No. 10-1163

In The
Supreme Court of the United States

CHRISTINE A. OPP, *et al.*,

Petitioners,

v.

OFFICE OF THE STATE'S ATTORNEY OF COOK COUNTY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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I. There Is A Clear Conflict Regarding The Scope of The Policymaking Appointee Exception

The lower courts have repeatedly recognized that there is a circuit split regarding the scope of the policymaking appointee exception. The Seventh Circuit in the instant case rejected the "differing approach[]" of the Second Circuit. (App. 6a). The Second Circuit emphatically "disagree[d] with the Seventh Circuit's approach." *Butler v. New York State Department of Law*, 211 F.3d 739, 746 (2d Cir.2000). Six district court decisions have concluded that the circuit courts are in conflict. (Pet. 28-30). Respondents insist that all these decisions recognizing the conflict are mistaken.

(1) Respondents suggest that there is no real conflict because "[t]he Second Circuit's approach is not internally consistent." (Br.Opp. 10). But this assertion is neither explained nor elaborated upon. Respondents do not contend that any Second Circuit decision subsequent to *Butler* is inconsistent with *Butler* itself. The 2000 decision in *Butler* applied the same limiting principles established by the Second Circuit a decade earlier in *EEOC v. Vermont*, 904 F.2d 794 (2d Cir.1990). Respondents do not claim that there is in *Butler* itself any language that is inconsistent with the holding of the case.

Respondents repeatedly insist that the standard adopted by the Second Circuit in *Butler* is unsound. Respondents assert that *Butler* is "incorrect,"

"improperly [reasoned]," and "inconsistent with" a concurring opinion in *Gregory v. Ashcroft*, 501 U.S. 452 (1991). (Br.Opp. 5, 11, 14, 25). On the other hand, according to respondents, the Seventh Circuit "correctly" construed the exception. (Br.Opp. 8). But if the Second Circuit standard is incorrect, and the Seventh Circuit standard is the right one, the two standards must of course be different.

Respondents assert that the "a[ ] district court within the Second Circuit saw no conflict in using the Seventh Circuit's ... test." (Br.Opp. 13). But the decision to which respondents refer, *Schallop v. New York State Dep't of Law*, 20 F.Supp.2d 384 (N.D.N.Y.1998), was decided *before* the Second Circuit decision in *Butler*; indeed, *Schallop* expressly relied on the reasoning of the District Court in *Butler*, which the Second Circuit subsequently expressly disapproved. *Schallop*, 20 F.Supp.2d at 398.

(2) The First Circuit in *EEOC v. Massachusetts*, 858 F.2d 52 (1988), expressly based its avowedly narrow construction of the policymaking appointee exception on the Title VII Conference Report. Respondents insist that "[t]he court *only* mentioned the word 'narrowly' when quoting from the [Title VII] Joint Explanatory Statement." (Br.Opp. 9) (emphasis added). But the First Circuit quoted the Joint Explanatory Statement because it regarded that history as "relevant ... to the scope of the 'employee' definition," 858 F.2d at 55, and as an indication of what "Congress intended" the exemption (in both Title VII and the ADEA) to mean. 858 F.2d at 56. The First Circuit specifically quoted the Joint Statement in order to

make clear how "[t]he report actually reads." 858 F.2d at 55. The court then applied that narrow construction standard in establishing a general rule governing the scope of the exception. "[T]he narrow construction mentioned by the conferees ... is clearly intended to limit the reach of the exception *down the chain of command*." 858 F.2d at 56 (emphasis added).

Respondents object that

> the First Circuit *only* made the following observation:
>
> > It may be true that many, though surely not all, of the "policymaking positions at the *highest levels* of the departments or agencies of State or local governments" in the executive and even legislative branches require a close relationship between appointer and appointee. And yet that does not mean that the same is true of the judiciary.

(Br.Opp. 10) (quoting *EEOC v. Massachusetts*, 858 F.2d at 56) (emphases added). But this passage is not the only reference in the First Circuit's opinion to the "highest level" position limitation. First, the sixteen words that appear in quotation marks – including the reference to appointees at "the highest levels" – are from the Joint Explanatory Statement, which the First Circuit had also quoted in an earlier paragraph and which it correctly regarded as an authoritative account of the statutory provision. 858 F.2d at 55. Second, in the sentences which immediately follow the portion of

the First Circuit referred to by respondents, that Court of Appeals specifically applied the "highest levels" standard. 858 F.2d at 56. Third, in the next paragraph, the First Circuit again explained that "the very language of the conferees ... limited the positions covered to those at the highest levels." *Id.*

(3) In *Anderson v. Albuquerque*, 690 F.2d 796, 800 (10th Cir.1982), the Tenth Circuit held that the exemption is to be narrowly construed and then applied that standard. "[T]he position does not fit into the narrow exemption intended by Congress." Respondents simply dismiss the holding in *Anderson* as "incorrect." (Br.Opp. 23). In *Kelley v. City of Albuquerque*, 542 F.3d 802, (10th Cir.2008), the Tenth Circuit explained that "Congress intended for the exemptions to be 'construed narrowly' to cover only a *relatively small set of individuals*." 542 F.3d at 809 (emphasis added). In *Crumpacker v. Kansas Dep't of Human Resources*, 474 F.3d 747 (10th Cir.2007), that Circuit held that the policymaking appointee exception is limited to "positions at the highest levels." 474 F.3d at 752. Respondents argue that the Tenth Circuit in *Crumpacker* was "merely quoting the Joint Explanatory Statement." (Br.Opp. 22). But *Crumpacker* quoted the Statement for the express purpose of "point[ing] to Congress's explanation of the scope of the exemption." 474 F.3d at 752. District courts in the Tenth Circuit avowedly subject the exemption to a

narrow construction, and limit the policymaking appointee exception to officials at the highest level.[1]

The Fifth Circuit in *Teneyuca v. Bexar County*, 767 F.2d 148, 152 (5th Cir.1985), held that "the legislative history of this provision ... indicates that the exception is to be narrowly construed." 767 F.2d at 152. That holding concerns the legislative history of the exemption as a whole, not any history particular to and limited to a specific clause of the exemption. Although *Teneyuca* involved the personal staff clause, rather than the policymaking level appointee clause, of the exemption, nothing in the opinion suggested – and respondents do not argue – that the two clauses could be subject to different standards of construction. District courts in the Fifth Circuit apply the narrow construction principle to policymaking appointee exception.[2] In *Rutland v. Moore*, 54 F.3d 226, 230 n.6 (5th Cir.1995), the Fifth Circuit cited the portion of the Joint Explanatory Statement limiting the policymaking appointee exception to "positions at the highest levels."

The Fourth Circuit decision in *Curl v. Reavis*, 740 F.2d 1323 (4th Cir.1984), held that the entire statutory exemption – not, as respondents assert (Br.Opp. 16), merely the personal staff exception – is to be

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[1] *Johnson v. Board of County Comm'rs of Fremont*, 859 F.Supp. 438, 443 (D.Colo.1994); *Carlton v. City of Topeka, Kan.*, 1993 WL 32780 at *3 (D.Kan.).

[2] *Gomez v. City of Eagle Pass*, 91 F.Supp.2d 1000, 1003 (W.D.Tex.2004).

"construed narrowly" in light of the Joint Explanatory Statement. 740 F.2d at 1328. Section 701(f) of Title VII refersto the provision as a whole as "the exemption." 42 U.S.C. § 2000e-(f). The Fourth Circuit noted that the statutory "exemption" contained several distinct "specific exceptions." 740 F.2d at 1327. The narrow construction rule in *Curl* is about the entire statutory exemption, not merely the particular exception for personal staff.

> [T]he only *exception* to employee status relevant here is that for the "personal staff" of election officials. It is clear from the legislative history of this section that the *exemption* was intended to be "construed narrowly." *Joint Explanatory Statement....*

740 F.2d at 1328 (emphasis added).

Also relying on the Joint Explanatory Statement, the Sixth Circuit holds that the legislative history "indicat[es] that the statutory exceptions in the ... legislation ... should be construed narrowly." *Walton v. Michigan*, 1990 WL 182033 at *3 (6th Cir.) (emphasis added). Respondents object that the particular exception at issue in *Walton* was the "personal staff" clause. (Br.Opp. 17). But the holding in *Walton* concerns the "exceptions," plural. District courts in the Sixth Circuit apply the narrow construction rule to the policymaking appointee clause.[3]

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[3] *Gomez-Mesquita v. City of Detroit*, 2007 WL 2225859 at *4 (E.D.Mich.).

Respondents argue that the Eighth Circuit in *Goodwin v. Circuit Court of St. Louis County*, 729 F.2d 541 (8th Cir.1984), "just mentioned the word 'narrowly' when quoting from the Joint Explanatory Statement." (R.Br. 21). To the contrary, application of the narrow construction principle was an essential element of the Eighth Circuit's decision.

> Any doubt that might exist that Goodwin [fell outside the exemption] is resolved by the explicit Congressional intent that "this exemption shall be construed narrowly." Joint Explanatory Statement....

729 F.2d at 549. The Eighth Circuit's subsequent decision in *Stillians v. Iowa*, 843 F.2d 276 (8th Cir.1988), relied on by respondents (Br.Opp. 21), is entirely consistent with *Goodwin*. The position at issue in that case, which the Eighth Circuit deemed at the policymaking level, was the Director of the statewide Iowa Arts Council, which the Court of Appeals understandably concluded was a "high level position[]." 843 F.2d at 279. District courts in the Eighth Circuit continue to apply the *Goodwin* narrow construction rule subsequent to *Stillians*.[4]

(4) The decision in *Stout v. Commonwealth*, 521 Pa. 571 (1989), was expressly based on the ADEA. Respondents object that in *Stout* there was "no ADEA claim before the court." (Br.Opp. 15). In *Stout* the ADEA was before the court as a defense. The action

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[4] *Brown v. Polk County, Iowa*, 811 F.Supp. 432, 437 (S.D.Iowa1992).

had been brought by the state attorney general against a sitting judge who had reached the state mandatory retirement age; the defendant judge argued that that state provision violated the ADEA. 521 Pa. at 582. Under the heading "Applicability of Age Discrimination in Employment Act," the Pennsylvania Supreme Court addressed and decided the judge's claim that "she is not an employee on the policymaking level and ... , therefore, ... falls within the substantive provisions of the [Age Discrimination in Employment] Act." 521 Pa. at 582-83.

The Pennsylvania Supreme Court held that the exception is limited to officials who "promulgate regulations and directives." 559 A.2d at 496. Respondents assert, without explanation, that "[n]othing the court stated was inconsistent with the Seventh Circuit's approach." (Br.Opp. 16). But the Seventh Circuit's interpretation of the policymaking appointee exception is not limited to individuals who can adopt regulations and directives binding on subordinates or others; respondents do not claim that any of the plaintiffs in this case had the type of authority required by the Pennsylvania Supreme Court.

Respondents object that the ultimate issue in *Office of Lake County State's Atty. v. Human Rights Comm'n*, 235 Ill.App.3d 1036 (2d Dist.1992), was the construction of an Illinois anti-discrimination statute. But the State's Attorney in that case expressly urged the Illinois court to construe the state law exemption in the same manner as the ADEA and Title VII exemptions. 235 Ill.App.3d at 1045. It was in response

to that argument that the Illinois Appellate Court interpreted the federal policymaking appointee exception and held that that federal exception was to be "narrow[ly] constr[ued]," and limited to "policymaking positions *at the highest levels* of the departments or agencies." 235 Ill.App.3d at 1045 (quoting *EEOC v. Vermont*, 904 F.2d at 800) (emphasis in original). That emphatic interpretation of the federal exception would assuredly be binding on a state trial court in Illinois' Second Appellate District.

(5) Respondents assert that "courts generally" agree that "public attorneys, in positions similar to those of the Plaintiffs, are appointees on the policymaking level." (Br.Opp. 26). That is not correct.

Several of the decisions cited by respondents stressed that the claimant in those cases, unlike the plaintiffs in the instant action, were *not* merely line attorneys. "[Plaintiff's] attempt to minimize the scope and importance of his role as simply that of ... 'line attorney' is wholly unpersuasive." *Tomlis v. Office of Attorney General*, 45 Fed.Appx. 139, 143 (3d Cir.2002); see *id.* at 144 (noting that plaintiff reviewed proposed regulations and was authorized to file appellate briefs "*without* review by superiors") (emphasis in original). "[Plaintiff's] supervisory authority [as a Deputy Bureau Chief] placed her at a higher level of responsibility than most other [Assistant Attorneys General]." *Butler v. New York State Dep't of Law*, 211 F.3d at 749; see *id.* (plaintiff "as Deputy Bureau Chief was in a higher position than other AAGs"). In *Butler* it was "undisputed that as Deputy Bureau Chief, Ms. Butler supervised ten Section Chiefs and approximately 112

employees." Brief for Defendants-Appellees, *Butler v. New York State Dep't of Law*, No. 98-7616, 1998 WL 34094056 at *4.

Moreno v. County of Westchester, 1991 WL 340566 (S.D.N.Y.), held that the position of line attorney in a county attorney's office is not within the policy-making appointee exception, applying Second Circuit precedent limiting that exception to "persons who would work closely with an elected official." 1991 WL 340566 at *3. Respondents assert, without citation or explanation, that the position in *Moreno* involved "relatively limited duties and responsibilities." (Br.Opp. 27). Nothing in the opinion, however, supports that assertion. To the contrary, the defendant in *Moreno* argued (in terms similar to the decision below), "that assistant county attorneys are invested with all of the rights and duties of the county attorney." 1991 WL 340566 at *2; see App. 9a. Similarly, in *Tranello v. Frey*, 758 F.Supp. 841 (W.D.N.Y.1991), the court held that an assistant county attorney was not within the policymaking appointee exception, even though in that case the plaintiff had some "supervisory role." 758 F.Supp. at 843. The district court relied on the legislative history limiting that exception to "positions at the highest levels of the departments or agencies." 758 F.Supp. at 850 (quoting 1972 U.S. Code Cong. & Admin. News 2137, 2180).[5]

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[5] Respondents object that the attorney in *Tranello* handled only civil cases, whereas assistant state's attorneys in Illinois

(Continued on following page)

Many of the decisions cited by respondents regarding line attorneys actually construed and applied the personal staff exception, not the policymaking appointee exception. Those decisions repeatedly hold that in determining whether an employee is a personal staff member the courts are to look at whether the plaintiff had a close working relationship with the appointing official. *Teneyuca v. Bexar County*, 767 F.2d at 151 (relevant factors include "the actual intimacy of the working relationship between the elected official and the person filling the position"); *Rutland v. Office of the Attorney General*, 851 F.Supp. 793, 800 (S.D.Miss.1994) (quoting *Teneyuca*; "according to the Attorney General's affidavit, which is unchallenged ... , direct reporting by Special Assistant Attorneys General to the Attorney General is a common occurrence"). Some line attorneys do have that sort of personal relationship with the elected official who appointed them. But respondents do not contend that such a close relationship existed in this case between the plaintiffs and the State's Attorney.

(6) Respondents argue that disputes about the policymaking appointee exception in the ADEA, Title VII, and other federal statutes are "less likely ... in the future" because of the Government Employee Rights Act of 1991 (GERA). 42 U.S.C. §§ 2000e-16a

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may also handle criminal cases. (Br.Opp. 12-13). But nothing in the decision below suggested that the Seventh Circuit standard depends on the type of case a lawyer handles. In the instant case petitioner Cahnmann handled only civil tax matters.

et seq. (Br.Opp. 27). Respondent's prediction about future litigation is belied by twenty years of actual experience. GERA has been the law for two decades, without noticeably affecting the volume of litigation regarding the exception. Most of the exemption cases cited by petitioners and respondents were decided after the enactment of GERA.

II. This Case Is An Appropriate Vehicle for Resolving This Conflict

This appeal presents precisely the type of case in which resolution of this conflict is dispositive.

The First, Second and Fifth Circuits hold that the policymaking appointee exception is limited to positions at the "highest levels" of departments or agencies. If that interpretation of the policymaking appointee exception is correct, the dismissal of plaintiffs' claims was improper; the plaintiffs were line attorneys far removed from the upper echelon of managers in the State's Attorney office.

The First and Second Circuits hold that the policymaking appointee exception is limited to employees who work closely with the appointing official. If that interpretation of the policymaking appointee exception is correct, the dismissal of plaintiffs' claims was improper; defendants have never claimed that any of the plaintiffs had that sort of relationship with the State's Attorney.

The Pennsylvania Supreme Court holds that the policymaking appointee exception applies only to officials who have the authority to promulgate binding rules of general application. If that interpretation is correct, the dismissal of plaintiffs' claims was improper; respondents have never claimed that any of the plaintiffs have that type of power over other lawyers in the office.

Seven circuits insist that the statutory exemption must be construed narrowly. That standard is manifestly inconsistent with the Seventh Circuit's holding that the policymaking appointee exception applies to every one of the thousands of assistant state's attorneys in Illinois.

The relevant facts are not in dispute. The complaints in all three actions were dismissed under F.R.Civ.P. 12(b)(6) for failure to state a claim on which relief could be granted.[6]

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[6] Respondents assert that petitioners' "powers ... [we]re as extensive as the elected State's Attorney." (Br.Opp. 4). Respondents could not, of course, mean that every one of the 900 lawyers in the office – like the State's Attorney herself – actually had the plenary authority to supervise, establish rules controlling, or dismiss all of the other 900 lawyers. The cases on which respondents rely merely hold that when authorized to take a particular action in a specific case, e.g., to file a given motion or question a witness, a given assistant state's attorney exercises with regard to that act the same power that the State's Attorney herself would have had as to that specific matter. That is no different than any other exercise of delegated authority by a public or private employee.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit. In the alternative, the Solicitor General should be invited to file a brief expressing the views of the United States.

Respectfully submitted,

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