No. 11-

IN THE

Supreme Court of the United States

Police Chief MATTHEW T. BYRNE, Individually and in his Official Capacity, Lt. PAUL RICKARD, in his Individual and Official Capacity and Lt. PATRICK FREEMAN, in his Individual and Official Capacity,

Petitioners,

v.

JASON M. JACKLER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), this Court unequivocally excluded from First Amendment protection all expressions made by a government employee pursuant to his or her official duties. A gaping, court-acknowledged, and harshly-worded Circuit Court split exists after: (a) the Second Circuit carved its own exception to Garcetti for law enforcement officers who refuse to file on-the-job reports they deem false, and (b) the D.C. Circuit, on nearly identical facts, issued the exact opposite ruling, calling the Second Circuit's reasoning in the sub judice case "backwards," "dubious," and "about as useful as a mosquito net made of chicken wire."

This case presents the following questions:

1. May a government employer, free of First Amendment liability, discipline an employee for his refusal to prepare a job-related report?

2. Is there an exception to *Garcetti* for law enforcement employees?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *Jackler v. Byrne*, __ F.3d __ (2d Cir. 2011), No. 10-0859-cv, 2011 WL 2937279 (2d Cir. July 22, 2011). (*See* App. A at 1a-41a.) The Second Circuit reversed the February 11, 2010 decision of the United States District Court for the Southern District of New York, reported at 708 F. Supp. 2d 319 (S.D.N.Y. 2010). (*See* App. B at 42a-55a.)

STATEMENT OF JURISDICTION

The Second Circuit's opinion was rendered on July 22, 2011. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I

Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Title 42 United States Code, Section 1983

Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Respondent Jason Jackler was a probationary police officer for the City of Middletown Police Department ("the Police Department").[1] During an arrest, Jackler witnessed a fellow police officer punch the arrestee in

1. Because this case comes to this Court following petitioner's Fed. R. Civ. P. 12(c) motion, petitioners admit these facts for purposes of this petition only.

the face. The arrestee filed a civilian complaint with the Police Department alleging excessive force.

Jackler's superiors directed him to draft a report regarding the incident. He did as he was instructed. Jackler concedes that the incident report was prepared pursuant to his official duties as a police officer.

Jackler's incident report corroborated the arrestee's complaint. Jackler's superiors directed him to change his incident report to omit reference to the arresting officer's use of excessive force. Jackler refused to change his report. After Jackler's probationary period ended, he was terminated. Jackler claims that he was terminated in retaliation for refusing to change his report.

Procedural Posture

On January 8, 2009, Jackler filed his complaint against Petitioners in the United States District Court for the Southern District of New York. The district court had subject matter jurisdiction over the action, as the complaint asserted claims for substantive due process, 42 U.S.C. § 1983 conspiracy, and violations of the First, Fourth, Fifth, and Fourteenth Amendments, and 18 U.S.C. § 1962 (civil RICO). Petitioners answered the complaint on May 8, 2009. On July 22, 2009, Petitioners filed a motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted.

On February 11, 2010, District Judge Cathy Seibel issued a Memorandum Decision and Order dismissing Jackler's complaint in its entirety. Judge Seibel found that

Jackler's refusal to alter his report was made pursuant to his official duties as a police officer and reluctantly dismissed the First Amendment retaliation claim as barred by *Garcetti*. Judge Seibel was "troubled" by the implications of *Garcetti* "in the context of an employee who refuses a superior's direction to lie about facts" and urged the "higher courts" to address the issue.

Judge Seibel dismissed Jackler's substantive due process claim because, as a probationary police officer, he had no protectable property right in continued employment with the Police Department. She dismissed the conspiracy claim with the underlying claims. Although she declined to address the issue, Judge Seibel opined that Petitioners were entitled to qualified immunity because it is not clearly established that public employees have a constitutionally protected right to refuse to follow orders to engage in misconduct.[2]

On March 11, 2010, Jackler filed a notice of appeal with the United States Court of Appeals for the Second Circuit challenging only the dismissal of the First Amendment retaliation claim. The Court of Appeals had jurisdiction over respondent's appeal from the district court's Decision and Order and Final Judgment under 28 U.S.C. § 1291. The Second Circuit held that Jackler's refusal to change his police incident report was made in his capacity as a citizen rather than pursuant to his official duties and reversed the district court's decision. Petitioners now ask this Court to review the Second Circuit's decision.

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2. Respondent withdrew his RICO claim in response to Petitioners' motion to dismiss. The district court deemed the Fourth and Fifth Amendment claims unopposed and dismissed them as abandoned.

ARGUMENT

Point I

Review is Warranted Because There is a Circuit Split Regarding the Application of Garcetti

In this case, the Second Circuit held that a government employee's refusal to make a false statement in a job related report implicates the employee's First Amendment rights. *See Jackler*, __ F.3d at __, 2011 WL 2937279, at *1. Shortly thereafter, the D.C. Circuit was presented with the identical question. *See Bowie v. Maddox*, 653 F.3d 45 (D.C. Cir. 2011). The D.C. Circuit reached the diametrically opposite conclusion, in the process directly and specifically disparaging the Second Circuit's reasoning as untrue to this Court's holding in *Garcetti*. This Court should grant certiorari to resolve the clear, strident, and irreconcilable Circuit Court split on this very important and controversial issue, which affects both government employers and employees nationwide.

In *Bowie v. Maddox*, 642 F.3d 1122, 1134 (D.C. Cir. 2011), plaintiff, David Bowie, alleged that he was fired by the District of Columbia Office of the Inspector General ("OIG") in retaliation for refusing to sign an affidavit in connection with a former co-worker's discrimination claim against the OIG because he believed that the affidavit contained false information. *Id.* at 1126-27. The D.C. Circuit affirmed the district court's dismissal of the First Amendment retaliation claim. *Id.* at 1134. The unanimous opinion of Chief Judge David B. Sentelle, Senior Circuit Judge Stephen F. Williams, and Judge Janice Rogers Brown held that the First Amendment was not implicated

because Bowie's refusal to sign the false affidavit was pursuant to his official duties and is, as a result, precluded from protection by this Court's decision in *Garcetti*. *Id.* at 1133-34.

One month later, on July 22, 2011, the Second Circuit panel of Senior Judge Amalya L. Kearse, Senior Judge Robert D. Sack, and Judge Robert Katzmann reversed District Judge Cathy Seibel's dismissal of Jackler's retaliation claim. The Second Circuit held that *Garcetti* did not dictate dismissal here because Jackler's refusal to write the report as directed has a "civilian analogue," which shields the refusal with First Amendment protection. *Jackler*, __ F.3d at __, 2011 WL 2937279, at *14.

In the wake of the Second Circuit decision in *Jackler*, the plaintiff in *Bowie* petitioned for rehearing. 653 F.3d 45. That rehearing petition came before the same D.C. Circuit panel that issued the original opinion: Judges Sentelle, Williams, and Brown. The rehearing opinion, like the original opinion, was authored by Judge Janice Rogers Brown.

The rehearing opinion explained not only why *Garcetti* controlled the result, but also why the Second Circuit's entire approach in *Jackler* is unfaithful to *Garcetti* and unsound legally. In analyzing the Second Circuit *Jackler* opinion, the D.C. Circuit did not use tweezers; it used a sledgehammer.

The D.C. Circuit's *Bowie* decision creates a stark, immediate, and irreconcilable conflict with the Second Circuit's *Jackler* decision. The two cases cannot be harmonized. They present diametrically opposite

analyses and results for the rather mundane situation where a government employer seeks to discipline a law enforcement employee for failing to author a compelled on-the-job document that the employee believes to be false.

In *Jackler*, the Second Circuit held that, because citizens can refuse the compulsion to give false testimony and evidence, Police Officer Jackler's refusal to provide a compelled police incident report that he felt would be false, morphed him into Citizen Jackler, unaffected by *Garcetti*. *Jackler*, __ F.3d at __, 2011 WL 2937279, at *14. Citizen Jackler, the Second Circuit found, "has a First Amendment right to decide what to say and what not to say, and accordingly the right to reject governmental efforts to require him to make statements that he believes are false." *Id.* That analysis dictated the result, giving Jackler a First Amendment retaliation claim, *Garcetti* notwithstanding.

Five weeks after the Second Circuit's reversal, the D.C. Circuit in *Bowie* specifically examined *Jackler*, and explicitly rejected its holding.

Bowie, claimed that he was the victim of First Amendment retaliation for failing to sign an affidavit for the employer in an EEOC investigation related to the OIG because he believed it was false. Relying on *Jackler* to change his result at the appellate rehearing stage, Bowie argued that, even if his refusal was made pursuant to his official duties, it was nevertheless protected by the First Amendment because a private citizen has an analogous right to refuse to submit false testimony to the EEOC. *Bowie*, 653 F.3d at 46-47. That is exactly the reasoning the Second Circuit adopted in *Jackler*.

The D.C. Circuit acknowledged the *Garcetti* Court's line of dictum that "'[w]hen a public employee speaks pursuant to employment responsibilities . . . there is no *relevant* analogue to speech by citizens who are not government employees,'" *id.* at 47 (*quoting Garcetti*, 547 U.S. at 424) (emphasis in original), but it did not take this to mean that, any time speech has a civilian analogue it is protected by the First Amendment. *Id.* Rather, the D.C. Circuit wrote that *Garcetti* "made clear that only when public employees 'make public statements outside the course of performing their official duties' do they 'retain some possibility of First Amendment protection.'" *Id.* (*quoting Garcetti*, 547 U.S. at 423). "Only then is the analogy to private speech 'relevant.'" *Id.* (*quoting Garcetti*, 547 U.S. at 424).

The D.C. Circuit flat out rejected the Second Circuit's interpretation of *Garcetti* and its finding for Jackler on the facts of his case. Judge Janice Rogers Brown criticized that the Second Circuit "elided the question whether Jackler spoke as a citizen into its identification of a civilian analogue for the relevant speech. Because Jackler's speech was analogous to that of a private citizen, the court deduced that he 'was not *simply* doing his job in refusing to obey those orders.'" *Id.* (*quoting Jackler*, __ F.3d at __, 2011 WL 2937279, at *14 (emphasis in original). The D.C. Circuit found this reasoning flawed especially since the Second Circuit agreed that "a police officer has a duty not to substitute a falsehood for the truth." *Id.* at 47 (*quoting Jackler*, __ F.3d at __, 2011 WL 2937279, at *13).

Judge Brown condemned the Second Circuit:

> The Second Circuit gets *Garcetti* backwards. The critical question under *Garcetti* is not whether the speech at issue has a civilian

> analogue, but whether it was performed "pursuant to . . . official duties." *A test that allows a First Amendment retaliation claim to proceed whenever the government employee can identify a civilian analogue for his speech is about as useful as a mosquito net made of chicken wire*: All official speech, viewed at a sufficient level of abstraction, has a civilian analogue. Certainly the district attorney's memo in *Garcetti* was analogous in some sense to private speech – for example, testimony or argumentation on the same subject by the criminal defendant it concerned. Critically though, Ceballos's memo was composed as part of his government job, and the Supreme Court unambiguously "reject[ed] . . . the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties."

Id. at 48 (*quoting Garcetti*, 547 U.S. at 426) (emphasis added).

The D.C. Circuit continued to hammer the Second Circuit:

> The Second Circuit concluded that, because the police department could not, consistent with the First Amendment, have forced [a civilian] to withdraw his complaint, Jackler was entitled to the same constitutional protection in disobeying the orders of his government employer. This begs the question. Under *Garcetti*, the rules are different for government employees speaking in their official capacities. An utterance made pursuant to employment

> responsibilities is unprotected even if the same utterance would be protected were the employee to communicate it as a citizen. As all of the dissenting Justices recognized, *Garcetti* categorically denies recovery under the First Amendment to plaintiffs who spoke pursuant to . . . official duties. Under the circumstances, it is not difficult to sympathize with the Second Circuit's dubious interpretation of *Garcetti*. The police chief's instruction to Jackler and the actions he ordered Jackler to take were clearly illegal. But the illegality of a government employer's order does not necessarily mean the employee has a cause of action *under the First Amendment* when he contravenes that order.

Id. (quotation marks and citations omitted).

Accordingly, the D.C. Circuit re-affirmed that Bowie had no First Amendment retaliation claim predicated on a refusal to submit a false affidavit. The refusal, the D.C. Circuit clearly held, was not protected by the First Amendment because it was made pursuant to his official duties, regardless of whether his refusal had a "citizen analogue." *Id.*

It is impossible to square *Jackler* with *Bowie*; the law in two important and path-marking circuits is hopelessly split.

But that is not the only Circuit split *Jackler* has opened. The *Jackler* decision also conflicts with the Sixth Circuit's decision in *Barachkov v. 41B Dist. Court*, 311 F. App'x 863, 869-70 (6th Cir. 2009). In that case, the

plaintiffs alleged that they were fired for their "refusal to give false information" regarding the performance and internal operations of the local court. *Id.* at 869. The Sixth Circuit acknowledged that the "determinative factor under *Garcetti* is not where, or to whom, the employee communicated, but rather whether the employee communicated pursuant to his or her official duties." *Id.* at 870 (*citing Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 545 (6th Cir. 2007)). The Sixth Circuit found that the plaintiffs' refusal to make false statements did not enjoy First Amendment protection and could not serve as a predicate to a First Amendment retaliation claim.

Point II

Review is Warranted Because the Second Circuit's Decision Directly Conflicts with this Court's Decision in Garcetti

This Court made clear in *Garcetti* that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." 547 U.S. at 421. This categorical rule unequivocally removes from First Amendment protection *all* expressions made by public employees pursuant to their official duties. *Id.* at 426 (Stevens, J., dissenting) (acknowledging the majority's conclusion that the First Amendment "Never" protects a government employee from discipline based on speech made pursuant to the employee's official duties); *Id.* at 430 (Souter, J., dissenting) (recognizing that the majority's holding "categorically den[ies] *Pickering* protection to any speech uttered 'pursuant to . . . official

duties'"); *Id.* at 446 (Breyer, J., dissenting) ("In a word, the majority says, "never."). The Second Circuit's *Jackler* decision created an exception to this rule for a government employee's refusal to make false on-the-job statements. This Court should grant certiorari to reaffirm the reach of *Garcetti* and end the confusion.

In *Garcetti*, Richard Ceballos, a calendar deputy in the Los Angeles County District Attorney's Office, issued a memo to his supervisor conveying his opinion that an affidavit used to obtain a search warrant contained serious misrepresentations and recommending dismissal of the criminal case on which it was based. *Id.* at 413-15. Ceballos claimed that his employer retaliated against him as a result of his memo in violation of the First Amendment. *Id.* at 415.

The threshold inquiry in this Court's analysis was whether Ceballos spoke as an employee or as a citizen on a matter of public concern when he purported to expose a false search warrant application. This Court held that Ceballos' speech was not protected because it was made in his capacity as a government employee and not as a private citizen. *Id.* at 421. The "controlling factor" in the determination that Ceballos spoke as an employee was that his memo was made "pursuant to" his job duties. *Id.*

This Court noted that it was "immaterial whether he experienced some personal gratification from writing the memo . . . . The significant point is that the memo was written pursuant to Ceballos' official duties." *Id.* Since Ceballos was not speaking as a citizen, this Court did not have to reach the question of whether the memo touched upon a matter of public concern; it was irrelevant.

In dicta, the *Garcetti* Court attempted to assuage concerns of a "perceived doctrinal anomaly" that it would be inconsistent to compel public employers to tolerate certain employee speech made publicly, but not speech made pursuant to an employee's assigned duties. *Id.* at 423. This Court stated that such a concern "misconceives the theoretical underpinnings" of this Court's jurisprudence and reiterated that "[e]mployees who make *public statements outside the course of performing their official duties* retain *some possibility* of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government." *Id.* at 423. In contrast, "[w]hen a public employee speaks pursuant to employment responsibilities . . . there is no relevant analogue to speech by citizens who are not government employees." *Id.* at 424. Therefore, such speech is never protected.

The facts of *Jackler* are quite similar to those of *Garcetti*. Jackler was a probationary police officer who witnessed a fellow officer punch an arrestee. The arrestee filed a civilian complaint with the Police Department. Jackler's supervisors directed Jackler to file a police incident report detailing his account of the incident. Jackler filed the requested incident report, corroborating the civilian complaint and implicated his fellow officer in the use of excessive force. Just like Ceballos, Jackler conceded that he made the report pursuant to his official duties as a police officer.

After reading the incident report, Jackler's supervisors directed him to withdraw it and write a new report that did not accuse the other officer of brutality. Jackler refused and was subsequently terminated. He claimed

that he was terminated because he refused to submit a false statement.

The Southern District of New York reluctantly dismissed Jackler's First Amendment retaliation claim as barred by *Garcetti*. Judge Cathy Seibel noted that *Garcetti* focuses on whether the speech was made pursuant to the employee's official job duties, not on the forum in which it was made or the content of the speech. *Jackler*, 708 F. Supp. 2d at 324. Judge Seibel employed the *Garcetti* analysis dictated by this Court, and she focused only on whether Jackler's refusal to change his report was made pursuant to his duties as a police officer. She wrote:

> I am constrained by *Garcetti* and *Weintraub* to conclude that Plaintiff's speech here was in his capacity as a police officer, not a citizen. . . .Jackler's refusal to alter his report was done in his capacity as a police officer, and that refusal only occurred because he was an officer. Ironically, it is because he was a public employee with a duty to tell the truth that his insistence on fulfilling that duty is unprotected.

Id. (*citing Weintraub v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 593 F.3d 196, 202 (2d Cir. 2010)).

Judge Seibel continued that because

> in determining whether an employee speaks as a citizen the focus must be on the role the speaker occupied when he spoke, and because it is so clear on the facts as alleged by Jackler that he refused to withdraw or alter his truthful

> report in the belief that the proper execution of his duties as a police officer required no less, I do not see how I can avoid the conclusion that he was speaking as an officer, not a citizen, when he did so.

Id. at 324-25 (internal citations omitted). Judge Seibel's decision was perfectly consistent with this Court's analysis in *Garcetti*. She dismissed Jackler's retaliation claim accordingly.

"Troubled" by this outcome, however, Judge Seibel "encourage[d] higher courts to consider whether *Garcetti* should apply at all when the employee speech concerns a matter of fact, rather than a matter of judgment, opinion, or policy, as in *Garcetti*." *Id.* at 324 n.5. She further stated that "[b]ecause the implications of this conclusion are so disturbing in the context of an employee who refuses a superior's direction to lie about facts, I would welcome appellate scrutiny of the issue." *Id.* at 325.

The Second Circuit accepted Judge Seibel's invitation to reverse, and it invented its own *Garcetti* exclusion (to the consternation of the D.C. Circuit, *see* POINT I, *supra*).

The issue before the Court of Appeals was whether a public employee's refusal to make false on the job statements at his supervisor's direction was protected by the First Amendment. The Second Circuit bent over backwards to answer in the affirmative, ignoring this Court's categorical rule to the contrary. The Second Circuit did not dispute Judge Seibel's observation that Jackler "refused to withdraw or alter his truthful report in the belief that the proper execution of his duties as a

police officer required no less." *Jackler*, 708 F. Supp. 2d at 325. Despite that lip service to the *Garcetti* command to look at the work/non-work context of the speech, in the end it appears that whether Jackler spoke (or refused to speak) as an employee or as a citizen was irrelevant to the Second Circuit.

Instead, the Second Circuit focused on whether Jackler's speech touched on a matter of public concern. *Jackler*, __ F.3d at __, 2011 WL 2937279, at *13. It found that a report of a police officer's use of excessive force satisfied the requirement. *Id.* *Garcetti* instructs, however, that the public concern inquiry is only relevant if the plaintiff can surmount the threshold requirement that he was speaking as a private citizen rather than as an employee. *Garcetti*, 547 U.S. at 418.

Elevating one line of dictum from *Garcetti* into a doctrinal requirement, the Second Circuit then invented a second prong, holding that a public employee's speech is protected, regardless of the speaker's role, if the speech at issue has a "relevant citizen analogue." *Jackler*, __ F.3d at __, 2011 WL 2937279, at *14. This is not the first time that the Second Circuit relied on this criterion in determining whether a public employee's speech was protected. *See Weintraub*, 593 F.3d at 203 (considering the existence of a "relevant citizen analogue" in determining whether teacher's speech was made pursuant to his job duties).

Garcetti, however, never suggested that the existence of a "relevant citizen analogue" plays any role in determining whether a government employee's speech is protected, and it certainly did not hold that the mere existence of a citizen analogue to an employee's speech

renders the speech protected. Rather, the *dicta* merely explained this Court's rationale for its conclusion that speech made pursuant to official duties is not protected, *i.e.*, because there is no citizen analogue to speech that is made pursuant to an employee's official duties. *Id.* at 206 (Calabresi, J., dissenting).

The Second Circuit held that Jackler's refusal to withdraw his truthful report and re-submit a false one was protected because a private citizen has the right to refuse to rescind truthful accusations and to refuse to make false statements. *Jackler*, __ F.3d at __, 2011 WL 2937279, at *14. The Second Circuit then applied the *Pickering* balancing test and concluded that Jackler's refusal to change his report was protected. *Id.* at 14-15.

It is obvious that, following the invitation of District Judge Seibel, the Second Circuit set about to configure a way that allows Jackler to win because he alleges that he was terminated for doing what he believed was the right thing to do. In so doing, as the D.C. Circuit has recognized, the Second Circuit has disemboweled *Garcetti.*

Like Jackler, Ceballos worked in law enforcement, with a duty to enforce the law. Like Jackler, Ceballos wrote a memo exposing improper police practices. Like Jackler, Ceballos alleged that the First Amendment protected him. This Court said "no" to Ceballos, and the Second Circuit said "yes" to Jackler.

Since all citizens can make complaints exposing false arrest warrant applications, *Ceballos himself* would be viewed by the Second Circuit as having a "citizen analogue." *Ceballos himself* could win his case against

Garcetti in the Second Circuit. As the D.C. Circuit observed, arguably, there is an abstract citizen analogue to all employee speech. *Bowie*, 653 F.3d at 48. It is hard to see what is left of *Garcetti* in the Second Circuit.

Jackler also seems to create an absolute rule that a government employee's refusal to make a false on-the-job statement is always protected. That finding is untrue to *Garcetti's* disinterest in the content or context of speech if it is initially deemed job-related. This Court said that the decisive test is for job-relatedness. The Second Circuit just chucked that test in favor of one of its own making.

Finally, the Second Circuit's *Jackler* rule exalts a refusal to lie over the *Garcetti* rule of job-relatedness, putting form over substance. Every future First Amendment retaliation plaintiff, instead of getting his case dismissed with the claim of "I was fired for writing a truthful report," could substitute, "I was fired because they *knew* I would not write a false report." In the Second Circuit, "tails" gets dismissed, but "not heads" survives, even though they are part of the same job-related coin.

If *Garcetti* is to be overruled or given eviscerating exceptions, it must come from this Court. If *Garcetti* is still the law of the land, it must be reaffirmed by this Court before other Circuits do what the D.C. Circuit said the Second Circuit has already done: turned a mosquito net into chicken wire.

Point III

This Court Should Settle this Important Constitutional Issue

Despite its categorical rule, "[n]avigating the shoals of the standard articulated by the Supreme Court in *Garcetti* . . . has proven to be tricky business . . . ." *Decotiis v. Whittemore*, 635 F.3d 22, 26 (1st Cir. 2011); *see also Davis v. McKinney*, 518 F.3d 304, 311-13 (5th Cir. 2008) ("*Garcetti* changed this analysis in ways not yet fully determined."). The lack of an articulated "comprehensive framework" for determining when a public employee is speaking pursuant to his official duties has led to confusion in the district and appellate courts resulting in many different and conflicting interpretations of *Garcetti*. *Garcetti*, 547 U.S. at 424. "The lower courts' efforts to apply *Garcetti's* categorical holding to various fact scenarios have resulted in some puzzling outcomes that seem to have raised more questions than *Garcetti* purported to settle." Christine Elzer, *The "Official Duties" Puzzle: Lower Courts' Struggle with First Amendment Protection for Public Employees After Garcetti v. Ceballos*, 69 U. Pitt. L. Rev. 367, 368 (2006). As one District Judge wrote, "whether the water has been somewhat cleared or further muddied by *Garcetti* remains to be seen. Suffice it to say, many billable hours will likely be spent wrangling over the scope of every employee-plaintiff's 'official duties.'" *Price v. Macleish*, Nos. 04-956 (GMS), 04-1207 (GMS), 2006 WL 2346430, at *5 (D. Del. Aug. 14, 2006), *aff'd*, *Foraker v. Chaffinch*, 501 F.3d 231 (3d Cir. 2007).

"Generally, lower courts apply *Garcetti* as a threshold determination prior to the *Connick-Pickering* analysis,

reviewing the speech's public concern nature under *Connick* and balancing the individual and government interests under *Pickering*. Beyond that concurrence, the lower courts' applications of *Garcetti* are inconsistent because the Court's 'practical inquiry' instruction left open and unclear how to specifically define 'pursuant to official duties.'" Diane Norcross, *Comment: Separating the Employee from the Citizen: The Social Science Implications of Garcetti v. Ceballos*, 40 U. Balt. L. Rev. 543, 556-57 (2011) (citing cases). This confusion is not confined to any single facet of the decision. Rather, as time has passed, the lower court's inconsistencies have infected various aspects of the decision. "In the five years after *Garcetti*, the 'practical inquiry' defining official duties continues to be unclear, suggesting the need for revision and review by both the judiciary and the legislature." *Id.* at 558; *see also Chamberlin v. Town of Stoughton*, 601 F.3d 25, 31 (1st Cir. 2010) ("Virtually all of the 'protected conduct' relied on by the plaintiffs was speech-related activity that arguably was done 'pursuant to their official duties'; but it is unclear how far the Supreme Court intends to carry *Garcetti* . . . .").

For example, the D.C., Tenth, and Eleventh Circuits have interpreted *Garcetti* to broadly unprotect speech related to the completion of the employee's work duties. *Id.* at 557-58 (citing cases). In contrast, the Fourth and Seventh Circuits have interpreted *Garcetti* to require that the act of speaking was an official duty itself and not merely that the speech related to the subject matter of an employee's job or fulfilled a general duty. *Id.* The Fifth and Ninth Circuits have defined "speech pursuant to official duties" as through the "chain of command." *Id.* The Sixth Circuit has rejected this theory. *Id.* The Eleventh Circuit

has applied *Garcetti* to bar protection to speech related to, but not required by, employment. *Id.* The Second Circuit joined this approach in *Weintraub*. *See* 593 F.3d at 203.

"Still others have cited *Garcetti* while seemingly ignoring the 'official duties' prong altogether." Elzer, *supra* at 368 (citation omitted). This was exactly the case with the Second Circuit's *Jackler* decision, which employed a straight *Pickering* analysis without first addressing whether Jackler spoke as a private citizen or an employee. *Jackler* seems to hold that the refusal to make a false statement is never "pursuant to official duties" and, thus, always protected. The D.C. Circuit' *Bowie* decision comes out the opposite way, apparently holding that no public employee refused speech is ever protected as long as it is pursuant to official duties.

And now, the latest source of confusion, amplified in *Jackler*, is *Garcetti's* line of dictum concerning the relevance of the existence of a "citizen analogue" to the employee's speech. The Second Circuit interpreted this dictum as requiring First Amendment protection whenever the plaintiff can articulate some abstract "citizen analogue" to his speech. Although the Second Circuit decision most clearly articulated this new prong, other Circuits have also considered it as a factor in determining whether speech is protected. *See, e.g.*, *Decotiis*, 635 F.3d at 32 (considering whether there is "a so called citizen analogue to the speech" in determining whether a public employee's speech was made pursuant to official duties); *Rohrbough v. Univ. of Colo. Hosp. Auth.*, 596 F.3d 741, 746 (10th Cir. 2010) ("The *Garcetti* decision also suggested that a government employee's speech is not protected when there is 'no relevant analogue to speech by citizens who are not

government employees.'"); *Alaska v. EEOC,* 564 F.3d 1062, 1074 (9th Cir. 2009) ("At the threshold stage, as *Garcetti* illustrated, First Amendment protection attaches only to speech analogous to that which an ordinary citizen would make as part of public discourse."); *Morales v. Jones*, 494 F.3d 590, 602-03 (7th Cir. 2007) ("In this case, unlike *Garcetti*, there is a relevant analogue to speech by citizens who are not public employees. Any citizen may report suspicions of public corruption to the district attorney's office, which, as I noted above, had the ability and the authority to investigate allegations of wrongdoing at the highest levels of the police department. A reasonable jury could find, and I would find, on balance, that Lt. Morales spoke as a private citizen when he conveyed his suspicions to the district attorney and his speech was therefore protected by the First Amendment.").

On the opposite end of the debate, the *Bowie* Court adamantly rejected this approach as "backwards" and "about as useful as a mosquito net made of chicken wire." 653 F.3d at 48. Other Circuits have also acknowledged that public employee speech made pursuant to official duties is never protected because such speech has no relevant "citizen analogue." *See, e.g.*, *Foley v. Town of Randolph*, 598 F.3d 1, 6, 8 (1st Cir. 2010) (acknowledging *Garcetti's* reference to "citizen analogue" as dictum and noting that when plaintiff spoke to the media pursuant to his official duties, there was "no relevant analogue to speech by citizens"); *Abdur-Rahman v. Walker*, 567 F.3d 1278, 1285-86 (11th Cir. 2009) ("Speech that owes its existence to the official duties of public employees is not citizen speech even if those duties can be described so narrowly as not to mandate the act of speaking. In that context, '[t]here is no relevant analogue to speech by citizens who are not

government employees,' and the speech is unprotected.").

These various interpretations of *Garcetti* throughout the Circuits demonstrate the immediate need for clarification on the reach of its application. In its short five year life span, *Garcetti* has already been cited 1,545 times in reported cases.

Undoubtedly, there are many other cases in the pipeline raising the unsettled issues raised in *Jackler*, *Bowie*, and elsewhere. Beyond that, there are employment decisions to be made every single day in every single government agency in the country, including who gets tenure, who gets demoted, who gets promoted, who gets the biggest raise, and who gets fired. Many of those decisions might be made based on employee refusals to complete a report, to write a memo, to file an affidavit, to tell someone else what happened, or to alter a report in a minor or major way.

All these government supervisors – and the employees to be affected by these decisions – have a right to know if the decision-makers face First Amendment liability and attorneys' fees awards if they misjudge their decision.

This Court must clarify the ground-rules for the multitudes affected on a daily basis.

As a David Bowie more famous than the D.C. plaintiff once sang, "I don't want knowledge, I want certainty." David Bowie, Law (Earthlings on Fire) (BMG Records 1997). This Court should grant certiorari to provide this clarity.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

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Respectfully submitted,

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