I. CERTIFICATE OF INTERESTED PARTY

The National Association of Police Organizations, Inc. (ANAPO@) and its affiliate, the National Law Enforcement Officers= Rights Center of the Police Research and Education Project, is a national non-profit organization which represents law enforcement officers throughout the United States.

NAPO is a coalition of police associations that serves to protect the rights of law enforcement officers through legal advocacy, education and legislation. NAPO represents thousands of law enforcement organizations, with over 200,000 sworn law enforcement officers and 11,000 retired officers. NAPO often appears as amicus curiae in appellate cases of special importance to the law enforcement profession.

The Fraternal Order of Police is a national non-profit fraternal organization that promotes improvements in law enforcement and officers' rights throughout the country. FOP has participated in leading police expression cases in this circuit. Edwards v. City of Goldsboro, N.C., 178 F.3d 231 (4th Cir. 1999).

NAPO, FOP and the law enforcement profession have a vital interest in the critical issues of law before this court. If left undisturbed, the trial court's bold unprecedented decision will obstruct the truth and chill the rights of police officers and other witnesses in future grievance hearings and judicial proceedings. NAPO and FOP seek to argue that police officers and other witnesses must be free of retaliation for providing truthful testimony if the rule of law is to endure.

II. STATEMENT OF SUBJECT MATTER JURISDICTION AND BASIS FOR APPELLATE JURISDICTION

Amici adopts Appellant Kirby's statement of jurisdiction.

III. STATEMENT OF ISSUES

Amici adopt Appellant's statement of issues. Amici suggests that the following are the most

pertinent issues for examination:

1. Whether a public employer may retaliate against a law enforcement officer for providing *truthful* testimony against the employer?

2. Whether Plaintiff Kirby, a sworn law enforcement officer, may be punished and retaliated against for truthfully testifying at an official municipal public hearing, whereby the officer's testimony involved the condition and malfunctioning of municipal police equipment, a marked police car used in part for emergency purposes to respond to citizen requests for police assistance, and the related conduct of a fellow police officer in performing his official police duties?

A) Whether a law enforcement employer may require that police officers testify at official municipal hearings in "support of the [police] administration" and punish officers for failing to support the police administration with testimony regardless of the true facts?

3. Whether public *truthful testimony* by a law enforcement officer about the condition of a municipal police car, which had malfunctioned and become a subject of an official public municipal hearing, and public testimony about the official conduct of the officer, constitutes protected expression under the First Amendment?

A) Was any subject of the public police personnel hearing of Officer James Henning involved "any matter of concern to the community" in Elizabeth City?

4. Is the public concern test applicable in retaliation claims arising from *truthful testimony at official public hearings* or is truthful testimony at an official public hearing inherently protected regardless of the particular content of the testimony?

5. Whether a constitutional tort action by a North Carolina law enforcement officer filed in

federal court alleging claims under the First and Fourteenth Amendments against a municipality and a Chief of Police constitutes a petition for redress protectable by the *Petition Clause* of the First Amendment to the United States Constitution?

A) Must Petition Clause claims be premised upon matters which involve public concern?

6. Whether law enforcement officers enjoy a constitutional right of *free association* to testify truthfully at official municipal hearings in support of fellow officers even if such testimony does not "support the [police department's] administration"?

7. Whether requiring police officers to "support the [police department's] administration" through altered or perjured testimony or else be punished constitutes an *unconstitutional condition* of employment?

IV. STANDARD OF REVIEW

This court should apply *de novo* review and afford full credit to the substantial facts provided by Officer Kirby. In Rutan v. Republican Party, 497 U.S. (1990), the Supreme Court explained how government must have "a vital interest" in limiting First Amendment freedoms of public employees." This Court must determine if Officer Kirby's governmental employer has established "a compelling government justification for limiting [Kirby's] speech." Hickory Firefighters Ass'n v. City of Hickory, 656 F.2d 917, 921 (4th Cir. 1981).

The constitutional rights of law enforcement officers "must be afforded great weight." Konraith v. Williquette, 732 F. Supp. 973, 978 (W.D. Wis. 1990). Law enforcement officers are not relegated to a "watered down version of constitutional rights." Garrity v. New Jersey, 385 U.S. 493, 500 (1967).

V. STATEMENT OF THE CASE

Amici adopts Appellant's statement of the case.

VI. STATEMENT OF FACTS

Amici adopts Appellant's statement of facts. Officer Edward Kirby, a veteran Elizabeth City Police Detective, *truthfully* testified in an official municipal hearing about the condition and malfunctioning of official police equipment, an Elizabeth City police car, the conduct of an officer, and other matters involving the Elizabeth City Police Department. See affidavits of Attorney Keith Teague and Officer Kirby. JA Officer Kirby's truthful testimony did not sit well with Defendant Hampton. Dep. exh. 9, JA Retaliation ensued.

Defendants Hampton and Koch initially punished Kirby with a reprimand which, on its face, demonstrates the initial retaliation. Dep. Exh. 9. The reprimand strikes at the *content*[1] of Kirby's expression: testimony that did not support the police administration.

Defendants' reprimand of Officer Kirby was motivated by and issued Afor your [Kirby's] failure to support the administration of the police department while serving in a supervisory capacity.@ Defendants' disciplinary memorandum stated that the alleged Afailure to support@ consisted of Plaintiff=s Atestimony at the grievance hearing@ which Defendants alleged Aplaced you between the administration of this department and position of sergeant that you hold with this agency.@ Exh. 9, JA Defendants orchestrated a false performance evaluation as a part of a scheme to discredit and harm Kirby. See Kirby affidavit, JA

Following the initial punishment of Officer Kirby, the Defendant employer mounted a

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[1] *This content discrimination offends the core of the First Amendment. E.g., Ward v. Rock, 491 U.S. 781, 191 (1989). In Turner v. FCC, 114 S.Ct. 2445, 2458 (1994), the Court reaffirmed the prohibition of content discrimination in expression. "Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dept. v. Mosely, 408 U.S. 92, 95 (1972).*

campaign of continuing retaliation actions against Officer Kirby which included a demotion, a publication of materials from his confidential protected personnel files, disparate treatment, and finally culminating in being relegated to a receptionist rather than a police sergeant.

VII. SUMMARY OF ARGUMENT

The bottom line of the trial court=s unprecedented decision has legitimized retaliation for truthful testimony - which is among the most troublesome results that amici have ever encountered.

Grievance hearings and the right to grieve are among the most important aspects of law enforcement personnel administration. Police grievance systems are utilized to address rudimentary workplace problems involving a variety of police, safety and personnel issues. Many grievance hearings successfully resolve problems, prevent litigation and promote workplace safety and justice. The International Association of Chiefs of Police (IACP) and virutually all other public employee associations support personnel systems with grievance hearings. Simple grievance hearings are the primary method of sensible resolution of public workplace disputes. The trial court's unprecedented decision will hamper and obstruct public personnel administration because witnesses will remember the wrath inflicted upon Officer Kirby in Elizabeth City because he honored his oath of office and told the truth.

Defendants' retaliatory conduct has not only harmed Officer Kirby, it promotes a strong chilling effect on other police officers and witnesses. Defendants' retaliatory scheme constitutes a direct affront to the integrity of the grievance hearing process and to the rule of law. The trial court's decision will have a chilling effect on testimony at all types of hearings which has dangerous ramifications for the judiciary.

Truthful testimony is the lifeblood of the judiciary. A consensus of cases has long recognized that truthful testimony is one of several fundamental sacred grounds in American constitutional jurisprudence. Truthful testimony enjoys special and unique importance and protection by courts. Witnesses have historically enjoyed immunity from actions against them

because of truthful testimony. Truthful testimony may not be trampled upon by police administrators embarked on missions of retaliation.

Officer Kirby's expression is protected because, *inter alia*, it involved three areas of expression that courts have historically held protected: 1) truthful testimony; 2) speech about the malfunctioning and condition of police equipment; 3) speech about police officer conduct.

As will be demonstrated below, numerous on-point authorities support Officer Kirby's position. E.g., Schneider v. City and County of Denver, 2002 WL 1938583, 47 Fed.Appx. 517, 520 (10th Cir. 2002) (police officer testimony against his department's administration at civil service personnel hearing held constitutionally protected under First Amendment; verdict affirmed); Catletti v. Rampe, 334 F.3d 225 (2nd Cir. 2003); Myers v. Nebraska, 324 F.3d 655, 659 (8th Cir. 2003); Kinney v. Weaver, 301 F. 3d 253 (5th Cir. 2002); Green v. Philadelphia Housing Authority, 105 F.3d 882, 887 (3rd Cir. 1997); Pro v. Donatucci, 81 F.3d 1283 (3rd Cir. 1996); Reeves v. Claiborne County Bd. Of Ed., 828 F.2d 1096, 1100-01 (5th Cir. 1987); Johnston v. Harris County, 869 F.2d 1565, 1578 (5th Cir. 1989); Melton v. City of Oklahoma City, 879 F. 2d 706 (10th Cir. 1989); Miller v. Kennard, 74 F. Supp. 2d 1050 (D. Utah. 1999); Shehee v. City of Wilimington, 205 F.Supp.2d 269 (D. Del. 2002), aff'd in pertinent part _____; Freeman v. McKellar, 795 F. Supp. 733, 739 (E.D. Pa. 1992); Tate v. Yenoir, 537 F. Supp. 306 (E.D. Mich. 1982). This wealth of compelling on-point authority sheds a thousand points of light on the narrow issue before the Court. Officer Kirby's position is especially compelling because, *inter alia*, his testimony was undisputably truthful.

Numerous cases have held that officer expression about police equipment is constitutionally protected. E.g., Worrell v. Bedsole, 1997 WL 153830 (4th Cir. 1997)(police officer speech about police vehicles and equipment held protected); Howell v. Town of Carolina Beach, N.C., 106 N.C. App. 410, 417 S.E.2d 277 (N.C. App. 1992)(officer expression about condition of police weapons protected). Few things could be more dangerous and of greater public concern than a

malfunctioning police car, which could cause unnecessary death or injury of citizens awaiting police help. Although the trial court embarked on a public concern inquiry, such is misplaced in cases involving truthful testimony. Because of the special unique context of an *official public hearing*, truthful testimony should be protected whether the content relates to public concern or something else. Requiring a public concern analysis opens an unnecessary pandora's box for public employers, witnesses and courts. Should an employee feel protected while truthfully testifying about a matter of public concern and not protected while testifying truthfully about some non-public concern matter? How is an employee to know in the middle of testimony?

This court should hold that public employees are not subject to retaliation because of truthful testimony regardless of the particular content of the expression. However, even if this Court applies the public concern test, Officer Kirby should prevail because truthful testimony about malfunctioning police equipment and the conduct of a police officer is overwhelmingly of public concern and protected.

VIII. ARGUMENT

TESTIMONY IS AMONG THE MOST PROTECTED CATEGORIES OF ALL TYPES OF SPEECH, ESPECIALLY TRUTHFUL TESTIMONY THAT INVOLVES IMPORTANT MATTERS OF HIGH PUBLIC CONCERN SUCH AS SPEECH INVOLVING POLICE EQUIPMENT AND OFFICER CONDUCT.

Officer Kirby's expression was in a forum and context of the highest rung of protection: truthful testimony in an official public adjudicatory hearing. In Schneider v. City and County of Denver, 2002 WL 193 1938583, 47 Fed.Appx. 517, 520 (10th Cir. 2002), the Tenth Circuit recently addressed a strikingly similar case involving retaliation against a police officer after he testified at a civil service hearing. The case was on appeal from a $75,000 verdict in the officer=s favor because of a retaliatory transfer arising from his testimony. Officer Schneider testified about one of the Police Department=s training programs. The Chief became upset that Officer Schneider had testified against his own department at the civil service hearing. After reviewing the elements of

retaliatory speech claims, the Tenth Circuit affirmed the judgement and verdict. Schneider is highly persuasive, especially in conjunction with the compelling Fourth Circuit cases protecting officer speech.

The most recent circuit cases support protection for testimony. See Catletti v. Rampe, 334 F.3d 225 (2nd Cir. 2003) and Myers v. Nebraska, 324 F.3d 655, 659 (8th Cir. 2003), where the Second and Eighth Circuits found that testimony in a hearing was constitutionally protected.

In Tindal v. Montgomery County Commission, 32 F.3rd 1535 (11th Cir. 1994), the Court held that retaliation for testimony constituted a matter of public concern. The Court further held that no qualified immunity was available because the constitutional right to testify without retaliation was clearly established.

In Kinney v. Weaver, 301 F. 3d 253 (5th Cir. 2002), police officers initiated a First Amendment action alleging that they had been retaliated against for providing testimony. The trial court denied defendants motion for summary judgment. 111 F. Supp. 2d 831. On appeal, the Fifth Circuit held that the officers right not to be retaliated against for testifying was clearly established at the time of the defendant=s conduct. The Fifth Circuit concluded that the testimony by the officers regarding the *conduct of police officers* is Aunquestionably a matter of public concern.@ Id. at 269. Officer Kirby's testimony involved the conduct of Officer Henning and should be similarly protected. The Fifth Circuit explained:

> AThere is no question Kinney=s and Hall=s testimony in the Kerville case is speech protected by the First Amendment. Testimony in Judicial proceedings is >inherently of public concern.= [omitting four Circuit Court case citations] moreover, the testimony at issue in the instant case is of public concern not only because of its context, but also because its subject matter B i.e., the use of excessive force by police officers.@

The Fifth Circuit denied qualified immunity. AThus, we conclude that the police chief=s and Sheriff=s alleged conduct not only violated a constitutional right, but also, in light of the law clearly established at the time of the conduct occurred, was objectively unreasonable in the particular

circumstances of the case.@ Id. at 283.

In Miller v. Kennard, 74 F. Supp. 2d 1050 (D. Utah. 1999), a police officer initiated a First Amendment claim alleging that he was investigated and transferred because of his testimony which related to an automobile dealership's practice of leaving keys in the ignition of under guarded cars which allegedly may have created a foreseeable risk to public safety. The Court concluded that this testimony touched upon a matter of public concern. The Court further concluded that it was clearly established at the time of the alleged adverse action that a police officers testimony constituted protected speech therefore, the Court rejected the employer=s contention of qualified immunity. In Miller, the subject of the testimony was a private entity rather than a public entity, which would seem to somewhat detract from a public concern finding. However, the automobile dealership=s conduct may have created a risk to public safety, therefore it was of public concern as the Court concluded. The same is true of Officer Henning=s police car in Elizabeth City.

In Miller, the Court pronounced that Amatters of public concern are those of interest to the community, whether for social, political or other reasons.@ Id. at 1057. The Court relied upon a leading Tenth Circuit case, Melton v. City of Oklahoma City, 879 F. 2d 706 (10th Cir. 1989). Melton, a police officer, was fired because he testified on behalf of a criminal defendant. There, the Court found that Melton=s speech touched on matters of public concern because one of the litigants in the case was a public official. Here, of course, Officer Henning was likewise a public official. Even though Melton=s intent was to assist the defendant at trial, and not necessarily to specifically inform the public, the Court held that Melton=s testimony constituted protected speech. AThe First Amendment protects the right to testify truthfully at trial.@ 879 F.2d at 714.

The Tenth Circuit heard the case en banc to reconsider its holding regarding the plaintiff=s liberty interest claims. However, the Tenth Circuit panel decision regarding First Amendment analysis was not challenged in the rehearing. See Melton v. City Oklahoma City, 928 F. 2d 920 (10th Cir. 1991)(en banc).

In Lynch v. City of Philadelphia, 166 F. Supp. 2d 224 (E.D. Pa. 2001), a police officer initiated a First Amendment challenge to punishment of the officer for having provided testimony. The Court concluded that the officer=s testimony constituted protected speech. The Court reasoned that Ait is clear that appearing in court is a matter of public concern...@ Here, the forum for Officer Kirby was an official public adjudicatory hearing in a public building open to the public. JA ____. While it technically was not "court," it had the same effect.

In Ziccarelli v. Leake, 767 F. Supp. 1450 (N.D. Ill. 1991), a prison guard=s testimony in a hearing was held to constitute a matter of public concern. See Perry v. McGinnis, 209 F. 3d 597, 607 (6th Cir. 2000)(decisions made in inmate disciplinary cases protected by First Amendment).

In Pro v. Donatucci, 81 F.3d 1283 (3rd Cir. 1996), the Court recognized First Amendment protection for an employee's testimony. The court reasoned that a public employee's testimony before an adjudicatory body is inherently a matter of public concern protected by the First Amendment. In Donatucci, the Court explained:

> Aa public employee=s truthful testimony receives constitutional protection regardless of its content...@ Reeves v. Claiborne County Bd. Of Ed., 828 F.2d 1096, 1100-01 (5th Cir. 1987); Johnston v. Harris County, 869 F.2d 1565, 1578 (5th Cir. 1989); Freeman v. McKellar, 795 F. Supp. 733, 739 (E.D. Pa. 1992) (Aa public employee=s sworn testimony before an adjudicatory body has been held to be inherently a matter of public concern and protected by the First Amendment.@ Hoopes v. Nacrelli, 512 F. Supp. 363, 365 (E.D. Pa. 1981).

Therefore, without even getting embroiled into the particular content of the testimony, Officer Kirby=s testimony is inherently protected. If the court engages in a public concern, content, form and context analysis, Officer Kirby would still necessarily prevail because his testimony was about the condition of police equipment and officer conduct. This Court in Worrell v. Bedsole explicitly addressed the issue of officer speech about police equipment and found that such is constitutionally protected speech.

In Tate v. Yenoir, 537 F. Supp. 306 (E.D. Mich. 1982), the court held that a law

enforcement officer stated a valid claim for deprivation of his First Amendment rights when he was punished as a result of his testimony. There, the court reasoned that Ato hold otherwise would place a judicial imprimatur on the intolerable occurrence of allowing a witness= testimony to be compromised out of fear of what that witness= employer may think or do.@

In Owens v. Rush, 654 F.2d 1370, 1379 (10th Cir. 1981), the court held that "attending meetings on necessary legal steps" and "associating for the purpose of assisting persons seeking legal redress" are modes of expression and association protected by the First Amendment. See NAACP v. Button, 371 U.S. 415, 429-30 (1963)(litigation is a petition for redress). Rush involved a police officer assisting in litigation by assisting his wife file a sex discrimination charge. The court held that "activities supportive of" of someone seeking relief constitutes protected conduct. 654 F.2d at 1379.

OFFICER KIRBY=S LIBERTY INTEREST

In Tate, in addition to the First Amendment grounds for relief, the Court also addressed the issue of the Plaintiff=s *liberty interest* as did the North Carolina Court of Appeals in Howell.[2] The court in Tate explained:

Ato permit an employer to in effect substantively regulate an employee-witness= testimony would in this court=s judgment violate a fundamental principle of liberty and justice which lies at the base of all our civil and political institutions.@ 537 F. Supp. at 310-311.

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[2] *Officer Kirby properly alleged a liberty interest claim as a cause of action. This claim goes hand-in-hand with his First Amendment claims. In Howell v. Town of Carolina Beach, 106 N.C. App. 410, 417 S.E.2d 277, 283 (1992), Officer Howell was retaliated against and denied due process because of his expression and because of his political activities. Howell's forecast of the evidence presented a colorable claim that a constitutionally protected "liberty interest" ... has been violated." Id. The Court of Appeals reversed the trial court's dismissal of Howell's liberty, expression and due process claims. "Any exercise by the State of its police power ... is a deprivation of liberty." In Re Hospital, 282 N.C. 542, 550 (1973).*

The court in Tate further explained:

> Afundamental fairness requires that an employee-witness be free from fear of retribution by an employer in the form of employment termination. Secondly, the type of speech at issue, while defying precise categorization, is of great public concern. An adjunct to these two considerations is the obvious need for complete and honest testimony... The Court believes that the above notions are inextricably intertwined and are intrinsic in the very essence of a scheme of ordered liberty.@

As the Supreme Court stated in its last case where the Court directly adjudicated First Amendment rights of law enforcement officers, Avigilance is necessary to insure that public employers do not use authority over employees to silence discourse...@ Rankin v. McPherson, 483 U.S. 378, 384 (1987). Defendants in this case did far more than attempt to silence discourse: Defendants retaliation because of Officer Kirby's testimony threatens the very fabric of the rule of law.

In Green v. Philadelphia Housing Authority, 105 F.3d 882, 887 (3rd Cir. 1997), the Court explained that

> Awhen an employee testifies before an official government adjudicatory or fact-finding body he speaks in a context that is inherently a public concern. Our judicial system is designed to resolve disputes, to right wrongs. We encourage uninhibited testimony, under penalty of perjury, in an attempt to arrive at the truth. It would compromise the integrity of the judicial process if we tolerated state retaliation for testimony which is damaging to the state... the utility of inhibited testimony and the integrity of the judicial process would be damaged if were to permit unchecked retaliation for appearance and truthful testimony at such proceedings. Not only would >the First Amendment right of the witness be infringed by this type of coercion, the judicial interest in attempting to resolve disputes would be in jeopardy...@ 105 F.3d at 887.

In Shehee v. City of Wilmington, 205 F.Supp.2d 269 (D. Del. 2002), aff'd in pertinent part _____, the Court addressed a case by a public employee who alleged that his deposition testimony constituted protected expression. After apply the applicable constitutional test, the Court concluded that the Plaintiff=s deposition testimony constituted protected speech.

In Carvalho v. Town of Westport, 140 F. Supp.2d 95 (D. Mass. 2001), Chief Judge William

Young addressed a law enforcement speech and constitutional tort action. Addressing the threshold question of whether the officer=s speech addressed a matter of public concern, Judge Young observed that the retaliation as alleged was the cause of the officer=s Astatements both inside and outside court regarding the allegedly unlawful and inappropriate action of officers...and the resulting civil suit...@ Id. at 98-99. Judge Young observed that the officer alleged retaliation for statements regarding a purportedly unlawful arrest. Judge Young found that the officer=s statements involved matters of public concern. Judge Young further held that the reprimand against the officer and ultimately his demotion constituted actionable First Amendment claims.

In Beach v. City Olathe, 185 F.Supp.2d 1229 (D. Kan. 2002), the Court addressed a claim of retaliation against a police officer for exercising his rights to freedom of speech and association. Issues regarding officer compensation, staffing, **police equipment**, facilities, morale and the leadership and ethics of a police major became the topic of conservation among members of the police department. Plaintiff communicated with the City Council and the City Manager about the issues. A departmental internal affairs investigation was therefore ordered. Defendants contended that Plaintiff was allegedly engaging in Aopen and disrespectful criticism...@ The court relied upon Lee v. Nicholl, 197 F.3d 1291, 1295 (10th Cir. 1999) for the proposition that speech that calls attention to a government's failure to discharge its governmental duties generally constitutes a matter of public concern. The Court concluded that the Plaintiff=s speech Aconcerned important community issues and therefore addressed matters of public concern.@ The court in Beach also recognized the Plaintiff=s freedom of association claim.

In a different context, witnesses including police officers are immunized from liability from testimony under the doctrine of absolute witness immunity. E.g., Briscoe v. LaHue, 460 U.S. 325 (1983); Lyle v. Sparks, 79 F.3d 372 (4th Cir. 1996).

In Edwards v. City of Goldsboro, 178 F.3d 231 (4th Cir. 1999), this Court made clear that the Constitution precludes governmental conduct which has a *chilling effect* upon employee speech.

In Edwards, the officer was denied the right to teach an off-duty course of instruction. The officer was confronted with a threat of termination if he taught the concealed handgun course. The court observed that the threat of termination "was intended to chill his rights to engage..." in protected expression. "[A]ccordingly, the threat is actionable." 178 F.3d at 248. See Mansoor v. Trank, 2003 WL 231589 (4th Cir. 2003)(police officer speech "about various department policies, ranging from a proposed pay plan to lack of overtime opportunities protected@; denying qualified immunity).

In Goldstein v. Chestnutt Ridge, 218 F.3d 337, 354 (4th Cir. 2000), this Court analyzed the firefighter's speech which included Aequipment@ of firefighters. Officer Kirby=s testimony related to police equipment. Goldstein involved speech addressing Ainadequate gear@ where as Officer Kirby=s speech related to a malfunctioning police car and officer conduct. In Edwards, the Fourth Circuit explained how the officer=s speech regarding the proper use of concealed weapons affected public safety and thus involved matters of public concern. 178 F.3d at 247.

This Court has reaffirmed its historic opposition to government retaliation: "It is well established that a public official may not misuse his power to retaliate...." Trulock v. Freeh, 275 F.3d 391, 405 (4th Cir. 2001)(denying qualified immunity to public employer official).

If the rule of law is to endure through traditional adversarial hearings before courts, agencies, municipalities and other adjudicatory entities, witnesses must be free to tell the complete truth no matter what the possible consequences for the employer. Law enforcement employers who attempt to manipulate testimony of officers by threats and retaliation violate the most fundamental law of the land and every principle of justice that the real law enforcement profession stands for.

B) EXPRESSION ABOUT MALFUNCTIONING POLICE EQUIPMENT AND OFFICER CONDUCT IS OF PUBLIC CONCERN

Speech relating to public concern has been defined as any speech that can "be fairly considered as relating to any matter of political, social, or other concern to the community." Connick v. Meyers, 461 U.S. 138, 146 (1983). "Issues which touch upon public concern are

limitless." Moore, 877 F.2d 364, 370 (5th Cir. 1989). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record." Rankin, 483 U.S. at 384-85. This Court in Piver v. Pender, 835 F.2d 1076 (4th Cir. 1987) explained the public concern framework:

> The "public concern" or "community interest" inquiry is better designed - and more concerned - to identify a narrow spectrum of employee speech that is not entitled even to qualified protection than it is to set outer limits on all that it is. The principle that emerges is that all public employee speech that by content is within the general protection of the first amendment is entitled to at least qualified protection against public employer chilling action except that which, realistically viewed, is of **purely** "personal concern" .... The focus is therefore upon whether the "public" or community is likely to be truly concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a "private" matter between employer and employee.[3] (emphasis added)

A wealth of cases demonstrates how public concern in public employee expression cases has been broadly interpreted by this Court. In Worrell v. Bedsole, 1997 WL 153830 (4th Cir. 1997), the Fourth Circuit addressed a strikingly similar case. There, a Deputy Sheriff, a lieutenant, communicated to his employer about deficiencies in police equipment. Like Kirby, Worrell's expression involved information about "unreliable police cars...." This Court found Worrell's expression to be protected, remanded for trial before Judge James Fox, and the jury returned a verdict of $782,400.00. Other cases from this Court emphatically renounce public employer retaliation. E.g., Trulock v. Freeh, 275 F.3d 391 (4th Cir. 2001)(denying qualified immunity to public employer official).

In Edwards v. City of Goldsboro, 178 F.3d 231 (4th Cir. 1999), this Court=s analytical

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3 *Law enforcement expression cases demonstrate that even reports by law enforcement officers about their own personnel related problems are typically of public concern. E.g., Wilson v. UT Health Center, 973 F.2d 1263, 1269 (5th Cir. 1992)(complaints about sex harassment within police agency are of public concern); Stough v. Gallagher, 967 F.2d 1523 (11th Cir. 1992).*

opinion explained the expression and association rights of police officers.[4] There, Sgt. Edwards sought to teach a concealed carry handgun course and was suspended because the content of the course did not suit the Chief of Police, an admitted opponent of the concealed carry law. The content of Edwards' course was like the content of Kirby's testimony: it did not please the Chief of Police and overt retaliation ensued.

Rankin v. McPherson, 483 U.S. 378 (1987) established that law enforcement officers are free to express their opinions about matters of public concern regardless of whether their law enforcement employers agree. In Rankin, the plaintiff made a foolish remark after the attempted assassination of President Reagan: Aif they go for him again, I hope they get him.@ Clearly, that statement did not Asupport the Department's Administration@ as it was a mean spirited, disrespectful and terrible thing to say. Despite the ugliness of the speech, the Supreme Court held it protected. In contrast, surely the professional and truthful testimony of Officer Kirby regarding the condition of police equipment merits more protection than the shameful comment made by the plaintiff in Rankin.

The question here is whether the public in Elizabeth City would likely be interested in or concerned about the condition of police equipment in the Elizabeth City Police Department and the conduct of Officer Henning. "The delivery of police services...is unavoidably of interest to its citizenry." Broderick v. Roache, 767 F. Supp. 20, 24 (D. Mass. 1991)(granting summary judgment to Plaintiff on protected status of speech). There is even evidence in the record showing that the public in Elizabeth City was concerned about these matters. JA .

This Court has also decided the issue of whether the working conditions of public safety employees is a matter of public concern. In Hickory Firefighters , 656 F.2d 917, 920 (4th Cir.

4 *Cited in at least 182 cases since then, Edwards is an instructive opinion addressing officer speech and association rights, as well as a host of other section 1983 issues including qualified immunity, Monnell liability and other issues.*

1981), the court held that "working conditions of firefighters are a matter of public concern..." There, the remarks about working conditions were like that of Kirby's testimony here: Elizabeth City police officers have to deal with malfunctioning police cars. Police cars are a part of working conditions. In Janetta v. Cole, 493 F.2d 1334 (4th Cir. 1974), Judge Haynsworth's opinion demonstrated how a firefighter was unconstitutionally deprived of his expression rights for communicating and circulating a petition about personnel policies in his department.

In Howell v. Town of Carolina Beach, 106 N.C. App. 410, 417 S.E.2d 277 (1992), the court explained how a police officer's communications addressing police equipment problems was of pubic concern and constitutionally protected. In Howell, the equipment problems involved malfunctioning firearms, whereas Officer Kirby's expression involved a malfunctioning police car and the conduct of an officer. Howell found both an expression and a liberty interest for the officer.

In Piver v. Pender County Board of Education, 835 F. 2d 1076 (4th Cir. 1987), this Court held that questions over the performance of a public employee touched upon the matter of public concern and was protected. The subject of Officer Kirby=s testimony related to the performance of Sergeant Henning and whether he had properly maintained his police car or whether he had engaged in officer conduct and abuse of police equipment.

In Berger v. Battalia, 779 F. 2d 992 (4th Cir. 1985), this Court held that a police officer=s conduct consisting of appearing in black face in a night club constituted public concern and was protected expression.

In Zamboni v. Stamaler, 847 F. 2d 73 (3rd Cir. 1988), the Court held that speech about an agency's promotional system was of public concern and protected. In Thompson v. City of Starkville, 901 F.2d 456 (5th Cir. 1990), the Court held that communications over promotion policy and others filing grievances involve matters of public concern.

To be sure if the off-duty use and manner of handling concealed weapons by a police officer is a matter of public concern as this Court held in Edwards, then the on-duty malfunctioning police

equipment such as the police car that Officer Kirby testified about is an even greater public concern. Few things could be more dangerous and of concern to the public than a malfunctioning police car.

In Kincade v. City of Blue Springs, 64 F.3d 389, 396 (8th Cir. 1995), the court explained that statements which Aconcern potential danger to the community=s citizens@ is Asurely a matter of concern to the public...@ The citizens of Elizabeth City surely have a vital public concern about the operational functioning of police equipment and officer conduct, especially a police vehicle which is often used on emergency basis to respond to citizens= request for assistance. Nothing could be of greater public concern than the operational ability of a police vehicle.

POLICE EMPLOYERS MAY NOT CONSTITUTIONALLY COMMAND "SUPPORT" OF ITS POLICE "ADMINISTRATION" CONSISTING OF DISTORTED TESTIMONY OR PERJURY.

The upshot of Defendants' practice of retaliating against Officer Kirby for his failure to "support the administration" of the police department is tantamount to the line of loyalty of cases in the 1950's and the 1960's whereby the Supreme Court struck down efforts by local governments to attempt to secure loyalty and support for supposedly politically correct governmental administration. Perhaps the leading of those cases is Keyishian v. Board of Regents, 385 U.S. 589 (1967).[5] These bedrock cases outline a fundamental principle:

> Governmental employers may not insist upon support for their own regimes where such support tramples upon constitutional rights, particularly where expression and associational rights are involved.

See generally Ross, The Constitutional Rights of Public Employees contained in Sword and Shield Revisited: A Practical Approach To Section 1983 (ABA 1998). These cases became known as the "loyalty oath" cases whereby governments were attempting to coerce citizens into various types of

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5 See, e.g., Shelton v. Tucker, 364 U.S. 479 (1960); Wieman v. Updegraff, 344 U.S. 183 (1952); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961); Baggett v. Bullitt, 377 U.S. 360 (1964); Elfbrandt v. Russell, 384 U.S. 11 (1966).

support for the government politics of the moment.

In Police Department v. Mosley, 408 U.S. 92 (1972), the Court reaffirmed the principle that government may not restrict expression because of the message, its ideas, its subject matter or its content. Mosley contains an excellent analysis of the free speech doctrine which prohibits content discrimination. Here, the reprimand of Officer Kirby, on its face, imposes content discrimination by singling out speech which does not "support the administration."

In Tate v. Yenoir, 537 F. Supp. 306 (E.D.Mich. 1982), the Court denied the defendant employer=s motion to dismiss in a First Amendment claim brought by a law enforcement officer who had testified and who had criticized law enforcement officers during his testimony.

Police officers often have to testify in cases involving their own agencies. They cannot "side" with the Department when it comes to testimony. Rather, they must tell it like it is - even if it hurts.

GOVERNMENT CANNOT CENSOR EXPRESSION BY CONTENT BASED DISCRIMINATION

The trial court's analysis condones explicit content discrimination in expression. Government cannot censor expression based upon the content of the expression. E.g., Rosenberger v. Univ. of Virginia, 115 S.Ct. 2510 (1995); Ward v. Rock Against Racism, 491 U.S. 781, 191 (1989); Clark v. Community, 468 U.S. 288, 293 (1984).

> "Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dept. v. Mosely, 408 U.S. 92, 95 (1972).

THE GROWTH OF GOVERNMENT HAS CAUSED A USURPATION OF GOVERNMENT POWER IN PUBLIC SECTOR WORKPLACES WHICH PRESENT GRAVE RISKS OF CONSTITUTIONAL DEPRIVATIONS

As government has grown, governmental employers have increasingly continued to usurp power over workers including police officers. As Judge Robert Bork has demonstrated in his authoritative treatise, governmentally imposed "political correctness" is now permeated throughout America and its institutions. See Bork, Slouching Towards Gomorrah: Modern Liberalism and American Decline at 54, 90, 203, 215, 247, 255, 262 and 333 (1996). Americans from all walks of life need constitutional protection from increasingly arbitrary and oppressive government power, more often at the local level. See Senator Sam J. Ervin, Jr., Preserving The Constitution 165, 213 - 214 (1984); Bovard, Lost Rights: The Destruction of American Liberty 1-6, 49 - 51 (1995); Equal Protection For Non-Suspect Class Victims of Governmental Misconduct, 18 Campbell L. Rev. 333 (1997). Contemporary public sector employers present vast opportunities for bureaucrats to employ abusive tactics on personal political missions. See Board v. Umbehr, 116 S.Ct. 2342, 2347 (1996)(cataloging cases of government retaliation in different contexts); Equal Protection, 18 Campbell L. Rev. at 337. James Bovard explains in Lost Rights (1995).

> Americans' liberty is perishing beneath the constant growth of government power. Federal, state and local governments are confiscating citizens' property, trampling their rights and decimating their opportunities more than ever before. Id. at 1.

Government now appears more concerned with dictating personal behavior than with

> protecting citizens from murderers, muggers, and rapists. The decline of liberty results not only from specific acts of government - but also from the cumulative impact of hundreds of thousands of government decrees, hundreds of taxes, and legions of government officials with discretionary power over other Americans." Id. at 5.

This case demonstrates how unchecked government regulation often exceeds proper boundaries and

invades traditional areas where government has no valid place.

IX. CONCLUSION

The law enforcement profession is the most abused and violated classes of public employees in America.[6] Law enforcement officers are regularly subjected to the most deadly dangers and risks in the streets of this Circuit.[7] They are at least entitled to the basic freedom to testify truthfully.

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6 See generally Parish v. Hill, 350 N.C. 231, 245-46 (1999); Toomer v. Garrett, 574 S.E.2d 76 (2002); Representing Law Enforcement Officers in Personnel Disputes and Employment Litigation, 77 Am. Jur. Trials 1, 18-21 (2001).

7 The severe dangers confronting the law enforcement profession has continued to grow and well documented in national data. See Clark and Zack, Fatalities to Law Enforcement Officers and Firefighters, 1992-1997, Journal of Compensation and Working Conditions, United State Department of Labor, Bureau of Labor Statistics, summer 1999) at 3. AMost of the 887 police fatalities occurred during the pursuit of criminals - some were shot and others were fatally injured in highway crashes.@ Id. at 3, quoting Bureau of Labor Statistics.

During 1992-1997, North Carolina was the sixth highest state in the nation in the number of total fatalities for law enforcement officers. Clark and Zack at page 4, text table 2. National data has continued to confirm law enforcement as the most stressful job in America. See Kupelian, The Most Stressful Job in America: Police Work in 1990s=, New Dimensions: the Psychology Behind the News / August 1991 at 18 through 33. Law enforcement officers have become to be characterized as Asoldiers in a no win war...@ Id. at 26. Serving as a law enforcement officer is like being "a pedestrian in Hell." Westley, Violence and the Police v. (1970).

In Lawrence v. Texas, 123 S.Ct. 2472, 2484 (2003), the Court reminded us of the spirit of our Constitution.

"As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."

More than ever before, the law enforcement profession needs this Court to reaffirm what should be obvious: police officers and other witnesses who provide truthful testimony are not subject to retaliation because the truthful testimony does not suit the whims of the public employer.

This court should reverse the trial court and grant summary judgment to Officer Kirby.

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A police officer's life is always at risk, no matter how routine the assignment might seem." Floyd, Police Deaths Mount Nationwide, at 1; National Law Enforcement Officers Memorial Fund, Inc. "On average, one police officer dies within the line of duty nationwide every 54 hours." Id. "There are more than 64,000 criminal assaults against our law officers each year resulting in more than 22,000 injuries." Id. Officer deaths from being run over by vehicles have been substantial. 79 Officers Killed During First Half of Year (1998), at 1. Over fourteen thousand law enforcement officers have been killed. The Officers at 1.

X. CERTIFICATE OF COMPLIANCE

Counsel for Amicus hereby certifies that:

1. This brief has been prepared using _____ in font _____.

2. Exclusive of the corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument and the certificate of service, the brief contains _____ words.

William J. Johnson

XI. CERTIFICATE OF SERVICE

I have had the foregoing amicus curiae brief served upon defense counsel Patricia Holland, P.O. Box 27808, Raleigh, N.C. 27611 and upon Appellant's counsel J. Michael McGuinness, P.O. Box 952, Elizabethtown, N.C. 28337 by mail this ____ day of December, 2003.

_____
William J. Johnson