as citizens rather than employees[14], because the statements they made to Barlow were "not part of their [official] employment duties." Mem. Op. at 44, n.133 (A-58). As very few employees' "job duties" include complaining to others about management, virtually all employee/plaintiffs would be found to be speaking as "citizens", under such a restrictive reading of *Garcetti*.[15] This does not square with the Supreme Court's fundamental principle that the First Amendment does not "constitutionalize" the employee grievance.

Rather, many courts, including in Delaware, have held that plaintiffs were acting within their job duties when they expressed job-related concerns "up the chain of command," and were complaining about issues which were within their "special

[14] The trial court correctly noted that if Plaintiffs were not speaking as citizens, summary judgment would be granted on that basis alone. Mem. Op. at 44, n.133. (A-58).

[15] The court also gave short shrift to the "citizen" prong of the *Connick/Pickering/Garcetti* analysis, by finding that Plaintiffs were speaking as citizens simply because the officers were "off duty" at the time of the meeting. Nothing in the case law suggests that "on duty/off duty" is a dispositive factor as to whether one is engaging in protected speech.

knowledge and experience" from being on the job. *Foraker v. Chaffinch*, 501 F.3d 231, 240 (3d Cir. 2007), *abrogated on other grounds by Borough of Duryea, Pa. v. Guarnieri*, 131 S.Ct. 2488 (2011).[16] In the same way as all of these cases, by going to Sue Barlow, Plaintiffs were expressing their concerns about issues within the police department (issues within their specialized knowledge and experience) "up the chain of command" of their government employer. The Organizational Structure of the Town of Georgetown, as Plaintiffs themselves acknowledge, places the "Mayor and Town Council" at the top rung of Town governance and as supervisors of (among others) the Town Manager and Chief of Police. (B-23, 44, 270). The Town was Plaintiffs' employer, and Sue Barlow was a Town official, and Plaintiffs'

[16] *See also Meltzer v. City of Wilmington*, 2011 WL 1312276, (Del.Super. 2011)(city attorney who spoke to Mayor after failing to get relief at lower levels speaking as employee, not citizen, and pursuant to his official duties even though statements were "an unusual aspect of an employee's job that is not part of his everyday functions." At *12); *Gorum v. Sessoms*, 561 F.3d 179, 185 (3d Cir. 2009) (professor who opposed and advocated against University President's position on issues did not speak as a citizen); *Cindrich v. Fisher*, 341 F.Appx. 780, 786, 2009 WL 1950073 (3d Cir. 2009) (attorney sending unauthorized letter to a Judge held to be speaking as employee within the scope of official job duties); *Shingara v. Skiles*, 274 Fed.Appx. 164 (3d Cir 2008)(civilian police employee who complained to superiors about a supervisor in an anonymous letter not speaking as a citizen but as an employee(*citing Garcetti*)); *Bobeck v. Brownsville Area School Dist*., 2009 WL 331593 (W.D.Pa. 2009)(teacher's complaints about inadequate equipment and facilities at school open house "went to the very heart of the manner in which [he] carried out his job," not speaking as a citizen); *Bellaman v. Corbett*, 2011 WL 2893644 (M.D. Pa. July 15, 2011) (where employee's "speech was made . . . as a result of specialized knowledge or experience acquired through her job," she was not speaking as citizen and did not state a claim for First Amendment Retaliation); *Ruder v. Pequea Valley Sch. Dist.*, 2011 WL 1832794 (E.D. Pa. 2011)(internal "complaints up the chain of command . . .do not implicate the right to petition under the First Amendment"); *Rohrbough v. University of Colorado Hosp.*, 596 F.3d 741, 747 (10th Cir. 2010)(hospital employee speaking pursuant to official duties when she complained to senior officials, including hospital president, about "staffing crisis" impacting patient care).

bosses' boss. In short, they sought her out as government "employer" and not as government "sovereign."[17] While they may have impermissibly jumped rank (and violated GPD's COC Policy in so doing), they were still seeking relief regarding aspects of their jobs *within their employment organization*.

However even assuming, *arguendo*, this Court were to agree that Plaintiffs were speaking as "citizens," the trial court correctly found that they failed the rest of the *Connick/Pickering* test. For Plaintiffs to argue on appeal that the trial court "summarily dismissed" their claims (AOB at 12), is remarkable when one reviews the *21 pages* of the decision below in which the Court painstakingly reviewed and analyzed the depositions as they pertained to each of Plaintiffs' factual complaints. (Mem. Op. at pp.17-35, 40-41, (A-31-49, 54-55)). Following this analysis, the Court divided the Barlow-meeting complaints into 3 broad categories of: (1) equipment concerns; (2) low officer morale, and (3) personnel issues. Just as below, Plaintiffs' bare claim on appeal that "the department [was] dysfunctional, unsafe and compromising of public safety" (AOB at 11, 13) is only so much verbiage—as evidenced by Plaintiffs' inability to point to a single page of the evidentiary record which would support such claims. Mrs. Barlow testified: "I don't think that they

[17] *See Hill v. Borough of Kutztown*, 455 F.3d 225, fn.24 (3d Cir. 2006) (as to "petition" claim "[w]e have never held…that a report of a supervisor's misconduct to a legislative body when that legislative body is also the reporter's employer constitutes 'petitioning activity.'").

had a safety concern. I never got that from them, that they had a safety concern (B-94).

The trial court correctly held that, in determining whether an employee's speech addresses a matter of public concern, "[t]he focus is on the role the employee has assumed in advancing the particular expressions: that of a concerned public citizen, informing the public that the state institution is not properly discharging its duties, or engaged in some way in misfeasance, malfeasance or nonfeasance; or merely as an employee, concerned only with internal policies or practices which are of relevance only to the employees of that institution." Mem. Op. at 39, A-53 (*citing Dahl v. Rice County, Minn*., 621 F.3d 740, 744 (8th Cir. 2010)). Or, as the court in *Murray v. Gardner* succinctly put it: "the role of the whistle-blower merits protection; the expressions of personal dissatisfaction by a discontented employee do not." 741 F.2d 434, 438 (D.C. Cir. 1984).

After analyzing each of the three categories, the Court held that only "equipment concerns" might possibly state an issue of public concern, allowing the Court to proceed to the *Pickering* balancing test. (Mem. Op. at 36-42, (A-50-56)). This was a very generous reading of the factual record in Plaintiffs' favor because, as the Court itself noted, the "vest issue [expired manufacturer warranties] is a nonstarter," because the Plaintiffs themselves *had* "in-warranty" vests and agreed that the issue had been resolved by the time of the meeting; the Court also noted that

none of the "passing references" about vehicle maintenance were detailed in the record; "[r]ather, they reflect a pattern of conclusory complaints." Mem. Op. at p. 42, n.129 (A-56). Finally, the depositions revealed that the focus on vest and vehicle issues at the Barlow meeting was "attenuated." *Id*. For example, Mrs. Barlow testified that "the focus of the meeting was the complaints against the captain and the chief that had nothing to do with the cars or the vests." (B-100); *see also* B-240, 251-54; B-14-16, 81-82; B-182, 194, 198-99 (Locklear, Cordrey and Grose).

With this one narrow issue of potential public concern in mind, the court proceeded to the *Pickering* balancing test, noting that, as a paramilitary employer, GPD had, on its side of the scale, a paramount interest in maintaining order and discipline. Mem. Op. at 43 (A-57). Again, contrary to Plaintiffs' claims on appeal that the trial court "summarily" rejected their claims (AOB at 12-13), the court once again engaged in a thorough discussion and balancing. The court noted the private and impromptu nature of the meeting; the fact that the record showed that this was a case of "secret griping" rather than "secret informing"; that Plaintiffs' comments were directly focused on the Captain and Chief, and "the factor that weighs most heavily against Plaintiffs"--the fact that their speech only minimally touched on a matter of public concern. Mem. Op. at 44-46 (A-58-60). Plaintiffs' speech was "most accurately characterized as . . . employee grievance[s] concerning internal office policy." *Id* at 46 (*citing Connick*). Therefore, the trial court held, Defendants'

disciplinary actions had not violated any First Amendment right of Plaintiffs.

Oddly, Plaintiffs claim that the trial court "erred" by "ignoring"[18] the Third Circuit cases of *Czurlanis, supra*, and *Watters v. City of Philadelphia*, 55 F. 3d 886 (3d Cir. 1995), in favor of the *Pickering* balancing test. (AOB at 14-15). Each of these Circuit Court cases are, of course, subordinate to the U.S. Supreme Court's pronouncements in *Pickering*, and each of these cases themselves applied the *Connick/Pickering* tests to reach their conclusions on their entirely unique fact patterns. Plaintiffs also erroneously suggest that their actions should be condoned unless there was some *actual* disruption or detriment to GPD's operations. (AOB at 14). It is well settled that this is not the case. The mere risk of such disruption to the workplace is sufficient to have it weigh (heavily, in the case of police agencies) in the *Pickering* balance. "[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Connick, supra*, 461 U.S. at 152. "There is value in maintaining order and respect for their own sake in a paramilitary context. . . ." *Volkman, supra*, 736 F.3d at 1092. *See also Guarnieri, supra*, 131 S.Ct. at 2494.

The court also did not find, as Plaintiffs suggest (AOB at 16) that Plaintiffs suffered no "adverse" action. *See* Mem. Op. at 17 (A-31). Certainly, they perceived

[18] The trial court actually discussed each of these cases at some point.

their disciplinary suspensions to be "adverse." The question, for purposes of summary judgment, was whether Plaintiffs could establish that the adverse employment action "was causally connected to his participation in a protected activity." *Dahl*, 621 F.3d at 744 (citation omitted). The court below correctly answered this question in the negative.

The trial court held that Plaintiffs' failure to establish a claim for violation of "free speech" under the First Amendment necessarily precluded their claims under for "petition/assembly" violations under the First Amendment and the Delaware Constitution, on the same set of facts. The U.S. Supreme Court has held that the law governing public employee "speech" and "petition" retaliation claims is virtually identical, and the same legal analysis applies *(i.e. Connick/Pickering*). *Guarnieri, supra*, 131 S.Ct. at 2493 (2011).[19]

Plaintiffs argue, without authority, that the Delaware Constitution's "Petition/Assembly" clause (what they term the "Meeting/Application" clause), *Del. Const*. Art. I, §16, provides them with "broader" rights than does the First Amendment. Plaintiffs also attempted to argue below that Defendants had waived summary judgment as to the Delaware "petition clause" claim. This is plainly incorrect and the trial court did not find that any waiver occurred. Plaintiffs were

[19] As a "Petition" claim typically involves the invocation of a *formal* method of redress, it seems unlikely that the factual elements surrounding the Barlow meeting would qualify as a "petition" in any event. *Guarnieri* at 2494.

clearly on notice that Defendants moved for "summary judgment . . . as to Plaintiffs' Third Amended Complaint in its entirety." (D.I. #92). Plaintiffs' purported state law claim was subsumed within Count III of their Complaint (entitled "§1983 Action"), which was addressed in the briefing, noting, as here, that the law governing public employee speech and petition retaliation is virtually identical. *See also State v. Elliott*, 548 A.2d 28, 31, fn.6 (Del.Super. 1988)(discussing Art. I, §16, and noting that freedoms of assembly and speech often considered as "one concept").

Contrary to Plaintiffs' bare arguments, there is no authority suggesting that the Delaware Constitution intended to afford citizens some "greater protection" for petition activity than that set forth in the First Amendment.[20] Absent such authority (which Plaintiffs do not cite and which does not exist), the same well-settled legal principles from the U.S. Supreme Court as to "public employee" speech or petition should apply when public employees seek to bring a claim under the Delaware assembly/petition clause, Art. I, §16.[21]

The Delaware assembly clause provides:

> Although disobedience to laws by a part of the people, upon suggestions of impolicy or injustice in them, tends by immediate effect and the influence of example not only to endanger the public welfare and safety, but also in governments of a republican form contravenes the social principles of such governments, founded on common consent for common good; yet the citizens

[20] This argument was rejected as unsupported by the Superior Court when made by the criminal defendants in *State v. Elliott*, *supra*, 548 A.2d at 31, with Court applying federal authority.

[21] Plaintiffs themselves apparently recognized this principle earlier in this litigation. In 2011, Plaintiffs conceded that "Defendants are correct that Free Speech and *Petition Clause claims share 'citizen' and 'public concern' issues*." (D.I. #48, p. 14, fn. 15 (emphasis added)). Plaintiffs did not differentiate their "Delaware" petition claim from their federal claims in this regard.

> have a right in an orderly manner to meet together, and to apply to persons intrusted with the powers of government, for redress of grievances or other proper purposes, by petition, remonstrance or address.

On its face, the latter portion of the clause is textually parallel to the First Amendment (*Federal*: "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"; *Delaware*: "right in an orderly manner to meet together and to apply to . . .government for redress of grievances…."[22]

The opening clause is important and instructive—and not in a way that assists Plaintiffs--in that, while Delaware affords "citizens" (begging the question of whether public employees are speaking as such in any given case) the same petition rights as the federal constitution, the State puts a heightened focus on the right of *government* to control some assemblies for purposes of public safety. *Taylor v. Municipal Court*, 247 A.2d 914, 918 (Del.Super. 1968). §16's focus is clearly on "assemblies"—meaning persons engaged in an organized form of civic activity. With this focus, unsurprisingly, the few Delaware cases addressing this clause pertain almost exclusively to situations where assemblies implicated public safety, and Delaware courts have been uniformly deferential to government and police concerns. *Taylor, supra* (Wilmington "unlawful assembly" ordinance); *State v. Ayers*, 260 A.2d 162 (Del. 1969)(Delaware "Riot Act"); *State v. Elliott*, *supra*,

[22] *Compare/Contrast Doe v. WHA*, 88 A.3d 654, 665 (Del. 2014)(federal precedent not controlling where (in contrast to §16) Delaware constitutional provision re: right to bear arms "intentionally broader" than federal, on its face, per legislative history, and prior Delaware cases did not use federal case law for guidance).

(qualified "right of assembly" re: criminal convictions in anti-abortion protest).

The few Delaware cases addressing Art. I, §16 also counsel the application of analogous federal precedent to this clause. The *Taylor* court noted that there were no decisions "directly interpreting the language" of §16; therefore it is "imperative" to examine "the reasoning of any case which, by analogy, might aid in such construction." 247 A.2d at 917. This Court in *Piekarski v. Smith*, 153 A.2d 587 (Del. 1959) relied on "historical" considerations and scholarly analysis of the First Amendment in rejecting plaintiffs' claims that denial of a formal hearing by state agency violated Art. I, §16, and in *State v. Ayers*, *supra*, the Court analyzed §16 along with the First and Fourteenth Amendments regarding "right of assembly". Plaintiffs offer no basis to conclude that the well-settled and nuanced body of First Amendment caselaw regarding regulation of public employee speech/petition should not be equally applicable to a public employee's claim under Art. I, §16, or that Delaware law negates the federal principles in any way.

Plaintiffs also seem to overlook the fact that they ultimately bear the burden of proof on *all* of the claims they raise in this litigation. As to the "assembly" rights which are the focus of the Delaware Constitution, Plaintiffs point to no evidence in the record that they were unlawfully disciplined for "assembling" with the other officers to go to Mrs. Barlow's house (assuming *arguendo* this was an "assembly") and, indeed, each officer was disciplined individually and not for acting as a group.

c. While the Superior Court did not reach the issue, Defendants would be entitled to qualified immunity, even if Plaintiffs had demonstrated that any constitutionally protected conduct occurred, as Defendants' conduct did not violate any clearly established constitutional right.

Even if, by some stretch of the imagination, the record could be construed to determine that Plaintiffs prevailed upon every question of law in the *Garcetti/Connick/Pickering* analysis regarding employee speech, the individual Defendants would be entitled to qualified immunity for maintaining and applying the COC policy. The trial court did not need to reach this question, as it found that Plaintiffs failed to survive the *Pickering* balancing test, and thereby failed to establish a constitutional right. *See Volkman*, *supra*, 736 F.3d at 1090. Qualified immunity protects government officials performing discretionary functions from civil liability unless the conduct "violates clearly established law [where] . . . the contours of a right are sufficiently clear *that every reasonable official would have understood that what he is doing violates that right* . . . ." *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2083 (2011)(emphasis added); *Volkman*, *supra*.

The Plaintiff bears the burden of establishing that the constitutional right at issue was clearly established. *Volkman* at 1090. Given the U.S. Supreme Court, and other courts', deference to the particular importance of *internal* regulation and paramilitary control in police departments—well-established in the case law at the time of the disciplinary action--there is no possible way Defendants (let alone "every

reasonable [police] official") would have known they were violating any "clearly established" rights by enforcing the COC Policy. *See* B-166.

In *Lane v. Franks,* the Supreme Court held that the Defendant was entitled to qualified immunity for firing an employee for testifying truthfully in a corruption trial, because the caselaw in the applicable circuit was internally inconsistent and "the question was not 'beyond debate' at the time Franks acted." 134 S.Ct. 2369, 2374 (2014)(*citing Ashcroft v. al-Kidd*). In *Lane*, however, there was at least *some* circuit law that held that it was improper to fire an employee for testifying, but Franks was still granted qualified immunity. By contrast, in the instant case, there is no case law whatsoever from Delaware, from the Supreme Court or in the Third Circuit that establishes "beyond debate" (or even suggests) that the type of Chain of Command policy Chief Topping applied – requiring operational concerns to go through the internal chain of command and through his office before being elevated outside the Department – would violate any clearly established constitutional right of a police officer employee.

2. The Superior Court properly granted summary judgment as to Count IV, Plaintiffs' "Whistleblower" claim, as there is no evidence whatsoever in the record that would satisfy the statutory elements of this claim.

Count IV of Plaintiffs Third Amended Complaint was an allegation of violation of the Delaware Whistleblowers' Protection Act, 19 *Del.C.* Ch. 17. The Act provides protection from discharge, threats or other discrimination to an

employee who reports "a violation which the employee knows or reasonably believes has occurred, or is about to occur." 19 *Del.C.* §1703. The Act is not a vehicle to bring lawsuits for ordinary workplace grievances. "Violation" is a specifically defined term under the Act, and means an act of the Employer that constitutes either financial misappropriation or is:

> [m]aterially inconsistent with, and a serious deviation from, *standards implemented pursuant to a law, rule or regulation promulgated under the laws of this State, a political subdivision of this State, or the United States, to protect employees or other persons* from health, safety, or environmental hazards while on the employer's premises or elsewhere.

19 *Del.C.* §1702(6)(a).

While the record contains no evidence that there ever was "discharge, threats or other discrimination" against Plaintiffs, Plaintiffs' "Whistleblower" claim fails at the outset, because there is no evidence whatsoever in the record that Plaintiffs reported, at the Barlow meeting, any "violation" of or deviation from "a law, rule or regulation," duly promulgated, "to protect employees or other persons from health, safety or environmental hazards." Mrs. Barlow testified:

> Q: Was anything disclosed to you at the meeting that you considered a violation of law?
> A: No.
> Q: Were any health, safety, or environmental hazards at the police department discussed at the meeting?
> A: No.

B-106; s*ee also* B-184, 199 (no discussion of health, safety, environmental violations at the meeting). While Plaintiffs on appeal claim that a report can be based upon a

"reasonable belief" that a violation occurred, they still have never identified *what laws, rules or regulations* they purportedly "believed" were violated by Defendant and which they disclosed to Mrs. Barlow.[23]

As below, Plaintiffs try to avoid summary judgment by contending that the substance or content of the issues raised at the Barlow meeting "is in dispute." (AOB at 19). They provide not a single citation to the record to support this claim and it is, in fact, untrue. The "substance" of the meeting is found in the depositions (and one affidavit, B-239-40) of six of the nine meeting attendees (to include Mrs. Barlow), with no witness' testimony in material disagreement with any other's.

Plaintiffs cannot rely on the "expired vest warranty" issue to make out their "Whistleblower" claim, as the record is undisputed that there are no "laws, rules or regulations" which govern the use of vests after the manufacturer's warranty has expired, or their functional lifespan in general. (*See* B-22). Furthermore, both Plaintiffs had "in warranty" vests at the time of the meeting and they themselves did not even mention vests at the Barlow meeting. From the time of their pleading all the way through summary judgment proceedings and this appeal, Plaintiffs have done no more than to recite the "magic words" of 19 *Del.C.* §1702(6)(a), while failing to demonstrate, with evidence, that the statutory terms have been met. It is

[23] Plaintiffs, at AOB p.19, again falsely claim that they raised concerns about "public safety"—a claim belied by the record. (*See* pp. 20-21, *supra*). They also cite to a generic provision of the current Town Charter (not the version in effect at the time of the Barlow meeting) which provides that the Town Council shall provide generally for the safety and good order of the Town.

clear on the record that the Court properly granted summary judgment in Defendants' favor as to Count IV.

3. The Superior Court properly granted summary judgment as to Count V, Plaintiff Brittingham's claim for "constructive discharge" in violation of the covenant of good faith and fair dealing, as the Court correctly found that no evidence exists in the record in support of this claim.

In Count V of the Complaint, Plaintiff Brittingham alleged, with no details, that the Town "constructively discharged" him for his actions at the Barlow meeting, in violation of the doctrine of "good faith and fair dealing." This "doctrine" is a judicially-created, public policy exception to the typical rule of "at-will" employment, which provides that "an implied covenant of good faith and fair dealing may be breached in some circumstances for the termination of an at-will employee." *Schuster v. Derocili*, 775 A.2d 1029, 1035 (Del. 2001)(termination for failure to submit to sexual harassment deemed a violation, as a matter of public policy).

When Defendants moved to dismiss the Third Amended Complaint, the Court allowed the "doctrine"/constructive discharge Count to proceed on the basis that Brittingham's allegations of "First Amendment" violations, if proven, could constitute a "public policy" violation, assuming of course he could prove he was constructively discharged for protected conduct[24]. In addition to denying

[24] This Court has held that the theory of "implied covenant" does *not* to apply to alleged "retaliation" for an employee questioning the propriety of the employer's business practices. "Employees who uncover and blow the whistle on questionable internal financial and business practices [absent illegality] have won no support from the courts.'" *E.I. DuPont de Nemours &*

constitutional violations, Defendants moved for summary judgment on this claim based on the fact that Plaintiff Brittingham, by his own admissions at deposition, was not "constructively discharged" at all – he voluntarily quit his employment.

In support of this claim, Brittingham testified to no more than that he was upset by the discipline and stressed out by his job and he "saw an opportunity to leave [to Milford] after everything that was going on, and I took it." (B-35-36). He agreed that he was not terminated, nor IA'd for anything after the Barlow discipline; Chief did not harass him – they "barely conversed" and he "didn't have to deal with him." (B-36). Brittingham acknowledged that he could not be forced out of his job without being able to challenge a discharge under LEOBOR. *Id*. Chief allowed Brittingham to pursue the Milford position on work time and made him a present of his K-9. (B-38, 42-43). Most importantly, Brittingham conceded that Chief Topping—far from forcing him out—actually tried to get him to stay on at Georgetown. (B-37). This conversation was memorialized in an audio recording. (B-42-43). Chief Topping also confirmed this discussion at his deposition. (B-172-73) ("I told him he didn't have to leave.")).

Co. v. Pressman, 679 A.2d 436, 442 (Del. 1996)(citations omitted). A case cited by Plaintiffs (AOB at 20) similarly opines that it "appears that Delaware will not invoke the public policy exception absent some illegal act by the employer." *Jordan v. Town of Milton*, 2013 WL 105319, *12 (D.Del. 2013).

On this record, the trial court logically found that Brittingham did not demonstrate "working conditions so intolerable that a reasonable person would have felt compelled to resign." Mem. Op. at 47 (A-61). No reasonable trier of fact could find that Shawn Brittingham demonstrated that he was "constructively discharged" at all, let alone in violation of the doctrine of good faith and fair dealing. The Court properly granted summary judgment as to Count V.

CONCLUSION

For all of the reasons set forth herein, Appellees, Town of Georgetown, William Topping and Ralph Holm respectfully request that this Court AFFIRM the decision of the Superior Court in its entirety.

Respectfully submitted,

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