No. 10-20743

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOSLYN M. JOHNSON,

Plaintiff-Appellant,

v.

CITY OF HOUSTON, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Defendant-Appellee the City of Houston (the "City") raises three arguments in its brief: (1) that Plaintiff-Appellant Sergeant Joslyn M. Johnson ("Sergeant Johnson") did not challenge the district court's dismissal of the Houston Police Department ("HPD") and Chief Harold Hurtt in his official capacity; (2) that the district court was correct to find that Sergeant Johnson's claims against the City were barred by *res judicata*; and (3) that Sergeant Johnson was required to argue and assign error to grounds for dismissal never reached by the district court. Remarkably, the City gave only perfunctory attention to the issue of *res judicata*, which, being the only basis for the district court's decision dismissing Sergeant Johnson's claims case against the City, might be expected to be the focus of the City's argument.

The City's attempt to refocus this Court's attention away from the district court's actual decision demonstrates that the City recognizes the weakness of its own *res judicata* argument. The City's argument that *res judicata* bars Sergeant's claims is unpersuasive and relies on mischaracterizing the operative facts of Sergeant Johnson's claims. Although Sergeant Johnson submits that this Court should not reach issues upon which the district court did not rule, her Complaint against the City clearly states claims upon which relief can be granted under the U.S. Constitution, federal laws, and the Texas Constitution.

ARGUMENT

A. The Dismissal of the HPD and Chief Hurtt Is Irrelevant to Whether Sergeant Johnson May Proceed Against the City.

The City correctly notes in its brief that the HPD and Chief Hurtt have been dismissed from the case and that Sergeant Johnson does not challenge the dismissal of the HPD and Chief Hurtt. (Brief of Appellee at 5-6). This should not be surprising given that the City essentially, if not expressly, argued to the district court and to this Court that Sergeant Johnson's claims against the HPD and Chief Hurtt and her claims against the City were redundant. *Id*.; USCA5 at 213-14. Sergeant Johnson clearly does challenge the basis upon which the case against the City of Houston was dismissed, however. Why the City raised the issue at all is puzzling, as obviously a plaintiff needs only one defendant to have a viable claim.

B. The City's Argument That *Res Judicata* Bars Sergeant Johnson's Claims Does Not Withstand Scrutiny.

In her opening brief, Sergeant Johnson demonstrated at length why the district court's *res judicata* finding was erroneous. The City's answer brief pays remarkably little attention to the issue, which is the central, if not the only, issue raised in this appeal. Moreover, the City's argument in support of *res judicata* relies on fundamentally mistaken notions about the two lawsuits at issue: a wrongful death action brought by the estate of Sergeant Johnson's deceased husband, Officer Rodney Johnson, seeking monetary damages ("the Wrongful

Death Action"), and the present action by Sergeant Johnson, in her individual capacity, challenging an HPD policy put into effect after her husband's tragic murder and seeking declaratory and injunctive relief ("The First Amendment Action").

First, the City erroneously asserts that Sergeant Johnson participated in the Wrongful Death Action "in her individual capacity" and "asserted her own claims for damages." Brief of Appellee at 9. This simply is not true. In fact, the district court's ruling in the Wrongful Death Action made crystal clear that Sergeant Johnson did **not** participate in the prior action "in her individual capacity" or seek her own award of damages. In denying the City's motion to dismiss any claims brought by Sergeant Johnson in her individual capacity or on behalf of all Houston Police Officers, the District Court expressly found that Sergeant Johnson **"makes no such claims."** USCA5 at 155 and 173 (emphasis added).

Second, the City erroneously asserts that both the Wrongful Death Action and the First Amendment Action "revolve around the circumstances surrounding Officer Johnson's death and the HPD policies which Sergeant Johnson claims prohibit officers from determining a person's immigration status apart [sic]." Brief of Appellee at 10. According to the City, "In both cases, Sergeant Johnson attempts to challenge the propriety of the same HPD procedures." *Id.* Again, this simply is not true. Sergeant Johnson thoroughly debunked these false notions in

her opening brief. *See* Brief for Appellant at 14-15; *see also* USCA5 at 21-22 and 109. The HPD changed its policy after Officer Johnson's death, and it is this new policy that Sergeant Johnson challenges. *Id.*

Finally, the City makes no effort whatsoever to rebut Sergeant Johnson's showing that the two cases would not have formed a "convenient trial unit," which is a touchstone for any finding of *res judicata*. *See, e.g., Lafreniere Park Foundation v. Broussard*, 221 F.3d 804, 810 (5th Cir. 2000); *Davis v. Dallas Area Rapid Transit*, 383 F.3d 309, 313 (5th Cir. 2004). The law is clear that a plaintiff cannot bring an action against a defendant based on the same nucleus of operative facts that were at issue in a prior lawsuit between the same parties. *Davis*, 383 F.3d at 313. Sergeant Johnson has not done that, and the district court's finding of *res judicata* was erroneous. The City's only arguments to the contrary misconstrue the operative facts. Consequently, the district court's decision must be reversed, and this case must be remanded for further proceeding.

C. Sergeant Johnson Has Not "Waived" Her Right to Challenge an Issue the District Court Never Reached.

Through sleight of hand, the City attempts to promote the notion that, even if the Court finds that Sergeant Johnson's claims are not barred by *res judicata*, the district court's decision ought to be affirmed because Sergeant Johnson somehow waived her right to challenge an issue the district court never reached. At least four times in its brief, the City asserts that Sergeant Johnson "waived" various

arguments. *See* Brief of Appellee at 5, 8, and 11. The City apparently hopes the Court will not notice that one of these "waivers" is not like the others. The first three purported waivers concern issues that Sergeant Johnson elected not to contest—the dismissal of HPD, the dismissal of Chief Hurtt, and both the competency of the district court in the Wrongful Death Action and the finality of the judgment in that action. Each of these matters was expressly reached by the district court in its memorandum opinion and order, and, again, Sergeant Johnson does not contest them.

By contrast, the City's fourth purported "waiver" is an issue the district court did not reach. The City claims that Sergeant Johnson "waived" her right to challenge the City's "right to dismissal of her claims on substantive grounds." Brief of Appellee at 11. In the district court, the City moved to dismiss Sergeant Johnson's Complaint for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. USCA5 at 42-46. In her opposition, Sergeant Johnson demonstrated that the City's argument was without merit. *Id.* at USCA5 at 110-20. Because the district court found Sergeant Johnson's claims were barred by *res judicata*, however, it never reached the City's Rule 12(b)(6) argument. It expressly stated so in its memorandum opinion and order: "Because the Court grants the City's motion to dismiss on *res judicata* grounds, it need not address the City's additional grounds for dismissal as they are rendered moot." *Id.* at 247.

Obviously, Sergeant Johnson can only appeal rulings that the district court actually made. This is simple logic. How could an appellant ever assign error to a ruling that was never made? In her opening brief to this Court, Sergeant Johnson demonstrated that the district court's finding of *res judicata* was erroneous. That is all she was required to do. She was not required to demonstrate that other arguments asserted by the City in its motion to dismiss, but never reached by the district court, were erroneous as well. The City's "waiver" argument is without merit.

Nor do the authorities cited by the City support the novel proposition that, by not briefing an argument to an appellate court, an appellant waives any right to challenge the argument even though the argument is not part of the ruling on appeal. These authorities, *Audler v. CBC Innovis Inc.*, 519 F.3d 239 (5th Cir. 2008) and *Yohey v. Collins*, 985 F.2d 222 (5th Cir. 1993), merely stand for the generic proposition that, if an appellant wishes to assign error to a decision of a district court, the appellant must brief the alleged error. By contrast, cases in which appellate courts declined to rule on issues not considered by district courts are legion. *See, e.g., Bogy v. Ford Motor Co.*, 538 F.3d 352, 355 (5th Cir. 2008); *U.S. ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370, 380 (5th Cir. 2004); *Corwin v. Marney*, 788 F.2d 1063, 1069 (5th Cir. 1986); *Roebuck v. Florida Dep't of Health & Rehabilitative Services, Inc.*, 502 F.2d 1105, 1106 (5th Cir. 1974).

Likewise, this Court should decline to consider in the first instance arguments not decided by the district court. The City certainly provides no reason why this Court should deviate from ordinary appellate practice. If, as Sergeant Johnson has argued, the district court's finding of *res judicata* was in error, then this case should be remanded to the trial court for further proceedings.

D. Sergeant Johnson's Complaint States Viable Claims Against the City.

In the unlikely event that the Court elects to consider arguments not reached by the district court instead of the more typical practice of remanding for further proceedings, the Court should find that Sergeant Johnson's Complaint clearly states one or more viable claims upon which relief can be granted. In reviewing a motion to dismiss for failure to state a claim upon which relief can be granted, a court must accept the plaintiff's allegations as true, must view them in the light most favorable to the plaintiff, and must draw all inferences in favor of the plaintiff. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). Sergeant Johnson's Complaint clearly states claims under federal law and under the Texas Constitution upon which relief can be granted.

1. Sergeant Johnson Has Stated Claims Under 42 U.S.C. § 1983.

Section 1983 imposes liability on "anyone who, under color of state law, deprives a person of any rights, privileges, and immunities secured by the

Constitution and the laws of the United States." *Blessing v. Freestone*, 520 U.S. 329, 340 (1997). In order to seek redress under section 1983, a plaintiff must assert not merely the violation of a federal law, but the violation of a federal right. *Id*. Sergeant Johnson has asserted violations of several federal rights for purposes of her section 1983 claim. USCA5 at 26-27 and 110-18.

a. First Amendment Right.

Sergeant Johnson alleges that the City violated her right under the First Amendment of the U.S. Constitution by restricting her ability to share information with federal immigration officials about possible violations of federal law. *See* USCA5 26-27 and 110-15. According to the City, the restrictions at issue do not violate the First Amendment because speech regarding the criminal alien or immigrant status of a person arrested or detained by an HPD officer is speech related to the officer's official duties. Brief of Appellee at 13.

In *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006), the U.S. Supreme Court "made clear that public employees do not surrender all of their First Amendment rights by reason of their employment. *Id.* "Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Id*. A public employee's speech is protected by the First Amendment when the interest of the employee as a citizen addressing matters of public concern outweigh the interests of the government employer in promoting

the efficiency of the service it performs through its employees. *Charles v. Grief*, 522 F.3d 508, 512 (5th Cir. 2008). This analysis is sometimes referred to as a "*Pickering* balancing test." *Id.* at 515 (citing *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968)).

In *Garcetti*, a deputy district attorney reported inaccuracies in a search warrant to his supervisor and recommended the office refrain from prosecuting a related criminal case. The deputy district attorney alleged that he suffered retaliation for this inter-office speech. The Court in *Garcetti* concluded that the deputy district attorney's speech was not protected by the First Amendment because it was made pursuant to his official duties, specifically, the fulfillment of his responsibility to advise his supervisor how best to proceed with a pending case. *Id*. at 513. However, the Court in *Garcetti* did not "explicate what it means to speak pursuant to one's official duties." *Williams v. Dallas Independent School District*, 480 F.3d 689, 692 (5th Cir. 2007). That task has been left to the appellate courts.

In *Davis v. McKinney*, 518 F.3d 304, 312 (5th Cir. 2008), this Court noted that, "[b]ecause *Garcetti* is a recent decision, lower courts have had limited opportunity to interpret it." In *Davis*, the Court declared that, "[c]ases from other circuits are consistent in holding that when a public employee raises complaints or concerns up the chain of command at his workplace about his job duties, that

speech is undertaken in the course of performing his job." *Id.* at 313. "If, however, a public employee takes his job concerns to persons outside the work place . . . , then those external communications are ordinarily not made as an employee, but as a citizen." *Id.* In *Davis*, a University of Texas computer systems administrator reported possible criminal behavior and racial discrimination, discovered during the course of carrying out her duties and responsibilities, to the Federal Bureau of Investigation ("FBI") and U.S. Equal Employment Opportunity Commission ("EEOC"). The Court found that the administrator's communication with the FBI and EEOC, although clearly related to the plaintiff's employment, were protected, noting that a public employee's "external communications are ordinarily not made as an employee, but as a citizen." *Id*. at 313-314, 316.

Similarly, in *Charles v. Grief*, 522 F. 3d 508, 512 (5th Cir. 2008), an employee of the Texas Lottery Commission provided information about racial discrimination and retaliation, misuse of funds, and other alleged misconduct by the Commission's management to members of the Texas Legislature. *Charles*, 522 F.3d at 510, 514. The Court noted: "Charles voiced his complaints *externally*, to Texas legislators who had oversight authority over the Commission, not *internally*, to supervisors." *Id.* at 514 (emphasis original). "His decision to ignore the normal chain of command in identifying problems with the Commission's operations is a significant distinction." *Id.* As in *Davis*, the Court concluded that these external

communications were "not left unprotected by *Garcetti*'s genre of 'non-protected' speech." *Id.*

The City does not argue that the speech at issue -- communications with federal immigration officials about possible violations of federal law -- is not speech about a matter of public concern. Nor does the City argue that the results of the *Pickering* balancing test weigh so clearly in its favor that Sergeant Johnson cannot state a claim for relief as a matter of law. Instead, the City argues that the speech at issue is not protected because it is part of Sergeant Johnson's official duties and responsibilities. *See* Brief of Appellee at 3. The City is simply wrong.

The speech at issue here clearly is not "required" of Sergeant Johnson by the HPD as part of Sergeant Johnson's job. To the contrary, the City and HPD want to prevent Sergeant Johnson from communicating with federal immigration officials about possible violations of federal law she might discover. Sergeant Johnson does not claim such speech is unrelated to her job. Nonetheless, it clearly constitutes protected speech made as a citizen, not an as employee. At least three factors are important in this regard.

First, it is irrelevant that the speech at issue might arise from special knowledge Sergeant Johnson obtains through her employment. The Court in *Charles* rejected this argument: "to hold that any employee's speech is not

protected merely because it concerns facts that he happened to learn while at work would severely undercut First Amendment rights." *Charles*, 522 F.3d at 513.

Second, and unlike in *Garcetti*, but like in *Davis* and *Charles*, the speech at issue is not intra-office speech or even speech within Sergeant Johnson's chain of command. Nor is it even made within the HPD or the City. Rather, it is external speech. In particular it is speech to federal officials.

Third, it is well established that citizens have the right to inform federal officials of possible violations of federal law. *See, e.g. In re Quarles*, 158 U.S. 532, 535-36 (1895); *U.S. v. Guest*, 383 U.S. 745, 775, 779 (1966) (Harlan, J. , concurring in part and dissenting in part) (Brennan, J., concurring in part and dissenting in part); *Edwards v. Habib*, 366 F.2d 628, 629 (D.C. Cir. 1965) ("It is not seriously questioned that every citizen has the right, if not the duty, of informing his government of a violation of law, and … a court of equity, on a proper showing, may enjoin any interference with that right.") *Sims v. Century Kiest Apartments*, 567 S.W.2d 526, 529-30 (Tex. App. -- Dallas [5th Dist.] 1978). Along with the right to petition Congress and the right to vote in federal elections, the right to inform federal officials of possible violations of federal law is among the set of rights and privileges enjoyed by citizens of the United States, as distinguished from those enjoyed by citizens of any particular state. *Twining v. New Jersey*, 211 U.S. 78, 97 (1908). Consequently, not only is the speech at issue

external to Sergeant Johnson's chain of command –in fact, it is external to her employer, the City –but it also is completely consistent with the independent, well established right of U.S. citizens to inform federal officials of possible violations of federal law. It also is not materially different from *Davis*, in which the university administrator was found to have engaged in protected speech when she reported possible violations of federal law to the FBI and the EEOC. Similarly, Sergeant Johnson seeks to report possible violations of federal immigration laws to federal immigration officials. Her speech is "not left unprotected by *Garcetti*'s genre of 'non-protected' speech." *Charles*, 522 F.2d at 514.

The City cites *Nixon v. City of Houston*, 511 F.3d 494 (5th Cir. 2007) in arguing to the contrary. *Nixon* is clearly inapposite, however. *Nixon* is an insubordination case, not a free speech case. In *Nixon*, an on-duty, uniformed HPD patrol officer who had a history of making unauthorized statements in the media was fired after going to the scene of an accident following a high speed chase and giving interviews to reporters:

> Nixon posed as an official HPD spokesman at the scene of an accident and criticized HPD's handling of the high-speed pursuit issue. Furthermore in [follow-up media appearances] Nixon stated that he knowingly disobeyed HPD pursuit policy on a prior occasion and felt comfortable violating other direct orders because he has "civil service protection." Such statements and conduct smack of insubordination, and it is entirely reasonable for the HPD to predict that such insubordination and likely acts of future insubordination would harm HPD's ability to maintain discipline and order in the department… Furthermore HPD could reasonably predict that an officer criticizing

> HPD policy while masking as an official spokesperson at the scene of an accident and discussing his past violations of HPD policy and future willingness to violate such policies would bring the mission of HPD and the professionalism of its officers into disrepute.

Nixon, 511 F. 3d at 499. Unlike in *Nixon*, this case is not an insubordination case. Moreover, the officer in *Nixon* was not sharing information about possible violations of federal law with federal authorities, which is a distinct right of U.S. citizenship in its own right. *In re Quarles*, 158 U.S. at 535-36. Because the prohibited speech at issue is protected speech, Sergeant Johnson has stated a claim for violation of her First Amendment rights.

b. Right to Inform Federal Officials of Possible Violations of Federal Law.

Second, and related to, but independent of Sergeant Johnson's claim for violation of her First Amendment right to freedom of expression, is the already-noted right of U.S. citizens to inform federal officials of possible violations of federal law. *See, e.g., In re Quarles*, 158 U.S. at 535-36. Section 1983 has been used in other instances to remedy a violation of this longstanding right. In *Williams v. Allen*, 439 F.2d 1398 (5th Cir. 1971), this Court found that a police officer could bring an action under section 1983 to remedy an alleged violation of his right to inform federal authorities of a possible violation of federal law after he was allegedly terminated in retaliation for having reported acceptance of lottery payoffs by police officers to the IRS. Clearly, Sergeant Johnson's original petition,

which referenced the deprivation of her rights secured by the Constitution and the laws of the United States, states a claim under section 1983 for violation of this right as well.

c. Rights Under 8 U.S.C. §§ 1373 and 1644.

Third, Sergeant Johnson has stated a claim under section 1983 for violation of her rights under 8 U.S.C. § 1373 and its companion statute, 8 U.S.C. § 1644. The U.S. Supreme Court "has traditionally looked at three factors when determining whether a particular statutory provision gives rise to a federal right." *Blessing*, 520 U.S. at 340. "First, Congress must have intended that the provision in question benefit the plaintiff." *Id*. (*citing Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 430 (1987)). "Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence." *Id*. at 340-41 (*quoting Wright*, 479 U.S. at 431-32). "Third, the statute must unambiguously impose a binding obligation on the States." *Id*. "In other words, the provision giving rise to the asserted right must be couched in mandatory rather than precatory terms." *Id*.

It appears to be a question of first impression whether the federal statutes at issue give rise to a federal right. A reasonable examination of the statutes, especially section 1373(a), demonstrates that they confirm, if not create, a federal

right on the part of local government officials such as Sergeant Johnson to share information with federal immigration officials without interference from their employers. The most obvious example is section 1373(a), which expressly states that local government entities "may not prohibit or in any way restrict" a government official from "sending to or receiving from the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. § 1373(a). The language of both statutes is directed squarely at government officials' ability to share information. These provisions—enacted by Congress in response to policies like the HPD's policy that were proliferating across the country—benefit local government officials like Sergeant Johnson because they reinforce and amplify these officials' constitutional rights to freedom of expression and to inform federal officials of possible violations of federal law. They are particularly beneficial to local law enforcement officials, such as Sergeant Johnson, who have sworn an oath to preserve, protect, and defend the Constitution and laws of the United States and are charged by law with detecting and preventing crimes and arresting violators of the law.

Second, there is nothing vague or amorphous about the statutes or the right they create. It cannot be said that their enforcement would "strain judicial competence." Courts clearly are competent to determine whether prohibitions or

restrictions are being placed on state or local government officials' communications with federal immigration officials and to declare any such prohibitions or restrictions unlawful.

Third, the statutes clearly impose a direct and binding obligation on state and local governments. Their language could not be clearer. No restrictions or prohibitions on the sharing of information are permitted. There is nothing precatory about them. It is difficult to conceive of how Congress could have expressed itself any clearer when it used the words "a Federal, State, or local government entity or official may not prohibit, or restrict . . . any government entity or official from sending to or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual." Congress has unmistakably ordained that state and local governments may not restrict their law enforcement officers' communication with federal immigration officials regarding a person's immigration status.

Whether characterized as a violation of her right to freedom of expression under the First Amendment to the U.S. Constitution, her right as a citizen of the United States to inform federal officials of possible violations of federal law, or her rights under 8 U.S.C. §§ 1373 and 1644—all of which are mutually reinforcing in this instance—Sergeant Johnson has plainly stated a claim under 42 U.S.C. § 1983.

2. Sergeant Johnson Has Stated a Claim Under the Texas Constitution.

The City's argument that Texas common law does not provide a cause of action for violations of the Texas Constitution is without merit. Brief of Appellee at 12. Although the City is correct that there is no right of action for damages arising under the free-speech provision of the Texas constitution, Sergeant Johnson does not seek monetary damages. She seeks declaratory and injunctive relief. It is well established that the Texas Constitution provides for equitable relief for violations of its provisions. *Olibas v. Gomez*, 481 F. Supp.2d 721, 726 (W.D. Tex. 2006); *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex. 1995); *Nueces County v. Ferguson*, 97 S.W.3d 205, 218 (Tex. App. -- Corpus Christi [13th Dist.] 2006); *City of Elsa v. M.A.L.*, 192 S.W.3d 678 (Tex. App. -- Corpus Christi [13th Dist.] 2006). When Sergeant Johnson's claims are analyzed based on how she pled them rather than as the City miscontrues them, there is no doubt that Sergeant Johnson has stated a claim under the Texas Constitution upon which relief can be granted.

CONCLUSION

For the reasons set forth in Sergeant Johnson's Opening Brief and the additional reasons set forth above, Sergeant Johnson respectfully requests that this Court reverse the district court's decision granting the City's motion to dismiss on the basis of *res judicata* and remand this matter for further proceedings.

Dated: March 28, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2011, a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT has been served electronically via this Court's ECF system on the following:

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