No. 10-202

In the Supreme Court of the United States

GARY N. WEINTRAUB, AS ADMINISTRATOR OF THE ESTATE OF DAVID H. WEINTRAUB,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, COMMUNITY SCHOOL DISTRICT 32, CITY OF NEW YORK, DOUGLAS GOODMAN, DAISY O'GORMAN, FELIX VAZQUEZ, FRANK MILLER, AIDA SERRANO, LAWRENCE BECKER, AND JERRY CIOFFI,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

BRETTE L. STEELE
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

ANDREW H. SCHAPIRO
Counsel of Record
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 506-2500
aschapiro@mayerbrown.com

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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REPLY BRIEF FOR PETITIONER

The City concedes that this case presents two "real" circuit splits on "an important question of constitutional law." Opp. 5, 8. Thus, rather than responding to the petition on the merits, the City proffers several unpersuasive arguments that the petition is not an ideal vehicle for resolving these splits. Opp. 26. We respectfully submit that these arguments should be rejected.

First, the City's argument that Mr. Weintraub did not speak on a matter of public concern is both irrelevant to this petition and contradicted by the express findings of the district court. Second, the interlocutory posture is not an impediment to certiorari because the decision below decided an important issue, otherwise worthy of review, and resolution of that issue by the Court may serve to hasten or finally resolve the litigation. Third, the recognized circuit splits have material consequences in this case as well as many of the cases that will be decided until these splits are resolved. Accordingly, certiorari should be granted because this case presents an excellent vehicle to resolve two open questions left open by *Garcetti* v. *Ceballos*, 547 U.S. 410, 421 (2006), that are deeply dividing the courts of appeals.

I. The Opposition Brief Fails To Address The Primary Points Made In The Petition.

A. The Public Concern Inquiry Has No Bearing On This Petition.

Rather than addressing the "pursuant to" standard established in *Garcetti*, the City argues at length about whether the speech addressed a matter

of public concern. Opp. 9-15. That discussion is simply irrelevant to the instant petition.

The district court conclusively found that "[t]here is no doubt that the content of Weintraub's statement * * * relates to a matter of public concern, namely discipline in the public schools." See Pet. App. 71a. Indeed, the district court held that "the specific issue of student violence against teachers presents an issue of public concern in its own right." Pet. App. 72a. The Second Circuit acknowledged this holding (see Pet. App. 4a-5a) before expressly deciding not to reach the issue (see Pet. App. 9a ("[T]here is no cause for us to address whether [Mr. Weintraub's speech] related to a 'matter of public concern.'")). Accordingly, this issue is not before the Court in this petition.

B. The Reasons Why The Decision Below Is Wrongly Decided Stand Unrebutted.

Because the City elects to focus on the public concern element of the *Pickering* test, the City's brief offers only conclusory statements in response to our argument that the Second Circuit's construction of the "pursuant to" standard is unworkable and inconsistent with this Court's precedents.

The petition discussed four reasons raised by Judge Calabresi why the majority's decision was wrongly decided, and the City fails to respond. First, the petition established that the majority's method of piling inference upon inference was unworkable because it would transform nearly all workplace expression into speech "pursuant to" official duties. Pet. 23. The City offers no response. Second, the petition demonstrated that the majority's reliance on the absence of a public analog for the speech was in-

consistent with *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410, 414 (1979). Pet. 24. The City fails even to mention *Givham*, let alone grapple with the inconsistency. Third, the petition noted that the majority's decision would effectively force speech into public forums, thereby undermining the ultimate goal of *Garcetti* to promote efficient governance. Pet. 24-25. Again, the City offers no response. Finally, the petition argued that the majority improperly affirmed the district court's treatment of the "pursuant to" standard as a question of law, rather than a mixed question of law and fact reserved for a jury. Pet. 26-27. The City fails to engage this argument on the merits.

For all of the unrebutted reasons discussed in the petition and Judge Calabresi's dissent, review is warranted to establish the correct interpretation of this Court's *Garcetti* decision.

II. The Petition Presents Important Legal Questions Appropriate For Interlocutory Review.

The City is wrong to suggest that interlocutory review is unwarranted because this case does not involve "important issues" or a "patently wrong" decision. Opp. 5. It involves both.

First, the City itself concedes that this case involves an "important question of constitutional law." Opp. 8. As the petition highlights, the sheer volume of cases litigated in the lower courts and the chilling effect of the majority's decision over any public employee who challenges misguided or malfeasant conduct by co-workers warrant review. Pet. 27-29. See also Brief of the National Education Association as *amicus curiae* (discussing the impact of the decision

below on employee grievance procedures). Second, the majority's decision is in fact patently wrong for all of the reasons discussed in Part I, *supra*, and Part II of the petition.

In any event, this Court routinely grants certiorari even when further proceedings would otherwise be pending before the district court. See, *e.g.*, *Central Bank of Denver* v. *First Interstate Bank of Denver*, 511 U.S. 164, 168-170 (1994) (reversing denial of summary judgment); *Solorio* v. *United States*, 483 U.S. 435, 437 (1987) (reviewing decision that reinstated criminal charges following the trial court's dismissal of the indictment); *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462, 469 (1977) (reversing denial of motion to dismiss). The interlocutory posture of a judgment is simply no "impediment to certiorari" when the decision below "has decided an important issue, otherwise worthy of review" and where resolution of that issue by the Court "may serve to hasten or finally resolve the litigation." Eugene Gressman, et al., Supreme Court Practice § 4.18, at 282 (9th ed. 2007).

Indeed, as the district court stressed, "review of this question at this point in the proceedings may advance the ultimate termination of this litigation, which has been pending for nearly [eleven] years." Pet. App. 48a. The district court reasoned that "[i]f the action were to proceed to trial before Weintraub could appeal the Court's ruling, he would be precluded from presenting the bulk of his First Amendment retaliation claim to the jury," and in the event of a later reversal, "the case would need to be retried, resulting in a substantial waste of resources on the part of the Court and the parties to this action." *Ibid.* This same rationale calls for the review and ul-

timate decision of these important legal questions before the lower courts invest the time and expense of trial.

III. The City Concedes That This Case Presents "Real" Splits On Important Constitutional Questions.

The City concedes, as it must, that this case presents two "real" circuit splits on "an important question of constitutional law." Opp. 5, 8. The City attempts to downplay the significance of these splits by arguing that "the two positions, as applied, are not irreconcilable in a material way," Opp. 21, but that is incorrect.

A. The "Related To" And "Required By" Standards Are Irreconcilable.

1. As we established in our petition, the Second, Third, Fifth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits define "pursuant to" to include all speech that facilitates an employee's official duties. Pet. 8-10. Courts in these circuits have consistently held that employee complaints are unprotected whenever they are *related* to official duties, regardless of whether the employee is *required* to file a complaint. See, *e.g.*, *Rohrbough* v. *Univ. of Colo. Hosp. Auth.*, 596 F.3d 741, 746 (10th Cir. 2010) (finding that a nurse's complaints about a staffing crisis in the hospital were unprotected speech because "the staffing crisis affected her ability to do her job and provide appropriate patient care"); *Williams* v. *Dallas Indep. Sch. Dist.*, 480 F.3d 689, 693 (5th Cir. 2007) (per curiam) (finding that athletic director's complaint was "pursuant to" official duties because it was "part-and-parcel of his concerns about the program he ran"). Under this standard, Mr. Weintraub's

complaint regarding the school administration's decision to not discipline a student was unprotected because it was a "means to fulfill," and "undertaken in the course of performing, * * * his primary employment responsibility of teaching," Pet. App. 12a, despite the fact that there was no evidence that Mr. Weintraub was *required* to file a grievance.

The Eighth and Ninth Circuit cases cited by the City cannot be squared with these decisions, and the City's reasoning to the contrary is conclusory at best. For example, in *Davenport* v. *University of Arkansas Board of Trustees*, 553 F.3d 1110 (8th Cir. 2009), the Eighth Circuit found that found that a security officer's "duties did not include reporting either wrongdoing by a superior officer or a lack of resources" and that his complaint was therefore protected by the First Amendment. The City argues that the outcome in *Davenport* "would be no different under the 'related to' rubric" discussed above, Opp. 22, but the officer's complaints did in fact *relate* to his responsibilities and *affect* his ability to do his job. Under these facts, the complaints would clearly be deemed unprotected by the courts on the opposite side of the split.

Similarly, the City's unsupported assertion that "any of the eight Circuits applying the 'related to' test" would reach the same outcome in *Lindsey* v. *City of Orrick*, 491 F.3d 892 (8th Cir. 2007), is completely unfounded. Opp. 22. In *Lindsey*, the Eighth Circuit held that a city public works director's complaints regarding sunshine-law compliance were protected even though he was required to attend a training session on the state's sunshine law, because he was not required to ensure compliance with the law. See *Lindsey*, 491 F.3d at 898. Contrary to the City's

assertion, this case would have been decided differently in any of the eight Circuits applying the "related to" test because the official duties emanating from the sunshine-law training obviously related to the complaints regarding sunshine law violations that the Eighth Circuit found to be protected.

The City is also wrong to assert that the result in *Alaska* v. *EEOC*, 564 F.3d 1062, 1069 (9th Cir. 2009), cert. denied, 130 S. Ct. 1054 (2010), "would have been the same under either test" because the speech occurred in an open forum about issues of public concern. Opp. 22. The nature of the forum is not dispositive, see, *e.g.*, *Winder* v. *Erste*, 566 F.3d 209, 214–216 (D.C. Cir. 2009), (finding that testimony before a city council was unprotected), and the Ninth Circuit's finding that the employee's speech was not "pursuant to" her official duties because "official duties didn't require her to complain" presents a stark contrast with the rule imposed in the instant case. *Alaska*, 564 F.3d at 1070.

Finally, the City's assertion that the Ninth Circuit arrived at its decision in *Freitag* v. *Ayers*, 468 F.3d 528 (9th Cir. 2006), "without use of the 'required' language" is beside the point. Opp. 23. The court's finding that "[i]t was certainly not part of [the female corrections officer's] official tasks to complain to the Senator or the IG about the state's failure to perform its duties properly," looks to what is officially *required* and not merely what is vaguely *related* to duties like the complaint to an outside union regarding classroom safety at issue here. *Freitag*, 468 F.3d at 545.

In each of these cases, the Eighth and Ninth Circuits held that "speech proffered outside the scope of the *requirements* of an employee's job duties is al-

ways constitutionally protected." Opp. 23 (emphasis added). Mr. Weintraub would have obtained a different result if he had taught fifth grade in a public school system in any of the 16 states within the jurisdiction of the Eighth or Ninth Circuits because there was no *requirement* that he file a grievance petition with the external teachers' union, his speech merely *related to* the topic of student discipline. Accordingly, this clear split in authority warrants review.

2. The City's argument that "the test involves a * * * practical determination of what is normally incorporated in a job title," Opp. 24, does not cut against the requirement standard imposed by the Eighth and Ninth Circuits. Instead, the practical nature of the inquiry counsels in favor of regarding the question as a mixed question of law and fact, and allowing a fact finder to determine precisely what is involved in a job regardless of what is written. See *Posey* v. *Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1129 (9th Cir. 2008); *Reilly* v. *City of Atlantic City*, 532 F.3d 216, 227 (3d Cir. 2008), cert. denied, 129 S. Ct. 1316 (2009).

B. The Standard of Review Materially Impacts The Outcomes Of Cases.

The City concedes that the well recognized split among the courts of appeals over whether to analyze *Garcetti*'s "pursuant to" standard as a question of law or as a mixed question of law and fact is "real." See Opp. 5. The City's only response to this split is the conclusory assertion that "allowing a jury to determine factual issues or restricting them to a District Court judge would not in a substantial majority of cases change the outcome." Opp. 25. That is a non

sequitur. The question is not *who* should decide the facts, but *whether* there are facts to be decided.[1]

As the City stresses, this Court adopted a "practical" approach to job duties, recognizing that "'[f]ormal job descriptions often bear little resemblance to the duties an employee actually [is] expected to perform.'" Opp. 24 (quoting *Garcetti*, 547 U.S. at 424-425). It is precisely this practical component of the inquiry where fact finding can have a profound impact. In *Frietag*, for example, the Ninth Circuit remanded for a factual determination of "whether prison guards are expected to air complaints regarding the conditions in their prisons all the way up to the Director" and "what the union contract provides with respect to the persons to whom such grievances may or must be presented." *Freitag*, 468 F.3d at 546.

Here, the same factual inquiry could have resulted in a different outcome for Mr. Weintraub. A factual determination of whether Mr. Weintraub was expected to petition the external union and what the union contract provided could have prompted the reasonable conclusion that Mr. Weintraub's "duties as a teacher did not *require* him to take any further steps such as approaching Goodman about the situation or commencing a dispute-resolution proceeding." See Pet. App. 47a. Thus, review is warranted because the Third, Seventh,[2] and Ninth Circuits would

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[1] In any event, the City's statement that "Petitioner did not request a jury" misstates the record. The demand for a jury trial is endorsed on the face of the summons filed in the district court that commenced this action.

[2] The City contends that the Seventh Circuit treats the "pursuant to" inquiry as a question of law despite applying the stan-

have remanded this case for factual determinations, and those determinations could well have altered the outcome of this case.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

BRETTE L. STEELE
Mayer Brown LLP
1999 K Street, NW
Washington, DC
20006
(202) 263-3000

ANDREW H. SCHAPIRO
Counsel of Record
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 506-2500
aschapiro@mayerbrown.com

Counsel for Petitioner

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dard of "rational trier of fact" because the Court cited *Connick* v. *Myers*, 461 U.S. 138, 148 (1983). Opp. 26-27 (citing *Davis* v. *Cook County*, 534 F.3d 650 (7th Cir. 2008)). But the citation to *Connick* is not dispositive. As the Ninth Circuit explained, "*Garcetti* has transformed [the inquiry] into a mixed question of fact and law." *Posey*, 546 F.3d at 1127.