FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GREG OHLSON, *Plaintiff-Appellant*, v. BETH BRADY, Arizona Department of Public Safety; JOSEPH TRIPOLI, Arizona Department of Public Safety; VINCENT FIGARELLI, Arizona Department of Public Safety, *Defendants-Appellees.*	No. 20-15656 D.C. No. 2:18-cv-01019-DLR OPINION

Appeal from the United States District Court
for the District of Arizona
Douglas L. Rayes, District Judge, Presiding

Argued and Submitted April 14, 2021
San Francisco, California

Filed August 23, 2021

Before: Mary M. Schroeder, Johnnie B. Rawlinson, and Bridget S. Bade, Circuit Judges.

Opinion by Judge Schroeder

SUMMARY*

Civil Rights

The panel affirmed the district court's judgment in favor of government officials on grounds of qualified immunity in plaintiff's action alleging that his employer violated his First Amendment rights by disciplining him for protected speech.

Plaintiff was a forensic scientist employed by the state of Arizona in the Arizona Department of Public Safety, Scientific Analysis Bureau ("Department"), an agency that analyzes blood samples for alcohol content. His job was to test blood samples and report the findings, and to testify about those findings in court proceedings. Plaintiff advocated for changes in how the lab disclosed batched test results and, contrary to his superiors' orders, communicated his opinions within the Department, with defense attorneys, and in court hearings. He was disciplined and eventually forced to retire. The district court concluded that plaintiff spoke as a private citizen and that his speech was protected expression but that defendants were entitled to qualified immunity.

The panel noted that there was no dispute that plaintiff's advocacy led to his employer's action against him. Nor was there any serious dispute that what he was speaking about—the manner in which forensic evidence is produced and presented in court—was a matter of public concern. The only serious dispute was whether plaintiff's speech should be treated as that of a private citizen exercising the right

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

protected by the First Amendment to criticize the government, or as that of a government employee subject to discipline for undermining agency administration and public confidence in agency operations.

The panel first disagreed with the district court's conclusion that plaintiff spoke as a private citizen, and therefore his speech was protected, in large part because he spoke against his supervisors' orders. The panel held that protecting speech because it violates a supervisor's order would make it difficult for an agency to enforce any rules, even those necessary to preserve proper agency administration. The panel also had doubts about the district court's conclusion that, because citizens have a duty to testify when subpoenaed to do so, plaintiff was speaking in court as a citizen rather than as an employee. The panel noted that plaintiff's job duties included testifying in court. Whether testimony given as part of a government employee's duties was protected speech was a question the Supreme Court left open in *Lane v Franks*, 573 U.S. 228 (2014).

The panel also could not say that defendants failed to identify any possible injury. The panel noted that plaintiff's advocacy in the course of his employment duties could conceivably have adversely affected confidence in the accuracy of the Department's test results, as well as in the Department. The panel agreed, however, with the district court that defendants had not violated any clearly established law. The panel stated that where, as in this case, an employee, in the course of doing the job, has expressed views the employer regards as contrary to its interests, controlling legal principles remained particularly uncertain. Because it was abundantly clear that the law was not clearly established, defendants were entitled to qualified immunity.

COUNSEL

Joseph P. S. Louis (argued), Nesci & St. Louis, Tucson, Arizona; Michael Garth Moore, Tucson, Arizona; for Plaintiff-Appellant.

Michael K. Goodwin (argued), Assistant Attorney General; Mark Brnovich, Attorney General; Office of the Attorney General, Phoenix, Arizona; for Defendants-Appellees.

Kolya D. Glick (argued), Andrew T. Tutt, and R. Stanton Jones, Arnold & Porter Kaye Scholer LLP, Washington, D.C., for Amicus Curiae National Police Accountability Project (NPAP).

OPINION

SCHROEDER, Circuit Judge:

It has been well accepted for more than fifty years that public employees have First Amendment rights to speak out on matters of public interest and concern, so long as the speech does not interfere with the legitimate and orderly administration of government operations. *See Connick v. Myers*, 461 U.S. 138, 147 (1983), *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cnty., Ill.*, 391 U.S. 563, 568 (1968). In this case, the plaintiff claims that state employees have violated those rights by retaliating against protected speech. In such cases it has often proved difficult to draw the line between speech that is shielded by the First Amendment–because the employee is speaking as a citizen about matters of public concern–and speech as a public employee which amounts to sanctionable employee

misconduct. *See, e.g.*, *Dahlia v. Rodriguez*, 735 F.3d 1060, 1068–76 (9th Cir. 2013) (en banc).

The plaintiff, Greg Ohlson, was a forensic scientist employed by the state of Arizona in the Arizona Department of Public Safety, Scientific Analysis Bureau ("Department"), an agency that analyzes blood samples for alcohol content. His job was to test the samples and report the findings, and to testify about those findings in court proceedings. Samples were analyzed in batches that included samples from several different defendants.

When a report on an individual's blood sample was requested, the Department policy was to report the result for that individual. Ohlson, however, believed defense attorneys could better evaluate the accuracy of the result if the samples of the individual in question were reported along with the results for the entire batch of samples with which that individual's samples were tested. Contrary to his superiors' orders, he said so, both in communications within the Department and with defense attorneys, and in court hearings. He was disciplined and eventually forced to retire.

There is no dispute that the plaintiff's advocacy led to the employer's action against him. Nor is there any serious dispute that what he was speaking about–the manner in which forensic evidence is produced and presented in court–is a matter of public concern. The only serious dispute is whether his speech should be treated as that of a private citizen exercising the right protected by the First Amendment to criticize the government, or as that of a government employee subject to discipline for undermining agency administration and public confidence in agency operations.

The district court concluded that the speech was protected expression but entered judgment in favor of the government on grounds of qualified immunity. The district court's conclusion that Ohlson spoke as a private citizen, and therefore that his speech was protected, was based in large part on the fact that Ohlson spoke against his supervisors' orders. In the district court's view, this was strong evidence that the speech should be protected. We disagree with this aspect of the district court's reasoning. Protecting speech because it violates a supervisor's order would make it difficult for an agency to enforce any rules, even those necessary to preserve proper agency administration. *See Pickering*, 391 U.S. at 568.

The district court looked to the Supreme Court's decision in *Pickering*, insofar as it calls for a balancing of the First Amendment interests of the plaintiff with the interests of the government. The district court emphasized that Ohlson spoke out against Department procedures when he was a witness in court proceedings. The district court concluded that because all citizens have a duty to testify when subpoenaed to do so, Ohlson was speaking in court as a citizen rather than as an employee. We have some doubts about this conclusion as well, because testifying in court was part of Ohlson's job duties. He was not called upon to testify as a private citizen. Whether testimony given as part of a government employee's job duties is protected speech is a question the Supreme Court has left open. *Lane v. Franks*, 573 U.S. 228, 238 n.4 (2014).

In weighing the First Amendment interests of the plaintiff against the interests of the state, the district court said that the state agency had not identified any particular injury to the state, so the scales tipped strongly toward Ohlson. Our analysis comes out somewhat differently. Ohlson was

advocating, in the course of his employment duties, for a different and, in his view, better way the agency should report results. At least conceivably, this could have adversely affected confidence in the accuracy of the results as well as in the agency that was reporting them. The Department was duly licensed and accredited. Its operations, including the manner of reporting test results, were in accord with industry standards. We cannot say that the defendants failed to identify any possible injury.

With respect to liability, the district court held that the defendants were entitled to judgment because the defendants had not violated any clearly established law. We agree with that conclusion, and affirm the district court's judgment in favor of the defendants.

BACKGROUND

Greg Ohlson began working at the Department in 2004. Defendants include Joe Tripoli, Ohlson's supervisor, Beth Brady-Morris, Tripoli's supervisor and the Crime Lab Manager, and Vincent Figarelli, Brady-Morris's supervisor and the Superintendent of the Scientific Analysis Bureau. Ohlson started as a lab analyst in the drug toxicology unit and transferred to the alcohol unit in 2015. At the alcohol unit in 2016, he was the most senior level forensic scientist.

The Department has a variety of quality control policies. Most relevant here is the Department's approach to ensuring accuracy among blood samples by looking at an entire batch of samples. When the Department receives blood alcohol samples from law enforcement agencies, it analyzes each individual sample. A "batch" of samples is then reviewed. The Department's quality assurance manual policy and

national standards require this step to ensure non-conformities in batches are identified and to catch instrument failures or malfunctions skewing results. Under Department policy, individual sample results are released to a defendant, but, absent a court order, not the other samples in the batch. They may be viewed at the lab, however.

The Department is nationally accredited, and its laboratory policies and protocols have been approved by the appropriate accrediting body. The Department sought Ohslon's input on laboratory policies on several occasions, and he became increasingly insistent on certain policy changes. Ohlson felt strongly that the Department should make the results of all of the samples within a batch readily available to the criminal defendants; he suggested making the batch data public by releasing it on a website. Ohlson brought this up in conversations with Brady-Morris and Tripoli on numerous occasions. He was told to put it in writing, and he sent this suggestion, and many others, in emails to his supervisors.

Ohlson's supervisors informed him that, though the release of batch results may be a good idea, it was not feasible because the Department would need technological help, and Ohlson's supervisors were not in a position to make that Department-wide decision.

Contrary to Department policy, Ohlson then began creating a private PDF file of all of the data within batches. As part of his job, Ohlson regularly conducted pre-trial interviews with defense attorneys. In those interviews, he began instructing them to request the production of data for the entire batch.

Also, as part of Ohlson's job as an analyst, he regularly testified in state court proceedings. Either side could subpoena Ohlson to testify. In his deposition he said he did so over a hundred times. Another laboratory employee also testified that blood-alcohol analysts regularly testify in court. While testifying, Ohlson was regarded as on duty and provided a Department vehicle to get to court.

In May 2016, Ohlson testified, in the case of *State v. Worthen*, that he felt the disclosure of the entire batch was necessary to ensure accuracy of the result, and testified further that he had a PDF of the batch results that he could send to the parties if permitted to do so. On June 29, 2016, as a result of this testimony, Ohlson's supervisors told him he had violated Department policy, and counseled him to bring his future testimony in line with that of laboratory policy and to delete the PDF files.

He reacted strongly, requesting a meeting with the Assistant Director, venting to a coworker, and meeting with a manager. Ohlson's supervisors then gave him a Performance Notation that instructed him to, among other things, adhere to general lab policies, cease his personal scanning of batch results, cease use of legal proceedings to advance personal views, and modify testimony to bring it in alignment with the Department's positions. Ohlson wrote "Unable to comply completely" by the relevant paragraphs.

Ohlson was called upon a few days later to testify in another evidentiary hearing, *State v. Morel*. Defense counsel in that case had sought the batch report, apparently per Ohlson's suggestion, because they had spoken earlier. The state had declined to produce it, taking the position that the other results within the batch were not relevant to the

defendant's blood results. The defense attorney specifically questioned Ohlson about his scanning of the batch tests results, the complexity of that process, and whether it was against Department policy to produce the batch results. The attorney asked whether there had been a situation where the batch samples had shown a problem with the Department's methods or equipment. Ohlson responded: "Not personally in the last year, but I've been doing this for 35 years, so I have seen circumstances that have caused that to happen, which is why I have my specific position in this." The attorney followed up: "And what is your specific position in this?" Ohlson answered that his personal belief was that batch results should be disclosed. Further, he expressed his disagreement with his superiors, and closed by recognizing that it was not in his "best interest in terms of career advancement" to testify as he had. He also stated that he had been instructed to delete his private copies of batch results.

Following this testimony, Ohlson was placed on administrative leave pending an investigation by the Department's Professional Standards Unit. In November, the investigation resulted in a 16-hour suspension, followed later that month by Ohlson giving notice of his retirement.

Ohlson then filed a complaint in federal district court alleging, as relevant here, a First Amendment retaliation claim for "testifying truthfully and completely under oath in the [*Worthen* and *Morel* cases], and in advocating within the [Department] for a change in the manner in which the department responds to requests in criminal cases for entire batch runs." The district court granted defendants' summary judgment motion, holding that Olson established a violation of his First Amendment rights, but failed to show that they were clearly established. The district court analyzed the

allegations of retaliation for both the internal advocacy and testimony, and held that Ohlson established a violation of his First Amendment rights with respect to both types of speech.

Addressing first whether Ohlson's speech was on a matter of public concern, the district court held that it was because his "advocacy involved [the Department's] duty to serve the criminal justice system by improving . . . access to accurate test results." The district court held that Ohlson's speech was made as a private citizen principally because, though Ohlson's job responsibilities involved testifying in court and updating scientific methodology, his supervisors told him to stop advocating and he nevertheless persisted. The district court also noted that Ohlson's internal advocacy went outside of his chain of command when he spoke "with attorneys privately about the importance of receiving results in a batch." *See Dahlia*, 735 F.3d at 1074.

Defendants argued before the district court that, under *Pickering*, the state's interests as an employer in promoting efficiency in public services outweighed Ohlson's interest in commenting on matters of public concern. Defendants contended that Ohlson's role as "the public face of [an] organization" made his advocacy particularly harmful to the effective operation of the Department.

The district court concluded that the government had failed "to indicate how its legitimate interests suffered particularized injury as a result of [Ohlson's] speech." Nevertheless, it granted summary judgment to the defendants on the basis of qualified immunity, holding Ohlson's First Amendment rights were not clearly established.

On appeal, Ohlson argues that the defendants were not entitled to qualified immunity because their violations of his First Amendment rights, particularly his right to testify truthfully in court, were clear. Defendants maintain that, even if they violated the First Amendment, they are entitled to immunity and further contend there were no violations because Ohlson was at all times speaking pursuant to his official responsibilities, and not as a private citizen exercising First Amendment rights.

DISCUSSION

A. Legal Background

This has not been an easy case for the district court or for this court, at least in part because the key decisions of the United States Supreme Court span a period of over four decades. This contributed to the district court's conclusion that, although, in the court's view, the actions of the defendants in this case violated Ohlson's First Amendment Rights, those rights were not so clearly established that the defendants should have known they were committing constitutional transgressions. A review of the Supreme Court decisions, and our court's efforts to apply them, demonstrates why we must agree that the plaintiff's rights were not clearly established. Where, as here, an employee, in the course of doing the job, has expressed views the employer regards as contrary to its interests, controlling legal principles remain particularly uncertain.

Our review begins with the tumultuous decade of the 1960's when freedom of expression was the focus of seminal First Amendment cases. *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Tinker v. Des Moines Indep.*

Cmty. Sch. Dist., 393 U.S. 503 (1969). With respect to the rights of government employees, we look to *Pickering*, 391 U.S. 563. That was the classic case of the public school teacher who was fired for writing a letter to the editor of the local paper criticizing the budgetary actions of the school board. The Court said its task was to arrive at a "balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568. The analysis became known as the *Pickering* balancing test. *See, e.g.*, *Moser v. Las Vegas Metro. Police Dep't*, 984 F.3d 900, 905 (9th Cir. 2021).

In ruling for the teacher, the Court held that the First Amendment interests of the teacher outweighed the administrative interests of the Board. The teacher had a First Amendment interest in expressing his views, he had not seriously interfered with the Board's functions, and the subject was one of public concern. *Pickering*, 391 U.S. at 571–73. The interest of the school board was no greater than it would have been had the speaker been an ordinary citizen. *Id.* at 572–73.

Just short of two decades later, the Court found the balance went the other way in *Connick*, 461 U.S. 138. There, a disgruntled government employee circulated a nasty questionnaire to fellow employees that was critical of the employer and intended as a salvo in what was essentially a personnel dispute. *Id.* at 141. The employee was commenting on matters of public concern "in only a most limited sense," and the employer, in disciplining the employee, was upholding legitimate administrative interests. *Id.* at 151–54.

The problem for the courts was different in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). There the employee had expressed disagreement with a superior's decision on a matter of public concern, but the employee had done so in the course of performing his job duties. *Id.* at 420–22. The plaintiff was a deputy district attorney who had been disciplined for sharply criticizing his supervisor's decision to pursue a case involving what the deputy thought were serious "inaccuracies in an affidavit used to obtain a critical search warrant." *Id.* at 413–15. The Supreme Court majority there reversed our court's decision in favor of the deputy, with the Supreme Court stressing that the deputy was not speaking as a citizen but pursuant to his duties in the district attorney's office. *Id.* at 424–26. The dissenters lamented an apparent loss of the *Pickering* balancing test. *Id.* at 427–44 (Souter, J., dissenting); *Id.* at 444–50 (Breyer, J., dissenting).

Our court endeavored to articulate the Supreme Court's guidance to that point. *Eng v. Cooley*, 552 F.3d 1062 (9th Cir. 2009). We there noted the "tangled history" of public employee free speech law, and clarified that the *Pickering* balancing test could be distilled into five factors:

> (1) whether the plaintiff spoke on a matter of public concern;
>
> (2) whether the plaintiff spoke as a private citizen or public employee;
>
> (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action;

> (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and
>
> (5) whether the state would have taken the adverse employment action even absent the protected speech.

Id. at 1070.

Eng explained that, at the fourth step, the burden shifts to the defendants to show that "the state's legitimate administrative interests outweigh the employee's First Amendment rights." *Id.* at 1071 (quotation marks and citation omitted). The court further observed that, though the balance is "ultimately a legal question," it often turns on an underlying factual question of whether the state had an "adequate justification" in restricting the speech. *Id.* at 1071–72.

It was after *Eng*, and still in the wake of the Supreme Court's *Garcetti* decision, that our court decided *Dahlia*, on which the district court in this case principally relied. We went en banc to overrule an earlier decision of this court that had applied *Garcetti* to hold that an employee acting pursuant to his job duties is never protected by the First Amendment. *See Huppert v. City of Pittsburg*, 574 F.3d 696 (9th Cir. 2009). The plaintiff in *Dahlia* was a detective for the Burbank Police Department who had reported police misconduct both internally and to the Los Angeles County Sheriff's's Department. *Dahlia*, 735 F.3d at 1064–65. Looking to the *Pickerin*g balancing analysis, the majority concluded that the employee's speech was not within the

scope of his duties, emphasizing that the Supreme Court's analysis in *Garcetti* embodied some flexibility because of its fact-intensive nature. *Id.* at 1067, 1074, 1076–78.

We outlined some "guiding principles" to determine whether public employees are speaking as private citizens: (1) whether or not the employee had confined his communications to his chain of command; (2) the subject matter of the communication; and (3) whether the employee's speech was in "direct contravention" of his supervisor's orders, which our court said indicates the "speech may often fall outside of the speaker's professional duties." *Id.* at 1074–75. *Dahlia* said that the first, "chain of command," factor was "a relevant, if not necessarily dispositive, factor." *Id.* at 1074. Thus, in holding the plaintiff was speaking as a citizen, the opinion emphasized that the plaintiff had gone outside his agency's chain of command to report the misconduct. *Id.* at 1077–78. The majority rejected the view of the concurrence, which had stressed that the plaintiff's job required him to report misconduct and that in its opinion *Garcetti* announced a bright-line rule that conduct in the course of performing required duties is not protected. *Id.* at 1069 n.7.

In *Dahlia*, it was important to the majority that the plaintiff had reported the misconduct beyond his superiors and outside the chain of command in order to differentiate that situation from *Garcetti*, where the criticism of the employee's superiors was made in the course of communications required as part of the job. *Id.* at 1077–78. This distinction supported the majority's conclusion that the plaintiff was speaking as a private citizen rather than as an employee. *Id.* The plaintiff had gone outside the scope of his regular job duties to report misconduct.

The district court in this case, however, focused on a different *Dahlia* "guiding principle": whether the employee was speaking in contravention of his supervisors' orders. The court relied on that principle to conclude that Ohlson was speaking as a citizen rather than as an employee.

The problem for us in this case, however, is that when Ohlson contravened orders, he was at all times speaking in the course of his employment duties–whether conducting pre-trial interviews with attorneys, advocating within the Department for different procedures, or speaking more publicly as a witness called to testify on behalf of the Department as part of his job. As *Pickering* itself counseled, the interests of the government agency in orderly administration must be considered and weighed against the First Amendment interests of the speaker. Speaking in defiance of orders does not, by itself, trigger First Amendment protection, and we do not believe *Dahlia* stands for that proposition. This is because orderly government administration requires there to be some rules about employee conduct and misconduct. Insubordination cannot be regarded as per se protected activity. Yet the district court's analysis, in treating speech as protected because it was uttered in defiance of orders, comes close to holding just that. The district court did not take into account the fact that Ohlson was testifying in court as the Department's employee, and that the Department had an interest in what he said.

Neither *Dahlia* nor the Supreme Court cases preceding it involved an employee's testimony in court. The year after *Dahlia*, however, a decision of the Supreme Court did. *Lane*, 573 U.S. 228. What the Supreme Court held and did not hold in *Lane* serves to highlight the difficulties in distinguishing between protected and unprotected speech when an

employee's testimony, as in this case, concerns the employee's job.

In *Lane*, the plaintiff was a director of a community college program who had exposed malfeasance of a subordinate employee and then testified as a fact witness in the subsequent criminal trials. *Id.* at 231–33. The plaintiff was fired on the basis of that testimony. *Id.* at 233–34. In the plaintiff's suit against the employer for violating his right to free speech, the Eleventh Circuit held that, in testifying, the plaintiff had spoken as an employee, not as a citizen, and his speech was not protected. *Id.* at 235. The Supreme Court disagreed. *Id.* at 241. The Court held that the plaintiff as a citizen had a duty to testify when subpoenaed to do so and was therefore speaking as a citizen, not as an employee. *Id.* It employed the *Pickering* balancing test to determine that the government lacked any adequate justification to discipline the plaintiff. *Id.* at 242. The Court observed that his testimony was not false or erroneous and that he made no improper disclosures. *Id.* The plaintiff's job as a program director did not require him to testify, and he was testifying outside the duties of his job. The majority opinion stressed that as an employee, the plaintiff must be protected when performing a duty to testify that is required by all citizens and not a duty imposed solely as a result of his job duties. *Id.* at 238. This was critical to the Court's conclusion that the plaintiff's speech was protected by the First Amendment.

The Court nonetheless held that the plaintiff's rights were not clearly established at the time of the violation; the law of the Eleventh Circuit supported the defendants in that case and they could not have known the Supreme Court would overrule it. *Id.* at 243–46. The Court held the defendants were therefore entitled to qualified immunity. *Id.* at 243. A

special concurrence by Justice Thomas expressly reserved the question of whether testimony given as part of the duties of the job, like those of a policeman or laboratory analyst, would be protected. *Id.* at 247 (Thomas, J., concurring). *Lane* opens the door to the case before us.

Ohlson claims that both his testimony in court and his advocacy in the workplace concerning the production of batch results were protected by the First Amendment. We deal with them in turn.

B. Ohlson's Testimony

This case, unlike *Lane*, concerns testimony by an employee who was required to testify as part of his government employment. Ohlson's job duties included analyzing blood samples, producing the testing results when they were requested by defense counsel, and explaining the results in court testimony when called upon to do so. Ohlson was disciplined in large part because, in his testimony in two separate cases, he had expressed his view that flaws in testing could be better identified if the Department disclosed requested testing results in batches rather than individually. Such disclosure was contrary to the Department's practice, one that had met industry standards. Ohlson believed his idea was better and violated orders not to so testify. He contends the resulting discipline violated his First Amendment rights because his testimony was protected speech.

The only relevant Supreme Court decision bearing on whether court testimony is protected is *Lane*, 573 U.S. 228. That case, however, involved testimony of an individual who had been subpoenaed as a fact witness at a criminal trial of another employee. *Id.* at 231–33. As we have noted, the

witness in *Lane* was not required to testify as part of his job duties. Whether testimony given pursuant to the duties of a government job is protected by the First Amendment was an issue explicitly left open in *Lane*. In holding the testimony in that case was protected, the concurrence emphasized that the *Lane* holding did not apply to individuals, such as "laboratory analysts," who testify pursuant to job duties. *Id.* at 247 (Thomas, J., concurring) (citations omitted). Ohlson is one such laboratory analyst. His case is therefore the one *Lane* pointedly did not decide.

Thus, the opinion and concurrence in *Lane*, together with the lack of authority on the matter since *Lane*, compel us to conclude that there is no clearly established law protecting the testimony that Ohlson gave in the course of performing his duties as a laboratory analyst for the state. We deal with it as an issue of first impression.

To the extent Ohlson contended in the district court that his testimony concerning batch production was spoken as a private citizen because he was speaking in defiance of orders, the district court seemed to agree. We believe the district court's ruling in this regard was founded upon a misunderstanding of our opinion in *Dahlia*, 735 F.3d 1060. There, in providing some "guiding principles" to determine when the employee's speech was within the scope of his duties, we stated that "no single formulation of factors can encompass the full set of inquiries relevant to determining the scope of a plaintiff's job duties." *Id.* at 1074. Importantly, we decided *Dahlia* before we had the benefit of *Lane*, where the Supreme Court went out of its way to leave open the question of whether testimony pursuant to job duties can be protected speech.

In *Dahlia*, we were writing in the aftermath of *Garcetti*, which had proven problematic in that it had compelled a panel of our court to apply a rigid rule that expression within the scope of an employee's job duties was never protected. *See Huppert*, 574 F.3d 696, *overruled by Dahlia*, 735 F.3d 1060. We held in *Dahlia* that *Garcetti* called for a more practical approach. 735 F.3d at 1069–70. The most important factor in *Dahlia* was that the employee reported the misconduct "outside his chain of command." *Id.* at 1074, 1077–78. The subject matter of the speech was also important, with routine incident reports falling within the scope of duties, and concerns about "corruption or systemic abuse" likely falling outside. *Id.* at 1074–75. Third, we said that when a public employee "speaks in direct contravention to his supervisor's orders, that speech may often fall outside the speaker's professional duties," especially if the speaker is threatened or harassed by superiors. *Id.* at 1075–76.

Dahlia does not stand for the proposition that speech in defiance of orders is always a strong indication that an employee is speaking as a private citizen and the speech protected, although that appears to have been the district court's interpretation. Such an interpretation could lead to protecting not only those government employees exercising First Amendment rights to speak freely about matters of public concern, but also to protecting those employees defying legitimate orders aimed at deterring employee misconduct. This would incentivize insubordination and make government administration more difficult. *Dahlia* laid down no hard and fast rules, and could not do so in light of *Pickering*'s balancing test that requires weighing the interests of both sides.

The district court decided the case on summary judgment without considering evidence of the scientific merit to both parties' positions, or the full administrative impacts of Ohlson's advocacy on the Department. We believe further proceedings on those issues would be required for an actual balancing of interests. We recognized in *Eng* that, while the balancing inquiry is a legal requirement, it often comes down to factual disputes about the value of competing interests. 552 F.3d at 1071. We do not attempt to resolve any such dispute or engage in the weighing of interests here.

We do know that Ohlson was a qualified professional employee, and the procedures used by the Department met applicable standards. With these two opposing interests, this case is not like *Lane* or *Dahlia*, where the speech in question was exposing corruption and held to be protected. This case is also unlike *Pickering*, where the employer had no greater interest in the content of the speech than if the speech was that of a member of the general public rather than of a government employee. 391 U.S. at 572–73. Ohlson's testimony was given as an expert explaining the testing process, and, as we have seen, would have a much greater potential impact on public perception and confidence in laboratory procedures than would views expressed by a lay member of the public. On the basis of the record before us, we express no opinion as to whether the interests of Ohlson, in publicly expressing his views on better laboratory procedures, outweighed the interests of defendants in the administration of their duties. We see the balancing inquiry as more difficult than the district court perceived it, and disagree with its view on summary judgment that the balance clearly favors Ohlson.

What is abundantly clear to us, as it was to the district court, is that the law is not clearly established, and the defendants are entitled to qualified immunity.

C. Ohlson's Internal Advocacy

Ohlson alleges that he was also retaliated against for internal advocacy he conducted within the Department. His complaint alleged retaliation for "advocating within the [Department] for a change in the manner in which the department responds to requests in criminal cases for entire batch runs." The district court analyzed this claim together with the claim for retaliation against protected testimonial speech. It held the merits favored Ohlson in both claims but that the defendants were entitled to qualified immunity for both because no law clearly established Ohlson's rights.

The Supreme Court has said that a constitutional right is clearly established when "any reasonable official in the defendant's shoes would have understood that they were violating [a plaintiff's constitutional right]." *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014) (citations omitted). No "directly on point" case is required, but the constitutional question must be "beyond debate." *Kramer v. Cullinan*, 878 F.3d 1156, 1163 (9th Cir. 2018) (citations omitted). We have been directed to no case recognizing a First Amendment violation with respect to governmental action against an employee's speech within the workplace. We did recognize such a violation in *Garcetti*, but we were reversed by the Supreme Court. Ohlson is therefore not able to show that the Department violated clearly established law with respect to this claim.

CONCLUSION

The judgment of the district court in favor the defendants on grounds of qualified immunity is **AFFIRMED**.