No. 14-35185

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RHONDA LEDFORD; RAYMON GREGSTON; JO MCKINNEY; SHANE PENROD; KIM MCCORMICK; BOB ROBINSON; GRACIE REYNA; TOM DE KNIF; FRANK FARNWORTH; DIANA CARNELL; PHILLIP GREGSTON; LISA LITTLEFELD; ADDISON FORDHAM,

Plaintiffs-Appellees,

vs.

IDAHO DEPARTMENT OF JUVENILE CORRECTIONS, AN EXECUTIVE DEPARTMENT OF THE STATE OF IDAHO,

Defendants

SHARON HARRIGFELD, IDJC Director; BETTY GRIMM, IDJC Juvenile Corrections Center — Nampa Superintendent

Defendants-Appellants.

Appeal from the United States District Court for the District of Idaho
Case No. 1:12-cv-00326-BLW
Honorable B. Lynn Winmill, presiding

APPELLEES' RESPONSE BRIEF

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Federal Constitutional Authorities and Statutes

Federal Cases

Federal and Circuit Rules

Idaho Statutes

Idaho Cases

I. INTRODUCTION

At the heart of the Plaintiffs' claims in this matter is the unlawful retaliation they have all experienced in response to their reports and complaints of pervasive and multi-dimensional corruption at the Idaho Department of Juvenile Corrections.

That corruption is manifested in the tolerance by the Defendants of unreasonably dangerous living and working conditions that expose juvenile offenders, IDJC employees, and even the public to needless dangers; in the unchecked waste of public funds; in unfair and illegal cronyism in hiring, promotions, and disciplinary processes that are required by Idaho law to be merit-based; and, in the ongoing violations of laws and rules that exist to protect against those problems.

As the Appellants themselves point out, the Plaintiffs are occupationally diverse: they are security officers (Ledford and Penrod); rehabilitation technicians (Reyna, Littlefield, and Fordham), maintenance workers (Gregston and DeKnijf); clerical workers (McKinney and McCormick); and a nurse (Farnworth).

Notwithstanding that diversity, and the fact that these troubling issues have personally affected each of them in different ways, the Plaintiffs united over two years ago to bring this action against their own employer because these longstanding problems transcend their individual and personal interests as employees, and are of enormous importance to the integrity of the government of

the State of Idaho itself. They pursued that course only after years of seeing their reports and complaints met with retaliation not only against them, but against their fellow employees, and after it became clear that the entities, people, and systems—i.e., their own employers, as well as IDJC Human Resources and the Idaho Division of Human Resources— would not protect them.

Specifically, Idaho's fundamental competence and willingness to safeguard its own juvenile offenders from violent and dangerous conditions, and even from multiple incidents of sexual exploitation by some IDJC employees, is in question. Where IDJC has failed to do this, it has also recklessly endangered its own employees and the public itself, as both are forced to deal with unrehabilitated and arguably more dangerous criminals-in-training further down the road.

On summary judgment, the Plaintiffs' evidence proved to the satisfaction of the District Court that there are at least questions of material fact as to whether the Plaintiffs' reports and complaints were protected by the First Amendment as expressions by private citizens on matters of public concern, rather than the private grievances of individuals acting squarely within the scope of their assigned tasks and job duties.

The character of those reports and complaints as matters of public concern is evident from the list of laws violated by IDJC: the Prison Rape Elimination Act ("PREA") 42 U.S.C. § 15609, *et seq.*; the Civil Rights of Institutionalized Persons

Act ("CRIPA") 42 U.S.C. § 1997 *et seq.*; the Idaho Administrative Procedures Act ("IDAPA") Idaho Code § 67-5201, *et seq.*; the Juvenile Corrections Act and Rules (Idaho Code § 20-501) that establishes the juvenile corrections system as one based upon the principles of accountability, community protection, and competency development; Idaho Code § 67-5301, *et seq.*, which establishes a merit-based hiring system; the provisions of the Idaho Protection of Public Employees Act ("IPPEA"), Idaho Code § 6-2101, *et seq.* E.R. 1940-1941 (Dkt. 53, Plaintiffs' Memorandum in Response to Motion for Summary Judgment); and, of course, the First and Fourteenth Amendments to the Constitution.

Further, the protected nature of the reports, complaints, and other speech at issue was very well established years prior to the retaliation at issue in this matter. The Defendants thus have no grounds to claim error on the part of the District Court in that respect, particularly where they had the dedicated support and advice of dedicated Deputy Attorneys General for the State of Idaho at all relevant times. The Plaintiffs-Appellees thus respectfully argue here that the answer to both of their questions presented below are yes, that the District Court's ruling was well-founded in both law and fact, and that its partial denial of summary judgment should thus be affirmed on this appeal so that the Plaintiffs may proceed toward trial on this matter.

II. RESPONDENTS' QUESTIONS PRESENTED

1. Was the District Court correct in finding that issues of material fact exist as to whether the Plaintiffs' reports, complaints, and other speech concerning corruption and violations of law by the Defendants were on matters of public concern and beyond the scope of the Plaintiffs' ordinary duties as employees, and thus protected by the First Amendment?

2. Was the District Correct in denying qualified immunity to Harrigfeld and Grimm where the laws prohibiting retaliation against public employees in response to protected speech were clearly established at the time, and where there is evidence that both Harrigfeld and Grimm were directly involved in unlawfully retaliating against the Plaintiffs?

III. RESPONDENTS' STATEMENT OF FACTS

A. The Appellants omitted required evidence relied upon by the District Court from the Excerpts of Record.

As a threshold matter, the Court is likely to be misled by the Appellants' unexplained omission from the Excerpts of Record of all but five pages of Exhibits "A" through "KK" to the Declaration of Andrew T. Schoppe with Compendium of Exhibits in Support of Opposition to Motion for Summary Judgment (Dkt. 55; E.R. Vol. VIII). Other portions of the 2,354 pages in those exhibits were relied upon by the District Court in reaching its decision, and their inclusion in the record will

likely assist this Court in considering this appeal. Appellees have thus filed a supplemental Excerpt of Record[1] along with this Response.

B. The Plaintiffs reported and complained about corruption, violations of law, unfair and unlawful hiring practices, and waste of public resources.

The evidence set forth in the exhibits noted above shows the Appellants' claim that the Plaintiffs made no reports concerning matters of public concern to be utterly untrue. As outlined below, that evidence also amply satisfies the "content, form and context" *Connick* factors which the Appellants incorrectly claim was absent from the District Court's ruling.

First, in 2011 and 2012, all of the Plaintiffs, as well as many of their colleagues, developed serious fears for their safety and for that of the juveniles incarcerated at JCC Nampa. The Plaintiffs and others believed that chronic short-staffing problems violated the juveniles' civil rights where IDJC could not maintain appropriate levels of supervision, well-being checks, or even proper suicide watches, the latter of which are misleadingly misclassified in order to better reflect on safety records. E.R. 2162 (Dkt. 55-1, Ex. A, Ledford Depo.).

JCC Nampa's chronic understaffing caused serious safety and security problems for both staff and juveniles, and impeded staff's ability to perform

[1] Appellees' Supplemental Excerpt of Record consists of conformed copies of all documents in Dkt. 55, redacted here to protect the identities of minors as required by F.R.A.P. 25(a)(5); Fed. R. Civ. P. 5.2. With apologies to the Court and to

necessary tasks, like monitoring juveniles for suicide risk. She testified that this causes a great deal of stress for employees, and puts both employees and juveniles at risk. E.R. 2606—2612 (Dkt. 55-2, Ex. K, Knoff Depo.; E.R. 2162 (Dkt. 55-1, Ex. A, Ledford Depo).

Many O&A staff, including Plaintiffs Fordham, Littlefield, and Reyna, that the changes made by Rotors in that department at the direction of Grimm, Harrigfeld, and Roters, caused the staff there to fear for their safety and for that of the juveniles. E.R. 2163-2165 (Ex. A, Ledford Depo. 198-202). Contrary to the claims of the Appellants, there was nothing in O&A's disciplinary practices that violated the civil rights of any of the juveniles there, or that departed from national norms, and the Plaintiffs and others believed that it was the profound inexperience of Harrigfeld and her changes in disciplinary policies that changed things for the worse. The Appellants' claims that juveniles were locked-down simply for "staff convenience" is a fabrication of Harrigfeld, Grimm, and their tool, Laura Roters. E.R.1960-1964 (Dkt. 53-1, Plaintiffs' Separate Statement, Items 1 through 4); E.R. 2143, 2429 (Dkt. 55-2, Ex. K, Knoff Depo.); E.R. 2164, 2418, 2423, 2424, 2429, 2430, 2623 (Dkt. 55-1, Ex. G, Fordham Depo.).

As for form and context, the Plaintiffs' reports and complaints were raised both inside and outside of the usual channels at IDJC— for example, via Plaintiff

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Appellants' counsel, this process caused Appellees' short delay in filing this Brief.

Gregston's Petition concerning hiring practices— and those reports and complaints were not confined to their own respective areas of responsibility as IDJC employees, but were addressed to the broader corruption problems within IDJC as a whole. E.R. 2140 (Dkt. 55-1, Ex. A, Ledford Depo.; E.R. 2171, 2185, 2186 (Dkt. 55-1, Ex. B, Gregston Depo.).

The protests of the Plaintiffs and of their fellow employees concerning the unfair and unlawful hiring and promotion of both Laura Roters and Julie McCormick, for example, were far beyond their routine duties as IDJC employees, and implicated issues of corruption and IDJC's adherence to the state's purportedly merit-based personnel system. E.R. 2895-2898 (Dkt. 55-7, Ex. Q, Carnell Aff.); E.R. 2899-2904 (Dkt. 55-7, Ex. R, Inman Aff.); E.R. 2918 (Dkt. 55-7, Ex. U, Velten Aff.).

As the District Court noted, hiring and promotions practices and compliance with state laws and policies concerning those practices were HR Director Julie Cloud's job, not the Plaintiffs'. E.R. 129-266 (Dkt. 34, Cloud Aff.). Cloud confirmed at her deposition that the hiring and promotions practices at IDJC are governed by IDAPA Rule 15, and that it is her job to ensure that the IDJC complies with those requirements and with other laws governing employment at the Department. E.R. 953-955 (Dkt. 38-3, Cloud Depo., 17:14-20:23).

Plaintiff Ledford went far beyond her own duties as a Safety & Security Officer by documenting and reporting to the Idaho Division of Human Resources flagrant timecard fraud by former Unit Manager Dave Rohrbach and other IDJC employees. E.R. 466-467 (Dkt. 36-3, Ledford Depo., pp. 136-141); E.R. 2002 2003 (Dkt. 53-1, Plaintiffs' Separate Statement, Items. 97-101).

Harrigfeld, Grimm, and former HR Director Julie Cloud all denied any awareness of the truth of those allegations. E.R. 308-309-(Dkt. 36-3, Harrigfeld Depo., 84:11-18); E.R. 470-472 (Dkt. 36-2, Grimm Depo., 189-191); E.R. 1000-1001 (Dkt. 38-3, Cloud Depo., 75-76).

However, a January 23, 2013 email to Harrigfeld's private email account that was not produced to the Plaintiffs until months after Harrigfeld's deposition, Rohrbach himself —while claiming that he had actually "saved the state" a substantial amount of overtime payments admitted that he had falsified his timecards even while he blamed Plaintiff Gregston for making the allegations and for engaging in unethical conduct in preparing the Petition:

> "A reasonable review of my time sheets, considering what it was I was doing, could only have a person conclude I ate hours. **Oh, technically I falsified my time sheet**, but as far as I know cheating yourself is not "padding" your time sheet nor is it a crime." E.R. 3613-3614 (Dkt. 55-17, LEDFORDSSD127772-127773 [emphasis supplied]).

Grimm also signed off on Rohrbach's timecards, and should have known that he was not reporting his time accurately. E.R. 2607-2609 (Dkt. 55-2, Ex. K, Knoff Depo., 31-36:2).

The other Plaintiffs' reports were similarly related to their workplace, but went beyond the scope of their ordinary duties as employees of IDJC, and implicated corruption, legal violations, unlawful hiring practices, and waste of public resources, all of which are matters of public concern.

Plaintiff Gregston complained directly to Grimm and Harrigfeld about improper hiring and promotions and other practices that were causing increased risks to the safety and security of staff and juveniles. He was the co-author of a petition making these complaints, and Grimm and Harrigfeld questioned him about the petition. E.R. 530-533 (Dkt. 55-1, Gregston Depo., 57-60).

Plaintiff Penrod discussed his criticisms of safety risks directly with Grimm and others, and was the first person to sign the protest petition (referred to above) drafted by Plaintiff Gregston. E.R. 2246-2247 (Dkt. 55-1, Ex. C, Penrod Depo., 127-28, 131-33).

Plaintiff McKinney refused her supervisors' orders to back-date the court records of juveniles, a practice which is illegal and which IDJC employed in an effort to deceive the juvenile courts concerning IDJC's lack of diligence in preparing juveniles' progress reports in a timely fashion as required by law.

McKinney also publicly outed her supervisors' instructions to not record important safety and security-related complaints by juveniles and employees, even with respect to allegations of sexual misconduct involving juveniles, when the reporters failed to check a seemingly insignificant box. E.R. 2628-2629 (Dkt. 55-2, Ex. J, McKinney Depo., 111:6-114).

Plaintiff DeKnijf— a maintenance worker— repeatedly reported the serious problems with safety and security at the facility to his supervisor, who routinely relayed them to Grimm, Harrigfeld, and other administrators. Among those concerns was the fact that juveniles are allowed to wear "gang colors" inside the facility in violation of IDJC's own policies and common sense. E.R. 2472-2475 (Dkt. 55-2, Ex. H, DeKnijf Depo., 145-146; 159-160.

Plaintiff Kim McCormick questioned her supervisors' decisions to unlawfully pay housing and related expenses for juveniles past their release dates, to pay for juveniles' cell phones and gym memberships, and also concerning the significant sums of money spent by IDJC to house some of its most violent and unmanageable offenders in privately-owned residences off-site and with 24/7 caretakers. IDJC also routinely fails to enforce criminal restitution orders issued by the juvenile courts. E.R. 2302-2304 (Dkt. 55-1, Ex. D, McCormick Depo., 117-125).

Plaintiffs and rehabilitation technicians Reyna, Littlefield, and Fordham were all among the most vocal critics of the policies that placed juveniles and staff in great danger in the Observation & Assessment Unit. They also repeatedly complained that the scheduling policies of the unit were unfairly tilted against them, and vocally supported the Petition that had been drafted by Plaintiff Gregston. E.R. 2099-2100, 2114 (Dkt. 53-1, Plaintiffs' Separate Statement, Items. 6, 7, 14); Id., 41:15-46:16, 143:14-144:5, LEDFORDSSD573960.

Plaintiff Frank Farnworth testified that incident reports at IDJC were routinely falsified to make the severity of violent and image-damaging incidents seem less significant, as when a violent assault on one employee that left her unable to speak for months was recorded as little more than a verbal altercation. Farnworth Depo., 163:12-165:14. Farnworth also testified that other incident reports have gone missing or have been altered. Farnworth Depo., 164:16-166:10.

While none of the Plaintiffs witnessed or reported specific incidents in which juveniles were sexually abused by IDJC employees, both Harrigfeld and Grimm were warned by many employees, including some of the Plaintiffs, about the inappropriate behavior exhibited by former Safety & Security Supervisor—and now convicted felon—Julie McCormick toward juvenile "CY," as well as about the charges of child molestation that had been brought against Grimm's personal friend and sometime-IDJC physician Dr. Richard Pines. Neither

Harrigfeld, Grimm, Cloud, Thomson, nor the Deputy Attorneys General who work for IDJC did anything to prevent the abuse. E.R. 2895-2898 (Dkt. 55-7, Ex. Q, Carnell Aff.); E.R. 2899-2904 (Dkt. 55-7, Ex. R, Inman Aff.); E.R. 2918 (Dkt. 55-7, Ex. U, Velten Aff.); E.R. 4341-4345 (Dkt. 55-30, Ex. CC, Curtis Aff.); E.R. 4347-4349 (Dkt. 55-30, Ex. DD, Wilson Aff.). Since this litigation commenced, the Plaintiffs have learned that twelve, and probably more, primarily male juveniles have been sexually abused and exploited by mostly female IDJC employees since 2000. E.R. 3101-3105 (Dkt. 55-9, Plaintiffs' Supp. Resp., Table 18); E.R. 4341-4345 (Dkt. 55-30, Ex. CC, Curtis Aff.); E.R. 4347-4349 (Dkt. 55-30, Ex. DD, Wilson Aff.).

Former O&A lead rehabilitation technician—and another vocal critic of IDJC's corruption and unlawful target of retaliation by Grimm and Harrigfeld—Tom Knoff frequently relayed the concerns of his staff to Grimm and/or Harrigfeld by name, and testified that he and other O&A staff, including some of the Plaintiffs, had openly questioned Grimm's decision to permit her personal friend Dr. Richard Pines, to visit a juvenile in JCC Nampa even after the Idaho Board of Medicine had filed charges against him for the sexual abuse of several minor male patients of his. E.R. 2627-2628, 2675-2676 (Dkt. 55-2, Ex. K, Knoff depo., 47-49; 107-112); E.R. 2899-2904 (Dkt. 55-7, Ex. R, Inman Aff.); E.R. 2895-2898 (Dkt. 55-7, Ex. Q, Carnell Aff.); E.R. 382-386 (Dkt. 36-2, Grimm Depo., 144-147).

C. The Plaintiffs were warned against speaking out, threatened with termination, and subjected to other retaliation and adverse actions in response to their reports.

The Defendants were unhappy with the reports and complaints of the Plaintiffs and others, and took action against the Plaintiffs in an effort to not only silence them, but to make examples of them.

As conspicuously revealed in the documentary evidence, Harrigfeld, Grimm, and Cloud all went out of their way to keep tabs on Rhonda Ledford's communications and activities as early as 2011, when Cloud described Ledford as "disgruntled" and as someone who kept things "stirred." E.R. 3190-3191 (Dkt. 55-10, Ex. Z, LEDFORD093442.

Ledford was instructed by Harrigfeld that Ledford needed to learn how to show that she was a team player and supportive of Harrigfeld's mission, and that Ledford was not to discuss things with staff. Ledford gave up applying for any more positions at that point because she knew that she would never be promoted. E.R. 2155 (Dkt. 55, Ex. A, Ledford depo. 169:21-170:25).

Ledford was instructed not to talk about safety or security issues, timecard padding, or virtually anything else with other employees at the department. These instructions came from Julie Cloud, Julie McCormick, Summer Wade, Betty Grimm, and Sharon Harrigfeld. Ledford was also given unique expectations that no other safety and security officer was given. Her last supervisor before she was

terminated by IDJC Mark Freckleton, was told to do the same thing by Betty Grimm when he became her supervisor in September or October 2012, and after Julie McCormick had been arrested. E.R. 2147 (Dkt. 55-1, Ex. A, Ledford Depo., 134-136). Freckleton told Ledford that it seemed to him that the department was trying to get rid of her. E.R. 2162 (Dkt. 55-1, Ex. A, Ledford Depo., 197-198.

Grimm identified Gregston as "one of the foxes in my henhouse." E.R. 2101 (Dkt. 53-1, Plaintiffs' Separate Statement, 14). Gregston was threatened with disciplinary action if he continued in his criticisms of Grimm and Harrigfeld. E.R. 2200-2205 (Dkt. 55-1, Ex. B, Gregston Depo., 120, 135-36).

Penrod was the first person to sign Gregston's Petition. E.R. 2237, 2256 (Dkt. No. 55-1, Penrod Depo., 127-28, 131-33).Within two weeks of signing Gregston's petition, he was placed on the graveyard shift and was told that it was for "disciplinary" reasons. This reason was, according to Penrod, "unfair" and a "fake thing.". He found the shift change very difficult, especially with respect to the needs of his autistic son. E.R. 2237, 2256 (Dkt. No. 55-1, Penrod Depo.201-203). Other instances of retaliation and adverse action against the Plaintiffs and other employees are extensively documented in Plaintiffs' Separate Statement of Genuine Issues. E.R. 1959-2004 (Dkt. 53-1).

On September 10, 2012, Grimm wrote to Cloud and Thomson that "I spoke to Sharon this evening via phone. The Director has made it clear to me that if I

don't hold Mark Freckleton accountable for Rhonda Ledford, I will be held accountable. We (Julie, Pat, Betty and Mark) will be meeting on Tuesday 9/11/12 to discuss further. I would like minutes taken of our meeting." E.R. 1996 (Dkt. 53-1, Plaintiffs' Separate Statement, Item 66).

Grimm testified at her deposition that she was, for most purposes, "always in close communication…[with Harrigfeld] We talked on the phone, we saw each other face to face, I knew she was always available to me no matter what time of day or night, what day. She was very supportive of me and very helpful." E.R. 362 (Dkt. 36-2, Grimm Depo., 57:21-58:19).

Ultimately, as noted in the Appellants' Brief, Harrigfeld terminated Ledford for gathering evidence— recorded conversations— in support of the Plaintiffs' claims in this matter, another protected activity under Idaho Code § 6-2104. The contrast between Harrigfeld's treatment of Ledford and her treatment of former SSO Julie McCormick, who essentially raped a male juvenile within the walls of JCC Nampa while Harrigfeld stood by and did nothing despite the known risks, could not be more stark, or more of a testament to Harrigfeld's inclinations toward retaliation against those who dare to criticize her.

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IV. ARGUMENT

A. The District Court's ruling implicitly addressed the *Connick* factors concerning the "content, form, and context" of the Plaintiffs' speech.

The Appellants criticize the District Court for failing to pattern its ruling as if it were a geometric proof by not explicitly stating how particular issues of fact met each of the elements—"content, form and context"— of *Connick v. Myers*, 461 U.S. 138, 146, (1983). The District Court had no such duty, as Fed. R. Civ. P. 52(a)(3) does not require it to state its findings or conclusions in issuing its decision, so long as the legal and factual grounds for the partial denial of summary judgment at issue here are sufficiently clear for this Court to meaningfully evaluate the basis for the ruling.

In fact, all of the factors set forth in *Connick* were addressed in the Court's ruling as it described, with citations to the evidentiary record— primarily the Exhibits omitted from the Excerpts of Record by the Appellants— the content, form, and context of the subject communications outlined above.

B. The Plaintiffs' reports, complaints, and other speech concerning the corrupt practices of IDJC were of inherent public concern.

As the Supreme Court ruled earlier this year, "[w]hether speech is a matter of public concern turns on the "content, form, and context" of the speech. *Connick v. Myers*, 461 U. S. 138, 147-148, 103 S. Ct. 1684, 75 L. Ed. 2d 708. **Here, corruption in a public program and misuse of state funds <u>obviously</u> involve**

matters of significant public concern. See *Garcetti*, 547 U. S., at 425, 126 S. Ct. 1951, 164 L. Ed. 2d 689. And the form and context of the speech—sworn testimony in a judicial proceeding—fortify that conclusion. [Citation omitted]." *Lane v. Franks*, 134 S. Ct. 2369, 2373 (U.S. 2014) (emphasis and underlining supplied).

This is not a new principle, either, and numerous cases that predate the incidents at issue in these proceedings completely defeat the Appellants' unsupportable claim that the law was not well-established to the point that Harrigfeld and Grimm knew, or should have known, that they could not retaliate against the Plaintiffs for their speech on such matters.

Even *Connick*— a case decided over thirty years ago, and which is apparently respected by the Appellants— held that speech relates to matters of public concern when it addresses ""any matter of political, social, or other concern to the community." *Connick v. Myers*, 461 U.S. 138, 146, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983)." *Marez v. Bassett*, 595 F.3d 1068, 1074 (9th Cir. Cal. 2010).

In its 2010 decision, the *Marez* Court went on to cite other, more recent cases for this proposition: "Claims of government corruption, maladministration, or misuse of funds fall squarely within the First Amendment. *Huppert v. City of Pittsburg*, 574 F.3d 696, 704 (9th Cir. 2009) ("misuse of public funds, wastefulness, and inefficiency in managing and operating government entities are

matters of inherent public concern."); *Marable v. Nitchman*, 511 F.3d 924, 932 (9th Cir. 2007) ("[A]n employee's charge of high level corruption in a government agency has all of the hallmarks that we normally associate with constitutionally protected speech."). *Marez v. Bassett*, 595 F.3d 1068, 1074 (9th Cir. Cal. 2010).

As the District Court noted, this inquiry is a mixed question of law and fact. *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1129 (9th Cir. 2008).

1. The Plaintiff's "Whistleblower" reports should be deemed matters of public concern because they promote IPPEA's purpose of promoting the integrity of government.

The Plaintiffs' contention that their reports and complaints addressed matters of public concern is supported by the fact that the people of the State of Idaho intended for that law "to protect the integrity of government by providing a legal cause of action for public employees who experience adverse action from their employer as a result of reporting waste and violations of a law, rule or regulation." I.C. § 6-2101; *Van v. Portneuf Med. Ctr.*, 147 Idaho 552, 557, 212 P.3d 982, 987 (2009). To present a prima facie case for retaliatory discharge under the Whistleblower Act, the plaintiff must show: "(1) he was an 'employee' who engaged or intended to engage in protected activity; (2) his 'employer' took adverse action against him; and (3) the existence of a causal connection between the protected activity and the employer's adverse action." *Van*, 147 Idaho at 558, 212 P.3d at 988." *Black v. Idaho State Police*, 155 Idaho 570, 573-574 (Idaho 2013).

While the *Black* Court ruled against the whistleblower plaintiff in that case, it cited other cases for the proposition that "[p]rotected activity may arise in several forms. Examples of protected activity include (1) reporting safety violations that potentially violate federal regulations (*Van*, 147 Idaho at 559-60, 212 P.3d at 989-90); (2) documenting a waste of public funds and manpower (*Curlee v. Kootenai Cnty. Fire & Rescue*, 148 Idaho 391, 394, 224 P.3d 458, 461 (2008)); and (3) communicating a mayor's potential conflict of interest with an employee health plan that could potentially waste public resources. *Smith v. Mitton*, 140 Idaho 893, 898-99, 104 P.3d 367, 372-73 (2004)." *Black v. Idaho State Police*, 155 Idaho 570, 573-574 (Idaho 2013), n3.

Where the Plaintiffs presented substantial evidence showing that their reports and complaints concerned corruption and other issues along the lines identified in *Black* and the cases it cites, those reports and complaints are even more deserving of protection under the First Amendment as matters of public concern.

C. The Plaintiffs' reports on matters of public concern are protected because their duties did not require those reports or complaints to be made.

First, "[t]he scope and content of a plaintiff's job responsibilities is a question of fact over which the courts lack jurisdiction, while 'the ultimate constitutional significance of the undisputed facts' is a question of law." [Citation

omitted]." *Hagen v. City of Eugene*, 736 F.3d 1251, 1257-1258 (9th Cir. Or. 2013).

"[A] public employee's speech on a matter of public concern is protected "if the speaker 'had no official duty' to make the questioned statements, . . . or if the speech was not the product of 'performing the tasks the employee was paid to perform.'" *Posey*, 546 F.3d at 1127 n.2 (alteration and some internal quotation marks omitted) (quoting *Marable v. Nitchman*, 511 F.3d 924, 933 (9th Cir. 2007); *Freitag v. Ayers*, 468 F.3d 528, 544 (9th Cir. 2006)). Statements do not lose First Amendment protection simply because they concern "the subject matter of [the plaintiff's] employment." *Freitag*, 468 F.3d at 545." *Hagen v. City of Eugene*, 736 F.3d 1251, 1257-1258 (9th Cir. Or. 2013).

In the *Marable* case cited in *Hagen*, the plaintiff-employee worked as an engineer for the State of Washington's ferry system. He worked on a specific ferry and was promoted to alternate state chief engineer, and was responsible for the engine department. The plaintiff made complaints about corrupt practices on the part of the management, and later alleged that he was demoted and received a week's suspension in retaliation for speaking out against his employer's corruption. Like the Plaintiffs in these proceedings, he filed an action under 42 U.S.C. § 1983, and alleged violations of his First Amendment rights in the form of retaliation, the

violation of his rights to due process, and related state law claims, including a Washington statutory "whistleblower claim." *Marable*, 511 F.3d at 926-927.

On appeal of the lower court's order granting the employer's motion for summary judgment, the Ninth Circuit's appellate panel found that the plaintiff suffered an adverse employment action because he was accused of misconduct and suspended without pay. The appellate court also found that there were triable issues of fact regarding whether the alleged protected speech was a motivating factor in the disciplinary action. The plaintiff's complaints concerning his superiors' allegedly corrupt overpayment schemes were not a part of his official job duties as the alternate state chief engineer, and he had no official duty to ensure that his supervisors were refraining from the alleged corrupt practices. The appellate court held that "[t]he district court erred in concluding that *Freitag* mandates the holding that Marable's speech was pursuant to his official duties. At the outset, we think it worth noting that an employee's charge of high level corruption in a government agency has all of the hallmarks that we normally associate with constitutionally protected speech. The matter challenged was a matter of intense public interest, had it become known, and criticisms of the government lie at or near the core of what the First Amendment aims to protect." *Id.* at 932.

In evaluating the issue, the Ninth Circuit appellate panel noted that "[t]he Supreme Court has observed that the inquiry into whether employee speech is pursuant to employment duties is a practical one. [Citation omitted]… Thus Marable's formal job description is perhaps not dispositive. Functionally, however, it cannot be disputed that his job was to do the tasks of a Chief Engineer on his ferry, and such tasks did not include pointing to corrupt actions of higher level officials whom he purportedly thought were abusing the public trust and converting public funds to their own use by overpayment schemes." *Id.*

There are obvious similarities between *Marable* and this matter, where the Plaintiffs reported and complained about broad issues of corruption, waste, and serious violations of law that permeated IDJC to an extent that went far beyond the boundaries of their own individual job duties. In both cases, both First Amendment and state law whistleblower claims are also squarely at issue. As shown above, all of the factors of *Connick* are satisfied, and the Plaintiffs presented evidence that, at the very least, presents an issue of fact as to whether or not their reports, complaints, and other speech implicated matters of public concern and were not simply made in the course of their ordinary duties as employees.

Accordingly, both Harrigfeld and Grimm should have known that the Plaintiffs' speech on issues of corruption, violations of law, waste, and other matters concerning the integrity of the government of the State of Idaho were

protected where their ordinary job duties did not require them to monitor the corruption or other unlawful activities of their own leaders and employers. They cannot argue that the Plaintiffs' duties required them to make reports concerning such matters even while the evidence shows that they threatened, punished, and attempted to silence the Plaintiffs.

A "reasonable official would also have known that a public employee's speech on a matter of public concern is protected if the speech is not made pursuant to her official job duties, even if the testimony itself addresses matters of employment. [Citations omitted]…. Notwithstanding *Garcetti*, we held in *Eng*, as we do here, that "[t]here could be no confusion . . . that when [plaintiff] commented upon matters of public concern as a citizen and not pursuant to his job responsibilities, his speech was protected by the First Amendment — **that rule had long been the law of the land.**" *Id*. (internal quotation marks, citations, and alterations omitted). *Garcetti* in no way altered Karl's clearly established First Amendment right to give subpoenaed deposition testimony in the *Wender* litigation in her capacity as a private citizen, without facing retaliation as a result." *Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1074-1075 (9th Cir. Wash. 2012) (emphasis supplied).

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D. Whether there was a "causal nexus" between the Plaintiffs' reports and complaints and the retaliation they suffered is an issue of material fact for the jury to decide.

Briefly, the question of whether the Plaintiffs were the target of adverse action is an issue of material fact that cannot be resolved on summary judgment. *Marez v. Bassett*, 595 F.3d 1068, 1076 (9th Cir. Cal. 2010); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Plaintiffs argue that the evidence outlined above concerning the threats and warnings made to the Plaintiffs in response to their reports and complaints, and especially the obsessive focus of Harrigfeld, Grimm, and Cloud on Ledford in particular as one who "keeps things stirred" at the very least presents an issue of material fact in this respect, and that a jury should decide that issue.

E. Appellants' omission of over 2,300 pages of evidence violated Circuit Rule 30-1.4 and should be appropriately addressed by this Court.

As noted above, the Appellants' Excerpts of Record strangely omitted virtually all of the Exhibits submitted by the Plaintiffs in opposition to the motion for summary judgment at issue here (Dkt. 55). Each reference by the District Court to Dkt. 55 was a reference to those materials which should have been included in the Excerpts of Record as "required contents" under Circuit Rule 30-1.4.

The Appellants and their counsel certainly knew that this Court could not possibly conduct a complete review of the District Court's decision without that

evidence. This Court should thus consider whether sanctions are appropriate under Circuit Rule 30-2.

F. Appellees' late filing of their Response Brief and Supplemental Excerpts of Record should be excused because the delay is justified by extensive required redaction and because there is no prejudice to the Appellant.

In the course of finalizing this Response Brief and Excerpts of Record, counsel for the Appellees found it necessary to review and redact information concerning the identities of individuals known to be minors that was inadvertently contained in their evidence submitted in support of their opposition to the Defendants' motion for summary judgment (Dkt. 55). As indicated in the text of Dkt. 64, Defendants' evidence in Dkts. 36 and 38 was sealed in response to the Plaintiffs' motion to strike in which the Plaintiffs notified the Court and the Defendants that Dkts. 36 and 38 had not been redacted to protect the identities of juvenile offenders as required by the Court's Protective Order. E.R. 4467-4469 (Dkt. 18).

Plaintiffs became aware at that time that some of their own redacted documents had inadvertently disclosed the same kind of information, but were not required to redact and re-file as were the Defendants.

Completing that process for purposes of this Response Brief required far more time than was anticipated by Appellees' counsel, and this resulted in the late

filing of Appellees' Response Brief and Excerpts of Record on Sunday, Nov. 9, rather than on Friday, Nov. 7, 2014.

Appellees have taken extra care with the review-and-redaction process because, notwithstanding the sealing of Dkts. 36 and 38 by the District Court, the Appellants' Excerpts of Record includes both of those documents in unredacted form.

Appellees' counsel respectfully apologizes to both the Court and to counsel for the Appellants for the brief delay, but submits that the protection of the identities of minors in compliance with the District Court's Protective Order and with the Circuit Rules constituted good cause for the delay, and that no party will suffer any prejudice at all where the delay occurred over the course of a weekend.

V. CONCLUSION

The Appellees respectfully ask that this Honorable Court affirm the decision of the District Court to partially deny the Appellants' motion for summary judgment, and to permit Appellees to proceed to have their claims tried before a jury.

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VI. STATEMENT OF RELATED CASES

To the knowledge of the undersigned counsel for Appellees, there are no cases related to this matter pending in the Ninth Circuit.

Respectfully submitted,

Date: November 9, 2014

THE LAW OFFICE OF
ANDREW T. SCHOPPE, PLLC

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By: _____
ANDREW T. SCHOPPE
Counsel for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

I, Andrew T. Schoppe, hereby certify pursuant to Ninth Circuit Rule 32-1 that the foregoing brief is printed in proportionally spaced Times New Roman typeface with a point size of 14, and contains 6,791 words.

Date: November 9, 2014

THE LAW OFFICE OF
ANDREW T. SCHOPPE, PLLC

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By: _____
ANDREW T. SCHOPPE

DECLARATION OF ELECTRONIC SERVICE

I, Andrew T. Schoppe, hereby declare:

I am and at all times herein mentioned was a citizen of the United States and a resident of Ada County, Idaho. I am over the age of eighteen (18) years and not a party to the within action. My business address is The Law Office of Andrew T. Schoppe, PLLC, 910 W. Main Street, Ste. 358B, Boise, Idaho 83702, and I am a member of this Court.

On November 9, 2014, I served the Appellees' Response Brief on counsel for the party(ies) named in this action via the Court's electronic filing system (ECF), all of whom are registered electronic filers.

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Attorneys for Defendants-Appellants

I certify and declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at Redlands, California on November 9, 2014.

ANDREW T. SCHOPPE